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# The Torah and Self-Defense.pdf

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# The Torah and Self-Defense

David B. Kopel\*

## I. Introduction

The first five books of the Bible are sometimes called the Pentateuch. Jews call them the *Torah*, which means “teaching” or “instruction.”<sup>1</sup> The *Torah* is by far the most important of Jewish scriptures. The Jewish Bible contains the same books as what Christians call the “Old Testament.” Accordingly, the *Torah* is the foundation of Christian scriptures.

This article surveys the *Torah*’s teachings on the right and the duty to defend oneself and others. Part II examines the *Book of Genesis*, in particular, the “Jewish natural law” which was given to Noah, and the story of Abraham, the patriarch of the Jewish people. Part III studies Moses and the Exodus of the Hebrew people from Egypt. Part IV looks at *Torah* laws regarding home defense against burglars, and the duty of bystanders to rescue third parties who are being attacked by a “pursuer.” The examination of the *Torah* laws includes analysis of the extensive Jewish scholarly commentary on the *Torah*. Part V turns to the Sixth Commandment, whose language “Thou shalt not kill,” has been frequently, but implausibly, misconstrued as a prohibition on self-defense. The article concludes that the *Torah* clearly creates a right and a duty to defend oneself and others.<sup>2</sup>

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1. “Torah” is sometimes rendered as “law,” but this is a mistranslation.

2. One topic which this article does not cover is the historical accuracy of the *Torah*: was there really a patriarch named Abraham, did Moses and the Hebrews really escape from Egypt during a great wind which parted the waters, and so forth.

## II. Genesis

### A. *In the Image of God*

The first legal code in the Bible was given to Noah and his family after the Great Flood wiped out the entire human race, except for the people on Noah's Ark. The laws are sometimes called "the Noahide commandments," "Jewish natural law" or the "Rainbow Commandments." Unlike laws which are given later in the *Torah*, the Rainbow Commandments are considered applicable to God's relationship with all of humanity, not just with the Hebrews.

God forbade murder, and required the death penalty in cases of murder: "Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man."<sup>3</sup> The rule helps explain why human life is sacred: because man is made in God's image.<sup>4</sup> The concept of *imago Dei* would become a foundation for the development of human rights. Made in God's image, all humans necessarily have an inherent dignity.<sup>5</sup>

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Within the Judeo-Christian tradition, the *Torah* is holy scripture, which means, at the very least, every story in the Bible is in some way sacred, and there is something to be learned from studying the story. Today, most Jews and Christians do not believe in the Adam and Eve stories as literal history (i.e., about 6,000 years ago God created the first woman by removing a rib from the first man). But the story may still be worth studying to consider the relationship between humans and God, or how the whole Earth is a divine creation, or how humans have a duty to use the earth as wise caretakers. Even if some of the stories are symbolic, they can have lessons to teach. When re-telling a story which may be considered to be symbolic rather than literal history, I do not bother to continually provide caveats that the story may not be literally true. I leave it up to each reader to decide between symbolic and literal readings; the difference is irrelevant insofar as we are looking for ethical lessons about self-defense. For people who do not believe in a Judeo-Christian religion, understanding the *Torah* is important because it has been a foundation of Western thought.

Except as otherwise noted, this article uses the King James Version of the Bible ("KJV"), which is by far the most influential translation in the English-speaking world, and which is also more successful than more recent translations in evoking some of the poetic style of the original Hebrew.

3. *Genesis* 9:6. The great Jewish legal scholar Philo of Alexandria explained murder as a form of:

sacrilege as having plundered the most sacred of all possessions of God; for what is a more venerable or more sublime offering to God than man? . . . man, who is the most excellent of all animals, in respect of that predominant part that is in him, namely, his soul, is also most closely related to the heaven [and] . . . to the Father of the world, inasmuch as he has received mind . . .

PHILO OF ALEXANDRIA, *The Decalogue*, in *THE WORKS OF PHILO* 529-30 (C.D. Yonge trans., Hendrickson Pub., 1993).

4. *See also Genesis* 1:26-27: "And God said, Let us make man in our image, after our likeness . . . So God created man in his own image, in the image of God created he him; male and female created he them."

5. The *imago Dei* is restated in the Apocrypha, later Jewish writings which are

According to *Genesis*, the inherent dignity of man is the reason why murder is forbidden, and why the death penalty is required in the case of murder. Animals are not made in God's image, and there is no penalty for killing them.<sup>6</sup> Humans are made in God's image, and the murder of a human therefore requires the supreme penalty.

### *B. Abraham*

Many more generations passed, the tower of Babel rose and fell, and then God spoke to a man named Abram, told him that God would bless him, and ordered him to leave his home and go to the land of Canaan. Abram did so, and moved to Canaan (modern Israel) with his wife Sarai and his nephew Lot.

Lot settled in the town of Sodom.<sup>7</sup> The kingdoms of Sodom and Gomorrah were overrun by invaders from Mesopotamia. Lot, along with other townspeople, was carried away as a captive.

One captive escaped, "and told Abram the Hebrew"<sup>8</sup> what had happened. Although Lot had previously taken the best available land and left Abram to fend for himself, Abram immediately began a rescue mission. He "armed his trained servants," all 318 of them.<sup>9</sup> He procured allies from three tiny kingdoms by the Dead Sea, where Abram and Lot had been living. Abram then led the combined forces in pursuit of Lot, and caught up with the captors near the town of Dan, which is near Mount Hermon, in the Golan Heights.

Abram divided his forces into groups, launched a night attack, "and smote them."<sup>10</sup> The defeated captors attempted to flee with their booty and prisoners, but Abram pursued them "unto Hobah,"<sup>11</sup> near Damascus, and liberated all the captives and the stolen treasure.

The nearby kings went out to meet Abram after his great victory. Among these kings was "Melchizedek, king of Salem," who also "was the priest of the most high God."<sup>12</sup> Melchizedek's name means "king of righteousness" and the name of his kingdom of "Salem" derives from the

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canonical to Catholics, Orthodox, and some other Christians. "[F]or God created man for incorruption, and made him in the image of his own eternity." *Wisdom of Solomon* 2:23, Revised Standard Version ("RSV"). "He endowed them with strength like his own, and made them in his own image." *Sirach* 17:3 (RSV).

6. Indeed, God commanded man to eat meat: "Every moving thing that liveth shall be meat for you: even as the green herb have I given you all things." *Genesis* 14:13.

7. The story took place before Sodom and Gomorrah were destroyed by God.

8. *Id.*

9. *Genesis* 14:14.

10. *Genesis* 14:15.

11. *Id.*

12. *Genesis* 14:18.

same root as the Hebrew word “shalom.”<sup>13</sup>

Many biblical interpreters have called Melchizedek an antetype of Jesus.<sup>14</sup> An antetype is a prior person or event who shares important characteristics with the main person or event. For example, some Christians see Moses’ sister, Miriam, as an antetype of the Virgin Mary, or Noah’s Ark as an antetype of baptism. Many commentators have studied the prophet Jeremiah as an antetype of Jesus, and the Jewish liberation at Exodus as an antetype of the liberation of all humanity in the Resurrection.

Melchizedek blessed Abram, and also said “blessed be the most high God which hath delivered thine enemies into thy hand.”<sup>15</sup> Abram gave a tithe (one-tenth) of his property to Melchizedek the priest.<sup>16</sup>

When the other kings tried to bargain with Abram for the spoils of victory, Abram asked only that his allied kingdoms receive their fair share. For himself and his household and fighters, he asked only for what they had eaten.<sup>17</sup>

In every respect, Abram was the model of the ideal Jewish fighter: he fought to save the innocent, not for material gain. He was a bold and successful commander, who caught and destroyed enemies. He was a good diplomat who built an alliance with other victims of the aggressors. A great priest blessed him for his good works of using violence to rescue innocents.<sup>18</sup>

Thousands of years later, after the New England settlers had won King Philip’s War in 1675-76, minister Samuel Nowell preached a sermon on Artillery Day, the day that new officers of the militia artillery were elected. His sermon set forth the main lines of New England militia preaching that would be followed into the American Revolution. Basing the sermon on the text “he armed his trained servants,” Nowell (and

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13. Literally, “shalom” means “completeness,” which is taken to signify “peace.”

14. See *Hebrews* 6:20-7:3, 7:11-18 (comparing Jesus to Melchizedek; priesthood of Melchizedek is higher than the Levitical priesthood).

15. *Genesis* 14:20.

16. *Id.*

17. *Genesis* 14:15; CHAIM HERZOG & MORDECHAI GICHON, *BATTLES OF THE BIBLE* 35-36 (Greenhill Books, 2002) (1978). The Biblical text refers to Abram’s “servants,” but the Hebrew term *n’Aarim* means literally “youths,” and connotes “elite corps.” ETZ HAYIM: TORAH AND COMMENTARY 82 (David L. Lieber trans., Jewish Publ’n Soc’y 2001) (the *Etz Hayim* is a Hebrew and English text of the Pentateuch, along with extensive commentary, produced by the Rabbinical Assembly of the United Synagogue of Conservative Judaism).

18. Not every act of an Old Testament figure is a model for imitation. For example, Abraham twice told strangers that his wife Sarai was really his sister, and urged the strangers to sleep with Sarai. *Genesis* 12:11-20, 20:1-18. The Biblical text is very clear that the rescue of Lot was admirable; it was the rescue of Lot that led Melchizedek to bless Abram.

countless other New England preachers) explained that God required people to defend themselves when unjustly attacked, that defensive training was a sacred obligation, and that God was a “Man of War” who would always lead them to victory if they fulfilled their duty to fight courageously.<sup>19</sup>

In the violent rescue story of chapter 14 of *Genesis*, the word “Hebrew” is used for the first time;<sup>20</sup> perhaps the introduction of the word shows how Abram was becoming the father of a nation. After receiving Melchizedek’s blessing in chapter 14, Abram then received God’s blessing in the next chapter. The chapter begins: “After these things the word of the Lord came unto Abram in a vision, saying, ‘Fear not, Abram: I am thy shield and thy exceeding great reward.’” God made a covenant with Abram and changed his name to “Abraham.” God promised that Abraham’s descendants would be as numberless as the stars in the sky, gave the land of Canaan to Abraham and his descendents, and gave Abraham the great treasure for which Abraham had yearned—a son named Isaac, born to Abraham’s aged and barren wife Sarai (who was renamed Sarah). A few generations after Abraham, his descendents settled in Egypt, where they were welcomed.

All three of the major monotheistic religions claim descent from Abraham, either spiritually or by blood. Collectively, Jews, Christians, and Muslims are sometimes called “the children of Abraham.”

### III. Exodus

By the beginning of the next book of the Bible, *Exodus*, the Hebrews had been enslaved in Egypt for centuries.<sup>21</sup> Afraid that the Hebrew slaves were reproducing too fast, the Pharaoh ordered the murder of all Hebrew baby boys, although the plan was thwarted by righteous midwives. One Hebrew baby boy was saved when his mother floated him down the Nile River in a basket, and he was discovered by

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19. HARRY S. STOUT, *THE NEW ENGLAND SOUL: PREACHING AND RELIGIOUS CULTURE IN COLONIAL NEW ENGLAND* 83-85 (Oxford Univ. Press 1986); MARIE L. AHERN, *THE RHETORIC OF WAR: TRAINING DAY, THE MILITIA, AND THE MILITARY SERMON* 64 (Greenwood Press 1989) (1678 sermon describing Abram’s trained servants as an early form of militia; like the Massachusetts militia, they served God by defending their community against attackers).

20. *Genesis* 14:13.

21. The first Hebrew to settle in Egypt, Abraham’s grandson Joseph, became the chief advisor to the Pharaoh. Joseph convinced the Pharaoh to build up grain reserves before a seven-year famine struck Egypt. During the famine, Joseph advised the Pharaoh to trade grain to the starving Egyptians in exchange for title to their land. So the Egyptians became, in effect, serfs or sharecroppers on their own land. *Genesis* 37-50. In light of this history, Egyptian resentment of the Hebrews was understandable, and the slavery of the Hebrews amounted to collective punishment for clever exploitation of the Egyptian farmers.

an Egyptian princess, and raised as an Egyptian prince, unaware of his true identity.

Grown up, Prince Moses “went out unto his people, and looked on their burdens: and he saw an Egyptian beating a Hebrew, one of his people. [Moses] looked this way and that, seeing no man, he struck down the Egyptian, and hid him in the sand.”

The next day, Moses again went out to the Hebrew slaves and saw two of them fighting. Moses rebuked the one who had started the trouble, saying, “Why do you strike your companion?”

The trouble-making Hebrew slave retorted: “Who made you a prince and a judge over us? Do you mean to kill me, as you killed the Egyptian?”

Pharaoh learned what Moses had done, and sought to slay him, but Moses fled into the desert to the land of Midian, in the Sinai Peninsula.<sup>22</sup> There, Moses came upon a well, where the seven daughters of the priest of Midian were watering their flock. Then some “shepherds came and drove [the daughters of Midian] away, but Moses stood up and saved them, and watered their flock.”<sup>23</sup>

Moses married one of the daughters<sup>24</sup> and one day, when he was tending the flock on a mountain, God appeared to Moses in a burning bush and commissioned Moses to lead the Hebrews out of bondage in Egypt.<sup>25</sup> In Jewish legend, Moses arrived at the place of the burning bush because he was searching for a lost lamb.

Thus, the question posed by the quarrelsome Hebrew slave to Moses, “Who made thee a prince and a judge over us?”<sup>26</sup> received a quick answer: God appointed Moses to rule the Hebrews.

Between the infancy narrative of Moses found in the river, and the appointment of Moses as deliverer of the Hebrew slaves, the only details supplied about Moses are the stories just described. There is no extraneous information about him, such as what he looked like.

Moses, an Egyptian prince, felt compassion for people who were weaker than him, and he intervened immediately to protect them. While the first intervention was of course very violent, resulting in a death, the details of Moses rescuing the daughters of Midian are less clear. It is possible that Moses “helped” the daughters by standing up and reasoning with the cruel shepherds, convincing them to leave the seven daughters alone.<sup>27</sup> It is also plausible that Moses fought or threatened to fight the

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22. *Exodus* 2:11-14.

23. *Exodus* 2:15-17.

24. *Exodus* 2:21.

25. *Exodus* 3.

26. *Exodus* 2:14.

27. For a story based on such an interpretation, see PHILO OF ALEXANDRIA, *On the*

abusive shepherds, and that is why they left. As an Egyptian prince, Moses would have been trained in combat for many years. By Jewish legend, Moses led a great military campaign in Ethiopia while he was a prince.<sup>28</sup>

Moses' confrontation with the evil shepherds has been universally praised by commentators. The slaying of the man abusing the Hebrew slave has received mixed commentary. Some writers have criticized Moses for using excessive force, for violating the criminal law of Egypt, and for not using his power as a prince to resolve the problem in a more deliberate and non-violent manner. The majority of writers, including the author of *The Acts of the Apostles* (a New Testament book detailing the first decades after the resurrection of Jesus), praise Moses. The *Acts* author explained that Moses "seeing one of [his Hebrew brethren] suffer wrong, he defended him, and avenged him that was oppressed, and smote the Egyptian."<sup>29</sup> The contentious Hebrew slave who criticized Moses, rather than recognizing him as a deliverer, was analyzed as an antetype of the Hebrew nation's frequent refusal to trust and follow Moses, and of the Hebrews' bad treatment of later prophets, eventually including Jesus.<sup>30</sup>

Even without drawing a connection between Moses and Jesus, we can read into the story an antetype of the problems that the Jewish nation would later face: some Jews quarreled with other Jews, or even fought them, instead of uniting as Jews against deadly oppressors and other perils.

Moses' slaying of the cruel Egyptian slave master also prefigured the tenth plague, in which God slew all the first-born sons in Egypt.

After the Egyptians suffered ten plagues because Pharaoh refused Moses' repeated commands to "let my people go," the Hebrew slaves

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*Life of Moses, I*, in THE WORKS OF PHILO, *supra* note 3, at 464.

28. E.g., FLAVIUS JOSEPHUS, *The Antiquities of the Jews* in JOSEPHUS: THE COMPLETE WORKS 80-82 (William Houston & Thomas Nelson trans., 1998). The Jewish historian Josephus was highly revered by the radical Protestant reformers. If a New England Puritan owned two books, the second was likely to be Josephus. Ben Zion Wacholder, *Josephus, Flavius*, in THE OXFORD COMPANION TO THE BIBLE 384 (Bruce M. Metzger & Michael D. Coogan, eds., 1993). The Jewish legends of Moses supplied much of the plot for the movie *The Ten Commandments*, starring Charlton Heston.

29. *Acts* 7:24.

30. *Acts* 7:24-28. See also PHILO OF ALEXANDRIA, *On the Life of Moses, I*, in THE WORKS OF PHILO, *supra* note 3, at 463 (writing that the overseer was a horrible abuser who had killed people by beating them to death, and that "Moses slew, thinking the deed a pious action; and, indeed, it was a pious action to destroy one who only lived for the destruction of others."). For critical commentary, see Augustine, *Reply to Faustus the Manichaean (Contra Faustum Manichaeum)* (400 A.D.), book 22, para. 70, available at [www.ccel.org/fathers2/NPNF1-04/npnf1-04-35.htm#P2017\\_1188097](http://www.ccel.org/fathers2/NPNF1-04/npnf1-04-35.htm#P2017_1188097) ("it was wrong for one who had no legal authority to kill the man, even though he was a bad character, besides being the aggressor").



were allowed to leave. Before departing Egypt, the Hebrews were allowed to take whatever they wanted from the Egyptians, because God made the Egyptians favorably disposed to the Hebrews.<sup>31</sup> The Hebrew slaves thus received partial reparations for hundreds of years of slavery.

“And God took the people toward the way of the Wilderness to the Sea of Reeds. And the Children of Israel were armed when they went up from Egypt.”<sup>32</sup> Presumably the weapons were obtained from the Egyptians.<sup>33</sup> For most of human history, a distinctive feature of a free man is that he possesses arms, and a distinctive feature of a slave is that he does not, so the text shows that the Hebrews were marching out triumphantly as a free people, not running away like slaves.

Then, Pharaoh changed his mind, and sent his army in pursuit, but the army was drowned in the waters of the Sea of Reeds. (Most modern scholars agree that “Sea of Reeds” is the proper translation from the Hebrew, rather than the King James Version’s “Red Sea.” The use of “Red Sea” can be traced to the Septuagint, a Greek version of the Old Testament written in the third century B.C.)

According to Rabbienu Bachya, a fourteenth-century author who wrote on Jewish ethics, the story of the escape from Egypt illustrates the appropriate Jewish attitude toward weapons: people must use every practical option, including self-defense, before expecting a miracle.<sup>34</sup>

31. *Exodus* 12:35-36.

32. *Exodus* 13:18. Here, I quote a standard Jewish Bible translation. RASHI, THE TORAH: WITH RASHI’S COMMENTARY TRANSLATED, ANNOTATED, AND ELUCIDATED 145 (Yisrael Isser Zvi Herczeg et al., eds, Mesorah Pubs., 4th ed. 1997). Rashi is the foremost of all Jewish Bible commentators.

Instead of “armed,” the KJV uses the word “harnessed” (a word typically used for horses) as an awkward way of expressing that the Hebrews marched out in military order. Other translations better express the passage’s sense that the Hebrews marched out free in glorious battle array: “And the people of Israel went up . . . equipped for battle” (RSV); “and the children of Israel went up armed” (American Standard Version); “And the sons of Israel went up in military order” (American Baptist Publication Society). The Hebrew word is *chamushim*, probably related to the Egyptian *chams*, meaning “lance.” THE PENTATEUCH AND HAFTORAHS, 265 n.18 (Joseph H. Hertz, Chief Rabbi of the British Empire ed., Soncino Press 1965).

33. This is the view of the foremost Jewish Bible commentator of all time, Rashi. RASHI, *supra* note 32, at 145 (explaining that *Exodus* 13:18 was written so that readers would not wonder where the Israelites got the arms with which they fought the Amalekites a short while later). A second analysis sometimes attributed to Rashi is that the word means “divided by five,” so that eighty percent of the Hebrew slaves stayed in Israel and perished. This alleged Rashi text, however, is self-contradictory, since the same text later states (as does the authentic Rashi) that the verse explains where the Hebrews got the arms for the battles with Amalekites. 1 A.J. ROSENBERG, THE BOOK OF EXODUS: A NEW ENGLISH TRANSLATION OF THE TEXT, RASHI, AND A COMMENTARY DIGEST 189-90 n. 18 (Judaica Press 1995).

34. 2 ELIE MUNK, THE CALL OF THE TORAH: AN ANTHOLOGY OF INTERPRETATION AND COMMENTARY ON THE FIVE BOOKS OF MOSES 164 (Yitzchok Kirzner ed.; E.S. Mazer transl., Mesorah Pubs. 1995).

The Hebrew liberation from Egypt, where the Pharaoh demanded to be worshipped as a god, was more than the end of physical slavery. It marked the beginning of political self-rule by the Hebrews and their spiritual liberation. Eric Voegelin, a historian of philosophy, wrote that the physical exodus was also a “spiritual exodus from the cosmological form of imperial rule. The sonship of god is transferred from the pharaoh to the people of Israel in immediate existence under Yahweh.”<sup>35</sup> Hence, a person’s life belongs to God, not to the government.

At the annual Passover Seder, Jewish families say:

In every generation, each person must look upon himself or herself as if he or she personally had come out of Egypt. As the *Book of Exodus* says, “You shall tell your children on that day: it is because of what the Eternal One did for me when I went forth from Egypt.” For it was not our fathers and mothers alone whom the Holy One redeemed. We too were redeemed along with them.<sup>36</sup>

After the Hebrews escaped across the sea, they sang, “The Lord is a man of war: the Lord is his name. Pharaoh’s chariots and his host hath he cast into the sea: his chosen captains . . . are drowned in the Red Sea.”<sup>37</sup> This passage would become a favorite text of New England preachers during colonial days and the American Revolution.

At the Exodus, God’s deliverance of the Hebrews was accomplished without human weapons. Yet the fact that God chose to use his own weapons (such as weather, disease, lice, locusts, and darkness) against the Egyptians does not mean that God did not want the Hebrews to use human weapons against their enemies. Indeed, God made sure that the Hebrews could take arms from the Egyptians, and under God’s direction, the Hebrews became formidable fighters.

In the “Wilderness” (the Sinai Desert), the Hebrews were attacked by the Amalekites, a tribe of desert bandits, who fell upon the Israeli rear, slaughtering feeble, sick, and hungry stragglers.<sup>38</sup> While the battle raged, Moses stood at the top of a hill. “And it came to pass, when Moses held up his hand, that Israel prevailed: and when he let down his hand, Amalek prevailed.” Moses was getting too tired to hold up his hands, so Moses’ brother and brother-in-law helped him keep his arms up. Then, the Israelite general “Joshua discomfited Amalek and his people with the edge of the sword.” God announced that there would always be enmity between the Israelites and the Amalekites, and that the

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35. ERIC VOEGELIN, *THE ECUMENIC AGE* 26 (Louisiana State Univ. Press 1974).

36. The wording varies from one Haggadah to another. The more standard versions refer to “fathers” rather than “fathers and mothers.”

37. *Exodus* 15:3-4.

38. *Deuteronomy* 25:17-18.

latter would eventually be obliterated.<sup>39</sup>

Eventually, the Israelites made their way to the eastern side of the Jordan River, in what is today the southwestern portion of the nation of Jordan. There, the Israelites defeated the Amorites, after Sihon, king of the Amorites, refused to allow the Israelites to pass through peacefully. The kingdom of Og, which was allied with the Amorites, attacked the Israelites, but was defeated.<sup>40</sup>

Degraded by hundreds of years of slavery, the Israelites struggled with freedom, and frequently complained to Moses that they would be better off to still be slaves in Egypt.<sup>41</sup> They had not developed the mature habits of self-discipline and self-control that grow best in an atmosphere of freedom. Slavery encourages the slave to look only to the authority of the master, rather than to develop the slave's own moral faculties.

The Israelites often lapsed into idolatrous practices. God decided that the Hebrews should wander for forty years in the desert so that a new generation, born in freedom, could grow up and be fit to receive the promised land—and, it turned out, bold enough to fight for the promised land against difficult odds.

#### IV. The Mosaic Law

The second half of the *Book of Exodus*, and much of the remaining books of the Pentateuch (*Leviticus*, *Numbers*, and *Deuteronomy*) are given over to a detailed legal code involving religious ritual, criminal law, civil law, and other matters of community governance.

In the *Book of Leviticus*, God promised the Jews that if they kept His law, they would vanquish their enemies by force:

And I will give you peace in the land, and ye shall lie down, and none shall make you afraid: and I will rid evil beasts out of the land, neither shall the sword go through your land. And ye shall chase your enemies, and they shall fall before you by the sword. And five of you shall chase an hundred, and an hundred of you shall put ten thousand to flight: and your enemies shall fall before you by the sword.<sup>42</sup>

The law quite explicitly authorized personal and family self-defense against criminal attack. The *Book of Exodus* absolved a homeowner who killed a burglar at night: "If a thief be found breaking up, and be smitten

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39. *Exodus* 17:8-16.

40. *Numbers* 21:21-35.

41. EDWARD J. WHITE, *THE LAW IN SCRIPTURES* 389 (Union, N.J.: The Lawbook Exchange 2000) (1935).

42. *Numbers* 21:21-35.

that he die, there shall be no blood shed for him.”<sup>43</sup> The Modern Language Bible renders the verse: “When a burglar is caught breaking in, and is fatally beaten, there shall be no charge of manslaughter.” The traditional Hebrew translation refers to a thief who is found “while tunneling.” (Since homes were made of clay walls, a burglar might enter by tunneling through a wall.)

Under the Mosaic law, the nearest relative of a person who was murdered was obliged to kill the murderer, providing blood restitution for the death of the innocent. But when a nocturnal burglar was killed in the act, there was no wrong-doing. Thus, his relatives had no right of restitution against the home-owner.<sup>44</sup>

The next verse stated that “If the sun be risen upon him, there shall be blood shed for him.” The passage seems to prohibit use of deadly force against a daytime burglar. The common law of England preserved the night/day distinction: one could kill a night-time burglar, but not a daytime one.

All the Hebrew scriptures have been the subject of extensive commentary by a long line of rabbinic scholars. Various scholars have drawn slightly different lessons about self-defense from *Exodus* 22:2-3, but they have all agreed with the core principle that self-defense is permissible in cases of necessity.

#### A. *Philo of Alexandria*

One of the greatest Jewish legal scholars of antiquity was Philo of Alexandria (approx. 20 B.C.–A.D. 50), who wrote about the Jewish law in Alexandria, Egypt, during the period when Egypt and Israel were both under Roman rule. Much of Philo’s treatise aimed to show that Jewish law from the Bible was consistent with Roman law. Roman law of the time allowed the killing of a thief only in self-defense, and required that the victim first make a cry for help (to summon neighbors) before using deadly force.

Philo argued that the Mosaic provision conformed to Roman law, because every night burglar was a potential murderer. The burglar would be armed, at the least, with iron house-breaking tools, which could be used as weapons. Because assistance from the police or neighbors would be unlikely at night-time, the victim was allowed immediate resort to

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43. *Exodus* 22:2.

44. WHITE, *supra* note 41, at 77. If the deceased were not a real burglar, but someone who was mistaken for a burglar, there was no criminal offense. SAMUEL MENDELSON, *THE CRIMINAL JURISPRUDENCE OF THE ANCIENT HEBREWS* 33 (Herman Press 1968).

deadly force.<sup>45</sup> Although neither Philo nor Exodus were explicit about what would happen in a day-time burglary, modern scholarship about practices at Philo's time suggests that use of deadly force would be legal if a victim in mortal peril called for help and none arrived.<sup>46</sup>

Like the Romans, Philo viewed all forms of theft as merely variations on a single type of attack on society: an assault on the right of ownership of private property. Thus, a petty thief was no different in principle from a tyrant who stole the resources of his nation, or a nation which plundered another nation.<sup>47</sup> The great Christian theologian, Augustine of Hippo, made a similar point, asking: "[If justice be taken away] . . . what are [governments] but [great bands of robbers]?"<sup>48</sup>

Philo also thought it foolish to blame arms rather than criminals for crime:

it is a piece of folly to be angry with the servants rather than those who are the causes of such folly . . . [unless] it can be called fitting to let men go who have committed murder with the sword, and to content one's self with throwing away the sword; and unless, on the contrary, one ought not to give honour to those who have shown preeminent valor in war, but to the inanimate coats of armor . . . .<sup>49</sup>

### B. *The Oral Torah*

Besides giving Moses the Written *Torah*, God also gave Moses the Oral *Torah*, according to Jewish tradition. Around A.D. 200, long after

45. PHILO OF ALEXANDRIA, *The Special Laws, II*, in THE WORKS OF PHILO, *supra* note 3 at 616-17 (concerning housebreakers). See also ERWIN R. GOODENOUGH, THE JURISPRUDENCE OF THE JEWISH COURTS OF EGYPT: LEGAL ADMINISTRATION BY THE JEWS UNDER THE EARLY ROMAN EMPIRE AS DESCRIBED BY PHILO JUDEAUS 154-55, 231-32 (The Lawbook Exchange 2002) (1929). The Roman law stated:

12. If a thief commits a theft by night, if the owner kills the thief, the thief shall be killed lawfully.

13. By daylight . . . if a thief defends himself with a weapon . . . and the owner shall shout [then the thief may be killed lawfully].

14. In the case of all other . . . thieves caught in the act freemen shall be scourged and shall be adjudged as bondsmen to the person against whom the theft has been committed provided that they have done this by daylight and have not defended themselves with a weapon . . . .

THE TWELVE TABLES, Table 8, "Torts or Delicts," items 12-14, at [http://www.yale.edu/lawweb/avalon/medieval/twelve\\_tables.htm](http://www.yale.edu/lawweb/avalon/medieval/twelve_tables.htm) (Yale Law Sch. Avalon Project ed., 2004).

46. GOODENOUGH, *supra* note 45, at 154-55, 231-32.

47. *Id.* at 230-31.

48. AUGUSTINE, CONCERNING THE CITY OF GOD AGAINST THE PAGANS 139 (Henry Bettenson trans., Penguin, book 4 1984) (1467).

49. PHILO OF ALEXANDRIA, *The Special Laws, II*, in THE WORKS OF PHILO, *supra* note 3, at 591. Philo was arguing in favor of enforcing the Mosaic death penalty against children who beat their parents, and against the policy of merely cutting off the offender's hand.

the Hebrew scriptures were written, Rabbi Yehuda Hanasi (Judah the Prince) transcribed the Oral Law in the *Mishneh* (Hebrew for “compilation”) and then the *Gemarah* or *Gemara* (Aramaic for “compilation”). He wrote down the Oral *Torah* (sometimes called the Oral Law) because Roman persecutions of Jews were making it much more difficult to transmit the Oral *Torah* through diligent study.

The *Talmud* combines excerpts from the *Mishneh* and the *Gemarah*, along with a multi-layered commentary that includes, as the Oral *Torah* did, commentary on the written *Torah*, and commentary upon commentary added by various rabbis over the centuries. The Jerusalem *Talmud* was compiled around A.D. 350 to 400, and the Babylonian *Talmud* (written by the large Jewish community, which lived in what is now Iraq until the late twentieth century), was written about a century afterward. The Vilna (Lithuania) *Talmud* was written later; modern editions of the Vilna *Talmud*, with additional commentary from modern scholars, are the most authoritative and comprehensive Talmuds yet produced.<sup>50</sup>

Regarding the passages in *Exodus*, the Babylonian *Talmud* explained:

What is reason for the law of breaking in? Because it is certain that no man is inactive where his property is concerned; therefore this one [the thief] must have reasoned, “If I go there, he [the owner] will oppose me and prevent me; but if he does, I will kill him.” Hence the Torah decreed “If he come to slay thee, forestall by slaying him.”<sup>51</sup>

This last sentence is sometimes translated as “If someone comes to kill you, rise up and kill him first.”<sup>52</sup>

This final sentence does not delegate discretion; it is a positive command. A Jew has a *duty* to use deadly force to defend herself against murderous attack.

The *Talmud* also imposes an affirmative duty on bystanders to kill if necessary to prevent a murder, the rape of a betrothed woman, or pederasty.<sup>53</sup> Commentators have agreed that a person is required even to hire a rescuer if necessary to save the victim from the “pursuer” (the

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50. 2 TALMUD BAVLI; THE GEMARA: THE CLASSIC VILNA EDITION WITH AN ANNOTATED, INTERPRETIVE ELUCIDATION, AS AN AID TO TALMUD STUDY. TRACTATE SANHEDRIN (Michael Wiener & Asher Dicker elucidators, Mesorah Pubs., 2d ed. 2002) [hereinafter cited as VILNA TALMUD]. The Jerusalem Talmud contains material about living in Israel which does not appear in the other Talmuds. When Jewish scholars cite a Talmud, the rule is that the citation is to the Babylonian Talmud, unless otherwise noted.

51. HEBREW-ENGLISH EDITION OF THE BABYLONIAN TALMUD: SANHEDRIN, 72a (I. Epstein ed. Sonsino Press 1994).

52. BABYLONIAN TALMUD: *Sanhedrin*, folio 72a.

53. VILNA TALMUD, *Tractate Sanhedrin*, folio 73a.

rodef).<sup>54</sup> Likewise, “if one sees a wild beast ravaging [a fellow] or bandits coming to attack him . . . he is obligated to save [the fellow].”<sup>55</sup>

The duty to use force to defend an innocent is based on two passages. The first is *Leviticus* 19:16, which provides, “neither shalt thou stand against the blood of thy neighbour.”<sup>56</sup> Or in a modern translation, “nor shall you stand idly by when your neighbor’s life is at stake.”<sup>57</sup>

The second passage comes from *Deuteronomy*, and explains that if a man and a betrothed (engaged) woman had illicit sex in the city, it would be presumed that she had consented, because she would have cried out for help had she not consented. But if the sexual act occurred in the country, she would be presumed to have been the victim of a forcible rape, “[f]or he found her in the field, and the betrothed damsel cried . . . there was none to save her.”<sup>58</sup> This implies furthermore that it was the duty of bystanders to heed a woman’s cries, and come to her rescue.<sup>59</sup>

One of the most important parts of the Oral *Torah* contains the *Mitzvot*,<sup>60</sup> which are 613 commands from God that guide Jewish life. Of these *Mitzvot*, 248 are positive commands (corresponding, it is said, to the number of members of the human body) and 365 are negative injunctions (corresponding to the number of days in a year).

The penultimate positive *Mitzvot*, number 247, requires one “[t]o save a person who is being pursued even if it is necessary to kill the pursuer.”<sup>61</sup> One of the negative *Mitzvot* sets forth a similar requirement by commanding one “[n]ot to have pity on a pursuer. Rather, he should be killed before he kills or rapes the person he is pursuing.”<sup>62</sup> A person engaged in a rescue is not liable for property damage that occurs during the rescue; the rabbis reasoned that a contrary rule would deter people

54. VILNA TALMUD, *Tractate Sanhedrin*, folio 73a<sup>3</sup>.

55. VILNA TALMUD, *Tractate Sanhedrin*, folio 73a<sup>1</sup> (alterations in original).

56. See also *Proverbs* 24:11-12: “Rescue those who are being taken away to death; hold back those who are stumbling to the slaughter. If you say, ‘Behold, we did not know this,’ does not he who weighs the heart perceive it?” (English Standard Version).

57. NEW AMERICAN BIBLE.

58. *Deuteronomy* 23:23-27.

59. 2(a) THE MISHNEH: SEFER NEZEKIN 150-51 (Matis Roberts Trans., Mesorah Pubs. 1987). See also VILNA TALMUD, *Tractate Sanhedrin*, folio 73a. *Nezekin* or *Neziqin* is the portion of the law dealing with damages of all sorts. *Sefer* means “Book of.”

60. The word *Mitzvot* literally means “commandment.” It can also refer to any Jewish religious obligation, or more generally to any good deed. *Mitzvot* definition at <http://www.jewfaq.org/defs/mitzvot.htm>.

61. MOSES MAIMONIDES, *MISHNEH TORAH* 58 (Eliyahu Touger transl., Moznaim Pub. Corp. 1996-97).

62. *Id.* at 85 (quoting from negative commandment no. 293)

from rescuing.<sup>63</sup>

A 1998 Israel law, derived from the Levitical law, mandates that a person aid another who is in immediate danger if aid can be rendered without danger to the rescuer.<sup>64</sup> A few American states have similar laws, often called Good Samaritan Laws.<sup>65</sup>

### C. *Midrash*

Whereas the sensibility of the *Talmud* is careful legal analysis, the *Midrash* are collections of rabbinic commentaries on the Jewish scriptures which take a much more free-wheeling approach. The *Midrash* never contradict or disparage the scriptural text, but the *Midrash* are very liberal in construing passages metaphorically, and in drawing creative connections between passages that seem unrelated.<sup>66</sup>

For example, one *Midrash* takes the position, one that was adopted by all significant Jewish commentators, that the passage about the sun being risen on the burglar is metaphorical. “If the sun be risen upon him” is transformed to “If the burglar’s intentions are plainly non-violent.” Thus, if a householder is certain that a burglar will not kill him, then the householder may not kill the burglar, regardless of whether it is day or night. Conversely, if the burglar is a violent threat to the household, then the burglar may be killed, regardless of the hour of the day.<sup>67</sup>

### D. *Rashi*

“Rashi” is an acronym for Rabbi Solomon bar Isaac, who lived from 1040 to 1105. He is called “The Father of the Commentators . . . the greatest commentator.”<sup>68</sup> He wrote and studied in France and Germany, and his commentaries were influential among some Christians of the early twelfth century and among Jews for many centuries thereafter. His extensive commentaries on the *Talmud* are included in modern editions

63. TALMUD BAVLI; THE GEMARA: THE CLASSIC VILNA ED. WITH AN ANNOTATED, INTERPRETIVE ELUCIDATION, AS AN AID TO TALMUD STUDY, Tractate Bava Kamma, folio 117b<sup>3</sup> (Abba Zvi Naiman & Mendy Waschman elucidators, Mesorah Pubs. 2001).

64. DANIEL FRIEDMAN, TO KILL AND TAKE POSSESSION: LAW, MORALITY, AND SOCIETY IN BIBLE STORIES 90-91 (Peabody, Mass.: Hendrickson Pub., 2002) (1st published in Israel in 2000).

65. *Id.*

66. *Midrash* comes from *darash*, which means “to search.”

67. THE MIDRASH: TANNATIC COMMENTARIES ON THE BIBLE 410-11 (Reuven Hammer trans., Paulist Press 1995) (reprinting *Mekhilta Nezikin* 13, 3, 101).

68. THE RISHONIM: BIOGRAPHICAL SKETCHES OF THE PROMINENT EARLY RABBINIC SAGES AND LEADERS FROM THE TENTH-FIFTEENTH CENTURIES 124 (Hersh Goldwurm ed., Mesorah Pubs., 2d ed. 2001) (quoting Rabbi Schlomo ben Isaac).



of the *Talmud*.

Rashi writes that killing the burglar is lawful only when the burglar is “in the very act of forcing the entry.” In such a case, there is no bloodguilt, for the burglar “has been dead from the very beginning of his criminal act.” Rashi continues:

Here the Torah teaches you the rule: “If one comes with the intention of killing you, be quick and kill him.”—And this burglar actually came with the intention of killing you, for he knew full well that no one can hold himself in check, looking on whilst people are stealing his property before his eyes and doing nothing. He (the thief) therefore obviously came with this purpose in view—that in case the owner of the property would resist him, he would kill him.<sup>69</sup>

The language suggested that the burglar should not be killed “[i]f the sun be risen upon him,” (or, in Rashi’s translation, “[i]f the sun shone upon him”) was not given literal force:

This is only a metaphorical expression signifying: if the fact is clear to you he is peaceably disposed towards you. The simile is: just as the sun brings peace (happiness) to the world so if it is evident to you that he did not come with the intention of killing, even if the owner of the property would resist him, as, for instance, when a father breaks in to steal the money of his son . . . .<sup>70</sup>

#### E. *Maimonides*

The great Jewish legal scholar Maimonides (Rabbi Moshe Ben Maimon, a/k/a “Rambam” (1153-1204))<sup>71</sup> takes a more expansive view of self-defense than does Rashi. Maimonides agrees with all the earlier scholars that the rationale for killing the burglar is the presumption of danger. Specifically, the rationale is explained as “[the burglar] was thought to enter with an intention to murder someone.”<sup>72</sup>

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69. PENTATEUCH WITH TARGUM ONKELOS, HAPHTOROTH AND RASHI’S COMMENTARY 116 (M. Rosenbaum & A.M. Silberman trans., Hebrew Pub. Co., 1934) (parenthetical in original; italicization from original omitted); see also *Exodus* in 2 RASHI, *supra* note 32, at 277 (providing a slightly different translation).

70. PENTATEUCH WITH TARGUM ONKELOS, HAPHTOROTH AND RASHI’S COMMENTARY, *supra* note 69, at 116.

71. JAMES TOWNLEY, THE REASONS OF THE LAWS OF MOSES FROM THE “MORE NEVOCHIM” OF MAIMONIDES 239 (The Lawbook Exchange 2001) (1827) (reprinting Maimonides, ch. 16).

72. TALMUD, *Tractate Sanhedrin*, folio 72a.

According to Rashi, a burglar who enters by a doorway (rather than by irregular means of entry) can be killed only if he continues to trespass after being warned to leave. Other scholars disagree. Compare VILNA TALMUD, *Tractate Sanhedrin*, folio 72b<sup>3</sup> n. 23 (burglar must be warned) with MAIMONIDES, MISHNEH TORAH, *Sefer Neziken*, ch. 9, verse

The fourteen-volume *Mishneh Torah* (“Repetition of the Torah”) by Maimonides elaborated on the law regarding self-defense against burglars:

7. When a person breaks into [a home]—whether at night or during the day—license is granted to kill him. If either the homeowner or another person kills him, they are not liable.<sup>73</sup>

The modern translator explains in a footnote the historical dispute over the killing of daytime burglars, which Maimonides sanctioned:

Although *Exodus* 22:2 speaks of “the sun shining upon him,” this is interpreted, as explained in *Halachah* 10, as referring to a person who one knows will not kill him, and not to a theft that takes place during the day.<sup>74</sup>

Maimonides continued:

The license to kill him applies both on the Sabbath and during the

8 (burglar need not be warned).

Two rabbis, Da’ath Zekenim and Hadar Zekenim, argue that the law only applies for a tunneling burglar and opine that a burglar who enters by a window is presumed to be willing to flee if confronted by a homeowner. ROSENBERG, *supra* note 33, at 364. The Zekenims’ theory is silly, for there is no reason to presume that a burglar who comes in via a window intends no harm to a victim he confronts. Indeed, confrontational burglaries often result in rapes and assaults against the burglary victim. See David B. Kopel, *Lawyers, Guns, and Burglars*, 43 ARIZ. L. REV. 345, 360-61 (2001).

Rashi argues that only the party possessing the invading home may kill the burglar; other scholars take the opposite position. VILNA TALMUD, *Tractate Sanhedrin*, folio 72b<sup>2</sup>.

The sages also debate whether a person may carry arms in public on the Sabbath. Rabbi Eliezer argues that such carrying is permitted, because arms are “ornaments.” The majority, though, contends that such carrying should not be allowed, because the Sabbath prefigures the Messianic era, and in the Messianic era there will be no wars or weapons. Rabbi Eliezer counters by arguing that weapons will not be eliminated in the messianic era. To support the claim that weapons are ornaments, Eliezer cites *Psalms* 45:4, which provides: “Gird thy sword upon [your] thigh, O mighty one, [for it is] your glory and your splendor.” (brackets in original). Another Rabbi retorts that the Psalm refers to the *Torah*, and not to a literal sword. But this Rabbi’s argument is undermined by the *Gemara* rule that “[a] verse never departs from its plain meaning,” although metaphorical meanings may be added. 2 TALMUD BAVLI; THE GEMARA: THE CLASSIC VILNA ED. WITH AN ANNOTATED, INTERPRETIVE ELUCIDATION, AS AN AID TO TALMUD STUDY. *Tractate Bava Kamma*, folio 63a<sup>1-2</sup> (Eliyahu Baruch Shulman et al. elucidators, Mesorah Pubs., 3d ed. 2002).

Fortifying property with a wall, thorns, or hidden glass (and, by analogy, barbed wire) is permissible, but one must take care that the wall or sharp item does not fall or protrude into a public area. 1(a) THE MISHNAH. SEFER NEZEKIN, *Tractate Bava Kamma* 49 (Avrohom Yoseif Rosenberg ed., Mesorah Pubs., 1986).

73. MAIMONIDES, *Hilchot Geneivah: The Laws of Theft*, in MISHNEH TORAH 226 (Eliyahu Touger trans., Moznaim Pub. Corp. 1996-97) (the bracketed items are insertions by the translator).

74. *Id.* at 226-28, n. 15-16.

week; one may kill in any possible manner . . . .

8. [The license to kill] applies to a thief caught breaking in or one caught on a person's roof, courtyard or enclosed area, whether during the day or during the night . . . .

9. Why did the Torah permit the blood of such a thief [to be shed] although he is only attempting [to steal] money? Because it is an accepted presumption that if the house-owner arise and attempts to prevent [the thief from stealing], [the thief] will slay him. And thus the thief entering his colleague's house to steal is in effect a pursuer seeking to killing his colleague. Therefore, he should be killed, whether he is an adult or a minor, or a man or a woman.

10. If it is clear to the house-owner that the thief [who breaks in] will not kill him and instead is only seeking financial gain, it is forbidden to kill [the thief] . . . . Therefore, a father who breaks into his son's home should not be killed. But a son who breaks into his father's home may be killed.<sup>75</sup>

The translator here notes that, regarding the father/son scenarios, "[a]ccording to the *Maggid Mishneh*, these are not absolutes, but rather statements of probability . . . if a son is certain that his father will kill him, he may kill him if he apprehends him breaking in."<sup>76</sup>

As Maimonides elaborated, the killing of a burglar was for the protection of life, not of property:

11. [Different rules apply with regard to] a thief who stole and departed, or one who did not steal, but was caught [leaving the tunnel through which he entered the home]. Since he turned his back [on the house] and is no longer [intent on killing its owner], he may not be slain.

12. Similarly, a person who breaks into a garden, a field, a pen or a corral may not be killed, for the prevailing assumption is that he came merely [to steal] money, for generally the owners are not found in such places.<sup>77</sup>

Regarding the criminal law in general, Maimonides explains that theft (by which he means taking something secretly) is punished more severely than robbery (taking something by force or threat of force from someone), because it is harder to deter: "every one, also may guard

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75. *Id.* at 226-228.

76. *Id.*

77. *Id.*

against a robber and resist him, which he cannot do against a thief; and lastly, a robber is known and may be pursued, and exertions used to recover the things of which a person has been robbed, whilst a thief is unknown.”<sup>78</sup> Implicit in Maimonides’s statement is the idea that the victim of a robbery is likely to resist, would pursue the robber, and would exert himself to recover his own goods—rather than passively submitting.

#### *F. Mendelsohn*

Samuel Mendelsohn was a late nineteenth and early twentieth century Jewish rabbi and commentator on the ancient Hebrew legal code.<sup>79</sup> He is not even remotely as prestigious as Maimonides or Rashi, nor was Mendelsohn’s work especially original. However, for an English-language audience, he did provide a good summary of what the more prestigious commentators had concluded. Summarizing various portions of the Mosaic law, and drawing principles therefrom, Mendelsohn wrote that homicide is justifiable:

1. In the execution of condemned criminals by the legal executioners.
2. In defense of human life; thus if one attempts the life of another, the crime should be prevented, if necessary, by the killing of the would-be criminal.
3. In defense of chastity.<sup>80</sup>

This third case included killings to prevent rape, adultery, incest, or pederasty. Unlike some other legal systems, the Hebrew law made no distinction between rape and adultery, and imposed an affirmative obligation on everyone (not just a relative of the woman in question) “to prevent by all necessary force the commission of the crime.”<sup>81</sup>

Finally, homicide was justifiable:

4. In self-defense, and that not only when one directly attempts his life, but also when he discovers a burglar on his premises during the night.<sup>82</sup>

Mendelsohn elaborated that in self-defense circumstances, the

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78. TOWNLEY, *supra* note 71, at 235 (reprinting Maimonides, ch. 16).

79. SAMUEL MENDELSON, *THE CRIMINAL JURISPRUDENCE OF THE ANCIENT HEBREWS* (The Lawbook Exchange 2001) (1891).

80. *Id.* at 58-60. Mendelsohn used commas rather than periods after the numerals. I have inserted periods to conform to modern usage.

81. *Id.* at 59 n.112. *See also* VILNA TALMUD, *Tractate Sanhedrin*, folio 73a.

82. MENDELSON, *supra* note 79, at 58-60.

killing had to be for the purpose of preventing a crime, rather than revenging a completed crime, and deadly force could be used only when other means, such as “maiming the culprit,” would not suffice.<sup>83</sup>

Mendelsohn explained that there were some homicides which could not be punished by the judiciary, but for which an aggrieved relative of the victim could, with impunity, kill the person who had committed the homicide. Such homicides included killings perpetrated through gross negligence and through ignorance of the law. An example was, “When one, in his endeavor to prevent the commission of an atrocious crime, intentionally kills the would-be criminal, without trying other means of prevention.”<sup>84</sup> Thus, deadly force could be used to prevent any atrocious crime, but when such force was more than was reasonably necessary, the person using such force was beyond government prosecution, yet could still lawfully be killed by the victim’s relatives.

Mendelsohn collected many maxims of Jewish law, including: “Kill him who unlawfully attempts to kill thee.”<sup>85</sup> Another maxim stated, “The act of breaking in is the burglar’s death warrant.”<sup>86</sup>

#### G. *The Greatest Law*

Finally, in Jewish law, there is one law which is the most important: The law of *pikuach nefesh* (saving lives) takes precedence over all others. To fail to protect human life simply because protecting the life might require the protector to use violence or to violate a gun control law would be contrary to *pikuach nefesh*.

In sum, we have seen that the commentators were unanimous about the core of the rule from *Exodus* about slaying burglars: it was based on the presumed intention of the burglar to slay the home-owner if the burglar met with resistance. Killing a thief merely to protect property was not allowed, nor was killing allowed in other cases in which the crime victim could be sure that he was not in physical danger. Killing for the defense of self and others was not only permitted, it was mandatory when necessary to prevent murder, and some other crimes.

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83. *Id.* at 58-60.

84. *Id.* at 63-64. See also VILNA TALMUD, *Tractate Sanhedrin*, folio 74a<sup>3</sup> n.24 (Rashi states that the assailant may not be killed unless necessary to protect the victim); *id.* at 74a (the rescuer must disable rather than kill the assailant if possible).

85. MENDELSON, *supra* note 79, at 179. (Mendelsohn compared this rule to the Latin legal maxim *Quodcumque aliquis ob tutelam corporis sui fecerit jure id fecisse videtur*, i.e., whatever one does in defense of his own person, that he is considered to have done legally).

86. *Id.* at 181.

## V. The Sixth Commandment

In the months preceding the liberation of Iraq, it became common for people who wanted to preserve the Saddam regime to announce, “What part of ‘Thou Shalt Not Kill’ did you not understand?”

No religiously knowledgeable Jewish or Christian pacifist would say something like that, because a knowledgeable person would have read *Exodus*, the book in which the Ten Commandments first appear. (They are restated, in slightly different form, in *Deuteronomy*).<sup>87</sup> The conscientious reader would be well aware that *Exodus* not only sanctions killing, but positively commands it in certain cases.

### A. *Thou Shalt Not Kill*

Let us now take a closer look at the Sixth Commandment. *No one* actually interprets “Thou shalt not kill” completely literally. The commandment, after all, does not say “Thou shalt not kill humans,” but simply says “Thou shalt not kill.” Certainly the vast majority of Judeo-Christian pacifists who have interpreted the passage to forbid any killing of humans have participated in the killing of mammals, fish, and birds—either directly as hunters, or indirectly, by eating animals which someone else has killed.

Vegetarians kill vegetables, fruit, and grains. The farmlands which grow crops are lands which can be cultivated because they have been converted from natural habitat into farmland, thereby directly killing many natural plants, mammals, birds, insects, and other creatures, and indirectly killing other animals and plants by depriving them of habitat.

Theoretically, one could live entirely by eating wild berries and other fruit, thereby not killing anything through food consumption. But even then, one might sometimes kill insects, rats, or other pests in the home. Anyone who takes antibiotics, or uses antibiotic soap, is deliberately killing millions of bacteria.

There have occasionally been groups which have attempted to adhere very closely to “Thou shalt not kill.” For example, there was once a small Quaker sect in Russia, which did not even kill lice, but instead “put them somewhere else.”<sup>88</sup> Yet even this sect still participated in killing, by eating food that farmers had grown on cultivated land.

It is possible that someone who would not kill lice also would rather die than take antibiotics, lest he kill the bacteria in his body. But if a person is willing to take antibiotics rather than die, or to crush a wasp

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87. *Deuteronomy* 5:6-21.

88. Bernard Canter, *The Quaker Bedside Book*, in *THE QUAKER READER* 520 (Jessamyn West ed. 1962).

before it stings him, then he is willing to kill under some circumstances. If he eats anything other than wild fruit, his eating causes the death of animals (either because he consumes them, or because the non-animal food he eats is grown on land which destroys animal habitats).

Therefore, no one applies “Thou shalt not kill” literally. If one is willing to depart from an absolutely literal application of the King James translation, then it is reasonable to apply the commandment according to its plain meaning in the original Hebrew. The word in the original Hebrew text is *r’tzach*, which would be translated as “murder.” The Jewish Publication Society commentary on *Exodus* explains that the Hebrew verb stem “applies only to illegal killing and, unlike other verbs for the taking of life, is never used in the administration of justice or for killing in war.”<sup>89</sup>

Thus, the *Mitzvot* which implements the Sixth Commandment states that a good Jew is required “Not to kill an innocent person, as [Exodus 20:13] states: ‘Do not murder.’”<sup>90</sup>

### B. Death Penalty

Besides the self-defense and defense-of-others passages, we have another very easy way of ascertaining that “Thou shalt not kill” does not forbid all killing. The Mosaic law—of which the Ten Commandments are the foundation—imposes the death penalty for about three dozen offenses. The *Exodus* chapter which follows the Ten Commandments prescribes the death penalty for murder.<sup>91</sup> The succeeding chapters of the *Torah* include death penalty requirements for child sacrifice;<sup>92</sup> adultery;<sup>93</sup> bestiality;<sup>94</sup> sodomy;<sup>95</sup> some forms of incest;<sup>96</sup> some rapes;<sup>97</sup> whoredom committed by a priest’s daughter;<sup>98</sup> blasphemy (cursing God);<sup>99</sup> defiling the Sabbath;<sup>100</sup> prophesying on behalf of other gods or

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89. NATHUM M. SARNA THE JPS TORAH COMMENTARY: EXODUS 113 n.13 (Jewish Publ’n Soc’y 1991). Also, the verb is normally used for Hebrews killing Hebrews, but not for killings outside the Hebrew community. PETER C. CRAIGIE, THE PROBLEM OF WAR IN THE OLD TESTAMENT 58 (Wm. B. Eerdmans Publ’g Co. 1978). The broader word that encompasses all killing is *harag* or *haroq*.

90. MAIMONIDES, MISHNEH TORAH 84 (Negative commandment no. 289).

91. *Exodus* 21:12, 14; *Numbers* 35:16-18, 21, 30, 33; *Leviticus* 24:1-17, 21.

92. *Leviticus* 20:2.

93. *Leviticus* 20:10; *Deuteronomy* 22:22-24; *Ezekiel* 18:11.

94. *Exodus* 22:19; *Leviticus* 20:15-16.

95. *Leviticus* 20:13.

96. *Leviticus* 20:11-14.

97. *Deuteronomy* 22:25-27.

98. *Leviticus* 21:9.

99. *Leviticus* 24:13-16.

100. *Exodus* 31:14-15, 35:2. See *Numbers* 15:32-36 (execution of a man for gathering sticks on the Sabbath).

enticing people to worship them;<sup>101</sup> being an incorrigible son;<sup>102</sup> consulting “familiar spirits;”<sup>103</sup> allowing an ox which was known to be dangerously aggressive to roam free, resulting in the death of an innocent;<sup>104</sup> and kidnapping, including kidnapping for the purpose of selling the victim into slavery.<sup>105</sup>

The death penalty was also specified for striking<sup>106</sup> or cursing one’s parents.<sup>107</sup> By the time of Jesus, and perhaps long before, the rabbinical leadership had made sure that the death penalty for these particular offenses was very rarely, if ever, imposed.<sup>108</sup> Jesus criticized the Jews for not enforcing this law.<sup>109</sup> It is ironic that in today’s society Jesus is invoked in political campaigns to abolish capital punishment; the people who quote Jesus in his defense of the woman charged with the capital offense of adultery<sup>110</sup> never seem to quote Jesus’s complaint that the death penalty for a different offense was not enforced often enough.

The essential principle undergirding the Mosaic law was the protection of innocent life: “the innocent and righteous slay thou not: for I will not justify the wicked.”<sup>111</sup> “These . . . things doth the Lord hate: . . . hands that shed innocent blood.”<sup>112</sup>

Deliberate murder could only be redressed with execution. The *Book of Numbers* echoed *Genesis*: “the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it.”<sup>113</sup> Maimonides observed that the necessity of the killer being executed

101. *Deuteronomy* 13:1-10.

102. *Deuteronomy* 21:18-21. Maimonides rationalized this law “for it was more than probable, that, growing worse and worse, he would at length become a murderer.” TOWNLEY, *supra* note 71, at 239. But see MENDELSON, *supra* note 79, at 56 n.106 (arguing that the law reduced the scope of ancient parental authority to kill their children, and that law was further narrowed in scope by the rabbinic requirement that both of the child’s parents must make an accusation).

103. *Leviticus* 19:31, 20:6, 20:27; *Deuteronomy* 18:10-11.

104. *Exodus* 21:29.

105. *Exodus* 21:16; *Deuteronomy* 24:7.

106. *Exodus* 21:15.

107. *Exodus* 21:17; see also *Proverbs* 20:20. By Rabbinic tradition, the penalty was imposed only if the person making the curse had uttered the ineffable name of God. 2(a) THE MISHNEH, SEFER NEZEKIN 125-26 (Matis Roberts transl., Mesorah Pubs. 1987); MENDELSON, *supra* note 79, at 48 n.91. Since God’s secret name was known to very few, and was such a closely-guarded secret that it was eventually lost, the death penalty would necessarily be extremely rare for this offense.

108. See, e.g., H.B. CLARK, BIBLICAL LAW 270 n.23 (The Lawbook Exchange 2000) (1943) (citing 38 CASE & COMMENT 2 (1932)); see GOODENOUGH, *supra* note 45, at 73 n.151.

109. *Matthew* 15:3-6; *Mark* 7:10-13.

110. *John* 8:7 (“He that is without sin among you, let him first cast a stone at her.”).

111. *Exodus* 23:7.

112. *Proverbs* 6:16-17.

113. *Numbers* 35:33.



remained even if the wounded man, before dying, forgave his killer, and asked that his life be spared, for “life was to go for life, whether small or great, bond or free, wise or foolish; for no greater crime than this can ever be committed.”<sup>114</sup>

Among the positive *Mitzvot*, four deal with how the death penalty should be carried out. Another requires that a thief be executed or forced to pay restitution.<sup>115</sup>

The Jewish community in Alexandria, under Roman rule, apparently was allowed to carry out its own executions (often, through lynching) for offenses among Jews.<sup>116</sup> The Romans apparently did not interfere with Jews in Egypt who executed other Jews for capital offenses under Jewish law (such as idol worship), which were not offenses under Roman law.<sup>117</sup>

Philo of Alexandria recounted with approval the story from *Exodus* of how the enraged Levites, the priestly tribe, had spontaneously slain the Israelites who were engaged in drunken worship of the Golden Calf. Philo explained that: “every kind of homicide is not blameable, but only that which is combined with injustice; and that of other kinds some are even praiseworthy which are committed out of a desire and zeal for virtue.”<sup>118</sup>

Although the death penalty<sup>119</sup> was mandatory for premeditated murder, the penalty for manslaughter was not so strict. The killer could flee to a city of refuge, make financial restitution to the victim’s family, and eventually resume normal life.

To a modern opponent of capital punishment, the presence of capital offenses in the Mosaic law may seem severe. But the number of Biblical capital offenses is small compared to the number in some other legal systems. For example, England in the eighteenth century had about 150 capital felonies, according to William Blackstone.<sup>120</sup>

Unlike many legal codes, from ancient times as well as more recent, the Mosaic law made no distinctions of rank. Under the Jewish law, killing a poor person was just as serious a crime as killing a wealthy person. Much more so than many legal codes, the law of the *Torah* gave equal protection to the rich and the poor.

Although the Mosaic law is sometimes portrayed as harsh, it

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114. TOWNLEY, *supra* note 71, at 232-33

115. MOSES MAIMONIDES, *MISHNEH TORAH: Hilchot Yesodei HaTorah* 56-57 (Eliyahu Touger transl., Monzaim Pub., 1989) (Positive Commandments 228-231, 239).

116. GOODENOUGH, *supra* note 45, at 25.

117. *Id.* at 34-36, 48-49.

118. PHILO OF ALEXANDRIA, *The Special Laws, III (De Specialibus Legibus, III)*, in *THE WORKS OF PHILO*, *supra* note 3, at 607.

119. Imposed by the victim’s nearest relative, if necessary.

120. 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*18.

contains many of the principles which Jesus articulated in the Sermon on the Mount, such as being kind to enemies or strangers. For example:

If thou meet thine enemy's ox or his ass going astray, thou shalt surely bring it back to him again. If thou see the ass of him that hateth thee lying under his burden, and wouldest forbear to help him, thou shalt surely help with him . . . . Also thou shalt not oppress a stranger: for ye know the heart of a stranger, seeing ye were strangers in the land of Egypt.<sup>121</sup>

The Golden Rule, although often ascribed to Jesus, was actually first biblically stated in *Leviticus*: "thou shalt love thy neighbor as thyself."<sup>122</sup> The Jewish law also required kind treatment of animals, many centuries before the laws of most other nations did so.<sup>123</sup>

The exodus from Egypt had removed the Israelites from the rule of a human king, and made God their king. The change was reflected in their understanding of law. While other nations considered the king to be the source of law, the Israelites believed that God was the only source of law. Accordingly, the law could not be altered by humans.<sup>124</sup>

The Israelite understanding of the true source of law would become the guiding principle of Western resistance to despotism. While kings might be conceded the power to make new laws, those new laws were required to be in conformity with God's law—sometimes called "natural law." A king who made laws contrary to natural law was not a true king making true laws; he was a tyrant enforcing his wicked personal will. Accordingly, he forfeited his office, and could be removed by force—and often was.

## VI. Conclusion

Over the centuries, Christians have disagreed about whether any or all of the Mosaic law is still binding on Christians. One answer has been that dietary and ceremonial laws (such as laws about kosher food) are no longer applicable, but that moral laws (such as laws against incest, cruelty to slaves, and so on) remain in force. Others have argued that the entire Mosaic law has been superceded by the New Covenant of Jesus. Many first-century Christians believed that both dietary laws and moral

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121. *Exodus* 23:4-5, 9; see also *Exodus* 22:21-24.

122. *Leviticus* 19:18.

123. See, e.g., *Deuteronomy* 5:14 (farm animals must be allowed to rest on the Sabbath); *Exodus* 20:10 (same); *Exodus* 23:11 (farm animals are entitled to eat food from land which God requires to be left fallow every seventh year); *Deuteronomy* 25:4 ("Thou shalt not muzzle the ox when he treadeth out the corn.").

124. See, e.g., CARL S. EHRLICH, *Law: Israelite Law*, in *THE OXFORD COMPANION TO THE BIBLE* 422 (Bruce M. Metzger & Michael D. Coogan eds., Oxford Univ. Press 1993).

laws from the Old Testament were still binding on modern Christians, and today, some small “Jewish Christian” sects have the same belief.

Modern Jews have similarly diverse views about the extent to which various parts of the Mosaic law are binding today. The Orthodox Jews tend toward a more restrictive vision, while Reform or Reconstruction Jews believe that much of the law is no longer applicable, at least as a literal statute; rather, the law remains applicable only for illustrating underlying principles of moral behavior. Conservative Jews tend to pick a middle ground between Reform and Orthodox. Perhaps the only item on which all Christians and all Jews agree is that the required rituals of the Jewish Temple are not currently in force, as the Second Temple was destroyed by the Romans in 70 A.D., and has not been rebuilt.

What can also be said, with some certainty, is that the first five books of the Bible offer nothing to support an argument that defensive violence or killing are inherently wrong. To the contrary, the law which God gave to the Israelites required use of deadly force in self-defense and defense of others. Deadly force was allowed in circumstances in which there was strong, but not incontrovertible, evidence that a criminal aggressor had murderous intent. Deadly force was not allowed in mere defense of property when there was not an implicit threat to the life on the property. Abraham and Moses, the greatest heroes of the *Torah*, both used force to protect innocents. Under the *Torah*, using force to protect innocents was not only a right, but a positive moral duty.