Is There a Jewish Version of the "Just War" Doctrine? Some Notes on the Nature of Halachic Interpretation

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In memory of Aaron Panken: scholar, colleague, gifted teacher, and interpreter of Talmud, with whom I dearly wish I could have discussed the topic of this paper.

The life of the rabbi is to a significant degree a life of interpretation. Whenever we speak, as we do frequently, in the name of the "Jewish tradition," we are necessarily interpreting the formative texts of that tradition. And whenever our teaching involves a normative matter, we are necessarily interpreting halachic texts, for halachah is that genre of Jewish literature that most directly addresses our ritual and ethical behavior, the actions that a Jew ought to perform in the world. But what, precisely, does it mean to interpret such a text? Just what are we rabbis doing when we ascribe to our texts a meaning that is not immediately evident in the words on the page? Does our interpretation represent a meaning that is authentic to the sources, a teaching that is in some essential respect really *there,* even though the texts do not state it explicitly? Or is our interpretation more properly speaking an act of our own invention, a conclusion we reach on the basis of our own values and commitments that we read back into—and force upon—the texts?

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These are questions of high theory, part of the domain of hermeneutics, the discipline that encompasses the theoretical inquiry into the act of interpretation. But they are also intensely practical, confronting us in every instance of teaching and preaching that we do. I don't propose in this essay to answer these questions with any sort of finality. My more modest goal, as indicated in the subtitle of this piece, is to offer some thoughts about this thing called interpretation. What is it we do when we interpret a sacred Jewish text, particularly a text of halachah? And in what way can we assert with integrity that our interpretation is *correct*, that it "gets the sources right," that it represents what the texts in fact say and not simply what we wish they would say? To make all of this a bit more concrete, I explore those seemingly abstract, theoretical questions by examining a specific ethical issue, one that is all too practical: does Jewish tradition prohibit the waging of an unjust war?

On Just Wars, Unjust Wars, and the Halachah

Ethical thinking about warfare is almost as old as the practice of warfare itself.[1] Here, though, I focus upon the particular tradition known as the theory of "just war," or *jus ad bellum*, "a just cause for going to war."[2] The Latin indicates the roots of this tradition in Christian theology,[3] developed in the writings of the fathers[4] and doctors[5] of the Church from late antiquity through the Middle Ages, debated throughout the succeeding centuries,[6] and codified in the *Catechism* of the Roman Catholic Church:[7]

> The strict conditions for legitimate defense by military force require rigorous consideration. The gravity of such a decision makes it subject to rigorous conditions of moral legitimacy. At one and the same time:
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> — the damage inflicted by the aggressor on the nation or community of nations must be lasting, grave, and certain;
> — all other means of putting an end to it must have been shown to be impractical or ineffective;
> — there must be serious prospects of success;
> — the use of arms must not produce evils and disorders graver than the evil to be eliminated. The power of modern means of destruction weighs very heavily in evaluating this condition.
>
> These are the traditional elements enumerated in what is called the "just war" doctrine.

Note the foundational presupposition of the Church's teaching: the "just war" is first and foremost a *defensive* war, though not all wars of defense meet the standards set by the doctrine.

Do we find a similar doctrine or tradition of thought within the sources of Judaism? Michael Walzer, one of the preeminent contemporary theorists writing on the ethics of war,[8] answers that question in the negative.[9] Walzer freely concedes that Judaism has much to say, "in the Bible, the Talmud, in Jewish law (*halakha*), in scholarly commentaries and rabbinic responsa," about warfare. Still, because the Jews were deprived of national political sovereignty for two thousand years, rabbis, philosophers, and *poskim* (halachic authorities) during those centuries considered war primarily in the abstract, as a purely theoretical issue, in contrast to Christian thinkers for whom war was an ever-present aspect of realpolitik. This political reality has led to what Walzer describes as "the incompleteness of Jewish thought about war."[10] For example, it is well-known that the Rabbis[11] distinguish between a "commanded war" (*milchemet mitzvah* or *chovah*) and a "discretionary war" (*milchemet har'shut,* which might also be translated as "the king's war"). The former category, akin to the notion of a "holy war,"[12] includes Joshua's wars of conquest, the war to destroy Amalek (see Deut. 25:19), and wars of defense waged by Jewish communities against gentile aggressors, while the latter is exemplified by "the wars fought by the Davidic dynasty (*beit David*) for expansion and profit."[13] There are some important differences between the two types of war,[14] but the "incompleteness" of which Walzer speaks lies in the fact that Rabbinic thought admits of no *other* category. All wars are either "commanded" or "permitted"; there exists in the classical texts no conception of *prohibited* war, that is, a war upon which the king is forbidden to embark precisely because it is fought for *unjust* reasons and ends. The king is entitled by virtue of his being the king (i.e., the *r'shut*, the governing authority) to initiate wars of aggression if and when he and the Sanhedrin deem them necessary and advantageous by raison d'état. This is because the Rabbis were "realists" who "apparently did not believe that it was possible to stop political rulers from fighting for the sake of their own power and prestige."[15] Walzer, we should note, does not regard this situation as irremediable. Jews now live in a world where Jewish political sovereignty, in the form of the State of Israel, has reemerged. Issues concerning

warfare have become a pressing practical matter for the citizens of the state, as they have for Diaspora Jews who possess full citizenship in democratic societies and who serve in the armed forces of their countries. Modernity therefore has created the opportunity for rabbis and other Jewish thinkers to consider possibilities "for the development, elaboration, and revision of the Biblical and Talmudic understanding of warfare,"[16] and Walzer calls upon them to do so. The bottom line, however, is that no doctrine concerning just and unjust wars is to be found in the biblical and Rabbinic sources; it must be *developed*, brought into being—created?—by the interpreters of those sources.

The Israeli philosopher Aviezer Ravitzky dissents, in part, from Walzer's thesis.[17] Ravitzky accepts Walzer's finding that the just-versus-unjust war distinction is absent from the classical biblical and Rabbinic texts, and like Walzer he attributes this silence to the disappearance of Jewish political sovereignty from tannaitic times until 1948. Where he differs is in his argument that "the halachic community"—a group consisting largely of twentieth-century Orthodox halachists who lived in Mandatory Palestine or the state of Israel[18]—has already invoked various conceptions of prohibited war (Ravitzky's term: *milchama asura*) as a third category of conflict alongside the existing *milchemet mitzvah* and *milchemet har'shut*. This prohibited war tends to be identified as a war of aggression, making it nicely parallel to the unjust war of Christian and secular thinkers. Thus, says Ravitzky, Walzer's call for rabbinic action has already been met by contemporary halachists for whom questions of war are no longer of purely abstract interest. These rabbis have accepted what he calls the "interpretive challenge"[19] to create a sufficient just-war doctrine out of the sources of Judaism.

The success, or lack thereof, of those rabbinic efforts is an interesting question, but I am more concerned with the "interpretive challenge" itself. Given that we find no explicit doctrine on the unjust war (the "prohibited" war) in the foundational Jewish sources, any substantive Jewish version of that doctrine must be *interpreted* into being. Now the fact that any particular teaching is the result of interpretation should not be a surprise to Jews, who have been interpreting their texts for thousands of years and who have accepted the results of those interpretive exercises as "Torah." But for the contemporary reader, schooled in critical thinking and quick to sniff out the difference between that which is read *out* of the texts

and that which is read *into* them, Ravitzky's challenge is likely to raise the question of *authenticity*. When the sources do not explicitly mention a particular teaching or idea, are we nonetheless entitled to claim that such a teaching or idea is "there," located in those very sources? Or is it rather the creative product of well-meaning rabbis giving voice to what they *wish* the texts would say?

This question of authenticity on the subject of war became quite personal for me in 2002, when the CCAR Responsa Committee (which I chaired at the time) considered a *sh'eilah* engendered by the impending American invasion of Iraq: "Does our tradition countenance preemptive military action when there is suspicion, but no prima facie evidence exists, that a perceived enemy will attack?" Note the wording of the query. We on the Committee were not being asked to express our personal opinion concerning the morality (let alone the wisdom) of the proposed military operation. We were asked rather to express the view of "our tradition," a body of teaching separate and distinct from our own beliefs and ideologies.[20] Our responsum,[21] among its other conclusions, rejects the moral acceptability of *milchemet har'shut* in our day and age. It finds that "we are morally justified in waging war only when war is absolutely necessary and unavoidable. A war fought today for anything other than defensive purposes must therefore be viewed as . . . a transgression of the message of Torah, and as a repudiation of our most cherished values and commitments." To translate: the responsum claims to have derived from the halachic sources what amounts to a conception of "just and unjust war" that in important respects parallels the Christian doctrine. While conceding that "discretionary war" may at one time have been conscionable, the responsum now declares it an *unjust* war, forbidden as an instance of what others call *milchama asura*.

That claim, to put it mildly, was a controversial one. I recall that at the time at least one critic of our responsum openly doubted whether our conclusion truly expressed the teaching of Jewish tradition. We might say that the critic challenged our conclusion's authenticity. The issue, simply and starkly, was this: does the responsum's *isur* (prohibition) of discretionary war in our time really exist in our sacred texts? Does it flow logically or reasonably from what those texts explicitly say? Or is it nothing more than its authors' wishful thinking? Did we, a group of liberal (though not, as the *t'shuvah* makes clear, pacifistic) rabbis, simply ascribe it to the Jewish legal texts,

reading our own political (or politically correct) preferences into a body of sacred writings that in fact contains no such *isur*?

Validity in Interpretation?[22]

The critic's challenge exemplifies the more general, theoretical issue I describe at the outset of this article. Suppose a rabbi declares that "Judaism teaches *X*," with "*X*" standing for any substantive norm, idea, or doctrine. If *X* is not stated explicitly in the sources that define Jewish belief and action—or, in the case of *machloket*, where the sources contain conflicting views (*X* and not-*X*) and do not explicitly decide that *X* is correct—the rabbi's statement is an *interpretation* of those sources. That interpretation is a claim of meaning[23] upon the textual tradition, an argument that *X* is the best and most coherent understanding of what the texts say on the matter in question. It is a claim that *X* is more than the rabbi's personal opinion, that *X* is in fact "there" in the sources even though they don't say "*X*" in any clear and unambiguous way. How do we test the validity of that claim? Is there a way to determine that it *is* the correct reading of the tradition or, alternatively, that it is the best available reading, more probably correct than conflicting claims?

The question of validity—what makes an interpretation *correct*?—has long been a central concern of hermeneutical theorists, who have developed a number of varying approaches to answering it. I want to consider some of those approaches as a way of helping us to understand how claims of meaning work in halachah or in other textual traditions. But let me begin with two *azharot* (caveats). The first, which should be obvious, is that what follows is an extremely cursory treatment. I cannot possibly do justice in this setting to the deep and complex field of thought that is hermeneutics. Still, I hope that this brief article can serve to outline in the broadest of brushstrokes the major options and choices that confront us as we consider the nature of our own work as students of text. Second, I intentionally exclude from my discussion two of those options, two particular conceptions of interpretation. The first is that of Sir Henry Sumner Maine, the nineteenth-century British jurist and legal historian, who classified all legal interpretation under the heading "legal fiction," on the grounds that, like all such fictions, judicial interpretation is an act intended to make the law say what

it does not in fact say. And if all interpretation is an act of fiction, it is futile to speak of a "valid" interpretation, one that captures the factually correct—though implicit—meaning of the text.[24] I also exclude from my purview the various forms of deconstructionist criticism, which (though remember the caveat: these things are too complex to be adequately captured in a one-sentence summary) tend to posit that the "meaning" of any text is inherently unstable and therefore undecidable.[25] By excluding these theories I am not saying that they are "wrong"—they might be, but that's not my concern. My point is rather that they do not describe the practice of interpretation as we tend to experience it. That is, when the literary critic or the jurist or the rabbi sits down to interpret a text, she most likely is in search of a meaning that, though not explicitly stated therein, is nonetheless *of* the text and can plausibly be attributed to it. The interpretive approaches that I include in my discussion accept that perception, even as they disagree as to how the interpreter identifies the meaning of a text and, indeed, as to just what we mean by "meaning." These theories can usefully be grouped along a spectrum of thought. For the sake of convenience, let's refer to those on the one end as "objectivist" and to those on the other as "constructivist."[26]

An objectivist theory holds that the meaning of a text is *determinate*, a discrete and factual reality. According to E. D. Hirsch, Jr., one of the preeminent objectivists in the field of literary theory, "determinate" means that the verbal meaning of a text is "self-identical . . . an entity which always remains the same from one moment to the next . . . it is changeless . . . Verbal meaning, then, is what it is and not something else, and it is always the same."[27] The text's meaning, in other words, is not created by the reader but preexists her reading of it. It is there, waiting to be discovered, and an interpretation is "valid" to the extent that it corresponds to that meaning. Precisely *how* we discover the text's verbal meaning is a subject of controversy among the objectivists. Some, notably Hirsch himself, identify the meaning of a text with the intention of its author: "*Meaning* is that which is represented by a text; it is what the author meant by his use of a particular sign sequence; it is what the signs represent." Hirsch distinguishes the text's "meaning" from its "significance," the response of the reader to his reading of the text. Significance, for Hirsch, "names a relationship between that meaning and a person, or a conception, or a situation, or indeed,

anything imaginable." The significance of a text is thus something separate and apart from its meaning: "significance always implies a relationship, and one constant, unchanging pole of that relationship is what the text *means*." It is essential that we maintain this distinction, Hirsch says, for when we substitute some other criterion of meaning for the author's intention, then the reader who discerns that meaning effectively becomes the author, inasmuch as whoever creates the meaning of a text must be considered its author. Not only is this situation illogical—can the reader simultaneously be the author of the text?—but since "almost any word sequence can, under the conventions of language, represent more than one complex of meaning," different readers will arrive at conflicting yet equally plausible meanings. This is an unacceptable situation; indeed, "to banish the original author as the determiner of meaning was to reject the *only* compelling normative principle that could lend validity to an interpretation."[28]

By "banishing the original author," Hirsch is referring to a tendency known as "literary formalism" and represented by (among other movements)[29] the New Criticism, a leading school of literary thought during the first half of the twentieth century. Like Hirsch, the New Critics hold that meaning is an objective, determinate reality and that the valid interpretation conforms to that reality. But unlike Hirsch, they insist that meaning is to be derived from the text itself and the text alone. The interpreter uncovers this meaning by way of close, analytical reading of the text, a reading confined to "evidence from direct inspection of the object"[30] rather than by consideration of facts external to the text, including intentions located in the author's mind, whatever meaning the author might have intended for the text to convey. The author's intention is irrelevant because a text, once published, becomes independent of her and belongs to its readers. Such evidence "is discovered [in the case of poetry] through the semantics and syntax of a poem, though our habitual knowledge of the language through grammars, dictionaries, and all the literature which is the source of dictionaries, in general through all that makes a language and culture."[31]

Constructivist approaches hold that "meaning" is not an objective reality, present in the mind of the author or in the text itself, to be discovered through the application of some quasi-scientific method. It is rather the outcome of an encounter between the object (the text) and the subject (the reader). Literary theorists who

adopt this view are part of a general movement in the humanities that took hold in the mid- to late-twentieth century. Contrary to the previously dominant objectivist trend in hermeneutical thought, those associated with this new movement asserted that the act of knowing is rooted in history, tradition, and experience, so that it is inescapably dependent upon the reader's perspective.[32] In this view the reader cannot apprehend an objectively correct meaning of a text, because the very act of apprehension is inevitably shaped by the reader's own particular stance in tradition and culture.[33] The theorist perhaps most prominently associated with this view is Hans-Georg Gadamer,[34] who argues that no interpretation can be objective (*wertfrei*) because the interpreter always apprehends her object—in this case, a text—from a contingent and historical position, the framework of practices, beliefs, interests, and problems within which she lives, works, and thinks. This framework, or "horizon," is delineated by one's prejudices (better: prejudgments) about the nature of a phenomenon; it is through the lens of these pre-judgments that one is able to grasp reality in the first place. In this account, textual truth is an event, a dialogical meeting between the text and an interpreter (in Gadamer's language, a "fusion" of the horizons of the text and its reader) who, though she cannot know the text except by way of her prior expectations, seeks to test those expectations against the text. Meaning is therefore not a fixed, determinate object—something that is *there* in the text—but a reality that changes with every encounter between a text and its readers. Examples of this approach include reader-response theories of textual interpretation[35] as well as those theories that hold that the meaning of texts is determined by the interpretive communities that engage in the act of reading from the perspective of shared texts, values, and beliefs.[36]

This same spectrum of approaches is present in the specific field of jurisprudence, which, like halachah, devotes its efforts to deriving normative guidance by way of the interpretation of canonical texts. We can identify this divergence of viewpoints with special clarity in the ongoing controversy among American lawyers over the proper way to interpret the Constitution of the United States. On the objectivist end of the spectrum stand the proponents of the doctrine called "originalism," which posits that the interpretation of the Constitution ought to be determined or constrained by the manner in which that document was interpreted at the time of its

composition and/or ratification.[37] Originalists, to be sure, disagree just as do literary theorists over the nature and the source of this constraint. Some, in parallel to Hirsch, argue that the authoritative meaning of a legal text is identical with the original intent of its authors or framers at the time of the document's composition or ratification.[38] Others, much like the formalists, reject the authors' intentions as the proper criterion of the text's meaning in favor of the words of the text itself: that is, the text should be interpreted according to its "original public meaning" or "semantic meaning," the general pattern of linguistic usage—that is, how most people would have understood the words of the text—at the time of its composition or ratification.[39] Both groups of originalists agree, however, that the meaning of the constitutional text is *determinate,* fixed at the time of its origin, located "there" in the text, and discoverable through the application of proper interpretive method, so that any interpretation that departs from this fixed meaning is contrary to law. On the other side of the dispute we find constructivists of various kinds. Adherents of the theory known as "living constitutionalism" hold that the meaning of a constitutional text is neither determinate nor fixed for all time but rather "evolves, changes over time, and adapts to new circumstances, without being formally amended."[40] Constructivists think of a constitution as a special sort of text that, though it is a written document composed at particular historical moments, must nonetheless be sufficiently flexible to speak to present-day needs.[41] As the Israeli jurist and former chief justice Aharon Barak puts it, a constitution is "a living document . . . The objective purpose of the constitution reflects *contemporary* values. It expresses the *contemporary* national credo and fundamental *contemporary* constitutional viewpoints."[42] The word "purpose" is key to the whole enterprise: it is the *purpose* of the text, as discerned by the interpreter, that guides the interpretation.[43] In the words of the legal philosopher Ronald Dworkin, creative interpretation (a category of which legal interpretation is a member) is constructive in nature. It is "essentially concerned with purpose . . . But the purposes in play are not (fundamentally) those of some author but of the interpreter. Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong."[44] The meaning of the constitutional text is therefore a *constructed* one, emerging from the

dialogical encounter between the text and its present-day community of interpreters, who read the document quite "purposefully," from the perspective of the demands of their own time.

As with the options in literary interpretation, there are good arguments both for and against either of these interpretive approaches to the Constitution. Originalists will argue that the Constitution, like any legal text, is an instruction issued by its framers to the community that has pledged to live by it. As such, it ought to have a determinate, fixed meaning, for if its meaning can be said to change over time, then it cannot truly constrain the decisions of the judges, who become in effect the authors of the document, free to determine its meaning according to their own views and personal preferences.[45] Living constitutionalists, for their part, ask why our contemporary understanding of the Constitution should be subject to the control of the "dead hand" of the past,[46] a standard that arguably renders the document incapable of responding to present-day needs and which in any case would lead to decisions that many today would find objectionable.[47] They also note the irony that the authors and ratifiers of the Constitution themselves were not necessarily "originalists" and were divided over the most basic question of how the Constitution ought to be interpreted.[48] The point is that both approaches can plausibly claim legitimacy in the field of legal and constitutional interpretation. Neither is clearly or objectively *the* one and only correct way to establish the meaning of a legal text. Jurists are divided between them, with some seeking a middle-ground theory that would capture the best of both approaches while avoiding the pitfalls of each. Jurists, we might say, have no choice but to *choose* the interpretive approach that they find most persuasive and cogent. And having done so, they form themselves into separate[50] legal interpretive communities that pursue the work of interpretation in accordance with those choices.

Reform Jews, Interpretation, and the Unjust War

So, let's return to our question: do the literary sources of the Jewish tradition (read: the halachic sources) recognize or accommodate a teaching that approximates the "just and unjust wars" doctrine? The answer requires interpretation, and, like literary and legal interpreters, we halachists have choices as to *how* to interpret. If we choose an objectivist approach, we would have to conclude that those sources

do not recognize something called *milchama asura*, wars—i.e., wars of aggression—that are prohibited precisely because they are morally unjust. As noted above, under the rubric of *milchemet har'shut* the king ("the house of David") is expressly permitted to wage war "for expansion and profit." Thus, even though we today think of such wars as unjust or immoral, we could not sincerely claim that our opposition was based upon some authentic Jewish teaching, something objectively *there* in the halachic texts. Yet there is no principle inherent to the procedure of literary or legal interpretation that obliges us to interpret our texts precisely in accordance with the intent of their authors or with objective factors internal to the texts themselves. The constructivist option, an accepted interpretive convention, also exists, and there is no reason to suppose that it does not similarly exist in the halachah. Indeed, we have seen in our discussion of the question of just and unjust wars that Michael Walzer calls upon contemporary rabbis to adopt precisely that approach and that Aviezer Ravitzky has shown that a number of them taken significant steps in that direction. And it should go without saying (but in the interests of clarity I'll say it anyway) that Reform Jews who seek substantive guidance from our textual tradition on the difficult moral issues of today have no real choice *but* to read our texts through a "living constitutionalist" lens. It is in that way that our sources can actually speak to a Jewry committed to a liberal and progressive—that is, a *modern*—worldview. Otherwise, the gap between ourselves and those texts, between ourselves and the minds of those who wrote them, would be an unbridgeable chasm.[51]

The CCAR responsum[52] is an essay in constructivist interpretation. It acknowledges that the sources clearly permit the state to wage non-defensive wars, so that "we might draw the conclusion that it is morally justifiable for governments to wage such wars in our own day and time." But it rejects that conclusion on two major grounds, each supported by way of textual citation. First, "although the Torah allows the king to engage in war for reasons other than national defense, it most certainly does not advocate that he do so. Indeed, the opposite is the case. Jewish law offers but grudging approval of the state's military regime, and it places significant roadblocks in the path of the king who wishes to embark upon a discretionary war." Second, "although the Torah permits the state to resort to arms, it does not glorify war. Again, the opposite is the case. Peace, and not war, is our primary aspiration; we

are commanded to seek peace and pursue it." Among the proofs for this is the fact that David himself, "whose military career offers us the very paradigm for 'discretionary war,'" was expressly forbidden to build the Temple because of the blood he had shed on many battlefields (I Chron. 22:8). From this, the responsum asserts—and, significantly, it asserts this *in the name of the textual tradition*—that "war is at best a necessary evil, 'necessary' perhaps but 'evil' all the same," so that, given the horrific destructiveness of modern military technology, "we are morally justified in waging war only when war is absolutely necessary and unavoidable. A war fought *today* for anything other than defensive purposes must therefore be viewed as an *un*necessary evil, as a transgression of the message of the Torah, and as a repudiation of our most cherished values and commitments." As the reader can discern, this is an example of the sort of "purposive interpretation" that legal theorists such as Dworkin and Barak recommend to jurists.[53]

To summarize: the responsum's conclusion is a claim of meaning upon the texts. It asserts the existence in the Jewish legal tradition of a category of warfare similar to Ravitzky's *milchama asura*, a category never mentioned in the texts themselves. The claim is *valid* only if we approach the task of interpretation as constructivists, for whom "meaning" is not an objective fact to be located in the mind of the author(s) or in the words on the pages but emerges from the encounter (the "fusion of horizons") between the text and its contemporary readers. This constructivist approach, again, is not the *only* legitimate way to interpret literary, legal, or halachic texts—but it *is* legitimate.[54] And in the absence of that interpretive approach, the responsum could hardly have arrived at its conclusion concerning non-defensive war.

Why It Matters

Some, undoubtedly, will question the need for all this. If we find aggressive war to be morally objectionable, then we would certainly continue to object to it even if our sacred texts did not prohibit the waging of such conflicts. Moral truth, after all, is true on *moral* grounds: we acknowledge it as true on the basis of our moral commitments, our affirmations concerning good and evil, and not because some ancient book declares it to be true. As religious liberals, we prioritize morality over text; we stand ready to reject the

teachings of the Bible or the Sages when these contradict our own moral values. So why do we not simply state our truth and act on it? Why get exercised over the question of "valid interpretation" of the texts when, at the end of the day, we are prepared to set them aside when they do not cohere with our beliefs? Why not dispense with these time-consuming interpretive gymnastics aimed at "proving" that to which in any case we are already committed?

These are obviously very good questions, and I don't have answers that will satisfy everyone. That's because those answers, like one's approach to textual interpretation, are based upon a choice that each of us must make. It is the choice as to how we shall define the rabbinical role, as to the kind of rabbi that each of us wishes to be. Though other choices are available, for my part I perceive that my authority to speak moral truth *as a rabbi* is inextricably bound to the textual tradition that my *s'michah* pronounces me qualified to teach. Put somewhat crudely, I cannot imagine that anyone would give the slightest damn about anything I say or teach (let alone pay me to say or teach it) were it not for the title "rabbi" that precedes my name and that suggests that what I am saying and teaching partakes of Jewish authenticity and integrity. And if that phrase "Jewish authenticity and integrity" means anything at all, it means that we are commissioned to speak and to teach, not in our own name, but in the name of the texts, including the halachic texts, of our tradition. In other words, interpretation *matters,* because the power of our message rests in our ability to interpret those texts and to get their message right, or at least as right as we can.

Notes

1. For ancient Eastern as well as Islamic precedents, for example, see the articles in Torkel Brekke, ed., *The Ethics of War in Asian Civilizations: A Comparative Perspective* (Abingdon, UK: Routledge, 2006).
2. As opposed to the other major stream of military-ethical thought: *jus in bello*, the ethical principles that ought to govern military combat. Not all ethical thinkers support this distinction; Helen Frowe, in particular, argues that "a single set of principles determines the justness of actions that cause nonconsensual harm," so that "there are no distinctive *ad bellum* or *in bello* principles." Helen Frowe, "The Just War Framework," in *Oxford Handbook of Ethics of War*, ed. Seth Lazar and Helen Frowe (forthcoming, New York: Oxford University Press), available at https://www.academia.edu/30972143/The_Just_War_Framework (accessed September 7, 2018).

3. This should not cause us to ignore the pre-Christian origins of the doctrine in Western thought. These include: the "Melian Dialogues" in Thucydides, *The Peloponnesian War*, Book V, chaps. 84–116; Plato, *The Republic of Plato*, trans. Alan Bloom (New York: Basic Books, 1968), 150–51); and Cicero, *On Duties*, ed. M. T. Griffin and E. M. Atkins (Cambridge: Cambridge University Press, 1991), book 1, throughout (see especially sec. 34).
4. Most notably Augustine of Hippo, d. 430. See John Mark Mattox, *St. Augustine and the Theory of Just War* (London: Thoemmes Continuum, 2006), and John Langan, "The Elements of St. Augustine's Just War Theory," *Journal of Religious Ethics* 12 (1984): 19–38. Augustine, in turn, was influenced by the combination of Christian and Ciceronian elements in the thought of his great predecessor Ambrose of Milan, d. 397. See Louis J. Swift, "St. Ambrose on Violence and War," *Transactions and Proceedings of the American Philological Association* 101 (1970): 533–43.
5. See, in general, Frederick H. Russell, *The Just War in the Middle Ages* (Cambridge: Cambridge University Press, 1975). By "doctors" I mean the canon lawyers such as Gratian (ca. 1140) as well as the theologians. Among the latter, the most prominent is clearly Thomas Aquinas (d. 1274), who provided a synthesis of the various elements of Christian thought on war in his *Summa Theologiae*, *Secunda Secundae Partis* (Second Part of the Second Part), question 40 ("De Bello"), http://www.newadvent.org/summa/3040.htm (accessed September 9, 2018). See Gregory M. Reichberg, *Thomas Aquinas on War and Peace* (Cambridge: Cambridge University Press, 2016).
6. Natural-law and law-of-nations thinkers played a critical role here. This is especially true of Hugo Grotius (d. 1645). See G. Draper, "Grotius' Place in the Development of Legal Ideas about War," in *Hugo Grotius and International Relations*, ed. Hedley Bull et al. (Oxford: Clarendon Press, 1990), 177–207. We should also note that the "Christian theology" mentioned in the text is not restricted exclusively to Roman Catholic sources. The American Protestant thinker Paul Ramsey has made his own notable contributions to just-war discourse; see his *The Just War: Force and Political Responsibility* (Lanham, MD: Rowman and Littlefield, 2002).
7. *Catechism of the Catholic Church*, pt. 3, sec. 2, chap. 2, art. 5, para. 2309, http://www.vatican.va/archive/ENG0015/__P81.HTM (accessed September 9, 2018). The Catechism includes other teachings relating to the ethics of military combat, but this paragraph is the one explicitly linked to the "just war" doctrine.
8. See Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977).
9. Michael Walzer, "The Ethics of Warfare in the Jewish Tradition," *Philosophia* 40 (2012): 633–41; Michael Walzer, "War and Peace in

the Jewish Tradition," in *The Ethics of War and Peace: Religious and Secular Perspectives*, ed. Terry Nardin (Princeton: Princeton University Press, 1996), 95–114.

10. Both this and the preceding quotation are taken from Walzer, "The Ethics of Warfare," 633.
11. *Mishnah Sotah* 8:7; *Tosefta* (ed. Lieberman) *Sotah* 7:24; BT *Sotah* 44b; JT *Sotah* 8:10, 39b.
12. Reuven Firestone, *Holy War in Judaism: The Fall and Rise of a Controversial Idea* (New York: Oxford University Press, 2012).
13. BT *Sotah* 44b. See Rambam, *Mishneh Torah, M'lachim* 5:1.
14. For example, a considerable number of potential warriors are exempt from fighting in *milchemet har'shut* (*Mishnah Sotah* 7), and the king is not permitted to embark upon such a discretionary war without first consulting with the *beit din hagadol* (BT *Sanhedrin* 20b).
15. Walzer, "The Ethics of Warfare," 636.
16. Ibid., 640. One of these developments, he points out, is the Israeli army's doctrine of "purity of arms" (*tohar haneshek*), which seems to owe more to modern conceptions of military ethics than to biblical and Rabbinic textual antecedents. See Lindsey Danziger, "Does Purity Have a Place on the Battlefield? *Tohar Hasneshek*'s Place in Jewish Text and Tradition" (rabbinical thesis, HUC-JIR, 2017).
17. Aviezer Ravitzky, *Cheirut al Haluchot: Kolot Acherim shel Hamach'shava Hadatit* (Tel Aviv: Am Oved, 1999), 139–57. A shorter version of this article appears in English as "Prohibited War in Jewish Tradition," in Nardin, ed., *Ethics of War and Peace*, 115–27.
18. These include R. Avraham Yizchak Hakohen Kook, R. Avraham Y'shayahu Karelitz (the Chazon Ish), R. Shaul Yisraeli, R. Y'hudah Shaviv, R. Aharon Lichtenstein, and—to cite the one Diaspora scholar—R. Chaim Hirschenson of the United States.
19. Ravitzky, *Cheirut al Haluchot*, 153. The "challenge" he refers to is whether contemporary rabbis can overcome a centuries-long tendency in Jewish literature to "spiritualize" questions of war and peace; that is, to treat them in an abstract and non-pragmatic fashion.
20. Such is the difference between a *responsum*, which purports to express the viewpoint of halachah or Jewish tradition, and a *resolution*, a statement of position enacted, say, by the plenum or board of the CCAR. The validity or correctness of the former depends upon the extent to which it "gets the sources right" and is supported by textual evidence. The latter, by contrast, is valid purely by virtue of its being enacted by a properly constituted institutional body.
21. "Preventive War," *Reform Responsa for the Twenty-First Century*, vol. 2 (New York: CCAR, 2010), no. 5762.8, pp. 365–79. See sec. 2, "Discretionary War in Our Time," 368–69, https://www.ccarnet.org/ccar-responsa/nyp-no-5762-8 (accessed September 16, 2018).

22. A phrase that, minus the question mark, I have lifted from the title of the now-classic work of E. D. Hirsch, Jr., *Validity in Interpretation* (New Haven: Yale University Press, 1967).
23. See James Boyd White's description of how a judge interprets legal texts: "The judicial opinion is a claim of meaning: it describes the case, telling its story in a particular way; it explains or justifies the result; and in the process it connects the case with earlier cases, the particular facts with more general concerns . . . In doing these things it makes two claims of authority: for the texts and judgments to which it appeals, and for the methods by which it works." James Boyd White, "What's an Opinion For?" *University of Chicago Law Review* 62 (1995): 1367–68.
24. Henry S. Maine, *Ancient Law*, 4th ed. (London: John Murray, 1870), 26: "any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified . . . The *fact* is . . . that the law has been wholly changed; the *fiction* is that it remains what it always was." On p. 25, Maine concedes that he is using the term "legal fiction" in a wider sense than is customary among jurists in either the common law or Roman traditions. For him, it signifies any changed meaning read into (i.e., not out of) an existing legal rule.
25. Let this statement by a leading American deconstructionist literary scholar suffice: "Deconstruction is not a dismantling of the structure of a text, but a demonstration that it has already dismantled itself. Its apparently solid ground is no rock but thin air." J. Hillis Miller, *Theory Now and Then* (Durham: Duke University Press, 1991), 126.
26. I take the term "constructivist interpretation" from Ronald Dworkin (see note 44).
27. Hirsch, *Validity in Interpretation*, 46.
28. Ibid., 8, 4, and 5.
29. These would include the schools known as Russian formalism and structuralism. See, respectively, Victor Ehrlich, *Russian Formalism*, 4th ed. (The Hague: Mouton, 1980), and Jonathan Culler, *Ferdinand de Saussure,* rev. ed. (Ithaca, NY: Cornell University Press, 1986).
30. Monroe C. Beardsley, *Aesthetics: Problems in the Philosophy of Criticism*, 2nd ed. (Indianapolis: Hackett Publishing Company, 1981), 20.
31. See W. K. Wimsatt, Jr., and Monroe C. Beardsley, "The Intentional Fallacy," reprinted in *Philosophy Looks at the Arts*, 3rd ed., ed. Joseph Margoli (Philadelphia: Temple University Press, 1987), 367–81. The quotation at the end of the paragraph is at p. 373. Originally published in *The Sewanee Review* 54, no. 3 (1946): 468–88. On the New Criticism generally, see Rene Wellek and Austin Warren, *Theory of*

Literature (New York: Vintage, 1954). There are obvious similarities between the approach of the New Critics and that of Roland Barthes in his 1967 essay "The Death of the Author," though there are significant differences. Barthes's major concern is that to ascribe an author to a text is to limit the potential meanings of that text. The New Critics, as formalists, had no problems with limits per se. Their goal was to find the *best* interpretation, even if that interpretation has nothing to do with the author's intentions. See Graham Allen, *Roland Barthes* (London: Routledge, 2003), 73–77.

32. See David R. Hiley, James F. Bohman, and Richard Shusterman, eds., *The Interpretive Turn: Philosophy, Science, Culture* (Ithaca: Cornell University Press, 1991). The "previously dominant objectivist trend in hermeneutical thought" refers to the theories of such writers as Schleiermacher, Dilthey, Husserl, and Betti. See, in general, Josef Bleicher, *Contemporary Hermeneutics* (London: Routledge and Kegan Paul, 1980).
33. For a concise expression of this point see Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham: Duke University Press, 1989), 4: "There is no such thing as literal meaning, if by literal meaning one means a meaning that is perspicuous no matter what the context and no matter what is in the speaker's or hearer's mind, a meaning that because it is prior to interpretation can serve as a constraint on interpretation."
34. "Understanding always involves something like the application of the text to be understood to the present situation of the interpreter." Hans-Georg Gadamer, *Truth and Method*, rev. ed., trans. J. Weinsheimer and D. C. Marshall (New York: Crossroad, 1989), 307–8. While this is not the place for an extended consideration of Gadamer, good treatments of his thought include the following: Richard J. Bernstein, *Beyond Objectivism and Relativism: Science, Hermeneutics, and Praxis* (Philadelphia: University of Pennsylvania Press, 1983); Georgia Warnke, *Gadamer: Hermeneutics, Tradition and Reason* (Stanford: Stanford University Press, 1987); and David Hoy, *The Critical Circle: Literature, History, and Philosophical Hermeneutics* (Berkeley: University of California Press, 1978).
35. For a major statement see Wolfgang Iser, "The Reading Process: A Phenomenological Approach," *New Literary History* 3, no. 2 (Winter 1972): 279–99. For a summary collection of articles, see Jane Tompkins, ed., *Reader-Response Criticism: From Formalism to Post-Structuralism* (Baltimore: Johns Hopkins University Press, 1980).
36. The approach commonly associated with Stanley Fish; see note 33 and his *Is There a Text in This Class?* (Cambridge: Harvard University Press, 1982). The concept of interpretive communities stretches beyond the humanities. See also Thomas Kuhn, who

famously noted the relevance of interpretation, tradition, and community in the realm of the so-called hard sciences: "A *scientific community* cannot practice its trade without some set of *received beliefs* . . . [*which*] form the foundation of the 'educational initiation that prepares and licenses the student for professional practice.'" Thomas Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1962), 4–5.

37. For a summary treatment see Dennis J. Goldford, *The American Constitution and the Debate over Originalism* (New York: Cambridge University Press, 2005). For a good definition, see Keith E. Whittington, "The New Originalism," *Georgetown Journal of Law and Public Policy* 2 (2004): 599: originalism holds "the discoverable meaning of the Constitution at the time of its original adoption as authoritative for purposes of constitutional interpretation in the present."
38. Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, MA: Harvard University Press, 1977), 364; Robert Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Review* 47 (1971): 1ff.
39. Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, NJ: Princeton University Press, 2004), 94ff; Antonin Scalia, "Originalism: The Lesser Evil," *University of Cincinnati Law Review* 57 (1989): 849ff. On "semantic meaning," see Lawrence B. Solum, "Semantic Originalism" (November 22, 2008), Illinois Public Law Research Paper No. 07-24, http://ssrn.com/abstract=1120244 (accessed September 30, 2018).
40. David A. Strauss, *The Living Constitution* (New York: Oxford University Press, 2010), 1.
41. An idea memorably expressed in the words of Chief Justice John Marshall: "We must never forget that it is *a Constitution* we are expounding . . . a Constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs." *McCulloch v. Maryland,* 17 U.S. 316 (1819), 407, 415. See, in general, Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (New York: Alfred A. Knopf, 2005).
42. Aharon Barak, *Purposive Interpretation in Law* (Princeton, NJ: Princeton University Press, 2005), 155 (emphasis added). Barak notes the controversy between this doctrine and that of the originalists; see ibid., n. 24. See also Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge: Cambridge University Press, 2015), 99: "The ultimate purpose of the constitution should enable it to confront a changing reality. That is the meaning of the metaphor regarding a 'living constitution' . . . The vitality of the constitution means giving modern meaning to the old constitutional principles."

43. See Aharon Barak, *Purposive Interpretation*, as well as his *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge: Cambridge University Press, 2015), 99: "The ultimate purpose of the constitution should enable it to confront a changing reality. That is the meaning of the metaphor regarding a 'living constitution' . . . The vitality of the constitution means giving modern meaning to the old constitutional principles."
44. Ronald Dworkin, *Law's Empire* (Cambridge, MA: Belknap/Harvard University Press, 1986), 50. The interpreter's already existing notions of what makes the object—a literary work, an artistic creation, a statute, or a constitution—"the best possible example" of its genre are parallel to Gadamer's "prejudices."
45. In the words of a former U.S. Supreme Court Chief Justice, living constitutionalism is "the substitution of some other set of values for those which may be derived from the language and intent of the framers." See William H. Rehnquist, "The Notion of a Living Constitution," *Harvard Journal of Law and Public Policy* 29 (2005–2006): 403.
46. The metaphor of the dead hand, or of dead people in general, is prevalent in the rhetoric of those who oppose originalism; see Goldford, *American Constitution*, 131, and Reva B. Siegel, "Heller and Originalism's Dead Hand—In Theory and Practice," *UCLA Law Review* 56 (2009): 1399–1424. For examples of the critique, see Paul Brest, "The Misconceived Quest for the Original Understanding," *Boston University Law Review* 60 (1980): 204–28: "Even if the adopters freely consented to the Constitution, however, this is not an adequate basis for continuing fidelity to the founding document, for their consent did not bind succeeding generations. We did not adopt the Constitution, and those who did are dead and gone," ibid., 225; and Michael S. Moore, "A Natural Law Theory of Interpretation, *Southern California Law Review* 58 (1985): 277–399: "What the founders intended by their language should be of relevance to us only as a heuristic device to enable us to think more clearly about our own ideals. The dead hand of the past ought not to govern . . . and any theory that demands that it does is a bad theory," ibid., 325.
47. The classic example, cited by many in the literature, is the U.S. Supreme Court's school desegregation decision, *Brown v. Board of Education,* 347 U.S. 483 (1954), based upon the "equal protection" clause of the Fourteenth Amendment to the Constitution. If it is true that "the overwhelming consensus among legal academics has been that *Brown* cannot be defended on originalist grounds" (Michael J. Klarman, "*Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell," *Virginia Law Review* 81 [1995]: 1881), it follows that a strict originalist approach would

require that *Brown* be overturned. Few, however, would accept such an outcome.

48. Saul Cornell, "*Heller,* New Originalism, and Law Office History: 'Meet the New Boss, Same as the Old Boss,'" *UCLA Law Review* 56 (2009): 1096–1125; Caleb Nelson, "Originalism and Interpretive Conventions," *University of Chicago Law Review* 70 (2003): 519–98.
49. One of the most interesting is that of Jack M. Balkin, *Living Originalism* (Cambridge, MA: Belknap/Harvard University Press, 2011). See also Michael W. McConnell, "Textualism and the Dead Hand of the Past," *George Washington Law Review* 66 (1998): 1127–40.
50. "Separate" need not mean "isolated." Interpretive communities can and do speak to each other. That in fact is the way that they test their ideas, subjecting their conclusions to modification and change. But each community has its own internal rules and procedures for determining just what counts as an acceptable "move" in the activity of interpretation. Academic disciplines, which borrow from and engage in constant conversation with other fields but retain their own distinct disciplinary integrity, are a good example of this.
51. For a more detailed exposition of these ideas, see Mark Washofsky, "Kiddushin as a Progressive Halakhic Concept: Toward a Theory of Progressive Halakhah," in *The Modern Family and Jewish Law*, ed. Walter Jacob (Pittsburgh: Rodef Shalom Press, 2018), 27–80.
52. *Reform Responsa*, vol. 2, no. 5762.8, sec. 2, "Discretionary War in Our Time," 368–69.
53. See Mark Washofsky, "You Shall Love the *Ger*: On Formalism, Instrumentalism, and Purpose in Halakhic Interpretation," in *Thank You My Teacher, Thank You My Friend: Festschrift in Honour of Rabbi Lawrence A. Englander*, ed. David Vaisberg (Hadassa Word Press, 2016), 19–41, https://www.academia.edu/34744466/You_Shall_Love_the_Ger_On_Formalism_Instrumentalism_and_Purpose_in_Halakhic_Interpretation (accessed October 12, 2018).
54. "Legitimacy" here is defined descriptively: since recognized literary and legal theorists adopt one approach or the other, both approaches can be said to operate legitimately within the field. See, for example, Philip Bobbitt, *Constitutional Fate* (New York: Oxford University Press, 1984), who notes the existence of six different "modalities" ("approaches") to constitutional interpretation in current use among American jurists. These modalities lead frequently enough to different conclusions as to what the Constitution "means" on any particular question. All of them are legitimate, because they are all part of the existing practice of constitutional interpretation. The jurist must choose from among them.