

HUMAN DIGNITY AND PUNISHMENT IN JUDAIC AND ISLAMIC LAW: WAR AND THE DEATH PENALTY

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Abstract: This article attempts to shed light on Jewish and Islamic ethical traditions regarding two closely related issues—capital punishment and war—and how their understanding of the concept of human dignity, and its loss through wrongdoing, is crucial to driving these religions' various positions on the subject. The ultimate goal of this article is threefold: (1) to show how each tradition varies its conceptualization of human dignity, even within itself (i.e., in comparing its doctrine on capital punishment versus war), (2) to contrast, but also to find progressive commonalities between both religions, particularly imperative as they continue to clash in the Arab-Israeli conflict, and (3) to illuminate how Judaic and Islamic ethics fit within—and can inform—the much more familiar (to the West) Christian perspectives on the same issues.

First, it shows how Jewish law almost universally says that capital punishment is just in theory, but very rarely, if ever, just in practice because (1) even the worst wrongdoers retain their dignity, and (2) contemporary human beings are incapable of ascertaining those very few who might not. By contrast, arguably the most prevalent and most visible school of Jewish ethics adheres to a permissive ethic with respect to what qualifies as legitimate self-defensive actions, in large part because of how it conceptualizes the human dignity of those who belong to the community of the perceived aggressors—including those whom others would see as innocent civilians. Thus, particularly given how Judaism conceptualizes dignity in the context of capital punishment, there is some room for a more progressive conceptualization of these ethics.

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Second, it shows how all major schools of Islamic thought allow for capital punishment, emphasizing that those who commit egregious crimes to the social order of Muslim communities and to Islam itself—for instance, those who commit apostasy—have lost their own dignity. However, interestingly enough, those who commit what are considered to be private wrongdoings—including even murder—are preferably granted mercy. At the same time, the prevailing thought in Islam in the realm of the ethics of war emphasizes that even those non-Muslims, particularly non-Muslims who do not directly participate in aggression against Muslim communities, are to be shown mercy. This is more consistent with the minority movement in Islam pushing for abolition of capital punishment.

Finally, it analyzes how these ethics fit within Christian perspectives on the same issues, particularly as these perspectives have rapidly changed entering the 21st century. It shows, among other things, how remarkable and progressive Jewish ethics are on capital punishment, foreshadowing centuries ago not only the contingent within Islam pushing for abolition, but also the Christian-Catholic contingent that is headed in a similar direction. It also shows how Judaism and Islam alike are remarkable in illuminating ideas about human dignity that provide different, yet clear, ideas on ethical questions posed by today's non-conventional warfare—questions with which the Christian-Catholic Just War ethic may be less equipped to deal. Ultimately, in unique, yet related ways, both Judaic and Islamic ethics can inform a more progressive ethic on these issues.

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From a Western perspective, the Arab-Israeli conflict is hardly unfamiliar; indeed, countries such as the United States have long had

a large stake in this conflict, a stake that has only increased after September 11, 2001. Yet, from the same Western perspective, the Judaic and Islamic ethical traditions that pervade this conflict are certainly not popularly understood, or even well understood in scholarly circles. Ethical traditions pertaining to the taking of human life—for example, those pertaining to capital punishment and, of course, war and collective self-defense—are particularly manifested in this conflict. Indeed, though a relatively modern phenomenon, the Arab-Israeli conflict provides an essential lens through which to view far more longstanding Judaic and Islamic ethical traditions. But, from a Western perspective that has been heavily influenced by Christian ethical traditions, such as the Just War Theory that originated in Catholicism, these Judaic and Islamic traditions—and the similarities and differences they have with Catholic traditions, with each other, and even internally within themselves—are underappreciated.

Understanding these traditions is important for a number of reasons, the most basic of which is to gain a deeper understanding of the actions taken within this conflict—and, along the way—to correct misconceptions that occur within this politically and ideologically charged event. It is particularly useful to gain a deeper understanding of what is arguably both the greatest source of hope and the greatest source of division with respect to these tensions: a broadly similar understanding of the concept of human dignity within these Abrahamic faiths. In particular, they have a shared adherence to the idea that all human beings are inhered with a sacred dignity, possessing a life with priceless value. At the same time, they also have a shared adherence to the idea that human beings who act wrongfully may ultimately lose this dignity, dehumanizing themselves to a lower status as a result. Concurrently, they adhere to the belief that human beings can be fit to judge when this loss of dignity occurs, giving them sanction to impose deadly force to end the life of another. These ideas are very clearly present in some of the rhetoric used in the context of the modern Arab-Israeli conflict (as well as in post-9/11 conflict), but they have also long been present in rhetoric between the different Abrahamic faiths (e.g., Christian anti-Semitism, Christian attitudes towards Muslims in conflicts like the Crusades).

This article attempts to shed light on these ethical traditions and their understanding of the concept of human dignity. To be sure, this article does not claim deep expertise or authority on these religions. For example, eschewing its own claims as to what the “correct” or “best” interpretation of a particular religious ethic is, it seeks to

highlight various schools of thought within these religions, in the process relying on much of existing scholarship that shows which schools of thought dominate (and where no particular school of thought dominates, leaving ambiguity as to what Judaic or Islamic ethics say about a particular issue). At the same time, this article seeks to add value by probing, in greater depth than existing scholarship that focuses more on pinning down exact ethical edicts, the question of how human dignity and how its possession and its loss play a key role in how these ethical traditions are justified. It is through probing this question that this article is able to illuminate the similarities and differences that Judaism and Islam have, both within themselves, and with one another. With respect to the former, this article envisions that, to the extent that certain ethical traditions within a particular religion strongly affirms this concept (e.g., where Judaism has, for far longer and far more emphatically than other Abrahamic faiths, opposed capital punishment), this affirmation might pervade the whole. With respect to the latter, this article envisions that, particularly to the extent that they affirm the concept of human dignity, identifying commonalities may be useful. Finally, it is also through probing the question of human dignity that this Article illuminates how Judaic and Islamic ethics fit within Western-Christian perspectives on the same issues, particularly given how the idea of human dignity plays such a central role in these perspectives as well.

This article proceeds in three parts. Part I will show how Jewish law almost universally says that capital punishment can be just in theory, but very rarely, if ever in practice, among other reasons because even the worst wrongdoers retain their dignity, and contemporary human beings are incapable of ascertaining those very few who might not. It will also show how a prevalent and visible, yet not universal, school of Judaism adheres to a permissive ethic with respect to what qualifies as legitimate self-defensive actions. This is in large part because of how it conceptualizes the human dignity of those who belong to the community of the perceived aggressors—including those whom others would see as innocent civilians. Part I will also show, by contrast, alternative conceptualizations of human dignity within Judaism lead to a different ethic on collective self-defense, one that ultimately shares many of the ideas of Judaism's near universal capital punishment ethic.

Part II will show how all major schools of Islamic thought allow for capital punishment, emphasizing that those who commit egregious crimes to the social order of Muslim communities and to Islam itself,

for instance apostasy, have lost their own dignity. In contrast, interestingly, those who commit what are considered private wrongdoings—including even murder—are preferred to be granted mercy. At the same time, the prevailing thought in Islam with regards to the ethics of war emphasizes that even those non-Muslims, particularly non-Muslims who do not directly participate in aggression against Muslim communities, are to be shown mercy. These ideas at once differ from the conceptualization of human dignity, held by a very visible, but ultimately minority fundamentalist contingent within Islam, while being more consistent with a small minority of Muslims arguing that Islamic law no longer should be interpreted to sanction capital punishment.

Part III will show: (1) how remarkable and progressive Jewish ethics are on capital punishment, foreshadowing centuries ago not only the contingent within Islam pushing for abolition, but also the Christian-Catholic contingent that is headed in a similar direction; and (2) how Judaism and Islam alike, though appearing not to be as comprehensive as the Christian-Catholic Just War ethic that has been both theorized and practically applied over many centuries, are remarkable in illuminating ideas about human dignity that provide differing, but clear ideas on ethical questions posed by today's non-conventional warfare—questions with which Christian-Catholic Just War ethic may be less equipped to deal. Though fundamentalist conceptions of Islam muddle this, the prevailing views within Islam of human dignity of foreign wrongdoers in war are particularly illuminating, as they shine a more progressive light on the idea of collective punishment.

I. JUDAISM

This part will show how Jewish law almost universally says capital punishment can be correct in theory, but inapplicable in practice. This is primarily because even the worst wrongdoers retain their dignity, and contemporary human beings are incapable of ascertaining those very few who might not. It will also show how a prevalent (and very visible), but not universal, school of Jewish thought adheres to a permissive ethic with respect to what qualifies as legitimate self-defensive actions—a conceptualization that takes a somewhat different, more restrictive view of human dignity.

Jewish ethics on human life is derived from a number of sources, including the Tanakh (the written Hebrew Bible, of which the Torah, its first five books, is the most important Jewish authority), the Mid-

rash (commentary on the Tanakh), and the Talmud (Jewish oral law, comprised of the Mishnah, which covers black-letter law, and the Gemara, which is commentary).¹ As is evident in the types of these sources, written and oral law are both considered important to understanding God's original intent. This article reviews these primary sources, and secondary scholarship on these sources, to discern what Jewish ethics say about human life, and particularly the concept of human dignity, in the context of capital punishment and self-defense.

A. *Capital Punishment: the Preservation of Human Dignity in Spite of Guilt*

All major schools of modern Jewish thought appear to clearly reject the death penalty as a means of punishment. With that said, it should not be surprising, given its prevalence in the Torah,² that Jewish ethics cannot and does not completely reject the death penalty—at least, in theory. In theory, the death penalty is just because, according to Jewish thought, the wrongdoings that merit such punishment amount both to a great disturbance in the natural social order, and to the loss of the human dignity of the wrongdoer.³ As Haim H. Cohn, former Justice of the Supreme Court of Israel, once stated, the primary purpose of punishment prescribed by Jewish law is expiation—that is, to turn away the anger of God.⁴ Crimes such as murder invoke particularly great wrath on the part of God, as they are a direct assault

1. See Irene Merker Rosenberg & Yale L. Rosenberg, *Of God's Mercy and the Four Biblical Methods of Capital Punishment: Stoning, Burning, Beheading, and Strangulation*, 78 TUL. L. REV. 1169, 1175 (2004) (discussing the sources of Jewish law, particularly as they apply to capital punishment); see also Wilhelm Bacher, *Talmud*, JEWISH ENCYCLOPEDIA (1906), <http://www.jewishencyclopedia.com/articles/14213-talmud>; see generally Emil G. Hirsch et al., *Bible Canon*, JEWISH ENCYCLOPEDIA (1906), <http://www.jewishencyclopedia.com/articles/3259-bible-canon>.

2. Throughout Exodus, Leviticus, Numbers, and Deuteronomy, the Torah lists the following as warranting capital punishment: adultery, bestiality, blasphemy, false evidence in capital cases, false prophecy, idolatry, incest, insubordination to supreme authority, kidnapping, licentiousness of the daughter of a priest, murder, rape committed on a betrothed woman, striking or cursing a parent, breaking the Sabbath, and witchcraft and augury. See Marcus Jastrow & S. Mendelsohn, *Capital Punishment*, JEWISH ENCYCLOPEDIA (1906), <http://jewishencyclopedia.com/articles/4005-capital-punishment>.

3. CHARLES MATHEWES, UNDERSTANDING RELIGIOUS ETHICS 173 (2010).

4. Haim H. Cohn, *The Penology of the Talmud*, 5 ISR. L. REV. 53, 55 (1970) (“Like all theocratic law, the laws prescribing punishments and allocating them to various offenses are emanations of God’s will, and their primary purpose is expiation, to turn away God’s blazing anger. Not only are criminals and their crimes an abomination in the eyes of God and must for this reason alone be eliminated, but the very character of punishment as God’s command leaves no alternative”).

on the creation of man in God's image.⁵ Simultaneously, these wrongdoings are an abominable disturbance of the order of man, and for these reasons, these wrongdoers must be eliminated.⁶ In this way, Jewish thought is unsurprisingly similar to traditional Christian thought on such wrongdoings, thought that relies heavily on the Old Testament:⁷ they amount to a sort of "pollution" that must be eradicated.⁸

However, even though many elements of Jewish law appear very clearly to indicate that capital punishment is morally licit, as Professor Gerald Blidstein has stated, "It has long been a truism that Jewish law is so weighted as to make execution a virtual impossibility."⁹ In particular, Jewish law has long imposed strict substantive, procedural, and evidentiary requirements alike that make imposing the death penalty practically impossible—requirements that were approved in the ancient Talmud itself. To start, the laws regarding which specific wrongdoings qualify for the death penalty are strictly, even literally interpreted, meaning that even very similar wrongdoings would not qualify if they are not explicitly enumerated.¹⁰ Furthermore, imposing the death penalty requires a special kind of premeditation: a wrongdoer must have been specifically warned prior to committing the crime, and in response, must have expressed full awareness of his future wrongdoing, then immediately committed the wrongdoing.¹¹ Causation is also very rigidly defined: for example, if a victim dies

5. See *Genesis* 9:5-6 ("For your own lifeblood, too, I will demand an accounting, from every animal I will demand it, and from human beings in regard to their fellows I will demand an accounting for human life. Whoever spills the blood of a human being, by a human being his blood will be spilled, for in the image of God has the human being been made"); see also MATHEWES, *supra* note 3 ("Murder is not just an assault on a human, or an attack on human society, or an insult to the Image of God in humanity, it is also a profound violation and pollution of the covenant, the identity-conferring marker for both God and Israel, and puts the true nature of both of their beings into question").

6. As Charles Mathewes further states, "Murder does not most basically break a law, it is what Genesis said it was - an assault on the nature of creation, on the human social order, and on God's created Image, that must be retributed for by humanity. [The Talmudic rabbis] add to this the insistence that the pollution must be overcome." See MATHEWES, *supra* note 3, at 173.

7. See THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. IIa-IIae, q. 64, art. 2 (Fathers of the English Dominican Province trans., 1915), <http://www.basilica.org/pages/ebooks/St.%20Thomas%20Aquinas-Summa%20Theologica.pdf> ("By sinning man departs from the order of reason, and consequently falls away from the dignity of his manhood, in so far as he is naturally free, and exists for himself, and he falls into the slavish state of the beasts, by being disposed of according as he is useful to others.").

8. See MATHEWES, *supra* note 3, at 173.

9. Gerald J. Blidstein, *Capital Punishment - The Classic Jewish Discussion*, in *CONTEMPORARY JEWISH ETHICS* 310, 317 (Menachem Marc Kellner ed., 1978).

10. See HAIM H. COHN, *HUMAN RIGHTS IN JEWISH LAW* 227 (1984).

11. *Sanhedrin* 80b ("For it has been taught: But others liable to any death penalty decreed in the Torah are executed only . . . after a warning, which warning must have stated that he was

from starvation only because a person tied him up intending to starve him to death, this action cannot be punished by the death penalty.¹²

In addition, the Talmud required two direct eyewitnesses to testify that they saw the alleged wrongdoing,¹³ ruling out not only any circumstantial evidence, but also the alleged wrongdoer's own confession (as well as the testimony of immediate family members).¹⁴ At the same time, inconsistencies on even minor matters mean that the entire testimony of that eyewitness is excluded.¹⁵ Finally, as a clever means of tempering the passions of a court, the Talmud required at least one member of the Sanhedrin, the 23-member court that would traditionally preside over these cases, to acquit, meaning that a unanimous decision to convict actually resulted in acquittal.¹⁶ Even after conviction, the defendant can be requested to affirmatively provide any information that he can to avoid his execution, and even immediately before the execution, officials will ask the public if there is any information that would exculpate the defendant.¹⁷ At any of these points, a conviction can be reversed, unlike an acquittal, which never can be reversed.¹⁸

It should not be surprising that these Talmudic requirements eliminated the death penalty in effect, even if not in theory. Indeed,

liable to death at the hands of Beth din. R. Judah said: They must have informed him by which death he would be executed.”)

12. *Sanhedrin* 77a (“Raba said: If one bound his neighbor and he died of starvation, he is not liable to execution.”).

13. See *Sanhedrin* 80b (“For it has been taught: But others liable to any death penalty decreed in the Torah are executed only on the testimony of [at least two] witnesses False”). As Professors Bruce Ledewitz and Scott Staples have noted in comparison, “In most trials, civil as well as criminal, a legal decision could not be reached on the evidence of only one witness.” See Bruce S. Ledewitz & Scott Staples, *Reflections on the Talmudic and American Death Penalty*, 6 U. FLA. J.L. & PUB. POL’Y 33, 35 (1993).

14. *Sanhedrin* 37b (“[O]nly in capital charges do we disallow conjecture, but permit it in civil suits.”); *Sanhedrin* 9a (“Rabina said that [R. Meir and the Rabbis are dealing with a case] where one of the witnesses, [who testified to the woman’s guilt,] was found afterwards to be a relative or otherwise disqualified.”); *Sanhedrin* 9b (“If, however, he admits that he acceded to the act, he is a wicked man [and therefore disqualified from acting as witness] since the Torah says: Put not thy hand with the wicked to be an unrighteous witness. Raba said: Every man is considered a relative to himself, and no one can incriminate himself.”).

15. As Rosenberg and Rosenberg have noted, the judges interrogate witnesses on even “the most tangential facts, such as whether the stems on a fig tree, the situs of the murder, were thick or thin—all while being constantly reminded the gravity of the matter, and the value of the life, at stake.” See Rosenberg & Rosenberg, *supra* note 1, at 1179.

16. *Sanhedrin* 32a (“[I]n criminal cases all of them may acquit, but the whole body must not accuse.”).

17. *Sanhedrin* 43a (“Whoever knows anything in his favour, let him come and state it.”).

18. *Sanhedrin* 32a (“In [civil cases] the judge who proclaimed his view either to advantage or to disadvantage may, after deliberating, announce his view to the contrary. In [criminal cases], however, he may do so only to acquit, but not to condemn.”).

the Talmud famously quotes rabbis appearing to agree that a Sanhedrin that ordered an execution once in seven years was to be considered “destructive” (with still other rabbis putting the number at once in seventy years, or even asserting that they themselves would never put anyone to death).¹⁹

Why exactly do modern Jewish ethics so strictly regulate the death penalty, in spite of seemingly clear support of the death penalty from older written sources? The concept of human dignity appears to play a key part. On the one hand, it cannot be denied that a concern for executing the innocent plays a role in these near-impossible requirements. As Rabbi Ben Zion Bokser stated, “[t]oo often we learn of people who were convicted of crimes and only later are new facts uncovered by which their innocence is established . . . But the dead cannot be brought back to life again.”²⁰

On the other hand, these substantive, procedural, and evidentiary requirements appear to be concerned with not only putting the innocent to death, but also with killing even the clearly guilty. This is evident from how Talmudic discussion also shows how some of the rabbis would avoid imposing the death penalty on even those who are, in all probability, guilty: for example, they would “ask improbable and obscure questions of the witnesses—such as whether it were not possible that the victim had been suffering from some fatal disease, which actually killed him.”²¹ Indeed, the tone of Talmudic discussion on the death penalty, and specifically regarding the idea that an execution once every seven years would be destructive, “suggests that there were other guilty parties apprehended during the seven years, but that for various reasons they were not executed.”²²

Both explicitly and implicitly, the Talmudic concern for executing even the clearly guilty is consistent with the idea that even guilty people do not lose their human dignity. The arguably extraordinary requirement that a person had to have been specifically warned before the crime and to have specifically responded to that warning—a requirement that would not be met by some of the most heinous wrong-

19. *Makkoth 7a*.

20. Ben Zion Bokser, *Capital Punishment*, in 3 PROCEEDINGS OF THE COMMITTEE ON JEWISH LAW AND STANDARDS 1537, 1538 (David Golinkin ed., 1997).

21. See Ledewitz & Staples, *supra* note 13, at 40. “R. Tarfon and R. Akiba say, ‘Were we members of a Sanhedrin, no person would ever be put to death.’ How could they [being judges] give effect to that [policy]? Both R. Johanan and R. Eleazar suggested that the witnesses might be plied with [intimate] questions such as, ‘Did you take note whether the victim was [perchance] suffering from some fatal affection or was he perfectly healthy?’” *Makkoth 7a*.

22. Ledewitz & Staples, *supra* note 13, at 40.

doers today, including many serial killers and terrorists—implicitly indicates agreement with the idea that even the worst wrongdoers may not lose their human dignity, as even the wrongdoers may not have displayed the worst kind of evil intention and cognition of their wrongdoing.

The Talmud also suggests that even the worst wrongdoers remain made in the “image” of God.²³ As Professors Ledewitz and Staples argue, this is especially reflected in a Talmudic parable, wherein a king orders that his twin brother, who commits highway robbery—a significant crime in the Abrahamic faiths, as part II on Islam will also show, given its implication for social order—to be hanged.²⁴ They do so, but all who saw him respond with “The king is hanged!”²⁵ This idea is also supported by the Talmud emphasizing God’s own suffering when even the guilty are punished for their wrongdoing: “When a man suffers. What expression does the Shechinah use? ‘My head is too heavy for me, my arm is too heavy for me.’ And if God is so grieved over the blood of the wicked that is shed, how much more so over the blood of the righteous!”²⁶

As Rosenberg and Rosenberg argue, the traditional methods of capital punishment under Jewish law, though they would seem barbaric to a modern day audience, also show a simultaneous concern for the reduction of suffering and the preservation of human dignity of even the rare few, ostensibly clearly guilty people who are subject to the death penalty.²⁷ As a general matter, the Talmud states that a condemned person should receive a favorable death, given the commandment in Leviticus that we must love our fellow as we love ourselves.²⁸ For example, in ancient Jewish times, stoning was considered to be the standard, yet also the most severe method of capital punishment.²⁹

But despite the severity of stoning, the Gemara in the Talmud manifests rabbinical concerns that stoning should maintain a person’s dignity as well as minimize pain.³⁰ On the one hand, Rabbi Yehudah,

23. *Id.* at 44.

24. *Id.*; see also *Sanhedrin* 46b, for a description of the Talmudic parable.

25. *Sanhedrin* 46b.

26. See *Sanhedrin* 46a.

27. See generally Rosenberg & Rosenberg, *supra* note 1.

28. *Sanhedrin* 45a (“And should you say, Let us wreak both upon her, behold R. Nahman said in Rabbah b. Abbahu’s name: Scripture says Love thy neighbor as thyself: choose an easy death for him.”).

29. See Rosenberg & Rosenberg, *supra* note 1, at 1193 (interpreting ancient Jewish law as considering stoning as “the most severe form of capital punishment and is presumably reserved for the worst offenses”). *Id.*

30. See Rosenberg & Rosenberg, *supra* note 1, at 1192; see, e.g., *Sanhedrin* 45a.

in apparent concern for minimizing the time between stoning and death, argues that women being stoned should be unclothed just as men are, in order that stones will achieve full—and swift—impact.³¹ On the other hand, the Sages argue that women should remain clothed, because women, unlike men, would care about this manner of preserving their dignity, even in death.³² Ultimately, the Sages prevail in the Talmud, and thus Jewish law prescribed that women should wear a thin garment when being stoned.³³ As Rosenberg and Rosenberg conclude, this debate “illustrates the Sages’s attentiveness to even the most minute details in an effort to minimize both the suffering of the defendant and unnecessary humiliation, even in cases in which the incremental benefit may be minimal.”³⁴

That Jewish ethics would recognize the dignity of even the most heinous wrongdoers is not surprising, if one accepts, as Ledewitz and Staples have argued, “[a] love of mercy and a dread of strict justice are common Talmudic themes.”³⁵ For example, the Talmud says that God prays that His mercy may overcome His own anger: “May it be My will that My mercy may suppress My anger, and that My mercy may prevail over My [other] attributes, so that I may deal with My children in the attribute of mercy and, on their behalf, stop short of the limit of strict justice.”³⁶ According to the Talmud, it is mercy (along with bashfulness and charitableness) that King David emphasized to the Gibeonites when they requested the death of seven of Saul’s sons, in retaliation for Saul’s killing of their innocents.³⁷ In this way, the Talmud also emphasizes that retribution cannot justify capital punishment, precisely because of the need for mercy.

Judaism’s emphasis on the ideal of mercy is complemented by its emphasis on the idea of repentance. As Ledewitz and Staples further argue, “The ultimate goal of the Talmudic criminal justice system was not justice, but repentance.”³⁸ Indeed, to the extent that classical Jew-

31. Rosenberg & Rosenberg, *supra* note 1, at 1191-92. Rabbi Yehudah’s argument is derived from *Sanhedrin* 45a.

32. *Sanhedrin* 45a.

33. *Id.*

34. See Rosenberg & Rosenberg, *supra* note 1, at 1192 (supporting the idea that Jewish ethics recognizes the dignity of even clearly guilty and heinous wrongdoers, Rosenberg and Rosenberg identify other areas where the Talmud illuminates a concern for minimizing both pain and indignity). For example, the Gemara explains that the law dictates that a person must be pushed from a certain height, one high enough to hasten death, but low enough to minimize the indignity that would arise from a body being smashed from a fall. *Id.*

35. Ledewitz & Staples, *supra* note 13, at 43.

36. *Berakoth* 7a.

37. See *Yebamoth* 78b-79a.

38. Ledewitz & Staples, *supra* note 13, at 44.

ish law supports the death penalty in theory,³⁹ even if not in frequent practice, scholars have argued that this support is consistent with Jewish law's emphasis on repentance, for it is only through this magnitude of punishment that wrongdoers are, in fact, able to atone for the gravity of their crimes.⁴⁰ Simultaneously, the ideal of repentance undergirds the Talmud's effective rejection of the death penalty. To this end, a story in the Talmud urges that the Psalm, "Let sinners cease from the earth and let the wicked be no more"—a verse central to the basic idea that the death penalty is just because it eradicates evil in the human world—can be interpreted in a way so that people pray for sinners' repentance, rather than for their death and their ceasing to exist as people.⁴¹

And, while those who commit acts such as murder cannot sufficiently atone in the sense of fully restoring that which they have taken, the Talmud resists the death penalty, even for the clearly guilty, because of the belief that "even in murder, even without forgiveness by the victim, mercy and acceptance of repentance are possible without application of strict justice."⁴² These ideas are reflected in Rabbi Tsevi Yehudah Berlin (Netsiv)'s observations about the original prophets of Genesis: "they acted [uprightly] toward the nations of the world, even though they worshipped vile idols. They nevertheless showed them love and were concerned about their well-being, thereby maintaining [God's] creation. We see this in the extent to which Abraham our father prayed for Sodom. Even though he despised them and their king to the utmost because of their wickedness . . . he nevertheless wished their continuous existence."⁴³

It must be acknowledged that there are certain limitations to Talmudic thought on capital punishment. For one thing, despite its restrictiveness on the implementation of the death penalty, the Talmud

39. *Id.* at 42.

40. *Id.* at 51 ("The death penalty is a part of, and not separate from, this general attitude. An execution, though awesome, is not an act of hostility. It is a ritual opportunity for the condemned prisoner to attain atonement."). Ledewitz and Staples contrast the Talmudic conceptualization of the death penalty with the death penalty in America today: "Not many Americans believe that the criminal is atoning for his crime through a ritual act. In execution, we may be deterring crime, satisfying the victim's family, saving money or even getting rid of the garbage. . . . By doing to the criminal and not for him, we in America have severed the link of humanity with the criminal, a motivation that never occurred to the rabbis." *Id.*

41. *Psalms* 104:35.

42. Ledewitz & Staples, *supra* note 13, at 46.

43. Benjamin Ish-Shalom, "Purity of Arms" and Purity of Ethical Judgment, 6 MEOROT 1, 5 (2006) (citing and translating R. TSEVI YEHUDAH BERLIN (NETSIV), HA'AMEQ DAVAR, GENESIS, INTRODUCTION (1879)).

does provide for extrajudicial use of capital punishment.⁴⁴ In particular, it allows for the relaxation of the ordinary procedural safeguards in rabbinical courts if demanded by the “needs of the hour.”⁴⁵ And, in such extraordinary circumstances, capital punishment may even be imposed for actions that would not normally even qualify for the death penalty.⁴⁶ In the time of the Talmud, the king could also call a separate court that was not constrained by the same procedural standards, and that court could execute based similarly on “the needs of the hour.”⁴⁷ In the history of the State of Israel, this emergency doctrine has resulted in only two executions: Adolf Eichmann, the Nazi war criminal, and Meir Tobianski, an Israeli soldier during the 1948 Arab-Israeli war who was falsely accused of treason and posthumously exonerated.⁴⁸

On an even broader level, as Professor Samuel Levine has argued, Talmudic arguments were made in the backdrop of a Jewish population that was very small and experienced a smaller level of violence as compared to, the United States, for example, and that “had they been theorizing in a more violent society, the Rabbis may have approved of larger number of executions.”⁴⁹ Furthermore, as Ledewitz and Staples point out, the Talmudic death penalty is difficult to describe, in part because “[w]hen discussing a specific topic like the death penalty, the detailed discussions in the Talmud falsely suggest that the discussions corresponded to practice,” when it is “not clear how much of its pronouncements were ever enforced.”⁵⁰ This is particularly salient to Talmudic discussions on the death penalty, because the Talmud was compiled centuries after Jews had lost political sovereignty in Israel.⁵¹ As a consequence, “[t]he Diaspora meant that they

44. *See id.* at 7, 9.

45. *See Sanhedrin* 46a (“It once happened that a man rode a horse on the Sabbath in the Greek period and he was brought before the Court and stoned, not because he was liable thereto, but because it was [practically] required by the times. Again it happened that a man once had intercourse with his wife under a fig tree. He was brought before the Beth din and flogged, not because he merited it, but because the times required it.”).

46. *See id.*

47. Samuel J. Levine, *Capital Punishment in Jewish Law and Its Application to the American Legal System: A Conceptual Overview*, 29 ST. MARY’S L.J. 1037, 1051 (1998).

48. Patrick Martin, *Israeli Party Ponders Capital Punishment Bill to Prevent Another Prisoner Swap*, GLOBE & MAIL (Oct. 28, 2011, 4:58 PM), <http://www.theglobeandmail.com/news/world/worldview/israeli-party-ponders-capital-punishment-bill-to-prevent-another-prisoner-swap/article620238/>.

49. Levine, *supra* note 47, at 1049.

50. Ledewitz & Staples, *supra* note 13, at 35.

51. *See id.* Staples and Ledewitz note that “when discussing a specific topic like the death penalty, the detailed discussions in the Talmud falsely suggest that the discussions corresponded to practice. The extent of correspondence is not known. The Talmud was not fully compiled until

were small communities in nations not under Jewish law, so the issue of capital punishment remained fundamentally a theoretical one for the rabbis. Often, in fact, the issue of capital punishment served as a site to explore the differences in Jewish understandings of God and the human in contrast to Christian and Islamic accounts.”⁵²

Yet, these limitations on Talmudic thought only serve to reaffirm the strength of modern day Jewish opposition to the death penalty, a position taken in spite of these limitations. With regards to extrajudicial use of capital punishment, Judaism’s modern opposition to capital punishment becomes particularly noteworthy, considering that in the comparative context of collective self-defense, post-Sanhedrin Jewish courts also have tended to “consider[] almost every historical moment an emergency,” thus allowing them to relax the strict rules about procedure . . . ,” because “the hour required it.”⁵³ To the extent that the Talmud did not consider the type of heinous wrongdoings that take place in modern society, such as what international law considers war crimes, it becomes particularly remarkable that the modern state of Israel has only executed one person accused of such wrongdoing (i.e., Eichmann).

And with regards to the idea that Talmudic theorizing on the death penalty was informed by a vastly different context, the same observation can be, and has been made in support of abolition: modern day opposition has been driven, in part, by a system of justice that imposes that capital punishment must be near perfect, and that such a system far from exists—if it even existed in Talmudic times. As Orthodox Rabbi Yosef Edelstein has stated, “the capital punishment outlined by the Written and Oral Torah” was “carried out by the greatest Sages from among our people (who were paragons of humility and humanity and not just scholarship, needless to say), did not remotely resemble the death penalty in modern America . . .”⁵⁴ However, “the system of judicial punishments could become brutal and barbaric unless administered in an atmosphere of the highest morality and piety.

hundreds of years after the loss of Jewish political sovereignty in Israel. It is not clear how much of its pronouncements were ever enforced.” *Id.*

52. MATHEWES, *supra* note 3, at 173.

53. Jonathan K. Crane, *Torture: Judaic Twists*, 26 J.L. & RELIGION 469, 500 (2010-2011).

54. Yosef Edelstein, *Parshat Beha'alotcha: A Few Reflections on Capital Punishment*, ORTHODOX UNION (June 23-24, 2004), <https://www.ou.org/torah/savannah/5760/behaalotcha60.htm> [<https://web.archive.org/web/20060105042354/http://www.ou.org/torah/savannah/5760/behaalotcha60.htm>].

When these standards declined among the Jewish people, the Sanhedrin . . . voluntarily abolished this system of penalties.”⁵⁵

This continuing abolitionist stance shows even more foresight when considering how today’s society must deal with wrongdoers—for example, adolescents or people with intellectual disabilities who may have varying degrees of intention, cognition, and control that, ostensibly, reflect on the question of whether he or she continues to retain human dignity—that either were not dealt with in ancient times, or, if they were, were dealt with without concurrent written record. This has made it difficult for modern society, inspired by religion, to reach by concrete principle or analogy—even more so as modern science helps shed greater light on these issues.

For these, and other reasons, the death penalty is opposed by the major rabbinical organizations of Orthodox, Conservative, and Reform Judaism. Of these, Orthodox Judaism appears to be the most amenable to the idea that capital punishment could work in theory; by contrast, those of the Reform tradition have readily resolved that “both in concept and in practice, Jewish tradition found capital punishment repugnant.”⁵⁶ Yet, the words of Orthodox Rabbi Yosef Edelman exemplify even Orthodox concern with the idea of modern day capital punishment: according to the Torah “[i]t is not morally wrong, in absolute terms, to put a murderer to death. . . . However, things look rather different when we turn our attention to the practical realization [of actually implementing the death penalty].”⁵⁷

Thus, Jewish law has long held very little room for doubt. The death penalty is not morally licit; a position borne out of Talmudic concern for not only the innocent, but also the human dignity of even people who others have shown to be guilty, having had to overcome great substantive, procedural, and evidentiary barriers to doing so. As both parts II and III will show, this position is extraordinary in its progressiveness within the Abrahamic faiths. As Ledewitz and Staples further argue, “the confidence the rabbis had in God, rendered reform more easily attainable than reform is in our positivist age, which skeptically views any talk of ideals and morality. That is, it was easier for

55. 2 ARYEH KAPLAN, *THE HANDBOOK OF JEWISH THOUGHT* 170-71 (1992).

56. Central Conference of American Rabbis, *Resolution on Capital Punishment Adopted by the CCAR at the 90th Annual Convention of Central Conference of American Rabbis Phoenix, Arizona* (Mar. 26-29, 1979), <http://ccarnet.org/rabbis-speak/resolutions/1979/capital-punishment-1979>.

57. Edelman, *supra* note 54; *but see* Shmuley Boteach, *An Israeli Death Penalty for Terrorists*, *TIMES OF ISRAEL* (Jan. 16, 2014), <http://blogs.timesofisrael.com/an-israeli-death-penalty-for-terrorists-2> (arguing in favor of the death penalty for mass murderers).

the rabbis to depart from the Word of God than it is for American judges today to depart from the voice of the people.⁵⁸ The rabbis believed that their interpretation of the Torah's recounting of G-d's words to conform with their own ideals was faithful to G-d's intent."⁵⁹ As the next section will show, it is also illuminating in how it contrasts to the Jewish ethics of collective self-defense, ethics that not only are less universal, but also manifest positions that ultimately take a different viewpoint of guilt and human dignity.

B. War and Collective Self-Defense: the Loss of Dignity Under an Expansive Conceptualization of Guilt

Clear opposition in Jewish ethics to the death penalty—and the belief embedded therein that even the guilty retain human dignity—stands in some contrast to major schools of thought in Judaism on self-defense and its implications for human dignity. On the one hand, it cannot be said that Jewish positions on the ethics of collective self-defense are as evident and unified as they are as compared to capital punishment, where all major schools of thought take a very clear and similar stance. Nor can it be said that any of the major schools of thought today are in complete continuity with classical Jewish law, a phenomenon that is partially a consequence of the fact that, unlike in capital punishment, much of the practical realities of collective self-defense today do not find exact analogies in the practical realities of war in Talmudic times.

On the other hand, this article explores what can be argued to be, at least popularly speaking among people in the Jewish diaspora, a major, even predominant school of thought that is derived from the Orthodox tradition. In comparison to the restrictiveness of Jewish ethics on the death penalty and its emphasis on mercy, this tradition is substantially more permissive with respect to the moral licitness of collective self-defense—including being more permissive in casting alleged wrongdoers as losing their human dignity.

This tradition's answer to the most basic question of the ethics of war—what justifies it—begins to show this contrast. Classical Jewish ethics states that there are two basic kinds of war, obligatory and optional.⁶⁰ Obligatory war involves the defense of another Jewish person

58. Ledewitz & Staples, *supra* note 13, at 39.

59. *See id.*

60. *See Melakhim* 5:1-2 ("The primary war which the king wages is a mandatory war. What is a mandatory war? A war against the seven nations, a war against Amalek, and a war to deliver Israel from the enemy attacking him. Thereafter he may engage in an optional war, that is, a war

and the Jewish nation—causes that are not just permitted, but morally mandated.⁶¹ On the one hand, this appears to be consistent with the classical Western (and Christian) conceptualization of what is “just cause” to use deadly force, where deadly force is justified only to defend lives. On the other hand, the Orthodox position argues that the concept of self-defense must extend beyond purely saving lives, to defending the honor of the Jewish nation and, concurrently, of God—a position entailing that war can be undertaken even if it is questionable that doing so would save any lives.

Among the most distinguished rabbis of religious Zionism and a member of the Chief Rabbinate Council, Rabbi Yisraeli points to the example of a rescue operation that, though ostensibly aiming to save hostages from terrorists, would quite foreseeably cost more lives than would have been saved through it.⁶² Ultimately, he argues that this sacrifice of life would be justified by the Jewish commandment of *kidush hashem*, or “sanctifying the divine name,” which, in this case, is accomplished by defending the honor of the Jewish nation, regardless of cost.⁶³ Yisraeli also points to the ancient Jewish war on Midian, which is described in the Torah as both fighting to “avenge the people of Israel” and seeking “the vengeance of G-d,” as showing how defending the honor of the Jewish nation is an act of sanctifying God.⁶⁴ Exemplifying how important Jewish honor is in this tradition, it is

against neighboring nations to extend the borders of Israel and to enhance his greatness and prestige.”). In the Talmud, optional wars were wars that God does not morally require, but which humans may still engage in for justifiable purposes; King David’s wars of expansion were considered optional. Norman Solomon, *Judaism and the Ethics of War*, 87 INT’L REV. OF THE RED CROSS 295, 297-98 (2005), https://www.icrc.org/eng/assets/files/other/irrc_858_solomon.pdf. This category is essentially defunct in modern times because, in order to engage in optional war, the Talmud required a king to seek authorization from an institution called the Great Court, consisting of 71 judges, and from the High Priest. *Id.*

61. See *Melakhim* 5:1-2; Sarah Bohman, *Laying Down One’s Swords – Judaism’s Just War*, 3 U. ST. THOMAS J. L. & PUB. POL’Y 99, 102-03 (2009) (“[M]ost rabbinical scholars agree that one must defend another Jewish person, the Nation, and the worship of God while the other causes remain optional, leaving room for moral and ethical considerations.”). *Id.*

62. Yitzchak Avi Roness, *Halakha, Ideology and Interpretation: Rabbi Shaul Yisraeli on the Status of Defensive War*, 20 JEWISH L. ASS’N STUD. 184, 193-94 (2010) (citing and translating SHAUL YISRAELI, *HAVOT BINYAMIN* 130-131 (1992); see also Michael J. Broyde, *Just Wars, Just Battles and Just Conduct in Jewish Law: Jewish Law Is Not a Suicide Pact*, in *WAR AND PEACE IN THE JEWISH TRADITION* 2-3 (Lawrence H. Schiffman & Joel B. Wolowelsky, eds. 2007) (discussing Rabbi Elizer Yehudah Waldenberg’s argument that it is permissible for government to engage in a rescue mission even when more will be killed than will be saved).

63. See Roness, *supra* note 62, at 193-94 (citing and translating YISRAELI, *supra* note 62, at 130-31 (“When all Jews go out together as one to fight the murderer’s intent on harming Jews, the divine name is sanctified.”)).

64. See *id.* at 194.

even considered permissible to kill a Jewish soldier “so as to avoid the long, drawn out demoralizing situation of a soldier in enemy hands.”⁶⁵

This contrast is further apparent in this tradition’s answer to other questions regarding the ethics of war. On the one hand, while Jewish conceptualization of what causes justify war has some continuity with classical Jewish ethics, namely with respect to obligatory war, other aspects of the ethics of war are not as clear when it comes to ancient analogies. For example, as Rabbi David Saperstein argues with regards to the idea that war must be undertaken only as a last resort, “It seems to me that the Christian tradition, being much more of a literal last resort tradition, can make a far more powerful argument about the need to have exhausted sanctions and all other alternatives that the Jewish tradition requires.”⁶⁶ Similarly, with regards to the idea of proportionality—that the benefits of war (or any particular military action) must be proportionate to the harms they cause (particularly the harms caused to civilians)—“[s]ome minor themes in the Jewish tradition allude to [it] . . . [b]ut there is no discussion of how many combatants can be killed in battle.”⁶⁷

On the other hand, this sort of imperfect analogy gives room for wide breadth of interpretation—a breadth that allows the modern Orthodox position to be more permissive in sanctioning acts of collective self-defense. This permissiveness is evident, for example, in the statement of Rabbi Shaul Israel, Judge of the Supreme Rabbinical Court of Jerusalem, that all conduct in war that is needed to win is permitted by Jewish law, as well as the idea that one who kills the pursuer is exempt from punishment, even if lesser force could have been used, because the pursuer is *gavra katila*, or an individual who is already considered to be dead in a legal sense.⁶⁸ Similarly, Rabbi Broyde argues that “[c]ertainly there is a deep consensus that every violation of Jewish

65. See Broyde, *supra* note 62, at 3.

66. See DAVID R. SMOCK, RELIGIOUS PERSPECTIVES ON WAR: CHRISTIAN, MUSLIM AND JEWISH ATTITUDES TOWARD FORCE 16 (2002) (discussing Rabbi Saperstein’s comments during United States Institute of Peace (USIP) conference proceedings).

67. *Id.*; see also Elliot N. Dorff, *Bishops, Rabbis, and Bombs*, in CONFRONTING OMNICIDE: JEWISH REFLECTIONS ON WEAPONS OF MASS DESTRUCTION 164, 180 (Daniel Landes ed., 1991) (stating that “the principle of proportionality is not nearly as clear and authoritative a tenet in Judaism as it is in Catholicism.”).

68. See Broyde, *supra* note 62, at 4 (citing and translating R. Shaul Israeli, *Military Activities of National Defense*, in HA-TORAH VE-HA-MEDINAH 5-6 (1953); see also Ya’acov Blidstein & Jonathan Chipman, *The Treatment of Hostile Civilian Populations: The Contemporary Halakhic Discussion in Israel*, 1 ISRAEL STUD. 27, 31-32 (1996) (discussing also the development of the position that someone being threatened, or the pursued, may kill the pursuer even if he could have defended himself using lesser force).

law other than *ervah* [immodest exposure] and idolatry would be permitted in the course of fulfilling valid military orders.”⁶⁹

The same lack of direct clarity—and resulting broad modern day interpretation—applies to the key issue of civilian casualties of war. As scholars have argued, “there exists no discussion in classical rabbinical sources that takes cognizance of the likelihood of causing civilian casualties in the course of hostilities.”⁷⁰ Notwithstanding this lack of classical sources, modern Jewish ethicists appear generally to agree with the discrimination principle of Western Just War theory. Intentional killing of civilians is illicit, though unintended, but foreseeable killing of innocent civilians can be morally licit: as Broyde argues, “Jewish law would allow the unintentional killing of innocent civilians as a necessary (but undesired by-product) of the moral license of war.”⁷¹ That being said the question of who actually qualifies as an innocent civilian sets certain Jewish schools of thought apart from Western Just War theory on civilian casualties.

With regards to who qualifies as an innocent civilian, modern Orthodox thought defines this term very narrowly. It is important first to understand that classical Jewish sources are not completely devoid of implications for this issue. For example, the great Jewish philosopher Maimonides stated that when a city is besieged, it cannot be surrounded on all sides, meaning that there must be room for people—and particularly civilians—to escape, should they wish.⁷² On the one hand, read on its face, this is an extraordinarily noble and charitable idea by Maimonides. On the other hand, the vocal Orthodox school of war ethics interprets this principle to mean that a person who remains is not innocent, but instead, is one who “passively protects [wrongdo-

69. Broyde, *supra* note 62, at 4.

70. 3 J. DAVID BLEICH, *CONTEMPORARY HALAKHIC PROBLEMS* 277 (1989) (“[N]ot only does one search in vain for a ruling prohibiting military activity likely to result in the death of civilians, but, to this writer’s knowledge, there exists no discussion in classical rabbinic sources that takes cognizance of the likelihood of causing civilian casualties in the course of hostilities legitimately undertaken as posing a halakhic or moral problem.”) (referencing *Amud ha-Yemini*, no. 16, chap. 3-5, sec. 1); *see also* Dorff, *supra* note 67, at 176 (arguing that it is unclear if Jewish law “requires any distinction between combatants and noncombatants even in the conduct of war”).

71. Michael J. Broyde, *Battlefield Ethics in the Jewish Tradition*, 95 *AM. SOC’Y INT’L L. PROC.* 92, 97 (2001).

72. MAIMONIDES, *Laws of Kings* 6:7 (“When one surrounds a city to lay siege to it, it is prohibited to surround it from four sides; only three sides are permissible. One must leave a place for inhabitants to flee for all those who wish to abscond to save their lives.”).

ers] and does not condemn them”—in other words, one who “saw and knew this but did nothing”—may be subject to killing.⁷³

For example, Rabbi Michael Broyde states that “the Jewish tradition feels that innocent civilians should do their very best to remove themselves from the battlefield and those who remain are not so innocent. If one voluntarily stays in a city that is under siege, one has the status of a combatant.”⁷⁴ Rabbi Michael Broyde agrees: “Since the Jewish tradition accepts that civilians (and soldiers who are surrendering) are always entitled to flee from the scene of the battle, it would logically follow that all who remain voluntarily are classified as combatants, since the opportunity to leave is continuously present.”⁷⁵ Broyde further clarifies that “I would apply this rule in modern day combat situations to all civilians who remain voluntarily in the locale of the war in a way which facilitates combat.”⁷⁶ Broyde also points to Maimonides as supporting collective punishment.⁷⁷ Others cite Maharal, who interprets Jewish law as permitting a nation defending one’s self to make no distinction between the innocent and the guilty.⁷⁸ Citing Maharal, Rabbi Chaim Jachter argues that “the Israeli army may risk the lives of Palestinian civilians living near Palestinian terrorists. The same applies to Hezbollah terrorists embedded among the civilian population of Lebanon.”⁷⁹

73. Broyde, *supra* note 62, at 6. In particular, killing is justified “if one is in a situation where innocent people are being killed by terrorist acts that cannot be stopped by catching the perpetrators themselves, and those terrorists are supported by a civilian population that passively protects them and does not condemn them.” *Id.*

74. Broyde, *supra* note 71, at 97. Along these lines, the IDF has routinely issued warnings to civilians to leave before they engage in attacks, presumably as a way to ensure that they ultimately attack only combatants. See *Palestine/Israel: Indiscriminate Palestinian Rocket Attacks*, HUM. RTS. WATCH (July 9, 2014), <http://www.hrw.org/news/2014/07/09/palestineisrael-indiscriminate-palestinian-rocket-attacks>. However, such warnings do not absolve a state claiming self-defense of the responsibility to target combatants only. *Id.*

75. Broyde, *supra* note 71, at 97.

76. See Broyde, *supra* note 62, at 39 n.90.

77. See *id.* at 6-7 (citing MAIMONIDES, *Laws of Kings* 9:14: “For this reason the inhabitants of Shekhem were liable to be killed since Shekhem stole [Dina], and the inhabitants saw and knew this and did nothing.”); see also Ya’acov Blidstein & Jonathan Chipman, *supra* note 68, at 39 (“The killing of civilians is acceptable, provided it is initiated by sovereign authority [the Israeli government], not by individuals taking the law (quite literally) into their own hands.”).

78. See Blidstein, *supra* note 68, at 36 (citing MAHARAL, *Commentary Gur Aryeh to Genesis* 34:14 (Jacob’s sons were permitted to kill the inhabitants of Shekhem in response for the taking of Dina “even though there are many who did not do [anything], this makes no difference. As they belong to the same nation which did them harm, they are allowed to wage war against them.”)).

79. Chaim Jachter, *Halachic Perspectives on Civilian Casualties: Part 3*, 17 KOL TORAH 1, 3 (2008); see also *Israel: Serious Violations in West Bank Operations*, HUM. RTS. WATCH (July 3, 2014), <http://www.hrw.org/news/2014/07/03/israel-serious-violations-west-bank-operations> (argu-

There are numerous other examples of prominent rabbis arguing, in the backdrop of concrete modern day circumstance, that Jewish law defines “innocent civilian” very narrowly. For example, Mordechai Eliyahu, the former Sephardi Chief Rabbi of Israel, wrote in 2007 that “there was absolutely no moral prohibition against the indiscriminate killing of civilians during a potential massive military offensive on Gaza aimed at stopping the rocket launchings.”⁸⁰ Going further, he argues that it is morally forbidden to risk the lives of Jews, including Israeli Defense Forces, in order to limit harm to Palestinian non-combatants in Gaza.⁸¹ His son Shmuel Eliyahu, chief rabbi of Safed, argued that “all leaders of the Jewish people [should not be] compassionate with those who shoot [rockets] at civilians in their houses.”⁸² He further stated, “If they don’t stop after we kill 100, then we must kill 1,000. And if they don’t stop after 1,000, then we must kill 10,000. If they still don’t stop we must kill 100,000. Even a million. Whatever it takes to make them stop.”⁸³ Indeed, such opinions are not limited to certain Orthodox rabbis, but extend to more liberal Zionists, including prominent figures such as Alan Dershowitz. Dershowitz writes:

Although collective punishment is prohibited by international law, it is widely practiced throughout the world, including the most democratic and liberty-minded countries. Indeed, no system of international deterrence can be effective without some reliance on collective punishment. Every time one nation retaliates against another, it collectively punishes citizens of that country. The American and British bombings of German cities punished the residents of

ing that “the scale of arbitrary arrests and detentions, unlawful use of force, property destruction including home demolitions, and raids on homes and media offices raise the collective punishment concerns.”). Practices such as demolitions of family homes of suspected Palestinian terrorists particularly manifest at least some degree of acceptance of the idea of collective punishment, as such practices necessarily harm not only aggressors, but people considered to be non-combatants under international law. See *Q&A: 2014 Hostilities between Israel and Hamas*, HUM. RTS. WATCH (Aug. 3, 2014), <http://www.hrw.org/news/2014/08/03/qa-2014-hostilities-between-israel-and-hamas> (“Prohibited are direct attacks against civilian objects, such as homes and apartments, places of worship, hospitals, schools, and cultural monuments—unless they are being used for military purposes. Civilian objects become subject to legitimate attack when they become military objectives—that is, when they are making an effective contribution to military action and their destruction, capture, or neutralization offers a definite military advantage. This would include the deployment of military forces in what are normally civilian objects. Where there is doubt about the nature of an object, it must be presumed to be civilian.”).

80. Matthew Wagner, *Eliyahu Advocates Carpet Bombing Gaza*, JERUSALEM POST (May 30, 2007), <http://www.jpost.com/Israel/Eliyahu-advocates-carpet-bombing-Gaza>.

81. *Id.* Eliyahu, like others, points to the Shechem massacre in Genesis in support of his argument. *Id.*

82. See Wagner, *supra* note 80.

83. *Id.*

those cities. The atomic bombings of Hiroshima and Nagasaki killed thousands of innocent Japanese for the crimes of their leaders. The bombing of military targets inevitably kills civilians.⁸⁴

What accounts for such permissive views of collective self-defense across Jewish ethics? Ultimately, the answer lies significantly in how these strains of Jewish ethics cast the human dignity of people on the alleged aggressors' side, and in ways that are both similar and dissimilar to how Jewish ethics cast the human dignity of the guilty who are subject to capital punishment. This is evident in even arguments that are charitable to aggressors, such as the argument that, in Jewish law, the general concept of self-defense is justified by the idea that self-defense saves not only the person being attacked, but also the attacker, from committing a sin, and thus suffering the moral guilt and punishment thereof.⁸⁵ Thus, Aharon Enker and Dov Frimer argue that "it is permitted to kill the pursuer when, in his pursuit, he is carrying out a severe sin whose punishment is death, and his being killed will save the pursued party from his plot," an idea that clearly focuses not just on the consequences for the potential victim, but also for the wrongdoer—and in this way shares similarity to the argument that, theoretically, capital punishment is morally licit under Jewish law because this actually allows wrongdoers to atone for their wrongdoing.⁸⁶

In its emphasis on the salvation of wrongdoers, these arguments appear to be a minority view; nevertheless, the majority view, too, focuses on the human worth and dignity of aggressors, in justifying its permissive stance on collective self-defense. In particular, this view posits that collective self-defense is important, not only because it saves the lives of the innocent, but also because it eradicates a pernicious

84. ALAN M. DERSHOWITZ, *THE CASE FOR ISRAEL* 167 (2003).

85. Shlomo Zuckier, *A Halakhic-Philosophic Account of Justified Self-Defense*, 16 *TORAH U-MADDA* J. 21, 29-30 (2013). Zuckier distinguishes this idea as arising from the concept of *rodef* (pursuer), versus the concept of *ba ba-mahteret* (the "tunneler"), which justifies killing another to preserve one's life, regardless of the moral guilt of the other. *Id.* at 28-30.

86. *Id.* at 29 (citing and translating AHARON ENKER HEKHREAH VE-Z. OREKH BE-DINEI ONASHIM 217 (1977)). In particular, they read the phrase *mazzlin otan be-nafshan* "we save them with [the taking of] their lives," as referring to saving both the attacker and the would-be victim. *Id.* Zuckier further argues arguing that self-defense from the Jewish perspective can be justified by the fact that a potential victim has a right to life, and the wrongdoer has forfeited his own life. *Id.* *But see* RABBI OVADIAH YOSEF, 21 *TORAH SHEBE'AL PEH* 14 (1989) (arguing that human life takes precedence over defense of Jewish sovereignty, and that it were determined that "if territories are returned, the threat of war shall be decreased and there is the possibility of lasting peace, it appears that according to all halakhic opinions it is permissible to return territories of Eretz Yisrael for the sake of attaining this goal, for nothing stands in the way of *pikuah nefesh*.")) (also arguing that not only the utmost Jewish ideal of peace, but also the Bible supports this idea, where King Solomon gave King Hiram territory for services rendered in the form of materials to build the Temple.) *Id.*

cious pollution in the order of man. Manifesting this emphasis on greater pollution in the social order, over even the lives of the innocent, Judaism considers war as sometimes necessary because “Jewish perspectives seem clear that one cannot live with concern only with themselves and their own community because disputes will build and sinners can influence your actions.”⁸⁷

Reflecting this perspective, scholars supporting a broad conception of collective self-defense point to the famous rabbi Rashi, who, interpreting Deuteronomy, states that evil must be addressed, lest evil eventually spread and overcome.⁸⁸ This is evident, for example, in Rabbi Broyde’s argument that *hillul Hashem*, or avoiding the desecration of God’s name, permits “even the killing of otherwise innocent civilians.”⁸⁹ Emphasis on eradicating the unholy (which also underscores how these ethics broadly conceive of morally licit justification to use deadly force) is also present in Shmuel Eliyahu’s argument that “[i]f they don’t stop after we kill 100, then we must kill 1,000,” where he quotes from Psalms, which states, “I will pursue my enemies and apprehend them and I will not desist until I have eradicated them.”⁹⁰

This emphasis on eradicating greater pollution in the social order, even somewhat irrespective of its consequences for saving the actual lives of the innocent, not only explains this school’s broad definition of what causes justify war (e.g., not just defense of life, but punishment of others) and how justified war must be executed (e.g., concepts like proportionality and last resort more broadly defined, as guilty people are owed no greater consideration), but also is particularly used to justify the ethic of “collective punishment” that is used to narrow the category of those who qualify as innocent civilians. For example, in justifying his position that “collective punishment of vast segments of society for the active misconduct of the few” is morally licit, Broyde argues that “retaliation when done to teach a lesson is not a general violation of Jewish law, and killing for a purpose is not prohibited in wartime thus, retaliatory killing in war is permitted”⁹¹

This position is further expounded by Rabbi Shaul Israeli, in his influential monograph entitled “The Qibia Incident in Light of

87. Bohman, *supra* note 61, at 103.

88. RASHI, *Commentary on Deuteronomy* 20:12 (“Wiping out evil is also part of justice. Dangerous disputes must be resolved, because if you choose to leave evil alone—it will eventually attack you.”).

89. See Broyde, *supra* note 62, at 5.

90. Wagner, *supra* note 80.

91. Broyde, *supra* note 62, at 5-6; see also *infra* note 119 and accompanying text.

Halakhah” —referring to a killing by the IDF in 1953 of sixty-nine Arabs, two-thirds of whom were women and children.⁹² On the one hand, in supporting the ethic of collective punishment, Rabbi Israeli does not argue, as Broyde appears to, that moral guilt extends even to those who are not actively performing, or conspiring to perform, wrongdoing; nevertheless, those who even support the violence with their words can be considered as part of the conspiracy.⁹³ This argument complements that of Rabbi Ariel, who supports collective punishment not by casting civilians as somehow complicit and thus morally blameworthy, but instead by arguing that even an innocent child is an “organ” that is part of the greater body that is the nation.⁹⁴ On the other hand, by not individualizing the moral blameworthiness of an innocent child—or even seeking to assess what individual threat the child poses, whether or not the child intentionally poses it—this position effectively characterizes this child as an evil that must also be eliminated.

At the same time, it is clear that classical sources also support alternate positions. These positions urge mercy over punishment, particularly collective punishment, and are highlighted by other Jewish voices. In ancient Jewish law, though the Tanakh is not short on severe treatment and punishment of people, particularly the guilty, Talmudic rabbis did much in the way of interpretation to soften the harshness of law.⁹⁵ An example at the intersection of capital punishment and collective self-defense is the rabbinic interpretation of executions of captured leaders in the Torah.⁹⁶ Without ignoring these executions, rabbis pointed to the classical example of Ahab King of Israel, who allowed the defeated and captured Hadad King of Syria to seek refuge with him, rather than killing him.⁹⁷

Indeed, notwithstanding modern day interpretations of the ethics of war, much of which is made in the vacuum of direct instruction or

92. See Broyde, *supra* note 62, at 4 (citing and translating R. Shaul Israeli, *Military Activities of National Defense*, in HA-TORAH VE-HA-MEDINAH 5-6 (1953)).

93. See Broyde, *supra* note 62, at 22-23 (“This is not, R. Israeli posits, any form of collective punishment, as only people who are guilty (whether of murder or conspiracy to commit murder) are actually being punished.”).

94. See Blidstein, *supra* note 68, at 35-36 (citing and translating Yaakov Ariel, *The Ethic of War in the Torah*, in ARAKHM BE’MIVHAN MILHAMAH 80-86 (A. Blum ed., 1982) (“Just as in a personal struggle . . . it is your right to protect yourself by striking the soft belly [of the aggressor] . . . so in war against the collective, you may strike those organs of the [enemy] nation that seem [appropriate] to you, in order to prevent a strike on the part of other organs.”).

95. See, e.g., Guy B. Roberts, *Judaic Sources of and Views of the Laws of War*, 37 NAVAL L. REV. 221, 232 (1988).

96. *Id.* at 233 (discussing executions of captured leaders in the Torah).

97. 1 Kings 20:31; see also Solomon, *supra* note 60, at 299.

analogy in classical sources (unlike in capital punishment), there are many classical examples that begin to suggest an interpretation that is more merciful towards even the clearest and most unyielding aggressors. For example, as Guy Roberts has argued, ancient Israelites were quite merciful as compared to contemporaries such as the Assyrians, and “on the whole, the Israelite warriors conducted themselves in a disciplined, restricted manner in accordance with rules and regulations derived from divine inspiration.”⁹⁸ Still, other examples are found in the work of Maimonides. Despite the modern interpretation of his “four sides” call, the body of his teachings arguably suggests a more restrictive position on morally licit conduct in war. Among these is the idea, touching on last resort, that “[w]hen you approach a city to war against it, call them to peace,” and the idea, touching on civilian discrimination and derived from Deuteronomy, that Jewish forces cannot destroy fruit trees to hurt their enemy.⁹⁹

Scholars have argued that these sources support a more restrictive Jewish interpretation of the Western concept of Just War, particularly an interpretation consistent with the idea that “[t]he justification of war . . . is the saving of lives, not the punishment of the enemy,” as Rabbi Bleich states.¹⁰⁰ To this end, Rabbi Aryeh Klapper argues, “human dignity is a primary rather than a secondary issue” in wartime; it is necessary to maintain “prohibitions in wartime precisely because we need them to prevent wholesale moral deterioration.”¹⁰¹ Moreover, “[t]he Torah is conscious that war corrupts, and therefore tells us that we need to maintain boundaries even in war. That it is necessary to permit killing does not mean that we need to permit everything, as we need to protect ourselves from war as well.”¹⁰²

Klapper’s argument suggests that individual life should be valued even in contexts when war is fought for self-defense, and certainly when military action may not strictly or immediately further self-defense per se, despite other important goals (e.g., furthering the glory of God). It would also caution against undertaking military action

98. Roberts, *supra* note 95, at 233.

99. MAIMONIDES, *Laws of Kings* 6 (citing *Deuteronomy* 20:10); MAIMONIDES, *Laws of Kings* 6:8-9 (citing *Deuteronomy* 20:19).

100. See Bleich, *supra* note 70, at 285. Bleich uses the traditional language of proportionality to describe what Jewish law requires, stating that war is permitted only when “a proposed war is indeed necessary and . . . will be successful in achieving its objectives,” and “only when the lives preserved are greater in number than the lives whose loss may be anticipated as a result of armed conflict” and “the need to eliminate a potential aggressor is an imperative *causis belli* that renders even preemptive war permissible.” *Id.*

101. Aryeh Klapper, *Warfare, Ethics, and Jewish Law*, 6 MEOROT 8 (2006).

102. *Id.*

even when delaying such action would achieve the same self-defensive results, without also increasing the level of threat—for example, actions of killing people who are not participating in any sort of preparation for an imminent threat—because such actions impart guilt on individuals who are not (yet) guilty.

There are also classical examples that point to the moral licitness, or at least the need to restrict, collective punishment. Most notably, as pointed out by Rabbi Shlomo Goren, the eventual Chief Rabbi of the IDF, and then later the State of Israel,¹⁰³ Jacob serves as an example. Rabbi Goren particularly points to Jacob's criticism of his sons for their killing all of the men in their enemy Shechem's city, after Shechem had kidnapped and raped Jacob's daughter, Dinah.¹⁰⁴ Jacob rejected "collective responsibility . . . as a criterion in the ethic of waging war . . . [and] was opposed to killing . . . both from a security viewpoint and from an ethical one."¹⁰⁵

As Rabbi Goren argues, "We are commanded . . . even in times of war . . . not to harm the non-combatant population, and certainly one is not allowed to harm women and children who do not participate in war . . ."¹⁰⁶ On one hand critics argue that Rabbi Goren's approach has been criticized by others, who argue that his position "is not based upon Talmudic sources, nor does it confront the arguments of the opposing approaches. This naturally weakens its halakhic [or Judaic legal] impact and authority."¹⁰⁷ On the other hand, particularly considering that other scholars have argued that classical rabbinical sources actually do not address this issue one way or the other, it is still noteworthy that there are still other aspects of classical Jewish sources that, at the very least, suggest limiting collective punishment.

These counterarguments to dominant schools of thought on collective self-defense are particularly powerful when considered against the backdrop of Jewish thought on capital punishment, which emphasizes the continuing human dignity of people, even wrongdoers. Apparently driven by this as much as by any other concern, Jewish thought has long appeared to recognize that "punishment[] could become brutal and barbaric unless administered in an atmosphere of the highest morality and piety."¹⁰⁸ Thus, as earlier established, Jewish law

103. David B. Green, *First Chief Rabbi of the Israeli Army Dies*, HAARETZ (Oct. 29, 2015, 9:25 AM), <http://www.haaretz.com/israel-news/this-day-in-jewish-history/.premium-1.682841>.

104. See Blidstein, *supra* note 68, at 37.

105. *Id.*

106. *Id.*

107. *Id.*

108. KAPLAN, *supra* note 55, at 170.

takes painstaking efforts, first, to ensure that no person, who does not have the most extraordinarily heinous of intentions, is considered blameworthy enough to be executed. This is particularly evident in the very restrictive interpretation of premeditation: in order to be eligible for the death penalty, a wrongdoer must have been specifically warned prior to committing the crime, and in response, must have expressed full awareness of his future wrongdoing, then immediately committed the wrongdoing.¹⁰⁹

This stringency stands as a sharp contrast to the permissiveness of collective punishment, which, in imparting responsibility, if not outright guilt to those who have not acted wrongfully, also stands in contrast to the strict conceptualization of causation in Talmudic capital punishment (e.g., even if a victim dies of starvation only because a person tied him up intending to starve him to death, this action cannot be punished by the death penalty). The idea that otherwise innocent people could be collectively punished, in retaliation for wrongful actions undertaken by others in their population or sovereignty, also stands in contrast to Talmudic rejection of the concept of retaliation as a justification for capital punishment.¹¹⁰

Moreover, an alleged wrongdoer is given every human opportunity to be exculpated including at any point between his conviction and the moment of his execution.¹¹¹ Equally, if not more importantly, Jewish law takes painstaking efforts, second, to ensure that not all—if any—of even the most heinous wrongdoers are executed; in fact, the

109. See *supra* note 11 and accompanying text.

110. See *Yebamoth* 78b-79a. However, Michael Broyde argues that the Talmud criticized the Gibeonites only as lacking in the proper morality for the Jewish people, stating “[t]he Talmud makes no mention of the fact that underlying act—the murder of seven absolutely innocent people as an act of retaliation—violates the Jewish law rules of murder. The reason that is so is clear. This retaliatory conduct in wartime does not violate any such prohibition.” Broyde, *supra* note 62, at 5-6. From absence, Broyde contends that what is clear in Talmudic discussion regarding this incident is the argument that this act was lacking in proper morality for the Jewish people, with King David emphasizing to the Gibeonites three characteristics that distinguish Jewish people—mercy, bashfulness, and charitableness. *Id.* (citing and commenting on *Yebamoth* 78b-79a). While the Holy Bible states that David readily agreed to the Gibeonites’ request, the Talmud illustrates David’s disgust. Compare *Yebamoth* 78b-79a with *2 Samuel* 21:5-6 (narrating the events where David had to deal with God’s wrath against Israel, stating that “They answered the king, ‘As for the man who destroyed us and plotted against us so that we have been decimated and have no place anywhere in Israel, let seven of his male descendants be given to us to be killed and exposed before the LORD at Gibeath of Saul—the LORD’s chosen one.’”). Assuming Broyde’s argument about the laws of murder is correct—which is supported by the fact that David ultimately did yield to the requests of the Gibeonites—it is clear that, legal rules aside, a spirit of mercy still pervades application of the law. This would urge that, even if Judaism permits collective punishment, mercy and leniency are *still* to be favored.

111. See *supra* notes 17-18 and accompanying text.

Talmud suggests that decision-makers look for every possible opportunity to exculpate even those who are certainly guilty. This is evident in an instance when judges interrogated witnesses on even “the most tangential facts, such as whether the stems on a fig tree, the situs of the murder, were thick or thin—all while being constantly reminded the gravity of the matter, and the value of the life, at stake.” Finally, Jewish law is concerned about maintaining the dignity of even the very few that society, for whatever reason, deems necessary to kill, taking painstaking considerations to minimize pain and other indignities in death.¹¹² All of these efforts are driven by the idea that God suffers when even the guilty are punished for their wrongdoing, and that mercy on wrongdoers may be consistent with the idea of justice.¹¹³

The comparison and contrast of these different ethics is further illuminating when considering how Jewish law tackles some of the universal differences between capital punishment and collective self-defense. For instance, capital punishment involves an innocent life that has already been taken and cannot be restored, while collective self-defense involves an innocent life that could be saved. This difference complements another that others, inside and outside Judaism, point to in distinguishing collective self-defense from other sorts of ethics, inclusive of the ethics of even individual self-defense: a necessary, but lesser evil, war is different, sanctioning actions where morality would not otherwise, because basic collective existence is at stake—a most urgent justification.

Yet, this difference becomes less salient in the context of Jewish ethics, to the extent that it sanctions force even when the goal is not strictly to save lives. It also becomes less salient, of course, to the extent that Jewish ethics on capital punishment elides innocent/guilty, distinctions and frames the issue as involving sacred human life, notwithstanding guilt, at stake. Another basic difference is that capital punishment usually involves imposing death on the people of one’s own nation, while collective self-defense involves the Other. Yet, true as this may be in real life, Jewish ethics does not make this distinction, thus weakening it.

Finally, the comparison and contrast is stark when considering how modern Jewish ethics deals with the fact that earlier ethics (e.g., in the Talmudic era) took place in a much different context. As earlier established, the Talmud was compiled centuries after Jews had lost political sovereignty, a political reality that made the question of capi-

112. See *supra* notes 27-33 and accompanying text.

113. See *supra* notes 26, 35-38 and accompanying text.

tal punishment largely theoretical for the rabbis of the Talmud.¹¹⁴ The same political reality impacted the development of Jewish ethics on war: as stated by Rabbi Louis Jacobs, “For 2,000 years Jews had no state of their own, so that the whole question was academic.”¹¹⁵ Arguably, this is the major driving cause of the fact that classical Jewish war ethics does not have the same level of detail as compared to the Christian Just War tradition, which was not only theoretically developed, but applied in practice over many more centuries. Despite this shared political reality, however, Jewish ethics on capital punishment and on collective self-defense diverge in different directions. And despite changing circumstances—namely, the comparatively larger population of, and larger level of violence in the Jewish state—that arguably justify capital punishment, Jewish ethics continues to be abolitionist. By contrast, adapting to changed political circumstances and to the emergency “need[s] of the hour” in a way that capital punishment ethics has not, Jewish ethics (or at least the most visible school) has declared the licitness of a permissive collective self-defense.

Undoubtedly, these ethics are driven by the restoration of a Jewish state, a development that, as Professor Goldfeder argues, also gave rise to some believing that it was time to “disassociate entirely from the culture of Diaspora-developed Jewish law and return to a straighter reading of the Book.”¹¹⁶ As David Ben-Gurion, Israel’s first Prime Minister, argued, “The Bible was great before there was Midrash—it is not dependent on the Midrash, and it is not to be understood through the aid of the Midrash but through its own inner content.”¹¹⁷ Yet—in line with the continuity of tradition with respect to capital punishment in Jewish ethics—some disagreed with this stance, as represented in Rabbi Goren’s arguments that there instead needed to be “a return to the Bible through the ethical world of the Rabbinical Sages,” one that “would effectively confer to the State and the armed forces a more valuable ethical code by which to conduct wars.”¹¹⁸ In an important sense, this stance is consistent with modern day adherence to Talmudic guidance on the death penalty despite

114. See *supra* notes 51-52 and accompanying text.

115. LOUIS JACOBS, WHAT DOES JUDAISM SAY ABOUT . . . ? 228 (Geoffrey Wigoder ed., 1973).

116. Mark Goldfeder, *Defining and Defending Borders; Just and Legal Wars in Jewish Thought and Practice*, 30 *TOURO L. REV.* 631, 635 (2014).

117. DAVID BEN-GURION, BEN-GURION LOOKS AT THE BIBLE 51 (Jonathan Kolatch trans., Jonathan David Publishers 1972) (1969).

118. Arye Edrei, *Divine Spirit and Power: Rabbi Shlomo Goren and the Military Ethic of the Israel Defense Force*, 7 *THEORETICAL INQUIRIES L.* 255, 269 (2006).

changing circumstances. This guidance highlights man's fallibility in making decisions about who is innocent versus who is guilty, and thus chooses to draw a line in favor of life rather than death. Goren's stance also appears consistent with the idea that, in the absence of more irrefutable classical guidance on the ethics of war, including clear guidance from the Talmud, the principles of mercy that the Talmud espouses might carry more weight.

Ultimately, Jewish ethics on collective self-defense is not universal, and, at least among a prevailing (and visible) school of thought, has a different idea of human dignity, an idea that drives the concept of collective punishment. As the next part will show, such ideas are not limited to Judaism; comparing and contrasting these ideas with those found in Islam is particularly interesting, to the extent that these ideas ultimately, as part III will show, provide answers in a way that Christian-Catholic ethics does not, for historical and other reasons. Yet, the Jewish ethics of capital punishment, its universal nature, and its differing ideas of human dignity and guilt, provides an interesting point of comparison and contrast in its own right.

II. ISLAM

Part II will illustrate how the major schools of Islam universally allow for capital punishment, specifically those who commit crimes that denigrate and pollute the social order of Muslim communities. At the same time, the prevailing thought in Islam within the realm of the ethics of war emphasizes that even those non-Muslims, particularly non-Muslims who do not directly participate in aggression against Muslim communities, are to be shown mercy. Central to both of these positions are differing conceptualizations of guilt, innocence, and human dignity—conceptualizations that are also different from fundamentalists, who support expansive ideas of both capital punishment and war.

The ethics of Islam regarding human life is derived from various sources, including the Qur'an, which are Allah's own words, and the Sunnah, the teachings and stories of the Prophet Mohammed. The Qur'an and the Sunnah together provide the sources for Shari'a, considered the law that Allah has prescribed, and the fiqh is the body of legal jurisprudence that Islamic scholars have made from Shari'a.¹¹⁹

119. William A. Schabas, *Islam and the Death Penalty*, 9 WM. & MARY BILL OF RTS. J. 223, 231 (2000). The Qur'an is not a legal document; it is designed to "regulate not the relationship of man with his fellows but his relationship with his Creator," and set forth "desirable norms of behavior rather than . . . legally enforceable rules." N. J. COULSON, A HISTORY OF ISLAMIC LAW

Particularly persuasive within this is an *ijma*, which is a consensus of Muslim jurists on a particular issue or question.¹²⁰ This article reviews these primary sources, as well as secondary scholarship on these sources.

A. *Capital Punishment: Loss of Dignity in Crimes Hurting Islamic Order, Retaining Dignity in Private Crimes*

The Islam of both yesterday and today does not reject the death penalty; the four primary schools of Sunni fiqh, and the two primary schools of Shi'a fiqh, still sanctions the death penalty for at least some crimes, under certain circumstances.¹²¹ Generally, the death penalty in Islam is reserved for two types of wrongdoings: 1) *hudud* crimes, which are serious wrongdoings explicitly mentioned in the Qur'an as meriting the death penalty, because they are considered to spread mischief and corruption in the land (*asad fil-ardh*);¹²² and 2) *qisas* crimes, which are also wrongdoings mentioned in the Qur'an as meriting the death penalty, but that are considered private wrongdoings, as they amount to injuring the body of another person, such as murder.¹²³ A third type of crime in Islam is *ta'zir*, which are wrongdoings not mentioned in the Qur'an and are thus considered more minor, with punishment left to the discretion of a judge; capital punishment is generally not imposed for this type of crime.¹²⁴

11-12 (1964). However, Shari'a uses the Qur'an to prescribe actual laws. Susan C. Hascall, *Shari'ah and Choice: What the United States Should Learn from Islamic Law about the Role of Victims' Families in Death Penalty Cases*, 44 J. MARSHALL L. REV. 1, 60 (2010).

120. Taymour Kamel, *The Principle of Legality and its Application in Islamic Criminal Justice*, in *THE ISLAMIC CRIMINAL JUSTICE SYSTEM* 149, 154 (M. Cherif Bassiouni ed., 1982) (defining *ijma* as a "consensus of the community through its competent representatives," or its jurists).

121. See, e.g., Robert Postawko, *Towards an Islamic Critique of Capital Punishment*, 1 UCLA J. ISLAMIC & NEAR E. L. 269, 289 (2002) (discussing some of the differences in application of capital punishment among the different schools, with all applying the death penalty in some cases). In the primary schools of Sunni fiqh (Islamic jurisprudence) and Shi'a fiqh, certain types of crimes mandate capital punishment. *Id.*

122. *Id.* at 285. This category of crime is derived is the Qur'an verse stating: "The punishment of those who wage war against Allah and His Messenger, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land: that is their disgrace in this world, and a heavy punishment is theirs in the Hereafter; Except for those who repent Before they fall into your power: in that case, know that Allah is Oft-Forgiving, Most Merciful." *Qur'an* 5:33-34.

123. See Postawko, *supra* note 121, at 285; MATHEWES, *supra* note 3, at 179-80.

124. See Postawko, *supra* note 121, at 307 (arguing that "[j]urists disagree whether death may even be imposed as a *ta'zir* penalty.").

Hudud crimes that qualify for the death penalty include apostasy,¹²⁵ adultery,¹²⁶ armed robbery,¹²⁷ and rebellion.¹²⁸ As Charles Mathewes argues, “the logic [of executing individuals who commit these acts] is that such acts, in traditional Islamic societies, strike at the basis of social order and thus peace, and therefore threaten the whole social fabric, as society is valuable in the same way as are (though not more than) human individuals, it must be defended vigorously.”¹²⁹

Qisas crimes that qualify for the death penalty are generally acts of homicide.¹³⁰ Here, Islam recognizes the idea of *lex talionis*, or an “eye for an eye,” that is familiar to Westerners. Indeed, the very word *qisas* means retribution through the imposition of equal harm. At the same time, mercy is strongly encouraged and, given that the crime is one of private wrongdoing, the victim’s family is given the opportunity—even encouraged—to forgive the perpetrator and to demand monetary compensation instead.¹³¹ This position is derived from the Qur’anic verse that states, “Life for life, eye for eye, nose for nose, ear

125. The licitness of the death penalty for apostasy derives from the Qur’an: “Anyone who, after accepting Faith in Allah, utters Unbelief, - except under compulsion, his heart remaining firm in Faith - but such as Open their breast to Unbelief, - on them is Wrath from Allah, and theirs will be A dreadful Penalty.” *Qur’an* 16:106. Also, the Prophet Mohammed, who the Islamic faith refers to as “the Holy Prophet,” stated that: “[w]hoever changed his Islamic religion, kill him.” *Sahih al-Bukhari* 9.84.57.

126. *Sahih Muslim* 17:4192 (“Verily Allah has ordained a way for them (the woman who commits fornication); (When) a married man (commits adultery) with a married woman, and an unmarried male with an unmarried woman, then in the case of married (persons) there is (a punishment) of one hundred lashes and then stoning (to death).”).

127. See *supra* note 122 and accompanying text.

128. *Qur’an* 49:9 (“If two parties among the Believers fall into a quarrel, just make peace between them: but if one of them transgresses beyond bounds against the other, then you (all) fight against the one that transgresses until it complies with the command of Allah; but if it complies, then make peace between them with justice, and be fair: for Allah loves those who are fair (and just).”).

129. MATHEWES, *supra* note 3, at 180.

130. *Qur’an* 5:45 (“We ordained therein for them: ‘Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal.’ But if any one remits the retaliation by way of charity, it is an act of atonement for himself. And if any fail to judge (the light of) what Allah has revealed, they are (no better than) wrong-doers.”). However, there are many restrictions on the death penalty for murder. For instance, different schools distinguish different grades of extent (e.g., the Hanafi school goes so far as to distinguish deliberate, quasi-deliberate, accidental, and indirect intent, restricting the death penalty only to deliberate intention to kill). J.N.D. Anderson, *Homicide in Islamic Law*, 13 BULL. SCH. ORIENTAL & AFR. STUD. 811, 818 (1951)). Moreover, the action shall be brought by the victim’s nearest relative. DAVID F. FORTE, *STUDIES IN ISLAMIC LAW: CLASSICAL AND CONTEMPORARY APPLICATION* 93 (1999).

131. MATHEWES, *supra* note 3, at 180. Charles Mathewes argues that, “[w]hile the Quran does not judge the choice, the tacit presumption as it develops in the legal literature seems to be for mercy.” *Id.*

for ear, tooth for tooth, and wounds equal for equal. But if anyone remits the retaliation, by way of charity, it is an act of atonement for himself.”¹³²

Similar to key aspects of Jewish ethics, the idea of the social order of man, eradicating pollution that disrupts that order, and, ultimately, the question of whether wrongdoers retain their human dignity, is central to understanding Islamic ethics on the death penalty. The importance of maintaining the greater social order is evident in the fact that traditional Islam often places equal, if not more value on obligation as compared to right. As Islamic scholar Mohammad Hashim Kamali argues, in Shari’a, “[d]ignity thus becomes a reality when there is a balanced emphasis on rights and obligation.”¹³³ Even the ordered nature of the capital punishment speaks to the social order; as the Prophet Mohammed stated, “God has ordained excellence in all things, when you put to death, do so after a decorous manner.”¹³⁴

But perhaps these concepts are most evident in the fact that Islam treats *hudud* crimes as more serious than *qisas* crimes, thereby affording the opportunity for mercy from a death penalty sentence only in the latter.¹³⁵ In doing so, it tellingly deems crimes like apostasy and adultery, among others, as more serious than the crime of murder. Those who commit murder may not be completely unsalvageable, and may not have completely lost all human dignity; even individuals who are not granted mercy by their victim’s family, despite encouragement to do so, can be considered as having retained their dignity, but still needing to pay their retribution-related debt with their lives.

In contrast, it is evident that those who commit crimes like apostasy and adultery are considered as having caused an evil so serious that it can continue to cause harm and must be contained; in the process, the wrongdoer him or herself is considered beyond earthly salva-

132. *Qur’an* 5:45; see also *Qur’an* 2:178 (“...The law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude. This is a concession and a mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty.”)).

133. MOHAMMAD HASHIM KAMALI, *THE DIGNITY OF MAN: AN ISLAMIC PERSPECTIVE*, at xv (Islamic Texts Soc’y 2002) (1999).

134. YUSUF AL-QARADAWI, *THE LAWFUL AND THE PROHIBITED IN ISLAM* 54 (Kamal El-Helbawy et.al. trans., American Trust Publ’ns 1994).

135. However, others argue, “*hudud* law eludes the sphere of private justice,” and, in this way, “shown itself both to be highly innovative and at its most categorical, reducing as far as possible the field of private justice.” Eric Chaumont, “*God Has Ordained Excellence in All Things; When You Put to Death, Do So After a Decorous Manner*”: *The Implementation of Mandatory (Ai-Hudüd) Penalties*, in *THE QUEST FOR A COMMON HUMANITY* 341 (Katell Berthelot & Matthias Morgenstern eds., 2011).

tion. As scholars have noted, apostasy is seen as a simultaneous “threat to individual salvation and community stability,”¹³⁶ while adultery is a concern because of “its effect on community stability; it is thought that adultery leads to family conflict, jealousy, illegitimate children, and the spreading of disease.”¹³⁷ Meanwhile, crucifixion—considered in Islamic law as the most severe form of capital punishment because it prolongs dying—is traditionally reserved for the *hudud* of armed robbery because, in the context of older times where robbery on insecure roads was frequent, serious, and caused great fears, this crime amounted to arguably the greatest destabilization of society. For all of these crimes, the severity of the impact of a crime speaks simultaneously to the destabilization of society and the dehumanization of the individual.

That Islam considers individuals who commit these *hudud* crimes as having forfeited their human dignity is made further clear by the fact that Islamic law is, according to scholars, predominantly a “moralizing instrument as well as a preventative agent.”¹³⁸ It seeks in part “to reform the individual” and to “purify his conscience,” while simultaneously “recogniz[ing] moral fallibility.”¹³⁹ Concurrently, some have argued that that retribution in classical Islamic law is arguably the least important purpose of Shari’a, something that is evident in the fact that the Qur’an encourages forgiveness with respect to *qisas* crimes.¹⁴⁰ In general, “[t]he preservation and flourish[ing] of the ummah [the Islamic nation] is not furthered by the elimination of its members, however wayward,” because “[c]lassical jurists were not afraid that crimes would go unpunished, for God has vowed to exact a penalty in the afterlife.”¹⁴¹ That classical Islamic law would impose the death penalty for those found guilty of *hudud* crimes, without extending mercy, as is possible with retribution-driven *qisas* crimes, suggests that “purification” was no longer for the most heinous of wrongdoers—at least not in living human form.

At the same time, these classical sources need not necessarily be read to reach this conclusion. As an initial matter, the Qur’an mandates utmost respect for life: “We prescribed for the Children of Israel

136. See Postawko, *supra* note 121, at 293.

137. Matthew Lippman, *Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law*, 12 B.C. INT’L & COMP. L. REV. 29, 40 (1989).

138. NAGATY SANAD, *THE THEORY OF CRIME AND CRIMINAL RESPONSIBILITY IN ISLAMIC LAW: SHARI’A* 49 (1991).

139. See *id.* at 49-50.

140. Postawko, *supra* note 121, at 320.

141. *Id.*

that whoever kills a person, unless it be for manslaughter or for mischief in the land, it is as though he had killed all human beings. And whoever saves a life, it is as though he had saved the lives of all human beings.”¹⁴² As theologist Asghar Ali Engineer has argued, “This is a very strong statement about the value of human life. Islam would not approve of any life being taken, as life is the creation of Allah and representative of all living beings on earth.”¹⁴³ As Kamali argues, “we read the direct and unqualified affirmation of the dignity of man in” the Qur’an, which states that “[w]e have bestowed dignity on the progeny of Adam . . . and conferred on them special favours, above a great part of Our creation.”¹⁴⁴ And as the Qur’an further commands, “Keep your duty to your Lord, who created you from a single soul and created its mate of the same [kind] and created from them countless men and women.”¹⁴⁵

Based on these verses, as Kamali argues, “[t]he Quran [states that] all human beings have been created honourable and in the best of mould.”¹⁴⁶ According to Kamali, “everyone and all members of the human race, including the pious and the sinner, are endowed with dignity, nobility, and honour, which cannot be exclusively expounded and identified Dignity in other words is not earned by meritorious conduct, it is an expression of God’s favour and grace.”¹⁴⁷

This idea is complemented by the emphasis in the Qur’an on the idea of mercy, which is highlighted in, but hardly limited to, the emphasis on mercy with respect to *qisas* crimes. As the Qur’an states, “O my servants who have transgressed against their souls! Do not despair of the mercy of God. For God forgives all sins. He is most forgiving, most merciful.”¹⁴⁸ “My mercy engulfs everything and extends beyond everything.”¹⁴⁹ Indeed, the Qur’an suggests that God can even forgive at the last possible instant.¹⁵⁰ Considering that God can forgive up

142. *Qur’an* 5:32.

143. ASGHAR ALI ENGINEER, ON DEVELOPING THEOLOGY OF PEACE IN ISLAM 4 (2003).

144. KAMALI, *supra* note 133, at 1 (citing and construing Qur’an 17:70).

145. *Qur’an* 4:1.

146. KAMALI, *supra* note 133, at 12 (citing and construing Qur’an 17:70, 95:4).

147. KAMALI, *supra* note 133, at 1.

148. *Qur’an* 39:53.

149. *Qur’an* 7:156.

150. *Qur’an* 79:35-41; see also *Qur’an* 39:53 (“Say, ‘O My servants who have transgressed against themselves [by sinning], do not despair of the mercy of Allah. Indeed, Allah forgives all sins. Indeed, it is He who is the Forgiving, the Merciful.’”).

until the final instant of life, humans should attempt to forgive as well.¹⁵¹

It is also relevant that Islamic law, having established which crimes qualify for the death penalty, put up many barriers to imposing this punishment even for those accused of the most serious *hudud* crimes considered to spread evil in society. Many of these barriers are designed to protect the innocent (as well as those who may be guilty, but of lesser wrongdoings). For example, generally, with armed robbery, while discretion is afforded to the *qadi*, the death penalty is imposed only when death occurs, whether or not the attempt at the actual dispossession was successful.¹⁵²

Furthermore, under Shari'a in general, there is a presumption of innocence for *hudud* crimes, taken from the Prophet Mohammed's instruction to "[a]void condemning the Muslim to *hudud* whenever you can and when you can find a way out for the Muslim then release him for it. If the Imam errs it is better that he errs in favor of innocence than in favor of guilt."¹⁵³ Also relevant is his instruction to "[p]revent punishment in cases of doubt. Release the accused if possible, for it is better that the ruler be wrong in forgiving than wrong in punishing."¹⁵⁴ Consistent with the presumption of innocence, circumstantial evidence that is incriminating is excluded, while circumstantial evidence supporting exoneration is allowed.¹⁵⁵ Even direct evidence faces a high barrier: regarding adultery, for example, there must be four eye-witnesses to the act, and those witnesses have to meet certain requirements.¹⁵⁶ Finally, while confessions are considered generally binding proof of guilt of *hudud* offenses, not only may such confessions be withdrawn, but it is required for the *qadi* (a judge of Islamic law) to remind a confessor of this option.¹⁵⁷ As Postawko concludes, "the difficulties of proof mandated by strict evidentiary requirements and the Qur'anic restriction of the ultimate penalty to specified crimes

151. MATHEWES, *supra* note 3, at 180 ("[I]t is suggested that God's mercy is something that all the faithful should copy.").

152. See Postawko, *supra* note 121, at 296 ("[I]n cases of hirabah in which the victim's death results, with or without the successful dispossession of property, the penalty is generally agreed to be death.").

153. M. Cherif Bassiouni, *Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System*, in *THE ISLAMIC CRIMINAL JUSTICE SYSTEM* 3, 26 (M. Cherif Bassiouni ed., 1982).

154. SANAD, *supra* note 138, at 73.

155. Bassiouni, *supra* note 153.

156. Postawko, *supra* note 121, at 300.

157. See Safia M. Safwat, *Offences and Penalties in Islamic Law*, 26 *ISLAMIC Q.* 149, 155 (1982).

argue in favor of a legal reluctance to impose the death penalty in traditional Islam.”¹⁵⁸ Indeed, “conditions are placed on the infliction of the penalty such that the imposition of death will in practice be a rare, almost impossible, event.”¹⁵⁹

On the other hand, many of these barriers are also evidently designed to protect even the clearly guilty, and particularly to give them an opportunity to expunge their guilt. Indeed, the very Qur’anic verse from which the category of *hudud* crimes is derived ends that serious punishment will be fall those who commit these wrongdoings, “[e]xcept for those who repent before they fall into your power: in that case, know that Allah is oft-forgiving, most Merciful.”¹⁶⁰ To wit, Islamic law declares that, with respect to the crime of armed robbery, a wrongdoer can avoid the death penalty if he repents before he is arrested and willingly surrenders to authorities.¹⁶¹ At this point, “[t]he penitent poses no further threat to the community, while his new commitment to God and the ummah, not his death, has the greater exemplary and deterrent value to others.”¹⁶²

With respect to the crime of apostasy, a person is given at least three days to repent to avoid punishment.¹⁶³ Furthermore, if a person repents, several schools of Islam mandate that the repentance should be accepted as sincere, without further questioning.¹⁶⁴ And with respect to the death penalty for rebellion, the primary goal, according to some scholars, is not punishment or eradication, but reconciliation.¹⁶⁵ To this end, those who voluntarily surrender, or even wounded or captured involuntarily during rebellion, are not permitted to be executed.

158. Postawko, *supra* note 121, at 285.

159. *Id.* at 300. With respect to apostasy specifically, Riyad Maydani has stated that apostasy “has become an obsolete rule.” Riyad Maydani, *Uqūbāt: Penal Law*, in *LAW IN THE MIDDLE EAST* 223, 227 (Majid Khadduri & Herbert J. Liebesny eds., 1955); *see also* Postawko, *supra* note 121, at 320 (arguing that procedural requirements for a conviction of a *hudud* crime have become more and more difficult).

160. *Qur’an* 5:34. As Ali Engineer argues, the Qur’an is basically against executing any human being in ideal circumstances. ALI ENGINEER, *supra* note 143, at 7-8; *see, e.g., Qur’an* 4:93 (“If a man kills someone intentionally, it is Allah who will punish him and his recompense will be hell in which he will abide forever. Even in such cases, one should not sentence the killer to death.”).

161. MUHAMMAD IOBAL SIDDIQI, *THE PENAL LAW OF ISLAM* 142 (Kazi Publ’n 1979); *Qur’an* 5:33-34.

162. Postawko, *supra* note 121, at 297.

163. *See* Safwat, *supra* note 157, at 168.

164. *Id.* at 169.

165. Khaled Abou El Fadl, *Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam*, in *CROSS, CRESCENT, AND SWORD: THE JUSTIFICATION AND LIMITATION OF WAR IN WESTERN AND ISLAMIC TRADITION* 149, 153 (James T. Johnson & John Kelsay eds., 1990).

Only those who are killed during battle are subject, in effect, to execution.¹⁶⁶

Notwithstanding these barriers, of course, it is a simple fact that capital punishment does still occur under Islamic law, and in Islamic states—and such capital punishment extends still to, among others, at least some convicted adulterers as well as apostates who reject repentance.¹⁶⁷ Still, many elements of Islam, including those setting standards for imposing the death penalty, lend support to those within Islam who argue that a proper understanding of classical Islamic law would prohibit even more executions—even all executions—as people retain their human dignity regardless of their wrongdoing.

Minority scholars argue, for example, that the death penalty for apostasy has always been intended to apply only when it was accompanied by concurrent acts of rebellion, sedition, or treason that threatened the security and safety to Muslim people and society.¹⁶⁸ They argue that the Prophet Mohammed himself never executed anyone for adopting, then abandoning Islam, and that his statement in support of death for apostasy referred to those who not only left the religion, but engaged in battle against the Muslim community in Medina.¹⁶⁹ With respect to adultery, such scholars point to the fact that the imposition of such varied penalties is an indication that ijma consensus on the appropriateness of the death penalty for this wrongdoing does not yet exist.¹⁷⁰ Such proponents argue that Qur'anic interpretations cannot be static, because, though undoubtedly divine, its revelations (as well as those of other extra-Qur'anic sources of law, such as the Sunnah) were responses to specific historical situations.¹⁷¹

166. MATTHEW LIPPMAN ET AL., *ISLAMIC CRIMINAL LAW AND PROCEDURE* 49 (1988).

167. See, e.g., Arshiya Khullar, *Brunei Adopts Sharia Law Amid International Outcry*, CNN (May 1, 2014, 5:45 AM), <http://www.cnn.com/2014/05/01/world/asia/brunei-sharia-law>.

168. See MASHOOD A. BADERIN, *INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW* 124 (2003).

169. See Donna E. Arzt, *The Role of Compulsion in Islamic Conversion: Jihad, Dhimma and Ridda*, 8 *BUFF. HUM. RTS. L. REV.* 15, 30-31 (2010).

170. Postawko, *supra* note 121, at 290.

171. Reza Aslan, *The Problem of Stoning in the Islamic Penal Code: An Argument for Reform*, 3 *UCLA J. ISLAMIC & NEAR E.L.* 91, 105 (2004). As Edna Boyle-Lewicki argues, "Perhaps it is time to recognize that 're-opening' the ijthihad process [the process during which Islamic jurists reason through an issue, then potentially to reach a binding conclusion] to deal with these amazing developments need not mean a repudiation of the work of past jurists, but an opportunity to answer important questions that the medieval mujtahid could not have imagined. . . In fact, the Prophet himself admitted that he was a human being who could indeed make an error in adjudication." Edna Boyle-Lewicki, *Need World's Collide: The Hudud Crimes of Islamic Law and International Human Rights*, 13 *N.Y. INT'L L. REV.* 43, 78-79 (2000); see also Mohammad Hashim Kamali, *Appellate Review and Judicial Independence in Islamic Law*, in *ISLAM AND PUBLIC LAW* 64 (Chibli Mallat ed., 1993).

These arguments, and others, support the idea that human beings cannot lose their self-dignity, neither in theory nor in practice.

In this sense, Islam is not completely dissimilar to the Jewish ethics of capital punishment. More to the point of this part, as the next section will show, this differing conceptualization of collective self-defense also is more consistent—at least, more so than the prevailing conceptualization—with ideas of human dignity within prevailing (and non-fundamentalist) Muslim ethics of war.

B. War and Collective Self-Defense: Retaining Dignity Despite Non-Muslim Status

Islam's conceptualization of the morality of capital punishment, and of the human dignity of those who may be subject to capital punishment provides an interesting contrast to its conceptualization of the ethics of collective self-defense. These ethics have been subject to considerable debate within modern Islam, a debate that has become particularly salient since September 11. On the one hand, for certain, more fundamentalist schools of Islam, the ethics of capital punishment and of collective self-defense are utterly consistent: just as they are certainly more willing to put to death apostates, adulterers, and others who commit *hudud* crimes, they are extraordinarily permissive with respect to their conceptualization of what qualifies as legitimate self-defense.¹⁷² On the other hand, this section will show how, notwithstanding these fundamentalist schools, there is agreement within modern, mainstream Islam about certain principles of collective self-defense,¹⁷³ principles that evince a certain respect for the human dignity of non-Muslims, both combatants and civilians—and in a way that stands as somewhat of a contrast to how traditional Islam sees the *hudud* crimes such as apostasy and adultery. Acknowledging the vio-

172. It should be noted that groups such as Hamas do not adhere to the types of procedures that classical Islamic law imposes on capital punishment, including ensuring that the death penalty is implemented justly. *Gaza: Halt Executions*, HUM. RTS. WATCH (Aug. 25, 2014), <http://www.hrw.org/news/2014/08/25/gaza-halt-executions>. In the context of its conflict with Israel, Hamas has been criticized for its rushed, arguably extrajudicial executions of those found to have been “collaborating with the enemy.” *Id.* Aside from its lax procedures, these executions appear contrary to classical sources indicating that Muslims who might appear to be abetting the enemy should be given consideration because they are still Muslims. JOHANNES J.G. JANSEN, *THE NEGLECTED DUTY: THE CREED OF SADAT'S ASSASSINS AND ISLAMIC RESURGENCE IN THE MIDDLE EAST* 208 (1986).

173. Much of the source of Islamic laws of war, which is encompassed in the *siyar*, or the laws of Islamic nations, comes from a compilation and translation of the Imam Abu Hanafi's work. See generally MUHAMMAD IBN AL-HASAN SHAYBANI, *THE ISLAMIC LAW OF NATIONS: SHAYBANI'S SIYAR* (Majid Khadduri trans., 1966).

lence in classical Islam, this school of thought has posited that such violence must be evaluated in the context in which they occurred.¹⁷⁴ Just as Christian Just War theory has evolved, they have argued that changing situations beginning around the 19th Century required a re-definition of the rules of warfare, particularly one that defined legitimate defensive use of force narrowly.¹⁷⁵

One of the clear principles of modern Muslim consensus, notwithstanding either fundamentalist movements or popular perception, is that war is only justified for the purpose of self-defense. The key to understanding this consensus—as well as those within Islam who disagree with it—is understanding the word jihad in the Qur'n, which means a struggle or striving; there are two main kinds of jihad: the greater jihad, the process of self-purification, and the lesser jihad, which is the struggle for self-protection, which is not limited to self-defense, but also extends to self-determination and autonomy, and is not limited to physical force, but also extends to means such as words.¹⁷⁶ As is evident, jihad encompasses aims beyond pure physical self-defense.

However, this does not mean that force can be justified by other aims of jihad beyond self-defense; in other words, jihad might be justified, but may not itself justify force. To understand this, one must have an understanding of the classical Islamic sources that develop the principle of when uses of deadly force are justified. This includes several key Qur'anic verses, such as, "Permission [to fight] is given to those against whom fighting is launched, because they have been wronged" and, "Fight in the way of Allah against those who fight you, and do not transgress. Verily, Allah does not like the transgressors."¹⁷⁷ The verse, "what has happened to you that you do not fight in the way of Allah and for the oppressed among men, women and children," among others, is also key, interpreted to mean that force can be used

174. See MICHAEL BONNER, *JIHAD IN ISLAMIC HISTORY: DOCTRINES AND PRACTICE* 159-61 (2006).

175. *Id.* (discussing the reinterpretation of Islamic doctrine on warfare). The extent to which modern interpretations of Islam clash with classical interpretations has been most recently the subject of great debate among those analyzing ISIS. See, e.g., Graeme Wood, *What ISIS Really Wants*, ATLANTIC, Mar. 2015, <http://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980> (arguing that the warfare of ISIS has a basis in classical Islam); Caner K. Dagli, *The Phony Islam of ISIS*, ATLANTIC, Feb. 27, 2015, <http://www.theatlantic.com/international/archive/2015/02/what-muslims-really-want-isis-atlantic/386156> (arguing that the warfare of ISIS is rooted in a narrow, rigid reading of classical Islamic sources).

176. Niaz A. Shah, *The Use of Force Under Islamic Law*, 24 EUR. J. INT'L L. 343, 344 (2013).

177. *Qur'an* 22:39, 2:190.

on behalf of others.¹⁷⁸ The Qur'an explains that "Fitnah [tumult] and oppression is worse than killing."¹⁷⁹ As Islamic cleric Muhammad Husayn at-Tabatbai states, deadly force can amount to "defending oneself from degradation, and liberating oneself from the fetters of slavery, oppression and injustice."¹⁸⁰

But what exactly qualifies as fighting or oppression that is sufficient to justify the use of force? The Muslim consensus establishes that what qualifies is actual aggression. As one of the modern theological scholars of the Qur'an, Muhammad Asad, argues, only a war against such aggression can be considered a war "in God's cause," and that this is an "early, fundamental principle of self-defense" is maintained throughout these Qur'anic verses.¹⁸¹ Much of the disagreement within Islam to this idea arises from the undisputed fact that, under classical Islamic law, the world is divided into the territory of Islam, Dar al-Islam, and the territory of war, Dar al-Harb.¹⁸² Although this does not necessarily mean that actual violence and fighting always existed, classical Islamic recognizes that there is a constant state of "war" between these two realms, given that Islam must be spread throughout the world.¹⁸³

On the one hand, there are those who argue that, in order to spread Islam, force must be used against the non-Muslim world. Led by Islamic theorists Sayyid Abul A'la Mawdudi and Sayyid Qutb, such people argue that force can be used against non-believers, precisely in order to spread Islam to Dar al-Harb, and to fight the enemies of God located therein.¹⁸⁴ This position is driven primarily from the so-called Qur'anic "verse of the sword," which states, "When the [four] forbidden months are over, wherever you find the polytheists, kill them, seize them, besiege them, ambush them—but if they turn [to God], maintain the prayer and pay the prescribed alms, let them go on their way, for God is most forgiving and merciful."¹⁸⁵ It is also driven by the

178. *Qur'an* 4:75; Shah, *supra* note 176, at 345.

179. *Qur'an* 2:217.

180. 3 MUHAMMAD HUSAYN AT-TABATABAI, *TAFSIR AL-MIZAN: AN EXEGESIS OF THE QURAN*, 2:190-2:195 cmt. (1983).

181. MUHAMMAD ASAD, *THE MESSAGE OF THE QUR'AN* n.167 (2008).

182. SHAYBANI, *supra* note 173, at 11-14.

183. *Id.*

184. Shah, *supra* note 176, at 351-52.

185. *Qur'an* 9:5. As Shah argues, based on historical progression of Islam, that the progression argument should color how the Qur'an is read. Shah, *supra* note 176, at 346-47. This argument states that the Qur'an did not allow the use of force and, instead, favored patience in the early years of Islam, i.e., the Meccan period (610-622 AD). *Id.* However, following Prophet Mohammed's migration to Medina, when he founded a Muslim community, jihad was allowed in self-defense, i.e., in the Medinan period (622-632 AD). *Id.* In the last year of the Medinan period

verse that says, “Fight those who do not believe in Allah or in the Last Day and who do not consider unlawful what Allah and His Messenger have made unlawful and who do not adopt the religion of truth from those who were given the Scripture—[fight] until they give the jizyah willingly while they are humbled.”¹⁸⁶

On the other hand, there are those, led by Asad, who disagree that force must be used for conversion.¹⁸⁷ They argue, first, that these verses were made in reference to specific historical events, exhorting Muslims to prepare to fight against specific aggressors in that time, and groups who had broken specific covenants with Muslims of that particular time.¹⁸⁸ They also argue that these verses must be read in the context of the surrounding verses that say: “Fight in God’s cause against those who fight you, but do not overstep the limits: God does not love those who overstep the limits. . . . If they do fight you, kill them—this is what such disbelievers deserve—but if they stop, then God is most forgiving and merciful. Fight them until there is no more persecution, and [your] worship is devoted to God. If they cease hostilities, there can be no [further] hostility, except towards aggressors.”¹⁸⁹

Those led by Asad argue that nowhere does the Qur’an explicitly state that Muslims must be permanently at war with non-Muslims, and that, consistently throughout history, Muslims have co-existed peacefully with such non-believers.¹⁹⁰ Indeed, the Qur’an explicitly provides rules dictating how Muslims must co-exist peacefully with non-Muslims, stating: “Except those of the [polytheists] with whom you have a treaty, and they were not deficient (in fulfilling the treaty) with you, and did not back up any one against you. So fulfill the treaty with them up to their term,” and, “Allah does not forbid you as regards those who did not fight you on account of faith, and did not expel you

(9 AH) the argument goes, all the verses relating to self-defense were repealed by verses 9:5 and 9:29, making jihad a continuous obligation for Muslims of all ages. *Id.*

186. *Qur’an* 9:29.

187. See, e.g., Imam Sayed Moustafa Al-Qazwini, *Just War: An Islamic Perspective*, 9 *NEXUS* 79, 83 (2004) (“The aim behind war is to deter aggression or oppression, not to impose Islam as a religion.”).

188. Shah, *supra* note 176, at 349. As Shah argues, verse 9:29 was addressed to a people that were anticipating a specific attack by the Romans. *Id.* Thus, they were not to fight all those who do not believe in Allah, but this particular group. Meanwhile, the verse of the sword addressed a particular group of the polytheists, the Quraysh, who broke their covenants with the Muslims. *Id.* Thus, they were not to fight all polytheists, but this particular group. *Id.*

189. *Qur’an* 2:190-91.

190. Charles W. Amjad-Ali, *Jihad and Just War Theory: Dissonance and Truth*, 48 *DIALOG* 239, 246 (2009).

from your homes, that you do good to them, and deal justly with them.”¹⁹¹

They also point to a hadith by the Prophet Mohammed, in which he gives his own definition of jihad: “The best jihad is [speaking] a word of justice to a tyrannical ruler.”¹⁹² The Prophet also stated: “If any of the Muslims, whether high ranking or otherwise, give temporary refuge to any of the infidels to hear the message of God then let him do so. If he follows you [accepts Islam] then he is your brother in religion; but if he refuses, secure his safety and seek help from God.”¹⁹³ Ultimately, based on these and other sources, classical writings argue that a war of aggression is not supported by the Prophet and his own precedents.¹⁹⁴ As Fourth Caliphate Imam Ali stated about non-Muslims, “they are either your brothers in religion or your equal in creation.”¹⁹⁵

Other traditional Western-Christian Just War concepts, such as proportionality and last resort, also find support in this law, often times this support is directly in Qur’anic verses that speak almost directly in the Western-Christian language of these concepts. Muslim scholars point to several such verses that, for example, lend strong support to the idea of proportionality: “And if you were to harm (them) in retaliation, harm them to the measure you were harmed,” a verse given specifically in the context of armed conflict.¹⁹⁶ Still other Qur’anic verses point to the proportionality principle, such as “[t]he one who does something evil will not be punished but in its equal proportion[,]” and “[t]he recompense of evil is evil like it.”¹⁹⁷ The conduct of Prophet Mohammed in war also indicates, according to scholars, that proportionality is a principle in Islamic war ethics. For example, scholars point to numerous instances where the Prophet’s contingent did not pursue an opposing military that had fled the scene because the contingent had achieved their primary goals at that

191. *Qur’an* 9:4, 60:8.

192. *Musnad Ahmad ibn Hanbal* 38.4330.

193. IMAM MOHAMMED SHIRAZI, *WAR, PEACE & NON-VIOLENCE: AN ISLAMIC PERSPECTIVE* 109 (2002).

194. SAYED KHATAB, *UNDERSTANDING ISLAMIC FUNDAMENTALISM: THE THEOLOGICAL AND IDEOLOGICAL BASIS OF AL-QA’IDA’S POLITICAL TACTICS* 141 (2011).

195. ALLAMAH SAYYID MUHAMMAD HUSAYN TABATABA’I, *A SHI’ITE ANTHOLOGY* 69 (William Chittick ed., 1980).

196. *Qur’an* 16:126; Shah, *supra* note 176, at 361 (arguing that the purpose of this verse is both to enumerate the principle of proportionality, as well as to prohibit mutilation of opposing forces).

197. *Qur’an* 40:40, 42:40.

point.¹⁹⁸ As one scholar concludes, “it is apparent that a high degree of danger must be engaged before the unintentional killing of civilians is to be allowed.”¹⁹⁹ And Mawdudi counsels that force should be used only when it is unavoidable and only to the extent that it is absolutely necessary.²⁰⁰

Undoubtedly, others take a very permissive view of the concept of proportionality, even as they give lip service to this. For example, classical Sunni theorists argue that, though “considerations of proportionality are important, since one wants to shed no more blood than is necessary,” ultimately, “the necessities of the war effort motivated by religious considerations allow for considerable discretion. If women and children are killed in the pursuit of battle, it is not the fault of the Muslims. They are from them. The leaders of the people of war are at fault for the death of their innocents.”²⁰¹ Yet, as with conceptions of the sword verses, this appears to be a minority fundamentalist position within Islam. Ultimately, it is apparent that classical Islamic *fiqh* evaluates military actions “on a basis not dissimilar to a modern proportionality calculation.”²⁰²

Similarly, with respect to the idea of last resort, scholars generally posit that notice must be given to the other side before aggression is commenced, a principle derived from the Qur’anic verse that states, “If thou fearest treachery from any group, throw back (their covenant) to them, (so as to be) on equal terms.”²⁰³ As Islamic exeget Abdul Majid Daryabadi states, “It is obligatory on the part of the Muslim head of government and/or their representative to apprise the enemy beforehand of the non-existence of pacts and treaties. Fighting without this previous notice is unlawful.”²⁰⁴ Other scholars support this argument, several of whom making an analogy to surgery: like

198. Shah, *supra* note 176, at 359-60.

199. Jacob Turner, *Towards a Synthesis Between Islamic and Western Jus In Bello*, 21 J. TRANSNAT’L L. & POL’Y 165, 194 (2011).

200. S. ABUL A’LA MAUDUDI, *THE MEANING OF THE QURAN 49:9-10* cmt. (A.A. Kamal ed., Muhammad Akbar trans., Islamic Publ’ns 2000).

201. JOHN KELSAY, *ISLAM AND WAR: A STUDY IN COMPARATIVE ETHICS* 67 (1993). As Human Rights Watch has argued, Hamas, in statements making explicitly that its “stand is not to target children, the elderly, or places of player,” it implicitly concedes that it does target other categories of civilians. HUMAN RIGHTS WATCH, *ERASED IN A MOMENT: SUICIDE BOMBING ATTACKS AGAINST ISRAELI CIVILIANS* 51 (2002). Thus, while they might be complying with explicit Qur’anic injunction, they may still be targeting some civilians.

202. Turner, *supra* note 199, at 194.

203. ASAD, *supra* note 181; *Qur’an* 16:126.

204. NIAZ A. SHAH, *SELF-DEFENSE IN ISLAMIC AND INTERNATIONAL LAW: ASSESSING AL-QAEDA AND THE INVASION OF IRAQ* 22 (2008) (quoting ABDUL MAJID DARYABADI, *THE GLORIOUS QURAN: TEXT, TRANSLATION AND COMMENTARY* 346 (2002)).

surgery, force should be used only after all other means have been exhausted—in other words, as a last resort.²⁰⁵ Jihad, as traditionally interpreted, requires inviting the other side to Islam first, before engaging in aggression, a practice that the Prophet Mohammed was said to uphold consistently.²⁰⁶

Of course, as with proportionality, this invitation can be interpreted quite broadly: for example, even al-Qaeda justified its aggression in part because it argued that it had, indeed, invited the other side to Islam, telling them to turn away from their non-believing, indulgent ways.²⁰⁷ As Professor Alia Brahimî argues, “[this] conception of the last resort criterion goes beyond the classical variant which offers the enemy something of a false (not to mention archaic) choice.”²⁰⁸ Yet, this is inconsistent with the Muslim consensus more broadly on what justifies force in the first place, in the sense that force, in this instance, was undertaken not to repel actual aggression; instead here, force was consistent with the fundamentalist idea that Islam must be spread to the non-Muslim Dar al-Harb. Where force is undertaken to repel aggression, classical Muslim law suggests that a successful call to Islam is sufficient to negate the justness of using force, as this would concurrently mean that opposing forces have ended their aggression; yet, it does not suggest that rejecting a call to Islam in and of itself amounts to aggression, justifying the (continued) use of deadly force.

Compared to the principles of proportionality and last resort, there is arguably a less direct reference to the issue of combatant/non-combatant discrimination in the Qur’an. That said, scholars have interpreted the verse, “Fight in the way of Allah against those who fight you, and do not transgress. Verily, Allah does not like the transgressors,” to mean that self-defenders can only fight combatants, and only during actual combat.²⁰⁹ Ergun Çapan writes that the “reservation of ‘those who fight you’ in the original text of the verse is of extreme importance.”²¹⁰ Furthermore, “the mood in Arabic denotes ‘participation’ which, in this sense means: ‘those who fall under the status of combatant.’ Thus, non-combatants are not to be fought against.”²¹¹ Scholars have interpreted “those who wage war against you” as mean-

205. ALIA BRAHIMI, JIHAD AND JUST WAR IN THE WAR ON TERROR 139-140 (2010).

206. *Id.* at 140.

207. *Id.*

208. *Id.*

209. Shah, *supra* note 176, at 345 (citing and construing *Qur’an* 22:39).

210. Ergün Çapan, *Suicide Attacks and Islam*, in TERROR AND SUICIDE ATTACKS: AN ISLAMIC PERSPECTIVE 102, 106 (Ergün Çapan, ed. 2005).

211. *Id.*

ing combatants, emphasizing that non-combatants should not be harmed.²¹² Beyond the Qur'an, the Prophet Mohammed also instructed combatants: "Do not kill the old, the young or the women," and, "Do not cut down trees, unless you are forced to do so."²¹³ Also, "Trees are not to be feeled, nor the supply of water cut off."²¹⁴

It must be noted that, at the time when classical Islamic law was being formed, the separation between combatants and non-combatants was less clear than it is today, as any able-bodied male could be considered a potential soldier—hence potentially explaining the distinction of women and children.²¹⁵ On the one hand, advice about conducting specific actions could be sufficient to qualify a person as a combatant, as shown by the example of Duraid ibn Simma, who was killed by the Prophet Mohammed's forces because he provided close counsel to his son on how to conduct battle against Muslims.²¹⁶ As Ella Landau-Tasserion states, it "is widely agreed [upon in Islam] that the lives of 'noncombatants' who take part in combat—which need not mean taking up weapons—are forfeit, like those of the warriors themselves."²¹⁷ On the other hand, as Jacob Turner has argued, the best view of the Classical Islamic sources is that parties lose noncombatant immunity only once they present a direct threat, as "[t]he Islamic sources indicate that this is the chief criterion on which parties are to be targeted."²¹⁸

Consistent with this idea, Islamic scholar Ibn Rushd wrote that there "is no disagreement about the rule that it is forbidden to slay

212. See, e.g., Muhammad Munir, *Suicide Attacks and Islamic Law*, INT'L REV. OF THE RED CROSS 71, 84-85 (2008) ("The reservation 'those who fight you' in the original text of the verse is of extreme importance, because the Arabic word muqatil. . . means combatant.").

213. SHIRAZI, *supra* note 193, at 28; see also ABDULLAH YUSUF ALI, *THE MEANING OF THE HOLY QUR'AN* n.204 (photo. reprint 2001) (10th ed. 1999) ("In any case strict limits must not be transgressed: women, children, old and infirm men should not be molested, nor trees and crops cut down, nor peace withheld when the enemy comes to terms.").

214. SHIRAZI, *supra* note 193, at 47.

215. A question that may also not be directly addressed by classical Islamic sources is the question of whether Israeli settlers residing in abodes that are illegal under international law should be considered combatants. International law very clearly considers them non-combatants. See HUMAN RIGHTS WATCH, *supra* note 201, at 54-56.

216. Turner, *supra* note 199, at 191 (citing and construing *Sahih al-Bukhari* 5.59.612); see also Quintan Wiktorowicz, *A Genealogy of Radical Islam*, in *POLITICAL ISLAM: A CRITICAL READER* 271 (Frédéric Volpi ed., 2010).

217. Ella Landau-Tasserion, "Non-Combatants" in *Muslim Legal Thought*, HUDSON INSTITUTE 2 (2006), http://www.hudson.org/content/researchattachments/attachment/1136/20061226_noncombatantsfinal.pdf.

218. Turner, *supra* note 199, at 200. As such, those who direct and plan particular attacks might still be targeted under this definition. Counseling a general course of action is too remote from any single act to give rise to a designation of being a combatant.

women and children, provided that they are not fighting, for then women, in any case, may be slain.”²¹⁹ Along these lines, a particularly important example to isolate, one very relevant to modern day warfare, is addressed by Prophet Mohammed himself: when asked by Muslim fighters about the then-common practice of using children as human shields by holding them over the walls of forts at which combatants would shoot, he instructed his fighters to hit such targets only if absolutely necessary, and to make every effort to target only combatants.²²⁰ Thus, the killing of non-combatants creates truly collateral damage only if such efforts are made. Ultimately, then, as Turner argues, “It is apparent from the foregoing that Classical Islamic fiqh does support a distinction between combatants and civilians and that this should be done on the basis of individual agents engaging in hostilities.”²²¹

Of course, there are those who disagree with this more restrictive stance: groups such as ISIS, al-Qaeda, Hamas, and the Taliban subscribe to the legitimacy of collective punishment of even otherwise innocent people, partly in retaliation for the death of their own innocents.²²² This is seen, once more, in the idea that “[i]f women and children are killed in the pursuit of battle, it is not the fault of the Muslims. ‘They are from them.’ The leaders of the people of war are at fault for the death of their innocents.”²²³ Some go even further, ascribing guilt to such people. Echoing arguments made in contemporary Jewish war ethics, Ramadhan Shellah, leader of the Palestinian Islamic Jihad, has argued, “We don’t consider the settlers who occupy the Zionist settlements civilians, but they are an extension of occupation and they are not less aggressive and barbaric than the Zionist

219. RUDOLPH PETERS, *JIHAD IN CLASSICAL AND MODERN ISLAM* 33 (1996). The 8th century scholar al-Shaybani also stated: “I asked Abu Hanifah about the killing of women, children, such old men who do not have the ability to fight, those suffering from chronic illness and are unable to fight. He forbade their killing and detested it.” MUHAMMAD AL-HASAN AL-SHAYBANI, *THE SHORTER BOOK ON MUSLIM INTERNATIONAL LAW* 82 (Mahmood A. Gazi, trans., 1998).

220. ABU’L-HASAN AL-MAWARDI, *AL-AKHAM AL-SULTANIYAH: THE LAWS OF ISLAMIC GOVERNANCE* 65 (Asadullah Yate trans., 2005).

221. Turner, *supra* note 199, at 193.

222. See, e.g., Sami Yousafzai, *Taliban: We Slaughtered 100+ Kids Because Their Parents Helped America*, *DAILY BEAST* (Dec. 16, 2014, 4:42 AM), <http://www.thedailybeast.com/articles/2014/12/16/pakistani-taliban-massacre-more-than-80-schoolchildren.html>. Groups such as Hamas have also argued that attacks against civilians are justified as retaliation for attacks against their own civilian populations, in effect inflicting collective punishment on people who might otherwise be considered as retaining a right to life that stands independent of what others around them do. See HUMAN RIGHTS WATCH, *supra* note 201, at 52-53.

223. KELSAY, *supra* note 201, at 67.

soldier.”²²⁴ Along the same lines, Sunni cleric Sheikh al-Qaradawi argues that “Israeli women are not like women in our society because Israeli women are militarised.”²²⁵ In a different context, Osama Bin Laden argued that American civilians are responsible for the actions of their military because they are in a democracy, and when in war, the American people are thus responsible for the actions of their leaders.²²⁶

And as far as innocent Muslims who might be killed during such uses of force, one author explains this away by arguing that “we [true Muslims] cannot know who are the ones who were forced into the army of the infidels. We cannot differentiate between those who are and those who are not. When we kill them in accordance with the Command of God we are both rewarded and excused. They, however, will be judged according to their intentions.”²²⁷ Yet, again, these positions are minority fundamentalist positions held within Islam.

What ultimately undergirds these positions are ideas of guilt and human dignity. For example, like Rabbi Israeli in Judaic ethics, the idea that “[t]hey are from them,” does not necessarily place guilt and blame directly on these non-combatants. At the same time, the idea of collective punishment is clearly just as present, and so thus is the idea that these people, even if they are not directly guilty, are an indivisible part of a larger, collective problem. Yet, others do go even further, directly suggesting collective guilt. This is exemplified in the Hamas Charter, which “speak[s] against Jews in terms that suggest collective guilt, even participation in a battle marking the end times.”²²⁸

Yet, these radical ideas aside, Islam actually sanctions the idea that civilians retain their dignity and value, even if they might pose an

224. Muhammad Munir, *Suicide Attacks: Martyrdom Operations or Acts of Perfidy?*, in ISLAM AND INTERNATIONAL LAW: ENGAGING SELF-CENTRISM FROM A PLURALITY OF PERSPECTIVES 99, 102 (Marie-Luisa Frick & Andreas Th. Müller, eds., 2013).

225. *PM Quizzed Over Cleric's UK Entry*, BBC News (July 8, 2004, 10:32 AM), http://news.bbc.co.uk/2/hi/uk_news/3872289.stm.

226. *Osama Bin Laden's 1998 Interview*, GUARDIAN (Oct. 8, 2001 6:42 PM), <http://www.theguardian.com/world/2001/oct/08/afghanistan.terrorism>.

227. JOHANNES J.G. JANSEN, *THE NEGLECTED DUTY: THE CREED OF SADAT'S ASSASSINS AND ISLAMIC RESURGENCE IN THE MIDDLE EAST 208-09* (1986) (translating *Al-Farida al-gha'iba* (*The Neglected Duty*), a pamphlet left by the assassins of Anwar Sadat).

228. KELSAY, *supra* note 201, at 99. See, e.g., Islamic Resistance Movement, *The Covenant of the Islamic Resistance Movement* art. 7 (Aug. 18, 1988). The Hamas Charter cites a hadith, which states: “The last hour would not come unless the Muslims will fight against the Jews and the Muslims would kill them until the Jews would hide themselves behind a stone or a tree and a stone or a tree would say: Muslim, or the servant of Allah, there is a Jew behind me; come and kill him; but the tree Gharqad would not say, for it is the tree of the Jews.” *Sahih Muslim*, 41:6985.

indirect threat, and even the guilty retain some degree of protection, even if they are not Muslims. With respect to civilians,²²⁹ these individuals are considered to have value as human beings. This is evident in the hadiths that enjoin the killing of women and children, including one where the Prophet Mohammed comes across the body of a murdered woman, and says, “Tell him that the Messenger of God forbids him to kill children, women, and servants,” and, in response to someone who states that children are the children of pagans, asks, “Were not the best of you, also, once the children of pagans? All children are born with their true nature and are innocent.”²³⁰

Thus, “[i]t seems from the foregoing passage that there is a reasonable degree of consensus, at least in the hadith, that women and children should not normally be killed.”²³¹ James Turner Johnson argues that the “reason given in the text is not that these [non-combatants] have rights of their own to be spared harm, rights derived either from nature or from considerations of fairness or justice, but rather that they are potentially of value to the Muslims.”²³² Thus, even if a state believes that they have a right to self-defense,—for example, even if they believe, as Palestinian occupants of the West Bank and Gaza do, that they have a right to their land, a right that is being trammled by so-called Israeli “occupation”—force cannot have a neglectful attitude towards the well-being and, particularly, the continuing lives of the civilians, who retain their human dignity.

Even combatants, because they must be considered human beings who also retain dignity, despite guilt, must be killed only in actions tailored towards self-defensive goals; not in punishment of, or in retaliation toward, a non-Islamic group who reject God, and thus, forfeit dignity (even if they might not pose any immediate physical threat to Muslims); a goal that gives more leeway as to how war must be conducted (e.g., concepts like proportionality and last resort more

229. Turner, *supra* note 199, at 193. It should be noted that scholars have also had to grapple with the fact that the Islamic jurisprudence appears to distinguish how to treat Muslims, those who adhere to monotheistic (i.e., Abrahamic) faiths, and those who adhere to polytheistic faiths, who appear to be afforded the least amount of protection. *Id.* at 191-92. In places, it appears to permit, and even to require, the killing of polytheists, and different schools have different interpretations. *Id.* As Turner argues, however, the clear interpretation is that only if polytheists actually engage in combat can they be killed. *Id.*

230. Munir, *supra* note 224, at 116 (citing and translating Al-Tabrezi, *Mishkat al-Masabih*, al-Maktab al-Islami, Cairo, n.d., Hadith No. 3955).

231. Turner, *supra* note 199, at 189.

232. JAMES TURNER JOHNSON, *THE HOLY WAR IDEA IN WESTERN AND ISLAMIC TRADITIONS* 122 (1997). Kelsay has also argued that Classical Sunni theorists favoured the former view: “If one is a leader (an adult, able[-]bodied male), one’s guilt is obvious. If one is a follower (child, woman), one’s guilt may be diminished.” KELSAY, *supra* note 201, at 66.

broadly defined, as guilty people are owed no greater consideration). Otherwise, actions cross the line into the aggression prohibited by Islamic law, reading Qur'anic verses such as the verse of the sword in the entirety of context. This position is complemented by the idea that even in capital punishment, which is applicable to apostates and those who reject Islam, the law lays out very specific measures to ensure that people—even people who have already been condemned of wrongdoing—may avoid death until the very last possible time.

The comparison and contrast between these different ethics is further illuminating when considering how Islamic law tackles some of the universal differences between capital punishment and collective self-defense. As the previous section established, capital punishment in Islamic law focuses on maintaining social order, and eradicating evil that can spread throughout society and pollute that social order. Hence, Islam can impose capital punishment for apostasy and adultery. Yet, the elements of capital punishment in Islam that focus on mercy and repentance are complemented by the elements of collective self-defense, which are careful, even with respect to non-believers in Dar al-Harb, to see such non-believers as having inherent value. Thus, those in Dar al-Harb, even though one could easily see them as potentially spreading evil and contaminating the Islamic world, can only be killed in self-defense, not for conversion purposes or in the name of spreading Islam. A contrast can particularly be drawn by how Islamic capital punishment treats, for example, adulterers, which particularly impacts women, and how collective self-defense treats and spares women (and children) in the realm of Dar al-Harb. Of course, a possible distinction between the two, which is a distinction between wrongdoers potentially subject to capital punishment and people in Dar al-Harb, is precisely the distinction of action—intuitively, some might find it easy to see people such as apostates and adulterers as affirmatively taking wrongful action, whereas people in Dar al-Harb do not.

Another potential issue, discussed earlier in this article, is one regarding Judaism: capital punishment usually involves imposing death on the people of one's own nation, while collective self-defense involves "the Other." And, arguably more so than in Judaism, this distinction finds greater support in Islam, particularly in the very idea that Islam discourages capital punishment for *qisas* murders, despite the heinousness of this act, but does not for the *hudud* crime of apostasy (and rebellion), wherein people cross the line from being part of Islam/an Islamic nation to an Other. As Kelsay summarizes classical Islamic thought on Muslim rebels versus non-Muslims, "Rebels can be

wrong, even mistaken in their reasoning. They nevertheless remain Muslims, with certain rights that must be respected by an Islamic government. Blasphemers, apostates, on the other hand, are corrupt. . . They are not to be protected, rather, the task of a just government is to eliminate them.”²³³

And, yet, it is potentially instructive that it is easy enough for some—particularly Islamic fundamentalists—to find no distinction between the two. The question, then, is whether they may be half right: there may indeed be less distinction between how Islam treats capital punishment and collective self-defense—but that might mean that both must value mercy, and the lasting human dignity of people, more, rather than less. Particularly considering that Islamic law encourages mercy with respect to even those who commit murder, because Islamic law sees this is a private wrongdoing, it is evident that the importance of social order and eradicating evil pollutants is paramount in Islamic law. That, then, this position is not seen as inconsistent with the traditional position on *Dar al-Harb* adds strength to those within Islam who argue that classical Islam actually heavily restricts capital punishment, if not outlaws it, for similar reasons that Judaism has abolished capital punishment.

In the end, much can be drawn from the Qur’anic verse, which states: “We decreed upon the Children of Israel that whoever kills a soul unless for a soul or for corruption [done] in the land - it is as if he had slain mankind entirely. And whoever saves one - it is as if he had saved mankind entirely.”²³⁴ As Kamali argues, “[t]he reference to the children of Israel, that is, the Jews, represents the continuity of the basic values that are common to all revealed religions. Both Judaism and Islam are committed to the protection of human life. It makes no difference whether the victim is a Jew, a Muslim, or anyone else.”²³⁵

Of course, whether the Islamic religion and whether people who may follow Islam give recognition to this idea are two separate issues. Some Islamic fundamentalists have been subject to those who say that they find support less in theological argument and more in popular acceptance. For example, regarding Hamas, Brahimi argues that this terrorist organization “has never sought to find a theological argument for the use of suicide bombings, relying instead on the popular acceptance among the Palestinians of the legitimacy of such attacks

233. KELSAY, *supra* note 201, at 94.

234. *Qur’an* 5:32.

235. KAMALI, *supra* note 133, at 21.

and the martyrdom of its perpetrators.”²³⁶ Regardless of the extent that they do rely on such popular acceptance, it is evident that the devout people of this religion more generally do look to such theological arguments. In this sense, they may be able to find a religion with emphasis in justice, but also mercy, and the human dignity of all.

III. SITUATING JEWISH AND ISLAMIC ETHICS IN THE WESTERN-CHRISTIAN TRADITION

From a Western perspective that has been heavily influenced by Christian ethical traditions, such as the Just War Theory that originated in Catholicism, these Judaic and Islamic traditions—and the similarities and differences they have with Catholic traditions, with each other, and even internally within themselves—are underappreciated. Analysis of Judaic and Islamic traditions is particularly interesting given how these traditions fit within the context of Christian-Catholic doctrines on capital punishment, collective self-defense, and human dignity that have themselves shifted over centuries, including particularly dramatic shifts in recent years.

In various ways, such analysis helps illuminate these Western changes, taking place as they do with the same geopolitical and social changes that inform Jewish and Islamic ethics throughout the world. Simultaneously, this analysis demonstrates how these doctrines within the Abrahamic faith, perhaps less well understood or appreciated in the Western-Christian world, have incredible merit in contemporary society, particularly to the extent that they show successful ways that classical doctrines can be adapted, without being rejected or entirely changed, in a contemporary, Western context. In addition, this analysis demonstrates how all of these faiths share certain commonalities, commonalities that, particularly to the extent that they recognize human dignity, may help people of these faiths work through dissimilarities, antagonism, and outright hostility and violence.

In Christian, and particularly Catholic, doctrine, ethics about capital punishment have shifted. For centuries since its founding, the Catholic Church has sanctioned capital punishment, justifying it on the basis of the idea that humans lose their dignity when they act egregiously wrongfully. As Aquinas argues in justifying capital punishment, “By sinning man departs from the order of reason, and consequently falls away from the dignity of his manhood, in so far as he is naturally free, and exists for himself, and he falls into the slavish

236. BRAHIMI, *supra* note 205, at 166-67.

state of the beasts, by being disposed of according as he is useful to others."²³⁷ As such, this traditional doctrine is somewhat more consistent with Islamic doctrine. Indeed, traditional Catholic doctrine once allowed for the execution of heretics, for, as Aquinas stated, while murderers kill the body, heretical teachers kill the soul; therefore, they, too, must be eliminated, unless they infect the rest of society with their corruption.²³⁸ At the same time, traditional Catholic doctrine was more stringent than Islamic doctrine, seeing murderers as meriting the death penalty because they have caused an evil that is not just private, in contrast to Islam's conceptualization of murder, but will spread throughout society.

Yet, beginning in the mid-twentieth century, the Catholic Church has denounced capital punishment.²³⁹ This is reflected particularly in the Catechism, which states that "as a consequence of the possibilities which the state has for effectively preventing crime . . . the cases in which the execution of the offender is an absolute necessity are very rare, if not practically nonexistent."²⁴⁰ This statement accords with the idea that even the most wrongful and guilty retain their inherent human dignity.

On the one hand, it is debatable, at least to some, whether or not the Catholic Church, in spite of these proclamations, has officially changed its position on capital punishment.²⁴¹ On the other hand, it appears inevitable that this will be the direction in which this doctrine will evolve. Similar to the position that Judaism has assumed since Talmudic times, today the Catholic Church takes a position that does not completely reject capital punishment in theory, but does render it practically impossible to implement in practice. Simultaneously, the Church appears to recognize the idea, as recognized in Jewish ethics, that society has progressed and has moved away from the highest standards of traditional morality and piety (and, simultaneously, is no longer as in direct contact with God as society ostensibly was during Biblical times).²⁴² In this sense, Christian-Catholic doctrine serves as a

237. AQUINAS, *supra* note 7.

238. *Id.* at q.11 art. 3 (advocating the death penalty for heretics). Aquinas quotes from the Bible, stating "'A little leaven,' says: 'Cut off the decayed flesh, expel the mangy sheep from the fold, lest the whole house, the whole paste, the whole body, the whole flock, burn, perish, rot, die.'" *Id.* (quoting *Galatians* 5:9).

239. *See, e.g.,* E. CHRISTIAN BRUGGER, *CAPITAL PUNISHMENT AND ROMAN CATHOLIC MORAL TRADITION* (2003) (tracing the history of Catholic doctrine on capital punishment).

240. *Catechism of the Catholic Church* ¶ 2267.

241. *See, e.g.,* Antonin Scalia, *God's Justice and Ours*, *FIRST THINGS* (May 2002), <http://firstthings.com/article/2002/05/gods-justice-and-ours> (arguing that this is not the case).

242. *See supra* notes 55-57 and accompanying text.

response to Jewish scholars who have argued that Talmudic law on capital punishment serves as a rebuttal to Christian anti-Semitic arguments that Judaism “represents a desiccated form of religion in comparison with its so-called successor, Christianity,” and that “Jews were—and continued to be—responsible for the execution of Christ.”²⁴³

The ethics of war are also beginning to shift—but it is not yet clear in what direction. On the one hand, a shift is clearly reflected in Pope John Paul II’s stricter construction of what qualifies as legitimate collective self-defense, as evidenced in his opposition to wars like those that the U.S. waged in Iraq during the 2000s.²⁴⁴ Throughout his papacy, he urged that “all forms of action aimed at disarming the aggressor” must be undertaken before force is applied, and that “all military aggression is judged to be morally wrong, [l]egitimate defense, by contrast, is viewed as admissible and sometimes obligatory.”²⁴⁵ Such statements are representative of a directional shift in Just War Theory, as well as a rejection of once-central ideas, such as some wars being directly sanctioned by God (an attitude that helped drive the Crusades²⁴⁶) and retribution being a just cause for war.²⁴⁷

In manifesting the idea that war can serve as a means of punishing human beings who, acting wrongfully, have lost their dignity, these once-central ideas are arguably more prominent in certain branches of Islamic and Jewish war ethics today. On the other hand, as I personally have argued previously, this doctrine remains in many ways broadly permissive (particularly within the context of the restrictions the church has made in other contexts where life is at stake, including capital punishment). At the same time, it is not yet clear how this doctrine will deal with the new kinds of warfare in the post-September 11th era, with respect to important questions, such as who qualifies as a combatant. In this way, it is difficult to compare and contrast mod-

243. Beth A. Berkowitz, *Negotiating Violence and the Word in Rabbinic Law*, 17 *YALE J.L. & HUMAN.* 125, 127-28 (2005).

244. See John Paul II, *Address to the Diplomatic Corps* (Jan. 13, 2003).

245. Alan Cowell, *Pope Seeks a Disarming of “Aggressor” in Bosnia*, *N.Y. TIMES* (Jan. 13, 1994), <http://www.nytimes.com/1994/01/13/world/pope-seeks-a-disarming-of-aggressor-in-bosnia.html>.

246. See Jonathan Riley Smith, *Rethinking the Crusades*, *FIRST THINGS* (Mar. 2000), <http://www.firstthings.com/article/2000/03/rethinking-the-crusades>.

247. See Nicholas G. Hahn, III, *Our Pacifist Pope?*, *FIRST THINGS* (Sept. 10, 2013) <http://www.firstthings.com/web-exclusives/2013/09/our-pacifist-pope> (citing and construing theologians Augustine and Aquinas for the proposition that a just cause is “one that avenges wrongs, when a nation or state has to be punished, for refusing to make amends for the wrongs inflicted by its subjects, or to restore what it has seized unjustly”).

ern Western-Christian Just War theory with modern Jewish and Islamic ethics of war, which, at least partly out of a geopolitical and practical need to do so, provide more in the way of guidance on these kinds of issues.

As this discussion begins to develop, these shifts in Christian-Catholic ethics put some of the position shifts in Judaism and Islam in a particularly interesting light. For example, from a progressive standpoint, it makes Talmudic restriction of capital punishment, and its emphasis on mercy and the retention of human dignity, all the more remarkable, in the context of a Christian-Catholic and Islamic jurisprudence that is, relatively speaking, only beginning to move in that direction. Particularly remarkable within this idea is how Jewish ethics has been willing to adapt classical sources, which quite clearly sanction a particular behavior, to changing circumstances, as evident in the idea that, though the Torah saw the prevalence of the death penalty, the decline of standards of morality and piety within human society means that this method of punishment should no longer be implemented.

At the same time, it is remarkable that Judaism has maintained this abolitionist tradition, even in the midst of changing circumstances, particularly the recreation of the Jewish state during the 20th Century. In this sense, the ethics of Judaism, the oldest of these Abrahamic faiths, simultaneously provides a remarkable perspective on an issue looming largely throughout this entire discussion: how religions do or do not change their doctrines through time, while reconciling them with the past, particularly with their classical sources, in the context of changing times that bring historically unprecedented situations and challenges.

Similarly, from a progressive standpoint, what may seem like gaps in the Jewish and Islamic analogues to Just War theory in the eyes of Western observers, may actually help to advance conversations that Christian-Catholic ethics is having on issues of civilians versus combatants, and what force is morally permissible in midst of uncertainty—issues that, to a very significant extent, involve the question of human dignity and when people do (and do not) lose such dignity. Whether one agrees or disagrees with either Jewish or Islamic ethics on these issues, the guidance these religions provide demonstrates that Western Just War theory does not (and should not) hold a monopoly on these ethics, even as Western Just War theory, in rejecting ideas like divinely sanctioned war waged by a state and retribution/collective punishment as justifications for war, could also inform Jew-

ish and Islamic ethics in return. In these ways, analysis of Judaic and Islamic ethics is useful as part of a broader analysis of the Abrahamic faiths and their ethical traditions concerning life, particularly in the context of modern geopolitical events, the Arab-Israeli conflict and the post-September 11th fight to end terrorism, which very clearly involve all of these faiths.

As the Arab-Israeli conflict continues, so it continues to be a situs for ethical traditions—and, within those traditions, pushes for change—of Judaic and Islamic ethics, alike. Playing a key role in these phenomena is the idea of human dignity, the question of when it is retained and lost, and the similarities and differences in how that question is answered—both between faiths and even, at times, within the same faith. By shedding light on these issues, and analyzing them within the larger context of Abrahamic faiths adapting to modern events, this article has sought to achieve a greater understanding of the concepts that so deeply drive these events. Through this understanding—and particularly through a greater understanding among the pious of how these faiths strongly affirm the concept of human dignity, oftentimes in very similar ways—it is hoped that these Abrahamic faiths will recognize and affirm a commonality between themselves that will one day help to achieve the visions of peace so clearly held by sages and prophets of all of these faiths.