

VENERATE, AMEND . . . AND VIOLATE

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*“Over time, from one generation to the next, the Constitution has come to earn the high respect and even, as Madison dared to hope, the veneration of the American people.”*¹

*“The Constitution . . . is a political document. It may even be a nomos . . . But it will not be Torah.”*²

*“At times the abolition of the Torah is its founding.”*³

SYMBOLS OF IMPERFECTION

Many regard the Constitution as part of the holy trinity of American secular religion.⁴ A venerated document, it is often referred to in religious terms.⁵ A “kind of Ark of the Covenant of the New Israel that is America,”⁶ this “most wonderful instrument ever drawn by the hand of man,”⁷ was “divinely inspired,”⁸ and ought to be safeguarded with a “holy zeal.”⁹ A President and a Chief Justice exhorted the teaching of the principles of the Constitution in terms that in the Jewish prayer book referred to divine commandments: “[T]each them to your children, speak of them when sitting

1. Roper v. Simmons, 543 U.S. 551, 578 (2005).

2. Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 894 (1993).

3. TALMUD BAVLI (Babylonian Talmud, hereinafter “BAVLI”): Tractate Menakhot 99a–b (Resh Lakish).

4. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 24 (1975); Abraham Lincoln, *The Perpetuation of Our Political Institutions*, 6 J. ABRAHAM LINCOLN ASS’N 6, 10 (1984), available at <http://hdl.handle.net/2027/spo.2629860.0006.103> (referring to reverence for the laws as the nation’s “political religion”); Irving Kristol, *The Spirit of ’87*, PUB. INT., Winter 1987, at 3, 5.

5. MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* 120, 225 (1986); SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 11 (2011) (“‘Veneration’ of the Constitution has become a central, even if sometimes challenged, aspect of the American political tradition.”); Sanford Levinson, *“Veneration” and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment*, 21 TEX. TECH L. REV. 2443, 2451–52 (1990) (noting Madison’s argument that the very recognition of possible constitutional imperfection is dangerous to the constitutional order, which depends on a mood of “veneration” toward the Constitution); see also, Steven G. Calabresi, *“A Shining City on a Hill”: American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1397–405 (2006).

6. Calabresi, *supra* note 5, at 1398; see also *id.* at 1403 (referring to the National Archives, where the Constitution and the Declaration of Independence are publicly displayed, as “a national, modern day ark for our national covenant.”); George P. Fletcher, *Three Nearly Sacred Books in Western Law*, 54 ARK. L. REV. 1, 1 (2001) (referring to the Constitution, as well as the French and German Civil Codes, as “nearly sacred” as they have “provide[d] a thread of continuity deeper than transient political loyalties,” and their language has attained “an almost liturgical quality.”).

7. KAMMEN, *supra* note 5, at 91 (quoting Justice William Johnson).

8. *Id.* at 264 (quoting Justice George Sutherland).

9. LEVINSON, *supra* note 5, at 10 (quoting James Madison).

in your home, speak of them when walking by the way, when lying down and when rising up, write them upon the doorplate of your home and upon your gates.”¹⁰ The Constitution is the most recent chapter in a continuous “concatenation of covenants” stretching from Abraham to modern-day America.¹¹ In a way reminiscent of the renewals of the biblical covenants between God and the people of Israel—done by public reading of the sacred text¹²—members of the House of Representatives recited aloud the constitutional text in the opening sessions of the 112th and 113th Congresses (on January 6, 2011 and January 15, 2013, respectively).¹³ The symbolic, and political, significance of such recitation was not lost on anyone. “Constitution worship” was on the minds of those in the GOP and Tea Party supporters of the public reading.¹⁴ At the same time, Rep. Jerrold Nadler (D-NY), decried the “ritualistic reading” and objected to the “reading [of the Constitution] like a sacred text . . . You read the Torah, you read the Bible, you build a worship service around it . . . You are not supposed to worship your constitution.”¹⁵ In sounding such objections Nadler followed Thomas Jefferson’s famous mocking of men who “look at constitutions with sanctimonious reverence and deem them like the ark of the covenant, too sacred to be touched.”¹⁶ Jefferson rejected the view that the document drafted by “the men of the

10. *Id.* at 12 (quoting John Quincy Adams and Warren Burger). *Compare Deuteronomy* 6:7–9; *see also* Lincoln, *supra* note 4, at 5 (“Let reverence for the laws, be breathed by every American mother, to the lisping babe, that prattles on her lap—let it be taught in schools, in seminaries, and in colleges;—let it be written in Primmers, spelling books, and in Almanacs;—let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the political religion of the nation; and let the old and the young, the rich and the poor, the grave and the gay, of all sexes and tongues, and colors and conditions, sacrifice unceasingly upon its altars.”).

11. LEVINSON, *supra* note 5, at 11 (quoting ANNE NORTON, *ALTERNATIVE AMERICAS: A READING OF ANTEBELLUM POLITICAL CULTURE* 18 (1986)).

12. *Joshua* 24:1–19; *2 Kings* 23:2–3; *Nehemiah* 8:8; *see, e.g.*, MICHAEL WALZER, *IN GOD’S SHADOW: POLITICS IN THE HEBREW BIBLE* 1–15 (2012) (on the political significance of the acts of renewal).

13. Michael Muskal, *House Reads the Constitution, Line by Line*, L.A. TIMES (Jan. 6, 2011), <http://articles.latimes.com/2011/jan/06/news/la-pn-constitution-congress-20110106>; *House Reading U.S. Constitution Aloud Tuesday Morning*, HUFFINGTON POST (Jan. 14, 2013, 4:12 PM), http://www.huffingtonpost.com/2013/01/14/house-reading-constitution_n_2473839.html.

14. Andrew Romano, *America’s Holy Writ*, NEWSWEEK (Oct. 17, 2010), <http://www.andrewromano.net/68/america-s-holy-writ>.

15. Jason Horowitz, *Recitation of Constitution Set in House Renews Debate over Founders’ Intentions*, WASH. POST (Jan. 4, 2011, 7:26 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/04/AR2011010404652.html>; *see also id.* (quoting Bruce Ackerman’s argument that the spirit of the Constitution is “deeply inconsistent with the rote reading of a text as if it were handed down from Mount Sinai.”).

16. LEVINSON, *supra* note 5, at 9 (quoting Thomas Jefferson).

preceding age” was “beyond amendment.”¹⁷ On the other hand, James Madison invoked the very notion of constitutional reverence in order to reject “frequent appeals” to the people, i.e., to amend the Constitution, since such appeals “would, in a great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability.”¹⁸ Indeed, not only “frequent” appeals, but “every appeal to the people would carry an implication of some defect in the government.”¹⁹

Sanford Levinson points to the “central puzzle” of drawing distinctions between constitutional changes that are “genuine amendments” and ordinary developments by interpretation, i.e., constitutional changes that “unfold organically . . . from the foundational predicates of the legal system.”²⁰ Whereas interpretations are linked “in specifiable ways to analyses of the text or at least to the body of materials conventionally regarded as within the ambit of the committed constitutionalist,”²¹ an amendment is a “legal invention not derivable from the existing body of accepted legal materials.”²² Interpretations operate on materials within the constitutional and legal system; constitutional amendments challenge the perception of the authors of the constitutional document as possessing “a wisdom more than human”²³ if not being outright demi-gods.²⁴ Amendments are, therefore, more than “mere symbols of inventive change. They are also, almost necessarily, symbols of imperfection.”²⁵ Thus, while formal provisions for constitutional amendments are now a “near universal feature of national constitutions,”²⁶

17. 10 PAUL LEICESTER FORD, *THE WRITINGS OF THOMAS JEFFERSON* 42 (New York, G. P. Putnam’s Sons 1899) (letter to Samuel Kercheval, July 12, 1816).

18. *THE FEDERALIST* NO. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961).

19. *Id.* However, Madison himself also recognized that constitutional amendments may be “useful alterations” and regarded Article V as “guard[ing] equally against the extreme facility [of amendment], which would render the Constitution too mutable; and that extreme difficulty [of amendment], which might perpetuate its discovered faults.” *THE FEDERALIST* NO. 43, at 278 (James Madison) (Clinton Rossiter ed., 1961).

20. Sanford Levinson, *On the Notion of Amendment: Reflections on David Daube’s “Jehovah the Good”*, 1 *S’VARA* 25, 26 (1990).

21. Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) < 26; (B) 26; (C) 27; (D) > 27: Accounting for Constitutional Change, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 13, 15 (Sanford Levinson ed., 1995).

22. *Id.* at 16. However, Levinson “cheerfully concede[s] serious doubt that anyone can supply formal criteria by which to distinguish [between interpretation and amendment].” *Id.* at 33.

23. FORD, *supra* note 17, at 42.

24. *Id.*

25. Levinson, *supra* note 20, at 27.

26. Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, in *COMPARATIVE CONSTITUTIONAL LAW* 96, 96 (Tom Ginsburg and Rosalind Dixon eds., 2011); *see*

much controversy remains about the comparative difficulty of the various amendment processes.²⁷

If the notion of amendment is a difficult one to contend with in the context of a secular religion,²⁸ it becomes unbearable when the author of the constitution is not “merely” divinely inspired but is truly divine. For religious systems that are based on divine texts, acknowledging the very possibility of “self-conscious reformism”²⁹ that amendment (as distinguished from interpretation) of these foundational, canonic texts entails is nothing short of revolutionary,³⁰ and perhaps even heretic. Thus, a theory of constitutional amendment which expressly exists in secular constitutional regimes, including those that profess constitutional faith, has no room, as such, in “[m]ost major Western religions.”³¹ Human beings, no matter how wise, cannot amend divine law.³²

This article addresses the fundamental conundrum that is presented by notions of perfect and complete divine law and the need for, and the reality of, human-initiated changes to that law throughout the ages. It does so through the prism of Jewish legal tradition.³³ American legal scholarship has shown relatively little interest in constitutional and domestic public law

also José Antonio Cheibub, Zachary Elkins & Tom Ginsburg, *Latin American Presidentialism in Comparative and Historical Perspective*, 89 TEX. L. REV. 1707, n.85 (2011) (noting that of 444 historical and current constitutions surveyed only nine do not provide explicitly for a revision mechanism).

27. Dixon, *supra* note 26, at 96.

28. Challenging “our imbecilic Constitution,” Sanford Levinson singled out Article V: “if one must choose the worst single part of the Constitution, it is surely Article V, which has made our Constitution among the most difficult to amend of any in the world.” Sanford Levinson, Op-Ed., *Our Imbecilic Constitution*, N.Y. TIMES, May 29, 2012, http://campaignstops.blogs.nytimes.com/2012/05/28/our-imbecilic-constitution/?_php=true&_type=blogs&_r=0; see also SANFORD LEVINSON, *FRAMED: AMERICA’S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 335–37 (2012).

29. Sanford Levinson, *Constitutional Imperfection, Judicial Misinterpretation, and the Politics of Constitutional Amendment: Thoughts Generated by Some Current Proposals to Amend the Constitution*, 1996 BYU L. REV. 611, 614.

30. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 614 (1969) (suggesting that the very notion of amendment institutionalizes and legitimates revolution); see also Levinson, *supra* note 29, at 614 (“[T]here ought, presumably, to be an inverse relationship between the sacredness with which one views the Constitution and the propensity to imagine it as sufficiently imperfect to warrant amendment.”).

31. LEVINSON, *supra* note 5, at 152.

32. Noam J. Zohar, *Midrash: Amendment through the Molding of Meaning*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT*, *supra* note 21, at 307, 307.

33. For the purposes of my argument, I will follow the traditional Jewish views that regard the *Halakhah*, i.e., Jewish law, which is based on the revelation at Mt. Sinai, as normative and binding. This view, which is shared by both Orthodox Judaism and the Jewish Conservative movement, gives the conundrum of amendment of divine law its full thrust.

aspects of ancient legal systems.³⁴ Language barriers and paucity of sources account partly for this lack of engagement. The sense that ancient systems are too distant from our modern experiences, values, ideals and theories compounds the lack of intellectual curiosity. While debates regarding emergency powers that ensued after the 9/11 terrorist attacks have rekindled interest in the institution of the Roman dictatorship,³⁵ such interest did not spill over to other aspects of the laws of antiquity.³⁶ Yet, as Adriaan Lanni and Adrian Vermeule suggest, legal systems of antiquity may be “optimally different from our own world: sufficiently close to be useful, sufficiently alien to supply unfamiliar institutional forms that can enrich the repertoire of modern polities designing or redesigning their constitutions.”³⁷

Why, then, Jewish law?³⁸ This article suggests that the Jewish legal system can prove optimally different from our own world when the theory of

34. Adriaan Lanni & Adrian Vermeule, *Constitutional Design in the Ancient World*, 64 STAN. L. REV. 907, 908 (2012) (“By and large . . . the ancient world is terra incognita for the theory of constitutional design.”). This lack of attention can be contrasted, on the one hand, with the scholarship devoted to “private law” issues, in general, and Roman private law, in particular and, on the other hand, with scholarship exploring the Roman origins of the international legal system.

35. See OREN GROSS & FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE 17–26, 239–43 (2006); NOMI CLAIRE LAZAR, STATES OF EMERGENCY IN LIBERAL DEMOCRACIES 113–35 (2009) (contemporary discussion of Roman dictatorship); John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT’L J. CONST. L. 210, 211–13 (2004).

36. There may now be some signs of a budding interest among legal scholars in ancient legal systems. See, e.g., Lanni & Vermeule, *supra* note 34, at 908–11; Eric A. Posner, *The Constitution of the Roman Republic: A Political Economy Perspective* *1, *2 (Univ. Chi. Pub. Law & Legal Theory, Working Paper No. 327, 2010), available at <http://ssrn.com/abstract=1701981>.

37. Lanni & Vermeule, *supra* note 34, at 909.

38. One possible “Jewish” retort is, of course, to answer the question with another, i.e., “why not?” Bearing in mind the risk of ruining a quip by explaining it, I note that, in this context, such an answer is not as trivial as it may appear at first blush. Max Weber commented that it would take “more than a lifetime to acquire a true mastery of the literature concerning the religion of Israel.” MAX WEBER, ANCIENT JUDAISM, at ix (Hans H. Gerth & Don Martindale eds. & trans., 1952). Similarly, Lawrence Lessig noted the challenges facing lawyers who wish to “properly enter the world of Judaic interpretation.” Lawrence Lessig, *What Drives Derivability: Responses to Responding to Imperfection*, 74 TEX. L. REV. 839, 842 (1996) (reviewing SANFORD LEVINSON, RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995)). For reasons that go far beyond the scope of this article, the studying and analyzing of Jewish texts has virtually been left to those within Jewish Orthodoxy. Although this article is but a “single essay” (*id.* at 842), I hope that it would serve as a contribution in re-appropriating those texts by the general Jewish (and Non-Jewish) public. See Ruth Kalderon, Member of Knesset, Address at the Israeli Knesset (Feb. 14, 2013), available at http://yeshatid.org.il/rootkalderon_firstspeech (“The Torah is not the property of one [Jewish] movement or another. It is the gift we have all been given, and we all have the opportunity to

constitutional amendments is concerned. The answers given within the Jewish legal tradition to the conundrum of constitutional amendments may prove valuable in developing and enriching our discursive and pragmatic repertoires in dealing with the challenges that the very notion of amendment invokes. The intellectual resources of the Jewish legal tradition may prove particularly useful for comparative endeavors to those who are willing to look to ancient legal systems to “immerse . . . in the tradition of our society and of kindred societies that have gone before.”³⁹ Indeed, inquiry into Jewish law is uniquely promising in this regard. More so than any other system of antiquity, the Jewish tradition is a thoroughly legal culture. Moreover, while Jewish law has its roots firmly planted in antiquity, it is also a living body of legal principles, norms and rules, which continues to develop, evolve and change. While the circumstances of the composition of the Jewish constitutional text itself are a matter of controversy, there is no dearth of sources when Jewish law is concerned. Finally, and most significantly for the purposes of our inquiry, whereas one may speak of a “mood of veneration” towards the Constitution, Jewish legal tradition offers not merely a “mood” but the ultimate manifestation of veneration towards a written constitutional text. Indeed, Jewish veneration attaches not only to the content of the divine law but also to the written form that the law takes.⁴⁰ The Ark of the Covenant, kept in the Holy of Holies inside the Temple in Jerusalem, housed the Tablets of Stone that contained the essence of the written text, i.e., the Ten Commandments.⁴¹ Torah scrolls—hand written copies of the Torah—are sacred, and their production, maintenance, use, and what is to be done with them when they can no longer be used halakhically, are strictly regulated.⁴² Even printed versions of the Torah (and the Talmud) are sanctified. They may neither be tampered with nor destroyed.⁴³

examine it as we create the reality of our lives. No one took the Talmud and the rabbinical literature away from us. We have given it away ourselves . . .”).

39. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 236 (1962).

40. DAVID HARTMAN, *A HEART OF MANY ROOMS: CELEBRATING THE MANY VOICES WITHIN JUDAISM* 7 (1999) (“[T]he word of God is interchangeable with God. Torah, therefore, conveys the immediacy of God’s presence, as if it were an incarnation of God’s will and love.”); *id.* at 9 (“[N]ot only the semantic significance of the words themselves but also their syntactic and even their physical form became objects of interpretation.”).

41. *Exodus* 25:10–22; *1 Kings* 8:9.

42. *See, e.g.*, 2 ARYEH KAPLAN, *THE HANDBOOK OF JEWISH THOUGHT* (1992); MARK S. GLICKMAN, *SACRED TREASURE, THE CAIRO GENIZAH: THE AMAZING DISCOVERIES OF FORGOTTEN JEWISH HISTORY IN AN EGYPTIAN SYNAGOGUE ATTIC* 4–12 (2012).

43. Several alternative explanations exist for the sanctity of *kitvei ha’kodesh* (holy texts). One such explanation is content-based, i.e., the texts contain the written name of God (*shem Hashem*). Another explanation grants special religious status only to texts (and objects) that have been, in fact, sanctified to God.

Twenty years ago Suzanne Stone noted a growing body of legal scholarship that had turned to the Jewish legal tradition.⁴⁴ Recent scholarship has similarly continued to reference Jewish legal concepts in discussing such issues as sources of law,⁴⁵ copyrights,⁴⁶ the First Amendment,⁴⁷ the Fifth Amendment,⁴⁸ contract law,⁴⁹ Torts,⁵⁰ and animal rights.⁵¹ Stone argues that while earlier scholarship sought to portray the Jewish tradition as being compatible with the American legal system and liberal theory, more recent authors have looked to Jewish law as a source for a legal counter-model to the American one.⁵² Jewish legal tradition is, on a fundamental level, at odds with liberal legal theory.⁵³ Most significantly, the building blocks of the former are community and (religious) obligations rather than individuals and rights.⁵⁴ More generally, the Jewish legal tradition is not a political or legal

44. Stone, *supra* note 2, at 813.

45. Michael J. Broyde, *Custom as a Source of Jewish Law: Some Religious Reflections on David J. Bederman's Custom as a Source of Law*, 61 EMORY L.J. 1037 (2012).

46. Neil W. Netanel & David Nimmer, *Is Copyright Property? The Debate in Jewish Law*, 12 THEORETICAL INQUIRIES L. 241, 244 (2011) (Noting that “the arguments within the Jewish law debate have some intriguing parallels with those of secular copyright law.”).

47. Daniel Kazhdan, *How Jewish Laws of Resistance Can Aid Religious Freedom Laws*, 100 CALIF. L. REV. 1069, 1089–91 (2012).

48. Samuel J. Levine, *Rethinking Self-Incrimination, Voluntariness, and Coercion, Through a Perspective of Jewish Law and Legal Theory*, 12 J. L. SOC'Y 72 (2011).

49. Benjamin Porat, *Contracts to the Detriment of a Third Party: Developing a Model Inspired by Jewish Law*, 62 U. TORONTO L.J. 347 (2012).

50. Benjamin Shmueli, *Liability Under Uncertain Causation? Four Talmudic Answers to a Contemporary Tort Dilemma*, 30 B.U. INT'L L.J. 449 (2012).

51. Randall Schapiro, *A Shmuz About Schmalz: a Case Study: Jewish Law and Foie Gras*, 7 J. ANIMAL L. 119 (2011) (footnote omitted).

52. Stone, *supra* note 2, at 818–19 (“Although the attraction of Jewish law once lay in its perceived similarity to the American liberal legal model, it now lies in its perceived difference from that model. [T]he Jewish legal tradition has come to represent . . . precisely the model of law that many contemporary American theorists propose for American legal society.”). Stone identifies Robert Cover’s work as making it “respectable [again] to draw on the Jewish tradition in public discourse.” *Id.* at 820.

53. *But see id.* at 832 (arguing that a counter-model is an inaccurate rendering of Jewish law and, in any event, has limited usefulness to a thoroughly secular legal society).

54. JEROLD S. AUERBACH, RABBIS AND LAWYERS: THE JOURNEY FROM TORAH TO CONSTITUTION 42–48 (1990); Michael J. Broyde, *Introduction—Rights and Duties in the Jewish Tradition*, in CONTRASTS IN AMERICAN AND JEWISH LAW, at xxiii (Daniel Pollack ed., 2001); Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65, 67 (1987), reprinted in LAW, POLITICS, AND MORALITY IN JUDAISM 3, 5 (Michael Walzer ed., 2006) (“Social movements in the United States organize around rights. When there is some urgently felt need to change the law or keep it in one way or another, a ‘Rights’ movement is started, civil Rights, the right to life, welfare rights, and so on. The premium that is to be put upon an entitlement is so coded. When we ‘take rights seriously’ we understand them to be trumps in the legal game. In Jewish law, an entitlement without an obligation is a sad, almost pathetic thing.”); George P. Fletcher, *Self-Defense as a Justification for Punishment*, 12 CARDOZO L. REV.

theory (at least not primarily), but rather a religious theory aimed at regulating every aspect of human conduct within a religious community.⁵⁵ Claims that the “Judaic resolution of certain theoretical difficulties can be wholly transplanted to the American domain,”⁵⁶ appear to be at once overly optimistic and misplaced. Rather, as Stone cautions, “[a] legal system ultimately derives its shape from the culture-specific forces of a particular history and a particular discourse. Theorists will need to look to America’s particular history and particular form of legal discourse to make sense of the American Constitution. . . In so doing, they should be cautious not to derive too many lessons from the counter-text of Jewish law. For, in the final analysis, Jewish law is not only a legal system; it is the life work of a religious community.”⁵⁷ It is with these words of caution in mind that I proceed.

Part I of the Article outlines the general contours of the Jewish legal tradition. It discusses the view of the Torah as both complete and perfect (morally and legally) and the veneration with which this textual reflection of God’s will has been held. The article then turns to consider the ability of halakhic authorities to deviate from the divine laws set forth in the Torah and makes two claims in this context. Part II argues that despite the veneration towards the Torah, halakhic authorities have, in fact, deviated from its dictates throughout the generations. Jewish law has given questions such as “could rules promulgated by the halakhic, human, authorities deviate from the divinely ordained law of the Torah?” a qualified affirmative answer. It had long been recognized that halakhic authorities could act in extraordinary

859 (1991); HAIM COHN, *HUMAN RIGHTS IN JEWISH LAW* (1984); Daniel J. Elazar, *Obligations and Rights in the Jewish Political Tradition: Some Preliminary Observations*, JERUSALEM CENTER FOR PUB. AFFAIRS, <http://jcpa.org/dje/articles2/oblig-rights.htm> (last visited Dec. 20, 2014); Moshe Silberg, *Law and Morals in Jewish Jurisprudence*, 75 HARV. L. REV. 306, 313 (1961).

55. Stone, *supra* note 2, at 821 (“[O]ne cannot fully understand Jewish law without considering the religious framework that makes Jewish law possible and renders it intelligible to its practitioners.”); cf. GEOFFREY P. MILLER, *THE WAYS OF A KING: LEGAL AND POLITICAL IDEAS IN THE BIBLE* 7 (2011) (developing the argument that the Bible contains a “systematic, comprehensive, and remarkably astute analysis of political obligation and governmental design - in short, a political philosophy . . .”).

56. David R. Dow, *Constitutional Midrash: The Rabbis’ Solution to Professor Bickel’s Problem*, 29 HOUS. L. REV. 543, 544 (1992) (suggesting that the “normative ontology of the systems of Jewish and American law are so nearly identical . . .”).

57. Stone, *supra* note 2, at 893–94; see also Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L.Q. 441, 444 (1997) (while acknowledging the existence of fundamental differences between the two systems, arguing that certain “conceptual similarities” between them allow for “meaningful yet cautious comparisons” of the two systems).

emergency capacities⁵⁸ to deal with exceptional circumstances when application of the ordinary law would produce unacceptable results. Acting in such capacity the halakhic authorities could, and did, set aside parts of the God-given Torah law and at other times suspended ordinary laws, promulgated emergency measures, and resorted to extralegal sanctions that had not been authorized under the Torah. I go on to analyze the traditional reasons that have been put forward to justify, excuse or explain actions by sages and rabbis that contravene or deviate from the Torah. Part II also discusses the safeguards and restrictions that have been put in place in order to prevent, or at least minimize the danger of, abuse or misuse of the power to deviate from the basic law. Moreover, it also argues that even in non-emergency circumstances we can find examples—in rabbinic legislation and judicial decision-making—that deviate from the Torah. In this “ordinary” context some such demonstrations go as far as overruling permanently the dictates of the Torah and thus amending the divine constitution.

Part III examines the legal nature of the extraordinary capacity of halakhic authorities to deviate from the law of the Torah and whether it should be understood as operating within the framework of legal authority or rather as an extralegal power. It argues that the legal basis for the sages’ ability to deviate from and amend (including by violating) the Torah is not always clear. Indeed, I suggest that at least in some cases the ambiguity about the legal foundation of such radical authority or power may be purposeful. Some halakhic authorities identify the source of their authority as present within the constitutional framework—the Torah—itsself. Yet others seem to recognize that their actions had been devoid of such legal authority. Rather than invoking their widely-recognized broad interpretative powers and attempt to make the claim that their actions and decisions had been in accordance with the dictates of the Torah, they accept, albeit tacitly, the need to act in contravention of the Torah. Significantly, rather than argue for legal *authority* to act as they did, those sages base their actions on notions of extralegal *power*. In addition to the jurisprudential inquiry, Part III also suggests that the question of the rabbis’ capacity to amend the Torah should be considered against the particular historical contexts that served as backgrounds for much of Jewish lawmaking and judicial decision-making in the Land of Israel and in Babylon. Pointing to significant, yet subtle, differences between the Jerusalem Talmud and its Babylonian counterpart in this context raises questions that go to the relationship between the two centers of Jewish study and learning as well as between those centers and non-Jewish forces with

58. I use the term “capacity” at this point as I will later discuss the question of whether in so acting the halakhic authorities exercise “authority” or rather “power.”

which they had come into contact, e.g., the late Roman republic (and, more significantly, the Roman empire) in the Land of Israel and the Babylonian and Persian empires in the east.

I. VENERATION . . . AND AMENDMENT

Judaism is a thoroughly legal culture.⁵⁹ Structured around the concept of obligations (*mitzvot*, commandments), that are designed to make people follow God's will, rather than around a notion of individual rights,⁶⁰ Jewish law closely regulates all aspects of human life and existence, both the public sphere of social and political interactions and the private sphere of human conduct.⁶¹ The *halakhah*⁶² is all-encompassing: it regulates both religious and non-religious aspects of life (indeed, Jewish law does not make such distinction), it contains laws of war, criminal and civil law, the rituals at the Temple, as well as rules pertaining to tying one's shoes.⁶³

For the greater part of its history the glue holding the Jewish people together had been defined not by territory, citizenship, or subservience to an

59. 1 THE JEWISH POLITICAL TRADITION: AUTHORITY 247 (Michael Walzer et al. eds., 2000).

60. Cover, *supra* note 54, at 7 ("there is a sense in which the ideology of rights has been a useful counter to the centrifugal forces of the Western nation-state while the ideology of mitzvot or obligation has been equally useful as a counter to the centripetal forces that have beset Judaism over the centuries.").

61. Zohar, *supra* note 32, at 308 ("revealed law . . . involves not only God's authority, but also the direct expression of that authority in a specific set of laws.").

62. *Halakhah* refers to the whole body of Jewish law, including the written Torah and the oral Torah, rabbinic law, customs and traditions. The term may also refer to any single rule of law. *What is Halakhah?*, JUDAISM 101, <http://www.jewfaq.org/halakhah.htm> (last visited Dec. 20, 2014).

63. According to the *Shulchan Arukh*—the most authoritative codex of Jewish law, compiled by Rabbi Yosef Karo in 1563—the right shoe goes on first but the left shoe is tied first. SHULKHAN ARUKH, *Orach Chayim* 2:4. Generally, the right side is given precedence over the left. MISHNAH BERURAH, 2:5–2:7; see also *Genesis* 48:13–14 (Jacob's blessing to his grandchildren, Ephraim and Menashe); *Psalms* 110:1 ("The Lord said unto my Lord, Sit thou at my right hand, until I make thine enemies thy footstool."). However, when we come to the act of tying the shoelaces the left goes first. One explanation given is that even when tying shoes one is reminded of the *mitzvah* to put on *tefillin* (phylacteries) every weekday during morning prayers. The hand-*tefillin* are tied on the left arm against one's heart. The *tefillin* themselves serve as a daily reminder of God's deliverance of Israel from Egypt. To complete the picture, when shoes are taken off, the left shoe comes off first. See also Yehuda Amichai, *Sandals*, in YEHUDA AMICHAH: A LIFE OF POETRY, 1948–1994, at 391 (Benjamin & Barbara Harshav trans., 1995) ("Sandals are the reigns of my galloping feet / And the tefillin straps of my weary, praying leg."); EDNA NAHSHON, *JEWS AND SHOES* (2008). It should also be noted that Jewish tradition attributes a more prominent role to actions than to abstract notions and ideas in living one's life. Finally, halakhic authorities have debated whether left-handed men and women (the latter who are exempt from the *mitzvah* of *tefillin*) ought to follow the same "right first-then left-then tie left-then tie right" order.

identifiable human authority, but rather by adherence to the *halakhah*.⁶⁴ Not occupying a land of its own and placed at the mercy of the rulers of the different countries in which it was located, the strength of Jewish communities depended on the individual and communal observance of Jewish law and tradition and on a sense of internal cohesiveness that had been created and sustained by such observance.⁶⁵ In the absence of centralized power and limited ability to coerce compliance, “it is critical that the mythic center of the Law reinforce the bonds of solidarity. Common, mutual, reciprocal obligation is necessary. The myth of divine commandment creates that web.”⁶⁶ One need not subscribe to Cover’s normative and descriptive views of Jewish law as a legal system lacking in institutional hierarchy and means to enforce its rules on recalcitrant members, to appreciate the centrality of law in Judaism.

Jewish tradition regards the Torah as absolute and perfect, both legally and morally⁶⁷ and does not consider the Euthyphro dilemma as a valid challenge.⁶⁸ “God,” writes Jonathan Sacks, the former Chief Rabbi of the United Kingdom and the Commonwealth, “commands the good because it is good.”⁶⁹ Albeit both God and humans are “equally answerable” to the claims of justice, “the good is what God commands because God-the-lawgiver is also God-the-creator-and-redeemer. Morality mirrors the deep structure of the universe that God made and called good.”⁷⁰ God’s commandments,

64. 1 THE JEWISH POLITICAL TRADITION: AUTHORITY, *supra* note 59, at 247 (“After 70 C.E., Israel no longer possessed a geographical center in Jerusalem or an institutional center in the royal court or the Temple. It became a text-centered society, focused on the Torah, bound by its covenant to a set of laws.”).

65. AARON KIRSCHENBAUM, JEWISH PENOLOGY: THE THEORY AND DEVELOPMENT OF CRIMINAL PUNISHMENT AMONG THE JEWS THROUGHOUT THE AGES 13 (2013).

66. Cover, *supra* note 54, at 6.

67. For an interesting discussion see Aharon Lichtenstein, *Does Jewish Tradition Recognize An Ethic Independent of Halakha?*, in MODERN JEWISH ETHICS 63 (Marvin Fox ed., 1975) (arguing that *lifnim mishurat ha’din* is “an ethical moment that though different from Halakha is nevertheless of a piece with it and in its own way fully imperative.” *Id.* at 83); *Symposium on Aharon Lichtenstein’s Paper “Does Jewish Tradition Recognize an Ethic Independent of Halakha?”* (2012), available at <http://www.theapj.com/symposium-on-aharon-lichtensteins-paper-does-jewish-tradition-an-ethic-independent-of-halakha/> (last visited Dec. 20, 2014).

68. PLATO, EUTHYPHRO (c. 399 B.C.E.), *reprinted in* PLATO: THE COLLECTED DIALOGUES (Edith Hamilton & Huntington Cairns eds., Lane Cooper trans., 1961) (“Is what is holy holy because the gods approve it, or do they approve it because it is holy?”); JONATHAN SACKS, TO HEAL A FRACTURED WORLD: THE ETHICS OF RESPONSIBILITY 163–64 (2005); *see also* MICHAEL J. HARRIS, DIVINE COMMAND ETHICS: JEWISH AND CHRISTIAN PERSPECTIVES (2003); AVI SAGI & DANIEL STATMAN, RELIGION AND MORALITY 62–63 (1995).

69. SACKS, *supra* note 68, at 164.

70. *Id.* at 164 (“For the Bible . . . God who teaches us how to act in the world is also the maker of the world in which we act. This means that in monotheism, morality means going with, not against, the grain of the cosmos and history.”). Sacks argues that instances in which it seems

themselves moral and good, cannot be changed or diminished. That is so even if the apparent underlying rationale for the commandment no longer applies.⁷¹ Moreover, the Torah incorporates all the human law making and interpretative authorities that may be necessary to respond to changed circumstances.⁷² Justice Davis' famous observation that the Constitution applied equally in times of war and in times of peace, which projects belief in the fortitude, completeness, and perfection of the existing legal system, and in the government's ability to fend off any crisis without deviating from ordinary norms, seems all the more apposite to a constitution given by God rather than one drafted by exceptional, yet fallible, human beings.⁷³

A. "The Daughters of Zelophehad Speak What is Right"

Jewish law is founded on a single source of legal authority, i.e., divine will as it is expressed in the Torah that was revealed to Moses at Sinai.⁷⁴ The constitutional text of Jewish law has its ultimate source in divine revelation,⁷⁵

that God demands "pure obedience" merely suggest that the story is more subtle than it seems. *Id.*

71. Levine, *supra* note 57, at 458–61.

72. See, e.g., Melissa S. Lane, *Lifeless Writings or Living Script?: The Life of Law in Plato, Middle Platonism, and Jewish Platonizers*, 34 CARDOZO L. REV. 937 (2013). Lane discusses two criticisms of written laws: precision (i.e., written law cannot be a precise embodiment of knowledge due to the law's inflexible and unchanging character) and habituation (i.e., by encouraging study rather than action). She suggests that the strategy of treating "written laws as embodying divine wisdom" has offered one method to counter such criticisms. *Id.*

73. *Ex parte* Milligan, 71 U.S. 2, 120–21 (1866); EDWARD S. CORWIN, TOTAL WAR AND THE CONSTITUTION 39–80 (1947); GROSS & NÍ AOLAÍN, *supra* note 35, at 89–93; see also Dow, *supra* note 56, at 556 ("the principle of completeness in the American system is far less emphatic and categorical—it is, in a word, less potent—than is the Jewish principle of completeness.").

74. The term "Torah" can have a range of meanings: it specifically refers to the five books of Moses but can also encompass the oral Torah. See *What is Halakhah?*, *supra* note 62. In this paper I shall mostly refer to Torah as the five books of Moses (also known as the written Torah, Torah *she'bichtav*). Modern scholars generally agree that the Torah was composed over several centuries and that the five books comprising the Pentateuch had been written, either in whole or in part, by different authors—the most commonly identified are known as D, P, J, and E. See, e.g., THE PENTATEUCH AS TORAH: NEW MODELS FOR UNDERSTANDING ITS PROMULGATION AND ACCEPTANCE (Gary N. Knoppers & Bernard M. Levinson eds., 2007). Modern scholarship notwithstanding, Jewish tradition regards the Torah as dictated to Moses by God on Mt. Sinai. This remains one of the most fundamental principles of the Jewish faith. MAIMONIDES, COMMENTARY TO THE MISHNAH, *Sanhedrin* 10:1 (Setting forth thirteen fundamental principles of Jewish thought. The Eighth Principle professes belief in the divine origin of the Torah, declaring that, "I believe with perfect faith that the entire Torah that we now have is that which was given to Moses.").

75. See Arthur J. Jacobson, *Job's Justice*, 34 CARDOZO L. REV. 983, 985 (2013); Arthur J. Jacobson, *Autopoietic Law: The New Science of Niklas Luhman*, 87 MICH. L. REV. 1647, 1686 (1990).

making its commandments immutable.⁷⁶ The combination of the Torah constituting divine will that is perfect and all encompassing suggests that, at least in theory, no “genuine amendment” to its commandments can be made by mere mortals.⁷⁷ The only possible formal amendment would be for God Himself, the law-giver, the constitution-drafter *and* the sovereign, to announce new laws that would supplant, amend, or even repeal existing divine commandments.

The Torah, in fact, includes rare examples that arguably demonstrate such formal amendment to existing law.⁷⁸ The book of Numbers tells the story of the five daughters of Zelophehad of the tribe of Manasseh who confront Moses, Elazar the High Priest, the tribal chieftains and the congregating people of Israel at the entrance to the Tabernacle demanding to inherit their father’s (future) property rights in the Land of Israel since their father had died leaving no male heirs.⁷⁹ Upon hearing the daughters’ claim, Moses brings their case before the Lord who then decrees that “The daughters of Zelophehad speak what is right; you shall surely give them a possession of inheritance among their father’s brothers, and cause the inheritance of their father to pass to them.”⁸⁰ It may be argued that the five wise, exegete, and virtuous sisters⁸¹ merely seek to change customary rules rather than divine law regarding intestate inheritance since no formal rules are set in the Torah regarding that issue prior to this incidence. However, we must consider “the narrative framework in which we find the dispute, and the resultant law.”⁸² The chapter of Numbers immediately preceding the story of the five sisters recounts the census of male adult Israelites conducted by Moses and Elazar the High Priest in accordance with God’s command.⁸³ After carrying out the census God speaks again to Moses: “To these the land [of Israel] shall be

76. 2 MENACHEM ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES* 479 (Bernard Auerbach & Melvin J. Sykes trans., 1994). “The substance of the supreme legislation is fixed, perpetual, and beyond change.” *Id.* at 480.

77. JOEL ROTH, *THE HALAKHIC PROCESS: A SYSTEMIC ANALYSIS* 201 (1986) (“if the power of the systematically recognized authorities were extended to the amendment or abrogation of [rules set out in the Torah], would not the authority of the sages be, in fact, primary, and not secondary? And if, in fact, that was the case, would not the primacy of the *grundnorm* within the legal system have been undermined?”); WALZER, *supra* note 12, at 17 (“No human lawmaking is recognized; hence there are no stipulated procedures for adding to the divinely revealed law or for revising it, let alone for replacing it.”); ZOHAR, *supra* note 32, at 308 (“If the Law is invested with God’s authority, how can it ever be amended?”).

78. David Daube, *Jehovah the Good*, 1(1) S’VARA 21 (1990).

79. *Numbers* 27: 1–4.

80. *Numbers* 27: 7.

81. See BAVLI, *supra* note 3, at 119b for this description of the five women.

82. BERNARD S. JACKSON, *STUDIES IN THE SEMIOTICS OF BIBLICAL LAW* 226 (2000)

83. *Numbers* 26:1–51.

divided as an inheritance, according to the number of names.”⁸⁴ The allocation of the land is to be done according to the tribal census that, as we have seen, was conducted on the basis of male adults. Thus, when the daughters of Zelophehad come before Moses they do not protest a mere custom. Rather, they clearly rile against “a specific divine command allocating the promised land to the sons of Jacob *in the male line*.”⁸⁵ God’s pronouncement that “the daughters of Zelophehad speak what is right,” and His subsequent commandment to “cause the inheritance of their father to pass to them” is, therefore, a clear modification of a previous divine commandment. While such amendments require “no complicated doctrine” to account for them from a legal perspective,⁸⁶ they are nonetheless highly problematic inasmuch as they signify the imperfection of God’s original dictates and, implicitly, of God Himself.⁸⁷ Not surprisingly, other than on such rare instances, the Torah does not recognize the possibility of formal amendment, modification, addition to, or repeal of the divine commandments contained therein. When legal changes are concerned, the Bible adopts a “rhetoric of concealment.”⁸⁸

Michael Walzer argues that such concealment covers a much broader phenomenon of legal change. Arguing that the Bible contains three distinct and significantly different legal codes—“Exodus is the law of the tribes . . . Leviticus the law of the temple . . . Deuteronomy is the law of the nation or, more specifically, the law of the royal court . . .”⁸⁹—he suggests that “[f]rom a theological point of view, the three codes are literally inexplicable—and that is why the differences among them are never acknowledged in the text.”⁹⁰ Because such process of adaptation to change had to remain unacknowledged it could not result in acknowledged outcomes. Thus, “the result is a divine word inconsistent with itself.”⁹¹ Yet significantly, because all three legal codes are held together as revealed to Moses at Sinai, every word in each of them is divine and, in and of itself, perfect and necessary. This is in striking

84. *Numbers* 26:52–53.

85. JACKSON, *supra* note 82, at 227.

86. Zohar, *supra* note 32, at 308.

87. Obviously, I would not purport to deal with questions about the omnipotent and omniscient nature of God in this article. I will merely refer the readers to the two Creation stories that are told in *Genesis* 1:1–2:3 and *Genesis* 2:4–25, which reveal two distinct images of God. See also LEON R. KASS, *THE BEGINNING OF WISDOM* (2006).

88. AARON D. PANKEN, *THE RHETORIC OF INNOVATION* 76 (2005); see also WALZER ET AL., *supra* note 59, at 250–51 (“[L]ike most American judges, the rabbis are eager to deny that they ever change the law. . . . There is a great deal of quiet or concealed boldness in the history of halakhic decision making . . .”).

89. WALZER, *supra* note 12, at 20.

90. *Id.* at 17.

91. *Id.*

contrast to the status of, for example, the 18th Amendment to the Constitution of the United States once the 21st Amendment was adopted and ratified.

B. “Mountains Hanging by a Hair”

One need not subscribe to Walzer’s view of the three legal codes in order to appreciate the necessity of human interpretation of the divine commandments. The puzzle of distinguishing between “genuine amendments” to the constitutional text and ordinary developments by interpretation is both less relevant and more critical in the context of religious systems such as the Jewish legal tradition than in a secular constitutional system like that of the United States.⁹² It is less relevant because the Torah, as divine law, does not allow or recognize any possibility for a formal, human, amendment to that law. “Israel’s law,” writes Walzer, “is God’s alone; it has no other possessive modifier.”⁹³ Not only is there no Biblical equivalent to the constitutional power to amend that is contained in Article V of the Constitution, the Torah actively prohibits any such amendment.⁹⁴ At the same time, precisely because of that impermissibility (indeed, impossibility) there is much greater need for a broad leeway for creative interpretation and application of existing rules.⁹⁵ Applying the Torah’s principles and rules to everyday life and adapting them to the realities of social, economic and political change require decision-making in the processes of interpretation and elaboration, application and administration of the law.⁹⁶ Interpretation has thus become the “central genre[] of Jewish legal and political literature.”⁹⁷ As Noam Zohar notes, “[t]he very sanctification of the text became a fountainhead for great creativity. Not one word of the

92. Two other parts of this puzzle in the context of Jewish law ought to be mentioned. First, is the concept of “circumvention of the law” (*ha’arama*) which Shmuel Shilo defines as “avoidance of the consequences of applying the law by finding some loophole in the law itself thereby enabling a person to avoid the consequence of its application by placing himself in a different legal context which will lead to other results.” Shmuel Shilo, *Circumvention of the Law in Talmudic Literature*, 17 *ISR. L. REV.* 151, 152–53 (1982). Second, is the notion of equity in the Jewish tradition that incorporates the concept of *lifnim mishurat ha’din* (acting beyond the letter of the law). See, e.g., AARON KIRSCHENBAUM, *EQUITY IN JEWISH LAW* (1991).

93. WALZER, *supra* note 12, at 22.

94. ROTH, *supra* note 77, at 156.

95. Zohar, *supra* note 32, at 318 (“Paradoxically, the very supreme authority carried by the revealed ‘constitution’ seems to make the control of its (legally binding) meaning into a vehicle for radical change.”); see also WALZER, *supra* note 12, at 19 (“God’s monopoly works against the consolidation of interpretive power in Israelite society and serves to legitimize the plurality of interpreters.”).

96. MOSHE HALBERTAL, *INTERPRETATIVE REVOLUTIONS IN THE MAKING* 13–15 (2004).

97. WALZER ET AL., *supra* note 59, at 248.

divine Torah could be changed, but the meaning of its words was radically subject to rabbinic determination.”⁹⁸

Jewish law embraces the principle of human decision-making responsibility by recognizing the exclusive competence of halakhic authorities to determine the meaning of the Torah by way of interpretation and exegesis. Once the Torah had been revealed at Sinai and passed from God to man so too did the authority to interpret and administer it.⁹⁹ God is excluded from further intervention to determine the law beyond the initial revelatory moment. Jewish law even accepts as valid decisions that are recognized as substantively mistaken as long as the appropriate halakhic authorities have made them, and imposes concomitant obligation on all to obey those decisions.¹⁰⁰ The result of decisions by the rightful authorities is, therefore, not a reflection or finding of an objective (divine) truth but rather the expression of an “earthly truth” that enjoys “pragmatic validity.”¹⁰¹ As a noted eighteenth century commentator put it, “[t]he Torah was not given to ministering angels. It was given to man with a human mind. He gave us the Torah in conformity to the ability of the human mind to decide, even though it may not be the truth . . . Only it be true according to the conclusions of the human mind . . . The truth be as the sages decide with the human mind.”¹⁰² At the same time, the exercise of rabbinic interpretative authority was to be carried out within the legal system with fidelity to God’s laws and commandments.¹⁰³ However, the broad scope of that authority and the radical

98. Zohar, *supra* note 32, at 317; *accord*, Levinson, *supra* note 29, at 339.

99. The famous talmudic story of *tanuro shel Akhnai* (the Oven of Akhnai) recounts a halakhic debate concerning the question whether a certain type of oven was susceptible to uncleanness. During the debate, the majority of sages reject miraculous signs invoked by Rabbi Eliezer ben Hyrkanos to support an opinion contrary to their own. The sages are not moved to change their position even when a voice from Heaven proclaims that Rabbi Eliezer is right and they are wrong. Upon hearing the heavenly pronouncement the sages argue that in interpreting the Torah the majority of sages prevails and that once the Torah was given by God to the people of Israel “it is not in Heaven,” namely, its interpretation is exclusively in the domain of the sages. The Talmud tells us that upon hearing the sages’ argument and their refusal to follow the voice from Heaven, God laughed and said: “My children have defeated me, my children have defeated me.” Baba Mezia in BAVLI, *supra* note 3, at 59b; *see also* Itzhak Englard, *Majority Decision vs. Individual Truth: The Interpretations of the “Oven of Achnai” Aggadah*, 15 TRADITION 137, 137 (1975); Stone, *supra* note 2, at 855–65; David Luban, *The Coiled Serpent of Argument: Reason, Authority, and Law in a Talmudic Tale*, 79 CHI.-KENT L. REV. 1253, 1253 (2004); JEFFREY L. RUBENSTEIN, TALMUDIC STORIES: NARRATIVE ART, COMPOSITION, AND CULTURE 34–63 (1999); Daniel J.H. Greenwood, *Akhnai*, 1997 UTAH L. REV. 309, 309 (1997); Edmond N. Cahn, *Authority and Responsibility*, 51 COLUM. L. REV. 838, 838–39 (1951).

100. Rosh Hashana in BAVLI, *supra* note 3, at 25a; *cf.* YERUSHALMI, HORAYOT 1:1.

101. ELIEZER BERKOVITS, NOT IN HEAVEN 48 (1983).

102. *Id.* at 55 (quoting KTZOT HA’KHOSHEN).

103. Zohar, *supra* note 32, at 309. Of course the meaning and scope of “fidelity” to God’s commandments may, in and of itself, be subject to debate. Thus, for example, Maimonides argues

subjecting of meaning to human determination raise again the question of drawing boundaries between legitimate interpretation and impermissible amendment, and more generally between legal interpretation and innovation. Yet, even when the sages have used their interpretative authority to effectively amend scriptural law this has not been readily acknowledged.¹⁰⁴

Laws and rules that derive from the explicit biblical text are known as *d'oraita* (Aramaic for “from the Torah”).¹⁰⁵ However, the written constitutional document does not, and cannot, cover the full panoply of legal rules. The *Mishnah*—a redaction of Jewish traditions and legal opinions that was compiled circa 200 CE—comments, for example, that the rules pertaining to the Sabbath are like “mountains hanging by a hair, for Scripture is scanty and the rules many.”¹⁰⁶ To overcome the discrepancy, Jewish tradition has maintained that the law revealed to Moses at Sinai is comprised of two co-equal parts: The written Torah (i.e., the five books of Moses) and the oral Torah.¹⁰⁷ The latter facilitates the interpretation of the former but is equally vested with God’s authority. Laws that derive from the Torah through rabbinic interpretation and exegesis enjoy a status akin to that of the Torah.¹⁰⁸

In addition to laws that are derived exegetically from the Torah, halakhic authorities may also engage in independent law-making, by issuing laws and rulings that do not have a basis in the biblical text—known as *d'rabbanan* (“from the Sages”).¹⁰⁹ Notwithstanding the fact that such laws introduce

that rabbinic interpretation and legislation are permissible so long as they do not purport to be “from Sinai,” i.e., as long as the distinction between divine law and human law remains well established. For some of the debates concerning the scope of the rabbis’ authority see WALZER ET AL., *supra* note 59, at 244–378.

104. Zohar, *supra* note 32, at 310 (“Midrash usually has the trappings of interpretation”) and 318 (“[E]ven *amendment* seems too mild a term for describing the midrashic freedom celebrated by the Sages. In (modern) constitutional amendment . . . in order to override the text’s authority, a formal procedure is required for an appeal to the sovereign people. In rabbinic Judaism, however, there is no authority that can override the absolute commitment to the initial revelation. The text is eternally fixed; but its meaning is ultimately fluid.”).

105. 2 ELON, *supra* note 76, at 207.

106. Hagigah in BAVLI, *supra* note 3, at 10a; see also Ismar Schorsch, *Mountains Hanging by a Hair*, JEWISH THEOLOGICAL SEMINARY, (Feb. 18, 1995), <http://learn.jtsa.edu/content/commentary/ki-tissa/5755/mountains-hanging-hair>.

107. God’s commandment to Moses: “Come up to me into the mount, and be there: and I will give thee the tables of stone, and the law, and the commandments . . .” is seen to reflect the handing down to Moses of the two forms of the Torah. *Exodus* 24:12. Maimonides explains: “‘The law’ refers to the written law; ‘the commandment,’ to its interpretation.” Thus, “All the precepts which Moses received on Sinai, were given together with their interpretation.” MAIMONIDES, *Mishne Torah*, reprinted in ISADORE TWERSKY, A MAIMONIDES READER 35, 35 (1972).

108. See AARON KIRSCHENBAUM, EQUITY IN JEWISH LAW 10 (1991); TALYA FISHMAN, BECOMING THE PEOPLE OF THE TALMUD (2011).

109. 2 ELON, *supra* note 76, at 477–544; JAY M. HARRIS, HOW DO WE KNOW THIS? MIDRASH AND THE FRAGMENTATION OF MODERN JUDAISM 137–250 (1994) (the role of the rabbis as

“something entirely new into the *Halakhah*—something not capable of being derived from any pre-existing authoritative legal precept,”¹¹⁰ the source for the rabbis’ authority to engage in such legislative activity is traditionally argued to exist (by means of further exegetical analysis) in the constitutional text—the Torah—itsself.¹¹¹ The biblical text is also used to set the permissible scope for such independent legislation.¹¹² Thus, Rambam (Maimonides), the great 12th century codifier of Jewish law, interprets the commandment, “Every matter which I command you, observe to do it; thou shalt not add thereto, nor diminish from it,”¹¹³ to allow rabbinic legislation that does not purport to have primary status similar to that of the Torah (thus not adding to the Torah itself)¹¹⁴ and to prohibit legislation that abrogates from the immutable dictates of the biblical text.¹¹⁵

The distinction between the two types of legislative tools—rabbinic interpretation of biblical text and rabbinic independent legislation—is both theoretically and practically significant even if often not an easy one to make in practice. Laws *d’rabanan* are secondary legislation in the hierarchy of legal norms, subordinate to the law of the Torah. In case of a clear

interpreters of the law is not confined to revealing the meaning of the Torah commandments but also extends to creating, expanding and extending the law).

110. ELON, *supra* note 76, at 477.

111. Samuel J. Levine, *An Introduction to Legislation in Jewish Law, with References to the American Legal System*, 29 SETON HALL L. REV. 916, 925–26 (1999).

112. *Id.* at 927–31.

113. *Deuteronomy* 13:1; *see also Deuteronomy* 4:2. The Ninth Principle of Jewish faith, as set by Maimonides, declares a Jew’s faith in the immutability of the Torah. The prohibition against adding to the Torah is known as *Bal tosif*. The prohibition against diminishing or subtracting from it is known as *Bal tigra*.

114. MAIMONIDES, *Mishne Torah, Hilkhhot Mamrim* 2:9 (interpreting the Torah’s admonition to mean that one may neither add to the words of the Torah nor diminish from them, “and establish that matter in perpetuity *as from the Torah*”) (emphasis added). He explains: “[Cooking and eating] poultry with milk is permissible from the Torah If [a court] were to forbid the meat of fowl by maintaining that . . . it is forbidden from the Torah, that would be adding. But if [the court] said: ‘The meat of the fowl is permissible from the Torah, but we forbid it . . . in order that the matter not bear negative results [fear of a slippery slope] . . . this is not adding, but putting up a fence around the Torah.’ *Id.*; *see also* Part II below.

Similarly, according to some commentators who accept the position that courts are able to adjudicate criminal cases and punish defendants not in accordance with the laws of the Torah (*see* Part II below), the manner of punishments so imposed ought to differ from that which is prescribed by the Torah so as to ensure that the extraordinary nature of the punishment is clear. *See, e.g.*, KIRSCHENBAUM, *supra* note 65, at 286–87.

115. TWERSKY, *supra* note 107, at 35 (1972); *see also* ROTH, *supra* note 77, at 157–68 (analyzing the debate between Maimonides and Rabbi Solomon ben Abraham Aderet (Rashba) regarding the scope of the twin prohibitions of *bal tosif* and *bal tigra*. In short, whereas Maimonides focuses on the manner of a rabbinic addition to, or subtraction from the dictates of the Torah, Rashba focuses on the intent behind the sages’ actions suggesting that the prohibitions do not apply when the sages act “for some cause,” i.e., for a reason.).

contradiction between *d'oraita* and *d'rabanan* that cannot be squared away, the former would prevail.¹¹⁶ Secondary (human) legislation cannot modify, contradict, suspend or overturn primary (divine) legislation. To the extent that it purports to do so, it would be “unconstitutional.”

II. AMENDMENT . . . AND VIOLATION

A. *Temporary*

In the aftermath of the 9/11 terrorist attacks debates about presidential powers have rekindled interest in the institution of the Roman dictatorship. An emergency institution built into the constitutional framework of the Roman republic, the Roman dictatorship has served as the prototype for all modern forms of what I called elsewhere “models of accommodation” of emergency powers.¹¹⁷ Scholars studying emergency powers have considered the experience of the “celebrated Roman dictatorship”¹¹⁸ to be the quintessential starting point in devising modern models of emergency powers. The salient features of that ancient emergency institution—its temporary character, appointment according to specific constitutional forms, nomination for a particular goal and the ultimate goal of upholding the constitutional order rather than changing or replacing it—have been adopted as the basic guidelines for modern-day constitutional dictatorships.¹¹⁹ However, the Roman mechanism of constitutional dictatorship is not the only example of emergency regimes to be found in ancient legal systems. Much

116. See, e.g., Shabbat in BAVLI, *supra* note 3, at 128b.

117. Oren Gross, *Chaos and Rules: Should Responses to Violent Crisis Always Be Constitutional?*, 112 YALE L.J. 1011, 1058–69 (2003); GROSS AND NÍ AOLÁIN, *supra* note 35, at 17–85.

118. CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP 15 (1948).

119. In his argument for a strong and vigorous executive, Alexander Hamilton brought the Roman example: “

Every man the least conversant in Roman history knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of dictator, as well against the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes of the community whose conduct threatened the existence of all government, as against the invasions of external enemies who menaced the conquest and destruction of Rome.

THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton L. Rossiter ed., 1961); see also Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1798–1802, 1844 (2010) (discussing the Roman dictatorship in the broader context of the constitutional dictatorship model).

less noted and hardly ever thought of in the context of emergency regimes, Jewish legal authorities developed their own way to deal with exigencies.¹²⁰ This unique alternative model is particularly startling when considered in the context of the Jewish legal tradition as it recognizes the possibility of openly deviating from God's express will and commandments. Despite the divine source of the law, it was recognized early on that halakhic authorities could act in extraordinary circumstances when application of the ordinary law would produce unacceptable results. Exercising extraordinary capacity, halakhic authorities could, and did, set aside parts of the God-given Torah law and at other times suspended laws, promulgated emergency measures, and resorted to sanctions that had not been authorized under the Torah.¹²¹ However, as discussed in Section A(5) below, in putting in place such emergency measures the sages have not purported, at least not formally, to change the basic constitutional law. At most, constitutional dictates have been suspended, either expressly or implicitly, but not abrogated.

1. "If you establish everything on the laws [of] the Torah . . . the world would be destroyed"

Jewish law mandates explicitly that individuals violate the law, including the law of the Torah, in cases of extreme necessity or *pikuach nefesh* (preservation or saving of life).¹²² Martyrdom—giving one's life rather than

120. AARON M. SCHREIBER, *JEWISH LAW AND DECISION-MAKING: A STUDY THROUGH TIME* 375–424 (1979); Hanina Ben-Menahem, *Exigency Authority*, in 1 *WINDOWS ONTO JEWISH LEGAL CULTURE* 85, 85–130 (Hanina Ben-Menahem, Arye Edrei & Neil S. Hecht eds., 2011); Oren Gross, *Violating Divine Law: Emergency Measures in Jewish Law*, in *EXTRA-LEGAL POWER AND LEGITIMACY: PERSPECTIVES ON PREROGATIVE* 52, 57–74 (Benjamin A. Kleinerman & Clement Fatovic eds., 2013); Neil S. Hecht & Emanuel B. Quint, *Exigency Jurisdiction Under Jewish Law*, 9 *DINE ISRAEL* 27 (1978-80).

121. *See infra* Section A.

122. Three exceptions exist in which one must sacrifice his or her life rather than transgress the law (*ye'hareg ve'al ya'avur* meaning "be killed and not transgress"): idolatry, sexual immorality (e.g., incest) and bloodshed (i.e., murder). The three are often referred to as the three cardinal sins. BAVLI: SANHEDRIN 74a; BAVLI: PSAHIM 25a and b; *see also* KALMAN J. KAPLAN & MATTHEW B. SCHWARTZ, *JEWISH APPROACHES TO SUICIDE, MARTYRDOM, AND EUTHANASIA* (1998). It should also be noted that circumstances of religious oppression may also give rise to martyrdom. Thus, if a (non-Jewish) government passes legislation that is intended to force Jews to violate their religion in public, or if Judaism is generally being targeted by the government, Jews are commanded to sacrifice their lives rather than violate the law, even if the violation involves a non-cardinal rule. As intent to humiliate is generally required on the part of the government, it is a matter of debate whether laws that are facially neutral but whose application is clearly intended to target Jews must be disregarded even at the pain of death. Similarly, there is some debate as to whether a requirement to violate religious customs can ever require martyrdom or whether martyrdom is limited to violations of religious laws. *See* MARK R. COHEN, *UNDER CRESCENT AND CROSS* 174–75 (1994); ROTH, *supra* note 77, at 181–85; Robert M. Cover,

violating the law—is not required.¹²³ In fact, it is prohibited.¹²⁴ Since the central building block of Jewish existence to which Jewish identity, rights, duties, and responsibilities are inexorably linked is the Jewish community (the *kehila*),¹²⁵ it is not surprising to find similar notions that pertain to actions by public authorities in contravention of Torah laws when such actions are deemed necessary to safeguard the life of the community and the concomitant continued observance of the law.

During the thirteenth and fourteenth centuries, many Jewish communities throughout Europe found themselves in circumstances when strict observance of existing rules and norms of criminal procedure would put the safety and security, indeed the very existence, of the community at risk. *Malshinim* (informers) and *mosrim* (“handing over”) were members of the Jewish community who divulged information (often false) to the non-Jewish, gentile, authorities that would then use that information against the Jewish community as a whole or against individuals (often the community’s leaders).¹²⁶ The informers posed grave physical danger to many and

Violence and the Word, 95 YALE L.J. 1601, 1604–05 (1986) (“Martyrdom . . . is a proper starting place for understanding the nature of legal interpretation. . . . Martyrs insist in the face of overwhelming force that if there is to be continuing life, it will not be on the terms of the tyrant’s law. . . . Martyrs require that any future they possess will be on the terms of the law to which they are committed (God’s law). And the miracle of the suffering of the martyrs is their insistence on the law to which they are committed, even in the face of world-destroying pain. Their triumph—which may well be partly imaginary—is the imagined triumph of the normative universe—of Torah, Nomos—over the material world of death and pain. Martyrdom is an extreme form of resistance to domination. . . . The torture of the martyr . . . reminds us that the interpretive commitments of officials are realized, indeed, in the flesh. As long as that is so, the interpretive commitments of a community which resists official law must also be realized in the flesh, even if it be the flesh of its own adherents.”); Kazhdan, *supra* note 47, at 1087–91.

123. *Leviticus* 18:5 states: “you shall keep My laws and My rules, *by them* man shall *live*.” (emphasis added). This has been taken to mean that one ought not to give up her life so as to keep the divine commandments. One is also commanded to do all that she can, including, where needed, violate the law, in order to save another person’s life. See *Leviticus* 19:16 (“Thou shalt not . . . stand [idly by on] the blood of thy neighbor.”).

124. SHABBETAI KATZ, SIFTEI COHEN, YOREH DE’AH 157:1; MAIMONIDES, *Mishne Torah*, *Hilkhot Yesodei ha’Torah* 5:1; cf. TOSAFOT AVODAH ZARAH 27b, s.v. *yakhol*.

125. See, e.g., ELLIOT N. DORFF, *THE UNFOLDING TRADITION: JEWISH LAW AFTER SINAI* 16 (2005); KIRSCHENBAUM, *supra* note 65, at 295–302; 1 *THE JEWISH POLITICAL TRADITION: AUTHORITY*, *supra* note 59, at xiii; see also AVI SAGI & ZVI ZOHAR, *CONVERSION TO JUDAISM AND THE MEANING OF JEWISH IDENTITY* 213–26 (1994) (arguing that conversion to Judaism means, first and foremost, joining the collective, the Jewish people, and undertaking part in the people’s collective covenant with God, rather than entering a personal covenant between the convert and God).

126. 9 *ENCYCLOPAEDIA JUDAICA* 780–86 (Michael Berenbaum & Fred Skolnik eds., 2d ed. 2007).

constituted an imminent threat to the integrity of Jewish communal life.¹²⁷ Yet, they could not have been dealt with in accordance with the strict rules of criminal law and procedure and the law of evidence. Torah law specifies the judicial proceedings and the rules of evidence that ought to be followed when the court hears a criminal charge against a person.¹²⁸ Rules regarding the competence of the court, rules of evidence and rules concerning the range of possible judicial remedies are explicitly set forth with great detail and precision.¹²⁹ For example, the Torah has been interpreted to require that an individual ought to be warned in advance against violating the law by specific act and be told of the penalty that may be imposed on her should she commit the transgression.¹³⁰ As the *malshinim* operated under a cloak of secrecy, such forewarning would have been practically impossible (not to mention useless even if possible). Furthermore, while Torah law requires that testimonial evidence be given in the presence of the defendant,¹³¹ many *malshinim* who were closely connected to the non-Jewish authorities used their contacts to ensure that they would not be forced to appear before Jewish courts.¹³² Thus, insistence on strict adherence to the law could have undermined the effectiveness of the criminal process and put the whole community in danger.¹³³ Rabbi Asher ben Yechiel (known as the Rosh), who operated in Germany and Spain at the end of the 13th century and the early fourteenth century, explained the problem clearly:

127. KIRSCHENBAUM, *supra* note 65, at 329–40; 1 ABRAHAM A. NEUMAN, *THE JEWS IN SPAIN: THEIR SOCIAL, POLITICAL AND CULTURAL LIFE DURING THE MIDDLE AGES 130–32* (1980); JAVIER ROIZ, *A VIGILANT SOCIETY: JEWISH THOUGHT AND THE STATE IN MEDIEVAL SPAIN 224–27* (Selma L. Margareten trans., 2013).

128. See, e.g., *Deuteronomy* 17:6, 19:15–19; see also Arnold N. Enker, *Aspects of Interaction Between The Torah Law, The King's Law, and the Noahide Law in Jewish Criminal Law*, 12 CARDOZO L. REV. 1137 (1991).

129. Asher Maoz, *State and Religion in Israel*, in *INTERNATIONAL PERSPECTIVES ON CHURCH AND STATE* 239, 242–43 (Menachem Mor ed., 1993).

130. Such advance warning is only necessary in cases of capital offenses or those for which the penalty is flogging. MAIMONIDES, *Mishne Torah, Isurei Bi'ah*: 1:3. Maimonides compiled his great code of Jewish law in the late 12th century. For an English translation, see ISADORE TWERSKY, *A MAIMONIDES READER* 35–227 (1972).

131. MAIMONIDES, *Mishne Torah, Shoftim*, 3:11; see also SHALOM ALBECK, *EVIDENCE IN TALMUDIC LAW* 44 (1987).

132. Jane S. Gerber, *Turning Point: The Spanish Expulsion*, in *THE WILEY-BLACKWELL HISTORY OF JEWS AND JUDAISM* 224, 225 (Alan T. Levenson ed., 2012).

133. See Nomi Maya Stolzenberg, *Divine Accommodation, Dirty Hands, and Freedom of the Church: A Different Political Theology* (Sept. 2012) (unpublished paper) (on file with author). Stolzenberg argues that biblical law prescribed such strict procedural safeguards, which were “virtually impossible to meet” and thus “rendered [divine law] practically unenforceable,” due to the “inherent deficiencies of human judgment and the consequent risk of erroneous judgments and erroneous convictions attending to any human implementation of law.” *Id.* at 41.

[I]t is well known that he who is known to be a *malshin*, the heathens [-the secular authorities] befriend him for their own benefit, and if it were necessary to hear the testimony in his presence . . . justice would never be made, as he would be saved by the heathens, for when he is not in danger he hands over [to the authorities] individuals and groups, let alone when he perceives himself to be in danger he would hand over by [using] false pretense and endanger the whole of Israel.¹³⁴

The Torah contains certain exceptions to the regular rules of criminal procedure and law in circumstances that endanger the existence of the community. Discussing the case of an apostate who incites a family member or a close friend to commit idolatry, *Deuteronomy* provides: “thou [the person who was the target of incitement] shalt surely kill him; thy hand shall be first upon him to put him to death, and afterwards the hand of all the people.”¹³⁵ While various halakhic commentators have sought to ameliorate the harshness of such “ritualized atrocity”¹³⁶ by re-introducing due process in this case by way of exegesis, neither trial nor other semblances of due process such as the testimony of two witnesses as a precondition for conviction in a capital case,¹³⁷ are required according to the biblical text.¹³⁸ Yet, even exceptions such as *Deuteronomy* 13:10 could not assist the Jewish

134. NAHUM RAKOVER, *THE RULE OF LAW IN ISRAEL* 131 (1989); ASHER BEN YEHIEL, *RESPONSA OF THE ROSH*, 17(a).

135. *Deuteronomy* 13:10; see also CARYN A. REEDER, *THE ENEMY IN THE HOUSEHOLD: FAMILY VIOLENCE IN DEUTERONOMY AND BEYOND* 27–32 (2012).

136. John W. Wright, *A Tale of Three Cities: Urban Gates, Squares and Power in Iron Age II, Neo-Babylonian and Achaemenid Judah*, in *SECOND TEMPLE STUDIES III: STUDIES IN POLITICS, CLASS AND MATERIAL CULTURE* 19, 28 (Philip R. Davies & John M. Halligan eds., 2002) (referring to stoning at the gate of a city as a “ritualized atrocity” that is meant to re-establish and reinforce the city’s sovereignty).

137. Compare *Deuteronomy* 13:7–12, with *Deuteronomy* 17:2–7 (establishing the requirements of the testimony of two (or three) witnesses and of a diligent inquiry and investigation before an idol worshipper may be put to death). According to Levinson, the function of *Deuteronomy* 17:2–7 is to “demarcate the domain of local justice.” BERNARD M. LEVINSON, *DEUTERONOMY AND THE HERMENEUTICS OF LEGAL INNOVATION* 118 (1997). Thus, the requirement of two witnesses establishes the priority of witness law over summary execution and emphasizes the secularization of judicial procedure in the local sphere. *Id.* *Deuteronomy* 17:2–7 is part of a broader theme of centralization that applied both to cultic matters (such as sacrifices) and to judicial process. *Id.* at 117–18.

138. It is interesting to note that at least according to one scholar, *Deuteronomy* 13:10 reflects Neo-Assyrian practice for dealing with threats to the sovereign and the notion that summary execution of apostates is the proper response to a religious emergency in circumstances that raise challenges to the duty of absolute loyalty to the Lord, who is Israel’s sovereign, and to His laws. BERNARD M. LEVINSON, “THE RIGHT CHORALE”: *STUDIES IN BIBLICAL LAW AND INTERPRETATION* 166–93 (2008).

communities that had to contend with *malshinim*.¹³⁹ For one thing, the text is limited to apostates.¹⁴⁰ Furthermore, practically all halakhic commentators, including the leading Middle Ages authorities, interpreted the biblical text as not doing away with the general requirements of due process.¹⁴¹ Accepting testimonial evidence given outside the presence of the alleged *malshin* would mean acting contrary to the dictates of the Torah and the basic tenets of Jewish law leading the court itself to violate the very law that it was so anxious to uphold.

The need to preserve the law and to sustain a level of morality among the members of the community in line with the ethical requirements of that law, on the one hand, and the practical difficulties arising from adherence to the strict criminal judicial proceedings promulgated by the Torah and the Torah's idealized form of justice,¹⁴² on the other hand, could have been resolved in several ways. One was to follow strictly what Kirschenbaum calls the "classical hermeneutical system of law," i.e., the substantive and procedural dictates of the Torah,¹⁴³ resulting in "lawbreaking going unpunished and law unenforced in the sublunar world."¹⁴⁴ Instead, halakhic authorities turned to two separate tools in order to ensure effective law enforcement. Some halakhic authorities asserted that the principle of *dina de'malkhuta dina* ("the law of the state is the law") ought to be extended to criminal law matters and to criminal law enforcement by the non-Jewish government.¹⁴⁵ Yet others have relied on exigency jurisdiction and the pragmatic, applied system of Jewish law¹⁴⁶ in order to deviate from the strict legal rules prescribed by the

139. *But see* KIRSCHENBAUM, *supra* note 65, at 329–30, 333 (suggesting that dealing with the *malshin* is not a matter of punishment for past actions but rather of prevention of future harmful conduct which, as such, is not constrained by the strict rules of criminal law and procedure).

140. Such legislation of family violence, REEDER, *supra* note 135, at 7, may be seen against the context of reinforcing the identity of the Israelites as they are about to cross the river Jordan, enter the Promised Land, and come into contact with the local nations of the land, with the attendant "fear of their failure in the face of temptation." *Id.* at 23. As Reeder notes, the relationship highlighted in this context are "the most intimate relationships a man would have." *Id.* at 28. Yet, "[w]hen any one of [the Lord's] people turns aside to follow other gods, that Israelite becomes like the other nations," extinguishing that special familial relationship. *Id.* at 28; *see also Deuteronomy* 27, 28 (detailing the blessings and the curses that would be pronounced on the Mountains of Gerizim and Ebal as the people of Israel enter the Holy Land).

141. LEVINSON, *supra* note 138, at 180.

142. Suzanne Last Stone, *Sinaitic and Noahide Law: Legal Pluralism in Jewish Law*, 12 CARDOZO L. REV. 1157, 1198 (1991).

143. KIRSCHENBAUM, *supra* note 65, at 9.

144. Stolzenberg, *supra* note 133, at 42.

145. *See, e.g.,* Aaron Kirschenbaum & Jon Trafimow, *The Sovereign Power of the State: A Proposed Theory of Accommodation in Jewish Law*, 12 CARDOZO L. REV. 925, 932–40 (1991); Chaim Povarsky, *Jewish Law v. The Law of the State: Theories of Accommodation*, 12 CARDOZO L. REV. 941, 943–50 (1991).

146. KIRSCHENBAUM, *supra* note 65, at 9.

Torah.¹⁴⁷ As Rabbi Shlomo ben Aderet (Rashba), the leading Jewish sage in thirteenth-century Spain, argued famously: “if you establish everything on the laws prescribed in the Torah . . . the world would be destroyed.”¹⁴⁸ Rashba reasoned that following the strict letter of the law in such matters would undermine deterrence and would result in much violation of the law.¹⁴⁹

In adopting this position Rashba followed a well-trodden path in Jewish tradition of decisions dealing with exigent circumstances.¹⁵⁰ The rabbis’ ability to deviate from Torah law in exigencies has been recognized to apply in two categories of cases:¹⁵¹ First, *shev ve’al ta’aseh* (“sit and do not perform

147. RAKOVER, *supra* note 134, at 148–50; Hecht & Quint, *supra* note 120; Aaron M. Schreiber, *The Jurisprudence of Dealing with Unsatisfactory Fundamental Law: A Comparative Glance at the Different Approaches in Medieval Criminal Law, Jewish Law and the United States Supreme Court*, 11 PACE L. REV. 535, 545–51 (1991).

148. SHLOMO BEN AVRAHAM BEN ADERET, SHE’ELOT U-TESHUVOT HA-RASHBA (RESPONSA) NO. 393 (2000). See ROIZ, *supra* note 127, at 225–27 (discussing an example of Rashba’s role in dealing with *malshinim*).

149. Similarly, in *Right and Wrong*, Charles Fried acknowledges that his general argument that rights may be absolute within their scope of application runs into difficulties when applied to a case “where killing an innocent person may save a whole nation.” CHARLES FRIED, *RIGHT AND WRONG* 10 (1978). Much like Rashba, Fried concedes that, “[i]n such cases it seems fanatical to maintain the absoluteness of the judgment, to do right even if the heavens will in fact fall.” *Id.* The regular norms that ought to apply in ordinary times lead to a “fanatical” result when an attempt is made to apply them in such extreme circumstances. *Id.* Fried resolves the tension between the general absolutist view of rights and the relativist approach taken in such “extreme cases” by appealing to the notion of the “catastrophic” case, regarding it as “a distinct concept just because it identifies the extreme situations in which the usual categories of judgment (including the category of right and wrong) no longer apply.” *Id.* It is precisely for this reason that Fried speaks of categorical norms of right and wrong, rather than of absolute norms. This type of argument enables Fried to claim that although extreme cases may invoke conduct that does not comport with the relevant categorical right, that fact, in and of itself, does not prove the absence of an absolute, central core of that right. *Id.* at 10, 31; see also ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 30 (1974) (“The question of whether . . . side constraints are absolute, or whether they may be violated in order to avoid catastrophic moral horror, and if the latter, what the resulting structure might look like, is one I hope largely to avoid.”); Ronald Dworkin, *The Rights of Myron Farber*, N.Y. REV. BOOKS, Oct. 26, 1978, at 34. *But see* Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 423–25 (1993). If for scholars like Fried the exceptional case presents a critical dilemma, it all the more does so for halakhic scholars and authorities who accept the divine authority of the Torah. For them, violating Torah law even under extreme circumstances (let alone in cases that are serious but less-than-extreme) is a bold move to make religiously, intellectually, legally, and psychologically.

150. For another example of violation of criminal legal procedure and due process, see, e.g., *Joshua* 7:19–25 (the execution of Achan). Achan was executed by stoning despite the fact that the basis for finding him guilty was his own confession. *Id.*; BAVLI: SANHEDRIN 25a. Deviations from Torah law by courts imposing stricter punishments than set out in the Torah or by executing individuals who committed non-capital offenses are discussed in note 186 and the accompanying text.

151. See, e.g., YITZHAK D. GILAT, *STUDIES IN THE DEVELOPMENT OF THE HALAKHAH* 191–92 (1992).

[an act commanded by the Biblical law]”). In these cases of passive modification,¹⁵² the rabbis prohibit that which according to the Torah is permissible.¹⁵³ The *raison d’être* of such rabbinic legislation is ensuring and fostering observance of the laws of the Torah by adding safeguards to existing biblical prohibitions or prohibiting the commission of certain acts that are not prohibited by the Torah where such additional prohibition is deemed necessary to “build a fence around the Torah.”¹⁵⁴ Traditional view has it that despite its practical effects such rabbinic legislation is not deemed as overruling the Torah and presents, therefore, less conceptual difficulties to the halakhic authorities than the following case.¹⁵⁵ The second case, much less frequent and significantly more problematic, is one involving *qum aseh* (“rise and perform”), where the rabbis command the performance of actions that are proscribed by the Torah.¹⁵⁶ Unlike the case of *shev ve’al ta’aseh*,¹⁵⁷ rabbinic legislation of *qum aseh* is seen for what it is, i.e., overruling the Torah and as such is significantly more challenging and contested.¹⁵⁸ Thus, for example, whereas a legislation of *shev ve’al ta’seh* could be *le’dorot* (“for generations,” i.e., permanent), a rabbinic legislation of *qum aseh* has traditionally been limited to temporary measures due to particular exigencies.¹⁵⁹

The remainder of this Part analyzes some of the explanations and justifications given to rabbinic exigency legislation that deviates from the laws of the Torah and the safeguards that have been imposed on the exercise of such authority or power.

152. ROTH, *supra* note 77, at 185 (referring to “passive abrogation”).

153. One example is the prohibition on marriage by sexual intercourse, although it is permitted under the Torah. While a marriage so effected would still be valid, the man would be subject to punishment by flogging. MAIMONIDES, *Mishne Torah*, *Ishut* 3:21; BAVLI: YEVAMOT 52a; BAVLI: KIDDUSHIN 12b. Another example concerns the rabbis’ prohibition on blowing the shofar when Rosh Hashanah falls on the Sabbath albeit blowing the shofar is permissible according to the Torah. BAVLI: ROSH HASHANAH 29b.

154. MAIMONIDES, *Mishne Torah*, *Hilkhot Mamrim* 2:4 and 2:9. See also Section II(A)(2) below.

155. BAVLI: YEVAMOT 90b; *see also* ROTH, *supra* note 77, at 185–90.

156. ROTH, *supra* note 77, at 190–99.

157. Rashi—the eleventh-century commentator on the Bible and Talmud—argues that when the sages decree *shev ve’al ta’aseh* on an act permitted in, or even required by, the Torah, “this is not an actual uprooting,” since the act that is biblically required or permitted “is uprooted by itself.” RASHI, YEVAMOT 90a, s.v. *shev ve-al ta’aseh*.

158. ROTH, *supra* note 77, at 190–99.

159. *See id.* at 195 (“[I]t is difficult to conceive of a set of circumstances in which the permanent mandating of an action forbidden by the *grundnorm* can be required in order to protect it . . . active abrogations can only be temporary When the reason which gave rise to the need ceases to obtain, the mandated behavior reverts to its forbidden status.”).

2. Building a Fence Around the Torah

The Book of Kings includes a famous instance of *qum aseh*, recounting the story of the prophet Elijah challenging King Ahab and the 850 prophets for the false gods Baal and Ashera to a duel on Mt. Carmel: “Then Elijah said to them, ‘I am the only one of the Lord’s prophets left, but Baal has four hundred and fifty prophets. Get two bulls for us. Let them choose one for themselves, and let them cut it into pieces and put it on the wood but not set fire to it. I will prepare the other bull and put it on the wood but not set fire to it. Then you call on the name of your god, and I will call on the name of the Lord. The god who answers by fire—he is God.’”¹⁶⁰ After hours in which the calls of prophets of the Baal to their god remain unanswered, Elijah called upon the Lord. “Then the fire of the Lord fell and burned up the sacrifice, the wood, the stones and the soil, and also licked up the water in the trench. When all the people saw this, they fell prostrate and cried, ‘The Lord—he is God! The Lord—he is God!’.”¹⁶¹ This anecdote (which contains what may be the sole example of humor in the Bible),¹⁶² is legally problematic. According to the Torah, one is prohibited from making any sacrificial offerings to the Lord outside the Temple (ensuring the political and religious centrality of Jerusalem).¹⁶³ Moreover, *Deuteronomy* contains an explicit prohibition on obeying any prophet who orders the people to violate Torah law.¹⁶⁴ How, then, can we explain Elijah’s actions and, moreover, God’s manifest approval of them?¹⁶⁵ Rav Hisda—a leading third century sage living in Babylon—uses this example to argue that the sages have authority to overrule *permanently*—to “uproot”—parts of the law of the Torah, including by way of *qum aseh*, i.e., by commanding the performance of an action that is prohibited under the Torah law.¹⁶⁶ Nor is this authority confined to prophets such as Elijah,¹⁶⁷

160. 1 *Kings* 18:22–24. The cult of worshipping Baal originated in Phoenicia and was brought to the Kingdom of Israel through the influence of Jezebel, wife of king Ahab. MARK S. SMITH, *THE EARLY HISTORY OF GOD: YAHWEH AND OTHER DEITIES IN ANCIENT ISRAEL* 43–47 (2d ed. 2002).

161. 1 *Kings* 18:38–39.

162. After the prophets of the Baal call upon their god “from morning till noon,” Elijah chastises them saying: “‘Shout louder!’ he said. ‘Surely he is a god! Perhaps he is deep in thought, or busy, or traveling. Maybe he is sleeping and must be awakened.’” 1 *Kings* 18:27.

163. *Deuteronomy* 12:13–14; *Leviticus* 17:3–4; see also MAIMONIDES, *Mishne Torah*, *Hilkhot Bet Habehira* 1:3.

164. *Deuteronomy* 13:16.

165. For examples of similar violations of the biblical interdiction on sacrifices outside the Temple, see *Judges* 6:25–27; *Judges* 13:19; *Joshua* 8:30–31. Some sources attempt to resolve the conundrum by suggesting that Elijah acted under a prior divine directive. See, e.g., YERUSHALMI: TA’ANIT 11a; MIDRASH BAMIDBAR TANHUMA, NASO 28.

166. BAVLI: TRACTATE YEVAMOT 90a and b.

167. See KAPLAN, *supra* note 42, at 165–66.

because according to the Torah itself, prophets may not introduce innovations to the law once the Torah was given.¹⁶⁸ However, other Talmudic sages reject Rav Hisda's position, highlighting the exceptional circumstances in which Elijah had acted. Rather than reading the story as revealing a broad authority to abrogate the Torah's prohibitory commandments (i.e., permitting that which by the Torah is proscribed), it is interpreted as demonstrating that violations of Torah law may be permissible only in moments of great crises and consternation when such violations are necessary to prevent greater harms to the community. Elijah's actions, violating the laws of the Torah, were necessary in order to prevent the people from the even greater sin of idol-worshipping and to convince them to return to God.¹⁶⁹ They were undertaken by Elijah in order to establish a hedge or a fence around the Torah (*migdar milta*).¹⁷⁰ As such, Elijah's "teleological suspension of the halakhic,"¹⁷¹ was an ad hoc, temporary means to respond to a particular crisis.¹⁷² It did not signal the abrogation or abolition of the divinely ordained prohibitory Torah law, but rather its temporal suspension.¹⁷³ Elijah did a little wrong to do a great right.¹⁷⁴ In order to ensure the people's obedience to the laws of the Torah, he chose to violate one of those very laws.

168. Gross, *supra* note 120, at 60.

169. BAVLI: YEBAMOT 90b. Idolatry is one of three offenses that would justify martyrdom under Jewish law. BAVLI: SANHEDRIN 74a.

170. See, e.g., ADERET, *supra* note 148, at pt. 1, no. 127 ("[T]he court may never stipulate the uprooting of a matter from the Torah except under extraordinary circumstances (*le'migdar milta*), as Elijah on Mount Carmel and similar situations, but generally not.>").

171. Wallace Greene, *Extra-Legal Juridical Prerogatives*, 7 J. STUDY JUDAISM 152, 169 (1976).

172. Cf. Tosafot Nazir 43b, s.v. *ve'hai* (suggesting that rabbinic deviation from the Torah by way of *qum aseh* is not limited to extraordinary crisis situations but may be invoked when there is "sufficient cause and reason" for such action (*panim ve'ta'am ba'davar*)). The Tosafot do not elaborate on what circumstances may be sufficient in this context. See also Joseph Caro, *Kesef Mishne, Hilkhot Nedarim 3:9*, s.v. *u'mah she'katav rabbenu* ("[The strengthening of the words of the sages . . . even though not literally *migdar milta*, results in the observance of their words through *migdar milta*. For if people would treat one of their dictates lightly, they might do so with all of them. Therefore, anything that strengthens their words is like *migdar milta*."); ROTH, *supra* note 77, at 198–99.

173. Rabbi Jack Abramowitz, 439. *What About Elijah?: The Prohibition Against Offering Sacrifices Outside the Temple*, ORTHODOX UNION,

<http://www.ou.org/torah/mitzvot/taryag/mitzvah439/> (last visited Dec. 20, 2014) ("[P]rophets were sometimes Divinely mandated to do things outside of normative behavior. While God might tell Eliyahu to build a bamah, Eliyahu could not tell the nation to do so") Some authorities regard even such an explanation to be problematic in as much as it acknowledges the possibility of deviating from the Torah. In an attempt to reconcile Elijah's actions with the biblical commandments and prohibitions, some sources argue that God Himself had directed Elijah to act as he did. See, e.g., Greene, *supra* note 171, at 168–169.

174. "To do a great right, do a little wrong" is the advice given by Bassanio to Portia. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1, l. 211 (Stephen Greenblatt ed.,

Similar cases can be found dealing with sacrifices done not in strict accordance with the law as well as with harsh punishments imposed on violators of the law.¹⁷⁵ Thus, for example, “once a man rode a horse on the Sabbath in the time of the Greeks, and he was brought to the court and stoned [to death], not because this was the legally prescribed punishment but *because the hour so required*. On another occasion, a man thrust his wife under a fig tree [i.e., in a public place] and he was brought to the court and flogged, not because this was the legally prescribed punishment but because *the exigencies of the time so required*.”¹⁷⁶ In these two cases, the court is imposing punishments not prescribed by the Torah. In the first case—in which the court imposes the death sentence for an offense that, according to the Torah, is not a capital offense—the court attempts to combat the danger of assimilation under Greek rule with its attendant threat to the very survival of the Jewish community.¹⁷⁷ In the second it struggles to maintain proper levels of morality among the people by particularly addressing moral transgressions that challenge the observance of God’s laws publicly as inimical to the survival of the community. In order to achieve these goals, which the court believes eventually will lead to more observance of the

1997); see also Ward Farnsworth, “To Do a Great Right, Do a Little Wrong”: A User’s Guide to Judicial Lawlessness, 86 MINN. L. REV. 227 (2001) (suggesting that the remedial decision in *Bush v. Gore* was an instance of pragmatism or perhaps even lawlessness by the Supreme Court).

175. See, e.g., *Joshua* 8:30–31; *Judges* 6:25–27; *Judges* 13:19.

176. BAVLI: SANHEDRIN 46a (emphasis added); cf. YERUSHALMI: HAGIGAH 9b (giving as a reason for the severe punishment the fact that the man “conducted himself *be’bizayon* [shamefully].”). Ben-Menahem notes that whereas in the Babylonian Talmud the reasoning refers to a social phenomenon and the need to safeguard society, according to the Jerusalem Talmud the reasoning for deviation from the law is particular to the specific case (rather than to the social circumstances at the time) and is based exclusively on the nature of the defendant’s conduct. See HANINA BEN-MENAHM, JUDICIAL DEVIATION IN TALMUDIC LAW 18 (1991). For more discussion on the differences between the two Talmudic compilations with respect to deviations from the law, see *infra* Part III.D.

177. As Eliezer Berkovits puts it: “It happened during a time when the Jewish people were locked in a deadly struggle with the pagan Hellenistic way of life, which was followed by many and was a threat to Jewish survival. The man riding a horse on that fateful Shabbat was not just riding a horse; he obviously was one of the Hellenists and was demonstratively flaunting his disregard for the sanctity of the Shabbat day.” BERKOVITS, *supra* note 101, at 65. See also KIRSCHENBAUM, *supra* note 65, at 276–77. On the complex relationship between Judaism and Hellenism, see, for example, JOHN J. COLLINS, BETWEEN ATHENS AND JERUSALEM: JEWISH IDENTITY IN THE HELLENISTIC DIASPORA (1999); MARTIN HENGEL, JUDAISM AND HELLENISM: STUDIES IN THEIR ENCOUNTER IN PALESTINE DURING THE EARLY HELLENISTIC PERIOD (2003); LEE L. LEVIN, JUDAISM AND HELLENISM IN ANTIQUITY: CONFLICT OR CONFLUENCE? (1998); Moshe Amit, *Worlds Which Did Not Meet*, in JEWS IN THE HELLENISTIC-ROMAN WORLD 251 (Aharon Oppenheimer et al. eds., 1996).

Torah, the court is ready to act in a manner not prescribed by divine law.¹⁷⁸ Rather than see these two cases as examples of broad rabbinic authority to issue *qum aseh* legislation (the court is ordering the performance of actions—specific punishments—that are not authorized by the Torah), the Talmud explains that in meting harsher punishments than those mandated by the Torah—violating the principle of *nulla poena sine lege*—the court acts “*migdar milta*,” in order to “build a fence for the Torah,” to ensure that further violations do not occur.¹⁷⁹

3. It is Time to Act for God

The Talmud is the written embodiment of thousands of years of rabbinic discussions, teachings, laws, opinions and debates. It reflects Judaism’s oral law that, according to tradition, has been passed from Moses down the generations.¹⁸⁰ Yet for all of its centrality to Jewish law a prohibition existed

178. See generally Jenna Weissman-Joselit, *In the Driver’s Seat: Rabbinic Authority in Postwar America*, in 2 JEWISH RELIGIOUS LEADERSHIP: IMAGE AND REALITY 659, 664 (Jack Wertheimer ed., 2004) (internal quotation marks omitted) (detailing the Conservative movement’s struggle to revitalize the observance of the Sabbath including by sanctioning driving to synagogue and conceding that “the positive values involved in the participation in the public worship on the Sabbath outweighs the negative values of refraining from riding in an automobile.”). This deviation from law and tradition was regarded as a “grudging concession to a difficult situation” recognizing that the alternative would be “a total neglect of Sabbath worship through inability to reach the synagogue.”

179. BAVLI: YEVIAMOT 90b. Similarly, Rabbi Simeon ben Shetah who hanged eighty women in one day without having conclusive testimony of their guilt and without complying with the requirements of interrogation and inquiry violated the law that no two capital cases may be tried on the same day. The defendants, charged with witchcraft, were not given the benefit of a full trial due to the perceived need to act rapidly to ensure that the people fully understood that undermining the belief in God would be severely punished. YERUSHALMI: HAGIGAH 2:2; BAVLI: SANHEDRIN 45b; Alter Hilvitz, *Yehudah ben Tavai and Shimon ben Shetah and Their Actions*, in 89 SINAI 266 (1980). It is also interesting to note that the manner in which the punishment was carried out—hanging—may, itself, be indicative of the extraordinary circumstances of the case since hanging was not recognized as one of the traditional manners for carrying out the death penalty (unlike stoning or burning). See KIRSHENBAUM, *supra* note 65, at 276–78.

180. TWERSKY, *supra* note 107, at Ch. 1, Mishna 1 (“Moses received Torah from Sinai, and passed it on to Joshua; and Joshua to the elders, and the elders to the prophets; and the prophets passed it on to the members of the Great Assembly.”). It is worth noting that the *Mishnah* here is both inclusive and exclusionary: it details the transmission of the oral Torah down the generations while also excluding from that transmission chain one notable group, i.e., the priests. See, e.g., MOSHE DAVID HERR, *Ha’retzef shebe’shalsholet mesirata shel ha’Torah*, in 44 ZION 44 (1979). This is but one, subtle and tacit, reflection of the struggle that existed over the leadership of the Jewish community in the Land of Israel between the sages and the hereditary priesthood. See, e.g., YESHA’YAHU GAFNI, *Shevet u’mehokek”: al defusey manhigut hadashim bi’tkufat ha’Talmud be’Eretz Israel ube’Bavel*, in PRIESTHOOD AND MONARCHY (Yesha’yahu Gafni & Gavri’el Motskin eds., 1987).

on reducing the oral tradition to a written form.¹⁸¹ Although some authorities equated those who would write down Oral law to those who burn the Torah itself,¹⁸² ca. 200 CE Rabbi Yehuda Ha’Nasi (also known simply as “Rabbi”), redacted Jewish traditions and legal opinions when he compiled the *Mishnah*.¹⁸³ Maimonides explains Rabbi’s decision thus: “he observed that the number of disciples was diminishing, fresh calamities were continually happening, the wicked government [Rome] was extending its domain and increasing in power, and Israelites were wandering and emigrating to distant countries. He therefore composed a work to serve as a handbook for all, the contents of which could be rapidly studied and not be forgotten.”¹⁸⁴

The justification for violating the prohibition on reducing to writing the Oral law was found in a verse from Psalms: “It is time to act for God, they have dissolved thy law,”¹⁸⁵ which has been interpreted inversely to mean: “They [the rabbis] have dissolved thy law, [because] it is time to act for God.”¹⁸⁶ Acting for God—even by way of violating the Torah commandments—is recognized as a means necessary to prevent dissolution of the law.¹⁸⁷ Fearing that the oral tradition may be lost it was deemed necessary to “uproot [a law of the] Torah, lest the Torah be forgotten.”¹⁸⁸ The halakhic “wisdom of the feasible” requires violating a law in order to preserve the Torah as a whole.¹⁸⁹ As Rashi explains, “there are times when we abrogate the words of the Torah in order to act for the Lord . . . It is permissible to violate the Torah and to do that which seems forbidden.”¹⁹⁰ Similarly, the Talmud explains a High Priest, Simeon the Righteous’s, decision to don his sacred robes—which, according to the law were not to be worn outside the Temple¹⁹¹—when he met with Alexander the Great, through the concept of

181. BAVLI: GITIN 60a; MOSES MAIMONIDES ET AL., GUIDE TO THE PERPLEXED, Part I, Ch. 71 (1974); see also ISHAI CHAI-ROSENBERG, *The Prohibition on Writing the Oral Law*, in 9 B’SDE HEMED (1996); Michael Vigoda, *Writing Down the Oral Torah: A Prohibition That Has Turned Into a Mitzva*, 244 DAAT (2006), available at www.daat.co.il/mishpat-ivri/skirot/244-2.htm. On the reasons that have been put forward to explain this counter-intuitive prohibition, see Michael Vigoda, “*You May Not Say in Writing Those Matters that Are Oral*”: *On the Transformations of a Forgotten Halakha*, 26 DIMUY (2006).

182. BAVLI: TEMURA 14a.

183. Three hundred years later, the Mishnah was supplemented by the Gemarah, which is comprised of rabbinical analysis of, and commentary on, the Mishnah.

184. TWERSKY, *supra* note 107, at 36.

185. *Psalms* 119:126.

186. BAVLI: BRAKHOT 54a and 63a. The verse itself may be interpreted in another way, i.e., as reading “It is time for God to act [because] they [sinners] have dissolved thy law.”

187. In this specific case, the deviation has been of a permanent rather than temporary nature.

188. BAVLI: TEMURA 14b.

189. BERKOVITS, *supra* note 101, at 67.

190. RASHI: BRAKHOT 54a, s.v. *ve’omer*.

191. YERUSHALMI: KILAYIM 39b.

“time to act for God.” This violation of the law was deemed necessary as calls had been made on Alexander to destroy the Temple in Jerusalem. The High Priest’s decision to act as he did was aimed at demonstrating the utmost respect to Alexander with the hope that he could be placated and the Temple saved.¹⁹²

4. Temporary Measures: Hora’at Sha’ah

Common threads going through the various reasons put forward for violations of Torah law by halakhic authorities, especially those pertaining to legislation ordering the performance of actions that are prohibited by the Torah, have been the temporal character of such violations and the exceptional nature of the circumstances that may justify resort to extraordinary measures.¹⁹³ Maimonides emphasizes the temporary character of the measures when he writes that:

[t]he court may impose flogging on one who is not liable [according to the Torah law] for lashes and execute one who is not liable for the death penalty, [and it may so act] not to transgress the law of the Torah but in order to make a fence around the Torah. When the court sees that the people are dissolute with respect to a certain matter, they [the judges] may safeguard and strengthen that matter as they deem proper, and all this *as a temporary measure, and not to establish a precedent for generations to come.*¹⁹⁴

Recognizing the danger that abuse or misuse of special measures might lead to a general disrespect for the law, it was similarly accepted that only extreme circumstances involving situations of wide-spread breakdown in observance of the law,¹⁹⁵ or fear that such wide-spread disobedience might follow unless exceptional measures were taken, or those involving habitual offenders, might justify the use of extraordinary measures in violation of the dictates of the Torah.¹⁹⁶ Rambam summarizes the matter as follows: “If [the court] should deem it necessary temporarily to set aside a positive commandment or to nullify a negative commandment in order to restore the people to the

192. BAVLI: YOMA 69a.

193. See generally 8 TALMUDIC ENCYCLOPEDIA 512–27 (1957). See also BEN-MENAHM, *supra* note 176, at 173–79.

194. MAIMONIDES, *supra* note 107, Sefer Shoftim, *Hilkhot Sanhedrin* 24:4–5 (emphasis added). See also BAVLI: SANHEDRIN 46a; BAVLI: YEVAMOT 90b; JOSEPH BEN EFRAIM KARO, SHULKHAN ARUKH, Khoshen Mishpat, Siman 2.

195. “It is better [that] one letter of the Torah should be uprooted so that the [entire] Torah will not be forgotten by Israel.” BAVLI: TMURAH 14b; BAVLI: YEVAMOT 79a.

196. Hecht & Quint, *supra* note 120, at 61–66.

faith or to save many Jews from becoming lax in other matters, they may act as *the needs of the time dictate*.”¹⁹⁷ He continues:

Just as a physician amputates a hand or foot to save a life, so a court in appropriate circumstances may decree a temporary violation of some of the commandments to preserve all of them, in line with the approach of the early Sages who said: “One should violate . . . one Sabbath in order to enable the observance of many Sabbaths.”¹⁹⁸

Some eight hundred years later, President Lincoln used Rambam’s simile almost verbatim. Surely it was unthinkable, argued Lincoln, “to lose the nation and yet preserve the Constitution,” for “[were] all the laws, *but one*, to go unexecuted, and the Government itself go to pieces, lest that one be violated?”¹⁹⁹ He answered these rhetorical questions by resorting to the analogy of a human being. While the natural inclination of every person is to protect both life and limb, “often a limb must be amputated to save a life; but a life is never wisely given to save a limb.”²⁰⁰

5. Safeguards

Cognizant of the pressures that extraordinary circumstances exert on decision-makers and the problematic nature of measures that might be taken in order to overcome a particular crisis but which violate the Torah, halakhic authorities imposed restrictions on the exercise of this power.²⁰¹ A court could impose a punishment that was not prescribed by the Torah or deviate from the evidentiary rules specified therein, only after it had been convinced that the necessities of the times required it.²⁰² In exercising its exceptional jurisdiction, the court had to be constantly mindful of the fact that it did so

197. MAIMONIDES, *Mishne Torah*, Sefer Shoftim, *Hilkhot Mamrim* 2:4.

198. *Id.* See also BAVLI: YOMA 85b; BAVLI: ERUVIN 32b; BAVLI: YEVAMOT 90b; YERUSHALMI: HAGIGA 2:2, 11b; 2 ELON, *supra* note 76, at 517.

199. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 429–30 (Roy Prentice Basler ed., 1955).

200. Quoted in ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 59–60 (1989).

201. MAIMONIDES, *Mishne Torah*, Sefer Shoftim, *Hilkhot Sanhedrin* 24:10; ADERET, *supra* note 143, at No. 238; 2 ELON, *supra* note 76, at 519.

202. The nature of the precise circumstances that could give rise to such jurisdiction was a matter of controversy. Some argued that exigency jurisdiction was warranted when the public behaved in a dissolute manner on certain matters, or when there was a danger that other members of the public might violate the law if an offender went unpunished (or, for that matter, had been subjected to a lenient punishment that might not have the requisite deterrent effect on the public). Others suggested that habitual offenders, or persons with regard to whom there was a fear that they might continue to break the law, could be punished with exceptional punishment even where no danger existed that other members of the community might follow their example and violate the law. See Hecht & Quint, *supra* note 120, at 62–66 (citations omitted).

for the sole purpose of fostering the observance of the law (and thus of the community that it formed) and the adherence to the Jewish faith in God. Meting an unusual punishment was neither to be done for any other purpose nor lightly.²⁰³ The court was also warned not to disregard human dignity.²⁰⁴ As Rambam holds: “All these matters apply to the extent that the judge deems appropriate and necessary for the needs of the time. In all matters, he shall act for the sake of Heaven and not regard human dignity lightly, for consideration for human dignity may warrant setting aside rabbinic injunctions . . . He must be careful not to destroy their dignity; rather he must act solely to increase the honor of God.”²⁰⁵

The jurisdiction of the court and its decision in a specific case are limited to the particular exigency that has given rise to such unique jurisdiction. They are not permanent, but rather are for that case and that day only.²⁰⁶ With the exigency over, the special jurisdiction of the court is terminated. Moreover, due to its special character, confined as it were to the particular facts of the

203. BAVLI: YEVAMOT 90b; BAVLI: SANHEDRIN 46a; KARO, *supra* note 194, at 2:1; MAIMONIDES, *Mishne Torah*, Sefer Shoftim, *Hilkhot Sanhedrin* 24:4 and *Hilkhot Mamrim* 2:4.

204. On the centrality of the concept of human dignity in Jewish law see, for example, NAHUM RAKOVER, HUMAN DIGNITY IN JEWISH LAW (1998); Melissa Weintraub, *Kvod Ha-Briot: Human Dignity in Jewish Sources, Human Degradation in American Military Custody*, TRUAH.ORG (2005), available at http://www.truah.org/images/stories/pdf_torture_resources/Human_Dignity_Weintraub_0.pdf (“Halakhic sources . . . concur that *kvod ha-briot* is one of the overarching values of Jewish tradition . . .”); MELISSA WEINTRAUB, *Does Torah Permit Torture? Defending Dignity, Life, and Sacred Personhood*, in JEWISH CHOICES, JEWISH VOICES: WAR AND NATIONAL SECURITY 116 (Elliott N. Dorff & Danya Ruttenberg eds., 2010).

205. MAIMONIDES, *Mishne Torah*, Sefer Shoftim, *Hilkhot Sanhedrin* 24:10. Note Rambam’s assertion that “consideration for human dignity may warrant setting aside rabbinic injunctions.” See also MAIMONIDES, *Mishne Torah*, *Hilkhot Kilayim* 10:29 (“A Rabbinic prohibition is always and everywhere superseded for the sake of human dignity. And even though we are explicitly enjoined in the Torah not to depart from the Sages’ teachings either to the right or to the left, this negative precept itself is set aside in the interests of human dignity.”); BAVLI: BERAKHOT 19b. Moreover, considerations of human dignity may even justify transgressions of certain biblical commandments, provided that such transgression involves abstention from acting rather than active violation of a commandment. See, e.g., BAVLI: MEGILLAH 3b; MENACHEM MEIRI, BEIT HABECHIRAH, Berakhot 19b; Weintraub., *supra* note 204, at 15 (“[T]he rabbis ruled that the positive obligation to honor other human beings, and the negative injunction to avoid humiliating or contemptuous behavior, takes precedence over all other rabbinic verdicts, and many Torah commandments as well. The rabbis elevate human dignity to such paramount, exceptional importance that they grant it priority over their own authority.”); RAKOVER, *supra* note 204, at 50–57, 93–108.

206. Note, however, that “for that case” and “that day” are not necessarily interchangeable. As Gilat correctly notes, the notion of “*left sha’ah*” (temporarily) seems to define the underlying purpose of the legislation rather than its temporal duration. In other words, it explains that the legislation comes as a response to exigent circumstances and thus can extend, temporally, as long as those circumstances exist (even if that means, in practice, quite a long period of time). GILAT, *supra* note 151, at 199.

case at hand, a decision by the court in any concrete case cannot serve as a precedent for future cases arising either in ordinary times or under future exigencies.²⁰⁷ The exceptional nature of those measures is clearly evidenced by the terminology used: *hora'at sha'ah* (“temporary measure”), *ha-sha'ah zerikhah le-khakh* (“the hour requires it”), and *lefi sha'ah* (“temporarily”).²⁰⁸ The full thrust of this is made clear in Rambam’s discussion of Elijah’s sacrifice on Mt. Carmel: “if all the prophets ordered the transgression [of the law] as a temporary measure it is a commandment to listen to them. But if they said that the [law to be violated] is forever uprooted [they] shall die by suffocation for the Torah says ‘[the law is] for us and for our sons forever.’”²⁰⁹ The violation of the law may only be permissible when it is regarded as a temporal suspension of, rather than as an attempt to modify (or, indeed, abrogate), the law.²¹⁰ Elijah’s sacrifice on Mt. Carmel—in violation of the prohibition of making sacrifices outside of Jerusalem—is accepted as an exceptional violation of the law that is made necessary in light of the extreme circumstances of the time. It does not abrogate or derogate from the continued application of the prohibition to other cases. The integrity of the legal system and of the divine law is, therefore, maintained.²¹¹

207. MAIMONIDES, *Mishne Torah*, Sefer Shoftim, *Hilkhot Sanhedrin* 24:4.

208. 2 ELON,, *supra* note 76, at 533–36. According to Elon, the enactment of a temporary measure does not preclude the possibility of such measure becoming permanent as a matter of practice. He argues that the “temporary” nature of the enactment is to be attached to the subordinate position of enactments by halakhic authorities in the hierarchy of legal norms within Jewish law. Thus, “[a]lthough, on the surface, these formulas appear to limit the time during which legislation may continue to be in force, it is apparent from an examination of the substance of the legislation of the halakhic authorities throughout all the areas of the law that in fact there is generally no such limitation.” *Id.* at 534. This explanation is problematic since all legislation promulgated by halakhic authorities, whether called “temporary” or not, is, by definition, subordinate to the laws of the Torah. A simpler explanation is the one proposed in the text, namely that the temporary emergency legislation was, indeed, meant to be just that, temporary and transitory, confined to the particular facts of a concrete case or situation. That is clearly the position assumed by Rambam. The fact that some such temporary legislation became an integral part of Jewish law marks a deviation from the original purpose for which that legislation had been promulgated.

209. MAIMONIDES, *Mishne Torah*, Yesodei Ha’Torah, Ch. 9, Rule 3.

210. ABRAHAM ISAAC KUK, MISHPAT KOHEN, *Hilkhot Melakhim*, resp. 143 (1966); *see also* GROSS & NÍ AOLÁIN, *supra* note 35, at 172–74, for discussion of the significance of temporal duration of emergency measures.

211. *See, e.g.*, DAVID WEISS HALIVNI, *Can a Religious Law Be Immoral?*, PERSPECTIVES ON JEWS AND JUDAISM: ESSAYS IN HONOR OF WOLFE KELMAN 166–67 (Arthur Chiel ed., 1978); Lichtenstein, *supra* note 67, at 67 (“There are of course situations in which ethical factors—the preservation of life, the enhancement of human dignity, the quest for communal or domestic peace, or the mitigation of either anxiety or pain—sanction the breach, by preemptive priority or outright violation, of specific norms. However, these factors are themselves halakhic considerations, in the most technical sense of the term, and their deployment entails no rejection of the system whatsoever.”); Greene, *supra* note 171, at 168.

Restrictions are also imposed on the identity of those who may exercise extraordinary jurisdiction. Thus, for example, whether such jurisdiction applied to courts other than the Sanhedrin was a matter of much debate.²¹² Moreover, wishing to impose additional limitations on the exercise of extraordinary jurisdiction by such courts, some have suggested that courts could exercise this jurisdiction only with the consent of a *gadol*, i.e., “the greatest of his generation”—a person who is known to have attained a unique mastery of the *halakhah*—or “seven good people of the city,” i.e., the political leaders of the community.²¹³

Finally, in an attempt to prevent what may be regarded as the intoxicating effect of emergency authority and the risk of their abuse or misuse,²¹⁴ Rambam proclaims that a court that invokes the emergency measure of *hora’at sha’ah* twice must be especially careful before doing so again. As Yuter suggests, “frequent appeals to *hora’at sha’ah* undermine the integrity of the legal order by introducing the slippery slope that slides into legal disintegration.”²¹⁵

212. The term Sanhedrin (also known as the Lesser Sanhedrin) refers to rabbinical courts comprised of twenty-three judges that were constituted in each of the cities in the Land of Israel. However, the term is more commonly used in reference to the Great Sanhedrin, comprised of seventy-one judges, which acted as the Supreme Court, taking appeals from cases decided by lesser courts. Cf. MARTIN GOODMAN, *ROME AND JERUSALEM: THE CLASH OF ANCIENT CIVILIZATIONS* 310–12 (2008) (arguing that the Great Sanhedrin played a judicial role in first-century Jerusalem, “but only as adjunct to the High Priest.”).

213. KARO, *Shulhan Arukh*, Hoshen Mishpat 2. The institution of “*shiv’a tovei ha-ir*” (seven good people of the city) is mentioned in the Talmud as a body that is entrusted to act on behalf of the community. See BAVLI: MEGILLAH 26a; see also GEDALIAH ALON, *THE JEWS IN THEIR LAND IN THE TALMUDIC AGE* 145 (Gershon Levi trans., 1989); A. KARLIN, *Seven Good People of the City: Their Role and Legal Status*, in 1 *THE TORAH AND THE STATE* 52 (1949); *Seven Good People of the City*, *TALMUDIC ENCYCLOPEDIA*, (2000); WALZER, *supra* note 59, at 379–429. Debates can be found as to whether being considered among the greatest in the generation was sufficient or whether there existed an additional condition that such a person be appointed by the community, and vice versa—whether appointment as a judge, without being great in the Torah, would be sufficient. Hecht & Quint, *supra* note 120, at 71–92.

214. GROSS AND NÍ AOLÁIN, *supra* note 35, at 228–43 (discussing the normalization of “the exception,” in general, and the “getting used to it” phenomenon, in particular).

215. Alan J. Yuter, *Hora’at Sha’ah: The Emergency Principle in Jewish Law and a Contemporary Application*, *JEWISH POL. STUD. REV.*, Fall 2001, at 8; see also JOHN STUART MILL, *THREE ESSAYS: ON LIBERTY, REPRESENTATIVE GOVERNMENT, THE SUBJECTION OF WOMEN* 185 (1975) (1861) (“Evil for evil, a good despotism, in a country at all advanced in civilization, is more noxious than a bad one; for it is far more relaxing and enervating to the thoughts, feelings, and energies of the people. The despotism of Augustus prepared the Romans for Tiberius. If the whole tone of their character had not first been prostrated by nearly two generations of that mild slavery, they would probably have had spirit enough left to rebel against the more odious one.”).

B. *Uprooting the Torah*

Jewish tradition idealizes the Torah as both absolute and perfect. It is the expression of God's will and divine commandments. However, Jewish law bears the marks of rabbinic legislation and judicial decisions that have practically overruled and "uprooted" the Torah law.²¹⁶ Neither temporary nor confined to exigent circumstances, such uprooting of the Torah law amounts to permanent modifications of the legal terrain. Halakhic authorities could, and did, "abrogate Torah law for the long term and under relatively ordinary circumstances, perhaps because the law [was] inconvenient, difficult, impracticable, or inappropriate in a changed society."²¹⁷

Consider the example of the payments of debts. According to the Torah, all debts are forgiven at the end of a Sabbatical year (i.e., every seven years).²¹⁸ The Torah recognizes the danger in this provision and warns:

Beware that there be not a thought in thy wicked heart, saying, "The seventh year, the year of release, is at hand;" and thine eye be evil against thy poor brother, and thou givest him nought; and he cry unto the Lord against thee, and it be sin unto thee.²¹⁹

Yet, despite this warning, would-be lenders refused to lend money to those in need as the Sabbatical year approached resulting in exactly the hardship that the Torah had warned against.²²⁰ In order to address this undesirable economic and social reality, Hillel the Elder—a first century CE leading rabbinic authority—devised the institution of the *prozbul*, which, through a legal fiction using the courts,²²¹ allowed creditors to enforce payments due to

216. Hayes identifies nineteen rabbinic legislative enactments (out of a total of 155 that were promulgated during the Second Temple and tannaitic periods) as "innovating in such a way as to contradict biblical law." Christine Hayes, *Abrogation of Torah Law: Rabbinic Taqqanah and Praetorian Edict*, in *THE TALMUD YERUSHALMI AND GRAECO-ROMAN CULTURE* 642, 643 (Peter Schäfer ed., 1998).

217. Christine Hayes, *Rabbinic Contestations of Authority*, 28 *CARDOZO L. REV.* 123, 126 (2006).

218. *Deuteronomy* 15:1–2 ("At the end of every seven years thou shalt make a release [of debts]. And this is the manner of the release: Every creditor that lendeth ought unto his neighbor shall release it; he shall not exact it of his neighbor, or of his brother; because it is called the Lord's release."); see also YOSEF TZVI RIMON, *SHEMITA: FROM THE SOURCES TO PRACTICAL HALAKHA* (2008).

219. *Deuteronomy* 15:9.

220. Although the Mishnah pronounces that anyone who pays off his debt on the Sabbatical year "the Sages are happy with him," (*Mishnah Shvi'it* 10:4), this does not impose a legal obligation on the borrower.

221. Pinchas Shiftman, *Prozbul and Legal Fiction*, 2(2) *S'VARA* 63 (1991); see also David Kraemer, *Prozbul and Rabbinic Power*, 2(2) *S'VARA* 66 (1991); David Gordis, *Prozbul and Poseq*, 2(2) *S'VARA* 71 (1991).

them after the Sabbatical year.²²² Excusing the wealthy from having to observe the remission of debts ensured that the poor would still be able to get loans even as the Sabbatical year approached. While the social goal behind the enactment are worthy, the Torah text about the remission of debts on the Sabbatical year does not recognize any exceptions. Hillel's *prozbul* contradicts an express biblical commandment,²²³ leading the Talmud to ask poignantly: "Is it conceivable that where the Bible specifically says that every seventh year brings with it automatic remission of debt, Hillel could have ordained that it does not?"²²⁴ Yet, bold as is the possibility of rabbinic legislation and judicial decisions overturning divine law, for the most part such acts can still be regarded as comporting with the vision of the Torah as absolute and perfect: first, rabbinic legislation and judicial decisions may be framed and described so that the apparent contradiction with the Torah law is explained away as no contradiction at all. Second, even if the existence of contradiction is acknowledged, one can seek to establish the source of authority for the rabbinic legislation within the Torah itself.²²⁵ Talmudic sages follow these strategies to reconcile Hillel's *prozbul* with the Torah and demonstrate that it does not, in fact, uproot Torah law.²²⁶

222. See ROMAN A. OHRENSTEIN AND BARRY GORDON, *ECONOMIC ANALYSIS IN TALMUDIC LITERATURE: RABBINIC THOUGHT IN THE LIGHT OF MODERN ECONOMICS* 12 (3d rev. ed. 2009); PANKEN, *supra* note 88, at 192–98.

223. YERUSHALMI: GITTIN, 21b; BAVLI: GITTIN, 36a-b. The Babylonian Talmud quotes the opinion of Rav Shmuel who called the *prozbul* "the arrogance of judges" (*ulbana d'dayanei*) and stated that if he could, he would abolish it. BAVLI: GITTIN 36b; *see also* Hayes, *supra* note 216, at 647 ("Hillel's *prozbul* is the single most explicit example of a rabbinic decree that overturns a provision of the Torah. . . . This is perhaps the most radical example of a rabbinic *taqqanah* recorded in our sources."); Allen Schwartz, *Schemittat Kesafim: Reclaiming a Forgotten Mitzvah*, JEWISH ACTION 16 (Fall 2008), available at <http://www.ou.org/pdf/ja/5769/fall69/16-17.pdf>.

224. BAVLI: GITTIN 36a. Rashi adds: "And thus uproot an injunction of the Torah?" *Id.*

225. See Hayes, *supra* note 216, at 646-56 for examples of "revisionism" in the context of standing, non-emergency, *taqqanot*. Such examples include the recharacterization of the law that the relevant legislation contradicts as itself *d'rabbanan* rather than *d'oraita* (thus the relevant legislation does not contradict the law of the Torah) and the finding of a biblical source for the rabbinic legislation (transforming it into an interpretative measure of the Torah text rather than an independent, secondary, legislation).

226. It has been argued that the relevant biblical text contains two releases that must operate in tandem: the release of debts and the release of land in the sabbatical year. The land is left to lie fallow and all agricultural activity is forbidden. Any fruits that grow of their own accord are deemed ownerless and may be picked by anyone. BAVLI: GITTIN 36a (Rabbi Yehuda Hanasi opining that "when you let the land rest you release debts; when you do not let the land rest you do not release debts."). The nature of agricultural cycles creates special needs for farmers to borrow money in order to finance their operations. *See, e.g.*, Farm Credit Act of 1933, ch. 98, 48 Stat. 257 (repealed 1966) (establishing the Farm Credit System: a group of cooperative lending institutions to provide loans for agricultural purposes). Inputs such as seeds and fertilizers and machinery are purchased and workers paid before the crops are harvested. But if the farmer is commanded to let his land rest for a full year he will not be able to repay such loans. At the same

It is not surprising that while one finds explicit mention and use of the sages' temporary emergency powers throughout the ages, relatively little discussion exists with respect to the rabbis' ability to "uproot" permanently Torah law. Recognizing such authority beyond the confines of emergencies goes directly against the grain of veneration of the Torah. The very notion of "unconstitutional innovations"²²⁷ such as the *prozbul* and similar rabbinic regulations that purport to overturn Torah law permanently is anathema to the Rabbis.²²⁸ Thus, in a subsequent process of revisionism later authorities either neutralized most (but not all) of the rabbinic legislative enactments that had been considered as contradicting Torah law or denied their innovative or contradictory nature.²²⁹

III. AUTHORITY AND POWER

Jewish legal tradition does not recognize a "state of exception," in the sense this term is understood by Giorgio Agamben, i.e., as a general suspension of law in times of emergency. According to Agamben, the state of exception "is not defined as a fullness of powers, a pleromatic state of law . . . but as a kenomatic state, an *emptiness* and standstill of the law."²³⁰ It is "a

time he still requires credit and funds in order to maintain the land even if he cannot enjoy its fruits. Thus, the Torah warns lenders not to hold off their loans when the sabbatical year approaches while also releases the farmer from the need to repay his debts.

Jews lost the power to observe the Jubilee year return of land. Thus, according to the Torah itself they are also not obligated to observe the seventh year release of debts rule and Hillel's *prozbul* merely reaffirms that. MAIMONIDES, *Mishne Torah, Hilkhot Shmitah*: 9:16; see also Hayes, *supra* note 217, at 128–30. Another line of reasoning is that the Torah's commandment regarding the release of debts is addressed to *individual* creditors. However, the *prozbul* utilizes a legal fiction: creditors turn over loans to a court that is not subject, as such, to the obligation to release the debt. See PANKEN, *supra* note 88 at 193.

Alternatively, the sages used biblical text in order to find a peg for Hillel's authority to promulgate the *Prozbul*. TALMUD YERUSHALMI (Jerusalem or Palestinian Talmud, hereinafter "YERUSHALMI"): SHEVI'IT 29b ("When he [Hillel] saw that the people refrained from lending [money] one to another and transgressed what is written in the law. . . Hillel the Elder enacted the *prozbul* . . ."). The *prozbul* is based, therefore, on the need to ensure that lenders did not transgress the warning contained in *Deuteronomy* 15:9 ("thine eye be evil against thy poor brother.") and as such it is "from the Torah." See also Hayes, *supra* note 216 at 647–48; cf. Kraemer, *supra* note 221 at 66–67.

227. Hayes, *supra* note 217 at 126.

228. Greene, *supra* note 171 at 154.

229. Hayes, *supra* note 222 at 646–56. Hayes argues that out of sixteen earlier rabbinic legislations that contradicted the Torah, five (including the *prozbul*) were pronounced to be based on biblical exegesis rather than rabbinic legislation. In these cases, "the rabbis *alter the record* of a ruling's legal source in response to the fact that that ruling contradicts biblical law." *Id.* at 655 (emphases in the original).

230. GIORGIO AGAMBEN, *STATE OF EXCEPTION* 48 (2005) (emphasis added).

zone of anomie in which all *legal* determinations . . . are deactivated.”²³¹ Extraordinary powers that are exercised, and measures that are taken, in that space of juridical vacuum are, therefore, “radically removed from any juridical determination . . . and the definition of their nature. . . will lie beyond the sphere of law.”²³² The state of exception, argues Agamben, constitutes an anomie that results from the suspension of law. It is not originary of law nor does it reflect a reversion to a state of nature:²³³ “The state of exception is not a special kind of law . . . rather, insofar as it is a suspension of the juridical order itself, it defines law’s threshold or limit concept.”²³⁴ Agamben’s definition of the state of exception is a negative one, i.e., the state of exception is a state of not-law. This definition leads Agamben to concede the impossibility “of thinking an essential problem . . . What is a human praxis that is wholly delivered over to a juridical void?”²³⁵

Jewish legal tradition rejects the very possibility of a “juridical void” in which actions taken are “radically removed from any juridical determination.”²³⁶ Both extraordinary measures and judicial decisions and legislative enactments by halakhic authorities continue to operate within the general, eternal, framework of the Torah and the *halakhah* which are never suspended or set aside. Exigency and necessity do not make legal that which otherwise would be illegal. This, then, raises two further questions: First, what, if any, is the source of the rabbis’ authority to act in ways that deviate from the foundational, divine, text? Second, even if we accept that Jewish law does not face Agamben’s “essential problem” in theory, what, again if any, are the sanctions that may be meted against those who overstep their authority?

A. Authority

The mitzvah to light Chanukah lights does not appear in the biblical text and is recognized as an independent rabbinic legislation, i.e., it has the status of a legislation *d’rabbanan*. The rabbis decreed that when performing this mitzvah one is to say the following blessing: “Blessed are You, the Eternal our God . . . Who has commanded us to . . .” However, the source for the mitzvah is not the Torah, i.e., divine commandment, but rather a rabbinic legislation. How is it, then, that the blessing states that God (rather than the

231. *Id.* at 50 (emphasis added).

232. *Id.* at 50 (emphasis added).

233. *Id.* at 50–51.

234. *Id.* at 4.

235. *Id.* at 49.

236. *Id.* at 49–50.

rabbis) commanded us to light the lights? The Talmud answers this quandary by suggesting that the general source for the rabbis' authority to engage in legislative activity, including independent and innovative legislation, is found in the biblical text itself.²³⁷ When the rabbis legislate, their authority derives from the Torah. The admonition of *Deuteronomy*:

[Y]ou shall carry out the verdict that is announced to you . . . observing scrupulously all their instructions to you. You shall act in accordance with the instructions given you and the ruling handed down to you; you must not deviate from the verdict that they announce to you either to the right or to the left.

is invoked as the main source for the Torah vesting legislative authority in the rabbis.²³⁸ But, does that authority encompass within its ambit also the authority to promulgate laws and rules that overrule the Torah law, despite the Torah's divine source? How could such rabbinic legislation be squared with the vision of the Torah as absolute and perfect? As this Section demonstrates, halakhic commentators have responded to this conundrum by either framing rabbinic legislation in ways that eliminated the apparent contradiction with the Torah or arguing that the source of authority for the rabbinic legislation, even when it deviates from the Torah, is found in the Torah itself.

According to Jewish tradition, God handed down to Moses on Mt. Sinai not merely the text of the written Torah but also an Oral Torah to facilitate the interpretation of the written document.²³⁹ Some interpretations have already been revealed to Moses at Sinai (thus, requiring no further human interpretation). In other instances the Oral law contains the hermeneutic tools that allow halakhic authorities to interpret the Torah.²⁴⁰ The *halakhah*,

237. Levine, *supra* note 111 at 925–31.

238. *Deuteronomy* 17:10–11; BAVLI: SHABBAT 23a. Rambam (Maimonides) holds similarly that the quoted verses establish the obligation to obey and comply with all rabbinic laws. MAIMONIDES, *Book of Commandments*, *shoresh rishon* (first principle), in TWERSKY, *supra* note 107, at 424. However, Ramban (Nachmanides) in his *Notes on Maimonides' Book of Commandments* rejects this position describing it as “erecting a high wall around the laws of the sages that is [nonetheless] collapsing to the ground.” According to Nachmanides, Rambam's position would practically elevate all rabbinic legislation to the level of Torah law. *See also Drashot Ha'Ran*, Dr. 12. For an additional source of rabbinical authority to legislate see *Deuteronomy* 32:7 (“ask thy father, and he will declare unto thee, thine elders, and they will tell thee.”).

239. On the various positions regarding the nature of the revelation at Sinai. *See, e.g.*, Stone, *supra* note 2 at 849–54.

240. Zvi Hirsch Chajes, *Introduction to the Talmud*, in COLLECTED WRITINGS OF RABBI ZVI HIRSCH CHAJES 281, 284–91 (1985); MAIMONIDES, *Mishne Torah*, Introduction, in TWERSKY, MAIMONIDES READER, at 35 (“All the precepts which Moses received on Sinai, were given

comprised of both the written and oral is, therefore, an all-encompassing body of law. Nothing can stand outside it and no changes can be made, regardless of future developments and circumstances, which are not already part and parcel of the law given by God to Moses. The revelatory moment on Mt. Sinai was at once singular and eternal, uniquely individual and widely communitarian, delivering the Decalogue to man and pronouncing a complete body of law.²⁴¹ This suggests that Jewish law contains within itself a very strong originalist position.²⁴² Any further interpretive, judicial or legislative efforts by the rabbis are only directed at revealing the truth as it is embodied in that body of laws. The Torah, reflecting God's will and commandments, is dispositive.²⁴³ It also settles within its ambit all questions that may arise.²⁴⁴

Rather than reject the view of a living constitution, many halakhic authorities (including some early ones) have attempted to show that even if the *halakhah* is evolving, their authority to issue “new” legislation and

together with their interpretation . . .”); see also Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 1 (1984).

241. See, e.g., GEORGE J. BROOKE, HINDY NAJMAN, AND LOREN T. STUCKENBRUCK, *THE SIGNIFICANCE OF SINAI: TRADITIONS ABOUT DIVINE REVELATION IN JUDAISM AND CHRISTIANITY* (2008); S.Y. AGNON, *PRESENT AT SINAI: THE GIVING OF THE LAW* (Michael Swirsky trans., 1959).

242. See, e.g., Emil A. Kleinhaus, *History As Precedent: The Post-Originalist Problem in Constitutional Law*, 110 YALE L.J. 121, 146 (2000) (“As a result of the unique status of the Torah. . . the analogy between Jewish law and originalism in American constitutional law is neater than the broader analogy between Jewish law and constitutional law as a whole. For the rabbi, as for the originalist, authoritative textual exegesis, supplemented by reliable evidence as to what the foundational text means, is the source of law.”); Levine, *supra* note 111 at 927; Peter J. Smith & Robert W. Tuttle, *Biblical Literalism and Constitutional Originalism*, 86 NOTRE DAME L. REV. 693 (2011). Michael J. Broyde and Ira Bedzow argue that “Originalism fares no better [than intentionalism] in its connection to Jewish law, since the whole reason that halakhic works began to be written down in the first place is based upon the admission that there had been a significant deterioration in the accurate transmission of the oral law.” Michael J. Broyde & Ira Bedzow, *The Codification of Jewish Law and an Introduction to the Jurisprudence of the Mishna Berurah*, 35 HAMLIN L. REV. 623, 638 (2012). However, this assertion is based on their view of originalism as basing normativity on the understanding of the *recipients* of the law at the time of its enactment. *Id.* They do note, however, that according to Jewish tradition “all legal works are themselves interpretative commentaries on legislation that is believed to have begun with Moses at Sinai.” *Id.*; see also YERUSHALMI: MEGILLAH 28a (“The Scriptures, the Mishnah, the Talmud and Aggadah, and even the laws that a veteran scholar would innovate in the future had already been taught to Moshe at Sinai.”).

243. The product of God's will, the Torah may be seen as an example of a constitution that is authored by a single founder who is, in one sense, an “outsider.” See Lanni & Vermeule, *supra* note 34 at 908.

244. ELLIOTT N. DORFF & ARTHUR ROSETT, *A LIVING TREE: THE ROOTS AND GROWTH OF JEWISH LAW* 198 (1988) (“[T]he rabbinic tradition of interpretation starts with supreme confidence that, however subtle the text may be, somewhere within it correct guidance on every legal issue can be found.”).

judgments that do not merely find and reveal the law (but not necessarily the outcomes of exercising such authority), is provided for in the canonical texts:²⁴⁵ Accounts such as Elijah's sacrifice on Mt. Carmel²⁴⁶ or the verse from Psalms "[i]t is time to act for God, they have dissolved thy law."²⁴⁷ The books of Prophets include examples of great leaders deviating from the rules of the Torah.²⁴⁸ According to Jewish tradition the prophets passed the Torah on to the members of the Great Assembly whose stature was no lesser than that of the prophets (and arguably was even higher as far as setting the *halakhah* is concerned). Thus, the examples of the prophets could be, and have been, invoked as precedents for, and examples of, rabbinical authority to overrule the Torah in certain cases.²⁴⁹ Others have established the authority of the rabbis to legislate in contravention of the Torah on the text of the Torah itself, i.e., the five books of Moses as opposed to the later sections of the Bible. For example, Rashba argues that, "[t]he sages do not uproot a word from the Torah of their own accord. Rather one of the Torah's commandments is to heed the magistrate in charge at the time, and all that they [the magistrates] decide to permit due to necessity [even if it is not so permitted according to the biblical text] is [deemed] permitted by the Torah."²⁵⁰ Relying on the text of Deuteronomy 17:9–11,²⁵¹ Rashba resolves

245. Stone, *supra* note 142, at 1199 ("From the internal viewpoint of Jewish law, any authority exercised, no matter how pressing the historical circumstance, first must have a legal basis in Scripture. Thus, medieval and later jurists struggled to articulate where in the Jewish legal structure the power . . . was located.").

246. See *infra* Part II.A.2.

247. See *infra* Part II.A.3.

248. For example, on instances in which wars were waged on the Sabbath see Shlomo Goren, *Waging War on the Sabbath*, SINAI: JUBILEE VOLUME 149 (1958), available at <http://www.daat.ac.il/daat/kitveyet/shana/lehima-2.htm>; Moshe Zvi Nerya, *On the Permission to Wage War on the Sabbath* (1962), available at <http://www.daat.ac.il/daat/tsava/maamar/al-heter-2.htm>. Commentators have wrestled with the challenge of such violations in several ways: First, arguing that certain deviations from the law of the Torah—such as during Joshua's war against the city of Jericho (*Joshua* 6:3–4)—had been specifically approved by God Himself. Second, suggesting that violating the Sabbath is only allowed in cases of a mandatory or obligatory war (*milchemet chova* or *milchemet mitzvah*) as distinguished from a permissible, optional, discretionary war (*milchemet reshut*). Third, adopting the position that specific instances of violations demonstrate examples of *hora'at sha'ah* (temporary emergency measures) and cannot be taken as precedents for the future.

249. GILAT, *supra* note 151, at 198–200. According to Stolzenberg, such legal actions may be "profane" in the sense of deviating from the sacred law of the Bible, but are, at the same time, religiously necessary and justified since the alternatives will be that sacred law will go unenforced. See Nomi Stolzenberg, *The Profanity of Law*, in *LAW AND THE SACRED* 29, 51–63 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2007).

250. GILAT, *supra* note 151, at 200.

251. "And you shall come to . . . the magistrate in charge at the time . . . When they have announced to you the verdict in the case, you shall carry out the verdict that is announced to you . . . observing scrupulously all their instructions to you. You shall act in accordance with the

the tension between the dictates of the Torah and the twin biblical admonitions of *Bal tosif* and *Bal tigra*, on the one hand, and rabbinic legislation, on the other hand, by claiming that all the powers that the rabbis may need in order to deal not only with the normal functions of developing the *halakhah* by way of interpretation, but also those powers that may be necessary by way of amending the Torah, are provided for by the Torah itself.²⁵² According to Rashba, the above quoted biblical verses and the principle of *lo tasur* that is reflected in them amount, therefore, to a constitutional amendment clause.²⁵³ There is no situation that is not covered by the Torah or that may necessitate looking outside the basic law for additional powers and authority.²⁵⁴

However, the claim that amendments of the Torah law are explicitly prescribed within the general framework of the Torah is problematic.²⁵⁵ First, none of the verses that have been invoked in this context specifically authorizes deviation from biblical norms and principles.²⁵⁶ For example, the principle of *lo tasur*, which Rashba relies on, requires that the people follow the instructions and decisions of the magistrates (as well as of the levitical priests). They emphasize the authority of the judges and the priests, the binding nature and the finality of their decisions as authoritative pronouncements about the law.²⁵⁷ Decisions by the rightful authorities are binding and may not be challenged (even if erroneous). Indeed, anyone who acts in disregard of such a verdict may be put to death so that “you will sweep

instructions given you and the ruling handed down to you. *You must not deviate from the verdict that they announce to you either to the right or to the left.*” Deuteronomy 17:9–11 (emphasis added). This is known as the principle of *lo tasur* (meaning literally “you shall not deviate”). Yonason Sacks, *The Mitzvah of “Lo Tasur:” Limits and Applications*, 27(4) TRADITION 49 (1993).

252. GILAT, *supra* note 151, at 200.

253. ROTH, *supra* note 77, at 201.

254. GILAT, *supra* note 151, at 200. This position of Rashba seems to contradict his position that “if you establish everything on the laws prescribed in the Torah . . . the world would be desolate” (*see supra* note 143 and the accompanying text). One way to reconcile the two is if we understand his rejection of establishing “everything on the laws prescribed in the Torah” as an opposition to a rigidly formalist, literalist approach to the biblical text. *See also* R. YOSEF ALBO, SEFER HA’IKARIM 3:23 (“It is impossible that the Torah would have been given in complete form, suitable for every generation . . . Therefore, at Sinai Moshe was taught the general principles orally, things that are hinted to briefly in the Written Torah, so that the Sages of each generation would be able to extract the newly needed details of practical halakhah.”).

255. Greene, *supra* note 171, at 175–76 (“[T]he Rabbis themselves must have had doubts about the adequacy of the ingenious casuistry with which they sought halakhically to justify enactments which obviously uprooted Torah law.”); Stone, *supra* note 142, at 1201 (“The scriptural authority to dispense with Sinaitic procedure has proved altogether elusive.”).

256. SCHREIBER, *supra* note 120, at 397.

257. Rabbi Jacob Agus referred to the principle of *lo tasur* as “the magna carta of rabinnic legislation;” DORFF, *supra* note 5, at 145.

out evil from Israel.”²⁵⁸ But while the verdict may not be challenged there is nothing in the text that gives the magistrates the legal authority to act in a way that is knowingly and intentionally in contradiction with Torah law.²⁵⁹ Similarly, the verse “you shall keep My laws and My rules, by them man shall live,”²⁶⁰ has been invoked to mean that one ought to violate the Sabbath in order to save a life because the command “by them [laws] man shall *live*,” requires that one not forfeit one’s life in order to zealously obey the law.²⁶¹ However, this interpretation pertains to acts done in one’s individual—rather than official—capacity. Whether it could be extended to official acts and whether it could apply to such acts when they are taken in less-than-extreme cases when lives are not at stake, is unclear.²⁶²

Another strand that can be detected in the writings and judgments of halakhic scholars is one in which terms such as *hora’at sha’ah*, *midgar milta*, or “acting for God” are referenced as explanations for particular decisions without further attempts to discern the legal basis for such explanations. Those terms are invoked as “god terms,” i.e., rhetorical absolutes that impart the capacity to demand sacrifice, “for when a term is so sacrosanct that the material goods of this life must be mysteriously rendered up for it, then we feel justified in saying that it is in some sense ultimate.”²⁶³ The language used by the halakhic scholars invokes images of such ultimate terms as necessity, justice, and duty, and as such may not need further elaboration of their legal foundations.²⁶⁴ The decision whether to amend, deviate from, and violate the rules of the Torah is one for the sages to make at their own discretion. The combination of vesting such discretion with the rabbis and the lack of

258. *Deuteronomy* 17:12.

259. This narrower construction is more in line with the general context of the discussion in *Deuteronomy* 17:8–13. See also ROTH, *supra* note 77, at 202 (arguing that the *lo tasur* principle “does not clearly stipulate the right to amend . . . one is forced to conclude that the right to amend the Torah is deduced not from the Torah itself but from the interpretation of a sage to that effect . . . The fallacy, of course, is that the very interpretation that is supposed to solve the problem of *ultra vires* may itself be an instance of *ultra vires*.”).

260. *Leviticus* 18:5.

261. BAVLI: SANHEDRIN 74a.

262. Suzanne Stone notes that the notion of preservation of social order has been cited as justification for the exercise of rabbinic emergency powers and for the authority of the rabbis to dispense with Sinaitic law. However, “the obligation to preserve order in society is not identified anywhere as one of the revealed commandments. The term ‘preservation of order in society’ appears for the first time in Jewish law in the Mishnah. It is cited there to explain why the rabbis . . . adopted certain legislation . . . [However], [t]he need to preserve order, in these contexts, is the reason for the legislation, not the legal basis for the legislation.” Stone, *supra* note 142, at 1201.

263. LANGUAGE IS SERMONIC: RICHARD M. WEAVER ON THE NATURE OF RHETORIC 90 (Richard L. Johannesen, Rennard Strickland, & Ralph T. Eubanks eds., 1970).

264. KENNETH BURKE, A RHETORIC OF MOTIVES 298–301 (1950).

precision and elaboration regarding not only the legal foundations for the exercise of the rabbinic authority to amend but also the exact circumstances that may warrant amendments is not accidental. The challenges raised by a rabbinic authority to amend the Torah have led even those who accept that such an authority exists to try and contain its legitimate exercise to extraordinary circumstances. Yet, as Joel Roth notes, “[t]he extraordinary...is much less likely [than unusual circumstances] to be anticipated, and therefore precision regarding the extraordinary is an unreasonable demand.”²⁶⁵ Thus, “[t]he very imprecision of the rules governing amendment or abrogation intimates that the employment of these rules must be limited to extraordinary circumstances. Indeed . . . the degree of precision is inversely related to the extraordinariness of the situation.”²⁶⁶

A related justification for the invocation of exigency jurisdiction can be detected in claims of implicit, rather than explicit, biblical authorization to exercise exigency jurisdiction. Rabbi Nissim of Gerona, a leading fourteenth-century rabbi operating in Spain, discusses the case in which a person is to be executed for committing a capital offense although he did not receive an appropriate advance warning. He acknowledges the significance of the warning, which is mandated according to the Torah, yet recognizes that if such a person is not punished others may well follow his example due to lack of adequate deterrence and public order would be severely undermined.²⁶⁷ Thus, argues Rabbi Nissim, the Lord had ordered Israel that in addition to complying with the rules of the Torah they should set a king over themselves²⁶⁸ so that he might act to safeguard public order: “The king may adjudicate without [advance] warning as he sees necessary for public order.”²⁶⁹ According to Rabbi Nissim, the role of the magistrates was to adjudicate according to the laws of the Torah whereas God and the community conferred upon the king the authority to complement the Torah as needed for ensuring public and political order.²⁷⁰ In *The Apollon*, Justice Joseph Story stated a similar position:

265. ROTH, *supra* note 77, at 180.

266. *Id.* For similar notions see THE FEDERALIST NO. 23, at 153 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[I]t is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.”); Oren Gross, “Once More unto the Breach”: *The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J. INT’L L. 437, 439–40 (1998).

267. *Drashot Ha’Ran*, Dr. 11, at 75.

268. *Deuteronomy* 17:15.

269. *Drashot Ha’Ran*, Dr. 11, at 75.

270. *Id.*

It may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws. Such measures are properly matters of state, and if the responsibility is taken, under justifiable circumstances, the Legislature will doubtless apply a proper indemnity. But this Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress.²⁷¹

However, and this is the significant move for our purposes, Rabbi Nissim argues that in times that Israel is not ruled by a king: “the magistrate combines the two powers, the power of the judge and the power of the king.”²⁷²

B. Power

Consider the following two scenarios:²⁷³ (1) *The case of the bride-snatching in Naresh*:²⁷⁴ a fatherless minor girl is married off by her mother or brothers. Upon reaching adulthood, the “husband” arranges for them to be married formally.²⁷⁵ However, before he has a chance to proceed, another man kidnaps the girl (now woman) from her “bridal chair” and marries her (presumably upon obtaining the bride’s consent).²⁷⁶ (2) *The you-don’t-get-the-Get case*: a man sends a *get*—a letter of divorce—to his wife by a messenger. However, before the *get* reaches the wife, the husband recants, convenes a court (*beit din*), and cancels the *get* without notifying either the messenger or the wife.²⁷⁷ Under Torah law, in the case of Naresh the woman

271. *The Apollon*, 22 U.S. (9 Wheat.) 362 at 366–67 (1824); see also H CJ 5100/94 Pub. Comm. Against Torture in Israel v. State of Israel, 53(4) PD 817 at 845 [1999] (Isr.); Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 162 (2002); AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 286 (2008).

272. *Drashot Ha’Ran*, Dr. 11, at 75.

273. The Babylonian and Jerusalem Talmud recount additional cases similar to the two noted in the text. However, as these additional cases are conceptually similar, I only mention those two.

274. BAVLI: YEVAMOT 110a; BAVLI: BAVA BATRA 48b. Naresh was a town in Babylon.

275. Upon attaining majority the girl has the right to declare that she does not wish to be married to her husband. According to the opinion of Rav, the initial marriage (when the girl was still a minor) becomes valid only if, on attaining majority, the girl cohabits with her husband. If, however, prior to consummating her first marriage, the girl, after attaining majority, marries another man, the second marriage is valid. BAVLI: YEVAMOT 109b.

276. BAVLI: YEVAMOT 110a. In the absence of such consent the marriage is null and void. RACHEL BIALE, *WOMEN AND JEWISH LAW: THE ESSENTIAL TEXTS, THEIR HISTORY, AND THEIR RELEVANCE FOR TODAY* 59 (1995).

277. In which case, according to the Torah, the *get* is invalidated. BAVLI: GITTIN 33a; BAVLI: YEVAMOT 90b.

is married to the second man. In the *get* case, Raban Gamliel the Elder decreed that the *get* may not be so canceled before it is received by the wife unless such cancellation is done before a court, in the presence of either the messenger or the wife. Yet, what if the husband ignores the decree and cancels the *get*, which it is his right to do according to the Torah? In such a case the *get* is annulled and the marriage continues uninterrupted.²⁷⁸ Halakhic authorities have found both outcomes unsatisfactory. For example, the wife, in the second scenario, may remarry being unaware of the cancellation of the *get* by her husband with catastrophic results not only to herself but also to her future children. In order to resolve such cases, the concept of *hafka'at kiddushin* (literally “expropriation of the marriage” [from the husband]) was developed.²⁷⁹ Accordingly, the rabbis ruled that the marriage in the first scenario was annulled, and that the *get* in the second scenario was, Torah law notwithstanding, valid.²⁸⁰

How may such actions by the rabbis, in apparent contradiction with biblical law, be justified? The Talmud suggests several possible explanations: first, husbands and wives, by their own agreement, confer authority on the rabbis to act in such a manner. Every Jewish marriage is, according to this line of reasoning, subject to the rabbis’ consent, since every marriage is done in accordance with the laws of Moses and Israel (“*kedat Moshe ve’Israel*”).²⁸¹ Such an attempt to mitigate the tension between the need to respond to exigent circumstances and unacceptable outcomes, on the one hand, and the compulsion of legality that is reinforced by the religious veneration of God’s commandments and dictates, on the other hand, is clearly appealing.²⁸² However, it comes with a heavy price: If the rabbis’ authority derives from a consensual condition to the *marriage*, then their ability to act is limited to annulling the very act of marriage. This may not seem so extreme in cases such as the marriage at Naresh, but in the second scenario—delivering a *get*

²⁷⁸ 3 SIMON DUBNOV, *HISTORY OF THE JEWS* 115 (1968); ISAAC COHEN, *ACTS OF THE MIND IN JEWISH RITUAL LAW* 548 (2008).

²⁷⁹ See, e.g., Shlomo Riskin, *Hafka'at Kidushin: Towards Solving the Agunah Problem in Our Time*, 36 *TRADITION* 1 (2002); Jeremy Wieder, *Hafka'at Kiddushin: A Rebuttal*, 36 *TRADITION* 37 (2002); Eliav Shochetman, *Hafka'at Kiddushin*, 20 *SHENATON HA'MISHPAT HA'IVRI* 349 (1995), available at <http://www.jstor.org/stable/23419325>.

²⁸⁰ A significant debate exists regarding the second scenario whether the rabbis’ expropriation of the marriage invalidates the *get* prospectively (i.e., the couple is no longer married from this moment onward), or does it invalidate the very act of marriage retrospectively, regardless of the length of time during which the couple had been married. For further discussion and analysis, see, e.g., Avishalom Westreich, *The “Gatekeepers” of Jewish Marriage Law: Marriage Annulment as a Test Case*, 27 *J. L. & RELIGION* 329 (2012).

²⁸¹ BAVLI: GITTIN 33a.

²⁸² David Dyzenhaus, *The Compulsion of Legality, in EMERGENCIES AND THE LIMITS OF LEGALITY* 33–59 (Victor V. Ramraj ed., 2008).

by a messenger—it leads to radical results, i.e., rather than the *get* being held invalid prospectively, the marriage itself is annulled even though the couple may have lived together as married for many years!²⁸³

A second possible explanation is that in expropriating the marriage and pronouncing a woman who is married according to the Torah to be divorced, the rabbis have, in fact, used their extraordinary authority to uproot the laws of the Torah.²⁸⁴ This may solve the problematic results of the consent-based explanation. For if the rabbis' use such extraordinary authority, they may choose to direct the exercise of that authority not against the act of marriage, but rather against the *get* itself. They are not bound, by consent of the parties, to annulling the marriage; they may order the *get*—the act of divorce—valid despite the fact that it is invalid according to the Torah. Thus, the effect of their “expropriation” is merely prospective rather than retroactive.²⁸⁵ Here, too, there is an inherent difficulty in the suggested solution: it seems to resolve the particular hardship at hand at the cost of aggregating to the halakhic authorities a wide-ranging, sweeping authority to deviate from God's will as it is reflected in the Torah when they perceive a case to be hard but not necessarily one that constitutes an emergency.

It is in light of these difficulties, I suggest, that the (Babylonian but not the Jerusalem)²⁸⁶ Talmud is offering a third, startlingly radical, explanation. Discussing the case of the wedding at Naresh (Scenario 1), Rav Ashi—the first editor of the Babylonian Talmud—argues that the justification for *hafka'at ha'kiddushin* in that case is that, “he [the husband] acted improperly (*shelo ka'hogen*), therefore *they* [the sages] acted improperly towards him.”²⁸⁷ This explanation neither attempts to reconcile the actions of the sages with the language and dictates of the Torah nor directs us to an extraordinary, yet legal, authority to deviate from Torah law,²⁸⁸ since in neither case we would call that which the rabbis do “inappropriate.”

How, then, to understand the concept of *she'lo ka'hogen* in this context? One possible understanding regards Rav Ashi's reasoning as merely another

283. See, e.g., Arye Edrei, *The Authority of the Court in Matters of Marriage and Divorce*, 21 SHENATON HA'MISHPAT HA'IVRI 1, 34–35 (1998), available at <http://www.jstor.org/stable/23419343>; Berachyahu Lifshitz, *Afke'ihu Rabanan Le'kiddushin Minayhu*, in JUBILEE TO KEREM D'YAVNE YESHIVA 317, 317–19 (2004); Westreich, *supra* note 280, at 343–47.

284. BAVLI: YEVAMOT 90b.

285. Westreich, *supra* note 280, at 330, 336.

286. See *infra* Part III.D.

287. BAVLI: YEVAMOT 110a; BAVLI: BAVA BATRA 48b. See also Hanina Ben Menachem, *Hu Asa Shelo Ka'hogen*, 81 SINAI 157 (1977).

288. Either claim would mean, of course, that even when acting in such extraordinary capacity, the sages are adhering to the law and acting within the legal system.

way of expressing the idea (first elaborated by Rav Hisda who preceded Rav Ashi as the head of the Sura Yeshiva)²⁸⁹ of the sages' legal authority to uproot the law of the Torah (a position that is, to be sure, radical in and of itself).²⁹⁰ Yet, such an explanation fails to realize the significance of Rav Ashi's pronouncement that the sages' decision to annul the marriage is "improper." It exceeds the formal boundaries not only of the Torah but also of the *halakhah*. Rav Ashi does not fall back unto existing formulae to justify the jurisdiction of the sages. He does not claim authority that is based on consent of individuals, or that is in line with the dictates of the Torah, or, for that matter, that is based on recognized notions of extraordinary jurisdiction.²⁹¹ As Ben-Menahem notes, "if judges [like Rav Ashi] . . . chose explicitly to depart from the law, it was not necessarily because they had no alternative means to impose their will. Rather, it was because they apparently believed that explicit deviation from the law was a more appropriate technique in the prevailing circumstances."²⁹² Rav Ashi openly acknowledges that the conduct of the sages is improper. Moreover, that impropriety is analogized to, and is justified or excused (the Talmud does not tell us which) by, the would-be-husband's own improper and unlawful conduct.

Rather than engage in interpretative moves designed to reconcile the sages' decision with the dictates of the law, Rav Ashi prefers to recognize the dilemma and its extraordinary, indeed extralegal, solution. Instead of arguing for *legal authority* to act as they do, sages such as Rav Ashi base their actions on an *extralegal power*.²⁹³ This is not a comfortable position for a halakhic authority to assume as it runs against the very grain of veneration with which the Torah is held.²⁹⁴ Yet, significantly, Rav Ashi neither attempts to disguise the radical nature of his decision nor argues that it comports with the law. Instead, he openly, and courageously,²⁹⁵ concedes the deviation from the law.²⁹⁶ Not only is the reasoning that Rav Ashi provides for the decision

289. BAVLI, *supra* note 159 and the accompanying text. The Sura Yeshiva was one of the three central Babylonian yeshivas (the other were Pumbedita and Nehardea). A HISTORY OF THE JEWISH PEOPLE 377–78 (H.H. Ben-Sasson ed., 1976).

290. Westreich, *supra* note 280, at 330.

291. BERKOVITS, *supra* note 101, at 63 ("There is a realization present in those words that the marriages were valid according to the law but the *Rabbanan* acted against the law in annulling them in order to stop such evil practices.").

292. BEN-MENAHÉM, *supra* note 176, at 46.

293. Gross, *supra* note 117, at 1096–133; GROSS & NÍ AOLÁIN, *supra* note 35, at 110–70.

294. See also the objection made in the Jerusalem Talmud in another, yet related, context: "should one act blamefully, would we liberate his wife?" YERUSHALMI: YEVAMOT 70b.

295. BEN-MENAHÉM, *supra* note 167, at 45.

296. On the significance of candor and disclosure of the extra-legal nature of the act see, for example, Oren Gross, *Extra-legality and the Ethic of Political Responsibility*, in EMERGENCIES AND THE LIMITS OF LEGALITY 60 (Victor V. Ramraj ed., 2008).

remarkable, but the fact that *a* reasoning had been provided at all is extraordinary since a duty to give reasons for a judicial decision did not exist in Jewish law.²⁹⁷ In other words, not only does Rav Ashi not try to reconcile the ruling in the case with the Torah or to conceal the true extralegal reasoning that underlies the decision, but he takes pains at ensuring that this radical reasoning is made public and is seen for what it is.

Berkovits' discussion of the action of the High Priest going out in his sacred robes to meet Alexander the Great is illuminating in this context.²⁹⁸ "There was no biblical verse available for [the High Priest to justify his actions]. He had only his own counsel to rely upon and to accept responsibility for temporarily doing away with the law and doing what he had to do for the sake of God."²⁹⁹ If, in Jeffersonian terms, under certain circumstances public officials have to "cast[] behind them metaphysical subtleties, and risk[] themselves like faithful servants . . . and throw themselves on their country for doing for [the people] unauthorized what we know they would have done for themselves had they been in a situation to act,"³⁰⁰ the High Priest, having only "his own counsel" and acting at his own peril, had to throw himself not only on his people, but more significantly, on God.

297. BEN-MENAHAM, *supra* note 176, at 23–32. Ben-Menahem suggests that "providing reasons was regarded as dangerous in that it exposed the court's internal reasoning and decision-making process to the outside world." *Id.* at 24 (citing bSanh.31a; bShab.153b; bSanh.21b). Moreover, "[i]f judicial reasoning were revealed, then . . . [l]itigants would be in a position to shape the presentation of their case in a way that would affect the outcome at the expense of accuracy to the actual facts." *Id.* (citing mA.v.1:9; yB.B.9:4 (17,1)) Finally, disclosing reasons for a decision may result in public disputation of that reasoning and the concomitant loss of legitimacy for the court and loss of respect for the law. *Id.* at 24–25. On the duty to give reasons see Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995).

298. BERKOVITS, *supra* note 101, at 65–66.

299. *Id.* at 66–67 (emphasis added). Contrast this with Rashi, who explains that, "when the time comes to do something for the sake of the Holy One, blessed be He, it is *permitted* to dissolve the Torah." RASHI, *supra* note 157 (emphasis added).

300. Letter from Thomas Jefferson to John Breckenridge (Aug. 12, 1803), in DANIEL P. FRANKLIN, EXTRAORDINARY MEASURES: THE EXERCISE OF PREROGATIVE POWERS IN THE UNITED STATES 45 (University of Pittsburgh Press, 1991) [hereinafter Letter].

C. *Fear and Trembling*³⁰¹

Jewish legal tradition rejects the possibility of a “juridical void” in which actions taken are “radically removed from any juridical determination.”³⁰² Both extraordinary measures and judicial decisions and legislative enactments by halakhic authorities continue to operate within the general, eternal framework of the Torah and the *halakhah* which are never suspended or set aside as a whole. Thus, for Jewish law, Giorgio Agamben’s “essential problem” of the nature of “a human praxis that is wholly delivered over to a juridical void,” is irrelevant. But what then are the mechanisms to deal with those who overstep their authority regardless of the various safeguards noted above? When Thomas Jefferson put forward his version of what I called “official disobedience,”³⁰³ he emphasized the need for those officials who had acted extra-legally to “throw themselves on their country,”³⁰⁴ seeking ex post ratification of their actions, but to be ready and willing to risk themselves for going beyond “the strict lines of law”³⁰⁵ and account for their transgression should it not be so ratified.³⁰⁶ Official disobedience, much like civil disobedience, incorporates the willingness to pay the price for violating the law.

Any exercise of rabbinic authority or power that deviates from the dictates of the Torah, unless it is somehow neutralized or denied,³⁰⁷ remains a deviation from, and a violation of, biblical commandments. Furthermore, such deviation—appearing in the context of rabbinic legislation or judicial decision-making—is made publicly. The very fact of publicity and the attendant scrutiny by other halakhic authorities put the brakes on too easy an exercise or on abuse or misuse of such power or authority.³⁰⁸ In addition,

301. Most readers will associate the phrase “fear and trembling” with Kierkegaard’s famous essay. SØREN KIERKEGAARD, *FEAR AND TREMBLING* (Alastair Hannay trans., Penguin Books 1985) (1843). I wish to add another layer to that association by invoking perhaps the most powerful prayer in the Jewish liturgy of the Days of Awe, *Unetanneh Tokef*, which opens the *kedushah* (sanctification of God) sequence. In that prayer Jews recite: “We acclaim this day’s pure sanctity, its awesome power. This day, Lord, Your dominion is deeply felt This day even angels are alarmed, seized with fear and trembling as they declare: ‘The day of judgment is here!’” See also LAWRENCE A. HOFFMAN, *WHO BY FIRE, WHO BY WATER: UN’TANEH TOKEF* (2010).

302. See notes 229–35 and the accompanying text.

303. See, e.g., Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481, 1519–26 (2004).

304. Letter, *supra* note 300.

305. Letter from Thomas Jefferson to William C.C. Clairborne, Governor of Orleans Territory (Feb. 3, 1807), available at <http://memory.loc.gov/ammem/mtjhtml/mtjser1.html>.

306. GROSS AND NÍ AOLÁIN, *supra* note 35, at 123–30.

307. See generally Hayes, *supra* note 216.

308. Similarly, writing about particular examples of circumvention of the law, Shilo notes that despite the fact that those appear to have been morally neutral in the eyes of the rabbis, “it

Jewish legal tradition recognizes a variety of legal and extra-legal (e.g., social, economic and even physical) sanctions that can be applied against those who have violated the basic law.³⁰⁹ To the extent that the application of such external sanctions against halakhic authorities is not merely theoretical, their existence and the possibility of their use might make some rabbis hesitate before moving forward.

However, legal and extra-legal sanctions are of less significance in a fundamentally religious system. In his discussion of the prerogative power, John Locke puts much faith in human reason and rationality as mitigating and limiting factors on the exercise of the prerogative.³¹⁰ His theory of the prerogative reveals a substantial degree of trust in government and particularly in times of emergency. He gives the executive the benefit of the doubt: if there are allegations that the ruler's use of the prerogative power has not been for the purpose of promoting the public good, but rather was in the service of the ruler's own interests and purposes, the people have no remedy available from any "judge on earth." Their sole recourse is "to appeal to heaven."³¹¹ In a legal tradition, such as the Jewish one, which is not merely a legal system but "the life work of a religious community"³¹² that is founded on religious, cultural, legal and social veneration of the foundational documents, such an appeal to heaven is at once more powerful and unnecessary. As Stone notes, "one must not lose sight of the psychological dimension of decisionmaking in a system oriented to God's will . . . [and] the anxiety and fear that a legal decision may not represent the divinely revealed

emerges that not only they but the public in large regarded it with disfavor; though people might be inclined to avoid the law, they felt some shame in publicly doing so." Publicity ensured that such avoidance of the law "was infrequent." Shilo, *supra* note 92, at 163. On the significance of open candor and disclosure in the context of the adoption of extra-legal measures see, e.g., Gross, *supra* note 296.

309. See, e.g., Jeffrey I. Roth, *Responding to Dissent in Jewish Law: Suppression Versus Self-Restraint*, 40 RUTGERS L. REV. 31, 54–74 (1987); see also PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 159–71 (Richard Nice trans., 1977) (discussing the arsenal of measures that a religious society uses in order to protect its own identity); Michael A. Helfand, *Fighting for the Debtor's Soul: Regulating Religious Commercial Conduct*, 19 GEO. MASON L. REV. 157, 169–88 (2011) (discussing the imposition by religious arbitration tribunals of social sanctions on individuals who refuse to participate in religious arbitration proceedings or to comply with religious arbitration awards); Netanel & Nimmer, *supra* note 46, at 265.

310. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, para. 163–64 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

311. *Id.* at para. 168. In addition, or, when the majority of the people feels wronged, they may also choose to revolt against the oppressive ruler. *Id.* at para. 223, 225, 230. This is a tall order indeed as Locke recognizes that the right of the people to revolt against a ruler who abuses her powers will likely be exercised on rare occasions. *Id.* On Locke's theory of the prerogative see, for example, GROSS & NÍ AOLÁIN, *supra* note 35, at 119–23; CLEMENT FATOVIC, *OUTSIDE THE LAW: EMERGENCY AND EXECUTIVE POWER* 38–82 (2009).

312. Stone, *supra* note 2, at 894.

tradition.”³¹³ While the “ever-present coercive shadow of divine accountability,”³¹⁴ may emphasize fear of external sanctions, meted by either God or men, the element of internal trembling is as, if not more, powerful barrier against deviation from God’s will.³¹⁵ The concept of *yirat shamayim* (literally “fear of Heaven”) is one of the most profound, yet not easily understood or defined religious concepts.³¹⁶ It encompasses both the servile fear of being punished (in this life or the next) for one’s actions and the filial fear of harming or letting down someone we truly love and admire.³¹⁷ It is also the fear that emanates from faith in its purest and highest form as exemplified by Abraham.³¹⁸ In Judaism, *yirat shamayim* is regarded as one of the six continuous mitzvot that are binding on all individuals regardless of place, time, gender and so forth.³¹⁹ It is also considered the “*sine qua non* of systemic halakhic authority.”³²⁰ As Maimonides opines, “no one who lacks *yirat shamayim* may be appointed to any position of authority among Jews, even though his knowledge may be exceptional.”³²¹ Internalizing legal norms may be the strongest way by which law constrains behavior. *Yirat shamayim* is, in turn, the strongest expression of such internalization of norms.

D. Talmud or Talmudim?

Rav Ashi’s explanation for the expropriation of otherwise legally valid marriage by the halakhic sages raises a range of jurisprudential quandaries. It also raises fascinating historical questions about the relationship between the Jewish communities who lived in Jerusalem and Babylon and who compiled the two *Talmudim* (plural form of Talmud, hereinafter “Talmuds”) as well as regarding the variances that these two parallel sources of *halakhah* reveal.

313. *Id.* at 854.

314. *Id.* at 871.

315. See, e.g., Robert Cooter, *The Intrinsic Value of Obeying A Law: Economic Analysis of the Internal Viewpoint*, 75 *FORDHAM L. REV.* 1275, 1281 (2006) (noting religion as one possible source for internal viewpoint); Stephen A. Smith, *Duties, Liabilities, and Damages*, 125 *HARV. L. REV.* 1727, 1733 (2012).

316. ROTH, *supra* note 77, at 146–47 (noting the difficulties of translating the concept into English); EPHRAIM E. URBACH, *THE SAGES: THEIR CONCEPTS AND BELIEFS* 400–19 (1975).

317. John Mallon, *The Primacy of Jesus, the Primacy of Love*, *INSIDE THE VATICAN*, April 2006, available at <http://www.insidethevatican.com/articles/status-ecclesiae/status-ecclesiae-apr-2006.htm>.

318. KIERKEGAARD, *supra* note 301, at 49–56.

319. YITZCHAK BERKOWITZ, *THE SIX CONSTANT MITZVOS* (2009); NORMAN SOLOMON, *HISTORICAL DICTIONARY OF JUDAISM* 429 (2d ed. 2006).

320. ROTH, *supra* note 77, at 145–46.

321. MAIMONIDES, *Mishne Torah*, *Hilkhos Melakhim* 1:7. *Yirat shamayim* is a fundamental character trait that is, to some extent, observable through conduct that at a minimum demonstrates a commitment to the halakhic process. See ROTH, *supra* note 77, at 149.

Rav Ashi's reasoning of *she'lo ka'hogen* (the sages have responded to the husband's improper conduct by acting improperly towards him) appears only in the Babylonian Talmud. It is neither repeated as such nor does it have an equivalent in the Jerusalem Talmud. In fact, in the context of deviation by halakhic authorities from the dictates of the Torah, this is not the only difference between the two canonical texts.

Christine Hayes, focusing on legislation put in place by halakhic authorities,³²² argues that in all cases of rabbinic legislation that is described as contradicting the biblical text, the Babylonian Talmud “neutralize[s] or den[ies] the innovative or contradictory nature of these . . . *taqqanot*,”³²³ whereas the Jerusalem Talmud “is quite prepared to admit that at least some *taqqanot* are indeed innovations that contradict provisions of biblical law.”³²⁴ In contradistinction, Hanina Ben-Menahem argues that the Babylonian Talmud is, on the whole, more accepting of deviations from the law than its Jerusalem counterpart when judges who decide particular cases are responsible for such deviations.³²⁵ While a full exposition of possible causes

322. The concept of separation of powers is not part of Jewish law. Halakhic authorities fulfill both legislative and judicial capacities. Gross, *supra* note 120, at 56 n.24.

323. Ben-Menahem argues that such “neutralization” took place in the post-Talmudic era. See BEN-MENAHÉM, *supra* note 176, at 13. Furthermore, the thrust of his argument is that such neutralization, to the extent it can be identified, pertained only to the Babylonian Talmud since the Jerusalem Talmud mostly denied and rejected ab initio the possibility of extra-legal judicial deviation from the law. See *id.*

324. Hayes, *supra* note 216, at 643–44. The term “*taqqanah*” (plural “*taqqanot*”) refers, generally, to enactments issued by competent halakhic authorities based on their own authority (*d'rabbanan*) rather than on the biblical text (*d'oraita*). Yizhak Gilat argues that the willingness of halakhic authorities to deviate from the dictates of the Torah (even if limited to exceptional cases) was the product of early generations' unclear distinction, in practice if not in theory, between biblical and rabbinic law. GILAT, *supra* note 151, at 201. Possible deviations of the latter from the former could be reformulated and presented as a conflict between two rules that occupied a similar rung on the normative ladder. It was only in later generations that the clear distinction between the two developed fully and with it a significantly stricter view of the rabbis' ability to deviate from the Torah. *Id.* However, this explanation does not shed light on the significant differences between the two Talmuds on this issue.

325. Hanina Ben-Menahem, *The Treatment by the Jerusalem Talmud and the Babylonian Talmud to Deviation From the Law by Judges*, 8 SHENATON HA'MISHPAT HA'IVRI 113–35 (1981) [hereinafter *Deviation From the Law*]; BEN-MENAHÉM, *supra* note 171, at 8 (“The Jerusalem Talmud seems to hold that the judge's power is strictly limited to the application of the halakhah; it does not consider extra-legal considerations as an acceptable justification for judicial decisions. The Babylonian Talmud, on the other hand, is more flexible on this issue; it sometimes accepts the view that the judge's power exceeds the limits of the law.”). For specific examples of cases in which the Babylonian Talmud accepts or acquiesces to extra-legal reasoning while the Jerusalem Talmud denies it see *Id.* at 55–86; see also DAVID KRAEMER, *THE MIND OF THE TALMUD: AN INTELLECTUAL HISTORY OF THE BAVLI* 93–98 (1990). Suzanne Stone summarizes this position as finding that the Babylonian Talmud “is more open [than the Jerusalem Talmud]

for the divergence in attitudes as they are revealed in the two Talmuds is beyond the scope of this Article, there is fertile ground for further inquiry of the possible causes for the distinctions.³²⁶

Hayes notes that whereas the Babylonian Talmud does not contain any example of a *taqqanah* that uproots the law of the Torah that is not subject to a later revision or neutralization, the Jerusalem Talmud shows greater tolerance for occasional *taqqanot* that contradict Torah law.³²⁷ The Jerusalem Talmud's early confidence in rabbinic authority is juxtaposed to a Babylonian Talmud anxiety.³²⁸ Hayes argues that differences between the attitudes of the Jerusalem and Babylonian Talmuds to the question of violating Torah law can be, at least partially, explained by examining the interaction of the Jewish sages in the Land of Israel with Roman legal culture.³²⁹ Unlike their brethren living and working in Babylonia, outside the sphere of influence of the Roman Empire, Jews in the Land of Israel have lived under Roman control since the first century BCE.³³⁰ Thus, Hayes draws parallels between rabbinic *taqqanot* and the edicts issued by Roman Praetors (and provincial governors such as those who ruled Judea) focusing specifically on edicts that acted to contravene Roman civil law.³³¹ Arguing that rabbis working in the Land of Israel were familiar with the Roman edict and its functions,³³² Hayes suggests that, "the many functional parallels . . . between the praetorian edict and enactments issued by Second Temple and tannaitic authorities suggest that the latter . . . may have developed along lines defined by the former."³³³

Ben-Menahem's diametrically opposite claim attributes the differences that he identifies between the Babylonian and Jerusalem Talmuds to the different realities facing the Jewish communities in the Land of Israel and Babylon.³³⁴ The former had to deal, internally, with a number of Jewish sects while also contending with sects and groups, most notably Christians, who

to legal pluralism, anti-foundationalist notions of 'truth,' anti-authoritarian modes of decisionmaking, and overt judicial deviation from black letter law." Stone, *supra* note 2, at 848.

326. Some preliminary thoughts on possible directions for further investigations may be offered here. First, the relationship between the two Jewish communities. Second, in both the Land of Israel and Babylon, the structure of Jewish leadership was diarchic, split between political and religious spheres. The relations (and tensions) within each of the two communities between the halakhic sages, on the one hand, and the respective political leadership echelons, on the other hand, is another fertile ground for further investigation.

327. Hayes, *supra* note 216, at 644.

328. Hayes, *supra* note 217, at 124–25.

329. Hayes, *supra* note 216, at 672–74.

330. *Id.*

331. *Id.* at 669–72.

332. *Id.* at 670–72.

333. *Id.* at 669.

334. BEN-MENAHÉM, *supra* note 176, at 8.

offered an alternative to traditional Judaism and presented a serious challenge to mainstream Jewish leadership and to the traditional legal (and religious) culture.³³⁵ Emphasizing the primacy of the *halakhah* and rejecting any possibility of deviation therefrom had become of the utmost importance to the traditional Jewish leadership.³³⁶ Furthermore, after 70 C.E., with the destruction of the Temple and the collapse of the Bar Kokhba revolt against the Roman Empire, “the Torah and its representatives lost their institutional position and much of their prestige, and they and their successors spent the rest of antiquity struggling to restore them.”³³⁷ In such conditions, the rabbis operating in the Land of Israel had to act cautiously and conservatively and remain close to the biblical text so as to be able to point to it as the source of their authority. Unlike its sister community in the Land of Israel, the Jewish community in Babylon did not meet with similar challenges. The separation between it and the pagan environment surrounding it was much more pronounced. Thus, the Jewish sages operating in Babylon could afford a great degree of flexibility in their treatment of the *halakhah*.³³⁸ Accordingly, Ben-Menahem argues that the Babylonian Talmud demonstrates greater willingness to acknowledge legal pluralism and greater receptivity towards deviations by the rabbis from the law of the Torah, than does the Jerusalem Talmud.³³⁹

CONCLUSION

The Torah does not contain an equivalent to the constitutional power to amend that is contained in Article V of the Constitution. Indeed, the Torah actively prohibits any such amendment. At the same time, applying the

335. See, e.g., Judah Goldin, *On the Account of the Banning of R. Eliezer ben Hyrkanus: An Analysis and Proposal*, 16–17 J. ANCIENT NEAR E. SOC’Y 85, 91–92 (1984–85); Stone, *supra* note 2, at 857 (arguing that the story of the Oven of Akhnai reflects the critical role for centralized authority, unifying the law and “fixing behavioral norms”).

336. Similar manifestation of “hankering down” in the face of internal challenges have been (and remain) a staple of Jewish history. Thus, for example, faced with the challenges of the Enlightenment and the rise of the Reform movement in Germany, rabbinic cautious attitude to legal innovation and amendment “had hardened into a rigidly conservative dogmatism—nicely reflected in Moses Sofer’s famous dictum ‘Anything new is everywhere forbidden by the Torah.’” WALZER ET AL., *supra* note 59, at 251; see also LEVI YITZHAK HA-YERUSHALMI, *THE RULING KIPPAH* (1997).

337. SETH SCHWARTZ, *IMPERIALISM AND JEWISH SOCIETY: 200 B.C.E. TO 640 C.E.*, at 104 (2004).

338. *Deviation From the Law*, *supra* note 325. Similarly, Walzer et al. note that “Sephardi rabbis, who never had to confront either enlightenment or reform, were much more flexible in responding to the problems of their own communities.” WALZER ET AL., *supra* note 59, at 251–52.

339. BEN-MENAHAM, *supra* note 168, at 86–98.

Torah's principles and rules to everyday life, adapting them to the realities of social, economic and political change, and complementing them as needed leave much room for human interpretation and elaboration, application and administration of the law. Indeed, the very result of the sanctification of the biblical text has been the source of a sweeping interpretative authority exercised by the halakhic sages. Yet, even such broad and exclusive authority was deemed on occasion to be insufficient, and the challenges confronting the classical hermeneutical system of Jewish law had been resolved by other, innovative, creative and at times truly radical ideas and mechanisms. One attempt to address the challenge of amending divine law was the exercise by communal leaders and rabbinical courts of a body of pragmatic system of law through the utilization of exigency jurisdiction. In accordance with that jurisdiction legislation was issued and judicial decisions handed down that deviated from the biblical rules and norms. Under the banner of exigency jurisdiction, halakhic authorities addressed situations when adherence to the Torah was deemed injurious to the overall effort to ensure that the laws are obeyed as a matter of general practice. Acting in possible contravention of a particular normative dictate was seen as a means, regrettable but necessary, to ensure the long-term maintenance of the legal system as a whole.

If exigency jurisdiction was used in irregular circumstances, rabbinic legislation and judicial decision-making that deviate from the Torah in "ordinary" cases are truly rare and, for the most part, concealed. Yet they exist and at times they go as far as overruling permanently the dictates of the Torah and thus amending the divine constitution. For halakhic authorities who accept the divine authority of the Torah, violating its commandments—even in extreme circumstances—has been a bold move to make, and one fraught with legal, cultural, religious and psychological difficulties. In many instances, when halakhic authorities have legislated or made judicial decisions that appeared to be in violation of the biblical commandments, explanations have been put forward to reconcile the Torah with the actions of the rabbis. Alternatively, justifications or excuses were provided when a conflict could not be explained away. However, in at least some cases legal sources acknowledged the possibility that halakhic authorities had accepted, albeit tacitly, the need to act extralegally in contravention of the Torah.

The legal basis for the sages' ability to deviate from and amend (including by violating) the Torah is not always clear. At least in some cases the ambiguity about the legal foundation of such radical authority or power may be purposeful. Some halakhic authorities identify the source of their authority as present within the constitutional framework—the Torah—itsself. Yet others seem to recognize that their actions had been devoid of such legal authority. Rather than invoking their widely-recognized broad interpretative powers

and attempt to make the claim that their actions and decisions had been in accordance with the dictates of the Torah, they accept, albeit tacitly, the need to act in contravention of the Torah. Significantly, rather than argue for legal *authority* to act as they did, those sages base their actions on notions of extralegal *power*.