"You Shall Not Stand Aside While Your Brother's Blood Is Being Shed" vs. "Stand Your Ground": a Comparative Look at the American and Jewish Legal Systems' Approaches to a Pursuer.

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INTRODUCTION

Recent years have seen an explosion of interest in a comparative study of American and Jewish legal topics.[1] The aim of such study is to provide a fresh perspective on topics that have been discussed since antiquity yet are relevant to the contemporary world. This paper attempts to shed new light on a challenge that must be faced by all legal systems: may – or must – a bystander intervene when watching an aggressor (in Hebrew, a "*rodef*") pursue an individual with intent to harm him or her?

A comparative study can have many pitfalls, however, particularly when the legal systems are separated by millennia and countless cultural, linguistic, and societal differences.[2] As Professor Steven Friedell has written, "Jewish law has policies and purposes that are unique and that make the application of Jewish law in a modern legal system difficult."[3] The uniqueness of Jewish law stems from the fact that, "Jewish law is not only a legal system; it is the life work of a religious community. The Constitution, on the other hand, is a political document."[4] Therefore, before beginning to compare the two legal systems' approach to a pursuer, each system will be briefly introduced and explained.

This paper will begin by giving a brief overview of the American and Jewish legal systems and how they function. Part II will then continue to introduce the concept of a pursuer and highlight the main aspects of how the two legal regimes approach this difficult issue. In Part III, we will explore various distinctions, both significant and subtle, between the two systems. Part IV will then conclude with observations and closing remarks.

I. A COMPARISON OF THE AMERICAN AND JEWISH LEGAL SYSTEMS

The structure of the American legal system will be intimately familiar to most readers of this article, so only a brief summary is necessary. America is comprised of a federation of states. The

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1 *See, e.g.*, Samuel J. Levine, *Applying Jewish Legal Theory in the Context of American Law and Legal Scholarship: A Methodological Analysis*, 40 SETON HALL L. REV. 993 (2010); Elie Mischel, *Thou Shalt Not Go About as a Talebearer Among Thy People: Jewish Law and the Private Facts Tort*, 24 CARDOZO ARTS & ENT. L.J. 811 (2006-2007); Daniel Pollack, *The Capacity of a Mentally Retarded Person to Consent: An American and Jewish Legal Perspective*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 197 (2000); Samuel J. Levine, *An Introduction to Legislation in Jewish Law, with References to the American Legal System*, 29 SETON HALL L. REV. 916 (1998); Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L.Q. 441 (1997); Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813 (1993); Aaron M. Schreiber, *The Jurisprudence of Dealing with Unsatisfactory Fundamental Law: A Comparative Glance at the Different Approaches in Medieval Criminal Law, Jewish Law and the United States Supreme Court*, 11 PACE L. REV. 535 (1991).

2 *See, e.g.*, Irene Merker Rosenberg & Yale L. Rosenberg, *"Perhaps What Ye Say Is Based Only On Conjecture"- Circumstantial Evidence, Then And Now*, 31 HOUS. L. REV. 1371, 1371 (1994).

3 Steven F. Friedell, *Book Review: Aaron Kirschenbaum on Equity in Jewish Law*, 1993 B.Y.U. L. REV. 909, 919 (1993).

4 Stone, *supra* note 1, at 894.

federal government and each state government is subject to a constitution that sets out the structure of government and the rights of its citizens. Each government has a legislature that can pass statutes that, as long as they are constitutional, govern the actions of its citizens. There is also a dual court system. The federal decisions are binding on the states on all matters of federal law. The state courts have the final say on matters of local law, except as such law is contrary to the United States Constitution or a federal statute or when the field has been federally preempted.[5] In addition to statutory law, America is also a common-law jurisdiction. Significant weight is therefore accorded to previous judicial decisions.

In contrast, Jewish law stems from what Israeli Supreme Court Justice Menachem Elon has summarized as the "one basic norm and one single supreme value: the command of [G-d] as embodied in the Torah given to Moses at Sinai."[6] This law is all-encompassing. The Jewish tradition views every aspect of human life as governed by law, recognizing no distinction between the laws of tort, contract, ethical and moral behavior, and G-d's relationship to the creatures of the world; all equally reflect the divine will.[7] However, while Jewish law touches on all aspects of life, there is a fundamental distinction between ritual law and civil law. Ritual law concerns the fulfillment of G-d's will by performing or abstaining from certain behaviors. G-d's will, and thus the required behavior, stays constant, even if the sages' interpretation of it may change. Civil law, in contrast, concerns the behavior of individuals with one another. It is governed by basic legal principles given by G-d within which the sages have substantial latitude to develop their own rules and systems.[8]

Jewish criminal law has a similar dichotomy. There are two tracks via which a court can punish a criminal.[9] The first is the Biblical track. On this track, the court can sentence a defendant to death or flogging for the violation of certain Biblical commandments.[10] However, the punishment can only be carried out if a series of exceedingly strict protective measures were in place.[11] For example, the defendant must have been warned properly by two witnesses immediately prior to committing the crime;[12] he must acknowledge receipt of the warning;[13] the crime must have been seen by two law-

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5 Jose Trias Monge, *The Structure of the American Legal System - Its Sources, Forms and the Theory of Law*, 51 REV. JUR. U.P.R. 11, 17 (1982).

6 MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 233 (Bernard Anerbach & Melvin J. Sykes trans., Jewish Publication Soc'y 1994).

7 Mischel, *supra* note 1, at 821; *See also* JOSEPH B. SOLOVEITCHIK, HALAKHIC MAN 20, 22 (Lawrence Kaplan trans., Jewish Publ'n Soc'y of Am. 1983) (1944) (observing that "[t]here is no phenomenon, entity, or object in this concrete world" beyond the grasp of *halacha* [Jewish law], and noting that "just a few of the multitude of halakhic [halachic] subjects" include "sociological creations: the state, society, and the relationship of individuals within a communal context"; "laws of business, torts, neighbors, plaintiff and defendant, creditor and debtor, partners, agents, workers, artisans, bailees"; "[f]amily life"; "[w]ar, the high court, courts and the penalties they impose"; and "psychological problems . . . .").

8 Menachem Elon, *The Legal System of Jewish Law*, 17 N.Y.U.J INT'L L. & POL. 221, 225-27 (1984). A prime and pertinent example of the sage's ability to legislate in the area of civil law is the treatment of a third-party defender who damaged property en route to saving a victim. The Talmud says that according to the strict letter of the law, the defender should have to pay for the property he damaged. However, since this may significantly deter third parties from rescuing victims, the sages declared that he does not have to pay for the damages. *See* MAIMONIDES, MISHNEH TORAH, HILCHOT CHOVEL U'MAZIK 8:15.

9 Arnold N. Enker, *Aspects of Interaction Between the Torah Law, the King's Law, and the Noahide Law in Jewish Criminal Law*, 12 CARDOZO L. REV. 1137, 1144 (1990).

10 Thirty-six Biblical offenses carry a death penalty, and more than two hundred offenses are punishable by flogging. *See* MISHNEH TORAH, HILCHOT SANHEDRIN 15:10-13 (death) and ch. 19 (flogging); BABYLONIAN TALMUD, SANHEDRIN 80b, 81b.

11 *See* Rosenberg & Rosenberg, *supra* note 2, at 1373.

12 BABYLONIAN TALMUD, SANHEDRIN 80b, 81b

13 *Id.*

abiding witnesses who are allowed to testify; [14] and self-incrimination is forbidden.[15] It is due to these extreme requirements that the Talmud calls a court that executes one victim every 70 years a "bloody court".[16] Courts did not worry about permitting murderers to go free; the belief in an omniscient and omnipotent G-d who would extract punishment at His desire quelled those fears.[17]

The second track of criminal justice recognizes that crime is not simply a religious offense between man and G-d, but also harms a victim as well as civilized society at large.[18] The courts therefore have the authority, and the duty, to punish the defendant as they deem appropriate according to the degree of his guilt and the needs of the community – even when such punishment would be foregone under Biblical law.[19] Perhaps the epitome of this track of justice is how a court treats a murderer whom it knows with certainty is guilty but cannot condemn to death due to a technicality. Rather than actively killing the murderer using one of the four types of capital punishment mandated by the Torah, the court opts for a passive but equivalent approach: it locks the murderer in a room and feeds him a food mixture designed to kill him.[20] In this manner, the court is able to adapt the criminal code for use in a modern society.

To understand the practical application of the law, it is not sufficient to look at a Biblical or Talmudic commentary; doing so would be akin to reading a statute and ignoring the case law that interprets it. While there are vast amounts of commentaries and scholarly works on the Torah, Talmud, and later compilations of law (such as Maimonides' *Mishneh Torah* and Rabbi Yosef Karo's *Shulchan Aruch*), the main repository of practical law for many civil and criminal issues are the responsa. The responsa literature consists of an estimated three hundred thousand legal opinions dating back to the eighth century.[21] These opinions constitute the case law of the Jewish legal system.[22] This article will attempt to look to the major commentaries as well as the responsa in search of the Jewish approach to a pursuer.

II. THE LAW OF A PURSUER

a. *American law*

American law permits the use of lethal force in self-defense.[23] It also permits a third-party defender to use lethal force in the defense of another, even when no relationship exists between the defender and the attacked individual.[24] Courts differ on whether a third-party defender may use force that could not be used by the victim himself.[25] The right to use lethal force is granted solely to protect against injury; harming the attacker out of vengeance is forbidden and will be subject to punishment.[26]

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14 DEUTERONOMY 17:6; BABYLONIAN TALMUD, BABA KAMMA 114b;

15 *See* MISHNEH TORAH, HILCHOS SHOFTIM 18:6. This rule was actually cited in the landmark Supreme Court case of Miranda v. Arizona, 384 U.S. 436, 458 n.27 (1966), as the first known rule banning self-incrimination.

16 BABYLONIAN TALMUD, MAKKOS 7a.

17 *See* Rosenberg & Rosenberg, *supra* note 2, at 1374.

18 *See* Enker, *supra* note 9, at 1143.

19 *Id.*

20 MISHNEH TORAH, HILCHOT ROTZEACH 4:8.

21 *See* Elon, *supra* note 8, at 230-31.

22 *Id.*

23 40 Am. Jur. 2d Homicide § 167.

24 *Id.*

25 For example, in a scenario where the victim lost his right to invoke self-defense. See *infra*, notes 138-141 and accompanying text.

26 *See, e.g.*, 8 Okla. Crim. 164, 126 P. 707 (1912); State v. Pellegrino, 1998 SD 39, 577 N.W.2d 590 (S.D. 1998).

There are various criteria that must be fulfilled before lethal force may be used. For example, the force must be necessary;[27] proportionate to the threat faced;[28] used only when no ability to retreat exists;[29] and cannot be used by a first aggressor.[30]

The moral reasoning that underlies the right to use force in self-defense is the subject of much debate.[31] Stuart Green has identified five theories that offer a justification for defensive killings.[32] The first theory posits that justified homicide is a "choice of evils." Society is faced with a choice: permit the defender to be killed, or allow the potential victim to kill the attacker. By discounting the value of the attacker's life, society determines that it is a net benefit to society to allow the justified homicide.[33] A second theory states that the attacker has forfeited his life; by disrespecting his victim's right to life and liberty, his own life and liberty may be disrespected.[34] An alternative theory grounds the right to self-defense not in the morally opprobrious conduct of the attacker but in the inherent rights of the defender.[35] Society recognizes a person's inherent right to self-preservation and therefore grants to the defender what Sanford Kadish has termed the "right to resist unlawful aggression."[36] A fourth and related theory suggests that this right to self-defense is not granted by the state, but only exists as between the defender and the aggressor. The rationale for this theory is that those in the right should never yield to wrongdoers.[37] The fifth and final theory is that defensive homicide is justified because the intent is to save the defender, not to kill the attacker.[38] Various aspects of these theories can be glimpsed in the rules that American jurisdictions have fashioned for defenders faced with lethal attacks.

b. *Jewish law*

In Jewish law, the contours of the law of a pursuer are shaped by three unrelated but complementary regimes. One, in most instances[39] the Torah permits either the potential victim or a third party to intervene and kill a pursuer.[40] Two, both a homeowner and a non-resident third party may

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27 See *infra*, notes 90-93 and accompanying text.

28 See *infra*, notes 68-71 and accompanying text.

29 See *infra*, notes 120-124 and accompanying text.

30 See *infra*, notes 138-141 and accompanying text.

31 *See, e.g.*, GEORGE FLETCHER, RETHINKING CRIMINAL LAW 855-75 (1978); SUZANNE UNIACKE, PERMISSIBLE KILLING: THE SELF-DEFENCE JUSTIFICATION OF HOMICIDE (1994); A.J. Ashworth, *Self-Defence and the Right to Life*, 34 CAMBRIDGE L.J. 282 (1975); Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CAL. L. REV. 871 (1976); Jeff McMahan, *Self-Defense and the Problem of the Innocent Attacker*, 104 ETHICS 252 (1994); Michael Otsuka, *Killing the Innocent in Self-Defense*, 23 PHIL. & PUB. AFF. 74 (1994).

32 See Stuart P. Green, *Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 19 (1999).

33 *Id.*

34 Green, *supra* note 32, at 20. As Green points out, however, this theory has severe shortcomings. Someone that violates another's rights deserves to be punished, but it should not give the victim the equivalent right to harm the attacker.

35 *Id.* at 21.

36 Kadish, *supra* note 31, at 885.

37 Green, *supra* note 32, at 23.

38 *Id.* As Green notes, however, this theory relies on a flawed distinction between effects that are intentional and effect that are merely foreseeable.

39 In limited circumstances where the pursuer has a right but not an obligation to pursue the victim, a bystander may not intervene. Examples of circumstances where murder is permitted include an executioner appointed by the court and the permitted killing of an accidental murderer by a family member of the deceased.

40 While it is undisputed that the Torah permits this behavior, the exact source is a matter of dispute. The Talmud on SANHEDRIN 72b-73a lists two possible sources: (a) the verse in GENESIS (9:6) that states, "Whoever sheds the blood of man, by man shall his blood be shed.", or (b) an exegetical comparison to a betrothed girl who is raped. The verses (DEUTERONOMY 22:26-27) that discuss her innocence state, "But you shall do nothing to the girl, for the girl has committed

kill one stealthily invading a home, as the home invader is deemed a pursuer.[41] Three, every Jewish citizen has an obligation to assist his or her brethren in times of distress.[42] This obligation requires one to spend money and perhaps even to put oneself at risk for the sake of saving one's fellow from danger.[43] Taken together, these three doctrines combine to form an obligatory, affirmative duty to intervene and save a potential victim, whether in public or in private, from the lethal threats of an aggressor.[44]

Many of the particulars of the law of the pursuer are shaped by the underlying rationale for the law. Neither the Torah nor the Talmud, however, give an explicit rationale for obligating a bystander to kill a pursuer. The earliest explanations are to be found in the Talmudic commentators, who provide two opposing explanations. Rashi writes that the obligation to intervene stems from the necessity of saving the *pursuer* from committing a grave sin.[45] Maimonides disagrees and explains that one may kill the pursuer for the sake of saving the potential *victim* from a mortal threat.[46] These explanations are not necessarily mutually exclusive; each has significant support in the Talmudic text.[47]

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no capital sin, for like a man who rises up against his fellow and kills him, so is this thing. For he found her in a field, the betrothed girl cried out, but she had no savior." The Talmud first says that the implication of "she had no savior" is that it *is* possible to save her, even if you must kill the rapist. Once that is established, the verse's comparison of rape to murder ("for like a man who rises up") tells us that one may also kill an aggressor currently attempting murder.

Maimonides (MISHNEH TORAH, HILCHOS ROTZEACH 1:7) and SEFER HACHINUCH (600) use a different verse in DEUTERONOMY (25:12) that says "your eye shall not show pity." However, most of the commentaries on these works strenuously object to the use of this verse as the source. The generally accepted source is therefore the exegetical comparison from rape to murder.

It is important to note that identifying the correct source is not merely a philosophical argument; it can have serious practical ramifications. The MINCHAS CHINUCH (34:13) asks a somewhat humorous question that shows the significance of identifying the correct source. As will be discussed later [see *infra*, note 86], a bystander may not be allowed to use deadly force against a rapist if the victim consents (even under duress), even though substantial harm may be occurring. The MINCHAS CHINUCH therefore asks, if Person A asks Person B to kindly murder him, and Person B agrees – does Person B receive the status of a pursuer, thereby permitting Person A to kill *him*? If the source for killing a pursuer is killing a rapist, then it depends on the question of how to deal with a rapist whose victim has consented.

41 The source for this law is the verse, "If the thief is discovered while tunneling in, and he is struck and dies, there is no blood [i.e. guilt] on his account (EXODUS 22:1)." This is codified in MISHNEH TORAH, HILCHOS GENEIVA 9:7 and SHULCHAN ARUCH,CHOSHEN MISHPAT 425:1. This is akin to the "castle doctrine" found in many states, and will be discussed *infra* at notes 123-124.

42 This obligation stems from the verse in LEVITICUS (19:16) that states, "You shall not stand aside while your brother's blood is being shed." The Talmud on SANHEDRIN 73a uses this as the source of the requirement to save a friend who is drowning, being chased by robbers, or being attacked by wild animals. This requirement is codified in MISHNEH TORAH, HILCHOS ROTZEACH 1:14 and SHULCHAN ARUCH, CHOSHEN MISHPAT 426:1.

43 See *infra*, note 63 for sources.

44 The obligatory nature of the rescue does not apply to a home invasion, however. In a home invasion, a bystander is permitted but not required to intervene. See *infra*, note 62 for more information.

45 BABYLONIAN TALMUD, SANHEDRIN 73a (*s.v.* "*V'eilu*"). This explanation is also found in the CHIDDUSHEI HARAN (SANHEDRIN 73a).

46 PERUSH MISHNAYOS (SANHEDRIN 73a).

47 ACHIEZER (Vol. 1, 18:2) says that in fact both rationales apply: a pursuer is killed both to save the victim and to save the pursuer from committing a serious crime. Therefore, a bystander may kill the pursuer even if only one of the rationales would be currently applicable. For example, if a rapist has already inflicted substantial harm on his victim but has not yet completed the legal crime of rape, a bystander may kill him despite the fact that it will not save the victim from harm.

Another interesting thesis is propounded by Haim Shapira. Shapira, attempting to reconcile the textual sources in the *mishna* and Talmud, suggests that the law of the pursuer developed in two stages. In the first, pre-*mishnaitic* stage, the "prevalent version of the law of the pursuer was the 'religious' one that was aimed at saving and preventing the violation of the divine law." This is why the Talmud quotes various *tannaim* as permitting the killing of a person "pursuing" idolatry or the violation of the Sabbath. In the second stage, the law of the pursuer assumed its current form as a justification that may

Later commentators also discern a hint of punitive measures in the mandate to kill a pursuer.[48] Closely related to the question of punishment is a further discussion regarding the requirement for a pursuer to be morally culpable before being subject to a bystander's intervention. The inclusion of moral culpability as a criterion for designation as a pursuer is the subject of much debate.[49] The presence or absence of culpability may therefore have substantial practical ramifications.[50]

III. MAJOR DIFFERENCES BETWEEN AMERICAN AND JEWISH LEGAL SYSTEMS

On the surface, the American and Jewish legal systems appear to treat a pursuer in substantively similar fashion: both permit either the potential victim or a bystander to intervene with lethal force when they reasonably believe that the pursuer may kill an innocent victim. But the surface similarities mask important differences, many of which stem from the vastly different rationales that underlie the two regimes. This section will discuss the following significant differences between American and Jewish law on this topic: permissive versus obligatory nature of the intervention; amount of threatened harm necessary to use lethal force in self-defense or defense of another; necessity of using lethal force; duty to retreat; first aggressors; apparent aggressors; and innocent aggressors.

1. Permissive vs. Obligatory Nature of the Bystander's Intervention

The common law approach towards a duty to rescue is clear and consistent: aside for a few narrow exceptions,[51] there is no duty to rescue, regardless of the ease of the rescue or lack of danger to the rescuer.[52] The no-duty rule prevails in 47 of 50 states.[53] The remaining three states, however, do

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be invoked only to prevent harm to a victim. *See* Haim Shapira, *The Law of the Pursuer and the Source of Self-defense in Jewish Law*, 16 JEWISH LAW ASSOCIATION STUDIES 250 (2007).

48 YACHEL YISROEL (no. 119) writes that various comments of the Talmud allude to the fact that killing the pursuer is a form of punishment. For example, the Talmud rejects an attempted *a fortiori* comparison from rape to a pursuer on the grounds that "we cannot punish based on an *a fortiori*." Others have written that a home invader, but not a standard pursuer, is killed partially as a punishment. This is why the Talmud (a) excuses the home invader from paying for items he breaks during the invasion based on the Talmudic dictum of "we punish for the harsher crime but not the lesser crime" and (b) considers the invader's tunneling into the house a "warning", which is required prior to punishing a criminal. *See* 27 TARBITZ 4, 485-86 (1958).

49 Noam Zohar sees the Talmud as suggesting two possible rationales for self-defense. The first rationale simply relies on action vs. inaction; you may kill one who actively endangers another. The second rationale, however, implies that "it is not simply the necessity of saving a life, but *culpable aggression* that provides the foundation of self-defense (emphasis added)." *Killing a* Rodef, 1 S'VARA 58 (1990). Rabbi Moshe Feinstein rules that one may kill certain individuals endangering others despite a total lack of culpability; culpability is not required to be considered a pursuer. IGGROS MOSHE (CHOSHEN MISHPAT 2:71).

50 See *infra*, Part III.7 for a discussion of innocent aggressors.

51 A duty to rescue has been found where the endangered person and rescuer are found to have a special relationship, i.e. common carrier-passenger or innkeeper-guest. *See* Restatement (Second) of Torts § 314A (1965).

52 *See* Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L. J. 247, 247 (1980) ("No observer would have any difficulty outlining the current state of the law throughout the common-law world regarding the duty to rescue. Except when the person endangered and the potential rescuer are linked in a special relationship, there is no such duty.") The no-duty rule is based on the fundamental distinction drawn by the common law between omissions and commissions. See Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 219 (1908) ("There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance. . . ."). *See, e.g.*, Berdeaux v City Nat'l Bank (1982, Ala) 424 So 2d 594 (in action against bank by customer shot during course of armed robbery of bank, summary judgment in favor of bank was proper since bank had no duty to protect customers from injury at hands of criminal intruders); Zelig v. County of Los Angeles, 27 Cal. 4th 1112, 119 Cal. Rptr. 2d 709, 45 P.3d 1171 (2002) (as a general rule, one owes no duty to warn those endangered by the conduct of another).

impose criminal liability for violating a duty to rescue.[54] Explanations for the near-unanimity among the states regarding the lack of a duty to rescue include the fact that such statutes are ineffective, infringe on individual liberties, may actually discourage rescue, and are likely to be misused by politically ambitious prosecutors.[55] Despite not requiring a duty to rescue, most states do provide "Good Samaritan laws" that shield a would-be rescuer from many forms of liability.[56]

The lack of a duty to rescue is often criticized in the aftermath of shocking incidents that could have been easily prevented by bystanders.[57] One famous example of this phenomenon is the unfortunate incident of Kitty Genovese, who was murdered in New York City over the course of thirty-five minutes while thirty-eight bystanders did nothing to intervene.[58] Legal commentators called for legislative reform, but within a few years the issue had faded from view.[59] These extreme cases, however, are the exceptions that prove the rule: empirical evidence shows that verifiable non-rescues are extraordinarily rare, and verifiable rescues are exceedingly common.[60] Furthermore, states that have adopted a duty to rescue have not seen an increase or decrease in the number of non-risky rescues or the number of accidental deaths.[61] In other words, the presence or absence of a legal duty to rescue does not seem to alter the behavior of bystanders when faced with a rescue scenario. People act out of a moral duty, not a legal one.

In Jewish law, a bystander has an affirmative obligation to rescue an individual facing a lethal threat, even if it would require killing the aggressor.[62] The obligation to rescue may even require the rescuer to incur costs or put himself into danger to accomplish the rescue.[63] Unlike a common law system, however, a violation of a duty is not actionable at law.[64] That is because Torah law is not concerned with rights and their violations, but rather is a jurisprudence of obligations.[65] The obligation

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53 David A. Hyman, "Rescue without Law: An Empirical Perspective on the Duty to Rescue" (November 2005).*University of Illinois Legal Working Paper Series. University of Illinois Law and Economics Working Papers*. Working Paper 32.

54 See VT. STAT. ANN. tit. 12, § 519(c) (2010) (providing that any person who knows that another is at risk of physical harm and does not act can be fined up to one hundred dollars); MINN. STAT. § 604A.01 (2010) (providing that a person is guilty of a petty misdemeanor if he knows another is suffering physical harm and fails to provide reasonable assistance); WIS. STAT. ANN. § 895.48 (West 2010).

55 *Id.*

56 The types of liability excluded by statute vary wildly from state to state. Some only apply to physicians, while others apply to non-medical personnel as well. *See* Victoria Sutton, *Is There a Doctor (and a Lawyer) in the House? Why our Good Samaritans Laws Are Doing More Harm than Good for a National Public Health Security Strategy: A Fifty-State Survey*, 6 J. HEALTH & BIOMED. L. 261, 267 (2010).

57 Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 WM. & MARY L. REV. 423, 423 (1984-1985).

58 N.Y. TIMES, Mar. 27, 1964, at 1, col. 4. Another notable example was a rape that took place in a bar in Boston as the customers cheered on the rapists. *The Tavern Rape: Cheers and No Help*, NEWSWEEK, Mar. 21, 1983, at 25.

59 Silver, *supra* note 57.

60 Hyman, *supra* note 53 at 3.

61 *Id.*

62 See *supra*, note 42 for sources. There is an important distinction in this context between a home invader and other forms of pursuer: a bystander has an obligatory commandment to kill a standard pursuer, but only a permissive right to kill a home invader. *See* TOSFOS SANHEDRIN 73a (*s.v. "Af"*). AVI EZRI (HILCHOS GENEIVA 9:7) explains that the distinction is based on the fact that a home invader is at heart a burglar, not a pursuer. The homeowner or bystander may kill him because of the presumption that the invader would kill first if necessary, but there is no *need* to kill him.

63 *See, e.g.*, Rabbi Shlomo Zalman Auerbach, MINCHAS SHLOMO (7:1); Rabbi Naftalia Tzvi Yehuda Berlin, HA'AMEK SHAYLA (no. 129) (attempting to prove that one must enter into possible danger in order to save another from definite danger).

64 The basic common law rule is that no one is liable in tort unless he owes the plaintiff a legal duty which he neglected to perform. *See* Ben Zion Eliash, *To Leave or Not Leave:The Good Samaritan in Jewish Law*, 38 ST. LOUIS U. L.J. 619, 620 (1993-1994).

65 *See* Robert Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 JOURNAL OF LAW AND RELIGION 65-

to rescue one's friend arises because G-d commanded it, not because the friend has a right to be rescued. Thus, violating one's duty to rescue is not a cause of action in a Jewish court, and in fact the Talmud attaches no sanction for violating this duty.[66] The rescuer acts out of religious motivation instead of fear of civil or criminal liability.[67]

2. The amount of threatened harm needed to invoke the right of self-defense.

Not every threat to one's person is sufficient to invoke the right of self-defense. The level of harm threatened by an aggressor must clear a certain minimum threshold before the victim or a third party is justified in using deadly force. Here, too, the American and Jewish legal systems have varying approaches.

All American jurisdictions require that force used in self-defense be proportionate to the harm threatened.[68] While the states do not use identical language to describe this requirement, they frequently require that the force be "just", "appropriate", or "reasonable".[69] One can therefore only use lethal force when confronted with a serious threat.[70] Serious threats that warrant the use of lethal force include homicide, sexual assault, and sever bodily harm.[71]

There are two major exceptions to this proportionality requirement, however. One, many states allow the use of deadly force when faced with certain enumerated crimes, such as homicide, rape, or

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74 (1998).

66 The reason there is no sanction is due to a quirk in the structure of the obligation. As mentioned *supra*, note 42, the Biblical source for this obligation is found in the verse, "You shall not stand aside while your brother's blood is being shed" (LEVITICUS 19:16). This is a negative commandment that can only be violated by inactivity. See MISHNEH TORAH, HILCHOS RETZICHA 1:16. In Jewish law, one can only be punished for an active violation of a negative commandment. See MISHNEH TORAH, HILCHOS SANHEDRIN 18:2. Therefore, there is no sanction for not saving one's fellow.

67 Ernest Weinrib views the Torah 's creation of a duty to rescue without a corresponding sanction as a refutation of Jeremy Bentham's classic attack on the common law rule. Bentham thinks it is morally abhorrent that there should be no duty to rescue when it can be done at no danger to the rescuer. He therefore writes that omitting to rescue should be punished. Torah law shows that this conclusion is not inevitable, and is both stricter and more lenient than the rule Bentham proposes. It is stricter in that it may require a rescuer to save an individual even when it exposes the rescuer to danger. It is more lenient in that there is no sanction for violating this duty. *See* Ernest Weinrib, *Rescue and Restitution,* 1 S'VARA 1,59 (Winter 1990).

68 The force that an actor may use in self-defense "must be reasonably related to the threatened harm which he seeks to avoid." W. LAFAVE & A. SCOTT, CRIMINAL LAW § 54, at 392 (1972); *See, e.g.,* State v. Metcalfe, 203 Iowa 155, 212 N.W. 382 (1927) (degree of force used must be reasonably necessary under the circumstances - for ordinary trespass one may not take the life of the wrongdoer); Commonwealth v. Emmons, 157 Pa.Super. 495, 43 A.2d 568 (Pa.Super.Ct.1945) (force threatening serious injury used against a felon to protect car from theft was unreasonable when the security of a person or home was not involved).

69 *See, e.g.*, VT.STAT.ANN. tit. 13, § 2305(1) (1974) ("just"); N.D.CENT.CODE § 12.1-05-07(1) (1976) ("appropriate"). For examples of "reasonable", see IND.CODE ANN. § 35-41-3-2(a) to (c) (West Cum.Supp.1983 to 1984); see also IOWA CODE ANN. § 704.1 (West Cum.Supp.1983 to 1984) (defining reasonable force as that necessary to prevent injury, and including deadly force if life or safety is threatened); LA.REV.STAT.ANN. § 14:19 (West 1974) (permitting reasonable force in preventing forcible offenses or trespasses). Washington defines necessary force as that "amount of force" "reasonable to effect the lawful purpose intended." WASH.REV.CODE ANN. § 9A.16.010 (1977).

70 Many states also provide liberal excuse provisions for an actor that acted with the perception that he was facing a severe threat, even if that was later shown not to be the case. 2 PAUL ROBINSON, CRIM. L. DEF. § 131. See, e.g., MODEL PENAL CODE § 3.04(1) (force justified if actor believes it is immediately necessary); accord DEL.CODE ANN. tit. 11, § 464(a), (b) (1979). (defendant may justifiably respond when he believes such force is immediately necessary); HAWAII REV.STAT. § 703-304(1) (1976); KY.REV.STAT. § 503.050(1) (1975); NEB.REV.STAT. § 28-1409(1) (1979); 18 PA. CONS.STAT.ANN. § 505(a) (Purdon 1983).

71 40 Am Jur 2d Homicide § 154.

kidnapping.[72] Proportionality is not specifically required in these situations because lethal force is considered *ipso facto* proportionate when faced with these enumerated threats.[73] Two, since 2005, more than 40 states have passed or proposed new "castle doctrine" legislation.[74] These statutes grant a homeowner the right to use lethal force against a home invader by presuming harm rather than requiring proof of reasonable fear of death or serious bodily harm.[75]

Bystanders also have the right to use deadly force in the defense of another. This is true regardless of whether a relationship exists between the rescuer and the person who was being attacked.[76] The rescuer can generally use any force that would be necessary to save himself in order to defend another.[77] Some states, however, limit the extent of an intervening bystander's justified force to that which the *assailed third person* would be justified in using.[78] According to some courts, this justification may be a double-edged sword; according to this view, the rescuer acts at his peril if the person defended happened to be at fault and hence was not in a position to use self-defense.[79] Other courts have ruled that the fault of the person defended is not imputed to the rescuer. The rescuer is

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72 *See, e.g.*, KY.REV.STAT. § 503.050(2) (1975); UTAH CODE ANN. § 76-2-402(3) (1978).

73 Paul Robinson notes that the presumption of proportionality is not always valid, as illustrated by the following example. D, while riding on a bus, has an argument with A, the driver. In retaliation for D's opprobrious remarks, A decides to drive past D's stop and drop him off five stops later—in effect, technically kidnapping D. A sits in an enclosure that will permit D to stop him only by shooting him. Statutes that presumptively allow deadly force as a proportionate response to kidnapping would justify D's shooting of A, although it is in fact grossly disproportionate to the harm threatened (dropping D off five stops late). 2 CRIM. L. DEF. § 131

74 Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237, 237 (2008). *See, e.g.*, Alabama (ALA. CODE § 13A-3-23(b) (West 2006 & Supp. 2007)); Kentucky (KY. REV. STAT. ANN. § 503.055(3) (West 2006 & Supp. 2007)); Louisiana (LA. REV. STAT. ANN. § 14:19 (West 2003 & Supp. 2008)); Michigan (MICH. COMP. LAWS SERV. § 780.951 (Lexis 2001 & Supp. 2007)); Mississippi (MISS. CODE ANN. § 97-3-15(e-f) (West 2005 & Supp. 2007)); Missouri (MO. ANN. STAT. §§ 563.031(3), 563.074 (West 1999 & Supp. 2008)); Oklahoma (OKLA. STAT. ANN. tit. 21, § 1289.25(d) (West 2002 & Supp. 2007)); South Carolina (S.C. CODE ANN. § 16-11-440(c) (West 2001 & Supp. 2007)).

75 For example, Florida's law provides:

> A person is presumed to have held a reasonable fear of imminent peril of death. . . when using defensive force that is intended or likely to cause death or great bodily harm to another if:
> (a) The person against whom the defensive force was used . . . unlawfully and forcibly entered a dwelling, residence, or occupied vehicle . . . ; and
> (b) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.
> FLA. STAT. ANN. § 776.013(1) (West 2005 & Supp. 2008).

76 40 Am Jur 2d Homicide § 167; *See, e.g.*, Cunningham v. Neagle, 135 U.S. 1, 10 S. Ct. 658, 34 L. Ed. 55 (1890); Morrison v. Commonwealth, 24 Ky. L. Rptr. 2493, 74 S.W. 277 (Ky. 1903); State v. McKoy, 332 N.C. 639, 422 S.E.2d 713 (1992); State v. Bowers, 65 S.C. 207, 43 S.E. 656 (1903); State v. Saunders, 175 W. Va. 16, 330 S.E.2d 674 (1985).

77 40 Am Jur 2d Homicide § 168. *See, e.g*, State v. Grier, 609 S.W.2d 201 (Mo. Ct. App. W.D. 1980).

78 40 Am Jur 2d Homicide § 168. *See, e.g*, Muschette v. U.S., 936 A.2d 791 (D.C. 2007) (permitting self-defense claim of rescuer only when victim would have had a claim of self-defense); Mack v. State, 348 So. 2d 524 (Ala. Crim. App. 1977); State v. Granroth, 294 Minn. 491, 200 N.W.2d 397 (1972); State v. McKoy, 332 N.C. 639, 422 S.E.2d 713 (1992); State v. Williford, 49 Ohio St. 3d 247, 551 N.E.2d 1279 (1990); State v. Long, 325 S.C. 59, 480 S.E.2d 62 (1997); State v. Barnes, 675 S.W.2d 195 (Tenn. Crim. App. 1984); Hughes v. State, 719 S.W.2d 560, 71 A.L.R.4th 919 (Tex. Crim. App. 1986); Lynn v. Com., 27 Va. App. 336, 499 S.E.2d 1 (1998), aff'd, 257 Va. 239, 514 S.E.2d 147 (1999); Thomas v. State, 53 Wis. 2d 483, 192 N.W.2d 864 (1972).

79 2 Wharton's Criminal Law § 130 (15th ed.) *See, e.g.*, People v. Randle, 35 Cal. 4th 987, 28 Cal. Rptr. 3d 725, 111 P.3d 987 (2005) (doctrine of imperfect defense of third party exists, such that actual but unreasonable belief in need to defend another from imminent danger of death or great bodily injury negates malice and mitigates a homicide to manslaughter rather than murder); State v. Pavao, 81 Haw. 142, 913 P.2d 553 (Haw. Ct. App. 1996) (in assault prosecution, justification defense failed where defendant and his brother—whom defendant had been protecting—had forced their way into private bedroom where assault took place, and brother had been aggressor in assault on victim); State v. Weniger, 390 N.E. 2d 801 (Ohio 1979).

protected if he believed that the person defended was in danger and if his mistake of fact as to the defended person's fault was reasonable.[80] The general rule, however, is that a bystander may use lethal force to intervene in a situation where a third person is being mortally threatened by an aggressor.

Jewish law takes a similar approach, albeit with a few important differences. Other than situations of home invasion, using lethal force in defense is only permitted for certain enumerated crimes.[81] The *mishna* on *Sanhedrin* 73a lists the types of pursuers that may be killed: an actor chasing a potential victim in order to commit homicide, homosexual rape, or the rape of a betrothed girl.[82] The *mishna* concludes by stating that one may *not* kill a pursuer that is attempting to violate other bedrock principles of Torah law such as idolatry, forsaking the Sabbath, or committing bestiality. The difference between the first and second halves of the *mishna* stems not from the seriousness of the contemplated violations of the Torah – idolatry being perhaps the worst sin one can commit[83] – but the degree of harm that the violation will cause. The *mishna* thereby establishes a high threshold of required harm for the use of lethal force; below the threshold, a crime, even if serious, cannot be met with lethal force.[84] Certain important categories of harms, such as severe bodily harm,[85] kidnapping, and specific types of rape,[86] may therefore not be met with lethal force.

An exception to the general rule permitting the use of lethal force only in response to the enumerated crimes is in the case of a home invasion. The purpose of a home invasion is generally to commit burglary – not one of the enumerated crimes – and yet the Torah explicitly permits the homeowner to kill the burglar.[87] The Talmud explains that this permission only exists while the homeowner is unsure of the burglar's motives; once it becomes clear that the home invader will not kill the homeowner, the permission to use lethal force is revoked.[88] As will be discussed later, there is an

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80 2 Wharton's Criminal Law § 130 (15th ed.).

81 This is true for both the victim and the rescuer. Aside for a few disputed exceptions (see *infra* notes 96-100 and accompanying text), there is generally no difference between the amount of force permitted to the victim or a third party rescuer.

82 The Talmud later broadens the *mishna* to include nearly all circumstances of rape. See *infra* note 86.

83 The Talmud often stresses the importance of a commandment by explaining that a violation "would be akin to worshiping idolatry." Furthermore, idolatry is one of three cardinal sins (along with homicide and illicit sexual unions) that require one to be killed rather than violate.

84 *See, e.g*., MISHNEH TORAH, HILCHOS ROTZEACH 1:8, who only permits lethal force when the attacker is hitting the victim with enough force to kill.

85 Severe bodily harm cannot be met with lethal force only when the victim or bystander knows with certainty that *only* bodily harm will result. If there is a non-trivial chance that the attack could lead to the victim's death, then the attacker is considered a pursuer for the sake of homicide, and may be killed.

86 The Talmud on SANHEDRIN 73b explicitly states that the rationale for saving a victim from rape is due to the damage done to the victim. Therefore, in circumstances where the harm is minimized or non-existent, a rapist may not be killed to prevent the commission of the rape. An example of minimal harm would be statutory rape; the woman's consent precludes a bystander from intervening with deadly force. In a circumstance where the woman is being forcibly raped but instructs bystanders not to intervene, the authorities argue about the appropriate course of action. MISHNEH TORAH, HILCHOS ROTZEACH 1:12 and the TUR (CHOSHEN MISHPAT 425) says that a bystander should still intervene. The MEIRAS EINYANIM (CHOSHEN MISHPAT 425:4) says that one should still intervene if the woman is simply consenting due to her fear of the attacker; if it is clear that the woman is consenting because she does not view the attack as particularly harmful, then one does not intervene. A further discussion among the authorities involves a case where the current victim has previously been raped once before. Since the physical and psychological damage to a rape victim the second time is not as severe as the first time, is the second rape sufficient harm to authorize the use of lethal force? The BAYIS CHADASH (CHOSHEN MISHPAT 425 *s.v. "V'kol"*) says that it is not. Others argue. *See* SH"UT RADVAZ 1:388; ARUCH L'NER to SANHEDRIN 73a; MINCHAS CHINUCH 600.

87 EXODUS 22:1

88 BABYLONIAN TALMUD, SANHEDRIN 72a; MISHNEH TORAH, HILCHOS GENEIVA 9:7; SHULCHAN ARUCH, CHOSHEN MISHPAT 425:1.

ongoing debate about the homeowner's ability to use lethal force when such force may be unnecessary.[89]

3. *The necessity of using lethal force.*

Before lethal force may be used in self-defense or defense of another, American law requires that the use of such force be absolutely necessary.[90] Necessity is defined as the absence of reasonable nonlethal means of avoiding death or serious harm.[91] If there was no real or apparent necessity to kill the attacker, the defense of self-defense fails completely.[92] Similarly, the defender loses the right to use lethal force once the attacker has been disabled.[93]

The baseline Jewish law is very similar: one can only use lethal force against an aggressor if nonlethal force would not be sufficient to stop the aggressor.[94] In fact, if one kills an aggressor when it is clear that nonlethal force would have sufficed, then he is deemed a murderer and is eligible to receive the death penalty.[95]

However, there are two major and disputed exceptions to this general rule. One, it is possible that the requirement to first use nonlethal force only applies to a bystander; a victim can use lethal force even if nonlethal force would be sufficient. Two, a homeowner may use lethal force against a home invader even if it would be possible to use nonlethal or even no force (i.e. by hiding) to avoid being harmed.

Before continuing to a discussion explaining these exceptions, a threshold question is if these exceptions even exist. As mentioned, this is a subject of much dispute.

The first exception (victim does not need to use nonlethal force) is not found in the Torah or the Talmud. The earliest source for this appears to be in the glosses of Rabbi Aharon HaLevi of Barcelona, who writes that whereas a bystander must warn the aggressor prior to using lethal force, the victim does not have to give the aggressor fair warning prior to striking.[96] Rabbi Yitzchak ben Sheshet Perfet, in his responsa, later quotes this suggestion as a matter of law.[97] This distinction between a victim's and a

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89 See *infra*, notes 101-106 and accompanying text.

90 40 Am. Jur. 2d Homicide § 150; *See, e.g.*, Rorie v. U.S., 882 A.2d 763 (D.C. 2005) (establishing that the law of self-defense is a law of necessity; the right of self-defense arises only when the necessity begins, and equally ends with the necessity's cessation).

91 40 Am. Jur. 2d Homicide § 158; *See, e.g.*,Com. v. Vives, 447 Mass. 537, 854 N.E.2d 1241 (2006) (ruling that the right to self-defense arises only in circumstances where the defendant avails himself of all proper means to avoid physical combat); Rasley v. State, 878 So. 2d 473 (Fla. Dist. Ct. App. 1st Dist. 2004) (establishing that a person may not use deadly force without using every available means to avoid danger).

92 *See, e.g.*, People v. Cullen, 233 Ill. App. 3d 794, 175 Ill. Dec. 391, 600 N.E.2d 14 (1st Dist. 1992); Farley v. Commonwealth, 284 Ky. 536, 145 S.W.2d 100 (1940); State v. Johnson, 277 Minn. 230, 152 N.W.2d 768 (1967); State v. Havens, 177 S.W.2d 625 (Mo. 1944).

93 *See, e.g.* People v. Kruger, 236 Ill. App. 3d 65, 177 Ill. Dec. 673, 603 N.E.2d 743 (1st Dist. 1992) (finding that defendant lost right to keep shooting attacker once the attacker had been disabled).

94 BABYLONIAN TALMUD, SANHEDRIN 74a; MISHNEH TORAH, HILCHOS ROTZEACH 1:13; SHULCHAN ARUCH, CHOSHEN MISHPAT 425:1.

95 Maimonides adds that while one is liable to be killed, the court will not actually put him to death. MISHNEH TORAH, HILCHOS ROTZEACH 1:13. This is probably due to the technical difficulty with issuing the death penalty in a circumstance where the murderer was not properly forewarned. MINCHAS CHINUCH 600:7. The TUR (CHOSHEN MISHPAT 425) argues and thinks that in fact the death penalty would be issued in this case.

96 CHIDUSHEI HARA'AH to SANHEDRIN 72b. There is an ever earlier comment of Rabbi Eliyahu Mizrachi (RE'EM to GENESIS 32:8) that seems to imply that Yaakov would be justified in killing Esav without warning despite the fact that bystanders would be required to warn prior to striking.

97 SH"UT RIVASH (no. 238).

bystander's restrictions on the use of force was soon broadened by many to include the ability of the victim, but not a bystander, to use lethal force even when nonlethal force would suffice.[98] Others vehemently disagree and require both the victim and a bystander to utilize nonlethal force where possible.[99] According to many later commentators, this appears to be the opinion of Rashi as well.[100]

The second exception (homeowner may use lethal force against a burglar) is based on a passage in the Torah. In Exodus, the Torah states that, "If the thief is discovered while tunneling in, and he is struck and dies, there is no blood [i.e. guilt] on his account. If the sun shone upon him, there is blood on his account."[101] The Talmud has two versions of the exegetical interpretation. The first interpretation states that the homeowner may only kill the invader if "it is clear as the sun" that the invader will harm him. Alternatively, the verse can be interpreted as stating that the homeowner is only guilty for killing the invader if it was "clear as the sun" that the invader would *not* have harmed him.[102] The latter interpretation has been accepted as the correct one.[103] The rationale for permitting a homeowner to use lethal force unless he knows with certainty that the invader will not be harmed is based on a presumption: an invader knows that if he invades an occupied dwelling, the homeowner may attack him. The fact that he proceeds despite this knowledge creates a presumption that an invader is willing to harm the homeowner while invading the home.[104] It is therefore undisputed that a homeowner can use lethal force against any invader he is concerned may harm him.[105] There is a dispute, however, if the homeowner can use lethal force even when nonlethal force may suffice. Most authorities believe that he may not,[106] but some write that once lethal force was permitted in the general case there is no requirement to use nonlethal force.[107]

Now that we have established the existence of two potential exceptions to the general rule, it raises the question of *why* one should be permitted to use lethal force when nonlethal force would suffice. There are three potential answers to this question.

The first answer is a technical one. Rabbi Yitzchak Zev Soloveitchik (colloquially known as the "Brisker Rav") explains that there are two aspects to the law of the pursuer.[108] One, you may kill a pursuer in order to save the victim. In furtherance of this goal, one can only use lethal force when such

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98 MISHNEH L'MELECH (HILCHOS CHOVEL U'MAZIK 8:10); MINCHAS CHINUCH 600:7; YAD HAMELECH (HILCHOS ROTZEACH 1:13). Rabbi Eliezer Yehuda Waldenberg, author of volumes of contemporary respona, also rules that a victim may always use lethal force against his attacker. *See* TZITZ ELIEZER 4:24 and 15:55. *See also* YABIA OMER (CHOSHEN MISHPAT 4:5) for Rabbi Ovadiah Yosef's encyclopedic collection of sources on this topic.

99 In the respona of the SHVUS YAAKOV (CHOSHEN MISHPAT 2:187), he writes that "[while the argument that a victim can use lethal force even when nonlethal force would suffice] has merit, it weighs on me like a wall." He then proceeds to argue that there is no distinction between a victim and a bystander; both must use nonlethal force wherever possible. Rabbi Akiva Eger (commenting on MISHNEH TORAH, HILCHOS CHOVEL U'MAZIK 8:10) also argues on those that make a distinction between victim and bsytander and concludes that everyone must first use nonlethal force.

100 The GILYON MAHARSHA (SHULCHAN ARUCH, CHOSHEN MISHPAT 425:1) and MINCHAS CHINUCH (600:7) attempt to prove this from the fact that Rashi (SANHEDRIN 74a *s.v.* "*V'yachol"*), commenting on the *gemara* that mandates the use of nonlethal force, writes that it refers to both the victim and the bystander.

101 EXODUS 22:1-2.

102 BABYLONIAN TALMUD, SANHEDRIN 72a.

103 MISHNEH TORAH, HILCHOS GENEIVA 9:10; RABBI MOSHE ISSERLES (CHOSHEN MISHPAT 425:1).

104 BABYLONIAN TALMUD, SANHEDRIN 72a; RASHI (EXODUS 22:1); MISHNEH TORAH, HILCHOS GENEIVAH 9:9.

105 See *infra* notes 135-136 and accompanying text for a discussion of a homeowner's duty to retreat.

106 The K'NESES HAGEDOLAH (CHOSHEN MISHPAT 425) writes that there is "certainly" an obligation to use nonlethal force where possible. The same sentiment is echoed by the CHAVAS YAIR in his responsa (no. 31). *See* YACHEL YISROEL (no. 120) for a further discussion.

107 The K'NESES HAGEDOLAH (id.) thinks that this is the belief of the RA'AVAD (HILCHOS GENEIVA 9:8), who writes that one can only use lethal force against an invader at night. Based on this, perhaps the RA'AVAD assumes that at night it is impossible to gauge the correct level of force, and therefore one may always use lethal force.

108 CHIDDUSHEI MARAN RAV YITZCHAK HALEVI SOLOVEITCHIK on the MISHNEH TORAH, HILCHOS ROTZEACH 1:13.

force is necessary to save the victim. Two, the pursuer receives the categorization of a "*gavra katila*", or someone already viewed as dead. This is because the Torah explicitly said that "there is no blood [i.e. guilt]" for killing a pursuer.[109] Once the pursuer has received this categorization, while one should not intentionally use lethal force against the pursuer when nonlethal force would suffice, there is no punishment if he does. It is as if he killed a dead man.[110] However, while this approach may be intellectually satisfying, later commentaries find that it raises difficulties. Among other problems, one issue is that the Brisker Rav seems to use a concept found only by a home invader ("there is no blood") and applies it to the separate regime that governs all pursuers.[111]

The second answer offers a morally compelling explanation for permitting lethal force when nonlethal force would suffice. According to this approach, it is simply not true that a victim and/or homeowner can use lethal force against an attacker or invader at will. Rather, the victim and homeowner can be less *exacting* in their use of force than a bystander.[112] The law takes into account the psychological reality that someone under attack does not have the mental wherewithal to make accurate predictions about the necessary level of force to utilize. We therefore allow him more latitude when he decides between lethal and nonlethal force. This can explain why some commentaries thought fit to expand the liberal use of lethal force to situations where the rescuer's *family* was under attack.[113] Even though the rescuer would technically be a third party, and therefore subject to the stricter requirement to only use lethal force when necessary, he cannot be expected to be exacting when family members are in danger.

The final explanation is only hinted at in the rabbinic literature, but is appealing from a law-and-economics perspective. Sanctioning the automatic use of lethal force against a home invader would create a significantly higher deterrent against home invasions than a regime that only permitted lethal force when necessary.[114] By increasing the chances that a home invader may be killed, we lower the expected value of a home invasion.[115] In a related scenario, Rabbi Shlomo Zalman Auerbach seemingly agrees with this rationale.[116] Normally, one is not allowed to put one's life at risk in order to save money. However, Rabbi Auerbach thinks that it may be permissible for a homeowner to attack an invader even if the homeowner is not sure that he will prevail. The rationale he gives is that while this would be prohibited in a one-off scenario, by attacking the invader the homeowner is deterring future home invasions from occurring.[117]

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109 EXODUS 22:1.

110 Rabbi Shlomo Zalman Auerbach (MINCHAS SHLOMO 7:2:5) agrees that the home invader is a *gavra katila*. He therefore says that if a homeowner has the choice between killing the invader or hiding and allowing the house to be burgled, he may kill.

111 See YACHEL YISROEL (no. 120) for this and other questions.

112 The MINCHAS CHINUCH (600:7) explains that while a bystander must use nonlethal force when possible, "a victim is not obligated and does not have to be exacting [in his use of force]." Rabbi Akiva Eger quotes his son, Rabbi Shlomo Eger, as saying something similar. *See* DRUSH V'CHIDDUSH RABBI AKIVA EGER (KESUBOS 33b).

113 The LEVUSH HA'ORAH (GENESIS 32:8) writes this. This is not widely accepted, however; the TZEIDAH L'DERECH (GENESIS 32:8) points out that including family members in the exception does not appear in any of the major authorities and seems to be invented from whole cloth.

114 *See* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 474-476 (2004).

115 For example, let us say that a home invasion would net $100 in stolen goods for the invader. The invader also values his own life at $1,000. If the only deterrent is the possibility of dying, the invader will continue to invade as long as his chances of dying are less than 10%, since $100 is greater than 9.99% x $1,000. If we increase the chances of dying to 20%, the invader will be deterred from committing this home invasion.

116 MINCHAS SHLOMO (7:2:3).

117 A similarly utilitarian approach is put forth by Marilyn Finkelman. Finkelman suggests that while we do not condone the use of lethal force unnecessarily, if we were to punish individuals who should have used a lesser degree of harm we may over-deter rescue behavior. *See* Marilyn Finkelman, *Self-Defense and Defense of Others in Jewish Law: The*

To summarize, Jewish law generally only permits the use of lethal force against an attacker when nonlethal force would not suffice. There may be some wide-ranging exceptions that would allow a victim or homeowner to use lethal force even when nonlethal force was available. However, these exceptions may not be as broad or as applicable as they first appeared.

4. *Duty to Retreat*

In the English common law, a person attacked by an aggressor in a public setting had a duty to attempt a retreat from the altercation prior to using lethal force in self-defense.[118] William Blackstone explained the scope of the duty:

> [T]he law requires, that the person, who kills another in his own defence, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant; and that, not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood.[119]

The general common-law doctrine has been substantially adopted by many American courts, which have laid down the broad rule that a person who is assailed is not justified in taking the life of his assailant if a safe avenue of retreat is open to him.[120] Under this rule, a killing in self-defense is not deemed necessary so long as there was a safe avenue of escape from the attack.[121]

The duty to retreat has been narrowed considerably over the years. One category of exceptions involves defense of the home against an invader. Here, there are two highly related and often conflated doctrines: the castle doctrine and defense of premises.[122] The castle doctrine says that a defender who would otherwise have a duty to retreat has no such duty when the attack occurs in his own dwelling.[123] In contrast, the defense of premises privilege states that a defender may use deadly force against an aggressor who is making an unlawful, felonious, or violent entry into such premises.[124] While these doctrines are very similar, they have one important difference: the castle doctrine can be seen as an

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Rodef *Defense*, 33 WAYNE L. REV. 1257, 1265 (1986-1987).

118 RICHARD M. BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY 4 (1991) (describing English common law).

119 4 WILLIAM BLACKSTONE, COMMENTARIES *184–85.

120 40 Am. Jur. 2d Homicide § 159. For a classic discussion of the duty to retreat, see Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567 (1903).

121 *Id. See, e.g.*, Rasley v. State, 878 So. 2d 473 (Fla. Dist. Ct. App. 1st Dist. 2004) (ruling that a person may not use deadly force without first using every available means to avoid danger, including retreat); State v. Saunders, 267 Conn. 363, 838 A.2d 186 (2004) (the defense of self-defense is not available if a completely safe avenue of retreat was available); Crymes v. State, 630 So. 2d 120 (Ala. Crim. App. 1993), judgment aff'd, 630 So. 2d 125 (Ala. 1993); Ghoston v. State, 84 Ark. App. 387, 141 S.W.3d 907 (2004); Foreshaw v. Commissioner of Correction, 48 Conn. App. 122, 708 A.2d 600 (1998); Lane v. State, 222 A.2d 263 (Del. 1966); Hunter v. State, 687 So. 2d 277 (Fla. Dist. Ct. App. 5th Dist. 1997); State v. Kaul, 457 N.W.2d 252 (Minn. Ct. App. 1990); State v. Allison, 845 S.W.2d 642 (Mo. Ct. App. W.D. 1992); State v. Dedrick, 135 N.H. 502, 607 A.2d 127 (1992); People v. Russell, 91 N.Y.2d 280, 670 N.Y.S.2d 166, 693 N.E.2d 193 (1998); State v. Brown, 117 N.C. App. 239, 450 S.E.2d 538 (1994), writ allowed, 338 N.C. 670, 453 S.E.2d 182 (1994); State v. Thomas, 77 Ohio St. 3d 323, 1997-Ohio-269, 673 N.E.2d 1339, 67 A.L.R.5th 775 (1997).

122 Green, *supra* note 32, at 8.

123 *Id.* at 9. Green presents the common rationales for the castle rule: retreating may expose the defender to greater danger, and, as Justice Cardozo wrote, no one should have to face the indignity of "being a fugitive from his own home." Courts that accept this second rationale then have to grapple with cases where one occupant kills a co-occupant in self-defense when retreat would have been available. In People v. Tomlins, 107 N.E. 496, 497 (1914), Cardozo held that a father threatened by a son had no duty to retreat from their shared home. Some recent decisions do require the homeowner to flee if possible. *See* State v. Gartland, 694 A.2d 564 (N.J. 1997). For an expanded explanation of the castle doctrine, s*ee* Catherine L. Carpenter, *Of the Enemy Within, the Castle Doctrine, and Self-Defense*, 86 MARQ. L. REV. 653 (2003).

124 *Id.*

exception to the requirement of necessity, while the defense of premises privilege is an exception to the proportionality requirement.[125] As mentioned *supra*,[126] more than 40 states have passed or proposed new legislation that embodies one or both of these doctrines.[127]

The minimization of the duty to retreat has continued in contemporary times with the advent of colorfully named statutes such as "Shoot the Carjacker"[128], "Stand Your Ground"[129], and "Make My Day".[130] These statutes are much broader than the classical castle rule / defense of premises privilege in that they eliminate the duty to retreat in many scenarios that occur outside a person's house, such as a carjacking or even a public location. 25 states currently have some version of a "Stand Your Ground" law, which abolishes the duty to retreat anywhere that one is attacked.[131] The ability to stand your ground generally also extends to a third party defender as well.[132] The spread of such laws has led to nearly twice as many "justified homicides" being reported nationwide in the last ten years, even as the overall rate of homicides decreases.[133]

Jewish law eliminates a duty to retreat; if an attacker uses lethal force against you, either you or a third-party defender may respond with lethal force even if an avenue of retreat is safely available.[134] Furthermore, similar to the defense of premises privilege, lethal force is always permitted against a home invader unless the homeowner knows with certainty that the invader will not harm him.[135] In Jewish law, once an actor's behavior categorizes him as a pursuer or home invader, he may be killed as long as he continues to engage in that behavior. The burden to save his own life is on the pursuer; the potential victim or a third party defender does not have to avoid bloodshed.[136] The following hypothetical illustrates the point: A says to B, "if you eat that hot dog, I will kill you." B can easily "retreat" and refrain from eating the hot dog, thus saving both of their lives. However, he is not required to heed A's threat; once A threatens his life, A becomes a pursuer, and B (or a third party) may

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125 A humorous but telling example of a self-defense situation that is necessary but not proportionate is given by Paul Robinson: A illegally assaults B by tickling him with a long feather. B, confined to a wheelchair, can defend himself only by shooting A. If B shoots A, his response may be necessary but not proportionate. *See* 2 PAUL ROBINSON, CRIMINAL LAW DEFENSES § 131(d) (1984). The reverse scenario, when lethal force is proportionate but unnecessary, is a case where the attacker attempts to kill the defender but can be easily disabled.

126 See *supra*, note 74.

127 *See, e.g.*, LA. REV. STAT. ANN. §14:20 (West 1998) for an example of a statute containing both doctrines.

128 *Id.* The Louisiana "Shoot the Carjacker" law has an interesting history. One of the main catalysts for enacting the law was an incident where Miss Louisiana had her Ford Taurus – given to her as a prize for winning the beauty pageant – carjacked. The new law aimed to deter such behavior because, as one candidate for governor helpfully explained, "Carjackers shot dead won't be carjacking anyone else." *See* Rick Bragg, *In Louisiana, Just Assume It's a Gun in Their Pockets*, N.Y. TIMES, Aug. 31, 1997, at E5.

129 FLA. STAT. ANN. § 776.013(3) (West 2005 & Supp. 2008). Florida has one of the broadest self-defense statutes of any states, and allows the disproportionate use of force wherever on is attacked. The relevant portion of the statute provides that:

> A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.

130 COLO. REV. STAT. § 18-1-704.5(2) (1986). Colorado's "Make My Day" statute says that a defender may use lethal force if an intruder is attempting a felony that might entail "physical force, no matter how slight, against any occupant."

131 *See* Joe Palazzolo, *More Killings Called Self-Defense*, WALL STREET JOURNAL, Mar. 31, 2012, at A1.

132 *See, e.g.*, FLA. STAT. ANN. § 776.013(3) (West 2005 & Supp. 2008), quoted *supra* note 129.

133 *See* Palazzolo, *supra* note 131.

134 Minchas Shlomo (7:2:3); *See also* Finkelman, *supra* note 117, at 1266.

135 BABYLONIAN TALMUD, SANHEDRIN 72a; MISHNEH TORAH, HILCHOS GENEIVA 9:10; RABBI MOSHE ISSERLES (CHOSHEN MISHPAT 425:1).

136 A defender does have a duty to use nonlethal force where possible though. *See supra* notes 94-95.

kill A.[137]

5. *First aggressor loses right to self-defense.*

The American legal system takes a highly technical and formalistic approach regarding the availability of self-defense to a first aggressor. The general rule is that a first aggressor may not later invoke the justification of self-defense, even if an innocent party in that identical situation would be permitted the defense.[138] The applicability of this rule to a specific situation, however, will vary widely with the jurisdiction and may depend on seemingly insignificant details.

Many states differ on the availability of self-defense to a nonlethal first aggressor who was met with lethal force. Most jurisdictions deny a nonlethal first aggressor any right to invoke self-defense,[139] on the ground that self-defense is available only to the person who is wholly free from fault.[140] This is true even when the first aggressor's minor provocation is met with excessive force.[141] Thus, if A flicks B's ear – a battery – A may lose the right to self-defense if B responds by pulling a gun. In a few states, however, the nonlethal aggressor can regain his right to self-defense is he is met by an excessive, life-threatening response, provided that he first attempts to retreat from the altercation.[142]

A further question is if, and when, a first aggressor can regain his right to self-defense. The general rule is that if a first aggressor withdraws from an affray in good faith and so informs his adversary, but the latter nevertheless continues the conflict, the first aggressor's right to self-defense is revived.[143] This rule may be simple in theory but its application is often contentious. For example, there are disputes about far the first aggressor must retreat[144] or how long he must wait after retreating before continuing the conflict.[145]

As noted above,[146] a third-party intervenor may be liable for killing an aggressor if the intended

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137 MINCHAS SHLOMO (7:2:1).

138 40 Am. Jur. 2d Homicide § 145; 55 A.L.R.3d 1000 (Originally published in 1974); *See, e.g.*, Com. v. Rodriquez, 461 Mass. 100, 958 N.E.2d 518 (2011) (holding that self-defense is generally not available to a defendant who provokes or initiates an attack); U.S. v. Slocum, 486 F. Supp. 2d 1104 (C.D. Cal. 2007); Rajnic v. State, 106 Md. App. 286, 664 A.2d 432 (1995); Chandler v. State, 946 So. 2d 355 (Miss. 2006); State v. Bowman, 869 S.W.2d 901 (Mo. Ct. App. W.D. 1994); State v. Larry, 345 N.C. 497, 481 S.E.2d 907 (1997).

139 *See, e.g.*, N.Y. Penal Law §35.151(b). requiring the nonlethal aggressor to withdraw completely in order to regain his right to self-defense.

140 Exactly how "free" one must be from fault is also an open question. For example, early court cases held that an adulterer caught in flagrante delicto could not invoke self-defense to defend himself against the husband, the act of adultery being the "first aggression". *See, e.g.*, Dabney v. State, 21 So. 211 (1897). More recent cases tend to reject this approach and permit self-defense. *See* Atkins v. State, 339 S.E. 2d 782 (Ga. 1986). Courts have recently expanded the free from fault requirement even further, and barred the invocation of self-defense when the aggressor was found to have committed any crime in connection with the fatal result, even when the crime itself did not provoke the altercation. *See, e.g.*, Mayes v. State, 744 N.E. 2d 390 (Ind. 2001) (finding that the right of self-defense was forfeited due to the defendant carrying a gun without a proper license).

141 It is important to note in this context that a verbal provocation is not sufficient to justify a deadly assault. A verbal aggressor, therefore, may still invoke self-defense if attacked. *See* 42 Am. Jur. Trials § 151; 2 A.L.R. 3d 1292.

142 *See, e.g.*, ILL. COMP. STAT. ANN. CH. 720 §5/7-4(C)(1); KAN. STAT. ANN. §21-3214(3)(a).

143 2 Wharton's Criminal Law § 137 (15th ed.); 55 A.L.R.3d 1000.

144 *See, e.g.*, Toncray v Commonwealth (1942) 291 Ky 471, 165 SW2d 8 (the backing away from an assailant while continuing an assault which he provoked cannot be regarded as such an abandonment as will restore his unqualified right to defend himself).

145 *See, e.g.*, State v Kellogg (1901) 104 La 580, 29 So 285 (a mere momentary cessation of hostilities, with no bona fide, clearly expressed intent to withdraw from the conflict, will not excuse what the aggressor afterward does on the ground of self-defense).

146 See *supra* notes 78-79 and accompanying text.

victim was barred from invoking self-defense. These formalistic technicalities may therefore ensnare a well-intentioned but unlucky rescuer whose intervention saved a first aggressor; if the rescuer killed the attacker, he may be culpable despite his honorable intentions.

In contrast to the highly technical American system, Jewish law does not explicitly discuss the doctrine of first aggression. That omission itself seems to imply that a first aggressor (or a bystander coming to his defense) does not lose the right to invoke self-defense; if there was a distinction between a first aggressor and a standard defender, the legal authorities should have discussed it. In addition, it may be possible to glean from various sources that a first aggressor is permitted to invoke self-defense.

The Jerusalem Talmud asks what the law would be in a case where the tables have turned and the original defender is now pursuing the original aggressor; would a third party be allowed to kill the original defender, who is currently acting as a pursuer?[147] The Talmud itself does not give an answer. Rabbi Moshe Margolis, author of one of the standard commentaries to the Jerusalem Talmud, explains the underlying question. He writes that in a zero-sum outcome – only one party will live – then of course the bystander's duty is to save the initial defender; it would be perverse to help the first aggressor kill his victim solely because at this moment the victim has the upper hand.[148] The Talmud, however, was asking about a scenario where the original defender could remove the threat via nonlethal force and is choosing to use lethal force. In that scenario, to whom does a third party bystander owe a duty to protect? This question is left unanswered.[149] However, from the discussion we are able discern a few legal conclusions. One, the first aggressor himself can still invoke self-defense; it is only with respect to a third-party intervention that a first aggressor may have forfeited his right to receive help. Two, it is only a lethal first aggressor that may lose his right to third-party intervention. A nonlethal aggressor is not called a "pursuer" and therefore does not qualify for this discussion in the Talmud.

There is another situation where a first aggressor appears to retain his right to self-defense but loses his right to third-party intervention. In certain circumstances, the Torah permits a family member of an individual killed through negligence to pursue and kill the negligent killer.[150] Interestingly, the negligent murderer (who can be viewed as a first aggressor) is permitted to defend himself against the avenging family member[151], but a third-party bystander may not intervene to help either party.[152]

By analyzing the parallels between the situation where the intended victim began to pursue his attacker and the case of the avenging family member, we can seemingly draw the following conclusion: unlike in the American system, a first aggressor does not lose the right to self-defense. He does, however, lose the right to be helped by a third-party defender.

6. *Apparent Aggressors*

Another major difference between the American and Jewish legal systems is their approach toward an apparent aggressor. An apparent aggressor is someone that appears to be intent on harming or killing a victim, but the third party (or even the victim) cannot be sure of the intent until after the harm has already occurred. For example, A runs after B while holding a shiny, pointy object. To C, it appears that A is attempting to stab B. However, until the stabbing actually occurs, C cannot be sure that A is not simply returning the pen that B dropped. If C is only 75% sure that he is witnessing an

147 JERUSALEM TALMUD, SANHEDRIN 8:9.

148 MA'AREH HAPANIM (*ad locum*).

149 The MEIRI, commenting to the BABYLONIAN TALMUD, SANHEDRIN 73a, thinks that a bystander should kill the original defender to save the original aggressor once the original defender is illegally using lethal force.

150 NUMBERS 35:21; MISHNEH TORAH, HILCHOS ROTZEACH 1:2.

151 MISHNEH L'MELECH (HILCHOS ROTZEACH 1:15).

152 MINCHAS CHINUCH 296:27.

attack, may he intercede?

To answer this question, American law relies on a reasonableness standard. An individual must reasonably believe that he or she is under attack by an apparent aggressor before self-defense can be invoked.[153] The majority of courts measure the reasonableness of a defender's belief that self-defense was necessary under an objective standard; the defendant's apprehension of danger and belief of necessity must be a reasonable apprehension of serious bodily harm or threat of life, such as a reasonable person would, under the circumstances, have entertained.[154] A minority of courts, however, use a subjective standard.[155] In these jurisdictions, a defender may invoke self-defense if he honestly believed it was necessary, even if a reasonable person under the identical circumstances would disagree.[156]

A third-party intervenor is also subject to a reasonableness standard. Importantly, however, the intervenor may use the degree of force reasonably necessary to protect the victim as judged by the intervenor's, and not the victim's, reasonable perception of the facts.[157] The victim's perception of the situation, however, is still relevant to determine what the intervenor's perceptions actually and reasonably were.[158] A third party may therefore intervene and kill an apparent aggressor when he reasonably believes that the aggressor is about to seriously harm or kill a victim.

Jewish law differentiates between a home invader and a standard aggressor. A home invader may be killed even if his motives are unclear. Killing an apparent aggressor outside the home, however, is a matter of much dispute among contemporary authorities.

The permission to kill a home invader, even when his intentions are unclear, stems from the same verse in Exodus that negated the need for for the killing to be necessary.[159] The Torah states that, "If the thief is discovered while tunneling in, and he is struck and dies, there is no blood [i.e. guilt] on his account. If the sun shone upon him, there is blood on his account."[160] The accepted exegetical interpretation is that the homeowner is only guilty for killing the invader if it was "clear as the sun" that the invader would *not* have harmed him.[161] As a proof to this idea, that Talmud cites a quote from Rav: "Anyone that invaded my house I would kill other than Rabbi Chanina the son of Shilah . . . because I am sure that he would have mercy on me like a father on a son [and would never kill me]."[162] In other words, Rav would be willing to kill any home invader whom he was not *positive* would be unwilling to harm him. Allowing the homeowner to kill despite the uncertain motivations of the invader is based on a presumption: an invader knows that if he invades an occupied dwelling, the homeowner may attack him. The fact that he proceeds despite this knowledge creates a presumption that an invader is willing to harm the homeowner while invading the home.[163]

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153 40 Am. Jur. 2d Homicide § 168; *see also* Raines v. State, 455 So. 2d 967 (Ala. Crim. App. 1984); People v. Brace, 223 Ill. App. 3d 152, 164 Ill. Dec. 847, 583 N.E.2d 1169 (3d Dist. 1991); Hughett v. State, 557 N.E.2d 1015 (Ind. 1990).

154 40 Am. Jur. 2d Homicide § 153

155 *Id.*

156 *See, e.g.*, State v. Jones, 39 Conn. App. 563, 665 A.2d 910 (1995); State v. Straub, 9 Haw. App. 435, 843 P.2d 1389 (1993); People v. Krueger, 260 Ill. App. 3d 841, 198 Ill. Dec. 118, 632 N.E.2d 177 (1st Dist. 1994); Geralds v. State, 647 N.E.2d 369 (Ind. Ct. App. 1995); State v. Jackson, 262 Kan. 119, 936 P.2d 761 (1997);

157 40 Am. Jur. 2d Homicide § 168. *See, e.g.*, Fersner v. United States, 482 A.2d 387, 390 (D.C. 1984).

158 *See, e.g.*, Muschette v. United States, 936 A.2d 791, 799 (D.C. 2007).

159 See *supra*, Part III.3

160 Exodus 22:1-2.

161 BABYLONIAN TALMUD, SANHEDRIN 72a; MISHNEH TORAH, HILCHOS GENEIVA 9:10; RABBI MOSHE ISSERLES (CHOSHEN MISHPAT 425:1). The TOSEFTA (SHABBOS 16:14) must also accept this interpretation, since it proves that you can violate the Sabbath to possibly save a life *a fortiori* from the fact that you can kill a home invader to *possibly* save a life.

162 BABYLONIAN TALMUD, SANHEDRIN 72b.

163 BABYLONIAN TALMUD, SANHEDRIN 72a; RASHI (EXODUS 22:1); MISHNEH TORAH, HILCHOS GENEIVAH 9:9. *But see*

An apparent aggressor outside the home presents a much thornier issue because this presumption does not exist; it is impossible to presume untoward motivations from the apparent aggressor's mere presence. The Minchas Chinuch raises the issue, and he tentatively concludes – without actually ruling - that one may err on the side of saving the victim and therefore kill an apparent aggressor.[164] There does not appear to be much else written on the topic until the contemporary responsa took up the issue.

The modern authorities are evenly divided about what a third-party bystander should do when witnessing an apparent aggressor. Rabbi Eliezer Waldenberg writes that when faced with a choice where one of two people will definitely die, and your action or inaction will decide which one lives, the best course to take is inaction; this way you have not actively killed anyone.[165] The same would appear to be true when faced with the choice of killing the apparent aggressor or standing by and allowing the aggressor to kill the victim.[166] Furthermore, Rabbi Kook explicitly writes that the laws of an aggressor only apply when there is clear intent to harm; an apparent aggressor may not be killed.[167]

However, there are also authorities that rule that an apparent aggressor may be killed. Rabbi Shmuel HaLevi Vozner writes that one may kill an apparent aggressor.[168] The rationale is a combination of the fact that the Torah discounts the life of an actual aggressor and commands us to save someone whose life *may* be at stake. Rabbi Meir Lau also permits the killing of an apparent aggressor, and gives a very compelling rationale: we never know with 100% certainty what an aggressor intends.[169] Every aggressor is essentially an apparent aggressor; the certainty with which we regard his motive is just a matter of degree. Therefore, when the Torah permits us to kill an aggressor, it is giving us permission to kill someone who we perceive, to the best of our knowledge, to be intent on harming another.

Based on the various opinions presented, it would appear that Jewish law would permit the killing of an apparent aggressor. The Minchas Chinuch, Rabbi Vozner, and Rabbi Lau all permit it, and the only one who explicitly argues is Rabbi Kook.

7. *Innocent Aggressors*

One of the most wrenching and controversial questions that any legal system must answer is how to deal with an innocent aggressor – an individual who unwittingly and unintentionally is endangering the life of another. Can the innocent aggressor be killed in order to save the life of the threatened individual? Unfortunately this is not merely a theoretical question; it is a question that has particular application to modern times, where our actions may have geographically remote

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RA'AVAD (*ad locum*), who says that the presumption of harm only exist at night.

164 MINCHAS CHINUCH (600:1). He reaches this conclusion by looking to an unrelated decision of the TERUMAS HADESHEN cited in the SIFSEI KOHEN (YOREH DEIAH 157:1). Normally, whenever there is a doubt regarding a matter of life and death, we always err on the side of saving a life. However, the TERUMAS HADESHEN writes that this is not true when it comes to the three cardinal sins for which one has to surrender their life rather than commit: murder, idolatry, and adultery. One would have to forfeit their life even if there is a chance that one may not end up violating these sins. The normal rules of erring on the side of life do not exist in this context. The MINCHAS CHINUCH attempts to connect this ruling to the case of an apparent aggressor: since an *actual* aggressor must forfeit his life, perhaps this is an area where the usual rules of erring on the side of life do not apply. Therefore, even an *apparent* aggressor may be killed.

165 TZITZ ELIEZER (Vol. 15, no. 70).

166 Of course, it is possible to distinguish the two cases. Rabbi Waldenberg's case assumes that one of the two people will definitely die. Here, it is possible that if you do nothing, no one will die.

167 DA'AS KOHEN (YOREH DEI'AH NO. 84).

168 SH"UT SHEVET HALEVI (YOREH DE'AH 5:193).

169 YACHEL YISROEL (no. 66).

consequences. One example will suffice: A is about to dial a cell phone number he believes belongs to his friend. Unbeknownst to him, dialing that number will in fact detonate a bomb, killing many innocent civilians. May bystander B kill A to prevent him from dialing the phone?

The American legal system has developed a substantial body of theoretical literature on the topic of innocent aggressors but unfortunately very little in the way of case law.[170] Some theorists have posited that innocent aggressors may be killed in self-defense.[171] Others argue that it depends on the philosophical underpinnings of self-defense.[172] If self-defense is based on the attacker's moral forfeiture, a non-culpable attacker cannot be said to have forfeited his right to life. Alternatively, if self-defense stems either from a right to protect personal autonomy or a right to resist aggression, then the attacker's moral culpability is irrelevant; the defender may use lethal force against the innocent aggressor. Finally, if the source for self-defense is a choice of lesser evils, then each scenario involving an innocent aggressor would result in a delicate calculation regarding the value of the parties' lives.

In contrast, there is a very robust Jewish responsa literature on the topic of innocent aggressors. The authorities are split almost equally between those would permit and those who would prohibit the killing of an innocent aggressor. The disagreement stems from how to interpret and apply a passage in the Talmud. In *Sanhedrin*, the Talmud discusses the permissibility of killing a fetus that is endangering the mother. It concludes that, "once the [baby's] head has emerged, you may not touch (i.e. harm) it, because we do not push aside one life to save another. But does the baby not have the status of an aggressor (and therefore, like all aggressors, be susceptible to being killed)? The case of the baby is different, because [the mother] is being pursued from heaven."[173] This cryptic passage appears to show that an innocent aggressor may not be killed.[174] However, the two camps argue about how to apply it to other cases.

The camp that prohibits the killing of an innocent aggressor focuses on the similarities between the baby and a standard innocent aggressor. In an early ruling, Rabbi Yisroel Lifshitz explains that the baby is lacking two criteria that would permit the killing of an innocent aggressor: one, the aggressor must be consciously performing an action, and two, the aggressor must be engaged in proscribed behavior.[175] Notably, however, an innocent aggressor *may* be killed even if he does not realize that the

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170 *See, e.g.*, Kimberly Kessler Ferzan, *Self-Defense, Permissions, and the Means Principle: A Reply to Quong,* 8 OHIO ST. J. CRIM. L. 503 (2011); Shlomit Wallerstein, *Justifying the Right to Self-Defense: A Theory of Forced Consequences*, 91 VA. L. REV. 999 (2005*)*; Laurence A. Alexander, *Justification and Innocent Aggressors*, 33 WAYNE L. REV 1177 (1986); Comment, *Applying The Theories Of Justifiable Homicide To Conflicts In The Doctrine Of Self-Defense*, 33 WAYNE L. REV. 1447, 1460 (1986); George Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 ISRAEL L. REV. 367, 380 (1973).

171 Jonathan Quong, *Killing in Self-Defense*, 119 ETHICS 507, 507 (2009).

172 *See, e.g.*, *Applying The Theories Of Justifiable Homicide To Conflicts In The Doctrine Of Self-Defense, supra* note 170, at 1461.

173 BABYLONIAN TALMUD, SANHEDRIN 72b.

174 There are seemingly other sources in addition to this Talmudic passage. The MAHARSHA, commenting on SANHEDRIN 72b, posits that the reason one is required to attempt to warn an aggressor prior to killing him is to ensure that he is not an innocent aggressor. The implication is that one may not kill an innocent aggressor. In addition, the ACHIEZER (Vol. 1, no. 19) proves that you may not kill an innocent aggressor from the fact that he must pay for any damage he causes accidentally. Normally, whenever someone is susceptible to be killed, we forgive the lesser damages. Therefore, from the fact that an innocent aggressor must pay for his damages, it implies that he may not be killed.

175 TIFERES YISROEL (OHALOS 7:6). Rabbi Yitzchak Zilberstein brings a proof that the second criterion is necessary from a ruling of Rabbi Moshe Isserles. Rabbi Isserles rules (in his commentary to SHULCHAN ARUCH CHOSHEN MISHPAT 380:4) that a donkey whose weight threatens to capsize a boat is only considered a form of aggressor if the practice in that area was not to transport animals by boat. We therefore see that the permissibility of a person's behavior is one input into determining the status of an aggressor. *See* CHASHUKEI CHEMED on SANHEDRIN (responsa regarding 72b).

forbidden action he undertakes is endangering others.[176] Others list slightly different criteria for when an innocent aggressor may be killed based on their understanding of the Talmudic statement that the baby may not be killed "because [the mother] is being pursued from heaven." Maimonides, when quoting this passage, substitutes the phrase "because that is the way of the natural world," thus seemingly equating a non-actionable pursuit from heaven with natural behavior.[177] This leads various authors of responsa to write that an innocent aggressor can only be killed when acting out of the ordinary; if A's ordinary behavior is endangering B, then B is being pursued from heaven and A cannot be killed.[178]

The camp that permits the killing of an innocent aggressor understands the Talmudic passage somewhat differently. It is apparent from the Talmud's line of questioning that, but for the fact that the pursuit was "from heaven", a baby *could* be considered a pursuer of the mother and therefore killed. The question, then, is what differentiates a pursuit "from heaven" from a standard pursuit? Rabbi Moshe Feinstein thinks the distinction lies in the fact that the baby and the mother are each endangering one another; since only one can survive, and each has a right to life, they are each considered a pursuer of the other and a bystander may not kill either. The Talmud only throws in the "from heaven" comment to explain why the act of the baby being born is not considered an act of pursuit on the baby's part – because the birth is from heaven.[179] Rabbi Feinstein[180] and other contemporary authorities[181] therefore explicitly write that an innocent aggressor may be killed.[182] This ruling is also the basis for a heart-wrenching responsa written about an episode that occurred during the Holocaust: as the Nazis were searching a house for Jews, a baby in a hidden bunker began to cry. The others in the bunker, afraid that the crying baby would alert the Nazis to their location, put a pillow over its mouth and accidentally suffocated it in the process. The question was posed to Rabbi Chaim Kanievsky if those in the bunker acted properly. He answered that they had in fact acted legally – the crying baby was a pursuer that was not acting "from heaven", and therefore could be killed to save the others.[183]

It can be seen from this discussion that Jewish law certainly allows the killing of an innocent aggressor in certain situations, such as when an individual is performing an illegal act that happens to endanger others. In addition, most authorities would permit the killing of an innocent aggressor when the person is acting unnaturally and endangering others. However, in situations where the innocent aggressor is acting naturally and legally, the major authorities disagree about whether he may be killed. Since many of the leading contemporary authorities fall into the camp permitting it, that appears to be the slightly more mainstream approach.

IV. CONCLUSION

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176 This would explain why Rabbi Moshe Isserles (in his commentary to SHULCHAN ARUCH CHOSHEN MISHPAT 425:1) permits the killing of a forger whose forgeries risk incurring the wrath of the monarch on the community at large. The Vilna Gaon (BIUR HAGRA 425:11) explicitly adds that this applies even if the forger did not intend to endanger anyone.

177 MISHNEH TORAH, HILCHOS ROTZEACH 1:9.

178 *See* TESHUVOS DIVREI RANINAH (NO. 48); SH"UT GE'ONEI BASRA'I (NO. 45).

179 IGGROS MOSHE (CHOSHEN MISHPAT 2:71). *See also* IGGROS MOSHE (YOREH DEI'AH 2:60), where he writes that you may even kill someone who is indirectly endangering the masses if that person will die soon anyway.

180 *Id.*

181 *See, e.g.*, MINCHAS SHLOMO (Vol. 2 133:4); ZIKNEI HA'IR (no. 7).

182 One possible rationale for this may be found in Nachmanides, who writes that one who accidentally violates a Torah (as opposed to Rabbinic) law is still considered a sinner. Since one school of thought (as mentioned *supra* in Part II) thinks that the very basis for the Torah's permission to kill a pursuer is to save the *pursuer* from sinning, perhaps this applies even to an innocent aggressor.

183 MISHNAS PIKUACH NEFESH (no. 45).

There are many practical and theoretical differences between the American and Jewish approaches to a pursuer, seven of which have been highlighted by this paper. But after an in-depth look at how the two legal systems deal with a pursuer, it is interesting to note that they are much more similar than they are different. Both systems permit a victim or bystander to kill a pursuer despite the fact that the two systems have either a murky or disputed understanding of *why* it is permitted. Both systems allow for the liberal use of force in circumstances where it may not seem warranted (i.e. "Stand Your Ground" laws in American law and a home invasion in Jewish law), and yet artificially restrict it in other cases (i.e. a first aggressor in American law or to stop a kidnapping in Jewish law). And perhaps most interestingly, both systems often draw a clear line between attacks that occur inside the home versus outside of it; here, the systems are so similar that it seems plausible that the American system may have been influenced by Torah law.