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FREEDOM TO SIN: A JEWISH JURISPRUDENCE OF RELIGIOUS FREE EXERCISE

Shlomo C. Pill[*]

INTRODUCTION

Debates about religious liberty rights typically revolve around two basic concerns.[1] The first relates to the principle of freedom *for* religion: to what extent should the law accommodate the religious practices and sensibilities of individuals and organizations by granting them special exemptions from generally applicable legal norms in cases where legal restrictions and obligations offend ecumenical commitments.[2] The second issue is freedom *from* religion: to what extent may state law and policy embody and enforce religious norms and values, and to what extent must government avoid adopting and imposing faith-based policy preferences.[3]

These two concerns are, of course, reflected in the United States Constitution's religious freedom provision, which provides that the federal government may not make laws "respecting an establishment

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[1] *See* Thomas B. Griffith, *The Tension Within the Religion Clause of the First Amendment*, 3 BYU L. REV. 597, 599–600 (2011) (noting that when it comes to religious freedom enshrined in the First Amendment, "there are two sides to this constitutional coin").

[2] *Id.* at 600.

[3] *Id.* at 600–01.

of religion, or prohibiting the free exercise thereof."[4] As interpreted by the courts, the First Amendment's dual religion clauses protect religious believers from being subjected to laws that penalize religious observance[5] and further prohibit the government from prescribing or endorsing religious practice and preferring particular religions or religion generally over irreligion.[6] Well-settled precedent affirms Thomas Jefferson's "wall of separation between church and state."[7]

Still, settled law is often anything but,[8] and even this wall of separation between church and state is often a more permeable barrier through which religious values regularly enter policy making.[9] The United States has a very long history of respect for religious practices and ideals.[10] Many have argued that "Judeo-Christian" values are deeply woven into the fabric of American civil society and culture,[11]

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[4] U.S. CONST. amend. I.

[5] *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019–21 (2017) (holding that the Free Exercise Clause "protect[s] religious observers against unequal treatment" and against "laws that impose[ ] special disabilities on the basis of . . . religious status"); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449 (1988) (holding that the Free Exercise Clause prohibits laws that "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens").

[6] *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) ("[W]e will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.").

[7] Letter from Thomas Jefferson to the Committee of the Danbury Baptist Association of Connecticut (January 1, 1802), *in* 8 THE WRITINGS OF THOMAS JEFFERSON 113, 113 (H. A. Washington ed., Taylor & Maury 1854); s*ee, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) ("The First Amendment has erected a wall between church and state.").

[8] *See, e.g.*, Ilya Somin, *Why "Settled Law" Isn't Really Settled—and Why That's Often a Good Thing*, REASON: THE VOLOKH CONSPIRACY (Sept. 9, 2018, 3:57 PM), https://reason.com/2018/09/09/why-settled-law-isnt-really-settled-and/ (showcasing the process whereby precedent can be overruled).

[9] *See* H.E. Baber, *Religion in the Public Square*, 53 SAN DIEGO L. REV. 31, 36 (2016) ("But the wall of separation, as it has existed in the U.S., is at best permeable."). *See generally* Susanna Dokupil, *A Sunny Dome with Caves of Ice: The Illusion of Charitable Choice*, 5 TEX. REV. L. & POL. 149, 157–204 (2000) (analyzing scenarios where religious values impacted state policy decisions).

[10] *See generally* JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 1–5 (4th ed. 2016) (exploring the history of religious freedom in America).

[11] *See, e.g.*, Anna Grzymala-Busse, *Once, the 'Judeo-Christian Tradition' United Americans. Now It Divides Them.*, WASH. POST (Apr. 17, 2019), https://www.washingtonpost.com/politics/2019/04/17/once-judeo-christian-tradition-united-americans-now-it-divides-them/ (explaining that the Judeo-Christian tradition is viewed as "a core tenet of American national identity, part of the civic religion of the United States[,]" and is often employed for political ends).

and scholars have observed that the United States itself comprises a kind of "civil religion" complete with scriptures, a founding mythos, clergy, liturgies, rituals, holidays, and redemptive eschatology.[12] In an important sense, religion lies at the very foundations of the United States.[13] Early European settlers in America viewed their endeavor in religious—even biblical—terms.[14] They established colonies aimed at becoming shining cities on a hill, exemplars of the best of human society, freshly constructed in a virgin land and guided by God's providence—a new Israel and a light unto the nations.[15] While this earlier, overt religious fervor had cooled somewhat by the end of the eighteenth century,[16] many of the Founders viewed themselves as carrying on this tradition, seeing the American experiment in mythic, religious terms.[17] Beyond this, courts have routinely approved the assimilation of religious symbolism and observances into American political life.[18]

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[12] *See generally* Deborah K. Hepler, *The Constitutional Challenge to American Civil Religion*, KAN. J.L. & PUB. POL'Y, Winter 1996, at 93, 93–98, 100–02, 104–05, 109 (equating American patriotism with religious behaviors).

[13] *See* Russell Shorto, *Founding Father?*, N.Y. TIMES MAG., Feb. 14, 2010, at 32 (highlighting religion's role in the United States' development).

[14] *See* John Witte, Jr., *How to Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism*, 39 EMORY L.J. 41, 46 (1990) (explaining how the Puritan settlers viewed their mission in America). *See generally* CHARLES LIPPY, INTRODUCING AMERICAN RELIGION 36–38 (2009) (discussing the religious motives of the Puritan settlers).

[15] *See* Witte, *supra* note 14, at 46 (explaining the Puritans' religious motivations for forming their society); *see also* MARK S. FERRARA, NEW SEEDS OF PROFIT: BUSINESS HEROES, CORPORATE VILLAINS, AND THE FUTURE OF AMERICAN CAPITALISM 52 (2019) (confirming the desire of colonists to build a "shining city on a hill").

[16] *See, e.g.*, *Public Funding of Religious Activity in 18th-Century America*, PEW RSCH. CTR. (May 14, 2009), https://www.pewforum.org/2009/05/14/shifting-boundaries2/ (noting the eighteenth-century disapproval of government funding of religion and the adoption of state constitutional provisions barring the establishment of religion); D.H. Meyer, *The Uniqueness of the American Enlightenment*, AM. Q., Summer 1976, at 165, 169–72 (describing how the enlightenment era affected American perspectives).

[17] *See* Shlomo Pill, *Jewish Law Antecedents to American Constitutional Thought*, 85 MISS. L.J. 643, 645–47 (2016) (demonstrating the role traditional Jewish texts played in the drafting of the United States Constitution); Andrew Murphy, *New Israel in New England: The American Jeremiad and the Hebrew Scriptures*, 4 HEBRAIC POL. STUD. 128, 129–33 (2009) (explaining religious motivations behind the Puritan migration to New England); Gordon Schochet, *Introduction: Hebraic Roots, Calvinist Plantings, American Branches*, 4 HEBRAIC POL. STUD. 99, 101–02 (2009) (explaining religious motivations behind the creation of New England).

[18] *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 681 (2005) (holding that a display of the Ten Commandments at the Texas State Capitol was constitutional); Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 769–70 (1995) (permitting a private party to display a cross on the grounds of a state capitol); Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (ruling that a city's display of a nativity scene was constitutional).

Many Americans assert that, viewed from this perspective, religion ought to find wider expression in state symbols and ceremonies; that governmental practices should respect and accommodate religious sensibilities, preferences, and rituals; and that state law and policy should reflect religious norms and values.[19] These individuals and groups seek to push hard against the Establishment Clause's wall of separation in order to secure the state's legal endorsement of religious preferences and to facilitate greater religious influence on law and policy.[20] Notably, opposition to the strict separation of religion and state is not a partisan issue.[21] While it is most often associated with the political right, in recent years, prominent voices on the political left have also sought greater expression of liberal religious values in law and public policy.[22] Some religious Americans believe that a closer correlation between religious values and state laws and policies will strengthen both religion and society.[23]

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[19] *See* Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970) ("Adherents of particular faiths and individual churches frequently take strong positions on public issues . . . ."); Michael Lipka, *Half of Americans Say Bible Should Influence U.S. Laws, Including 28% Who Favor It Over the Will of the People*, PEW RSCH. CTR. (April 13, 2020), https://www.pewresearch.org/fact-tank/2020/04/13/half-of-americans-say-bible-should-influence-u-s-laws-including-28-who-favor-it-over-the-will-of-the-people/ (demonstrating that nearly half of all Americans believe that the Bible should influence the United States' laws).

[20] *See* Andrew Chung & Lawrence Hurley, *U.S. Supreme Court Endorses Taxpayer Funds for Religious Schools*, REUTERS (June 30, 2020, 10:28 AM), https://www.reuters.com/article/us-usa-court-religion/u-s-supreme-court-endorses-taxpayer-funds-for-religious-schools-idUSKBN2412FX (demonstrating how groups will push for state endorsement of religious preferences).

[21] *See, e.g.*, Opinion, *A First Amendment Storm*, N.Y. TIMES (Mar. 4, 2013), https://www.nytimes.com/2013/03/05/opinion/separation-between-church-and-state.html ("House Republicans and Democrats do not agree on much these days, but they managed to join together last month to breach the proper separation between church and state. By a 354-to-72 vote, the House approved a measure . . . that would authorize the Federal Emergency Management Agency to make direct grants to churches, mosques, synagogues and other houses of worship . . . ."); *Most Say Religious Holiday Displays on Public Property Are OK*, PEW RSCH. CTR. (Dec. 15, 2014), https://www.pewforum.org/2014/12/15/most-say-religious-holiday-displays-should-be-allowed-on-public-property/ (illustrating that, even across party lines, most individuals support religious holiday displays on public property).

[22] Tom Gjelten, *Provoked by Trump, the Religious Left Is Finding Its Voice*, NPR (Jan. 24, 2019, 5:04 AM), https://www.npr.org/2019/01/24/684435743/provoked-by-trump-the-religious-left-is-finding-its-voice (highlighting the religious-based desire of some members of the political left to welcome immigrants and to assist the poor, marginalized, and oppressed).

[23] *See, e.g.*, *Views of Religious Institutions*, PEW RSCH. CTR. (Nov. 3, 2015), https://www.pewforum.org/2015/11/03/chapter-3-views-of-religious-institutions/ (discussing the view that religious institutions strengthen community bonds, play an important role in helping the poor and needy, and protect morality in society).

This Article argues that even from a deeply religious perspective, it is unnecessary—and perhaps even undesirable—for religious norms and values to be expressed and enforced through law and policy.[24] I make this argument by examining attitudes towards the enforcement of religious norms in Jewish law and jurisprudence. Judaism is a deeply legalistic faith tradition,[25] and one whose religious precepts include not only ritual matters but also civil, family, and public law as well.[26] Indeed, on the surface, Jewish thought appears to embrace the idea that religion and politics are not separate spheres of human experience but are deeply entwined; the tone and tenor of Jewish scripture presupposes a Jewish polity that embraces Jewish religious practice on a societal level.[27] Nevertheless, an examination of how Jewish law was actually applied in practice in the times and places in which religious and lay authorities had the power to enforce religious norms reveals that rabbinic jurisprudence exhibited remarkable disinterest in using legal and judicial means to coerce ritual piety.[28] On the contrary, rabbinic scholars routinely argued that Judaism neither requires nor seeks the enforcement of religious law on its own terms and that attempts to run a society in accordance with Jewish law would have predictably disastrous outcomes.[29] Instead, rabbinic jurisprudence endorsed the idea that societal law should be made on the basis of ordinary policy considerations, while ritual obligations and prohibitions should be left to private conscience.[30] In effect, this meant that Jews living in pre-modern Jewish communities—communities

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[24] See, for example, STEVEN H. SHIFFRIN, THE RELIGIOUS LEFT AND CHURCH-STATE RELATIONS 32–36 (2009), for a source arguing that religious non-establishment and the freedom to be irreligious are desirable from a religious perspective. *See also* Abdullahi A. An-Na'im, *Complementary, Not Competing, Claims of Law and Religion: An Islamic Perspective*, 39 PEPP. L. REV. 1231, 1234 (2013) ("The premise of my argument is that Shari'a, by its nature and purpose, can only be freely observed by believers, and its principles lose their religious authority and value when enforced by the state.").

[25] *See infra* notes 61, 97 and accompanying text.

[26] *See infra* notes 62–73 and accompanying text.

[27] John Locke, for instance, concluded that "the commonwealth of the Jews . . . was an absolute theocracy; nor was there, or could there be, any difference between that commonwealth and the church. The laws established there concerning the worship of One Invisible Deity were the civil laws of that people and a part of their political government, in which God Himself was the legislator." JOHN LOCKE: A LETTER CONCERNING TOLERATION 43 (Oskar Piest ed., 2d ed. 1955); *see* Suzanne Last Stone, *Religion and State: Models of Separation from Within Jewish Law*, 6 INT'L J. CONST. L. 631, 635–38 (2008) (demonstrating the interconnectedness of Jewish religion and politics).

[28] *See infra* Section IV.A.

[29] *See, e.g.*, Responsa Rashbah 3:393, *in* 1 THE JEWISH POLITICAL TRADITION 402–03 (Michael Walzer et al. eds., 2000) ("For if you were to restrict everything to the laws stipulated in the Torah . . . the world would be destroyed . . . ."); *infra* Section III.A.

[30] *See infra* Section III.C.

that were unabashedly grounded in religion and which often had the power to enforce religious law if they so desired—enjoyed a substantial degree of religious freedom. Briefly put, Jews were free to sin so long as their behavior remained private enough that it did not undermine the religious constitution of the community.[31] Moreover, even when sins were committed publicly and flagrantly, so long as religious misconduct did not harm others, the typical communal response was to exercise its own right to disassociate from uncommitted members rather than to directly force impious Jews to observe Jewish religious law.[32]

Part I of this Article orients the reader by providing a brief overview of the history and sources of Jewish law. Part II reviews the severe limits that Jewish law, as presented in the Torah and *Talmud*, appears to place on religious liberty and the freedom to act sinfully. Part III explains how the previously presented picture of Jewish law reflects only an abstract, theoretical framework that was largely unenforceable on its own terms. This part also explains the major doctrines that rabbinic scholars developed to create and justify a workable system of societal law and order in practice. Finally, Part IV explains how this system of practical Jewish law was observed, noting that rabbinic authorities generally avoided the enforcement of purely ritual aspects of Jewish law, though they actively policed and sanctioned conduct that they regarded as materially harmful or dangerous to other people or the Jewish community. This Article concludes by reviewing the framework for religious freedom apparently embraced by rabbinic jurisprudence and the ways in which this view suggests that even deeply religious traditions should be wary of attempts to coerce religious piety by legal means.

I. JEWISH LAW: AN OVERVIEW

Judaism is a primarily nomos-centric faith tradition.[33] While Judaism encompasses theological dogma,[34] eschatology,[35] and

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[31] *See infra* Section IV.

[32] *See infra* Section IV.

[33] MICHAEL J. BROYDE, SHARIA TRIBUNALS, RABBINICAL COURTS, AND CHRISTIAN PANELS: RELIGIOUS ARBITRATION IN AMERICA AND THE WEST 198 (2017).

[34] On Jewish belief and theology, see generally MENACHEM KELLNER, DOGMA IN MEDIEVAL JEWISH THOUGHT: FROM MAIMONIDES TO ABRAVANEL 200–17 (2004), which discusses various historical and contemporary positions on the history of dogmatic and theological propositions in Judaism.

[35] *See, e.g.*, MAIMONIDES, COMMENTARY ON MISHNAH, SANHEDRIN 10:1 (Vilna ed.) (1168) (describing the Messianic Age). *See generally* Kaufmann Kohler, *Eschatology*, *in* 5 THE JEWISH ENCYCLOPEDIA 209–18 (1906) (exploring Jewish eschatological beliefs). On the complexity of rabbinic eschatological thinking, see generally Jenny R. Labendz,

mysticism,[36] it is ultimately concerned with the legal and ethical regulation of human behavior towards religious ends.[37] These laws are known as *halakhah*, or "the way of going"; the *halakhic* tradition includes primary and secondary rules and principles, interpretive methodologies, texts, traditions, and customary practices all filtered through rabbinic religious-legal discourses.[38] According to Jewish tradition, the *halakhah* is rooted in the divine revelation of both the written text of the Torah—the first five books of the Hebrew Bible—and an oral tradition that clarifies, explains, expands upon, supplements, and qualifies the largely indeterminate legal content of the biblical text.[39] In rabbinic thought, God communicated both the Oral Torah and Written Torah to Moses during the Jews' forty-year journey through the wilderness from Egypt to Canaan, and Moses in turn conveyed these teachings to the people.[40] Subsequently, the biblical text and oral traditions were preserved, transmitted, and further developed by generations of prophets, priests, and—beginning in the late Second Temple period—rabbis who studied, taught, interpreted, and applied the *halakhah*.[41]

At the end of the Second Temple period, Jews entered a prolonged period of major political, social, economic, and religious turmoil that made it increasingly difficult to accurately and completely transmit the vast and ever-expanding Oral Torah tradition from one generation to the next.[42] By the late second century A.D., the rabbis determined that the preservation of Torah knowledge required concretizing this fluid and open-ended tradition in fixed texts.[43] Therefore, in the early third

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Rabbinic Eschatology: Complexity, Ambiguity, and Radical Self-Reflection, 107 JEWISH Q. REV. 269, 269–71, 274–75 (2017) (discussing rabbinic eschatology).

[36] On Jewish mysticism, see generally GERSHOM G. SCHOLEM, MAJOR TRENDS IN JEWISH MYSTICISM 3–7 (1971) (defining Jewish mysticism).

[37] *See* Moshe Silberg, *Law and Morals in Jewish Jurisprudence*, 75 HARV. L. REV. 306, 308–09 (Amihud I. Ben Porath trans., 1961) (stating the all-encompassing nature of Jewish law).

[38] See generally MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES, 4 vols. (Bernard Auerbach & Melvin J. Sykes, trans., 1994), for the finest overview of *halakhic* jurisprudence.

[39] *See Halakhah*, ENCYCLOPAEDIA BRITANNICA (Sept. 18, 2019), https://www.britannica.com/topic/Halakhah (referencing how the Halakhah encompasses Jewish written and oral tradition, developing from the law given on Sinai).

[40] English Explanation of Pirkei Avot 1:1.

[41] *See* Mishnah Pirkei Avot 1:1 (discussing the origin of the Torah); ADIN STEINSALTZ, THE ESSENTIAL TALMUD 15 (Chaya Galai trans., 1976) (explaining the development of the written and oral law).

[42] *See* LAWRENCE H. SCHIFFMAN, FROM TEXT TO TRADITION: A HISTORY OF SECOND TEMPLE & RABBINIC JUDAISM 157–69, 172–74, 176 (1991) (explaining the turmoil encountered by the Jews at the end of the Second Temple period).

[43] *See* MAIMONIDES, INTRODUCTION TO MISHNAH TORAH §§ 2, 8, 14 (Rabbi Francis Nataf trans., 2017) (1168) (explaining preservation of knowledge through written texts).

century, Rabbi Judah the Prince compiled a work called the *Mishnah*, which provided a topically organized outline of the Oral Torah legal tradition as it then stood.[44] Subsequently, generations of rabbis in Jewish centers in Palestine and Persia used the Mishnah as a focal point of interpretation and source of law.[45] Between the third and sixth centuries A.D., these rabbinic discussions, called *gemarah* (literally: "studies"), were collected, organized, edited, and appended to the text of the Mishnah.[46] Together, the Mishnah and *gemarah* comprise the Talmud, the foundational base text of all subsequent *halakhah*.[47]

Rabbinic scholars have developed a variety of different conceptual frameworks for organizing *halakhic* rules and principles.[48] However, one of the most encompassing and enduring approaches—and one with particular significance for the question of the rabbinic approach to religious freedom—is division of Jewish legal norms into ritual and civil precepts.[49] In rabbinic jurisprudence, ritual precepts are referred to as "commandments between a person and God," while civil norms governing interpersonal interactions are known as "commandments

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[44] *See* SCHIFFMAN, *supra* note 42, at 177–89, 191–92, 194–96, 200 (discussing how the Mishnah derived from the oral traditions of the Torah). The Mishnah was redacted in Galilee early in the third century A.D. by Rabbi Judah the Prince, who served as both religious and political head of the Jewish community at the time. The Mishnah distills the teachings of the Oral Torah into rule-like formulations, some attributed to particular scholars and others left unattributed. Generally, these rules are organized topically, by individual Mishnah (literally "teaching"), chapter, tractate, and groups of tractates. *See* 3 MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 1049–50, 1052–56 (Bernard Auerbach & Melvin J. Sykes trans., Jewish Publ'n Soc'y 1st Eng. ed. 1994) (1988) (detailing the organizational structure of the Mishnah).

[45] *See* SCHIFFMAN, *supra* note 42, at 220–27, 229, 231, 233 (chronicling the individual development of the Talmud in Palestine and Babylon and noting that the Mishnah was the primary source and framework for the development of each Talmud).

[46] *See id.* at 219–20, 224–26 (recounting the efforts of rabbinic scholars to compile the oral tradition into written form); 3 ELON, *supra* note 44, at 1084–85 (explaining that "Talmud" refers to the Mishnah and the amoraic discussions of the Mishnah); *see also id.* at 1085–86, 1088, 1091–93, 1097 (providing the respective timelines of the redactions of the Babylonian Talmud (circa A.D. 220 to circa A.D. 500) and the Jerusalem Talmud (circa 220 A.D. to circa 400 A.D.)); Haim Zalman Dimitrovsky, *Talmud and Midrash*, ENCYCLOPAEDIA BRITANNICA (Apr. 28, 2020), https://www.britannica.com/topic/Talmud (noting the redaction of the Talmud occurred between the third and sixth centuries).

[47] *See* 3 ELON, *supra* note 44, at 1083–85, 1091, 1096, 1098–100 (explaining that the Talmud contains both the Mishnah and *gemarah* and that the Talmud came to be the sole authoritative source for the entirety of Jewish law).

[48] *See* 1 MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 75–76 (Bernard Auerbach & Melvin J. Sykes trans., Jewish Publ'n Soc'y 1st Eng. ed. 1994) (1988) (stating that the classification of Jewish rules is a difficult endeavor and that there were many attempts throughout history); *see also, e.g.*, *id.* at 122 (noting that there is a fundamental distinction between monetary and nonmonetary matters in *halakhah*).

[49] See *id.* at 93, 105–07, 109–13, 116, 122–23, 93 n.2, for a discussion about the *halakhah* and how the bifurcation of "religious" (or "ritual") and "legal" precepts shapes the understanding of Jewish law.

between a person and their fellow."[50] The first category includes things like the obligation to pray; the range of obligations and prohibitions related to the Jewish Sabbath, such as reciting the *kiddush* blessing over a cup of wine, eating three festive meals, and refraining from the thirty-nine kinds of prohibited work; observance of Jewish holidays, including eating *matzah* on Passover and taking the Four Species during *Sukkot*; and the laws of kosher food.[51] Laws that pertain to peoples' relationships with each other, by contrast, are those that prohibit various kinds of injury and violence; order and regulate business transactions, such as loans, sales, and leases; establish rules of inheritance; define valid contracts; regulate land use and relations between neighbors; and provide remedies and punishments for violations of these rules.[52]

Rabbinic law often treats interpersonal offenses as more severe than ritual violations.[53] Indeed, the rabbis often find greater flexibility in those areas of the law that pertain to Jews' religious obligations to God than in areas of the law that govern relations and proper conduct between human beings. The Mishnah, for instance, teaches that Yom Kippur, the Day of Atonement on which people's sins are forgiven through prayer and fasting, can only atone for a person's offenses against God.[54] With respect to "sins between a person and his fellow," however, "Yom Kippur does not atone, unless one has appeased his fellow [who he wronged]."[55] Additionally, the secondary rules of

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[50] MOSES MAIMONIDES, THE GUIDE FOR THE PERPLEXED 331 (George Routledge & Sons 2d ed. 1910) (1904) (1190).

[51] *See id.* at 329–31, 352–54, 370–71 (explaining the nature and composition of precepts governing the relationship between man and God); *Exodus* 20:8 ("Remember the sabbath day and keep it holy."); Mishnah Shabbat 7:2 (listing the thirty-nine prohibited categories of labor); Babylonian Talmud, Berakhot 33a (requiring prayer over the cup of wine); Babylonian Talmud, Shabbat 117b (establishing that three meals shall be eaten during Shabbat); *see also* Harav Yehoshua Pfeffer, *Three Meals on Shabbos*, THE KOLLEL (Jan. 26, 2018), https://dinonline.org/2018/01/26/three-meals-on-shabbos/ [http://web.archive.org/web/20180406023651/https://dinonline.org/2018/01/26/three-meals-on-shabbos/] (explaining the tradition and policy behind the legal requirement for three meals during Shabbat).

[52] *See* MAIMONIDES, *supra* note 50, at 329–31, 338, 342–45, 350–51 (explaining the nature and composition of the precepts governing interpersonal affairs).

[53] *See* 1 ELON, *supra* note 48, at 141–44, 147 (noting that moral imperatives—matters between man, his conscience, and God—are carefully distinguished from legal normative rules that govern human relationships and are unenforceable by court sanctions in the *halakhic* system).

[54] Mishnah Yoma 8:9.

[55] *Id.*; *see also* MOSES MAIMONIDES, MISHNEH TORAH, REPENTANCE 2:9 (Simon Glazer trans., Maimonides Publ'g Co. 1927) (1178) ("Neither repentance nor the Day of Atonement atone for any save for sins committed between man and God, for instance, one who ate forbidden food, or had forbidden coition and the like; but sins between man and man, for instance, one injures his neighbor, or curses his neighbor or plunders him,

decision that guide rabbinic adjudication create substantial leeway for rabbinic decisors to modify normative standards governing ritual matters pertaining to man's relationship with God in response to serious economic, health, emotional, political, and communal needs.[56] God is understood to be accommodating and willing to compromise on his own interests, so to speak.[57] This is not the case with respect to Jewish laws governing interpersonal affairs, however. In such matters, rabbinic decision makers are warned against taking liberties with the rights and obligations of human beings.[58] Any legal leniency offered to one party entails a corresponding legally unjustified burden upon the other party, which cannot be imposed without his or her consent.[59]

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or offends him in like matters, is ever not absolved unless he makes restitution of what he owes and begs the forgiveness of his neighbor. And, although he make restitution of the [monetary] debt, he is obliged to pacify him and to beg his forgiveness. Even he offended not his neighbor in aught save his words, he is obliged to appease him and implore him till he be forgiven by him.").

[56] *See* R. Moshe Feinstein, Responsa Igros Moshe, Orach Chaim 5:29; R. Shabtai Hakoehn, Kitzur B'hanhagas Issur V'hetter § 3; R. YECHIEL MICHEL EPSTEIN, ARUKH HASHULKHAN, YOREH DEAH 242:66 (1903) (stating that rabbis may relax the strict application of the law in times of distress or loss).

[57] This sentiment perhaps represents a variation of the rabbinic interpretation on Numbers 6:26 found in Berakhot 20b. *See Numbers* 6:26 ("The LORD bestow His favor upon you and grant you peace!"); Babylonian Talmud, Berakhot 20b (recounting the teaching of Rav Avira that God considered Israel worthy of favor because the Hebrew people went beyond the minimum requirements of the law that required them to bless Him when they ate to satiation). See also Ari Ackerman, *"Judging the Sinner Favorably": R. Hayyim Hirschensohn on the Need for Leniency in Halakhic Decision-Making*, 22 MOD. JUDAISM 261, 261–70, 272–73 (2002), for a discussion of this sentiment in the modern context where a significant share of the Jewish population is noncommittal to traditional strict observance of *halakhic* principles.

[58] *See* MAIMONIDES, *supra* note 50, at 347 (explaining that the judgments of the law will require extension in some scenarios and curtailment in others but warning that only the Sanhedrin should have such power in order to avoid injurious effects); *cf.* AARON KIRSCHENBAUM, EQUITY IN JEWISH LAW: BEYOND EQUITY: HALAKHIC ASPIRATIONISM IN JEWISH CIVIL LAW 179–94 (1991) (exploring the development of equity within the Jewish legal tradition, positing that "(1) [a] theoretic *din* that is conceived as formal rigorous law may be ameliorated by a waiver of rights under the *din*[;] (2) [t]he amelioration, motivated by compassion, a desire to promote good will, or a sense of fairness, is theoretically not a *din*; it is supererogatory: though meritorious, it is voluntary[;] [and] (3) [w]ithin this conceptual framework, it is discovered that that which had been theoretically viewed as voluntary appears in the Bible as obligatory" and that "the Bible has legislated *hessed*, *lifnim mishurat hadin*").

[59] *See* VILNA GAON, BEUR HAGRA ON SHULCHAN ARUKH, ORACH CHAYIM 331:3 (1798).

II. FREE EXERCISE IN JEWISH LEGAL THEORY

Jewish law is a complex normative system that simultaneously operates on a number of different planes.[60] One important distinction may be drawn between theoretical and practical *halakhah*—between Jewish law as it appears in abstract rule and principle statements in the fundamental and ancillary rabbinic texts and traditions, and Jewish law as it is actually practiced—both in terms of how rabbinic decisors resolve actual *halakhic* queries and cases and as a lived tradition of customary modes of Jewish observance. This part discusses what Jewish legal sources say about religious freedom *in theory*. Part IV explicates how this theoretical framework for religious law enforcement has been expressed in rabbinic and Jewish communal practice.

In theory, Jewish law comprises a pervasive and comprehensive system of religious duties and restrictions presented in highly legalistic forms, and further prescribes penalties for religious law violations and a system of officials and institutions tasked with enforcing these norms. Part II.A provides an overview of the religious laws and law-enforcement mechanisms presented in the Torah. Part II.B discusses how these Torah-based frameworks for religious law enforcement are expounded and expanded upon in Talmudic sources.

A. Torah

While often associated with law, the text of the Torah is not an exclusively prescriptive code of religious norms. However, the text includes laws: many, many rules and principles—six-hundred and thirteen of them according to rabbinic tradition[61]—that form the basis for normative Jewish religious practice.

Many of these norms are of the sort of primary rules of obligation one would expect to find in any functioning, ordered society. The Torah prohibits and prescribes criminal penalties for murder, rape, assault,

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[60] *See* 1 ELON, *supra* note 48, at 48–49 ("It is indeed obvious to anyone who studies the *Halakhah* that it is a gigantic seamless web containing old and new elements, sources, and interpretations, all intertwined with each other without any attempt at separation by historical period—as if in fact as well as in theory the web is of one piece. The halakhic authorities justifiably saw it as their legal and practical duty to unify and blend together the results of various halakhic eras into one single body of settled law and not to isolate one stage from another or one period from another for separate treatment.").

[61] Babylonian Talmud, Makkot 23b–24a.

and theft;[62] imposes liability for intentional and negligent torts;[63] regulates real and personal property transfers;[64] and obligates parties to fulfill contractual promises.[65] The Torah also includes rules governing employer-employee relationships,[66] price gouging,[67] and unfair lending practices;[68] it also mandates support for the poor[69] and proper treatment of foreigners.[70] Additionally, Torah law provides for the contracting and dissolution of marriage,[71] rights and duties of spouses,[72] and laws of inheritance.[73]

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[62] *Exodus* 20:13, 21:12–14 (murder); *Deuteronomy* 22:22–27 (rape); *Exodus* 21:15, 20, 22–27 (assault); *Exodus* 20:13 (theft); *Leviticus* 19:11, 13 (theft).

[63] *See Exodus* 21:18–36, 22:4 (discussing liability for battery, keeping abnormally dangerous animals, maintaining unsafe conditions on real property, and trespass to chattels); *Leviticus* 24:18–20 (imposing liability for trespass to chattels and battery).

[64] *See, e.g.*, *Leviticus* 19:35–36 (discussing personal property transactions), 25:14–33 (discussing real property transactions).

[65] *See Leviticus* 19:36 (instructing merchants to conduct their transactions honestly by using honest weights, balances, ephah, and hin); Babylonian Talmud, Bava Metzia 49a ("Apparently, it is a mitzva for one to fulfill his promises. . . . [O]ne should not say one matter with his mouth and think one other matter in his heart. It is prohibited for one to make a commitment that he has no intention of fulfilling. . . . Apparently, one who reneges is considered to have acted in bad faith."); Babylonian Talmud, Ketubot 86a–86b (prescribing that one may be lashed an unlimited number of times to force him to perform the positive mitzva of repaying his debts); RASHI, RASHI ON KETUBOT 86a (1115) (s.v. *periyat baal chov mitzvah*).

[66] *See Deuteronomy* 24:14–15 (instructing employers to not abuse laborers and to pay them their wage without delay); JOSEPH KARO, SHULCHAN ARUKH, CHOSHEN MISHPAT 303–06, 311, 331–37, 339 (Chaim N. Denburg trans., Juris. Press 1955) (1563) (discussing the intricacies of conduct within employer-employee relationships).

[67] *See Leviticus* 25:14 (mandating fairness in transactions); *see also* MOSES MAIMONIDES, MISHNEH TORAH: SALES 12:1–15 (Philip Birnbaum ed., Hebrew Publ'g Co. abr. ed. 1967) (1178) (establishing (1) that a deceitful party must repay the deceived party if the deceit equates to a sixth of the subject's value, (2) that a deceitful party does not have to repay the deceived party it if it equates to less than a sixth, and (3) that the transaction is void if it equates to more than a sixth).

[68] *Exodus* 22:24–26; *Deuteronomy* 24:6, 10–13; *cf. Leviticus* 25:14 (proscribing fraud); Deuteronomy 25:13–15 (requiring honest weights and measures).

[69] *See Deuteronomy* 15:7–11 (instructing the Hebrew people to give readily and sufficiently to impoverished kinsmen).

[70] *See Exodus* 22:20 ("You shall not wrong a stranger or oppress him, for you were strangers in the land of Egypt."); *Leviticus* 19:33–34 (instructing the Jewish people to treat foreigners as fellow citizens and to not wrong them), 24:22 ("You shall have one law for all of them—for the citizen and the stranger alike—for I am God."); *Deuteronomy* 24:17 ("You shall not subvert the rights of the stranger . . . .").

[71] *See Deuteronomy* 24:1–5 (establishing guidelines for marriage, divorce, and remarriage).

[72] *See Exodus* 21:10–11 (obligating a husband to provide his wife with adequate food, clothing, and sexual satisfaction); *Deuteronomy* 24:1 (providing for marital divorce if the husband is dissatisfied with his wife).

[73] *See Numbers* 27:6–11 (detailing the laws of inheritance); *Deuteronomy* 21:15–17 (discussing the inheritance rights of first-born sons).

In addition to these primary rules governing criminal, tort, contract, property, and family law, the Torah provides a system of secondary rules for applying and enforcing these laws. It prescribes the appointment of a king who is charged to "faithfully observe all the words of this Torah and all these laws,"[74] and it creates a hierarchical judicial system to enforce the law and resolve disputes.[75] The text also sets standards of evidence and judicial procedure,[76] and it includes some broad principles of legal decision making, providing, among other things, that cases should be resolved by majority vote[77] and that courts must be staffed by learned and unbiased individuals of integrity.[78]

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[74] *Deuteronomy* 17:19; *see also Deuteronomy* 17:14–20 (providing parameters for Israel's selection of a king).

[75] *See Deuteronomy* 16:18–20 (instructing the Hebrew people to appoint magistrates and officials who will rule with due justice); *Deuteronomy* 17:8–13 (providing that difficult cases should be tried by a Levitical priest or a judge and demanding compliance with their judgments); *Exodus* 18:13–25 (recounting Moses's acceptance of Jethro's advice that he select capable, God-fearing, and trustworthy men to serve as judges and decide minor disputes, saving himself for major disputes). *See generally* MOSES MAIMONIDES, MISHNEH TORAH, THE SANHEDRIN AND THE PENALTIES WITHIN THEIR JURISDICTION 1:1–10 (Philip Birnbaum ed., Hebrew Publ'g Co. abr. ed. 1967) (1178) (detailing the structure and composition of the Jewish courts of law).

[76] *See Exodus* 23:2 ("[Y]ou shall not give perverse testimony in a dispute so as to pervert it in favor of the mighty."); *Deuteronomy* 19:15–19 (forbidding a criminal defendant from being convicted on the basis of a single witness and providing punishment for false testimony); *Exodus* 22:9–12 (providing that evidence is required in livestock bailment disputes), 18:13–21 (listing judicial qualifications); *see also* KARO, *supra* note 66, at 7:11 ("Each member of a court of three judges must have seven characteristics: wisdom, humility, awe, hatred of money, love of truth, love of people, and a good reputation."); *cf. Deuteronomy* 22:13–19 (requiring parents of the wife to provide evidence to the city's elders of their daughter's virginity if her husband alleges she was not a virgin when they were married).

[77] *See Exodus* 23:2–3 ("You shall neither side with the mighty to do wrong—you shall not give perverse testimony in a dispute so as to pervert it in favor of the mighty—nor shall you show deference to a poor man in his dispute."); Mishnah Sanhedrin 1:6 ("In order to resolve the apparent contradiction [in Exodus 23:2] it must be explained: Your inclination after the majority to exonerate is not like your inclination after the majority to convict. Your inclination after the majority to exonerate can result in a verdict by a majority of one judge. But your incliation after the majority to convict a transgressor must be by a more decisive majority of at least two."). See generally *Majority Rule*, JEWISH VIRTUAL LIBR., https://www.jewishvirtuallibrary.org/majority-rule (last visited Sept. 2, 2021), for a discussion of the majority rule in the *halakhic* tradition and an explanation of how Exodus 23:2 is the foundational verse for the majority rule in Jewish jurisprudence.

[78] *See Deuteronomy* 16:18–20 (instructing magistrates and officials to be just, fair, impartial, and ethical); *Exodus* 18:21–22 (instructing the Hebrew people to select God-fearing, trustworthy men to settle major disputes between the people); *cf. Leviticus* 19:15 (instructing the Hebrew people to be fair and impartial in judgment of others); *Exodus* 23:2–3 (instructing the Hebrew people to show neither deference to the poor nor favoritism for the rich).

The Torah is not exclusively concerned with criminal, tort, contract, property, family, and civil procedure laws—what the Talmudic rabbis termed "laws [governing the relationship] between man and his fellow."[79] The Torah is fundamentally a work of religious instruction[80] and thus also contains a great many rules governing quintessentially religious and ritual conduct—or "laws [governing the relationship] between man and God."[81] Alongside its ordinary legal provisions, the Torah prohibits idolatry,[82] witchcraft,[83] blasphemy, and the adoption of foreign religious observances,[84] along with many other ordinances.[85]

Importantly, the same justice system the Torah institutes for the adjudication of criminal offenses and civil disputes is also charged with enforcing matters of ritual law. In authorizing judges to resolve legal questions, the Torah commands obedience to the legal rulings of "the priests and the judge" in all matters, whether criminal, civil, or ritual.[86] Thus, alongside Torah-mandated penalties for traditional legal offenses, such as capital punishment for murder and kidnapping[87] and financial liability for theft and torts,[88] the Torah also prescribes the

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[79] *See* MAIMONIDES, *supra* note 50, at 331 (distinguishing precepts that govern the relationship between God and man and precepts that govern relationships between people); *cf.* Mishnah Yoma 8:9 (explaining that transgressions are atoned for differently depending on whether they are transgressions against God or transgressions against man).

[80] *See* THE ESSENCE OF THE OLD TESTAMENT: A SURVEY 47 (Ed Hinson & Gary Yates eds., 2012) ("For both Jews and Christians, [the] books [of the Torah] are the source of theological truth, biblical morality, and ethical behavior that laid the foundation of Western civilization. . . . The five books of the Pentateuch are collectively known as the Torah, the Hebrew word for 'law' or 'teaching.' As such, they establish the foundation for a biblical theology of the entire canon of Scripture. Without these books people would have little understanding of the rest of the Bible . . . .").

[81] *See* Mishnah Yoma 8:9 (noting that people must also atone for their transgressions against God, although in a different manner than for transgressions against others); *supra* notes 50–51 and accompanying text (discussing the division of Jewish legal norms into ritual and civil precepts).

[82] *Exodus* 20:3–5.

[83] *See Exodus* 22:17 ("You shall not tolerate a sorceress."); *Leviticus* 19:31 (forbidding communication with ghosts and spirits), 20:27 (authorizing the execution of mediums).

[84] *See, e.g.*, *Leviticus* 24:11–16 (condemning to death those who blaspheme God); *Deuteronomy* 12:29–31 (commanding the Hebrew people to refrain from adopting the gods and religious practices of the other nations).

[85] *See, e.g.*, *Exodus* 20:8–11 (prohibiting labor on the Sabbath).

[86] *Deuteronomy* 17:8–10, 12.

[87] *Exodus* 21:12 (murder), 16 (kidnapping).

[88] *See Leviticus* 5:21–25 (establishing penalty for fraud and theft); *Exodus* 21:22–37 (providing, *inter alia*, that a husband may demand damages from a tortfeasor who batters his pregnant wife, that a ransom must be paid when a person's abnormally dangerous animal kills another person, and that a person must make restitution to

death penalty for blasphemy, working on the Sabbath, and idolatry.[89] Other ritual offenses, such as prohibitions against shaving with a straight razor, eating sanctified food while in a state of ritual impurity, and eating non-kosher food are punishable by court-administered lashes.[90]

B. Talmud

The Torah provides the general framework for Jewish law, but rabbinic thinking has always maintained that *halakhah* does not begin or end with scripture. According to the Rabbis,[91] religious scholars and jurists are the personification of "the judge that will be in those days,"[92] to whom the Torah itself grants wide latitude to enrich the landscape of Jewish law through the interpretation, construction, and application of biblical texts, and through new legislation.[93] Thus, the Rabbis of the Mishnaic and Talmudic eras, from approximately 150 B.C. until around A.D. 500, exercised substantial discretion in interpreting and applying biblical rules, in legislating additional legal obligations and prohibitions, and in filling out the relatively bare institutional and procedural judicial frameworks prescribed by the Torah.[94]

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another if the person digs a pit and the other's livestock falls in).

[89] *Leviticus* 24:15–16 (blasphemy); *Exodus* 31:15 (violating the Sabbath); *Leviticus* 20:2 (idolatry).

[90] *See* Babylonian Talmud, Makkot 13a–18b, 19b–23a (discussing the court-sanctioned administration of lashes and enumerating the offenses for which perpetrators are liable to receive lashes, including, *inter alia*, shaving with straight razors, eating sanctified food while ritually impure, and violating Kosher laws). *See generally Leviticus* 11:2–47 (outlining what animals the Hebrew people may eat), 19:27 ("You shall not round off the side-growth on your head, or destroy the side-growth of your beard."), 22:4–6 (proscribing the unclean from consuming the sacred donations until they are made clean).

[91] In this Article, references to the Jewish law authorities of the Mishnaic and Talmudic periods are referred to as the "Rabbis" in order to contrast them with the "rabbis" of the post-Talmudic era. In rabbinic jurisprudence, the Rabbis who functioned up to the "closing" of the Babylonian Talmud around A.D. 500 are understood to have had a qualitatively different kind of legal authority than the rabbis of later eras. *See generally* MICHAEL S. BERGER, RABBINIC AUTHORITY 4–6 (1998) (describing the authority that Talmudic Rabbis had to interpret the Torah).

[92] *Deuteronomy* 17:9; *see also* BERGER, *supra* note 91, at 32–34, 36–40 (describing Sages and Rabbis as having judicial authority).

[93] *See* MAIMONIDES, MISHNEH TORAH, REBELS 1:1–2:3 (Philip Birnbaum ed., Hebrew Publ'g Co. abr. ed. 1967) (1178) (illustrating that religious scholars and jurists had the ability to affect Jewish law through new legislation).

[94] *See generally* AARON M. SCHREIBER, JEWISH LAW AND DECISION-MAKING: A STUDY THROUGH TIME 188, 194–95, 197–201, 204, 234–47 (1979) (describing the legislative and judicial authority that the Rabbis had around 500 B.C.).

Most notably, the Talmud relates to the Torah's civil, criminal, and ritual norms in a highly legalistic manner.[95] The Talmud closely analyzes the sources, meaning, scope, and application of *halakhic* rules and principles, rarely distinguishing between the ways it approaches the religious and interpersonal areas of the law.[96] It likewise includes extensive legalistic discussions focused on building out the Torah's bare-bones framework for a Jewish court system tasked with enforcing *halakhic* norms. Mishnaic and Talmudic sources describe a hierarchical rabbinic court system of local and regional courts, or *battei din*,[97] with a supreme legislative court called the *Sanhedrin* with final universal authority over the *halakhic* system.[98] The Talmud also clarifies the qualifications for judges staffing these tribunals,[99] including that they possess *semikhah*, or formal rabbinic ordination.[100] Talmudic law prescribes rules of evidence in criminal and civil cases,[101] sets standards for judicial procedure and decision-making,[102] and prescribes the conditions under which court rulings may be revisited in light of new evidence or legal arguments.[103] While the Torah includes only a very general framework for punishing religious offenses,[104] the Talmud expands on this by highlighting four different methods of capital punishment for various sins and crimes,[105] as well as the means by which such executions may be carried out.[106] Moreover, the Talmud explains that all ritual offenses for which the

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[95] *See* CHAIM N. SAIMAN, HALAKHAH: THE RABBINIC IDEA OF LAW 1–4, 6–8 (2018) (illustrating how the Talmud displays strict concern for and adherence to the law derived from the Torah).

[96] *See generally* Wilhelm Bacher, *Talmud*, *in* 12 THE JEWISH ENCYCLOPEDIA 1, 1–4 (Isidore Singer et al. eds., 1905) (describing the structure of the Talmud).

[97] Singular: *Beit Din*.

[98] *See* SCHREIBER, *supra* note 94, at 237 (describing the Sanhedrin as the highest legislative and judicial authority in and during the Second Jewish Commonwealth); Marcus Jastrow & Louis Ginzberg, *Bet Din*, *in* 3 THE JEWISH ENCYCLOPEDIA 114, 114–15 (Isidore Singer et al. eds., 1902) (describing the hierarchical structure of the judicial system as described in the Mishnah and Talmud).

[99] Babylonian Talmud, Sanhedrin 7a–8a.

[100] *Id.* at 13b–14a.

[101] *Id.* at 40a–40b.

[102] *See* SCHREIBER, *supra* note 94, at 236–47 (describing the structure and procedure of the judiciary and the major actors and their roles in decision-making).

[103] *See* Babylonian Talmud, Sanhedrin 33a (describing cases in which the accused is brought back to be judged again in light of new evidence).

[104] *See* Marcus Jastrow & S. Mendelsohn, *Capital Punishment*, *in* 3 THE JEWISH ENCYCLOPEDIA, *supra* note 98, at 554–55 (stating that the punishment for most offenses is a violent death generally without referring to a particular mode of death).

[105] Babylonian Talmud, Sanhedrin 49b–53a, 54a–54b, 56a–59a, 60a–61b, 75a–76b, 88b–90a.

[106] *Id.*

Torah does not specify a particular penalty are punishable by lashes,[107] and the Talmud details the procedure by which lashes must be administered.[108]

Talmudic law also expands the religious penal framework created by the Torah by prescribing several additional punishments for religious wrongs not contemplated by the Hebrew Bible itself. The Rabbis enjoyed the authority to enact new civil and religious laws through legislation,[109] and they used this power to expand the scope of *halakhic* duties and prohibitions in order to better ensure that well-meaning observant Jews would not inadvertently violate biblical precepts.[110] The Rabbis further prescribed that violations of such rabbinic norms could be penalized by court-ordered whipping.[111] Moreover, while the Torah explicitly designates some ritual offenses as subject only to punishments meted out by God and not to any judicial sanctions,[112] the Talmud prescribes a court-imposed penalty for repeat offenders of these ritual sins. This punishment is known as *kipa* and involves imprisonment under harsh conditions designed to induce the offender's death—a penalty not contemplated by the Torah itself.[113]

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[107] *See* Babylonian Talmud, Makkot 13a–13b (listing the offenses that are punishable by lashes).

[108] *Id.* at 13a–15b.

[109] *See* Samuel J. Levine, *An Introduction to Legislation in Jewish Law, with References to the American Legal System*, 29 SETON HALL L. REV. 916, 918–21 (1999) (discussing the judicial and legislative power that the Rabbis had).

[110] *See id.* at 922–25 (illustrating negative legislation Rabbis enacted to protect Jews from unwittingly violating the laws in the Torah).

[111] Beth A. Berkowitz, *Negotiating Violence and the Word in Rabbinic Law*, 17 YALE J.L. & HUMANS. 125, 129 (2005). *See generally* Michelle Hammer-Kossoy, Divine Justice in Rabbinic Hands: Talmudic Reconstitution of the Penal System 298–305, 307–08, 310, 316–17, 321, 325–27, 330, 332–33, 335–36, 347, 357–58, 361–62, 420, 422–23 (2005) (Ph.D. dissertation, New York University) (on file with Regent University Law Review) (describing disciplinary lashes as part of the rabbinic punishment system). For examples of such flogging being prescribed for rabbinic offenses, see Babylonian Talmud, Kiddushin 81a (illustrating flogging as a punishment for violating the rabbinic prohibition of seclusion of unmarried opposite-sex couples); Tosefta Makkot 4:7–8 (lashes for a priest for subjecting himself to rabbinically defined ritual impurity); and Jerusalem Talmud, Pesachim 10b (describing the rabbinic prohibition against eating *matzah* on Passover eve).

[112] *See* Mishnah Keritot 1:1 (listing thirty-six sins for which the penalty is *karet*, or "cutting-off," which the Talmudic Rabbis understand to be a purely divine and non-judicial punishment that results in one's family line gradually being excised from the Jewish nation); MAIMONIDES, *supra* note 55, at 8:1–5 (describing *karet* as the cutting off of the soul itself, a purely divine act).

[113] *See* Babylonian Talmud, Sanhedrin 81b (describing the administration of the punishment *kippa*).

III. FROM THEORY TO PRACTICE

The foregoing discussion suggests that Jewish law comprises a comprehensive system of both primary rules of behavior that regulate religious, as well as civil, life and secondary rules that prescribe and facilitate the enforcement of those norms. This vision of *halakhah* is only part of the picture, however. Examining rabbinic legal sources, it is far from clear that what Jewish law seems to prescribe in theory was implemented in practice. In particular, rabbinic jurisprudence evinces a serious internal tension between a system of substantive religious regulations backed by prescribed penalties and a judicial system whose ability to do so is hampered by rabbinically constructed jurisdictional, procedural, and evidentiary hurdles, as well as rabbinic reluctance to zealously enforce Torah law on its own terms.

Part III.A discusses how Talmudic rules of evidence, procedure, and jurisdiction make it functionally difficult—indeed, nearly impossible—to enforce Jewish law's religious norms. Part III.B next explains how Talmudic Rabbis exhibited reluctance to enforce Torah laws even in cases where *battei din* might have been empowered to do so. Finally, Part III.C introduces several doctrinal bases in which rabbinic authorities have grounded broad discretionary authority to make and enforce legal norms outside the scripturally prescribed boundaries of standard *halakhic* rules. This last discussion sets the stage for understanding the kinds of choices rabbinic authorities have made in exercising their judicial and legislative discretion, and thus how Jewish law has practically addressed questions of religious freedom, which is severely restricted by the theoretical legal framework set forth in the Torah and Talmud.

A. The Unenforceability of Jewish Law

A surface-level survey of substantive and procedural *halakhah* suggests that the Torah, Talmud, and later rabbinic literature creates a comprehensive framework of both civil and ritual obligations and restrictions, violations of which are punishable through a range of judicial penalties. A closer study of rabbinic jurisprudence reveals, however, that rabbinic jurisprudence renders virtually all Jewish law unenforceable on its own terms.

1. Restrictive Definitions of Religious Offenses

Rabbinic Oral Torah traditions recorded in the Talmud include extensive discussions detailing the precise elements of various Torah-

based legal obligations and prohibitions.[114] In many cases, Jewish law defines behavioral norms in such restrictive ways as to make it quite difficult—indeed sometimes impossible—for Jewish sinners to truly violate the law, subjecting themselves to judicial penalties. Perhaps one of the more well-known examples of the Rabbis' restrictive definitions of *halakhic* offenses pertains to the Torah doctrine of *ben sorer umoreh*, or the "wayward and rebellious son."[115] The Written Torah prescribes that a young man who exhibits both drunkenness and gluttony, and who refuses to abide by his parents' admonitions, shall be brought "to the elders of the city . . . and the men of the town shall stone him to death."[116] The Talmud, however, adduces a host of scripturally constructed conditions that must be satisfied before one can be punished as a *ben sorer umoreh*. For example, the law applies only to sons, but not daughters,[117] and only to sons that have reached the age of legal majority but are not yet full-fledged adults.[118] Moreover, one is only liable for eating large amounts of meat and drinking large volumes of wine for purely gluttonous reasons; celebratory or religiously motivated eating and drinking do not count.[119] Additionally, to be liable, the *ben sorer umoreh* must procure the food and drink by stealing from his parents and must consume these items outside his parents' house.[120] The Talmud also rules that a *ben sorer umoreh* is only executed if both his mother and father agree to the penalty.[121] Extraordinarily, the death penalty is only carried out

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[114] JOSEPH TELUSHKIN, JEWISH LITERACY: THE MOST IMPORTANT THINGS TO KNOW ABOUT THE JEWISH RELIGION, ITS PEOPLE, AND ITS HISTORY 148–50 (1991).

[115] *See Deuteronomy* 21:18–21 (describing the punishment for a rebellious son); Samuel J. Levine, *Of Inkblots and Omnisignificance: Conceptualizing Secondary and Symbolic Functions of the Ninth Amendment, in a Comparative Hermeneutic Framework*, MICH. STATE L. REV. 277, 281–82 (2009) (using the rebellious son as an example of a legal scenario in the Torah that never has happened and never will happen); 1 ELON, *supra* note 48, at 365–66 (commenting on the impossibility of being a rebellious son based on the strict requirements set by the Rabbis).

[116] *Deuteronomy* 21:20–21.

[117] *See* Babylonian Talmud, Sanhedrin 68b (referring to a penalty imposed only on a rebellious son).

[118] *See id.* (describing the age of a boy that can be punished as a rebellious son, using biblical indicators to determine that general age).

[119] *See id.* at 70a (describing the context and portion sizes of indulging in wine and meat that are acceptable and those which are the blameworthy actions of the rebellious son).

[120] *See id.* at 71a (explaining that a son must eat meat stolen from his father on another's land to be a rebellious son as opposed to stealing from others or eating what was stolen on his father's property).

[121] *See id.* (stating that if one of the parents does not want their son punished, he does not become a rebellious son and therefore does not receive punishment as a rebellious son).

if neither parent is blind, deaf, lame, mute, or an amputee,[122] and only if both parents have similar appearances, similar voices, and are of similar height.[123] This onerous set of conditions for the applicability of the Torah's doctrine of *ben sorer umoreh* made it especially difficult for any particular juvenile delinquent to actually qualify for the legally mandated penalty. Indeed, the Talmud notes that, due to the difficult-to-satisfy elements of the offense, "there never was and never will be a *ben sorer umoreh*."[124] A similar conclusion is reached about a number of other Torah laws with similarly burdensome conditions for violation.[125]

2. Rabbinic Court Jurisdiction

When rigorously defined *halakhic* rules were violated in a manner implicating judicial penalties, restrictive jurisdictional requirements rendered any actual enforcement measures by rabbinic courts difficult. Under Talmudic standards, only certain courts within the formal *beit din* hierarchy possessed subject-matter jurisdiction over the imposition of corporal penalties for violations of Torah law.[126] Cases involving alleged religious offenses punishable by biblically-mandated lashes could be tried by the lowest level rabbinic courts—tribunals comprised of three judges—but only when such courts were sitting within the geographic borders of the biblical Land of Israel.[127] Capital cases, however, could only be heard by second-tier courts—tribunals known as "Courts of Twenty-Three," staffed by twenty-three rabbinic judges and located only in larger cities or regional centers in the biblical Land of Israel.[128] Moreover, these courts could only attend capital cases

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[122] *See id.* (illustrating certain attributes both parents must have in order for a rebellious son to be punished, derived from verses describing the role of the parents in punishing a rebellious son).

[123] *See id.* (declaring that the mother and father of a rebellious son must be identical in several aspects for the son to face punishment).

[124] *Id.*

[125] *See* Babylonian Talmud, Sanhedrin 71a (stating that there never has been and never will be a rebellious son, an idolatrous city, or a house afflicted with leprosy); *Deuteronomy* 13:12–19 (referring to the idolatrous city that the Torah prescribes be destroyed); *Leviticus* 14:34–53 (referring to the house afflicted with leprosy, which the Torah commands must be demolished); 1 ELON, *supra* note 48, at 366–69 (commenting on the impossibility of being the rebellious son or an idolatrous town).

[126] *See generally* THE PRINCIPLES OF JEWISH LAW 562 (Menachem Elon ed., 1975) (stating that the court of seventy-one judges had jurisdiction to confirm death penalties).

[127] *See* Mishnah Sanhedrin 1:2 (describing the requirement concerning the number of judges that must preside over cases where lashes could be a punishment); MAIMONIDES, *supra* note 75, at 16:1–2 (stating where lashes can be administered and who can administer them).

[128] *See* Mishnah Sanhedrin 1 (explaining why a lesser Sanhedrin that judges cases

when the supreme court of the Jewish legal system, the Sanhedrin, was properly constituted and sitting in its designated seat within the Temple courtyard in Jerusalem.[129] Certain other offenses could be punished only by the Sanhedrin itself.[130] According to the Talmud, the Sanhedrin ceased sitting in its usual location in the Temple courtyard some four decades before the destruction of the Second Temple during the Romans' sack of Jerusalem in A.D. 70, which effectively foreclosed rabbinic court jurisdiction over enforcing most of the more serious religious crimes in Jewish law.[131]

The prescribed qualifications for judges of these rabbinic courts were quite high.[132] By far, the most limiting judicial qualification was that judges needed to possess formal rabbinic ordination, or *semikhah*.[133] From biblical through early Talmudic times, the institution of *semikhah* was the chief method by which formal discretionary rabbinic authority to interpret and apply Jewish law was delineated.[134] Scholars who possessed *semikhah* were authorized to exercise a wide range of rabbinic powers, including the judicial enforcement of Jewish law, while non-ordained scholars lacked this authority.[135] However, at some point before the completion of the Talmud (around A.D. 500), the institution of *semikhah* lapsed.[136] From

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of capital law is composed of twenty-three judges).

[129] *See* Babylonian Talmud, Avodah Zara 8b (describing how the Sanhedrin stopped judging cases of fines when they could no longer sit at the Temple); MAIMONIDES, *supra* note 75, at 14:11 (stating that only when the Temple was standing could cases involving capital punishment be adjudicated).

[130] *See* Mishnah Sanhedrin 1:5 (listing cases for which only the Sanhedrin has authority to give punishments); *id.* at 11:2 (stating that, in the case of a rebellious elder, only the Sanhedrin can mete out a binding ruling and punishment).

[131] *See* Babylonian Talmud, Avodah Zarah 8b (describing the exile of the Sanhedrin from its traditional meeting place, the Sanhedrin ceasing to judge cases of fines, and Rome's aim to destroy the Sanhedrin's authority).

[132] THE PRINCIPLES OF JEWISH LAW, *supra* note 126, at 564; MAIMONIDES, *supra* note 75, at 2:1–9.

[133] *See* Babylonian Talmud, Gittin 88b (illustrating that only ordained judges or their agents may perform judicial acts)*;* SCHREIBER, *supra* note 94, at 402 (stating that only ordained judges could issue capital punishment).

[134] *See* THE PRINCIPLES OF JEWISH LAW, *supra* note 126, at 563 (describing how judges received their authority from the laying of hands—*semikhah*—by their predecessors); BERGER, *supra* note 91, at 52–62 (outlining the institution of *semikhah*).

[135] *See* Babylonian Talmud, Bava Kamma 84a–84b (discussing instances in which non-ordained judges lack judicial authority); THE PRINCIPLES OF JEWISH LAW, *supra* note 126, at 563 (stating that judges ordained to hear cases were bestowed their judicial authority by their predecessors who were likewise ordained); Jacob Katz, *Rabbinical Authority and Authorization in the Middle Ages*, *in* 1 STUDIES IN MEDIEVAL JEWISH HISTORY AND LITERATURE 41, 41–42 (Isadore Twersky ed., 1979) (stating that only ordained judges could sit on the Sanhedrin).

[136] *See* THE PRINCIPLES OF JEWISH LAW, *supra* note 126, at 563 (stating that *semikhah* ended sometime in the fourth century A.D.); Babylonian Talmud, Bava

that point onward, rabbinic scholars lacked any formal judicial authority to enforce Jewish law.[137]

3. Evidentiary Standards

Once a case of alleged religious misconduct does arrive in court, Jewish law imposes very substantial evidentiary and procedural burdens that make it extremely difficult to convict and punish defendants.[138] First, the Torah prescribes that the only valid evidence of a criminal or ritual offense is direct testimony of at least two eyewitnesses.[139] Neither circumstantial evidence nor a defendant's admission is admissible in court, no matter how substantial or convincing such evidence may be.[140] Moreover, Talmudic law introduces many qualifications for valid witnesses in such cases. Convictions must be based on the testimony of two Jewish, religiously observant, male witnesses who are not related to each other, to the parties, or to the judges.[141] The testimony of witnesses that are female,[142] not Jewish,[143] not scrupulously observant,[144] or are related to each other or to any parties involved in the case cannot serve as a basis for conviction and punishment.[145] Witnesses with any financial interest in the outcome of a case,[146] those that are biased against a

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Kamma 84b (providing examples of dispute resolution through the non-ordained judges, who acted as agents of the land of Israel).

[137] *See* JACOB BEN ASHER, ARBAH TURIM, CHOSHEN MISHPAT 1 (Vilna 1923) (1340) ("All this was only during the time of *semikhah* [formal ordination]; but now that there is no *semikhah*, all judges are null and void as a matter of Torah law . . . .").

[138] *See* 1 SAMUEL J. LEVINE, JEWISH LAW AND AMERICAN LAW: A COMPARATIVE STUDY 90–91 (2018) (explaining that Jewish law contained high evidentiary standards in murder trials, resulting in few occurrences of capital punishment).

[139] *Deuteronomy* 17:6, 19:15.

[140] *See* Babylonian Talmud, Sanhedrin 37b (explaining that in order to obtain a murder conviction, Jewish courts required eyewitness testimony of the commission of the murder and would not allow circumstantial evidence, no matter how convincing that evidence was).

[141] *See* JOSEPH KARO, SHULCHAN ARUKH, CHOSHEN MISHPAT 33–35 (Lemberg 1898) (1563) (detailing the various ways an otherwise competent witness could be disqualified from testifying under Jewish law); THE PRINCIPLES OF JEWISH LAW, *supra* note 126, at 605–11 (listing the types of people who were not considered competent under Jewish law to serve as witnesses).

[142] *See* KARO, *supra* note 141, at 35:14 (prohibiting women from testifying as witnesses).

[143] *See id.* at 34:19 (prohibiting non-Jewish people from testifying as witnesses).

[144] *See id.* at 34:1–15 (disqualifying witnesses because of sin).

[145] *See id.* at 33:1–17 (prohibiting witnesses with a familial relationship to each other or a party from testifying).

[146] *See id.* at 37:1–21 (prohibiting those with a financial interest in the case from testifying as witnesses).

party,[147] and those—such as professional gamblers—who have demonstrated a lack of regard for their own or others' money are likewise unable to offer evidence.[148]

When it comes to the substance of the testimony, Jewish law imposes similarly strict demands. As a threshold matter, *halakhah* prescribes that a defendant can only be punished if he was warned not to proceed with the sin by the witnesses immediately before he committed the alleged offense.[149] In order to convict a properly warned offender, the witnesses must be able to accurately recount the basic elements of the crime or offense, such as where, when, how, and by whom it was committed.[150] If a witness is unable to provide some part of this basic information, or if there are inconsistencies between the testimony offered by various witnesses, the testimony is inadmissible in its entirety.[151]

4. Judicial Decision-Making Procedures

Jewish law prescribes that once valid evidence is taken by a court, the presiding judges deliberate to determine the applicable law, weigh the facts, and ultimately vote on a verdict.[152] The Talmud puts in place a host of mechanisms at every stage in these deliberations to make it

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147 *See id.* at 34:20 (prohibiting those with a bias against a party from testifying as witnesses).

148 *See id.* at 34:16, 18 (prohibiting those who do not value their own or others' money from testifying as witnesses).

149 *See* Babylonian Talmud, Sanhedrin 8b (requiring that witnesses to a capital crime must have warned the defendant prior to the crime for the defendant to be executed); MAIMONIDES, *supra* note 75, at 12:2 ("Whether the accused is scholarly or ignorant, a warning [by the witnesses] is required, inasmuch as the purpose of warning is that of distinguishing between the unwitting and the willful transgressor, since he might have committed the offense unintentionally.").

150 *See* MAIMONIDES, MISHNEH TORAH, TESTIMONY 1:4 (Philip Birnbaum ed., Hebrew Publ'g Co. abr. ed. 1967) (1178) ("With seven inquiries we examine the witnesses: On which week, and during which year, and which month, and on which day of the month, and on which day of the week, and at what time of day, and in which place. And included in these inquiries that are the same in all cases, there are others. For if they testify that the defendant committed idolatry, we ask them which god he worshiped, and in what manner did he worship it. If they testify that the defendant violated the Sabbath, we ask them which forbidden labor he performed and how he did it. If they testify the defendant ate on Yom Kippur, we ask them what he ate and how much he ate. If they testify that he committed murder, we ask them how he killed him. And so too for all similar questions—they are part of these inquiries.").

151 *See id.* at 2:1 (noting that any inconsistency in the testimonies of witnesses invalidates the testimonies).

152 *See* Mishnah Sanhedrin 5:1–5 (describing the process by which judges examined witnesses and deliberated the evidence before reaching a verdict); THE PRINCIPLES OF JEWISH LAW, *supra* note 126, at 578–79 (describing the deliberation process of the judges).

difficult for a court to reach a guilty verdict and implement the legally mandated penalty.[153] These rabbinic rules of jurisdiction, evidence, and procedure made it difficult, if not impossible, to convict and punish violators of Torah law for their sins in accordance with Jewish law's own rules for *halakhic* adjudication and law enforcement.[154] Indeed, the Mishnah notes that rabbinic court convictions and punishments were so burdensome that "a court that executes [a defendant] once in seventy years is called murderous."[155]

B. Rabbinic Reluctance to Enforce Jewish Law

In traditional Jewish thought, the foregoing limitations on the enforcement of Jewish religious law—restrictive definitions of *halakhic* offenses, limited *beit din* jurisdiction, and burdensome evidentiary and procedural rules—are at least partly outside the bounds of rabbinic discretion. Many of these norms are understood to be deeply embedded in the Oral Torah tradition rooted ultimately in divine revelation, and Talmudic Rabbis would therefore not have considered them subject to their own prudential interpretive judgments.[156] Even the Talmudic Rabbis, however, were candid about the fact that they sought to avoid being legally obligated to enforce Jewish religious law on its own terms.

One of the best-known illustrations of this rabbinic reluctance to judicially enforce Torah law on its own terms is a statement by two Mishnaic sages, Rabbis Akivah and Tarfon. In response to the Mishnah's suggestion that judicial executions for religious offenses

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[153] *See* Daniel A. Rudolph, *The Misguided Reliance in American Jurisprudence on Jewish Law to Support the Moral Legitimacy of Capital Punishment*, 33 AM. CRIM. L. REV. 437, 458–60 (1996) (discussing the various evidentiary and procedural hurdles a court must overcome to administer capital punishment). For further description of these restrictions, see MAIMONIDES, *supra* note 75, at 9:2 (describing the voting margin by which a defendant had to be convicted); Babylonian Talmud, Sanhedrin 17a (describing the process by which judges were added to the court if a judge could not reach a decision during deliberations); ZVI HIRSCH CHAJES, MAHARITZ CHIYUS TO SANHEDRIN 17A (Lemberg 1928) (1845) (noting that judges held that there were some matters they could not hear under the Torah). *See generally* Ephraim Glatt, *The Unanimous Verdict According to the Talmud: Ancient Law Providing Insight into Modern Legal Theory*, 3 PACE INT'L L. REV. ONLINE COMPANION 316, 318, 322 (2013) (stating that under Jewish law a unanimous guilty verdict in a murder trial would result in the accused being set free).

[154] *See* SCHREIBER, *supra* note 94, at 277 ("These [procedural and evidentiary requirements imposed by Jewish law] would appear to make it well-nigh impossible ever to convict any criminal. . . . Accordingly, it has been argued that these norms were ideal only and were never intended to be utilized in actual practice.").

[155] Mishnah Makkot 1:10.

[156] *See* STEINSALTZ, *supra* note 41, at 4, 6–7 (explaining that the Talmud contains the oral law and the Torah, both of which come from God and cannot be disregarded).

should be rare, and its consequential admonition that a court that executes one in seventy years is called murderous,[157] Rabbis Akivah and Tarfon declared: "If we had been members of the *Sanhedrin* [which by that time had been disbanded for nearly a century], we would have never executed anyone."[158] The Talmud quite reasonably questions this bold statement.[159] The Talmud explains that one way these Rabbis could have avoided punishing even guilty sinners is by moving the evidentiary goalposts to ensure that defendants could not be proven guilty.[160] Murder convictions, for instance, could be avoided by requiring evidence that the victim was not a *treifa*—a terminally ill person—at the time he was killed.[161] This would set an impossible standard because one could not definitively *disprove* the possibility that the victim had some serious bodily defect in the very place where the fatal blow was struck.

The Mishnah offers the alternative view of Rabbi Shimon ben Gamliel, who argued that Rabbis Akivah and Tarfon's approach "would increase the number of murderers among the Jewish people."[162] The Talmud wonders, however, how Rabbi Shimon would have succeeded in punishing offenders given the high—perhaps insurmountable—evidentiary standards that would have precluded Rabbis Akivah and Tarfon from reaching guilty verdicts.[163] It explains that Rabbi Shimon would have accepted somewhat lower burdens of proof; for example, penalizing homicide unless it was affirmatively proven that the victim was a *treifa*.[164]

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[157] *See* Mishnah Makkot 1:10 (noting an example where the Rabbis debated over how to enforce the Torah).

[158] *Id.*

[159] *See* Babylonian Talmud, Makkot 7a (questioning how Rabbis opposed to the death penalty would sentence a defendant in accordance with Jewish law if witnesses testified that the defendant intentionally committed murder).

[160] *See id.* (providing an example of how Rabbis could raise the evidentiary bar to avoid executing a defendant guilty of a capital crime).

[161] *See id.* (discussing how the Rabbis could spare the accused from execution by requiring definitive proof that the victim was not terminally ill). While killing a human being that is classified as a *treifa* is indeed murder under Jewish law, the murderer is exempt from the death penalty. *See* MAIMONIDES, MISHNEH TORAH, THE LAWS OF MURDER AND THE PRESERVATION OF LIFE 2:8 (Philip Birnbaum ed., Hebrew Publ'g Co. abr. ed. 1967) (1178) (explaining that a person who kills someone who is already mortally wounded is free from human judgment); Irene Merker Rosenberg et al., *Return of the Stubborn and Rebellious Son: An Independent Sequel on the Prediction of Future Criminality*, 37 BRANDEIS L.J. 511, 534 (1999) (explaining that a defendant could go free if the court required definitive proof that there was not already an affliction in the precise spot where the defendant wounded the victim).

[162] Mishnah Makkot 1:10.

[163] *See* Babylonian Talmud, Makkot 7a (discussing the viewpoints on this issue from Rabbi Akivah, Rabbi Tarfon, and Rabbi Shimon).

[164] *Id.*

The debate between Rabbis Akivah and Tarfon and Rabbi Shimon ben Gamliel reveals a critical point about the judicial posture of the Talmudic Rabbis: They had the discretion to—and did—make prudential choices about how and when to enforce Jewish religious law by manipulating evidentiary standards. If *halakhic* rules of evidence and judicial procedure make it difficult to convict and punish those who violate religious law, this is at least in part because the Rabbis wanted it that way.[165]

C. Order Without Law

Rabbinic jurisprudence thus makes Jewish law largely unenforceable, and the Rabbis often sought to avoid enforcing *halakhah* on its own terms even when doing so was possible. Still, Jewish law scholars also recognized that Jewish society simply would be unable to function without some way of maintaining order through law; if normative Jewish law sourced in the Torah and Talmud were unable to do the job due to its own internal enforcement limitations, as well as the Rabbi's own hesitancy to actualize this expansive body of religious teachings as applied law, something else would have to take its place. The Talmudic Rabbis, therefore, recognized and adopted several doctrines that empowered rabbinic courts, as well as Jewish communal authorities, to make and enforce laws—albeit not necessarily the ritual and civil norms prescribed by the *halakhah*.[166]

One such measure was designed to soften the legal impact of the total loss of *halakhic* judicial authority due to the discontinuance of formal rabbinic ordination sometime before the fourth century A.D.[167] As noted above, only rabbinic courts presided over by judges who possess formal rabbinic ordination, or *semikhah*, can hear and resolve cases under Jewish law; non-ordained judges have no right or power to exercise judicial authority.[168] According to the Talmud, the last generation of ordained Rabbis anticipated this eventuality and therefore chose to enact legislation appointing subsequent non-ordained scholars as their judicial agents.[169] This legislation granted

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[165] Babylonian Talmud, Avodah Zara 8b (discussing the Sanhedrin's self-exile from the Temple court in order to withdraw the jurisdiction of rabbinic courts to try criminal cases); *cf.* Babylonian Talmud, Sanhedrin 2b–3a (discussing the Rabbis' deliberate decision to lower biblically prescribed burdens of proof in civil cases in order to facilitate economic activity).

[166] *See* STEINSALTZ, *supra* note 41, at 169–70 (discussing how the rabbinical courts still enforced the law despite the near impossible evidentiary burdens of *halakhic* law).

[167] *See generally* ASHER, *supra* note 137, at 1:3.

[168] *See supra* note 135 and accompanying text.

[169] *See* Babylonian Talmud, Bava Kamma 84b (discussing those cases over which

non-ordained rabbis authority to exercise jurisdiction over commonly occurring kinds of cases that also involved claims of actual monetary losses.[170] Judicial authority to resolve other kinds of cases, however,—including all violations of ritual law—was withheld and reserved for judges that possessed *semikhah*, which no longer existed (and has never been revived).[171]

This expansion of judicial power beyond the limits set by normative *halakhah* was an important rabbinic tool for ensuring that Jewish society could be made functional even in the absence of a system of practically enforceable *halakhah*. The Rabbis thought society might function even if courts were not empowered to resolve cases of wrongs that did not entail actual financial losses; even cases involving financial losses could be ignored—in compliance with the standard *halakhic* restrictions on non-ordained judges' judging—if they were of the kind that occur only very rarely.[172] But society cannot function without some accepted methods for the legal redress of routine matters that involve financial losses, and a limited grant of judicial agency over such matters was therefore necessary and warranted.[173]

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non-ordained rabbis have jurisdiction); THE PRINCIPLES OF JEWISH LAW, *supra* note 126, at 563 (explaining that modern, non-ordained rabbis act as agents of the ancient, ordained Rabbis).

[170] *See* Babylonian Talmud, Bava Kamma 84b (discussing those cases over which non-ordained rabbis have jurisdiction); KARO, *supra* note 141, at 1:1 ("The Talmud concludes that we are authorized to perform their agency only in cases that commonly occur and involve monetary losses, such as matters of debts and admissions to liabilities . . . but in matters that do not commonly occur—even if they involve financial loss—such as where one person injures another, we do not judge; and likewise in cases where there is no actual financial loss at stake, such as claims for embarrassment—even though they are commonly occurring, we do not adjudicate."). Rabbinic commentators explain that the jurisdictional boundaries of this grant of judicial agency were designed specifically to ensure that rabbinic courts could continue to function in those areas of life that they viewed as critical to maintaining the bare minimum conditions necessary for a functioning Jewish civil society. *See, e.g.*, JOSEPH KARO, BEIT YOSEF TO ARBAH TURIM, CHOSHEN MISHPAT 1:4 (Vilna 1923) (1542) (addressing the issue of tax collection, which would be necessary to maintain a functional Jewish society). In the view of the Talmudic Rabbis, life might go on if parties had no recourse to formal adjudicatory processes for disputes that either did not involve financial loss or did, but only rarely. However, the law-ordered fabric of Jewish society could not be maintained if routinely occurring cases implicating financial losses could not be properly resolved in court if necessary. *See id.* (discussing the payment of fines and ransoms, which would be commonly-occurring cases involving financial losses); JACOB LORBERBAUM, NETIVOT HAMISHPAT, MISHPAT HA'URIM 1:1 (Lemberg 1898) (1809); NACHMANIDES, COMMENTARY ON THE TALMUD, YEVAMOT 46b (Jerusalem 1928–29) (1270).

[171] RABBI J. NEWMAN, SEMIKHAH (ORDINATION): A STUDY OF ITS ORIGIN, HISTORY AND FUNCTION IN RABBINIC LITERATURE 53 (1950). On attempts to revive the institution of *semikhah*, see *id.* at 155, 158, 160–70.

[172] *See* KARO, *supra* note 170, at 1:4.

[173] *See supra* note 170 and accompanying text.

Importantly, this system of judicial agency exercised by non-ordained scholars illustrates a point that will be made more clear below: The Rabbis apparently viewed the enforcement of the Torah's laws of tort, property, and contract as far more essential—at least in the judicial sphere—than the *halakhah's* ritual restrictions on idolatry, Sabbath labor, and sexual sin.[174] The last ordained judges could have included the authority to enforce all of Jewish law in their legislative grant of judicial agency to later scholars. They did not do so, signaling perhaps that in rabbinic jurisprudence, ritual law enforcement lay beyond the scope of what is essential for maintaining an ordered society.

A second rabbinic doctrine used to supplement Jewish law's largely unenforceable norms is the principle of *dina d'malchuta dina*, or "the law of the kingdom is law."[175] This doctrine stands for the idea that the just laws and policies enacted by the legitimate political authorities in any given jurisdiction are, in the eyes of the *halakhah*, valid rules of law and thus normatively binding on Jewish subjects.[176]

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[174] *See infra* Part IV.

[175] *See* Michael J. Broyde, *A Jewish Law View of World Law*, 54 EMORY L.J. 79, 89 (2005) (discussing how the doctrine of *dina d'malchuta dina* is applied in practice while still adhering to other Jewish laws); Rabbi Hershel Schachter, "*Dina De'malchusa Dina": Secular Law as a Religious Obligation*, *in* 1 J. HALACHA & CONTEMP. SOC'Y 103, 104 (1981) (explaining how Jewish law principles are applied to secular law); Aaron Rakefet-Rothkoff, *Dina D'Malkhuta Dina—The Law of the Land in Halakhic Perspective*, 13 TRADITION: J. ORTHODOX THOUGHT 5, 6 (1972) (explaining that *halakhah* can impose an obligation to follow secular law). *See generally* THE PRINCIPLES OF JEWISH LAW, *supra* note 126, at 710–15 (explaining the general context of *dina d'malchuta dina*).

[176] *See* Broyde, *supra* note 175, at 89 ("The Jewish law doctrine that 'the law of the land is the law' provides that, in certain circumstances and for particular purposes, secular law is legally effective under Jewish law."). Aside from the legal limits of this principle discussed here, *see infra* text accompanying notes 177–79, Jewish law places a number of other important limits on the extent to which Jews are religiously obligated to obey local secular laws, *see* Schachter, *supra* note 175, at 105 ("'Dina de'malchusa dina' cannot be interpreted to mean that the law of the land is the law, period. Were this so, it would mean that wherever the law of the land is different from the law of the Torah, it is the law of the land we are to follow. This is absurd . . . and would effectively nullify about half of [the Code of Jewish Law]."). For example, Rabbi Joseph Karo maintained that this principle relates only to secular laws that affect the local government's financial interests. *See* KARO, *supra* note 66, at 369:11. *See generally* Broyde, *supra* note 175, at 91–92 (giving a general overview of Karo's view, along with competing views from other rabbis). Additionally, there is widespread agreement that the obligation to obey secular law imposed by government authorities applies only to basically just laws enacted by politically legitimate governments, as opposed to norms that are substantively or procedurally unjust, such as tax levies set by tax collectors with unfettered discretion. *See* Babylonian Talmud, Nedarim 28a (permitting lying to tax collectors who unjustly levy overly burdensome taxes); Rakefet-Rothkoff, *supra* note 175, at 10 ("[T]he laws must be equitable, and applicable to all citizens and residents of the state. . . . The Jew must only observe the decrees of a just government, but he is not obligated to observe the rulings of a despotic regime."). *See generally* MAIMONIDES, MISHNEH TORAH, ROBBERY

Jews are religiously obligated to obey the laws of the countries in which they live in their dealings with the government,[177] non-Jewish citizens,[178] and other Jews as well.[179] The authority of governmental laws thus fills an important role within a Jewish legal system in which the *halakhah's* own rules are largely unenforceable in practice. *Jewish* law norms may be unenforceable due to jurisdictional, evidentiary, and

AND LOST PROPERTY 5:12–18 (Philip Birnbaum ed., Hebrew Publ'g Co. abr. ed. 1967) (1178) (requiring the paying of taxes levied on the entire populace, since those taxes are not unjustly levied); KARO, *supra* note 66, at 369:8 ("A king that takes a field or courtyard from one of the citizens of the country not in accordance with the laws: that is theft . . . . The general principle is, that any rule that the king determines for all, but not for any one person, is not theft [but is a valid rule of law].").

[177] *See* Babylonian Talmud, Bava Metzia 83b–84a (noting that several Talmudic rabbis functioned as criminal law enforcement officers on behalf of the Roman government enforcing Roman law); Babylonian Talmud, Bava Kamma 113a (validating government tax collection, so long as it is executed in accordance with established law and not arbitrarily); Babylonian Talmud, Bava Batra 54b (validating private title to real property acquired through government disbursement of public lands); JOSPEPH KARO, SHAKH TO SHULCHAN ARUKH, YOREH DE'AH 165:5 (Chaim N. Denburg trans., Juris. Press 1955) (1563) (noting government's power to establish valid currency); Schachter, *supra* note 175, at 105 (explaining that in some areas the dictates of *halakha* require people to be governed by the laws of the state rather than by the Torah alone).

[178] *See* RABBI SHLOMO LURIA, YAM SHEL SHLOMO, BAVA KAMMA 6:14 (1530); KARO, *supra* note 66, at 73:39. Some Jewish law authorities dispute this view, and maintain that the doctrine of *dina d'malchuta dina* only confers *halakhic* legitimacy on public laws that regulate citizens' relationships with the government and state and that it does not mandate obeying laws regulating private relations between individuals. *See, e.g.*, VIDAL OF TOLOSA, MAGID MISHNAH TO MISHNAH TORAH, THE LAWS OF CREDITORS AND DEBTORS 27:1 (1360) (s.v. *aval kol shtaros she'chasumeihem akum harei eilu pesulin*). However, even according to these authorities, other doctrines, such as the Talmudic principle that common commercial customs—which can be and often are determined by applicable law—do regulate private relations between Jews and non-Jews from the perspective of Jewish law. *See, e.g.*, Mishnah Bava Metziah 7:1 (explaining how employers must follow local customs as to when to begin work and whether to feed laborers); KARO, *supra* note 66, at 331:1–2; Rabbi Moshe Feinstein, Responsa Igros Moshe, Choshen Mishpat 1:72 (acknowledging that commercial customs binding under Jewish law can be established by local secular law); Michael J. Broyde*, Public and Private International Law from the Perspective of Jewish Law, in* THE OXFORD HANDBOOK OF JUDAISM AND ECONOMICS 363, 373–74 (Aaron Levine, ed., 2010) (explaining that the Mishnah pronounces the validity of commercial customs established by secular law).

[179] *See Joseph Goldberg v. Aryeh Schwartz*, 2 J. BETH DIN AM. 52, 53 (2014) ("Jewish law recognizes that when parties conduct business, there is a presumption that the commercial laws and practices of their locale are implicitly adopted by them as terms of their agreement."); *see also* Broyde, *supra* note 178, at 373–74 (explaining how certain business customs are *halakhically* valid because the conduct in question was required by secular law).

procedural problems, but *secular* laws must still be observed by Jewish citizens as a matter of religious duty.

An important variation on *dina d'malchuta dina* that provided a basis for expansive Jewish lawmaking and law enforcement outside the regular bounds of *halakhah* was proposed by the fourteenth-century Spanish scholar, Rabbi Nissim Gerondi.[180] According to Gerondi, Jewish religious law as set forth in the Torah and Talmud was never meant to function as the enforceable law of a functioning Jewish society, and it instead serves to bring God's effluence to the world through private observance of *halakhic* norms.[181] In place of Jewish law, Gerondi argues that the Torah contemplates a parallel system of social ordering, which he understands to be a function of the political, rather than religious, realm.[182] Here, Gerondi not only lays out a vision for a means of ordering Jewish society without resort to the hard-to-enforce standards of normative *halakhah*, he goes further by suggesting that Jewish religious law was never supposed to operate as an enforced system for societal ordering.[183]

What Gerondi calls the "King's Law" appears to be a more particularized expression of what in the Talmud is a far more expansive authorization for extra-*halakhic* lawmaking and law enforcement.[184] The Talmud affirms that rabbinic authorities enjoy a kind of extra-legal exigency power to make and enforce laws other than

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[180] *See* Rabbi Nissim Gerondi, Derashot HaRan, 11:3–5 (explaining the authority of judges to punish based on the exigencies of the hour and the needs of the society). For an excellent translation and commentary on relevant portions of Gerondi's discussion of this issue, see 1 THE JEWISH POLITICAL TRADITION, *supra* note 29, at 156–65 (delineating between civil law and religious law in order to establish societal order). *See also* Warren Zev Harvey, *Rabbi Nissim of Girona on the Constitutional Power of the Sovereign*, 29 DINE ISR. 91, 92–94 (2013) (arguing that the king is granted some extrajudicial power by taking into account both utilitarian and teleological factors).

[181] 1 THE JEWISH POLITICAL TRADITION, *supra* note 29, at 158.

[182] *Id.* at 157–58.

[183] Rabbi Nissim Gerondi, Derashot HaRan, 11:5.

[184] Indeed, Gerondi explicitly argues that this doctrine, *see infra* text accompanying note 226, is the practical expression of the king's law-making prerogative in times and places in which Jewish societies possess only judicial, but not executive authority to govern their own affairs. *See* Rabbi Nissim Gerondi, Derashot HaRan, 11:3–4, 8 ("And do not question my view based on [the Talmudic teaching that] . . . 'the rabbinic courts may administer floggings not in accord with the law of the Torah . . .'—which seems to imply that the courts [and not the kings] are appointed to legislate in accordance with the exigencies of the times. This is not correct. For in those times, when there were a Sanhedrin and a king in Israel, the Sanhedrin would judge based on the righteous laws of the Torah and would not institute anything beyond this unless they were empowered by the king to do so. But when there was no king in Israel, the judge came to serve two functions, that of the judge [to administer religious law] and that of the king [to create and implement societal regulations].").

those prescribed by the Torah in order to maintain public order.[185] This doctrine is known as *makin v'onshin shelo min ha-din*, or "hitting and penalizing not on the basis of the law,"[186] and the Talmud invokes this authority to justify a number of rabbinic law enforcement actions that would be otherwise unauthorized under substantive and procedural *halakhah*.[187] The Talmud justifies these seemingly illegal judicial actions as instances of *makin v'onshin shelo min hadin* and includes numerous other normative examples of formally illegal judicial measures without explicitly invoking this principle, which are best understood as instances of the Rabbis exercising this broad exigency authority.[188]

Post-Talmudic authorities understand this doctrine as granting communal authorities broad license to exercise legislative, judicial, and executive powers necessary to preserve social order within the Jewish community.[189] Rabbinic scholars candidly recognized that this power served not to better enforce *Jewish* law in the absence of formal ordination but to enable law-enforcement actions outside the restrictive bounds of substantive and procedural *halakhah*.[190] Rabbi Solomon ben Aderet, a major thirteenth-century Jewish law authority, opined that "if you were to establish [societal order] on the basis of the laws that are fixed in the Torah . . . we would find the entire world destroyed,"[191] and he therefore claimed that enacting extra-legal

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[185] *See* Babylonian Talmud, Sanhedrin 46a (discussing the power to extrajudicially make and enforce laws not found in the Torah). *See generally* ASHER, *supra* note 137, at 2:1–2; KARO, *supra* note 141, at 2:1–2.

[186] Babylonian Talmud, Sanhedrin 46a ("I heard that the court may administer lashes and capital punishment, even when not required by Torah law.").

[187] See discussion *infra* Section IV.A, for examples of rabbinic law enforcement actions that are unauthorized under *halakhah*.

[188] *See*, *e.g.*, Babylonian Talmud, Sanhedrin 81b (authorizing penalties for repeat offenders and criminals that cannot be convicted under Jewish law's high procedural and evidentiary standards); Babylonian Talmud, Bava Kamma 117a (allowing the killing of a Jew who threatened to report another Jew to unjust government tax collectors). *Compare* Babylonian Talmud, Sanhedrin 58b (authorizing the amputation of an assailant's arm as punishment for battery, though formal Jewish law views battery as a civil tort subject only to financial liability for the victim's injury) *with id*. at 27a–27b (impliedly accepting the Exilarch's directive to blind the defendant to a murder charge after an informal investigation not consistent with Jewish law's procedural norms).

[189] KARO, *supra* note 141, at 2 (authorizing courts of law to impose, with or without evidence, financial and physical penalties (including death) if the exigencies of the hour demand it).

[190] MAIMONIDES, *supra* note 75, at 24:4, 10 (stating that this ad hoc rabbinic authority served "[n]ot to contradict the Torah, but to create safeguards for the Torah . . . all as temporary determinations, but not in order to establish the *halakhah* for all time").

[191] 1 THE JEWISH POLITICAL TRADITION, *supra* note at 29, 402–03 (quoting Responsa Rashbah 3:393) (explaining the impracticability of restricting punishment to

standards through the authority of *makin v'onshin shelo min hadin* was a necessary means of "sustaining the world."[192] For both Gerondi and Aderet, as well as others, rabbinic jurisprudence recognizes the possibility—even the necessity—of a normative system of societal law that coexists with the religious teachings of the *halakhah*, which is grounded in policy concerns and which is expected to be inconsistent with both the primary and secondary rules and principles of the Torah and Talmud.[193] This radical doctrine effectively supplants the *halakhah*, which the Torah and Talmud ostensibly present as a comprehensive legal system. It replaces it with a parallel but different system of policy-driven laws, and it was justified in several ways.[194]

Whatever the justification, the expansive doctrine of *makin v'onshin shelo min hadin* combined with the more limited frameworks for extra-*halakhic* law-enforcement described above provides substantial bases for discretionary lawmaking and law-enforcement by rabbinic authorities outside the limiting bounds of standard Jewish religious law. Importantly, such legislative and judicial action was generally premised on the need to use extra-*halakhic* law to create ordered societies rather than on the concern for ensuring Jewish piety and ritual observance. With this basic framework for how rabbinic jurisprudence envisioned law operating in practice, we turn to a closer review of how rabbinic and communal authorities utilized their discretionary lawmaking and law-enforcing powers under Jewish law. As Part IV of this Article will show, they did so with an acute focus on preventing and punishing civil and criminal harms and with a general

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the Torah's penal code exclusively).

[192] *Id.* at 402.

[193] *See, e.g.*, Shimon ben Tzemach Duran, Responsa Sefer HaTashbetz 3:168 ("It is known that thieves do not steal in front of witnesses, such that if we were to only adjudicate cases of theft on the word of eyewitnesses and the like [as is required under Torah law], justice would be ruined. Thus, permission is given to every judge in each generation to erect fences in such matters . . . and even under Talmudic law it is permitted to flog and punish not in accordance with [Torah] law in order to shore up these matters; and all the more so in order to save misappropriated property from those that take it and to rescue the oppressed from oppressors."); Responsa Zichron Yehudah 58 ("It is well known that from the day the Sanhedrin was exiled from the Chamber of the Hewn Stone [on the Temple Mount], the Torah laws governing capital crimes were abolished among the Jews, and thus, all that we judge known is to shore up the breaches of the generation. . . . And the law that we adjudicate in criminal matters are not at all the laws of the Torah . . . ."); Responsa Rashbah 279:2 (attributed to Nachmanides) (explaining the authority of judges to torture and punish financially as needed).

[194] *See* Rabbi Nissim Gerondi, Derashot HaRan, 11:3–5 (explaining the authority of the king to punish, even without prior warning, as he deems fit for the good of the kingdom). See also ASHER, *supra* note 137, at 1:1–2, 1 THE JEWISH POLITICAL TRADITION, *supra* note 29, at 402–03 (quoting Responsa Rashbah 3:393), and Responsa Rashbah 4:311, for various justifications of this doctrine. See TZVI HIRSCH CHAYES, TORAT HANEVI'IM 17–18, for a more modern analysis.

disinterest in using their expansive extra-*halakhic* powers to coerce ritual observance.

IV. FREE EXERCISE IN JEWISH LEGAL PRACTICE

Due to the largely unenforceable character of much of standard Jewish law, rabbinic law enforcement in practice was largely an exercise in and expression of rabbinic discretion. Talmudic and post-Talmudic rabbis made choices about which areas of law they would enforce. Moreover, Talmudic and post-Talmudic scholars made choices about how and when to utilize the broad powers of *makin v'onshin shelo min hadin* to condemn and penalize certain classes of behavior as harmful and worthy of sanction.[195] One of the discretionary threads that appears to run through all these law-enforcement choices was the rabbinic decision to distinguish between strictly religious sins on the one hand, and societal misconduct that caused harm to other people or to the community on the other hand.

Rabbinic legal writings and practices from times and places in which rabbinic and lay authorities enjoyed the authority and power to use force to police their communities suggest that rabbinic law enforcement was broadly consistent with a three-tiered framework. First, throughout Jewish legal history, rabbinic authorities have responded to actions that caused tangible harm to others or threatened the physical well-being of Jewish communities by exercising both legal and extra-legal judicial authority to punish and deter such behavior.[196] These sanctions—which could range from civil liability,[197] criminal fines,[198] imprisonment,[199] and various kinds of corporal punishment,[200] depending on the time, place, and scope of the rabbis' law enforcement

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[195] *See* ASHER, *supra* note 137, at 1:6–13 (discussing rabbinic practices and prudential doctrines used to effectively resolve disputes by circumventing the formal jurisdictional limitations of post-Talmudic rabbinic courts and judges).

[196] *See supra* note 185 and accompanying text.

[197] *See, e.g.*, Babylonian Talmud, Gittin 53a (imposing compensatory liability on priests that invalidate others' sacrificial offerings through their improper state of mind while performing the sacrificial service in order to deter intentional misconduct by priests); ASHER, *supra* note 137, at 1:2–5 (discussing various mechanisms for extracting compensatory payments from tortfeasors in cases where formal Jewish law would not support a finding of legal liability).

[198] *See, e.g.*, Responsa Mahari Weil 28 (fine for assault).

[199] *See, e.g.*, Responsa Zichron Yehudah 36 (imprisonment for tortious assault); Responsa Ritva 159 (prison for theft and destruction of communal property).

[200] *See, e.g.*, Responsa Rivash 251 (execution of two murderers); Responsa Maharam M'Rutenberg 81:1 (Prague ed.) (amputation of a wife-beater's arm); Responsa Zikhron Yehuda 79 (amputation of arms of a man that assaulted a judge); Responsa Rambam 1:71 (Blau ed.) (flogging witnesses for signing a contract without reading it first); Responsa Lekhem Rav 7 (flogging for slander).

power under local non-Jewish law—were designed to coerce compliance with appropriate societal norms.[201] Critically, enforcement measures were utilized whether or not the harmful conduct was technically forbidden by Jewish law and regardless of whether the punishments were technically authorized by the Torah or Talmud.

Second, when conduct fell short of causing or threatening tangible harm to other people or to the community, but nevertheless undercut the religious foundations and commitments that constituted the community as a *Jewish* community, rabbinic authorities typically responded by utilizing social sanctions that effectively asserted the community's right to not associate with individuals that did not share its mission and values.[202] Such measures ranged from social ostracization,[203] to the denial of various rights and privileges associated with membership in the Jewish community,[204] exclusion from participation in communal functions,[205] economic boycotts,[206] and similar steps. Importantly, when dealing with such behavior, rabbinic law enforcement did not aim to compel compliance with Jewish legal norms per se. Religious offenders were left largely free to violate Jewish law, so long as they did not hurt others in the process, but social sanction was used to prevent them from paradoxically maintaining good standing in the Jewish community while at the same time flagrantly rejecting that same community's basic values and commitments.

Third, and perhaps most surprisingly, rabbinic authorities have traditionally taken a rather non-interventionist approach to enforcing strictly religious or ritualistic Jewish law norms and values. While public and flagrant violations of some religious standards could undermine Jewish communal cohesion and were addressed with social sanctions,[207] private ritual offenses that did not tangibly harm others

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[201] *See supra* notes 175–76 and accompanying text.

[202] *See infra* notes 365–67 and accompanying text.

[203] *See* KARO, *supra* note 177, at 334:1–5, 13, 17 (describing devices used for social alienation, including excommunication).

[204] Responsa Maharashdam, Choshen Mishpat 355:2 (discussing the denial of communal voting rights for threatening to inform on Jews to local non-Jewish authorities); Responsa Maharam 383:1 (Prague ed.) (loss of voting rights for assault).

[205] *See* KARO, *supra* note 177, at 334:2 ("One who is shunned . . . is not included in the group of three for reciting the Grace After Meals, and is not included in any ritual practice that requires a quorum."); SCHREIBER, *supra* note 94, at 419 (discussing expulsion from the synagogue as a penalty for misconduct); SIMCHA ASSAF, HA-ONSHIN ACHAR CHASIMAS HA-TALMUD 43 (1922) (exclusion of an offender from being called to read from the Torah during synagogue services).

[206] *See* KARO, *supra* note 177, at 334:2 ("It is also prohibited to provide [economic] benefit to [one that is excommunicated] beyond what is required to sustain his life . . . he is provided only a small shop to sustain his [basic] livelihood.").

[207] *See infra* note 367 and accompanying text.

or impact the community usually were not formally punished.[208] Even when they had the power to do so, rabbinic authorities rarely tried to compel individual Jews to comply with what they regarded as appropriate religious standards of behavior in ritual matters.[209]

Put differently, rabbinic choices about what kinds of Jewish legal norms and values should be enforced and in what ways lay on a spectrum. At one extreme, the harshest coercive penalties were reserved for offenses—whether offenses against formal Jewish law or otherwise—that caused tangible material harm to other people or the community. At the other extreme were private ritual violations, which were condemned by the rabbis but not generally punished in ways designed to stamp out religious dissent or compel compliance with the community's ritual standards. Between these two poles lay a range of other kinds of offensive conduct that could be and was addressed with a variety of other sanctions designed to preserve the character and constitution of Jewish religious communities.

The following sections illustrate this three-tiered approach to rabbinic law enforcement priorities and decisions. Part IV.A discusses the differing approaches taken by Talmudic and post-Talmudic authorities to criminally harmful behavior and ritual sin. Part IV.B carries the argument further by showing that rabbinic authorities took differing approaches to address financial harms and financial sins. Part IV.C illustrates the rabbinic legal practice's hesitancy to enforce ritual obligations in the realm of sexual wrongs. Here, *halakhic* decisors drew distinctions between sexual ethics and sexual morality, zealously penalizing sexual harms committed against others while generally declining to forcefully punish consenting adults for purely immoral sexual sins. In these three parts, we find that while rabbinic authorities actively policed actions that harmed others, they rarely used their substantial discretionary judicial powers to penalize or prevent ritual sin per se. Finally, Part IV.D notes that rabbinic reluctance to use judicial power to coerce ritual compliance should not be taken to indicate that rabbis were indifferent to their constituents' religious piety. Rabbinic authorities and Jewish communities have used—and to some extent still do use—a variety of kinds of social pressure to communicate disapproval of various kinds of irreligious behavior by members and to exclude some kinds of sinners from participation in the religiously-grounded Jewish community. Still, as

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[208] *See infra* note 365 and accompanying text.

[209] *See infra* Section IV.A. For some notable contrary examples, see Responsa Rambam 2:349 (Blaud ed.) (flogging a priest for disobeying a court order to divorce a woman he had married in violation of a ritual law prohibiting a priest from marrying a divorcee). *See also* SCHREIBER, *supra* note 94, at 412 (flogging for suspected heresy); Shibolei Haleket 60 (expulsions from the synagogue for violating the Sabbath).

this discussion points out, such shunning and excommunicative measures are best understood as expressions of Jewish communities' rights of association rather than as means of compelling ritual orthodoxy and orthopraxy.

Before turning to these specific illustrations of how rabbinic law enforcement worked in practice, it is important to appreciate what this rabbinic model of religious enforcement did. In deciding how and when to use coercion to enforce legal norms, rabbinic authorities made conscious decisions, for the most part, to not seek to compel Jewish compliance with Jewish religious norms. The exceptions to this were when religious dissent was public and flagrant, and undermined the religious constitution of the community, as well as in cases where ritual violations caused material harms to others or to the community. In effect, rabbinic law enforcement practices thus tended to carve out significant room for the free exercise of religion. Informal social sanctions and the secondary consequences of the community's decision to not associate with those who rejected its values did not fundamentally alter the basic position that sinners were free to sin and that the rabbis would typically refuse to force normative religious observance, even when they had the power to do so.

A. Criminal Harms and Ritual Sins

Coercive Jewish law enforcement finds its apex in rabbinic responses to the kinds of behaviors that modern legal systems characterize as crimes. The jurisprudence of the Torah and Talmud does not recognize a distinct category of criminal law.[210] As mentioned earlier, rabbinic thought divides Jewish law into "laws between a person and God" and "laws between a person and their fellow."[211] Still, while Jewish jurisprudence does not include a distinct area of criminal

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[210] Criminal law in the Anglo-American legal tradition is substantially demarcated by the fact that certain kinds of actions are deemed to be not merely private harms to individual victims, but offenses against society as a whole. *See* WAYNE R. LAFAVE, CRIMINAL LAW 16 (5th ed. 2010). Jewish law, from the Torah through the Talmud, does not recognize a cohesive class of such distinctly social harms that public prosecutors are tasked with correcting. *See* STEINSALTZ, *supra* note 41, at 163. Instead, many offenses that Western legal systems would view as criminal—theft, battery, and rape, among others—are viewed as private offenses to be corrected by restitution to the victim. Other offenses, such as murder, are held to be outside the realm of purely private harms and cannot be forgiven by the victims (or their families), but they are also not prosecuted by the state as representative of the public interest. *See* Daniel J.H. Greenwood, *Restorative Justice and the Jewish Question*, 21 UTAH L. REV. 533, 556 (2003) ("Jewish law does not make our careful distinction between tort and criminal law . . . .").

[211] *See supra* note 50 and accompanying text.

law, rabbinic legal practice from Talmudic times onward tended to recognize intentional violations of others' lives, bodily integrity, and property as particularly offensive and deserving of serious penalties.[212] Indeed, the Talmudic Rabbis routinely used their discretionary judicial powers to go outside the bounds of standard *halakhah* and penalize criminal conduct on the basis of its material harmfulness rather than its religious sinfulness.

As discussed above, it is exceedingly difficult to secure convictions of criminal defendants under formal Torah law.[213] The Mishnah therefore prescribes that in cases where a rabbinic court is thoroughly convinced of an alleged murderer's guilt but lacks sufficient evidence to meet the burdensome standard of proof imposed by Torah law, the court may convict and sentence the defendant to harsh imprisonment designed to hasten his death.[214] Here, the imprisonment and death of the defendant are authorized to control the danger posed by the murderer even though incarceration is not a penalty contemplated by the Torah,[215] and the Torah's rules of evidence do not authorize the defendant's conviction, much less his death.[216] In another passage, the Talmud discusses the appropriate penalty for battery,[217] which the Torah itself classifies only as a tort for which an assailant must pay compensatory damages.[218] Contravening the Torah's rule, the text records that the Talmud sage Rav Huna ruled that an assailant should have his hand amputated[219] and that at least one Talmudic sage actually applied this rule in practice, ordering a criminal assailant's

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[212] *See, e.g.*, RABBI YOM-TOV LIPMAN HELLER, TOSAFOT YOM TOV ON MISHNAH MAKKOT 1:10 (Vilna 1913) (1617) (s.v. *af hein marbim shofchei damim b'yisrael*) (explaining that the Rabbis were more zealous in condemning and penalizing murder than sinful, consensual sex like adultery because the former is "bad for both Heaven and earthly creation," as opposed to the latter, which is ritually sinful, but not materially harmful).

[213] *See supra* note 154 and accompanying text.

[214] *See* Mishnah Sanhedrin 9:5 (describing the punishment for repeat offenders, which included the offender being locked in a vaulted chamber until he starved to death).

[215] While the Torah contemplates imprisonment as a means of detention of a criminal defendant pending trial, *see Numbers* 15:34 (example of imprisonment in the Torah), it does not prescribe incarceration as a punishment for any offenses, *see generally* THE PRINCIPLES OF JEWISH LAW, *supra* note 126, at 536–38 (explaining imprisonment from the Torah and Talmud perspectives).

[216] *See* Babylonian Talmud, Sanhedrin 81b (outlining how the Torah's evidentiary rules prevent conviction for murder).

[217] *See* Babylonian Talmud, Sanhedrin 58b (discussing examples of penalties for battery).

[218] *See Exodus* 21:18–19 (monetary fine for battery); Babylonian Talmud, Bava Kamma 28a (showing that the punishment for battery is payment of damages).

[219] *See* Babylonian Talmud, Sanhedrin 58b (stating that if one habitually raises his hand to strike another, his hand should be cut off).

hand cut off.[220] The Talmud further notes that the same penalty may be imposed in cases of attempted battery, though Torah law does not recognize attempted crimes as punishable.[221] Thus, for the Rabbis of the Talmud, injurious behaviors warranted criminal sanctions even when the Torah itself did not authorize such penalties, even when it explicitly proscribed such actions.

Post-Talmudic authorities continued to use extra-*halakhic* judicial powers to deter and severely penalize conduct that harmed or endangered others' lives, bodies, property, or the Jewish community.[222] One of the more serious and regularly punished crimes in pre-modern Jewish communities was *mesirah*, the act of informing on Jews to unjust non-Jewish authorities.[223] *Mesirah* is not punishable under Torah law; standard *halakhah* does not impose liability for indirect

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[220] *See id.* (stating that Rav Huna cut off someone's hand as punishment for striking another).

[221] *See id.* ("One who raises his hand to strike another, even if he ultimately [did] not strike him . . . Rav Huna says: His hand should be cut off . . . [and] Rav Huna [did indeed] cut off the hand [of an attempted assailant]."); THE PRINCIPLES OF JEWISH LAW, *supra* note 126, at 469–72 (discussing Jewish law not punishing attempted crimes); *see also, e.g.,* Babylonian Talmud, Sanhedrin 27a–b (recording Rev Abba bar Ya'akov's willingness to carry out the order of the Exilarch to blind an accused murderer, though ultimately there was insufficient evidence to do so); Babylonian Talmud, Bava Metzia 24a ("A silver goblet was stolen from the host of Mar Zutra Hasida [the Pious. Later,] Mar Zutra saw a certain student of Torah who washed his hands and dried them on the cloak of another [friend]. Mar Zutra said: This is the one who [stole the cup, for he has no consideration] about the property of [his friend. Mar Zutra] bound that student [to a post and coerced him], and the student then confessed [to the crime].").

[222] *See, e.g.*, SCHREIBER, *supra* note 94, at 378 (discussing case studies of extra-*halakhic* punishments).

[223] *See* THE PRINCIPLES OF JEWISH LAW, *supra* note 126, at 507–09 (defining informer within the context of Jewish society). Maimonides' summation of the legal consequences of "informing" attests to the severity of the offense in medieval Jewish thought:

> It is prohibited to hand a Jew—whether his body or his money— over to an idolater, and this is true even if he is sinful, and even if he is responsible for causing distress and pain. Anyone [that does so] . . . has no share in the world to come.
>
> An informer may be killed anywhere, even today when rabbinic courts do not try capital cases. It is permissible to kill him before he has informed, for once he says that he intends to inform against a person or his property . . . he has given himself over to death.

MAIMONIDES, MISHNEH TORAH, ONE WHO INJURES A PERSON OR PROPERTY 8:9–10 (Philip Birnbaum ed., Hebrew Publ'g Co. abr. ed. 1967) (1178). *See generally* Joseph Jacobs & Meyer Kayserling, *Moser, in* 9 THE JEWISH ENCYCLOPEDIA 42, 42–44 (Cyrus Adler et al. eds., 1905) (defining "moser," which is the Jewish word for an informer).

harms[224] and maintains that even direct injuries caused by speech alone cannot be judicially sanctioned.[225] Moreover, standard Jewish law does not permit the preemptive prevention of wrongful acts not yet completed.[226] Nevertheless, in light of serious dangers posed by informers in anti-Semitic political and social contexts, rabbinic authorities affirmed that informers needed to be stopped in order to protect the individuals and communities endangered by their actions.[227] Standard *halakhic* codes prescribed that informers should be killed to prevent them from informing on others,[228] and rabbinic responsa from the era are replete with cases in which such penalties were indeed carried out.[229]

Harsh, extra-*halakhic* measures were also used to deal with other kinds of criminal behavior that rabbinic and communal authorities viewed as harming the material well-being of other people—whether Jewish or not—or of the Jewish community as a whole. In pre-modern Jewish communities, murderers were typically killed or maimed,[230]

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[224] *See* Irene Merker Rosenberg et al., *Murder by* Gruma*: Causation in Homicide Under Jewish Law*, 80 B.U. L. REV. 1017, 1021 (2000) ("A rabbinic court cannot convict a person of murder unless that person caused the victim's death directly and not by a *gruma* or indirect cause." (internal footnotes omitted)); Neil Weinstock Netanel, Maharam of Padua v. Giustiniani*: The Sixteenth-Century Origins of the Jewish Law of Copyright*, 44 HOUS. L. REV. 821, 858 (2007) ("Jewish law holds that causing harm indirectly (the Hebrew term is 'grama') gives rise to no legal liability . . . ."); *supra* note 223 and accompanying text (explaining that *mesirah* is not punishable under Torah law).

[225] *See* Babylonian Talmud, Sanhedrin 10a (referring to "bearing false witness" as "a [sin] that does not involve an action," for which there is no judicial penalty); *Sefer Hachinukh 236:4*, SEFARIA, https://www.sefaria.org/Sefer_HaChinukh.236?lang=en (last visited Sept. 15, 2021) (making the same point regarding the sins of gossip and slander).

[226] *See* THE PRINCIPLES OF JEWISH LAW, *supra* note 126, at 471 (stating that no offense is committed unless the criminal act is completed).

[227] *See, e.g.*, Babylonian Talmud, Berakhot 58a (recommending killing anyone who threatens your life); Babylonian Talmud, Bava Kamma 117a (validating physical harm to protect Jewish property); Responsa Rosh 17:1 (explaining what to do with informers); KARO, *supra* note 66, at 388:10 (justifying violence against an informer even if they cannot be warned); YECHIEL MICHEL EPSTEIN, ARUKH HASHULCHAN, CHOSHEN MISHPAT 388:8–10 (Vilna 1929) (1905) (providing examples of rabbinic authorities dealing with informers); *see also* SCHIFFMAN, *supra* note 42, at 60–66, 70, 79–91 (providing social and political context that informers posed a danger because of the specific religious conflict the Jews were facing); *see generally* Rabbi Michael J. Broyde, *Informing on Others to a Just Government: A Jewish Law View*, 41 J. HALACHA & CONTEMP. SOC'Y 5, 5–7, 48 (2002) (discussing the applicability of the doctrine of *mesirah* in modern times and in just legal systems).

[228] *See* MAIMONIDES, *supra* note 223, at 8:9–10 (providing *halakhic* codes that required informers to be killed).

[229] *See, e.g.*, Responsa Rosh 17:1, 8 (showing examples of rabbinic leaders approving capital punishment for informers); Responsa Tashbetz 3:158 (same).

[230] *See* Babylonian Talmud, Bava Kamma 83b–84a (showing examples of murderers being maimed and killed in pre-modern Jewish communities).

and individuals convicted of battery or assault were flogged,[231] had limbs amputated,[232] or were fined.[233] The authority of communal rabbinic courts to police antisocial behavior was reinforced by harsh penalties for contempt. Those who refused to comply with court orders faced financial and corporal penalties designed to compel compliance and deter others from ignoring judicial orders in the future.[234]

Notably, like the Talmudic penalties and adjudication of *mesirah* discussed above, these pre-modern punishments ran counter to standard Torah rules.[235] Importantly, these criminal sanctions were applied to offenders who caused material harm to others without regard for whether their conduct was technically prohibited by *halakhah*.[236] Similarly, the ways cases were adjudicated and the kinds of penalties imposed were routinely outside the bounds of standard Jewish religious law.[237] Offenders were punished after being convicted in trials that rarely—if ever—conformed to the formal jurisdictional, evidentiary, and procedural demands of Torah law. Circumstantial

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[231] *See, e.g.*, Responsa Maharam 81:1 (Prague ed.) (stating that one who batters his wife may be punished by lashes); Responsa Mahari Weil 28 (flogging for assault and battery); Responsa Divrei Ribbot 167 (flogging one convicted of assault and battery after the defendant attacked the victim for taking his seat in the synagogue).

[232] Other penalties for assault included fines not connected to compensatory payments to the victim and forcible banishment from the jurisdiction. *See* SCHREIBER, *supra* note 94, at 407–09, 418–19 (providing examples of amputation, gouging one's eyes, and banishment as punishment); Responsa HaRivash, 251:1 (giving examples of amputation resulting from battery and assault). *See generally* Ephraim Kanarfogel, *The Adjudication of Fines in Ashkenaz During the Medieval and Early Modern Periods and the Preservation of Communal Decorum*, 32 DINÉ ISR. 159, 162–64 (2018) (detailing penalties, including fines and banishment).

[233] *See* Kanarfogel, *supra* note 232, at 173–74 (providing examples of murderers being fined).

[234] *See Contempt of Court,* JEWISH VIRTUAL LIBR.: A PROJECT OF AICE, https://www.jewishvirtuallibrary.org/contempt-of-court (last visited Aug. 8, 2021) (detailing how authorities dealt with people who were in contempt of court).

[235] *See Homicide*, JEWISH VIRTUAL LIBR.: A PROJECT OF AICE, https://www.jewishvirtuallibrary.org/homicide (last visited Aug. 7, 2021) (comparing the categories and punishments of murder between the Torah and the Talmud).

[236] *See generally* KARO, *supra* note 170, at 2:1 (commenting on the context of criminal punishments and explaining the extra-*halakhic* punishments that people were applying).

[237] *See id.* (explaining that people were being punished with death sentences that were not from the Torah).

evidence was accepted,[238] judges lacked formal ordination,[239] defendants could be convicted on the basis of their own admissions without having first been warned against committing the crime,[240] judicial decision-making was more flexible,[241] and opportunities for appeal were often limited.[242] Moreover, many punishments ran counter to Torah law prescriptions.[243] In other words, rabbinic criminal law enforcement occurred within the extra-*halakhic* discretionary framework of *makin v'onshin shelo min hadin*. In meting out penalties for crimes, pre-modern rabbinic authorities relied on their exigent judicial powers. Understanding how rabbis elected to use these powers helps clarify rabbinic priorities; these were not law-enforcement measures that religious scholars believed the Torah and Talmud

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[238] *See* ASHER, *supra* note 137, at 2 ("And it seems [to me that permission to punish crimes exists] even if there is not eyewitness testimony, which is required for conviction [under Torah law] at times where the courts adjudicated corporal penalties [as a matter of law], but where there is only circumstantial evidence or persistent rumors . . . ."); YOEL BEN SHMUEL SIRKES, BACH, CHOSHEN MISHPAT 2 (examples of *v'nireh she'afilu ein b'davar eidut*); Responsa Rosh 18:13 (ordering punishment in a case based on circumstantial evidence without eyewitness testimony).

[239] As discussed earlier, all rabbinic judges in the post-Temple world lacked the formal ordination required of judges under Torah law. *See supra* note 137 and accompanying text.

[240] *See Evidence*, JEWISH VIRTUAL LIBR.: A PROJECT OF AICE, https://www.jewishvirtuallibrary.org/evidence (last visited Aug. 5, 2021) (outlining the evolution of evidentiary standards that led to reduced requirements needed to convict); Responsa Rashbah 3:393, *supra* note 29 (authorizing convictions of defendants that were not warned prior their committing crimes).

[241] *Compare supra* note 138 and accompanying text (discussing the formal Jewish law's formalistic and defendant-favoring decision-making processes), *with* FALK, DRISHA TO ABRAH TURIM, CHOSHEN MISHPAT 1:2 (Vilna 1923) (1620) (illustrating post-Talmudic authorities routinely endorsing the idea that judges can and should punish criminal conduct based on their own properly deliberative—but nonetheless instinctual—impressions of the issue). It is worth noting that in virtually all the cases of rabbinic criminal law enforcement discussed above, decisions about guilt and punishment are being made through the informal process of seeking the legal opinion of a prominent Jewish law authority, rather than exclusively through the formal judicial processes described in the Talmud. *See* KARO, *supra* note 170, at 2:1 (arguing against judges adopting the defendant-favoring perspective of formal Torah law, and instead urging them to focus on maintaining law and order).

[242] *See* J. David Bleich, *Contemporary Halakhic Problems, Vol IV, Chapter 2*, SEFARIA (1995), https://www.sefaria.org/Contemporary_Halakhic_Problems,_Vol_IV (explaining the inadequate appeal process in the Jewish Legal System).

[243] *Compare Numbers* 15:32–36 (representing the only permissible instance of imprisonment in the Torah, which involved holding a religious offender until the appropriate penalty was revealed to Moses by God), *with* Mishnah Sanhedrin 9:5 (showing imprisonment as an extra-legal measure for repeat offenders or for those who cannot be convicted of crimes that they almost certainly committed but were hard to prove due to the high evidentiary burdens imposed by Torah law). "Imprisonment was one of the most common sanctions employed by Jewish decision-makers in the Middle Ages." SCHREIBER, *supra* note 94, at 412.

required them to implement but were police actions that they chose to pursue for what they believed were important ends.

The rabbis' reliance on their expansive judicial powers under the doctrine of *makin v'onshin shelo min hadin* meant that they could have penalized the broad spectrum of wrongful behaviors proscribed by Jewish law. In practice, however, while Talmudic and pre-modern *halakhic* authorities routinely sanctioned criminally harmful acts—whether or not the conduct technically warranted such punishment under Torah law—they generally declined to penalize sinful behavior that did not injure or endanger others, even when such actions were clearly proscribed by the Torah.

In contrast to the numerous cases of extra-*halakhic* law-enforcement actions discussed above, Talmudic sources record only very few instances in which purely ritual sins resulted in perpetrators being subject to coercive penalties by rabbinic authorities.[244] Notably, the Rabbis' actions in many of these cases can be understood as responding to some material harm caused by the sinful act in question rather than as punishment for the sin itself. Some of these cases are recorded as part of the Talmud's principal discussion of the *makin v'onshin shelo min hadin* doctrine.[245] In one example, the Talmudic scholar Shimon ben Shetach is said to have executed eighty witches on one day in the city of Ashkelon[246]—despite the standard rabbinic rule that a court may not carry out more than one death sentence per day.[247] The Talmud, however, emphasizes that Shimon ben Shatah was called upon to kill these sorceresses because they were "destroying the world."[248] The issue was not the biblical sin of witchcraft per se, but the fact that these witches were acting destructively. In the same passage, the text records that a man was executed by stoning for the ritual offense of riding a horse on the Sabbath despite the fact that horseback riding is not one of the forbidden Sabbath activities for which the Torah prescribes the death penalty.[249] The Talmud clarifies, however, that

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[244] *See supra* notes 238–42 and accompanying text (examples of cases with extra-*halakhic* law-enforcement); *infra* notes 246–53 and accompanying text (examples of moral sins punished by rabbinic authorities).

[245] *See* Babylonian Talmud, Sanhedrin 44b–46a (providing examples of punishments that had no basis in law but were carried out nonetheless).

[246] Mishnah Sanhedrin 6:4.

[247] *Id.*

[248] *Id.* (justifying the use of multiple capital punishments in a single day because of "unusually pressing circumstances").

[249] *See* Babylonian Talmud, Sanhedrin 46a (detailing the execution). While the Torah prescribes the death penalty for those that intentionally perform biblically proscribed forms of labor on the Sabbath, horseback riding is not one of the thirty-nine kinds of labor that the Torah forbids on the Sabbath. *See* Mishnah Shabbat 7:2 (listing prohibited Sabbath labors). Instead, riding a horse on the Sabbath is only prohibited as

this incident took place during a period of religious persecution, when Jews were waging a war against the Seleucid Empire—and some of their own defecting coreligionists—to secure the right to practice Jewish law.[250] In this context, riding a horse on the Sabbath—a violation of rabbinic, though not biblical law—was more than a sin: it was an act of treason that undermined the Jewish national effort to counter foreign cultural and political domination.[251] In a third example, a man was whipped for having sex with his own wife in public, despite the fact that the Torah contains no explicit prohibition against such activity.[252] Here too, the sin in question was not a moral wrong (or prohibited by the Torah), but it was a breach of public order that the Rabbis thought should be penalized for social reasons.[253]

Elsewhere, the Mishnah instructs that "[o]ne who was repeatedly flogged should be placed in a cell by the court and fed barley bread until their stomach bursts."[254] The Talmud explains that this rule is referring to a defendant who is guilty of repeatedly committing a sin that is punishable by death at the hands of heaven rather than by any judicial penalty.[255] According to the Talmud, an established pattern of violations demonstrates the sinner's defiant opposition to God; since he has forfeited his life to divine retribution in any case, a *beit din* is authorized to save the sinner from himself by incarcerating him unto death.[256]

In still another case, the Talmud reports that Rabbi Nachman flogged a groom who, on the morning after his wedding, brought his new wife to court claiming that he had discovered that she was not a virgin.[257] In ordering the punishment, Rabbi Nachman explained that the man's claim suggested he was sexually experienced, which further

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a consequence of rabbinic legislation, which was enacted to help prevent riders from inadvertently tearing a twig from a tree—which is a biblically proscribed Sabbath labor—to use as a riding crop. *See* Babylonian Talmud, Beitzah 36b (prohibiting horseback riding through rabbinic decree).

[250] *See* SCHIFFMAN, *supra* note 42, at 60–66, 70, 79 (discussing the period of religious conflict between ancient Jews and the Seleucid Empire).

[251] *See* Babylonian Talmud, Sanhedrin 46a (distinguishing between policing moral sins and controlling societal order); SCHIFFMAN, *supra* note 42, at 60–66, 70, 79–81, 84, 86–91 (discussing how Jews may have acted treasonously during the period of religious conflict between the ancient Jews and the Seleucid Empire).

[252] *See* Babylonian Talmud, Sanhedrin 46a (detailing the incident).

[253] *See id.* (explaining that the Torah does not prohibit sex in public, but the Rabbis punished him regardless because they believed the social circumstances required it).

[254] Mishnah Sanhedrin 9:5.

[255] Babylonian Talmud, Sanhedrin 81b.

[256] *See id.*

[257] Babylonian Talmud, Ketubot 10a.

indicated that he frequented prostitutes.[258] Here too, however, the flogging appears to have been administered not as a punishment for the groom's apparent past sexual sins. Instead, some commentators note that Rabbi Nachman aimed to sanction the young man for impugning his new wife's reputation with an unfounded and unprovable accusation.[259] The groom was penalized for materially harming his wife, not for engaging in religiously proscribed sexual immorality.

The Talmud not only suggests that the Rabbis were interested in punishing sin in cases where moral wrongs produced material harms, but also, in at least one case, endorses penalizing those who sought to enforce purely ritual standards of conduct. The Talmud records one incident in which the sage Adah bar Ahavah saw a woman walking in the market with what he adjudged to be an immodestly ostentatious cloak.[260] In response to this sinful breach of religious modesty standards, the rabbi tore the cloak from the woman.[261] The Rabbis determined that Adah bar Ahavah's impertinent act was improper and held him liable to pay 400 *zuz* to his victim for her embarrassment.[262]

In the post-Talmudic era, too, rabbis generally declined to prosecute and punish Jews for personal religious failings so long as those sins did not harm others or undermine the social structures of the Jewish community. Recorded instances of rabbinic courts meting out coercive punishments for purely ritual sins are far less common than instances of penalizing criminal behavior. Ephraim Kanarfogel has documented widespread nonobservance of several basic ritual practices among medieval Jews.[263] Rabbis responded to these religious lapses in a number of ways, but there is little indication that coercive measures were used to try to force Jews to more scrupulous observance.[264]

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[258] *Id.*

[259] *See* RASHI, *supra* note 65, at 10a; Yam Shel Shlomo, Ketubot 10a.

[260] Babylonian Talmud, Berakhot 20a.

[261] *Id.*

[262] *See id.* (describing the outcome of the incident). Commentators disagree about how to understand this incident. For two competing interpretations, compare RASHI, RASHI ON BERAKHOT 20a (1105) (s.v. *dalet me'ot*) (explaining that Rav Adah bar Ahavah would have avoided liability had he stopped to confirm whether the woman was Jewish prior to grabbing the cloak), with Responsa Teshuvot Vehanhagot 1:368 (interpreting the Talmudic story as teaching that Rav Ada bar Ahavah should have waited to influence the woman to adopt more appropriate dress through other means rather than attempting to coerce her into religious compliance).

[263] Ephraim Kanarfogel, *Rabbinic Attitudes Toward Nonobservance in the Medieval Period, in* JEWISH TRADITION AND THE NONTRADITIONAL JEW 3, 3, 7 (Jacob J. Schachter ed., 1992).

[264] *Id.* at 3, 7–12 (describing various examples of nonobservance of rituals and rabbinical responses that included increased preaching and teaching on the subjects but

Like the Talmudic cases penalizing ritual sin, many of the most prominent examples of medieval rabbinic penalties for moral or religious offenses are best understood as reflecting a primary concern for public order and safety. In one well-known case adjudicated by Rabbi Asher ben Yechiel, Abraham Safi'a was accused of blasphemy by several witnesses.[265] Safi'a had been recently released from prison, and one of his friends had gone to his home to visit with him.[266] Upon entering the courtyard and seeing the defendant, the friend exclaimed, "Blessed is the One that releases prisoners," a blessing the Talmud rules should be recited when seeing someone safely released from unjust incarceration.[267] In response to the blessing, however, Safi'a cursed God, a serious sin for which the Torah prescribed the death penalty.[268] Rabbi Asher directed that it would be appropriate to cut out Safi'a's tongue as punishment for his blasphemous utterance.[269] A careful reading of Rabbi Asher's responsum suggests, however, that the rabbi's main concern was not sanctioning the sin of blasphemy but harshly responding to an act that placed the Jewish community in serious danger. In responding to the query, Rabbi Asher notes that Safi'a blasphemed in Arabic rather than Hebrew, suggesting that this was not merely a matter of ritual concern to the Jewish community, but it became a broader scandal to which the local Muslim community and ruler took great offense.[270] The local governor might repeal the Jews' judicial autonomy over their own community if he adjudged their own response to this grievous sin too lenient. A loss of Jewish communal autonomy, Rabbi Asher writes, would be disastrous: "For

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were absent any physical punishment). To be clear, my argument here is not that pre-modern rabbinic authorities and Jewish communities never punished ritual sins or attempted to apply coercive measures to compel Jews to comply with ritual norms. There are indeed examples in Talmudic and post-Talmudic sources of penalties meted out for ritual sins. *See infra* note 288 and accompanying text; *see also, e.g.*, Babylonian Talmud, Berakhot 58a (describing how a man was lashed for having sex with a non-Jewish woman); Simcha Assaf, Ha-Onshin Achar Chasimas Ha-Talmud 57 (1922) (recording Rav Hai Gaon ordering lashes for intentional Sabbath violations); *id.* at 59 (recording a ruling by Rabbenu Chananel authorizing the flogging of one that lit a flame on the Sabbath); *id.* at 62 (lashes for heresy); *id.* at 81 (lashes for repeat adultery); Responsa Yachin U'Boaz 1:143 (chastising a local judge for flogging and publicly humiliating a woman based on circumstantial evidence of adultery). At the same time, it seems clear that the primary emphasis of rabbinic coercive law enforcement efforts in the pre-modern world was on punishing and deterring criminal, rather than ritual, misconduct. *See generally* Simcha Assaf, *supra* note 264.

[265] *See* Responsa Rosh 17:8 (recounting the charges).

[266] *Id.*

[267] Responsa Rosh 17:8; Babylonian Talmud, Berakhot 54b.

[268] Responsa Rosh 17:8; *see Leviticus* 24:10–16 (prescribing the death penalty for a blasphemer).

[269] Responsa Rosh 17:8.

[270] *Id.*

how much blood would be spilled if we were to be subject to the judgment of the Muslims?"[271] Ultimately, Rabbi Asher's willingness to punish Safi'a's blasphemy revolved around the dangers posed by not sanctioning the sin rather than the moral wrong of the sin itself.

Admittedly, the Talmud does state that a Jew may be forced to fulfill a *mitzvah*, or ritual duty. It teaches that, while Jewish law contemplates only limited penalties for violating Torah prohibitions, as much force as necessary may be used to compel a Jew to fulfill a ritual obligation.[272] "If they say to him, 'fulfill the obligation of *sukkah*,' but he refuses to do so, or 'perform the obligation of *lulav*,' and he does not do so, they hit him until [he fulfills his religious obligation or until] his soul leaves him."[273] However, this sweeping permission to coerce ritual piety is subject to several important doctrinal and practical limitations. As a result, while Talmudic law may direct that Jews be compelled to religious observance *in theory*, rabbinic jurisprudence renders such compulsion impossible in practice. Some commentators rule that the Talmud's permission to coerce *mitzvah* performance applies only to rabbinic courts staffed by formally ordained judges.[274] Since, as discussed above, biblical *semikhah* lapsed during the second century A.D., this view rejects the possibility of enforcing ritual obligations in

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[271] *Id. See generally Muslim Spain (711–1492)*, BBC, https://www.bbc.co.uk/religion/religions/islam/history/spain_1.shtml (last updated Sept. 4, 2009) (noting how non-Islamic people living in Islamic-controlled nations had few legal rights and often faced increased persecution if they failed to follow Islamic rules).

[272] *See* Babylonian Talmud, Ketubot 86a–b (contrasting the use of force to coerce the performance of ritual obligations with the Torah's mandate to penalize violations of ritual prohibitions). Under Torah law, the penalties for ritual violations are limited: one might be subject to a set number of lashes for sins that carry the punishment of flogging, to a fixed-sum monetary fine, or to other sanctions. In all such cases, however, once the prescribed penalty is imposed, the sinner is not subject to further punishments—even if they remain unrepentant. When it comes to a person's refusal to perform ritual obligations, however, the Talmud adduces that the Torah permits subjecting that person to as much coercive force as necessary to effect their performance of the required ritual. *See* Shita Mekubetzet, Ketubot 86a (s.v. *l'didan*) ("When do we say that we only flog thirty-nine lashes—that is with respect to violating ritual prohibitions. But if one is obligated to perform a positive ritual obligation and does not wish to do so, we strike him [as necessary] so that he will do it.").

[273] Babylonian Talmud, Ketubot 86a–b. "The obligation of *sukkah*" refers to the biblical obligation to build and dwell in a temporary hut during the fall holiday of *Sukkot*. *See Leviticus* 23:41–43 (requiring the Hebrew people to build and dwell in temporary booths in celebration to the Lord). "The obligation of *lulav*" refers to the biblical prescription to "take" four plant species, including the *lulav*, or palm frond, in celebration of the *Sukkot* holiday. *See Leviticus* 23:39–41 (requiring the Hebrew people gather the plants).

[274] Bayit Chadash *to* Arbah Turim, Choshen Mishpat 1:3; RABBI ARYEH LEIB HELLER, KETZOT HACHOSHEN 3:2 (1796). *But see* Responsa Rashbah 4:264; Responsa Chatam Sofer, Choshen Mishpat 177 (ruling that coercion to perform ritual duties can be implemented by non-ordained judges).

practice. At least one major rabbinic codifier of Jewish law ruled that coercion may only be applied in cases where a Jew has made a public declaration flagrantly declaring a religiously obligatory *mitzvah* null and void.[275] On this view, the Talmudic rule does not permit religious policing of Jews' private observance, and coercion can easily be avoided without necessarily having to perform religious duties against one's will. Other rabbinic scholars maintain that the imperative for rabbinic courts to force Jews to perform religious obligations applies only in situations in which such pressure will result in the *mitzvah* being done willingly[276] or where religious pressure will result in greater genuine religious commitment by those being coerced.[277] On these views, opportunities for the kind of religious pressure authorized by the Talmud would be substantially limited.

In actual practice, it appears that the use of force to coerce Jews to fulfill religious obligations was generally limited to instances in which their failure to do so would injure others. One notable example relates to the biblical *mitzvah* of *chinukh*, the Torah-based obligation of parents to teach their children about Jewish law, practice, and belief.[278] The Talmud expands this duty to include not only strictly religious and scriptural education but also vocational training and life skills.[279] This basic religious duty, aimed at ensuring Jewish continuity from one generation to the next, animates many Jewish rituals and customs. The *mitzvah* to educate is not merely ritualistic, however. The obligation reflects an appreciation of the fact that people cannot be fully participating members of the Jewish community unless they

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[275] *See* RAMBAN (NACHMANIDES), COMMENTARY ON THE TORAH: EXODUS 310 (Rabbi Dr. Charles B. Chavel trans., 1973) (arguing that the Torah permits coercing a Jew "until he accepts upon himself the *obligation* to do [the *mitzvah*]," not until the time he *completes* that obligation, suggesting that religious coercion may be used not to force an individual to observe a religious practice, but to compel a heretical member of the Jewish community to accept that a given *mitzvah* is in fact religiously mandatory (emphasis added)).

[276] *See, e.g.*, RASHI, RASHI ON LEVITICUS 1:3 (1934) (1105) (s.v. *yakriv otoh*) ("This teaches that we coerce him. You might think that this can be done against his will; therefore, the verse states, 'according to his will.' How can that be? It means that he can be coerced until he declares his genuine willingness [to perform the ritual obligation].").

[277] *See, e.g.*, OHR SAME'ACH TO MISHNAH TORAH, THE LAWS OF REBELS 4:7 ("That which we strike him [to fulfill a ritual duty] . . . this is because he will actually fulfill the ritual duty . . . but if it is apparent that the pressure would not cause him to perform the obligation, then it is prohibited to touch even one hair on his head, for what will be gained—the ritual will still remain unperformed.").

[278] *Deuteronomy* 6:7.

[279] *See* Babylonian Talmud, Kiddushin 29a (describing an obligation for a father to teach his child how to swim); *id.* (describing an obligation to teach one's child a trade so that he does not resort to thievery).

receive an adequate Jewish education as children.[280] The law also recognizes that children without vocational and life skills will have a hard time securing gainful employment, managing households, and participating in other activities necessary to living successful lives.[281] Given the serious material concerns at play in educating children, and the serious disadvantages uneducated people face, the *halakhah* rejects the notion that parents' decision to fulfill their religious duty to educate could be left to their own conscience. Instead, communal authorities must, if necessary, compel parents to educate their children, and if this is not possible, public funds must be collected and appropriated for that purpose.[282] Thus, the major sixteenth-century codifier Rabbi Moses Isserles prescribed, "We compel a person to hire teachers for his children; and if he is not present in the city but has assets . . . we seize his assets [in his absence] and hire teachers for his son."[283]

Contrasting the *halakhah*'s approach to the duty to educate one's children with the obligation to educate oneself further highlights the law's central concern with preventing material harm to others. Adult Jews are religiously obligated to set aside regular times to study the Torah.[284] This duty to engage in Torah study is framed as an extension of the duty to educate children,[285] and like educating children, adult learning is a central feature of Jewish religious life.[286] Yet the importance of adult learning notwithstanding, and in contrast with its approach to educating children, rabbinic law does not provide for forcing adults to self-educate.[287] The reason for this distinction seems straightforward: while one's failure to fulfill the ritual duty to educate his or her children will actually harm those children, an adult's willful decision to not improve his or her Torah knowledge does not harm anyone, so there is no basis in rabbinic legal practice for compelling

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[280] *See generally Hinukh*, *in* ENCYCLOPEDIA TALMUDIT, 16:161–62 (1978).

[281] *See, e.g.*, Babylonian Talmud, Kiddushin 29a (obligating a father to teach his child a trade so that the child can support himself and need not turn to theft).

[282] KARO, *supra* note 177, at 245; 2 J. DAVID BLEICH, CONTEMPORARY HALAKHIC PROBLEMS: PART II, CHAPTER XV TORAH EDUCATION OF THE MENTALLY RETARDED ¶ 34 (1993).

[283] Rema *to* Shulkhan Arukh, Yoreh Deah 245:4.

[284] MAIMONIDES, MISHNEH TORAH, TORAH STUDY 1:8 (Simon Glazer trans., 1927) (1178).

[285] KARO, *supra* note 177, at 245:1 ("If one's father did not teach him Torah, a person is obligated to teach himself.").

[286] *See* SAIMAN, *supra* note 95, at 5–7 (explaining that adult religious study is a central feature of Jewish religious life).

[287] *Compare* KARO, *supra* note 177, at 245:4 (mandating coercion to compel parents to educate their children), *with* KARO, *supra* note 177, at 246:1 (making no mention of compulsory self-education).

anyone to comply with this ritual norm.

Violations of Jewish Sabbath laws appear to be the major exception to the rabbis' general tendency to eschew actively penalizing purely ritual misconduct.[288] Medieval rabbinic sources record numerous instances of corporal penalties meted out to Jews who violated the *halakhah*'s purely ritualistic Sabbath labor restrictions.[289] However, there do not appear to be any recorded instances of flogging or other corporal penalties for Sabbath offenses in pre-modern Sephardic Jewish communities—and this stands in stark contrast with those same communities' relatively zealous use of force to police interpersonal wrongs.[290]

This attitude towards compelling Jews to observe Jewish ritual laws may be summarized by a statement of Rabbi Yeshayahu Karelitz, an important Israeli rabbinic scholar of the twentieth century. He concluded that punishing religious misbehavior is not appropriate in post-biblical times "when God's supervision is not apparent."[291] Under such conditions,

> punishing sinners does not repair the breaches [in society created by misconduct], but only adds additional breaches; for it appears in peoples' eyes as a destructive use of illegitimate force. Thus, since the whole purpose [of punishing sin] is to repair, this does not apply at times when doing so does not serve to repair. Instead, we must seek to convince others to repent, but only through chains of love, and by placing them under rays of light.[292]

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[288] *See* Kanarfogel, *supra* note 263, at 14–16 (comparing the punishment of Sabbath violations to other ritual misconduct).

[289] *See id.* at 15–16 (describing strict penalties for those who worked on the Sabbath); Simcha Assaf, Ha-Onshin Achar Chasimas Ha-Talmud 20, 26, 34 (1922) (describing corporal punishments for Sabbath violations).

[290] *See* Kanarfogel, *supra* note 263, at 16 n.42, 16–17 (recording numerous instances of the use of force by Sephardic authorities to punish criminal offenses, but none involving Sabbath desecration).

[291] Chazon Ish, Yoreh Deah 2:16.

[292] *Id.* The nineteenth century scholar, Rabbi Tzvi Hirsch Chayes, took a similar view. He wrote that when it comes to dealing with sinful people, "we must impose upon them with words of chastisement that will enter the listening heart—with a rod of pleasantness, and not with a rod of beatings." Rabbi Tzvi Hirsch Chayes, *Darkhei Horaah* 2:6, *in* 1 KOL KITVEI MAHARITZ CHAYES 275–76 (1958); s*ee also* DAVID HOLZER, THE RAV: THINKING ALOUD 140 (2009) (quoting Rabbi Joseph B. Soloveitchik's criticism of religious observance in the State of Israel) ("The sacrificial action must be a free action. It depends upon the freedom of the sacrificial action. In order to be significant, the withdrawal must extend from the free decision of the individual either to act or to retreat, to conquer or to experience defeat, and he chose the latter of them. No undue influence and no coercive circumstances must interfere with the behavior of the person. Sacrifice

B. Civil Harms and Civil Sins

As in cases of criminal wrongs, pre-modern rabbinic and communal authorities distinguished between purely religious sins and materially harmful conduct in the realm of civil law. In *halakhic* jurisprudence, civil offenses are not only legally actionable; they are sins as well.[293] Unintentional torts, for instance, trigger liability to pay compensatory damages,[294] but negligently injuring other people or property is also a moral wrong for which the tortfeasor must repent and seek forgiveness from God.[295] In this way, the rabbinic tradition significantly diverges from Western jurisprudence in how it conceptualizes civil wrongs. In Anglo-American law, for instance, tortious conduct is rarely thought of as morally offensive or socially condemnable in the same manner as are most criminal acts.[296] In *halakhic* thought, by contrast, one does not enjoy the license to commit civil offenses so long as one is also willing to make full restitution for the injuries caused thereby.[297] Instead, Jewish law condemns civil offenders as sinners; tortious conduct is also morally offensive.[298]

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is endowed with meaning as long as the act of offering was experienced in liberty and [the] unrestricted opportunity of deciding against the deed. If one is constrained by legislation which is provided by effective sanctions . . . then the sublime sacrificial action is desecrated, vulgarized.").

[293] *See* MAIMONIDES, MISHNEH TORAH, DAMAGES TO PROPERTY 5:1 (Philip Birnbaum ed., 1967) (1178) ("It is prohibited for a person to cause damage and then compensate [the victim] for what they damaged."); Yad Rama to Tractate Bava Batra 26a (concluding that causing damage to others violates the biblical command to "love your neighbor as yourself").

[294] *See* THE PRINCIPLES OF JEWISH LAW, *supra* note 126, at 319–20 (describing how one's unintentional tortious behavior can make him liable for damages).

[295] *See* MAIMONIDES, *supra* note 55, at 1:1 ("Likewise, one that harms another person or damages their property—even if they have compensated the victim for the loss—their sin is not atoned for until they confess their sinful conduct [to God] and turn away from doing such things in the future . . . .").

[296] See LYNN STOUT, CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE 153–54 (2011), for a discussion of how Anglo-American law is largely grounded in assumptions about the economic selfishness of human nature and how it accepts that tendency so that many areas of law focus on ordering competing self-interested parties, not on cultivating moral behavior. See, for example, Learned Hand's famous formula legitimizing economically efficient torts in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173–74 (2d Cir. 1947). *See also* Wex Definitions Team, *Moral Turpitude*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/moral_turpitude (June 2020) (noting that certain acts, including criminal ones, can be morally offensive, and society looks down upon them).

[297] *See* MAIMONIDES, *supra* note 293, at 5:1 ("It is prohibited for a person to cause damage and then compensate [the victim] for what they damaged.").

[298] *See* Netanel, *supra* note 224, at 858 (explaining that indirect civil harm is morally wrong in Jewish law but not legally actionable).

While civil wrongs also entail ritual sins, rabbinic scholars have conceptualized the relationship between moral wrongs and financial liability in a variety of ways that largely track *halakhic* decisors' concern for assessing liability in terms of causing harm to others rather than in terms of the sinful or pious quality of one's actions. In some cases, consent to what the Torah defines as a financial wrong obviates the sinfulness of the behavior in question because, in the realm of interpersonal relations, morality and ethics are closely intertwined.[299] This is true, for example, with respect to the Torah's prohibition against *ona'ah*, or significantly over-charging or under-charging for certain kinds of commercial goods with relatively clear market prices.[300] Importantly, *ona'ah* is understood by the rabbis as a form of theft.[301] Thus, *halakhic* codes clarify that the ban on *ona'ah* is violated only when the inordinately high or low purchase price is the result of fraud, such as where a seller conceals the true market price from the buyer and charges a much higher amount for the product.[302] However, where both buyer and seller are fully informed about the actual market value of the goods and, notwithstanding this, willingly transact the sale at a different price, Jewish law rules that not only does the party that overpaid or underpaid for the product not have grounds to void

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[299] *See* Babylonian Talmud, Bava Kamma 92a (explaining that a person is not liable for property damage if he intentionally damages another's property on the condition that he will be exempt from restitution); MAIMONIDES, *supra* note 223, at 5:9 (highlighting the connection between morality and ethics in interpersonal relationships by noting that mere civil restitution is not sufficient and that moral absolution must also be sought in the form of forgiveness); *Leviticus* 19:16–18 (relating the Hebrews' moral status before God to their ethical duties in society regarding interpersonal relationships).

[300] *See* Shmuel Shilo, *Ona'ah*, *in* THE PRINCIPLES OF JEWISH LAW, *supra* note 126, at 215 (defining *ona'ah* as doing wrong to another by buying or selling an article at an unfair price); *Leviticus* 25:14 (commanding the Hebrews not to wrong their neighbors in their buying and selling); Mishnah Bava Metzia 4:3 (establishing the threshold to claim exploitation at a price one-sixth more than the fair market value of the article); Babylonian Talmud, Bava Metzia 50b (reiterating the threshold to claim exploitation as one-sixth more than the fair market value of the article); Babylonian Talmud, Bava Metzia 51b (distinguishing between civil liability regarding exploitation, which may be contractually waived by the parties, and the Torah prohibition of exploitation, which cannot be waived).

[301] *See* Babylonian Talmud, Bava Metzia 61a (describing *ona'ah* as a form of theft).

[302] *See* Ben-Zion Rosenfeld & Joseph Menirav, *Fraud: From the Biblical Basis to General Commercial Law in Roman Palestine*, 37 J. FOR STUDY JUDAISM PERSIAN, HELLENISTIC & ROMAN PERIOD 594, 595 (2006) (defining the notion of *ona'ah* as fraud per se); Babylonian Talmud, Bava Metzia 51a (noting that a customer does not engage in *ona'ah* when he pays less than market value because the seller knows the value of his merchandise, so the purchase will not be fraudulent); *id.* at 59b–60b (applying the doctrine of *ona'ah* to prohibit selling adulterated products); KARO, *supra* note 66, at 227:2–8 (ruling that parties to an *ona'ah* sale may back out on grounds of injustice only until they reasonably ought to have learned the true value of the article for sale).

the sale, but no sinful violation of Torah law has been committed at all.[303]

In other cases, *halakhah* views civil law prohibitions as teaching important moral values.[304] In such cases, one party's consent to a civil wrong does not obviate the sinfulness of the religiously prohibited act.[305] Still, in such cases, rabbinic practice generally rejects compensatory liability for the sin so long as it does not cause nonconsensual injuries to a victim.[306] A particularly telling example of this tendency to impose liability for financial sins only where the immoral conduct actually harms others relates to the Jewish law prohibition against *ribbis*, or borrowing or lending money on interest.[307] The Torah itself proscribes paying or receiving interest payments on debts,[308] and all parties who facilitate such payments—the creditor, debtor, contract drafters and witnesses, and guarantors—are deemed to be committing serious religious sins.[309]

The Talmud, however, records a debate about whether and when rabbinic courts ought to compel the return of interest payments made in violation of the *ribbis* prohibition.[310] According to the Talmudic scholar Rabbi Elazar, courts should force creditors to return wrongfully obtained interest payments,[311] while another scholar, Rabbi Yochanan, rules that courts cannot force lenders to return interest payments.[312] The Talmud adopts the view of Rabbi Elazar that debtors may rely on

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[303] Babylonian Talmud, Bava Metzia 51b; MAIMONIDES, *supra* note 67, at 13:5; KARO, *supra* note 66, at 227:21.

[304] *See, e.g.*, SAIMAN, *supra* note 95, at 90–93 (explaining that an employer's workplace responsibilities may be waived by employee consent).

[305] *See id.* at 91–92 (explaining that even providing a grand feast to satisfy the employees would not have cured the sinfulness of neglecting one's religious obligation).

[306] *See, e.g.*, *id.* at 90–93 (construing Jewish laws of workers' rights as teaching moral and ethical lessons).

[307] *See Deuteronomy* 23:20 ("You shall not lend on interest to your brother—interest on money, interest on goods, or interest on anything that is lent on interest."). *See generally* Haim H. Cohn, *Usury*, *in* THE PRINCIPLES OF JEWISH LAW, *supra* note 126, at 500–05 (examining the development of prohibitions of the charging of interest and the various loopholes constructed to hinder its enforcement). See Leonard Grunstein, *Interest, Ribit, and Riba: Must These Disparate Concepts Be Integrated or Is a More Nuanced Approach Appropriate for the Global Financial Community?—Part I*, 130 BANKING L.J. 439, 446–49 (2013), for a comprehensive introduction to the scope and application of the *ribbis* prohibition.

[308] *See Exodus* 22:24 (commanding the Hebrews not to lend money to the poor or to demand interest from them); *Leviticus* 25:35–37 (commanding the Hebrews not to require interest of a fellow countryman who, being in need, comes to live on their land).

[309] *See* Babylonian Talmud, Bava Metzia 75b (describing how all parties involved in facilitating a loan on interest violate the commandment against lending on interest).

[310] *Id.* at 61b–62b.

[311] *Id.* at 61b.

[312] *Id.*

rabbinic courts to recover funds they agreed to pay as interest on their loans, and later authorities ruled accordingly.[313] However, *halakhic* practice in this area affirms that, in implementing Rabbi Elazar's ruling, rabbinic authorities were determined to coerce the repayment of interest only in cases where the sinful *ribbis* payments caused material injuries that the debtor wished to recover.[314] Thus, many authorities rule that a court should only compel a lender to divest of illicit interest payments when the borrower sues to recover those funds or when interest payments were extracted from the debtor against his will.[315] If the debtor has not brought an action for the *ribbis* payments, however, he is deemed to have implicitly forgiven the lender's improper collection of interest.[316]

Medieval rabbis' permissive attitudes towards liability for lending on interest reflect an important shift in *halakhic* thinking about *ribbis* that transformed the central focus of this doctrine from civil to ritual law. The Torah represents its prohibition against lending money on

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[313] *Id.* at 65b; KARO, *supra* note 177, at 161:2. Notably, some authorities understand the rule permitting judicial extraction of wrongly received *ribbis* payments to be a consequence not of the civil nature of the prohibition on charging interest, but an expression of the rule that rabbinic courts may compel Jews to fulfil ritual duties—in this case, the duty to not give or receive *ribbis* payments. *See* SHABBATAI BEN MEIR HAKOHEN, SIFTEI KOHEN ON SHULCHAN ARUKH, YOREH DE'AH 161:7 (Ashlei Ravrevei ed., 1888) (1645) (implying that the reason judges will not seize money paid as interest is because the people live together, suggesting that they will have the opportunity to confront one another as needed). On this view, limiting judicial authority to extract ill-gotten interest payments to cases where the borrower sues to recover the *ribbis*—demonstrating that the extraction of interest on the debt constitutes a loss—reinforces the idea that the forceful implementation of ritual law ought to be limited to cases where sinful conduct inflicts material harm on others.

[314] *See* KARO, *supra* note 66, at 161:4 (providing for creditors to rent out a debtor's property and collect his rent until his debt has been settled); Babylonian Talmud, Bava Metzia 65b (permitting courts to force the payment of unpaid interest in a breach of contract case where the interest has been fixed in advance by contract).

[315] *See, e.g.*, DAVID HALEVI SEGAL, TUREI ZAHAV ON SHULCHAN ARUKH, YOREH DE'AH 161:3 (Ashlei Ravrevei ed., 1888) (1645) (providing for no remedy against unjust interest if both parties have consented); *see also* HAKOHEN, *supra* note 313, at 161:8 (ruling that when *ribbis* payments are received from an unwilling debtor, they amount to the judicially cognizable civil crime of theft, but that when such legally proscribed payments are made willingly by a borrower, the payment is only a ritual sin for which there is little remedy).

[316] *See* YAAKOV LORBERBAUM, NETIVOT HAMISHPAT, BEURIM ON SHULCHAN ARUKH, CHOSHEN MISHPAT 9:2 (Lemberg 1898) (1809) ("Since he gave it willingly, the presumption is that he forgave it."); She'ilas Yaavetz 1:147 (noting that a creditor that has accepted *ribbis* payment has a ritual obligation—though not judicially-enforceable civil liability—to voluntarily return the money even if the debtor has not sued to recover the interest payments); Responsa Maharashdam, Choshen Mishpat 228 (discussing transactional ethics); Sheilat Yaavetz 1:147 (ruling that *ribbis* payments cannot be recovered by a borrower if his conduct or words indicate that he was content to make the interest payments to the creditor).

interest as a primarily civil concern aimed at establishing generous and fair relations between creditors and debtors "so that your brother may be able to live with you."[317] *Halakhic* authorities recognized, however, that Jews being unable to borrow or lend money on interest is economically viable only in an insular, largely Jewish, agricultural society like the one envisioned by the Hebrew Bible.[318] However, as commerce became more economically important, and as Jews and non-Jews came to occupy the same economic and societal spaces, the prohibition against *ribbis* became counter-productive.[319] Rather than encouraging Jews to generously lend spare funds to their brethren in need, the rule gave Jewish creditors good reason to avoid lending to Jews and to instead extend credit only to non-Jews from whom *halakhah* permits taking market-rate interest payments.[320] This, in turn, would force Jewish borrowers to seek loans from non-Jewish lenders, who could then charge higher interest rates since Jewish borrowers would be unable to seek more competitive rates from Jewish lenders. In heterogeneous credit markets, then, the prohibition on *ribbis* would end up "closing the door before borrowers"[321] rather than

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[317] *Leviticus* 25:36; *see also* Cohn, *supra* note 307, at 500–01 (citing *Deuteronomy* 23:21) (describing the view that rules against lending money on interest are intended to help sustain the fabric of society and community).

[318] *See* J. David Bleich, *Hetter Iska, the Permissible Venture: A Device to Avoid the Prohibition Against Interest-Bearing Loans*, *in* OXFORD HANDBOOK OF JUDAISM AND ECONOMICS 197, 197–98 (Aaron Levine ed., 2010) (explaining that as Hebrew society evolved through the Middle Ages from an agrarian society to a more transactional one, rabbinical practices changed as rabbis sought to avoid violating either the spirit or the letter of the law).

[319] *See* Elliot Klayman, *Shades of "Pragmatism" in Halakhah: A Model for Legal Reform?*, 48 J. CHURCH & STATE 623, 648 (2006) ("As economies developed and become more sophisticated, Jews found that if they wanted to participate in commerce they needed an accommodation for the otherwise biblically enjoined practice of usury."); Grunstein, *supra* note 307, at 448–49 (explaining Rabbi Halevi Epstein's reasoning about charging interest).

[320] *See* KARO, *supra* note 177, at 159:1 (explaining that, although the Torah permitted lending with interest only to Gentiles, and not to Jews, both were to be permitted in contemporary Judaism). Because Jews could charge interest on loans to non-Jews or foreigners but could not charge interest on loans made to other Jews, Jews had a big incentive not to lend to other Jews. *See Deuteronomy* 23:20–21 (distinguishing between lawfully charging interest of foreigners and unlawfully charging interest of one's fellow countrymen).

[321] Babylonian Talmud, Sanhedrin 3a. Due to the tight restrictions on lending in standard Jewish law and the difficulty many borrowers therefore had in securing loans, many rabbis proposed modifications to Jewish civil law. *Id*. A common rationale for these modifications was the expression, "so that the door shall not be closed before borrowers." *Id*. Similarly, this principle was used to justify the rabbinic creation of a mechanism to circumvent the biblical law canceling all outstanding debts every seventh year, *see Deuteronomy* 15:1 (declaring that all debts should be forgiven in the seventh year), since this rule substantially discouraged the extension of credit, *see* Babylonian Talmud,

ensuring that "your brother may be able to live with you."[322]

Rabbinic authorities responded to this contingency in part by reconceptualizing the Torah's prohibition on interest-bearing loans as a primarily ritual rather than civil norm.[323] This shifting understanding helped facilitate the creation of new financing structures that could be used by Jews to extend credit to other Jews profitably without violating the ritual proscription on *ribbis*.[324] The permissiveness with which *halakhic* scholars treated such lending between Jews was in substantial part facilitated by their thinking of *ribbis* as a ritual rather than a civil concern.[325]

By contrast, consider how rabbinic jurisprudence has imposed legal liability in cases where a party's failure to uphold a religious duty

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Gittin 36b (noting that since people had stopped extending credit at the risk of their debts being forgiven, an alternative means of lending had been developed).

[322] *Leviticus* 25:36.

[323] The Talmudic discussions of *ribbis* include rabbinic perspectives that view the doctrine as essentially civil in nature, as well as those that see the prohibition on interest as ritualistic. *See* Babylonian Talmud, Bava Metzia 60b (describing the economic market effect of lowering prices); Aaron Kirschenbaum, *Jewish and Christian Theories of Usury in the Middle Ages*, 75 JEWISH Q. REV. 270, 284 (1985) (stating that the religious aspects of the Jewish law forbidding *ribbis* are most central). Over time, however, rabbinic thinking on the issue came to emphasize the ritual nature of *ribbis* over any civil law aspects inherent in the doctrine. *Compare* MOSES MAIMONIDES, MISHNEH TORAH, CREDITOR AND DEBTOR 4:1–10:6 (Philip Birnbaum ed., Hebrew Publ'g Co. abr. ed. 1967) (1178) (warning lenders that exacting interest is a terrible sin against the bodies of others, and likewise warning borrowers that they risk suffering harm), *with* JACOB BEN ASHER, ARBA'AH TURIM, YOREH DEAH 159–177 (Vilna 1923) (1340) (treating interest chiefly as a matter of contract for parties to agree as they choose, but not always enforceable), *and* KARO, *supra* note 177, at 159–177 (permitting lending on interest for practical purposes in various circumstances, particularly to non-Jews, despite the religious rule to the contrary).

[324] *See* Grunstein, *supra* note 307, at 452–53 (detailing the distinctions between a loan and an investment under Talmudic law).

[325] That sinful conduct ought not trigger judicial penalties absent legally cognizable harm to others finds further expression in how Jewish law deals with witnesses who fail to testify in civil cases. *See generally* KARO, *supra* note 66, at 28:1 (stating that a witness who withholds testimony will be judged not by civil courts but by the laws of heaven). See *id.* at 198:15, for another example of the rabbinic distinction between ritual sins and civil harms relating to the *halakhic* prohibition against reneging on financial agreements even before they become fully binding contracts. *See also* Menachem Elon, *Contract*, *in* THE PRINCIPLES OF JEWISH LAW, *supra* note 126, at 247 ("While Jewish law bases the conclusion of a contract on the *gemirat ha-da'at* (i.e., final intention or making up the mind) of the parties to be bound, such intention may only be inferred from a formal and recognized *kinyan* ('mode of acquisition') executed by one of the parties."); MAIMONIDES, *supra* note 67, at 7:8 ("One that transacts through verbal agreement should keep their word, even if he has not yet received any payment, or made his mark, or conveyed a security interest. And anyone that goes back [on their word]—whether the buyer or the seller—even in cases where he is not liable to [the rabbinic curse of] 'He who exacted payment,' he is untrustworthy and lacking faithfulness, and the spirit of the Rabbis is discontented with him.").

has negative financial impacts on others. *Tzedakah*, or the obligation to give charity, is an important *mitzvah*.[326] The Torah commands, "If there is a needy person among you . . . you must open your hand and extend to him sufficient for whatever he needs."[327] In Talmudic law, this individual religious duty is reframed as a communal obligation to provide food and other necessities for the local poor.[328] To fulfill this imperative, communal authorities would assess each resident's charity obligation, which would be donated to the public coffers and routinely redistributed to the poor.[329] The Talmud rules that community members who fail to give an appropriate amount may be forced to fulfill their charitable obligations, and that rabbinic courts may, if necessary, seize the assets of those who refuse to pay.[330] Post-Talmudic codes confirm this rule,[331] which was routinely implemented in practice in pre-modern Jewish communities.[332] Rabbinic commentators note, however, that the Talmud's framework for tax-based social welfare

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[326] *See* Sara E. Karesh & Mitchell M. Hurvitz, *Tzedakah*, CREDO REFERENCE (2016), https://search.credoreference.com/content/entry/fofjudaism/tzedakah/0 (describing the ritual obligation to give to charity, at times enforced by rabbis); Sara E. Karesh & Mitchell M. Hurvitz, *Tzedakah Box*, CREDO REFERENCE (2016), https://search.credoreference.com/content/entry/fofjudaism/tzedakah_box/0 (noting that *tzedakah* is an important *mitzvah* in Judaism); MOSES MAIMONIDES, MISHNEH TORAH: GIFTS TO THE POOR 1:2–5 (Philip Birnbaum ed., Hebrew Publ'g Co. abr. ed. 1967) (1178) (stating that those who fail to set aside a portion of all they grow or earn for the poor merit punishment). See generally Michael J. Broyde, *The Giving of Charity in Jewish Law: For What Purpose and Toward What Goal?*, *in* TOWARD A RENEWED ETHIC OF JEWISH PHILANTHROPY 241, 242–44 (Yossi Prager ed., 2010), for a discussion on charitable giving in Jewish law.

[327] *Deuteronomy* 15:7–8.

[328] *See generally* EPSTEIN, *supra* note 56, at 248:1–7 (discussing the rabbinic transformation of Jewish law's charity obligation from a private duty to a communal imperative).

[329] *See* Babylonian Talmud, Bava Batra 8b (discussing rules for the collection and distribution of the charity fund); ASHER, *supra* note 137, at 256:1; Allan Borowski, *Anticipating Modernity: The Jewish 'Welfare State' in Biblical and Medieval Times*, 47 AUSTRALIAN J. SOC. ISSUES 353, 364–65 (2012) ("Among the institutions that were found in virtually every [Jewish community] was: (1) the charity fund or community chest whose monies were collected weekly from all members and paid to the local poor every Friday; (2) the food bank or public soup kitchen for daily distribution to both the poor and strangers of food donated on a daily basis; (3) the clothing fund; and (4) the fund to cover the burial expenses of the poor.").

[330] *See* Babylonian Talmud, Bava Batra 8b (permitting the gatherers of the charity fund to take from wealthy citizens by force, though not from the poor).

[331] *See* MAIMONIDES, *supra* note 326, at 7:10 (instructing courts to deliver physical beatings to those who fail to give *tzedakah* and to take from such wrongdoers by force what was owed); KARO, *supra* note 177, at 248:1 (requiring all to be whipped and have their property seized if they fail to give); ASHER, *supra* note 323, at 248:1 (instructing those who do not pay to have their property seized).

[332] *See* Borowski, *supra* note 329, at 365–66 (detailing how Jewish communities have enforced *tzedakah* requirements).

differs from the formal religious duty of *tzedakah*.[333] For example, while all Jews—even the poor—are ritually obligated to give charity,[334] only those with the means to support themselves are obligated to contribute to communal charity funds.[335] These two kinds of charity are distinct: the Torah's ritual prescription is designed to educate Jews to be generous and giving towards others,[336] while the Talmud's social safety-net system is more concerned with ensuring that the poor are cared for than it is with cultivating people's ethical and moral virtues.[337]

C. Sexual Ethics and Sexual Morals

Jewish law includes a comprehensive and often strict framework of sexual morality and ethics.[338] Indeed, sexual offenses are regarded

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[333] *See* EPSTEIN, *supra* note 56, at 248:1–4 (distinguishing between the religious moral obligation to give charity, which is incumbent even on the poor, albeit only in a minimal amount, and the civic duty to provide for communal welfare needs, which correlates to one's means); *Tzedakah – Charity in the Jewish Tradition*, BD. JEWISH EDUC. NSW, https://bje.org.au/knowledge-centre/jewish-ethics/tzedakah/ (last visited Aug. 15, 2021) (defining *tzedakah* as a ritual obligation, something more than optional charity).

[334] *See* Babylonian Talmud, Gittin 7b (instructing even those dependent upon charity to give alms, promising that God will reward their generosity); KARO, *supra* note 177, at 248:1 (recounting how even the poor had their assets seized by the courts if they refused to give charity).

[335] *See* EPSTEIN, *supra* note 56, at 248:3 (mandating donations to the poor at least once per year); *id.* at 248:4 (noting that if poor persons failed to give they would not be punished); BD. JEWISH EDUC. NSW, *supra* note 333 (explaining that *tzedakah* is required as an obligatory ritual care for the needy).

[336] *See* Babylonian Talmud, Bava Batra 10a ("Turnus Rufus, the wicked, asked Rabbi Akivah: 'If your God loves the poor, why does he not support them?' Rabbi Akivah answered him, '[God does not support the poor Himself, and instead commands human beings to give charity] so that through the poor [to whom we give charity] we will be saved from the judgment of hellfire. . . . This is like a human king that is angry with his son and puts him in prison, ordering that he not be given food or drink. One person goes and gave him food and drink. If the king heard about this, wouldn't he send that person a gift?").

[337] The Talmud's emphasis on social welfare over the cultivation of moral virtue in its charity jurisprudence is well illustrated by its authorization of judicial coercion to enforce people's legal obligations to contribute to communal charity funds. Both rabbinic scholars and moral and legal philosophers have argued that performing morally virtuous acts under compulsion or only in response to the rightful demand of another generally undermines the moral quality of such acts. *See, e.g.*, Babylonian Talmud, Pesachim 50b (explaining that God will grant greater mercy to those who do good for its own sake than to those who do good with an ulterior motive); Robert P. George, *The Central Tradition—Its Value and Limits*, *in* VIRTUE JURISPRUDENCE 24, 43–45 (Colin Farrelly & Lawrence B. Solum eds., 2008) (arguing that legal compulsion is often incompatible with the cultivation of individual moral virtue); Babylonian Talmud, Gittin 7b (mandating that all give to the poor).

[338] On Jewish law and sexuality, see generally YAAKOV SHAPIRO, HALACHIC

as particularly serious in that they—along with murder and idolatry—are one of the three kinds of religious violations for which the *halakhah* demands that Jews martyr themselves rather than commit such a sin.[339] Jewish law regulates marriage[340] and divorce,[341] as well as the who, what, where, when, and how of sexual relationships generally.[342] Importantly, in rabbinic jurisprudence, mutual consent is necessary, but not sufficient, to render a sexual relationship legally permissible.[343] In practice, however, rabbinic authorities rarely punished Jews for committing private sexual offenses in which all parties were willing participants.[344] Rabbinic enforcement of the

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POSITIONS: WHAT JUDAISM REALLY SAYS ABOUT PASSION IN THE MARITAL BED 13 (2d ed. 2016) (offering a comprehensive overview of Jewish law and thought on sex from an Orthodox denominational perspective); THE SACRED ENCOUNTER: JEWISH PERSPECTIVES ON SEXUALITY (Rabbi Lisa J. Grushcow ed., 2014) (ebook) (providing a comprehensive anthology of Jewish views on sex, relationships, marriage, fertility, and other topics, primarily from a Reform denominational perspective); and Adiel Schremer, *Marriage, Sexuality, and Holiness: The Anti-Ascetic Legacy of Talmudic Judaism*, *in* GENDER RELATIONSHIPS IN MARRIAGE AND OUT 35, 37 (Rivkah Blau ed., 2007) (investigating the implicit assumptions at the root of traditional rabbinical understandings of marriage).

[339] *See* Babylonian Talmud, Sanhedrin 74a (stating that one who commits sexual immorality, idolatry, or murder should allow himself to be killed rather than commit the sin).

[340] *See, e.g.*, Babylonian Talmud, Kiddushin 2a, 4a (providing two examples of how the Talmud regulates marriage through initial betrothal); MAIMONIDES, MISHNEH TORAH, MARRIAGE 1:1–3 (Philip Birnbaum ed., Hebrew Publ'g Co. abr. ed. 1967) (1178) (explaining how a marriage occurs under the Torah, first with witnesses and then through consummation).

[341] *See, e.g.*, Babylonian Talmud, Gittin 2a, 90b (regulating how divorces occur and how they are preserved); MAIMONIDES, MISHNEH TORAH, DIVORCE 1:1–3 (Philip Birnbaum ed., Hebrew Publ'g Co. abr. ed. 1967) (1178) (stating the requirements for divorce).

[342] *See, e.g.*, MAIMONIDES, MISHNEH TORAH, FORBIDDEN INTERCOURSE 1:4–6, 10, 11:15, 12:1 (1178) (giving examples of Jewish law regulating sexual relationships).

[343] Rape is both a religious and civil offense under biblical and rabbinic law. *See Deuteronomy* 22:25–29 (explaining the penalties for rape under Jewish law, such as payment to the woman's father and marriage to the woman). Likewise, Talmudic law requires consent for sex even within the context of a marital relationship—a rarity in pre-modern legal regimes. *Compare* Babylonian Talmud, Eruvin 100b (explaining that consent is necessary in marriage under Jewish law), *with* Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1465 (2003) (explaining how husbands could not be charged with raping their wives from the seventeenth century to about 1970). Still, many consensual—and thus *ethical*—sexual relationships are nonetheless regarded as prohibited under Jewish law. *See, e.g.*, MAIMONIDES, *supra* note 342, at 11:15, 12:1 (detailing morally proscribed and legally punishable sexual relationships, all of which presume participants' mutual consent to intercourse).

[344] *See, e.g.*, JOSHUA FALK, ME'IRAT EINAYIM SHULCHAN ARUKH, CHOSHEN MISHPAT 425:12 (Lemberg 1898) (ruling that one should not use force to prevent a morally sinful sexual act between two consenting parties, though one should use force to prevent the same sinful sex act if the woman is being subject to coercion).

Torah's sexual mores was largely limited to cases in which one party was likely to have been sexually victimized by another, or where sexual conduct between consenting parties also had the secondary effect of harming innocent third parties or the community.[345] In the absence of such harm, however, religious misconduct of the sexual variety typically was not seriously punished.

The distinction rabbinic jurisprudence draws between sexual sin and sexual harm is exemplified by an extensive *halakhic* discussion about when force may be used to prevent religious misconduct. The Mishnah rules that a man "chasing after a person to kill them, or after another man or betrothed woman [for sex]" should be stopped and, if necessary, killed to prevent the perpetrator from committing the intended sin.[346] By contrast, the Mishnah teaches that a person seeking to sexually violate an animal, perform labor on the Sabbath, or commit idolatry may not be killed to prevent the sin.[347] In other words, Jewish law authorizes the use of force to prevent sexual sin only in cases where the sin also involves a human victim, such as cases of rape. Where both sexual partners are willing participants in the commission of the sin, however, Jewish law does not authorize the use of force to prevent the sin and compels the parties involved to abide by ritual Torah norms.

Halakhic literature suggests that sexual sin was not uncommon in many pre-modern Jewish communities, but such conduct was typically addressed by rabbinic exhortations to greater personal piety.[348] One perennial problem was Jewish men taking Jewish or non-Jewish women as concubines or carrying on affairs with housemaids.[349] Such relationships raised substantial religious concerns. Beyond these religious concerns, however, sexual sins of this sort threatened the integrity of Jewish families and led to the mistreatment of both wives and mistresses; affairs with non-Jewish women could create physical dangers to both the parties involved and the Jewish community.[350] This led many pre-modern rabbis to preach strongly against such relationships in places where they were

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[345] *See* Leah Bornstein-Makovetsky, *Extramarital Relations Among Jews in the Ottoman Empire, in* 13 MISCELLANEA HISTORICO-IURIDICA 25, 39–40 (2014) (explaining that rabbinic authorities punished rape severely and would even turn rapists over to secular authorities for harsher punishment); YOM TOV ASSIS, THE GOLDEN AGE OF ARAGONESE JEWRY 293 (2008) (stating that Jewish law punished rape severely).

[346] Mishnah Sanhedrin 8:7.

[347] *Id.*

[348] *See* Kanarfogel, *supra* note 263, at 17–19 ("Sexual promiscuity and even adultery were never absent from any region in the medieval Jewish world.").

[349] *Id.* at 17; Bornstein-Makovetsky, *supra* note 345, at 36–37.

[350] *See, e.g.*, Responsa Rashba 5:242 (considering how relationships with Jewish concubines would negatively impact Jewish family structures).

common.[351] Cases of actual corporal punishment for violations of these measures, however, seem to have been rare.[352]

Of course, where sexual sin did cause worldly harms or dangers, rabbinic and communal authorities often responded forcefully as in parallel cases of civil and criminal misconduct. Jewish rapists were often dealt with severely by rabbinic authorities.[353] In some cases, the local *beit din* itself would punish the offender with flogging, or sometimes worse.[354] But more often, Jewish communal leaders would hand the rapists over to non-Jewish officials for more severe punishment.[355]

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[351] *See* Kanarfogel, *supra* note 263, at 17–18, 24, 24 n.362 (explaining that although these types of sexual relations were common, rabbis spoke out against such relations).

[352] *See id.* at 18–19 (explaining that rabbis were cautious and patient before using corporal punishment when Jewish men had sexual relations with non-Jewish women, and corporal punishment was mainly considered an option when the men unabashedly flouted the sexual ban).

[353] *See Deuteronomy* 22:25–29 (stating the Torah's punishment for rape). Further, it is worth noting that, as other scholars have noted, there seem to be very few cases in which rabbinic authorities directly addressed criminal punishments for Jewish rapists. *See, e.g.*, ASSIS, *supra* note 345, at 292 ("[T]he Hebrew sources are totally silent on the subject."). When cases of rape do appear in pre-modern Jewish law sources, they primarily address the ritual and family law implications of alleged rapes, rather than the criminal law issues related to punishing the rapist. *See, e.g.*, Responsa Binyan Tzion 154 (discussing the family law implications in the case of a woman that claims she was raped several times while her husband was away on business by a traveler who defrauded her and induced her to have sex with him by claiming he was the prophet Elijah and that the product of their union would be the Messiah). There may be a few reasons for this. First, unsurprisingly, and consistent with pre-modern and modern trends, sex crimes were and still are notoriously underreported for many reasons. Maria Boes, *Jews in the Criminal-Justice System of Early Modern Germany*, 30 J. INTERDISC. HIST. 407, 428 (1999). This would have made it difficult to address the criminal aspect of alleged rapes, while the post hoc ritual and family law implications posed more immediate concerns. Moreover, it is likely that many cases of rape were dealt with quietly and within the family so as to preserve the honor and social status of both the victim and her family in an environment where rape was often perceived as a form of sexual defilement and dishonor, even if the victim was held blameless for the crime. *See id*. (explaining why cases of rape in Jewish communities were dealt within homes); Bornstein-Makovetsky, *supra* note 345, at 39 (discussing several recorded cases of rape that came to light only due to subsequent marital issues after the victims' families compelled the perpetrators to marry and maintain the victims, which the rapist/husbands later sought to avoid through divorce).

[354] *See, e.g.*, Rabbi Elazar of Worms, Sefer Roke'ach, The Laws of Repentance 11 (ruling that rapists should be punished with lashes and by having to fast for 40 days in a row, among other deprivations).

[355] *See* ASSIS, *supra* note 345, at 292–93 (discussing several cases of rape committed by Jewish assailants that were brought to trial in royal courts); *id.* at 292 (noting that with respect to thirteenth century Aragon, "[a]ll our information about Jewish rapists comes from Latin archival records, whereas the Hebrew sources are totally silent on the subject"); Rodrigue Lavoie, *La Délinquance Sexuelle à Manosque*

D. Sin, Social Sanction, and Rights of Association

The fact that pre-modern rabbis and Jewish communal leaders declined to use their discretionary law enforcement powers to directly compel Jews to observe ritual *halakhah* does not mean that Jewish ritual law was not important to the rabbis. On the contrary, rabbinic scholars cared deeply for religious norms. They produced voluminous literature dedicated to interpreting and debating the details of Judaism's expansive ritual practices and norms,[356] while rabbis delivered and published sermons encouraging proper ritual practice[357] and routinely chastised their constituents for sinful behavior.[358] More importantly, the ritual practice of Jewish law was one of the chief ways in which Jewish communities in the pre-modern era constituted and defined themselves.[359] Still, this intense focus on Jewish ritual law and practice was not generally expressed through coerced piety. Instead, rabbis policed the religious underpinnings of the Jewish community through the exercise of rights of association.[360] They viewed Jewish

(1240-1430): Schéma général et singularités juives, 37 PROVENCE HISTORIQUE 571, 578 (1987) (noting that Jews accused of sexual crimes in medieval non-Jewish courts were routinely tortured and rarely acquitted, suggesting that Jewish communities' referring rape accusations to gentile courts—rather than insisting that cases between Jews be litigated in rabbinic courts—may have been an intentional decision to insure harsh punishments for sexual criminals).

[356] For an overview of such works, see 3 ELON, *supra* note 44, at 1101–528 (showing extensive examples of the writing that has been done on the topic of ritual practice).

[357] On rabbinic preaching and sermons, see Joseph Dan & Alexander Carlebach, *Homiletic Literature*, *in* 9 ENCYCLOPEDIA JUDAICA 507–08 (Fred Skolnik & Michael Berenbaum eds., 2d ed. 2007) (explaining the importance of rabbinic homilies and how they inform the listener of behavioral norms). *See also, e.g.*, Avriel Bar-Levav, *Ritualizing Death and Dying: The Ethical Will of Naphtali Ha-Kohen Katz*, *in* JUDIASM IN PRACTICE 155, 155 (Lawrence Fine ed., 2001) (showing an example of a rabbinic sermon that discussed death and burial rituals).

[358] *See, e.g.*, MARC SAPERSTEIN, "YOUR VOICE LIKE A RAM'S HORN": THEMES AND TEXTS IN TRADITIONAL JEWISH PREACHING 293–365 (1996) (providing a translation of a thirteenth century sermon by Rabbi Isaac Aboab on repentance).

[359] *See* JEFFREY R. WOOLF, THE FABRIC OF RELIGIOUS LIFE IN MEDIEVAL ASHKENAZ (1000-1300) 24–25, 29, 31–32 (2015) (explaining how the Jewish community took pride in their rituals because the rituals set them apart, gave them autonomy, and created norms in the community).

[360] It must be pointed out, of course, that the line between a community's disassociating from those it desires to exclude from membership on the one hand, and its forcing members to conform to communal norms on the other hand, can be exceedingly thin. Even in American law, we have long recognized that the decision by some groups or organizations to exclude and disassociate from others amounts to more than a relatively benign decision to simply draw the lines of community more narrowly. Such exclusion may be legally recognized as a distinct harm—discrimination—that,

communities as associations constituted by members' commitments to at least the normativity—if not always the perfect observance—of traditional Jewish law.[361] Consequently, Jews that flagrantly rejected this notion by publicly flouting ritual norms had their membership privileges curtailed or were expelled from the religious community entirely.[362] However, as discussed above, sinful but harmless community members generally were not directly forced to privately observe ritual *halakhah*.

Rabbinic authorities policed the boundaries of the Jewish community by using shunning methods to gradually disassociate

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depending on the basis on which an individual is being excluded, may be actionable. *See* John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149, 155–57 (2010) (distinguishing between three possible categories of association, explaining that some are protected and some are not). This was even more true when it came to exclusion from the Jewish community during the medieval period. *See* WOOLF, *supra* note 359, at 73 ("Since his legal status was conditional upon his membership in the *qehillah*, unless he actually converted to Christianity, he was consigned to both legal and social limbo."). Many scholars have therefore noted that expulsion from the Jewish community or denial of membership privileges often amounted to a very serious form of punishment for pre-modern Jews—one that could and often did indeed compel those subject to such penalties to conform to communal religious standards. *See* JACOB KATZ, TRADITION AND CRISIS: JEWISH SOCIETY AT THE END OF THE MIDDLE AGES 83–84 (1961) (showing that officials in the *kehilla* would take an oath and that the threat of banishment was great enough to influence them to keep the oath without other human deterrents); Yosef Kaplan, *The Social Functions of the* Herem *in the Portuguese Jewish Community of Amsterdam in the Seventeenth Century*, *in* DUTCH JEWISH HISTORY 111, 119–20 (Jozeph Michman ed., 1984) (considering the efficacy of excommunication as a serious coercive penalty in direct relation to the degree to which Jewish community members had the ability to build social, economic, and political ties in the broader non-Jewish society). Still, it seems important to distinguish between the essentially associational character of these kinds of sanctions and the more directly coercive and penal nature of corporal punishments and civil fines discussed above. Jews that engaged in harmful conduct were not given even the theoretical option of avoiding penalties by leaving the community. Sinners, by contrast, were largely left free to sin—in theory at least—so long as they did not do so as members of the sacred Jewish religious community.

[361] *See* WOOLF, *supra* note 359, at 24–25, 28–29 (expounding on the sense of identity that a Jewish community has because of its rituals and writings, especially when they are living near a non-Jewish community).

[362] *See* Yosef Kaplan, *Religion, Politics and Freedom of Conscience: Excommunication in Early Modern Jewish Amsterdam,* 5 MENASSEH BEN ISR. INSTITUUT 5, 11 (2010) (showing the authority of the community to excommunicate); WOOLF, *supra* note 359, at 76 (describing excommunication of wayward members by the *kehillah* as "an effective expression of its essential identity"); Kanarfogel, *supra* note 263, at 18–19 (explaining that when a person defiantly flouts their sin in the community, many forms of corporal punishment are allowed, such as a change in status from wife to *pilegesh* (concubine) when marriage rituals are violated); Tsuriel Rashi & Hananel Rosenberg, *Shaming in Judaism: Past, Present, Future*, 19 J. RELIGION & SOC'Y 1, 5–7 (2017) (providing examples of the different punishments for when a person publicly sinned).

flagrant ritual sinners from the religiously grounded *kehillah*.[363] These sanctions, which in rabbinic jurisprudence are referred to as "*cherem*" (literally, "ban" or "restriction"), included a range of different measures that ranged in type and severity. While serious corporal punishments and financial penalties were typically imposed only for wrongs that harmed others, *cherem* sanctions were deployed against individuals who violated Jewish ritual laws and norms.[364] Importantly, social shunning and excommunication were generally used only in response to breaches of "*communal discipline*" rather than ordinary private religious indiscretions.[365] Jewish communities have always been made up of members who maintain varying levels of ritual observance.[366] Private laxity in matters of Jewish ritual was a recognized fact of life that did not warrant punitive measures designed to compel compliance with religious law. However, when religious misconduct moved from the private to the public space and indicated a rejection of the religious foundations of the Jewish community or threatened the religion-based cohesiveness of Jewish communal life, rabbinic law prescribed the use of *cherem* as an exercise of the community's right to disassociate from subversive members.[367]

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[363] *See* Moshe Greenberg & Haim Hermann Cohn, *Herem*, *in* 9 ENCYCLOPEDIA JUDAICA *supra* note 357, at 10, 15 (characterizing the effect of these measures as "[t]reating a Jew as if he were a non-Jew"). For an overview of these methods, see Rashi & Rosenberg, *supra* note 362, at 7 (explaining the process of shunning and the difference between punishments). For further examples, see Babylonian Talmud, Moed Katan 17a (presenting an example of a religious teacher who has been excommunicated and is going through the legal process of returning); MAIMONIDES, MISHNEH TORAH, TORAH STUDY 7:4 (Simon Glazer trans., Maimonides Publ'g Co. 1927) (describing regulations when a person is shunned); and SCHREIBER, *supra* note 94, at 417 (describing different levels of excommunication that could be inflicted).

[364] *See* KARO, *supra* note 177, at 334:1, 43; R. Isaac Kook, Responsa Da'at Kohen, Yoreh Deah 193 (discussing sanctions against a community that failed to excommunicate a prominent member for eating and drinking on Yom Kippur); Responsa Rambam 157 (Freiman ed.) (*cherem* for a *kohein* (priest) that married a divorcee, which is ritually prohibited); Assaf, *Ha'onshin Aharei Hatimat Hatalmud* 114; Rashi & Rosenberg, *supra* note 362, at 6–7 (showing how *cherem* can be used to enforce rituals).

[365] *See* Michael J. Broyde, *Forming Religious Communities and Respecting Dissenters' Rights: A Jewish Tradition for a Modern Society*, *in* HUMAN RIGHTS IN JUDAISM: CULTURAL, RELIGIOUS, AND POLITICAL PERSPECTIVES 35, 48, 51–53 (Michael J. Broyde & John Witte Jr. eds., 1998) (showing that shunning was used when the transgressions happened publicly rather than privately).

[366] *See* Kanarfogel, *supra* note 263, at 3–7, 14, 34 (explaining that during the Medieval period when Jewish people lived near non-Jews there were different levels of non-observance); Judith Bleich, *Rabbinic Responses to Nonobservance in the Modern Era, in* JEWISH TRADITION AND THE NONTRADITIONAL JEW, *supra* note 263, at 37–39, 54, 66, 114 (showing the separation between the strict observers and those that were either lax or non-observers).

[367] *See* Michael J. Broyde, *Forming Religious Communities and Respecting Dissenters' Rights: A Jewish Tradition for a Modern Society, in* HUMAN RIGHTS IN

Thus, in the context of pre-modern Jewish societies, public religious misconduct was not merely an offense against God but an attempt to reject and undermine the religious structure and foundations of the *kehillah*, which further threatened the integrity of these religiously oriented civil associations. Private ritual offenses were for God to deal with and did not merit serious social or judicial sanctions absent some material harm to others, but public rejections of the normativity of Jewish religious law by members of the community frayed the fragile social fabric of the *kehillah* in a world in which the corporate Jewish community was critical to preserving Jewish life. Rabbinic and lay communal authorities responded to such antisocial behavior expressed through sin by using the *cherem* and other forms of social sanction as a means of exercising their rights of association.[368] Jews who refused to "buy in" to the constitutive foundations of the Jewish community and chose to express such dissent in a public manner were not forced to observe Jewish law, but they were also not permitted to reject the Jewish community and be members in good standing in that community at the same time.

CONCLUSION

One prominent theory of American religious liberty holds that the First Amendment's religion clauses are designed to work at cross purposes.[369] Carefully policing religious establishment places limits on how far religious groups and individuals might successfully secure special legal protections and accommodations for their religious

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JUDAISM, *supra* note 365, at 52–53, 55–56 (explaining that public sin resulted in excommunication); Rashi & Rosenberg, *supra* note 362, at 7 (describing examples of *cherem* and discussing its implications).

[368] *See* KATZ, *supra* note 360, at 83–84, 94 (explaining that the *kehillah* is able to implement the *cherem* to protect the traditions of the community); Bleich, *supra* note 366, at 38–39, 49–50, 81–82 (discussing leadership's fear that public religious misconduct could undermine the already fragile Jewish community in the pre-modern era); WOOLF, *supra* note 359, at 75–76 (showing that community survival was placed above individual interests and the *cherem* was an "effective expression of [the community's] essential identity" and therefore its survival); *supra* notes 344–45 and accompanying text (comparing the different consequences of public defiance and private sinfulness).

[369] *See, e.g.*, Locke v. Davey, 540 U.S. 712, 718 (2004) ("These two Clauses, the Establishment Clause and the Free Exercise Clause, are frequently in tension."); Cutter v. Wilkinson, 544 U.S. 709, 719 (2005) (quoting Walz v. Comm'n, 397 U.S. 664, 668–69 (1970)) ("The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."); Michael W. McConnell, *The Religion Clauses of the First Amendment: Where is the Supreme Court Heading?*, 32 CATH. LAW. 187, 187, 195–97 (1989) (demonstrating the tension between the two clauses by examining two Supreme Court cases).

practices and sensibilities.[370] At the same time, expansive free-exercise allowances are curtailed by establishment concerns.[371] These competing imperatives should ideally maintain a delicate balance that preserves both freedom for and freedom from religion in a political realm designed to be ecumenically neutral, though not assertively secular.[372] However, some deeply religious Americans on both the right and left sides of the political spectrum seem content to push hard for expansive free-exercise rights while at the same time promoting greater representations of religious norms and values in state law and policy.[373] Many of these people and groups maintain that their deeply held religious convictions not only need to be accommodated through

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[370] *See* Gabrielle Gollomp, Trinity Lutheran Church v. Comer*: Playing "In the Joints" and on the Playground*, 68 EMORY L.J. 1147, 1157–59 (2019) ("[S]ometimes the promotion of free exercise of religion may clash with the Establishment Clause, and enforcement of the Establishment Clause may stifle the free exercise of religion.").

[371] *Id.*

[372] For illustrative suggestions about how this balance should be struck, see Alan Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates: Why the Arguments for Rigorously Enforcing the Free Exercise Clause and Establishment Clause Are Stronger When Both Clauses Are Taken Seriously*, 32 CARDOZO L. REV. 1701, 1705–06 (2011), for an examination of how the two clauses complement each other. *See also* Steven K. Green, *Religious Liberty as a Positive and Negative Right*, 70 ALB. L. REV. 1453, 1467 (2007) (explaining that government is not under an obligation to treat nonreligion in the same manner that it treats religion and may be inclined to favor secular values over religious ones); Donald L. Beschle, *Does the Establishment Clause Matter? Non-Establishment Principles in the United States and Canada*, 4 U. PA. J. CONST. L. 451, 452 (2002) (exposing that it is misguided to believe that the two clauses are in conflict); Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1612–13 (1993) (showing that the Establishment Clause's purpose is to prevent the government from legislating religious values, while the Free Exercise Clause provides an individual with legal exemptions); Arlin M. Adams & Sarah Barringer Gordon, *The Doctrine of Accommodation in the Jurisprudence of the Religion Clauses*, 37 DEPAUL L. REV. 317, 338–39 (1988) (identifying a zone between the two clauses where government is able to accommodate religion and lessen any burden on religion).

[373] For examples of religious advocates pushing for expansive free exercise rights while also seeking greater state support for religious establishments and the promotion of religious norms in state laws, see Nelson Tebbe et al., *Churches Have Been Hypocritical During the Pandemic*, WASH. POST (May 13, 2020), https://www.washingtonpost.com/outlook/2020/05/13/churches-have-been-astonishingly-hypocritical-during-pandemic/ (showing religious organizations stating claims for free exercise exemptions from public health regulations and requesting state financial bailout support on equal terms with other businesses), Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51, 53–54 (2014) (pointing to the imposition of religious norms through law as a result of free exercise claims to avoid providing contraceptive coverage in employee insurance plans), and Hillel Y. Levin, *Why Some* Religious *Accommodations for Mandatory Vaccinations Violate the Establishment Clause*, 68 HASTINGS L.J. 1193, 1195–96, 1203–05 (2017) (explaining why religious exemptions to vaccines without philosophical accommodations violate the Establishment Clause).

free exercise rights, but they also maintain that the values and norms taught by their faith traditions are objectively right and ought to be implemented in the public sphere through law.[374]

The notion that strong religious convictions entail that faith-based values inform policymaking and that important religiously rooted moral norms be enforced through law is far from self-evident. Our discussion of the Jewish legal tradition suggests that even deeply legalistic faith traditions—where religious rules and principles regulate not only ritual observances but also commercial and family life, property ownership, criminal justice, and civil governance—do not necessarily demand that religious law be prescribed and enforced as state law. On the contrary, though rabbinic jurisprudence took *halakhah* very seriously as a legalistic framework for public and private life, it has long rejected the idea that Jewish law should be enforced. Instead, pre-modern rabbinic practice indicates that *halakhic* scholars and decision makers maintained that judicial law enforcement should be guided by an interest in preventing and punishing material harm to others. Rabbinic and law authorities did shun and excommunicate community members who publicly rejected religious practices, but they typically did so to establish and police the Jewish community's rights of association rather than to coerce others to higher levels of religious piety. While religious belief and practice were foundational elements of Jewish life and community, even intensely observant Jewish leaders generally rejected the idea that such deep religious commitments ought to be imposed upon their less scrupulous coreligionists. For the rabbis, the purpose of religious law was not to effectively run society; indeed, they often felt that *halakhic* rules would have serious negative consequences if implemented as public law. Instead, they viewed religious observance as a personal and communal endeavor, one that could not be coerced, and one that is distinct from the political project of building and maintaining human societies.

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[374] *See* FRANK TUREK & DR. NORMAN GEISLER, LEGISLATING MORALITY 20, 22 (2003) (stating that while the Religion Clauses prohibit establishing a religion, they do not prohibit establishing a national morality based on religion); *See* Lipka, *supra* note 19 (conducting research that shows many people believe the Bible should have influence in government); Frank Turek, *Why Christians Must Legislate Morality,* CHRISTIAN RSCH. INST. (Aug. 14, 2014), https://www.equip.org/article/is-legislating-morality-biblical-2/ (stating that it is both biblical and a responsibility of government to legislate morality); Patrick Fagan, *Why Religion Matters Even More: The Impact of Religious Practice on Social Stability*, HERITAGE FOUND. (Dec. 18, 2006), https://www.heritage.org/civil-society/report/why-religion-matters-even-more-the-impact-religious-practice-social-stability ("[L]egislators should seek constitutionally appropriate ways to explore the impact of religious practice on society and, where appropriate, recognize its role and importance.").

Rabbinic jurisprudence—along with some other faith traditions—thus makes a thoroughly religious case for robust religious liberty protections. It suggests that religiously committed people may find room within their own faith commitments to advocate for strong and robust protections for religious free exercise, not only for themselves but also for others whose (non)observances they may view as sinful. It provides a test case for how religions with broad normative teachings can protect not only their own religious freedom but also that of others––not only for ecumenically weak reasons of convenience and utility in a religiously diverse society but also on genuinely religious grounds.

THE CONSTITUTIONALITY OF TARGETED KILLING

Bryce G. Poole[*]

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INTRODUCTION

On January 2, 2020, the Department of Defense (DoD) released a public statement that "[a]t the direction of the President, the U.S. military has taken decisive defensive action to protect U.S. personnel abroad by killing Qasem Soleimani, the head of the Islamic Revolutionary Guard Corps-Quds Force, a U.S.-designated Foreign Terrorist Organization."[1] Soleimani was the Iranian terror master

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[1] U.S. Dep't of Def., Statement by the Department of Defense (Jan. 2, 2020), https://www.defense.gov/Newsroom/Releases/Release/Article/2049534/statement-by-

who, along with the Quds force, was "responsible for the deaths of hundreds of American and coalition service members and the wounding of thousands more."[2] Soleimani "orchestrated attacks on coalition bases in Iraq over the last several months . . . culminating in the death and wounding of additional American and Iraqi personnel."[3] Yet Soleimani was not targeted based solely on his past crimes, or at least that was not the reason provided to justify the strike. President Donald Trump authorized the strike because Soleimani was planning an "imminent attack against Americans."[4] Secretary of State Mike Pompeo concurred, adding that Soleimani was planning a "big action that could potentially kill hundreds of American diplomats and soldiers."[5] The DoD stated that the strike was a "decisive defensive action." The DoD further stated that "[t]he strike was aimed at deterring future Iranian attack plans."[6]

In the wake of Soleimani's death, journalists, politicians, and members of the international law community throughout the world reacted strongly.[7] Many commentators condemned the United States and the Trump Administration.[8] For example, one journalist noted

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the-department-of-defense/; *See also* OFF. OF ASSISTANT ATT'Y GEN., MEMORANDUM FOR JOHN A. EISENBERG LEGAL ADVISOR TO THE NATIONAL SECURITY COUNCIL (2020) (explaining that "at the direction of the President, the U.S. military conducted an airstrike in Iraq targeting Qasem Soleimani").

[2] Statement by the Department of Defense, *supra* note 1.

[3] *Id.* In April 2019, Brian Hook, U.S. Special Representative for Iran, had stated, "based on declassified U.S. military reports, that Iran is responsible for the deaths of at least 608 American service members. This accounts for 17 percent of all deaths of U.S. personnel in Iraq from 2003 to 2011. This death toll is in addition to the many thousands of Iraqis killed by the IRGC's proxies." Department Press Briefing, U.S. Dep't of State (Apr. 2, 2019) (on file with author).

[4] *Secretary of State Pompeo on what Happens Next After Soleimani's Death*, FOX NEWS (Aug. 15, 2021), https://www.foxnews.com/transcript/fox-news-sunday-on-august-15-2021.

[5] *Id.*

[6] Statement by the Department of Defense, *supra* note 1.

[7] *See, e.g.*, Dexter Filkins, *The Dangers Posed by the Killing of Qassem Suleimani*, NEW YORKER (Jan. 3, 2020), https://www.newyorker.com/contributors/dexter-filkins ("The killing of Qassem Suleimani, the Iranian commander targeted by an American strike Thursday night, is the most consequential act taken against the regime in Tehran in thirty years—even if we don't know what those consequences will be. One thing is clear: we're entering a dangerous period, in which the conflict between the two countries could easily spin out of control."); Grace Segers & Kathryn Watson, *"Illegal" or "Bold"? Lawmakers Divided over Airstrike Killing Iranian Military Leader*, CBS NEWS (Jan. 3, 2020, 3:12 PM), https://www.cbsnews.com/news/iran-general-killed-lawmakers-divided-over-airstrike-killing-iranian-military-leader-qassem-soleimani/ ("Lawmakers are divided over the U.S. airstrike in Baghdad that killed Iranian military leader Qas[]em Soleimani, the head of Iran's elite Quds military force and one of the most powerful figures in the Islamic Republic.").

[8] *See, e.g.,* Stephen Collinson, *Uproar and Consequences Mount for Trump after*

that approval or criticism of the Soleimani strike appeared to be based largely on partisan loyalties.[9] Some commentators argued that the Soleimani strike was "tantamount to an act of war,"[10] predicted that Iran would retaliate,[11] and claimed that the United States would be dragged into another bloody war in the Middle East.[12] The Department

Soleimani Killing, CNN, https://www.cnn.com/2020/01/06/politics/donald-trump-iran-iraq-impeachment/index.html (Jan. 6, 2020, 9:56 AM) ("There is also no obvious sign of a long-term strategy to head off Iranian reprisals — apart from Trump's increasingly belligerent tweets."); Alice Friend et al., *Why did the Pentagon Ever Give Trump the Option of Killing Soleimani?*, WASH. POST (Jan. 10, 2020), https://www.washingtonpost.com/outlook/why-did-the-pentagon-ever-give-trump-the-option-of-killing-soleimani/2020/01/10/57cbed14-3316-11ea-91fd-82d4e04a3fac_story.html ("[P]olicymakers gave Trump the option of killing Qasem Soleimani as one of several choices, perhaps hoping that including such a dramatic measure would push him toward a middle course; instead, he went for it, reportedly with little forethought or preparation. Our national security system is not meant to function that way."); Steve Benen, *Fallout from Trump's Soleimani Airstrike is Already Taking Shape*, MSNBC (Jan. 6, 2020, 9:00 AM), https://www.msnbc.com/rachel-maddow-show/fallout-trump-s-soleimani-airstrike-already-taking-shape-n1115016 ("There's no reason to believe Donald Trump prepared for any of these consequences, or even has a coherent plan for what may happen next.").

[9] Lindsay Wise, *Reaction to U.S. Strike Killing Iranian Military Leader Falls Along Party Lines*, WALL ST. J., https://www.wsj.com/articles/reaction-to-u-s-strike-killing-iranian-military-leader-fallsalong-party-lines-11578025323 (Jan. 3, 2020, 10:20 AM) ("A number of Republicans praised the move as a just response to Iranian aggression, while some Democrats questioned whether it represented a dangerous escalation and argued Congress should have been notified ahead of time.").

[10] Robin Wright, *The Killing of Qassem Suleimani is Tantamount to an Act of War*, NEW YORKER (Jan. 3, 2020), https://www.newyorker.com/news/our-columnists/the-us-assassinated-suleimani-the-chief-exporter-of-irans-revolution-but-at-what-price?verso=true ("On orders from President Trump, the United States killed Major General Qassem Suleimani, the leader of Iran's élite Quds Force and the mastermind of its military operations across the Middle East, in an overnight air strike at Baghdad's International Airport. The assassination was the boldest U.S. act in confronting Iran since the 1979 revolution, tantamount to an act of war.").

[11] Richard Haass, *America Must be Ready for Iranian Retaliation*, FIN. TIMES (Jan. 3, 2020), https://www.ft.com/content/0da7ecc4-2e48-11ea-84be-a548267b914b?segmentId=b385c2ad-87ed-d8ff-aaec-0f8435cd42d9 ("Iran is readying the dogs of war following the US assassination of Qas[]em Soleimani, the chief of the Iranian Revolutionary Guards' overseas forces. . . . There is little or no chance that matters rest where they are. Iran is highly likely to retaliate given the cult-like stature of Soleimani inside the country.").

[12] *See, e.g.*, James Pardew, *Waist Deep and Sinking in the Middle East: We're Now at War with Iran*, THE HILL (Jan. 4, 2020, 11:30 AM), https://thehill.com/opinion/national-security/476762-waist-deep-and-sinking-in-themiddle-east-were-now-at-war-with-iran ("With President Donald Trump's decision to authorize the U.S. military to execute Gen. Qas[]em Soleimani, commander of Iranian forces throughout the Middle East, the United States is at war with Iran, whether the White House acknowledges it or not. . . . The United States is not tiptoeing into a Middle Eastern quagmire. It is waist deep and sinking."). In contrast, President Trump said, "We took action last night to stop a war. We did not take action to start a war." Quint Forgey et al., *Trump: 'We Took Action Last Night to Stop a War,'* POLITICO (Jan. 3, 2020, 6:35 PM), https://www.politico.com/news/2020/01/03/mike-pompeo-us-war-iran-093149.

of Homeland Security issued a National Terrorism Advisory System Bulletin cautioning that "Iranian leadership and several affiliated violent extremist organizations publicly stated they intend to retaliate against the United States" and "an attack in the homeland may come with little or no warning."[13] Journalists, politicians, and legal commentators threw the term "assassination" around, rather loosely, generally as an assumption without any supporting legal analysis.[14]

Was the Soleimani strike an "assassination," as some critics claim? Or was it a "targeted killing"? Was it, as the DoD stated, a "decisive defensive action"?

Soleimani was not the first terrorist slain in a targeted killing operation, and he will not be the last. President Trump was the third consecutive President of the United States to authorize a targeted killing strike to kill a high-profile terrorist.[15] Thus, before the

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And General Mark Milley, Chairman of the Joint Chiefs of Staff, stated that "the United States had 'clear, unambiguous' intelligence that a top Iranian general was planning a significant campaign of violence against the United States when it decided to strike him . . . warning Soleimani's plots 'might still happen.'" *Top U.S. General: Soleimani was Planning 'Campaign' of Violence Against U.S.*, REUTERS, https://www.reuters.com/article/us-iraq-security-usa-milley/top-u-s-general-soleimani-was-planning-campaign-of-violence-against-u-s-idUSKBN1Z222T (Jan. 3, 2020, 2:19 PM).

[13] *Summary of Terrorism Threat to the U.S. Homeland*, DEP'T OF HOMELAND SEC. (Jan. 4, 2020), https://www.dhs.gov/ntas/advisory/nationalterrorism-advisory-system-bulletin-january-4-2020. Iran subsequently fired 15 missiles at two Iraqi military bases where U.S. troops are stationed, causing no American casualties, but at the time of this writing it is not clear if that is the end of Iran's promised retaliation. David S. Cloud et al., *Iran Fires Missiles at Two Bases Housing U.S. Forces in Iraq*, L.A. TIMES (Jan. 7, 2020, 7:52 PM), https://www.latimes.com/politics/story/2020-01-07/iranian-tv-says-tehran-has-launched-missiles-at-u-s-bases-in-iraq.

[14] *See, e.g.*, Jonah Shepp, *The Real Risk of Assassinating Soleimani*, N.Y. MAG. FOREIGN POL'Y (Jan. 4, 2020), http://nymag.com/intelligencer/2020/01/the-real-risk-of-assassinating-soleimani.html ("The Trump administration claimed the right to assassinate Soleimani (along with Jamal Jaafar Ibrahimi, a.k.a. Abu Mahdi al-Muhandis, the founder of the Iran-backed Iraqi Shia militia Kataib Hezbollah) via unilateral executive action and without consulting Congress because Soleimani was planning imminent attacks that would kill dozens or hundreds of U.S. citizens, and also because both men had long been designated terrorists by the United States."); Max Fisher & Amanda Taub, *A One-Word Accusation Swirls Around Trump's Deadly Strike: Assassination*, N.Y. TIMES (Jan. 7, 2020), https://www.nytimes.com/2020/01/07/world/middleeast/iransoleimaniassassination.html ("A single word has become a focal point of concerns about President Trump's decision to kill Iran's top general: assassination.").

[15] Simon Frankel Pratt, *US Killing by Drone: Continuity and Escalation*, THE INTERPRETER (Dec. 11, 2018, 3:30 PM), https://www.lowyinstitute.org/the-interpreter/us-killing-drone-continuity-and-escalation. President George W. Bush authorized the targeted killing of Abu Musab al-Zarqawi, who was killed in a targeted strike on June 7, 2006. *Bush: al-Zarqawi Death a 'Severe Blow,'* NBC NEWS (June 8, 2006, 7:03 AM), https://www.nbcnews.com/id/wbna13197560. President Barack Obama authorized the targeted killing of Osama bin Laden, who was killed on May 2, 2011. CNN Editorial

questions regarding the legality of killing Soleimani can be answered, there is actually a predicate threshold question that must be answered first: Does the President of the United States have the authority under the Constitution to order the targeted killing of a terrorist or suspected terrorist? In other words, is targeted killing legal under the U.S. Constitution and U.S. domestic law?

The American Civil Liberties Union ("ACLU") has strongly denounced the United States' targeted killing program. According to the ACLU, "[t]he U.S. Constitution and international law prohibit the use of lethal force outside of armed conflict zones unless it is used as a last resort against a concrete, specific, and imminent threat of grave harm."[16] This Article argues that targeted killing is permissible under the U.S. Constitution in self-defense or during an armed conflict.[17]

Section I begins by analyzing one of the most important cases in the context of evaluating the parameters of the Executive Branch's authority under the Constitution and *Youngstown Sheet & Tube Co. v. Sawyer*,[18] with particular emphasis on the three-tiered analytical approach Justice Jackson provided in his seminal concurring opinion.[19] Section II analyzes the text of the Constitution, focusing on the enumerated grants of power to the Legislative Branch in Article I and the Executive Branch in Article II, as well as a few other constitutional provisions that factor into the analysis. Section III analyzes the statutory framework governing the use of lethal force by officers and operatives of the Executive Branch. Finally, this Article culminates by offering some concluding thoughts on the issue.

Research, *Osama bin Laden Fast Facts*, CNN WORLD, https://www.cnn.com/2013/08/30/world/osama-bin-laden-fast-facts/index.html (Apr. 27, 2021, 12:27 PM). President Joe Biden authorized targeted killing missions in Afghanistan on or about August 28, 2021. Helene Cooper & Eric Schmitt, *A Reprisal Strike Killed Two ISIS Militants and Wounded Another*, N.Y. TIMES, https://www.nytimes.com/2021/08/28/world/us-airstrike-isis-k.html (Sept. 10, 2021); *see also* Eric Schmitt & Helene Cooper, *Pentagon Acknowledges Aug. 29 Drone Strike in Afghanistan was a Tragic Mistake that Killed 10 Civilians*, N.Y. TIMES, https://www.nytimes.com/2021/09/17/us/politics/pentagon-drone-strike-afghanistan.html (Oct. 16, 2021) (reporting that President Biden's airstrike was a "tragic mistake" that missed its target and caused excessive damage and loss of human life).

[16] *Targeted Killing*, ACLU, https://www.aclu.org/issues/ national-security/targeted-killing (last visited Sept. 12, 2021).

[17] Due to space constraints, this paper focuses exclusively on the constitutional question. The author intends to analyze the legality of targeted killing under international law in a forthcoming paper.

[18] 343 U.S. 579 (1952).

[19] *Id.* at 635–38 (Jackson, J., concurring).

I. THE CONSTITUTION AND FOREIGN AFFAIRS IN THE SHADOW OF *YOUNGSTOWN SHEET & TUBE CO. V. SAWYER*

On June 2, 1952, the Supreme Court ruled that President Truman lacked authority to seize steel mills which he said were vital to national security efforts in the context of the ongoing hostilities in the Korean War.[20] The Court issued a fractured opinion.[21] In his concurring opinion, Justice Jackson enunciated a three-tiered approach to analyzing issues related to Executive Branch actions. Justice Jackson's opinion has been cited hundreds of times.[22] "Many who study the balance of congressional and presidential power, especially in the area of foreign affairs, view Justice Jackson's concurrence in *Youngstown* as providing a sensible framework for resolving the conflicting claims of the two branches and decry this framework's alleged erosion in subsequent case law."[23] Then-Judge Brett Kavanaugh has described Justice Jackson's concurrence as "the single most influential tract on national security separation-of-powers law."[24] Justice Jackson's concurrence "established the framework that has become paramount in national security separation-of-powers law."[25]

Justice Jackson argued that (1) "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[26] And (2) "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."[27] The President may on occasion find himself in the position where he must take action

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[20] *Id.* at 587–89.

[21] The majority opinion, joined by six justices, is relatively short, at six pages in length. *Id.* at 582–88. Five justices filed separate concurrences totaling 74 pages. *Id.* at 593–667.

[22] *See* Patricia L. Bellia, *Executive Power in* Youngstown*'s Shadows*, 19 CONST. COMMENT. 87, 88–90 nn.10–14 (2002) (collecting casebooks, law review articles, and other scholarship analyzing *Youngstown* and the various legal theories formulated to explain it).

[23] *Id.* at 89 (footnotes omitted); *see also* CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 24 (2d ed. 2015) (describing *Youngstown* as "a particularly important precedent" for "considering the relationship between Congress and the president").

[24] Brett M. Kavanaugh, *Congress and the Presidents in Wartime* 5, LAWFARE (Nov. 29, 2017, 3:00 PM), https://lawfare.s3-us-west-2.amazonaws.com/staging/2017/Kavanaugh%20Review%20of%20Barron.pdf.

[25] *Id.*

[26] *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

[27] *Id.* at 637.

despite "congressional inertia, indifference or quiescence [which] may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."[28] Thus, in the "zone of twilight," where there is no explicit congressional authorization, the "actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[29] Finally, (3) "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[30]

Congress has never prohibited targeted killing. Therefore, under Justice Jackson's *Youngstown* triptych, the Executive power cannot be "at its lowest ebb," but rather must fall into one of the other two categories.[31] Consequently, the President's authority either exists in the "zone of twilight" of inherent constitutional authority absent specific legislative delegation, or the President's authority will be at its "maximum" if supported by legislative enactments.[32] As will be shown, there are several congressional enactments authorizing the President to conduct targeted killing missions (although, of course, Congress has not used the term "targeted killing" as that would be anachronistic). Before turning to these specific congressional enactments, however, it is necessary first to analyze the text of the Constitution itself.

II. CONSTITUTIONAL AUTHORIZATION FOR THE USE OF LETHAL FORCE

A. Legislative Power Under Article I of the Constitution

The Constitution contains numerous provisions relating to military and foreign affairs. These provisions can plausibly be read to empower the government to use lethal force to defend the United States and her citizens. The Preamble declares that "We the People" "ordain[ed] and establish[ed]" the Constitution in part "in Order to . . . provide for the common defence . . . and secure the Blessings of

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[28] *Id.* Justice Scalia observed that legislative inaction may signify "(1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice." Johnson v. Transp. Agency, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting). The Supreme Court has also observed that congressional silence is most significant "when the area is one of traditional year-by-year supervision." Zuber v. Allen, 396 U.S. 168, 185–86 n.21 (1969).

[29] *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

[30] *Id.* at 637–38.

[31] *Id.*

[32] *Id.* at 635–37.

Liberty to ourselves and our Posterity."[33]

Article I states that "[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence."[34] Article I further empowers Congress:

> To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;
>
> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
>
> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
>
> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulation of the land and naval Forces;
>
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;
>
> . . . —And
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.[35]

Only Congress has the authority to declare war.[36] Some scholars have argued that Congress's power to declare war is synonymous or coextensive with the power to *engage* in or *wage* war.[37] If this were true, then the President would lack the authority to engage in war—and therefore, the argument goes, he would also lack the authority to use lethal force to defend the nation and her citizens—absent a direct congressional authorization. For example, Michael Glennon has argued that the Declare War Clause not only "empowers Congress to

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[33] U.S. Const. pmbl.

[34] *Id.* art. I, § 8, cl. 1.

[35] *Id.* art. I, § 8, cls. 10–16, 18.

[36] *Id.* art. 1, § 8, cl. 11.

[37] *See*, *e.g.*, Jules Lobel, *Covert War and the Constitution*, 5 J. NAT'L SEC. L. & POL'Y 393, 396–402 (2012).

declare war," but also "serves as a limitation on executive war-making power, placing certain acts off limits for the President."[38] Yet, this is an incorrect reading of the Constitution because of the language of Article I, Section 10, which states, "No State shall, without the Consent of Congress . . . keep Troops, or Ships of War in time of Peace, . . . or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."[39] Thus, Article I, Section 10, "creates the *exact* war powers process between Congress and the states that scholars critical of the presidency want to create between Congress and the president. It makes resort to force conditional on the 'Consent of Congress,' and it even includes an exception for defending against sudden attacks."[40] Because Article I, Section 8, grants Congress the authority to declare war, and does not use the word "engage," whereas Section 10 prohibits States from "engaging" in war, it is clear that the Declare War Clause is neither synonymous nor coextensive with *engaging* in war. The different wording in the two Sections is deliberate, and the correct reading of the text accounts for that deliberate difference.[41]

Additionally, the allocation of war powers in the final text of the Constitution stands in stark contrast to the allocation of those same war powers in the Articles of Confederation. Article IX of the Articles of Confederation reads: "The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war."[42] Thus, when the Framers drafted the Constitution, if they wanted the Legislative Branch to retain the "sole and exclusive right and power of determining on peace and war," they already had

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[38] MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 17 (1990).

[39] U.S. CONST. art. I, § 10, cl. 3.

[40] JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 146 (2005) (quoting the U.S. Constitution on the war powers process).

[41] *See id.* at 97, 99–100, 105 (showing that the Declare War Clause reflected the Framers' intention to restrict Congress from encroaching on executive power to conduct war).

[42] ARTICLES OF CONFEDERATION of 1778, art. IX, para. 1. The only exception carved out from Article IX was that the individual states, while expressly prohibited from waging war without the authorization of the "United States in Congress assembled," were permitted to do so to repel actual invasion or an imminent attack:

> "No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted."
> *Id*. art. VI, para. 5.

the precedent of the Articles of Confederation before them. Clearly, the Framers rejected this formulation by dividing the sovereign war powers between the Executive and Legislative Branches.

Therefore, the correct understanding of the Declare War Clause is that declaring war is exactly that: a declaration. The declaration has the legal effect of fixing the status of the belligerents, but it does not necessarily authorize the use of force.[43] The authorization for the use of force is not contingent on a declaration of war but is subject to the constraints built into the Constitution and to the "Laws of Nations."[44] This conclusion is supported by an analysis of the United States' historical practice. There have been only five congressionally-declared wars[45] in the history of the United States: the War of 1812,[46] the War with Mexico (also called the Mexican-American War) of 1846,[47] the Spanish-American War of 1898,[48] World War I,[49] and World War II.[50]

Significantly, only the Declaration of War with Great Britain in the War of 1812 initiated a war.[51] The congressional declarations in the other four wars merely recognized (or "declared") the prior existence of a state of war.[52] The fact that these declarations of war were accompanied by congressional authorizations for the use of force shows that, as a matter of historical practice, Congress has recognized a distinction between declaring war and authorizing force.

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[43] Robert J. Delahunty & John Yoo, *Making War*, 93 CORNELL L. REV. 123, 156–58 (2007) (distinguishing what it means to "declare war" versus "wage war").

[44] The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 25 Op. O.L.C. 188, 189–91, 193–96 (2001); JENNIFER K. ELSEA & MATTHEW C. WEED, CONG. RSCH. SERV., RL31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 88 (2014).

[45] *About Declarations of War by Congress*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/declarations-of-war.htm (last visited Sept. 12, 2021).

[46] Declaration of War with Great Britain, ch. 102, Sess. 1, 12th Cong. (1812).

[47] Declaration of War with Mexico, ch. 28, Sess. 1, 29th Cong. (1846).

[48] Declaration of War with Spain, ch. 189, Sess. 2, 55th Cong. (1898).

[49] Declaration of War with Germany, ch. 1, S.J. Res. 1, 65th Cong. (1917); Declaration of War with Austria-Hungary, H.J. Res. 169, 65th Cong. (1917).

[50] Declaration of War with Japan, ch. 561, 55 Stat. 795 (1941); Declaration of War with Germany, WWII, ch. 564, 55 Stat. 796 (1941); Declaration of War with Italy, WWII, ch. 565, 55 Stat. 797 (1941); Declaration of War with Bulgaria, WWII, ch. 323, 56 Stat. 307 (1942); Declaration of War with Hungary, WWII, ch. 324, 56 Stat. 307 (1942); Declaration of War with Rumania, WWII, ch. 325, 56 Stat. 307 (1942).

[51] ELSEA & WEED, *supra* note 44, at 81; *see also* J.C.A. STAGG, AN INTRODUCTION TO THE LIFE AND PAPERS OF JAMES MADISON 7–8, https://www.loc.gov/static/collections/james-madison-papers/documents/essayStagg.pdf. (last visited Sept. 14, 2021) (showing the events leading up to America's decision to declare war with Great Britain in the War of 1812).

[52] *See* ELSEA & WEED, *supra* note 44, at 1–3, 81–87 (providing the historical context for each declaration of war).

Numerous other hostilities have been specifically authorized by Congress through instruments other than formal declarations. "From the Administration of President John Adams to the present, there have been various instances when legislation has been enacted authorizing the use of military force by the President instead of formally declaring war."[53] For example, Congress expressly authorized the use of force in the Quasi-War with France in 1798;[54] offensive actions against Tripoli in 1802;[55] against Algeria in 1815;[56] the Suppression of Piracy in 1819–1823;[57] the use of force against communist incursion in Formosa in 1955;[58] the use of force against communist incursion in the Middle East in 1957;[59] the use of force to support the government of South Vietnam against communist incursion in 1964;[60] congressional authorization for the deployment of military forces as part of the Multinational Force in Lebanon in 1983;[61] the authorization for the use of force against Iraq in 1991 pursuant to Resolutions by the United Nations Security Council;[62] and, of course, the 2001 Authorization for the Use of Military Force enacted in response to the terrorist attacks of September 11, 2001[63] (which will be discussed in greater detail in Section IV); and the 2002 Authorization for the Use of Force Against Iraq.[64] A glaring omission from this list of congressional authorizations for the use of military force is the United States' intervention in the Korean War that formed the compelling background for the *Youngstown* decision. This is because Congress never authorized the

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[53] *Id*. at 5.

[54] An Act More Effectually to Protect the Commerce and Coasts of the United States, ch. 48, 2 Stat. 561 (1798); An Act Further to Protect the Commerce of the United States, ch. 68, 2 Stat. 578 (1798).

[55] An Act for the Protection of the Commerce and Seamen of the United States Against the Tripolitan Cruisers, ch. 4, 1 Stat. 129 (1802).

[56] An Act for the Protection of the Commerce of the United States Against the Algerine Cruisers, ch. 90, 3 Stat. 230 (1815).

[57] Regulations for the Suppression of Piracy, 33 U.S.C. §§ 381–387 (1925).

[58] Act of Jan. 29, 1955, ch. 4, 69 Stat. 7 (authorizing the President to defend Formosa, the Pescadores, and other territories using the United States Armed Forces).

[59] Act of Mar. 9, 1957, Pub. L. No. 85-7, 71 Stat. 5 (promoting Middle Eastern peace and stability).

[60] Act of Aug. 10, 1964, Pub. L. No. 88-408, 78 Stat. 384 (promoting continued peace and security in southeast Asia).

[61] Multinational Force in Lebanon Resolution, Pub. L. 98-119, 97 Stat. 805 (1983).

[62] Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991).

[63] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing the President to use the United States Armed Forces against those responsible for the recent attacks launched against the United States).

[64] Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498.

use of force in the Korean War.[65] Instead, President Truman invoked resolutions of the United Nations Security Council as the only authorization he needed before committing troops to a major war that left over three or four million people dead.[66]

Then-Judge Brett Kavanaugh wrote that "[t]he difference between an authorization and a declaration appears to boil down to a question of delegation. When Congress *authorizes* the President to use force, the question of whether and when to initiate hostilities has been delegated to the President, subject to whatever constraints the authorization specifies."[67] In contrast, on those rare occasions "[w]hen Congress *declares* war against a foreign nation, the nation is immediately in a state of war, which can matter for purposes of certain domestic and international laws."[68]

Finally, Congress holds the considerable "power of the purse."[69] Simply put, Congress can end any military or intelligence activity of the Executive Branch—including targeted killing operations—simply by withholding the funds necessary for that mission. Under Article I, it is Congress, not the President, that has the power to "lay and collect Taxes" and to "borrow Money," to make "Appropriations" and "provide for the common Defence," to "raise and support Armies" and "provide and maintain a Navy," and to "call[] forth the Militia."[70] Moreover, the Appropriations Clause of Article I restricts the federal government from spending money absent congressional appropriation: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."[71]

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[65] Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT'L L. 21–22 (1995) ("In June 1950, President Truman ordered U.S. troops to Korea without first requesting congressional authority. For legal footing he cited resolutions passed by the Security Council.").

[66] S.C. Res. 82, ¶ 1–3 (June 25, 1950); S.C. Res. 83 (June 27, 1950) (finding that North Korea posed a threat to peace and security and called upon members of the United Nations to repel North Korea's attacks); Liam Stack, *Korean War, a 'Forgotten' Conflict That Shaped the Modern World*, N.Y. TIMES (Jan. 1, 2018), https://www.nytimes.com/2018/01/01/world/asia/korean-war-history.html (reporting that historians estimate three to four million people died during the Korean War, and as many as seventy percent of the casualties were civilians).

[67] Kavanaugh, *supra* note 24.

[68] *Id.*

[69] *See* U.S. CONST. art. I, § 7, cl. 1; *id*. art. I, § 9, cl. 7 (showing how Congress's power derives from its control over appropriations).

[70] *Id.* art. I, § 8, cls. 1–2, 12–13, 15; *id*. art. I, § 9, cl. 7.

[71] *Id.* art. I, § 9, cl. 7.

In *Federalist 58*, James Madison argued that "[t]his power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."[72] Similarly, in 1789, Thomas Jefferson wrote in a letter to James Madison that the power of the purse was a significant reservation to the legislature. "We have already given . . . one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay."[73]

Peter Raven-Hansen and William C. Banks described the power of the purse and the legislature's use of that power in the increasingly complex area of national security legislation. "The technological transformation of modern warfare and the increase of global risks to our national security have reinforced the importance of the power of the purse in military and foreign affairs, or what we collectively term 'national security affairs.'"[74] Globalism and the increasing interdependence among nations, along with unprecedented (and sometimes unpredictable) technological advances, contribute to an increasingly complex world in which the Executive requires great flexibility to meet the challenges of the day.[75] "Unable to anticipate precisely and in detail the occasions for the exercise of military force, Congress has increasingly ceded the initiative to the President and then used its power of the purse after the fact to ratify or restrict the presidential initiative."[76]

Throughout the nation's history, the long-term pattern regarding appropriations for national security and foreign affairs can best be described as one of punctuated equilibrium.[77] There have been

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[72] THE FEDERALIST NO. 58, at 289 (James Madison) (Lawrence Goldman ed., 2008).

[73] Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-15-02-0375-0003.

[74] Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 835–36 (1994).

[75] *See* J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 1022, 1077–78 (2020) (explaining that large deference has been granted to the executive security agencies to respond to national security threats); *cf.* GLOBALIZATION OF TECHNOLOGY: INTERNATIONAL PERSPECTIVES 1 (Janet H. Muroyama & H. Guyford Stever eds., 1988) (explaining that the advancement in globalization and rapid technological advancement "has both created and mandated greater interdependence among firms and nations").

[76] Raven-Hansen & Banks, *supra* note 74, at 835–36.

[77] In his concurring opinion, Justice Jackson argued that when the President acts contrary to statutes, then the power of the President is at its "lowest ebb." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring)

numerous instances in which Congress has initially granted the Executive the financial appropriations necessary for the Executive to carry out its national security and foreign affairs missions, only for Congress to dial back those appropriations as the crisis has waned. "As early as the 1820s and 1830s, Congress began enacting limitations on defense . . . appropriation power to substantive committees, which had the effect of encouraging policymaking by appropriation."[78] As the world grew more complex in the twentieth century, Congress again exercised its appropriations authority to guide and shape national security and foreign affairs efforts. "After delegating massive powers to the Executive in sweeping authorizations and lump-sum appropriations during World War II, Congress attempted to reassert control of the defense establishment by enacting defense authorizations for only one year at a time and including appropriation caps within the authorizations."[79]

More recently, over the past four decades, Congress has used the power of the purse as an effective check on perceived Executive overreach regarding military or covert operations. Two examples include "the Vietnam War, an undeclared but congressionally authorized war that Congress sought repeatedly to control and ultimately to end by exercising its power of the purse."[80] And the Iran-Contra Affair, in which Congress, through the Boland Amendments, issued "no fewer than thirteen [appropriation] restrictions" which checked the Reagan administration's use of covert actions.[81]

Although the President is the Commander in Chief (as discussed in the following subsection), he has nothing to command except what Congress provides via the mechanism of appropriation. Due to the power of the purse held solely by Congress, the President is unable as a practical (if not constitutional) matter to engage in hostilities without Congress.[82] It is significant, therefore, that Congress has never defunded targeted killing operations. Nor has Congress ever defunded the drone program. Moreover, as shall be seen in Section III, *infra*, Congress has enacted statutes which empower the President to use

("Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.").

78 Raven-Hansen & Banks, *supra* note 74, at 843.

79 *Id.* at 843–44.

80 *Id.* at 837.

81 *Id.*

82 John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L.R. 1639, 1680 (2002).

lethal force either through military or intelligence agencies.[83]

B. Executive Power Under Article II of the Constitution

As discussed in the previous subsection, only Congress has the authority to declare war. The Constitution does not allocate all war powers to a single branch, but rather divides the war powers between Congress and the President.[84] This does not mean that the President has the authority to declare war, but he does have significant inherent war power.

Article II of the Constitution states, "The executive Power shall be vested in a President of the United States of America."[85] It is worth pausing for a moment to consider the different wording between the Vesting Clauses in Article I and Article II. The Legislative Vesting Clause reads, "[a]ll legislative Powers *herein granted* shall be vested in a Congress of the United States."[86] In contrast, the Executive Vesting Clause does not contain the limitation that the Executive Powers vested are those "herein granted" within the Constitution.[87] The absence of this limitation is evidence that the Executive Vesting Clause draws on a conception of the authority of the Executive Branch that pre-existed the Constitution. This interpretation is analogous to Chief Justice John Marshall's interpretation of the Judicial Vesting Clause in Article III, which led him to conclude that the Supreme Court has the authority of "judicial review" and determining the constitutionality of a congressionally-enacted statute.[88]

Alexander Hamilton also understood the distinction between the Executive and Legislative Vesting Clauses in this manner. Hamilton wrote:

> The enumeration ought rather therefore to be considered as intended by way of greater caution, to specify and regulate the principal articles implied in the definition of Executive Power; leaving the rest to flow from the general grant of that power, interpreted in conformity to other parts ⟨of⟩ the constitution and to the principles of free government.
>
> The general doctrine then of our Constitution is, that the

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83 *See infra* Section 0.

84 U.S. CONST. art. I, § 8, cls. 11–16; *id.* art. II, § 2, cl. 1.

85 *Id.* art. II, § 1, cl. 1.

86 *Id.* art. I, § 1 (emphasis added).

87 *Id.*; *id.* art. II, § 1.

88 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 138–39, 146–48, 173–74 (1803) ("The [C]onstitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish.").

> EXECUTIVE POWER of the Nation is vested in the President; subject only to the *exceptions* and *qu*[*a*]*lifications* which are expressed in the instrument.
>
> * * *
>
> It deserves to be remarked, that as the participation of the senate in the making of Treaties and the power of the Legislature to declare war are exceptions out of the general "Executive Power" vested in the President, they are to be construed strictly—and ought to be extended no further than is essential to their execution.
>
> While therefore the Legislature can alone declare war, can alone actually transfer the nation from a state of Peace to a state of War—it belongs to the "Executive Power," to do whatever else the laws of Nations cooperating with the Treaties of the Country enjoin, in the intercourse of the UStates with foreign Powers.[89]

Modern scholars have agreed with Hamilton. Louis Henkin observed in his seminal volume, *Foreign Affairs and the U.S. Constitution*, "[t]he executive power . . . was not defined because it was well understood by the Framers raised on Locke, Montesquieu and Blackstone."[90] Similarly, Edward S. Corwin stated, "Blackstone, Locke, and Montesquieu were all in agreement in treating the direction of foreign relations as a branch of 'executive' . . . power."[91]

Article II further vests the President with significant war powers: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."[92] The Constitution exhorts the President to "take Care that the Laws be faithfully executed."[93] Finally, the President is the only constitutional officer whose oath is spelled out in the Constitution itself. The oath states, "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."[94] These powers allow him "to direct the movements of the naval and

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[89] Pacificus No. I (June 29, 1793), FOUNDERS ONLINE, https://founders.archives.gov/?q=%22executive%20power%22%20Author%3A%22Hamilton%2C%20Alexander%22&s=1311311112&sa=&r=5&sr=.

[90] LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 39 (2d ed. 1996).

[91] EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 416 n.1 (rev. 4th ed. 1957).

[92] U.S. CONST. art. II, § 2, cl. 1.

[93] *Id.* art. II, § 3.

[94] *Id.* art. II, § 1, cl. 8.

military forces placed . . . at his command."[95] Chief Justice Marshall suggested that the President's "high duty" to "take care that the laws be faithfully executed," as well as the Commander in Chief power, include the authority to deploy U.S. military force.[96]

In 1936, the Supreme Court ruled in *United States v. Curtiss-Wright Export Corp.* that the President had independent authority, under Article II of the Constitution, to limit participation by private parties in the international arms trade where the President had determined that the sale of the weapons systems posed a potential threat to national security.[97] The Court stated that the President has

> plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.[98]

Consequently, the Court found that congressional enactments "must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."[99] The Supreme Court has recognized that the President holds the "vast share of responsibility for the conduct of our foreign relations"[100] and holds "independent authority 'in the areas of foreign policy and national security.'"[101]

As discussed in this Article's previous subsection, Congress, not the President, has the authority to declare war. How does this relate to and interact with the President's inherent constitutional authority under the Commander in Chief Clause? In 1863, the Supreme Court held that the President "has no power to initiate or declare a war," but if there was an invasion, "the President is not only authorized but bound to resist force by force . . . without waiting for any special legislative authority."[102]

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95 Fleming v. Page, 50 U.S. (9 How.) 603, 614–15 (1850).

96 Little v. Barreme, 6 U.S. (2 Cranch) 170, 177 (1804).

97 299 U.S. 304, 318–20 (1936).

98 *Id.* at 320.

99 *Id.*

100 Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414–15 (2003) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)).

101 *Id.* at 429 (quoting Haig v. Agee, 453 U.S. 280, 291 (1981)); *see also* Dep't of the Navy v. Egan, 484 U.S. 518, 529–30 (1988) (quoting *Haig*, 453 U.S. at 293–94) ("The Court also has recognized 'the generally accepted view that foreign policy [is] the province and responsibility of the Executive.'").

102 The Prize Cases, 67 U.S. (2 Black) 635, 668 (1863).

As discussed above, the United States has engaged in five congressionally-declared wars. The United States has also engaged in hostilities based on congressional authorization for the use of force (distinct from declarations of war) on numerous occasions. In addition to the declared wars and the congressional authorizations for the use of force, the United States has frequently deployed its military overseas *without* express congressional authorization. In 1991, against both the backdrop of the looming crisis in the Middle East after Iraq annexed Kuwait and in the run-up to the United States' military intervention to liberate Kuwait, then-Professor Harold Koh (who later became the Legal Adviser to the Secretary of State) testified before the Senate Committee on the Judiciary. Professor Koh stated, "Congress has declared war only five times in our history, the President's supporters note, while the President has used force unilaterally on as many as 211 times."[103] Senator Edward Kennedy later addressed this claim during the hearing:

> Much has been made of the so-called 211 past incidents in which the United States has used force abroad without a declaration of war. The vast majority of these cases were minor incidents or brief skirmishes, involving small expeditions to protect a handful of U.S. citizens in danger or to attack pirates.[104]

Professor Louis Henkin and Professor William Van Alstyne, while not necessarily agreeing with Senator Kennedy's description that the "211 past incidents" were merely "minor incidents or brief skirmishes," stated that none of the "211 past incidents" arose to the level of a full-scale war—with the notable exception of the Korean War.[105] Senator Kennedy also acknowledged that the Korean War was more than a "minor incident[] or brief skirmish[]."[106] The scholars and the senator all seemed to agree that President Truman lacked the constitutional authority to commit the entire might of the American war machine to a protracted armed conflict without any congressional authorization.[107]

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[103] *The Constitutional Roles of Congress and the President in Declaring and Waging War: Hearing Before the Comm. on the Judiciary*, 102d Cong. 133 (1991) [hereinafter *Hearing*] (statement of Harold Hongju Koh, Professor of Law, Yale University).

[104] *Id.* at 30 (statement of Sen. Edward M. Kennedy).

[105] *Id.*; *id.* at 119 (statement of Louis Henkin, Professor of Law, Columbia Law School); *id.* at 119–20 (statement of William Van Alstyne, Professor of Law, Duke Law School).

[106] *Id.* at 30 (statement of Sen. Edward M. Kennedy).

[107] *Id.*; *id.* at 89 (statement of Louis Henkin, Professor of Law, Columbia Law

The Congressional Research Service (CRS) released a report, last updated in September 2021, cataloging "hundreds of instances in which the United States has used its Armed Forces abroad in situations of military conflict or potential conflict or for other than normal peacetime purposes."[108] The report excludes from the list of hundreds of military interventions, "[c]overt operations, domestic disaster relief, and routine alliance stationing and training exercises," and also excludes "the Civil and Revolutionary Wars and the continual use of U.S. military units in the exploration, settlement, and pacification of the western part of the United States."[109] It is beyond the scope of this Article to analyze each of these "hundreds of instances," but a cursory review of the list compiled by the Congressional Research Service provides nuance that Senator Kennedy's claim that "[t]he vast majority of these cases were minor incidents or brief skirmishes, involving small expeditions to protect a handful of U.S. citizens in danger or to attack pirates" elides.[110] This history matters because the Supreme Court has stated many times that historical practice informs the present understanding of what the Constitution means, particularly in separation-of-powers and national security cases.[111] "'[L]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions' regulating the relationship between Congress and the President."[112]

For example, during the First Seminole War, the United States invaded Spanish Florida to attack insurgents from the Seminole tribe who had been staging raids and massacres in United States territory before slipping back across the border into the safe haven of Spanish Florida. During the First Seminole War, 1816–1818, Major General Andrew Jackson led an army of roughly 4,000 soldiers (supplemented by irregular forces drawn from the Creek Indians, tribal enemies of the Seminole), and "invaded Spanish Florida and destroyed Seminole

School); *id.* at 125 (statement of Harold Hongju Koh, Professor of Law, Yale University).

[108] BARBARA SALAZAR TORREON & SOFIA PLAGAKIS, CONG. RSCH. SERV., R42738, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2020 summary (2021).

[109] *Id.*

[110] *Id.*; *Hearing*, *supra* note 103, at 30 (statement of Sen. Edward M. Kennedy).

[111] *See, e.g.*, Zivotofsky v. Kerry, 576 U.S. 1, 23 (2015) (relying on the weight of historical evidence to support a finding of the President's sole recognition power); Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) (determining that Congress's long-standing acquiescence to executive action creates a presumption of Congress's consent to the President's powers).

[112] NLRB v. Noel Canning, 573 U.S. 513, 524 (2014) (quoting The Pocket Veto Case, 279 U.S. 655, 689 (1929)).

power west of the Suwannee River."[113] A large cohort of Seminole insurgents were holed up in a Spanish fort.[114] Jackson claimed a right to attack the fort in self-defense.[115] In a letter to the Spanish governor, Jackson stated, "that the conduct of this *banditti* is such as will not be tolerated by our Government, and, if not put down by Spanish authority, will compel us, in self-defence, to destroy them."[116] The Spanish governor urged Jackson to postpone his attack on the fort, claiming that Spain would take action against the Seminole insurgents.[117] When the Spanish governor dithered, however, Jackson dispatched gunboats to destroy the fort after a short but intense battle, killing most of the inhabitants.[118] Jackson and his army went on to capture several more Spanish forts and also captured and occupied an island (Amelia Island) that belonged to Spain, and the United States refused to return the island to Spanish control after the conclusion of the war.[119] Significantly, Jackson and his army acted under the orders of President James Monroe, who never sought congressional authorization for the First Seminole War.[120] Indeed, in 1818, Congress introduced resolutions condemning some of Jackson's actions, notably the killing of two British citizens who were tried by special courts-martial for aiding the insurgents.[121] The resolutions failed, and Congress remained silent regarding the larger conflict and the capture of the Spanish forts and island.[122]

There are other examples on the CRS report list of conflicts involving hundreds and even thousands of combatants that were never explicitly authorized by Congress. In 1818, the United States

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[113] John K. Mahon, *Seminole Wars*, *in* THE OXFORD COMPANION TO AMERICAN MILITARY HISTORY 646, 646 (John Whiteclay Chambers II ed., 1999).

[114] Letter from General Jackson to the Governor of Pensacola (Apr. 23, 1816), *in* 4 AMERICAN STATE PAPERS: FOREIGN RELATIONS 555, 555 (Walter Lowrie & Walter S. Franklin eds., 1834); Report of Captain Amehung to General Jackson (June 4, 1816), *in* 4 AMERICAN STATE PAPERS: FOREIGN RELATIONS 557, 557 (Walter Lowrie & Walter S. Franklin eds., 1834).

[115] Letter from General Jackson to the Governor of Pensacola, *supra* note 114, at 556.

[116] *Id.* (emphasis added).

[117] Letter from Governor Zuniga to General Jackson (May 26, 1816), *in* 4 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 114, at 556, 556–57; Report of Captain Amehung to General Jackson, *supra* note 114, at 557.

[118] DEBORAH A. ROSEN, BORDER LAW: THE FIRST SEMINOLE WAR AND AMERICAN NATIONHOOD 20–22 (2015); J. Loomis to Commodore Patterson (August 13, 1816), *in* 4 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 114, at 559, 560.

[119] ROSEN, *supra* note 118, at 22–23.

[120] *Id.*

[121] JOHN MISSALL & MARY LOU MISSALL, THE SEMINOLE WARS: AMERICA'S LONGEST INDIAN CONFLICT 43–44, 47–50 (2004).

[122] *Id.* at 48–50.

dispatched Navy forces to annex Oregon over claims by both Russia and Spain.[123] In 1832, a naval force captured a fort in Sumatra "to punish natives of the town of Quallah Batoo for plundering the American ship *Friendship*."[124] For two weeks in 1833, naval forces occupied Buenos Aires, Argentina, in order to put down an insurrection that threatened the interests of the United States and other countries.[125] In 1841, "[a] naval party landed and burned towns [in Samoa] after the murder of an American sailor on Upolu Island. This was the second engagement with islanders of the Pacific Ocean during the United States Exploring Expedition."[126] In 1844, "U.S. President John Tyler deployed U.S. forces to protect Texas against Mexico, pending Senate approval of a treaty of annexation (later rejected). He defended his action against a Senate resolution of inquiry."[127] In 1871, the U.S. captured five forts in Korea.[128]

In 1925, the United States dispatched 600 troops to Panama for two weeks to quell "[s]trikes and rent riots" and "to keep order and protect American interests."[129] Over a seven-year period beginning in 1926, the United States intervened militarily in Nicaragua multiple times after "[t]he *coup d'état* of General Chamorro aroused revolutionary activities."[130] U.S. forces, predominantly Marines, "came and went intermittently" from 1926 until 1933.[131] Although President Calvin Coolidge did inform Congress of the United States' military interventions in Nicaragua, he did not do so until 1927, and he did not seek congressional authorization for the interventions.[132]

From 1927 to 1933, the United States (along with Great Britain) dispatched several naval and military expeditions "to protect American interests" in China, occupying Chinese territory sometimes for months at a time.[133] In October of 1945, "50,000 U.S. Marines were sent to North China to assist Chinese Nationalist authorities in disarming and repatriating the Japanese in China and in controlling ports, railroads, and airfields."[134] (It could be argued, although Congress did not expressly authorize the deployment of the 50,000 U.S. Marines to

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123 TORREON & PLAGAKIS, *supra* note 108, at 3.
124 *Id.*
125 *Id.*
126 *Id.*
127 *Id.* at 4.
128 *Id.* at 5.
129 *Id.* at 10.
130 *Id.*
131 *Id.*
132 CALVIN COOLIDGE, MESSAGE OF THE PRESIDENT OF THE UNITED STATES TO CONGRESS, JANUARY 10, 1927, H.R. Doc. No. 70-342, at 291–92, 297–98 (1st Sess. 1927).
133 TORREON & PLAGAKIS, *supra* note 108, at 10.
134 *Id.*

China, that this deployment fell under the congressional authorization for World War II. The problem with that argument is that World War II had already ended by October 1945.)[135] In 1962, the President deployed 5,000 Marines to Thailand "to support that country during the threat of Communist pressure from outside."[136]

Also in 1962, President John F. Kennedy dispatched the Navy to "quarantine" (legally, a blockade) Cuba in order to prevent the Soviet Union from emplacing nuclear missiles.[137] President Kennedy issued "A Proclamation" stating his reasons for ordering the "interdiction of the delivery of offensive weapons to Cuba," but he did not seek congressional authorization.[138] "Concerning the role of Congress in the Cuban Missile Crisis, the Congress did not play any role in terms of participation/involvement in the foreign policy making."[139] In fact, members of Congress criticized President Kennedy's "quarantine."[140] "Congress declared Kennedy's response to be weak and called for a much more aggressive approach on the part of the US in dealing with the Soviets."[141] During a congressional briefing the day before President Kennedy issued his "Proclamation," several members of Congress "criticized the Kennedy Administration's response to the Soviet build up in Cuba to be insufficient and advocated for immediate all-out military action against the missile sites."[142] But Congress never voted to authorize the use of force, and President Kennedy ordered the "quarantine" based solely on his own authority as Commander in Chief.[143]

More recently, in 1986, President Ronald Reagan launched an incredibly complex military raid involving more than 100 advanced jet fighters flying for 6,000 miles to bomb five targets in different cities in Libya.[144] In 1999, President William J. Clinton ordered a 78-day campaign of air strikes in Kosovo in which the U.S. Air Force flew

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[135] BARBARA SALAZAR TORREON, CONG. RSCH. SERV., RS21405, U.S. PERIODS OF WAR 2–4 (2010).

[136] TORREON & PLAGAKIS, *supra* note 108, at 11.

[137] DONALD KAGAN, ON THE ORIGINS OF WAR AND THE PRESERVATION OF Peace 508, 516, 520–23 (1995).

[138] Proclamation No. 3504, 3 C.F.R. 101 (1962); Karthik Gopalan, *Kennedy and the Cuban Missile Crisis*, FOREIGN POL'Y J. (Aug. 16, 2010), http://www.foreignpolicy journal.com /2010/08/16/kennedy-and-the-cuban-missile-crisis/.

[139] Gopalan, *supra* note 138.

[140] KAGAN, *supra* note 137, at 516, 520–23.

[141] Gopalan, *supra* note 138.

[142] *Id.*; Proclamation No. 3504, 3 C.F.R. § 101 (1962).

[143] KAGAN, *supra* note 137, at 516, 520; Gopalan, *supra* note 138; Proclamation No. 3504, *supra* note 142, at 102.

[144] Judy G. Endicott, *Raid on Libya: Operation Eldorado Canyon*, *in* SHORT OF WAR: MAJOR USAF CONTINGENCY OPERATIONS, 1947–1997, at 145, 146–50 (A. Timothy Warnock ed., 2000).

30,018 sorties, approximately 10,000 of which were strike missions[145]—and once again, the President ordered this deployment of military force absent congressional authorization.[146] President Barack Obama ordered a prolonged campaign of air strikes in Libya—in which U.S. Air Force pilots flew 983 sorties, including 370 strike sorties—without express congressional authorization.[147] Indeed, the Office of Legal Counsel ("OLC") published a legal Memorandum concluding that the President did not need to seek congressional authorization because "President Obama could rely on his constitutional power to safeguard the national interest by directing the anticipated military operations in Libya—which were limited in their nature, scope, and duration—without prior congressional authorization."[148] Finally, President Obama began, and President Donald Trump continued, a prolonged military intervention—now entering its fifth year of "kinetic" operations—in Syria without express congressional authorization.[149] The 113th Congress did attempt to authorize President Obama's military adventures in Syria in 2013, but the bill never received a floor vote in the House or the Senate.[150] To be fair, both Presidents Obama and Trump both have claimed authority—backed by members of Congress—under the Authorization for the Use of Military Force enacted in 2001.[151] The AUMF will be discussed in greater detail in Section IV, *infra*, as it relates to targeted killing.

The point of this whirlwind tour of notable military interventions conducted by the United States by the orders of the President absent congressional authorization—and it must be emphasized that this list is far from exhaustive—is to provide the nuance that Senator Kennedy lacked when he claimed that the majority of American military

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145 Gregory Ball, *1999 - Operation Allied Force*, A.F. HIST. SUPPORT DIV. (Aug. 23, 2012), https://www.afhistory.af.mil/FAQs/Fact-Sheets/Article/458957/operation-allied-force/; Daniel L. Haulman, *The U.S. Air Force in the Air War Over Serbia, 1999*, 62 AIR POWER HIST. 2, 10–11, 17–18 (2015).

146 JULIE KIM, CONG. RSCH. SERV., RL30729, KOSOVO AND THE 106TH CONGRESS 1 (2001).

147 Deborah C. Kidwell, *The U.S. Experience: Operational*, *in* PRECISION AND PURPOSE: AIRPOWER IN THE LIBYAN CIVIL WAR 107, 112, 118–19, 135 (Karl P. Mueller ed., 2015).

148 Auth. to Use Legal Force in Libya, 35 Op. O.L.C. 20, 39 (2011).

149 MATTHEW C. WEED, CONG. RSCH. SERV., R43760, A NEW AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST THE ISLAMIC STATE: ISSUES AND CURRENT PROPOSALS summary (2017).

150 S.J. Res. 21, 113th Cong. § 2 (2013) (introduced to the Senate on Sept. 6, 2013, but never voted on).

151 MATTHEW WEED, CONG. RSCH. SERV., MEMORANDUM: PRESIDENTIAL REFERENCE TO THE 2001 AUTHORIZATION FOR USE OF MILITARY FORCE IN PUBLICLY AVAILABLE EXECUTIVE ACTIONS AND REPORTS TO CONGRESS 3 (2018); Authorization for Use of Military Force, 50 U.S.C. § 1541.

interventions were "minor incidents or brief skirmishes."[152] Senator Kennedy was no doubt correct that the *majority* of the interventions were relatively minor, but his use of the term "vast majority" elided the nuance that there has been a solid core of military interventions that can hardly be described accurately as "minor incidents or brief skirmishes."

Indeed, as a 1980 OLC Memorandum written by Assistant Attorney General John M. Harmon emphatically states, "[o]ur history is replete with instances of presidential uses of military force abroad in the absence of prior congressional approval."[153] The OLC Memorandum describes a "pattern of presidential initiative and congressional acquiescence [which] may be said to reflect the implicit advantage held by the executive over the legislature under our constitutional scheme in situations calling for immediate action."[154] The OLC Memorandum argues that "constitutional practice over two centuries, supported by the nature of the functions exercised and by the few legal benchmarks that exist, evidences the existence of broad constitutional power."[155] Furthermore, "[t]he power to deploy troops abroad without the initiation of hostilities is the most clearly established exercise of the President's general power as a matter of historical practice."[156]

The OLC Memorandum concludes, "[t]his history reveals that purposes of protecting American lives and property and *retaliating* against those causing injury to them are often intertwined," and "there is much historical support for the power of the President to deploy troops without initiating hostilities and to direct rescue and retaliation operations even where hostilities are a certainty."[157] The OLC Memorandum concedes, however, using the Korean War as a reference point, that a long-term military campaign "cannot be sustained over time without the acquiescence, indeed the approval, of Congress, for it is Congress that must appropriate the money to fight a war or a police action."[158] Although "[p]residents have exercised their authority to introduce troops into Korea and Vietnam without prior congressional authorization, those troops remained only with the approval of Congress."[159]

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[152] *Hearing*, *supra* note 103, at 30 (statement of Sen. Edward M. Kennedy).

[153] Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 187 (1980).

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.* at 187–88.

[159] *Id.*

Similarly, a 2018 OLC Memorandum supports this conclusion. The OLC Memorandum states that "[w]hen it comes to the war powers of the President, we do not write on a blank slate."[160] The OLC Memorandum analyzes the historical practice, including "[t]he legal opinions of executive advisers and the still weightier precedents of history have established that the President, as Commander in Chief and Chief Executive, has the constitutional authority to deploy the military to protect American persons and interests without seeking prior authorization from Congress."[161]

Again, nothing in this discussion should be read to imply that the president has the authority to take the country to war—only Congress can declare war. But this discussion should make clear that the President's decision to deploy troops and use lethal force to defend American citizens and property is not synonymous with declaring war. The president has a wide range of options, including the use of lethal force, that fall short of full-scale war. As Judge David Barron has described the historical practice, Congress and the various presidents seem to have reached a "tacit pact": "Relatively small-scale, short-term commitments of troops were tolerated—and, actually, sometimes even encouraged—by those in Congress, even when the President did not seek true consultation in advance. Larger and more enduring commitments of force"—such as the Korean War—"were not pursued by the executive without full congressional backing."[162] Judge Barron states that "[t]his tacit pact was as much a political as a legal one. No President wished to enter into a failed war of real scale without having forced Congress to sign on first."[163]

At the risk of stating the obvious, if the "hundreds" of instances where the President has used military force abroad, including using lethal force, have not arisen to the level of violence requiring congressional authorization, then targeted killing easily qualifies as the type of action the President may execute under his inherent constitutional authority. Targeted killing involves a much smaller "footprint" or commitment of troops than many (if not most) of the historical examples of force that were within the President's constitutional authority.[164] If those other uses of lethal force did not require congressional authorization, then certainly a use of lethal force involving a smaller commitment of troops is on even stronger

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[160] April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. *3 (May 31, 2018).

[161] *Id.*

[162] DAVID J. BARRON, WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS 1776 TO ISIS 388–89 (2016).

[163] *Id.* at 389.

[164] AMOS N. GUIORA, LEGITIMATE TARGET: A CRITERIA-BASED APPROACH TO TARGETED KILLING, at x (2013).

constitutional footing. And as the following Section makes clear, the President is not, in fact, acting alone—he is acting in concert with the Legislative Branch.

Before closing the analysis of the presidential powers under Article II, however, it is worth taking a moment to consider that military force is not the only tool in the President's toolbox. In addition to tasking military assets with a mission, the President may also task other agencies with covert operations.[165] The specifics of the statutory authorization for covert actions are discussed in Section III, *infra*, but for the purposes of this Section, it bears emphasizing that the primary source of the President's authority to conduct covert actions is derived from his constitutional authority. The Supreme Court has ruled that the President's authority under the Commander in Chief Clause empowers him "to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy."[166]

During the Revolutionary War, General George Washington wrote to Colonel Elias Dayton that

> [t]he necessity of procuring good Intelligence is apparent & need not be further urged—All that remains for me to add, is, that you keep the whole matter as secret as possible. For upon Secrecy, Success depends in most Enterprizes of the kind, and for want of it, they are generally defeated, however well planned & promising a favourable issue.[167]

John Jay, a contributor to *The Federalist* and the first Chief Justice of the United States, wrote that the President is empowered by the Constitution to "manage the business of intelligence in such manner as prudence may suggest."[168]

Every President, beginning with George Washington, has exercised authority to engage in intelligence activities, including what is now called "covert action."[169] "When George Washington became

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[165] *See* MICHAEL E. DEVINE, CONG. RSCH. SERV., R45175, COVERT ACTION AND CLANDESTINE ACTIVITIES OF THE INTELLIGENCE COMMUNITY: SELECTED DEFINITIONS IN BRIEF 1, 4 (2019) (explaining the general historical lack of executive oversight in covert action and how other departments and agencies can now be used for covert operations).

[166] Totten v. United States, 92 U.S. 105, 106 (1875).

[167] Letter from George Washington to Colonel Elias Dayton (July 26, 1777), FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/03-10-02-0415.

[168] THE FEDERALIST NO. 64, at 318 (John Jay) (Lawrence Goldman ed., 2008).

[169] CHRISTOPHER ANDREW, FOR THE PRESIDENT'S EYES ONLY: SECRET INTELLIGENCE AND THE AMERICAN PRESIDENCY FROM WASHINGTON TO BUSH 12–13 (1995); *U.S. Intelligence Agencies and Activities: Risks and Control of Foreign*

President in 1789, he took over the duties of the chief intelligence officer, whose portfolio he had managed previously when he served as commander-in-chief during the War for Independence."[170] President Washington initially requested and received $40,000 (in 1790 dollars) from Congress "for the purpose of conducting secret intelligence activity."[171] By 1793, President Washington's intelligence budget, termed the "Contingent Fund for Foreign Intercourse[,] reached $1,000,000" (in 1793 dollars), roughly twelve percent of the government's operating budget at the time.[172] Congress proved remarkably willing to defer to the President's discretion in accounting for the money in the Contingent Fund: "Congress permitted an accounting of expenditures by certificate rather than by receipt, which would have named the agents involved."[173] (Congress gave "[t]his same privilege . . . to the Director of Central Intelligence in 1949.")[174] In America's first 100 years, Presidents including George Washington, "secretly appointed a total of 400 special agents to conduct activities with or against foreign countries."[175]

Modern scholars have also recognized the close association between traditional military activities and intelligence activities. "The U.S. President's authority to direct military and intelligence activities against foreign threats resides in his constitutional executive and commander-in-chief powers."[176] "As commander-in-chief, the president can exercise his authority through any agency or department that he believes will be most effective in defending the nation, as long as such action is also in accordance with statutory enactments by Congress."[177]

Intelligence: Hearing Before the House Select Comm. on Intelligence, 94th Cong. 1729, 1731–33 (1976) (statement of Mitchell Rogovin, Special Couns. to the Dir. of the CIA) ("Beginning with George Washington, almost every President has appointed special agents to engage in certain activities with, or against, foreign countries.").

[170] Ray S. Cline, *Covert Action as Presidential Prerogative*, 12 HARV. J.L. & PUB. POL'Y 357, 358 (1989).

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.* at 358 n.4; *see* 50 U.S.C. § 3510 (showing the approval of Congress for funding by certificate from the Director of the CIA).

[175] Marcus Eyth, *The CIA and Covert Operations: To Disclose or Not to Disclose – That is the Question*, 17 BYU J. PUB. L. 45, 47 (2002) (citing *U.S. Intelligence Agencies and Activities: Risks and Control of Foreign Intelligence: Hearing Before the House Select Comm. on Intelligence*, 94th CONG. 1732 (1976) (statement of Mitchell Rogovin, Special Counsel to the Director of the CIA)).

[176] Catherine Lotrionte, *Targeted Killings by Drones: A Domestic and International Legal Framework*, 3 SAINT JOHN'S J. INT'L & COMPAR. L. 19, 29–30 (2012).

[177] *Id.* at 31. *But cf.* Lobel, *supra* note 37, at 393 ("The question of whether the President has the constitutional power to authorize covert paramilitary actions or shadow wars against other nations or entities first surfaced at the beginnings of the American republic and continues to vex policymakers today.").

III. STATUTORY AUTHORIZATIONS FOR THE USE OF LETHAL FORCE

As the previous Section makes clear, the Constitution empowers the President with significant authority to use lethal force to defend the national interest. Significantly, Congress has never prohibited the Executive Branch's targeted killing regime. Under Justice Jackson's *Youngstown* triptych, therefore, the President's authority in this area either falls into the "zone of twilight" of concurrent authority absent specific Legislative enactments, or in the category where the President's authority is at its "maximum" when he acts pursuant to congressional authorization. This Section addresses the specific congressional authorizations that empower the President to conduct targeted killing missions.

A. The National Security Act of 1947

The National Security Act of 1947 provides the Executive with significant authority. The National Security Act does not contain the words "targeted killing," of course, but it can plausibly be read to include congressional authorization for targeted killing missions.

After World War II, Congress and the President worked together to reshape the institutions of national security. The result was the National Security Act of 1947 ("NSA").[178] Among the NSA's sweeping reorganization, the Act reorganized the Department of Defense (merging the predecessor Departments of the Army and the Navy),[179] created the Joint Chiefs of Staff,[180] created the United States Air Force (formerly the Army Air Forces, Army Air Corps, United States Army),[181] created the National Security Council ("NSC"),[182] and created the Central Intelligence Agency ("CIA").[183]

Scholars have argued that the NSA authorized the President to order covert actions at his discretion.[184] "Until the mid-1970s, there was very little congressional oversight of the CIA, and particularly of

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[178] National Security Act of 1947, Pub. L. 80-253, 61 Stat. 495 (codified at 50 U.S.C. § 401).

[179] 50 U.S.C. § 401.

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] W. MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION: PRACTICES, CONTEXTS, AND POLICIES OF COVERT COERCION ABROAD IN INTERNATIONAL AND AMERICAN LAW 118–19 (1992).

covert action programs."[185] This was often a deliberate choice by legislators. "Senior members of Congress who chose to be briefed would be informed of programs in the very broadest of terms sufficient to justify funding requests, although often they deliberately chose *not* to be briefed on programs while nonetheless approving the requisite funds."[186] One scholar has described this era as one of "Congressional undersight."[187]

B. The Intelligence Authorization Act of 1979

In the early 1970s, journalists revealed information about alleged assassination plots by operatives of the CIA.[188] In response, the Senate and House empaneled committees to investigate.[189] The Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities, known as the "Church Committee" after its chairman Senator Frank Church, proved far more important than the House committee.[190] In response to the Church Committee's report, Congress passed the Intelligence Authorization Act of 1979 ("1979 IAA").[191] Congress exercised its "power of the purse" and at a stroke removed much of the intelligence community's previous fiscal independence.[192] Before the 1979 IAA, "[t]here had been no annual bills authorizing appropriations for the intelligence community, and there was no identifiable appropriation for intelligence. There was only an appropriation concealed in the defense appropriations bill."[193] The IAA "for the first time placed the CIA and the other intelligence agencies under congressional authorization and appropriation procedures."[194]

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[185] WILLIAM J. DAUGHERTY, EXECUTIVE SECRETS: COVERT ACTION AND THE PRESIDENCY 91–92 (2004).

[186] *Id.*

[187] BARRY M. BLECHMAN, THE POLITICS OF NATIONAL SECURITY: CONGRESS AND U.S. DEFENSE POLICY 139–41 (1990).

[188] *A Glimpse into the CIA's 'Family Jewels*,*'* N.Y. TIMES (June 26, 2007), https://www.nytimes.com/2007/06/26/news/26iht-cia.4.6345003.html.

[189] *Id.*; Andrew Rudalevige, *The CIA's New 'Family Jewels': Going Back to Church?*, WASH. POST (Mar. 11, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/03/13/the-cias-new-family-jewels-going-back-to-church/.

[190] Rudalevige, *supra* note 189.

[191] A. John Radsan, *An Overt Turn on Covert Action*, 53 ST. LOUIS U. L.J. 485, 524 (2009).

[192] Marshall Silverberg, *The Separation of Powers and Control of the CIA's Covert Operations*, 68 TEX. L. REV. 575, 595–96, 621 (1990).

[193] *Id.* at 596 n.133 (quoting DANIEL B. SILVER ET AL., OVERSIGHT AND ACCOUNTABILITY OF THE U.S. INTELLIGENCE AGENCIES: AN EVALUATION 8 (1975)).

[194] *Id.* at 595–96.

C. The Intelligence Oversight Act of 1980

The political winds shifted again in 1979. The United States experienced significant setbacks in its foreign affairs efforts that year, particularly in the Middle East. First, Ayatollah Khoemeini seized the reins of power in Iran and the Shah fled into exile; Ayatollah's supporters stormed the U.S. embassy and took fifty-two Americans hostage for 444 days beginning on November 4, 1979.[195] At the same time, Afghanistan had plunged into chaos. In December 1979, barely a month after the Iranians stormed the U.S. embassy, the Soviet Union deployed 75,000 troops to invade Afghanistan "to crush whatever internal resistance or foreign intervention might follow."[196] "Having declared Afghanistan a member of the Soviet bloc, its government could not be allowed to fall."[197]

The United States witnessed these twin foreign affairs disasters in mounting horror. The world teetered on the precipice of hecatomb and blood-soaked chaos. The North Atlantic Treaty Organization ("NATO") approved the deployment of American Pershing II and cruise missiles at selected sites in Western Europe.[198] "The Pershings were reputed to be fifteen times more accurate than the SS-20s. Flying time to Moscow would be about ten minutes."[199] As the United States began to build up its conventional military forces and forward-deploy for the conflict that seemed inevitable and imminent, the Senate chose to revitalize America's unconventional forces by loosening the restrictions it had imposed on the intelligence community.[200] The setbacks in Iran and Afghanistan "cried out for a reassertion of American power. One aspect to that power was covert action, a return of Cold War ghosts to the scene. So Congress, rather than pass a comprehensive charter for the CIA, scaled back."[201]

Congress passed the Intelligence Oversight Act ("IOA"), which reduced the number of Legislative Branch committees that had oversight authority regarding Executive Branch covert actions from eight to two, the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence.[202] This Act reduced

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[195] *Iran Hostage Crisis*, THE COLUMBIA ENCYCLOPEDIA (8th ed. 2018); JOHN LEWIS GADDIS, THE COLD WAR: A NEW HISTORY 167 (2005).

[196] GADDIS, *supra* note 195, at 211.

[197] THOMAS BARFIELD, AFGHANISTAN: A CULTURAL AND POLITICAL HISTORY 233 (2010).

[198] GADDIS, *supra* note 195, at 203.

[199] *Id.* at 202.

[200] Radsan, *supra* note 191, 525.

[201] *Id.*

[202] Intelligence Authorization Act for Fiscal Year 1980, Pub. L. No. 96-450,

reporting requirements and streamlined the process, and obviously reduced the number of people who knew about secret operations—and therefore reduced the risk of exposure to adversary intelligence services.[203] The IOA required the President to issue a specific presidential finding for covert action, but it did not require that the finding be written.[204]

The IOA explicitly stated that the congressional oversight process did not require "approval of the intelligence committees as a condition precedent" before the Executive Branch could execute covert action missions.[205] Moreover, the IOA granted greater flexibility in the reporting requirements, permitting the Executive Branch to choose between "prior notice" or notice "in a timely fashion of intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence."[206] Under "extraordinary circumstances affecting vital interests of the United States," the President was authorized to restrict notification "to the chairman and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate."[207] In other words, if the Executive Branch elected for the "prior notice" option, then the IOA authorized the President to restrict the number of Congressmen who received notice of a covert action to a total of eight people, four in each House.

Unfortunately, it was not long before the pattern of punctuated equilibrium emerged again. Officials in the Reagan administration argued that the "timely fashion" language of the IOA "gave the president virtually unfettered discretion to choose the right moment" to inform the intelligence committees of a covert action.[208] These officials relied on the "timely fashion" language to delay reporting the existence of the Iran-Contra operation—which involved the sale of arms in violation of U.S. export controls in order to siphon money to pay for ransoming hostages without a congressional appropriation—for more than a year.[209] President Reagan publicly disclaimed knowledge of the covert action.[210] When Congress learned

§ 407(b)(1), 94 Stat. 1975, 1981–82 (codified as amended at 50 U.S.C. § 413); BAYH, INTELLIGENCE OVERSIGHT ACT OF 1980, S. REP. NO. 96-730, at 2, 3 (1980).

[203] Radsan, *supra* note 191, at 525.

[204] 50 U.S.C. § 413(a)–(b) (1982).

[205] *Id.*

[206] 50 U.S.C. § 413(b); *see also* Glenn Hastedt, *Hughes-Ryan Amendment*, ENCYCLOPEDIA OF AMERICAN FOREIGN POLICY (2d ed. 2016) (detailing the extensive reporting requirements under the Hughes Ryan Amendment).

[207] 50 U.S.C. § 413(a).

[208] DAUGHERTY, *supra* note 185, at 97 (internal quotation marks omitted).

[209] *Id.* at 96–97.

[210] President Reagan later stated that he did not have any knowledge of the

the truth, the members of the intelligence committees were outraged.[211] Congress and the President empaneled committees to investigate the debacle.[212] The joint congressional committee released a scathing report. According to the report, due to the failure of the Executive Branch to notify Congress "the operation continued for over a year through failure after failure, and when Congress finally did learn, it was not through notification by the Administration, but from a story published in a Beirut weekly."[213] The report concluded that "[t]he covert action was carried out in violation of the Congressional notice provisions of the National Security Act."[214]

D. The Intelligence Authorization Act of 1991

Based on the recommendations of the joint committee report on the Iran-Contra Affair, Congress passed the Intelligence Authorization Act of 1991 ("1991 IAA").[215] The 1991 IAA was not a complete rebuke

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operation because officials within his administration kept the details from him. *See* President Ronald Reagan, Address to the Nation on the Iran Arms and Contra Aid Controversy and Administration Goals (Aug. 12, 1987), https://www.presidency.ucsb.edu/documents/address-the-nation-the-iran-arms-and-contra-aid-controversy-and-administration-goals ("I was aware the resistance was receiving funds directly from third countries and from private efforts, and I endorsed those endeavors wholeheartedly; but—let me put this in capital letters—I did not know about the diversion of funds. Indeed, I didn't know there were excess funds. Yet the buck does not stop with Admiral Poindexter, as he stated in his testimony; it stops with me. I am the one who is ultimately accountable to the American people. The admiral testified that he wanted to protect me; yet no President should ever be protected from the truth. No operation is so secret that it must be kept from the Commander in Chief.").

[211] REPORT OF THE CONGRESSIONAL COMMITTEE INVESTIGATING THE IRAN-CONTRA AFFAIR, H. REP. NO. 100-433, S. REP. NO. 100-216, at 16 (1987) [hereinafter IRAN-CONTRA REPORT] (suggesting reasons for Congress's outrage over the concealment of the sale of arms); Karen Tumulty, *The Iran-Contra Hearings: Hamilton Calls North's Activity 'Series of Lies'*, L.A. TIMES (July 15, 1987, 12:00 AM), https://www.latimes.com/archives/la-xpm-1987-07-15-mn-2480-story.html (reporting that Rep. Lee H. Hamilton described the acts as "a profound threat to the democratic process"); *Iran-Contra Hearings Closing Statement*, DANIEL K. INOUYE INST., https://dkii.org/speeches/august-03-1987/, (last visited Oct. 6, 2021) (highlighting Chairman Inouye's view that the affair was "a story of deceit and duplicity and the arrogant disregard of the rule of law").

[212] MARK GROSSMAN, POLITICAL CORRUPTION IN AMERICA: AN ENCYCLOPEDIA OF SCANDALS, POWER, AND GREED 250 (2d ed. 2008).

[213] IRAN-CONTRA REPORT, *supra* note 211, at 415.

[214] *Id.*

[215] Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, 105 Stat. 429 (codified as amended in scattered sections of 10 U.S.C. and 50 U.S.C.). The Legal Information Institute has compiled a chart showing where each section of the original Act has been codified as amended in scattered sections of 10 and 50 of the United States Code. *See* Legal Info. Inst., *TOPN: Intelligence Authorization Act, Fiscal Year 1991*, CORNELL UNIV. L. SCH., https://www.law.cornell.edu/topn/intelligence_authorization_act_fiscal_year_1991 (last visited Sept. 9, 2021) (highlighting that a total of 46 statutory

of the Executive Branch's authority, but it clarified aspects of the President's statutorily-authorized power to execute covert actions that had previously been ambiguous. For the first time ever, a statute contained the term "covert action" and defined the term.[216] There had been an Executive Order—E.O. 12,333—that defined "covert action,"[217] but prior to 1991, no statute had ever contained such a definition or expressly recognized that the practice existed, despite widespread agreement that the NSA of 1947 authorized covert actions.[218]

Section 501(e) of the 1991 IAA defines covert action as "an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly."[219] This definition is obviously broad. An activity to "influence political, economic, or military conditions abroad" can include a host of different options.[220] It could include a cyber operation to plant evidence of a crime on the personal computer of a foreign government official. It could include destruction of an adversary's tangible property. It could include a protracted disinformation campaign designed to sow distrust and confusion amongst our adversaries. It also includes targeted killing. Killing a member of an adversary organization has a direct impact on the "political, economic, or military conditions abroad."[221]

The authorization for covert action is not unlimited, of course. Just as the 1991 IAA defined "covert action" for the first time and made clear that the Executive Branch had the statutorily-delegated authority to conduct covert actions, the Act also clarified the procedural and statutory parameters within which the Executive Branch must operate.[222]

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sub-sections within Titles 10 and 50 were amended by the 1991 IAA).

[216] 50 U.S.C. § 3093(e) (Supp. III 2012); H.R. REP. NO. 102-166, at 28 (1991).

[217] Exec. Order No. 12,333, 46 Fed. Reg. 235 (Dec. 4, 1981) (as amended by E.O. 13470 (2008)).

[218] H.R. REP. NO. 102-166, at 28 (1991) (Conf. Rep.); Glenn Hastedt, *National Security Act*, ENCYCLOPEDIA OF AM. FOREIGN POL'Y (2016), https://search-credoreference-com.ezproxy.regent.edu/content/entry/fofforeign/national_security_act/0; Exec. Order No. 12,333, 46 Fed. Reg. 235 (Dec. 4, 1981) (as amended by EO 13470 (2008)), https://www.dni.gov/index.php/ic-legal-reference-book/executive-order-12333.

[219] 50 U.S.C. § 3093(e).

[220] *Id.*

[221] *Id.*; *see* Jonathan Masters, *Targeted Killings*, COUNCIL ON FOREIGN RELS., https://www.cfr.org/backgrounder/targeted-killings (May 23, 2013, 8:00 AM) (highlighting the impact of targeted killings in foreign countries).

[222] *See* H.R. REP. NO. 102-166, at 26 (detailing the reporting requirements of the Executive Branch); 50 U.S.C. § 3093(a)–(d) (expounding upon the requirements, considerations, and limitations of executive findings).

The 1991 IAA retained the requirement that in order to authorize a covert action, the President must make a presidential finding.[223] This restricts the authorization to literally the highest level of the Executive Branch. The President may not delegate this authority to any subordinate officials within the Executive Branch.[224] Incorporating the recommendations of the intelligence committees based on the report of the Iran-Contra Affair, the 1991 IAA added new restrictions. For the first time ever, the statute required that the presidential finding must be in writing.[225] The presidential finding must include a determination that the covert action is "necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States."[226] The Executive Branch must report the presidential finding to the intelligence committees "as soon as possible" and generally must report "before the initiation of the covert action."[227] In cases where

> immediate action by the United States is required and time does not permit the preparation of a written finding, . . . a written record of the President's decision shall be contemporaneously made and shall be reduced to a written finding as soon as possible but in no event more than 48 hours after the decision is made.[228]

The presidential finding must "specify each department, agency, or entity of the United States Government authorized to fund or otherwise participate in any significant way in such action."[229] The presidential "finding may not authorize any action that would violate the Constitution or any statute of the United States."[230]

At the same time that the 1991 IAA added the foregoing restrictions, however, it also empowered the President and clarified his authority. In addition to providing the first-ever statutory definition for "covert action," as discussed above, the 1991 IAA also retained the provision first introduced in the Hughes-Ryan Amendment that "[n]othing in this subchapter shall be construed as requiring the approval of the congressional intelligence committees as a condition

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223 H.R. REP. NO. 102-166, at 26; 50 U.S.C. § 3093(a).

224 *See* 50 U.S.C. § 3093(a) (illustrating that the President is exclusively authorized to make a presidential finding for covert actions).

225 H.R. REP. NO. 102-166 (1991); 50 U.S.C. § 3093(a)(1).

226 50 U.S.C. § 3093(a).

227 *Id.* § 3093(c)(1).

228 *Id.* § 3093(a)(1).

229 *Id.* § 3093(a)(3).

230 *Id.* § 3093(a)(5).

precedent to the initiation of any significant anticipated intelligence activity."[231]

E. The Authorization for the Use of Military Force

After the terrorist attacks of September 11, 2001, which resulted in the deaths of 2,976 Americans, Congress unequivocally put the United States on a war footing. On September 18, 2001, Congress enacted the Authorization for the Use of Military Force (AUMF).[232] The AUMF authorized the President:

> to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[233]

It is worth noting here that the Preamble to the AUMF recognizes that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States."[234]

Although the statute contains the word "military" in its title, the text of the statute unambiguously grants authority to "use *all* necessary and appropriate force," not just military force.[235] This authorization therefore clearly includes the use of covert action—and targeted killing.[236] In the words of Banks and Raven-Hansen, "[h]ere then, is the answer under U.S. law to the proposal to go after not just the heads, but 'the arms and [the] fingers' of the September 11 terrorist networks: Congress said, *go do it*."[237]

Thus, the orders issued by four successive Presidents to execute targeted killing missions—that is, to target specific members of Al Qaeda and associated forces, by whatever means, from a sniper to a Navy SEAL team to a drone strike—are on solid statutory foundation.

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[231] *Id.* § 3091(a)(2); *see* DEVINE, *supra* note 165 at 2 n.4.

[232] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified as amended at 50 U.S.C. § 1541).

[233] *Id.* § 2(a).

[234] *Id.* pmbl.

[235] William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. R. 667, 736 (2003) (emphasis added).

[236] *Id.*

[237] *Id.* at 737 (alteration added to conform with original source).

Simply put, Presidents have not been acting alone. They have acted, and continue to act, in concert with Congress. By acting in concert with the statutory authorizations, the power of the President to conduct targeted killing missions falls squarely into the first of Justice Jackson's three categories: "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[238] Both the Executive Branch and the Legislative Branch have exercised their constitutional war powers.

CONCLUSION

The President wields significant authority based on the grant of war powers under Article II of the Constitution. These powers include the President's authority to order the use of lethal force to defend the Constitution, the nation, and its citizens. The President has a wide range of tools to draw on in discharging his constitutional responsibilities, including both traditional military force as well as covert actions conducted by officers and operatives of the intelligence agencies. If the President were acting alone, without a congressional mandate, the question would perhaps be more difficult. In Justice Jackson's terms, the President would be operating in the "zone of twilight."[239]

Yet the President is not acting alone. Not only has Congress never passed a law prohibiting the use of targeted killing—which would arguably have placed the President in the third category of Justice Jackson's taxonomy, where his power is at "the lowest ebb"—Congress has also never exercised its "power of the purse" to restrict the tools available to the President to order targeted killing missions, such as by defunding the drone program. Even more, Congress has enacted numerous provisions authorizing the President to use lethal force abroad by overt and covert means. Thus, the President's authority to execute targeted killing missions fits squarely into the first of Justice Jackson's categories: "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[240] Both the Executive Branch and the Legislative Branch possess significant war powers under the Constitution. Both have chosen to exercise those powers by authorizing targeted killing missions in defense of the Constitution, the nation, and

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[238] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[239] *Id.* at 637.

[240] *Id.* at 635.

its citizens.

Targeted killing in self-defense or in an armed conflict is constitutional.

DERIVATIVE IMMUNITY AS SAVIOR FROM STATE ACTOR STATUS

Justin Aimonetti[*]

ABSTRACT

The care for destitute children remained largely a private, religious pursuit until the twentieth century. Since then, states have increased public expenditures for a host of social services, including child welfare services. But states lack the resources to care for every child in need. So they have reenlisted private actors to fill the void. This development has converted what were once private, charitable endeavors into joint public-private affairs. And it has also exposed private actors to statutory regimes like Section 1983 that are supposed to target only "state actors" for liability.

Under the state action doctrine, some courts categorize private religious organizations that provide care to destitute children as "state actors." Courts often reason that these private charities are the functional equivalents of state agencies. This reasoning has given rise to a doctrinal quirk. When a state agency faces suit under Section 1983, the agency can invoke state sovereign immunity to avoid liability. Other governmental immunities, like qualified immunity, might be available too. But current doctrine does not extend sovereign immunity to private organizations. So a private organization, deemed a state actor for being the functional equivalent of a state agency, acquires the agency's liabilities without acquiring its immunities.

This Essay presents two solutions to remedy the discrepancy brought on by enhanced governmental reliance on private actors to carry out social services. The first relies on a doctrine known as derivative immunity. Under derivative immunity, a private actor can sometimes invoke immunities reserved for government actors. In the 2012 case Filarsky v. Delia*, the Supreme Court recognized that qualified immunity for individual persons can move across public-private lines when a private person performs a service on behalf of the state. But the Court has not sanctioned an analogous application of state sovereign immunity to private organizational actors. Option one thus calls for the Court to extend "derivative sovereign immunity" to private actors that are functionally equivalent to state actors. Alternatively, solution two recommends reining in the state-action doctrine by limiting the circumstances where private actors will qualify as state actors. Refusing to head down either path runs the risk of categorizing a private actor as a state actor and then depriving that defendant of the immunities their state counterpart enjoys.*

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INTRODUCTION

For much of the eighteenth and nineteenth centuries, the federal and state governments were "smaller in both size and reach."[1] Smaller government meant private and often religious organizations took active roles in providing the populace with charitable services.[2] Indeed, from the nation's earliest days to present, religious institutions have opened hearts and doors to destitute children in need of homes.[3] In the last century, however, states have expanded their reach into the child-welfare sector by providing more services to disadvantaged children at the public's expense.[4] Though nobly intended, state ventures into child welfare have converted a predominately private service into an increasingly public one. The result not only blurs the lines dividing the private from the public, but it also has profound legal consequences for the intersection of church, state, and society.

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* Justin W. Aimonetti, University of Virginia School of Law, J.D. 2020; University of Virginia, M.A. (History) 2020. I extend special thanks to Christian Talley, Dalton Nichols, Anna Edwards, and the Regent Law Review editing team for their editorial assistance. I am solely responsible for any errors.

1 Filarsky v. Delia, 566 U.S. 377, 384 (2012).

2 CATHERINE E. RYMPH, RAISING GOVERNMENT CHILDREN: A HISTORY OF FOSTER CARE AND THE AMERICAN WELFARE STATE 19 (2017); Walter I. Trattner, *Private Charity in America: 1700-1900*, 65 CURRENT HIST. 25, 25–26, 40 (1973).

3 *See, e.g.*, RYMPH, *supra* note 2, at 19 ("Almost half of children in orphanages at the end of the nineteenth century were living in Catholic institutions.").

4 *Id.* at 53–54.

Several courts have concluded that services like foster care and residential housing qualify as "state action."[5] With state action comes "state actor" status. And with state actor status comes the need to respect a "panoply of rights," a need that would have remained submerged but for the state actor designation.[6] One right from that panoply includes the right to sue a "state actor" under liability regimes like Section 1983.[7]

Section 1983 provides a remedy against those acting under color of state law for "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States.[8] As Section 1983 "creates a species of tort liability,"[9] plaintiffs may seek actual and punitive damages[10] as well as equitable relief against state actors under the statute.[11] The federal statute thus provides a stick to ensure state actors toe the constitutional line. Section 1983, however, can prove an unsatisfactory tool against some state actors because of their governmental immunities.

The Eleventh Amendment, for instance, shields the states themselves from suits brought under Section 1983.[12] The Supreme Court has extended the shield of sovereign immunity to state agencies that act as an "arm of the State."[13] A litigant who sues a state agency

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[5] *See, e.g.*, Perez v. Sugarman, 499 F.2d 761, 764–66 (2d Cir. 1974) (holding that two child care institutions qualified as state actors for liability under 42 U.S.C. § 1983 because they were performing a "public function" and were answerable to the State); Jeffries v. Ga. Residential Fin. Auth., 678 F.2d 919, 924 (11th Cir. 1982) (holding that evictions by private landlords operating under Section 8 of the United States Housing Act of 1937 qualified as state actions).

[6] Michael Wells, *Punitive Damages for Constitutional Torts*, 56 LA. L. REV. 841, 848–49, 851 (1996) (explaining how the Federal government intended for the Fourteenth Amendment to override traditional forms of immunity available to the states, and how Section 1983 created the cause of action that allowed individuals to sue state actors for violating their Fourteenth Amendment rights).

[7] *Perez*, 499 F.2d at 764.

[8] 42 U.S.C. § 1983.

[9] Imbler v. Pachtman, 424 U.S. 409, 417 (1976).

[10] *See* Smith v. Wade, 461 U.S. 30, 56 (1983) (holding that punitive damages can be awarded in a Section 1983 case if the violator's conduct is severe enough); Carey v. Piphus, 435 U.S. 247, 255–56 (1978) (asserting that individuals who sue under Section 1983 can receive damages for compensable injuries).

[11] *See* Hutto v. Finney, 437 U.S. 678, 693–94 (1978) (holding that Section 1983 applies to injunctive orders, including those commanding the State to pay attorney's fees); Lugar v. Edmondson Oil Co., 457 U.S. 922, 942 (1982) (holding that a constitutional challenge is a valid cause of action under Section 1983). The statute also gives courts discretion to grant attorney's fees to the "prevailing party." 42 U.S.C. § 1988(b); *see also* Tex. State Tchrs. Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792–93 (1989) (holding that a party is entitled to some level of fees when there is a "material alteration of the legal relationship" between the parties in their favor).

[12] Edelman v. Jordan, 415 U.S. 651, 662–63 (1974).

[13] Lake Country Ests. v. Tahoe Reg'l Plan. Agency, 440 U.S. 391, 400–01 (1979).

for relief under Section 1983 will thus get nowhere with the suit absent a waiver by the state of its immunity.[14] But that is not to say that state agencies play no role in Section 1983 cases.

Plaintiffs commonly sue state agencies and their private actor counterparts and sometimes obtain relief even though immunities should theoretically bar the claim.[15] Some courts, for instance, have relied on the functions performed by state agencies to characterize private, religious child-care institutions as de facto state actors.[16] As the state agency's "alter ego" (the agency's functional equivalent, so to speak), private, religious actors must prepare for possible lawsuits brought under Section 1983.[17] But the state agency need not prepare for similar suits because of the protection sovereign immunity affords. Any fair-minded observer will notice the discrepancy: the Constitution shields a state agency from liability while the state-action doctrine simultaneously exposes the agency's private counterpart to liability under Section 1983.[18]

Brent v. Wayne County Department of Human Services serves as an example of the incongruity at work.[19] In that case, a father brought a Section 1983 claim against a Michigan state agency and against Methodist Children's Home Society, a child care facility founded by the Methodist Church in 1917 as a haven for children without families because of the death toll brought on by the influenza epidemic.[20] The

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[14] *See* Jessica Wagner, *Waiver by Removal? An Analysis of State Sovereign Immunity*, 102 VA. L. REV. 549, 552–53 (2016) (discussing the doctrine surrounding the waiver of state sovereign immunity).

[15] *See* Filarsky v. Delia, 566 U.S. 377, 391 (2012) (explaining how private actors who work with the government could face liability from which the government itself is immune).

[16] *See* Perez v. Sugarman, 499 F.2d 761, 762–66 (2d Cir. 1974) (holding that two child care institutions qualified as state actors because their actions paralleled actions normally performed by state agencies).

[17] *Id.* at 764–66.

[18] This discrepancy has the practical significance of allowing a litigant to go after a private organization but not the equivalent state agency. *See Filarsky*, 566 U.S. at 391 (describing situations where private actors working for the government could face liability that the government is immune from). That reality can have profound consequences for the financial well-being of private organizations as the cost of litigation, attorneys' fees, and damages adds up. This is not to say, however, that a litigant will be deprived of all legal avenues to remedy a wrong. The litigant can sue state officers working for state agencies in their individual capacities. *See* Hafer v. Melo, 502 U.S. 21, 31 (1991) (holding that state officials are not "absolutely immune" and can be sued in their individual capacities under Section 1983). And the litigant can sue private actors and organizations for wrongs under state tort regimes. *See, e.g.*, Cowan v. Hospice Support Care, Inc., 603 S.E.2d 916, 919 (Va. 2004) (holding that private charities could be sued for gross negligence in Virginia).

[19] 901 F.3d 656, 677, 679 (6th Cir. 2018).

[20] Brent v. Wayne Cnty. Dep't of Hum. Servs., No. 11-10724, 2014 WL 3956730,

father's Section 1983 claim hinged on the alleged gross negligence of the state agency and the private, religious home while providing care to his five children.[21]

The district court made quick work of the father's claims against the state agency. All claims were dismissed because the state agency, as an arm of the state, could shelter under sovereign immunity and avoid any potential Section 1983 liability.[22] The district court also dismissed the claims against Methodist Children's Home Society, reasoning that the religious organization was not a state actor and therefore could not be sued under Section 1983.[23] The Sixth Circuit, however, had second thoughts.

On appeal, the Sixth Circuit reasoned that because the father's "allegations concern conduct the child-care organization[] and [the state agency's] employees undertook together," his complaint should have survived the motion to dismiss, since it made a threshold showing that Methodist Children's Home Society could qualify as a de facto state actor.[24] The Sixth Circuit instructed the district court on remand to consider both the "close nexus" between the state agency and Methodist Children's Home Society, as well as the state law that regulates how state agencies and the private home must care for children committed to the state's care.[25] In other words, the link between the state agency and the private religious actor could convert the religious organization into a state actor, exposing it to liability under Section 1983. But the Michigan state agency could face no liability because the shield of sovereign immunity immunized it from suit.

That discrepancy, permitting a de jure state actor to hide behind immunity while a de facto state actor performing the same function gets exposed to liability regimes reserved for state actors, has not sat well with the Roberts Court. In the 2012 case of *Filarsky v. Delia*, the Supreme Court extended qualified immunity to private individuals undertaking a government function.[26] A need to avoid a liability mismatch underscored the Court's holding: "Because government employees will often be protected from suit by some form of immunity, those working alongside them could be left holding the bag—facing full

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at *1 (E.D. Mich. Aug. 13, 2014); *Our History*, METHODIST CHILD.'S HOME SOC'Y, https://mchsmi.org/our-history/ (last visited Aug. 5, 2021).

[21] *Brent*, 2014 WL 3956730, at *1–2.

[22] Brent v. Wayne Cnty. Dep't of Hum. Servs., No. 11-10724, 2012 WL 12877988, at *14 (E.D. Mich. Nov. 15, 2012).

[23] *Id.* at *13.

[24] *Brent*, 901 F.3d at 677.

[25] *Id.* at 677, 679.

[26] 566 U.S. 377, 394 (2012).

liability for actions taken in conjunction with government employees who enjoy immunity for the same activity."[27]

This extension of governmental immunities to private actors falls under an underdeveloped doctrine referred to by some as "derivative immunity."[28] Though "rarely . . . identified as a distinct doctrine,"[29] and given short shrift by academia, derivative immunity focuses on extending to private actors who are working with the government the same protections afforded to government employees and entities performing similar functions.[30] The *Filarsky* Court captured the rationale and logic behind derivative immunity: "[E]xposing private individuals and firms to liability while sovereign immunity shields their public employee counterparts with whom they are working offends logic and equitable principles; moreover, it discourages the private sector from contracting with the government to serve the public's needs."[31]

This Essay proposes solutions to the discrepancy where private actors may face liability under Section 1983 as de facto state actors while their state agency counterparts hide behind immunities reserved for de jure state actors. To remedy the discrepancy, this Essay argues that two viable paths exist.[32] The Court can either extend derivative immunity to private actors deemed state actors, or it can rein in the

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[27] *Id.* at 391.

[28] The term derivative immunity makes sense, as the doctrine captures instances where a private actor *derives* her immunity from a government actor. *See Derivative*, BLACK'S LAW DICTIONARY (5th pocket ed. 2016) (defining "derivative" as "[s]omething that has developed from or been produced from something else").

[29] Jason Malone, *Derivative Immunity: The Impact of* Campbell-Ewald Co. v. Gomez, 50 CREIGHTON L. REV. 87, 107 (2016).

[30] *See id.* (explaining how "[i]n the past, [derivative immunity] was used as a means to describe the general circumstance of a third party claiming some form of immunity of a sovereign in response to a civil action").

[31] W. Logan Lewis, Campbell-Ewald Co. v. Gomez*: Diminishing the Derivative Sovereign Immunity Doctrine and the Social Costs of Increasing Liability to Government Contractors*, 59 WM. & MARY L. REV. 1491, 1506 (2018) (citing *Filarsky*, 566 U.S. at 391); *see also* Hansen v. Johns-Manville Prods. Corp., 734 F.2d 1036, 1045 (5th Cir. 1984) ("The rationale behind the defense is an extension of sovereign immunity: in circumstances in which the government would not be liable, private contractors who act pursuant to government directives should not be liable.").

[32] Admittedly, a third option does exist. The third option reconfigures the arm-of-the-state doctrine to no longer extend sovereign immunity protection to agencies of the state. Héctor G. Bladuell, Note, *Twins or Triplets?: Protecting the Eleventh Amendment Through a Three-Prong Arm-of-the-State Test*, 105 MICH. L. REV. 837, 838–42 (2007) (discussing the arm-of-the-state doctrine and proposing a reworking of the doctrine that focuses on the state's intent); Kelsey Joyce Dayton, Comment, *Tangled Arms: Modernizing and Unifying the Arm-of-the-State Doctrine*, 86 U. CHI. L. REV. 1603, 1652–53 (2019) (suggesting possible avenues to take the arm-of-the-state doctrine in a different direction).

state-action doctrine to avoid labeling a swathe of private actors as de facto state actors.

This Essay makes its case in four Parts. Part I briefly explores the history of private, religious actors providing care to destitute American children. Part II covers Section 1983, the state-action doctrine, and Eleventh Amendment immunity. It also touches on private religious actors qualifying as de facto state actors for purposes of Section 1983. Part III unpacks the underdeveloped doctrine of derivative immunity, contributing to the scholarship by synthesizing the various legal areas where private actors can cloak themselves in immunities reserved for de jure state actors. And Part IV considers the possibility of extending derivative immunity to private actors qualified as state actors because of their similarity to immunized state agencies. Part IV also contends that if extending derivative sovereign immunity does not provide an answer to the inequitable doctrinal oddity at work, then it is time for the Court to refine the scope of the state-action doctrine to limit the number of private actors who currently come within its sweep.

I. THE HISTORY OF PRIVATE, RELIGIOUS ACTORS CARING FOR AMERICA'S YOUNG

The care of destitute children throughout American history has largely fallen on the welcoming shoulders of private religious actors.[33] Early American society looked to "voluntary child care institution[s] . . . for most direct charitable services," as private rather than public agencies "represent[ed] the traditionally accepted way of providing such needed services."[34] Indeed, as early America's population grew, so did the number of "almshouses" and "charitable

[33] That is not to say that the local governments throughout early American history played no role in furnishing care to destitute children. Local governments often lent funds and provided a variety of services to private actors to help them service the poor. *See* Wright S. Walling & Gary A. Debele, *Private CHIPS Petitions in Minnesota: The Historical and Contemporary Treatment of Children in Need of Protection or Services*, 20 WM. MITCHELL L. REV. 781, 791 (1994) ("Because the government contributed public funds for many children receiving care, large institutionalized orphanages emerged where children remained for long periods of time, discouraging foster family placements."); Sacha M. Coupet, *The Subtlety of State Action in Privatized Child Welfare Services*, 11 CHAP. L. REV. 85, 85–86 (2007) ("Far from a recent phenomenon, public-private partnerships have a long history in child welfare practice, beginning with the period immediately following the Revolutionary War. From the inception of the union, the care of destitute and needy children has been characterized by a unique blend of private agency support coupled with public funding, regulation, and oversight.").

[34] George H. Guilfoyle, *Church-State Relations in Welfare*, 3 CATH. LAW. 112, 117 (1957).

facilities that provided care for . . . destitute . . . children."[35] Privately funded and often religious orphanages also emerged across the nascent nation, "offering out-of-home placement for children, often based in part on their religious and cultural identification."[36] And private organizations like "churches, fraternal societies, and benevolent organizations began providing charitable services" at a greater clip too.[37] Until the turn of the twentieth century, a combination of "local, state, and private efforts" defined poor relief, and especially relief directed toward children.[38]

The history of child welfare services in New York provides an example of the important role religious private actors played in providing children with needed care. In colonial New York, ecclesiastical bodies serviced the poor, including by taking charge of children placed under the government's control.[39] The Empire State continued its "depend[ence] on religious affiliated institutions and agencies to care for state wards" up until the 1880s.[40] In that decade, the state started to regulate "private 'societies for the care of children,' which were required to apply for a license and keep certain records concerning the children for whom they cared."[41] Twenty years later, New York had developed a system that "consisted of placing dependent and neglected children who were public charges under the care of private agencies, with the responsible counties, cities, and towns paying for the services provided."[42] The care for destitute children in New York over time had evolved into a "unique blend of private agency support coupled with public funding, regulation, and oversight."[43] That

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[35] Rebecca S. Trammell, *Orphan Train Myths and Legal Reality*, MOD. AM., Fall 2009, at 3, 3.

[36] Marian E. Saksena, *Out-of-Home Placements for Abused, Neglected, and Dependent Children in Minnesota: A Historical Perspective*, 32 WM. MITCHELL L. REV. 1007, 1012 (2006); *see also* Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. ON LEGIS. 1, 13–14 (2001) ("In the first half of the nineteenth century, fear of social upheaval, moralism toward the poor, and the spirit of charity spurred the founding of orphanages . . . ."); Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes*, 53 HASTINGS L.J. 1, 46 (2001) (noting that private organizations like "almshouses, orphanages, and houses of refuge became the" go-to venues for caring for destitute children).

[37] Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CALIF. L. REV. 569, 582 (2001).

[38] *Id.*; *see also supra* note 33 and accompanying text.

[39] Martin Guggenheim, *State-Supported Foster Care: The Interplay Between the Prohibition of Establishing Religion and the Free Exercise Rights of Parents and Children:* Wilder v. Bernstein, 56 BROOK. L. REV. 603, 605 (1990).

[40] *Id.* at 605–06.

[41] Phelan *ex rel.* Phelan v. Torres, 843 F. Supp. 2d 259, 270 (E.D.N.Y. 2011).

[42] *Id.* (quoting Wilder v. Sugarman, 385 F. Supp. 1013, 1020 (S.D.N.Y. 1974)).

[43] Coupet, *supra* note 33, at 85–86.

evolution did not outright displace private religious actors from caring for New York's young.[44] But it did intermix the private and the public financially, socially, and legally.[45]

Pennsylvania's history closely tracks New York's transition from reliance largely on private actors to reliance on a mix of public and private.[46] Before the twentieth century, the Quaker State counted on private organizations to nurture children in need of shelter and sustenance.[47] In 1901, the state legislature started regulating the care of dependent children under the supervision of private actors.[48] With the passage of the Juvenile Act, the state legislature called for the Commonwealth to begin "supervising the placement of children in foster care and regulating that care."[49] Pennsylvania also established juvenile courts that year which, in truth, were more akin to "social clinic[s]" set up in part to ensure children were placed with supportive private actors.[50] Oversight of child-welfare services at the state level in Pennsylvania eventually trickled down to regulation at the local level.

Take *Fulton v. City of Philadelphia,* the high-profile case heard by the Supreme Court in the 2020 term. Since 1917, Catholic Social Services—a religious foster care agency and ministry of the Archdiocese of Philadelphia—has run residential homes for at-risk teens and has placed destitute children with families.[51] It was not until the 1950s that the City of Philadelphia entered the child welfare arena, mandating that private actors like Catholic Social Services comply with a host of local regulations.[52] With the City's entrance came not only the possibility that Catholic Social Services would need to abide by local anti-discrimination laws, but also an increased likelihood that Catholic Social Services would qualify as a de facto state actor and thus

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[44] *See Phelan*, 843 F. Supp. 2d at 270–71 (stating that the child welfare program in New York was not exclusively reserved to the state; private agencies were still principal providers of services).

[45] Coupet, *supra* note 33, at 95–97.

[46] *See* Leshko v. Servis, 423 F.3d 337, 343 (3d Cir. 2005) (describing the history of foster care in Pennsylvania as it developed from a private service into a private-public hybrid).

[47] *Id.* at 343–44.

[48] *Id.* at 344.

[49] M.B. v. Schuylkill Cnty., 375 F. Supp. 3d 574, 597 (E.D. Pa. 2019) (quoting *Leshko*, 423 F.3d at 344).

[50] Paul N. Schaeffer, *Pennsylvania's Juvenile Court Law (Part II)*, 14 PA. BAR ASS'N Q. 150, 150, 154 (1943).

[51] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1874–75 (2021); Brief for the United States as Amicus Curiae Supporting Petitioners at 3, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123) [hereinafter Brief Supporting Petitioners].

[52] Brief Supporting Petitioners, *supra* note 51, at 3.

be subject to liability regimes like Section 1983.[53]

New York and Pennsylvania offer just two examples of states where the joinder of voluntary, private actors providing care to children with public regulation and oversight crystalized in the nineteenth century. That trend dominated the nation.[54] Indeed, the advent of state involvement in child welfare services throughout the country largely displaced private, religious philanthropic organizations as the main providers of care to abused and neglected children.[55] The displacement of private actors as the go-to providers of child-welfare services has had positive effects on America's young: greater social consciousness about the need to care for destitute children and enhanced public expenditure to see that consciousness through.[56] But it has also had unintended legal consequences for private, and often religious, philanthropic organizations that continue to fulfill the function of caring for destitute children. Those consequences are where this Essay turns next.

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[53] *See M.B.*, 375 F. Supp. 3d at 596 ("The test therefore 'asks whether the private entity has exercised powers that are traditionally the *exclusive* prerogative of the state.'"); Tazioly v. City of Philadelphia, No. CIV.A. 97-CV-1219, 1998 WL 633747, at *1, 16 (E.D. Pa. Sept. 10, 1998) (dismissing the argument that Catholic Social Services qualified as state actor for purposes of Section 1983).

[54] Coupet, *supra* note 33, at 85; Elizabeth Lee & Cynthia Samples, OFF. OF THE ASSISTANT SEC'Y FOR PLAN. AND EVALUATION, EVOLVING ROLES OF PUBLIC AND PRIVATE AGENCIES IN PRIVATIZED CHILD WELFARE SYSTEMS 3 (2008).

[55] Susan Vivian Mangold, *Protection, Privatization, and Profit in the Foster Care System*, 60 OHIO ST. L.J. 1295, 1296, 1306 (1999). "Before the last quarter of the nineteenth century, there were no public or private agencies dedicated to the care of abused and neglected children. It was private philanthropic agencies that first began this work, intervening into 'private' families in the name of protecting vulnerable children." *Id.* at 1301–02. The White House, under Presidents Theodore Roosevelt and Woodrow Wilson, took interest in reforming child welfare services. *See* Trammell, *supra* note 35, at 8–9 ("As a result of [a] 1919 White House Conference and the efforts of various child welfare organizations, state regulation of public and private child placement practices gained importance."). States, too, shared an interest in reforming child welfare services during this era. *See* David S. Tanenhaus, *Between Dependency and Liberty: The Conundrum of Children's Rights in the Gilded Age*, 23 L. & HIST. REV. 351, 370–71 (2005) ("In their efforts [in the late nineteenth century] to develop state-sponsored programs to provide more school and home-like care for these dependent children, child savers in Illinois established the rudiments of a child welfare system as well as the ideological foundations of the nation's first juvenile court.").

[56] *See* Trammell, *supra* note 35, at 9 (discussing the political awareness given to child welfare in 1919).

II. SECTION 1983, THE STATE-ACTION DOCTRINE, AND ELEVENTH AMENDMENT IMMUNITY

The Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."[57] Congress enacted Section 1983 of the Enforcement Act of 1871 (also known as the Ku Klux Klan Act) to give teeth to the Fourteenth Amendment by providing a remedy against state actors who violate an individual's federal constitutional or statutory rights.[58] "Litigation under Section 1983 has a venerable history dating back to the post-Civil War era, reflecting the statute's original purpose: to help African Americans vindicate their right not to be discriminated against during Reconstruction and its aftermath."[59]

Based on its text and purpose, Section 1983 has particular defendants in mind. The statute renders only "state actors" liable for violations.[60] Purely private conduct does not fall within Section 1983's sweep.[61] For that reason, a litigant bringing a claim under Section 1983

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[57] U.S. CONST. amend. XIV, § 1.

[58] *See* 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."); Andrew W. Weis, Note, *Qualified Immunity for "Private" § 1983 Defendants After* Filarsky v. Delia, 30 GA. ST. U. L. REV. 1037, 1042 (2014) ("Congress enacted § 1983 in the aftermath of the Civil War, and the statute, along with the Fourteenth Amendment, can be understood as shifting the role of protecting individual rights from states to the federal government . . . ."); Leigh J. Jahnig, Note, *Under School Colors: Private University Police as State Actors Under § 1983*, 110 NW. U. L. REV. 249, 253 (2015) ("The purpose of the statute was to establish 'the role of the Federal Government as a guarantor of basic federal rights against state power,' providing a uniform guarantee of rights even in a federalist system.") (quoting Mitchum v. Foster, 407 U.S. 225, 239 (1972)).

[59] Emily Chiang, *No State Actor Left Behind: Rethinking Section 1983 Liability in the Context of Disciplinary Alternative Schools and Beyond*, 60 BUFF. L. REV. 615, 663 (2012).

[60] Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767, 1767 (2010) ("The state action principle, which is a standard feature of American constitutional law, holds that, in general, the decisions of private people in the exercise of their legal rights are not attributed to the government for purposes of the Constitution, even though the government's coercive power supports those rights."); *see also* RANDY E. BARNETT & JOSH BLACKMAN, AN INTRODUCTION TO CONSTITUTIONAL LAW: 100 SUPREME COURT CASES EVERYONE SHOULD KNOW 132 (2020) ("The text of the Privileges or Immunities Clause concerns the making and enforcing of 'laws,' which can only be enacted by the government. This provision, therefore, seems to require state action. Similarly, the Due Process Clause's reference to the 'due process of law' is limited to the state mechanisms for how laws are applied. Here, too, there must be state action.").

[61] Craig B. Merkle, *Derivative Immunity: An Unjustifiable Bar to Section 1983 Actions*, 1980 DUKE L.J. 568, 568 (1980).

must allege that some state actor deprived her of a federal constitutional or statutory right.[62]

Despite state expansion into a wide swathe of social services, government cannot function without the help of private actors.[63] States lack the resources to carry out their expanding services, making it necessary to work beside private actors.[64] The way the government relies on private actors has increased the number of defendants potentially liable under regimes reserved for state actors.[65] And that is because private actors may be considered "de facto state actors" if they are intimately connected to "de jure state actors" who are also liable under regimes like Section 1983.

The Supreme Court has forged several different paths for plaintiffs to allege that a private actor should be categorized as a state actor for purposes of Section 1983.[66] One inquiry asks whether the

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[62] *See id.* (stating that a plaintiff can bring a Section 1983 action against a private person who conspires with a state actor to deprive an individual of her federal statutory or constitutional rights).

[63] *See, e.g.*, Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369 (2003) (noting that "[p]rivate entities provide a vast array of social services for the government; administer core aspects of government programs; and perform tasks that appear quintessentially governmental, such as promulgating standards or regulating third-party activities"); Nathan E. Busch & Austen D. Givens, *Public-Private Partnerships in Homeland Security: Opportunities and Challenges*, HOMELAND SEC. AFFS., Oct. 2012, at 2 (describing the essential relationship between private and public entities in homeland security).

[64] Martha Minow, *Alternatives to the State Action Doctrine in the Era of Privatization, Mandatory Arbitration, and the Internet: Directing Law to Serve Human Needs*, 52 HARV. C.R.-C.L. L. REV. 145, 146 (2017) (arguing that the state action doctrine deserves attention due to, among other reasons, "the sharp increases in privatization due to governmental outsourcing to private actors"); *see also* Paul Howard Morris, Note, *The Impact of Constitutional Liability on the Privatization Movement After* Richardson v. McKnight, 52 VAND. L. REV. 489, 494 (1999) (emphasizing that government use of private entities is driven by financial efficiency and reduced costs); Metzger, *supra* note 63, at 1370 ("[A common model of privatization consists of] government use of private entities to implement government programs or to provide services to others on the government's behalf.").

[65] *See* William Brooks, *The Privatization of the Civil Commitment Process and the State Action Doctrine: Have the Mentally Ill Been Systematically Stripped of Their Fourteenth Amendment Rights?*, 40 DUQ. L. REV. 1, 4 (2001) (discussing the governmental shift towards privatization).

[66] Coupet, *supra* note 33, at 107 (discussing the various avenues to qualify a private actor as a state actor); *see also* Richard Frankel, *Regulating Privatized Government Through § 1983*, 76 U. CHI. L. REV. 1449, 1452–53 (2009) (discussing the applicability of § 1983 to private entities); David M. Howard, *Rethinking State Inaction: An In-Depth Look at the State Action Doctrine in State and Lower Federal Courts*, 16 CONN. PUB. INT. L.J. 221, 226–27 (2017) ("Finding when a private party's action becomes state action is tricky because there is no bright-line between state action and private action . . . .").

state compelled the private actor to act the way it did.[67] Another asks whether the private actor is the "alter ego" of a state actor.[68] A third gets at whether the private actor performs a public function traditionally handled by state actors.[69] Regardless of the path taken, the goal of the state-action doctrine remains the same: determining whether the private entity's "conduct is 'fairly attributable to the State.'"[70]

Making the "fairly attributable" determination is easier said than done. The convoluted state-action doctrine has led to "sheer frustration,"[71] as courts have long struggled to determine whether a private actor qualifies as a de facto state actor. That struggle has had profound consequences for religious actors who provide care to impoverished children.

The Second Circuit ignited the struggle in 1974 when it held that two private children's homes, including the nonprofit St. Joseph's Home for Children, qualified as state actors because they sufficiently resembled the state agencies who bore the statutory burden of caring for children in need of assistance.[72] The circuit court reaffirmed that holding a couple of years later.[73] District courts throughout the circuit and the country have followed the reasoning ever since.[74] And scholars

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[67] *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296 (2001) (noting that when a state coerces a private entity to engage in specific activity, that activity may be classified as state action).

[68] *See* Rendell-Baker v. Kohn, 457 U.S. 830, 842–43 (1982) (discussing whether a private entity performs public functions similar to its public "alter ego" when analyzing claims under Section 1983).

[69] *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974) (discussing precedent that private actors who perform a task that is typically conducted by the state constitutes a state action).

[70] Filarsky v. Delia, 566 U.S. 377, 383 (2012) (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)).

[71] *Developments in the Law—State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1250 (2010).

[72] Perez v. Sugarman, 499 F.2d 761, 764–66 (2d Cir. 1974).

[73] Duchesne v. Sugarman, 566 F.2d 817, 833 (2d Cir. 1977); *see also* Woods v. Maryville Acad., No. 17 C 8273, 2018 WL 6045219, at *5–6 (N.D. Ill. Nov. 19, 2018) (noting that "[t]he Second Circuit stands by its precedent").

[74] Castro v. Windham, No. 116CV08148, 2017 WL 4676644, at *4 (S.D.N.Y. Sept. 19, 2017) ("[I]t must be assumed that private foster care agencies are state actors under Section 1983 until the Second Circuit holds otherwise."); S.W. *ex rel.* Marquis-Abrams v. City of New York, 46 F. Supp. 3d 176, 195–96 (E.D.N.Y. 2014) ("[U]ntil the Second Circuit holds otherwise, the law in this circuit is that private foster care agencies, including the agency defendants here, are state actors."). District courts outside of the Second Circuit have followed that circuit's lead. *See Woods*, 2018 WL 6045219, at *6 ("Other courts outside the Second Circuit, including two in this District, hold that a state's exercise of its custodial power . . . establishes the requisite nexus [when] [t]he State provides the care through the private institutions."); Johnson v. Williams, No. 15-13856, 2017 WL 4236548, at *2–4 (E.D. Mich. Sept. 25, 2017) (determining that "a non-

have made forceful arguments in the precedent's wake that "state child welfare departments and the private agencies with which they contract *are* state actors."[75]

Not all circuits, however, agree that private religious actors qualify as state actors under the state-action doctrine.[76] Some have concluded that religiously inspired child care institutions do not count as state actors.[77] Other courts assume, without deciding, state actor status, opting to resolve disputes on other grounds.[78] A few profess confusion.[79] The discordant views emanating from the nation's federal courts should not come as a surprise. The state-action doctrine perplexes. But until the doctrine receives a needed reboot, private religious actors will continue to face the threat of qualifying as state actors and thus possible exposure to Section 1983 liability. Yet the same cannot be said for the state agencies providing the same or similar services as their de facto state actor counterparts.[80]

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profit child-care institution" qualified as a state actor under the public function test, which allowed the plaintiff's Section 1983 suit to proceed against the institution); S.M. *ex rel.* King v. City of New York, No. 20-CV-5164, 2021 WL 3173456, at *4 (S.D.N.Y. July 26, 2021) (holding that a private foster care provider was a state actor, but critiquing the "shaky foundations of [the] underlying logic" that required such an outcome).

[75] Kelsi Brown Corkran, Comment, *Free Exercise in Foster Care: Defining the Scope of Religious Rights for Foster Children and Their Families*, 72 U. CHI. L. REV. 325, 331 (2005); Guggenheim, *supra* note 39, at 629–30.

[76] *Compare* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 290–91 (2001) (holding that an association regulating athletic competition between public and private schools should be treated as a state actor), *and* Donlan v. Ridge, 58 F. Supp. 2d 604, 610–11 (E.D. Pa. 1999) (holding that private child welfare entities may be held liable as state actors under Section 1983), *with* Milburn v. Anne Arundel Cnty. Dep't of Soc. Servs., 871 F.2d 474, 479 (4th Cir. 1989) (holding that foster parents are not state actors under Section 1983) *and* Howell v. Father Maloney's Boys' Haven, Inc., 976 F.3d 750, 754 (6th Cir. 2020) (holding that a private entity that "educates, treats, and provides day-to-day care to abused and neglected children that it houses" did not qualify as a state actor).

[77] *Cf.* Florer v. Congregation Pidyon Shevuyim, N.A., 639 F.3d 916, 919, 925–27 (9th Cir. 2011) (holding that a religious private actor was not operating under color of law and therefore was not a state actor).

[78] Hall v. Smith, 497 F. App'x 366, 375 (5th Cir. 2012); Phelan *ex rel.* Phelan v. Mullane, 512 F. App'x 88, 90 (2d Cir. 2013) (stating that the court would assume, "without deciding[,] that [a foster care agency] qualifies as a state actor subject to suit under § 1983").

[79] *See S.W.*, 46 F. Supp. 3d at 195–96 (highlighting the lack of clarity in adhering to Second Circuit precedent of treating foster care agencies as state actors); Mortimer v. City of New York, 15 Civ. 7186, 2018 WL 1605982, at *13 (S.D.N.Y. Mar. 29, 2018) (stating that courts within the circuit have questioned the precedent of viewing a private foster care agency as a state actor).

[80] Will v. Mich. Dep't of State Police, 491 U.S. 58, 66 (1989) ("Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. The Eleventh Amendment bars such suits unless the

The Eleventh Amendment embodies the principle of state sovereign immunity, which bars suits by private litigants filed against the states.[81] The Supreme Court has construed the Eleventh Amendment's language,[82] extending the cloak of sovereign immunity to cover actors beyond the states themselves. "As a subset of Eleventh Amendment [doctrine], the arm-of-the-state doctrine allows government entities closely situated to their respective state governments to partake of the state's Eleventh Amendment sovereign immunity."[83] Though the arm-of-the-state doctrine lacks "direction, coherence, and consistency,"[84] it permits state agencies that "operate as alter egos or instrumentalities of the states" to receive sovereign-immunity protection.[85] State agencies represent one form of a state's "alter ego," as they embody the quintessential arm-of-the-state.[86]

The extension of sovereign immunity protection to state agencies creates a doctrinal discrepancy when considering that states now, more than ever, rely on private actors to carry out state services.[87] Indeed, "state and local governments have discovered that the private sector can be a valuable partner in delivering social services."[88] The public sector's reliance on private actors to accomplish various tasks raises a question: should private actors deemed de facto "state actors" for being

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State has waived its immunity or unless Congress has exercised its undoubted power under § 5 of the Fourteenth Amendment to override that immunity. Congress, in passing § 1983, had no intention to disturb the States' Eleventh Amendment immunity[.]" (citation omitted)).

[81] Ratified in 1798, the Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

[82] Anthony J. Harwood, *A Narrow Eleventh Amendment Immunity for Political Subdivisions: Reconciling the Arm of the State Doctrine with Federalism Principles*, 55 FORDHAM L. REV. 101, 109 (1986).

[83] Jameson B. Bilsborrow, *Keeping the Arms in Touch: Taking Political Accountability Seriously in the Eleventh Amendment Arm-of-the-State Doctrine*, 64 EMORY L.J. 819, 819 (2015).

[84] *Id.* at 826.

[85] Alex E. Rogers, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 COLUM. L. REV. 1243, 1243 (1992) ("In deciding whether a state governmental body may seek refuge behind the Eleventh Amendment shield — and thereby remain insulated from suit in federal court — courts scrutinize an entity's functions, characteristics, and powers to gauge its link to the state."); Bilsborrow, *supra* note 83, at 821.

[86] *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989) (explaining that a state official represents the official's office); Alabama v. Pugh, 438 U.S. 781, 782 (1978) (recognizing that the state's Board of Corrections receives immunity as a state actor).

[87] Filarksy v. Delia, 566 U.S. 377, 390–92 (2012).

[88] Rogers, *supra* note 85, at 1252.

sufficiently similar to state agencies receive the same sovereign immunity protection that their state agency counterparts enjoy when sued under Section 1983?

III. THE "DOCTRINE" OF DERIVATIVE IMMUNITY

Under some circumstances, courts have extended to private actors immunities traditionally reserved for state actors, an extension described by some as "derivative immunity."[89] This Essay defines derivative immunity as "a third party claiming some form of immunity of a sovereign [or government actor] in response to a civil action."[90] Though so-called derivative immunity has received short shrift in academia as a stand-alone doctrine,[91] it remains "pivotal in [Section] 1983 cases," as a private actor's relationship with the state may simultaneously lead to liability and immunity.[92]

The impetus behind derivative immunity is to protect private actors "from liability from which government employees are immune."[93] Notions of fairness and consistency undergird the doctrine. And some courts have noted with incredulity situations in which private actors get exposed to liability regimes reserved for state actors, while de jure state actors get to assert immunity to suit. As will be discussed, private actors have sought to remedy that discrepancy by asserting iterations of derivative immunity in many scenarios.[94]

Take conspiracy for starters. Caselaw makes clear that private actors who conspire with state officials to engage in prohibited actions can be held liable under Section 1983 just like state actors can.[95] Yet

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[89] Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 802 (2008); *see also Filarsky*, 566 U.S. at 388–89 ("[E]xamples of individuals receiving immunity for actions taken while engaged in public service on a temporary or occasional basis are as varied as the reach of government itself.").

[90] Malone, *supra* note 29, at 107.

[91] *Cf. id.* at 89 (stating that all iterations of immunity are derived from sovereign immunity).

[92] Lewis, *supra* note 31, at 1503.

[93] *Id.* at 1505.

[94] Though not discussed in this Essay, courts have also extended "foreign sovereign immunity" to private actors. *See, e.g.*, Butters v. Vance Int'l, Inc., 225 F.3d 462, 466 (4th Cir. 2000) (extending foreign sovereign immunity to private agents of foreign governments); Ivey v. Lynch, No. 1:17CV439, 2018 WL 3764262, at *7 (M.D.N.C. Aug. 8, 2018) (holding that a private agent is protected by foreign sovereign immunity and immune from suit); Alicog v. Kingdom of Saudi Arabia, 860 F. Supp. 379, 384 (S.D. Tex. 1994) (stating that a private actor is safeguarded under foreign sovereign immunity).

[95] Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970); United States v. Price, 383 U.S. 787, 794 (1966).

some circuits have recognized that "[p]rivate persons cannot be held liable for conspiracy under [Section 1983] if the other conspirators are state officials who are themselves immune to liability."[96] In other words, a plaintiff is deprived of her Section 1983 action against a private-actor conspirator because "the immunity of the public official extends vicariously to the private party co-conspirator, thus insulating the private party from suit under [S]ection 1983."[97]

Derivative immunity often crops up in the contracting context.[98] The doctrine shields from liability private actors that contract with the federal government under the rationale that the action of the government's agent is tantamount to government action.[99] The doctrine applied in the federal contracting context has its roots in the Supreme Court's decision in *Yearsley v. W.A. Ross Construction Co*.[100] In that case, a private contractor asserted sovereign immunity as a defense against a suit brought after a construction project damaged nearby property.[101] The Court explained that the private contractor could not be sued because he acted within the scope of his agency relationship with the federal government and was thus covered by the government's immunity.[102] Derivative immunity for contracting thus operates on the premise that a sovereign must act through its agents.[103] And just as "the sovereign can claim immunity, so should the agent."[104]

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[96] Sykes v. California, 497 F.2d 197, 202 (9th Cir. 1974); Kurz v. Michigan, 548 F.2d 172, 175 (6th Cir. 1977); White v. Bloom, 621 F.2d 276, 281 (8th Cir. 1980) ("Many courts of appeals cases have adopted a per se rule that a private person is not liable for damages under [S]ection 1983 or [S]ection 1985 when his alleged co-conspirators have absolute immunity."); Andrew J. Pincus, *Section 1983 Liability of Private Actors Who Conspire with Immune State Officials*, 80 COLUM. L. REV. 802, 816 (1980) ("Courts have held that private citizens who conspire with immune state officials cannot be sued under [S]ection 1983.").

[97] Merkle, *supra* note 61, at 569.

[98] *Butters*, 225 F.3d at 466 ("[C]ontractors and common law agents acting within the scope of their employment for the United States have derivative sovereign immunity.").

[99] Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18, 20–21 (1940).

[100] *Id.* at 21.

[101] *Id.* at 19–21.

[102] *Id.* at 20–22.

[103] Under agency principles, the principal is on the hook for the acts of its agent. *See* Alfaro-Huitron v. Cervantes Agribusiness, 982 F.3d 1242, 1251 (10th Cir. 2020) (explaining that an agent is a representative of the principal, acting on the principal's behalf). As applied in the sovereign context, then, "an action against an employee who acts in accordance with his agency relationship with the sovereign is an action against the sovereign itself." Malone, *supra* note 29, at 92.

[104] Malone, *supra* note 29, at 92. The Court in *Campbell-Ewald* did nothing to alter the "axiomatic [principle] that government officials working on behalf of the sovereign as well as those who are contracted to perform a function equivalent to a

The Court has also extended qualified immunity to private actors working for state and local governments.[105] In *Filarsky v. Delia*, the Court permitted a private attorney hired by a locality to seek shelter under qualified immunity because the private actor was hired to carry out the government's business.[106] Equitable considerations drove the Court's decision to grant the private actor qualified immunity.[107] The Court wished to avoid dissuading private actors from working for the government out of fear of facing liability reserved for state actors.[108] The Court also recognized the need to avoid a doctrinal mismatch: though state actors were immunized, private actors working alongside the government actors "could be left holding the bag—facing full liability for actions taken in conjunction with government employees."[109] The prospect of becoming a bag-holder could make private actors "think twice before accepting a government assignment."[110] The Court's "analysis in *Filarsky* shows that the

government employee may claim some immunity." *Id.* at 93. Indeed, *Campbell-Ewald* shows "that derivative immunity is available to private contractors for claims involving federal statutory or constitutional harms and for all types of performance contracts as long as authority exists and the contractor complies with the instructions of government and federal law." *Id.* at 115. The Supreme Court's "reluctance to give a more detailed explanation of the parameters of derivative immunity" has been interpreted by some as indicating "at least a general inclination or knowledge by the Court that this doctrine will continuously be expanding." *Id.* at 118. The Court, however, did clarify the scope of derivative immunity in the contract setting. Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 166 (2016). *But see* Lewis, *supra* note 31, at 1510 ("*Campbell-Ewald* diminished the doctrine of derivative sovereign immunity and created uncertainty regarding the extent to which private firms and individuals may access the protections afforded to their governmental counterparts."); *Id.* at 1498 (noting that the doctrine of derivative sovereign immunity has proven difficult to apply, largely because "it can be difficult to establish an agency relationship between the contractor and the government").

[105] *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (stating that government officials may be shielded from personal liability if their conduct does not violate an individual's clearly established constitutional or statutory right).

[106] 566 U.S. 377, 389 (2012). In that case, Delia, a firefighter, brought a lawsuit under Section 1983 against the City, the fire department, other individuals, and Filarsky, a private attorney who was employed by the city to conduct an internal affairs investigation against Delia. *Id.* at 380–83.

[107] *Id.* at 390.

[108] *Id.* at 389–90.

[109] *Id.* at 391.

[110] *Id.*; Weis, *supra* note 58, at 1058 ("Finding the distraction piece of the policy inquiry similarly applicable, the Court noted that public employees working in close coordination with private individuals could be distracted by litigation related to their shared work."); Athina Pentsou, Note, *Assertion of Qualified Immunity by Private State Actors After* Filarsky*: An Application to the Employees of Prison Health Care Contractors*, 43 S. ILL. UNIV. L.J. 361, 361, 385 (2019) (advocating that courts should extend qualified immunity to private state actors who provide prison healthcare, thereby curing the circuit split on this issue).

paramount concern in [derivative] immunity [cases] is the function the defendant performs, rather than the defendant's title or status."[111]

To summarize, courts have extended federal sovereign immunity to federal contractors. They have extended qualified immunity to private actors working on behalf of local governments. And they have even extended a range of immunities to private actors conspiring with state actors. Yet courts have been hesitant to extend state *sovereign* immunity to private actors deemed de facto state actors because of their relationships with state agencies. "[D]erivative state sovereign immunity"[112] has received a cold shoulder in all circuits except for the Eleventh.[113] This Essay suggests that it may be time for that to change. The dramatic increase in the scope of services provided by states through private actors has increased the number of Section 1983 claims aimed at non-state defendants. Even if extending derivative state sovereign immunity to private actors turned de facto state actors presents too drastic a measure, one should be willing to reconsider the scope of the state-action doctrine given the government's increased reliance on private actors to carry out state services.

IV. REINING STATE ACTION IN OR EXTENDING DERIVATIVE IMMUNITY OUT

A combination of "the expansion of state services, the emphasis on privatization, . . . decentralization by the states, and the emergence of specialized [state] agencies"[114] has led to more and more private actors "asserting state sovereign immunity as an affirmative defense in suits arising out of work performed on behalf of the government."[115] Some courts have gone along with derivative immunity as an asserted defense, affording immunity protection to some private actors acting

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[111] Weis, *supra* note 58, at 1075.

[112] WhatsApp, Inc. v. NSO Grp. Techs. Ltd., 491 F. Supp. 3d 584, 592 (N.D. Cal. 2020).

[113] Del Campo v. Kennedy, 517 F.3d 1070, 1079 (9th Cir. 2008) ("All [circuits] but the Eleventh Circuit have denied state sovereign immunity to private entities . . . ."); Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp., 208 F.3d 1308, 1309, 1311 (11th Cir. 2000) (providing a private administrator of a state health care plan with sovereign immunity, reasoning that "[t]he pertinent inquiry is not into the nature of a corporation's status in the abstract, but its function or role in a particular context," and that the health care plan was essentially controlled by the state).

[114] Joseph Beckham, *The Eleventh Amendment Revisited: Implications of Recent Supreme Court Interpretations on the Immunity of Public Colleges and Universities*, 27 STETSON L. REV. 141, 147 (1997).

[115] Justin C. Carlin, *State Sovereign Immunity and Privatization: Can Eleventh Amendment Immunity Extend to Private Entities?*, 5 FIU L. REV. 209, 209 (2009).

as agents of the state.[116] Yet academia has largely ignored the rise of derivative sovereign immunity.[117] And that gap comes on the heels of both increased interconnection between private and public spheres,[118] plus a Supreme Court that has signaled both skepticism toward an expansive state-action doctrine[119] and a willingness to extend, under certain circumstances, government immunities to private actors.[120] Part IV of this Essay argues that the Court stands at a crossroads in the wake of the increased likelihood that a private actor will be deemed a de facto state actor and subject to suits under Section 1983, yet simultaneously deprived of the ability to invoke an immunity reserved for their de jure state actor counterpart.[121]

The Court can go one of two ways if it wishes to make sense out of the relationship between the state-action doctrine, enhanced private-public relations, and the doctrine of derivative immunity. The Court can rein in the state-action doctrine, charting a course that limits the circumstances where private actors will qualify as state actors. Or it can extend derivative immunity to private actors who qualify as state actors to mitigate doctrinal discrepancies. Refusing to head down either path runs the risk of categorizing a private actor as a state actor deprived of the immunities their state counterpart enjoys. That type of inconsistency troubled the Court in *Filarsky*, leading to the extension of qualified immunity to a private actor. And it should trouble the Court when a private actor qualifies as a state actor for mirroring and carrying out the functions of a state agency. Recent litigation surrounding a private religious organization known as Father Maloney's Boys and Girls Haven highlights the viability of either of this Essay's proposed paths.

Since the early twentieth century, the Kentucky-based private, nonprofit Catholic institute has provided "day-to-day care to abused and neglected children that it houses on a residential campus."[122] The

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[116] Bladuell, *supra* note 32, at 842–44.

[117] Carlin, *supra* note 115, at 211–12 ("[S]cholars and commentators have paid scant attention to the question of whether quasi-government agencies, or so-called public/private 'hybrid' entities, should be accorded state sovereign immunity.").

[118] Minow, *supra* note 64, at 145–46.

[119] Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928–30, 1932, 1934 (2019) (refining, and arguably pulling back on, the scope of the state-action doctrine).

[120] Filarsky v. Delia, 566 U.S. 377, 393–94 (2012) (holding that a certain private individual retained by a city government for his investigation services should not be denied qualified immunity, and more broadly, that "permanent, full-time" government employment is not required to obtain § 1983 immunity).

[121] Carlin, *supra* note 115, at 241.

[122] Howell v. Father Maloney's Boys' Haven, Inc., 976 F.3d 750, 751–52 (6th Cir. 2020); THE KENTUCKY ENCYCLOPEDIA 283 (John E. Kleber ed., 1992).

Haven does not stand alone in providing the Commonwealth's children with needed services. Kentucky's young have always found a warm bed and a hot meal under the roof of private religious actors.[123] In more recent years, however, the Kentucky legislature has expanded its provision of child welfare services. The Cabinet for Health and Family Services, an agency of the state, now "regulates the placement [and the care] of at-risk children in the Commonwealth's custody."[124]

In the Spring of 2018, a woman filed suit against the Haven, the Cabinet for Health and Family Services, and others for harm she suffered at the hands of a teenager housed in the Haven's residential facility.[125] Howell's claims for relief included one under Section 1983.[126] The Section 1983 claim against the Cabinet for Health and Family Services did not (and could not) get off the ground.[127] The Sixth Circuit has afforded the Kentucky agency sovereign-immunity protection under the arm-of-the-state doctrine.[128] And that protection meant that the Section 1983 claim against the agency was dead-on-arrival. Yet the same could not be said for the Section 1983 claim against the Haven.

The plaintiff turned to the state-action doctrine to assert a Section 1983 claim against the Haven, arguing that the private actor qualified as a de facto state actor.[129] Despite noting that several courts have characterized religious institutions like the Haven as state actors, the district court concluded that the Haven did not qualify as a state actor under the state-action doctrine.[130] But that decision prompted an appeal. The appellant argued on appeal in part that the Haven should qualify as a state actor because the Haven resembled the "*alter ego*" of Kentucky's state agency.[131] The Sixth Circuit, in this Essay's view, had

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123 *Howell*, 976 F.3d at 753.

124 *Id.* at 751 (stating that "[i]n caring for such children, the agency often contracts with private facilities").

125 *Id.* at 751–72; Howell v. Father Maloney's Boys' Haven, Inc., 424 F. Supp. 3d 511, 514–15 (W.D. Ky. 2020).

126 *Howell*, 976 F.3d at 752.

127 *Id.* at 751–52 (stating that the Cabinet for Health and Family Services was dismissed from Howell's case); Howell v. Father Maloney's Boys' Haven, Inc., No. 3:18-CV-00192, 2019 U.S. Dist. LEXIS 49908, at *2, *8 (W.D. Ky. Mar. 25, 2019) (stating that the Eleventh Amendment bars claims against the Cabinet for Health and Family Services).

128 *See* Sefa v. Kentucky, 510 F. App'x 435, 437 (6th Cir. 2013) (explaining that the Kentucky Cabinet for Health and Family Services has sovereign immunity to Section 1983 suits); Whittington v. Milby, 928 F.2d 188, 193–94 (6th Cir. 1991) (stating that the Cabinet "may not be sued in federal court . . . unless the state has waived its sovereign immunity or Congress has overridden it," and that a Section 1983 suit is no exception).

129 *Howell*, 976 F.3d at 752.

130 *Howell*, 424 F. Supp. 3d at 517–20.

131 Brief of Petitioner-Appellant at 3, 9, 24, *Howell*, 976 F.3d 750 (No. 20-5122).

two routes to resolve the Section 1983 claim against the Haven without facilitating a doctrinal discrepancy.

Option one would have been to extend derivative state sovereign immunity to the Haven. If the Haven qualifies as a state actor because it is the spitting image of Kentucky's agency, then, for the sake of consistency, derivative immunity should have barred the plaintiff's Section 1983 claim against the de facto state actor. A contrary conclusion would have exposed the private, residential institution to liability because of its similarity to a state agency—an agency that enjoyed immunity from liability. Treating likes alike makes sense from an equitable perspective, a doctrinal perspective, and a commonsense perspective.[132] Indeed, it was an assortment of those perspectives that drove the Supreme Court's decision in *Filarsky*.[133]

The second path, and the one the Sixth Circuit ultimately traveled, would be to rein in the state-action doctrine. From a first-principles perspective, the idea behind the state-action requirement for Section 1983 claims is quite simple: the Fourteenth Amendment restricts state conduct, not the conduct of private actors.[134] And Section 1983 was enacted under Section 5 of the Fourteenth Amendment, which is a provision that empowers Congress to protect individuals from improper state action.[135] Yet courts have expanded the Fourteenth Amendment's scope to cover more and more private activity as the government continues its expansion into private

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[132] Filarsky v. Delia, 566 U.S. 377, 393–94 (2012). The Court concluded that private actors doing private affairs investigations should have qualified immunity if government actors doing the same work would receive such immunity. *Id.* The Court explained that the common law treated both types of actors alike in such contexts, *id.* at 387, 393–94, and that it follows from common sense that the use of private actors for an official, government job should not preclude those actors from the benefits they would be afforded were they working in official government positions. *Id.* at 393–94.

[133] *Id.* (reversing the lower court's denial of qualified immunity to a private actor based on those equitable, doctrinal, and commonsense perspectives).

[134] Christopher W. Schmidt, *On Doctrinal Confusion: The Case of the State Action Doctrine*, 2016 BYU L. REV. 575, 584 (2016). The state-action doctrine does not rest on the idea of an actor having government-backed power, but on the idea that government actors exercising government-backed power are *agents* and private actors exercising such power are *principals*. BeVier & Harrison, *supra* note 60, at 1791–92.

[135] Darlene C. Goring, *Cold Comfort: § 1983 as the Exclusive Damages Remedy for Violations of § 1918 by State Actors*, 14 RUTGERS RACE & L. REV. 25, 45 (2013); Ronald D. Rotunda, *The Powers of Congress Under Section 5 of the Fourteenth Amendment After* City of Boerne v. Flores, 32 IND. L. REV. 163, 169 (1998). As modern doctrine makes clear, legislation enacted under Section 5 must conform to the Supreme Court's interpretation of the Fourteenth Amendment. City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997) (determining that the constitutionality of Section 5 legislation depends on the "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end").

spheres.[136] That reality has made differentiating between private and state activity "a highly complex task."[137] That difficult task, however, does not alter the reality that "[t]he power private entities wield over individuals is not always analogous to the awesome power that the State wields, and it is therefore not always sensible to use the Constitution [(and Section 1983)] as the means of checking them."[138] Indeed, the state-action doctrine serves the function of limiting the scope of the Fourteenth Amendment to preserve federalism and to safeguard a private sphere to allow individual liberty to flourish.[139] It makes some sense, then, to consider ways to refine the breadth of the state-action doctrine.

One way to rein in the state-action doctrine would be to "[d]efine state action very narrowly to refer solely to conduct of state employees and officials."[140] This bright-line approach appeals to formalists.[141] And for good reason. It confines constitutional restrictions "to the behavior of individuals who have accepted the application of those restrictions by choosing their roles as government officials."[142] Clearly demarcating who falls under the state-action umbrella may also facilitate greater public-private relations, as the "lack of [a] clear directive may result in private parties greatly restricting their public activities and interaction with government entities out of fear of unwittingly invoking the unpredictable state action doctrine."[143]

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[136] Schmidt, *supra* note 134, at 585, 611.

[137] *Id.* at 597–98.

[138] Gowri Ramachandran, *Private Institutions, Social Responsibility, and the State Action Doctrine*, 96 TEX. L. REV. ONLINE 63, 75 (2018).

[139] *The Civil Rights Cases*, 109 U.S. 3, 10–11 (1883) ("[The Fourteenth Amendment] does not invest Congress with power to legislate upon subjects which are within the domain of State legislation . . . ."); *Id.* at 13–14 ("[Legislation regulating private conduct] steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other . . . . If [legislation regulating private conduct] is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop."); Jahnig, *supra* note 58, at 255 ("[F]ederalism and liberty concerns have made the Supreme Court reluctant to expand the Fourteenth Amendment's power to private actors."); BeVier & Harrison, *supra* note 60, at 1772 (arguing for a view of the "Constitution that regards the document's principal function as having been to establish, empower, and limit government rather than to specify the content of rules that regulate private behavior or to ordain the distributional particulars of a just society"); Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1381–82 (2006) ("The Supreme Court has badly misinterpreted the purpose of the state action doctrine.").

[140] Minow, *supra* note 64, at 159–60, 163.

[141] *Id.* at 163.

[142] *Id.*

[143] Julie K. Brown, Note, *Less Is More: Decluttering the State Action Doctrine*, 73 MO. L. REV. 561, 579 (2008).

Those who fear a lack of remedies under a formalist approach should check their worry at the door. Adopting a formalist approach would neither eliminate all possible claims against private actors nor immunize private actors from potential liability. It would instead subject the conduct of private actors "to the terms of government contracts or otherwise prevailing state or federal statutory or common law" actions.[144] In other words, state tort claims or other federal claims that recognize a cause of action against private actors would provide a viable alternative to the liabilities that flow from state actor status.[145] Indeed, that is exactly what happened in the case involving the Haven.[146] The Sixth Circuit dismissed the case without prejudice because state law claims remained a possible avenue for the plaintiff to seek relief.[147]

All that being said, adopting a formalist approach to the state-action doctrine has potential downsides. Permitting some private actors to escape state actor status may widen the "scope for racial and gender discrimination, more constraints on speech, and more abuses of power."[148] A broader definition of state action, by contrast, may do a better job injecting constitutional norms into the fabric of private society.[149] Section 1983 suits also provide "public and constitutional accountability. The Constitution and the public are done a disservice if both government and private entities are able to avoid constitutional liabilities to which they would otherwise be subject, the former by subcontracting to the latter, and the latter by virtue of being private."[150]

Whether one is inclined toward a narrow or broad approach to the state-action doctrine, all should agree that the doctrine requires refinement.[151] The onslaught of privatization and the rise of derivative

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[144] Minow, *supra* note 64, at 163.

[145] The idea of "creat[ing] a § 1983 case out of every common law tort" has not appealed to the Supreme Court. Jack M. Beermann, *Common Law Elements of the Section 1983 Action*, 72 CHI.-KENT L. REV. 695, 731 (1997); Paul v. Davis, 424 U.S. 693, 711–12 (1976) (recognizing that "[s]tate[s] may protect against injury by virtue of [their] tort law, providing a forum for vindication of those interests by means of damages actions"). However, some argue that state liability regimes are insufficient. *See* Chiang, *supra* note 59, at 679–83 (arguing that state common law tort and contract laws by themselves can fail to properly redress a plaintiff).

[146] Howell v. Father Maloney's Boys' Haven, Inc., 976 F.3d 750, 752, 755 (6th Cir. 2020) (denying the plaintiff's Section 1983 claim against the Haven but noting that the plaintiff's "state-law claims against the Haven . . . endure").

[147] *Id.*

[148] Minow, *supra* note 64, at 163–64.

[149] *Id.* at 160–61, 164.

[150] Chiang, *supra* note 59, at 667.

[151] Another proposed test that makes sense "concludes that a two-pronged approach is appropriate for identifying at least a subset of state actions: (1) was the

immunity as a stand-alone doctrine creates an environment where private actors will get the short end of the doctrinal stick.[152] This Essay joins with others in pointing out that it is past time "to declutter the state action doctrine by combining tests, shedding unnecessary terminology, demystifying the state action doctrine, and giving the lower courts a tangible standard with which to work."[153] If doctrinal refinement never comes to pass, then it may make sense to extend derivative immunity to its outer bounds to safeguard private actors from inequitable exposure to liability reserved for state actors. Indeed, "[d]iminishing the doctrine of derivative sovereign immunity disserves the public interest by exposing private firms and individuals to liability when working with the government and incentivizes them to avoid government contract work altogether."[154]

CONCLUSION

Under some circumstances, the state-action doctrine permits courts to categorize private organizations as de facto state actors. That designation exposes private actors to liability regimes like Section 1983 reserved only for state actors. Yet when a litigant sues a de jure state actor, the defendant can often invoke some form of government immunity and avoid the suit. The discrepancy between a de jure state actor's ability to take refuge behind immunity while the de facto state actor is left holding the bag has led to a doctrine known as derivative immunity. That doctrine allows a private actor to sometimes invoke immunities reserved for government actors. Yet courts have seldom permitted a private actor-turned-state actor to invoke the defense of sovereign immunity, even though their state-actor status arises in part because of their similarity to a state agency covered by sovereign immunity's protective cloak. That discrepancy places the Court at a crossroads.

This Essay has argued that the Court can go one of two ways if it wishes to make sense out of the scenarios where a private actor becomes exposed to Section 1983 liability while that private actor's state-actor counterpart receives immunity from suit. The Court can rein in the state-action doctrine, charting a course that limits the circumstances where private actors will qualify as state actors. Or it

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injury caused by someone cloaked in the authority of the state, and (2) was the injury made possible only because the state placed the complainant in the injuror's care?" *Id.* at 691, 699.

[152] Carlin, *supra* note 115, at 209 ("Since the privatization-boom of the 1980s and 1990s, state governments have transferred a large number of traditionally public functions to private firms . . . .").

[153] Brown, *supra* note 143, at 581.

[154] Lewis, *supra* note 31, at 1505.

can extend derivative sovereign immunity to private actors who qualify as state actors because of their similarity to state agencies. Refusing to head down either path runs the risk of categorizing a private actor as a state actor and then depriving that defendant of the immunities their state counterpart enjoys. That risk has profound legal consequences for the intersection of church, state, and society. And it is a risk the Court should consider addressing.

A FELON AMONG US: SHOULD FELONS BE ALLOWED ON JURIES?

Michael Conklin[*]

> "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable."[1]

> "A 'jury of your peers' doesn't mean having a foreman with the same ankle monitoring device as the defendant."[2]

INTRODUCTION

This is a review of James M. Binnall's new book, *Twenty Million Angry Men: The Case for Including Convicted Felons in Our Jury System*.[3] The federal government and a majority of states have complete bans on felons serving on juries.[4] Binnall makes a strong case for ending these bans, supported by his own personal experience as a felon who was denied jury service and by his own novel, empirical research.[5] However, in his zeal to advocate for this position, he overstates favorable evidence and ignores potential counterarguments. This Review examines the strengths and weaknesses of Binnall's arguments and provides missing counterarguments to be considered.

I. ARGUMENTS IN FAVOR OF FELON JURORS

Case law is clear that blanket bans on felon jury service are permissible.[6] While Binnall likely disagrees with the reasoning from

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[1] Peters v. Kiff, 407 U.S. 493, 503 (1972).

[2] John Phillips, *California Moves to Let Felons Serve on Juries*, SAN GABRIEL VALLEY TRIB., https://www.sgvtribune.com/2019/06/13/california-moves-to-let-felons-serve-on-juries/ (June 13, 2019, 11:42 AM).

[3] JAMES M. BINNALL, TWENTY MILLION ANGRY MEN: THE CASE FOR INCLUDING CONVICTED FELONS IN OUR JURY SYSTEM (2021). The title is a play on words from the 1957 courtroom drama *12 Angry Men*. *Id.* at 143–44. The author of this review personally finds it in poor taste to refer to felons as "angry men." First, felons are not exclusively male. And second, perpetuating the stereotype that felons are "angry"—even if unintentional—is likely counterproductive to their successful reintegration to society.

[4] *Id.* at 19.

[5] *Id.* at 2–4, 130–32.

[6] *Id.* at 22; *see, e.g.*, Carter v. Jury Comm'n of Greene Cnty., 396 U.S. 320, 332

these cases, he largely accepts the current state of jurisprudence on the issue and focuses instead on pragmatic arguments for why states should allow felons to serve on juries. Binnall provides strong, empirical research to rebut the status quo and makes positive arguments for his position.

Throughout the book, Binnall persuasively argues that allowing felons to serve on juries would contribute to their successful reintegration into society. Jury duty "strengthen[s] community bonds" and fosters "future civic engagement."[7] This argument is supported by studies that find that serving on a jury results in increased voting rates.[8] With problematically high recidivism rates, policies that contribute to the successful reintegration of felons into society are of paramount importance.[9]

Binnall argues that felon status is not a meaningful predictor of character.[10] To support this claim, he provides the results of social science experiments. One such example is the Milgram experiment, in which participants were coerced into delivering what they believed to be dangerously high electrical shocks to fellow participants.[11] The study found that more than half of the participants were willing to administer such a shock when instructed.[12] Binnall uses this to demonstrate how committing a bad act is a poor proxy for lack of character.[13] Rather, it is more a function of being in an unfortunate situation that would have led most people to behave similarly.[14]

There is evidence to suggest that increasing the diversity of juries would lead to better deliberations. For example, a mock jury study found that juries with more diverse opinions on the death penalty were able to recall more case facts than homogenous juries.[15] Another study concluded that juries with high gender diversity result in juror perceptions of a more thorough, "less hostile and more supportive" process.[16] A survey measuring racial diversity also found advantages

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(1970) (discussing that states are constitutionally permitted to set qualifications for eligible jurors).

7 BINNALL, *supra* note 3, at 5.

8 *Id.*

9 "[M]ore than 65 percent of those released from California's prison system return within three years." *Recidivism Rates*, CAL. INNOCENCE PROJECT, https://californiainnocenceproject.org/issues-we-face/recidivism-rates/ (last visited July 15, 2021).

10 BINNALL, *supra* note 3, at 30–31.

11 *Id.* at 33.

12 *Id.*

13 *Id.* at 34.

14 *Id.*

15 *Id.* at 64.

16 *Id.* at 65 (quoting Nancy S. Marder, *Juries, Justice & Multiculturalism*, 75 S.

to more diverse juries.[17] Notably, "racially diverse juries deliberated longer, covered more case facts, made fewer factual errors, [and] left fewer factual inaccuracies uncorrected."[18]

The explanation for how juries with more diversity result in better deliberations is largely intuitive. More perspectives result in more ideas for consideration, which leads to more thorough deliberations.[19] Furthermore, different perspectives are more likely to lead to jurors challenging their assumptions and arriving at a more accurate understanding of the case.[20] Allowing felons to serve on juries would not only increase jury diversity due to the richness of felons' experiences with the justice system and the criminal element, but also due to felons being disproportionately likely to be persons of color.[21]

Binnall points out an interesting inconsistency in how courts treat potential character defects.[22] The Federal Rules of Evidence stipulate that "[e]vidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."[23] Additionally, "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."[24] Excluding felons from jury duty does seem to be inconsistent with these provisions of the Federal Rules of Evidence, as it imputes a judgment about character on people based on past criminal acts.

Binnall's most significant contribution to the debate is the results of a survey and a jury deliberation experiment that he conducted. The survey involved using the Revised Juror Bias Scale to measure pretrial bias in different populations.[25] It found that, on average, felons maintained a pro-defense/anti-prosecution pretrial bias.[26] However, the severity of this bias was no more pronounced than the biases from other groups, such as law students[27] and law enforcement

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CAL. L. REV. 659, 688–89 (2002)).

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.* at 43 ("While 8 percent of all adults bear the mark of a felony conviction, almost triple that many African-American adults (23 percent) have been convicted of a felony in the United States.").

22 *Id.* at 35.

23 *Id.*; FED. R. EVID. 404(b)(1).

24 FED. R. EVID. 404(a)(1).

25 BINNALL, *supra* note 3, at 51.

26 *Id.* (finding that felons averaged 33.29 on a 12 to 60 scale with a median of 36).

27 *Id.* at 51, 54 (finding that law students averaged 32.07, demonstrating a pro-defense/anti-prosecution pretrial bias).

personnel[28]—two groups that are generally not barred from jury duty. This is a powerful finding that allows Binnall to frame the issue as follows: "The question is not why biased felons should be treated differently than the rest of the population, but rather why they should be treated differently than the rest of the biased population . . . ."[29]

The mock jury experiment conducted by Binnall likewise provides powerful evidence in support of allowing felons on juries. The experiment divided participants into homogenous juries (exclusively non-felon jurors) and diverse juries (non-felon and felon jurors).[30] The experiment found few differences in deliberation length, the number of novel case facts covered, and legal concepts raised.[31] Furthermore, post-deliberation questionnaires revealed similar perceptions of deliberation satisfaction, attorney competence, attorney likability, and witness credibility.[32] The finding that diverse juries performed similarly to homogenous juries is a strong rebuttal to allegations that allowing felons to serve on juries would have negative consequences.

II. CRITIQUES AND COUNTERARGUMENTS

An unfortunate theme throughout the book is that Binnall conflates probabilities with certainties. This is highly problematic because the entire debate is based on probabilities. Examples of Binnall incorrectly viewing the issue in absolutist terms rather than probabilistic ones include the following:

- Opponents of felon jury duty "seemingly contend[] that a convicted felon's character is forever marred by his or her involvement in criminal activity."[33]
- "[A] jurisdiction might presume that *all* convicted felons lack probity" in order to justify jury duty bans.[34]
- "[J]urisdictions assume a level of homogeneity among convicted felons, assigning to the group a 'universal, unidirectional bias.'"[35]

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[28] *Id.* at 55 (finding that law enforcement personnel averaged 38.86, demonstrating a pro-prosecution/anti-defense pretrial bias). Note that law enforcement personnel are barred from jury duty in a few states. *Id.* at 54–55.

[29] *Id.* at 53 (quoting Brian Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 106 (2003)).

[30] *Id.* at 67.

[31] *Id.* at 70–71 (finding that diverse juries deliberated slightly longer and considered slightly less novel case facts but that neither of these differences were statistically significant).

[32] *Id.* at 71.

[33] *Id.* at 21.

[34] *Id.* at 30 (emphasis added).

[35] *Id.* at 46 (quoting Kalt, *supra* note 29, at 106).

- "By premising categorical felon-juror exclusion statutes on convicted felons' supposed lack of character, jurisdictions must make two interrelated assumptions about *all* convicted felons."[36]
- "[A] jurisdiction must assume that bad acts (felony convictions) *always* reveal bad character . . . ."[37]
- "[A] jurisdiction may suppose that the 'badges of shame' or 'degraded status' of *all* convicted felons 'undermine the integrity of the institution,'" in order to justify jury duty bans.[38]

This is a straw man tactic that allows Binnall to appear to have refuted the arguments of those who oppose his position by simply pointing out that not every felon possesses a lack of character. This also allows Binnall to ignore the real argument that felons should be excluded because of a higher probability of a character defect.

A similar shortcoming is found in Binnall's view regarding felons and the practice of law. He considers it an inconsistency to bar felons from jury service while allowing them to practice law.[39] Binnall laments, "[h]ow could [a felon] be 'fit' to counsel those facing years in prison or death, but 'unfit' to adjudicate even a minor civil matter?"[40] As explained in the previous paragraph, this exposes a glaring misunderstanding. Opponents of felon jury service do not maintain that every felon is unfit to be a juror.[41] Furthermore, being an attorney and serving on a jury are far too disparate to be analogous in any meaningful way. Being an attorney is a career. Denying someone a career is a far greater deprivation of liberty than denying him or her the duty of serving on a jury.[42] Nobody has a right to serve on a jury; the system even explicitly allows for anyone to be excluded from serving on a jury for no reason whatsoever.[43] Additionally, a great deal

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[36] *Id.* at 31.

[37] *Id.* (emphasis added).

[38] *Id.* at 30 (emphasis added) (quoting Kalt, *supra* note 29, at 102, 104).

[39] *Id.* at 40.

[40] *Id.* at 2–3.

[41] *See, e.g.*, United States v. Barry, 71 F.3d 1269, 1273–74 (7th Cir. 1995) (noting that a felon "*may* not take seriously his [or her] obligation" as a juror and that in "most" felony cases the accused exercised poor judgment (emphasis added)).

[42] *Cf.* Dupuy v. McDonald, 141 F. Supp. 2d 1090, 1134 (N.D. Ill. 2001) (explaining that working in a particular career is a "recognizable and protected liberty interest"). *But cf.* Amanda L. Kutz, Note, *A Jury of One's Peers: Virginia's Restoration of Rights Process and Its Disproportionate Effect on the African American Community*, 46 WM. & MARY L. REV. 2109, 2133–35 (2005) (discussing both how the loss of civil rights, like jury service, negatively impacts felons' lives and the processes by which those rights can be restored).

[43] *See* Batson v. Kentucky, 476 U.S. 79, 89 (1986) (explaining that, although

of time is invested in determining who is fit to be an attorney.[44] It would be highly inefficient to invest that same amount of time to determine whether every felon considered for jury duty is fit to serve.

The previous two explanations also demonstrate why the following, similar argument by Binnall is unwarranted. Binnall points out that "felon-juror exclusion statutes do not expel individuals who lack character but have no criminal record."[45] While true, this in no way demonstrates an inconsistency. Felon status is a binary, objective measure that is easy to ascertain. There is no such corresponding measure that could be implemented to identify and exclude non-felons who lack character.

This misunderstanding is further illustrated in a thought experiment Binnall provides: "Assume hypothetically that 95% of felons lack probity, that just 10% of non-felons do, and that only felons—all felons—are excluded from juries. If 6.5% of the jury-age population are felons, then over 60% of those who are unfit to serve would be non-felons who are not excluded."[46] This hypothetical, fully understood, is counterproductive to Binnall's attempted use. Since character—or here, "probity"—is difficult to ascertain, the justice system may be justified in excluding someone with a 95% probability of lacking character and replacing him or her with someone possessing just a 10% probability of lacking character. The fact that such a practice would lead to more jurors who lack character not being excluded than excluded is simply a function of the felon cohort being significantly smaller than the non-felon cohort, which is ultimately irrelevant.

An analogy will help illustrate the problems with Binnall's conflation of probabilities with certainties. Imagine an advocate arguing to allow seventeen-year-olds to serve on juries. In response to the argument that seventeen-year-olds should not be allowed to serve because they generally lack the maturity necessary, the advocate posits the following:

> My opponents believe that all seventeen-year-olds lack the maturity to serve on a jury. This is simply not true. Some seventeen-year-olds are more mature than some adults. In fact, there are more immature people over the age of seventeen than there are immature seventeen-year-olds.

American citizens do not have the right to sit on a jury, they are protected from peremptory challenges that discriminate against protected groups, like race or sex).

[44] *See, e.g.*, *In re* Simmons, 414 P.3d 1111, 1123 (Wash. 2018) (explaining the litany of factors that are considered in admitting potential lawyers to the bar).

[45] BINNALL, *supra* note 3, at 35–36.

[46] *Id.* at 36 (quoting Kalt, *supra* note 29, at 102–03).

> Since there is no ban against adults who lack maturity, the ban against seventeen-year-olds is therefore inconsistent and should be abandoned.

The flawed logic implemented in this reasoning closely parallels that of Binnall's. And similarly, the facts that not every seventeen-year-old is too immature for jury duty and that there are more immature adults than immature seventeen-year-olds do not rebut the argument that banning seventeen-year-olds from jury duty is an efficient way to reduce immature jurors. Likewise, Binnall's parallel arguments against felon jury exclusion do not rebut the argument that they are an efficient way to reduce seating jurors who lack character.

Binnall's logic for presenting the Milgram experiment is that felons are not intrinsically different from the average person; therefore, a felony conviction does not demonstrate a lack of character.[47] Felons just happen to find themselves in an unfortunate situation that would have led many people to engage in the criminal act.[48] But the Milgram experiment is a peculiar example to present in support of this proposition. The behavior that participants thought they were engaging in would likely not lead to a felony conviction. The participants in the study were coerced by authority figures to do what they did.[49] Therefore, the Milgram experiments do little to prove that committing felonies is just a product of circumstances and not indicative of character.

The surveys and mock jury experiments that Binnall presents are limited in their ability to support felon jury service. This is because the ultimate measure of juries' performance cannot be measured by quantifiable metrics such as time spent deliberating, number of issues considered, or perceived satisfaction of the jury experience. The purpose of juries is to adjudicate guilt and innocence accurately.[50]

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[47] *See supra* notes 11–13 and accompanying text (explaining how Binnall applies the Milgram experiment to show that bad behavior is not indicative of an average person's character).

[48] *See supra* notes 11–14 and accompanying text (explaining Binnall's analogy that because unfortunate situations can lead the average person to engage in bad behavior, other unfortunate situations can induce illegal conduct without reflecting on that individual's character).

[49] "When the [participant] refused to administer a shock, the experimenter was to give a series of orders/prods to ensure they continued." Saul McLeod, *The Milgram Shock Experiment*, SIMPLY PSYCH., https://www.simplypsychology.org/milgram.html (2017). These orderes included "[i]t is absolutely essential that you continue" and "[y]ou have no other choice but to continue." *Id.*

[50] GLEN WEISSENBERGER & JAMES J. DUANE, FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY 50 (7th ed. 2011) (emphasizing the distinction between the judge's role in evaluating the admissibility of

Perhaps juries that deliberate longer and have higher levels of perceived satisfaction are more likely to arrive at a more accurate verdict, but this is ultimately unknowable, as verdict accuracy is not measurable.[51]

In Binnall's mock jury experiment, every felon juror made a point to inform others on the jury of his or her criminal record.[52] Although not quantifiable, this could function as a deterrent for other jurors to speak candidly on topics such as the damaging effects of crime, negative impressions of the defendant, and the importance of incarceration. This silencing effect would be harmful to jury effectiveness, which is contingent upon jurors being comfortable speaking freely about controversial issues.[53]

Some have suggested that allowing felons to serve on juries would result in the need for increased court personnel due to a corresponding increased risk of violence in jury deliberations.[54] Binnall refers to this as "insulting and wildly illogical," but the evidence he provides to support this position is inadequate.[55] As Binnall points out, it is true that we live among felons every day.[56] However, walking by a felon in a grocery store is different from serving on a jury with one. Jury service may involve heated discussions involving the very process that resulted in a felon's incarceration. Binnall's second attempt to rebut this argument against felon inclusion on juries is even worse. He states that the people making this argument "cannot guarantee that a non-felon-juror will not commit an offense that puts others in the court in danger."[57] This demonstrates a similar misunderstanding to the ones discussed above regarding the conflation of probabilities with

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evidence and the jury's role in evaluating weight and credibility to reach its verdict).

[51] Criminal jury verdicts hinge on the inherently subjective nature of the "beyond a reasonable doubt" standard. Christoph Engel, *Preponderance of the Evidence Versus Intime Conviction: A Behavioral Perspective on a Conflict between American and Continental European Law*, 33 VT. L. REV. 435, 460–61 (2009) (illustrating how the subjective nature of the "beyond a reasonable doubt" standard affected subjects' decisions in the author's experiments). Because there is no objective standard for this burden of proof, there is no way to quantify whether a jury accurately found a defendant to be guilty based on this standard.

[52] BINNALL, *supra* note 3, at 80.

[53] *Cf.* Marianne M. Jennings, *The Role of the Teaching Scholar in Politically Charged Times*, 3 UNIV. PA. J.L. & PUB. AFFS. 191, 198, 202 (2018) (indicating that misinformation and strong stances on controversial political topics can decrease willingness to engage in open discussion, particularly in the classroom). Similarly, non-felon jurors may be less willing to discuss the nature of a defendant's charges when a felon juror has expressed his or her criminal history.

[54] BINNALL, *supra* note 3, at 137–40.

[55] *Id.* at 139.

[56] *Id.*

[57] *Id.*

certainties.[58] Namely, this is a probabilistic argument and, therefore, does not require that every felon juror would become violent, nor that every non-felon juror would be nonviolent. To be valid, the argument only requires that felons possess a higher probability of becoming violent.[59]

The studies discussed in the previous section that found that jury diversity results in better deliberations are not dispositive on the subject.[60] Other studies have found that group diversity harms decision making.[61] Of particular relevance to the debate regarding felons and jury duty, the negative consequences of group diversity are more likely to manifest when the group's decision involves polarizing attitudes, such as those involving crime and punishment.[62]

It is important in this debate to recognize that jury duty is generally viewed as an inconvenience.[63] Binnall acknowledges this, admitting that jury duty bans "arguably confer[] a benefit to convicted felons" and that jury duty is likely not "even something that they wish to experience."[64] Furthermore, the additional challenges that felons face when reentering society make jury duty even more inconvenient for this already marginalized group.[65] An additional aspect that Binnall neglects to mention is that evidence suggests felons would be disproportionately likely not to show up for jury duty when called, which is a crime.[66] A felon who found himself in violation of his parole

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[58] *See supra* notes 33–46 and accompanying text (critiquing Binnall's arguments that conflate probabilities and certainties).

[59] To clarify, the existence of a higher propensity toward violence in felons would not per se establish that jury bans should be maintained. The benefits of felons serving on juries would have to be weighed against this potential downside—and any resulting increase in court personnel expenses it would necessitate.

[60] *See supra* notes 15–18 and accompanying text (describing the findings, outlined in Binnall's book, that diverse juries lead to improved deliberations).

[61] Víctor Valls et al., *Linking Educational Diversity and Team Performance: Team Communication Quality and Innovation Team Climate Matter*, 89 J. OCCUPATIONAL & ORGANIZATIONAL PSYCH. 751, 752 (2016); Katherine Y. Williams & Charles A. O'Reilly, III, *Demography and Diversity in Organizations: A Review of 40 Years of Research*, 20 RSCH. ORGANIZATIONAL BEHAV. 77, 84 (1998).

[62] BINNALL, *supra* note 3, at 66.

[63] *Id.* at 27 ("[J]ury service is widely viewed as a bother, to be avoided if at all possible.").

[64] *Id.* at 4.

[65] *Cf.* WASH. STATE JURY COMM'N: REP. TO THE BD. FOR JUD. ADMIN. 3 (2000), https://www.courts.wa.gov/committee/pdf/jury_commission_report.pdf (acknowledging that the general public considers jury duty to be an inconvenience); BINNALL, *supra* note 3, at 6 (detailing additional challenges that felons encounter, such as difficulty obtaining housing and employment due to discrimination, that could cause further inconvenience if they were required to serve on a jury).

[66] Research shows that some African Americans possess a lack of faith in the judicial system due to African Americans comprising a disproportionate amount of

for not showing up to jury duty would likely not appreciate Binnall's unsolicited advocacy for jury duty on his behalf. Binnall is admirably upfront about this view of jury duty but does little to address it. He simply accuses anyone who brings it up as possessing a "privileged perspective" and that, nevertheless, jury duty bans evoke powerful symbolism; they remind felons they are still second-class citizens.[67] It is highly peculiar to purportedly advocate on behalf of a marginalized group by trying to impose on them a duty that they do not want, in an effort to promote symbolism.

CONCLUSION

While this Review mainly focuses on critiques of the book, Binnall does a good job presenting the case for felon jurors. His use of both big-picture statistics and personal anecdotes makes for an informative and engaging read. But the book must be understood as an advocacy piece and not an "objective analysis" as Binnall claims.[68] The use of straw man arguments and an unwillingness to address counterarguments to the evidence he provides leaves the reader largely in the dark regarding the other side of the debate.

The mostly one-sided nature of the book also manifests in Binnall's optimism for reform, which is greater than what the evidence justifies. Commenting on a survey that produced less than 50% support for allowing felons to serve on juries and less than 20% support for allowing violent felons to serve, Binnall interprets the findings as somehow giving "confidence to law-makers seeking to advocate for reform," reasoning that "the public seems open to debate on the topic."[69] Even more optimistic is Binnall's determination that the public is ripe for "a robust, fact-informed discussion about the topic."[70] Regardless of the end result of Binnall's advocacy, the reader will be thoroughly educated as to the case for allowing felon jurors.

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felons. The consequence of this is that they are less likely to show up for jury duty because they believe that the system is flawed. Juan R. Sánchez, *A Plan of Our Own: The Eastern District of Pennsylvania's Initiative to Increase Jury Diversity*, 91 TEMP. L. REV. ONLINE 1, 15 (2019).

67 BINNALL, *supra* note 3, at 6–7.

68 *Id.* at 12.

69 *Id.* at 134–35.

70 *Id.* at 135.

HE HAD IT COMING: THE FAILURE OF VIRGINIA'S SELF-DEFENSE LAW WHEN A BATTERED WOMAN DEFENDS HERSELF

INTRODUCTION

They meet at the Marine Corps ball.[1] He is charming and good-looking in his blue uniform; she wears a pretty dress and barely speaks English. They exchange numbers that night and are married only a few months later. Mere days after their fourth anniversary, he comes home and forces sex on his wife as he has done many times before. But tonight is different: she grabs a knife from the kitchen, cuts off her husband's genitalia, and simply drives away, leaving him bleeding and shocked by what has just happened to him.[2]

In the end, this man, John Bobbitt, is charged with marital sexual assault and found not guilty by a jury of nine women and three men.[3] A few weeks later, the battered woman, Lorena Bobbitt, is also found not guilty of a charge of malicious wounding "by reason of temporary insanity."[4] In the aftermath of Lorena's actions, the country took sides, so to speak.[5] John went on a national tour of sorts to talk about the incident and received $190,900 from Howard Stern's New Year's Eve Pageant fundraiser from sympathizers.[6] Lorena, on the other hand, became a household name, the punchline of sick jokes, and she felt that many people "didn't care why [she] did what [she] did."[7] Women who

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1 *Lorena: Episode 1* (Amazon Studios 2019).

2 *Id.*

3 Stephen Labaton, *Husband Acquitted of Assault in Mutilation Case*, N.Y. TIMES (Nov. 11, 1993), https://www.nytimes.com/1993/11/11/us/husband-acquitted-of-assault-in-mutilation-case.html. John Bobbitt was not prosecuted for marital rape because his and Lorena's situation did not meet the required elements of living separately and "serious physical injury . . . by the use of force or violence." VA. CODE ANN. § 18.2-61(B) (1994); Labaton, *supra* note 3. In 2002, Virginia amended this code section by entirely removing these elements, which had constituted the "marital rape exemption." *Domestic Violence – Sexual Assault*, ATT'Y GEN. OF VA., https://www.oag.state.va.us/programs-initiatives/domestic-violence?id=216 (last visited Dec. 23, 2020); VA. CODE ANN. § 18.2-61(B) (2002). Currently, Virginia still allows a marital rape case to be deferred and possibly dismissed for a defendant with no prior proceeding against him for marital rape if the defendant goes to counseling or therapy and the complaining spouse consents. VA. CODE ANN. § 18.2-61(C) (2020).

4 Labaton, *supra* note 3; Amy Chozick, *You Know the Lorena Bobbitt Story. But Not All of It.*, N.Y. TIMES (Jan. 30, 2019), https://www.nytimes.com/2019/01/30/arts/television/lorena-bobbitt-documentary-jordan-peele.html.

5 *See Lorena: Episode 2* (Amazon Studios 2019) (documenting individual reactions to Lorena's incident).

6 *Id.*

7 Chozick, *supra* note 4; *Lorena: Episode 2*, *supra* note 5.

empathized with Lorena, some of whom were battered themselves, wrote letters to her admiring her bravery or participated in demonstrations in which they hefted signs and chanted, "We support Lorena!"[8] At the time of this Note, it has been twenty-eight years since the incident. Lorena still lives in Virginia with a long-time partner and a daughter, and she volunteers at domestic abuse shelters.[9]

For Lorena, this was not the happiest of endings, but it did more than she could have imagined for battered women. Her story became worldwide news only three years after Anita Hill came forward with allegations against Supreme Court nominee Clarence Thomas for sexual harassment.[10] These stories brought the plight of battered women to the forefront of American consciousness in a way that had not been done before.[11]

However, in today's courtrooms, battered women who defend themselves still struggle to mount their own defenses. This is especially a problem for battered women who kill their batterers in an act of self-defense. Some critics worry that allowing these women to present evidence of the abuse they suffered will constitute an "abuse excuse," giving them a sort of license to kill.[12] They fear that this so-called "excuse" will erode the standard of "personal responsibility lying at the heart of the criminal law" and shift the blame from the defendant to the victim.[13] A sympathetic jury might think the deceased got what he deserved and acquit the woman.[14] However, in most cases, this abuse evidence is offered not as an excuse, but as a mitigating factor at the sentencing hearing in the hopes that the judge will take it into account.[15] On the other hand, the worry that a "technicality"[16] will allow a murderer to be acquitted or a battered woman to be sent to prison for killing her abuser is dispelled by the purpose of evidentiary rules: "to administer every proceeding fairly . . . to the end of

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[8] *Lorena: Episode 2*, *supra* note 5.

[9] Olivia B. Waxman, *'He Could Have Killed Me.' Lorena Bobbitt on Domestic Abuse and What She Wants You to Know About Her Case 25 Years Later*, TIME (June 22, 2018, 3:02 PM), https://time.com/5317979/lorena-bobbitt-today-anniversary-interview/.

[10] *Id.*

[11] *Id.*

[12] Richard J. Bonnie, *Excusing and Punishing in Criminal Adjudication: A Reality Check*, 5 CORNELL J.L. & PUB. POL'Y 1, 5, 7–9 (1995).

[13] *Id.* at 5.

[14] *Id.* at 7.

[15] *Id.* at 6.

[16] *See* Jonathan H. Kantor, *10 Killers Who Got off on Technicalities,* LISTVERSE (Jan. 6, 2020), https://listverse.com/2020/01/06/10-killers-who-got-off-on-technicalities/ (listing ten alleged murderers who were released or evaded conviction based on various legal "technicalities").

ascertaining the truth and securing a just determination."[17]

This Note shows that "living in domestic violence has such a major impact on a woman's state of mind that it could make an act of homicide justifiable, even when the first look at the facts does not appear to be traditional, confrontational self-defense."[18] It is essential for the judicial system to understand how Battered Woman Syndrome (BWS) affects a victim and how to utilize evidence of the condition in assessing self-defense claims. This understanding will help mistreated women meet the legal standard for self-defense and will lead to more just verdicts.[19]

This Note asks a question integral to justice for battered women: whether the imminent danger element of Virginia's self-defense law should be modified to the standard of a "reasonable person living in domestic violence" when a woman kills her abuser in an act of self-defense. Section I discusses the history of BWS and the common myths associated with the condition. Section II examines the precedent in Virginia currently applicable to these situations; this section will also look at the principles of human dignity that should influence the law in these cases. Section III then presents a solution to the problem: modifying the imminent danger element of self-defense in cases involving battered women who kill their violent partners in what they perceive as an act of self-defense. This proposed change in Virginia's common law tradition will ultimately benefit any individual living in domestic violence, but the immediate benefit will be felt by the battered woman.[20]

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[17] FED. R. EVID. 102.

[18] Lenore E.A. Walker, *Battered Woman Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 321 (1992) [hereinafter *BWS and Self-Defense*]; *see* Bailey v. Commonwealth, 104 S.E.2d 28, 31 (Va. 1958) ("Justifiable homicide in self-defense occurs where a person, without any fault on [her] part in provoking or bringing on the difficulty, kills another under reasonable apprehension of death or great bodily harm to [herself]."). This Note examines the unique struggle of the battered woman who kills her abuser when he is not physically attacking her. Though not without its own challenges, a self-defense claim is more accessible to the woman who kills her abuser while defending herself against a physical attack. *See* Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393, 396, 408 (1988) (explaining that a woman who kills her batterer during a battering incident can legitimately raise a self-defense claim if the claim meets the required elements).

[19] *See BWS and Self-Defense*, *supra* note 18, at 321–22 (discussing the importance of using expert witness testimony to understand the psychology of battered women and the mental effects resulting from that abuse).

[20] This Note does not discount the possibility of men battered by a female partner, a person battered by a same-sex partner, or even children battered by a parent. However, examination of these relationships is outside the scope of this Note. *See* Alexander Detschelt, *Recognizing Domestic Violence Directed Towards Men: Overcoming Societal Perceptions, Conducting Accurate Studies, and Enacting Responsible Legislation*, 12 KAN. J.L. & PUB. POL'Y 249, 249–50 (2002) (discussing the lack of acceptance of battered

I. WHO IS THE BATTERED WOMAN?

Worldwide, 35% of women have experienced either physical or sexual violence from an intimate partner or sexual violence from a non-partner.[21] In 2013, the World Health Organization utilized data from seventy-nine countries to conduct the "first global systematic review and synthesis of the body of scientific data on the prevalence of two forms of violence against women": intimate partner violence and non-partner sexual violence.[22] The report considers itself a call to action, sending the "message that violence against women is not a small problem that only occurs in some pockets of society," but rather is a global problem of "epidemic proportions."[23] The Americas ranked second in this violence study: 30% of women reported surviving intimate partner violence.[24]

The Department of Justice defines "domestic violence" in general as "a pattern of coercive control characterized by the use of physical, sexual, and psychologically abusive behaviors."[25] The coined term for women who suffer abuse from their partners, Battered Women Syndrome, was chosen in an attempt to convey the "measurable psychological changes that occur after exposure to repeated abuse."[26] "BWS is a complex phenomenon" which cannot be "neatly categorized" or made to fit a certain pattern,[27] but there are a few commonalities that these women often share.

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men and how to remedy it); Leonard D. Pertnoy, *Same Violence, Same Sex, Different Standard: An Examination of Same-Sex Domestic Violence and the Use of Expert Testimony on Battered Woman's Syndrome in Same-Sex Domestic Violence Cases*, 24 ST. THOMAS L. REV. 544, 544–46 (2012) (discussing domestic violence in same-sex partnerships and issues specific to such couples); Kristi Baldwin, *Battered Child Syndrome as a Sword and a Shield*, 29 AM. J. CRIM. L. 59, 61 (2001) (examining battered child syndrome and its uses in self-defense cases).

[21] WORLD HEALTH ORGANIZATION [WHO], GLOBAL AND REGIONAL ESTIMATES OF VIOLENCE AGAINST WOMEN 2 (2013), https://www.who.int/ publications/i/item/9789241 564625.

[22] *Id.* at 2, 16.

[23] *Id.* at 3. "The problem of battered women, while perhaps not accurately quantifiable, is grave." Elisabeth Ayyildiz, *When Battered Woman's Syndrome Does Not Go Far Enough: The Battered Woman as Vigilante*, 4 AM. U. J. GENDER & L. 141, 142 (1995).

[24] WHO, *supra* note 21, at 16. African, Eastern Mediterranean, and South-East Asian regions have the highest rates in the world: About 37% of women who have been in a relationship have endured physical or sexual violence at the hands of their partners at some point in their lives. *Id.*

[25] U.S. DEP'T OF JUST., THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS 5 (1996).

[26] *BWS and Self-Defense*, *supra* note 18, at 326.

[27] Linn v. State, 929 N.W.2d 717, 739 (Iowa 2019).

First, a battered woman is likely to be caught in the Cycle of Violence with her male partner.[28] The violence between them "typically begins shortly after the couple has had sexual relations together."[29]

Second, verbal abuse typically accompanies physical abuse.[30] This verbal assault can come in the form of berating the woman for something she has done wrong in the eyes of her partner, calling her names, or threatening her.[31] Threats of mutilation serve to terrify the woman and further confirm in her mind that her abuser will do as he promises; he may also threaten her family or friends, causing her to further isolate herself in an attempt to protect them.[32]

Third, battered women share traits with those who suffer from Post-Traumatic Stress Disorder (PTSD).[33] They tend to repress memories of the violence, outright deny that it occurs, or attempt to rationalize it by concentrating on what they might have done to deserve it rather than the fact that it occurred.[34] Specific symptoms of BWS include "emotional reactions like fear, anger, and sadness; attitudinal changes like self-blame and distrust; symptoms of psychological distress such as depression and sleep problems; and actions like fighting back, [and] initiating violence."[35] Battered women learn that manipulation is necessary to keep the peace with their abusive partners and sometimes believe they possess an unrealistic power of seduction (especially if they have found that sex "controls" their partner).[36] In truth, they have only the by-products of the abuse: intense concentration on survival during all stages of the Cycle of Violence, an unhealthy dependency on a violent yet occasionally loving man, a fear of being alone, and joy at experiencing periods of intense intimacy.[37] In order to understand the battered woman, it is necessary to take an in-depth look at the Cycle of Violence in which she lives and which shapes the circumstances in which some battered women end up killing their abusers in what they perceive as an act of self-defense.

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[28] *See* LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 101, 147 (1984) (discussing the evidence that supports the three phases of the Walker Cycle Theory of Violence); *infra* Section I.A (describing the Cycle of Violence).

[29] WALKER, *supra* note 28, at 55.

[30] *Id.* at 26.

[31] *Id.* at 27–28.

[32] *Id.* at 42–43.

[33] *Id.* at 124. BWS has been considered by some to be a subcategory of PTSD. Jennifer Gentile Long & Dawn Doran Wilsey, *Understanding Battered Woman Syndrome and Its Application to the Duress Defense*, 40 A.P.R. PROSECUTOR 36, 37 (2006).

[34] Linn v. State, 929 N.W.2d 717, 738, 740, 742 (Iowa 2019).

[35] *Id.* at 740.

[36] WALKER, *supra* note 28, at 54–55.

[37] *Id.*

A. The Cycle of Violence

In a 1978 study of 400 women who were living or had lived with an abusive partner, Dr. Lenore Walker, a trailblazing BWS psychologist, explored her Cycle Theory of Violence and found three distinct phases in the relationship between a woman and a batterer: (1) tension-building; (2) acute abuse incident; and (3) loving contrition.[38]

The first phase, tension-building, consists of small acts of gradual escalation that increase friction between the woman and her partner, including "verbal arguments and sometimes lower level physical abuse."[39] Sometimes, the woman does something to jumpstart phase two in an effort to minimize her pain and possible injuries and to feel the tiniest bit of control.[40]

Phase two, the acute battering incident, "is characterized by the uncontrollable discharge of the tensions" built up between the woman and her partner.[41] A typical battering incident "involve[s] slaps, punches, kicking, stomping, [or] choking" in addition to the continued verbal barrage, and possibly even rape.[42] This phase is when the woman is most likely to be injured, but it is also when the police are most likely to become involved.[43] However, the batterer will usually feel a "sharp physiological reduction in tension," which reinforces the unfortunate idea that violence is the answer to his problems because it *works*.[44]

Phase three functions as a sort of honeymoon phase, consisting of "extreme contrition" on the batterer's part and his renewed "loving behavior" towards the woman.[45] He may mix "pleas for forgiveness" and assurances of love with "promises to seek professional help, to stop drinking, and to refrain from further violence."[46] For some women, however, this phase is significant only because of the temporary

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[38] *Id.* at 95, 101, 147. Each battered woman's experience is different, and not every situation follows the Cycle of Violence theory. Two accepted alternative theories on the dynamic of domestic violence are "power and control" and "a continuum of violence." Long & Wilsey, *supra* note 33, at 36–37.

[39] Long & Wilsey, *supra* note 33, at 36; WALKER, *supra* note 28, at 95.

[40] State v. Kelly, 478 A.2d 364, 371 (N.J. 1984); *see also* Linn, 929 N.W.2d at 740 (noting that fighting back and starting the battering episode are symptoms of BWS).

[41] WALKER, *supra* note 28, at 96 (quoting LENORE E. WALKER, THE BATTERED WOMAN 59 (1979)).

[42] ELIZABETH DERMODY LEONARD, CONVICTED SURVIVORS: THE IMPRISONMENT OF BATTERED WOMEN WHO KILL 15, 29 (2002); WALKER, *supra* note 28, at 96.

[43] WALKER, *supra* note 28, at 96.

[44] *Id.*

[45] *Kelly*, 478 A.2d at 371; Long & Wilsey, *supra* note 33, at 37.

[46] *Kelly*, 478 A.2d at 371.

"absence of tension or violence," because her partner may show "no remorse for his previous assaults."[47] Either way, this phase reinforces the woman's belief in her batterer's "willingness and ability to change" and her belief that "the cycle of violence will not repeat itself."[48]

Walker's theory of learned helplessness explains how, during the Cycle of Violence, the battered woman develops survival and coping skills to deal with the reality of the violence rather than the skills necessary to escape the situation altogether.[49] Her experience creates a "state of psychological paralysis," and she becomes "unable to take any action at all to improve or alter [her] situation."[50] This manifests itself in a "belief that she cannot escape her abuser."[51] She becomes "trapped by [her] own fear."[52]

This basic understanding of who the battered woman is will assist in disproving the myths surrounding BWS and why the battered woman faces difficulties in the courtroom when she attempts to assert a self-defense claim.

B. Myths to Bust

Myths pervade society's view of battered women and the effect of the Cycle of Violence. In fact, the battered woman's struggle is greatly "aggravated by a lack of understanding among the general public concerning both the prevalence of violence against women and the nature of battering relationships."[53] Fearful that she will be "disbelieved or thought to be crazy or guilty of [her] own abuse," the battered woman avoids revealing details of the Dr. Jekyll/Mr. Hyde dynamic of her violent partner.[54]

A common myth is that the battered woman is a masochist and secretly enjoys the abuse.[55] This, however, ignores a multitude of more plausible explanations for her situation. A woman physically disciplined or abused as a child may, as an adult, accept the assaults

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47 Long & Wilsey, *supra* note 33, at 37.

48 *Id.*

49 WALKER, *supra* note 28, at 33.

50 *Kelly*, 478 A.2d at 372.

51 Long & Wilsey, *supra* note 33, at 37.

52 *Kelly*, 478 A.2d at 372.

53 *Id.* at 373. "[N]ot surprisingly, it is behind closed doors that women have been regularly abused." Michael Dowd, *Dispelling the Myths About the "Battered Woman's Defense": Towards a New Understanding*, 19 FORDHAM URB. L.J. 567, 569 (1992).

54 WALKER, *supra* note 28, at 23. In fact, when representing battered women, attorneys will often choose a strategy that highlights only a handful of battering incidents "for fear the jury might not believe that so much violence could occur without beginning to question the personality of the woman." *Id.*

55 Linn v. State, 929 N.W.2d 717, 742 (Iowa 2019).

as normal discipline from her batterer.[56] If she is ever successful in calming her partner during the tension-building phase, she might develop a mistaken belief that she can control him, not realizing that he is, in fact, the one controlling her.[57] She certainly does not enjoy the violence.

Another myth is an assumption that the abuse must not be too bad if the woman does not leave her batterer.[58] This is absurd, as any amount of abuse is unacceptable,[59] and the Cycle of Violence sheds light on why more women do not leave their violent partners: phase three's loving contrition reinforces any hope the woman may have that the man who is supposed to love her will change, and this hope keeps her "bound to the relationship."[60] Also, "a lack of material and social resources" may create difficulty for a woman to leave if she has no financial support apart from her partner.[61] It is hardest for the woman to leave if she has children with her abuser, as they have been known to threaten the health and lives of the children, keep the children from her through legal means, or even kidnap the children.[62]

This myth—that the only reason why a woman does not leave is because the abuse must not be so bad—contains a secondary myth that the abuse will end if she does leave.[63] However, this is not true.[64] Many women stuck in the Cycle of Violence genuinely believe that if they

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[56] WALKER, *supra* note 28, at 37.

[57] *Id.* at 95, 100. Perhaps she does not want to believe that she is not in control of her life. After all, "[h]uman beings are in general ashamed of what merely 'happens' to them, and is not the result of a conscious act of will." KAROL WOJTYLA, LOVE AND RESPONSIBILITY 181 (H.T. Willetts trans., Ignatius Press 1993) (1960).

[58] *Kelly*, 478 A.2d at 377.

[59] *See infra* Section II.D. In fact, battering is the opposite of the love with which human beings are to treat each other. *Id.* (examining human dignity and love).

[60] *Kelly*, 478 A.2d at 371–72.

[61] *Id.* at 372.

[62] WALKER, *supra* note 28, at 145.

[63] *See id.* (discussing examples of how a batterer can still abuse the woman after she has left by using legal or illegal means to remove children from her custody).

[64] *See* Steve Campion, *Willis Woman Tried to End Her Relationship with Her Ex Just Before Her Murder, Family Says*, ABC13 (Sept. 4, 2020), https://abc13.com/elizabeth-garner-vance-willis-woman-murdered-austin-domestic-violence/6408633/ (reporting that a woman was shot and killed by her ex-husband after she tried to leave a second time after divorcing him). When interviewed, the head of Houston Area Women's Center for domestic violence said, "When a person is finally at the point where they are ready to say enough is enough, that is, in fact, when they are most in danger." *Id.*; *see also* Victor Williams, *Woman Killed by Husband in Warren Had Recently Left Him, Filed for Divorce, Family Says*, CLICKONDETROIT (Oct. 12, 2020, 12:00 AM), https://www.clickondetroit.com/news/local/2020/10/12/woman-killed-by-husband-in-warren-had-recently-left-him-filed-for-divorce-family-says/ (reporting that an estranged husband committed murder-suicide a month after his wife left him and filed for divorce).

leave, their batterer will come after them and continue to abuse them; "[t]hey literally become trapped by their own fear."[65]

The perpetuation of these myths prevents society from understanding the battered woman.[66] Only by coming to acknowledge the "unique pressures" that she faces can her situation and her "state of mind be accurately and fairly understood."[67]

C. When the Woman Defends Herself . . . and Her Batterer Dies

The woman who defends herself against her batterer and ends up killing him often feels that no one, including law enforcement, takes her fear and her situation seriously and that she is alone in the struggle to protect herself.[68] She has abided by the law, sometimes for years, living in the Cycle of Violence with little or no retaliation against her batterer, perhaps futilely turning to law enforcement and the justice system for help.[69] "Yet when she finally strikes and defends herself, it is she who becomes the villain, the pariah disrupting home and hearth."[70]

While there may be multiple reasons why a woman kills her abuser, data reveals that most battered women only resort to violence "as their last attempt at protecting themselves from further physical and mental harm."[71] The battered woman's attentiveness to the tiniest shifts in her partner's moods convinces her that, this time, he really will go through with his threats to kill her.[72] She recognizes that something has changed in this "final incident," and she reacts accordingly.[73] If she uses a weapon, such as a gun, to defend herself, she does so because of the differences between herself and her attacker in terms of size, strength, and emotional control; if she does not compensate in this way, she may be unsuccessful in defending herself and accomplish nothing more than inciting a "vicious retaliation."[74] In

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65 *Kelly*, 478 A.2d at 372.

66 *See id.* (stating that to understand a battered woman's mental state, one must recognize the unique psychological, social, and economic factors that brought her to that state).

67 *Id.*

68 WALKER, *supra* note 28, at 39–40.

69 Ayyildiz, *supra* note 23, at 147; *see also* WALKER, *supra* note 28, at 95–96 (describing the phases that comprise the Walker Cycle Theory of Violence).

70 Ayyildiz, *supra* note 23, at 147. "The society that tolerated wife beating did not tolerate a woman fighting back." Linn v. State, 929 N.W.2d 717, 734 (Iowa 2019).

71 WALKER, *supra* note 28, at 41. In fact, very few women who kill their batterer threaten to do so or mention any kind of plan before the incident occurs. *Id.* at 42.

72 *Id.* at 40.

73 *Id.* at 42.

74 Ayyildiz, *supra* note 23, at 149–50. A woman is usually smaller than a man,

other words, the death of the batterer "may be necessary because lesser degrees of force may be insufficient."[75]

In the courtroom, evidence of BWS "transforms the battered woman into 'everywoman'" and opens a window for jurors to see "the hell a battered woman suffers" and how it affects the "reasonableness of her belief that she was in imminent danger."[76] When a woman's act of self-defense results in her attacker's death, it is "*critical* . . . to understand the cyclical pattern [of the] battering incidents."[77] For many, self-defense is the best option, but it dangles just out of reach because of the framework of self-defense laws.

II. THE LAW AS IT STANDS TODAY

In homicide cases, self-defense is an affirmative defense which can justify the action that caused the death of the victim and acquit the defendant.[78] In asserting a self-defense claim, the "defendant implicitly admits the killing was intentional and assumes the burden of introducing evidence of justification . . . that raises a reasonable doubt in the minds of the jurors."[79] Notice that the burden of proof that the defendant acted in justifiable self-defense is not beyond a reasonable doubt, or even by a preponderance of the evidence. The defendant, here the battered woman, need only plant a reasonable doubt in the minds of the jurors that she acted in the "lawful exercise" of her right to defend herself from injury.[80]

However, it is not enough that the woman feared "serious bodily injury, or even death, however well-grounded" that fear might be.[81] Fear alone will not excuse the fact that a human life has been taken.[82] If this were the case, then the law would imply a right to take the life of another, placing "human life too much at the mercy of those disposed

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not as strong, and "not socialized to use physical force." WALKER, *supra* note 28, at 143. She may even have received serious injuries in previous failed attempts to fight back before the final incident. *Id.*

[75] Ayyildiz, *supra* note 23, at 149.

[76] Dowd, *supra* note 53, at 574; Ayyildiz, *supra* note 23, at 144.

[77] WALKER, *supra* note 28, at 27 (emphasis added).

[78] *See* Commonwealth v. Sands, 553 S.E.2d 733, 736 (Va. 2001) (describing the elements of a self-defense claim in Virginia).

[79] *Id.* at 736 (quoting McGhee v. Commonwealth, 248 S.E.2d 808, 810 (Va. 1978)).

[80] *McGhee*, 248 S.E.2d at 810 (quoting Frazier v. Weatherholtz, 572 F.2d 994, 995 (4th Cir. 1978)).

[81] *Sands*, 553 S.E.2d at 736.

[82] Boone v. Commonwealth, 80 S.E.2d 412, 414 (Va. 1954).

to destroy it."[83] No one has the right to take a life, but a human being has the right to defend herself, even if it means her attacker is slain.[84]

A. Self-Defense in Virginia

In Virginia, there are two essential elements to a self-defense claim: (1) reasonable fear of death or serious bodily injury and (2) an overt act by the assailant that indicates imminent danger of death or serious bodily injury.[85] Reasonable fear is examined from the point of view of the defendant at the moment she acted.[86] Whomever the defendant was defending herself against must have created danger sufficient for her to have reasonable grounds to believe that she was in danger of serious bodily injury or even death.[87]

The overt act by the assailant that heralds "imminent danger" is an objective standard.[88] Black's Law Dictionary defines imminent danger as "[t]he danger resulting from an immediate threatened injury sufficient to cause a reasonable and prudent person to defend . . . herself."[89] This element ensures that the most extreme response—the slaying of a human being—is used only when absolutely necessary.[90]

This Note will now examine two Virginia cases in which a battered woman attempted to show that she acted in self-defense when she killed her abuser. Victoria Sands and Rebecca Cary were denied a jury instruction on self-defense on the grounds that they had not satisfied the overt act element of a self-defense claim.[91] On appeal to the Supreme Court of Virginia, one woman was granted the jury instruction, but the other was not.[92] These cases illustrate the difficulty that battered women face in the courtroom when they wish to assert a

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[83] Dodson v. Commonwealth, 167 S.E. 260, 261 (Va. 1933).

[84] *See* CATECHISM OF THE CATHOLIC CHURCH ¶ 2264 (1994) (explaining that because man is created in God's image, he is obliged to love his own life and defend it from attack, even to the point of slaying his attacker).

[85] *Sands*, 553 S.E.2d at 736–37.

[86] Hines v. Commonwealth, 791 S.E.2d 563, 565 (Va. 2016) (explaining that it is the defendant's responsibility to demonstrate his or her fear was reasonable).

[87] *Sands*, 553 S.E.2d at 736.

[88] *See id.* at 736–37 (explaining that the defendant needed to demonstrate that the act created a danger at the time of the shooting).

[89] *Imminent Danger*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[90] *Sands*, 553 S.E.2d at 737.

[91] *Id.* at 734, 736; Commonwealth v. Cary, 623 S.E.2d 906, 907, 909 (Va. 2006).

[92] *Sands*, 553 S.E.2d at 734 (finding no evidence to support a self-defense instruction and reinstating the defendant's convictions); *Cary*, 623 S.E.2d at 914 (finding evidence to support jury instructions for self-defense and vacating the defendant's convictions).

self-defense claim and why Virginia should modify the overt act element of such a claim to make this defense more accessible to them.

B. Commonwealth v. Sands

Victoria Shelton probably thought she had reached happily ever after the day she married Thomas Lee Sands, but two years later, Thomas began beating her.[93] As time went on, the physical abuse grew in severity and became a daily occurrence.[94] On August 23, 1998, Victoria was abused and threatened by her husband as he drank, used cocaine, and watched television in their bedroom for short intermittent periods of time, "but always returned to the assault upon his wife."[95] The day ended when Victoria grabbed a gun, walked into the bedroom, and shot her husband, her batterer, five times as he lay in their bed watching television.[96]

Victoria appealed her verdict of guilty of first-degree murder, claiming that the jury should have been permitted to hear her offered self-defense instruction.[97] The Virginia Court of Appeals agreed and remanded her case for a new trial, but when the case reached the Supreme Court of Virginia, Victoria's convictions were reinstated.[98] The high court held that because Victoria shot her husband "within an hour" of his last assault upon her, she was not in imminent danger from an overt act that would justify her actions and therefore could not claim that she acted in self-defense.[99] A contrary case may prove instructive on this timing line drawn by the Supreme Court of Virginia.

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[93] *Sands*, 553 S.E.2d at 734. The following facts are characterized as the Supreme Court of Virginia recited them: in the light most favorable to the defendant. *Id.* at 736.

[94] *Id.* at 734. Thomas threatened to kill Victoria and her family if she tried to leave him and held her hostage in their home, once for a period of three weeks. Victoria sought help from her parents, but after they were hospitalized in a car accident, she became afraid to carry out any plan to leave, fearing Thomas would "kill her if he discovered her plans." *Id.* at 735.

[95] *Id.* The day of her assault, Victoria was pushed into a sink, thrown down concrete steps, and pinned to the earth by Thomas's knees as he straddled her (he simultaneously fired two shots into the ground near her) and hit her with his fists and the butt of a gun—the barrel of which was also pushed into her nose. *Id.*

[96] *Id.*

[97] *Id.* at 734.

[98] *Id.*

[99] *Id.* at 737 & n.2. Justice Koontz dissented, arguing that it was the court's duty to determine only whether Victoria had offered "more than a scintilla of evidence" in order to warrant the jury instruction; it was then the jury's duty to decide whether Victoria had proved her self-defense claim. *Id.* at 738 (Koontz, J., dissenting).

C. Commonwealth v. Cary

For more than fifteen years, Rebecca Scarlett Cary had a tumultuous relationship with Mark Beekman in which she survived rape and repeated physical abuse.[100] On the night of September 6, 2002, Mark showed up at Rebecca's apartment intoxicated, refused to leave despite her repeated requests, and verbally and physically assaulted her.[101] Mark's episode paused as he went to use the bathroom, but when he returned, still threatening to batter Rebecca and refusing her demands to leave, Rebecca picked up a handgun and leveled it at Mark.[102] The gun went off, and moments later, Mark was dead.[103]

Rebecca was found guilty of first-degree murder after the trial court denied her a self-defense jury instruction because there was no overt act heralding imminent danger.[104] The Court of Appeals reversed, holding that the evidence surrounding Mark's return was sufficient to find that Rebecca was in imminent danger because Mark had been "advancing toward her in a threatening fashion to resume the attack he had stopped only moments earlier."[105] The Supreme Court of Virginia affirmed the judgment of the Court of Appeals and remanded Rebecca's case for another trial with the caveat that this new trial must include a jury instruction on self-defense and evidence of Mark's prior threats and battering.[106] Rebecca received her self-defense claim, but she had to endure a trial and two appeals to get it.[107]

Both Victoria and Rebecca thought they had found the love they deserved with the men who became their batterers. Instead, they found fear, pain, and life-threatening violence.

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[100] Commonwealth v. Cary, 623 S.E.2d 906, 907, 909 (Va. 2006). In that time, Mark fathered three of Rebecca's four children, broke her jaw, and cut her face with glass, a wound that required seventy-five stitches. *Id.* These facts are characterized in the light most favorable to the defendant, as required for such appeals. *Id.* at 907.

[101] *Id.* at 907–08. This final incident featured an argument about child support, which Mark continually failed to provide, and Mark called Rebecca vulgar names, grabbed her by the hair, and hit her in the face and sides. *Id.* at 908.

[102] *Id.* at 908. Rebecca had purchased the handgun four months earlier for the stated purpose of protecting herself and her children because they lived in a bad neighborhood. *Id.* at 907.

[103] *Id.* at 908. Cary did not remember "doing anything" to discharge the handgun. *Id.*

[104] *Id.* at 909.

[105] *Id.* at 910.

[106] *Id.* at 914.

[107] *Id.*

D. Human Dignity

In this age of #MeToo, society sees plenty of media coverage on how human beings should *not* be treated.[108] However, society lacks a well-grounded explanation of *why* human beings should not treat each other as objects of use or with discrimination on the basis of gender, race, and the like. Without this foundation in something objective that makes the human person worth more than gender or skin color, these condemnations of injustice are merely empty words.

Man and woman, created to tend and safeguard the rest of Creation, were given free will and reason to exercise dominion over all the earth.[109] Created *imago Dei*, in the image of God, each man and woman possesses a unique and inalienable dignity.[110] The human person then is a "good towards which the only proper and adequate attitude is love."[111] This love must be selfless, sacrificing, and enduring unto death.[112] Love must include the understanding that the beloved "has a value higher than that of an object for consumption or use," and the lover must act in a way that confirms and reinforces this understanding.[113] Because man and woman are "wonderfully made,"[114] they have not only the right to demand respect and love, but also the duty to defend their lives from danger.[115]

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[108] *See International Women's Day Statement by United Nations Women's Human Rights Experts: Confronting Sexual Violence, Demanding Equality*, OFF. OF THE HIGH COMM"R OF HUM. RTS. (Mar. 6, 2018), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22759&LangID=E (lauding the focus on sexual violence as a significant moment in the fight for women's equality).

[109] *See Genesis* 1:26 (Revised Standard) ("[A]nd let them have dominion over the fish of the sea, and over the birds of the air, and over the cattle, and over all the wild animals of the earth, and over every creeping thing that creeps upon the earth.").

[110] *See Genesis* 1:27–28 ("So God created man in his own image, in the image of God he created him; male and female he created them. And God blessed them . . . ."); 1 *Corinthians* 3:16 ("Do you not know that you are God's temple and that God's Spirit dwells in you?"). God created man and woman and pronounced their existence "very good." *Genesis* 1:31.

[111] WOJTYLA, *supra* note 57, at 41.

[112] *See* 1 *Corinthians* 13:4–8 ("Love is patient and kind; love is not jealous or boastful; it is not arrogant or rude. Love does not insist on its own way; it is not irritable or resentful; it does not rejoice at wrong, but rejoices in the right. Love bears all things, believes all things, hopes all things, endures all things. Love never ends . . . .").

[113] WOJTYLA, *supra* note 57, at 42–43.

[114] *Psalm* 139:14.

[115] *See* CATECHISM OF THE CATHOLIC CHURCH, *supra* note 84, at ¶ 2264 ("Love toward oneself remains a fundamental principle of morality. Therefore it is legitimate to insist on respect for one's own right to life. Someone who defends his life is not guilty of murder even if he is forced to deal his aggressor a lethal blow."); 1 *Corinthians* 3:17 ("If any one destroys God's temple, God will destroy him. For God's temple is holy, and that temple you are.").

While God shows His displeasure with killing, specifically declaring that "[w]hoever strikes a man *so that he dies* shall be put to death,"[116] He nevertheless distinguishes between premeditated murder, for which the punishment is indeed death,[117] and a killing that is accidental or unintended.[118] Such a killer does not "deserve to die, since he was not at enmity with his neighbor in time past."[119] God provides a way to protect him until "he stands before the congregation for judgment."[120]

Granted to the ruler—here personified in the law and judicial process—is the power to punish wrongdoing, but the punishment must fit the crime.[121] If the Almighty distinguishes the circumstances in which a person is killed, might Virginia's courts want to do the same for the battered woman?

III. A WORLD THAT NEEDS CHANGING

Virginia law allows the admission of evidence offered by abuse survivors about the abuse they suffered.[122] In a criminal prosecution in which the abused person is accused of assaulting or killing the abuser, the Virginia Rules of Evidence and the Code of Virginia make admissible any relevant evidence of "repeated physical and psychological abuse" inflicted upon the accused by the deceased.[123] Here, the Cycle of Violence in which the particular battered woman lives is evidence on point for her defense.[124] A modification of the overt

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[116] *Exodus* 21:12 (emphasis added).

[117] *Exodus* 21:14.

[118] God appointed six cities of refuge to which anyone who "kills his neighbor unintentionally without having been at enmity with him in time past" could flee and receive asylum from the victim's avenger. *Deuteronomy* 19:4, 6; *see also Numbers* 35:9–15 (ordaining the cities of refuge and stating their purpose); *Deuteronomy* 4:41–43 (naming the cities of refuge).

[119] *Deuteronomy* 19:6.

[120] *Numbers* 35:12.

[121] *See Romans* 13:4 ("But if you do wrong, be afraid, for he does not bear the sword in vain; he is the servant of God to execute his wrath on the wrongdoer."); *see also Exodus* 22:1–15 (establishing the principle of proportionality—*lex talionis*—for offenses such as stealing another's ox or borrowing the property of a neighbor).

[122] Va. Sup. Ct. R. 2:409; VA. CODE ANN. § 19.2-270.6 (1993).

[123] Va. Sup. Ct. R. 2:409; CODE § 19.2-270.6.

[124] Accord State v. Kelly, 478 A.2d 364, 368 (N.J. 1984) (explaining how expert testimony may be used to admit evidence of the Cycle of Violence), as New Jersey's method of incorporating BWS into homicide cases may be instructive. New Jersey's judicial system was one of the first to permit expert witness testimony on BWS specifically. *See id.* at 380 (describing BWS as part of a "relatively new field of research" and citing other jurisdictions also among the first to permit expert witness testimony on BWS). In 1984, only six years after Dr. Walker's ground-breaking study, the Supreme Court of New Jersey held that Gladys Kelly should have been permitted to offer expert

act element of a self-defense claim for use in battered women cases makes such a defense accessible to them.

A. Modifying the Imminent Danger Element to Make Self-Defense a Viable Option for the Battered Woman

As currently applied in Virginia, the overt act element of a self-defense claim presents a significant hurdle for the battered woman who attempts to assert self-defense when she acted in the absence of a physical attack.[125] In *Sands*, the Supreme Court of Virginia scolded the Court of Appeals for straying from the definition of imminent danger as "[a]n immediate, real threat to one's safety" and interpreting it "to mean something less than 'immediate.'"[126] The court pointed out that the "circumstances immediately surrounding" the incident had to be "sufficient to create a reasonable belief of an imminent danger."[127]

In deadly domestic violence situations, imminent danger takes on a "new meaning."[128] The battered woman lives in the Cycle of Violence. During the tension-building phase, she is ready and watching the signs of her violent partner's growing anger. She knows when he will begin or continue his assault. Even during the third phase of the cycle, in which he does his twisted best to make up to her after assaulting her, she is anticipating the brutality. Her "attunement to circumstances portending violence" causes her to perceive the threat of serious bodily harm or even death when others who have not been battered would not.[129] For her, imminent danger is daily life.

Black's Law Dictionary provides an alternative definition of imminent danger in the circumstances of homicide in self-defense:

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testimony on BWS when making her self-defense claim in response to the charge of killing her husband. *Id.* at 368. Of the opinion's twenty-six pages, five pages are devoted to an in-depth review of Dr. Walker's research and recommendations for utilizing BWS, which was very new at that time, in the judicial system. *Id.* at 369–73.

[125] *See* Jenkins v. Commonwealth, 423 S.E.2d 360, 367–68 (Va. 1992) (rejecting evidence of the defendant's history of sexual abuse as a child to support self-defense); *see generally* Bechtel v. State, 840 P.2d 1, 12 (Okla. Crim. App. 1992) ("Based on the traditionally accepted definition of imminent and its functional derivatives, a battered woman, to whom the threat of serious bodily harm or death is always imminent, would be precluded from asserting the defense of self-defense.").

[126] Commonwealth v. Sands, 553 S.E.2d 733, 736–37 (Va. 2001) (alteration in original) (quoting Sands v. Commonwealth, 536 S.E.2d 461, 465 (Va. Ct. App. 2000)). The Supreme Court said that, although it did not doubt the woman's fear, it could not "point to any evidence of an overt act indicating imminent danger, or indeed any act at all by her husband, when she shot him five times while he reclined on the bed." *Id.* at 737.

[127] *Id.*

[128] *BWS and Self-Defense*, *supra* note 18, at 325.

[129] Linn v. State, 929 N.W.2d 717, 740 (Iowa 2019).

imminent danger exists when there is "an immediate threatened injury sufficient to cause a reasonable and prudent person to defend himself or herself."[130] This, however, still does not necessarily help a battered woman. She is composed of a plethora of traumatic experiences that have affected her everything—her mind, her life, and her perceptions, but this does not make her unreasonable.[131]

Battered women who harm or kill their batterers should not have to show an *overt act* indicating imminent danger of bodily harm or death, as this puts them at a disadvantage. Instead, this objective element of a self-defense claim should require a showing of the *circumstances* surrounding the incident that would indicate imminent danger of bodily harm or death to a reasonable person *in the battered woman's position*. The jury examines the circumstances from either "the standpoint of a reasonable person in the circumstances of the battered woman or from the standpoint of a reasonable battered woman."[132]

Establishing this hypothetical reasonable person in the battered woman's circumstances is relatively simple. The woman can offer expert testimony on BWS and how it affects her mind and perception. This helps "explain why [she] perceived a threat from objectively non-threatening conduct on the part of the victim and why, though *apparently* the aggressor, the defendant was actually responding to perceived aggression by the victim."[133] She has the option of testifying as a witness herself and explaining her particular Cycle of Violence experience and any relevant history between herself and her batterer. If there are neighbors, family members, or friends who have knowledge of her abuser's violence firsthand or through reputation, the woman could call these individuals as witnesses as well. Lorena Bobbitt presented a "string of witnesses at her trial who testified that they had seen bruises on her arms and neck and that she had called 911 repeatedly and that John had bragged to friends about forcing his wife to have sex."[134] This helps a battered woman show the jury not only that she acted in self-defense, but also that a reasonable person in her circumstances would have made the same decision.[135] The objective

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[130] *Imminent Danger*, BLACK'S LAW DICTIONARY, *supra* note 89.

[131] *See* Dowd, *supra* note 53, at 574 ("[A] battered woman is a normal, reasonable person, caught in irrational circumstances, responding as any reasonable person would.").

[132] Bechtel v. State, 840 P.2d 1, 11 n.10 (Okla. Crim. App. 1992).

[133] *Linn*, 929 N.W.2d at 740 (quoting State v. Smullen, 844 A.2d 429, 451 (Md. 2004)).

[134] Chozick, *supra* note 4.

[135] *See* United States v. Nwoye, 824 F.3d 1129, 1138 (D.C. Cir. 2016) (explaining the value in offering BWS evidence in the context of duress and self-defense). In the

element of a self-defense claim remains objective, but it is also tied to the circumstances in which the defendant finds herself.

At first glance, "reasonable" might not appear to be a word that one would choose to describe a woman who kills a man when he is not an immediate threat to her. However, this perception is precisely why the law ought to adopt this modification of the imminent danger element of a self-defense claim. A battered woman is not crazy. She is not homicidal. She did not wake up one day and calmly decide to take a life. She is hurting. She is alone. She is afraid. She takes matters into her own hands *only* because she believes she has no other choice. Similar to a soldier returning from war, a battered woman has been affected by external circumstances in such a way that she no longer neatly fits into the standard category of a reasonable person.[136] An abused woman deserves to have this mental landscape included in her legal defense when she defends herself in the only way she knows. She is entitled to equal protection under the law, to a fair trial, to be heard and seen.[137] To receive equal protection under American law, her circumstances and the effect of BWS on her situation must be part of her case.

It would not be difficult for Virginia to modify the imminent danger element of a self-defense claim for battered women.[138] The modified element would not have to be limited to homicide trials either. Any woman who comes before the court accused of causing injury to her violent partner has a better chance of asserting a self-defense claim and receiving a just verdict with this modification.[139] In fact, this solution has the potential to decrease instances of domestic violence in

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federal court system, a defendant is permitted three kinds of evidence of the victim's character—opinion, reputation, and specific acts—when the defendant argues perceived self-defense. FED. R. EVID. 405. After years with her batterer, a battered woman is uniquely and painfully aware of each specific act of violence that her batterer has inflicted upon her. She should be allowed to present this evidence to the jury in her own defense.

[136] *See supra* text accompanying notes 33–35.

[137] U.S. CONST. amend. XIV, § 1; U.S. CONST. art. VI.

[138] The Federal Rules of Evidence and Virginia's Rules of Evidence have carved out separate rules for cases of sexual assault and child molestation. *See* FED. R. EVID. 413–415 (listing the rules of evidence for cases of sexual assault and child molestation); Va. Sup. Ct. R. 2:413 (listing the rules of evidence for child sexual offense cases); *see also* Marybeth H. Lenkevich, Note, *Admitting Expert Testimony on Battered Woman Syndrome in Virginia Courts: How* Peeples *Changed Virginia Self-Defense Law*, 6 WM. & MARY J. WOMEN & L. 297, 298–301 (1999) (discussing how Virginia law regarding expert testimony for BWS has already departed from long-established norms in the past and noting that such changes have opened the door for more juries in the future to hear expert testimony regarding BWS).

[139] *See supra* note 20 (naming other types of domestic violence and acknowledging that this Note could apply to them as well as to a woman battered by her male partner).

general. Currently, many battered women are afraid to turn to law enforcement and the judicial system because they do not think it will help or they are worried that they will not be believed.[140] Opening the self-defense door by utilizing this modification of the imminent danger element would be a concrete step towards showing these women that the judicial system can help them and will take their circumstances and defenses seriously.

In 1994, Lorena Bobbitt was acquitted on the charge of malicious wounding by asserting a temporary insanity defense.[141] Her counsel argued this angle successfully, but it would have been much easier for Lorena to assert a self-defense claim using this modified imminent danger element. BWS was still a newly recognized condition, but it had been successfully utilized in *State v. Kelly* a decade before Lorena's case.[142] Lorena claimed that her husband John abused her and raped her throughout their marriage.[143] In fact, a few weeks prior to Lorena's trial, John was tried for assaulting Lorena the night she mutilated him.[144] If Lorena had asserted a self-defense claim as Virginia law currently stands, her story would be incredibly similar to Victoria Sands' tale: married to a once loving but now violent man, unable to escape the Cycle of Violence, and took her safety into her own hands one night during a lull in the violence. Both Lorena and Victoria would have benefited immensely from this proposed imminent danger element of self-defense.

B. Applying the New Definition of Imminent Danger

Other jurisdictions have acknowledged that self-defense laws put battered women at a disadvantage.[145] For example, Oklahoma went one step further than the proposal of this Note and created a new self-defense jury instruction for BWS cases by striking the word "reasonable" from the standard: "Self-defense is a defense although the danger to life or personal security may not have been real, *if a person, in the circumstances and from the viewpoint of the defendant,* would

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[140] *See supra* Section I.C (discussing the battered woman's fear of others not believing her).

[141] *Lorena: Episode 2*, *supra* note 5; *Lorena: Episode 4* (Amazon Studios 2019).

[142] *See* State v. Kelly, 478 A.2d 364, 368 (N.J. 1984) (permitting expert evidence of BWS).

[143] *Lorena: Episode 1*, *supra* note 1.

[144] *See supra* note 3 (explaining why John was charged with marital assault rather than marital rape).

[145] *See supra* note 124 (explaining New Jersey's approach to BWS evidence); *see also infra* notes 146–48 and accompanying text (describing Oklahoma's approach to helping battered women assert a self-defense claim).

reasonably have believed that she was in imminent danger of death or great bodily harm."[146] While retaining the integrity and necessity of imminent danger, this new standard also considers the circumstances of a battered woman, who "lives under long-term, life-threatening conditions in constant fear of another eruption of violence."[147] It shifts the focus from "whether the danger was in *fact* imminent" to whether the battered woman's perception of the circumstances made her belief reasonable that the danger was imminent for someone in her place.[148]

This Note does not advocate removal of the word "reasonable" to describe the hypothetical person in a battered woman's circumstances, but Oklahoma's choice shows that a self-defense claim can be modified to make it accessible to a battered woman.[149]

Victoria Sands and Rebecca Cary illustrate how this proposed modification of the imminent danger element would function and how it can help future battered women who kill their abusers in self-defense. Victoria's case provides the "most recent, succinct, and comprehensive survey of the law of self-defense as it has developed" in Virginia.[150] A woman who lived in constant fear for her own safety was refused a jury instruction on self-defense because her act that ended the Cycle of Violence was not a response to an overt act of violence by her husband in the same incident.[151] If Victoria had shot her husband as he slammed her body into a sink or as he hit her face with his fists, she would have received that self-defense instruction. If she had waited until he got up from the bed and returned to mercilessly attacking her, she would have received that self-defense instruction. It is clear from the Supreme Court of Virginia's opinion that the trial court admitted ample evidence of the violence of Victoria's husband, enough evidence

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[146] Bechtel v. State, 840 P.2d 1, 11 (Okla. Crim. App. 1992) (emphasis added). The court found evidence of twenty-three incidents in which Ken Bechtel battered his wife Donna Lee by such acts as grabbing her by her ears or hair and "pounding her head on the ground, wall, door, cabinet," or even through the windshield of a boat. On the night of the final assault, Ken threatened to rape and kill her, choked her, stripped her of her nightgown, battered her genitalia, and banged her head on the bathroom floor and on the headboard of their bed; Donna Lee shot him as he tried to rise from their bed. The trial court found Donna Lee guilty of murder under the old standard, prompting the introduction of the new jury instruction on self-defense. *Id.* at 4–6, 11.

[147] *Id.* at 11–12.

[148] *Id.* at 12.

[149] *See* Hutson v. Newton-Embry, No. CIV-04-92-R, 2006 WL 1966589, at *3–5 (W.D. Okla. 2006) (holding it to be objectively unreasonable for counsel to fail to present expert evidence on BWS when asking for the new battered woman self-defense jury instruction).

[150] Commonwealth v. Cary, 623 S.E.2d 906, 912 (Va. 2006). This is still true at the time of this Note's writing.

[151] Commonwealth v. Sands, 553 S.E.2d 733, 736–37 (Va. 2001).

to span three pages of the court's opinion.[152] Yet the high court still held that there was not the necessary "scintilla of evidence"[153] to prove the overt act element of a self-defense claim.

If Victoria had access to this Note's imminent danger element rather than the overt act element, she might have been granted a self-defense jury instruction in her first trial. The fact that Thomas had a habit of alternating between beating Victoria and watching television[154] weighs heavily in favor of a reasonable person in Victoria's place anticipating more violence and possibly death when he reached the next commercial break. It is impossible to say whether the ultimate outcome of Victoria's case would have been different if the court had used this modified imminent danger element, but Victoria certainly would have received a just verdict.

In Rebecca Cary's case, the same high court, with only one new justice, held that Rebecca's situation was different enough from Victoria's that she was entitled to a self-defense instruction.[155] Justice Lawrence Koontz, Jr., the lone dissenter in Victoria's case, wrote the majority opinion in Rebecca's, deciding that there was sufficient evidence to potentially satisfy both elements of a self-defense claim.[156] The key difference between the two cases was timing. Where Victoria waited in fear for an hour before cutting the suspense with five gunshots, the final incident between Rebecca and her abuser had a quick respite of only five minutes while he used the restroom.[157] The circumstances supported the conclusion that he was returning to his assault upon Rebecca.[158] Still, Rebecca would have been granted the self-defense jury instruction during her first trial as well if Virginia used this Note's modified imminent danger element—because a reasonable person in her place would have seen impending harm.

CONCLUSION

The modification of the imminent danger element of self-defense advocated by this Note would help battered women like Victoria and Rebecca. In Virginia, self-defense is difficult for a battered woman to prove if she does not act in response to an overt act. A woman living in the Cycle of Violence should have equal footing with the rest of society when she comes before the courts, especially in a case involving

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[152] *See id.* at 734–36 (recounting in great detail an episode of the atrocities inflicted upon Victoria by her husband).

[153] *Id.* at 736.

[154] *Id.* at 735.

[155] *Cary*, 623 S.E.2d at 913–14.

[156] *Id.*

[157] *Sands*, 553 S.E.2d at 737 n.2; *Cary*, 623 S.E.2d at 913–14.

[158] *Cary*, 623 S.E.2d at 914.

self-defense. The violence and abuse she has survived, sometimes by the skin of her teeth, has changed her, whether or not she realizes the full extent of that change. She is no longer a typical citizen. She deserves to be tried and judged on a standard that allows the jury of her peers to deliver a fair verdict that considers what she fears and what she experiences.

This Note offers a solution that preserves the integrity of a self-defense claim but also considers the vastly different circumstances of domestic violence and the effect these have on a battered woman defendant. Virginia ought to modify the imminent danger element of a self-defense claim to create a standard for a battered woman who acts in self-defense that examines the circumstances that indicate imminent danger of impending bodily harm or death to a reasonable person in a battered woman's position. If this modified element became precedent in the next case in which a battered woman asserts self-defense, judges and juries would have an opportunity to better understand an abused woman and reach a verdict that considers her whole personhood. This new definition looks at her and says, "We see you as a whole." It takes seriously the totality of her circumstances and puts them in terms that are accessible to those twelve people who will decide whether she acted in self-defense. Only then can the life of a battered woman who acts in self-defense end better than self-defense precedent permits now.

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