Human Rights in Judaism

With a Focus on Religious Freedom

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> **Terms:** (1) Human Rights and Judaism. (2) Religious Freedom and Judaism. (3) Charity and Judaism. (4) Halacha/Halakha/Jewish Law. (5) Natural Law. (6) Human Dignity. (7) Freedom of Dissent. (8) Rabbinic Authority (9) Criminal Law in Judaism. (10) Ritual Law in Judaism. (11) Enforcement of Law in Judaism. (12) Education of Children in Judaism. (13) Excommunication in Judaism. (14) Communal Regulation in Judaism. (15) Unenforced Law in Judaism. (16) Exit Rights in Judaism.

In contemporary Western discourses, human rights encompass a broad constellation of material and moral needs and interests that ought to be protected and guaranteed to all people simply by virtue of the fact that they are people.[1] Like many other religious and normative traditions, Judaism and Jewish law recognize and protect many of these currently accepted human rights.[2] Indeed, religious legal traditions tend to be rather good at respecting and enforcing a broad range of *material* human rights and *material* human dignity. As explained below, Judaism recognizes the inherent equality and dignity of all people; respects people's natural liberty and autonomy; protects people's rights to life, bodily integrity, health, property, education, and basic food, housing, and healthcare; and provides important legal rights closely resembling contemporary ideas of due process in the courts. One might even argue that religious traditions tend to do a better job at ensuring many of these basic material human needs than do modern, secular state systems where bureaucracy, political concerns, and commitments to various forms of free-market capitalism tend to leave significant segments of society vulnerable and without basic human needs like adequate food, housing, healthcare, and education.

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[1] For important recent scholarship providing useful overviews of the history, substance, and evolution of Western human rights discourses, *see* Stearns, Peter N., *Human Rights in World History*, New York: Routledge, 2012; Kao, Grace Y., *Grounding Human Rights in a Pluralist World*, Washington: Georgetown University Press, 2011.

[2] For an overview of human rights thinking in Judaism, *see* Konvitz, Milton R., *Judaism and Human Rights*, New York: Norton, 1972; Broyde, Michael J./Witte Jr., John (eds.), *Human Rights in Judaism: Cultural, Religious, and Political Perspectives*, New York: Jason Aronson Publishers, 1998. On human rights in the Islamic and Christian traditions, *see* Witte Jr., John/van der Vyver, Johan D., *Religious Human Rights in Global Perspective*, Grand Rapids: Eerdmans, 1996; Baderin, Mashood et al., *Islam and Human Rights: Advocacy for Social Change in Local Contexts*, New Delhi: Global Media Publications, 2006.

Where religions tend to do a poor job at protecting human rights – and where modern states and non-state organizations tend to better succeed – is in the realm of recognizing and protecting less tangible, inchoate rights, and especially the range of rights associated with freedom of religion, conscience, association, and the right to dissent from prevailing societal norms and values. One of the core human rights widely recognized by numerous states and international conventions is the right to freedom of religion, and more particularly, the right to freely choose to not practice or believe in a particular faith, or any faith at all. The United States Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[3] The Commonwealth Charter of Human Rights, a non-binding aspirational statement of normative commitments adopted by over thirty Commonwealth countries, likewise affirms a commitment to religious freedom as an essential expression of human freedom. It states: "We emphasize the need to promote tolerance, respect, understanding, moderation and religious freedom which are essential to the development of free and democratic societies, and recall that respect for the dignity of all human beings is critical to promoting peace and prosperity."[4] The United Nations' Universal Declaration of Human Rights similarly affirms that "[e]Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."[5]

Religious freedom, however, is not a principle often associated with normative faith systems.[6] A large part of what makes religions what they are is their strong normative claims about correct practice and dogma to the exclusion of all others. Even when religious leaders do acknowledge the possibility that practitioners of other faiths may be believing and worshiping in a way that is essentially legitimate, such tolerance does not typically extend to members of their own religious communities that express dissent and autonomy in belief or practice by rejecting prevailing norms.[7] Religions, especially nomos-centric faiths in which religious virtue is measured principally in terms of one's conformity to a wide-ranging and comprehensive set of behavioral norms, prescribe correct and unacceptable modes of conduct in both public and private life. The scriptures and teachings of such traditions, moreover, typically include a wide range of penalties and consequences – some imposed by temporal religious authorities and others by God – for religious infractions. Often, particularly harsh punishments are prescribed for those who leave the

[3] U.S. Const., amend. 1.
[4] Charter of the Commonwealth, art. IV.
[5] Universal Declaration of Human Rights, art. 18.
[6] *See* Witte Jr., John, "Introduction", in: Witte/van der Vyver, *Religious Human Rights*.
[7] *See* Novak, David, "Religious Human Rights in Judaism," in: Broyde/Witte, *Human Rights in Judaism*, xx–xx.

faith be expressing heretical or blasphemous ideas or who convert out by affirmatively adopting the tenets and practices of another religion.[8]

This article explores the practice of religious freedom within the rabbinic legal tradition.[9] It focuses on the extent to which rabbinic law – despite being a system of religious standards that makes strong prescriptive claims about exclusively corrects practices and beliefs – has recognized the right of Jews to autonomously dissent from settled religious norms without attempting to coerce conformity and compliance with Jewish law. While rabbinic law does make strong assertions about correct religious practice and belief, and unabashedly affirms that Jews are obligated to observe such standards, it generally does not seek to coerce members of societies regulated by Jewish law to actually uphold their purely personal religious obligations. Instead, Jews living in Jewish communities governed by rabbinic law and rabbinic decisors have been left generally free to be as religiously observant or non-observant as they wish. Social or formal legal sanctions were traditionally brought to bear only – though not always – if individual dissent from

[8] *See, e.g.*, Elon, Menachem (ed.), *The Principles of Jewish Law*, Jerusalem: Keter Publishing House, 1975, 529; Affi, Ahmed/Affi, Hassan, *Contemporary Interpretation of Islamic Law*, Leicester: Troubador Publishing, 2014, 1–28; Helmholz, Richard H., *The Spirit of Classical Canon Law*, Athens: University of Georgia Press, 2010, 360–365.

[9] Jewish law (called *halakha* in Hebrew) is the term used to denote the entire subject matter of the Jewish legal system, including public, private, and ritual law. A brief historical review will familiarize the new reader of Jewish law with its history and development. The Pentateuch (the five books of Moses, the Torah) is the historical touchstone document of Jewish law, and according to Jewish legal theory was revealed to Moses at Mount Sinai. The Prophets and Writings, the other two parts of the Hebrew Bible, were written over the next 700 years, and the Jewish canon was closed around the year 300 B.C.E. From the close of the canon until 250 C.E. is referred to as the era of the *tannaim*, the redactors of Jewish law, whose period closed with the editing of the Mishnah by Rabbi Judah the Patriarch. The next five centuries was the epoch in which the two *Talmud*s (Babylonian and Palestinian) were written and edited by scholars called *amoraim* ("those who recount" Jewish law) and *savoraim* ("those who ponder" Jewish law). The Babylonian Talmud is of greater legal significance than the Palestinian Talmud, and is a more complete work. The post-*talmudic* era is conventionally divided into three periods: the era of the *gaonim*, scholars who lived in Babylonia until the mid-eleventh century; the era of the *rishonim* (the early authorities), who lived in North Africa, Spain, Franco-Germany, and Egypt until the end of the fourteenth century; and the *aharonim* (the latter authorities), which encompass all scholars of Jewish law from the fifteenth century up to this era. From the period of the mid-fourteenth century until the early seventeenth century, Jewish law underwent a period of codification, which led to the acceptance of the law code format of Rabbi Joseph Caro, called the *Shulhan Arukh*, as the basis for modern Jewish law. Many significant scholars -- themselves as important as Rabbi Caro in status and authority -- wrote annotations to his code which made the work and its surrounding comments the modern touchstone of Jewish law. The most recent complete edition of the *Shulhan Arukh* (Vilna, 1896) contains no less than 113 separate commentaries on the text of Rabbi Caro. In addition, hundreds of other volumes of commentary have been published as self-standing works, a process that continues to this very day. For a more literary history of Jewish law, see Elon, Menachem, *Jewish Law: History, Principles and Sources*, Philadelphia: Jewish Publication Society, 1993; and for a shorter review of the literary history of Jewish law, *see* Stone, Suzanne Last, "In Pursuit of the Counter-text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory," *Harvard Law Review* 106 (1992), 813–894.

rabbinic laws threatened the well-being and cohesion of society or caused material harm to other individuals. This article uses several examples from various areas of rabbinic law to show that in practice rabbinic jurisprudence creates substantial space for religious dissent and religious freedom even within the confines of rabbinically-regulated religious society.

Equality

Many scholars have noted that Judaism does not really speak in the language of rights – human rights or otherwise – and instead couches norms in the language of duties and obligations.[10] Nevertheless, the norms and values of Jewish law evince a strong commitment many of the core protections typically enshrined in Western human rights discourses, and in some cases, the rabbinic tradition goes even further in its robust respect for human life, health, property, and dignity.

The principle of inherent individual equality, which forms the necessary moral and logical starting point for any complex system of universal human rights, is enshrined in the Mishnah, the foundational second-century text of Jewish law that reflects the sum of rabbinic thinking over the previous several centuries.[11] The Mishnah wonder why in the in the biblical creation narrative God created only a single human being from which the human race would descend; why not create an entire population of human beings from the very beginning? The Mishnah responds: "In order to better ensure peace among people; so that one person will to be able to say to another, 'my father is greater than your father.'"[12] Instead, in the Jewish tradition, every human being ultimately traces his or her lineage to a single common ancestor; nothing makes any one person essentially different or better or more entitled to respect and rights than any other. This basic human equality is expressed in the biblical expression of the Golden Rule, "Love your neighbor as you love yourself," which the second century scholar, Rabbi Akivah affirmed is "a great and important principle of the Torah."[13] Similarly, in explaining why God required an annual census of the Jewish population, R. Yitzchak Arama (d. 1494) states: "They [individual members of the nation] were not like animals or inanimate objects; each one had an importance of his own like a king or priest . . . for they were all equal and individual in personal status."[14]

At the very beginning of the book of Genesis, the Torah affirms that there is something essentially special and significant about human beings, and that this specialness correlates to human beings having certain fundamental rights and duties towards each other.[15] When the Torah describes

[10] *See* Novack, David, "Religious Human Rights in Judaism," 5–6; Broyde, Michael J., "Introduction: Rights and Duties in the Jewish Tradition," in: Daniel Pollack (ed.), *Contrasts in American and Jewish Law*, New York: Yeshiva University Press, 2001, xxiii. See also Glendon, Mary Ann, *Rights Talk: The Impoverishment of Political Discourse*, Michigan: Michigan University Free Press, 1991.
[11] *See supra note* 10.
[12] Mishnah, Sanhedrin 4:5.
[13] Jerusalem Talmud, Nedarim 9:4.
[14] Arama, Yitzchak R., *Akeidas Yitzchak*, Numbers 1:2.
[15] *See* Novack, "Religious Human Rights in Judaism," 12.

God's creation of human beings, it records God as saying, "And God created the human species in his image; in the image of God He created it; male and female He created them."[16] This theme – that human beings were created in the divine image – features prominently in rabbinic law and thought. While scholars have offered myriad explanations of what it might mean to say that people are created "in the image of God," at the very least this description is taken to imply an essential human dignity due and owed every person. Thus, while Rabbi Akivah argued that the Torah commands that people do unto others as they would have done unto themselves, another scholar, a contemporary of Rabbi Akivah named Ben Azzai took this idea even further. According to Ben Azzai, the critical crux of Jewish ethics is not "love your neighbor as you love yourself," since this leaves open the opportunity to treat others poorly as long as one does not demand better treatment for one's self. Instead, Ben Azzai argued, the essential principle of the Torah is encompassed in the phrase, "in the image of God He created it [humanity]."[17] Reciprocity is not sufficient; the Torah demands dignified and respectful treatment of human beings *qua* human beings in light of the basic fact that people reflect the divine. Thus, another Mishnaic sage, Rabbi Tanchumah maintained that mistreatment of people equates to mistreatment of God.[18]

As in Western human rights discourses, the foundational principle of human equality necessarily leads to numerous reciprocal rights and duties that people have towards each other as a consequence of their basic equality.[19] *Halakha*, or Jewish law, contains numerous prescriptive and proscriptive rules that affirm many of the guarantees enshrined in contemporary human rights discourses, and in same instances goes even further in protecting important human concerns. The inviolability of human life is affirmed early on in the Torah, and is reinforced by a strict prohibition on murder.[20] Jewish law goes so far in recognizing other people's inviolable right to life that it recognizes no necessity defense to killing an innocent person; Jewish law prescribes that a Jew must passively allow him or herself to be killed rather than kill another without just cause.[21] Rights to bodily integrity are reinforced by a robust system of tort law compensation, and prohibitions against assault, kidnapping, and rape.

Related to these basic protections of individual life, dignity, bodily integrity, Jewish law also includes a host of protections that help guarantee peoples' basic autonomy. This is especially evident in rabbinic understandings of law and governance in the Jewish tradition. Broadly speaking, important streams of Jewish thought have maintained that restrictions on people's natural liberty and autonomy are binding only with the consent of the governed.[22] Thus, two

[16] Gen 1:27.
[17] *See* Jerusalem Talmud, Nedarim 9:4.
[18] *See* Sifra 4:12.
[19] *See* Pill, Shlomo C., "Jewish Law Antecedents to American Constitutionalism," Mississippi Law Journal 85 (2016), 665–69.
[20] *See* Exodus 20:12.
[21] *See* Babylonian Talmud, Sanhedrin 73a.
[22] *See* Pill, *Jewish Law Antecedents*, 657–65.

important Talmudic sources maintain that majoritarian consent is a key element to the normativity of any rabbinic legislation. One source relates to the initial adoption of new legislation: "No legislation may be imposed on the public unless the majority thereof can conform to it.'"[23] The second rule relates to the continuing validity of enacted legislation: "Any law enacted by a legislative-court, but not accepted by a majority of the public, is no law at all.'"[24] The Talmud provides several of examples of how this principle operated in practice,[25] and Maimonides confirmed this rule in his seminal twelfth century codification of Jewish law, *Mishnah Torah*.[26]

Indeed, rabbinic thought goes so far as to suggest that people's natural liberty and autonomy is so significant that Jews would not even be bound by Jewish law as laid out in the Torah had they not voluntarily consented to do so. The following passage illustrates how restrictions on natural liberty imposed by Torah law cannot be imposed absent willing consent.

> When God revealed Himself to give the Torah to the Jews, He first went to all the nations of the world [to offer them the Torah], but they did not want to accept it. . . . [Each nation asked about the content of the Torah's laws, and upon hearing them, declined to accept them] . . . Finally, God approached the Jews and offered them the Torah, and they opened their mouths and said, "whatever God will command us, we will do and we will listen" [Exodus 24:7].[27]

In other words, the Torah could not be imposed on anyone; only those that accepted it were bound by its rules. Another *Talmudic* passage intimates that had not the Jews willingly consented to be subject to the laws of the Torah, they would likely not be obligated to adhere to those obligations:

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[23] Babylonian Talmud, Avodah Zarah 36a.

[24] Jerusalem Talmud, Avodah Zarah 2:8, 16a.

[25] *See, e.g.*, Babylonian Talmud, Bava Basra 60b (rejecting the proposed legislation that would ban the eating of meat and the drinking of wine as an expression of mourning over the destruction of the Temple in Jerusalem because "we may not pass a law that a majority of the people cannot adhere to"); Babylonian Talmud, Bava Kamma 79b (the Rabbis legislated against raising small domesticated animals, which wander about and damage cultivated fields, in the Land of Israel as a means of encouraging settlement. However, they did not outlaw the domestication of larger animals because to do so would impose upon the public a law that the majority was not willing to comply with).

[26] Maimonides, *Mishnah Torah*, The Laws of *Maamarim* 2:5-6 ("A *beis din* that sees fit to legislate must consider the matter and know beforehand whether or not the majority of the public can abide by the proposed law, for no law can be imposed on the public unless the majority can follow it. If the *beis din* enacted a law believing the majority of the public can conform to it, and afterwards the people resist the measure, and a majority of the public refuses to abide by it, the law is void and the *beis din* may not compel people to adhere to it.").

[27] Sifri, Deutoronomy 33:2 [Hebrew]; *see* also Talmud Bavli, Avodah Zarah 2b; R. David ben Amram HaAdni (d. 14th century), Midrash Hagadol, Deutoronomy 33:2; R. Shimon Hadarshen (d. 13th century), Yalkut Shimoni, Deutoronomy 33:2 [Hebrew].

> Prior to the Sianatic revelation, God suspended a mountain over them [the Jews], and said to them: 'If you accept the Torah, good; but of not this shall be your grave.' Rav Acha bar Yaakov responded, 'If so, this episode provides a strong basis for rejecting our obligation to the Torah!' Rava explained, 'That is true, but they [the Jews] subsequently consented to the Torah's laws without coercion.[28]

Property rights also feature prominently in Jewish law and thought – not only rights to own and dispose of private property,[29] but also numerous duties associated with private property ownership that protect the material needs and interests of the indigent. The Torah prescribes expansive obligations towards the poor, requiring Jews to "not harden your heats and shut your hand against your indigent neighbor. Rather, you shall surely open your hands and lend him whatever he is lacking."[30] Rabbinic law expands on this idea by obligating Jewish communities to establish communal charity and welfare funds to provide food, housing, clothing, healthcare, and other necessities for the poor, all the while emphasizing that the mechanisms for distributing charity must be designed to minimize affronts to recipients' dignity.[31] Providing for people's material needs is regarded as so critical, that Jewish law even prescribes that people seeking food or clothing must be provided these basic necessities without prior investigations into the truth of their claimed needs.[32] The *halakha* further prescribes special duties of care to widows, orphans, immigrants and non-citizens, and other vulnerable members of society;[33] contains expansive provisions protecting the rights of workers to receive their wages in a timely manner;[34] and includes protections for debtors.[35] Rabbinic law also instituted expansive rights to education, imposing on Jewish societies the duty to ensure that their members receive adequate religious and vocational educations in order to become self-sustaining and contributing members of the community.

This broad respect for human beings as made in the image of God leads the *halakha* to embrace numerous other rights and protections. Jewish law, for instance, prescribes a broad range of procedural safeguards in curt processes to help ensure that defendants accused of crimes and litigants in civil cases are afforded broad access to due process.[36] Judicial proceedings cannot take place in the absence of the defendant or his or her representative; courts must be presided over by competent, impartial judges; testimony is only accepted from witnesses who have no interest in

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[28] Babylonian Talmud, Shabbos 86A.
[29] *See, e.g.*, Babylonian Talmud, Bava Basra 100a.
[30] Deut 15:7-8.
[31] *See* Sefer Hachinuch, no. 66; Shulkhan Arukh, Yoreh Deah 247:1-259:6.
[32] *See* Shulkhan Arukh, Yoreh Deah 251:10.
[33] *See* Exod 22:20–23;
[34] *See generally* Maimonides, *Mishnah Torah*, The Laws of Hiring Workers.
[35] *See* Deut 24:10-13.
[36] *See generally* Quit, Emanuel, *A Restatement of Rabbinic Civil Law: Vol. 1 Laws of Judges and Laws of Evidence*, Jerusalem: Gefen Books, 1990.

the outcome of a case, and who otherwise are not suspected of perjury; all parties in court are afforded the opportunity to present evidence and respond to and impeach the claims made against them; and the courts must help litigants unable to organize their own claims and defenses do so. Jewish law also maintains a strong presumption of innocence in criminal cases. Criminal convictions can only be obtained by a majority vote of at least two judges; convicted defendants are given the opportunity to reopen their cases upon the discovery of new claims or evidence until sentences are carried out.[37]

This brief survey suggests that Judaism and Jewish law embrace many of the kinds of material human rights typically associated with contemporary liberal rights discourses. However, the Jewish approach to less tangible human rights – especially rights to freedom of religious practice and conscience, and rights of free expression, association, and dissent – is more complicated. The following sections trace the development of Jewish law thinking and practice on issues related to the right to religious freedom and self-expression from biblical roots through rabbinic interpretation and application. The upshot of this millenia-long story of Jewish legal practice, however, is that while Torah and rabbinic writings seem to suggest strict limits on the rights of Jews to reject, violate, and dissent from normative Jewish law and practice, this was true more in abstract theory than in actual practice. On the ground, when rabbinic authorities actually used judicial and political power to enforce *halakha*, they rarely sought to actually compel Jews to comply with Jewish religious law because it was religiously obligatory. Instead, the rabbis regularly used force to punish conduct that caused or threatened material harm to other people or communities, whether or not such behavior technically violated any Torah norms. Likewise, rabbinic authorities tended to not use force to punish private violations of ritual *halakha*, unless such misconduct also affected the material interests of other people or the community. Put differently, rabbinic applications of Jewish law tended to carve out a substantial scope for individual religious dissent; violations of ritual law were not punished *per se*, but were corrected by coercive force only when they also impacted the more mundane, material needs and interests of other people or the Jewish community.

Torah's Law

The Torah – the first five books of the Hebrew Bible – comprises the foundational written text of Jewish law. According to rabbinic tradition, the Torah is the written record of God's speech to Moses over the course of the Jews' forty-year sojourn in the wilderness en route from Egypt to Canaan. This text includes the background origin story of creation, and the Jews descent into slavery and ultimate exodus from Egypt; narratives of events that took place during their travels to Canaan; and laws – many, many rules and principles that form the basis for normative Jewish religious practice.

[37] *See id*.

Some of the Torah's laws are, as may be expected from a scriptural text, ritualistic in nature. Among its many laws, the Torah prescribes the observance of the Sabbath by abstaining from work;[38] prohibits idolatry;[39] regulates the offering of animal sacrifices to God;[40] and establishes holidays.[41] Aside from these traditionally "religious" norms, the Torah also includes numerous civic regulations that closely resemble the kinds of standards one might expect to find in any ordered society. The Torah prohibits murder, theft, and kidnapping;[42] prescribes standards of liability for tort damages by and against persons and property;[43] regulates inheritance and loans;[44] and describes government institutions and formulates standards of judicial procedure.[45] The Torah prescribes various judicially-enforced punishments for the violation of both kinds of norms. Thus, alongside prescribed death penalties for murder and kidnaping,[46] and financial liability for theft and torts,[47] blasphemy, performing work on the Sabbath, and idolatry are also all capital offenses.[48] Likewise, the ritual prohibitions against shaving with a straight razor, eating sanctified food while in a state of ritual impurity, and eating non-kosher food are all punishable by court-administered lashes.[49]

The bifurcation of Jewish legal precepts into "ritual" and "civic" norms has a long tradition in rabbinic thought.[50] Rabbinic thought distinguishes between public and private offenses, between legal violations that only impact one's self and those actions that also affect other individuals or the public at large. The rabbis termed the first kind of norms, laws that pertaining to the relationship "between Man and God," while the second type are laws relating to affairs "between Man and his fellow."[51] According to Maimonides, laws governing the relationship between Man and God include "every commandment, whether it be a prescription or a prohibition, whose purpose is to bring about the achievement of a certain moral quality or of an opinion or the rightness of actions, which only concerns the individual himself and his becoming more perfect."[52] These laws include things like the obligation to pray; the range of obligations and prohibitions related to the Jewish Sabbath, such as reciting the *kiddush* blessing over a cup of wine, eating three

[38] *See* Exod 20:8-10.
[39] *See* Exod 20:2-5.
[40] *See* Lev 1:1-4:35.
[41] *See* Lev 23:1-44.
[42] *See* Exod 20:12, 21:16; Lev 19:11.
[43] *See* Exod 21:22-36.
[44] *See* Num 27:8-11; Deut 24:10-13.
[45] *See* Deut16:18-20, 17:8-20.
[46] *See* Exod 21:12 (murder); Exod 21:16 (kidnaping).
[47] *See* Exod 21:22-36; Lev 5:23.
[48] *See* Lev 24:16, 20:2; Exod 31:15.
[49] *See* Lev 11:3-8, 19:27; 22:4.
[50] *See* Sperber, Daniel, *On the Relationship of Mitzvot between Man and His Neighbor and Man and His Maker*, Jerusalem: Urim Publications, 2014, 13.
[51] *See* Maimonides, *The Guide for the Perplexed* III:35.
[52] Maimonides, *The Guide for the Perplexed* III:35.

festive meals, and refraining from the thirty-nine kinds of prohibited work; observance of Jewish holidays, including eating *matzah* on Passover, and taking the Four Species during *Succot*; and the laws of kosher food. Laws that pertain to peoples' relationships with each other, by contrast, are those that prohibit various kinds of injury and violence; order and regulate business transactions, such as loans, sales, leases; establish rules of inheritance; establish conditions of valid contracts; regulate land use and relations between neighbors; and provide remedies and punishments for violations of these rules.[53]

As explained below, rabbinic law has often treated interpersonal offenses as more severe than ritual violations, and often finds greater legal flexibility in those areas of the law that pertain to Jews' religious obligations to God than in areas of the law that govern relations and proper conduct between human beings. The Mishnah, for instance, teaches that Yom Kippur, the Day of Atonement on which people's sins are forgiven through prayer and fasting, can only atone for a person's offenses against God. With respect to "sins between a person and his fellow," however, "Yom Kippur does not atone, unless one has appeased his fellow [who he wronged]."[54] Additionally, the secondary rules of decision that guide rabbinic adjudication create substantial leeway for decisors to modify normative standards governing ritual matters pertaining to man's relationship with God in response to serious economic, health, emotional, political, and communal needs.[55] God is understood to be accommodating and willing to compromise on His own interest, so to speak. This is not the case with respect to Jewish laws governing interpersonal affairs, however. In such matters, rabbinic decision makers are warned against taking liberties with the rights and obligations of human beings. Any legal leniency offered to one party entails a corresponding legally unjustified burden upon the other party, which cannot be imposed without his or her consent.[56]

Mishnah and Talmud

While the text of the Torah provides the broad outlines of a legal system, rabbinic thinking has always maintained that Jewish law does not begin or end with scripture. The Torah itself indicates

[53] *See* Maimonides, *The Guide for the Perplexed* III:35.
[54] Mishnah, Yoma 8:9. *See also* Maimonides, *Mishnah Torah*, The Laws of Repentance 2:11-12 ("(11) Repentance and Yom Kippur only atone for transgressions between man and God, such as one who eats a forbidden food, or has a forbidden sexual relationship. But transgressions between man and his fellow, such as hurting his fellow, or cursing his fellow, or stealing from him, those are not forgiven until he gives his fellow what he owes him, and [his fellow] is appeased. (12) Even if he returned the money he owed, he must appease his fellow and ask him to forgive him. Even if he only perturbed his fellow verbally, he must make amends and meet with him until he forgives him.")
[55] *See, e.g.*, R. Moshe Feinstein, Igros Moshe: Orach Chaim 5:29; R. Shabtai Hakoehn, Kitzur B'hanhagas Issur V'hetter § 3; R. Yechiel Michel Epstein, Arukh Hashulkhan: Yoreh Deah 242:66.
[56] *See* Be'ur Hagrah *to* Shulkhan Arukh, Orach Chaim 331:3.

that the rabbis – the personification of "the judge that will be in those days"[57] – have wide latitude to enrich the landscape of Jewish law through the interpretation and application of biblical texts, and through the legislation of additional – "rabbinic" rather than "biblical" – laws.[58] The rabbis of the Mishnaic and Talmudic eras, from approximately 150 B.C. until around 500 A.D., exercised substantial discretion in interpreting and applying biblical rules, and in legislating additional legal obligations and prohibitions.

In some cases, the Talmudic rabbis legislated new religious duties and restrictions designed to protect against inadvertent violations of biblical rules.[59] The Torah, for instance prohibits the consumption of mixtures of milk and meat.[60] While this stricture was understood to include only mammal meat – cows, deer, sheep, etc. – the rabbis legislated a broader prohibition against the consumption of mixtures of milk and poultry as well on the theory that meat and poultry are so similar that unless they enacted a blanket prohibition on the consumption of all animal flesh with milk, people would accidentally violate the biblical stricture.[61]

In other instances, the rabbis used various interpretive techniques to soften the sometimes-harsh sting of biblical rules. Thus, while the Torah prescribes the death penalty for an array of different ritual and civil offenses, the rabbis rigorously defined the elements of particular offenses, and imposed numerous procedural and evidentiary hurdles that made the obligatory imposition of Torah-mandated capital punishment all but impossible.[62] Thus, Rabbi Akivah, an important second century rabbi declared that had he been head of the Sanhedrin, the rabbinic High Court in Jerusalem, he would have insured that the Court never executed anyone by using his judicial discretion to impose numerous procedural and evidentiary hurdles so as to ensure that no defendant would be found guilty of murder.[63] In a similar vein, the Talmud describes how late in the Second Temple period, the head of the Sanhedrin, the rabbinic High Court that had primary jurisdiction over capital cases, elected to remove the Court from its proper seat in the temple courtyard to instead assemble in one of the city's nearby shops. The Talmud explains that that was a conscious decision made in order to enable the Court to avoid mandatory jurisdiction over capital cases under Torah law, which could only be exercised when the Court was sitting in the temple courtyard.[64]

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[57] Deut 17:9. *See* Berger, Michael, *Rabbinic Authority*, New York et al.: Oxford University Press, 1998, 31–40.
[58] *See* Maimonides, *Mishnah Torah,* The Laws of Maamrim 1:1-2:3.
[59] *See* Elon, "Jewish Law," 490.
[60] *See* Exod 23:19.
[61] *See* Babylonian Talmud, Chullin 113a.
[62] *See generally*, Mishnah, Sanhedrin ch. 1-9.
[63] *See* Babylonian Talmud, Makkot 7a.
[64] *See* Babylonian Talmud, Avodah Zarah 8b.

While the rabbis chose to limit the practical and legal applicability and enforceability of many of the Torah's civil and religious norms, this did not mean that they left society without enforceable standards of behavior. At the same time that they limited the mandatory applicability of Torah laws, the rabbis also expanded their authority to exercise discretion in defining and punishing what they regarded as societal harms in the manner they saw fit. The Talmud thus prescribed that "we may . . . punish not in accordance with the law,"[65] by which the rabbis meant, they had the authority to use their own discretion to take such measures as they deemed necessary in order to insure good social order.[66] This power went so far as to permit the rabbis to punish offenses not actually proscribed by the Torah, and to do so in ways and in accordance with procedures not sanctioned by formal Jewish law, so long as the rabbis regarded such measures as necessary for the preservation of law and order.[67]

The Talmudic rabbis also contemplated the coercive enforcement of purely ritual norms, at least in theory. Although the Talmud imposes high evidentiary burdens of proof and prescribed burdensome procedures that must be followed before a defendant can be convicted of a capital offense or be subjected to other forms of corporal or financial punishment, it recognizes that properly constituted and authorized rabbinical courts, or *battei din*, may punish infractions of religious law, whether such offenses have harmed others or pertain only to personal ritual obligations.[68] For instance, the Talmud prescribes the use of lashes in order to compel recalcitrant Jews to fulfill the ritual obligations to take up the Four Species and to sit in a *succah* hut during the holiday of Succot.[69] In fact, the Talmud states explicitly that "just as a person can be punished for violating a negative prohibition, he can be compelled to fulfill a positive duty," and it makes no difference whether that obligation is a financial duty that impacts others or a purely ritual commandment.[70]

Examining rabbinic texts of the Talmudic period, however, it is far from clear that what was advocated in theory was ever implemented in practice. Talmudic sources contain numerous accounts of judicial law enforcement by the rabbis. In none of these instances, however, do we find the rabbis following the procedures, processes, and evidentiary standards they acknowledged to be critical components of the Torah's comprehensive approach to Jewish law.[71] Nor do we find cases in which the rabbis used formally sanctioned Torah law processes to coerce people to comply with ritual obligations, or to punish people for violations of their private religious duties. Instead, the Talmud is replete with instances of the rabbis using their extra-legal authority and judicial

[65] *See* Babylonian Talmud, Sanherdrin 46a.
[66] *See* Shulkhan Arukh, Chochen Mishpat 2.
[67] *See* Elon, "Jewish Law," 533–36.
[68] *See* Arbah Turim, Choshen Mishpat 425.
[69] *See* Ketubot 86a-b.
[70] *See* Ketubot 86a.
[71] *See* Saiman, Chaim N., *Halakha: The Rabbinic Idea of Law*, ch. 2-3 (forthcoming 2018).

power to flexibly enforce standards of behavior they deemed necessary for the proper civic functioning of Jewish society.

The Question of Authority

Rabbinic authority to define and shape the practical expression of Jewish law in this discretionary way was not and is not unrestrained. One of the most significant limitations on rabbinic discretion over the interpretation and application of the law is determination of which scholars and jurists actually qualify to fill the office of "Rabbi" with the interpretive and legislative authority this role implies. In biblical through early Talmudic times, the institution of *semikha*, a kind of ordination, was the chief method by which formal discretionary rabbinic authority to interpret, apply, and thus shape Jewish law was delineated.[72] In rabbinic tradition, the institution of *semikha* began when Moses laid his hands on the head of Joshua to signal a formal grant of judicial authority to the person that would eventually succeed him at the leader of the Children of Israel. Subsequently, *semikha* was given by teachers – who had themselves been ordained by their own teachers in an unbroken chain stretching back to Moses and Joshua – to their students.[73] Scholars who possessed *semikha* were authorized to exercise the wide range of discretionary rabbinic powers discussed above, while non-ordained scholars lacked this right.[74]

At some point before the completion of the Talmud around 500 B.C., the institution of *semikha* lapsed. This was likely a result of Roman persecutions of the Jews living in Judea following the Jews' failed Bar Kochba Revolt in the early second century. Numerous ordained rabbis were executed during this time, teaching Torah was proscribed by imperial rule on pain of death, and the remaining Jews were exiled from Judea. Since *semikha* could only be conferred by a scholar who been ordained himself, and since *semikha* could only be conferred in the biblical Land of Israel, the combination of exile, the killing of scholars, and the prohibition of teaching Torah led to the last ordained rabbis dying out without being able to continue the chain of *semikha* by ordaining their students.[75] From this point onward, the rabbis lacked any formal authority to enforce biblical law.[76]

The loss of formal *semikha* did not mean that rabbis could no longer enforce the law, however. In rabbinic constructions, the last generation of ordained rabbis enacted legislation authorizing their non-ordained scholarly successors to exercise judicial powers over those kinds of cases deemed necessary to ensure the proper functioning of society. The Talmudic formulation of this

[72] *See* Arbah Turim, Choshen Mishpat 1; Elon, "The Principles of Jewish Law," 563.
[73] *See* Hecht, Neil S. et. al. (eds.), *An Introduction to the History and Sources of Jewish Law*, Oxford: Oxford University Press, 1996, 124–127.
[74] *See* Babyloian Talmud, Bava Kamma 84a-b; Elon, "The Principles of Jewish Law," 563.
[75] *See generally* R Levi ibn Haviv, Kuntres Ha'semikhah.
[76] *See* Arbah Turim, Choshen Mishat 1.

authorization states that it gave non-ordained rabbis the legal power to hear and decide litigious matters that both occur commonly and also involve financial loss.[77] In truth, however, this grant of judicial authority has been understood to be far broader than that, and had been held to include the power to administer divorces and conversions – both of which must be overseen by a properly constituted court – as well as the license to take extra-legal measures necessary to preserve social order within Jewish communities.[78]

Critically, rabbinic practice and understandings of Jewish law may be characterized by the exercise of discretion. The formally ordained Talmudic rabbis made very conscious choices about whether to characterize specific norms at "ritualistic" or "interpersonal"; about which areas of biblical Jewish law they would use judicial powers enforce; and used interpretive and other devices to avoid enforcing the letter of the law when they thought that doing so would be socially detrimental. These rabbis also made choices about how and when to exercise their power to set and enforce extra-legal standards of behavior. Moreover, the last generation of formally ordained rabbis made a choice to authorize later non-ordained scholars to adjudicate cases under Jewish law, and also made choices about which kinds of cases those non-ordained judges would be empowered to hear. Additionally, the non-ordained rabbis of the post-Talmudic era made further choices about what extra-legal measures they would take to enforce norms and standards they deemed necessary for the well-being and proper functioning of Jewish societies.

In all of these many choices made by Jewish law authorities about how to enforce Jewish legal norms in practice, we find that time and again the rabbis chose to enforce Jewish law almost exclusively in cases concerning civil law, or "matters between man and his fellow." The observance of ritual law, however, was rarely coerced, and even when it was, enforcement was typically associated with either the fact that a violation of ritual law somehow threatened the physical well-being of the Jewish community, or the idea that the community could ostracize and distance itself from violators of religious norms as an expression of the community's own associational rights.

Principles of Rabbinic Law Enforcement

A broad survey of rabbinic legal writings and practice over the centuries suggests the existence of a three-tiered framework for the discretionary enforcement of Jewish law. First, throughout Jewish legal history, rabbinic authorities have responded to actions that caused tangible harm to others or threatened the physical well-being of Jewish communities by exercising both legal and extra-legal judicial authority to punish and deter such behavior. Critically, these sanctions, which could range from civil liability, criminal fines, imprisonment, and various kinds of corporal punishment,

[77] *See* Babylonian Talmud, Bava Kamma 84a-b.
[78] *See* Beit Yosef, Choshen Mishpat 1:4 (s.v. *u'maskinan*).

depending on the time, place, and scope of the rabbis' law enforcement power under local non-Jewish law were designed to coerce compliance with appropriate societal norms.

Second, when conduct fell short of posing tangible threats to other people or to the community, but undercut the religious foundations and commitments that constituted the community as a *Jewish* community, rabbinic authorities typically responded by utilizing social sanctions that effectively asserted the community's right to not associate with individuals that did not share its mission and values. Such measures ranged from social ostracization, the denial of various rights and privileges associated with membership in the Jewish community, exclusion from participation in communal functions, economic boycotts, and similar steps. Importantly, when dealing with such behavior, rabbinic law enforcement did not aim to compel compliance with Jewish law norms. Such religious offenders were left largely free to violate Jewish law; they were simply prevented from maintaining the paradoxical position of being members in good standing of the Jewish community while at the same time flagrantly and actively rejecting that same community's basic values and commitments.

Third, and perhaps most surprisingly, rabbinic authorities have traditionally taken a rather non-interventionist approach to enforcing strictly religious or ritualistic Jewish law norms and values. While public and flagrant violations of some kinds of religious standards could undermine Jewish communal cohesion, and were addressed with social sanctions, private ritual offenses that did not tangibly harm others or impact the community as a whole almost never formally punished. Even when they had the police power to do so, rabbinic authorities rarely tried to compel individual Jews to comply with what they regarded as appropriate religious standards of behavior in ritual matters. Nor were rabbinic judges zealous in applying social sanctions to exclude from the community individuals whose religious offenses remained private and personal rather than publicly flagrant. As shepherds of their flocks, rabbis did of course make judgments and determinations about appropriate public and private religious behavior, and routinely identified and criticized misconduct when it occurred and when they deemed it appropriate and useful to do so. However, the use of coercive measures designed to compel religious compliance or exclude ritually lax Jews from the Jewish community were the exception rather than the rule in the rabbinic enforcement of Jewish law.

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

and was addressed with a variety of other kinds of sanctions designed to preserve the character and constitution of Jewish religious communities.

Before turning to some specific examples of how this framework for rabbinic law enforcement worked in practice, it is important to appreciate what exactly it was that this model of religious enforcement did. In deciding how and when to use various means to enforce Jewish law and other societal norms, rabbinic authorities made a conscious decision to – for the most part – not seek to compel compliance with Jewish religious norms. The exception to this was when religious dissent was public, flagrant, and undermined the religious constitution of the community, in which case the violator was excluded from communal privileges as an expression of the community's associational rights, as well as in cases were ritual violations caused material harms to others or to the community, in which case it was not really religious but civic standards of good behavior that were being imposed. In effect, then, rabbinic enforcement of Jewish law in practice tended to carve out significant room for the free exercise of religion. Rabbinic authorities did not use legal or extra-legal means to force religious dissenters into compliance. So long as a person's ritual (mis)behavior did not harm others, that person remained largely free – at least in a legal sense – to do as he or she wished. Private religious misconduct could and often did lead to strained relations with one's more traditionally observant friends and neighbors, and some kinds of public flouting of the community's common religious standards and ethos could lead to one's being excluded from the community. However, such informal social sanctions and secondary consequences of the community's decision to not associate with those who reject its values did not fundamentally alter the basic position that sinners were free to sin, and that the rabbis would not typically force normative religious observance, even when they had the power to do so.

Rabbinic Law Enforcement as Protecting Jewish Civil Society

Coercive rabbinic law enforcement was at its apex when it faced what legal systems typically classify as criminal behavior. Beginning in the biblical era, continuing through Talmudic times, and throughout the medieval and early modern periods when Jewish communities in both Christian and Muslim lands often enjoyed a measure of political autonomy and delegations of police powers by local rulers, rabbinic authorities have been very active in regulating behavior that they viewed as impacting the material wellbeing of other people or the Jewish community, and often zealously enforced these standards using a variety of coercive means designed to compel compliance. Murderers were often killed or maimed; assailants were whipped, killed, or had limbs amputated, depending on the severity and frequency of their misbehavior; thieves, who are only subject of civil liability under formal Torah law, were fined, whipped, imprisoned, and sometimes killed; wife-beaters were whipped or maimed; and those found to be in contempt of court faced a range of civil and corporal penalties designed to compel compliance and warn off future refusals to

comply with judicial directives.[79] In all these cases, rabbinic judges and law enforcement officials demurred from enforcing formal Torah law using proper judicial and evidentiary procedures; they developed flexible and pragmatic methods for insuring that behavior that harmed others was punished, discouraged, and remedied with little regard for the enforcement of religious standards as such.

One of the most common and severely punished criminal offenses in medieval Jewish communities was *mesira*, or the act of informing on fellow Jews to the non-Jewish authorities.[80] The *moser*, or "informer," was generally recognized as posing a grave threat to both individual Jews and to the Jewish community as a whole.[81] A disgruntled Jew's informing on other Jews or the community to non-Jewish authorities for real or contrived offenses could lead to the accused being imprisoned, tortured, or killed, and to the community facing fines, progroms and massacres, expulsions, and other consequences. Rabbinic authorities thus often classified the *moser* as a *rodef*, Jewish legal term that literally means "pursuer" and is used to refer to someone actively trying to kill, rape, or otherwise seriously harm others.[82] Talmudic law prescribes that the *rodef* must be killed by anyone in a position to do so in order to rescue his intended victims from harm,[83] and this reasoning was applied to informers in Jewish communities throughout the middle ages and early modern periods.[84] Informers were regularly tried, convicted, and executed by communal and rabbinic authorities empowered to do so.[85] Even when local communities lacked a grant of such police powers from local rulers, informers were made to "disappear" in order to protect their potential individual and communal victims. In at least one notable case, a particularly dangerous informer was killed in the middle of the local synagogue during prayers on the Jewish high holy day of Yom Kippur.[86] Of course, such actions – as well as the less extreme forms of dealing with informers – did not meet the procedural and evidentiary tests of formal Torah law, and that rabbinic judges or communal authorities that ordered such measures to deal with informers did not possess the *semikha*-ordination required to try capital cases. Nevertheless, rabbinic authorities did choose to take measures to protect the community and its members from harmful behavior by others under their jurisdiction.[87]

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[79] *See generally* Schreiber, Aaron M., *Jewish Law Decision Making: A Study Through Time*, Philadelphia: Temple University Press, 1979, 375–422.
[80] *See* Broyde, Michael J., "Informing on Others to a Just Government: A Jewish Law View," *The Journal of Halacha and Contemporary Society* 41 (2002), 5–49.
[81] See Babylonian Talmud, Bava Kama 116b, 117a-b; Babylonian Talmud, Gittin 7a.
[82] *See* Resp. Rosh 17:1.
[83] *See* Babylonian Talmud, Sanhedrin 73a.
[84] *See* Shulkhan Arukh 388:1-16.
[85] *See* Schreiber, *Jewish Law*, 379–84.
[86] *See* Resp. Zichron Yehudah, no. 75; Resp. Eidut B'yehosef 1:34.
[87] *See, e.g.*, Resp. Rosh 17:1.

This all suggests a very important point: The rabbis' imposition and enforcement of criminal laws was not premised on any desire or interest to uphold Jewish religious law. In meting out penalties for theft, assault, murder, rape, and other offenses, the rabbis were not really interested in upholding the law of the Torah or actualizing some religious ideal of God's rule in society. Indeed, in many cases, rabbinic decisors made clear that such law enforcement activities were not premised on any prerogative to uphold the religious standards of Jewish law.[88] What the rabbis were interested in – and this is important to highlight – was the effective administration of civil justice and law and order in the Jewish communities and societies in which they functioned. Put differently, rabbinic judges cared little for enforcing Jewish religious norms and values on society. They were primarily – if perhaps not exclusively – interested in using the judicial, police, and law enforcement powers they were allowed to exercise under local state laws and under Jewish law, to prescribe and enforce standards of behavior that insured that society functioned well, productively, safely, and predictably for people. At times, of course, religious and civic norms overlapped; the rabbis did not refuse to prosecute and punish murderers merely because murder also happened to be a religious prohibition proscribed by the Torah. But when the rabbis executed or imprisoned murderers, they did not do so under formal Torah law. They did so because murders posed a threat to the life and wellbeing of other members of the community and to the foundations of good civil society as a whole.

Rabbinic Law Enforcement in Civil Matters: A Question of Consent

In the realm of civil law – torts, contract obligations, property rights, and the like – rabbis drew distinctions between what they regarded as interpersonal and ritual duties related to money and property. Like in the criminal law context, rabbinic judges often went well beyond the bounds of formal Jewish law in order to impose compensatory and punitive liability on parties that harmed others through theft, torts, nonpayment of contracts; employment injustices; fiduciary malfeasance; and similar offenses.[89] At the same time, rabbinic authorities also declined to punish and enforce a range of Torah law violations pertaining to financial matters because they regarded such misconduct as essentially religious and ritualistic rather than interpersonal in nature. In the absence of a real harm to another party, the rabbis declined to enforce what they viewed as basically religious norms regulating economic life.

Civil law offenses against other people are also religiously prohibited in the Jewish tradition. One not only has to compensate others for tortuously harming them; it is a sin to do so.[90] Likewise,

[88] *See* Prisha *to* Choshen Mishpat 425:5.
[89] *See* Schreiber, *Jewish Law*, 401–405.
[90] *See* Babylonian Talmud, Bava Kamma 51a (referring to the act of creating a dangerous obstacle in the public domain as a sin). *See also* Babylonian Talmud, Kiddushin 42b; Maimonides, *Mishnah Torah,* the Laws of Property Torts 5:1) ("It is forbidden to directly damage or cause damage to another's property."); Resp. Chatam Sofer, Yoreh Deah no. 241.

Jewish law prescribes upholding one's contractual promises as a ritual duty,[91] and prohibits certain kinds of financial transactions on a religious level, even if all parties to the deal agree to the terms.[92] Nevertheless, it is important to appreciate that in rabbinic law, it is not the fact that a particular civil wrong is prohibited by the Torah that triggers legal enforcement of the parties' relative rights and duties. Instead, even when a religious sin has been committed, it is the existence of a nonconsensual wrong to another party that induces rabbinic courts to act. There are numerous religious offenses that involve civil wrongs to others that rabbinic authorities have regarded as nonjusticiable because, despite the existence of a legal violation, there is no genuine victim to whom the defendant owes a compensatory duty.

A prime example of this phenomenon is rabbinic treatment of the Jewish law prohibition on *ribbis*, or usury. The Torah, prohibits borrowing and lending money on interest.[93] All parties involved in these kinds of forbidden usurious transactions – creditors, debtors, co-signers, lawyers, and witnesses – are all regarded as committing very serious sins.[94] Indeed, Jewish law views interest payments as ill-gotten gains; despite the fact that borrowers are usually more than willing to make interest payments in order to secure funds, many rabbinic authorities liken money paid as interest to stolen property.[95] Thus, Jewish law prescribes that creditors that have violated the *ribbis* prohibition by taking interest on loans are obligated to return these funds to the debtors that paid them.[96]

There is a debate among the Talmudic rabbis about whether and under what conditions rabbinical courts should compel creditors to return interest payments to borrowers. In large part, this issue hinges on whether the prohibition on *ribbis* is classified as a ritual or civil law matter, on whether this restriction pertains to Man's relationship with God or Man's relationship with other human beings. R. Yochanan rules that rabbinic courts cannot compel lenders to return interest payments to borrowers, seemingly because he views the prohibition on usury as a ritual matter between Man and God. On this view, creditors must contend with God over their usurious lending practices, and returning the funds to the debtor would do little to obviate the underlying sin. Alternatively, R. Yochanan may think that because *ribbis* is a ritual sin against God, the creditor should voluntarily return the interest out of regard for God, and not due to judicial compulsion. R. Elazar, by contrast, prescribes that the repayment of *ribbis* is subject to judicial coercion because the Torah's regulation of interest payments is fundamentally a civil matter between human beings. Since the prohibition is designed to regulate the relationships and exchanges of money between

[91] *See* Babylonian Talmud, Ketubot 86a.
[92] *See* Babylonian Talmud, Makkot 3b (price gauging).
[93] *See* Lev 25:36–37.
[94] *See* Babylonian Talmud, Bava Metziah 75b.
[95] *See* Arbah Turim, Yoreh Deah 160.
[96] *See* Shulkhan Arukh, Yoreh Deah 161:5.

creditors and debtors, rabbinic courts are empowered to extract ill-gotten interest payments from lenders and return the funds to their rightful owners.[97]

Post-Talmudic authorities adopted the view of R. Elazar, and have ruled that courts should compel creditors to repay interest received from borrowers.[98]

At first glance this may appear to undermine the central claim laid out in this paper that rabbinic legal practice has largely declined to actively enforce ritual law or compel members of the Jewish community to comply with accepted standards of religious behavior in matters pertaining exclusively to the relationship between Man and God. Indeed, forcibly extracting interest voluntarily paid by a borrower to a lender pursuant to a loan agreement willingly executed by both parties suggests that even in the absence of the lender's causing any harm to the debtor, he can be compelled to uphold his religious obligation to return his wrongfully gotten *ribbis*. However, rabbinic authorities have applied an important qualification to the rule that courts force lenders to return interest payments received from their debtors. Specifically, court action to compel a creditor's divestment from *ribbis* funds is only appropriate in cases where the borrower brings an action to recover those funds.[99] When a borrower fails to bring suit against the lender over the illegal *ribbis*, however, he is deemed to have waived his right to those funds and forgiven the lender's improper collection of interest on the loan. In such cases, while the creditor may have a strictly religious duty to return the funds, rabbinic courts have not generally ordered or forced him to do so.[100] Indeed, some authorities go so far as to suggest that once the debtor has forgiven the interest payments, the lender does not have any kind of obligation to divest from the *ribbis*. Such cases are no different than a victim waiving his or her right to collect compensation from a tortfeasor or thief, both of whom would have no legal or religious obligation to pay for their wrongful actions due to the victim's having forgiven their liability.[101]

In other words, while in principle rabbinic law does provide for compelling a creditor to comply with his religious duty to repay collected interest, it does so only in cases where the debtor who made these interest payments regards himself as having been wronged by the lender's conduct and seeks restitution. Absent claims to recover for this interpersonal harm, however, rabbinic authorities have been unwilling to compel lenders to repay *ribbis*, despite the acknowledged fact that collecting and retaining interest payments is a very serious sin.

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[97] *See* Babylonian Talmud, Bava Metzia 61b-62a.
[98] *See* Shulkhan Arukh, Yoreh Deah 161:5.
[99] *See* Magen Avraham, Yoreh Deah 161:14.
[100] *See* Pischei Teshuva *to* Shulkhan Arukh, Choshen Mishpat 161:5.
[101] *See id. See generally*, Reisman, Yisroel, *The Laws of Ribbis: The Laws of Interest and their Application to Everyday Life and Business*, Brooklyn, N.Y.: Mesorah, 1995, 344-54.

Bound up with pragmatic rabbinic permissiveness with respect to enforcement of the Torah prohibition against interest lending is an important shift in rabbinic thinking about *ribbis* that moved this stricture from the sphere of interpersonal to ritual law. The Torah's own presentation of this prohibition suggests that the prohibition on lending on interest is a civil concern – a law concerning Man's relationship with other human beings. Thus, in one of the several places in which the Torah records the prohibition on taking interest, it rationalizes the restriction as a means of insuring that "your brother may be able to live with you."[102]

An economic framework in which Jews cannot lend money to other Jews on interest only works in a relatively insular, largely Jewish society, like the one envisioned by the Hebrew Bible. Once Jews and non-Jews began to both inhabit the same social, economic, and political space, however, this stricture became not only untenable but also self-defeating. While the Torah prohibits Jews from lending to other Jews on interest, it permits them to collect interest on loans made to non-Jews; likewise, Jewish borrowers are allowed to borrow on interest from non-Jewish, but not from Jewish lenders. Consequently, in a society comprised of both Jewish and non-Jewish residents, Jewish lenders would avoid lending to fellow Jews, and instead opt for more profitable interest-bearing loans to gentiles. Similarly, non-Jewish creditors would take advantage of the militated credit market available to Jews in order to charge Jews higher interest rates than they would charge their non-Jewish borrowers.[103] In this context, rather than helping "you brother live with you," the *ribbis* prohibition resulted in Jews having only limited access to above-market rate credit. As the Talmudic rabbis put it, it "closed the door to borrowers."[104]

Rabbinic authorities responded to this contingency by gradually coming to a reconceptualization of the Torah's prohibition on interest-bearing loans that classified this law as a matter between Man and God, rather than one pertaining to the relationship between Man and Man. Once viewed as a ritual matter, the prohibition on *ribbis* began to be treated as a formal rather than functional rule, and this opened the door to the development of various financial structures that could be used to circumvent the restriction.[105] Some such arrangements were deemed impermissible, such as one whereby a Jew would extend an interest-bearing loan to a Jew by laundering the loaned funds through an interest-bearing loan to a non-Jew who would then supply those funds to the Jewish debtor in another interest-bearing loan as a small profit.[106] Other financing models became rabbinically acceptable, however, such as the *iska* arrangement whereby interest-bearing loans are structured as capital investments in a joint business venture between borrower and lender with a

[102] Lev 25:36.
[103] *See* R. Baruch Halevi Epstein, Torah Temimah, Lev. 25:36.
[104] *See, e.g.*, Babylonian Talmud, Bava Metzia 68a.
[105] *See* Broyde, Michael J., *Sharia Tribunals, Rabbinical Courts, and Christian Panels: Religious Arbitration in America and the West*, Oxford: Oxford University Press, 2017, 60–62 (pointing out the formalism of *heter iska* usages).
[106] *See* Shulkhan Arukh, Choshen Mishpat 168:2.

guaranteed fixed rate of return.[107] Indeed, over time, the reliance on a *pro forma iska* arrangement became standard among Jews, even as such financing arrangements functioned as ordinary loans in everything but name.[108]

The permissiveness with which rabbinic authorities have treated interest leading between Jews was thus largely facilitated by the conceptual characterization of *ribbis* as a ritual rather than civil law matter.[109] As a civil prohibition on predatory lending, there was little room for accommodation or leniency; restrictions on interest-bearing loans had to be enforced in order to protect the vulnerable human parties that such practices harmed. As a ritual sin, however, the rabbis could tolerate all manner of legal fictions that formally transformed loans into capital investments, though the function and outcome of such arrangements remained the same. Moreover, once *ribbis* lending as a broad legal category was adjudged to be a ritual sin against God, rabbinic enforcement of this rule could be limited to those cases that raised the obvious specter to interpersonal harm, such as those in which a debtor sued to recover interest he had already paid on a Biblically prohibited *ribbis* loan.

Another example of the rabbis' non-enforcement of religious violations that do not cause sufficiently cognizable harm to others is the Torah's obligating Jews to come to voluntarily come to court and testify about any matter about which they have pertinent information.[110] Oftentimes, the failure of such a witness to come forward in violation of this religious duty can result in a litigant losing a case he or she should have one, and consequently, in that litigant's suffering a financial loss. While the rabbis could have treated witnesses' failure to appear in court as a tort and have subjected such individuals to civil liability to compensate litigants for losses suffered as a result of their refusal to testify, they did not do so. This harm was classified as *grama*, or a loss produced by causation too attenuated to result in legally enforceable civil liability.[111] The fact that a religious law had been violated was insufficient to trigger any liability or coercive enforcement measures since the harm caused was regarded as too attenuated, speculative, and indefinite to warrant law enforcement action limited to protecting others from harm.

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[107] *See generally* Grunstein, Leonard, "Interest, Ribit, and Riba: Must These Disparate Concepts be Integrated, or is a More Nuanced Approach Appropriate for the Global Finance Community," *130. Banking Law Journal* (2013), 439–480.

[108] *See id.*

[109] This is evidenced by the way the laws of *ribbis* are organized within Jewish legal codes. Rather than including *ribbis* laws under the general heading of "Choshen Mishpat" – the section of Jewish law codes that includes laws of property, contract, torts, civil procedure, and the like – the laws of *ribbis* are included under the ritual-law focused "Yoreh Deah" heading alongside laws pertaining to kosher food, ritual impurity, and similarly ritualistic subjects.

[110] *See* Shulkhan Arukh, Choshen Mishpat 28:1.

[111] *See id.*

The rabbis made similar judgments in deciding that certain kinds of tort injuries with too attenuated and speculative chains of causation could not be a basis for civil liability on the part of the tortfeasor.[112] In many such cases, the Talmudic rabbis noted that in such cases the defendant would be "not liable in human law, but liable by the law of heaven."[113] In other words, while acknowledging that such tortious conduct was clearly a violation of the defendant's religious obligations to God, the rabbis nevertheless declined to use their judicial powers to remedy such offenses – likely because the interpersonal harm element in such cases was too uncertain to warrant enforcement.

Likewise, in cases of a defendant's withdrawal from some kinds of oral contracts, the rabbis recognized that while a ritual offense may have been committed, legally-enforceable liability should not necessarily follow. Under formal Jewish law, oral agreements not concretized by a *kinyan*, an act that signifies a meeting of the minds and each party's commitment to adhere to the terms of the contract, are not binding.[114] Parties can withdraw or refuse to uphold their obligations under such agreements, and face no legal liability for doing so.[115] Even so, however, the Talmudic rabbis maintained that withdrawing from such an agreement without good cause was a serious wrong, and affirmed this view by declaring a curse on those who engaged in such conduct: "May He who exacted payment from the Generation of the Flood and from the Generation of the Tower of Babel also exact payment from those who do not keep their word."[116] Reneging on an agreement is thus regarded as a serious religious wrong. Nevertheless, rabbinic practice has not used civil liability to punish parties for reneging on agreements or to compel them to uphold their religious obligation because rights of non-breaching parties to contractual performance do not vest without a *kinyan*, and so, the breaching party is not regarded as having caused any legally cognizable harm.[117]

Rabbinic treatment of various kinds of civil offenses under Jewish law suggests that the mere fact that a religious law was violated was neither sufficient nor necessary to trigger rabbinic law enforcement measures designed to compel compliance, punish misconduct, or remedy wrongs. Misconduct that caused or threatened material harm to others or to society was punished, whether or not such behavior offended against the technical duties and restrictions of formal Jewish law. At the same time, actions that violated Jewish ritual laws were not punished, and compliance with strictly religious norms was not enforced unless religious misconduct also caused material harm to others. The hallmark of the use of force to compel compliance with Jewish norms was the

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[112] *See* Babylonian Talmud, Bava Kama 55b-56a.
[113] *Id*.
[114] *See* Shulkhan Arukh, Choshen Mishpat 198:1. *See generally* 2 Herzog, Isaac, *The Main Institutions of Jewish Law*, vol., 2: *The Law of Obligations*, London: Soncino Press, 2d ed. 1967, 1-47.
[115] *See* Shulkhan Arukh, Choshen Mishpat 198:5.
[116] Mishnah, Bava Metziah 4:1.
[117] *See* Shulkhan Arukh, Choshen Misphat 204:1, 4.

existence of sufficiently concrete injuries or threats to individuals or the community such that any failure to enforce the law would result in material injuries and damage to the fabric of Jewish and general society.

Between Sexual Sin and Sexual Violence

Like many religious traditions, Judaism prescribes an expansive and strict sexual ethic, regulating marriage, divorce, and family life, and the who, what, where, when, and how of sexual relationships generally.[118] Indeed, sexual offenses are regarded as particularly serious in that they – along with murder and idolatry – are considered one of the three kinds of religious violations for which Jews are obligated to martyr themselves rather than commit.[119] In practice, however, rabbinic authorities rarely punished Jews for committing private sexual offenses in which all parties were willing participants.[120] Rabbinic enforcement of the Torah's sexual mores was largely limited to cases in which one party was likely to have been sexually victimized by another, or where sexual conduct between consenting parties also had the secondary effect of harming innocent third parties or the community. In the absence of such harm, however, religious misconduct of the sexual variety was typically not seriously punished.

The distinction between rabbinic enforcement and non-enforcement of Jewish law, and between ritualistic and interpersonal offenses in the sexual realm is well illustrated by a Jewish law opinion authored by Rabbi Moshe Feinstein, a preeminent twentieth century rabbinic authority.[121] In this responsum, Rabbi Feinstein deals with a question posed about the *halakhic* consequences of an adulterous relationship between a married Jewish woman and a non-Jewish man where all parties – the wife, her consort, and her husband – consented to the extramarital affair. The question arises in significant part because black-letter Jewish law prescribes that aside from adultery being a grave sexual sin in Judaism, after engaging in an extramarital affair, an adulterous wife must separate from her husband and the couple must divorce.[122] In Rabbi Feinstein's case, the questioner wondered whether the same rule applies even when both spouses consent to the affair.

In a long opinion, Rabbi Feinstein considered the question from a number of different angles. One of the possibilities that he considers is that the Torah's prescription for divorce in cases of adultery may only apply to cases where an adulterous relationship also entails some measure of *infidelity*.[123] Perhaps, he suggests, divorce is mandated only when a Jewish wife *betrays* her husband and her marital bond by engaging in an extramarital affair without her husband's approval. In the case at

[118] *See generally*, Maimonides, *Mishnah Torah*, The Laws of Prohibited Sexual Relationships.
[119] *See* Babylonian Talmud, Sanhedrin 74a.
[120] *See* Sefer Me'iros Einayim, Choshen Mishpat 425:12.
[121] *See* Resp. Igros Moshe, Even Haezer 4:44.
[122] *See* Babylonian Talmud, Ketubot 9a; Babylonian Talmud, Sotah 18b.
[123] *See* Resp. Igros Moshe, Even Haezer 4:44(5).

hand, however, both husband and wife endorsed the adulterous relationship. There was no betrayal of the marital bond; merely a rather unconventional arrangement between the husband and wife about the terms of their marital relationship. In such a case, Rabbi Feinstein supposes, perhaps dissolution of the marriage is not required.[124] Importantly, this view seems to be grounded in a recognition that sexual sins often comprise two parts. On the one hand, illicit sex is a ritual sin against God; but on the other hand, prohibited sexual relationships can also entail an interpersonal sin against other people, whether the victim of a nonconsensual sexual advance, or a betrayed spouse. Rabbi Feinstein never supposes that adultery is *permitted* by Jewish law merely because the spouses agree to the affair; extramarital sexual relationships are strictly prohibited by Jewish law. This prohibition, however, is a ritual one. On an interpersonal level, however, spousal permission transforms adultery into an open-marriage relationship; the ritual sin remains, but the interpersonal wrong is negated through consent.

Rabbi Feinstein's recognition of the dual ritual and interpersonal nature of adultery closely tracks an important distinction implied and also explicitly delineated in many of the major codifications, restatements, and commentaries on Jewish law. The *halakha* imposes a duty to rescue others from harm, and goes so far as to direct Jews to if necessary kill an assailant in order to save the life of the victim.[125] The same rule applies to saving a potential victim from being raped; bystanders may – and have a duty to – intervene to rescue the victim, and to if necessary kill the rapist in order to do so.[126] In stating this rule, the seminal sixteenth century Jewish law code, *Shulkhan Arukh*, frames the issue in terms of ritual sin, but emphasizes that the authorization to take action to prevent a sexual union prohibited by Jewish law exists only when this sin also entails harm to a victim.[127] The *Shulkhan Arukh* rules that "one who is chasing after another male or after any woman with whom he is prohibited from having a sexual relationship *to rape them* – aside from an animal – we save the victim, even at the cost of the life of the pursuer."[128] In other words, Jewish law authorizes the use of force to prevent sexual sin only in cases where the sin also involves a human victim, such as cases of rape. Where both sexual partners are willing participants in the commission of the sin, however, Jewish law does not authorize the use of force to prevent the sin and compel the parties involved to abide by ritual Torah norms.[129]

Rabbinic authorities did permit the imposition of punishments for sexual sins when such sins also harmed others or undermined the foundations of civil society. In addition to cases of non-consensual sex discussed above, judicial power was deployed to punish ritual sexual misconduct that resulted in potential dangers to the community at large. In one famous 13th century Spanish

[124] *See id.*
[125] *See* Babylonian Talmud, Sanhedrin 73a.
[126] *See id.*
[127] *See* Shulkhan Arukh, Choshen Mishpat 425:3.
[128] Shulkhan Arukh, Choshen Mishpat 425:3.
[129] *See* Sefer Me'iros Einaym, Choshen Mishpat 425:12.

case, a Jewish widow engaged in a sexual relationship with a Muslim and became pregnant.[130] She gave birth to twins, one of whom died in childbirth while the local Muslim community took custody of the surviving child. Apparently, the entire affair resulted in significant disruption for the community, and produced tensions between the Jews and the local Muslim population. The local ruler, one Don Juan, directed the local rabbinical court to judge and punish the woman for the affair, and the court did so, ultimately apparently settling on disfiguring her nose "in order to ruin her beauty that she beatified herself for her lover."[131]

While the judgement in that case is indeed harsh, it is important to point out the circumstances under which the rabbinic court came to judge the case at all. Records of the matter suggest that, first of all, local rabbinic authorities took little legal cognizance of the affair between the Jewish widow and her Muslim paramour – and certainly took no steps to punish the woman for this serious religious infraction – until after the matter was brought before the local ruler who directed the rabbinic court to deal with the matter.[132] Significantly, at that place and time, the common penalty for adultery meted out by non-Jewish courts was to have the guilty woman burned to death.[133] Thus, once ordered to deal with the affair by the local ruler, the rabbinic court was put in a position of not only having to penalize the inter-religious relationship, but of doing so in a way that non-Jewish authorities would consider sufficiently credible.[134] Of course, this all took place under the looming backdrop of the Jewish community's own precarious status and relationship with the non-Jewish authorities under whose rule they lived. Failure to deal with the matter, and deal with it harshly, could endanger the community's security and stability by incurring the wrath of the local Muslim community seeking custody of the child, and the displeasure of the local ruler who wanted the affair and the resulting intercommunal tensions addressed.

The material concerns and pressures – as distinct from religious sensibilities – that gave rise to the administering of harsh corporal punishment for this sexual affair between the Jewish divorce and Muslim man exemplify what is the standard black-letter rule in Jewish law. The *Arbah Turim*, and important 14th century restatement of rabbinic law, prescribed a similar approach to dealing with cases of sexual relationships between Jews and non-Jews.[135] While such relationships are strictly prohibited by rabbinic law, violators should not be punished unless they are apprehended while committing an actual sexual act "in public," but not in private.[136] The critical trigger for corporal punishment is not the commission of the religious sin of sexual intercourse between a non-Jew. Instead, judicial punishment is appropriate only when there is another, more mundane

[130] *See* Responsa Rosh 18:13.
[131] *Id.*
[132] *See id.*
[133] *See* Assaf, Simha, *Ha'onshin Aharei Hatimat Hatalmud*, Jerusalem 1922, 69.
[134] *See id.* For other examples of this concern, see Resp. Rivash 233 and Resp. Rosh 17:1.
[135] *See* Arbah Turim, Choshen Mishpat 425.
[136] Arbah Turim, Choshen Mishpat 425.

and material, social and civil wrong at play. Public sex acts that flout the norms of the community pay be sanctioned because they are *public sex acts*, and these are socially unacceptable. The Talmud takes a similar stance in recording that one rabbinic authority flogged a married couple for engaging in sexual intercourse in public.[137] In that case, there was no technical religious sin at all; married couples are, of course, permitted to engage in sexual conduct, and nothing in Jewish religious law specifically proscribes public engagement in otherwise ritually acceptable sexual behavior. In that case, as in the case described by the *Arbah Turim*, and the medieval Spanish affair between the Jewish widow and her Muslim lover, the essential issue was not whether a ritual sin had been committed, but whether or not specific behavior is socially unacceptable, and therefore deserving of legal sanction designed to compel compliance with social norms.

Rabbinic Law Enforcement Contextualized: External Concerns

The foregoing discussion suggests a very important principle of rabbinic legal practice. Namely, even in times and places when rabbinic authorities had the judicial and political power to use force to enforce Jewish law upon members of the Jewish community, they largely declined to do so in order to compel compliance with the ritual norms and values of the Torah. In fact, rabbinic authorities have noted explicitly that even grave violations of ritual aspects of Jewish law do not, in and of themselves, license the imposition of corporal punishment. In the eyes of rabbinic law, penalties for violations of Jewish law are only appropriate when, as one important scholar put it, the Torah violation entails "shame, disgrace, and harm to a victim."[138] Ritual offenses that do not impact other people, however, are between man and God, and not to be sanctioned by human authorities.

The *Arbah Turim* restatement of Jewish law expresses this rule as follows: "One who running . . . [to attempt] to violate any of the commandments of the Torah – even to desecrate the Sabbath or commit idolatry [both serious capital offenses under Torah law] – is not killed, except in court with a warning and with witnesses."[139] There is an important subtext here that needs to be spelled out: As noted above, the rabbis of the Talmudic period imposed numerous procedural and evidentiary hurdles on the judicial process, which rendered the legally-authorized enforcement of Torah norms rare if not impossible. The *Arbah Turim* referenced these procedural protections by noting that violators of ritual Jewish law can be killed or otherwise punished only with "witnesses" and "warnings." Moreover, only courts staffed by the kinds of formally ordained judged mentioned earlier were empowered to implement Jewish law using the kinds of procedures being referenced here by the *Arbah Turim*. The author of the *Arbah Turim* is thus stating that ritual violators may be judged and punished only by judges who possess biblical *semikha* following the

[137] *See* Babylonian Talmud, Sanhedrin 56a.
[138] Rashi *to* Sanhedrin 73a (s.v. *aval ha'rodef achar beheimah*).
[139] Arbah Turim, Choshen Mishpat 425.

stringent and cumbersome rule of procedure and evidence described by the Talmud. Put differently, the text is asserting that in contemporary practice (and really in any rabbinic practice following the Talmudic period), Jews who violate ritual Jewish law may not be subjected to corporal punishments for their infractions.[140]

The major exception to this rule, of course, is that ritual offenses that also harm other people or the community can be – and routinely were – punished. Murder, theft, tortious conduct, and rape are all religious sins proscribed by the Torah, and, as discussed above, all were routinely sanctioned by rabbinic authorities. The same was true for countless other ritual sins the violation of which negatively impacted others.

Consider the quintessentially ritualistic offense of blasphemy. The Torah prescribes the death penalty for "cursing the Name [of God]" in response to an actual incident it records as having taken place among the Jews wandering through the wilderness where are certain individual blasphemed and cursed God in public.[141] A similar case of public blasphemy was presented to Rabbi Asher ben Yechiel, the chief rabbinic figure of 13th century northern Spain, in which an individual who had been recently released after having been imprisoned by the local non-Jewish authorities cursed God over his troubles.[142] The matter was brought before a local rabbinic court that decided to execute the offender for his crime, but before doing so, the court decided to ask R. Asher ben Yechiel, the preeminent rabbinic authority in the region, his opinion on the matter. R. Asher began his opinion by expressing surprise at the fact that the court wished to execute someone for blasphemy: "About all other lands that I know about, there is no place in which [the Jewish community] judges capital crimes, except here in Spain. And I wondered at this; how can they try capital crimes without a Sanhedrin? . . . And I have never agreed with them on carrying out executions."[143]

After noting his surprise and opposition to rabbinic courts executing convicts, R. Asher nevertheless reluctantly endorses the court's decision to carry out its sentence on the blasphemer.[144] Significantly, however, his justifications for doing so have nothing to do with the grave nature of the defendant's sin. Instead, R. Asher notes that practical, material concerns can justify the use of force to enforce Jewish law in general, and in the case presented in particular. First, R. Asher noted that rabbinic courts in Spain operate pursuant to a royal command directing Jews to police their own communities.[145] He further argued that, in general, the use force to uphold

[140] *See* Rema *to* Shulkhan Arukh, Choshen Mishpat 425:1.
[141] *See* Lev 24:10-16. The definition and punishment for this offense can be found in the Babylonian Talmud, Keritut 7a-b and Succah 53a.
[142] *See* Responsa Rosh 17:8.
[143] *Id.*
[144] *See id.*
[145] *See id.*

societal norms can be justified as a measure designed to better protect Jewish lives since, if rabbinic courts did not try and punish criminal offenses in a way that the non-Jewish authorities considered adequate, those cases would be handled by the royal courts and "more blood would be spilled if these cases were tried by the non-Jews."[146] These concerns all coalesce in the case of the Jewish blasphemer. R. Asher noted that in this case the defendant's blasphemy was not merely a private sin; "he desecrated the name of God *in public*, and it was already heard by the non-Jews as well, who take very seriously anyone who speaks against their religion."[147] The matter was thus not merely a sin, but a public scandal. Moreover, since this instance of blasphemy was already known to the non-Jewish authorities, the rabbinic court was put in a position where is had to deal seriously with the offense – just as a local non-Jewish court would have dealt with one of their own coreligionists who committed blasphemy – in order to maintain the confidence of the non-Jewish authorities and the continued license to govern the Jewish community internally. R. Asher made clear that punishing the blasphemer was not justified on religious grounds *per se*; it was not the fact that the defendant sinned, but the fact that his sinning had wider material implications for the community that necessitated a strict corporal response that justified the execution.

The Jewish law approach to educating children offers another useful example of how ritual law becomes enforced law when religious sins impact others. The Torah prescribes a religious duty to educate children in about Jewish law and tradition.[148] "It is a positive commandment [of the Torah] for a person to teach his son Torah."[149] The rabbis have understood this duty to include religious teachings, but also moral training, vocational or professional education, and life skills like swimming.[150] Jewish law and practice is heavily structured about this fundamental educational imperative. The traditional Passover *Seder* is structured to provide educational opportunities for children; group Torah study, and Torah teaching in family and communal settings is a central feature of Jewish living; and virtually all contemporary observant Jewish communities maintain various programming opportunities geared towards children's religious education. While the duty to educate is thus an important religious obligation, it also has broader material concerns. Put simply, a Jewish child will find itself unable to function as a Jewish adult in the Jewish community unless it has received an adequate Jewish education.[151] More broadly, children who are left

[146] *Id.*
[147] *Id.*
[148] *See* Deut 6:7.
[149] Shulkhan Arukh, Yoreh Deah 245:1.
[150] *See* Babylonian Talmud, Kiddushin 29b (obligation to teach one's child to swim); *id*. ("Rabbi Yehuda said: 'One who does not teach one's child a trade teaches them to be a thief.'"); Pseudonymous Case, 9 Piskei Din Rabbaniyim [Israeli Rabbinic Court] 251, 259 (1974). ("Even if neither parent will educate the children in the study of Jewish law . . . still a parent owes his children -- and children should receive from their parents -- a close and robust relationship through which a child can develop into an adult with adult characteristics and an adult demeanor.")
[151] *See* "*Hinukh*," Encyclopedia Talmudit, 16:161-162 (1978).

uneducated in secular matters will find themselves ill equipped to secure gainful employment, run their own households, and generally do all the kinds of things people need to do in order to live successful lives. In light of these realities, rabbinic law has not been content to leave educational duties to the realm of ritual law; instead Jewish law authorities have prescribed the enforcement of this obligation. As R. Moshe Isserles wrote: "We compel a person to hire teachers for his children; and if he is not present in the city, but has assets . . . we seize his assets [in his absence] and hire teachers for his son."[152]

The fact that it is the harm to the child that triggers rabbinic enforcement of the duty to educate rather than the religious obligation itself is made clear by contrasting the obligation to educate one's children with the obligation to educate one's self. In Jewish law, education goes beyond teaching children; adults are religiously obligated to set aside regular times to study Jewish texts and traditions as well.[153] This duty to engage in Torah study can also be framed as an extension of the duty to educate children: "If one's father did not teach him Torah, a person is obligated to teach himself."[154] Like the education of children, adult education is a very central component of religious life, so much so that many devout Jews devote years to full-time Torah study. Despite the importance of adult learning, in contrast with its approach to educating children, rabbinic law never mandates the active enforcement of the obligations of adults to self-educate. The reason for this distinction seems straightforward: While one's failure to fulfill the ritual duty to educate his or her children will actually harm those children, an adult's willful decision to not improve his or her Torah knowledge does not harm any victims, and so there is no basis in rabbinic legal practice for compelling anyone to comply with this ritual norm.

All this does not mean that Jewish ritual law was not important to the rabbis. On the contrary, the endless minutiae of ritual *halakha* – from proper modes of Sabbath observance, kosher food and drink standards, prayer practices, the proper celebration of Jewish holidays, and even the rules of long defunct practices such as animal sacrifices in the Temple in Jerusalem and the laws of ritual purity and impurity – were endlessly debated, interpreted, and taught by rabbinic authorities in every place and time that Jews found themselves. Community rabbis delivered sermons encouraging proper ritual practice and chastising their flocks for sin. More importantly, the private ritual practice of Jewish law was one of the chief ways in which Jewish communities in the premodern era constituted and defined themselves. Jewish communities were *Jewish* primarily in the sense that they were communities constructed around and for individual and collective observance of rabbinic Jewish law.

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[152] Rema *to* Shulkhan Arukh, Yoreh Deah 245:4.
[153] *See* Maimonides, *Mishnah Torah,* The Laws of Torah Study, ch. 1.
[154] Shulkhan Arukh, Yoreh Deah 245:1.

Rabbinic authorities regularly sanctioned violators of ritual Jewish law using a variety of methods designed to shun offenders and to distance them from the structured community.[155] Such sanctions, generally subsumed under the general heading of "*cherem*" (literally "excommunication"), included a wide range of different measures that ranged in type and severity. A minor form of *cherem*, called *nidui*, involved informal social ostracism; Jews were prohibited from sitting within six feet of the offender, the subject of a *nidui* would not be counted towards the ten-man quorum required for public prayers, and could not wash his clothes, cut his hair, or shave.[156] More serious *cherem* practices included additional economic restrictions on members of the community speaking and doing business with the excommunicated individual.[157] Additional such measures included public humiliation; the denial of ritual privileges, such as being called upon to read from the Torah in the synagogue or leading prayers; the denial communal privileges, like the right to vote or hold public office. In extreme cases, grievous offenders could face banishment from the Jewish community.[158] Importantly, while serious corporal punishments and financial penalties were typically imposed only for wrongs that harms others, *cherem* sanctions were at times deployed against individuals who violated Jewish ritual laws and norms.[159]

It is important to understand that the use of *cherem* for ritual offenses was subject to limitations that distinguished this practice from the coercive enforcement of ritual norms. Most importantly, *cherem* was used as a penalty for breaches of "*communal discipline*" rather than ordinary private religious indiscretions.[160] "Adultery, polytheism, Sabbath violations, and other central tenets of the faith . . . were never subject to shunning by the Jewish tradition unless the person engaged in this conduct in a public manner."[161] Such public ritual misconduct was not merely an offense against God; private offenses against God were for God to deal with, and did not warrant serious social or legal sanctions. Instead, such public ritual misconduct was an affront to the community, an attempt to openly flout, reject, and undermine the religious structure and foundations of the Jewish community and the religious norms and values through which the community constituted itself. In response to such behavior, Jewish communities and rabbinic authorities used the *cherem*

[155] For an overview of these methods, see *Cherem*, in Encyclopedia Talmudit 16:326 (1976).
[156] *See* Babylonian Talmud, Mo'ed Katan 17a; Maimonides, *Mishnah Torah*, The Laws of Torah Study 7:4.
[157] *See* Maimonides, *Mishnah Torah*, The Laws of Torah Study 7:4.
[158] *See generally* Schreiber, *Jewish Law*, 417–21.
[159] *See* Shulkhan Arukh, Yoreh Deah 334:1, 43. *See also* R. Isaac Kook, Resp. Da'at Kohen, Yoreh Deah 193 (discussing sanctions against a community that failed to excommunicate a prominent member for eating and drinking on Yom Kippur); Resp. Rambam no. 157 (Freiman ed.) (*cherem* for a *kohein* (priest) that married a divorcee, which is ritually prohibited); Rema *to* Shulkhan Arukh, Choshen Mishpat 325:1; Assaf, *Ha'onshin Aharei Hatimat Hatalmud*, 114.
[160] *See* Broyde, Michael J., "Forming Religious Communities and Respecting Dissenters' Rights: A Jewish Tradition for a Modern Society," in: Michael J. Broyde./John Witte Jr. (eds.), *Human Rights in Judaism: Cultural, Religious, and Political Perspectives*, New York: Jason Aronson Publishers, 1998, 52.
[161] Broyde, "Forming Religious Communities," 55.

and related forms of social sanction as a means of exercising their rights of association. Jews who refused to "buy in" to the constitutive foundations of the Jewish community and chose to express such dissent in a public manner were not forced to observe Jewish law, but they could not reject the Jewish community and be members in good standing in the community at the same time. Instead of using legal means to compel sinners to behave appropriately, rabbinic authorities recognized sinners' basic rights to dissent from Jewish norms while also disassociating from such sinners whose behavior *de facto* placed them outside the religiously constituted Jewish communal structure.

Jewish communities have always been made up of members who maintained varying levels of ritual observance. Private laxity in matters of Jewish ritual was a recognized fact of life that did not warrant punitive measures designed to compel compliance with religious law. Jews were largely free to practice as piously or as irreverently as they wished, and there was no inquisition peering into their homes looking to catch them in a ritual sin. However, when religious misconduct moved from private to the public space and indicated a rejection of the religious foundations of the Jewish community or threatened the religion-based cohesiveness of Jewish communal life, rabbinic law prescribed the use of *cherem* as an exercise of the community's right to disassociate from subversive members.[162]

Conclusion

The foregoing overview of classical rabbinic approaches to the coercive enforcement of Jewish law norms suggests something very important about Jewish law approaches to human rights. Judaism, like many other faith traditions does a fairly good job at recognizing and prescribing the protection of various material human rights such as rights to life, property, education, housing, clothing, fair employment conditions, freedom of contract, and equal treatment under law. At the same time, rabbinic practice maintained a fairly robust respect for private religious conscience and dissent from Jewish ritual norms. Unlike some other religious-legal traditions that sought to compel compliance with their own ritual norms, and punished religious dissent with force, in practice Judaism largely avoided doing so. Ritual misconduct was sanctioned, but typically only when and because it had the effect of harming other people or the community. Rather than seeking to directly force Jews into religious compliance, rabbinic practice focused on using ordinary tools of membership and association to cultivate Jewish communities of like-minded Jews who were at least publically respectful of the norms and values of rabbinic law. In doing so, rabbinic authorities largely succeeded in carving out what can be viewed as a sphere for private freedom of religion and conscience within a normative Jewish framework.

[162] *See* Broyde, "Forming Religious Communities," 55–56.

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