Articles

RELIGIOUSLY MOTIVATED MURDER: THE RABIN ASSASSINATION AND ABORTION CLINIC KILLINGS

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INTRODUCTION

Yigal Amir assassinated Israeli Prime Minister Yitzhak Rabin.[1] He unsuccessfully argued at trial[2] that he killed Prime Minister Rabin to save Israeli Jews from Rabin and the agreement that Rabin negotiated as part of the Middle East peace process to surrender land in the West Bank to Palestinians. Amir defended himself by claiming that Rabin was a *rodef*[3]—a pursuer—and that it was Amir's religious and national duty to kill Rabin before other Jews were killed and more land was given away. This Article examines the *rodef* principle in Jewish law and its American legal counterpart, the defense-of-others justification defense

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1. Yigal Amir assassinated Rabin on November 4, 1995. Amir was found guilty of murder and was sentenced to life in prison on March 27, 1996. *See* Joel Greenberg, *Rabin's Killer Is Given a Life Sentence in Israel*, N.Y. TIMES, Mar. 28, 1996, at A1. His final appeal was denied on August 4, 1996. Evelyn Gordon, *Supreme Court Rejects Yigal Amir's Appeal*, JERUSALEM POST, Aug. 5, 1996, at 12. Yigal Amir, his brother, Hagai, and Dror Adani were convicted of conspiring to kill Rabin on September 11, 1996. Serge Schmemann, *Rabin Killer and 2 Others Guilty of Related Plots Against Leader*, N.Y. TIMES, Sept. 12, 1996, at A7. References to "Amir" throughout this Article refer to Yigal Amir, not Hagai Amir.

2. Judge Edmund A. Levy presided over Amir's trial, in the Tel Aviv District Court, for the assassination.

3. As will be developed herein, the word "*rodef*" has been modernly used in various ways to refer to: a person, namely a pursuer; a concept of the right or duty to defend others; and a principle regarding when such defensive actions are justifiable. *See infra* Part II.B.

in criminal actions. Part I discusses Rabin's assassination and Amir's belief that he was acting in defense of the people and State of Israel. Amir, like many religious and patriotic Israeli Jews, sincerely believes in the sanctity of the State of Israel as the homeland for the Jewish people; to these religious and patriotic Jews, giving up the homeland is untenable and is certain to lead to conflict with, and Jewish deaths at the hands of, Arabs. Whether or not Amir's claim is persuasive, questions persist as to the proper boundaries of a *rodef* defense under either Jewish religious law or Israeli secular law. In that context, Part II explores the *rodef* defense, focusing on (1) its origins in Judaism, (2) its application and development in Israeli secular law generally, and (3) its specific application to the facts of the Rabin assassination. Part III considers the American analog, the defense-of-others defense, noting in particular (1) the Model Penal Code treatment of the subject, (2) individual states' statutory provisions and case law, and (3) specific application of this justification defense. This discussion will focus especially on American cases involving the killing of doctors who perform abortions; the killers in these cases often defend themselves by claiming that they acted in defense of others—fetuses. After examining the state of the law, Part IV concludes by considering guiding principles and asking whether we should have such a defense at all, and if so, how it should be applied when invoked to justify a killing based upon religious beliefs.

In the end, we will see that Amir's defense failed the tests established under both Jewish religious law and Israeli secular law. Similarly, his defense would fail to satisfy standards set by principles of American criminal law, just as those who kill doctors who perform abortions are unable successfully to argue a defense-of-others justification. While any community may, under appropriate protections, elect to encourage third-party intervention, both Amir and individuals who kill doctors who perform abortions have crossed the established boundaries of acceptable behavior and must face the consequences. More broadly, under each of these systems of law, a religiously motivated defense-of-others argument will fail if the actor (1) does not act as would a reasonable person, (2) is not responding to an imminent threat or is basing his actions on prior conduct, or (3) responds with force disproportionate to the harm threatened.

I. AMIR WAS NOT ALONE IN HIS VIEWS

Broadly speaking, Amir believed that Prime Minister Rabin's negotiations with Palestinians living in Israel posed an immediate threat to the lives of Israeli Jews.[4] While it is easy to condemn Yigal Amir as a killer, his motivations are not as extreme as many might argue. Amir is not alone in his views, although many refuse to align themselves with him publicly. He is a serious student of law and religion with a deeply held, and not uncommon, belief that the

4. *See* Joel Greenberg, *Rabin's Killer Says He Acted for Past Generations of Jews*, N.Y. TIMES, Nov. 21, 1995, at A9.

policies of the Rabin government regarding the peace process were destined to destroy the Jewish people and Israel.

In many ways Amir seemed to be a model citizen—a proud native Israeli devoted to religion and to country, a student of law. "Israelis are now grappling with the fact that the killer was no crazed pariah, or even one of the fervid Americans many here regard as an alien implant. He was a Sabra—a native—a studious Jewish boy brought up in their most revered institutions."[5] And that native, once considered a model citizen, acted on beliefs shared by countless thousands in Israel and around the world.

Amir believed that returning Israeli-controlled land in the West Bank would ultimately be destructive of the Jewish people and the State of Israel. "'According to Jewish law, the minute a Jew gives over his land and people to the enemy, he must be killed,' [Amir] calmly instructed the judge at his court hearing."[6] Amir's goal in assassinating the Prime Minster, "according to [police] interrogators, was to stop the planned handover of much of the West Bank to Palestinian self-rule, a step he said would lead to 'another Yom Kippur,' a reference to the 1973 Arab-Israeli war in which Israel suffered heavy casualties."[7]

Amir had reason to fear for the lives of Israeli Jews in the occupied territories; Jews and Palestinians have long been engaged in a battle over this land.[8] The Middle East peace process was moving toward an apparent resolution under which Palestinians would have their own land and autonomy—an idea that was an anathema to many. During the negotiations, the debate over the peace process grew in intensity, reaching such a fever pitch that Amir's reaction was not a surprise to some. The assassination can be seen as a natural consequence of the

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5. John Kifner, *A Son of Israel: Rabin's Assassin—A Special Report; Belief to Blood: The Making of Rabin's Killer*, N.Y. TIMES, Nov. 19, 1995, § 1, at 1. Judge Levy expressed his opinion: "The fact that such a wild growth could sprout from within our midst requires us to examine which parts of Israel's educational system failed in not successfully imparting and establishing the foundations of democracy into elements of the younger generation." *The Court Passes Judgment*, JERUSALEM POST, Mar. 28, 1996, at 2.

6. *See* Kifner, *supra* note 5, § 1, at 1.

7. Joel Greenberg, *Assassination in Israel: The Suspect*, N.Y. TIMES, Nov. 6, 1995, at A11.

8. The current dispute between Jewish settlers and Palestinians over the occupation of the West Bank, although Biblical in origin, is widely considered to be a result of the 1948 War establishing the State of Israel and the subsequent occupation of the West Bank and Gaza Strip in 1967. *See* Andrea E. Bopp, *The Palestine-Israeli Peace Negotiations and Their Impact on Women*, 16 B.C. THIRD WORLD L.J. 339, 341 (1996) (reviewing HANAN ASHRAWI, THIS SIDE OF PEACE: A PERSONAL ACCOUNT (1995)). The establishment of the State of Israel and the subsequent occupation of the West Bank and the Gaza Strip resulted in the displacement of hundreds of thousands of Palestinians. *See, e.g.*, Behnam Dayanim, *The Israeli Supreme Court and the Deportation of Palestinians: The Interaction of Law and Legitimacy*, 30 STAN. J. INT'L L. 115, 122–23 (1994). Since December of 1987, hundreds of Israelis have been killed in the West Bank. *Israel Warns Self-Rule in Jeopardy After Two Soldiers Die in Gaza*, AGENCE FRANCE PRESSE, May 20, 1994, *available in* 1994 WL 9588978 (counting 226 such deaths to date).

violence and hatred that, ironically, had permeated the response to the peace process. As one news commentator noted, "the opposition was visceral, violent and deeply personal."[9] Threats on Rabin's life were constant and, not coincidentally, peace process opponents had staged a counterdemonstration at the rally where Rabin was killed.[10] Amir thus found himself part of a movement of people who feared the ultimate destruction of the Jewish people and state, a threat that came in the person of Yitzhak Rabin. The people caught up in this movement saw a dire need for dramatic change. Amir's response was to assassinate Rabin, in his mind in defense of Israel and the Jewish people.

That Amir was not alone in his outlook on the peace process and the danger posed by Rabin and his policies is further reflected in the reactions to Amir's deadly act. While some were stunned, others were not particularly surprised. "Rabbi Abraham Foxman, director of the Anti-Defamation League of B'nai B'rith, said the killing 'was not a surprise,' given the heated rhetoric of foes of peace with the Palestinians."[11] One news account reported, "One woman, speaking on condition that she not be identified, argued the killing 'should have been done sooner.' In Brooklyn's Orthodox neighborhoods, many praised the assassination."[12]

Not only were some people not surprised, there were some, including rabbis, who had suggested that Rabin should be killed. According to one report, "'People, activists and rabbis of the extreme right wing, the nationalist wing, both in Israel and the United States, declared many times that Rabin and his government deserved capital punishment,' echoed one government official, who spoke on the condition of anonymity."[13] While espousing an unpopular view, some individuals were willing to articulate this position publicly. "Israeli radio broadcast an earlier recording of...[one West Bank rabbi who] said, 'Turning in a comrade to gentiles in a way that endangers his life and handing over Jewish property, whoever does such a thing must pay with his life.'"[14] Further, an Orthodox rabbi in New York suggested that Jewish religious law would permit "Jews to kill leaders who acted against their people's interest."[15] After the assassination, Israeli police questioned two rabbis whom they suspected had ruled that Rabin was deserving of death.[16]

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9. Deborah Horan, *Israel: Assassin Whispers Confession As Israel Is Silenced*, INT'L PRESS SERVICE, Nov. 6, 1995, *available in* 1995 WL 10135490.

10. *See id.*

11. Farhan Haq, *U.S.-Israel: Rabin Assassination Sparks Fears for Future*, INT'L PRESS SERVICE, Nov. 6, 1995, *available in* 1995 WL 10135486.

12. *Id.*

13. Horan, *supra* note 9.

14. Kifner, *supra* note 5, § 1, at 1.

15. Horan, *supra* note 9.

16. *See* Joel Greenberg, *Israel Police Question 2 Rabbis in Rabin Assassination*, N.Y. TIMES, Nov. 27, 1995, at A3. Rabbis interpret the Torah and Talmud and provide rulings indicating the proper course of action to follow under religious principles. *See generally* MENACHEM ELON, THE PRINCIPLES OF JEWISH LAW 19–26, 56–73 (1975). Also,

Thus, while an assassination may be an extreme reaction, it still might be argued that Yigal Amir was not necessarily an extremist; his actions were singularly extreme, not his political and philosophical perspective. He simply viewed the world the same way that many others did. In order to save the people and the state, Amir believed that Jewish law dictated that he had a duty to assassinate the Prime Minister, who was devising and implementing the policies that Amir believed were destructive. Although Amir was not alone in his political perspective, he may still be distinguished from many of his ideological colleagues—the so-called extremists—for it is *Amir* who took the actual step of killing Prime Minister Rabin. Seen in this light, Amir's ideology was not necessarily extreme, but his *conduct* certainly set him apart.

II. *RODEF* AND AMIR'S DEFENSE TO THE RABIN ASSASSINATION

A. Jewish Religious Law Influences Israeli Secular Law

Amir acted on his belief that Rabin and his policies posed a grave threat to Israeli Jews by assassinating Rabin. Amir argued that he was justified in his actions under the *rodef* principle—slaying the pursuer to save the pursued. His rationale is derived from principles of Jewish law[17] that are central in the development of Israeli secular law.

"The State of Israel is—needless to say—an ideal laboratory of Jewish law—legislative, judicial, and academic.... [T]here is in Israel an immediate and vital concern in Jewish law such as is not to be found anywhere else...."[18] While the Israeli legislature rarely refers to Jewish law,[19] except to invest it with legal authority over marriages and divorces of Jews,[20] Jewish law remains a strong influence on Israeli secular law. The only instance in which Israeli law explicitly conforms with and incorporates Jewish law is in granting every Jew the right to return to Israel.[21] Nonetheless, in some cases the legislature has adopted

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note that various rabbis will be cited (and their opinions discussed) who have offered opinions on the issues discussed throughout the text. While each is certainly qualified to render opinions or interpretations of the meaning of the Torah, *see infra* note 26, and Talmud, *see infra* note 28, one in particular, Maimonides, will be presented as the foremost authority and interpreter of these religious matters for purposes of this discussion. *See infra* notes 30–31 and accompanying text.

17. The term Jewish law refers to the laws and rules of conduct required of all Jews, as developed via rabbinical interpretations of holy texts over time. *See infra* Part II.B, particularly text accompanying notes 26–32; *see also* ELON, *supra* note 16, at 15.

18. Haim C. Cohn, *Jewish Law In Israel*, *in* JEWISH LAW IN LEGAL HISTORY AND THE MODERN WORLD 126, 143–44 (Bernard S. Jackson ed., 1980).

19. *See generally id.*; Marilyn Finkelman, *Self Defense and Defense of Others: The* Rodef *Defense*, 33 WAYNE L. REV. 1257 (1987).

20. *See* Cohn, *supra* note 18, at 126; *see also* Finkelman, *supra* note 19, at 1260; Martin P. Golding, *Introduction* to JEWISH LAW AND LEGAL THEORY at xiii (Martin P. Golding ed., 1993).

21. Cohn, *supra* note 18, at 129.

religiously inspired statutes that reflect the rules of Jewish law.[22] Thus, while the legislature might not explicitly adopt Jewish law into the secular law, there is a clear influence.[23]

Israeli judges also pay respect to Jewish legal traditions. For example, judges hesitate to overrule a Rabbinical court decision.[24] In seeking to do justice in a particular situation, secular court judges look to the principles of justice as enunciated in both secular and religious law.[25] Therefore, while Jewish religious law is not controlling, it is an important source of interpretive ideas in the secular justice system. The *rodef* defense is an example of this influence. It grew out of religious principles and has now become a firm part of Israeli secular criminal law. We shall now examine the development and meaning of the *rodef* principle.

B. Development of Rodef *in Jewish Law*

The origins of the *rodef* defense reside in the Torah:[26] "Neither shalt thou stand idly by the blood of thy neighbor."[27] The *rodef* concept derives from the Talmud's[28] admonition to defend oneself against attempted murder. This admonition is based on a Torah decree that states, "If he come to slay thee, forestall by slaying him"; accordingly, a defendant charged with murder would be held not guilty if he had killed in self-defense.[29] The original text cannot only be

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22. *See generally id.* at 132 (referring to laws declaring an official day of rest).

23. *See id.* at 127 ("Whenever the Israeli legislature enacted a rule the like of which can be traced in Jewish law, it was not from any intention to adopt Jewish law as such, but solely on the actual merits of the particular legislative determination; and whenever it legislated in deviation from Jewish law, it was not because of any intention to discard Jewish law as such, but solely because the Jewish law solution of the legislative issue concerned did not commend itself on its merits."). While the secular code may be primarily drawn from nonreligious codes, judges perhaps bring in their own religious perspectives and understanding of Israel as the Jewish homeland into their interpretations of the secular law.

24. *See, e.g., id.* at 134–35.

25. *See id.* at 141. Thus, the secular court rulings are influenced by the interpretations of Jewish law—the secular is tinted by the religious.

26. The Torah, narrowly defined, is the Pentateuch, the first five books of scripture handed down to Moses. More broadly defined, it is both the written text of the Hebrew Bible and much of the oral tradition which supplements and interprets it (later reduced to writing by various rabbis). *See* ELON, *supra* note 16, at 54; Finkelman, *supra* note 19, at 1257 n.2; Note, *Justification and Excuse in the Judaic and Common Law: The Exculpation of a Defendant Charged with Homicide*, 52 N.Y.U. L. REV. 599, 613 n.59 (1977) [hereinafter *Justification and Excuse*].

27. *Leviticus* 19:16; *see also* George P. Fletcher, *Self-Defense as a Justification for Punishment*, 12 CARDOZO L. REV. 859, 860 n.7 (1991).

28. The Talmud is the definitive interpretation of the passages in the Hebrew Bible. *See* ELON, *supra* note 16, at 124; Finkelman, *supra* note 19, at 1257 n.2; *Justification and Excuse, supra* note 26, at 613 n.59.

29. *See* Finkelman, *supra* note 19, at 1260 (citing BABYLONIAN TALMUD, *Sanhedrin* 72a); *see also Justification and Excuse, supra* note 26, at 617.

read to permit self-defense, but also to require bystanders to attempt to save would-be victims.

Scholarly interpretations help us understand the full meaning of the key Torah passage and the *rodef* concept. One of the most well-respected and influential Talmudic scholars was Maimonides,[30] a rabbi who extensively analyzed the importance and application of the Torah.[31]

The basic rule derived from the Torah is: "If one person is able to save another and does not save him, he transgresses the commandment, 'Neither shalt thou stand idly by the blood of thy neighbor.'"[32] Maimonides and others have expanded upon this rule in many ways, including examining the duty itself, outlining the extent and limitations of the duty, prescribing the penalty for failure to act, and discussing specific scenarios where the duty might arise. This Article shall take up these subjects individually, exploring interpretations by Maimonides and others.[33]

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30. Rabbi Moses (or Moshe) ben Maimon (1135–1204). He is also known to some by his acronym, Rambam. *See* Finkelman, *supra* note 19, at 1258 n.2.

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> [His] Code of Laws (formulated in twelfth-century Egypt) represented the most thorough and systematic attempt that had ever been made to summarize Talmudic norms, principles, and rationales. It is a classic work, drafted with extraordinary care and precision, and it has engendered more commentaries than any other single work, with the exception of the Talmud itself. Although composed in the Middle Ages, it reliably reproduced in succinct fashion the perspectives and practices of the Talmudic era. Its wording and ordering of norms should be scrutinized with care.

AARON M. SCHREIBER, JEWISH LAW AND DECISION-MAKING: A STUDY THROUGH TIME 251–52 (1979).

32. MAIMONIDES, THE CODE OF MAIMONIDES (MISHNEH TORAH): THE BOOK OF TORTS 198 (Hyman Klein trans., 1964) (Treatise V, 1:14) (quoting *Leviticus* 19:16).

33. Before examining the specific contours of *rodef* and the defense-of-others principle, an introductory word will be helpful. The subject of this Article is one of legal justifications, rather than legal excuses. Under a justification defense, the actor engages in conduct that he "believes to be necessary to avoid a harm or evil to himself or to another." MODEL PENAL CODE § 3.02 (Proposed Official Draft 1962). While they are distinct concepts, the justification claim is related to, and often used interchangeably with, the concept of excuse.

> Claims of justification concede that the definition of the offense is satisfied, but challenge whether the act is wrongful; claims of excuse concede that the act is wrongful, but seek to avoid the attribution of the act to the actor. A justification speaks to the rightness of the act; an excuse, to whether the actor is accountable for a concededly wrongful act.

GEORGE FLETCHER, RETHINKING CRIMINAL LAW 759 (1978). While this Article primarily addresses justifications, there are occasional discussions of cases that deal with excuses. The difference between the two will be insignificant for purposes of those few discussions, and the terms "justification" and "excuse" may be used interchangeably at those points.

1. The Duty to Act Is Broad and Extends to All Jews

The *rodef* defense is anchored in the principle that an individual has the *duty* to use force to stop a pursuer.[34] This duty extends to every Jew, on behalf of others,[35] including the requirement to hire another to help prevent harm, but does not require the rescuer to sacrifice his own life.

Maimonides teaches first and foremost that not only is it a right, but "it is the *duty* of every Israelite to save the pursued."[36] The law of *rodef* "not merely permits, but *mandates* that a bystander come to the rescue of a putative victim."[37] Hence, all who see another in danger have an obligation to take action.[38]

Not only must one act to rescue another, but physical inability to carry out the rescue does not necessarily relieve the duty. Maimonides expands upon the basic rule to add:

> if one person sees another drowning in the sea, or being attacked by bandits, or being attacked by wild animals, and although able to rescue him either alone *or by hiring others*, does not rescue him...he transgresses...the injunction, "Neither shalt thou stand idly by the blood of thy neighbor."[39]

Thus, one must extend not only oneself but also one's financial resources in assistance of the pursued.[40]

While the bystander is obliged to expend financial resources if physically unable to rescue, there is no requirement that the bystander sacrifice his own life in

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34. *See* Fletcher, *supra* note 27, at 860.

35. Because this duty is ultimately one of spirit, it would seem to contemplate a duty to act on behalf of all, regardless of religion. Further, because the rescuer might not be able to immediately ascertain the religion of the would-be victim, the duty would apparently extend to the rescue of all.

36. MAIMONIDES, *supra* note 32, at 196 (Treatise V, 1:6) (emphasis added). Religious law authorities stress that this is not just a right, it is a duty. *See id.* As this Article will discuss, this duty has been codified into a defense in the Israeli Penal Law. *See infra* Part II.C.1.

37. J. David Bleich, *Jewish Law and the State's Authority to Punish Crime*, 12 CARDOZO L. REV. 829, 849 (1991) (emphasis added) (quoting Rabbi Moses Isserles).

38. The specific wording of the biblical command in question, *Deuteronomy* 25:12, further suggests that the requirement applies to any and all bystanders. SCHREIBER, *supra* note 31, at 253.

39. MAIMONIDES, *supra* note 32, at 198 (emphasis added) (quoting *Leviticus* 19:16).

40. *See* Aaron Kirschenbaum, *The Bystander's Duty to Rescue in Jewish Law*, 8 J. RELIGIOUS ETHICS 204, 207 (1980), *reprinted in* JEWISH LAW AND LEGAL THEORY, *supra* note 20, at 515 (stating that it is "an all-encompassing duty—including one's financial resources as well").

defense of another.[41] While the rescuer's death is not inevitable or even required, as this Article shall discuss,[42] the pursuer might face that ultimate fate.

Finally, the duty to rescue does not extend only to a limited class of individuals, such as family members of the pursued individual. Rather, the duty extends to all, likely including even strangers.[43] Thus, Jewish law imposes a broad duty on all Jews to rescue (or to hire another to rescue) any person in distress, regardless of relationship. While the duty exists, questions remain as to the parameters of the duty and application of the principle.

2. Limitations on the Rescuer

We now explore the boundaries of *rodef*. The first, and broadest, parameter has been mentioned: the rescuer may go so far as to take the life of the pursuer. Maimonides dictates that "if one person is pursuing another with the intention of killing him,...it is the duty of every Israelite to save the pursued, *even at the cost of the pursuer's life.*"[44] Nonetheless, there are limitations that ultimately help define *rodef* in Jewish law. Jewish law informs Israeli secular law, and Amir's present fate is controlled by the secular law. This Article shall now discuss the essential limitations and requirements.

a. Imminence/Certainty

The danger the rescuer seeks to prevent must be imminent or certain, so as to sanction force only in response to the most pressing need. However, the exact degree of certainty of the danger remains a point of contention. One commentator suggests that "[t]he *rodef* defense is limited to cases where the defendant killed someone *engaged in* a capital crime."[45] The expectation is that not only is one rescuing the pursued from a dangerous actor, but also from a dangerous act that is occurring.[46] Various rabbis have engaged in this debate. One rabbi offered a less stringent test, allowing intervention "even when the danger to the community is not known with certainty but is only 'feared.'"[47] Others insist that the *rodef*'s

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41. While "Rambam's position on this point is not clear,...[he only suggests taking] steps which do not indicate any taking of risk." SCHREIBER, *supra* note 31, at 254. Others suggest that "one is required to take action against a *rodef*, even if this involves *some* risk, but not if the risk is substantial." *Id.* at 254 n.223.

42. *See infra* Parts II.C.2.b, III.B.3.

43. *See* J. David Jacobs, *Privileges for the Use of Deadly Force Against a Residence Intruder: A Comparison of the Jewish Law and the United States Common Law*, 63 TEMP. L. REV. 31, 41 (1990). A similar requirement can be inferred from Maimonides, who, as just quoted, extends the obligation to "every Israelite," without qualification as to further status or relation. MAIMONIDES, *supra* note 32, at 196.

44. MAIMONIDES, *supra* note 32, at 196 (emphasis added).

45. Finkelman, *supra* note 19, at 1268 (emphasis added).

46. "[T]he permissible use of force presupposes *an actual attack* against the interest of an individual." Fletcher, *supra* note 27, at 863 (emphasis added).

47. Bleich, *supra* note 37, at 851 (referring to Rabbi Elijah of Vilna).

impending actions need only be known to a degree "approaching certainty."[48] One rabbi "maintained that the 'law of the pursuer' is applicable only in cases of *virtual certainty* while...[yet another] maintained that a significantly lesser degree of certainty is sufficient."[49] Whatever the degree of certainty required, it reflects a need for the rescuer to predict the level of danger presented.[50] Therefore, certainty and immediacy are required, and occasionally may be presumed,[51] but once the danger has passed or the pursuer has been stopped, the *rodef* defense is unavailable.[52]

Various reasons, related to protection of the pursued and punishment of the pursuer, may drive the imminence requirement. The requirement dictates protection of an individual from imminent harm and not from anything less urgent. This requirement thus eliminates most situations where self-help would be adequate. Further, since this duty to rescue effectively sanctions the death of the pursuer, society may want to ensure that there be some level of certainty that the pursuer is not just a potentially dangerous person; he must at least be close to committing some terrible wrong before intervention of this kind is allowed, or, especially, mandated. The justification is so drastic in its shortcutting of the judicial process that this added degree of certainty becomes a necessary prerequisite. However rationalized, immediacy/certainty is required; the only question is the extent of that requirement.

b. Proportionality/Minimal Force

The would-be rescuer is confronted with another limitation, somewhat related to the certainty requirement. The rescuer's actions must be proportional to the threat, consisting of only the minimally required force. This restriction ensures that the force employed is no more than responsive to the pursuer's attack, and is not punitive, for it is up to the formal justice systems to mete out punishment. Maimonides discusses minimal force:

> If it is possible to rescue the pursued at the cost of one of the pursuer's limbs, such as by striking him with an arrow or a stone or a sword and cutting off his hand or breaking his leg or blinding his eye, this should be done. If, however, it is impossible to judge

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48. *Id.*

49. *Id.* at 852 (emphasis added) (referring to Rabbis Joshua ben Karhah and Eleazar ben Simeon).

50. "A quasi-scientific prediction of future dangerousness takes the place of the traditional requirement, expressed clearly in the Talmud, that a 'pursuer,' i.e. an aggressor, is someone who is actually pursuing an innocent victim. The danger is visible. It is not inferred from past conduct." Fletcher, *supra* note 27, at 865–66.

51. At times, the prediction is bypassed because some circumstances, such as that of a burglary, give rise to a *presumption* of certainty, regardless of the facts, thereby circumventing the inquiry into the imminence. Jacobs, *supra* note 43, at 42.

52. Finkelman, *supra* note 19, at 1265.

> exactly and the pursued can be rescued only if the pursuer is killed, he may be killed....[53]

Not only should a rescuer use no more than the minimal force necessay to accomplish the goal, such restraint is required. "If one is able to save the victim at the cost of only a limb of the pursuer, and does not take the trouble to do so, but saves the victim at the cost of the pursuer's life by killing him, he is deemed a shedder of blood, and he deserves to be put to death."[54] Hence, again we see that the *rodef* principle is limited, merely providing an interloper a defense for acts society is willing to accept as reasonably necessary to save the pursued.[55]

c. Relationship

Third, the duty to assist the pursued is owed by all, toward all. "It is not based upon any special relationship based on law or contract between the bystander and the person in distress, such as parent and child, husband and wife, guardian and ward, guide and tourist,...master and servant, host and guest, *etc.*"[56]

d. Standard

Finally, it is unclear what standard, or perspective, should be used when judging the rescuer. Most authors seem not to express any opinion on the subject. One offers: "Jewish law employs the perspective of the lawful resident, a subjective standard, rather than a reasonable person standard,"[57] to judge the rescuer's actions. Another suggests an objective standard, instead of a more

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53. MAIMONIDES, *supra* note 32, at 196 (Treatise V, 1:7).

54. *Id.* at 197–98 (Treatise V, 1:13). Commentators have given more recent interpretations. *See* Finkelman, *supra* note 19, at 1263 ("The defendant may only use as much force as is necessary to stop the *rodef*, the perpetrator. Only a minimum of harm may be done to the *rodef*. Thus, if the *rodef* can be stopped by wounding him rather than killing him, one would not be permitted to kill the *rodef*."); *see also*, Jacobs, *supra* note 43, at 42 ("[I]t is not permissible to kill when there is another means of saving oneself.").

55. In addition, some argue that before any force is to be used, the pursuer must be warned. Maimonides "formulates the rule that the *rodef* must be forewarned before being killed,...[but another rabbi adds that] the intended victim...need not forewarn the attacker before killing him." SCHREIBER, *supra* note 31, at 256 (stating that the different standard for the potential victim derives from the idea that the victim under attack may be less able than a bystander to make a quick and clear judgment); *see also*, Anne Cucchiara Besser & Kalman J. Kaplan, *The Good Samaritan: Jewish and American Legal Perspectives*, 10 J.L. & RELIGION 193, 215 (1993–94) ("According to one view, he must acknowledge the warning, before it is legitimate to kill him.").

56. Kirschenbaum, *supra* note 40, at 218. For a more detailed discussion of this issue, see *supra* Part II.B.1.

57. Jacobs, *supra* note 43, at 42. This more appropriately may be seen as a heightened standard, perhaps harder to satisfy than the objective person standard, for not all reasonable people are lawful residents. This Article will later explore this issue in particular depth in the context of American legal principles. *See infra* Part III.B.5.a.

subjective "alter ego" test.[58] Still, most scholars seem not to address this question directly at all.[59]

This series of issues forms the ultimate code for judging a rescuer claiming the *rodef* defense under Jewish religious law. In the final analysis, Jewish law, at a minimum, requires that the danger be imminent and that no more force be used than that which is required, but if necessary, deadly force may be employed in defending the pursued.[60]

3. Jewish Law Encourages the Rescuer

Under Jewish law, every person has a religious obligation to come to the aid of the pursued;[61] in order to fulfill one's spiritual and religious duties, action is required. While there is no punishment for failure to act,[62] for the religious the transgression of a religious duty carries far more dire consequences than any secular court's punishment. This alone provides great incentive to act.

Beyond delineating the duty of and limitations on the would-be rescuer, Jewish law also specifically encourages bystanders to act in defense of others. Such encouragement comes in the form of exemption from religious and civil duties, as well as immunity from tort liability. Maimonides addressed the question of exemption from tort liability:

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58. Besser & Kaplan, *supra* note 55, at 215–16.

59. This avoidance may reflect the fact that choosing the appropriate standard is extremely difficult and that decisions are often made on a case-by-case basis. *See Justification and Excuse*, *supra* note 26, at 622 ("The decisionmaker was rationalizing rather than reasoning, in order to ease the burden of balancing the process of justification. No one could contend that rendering a decision in these extremely troublesome cases was not onerous. Nor can it be argued convincingly that the result reached was wrong or insensitive to the moral dilemma of the situation. The process of deciding that the conduct was right and therefore justified, however, created serious difficulties in reasoning."). While some have avoided the subject, the appropriate standard for judging the rescuer becomes central in our final analysis.

60. Deadly force is simply a proportional response to the pursuer who is about to use deadly force against the pursued.

61. *See supra* Part II.B.1.

62.

> It is a fact of history that in Jewish society—biblical, talmudic and medieval—non-prosecutable injunctions, by their sheer religious weight, were effective in their deterrent power.
>
> It would be misleading, therefore, to interpret the lack of judicial punishment in Jewish law for the innocent bystander who fails in his duty to come to the rescue of his fellow-man in distress as indicating that the duty is merely moral. Rather Jewish law views such failure as nonfeasance, a formal offense of inaction...where action is a duty required by law.

Kirschenbaum, *supra* note 40, at 207. Note that this also reflects the aforementioned principle that all have the duty to rescue. *See supra* text accompanying notes 34–42.

> If one chases after the pursuer in order to rescue the pursued, and he breaks objects belonging to the pursuer or to anyone else, he is exempt. This rule is not strict law but is an enactment made *in order that one should not refrain from rescuing another or lose time through being too careful when chasing a pursuer.*[63]

The bystander is thus encouraged to act, and to act promptly. Otherwise, a would-be rescuer might actually be discouraged from taking action.[64]

The *rodef* principle also carries a corresponding exemption from other duties, civil and religious, that arise during the course of rescue.[65] Further, traditional Jewish religious norms provided for ways of caring for orphans and widows, including those of rescuers killed during the rescue.[66] While the prime motivation certainly arose from religious duty, in these other ways, Jewish law accommodated and even encouraged bystanders to become rescuers.

4. *Applications and Extensions of* Rodef *in the Context of Rabin's Assassination*

The *rodef* principle, requiring the bystander to help the pursued, has been applied in a variety of contexts. In its original conception, the use of deadly force was permissible in three situations: "a perpetrator attempting murder, a perpetrator attempting homosexual rape, and a perpetrator attempting to rape a 'betrothed girl' or a married woman."[67] Amir's defense is analogous to the first scenario; the other two are inapposite.

Accepting, for the moment, Amir's belief that Israeli Jews were facing death at the hands of Arabs, under the first scenario the *rodef* defense might be applicable. The logic supporting the application of the *rodef* defense here is that Rabin's willingness to negotiate with and make land concessions[68] to the Palestinians regarding the West Bank provided ample incentive to the Palestinians to demand greater concessions from the Israelis in the West Bank negotiations. Thus, Rabin's policies[69] of favoring negotiations over conflict, in effect, fostered

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63. MAIMONIDES, *supra* note 32, at 191 (Treatise IV, 8:14) (emphasis added).

64. One rabbi observed that "if you were not to rule thus..., no one would put himself out to rescue a fellow-man from the hands of a pursuer." Kirschenbaum, *supra* note 40, at 215 (quoting Rabbah from the Talmud).

65. "The basic rule of Jewish law declares that all ethical, civil, religious and ritual positive duties are suspended if their implementation or fulfillment would create or sustain danger to human life." *Id.* at 213.

66. *See id.* at 219.

67. Finkelman, *supra* note 19, at 1260–61.

68. Amir maintained at trial that the Talmud provides that "the minute a Jew gives over his people and his land to the enemy, he must be killed." John Kifner, *Zeal of Rabin's Assassin Linked to Rabbis of Religious Right,* N.Y. TIMES, Nov. 12, 1995, at A12.

69. Amir's reasoning was that Mr. Rabin's policies put Jews in such a perilous situation that Rabin himself became a pursuer. *Id.*; *see also,* Joel Greenberg, *Assassination*

the continued hostility in the region, which would result in Palestinian terrorist attacks on Jews and the taking of the Jewish homeland and holy land.[70] Based on this theory of causal connection, Amir could argue that Rabin was the pursuer.

The *rodef* defense under religious law has been extended beyond the three original situations. This expansion of the defense sheds additional light on our subject.[71] The first relevant step in the extension of the *rodef* defense involved killing a "*moser*"—an informer.[72] Rabbis and other scholars have concluded that one may be justified in killing a *moser*, even before the *moser* gets the opportunity to inform, in order to save Jewish lives.[73] This demonstrates that the *rodef* need not be the individual who directly threatens the harm, because in these situations, the informer did not pose the physical threat to the Jewish community—those informed did. Amir could have argued that even if Rabin were not seen as a direct threat, he could be analogized to a *moser*.

Amir argued that the policies of the Rabin government were placing Israeli Jews in danger of mortal attack by Palestinian Arabs in the occupied territories. Thus, it was the Palestinians who posed the actual physical threat to Jews. However, Amir believed that Rabin was assisting the Arabs in their quest to harm the Jewish community.

Rabin, however, was not a *moser*. He was not a renegade informing external authorities. Rabin was the duly chosen representative of the government, proposing and implementing policies in conjunction with cabinet officials, legislators, bureaucrats, and the people. Also, being the *moser* would seem to imply deceitful acts of surreptitiously going to the enemy with certain information. Rabin used no such deceit or trickery. Instead he acted in public, in furtherance of his view of peace for Israel and Israelis.

Jewish religious law has also extended the *rodef* defense to the situation where an assailant is too powerful to resist, a situation in which it has been deemed justifiable to sacrifice the life of one person to save the lives of many. The story of Sheba ben Bichri, who led a rebellion against King David, illustrates this situation.[74] When King David learned of the planned coup, he demanded that Sheba answer the allegations and threatened to kill all of the residents of the town

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in Israel: The Suspect; Investigators Describe a Determined Killer Whose Target Was Peres as Well as Rabin, N.Y. TIMES, Nov. 6, 1995, at A11.

70. *See generally* Barton Gellmanand & Laura Blumenfeld, *The Religious Obsession that Drove Rabin's Killer; in Israel Assassin Was No Misfit*, INT'L HERALD TRIB., Nov. 13, 1995, at 10.

71. *See generally Justification and Excuse*, *supra* note 26.

72. A *moser* is a traitor to the Jewish community—generally speaking, a Jew who informs a non-Jewish authority of information that would be detrimental to the Jewish community. *See id.* at 619. An informer has been defined as "one secretly in the service of the police or of a diplomatic agency (as an embassy) that supplies information (a nest of spies and [informers])." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 1160 (G & C Merriam Co. 1971).

73. *Justification and Excuse*, *supra* note 26, at 619 n.83.

74. *See generally* Finkelman, *supra* note 19, at 1276 n.94; Jacobs, *supra* note 43, at 82–83; *Justification and Excuse*, *supra* note 26, at 619–22.

where Sheba was hiding if Sheba was not turned over to the authorities. In response to the King's threat, the townspeople killed Sheba, cut off his head, and delivered it to the authorities.[75] Some rabbis concluded that the act was justified because Sheba was guilty of treason against the King.[76] Others justified the act arithmetically, stating it was justifiable because there was a net savings of lives.[77]

Killing Rabin, Amir would argue, could satisfy either of these justifications. In the story of Sheba ben Bichri, Sheba posed an indirect threat to the lives of the townspeople whom King David would kill. Amir believed Rabin posed a similar indirect threat to Israeli Jews. Thus, Amir believed that assassinating Rabin was justified because it would lead to change in policy in regard to West Bank concessions to the Palestinians with a resultant net savings of Jewish lives.[78] To Amir, the math was simple: sacrifice one (Rabin) to save hundreds or possibly thousands.[79] Further, as a second justification, Amir viewed the policies and acts of Rabin in regard to the West Bank as treasonous against the people of Israel, the settlers of the West Bank, and the word of his God, as set forth in the Talmud. Because Rabin's actions and policies were treasonous,[80] Amir would argue, killing Rabin was justified.[81]

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75. *See* Finkelman, *supra* note 19, at 1276.

76. *See id.* at 1276–77; *Justification and Excuse*, *supra* note 26, at 620.

77. *See Justification and Excuse*, *supra* note 26, at 620.

78. *See generally* Finkelman, *supra* note 19, at 1276.

79. Currently, the population of the settlement in the West Bank is approximately 147,000. *See, e.g.*, Kifner, *supra* note 5, § 1, at 1. Approximately 5.7 million people live in Israel, outside the occupied territories. *Israel*, KCWD/Kaleidoscope, Feb. 20, 1995, *available in* LEXIS, World/Profil.

Some might also argue that Sheba's fate was sealed because he was acting unlawfully. Unlike Sheba, Rabin was not. The next step would be to argue that therefore Rabin was not a pursuer and the *rodef* defense was unavailable to Amir. However, Jewish law has extended the *rodef* defense to situations where the *rodef* is not guilty of any crime, even when the *rodef* is completely innocent. The most illustrative example of an innocent person being deemed a *rodef* comes from World War II and involves a group of Jews hiding from the Gestapo. When a baby began to cry, threatening the safety of the entire group, one member of the group put his hand over the infant's mouth in order to keep her quiet. The infant died. The rabbis ruled that the act was justified, instructing that even an innocent may be sacrificed to save the many. *See* Finkelman, *supra* note 19, at 1278–79. Even if Rabin were cast as merely an innocent agent of the people, he still promulgated and implemented policies that some argued were ultimately destructive of Israel and Jews.

80. *See, e.g.*, Barton Gellmanand & Laura Blumenfeld, *Israel's Mainstream Brings Forth a Killer; Religious Student Twisted Jewish Law to Justify Rabin's Assassination*, WASH. POST, Nov. 12, 1995, at.

81. This is the weaker justification since killing Rabin would in effect allow Amir to act as judge, jury, and executioner, in violation of Rabin's right to a trial. However, if one can focus solely on the act and the punishment, it provides further insight into Amir's reasoning.

For several reasons, the Rabin assassination is not analogous to the case of Sheba ben Bichri.[82] The primary difference lies in the fact that with Sheba, the Jews were facing a powerful authority intent on its destruction, and the death of one person was *certain* to stop the oppressor. To the contrary, the death of Rabin was not *certain* to stop any perceived threat to Jews.[83] Further, unlike the example of Sheba, where King David chose Sheba to be sacrificed, Amir, not the oppressor, made the decision of whom to kill. The teachings of rabbis consistently state that Jews may not select amongst themselves who is to die.[84] Amir could not successfully argue that his acts fall within this extension.

While Amir may have argued the *rodef* defense under one original view of the concept, he exceeded the defense's boundaries and would find no successful analogy to any of these extensions.[85]

5. Summary

This Article has explored the origins of the *rodef* defense in the Torah and the Talmud, various interpretations, the boundaries of the duty itself, limitations, and Jewish law's encouragement of the bystander to rescue the pursued. We see that there is a duty to rescue the pursued, or to hire someone to do so, at risk of injury, but not at risk of the rescuer's life. The rescuer is limited to acting to prevent harm that is in some measure imminent, and must react only with the minimal force necessary to prevent the harm intended by the *rodef*; but if necessary, the rescuer may kill the *rodef*.

Amir responded to what he wrongly perceived to be his duty. His response was inappropriate. There was no imminent harm presented specifically by Rabin toward another. Moreover, Amir failed to employ the minimal force that is allowed, instead responding with deadly force. He not only exceeded the basic limitations of *rodef*, he also could find no shelter in any of the historically developed extensions. Amir cannot claim justification under the religious *rodef* principle.

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82. Nor, for the same reasons, is it similar to the crying baby example given *supra* note 79.

83. In fact, this action did not stop the peace process. *See infra* note 117.

84. *See generally* Finkelman, *supra* note 19, at 1276–81; Fletcher, *supra* note 27, at 864–65. Also, note that even in the crying baby example, the Jews did not select amongst several individual babies—one baby was crying and that baby was killed. *See supra* note 79

85. The discussion *supra* Part II.B.4 presented a few specific examples of the expansion of *rodef*, which may be seen as exceptions. The discussion's scope was limited in order to show another way that Amir could have attempted to argue a (limited) *rodef* defense. However, this Article will show that those potential arguments fail.

C. Rodef *Principles as Applied in Israeli (Secular) Law Do Not Support Amir's Actions*

1. Israeli Secular Law Has Codified Rodef

Israeli secular law has adopted and modified the religious law *rodef* principle. While the Israeli justice system relies in part upon religious sources,[86] its decisions are separately reasoned, and Amir faced judgment within this secular justice system.[87] That system rejected his claim.

The relevant Israeli statute (section 22 of the Penal Law) reads:

> A person may be exempted from criminal responsibility for any act or omission if he can show that it was only done or made in order to avoid consequences which could not otherwise be avoided and which would have inflicted grievous harm or injury on his person, honour or property or on the person or honour of others whom he was bound to protect or on property placed in his charge:
>
> Provided that he did no more than was reasonably necessary for that purpose and that the harm caused by him was not disproportionate to the harm avoided.[88]

While there are similarities, the codified secular version of the defense-of-others principle differs from religious law in several relevant respects. First, the secular law establishes a defense, but, unlike Jewish law, not an obligation. Second, the statute does not explicitly address imminence or certainty, instead only requiring that the harm potentially caused by the pursuer be grievous. Third, in contrast to the broad duty imposed upon all under Jewish law, the statute limits the defense to protection of those with whom the rescuer has a specific relationship, or on property the rescuer is bound to protect. However, there is a similarity with Jewish law, in that the harm done in response by the rescuer must be proportional to the harm initially threatened by the pursuer.[89]

Few reported opinions mention the *rodef* defense and the application of section 22, and only one is relevant in the context of this discussion.[90] In the 1979

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86. *See supra* Part II.A.

87. Even though Amir occasionally outwardly denies the legitimacy of the Israeli government, it does govern his actions and controls his life as the sole recognized governmental authority.

88. The Penal Law, L.S.I. § 22 (Necessity) (Authorised Translation from the Hebrew Prepared at the Ministry of Justice (1977)).

89. Thus, the statutory defense combines a traditional secular defense and religious principles.

90. There are only limited English-language materials available containing translations of Israeli court opinions. Such materials contain the seminal case, *Afangar v. State of Israel*, 33(3) P.D. 141 (1979), discussed in the text that follows this note. A search of a Hebrew CD-Rom Israeli court opinion database only revealed two other cases in which this *rodef* concept is mentioned at all between 1981 and 1994. *See* Negaar v. State of Israel, 41(2) P.D. 57 (1987); Aloni v. Minister of Justice, 35(1) P.D. 113 (1981). However, neither

case of *Afangar v. State of Israel*,[91] the Israeli Supreme Court grappled with the application of section 22, while mindful of the religiously based *rodef* principles, and set forth the basic requirements to sustain a secular defense-of-others claim. The court thus examined a secular statute, and interpreted it in light of values and mores of Judaism that are shared by Israeli Jews, legislators, and judges.

In *Afangar*, the Israeli Supreme Court discussed four key factors that help determine the applicability of the *rodef* defense:

> (a) in Jewish law every one has the duty of coming to the help of another who stands in serious danger of being killed; if there is only danger of injury, no such duty arises according to many of the Sages but it is permitted to do so even if injury is thereby inflicted on the "pursuer"...;
>
> (b) Such duty and right obtain in respect of any one and against any one...;
>
> (c) The duty and right are only available as the circumstances may require for the defence of the pursued, i.e. when the pursuer is likely to continue attacking the pursued, but not when it appears that the danger has passed and the intervention of the "defender" does not have the character of defence and is otherwise motivated;
>
> (d) The leading rule is that a balance must be maintained in the amount of force the intervener employs in defence of the pursued, and exemption from criminal liability is conditional upon the employment of the minimum force required for the purpose...otherwise criminal liability attaches for any injury caused to the pursuer and clearly for killing the pursuer.[92]

A number of points follow from the the court's holding, and the inescapable conclusion is that Amir had no credible *rodef* defense.

2. *Amir's Actions Cannot Be Supported Under Secular* Rodef *Principles*

Earlier in this discussion,[93] we saw that a narrow reading of religious law allows a marginally plausible argument that the *rodef* principle justified Amir's assassination of Rabin. We then observed that while a few religious authorities may support such a conclusion, most religious and secular legal scholars reject such an interpretation. The application of section 22 and the *rodef* defense in

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of these two cases discusses the *rodef* concept in a way that sheds light on the subject at hand.

91. 33(3) P.D. 141, *reprinted in* NAHUM RAKOVER, 1 MODERN APPLICATIONS OF JEWISH LAW 445 (1992) (English translation (unofficial)) (future citations to this case will refer to *Modern Applications of the Jewish Law*, where the case is translated into the English language). As indicated *supra* text accompanying note 90, this is the only published opinion to address this topic in the relevant context.

92. *Afangar*, 33(3) P.D. 141, *reprinted in* RAKOVER, *supra* note 91, at 448 (citation omitted) (citing MAIMONIDES, *supra* note 32, at 198).

93. *See supra* Part II.A.

Israeli secular jurisprudence, most notably in *Afangar*, also reflects the religious principles and directly repudiates Amir's theory.

First, the *Afangar* court held that the attack by the rescuer must not be motivated by reasons other than the need to defend the pursued.[94] In confessing, Amir himself revealed that the assassination was "aimed at halting the Labor government's policy of granting autonomy to Palestinians on territory conservative Jews considered the biblical lands of Israel."[95] Amir killed for political reasons; he had a *political motivation* beyond any desire to rescue an individual from the grips of imminent danger.[96] Amir's goal was to stop the policies of the Rabin government, an alternative policy motive that may be distinguished from any presumed specific threat posed by Rabin. Because of this other motivation, Amir's legal argument is without merit. This political motivation may also indicate that Amir operated under a war mentality, which suspends the basic rules and motivations, justifying any action as may be available in the time of war. However, as a once model citizen and student of the law, he had accepted the legitimacy of the state. His selective rejection of the state's legitimacy is inconsistent and seemingly dishonest.

Second, *Afangar* limits the actions of the rescuer. The *rodef* defense applies to situations in which a specific person is in danger; it does not apply when the defendant is acting on behalf of the general public.[97] Amir was concerned with the possible destruction of the State of Israel and the fate of Israeli Jews. No specific person was in danger of injury. To the contrary, Amir himself argued that he was acting broadly, on behalf of the people of Israel; he declared, "everything I did, I did for the people of Israel, the law of Israel and the land of Israel."[98] The *rodef* defense does not support such an approach.

Third, *Afangar* sets forth an imminence requirement[99] and limits the defense to situations in which "the pursuer is likely to continue attacking the pursued, but not when it appears that the danger has passed."[100] While there is

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94. *See Afangar*, 33(3) P.D. 141, *reprinted in* RAKOVER, *supra* note 91, at 446.

95. Jo Strich, *Urgent*, AGENCE FRANCE PRESSE, Mar. 27, 1996, *available in* LEXIS, News Library.

96. Judge Levy, writing for a three-judge sentencing panel, wrote that Amir "decided that killing the late Prime Minister is the last way in which to stop the political process which was not to his liking...." Joel Greenberg, *Rabin's Killer Is Given a Life Sentence in Israel*, N.Y. TIMES, Mar. 28, 1996, at A10.

97. *Afangar*, 33(3) P.D. 141, *reprinted in* RAKOVER, *supra* note 91, at 449.

98. Strich, *supra* note 95 (quoting Amir). A friend who studied with Amir at Bar-Ilan University recalled that Amir once "said that Rabin should be considered a *rodef*—a pursuer—and has to be killed immediately. His reasoning was that Rabin's policies were bringing on terrorist attacks. Jews were being killed because of him." Kifner, *supra* note 5, §1, at 1.

99. Here, the court reads something extra into section 22 of the Israeli Penal Law, apparently drawing from religious law.

100. *Afangar*, 33(3) P.D. 141, *reprinted in* RAKOVER, *supra* note 91, at 448.

violence and death in the occupied territories,[101] Rabin was not actually attacking anybody at the time of his assassination. Without a present attack, there could be no danger or likelihood of a *continued* attack.

Fourth, *Afangar* requires that there be a balance in the amount of physical force employed. The rescuer may cause only minimal harm to the pursuer in rescuing the pursued; if the rescuer can save the pursued by the infliction of nonlethal injury, he may not kill.[102] Thus, the law requires that even if Rabin were in fact a pursuer, Amir would have had to employ the minimum force necessary to stop him—something short of killing.[103] The required balance was not maintained. More than minimal harm was inflicted.[104]

From Amir's perspective, perhaps there was no alternative, no minimum force to be employed. His perception was such that no orderly political solution was practical. As long as Rabin was in office, Amir perceived a threat that could only be stopped via Rabin's blood. This argument appears disingenuous because, as previously noted, Amir accepted the legitimacy of the state in all other respects.

The final aspect of *Afangar* to condemn Amir's case is the requirement that the rescuer may act to save the pursued only and must not employ additional force.[105] Just as the rescuer may not employ undue force, he is also prohibited from using any force at all when the original attack is over. Otherwise, the act turns from one of defense of the pursued to punishment of the pursuer.[106] The attack by Amir was for the purpose of punishing Prime Minister Rabin, contrary to the message of the Israeli Supreme Court.[107]

Amir's argument could not satisfy the *rodef* requirements under Israeli secular law. The court properly rejected his *rodef* claim, saying that the "guilty verdict and sentence were a warning to all who would use violence to achieve political ends."[108]

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101. *See supra* Part I.

102. *Afangar*, 33(3) P.D. 141, *reprinted in* RAKOVER, *supra* note 91, at 446. This requirement matches that found in the statute. *See also* Finkelman, *supra* note 19, at 1263–64.

103. To the contrary, Amir said that he had attempted to kill Rabin several other times before his completed act. *See* Joel Greenberg, *Rabin's Killer Says He Acted for Past Generations of Jews*, N.Y. TIMES, Nov. 21, 1995, at A9.

104. Further, had Rabin only been wounded, his popularity would likely have soared, as he would have been elevated to the highest hero status. Wounding him thus would probably have had the ultimate effect of ensuring the continuation of the peace process under the Rabin regime.

105. *Afangar*, 33(3) P.D. 141, *reprinted* in RAKOVER, *supra* note 91, at 447. This also may be seen as an extension of the proportionality requirement.

106. *Id.*

107. He may have been "punishing" what he believed to be Rabin's betrayal of the Jews. As presiding Judge Levy stated, Amir "acted after much thought, with premeditation and in cold blood, believing that the death of the prime minister was the best way to halt the peace process." Strich, *supra* note 95.

108. *Id.*

3. Even from Amir's Perspective, He Had No Rodef *Defense*

Even accepting Amir's base line political views,[109] he still had no defense. His argument was internally flawed and inconsistent and did not support the conclusion he reached. The more accepted version of Amir's theories posits[110] that the Rabin government's policies were improperly giving away the Jewish homeland to the Palestinians. The next step is to argue that these policies were undermining the Jewish state, and ultimately the argument posits that Rabin himself, as promoter and implementer of these policies, was allowing (and even promoting) the destruction of the Jewish people. Amir believed that "Mr. Rabin had hijacked the government from its people."[111] This world view does not justify killing Rabin under secular *rodef* principles. We shall now see why.

a. Even According to Amir's Theories, Rabin Was Not Really the Pursuer

Starting with a simple *rodef* analogy involving one person chasing another with a knife, the *rodef* analogy fails in Amir's case because Rabin was not, according to Amir, the pursuer. The person with the knife is the pursuer, and a rescuer would be permitted to intervene and argue the *rodef* defense of the pursued. In Amir's own words, "Mr. Rabin was a pursuer because his policies were leading to Palestinian attacks on Jews."[112] However, if the *policies* caused the *Palestinians* to attack Jews, Rabin-as-policymaker could possibly be accused of being a facilitator or abettor. But he certainly was not a pursuer. Amir's own theory would require instead that action be taken against the Palestinians—the real pursuers.[113] Under Amir's theory, Baruch Goldstein's 1994 massacre of at least twenty-nine Palestinians was an appropriate response,[114] but not the assassination

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109. I do not accept these views, and prior discussions in this Article, at times, presupposed my disagreement.

110. This is a much simplified account of these complex beliefs. Even from this simplified account, we can see that any proffered causal link between Rabin's acts and physical injury to Jews is tenuous, at best.

111. Gellmanand & Blumenfeld, *supra* note 70, at 10.

112. *Id.*

113. This does not suggest in any way that violence is an appropriate response. Instead it explains only that under Amir's theory, the pursuers perhaps are the Palestinians. Note also that the original *rodef* principle involved one about to *murder* another, which may require an intent to kill that was lacking on Rabin's part. *But see* Mark Juergensmeyer, *The Terrorists Who Long for Peace*, 20 FLETCHER F. WORLD AFF., Winter/Spring 1996, at 1, 1 (Juergensmeyer quoted a young settler as saying, "all Arabs who live here are a danger to us because they threaten the very existence of the Jewish community on the West Bank.").

114. On February 25, 1994, Baruch Goldstein, wearing his army reserve uniform, opened fire at the Cave of the Patriarchs in Hebron, a shrine that is regarded as holy by both Muslims and Jews, killing at least 29 Arabs as they prayed. Within a few minutes, the surviving worshipers beat Goldstein to death. *Witness of Hebron Massacre Said Killer Was Alone*, REUTERS N. AM. WIRE, Apr. 10, 1994, *available in* LEXIS, World/Reuna Database. *See generally Key Events that Have Marred the Israeli-PLO Accord*, JANE'S INTELLIGENCE

of the Prime Minister himself.[115] Had Amir been true to his own words and beliefs, he would not have attacked Prime Minster Rabin. This again illustrates the fact that Amir was operating outside of even the fringe. He believed, like Goldstein, that there was a war of sorts that mandated violent responses. His flaw was trying to contort a legal principle of the mainstream to justify his actions. In a sense, he was trying to fit a square peg into a round hole.

b. Democratic Means Were Available to Advance Amir's Goals

According to Amir, the policies of the Rabin government were the source of danger to the people of Israel. *Rodef* required that he employ other, nonlethal means to stop the policy-oriented danger to the people, such as voting Rabin out of office, engaging in political demonstrations, or engaging in other political discourse.[116] Surely there were other means available to Amir to stop the Rabin policies; assassination was not necessary.[117] Immediately after the assassination,

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REV., Apr. 1, 1996, at 162, *available in* 1996 WL 9483477. However, Goldstein still would have failed in offering a *rodef* defense, for lack of imminence and proportionality. Alternatively, occasional incidents of either settlers or police shooting and killing rock-throwing Palestinians provide a closer analogy, for there is greater imminence. It is still flawed, however, for there is no proportionality.

115. It has been reported that Amir had "read a book praising Baruch Goldstein and his massacre." Kifner, *supra* note 5, § 1, at 1. Further, residents of the militant settlement Kiryat Arba "had turned [Goldstein's] grave into a shrine where militants, like Amir, revered his act of martyrdom." Juergensmeyer, *supra* note 113, at 1.

116. Such responsive political action may be seen as proportional or minimal force. Also, for an interesting discussion of the power of words and the free speech implications of incendiary words and beliefs, in the context of the assassination of Rabin, see Owen Fiss, Freedom of Speech and Political Violence, Talk Presented at Haifa University (Jan. 30, 1997).

117. Immediately after Rabin's death, the Israeli government continued with its prior plans for the occupied territories. As was reported just after the assassination, "[Shimon] Peres, quickly named acting prime minister after the killing, vowed...to continue making peace with the Arabs, and opposition Likud party leader Benjamin Netanyahu, who supports Jewish settlement in the West Bank, promised not to block Peres' formation of a new government." Nicholas Goldberg, *Rabin Assassination*, NEWSDAY, Nov. 6, 1995, at A3. The subsequent path toward peace seems rocky but not impassable. For example, in late September, 1996, massive violence again rocked the region, as the old rivals clashed, prompting U.S. President Clinton to call an emergency summit meeting in Washington, D.C. *See* Peter Baker, *Clinton Sets Mideast Summit at White House This Week*, WASH. POST, Sept. 30, 1996, at A1. Amir may have inspired similar tactics among fanatical Jewish groups. In early January, 1997, an emotionally unbalanced Israeli soldier, Private Noam Friedman, fired into a crowd of Palestinians in Hebron. Serge Schmemann, *Israeli Wounds 6 Arabs in Hebron Rampage*, N.Y. TIMES, Jan. 2, 1997, at A1. Friedman claimed he was acting to halt the negotiations regarding the Israeli military withdrawal from Hebron. *Id.* The peace process, however, continued. Two weeks after the shooting, Prime Minister Netanyahu and P.L.O. leader Yasir Arafat signed an agreement providing for the partial withdrawal of Israeli forces from Hebron. Serge Schmemann, *Netanyahu and Arafat Agree on Israeli Pullout in Hebron*, N.Y. TIMES, Jan. 15, 1997, at A1. Within Israeli politics, Amir's assassination of Rabin seems to have fostered a willingness between the Likud and Labor parties to form a consensus for future negotiations with the Palestinians.

now-Prime Minster Benjamin Netanyahu stated: "In a democracy, governments are replaced through elections, not by murder."[118] The court was apparently convinced by this rationale, and Judge Levy observed that "even if the term 'pursuer' were somehow applied to Mr. Rabin, harming him was forbidden by Jewish law because there were democratic ways to replace him."[119]

The people of Israel now have exercised their will in the manner that Amir could have.[120] After Rabin's death, his successor had to be chosen, and the people (reflecting a choice regarding both policy and personality)[121] elected Benjamin Netanyahu, one of Rabin's most prominent critics on the peace process,

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Serge Schmemann, *Likud and Labor Legislators Draft Bipartisan Peace Plan*, N.Y. TIMES, Jan. 26, 1997, at A6. The parties, citing the internal upheaval following Rabin's assassination, recently drafted a joint plan to provide a national consensus in negotiations for a final settlement with the Palestinians. *Id.* Still, deadly bombings and killings continue, including a July 30, 1997, suicide bombing, which resulted in 15 deaths in a vegetable market, and a September 4, 1997, triple suicide bombing, which caused four deaths and at least 180 injuries in a popular shopping area in Jerusalem. *See* Serge Schmemann, *3 Bombers in Suicide Attack Kill 4 on Jerusalem Street in Another Blow to Peace,* N.Y. TIMES, Sept. 5, 1997, at A1. Still, President Clinton remained intent to send Secretary of State Albright to the region to press peace efforts. *See* Steve Erlanger, *Albright to Go Ahead with Mideast Trip*, N.Y. TIMES, Sept. 5, 1997, at A15. There has been such a history of violence that no one act will either block or clear the path to peace. *See also* Serge Schmemann, *The Harsh Logic of Assassination*, N.Y. TIMES, Oct. 12, 1997, § 4, at 1 (discussing Israeli assassination attempts on perceived opponents). As before the assassination, the peace progress appears to have been bumpy and halting at times, but progress certainly was not stopped by the assassination.

118. Goldberg, *supra* note 117, at A3. *But see Baruch Goldstein in His Own Words: 'Eventually We Have to Drive Them Out,'* WASH. POST, Mar. 6, 1994, at C1 (The article quoted Goldstein, in 1988, as saying, "Democracy is a nice concept for gentiles to live by. It is a concept that has its merits but in Judaism we have an absolute truth. This is the Torah. This is our law. It is above the decisions of man. The fact that this has to be a Jewish state is not something we decided but which we believe that God decided. We have no right to democratically or any other way allow this state to become a non-Jewish Arab state.").

119. Greenberg, *supra* note 1, at A1.

120. David Horovitz, *Killer of Rabin Claims Success of His 'Mission' Prompted Ousting of Labour*, IRISH TIMES, July 8, 1996, at 11, *available in* 1996 WL 11031939; *see also Rabin's Killer Backs Netanyahu*, L.A. TIMES, June 6, 1996, at A12 ("'Yigal Amir said he voted for Benjamin Netanyahu...,' lawyer Shmuel Fishman told reporters at a Tel Aviv court. 'Now he is part of more than half the country that's happy about the elections.'"). Thus, Amir continues to take part in the democratic process that he intentionally refused to respect with his deadly act.

121. Policy questions aside, Netanyahu was widely considered to be an attractive candidate, at times being called "Western" or "American" or "Kennedyesque." *See* Elizabeth Bumiller, *A First Lady's Duties Include Enduring Criticism*, N.Y. TIMES, July 13, 1996, at A1; Marjorie Miller, *Campaigning American Style Woos Israelis*, L.A. TIMES, May 26, 1996, at A1; Serge Schmemann, *The Israeli Vote: Man in the News; the 'American' Premier*, N.Y. TIMES, June 1, 1996, at A1.

as the new prime minister.[122] Perversely, "Amir expressed his satisfaction...that the killing had 'woken up' the Israeli public, and prompted the ousting of the Labour government and its replacement by Benjamin Netanyahu's right wing/religious coalition."[123] As Amir himself knows, the people of Israel did have and still do have effective alternative democratic means for expressing themselves and reworking the government.[124]

c. *Rodef* Does Not Allow for Amir's Vengeful Acts

Amir's own words further betray his position because they show he acted in revenge. In court, Amir said he acted on behalf of "all those thousands who had shed their blood for this country.... Maybe physically I acted alone, but what pulled the trigger was not only my finger, but the finger of this whole nation, which for 2000 years yearned for this land and dreamed of it."[125] As we saw earlier,[126] a pursuer "is someone who is *actually pursuing* an innocent victim. The danger is *visible.* It is *not inferred from past conduct.*"[127] The judgment of the pursuer cannot be based on past actions or vengeful motives such as those espoused by Amir. While he claims to have considered this matter carefully, Amir clearly ignored the basic requirements of the *rodef* principle.[128]

In sum, neither the religious nor the secular law development of the *rodef* principle supports Amir's attempted justification defense. He acted disproportionately, in a situation that did not involve imminent danger to any specific person, based on political motivations. The danger he perceived could have been rectified in other ways, and under any rational person's perspective, the killing was not justified.

III. AMERICAN JURISPRUDENCE: THE DEFENSE OF OTHERS

The American analog to the *rodef* principle is the defense-of-others defense. The basic requirements are similar to those of *rodef*, but there are certain

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122. Not only did the people choose Netanyahu, they also rejected Rabin's political ally and successor in the Labor Party, Shimon Peres.

123. Horovitz, *supra* note 120, at 11. This also reflects his other political motivations. *See supra* text accompanying notes 94–96.

124. While Amir may intellectually understand these options, he seems to adhere to a reality whereby only violence, not an orderly political process, can resolve problems in the government.

125. Greenberg, *supra* note 103, at A9.

126. *See* discussion *supra* Part II.B.2.a.

127. Fletcher, *supra* note 27, at 865–66 (emphases added).

128. Even if given a jury of his politically and religiously like-minded peers, a guilty verdict still would have been mandated for Amir. "'It's a horrible evil,' said Rabbi Steven Pruzansky of Teaneck, N.J., one of the most vocal opponents of the peace process. 'You can't find somebody who disagreed with Rabin more strenuously than I did, but he didn't deserve death.'" Debbi Wilgoren, *Rabbis Give Short Shrift to Murder as Obligation*, WASH. POST, Nov. 8, 1995, at A21.

distinctions to be drawn. In addition to the particular requirements and tests of the defense-of-others principle, a fundamental difference is that there is no obligation or duty under American law to come to the aid of another.[129] This Article shall look at the Model Penal Code ("MPC"), various states' statutes, and applicable case law to see how the American defense-of-others principle plays out. In addition to ordinary case law, we shall also pay special attention to religiously and politically charged cases involving criminal acts directed against doctors[130] who perform abortions, as they are analogous to the Amir case. At the conclusion of this examination, we shall see that these individuals' criminal acts are not justified by the defense-of-others principle. These cases suggest that, just as he was unsuccessful in Israel and under Jewish law principles, Amir similarly would have had no sufficient defense in an American court.

A. MPC and Commentaries Provide for a Defense-of-Others Defense

MPC[131] section 3.05 justifies an otherwise criminal act when the actor intervenes in defense of others. Section 3.05, entitled "Use of Force for the Protection of Other Persons," provides, in relevant part:[132]

> (1) Subject to the provisions of this Section and Section 3.09, the use of force upon or toward the person of another is justifiable to protect a third person when:
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> > (a) the actor would be justified under Section 3.04 in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect; and

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129. Recall, as discussed earlier, that this is in contrast to Jewish law principles. *See supra* Part II.B.1. Also recall that Israeli law does not follow Jewish law in this manner; it follows the same no duty rule as seen in American jurisdictions. *See supra* text accompanying note 88.

130. This discussion is not limited to only the doctors, although they are the common intended murder victims. I use "doctors" as a shorthand to include physicians and other personnel who assist them and the patients seeking abortions.

131. The MPC is a comprehensive codification of criminal law completed by the American Law Institute in 1962. The purpose of the MPC was to "stimulate the legislative process" in order to "appraise the content of the penal law by a contemporary reasoned judgment—the prohibitions it lays down, the excuses it admits, the sanctions it employs, and the range of authority that it distributes and confers." Herbert Wechsler, *Foreword* to MODEL PENAL CODE: OFFICIAL DRAFT AND REVISED COMMENTS at xi (1985). The MPC is not law itself, but a view of what the drafters believe the law ought to be, and how the criminal laws ought to be structured. It is, as the name suggests, a model, which is frequently employed. The MPC is influential in that its provisions have been adopted by legislatures and enacted into law, if not in their entirety, at least in significant part in the vast majority of states. *See id.* (summarizing the various states' actions taken in adopting the MPC).

132. MODEL PENAL CODE § 3.05(2) (Proposed Official Draft 1962), which addresses the issue of retreat, is omitted.

> (b) under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force; and
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> (c) the actor believes that his intervention is necessary for the protection of such other person.[133]

This test may be restated: First, the actor (rescuer) must only use the

> amount of force that he could use to protect himself. Second, given the circumstances as the actor believes them to be, the third person [(pursued)] must legally be justified in using such protective force.... [Third,] the actor must believe that his intervention is necessary for the protection of the third person.[134]

Section 3.04, incorporated by reference into section 3.05, provides that "the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion."[135] By specifically referencing section 3.04, section 3.05 incorporates a number of other criteria. Specifically, the actor is judged initially from a subjective point of view, asking whether the actor (not a reasonable person) believed in the need to use force. Next, the use of force must be immediately necessary, and the force must be in response to the use of force by the aggressor/pursuer on the present occasion, not based on past conduct. Finally, the force against which the actor is defending must be unlawful force.[136]

The drafters also noted as one particularly important aspect of section 3.05 that reasonable mistakes shall exculpate the rescuer. The drafters explained:

> Mistakes in the formation of that belief...are dealt with in Section 3.09.[137] There is thus liability when the actor negligently or

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133. *Id.* § 3.05.
134. *Id.* § 3.05 cmt. 1.
135. *Id.* § 3.04 (Proposed Official Draft 1962).
136. *See id.*
137. MPC section 3.09 provides, in pertinent part:

> (2) When the actor believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification...but the actor is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief that is material to the justifiability of his use of force, the justification afforded...is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability.
>
> (3) When the actor is justified...in using force upon or toward the person of another but he recklessly or negligently injures or creates a risk of injury to innocent persons, the justification...is unavailable in a prosecution for such recklessness or negligence towards innocent persons.

Id. § 3.09 (Proposed Official Draft 1962).

> recklessly forms his view of the circumstances, a liability that is proportional to the degree of fault shown by the mistake. There is also liability if the actor is ignorant or mistaken about the content of the Code, the criminal law, or any other provision dealing with the legality of an arrest. Finally, under Section 3.09, there is liability for risks that are recklessly or negligently caused to innocent persons by the actor's intervention. This was believed to go quite far enough, without imposing liability without fault in cases where the actor is in good faith and uses due care.[138]

The MPC thus sets out standards for the use of force in defense of others.

B. Most Individual States' Statutes and Case Law Provide for a Defense-of-Others Defense

The vast majority of the states have adopted a defense-of-others provision in their criminal codes, many modeled after the MPC.[139] The states maintain the same core requirements[140] as the MPC, because they have addressed the same central questions regarding the need to intervene. First, one must ask about the type of danger posed to the pursued. Is it imminent? Is it present? Must that danger be of a particular type, i.e., violent, unlawful, or felonious? Assuming there is a danger that may be defended against, what may the nature of the reactive force be? What relation must the responsive force bear to the initial force, and is deadly responsive force permitted? Next, we must ask whether there must be some relationship between the rescuer and the pursued. Is there a family relation, a contractual obligation, or other status relationship? We must also ask how we are to judge the rescuer's actions; from an objective or subjective perspective? Finally, do we want to encourage the rescuer to intervene in some way? The answers to

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138. *Id.* § 3.05 cmt. 1. In MPC section 210.3, which addresses manslaughter, the drafters offered another interesting comment:

> The critical element of the Model Code formulation is the clause requiring that reasonableness be assessed "from the viewpoint of a person in the actor's situation." The word "situation" is designedly ambiguous.... [I]t is equally plain that idiosyncratic moral values are not part of the actor's situation. *An assassin who kills a political leader because he believes it is right to do so cannot ask that he be judged by the standard of a reasonable extremist.*

Id. § 210.3 cmt. 5(a) (emphasis added).

139. Forty-one states have such statutory provisions. Five states—Delaware, Hawaii, Kentucky, Nebraska, and Pennsylvania—have adopted the MPC provision verbatim. *See* Marco F. Bendinelli & James T. Edsall, *Defense of Others: Origins, Requirements, Limitations and Ramifications*, 5 REGENT U. L. REV. 153, 154 n.11 (1995).

140. Note that this Article does not include a discussion of *all* provisions in every statute. In particular, it does not discuss provocation, the duty to retreat, or resisting arrest, all of which receive significant treatment by some states. While these and the other omitted features of the defense-of-others statutes are important, they are not particularly relevant to the subject of this Article. A thorough catalog of the states' treatment of this subject may be found in Bendinelli & Edsall, *supra* note 139.

these questions ultimately inform the way the various defense-of-others statutes have been written. This Article shall now proceed to examine a number of those statutes as well as interpretive case law.

1. Imminence/Certainty Is Required

Virtually all states with statutes that provide for a defense-of-others defense require that the force being defended against be imminent, immediate, or certain.[141] Illinois, for example, specifically states that the rescuer must be acting to defend against the pursuer's "imminent use of unlawful force," or "to prevent imminent death or great bodily harm."[142] While many states use the term imminence, others use terms such as "likely to use" or "about to use" particular force,[143] which still convey a sense of imminence, certainty, or immediacy.

States' imminence provisions typically require temporal immediacy, not the persistent possibility of death. The Alaska Court of Appeals offered the following commentary on the subject: "'Inevitable' harm is not the same as 'imminent' harm. Even though [the defendant] may have reasonably feared that [the deceased] (or one of [the deceased's] relatives) would someday kill him, a reasonable fear of future harm does not authorize a person to hunt down and kill an enemy."[144]

The Hawaiian courts have addressed the policy implications of the imminence requirement:[145]

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141. *See id.* at 168–69 & nn.79–84 (providing a detailed list of states' provisions).

142. 720 ILL. COMP. STAT. ANN. 5/7–1 (West 1993).

143. *See, e.g.*, ALA. CODE § 13A–3–23(a) (1994).

144. Ha v. State, 892 P.2d 184, 191 (Alaska Ct. App. 1995); *accord* State v. Hernandez, 861 P.2d 814, 819 (Kan. 1993); *see also* State v. Jones, 434 N.W.2d 380, 385 (Wis. 1989) (Callow, J., dissenting) ("One may not use deadly force simply because one's life has been threatened sometime in the past or because it may be threatened at some undetermined time in the future."). This issue has also arisen, with conflicting results, in cases where battered women have slain their abusers. *See* State v. Stewart, 763 P.2d 572, 578 (Kan. 1988) (holding that "a battered woman cannot reasonably fear imminent life-threatening danger from her sleeping spouse"); State v. Norman, 378 S.E.2d 8, 13 (N.C. 1989) (holding that battered wife was not entitled to a justification defense because the threat posed by the husband was not imminent when he had been asleep and the defendant "walked to her mother's house, returned with a pistol, fixed the pistol after it jammed and then shot her husband three times in the back of the head"). *But see* People v. Humphrey, 921 P.2d 1, 10 (Cal. 1996) (holding that testimony on battered woman's syndrome "is generally relevant to the reasonableness, as well as the subjective existence, of defendant's belief in the need to defend"); State v. Leidholm, 334 N.W.2d 811, 818–19 (N.D. 1983) (reversing and remanding a murder conviction of a battered woman who killed her husband while he slept so that jury could determine whether her belief in imminent harm was reasonable according to her subjective impressions as a battered woman).

145. Hawaii, a MPC state, maintains the requirement that the force be "immediately necessary...on the present occasion." HAW. REV. STAT. § 703–304 (1993).

> A presence requirement is the concomitant of the "immediate harm" requirement. The inevitable requirement of presence stands, even where the criminal acts done to prevent harm to self, others, or property do not involve force. Failure of the courts to require presence would license persons to violate the criminal statutes far more frequently.... To rule that a full justification defense to the prosecution for commission of crime is established even absent a presence requirement would be to create a very dangerous precedent, for it would make each citizen a judge of the criminality of all the acts of every other citizen, with power to mete out sentence.[146]

Thus, the states require, define,[147] and value imminence.

2. Nature of Pursuer's Actions Is Defined

Most statutes require that the rescuer use force only against a particular, present danger.[148] Statutes typically express that danger in two ways. The statute may initially set forth a broad class of general threats that may be defended against, followed by (or set forth in the alternative) a list of specific offenses or offense categories that justify the use of protective force.[149] In Illinois, a combination is used, as the rescuer is permitted to intervene to stop "unlawful force," "great bodily harm," "imminent death," "or the commission of a forcible felony."[150] Many other states contain more detailed lists of crimes,[151] with perhaps the most detailed being found in Utah, which allows defensive force against forcible felonies, and elaborates:

> [A] forcible felony includes aggravated assault, mayhem, aggravated murder, murder, manslaughter, kidnapping, and

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146. State v. Marley, 509 P.2d 1095, 1108 (Haw. 1973); *accord* Commonwealth v. Hood, 452 N.E.2d 188, 196 (Mass. 1983) (citing *Marley,* 509 P.2d at 1108).

147. The Alabama Court of Criminal Appeals turned to treatises to help define imminence.

> "In relation to homicide..., [imminence] means immediate danger, such as must be instantly met, such as cannot be guarded against by calling for the assistance of others or the protection of the law."...
>
> ....
>
> ...A mere fear, though well-grounded, of personal violence about to be committed, is no justification unless the danger appears to be imminent or threatening.

Raines v. State, 455 So. 2d 967, 971 (Ala. Crim. App. 1984) (quoting BLACK'S LAW DICTIONARY 676 (5th ed. 1979)).

148. *See, e.g.*, 720 ILL. COMP. STAT. ANN. 5/7–1 (West 1993); *see also* Bendinelli & Edsall, *supra* note 139, at 169–73 (discussing states' requirements of a specific threat of danger).

149. *See* Bendinelli & Edsall, *supra* note 139, at 169.

150. *See* 720 ILL. COMP. STAT. ANN. 5/7–1.

151. A number of statutes specifically authorize the use of force in apprehending a felon. *See, e.g.*, N.M. STAT. ANN. § 30–2–7(C) (Michie 1994).

> aggravated kidnapping, rape, forcible sodomy, rape of a child, object rape, object rape of a child, sexual abuse of a child, aggravated sexual abuse of a child, and aggravated sexual assault as defined [elsewhere], and arson, robbery, and burglary.... Any other felony offense which involves the use of force or violence against a person so as to create a substantial danger of death or serious bodily injury also constitutes a forcible felony.[152]

In one way or another, most statutes combine some of the general and some of the specific in order to indicate the nature of the actions against which defensive force may be employed.

3. Only Minimal Force/Proportional Response Is Permitted

The statutes typically mandate that only the force that is necessary to defend the pursued from the pursuer can be used. Illinois, for example, requires that the force be "necessary to defend," or "necessary to prevent" the specified harms and felonies.[153] Moreover, the justification is available *only when* the force is necessary *and to the extent* the force is necessary.[154] Thus, not only must there be the need for intervention, but the response must be proportional to the initial threat; the defendant may not exceed "the reasonable means which were necessary to protect himself."[155]

Along with the proportionality requirement comes the right to use deadly force, if necessary. This right is usually set forth separately in the statutes. Again turning to Illinois, the statute provides that the rescuer "is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm..., or the commission of a forcible felony."[156] This may be seen as an express application of the proportional force requirement. After all, the proportional force necessary to repel imminent death or great bodily harm likely will be deadly force.[157] In these various ways, the states impose a basic

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152. UTAH CODE ANN. § 76–2–402(4) (1995).

153. 720 ILL. COMP. STAT. ANN. 5/7–1.

154. *Id.*

155. State v. Johnson, 152 N.W.2d 529, 532 (Minn. 1967); *see also* People v. Willis, 569 N.E.2d 113, 115 (Ill. App. Ct. 1991) (rejecting argument where defendant "unreasonably believed that the 10 subsequent stab wounds were justified"), *modified*, 597 N.E.2d 672 (Ill. App. Ct. 1992).

156. 720 ILL. COMP. STAT. ANN. 5/7–1.

157. *See also* Kilgore v. State, 643 So. 2d 1015, 1018 (Ala. Crim. App. 1993) ("Fisticuff blows do not, as a rule, inflict the grievous bodily harm which, other means of escape being cut off, will excuse the slaying of the assailant. 'When a man is struck with the naked hand, and has no reason to apprehend a design to do him great bodily harm, he must not return the blow with a dangerous weapon.'" (citation omitted)).

requirement of minimal, proportional force, while permitting the use of deadly force.[158]

4. Some Relationship May Be Required

The statutes also concern themselves with the question of who may be defended, and, more specifically, whether the rescuer must have any particular relationship with the would-be victim.[159] Most states, like Illinois, allow for intervention against force directed at any third person, termed as "another,"[160] "any person,"[161] or "a third person."[162]

Approximately one-quarter of the states with defense-of-others statutes diverge from this broader approach. For example, Florida limits the specific class of protected persons to "a member of [the rescuer's] immediate family or household or...a person whose property he has a legal duty to protect."[163] Oklahoma's statute provides that the rescuer may assist "his or her husband, wife, parent, child, master, mistress, or servant,"[164] so that if force is used against one not in the group, the defense is unavailable.[165]

5. Various Standards Are Employed to Judge the Rescuer

Having seen the imminence requirements, the types of action that trigger the justification, the permissible reactive force, and the categories of people who may be protected, a central question remains: by what standard will we judge the actions of the rescuer? A continuum exists across which the states have selected governing standards, ranging from a purely objective standard, to a reasonable person standard, to a purely subjective standard. Most states employ the standard of "reasonableness,"[166] which most typically requires an examination of the

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158. Also, the proportionality and imminence requirements would seem to foreclose the possibility of premeditation; no defense-of-others argument could succeed because the actor's response would have ignored previous alternative responses and intervention points.

159. *See* Bendinelli & Edsall, *supra* note 139, at 200–06.

160. *See, e.g.*, 720 ILL. COMP. STAT. ANN. 5/7–1.

161. *See, e.g.*, IDAHO CODE § 18–4009 (1997).

162. *See, e.g.*, ALA. CODE § 13A–3–23(a) (1994).

163. FLA. STAT. ANN. § 776.031 (West 1992).

164. OKLA. STAT. ANN. tit. 21, § 733(2) (West 1983). The Oklahoma Criminal Court of Appeals once rejected an attempt to define the term "mistress" to mean "a woman with whom a man habitually consorts unlawfully," a "paramour," or one with whom there is a "clandestine relationship." Instead, the court determined that the term "mistress" was akin to a "master," with a mistress-servant relationship required. State v. Haines, 275 P.2d 347, 352 (Okla. Crim. App. 1954).

165. *See* Cowles v. State, 636 P.2d 342, 345 (Okla. Crim. App. 1981) ("[T]he use of fatal force in defense of a third person is justifiable for only a limited group of persons.... [If the pursued does] not fall within that group,...[the rescuer is] not entitled to the requested instruction.").

166. *See, e.g.*, 720 ILL. COMP. STAT. ANN. 5/7–1 (West 1993).

objective reasonableness of the rescuer's actions, under the circumstances as perceived (subjectively) by the rescuer.[167] Even in some states with a different statutory standard, the courts still employ the reasonable person test. This Article shall now survey the various states' statutes and case law.

a. Reasonable Person Standard

Several state statutes employ a reasonable person standard, illustrating the clear majority rule. For example, New Jersey has a provision nearly identical to MPC section 3.05, with the only, but quite significant, difference being its imposition of a reasonable person standard, as opposed to the MPC's subjective standard.[168]

Under New Jersey Criminal Code section 2C:3–5, the basic rule is that one may use force to protect another when, judged from the intervenor's standpoint (not the endangered person's), the situation would allow the endangered person to use force himself.[169] As the court observed in *State v. Holmes*, this is not the same as saying that the intervenor can use force when the person who is pursued could use force.[170] There are situations where the intervenor is honestly and reasonably unaware of factors that would make force inappropriate if used by the endangered person.[171] The intervenor, however, is only held responsible according to what his own *reasonable* belief is at the time, not according to facts that may be known by others, even including the person whom he is rescuing.[172]

The *Holmes* court held:

> [R]ead as a whole, [the statute] provides a justification for protection of a third person when the actor: (1) reasonably believes that force is necessary to protect the other; (2) reasonably believes that his intervention is necessary for that protection, [*sic*] and (3)

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167. *See* Bendinelli & Edsall, *supra* note 139, at 173–78.

168. New Jersey's criminal code section 2C:3–5 provides that the use of force by a rescuer upon a pursuer is justifiable to protect the pursued under three conditions:

> (1) The actor would be justified...in using such force to protect himself against the injury he believes to be threatened...; and
>
> (2) Under the circumstances as the actor *reasonably* believes them to be, the person whom he seeks to protect would be justified in using such protective force; and
>
> (3) The actor *reasonably* believes his intervention is necessary for the protection of such other person.

N.J. STAT. ANN. § 2C:3–5 (West 1995) (emphasis added); *cf.* MODEL PENAL CODE § 3.05(1) (Proposed Official Draft 1962).

169. *See* State v. Holmes, 506 A.2d 366, 369 (N.J. Super. Ct. App. Div. 1986).

170. *Id.*

171. *See id.* at 368–69 (explaining the defendant's argument that he was unaware that the alleged endangered person had provoked the alleged aggressor and that he reasonably believed the person was in need of assistance).

172. *Id.* at 369–70 (citing State v. Fair, 211 A.2d 359, 366–68 (N.J. 1965)).

> uses only that degree of force appropriate to protect the person he believes to be threatened.[173]

In *Holmes,* the court described the reasoning underlying both the statute and its development in the case law, noting a multifaceted public policy: "Not only is it just that one should not be convicted of a crime if he selflessly attempts to protect the victim of an apparently unjustified assault, but how else can we encourage bystanders to go to the aid of another who is being subjected to an assault?"[174] In *State v. Bryant,*[175] the court found additional reasons for a defense-of-others statute. First, the court held that it is wise to exonerate an actor who has a reasonable belief while acting to aid a third party, even if that belief is later proven to be mistaken, as "detached reflection cannot be demanded in the presence of an uplifted knife."[176] Second, the court encouraged actors to respond in proportion to the harm threatened, since only those proportionate responses can be deemed "reasonable."[177]

As another example, the Maryland courts require the jury to determine the actor's intent based on a combined subjective and objective standard. In *Alexander v. State,*[178] the court held that the fact finder must judge the intervenor's conduct in the totality of the circumstances, based upon the intervenor's "observation of the circumstances as they reasonably appeared to him."[179] In Maryland, as in other states, the reasonableness of the rescuer's perceptions ultimately determines liability.

The Kansas statute provides a specific test, a clear combination of the competing objective and subjective standards. Statutorily, force by the rescuer is justified "when and to the extent it appears to him and he reasonably believes that such conduct is necessary."[180] The Kansas Supreme Court has responded with a two-prong test: "The first prong is subjective: Did [the rescuer] sincerely believe it was necessary to kill [the pursuer] in order to defend [the pursued]? The second is objective: Was his belief reasonable?"[181]

Washington uses the term "reasonable" in its statute,[182] and one court has held that a defendant "may only use such force and means as a reasonably prudent

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173. *Id.* at 369; *see also* State v. Moore, 429 A.2d 397, 401 (N.J. Super. Ct. App. Div. 1981) (The "justification for killing depends upon the jury's determination of what it thinks a reasonable man, viewing the situation as did the defendant, would have done under the circumstances and not upon subjective exploration of the defendant's psyche.").

174. *Holmes,* 506 A.2d at 370.

175. 671 A.2d 1058 (N.J. Super. Ct. App. Div. 1996).

176. *Id.* at 1061 (quoting Brown v. United States, 256 U.S. 335, 343 (1921)).

177. *See id.*

178. 447 A.2d 880 (Md. Ct. Spec. App. 1982), *aff'd,* 451 A.2d 664 (Md. 1982).

179. *Id.* at 887.

180. KAN. STAT. ANN. § 21–3211 (1995).

181. State v. Hernandez, 861 P.2d 814, 819 (Kan. 1993) (citing State v. Rutter, 850 P.2d 899, 904 (Kan. 1993)).

182. WASH. REV. CODE § 9A.16.050 (1996); *see also* State v. Janes, 822 P.2d 1238, 1242 (Wash. Ct. App. 1992) ("[T]he court and the jury [must] evaluate the

person would use under the same or similar conditions."[183] Georgia also provides a reasonable belief standard[184] and specifically addresses evidentiary rules for proving the defense. Georgia's statute permits the defendant to offer:

> (1) Relevant evidence that the defendant had been the victim of acts of family violence or child abuse committed by the deceased...; and
>
> (2) Relevant expert testimony regarding the condition of the mind of the defendant at the time of the offense, including those relevant facts and circumstances relating to the family violence or child abuse that are the bases of the expert's opinion.[185]

In sum, through various statutes and judicial interpretations, many states allow and employ a reasonable person, objective-subjective standard.

b. MPC States

While the statutes of the five states that have adopted (verbatim) the MPC contain a subjective standard, whereby the rescuer is judged according to "the circumstances as the actor believes them to be,"[186] these states have not consistently employed this standard in case law, instead often adopting a reasonable person approach. Nebraska provides an example. In specifically reflecting on the MPC-based statute, the Nebraska Supreme Court held that "there is nothing in the justification...which appears designed to change the ancient common law rule that...the belief that the use of force is necessary must be reasonable and in good faith."[187] While this is illogical, it reflects the prevalence of the reasonable person standard in courts' judgment of the defense of others.[188]

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reasonableness of the defendant's perception of the imminence of that danger in light of all the facts and circumstances known to the defendant at the time he acted, including the facts and circumstances as he perceived them before the crime." (referencing battered child and battered woman syndromes)).

183. State v. Watkins, 811 P.2d 953, 958 (Wash Ct. App. 1991).

184. GA. CODE ANN. § 16–3–21(a) (1996).

185. *Id.* § 16–3–21(d). The available case law only raises Georgia's evidentiary issues in self-defense situations. *See, e.g.*, Pugh v. State, 382 S.E.2d 143 (Ga. Ct. App. 1989) (holding that battered woman's syndrome evidence is relevant to a claim of self-defense).

186. *See* DEL. CODE ANN. tit. 11, § 465(a)(2) (1995); HAW. REV. STAT. § 703–304(3) (1993); KY. REV. STAT. ANN. § 503.070(1)(b) (Michie 1990); NEB. REV. STAT. § 28–1410(1)(b) (1995); 18 PA. CONS. STAT. ANN. § 506(a)(2) (West 1983).

187. State v. Cowan, 285 N.W.2d 113, 114 (Neb. 1979) (citing State v. Eagle Thunder, 266 N.W.2d 755, 757 (Neb. 1978)).

188. This perhaps reflects a belief the courts are superimposing over the legislature's will, that the reasonable person is the proper standard. Judicial activism, it may be said, is prevailing to impose a different standard.

c. Policy Arguments Support the Reasonable Person Standard

Compelling reasons support employing the reasonable person standard. This standard helps protect against vigilantism and prevents extreme individual actions from escaping judicial and societal condemnation. A purely subjective standard ultimately would prove dangerous and could prevent the people from collectively expressing their values through the legal system. Several comments from the judiciary help illustrate this concern. The Alaska Supreme Court recently explained why it is important to apply some sort of reasonable person standard that brings objective and subjective criteria together:

> The reasonableness of a defendant's perceptions and actions must be evaluated from the point of view of a reasonable person in the defendant's situation, not a person suffering mental dysfunction. This distinction was elaborated in *People v. Goetz*:
>
> ....
>
> [There must] be a reasonable basis, viewed objectively, for the [defendant's] beliefs.... [A] belief based upon mere fear or fancy...or a delusion pure and simple would not satisfy the requirements of the statute....
>
> ....
>
> To completely exonerate such an individual, no matter how aberrational or bizarre his thought patterns, would allow citizens to set their own standards for the permissible use of force. It would also allow a...defendant suffering from delusions to kill or perform acts of violence with impunity, contrary to fundamental principles of justice and criminal law.[189]

A similar concern has been articulated in other circumstances by the federal district court in Maryland:

> No civilized nation can endure where a citizen can select what law he would obey because of his moral or religious belief. It matters not how worthy his motives may be. It is axiomatic that chaos would exist if an individual were permitted to impose his belief upon others and invoke justification in a court to excuse his transgression of a duly-enacted law.[190]

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189. Ha v. State, 892 P.2d 184, 195–96 (Alaska Ct. App. 1995) (quoting People v. Goetz, 497 N.E.2d 41, 48, 50 (N.Y. 1986)) (all but first omission in original) (alterations in original).

190. United States v. Berrigan, 283 F. Supp. 336, 339 (D. Md. 1968) (rejecting justification argument put forward by Vietnam war protestors arrested for destroying federal property and interfering with the administration of the Military Selective Service Act), *aff'd sub nom.* United States v. Eberhardt, 417 F.2d 1009 (4th Cir. 1969).

The controlling standard serves to control vigilantism, preserve a democratic system, and ensure that defendants are judged from a fair perspective, that of a reasonable person.

In *Alexander v. State*, the Maryland Court of Special Appeals interpreted its state's statute[191] broadly, in light of societal conditions. The court cited the murder of Catherine "Kitty" Genovese in New York, while onlookers turned their backs to her cries for aid,[192] and observed that such scenarios arise because of the onlookers' fear of the legal, rather than the physical, consequences of lending assistance under such circumstances. Thus, the court held that the Maryland act establishing this defense "was clearly intended to encourage and to afford protection to 'good samaritans' by removing their legal doubts, which might impede crime prevention and deter those who witness violent assaults upon persons, but who otherwise would aid an apparent victim of criminal violence."[193] Accordingly, the court refused to construe the statute narrowly, holding that doing so would "eliminate any purpose for its enactment."[194]

We must carefully weigh the benefit of the reasonable person standard in its encouragement of the bystander. It may have the additional salutary effect of increasing the likelihood of intervention, or conversely, decreasing the likelihood of the occurrence of incidents like that of the death of Kitty Genovese. Encouraging a sense of community and discouraging apathy and indifference to our fellow community members ultimately makes for a stronger, more unified community.

d. Some Statutes Provide Guidance for Findings of Fact

While in reading the statutes we may readily pass over the term "reasonable," it really is so far without definition, beyond what a jury in any given

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191. MD. ANN. CODE art. 27, § 12A (1965), provided:

> Any person witnessing a violent assault upon the person of another may lawfully aid the person assaulted by assisting in that person's defense. The force exerted upon the attacker or attackers by the person witnessing the assault may be that degree of force which the assaulted person is allowed to assert in defending himself.

This statute was repealed and replaced by MD. ANN. CODE art. 27, § 12A–3 (1996), to adopt the extension given by *Alexander* to the old section 12A.

192. 447 A.2d 880, 881 (Md. Ct. Spec. App. 1982) (In 1964, Genovese "was viciously ravaged and repeatedly stabbed while onlookers turned their backs to avoid witnessing the butchery, and neighbors closed their doors and windows to shut out her screams of anguish until her suffering was finally ended by the murderer."); *see also* A. M. Rosenthal, *Death in a Crowded Street: Once We Were Shocked*, INT'L HERALD TRIB., Mar. 16, 1994, *available in* LEXIS, News Library, (reflecting on the early reactions to the story and current attitudes); Kirschenbaum, *supra* note 40, at 204 (using the example of Kitty Genovese to frame the discussion of the duty to rescue).

193. *Alexander*, 447 A.2d at 884.

194. *Id.*

case may hold it to be.[195] Several states provide some minimal guidance in making the determination. Tennessee, for example, provides: "Any person using force intended or likely to cause death or serious bodily injury within their own residence *is presumed to have held a reasonable fear* of imminent peril of death or serious bodily injury...."[196] Utah provides very specific guidance for judges and juries in its statute:

> In determining imminence or reasonableness..., the trier of fact may consider, but is not limited to, any of the following factors:
>
> (a) the nature of the danger;
>
> (b) the immediacy of the danger;
>
> (c) the probability that the unlawful force would result in death or serious bodily injury;
>
> (d) the other's prior violent acts or violent propensities; and
>
> (e) any patterns of abuse or violence in the parties' relationship.[197]

e. Some May Encourage the Rescuer

One final interesting note is that the State of Washington specifically provides for a sort of immunity within its self-defense and defense-of-others statute. "No person in the state shall be placed in legal jeopardy of any kind whatsoever for protecting by any reasonable means necessary, himself or herself, his or her family,...or for coming to the aid of another who is in imminent danger of or the victim of assault, robbery, kidnaping, arson, burglary, rape, murder, or any other violent crime...."[198] Encouragement is one policy reason supporting the defense. As one Massachusetts court held: "[T]he underlying policy justifying the defense...is to discourage calculated indifference to the plight of another...[and is] predicated on the social desirability of encouraging people to go to the aid of third parties who are in danger of harm as the result of the unlawful actions of others."[199] Washington goes beyond simply allowing the defense and, via limited

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195. *See, e.g.*, State v. Jones, 434 N.W.2d 380, 383 (Wis. 1989) ("This court has recognized that the determination of reasonableness is 'peculiarly within the province of the jury.'" (quoting State v. Mendoza, 258 N.W.2d 260, 275 (Wis. 1977)).

196. TENN. CODE ANN. § 39–11–611(b) (1991) (emphasis added).

197. UTAH CODE ANN. § 76–2–402(5) (1995).

198. WASH. REV. CODE ANN. § 9A.16.110 (1996). As with the Georgia statute on expert testimony, *see supra* note 185 and accompanying text, the only available case law on this subject involves self-defense, *see* State v. Anderson, 863 P.2d 1370, 1374 (Wash. Ct. App. 1993).

199. Commonwealth v. Monico, 366 N.E.2d 1241, 1244 (Mass. 1977) (citations omitted).

immunity, affirmatively encourages action.[200] Such encouragement can help strengthen our communities; there is a benefit to society to be gained from encouraging each citizen to help every other citizen in need.[201]

In these various ways, the states' statutes and case law provide for a defense-of-others defense that permits the use of minimal, proportional force against imminent danger, as judged by a reasonable person—an objective-subjective test. This wise approach allows for community norms to come into play but also explicitly considers the often difficult circumstances encountered by the rescuer. We shall now apply these principles to two situations: the Rabin assassination and abortion protests. Amir would not have been able to mount a successful defense in this country, and abortion opponents who kill also violate American legal norms.

C. American Legal Principles Reject Religiously Motivated Murder

1. Amir's Arguments Would Fail the Basic Tests of American Law

Amir would have had no defense under a straightforward, traditional interpretation of American black letter law. Several principal reasons emerge.[202] First, there was no imminent threat posed by Rabin, thus failing one central test. While one might be concerned with the general fate of the Israeli people on the whole, there was no danger that one could believe required such forceful intervention.[203] Second, Amir's argument would fail because it runs contrary to the teaching in the case law, requiring that only minimal force to protect the endangered person be used. Here, in the absence of a concurrent physical attack by Rabin on anyone else, Amir could find no shelter in arguing that his was a proportional response. Amir used far more force than was appropriate to protect the people he thought to be threatened. Third, and related, there was no unlawful force threatened, thus not meeting the requirement set forth in most statutes.

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200. Recall that Jewish religious law provides similar immunity. *See* discussion *supra* Part II.B.3.

201. As Jeremy Bentham has queried: "in cases where the person is in danger, why should it not be made the duty of every man to save another from mischief, when it can be done without prejudicing himself...?" JEREMY BENTHAM, *Of the Limits of the Penal Branch of Jurisprudence, in* THE COLLECTED WORKS OF JEREMY BENTHAM 281, 293 (J. H. Burns & H.L.A. Hart eds., 1970).

202. This discussion is similar in many respects to that in Part II.C., *supra*, which discussed Amir's case under Jewish and Israeli law. Accordingly, to avoid unnecessary repetition, the present discussion is brief, and the reader is encouraged to refer back to the initial discussion.

203. As we have seen, Amir's conception of reality, and therefore his standard for a reasonable person, is grounded in a wholly different rationality than the mainstream and possibly even of those outside the mainstream. *See supra* Part II.C.3.

Fourth, Amir's claim of the need to protect third persons rested on his policy beliefs and would not meet with approval by a reasonable person.[204]

2. American Law Rejects Murder by Religiously Motivated Abortion Opponents

An examination of cases dealing with an American parallel to the Rabin assassination—abortion protests—offers valuable insights and comparisons.[205] As with Amir, violent pro-life protestors, attackers, and murderers are typically acting out of a deep and sincere religious belief. For these people, like Amir, there is no legal justification for their extreme actions. This Article shall first examine cases involving criminal trespass and other minor offenses, then homicide cases, followed by a review of commentary on the homicide cases. We shall see that for those who shoot and kill doctors and others who work in family planning clinics, case law and commentary consistently reject the defense-of-others claim.

a. Case Law Does Not Support Criminal Actions to Protest Abortions

i. Criminal Trespass

Courts have rejected the defense-of-others justification when offered by protestors charged with criminal trespass. In two New Jersey cases,[206] the defendants were arrested for blocking access to abortion clinics and claimed that their actions were justified because they were undertaken in defense of others—the fetuses. The courts rejected these arguments without an in-depth analysis of New Jersey criminal code section 2C:3–5 but did conclude that the defense was inapplicable.[207] In *State v. Loce*, the court observed that while the defendant

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204. Rather than being reasonable, Amir was extreme. Noam Arnon, spokesman for the settler movement, noted, "Desperate people do desperate things." Goldberg, *supra* note 117, at A3.

205. This discussion is not in any way intended to state a position on abortion practices, law, or politics. Instead, this case law provides an interesting parallel, as the courts have treated abortion-related protests in a manner similar to the way the Rabin assassination may be viewed. The similarity between Amir and the abortion protestors lies in their deeply held political, moral, and/or religious convictions and the fact that they acted on these convictions with deadly violence in contravention of the criminal laws.

206. State v. Loce, 630 A.2d 843, 844 (N.J. Super. Ct. Law Div. 1991), *aff'd as modified*, 630 A.2d 792 (N.J. Super. Ct. App. Div. 1993); State v. Wishnatsky, 609 A.2d 79, 82 (N.J. Super. Ct. Law Div. 1990).

207. *See Loce*, 630 A.2d at 844; *Wishnatsky*, 609 A.2d at 86–87; *see also* Zal v. Steppe, 968 F.2d 924, 929 (9th Cir. 1992) (holding trial court's refusal to allow attorney to assert necessity defense did not violate abortion protestor's rights under Sixth and Fourteenth Amendments because "clients were not seeking to avert a legally recognized harm" when trespassing at abortion clinic); People v. Bauer, 614 N.Y.S.2d 871, 873 (City Ct. 1994) (rejecting necessity defense because injury defendants sought to avoid was not criminal under New York law); People v. Crowley, 538 N.Y.S.2d 146, 149–50 (Justice Ct. 1989) (rejecting necessity defense, as a matter of law, to abortion protestor under N.Y. Penal Law § 35.05 because New York legislature has "afforded legal protection" to the

believed in his need to protect a fetus from abortion, his view did not comport with our traditional notions of the defense-of-others defense and the *specific* need to protect a particular individual facing attack.[208] The court viewed the central issue primarily as being about a statement of beliefs, and criminal action taken in concert with those beliefs, not as a question about the need to defend against the imminently dangerous acts of an individual.[209] The justification argument was addressed as a sort of political statement, like Amir's, and the defense-of-others argument was rejected.[210] The court observed:

> Defendants disagreed with the constitutional rulings [regarding abortion] and with the statutory laws. They had the right to disagree and they had the right in our free, open, constitutional democracy to work lawfully in a wide variety of ways to change existing constitutional and legal rules.
>
> ...When the defendants employed...violence, they, in effect, asserted that they were not bound by the normal decencies and constraints of our constitutional democracy. They asserted that they had the right to impose their views about abortion by physical force upon Ms. Z. They also asserted that they had the right to impose their views by force upon society in general. When they did that, the defendants mounted a frontal assault upon the whole concept of ordered liberty by which our society is governed.[211]

Furthermore, Alaska Supreme Court Justice Dimond concurred separately in *Cleveland v. Municipality of Anchorage*,[212] agreeing with the premise for the protest, but specifically acknowledging that the defense-of-others principle cannot exonerate those who employ criminal means to protest abortion practices. He empathized with the appellants' position regarding abortion, calling *Roe v. Wade* a

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injury defendants sought to prevent). *But see* People v. Archer, 537 N.Y.S.2d 726, 732 (City Ct. 1988) (holding that act abortion protestor sought to avert need not be criminal under N.Y. Penal Law section 35.05 to invoke necessity defense).

208. *See Loce*, 630 A.2d at 844–48. This observation rests partly on the constitutionally protected status of abortions and a woman's right to choose to terminate pregnancy. For a general discussion of the right to abortion, see *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny. This issue also arose in Paul Hill's criminal case, discussed *infra* Part III.C.2.a.ii.

209. *See Loce*, 630 A.2d at 848; *see also* United States v. Lynch, 952 F. Supp. 167 (S.D.N.Y. 1997) (holding that since abortion protestors were acting out of a sincere religious conviction that they were saving human lives they lacked the requisite willfulness to sustain a conviction for contempt of court), *aff'd*, 104 F.3d 357 (2d Cir. 1996) (unpublished opinion), *and cert. denied*, 117 S. Ct. 1436 (1997).

210. *Loce*, 630 A.2d at 848.

211. *Id.* Similarly, Amir attempted to impose his views about the Rabin government policies in a manner that was unacceptable in a constitutional democracy. He mounted his own frontal assault upon the notion of a free society that is bound by norms of appropriate behavior enforced by the criminal justice system. In both situations, the individuals involved otherwise accepted the legitimacy of the government but chose to disavow such legitimacy when objecting to one particular area of law and policy.

212. 631 P.2d 1073, 1084 (Alaska 1981) (Dimond, J., concurring).

"tragic decision."[213] Nonetheless, he joined the majority in rejecting the appellants' justification argument. "[P]ersons who share these convictions must work through the political process to achieve their goals or accept the consequences imposed by our legal system for attempting to achieve their goals by unlawful action."[214]

ii. Homicide

More serious, well-publicized cases involve individuals, like Amir, who have killed[215] in their zeal to prevent abortions. These cases reject the strained application of the defense-of-others justification in these shootings. For example, Paul Jennings Hill and Michael F. Griffin were charged and convicted with shooting physicians outside abortion clinics in Florida.[216] The court in *United*

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213. *Id.* at 1084–85 (Dimond, J., concurring).

214. *Id.* at 1086 (Dimond, J., concurring). Likewise, Amir should have worked through the political process before employing violent, criminal means to achieve his political ends. *See* Northeast Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1352 (3d Cir. 1988) (holding that justification defense is not available to abortion protestor under PA. CONS. STAT. ANN. § 503(a) (West 1983), because, among other things, there were "numerous legal alternatives that Defendants had available to pursue their goal of persuading women not to have abortions"); *see also* United States v. Turner, 44 F.3d 900, 902 (10th Cir. 1995) (holding that abortion protestor was not entitled to a jury instruction on necessity defense as a matter of law because defendant had legal alternatives to educate women about abortion), *cert. denied*, 515 U.S. 1104 (1995); Roe v. Operation Rescue, 919 F.2d 857, 869–70 (3d Cir. 1990) (holding that justification defense is not available to abortion protestors because there were legal alternatives).

215. Also, there are those who have been unsuccessful in their attempts to kill, or at least who commit extremely violent acts. Recent examples include the January, 1997, violent attacks by protestors at abortion clinics. Two bombs exploded outside an Atlanta, Georgia clinic, injuring six people on January 16, 1997. *See* Scott Marshall & Mike Morris, *Blast Rocks Abortion Clinic; 2nd Explosion in Dumpster Injures Several, Damages Cars*, ATLANTA J.-CONST., Jan. 16, 1997, at A1. Three days later, on January 19, 1997, two bombs exploded outside a Tulsa, Oklahoma clinic. *See* Brian Barber & Rik Espinosa, *Blasts Hit Tulsa Clinic, Explosions Second at Site in Three Weeks*, TULSA WORLD, Jan. 20, 1997, at A1. That same abortion clinic had also been bombed on January 1, 1997. *See* Robert Medley, *Tulsa Abortion Clinic Again Target of Blasts*, DAILY OKLAHOMAN, Jan. 20, 1997, at 1. A 15-year-old boy was arrested in connection with the Tulsa bombings. Jean Pagel, *Youth Charged in Tulsa Abortion Clinic Attacks*, DAILY OKLAHOMAN, Feb. 8, 1997, at 9. On the anniversary of the Supreme Court's decision in *Roe v. Wade*, the bombings were condemned by both sides of the abortion debate. *See Both Sides Mark* Roe v. Wade, *Condemnation of the Ruling and of Terrorism Near Abortion Clinics Take the Spotlight*, ATLANTA J.-CONST., Jan. 23, 1997, at A3. Gen Wilson, president of the Georgia Right-to-Life group, proclaimed that "violence, bombings, [and] terrorism are not pro-life." *Id.*

216. Tom Kuntz, *From Thought to Deed: In the Mind of a Killer Who Says He Served God*, N.Y. TIMES, Sept. 24, 1995, § 4, at 7. Michael Griffin pleaded temporary insanity. However, it has been reported that his arguments were rooted in the necessity defense. Also, John C. Salvi shot another doctor and an assistant in Massachusetts on December 30, 1994. He argued the insanity defense, so we cannot examine the defense-of-others justification in the same context. *Salvi Wants to Die If Convicted, Become Priest If Acquitted*, STAR TRIB., Jan. 6, 1995, at 2A. His true motives will remain unknown, for Salvi

States v. Hill granted the government's motion in limine to bar the defendant from introducing evidence of a necessity defense.[217] Hill's pro se response[218] to the government's motion was based on the assumption that abortion is the taking of an innocent human life, an assumption that is contrary to existing Florida statutory law,[219] and asserted that the Florida Supreme Court had recognized the viability of a fetus in the context of tort law, arguing that rationale should be extended to abortions.[220]

Hill further argued that granting the government's motion in limine would deny him the statutory defense of necessity and interfere with the administration of justice.[221] The motion's first argument was based on the statutory requirement that the accused possess a reasonable belief that the use of force was necessary. Hill believed that a real and imminent threat of abortion existed in the future since the doctor-victim had performed abortions in the past.[222] Therefore, Hill argued, he reasonably believed that deadly force was necessary. Second, Hill contended that he used force proportional to that used by the doctor; in other words, Hill claimed that the lethal force he used was reasonable in relation to the force the doctor was using on fetuses during abortions.[223] Third, Hill's response posited that the requirement that the perceived harm must be imminent

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committed suicide on November 29, 1996. *See* Sara Rimer, *Killer of Two Abortion Clinic Workers Is Found Dead of Asphyxiation in Prison Cell*, N.Y. TIMES, Nov. 30, 1996, § 1, at 9. An unusual result of Salvi's suicide was that the trial judge vacated his conviction and dismissed the indictment under the Massachusetts abatement rule because he died before having the opportunity to have his conviction reviewed by an appellate court. John Ellement, *Salvi's Record Wiped Clean, Posthumously; Charges Voided on Technicality*, BOSTON GLOBE, Feb. 1, 1997, at A1. A common law rule in Massachusetts and other states provides that when a criminal defendant dies before he has had an opportunity to appeal his conviction, the conviction is vacated and the indictment is dismissed. *See* Commonwealth v. Eisen, 334 N.E.2d 14 (Mass. 1975).

217. Paul Hill argued the necessity defense, which differs somewhat from the defense-of-others justification. For these purposes, however, any differences are irrelevant.

Also, note that the court published four separate opinions consecutively in the *Federal Supplement*, two of which will be discussed in this Article: *United States v. Hill*, 893 F. Supp. 1044 (N.D. Fla. 1994) [hereinafter *Hill I*]; and *United States v. Hill*, 893 F. Supp. 1048 (N.D. Fla. 1994) [hereinafter *Hill II*].

218. Hill's response to the government's motion was grounded in a student comment by Michael Hirsch that was scheduled for publication in the Spring, 1994 *Regent University Law Review*. Hirsch's original comment was an adapted master's thesis that was prepared over several years and adapted to Florida law in 1993, after Michael Griffin shot and killed a doctor. The issue that was to contain Hirsch's comment was released one week after the Paul Hill shootings; the editors published it without Hirsch's comment. The *Regent University Law Review* then published Paul Hill's brief the following year. Paul J. Hill, Note, *In Defense of Another: The Paul Hill Brief*, 5 REGENT U. L. REV. 31, 31–32 (1995).

219. *Id.* at 33. Hill argued that his knowledge of the viability of the fetus stemmed largely from scientific and medical seminars explaining fetal development.

220. *Id.* at 34.

221. *Id.* at 37–38.

222. *Id.* at 39.

223. *Id.* at 39–40.

was satisfied because of the many advertisements regarding the abortions performed at the center where the doctor worked.[224] Additionally, Hill argued that he waited until the threatened harm was imminent in time and place because he shot the doctor outside the clinic just prior to the time abortions were scheduled.[225] Finally, Hill argued that under the principles of self-defense and defense of others in English Common Law, an unborn child is protected under the law,[226] and he claimed that Florida must recognize that the fetus is a protected person for the purpose of the necessity defense.[227] Given those arguments, Hill's response concluded that, in legitimately defending another, he had satisfied the requirements of the necessity defense.

The court rejected Hill's arguments for several reasons. First, the court held that because abortions are legal and constitutionally protected, the necessity defense is not viable.[228] The court held that the defendant must prove he held a reasonable, objective belief the abortions he sought to prevent were beyond the protection of the Constitution and outside Florida law.[229] Since Hill proffered no evidence relating to the legality of the abortions performed, he failed to meet his burden.[230] The court also held that Hill did not act to prevent imminent peril and that there was no causal relationship between his conduct and the harm to be avoided.[231]

Still, the court did not foreclose completely Hill's defenses. First, the court recognized that an abortion protestor could "hold a reasonable belief that injuring or interfering with providers will prevent at least one or some abortions from occurring."[232] In addition, the court noted that the intent of the anti-abortion protestors is founded in their belief that an abortion is the intentional taking of

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224. *Id.* at 41.

225. *Id.* at 42.

226. *Id.* at 46–47.

227. *Id.* at 47.

228. *Hill II*, 893 F. Supp. 1048, 1049 (N.D. Fla. 1994). The court observed that the harm to be avoided does not necessarily turn on legality; rather, the harm must be a cognizable harm.

229. *Id.*

230. *Id.* at 1050.

231. *Hill I*, 893 F. Supp. 1044, 1048 (N.D. Fla. 1994).

232. *Id.* at 1046. The court observed that the causal connection is strengthened by two factors: the continual decline in the number of medical doctors willing to perform abortions and the fact that injuring or interfering with these doctors could eliminate services for patients for some duration. The court distinguished abortion protestors' prosecution from nuclear protestors' prosecution, where the nuclear protestors are foreclosed from raising the necessity defense both because they cannot hold a reasonable belief that the outcome of their action will be nuclear disarmament and due to the lack of imminent harm. The court thus noted that the critical nexus between preventing the abortions and injuring or interfering with the provider could be present, whereas it is lacking in the case of nuclear protestors. *Id.* (citing United States v. Montgomery, 772 F.2d 733, 736 (11th Cir. 1985)).

human life, equivalent to murder.[233] Under that basic assumption, the court held that Hill could proffer evidence of the imminent peril of the abortion and the possibility that injuring or interfering with the provider could prevent the abortion.[234] Nevertheless, on a motion to reconsider, the court found that the defendant failed to prove that any of the abortions were outside the scope of the United States Constitution or Florida law, irrespective of their potential imminence. Therefore, no cognizable harm existed for the purposes of the necessity defense.[235]

Finally, Hill's defense failed because he failed to show that there existed no reasonable, legal alternative to committing the criminal act.[236] Like Amir, Hill failed to demonstrate that he "actually tried the alternative or had no time to try it."[237] The *Hill* court concluded that the necessity defense was inapplicable.[238]

b. The Scholarly Debate on the Issue Also Rejects Such Killings

Amir and some Jewish extremists believe it appropriate, if not necessary, to have killed Rabin. Similarly, some Catholic extremists support the actions of those who kill doctors who perform abortions. Few do so publicly. Reverend David Trosch, a Catholic priest from Mobile, Alabama, is an outspoken leader who has advocated deadly violence as a viable means for protesting abortion. In a 1995 interview, he said: "Defending...[fetuses] by taking the lives of guilty, murderous abortionists is totally, wholly appropriate."[239] There are dozens of

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233. *Id.* at 1047. Michael Griffin apparently operated under this belief when he shot Dr. David Gunn three times in the back as he shouted, "don't kill any more babies." Bill Hutchinson, *Abortion Terror-Legacy of Fear: Debate on Abortion Rages One Year Later*, BOSTON HERALD, Dec. 29, 1995, at 6. Paul Hill etched in his cell after the trial, "I could not neglect to use deadly force as necessary to defend the innocent because to have done so would have been to sin." Diane Hirth, *Two Differ over Killings*, SUNDAY GAZETTE-MAIL, Aug. 6, 1995, at 1B.

234. *Hill I*, 893 F. Supp. at 1047. On August 19, 1993, Rachelle "Shelley" Shannon shot and injured Dr. George Tiller outside the Women's Health Care Service Clinic in Wichita, Kansas. Dr. Tiller returned to work the next day. *Abortion Foe Who Shot a Doctor Is Convicted of Attempted Murder*, N.Y. TIMES, Mar. 26, 1994, at A7. After her attempted murder conviction, Ms. Shannon stated, "If they asked if I had any regrets, all I could say without lying is that I regret that that bloodthirsty jackal is still out there slaughtering little babies. I know I did the right thing." Laura Griffin, *Violence in the Name of God*, ST. PETERSBURG TIMES, Oct. 23, 1994, at 1A.

235. *Hill II*, 893 F. Supp. at 1050.

236. *Hill I*, 893 F. Supp. at 1048. Such alternatives might include marching, distributing literature, or lobbying, or even campaigning for presidential candidates committed to appointing Supreme Court Justices dedicated to reversing *Roe*.

237. *Id.* at 1047 (citing United States v. Gant, 691 F.2d 1159, 1164 (5th Cir. 1982)).

238. *Id.* at 1048.

239. Diane Hirth, *Abortion Extremists Justify Their Violence Series: Life and Death: Violence and the Anti-Abortion Movement*, THE SUN-SENTINEL, July 24, 1995, at 1A.

others who are known to espouse this perspective; the number of those who actually would take deadly action is unknown.[240] In recent years, the sentiments of Reverend Trosch have been shared by some who were once in the antiabortion mainstream, including radio talk show hosts, editors of antiabortion publications, and their countless listeners and subscribers.[241]

While some do support these killings, the majority do not.[242] The most passionate commentary clearly argues against the use of violent means to prevent abortions.[243] Charles Rice and John Tuskey specifically denounce doctors who perform abortions as improperly taking the lives of unborn children but do not support the response of killing these doctors:

> When the Supreme Court declares it a "fundamental right" for a woman to have her unborn child killed, and when this killing proceeds unabated for over twenty years, it is not surprising that the Michael Griffins and Paul Hills of this world would conclude that "if it is OK to kill the child, it must be OK to kill the abortionist to save the child."[244]

Just as some observers of the Middle East peace process were not surprised by the Rabin assassination, these authors (and others) are not surprised by the murders of these doctors. Nonetheless, at the same time the authors reject the actions of those who have murdered such doctors. One reason is that there may be other alternatives.

> It is not difficult to think of several alternative means short of killing the abortionist to prevent abortions at an abortuary. Blockading the abortuary and its examination rooms is one example; breaking into the abortuary and destroying the instruments

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240. *See id.*

241. *See Anti-Abortion Flier Gives Activists Jitters*, ORLANDO SENTINEL, Feb. 1, 1995, at A1.

242. This may stem at least in part from teachings of Catholic moral philosophy that would reject such violence as a solution. *See, e.g.*, RICHARD A. MCCORMICK, S.J., *Ambiguity in Moral Choice*, *in* DOING EVIL TO ACHIEVE GOOD 7, 7 (Richard A. McCormick, S.J. & Paul Ramsey eds., 1978). ("[T]he evil caused as one goes about doing good has been viewed as justified or tolerable under a fourfold condition. (1) The action is good or indifferent in itself; it is not morally evil. (2) The intention of the agent is upright, that is, the evil effect is not sincerely intended. (3) The evil effect must be equally immediate causally with the good effect, for otherwise it would be a means to the good effect and would be intended. (4) There must be a proportionately grave reason for allowing the evil to occur." McCormick observed that these principles support actions in self-defense.).

243. *See* Charles E. Rice & John P. Tuskey, *The Legality and Morality of Using Deadly Force to Protect Unborn Children from Abortionists*, 5 REGENT U. L. REV. 83 (1995). This discussion in no way suggests that Rice and Tuskey are correct in their approach; it merely shows that even those who are toward the very end of the spectrum still do not advocate killing. They advocate other acts of violence that I vehemently oppose, but even they draw a line that Griffin, Hill, and others have crossed.

244. *Id.* at 88–89. Similarly, we have seen that Amir's actions were not surprising. *See supra* Part I.

> of death is another. One could threaten the abortionist—"Leave, or I will shoot you." One also could break the abortionist's hands or arms, or shoot to wound rather than to kill.[245]

This passage shows Rice and Tuskey's clear opposition to abortion, yet they espouse different means to stop the practice they so strongly oppose.[246] These authors call for many violent solutions that are extreme, but even they stop short of advocating homicidal acts.

Rice and Tuskey are concerned that there is not necessarily an *imminent* harm being stopped by the murders of the doctors. "To allow force to prevent harms contemplated to occur days, weeks, or months in the future would stretch the concepts of imminence and immediate necessity, and even unadorned necessity, beyond the breaking point."[247] Instead, these commentators call for a different response by the movement, eschewing violence as a solution, charting a course that requires "adhering to objective moral principle, speaking the truth without compromise, and most importantly,...praying."[248]

As discussed in Part II, *supra*, Amir could not meet the requirements of Jewish or Israeli law. Similarly, those who kill doctors who perform abortions have no cognizable justification under principles of American law. Their actions do not meet the basic requirements of the defense-of-others justification: they often do not respond to imminent action; they do not intervene to prevent unlawful acts; they ignore other, less violent responses; and they are not reasonable. Amir and these American killers have transcended the bounds of the criminal justice system and can find no safe harbor in principles derived from American statutes or case law.

IV. CONCLUSION AND GUIDING PRINCIPLES

Having examined Jewish law, Israeli law, and American legal principles, we must now consider where this journey has taken us. The ultimate questions for examination are whether a defense-of-others statute is desired or appropriate, and if so, under what circumstances? What practical and moral implications should define the principle and its application?

This Article's review of Jewish law, Israeli secular law, and American law has revealed important common features as well as certain differences. The

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245. Rice & Tuskey, *supra* note 243, at 104.

246. Similarly, Amir should have worked otherwise to effect change, and not by criminal, violent means.

247. Rice & Tuskey, *supra* note 243, at 105.

248. *Id.* at 151. Similarly, Yigal Amir, partly out of a deep religious conviction and partly out of great frustration, assassinated Yitzhak Rabin. Amir believes that he acted properly in taking such actions. But just because his actions were not entirely surprising to many, that does not justify them. Instead, as with the abortion protestors discussed by Rice and Tuskey, he should have found and explored other means for achieving his ultimate ends.

primary common features are first, that there must be some degree of certainty that the harm will occur—danger must be imminent; second, that the danger must be present, not based upon prior conduct; third, that only minimal, proportional force may be used in response; and fourth, that the pursuer/initial aggressor may be killed, if necessary. These requirements are central in all systems we have explored, for they represent a common-sense solution to the need to intervene to prevent danger to others. These core requirements answer many of those questions posed earlier as to how a jurisdiction should respond to the legal challenge of creating a responsive statute.

Still, three significant differences remain. First and foremost, the question will remain as to what standard should be employed. Jewish law employs the lawful citizen standard, while divergent standards are found in the various state statutes and case law, with the majority of jurisdictions maintaining a reasonable person standard. The reasonable person standard appears wisest, and should best be expressed as what a reasonable person would do in the circumstances as seen by the rescuer. Thus, there is a curb on the actions of the rescuer by not allowing pure subjectivity such as in the MPC, but at the same time not ignoring the heat of the moment that inevitably informs the decision of the bystander to become the rescuer.

Second, the jurisdictions diverge when it comes to the question of whether there must be some relationship between the rescuer and the pursued. Jewish law says the duty is owed to all; Israeli law and some states limit the relationship to those with whom there is a familial or contractual tie. If this is to be a meaningful rule, the relationship ought to extend to all members of the community, regardless of status. Thus, the rescuer should be justified in acting in defense of all others.

Third, there remains a question of the duty and encouragement to intervene. Jewish law imposes a duty on all Jews. For Israelis and Americans, there may be a sense of obligation, but there is no explicit duty. For Israelis, the rule of Penal Law section 22 is informed by the religious principle, so the sense of obligation might be derived therefrom. In their statutes and case law, some states explicitly acknowledge the goal of encouraging intervention, but still, there is no Good Samaritan obligation found in the principles of American criminal justice. If the bystander is to undertake the rescue, there must be some encouragement, without which the principle is greatly emasculated. Accordingly, a model statute should at least incorporate a corresponding immunity from tort liability for acts committed in furtherance of the rescue.

In the end, we should examine this issue from what may be called a moral communitarian perspective and ask what we should expect of our fellow community members. Our moral principles, whether derived from the Talmud, the Bible, the Quran, or any other religious or nonreligious sources, dictate that we must consider how we can all help each other as members of the same

community.[249] Not only should we permit, but we must in fact encourage third persons to act in defense of others. Returning to our original example, Yigal Amir claimed to be doing that when he pulled the trigger. However, he was not reasonable, ignoring the alternatives and reacting with disproportional force. From this example and the others explored in the preceding pages, we must learn to encourage intervention to ensure a strong, self-protecting community, while maintaining limitations to protect against those who take such extreme measures.

249. *See generally* Rosenthal, *supra* note 192.