

JEWISH LAW AND THE TRAGEDY OF SEXUAL ABUSE  
OF CHILDREN – THE DILEMMA WITHIN  
THE ORTHODOX JEWISH COMMUNITY

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One of the fundamental differences between Jewish law and common law involves a person's responsibility to rescue another. Common law generally permits a person to watch someone bleed to death without intervening in any way.<sup>1</sup> For the most part, so does American law.<sup>2</sup> Similarly, under American law, there is gen-

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1. See, e.g., Alison M. Arcuri, *Sherrice Iverson Act: Duty to Report Child Abuse and Neglect*, 20 PACE L. REV. 471 (2000) (describing how a person who "watched as his friend's hand muffled [seven-year-old] Sherrice's screams of terror, and simply walked away," allowed the friend to kill Sherrice, was not criminally liable under applicable California law). More than a century before, the New Hampshire Supreme Court described the common law rule:

Suppose A., standing close by a railroad, sees a two-year-old babe on the track and a car approaching. He can easily rescue the child with entire safety to himself, and the instincts of humanity require him to do so. If he does not, he may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child's injury or indictable under the statute for its death.

*Buch v. Amory Mfg. Co.*, 69 N.H. 257, 44 A. 809, 810 (1898). Common law contains exceptions, which do require action by a person bearing a special relationship to the person in trouble, such as a parent for a child, a teacher for a student and a hospital for a patient.

2. Only four states have legislatively imposed limited duties to render direct assistance to those in danger. See, e.g., MINN. STAT. ANN. § 604A.01 (2001); R.I. GEN. LAWS § 11-56-1 (1984); VT. STAT. ANN. tit. 12, § 519(a) (1967); WIS. STAT. ANN. § 940.34(2)(a) (2005). For a discussion of these statutes, which seem to have resulted in only one conviction, see Michael N. Rader, *The "Good Samaritan" in Jewish Law*, 22 J. LEGAL MED. 375, 396-71 (2001); Aaron Kirschenbaum, *The Bystander's Duty to Rescue in Jewish Law*, 8 J. OF RELIGIOUS ETHICS 204, 226 (1980); Aaron Kirschenbaum, *The "Good Samaritan" and Jewish Law*, DINE ISRAEL 7, 7-85 (1976). In the absence of such a statute, at least, the failure to rescue is generally not even a tort, no matter how easy the rescue would be to

erally no duty to prevent a crime or to report a criminal.<sup>3</sup> By contrast, Jewish law posits affirmative duties to exert one's energies and expend one's financial resources to save others and to prevent the commission of certain serious crimes.<sup>4</sup> Most Jewish law courses place great emphasis on these differences, and commentators often cite them as an indication of Jewish law's moral superiority.<sup>5</sup>

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effectuate. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS, § 314 (1965) (stating “[t]he fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”); *but see* *Soldano v. Daniels*, 190 Cal. Rptr. 310 (1983) (describing where plaintiff stated a cause of action in tort against defendant business owner who prevented plaintiff from using public phone in defendant’s public place of business to call police for help from an assailant). A few states have passed statutes requiring people to report an ongoing crime to authorities. *Id.* at 395-96.

3. English common law recognized an offense of “misprision of a felony,” which involved (1) knowledge of a felony; (2) a reasonable opportunity to report it without harm to oneself; and (3) failure to do so. *See, e.g.*, Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1 (1993). Nevertheless, this common law offense was never broadly recognized in the United States. In fact, it is believed that the New Jersey Supreme Court upheld the only conviction of the offense in United States history. *See* *State v. Hann*, 1878 WL \*8294 (N.J. 1878). Although Congress enacted a misprision of felony statute that arguably approximates the English common law offense, courts have consistently construed it as requiring active concealment of the felony rather than a mere failure to report. *See, e.g.*, Arcuri, *supra* note 1, at 475-76. As discussed later in the text, however, all fifty states, along with the District of Columbia and various U.S. territories, have adopted legislation requiring many people to report even reasonable suspicions about cases of child abuse. *See infra* text accompanying notes 115-21.

4. *See infra* text associated with notes 97-104 and 186-234. In fact, in contrast to common law, Jewish law imposes on a person a wide variety of affirmative duties to help others. As Rabbi Mark Dratch explains:

These [affirmative obligations imposed by Jewish law] include such commandments as loving one’s neighbor, returning found property, helping to load and unload the cargo from an animal in distress, giving charity, lending money to those in need, visiting the sick, comforting mourners, ensuring that wedding expenses are met, celebrating with a bride and groom, escorting the dead to burial, hospitality, and more.

*See* Rabbi Mark Dratch, *Why are Jews Ignoring Traditional Jewish Law by Protecting the Abuser?*, in *TEMPEST IN THE TEMPLE* 105, 106 (Amy Neustein ed., 2009).

5. Many other commentators as well have urged that the morally correct approach would be to impose a duty to save others from serious harm. *See, e.g.*, Ken Levy, *Killing, Letting Die, and the Case for Mildly Punishing Bad Samaritanism*, 44 GA. L. REV. 607, 611 n.4 (2010) (citing a long list of articles favoring and disfavoring such laws: (1) Rader, *supra* note 2; (2) Shiya Rochester, *Note, What Would Seinfeld Have Done Had He Lived in a Jewish State? Comparing the Halakhic and Statutory Duties to Aid*, 79 WASH. U. L.Q. 1185 (2001); (3) Ann Cuc-

However, American law has been proactive as to the tragedy of child sexual abuse, in contrast to its customary approach. American law imposes a variety of affirmative duties on individuals and organizations to protect prospective victims.<sup>6</sup> These obligations include conducting fingerprint-based criminal background checks on employees and reporting reasonably suspected or reasonably believed child abuse to public authorities.<sup>7</sup>

Ironically, with respect to protecting children from sexual abuse, Jewish law, as applied by many, but certainly not all important Orthodox authorities, seems to have departed from its traditional proactive nature. These authorities have rejected the ameliorative steps prescribed by secular law.<sup>8</sup> Even more troublingly, perhaps, they have feebly permitted, and in at least some cases possibly encouraged, reprisals against those who have reported abuse, including its victims and their families.

In recent years, the tide has begun slowly to turn. Unfortunately, it sometimes seems that it is only the revelation of atrocities, both old and new, that pushes through the inertia that for so many years has hampered progress. Indeed, the recent tragedy of Leiby Kletzky, whether or not the evidence will ultimately establish that it involved actual or intended child sexual abuse, has focused significant pressure from within the Hareidi Orthodox community itself on its largest rabbinical organization, the Agudath Israel of America (“Agudath Israel”). These developments will be discussed in the final part of this article.

In order to understand the state of affairs within Orthodox Judaism, it is useful to broadly differentiate between Hareidi<sup>9</sup> and

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ciara Besser & Kalman J. Kaplan, *The Good Samaritan: Jewish and American Legal Perspectives*, 10 J.L. & RELIGION 193 (1993/1994); (4) Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1 (1993)).

6. See *infra* Part III.

7. *Id.*

8. See, e.g., Michael Orbach, *Has the Silence Been Broken? New Book Has Some Answers, But Doubts Linger*, THE JEWISH STAR, Oct. 28, 2010, available at [http://failedmessiah.typepad.com/failed\\_messiahcom/2010/10/has-the-hareidi-communitys-silence-on-child-sexual-abuse-been-broken-567.html](http://failedmessiah.typepad.com/failed_messiahcom/2010/10/has-the-hareidi-communitys-silence-on-child-sexual-abuse-been-broken-567.html).

9. In addition to differences based on the same types of factors that differentiate non-Hareidi Orthodox Jews, Hareidi Jews differ importantly based on whether they belong to a Hassidic group or whether, instead, they are deeply affiliated with a particular Hareidi rabbinical institution, i.e., a yeshiva. See *Generally*, SAMUEL HEILMAN, DEFENDERS OF THE FAITH: INSIDE ULTRA-ORTHODOX (1999); JEROME R. MINTZ, HASIDIC PEOPLE: A PLACE IN THE NEW WORLD (1998).

non-Hareidi<sup>10</sup> Orthodoxy, even though neither of these groups is homogenous. “Hareidi” Orthodox Jews include Hassidic sects as well as those, with Hassidic or non-Hassidic, who are associated with traditional Lithuanian-style rabbinical schools. Generally speaking, these Orthodox Jews are less likely to attend mainstream, secular universities or to be actively involved in modern America’s cultural milieu. By contrast, non-Hareidi Orthodox Jews include, in the United States, those generally associated with Yeshiva University or more modern rabbinical schools, and, in Israel, those who are in the Orthodox Zionist movement. They are much more likely to have attended mainstream universities and, at least in the United States, to be at least somewhat engaged in American cultural events, including theatre, cinema and the like, and to be more familiar with, and trusting of, secular society and secular government.

Many within non-Hareidi Orthodoxy have expressly and actively endorsed the secularly imposed duties.<sup>11</sup> Others, mostly within the Hareidi community, have not.<sup>12</sup> Of this latter group some have adopted a “compromise” position that calls for reporting in certain circumstances.<sup>13</sup> Another part of the group almost completely resists cooperation with secular authorities and even com-

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10. There are important differences among non-Hareidi Jews within each particular host country, such as the United States, Israel, etc., as well as important differences among non-Hareidi Orthodox Jews within each country, based on education, economics, and other factors.

11. The Rabbinical Council of America (“RCA”), one of the largest groups of non-Hareidi Orthodox rabbis in the United States, has passed several resolutions decrying child sexual abuse, approving and reaffirming the obligation to report cases to secular authorities, and supporting legislation to require all schools to conduct criminal background checks as to their personnel. *See Policies and Positions of the RCA*, RABBINICAL COUNCIL OF AMERICA, <http://www.rabbis.org/news/index.cfm?type=policies>; *see also RCA Resolutions Regarding Allegations of Sexual Abuse by Rabbis*, RABBINICAL COUNCIL OF AMERICA (May 28, 2003), <http://www.rabbis.org/news/article.cfm?id=105491>. Some RCA members had been championing the fight against child sex abuse for much longer. *See, e.g.*, Rabbi Mark Dratch, *The Physical, Sexual and Emotional Abuse of Children*, RABBINICAL COUNCIL OF AMERICA (RCA) ROUNDTABLE (Nissan 5752; 1991).

12. *See, e.g.*, Lakewood, NJ – In Abuse Cases Beth Din or Secular Courts? Rift is Widening in Orthodox Community, <http://www.vosizneias.com/79922/2011/03/31/lakewood-nj-in-abuse-cases-beth-din-or-secular-courts-rift-is-widening-in-orthodox-community>.

13. *See infra* text associated with notes 253, 286-289 (permitting reporting in some cases while calling for conduct apparently conflicting with applicable secular law in other instances).

pliance with secular directives.<sup>14</sup> Indeed, there is considerable evidence that at least some Orthodox Jews who have attempted to publicize cases of abuse, or to otherwise work with secular officials, have experienced or been threatened with extremely serious reprisals.<sup>15</sup> Of course, many of those who resist resorting to secu-

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14. See Hella Winston, *In Lakewood Abuse Cases a "Parallel Justice System,"* THE JEWISH WEEK (Dec. 6, 2011), [http://www.thejewishweek.com/news/new\\_york/lakewood\\_abuse\\_cases\\_parallel\\_justice\\_system](http://www.thejewishweek.com/news/new_york/lakewood_abuse_cases_parallel_justice_system). Interestingly, in December 2010, the Lubavitch-Chabad rabbinical court of Crown Heights issued an edict that, while apparently aimed at banning reports of police brutality, was broadly written to cover other incidents as well. See, e.g., Simone Weichselbaum, *Rabbinical court to Lubavitchers: Quit Yer Snitchin'*, N.Y. DAILY NEWS, Dec. 10, 2010, 2010, WLNR 24499054 (Lubavitch-Chabad rabbinical court issues an edict that "No one shall bring to any media outlet information about any resident that could, if publicized, lead to an investigation or intensified prosecution by any law enforcement agency."). Nevertheless, on July 11, 2011, it was reported that two members of the Crown Heights Bet Din, of the Chabad Jewish community, issued a written statement in the name of the Bet Din and on Bet Din stationery stating, in part, that the serious prohibitions against reporting Jews to secular authorities or of litigating in secular courts do not apply when there is evidence of sexual abuse. See *Beis Din: Informing on Molesters – Not Messirah* (July 11, 2011), <http://www.crownheights.info/index.php?itemid=36091>. This followed new allegations of child sexual abuse within the Chabad communities in Australia and in Crown Heights. *Id.* As to allegations in Australia, see, e.g., *Further Abuse Claims Rock Community*, THE AUSTRALIAN JEWISH NEWS (July 15, 2011), <http://www.jewishnews.net.au/further-abuse-claims-rock-community/21931>.

15. See, e.g., Helen Winston, *As Pressure On Hynes Builds, New Revelations Of Rabbis' Intimidation*, JEWISH WEEK (May 15, 2012), [http://www.thejewishweek.com/news/new\\_york/pressure\\_hynes\\_builds\\_new\\_revelations\\_rabbis\\_intimidation](http://www.thejewishweek.com/news/new_york/pressure_hynes_builds_new_revelations_rabbis_intimidation); Susan Edelman, *Threats Against Rabbi Accuser*, N.Y. POST (Feb. 12, 2012), [http://www.nypost.com/p/news/local/threats\\_vs\\_rabbi\\_accuser\\_DGc2B4CYV8VtIUiT2TbvN#ixzz1mBSgvvrd](http://www.nypost.com/p/news/local/threats_vs_rabbi_accuser_DGc2B4CYV8VtIUiT2TbvN#ixzz1mBSgvvrd) (boy accusing Brooklyn rabbi of abuse receives phone threats as trial approaches); *Victim's Father Determined To Break Cycle Of Abuse In Brooklyn's Hasidic, Orthodox Communities*, CBS N.Y. (Mar. 28, 2012), <http://newyork.cbslocal.com/2012/03/28/victims-father-determined-to-break-cycle-of-abuse-in-brooklyns-hasidic-orthodox-communities/> (father of allegedly abused child says his family was victimized twice, once when his son was physically abused by a sexual predator and again when the son was shunned when he tried to seek help). See also Jerry DeMarco, *Ban by Rabbis of Orthodox Blog Could Change Views on Handling Sex Abuse*, CLIFFVIEW PILOT, Dec. 31, 2010, available at <http://www.cliffviewpilot.com/beyond/1974-ban-by-rabbis-of-orthodox-blog-could-change-views-on-handling-sex-abuse->. On February 28, 2009, Shua Finklestein, a 19-year-old, wrote a letter to the local Jewish community condemning its inaction in combating this phenomenon. In part, he wrote, "It is your duty as a Jew, as a human to find these people in our community and no longer let them live among us!!!" See Zach Patberg, *Orthodox Jewish Community in Lakewood Deals with Sex Abuse*, ASBURY PARK PRESS, Sept. 12, 2009, available at <http://theawarenesscenter.blogspot.com/2011/01/orthodox-jewish-community-in-lakewood.html>. A year before, Finkelstein revealed to his mother that when he was six-

years-old, an older male began to sexually abuse him and that this had lasted several years. *Id.* After writing this letter, Finkelstein died from an overdose of painkillers. A few weeks later Finkelstein's mother made the letter available online. On April 14, while the Finkelsteins were out of town for the holiday of Passover, their home was destroyed by fire. *Id.* According to a police report, the fire was likely caused by arson. *Id.* Dr. Carmen Otalara-Levin, who tried to help the Finkelsteins and another family whose child had allegedly been abused, reports that she received numerous threats, including one that, in her words, warned that if "I didn't watch out, I'd get burned out of my office or house." *Id.* When Dr. Carmen Otalara-Levin, a local chiropractor, put a sign in her office offering a reward for information about the fire, she says she was threatened. She said that someone walked up to her and said that if she didn't stop putting "her nose where it doesn't belong," she would have her face "rearranged." *Id.* It is reported that when a county investigator went to the Finkelstein's new house to discuss the investigation of the fire, he reportedly told her, "You want to find out who did this [*i.e.*, set fire to your house]? Start talking about molestation again." *Id.* In 2009, when an alleged victim or his father (himself an Orthodox rabbi) reported abuse to secular authorities in his community, a number of local Orthodox Jews signed or distributed a flyer accusing the father of "making a 'mockery of the Torah' and of committing a chillul HaShem [*i.e.*, of profaning G-d's name]." See Jonathan Turley, *Child Abuses Allegations Hit the Orthodox Jewish Community*, RES IPSA LOQUITUR ("THE THING ITSELF SPEAKS") (Dec. 10, 2010), <http://jonathanturley.org/2010/12/10/child-abuses-allegations-hit-the-orthodox-jewish-community>.

In 2008, Dov Hikind, a New York State Assemblyman, established a task force to fight sexual abuse within the Orthodox Jewish community. One prominent Orthodox clinical psychologist who initially agreed to head the task force suddenly changed his mind. This psychologist initially sent an e-mail, published in the Jewish Press, stating, in part, "to protect myself, my family, and my reputation, I decided to withdraw from the project." Nevertheless, he later explained that neither he nor his children had received any "threats." Instead, his children had simply been subjected to "shame" by their peers in the Hassidic Jewish community, and he felt it was necessary for him to protect them from such shame. See Michael Orbach, "Shame," not threats, led to resignation: Dov Hikind will name new leader to task force on abuse, THE JEWISH STAR, Oct. 19, 2008, available at <http://www.thejewishstar.com/stories/Shame-not-threats-led-to-resignation,176>. Orbach reports about opposition that another therapist received:

Another therapist, who requested anonymity, said that he had received threats because of his activities concerning child abuse in the Orthodox community. He is Orthodox, lives and works in the Five Towns and treats patients across the spectrum from Charedi to Modern Orthodox. His children were threatened, he said, with not being accepted into yeshivot or for shidduchim

[*i.e.*, for arranged dates that might lead to marriage], and he was threatened with financial ruin.

*Id.*

In 2007, Rabbi Nuchem Rosenberg established a telephone hot-line for abuse victims in Williamsburg, New York. The result, he says, is that he was ostracized by members of the Orthodox community. He allegedly received death threats and suffered a forehead injury from some projectile. See, *e.g.*, Christopher

lar authorities have not ignored the sex abuse problem.<sup>16</sup> They have sought solutions within the Orthodox community, such as increased education (of children, parents and employees), new regulations regarding access to children,<sup>17</sup> and the establishment of

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Alessi and Nathania Zevi, *Child Abuse in Orthodox Brooklyn: Chipping Away at a Wall of Silence*, THE BROOKLYN INK, Dec. 21, 2009, available at <http://thebrooklynink.com/2010/02/04/6308-child-abuse-in-orthodox-brooklyn-chipping-away-at-a-wall-of-silence/>.

In 2006, a mother reported to secular authorities that her fifteen-year-old daughter had been raped by a thirty-five-year old man. Local rabbinic authorities were reportedly “furious” that she went to secular authorities rather than to a rabbinic court. See Patberg, *supra*. Two years later, the alleged offender was convicted of endangering the welfare of a child and sentenced to three years probation. *Id.* Cf. Kathleen Hopkins, *Former Lakewood Camp Counselor Indicted On Child Sexual Abuse Charges*, ASBURY PARK PRESS, July 1, 2010, available at [http://failedmessiah.typepad.com/failed\\_messiahcom/2010/07/former-lakewood-camp-counselor-indicted-on-child-sexual-abuse-charges-567.html](http://failedmessiah.typepad.com/failed_messiahcom/2010/07/former-lakewood-camp-counselor-indicted-on-child-sexual-abuse-charges-567.html) (reporting, among other things, that a member of an Orthodox Jewish community was indicted for witness tampering in connection with a child sexual abuse matter).

This pattern seems to have persisted for years. In February, 2000, Dr. Mordechai Glick, an Orthodox Jewish psychologist, decried this pattern in a letter to the Orthodox Jewish English language newspaper, the JEWISH PRESS:

[I]f the police do get involved, a massive cover-up and pressure campaign usually ensures that the case will either not get to trial or if it does, will be dropped because potential witnesses are pressured (code for threatened) to refuse to testify or outright lie.

Amy Neustein & Michael Lesher, *Justice Interrupted: How Rabbis Can Interfere with the Prosecution of Sex Offenders – and Strategies for How to Stop them*, in TEMPEST IN THE TEMPLE, *supra* note 4, at 198.

Nor has this pattern been reported only within the Hareidi Orthodox community. When allegations of abuse were leveled against a charismatic rabbi within the non-Hareidi Orthodox community, the rabbinic court that finally investigated was accused of pressuring victims to recant, sealing the tribunal’s findings and covering up the record of abuse for years. See, e.g., Ana M. Alaya, *Victims: Rabbi Failed to Protect Children*, STAR LEDGER, Jan. 31, 2003, at 38; John Chadwick, *Group Opposes Lecture by Rabbi*, BERGEN RECORD, Jan. 31, 2003, at L-2. The alleged abuser was ultimately convicted and imprisoned.

16. Rabbi Mark Dratch reports:

Truth to tell, during the last decade or two we have witnessed increasing acknowledgement, awareness, and activity across the spectrum of the Jewish community, concerning all types of abuse. Today there are many agencies and programs to which people can turn for help and support. Educational initiatives and policy declarations have been forthcoming from rabbinical organizations and many community organizations.

Dratch, *supra* note 4, at 106.

17. Many educational efforts have been undertaken. For example, in 2006, the Association of Jewish Camp Operators (AJCO), a division of Agudath Israel of America, a Hareidi organization, published materials addressed to camp directors and to parents of campers. These materials address the issue of child sexual

specialized rabbinic courts, composed by rabbis who are educated about sexual abuse and assisted by experienced psychologists or psychiatrists.<sup>18</sup> Although these steps may be helpful, a number of factors materially limit what they can achieve.<sup>19</sup> This is especially tragic given the ever increasing evidence of child sexual abuse within the Orthodox Jewish community.<sup>20</sup>

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abuse. Similarly, in April 2010, AJCO held a meeting for more than 100 representatives from over thirty-five camps at which it distributed a seventeen-page packet of materials. It included, for instance, camp standards (in English and Yiddish) and suggested narratives for camp directors to use in disclosing to parents abuse that occurred either before or during the camp. See Michael Orbach, *Camp Directors Learn About Preventing Abuse*, THE JEWISH STAR (May 5, 2010), <http://www.thejewishstar.com/stories/Camp-directors-learn-about-preventingabuse>, 1713. The materials distributed are available at [http://jewishstar.static.adqic.com/uploads/files/acf4ee73b02010\\_05\\_camp12-1.pdf](http://jewishstar.static.adqic.com/uploads/files/acf4ee73b02010_05_camp12-1.pdf). See also, Zach Patberg, *Orthodox Move to End Silence on Sex Abuse*, ASBURY PARK PRESS (Nov. 28, 2009), [www.app.com/assets/pdf/B31475571128.PDF](http://www.app.com/assets/pdf/B31475571128.PDF) (reporting about a number of educational programs for educators and parents).

18. Some such efforts appear to have been aborted. See Patberg, *supra* note 17 (reporting that a rabbinical court in Lakewood, New Jersey, that handled many cases of alleged sexual abuse was closed). Special rabbinical courts to handle allegations of sexual abuse were also created in Chicago and Los Angeles, communities serving both non-Hareidi and Hareidi Orthodox Jews. See Rabbi Yosef Blau, *Confronting Abuse in the Orthodox Community*, NEFESH NEWS 7:9 (July 2003), [www.jofa.org/pdf/uploaded/863-BWMF1871.pdf](http://www.jofa.org/pdf/uploaded/863-BWMF1871.pdf) (referring to a special rabbinic court formed in Chicago and in other unspecified cities). At the 2003 convention of Torah Umesorah, the principal Hareidi educational organization in the United States, Rabbi Gedaliah Schwartz spoke about this rabbinic court, and Rabbi Steven Weil spoke about a similar specialized rabbinic court in Los Angeles.

19. Some of these factors, however, will be addressed in Part IV.

20. This is an international phenomenon. For example, in the Jerusalem neighborhood of Nachalaot, police allegedly uncovered the largest pedophilia case in Jerusalem's recent history. At least 10 suspects are alleged to have abused over 100 children. See Melanie Lidman, *'He masterminded the systematic rape of over 100 kids: Nahlaot community reels from largest pedophile abuse case in nation's history; at least three of 10 suspects remain free'*, THE JERUSALEM POST (Jan. 20, 2012), 1/20/12 Jerusalem Post 6, 2012 WLNR 1566691; Melanie Lidman, "More arrests in Nahlaot pedophilia case. See also "Jerusalem - Report: Child Molestation in Israel's Chareidi Community Reaching Alarming Rate," [VosIzNeias.com/101299](http://VosIzNeias.com/101299) (2/19/2012);

See also Paul Berger, *Orthodox Jews Begin to Reckon with Sexual Abuse*, RELIGIONS DISPATCHES (Dec. 9, 2010), [http://www.religiondispatches.org/archive/sexandgender/3258/orthodox\\_jews\\_begin\\_to\\_reckon\\_with\\_sexual\\_abuse](http://www.religiondispatches.org/archive/sexandgender/3258/orthodox_jews_begin_to_reckon_with_sexual_abuse) (reports that in 2009 twenty-five Orthodox men were arrested in Brooklyn, New York, for alleged sexual abuse, and that in 2010, twenty-nine sexual abuse investigations were started in Lakewood, New Jersey, which includes a very large Orthodox community). In 2009, Rabbi Pinchus Lipschitz, the editor of Yated Ne'eman, a major Hareidi newspaper, wrote, "The sad fact is that children in our community

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are being abused by perpetrators who prey upon their innocence and their silence. We don't have a count of how many people are hurt, but it is much larger than we realized, even a short time ago." See Pinchas Lipschitz, YATED NE'EMAN, Mar. 2009, at 5, available at [http://failedmessiah.typepad.com/failed\\_messiahcom/2009/03/yated-neeman-comes-out-against-child-sexual-abuse.html](http://failedmessiah.typepad.com/failed_messiahcom/2009/03/yated-neeman-comes-out-against-child-sexual-abuse.html). For information on recently aired allegations within the Chabad Hassidic community in Crown Heights and in Australia, see <http://www.crownheights.info/index.php?itemid=36091>; see also *Further Abuse Claims Rock Community*, THE AUSTRALIAN JEWISH NEWS (July 15, 2011), <http://www.jewishnews.net.au/further-abuse-claims-rock-community/21931>; see generally, *Daas Torah: Issues of Jewish Identity*, "Emmanuel: allegations that sex abuse is behind segregation (Mar. 28, 2011), available at [http://daattorah.blogspot.com/2011/03/emmanuel-allegations-that-sex-abuse-is\\_28.html](http://daattorah.blogspot.com/2011/03/emmanuel-allegations-that-sex-abuse-is_28.html); *NY Rabbi Jailed for Sexual Abuse of Teen*, N.Y. POST, Apr. 12, 2010, available at [http://www.nypost.com/p/news/local/brooklyn/newscore\\_new\\_york\\_rabbi\\_jailed\\_for\\_4udEzBT7r4QGY1h8AgLsvJ](http://www.nypost.com/p/news/local/brooklyn/newscore_new_york_rabbi_jailed_for_4udEzBT7r4QGY1h8AgLsvJ) (reporting that Rabbi Baruch Lebovits was convicted on 8 charges of abuse of a 16-year old between 2004 and 2005, and that Lebovits was sentenced to between 10 years, 8 months and 32 years in prison; and stating that 2 separate cases against Lebovits for alleged sexual assaults on minors were still pending); Paul Vitello, *Orthodox Jews Rely More on Sex Abuse Prosecution*, N.Y. TIMES, Oct. 13, 2009, available at <http://www.nytimes.com/2009/10/14/nyregion/14abuse.html>; Austin Cline, *Sexual Abuse of Kids in Hasidic Jewish Community*, AUSTIN'S ATHEISM BLOG (Feb. 24, 2009), <http://atheism.about.com/b/2009/02/24/sexual-abuse-of-kids-in-hasidic-jewish-community.htm>; Brad A. Greenberg, *Sexual Abuse in Brooklyn's Hasidic Community* (Feb. 2, 2009), [http://www.jewishjournal.com/thegodblog/item/sexual\\_abuse\\_in\\_brooklyns\\_hasidic\\_community\\_20090202/](http://www.jewishjournal.com/thegodblog/item/sexual_abuse_in_brooklyns_hasidic_community_20090202/); Robert Kolker, *On the Rabbi's Knee: Do the Orthodox Jews Have a Catholic-Priest Problem?*, NEW YORK MAGAZINE, May 14, 2006, available at <http://nymag.com/news/features/17010/>; Jennifer Friedlin, *Yeshiva in Sex Scandal Pledges More Protection*, JEWISH WEEK (June 16, 2006), <http://www.rickross.com/reference/clergy/clergy482.html>. Within the year or so preceding the date on which this article was written, at least four books were published dealing with child sex abuse within the Jewish community. See, e.g., EISHES CHAYIL (a pseudonym), HUSH! (2010); DANIEL EIDENSOHN, CHILD & DOMESTIC ABUSE (2 volumes) (2010); DAVID MANDEL AND DAVID PELCOVITZ, BREAKING THE SILENCE: SEXUAL ABUSE IN THE JEWISH COMMUNITY (2010) [hereinafter BREAKING THE SILENCE]; MICHAEL SALAMON, ABUSE IN THE JEWISH COMMUNITY (2011). See Hella Winston, *Speaking Volumes About "Hush" of Sexual Abuse*, THE JEWISH WEEK, Mar. 29, 2011, available at [http://www.thejewishweek.com/news/new\\_york/speaking\\_volumes\\_about-hush-sexual\\_abuse](http://www.thejewishweek.com/news/new_york/speaking_volumes_about-hush-sexual_abuse) (discussing these books as well as the general sexual abuse problem within the Orthodox Jewish community). Just shortly before another book was published that examined this topic within the Jewish community generally and contained chapters specifically discussing the situation within the Orthodox community. See TEMPEST IN THE TEMPLE: JEWISH COMMUNITIES AND CHILD SEX SCANDALS (Amy Neustein ed., 2009). In addition, various documentaries and video clips have been produced. See, e.g., Emily Wax, *'Standing Silent' follows uncovering of sexual abuse in Baltimore's Orthodox Jewish community* (Mar. 19, 2012), [http://www.washingtonpost.com/lifestyle/style/documentary-standing-silent-recounts-efforts-to-uncover-abuse-in-orthodox-community/2012/02/28/gIQAewi9NS\\_story.html?hpid=z8](http://www.washingtonpost.com/lifestyle/style/documentary-standing-silent-recounts-efforts-to-uncover-abuse-in-orthodox-community/2012/02/28/gIQAewi9NS_story.html?hpid=z8).

This article focuses on what actuates those Hareidi authorities who continue to oppose the steps adopted by secular law<sup>21</sup> and what might possibly convince them to change their position.<sup>22</sup> Their rhetoric typically invokes Jewish law, which has often been construed as distrustful of secular governments. However, other important policy choices also seem to be at play including a possible lack of respect for the practical judgment of its rank and file members – and, ironically, a concern lest those same members develop a lack of respect for their judgment. In addition, there are practical fears that reporting abuses to secular officials may lead to secular judgments that cause great communal harm by bankrupting important religious institutions. In some cases, these fears may give rise to a conflict of interest. Consequently, this article explores both doctrinal and policy concerns.

Part I briefly describes the problem of child sexual abuse, as well as some of the difficulties in measuring it and its consequences. Part II introduces the Jewish law doctrines that are most often adduced as obstacles to fighting such abuse. Part III discusses the principal proactive steps secular law has taken to combat abuse and provides considerable evidence for concluding that Jewish law actually supports implementation of, and cooperation with, secular measures. Part IV argues that the reluctance to embrace secular solutions is predicated upon both a variety of technical issues and, perhaps more significantly, a number of fundamental policy concerns. By casting light on these factors, this article aspires to encourage a more transparent and focused discussion that could lead to change, or at least a clearer and more helpful understanding of the issues. Part V goes one step further by identifying the paradox that confronts Hareidi community leaders and respectfully proposing specific steps for its resolution.

#### I. THE TRAGEDY OF CHILD SEXUAL ABUSE IN THE ORTHODOX JEWISH COMMUNITY

Reports of child sexual abuse over the past few years make it clear that the calamity of child sexual abuse has not spared the

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21. *See supra*, notes 13-14 (referring to such authorities).

22. Nevertheless, the author is working on a possible follow-up article which would try to provide a historical perspective on the extent to which rabbinic authorities have made public statements or taken public steps regarding child sexual abuse within the community.

Orthodox Jewish community.<sup>23</sup> The consequences of this abuse can be devastating. Numerous studies indicate that the likelihood of suicide and attempted suicide are dramatically greater for those who were sexually abused as children than for those who were not.<sup>24</sup> Indeed, psychologists deeply involved in the Orthodox Jewish community have called for more action to combat child sexual abuse because of the “unconscionable number of suicides of children who have been sex abuse victims.”<sup>25</sup>

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23. See *supra* notes 15-20. See also Christopher Alessi & Nathania Zevi, *Child Abuse in Orthodox Brooklyn*, THE BROOKLYN INK (Feb. 4, 2010), <http://thebrooklynink.com/2010/02/04/6308-child-abuse-in-orthodox-brooklyn-chipping-away-at-a-wall-of-silence/> (in the preceding year, twenty-six alleged child molesters were arrested, eight of whom were convicted, in orthodox Brooklyn, in contrast to previous years in which arrests averaged about two per year); EIDENSOHN I, *supra* note 20, at 7 (citing Rabbi Chaim Dovid Zwiebel, executive vice president of Agudath Israel of America, a large rabbinic organization, as saying in October 2008 that “Until not terribly long ago, the issue was very much in the shadows . . . [T]he severity of the problem and the possible magnitude were really things that most people, including myself, just didn’t understand.”); Phil Jacobs, *A Year Like No Other*, BALT. JEWISH TIMES, Sept. 7, 2007, available at <http://jewishsurvivors.blogspot.com/2007/09/phil-jacobs-baltimore-hero.html> (last visited Oct. 24, 2010) (describing a meeting in which many people alleged abuse by a rabbi, father, camp counselor, yeshiva teacher, older brother, etc.).

24. See, e.g., Nachum Klafter, *The Impact of Child Sexual Abuse*, The Jewish Board of Advocates for Children, Sept. 21, 2008, at 21: “[I]n numerous studies, childhood sexual abuse has been consistently observed by numerous researchers to be an independent and significant risk factor for suicide attempts and attempted suicide.” See also Dale O’Leary, *Gay Teens and Attempted Suicide*, <http://www.narth.com/docs/gayteens.html> (61% of gay teenagers surveyed who had attempted suicide had been abused. Only 29% of those who had not attempted suicide had been abused). See also *Child Abuse May “Mark” Genes in Brains of Suicide Victims*, SCI. DAILY (May 7, 2008), <http://www.sciencedaily.com/releases/2008/05/080507084001.htm>, (citing O. McGowan, Aya Sasaki, Tony C. T. Huang, Alexander Unterberger, Matthew Suderman, Carl Ernst, Michael J. Meaney, Gustavo Turecki, Moshe Szyf, & Jörg Hoheisel, *Promoter-Wide Hypermethylation of the Ribosomal RNA Gene Promoter in the Suicide Brain*, *PLoS ONE*, 2008; 3 (5): e2085 DOI: 10.1371/journal.pone.0002085 (child abuse may affect the victim epigenetically making them predisposed towards suicide); see also *Strong Link Between Childhood Sexual Abuse And Suicide Attempts In Women*, MEDICAL NEWS TODAY, June 9, 2009, available at <http://www.medicalnewstoday.com/printerfriendlynews.php?newsid=153022>; see also *Suicide Linked to Sexual Abuse*, <http://www.personalmd.com/news/a1996061806.shtml> (Duke University physician’s study shows that women victims of child sexual abuse are three to four times more likely to commit suicide than non-victims).

25. See, e.g., Elliot B. Pasik, *Elliot B. Pasik Esq. Speaks to the Jewish Community*, UNORTHODOX JEWS: A CRITICAL VIEW OF ORTHODOX JUDAISM (Feb. 16, 2006), <http://unorthodoxjews.blogspot.com/2006/02/elliott-b-pasik-esq-speaks-to-jewish.html> (referring to a statement by a psychologist “prominent in our [Ortho-

In addition to an increased propensity for actual or attempted suicide, child sexual abuse victims suffer panoply of other extremely physically and emotionally traumatic, dangerous, and life-altering consequences. These short-term and long-term consequences include nightmares, flashbacks, fear, anxiety, panic attacks, depression, social withdrawal, anger, hostility, mistrust, poor self esteem, inclination toward substance abuse, eating disorders, inappropriate sexual behavior, criminality, difficulty in developing and maintaining close social relationships, and a greater risk of sexually transmitted diseases, including HIV infection.<sup>26</sup> Rabbi Pinchas Lipschitz, editor of the *Yated Ne'em*, writes:

There is no real debate about the catastrophic effects of abuse. The innocence and purity of children is destroyed for life. The victims remain hurt, shamed and scarred. They suffer in silence, afraid to reveal their secret to anyone. They are hounded by feelings of guilt and embarrassment and live lives of tortured pain. The overwhelming majority of survivors suffer in silence, unless they are lucky enough to endure agonizing, arduous, expensive therapy. However, even a lifetime of therapy doesn't ensure that the victim can ever be fully healthy again. Not every young vic-

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dox Jewish] community" reporting an "unconscionable number of suicides of children who have been sex abuse victims."). Pasik referenced comments made by Dr. David Pelcovitz, a prominent psychologist within the Orthodox Jewish community, at the 2003 Torah Umesorah Convention. Pelcovitz was part of a program entitled, *The Principal's Role in Preventing and Responding to Abuse*, and an audiotape of that panel may be purchased directly from Torah Umesorah. Several specific cases of apparent suicides by alleged abuse victims has been discussed in the public new media. See, e.g., Zach Patberg, *Culture Clash: Secular Law and the Torah: Orthodox Community Deals with Sex Abuse*, ASBURY PARK PRESS, Sept. 12, 2009, available at [http://failedmessiah.typepad.com/failed\\_messiahcom/2009/09/expos%C3%A9-lakewood-child-sexual-abuse-and-blaming-victims-789.html](http://failedmessiah.typepad.com/failed_messiahcom/2009/09/expos%C3%A9-lakewood-child-sexual-abuse-and-blaming-victims-789.html); Susan Edelman & Kirsten Fleming, *Suicide Groom Twist*, N.Y. POST, Nov. 15, 2009, available at [http://www.nypost.com/p/news/local/brooklyn/suicide\\_groom\\_twist\\_pa15C1Z5nGPyHIYj18xCNI](http://www.nypost.com/p/news/local/brooklyn/suicide_groom_twist_pa15C1Z5nGPyHIYj18xCNI); Reuven Blau & Susan Edelman, *Suicide Groom Told Friend He Was Molested by Rabbi Baruch Lebovits*, N.Y. POST, Jan. 17, 2010, available at [http://failedmessiah.typepad.com/failed\\_messiahcom/2010/01/suicide-groom-told-friend-he-was-molested-by-rabbi-baruch-lebovits-123.html](http://failedmessiah.typepad.com/failed_messiahcom/2010/01/suicide-groom-told-friend-he-was-molested-by-rabbi-baruch-lebovits-123.html).

26. Various studies report some or all of these effects. See, e.g., *Child Abuse Statistics*, <http://www.prevent-abuse-now.com/stats.htm#Impapct> (last visited Oct. 24 2010), (citing Tsai, M. & Wagner, N. N., *Therapy groups for women sexually molested as children*, ARCHIVES OF SEXUAL BEHAVIOR, 7, 417-27 (1978); Klafter, *supra* note 24, at 18-23, 26-28 (providing bibliography of sources presenting and summarizing the scientific evidence of child sexual abuse consequences). See also MICHAEL J. SALAMON, *SEXUAL ABUSE AND THE BRAIN* (2011).

tim's psyche can be healed. Victims are much more likely to go off the derech [*i.e.*, to become irreligious], become addicted to drugs and lead a life of abusing themselves and others.<sup>27</sup>

Psychoanalyst Leonard Shengold has described the ravages of child sexual abuse as "soul murder."<sup>28</sup> Of course, these consequences seriously, albeit indirectly, injure all of the victims' loved ones, as well<sup>29</sup> as the entire Orthodox Jewish community.

Accurately describing the consequences and prevalence<sup>30</sup> of child sexual abuse is fraught with difficulties.<sup>31</sup> For example, there is no uniform definition as to what constitutes "child sexual abuse."<sup>32</sup> Many authorities employ a broad definition that includes both non-contact offenses, such as exhibitionism, and contact offenses of all sorts.<sup>33</sup> While this approach yields a relatively high percentage for the incidence of child sexual abuse, it could ironically understate the horrific consequences of abuse.

27. See Lipschitz, *supra* note 20.

28. LEONARD SHENGOLD, SOUL MURDER: THE EFFECTS OF CHILDHOOD ABUSE AND DEPRIVATION (1989); LEONARD SHENGOLD, SOUL MURDER REVISITED: THOUGHTS ABOUT THERAPY, HATE, LOVE, AND MEMORY (1999).

29. See Klafter, *supra* note 24, at 21. "[S]uicide [one of the consequences of sexual abuse] wreaks emotional havoc on the parents, siblings, children, and other loved ones of the deceased."

30. *Id.* "Prevalence" refers to the percentage of the population that previously suffered child sexual abuse.

31. *Id.* at 18.

32. *Id.* "Sexual abuse of children . . . should be defined as any sexual contact with a child which is coercive, or which involves an adult or significantly older child taking advantage of the child's naiveté or inability to protest. These sexual activities could include any of the following: exhibitionism; voyeurism; touching genitals, buttocks, or other body parts of the child for sexual arousal; directing the child to touch the perpetrator; fellatio or cunnilingus; anal or vaginal penetration; or any other nonconsensual activity intended by the perpetrator for sexual gratification."

33. David Finkelhor, *The Prevention of Childhood Sexual Abuse*, 19:2 THE FUTURE OF CHILDREN 171-72 (Fall 2009), available at [www.futureofchildren.org](http://www.futureofchildren.org). Daniel Eidensohn, for example, asserts:

Sexual abuse means to use a child in any way that provides sexual gratification of the adult. This means not only sexual intercourse but also holding or fondling in a way that causes sexual arousal in the adult. It also includes showing pornography to the child as well as discussion of a sexual nature for the purpose of getting the adult sexually aroused. Sexual abuse also means exposing genitals or taking pornographic pictures.

See EIDENSOHN I, *supra* note 20, at 3. Using such an expansive definition creates confusion or mistakes in discussing the obligation to report cases of sexual abuse. See *infra* the text associated with note 273.

Suppose, for instance, a study seeks to determine the extent to which child sex victimization increases the likelihood a person will commit or attempt suicide. A broad definition of “child sexual abuse” includes people whose victimization, however horrid, may have been *relatively* mild. To illustrate this point, assume that according to this broad definition, victims constitute thirty percent of the general population. Also assume that only a third of these cases involve the most severe forms of abuse.<sup>34</sup> Many authorities contend that the harshest consequences of abuse are positively correlated with the severity of the abuse.<sup>35</sup> Consequently, assume that half of the people who are most severely abused attempt or commit suicide, while none of the victims of lesser abuse do the same. By analyzing all abuse victims as one group, a study might report that only one-sixth of sexual abuse victims attempt or commit suicide, significantly understating the impact of severe abuse.

However sexual abuse is defined, its prevalence is believed to be “vastly underreported.”<sup>36</sup> Young victims are often too frightened, confused, guilt-ridden, or inarticulate to report effectively.<sup>37</sup> When questioned in adulthood, some victims may have forgotten or repressed memories. Indeed, studies show that some people even forget or repress offenses that were reported when they were younger.<sup>38</sup> Nevertheless, ten to thirty-five percent of adults who are questioned about their childhood experiences still report that they were sexually abused.<sup>39</sup> What is clear from all accounts is that many people have suffered some form of child sexual abuse.<sup>40</sup>

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34. I offer no particular definition for which forms are most severe. One possible, perhaps too restrictive, approach would be to include only those cases of abuse involving physical contact by the abuser or the abused with certain parts of the other's body.

35. See Klafter, *supra* note 24, at 19. “We anticipate relatively fewer and less severe long-term effects when trauma is less severe, less frequent . . . .”

36. *Id.* at 18 (reporting that this is the belief of most experts).

37. See, e.g., S. Oz & D. Balshan, *Mandatory Reporting of Childhood Sexual Abuse in Israel: What Happens after the Report?* 16 *J. CHILD SEXUAL ABUSE* 4 (2007) (“Children often feel too guilty to disclose, blaming themselves for the abuse having happened.”).

38. See, e.g., L.M. Williams, *Recall of childhood trauma: A prospective study of women's memories of child sexual abuse*, 62 *J. OF CONSULTING & CLINICAL PSYCHOL.* 1167-76 (1994).

39. See, e.g., Klafter, *supra* note 24, at 18.

40. See, e.g., Rebecca M. Bolen & M. Scannapieco, *Prevalence of Child Sexual Abuse: A Corrective Meta-Analysis*, 3 *SOCIAL SERVICE REVIEW* 73, 281-313 (1999) (a survey of adults showed that between 30-40% of women and about 13% of men had been sexually molested as children); Shanta Dube, et al., *Long-Term Conse-*

## II. THE RELEVANT JEWISH LAW DOCTRINES

There are four principal Jewish law doctrines that are typically cited as possible obstacles to some of the steps discussed in Part III that secular law has used to combat child abuse: (1) the rule against suing someone in a secular court; (2) the rule against uttering embarrassing or unfavorable remarks regarding another person (or believing such remarks uttered by others);<sup>41</sup> (3) the rule against harming someone physically or financially; and (4) the rule against informing on a Jew to non-Jews or to secular authorities.<sup>42</sup>

The rule against suing someone in a secular court arises from the verse, “And these are the ordinances that you shall place before them [*i.e.*, Jewish judges].”<sup>43</sup> With respect to this verse, the Talmud states:

Rabbi Tarfon used to say, “Whenever you find gatherings of idolaters serving as judges, even though their laws are identical to the laws of Jews, you are not permitted to submit to them for a judgment of your dispute, for it is stated, ‘These are the judgments that you (Moses) shall place before them . . .’”<sup>44</sup>

The Eleventh Century luminary, Maimonides, formulated this law in his magnum opus, the *Mishneh Torah*, as follows:

Whoever submits a suit for adjudication to gentile judges in their courts, even if the judgment rendered by them is in accord with Jewish law, is a wicked man. It is as though he reviled, blasphemed and rebelled against the law of Moses, our teacher, for it is said, “Now these are the ordinances which thou shalt set before them.” (Exod. 21:1) – “before them”, not before heathens, and not before laymen.<sup>45</sup>

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*quences of Childhood Sexual Abuse by Gender of Victim*, 28 AM. J. PREV. MED. 430 (2005) (25% of women and 16% of men child sex abuse victims). See also Jim Hopper, *Child Abuse: Statistics, Research and Resources*, www.jimhopper.com, for details regarding various studies.

41. See Dratch, *supra* note 4, at 110-13.

42. *Id.* at 111.

43. *Exodus* 21:1.

44. BABYLONIAN TALMUD (“BT”), TRACTATE GITTIN 88B2 (Hersh Goldwurm ed., Mesorah Publications, Ltd. 1993). The excerpt quoted in the text ignores the special fonts used by this translation of the Talmud.

45. MAIMONIDES, *MISHNEH TORAH*, *Laws of Courts*, Chapter 26, halakha 7, as translated in Simcha Kraus, *Litigation in Secular Courts*, 2(1) J. OF HALACHA & CONTEMP. SOC. 38 (Spring 1982) (hereinafter “KRAUS”).

Jewish legal texts consider a person's going to a non-Jewish court as tantamount to expressing a preference for the non-Jewish legal system over the Jewish system, which was a divine gift to the Jewish people. This implied expression is equated to blasphemy.<sup>46</sup> According to a majority of Jewish law scholars, the prohibition applies to the resort to any non-Jewish court, whether it is the court of a secular government or of a religious government of a different faith.<sup>47</sup> In addition, if a plaintiff collects an amount in excess of that to which he is entitled under Jewish law pursuant to a non-Jewish judicial proceeding, he may be guilty under Jewish law of theft.<sup>48</sup>

As discussed in more detail in Part III, the institution of a rabbinic court still exists, and private parties can still use such courts to resolve their disputes.<sup>49</sup> As a result, the doctrine against resorting to non-Jewish courts arguably prohibits a sexual abuse victim from commencing a secular court action against an abuser for compensation. Nevertheless, a number of exceptions might apply. First, most authorities rule that a Jew is allowed to sue a Gentile in a Gentile court because a Gentile presumably would be unwilling to appear before a Jewish court.<sup>50</sup> Similarly, they would permit the plaintiff in such a case to fully enforce any secular judgment so obtained.<sup>51</sup>

Second, many authorities state that a Jew may sue another Jew in secular court if the purpose is to obtain a judgment that would be used against some non-Jewish entity that is to be responsible to pay for the defendant's conduct, such as an insurance company or employer.<sup>52</sup>

Third, a Jew may be permitted to sue another Jew in a Gentile court if the Jewish defendant is unwilling to appear before a Jewish court.<sup>53</sup> Some authorities would allow the plaintiff to file suit in a secular court immediately if it is clear that the defendant would

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46. J. DAVID BLEICH, *CONTEMPORARY HALAKHIC PROBLEMS V* 5 (Ktav Publishing House, Inc., 2005).

47. *Id.* at 11.

48. *Id.* at 34-35, n.41.

49. *See generally* J. DAVID BLEICH, *CONTEMPORARY HALAKHIC PROBLEMS IV* 3-16 (Ktav Publishing House, Inc., 1995).

50. BLEICH, *supra* note 46, at 35, 37.

51. *See generally* Steven H. Resnicoff, *Bankruptcy: A Viable Halachic Option?*, 24 *J. OF HALACHA & CONTEMP. SOC'Y* 5, 51-52 (1992).

52. BLEICH, *supra* note 46, at 34.

53. *Id.* at 26-27.

not submit to a Jewish court.<sup>54</sup> Others would first require the plaintiff to obtain permission from a rabbinic court to file in a secular court.<sup>55</sup>

However, if a Jewish defendant is willing to appear before a rabbinic court, and no non-Jewish third party would be responsible to pay the defendant's judgment, then a Jewish plaintiff would be required to sue for compensation in a rabbinic court. Though an examination of the details of Jewish tort liability is not appropriate here, it is possible that a rabbinic court would grant a successful plaintiff a much lower judgment than would a secular court. Limiting resort to secular courts, and thereby limiting recovery to the possibly smaller compensatory award of a Jewish court, Jewish law could conceivably result in less deterrence than secular law. This may not significantly affect the degree of deterrence of an individual abuser. The prospects of criminal liability and reputational damage such a person faces may be more daunting than any possible monetary sanction.<sup>56</sup>

While the doctrine against resort to secular court appears to apply only to the filing of a civil suit and probably has minimal effect on efforts to combat the sexual abuse of children, the Jewish law doctrines against impugning a person's character, causing someone harm, and turning a Jew over to Gentiles could severely impede efforts to identify, screen out and criminally prosecute abusers. Consequently, we will briefly describe those doctrines and, in Part III, explore the extent, if any, that they actually interfere with efforts against child sexual molestation.

The rule against uttering embarrassing or unfavorable remarks about another person (or believing such remarks uttered by others) arises from the first part of the verse: "You shall not be a gossipmonger among your people, you shall not stand aside while your fellow's blood is shed . . . ."<sup>57</sup> The Jerusalem Talmud<sup>58</sup> and

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54. ABRAHAM DAVID BUCZACZ (1770-1840), KESSEF KODASHIM, *Hoshen Mishpat* 26:2.

55. BLEICH, *supra* note 46, at 34.

56. Deterrence regarding entities that may be able to screen, control, or monitor wrongdoers, however, may be detrimentally affected by any diminution of civil liability.

57. *Leviticus* 19:16. See, generally, Elie Mischel, *Thou Shalt Not Go about as a Talebearer among Thy People Jewish Law and the Private Facts Tort*, 24 CARDOZO ARTS & ENT. L. J. 811 (2006).

58. The Hebrew word used for "gossipmonger" is "Rakhil," which usually refers to a peddler. The Jerusalem Talmud explains that the word is used here because it is the way of gossips to go from person to person and door to door to

later authorities<sup>59</sup> make it clear that this prohibition applies even when what one might say is true. The Jewish law doctrine is usually referred to as “Loshon ha-Rah,” or “the evil tongue.”<sup>60</sup>

Gossip can inflict serious and widespread harm.<sup>61</sup> Usually, the gossip’s subject never learns all of the details said about him or the identities of all the persons to whom they were communicated. Consequently, the subject cannot effectively redress the harm caused to him. If the statements are false, any such injury is completely unwarranted. Even if the stories are true, the injury may be totally unmerited. Many stories do not relate to any wrongdoing, but can still cause embarrassment, and other harm, to the person discussed. Regardless of whether the tales truthfully describe a person’s misdeeds, the injury caused by the stories may be completely disproportionate to his culpability. In addition, gossiping starts controversies that often embroil third parties who eventually suffer as a result. Indeed, gossipmongering has even led to physical violence and fatalities.<sup>62</sup>

The rule against gossipmongering was violated by Miriam, Moses’ older sister, when she complained to Aaron, Moses’ older brother, about a particular aspect of Moses’ relationship with his wife.<sup>63</sup> As a result, Miriam was stricken with a severe skin afflic-

peddle their gossip. See JERUSALEM TALMUD, *Tractate Peah*, Chapter 1, Halakha 1. See also NOSSON SCHERMAN (ed.), *THE CHUMASH: THE STONE EDITION*, at 661 (New York: Mesorah Publications, Ltd., 1993) (citing Rabbi Shlomo Yitzhaki, a/k/a Rashi; 1040-1105).

59. See generally, ZELIG PLISKIN, *GUARD YOUR TONGUE* 29 (Jerusalem: Aish HaTorah Publications, 1975). See also AVROHOM EHRMAN, *JOURNEY TO VIRTUE* 38-47 (New York: Mesorah Publications Ltd., 2002).

60. Whether the gossip is true, it is referred to as “Loshon ha-Rah,” which literally means “the evil tongue.” When the gossip is untrue, it is referred to as “Motsei Shem Rah,” which literally means, “bringing out a bad reputation,” or what American law would call “defamation.” PLISKIN, *supra* note 59, at 29.

61. See, e.g., BABYLONIAN TALMUD, *Tractate Erchin*: “‘Death and life are in the power of the tongue’ (Proverbs 18:21). A person’s tongue is more powerful than his sword. A sword can only kill someone who is nearby; a tongue can cause the death of someone who is far away.”

62. According to an early commentator, this is one of the reasons why the end of the verse speaks of bloodshed. SCHERMAN, *supra* note 58, at 661 (citing Rabbi Moshe ben Nahman, a/k/a Ramban; 1194-1270).

63. *Numbers* 12:1-15. According to Jewish authorities, because Moses had to be ready at all times to receive prophetic messages, he refrained from marital relations with his wife. Moses’ siblings criticized this conduct because they, too, were prophets and did not believe it necessary to separate from their spouses. See SCHERMAN, *supra*, note 58, at 794-795. Interestingly, although Aaron,

tion,<sup>64</sup> the duration of which was mitigated when Moses interceded with G-d on her behalf.<sup>65</sup> The gravity of this prohibition is underscored by the fact that Judaism demands that each Jew recall six specific events every day.<sup>66</sup> Five of the events are fundamental to the mission and destiny of the Jewish people: (1) the day that the Jewish nation left Egypt; (2) the day on which G-d revealed himself to the Jewish people at Mount Sinai; (3) the concept of the Sabbath day; (4) the sin regarding the Golden Calf while Moses was atop Mount Sinai; and (5) the unprovoked attack against them by the nation of Amalek, the first enemy that had the hubris to attack the Jewish nation after the open miracles wrought for them in connection with the Jews leaving Egypt, an attack that emboldened other enemies throughout the ages.<sup>67</sup> The sixth event recalled daily is the affliction that befell Miriam when she criticized Moses. The message from that event is supposed to be understood as being, in some sense, as fundamental as that of the first five.

The third Jewish law doctrine that might interfere with steps to stymie child abuse is the Biblical rule against wrongfully harming someone, whether physically or fiscally. Even indirectly causing such damage is similarly proscribed.<sup>68</sup> Reporting on a sexual abuser could result in the abuser suffering a fine or physical punishment that, as a matter of Jewish law, would be inappropriate.

The fourth Jewish law doctrine commonly cited as an obstacle in fighting the war against child sexual abuse is the rule that prohibits informing against a Jew's person or property to (at least some)<sup>69</sup> Gentiles.<sup>70</sup> This doctrine is generally referred to by the He-

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through his part of the conversation, also violated this rule, he did not receive the same punishment as Miriam.

64. *Numbers* 12:10.

65. *Numbers* 12:13-15.

66. See generally EPHRAIM FRIEDMAN, ETCHED IN OUR MEMORIES iv-v, 15-24 (Chicago: Chicago Community Kollel, 1993). See also Jay Falk, *The Six Remembrances in Jewish Law* (July 8, 2010), <http://www.suite101.com/content/the-six-remembrances-part-2-a259153> (last visited Feb. 6, 2011).

67. See R. SHLOMO YITZHAKI (Rashi), Commentary to Deuteronomy 25:18; see also FRIEDMAN, *supra* note 66, at 12-13.

68. See RABBI YOSEF KARO, SHULHAN ARUKH, *Hoshen Mishpat* 378:1.

69. See *infra* Part III, as to whether this prohibition applies to informing against a person to a just government.

70. Many who support reporting requirements comment on how the Orthodox Jewish community's distaste for "Mesirah" is a major obstacle to reporting incidents of sex abuse. See, e.g., Rav Dovid Cohen, *Molestation – A Halachic Perspective*, in BREAKING THE SILENCE, *supra* note 20, at 124 ("Many object to reporting the molester to the secular authorities because of the law of Mesirah . . . This

brew word, “Mesirah,” literally meaning “delivery,” and is generally interpreted as applying not only to the physical delivery of a person or his property, but also to the communication of information enabling the capture of such person or property.<sup>71</sup>

The law of Mesirah, or informing, is extraordinary within Jewish law. In almost all other cases, someone who violates Jewish law may be punished only by rabbinic authorities and only after actually committing an offense.<sup>72</sup> The rule regarding informers is quite different. If someone adamantly announces that he is going to violate the rule and inform on another Jew to Gentiles (includ-

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is a fallacious argument.”). See also Dr. Isaac Schechter, *Sexual Abuse in the Religious community: Systems, Experience and Repair*, in *BREAKING THE SILENCE*, *supra* note 20, at 308-09 (“There are many significant systems challenges to addressing and resolving abuse issues in more insular and closed communities. Most prominent are a general fear of outside systems, and the specific issue of *Mesirah* . . . .”); MOSHE STERNBUCH, *Synopsis-comments by HaRav Sternbuch*, in *CHILD & DOMESTIC ABUSE I*, *supra* note 20, at 108; Jacob Kamaras, *Denial Has Been the Biggest Problem: Rabbi, survivor of sexual abuse address an ongoing dilemma for Orthodox Community*, *THE JEWISH STATE* (Jan. 15, 2010), <http://thejewishstate.net/jan1510abuse.html> (citing speech by Rabbi Yosef Blau, spiritual guidance counselor at Yeshiva University’s Rabbi Isaac Elchanan Theological Seminary of Yeshiva University as decrying the inaccurate use of the Mesirah doctrine); Yasmina Guerda, *Case of Rabbi Baruch Mordechai Lebovits (Brooklyn, NY): Unprecedented Case Brings Brooklyn Rabbi to Secular Court to be Sentenced*, *BROOKLYN EAGLE*, Apr. 12, 2010, available at <http://theawarenesscenter.blogspot.com/2010/04/case-of-rabbi-baruch-mordechai-lebovits.html> (discussing how the concept of Mesirah arose in the Lebovits’ case). On October 11, 2006, Rabbi Herbert Bomzer, appearing on ABC’s television show *Nightline*, asserted that informing was a capital crime under Jewish law and that even a victim of child sexual abuse was obligated to first resort to “Jewish authorities” who would try to resolve the matter internally. Neustein & Leshner, *supra* note 15, at 227 n.11. Nor is this a recent phenomenon. For example, months after charges against one alleged abuser were dropped following rabbinic intervention, a full-page notice signed by fifty rabbis was published in *DER BLATT*, a Yiddish-language newspaper in Brooklyn, stating, in part:

A Jewish man or woman who informs [to non-Jewish authorities], saying “I shall go and inform upon another Jew,” with respect to either his property or person, and [such person] was warned not to inform and he demurs and insists, “I shall inform!” – regarding him it is a *mitzvah* [positive commandment] to kill him and whoever has the first opportunity to kill him is entitled to do so . . . .”

*Id.* at 201 (citing *Severe Prohibition and Severe Warning*, *DER BLATT*, June 8, 2000, at 8).

71. See generally RABBI ARYEH KAPLAN, *HANDBOOK OF JEWISH THOUGHT* II 33-34 (1992).

72. Even witnesses to a capital crime are forbidden to execute a criminal prior to his being convicted in court. See BASIL F. HERRING, *JEWISH ETHICS AND HALAKHAH FOR OUR TIME* II 140 (1989).

ing Gentile governmental authorities), then every Jew has the obligation to use force, even deadly force if necessary, to prevent the informant from fulfilling his purpose.<sup>73</sup> This is true even if it is unclear how, or even whether, the Gentiles will respond to the informant's report. In fact, the same rule applies even if the person does not intend to hand over another Jew but only to hand over the property of another Jew.<sup>74</sup>

This rule, which requires such an unusually severe response, is not Biblical. It is a rabbinic rule, albeit of sufficiently ancient origin that it appears in the Talmud:

A certain man who was desirous of showing another man's straw [to be confiscated by Gentile robbers] appeared before Rav, who said to him: "Don't show it! Don't show it!" He retorted: "I will show it! I will show it!" R. Kahana was then sitting before Rav, and he tore [that man's] windpipe out of him. Rav thereupon quoted: "'Thy sons have fainted, they lie at the heads of all the streets as a wild bull in a net;(Is. 51:20)' just as when a 'wild bull' falls into a 'net' no one has mercy upon it, so with the property of an Israelite, as soon as it falls into the hands of heathen oppressors no mercy is exercised towards it."<sup>75</sup>

Talmudic commentators and subsequent Jewish law authorities explain that the lack of mercy applies not just to a Jew's property, but to a Jew's person as well. Alas, before, during and after the Talmudic period, many Gentiles – not just Gentile brigands, but also government agents, officials and leaders, and not just idol

73. See KAPLAN, *supra* note 71.

74. This is demonstrated by the Talmudic passage immediately cited in the text. In addition, it is stated explicitly in Maimonides' formulation of the law:

It is permissible to kill an informer in every place, even nowadays, when we do not judge capital cases. It is permissible to kill him before he informs, as soon as he says, "I will inform concerning so and so["], whether with regard to [endangering] his body or his property, and even regarding unimportant property, he has permitted himself to be killed. One is obliged to kill him, and whoever kills him first merits.

MAIMONIDES, MISHNEH TORAH, *Laws Concerning a Batterer* 8:10, translated in AARON M. SCHREIBER, JEWISH LAW AND DECISION-MAKING: A STUDY THROUGH TIME 379 (1979). This same formulation appears in YOSEF CARO, SHULHAN ARUKH, *Hoshen Mishpat* 388:10.

75. BABYLONIAN TALMUD, *Bava Kama* 117a. This translation is from the translation found in the Schottenstein Edition of the Talmud published by Artscroll Publications, Inc. However, I added the words "by Gentiles" to make the context clearer, and changed the use of quotation marks to comport with American, rather than British, usage.

worshippers, but people from other faiths – have felt little compunction about torturing and executing Jews.<sup>76</sup> They might do so for a variety of reasons, including jealousy, religious intolerance or greed. The rabbinic authorities believed that once a person disclosed a Jew's hidden assets, the Gentiles might torture the Jew to force him to reveal the location of still more assets, and that torture might lead to the Jew's death. The Gentiles might not believe the Jew even if he truthfully denied the existence of any additional possessions.<sup>77</sup>

The majority view is that ancient rabbinic authorities compared an informant to a person who is pursuing another to kill him because informing on a Jew or his assets could lead to the Jew's death.<sup>78</sup> Biblical law provides that everyone who sees such a Pursuer, known as a "Rodef," is obligated to use all necessary force, including lethal force, to stop him.<sup>79</sup> Because of this comparison,

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76. George Horowitz writes:

Arbitrary or cruel officials of Gentile princes and such rulers themselves were all too prone to rob and oppress the Jewish population subject to their power. Such a person was termed by the Talmud an *annas*, "a man of violence" for he usually imposed his will by brute force like a Nazi storm-trooper.

GEORGE HOROWITZ, *THE SPIRIT OF JEWISH LAW* 621-22 (1953).

77. Rav Asher ben Yehiel (1250-1327) writes:

One who attempts to hand over the property of a neighbor to gentile [authorities] has been equated by the Sages to one who pursues another with the intention of killing him. As Scripture says: "Your sons have fainted; they lie at the head of every street like an antelope in a net" (Isa. 51:20). This means: as this antelope receives no compassion when it falls into the net, similarly, when the property of a Jew falls into gentile hands, no one is moved [to help]. Today, they [the Gentiles] take part [of the Jew's property], tomorrow the whole [property], and finally he is handed over [to gentile authorities] and is put to death in an attempt to get him to admit to having more wealth. Therefore, he [the informer] is a *rodef* [pursuer to commit murder] and forfeits his life in order to save [the victim].

See SCHREIBER, *supra* note 74, at 380.

78. See R. ASHER BEN YEHEL (1250-1327), *SHUT HA-ROSH* 17:1. See also Rav Asher Zelig Weiss, *Response to Inquiry Regarding the Matter of Child Abuse*, *YESHURUN* 15 (2005), at 664 (stating that the doctrine against informers is rabbinic). Rabbi Mordechai ben Hillel (1250-1298) offers an alternative explanation, writing that the reason the rabbis ordered that informers be treated more harshly than other wrongdoers is that informing is an especially disgusting practice. See MORDEKHAI BEN HILLEL, *BAVA KAMA, Hagozel* §117. According to this approach, informing as part of an effort to prevent people from being victimized would seem to be unobjectionable.

79. See KAPLAN, *supra* note 71, at 32.

the early rabbinic authorities instituted the rabbinic rule against informing. Maimonides, a foremost Eleventh Century authority, phrases the rule as follows:

It is permitted to kill an informer in any place, even today when we no longer prosecute capital cases, and it is permitted to kill him before he informs, but only even when he says, "behold I am turning over someone or their property" even if there wasn't a lot of money involved, he forfeits his life. And we warn him saying, "don't inform" and if he is obstinate and says, "No I will inform," it is a commandment to kill him and whoever does so first merits.<sup>80</sup>

Moreover, the rabbis declare that an informer loses his place in the world to come.<sup>81</sup>

### III. SECULAR LAW EFFORTS TO COMBAT SEXUAL ABUSE OF CHILDREN

At first blush, several of the principal strategies instituted by secular law to combat the evil of child sexual abuse might be perceived as violating one or more of the Jewish law doctrines just introduced. However, upon closer examination, it seems that those doctrines do not necessarily interfere with implementation by an Orthodox Jewish community of the same sort of ameliorative measures. Secular legal authorities have imposed, in various ways and to differing extents, four principal measures to help prevent sexual abuse of children:<sup>82</sup>

1. Mandating screening of employees and volunteers of schools and other institutions that provide access to children;
2. Maintaining and supporting a registry of child sexual abusers that can be used in screening processes;
3. Mandating reporting of suspected abuse to secular authorities;

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80. MAIMONIDES, MISHNEH TORAH, *Law of Damages* 8:10.

81. *Id.* at 8:9.

82. Of course, there are many other *practical* steps that various secular schools may have implemented. These measures are not expressly discussed in the text, because they have not generally been the subject of secular legislation and because they do not involve Jewish law issues not already identified and discussed in this article.

4. Preventing persons accused or suspected of abuse to resign or be reassigned quietly without reporting them to appropriate legal authorities and having them subjected to an investigation.

### *Screening and Registries*

The first two measures involve sharing negative or unflattering information about someone's past conduct and making important decisions based on that information. Consequently, these measures clearly raise questions regarding the Jewish law doctrine against uttering unflattering statements about a person or believing such statements made by others.

Before examining the Jewish law implications of such steps, a quick review of the differences between the actions taken by secular law and by Orthodox Jewish institutions is in order. Relatively recent legislation throughout the United States requires organizations to conduct criminal background checks of prospective employees where such employees are likely to come into contact with young children. Legislation in at least forty-two states<sup>83</sup> and the District of Columbia<sup>84</sup> mandate background checks for public school employees. Many of these statutes require fingerprint background checks,<sup>85</sup> which are more reliable than other types of

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83. See, e.g., Caroline Hendrie, *States Target Sexual Abuse by Educators*, EDUCATION WEEK, Apr. 30, 2003. This article identified 42 states as having such statutes, stating that only Illinois, Indiana, Massachusetts, North Carolina, Pennsylvania, Texas, and Wisconsin lack such legislation. Since then, however, several of these states have adopted mandatory background check laws. See, e.g., 105 ILL. COMP. STAT. ANN. §5/10-21.9 (1988); IND. CODE ANN. § 20-26-5-10 (2002) (requiring an "expanded criminal history check" and authorizing schools to require applicants to provide a set of fingerprints); V.T.C.A., Education Code §22.0831; WISC. STAT. §118.19 (2004). Some states have multiple statutes covering teachers, coaches, school bus drivers, etc. See, e.g., Criminal Background Check Statutes: An Overview (Minnesota House Research Department, Revised Jan. 2010), available at <http://www.house.leg.state.mn.us/hrd/pubs/bkgdchck.pdf>.

84. See Michael Alison Chandler, *Laws on Child Sex Abuse in Schools*, WASH. POST, July 24, 2010.

85. There is some debate as to precisely how many of the jurisdictions requiring background checks actually require them to involve fingerprinting. Hendrie, *supra* note 83, states that all 42 jurisdictions she identifies require fingerprint-based tests. Other authorities differ. See, e.g., Christina Buschmann, *Mandatory Fingerprinting of Public School Teachers: Facilitating Background Checks or Infringing on Individuals' Constitutional Rights?*, 11 WM. & MARY BILL RTS. J. 1273, 1276 (2003) (listing the following states as requiring fingerprint-based checks: Alabama, Alaska, Arizona, California, Colorado, Connecticut,

background checks.<sup>86</sup> Similarly, many states require fingerprinting and background checks for school bus drivers, workers at child day care centers, and workers at nursing homes. At least thirteen states, representing approximately forty percent of the United States population, require *private schools* to fingerprint their employees and to do background searches of them.<sup>87</sup>

In fact, perhaps in response to legislative developments, highly publicized scandals, and large civil judgments and settlements, many major non-public youth organizations have voluntarily required criminal background checks for years. Such groups include the Boy and Girl Scouts, the Boys and Girls Clubs of America, Little League of America, the American Youth Soccer Organization, Pop Warner Football, and the Civil Air Patrol.<sup>88</sup> In addition, the United States Conference of Catholic Bishops has required background checks for employees and volunteers for all Catholic schools and youth groups since April 2003,<sup>89</sup> whether or not such checks are required by applicable secular law.

New York does not require private schools to perform criminal background checks. However, a state law enacted in 2007 expressly authorizes private schools to require fingerprint background checks for prospective employees and to pass the cost of such checks onto the applicants themselves, as is the practice at public schools. Nevertheless, very few Jewish schools require

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Delaware, D.C., Florida, Georgia, Idaho, Kansas, Kentucky, Maine, Maryland, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming).

86. See, e.g., Pasik, *supra* note 25, at 6.

87. *Id.* at 4. Pasik identifies twelve of these states as Alabama (ALA. CODE § 16-22A-6); California (CAL. EDUC. CODE §§ 33190(g), 3319(a)); Florida (FLA. STAT. § 1002.421(2)(i)); Illinois (ILL. COMP. STAT. § 5/2-3.25o); Louisiana (LA. REV. STAT. 15:587.1); Maryland (MD. CODE ANN., FAM. LAW § 5-561); Massachusetts (MASS. GEN. LAWS. ch. 71, § 38R); Michigan (MICH. COMP. LAWS § 380.1230); Minnesota (MINN. STAT. § 123B.03); Ohio (OHIO REV. CODE § 3319.391); Pennsylvania (24 PA. CONS. STAT. § 1-111); Rhode Island (R.I. GEN. LAWS § 16-2-18.1). In a private message to me, however, he pointed out that Virginia also has such a statute: VA. CODE ANN. § 22.1-296.3 (West 2002), available at <http://law.justia.com/codes/virginia/2010/title-22-1/chapter-15/22-1-296-3>. A December 2010 government report provides various details regarding these statutes. See GAO REPORT TO THE CHAIRMAN, COMMITTEE ON EDUCATION AND LABOR, HOUSE OF REPRESENTATIVES, K-12 EDUCATION: SELECTED CASES OF PUBLIC AND PRIVATE SCHOOLS THAT HIRED OR RETAINED INDIVIDUALS WITH HISTORIES OF SEXUAL MISCONDUCT, 24 (December, 2010), available at <http://www.gao.gov/new.items/d11200.pdf>.

88. See Pasik, *supra* note 25.

89. *Id.*

background checks. Indeed, a Freedom of Information law request recently disclosed that of 390 Jewish schools in New York, with an aggregate enrollment of 135,000 students, only one school was conducting fingerprint background checks.<sup>90</sup> It is unclear how many of these schools were conducting criminal background checks of any sort.

Although criminal background checks are not a panacea, there is good reason to believe that such checks would help protect children from abuse. In other scenarios, such background checks have successfully identified many criminal offenders. For example, the Brady Act, which requires background checks on applicants for firearms, led to 1.9 million application denials from 1994 through December 2009.<sup>91</sup> At least one Orthodox Jewish psychologist publicly referred to a case in which a non-Jew with a criminal record as a sexual abuser was employed by an Orthodox Jewish school that did not require fingerprint background checks. The psychologist explained that this employee was found to have made at least forty videotapes of sexual activity with boys in the school.<sup>92</sup>

In addition to requiring background checks, various state and federal laws help ensure that information regarding convicted sex offenders is available to the public and, of course, to schools and other institutions. One very important step was the passage of a federal law that requires the federal government to make available its fingerprint database of criminal law records to those who run background checks.

Other significant developments include the enactment of state laws requiring convicted sex offenders to register with local officials and the making of such registration information available to the general public via the internet. Although California has required sex offenders to register with local authorities since 1947, few, if any, other states immediately followed its lead.<sup>93</sup> In 1994,

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90. Elliot B. Pasik, Op-Ed, *Speak Out Against Child Abuse – Now*, THE JEWISH PRESS (OCT. 6, 2010), <http://www.jewishpressads.com/printArticle.cfm?contentid=45483>.

91. See Michael Bowling, Ronald J. Frandsen, Gene A. Lauver, Allina D. Boutilier, & Devon B. Adams, *Background Checks for Firearms Transfers, 2009–Statistical Tables*, Bureau of Justice Statistics, Statistical Tables (Oct. 2010), NCJ 231679.

92. See *supra* note 25 (text referring to Dr. David Pelcovitz).

93. In 1990, however, the State of Washington enacted a Community Protection Act that required public notification of the release of dangerous sex offenders. See Marc Klaas, *Klaaskids Foundation: Introduction by Marc Klaas*, available at <http://www.klaaskids.org/pg-legmeg.htm>.

however, seven-year-old Megan Kanka, was raped and killed by a child molester who had moved in across the street from Megan's home in New Jersey. Megan's parents were unaware of the molester's history. This case gained great notoriety, and that same year, New Jersey passed a mandatory sex offender registration statute known as "Megan's Law."<sup>94</sup> In May 1996, in the form of an amendment to the Jacob Wetterling Crimes Against Children's Act, the United States Congress compelled each state to pass some statute requiring public notification when a sex offender is released from prison. Since then, all fifty states have enacted some version of "Megan's Law."<sup>95</sup>

Registration efforts became even more effective on July 27, 2006, when the federal Adam Walsh Child Protection and Safety Act was signed into law. Among other things, this Act required the U.S. Department of Justice to create a publicly accessible Internet-based national sex offender database that allows users to specify a search radius across state lines. The result was the Dru Sjodin National Sex Offender Public Website,<sup>96</sup> which, among other things, enables a user to simultaneously search the registries of the fifty states, U.S. Territories, the District of Columbia, and participating Native American tribes.

Closer study of the Jewish law doctrine against gossipmongering discloses that the doctrine does not interfere with the adoption of background searches or creation of a registry of convicted, or even reasonably suspected, abusers. As already mentioned, the doctrine is derived from a verse that states, "You shall not be a gossipmonger among your people, you shall not stand aside while your fellow's blood is shed . . ."<sup>97</sup> The end of that verse establishes an obligation to act to save a person from being victimized. The Babylonian Talmud explains, "Whence do we know if a man sees his fellow drowning, mauled by beasts, or attacked by robbers, he is bound to save him? From the verse [Leviticus 19:16]: 'One

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94. See, e.g., Charles Montaldo, *History of Megan's Law: Law Named After Megan Kanka of New Jersey*, available at [http://crime.about.com/od/sex/a/megans\\_law.htm](http://crime.about.com/od/sex/a/megans_law.htm).

95. *Id.*

96. U.S. Dept. of Just., *Welcome to the Dru Sjodin National Sex Offender Public Website*, <http://www.nsopw.gov/Core/Portal.aspx?AspxAutoDetectCookieSupport=1>.

97. *Leviticus* 19:16.

should not stand over the blood of his fellow.”<sup>98</sup> Similarly, Maimonides explains, “Anyone who is able to save [a fellow in danger], and yet fails to save him, transgresses the commandment: ‘You shall not stand on the blood of your neighbor.’”<sup>99</sup>

Jewish law authorities ask why these two ostensibly unrelated rules are juxtaposed in a single verse. They explain that, “Although ordinarily one may not utter disparaging comments about others, one is actually obligated to [do] precisely that if doing so is necessary to save a person from being harmed, because one may not passively allow such harm.”<sup>100</sup> One who fails to fulfill the duty to rescue someone “is not just lacking in character, but shares in the guilt of perpetrating that assault.”<sup>101</sup> Indeed, a Sixteenth Century classic Hebrew work, Rabbi Jonah Ashkenazi wrote, “A person who sees his friend drowning in the sea or being attacked by a wild beast or set upon by armed brigands and could save him but does not, it is considered as if he had killed him [*i.e.*, his friend] with his own hands, and it is as to this that the [Torah] states, ‘Do not stand idly while your friend bleeds.’”<sup>102</sup>

Moreover, Jewish law authorities explain that the duty to rescue someone from harm is not limited to physical harm, but extends to emotional distress or financial loss as well.<sup>103</sup> Citing this

98. BABYLONIAN TALMUD, *Sanhedrin* 73a (citing a pre-Talmudic source for this interpretation).

99. MAIMONIDES, MISHNEH TORAH, *Laws of Murder and the Preservation of Life*, 1:14.

100. See, e.g. RABBI OVADIAH YOSEF (1920-), *YEHAVE DAAT* 4:60; ELIEZER YEHUDA WALDENBERG (1915-2006), *TZITZ ELIEZER* Vol. 16, part 4, section 1; RABBI NAFTALI TZVI YEHUDA BERLIN (1816-1893), *COMMENTARY ON THE TORAH*, Leviticus 19:16.

101. See Dratch, *supra* note 4, at 105-06. Rabbi Dratch argues that this is implicit in the fact that, in the work of Maimonides, the duty to rescue is not organized within the laws about human character and ethical behavior. Instead, it is included in the section entitled, “Laws of Murder and Self-Protection.” *Id.*

102. RABBI YONAH ASHKENAZI, *ISSUR VE-HETTER HE-AROKH* (1555), Gate 59, rule 38.

103. For example, consider the words of Rav Ovadiah Yosef, former Sephardic Chief Rabbi of Israel:

Rav Unterman cites Nesivas Shmuel [*i.e.*, an earlier rabbinic authority] concerning a paid auditor who realizes that the secretary of a Jewish company is embezzling money and forging accounts without anyone else realizing this. He has been rebuked and given warning that if he doesn't return the money the matter will be made public. If he doesn't listen – then it is it [*sic*] required and permitted for the auditor to publicize this and publicly embarrass him if it is impossible to save the money of the company any other way. That is because he is obligated to protect finan-

rule, Jewish law authorities have held that one is obligated to disclose unflattering information about another, even if the person is a professional who learned about the unflattering information as a professional confidence.<sup>104</sup> Such a duty to disclose certainly applies to protecting children from sexual abuse. Given the high rate of recidivism among sexual abusers of children, identifying and disclosing perpetrators seems essential to protecting prospective victims. Consequently, the Jewish law doctrine against gossiping does not prevent background searches or the creation of a registry to facilitate such searches for the purpose of fighting against the sexual abuse of children, as the searches and registries protect prospective victims of sexual abuse.

An important question arises, however, as to whether a registry should only contain information about proved instances of abuse, but not unproven allegations. Jewish law would seem to support a registry including even unproven – but not disproved – allegations. Even though Jewish law instructs people not to “believe” unproven charges, it obligates them to take precautions lest the charges be true. In fact, under Jewish law, one who fails to take such precautions after receiving a warning is himself guilty of wrongdoing. For instance, after the Babylonians took Jerusalem, razed the Holy Temple, and exiled most of its inhabitants, they allowed a small community of Jews to remain. The King of Babylon appointed Gedaliah, the son of Ahikam, as ruler over the land. Another Jew, Ishmael son of Nethaniah, was hired by the King of Ammon to assassinate Gedaliah. Johanan the son of Kareah warned Gedaliah about Ishmael’s treacherous plans, but Gedaliah correctly refused to believe ill of another Jew. However, Gedaliah acted wrongfully in failing to take any cautionary steps lest the warning be valid. As a result, Ishmael managed not only to assassinate Gedaliah, but to slaughter many others as well.<sup>105</sup> Although

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cial damage to the company. Furthermore he is being paid to protect the company from harm. Also see Zeh Hashulchan [i.e., another rabbinic authority] on this matter. In my humble opinion it would seem that he must do this even if he weren’t paid. If he knows that the secretary is stealing the company’s money he is obligated to notify the company because of “not standing idly by the blood of your fellow.”

See OVADIAH YOSEF, YEHAVE DAAT 4:60.

104. See, e.g., RAV. YA’AKOV BREISCH, *TESHUVOT HELKAT YA’AKOV*, III, no. 136 (doctor must reveal to his patient’s fiancée the fact that patient would likely die within two years if it was likely that, so informed, she would choose not go through with the marriage).

105. Jeremiah 40:11-41:3.

Jewish authorities acknowledge that Gedaliah's conduct was based on his personal righteousness and his desire to believe the best of others, they castigate Gedaliah because of his failure to pay attention to the warning he had received.<sup>106</sup>

In fact, the Talmud states:

One taught: That was the pit which Ishmael the son of Nethaniah had filled with slain bodies, as it is written, Now the pit wherein Ishmael cast all the dead bodies of the men whom he had slain by the hand of Gedaliah. But was it Gedaliah that killed them? Was it not in fact Ishmael that killed them?— But owing to the fact that he [Gedaliah] should have taken note of the advice of Johanan the son of Kareah and did not do so Scripture regards him as though he had killed them.<sup>107</sup>

Jewish law distinguishes between publication of unproved and proved accusations. Unproved accusations cannot be unnecessarily publicized. They can only be publicized for the purpose of protecting others from being victimized. In the case of persons accused of sexually abusing children, prospective victims would presumably not only include such children and their families, but also the organizations with whom such accused abusers attempt to become associated as employees or volunteers, at least to the extent that such organizations may become harmed, whether financially or reputationally, by the association. For example, under secular law, a school that employs an abuser may be vicariously liable for the abuser's conduct - or may be directly liable if a secular court finds that the organization was negligent in hiring or supervising the abuser. Consequently, accusations should be communicated to such organizations, and the organizations should investigate such accusations.<sup>108</sup>

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106. See, e.g., MOSHE CHAIM LUZZATTO (1707-1746), *MESILLAT YESHARIM*, chapter 20.

107. BABYLONIAN TALMUD, *Tractate Nidah* 61a.

108. Rabbi Moshe Sternbuch, currently Chief Rabbi of the Eidah HaHareidis, an anti-Zionist organization of Orthodox Jews, emphasizes that principals who receive such accusations are obligated to look into them:

. . . I was very upset at the outrageous behavior of the principal who refused to listen to the claims against the teacher concerning alleged disgusting deeds – because he said it was *loshon harah* [i.e., gossipmongering]. Now the accusations against the teacher are increasing and the principal still stubbornly insists that there is not adequate evidence in the matter and therefore it is better to be concerned with the prohibition of *loshon harah* – then [sic] to investigate the matter. The assertions of

A problem with secular registries is that they are usually available through the internet to the general public. Any person is able to peruse them; no constructive purpose is required. If there were no other effective way to make the information available to those who need it, it would seem permitted under Jewish law.<sup>109</sup> Otherwise, it might be necessary under Jewish law to restrict access to these databases.

Secular registries are restricted to data about persons who have been convicted of abuse. At first blush, this might seem to solve the problem of public access. After all, when someone is proved to have committed certain types of reprehensible acts, Jewish law permits publication of this fact both to protect the public and to deter prospective perpetrators. However, this generally applies to persons convicted in rabbinic courts. It is not clear whether the same rule would apply to persons convicted in secular courts. It would behoove Jewish law authorities to focus on this issue.

On the other hand, the fact that secular registries are limited to information about convictions makes them underinclusive. It is well known within the Jewish community that child abusers frequently “disappear” before formal charges are brought, only to be accused of similar wrongdoing in another Orthodox community.<sup>110</sup>

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the principal are total nonsense and they provide an opening for destruction – G-d forbid. It is a fundamental obligation for a rosh yeshiva or principal to listen to all rumors and suspicions concerning that which occurs in his domain.

See MOSHE STERNBUCH, TESHUVOT VEHANHAGOT 5:398, translated in CHILD & DOMESTIC ABUSE II, *supra* note 20, at 149.

109. Jewish law would not permit Jews lacking an appropriate purpose from accessing the registries. However, the mere possibility that persons might wrongfully review such information would not forbid making the information available so that those who need it could access it.

110. See, e.g., Blau, *supra* note 18. “Schools fire abusive teachers, who then move to another community and start teaching (and abusing) in the new yeshiva.” See also Scott Michels, *Alleged Victims and Advocates Say Sex Abuse Common, Rarely Discussed*, ABC NEWS, May 5, 2009 (discussing claim that alleged abuser was “forced out” of Baltimore Orthodox Jewish community but not reported to secular authorities), available at [http://failedmessiah.typepad.com/failed\\_messiahcom/2009/05/abc-news-orthodox-jewish-community-struggles-with-sexual-abuse-coverupsb.html](http://failedmessiah.typepad.com/failed_messiahcom/2009/05/abc-news-orthodox-jewish-community-struggles-with-sexual-abuse-coverupsb.html); *RCA Speech: Anonymous Rabbi Impregnated Student While Principal of School for Jewish Girls With Learning Disabilities*, JEWISH WHISTLEBLOWER (Dec. 27, 2004, 5:41 PM), <http://jewishwhistleblower.blogspot.com/2004/12/rca-speech-anonymous-rabbi-impregnated.html> (reports alleged statement by Dr. Susan Shulman that after an anonymous rabbi who impregnated a student while he was principal of a school for Jewish girls with

Consequently, it would be important to have a registry not only of people who have been convicted of child abuse, but also of people as to whom there were serious suspicions or allegations of such abuse. As already mentioned, Jewish law not only permits, but requires, people to be careful even as to unproved allegations.

Thus, Jewish law authorities must focus on whether they should create a database with restricted access to Jewish organizations whose employees and volunteers will likely come into close contact with children, such as day care centers, schools, camps, youth clubs, and the like. The need for background searches and shared information is obvious. Prominent rabbis and Jewish organizations have discussed this matter for years, supposedly expressing widespread support. The Rabbinical Council of America, one of the largest organizations of non-Hareidi Orthodox rabbis in the world, passed a resolution in 2003 endorsing state legislation that would require “all public and nonpublic schools, including yeshivas and Hebrew day schools, to perform national criminal background checks on all employees (and volunteers and contractors who have access to children).”<sup>111</sup> Nevertheless, no major Hareidi rabbinic organization has followed suit. Although the creation of an internal Jewish school registry has been discussed by Hareidi authorities,<sup>112</sup> it seemingly has not yet been created. Some opponents of reporting and registries may allege that there is no need to report or publicize the names of abusers because “everyone [in the Orthodox Jewish community] knows what’s going on.” However, this allegation is often simply untrue.<sup>113</sup>

### *Mandatory Reporting*

All fifty states, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S.

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learning disabilities was fired, he moved to another community where he was still regarded as a prominent rabbi).

111. Rabbinical Council of America, *Criminal Background Checks for Workers with Youth* (May, 17, 2005), <http://www.rabbis.org/news/article.cfm?id=100601>.

112. For example, Torah Umesorah is a Hareidi organization whose membership consists of over 675 day schools and yeshivos, with an aggregate student enrollment of over 190,000. At its 2003 convention, it was reported that the organization’s rabbinic leaders were favorably inclined toward creation of a registry. See also Pasik, *supra* note 25.

113. See, e.g., EIDENSOHN I, *supra* note 20, at 13 (quoting the father of a child who was the victim of someone whom local rabbis knew was an abuser but who had not disclosed this information to those in the community).

Virgin Islands impose liability on various persons to report child abuse.<sup>114</sup> The statutes differ in a number of important ways, such as upon whom the duty to report is imposed, the degree of awareness, belief or knowledge that triggers the reporting requirement, the type of abuse that must be reported, and the punishment for failing to report.

Two states, New Jersey and Wyoming, seem to impose the duty to report child sexual abuse on everyone. No one is identified as being exempt. Many other jurisdictions, however, specify particular categories of persons or entities, such as hospitals, doctors, other physical and mental health care providers, teachers, school officials and employees, child care providers, law enforcement officers, lawyers and clergy.

Commonly, a mandated reporter's obligation is triggered when the reporter has reasonable grounds to "suspect" that a particular person has been the subject of sexual abuse. Thus, in most instances, a mandated reporter is obligated to report even before the information he possesses causes him to reach a "belief" that the person has been abused.

As of December 2009, forty-seven states, in addition to the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, and the Virgin Islands, impose penalties on persons who knowingly or willfully fail to make a mandated report.<sup>115</sup> It is a misdemeanor in thirty-nine states, American Samoa, Guam, and the Virgin Islands.<sup>116</sup> In several states, the failure to report is upgraded to a felony in more serious instances of abuse.<sup>117</sup> Similarly, in some jurisdictions, a repeated failure to report is characterized as a felony.<sup>118</sup> Violators face possible criminal imprisonment of ten

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114. Child Welfare Information Gateway, *Mandatory Reporters of Child Abuse and Neglect: Summary of State Laws* (Apr. 2010), [http://www.childwelfare.gov/systemwide/laws\\_policies/statutes/manda.cfm](http://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.cfm).

115. Interestingly, although Maryland, North Carolina, Wyoming, and Puerto Rico mandate reporting, they do not specify penalties for failure to report. Child Welfare Information Gateway, *Penalties for Failure to Report and False Reporting of Child Abuse and Neglect: Summary of State Laws* (Dec. 2009), [http://www.childwelfare.gov/systemwide/laws\\_policies/statutes/report.cfm](http://www.childwelfare.gov/systemwide/laws_policies/statutes/report.cfm).

116. *Id.* Jurisdictions not characterizing such conduct as a misdemeanor include Connecticut, Delaware, Massachusetts, Mississippi, New Jersey, Vermont, Virginia, and Wisconsin.

117. *Id.* These states include Arizona, Florida and Minnesota.

118. *Id.* These jurisdictions include Illinois and Guam.

days to five years, as well as monetary fines.<sup>119</sup> In addition, in seven states and American Samoa, the statutes explicitly state that violators may be civilly liable for any injuries caused by their failure to report.<sup>120</sup> It is possible that courts in additional states would find that a civil cause of action for damages would be available even without specific enabling legislation.

Some states, such as New York, provide that someone, such as a teacher, who is reasonably suspected of abuse may not escape being reported and investigated merely by resigning from his or her employment. This is a particularly important provision given that suspected abusers have escaped exacting investigation and possible prosecution by simply moving from one school or community to the next.<sup>121</sup>

Jewish law's duty to protect prospective victims from harm trumps its rule against gossipmongering. Similarly, harming a person or his property is only a tort if one does so wrongfully. Thus, even if reporting a person to secular authorities leads that person to be investigated, convicted, and punished, reporting would only be a tort if it was wrongful to report. If, however, reporting is necessary to prevent prospective victims, reporting would not be wrongful under ordinary Jewish tort law.<sup>122</sup>

However, reporting Jews to secular authorities may also violate the more serious Jewish law doctrine that prohibits informing against Jews. As this article has already noted, this doctrine states that a person who seeks to hand over a Jew to Gentiles should be stopped by any force necessary, including lethal force. Indeed, this doctrine is frequently cited by those within the Orthodox Jewish community who oppose reporting child sexual abusers.<sup>123</sup>

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119. *Id.* The following states specifically refer to such possible punishments: Alabama, California, Connecticut, Delaware, Florida, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, New Mexico, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

120. *Id.* These jurisdictions include Arkansas, Colorado, Iowa, Michigan, Montana, New York, and Rhode Island.

121. *See* sources cited *supra* note 110.

122. *See* Broyde, *Informing on Others for Violating American Law: A Jewish Law View*, 43 J. HALACHA & CONTEMP. SOC'Y. 5, 26 (2002), available at <http://http://www.jlaw.com/Articles/mesiralaw2.html>.

123. *See, e.g.,* Sternbuch, *supra* note 70, at 108. "The greatest reason for people refusing to get involved in these cases is that they are afraid of the serious crime of informing (moser)"; Neustein & Leshner, *supra* note 15, at 200-01. This

One unfamiliar with Jewish law could think that this issue might only be theoretical. The person might assume that if secular law requires reporting, Jewish law would necessarily compel compliance. However, Jewish law does not invariably demand obedience to secular law. For example, historically, there have often been unjust, oppressive and discriminatory regimes. The dictates of such governments need not always be obeyed. Jewish law authorities continue to debate whether an offender may be reported even to a just government, as discussed below.

There are at least six significant reasons why the Jewish doctrine against surrendering Jews to Gentiles may not apply in countries, such as the United States, which have a fundamentally fair judicial system but that do not afford religious authorities juridical autonomy.<sup>124</sup> First, the doctrine may only apply to surrendering a Jew to brigands or to capricious governments. Surrendering a Jew to the duly authorized agents of a fundamentally fair justice system may never have been proscribed. Second, the doctrine may not apply to persons who are obligated, or perhaps even authorized, by secular law to report to the government. Third, the doctrine may only apply where the person surrendered might be executed, generally not the punishment for child abuse. Fourth, at least certain abusers may themselves be Pursuers, whom one is *biblically* required to stop by all necessary means, even by turning them over to secular authorities. This biblical obligation would override the rabbinic prohibition against surrendering Jews to Gentiles. According to a number of extremely prominent contemporary authorities, many, if not all, people who sexually abuse children are Pursuers. If so, Jewish law would permit reporting these people to secular authorities even if all of the other reasons were unpersuasive. Fifth, even if a person is not technically a Pursuer, according to many authorities, the rule against reporting him to the secular government does not apply if either he causes harm or distress to the Jewish community or he physically harms individuals. Sixth, as a matter of Jewish law it is critical to avoid profaning G-d's name. Informing may be necessary, and permitted, to accomplish these objectives. Each of these rationales will be examined in turn.

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doctrine is the reason for "rabbinic interference" in the reporting and prosecution of child sexual abusers. *See also* sources cited *supra* note 73.

124. Sources for each of these points are provided, *infra*. As the textual discussion will make clear, some of these reasons apply irrespective of whether the secular government is just.

*Informing on Someone to a Just Government*

To many contemporary Jewish law authorities, the bold proposition that the doctrine against informing may not apply to reporting a Jewish criminal to American governmental authorities might seem preposterous. However, there are significant reasons why this claim may be true.

As already mentioned, the rationale underlying the doctrine was that the Gentiles would have no mercy on the person informed upon and would ruthlessly torture or kill him for spite or in an effort to extort money they hoped the person might have. Indeed, some Jewish law authorities specifically articulate the doctrine as a rule against informing on Jews to “Anusim,” which means “oppressors,” rather than as a rule against informing on Jews to Gentiles generally. In fact, the prohibition is often phrased as precluding informing to “Jewish or Gentile oppressors.”<sup>125</sup> If so, it would be reasonable to assume that the doctrine was never intended to apply to cooperating with the law enforcement authorities of a civilized Gentile government.<sup>126</sup>

Rabbi Yehiel Mikhel Epstein, a late Eighteenth and early Nineteenth Century authority, expressed this view in his magnum opus, the *Arukh HaShulhan*:

As is widely known, in times of old in places far away, no person had any assurance in the safety of his life or money because of the pirates and bandits, even if they took upon themselves the form of government. It is known that this is true nowadays some places in Africa where the government itself is grounded in theft

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125. See, e.g., JACOB BEN ASHER (1269-1343), ARBA'AH TURIM, *Hoshen Mishpat* 388.

126. J. David Bleich writes:

Jewish law also posits severe strictures against delivering either the person or property of a Jew to a gentile. Thus, *Shulchan Arukh* declares that the person and property of even a “wicked person” and a “transgressor” remain inviolate even if that individual is a source of “trouble” or “pain” to others. There is, however, an inherent ambiguity in this prescription. There may be reason to assume that the prohibition is limited to turning over a person or his property to the custody of an “oppressor” who inflicts bodily or financial harm in a manner that is malevolent or entirely extralegal. Indeed, the terminology employed by the *Tur Shulchan Arukh* (“*Tur*”) in codifying this provision of Jewish law lends credence to such a restrictive interpretation since *Tur* incorporates the term “*anas*” or “oppressor” in recording the prohibition.

J. David Bleich, *Jewish Law and the State's Authority to Punish Crime*, 12 CARDOZO L. REV. 829, 829-30 (1991).

and robbery. One should remind people of the kingdoms in Europe and particularly our ruler the Czar and his predecessors, and the kings of England, who spread their influence over many lands in order that people should have confidence in the security of their body and money. The wealthy do not have to hide themselves so that others will not loot or kill them. On all of this [the presence of looting and killing] hinges the rules of informing [*moser*] and slandering [*malshin*] in the talmud and later authorities, as I will explain infra: These rules apply only to one who informs on another to bandits and so endangers that person's money and life, as these bandits chase after the person's body and money, and thus one may use deadly force to save oneself.<sup>127</sup>

Commentators debate whether Rabbi Epstein sincerely meant that Russia's Czarist government was a just government to which the doctrine of informing did not apply<sup>128</sup> or whether his statement was to appease government censors. But even if Rabbi Epstein was not sincere in his characterization of the Czarist government, he may well have been sincere as to the basic proposition that there is no Jewish law against informing to a just government.<sup>129</sup>

Other authorities have echoed Rabbi Epstein's position.<sup>130</sup> Among them is the late Rabbi Eliezer Yehuda Waldenberg, the Twentieth Century rabbinic authority for Sha'arei Tzedek Hospital in Jerusalem. When asked whether one could inform secular authorities about a teacher who was molesting children, he wrote:

Even in the understanding of the secular court system it appears that there is a difference between primitive and enlightened governments as is noted by the Arukh Ha-Shulhan in Hoshen Mishpat 388:7 where it states that "every issue related to informing found in the Talmud and poskim deals with those faraway places

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127. YEHIEL MIKHEL EPSTEIN (1829-1908), ARUKH HASHULHAN, *Hoshen Mishpat* 388. Rav. Yosef Shalom Eliashiv, Response from Rav. Eliashiv, 15 Yeshurun 641.

128. This issue arises in connection with the permissibility, as a matter of Jewish law, to extradite Jews from Israel for prosecution in other nations. See, e.g., MENACHEM ELON ET AL., *JEWISH LAW (MISHPAT IVRI): CASES AND MATERIALS* 369-88 (New York: Matthew Bender, 1999). See generally, Gedalia Dov Schwartz, *The Abused Child-Halakhic Insights*, TEN DA'AT (Spring 1988), at 12 ("... Hagaon R. Yechiel Mikhel Epstein, the author of the *Arukh Hashulchan* wrote that the laws concerning *mesira* [i.e., informing] do not apply to governments of law protecting the persons and property of their citizens.").

129. See Broyde, *supra* note 122, at 26-27.

130. See, e.g., Rabbi Gedalia Schwartz, *supra* note 128; RABBI YESHAYA BLAU, PITHEI HOSHEN V, chapt. 4, note 1.

where no one was secure in his money or body because of the bandits and pirates, even those who had authority, as we know nowadays in places like Africa.” Such is not the case in Europe, as the Arukh Ha-Shulhan notes. . . . I write this as a point of general importance regarding the laws of informing.<sup>131</sup>

The distinction between legitimate and illegitimate governments is consistent with the fact that, according to Jewish law, Gentiles are obligated to establish and administer a just legal system.<sup>132</sup> Jewish law posits that this was one of the seven laws given to Noah and his family as they exited the Ark, long before there were distinct categories of Jews and non-Jews.<sup>133</sup> Although the subsequently formed Jewish nation is bound by a more comprehensive set of laws in connection with the establishment of its special relationship to G-d, the Noahide Code remains effective at least for non-Jews.<sup>134</sup> Some authorities opine that the same divine rule that requires Gentiles to establish a justice system makes the rules of such a system binding on Jewish, as well as Gentile, inhabitants.<sup>135</sup> If so, it would be reasonable that the law against informing would not apply to forbid a person from cooperating in or assisting with the just operation of such a system.

Similarly, Jewish law seems to assume that a government, whether Jewish or Gentile, possesses certain inherent authority and responsibility with respect to maintaining law and order and promoting the community's interests.<sup>136</sup> Indeed, the Mishnah di-

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131. ELIEZER YEHUDA WALDENBERG, TZITZ ELIEZER 19:52.

132. See generally, Nahum Rakover, *Jewish Law and the Noahide Obligation to Preserve Social Order*, 12 CARDOZO L. REV. 1073 (1991); Bleich, *supra* note 126, at 852-854.

133. See Rakover, *supra* note 132, at 1074.

134. *Id.* Rakover explains that Jewish authorities disagree as to whether the Noahide laws also continue to apply to Jews or whether the new set of laws given to the Jewish nation completely replaced the Noahide laws that previously applied to them. See also NATHAN T. LOPES CARDOZO, *THE INFINITE CHAIN: TORAH, MASORAH AND MAN* 61-65 (1989).

135. See, e.g., Cohen, *supra* note 70, at 131-33. Specifically, Cohen states, “Thus, non-Jewish law not only reflects divine will, but is relevant and consequential for Jews as well.” *Id.* at 132. He further cites R. Isser Zalman Meltzer regarding the authority and value of secular law. *Id.* at 133.

136. See, e.g., R. MOSHE SOFER (1520-1572), SHUT HATAM SOFER, *Orah Hayyim* 208; YISROEL PESAH BEN YOSEF FEINHANDLER, AVNEI YOSHPE IV, at 181 (“With respect to a rule that is set forth as the law of the kingdom and is for the benefit of the community [such as general price controls, it is possible that] that it would be good for a rabbinical court to report [a violator to the secular government] because it is for the public good that each person should not be free to do what-

rects Jews always to pray for the welfare of the government, because without a government to keep order, people would swallow each other up.<sup>137</sup> This power extends even to questions of life and death. A king has the authority to impose capital punishment for reasons and on evidence inadequate for a rabbinic court.<sup>138</sup> In fact, the Talmud explains that a king has permission, under certain circumstances, to wage war for non-defensive purposes. In doing so, he may enlist up to one-sixth of the population, even though these people's lives will be put in danger.<sup>139</sup> Many authorities believe that this same power applies not only to Jewish kings, but to Gentile kings,<sup>140</sup> and not only to kings, but to other forms of government as well.<sup>141</sup>

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ever he wants . . ."). See generally, Bleich, *supra* note 126, at 846 (explicating Sofer's view and reconciling another of Sofer's writings that, at least superficially, would seem to contradict it). It is unclear whether this inherent power arises from the duty to establish a justice system or whether it is a completely independent authority. A summary of, and a link to, a fascinating lecture by contemporary authority Rabbi Asher Weiss is available at <http://hirhurim.blogspot.com/2010/06/case-study-in-contemporary-halakhic.html>.

137. PIRKEI AVOT 3:2.

138. See Bleich, *supra* note 126, at 85-91.

139. BABYLONIAN TALMUD, *Shavuot* 35b<sup>4</sup>. The text quotes from the English translation of the Babylonian Talmud identified in footnote 44. This English translation provides the original Aramaic page and, across from it, a translation. For a variety of reasons, it is not possible to provide a complete English translation on a single page. Consequently, the volume provides the Aramaic page and puts in bold type that portion of the Aramaic that is being translated on the English page. The volume then brings the same Aramaic page a second time, putting in bold that which is translated on the corresponding English page. Consequently, if page 144B is being translated, the English page is numbered 144B<sup>1</sup> and the second is 144B<sup>2</sup> and so on. B<sup>4</sup> means that the words being quoted appear on the fourth English page for the same Aramaic page.

140. See Bleich, *supra* note 126 at 831-32; MALBIM, COMMENTARY, II Samuel 12:5 (a king may impose capital punishment for theft); MAHARAM HALAVVAH, PESAHIM 25b (Gentile courts may impose capital punishment on Jews). See also ZEVI HIRSCH CHAJES (Maharaz Hayes), KOL SIFREI MAHARAZ HAYES I, at 48 (the king may punish criminals pursuant to the law of the Pursuer).

141. See, e.g., Moshe ben Yosef Shick, SHUT MAHARAM SHICK, *Hoshen Mishpat* 50. Either of both of the preceding considerations may explain the Jewish law doctrine, expressly stated in the Talmud, that, "the law of the [secular] kingdom is [as a matter of Jewish law, valid] law." Although the meaning, scope and precise application of this particular principle is subject to substantial controversy, many important authorities, particularly Ashkenazic authorities, apply this doctrine broadly, as including any laws adopted for the benefit of the people in the land. This position finds support, for instance, in the commentary of 11<sup>th</sup> century Talmudist Rabbi Shlomo Yitzhaki, known as *Rashi*. In tractate Gittin, the Talmud states, "All documents that are processed by courts of idolaters are valid,

Rabbi Hershel Schachter, a halakhic authority at Yeshiva University of America, writes:

There is no problem of “mesirah” [i.e., informing] the government of a Jewish criminal, even if they penalize the criminal with a punishment more severe than the Torah requires, because even a non-Jewish government is authorized to punish and penalize above and beyond the law, “shelo min hadin”, [sic] for the purpose of maintaining law and order. However, this only applies in the situation when the Jewish offender or criminal has at least violated *some* Torah law.<sup>142</sup>

Even if reporting a Jewish criminal to secular authorities does not violate the rule against informing, this does not necessarily mean that informing is proper. While some authorities have argued that the biblical imperative to “eliminate the evil that is amongst you”<sup>143</sup> alone makes it an obligation to assist secular law enforcement, this is not echoed by many others. However, where the criminal is a continued threat to the public, there are several strong reasons to report him, including protecting others from being victimized<sup>144</sup> and preventing the perpetrator from additional wrongdoing.<sup>145</sup>

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even if the witnesses who signed them are idolaters, except for divorce documents and documents emancipating slaves.” The general rule validating such documents would seem to conflict with the Jewish law requirement of Jewish witnesses. Nevertheless, Rashi explains that the reason why the documents are valid under Jewish law is that “the law of the kingdom is valid.” *See generally*, SHMUEL SHILO, DINA DEMALKHUTA DINA; *see also* YESHAYA BLAU, PITHEI HOSHEN: HILKHOT GNEIVAH VEON’AH, Chapt. 1, note 4, at 14 (according to the number by Hebrew letters) (even apart from the doctrine of DINA DEMALKHUTA DINA, each ruler who acts for the benefit of the people of the nation to make laws and to punish and fine those who transgress them).

142. Schechter, *supra* note 70, at 121. Rabbi Shlomo Zalman Auerbach, who was almost universally regarded as a preeminent leader of Hareidi Judaism in Israel during the latter part of the 20<sup>th</sup> Century, was asked whether there was a Jewish law obligation to try to have a particular Jew released from a United States prison. His response was, “According to what I know, in America they do not irrationally grab Jews in order to squeeze money from them. The Torah says, ‘Do not steal’ and he stole money. On the contrary, it is good that he serve a prison sentence, so that he learns not to steal.” *See* Broyde, *supra* note 122, at 10 n.12.

143. Schechter, *supra* note 70, at 121.

144. *See supra* notes 97-103 (accompanying text).

145. *See* WALDENBERG, *supra* note 131 (citing the purpose of preventing the wrongdoer from committing transgressing Jewish law as one of the reasons why reporting is permitted). *See generally* STEVEN H. RESNICOFF, *Helping a Client*

Some important rabbinic authorities, however, argue that there are no just governments and that Jews face wrongful discrimination everywhere,<sup>146</sup> or that the doctrine against informing applies whenever the person informed against may receive a punishment, such as imprisonment, that is not the one prescribed by Jewish law.<sup>147</sup> Because of these dissenting views, we turn to the next possible exception.

*Informing When Authorized or Required by Secular Law*

Even if the law against informing generally forbade people from voluntarily reporting to a non-Jewish, albeit just, government, there is strong reason to believe that the law would not apply to prevent people from complying with secular laws that mandate reporting. At this point, it is important to introduce a particular Talmudic passage that is especially pertinent to this issue and to a number of others that will follow:

R. Eleazar, son of R. Simeon, once met an officer of the [Roman] Government who had been sent to arrest thieves, "How can you detect them?" he said. "Are they not compared to wild beasts, of whom it is written, Therein [in the darkness] all the beasts of the forest creep forth?" (Others say, he referred him to the verse, He lieth in wait secretly as a lion in his den.) "Maybe," [he continued,] "you take the innocent and allow the guilty to escape?" The officer answered, "What shall I do? It is the King's command." Said the Rabbi, "Let me tell you what to do. Go into a tavern at the fourth hour of the day. If you see a man dozing with a cup of wine in his hand, ask what he is. If he is a learned man, [you may assume that] he has risen early to pursue his studies; if he is a day labourer he must have been up early to do his work; if his work is of the kind that is done at night, he might have been rolling thin metal. If he is none of these, he is a thief; arrest him." The report [of this conversation] was brought to the Court, and

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*Violate Jewish Law: A Jewish Lawyer's Dilemma*, in JEWISH LAW ASSOCIATION STUDIES X 213-18 (H.G. Sprecher ed., 2000).

146. RABBI YAAKOV BREISH, HELKAT YAAKOV, *Hoshen Mishpat* 5 (new edition), 3:96 (old edition).

147. See, e.g., RABBI MOSES FEINSTEIN, IGGEROT MOSHE, *Hoshen Mishpat* I:8; RABBI EZRA BASRI, DINE MAMMANOT IV:2:5 note 1, at 86. This position may be predicated, in part, on the assumption that secular authorities, unlike rabbinic authorities, lack Jewish law authority to impose exceptional punishments during extraordinary times or upon extraordinary wrongdoers. Thus, this position appears inconsistent with the views of significant authorities such as Rashba.

the order was given: "Let the reader of the letter become the messenger." R. Eleazar, son of R. Simeon, was accordingly sent for, and he proceeded to arrest the thieves. Thereupon R. Joshua, son of Karhah, sent word to him, "Vinegar, son of wine! How long will you deliver up the people of our God for slaughter!" Back came the reply: "I weed out thorns from the vineyard." Whereupon R. Joshua retorted: "Let the owner of the vineyard himself [God] come and weed out the thorns . . ." A similar thing befell R. Ishmael son of R. Jose. [One day] Elijah met him and remonstrated with him: "How long will you deliver the people of our God to execution!" — "What can I do", he replied, "it is the royal decree." "Your father fled to Asia," he retorted, "do you flee to Laodicea!" [footnotes omitted]<sup>148</sup>

This passage provides many lessons. From Rabbi Joshua's initial message to Rabbi Eleazar, "How long will you deliver the people of our G-d to be killed?" the commentators explain that the arrestees faced the death penalty,<sup>149</sup> even though the events transpired in a historical period during which a rabbinical court would not impose such punishment.<sup>150</sup> In addition, the secular government would convict defendants without adherence to the various procedural and evidentiary safeguards prescribed by Jewish law. Nevertheless, Rabbi Eleazar, the son of Simeon, and Rabbi Yishmael, the son of Rabbi Yosi, each of whom is a preeminent Jewish law authority, appear to believe that they acted correctly in directly arresting people who will be so executed. Only one person, Rabbi Joshua, son of Karkha, rebukes Rabbi Eleazar, and the rebuke does not declare that Rabbi Eleazar's conduct violates Jewish law. It only suggests that the conduct is not befitting the son of the great Rabbi Simeon. Moreover, the immediately following Talmudic passage explains how Rabbi Eleazar, in response to the criticism of Rabbi Joshua, son of Karkha, underwent a supernatural "test" of his righteousness that he easily passed. Similarly, none of the rabbinic contemporaries of Rabbi Yishmael, the son of

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148. SONCINO TALMUD, *Bava Metzia* 83b-84a. To be consistent with American usage, I have replaced all single quotation marks in the passage with double quotation marks.

149. See, e.g., BETZALEL ASHKENAZI, SHITTAH MEKUBETZET, *Bava Metzia* 83b (quoting Ritva) at 371.

150. A discussion of the Jewish law approach to capital punishment is beyond the scope of this paper.

Rabbi Yosi, object to his conduct. Nor does the prophet Elijah<sup>151</sup> assert that Rabbi Yishmael's conduct violates Jewish law. Instead, Elijah, too, seems to suggest only that the conduct does not befit the son of the illustrious Rabbi Yosi.<sup>152</sup>

This view is consistent with a passage in the Palestinian Talmud, also involving the Prophet Elijah.<sup>153</sup>

Thus, Rabbi Yom Tov Ishbili (1250-1330), known as *Ritva*, explains that all authorities agree that the prohibition against informers does not apply when someone assists an agent of a secular government in the apprehension or prosecution of criminals. *Ritva* argues that a secular government has the authority to impose even capital punishment in order to establish law and order.<sup>154</sup> According to this approach, the Talmudic debate focuses only on whether this was the "proper" conduct for extremely pious people, espe-

151. By the historical time in which this incident transpired, the prophet Elijah had left the world. This Talmudic text is one of many, which assumes that Elijah nevertheless "appeared" to various great figures from time to time.

152. See, e.g., BETZALEL ASHKENAZI, SHITTAH MEKUBETZET, *Bava Metzia* 83b (quoting *Ritva*) at 371; R. SHLOMO BEN ADERET (1235-1310; known as *Rashba*), SHUT HARASHBA III:393, and SHUT HARASHBA HEHADASHOT 345 (letter 14); Joel Sirkes (1561-1640), BEIT HADASH, *Hoshen Mishpat* 388 AND SHUT BEIT HADASH 44; MOSHE SHICK (1807-1879), SHUT MAHARAM SHICK, *Hoshen Mishpat* 50; ELIEZER YEHUDA WALDENBERG, TZITZ ELEAZER 18:2; SHMUEL WOZNER (1913-), SHEVET HALEVI 2:58; Moshe Halberstam, *Informing to Authorities on Those Who Abuse Their Children*, YESHURUN, vol. 15 (2005), at 643 (citing *Rashba*, *Sirkes*, and *Wosner*); Weiss, *supra* note 78, at 664 (citing *Rashba* and *Karo*). Interestingly, it is alleged that at least one great authority has argued that it might actually be forbidden to frustrate the government's law enforcement actions by providing refuge for fugitives. The Talmud describes an incident in which there was a rumor that certain persons from the Galilee had killed someone. These persons went to Rabbi Tarfon and asked him:

"Will the Master hide us?" Rabbi Tarfon replied, "How should I act? Should I not hide you, they will see you. Should I hide you, I would be acting contrary to the statement of the Rabbis, 'As to slander, though one should not believe it, one should take note of it.' Go and hide yourselves."

Babylonian Talmud, NIDAH 61A. Rashi explains the phrase, "As to slander, though one should not believe it, one should take note of it," by saying, "And perhaps you did kill and it is prohibited to save you." Although this statement is ambiguous, it is usually interpreted as saying that protecting an actual murderer from secular authorities is prohibited. Although some commentators disagree with Rashi in cases in which the fugitive's guilt is in doubt, they may agree when the guilt is more certain. In any event, Rabbenu Asher and Tosafot disagree with Rashi's decision.

153. See Bleich, *supra* note 126, at 837-38.

154. See BETZALEL ASHKENAZI, SHITTAH MEKUBETZET, *Bava Metzia* 83b (quoting *Ritva*) at 371.

cially given that the thieves who were apprehended were to be executed.<sup>155</sup> Rabbi Shlomo ben Aderet (1235-1310), known as *Rashba*, explains this passage similarly. His view is favorably cited by the Fifteenth Century scholar Rav Yosef Karo, author of *Shulhan Arukh*, the most central codex of Jewish law,<sup>156</sup> along with many others.<sup>157</sup>

Some commentators, such as Rabbi Menachem Meiri (1249-1310), explain Rabbi Yishmael's comment, "What can I do? It was the royal decree," as a statement that once the king commanded that he participate in the apprehension of criminals, he was obligated, as a matter of Jewish law, to do so.<sup>158</sup> This is consistent with the Jewish law doctrine that "the law of the [non-Jewish] kingdom is [even from the perspective of Jewish law] valid law" (*Dina De-Malkhuta Dina*).<sup>159</sup> Although the proper scope and application of this principal is subject to substantial dispute among many Jewish authorities, it applies to laws that are enacted for the benefit of the government and for the benefit of the community.<sup>160</sup>

Similarly, Rabbi Shmuel Wozner, a leading contemporary Israeli authority, was asked whether one may work for the government as a tax auditor, given that a tax auditor who discovers fraud must report it to the government. The questioner wanted to know if such an auditor had the status of an "informer." R. Wozner replied that, according to Jewish law, the subject of taxes is clearly within the scope of the "law of the land is the law." Consequently,

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155. See, e.g., Halberstam, *supra* note 152 (interpreting *Rashba*).

156. YOSEF KARO (1488-1575), BEIT YOSEF, *Hoshen Mishpat* 2, 388.

157. See, e.g., authorities cited *supra* note 138.

158. MENACHEM MEIRI, BEIT HABEHIRAH, *Bava Metsia* 83b. Consider, also, the position of the late Rabbi Moses Feinstein, who held, generally, that the law of *Mesirah* forbade reporting thieves to secular authorities. See MOSES FEINSTEIN, IGGEROT MOSHE VIII, *Orah Hayyim* 5, at 16-17. Nevertheless, he writes that his position is consistent with those of Rabbi Eleazar the son of Simeon and Rabbi Ishmael the son of Rabbi Jose, because they had been appointed by the government, as *Rashba* pointed out. *Id.* If the mandated reporting acts would have that effect then, in states such as New Jersey, in which everyone is a mandated reporter, Rabbi Feinstein might conceivably permit such reporting.

159. See YOSEF KARO, SHULHAN ARUKH, HOSHEN MISHPAT 369:6, 11. See also SHMUEL SHILO, DINA DE-MALKHUTA DINA, pp. 145-160 (Hebrew); Resnicoff, *supra* note 51. For a variety of theoretical explanations for this principle, see Rabbi Mark Dratch, *The 411 on 911: Reporting Jewish Abusers to the Civil Authorities*, in *BREAKING THE SILENCE*, *supra* note 20, at 143-144, endnote 5.

160. Resnicoff, *supra* note 51, at 22-25.

if someone violates that law, there is no sin in reporting him to the government.<sup>161</sup>

These authorities do not understand Elijah as disagreeing with this basic rule. Instead, they construe Elijah as saying that a subject is only obligated to obey the king's law while the subject chooses to remain in the kingdom. One can avoid this obligation by leaving the jurisdiction, and someone of Rabbi Yishmael's stature should do so before turning Jews over to be executed.<sup>162</sup>

It is noteworthy that Rabbi Eleazar and Rabbi Yishmael felt obligated to comply with the secular government's demands even though the Jewish criminals would be executed for crimes that would not be capital offenses under Jewish law. Consequently, Rabbis Eleazar and Yishmael must have disagreed with the view that the doctrine against informers applies whenever the person informed against will be punished in a way other than that prescribed by Jewish law. Similarly, all those who believe that Rabbis Eleazar and Yishmael acted appropriately must reject that view.

It is also interesting that the governments to whom the criminals were being delivered had "just" legal systems. After all, Rabbi Eleazar's initial criticism of the Roman policeman clearly suggests that the policeman lacked a sound basis for his arrests. The policeman responded "What shall I do? It is the King's command." This suggests that the policeman was arresting a quota of both innocent and guilty people, because the king was trying to maintain law and order by instilling fear in his subjects through executions, even if some of the people executed may have been innocent.

On the other hand, perhaps the context in which the arrests were being made was extraordinary and therefore warranted extraordinary measures. Jewish law clearly permits rabbinical authorities to exercise exceptional powers in extreme circumstances. Thus, the Talmud declares that rabbinic authorities may impose corporal and financial punishments even when they are "not in strict accordance with the law."<sup>163</sup> The Talmud reports that in a time of general licentiousness, rabbinic authorities imposed a death sentence on a person who engaged in marital relations with

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161. SHMUEL WOZNER (1913-), SHEVET HALEVI 2:58. See also MAHARAM ALSHICH, SHUT 66.

162. Moshe Halberstam, *Informing to Secular Authorities About Child Abusers*, YESHURUN 643(2005).

163. BABYLONIAN TALMUD, *Yevamot* 90b, *Sanhedrin* 17b, *Sanhedrin* 46a.

his wife in a public area, even though Jewish law does not generally prescribe such a punishment for such conduct.<sup>164</sup> Similarly, they executed a person who violated a rabbinic rule against breaking off a branch of a tree on the Sabbath, even though doing so was only a violation of a rabbinic decree.<sup>165</sup> The Talmud also explains that extreme measures may be used against incorrigible recidivists. Thus, Rav Huna ordered that the hands of one repeat offender be amputated.<sup>166</sup>

Rabbi Shlomo ben Aderet (1235-1310), known as *Rashba*, explains that this rule permits rabbinic authorities to convict people of crimes on the basis of their own confessions (even though confessions were not admissible under strict Jewish law), on the testimony of fewer than two eye-witnesses, and on the testimony of technically ineligible witnesses.<sup>167</sup> Indeed, Rashba declares that it is inconceivable that a society could survive if laws could only be enforced in accord with the technical biblical rules.<sup>168</sup> Strict adherence to those rules, he declares, would lead to utter desolation.<sup>169</sup> Rabbi Yosef Karo, author of the “*Shulhan Arukh*,” probably the most famous Jewish law treatise, cites Rashba’s words approvingly in various writings,<sup>170</sup> and they are echoed by other authorities.<sup>171</sup>

According to the Talmud, this special rabbinic power appears limited to exceptional times. Nevertheless, rabbinic authorities have relied upon this power throughout most of the post-Talmudic

164. BABYLONIAN TALMUD, Yevamot 90b, *Sanhedrin* 46a.

165. *Id.*

166. BABYLONIAN TALMUD, *Sanhedrin* 58b.

167. See RASHBA, SHUT RASHBA 5:238 (“as to well-known wrongdoers, the custom is for the sages to impose corporal punishment, to cut off a hand or a foot, even to execute them. . . . These powers are . . . [available to the sages] in times of need”); Tashbetz 3:168 (reporting that he imprisoned someone who was accused of theft); See also RABBENU ASHER, SHUT HAROSH, klal 21, numbers 8 and 9.

168. See RASHBA, *supra* note 167.

169. *Id.*

170. Caro quotes Rashba as saying:

It appears to me that if the witnesses are believed by the chosen judges, they (the judges) may impose monetary fines or corporal punishment as seems fit to them. This is in order to preserve the world (society). For should you establish everything according to the laws of the Torah, and act only in accordance with how the Torah punished, in cases of injury and similar cases, the result would be that world society would perish, for we would need witnesses and forewarning.

See YOSEF CARO, BEIT YOSEF, *Hoshen Mishpat* 2, cited and translated in AARON M. SCHREIBER, JEWISH LAW AND DECISION-MAKING: A STUDY THROUGH TIME 378 (1979).

171. See sources cited *supra* note 152.

period, until, at least, most Jewish communities lost all juridical autonomy.<sup>172</sup> In one case, Rashba was asked whether local rabbinic authorities had acted correctly when they punished a particular lawbreaker with exceptional harshness. Rashba ruled that they had acted correctly for two reasons. First, he cited this exceptional rabbinic power. Second, he added that “a fortiori” they had acted properly because they were clothed with the authority of the king who had authorized them to govern the people,<sup>173</sup> even though there was no hint that the king had specifically ordered the exceptional punishment that was imposed. The questioners were asking if they had acted properly under Jewish law. From Rashba’s reference to the authority of the king, it is clear he held that the king’s authority was effective as a matter of Jewish law and provided rabbinic authorities with broad discretion.<sup>174</sup>

Most Jewish law authorities conclude that the laws that apply to monarchies apply to democratic governments as well.<sup>175</sup> Consequently, according to the approach that the authority of the king provides an exception to the rule against informing, that exception would apply to persons whom secular law requires to report cases of sexual abuse of children. There would also seem to be no compelling reason to oppose enactment of state laws that expand the universe of mandated reporters to day school and yeshiva teachers and administrators. After all, the Talmudic sages Rabbis Eleazar and Rabbi Yishmael were only criticized because of their exalted stature and ancestry (which relatively few people enjoy) and under circumstances in which criminals guilty of mere monetary offenses

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172. See generally SIMCHA ASSAF, [JUDICIAL] PUNISHMENTS AFTER THE CLOSING OF THE TALMUD (Jerusalem, 1922) (Hebrew).

173. See Rashba, *supra* note 167.

174. See Weiss, *supra* note 78, at 664 (from Rashba’s reference to the authority of the king being an a fortiori justification, it is clear that Rashba believes that Jewish law is in accordance with the conduct of Rabbi Eleazar and Rabbi Yishmael).

175. See, e.g., Rabbi Ovadyah Haddayah, *Does Dina de-Malkhuta Dina Apply to the State of Israel?*, HATORAH VEHAMEDINAH 9:36-44 (1958), translated in MICHAEL WALZER ET AL. (eds), THE JEWISH POLITICAL TRADITION I, 477-479; RABBI TZVI SPITZ, CASES IN MONETARY HALACHAH 34 (2001) (citing R. Moses Sofer). See also RAV ELIAYHU HENKIN, TESHUVOT IVRA II 175 (1989) (the law applies to the United States). Rav Abraham Isaac Kook, the first Chief Rabbi of Israel, held that the power of a Jewish king certainly reverted to the Jewish nation in the absence of a king. Based on this proposition, he held that the legislation of the secular government of Israel was religiously valid. See R. ABRAHAM ISAAC KOOK, MISHPAT KOHEN No. 144, at pp. 337-38.

would be executed.<sup>176</sup> In the United States, persons informed upon may not even be prosecuted or convicted and, even if convicted, will not face capital punishment.

Moreover, as already discussed, mandated reporters in many states face the possibility of imprisonment and fines should they fail to report. Even if the doctrine against informing otherwise applied and there were no other exception, there is strong support for the proposition that a person who informs in order to avoid such a sanction has not violated the doctrine, at least where the person informed against will not be executed.<sup>177</sup> In fact, there is even support for the proposition that a person is not liable under Jewish law for violating the rule against informing whenever he informs without the intention of hurting the person upon whom he informs.<sup>178</sup> Informing on someone in order to fulfill the biblical commandment of saving a present victim is certainly a justifiable excuse.

#### *Informing on Persons Who Will Not be Executed*

Even if the Talmudic criticism leveled against Rabbis Eleazar and Rabbi Yishmael were interpreted as indicating that their conduct violated Jewish law, Jewish law would still permit reporting a Jewish criminal to secular authorities in certain circumstances. As already mentioned, the majority view is that the law against informing was enacted because of a fear that a Jew who was informed on might be unjustly killed.<sup>179</sup> Thus, Rabbi Meir Eisenstadt (1670-1744), in his book *Panim Me'erot*, ruled that it would have been permissible to turn over to the secular government someone who was suspected of theft, except for the fact that the secular au-

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176. See Ashkenazi, *supra* note 149.

177. MOSHE ISSERLES, SHULHAN ARUKH, HOSHEN MISHPAT 388:5 (Stating, as the first of two alternative views, that one who informs on another in order to save his own property and not to harm the other person does not violate the law against informing); MOSHE ISSERLES, SHUT RAMA 86 (citing various views as to whether informing to save one's own property violates the law against informing). One authority states that from one of Isserles' responsa, it seems that Isserles rules that informing in order to save one's own property is not a violation of the law against informing). See YESHAYA BLAU, PITHEI HOSHEN, HILKHOT NEZIKIN, chapt. 4, note 42, at 151 (citing SHUT RAMA 88, but apparently referring to SHUT RAMA 86).

178. See, e.g., ISSERLES, SHULHAN ARUKH, HOSHEN MISHPAT 388:5, *supra* note 177.

179. See *supra* note 78.

thorities would execute the accused if he confessed.<sup>180</sup> Rabbi Yosef Shalom Eliashiv (1910-), long recognized as one of the most highly regarded leaders of Hareidi Jews in twentieth and twenty-first century Israel, invoked this view in a recent ruling. R. Eliashiv was approached by representatives of an Israeli Office of Religious Affairs that had suffered more than one robbery of money it had collected. Circumstances seemed to point to one particular person, but he would not confess. The representative wanted to know whether it was permissible to report the man to the Israeli police who, after an investigation, might bring the man to an Israeli court. R. Eliashiv replied, in part:

See Responsa Panim Me'erot 2:155 dealing with the matter of one who found an open chest, and much was stolen from it. There was [sic] reasonable grounds to believe that one of his workers did this act of theft. Was it permissible to inform on this worker to the secular authorities? He proves from Bava Batra 117 and Bava Metzia 25 that there is a religious duty on the judge of this matter to hit and punish based on the knowledge that he has, when his knowledge is correct. He then quotes from an incident with Rabbi Heshel and the view of the Shach [R. Shabtai Ha-Kohen] but he concludes, "Nonetheless I say that it is improper to report him to secular authorities, as our Talmud sages state, 'they treat him like a caught animal' and one must be afraid that they will kill him." From this it is clear that such is not applicable in our [i.e., Rabbi Eliashiv's] times. According to halacha [i.e., Jewish law] it would be proper to report him to the police . . .<sup>181</sup>

No United States jurisdiction imposes capital punishment on someone for engaging in the sexual abuse of children. Thus, according to the above rationale, the rule against informing would appear inapplicable.

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180. MEIR EISENSTADT, PANIM MEIROT 2:155. *See also* Weiss, *supra* note 78, at 658 (relying on this view to permit individuals, not just rabbinic authorities, to inform on child abusers).

181. *See* Broyde, *supra* note 122 (quoting from R. SINAI ADLER, DEVAR SINAI 45-46 (Jerusalem 5760)). There was, however, an additional element of the question. The questioner suggested that because the suspect was a person "connected with Torah activities," reporting him and having him prosecuted in an Israeli court might involve profaning G-d's name. As to this, R. Eliashiv said, "But you mention the possibility that this will lead to a desecration of G-d's name, and it is not in my ability to evaluate this, since I do not know the facts." *Id.* As suggested in the text, *infra*, the refusal to report those who sexually abuse children profanes G-d's name more than reporting them would.

Nevertheless, there are Jewish law authorities who believe that, as a matter of Jewish law, Gentile governments lack the authority even to imprison Jews.<sup>182</sup> Some of these authorities support this position by citing the de facto, rather than merely the de jure, consequences of imprisonment, including the possibility that prisoners might be raped or murdered by other prisoners.<sup>183</sup> Other authorities disagree, possibly assuming either that only the official penalties ought to be considered or that the level of modern lawlessness authorizes the secular government to employ exceptional measures.<sup>184</sup> Some authorities even argue that imprisonment will be good for the abuser, because it will prevent him from repeating his transgressions or may result in his receiving the psychological or medical therapy he needs.<sup>185</sup>

However, all Jewish law authorities agree that the Jewish law doctrine against Pursuers not only permits, but requires, every person to take any step necessary to prevent a Pursuer from victimizing someone else. This doctrine not only justifies informing against a Pursuer to a Gentile government (even though this *might* lead to the Pursuer's death), it actually warrants killing the Pursuer directly, if that is the only way to stop the pursuit. Consequently, it becomes necessary to examine when Jewish law characterizes someone as a Pursuer.

### *Informing on Pursuers*

The law of the Pursuer is derived from Biblical verses regarding rape. Under Jewish law, there are two distinct stages in be-

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182. See, e.g., R. MOSES FEINSTEIN, IGGEROT MOSHE, *Hoshen Mishpat* 1:8.

183. YESHAYA BLAU, PITHEI HOSHEN, HILKHOT NEZIKIN, chapt. 4, note 1 (even where there is a just government, the doctrine of Mesirah may apply because imprisonment can still involve pikuah nefesh, i.e., the possibility that the imprisoned may be killed).

184. See, e.g., Moshe Halberstam, *Informing to Authorities on Those Who Abuse Their Children*, YESHURUN, vol. 15 (2005).

185. *Id.* (arguing both that it is a "Mitzvah" (i.e., either the fulfillment of a religious obligation or at least a good deed) to have an abuser imprisoned to prevent him from committing additional abuse and that the imprisonment might enable him to obtain helpful therapy). As to possible medical treatment, see A. Rosler and E. Witztum, *Pharmacotherapy of Paraphilias in the Next Millennium*, 18(1) BEHAV. SCI. & L. 43, 43-56 (2000), abstract available at <http://biopsychiatry.com/paraphilias.htm>. See also Charles A. Bertrand, *A New Treatment for Pedophilia*, MEDICINE UP TO THE MINUTE, <http://www.medicineuptotheminute.com/pedophilia.htm>.

coming completely “married.”<sup>186</sup> The first stage, known as “Kiddushin” or “Eirusin,” typically occurs when the groom recites a stipulated declaration and puts a ring on the bride’s finger.<sup>187</sup> Although many may refer to this as a “betrothal” or engagement, under Jewish law it is more than that. After the Kiddushin, for example, it would be a capital offense for the bride to have consensual coital sex with any man other than the groom.<sup>188</sup> The second stage, known as “Nisu’in,” occurs after Kiddushin and consists of the bride and groom spending a relatively short period of time in seclusion.<sup>189</sup> After Nisu’in, the marriage is complete.<sup>190</sup>

Before and during the Talmudic era, it was customary for these two stages to occur on separate dates, unlike modern practice.<sup>191</sup> The Torah discusses the case of a woman who was raped in a desolate area, such as a field, after Kiddushin but before Nisu’in. Although the man who molested her committed a capital offense, the Torah says that the woman is completely innocent because she doubtlessly called out for help, but there was no one to rescue her.<sup>192</sup> From this statement, the Talmud derives that had there been someone there who could have saved her, he would have been obligated to take any steps necessary to prevent the molestation. If necessary, he would even have been obligated to kill the molester.<sup>193</sup>

Through traditional Jewish law rules of interpretation and argument, the Talmud derives that the same law applies to prevent a Pursuer from committing any similar type of forbidden sexual conduct, such as an act of incest (as defined by Jewish law) or homosexuality.<sup>194</sup> In addition, it applies to prevent a Pursuer from killing another, even if the Pursuer does not intend to kill anyone,

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186. See Raymond Apple et al., *Marriage*, in 13 ENCYCLOPEDIA JUDAICA 563-74 (Michael Berenbaum & Fred Skolnik eds., 2<sup>nd</sup> ed. 2007).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. Deut. 22:26.

193. See MENACHEM ELON ET AL., JEWISH LAW (MISHPAT IVRI): CASES AND MATERIALS, 223-224; Aaron Kirschenbaum, *The Bystander’s Duty To Rescue in Jewish Law*, 8 J. RELIGION & ETHICS 204-26 (1980), reprinted in JEWISH LAW AND LEGAL THEORY (Martin P. Golding ed., 1993). See generally Steven H. Resnicoff, *Jewish Law Perspectives on Suicide and Physician-Assisted Dying*, 13 J.L. & RELIGION 289, 308-12 (1998-1999).

194. See MAIMONIDES, MISHNEH TORAH, *Laws of the Murderer and of the Preservation of Life*, chapter 1, rules 10-11.

and even if the death would be the indirect cause of the Pursuer's conduct.<sup>195</sup> Of course, if the Pursuer can be stopped by lesser means, one must use such means rather than kill the Pursuer.<sup>196</sup>

The law of Rodef does not authorize individuals to impose punishment after the offense is committed.<sup>197</sup> At that point, the wrongdoer must be subjected to the usual judicial procedures.<sup>198</sup> The doctrine only authorizes action to prevent the offense.

A person who sexually abuses children may be characterized as a Pursuer for either of two reasons. First, if the sexual conduct involved falls within the specific categories covered by the doctrine of the Pursuer, then the person would be a Pursuer.<sup>199</sup> Many cases of child sexual abuse would fit within such categories. Some, however, would not. For example, non-contact activities, such as exhibitionism, would not trigger the doctrine of the Pursuer. Not even all forms of contact abuse would fall within the scope of this doctrine. In fact, even coital sex between a man and an unrelated, unmarried woman, would not trigger the doctrine. Moreover, there is no exact Jewish law parallel to the secular crime of statutory rape and, even if there were, under Jewish law a woman aged twelve is an "adult."<sup>200</sup> The doctrine of "the law of the land is valid law" may make secular statutory rape statutes binding as a matter of Jewish law. If so, someone who violates such a law would thereby violate Jewish law as well. Nevertheless, such a person would not be guilty of committing the type of Jewish law sexual offense that triggers the law of the Pursuer.

Even if the sexual nature of the abuser's conduct does not trigger the law of the Pursuer, an abuser would be a Pursuer if the abuser's conduct can be characterized as putting the victim's life in danger. As mentioned in Part I, not only are specific cases reported in which victims of sexual abuse have ostensibly committed suicide as a result, but general studies show that those who have been sexually abused are far more likely to commit suicide than

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195. *Id.*

196. MAIMONIDES, MISHNEH TORAH, *The Laws of Murder and Preservation of Life* 1:6-16; ELON ET AL., *supra* note 128, at 227.

197. See MORDEKHAI, *supra* note 78, at no.196 (citing Maharam of Rothenburg); ELON ET AL., *supra* note 128, at 229.

198. R. JOEL SIRKES, BAIT HADASH, *Hoshen Mishpat* 388 (stating that the reason one can kill an informer before he informs is that, at that moment, he is like a Pursuer).

199. R. ELEAZER WALDENBERG, TZITZ ELEAZAR 19:52.

200. See, e.g., *Bar and Bat Mitzvah*, WIKIPEDIA.COM, [http://en.wikipedia.org/wiki/Bar\\_and\\_Bat\\_Mitzvah](http://en.wikipedia.org/wiki/Bar_and_Bat_Mitzvah) (last visited Mar. 10, 2012).

other people.<sup>201</sup> It is possible that, from a Jewish law perspective, the likelihood of suicide is sufficiently certain for the abuser to be treated as a Pursuer. However, this remains unclear.

One might point to the other psychological injuries occasioned by sexual abuse to argue that this harm is tantamount to killing the person. An analogy might be made to other cases in which rabbis have allowed people who suffer from certain serious psychological problems to participate in treatments that require violation of the Jewish laws pertaining to the Sabbath, even though such violations would otherwise be capital offenses. Jewish law permits desecration of the Sabbath for the purpose of saving a person's life. If helping someone recover from severe psychological harm constitutes saving the person's life, then trying to impose such psychological harm may be the same as trying to take the person's life. Of course, it is possible that Jewish law may not treat all types of severe psychological harm the same way.

Many contemporary Jewish law authorities have justified informing to the government on Jews in situations that did not involve a statistical risk of harm obviously greater than that in child sexual abuse. For example, a number of authorities have authorized reporting on people who drive recklessly,<sup>202</sup> although many people drive recklessly for many years without having any accidents. The reason for this may be that these authorities truly believe such drivers actually are Pursuers. Alternatively, however, these authorities may not be using precise language. Instead, they may think that these people, although not Pursuers, are close enough that the doctrine against informing should not apply.<sup>203</sup> After all, there are clear exceptions to the doctrine against informing as to people who harm the public or physically harm individuals.

One caveat, however, is that consensual sexual interaction between persons deemed under Jewish law to be unrelated adults

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201. See, e.g., *supra* note 24 (citing various authorities).

202. R. MOSHE STERNBUCH, TESHUVOT VEHANHAGOT 1:850; R. YITZHAK WEISS, SHUT MINHAT YITZHAK 8:148. See also R. OVADIAH YOSEF, SHUT YEHAVE DAAT 4:60 (ruling that one must inform authorities that a driver suffers from a physical condition that may prevent him from driving safely).

203. See Weiss, *supra* note 78, at 658 ("It is clear that a person who drives so quickly that he cannot stop when necessary without causing damage has a 'din' of [i.e. either "has the legal status of" or "is treated as"] a Pursuer"); SPITZ, *supra* note 175.

would not ordinarily trigger the doctrine of the Pursuer.<sup>204</sup> Under Jewish law, a woman is an adult at age 12, and a man is an adult at age 13; the secular age of consent to sexual intercourse varies from state to state, but the most common age is 16.<sup>205</sup> In addition, it is far from clear that Jewish law's requirement of consent by an adult is as demanding as secular law's requirement of "informed consent." Thus, many cases that secular law would characterize as sexual abuse of children might, under Jewish law, constitute consensual sex between or among adults. Of course, this does not affect the duty to report nonconsensual pedophilic abuse.

One might contend that the Pursuer doctrine is not triggered unless the abuser is in the midst of the pursuit. There are several possible responses to this argument. First, where a sexually abusive relationship has formed and the abuser is likely to see the victim, it could be said that Pursuit is already afoot.<sup>206</sup> In addition, given the fact that a pedophile suffers from a disease that causes him to constantly look for an opportunity to strike may mean that he should be treated at all times as "in pursuit." After all, the mental illness can erupt at any moment. In a sense, the abuser is a "ticking bomb."

Such a conclusion would be consistent with the views of some rabbinic authorities that members of the militant terrorist group Hamas should at all times be considered Pursuers, even when they are not in the midst of a specific terrorist operation.

Interestingly, one contemporary authority, Rabbi Dovid Cohen, points out that the rabbinic law regarding an Informer is based on the notion of a Pursuer. As already mentioned, an Informer may be killed only before he informs. Once he informs, he is treated as any other wrongdoer. If he has caused someone damage, then he can be held liable in a rabbinic court to provide compensation. However, there is an important exception. If a person is "established" as an informer because he has already informed several

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204. In some cases, even someone who is engaged in a sexual attack upon another adult is not technically a "Pursuer" under Jewish law, and a third person witnessing the attack would not be authorized to kill the attacker. See, e.g., TOSEFTA, *Sanhedrin* 11:15. See the textual discussion, *infra*, about the right, and obligation, to inform upon someone to protect an individual from physical abuse.

205. See, e.g., Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313, 314 (2003). The age for sexual contact, however, may be lower than that for sexual intercourse. *Id.*

206. Indeed, it is possible that even the pre-abuse process of "grooming" a prospective victim is part of the pursuit of that victim.

times, then he may be killed even before he begins to inform again. Rabbi Cohen argues that this same rule should surely apply to a real Pursuer. Consequently, if a pedophile is an “established” abuser, it should be permissible to turn him over to secular authorities immediately.<sup>207</sup> Moreover, because of the nature of pedophilia and the threat a pedophile poses to the public, Cohen would treat an abuser as an “established Pursuer” after he commits one act of abuse. He would notify the police immediately to protect the public.<sup>208</sup>

*Informing on People Who Harm or Distress the Jewish Community  
or Who Physically Harm Individuals*

The Shulhan Arukh states that one may inform on a person if he causes harm or distress to the Jewish community.<sup>209</sup> This rule applies, in part, to situations in which a person’s crime, such as counterfeiting, might cause the secular government to retaliate against the community.<sup>210</sup> In a severe case, as already discussed, the criminal might even have the status of a Pursuer.<sup>211</sup> Even if the person is likely to cause considerably less harm or distress to the public, this is enough to constitute an exception to the law against informing.<sup>212</sup>

It is reported that some Jewish criminals were smuggling valuables in phylacteries and other religious articles. They would ask unsuspecting religious Jewish travelers to deliver these items during their trips. When United States customs agents learned about the smuggling ring, they asked some Orthodox Jewish agents to help them apprehend the criminals. The agents asked R. Kaminetsky, a leading rabbinic authority in the United States during the twentieth century, whether, and if so how, they should proceed. The advice he gave them as to how to find the crooks is confidential, but he made it clear that arresting them was proper.

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207. Cohen, *supra* note 70, at 125.

208. *Id.*

209. Yosef Caro, SHULHAN ARUKH 388.12. See also MAIMONIDES, MISHNEH TORAH, *Laws of Tortfeasors*, chapter 8, rule 11.

210. *Id.*

211. RABBI ELIJAH OF VILNA, BIUR HAGRA, *Hoshen Mishpat* 388:74.

212. The basis for exceptions to the rule against informing is that the rule itself was created by rabbinic authorities for the benefit of the community. The rabbinic authorities therefore allowed exceptions when they thought the communal interests would be better advanced that way. See Weiss, *supra* note 78, at 659.

He believed that by misusing religious objects to perpetrate a crime, the criminals may have caused irreparable damage to many honest religious people.<sup>213</sup>

Similarly, someone who blew the whistle in 2009 on Jews engaged in a large Ponzi scheme announced that he had followed the Jewish law guidance of Rav Shmuel Kaminetsky, son of Rav Yaakov Kaminetsky, and a leading Hareidi rabbi in his own right. He states that Rabbi Shmuel Kaminetsky told him that he could not be silent and allow additional people to suffer financial victimization.<sup>214</sup>

In fact, an exception to the rule against informing appears to apply even where a person's actions may simply make it more difficult for people in the community to obtain loans or do business with non-Jews. Thus, a seventeenth-century authority writes, "It has been already well accepted as a custom and decree that the leaders of the community . . . publicize and give permission to publicize and reveal to the non-Jewish community those [Jewish] individuals who buy on credit without expecting to pay, or borrow money without expecting to repay it."<sup>215</sup>

Similarly, the late R. Moses Feinstein, one of the authorities who believe that the doctrine against informing applies in the United States, writes that a person who is distressing the public may be reported to the government. Specifically, he was asked by a group of rabbis in Baltimore, Maryland, whether it was permissible to report a person who was selling non-kosher meat as if it were kosher. R. Feinstein ruled that rabbinic authorities should try to convince the man to stop his practices, but if he persisted, he should be informed upon to the civil authorities.<sup>216</sup>

A few things should be noted about R. Feinstein's ruling. First, the seller's action caused no threat of Gentile retaliation against the Jewish community. Instead, his action distressed the commu-

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213. See Broyde, *supra* note 122, at 6-7, n.3.

214. See Sandy Eller, *Miami, FL - Lawyer: R' Shmuel Advised Me To Turn In Fraudster, Saying "It Is Not Mesira,"* VOS IZ NEIAS (April 13, 2011), <http://www.vosizneias.com/80774/2011/04/13/miami-fl-lawyer-r-shmuel-advised-me-to-turn-in-fraudster-saying-it-is-not-mesira/print/>.

215. MOSHE RIVKAS (1596-1671), BIUR HAGOLEH, *Shulhan Arukh, Hoshen Mishpat* 388:12.

216. R. MOSES FEINSTEIN, IGGEROT MOSHE, vol. 4, *Hoshen Mishpat* 8. A contemporary Israeli commentator suggested the same rationale in arguing that it should be permitted to inform the secular government about someone who violates price controls. See R. YISROEL PESAH FEINHANDLER, AVNEI YOSHEH 4, p. 181.

nity by overcharging them and by causing them to eat non-kosher food in violation of Jewish law. Second, the seller's action did not directly affect the community as a whole. Instead, it only directly affected the people who would have purchased from him or eaten meat obtained from him. There is no reason to believe that there were no other sellers of kosher meat in the applicable community. Thus, from R. Feinstein's decision, it is clear that the exception for someone who distresses the public is triggered even if the distress is only caused to some members of the public, rather than to the entire community.<sup>217</sup>

Those who sexually abuse children do not abuse only one child. Experts report that each of the abusers whom they or their organizations have counseled has victimized many people.<sup>218</sup> Even after being discovered and convicted, abusers continue to attack new victims, even if they have to move to another geographic location to do so.<sup>219</sup> Experts testify that there is no way to "cure" this aberrant conduct,<sup>220</sup> although an abuser's conduct may be controlled through active psychotherapy or pharmacotherapy.<sup>221</sup> Experts do not trust abusers to voluntarily remain in treatment. In fact, based on its experience, Ohel, undoubtedly the largest organization in Brooklyn dealing with Jewish sex abusers, refuses to counsel people who come to it voluntarily because it believes such people will quickly discontinue treatment and return to their patterns

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217. See also Weiss, *supra* note 78, at 658 (equating reckless driving, which endangers others, to causing distress to "the public").

218. In a program at the 2003 Convention of the Rabbinical Council of America, Dr. David Mandel reported that in 6 years, Ohel had served 110 abusers, 107 men and 3 women.

219. See sources cited *supra* note 110.

220. See, e.g., ANNA SALTER, PREDATORS (2003).

221. Michael Cochran & Megan Cole, *Inside the Mind of a Pedophile*, NEUROANTHROPOLOGY (May 10, 2010), <http://neuroanthropology.net/2010/05/10/inside-the-mind-of-a-pedophile/>. See also *Pedophilia*, WIKIPEDIA.COM, <http://en.wikipedia.org/wiki/Pedophilia> (last visited Mar. 25, 2012) (no cure has been developed); *Pedophile Search and Statistic Tips*, LIFETIPS, <http://childprotection.lifetips.com/cat/63575/pedophile-search-and-statistics/index.html> (last visited Mar. 25, 2012). At the 2003 Convention of the Rabbinical Council of America (RCA), Dr. David Mandel stated that there is no cure and that the prevailing view is that it cannot be cured. This tape is available to Rabbinical Council of America members only via its web site, <http://www.rabbis.org/>. See also Mayo Clinic Report on Pedophilia (2007), in EIDENSOHN I, *supra* note 20, at 67 ("No treatment for pedophilia is effective unless the pedophile is willing to engage in the treatment. Individuals can offend again while in active psychotherapy, while receiving pharmacologic treatment, and even after castration.").

of abuse. Ohel will only provide therapy to an abuser who has been pushed into treatment, such as by a rabbi's threat to expose him or an employer's threat to fire him.<sup>222</sup> Even then, Ohel may only agree to treat if a rabbi or employer agrees to monitor the person's ongoing participation in treatment.<sup>223</sup> Consequently, a sexual abuser of children seems clearly to qualify as the type of "public menace" who may be reported to secular authorities.<sup>224</sup>

Some rabbis have tried to warn sex abusers and have entered agreements designed to prevent them from repeating their offenses, but these do not seem to be effectual.<sup>225</sup> According to the experts, the case of sexual abusers is intrinsically different from the case of a person who tries to make money by misrepresenting non-kosher food as kosher. A sexual abuser of children is driven by a psychological predisposition that does not respond to a warning.<sup>226</sup> Consequently, warning him and waiting for his next attack would not only be futile, but it would unnecessarily endanger prospective victims. In light of this information, a number of rabbis have specifically ruled that a child sexual abuser may be reported because he is someone who is harassing and causing distress to the public.<sup>227</sup>

The Shulhan Arukh states that where the doctrine against informing applies, there is no exception for reporting on someone who distresses an individual rather than the public.<sup>228</sup> But sixteenth-century scholar R. Moses Isserles, the foremost commentator on the Shulhan Arukh, immediately explains, "This [prohibition against reporting a person who distresses an individual applies] only if the individual is distressed verbally."<sup>229</sup> If a person distresses another physically, such as by hitting him, the prohibi-

222. Comments of Dr. David Mandel at the 2003 RCA Convention.

223. *Id.*

224. See Dratch, *supra* note 4, at 115. See also Cohen, *supra* note 70.

225. Such an agreement was apparently reached with respect to Rabbi Motti Elon, a charismatic and highly visible leader within non-Hareidi Israeli Orthodoxy. Documents on the web site of the Israeli organization, Takanah, attest to that case and are available at <http://takanah.org.il/megera.asp>. See also *Police to Probe Harassment Charges Against Elon*, JTA (Feb. 18, 2010), <http://jta.org/news/article/2010/02/18/1010682/elon-accusedof-inappropriate-conduct>.

226. See sources cited *supra* note 221.

227. See, e.g., Steve Oppenheimer, *Confronting Child Abuse*, 44 J. OF HALACHA & CONTEMP. SOC'Y 31, 39 (2002) (reporting that contemporary Rabbi Dovid Cohen expressed this position in a writing addressed to Oppenheimer).

228. SHULHAN ARUKH, *Hoshen Mishpat* 388:12.

229. R. MOSHE ISSERLES (1520-1572), COMMENTARY, *Shulhan Arukh, Hoshen Mishpat Simon* 388:9.

tion against informing does not apply.<sup>230</sup> As numerous rabbinic authorities point out, many forms of sexual abuse involve considerably greater physical distress to a person than being hit.<sup>231</sup> In such cases, the prohibition against informing should not apply.

One way to understand these exceptions is by focusing on the biblical Jewish law doctrine, already mentioned, that obligates a person to rescue others from being victimized, whether physically or emotionally. According to the majority view, the rabbis enacted the doctrine against informing to protect even wrongdoers from being improperly harmed by secular authorities who might be too severe. Nevertheless, by enacting the rule against informing, the rabbis did not intend to reduce, or even interfere with, the biblical obligation to protect the innocent. The rabbis themselves would punish wrongdoers without resort to the secular government. Today's rabbinic authorities lack the power to investigate, adjudicate and impose effective sanctions in cases involving the sexual abuse of children. The only way to protect innocent children is by reporting abusers to secular authorities. Thus, abuse situations seem to fall neatly within the rule allowing a person to inform against a public menace and against someone who causes non-verbal distress even to a single victim.

Nevertheless, it is important to note that certain conduct forbidden under secular law as "abuse" does not necessarily involve "victimization." As already mentioned, the secular law term, "child abuse," includes various types of "consensual" conduct between single, unrelated individuals, both of whom, under Jewish law, are adults. As a matter of law, consensual sexual interaction – even interactions that involve contact – may not involve a "victim."

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230. R. YEHOShUA FALK (1555-1614), COMMENTARY, *Shulhan Arukh, Hoshen Mishpat* 388:12(30); Weiss, *supra* note note 78, at 658 (citing Falk and others). Although some authorities think that a person cannot be informed against if he has hit only one person, if he is wont to hit people, he may be informed against. See, e.g., R. SHABTAI HAKOHEN (1622-1663), COMMENTARY, *Shulhan Arukh, Hoshen Mishpat* 388:12 (60) (citing the view of Maharam M'Riziborg that it is a "Mitzvah" (i.e., either an obligation or a meritorious deed) for anyone who sees that a person hit another to report the attack to secular authorities). See also Moshe Halberstam, *Informing to Authorities on Those Who Abuse Their Children*, YESHURUN, vol. 15 (2005).

231. See, e.g., Weiss, *supra* note 78, at 659 (from the words of R. Shabtai Hakohen that one may inform against someone who has a habit of hitting people, a fortiori, one may inform on a child abuser).

One might argue that, at least in the largely sheltered environment in which Orthodox Jewish girls and boys are raised, a girl aged twelve and a boy aged thirteen cannot effectively consent to sexual conduct.<sup>232</sup> The people making this argument, though, would seem to bear the burden of proving this as a matter of Jewish law, and such proof has not been forthcoming. Moreover, secular law outlaws sexual conduct even with a boy or a girl aged seventeen, cases in which it is extremely unlikely that Jewish law would say that a person could not give consent.<sup>233</sup> In these cases, if both parties consented, then there would be no victim under Jewish law. Someone would only be permitted to report such a case if the law against informing were inapplicable to a just government, to a government that would not impose capital punishment, to a mandated reporter, or, as will now be discussed, if reporting were necessary to avoid a profanation of G-d's name. Moreover, if local rabbinic authorities were to determine that it was a time of especial lawlessness with respect to these matters, they might decree that all such offenses, even if otherwise "consensual," should be reported.<sup>234</sup>

#### *Informing to Prevent Profanation of G-d's Name*

Jewish law recognizes sanctifying G-d's name and avoiding profaning G-d's name, i.e., bringing it into disgrace, as vitally important.<sup>235</sup> The importance of these values is perhaps most clearly highlighted in connection with the Jewish law regarding responding to duress. If someone threatens to kill a Jew unless the Jew violates a particular Jewish law, Jewish law permits – and some say actually requires – the Jew to violate the law in order to save his life.<sup>236</sup> Nevertheless, if the violation would involve public profanation of G-d's name, then it is not permitted.<sup>237</sup> There are a

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232. Although I have not seen this argument in print, Rabbi Jacobi raised it in a conversation with me.

233. Of course, if a person did not give consent, then Jewish law would certainly recognize that person as a "victim."

234. The source of such power might either be SHULHAN ARUKH, *Hoshen Mishpat* 2 (a rabbinical court's emergency power) or, more simply, the power of local authorities to legislate on matters for the public welfare.

235. See, e.g., KAPLAN, *supra* note 71, at 15-16.

236. *Id.* at 24-25.

237. *Id.* at 17-18.

number of cases in which the need to prevent profanation of G-d's name permits conduct that would otherwise violate Jewish law.<sup>238</sup>

Ironically, some people assert that *disclosing* abuse would profane G-d's name.<sup>239</sup> But this author agrees with the many other commentators and rabbis who argue that it is the failure to protect the vulnerable and the innocent, the allowance of untold horror to be inflicted upon them, and the attendant violation of the Jewish law duties and values, that is the true profanation of G-d's name.<sup>240</sup> This failure to report those who sexually abuse children has generated scathing criticism from Jews and non-Jews alike.<sup>241</sup> The profound enormity of, and the evil caused by, child sexual abuse must be stopped.<sup>242</sup> Indeed, one of the many tragic consequences of unchecked sexual abuse is that it often leads the victims to lose their faith and to commit acts that clearly profane G-d's name.<sup>243</sup> This can be avoided by helping past victims obtain closure and by preventing the abuse of prospective victims.<sup>244</sup>

Furthermore, as a purely practical matter, it seems likely that the truth about child sexual abuse will continue to find its way into the press. The nature of the news media and the disaffection and alienation of those who are abused, which makes the media

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238. See, e.g., Broyde, *supra* note 122, at 13.

239. See, e.g., Dratch, *supra* note 4, at 111 (citing, but disagreeing with, this phenomenon).

240. See, e.g., Cohen, *supra* note 70, at 127.

241. A typical example of such criticism, but phrased temperately, was expressed by David Framowitz, a founding member of Survivors for Justice: "Sadly, the history of the past 40 years has shown us the dangers of trusting our rabbis with issues related to sexual abuse. Their instinct is to protect the reputation of their communities by covering up the incidents and intimidating the victims into silence. It seems the occasional death is an acceptable price to them." See David Framowitz, *Action, Not Talk, Needed in Combating Sexual Abuse*, NEW YORK JEWISH WEEK (Mar. 6, 2009), [http://failedmessiah.typepad.com/failed\\_messiahcom/2009/03/action-not-talk-needed-in-combating-sexual-abuse.html](http://failedmessiah.typepad.com/failed_messiahcom/2009/03/action-not-talk-needed-in-combating-sexual-abuse.html). See also Dratch, *supra* note 4, at 117; Neustein & Leshner, *supra* note 15, at 197-229; Hella Winston, *Judge: Orthodox Protect Abusers, not Victims*, JEWISH WEEK (Oct. 10, 2009), [http://www.thejewishweek.com/features/judge\\_orthodox\\_protect\\_abusers\\_not\\_victims](http://www.thejewishweek.com/features/judge_orthodox_protect_abusers_not_victims).

242. See Dratch, *supra* note 4, at 117.

243. See, e.g., Dr. Asher Lipner, *Community Responsibility to Confront Abusers*, in CHILD & DOMESTIC ABUSE I, *supra* note 20, at 134-135. "It has been reported by rabbis and organization directors that specialize in working with the teens-at-risk population as well as researchers, that sexual abuse has been identified as a leading cause of the 'off the derech' syndrome [i.e., of Orthodox Jews becoming non-Orthodox]."

244. See Cohen, *supra* note 70, at 127.

less heedful of calls for silence, are no different with respect to abuse by Jews than as to abuse by Catholics. The press will find a way to disclose reports of abuse. If Jewish leaders or organizations are perceived to have engaged in a purposeful cover-up, the profanation of G-d's name would be great.

*Summary of how Jewish law doctrines apply to reporting sexual abuse*

Before proceeding to Part IV, which will identify, examine and comment on the problems that still require rabbinic resolution, it is useful to summarize how the Jewish law principles already examined apply to reporting particular types of child sexual abuse to secular authorities of a just government.

1. If the sexual abuse involves a non-consensual act of penetration between two men, between a man and a married woman, or between a man and a woman who are related in certain specific ways, then the Jewish doctrine of the Pursuer requires reporting the abuse if it cannot otherwise be stopped.
2. According to some authorities, other serious forms of non-consensual child sexual abuse may also involve threats to a victim's life, even if the threat to life results from the psychological impact of the abuse. If so, then the Jewish doctrine of the Pursuer would require reporting these cases as well.
3. Some types of child sexual abuse may not trigger the doctrine of the Pursuer. For example, as to certain forms of sexual abuse, Jewish law authorities may be unconvinced that they actually endanger a child's physical or psychological life. Nevertheless, reporting even these cases, whether or not consensual, may be permitted if the secular government is just, if the person informed against would not face capital punishment, if failing to report would profane G-d's name, if the reporter is a mandated reporter under secular law, if the abuser's conduct harms or distresses the community, or if the abuser's conduct physically or psychologically harms the child. In fact, in each of the last three cases such reporting would be required.

Notwithstanding the evidence adduced in Part III, there remains considerable reluctance on behalf of many Orthodox Jews to report child sexual abuse. The article will now reflect on some of the reasons outside of Jewish law doctrine.

## IV. ADDITIONAL COMPLICATIONS

*Technical Problems*

There seem to be both technical and non-technical reasons why many Orthodox Jews fail to support cooperation with secular authorities. “Technical” reasons include sociological and other factors that, as a practical matter, complicate the contemporary Jewish law process. Non-technical reasons involve more fundamental policy issues.

As I have explained elsewhere,<sup>245</sup> Jewish jurisprudence originally involved diverse institutions that were fully authorized, either singly or jointly, to perform tasks essential to every legal system, such as enacting legislation, rendering definitive rulings of fact and law, and enforcing those rulings. Such institutions included the Great Council (the Sanhedrin ha-Gadol),<sup>246</sup> the King,<sup>247</sup> and rabbinic authorities possessing Mosaic ordination.<sup>248</sup> Although historical developments caused the demise of these institutions,<sup>249</sup> Jewish communities have subsequently enjoyed juridical autonomy during certain eras and in particular lands. Such autonomy enabled them to establish official rabbinical courts that could render rulings binding on all Jews within a given jurisdiction. In contemporary times, even this autonomy no longer exists.

As the role of institutions waned, the role of local rabbinic authorities waxed. While each Jewish community was relatively tightly-knit and homogenous, the local rabbinic leader, even if not appointed by secular authorities, could enforce his rulings by wielding social sanctions. However, as social barriers preventing Jews from entering secular society crumbled, and as Jewish communities dispersed throughout the United States, the Orthodox Jews in any given location no longer belonged to a single community. With a few notable exceptions, non-Hareidi and Hareidi Orthodox Jews began to share the same neighborhoods, as did various subgroups of each. In this climate, there were no longer serious barriers of entry preventing a person from moving from one group or subgroup to another. As a result, local rabbis largely lost

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245. Steven H. Resnicoff, *Autonomy in Jewish Law – In Theory and in Practice*, 24 JOURNAL OF LAW & RELIGION 507 (2008-09).

246. *Id.* at 523.

247. *Id.* at 524-25.

248. *Id.* at 522-23.

249. *Id.* at 524.

the ability to back up their rulings with the threat of significant social sanctions.

At the same time, however, technological advancements made international communication virtually instantaneous, contributing, at least in part, to the reputations of particular rabbis to spread throughout all parts of the worldwide Orthodox community. In some sense, these particular rabbis became global authorities. Questions could be posed to them from all over the world, sometimes effectively sidestepping local rabbis and further diminishing their role. Similarly, the views of these global authorities became disseminated throughout the global Orthodox Jewish community.

However, this development has produced a variety of complications. Given the large number of people trying to pose questions and the limited time such global authorities possess, the questions and, in many instances, the responses, are filtered through others. Consequently, the ability to put the question in a clear, unbiased, and nuanced manner may be severely compromised, depending on the perceptions, communication skills and biases of those involved in the filtering process. The answer to a question might critically depend on background information – sometimes involving applicable secular law - properly provided by the questioner, but omitted or miscommunicated to the global rabbinic authority.

Sometimes the questioner himself may unwittingly fail to include all of the relevant background information. If the questioner were consulting with a local rabbi, that rabbi might be independently aware of the relevant information or, if not, by conversing with the questioner, the rabbi may prompt the questioner to provide the additional data. The global authority, however, will unlikely be the master of all of the background information surrounding questions from around the world. For example, a question about whether a person must (or may) report information about sexual abuse to secular authorities may in part depend on the applicable state law. In some states, a secular obligation to report depends on a person's occupation and whether the information came to the person as part of his or her occupational duties. In some states, a secular obligation to report arises as soon as someone has a reasonable basis to suspect abuse, while in other states the obligation would not yet be triggered. It is certainly possible that many of these variables may not be important under Jewish law, but the *responsa* often do not even make it clear that the information was accurately transmitted. Sometimes, the actual ruling may be ambiguous or unclear, but, given the volume of

other questions and matters which the few global authorities must address, follow up questions may not make it through the filtering process.<sup>250</sup>

One example will help illustrate part of this phenomenon. Rabbi Yosef Shalom Eliashiv (1910-), long recognized as one of the most highly regarded leaders of Hareidi Jews in twentieth and twenty-first century Israel, was asked whether a person who knows that a child is being abused and who cannot otherwise prevent the abuse can report the abuser to secular government authorities even if they might fine or imprison the accused.<sup>251</sup> Citing the previously discussed views of Ritva and Rashba, R. Eliashiv replied that the person could report the abuser:

From Rashba's words we see that regarding things that pertain to "Tikun Olam" [i.e., curing the world], the sages of Israel have the power in each generation to erect fences and stand in the breach even without the extra element of the king's authority. From the language of Ritva . . . it seems that the reason [Rabbi Eleazar acted correctly] was [that he acted with] the authority of the king, and this is what Ritva said:

"He told them, 'Apprehend him [i.e., some criminal]' and the fact that there was no witness or warning [to the criminal before he committed the crime], and the fact that it was not at a time when the Great Council sat [and Jewish law did not permit capital punishment when the Great Council did not sit] was not a problem because he [Rabbi Eleazar] was the agent of the king, and the king can execute accused criminals without witnesses and warning in order to frighten the world [i.e., to deter violations of the law] as King David killed the Amalekite, and an agent of the king is like the king." But according to what was said [by Rashba] with respect to matters pertaining to curing the world it is not necessary to have authority from the king.<sup>252</sup>

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250. For an example of a process that apparently involved a number of serious communication problems, listen to the audio tape of Rabbi Noson Kamenetsky's March 12, 2005, public lecture entitled "The Making of a Ban," available at [http://www.yutorah.org/lectures/lecture.cfm/731293/rabbi\\_nathan\\_kamenetsky/making\\_of\\_a\\_ban: a\\_look\\_at\\_the\\_banning\\_of\\_a\\_making\\_of](http://www.yutorah.org/lectures/lecture.cfm/731293/rabbi_nathan_kamenetsky/making_of_a_ban:_a_look_at_the_banning_of_a_making_of).

251. In fact, the question seems to have been a little different from the way R. Eliashiv frames it.

252. R. Yosef Shalom Eliashiv, *Question re Reporting an Abuser of a Boy or Girl to Secular Authorities*, YESHURUN 15 (2005) at 641.

Nevertheless, the practical impact of Rav Eliashiv's ruling is substantially blunted by a proviso he adds at the end:

"However, it is only permissible to report [a person] to the authorities if it is certain (*borur*) that the person is guilty [because] from this [i.e., reporting such a person] the world may be cured, but in a situation in which there are not even circumstantial evidence (*raglayim l'davar*) but only some appearance (*dimiyon*) [of guilt], not only would reporting fail to help cure the world, it would contribute to the destruction of the world . . . It is possible that it is only because of some bitterness a student has towards his teacher that he makes an allegation against him . . .<sup>253</sup> [Emphasis added]

R. Eliashiv's ruling is regarding the evidence a person must have before he may report. The ruling mentions two extremes. It begins by stating that one can only report on a person whose guilt is "certain," implicitly suggesting that strong circumstantial evidence might not be enough. But it then says it would be harmful to report if there is not circumstantial evidence. He does not seem to say what a person may do if there is circumstantial evidence or how much evidence might be enough to make a person's guilt certain (*borur*). Despite these ambiguities, it is clear that according to Rav Eliashiv, a child's allegation that he or she is the subject of abuse is, by itself, insufficient.

This is troubling for two reasons. First, the reality is that ordinary people are not likely to have certainty regarding an abuser's guilt. They possess no power to compel the purported abuser to answer questions, account for his whereabouts, etc. Nor are they trained either as to the questions to ask or as to the criteria by which to evaluate the evidence they uncover. Indeed, a primary purpose of reporting is to inspire an investigation by those who enjoy the relevant resources and training.

A number of Jewish law authorities discuss the various evidentiary bases that would be sufficient to predicate a report to authorities. One extreme view seems to argue that two qualified Jewish eyewitnesses would be necessary.<sup>254</sup> This position seems radical, given Rashba's words that a society could not survive if

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253. *Id.* Note that EIDENSOHN II, *supra* note 20, at 139, also translates Rav Eliashiv's Hebrew statement as permitting reporting only when the abuser's guilt is "certain."

254. R. MENASHE KLEIN, MISHNE HALACHOT 16:58.

such high standards had to be satisfied. Other authorities suggest far lower evidentiary standards than the certainty to which R. Eliashiv refers.<sup>255</sup> It is possible that Rav Eliashiv would permit a *rabbinic court* to act on less than certainty. After all, the sixteenth century authority Rabbi Moses Isserles cites “*Takanas Kadmonim* (ancient legislation)” that permits a rabbinic court to accept the testimony of persons who are technically ineligible to serve as witnesses if the alleged wrongdoing occurred where technically eligible witnesses are not usually available.<sup>256</sup>

Second, R. Eliashiv’s ruling ignores the very serious concern that in attempting to establish the “certainty” of an abuser’s guilt, persons – including rabbis, parents, educators and others – who are inadequately trained as to secular law procedural standards may actually jeopardize the possibility of convicting guilty predators. A victim’s testimony is often critical to a successful secular prosecution. However, child victims are not always entitled to testify in criminal court. In some cases, a child’s testimony is deemed to have been too “tainted” by “suggestive” comments or conduct by parents or others.<sup>257</sup> Even if the testimony is admitted, its credibil-

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255. See, e.g., Rav Yehuda Silman, *Different Halachic Frameworks for Abuse*, in CHILD & DOMESTIC ABUSE I, *supra* note 20, at 71.

256. Cohen, *supra* note 70, at 125. See also SHO’EL UMEISHIV I:185.

257. The Israeli police, for example, have voiced this concern in connection with efforts to prosecute persons allegedly involved in the largest pedophilia case in Jerusalem’s recent history. In the Jerusalem section of Nahlaot, at least 10 suspects are alleged to have abused over 100 children. The police contend that by failing to promptly report their suspicions to the police and by undertaking their own private investigation, the victims’ parents may have seriously compromised the ability to bring the perpetrators to justice. They argue, for example, that it is always difficult to have the testimony of minors admitted in court, and prior conversations between parents and their children may be seen to have tainted that testimony. See Melanie Lidman, ‘*He masterminded the systematic rape of over 100 kids, and he’s just sitting there.*’ Nahlaot community reels from largest pedophile abuse case in . . .”, JERUSALEM POST, Jan. 20, 2012; Melanie Lidman, *More arrests in Nahlaot pedophilia case. At least nine suspects, 70 victims involved, say Jerusalem police*, JERUSALEM POST, Jan. 9, 2012; Melanie Lidman, *Knesset Committee for the Rights of the Child demands answers in Jerusalem pedophile case. More than a dozen perpetrators abused 100 children in . . .*, JERUSALEM POST, Jan. 5, 2012. As to the possible tainting of child testimony, see J. Eric Smithburn, *The Trial Court’s Gatekeeper Role Under Frye, Daubert, and Kumho: A Special Look At Children’s Cases*, WHITTIER JOURNAL OF CHILD & FAMILY ADVOCACY (Fall 2004); Andrew Darcy, Comment, *State v. Buda: the New Jersey Supreme Court, the Confrontation Clause, and “Testimonial” Competence*, 40 SETON HALL L.R.1169 (2010); Ashish S. Joshi, *Taint Hearing: Scientific and Legal Underpinnings*, 34-NOV CHAMP 36 (2010); Dana D. Anderson, Note, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S.CAL.L.REV. 2117 (1996).

ity may be effectively undercut by reference to such comments or conduct. Predators who are not convicted remain free to prey on additional victims.

Third, R. Eliashiv's ruling does not expressly address the possible tension between Jewish law and secular mandated reporting statutes as to the kind of evidence that warrants a report or the type of conduct that should be reported. Under most reporting statutes, for instance, much less than certainty triggers the duty to file a report. Some statutes require a report by anyone who "in good faith suspects"<sup>258</sup> or has "reasonable cause to suspect" child abuse.<sup>259</sup> In such states, a reporter would be obligated to file even if he or she has not yet formed a "belief" that the child has been abused. R. Eliashiv's ruling, published in 2005, does not mention whether Israel has such laws or the potential consequences of such laws.

In fact, long before 2005, Israel enacted such laws.<sup>260</sup> The requirement to report applies to all adults and requires reporting when a person has a suspicion of child abuse or when there is a reasonable basis for a belief that a child was abused.<sup>261</sup> Violators

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258. See, e.g., Del. Ann Code, tit. 16, §903; Oh. Rev. Code §2151.421 (when the person suspects).

259. See, e.g., Alaska Stat. §47.17.020, 47.17.023; American Samoa Ann. Code §45.2002; Ark. Ann. Code §12-12-507; Ca. Penal Code §11166; Col. Rev. Stat. §19-3-304; Ct. Gen. Stat. §17a-101a ("reasonable cause to suspect or believe"); DC Ann. Code §4-1321.02; Fla. §39.201; Guam Ann. Code tit. 19, §13201; Kan. Ann.Stat. §38-2223; Mi. Comp. Laws §722.623; Mi. Ann. Code §43-21-353; Mo. Rev. Stat §210.115; 568.110; Mont. Ann. Code §41-3-201; N.H. Rev. Stat. §169-C:29; N.J. Ann. Stat. §9:6-8.10; N.M. §32A-4-3; N.Y. Soc. Serv. Law §413; N.C. §7B-301 (when a reporter has cause to suspect); N.D. Cent. Code §50-25.1-03; Northern Mariana Islands Commonwealth Code tit. 6, §5313; Pa. Cons. Stat., ch. 23, §6311; Puerto Rico Ann. Laws tit. 8, §446 ("comes to suspect"); RI Gen. Laws §40-11-3(3); S.D. Codified Laws §26-8A-3; Tenn. Ann. Code §37-1-403, 37-1-605; Virgin Islands Ann. Code tit. 5, §2533; Va. Ann. Code §63.2-1509; W.Va. Ann. Code §49-6A-2; Wis. Ann. Stat. §.48.981; Wyo. Ann. Stat. §14-3-205.

260. These laws appear to have been enacted in 1989. See, e.g., The Israel National Council for the Child, available at [http://www.children.org.il/centers\\_eng.asp?id=69](http://www.children.org.il/centers_eng.asp?id=69), and Benjamin Shmueli, *Mandated Reporting on Child Abuse in Jewish Law and Israeli Law*, THE FAMILY IN LAW REVIEW (Hebrew), Vol. 3, 2010. Available at SSRN: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1514380](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1514380) (stating enactment was in 1989). But cf. S. Oz and D Balshan, *Mandatory Reporting of Childhood Sexual Abuse in Israel: What Happens After the Report?*, J. CHILD SEXUAL ABUSE 16(4) (2007), available online at <http://jcsa.haworthpress.com> (who state that these laws were adopted in 1980).

261. See, e.g., The Israel National Council for the Child, available at [http://www.children.org.il/centers\\_eng.asp?id=69](http://www.children.org.il/centers_eng.asp?id=69).

are subject to a possible jail sentence of up to three months. Tougher laws apply to parents and to certain professionals, such as teachers, doctors and social workers. Persons subject to these laws may be sentenced to up to six months in jail.<sup>262</sup>

Another troubling aspect with respect to R. Eliashiv's responsum is that it does not address the forms of sexual abuse that may be reported. In the United States, for instance, there appear to be increasing accounts of women teachers who have engaged in sexual relationships with their students.<sup>263</sup> Under the law of many states, these women teachers commit criminal sexual abuse and must be reported.<sup>264</sup> Yet, as a matter of Jewish law, not only might the doctrine of the Pursuer be inapplicable, but the student might not even be regarded as "victimized." The same may also be true of some other forms of secular sexual offenses, including conduct that does not involve penetration and during which the participants are fully clothed, the reporting of which secular law also requires. It has even been reported that some rabbis contend that a boy is not "sexually abused" unless he has been the victim of homosexual penetration.<sup>265</sup> Irrespective of whether the report is true, the existence of the report certainly underscores the importance for rabbinic authorities to be clear as to the types of conduct that must be reported.<sup>266</sup>

Nor does R. Eliashiv's ruling discuss the relevance, if any, of the fact that a person failing to report may himself be fined or imprisoned or may be subject to civil suit by the abuser's victims.

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262. *Id.*

263. *See, e.g.,* reports of such allegations available at <http://www.wnd.com/?pageId=39783>.

264. Typically, state statutes require the reporting of "sexual offenses" such as these.

265. *See* Neustein & Leshner, *supra* note 15, at 226 n.6.

266. Neustein and Leshner state that "Rabbi Isaac Mann, a teacher of Talmud at the Academy of Jewish Religion, in a personal communication with the authors, disputed such a position, pointing out that Jewish courts have long claimed the authority to regulate improper conduct of all kinds in their role as guardians of the community." *Id.* In fact, however, the reported opinion and Mann's opinion may both be true. One issue is whether conduct renders the abuser a Pursuer who can be killed, if necessary, to prevent him from abusing his victim. With respect to a male abuser of a male child, it is possible that the abuser is only an actual Rodef if he seeks to homosexually penetrate his victim. On the other hand, Mann is right when he says that rabbinical courts can punish an abuser even if the abuser is not a Pursuer. Indeed, the doctrine against informing may not apply to an abuser, even if the abuser is not a Pursuer, because such an abuser is a public menace.

Because the ruling avoids this issue, it also fails to discuss the relevance, if any, of the likelihood that a person failing to report would in fact be caught and, if caught, incur such penalties. Yet the applicable punishments and likelihood of apprehension differ from state to state in the United States and from country to country worldwide. Thus, if the nature of these penalties and the likelihood of suffering them are relevant under Jewish law, as they surely seem to be, then the practical guidance of R. Eliashiv's response, which does not address these penalties, is substantially limited. In fact, the ruling of any global authority would be importantly restricted by the authority's knowledge of the background facts in each jurisdiction.

Another technical problem, unrelated to R. Eliashiv's statement, arises from the sensitivity of the issues involved, which leads some rabbis to avoid ruling or to rule privately rather than publicly.<sup>267</sup> Many private rulings - and even some public rulings - are unwritten.<sup>268</sup> Obviously, such opinions cannot be carefully analyzed or parsed. The dearth of comprehensive, nuanced, and unambiguous written rulings by Jewish law experts is troublesome.

#### *More Fundamental Problems*

Aside from various technical problems, it seems likely that there are more fundamental issues at play. For example, reporting a sexual abuser can cause collateral damage to innocent third parties.<sup>269</sup> Often the damage to these innocent people pales, as a

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267. An author who published an article about this issue almost a decade ago told me that one or more of the rabbinic authorities who had privately sent him written opinions on the topic contacted him after his article was published and asked him not to make their written opinions available to others and not to publicize them again.

268. Rabbi Eliezer Silver (1882-1968) was the President of the Union of Orthodox Rabbis of the United States and Canada and was one of the leading rabbinic authorities of his time. In an audiotape that is available on the internet, Gershon Silver, Rabbi Silver's grandson, states that he was sexually abused, that the matter was brought to his grandfather's attention, and that his grandfather issued a ruling ("psak") that instances of sexual abuse must be reported to the police. See *Bend Over Agudah - Truth is Incoming*, available at [http://failed\\_messiah.typepad.com/failed\\_messiahcom/2009/06/the-evi-of-agudath-israel-of-america-123.html](http://failed_messiah.typepad.com/failed_messiahcom/2009/06/the-evi-of-agudath-israel-of-america-123.html). Jewish law rulings, however, are often quite nuanced. Without a written ruling to review, it is not possible to evaluate the accuracy of the grandson's statements.

269. For example, it could cause shame and financial hardship to the abuser's entire family. In some circles, it could also tragically cause more pain to the

matter of Jewish law, in comparison to the prospective harm to the abuser's victims.<sup>270</sup> However, as already mentioned, some forms of reportable sexual abuse might, under Jewish law, be regarded as "victimless crimes." Consequently, although there may still be certain Jewish law reasons to report such abuse, there may also be countervailing Jewish law considerations. Simply declaring that Jewish law permits reporting may communicate the wrong message about the relative priorities of Jewish law. However, as suggested in Part V, a more nuanced announcement explaining what needs to be reported and why it needs to be reported may effectively avoid such miscommunication.

A second problem is that civil suits arising out of child sexual abuse cases may bankrupt some of the religious schools or organizations that employed the abusers. Thus, in April 2009, two major Hareidi organizations, Agudath Israel and Torah U-Mesorah, issued a statement in opposition to a law that would dramatically expand the statute of limitations for victims of child sexual abuse. While acknowledging "the horror of child sexual abuse and the devastating long-term scars it all too often creates," the statement explained: "What Agudath Israel and Torah U'Mesorah must object to, however, is legislation that could literally destroy schools, houses of worship that sponsor youth programs, summer camps and other institutions that are the very lifeblood of our community."<sup>271</sup> The statement pointed out that "perhaps the most problematic example of such legislation," were bills that would create a one-year window in which persons could bring any past claim of child sexual abuse, no matter how long ago the alleged abuse had occurred.<sup>272</sup> Nevertheless, even without changes in the statute of limitations, suits by those who were allegedly abused could financially ruin some Jewish institutions.

However, to the extent that the victims of abuse remain within the Orthodox Jewish community, and to the extent that the victims can tangibly see that the relevant institutions acted in good faith and sought to protect them when abuse was discovered, they

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abuser's victims. Nevertheless, some psychologists, and some survivors of abuse argue that disclosing the abuse and confronting the abuser are important steps in the healing process. See, e.g., Lipner, *supra* note 243, at 143-147.

270. Similarly, when Jewish law calls for a person to be executed, the execution would not be stayed even if it would result in distress to the person's dependents.

271. EIDENSOHN I, *supra* note 20, at 96.

272. *Id.* at 96.

might well be convinced that suing the institutions for large sums would be inappropriate, as unfairly burdensome to the school community. However, to the extent that victims feel betrayed by those institutions, and therefore alienated from the school community and possibly even from the broader Orthodox Jewish community, it is more likely that such victims will pursue maximum financial recoveries from those institutions. Indeed, in light of the trend toward increased exposure of abuses, whether by the media or by others, institutions that do not act in good faith or do not seek to protect their students are likely to suffer financial setbacks. A policy encouraging the reporting of sexual offenses and the protection of victims may be the best way to protect the financial integrity of Orthodox schools and institutions.

A third problem is that some statements made by some of those advocating against child sexual abuse may appear relatively extreme, undercutting other parts of their message and raising questions about the slipperiness of the slope on which they are descending. For instance, Daniel Eidensohn, who recently authored/edited 2 volumes on child sexual abuse in the Jewish community, offers the following definition of sexual abuse:

Sexual abuse means to use a child in any way that provides sexual gratification of the adult. This means not only sexual intercourse but also holding or fondling in a way that causes sexual arousal in the adult. It also includes showing pornography to the child as well as discussion of a sexual nature for the purpose of getting the adult sexually aroused. Sexual abuse also means exposing genitals or taking pornographic pictures.<sup>273</sup>

Secular statutes often do not require that all such activities be reported.<sup>274</sup> In fact, Eidensohn offers no proof that these types of “sexual abuse” necessarily harm the child. He also offers no proof regarding the nature or extent of such harm. Nor does he offer proof that the various rabbinic authorities in favor of reporting sexual abuse had this type of conduct in mind.

Perhaps the slope is even more slippery in moving from reporting of such incidents of “sexual abuse” to reporting about other

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273. EIDENSOHN I, *supra* note 20, at 3.

274. Some statutes seem to require reporting of sexual offenses involving, at a minimum, some type of touching. *See, e.g.*, NY SOC. SERV. LAW §412. *But see* N.J. 9:6-1, which defines abuse as including “(e) the performing of any indecent, immoral or unlawful act or deed, in the presence of a child, that may tend to debauch or endanger or degrade the morals of the child.”

types of “physical abuse.” Although Jewish law does not permit parents to strike their children out of anger,<sup>275</sup> the long and well-established view is that Jewish law permits the use of considerably more corporal punishment – by parents and even by teachers – than secular law allows. Indeed, in his ruling regarding child sexual abuse, R. Eliashiv makes it clear that the secular standard regarding physical abuse is not the standard under Jewish law.<sup>276</sup> It might be difficult, however, to effectively communicate these differences to all of the members of the Hareidi community.

The slope may be most dangerous, however, in that it may lead away from reliance on rabbinic authorities and toward reliance on secular authorities, and secular standards in general. In the modern world, assimilation is a continuous threat to the preservation of the Jewish people. As already described, rabbinic authorities lack the secular legal power to enforce their rulings and to maintain “law and order” within their communities. In this context, the need to convince people that they must resort to religious authorities for guidance and the resolution of disputes may be increasingly important. Similarly, it may be vital to convince people not to sidestep rabbinic courts by directly seeking secular intervention. Why? Undermining the importance of rabbinic authorities may weaken the glue that holds the Orthodox community together. Additional exposure to, and importance reliance upon, secular institutions and authorities may further weaken the cultural wall that keeps the Orthodox community and the secular community separate, and may make assimilation more probable.

Maintenance of this wall is not as important to non-Hareidi Orthodox Jews, who are already much more exposed to the non-Jewish world than Hareidi Jews. In fact, many Hareidi Jews raised in Israel, and possibly some in the United States as well, lack even a basic secular education. For some Hareidi Jews, Yiddish, and not the official language of the country in which they were born, is their primary language. Non-Hareidi Orthodox Jews are more likely to watch television and surf the internet than Hareidi Jews. Similarly, anecdotal evidence suggests that non-

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275. See generally Ronnie Warburg, *Corporal Punishment in School: A Study in the Interaction of Halakha and American Law with Social Morality*, 37 TRADITION 57 (2003); and Benjamin Shmueli, *Corporal Punishment of Children in Jewish Law: Traditional Approaches Meet Modern Trends--A Comparative Study*, 18 JEWISH L. ANNUAL 137 (2010).

276. Eliashiv, *supra* note 127, at 642 (“As to corporal punishment of children, the secular perspective] is completely different from ours.”).

Hareidi Orthodox Jews are more likely to be involved with secular civic organizations or “causes” than Hareidi Jews. Consequently, non-Hareidi Orthodox Jews may be able to navigate the secular community more easily than Hareidi Jews can, and they may be more comfortable with, and trusting of, secular authorities than their Hareidi counterparts. It may be true that exposure to the secular world involves a risk of being improperly influenced by it. Nevertheless, having survived that exposure thus far, non-Hareidi Orthodox Jews may be less fearful of future exposure. By contrast, Hareidi Jews, being less familiar with secular society and authority, may be more fearful of being involved with them. Hareidi rabbinic authorities constantly warn against such exposure.

Similarly, non-Hareidi and Hareidi Orthodox Jews have importantly different perceptions regarding the role of rabbinic authorities.<sup>277</sup> Non-Hareidi Orthodoxy looks to rabbinical authorities for spiritual inspiration and for expert opinions on technical questions of Jewish law. Nevertheless, non-Hareidi Orthodoxy does not generally look to rabbinic authorities for a Jewish law “ruling” as to the job to take, the profession to pursue, or the community in which to settle. These decisions, and many others like them, are largely regarded as matters of personal choice, even though they may inevitably have spiritual consequences. Non-Hareidi Orthodox Jews will seek advice on these matters from people whom they consider knowledgeable and wise, whether or not such people are rabbinical authorities. They will not feel obligated to accept the advice proffered. Instead, they will likely regard making the choice as a personal responsibility.

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277. Sociologist M. Herbert Danzger, who is himself an Orthodox Jew, states: In chapter 7 we noted that dress styles identify different subcommunities of Orthodox Jews, which hold different attitudes toward Israel, secular education, and relations between men and women . . . . Some observers . . . have argued that these differences derive from the fact that traditionalists are world-rejecting sectarians whereas modernists are world-accepting denominationalists . . . . We suggest, instead, that the critical feature distinguishing the modernist from the traditionalist is *the nature and scope of the authority to which each is committed*. Traditionalists allow their leaders authority in political and personal matters, and the leadership attempts to exercise authority beyond the specifics of halakhah . . . . Modernists, in contrast, seek maximum scope for personal decision making, and their leadership limits its authority to halakhah.

M. HERBERT DANZGER, *RETURNING TO TRADITION: THE CONTEMPORARY REVIVAL OF ORTHODOX JUDAISM* 164 (1989). By “traditionalists,” Danzger means Hareidi Orthodox Jews, and by “modernists,” he means non-Hareidi Orthodox Jews.

By contrast, Hareidi Jews are far more likely to seek guidance from their rabbinic authorities even as to these questions and, should those authorities tell them what to do,<sup>278</sup> they may feel obligated to comply. Part of the reason for this Hareidi approach is its view of a doctrine known as, “Da’as Torah,” “Da’at Torah,” or “the Torah View.” The content and contours of this concept are subject to considerable controversy.<sup>279</sup> Nevertheless, it is often invoked within the Hareidi Orthodox community to justify reliance, and often to prove an obligation to rely, on the advice of rabbinic authorities even when those authorities do not articulate convincing Jewish law justifications for the conduct they advise.

To the extent that Jewish law determinations depend on factors such as the certainty of the evidence of abuse, the Hareidi approach calls for consultations with rabbinic authorities before reporting may be allowed.<sup>280</sup> Indeed, this is exactly how the Hareidi position has recently been allegedly articulated by speakers at a

278. See, e.g., Resnicoff, *supra* note 51, at 540-546.

279. For a variety of views, see, generally, Binyomin Brown, *Doctrine of “Da’at Torah”: Three Levels* (Hebrew), in JERUSALEM STUDIES: IN JEWISH THOUGHT vol. xix, at 537 (Yohayada Amir ed. 2005); Shalom Carmy, “*The Heart Pained by the Pain of the People: Rabbinic Leadership in Two Discussions by R. Joseph B. Soloveitchik*,” 13 TORAH U-MADDA J. 1 (2005), available at [http://www.yutorah.org/\\_shiuirim/1-14%20Carmy.pdf](http://www.yutorah.org/_shiuirim/1-14%20Carmy.pdf); Rabbi Alfred Cohen, *Daat Torah*, 45 J. HALACHA & CONTEMP. SOC’Y 67 (Spring 2003); Aaron Cohen, *The Parameters of Rabbinic Authority: A Study of Three Sources*, 27 TRADITION 4 (1993); Lawrence Kaplan, *Daas Torah: A Modern Conception of Rabbinic Authority*, in RABBINIC AUTHORITY AND PERSONAL AUTONOMY 1 (Moshe Sokol ed., Jason Aronson 1992); Jacob Katz, *Da’at Torah – The Unqualified Authority Claimed for Halachists*, available at <http://www.law.harvard.edu/programs/Gruss/katz.html>; Rabbi Berel Wein, *Daas Torah: An Ancient Definition of Authority and Responsibility in Jewish Life*, *Jewish Observer* 4 (Oct. 1994); see also STEVEN H. RESNICOFF, UNDERSTANDING JEWISH LAW 51-53, 127-135 (2012).

280. See, e.g., Rav Yehuda Silman, who writes:

In fact these cases do not require a beis din and we need to merely consider the possible loss versus the possible gain . . . . On the other hand it is certain that it is impossible that everyone can take responsibility for deciding whether to inform the secular authorities. That is because the majority of people do not have the prerequisite Torah knowledge or professional knowledge to establish whether the evidence is serious and the concern is genuine. Thus of necessity these matters should only be dealt with by an established beis din or at least an experience [sic] rabbi who has had a lot of experience dealing with cases of abuse.

See EIDENSOHN I, *supra* note 20, at 71 (providing the translation). Similarly, Rav Sternbuch notes, “However a Rabbinical authority should be consulted as we discuss later.” *Id.* at 108.

conference sponsored by Agudath Israel, perhaps the leading Hareidi organization in the United States.<sup>281</sup>

In fact, as the July 2011 search was still proceeding for the missing 8-year-old Leiby Kletsky, who was later found murdered and dismembered, Rabbi Shmuel Kaminetsky, Vice President of Agudath Israel's Supreme Council of Torah Scholars announced publicly that before reporting any alleged case of child sexual abuse, a person was obligated first to go to receive permission from a rabbi or rabbinic court.<sup>282</sup> Of course, compliance with this procedure may well cause delay that the abuser can exploit to continue his abuse – or to flee and continue his abuse in another locale.

After the murder of Leiby Kletsky, the position articulated by Agudath Israel became increasingly examined and criticized. It was widely reported that it was only a mother's intervention that saved another child from being kidnapped by the alleged murderer of Leiby Kletsky.<sup>283</sup> Had this attempted abduction, two years before Leiby Kletsky's murder, been reported to authorities, it is possible that he would have been incarcerated, protecting others from being attacked, at least for a time.

Of course, the position stated by Agudath Israel did not preclude the granting of rabbinic permission to report in appropriate cases. Nevertheless, a long history in which many Hareidi rabbis had refused to authorize reporting may have discouraged people in the Hareidi community from even talking with their rabbis about such events.<sup>284</sup>

Public pressure over the position Rabbi Kaminetsky announced caused a considerable stir. Agudath Israel published a written

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281. See Paul Berger, Ultra-Orthodox Group Affirms Abuse Cases Go First To Rabbi, *THE FORWARD* (May 25, 2011), <http://forward.com/articles/138131/>.

282. Kaminetsky: Report Child Abuse to Rabbis Not to Police, *JTA* (July 21, 2011), <http://www.jta.org/news/article/2011/07/21/3088644/kamenetsky-report-child-abuse-to-rabbis-not-police>. An audio clip of Rabbi Kaminetsky's statement is available at [http://failedmessiah.typepad.com/failed\\_messiahcom/2011/07/rabbi-shmuel-kamenetzky-call-rabbis-not-police-to-report-child-abuse-123.html](http://failedmessiah.typepad.com/failed_messiahcom/2011/07/rabbi-shmuel-kamenetzky-call-rabbis-not-police-to-report-child-abuse-123.html).

283. See, e.g., Mark Duell, *Mum's Desperate Screams Stopped Butcher of Brooklyn Kidnapping ANOTHER Boy*, *DAILYMAIL* (July 17, 2011), <http://www.dailymail.co.uk/news/article-2015424/Levi-Aron-Mums-screams-stopped-Butcher-Brooklyn-kidnapping-ANOTHER-boy.html>.

284. This issue was raised by a caller to the Zev Brenner radio show during Brenner interview with Rabbi Chaim Dovid Zwiebel, Executive Vice President of Agudath Israel for Government and Public Affairs. Links to audio files for the interview are available at [http://failedmessiah.typepad.com/failed\\_messiahcom/2011/07/rabbi-david-zwiebel-on-reporting-child-sexual-abuse-123.html](http://failedmessiah.typepad.com/failed_messiahcom/2011/07/rabbi-david-zwiebel-on-reporting-child-sexual-abuse-123.html).

statement purporting to clarify the Jewish law position that had been articulated at the conference it had sponsored several months before. In part, the statement provides that a person who has information regarding possible child sexual abuse, “should not rely exclusively on his own judgment to determine the presence or absence of *raglayim la’davar*: Rather, he should present the facts of the case to a rabbi who is expert in halacha and who also has experience in the area of abuse and molestation – someone who is fully sensitive both to the gravity of the halachic considerations and the urgent need to protect children.”<sup>285</sup>

Similarly, Rabbi Chaim Dovid Zwiebel, Agudath Israel’s Executive Vice President for Government and Public Affairs, appeared on a New York City radio show hosted by Zev Brenner.<sup>286</sup> At one point in the interview, Brenner asked a person who was 100% sure that child sexual abuse had occurred would still have to consult a rabbi before reporting the abuse to the police, and Zwiebel said yes. Of course, Zwiebel also made it clear that, if the rabbinic authority agreed that the evidence satisfied a *raglayim la’davar* standard, the rabbi should authorize reporting to the police.

Nevertheless, the position Zwiebel presented raised a number of problems. First, he alternatively described the *raglayim l’davar* standard as evidence giving’s rise to “a reasonable belief” that the abuse had occurred or “a reasonable suspicion” that the abuse had occurred. In fact, however, under secular law, the latter may be a considerably lower standard. If the rabbis apply a higher “reasonable belief” standard, mandated reporters who rely on the rabbis may be in violation of the law.

Second, the laws generally do not permit a mandated reporter to defer to the judgment of another. Moreover, if a person is a mandated reporter, he may violate his secular legal obligation by deferring a report until after he has consulted with a rabbi – and almost certainly if he waits until after the matter has been investigated by a rabbinical court. The Ocean County, New Jersey

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285. Avi Shafran, *Agudath Israel Statement on Reporting Suspicions of Child Abuse*, CROSS-CURRENTS (July 22, 2011), <http://www.cross-currents.com/archives/2011/07/22/agudath-israel-statement-on-reporting-suspicions-of-child-abuse/>.

286. Links to audio files of this interview are available at [http://failedmessiah.typepad.com/failed\\_messiahcom/2011/07/rabbi-david-zwiebel-on-reporting-child-sexual-abuse-123.html](http://failedmessiah.typepad.com/failed_messiahcom/2011/07/rabbi-david-zwiebel-on-reporting-child-sexual-abuse-123.html).

prosecutor, whose jurisdiction includes the Hareidi community of Lakewood, had said as much.<sup>287</sup>

Third, there is the problem of what may happen between the time the prospective reporter develops the reasonable suspicion or belief and the time that person actually obtains the type of rabbinic instruction that the position articulated by Agudath Israel calls for. After all, the Agudath Israel position specifically states that one may not simply consult any rabbi. Rather, it states that the person with the evidence:

should present the facts of the case to a rabbi who is expert in halacha and who also has experience in the area of abuse and molestation – someone who is fully sensitive both to the gravity of the halachic considerations and the urgent need to protect children. (In addition, as Rabbi Yehuda Silman states in one of his responsa [Yeshurun, Volume 15, page 589], “of course it is assumed that the rabbi will seek the advice of professionals in the field as may be necessary.”)<sup>288</sup>

Yet, the Agudath Israel statement did not identify any rabbis who satisfy this standard. When Brenner interviewed Zwiebel, he repeatedly asked him for names of rabbis whom Agudath Israel would deem appropriate, and Zwiebel repeatedly refused to provide any names at all. Instead, Zwiebel acknowledged that putting together such a list might be an appropriate project for Agudath Israel. In the absence of a clear list of accessible authorities competent for this task, and given the possibility that the rabbi might deem it necessary to obtain input from other professionals in the field, the delay between development of the prospective reporter’s reasonable suspicion or belief and rabbinic authorization to report may be significant, which could enable an abuser to perpetrate additional atrocities. Almost astonishingly, as this article was going to print, 10 ½ months after Zwiebel’s radio interview,

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287. Berger, *supra* note 280. In addition, the prosecutor stated that if there is a reasonable basis for suspecting child sexual abuse, but a person does not report it to the authorities because his rabbi told him not to, the rabbi’s advice will not serve as a defense. *Id.* This is similar to a situation in which a teacher who has a reasonable suspicion or reasonable belief, which triggers the statute, reports a matter to the principal. The teacher does not his or her duty under most applicable reporting statutes by simply relying on the principal’s assessment as to whether the evidence is sufficient to report. If the teacher believes the standard is met, the teacher must report to the appropriate governmental authority.

288. Shafran, *supra* note 284.

not only had Agudath Israel failed to publish a list of appropriately trained rabbis, but Zwiebel announced that Agudath Israel had no intention of doing so. He stated that the Brooklyn District Attorney had announced that he would prosecute anyone who would interfere with a person's compliance with state reporting requirements. Providing a list of rabbis with whom people should consult, he said, would be to put those rabbis in danger of prosecution.<sup>289</sup>

Finally, in his 2011 interview, Zwiebel did not explain why the rabbinic authorities would be more qualified to evaluate the quality of the available evidence than the prospective reporter. Interestingly, by not identifying any specific rabbinic authorities as "qualified," he avoided any particularized evaluation as to the appropriateness of their "credentials."

Non-Hareidi Orthodox Jews, however, would be more likely to think that an evaluation of the quality of evidence does not require rabbinic expertise, but merely sound judgment that many individuals – with or without consulting rabbinic authorities – are able to exercise.<sup>290</sup>

#### V. A PROPOSAL FOR THE HAREIDI COMMUNITY

The status quo within the Hareidi community is untenable. Secular authorities are becoming increasingly aware of allegedly rampant and criminal non-compliance with mandatory reporting law. Increased public protests, including media attacks focused on Jewish social service agencies such as Ohel, may make prosecution of non-reporters inevitable.

Meanwhile, the sexual abuse of children continues with all of its attendant horrors. Jewish organizations cannot even effectively protect themselves by creating an internal, registry of actual or suspected offenders for use by Orthodox community officials only. Why? Because the creation of such a registry would constitute a paper trail evidencing that suspected abuse was not reported to secular authorities. Yet sexual abusers are confirmed recidivists who cannot be discerned at first glance and who move

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289. Paul Berger, *Agudath Insists Abuse Claims Go to Rabbis*, THE FORWARD (May 23, 2012), <http://forward.com/articles/156692/agudath-insists-abuse-claims-go-to-rabbis/?p=all#ixzz1vj1Efh6i>.

290. *Id.* (citing Rabbi Yosef Blau, of Yeshiva University and a non-Hareidi Orthodox Jew, as stating, "There is no decent justification why anybody in their right mind should think rabbis are qualified to make that judgment.").

from place to place when necessary to find new prey. Creating a registry is critical to protect more children from being victimized.

Moreover, those who do not report – often because they believe doing so is not permitted by Jewish law – face possible criminal prosecution.<sup>291</sup> Similarly, these individuals and various Orthodox organizations face the possibility of enormous financial liability for failing to report. In addition, to the extent that more and more Hareidi Jews refuse to remain silent and report even in the face of rabbinic pressure, the authority of rabbis and rabbinical courts are importantly undermined.

Furthermore, rulings that require a mandated reporter to consult a rabbi before reporting to secular authorities arguably contradict not only the views of Rabbis Eleazar and Yishmael, who turned suspected wrongdoers over to the secular authorities, but also the opinions of Rabbi Joshua and the Prophet Elijah. According to R. Eliashiv, for instance, the latter do not believe that reporting violates Jewish law, but only that the exceptionally pious should not be involved in the process. Nevertheless, to the extent that a rabbinic authority must be consulted first in each instance, the rabbinic authority is thereby thrust directly into the process. Without the rabbi's approval, the reporting would not occur.

The author would like to respectfully suggest a way in which Hareidi authorities could protect vulnerable Jewish children, protect community members from being prosecuted for non-reporting, protect Orthodox Jewish schools, yeshivas and other organizations (including social service organizations trying to provide therapy to abusers) from being sued to the hilt, avoid profaning G-d's name and, in fact, promote sanctification of G-d's name, while minimizing any attenuation of rabbinic authority or standards. Although this proposal is neither ingenious nor novel, it could work – at least in each locale that implements it.

The Hareidi rabbis in the locale would announce:

- (1) that child abuse victims suffer tragic and life-shattering harms that can cause them to lose their spiritual lives by abandoning Judaism, and that can lead to their physical sickness and death as well;

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291. As this article is being written, at least one Hareidi Jew is under criminal indictment for allegedly attempting to persuade others not to cooperate with secular authorities.

- (2) that there is a clear presumption (Umdenah) under Jewish law that those who commit child sexual abuse suffer from a sickness, and that they are recidivists whose behavior cannot simply be cured by repentance or by rabbinic intervention;<sup>292</sup>
- (3) that, therefore, protecting children from abusers requires using secular authorities to force abusers to obtain treatment or to incarcerate them so that they will be unable to continue their attacks;
- (4) that no one should have qualms about reporting evidence of abuse or complying with mandatory reporting laws because:
  - (a) child abusers are either Pursuers or, at the very least, persons who are a public menace, to whom the law of Informing does not apply;
  - (b) persons are obligated to take steps to protect others from being victimized by abusers;
  - (c) a report will NOT trigger an immediate conviction or even an immediate arrest, but only a secular investigation by trained secular authorities;
  - (d) the many procedural safeguards in the secular judicial system ensure that those who are accused are extremely unlikely to be unfairly convicted;
  - (e) abusers, even if convicted, will not face capital punishment;
  - (f) persons are not obligated to run the risk of criminal or civil punishment for failing to comply with mandated reporting laws which are in fact enacted for the purpose of protecting the public (*Tikkun Olam*);
  - (g) even where there is no secularly mandated duty to report, the rabbinic authorities issuing the announcement are themselves requiring people to report pursuant to the inherent rabbinic authority to act to protect the community from public menaces.<sup>293</sup>

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292. See, e.g., the Statement of the Rabbinical Board (Vaad Harabbonim) of Baltimore in 2007, which stated, in part:

An abuser is not simply a lustful person, plagued by a Taavah – a desire – that can be addressed with sincere Teshuva. He has a severe illness, that may be incurable, and that is at best enormously difficult to manage. Publicizing his status as an abuser – while causing enormous damages to his own family – may be the only way to truly protect the community from him.

EIDENSOHN I, *supra* note 20, at 89.

293. See SHULHAN ARUKH, *Hoshen Mishpat* 2.

The intended benefits of this proposal are that:

- (a) it is limited in scope and that this limitation is clearly communicated;
- (b) it realistically assesses the threat posed by child sexual abusers;
- (c) it is expressly based on the fact that child sexual abusers suffer from an illness that renders them immune from the normal types of influence rabbinic authorities might otherwise attempt;
- (d) it demonstrates the sincere concern rabbinic authorities have for the victims of child sexual abuse;
- (e) it is likely to be more effective than the status quo, particularly by permitting the creation of registries of those suspected of such abuse without exposing those involved in the creation of such registries to criminal prosecution; and
- (f) by taking what might be perceived to be a bold step to protect children, it may increase, rather than undermine, rabbinic authority.

Whether the rabbis should insulate Hareidi organizations from incurring civil liability to private persons for failing to report prior acts of abuse is a separate question. The urgent issue is preventing additional abuse from taking place.