

OF SWORDS AND PLOWSHARES: THE AUTHORITY FOR  
DEFENSIVE WAR IN JEWISH LAW, CANON LAW, AND  
ISLAMIC LAW

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INTRODUCTION

[T]hey shall beat their swords into plowshares, and their spears into pruninghooks: nation shall not lift up sword against nation, neither shall they learn war any more.<sup>1</sup>

Human proclivity to war remains a scourge even in the modern era—swords abound amid a want of plowshares. However, not all wars are created equal: a defensive war waged in response to external aggression has long been recognized as a justifiable state of conflict.<sup>2</sup> Under international law, a defensive war is a military response designed to ensure self-preservation in the face of an imminent threat or attack.<sup>3</sup> A state of defensive war is, by definition, a desperate time wherein “the necessity of that

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<sup>1</sup> *Isaiah* 2:4.

<sup>2</sup> *See, e.g.*, 2 HUGO GROTIUS, *THE LAW OF WAR AND PEACE* 171 (Francis W. Kelsey trans., 1646).

<sup>3</sup> 2 JOHN BASSETT MOORE, *A DIGEST OF INTERNATIONAL LAW* § 217 (1906).

self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”<sup>4</sup>

This Essay seeks to distill religious justifications and empowerments for the precarious times of defensive war. Namely, the legal doctrines of three faiths—Jewish law, canon law, and Islamic law—are analyzed to reveal varying enumerations of fundamental natural rights which, in turn, give rise to a state’s authority to engage in defensive war. Additionally, each religion’s varying regulations of defensive war are examined to elucidate the permissible breadth of state self-defense in each faith. Finally, a comparative analysis is employed to outline the contours of each religion’s central values and concerns underlying defensive war. As a grounding mechanism, this exploration is largely guided by each religion’s primary sources and does not venture far outside such pools of knowledge.

Part I investigates the right to self-defense in Jewish law as an imperfect bridge to a state’s right to engage in defensive war. Several minimization principles—some tethered to the right to self-defense, some independent of it—are explored as regulations of defensive war in Jewish law. Part II explores the right to human dignity in canon law as a fundamental truth that gives rise

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<sup>4</sup> *Id.* (internal quotation marks omitted).

to a state's empowerment to engage in defensive war and surveys Just War Doctrine as a set of guiding principles regulating defensive war. Part III inspects the right to life in Islamic law as a natural law principle which empowers defensive war and details its various regulations. Finally, Part IV analyzes these empowerments and regulations alongside each other to bring forth fundamental values lying within the legal doctrines of each religion.

#### I. JEWISH LAW

Maimonides, renowned Jewish philosopher and *Torah*<sup>5</sup> scholar from the Middle Ages, famously asserted that “saving Israel from the clutches of the enemy that has attacked them” constitutes a “mandatory war.”<sup>6</sup> Such a proclamation demands inspection. “Saving Israel from the clutches of the enemy that has attacked them” has been understood as defending any Jewish

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<sup>5</sup> For those unfamiliar with Jewish law, the *Torah*, also known as the Hebrew Bible, comprises five holy narratives: *Bəreshit* (“Genesis”), *Shəmot* (“Exodus”), *Vayikra* (“Leviticus”), *Bəmidbar* (“Numbers”), and *Dəvarim* (“Deuteronomy”). The *Torah* also encompasses an oral tradition (*tora sh'b'al peh*) which interprets these texts. The *Talmud* is a primary source of Jewish law and is comprised of the *Mishneh* (a written compendium of the oral traditions of the *Torah*) and the *Gemara* (an interpretation of the *Mishneh* and related writings). For a sublime explanation of the foundations of Jewish law in a context relevant to this Essay, see Marilyn Finkelman, *Self-Defense and Defense of Others in Jewish Law: The Rodef Defense*, 33 WAYNE L. REV. 1257, 1257 n.2 (1987).

<sup>6</sup> MAIMONIDES, *MISHNEH TORAH, Melakhim* 5:1.

nation or state from attack.<sup>7</sup> A “mandatory war” is, much like it sounds, a war that must be fought and cannot be avoided.<sup>8</sup> Taken together, a defensive war necessary to protect a Jewish state cannot be avoided. However, Maimonides provides precious little support for this assertion—a fact which has thoroughly confounded scholars.<sup>9</sup> Relying primarily on the *Torah* and the *Talmud*, this Section examines the natural right to individual self-defense in Jewish law as a potential foundation for the state’s right to collective defense. Part I.A explores the fundamental right to individual defense while Part I.B examines this right’s application to third-party defense. Finally, Part I.C addresses the complications of extending the right to individual self-defense to the state’s collective duty to defend its borders.

#### A. The Individual’s Right to Self-Defense

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<sup>7</sup> See, e.g.; Robert Eisen, RELIGIOUS ZIONISM, JEWISH LAW, AND THE MORALITY OF WAR 51 (2017).

<sup>8</sup> See *id.* at 51-52. There are several other types of mandatory wars in Jewish law, however, a discussion of such is outside the scope of this Essay. See *id.*

<sup>9</sup> See, e.g., EISEN, *supra* note 7, at 33 (“There is no law in the Torah that explicitly commands, or even allows, the Israelites to wage wars to defend themselves.”), at 51 (“It is not clear how Maimonides justified the inclusion of defensive wars in the category of mandatory wars . . . .”); Rabbi Elliot N. Dorff, *Defensive War*, MY JEWISH LEARNING, <https://www.myjewishlearning.com/article/defensive-war/> (last visited Dec. 5, 2018) (“Significantly, there is no explicit, biblical justification for engaging in defensive war.”).

Jewish law proscribes murder as a capital offense.<sup>10</sup> However, as explained by the *Talmud*, an individual is permitted—and, perhaps, even obliged—to defend against attempted murder with lethal force: “the *torah* decreed, ‘If He come to slay thee, forestall by slaying him.’”<sup>11</sup> This strong language implies that self-defense is not optional when facing murderous attack, but rather that each individual has an innate duty to defend oneself against lethal force. Indeed, under Jewish law, a defendant charged with murder would not be found guilty if the killing occurred in self-defense—even if the self-defense killing occurred on the Sabbath.<sup>12</sup> Jewish law firmly enshrines an individual’s innate right to protect one’s bodily integrity from lethal attack.

The exculpatory principle of lethal self-defense extends beyond instances wherein lethal aggression directly threatens one’s personal safety. The *Torah* also provides that one may kill a thief caught breaking into one’s home.<sup>13</sup> The *Gemara* explains

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<sup>10</sup> MAIMONIDES, MISHNEH TORAH, SEFER NEZIKIM, *Hilkhot Roze-ah* 1:1 (H. Klein tran. 1954) (quoting *Exodus* 20:13) (“If one slays a human being, he transgresses a negative commandment, for Scripture says, ‘Thou shalt not murder’ . . . . If one murders willfully in the presence of witnesses, he is put to death . . . .”).

<sup>11</sup> BABYLONIAN TALMUD, *Sanhedrin* 72a (I. Epstein trans. 1935).

<sup>12</sup> Self-defense exculpates an individual for both breach of Sabbath and murder. See Seder Mo’ed, Mishnah Shabbat 7:2; see also BABYLONIAN TALMUD, *Sanhedrin* 72b.

<sup>13</sup> *Exodus* 22:1 (“If a thief is caught breaking in, and is struck and killed, there is no bloodguilt in this case.”).

that this principle does not derive from a right to safeguard personal property, but rather protecting the bodily integrity of the homeowner—a thief that is willing to break into a person’s home is likely willing to kill the homeowner if encountered during the course of the burglary.<sup>14</sup> A lethal intent may be imputed to the thief by virtue of the dire circumstances of a home robbery which, in turn, justifies the homeowner’s right to kill in self-defense. Thus, the right to kill in self-defense in Jewish law extends to circumstances wherein the harm is not fully actualized but is based on a sound assumption that a lethal threat is imminent.

Home burglary is not the sole example wherein grave circumstances justify the imputation of lethal intent to an aggressor and exculpate killing as a matter of self-defense. Per the *Mishnah*:

These may be delivered [from transgression] at the cost of their lives: he that pursues after his fellow to kill him, or after a male, or after a girl that is betrothed; but he that pursues after a beast, or that profanes the Sabbath, or that commits idolatry—they may not be delivered [from

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<sup>14</sup> BABYLONIAN TALMUD, *Sanhedrin* 72a (“There is a presumption that a person does not restrain himself when faced with losing his money, and therefore this burglar must have said to himself: If I go in and the owner sees me, he will rise against me and not allow me to steal from him, and if he rises against me, I will kill him. And the Torah stated a principle: If someone comes to kill you, rise and kill him first.”).

transgression] at the cost of their lives.<sup>15</sup>

This passage provides three instances where an aggressor may be stopped at the cost of the aggressor's life: (1) an aggressor attempting murder; (2) an aggressor attempting homosexual rape; and (3) an aggressor attempting to rape "a girl that is betrothed."<sup>16</sup> However, bestiality, violating the Sabbath, and committing idolatry are deemed insufficient to justify killing the aggressor.<sup>17</sup> None of the aforementioned cases involve an imminent risk of bodily harm to another individual—a sharp juxtaposition to the severe risk of lasting physical and emotional harm posed by attempted murder, rape, and home burglary. Additionally, while violating the Sabbath may result from mere negligence, violent actions such as attempted murder, rape, and home burglary all require a highly-calculated and deliberate level of intentionality.

Interestingly, and rather tragically, it seems that the life of a non-betrothed woman is less valued than that of a non-betrothed man: while no condition limits the application of lethal self-defense when a male is facing homosexual rape, self-defense is only

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<sup>15</sup> SEDER NEZIKIN, MISHNAH SANHEDRIN 8:7 (Danby trans. 1933).

<sup>16</sup> See *id.*; see also Michael Satlow, *A Detached Kiddushin*, THEGEMARA.COM: A DETACHED AND CONTEXTUAL APPROACH (Mar. 13, 2017), <http://thegemara.com/a-detached-kiddushin/> (explaining that, traditionally, "betrothal" signified the first step of a legal marriage but preceded cohabitation).

<sup>17</sup> SEDER NEZIKIN, MISHNAH SANHEDRIN 8:7.

justified for a woman facing rape when she is betrothed. Lying within this puzzling distinction is the nefarious implication that the value of a woman's life is somehow increased after she becomes betrothed. While an individual's right to lethal self-defense is firmly grounded in whether the individual is facing an imminent threat to the individual's bodily integrity, it seems that gender and marital status also play a significant role.

### **B. The *Rodef* Principle**

The right to lethal self-defense is not strictly limited to the victim. Indeed, the *Talmud* firmly commands "Do not stand upon the blood of your neighbor; I am the Lord."<sup>18</sup> This strict language provides that intervention to save a victim is not a permissive decision, but rather a mandatory obligation. The *Talmud* also instructs that bystanders, in especially dire situations, may employ lethal force to save victims:

But if the man comes upon the engaged [betrothed] girl in the open country, and the man lies with her by force, only the man who lay with her shall die, but you shall do nothing to the girl. The girl did not incur the death penalty, for this case is like that of a man attacking another and murdering him. He came upon her in the open; though the engaged girl

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<sup>18</sup> *Leviticus* 19:16 (Jewish Publication Society trans. 1962); see also BABYLONIAN TALMUD, *Sanhedrin* 73a ("Yes, it is indeed so that [*Leviticus* 19:16] relates to the obligation to save one whose life is in danger.").

cried for help, there was no one to save her.<sup>19</sup>

In analyzing this passage, the *Gemara* likens the inherent violence of rape to that of murder, and instructs that a bystander should intervene to save a betrothed woman from rape even if such intervention comes at the cost of the rapist's life.<sup>20</sup> The *Gemara* points to the phrase "there was no one to save her" from *Deuteronomy 22:27* as implicitly creating an imperative that, had someone been there to intervene on the victim's behalf, any necessary means—including killing the aggressor—are permissible if required to protect the victim.<sup>21</sup> Thus, third-party bystanders have an obligation to rescue victims facing treacherous circumstances such as attempted rape or murder, and a third-party bystander may, if necessary to protect the victim, employ lethal force to stave off an aggressor.

The rule enabling third-party intervention is known as the law of the *rodef*, the "pursuer" or "perpetrator."<sup>22</sup> Several principles guide the law of the *rodef*. First, an intervenor may

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<sup>19</sup> *Deuteronomy 22:25-27*.

<sup>20</sup> BABYLONIAN TALMUD, *Sanhedrin* 73a ("The Torah juxtaposes the case of a murderer to the case of a betrothed young woman to indicate that just as in the case of a betrothed young woman one may save her at the cost of the rapist's life, so too, in the case of a murderer, one may save the potential victim at the cost of the murderer's life.")

<sup>21</sup> *See id.* ("But if there was someone to save her, he must do so by any means that can save her, even by killing the potential rapist.")

<sup>22</sup> *See* BABYLONIAN TALMUD, *Sanhedrin* 73a.

only use as much force as is required to stop the *rodef*.<sup>23</sup> If a *rodef* can be stopped with non-lethal force, then an intervenor is not permitted to kill the *rodef*. Overzealous intervenors are not tolerated: the *rodef* defense ceases once a pursuer is effectively stopped<sup>24</sup> and one is not permitted to kill an aggressor in self-defense if it would result in the death of innocent third-parties.<sup>25</sup> Second, the *rodef* defense is limited to pursuers engaged in a capital crime, such as attempted murder, homosexual rape, or the rape of a betrothed woman.<sup>26</sup> Third, the law of the pursuer is not applicable if the intervenor's life would be at stake in order to rescue the victim.<sup>27</sup> One is not required to give up one's life to save another—one deserves, and is entitled to, autonomy over one's own

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<sup>23</sup> BABYLONIAN TALMUD, *Sanhedrin* 74a (“If a pursuer was pursuing another to kill him, and one was able to save the pursued party without killing the pursuer, but instead by injuring [the pursuer] in one of [the pursuer’s] limbs, but he did not save [the pursuer] in this manner and rather chose to kill [the pursuer], he is executed on his account as a murderer.”); see MAIMONIDES, MISHNEH TORAH, SEFER NEZIKIM, *Hilkhot Roze’ah* 1:13 (“If it is possible to save the pursued by damaging one of the limbs of the *rodef*, one should.”).

<sup>24</sup> See, e.g., *Deuteronomy* 25:11-12; see also sources *supra* note 23. However, it is less clear whether the overzealous intervenor who unnecessarily kills a *rodef* would be punished under Jewish law. Compare BABYLONIAN TALMUD, *Sanhedrin* 49a (Abner punished—by way of the death penalty via execution by Joab—for using excessive force by killing Asahel when Asahel could have been stopped with non-lethal force) with MISHNEH TORAH, SEFER NEZIKIM, *Hilkhot Roze’ah* 1:13 (asserting that the overzealous protector who uses unnecessary lethal force deserves death but may not be punished by the court).

<sup>25</sup> See BABYLONIAN TALMUD *Sanhedrin* 74a; *Yoma* 82b; *Pesahim* 25a.

<sup>26</sup> *Sanhedrin* 73a-b; see also J. EPSTEIN, ARUKH HA-SHULHAN, *Hoshen Mishpat* 425:8.

<sup>27</sup> BABYLONIAN TALMUD, *Bava Metis’a* 62a (“Your life takes precedence over the life of your companion.”); see also *Leviticus* 18:5; BABYLONIAN TALMUD *Shabbat* 85b (understanding *Leviticus* 18:5 as extolling a principle to “live” by the laws and thus finding that a rescuer is not required to sacrifice their life to save a victim).

life.<sup>28</sup> Finally, fourth, a *rodef* must pose a cognizable threat in order for a bystander's intervention to be justified.<sup>29</sup> This principle limits wanton intervention by requiring that the *rodef*'s actions present an imminent threat of realizing a capital crime before a third-party actor may step in to save the victim.<sup>30</sup> The aforementioned minimization principles limit the application of the *rodef* principle to dire circumstances wherein a victim's bodily integrity and dignity are clearly in jeopardy, while remaining cognizant of the value of the *rodef*'s own life. The high value of human life is an ever-present specter over the law of the *rodef*.

### C. An Imperfect Bridge: The *Rodef* Principle and State Self-Defense

At first blush, the *rodef* principle provides a ready foundation for justifying a state's right to collective self-defense. Defensive wars necessarily involve an imminent lethal threat—barring surrender, it is a safe assumption that military forces advance upon an enemy with the firm intention to kill. The bodily integrity of defenders is clearly at stake; notably, in a much more apparent manner than in the case of a home burglary—defensive wars unequivocally present an actualized risk of imminent harm.

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<sup>28</sup> See sources *supra* note 27.

<sup>29</sup> J. Epstein, Arukh ha-Shulan, *Iloshen Mishpat* 358:18.

<sup>30</sup> See *id.* (providing examples demonstrating that a *rodef* should not be killed unless the *rodef* presents an imminent and readily apparent threat).

In the face of such an explicitly lethal threat, based on the aforementioned principles of Jewish law,<sup>31</sup> defenders should be able to protect themselves from lethal force by killing the invaders. Furthermore, the *rodef* principle commands mandatory intervention when a victim faces a severe threat; a sudden attack that initiates a defensive war could certainly imperil the lives of many and justify the use of lethal force to repel the threat posed not only to each defender, but also to the defender's peers. Indeed, under the *rodef* principle, one could argue that defenders are *required* to intervene on each other's behalf and fight the impending aggressors to protect their fellow citizens from the lethal threat posed by the invaders.<sup>32</sup>

However, there are several fatal defects to fully employing the *rodef* principle as a bridge from individual rights to the state's duty of collective self-defense. These defects largely stem from the minimization principles which already shrink the application of the *rodef* principle in individual affairs.<sup>33</sup> Lethal third-party intervention under the *rodef* principle is only permissible in the face of an imminent threat.<sup>34</sup> While a defender living in close proximity to an aggressor's invasion likely faces an imminent

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<sup>31</sup> See discussion *supra* notes 10-16 and accompanying text.

<sup>32</sup> See discussion *supra* notes 18-30 and accompanying text.

<sup>33</sup> See discussion *supra* notes 23-30 and accompanying text.

<sup>34</sup> See discussion *supra* notes 29-30.

threat to the defender's safety, those living far away from the invasion face a much less pressing threat—thereby breaking down the collective “call to arms” for those who reside far away from the battlegrounds of the defensive war. Additionally, even in the face of sudden aggression, surrender is always an option—there is always a non-lethal method of de-escalation which would render the lethal force of a defensive war unnecessary.

Further difficulties with the application of the *rodef* principle as a foundation for state self-defense arise from the tragic cardinal tenet that war almost always entails the heavy loss of life, for both civilian and soldier alike. Under the law of the *rodef*, a rescuer is not required to risk their life in order to save a victim.<sup>35</sup> Thus, soldiers could not be compelled to protect their country under the *rodef* principle, given the high likelihood that the conflict would cost them their lives. Conscription, often a necessary element for a defensive war,<sup>36</sup> cannot be justified using the *rodef* principle as a foundation for state self-defense. Furthermore, the *rodef* principle's prohibition on the death of innocent third parties would render defensive war practically

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<sup>35</sup> See *supra* note 27.

<sup>36</sup> Conscription has been associated with defensive war for thousands of years. See, e.g., J.N. POSTGATE, EARLY MESOPOTAMIA SOCIETY AND ECONOMY AT THE DAWN OF HISTORY 242 (1992) (detailing a system of conscription during times of war dating from the reign of Hammurabi, roughly 1791-1750 BC).

impossible to wage, as the ravages of war almost necessarily pose a lethal danger to innocent civilians on both sides of a conflict.<sup>37</sup> In sum, these flaws fatally doom employing the *rodef* principle as a foundation for state self-defense.

The absence of a clear grounding principle for defensive wars has bewildered scholars of Jewish law.<sup>38</sup> While the *rodef* principle is only a fractured gateway from individual defense to collective defense, it does provide a loose foundation that highlights central values underlying Maimonides's assertion that "saving Israel from the clutches of the enemy that has attacked them" qualifies as a mandatory war.<sup>39</sup> Permitting lethal self-defense for attempted murder and various kinds of attempted rape indicate that Jewish law highly values bodily integrity and personal dignity to such an extent that, under especially dire circumstances, extrajudicial killing is permitted to protect such values. Additionally, the *rodef* principle indicates a communal obligation to protect those facing grave harm—bystanders not only have a right, but a *duty* to aid those in jeopardy. However, the law of the *rodef* is explicitly regulated by several minimization principles—considerations such as the prohibition against wanton

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<sup>37</sup> See *Sanhedrin* 74a; *Yoma* 82b; *Pesahim* 25a.

<sup>38</sup> See discussion *supra* note 9 and accompanying text.

<sup>39</sup> MISHNEH TORAH, *Melakhim* 5:1.

force, the severity of the crime, the imminence of the harm, and the life of the rescuer —indicating that the communal safety values underlying the *rodef* principle are balanced, and ultimately blunted, by a high regard for each individual’s life and sense of autonomy.

Two minimization principles are critically untethered from the law of the *rodef* and unequivocally regulate the conduct of defensive war in Jewish law: *bal tashchit* (“do not destroy”)<sup>40</sup> and the escape-route requirement.<sup>41</sup> *Bal tashchit* requires that fruit trees may not be cut down in times of war to build siege weapons.<sup>42</sup> *Deuteronomy*, the origin of *bal tashchit*, prudently asks “Are the trees people, that you should besiege them?”<sup>43</sup> Wanton destruction of natural resources during war—which are necessary for long-term survival—is strictly forbidden. Notably, there are no qualifiers or limitations on the application of *bal tashchit*; it extends to all wars. Even in the face of imminent aggression, a short-term victory may not overcome long-term survival.

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<sup>40</sup> See *Deuteronomy* 20:19-20; see also MAIMONIDES, MISHNEH TORAH, SEFER SHOFTIM, *Hilkhot Melachim UMilchamotehem* 6:8.

<sup>41</sup> MAIMONIDES, MISHNEH TORAH, SEFER SHOFTIM, *Hilkhot Melachim UMilchamotehem* 6:7.

<sup>42</sup> *Deuteronomy* 20:19-20 (“When you lay siege to a city for a long time, fighting against it to capture it, do not destroy its trees by putting an ax to them, because you can eat their fruit. Do not cut them down.”); see also MISHNEH TORAH, SEFER SHOFTIM, *Hilkhot Melachim UMilchamotehem* 6:8 (“Anyone who cuts down a fruit tree with a destructive intent, should be lashed.”).

<sup>43</sup> *Deuteronomy* 20:19-20.

Maimonides sets out the escape-route requirement: “[w]hen a siege is placed around a city to conquer it, it should not be surrounded on all four sides, only on.”<sup>44</sup> Those who no longer wish to act as aggressors against a Jewish state should always be free to leave the conflict. This has both short and long-term benefits: it helps the current conflict come to an end more quickly and promotes long-term conciliation by waging war more humanely. Although the extent to which the *rodef* minimization principles extend to state self-defense remains unclear, taken together with *bal tashchit* and the escape-route requirement, it seems that self-autonomy and self-preservation tempered against long-term integrity are defining elements of defensive war in Jewish law.

## II. CANON LAW

Human dignity and morality rest at the center of canon law and its justification for defensive wars. This understanding of canon law is largely founded upon *The Catechism of the Catholic Church*—an official summary of Catholic faith aimed “at presenting an organic synthesis of the essential and fundamental contents of Catholic doctrine”<sup>45</sup>—and various papal encyclicals.<sup>46</sup>

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<sup>44</sup> MAIMONIDES, MISHNEH TORAH, SEFER SHOFTIM, *Hilkhot Melachim UMilchamotehem* 6:7.

<sup>45</sup> *The Catechism of the Catholic Church*, 3. “A catechism is a text which contains the fundamental Christian truths formulated in a way that facilitates their understanding.” *Frequently Asked Questions About the Catechism of the Catholic*

Part II.A surveys the role of human dignity in canon law while Part II.B assess how canon law protects human dignity through defensive war. Finally, Part II.C examines how canon law regulates defensive war in light of its moral values—namely, by way of Just War Doctrine.

### A. The Right to Human Dignity

The *Catechism* instructs that “the dignity of the human person is rooted in his creation in the image and likeness of God.”<sup>47</sup> Canon law understands human dignity as signifying an acknowledgement and inherent respect for the representation of God in each person.<sup>48</sup> In *Pacem in Terris*, Pope John XXIII understood each person’s right to human dignity as underlying principles of common humanity and equality: “[N]o one can be by nature superior to his fellows, since all men are equally noble in natural dignity.”<sup>49</sup> Pope John XXIII found this divine imprint of equal dignity to be ever-present and inalienable from humans,

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*Church*, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, <http://www.usccb.org/beliefs-and-teachings/what-we-believe/catechism/catechism-of-the-catholic-church/frequently-asked-questions-about-the-catechism-of-the-catholic-church.cfm> (last visited Dec. 5, 2018).

<sup>46</sup> Papal encyclicals are largely regarded as authoritative statements of Catholic doctrine. See POPE PIUS XII, *HUMANI GENERIS* 20 (“[I]f the Supreme Pontiffs in their official documents purposely pass judgment on a matter up to that time under dispute, it is obvious that that matter, according to the mind and will of the Pontiffs, cannot be any longer considered a question open to discussion among theologians.”).

<sup>47</sup> JOHN PAUL II, *supra* note 45 at ¶ 1700.

<sup>48</sup> See *id.*

<sup>49</sup> POPE JOHN XXIII, *PACEM IN TERRIS* 89 (1963).

despite their personal shortcomings or sinful actions.<sup>50</sup> The natural right to human dignity also gives rise to a collective duty: once one recognizes this dignity as a personal right common across humanity, one is bound to respect and protect this same dignity in others.<sup>51</sup> In turn, respect for human dignity gives rise to a bevy of individual rights: fair wages,<sup>52</sup> the right of free meeting and association,<sup>53</sup> and the right to partake in political activities,<sup>54</sup> to name but a few. This collective duty of respecting human dignity is entrusted to the public authority of the state, which is charged with the responsibility of protecting and safeguarding each citizen's right to human dignity.<sup>55</sup>

## B. Protecting the Right to Human Dignity

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<sup>50</sup> *Id.* ¶ 158 (“A man who has fallen into error does not cease to be a man. He never forfeits his personal dignity; and that is something that must always be taken into account.”).

<sup>51</sup> *Id.* ¶ 44 (“[M]an's awareness of his rights must inevitably lead him to the recognition of his duties. The possession of rights involves the duty of implementing those rights, for they are the expression of a man's personal dignity. And the possession of rights also involves their recognition and respect by other people.”); *see also id.* ¶ 30.

<sup>52</sup> *Id.* ¶ 20 (“A further consequence of man's personal dignity is his right to engage in economic activities suited to his degree of responsibility. The worker is likewise entitled to a wage that is determined in accordance with the precepts of justice.”).

<sup>53</sup> *Id.* ¶¶ 23-24.

<sup>54</sup> *Id.* ¶¶ 26-27.

<sup>55</sup> JOHN XXIII, *supra* note 49 ¶ 60. (“It is generally accepted today that the common good is best safeguarded when personal rights and duties are guaranteed. The chief concern of civil authorities must therefore be to ensure that these rights are recognized, respected, co-ordinated, defended and promoted, and that each individual is enabled to perform his duties more easily.”); *see also id.* at 62 (“One of the principal duties of any government, moreover, is the suitable and adequate superintendence and co-ordination of men's respective rights in society.”).

Pope John XXIII's understanding that canon law imposes upon public authorities an obligation to protect its citizens is not an isolated interpretation. Indeed, the *Catechism* clearly instructs that, in appropriate circumstances, "public authorities . . . have the right and duty to impose on citizens the *obligations necessary for national defense*."<sup>56</sup> Canon law recognizes that national defense may, at times, be entirely necessary for the preservation of the state and the lives of its citizens. Indeed, military service in defense of one's country is recognized as an honorable duty:

Those too who devote themselves to the military service of their country should regard themselves as the agents of security and freedom of peoples. As long as they fulfill this role properly, they are making a genuine contribution to the establishment of peace.<sup>57</sup>

Not only does the state have an inherent authority to wage defensive war, but citizens also have a duty to obey the state and aid in the defense of their country. However, conscientious objectors are exempt from this obligation: "Public authorities should make equitable provision for those who for reasons of conscience refuse to bear arms; these are nonetheless obliged to

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<sup>56</sup> JOHN PAUL II, *supra* note 45 ¶ 2310.

<sup>57</sup> POPE PAUL VI, *GAUDIUM ET SPES* ¶ 79 (1965).

serve the human community in some other way.”<sup>58</sup> While the state is empowered to protect its borders from a pressing threat, the state does not have absolute authority to compel citizens to fight in defense of their country against their will.

Despite these prerogatives about a state’s right to engage in defensive action, canon law views any lethal action with great skepticism and distrust.<sup>59</sup> Drawing from the fifth commandment’s prohibition “thou shalt not kill,” the *Catechism* condemns a desire for lethal vengeance<sup>60</sup> and views it as an acute moral wrong: “Hatred of the neighbor is a grave sin when one deliberately desires him grave harm.”<sup>61</sup> Thus, the intent underlying lethal action is critical. While “it is praiseworthy to impose punishment to correct vices and maintain justice,” deliberate hatred is a sin and cannot serve as the basis for retaliatory action.<sup>62</sup> When motivated by vengeance, lethal action gravely threatens human dignity; as such, non-lethal protection of human dignity is unequivocally favored in canon law.<sup>63</sup>

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<sup>58</sup> POPE JOHN PAUL II, *CATECHISM OF THE CATHOLIC CHURCH* ¶ 2311 (Libreria Editrice Vaticana trans., Double Day 2d ed. 1995).

<sup>59</sup> *See id.* ¶ 2307-08.

<sup>60</sup> *Id.* ¶ 2302 (“By recalling the commandment, ‘You shall not kill,’ our Lord asked for peace of heart and denounced murderous anger and hatred as immoral.”).

<sup>61</sup> *Id.* at 2303.

<sup>62</sup> *Id.* at 2302 (internal quotation marks omitted); *see also id.* at 2303.

<sup>63</sup> *Id.* at 2306 (“Those who renounce violence and bloodshed and, in order to safeguard human rights, make use of those means of defense available to the

This distrust of lethal action readily extends to the “ancient bondage” of war, which canon law views as fraught with evil and injustice—thereby rendering war prone to vengeful violence and especially burdensome on human dignity.<sup>64</sup> As a general principle, “[a]ll citizens and all governments are obliged to work for the avoidance of war.”<sup>65</sup> However, “governments cannot be denied the right of lawful self-defense, once all peace efforts have failed.”<sup>66</sup> Given that war’s violence inherently lends itself to moral wrongs which prey upon human dignity, war is only morally defensible once peace is no longer an option.<sup>67</sup> Even then, war is not favored—as renowned Catholic theologian Saint Aquinas asserted: “it is always sinful to wage war.”<sup>68</sup> In canon law, there are no “good” wars, only “least-bad” wars that are waged as a matter of necessary self-protection. The state’s inherent defensive powers, although necessary to ensure long-term survival, can only be

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weakest, bear witness to evangelical charity, provided they do so without harming the rights and obligations of other men and societies.”).

<sup>64</sup> *Id.* at 2307 (“Because of the evils and injustices that accompany all war, the Church insistently urges everyone to prayer and to action so that the divine Goodness may free us from the ancient bondage of war.”).

<sup>65</sup> *Id.* at 2308.

<sup>66</sup> *Id.*

<sup>67</sup> See sources *supra* notes 59-66; see also GAUDIUM ET SPES, *supra* note 57, at 81 (“It is our clear duty, therefore, to strain every muscle in working for the time when all war can be completely outlawed by international consent.”).

<sup>68</sup> See ST. THOMAS AQUINAS, *Treatise on War*, SUMMA THEOLOGICA II:II 40 (“It would seem that it is always sinful to wage war. Because punishment is not inflicted except for sin. Now those who wage war are threatened by Our Lord with punishment, according to *Matthew* 26:52: ‘All that take the sword shall perish with the sword.’ Therefore all wars are unlawful.”).

exercised as an absolute last resort due to war's propensity to act as an affront to morality and human dignity.

### C. Just War Doctrine

The guiding principles of morality and dignity provide “strict conditions for legitimate defense by military force” and comprise foundational elements of what is commonly known as “Just War” Doctrine.<sup>69</sup> Just War Doctrine is intended to subject defensive war to “rigorous conditions of moral legitimacy.”<sup>70</sup> In order to meet this robust moral standard, Just War Doctrine mandates the contemporaneous presence of four necessary conditions:

At one and the same time:

[1.] the damage inflicted by the aggressor on the nation or community of nations must be lasting, grave, and certain;

[2.] all other means of putting an end to it must have been shown to be impractical or ineffective;

[3.] there must be serious prospects of success;

[4.] the use of arms must not produce evils and disorders graver than the evil to be eliminated. The power of modern means of destruction weighs

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<sup>69</sup> POPE JOHN PAUL II, CATECHISM OF THE CATHOLIC CHURCH ¶ 2309 (Libreria Editrice Vaticana trans., Double Day 2d ed. 1995).

<sup>70</sup> *Id.*

very heavily in evaluating this condition.<sup>71</sup>

The assessment of whether these conditions are met “belongs to the prudential judgment of those who have responsibility for the common good.”<sup>72</sup>

Just War Doctrine proffers rich insight into canon law’s treatment of defensive war. The first three conditions govern *jus ad bellum*, the moral requirements for undertaking a defensive war.<sup>73</sup> The first condition’s reference to “the damage inflicted by the *aggressor*”<sup>74</sup> reinforces that *only* a defensive war can have moral legitimacy—offensively initiating an invasive war that will result in the intentional loss of human life is an utter affront to human dignity. A just war is necessarily a defensive war. However, not all defensive wars pass muster: only defensive wars in response to a “lasting, grave, and certain”<sup>75</sup> harm do not offend human dignity. The second condition reinforces the common understanding throughout the *Catechism* that war, as a Pandora’s Box of mortal sin, should only be undertaken as a last resort when all other means of conflict resolution have failed.<sup>76</sup> The third

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See ST. THOMAS AQUINAS, *supra* note 68, at II:II Q. 40.

<sup>74</sup> *Catechism of the Catholic Church*, at 2309 (emphasis added).

<sup>75</sup> *Id.*

<sup>76</sup> See, e.g., sources *supra* notes 64-67.

condition suggests that, even when all attempts at reconciliation have failed, surrendering to the enemy is favored over waging a suicidal war—there is more human dignity (and less vengeance) in surrender than needlessly wasting one’s life for a futile cause. Interestingly, by relegating the judgement of Just War conditions to “those who have responsibility for the common good,”<sup>77</sup> Just War Doctrine seemingly implies that in democracies, wherein common people are afforded a representative voice in government affairs, citizens share in the state’s role as moral arbiters of war.

However, out of all the conditions of Just War Doctrine, the fourth and final condition has received the most attention from scholars, academics, and political leaders, especially in the twenty-first century.<sup>78</sup> The final condition of Just War Doctrine addresses *jus in bello*—whether a war is conducted justly.<sup>79</sup> This condition is heavily influenced by moral law, which “expresses the dignity of the person and determines the basis for his fundamental rights

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<sup>77</sup> *Catechism of the Catholic Church*, at 2309.

<sup>78</sup> See, e.g., Joseph Boyle, *The Catholic Teaching on War and Peace: Its Application to American Foreign Policy After 9/11*, 3 U. ST. THOMAS L.J. 235, at 238-40 (2005); Jeff McMahan, *Rethinking the “Just War,”* N.Y. TIMES (Nov. 11, 2012), <https://opinionator.blogs.nytimes.com/2012/11/11/rethinking-the-just-war-part-1> (critiquing the application of Just War Doctrine in the modern era); Former President Barack H. Obama, Acceptance Speech for Nobel Peace Prize at the Norwegian Nobel Committee (Dec. 10, 2009) (transcript available at <https://www.nobelprize.org/prizes/peace/2009/obama/26183-nobel-lecture-2009>) (discussing the relevance of Just War Doctrine in the modern era).

<sup>79</sup> See ST. THOMAS AQUINAS, *supra* note 68, at II:II, Q. 40.

and duties.”<sup>80</sup> The *Catechism* instructs that moral law has “permanent validity”—“the mere fact that war has regrettably broken out does not mean that everything becomes licit between the warring parties.”<sup>81</sup> Human dignity does not waver, even during the dire times of a defensive war.

The *Catechism* outlines the principles of moral law informing the fourth condition of Just War Doctrine. Generally, the military response must be a reasonable use of force that is proportionate to the threat.<sup>82</sup> Humane treatment of civilians, wounded soldiers, and prisoners of war is an ever-present and unabating mandate.<sup>83</sup> Similarly, wartime actions in contravention of the law of nations—such as political genocide, torture, and ethnic cleansing—are universally condemned as mortal sins.<sup>84</sup> The sin of mass extermination extends to all who partake; violators can take no refuge under the shield of blind obedience.<sup>85</sup> Notably, the *Catechism* also proscribes the use of weapons of mass

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<sup>80</sup> *Catechism of the Catholic Church*, at 1956 (explaining that moral law is “[t]he natural law, present in the heart of each man and established by reason, is universal in its precepts and its authority extends to all men.”).

<sup>81</sup> *Id.* at 2312 (internal quotation marks omitted).

<sup>82</sup> *Id.* at 2266 (“Legitimate public authority has the right and duty to inflict punishment proportionate to the gravity of the offense.”). An overzealous defense exceeds the legitimate public authority vested in the state.

<sup>83</sup> *See id.* at 2313.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

destruction<sup>86</sup> and warns of the moral dangers of the arms race as a method of deterrence.<sup>87</sup>

The fourth condition of Just War Doctrine, and its associated moral law underpinnings, is largely focused on preventing indiscriminate killing—namely, the killing of noncombatants. The undifferentiated killing of civilians severely implicates the mortal sin of vengeful violence.<sup>88</sup> After all, “Hatred of the neighbor is a grave sin when one deliberately desires him grave harm.”<sup>89</sup> The killing of innocents is certainly one of the gravest possible harms. Weapons of mass destruction and targeted racial attacks escalate this harm and are especially egregious assaults on human dignity. Any peace secured by such means would still be an affront to human dignity.

Just War Doctrine seeks to minimize the infraction of human dignity during war to the narrowest extent possible, including in the context of a just defensive war. Even certain peace time activities that may precede a war—such as stockpiling arms—are denounced. Within the warnings about the arms race

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<sup>86</sup> *Id.* at 2314 (“Every act of war directed to the indiscriminate destruction of whole cities or vast areas with their inhabitants is a crime against God and man, which merits firm and unequivocal condemnation.”). This prohibition encompasses, but is not limited to, atomic, biological, and chemical weapons. *Id.*

<sup>87</sup> *Id.* at 2315 (“The *arms race* does not ensure peace. Far from eliminating the causes of war, it risks aggravating them. . . . *Over-armament* multiplies reasons for conflict and increases the danger of escalation.”).

<sup>88</sup> See discussion *supra* notes 59-63 and accompanying text.

<sup>89</sup> *Catechism of the Catholic Church*, 2303.

lies the implicit message that a defensive war may not be just if it was preceded by peacetime activities that incited aggression. Canon law envelops its narrow justification for defensive war within a deeper fidelity to peace. A just defensive war is one guided by moral law and human dignity—aggression and vengeance have no place on the canon law battlefield.

### III. ISLAMIC LAW

Through even a cursory reading of Islam’s primary holy text, the *Qur’an*, it becomes clear that the fundamental right to life is a predominant and resolute aspect of Islamic law.<sup>90</sup> Per an understanding distilled primarily by the text of the *Qur’an* and the teachings of various Ayatollah,<sup>91</sup> the state’s right to engage in defensive war directly stems out of protecting this fundamental right to life. Part III.A details Islam’s understanding of the right to life and Part III.B describes how the protection of this right to life forms the basis of the state’s right to engage in collective self-defense. Lastly, Part III.C examines Islam’s robust regulation of defensive wars.

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<sup>90</sup> See sources *infra* notes 92-96. The Muslim faith believes that the *Qur’an* was orally revealed by God to the Prophet Mohammad by the archangel Gabriel and reveals divine messages that proclaim fundamental truths. See F.E. PETERS, *THE WORDS AND WILL OF GOD* 11-12 (2003).

<sup>91</sup> Ayatollah are high-ranked Shi’a Muslim clerics. See John L. Esposito & Emad El-Din Shahin, *THE OXFORD HANDBOOK OF ISLAM AND POLITICS*, at 400 (2016).

### A. The Right to Life

Under Islamic law, the prevailing purpose of humanity is to worship God and develop a principled social order.<sup>92</sup> Islam is primarily concerned with ensuring the welfare of humankind which, at its core, requires upholding the sanctity of the common right to life.<sup>93</sup> No value is more central to Islam than the right to life—indeed, the *Qur'an* asserts that unjustly taking the life of one human is as sinful as if one had killed the entire human race.<sup>94</sup> In the analogous words of Ayatollah Imam Mohammed Shirazi, “The killing of a believer is greater in the sight of God than the perishing of the world.”<sup>95</sup> *Qur'anic* principles also provide that humans are the masters of their own lives.<sup>96</sup> Thus, taking these principles together, each person has the fundamental right to life and this right cannot be subject to subjugation.

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<sup>92</sup> *Qur'an* 49:13 (“O mankind, indeed We have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you.”). This Essay relies on translations of the *Qur'an* from THE NOBLE QUR'AN, which was created by the generous assistance of several open-source online Muslim communities. *About, THE NOBLE QUR'AN*, <https://quran.com/about> (last visited Dec. 11, 2018).

<sup>93</sup> *See Qur'an* 49:13; *see also id.* at 17:70 (“And We have certainly honored the children of Adam and carried them on the land and sea and provided for them of the good things and preferred them over much of what We have created, with [definite] preference.”).

<sup>94</sup> *Id.* at 5:32 (“We decreed upon the Children of Israel that whoever kills a soul unless for a soul or for corruption [done] in the land—it is as if he had slain mankind entirely.”).

<sup>95</sup> Ayatollah Imam Mohammed Shirazi, *WAR, PEACE & NON-VIOLENCE: AN ISLAMIC PERSPECTIVE*, at 61 (2002).

<sup>96</sup> *See AYATOLLAH IMAM MOHAMMED SHIRAZI, THE ISLAMIC SYSTEM OF GOVERNMENT* 29, at (Z. Olyabek trans., 2000).

### B. Safeguarding the Right to Life

Given the incredible value Islamic law attributes to the fundamental right to life, it should come as no surprise that the *Qur'an* permits the use of force to protect life: “Permission [to fight] has been given to those who are being fought, because they were wronged.”<sup>97</sup> Of note is that this verse is written in the passive tense and that the aforementioned permission is explicitly limited to “those who are being fought, because they were wronged”—thereby indicating that war is only acceptable when fighting in a defensive capacity.<sup>98</sup> Verse 22:40 elucidates what the *Qur'an* means by “wronged”: “[the wronged are] those who have been evicted from their homes without right—only because they say, ‘Our Lord is Allah.’”<sup>99</sup> Here, the *Qur'an* is focused on protecting against religious persecution of Muslims.<sup>100</sup> Religious coercion is not tolerated—verse 2:256 of the *Qur'an* unequivocally states that “There shall be no compulsion in [acceptance of] the religion.”<sup>101</sup> Thus, permission to engage in defensive war is predicated on protecting the lives of Muslims who have been persecuted or oppressed because of their religion.

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<sup>97</sup> *Qur'an* 22:39; see also *id.* at 42:41 (“And whoever avenges himself after having been wronged—those have not upon them any cause [for blame].”).

<sup>98</sup> See *id.* at 22:39.

<sup>99</sup> *Id.* at 22:40; see also *id.* (“Allah will surely support those who support Him.”).

<sup>100</sup> See *id.*

<sup>101</sup> *Id.* at 2:256.

Verse 2:190 echoes a similar understanding: “Fight in the way of Allah those who fight you but do not transgress. Indeed, Allah does not like transgressors.”<sup>102</sup> “Fight in the way of Allah against those who fight you” affirms the permission given in Verse 22:39 to engage in defensive war once attacked.<sup>103</sup> The command “do not transgress” demonstrates the strictness of this permission—force is solely permissible when used in defense.

However, defensive force is not limited to protecting an individual’s own sovereign—defensive war may also be waged to protect others. The *Qur’an* permits the use of force to defend Muslims who are oppressed and unable to protect themselves in verse 4:75:

And what is [the matter] with you that you fight not in the cause of Allah and [for] the oppressed among men, women, and children who say, "Our Lord, take us out of this city of oppressive people and appoint for us from Yourself a protector and appoint for us from Yourself a helper?"<sup>104</sup>

On the basis of humanitarian grounds, this verse permits—and, judging by its tone, perhaps implores—the use of force to protect any oppressed persons. Taking the aforementioned verse together with verse 22:40, it follows that defensive wars may be waged to

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<sup>102</sup> *Id.* ¶ 2:190.

<sup>103</sup> *See Qur’an* at 2:190.

<sup>104</sup> *Id.* ¶ 4:75.

protect the lives of any Muslims facing religiously-motivated oppression so severe as to compel them to leave their homes—for instance, ethnic cleansing or torture.<sup>105</sup> Notably, this right to protect the lives of third-parties may extend to non-Muslims facing oppression. Verse 4:75 does not explicitly prohibit extending protection to Muslims and non-Muslims alike.<sup>106</sup> Indeed, verse 5:32 of the *Qur'an* states that “whoever saves [a life]—it is as if he had saved mankind entirely.”<sup>107</sup> Such an extension would congeal well with the *Qur'anic* messages of common humanity<sup>108</sup> and mercy for all humankind,<sup>109</sup> as well as Islam’s high regard for the fundamental right to life.

Under limited circumstances, the *Qur'an* also permits the use of protective force against Muslims: “if two factions among the believers should fight, then make settlement between the two. But if one of them oppresses the other, then fight against the one that oppresses until it returns to the ordinance of Allah.”<sup>110</sup> Permission is once again granted to use defensive force to repel oppressors, even those that follow the Muslim faith. Scholars have

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<sup>105</sup> *See id.*; *see also id.* ¶ 22:40.

<sup>106</sup> *See id.* ¶ 4:75.

<sup>107</sup> *Id.* ¶ 5:32.

<sup>108</sup> *See id.* ¶ 2:213..

<sup>109</sup> *See Qur'an* ¶ 21:107 (“And We have not sent you, [O Muhammad], except as a mercy to the worlds.”).

<sup>110</sup> *Id.* ¶ 49:9.

disputed the precise application of this verse to intra-Muslim conflict: some associate it with “day-to-day” conflicts akin to a street brawl or familial dispute,<sup>111</sup> while other interpret this verse as allowing a ruler to employ defensive force against a rebellion.<sup>112</sup> However, this verse’s placatory aims are clear: “if [the oppressor] returns [to Allah’s command], then make settlement between them in justice and act justly.”<sup>113</sup> The *Qur’an* prescribes robust conciliation (a settlement made “in justice”)<sup>114</sup> for intra-Muslim conflict—perhaps an effort to ensure future cohesiveness within the Muslim community.

Even during a righteous defensive war, the *Qur’an* leans toward peace. In accordance with Islamic law, war should be exercised with great restraint and brevity.<sup>115</sup> A defensive war can only persist so long as there is an imminent threat; “there is to be no aggression except against the oppressors.”<sup>116</sup> The *Qur’an* instructs that “if [the aggressor] incline[s] to peace, then incline to it [also] and rely upon Allah.”<sup>117</sup> The justification for a defensive war wanes as soon as the aggressor starts to lose their oppressive

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<sup>111</sup> See Shaykh Ashiq Ilahi Madni (r.a), ANWARUL BAYAN V 178 (2008).

<sup>112</sup> See also Niaz A. Shah, ISLAMIC LAW AND THE LAW OF ARMED CONFLICT: THE ARMED CONFLICT IN PAKISTAN 66-67 (2011).

<sup>113</sup> *Qur’an* 49:9.

<sup>114</sup> See *id.*

<sup>115</sup> *Id.* ¶ 2:190, 193-94; 8:61.

<sup>116</sup> *Id.* ¶ 2:193.

<sup>117</sup> *Id.* ¶ 8:61.

motives—an aggressor need not fully actualize a desire for pacification, merely “incline to it.”<sup>118</sup> In Islamic law, pacifism and conciliation trump even those wars fought in defense of oppression—the fundamental right to life overrides all other worldly concerns.

### C. Islamic Regulation of Defensive Wars

Islam’s sincere regard for the fundamental right to life unwaveringly regulates defensive war as permitted by the *Qur’an*. As a general principle, “Allah does not forbid you from those who do not fight you because of religion and do not expel you from your homes—from being righteous toward them and acting justly toward them. Indeed, Allah loves those who act justly.”<sup>119</sup> As such, the killing of elders, women, children, religious clerics, low-level workers, and the infirm is explicitly forbidden.<sup>120</sup> These noncombatants pose no threat and thus may not be targeted in a defensive war. Moreover, these noncombatants are not simply

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<sup>118</sup> *See id.*

<sup>119</sup> *Id.* ¶ 60:8.

<sup>120</sup> *Sahih Muslim* 19:4320 (“[T]he Messenger of Allah (may peace be upon him) forbade the killing of women and children.”); *Al-Bayhaqi* 16689 (“[T]he Prophet (may peace be upon him) said to an outgoing army, ‘Leave in the name of God, and upon the way of his messenger. Do not kill any old person.’”); *Nayl al-Awtar* 3324 (“[T]he Prophet (may peace be upon him) said, ‘Do not ever kill the people living in towers [monks].’”); *Ahmad* 15562 (recognizing the Prophet’s command to not kill workers who are removed from the hostilities); *Al-Mugni* 7612 (“The blind, the infirm and the monks are not to be killed according to Islamic legal scholars as they are not from among the combatants, similar to the old person.”).

passed over or ignored—the defenders must act “righteously” and “justly” toward them, perhaps insinuating a duty to provide shelter or food if wartime conditions imperil noncombatants, even those with an allegiance to enemy forces.<sup>121</sup> The *Qur’an* also mandates that prisoners of war (former combatants who previously threatened the right to life) be treated with dignity and care: “And they give food in spite of love for it to the needy, the orphan, and the captive, [saying] ‘We feed you only for the countenance of Allah . We wish not from you reward or gratitude.’”<sup>122</sup> Even in tumultuous times of defensive war, one who does not pose an active risk to another’s right to life may not be targeted and must be treated with dignity, regardless of their loyalties or allegiance.

Not only are noncombatants spared in a defensive war, but crucial natural resources are also to be left unravaged. Wanton destruction of nature and “scorched earth” tactics have no place in Islamic law: “[D]o not cut the fruitful trees, or destroy homes. And do not wound the sheep, goats or cattle except to for eating.”<sup>123</sup> These natural resources are crucial elements necessary to ensure the long-term enjoyment of the right to life—humans need

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<sup>121</sup> See *Qur’an* ¶ 60:8.

<sup>122</sup> See *id.* ¶ 76:8-9.

<sup>123</sup> *Al-Muwatta* 949.

sustenance and shelter in order for them and their progeny to survive. “Scorched earth” tactics that target such resources are thus in derogation of the right to life and cannot be tolerated, even in the context of a defensive war.

#### IV. DISTILLING DEFENSIVE WAR ACROSS JEWISH LAW, CANON LAW, AND ISLAMIC LAW

With the fundamentals of defensive war laid bare, this Section addresses areas of overlap and variance across each religion’s approach to a state’s use of protective force. This comparative analysis strives to tease out the underlying values and likely policy goals of the differing approaches to defensive war. Part IV.A considers the individual natural rights in each faith that inform the state’s right to engage in defensive war. Part IV.B analyzes how each religion navigates from these individual rights to the state’s right of self-defense and how this reflects upon each faith’s attitude toward war and peace. Part IV.C examines the breadth and depth of the regulations imposed by each religion upon the state’s right to engage in defensive war.

##### **A. Underlying Conceptualizations of Individual Natural Rights**

Placing a microscope to the individual rights that underly the state's right to engage in defensive war—or in the case of Jewish law, *may* underly—reveals a rich myriad of both common and varying ideals. Both the right to life and the right to human dignity are ever-present values that are found to be inalienable from their human vessels.<sup>124</sup> These natural rights persist vibrantly, deserve protection, and do not dither in the face of dire circumstances or sinful actions. However, the right to self-defense is not an ever-lingering privilege; it is explicitly limited to specific situations—namely, attempted murder, home burglary, and various types of attempted rape.<sup>125</sup> The right to self-defense is only triggered by an imminent threat of sufficient severity. Whereas the aforementioned natural rights in Islam and canon law are permanently rooted in each individual, the right to self-defense only rises to the surface when prompted by the grave threat of an aggressor. Thus, the right to human dignity and the right to life are positive rights which are ultimately protected by lethal force, while the right to self-defense is an exculpatory right that excuses the use of lethal force under precise circumstances.

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<sup>124</sup> See discussion *supra* notes 50, 92-94.

<sup>125</sup> See discussion *supra* notes 12-15.

Within all of these rights lies the basic premise of common humanity—that all humans, at their core, have fundamental values that merit protection. Jewish law recognizes that all humans have a right to shield themselves from grave threats to their bodily integrity: “If someone comes to kill you, rise and kill him first.”<sup>126</sup> There are no exceptions to this rule—under Jewish law, all human bodies are of equal value when facing a lethal threat. However, of tragic note, it does seem that the value of the non-betrothed woman’s bodily integrity is “less equal” in the case of rape.<sup>127</sup> With regard to the right to human dignity in canon law, “*all* men are equally noble in natural dignity.”<sup>128</sup> Islamic law proclaims that *all* humans enjoy the fundamental right to life in very robust terms, wherein one unjust killing is regarded as the equivalent of killing the entire human race.<sup>129</sup> canon law provides an ethereal and intangible understanding of common humanity, while Jewish law and Islamic law notions of equality are more palpable and corporeal—they are rooted in the physical human form. Whereas the right to self-defense and the right to life share an understanding that common humanity lies in an equal right to

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<sup>126</sup> BABYLONIAN TALMUD, *Sanhedrin* ¶ 72a.

<sup>127</sup> See discussion *supra* notes 15-16.

<sup>128</sup> POPE JOHN XXIII, *supra* note 49, at 89 (emphasis added).

<sup>129</sup> See discussion *supra* notes 94-95.

bodily integrity, the right to human dignity seems more akin to an understanding that human equality lies in the soul, not the body.

Canon law and Islamic law expand upon these respective understandings of common humanity by establishing that an individual's recognition of the right to human dignity or the right to life extends outward to a collective recognition of such right. For instance, in referencing personal dignity, Pope John XXIII espoused that "in human society[,] one man's natural right gives rise to a corresponding duty in other men; the duty, that is, of recognizing and respecting that right."<sup>130</sup> In canon law, all are bound to respect each other's individual right to personal dignity. Similarly, as noted above, the *Qur'an* explicitly equates the value of one human life with the value of all human lives—thus, all human lives are interconnected and united.<sup>131</sup> Canon law extends this collective understanding further than Islamic law, and directly points to this collective responsibility as giving rise to additional individual liberties, such as freedom of association and political advocacy.<sup>132</sup> Generally, this extension of an individual right to a collective obligation is possible because the right to human dignity and the right to life are positive rights; such an

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<sup>130</sup> POPE JOHN XXIII, *supra* note 49, at 44; *see also* discussion *supra* note 51.

<sup>131</sup> *See* discussion *supra* notes 92-95.

<sup>132</sup> *See* discussion *supra* notes 50-54.

extension of a narrower exculpatory right, such as the individual right to self-defense, seems impossible.

### **B. Bridging Individual Rights to State Self-Defense**

Not surprisingly, the aforementioned individual rights are zealously protected across their respective religions. It is by way of these protections that the right to engage in defensive war emerges. Of the three religions, Jewish law offers the most amorphous conduit from individual rights to state rights. By enabling third-party bystanders to intervene in a conflict to protect an individual, the *rodef* principle enshrines the value of bodily integrity underlying Jewish law's right to individual self-defense. Upon initial inspection, the *rodef* principle provides a facially plausible bridge from the individual right to self-defense to the state's right to engage in defensive war on behalf of its own citizens<sup>133</sup>—however, as noted above, there are seemingly fatal flaws to this theory.<sup>134</sup> Perhaps defensive wars are mandatory in Jewish law as a matter of necessity—in order for a Jewish state to exist, it, by definition, must be able to defend itself from threats to its existence. It is possible that Maimonides's silence indicates that he believed this principle to be obvious and self-explanatory,

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<sup>133</sup> See discussion *supra* notes 31-32 and accompanying text.

<sup>134</sup> See discussion *supra* notes 33-36 and accompanying text.

and thus no further explanation was required to justify the state's right to engage in defensive war.<sup>135</sup> Regardless, the absence of a clear grounding principle for Maimonides's proclamation that "[s]aving Israel from the clutches of the enemy that has attacked them" is a "mandatory war"<sup>136</sup> sets Jewish law apart from canon law and Islamic law.

Canon law and Islamic law both explicitly justify the state's right to engage in defensive war based on its responsibility to protect the right to human dignity and the right to life, respectively. Canon law charges public authorities with the responsibility of safeguarding each citizen's right to human dignity.<sup>137</sup> Islamic law permits defensive wars for "those who are being fought" to protect the right to life.<sup>138</sup> However, despite the foregoing permissions, both canon law and Islamic law heavily lean toward peace and discourage any form of conflict, albeit under varying methodologies. Canon law finds that non-violent conflict resolution respects human dignity, whereas vengeful means of conflict resolution—such as war—greatly threaten human dignity

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<sup>135</sup> Robert Eisen, Professor of Religion and Judaic Studies and Chair of the Department of Religion at George Washington University at the time of writing, has also noted the absence of a definitive grounding principle for defensive war and has arrived at a similar conclusion. See EISEN, *supra* note 7, at 31-35.

<sup>136</sup> MAIMONIDES, MISHNEH TORAH, *Melachim* 5:1 (Eliyahu Touger trans.).

<sup>137</sup> See discussion *supra* notes 51-56.

<sup>138</sup> See discussion *supra* notes 97-103 and accompanying text.

and constitute grave moral wrongs.<sup>139</sup> As noted above, there is no such thing as a “good” war—it is impossible to wage even a defensive war absent sin.<sup>140</sup> War, in any form, is uniformly discouraged in canon law. This methodology serves to avert war and thereby conserve resources that would otherwise be used in preparation for conflict, and discourages public authorities from resorting to war to resolve political disputes—both of which are likely to provide significant long-term benefits and stability. Under Islamic law, war is only justified to fend off ongoing oppression.<sup>141</sup> Peace is the established norm; war can only exist as a means to repel foreign aggression: “Fight in the way of Allah those who fight you but do not transgress.”<sup>142</sup> Thus, a state of war is an externally-imposed deviation from the status quo. Islamic law favors peace because it is a harmonious status quo that does not impose a heavy burden upon the fundamental right to life. A subtle difference amongst these two faiths thusly arises—canon law predominantly disfavors war while Islamic law favors peace.

Variation also lies within the motivation for war. In Jewish law, defensive war is a means of self-preservation—saving the

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<sup>139</sup> See discussion *supra* notes 60-63.

<sup>140</sup> See discussion *supra* note 67.

<sup>141</sup> See sources *supra* note 115.

<sup>142</sup> *Qur'an* 2:190.

Jewish state from “the clutches of the enemy.”<sup>143</sup> A similar impetus can be inferred from canon law’s mantra that “governments cannot be denied the right of lawful *self-defense* once all peace efforts have failed.”<sup>144</sup> A state needs the right to engage in self-defense when necessary in order to ensure its long-term survival. However, Islamic law focuses on saving those suffering under religious persecution as an additional justification for defensive intervention: “those who have been evicted from their homes without right—only because they say, ‘Our Lord is Allah’” deserve protection.<sup>145</sup> In Islam, freedom to worship the Muslim faith supplements protecting the right to life as justifications for defensive war. Whereas Jewish law and canon law view defensive war solely as a means to protect the state, Islamic law also views defensive war as a means to safeguard religious integrity.

Islamic law also expands upon the breadth of those who may be protected—as noted above, defensive force may be used to protect one’s own sovereign, an oppressed Muslim community, and, perhaps, non-Muslim communities facing dire circumstances.<sup>146</sup> Jewish law similarly espouses broad inclusion

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<sup>143</sup> MAIMONIDES, MISHNEH TORAH, *Melachim* 5:1 (Eliyahu Touger trans.).

<sup>144</sup> POPE JOHN PAUL II, CATECHISM OF THE CATHOLIC CHURCH, 2038 (Libreria Editrice Vaticana trans., Double Day 2d ed. 1995).

<sup>145</sup> See discussion *supra* notes 97-100 and accompanying text.

<sup>146</sup> See discussion *supra* notes 104-109 and accompanying text.

under the *rodef* principle—a bystander could intervene to protect a victim facing a sufficiently grievous threat. The *rodef* principle does not distinguish amongst victims on the basis of faith and thus could be considered the broadest application of an individual right pertaining to defensive force amongst the three religions. However, as noted above, the *rodef* principle has a far murkier application to the state’s right to use defensive force. In contrast, defensive force is only permitted to protect one’s own state in Canon law—another indication of its strong condemnation of all forms of war.<sup>147</sup>

Canon law’s denunciation of war also manifests in its absence of a mandated call to arms. When facing a grievous threat, states are permitted to respond with defensive force, but are not required to do so. Rather, it is the effort to restrain against violent urges that is mandatory: “[a]ll citizens and all governments are *obliged* to work for the avoidance of war.”<sup>148</sup> Islamic law also does not require a defensive response to an imminent threat: “Permission [to fight] has been given to those who are being fought, because they were wronged.”<sup>149</sup> *Permission*

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<sup>147</sup> POPE JOHN PAUL II, *supra* note 56 and accompanying text.

<sup>148</sup> POPE JOHN PAUL II, CATECHISM OF THE CATHOLIC CHURCH, 2308 (Libreria Editrice Vaticana trans., Double Day 2d ed. 1995) (*emphasis added*).

<sup>149</sup> *Qur’an* 22:39; *see also id.* at 42:41 (providing permission, but not a duty, to carry out righteous avengement).

is granted; an obligation is not mandated. However, Maimonides proclaims, in no uncertain terms, that responding with defensive force is a “mandatory war” for the Jewish state once conflict is thrust upon it.<sup>150</sup> The *rodef* principle similarly provides that, barring a lethal threat to the bystander, defensive intervention is an obligation, not merely a permissive option.<sup>151</sup> Thus, in Jewish law, there seem to be stronger underlying currents of commendation for the aggressor and the need for self-preservation—the potential loss of life during the defensive war always justifies the negation of the threat to the community. Canon law and Islamic law permit defensive action when necessary but never fully reach this precipice.

### C. The Regulation of Defensive War

Whereas the prior sections revealed core divergences, the three religions largely regulate war in an analogous manner—perhaps a reflection of a common understanding of how the evils of war should be managed. All three religions require a showing of imminent and severe harm as a necessary precursor to defensive war. For instance, the *rodef* principle, albeit an imperfect foundation, only allows for intervention in the face of an imminent

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<sup>150</sup> MAIMONIDES, MISHNEH TORAH, *Melachim* 5:1 (Eliyahu Touger trans.).

<sup>151</sup> See discussion *supra* notes 20-21, 27.

threat to human life: while the burglar who breaks into a home deserves death because he is intruding upon the space of the homeowners, the burglar who trespasses upon a field does not deserve death because he is removed from the homeowners and does not pose an imminent threat to human life.<sup>152</sup> The *rodef* principle also limits intervention to preventing capital crimes—those most damaging to bodily integrity. Similarly, the *Catechism* requires that “the damage inflicted by the aggressor. . . must be *lasting, grave, and certain*” in order to justify defensive war.<sup>153</sup> Finally, defensive wars are only justified in Islam when citizens are already under attack or are facing such severe oppression that they are being forced to leave their homes—fates that certainly meet, and arguably surpass, the requirement of an imminent and severe threat.<sup>154</sup> Across all these faiths, the great cost imposed by a defensive war can only be justified by a dire and immediate threat.

These religions all explicitly endorse the humane treatment of noncombatants. Jewish law mandates that an escape route be provided during defensive warfare. Once the aggressors no longer wish to continue the hostilities, thereby essentially reducing their

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<sup>152</sup> J. EPSTEIN, *supra* note 29.

<sup>153</sup> POPE JOHN PAUL II, CATECHISM OF THE CATHOLIC CHURCH, 2309 (Libreria Editrice Vaticana trans., Double Day 2d ed. 1995) (*emphasis added*).

<sup>154</sup> See discussion *supra* notes 99, 104-105.

status to noncombatants, they are provided with a means to leave the battlefield.<sup>155</sup> Mercy was favored as the key to long-term self-preservation, as opposed to utterly decimating the aggressor. Canon law and Islamic law both expand upon this principle, albeit in different directions. Canon law not only provides for the humane treatment of noncombatants (“Non-combatants, wounded soldiers, and prisoners must be respected and treated humanely”)<sup>156</sup> and regulates the treatment of combatants (“the use of arms must not produce evils and disorders graver than the evil to be eliminated”),<sup>157</sup> but also proscribes peacetime activities that could result in a disproportionately negative effect on noncombatants—namely, the arms race and the use of weapons of mass destruction (“Over-armament multiplies reasons for conflicts and increases the danger of escalation”).<sup>158</sup>

This broad regulation evidences canon law’s severe distrust and distaste for war. War must be precisely tailored to meet its ends—a scalpel rather than a sledgehammer. The *rodef* principle endorses similarly narrow tailoring but in less explicit terms: the intervenor may only use the level of force necessary to stop the

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<sup>155</sup> See discussion *supra* notes 41, 44.

<sup>156</sup> POPE JOHN PAUL II, CATECHISM OF THE CATHOLIC CHURCH, 2313 (Libreria Editrice Vaticana trans., Double Day 2d ed. 1995).

<sup>157</sup> *Id.* at 2309.

<sup>158</sup> *Id.* at 2315.

aggressor.<sup>159</sup> Both religions are concerned with preventing the overzealous defender's unnecessary destruction.

While canon law horizontally expands the protections for noncombatants, Islamic law expands vertically. Islam features the broadest class of noncombatants that are explicitly protected from the ravages of war: elders, women, children, clerics, workers, and the infirm are not to be harmed<sup>160</sup> and are to be treated kindly and justly.<sup>161</sup> In addition to representing an essentially defenseless population, this large class also represents valuable infrastructure: clerics maintain religious institutions, and low-level workers tend agriculture and maintain the economy—critical aspects of society necessary for long-term survival. By leaving these institutions intact, long-term conciliation becomes a substantially more likely prospect. Whereas Jewish law and Canon law seek to provide for long-term survival through emphasizing self-preservation or de-escalation, Islamic law promotes long-term integrity with respect for key societal institutions, even those under the aggressor's domain.

Finally, all three religions regulate resource management during a defensive war. Both Jewish law and canon law clearly

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<sup>159</sup> See discussion *supra* notes 23-24.

<sup>160</sup> See sources *supra* note 120 and accompanying text.

<sup>161</sup> See discussion *supra* note 121.

prohibit the felling of fruit trees during times of war in an effort to incentivize a focus on long-term needs as opposed to short-term benefit<sup>162</sup> Canon law joins this general proposition, albeit in more nebulous terms, by requiring that “there must be serious prospects of success” before going to war.<sup>163</sup> This statement indicates a desire to disincentivize engagement in rash wars wherein it is likely that resources—be it human dignity, raw natural resources, or financial capital—will be expended for naught. If war is to be undertaken, the outcome must be worth the necessary investment of resources. Thus, this statement regulates resources by determining the circumstances under which they may be expended—namely, a defensive war wherein there is a serious prospect of successfully repelling the aggressors. While this echoes a similar ethos to that underlying Jewish law and Islamic law, it lacks the clear environmental emphasis present in those religions.

#### CONCLUSION

This comparative analysis elucidates three varying expressions of common humanity: the right to self-defense, the

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<sup>162</sup> See discussion *supra* notes 41,43-44, 115.

<sup>163</sup> POPE JOHN PAUL II, CATECHISM OF THE CATHOLIC CHURCH, 2309 (Libreria Editrice Vaticana trans., Double Day 2d ed. 1995).

right to human dignity, and the right to life. Different shades of this common humanity are revealed by holding the latter two positive rights alongside the exculpatory right to self-defense—namely, the more temporal and limited nature of the right to self-defense as compared to the lingering and ever-present right to human dignity and the right to life.

Juxtaposing the extension of these individual rights to the state's obligation to engage in defensive war provides further coloring. The *rodef* principle in Jewish law highlights self-preservation in the face of grave circumstances but does not proffer a complete foundation upon which the state's right to engage in defensive war may rest. The state's collective responsibility springs much more readily from the explicit mandates charging public authorities to protect the right to human dignity and the right to life in Canon law and Islamic law, respectively.

However, these varying shades converge in their regulation of defensive war. Similar concerns abound amongst the three religions: all impress a high regard for the innocent lives of noncombatants. Natural and human resources alike are prudently guarded. Long-term preservation takes precedence over short-term victory. This convergence again evidences a common

humanity across the three religions—all attempt to negate the worst of war's bite by mitigating its most dire consequences. These lessons remain a felt necessity in the defensive conflicts of the modern era, wherein it seems the sword is a far more common implement than the plowshare.