

Thou Shalt Not Abuse Thy Spouse:
*Applying Jewish law in the battle against
domestic violence*

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Introduction

In recent decades “a growing body of legal scholarship is turning . . . to the Jewish legal tradition to advance debate in contemporary American legal theory.”¹ A belated response to the 1970s call for a reconstruction of laws concerning religion and gender, the lawyers’ turn to the Jewish legal mode has been slow in coming.² Looking to improve the American legal system, modern legal scholars have increasingly incorporated Jewish legal concepts into their analyses of health law, criminal law, legal ethics, legal interpretation and constitutional amendment.³ Scholars draw not only upon Jewish law itself to reshape American legal theory, but also Jewish history, philosophy and interpretive techniques.

While some scholars find Jewish law to be “so nearly identical . . . to the American domain,”⁴ others reject the applicability of a religious-based and ancient legal code to a secular and modern legal system.⁵ According to law professor Steven Friedell, “Jewish law has policies and purposes that are unique and make the application of Jewish law in a modern legal system difficult.”⁶ Though there are fundamental differences between secular and religious legal systems, there are some conceptual similarities between American and Jewish law that merit comparison. Regardless of whether the Jewish legal

¹ Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 Harv. L. Rev. 813, 814 (1993).

² Howard J. Vogel, *A Survey and Commentary on the New Literature in Law and Religion*, 1 J.L. & Religion 79, 142 (1983).

³ Samuel Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 Hast. Const. L. Quart., 441, 444 (1997) (citing as examples Stone, *supra*, note 1 at 816; Dena S. Davis, *Method in Jewish Bioethics: An Overview*, 20 J. Contemp. L. 325 (1994); Irene Merker Rosenberg & Yale L. Rosenberg, “*Perhaps What Ye Say Is Based Only on Conjecture*”: *Circumstantial Evidence, Then and Now*, 31 Hous. L. Rev. 1371 (1995); Gordon J. Beggs, *Proverbial Practice: Legal Ethics from Old Testament Wisdom*, 30 Wake Forest L. Rev. 831 (1995)).

⁴ David R. Dow, *Constitutional Midrash: The ,* 29 Hous. L. Rev. 543 (1992)*Rabbi’s Solution to Professor Bickel’s Problem*, 29 Hous. L. Rev. (1992).

⁵ Stone, *supra* note 1, at 894.

⁶ Steven Friedell, *The “Different Voice” in Jewish Law: Some Parallels to a Feminist Jurisprudence*, 67 Ind. L.J. 915 (1992).

model is wholly applicable to the American legal model, Jewish law may elucidate issues in American constitutional theory, particularly within feminist jurisprudence.

Students and scholars have noted the similarity between Jewish law and feminist ideals.⁷ “Although Jewish law was developed almost entirely by men, it nevertheless incorporated many of the ideals and approaches that feminists of the Gilligan school would favor.”⁸ Carol Gilligan suggests in her influential book *In a Different Voice*, that women tend to develop a distinct set of standards from men, including a fear of competitive situations and impersonal achievement.⁹ She also posits that women see moral issues in terms of relationships and responsibilities and not in terms of rights and rules.¹⁰ Many legal scholars reacted to Gilligan’s book by trying to incorporate her theses into American law. Legal reforms such as placing less emphasis on rules and precedents and placing greater importance on the relationship of the parties were increasingly proposed.¹¹ Further, legal scholars suggested judges should encourage solutions based on specific contexts and relationships and place greater emphasis on mediation.¹² Implementation of such reforms would mean lawyers and judges would turn away from the advocacy model and focus on collaborative techniques to create healthy solutions to problems.¹³

⁷ George Fletcher, *Ho and Halakha*, 1 S’vara 13, 14 (1990).

⁸ Friedell, *supra* note 6, at 918.

⁹ Carol Gilligan, *In a Different Voice* 100 (1982).

¹⁰ *Id.*

¹¹ Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 Berkeley Women’s L.J. 39, 52-53 (1985).

¹² *Id.* at 52.

¹³ *Id.* at 53.

However, critics of Carol Gilligan feared that her approach would reinforce a stereotype of women as unnaturally suited for particular roles in society.¹⁴ As a result, scholars have turned to Jewish law to gain insight in how to avoid the stereotyping of women and prove that the “values of responsibility and caring are not necessarily the province of women alone and are therefore not necessarily the result of an innate psychology of young girls.”¹⁵ As American culture has intertwined caring and nurturing with the female persona, Jewish law serves as a contrast case, described by scholars as “anti-hierarchical, egalitarian, communitarian, written in a feminist voice and based on reciprocal obligations rather than rights.”¹⁶ A close analysis of Jewish law reveals a culture that parallels feminist jurisprudence and exhibits a legal system that attributes responsibility and caring to the entire community.

The purpose of this paper is to analyze whether the ideals of Jewish legal model can and should be effectively incorporated in the American legal system, particularly concerning domestic abuse laws. Part one presents a general overview of the sources of Jewish law. Part two discusses how domestic abuse is dealt with in the American legal system, through criminal, civil and family law. Part three deals with how domestic abuse is handled according to Jewish law. Part four offers suggestions to how Jewish legal ideals can be used to improve American laws dealing with domestic violence. The paper concludes with an analysis of whether religious based laws can truly apply to a secular system.

¹⁴ See Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 Harv. L. Rev. 1749 (1990); See also EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264 (N.D. Ill. 1986), aff'd, 839 F.2d 302 (7th Cir. 1988) (small number of women employed in commission sales jobs is not due to unlawful discrimination but can be explained in part by tendency of women to prefer jobs that do not involve cutthroat competition).

¹⁵ Friedell, *supra* note 6, at 918.

¹⁶ Stone, *supra* note 1, at 819.

I. Sources of Jewish Law

Judaism is recognized by many scholars as the first and oldest religion.¹⁷ Though Jewish law does not govern the citizens of any particular state, its tenets provide guidance for Jewish persons all over the world. The Jewish law's written record is extensive, spanning over two thousand years and covering almost "every aspect of daily life in many countries and a variety of cultures."¹⁸ The detailed record allows scholars to more easily comprehend the development of Jewish law and how ancient tenets apply to modern jewries.

The collective body of Jewish law is called Halakha, which literally translates to "the path" or "the way of the walking."¹⁹ Historically, Halakha served many Jewish communities as an enforceable avenue of civil and religious law.²⁰ Halakha (Hebrew: הֲלֹכַה) is the collective corpus of Jewish religious law, based on the commandments in the Torah (five books of Moses) and later rabbinic law (the Mishnah and Talmud) as well as customs and traditions.²¹ The Halakha guides all aspects of human life, both physical and spiritual and provides guidelines to cover a wide variety of situations and principles.

The Torah's commandments deal with a wide range of topics, including among others the tabernacle and its rituals and priests, holidays, diet, sexual relations, purity, torts and penalties.²² The Torah is not arranged as an organized system of regulations, but rather

¹⁷ Ivan Strenski, *Thinking About Religion: An Historical Introduction to Theories of Religion*, 21 Wiley Blackwell (2006) (suggesting Judaism is the oldest religion).

¹⁸ Friedell, *supra* note 6, at 919.

¹⁹ H.M. Vroom, Jerald D. Gort, *Holy Scriptures in Judaism, Christianity and Islam: Hermeneutics, Values and Society*, 48 Rodopi (1997).

²⁰ Leon Klenicki, Geoffrey Wigoder, *A Dictionary of the Jewish-Christian Dialogue*, 119 Paulist Press (1995).

²¹ Danny Ben-Moshe, Zohar Zegev, *Israel, the Diaspora and Jewish Identity*, 319 Sussex Academy Press (2007).

²² Goldstein-Goren International Center for Jewish Thought, "Halakha-Jewish Law", www.bgu.ac.il/humsos (accessed April 2009) available at <http://hsf.bgu.ac.il/cjt/files/lectures/gloss.htm#Halakhah>.

as many distinct groups of law, that relate to the biblical story lines.²³ As developed in subsequent literature to the Torah by Mishnah and Talmudic rabbis, the Torah offers 613 commandments or “mitzvot,” to be followed by those in Jewish communities. The mitzvot themselves are further divided into 248 positive mitzvot and 365 negative mitzvot, which are treated differently in terms of Divine and human punishment in the event one of the mitzvot is broken.²⁴ Positive commandments (of which tradition holds there are 248) require an action to be performed, and thus bring one closer to God. Negative commandments (traditionally 365 in number) forbid a specific action; thus violations create a distance from God. In striving to "be holy" as God is holy, one attempts so far as possible to live in accordance with God's wishes for humanity, striving to more completely live with each of these with every moment of one's life.²⁵ A different approach divides the Torah's laws into a different set of categories: laws in relation to God and laws about relations with other people.²⁶ There is a notion in Halakha that violations of the latter are more severe, in certain ways, because of the requirement one must obtain forgiveness both from the offended person and from God.²⁷

Although the Torah serves as the primary source of Halakha, Jewish law is also based on the halakhic process, or a religious-ethical system of legal reasoning.²⁸ In assessing and determining Jewish law, rabbis look to Jewish literature, particularly the Mishnah and

²³ David J. Zucker, *The Torah: an Introduction for Christians and Jews*, 9 Paulist Press (2005).

²⁴ Herbert Alan Davidson, *Moses Maimonides: The Man and His Works*, 168 Oxford University Press (2005).

²⁵ *Id.*

²⁶ Max I. Dimont, *Jews, God and History*, 35-35 Signet Classic (2004).

²⁷ Marc Angel, *Exploring the thought of Rabbi Joseph B. Soloveitchik*, 270 ("[The] understanding of repentance shifts the focus from God's activity to that of man. . . Though man may call upon Divine benevolence to achieve atonement, he acts on his own in order to deserve bestowal of kindness.").

²⁸ Louis E. Newman, *Past Imperatives: Studies in the History and Theory of Jewish Ethics*, 104 ("In each rabbi's analysis, legal precedents are cited and analyzed using methods of legal reasoning.").

the Talmud.²⁹ The Mishnah is the first topical compilation of rabbi-made oral law and was authored around 200 C.E.³⁰ Rabbinic scholars following this period studied, clarified and specified how the Mishnah was to be applied in everyday Jewish life. From 200 – 500 C.E.. Jewish scholarship focused on creating a comprehensive collection of religious literature for which Jewish persons to abide.³¹ Rabbis during this period are referred to as Amora'im and through their studies and work consolidated their findings in the Talmud, whose framework was based upon the Mishnah and which contained an intricate body of judicial opinions, legislation, customs and recommendations.³² Talmudic texts deal with many issues outside the typical body of law and thus Jewish texts following this period expanded on topics outside traditional legal issues.³³

Upon completion of the Talmud, Jewish scholars began codifying Jewish law so as to make it easier for comprehension and study.³⁴ The main codes are the Maimonides' Mishneh Torah (1135-1204), the Tur (1270-1340) and the Shulhan Arukh (1488-1575), which together are universally accepted as the authoritative code of Jewish Law.³⁵ Over

²⁹ Davidson, *supra* note 24, at 189 (The halakhic system contemplated by these works is designed to govern every aspect of human life, secular as well as religious, communal as well as individual.).

³⁰ Menachem Elon, *Jewish Law - History, Sources, Principles* (vol. 3, 1994).

³¹ Klenicki, *supra* note 19, at 118.

³² *Id.* ("Subsequent generations of Rabbis thoroughly analyzed the Mishnah as well as other teachings and traditions of the rabbis who lived during the time and prior to the formulation of the Mishnah. The analysis and discussion of the Mishnah is known as *Gemara*, and the Mishnah and *Gemara* together are known as the Talmud.").

³³ Patrick Glen, *Legal Traditions of the World: Sustainable Diversity in Law*, 103 Oxford University Press (2007) ("The jewish tradition is a normative or legal tradition in much the same measure as it is a religious tradition. The two have become fused in the idea that the divine will express itself in legal norms, which have sanctions, leaving relatively little outside the reach of the law, or halakha. The divine character of the norms, and the love of study, have pushed Talmudic law to cover almost all of life, in a way that western law can probably never reach.").

³⁴ Klenicki, *supra* note 19, at 118.

³⁵ Michael Walzer, Menachem Lorberbaum, Noam J. Zohar, Ari Ackerman, *The Jewish Political Tradition Volume II: Membership*, xx Yale University Press (2006) (There are five classical Jewish codes: *Alfasi*, *Maimonides*, *Rosh*, *Tur* and *Shulhan Arukh*. However, only *Maimonides'* *Mishneh Torah* and the *Shulhan Arukh* have been translated into English.).

the last two thousand years, Jewish texts and traditions have progressively been analyzed, organized and interpreted so as to create a cohesive legal system.

II. Domestic Abuse Laws in the American Legal System

The existence of the American legal system represents a speck on the timeline on which Jewish law has evolved. The secular nature of the American legal model distinguishes it from the Jewish legal model and its mechanisms to govern spousal relations. The American legal system addresses domestic abuse in three main schemes: criminal law, civil law and family law.³⁶

[T]he three branches of the law have joined forces and have created various instruments in an attempt to eradicate this terrible phenomenon. Criminal law has contributed modes of punishment, civil law has provided methods of protecting battered family members (protective orders), and family-divorce law has recognized spousal abuse as grounds for divorce.³⁷

According to the United States Department of Justice, there has been a substantial increase in the instances of domestic violence over the last twenty years.³⁸ The federal legislature has acted in an attempt to remedy such an epidemic. Legislation such as the Violence Against Women Act³⁹ (signed as Public Law 103-322 by President Bill Clinton

³⁶ Yuval Sinai, Benjamin Shumeli, *Changing the Current Policy Toward Spousal Abuse: A Proposal for a New Model Inspired by Jewish Law*, *Hast. Int. L. Rev.* 155, 158 (2009).

³⁷ *Id.*

³⁸ See Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Just., NCJ 181867, *Extent, Nature, and Consequences of Intimate Partner Violence*, at iii (2000), available at <http://www.ojp.usdoj.gov/nij/pubs-sum/181867.htm> (In a 1995-1996 study conducted in the 50 States and the District of Columbia, nearly 25% of women and 7.6% of men were raped and/or physically assaulted by a current or former spouse, cohabiting partner, or dating partner/acquaintance at some time in their lifetime.); See also Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Just., NCJ 183781, *Full Report of the Prevalence, Incidence, and Consequences of Intimate Partner Violence Against Women: Findings from the National Violence Against Women Survey*, at iv (2000), available at <http://www.ojp.usdoj.gov/nij/pubs-sum/183781.htm> (Approximately 1.3 million women and 835,000 men are physically assaulted by an intimate partner annually in the United States.).

³⁹ The Violence Against Women Act imposes rather heavy federal criminal sanctions (fines and/or up to twenty years in prison) for traveling or causing another person to travel across state lines for the purpose of committing spousal abuse (including an effort to kill, injure, harass, or intimidate a domestic partner) or in order to violate a state's protective order.

on September 13, 1994) serves to enhance investigation and prosecution of violent crimes perpetrated against women.

Though the federal legislature has acted, states' treatment of domestic abuse remains fragmented and inconsistent. To date, no state has enacted specific domestic abuse laws in the tort, criminal or family law realms.⁴⁰ Instead, spousal abuse must fall under an already existing penal category⁴¹ or tort cause of action⁴² for successful prevention. Further, states differ according to how they handle domestic abuse within their respective jurisdictions. Some states even differ in regard to how they handle different kinds of abuse⁴³ within their jurisdiction.

a. Domestic Abuse under American Tort Law

Under traditional common law, the doctrine of immunity in intra-familial relations prevailed.⁴⁴ Thus, one spouse suing another for abuse was previously blocked.⁴⁵ Because tort claims amongst members of a family unit could potentially destroy harmony within the family, such tort claims were viewed as unnecessary and harmful.⁴⁶ The

⁴⁰ Sinai, *supra* note 36, at 158.

⁴¹ Eg. assault or battery in criminal law or civil law and IIED under tort law

⁴² Sinai, *supra* note 36, at 158 ("These legal systems do not recognize spousal abuse as independent grounds for tort claims. Rather, they choose other, more general, arrangements to deal with it; this indicates that the legal treatment of the problem is incomplete.").

⁴³ States have different policies and laws regarding domestic abuse depending on whether the abuse is physical, sexual or emotional.

⁴⁴ Vincent B. Hasselt, *Handbook of Family Violence*, 215 (The woman's identity as an individual ceased the moment she became a wife. Under common law, wives had no right to sell, sue or contract without their husband's approval.).

⁴⁵ Sinai, *supra* note 36, at 161 (The rationale for spousal immunity was the view of the husband and the wife as a unified entity in virtue of the marriage, and a person cannot commit a tort against himself.).

⁴⁶ Hasselt, *supra* note 44, at 215 ("The reasoning followed that since a husband and wife were legally one, the law would not allow a person to sue himself." Interspousal immunity was also defended for centuries with the rationale that if man and wife were legally one, then one could not rape himself. Spousal immunity may have also been motivated by economic factors).

doctrine of spousal immunity has since been abrogated in most states,⁴⁷ though not all states, making tort causes of action against a spouse generally actionable.⁴⁸

Even as some states permit interspousal causes of action, no state has yet crafted a specific spousal abuse tort. “Spouses who are abused either physically, sexually, or emotionally, must sue under the same tort claims that everyone else uses, such as assault, battery, slander, and intentional infliction of emotional distress (IIED).”⁴⁹ Different states take different approaches concerning tort causes of action against a spouse as each state mandates and makes its own laws. For example, in some states, spousal immunity may only be abrogated when certain conditions are met.⁵⁰ Such conditions include extreme intentional torts, when spouses are sufficiently separated or when an extremely violent act has been committed or vehicular torts.

While physical harms to a spouse are readily noticeable and generally actionable, emotional harms often lay undetected. Many states have crafted the intentional infliction

⁴⁷ Mark Ellman, Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?*, 55 Md. L. Rev. 1268, 1282-1283 (1996).

⁴⁸ George C. Christie, James E. Meeks, Ellen S. Pryor, Joseph Sanders, *Cases and Material on the Law of Torts*, 543-545 4th ed. 2004); See also Leonard Karp, *Domestic Torts: Family Violence, Conflict and Sexual Abuse*, 683-686 (2005) (listing the states which have not fully abrogated the interspousal immunity doctrine).

⁴⁹ Sinai, *supra* note 36, at 162.

⁵⁰ In Utah spousal immunity is abrogated only for intentional torts. See *Stoker v. Stoker*, 616 P.2d 590 (1980). In Idaho spousal immunity is abrogated only for intentional torts and vehicular torts. See *Lorang v. Hays*, 209 P.2d 733 (1949); *Rogers v. Yellowstone Park Co.*, 539 P.2d 566 (1975). In Florida, spousal immunity was abrogated only for extreme intentional torts and where spouse dies between alleged wrongful conduct and commencement of suit, where the claim is limited to the amount of insurance. See *Waite v. Waite*, 618 So. 2d 1360 (1988); *Sturiano v. Brooks*, 523 So. 2d 1126 (1993). In Georgia there is no interspousal immunity from wrongful death actions. See *Harris v. Harris*, 313 S.E.2d 88 (1984); *Smith v. Rowell*, 335 S.E.2d 461 (1985). See also *Jones v. Jones*, 376 S.E.2d 674 (1989). In Louisiana spousal immunity was never fully abrogated, but interspousal torts are allowed when spouses are judicially separated. See La. Rev. Stat. Ann. § 9:291. In Iowa spousal immunity was abrogated for personal injury actions. See *Shook v. Crabb*, 281 N.W.2d 616 (1979). In Nevada and Vermont spousal immunity was abrogated for vehicular torts only. See *Rupert v. Stienne*, 528 P.2d 1013 (1974); *Richard v. Richard*, 300 A.2d 637 (1973). In Massachusetts the immunity was abrogated for vehicular torts and later for other personal injury torts; exceptions to be determined by the court. See *Lewis v. Lewis*, 351 N.E.2d 526 (1976); *Brown v. Brown*, 409 N.E.2d 717 (1980).

of emotional distress tort to deal with such emotional domestic abuse. The Restatement (Second) of Torts defines IIED:

- (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
- (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
 - (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
 - (b) to any other person who is present at the time, if such distress results in bodily harm.⁵¹

Like torts concerning physical harms, IIED is not universally applied and accepted in all states.⁵² Further, IIED claims often fail because the spouse's conduct was not "sufficiently outrageous" or the emotional distress was not accompanied by physical harm.⁵³ IIED verdicts are even more difficult to attain when the spouses have divorced subsequent to the emotional abuse. Courts often connect emotional distress to the ordinary course of divorce⁵⁴ and liability is only found where the conduct is so outrageous in character that it goes beyond all bounds of human decency, and to be "regarded as atrocious and utterly intolerable in a civilized society."⁵⁵

The pre-existing relationship between married parties appears to hinder successful tort suits between spouses. Through interspousal immunity and the high burden of proof

⁵¹ Restatement (Second) of Torts, section 46.

⁵² Most states have accepted and enforced the IIED tort, with a few exceptions. Only South Dakota has prohibited such claims (on public policy grounds). New York does not currently recognize IIED claims between spouses. However, New York has in the past allowed claims for "intentional infliction of severe emotional distress" between common law spouses. Other states have dealt with the issue with seeming acceptance, but some of them have not found conduct outrageous enough to qualify as interspousal IIED.

⁵³ Alba Conte, *Sexual Harassment in the Workplace*, 315 Aspen Publishers (1999) ("The conduct for extreme and outrageous conduct is extremely difficult to satisfy.").

⁵⁴ See e.g., *Koepke v. Koepke*, 556 N.E.2d 1198, 1200 (Ohio 1989)(noting "almost all divorce actions involve some form of emotional distress.").

⁵⁵ Conte, *supra* note 53, at 396.

in IIED claims (at least in states that recognize the tort)⁵⁶, some states make it difficult for married persons to bring tort causes of action in regard to domestic abuse. The vast difference in how respective states deal with tort suits between spouses means certain spouses could bring a claim under a certain set of facts in one state, but not another. Even in the majority of states where interspousal suits are permitted, the special relationship between married parties fails to be considered regardless if the suit is brought against a spouse or a complete stranger.⁵⁷

b. Domestic Abuse under American Criminal Law

Under original common law, a wife could not bring a rape claim against her husband because a man and wife were deemed a single unit and one could not bring a claim against himself.⁵⁸ States were hesitant to interfere with relations between married persons and generally allowed wedded parties to sort out their own affairs.⁵⁹ Much like tort law, criminal law has progressed and physical and sexual abuse amongst spouses is now a ripe claim for criminal courts.⁶⁰ However, a spouse's conduct must fall under a previously defined crime, and a separate "domestic violence" offense that elaborates different schemas of spousal abuse ceases to exist.⁶¹ While certain states define domestic abuse in

⁵⁶ In the U.S., there is no clear rule for interspousal tort claims in general and in cases of IIED in particular. Less than half the states have written laws allowing IIED claims between spouses; in the other states, the question is still open.

⁵⁷ Robin Fretwell Wilson, *Reconceiving the Family*, 18 Cambridge University Press (2006) ("It has long been understood that there is both a public and private interest in marriage. . . Unfortunately, the drafters seem to conflate those separate interests. They simply do not recognize the validity or scope of the public interest in marriage.").

⁵⁸ Hasselt, *supra* note 44, at 215.

⁵⁹ *Id.*

⁶⁰ Nancy K. D. Lemmon, *Domestic Violence Law: A Comprehensive Overview of Cases and Sources*, 463 Austin & Winfield (1996) (With the abrogation of the marital rape exemption, the criminal justice system will no longer legitimize marital rape, and the institution of marriage no longer stands as a bar to interspousal crimes.).

⁶¹ Carl G. Buzawa, *Domestic Violence: The Criminal Justice Response*, 16 (Most domestic violence legislation has defined violence as an individual act, usually a physical assault or threat of physical harm intended to cause physical harm.).

their laws, definitions are usually based upon pre-existing notions of assault and battery.⁶²

Thus, one's marital status is only significant in defining their conduct as "domestic abuse" as opposed to "assault," "battery" or "rape."

States that have specific domestic abuse laws generally enact such laws as protective measures. Criminal sanctions are rarely enforced as these laws usually result in injunctive relief or protective orders.⁶³ Further, "[m]ost of the states have no specific felonies for spousal or partner abuse; at most they define domestic abuse as fitting within the normal definition of existing felonies . . . and do not include any special or increased criminal punishments for domestic abuse."⁶⁴ Criminal sanctions may result from violations of protective orders, though judges rarely impose such penalties.⁶⁵

Much like tort law in the United States, criminal law lacks effective means to protect spouses from emotional abuse.⁶⁶ Emotional abuse does not fit under the framework of any existing offense and thus is overlooked both by states that have domestic abuse laws and those that do not. While penal laws such as assault, battery and rape may serve as a deterrent to physical and sexual abuse, emotional abuse is left without an effective legal response.⁶⁷

⁶² *Id.*; See e.g., Ariz. Rev. Stat. Ann. § 13-3601 (2008) (Crimes of domestic violence are generally considered in Arizona as normal crimes committed against family members. Three convictions of domestic violence can result in a felony for the third offense. Also, crimes of domestic violence with a firearm or against pregnant women can receive harsher punishments.); See also Cal. Fam. Code § 6211 (2008); See also Md. Code Ann., Fam. Law § 4-501 (2008) (In California and Maryland, Domestic abuse is defined as the commission of standard crimes against the person, etc. amongst family or partners.).

⁶³ Buzawa, *supra* note 61, at 240 (noting a majority of judges rarely or never used criminal sanctions when a protective order was violated.).

⁶⁴ Sinai, *supra* note 36, at 178-179.

⁶⁵ Buzawa, *supra* note 61, at 240.

⁶⁶ Wilson, *supra* note 57, at 18 (noting that domestic violence legislation recognizes that physical battery between spouses is not acceptable, but fails to recognize generally accepted standards of minimum acceptable behavior for spouses.); See also Rosemary A. Chalk, Patricia King, Board on Children, Youth, and Families (U.S.). Committee on the Assessment of Family Violence, *Violence in Families*, 174 National Academies Press (1998).

⁶⁷ Sinai, *supra* note 36, at 179.

c. Domestic Abuse under American Family Law

Family law courts provide limited remedies to spouses who suffer from domestic abuse. Remedies include protective orders and temporary restraining orders, though protective orders are more commonly issued to prevent domestic violence.⁶⁸ Under a protective order from the court, the defendant spouse is typically ordered out of the home and the petitioner is given temporary possession of the family residence.⁶⁹ A petitioner must show that harm is likely to occur without the order to obtain such a protective order.⁷⁰ The defendant spouse may be ordered to stay away from the petitioner's home, work, or school and some state family courts consider long-term remedies such as requiring the defendant to undergo counseling.⁷¹ In addition to protective orders, family courts may also award the petitioner temporary child custody, child support, spousal support and attorneys' fees.⁷² Thus, protective orders may deprive the defendant of fundamental interests such as home, property and the right to their children in the interest of preventing immediate harm and abuse.

Despite constitutional challenges to such measures, all states have passed statutes that establish guidelines for attaining domestic violence protective orders.⁷³ The remedies and

⁶⁸ Chalk, *supra* note 66, at 173 (“Beginning with the passage of the Pennsylvania Protection from Abuse Act in 1976, every state now provides for protective orders in cases of domestic abuse. Protective orders are civil injunctions that establish restraints against a person accused of threatening or harassing the individual who requests the order.”).

⁶⁹ Lynette Feder, *Women and Domestic Violence*, 36 Haworth Press (1995) (noting virtually all jurisdictions authorize the court to grant the petitioner exclusive possession of the family home, and to evict the abuser from the home).

⁷⁰ *Id.* at 32 (noting conduct that is considered sufficient to obtain a protective order will vary among statutes); See also Catherine F. Klein, Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra L.Rev. 801 (1993).

⁷¹ Feder, *supra* note 69, at 35 (In all states, courts can order the respondent to refrain from entering the victim's residence, school, property or place of employment, as well as any other place that is specified in the order. The Model Code and most state statutes include such catch-all provisions stating that a court can order such other relief as it deems necessary to provide for the safety and welfare of the petitioner.).

⁷² *Id.*

⁷³ Leonard Karp, *Domestic Torts: Family Violence, Conflict, and Sexual Abuse* 116, 69-70 (vol. I. 2005).

procedures for such protective orders are similar from state to state and apply not just to spouses, but any member of a household.⁷⁴ Generally, protective orders may be issued ex parte which typically last for a short period of time or issued following a hearing which can last up to two years.⁷⁵ The petitioner must allege some kind of previous abuse, though states vary on the specific allegations.⁷⁶ Protective order statutes are enacted specifically to prevent physical abuse, but some states allow protective orders for other kinds of abuse including sexual abuse, emotional abuse, verbal abuse and severe emotional distress.⁷⁷ Punishments for violating protective orders also vary between states.⁷⁸ Protective order violations typically result in a misdemeanor, but may also be considered either a civil or criminal contempt of court, punishable by fine or incarceration.⁷⁹

States also allow persons to obtain a temporary restraining order against their abusive spouse. However, temporary restraining orders are seldom used as means to prevent domestic violence as they are far less effective than protective orders in protecting the petitioner.⁸⁰ Also, the protective order can be issued in conjunction with other remedies⁸¹ and is a much more time efficient mean to protect oneself in the face of abuse. Protective orders are relatively simple to obtain, requiring only that the petitioner submit the proper

⁷⁴ Chalk, *supra* note 66, at 173

⁷⁵ *Id.*

⁷⁶ Feder, *supra* note 69, at 32 (“Assault and battery are the most common offenses on which a protection order will be based. . . An order may be issued based on physical abuse whether or not the conduct resulted in visible physical injury to the victim. In most states a protective order can also be awarded on sexual assaults, threats, attempts to harm, and damage to property.”).

⁷⁷ *Id.* at 33 (Examples of emotional abuse include threats, insults and degrading comments); See e.g., Del. Code Ann tit. 10 § 945 (1992); Haw. Rev. Stat. § 586-1; N.M. Stat. Ann. § 40-13-2(c)(2) (1993); N.Y. Fam. Ct. Act § 821-1(a) (1994).

⁷⁸ Feder, *supra* note 69, at 34-35.

⁷⁹ *Id.*

⁸⁰ Karp, *supra* note 73, at 91 (The preliminary injunction does order both parties not to harass, molest, and assault each other, but law enforcement will generally not prosecute criminally because the injunction is not an order of protection.).

⁸¹ *Id.*

application to the court and do not require the use of a lawyer.⁸² Though accessibility to protective orders make them an effective means to prevent domestic violence, “in certain states the orders do not cover sexual abuse or emotional or verbal abuse/distress (or sometimes include only severe emotional abuse).”⁸³ Thus, many types of abuse other than physical abuse will not qualify the petitioner as worthy of protection.

III. Domestic Abuse Laws in the Jewish Legal Model

In contrast to the highly legalistic American law, Jewish law is not as concerned with theoretical niceties.⁸⁴ While the study of “Jewish law can be highly technical and abstract,”⁸⁵ the law’s application to civil and criminal disputes is malleable and distinct to each case according to the facts.⁸⁶ When ancient rabbis applied Jewish law, they emphasized compromise and encouraged parties to reach a mutually agreed settlement.⁸⁷ When a settlement could not be reached, community members or rabbis would attempt to mediate.⁸⁸ If mediation failed, litigants would be encouraged to authorize a panel of judges or arbiters to decide the case in a way consistent with how the parties might have settled the case if they were able to compromise.⁸⁹ Thus, decisions were not made

⁸² Chalk, *supra* note 66, at 173 (Other advantages to protective orders include that they are victim-initiated, timely and focus on the victim’s protection.).

⁸³ Sinai, *supra* note 36, at 191-192.

⁸⁴ Friedell, *supra* note 6, at 919-920.

⁸⁵ *Id.* (“During the medieval period rabbis developed a study method known as “pilpul,” based on a word meaning “pepper.” This method often involves hair-splitting analysis, hardly the sort of approach favored by a feminist jurisprudence. The hair-splitting analysis, which is a feature of the study of Jewish law, is not a feature of its practice in litigated cases.”).

⁸⁶ Walter Jacob, Moshe Zemer, *Re-examining Progressive Halakhah*, 14 Berghahn Books (2002) (“Among the scholars grouped under the rubric of *mishpat ivri*, the academic study of Jewish law, we encounter a broadly-accepted consensus that precedent exerts no binding, obligatory constraining force over the decision maker in any case at rabbinic law.”).

⁸⁷ Friedell, *supra* note 6 at 920.

⁸⁸ Shubert Spero, *Morality, Halakha, and the Jewish Tradition*, 187 KTAV Publishing House, Inc. (1983).

⁸⁹ Nisson Wolpin, *The Ethical Imperative: Torah Perspectives on Ethics and Values*, 308 Mesorah Publications (2000) (Parties could agree to arbitrate the dispute before a Jewish panel which would not necessarily apply strict Jewish law.).

according to strict law, but according to what would restore peace to the parties at issue and the community.

Jewish law also differs from American law in that each rabbi or judge took distinct approaches to settling disputes in a way they thought would bring about a peaceful solution.⁹⁰ Notions of peace were more important than notions of justice according to the law.⁹¹ Litigants could always insist upon a decision according to strict Jewish law, but rabbis often attempted to avoid litigation and could exert influence over the parties to reach a settlement based on compromise.⁹² When a party insisted on a judgment according to strict law, rabbis, community members and judges could continue to persuade the party to reach a settlement even after the verdict.⁹³

The culturally feminine perspective⁹⁴ was thus paramount in Jewish courts. With an emphasis on collaboration over the adversarial approach of American courts, rabbis and judges attempted to restore the relationship between parties. If not directly settled by the parties, arbitrators would reach settlements according to how parties should have compromised.⁹⁵ The settlement process of Jewish courts differs greatly from American

⁹⁰ 5 Encyclopedia Judaica *Compromise* 857 (1972).

⁹¹ Friedell, *supra* note 6, at 921 (“[A] decision that left one side losing everything would not restore peace to the parties or the community. Peace and justice would be possible only if the parties could each leave the court or arbitration with a sense of having been treated fairly.”).

⁹² Aaron Kirschenbaum, *Equity in Jewish Law*, xlii KTAV Publishing House, Inc. (1991) (“In classical codes, compromise is a function of the wishes of the parties; it is a private matter; and it must be solemnized – to prevent contenders from subsequently reneging on the agreement – by a formal act of undertaking. Religious authorities converted this matter, essentially private between the parties, into obligatory conduct which is imposed upon the parties.”).

⁹³ Rabbi J.B. Soloveitchik, *Shiurei Harav, A Consensus of the Public Lectures of Rabbi Joseph B. Soloveitchik*, ed. J. Epstein, 82 (New York: Hamevaser, 1974) (“In other legal systems, the judge may recommend compromise or arbitration. By doing so, he relinquishes the right to settle the case. In Judaism, compromise and strict legality are treated equally.”).

⁹⁴ The “culturally feminine perspective” refers to ideals and mechanisms that American culture has connected to the feminine persona. Such qualities include caring, nurturing, collaboration, sharing and compromise. The culturally female concept of justice relies on experience, context, intuition, and subjective judgment.

⁹⁵ Fridell, *supra* note 6, at 923.

court settlements that base settlement outcomes on the likeliness of a case to succeed on its merits in litigation.

a. Domestic Relations in Jewish Law

As Jewish law puts great emphasis upon mending relations between parties to a case, it also emphasizes maintaining strong relationships within the marriage context.

Primarily, Jewish law commands spouses to treat each other with dignity and respect.⁹⁶ Jewish law maintains that when a wife is abused by her husband, their special relationship is gravely damaged and that legal actions must be taken to restore harmony to the relationship and/or surrounding community.⁹⁷ “The central rationale is that spouses whose relationship involves abuse cannot continue to live together, and thus the law needs to intervene, since “no one can live with a serpent in the same basket.”⁹⁸ Rabbis implemented heavy criminal and civil sanctions against those who beat their wives physically, sexually or emotionally.⁹⁹ Penalties included among others, ostracism, imprisonment, monetary fines and corporal punishment.¹⁰⁰

Halakhic literature also expresses the importance of a peaceful co-existence between husband and wife:¹⁰¹

The man who beats his wife transgresses the same prohibition as he who assaults his neighbor, and if he does it habitually, the rabbinical court should afflict him and excommunicate him, and whip him in all the

⁹⁶ As stated in the Talmud: “A man should always be careful about his wife's honor, for blessing is found in a man's house only on account of his wife.” The Talmud further states that the ideal husband is: “the man who loves his wife as himself, and honors her more than himself.”

⁹⁷ Reuven P. Bulka, *Jewish Marriage*, 13-14 KTAV Publishing House, Inc. (1986) (“Marriage is intimacy, a fusion of souls, a partnership in the totality of life.”).

⁹⁸ Sinai, *supra* note 36, at 160.

⁹⁹ Carol Goodman Kaufman, *Sins of Omission: The Jewish Community's Reaction to Domestic Violence*, 60 Westview Press (2003).

¹⁰⁰ *Id.* (citing Rabbi Moses Isserles' interpretation of the Shulhan Aruch stating “It is a sin for a man to beat his wife, and if he does this habitually the court can punish him. Excommunicate him and whip him and apply all measures of force until he takes an oath never to do so again. If he violates this oath he may be compelled to divorce her.”).

¹⁰¹ Sinai, *supra* note 36, at 201.

methods of compulsion and coercion, because this is not the custom of Jewish people for men to beat their wives.¹⁰²

Halakhic rabbis highlighted the repercussions of domestic abuse, forcing men who beat their wives to give their spouses the option for a legal Jewish divorce.¹⁰³ Halakhic scholars also believed that greater severity was assigned to a man who beat his wife than to a man who beat a stranger.¹⁰⁴ Rabbinic authorities stressed that a woman should feel safe in her home and that there could not be a peaceful home life where a woman lived in constant fear of her husband.

Jewish law recognized that a wife's fear from her husband may result from threatened harm as well as actual harm. Thus, emotional suffering was deemed as serious a violation as physical harm.¹⁰⁵ According to one halakhic authority, "no offender commits as grave an offense against rabbinic enactments as the man who beats and degrades his wife, for the rabbis' enactment was that a man may not beat his wife and is obligated to respect her dignity."¹⁰⁶ Forced sexual relations or sexual abuse was also condemned as Maimonides states that a wife is "not his slave to be compelled to have intercourse with someone she hates."¹⁰⁷ Therefore, Jewish law recognized the evils in all aspects of domestic violence including physical, sexual and emotional abuse.

b. Resolution of Domestic Abuse Under Jewish Tort Law

¹⁰² Shulkhan Arukh, Even Haezer, 154:3.

¹⁰³ Mordechai Frishlik, *Physical Violence against Women as Grounds for Receiving Get in Jewish Law and Rabbinical Jurisdiction*, 17 Dinei Yisrael 93 (1993); See also Kaufman, *supra* note 99, at 60.

¹⁰⁴ Sinai, *supra* note 36, at 204.

¹⁰⁵ *Id.* at 201 ("Not only bodily damage is prohibited, leading to civil and criminal sanctions; emotional abuse that causes the woman grief and degradation is similarly proscribed.").

¹⁰⁶ Resp. Binyamin Zeev 88; See also Sinai, *supra* note 36, at 201 (citing Resp. Tasbetz, 2.8)(in a case in which a man emotionally abused his wife until she lost her will to live, though no mention is made of his having struck her, it nonetheless states that "this is worse than death.").

¹⁰⁷ Maimonides, *Hil Ishut*, 14:8.

Though Jewish courts denounced the practice of domestic violence, many courts during the Talmudic period lacked the authority to award damages for such abuse.¹⁰⁸ Personal injury claims were uncommon to halakhic courts and were not subject to awards of damages unless the plaintiff was completely free of fault.¹⁰⁹ However, courts had jurisdiction to prescribe liability and thus could excommunicate a husband who beat his wife until such time he paid adequate damages to the petitioner or the court.¹¹⁰ Thus, compromises and settlements were often reached to avoid the dilemma of damages altogether. “Jewish law [also] allowed for flexibility in shaping the law to fit the needs of the parties and the community.”¹¹¹ Rabbis were permitted to adjust the law according to the particular facts of the case and relation between the parties.¹¹² The special relationship between spouses was often considered by judges when settling, mediating and ruling on cases involving married persons.¹¹³

Under the Maimonides code, a distinction was made between a man who assaulted a stranger and a man who assaulted his wife.¹¹⁴ “In the case of abuse sustained at the hands of a stranger, the husband suffers by reason of her anguish and is distressed by her injury and is entitled to part of the compensation; this is not the case when he himself injured his wife, in which case he is not entitled to any part of the compensation.”¹¹⁵ The Torah

¹⁰⁸ Shulhan Arukh, *Hoshen Mishpat* 1:1-5.

¹⁰⁹ Friedell, *supra* note 6, at 923.

¹¹⁰ Kaufman, *supra* note 99, at 60.

¹¹¹ Friedell, *supra* note 6, at 924.

¹¹² See, e.g., Talmud, *Bava Kamma* 96b. For example, a wicked individual could be penalized by being made subject to a stricter rule, and less powerful individuals could be aided by the court imposing a more lenient rule.

¹¹³ Shulkhan Arukh, *Hoshen Misshpat* 420:25 (“Where a simple person was the offender, the offense is greater and where an important person is offended, his offense his greater.”).

¹¹⁴ Cindy Enger, Diane Gardsbane, *Domestic Abuse and the Jewish Community*, 41 Haworth Press (2005) (citing Rabbi Samuel of Speyer who in the year 1223 stated “It is an accepted view that we have to treat a man who beats his wife more severely than we treat a man who beats a fellow man”)(noting Mishnah texts stress a woman’s status as wife rather than simply as another individual).

¹¹⁵ Sinai, *supra* note 36, at 208.

itself does not specifically mention punishments for husbands who beat their wives, but halakhic literature notes that in the event of physical abuse, a fine will be assessed whereby a portion of the husband's property is confiscated and given to the wife.¹¹⁶ Even when a wife did not suffer from physical injury, fixed fines would be assessed against husbands for harm stemming from the humiliation and mental suffering caused to their wives. As long as the wife was free of fault, she could receive damages from the husband and was free to use the funds at her discretion.¹¹⁷ However, liability was not reciprocal in that a wife would never be made to pay damages if she were to cause physical harm to her husband.¹¹⁸ The fine assessed due to the husband's physical injury to the wife was to compensate for her pain, mental anguish and recuperation.

Much like modern American law, ancient Jewish law did not recognize pure emotional harm that did not come about as the result of physical abuse.¹¹⁹ However, halakhic courts had the freedom to assess fines as a matter of public policy and often did so when a husband undermined his wife's dignity.¹²⁰ Judges had wide discretion in assessing penalties on a tortfeasor, issuing fines and bans in cases of emotional abuse where the parties failed to settle.¹²¹ The status of the offender and offended was always

¹¹⁶ Tosefta, *Bava Kamma* 9:14, 45.

¹¹⁷ Maimonides and the Shulkhan Arukh elaborated on the issue of the wife's entitlement to money she had received from her husband, emphasizing that "everything is hers, and the husband is not entitled to any proceeds, and if she wanted to give the money to another, she has permission."

¹¹⁸ Enger, *supra* note 114, at 58-59 (A wife was exempt from liability for damage to her husband or her husband's property for the sake of the smooth functioning of the household and to avoid strife.).

¹¹⁹ Sinai, *supra* note 36, at 210.

¹²⁰ See Maimonides, *Hilkhot Hovel U'Mazik*, 3.7 ("And the rabbinical court should create a fence at all places and all times as it deems fit."); See also Teshuvat HaGaonim, *Shaarei Teshuva*, 8 ("[H]e who humiliates his neighbor by words is excommunicated until he pacifies the offended person.").

¹²¹ Aaron Kirschenbaum, *Equity in Jewish Law*, 81 KTAV Publishing House, Inc. (1991) (According to Maimonides, judges had wide discretion and allowed judges to rule according to personal convictions or beliefs.).

taken into account when assessing fines and penalties to ensure that the penalty matched the offense and that the punishment would act as a sufficient deterrent.¹²²

c. Resolution of Domestic Abuse under Jewish Criminal Law

Just as Jewish courts could enact penalties under tort law for domestic abuse, they also enacted criminal penalties. “[I]n the criminal realm the governmental authorities [were] invested with extra-legal emergency powers to deviate from the law of the Torah, by enacting laws dictated by public policy and enforcing . . . a variety of methods.”¹²³

According to leading Ashkenazi Rabbi Maharam Rothenberg in the thirteenth century, criminal penalties for husbands engaging in domestic abuse included “to excommunicate him and to whip and to administer different forms of punishment, and even to cut off his hands if he practice[d] it repeatedly.”¹²⁴ Subsequent Jewish scholars agree that domestic violence is still one of society’s major ills, even within Jewish communities.¹²⁵ Though there was a widely accepted notion that rabbis lost their authority for criminal adjudication following the destruction of the Temple,¹²⁶ rabbis in the fourteenth century recognized the harm cause by abusive husbands. Thus, they often resolved matters concerning abusive husbands with criminal punishments.¹²⁷

Like Jewish tort law, the context and frequency of the abuse was considered in assessing criminal punishments for domestic violence. Distinctions were made between recurring abuses and single instances of abuse, and criminal punishments reflected the

¹²² See, e.g., Talmud, *Bava Kamma* 96b. For example, a wicked individual could be penalized by being made subject to a stricter rule, and less powerful individuals could be aided by the court imposing a more lenient rule.

¹²³ Sinai, *supra* note 36, at 216; See also Rav Shaul Yisraeli, *Amud HaYemini* 9.

¹²⁴ Resp. Maharam Rothenberg, part 4, Prague ed., 81.

¹²⁵ See Enger, *supra* note 114, at 118; Kaufman, *supra* note 99, at 187; Rachel Lev, *Shine the Light: Sexual Abuse and Healing in the Jewish Community*, 171 UPNE (2003) (noting the prevalence of Jewish women to remain silent regarding domestic abuse so as not to disturb the home and community).

¹²⁶ S. Zalman Abramov, *Perpetual Dilemma*, 132 Farleigh Dickinson University Press (1976).

¹²⁷ Kaufman, *supra* note 99, at 60; See also Resp. Rashba, 5:274.

degree of abuse.¹²⁸ Further, rabbis always considered the possibility of reconciliation before administering an overly harsh penalty that would prevent future harmony for the family.¹²⁹ As reflected in the Jewish courts' adjudication of tort law, the possible collaboration between affected parties and the well-being of the community was contemplated before penalties were assessed.¹³⁰

The contextual basis on which Jewish courts ruled recognizes the special relationship between husband and wife. Spousal abuse was treated with greater scrutiny than the abuse of a stranger and as a result warranted harsher penalties such as excommunication, execration, imprisonment, and even graver forms of corporal punishment.¹³¹ While halakhic authorities typically imposed monetary fines for instances of physical abuse, the damage to the community and family caused by domestic violence justified extra-legal sanctions.

d. Resolution of Domestic Abuse under Jewish Family Law

Perhaps the largest distinction between Jewish family law courts and modern American family law courts is the divorce process.¹³² Under religious Jewish family law, the voluntary participation of a husband and wife was required in order to obtain a

¹²⁸ Resp. Radbaz, 3:447 (“[I]f he hits her frequently he should be punished.”).

¹²⁹ Friedell, *supra* note 6, at 921 (noting that restoration of harmony between the parties and the community was valued over justice in halakhic society).

¹³⁰ *Id.*

¹³¹ Kaufman, *supra* note 99, at 60.

¹³² Natalie J. Sokoloff, Christina Pratt, Beth E. (FRW) Richie, *Domestic Violence at the Margins*, 217 Rutgers University Press (2005) (“In the Jewish legal system . . . only a man creates the marriage and he has the unilateral power to end it. A marriage cannot dissolve until the husband delivers a *get* to his wife. Both parties must appear before the Bais Din (usually composed of rabbis, or a male rabbi and two witnesses). A scribe writes in Aramaic: ‘I release and set aside you, my wife, in order that you may have the authority over yourself to marry any man you desire . . . You are permitted to every man. . . This shall be for you a bill of dismissal, a letter of release, a *get* of freedom.’ The husband then places then literally places the *get* into the woman’s hands and she formally receives it. After the ceremony, the *get* is sliced with a knife so that it cannot be used again and turned over to the custody of the officiating rabbi.”).

divorce and divorces were only authorized only by rabbinical courts.¹³³ The Mishnah and Talmud contained a comprehensive list of reasons for which to obtain a valid divorce, thus making it more difficult to break the bonds of marriage if a party's motivation for divorce was not enumerated.¹³⁴ In Israel today, matters of marriage and divorce are still governed by religious Jewish law, separate from civil and criminal courts.¹³⁵

According to Jewish law, a wife who leaves her husband loses her right to spousal support.¹³⁶ However, according to halakhic rabbis, a woman who leaves her husband as the result of abuse is entitled to support since it was the husband who was at fault.¹³⁷ Consequently, the husband was forced to take an oath that the abuse would cease and if it did not, the wife could continue to receive spousal support even if living outside the marital home.¹³⁸ Thus, halakhic courts provided no authority to force a woman to live with a man who beat her and provided her a weary existence.¹³⁹ In many cases where domestic abuse persisted, the husband was forced to leave the home, similar to protective orders in the United States.

¹³³ *Id.* ("To protect a woman, Jewish law requires [a woman] consent to a divorce proceeding. In addition, it mandates an elaborate premarital agreement (*ketubah*) in which the man promises to pay a sum of money if he should divorce her.").

¹³⁴ *Id.* at 218 (Under halakhic law, a woman may only initiate a divorce under one of three circumstances: the husband is inflicted with a disease that is deemed unendurable, the husband neglects his marital obligations or if the couple is sexually incompatible.).

¹³⁵ Barbara J. Nelson, *Nājamā Caudhurī*, *Women and Politics Worldwide*, 393-394 ("The rabbinical courts' Jurisdiction (Marriage and Divorce) Law of 1953 implemented this decision, vesting exclusive jurisdiction for all matters concerning the marriage and divorce of Jewish citizens or residents of the state in rabbinical courts.").

¹³⁶ Ben-Zion Scherschewsky, *Dinei Mishpaha (Family Laws)*, 130 Rubin Mass (1993).

¹³⁷ *Id.* at 197-198.

¹³⁸ Resp. Rashba, 7:477 (noting the more serious nature of a man who beats his wife as compared to beating a stranger and permitting the wife to live outside the marital home "for the law is on her side, because a person cannot be expected to live together with a snake."); See Kaufman, *supra* note 99, at 60 (citing Rabbi Moses Isserles' interpretation of the Shulhan Aruch stating "It is a sin for a man to beat his wife, and if he does this habitually the court can punish him. Excommunicate him and whip him and apply all measures of force until he takes an oath never to do so again. If he violates this oath he may be compelled to divorce her.").

¹³⁹ Elian Shocketman, Violence Against Women as Grounds for Divorce, Jubilee Volume in Name of Menachem Elon.

Physical violence by itself was not recognized by the Talmud as an enumerated offense coercing a divorce.¹⁴⁰ Instead, a man who abused his wife was obligated to divorce his wife or allow his wife the option of a divorce as well as paying a fine for reparation.¹⁴¹ In light of the consequences, Jewish husbands were expected to refrain from abuse. However, as noted above, Jewish law put enormous value on keeping the family unit together and often times would choose mediation or arbitration to resolve disputes rather than mandating divorce.¹⁴² In instances where abuse continued even after arbitration, the abusive husband would be excommunicated and compelled to divorce his wife. Even when a wife chose to live with her abusive husband, she retained her rights to obtain a divorce or punitive monetary payments that existed prior to the point her husband ceased the abuse.¹⁴³

Some rabbinical courts also viewed emotional abuse as a reason to compel husbands to allow their wife a divorce.¹⁴⁴ However, compelling a divorce was typically a final option only after criminal and civil penalties were imposed.¹⁴⁵ As Jewish courts did everything in their power to keep families together, they looked to harsh criminal and

¹⁴⁰ Sinai, *supra* note 36, at 222 (citing B. Ketubot 77a.).

¹⁴¹ Sokoloff, *supra* note 132, at 217.

¹⁴² Shulkhan Arukh, *Even Haezer*, 83:1 (“And they were ordered to live in peace together and they would choose two or three arbitrators who would rebuke them, and any dispute they had, they would arbitrate between them.”); See also Sinai, *supra* note 36, at 223 (noting revered halakhic rabbi, Rabbenu Simcha stressed “that great caution must be exercised in breaking up the family, particularly if there is any possibility of savaging the marriage and restoring domestic harmony between the couple.”).

¹⁴³ *Id.* (“Rabbenu Simcha also stressed that even if a woman agreed to live with a violent husband . . . it would not prevent her from demanding at a later stage that her husband stop beating her.”).

¹⁴⁴ Sinai, *supra* note 36, at 226. (noting an Israeli Rabbinical Court of Appeals case where a woman was forced to leave her home and live in a shelter due to her husband’s emotional abuse and it was determined the couple should get divorces as soon as possible).

¹⁴⁵ Louis Jacobs, *The Jewish Religion: A Companion*, 133 Oxford University Press (1995) (“On the moral and religious level a divorce should be resorted to only as a last option where the marriage has irretrievably broken down.”).

civil penalties as a mechanism to curb abuse.¹⁴⁶ Thus, divorces were rarely compelled on the basis of emotional abuse as courts increasingly implemented sanctions to avoid breaking up the family unit.

Overall, halakhic courts varied in their treatment of divorce. Instead of bright-line rules, Jewish courts ruled in accordance with its discretion and according to the facts of the particular case.¹⁴⁷ Nonetheless, Jewish courts universally viewed the husband as having an obligation under divine law to treat their wife with respect “because the woman is entitled to live, and not to suffer, and how much more so is she entitled to live and not to live with the risk of death.”¹⁴⁸

IV. Jewish Law Application to American Law – A Legal Analysis

Though there are fundamental differences between secular and religious legal systems, there are some conceptual similarities that merit comparison. Halakhic rabbis separated religious and legal aspects of Jewish law, using logic and legal reasoning in rendering judgments concerned with social relationships.¹⁴⁹ Thus, many of the Jewish ideals and laws concerned with domestic violence are applicable to American law.

Jewish law placed much emphasis on working out disputes through compromise and coming to an understanding of the other side’s point of view. The collaborative approach to dispute resolution is indicative of Carol Gilligan’s hypothesis in *In a Different Voice*, which posits women and men have different sets of moral standards, women tending to value relationships more than men. Thus, some legal scholars suggest that Jewish law

¹⁴⁶ One of the great rabbinical authorities during the sixteenth century Rabbenu David b. Zimra, noted penalties should be instituted with increasing severity, from lenient to the strict (including isolation, fines, imposition of physical punishment by the competent authorities and incarceration) before a husband was compelled to divorce his wife.

¹⁴⁷ Jacob, *supra* note 86, at 14 (noting halakhic courts used wide discretion in deciding cases and looked to the circumstances, facts and relationships of the parties in each case).

¹⁴⁸ Sinai, *supra* note 36, at 225 (citing R. Eliezer Waldenberg).

¹⁴⁹ Menachem Elon, *Jewish Law – History, Sources, Principles*, 987 (vol. 3 1994).

took a feminist approach through its adjudication process.¹⁵⁰ Ironically, Jewish women held little power in ancient Jewish culture and were prohibited from acting as rabbis or any other highly held societal positions.¹⁵¹ However, it is the Jewish legal tradition, and not necessarily the women's position in Jewish society, that supports a culturally feminine perspective.¹⁵²

Primarily, Jewish law viewed domestic relations as a system of obligations.¹⁵³ Husbands and wives were obligated to treat one another with respect as opposed to having a right to be treated with respect. The obligation to respect one's mate not only permeated the marital home, but extended throughout all of society. Jewish law is characterized by a "recognition that individuals have particular needs and strong obligations to render person-specific responses."¹⁵⁴ As opposed to possessing a right granted by the state to live free from violence, Jewish spouses owed an obligation to God to treat fellow community members with dignity.

A similar notion exists in American society. Americans also desire to be treated with respect by their spouses and fellow community members. However, Americans possess these rights as granted to them through the Constitution and the Declaration of Independence.¹⁵⁵ Conversely, the Torah is not simply a legal document, but a comprehensive manuscript of how one should conduct their life in relation to others and

¹⁵⁰ Steven F. Friedell suggests in his article *The "Different Voice" in Jewish law: Some Parallels to a Feminist Jurisprudence* that Jewish law took an approach that would support Carol Gilligan's school of thought.

¹⁵¹ Stone, *supra* note 1, at 814.

¹⁵² *Supra* note 94.

¹⁵³ Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J. L. & Religion 65, 65-90 (1987).

¹⁵⁴ Robert M. Cover, *Nomos and Narrative*, 97 Harv. L. Rev. 4, 13 (1983).

¹⁵⁵ Declaration of Independence § 2 (1776) ("Life, liberty and the pursuit of happiness"); The constitution also mentions "life, liberty, [and] property," in its fifth and fourteenth amendments suggesting Americans cannot be deprived of any of them without due process of law.

God. Jewish texts that analyze the Torah's tenets go beyond mere legal reasoning and suggest that righteous living extends beyond the legal realm.¹⁵⁶ Though Jewish law attempts to separate the legal and religious aspects within its doctrine, the interconnectedness of God and law makes it extremely difficult to apply to the American legal model. The commitment Jewish citizens have to uphold divine law does not hold true with American citizens who answer to a jurist as opposed to God.

The direct application of Jewish law to American law is also made difficult by the communitarian approach taken by Jewish courts. Even if adverse parties reach a settlement, there is no guarantee the settlement is in accord with moral precepts. Criminals may be able to reach agreements now and then, but that they are able to compromise does not necessarily make them righteous. Thus, the well-being of a community through settlements is dependant upon the morals of the citizens in that community.

The American legal system similarly encourages settlements between parties. Settling disputes through mediation or arbitration helps maintain and heal the relationship between parties and ultimately saves time and money wasted through litigation. Many settlements made through the American legal system are based on the probable outcome of litigation. Differing from halakhic courts which took every step to avoid filing formal claims,¹⁵⁷ American courts play no part in pre-litigation. To further the settlement process and guarantee all disputes were heard, Jewish courts did not uphold statutes of limitations and judges never held claims invalid due to a formal requirement. However, such techniques are often used in American courts by parties who wish to avoid litigation.

¹⁵⁶ The Mishnah, Talmud and Jewish codes touch on topics such as diet, prayer, holidays and many other issues that are not law related as seen by a secular culture.

¹⁵⁷ Friedell, *supra* note 6, at 924-925.

Procedural based proscriptions frequently prevent valid substantive claims from ever being heard, preventing parties an opportunity to make their case before a judge or to an adversary. The “win at all cost” and adversarial nature of the American legal system makes it hard to incorporate the settlement practices of Jewish courts.

Though Jewish courts’ settlement practices may not correlate with those of the American legal system, Jewish legal concepts concerning marital relations can be used to improve American domestic violence laws. Halakhic literature emphasizes the reciprocal obligation of spouses to refrain from abuse. The ongoing relationship between spouses was motivation for Jewish courts to encourage mutual settlements between husband and wife in instances of domestic violence. Jewish law functioned to maintain harmony amongst the family and community following settled outcomes. Recognizing the special relationship between a husband and wife, halakhic texts speak specifically about the wrongs of domestic abuse, including physical, sexual and emotional abuse.

American law does not contain similar principles. Instead, spousal abuse must fit under a pre-existing tort or crime for a formal claim to be filed. Criminal and civil laws in America fail to recognize the continued relationship amongst married parties and characterizes wrongful conduct between them as it would amongst strangers. The bonds of marriage create unique and often complicated relationships that lose their character in American courts. States should amend their laws to take these relationships into consideration.

Jewish courts looked to the particular facts of each case, sometimes stretching and amending the law to fit the parties’ circumstances. Such juridical methods would not work in the American common law system which is based on a mix of case precedent and

legislated bright-line rules. However, the parties' positions should be taken into account; a husband's continued physical and mental abuse of his spouse is likely more damaging than a single instance of assault on a stranger. Domestic abuse often damages more than just the parties involved. When children are witness to such abuse, their emotional development may be stunted and their ability to create meaningful relationships may be damaged. The harmful effects of domestic violence thus escape from the home into the general community. Yet the penalties for the assault of a stranger and the assault of a spouse are the same before American courts.

Jewish courts also enacted criminal and civil penalties in accordance with the status of the unlawful party. Those with high societal positions were assessed larger fines and harsher penalties than those of lower status. Regardless of status, women could not be charged with domestic violence. Such a construct would not work in American courts. While harsher crimes merit harsher sentences, enacting penalties based on social status or gender would be ripe for a constitutional claim. However, American courts should pay special attention to the relation of the parties when assessing damages and enacting penalties.

Some scholars suggest states should create specific domestic abuse laws.¹⁵⁸ Such laws would consider the continuing relationship between married parties and provide remedies for physical, sexual and emotional abuse. As discussed above, emotional abuse is often difficult to prove through American civil courts and a focused domestic violence statute could fill the gap.

¹⁵⁸ Sinai, *supra* note 6, at 232-235 (suggesting the creation of a specific tort of spousal abuse, a specific criminal offense for spousal abuse and new legislation to allow protective orders for emotional abuse).

One must consider the negatives in creating special laws pertaining to married couples. First, there is a possible equal protection claim that could arise if domestic abuse laws are enacted. Such laws would have a much larger effect upon men as the majority of domestic abuse cases involve a husband beating a wife. However, because the law would likely be neutral on its face, one would have to show that the law has a discriminatory intent. Even if there is no discriminatory intent and domestic abuse laws pass constitutional muster, one must consider the law's effect on the institution of marriage. With added protections for married couples, some might rush into marriage without making certain they have found the right person with which to create a marital domain. Thus, there is the possibility that divorce rates would increase as a result of domestic abuse laws. An increase in divorce rates would produce a flood of litigation in family courts. Conversely, others may turn away from marriage in fear of the added liability domestic abuse laws may create. What may be a standard case of assault or battery against a stranger could turn into a much harsher and serious charge for a married person. As a result, people may opt to raise families outside of marriage. With the emphasis American society puts on creating family units through marriage, domestic abuse laws may not be the best solution.

Because most of the physical and sexual harms of domestic abuse are covered under existing law, laws should be expanded to encompass emotional abuse. Intentional infliction of emotional distress has a high burden of proof and not all states recognize the tort. Without further protections from emotional harms, abused parties have no opportunity to help themselves. Rather than creating domestic abuse laws to cover emotional abuse, all states should adopt the IIED tort and lower the burden of proof.

States should also consider passing penal laws that deal with emotional abuse. Emotional abuse laws should not only apply to those in the marital home, but to citizens and society in general. The presence of an emotional abuse crime or tort¹⁵⁹ could act as an effective deterrent to such abuse.

Without a wider array of laws to protect abused spouses, the only full-proof mechanism to remedying abuse in America is divorce. Divorce is not an easy process. Repercussions include emotional strain, breaking families apart and extreme monetary cost. Under Jewish law, divorce was only to be authorized by religious courts, and the voluntary participation of both parties was required. When a husband abused his wife, he was obligated and sometimes compelled by the court to allow her a divorce. American family law differs in that divorce proceedings need only be initiated by one party and the court cannot refuse a divorce over a party's wishes. Further, most state family courts allow no-fault divorces meaning parties can end their marriage for any reason.

State family courts should look to Jewish law in modifying their divorce laws to help deter domestic violence. Under Jewish law, a husband's obligation to allow his wife a divorce due to abuse is the equivalent of a penalty. Essentially, the husband loses his right to marriage. American courts could enact similar penalties upon divorcees who cause their spouse to seek a divorce because of abuse. Family courts could look to previous criminal charges or tort causes of action against the abuser as evidence of an abusive relationship. In the event no criminal charges or lawsuits exist, the family court could establish a burden of proof a divorcee must meet to prove an abusive relationship existed. Punitive damages could then be assessed against spouses who are proven to have

¹⁵⁹ The lowering of the burden of proof in IIED cases to show emotional distress could also serve as a deterrent to emotional abuse.

caused the divorce through abuse. As a matter of public policy, punitive divorce damages could succeed in deterring domestic abuse.

There are also downfalls to assessing punitive divorce damages. The risk of having to pay beyond what one normally pays upon divorce¹⁶⁰ may deter people from getting married altogether. Those who are in unhealthy marriages may avoid divorce out of the fear punitive divorce damages may be assessed against them. Thus, they remain in unhealthy marriages even if no abuse occurs. People could also attempt to contract around such damages through prenuptial agreements or special marriage agreements. Finally, family courts prefer to avoid delving into parties' motivations for divorce.¹⁶¹ Instead, states choose a no-fault scheme so as to avoid wasting the courts' time and money.

Even with a no-fault scheme, divorces in America are not easy to obtain. Though state divorce laws are not as stringent as Jewish divorce laws, divorces require money and time which many Americans do not have. Abusive marriages may persist in the event an abused party cannot afford to pay divorce fees or attorney fees. Further, communication between parties may continue long after one party wishes to cease contact, as most divorces take up to six months to be finalized. Thus, divorces should be more accessible to the average American, especially in cases of domestic abuse. Costs should be lowered and the waiting period should be shortened.

Just as divorces should be easier to obtain, protective orders should be easier to obtain. Jewish courts could excommunicate an abusive husband in cases of physical,

¹⁶⁰ Normal payments upon divorce include spousal support, child support and splitting community property in community property states.

¹⁶¹ Wilson, *supra* note 57, at 18 (Drafters worry that allowing marital misconduct to be considered in allocating financial consequences of divorce would be very subjective, intrusive and turn into a contest about comparative moral rectitude in marriage, attempting to determine who was the worse spouse.).

sexual or emotional abuse. In the United States, protective orders are easily attainable for physical or sexual abuse, but difficult to attain in cases of emotional abuse.¹⁶² Thus, American courts should follow Jewish courts in equating emotional abuse with physical and sexual abuse when issuing protective orders. Emotional abuse can be just as harmful as physical abuse. Standards for obtaining protective orders in cases of emotional abuse should be lowered and courts should err on the side of caution. In the event a protective order is violated, courts need to issue stricter sanctions against the respondent. Protective orders can be an effective self-help mechanism to prevent domestic abuse. However, they can only be effective if law enforcement provides proper protection and courts issue appropriate punishments for violations.

V. Conclusion

The Jewish law's commitment to the community and its members can be adapted to American law. The Jewish concept of "gemilut has-adim,"¹⁶³ performing acts of loving kindness, permeated Jewish community and the mechanisms Jewish courts used to adjudicate disputes. American society and American courts appear to concern themselves only with resolving the direct dispute between two parties and fail to consider the further implications of failing to peacefully settle a claim. American courts should strive to look to the facts of each case and judge according to what will improve relations between adversarial parties and the community as a whole.

Jewish law also considered the relationship between parties, creating harsher penalties for those who physically harmed a spouse over those who physically harmed a stranger. American courts should follow suit and take into consideration the relation of the parties

¹⁶² Not all states issue protective orders in instances of emotional abuse; states that do issue protective orders only do so in cases of extreme emotional abuse.

¹⁶³ Friedell, *supra* note 6, at 942.

when adjudicating claims. Continual domestic violence undoubtedly causes more harm to the abused party and the community over a single instance of abuse against a stranger.

Through this paper, I have presented the different ways in which a modern secular legal system and an ancient religious legal system deal with domestic violence. Aside from the two thousand years that separate the creation of such systems, there are obvious differences between the legal models. One separates religion from law while the other intertwines religion and law. One follows strict case precedent while the other bends the laws to fit the circumstances of the parties. Finally, one finds justice through the adversarial process while the other uses a collaborative approach to bring peace to the community.

Certain aspects of Jewish law do not fit into the American scheme. But the overall lack of violence in Jewish communities suggests that Jewish law was effective in maintaining peaceful relations between spouses. Incorporating religious mores into American society is not the answer. That America's birth stemmed from a search for religious freedom suggests that religious ideals and beliefs should remain between American citizens and their respective deity. However, Jewish law's emphasis on collaboration, the value placed on community and the obligation to treat spouses with dignity can all help the American legal system to speak *In A Different Voice*.