

JUSTICE AND THE WAR ON TERROR

A NEW TWO-PART SERIES FROM THE ROHR JEWISH LEARNING INSTITUTE



*In most states



CLE COURSE SYLLABUS

Eligible for 3 CLE credits in most states

How do we resolve the conflict between maintaining national security and the integral American ethic of protecting civil liberties of every individual? Using case law, the Constitution, legislation, legal theory, Jewish legal perspectives, and case studies, *Justice and the War on Terror* will analyze different approaches to this vexing dilemma.

PART ONE:

TORTURE AND THE TICKING BOMB DILEMMA

The recent *Torture Report* alleges that the brutal interrogation techniques used by the CIA in the aftermath of 9/11 were ineffective. But what if they did yield valuable information—would they have been justified? While the evils of terror must be combated, human rights must also be protected. How are we to balance these competing values?

Just twenty years ago the debate on the use of extreme measures in interrogations seemed theoretical. With the War on Terror, they have become discussions with real consequences. This lesson will discuss the legal issues from the perspective of U.S. law and compare these findings with relevant concepts laid out in Talmudic law and contemporary Israeli law.

How and when does the Geneva Convention ban on torture apply to actions of the United States government? In "ticking bomb" scenarios, may we disregard the 8th Amendment to elicit information from uncooperative terror suspects to save many lives?

May this coerced information be used later in court to convict mass murderers?

The discussion will include *Ingraham vs. Wright*, 430 U.S. 651 (1977) (corporal punishment in public schools), *Chavez v. Martinez*, 538 U.S. 760 (2003) (coercive questioning), and *Leon v. Wainwright*, 734 F.2d 770 (11th Cir. 1984) (necessity defense for torture). The Geneva Convention, The Patriot Act, The Detainee Treatment Act with President Bush's signing statement, and President Obama's Executive Order

Number 13491 will be considered as they relate to enhanced interrogation techniques.

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PART TWO: THE HOSTAGE DILEMMA

In 2011, Israel exchanged 1,027 prisoners (including some convicted of multiple murders and carrying out terror attacks against Israeli civilians) for Gilad Shalit, a captured IDF soldier held hostage by Hamas for more than 5 years. Recently, the rise of ISIS and the murders of James Foley and Steven Sotloff compel us to contemplate a heart wrenching debate: Is it ethical to pay hefty ransoms or release dangerous criminals in exchange for the life and freedom of an innocent hostage?

Hamas, ISIS, Somali pirates and other terrorist organizations have successfully used kidnapping as a means of instilling fear and terror as well as a tool to raise huge sums of money, obtain freedom for their members and accomplish other terror-related goals. What is the correct approach in hostage situations? How do decision makers balance the opportunity to save a life while being careful not to encourage or incentivize additional kidnappings?

This session will consider the dilemma in light of the Federal Material Support Statute, codified in 18 U.S.C. 2339A and 2339B, which bans monetarily supporting terrorist organizations. While it is clear that according to the letter of the law a hostage payment to ISIS, for example, would be banned without exception, we will discuss whether an affirmative duress or necessity defense can be supported by related case law and common law including: *State vs. Warshaw*, 1979 410 A.2d 1000 (1979), *Commonwealth vs.*

Jeb E. Brugmann, 13 Mass. App. 373, 433 N.E.2d 457 (1982); and *United States v. Bailey*, 444 U.S. 394 (1980)

We will look to Israel, a democracy that has dealt with these situations since its founding, and analyze related policy and law including the findings of the *Shamgar Committee on Determination of Principles for Conducting Negotiations for Release of Captives*, Basic Law: President of the State (Amendment – Prohibition on Release of Murderers) Bill No. 2113/19 and HCJ 5606/13 *Schijveschuurder v. State of Israel*.

Finally, we will discuss the case of a Jewish sage from the Middle Ages, Rabbi Meir of Rothenberg who was imprisoned and held for ransom in Germany in 1286. Rabbi Meir ruled from captivity on his own abduction in light of Talmudic law and instructed fellow Jewish legal deciders and his followers on a sad, but objective, course of action.