

Rabbi Bleich's most recent book is *Bioethical Dilemmas: A Jewish Perspective*, vol. II.

## *Survey of Recent Halakhic Periodical Literature*

### **TORTURE AND THE TICKING BOMB**

To say that the issue of torture, even in extremely limited narrow circumstances, represents a moral dilemma is an understatement. Indeed, one approaches the topic with extreme hesitation. Certainly, any thinking person, any human being possessing even rudimentary moral sensitivity abhors torture in all its forms. In this regard the international conventions banning torture are no more than the expression of the lowest common moral denominator of the human race.

Torture deprives the victim of the essence of humanity; it strips a person of dignity and renders him or her bereft of autonomy. Freedom of will, reflected in personal autonomy, is the essence of the human condition. The effect of torture is a) to humiliate and degrade the victim and b) to destroy the victim's volitional freedom.

#### **I. THE LEGAL HISTORY AND THE CONTEMPORARY ATTITUDE**

Historically, torture has been employed for a variety of purposes. At its most barbaric, torture has been utilized in a purely punitive or sadistic manner as, for example, when employed by victors against captives. At times, torture has been utilized in what may be described as a preventative or prophylactic manner as a means of intimidation. Thus, a ruler may seek to forestall future acts of treason by torturing political enemies. Similarly, an unstable regime may employ torture in order to terrorize political enemies. In such cases torture is used to intimidate. Those two types of torture, *viz.*, "punitive torture" and "intimidative torture," are morally indefensible and repugnant in the extreme.

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Equally odious, albeit sanctioned in the past by some societies, is judicial torture, i.e., torture designed to elicit a confession from a criminal who is indeed guilty.<sup>1</sup> Until relatively recent times, European criminal procedure was heavily dependent on the use of torture. The European law of proof emerged in the city-states of northern Italy in the thirteenth century and spread throughout Europe as part of the reception of Roman law. The European law of proof replaced proof by ordeal conducted under the auspices of the Church. Trial by ordeal purported to achieve certainty by having judgment rendered by the unerring Deity. That mode of proof was effectively terminated by a decision of the Fourth Lateran Council in 1215. With abolition of divine determination of guilt, a standard of proof had to be devised that would eliminate the possibility of human error.<sup>2</sup>

For conviction of a crime punishable by death or maiming the European law of proof demanded testimony of two unimpeachable eyewitnesses. The parallel to the biblical two-witnesses rule is quite obvious. The practical problem that arises in applying that rule of proof is equally obvious: with such a high burden of proof conviction becomes virtually impossible. If the criminal justice system cannot punish perpetrators, crime is likely to become rampant. Jewish law recognizes that the two-witness rule is designed only for a society of righteous, law-abiding citizens for whom prescription of statutory punishment serves primarily as a pedagogic device. Jewish law provides that in an imperfect but real world criminals may be brought to justice either by application of the *ad hoc* emergency powers of the *bet din* or by imposition of the *mishpetei ha-melekh*, i.e., the king's justice designed to preserve the social fabric.<sup>3</sup> The procedures employed in such cases permitted relaxation of the rules of evidence in relying upon a single witness and even upon circumstantial evidence.<sup>4</sup>

In European criminal law the problem was mitigated by virtue of the fact that, in addition to the testimony of two eyewitnesses, the confession of the defendant was accepted as proof of guilt. That law of proof could be effective only in cases of overt crime or repentant criminals. For the criminal law system to be effective, unrepentant criminals who committed clandestine crime had to be forced to confess. The law of torture emerged as a means of regulating the process of coercing a confession.

A procedure emerged that provided for examination under torture. A standard of "probable cause" was established as a prerequisite for examination of the suspect under torture in order to assure that only

persons quite likely to be guilty would be subjected to the procedure. Probable cause consisted of either a single eyewitness or two items of circumstantial evidence, e.g., the suspect was seen departing the scene of the crime with a bloody dagger and the stolen loot. In theory at least, the confession was to contain details presumably known only to the perpetrator. In practice, leading questions as well as other devices provided the victim instruction with regard to the statement required of him. There was also a requirement that the confession be confirmed subsequent to removal of physical duress. However, the hapless victim realized full well that failure to confirm freely would only occasion return to the torture chamber.

Thus, in effect, torture was designed to confirm conclusions previously reached on the basis of circumstantial evidence. To be sure, the law of torture was often abused in execution and when employed in instances of flimsy or non-existent circumstantial evidence in extorting confessions from the innocent. At best, it was both superfluous and unreliable in confirming guilt already determined by other means.<sup>5</sup>

It would be consistent with contemporary faith in the moral development of mankind during and after the age of the Enlightenment to believe that the great writers of that period, particularly Beccaria and Voltaire, shocked the conscience of Europe by exposing the inhumanity of torture and inspired the monarchs of Europe to abolish its practice. John Langbein, a legal historian, convincingly categorizes that view as a “fairy tale.”<sup>6</sup> Langbein establishes an entirely different causal nexus.

The rule of proof that gave rise to investigation under torture applied only to blood sanctions, i.e., death or maiming. The two-witness rule did not apply to sanctions imposed for lesser crimes that were punished by fines or minor corporal punishment. With the introduction of the galley sentence, the workhouse and incarceration as criminal sanctions it was possible to apply the same standard of proof to serious crime as had earlier been applied to petty crime with the result that torture became less significant for the administration of justice. Consequently, during the eighteenth century the system of judicial torture was gradually abolished in most European countries but nevertheless did survive in some few jurisdictions until early in the nineteenth century. By the beginning of the twentieth century, in a submission dated 1907, a contributor to the *Encyclopedia Britannica* was sufficiently confident that torture had been eradicated in Europe to write: “The whole subject is now one of only historical interest as far as Europe is concerned.”<sup>7</sup>

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Today, abhorrence of torture is emblematic of every civilized society. Jews, of all people, have profound historical cause to foster renunciation of torture in all its forms. From antiquity until the modern period Jews have repeatedly been singled out for all manner of cruelty at the hands of their oppressors. The forms of torture visited upon the *asarah harugei malkhut* who suffered martyrdom at the hands of the Romans, as so vividly described in both the *Yom Kippur* and *Tisha be-Av* liturgies, were replicated by crusaders, inquisitors and cossacks. Jews continued to be prime victims of torture well beyond the Middle Ages.

Toward the middle of the nineteenth century, at a time when most people had come to believe that the practice of torture had been consigned to the dustbin of history, Western society suffered a rude awakening as the result of an incident that profoundly affected the Jewish community, *viz.*, the Damascus affair of 1840.

A priest in Syria was found dead. Without a scintilla of evidence, Jews were accused of his murder. The political machinations that were contributing factors to the accusation are both complex and murky but the result was quite clear: a number of prominent members of the Jewish community were apprehended, held in prison and tortured until confessions were obtained. Reports of the affair reached Europe and civilized nations were appalled. They had assumed that the practice of eliciting confessions by means of torture had long since been abandoned. Torture might have been rampant in the Dark Ages but certainly could not endure in a modern enlightened age. Despite widespread acceptance of the ritual-murder myth, there was considerable agitation for the release of those hapless individuals. Prominent personages, including Sir Moses Montefiore in Britain and Adolphe Crémieux in France, became protagonists of the victims' cause. Ultimately, the entirely innocent victims were released. Stories of unspeakable torture reaching Europe had been discounted as unbelievable but with the release of the victims the truth could no longer be suppressed. Eyes had been gouged and genitalia crushed. There had been multiple instances of children being tortured in order to force parents to confess.<sup>8</sup> Of course, in such circumstances victims will say anything demanded of them in the hope of avoiding further excruciating pain. As a result, the civilized world came to the stunning realization that not only is torture inconsistent with human sensibility but, moreover, confessions elicited pursuant to torture are meaningless and must be regarded as devoid of judicial probity.

Abhorrence of torture is certainly well-grounded and leads to a result that is entirely understandable and, in a certain sense, entirely correct. The result has been the formulation by the family of nations of a principle couched in the form of a Kantian moral imperative: All torture must be abjured; otherwise, there is no setting of boundaries. Such a reaction is entirely cogent despite the fact that in extreme cases such a principle may trigger application of the Latin maxim "*Fiat justitia et pereat mundus*"—Let justice be done and let the world perish." Justice entails respect for human dignity and human dignity requires preservation of the integrity of individual autonomy.

"Let justice be done" is axiomatic and requires no validation. It is the second clause of the maxim—"and let the world perish"—that is problematic. It is the concept that this moral rule is universal in nature and hence applicable in any and all circumstances regardless of consequences that requires examination. The most striking challenge to the universal nature of the ban against torture lies in the example of the ticking bomb.

## II. THE TICKING BOMB: IS IT DIFFERENT?

Considerations auguring against the earlier-described uses of torture are of no significance whatsoever with regard to the dilemma of torture and the ticking-bomb. Torture in the case of the ticking bomb is of an entirely different nature. It is neither punitive, intimidative nor judicial. It is designed neither to give vent to sadistic instincts, to punish nor to set an example. It is designed purely and simply to elicit information and circumstances will rapidly demonstrate whether or not the information elicited in such a manner is accurate. Since it is designed to reveal information and is quite different in purpose from other forms of torture it can perhaps best be termed "revelatory torture" to distinguish it from the earlier described forms of torture.<sup>9</sup> This form of torture has been categorized by one writer as "interrogational torture"<sup>10</sup> and the term has been recast by another as "preventative interrogative torture."<sup>11</sup> The various forms of torture should not be confused. Arguments against and sources decrying other forms of torture cannot be applied *mutatis mutandis* to revelatory or preventative interrogative torture.

The most difficult moral dilemmas arise in situations in which moral imperatives come into conflict with one another. Judaism, unlike the common law system, posits a duty of rescue as a moral and halakhic imperative. "Do not stand idly by the blood of your fellow" (Leviticus

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19:16), in its more obvious applications, requires rendering life-saving assistance in rescuing a potential drowning victim, helping a person escape from a conflagration, rendering medical assistance and even administration of CPR. In such situations recognition of a duty of rescue is hardly exceptionable.

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

Some ethicists have taken the position that torture constitutes a *malum per se* that can never be sanctioned regardless of the consequences.<sup>12</sup> Absolutists assert that civilized people do not sanction torture and that a society that can be preserved only by resort to torture is not worth preserving. Their position is based upon deontological grounds rather than on assessment of consequences. For them, torture is inherently evil and can never be justified or excused.<sup>13</sup> Others present a slippery slope argument in contending that if torture is sanctioned in even the most egregious of circumstances the barrier posed by the moral and political taboo against torture will be shattered with the result that torture will no longer be perceived as noxious in situations in which grounds for resorting to torture are far less compelling.

Jurists typically point to the fact that torture is prohibited as a matter of international law by the Geneva Convention Against Torture, the European Convention on Human Rights and by the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The last of those conventions entered into force in 1987 and has since been ratified by more than 130 countries,<sup>14</sup> as well as by national statutes enacted by most democratic countries.

Other legal scholars adopt a variant posture in affirming that the rule of law must indeed be upheld and that, as a matter of law, torture can never, and should never, be sanctioned but, nevertheless, contend that, after the fact, society would be justified in failing to apply penal

sanctions for violation of the law in exceptional circumstances.<sup>15</sup> The underlying notion is akin to that of jury nullification. A defendant may be guilty beyond a shadow of a doubt and the jury may be absolutely convinced of the guilt of the accused and nevertheless quite legitimately return a verdict of not guilty so that the defendant will escape punishment. A jury may do so simply because its members have come to believe that in the case before them the interests of justice are better served by withholding penal sanctions. A decision to employ torture might be ratified at any one of several stages in the judicial process: prosecutors might decline to press charges; the charge might be dismissed “in the interest of justice;” the jury might refuse to convict; the judge might mitigate or suspend punishment; and, finally, clemency always remains a final option.

*Post factum* ratification of this nature serves to excuse the act but does not provide legal justification. Extralegal action, even if subsequently ratified, does not establish legal precedent for the future.

There is a striking precedent for such a moral stance in our contemporary judicial practice. For good reason, the various American jurisdictions have declined to legalize euthanasia. Yet in the few cases of mercy killing that have been brought to trial, by and large, juries have refused to convict or have found the defendant guilty of a lesser charge than homicide and, even when the defendant is found guilty, judges have mitigated the punishment.<sup>16</sup> Thus the pristine moral value is preserved in theory while, when warranted, the harshness of its application is mitigated in practice.

Such a view does not really anticipate total proscription of torture. Instead, it would leave the decision in the hands of police interrogators, security officials or military commanders. In every particular case they would bear the responsibility of weighing the extent of potential harm against violation of their duty to abide by the provisions of law and of reaching an *ad hoc* determination. Such a policy anticipates that the powers that be will resort to torture only if they are convinced that their breach of legal norms is so obviously justified that no jury would impose criminal sanctions.

Inherent in that position is a certain measure of hypocrisy. The hypocrisy—and indeed unfairness to the moral agent—lies in unwillingness to provide clear guidelines in advance. And that position also fails to take into account the very real element of subjectivity on the part of members of a jury. Some juries may be comprised of legal purists who, enamored of the Roman law maxim, or of what they perceive as an *a priori* equivalent, believe that obedience to law is the supreme moral

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value. Accordingly, they may well ignore any and all countervailing considerations and extenuating circumstances and conclude that justice requires that all breeches of law be punished. On the other hand, an approach that does not sanction torture *ex ante* but allows for *post factum* ratification does have one positive aspect, *viz.*, it does not require the law to sanction the unsanctionable but in egregious cases permits society to tailor its response to the circumstances of the case.

There is, however, another possible moral response, one that is difficult to explain but that is nevertheless entirely cogent. In a system that posits an obligation of rescue, the ticking bomb situation poses a palpable dilemma. The obligation of rescue is a reflection of the mandate to preserve human life. The talmudic aphorism to the effect that a person who preserves a single life is regarded as if he has preserved the entire world (*Sanhedrin* 37a) is not hyperbole; it is a succinct and eloquent reflection of the value of human life in the hierarchical context of moral values. And precisely therein lies the essence of the dilemma. On the one hand, preservation of freedom is a fundamental value; torture designed to deprive an individual of human freedom is a denial of that value. On the other hand, a moral agent is bound by an obligation of rescue. All thinking moral persons recognize that we ought to preserve both autonomy of will and human dignity; all thinking moral individuals recognize a duty to preserve human life. Scrutiny of each of those principles separately give rise to no disagreement whatsoever. The moral value of each principle is crystal clear. That is why ethicists prefer to qualify moral observations with a *ceteris paribus* clause, *i.e.*, all things being equal, X is good and Y is evil. All things being equal, we ought to strive not only for preservation but for maximization of human dignity; all things being equal, we ought to respect individual autonomy; all things being equal, we ought to maximize preservation of human life. But in the real world all things are seldom, if ever, equal.

The case of the ticking bomb is a classic instance of the collision of two distinct and disparate moral values. The classic example is that of a fanatic who has set a hidden nuclear device to explode in the heart of a major metropolis and only he knows where the bomb has been secreted. The device has been timed to explode imminently with the result that there is no time to evacuate the innocent populace. A variation of the same dilemma involves a scenario in which a bomb has been placed in one of several hundred school buildings. It is impossible to evacuate all of the schools but only the terrorist knows which school has been targeted. In a post September 11th scenario, an airplane has been



hijacked and it has been determined that terrorists plan to strike an unidentified skyscraper or government building. Only by torturing one of the accomplices can the authorities determine the targeted building so that it may be evacuated. In each of these examples torture is the only available means to elicit the information necessary to save innocent lives. Situations such as these require adjudication between competing values and a determination of which it is that must be assigned priority. The sheer enormity of the stakes involved compels our attention.

But the case of the ticking bomb is by no means the first instance in our history in which these values have come into conflict. Patrick Henry was one of the heroes of the American revolution. At the time when the American colonies were in revolt against the British crown he proclaimed: "Give me liberty, or give me death!" To this day the motto "live free or die" is engraved upon all automobile license plates issued by the state of New Hampshire.

What was Patrick Henry's credo? He recognized that preservation of human life in a moral desideratum and he also knew full well that if the revolution failed to achieve its stated goal the instigators would be hanged on the gallows as traitors to the Crown. But he also perceived the political institutions controlling his life and the lives of his fellow colonists as instruments for the effective denial of human freedom. The existing situation made it necessary to choose between two values; the choice was life versus human freedom. In Patrick Henry's calculus of values freedom was dominant and hence superior even to life itself.

Western society has, correctly or incorrectly, adopted the notion of human dignity as a paramount value and, at times, as even a greater value than life itself. It is that hierarchical ranking of values that constitutes the matrix against which many bioethical issues are adjudicated. "Death with dignity" has become a slogan employed not simply for preservation of human dignity even in death—a value that cannot be gainsaid—but for the sacrifice of longevity anticipation, whether brief and ephemeral or otherwise, i.e., the sacrifice of life itself for the sake of preservation of perceived dignity.

Little wonder, then, that when human dignity, personal autonomy and freedom of will come into conflict with preservation of life, even in situations in which there is a cognizable duty of rescue, Western society prefers the former over the latter. In the context of contemporary Western mores, the Geneva Convention's unequivocal and blanket ban on torture is not at all surprising. It is a global statement announcing that Western society stands firmly on the side of human dignity and per-

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sonal autonomy as the encapsulation of the essence of the human condition. As such, those values are assigned priority over even life itself.

Moreover, in a strictly legal sense, arrival at that determination is not difficult because, even *ceteris paribus*, Western legal codes do not posit an obligation of rescue except in certain limited circumstances, e.g., an existing duty of care established on the basis of a contractual relationship.

Common law does not impose a duty to act as a Good Samaritan. A physician on his way to the golf course who comes upon the scene of a motor vehicle accident may refuse to stop without becoming subject to any penalty whatsoever. The duty of care is born of contract or of a special relationship; one does not, as a matter of course, owe a duty of rescue to a stranger. That remains the law in forty-eight of the fifty American states. The sole exceptions are Vermont and Minnesota. In Vermont, if a person is capable of rendering life-saving assistance and does not do so he is guilty of a misdemeanor and subject to a fine not in excess of \$100. Minnesota has enacted a similar law but in Minnesota human life is apparently regarded as twice as valuable since, in Minnesota, failure to render such assistance is punishable by a fine of up to \$200.

We live in a society which accepts as part of its common cultural system of values the notion that there is no absolute legal obligation to rescue a person whose life is in danger and in whose psyche is enshrined a concept of justice defined as a reflection of human dignity and personal autonomy. The various international conventions, which extend even to the case of the ticking bomb, do nothing more than record and apply the socio-moral norms commonly accepted by Western society.

Judaism has its own unique system of values and its own canons for resolving moral dilemmas. A Jew is referred to as an “*Ivri*” translated in the vernacular as a “Hebrew.” Why are Jews termed Hebrews? The conventional explanation is that it is because their ancestor Abraham hailed from “*ever ha-nahar*-the other side of the river [Euphrates].” The Midrash, *Bereshit Rabbah* 42:13, indicates that the appellation has an entirely different connotation. Ideologically, the entire world stood on one side of the monotheism-polytheism conflict and Abraham stood alone on the opposing side. Inherent in that nugget of linguistic analysis is the proposition that, in moral controversies as well, it may be anticipated that the descendents of Abraham will be on “the other side.” Thus, it is not at all surprising that in debates concerning contemporary moral issues Jewish law and tradition compel conclusions at variance from those espoused by society at large.

### III. THE TICKING BOMB AND JEWISH LAW

#### 1. THE LAW OF THE PURSUER

In confronting the moral dilemma posed by the ticking bomb it must be candidly acknowledged that the values reflected in Jewish teaching and the comparative weight assigned to those values are not congruent with the mores unhesitatingly accepted by the dominant culture. Judaism posits a duty of rescue that is virtually absolute in nature. Not only does the duty of rescue compel intervention, it also reflects the paramount position Jewish law assigns to the preservation of life with the result that, when preservation of life comes into conflict with other values, it is preservation of life that must triumph.

The value assigned to preservation of innocent life is manifest in yet another provision of Jewish law applicable to resolution of the ticking bomb dilemma, *viz.*, the law of the *rodef*. The term "*rodef*" is best translated as "pursuer" and refers to a would-be aggressor intent upon taking the life of his victim. In Jewish law, elimination of the *rodef* in order to save the life of the victim is not only permitted but is mandated. The rule is far broader than the principle of self-defense. A person whose life is threatened by another may exercise a right of self-defense; he may take the life of the aggressor in order to save his own life. However, although common law does allow for extension of the principle of self-defense in certain limited cases, e.g., a threat to the life of a spouse, self-defense is generally limited to the literal meaning of the term, i.e., to the defense of oneself. It does not apply to the rescue of a third party. Common law does not recognize a right, much less an obligation, to intervene in order to preserve the life of a stranger. Hence the claim that one was engaged in an act of rescue does not constitute a defense to a charge of homicide.

Refusal to justify such intervention is entirely consistent with the common law's failure to posit a duty of rescue. Since both the aggressor and the victim are strangers to whom no legally cognized duties are owed, the common law stance is readily understandable. One life is pitted against another; one or the other will surely die. Absent an obligation to rescue the putative victim why should the blood of one be deemed "redder" than the blood of the other? If there are no grounds to choose between two lives there is no rationale that serves to justify the sacrifice of one person for the sake of the second. The result is legally mandated non-intervention.

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Jewish law, on the contrary, mandates intervention. Not only is intervention to rescue the victim a defense against homicide but failure to intervene constitutes violation of a biblical commandment. The biblical provisions surrounding the law of the pursuer are clearly designed to protect the putative victim. Hence the law of the pursuer must be seen as an amplification of the obligation of rescue. Primacy of the obligation of rescue requires even forfeiture of the life of the would-be perpetrator. Of course, invocation of the law of the pursuer in causing the pursuer's death is justified only if there is no other way to accomplish the necessary end and only if it can be established with the requisite degree of certainty that failure to intervene will result in loss of the victim's life.

Although such an element may well be present as well, the law of the pursuer should not be seen primarily as a vehicle for punishment of the pursuer. The intervenor does not act as a kangaroo court serving at one and the same time as prosecutor, judge, jury and executioner punishing a person who seeks to commit a crime. The law of pursuit is fully applicable even if the perpetrator is lacking in any measure of moral culpability whatsoever. The pursuer may have gone berserk; he may be demented, a mental incompetent or a child having no halakhic or legal capacity and yet he is regarded as a *rodef* against whom the law of the pursuer is fully operative.

In American folklore there is an anecdote concerning pioneers traveling along the Wilderness Road. In the early days of American history, long before the United States extended from "sea to shining sea," there was a long period of westward migration. Settlers of the western territories were frequently attacked by Indians and oftentimes were forced to take refuge in hiding places in order to avoid discovery by Indian marauders. Apparently, in one such instance a baby began to wail. There was a distinct danger that the infant's cries would become audible to the enemy. In revealing the site in which the settlers were hiding, the infant would have compromised the safety of the entire group. In order to obviate the danger the child's mother placed her hand over the baby's nose and mouth causing him to suffocate. There was no other way to eliminate the threat caused by his cries.<sup>17</sup>

Moral theologians may debate the applicability of a double-effect theory; ethicists may quarrel over the justification of sacrificing a single person in order to save many; jurists may ponder the cogency of a necessity defense; but to rabbinic scholars the moral imperative in such a situation is clear-cut and unequivocal.

A remarkably similar fact pattern is presented in a responsum published in a work devoted to halakhic problems that arose during the period of the Holocaust.<sup>18</sup> That responsum also concerns a crying baby; the parents and others were hiding in a bunker somewhere in occupied Europe rather than on the Cumberland Trail; the enemy were not Indians, but Nazis. The choice was simple but heart-wrenching: Does one allow the baby to continue crying and thereby reveal the presence of Jews who will face certain and imminent death or does one eliminate the threat by suffocating the baby?

In terms of categories established by Jewish law the baby has the status of a “pursuer” by virtue of the fact that it is engaged in conduct presenting a clear and certain danger to the lives of others. The infant intends no harm; no moral turpitude is entailed in the crying of a child; the child does not bear moral responsibility nor does he possess legal capacity. The infant is innocence personified. Nevertheless, the child’s acts, albeit unintentional, endanger others, and that factor, in and of itself, renders the law of the pursuer operative.

How is the operation of the law of the pursuer in such an instance to be understood? Certainly not in terms of the number of lives saved as balanced against the number of lives sacrificed. The ticking bomb example is generally presented as a hypothetical situation in which the lives of countless numbers of individuals are about to be extinguished but the identical issues would be present even if but a single life were at stake. Judaism regards every life as endowed with infinite value. As schoolchildren we were taught that infinity added to infinity equals infinity. I now understand that in certain esoteric mathematical applications some infinities are greater than other, but in the moral realm all infinities remain equal. The rules and principles that apply with regard to preserving countless lives apply with equal force to saving a single life.

But, if so, how can the taking of one life in order to save that of another be justified? Why must one prefer the life of the victim over the life of aggressor, particularly when the aggressor is completely without guilt? Quite apparently, the law of the pursuer reflects a simple principle, *viz.*, society must take whatever measures may be necessary in order to eliminate violence. Whether or not the perpetrator has legal or even moral culpability is completely irrelevant. Violence is violence and members of society are individually and collectively charged with eradicating violence. The law of the pursuer is most readily understood as the embodiment of a divinely announced policy principle. The reason

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or reasons that serve to explain why the Torah enshrines elimination of violence in the law of the pursuer as a policy principle need not to be belabored. The reasons are probably manifold and certainly subject to analysis and discussion but ultimately they are of little consequence since the moral values of Judaism are normative simply by virtue of the fact they are declared as such by the Torah and enshrined in Halakhah as revealed at Sinai.

### 2. PASSIVE PURSUIT

The terrorist with knowledge of a ticking bomb might well be labeled a *rodef* but for one potentially salient point: A *rodef*, defined literally, is a person intent upon an overt act of violence. The terrorist in the ticking bomb scenario is not necessarily the person who armed the bomb or who was associated in any overt manner with preparation for the act of violence. He may be guilty only of failure to reveal information necessary to thwart the plotting; as such, his involvement is entirely passive. Is the law of the pursuer limited to persons engaged in overt acts or does it extend as well to persons causing harm, or who allow harm to take place, simply by means of passive nonfeasance?

An answer to that question may be gleaned from analysis of a ruling recorded in the Palestinian Talmud, *Terumot* 8:10. The situation discussed involves a group of travelers surrounded by marauders who deliver an ultimatum: "Give as one of [your company] or we will kill all of you!" It is clear that the person to be delivered is marked for death. The ruling is unequivocal: "Even if they will all be killed let them not deliver a single Jewish life." The rule formulated by the Palestinian Talmud may otherwise be expressed as "Better two deaths than one murder." Better to allow everyone to be put to death rather to become complicit in a single act of homicide. That rule precludes a person not only from serving as the proximate cause of the death of an innocent individual but also from remotely or indirectly contributing to the death of such a victim. The number of lives to be lost as a result is irrelevant. In this case the law resonantly declares, "*Fiat justitia et pereat mundus.*" Justice requires that one not be complicit in an act of homicide even if the entire world will perish as a result. That rule applies even if refusal to participate in homicide will contribute to even greater loss of life. In the case discussed in the Palestinian Talmud the demand was for a single member of a group; failure to comply would result in extermination of the entire group, including the designated individual.

The Palestinian Talmud relates this rule to the seemingly contradictory narrative recorded in II Samuel 20:14-22. Sheba the son of Bichri was guilty of *lèse majesté* and King David ordered his execution. David's soldiers surrounded the city in which Sheba the son of Bichri sought refuge and ordered the inhabitants to surrender the fugitive upon pain of themselves being collectively put to death. Delivery of Sheba the son of Bichri was regarded as acceptable and was found not to have violated the rule enunciated by the Palestinian Talmud. Two conflicting explanations are formulated in distinguishing the case of Sheba the son of Bichri. Resh Lakish maintains that the townsfolk acted correctly because the designated victim was indeed culpable by virtue of having committed a capital crime. In effect, his execution could not be considered culpable homicide. The conflicting opinion of R. Yohanan maintains that not only may a culpable individual be surrendered but that any other person might also be delivered to death in similar circumstances. According to the latter opinion the crucial factor in the case of Sheba the son of Bichri is that the choice of whom to deliver was not made by the townspeople but by those demanding his life. The crucial distinguishing factor, according to this view, is specification of the victim. In effect, the community cannot select one their number for death of their own accord because they have no right to prefer one person over another. But when relieved of that burden by virtue of the fact that the selection has been made by others they may deliver the victim in order to spare the community.

The opinion of Resh Lakish requiring that the person delivered be criminally culpable is not difficult to understand. The victim is not only already a marked man, he is also deserving of his fate. Hence, what difference does it make how he meets his death? The second opinion, however, requires clarification. What rationale serves to establish specification by others as exculpation from homicide? Assuredly, specification by the perpetrator does not transform an innocent victim into a guilty party. If so, those who deliver the specified victim to death are abetting an act of homicide.

One incisive analysis is predicated upon recognition of the designated victim on having become, precisely by virtue of his antecedent designation for death, a *rodef*.<sup>19</sup>

On first analysis, categorization of the designated victim as a *rodef* is difficult to comprehend. The designated victim is pursuing no one; he harbors no malevolent intentions whatsoever. He has done and is doing nothing at all. In truth, he himself is an entirely innocent victim. Through

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no fault of his own he happens to have fallen into the bad graces of a thoroughly evil person or persons who will not hesitate to kill others in order to take the life of the designated victim as well. The intended victim endangers others by virtue of being in a particular place at a particular time. It is his mere existence, the fact that he is living and breathing, that endangers others. Nevertheless, according to this opinion, he is categorized as a *rodef* and the law of the pursuer applies because his very presence among the group endangers the lives of others.

On this analysis it becomes apparent that the law of the pursuer is applicable even in instances in which the “pursuer” is not engaged in an overt act of aggression; the law of the pursuer is equally applicable in situations in which mere passive existence gives rise to danger to others.<sup>20</sup>

To be sure, in the case of the ticking bomb it is not the physical existence of the recalcitrant terrorist that poses the danger but the terrorist’s failure to speak. The passivity of non-feasance is even more pronounced than the passivity of existence. Nevertheless, the notion that passive non-intervention is encompassed within the law of the pursuer is assumed as a matter of course by R. Naphtali Zevi Judah Berlin in this commentary on *She’iltot de-Rav Aba’i Ga’on, Ha’amek She’elah, She’ilita* 142:9. Judges 21:5 records that any person who might fail to appear in order to participate in the action taken against the tribe of Benjamin would be put to death. *Ha’amek She’elah* asserts that the culpability of those individuals stemmed from the law of the pursuer. Failure to join in the disciplinary action of the community, he asserts, would expose fragmentation within the nation and strengthened the resolve of the external enemies. Strengthening the hand of the enemy even by purely passive nonfeasance, according to *Ha’amek She’elah*, renders such an individual a pursuer.

Once it is recognized that a prospective act of commission is not required to trigger the law of the pursuer it may well be argued that refusal to divulge information necessary to countermand the lethal effect of an already committed act similarly constitutes an act, albeit a passive one, of pursuit. By failing to act the potential informant makes it possible for a calamity to occur. If so, he is a pursuer who may be eliminated in order to preserve the lives of potential victims.

Obviously, killing the very person who possesses crucial information necessary to save the lives of intended victims would defeat the very purpose of the law of pursuit. Dead people cannot talk and the information available during the lifetime of such a person would be carried to the grave and become irretrievably lost. Indeed, since the victims would



not be rescued by eliminating the pursuer, the pursuer dare not be killed because killing the pursuer cannot be justified in situations in which the victim is doomed in any event. But the law of the pursuer provides for far more than the elimination of the pursuer; the law of pursuit requires thwarting the nefarious intent of the pursuer by any means possible. Indeed, killing the pursuer constitutes a capital offense if rescue can be accomplished in a less onerous manner, e.g., by maiming the pursuer and thereby incapacitating him. The talmudic example is a situation in which the victim can be rescued by cutting off one of the limbs of the pursuer. In effect, the law of the pursuer allows only such force as is required to eliminate the threat. It is thus clear that the law of pursuit sanctions any form of bodily force, including mayhem, when necessary to preserve the life of the victim.

There is one significant limitation upon invoking the law of the pursuer in the context of a terrorist believed to be in possession of information, namely, the requirement for a threshold level of certainty that loss of innocent life will ensue if no intervention occurs. In the case of the ticking bomb the issue that it is bound to arise is whether or not there exists the requisite degree of certainty that the suspect possesses such information and that revealing such information will serve to avert the impending calamity.<sup>21</sup>

### 3. INTRACTABLE PAIN

It might be contended that, although the law of the pursuer warrants mayhem and even sacrifice of a limb, nevertheless torture involving insufferable pain is inhumane and more onerous than death and hence cannot be sanctioned under any circumstances. The argument would be that only measures up to and including death of the pursuer are sanctionable but torture is inhuman in the extreme and even worse than death. That argument is readily rebutted by reference to the law governing martyrdom as understood by virtually all early-day talmudic commentators. The Book of Daniel 3:12-23 recounts that Shadrach, Meshach and Abed-nego, identified by the Gemara as Hananiah, Mishael and Azariah, allowed themselves to be cast into a fiery caldron rather than accede to the demand of *Nebuchadnezzar* that they worship an idol. The Gemara, *Ketubot* 33b, observes that, although those personages accepted martyrdom with equanimity, "had they been tortured they would have worshipped the idol." Those commentators are uniform in assuming that the Gemara is not gratuitously and without evidence impugning the devotion of Hananiah, Mishael and Azariah or

questioning their mettle in resisting duress. Instead, they understand the Gemara as declaring that, under the given circumstances, Hananiah, Mishael and Azariah would have been under no obligation to accept torture. But why not? The most obvious answer would be that, although Halakhah requires martyrdom on behalf of monotheism, it regards torture as even more onerous and does not require acceptance of torture as well. That is indeed the resolution offered by one anonymous early-day authority in order not to compromise that cardinal principle.<sup>22</sup> However, that view is an individual opinion and is implicitly rejected by a host of other authorities who address the problem and propose entirely different solutions.<sup>23</sup> It is thus clear that the consensus of halakhic opinion is that, when martyrdom is required, acceptance of torture is required as well. Since there is no provision in Jewish law mandating acceptance of any sanction more severe than death, it follows that Jewish law does not regard torture as more onerous than death.<sup>24</sup> By the same token, it follows that when preventative measure, including mayhem and death, may be imposed in order to restrain a pursuer, torture may be employed as well.

#### 4. FRUSTRATION OF A CRIMINAL ACT

In a ticking bomb scenario in which the terrorist was himself a participant in the fashioning and arming of the bomb use of torture can be justified on other grounds as well. Jewish law provides for physical duress in order to secure compliance with biblical mandates. In constructing and arming the bomb the terrorist has completed the physical act that will render him culpable for homicide upon the death of the victim or victims; the effect of that act is delayed by the timing device with the result that there exists a window of opportunity for canceling or rescinding the act.

Legal systems tend to treat equally those whose acts create harm and those whose acts create only the potential for harm but who later fail to intervene in order to prevent the actualization of such harm. A comparable halakhic example is the situation in which, on *Shabbat*, a person has placed dough in an oven or water on a stove. The physical act of Sabbath desecration is complete but there is no actual desecration until the bread becomes baked or the water becomes heated. In the interim period the dough or the water may be removed thereby rendering the earlier act innocuous. Just as duress may be applied *ab initio* in order to restrain a person from transgression,<sup>25</sup> a person may be compelled to perform an act necessary to thwart the effect of an earlier pro-

scribed act and thereby retroactively render that act innocuous. Thus, a person who, on the Sabbath, has placed bread in an oven or water on a stove may be forcibly compelled to remove the bread before it becomes baked or the water before it becomes heated. Quite similarly, a person who has attached a timing device to a bomb may be compelled by force, or even torture, to neutralize that act or to enable others to neutralize that act before it achieves fruition as an act of homicide.

## 5. THE OBLIGATION OF RESCUE

The same line of reasoning yields an identical result even in cases in which the terrorist was not at all complicit in constructing or arming the bomb but merely possesses detailed knowledge of the actions of others. To be sure, in such a situation the terrorist has performed no illicit act that he must be compelled to frustrate and thereby render innocuous. Although the terrorist may himself have done no harm and have caused no danger, he nevertheless has an obligation of rescue. The terrorist, no less so than other persons, has a duty to save endangered lives. He, too, is commanded “Thou shalt not stand idly by the blood of your fellow” (Leviticus 19:16). And Jewish law provides that people can be compelled to discharge biblically mandated duties.

Fulfilling positive obligations and avoiding negative transgressions frequently requires expenditure of funds. A person is required—and may be compelled—to expend his entire fortune in order to avoid transgression of a negative commandment, e.g., in order to obtain kosher food rather than resorting to eating forbidden food in order to sustain life.<sup>26</sup> “According to some authorities, a person is required to expend no more than a tenth of his net worth,<sup>27</sup> and for others no more than a fifth of his assets,<sup>28</sup> in order to fulfill a positive commandment, e.g., to acquire the four species for use on *Sukkot*.

The duty of rescue is couched in negative rather than positive terms: “Thou shalt *not* stand idly by the blood of your fellow.” Ostensibly, expenditure of one’s entire fortune should be required, if necessary, in order to avoid transgressing a negative commandment that will perforce occur if one were to “stand idly” and fail to provide needed assistance. Such is indeed the position of many authorities. Others maintain that the disparity in the financial burden to be assumed is not dependent upon a negative versus a positive linguistic formulation of the obligation but upon whether the otherwise ensuing transgression is active or passive. According to that analysis, overt transgression of any commandment is to be eschewed, literally at all costs, even if the commandment is

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expressed in the passive voice while avoidance of a passive transgression requires expenditure of only one-tenth or one-fifth of one's resources even if the commandment is expressed negatively. An obvious example of the latter is the commandment "Thou shall not stand idly by the blood of thy fellow." The injunction, in its formal sense, is a negative commandment yet it is transgressed by simple nonfeasance.

Other than with regard to the three cardinal transgressions, avoidance of violation of a commandment does not require sacrifice of more than a person's entire fortune. Consequently, the duty of rescue certainly does not require expenditure of more than a person's entire fortune. For that reason a person need not sacrifice a limb or an organ in order to rescue another individual since a rational person would expend his entire fortune to avoid such loss. For the same reason a person need not accept physical pain or emotional anguish that he would willingly pay such sums in order to avoid. However, infliction of physical pain below that threshold level is warranted as a means of compelling the obligation of rescue.<sup>29</sup> Accordingly, imposition of physical pain up to that magnitude would be justified in the case of the ticking bomb.

### 6. PERSONAL AUTONOMY

Quite apart from the foregoing, in terms of Jewish tradition and teaching, torture in the case of the ticking bomb does not really present a moral dilemma arising from the collision of opposing moral values. According to Jewish teaching, the conflict between preservation of life versus preservation of individual autonomy and human dignity in such a situation is apparent rather than real. There are a limited number of situations in which Jewish law demands freely-willed acquiescence in the performance of an act but at the same time sanctions physical duress to secure assent. The primary example lies in compelling a recalcitrant husband to execute a bill of divorce in instances in which Jewish law recognizes the wife's right to demand a divorce. The fact that the *get* is halakhically mandated does not mitigate the halakhic requirement that the divorce be executed only pursuant to the free-will directive of the husband. Halakhah provides that, in such circumstances, a recalcitrant husband may be subjected to physical pain until he signifies acquiescence by declaring "I wish it." Rambam, *Hilkhot Gerushin* 2:20, in a departure from his usual wont in composing the *Mishneh Torah*, enters into a philosophical excursus in order to dispel the obvious paradox. If a *get* may be compelled in such cases, why the need for pronouncement of the verbal formula "I wish it?" And if an autonomous will is required

in such circumstances, how can a declaration made under physical duress possibly be accepted as evidence of a freely willed act?

Rambam dispels the paradox by asserting that the human psyche is multi-layered. Every Jew wishes to fulfill his obligation to obey the commandments of the Torah as that obligation is accurately declared to him by competent rabbinic authorities. That is his innermost will. But it is not the only facet of his psyche. Man is also possessed of an “evil inclination,” which is simply a cognomen for the corporeal nature of man, and hence is subject to lust, desire, spite and a host of other emotions. Man’s corporeal nature often causes him to desire that which he is commanded to abjure and to shrink from performance of an act he is duty-bound to perform. A person’s evil inclination may cause him to desire things that another part of his psyche, the good intention or the spiritual component of his being, knows to be wrong and finds abhorrent. Quite often the two components of the psyche are at war with one another and not frequently the evil inclination achieves dominance.

Halakhah, according to Rambam, recognizes that a person acts freely only when the “evil inclination” acquiesces in the desire of the deeper, more fundamental inner will. But the evil inclination is concerned solely with pleasure, sensual gratification and the like, all of which are forms of physical well-being. Pleasure and pain are antagonistic forces. The evil inclination lusts after pleasure but abhors pain. Pleasure may be desirable but not if accompanied by a commensurate degree of pain. Thus, the desire of the evil inclination for sensual gratification is readily cancelled by generating a situation in which the evil inclination rapidly determines that, on balance, there is no sensual profit in continued pursuit of the particular gratification in question and, consequently, the evil inclination quite readily renounces the pursuit of that desire. The net result is that the evil inclination no longer presents an impediment to realization of the desire of the inner will. Cooption of the evil inclination results in realization of complete autonomy. Thus, in terms of Jewish teaching, physical duress designed to assure compliance with divine law does not at all compromise individual autonomy. Quite to the contrary, it serves to eliminate impediments to expression of that autonomy.

## IV. NON-JEWS AND THE TICKING BOMB

### I. THE LAW OF THE PURSUER

The foregoing reflects the position of Jewish law and tradition as it pertains to Jews. Non-Jews, however are not bound by the 613 precepts of the Sinaitic covenant; they are subject only to observance of the Seven Commandments of the Noahide Code. The Noahide Code does not posit a duty of rescue. Thus, common law and Western legal systems, which do not establish a legal requirement to act as a Good Samaritan, are consistent with Jewish teaching as addressed to non-Jews. It stands to reason that, if there is no duty of rescue, any attempt to elicit information, even of life-saving potential, is nothing other than an illicit battery. Hence it might appear that international conventions banning torture are consistent with the universalistic aspect of Jewish teaching as it applies to the nations of the world.

Nevertheless, such a conclusion would not be correct. The law of the pursuer is integral to the Noahide Code. Some authorities contend that a Noahide, no less so than a Jew, is duty-bound to intervene in order to eliminate a pursuer;<sup>30</sup> others assert that a Noahide is not obligated to eliminate the pursuer but that nevertheless a Noahide has full discretion to do so.<sup>31</sup> Unlike the common law, the Noahide Code grants license to all persons to prevent acts of violence targeted against innocent victims even in the absence of a duty of care on the part of the intervener *vis à-vis* the putative victim. Thus, although the Noahide Code does not require a physician to stop at the site of a motor vehicle accident for the purpose of rendering life-saving assistance, he may, and for some authorities, he must, intervene in order to prevent an act of violence. Reflected in those provisions is undoubtedly the consideration that elimination of violence constitutes a societal concern of a magnitude even higher than that of preservation of human life.

Accordingly, a non-Jewish terrorist intent upon an act of aggression may be thwarted by any available means. Similarly, if he has armed a bomb he may be compelled by force to neutralize that threat or to reveal the information needed to enable others to do so.

### 2. DININ

Torture of a completely innocent non-Jew who by happenstance has come into possession of information regarding the location of a ticking

bomb designed to compel disclosure of that information is an entirely different matter. Such an individual is not a pursuer; as a non-Jew he has no obligation of rescue. Hence there is no duty incumbent upon him that he may be compelled to discharge against his will. If so, ostensibly, torture of such a person should be regarded as an illicit battery.

Nevertheless, in the limited situation of an innocent non-Jew in possession of information regarding a ticking bomb there is license, and perhaps even an obligation, to apply torture, if necessary, in order to elicit the requisite information. Sanction for such a procedure may be derived from the last in the list of the seven Noahide commandments, *viz.*, *dinin* or “laws.”

As formulated by Rambam, *Hilkhot Melakhim* 9:14, the essence of the commandment of *dinin* is an obligation to bring to justice violators of the first six of the Noahide commandments. Perpetrators must be punished; accordingly, Noahide societies have an obligation to establish a judicial system, to bring transgressors to justice and to impose capital punishment. Those obligations devolve upon society as a whole and upon each and every member of society. Rambam advances this analysis of *dinin* in conjunction with his elucidation of a particularly vexatious biblical narrative. Genesis 34 records the abduction and violation of Dinah by Shechem the son of Hamor. Her brothers, Simeon and Levi, responded not by simply executing the perpetrator but by annihilating all the people of Shechem as well. Rambam asserts that the townspeople “saw and knew” what Shechem had done but failed to bring him to justice. Failure to punish the culprit, according to Rambam, is also a violation of the commandment of *dinin* and hence constitutes a capital offense. Failure to punish the perpetrator, according to Rambam, is as heinous as commission of the transgression.

According to Rambam, there is yet another duty imposed upon Noahides by virtue of the commandment of *dinin*. Rambam declares that courts must be established in order to judge violators and also “*le-hazhir et ha-am*—to admonish the populace.” The commandment of *dinin* not only establishes a duty to punish but also imposes another obligation as well, *viz.*, to prevent nefarious deeds before their inception. Rambam is clearly enunciating the position that Noahide courts are endowed with the power of injunctive relief which they must exercise in order to prevent crime.

It must be remembered that the commandment of *dinin* imposes obligations not only upon society at large but upon individuals as well. Thus, there exists both a collective and an individual obligation to pre-

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vent crimes from being committed. Accordingly, in the ticking bomb scenario, although the potential informant may be innocent of any wrongdoing and not be bound by a duty of rescue, he nevertheless has an obligation to prevent a crime from taking place. Hence he can be compelled to divulge the information necessary to effect that end. Since society has a selfsame obligation it may force him to divulge that information.

The commandment of *dinin* is a commandment to do justice and to assure that the interests of justice are served. In order to establish a just society evildoers must be punished and crime must be prevented.

### V. *HORA'AT SHA'AH* AND CONSTRUCTIVE TORTURE WARRANTS

Application of the law of the pursuer serves only to justify duress applied to a person responsible in some sense for the impending calamity even if the responsibility lies only in failure to communicate information needed to avert a disaster. It cannot be invoked to justify torture of a totally uninvolved innocent non-Jew as a means of indirectly bringing pressure to bear upon the person in possession of the requisite information. The most obvious example lies in torture of a terrorist's spouse, parent or child in anticipation that the terrorist, who might be willing himself to accept such torture, will not allow a loved one to suffer a similar fate. Such an innocent and ignorant party simply cannot be defined as a pursuer.

Miriam Gur-Aryeh<sup>32</sup> has pointed out that acceptance of a necessity defense—a possibility impliedly recognized in a 1999 decision of the Supreme Court of Israel<sup>33</sup>—would indeed serve *post factum* to justify torture even of totally innocent parties. It is precisely for that reason that she takes issue with employment of the doctrine of necessity by the Israeli court. The law of the pursuer, although not dependent upon moral or legal culpability, is predicated upon elimination of an evil; an innocent, uninvolved and ignorant bystander is neither actively nor passively engaged in an evil act. The notion of necessity involves acceptance of a lesser evil in order to avoid a greater evil. Application of the doctrine of necessity is not only consistent with recognition of torture as a *malum per se* but is actually born of recognition and acceptance of the evil nature of the act. The aspect of necessity arises, misguidedly or otherwise, from an assessment that grievous harm done to one person will rescue a multitude. If so, the mechanism for averting the calamity is



irrelevant; whether the person harmed is innocent or guilty is of no consequence; and whether the source of the threat is directly eliminated by means of that harm or whether the harm is only indirectly and tangentially related to the rescue has no bearing whatsoever upon the notion of necessity.

Absent a duty of rescue on the part of the potential torture victim or if the torture under consideration is so onerous as to be equated with expenditure of more than the victim's entire fortune, there seems to be no way that Jewish law might recognize a principle analogous to the doctrine of necessity. Yet a parallel may be found in one source. The thesis is highly novel and probably not reflective of mainstream halakhic opinion and, although in a formal sense it involves a rather different principle, that thesis is indeed analogous to the doctrine of necessity.

Similarly, Alan Dershowitz' proposal that torture be sanctioned in certain limited circumstances such as the case of the ticking bomb but only pursuant to obtaining advance judicial approval in the form of a "torture warrant" from an appropriate oversight body<sup>34</sup> is not without precedent in Jewish law. Indeed, the dual notions of "necessity" and "torture warrants" appear in the same source.

The Book of Esther records that, upon being informed of the decree issued by Ahasuerus for the annihilation of the entire Jewish people, Esther risked her own life in presuming to appear before the king without a royal summons. Putting aside the issue of self-endangerment, Esther's act was halakhically problematic. According to rabbinic tradition, Esther presented herself for the purpose of a conjugal assignation in the course of which she sought to present her petition. However, according to the same rabbinic tradition, Esther was actually the wife of Mordecai. Her earlier liaisons with Ahasuerus were indeed acts of adultery but permitted to her because of duress.<sup>35</sup> On this occasion she willingly and voluntarily made herself available to Ahasuerus for an adulterous act. Her conduct was sanctioned by Mordecai as a *hora'at sha'ah*, or *ad hoc* emergency measure, necessary for the salvation of the people of Israel. The biblical paradigm for a *hora'at sha'ah* is found in the narrative of Elijah and the sacrifices he offered on Mt. Carmel in order to discredit the prophets of Baal. Mordecai and the Sanhedrin had the power to issue a *hora'at sha'ah* in order to prevent the annihilation of the entire Jewish people.

R. Abraham Isaac Kook, *Mishpat Kohen*, no. 143 and no. 144, secs. 6-8, asserts that not only adultery but even bloodshed is permitted on an emergency *ad hoc* basis for the purpose of preserving the entire Jewish people.<sup>36</sup> That power is inherent, he contends, in the authority

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to promulgate a *hora'at sha'ah*, or ad hoc emergency directive, in emergency situations. Rabbi Kook, however, acknowledges that authority for such action is limited to situations in which the entire Jewish people, or perhaps only the entire populace of the Land of Israel, are threatened but does not extend to imminent destruction of a single community. If so, his thesis is applicable only when the threat is of the magnitude of a nuclear holocaust.

Of course, the question of which individual or group of individuals has the authority to promulgate a *hora'at sha'ah* of this nature is crucial. Needless to say, such power is not vested in a Noahide court or in administrative officials of a secular government. But Rabbi Kook broadens his thesis in a highly innovative maneuver in arguing that, in such extreme circumstances, an actual *hora'at sha'ah* is unnecessary. He argues that, in effect, there exists a “constructive” *hora'ot sha'ah* sanctioning such practice. Were a duly qualified Sanhedrin in existence it would most certainly grant permission to take necessary action in such egregious circumstances; therefore, actual license is unnecessary.

The notion of *hora'ah sha'ah* is similar to the doctrine of necessity in that it is an *ad hoc* acceptance of a lesser evil over a greater evil not incorporated in any statutory code. Necessity, however, is always an affirmative defense and can never be the subject of prior judicial license. In contradistinction, if Rabbi Kook's responsum is regarded as normative, guidance in determining what is encompassed in such a *hora'at sha'ah* is available before the fact to any student or reader pondering the options available to him. But, then, that is also the case with regard to any legal scholar who peruses the literature devoted to explication of the doctrine of necessity. In both cases such an investigation is directed only to an assessment of what, after the fact, a jury would accept as necessity or what a *bet din* would regard as a legitimately construed *hora'at sha'ah*.

## VI. AN AFTERWORD

In a certain sense the conclusions of this endeavor are counterintuitive. They certainly go against the grain of a sensitive contemporary moral conscience. We correctly abhor infliction of pain upon others; we correctly abhor anything akin to depriving a person of human dignity. We disdain depriving people of autonomy; we certainly condemn dehumanization of human beings. Yet, for Judaism, morality and ethics are not subjective. Morality is the product of the halakhic system which itself is the embodiment of divine revelation.<sup>37</sup> Jewish law is the embodiment of

a corpus of moral principles, not all of which are self-evident to the human mind.

The Roman law maxim is “Let justice be done even if the world is destroyed.” The rabbinic maxim is “Let the law pierce the mountain.” Let the law be enforced even if in the process it is necessary to bore through mountains; let justice be done even if the obstacles are deeply rooted human sensibilities. In the context of this discussion the appropriate maxim may well be “Let justice be done even if it must pierce the mountain of the human psyche.”

## NOTES

1. For a comprehensive study of judicial torture see Priro Fiorelli, *La tortura guidigaria nel diritto commune*, 2 vols. (Milan, 1953-54).
2. For a further discussion of the law of torture as an adjunct of the European law of proof see John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (Chicago, 1979), pp. 3-7 and *idem*, “The European Law of Torture,” *Torture*, ed. by Sanford Levinson (New York, 2004), pp. 93-103.
3. In addition to establishing a two-witness rule as the standard of proof for conviction, Jewish law requires that the culprit 1) be warned in advance that his transgression carries with it capital punishment, 2) that the witnesses not contradict one another even with regard to ancillary matters, 3) that the witnesses observe the act simultaneously and, finally, 4) that they be aware of each other’s presence. In cases of homicide, and homicide only, there is a punishment available other than the biblically prescribed form of execution. The punishment consists of placing the convicted criminal in a cell (*kippah*), providing him with reduced rations of bread and water in order to shrink the digestive system and then feeding him barley in order to cause fatal distention. According to Rambam, that punishment was administered if any one of the first three conditions enumerated above was not fulfilled; according to Rashi, it was administered if either of the first two or the fourth condition was not fulfilled. That punishment was not available in cases in which only a single witness observed the act and certainly not in cases in which the only evidence was circumstantial in nature. See Rambam, *Hilkhot Rozeah* 4:8-9 and *Kesef Mishneh*, *ad locum*. In an otherwise thoroughly cogent discussion, Alan Dershowitz, *Why Terrorism Works* (New York, Haves, 2002), p. 157, correctly identifies the problem created by establishment of a two-witness rule but is simply in error in his explanation of how Jewish law remedied that problem.
4. For a discussion of admissibility of circumstantial evidence in the Noahide Courts and in administration of the king’s justice see J. David Bleich, “Capital Punishment in the Noahide Code,” *Contemporary Halakhic Problems*, II, (New York, 1983) 349-367.
5. British common law had no need for torture since it accepted circumstan-

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tial evidence in determining guilt. See Sir Frederick Pollack and Frederic W. Maitland, *The History of English Law*, 2<sup>nd</sup> edition, (Cambridge, 1898), II, 659-660. Prior to abolition of the ordeals, the defendant, in England, had the option of avoiding the ordeal by accepting a trial by jury. Consequently, it was possible to apply the same standard of proof to serious crime as had been applied to petty crime during the earlier period of trial by ordeal. The jury's verdict was not a divine judgment and hence did not require absolute proof. Accordingly, circumstantial evidence was accepted as sufficient. With abrogation of trial by ordeal, a jury trial became the only option. See *Torture and the Law of Proof*, p. 275.

However, torture by order of the Privy Council or the monarch was used in at least eighty-one cases during the Tudor-Stuart period between 1540 and 1640. See James Heath, *Torture and English Law: An Administrative History from the Plantagenets to the Stuarts* (Westport, 1982) and Langbein, *Torture*, pp. 81-128. Most of those cases involved real or suspected sedition or treason. See *Torture and the Law of Proof*, pp. 73-74. In the words of Sir Francis Bacon: "In the highest cases of treason, torture is used for discovery, and not for evidence." Hence, the coercive maneuvers employed in those cases can best be categorized as "intimidative torture" resorted to by a threatened monarch rather than as judicial torture. See J. Spending, *The Letters and Life of Francis Bacon* (London, 1883), III, 114.

6. *Torture and the Law of Proof*, pp. 10-12.
7. See James Williams, "Torture," *Encyclopedia Britannica*, 11<sup>th</sup> edition (Cambridge, 1910-11), XXVII, 72.
8. See Jonathan Frankel, *The Damascus Affair: "Ritual Murder," Politics, and the Jews in 1840* (Cambridge, 1997), especially pp. 37-43. For a description of a similar but less well known incident in Rhodes see *ibid.*, pp. 68-72. Ironically and sadly, as the nineteenth century progressed, ritual murder charges in Europe did not abate. See *ibid.*, pp. 438-440.
9. A form of torture of this nature, known as "*torture préalable*" existed in France. According to this doctrine a duly convicted criminal awaiting execution could be examined under torture with regard to other crimes and criminals and particularly with regard to accomplices. That form of torture was defended by Voltaire and although ordinary judicial torture was abolished by Louis XVI in 1788 *torture préalable* was not banned until 1788. See *Torture and the Law of Proof*, pp. 16-17.
10. See Henry Shue, "Torture," *Torture*, p. 53.
11. See Oren Gross, "The Prohibition on Torture and the Limits of the Law," *Torture*, p. 232.
12. Diverse views representative of a wide spectrum of contemporary thinkers as well as discussions of treatment of torture in international law are presented in a series of essays published in the previously-cited work, *Torture*, edited by Sanford Levinson.
13. See, for example, Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (New York, 1985), pp. 27-59.
14. Curiously, ratification by the United States may prove to have been more symbolic than substantive. In the resolution ratifying the treaty the Senate declared, ". . . the United States considers itself bound by the obligation . . .

to prevent ‘cruel, inhuman or degrading treatment or punishment,’ only insofar as the term means the cruel, unusual and inhuman treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.” See Resolution of Advice and Consent to Ratification of the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment—Reservations, Declarations, and Understandings, part I (1), 136 Cong. Rec. § 17491 (daily ed., October 27, 1990). In effect, the Senate agreed to eschew only acts already prohibited by the Constitution. More significantly, linkage of the phrase “cruel, inhuman or degrading treatment or punishment” to conduct prohibited by the Fifth, Eighth and Fourteenth Amendments does not establish an unchanging definition. Terms and phrases employed in the Constitution are subject to interpretation by the courts. Accordingly, the meaning of the words “cruel, inhuman or degrading treatment or punishment” is restricted to the meaning assigned to them by United States courts in any judicial decision, including future decisions no less so than those handed down in the past. It then follows that a practice regarded as unconstitutional in the past may be ruled constitutional in the future and will not be independently banned by the Convention.

A highly significant limitation of the constitutional rights in question was formulated by the U.S. Supreme Court in *Chavez v. Martinez*, 538 U.S. 760 (2003). In fragmented opinions the Court apparently accepted the notion that coercive interrogation is acceptable in situations in which eliciting information in a timely fashion is a matter of necessity. Earlier, in a kidnapping case, *Leon v. Wainwright* 734 F.2d 770 (11<sup>th</sup> Circuit 1984), in dicta having no direct bearing on the actual decision, a federal appellate court approved the conduct of Miami police who choked a suspect “until he revealed where [the victim] was being held.” *Id.* at 770. The court unanimously categorized the conduct as that of “a group of concerned officers acting in a reasonable manner to obtain information they needed in order to protect another individual from bodily harm or death.” *Id.* at 773. See John T. Parry, “Escalation and Necessity,” *Torture*, pp. 150-152. That position, of course, may well serve to legitimate “revelatory” or “preventative interrogational torture” under United States law.

15. See, for example, Oren Gross, *Torture*, pp. 229-253.

Although couched in terms of a different legal doctrine, this is essentially the position of the Supreme Court of Israel as announced in H. C. 5100/94 *Public Committee against Torture in Israel v. The State of Israel, The General Security Services and Others*, 553(4) PD 817 (1999). Translated excerpts from that decision are published in *Torture*, pp. 165-181. In its decision the Israeli court disallowed even moderate forms of physical pressure despite claims that such methods were necessary to save lives. Nevertheless, relying upon the conclusions of the 1987 report of the Landau Commission, the Israeli Supreme Court invoked the traditional common-law defense of necessity and left open the possibility that an interrogator might avail himself of such a defense in “a ticking-bomb” situation. See *infra*, note 33 and accompanying text.

A necessity defence might well be recognized by a United States court, particularly if American ratification of the Geneva Convention is not

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understood as an absolute and unequivocal acceptance of a ban against torture. See *supra*, note 14. If, however, the Geneva Convention is accepted unequivocally and without reservation, it is difficult to understand how a necessity defence might be entertained. The essence of a necessity defence is that the law is not designed for, and should not be applied to, situations in which its enforcement would create a greater harm than it seeks to eliminate. The defence requires that “the harm or evil sought to be avoided by such conduct [be] greater than that sought to be prevented by the law defining the offense charged.” See Model Penal Code §3.02(1)(a). Accordingly, the defence would not seem to be available in a situation in which the law is expressly applicable to the circumstances giving rise to the claim of justification.

16. See American Law Institute, §210.5, Commentary at 106.
17. See Joseph Fletcher, *Situation Ethics* (Philadelphia, 1966), p. 124.
18. See R. Shimon Efrati, *Mi-Gei ha-Hareigah* (Jerusalem, 5761), no. 1. A similar situation is also described by R. Isaac Arieli, *Einayim la-Mishpat, Berakhot* 58a, who similarly rules that the infant may be killed in order to eliminate the threat to the others in hiding.
19. See R. Moshe Feinstein, *Iggerot Mosheh, Yoreh De'ah*, II, no. 60, *anaf* 2. See also R. Shalom Dov Wolpo, *Rodef u-Ba be-Mahteret* (Kiryat Gat, 5748), no. 25. Rabbi Wolpo's contention that the crying infant should not be considered a pursuer because “such is the nature of the world” (*kakh darko shel olam*) is unwarranted. The phrase occurs in Rambam's *Hilkhot Rozeah* 9:6 with regard to a woman in childbirth whose life is threatened by the emerging fetus. The fetus is a pursuer and may be dismembered in order to preserve the life of the mother. However, once the head of the fetus has emerged and entered the birth canal that rule no longer applies since one life cannot be sacrificed to save another. The Gemara, *Sanhedrin* 72b, explains the distinction by declaring that in the latter case “Heaven is pursuing her.” Rambam rephrases that notion and interprets it as meaning “such is the nature of the world.”

The limitation placed by the Gemara upon the definition of a pursuer excludes only situations in which the pursuant is entirely at the hands of Heaven and any human involved is merely a passive instrument of providence. That is evident from the fact that a minor is considered to be bereft of *da'at* or rational capacity. Nevertheless, the law of the pursuer applies to a minor or a person who goes berserk and wields a gun or an infant that cries. Moreover, Rabbi Wolpo's conclusion is certainly precluded if R. Moshe Feinstein's analysis of Rambam's statement as presented in his earlier-cited responsum is accepted.

20. The controversy recorded in the Palestinian Talmud persists in the writing of medieval codifiers. Rambam, *Hilkhot Yesodei ha-Torah* 5:5, rules that a designated victim may be delivered for execution in order to save the entire company only if he is culpable of the death penalty while Rabbenu Nissim, *Yoma* 82b, rules that designation alone is sufficient. Both views are cited by Rema, *Yoreh De'ah* 157:1, without a definitive resolution.

The controversy, however, is limited to situations in which the danger stems from the mere presence and existence of the “pursuer.” Moreover, unlike other instances involving a pursuer, the Palestinian Talmud indicates



that delivery of the designated victim is not consistent with “*mishnat hasidim*—the teaching of the pious” and that Elijah declined to continue to reveal himself to a person who had violated “the teaching of the pious” by acting in that manner. Rambam, *Hilkhot Yesodei ha-Torah* 5:5, qualifies the import of that categorization by ruling that, although the law permits such acts, “*ein morin ken le-khathilah*—one does not direct [action] in accordance with such [rule] *ex ante*.” [Cf., however, R. Jacob Emden, *Even Bohem* 1:73, who takes issue with Rambam’s ruling and asserts that the rule is normative in nature and should be relied upon as such. The incident involving Elijah and the concept of *mishnat hasidim*, asserts *Even Bohem*, is limited to an *adam hashbuv*, or prominent personage such as Resh Lakish who should not involve himself even in such circumstances.] That rule stands in stark contradistinction to the rule with regard to a pursuer codified by Rambam, *Hilkhot Rozeah* 1:9, 14 and 16, mandating elimination of a pursuer.

Rabbi Wolpo correctly states the principle “*ein morin ken*” applies only to a purely passive individual whose “pursuit” arises simply from his existence. However, Rabbi Efrati opines that the principle applies to every pursuer who is an *ones*, i.e., who acts under duress. Accordingly, Rabbi Efrati regards refusal to suffocate an infant is a situation of the nature described earlier as entirely commendable. That position, however, is untenable. The Gemara, *Yevamot* 33b and 61b, in the phrase “*pitui ketanah ones hu*,” equates the freely-willed, autonomous act of a minor with an act committed under duress. Rambam, *Hilkhot Rozeah* 1:9, rules unequivocally that, not only a minor, but also a fetus must be killed when engaged in an act of pursuit. Indeed, it is in the context of a ruling with regard to a fetal pursuer that Rambam records the mandatory nature of the obligation to sacrifice the pursuer in order to preserve the victim.

[A possible contradiction to the principle of *pitui ketanah ones hu* in the discussion of the Gemara, *Sanhedrin* 55b, is dismissed by R. Elijah of Vilna, *Eliyahu Rabba*, *Niddah* 5:5, and rendered compatible with that principle by R. Elchanan Wasserman, *Kovez He’arot*, no. 75, sec. 2. Rambam’s disputed ruling, *Hilkhot Issurei Bi’ah* 3:2 and *Hilkhot Sotah* 2:4, to the effect that a minor who commits adultery is forbidden to her husband is based upon an entirely extraneous consideration. See R. Meir Simchah ha-Kohen of Dvinsk, *Or Sameah*, *Hilkhot Issurei Bi’ah* 3:2, s.v. *ulam*.]

The distinction between the case of an overt pursuer in which intervention is mandated and the situation of an entirely passive pursuer in which intervention, although permitted, is not “the teaching of the pious” must lie in the fact that acts of violence or endangerment must be thwarted whereas in the case of a passive pursuer there is no potentially threatening act to prevent; hence, in the latter case, prevention of harm to the threatened innocent victim represents only fulfillment of a duty of rescue. In usual situations the life of one person may not be sacrificed in order to rescue another since “What makes you think (*ma’i hazit*) that one life is of greater value than another.” That consideration is negated when the life to be sacrificed is that of even a passive pursuer. The element of “pursuit” serves to compromise the value of the life of the pursuer. The net result is that the putative intervener may choose which life to preserve; he may choose to preserve the life of the victim by intervening or he may preserve the life of the passive pursuer by refus-

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ing to act. The “teaching of the pious” is that one not actively prefer one life over another when intervention is a matter of discretion.

21. For a discussion of the degree of certainty required by Jewish law for invocation of the law of the pursuer see *Contemporary Halakhic Problems*, IV (New York, 1995), 82-86.

Jeremy Bentham, who, as will be shown, *infra*, note 34, supported use of torture in “a very few cases” addressed the issue of certainty by demanding the same degree of certainty as required for conviction of a crime:

But now then how can it be ascertained whether it be in a man’s power to give the information that is wanted of him? As well as it can be known whether he be guilty of any crime. Both of them matters of fact, equally open to enquiry. That it is now in his power is, it is true, a present matter of fact: that he did commit such or such a crime is a past matter of fact. Perfect certainty it must be confessed is an advantage scarce permitted to human kind; but a man may obtain as compleat a certainty respecting present facts as respecting past.

See *Northern Ireland Legal Quarterly*, vol. 24, no. 3 (Autumn, 1973), p. 317.

22. See *Shitah Mekubbezet*, *Ketubot* 33b, s.v. *u-be-kuntreisin piresh*.
23. See, for example, the comments of *Tosafot*, *ad locum*, s.v. *ilmale*.
24. See *Iggerot Mosheh*, *Yoreh De’ah*, II, no. 174, *anaf* 4.
25. Corporal force may be employed by any individual in order to prevent overt transgression on the part of another. See *Bava Kamma* 28a, *Netivot ha-Mishpat* 3:1 and *Minhat Hinnukh*, no. 8. Force may similarly be employed to compel performance of positive obligations. However, *Yere’im*, no. 164, and *Mordekhai*, *Gittin* 4:384, maintain that duress may be applied to compel performance of a positive obligation only by a *bet din* whose members are recipients of the ordination conferred by Moses upon the judges appointed by him in the wilderness and subsequently transmitted from generation to generation. *Kezot ha-Hoshen* 3:1 maintains that contemporary *battei din* are empowered to act as “agents” of earlier courts for this purpose. In disagreement with those authorities, *Netivot ha-Mishpat* 3:1 asserts that a qualified *bet din* is not necessary for that purpose and hence even private parties may compel performance of *mizvot*. See also *Meshovev Netivot* and *Netivot ha-Mishpat*, *Mahadurah Batra*, *ad locum*.
26. See Rema, *Orah Hayyim* 656:1.
27. See *Bet Yosef*, *Orah Hayyim* 656.
28. See Rema, *Orah Hayyim* 656:1. Cf., *Mishnah Berurah* 656:8 who regards expenditure of ten percent to be obligatory but the difference between ten and twenty percent to be discretionary. The issue is contingent upon interpretation of the statement of Rema, *Orah Hayyim* 656:1. See R. Yechiel Michal Epstein, *Arukh ha-Shulhan* 656:4. Cf. also, *Bi’ur Halakhah* 656:1, s.v. *afilu* and R. Yo’av Yehoshu’a of Kintzck (Konskie), *Helkat Yo’av*, I, *Dinei Ones*, *anaf* 7.
29. For a fuller discussion of this matter see *Contemporary Halakhic Problems*, IV, 282-285.
30. See R. Isaac Schorr, *Teshuvot Koah Shor*, p. 32b; R. Isaac Shmelkes,



*Teshuvot Bet Yizhak, Yoreh De'ah*, II , no. 162, sec. 4; and R. Meir Dan Plocki, *Hemdat Yisra'el* (New York, 5728), p. 178. Applicability of the law of the pursuer to Noahides seems to be indicated by the language of Rambam, *Hilkhot Melakhim* 5:4, and is assumed as a matter of course by R. Chaim Soloveitchik, *Hiddushei Rabbenu Hayyim ha-Levi, ad locum*. Cf., the gloss of *Hazon Ish* on *Hiddush Rabbenu Hayyim ha-Levi, ad locum* and R. Eleazar Menachem Shach, *Avi Ezri, Mahadura Kamma. Hilkhot Rozeah* 9:6. An opposing view is adopted by *Teshuvot Ben Yehudah*, no. 12 and R. Chaim Chizkiyahu Medini, *Sedei Hemed, Kuntres ha-Kelalim, Ma'arekhet ha-Gimel*, no. 44.

31. See *Minhat Hinnukh*, no. 296 and R. Shlomoh Zevin, *Le-Or ha-Halakhah*, 2<sup>nd</sup> edition (Tel Aviv, 5717), p. 17. For further discussion see *Contemporary Halakbic Problems*, II, 160-164.
32. "Can the War against Terror Justify the Use of Force in Interrogations? Reflections in Light of the Israeli Experience," *Torture*, pp. 183-190.
33. See *supra*, note 15.
34. See Alan Dershowitz, *Shouting Fire* (Boston, 2002), pp. 476-477; *idem*, *Why Terrorism Works* (New Haven, 2002), pp. 158-160 and p. 251, note 6; and *idem*, "Tortured Reasoning," *Torture*, pp. 257-280.

The proposal for use of torture pursuant to a judicial warrant was first formulated by the eighteenth-century utilitarian philosopher Jeremy Bentham in a manuscript published for the first time by W.L. and P.E. Twining, *Northern Ireland Legal Quarterly*, vol. 24, no. 3 (Autumn, 1973), pp. 305-356. Bentham reports that despite his initial abhorrence of the very idea he has learned "to correct the first impressions of sentiment by the more extensive considerations of utility." As a result he declares that "I am inclined to think there are a very few cases in which for a very particular purpose, Torture might be made use of with advantage." *Ibid.*, p. 308. Bentham sanctions torture in situations in which "the thing which a Man is required to do" is "a thing which the public has an interest in his doing" and it is either certain that it is in his power to comply or in which probably though not certainly it is in his power to do; and for the not doing of which it is possible that he may suffer, although he be innocent; but which the public has so great an interest in his doing that the danger of what may ensue from his not doing it is a greater danger than even that of an innocent person's suffering the greatest degree of pain that can be suffered by Torture, of the kind and in the quantity permitted to be employed.

Bentham concludes that portion of his discussion with the observation: "Are there in practice any cases that can be ranked under this head? If there be any, it is plain there can be but very few." *Ibid.*, pp. 312-313.

35. See *Sanhedrin* 74b.
36. Rabbi Kook's interlocutor, R. Zalman Pines, however, contended that the power of *hora'at sha'ah* is limited to prevention of transgression and does not extend to rescue of the community. Rabbi Kook vigorously contested that distinction.
37. See R. Ovadiah Bartenura, *Avot* 1:1