THE THEATER OF DEVIANCE AND THE NORMATIVE BOUNDARIES OF SOCIETY:
LESSONS FROM THE RABBINIC INTERPRETATIONS TO THE BIBLICAL LAW OF SOTAH

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INTRODUCTION

A widely held view on the purpose of criminal law is that it is designed to maintain social order. Assuming this view to be correct, 

1. Throughout this article, I follow Henry Campbell Black’s definition of criminal law as “the body of law defining offenses against the community at large, regulating how suspects are investigated, charged, and tried, and establishing punishments for convicted offenders.” See HENRY CAMPBELL BLACK, BLACK’S LAW DICTIONARY 403 (8th ed., Thomson West Group 2004). Note that this definition considers criminal procedure as a subfield of criminal law, consisting of the steps that are followed from the criminal incident (violation of the law) through punishment (or release) of the offender.


3. This view is by no means uncontroversial. Retributivists, for example, maintain that the purpose of criminal law is to achieve retributive justice by punishing “all and only those who are morally culpable in the doing of some morally wrongful action” regardless of whether or not such punishment is required to preserve social order, for example, to “deter future crime, incapacitate dangerous persons, educate citizens in the behaviour required for a civilized society, reinforce social cohesion, prevent vigilante behaviour . . .” and so on. MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF CRIMINAL LAW 35, 153 (Oxford Univ. Press 1997). In any event, in this article I assume that the “maintaining-order” view is correct, namely, that the primary (though perhaps not exclusive) purpose of criminal law is to maintain social order. For an overview of the various perspectives on the purpose of criminal law, see Albert W. Alschuler, The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next, 70 U. CHI. L. REV. 1 (2003); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW (4th ed., LexisNexis 2006); Russell L. Christopher, Deterring Retributivism: The Injustice of “Just” Punishment, 96 NW. U. L. REV. 843 (2002); Richard S. Frase, Punishment Purposes, 58 STAN. L. REV. 67 (2005); Jim Dignan, Normative Constraints: Principles of Penalty, in PRINCIPLED SENTENCING 199 (Andrew von Hirsch & Andrew Ashworth eds., 3d ed., Hart Publ’g 2009); Alice
how does criminal law achieve its purpose? The standard answer is by deterring crimes through the threat of penalties, and by incapacitating or rehabilitating criminals so that they cannot or will not engage in future crimes. Sociologists, however, have a somewhat different answer: criminal law maintains social order by branding deviant behavior as criminal. Society, it is argued, is constructed through opposition and contrast: it creates and preserves its identity, its distinct structure and unique shape, by emphasizing the differences between its own characteristics and practices and the characteristics and practices of the Other, the deviant. Deviance, in this view, is essentially a relative phenomenon. The definition of deviance, which changes from era to era and from place to place, is just that characteristic which society designates to establish, through it and in contrast to it, its identity and boundaries. Whatever the society, the deviant in that society is one who “represents the forces excluded by the group’s boundaries,” informing society “as it were, what the evil looks like, what shapes the evil can assume.” In doing so, the deviant shows society “the differences between kinds of experience which belong within the group and kinds of experience which belong outside it.”


[to maintain order in society, the legal system must not only provide for a safe society, it must also provide for a society that is satisfied with the workings of the system. The law-abiding populace must be assured that those who have done wrong are punished, and those who are innocent are protected.


While “deviance” as a category is universal, a universal content of deviance is nonexistent. Deviance is essentially socially defined and is therefore always culturally relative. Thus, in order to understand a specific type of deviance, we have to understand its context within the social system and, in particular, the system’s value structure. . . . Deviance thus viewed is no longer a peripheral phenomenon, but a central element of any functioning social system. The analysis of social deviance thus becomes a crucial factor in an understanding of the social order itself.

HOWARD S. BECKER, OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE 9 (Free Press 1963): “[D]eviance is not a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an ‘offender.’” For this view, see also ERICH GOODE, DEVIANT BEHAVIOUR: THE INTERACTIONIST APPROACH (Prentice-Hall 1978); E.M. SCHUR, INTERPRETING DEVIANCE (Harper & Row 1979).

As an instrument of order, then, criminal law’s function is to reclassify the deviant as an Other—separate the deviant from a place in the legitimate order and define him or her as standing at a place opposed to it. When society prosecutes the deviant as a criminal, it makes a statement about the nature and placement of its normative boundaries. It declares through the “status degradation ceremony” of criminalization where the line is drawn between behavior that belongs in the special universe of the society and behavior that does not—behavior that threatens the integrity and stability of the society, making it lose its distinctive structure and unique identity. Criminal law, in this respect, is essentially a communicative and didactic institution. It conveys a message that is directed not only to offenders, but to the public at large. These messages about evil are conveyed by means of theatrical rituals performed in front of them, e.g. prosecution and trial, announcement (1962).

8. See Paul S. Berman, An Anthropological Approach to Modern Forfeiture Law: The Symbolic Function of Legal Actions Against Objects, 11 YALE J.L & HUMAN. 1, 19 (1999): “[T]he English world ‘law’ derives from Old Norse, where the word not only referred to rules of conduct, but also to the community itself, which shared those laws. Thus, the term ‘outlaw’ originally described someone who had been expelled from the community and therefore literally stood outside the law.”

9. Harold Garfinkel, Conditions of Successful Degradation Ceremonies, 61 AM. J. SOC. 420, 420 (1956). Garfinkel defines “status degradation ceremony” as “[a]ny communicative work between persons, whereby the public identity of an actor is transformed into something looked on as a lower in the local scheme of social types.”

10. Erikson, Notes on the Sociology of Deviance, supra note 7, at 310: “In a figurative sense, at least, morality and immorality meet at the public scaffold, and it is during this meeting that the community declares where the line between them should be drawn.”


of verdict and punishment. But, so viewed, criminal law raises a fundamental problem. Paradoxically, the very same feature that makes it of utmost importance for maintaining social order—presenting to the public “what the evil looks like”—also constitutes the greatest threat to social order. For, what criminal law does is essentially call to the public’s attention the ubiquitous presence of deviance in daily life. It increases the salience of deviance, publicly confirming its ordinariness as a normal feature of social reality. As a result, rather than reinforce the normative boundaries of society, criminal law may have the effect of undermining them by leading the public to regard deviance as normal—not outside the legitimate order, but rather an integral part of it. And insofar as this is so, criminal law is, at least in one important aspect, self-defeating.

My aim in this article is to focus on a special case of this problem—let us call it the problem of “normalizing deviance”—as it has been identified and addressed some 2000 years ago in the rabbinic literature on the Biblical law of adultery. The Biblical law prohibits adultery on pain of death. The law also asserts that in case of

14. Stone Peters, Legal Performance Good and Bad, supra note 13, at 180-81: [T]he central events of law—trials—(it is observed) are normally performed before live audiences by those specially trained to shed their own identities and “represent” others. Trials are the re-enactment of a conflict (an agon), whose essential narrative form is dialogue. They exploit iconic props as crucial clues to the unfolding of the narrative, and often rely on space, staging, costume, and spectacle in an attempt to bring back to life the dramatic event they are attempting to recount.

15. Garland, Punishment and Society, supra note 12, at 254: “In the late twentieth century, as in the eighteenth, the moment of sentencing is understood as ‘an occasion for addressing the multitude’ and there is seldom a newspaper which appears without carrying an account of some judge’s remarks and the circumstances which prompted them.”

16. A good example of how punishment serves a communicative function is shaming punishments, which involve the deliberate public humiliation of the offender (for example, requiring offenders to stand in public spaces with signs describing their offenses, ordering convicted burglars to allow their victims to come into their homes and take anything they want, requiring offenders to apologize for their crimes, publishing the names of offenders in newspapers or on billboards listing the names and the offenses, requiring thieves to wear T-shirts announcing their crimes, etc). The function of shaming punishments is essentially communicative in that, by having the offender publicly display his/her criminal status, and by allowing citizens to directly criticize and cast shame upon him/her, society expresses its condemnation of the offender’s conduct and sends a clear message as to where the boundaries of society are located. For a discussion of the purpose of shaming punishments, see Dan M. Kahan & Eric A. Posner, Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines, 42 J.L. & Econ. 365 (1999); Dan M. Kahan, Punishment Incommensurability, 1 BUFF. CRIM. L. REV. 691 (1998); Dan M. Kahan, Social Meaning and the Economic Analysis of Crime, 27 J. LEGAL STUD. 609 (1998); Kahan, What Do Alternative Sanctions Mean?, supra note 12.

17. Lev 20:10, translation from The Holy Scriptures According to the Masoretic Text (Jewish Publication Soc’y Am. 1960): “And the man that committeth adultery with another man’s wife, even he that committeth adultery with his neighbour’s wife, both the adulterer and the adulteress shall surely be put to death.”
uncertainty—when the husband suspects that his wife has committed adultery, but there are no witnesses to the alleged act—the suspected woman should be taken to the temple and forced to drink “water of bitterness” into which the name of God had been dissolved, the priest pronouncing a fearful curse that if she be guilty the water “that causeth the curse shall go into thy bowels, and make thy belly to swell, and thy thigh to fall away.” This last section of the law relating to the suspected adulteress—the “sotah”—has been debated extensively by the rabbis of the Mishnah, the generation of the Tannaim, who lived in Palestine in the first and second century C.E. The Mishnah, tractate Sotah, presents three main changes introduced by the rabbis to this section of the law, all of which concern the ritual of the “water of bitterness.” The first was to subject the ritual to strict legal regulation, which toughens the conditions for staging it on the one hand, while on the other hand loosens the criteria for terminating it even after the conditions for staging it have been met. The second change was to intensify the theatrical character of the ritual with the effect of transforming the woman undergoing it into a grotesque and degraded figure. The third change was to cancel the ritual altogether, eliminating it from legal practice.

The vast majority of scholarship on these changes regards them as being motivated by distinct, indeed contradictory, concerns: for

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19. The name sotah is derived from Numbers 5:12 based on the word הָעַד, to “stray” from the path of righteousness.

20. The Mishnah, redacted in approximately 220 A.C in the name of Rabbi Judah the Prince (hana’si), represents the earliest rabbinic interpretation of sotah. The authors of the Mishnah devoted an entire tractate to this topic. The tractate, named Sotah, is the fifth of seven tractates in Seder Nashim (Order of Women), which is the third of six books that comprise the Mishnah. Seder Nashim consists of seven tractates, the fifth of which is tractate Sotah. The later rabbinic texts of the Tosefta and the Jerusalem (Palestinian) and Babylonian Talmuds, redacted between the third and fifth century, follow the organizational schema of the Mishnah and devote an entire tractate to the sotah ritual. Other rabbinic writings that include interpretations of the sotah ritual include the halakhic midrashim of Sifre Numbers and Sifre Zutta and the aggadic midrashim of Tanhuma-Yelamdenu and Numbers Rabbah.

21. The sotah law has been a recurrent interest within non-rabbinic writings as well. Thus, Philo discusses it in The Special Laws, Book 3, § 52-63; and Josephus gives a version in Jewish Antiquities Book 3, § 270-73. References to the sotah rite are found also within the Targumim (the Aramaic translation of the Hebrew Bible) and Septuagint (a collection of Greek translations of the Bible). Both contain a translation of Numbers 5:11-31.

22. The changes are presented in the order in which they appear in the Mishnah, tractate Sotah. It should also be noted that all three changes are introduced at a time when the ritual had long ceased to be performed. I will return to the significance of this point later.
example, a concern to eliminate legal discrimination against women on the one hand, and concern to reinforce male dominated power structures on the other. In this article, however, I will attempt to show that these changes are in fact driven by the same concern identified as a paradox above. I will argue that the rabbis of the Mishnah conceive of the sotah ritual as a legal instrument designed to reinforce the normative boundaries of society—a ritual through which society declares where the line is drawn between permissible and impermissible (deviant) sexual behavior. But the fundamental concern driving the three changes is that this instrument will ultimately work against its own purpose. Specifically, by virtue of its very performance, the ritual forges for deviance an undeniable presence in social reality. Therefore, rather than reinforce the normative boundaries of society, the ritual will actually


24. In this respect and in terms of contemporary ritual theory, my argument is that the Tannaitic discussion presents a functionalist-structural understanding of the sotah ritual. According to the functional-structural approach, ritual is always a “means of regulating, or controlling, the structures, processes, and relations of society . . . by giving normative patterns for maintaining order and constructive patterns for restoring that order when it has been lost.” FRANK H. GORMAN, JR., THE IDEOLOGY OF RITUAL: SPACE, TIME AND STATUS IN THE PRIESTLY THEOLOGY 28-29 (Sheffield Acad. Press 1990); see also ALFRED R. RADCLIFFE-BROWN, THE SOCIAL ANTHROPOLOGY OF RADCLIFFE-BROWN ch. 8 (Routledge & Kegan Paul 1977); Terence S. Turner, Transformation, Hierarchy and Transcendence: A Reformulation of Van Gennep’s Model of the Structure of Rites de Passage, in SECULAR RITUAL 63 (S.F. Moore & B. Meyerhoff eds., Van Gorcum 1977); ROY A. RAPPAPORT, ECOLOGY, MEANING, AND RELIGION 193-97 (N. Atl. Books 1979). While the functionalist-structural approach regards all rituals as instruments of order, my argument in this article is restricted to the sotah ritual. That is, I do not claim that the rabbis view all rituals as means of regulating and controlling societal order. Rather, I only claim that they understand the sotah ritual this way. Perhaps they understand other rituals as serving a distinctly different purpose. For an overview of the different ways of understanding rituals, see CATHERINE BELL, RITUAL: PERSPECTIVES AND DIMENSIONS 3-88 (Oxford Univ. Press 1997).
have the effect of undermining them by leading the public to regard deviance as a natural part of everyday life. In this reading, the Mishnah is not concerned with historical facts about the sotah ritual. Rather, the discussion is conceptual-logical, focusing on the ritual’s function as a legal concept and on its logical ability to fulfill it. The ritual’s function, according to the rabbis of the Mishnah, is to reinforce the normative boundaries of society, and the concern is that the ritual will, paradoxically, bring about the opposite outcome. I shall attempt to show that the three changes offered by the rabbis reflect three distinct methods for addressing this logical problem which, although framed in terms of sotah, is of much relevance for the general problem of normalizing deviance raised by criminal law.

My argument will proceed in three stages. In the first stage, I will examine, in the order in which they are presented in tractate Sotah of the Mishnah, the three changes introduced by the rabbis of the Mishnah to the Biblical law of sotah. In the second stage, I will define the problem to which these changes are a response based on the observation of G.W.F. Hegel, Claude Levi-Strauss, Emile Durkheim, Kai T. Erikson and Michel Foucault. In the third stage, I will show how the changes reflect three distinct methods for addressing this problem. I will conclude with a brief comment on the lessons that can be learned from the rabbinic discussion of sotah about the general problem of normalizing deviance. In this respect, my concern in this article is not to offer a solution to the problem of normalizing deviance. Rather, it is to illustrate possible venues of dialogue with ancient texts concerned with this very problem of deviance, and perhaps even draw inspiration from their unique treatment of the problem. The text that I will explore here would be the formally “religious” text of the Mishnah.

25. It is generally accepted in the literature that the Mishnaic discussion is not historical but conceptual or theoretical. That is to say, that the issue under discussion is not the ritual as it had been performed in the days of the Temple, but the ritual as it is theoretically conceived. Or in other terms, as it should ideally be performed, regardless of whether or not it had been performed this way in reality. (See, e.g., Rosen-Zvi, The Rite that Was Not, supra note 23, at 161-68. For an understanding of the discussion as (at least partially) historical, see Y.N. Epstein, Introductions to the Literature of the Tannaim 399 (Magnes 1957) (Hebrew); Tal Ilan, Jewish Women in Greco-Roman Palestine 136-41 (Peabody 1996); Hauptman, Rereading the Rabbis, supra note 23, at 15-29. In terms of my analysis, the question is not how (if at all) the ritual had been used in the past to regulate and control societal order, but rather how (if at all) the ritual should be performed if the sole purpose of its performance is to regulate and control societal order. For the main differences between this interpretation of the question and the common interpretations advanced in the literature, see the discussion infra in Sect. 1.E of this article.
I. THREE EXEGETICAL CHANGES: THE RABBINIC INTERPRETATIONS OF THE BIBLICAL LAW

A. The Biblical Law

The following is the Biblical passage relating to the law of sotah:

If any man's wife go aside, and act unfaithfully against him, and a man lie with her carnally, and it be hid from the eyes of her husband, she being defiled secretly, and there be no witness against her, neither she be taken in the act, and the spirit of jealousy come upon him, and he be jealous of his wife, and she be defiled; or if the spirit of jealousy come upon him, and he be jealous of his wife, and she be not defiled; then shall the man bring his wife unto the priest. . . . And the priest shall bring her near, and set her before the Lord. And the priest shall take holy water in an earthen vessel; and of the dust that is on the floor of the tabernacle the priest shall take, and put it into the water. And the priest shall set the woman before the Lord, and let the hair of the woman's head go loose, and put the meal-offering of memorial in her hands, which is the meal-offering of jealousy; and the priest shall have in his hand the water of bitterness that causeth the curse. And the priest shall cause her to swear, and shall say unto the woman:

If no man have lain with thee, and if thou hast not gone aside to uncleanness, being under thy husband, be thou free from this water of bitterness that causeth the curse; but if thou hast gone aside, being under thy husband, and if thou be defiled, and some man have lain with thee besides thy husband,

then the priest shall cause the woman to swear with the oath of cursing, and the priest shall say unto the woman—

the Lord make thee a curse and an oath among thy people, when the Lord doth make thy thigh to fall away, and thy belly to swell; and this water that causeth the curse shall go into thy bowels, and make thy belly to swell, and thy thigh to fall away; and the woman shall say: Amen, Amen. And the priest shall write these curses in a scroll.

and he shall blot them out into the water of bitterness. And he shall make the woman drink the water of bitterness that causeth the curse; and the water that causeth the curse shall enter into her and become bitter. . . . And when he hath made her drink the water, then it shall come to pass, if she be defiled, and have acted unfaithfully against her husband, that the water that causeth the curse shall enter into her and become bitter, and her belly shall swell, and her thigh shall fall away; and the woman shall be a curse among her people. And if the woman be not defiled, but be clean; then she shall be cleared, and shall conceive seed.  

The Biblical passage consists of three parts arranged in chronological order. The first deals with initiation of the episode with the husband’s suspicions regarding his wife’s fidelity. The second part details legal regulation of the episode: the task of clarifying and establishing these suspicions rests with the Priesthood of the Temple, which embodies legal authority. The third part describes the procedures the priests employ in their capacity as the legal institution in order to clarify whether the suspected woman has actually committed adultery. The woman is made to drink “water of bitterness,” which clarifies in retrospect the decision of God (who is omniscient). In the event that her abdomen swells up, it becomes clear that God has ruled that her guilt is certain. In the event that her abdomen does not swell, God has given evidence of her innocence, and indeed will compensate her for her suffering by having her give birth to a child (“shall conceive seed”).

The rabbis of the Mishnah, as noted above, introduce three main changes to the Biblical law, which I will call respectively “regulation,” “theatricalization” and “elimination.”

B. Regulation

From the first verse of the Biblical passage it is possible to understand that there is a basis for the husband’s suspicions—his wife has acted “unfaithfully against him”—and therefore an appropriate procedural response is needed. But the second verse emphasizes that the event originates in the husband’s subjective feelings (“spirit of jealousy”) and independently of whether or not his wife has actually been unfaithful to him. Perhaps his suspicions are justified (“she be defiled”). Perhaps they have no basis at all (“she be not defiled”). Nonetheless, from these two verses it appears that the husband’s suspicions alone, that is, his subjective feelings, suffice to put into

motion a real event, a sort of trial that has practical consequences, even if not definitely establishing the accused woman's guilt. The fact of innocence or guilt can only be revealed through the agency of the priest in his role as legal regulator, and the rite in which he is practiced will in the end reveal the truth.

The Tannaitic analysis, however, takes the Biblical discussion in a new direction. The Mishnah replaces this exclusively subjective framework (the husband's suspicions) with a more objective one, making the matter dependent on objective criteria that are not dependent solely on the feelings of the husband:

He who expresses jealousy to his wife [concerning her relations with another man]—R. Eliezer says, "He expresses jealousy before two witnesses, and he imposes on her the requirement of drinking the bitter water on the testimony of a single witness or even on his own evidence [that she has been alone with the named man"]). R. Joshua says, "He expresses jealousy before two witnesses, and he requires her to drink the bitter water on the testimony of two witnesses."28

According to the Mishnah, the situation is no longer judged only from the subjective viewpoint of the husband. Rather, objective and recognized patterns are fixed on a legal-objective basis: a suspicion justifies the performance of the ritual only if some defined legal criteria of appropriate circumstances and supportive testimony are fulfilled.29

But the regulation does not end here. In the Biblical narrative, the only active roles in the episode of sotah are played by the husband, who accuses his wife, and by the priest, who clarifies the husband's accusations by causing the woman to drink the bitter water. The rabbis of the Mishnah, however, introduce additional legal regulations that widen the circle of players. For example, the possibility exists for the woman and other witnesses to cancel the ritual, subject to certain legal constraints, even if the legal conditions for performing the ritual have been met: "And these do not undergo the ordeal of drinking the bitter water or receive a marriage contract: she who says, 'I am unclean,' or against whom witnesses came to testify that she is unclean; and she who says, 'I will not drink.'"30

The background for this Mishnaic discussion is the stage in the

29. See Moshe Halbertal, Interpretive Revolutions in the Making: Values as Interpretive Considerations, in MIDRASHEI HALAKHAH 69 (Magnes Press 1997) (Hebrew); Hauptman, Rereading the Rabbis, supra note 23, at 17-19.
process wherein it was already established that the suspicions are sufficiently grounded to justify performing the ritual. In the Biblical narrative this stage is supposed to conclude with the woman drinking the bitter waters. But the rabbis of the Mishnah introduce a legal change also at this stage, which is rather an astonishing one. To start with, the rabbis rule that even at this advanced stage of the rite, the woman can still refuse to take part in it—by admitting guilt. This way the woman can terminate the procedure at the cost of agreeing to a divorce settlement in which she forfeits the sum guaranteed her in the marriage contract (*ketubah*). The self-incrimination that the Mishnah permits the woman is astonishing since it stands in utter conflict with the well known *Halachic*-legal principle that "no one makes himself [out to be] a wicked man"—a person’s self-incrimination has no legal effect, and can never be regarded as acceptable testimony in a legal proceeding.31

But astonishment at the Mishnaic interpretation does not end here. The second part of the passage details another possibility whereby the woman can cancel the ceremony without even having to admit guilt: simply by refusing to drink the water. The very option of refusing to drink, thereby cancelling the ceremony without sufficient justification, seems very strange. The Mishnah seems to be allowing the woman to hide the truth by simply refusing to cooperate with an established legal process. True, she is obliged to compensate her husband for her refusal (forgoing her marriage contract), but in effect, at least from the legal standpoint, she escapes without punishment, without clarification of the facts and without the truth.

This astonishing course of discussion about extending the legal possibilities of cancelling the ritual takes a new turn in the continuation of the Mishnah:

> [If] one witness said, “I saw that she was made unclean,” she would not undergo the ordeal of drinking the bitter water. And not only so, but even if it was a boy slave or a girl slave, . . . these are believed even to invalidate her [from receiving payment of] her marriage contract. As to her mother-in-law, and the daughter of her mother-in-law, her co-wife, and the husband’s brother’s woman, and the daughter of her husband, . . . these are believed—not to invalidate her from receiving payment of her marriage contract, but that she should not undergo the ordeal of drinking the bitter water.32

Like the preceding discussion, this too deals with legal possibilities

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31. See Babylonian Talmud, Tractate Kethuboth 18b.
for cancelling the ritual even before it begins. But here there is presented a list of potential witnesses whose testimony is empowered to cancel the ritual, thereby leading to the accused woman’s divorce and perhaps even to forfeiting her marriage contract. The discussion of these potential witnesses is surprising when compared to a similar discussion in tractate Yebamot dealing with the legal mandate of these same potential witnesses in the legal context of aguna—a woman whose husband has disappeared without trace. This discussion in tractate Yebamot concludes with the ruling that an aguna cannot remarry until her husband’s death has been established by appropriate testimony. In the course of the discussion regarding what constitutes appropriate testimony in this matter, the Mishnah presents the following views:


In their external form, the Mishnahs in tractates Sotah and Yebamot are similar. Both begin by presenting the relevant legal subject (in Sotah—the suspected woman’s drinking the bitter waters; in Yebamot—the remarrying of a woman whose husband disappears without trace), and continue by stipulating the legal requirements the witnesses must fulfill—their number (one witness) and identity (women, slaves and relatives). But despite their formal similarity, the two Mishnahs come to completely opposite conclusions regarding the legal validity of the witnesses. Whereas the Mishnah in Sotah rules that all categories of witnesses under discussion are considered acceptable for preventing the woman from drinking the bitter water, the Mishnah in Yebamot makes the opposite ruling with regard to all that pertains to the case of aguna. The same list of witnesses that tractate Yebamot dismisses as unacceptable serves in tractate Sotah as the list of witnesses on whom the court may rely in cancelling the ritual.

This comparison between the Mishnahs in Sotah and Yebamot illustrates just how legally exceptional are the principles at work in tractate Sotah. I will explore shortly the reasons for the exceptions in the case of sotah. For the moment, suffice to say that the Mishnaic discussion of sotah deviates from the Biblical narrative in two important ways. First, it replaces the Biblical subjective framework with an objective one. According to the Biblical narrative, the subjective suspicions of the husband suffice to put the process in motion. But in

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the Mishnaic discussion, these suspicions are examined in the context of strict legal regulation based on clear and evident objective criteria, for example, testimony of eye witnesses or admonition given before witnesses. Secondly, the Mishnah establishes an additional legal regulation with respect to the possibility of actually staging the ritual even when the initial legal regulation has been in place and there is a solid foundation for the suspicion. Here the regulation assumes a character opposite from the earlier one. Whereas the earlier regulation hardened the legal criteria required (from subjective to objective), the latter made them more flexible. First, the woman is given the possibility of terminating the ritual without admitting guilt. Second, forms of testimony that would have been inadmissible in other legal processes—for example testimony of a single witness, slaves or relatives—are admissible in the case of the Sotah to prevent the accused women from participating in the ritual, even in the instance that the woman wants to participate in the ritual in order to prove her innocence.

C. Theatricalization

The rabbinic discussion of sotah makes a second departure by strengthening the dramatic and theatrical foundations of the ritual. The Biblical narrative establishes three theatrical foundations—the disheveling of the suspected woman’s hair, her drinking of the bitter waters, and the priest’s pronouncing of a fearful curse. But notwithstanding these aspects of the ritual, the essence of the ritual takes place in a metaphysical plane, not in a physical or theatrical plane: after the woman’s hair has fallen loose and she has drunk the water, the onlookers all wait to see how God’s judgment will fall. Herein lies the principal tension and the essential meaning of the ritual: God is meant to reveal the woman’s guilt, or it is He who will exonerate her and knows how to compensate her for the pain and disgrace she suffered. Therefore, the principle of the ritual is embedded in the metaphysical dimension of God’s intervention in reality. But the rabbinic interpretation turns things topsy-turvy. The metaphysical becomes less important than the physical, and precisely the physical-theatrical dimension becomes the central aspect of the ritual. Thus does the next passage in the Mishnah describe the process of the ritual:

And the priest grabs her clothes—if they tear, they tear, . . . if they are ripped up, they are ripped up—until he bears her breasts. And he tears her hair apart. R. Judah says, “If she had pretty breasts, he did not let them show. And if she had pretty hair, he did not pull it
apart.” [If] she was clothed in white clothing, he puts black clothes on her. [If] she had gold jewelry, chains, nose rings, and finger rings on, they take them away from her to put her to shame. Then he brings a rope made out of twigs and ties it above her breasts. And whoever wants to stare at her comes and stares, except for her boy slaves and girl slaves, since in any case she has no shame before them.34

In addition, the Tosefta notes an additional theatrical gesture that does not appear in the Mishnah: “She wrapped a beautiful scarf for him, therefore a priest takes her cap from her head and puts it under foot.”35

The Biblical verses do not explain the reason for disheveling the woman’s hair. A simple understanding of the verses is that this process is meant to symbolize the woman’s transfer from the husband’s jurisdiction to that of God. Covered hair, as the Sifre notes, signifies a woman’s status as a married woman, i.e. as belonging to her husband.36 Seen this way, the disheveling of the woman’s hair is intended to express her new ambivalent legal status as a wife whose loyalty to her husband has been called into question when she stands before the priest. But in the above passage, the act of disheveling appears to be intended to degrade the woman. That is why “if she had pretty hair, [the priest] did not pull it apart,” and why, after taking her cap off her head, the priest “puts it under foot.” Indeed, it is only one of many dramatic gestures that the priest performs in the course of the ritual—others include dressing her in black, removing her jewelry, stripping away her clothes and exhibiting her naked before the crowd of observers—that together work to clearly create a degrading image of her as a devious, diabolical figure, far removed from what could possibly be regarded as normal, ordinary, normative, moral or righteous.37

This image is constructed through a carefully managed performance, proceeding in two stages. The first stage focuses on removing the mask of normativity that conceals and protects the woman’s secret from the world, allowing her to present herself as an ordinary, normative woman. This stage is reflected in the first set of gestures described in the Mishnah—removing all her jewelry and dressing her in black rather than white, the intention being to peel away all disguises that portray the woman differently from what she is. The

34. Mishnah, Tractate Sotah 1:5-6.  
35. Tosefta, Tractate Sotah 3:3.  
36. Sifre to Numbers, 11.  
37. As Haberman comments, The Suspected Adulteress, supra note 23, at 24: “the composure of the mishnaic text ruptures abruptly into violent eroticism.” Satlow, Tasting the Dish, supra note 23, at 176, similarly describes the Mishnah as a “rhetoric of violence and humiliation.”
adulterous woman does not have an external identifying mark that identifies her as an adulteress. To the outside world she appears perfectly normative, wearing white and adorning herself as all normative women do. Yet, while normative women wear white and adorn themselves to please their husbands, she does so to please strange men. The intent of these two dramatic gestures, then, is to brand her with an observable identifying mark so that no one could mistake her for being someone she is not.\(^{38}\)

Once the exterior masks have been removed, the ritual proceeds to its second stage, which focuses on the woman’s interior. The aim is to expose the evil lurking behind the masks and to convey, through theatrical devices and techniques, a full impression of what the woman truly is:\(^{39}\) a personification of sin and corruption; an evil temptress out to seduce honorable and upright men from the path of righteousness. This stage is reflected in the second set of dramatic gestures described in the Mishnah—exposing the woman’s breasts, raising them up, tying them to her chest by means of a rope, and inviting the general public to witness the spectacle. The message behind these gestures cannot be misunderstood: although there are normatively behaving women who do not wear jewelry or white clothes, surely only a purely evil and corrupted creature would expose her body to all and invite the public at large to come see. Thus, if the first set of gestures described in the Mishnah is meant to peel away the woman’s exterior masks, which portray her as someone she is not, the second set of gestures is intended to expose the woman’s interior and reveal what she truly is: a conniving, menacing demonic figure of prostitution, evil and sin.

To conclude, in the Biblical narrative, the theatrical aspect of the ritual is meant to express the woman’s ambivalent legal status (whether she is under her husband’s jurisdiction or removed out of it and into God’s direct supervision through His priests), but not to injure her honor. In the Tannaitic description, however, the theatrical aspect, as reflected in the two sets of gestures, is pronouncedly directed against the woman herself, constituting her as the incarnation of corruption and sin.

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\(^{38}\) For a roughly similar analysis of these gestures, see Rosen-Zvi, *The Rite That Was Not*, supra note 23, at 83.

\(^{39}\) Some have suggested that the intent of these gestures is to expose the truth about women in general, not merely accused women standing trial. See, e.g., Satlow, *Texts of Terror*, supra note 23. I am not convinced by this interpretation, mainly because, as Rosen-Zvi remarks, *The Rite That Was Not*, supra note 23, at 229, 235, the perception of women as "evil temptresses" is uncharacteristic of Tannaitic culture.
D. Elimination

In the final chapter of tractate Sotah, after all aspects of the sotah ritual have been discussed in detail, the Mishnah informs us that, “When adulterers became many, the ordeal of the bitter water was cancelled. And Rabban Yohanan b. Zakkai cancelled it, since it is said, ‘I will not punish your daughters when they commit whoredom, nor your daughters-in-law when they commit adultery, for they themselves go apart with whores.’”

The Mishnah links the elimination of the ritual with a contemporary moral-social reality: with the advent of a decadent age in which moral virtue has been corrupted, there was no longer any place for the sotah ritual. Therefore Rabban Yohanan b. Zakkai cancelled it. But why was there no place for the ritual? The Jerusalem Talmud and the Babylonian Talmud provide slightly different answers. According to the former, in the depraved circumstances of the time, there was no longer justification for performing it. So long as men are committing acts of sexual immorality, there is no justification for punishing women’s sexual immorality: “For it is written, ‘for they behave like donkeys with the prostitutes’ (Hosea 4:14), and it is written: ‘The woman will be a swearword among her people’ (Numbers 5:27). In times when her people are peaceful, not it times when her people are dissolute.”

According to the Babylonian Talmud, on the other hand, the circumstances of the time rendered the ritual ineffective; it simply stopped working:

Our Rabbis taught: And the man shall be free from iniquity—at the time when the man is free from iniquity, the water proves his wife; but when the man is not free from iniquity, the water does not

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41. For a detailed discussion of the tannaitic literature on the relation between the cancellation of the sotah ritual and moral decline, and its parallels in Greco-Roman literature, see Lisa Grushcow, Writing the Wayward Wife: Rabbinic Interpretations of Sotah 252-56 (Brill 2006); Lisa J. Grushcow, The Case of the Disappearing Ritual: Theology, History, and Halakhah, 61 Conservative Judaism 44, 48-51 (2009).
42. The ritual had most probably ceased to be performed long before Rabban Yohanan b. Zakkai cancelled it. See Gedalyahu Alon, Studies in Jewish History in the Times of the Second Temple, the Mishna and the Talmud, Vol. 1, 56 (HaKibutz HaMe’uchad 1957) (Hebrew); Epstein, Introductions to the Literature of the Tannaim, supra note 25, at 400; Rosen-Zvi, The Rite That Was Not, supra note 23, at 160. Its cancellation by Rabban Yohanan b. Zakkai is thus more of a symbolic gesture than an actual policy change (“we would have cancelled the ritual even if it was still being performed”).
43. See Grushcow, The Case of the Disappearing Ritual, supra note 41, at 45.
prove his wife. . . . R. Eliezer said: The prophet spoke to Israel, If you are scrupulous with yourselves, the water will prove your wives; otherwise the water will not prove your wives. 45

The citation of the verse from the Book of Hosea in the Mishnah, however, suggests a third possible answer. The decadent circumstances of the time rendered the ritual vacuous and devoid of meaning. 46 As a means of safeguarding moral order, the ritual is meaningful only if it is part of a moral covenant that touches on the entirety of those norms that constitute a moral society. It has no meaning in a society that does not follow any such norms. If the members of society do their part in obeying these norms—they do not “go part with whores”—then there is reason to condemn transgressors who deviate from them. But if the members of society do not obey these norms, there is no sense in sanctimonious finger-pointing directed against those who deviate from them. According to this interpretation, Yohanan b. Zakkai cancelled the sotah ritual because the meaningfulness of the ritual as a regulatory device ceased the moment society effectively declared its abandonment of the moral covenant that gave the ritual meaning (“when adulterers became many”). Thus, in a society in which infidelity has become the norm, there is no purpose to a ritual and to legal principles whose source is an ethical system that forbids adultery.

E. Distinct Concerns?

The discussion so far has concentrated on the nature of the three changes introduced by the rabbis of the Mishnah to the Biblical law of sotah. To summarize, the first change was to subject the sotah ritual to strict legal regulation that hardens the legal criteria for performing the ritual (from subjective to objective criteria) while relaxing the criteria for terminating the ritual, even after it has been decided that there is sufficient ground for performing it. The second change was to intensify the theatrical character of the ritual, with the effect of the transforming accused woman into a degraded figure. The third change was to eliminate the ritual from legal practice, allegedly as the outcome of normative reality. At this stage we may ask: are the three changes motivated by the same concerns?

By far, the predominant view in contemporary scholarship is that they are not. 47 The first change, it is commonly argued, is motivated by

45. Babylonian Talmud, Sotah 47b.
46. For a similar interpretation, see Rosen-Zvi, The Rite that Was Not, supra note 23, at 178-79.
47. To be sure, no one, as far as I can tell, has suggested that they are motivated by the same
concern for the well-being and fate of women in a patriarchal society. According to this argument, hardening of the legal criteria for justifying the ritual serves to strike a balance. First, it promotes the idea that women need not live in fear of their husbands’ accusations. Further, relaxation of the criteria, once it becomes clear that there is good reason for proceeding with the ritual, is intended to spare the accused woman the shame the ritual will cause her. Given the shame involved, it is to the benefit of the accused woman to avoid the ritual, even at the cost of being unable to prove her innocence, save her marriage and preserve her marriage contract.

But the second change is necessarily driven by a wholly different concern. If the woman’s well-being is what concerns the rabbis of the Mishnah, we would expect that their interpretation of the Biblical narrative would favor decreasing the cost of participation, that is, minimize the humiliating aspects of the ritual. We see however that the second change brings about just the opposite: the text of the Biblical narrative is rewritten so as to transform the accused woman into a grotesque and degraded figure. The second change, then, is surely not driven by concern for the well-being of women. It is more likely driven, as some scholars have suggested, by concern to assert male dominance over women, by an image of female sexuality as an overt threat to morality, or perhaps simply by vehement opposition to sexual

48. See, e.g., Hauptman, Rereading the Rabbis, supra note 23, at 15-21; Haberman, The Suspected Adulteress, supra note 23, at 23; and Halbertal, Interpretive Revolutions in the Making, supra note 29, at 94.

49. See Halbertal, Interpretive Revolutions in the Making, supra note 29, at 94. In the words of Haberman, The Suspected Adulteress, supra note 23, at 23, the legal procedures are meant to protect women against the “potential ravages of jealousy.”

50. As Hauptman puts it, Rereading the Rabbis, supra note 23, at 18, the legal procedures protect women by “sharply reduc[ing] the number of instances in which a man could subject his wife to the ordeal of the bitter waters.”

51. In an attempt to explain this tension between the two changes, some scholars have argued that the first change (legalization) is essentially a response to the second (theatricalization), reflecting the rabbis’ discontent with the treatment of the accused woman. In Hauptman’s words, Rereading the Rabbis, supra note 23, at 15-19, the rabbis were concerned with the ritual’s “immorality and discriminatory nature,” (19) and therefore introduced legal regulations in order “to eliminate a practice that confounded their notions of justice and morality.” (15) For a similar point, see Ilan, Jewish Women in Greco-Roman Palestine, supra note 25, at 136-41. But the problem with this reading, as Rosen-Zvi points out, The Rite that Was Not, supra note 23, in ch. 1, § 1, is that the first change was most likely introduced before the second change, and hence cannot be understood as a response to it.

52. For this explanation, see Haberman, The Suspected Adulteress, supra note 23, at 30.

53. For this explanation, see Satlow, Tasting the Dish, supra note 23, at 182; Peskowitz, Spinning Tales, supra note 23, at 135-36.
permissiveness. Any of these possibilities will explain why, according to the rabbis, the accused woman deserves to be publicly humiliated regardless of whether or not she has indeed committed adultery. While she is still only suspected, the punishment of public humiliation is in keeping with what she has already done, namely, raising suspicion by exposing herself to sin.

Finally, the third change seems to be driven by yet a third concern: to express the rabbis’ discontent with the decadent reality of contemporary life, where everyone “goes apart with whores.” This concern would seem to explain why, although the ritual had long ceased to be performed in practice, the rabbis nonetheless made the point of announcing its formal cancellation.

But is this analysis of these changes correct? Are they truly motivated by separate, distinct concerns? In the following two parts of the article I will try to show that they are not. I will offer an alternative analysis according to which the changes all in fact address a single, more general concern: how are we to ensure that the sotah ritual fulfills its function of maintaining social order?

This concern, as I will explain more fully shortly, is related to but distinct from the concern for “maintenance of order” that some scholars have associated with the second change of theatricalization. According to these scholars, this change relating to the Biblical narrative should be understood in the context of the role of rhetoric in the maintenance of social order. Their analytic framework, incorporating insights from a variety of streams in ritual theory, including anthropological, performative and functional-structural approaches, is based on two premises. First, the rabbis perceive the sotah ritual as a means of regulating and controlling women’s bodies and sexuality. Second, the rabbis never intend the ritual to be performed in actual practice. It is essentially a “textual” ritual—a literary artifact that regulates and controls women’s sexual behavior by influencing (male) readers’ views.

55. Remember that a sizable portion of the humiliating acts (changing her clothes, removing her jewelry and exposing her nakedness) take place even before she drinks the bitter water, that is, before it is proved that she was unfaithful.
58. See especially Rosen-Zvi, *The Rite That Was Not*, supra note 23, at 236-38; Satlow, *Texts of Terror*, supra note 23. There are important differences between Rosen-Zvi’s and Satlow’s arguments. In this paragraph I attempt to capture the essence of these arguments.
of women, promoting a societal climate of hostility and suspicion toward female sexuality.\textsuperscript{59}

In this respect, the second change should be understood as a "speech act" whose function is to assert a non-legal measure of control over the woman’s body and sexuality while fortifying and reproducing extant attitudes and gender hierarchies.\textsuperscript{60} The text of the \textit{sotah} aims at deterring women from challenging prevailing female sexual mores, achieving this effect by providing a vivid and detailed description of the \textit{sotah}'s violent fate. The \textit{sotah} story thus becomes a warning to all women: even the suspicion of sexual misconduct suffices to put a woman at risk of public display, physical abuse and humiliation, and every activity perceived (by men) as leading to sexual misconduct will be violently punished.

The vivid description of the \textit{sotah}'s disfigurement, then, is designed to reestablish firmly the existing gender order by conveying the grave costs of challenging it. It is intended to construct, reproduce and promote an atmosphere of intimidation whose function is to reinforce and perpetuate the existing (male dominated) power structures of society—including contemporary society, which reaffirms these oppressive attitudes by the very act of recounting the text itself.

Perhaps the clearest example of how this mechanism works is provided by Foucault in his study of public executions in the early modern period.\textsuperscript{61} The public execution, Foucault argues, should be understood "not only as a judicial, but also as a political ritual"—a carefully managed dramatic performance which "belongs, even in minor cases, to the ceremonies by which power is manifested."\textsuperscript{62} By disobeying the sovereign's law, the disobedient individual has

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\textsuperscript{59} As Satlow puts it, \textit{Texts of Terror}, supra note 23, at 275, 295-96: "If we accept the premise that the rabbis in late antiquity had limited juridical power, then the only way by which they could have promoted their values and norms would have been through rhetorical persuasion." The second change should thus be understood as an attempt of "a juridically weak (if not powerless) group with an apparently limited following . . . to coerce and persuade men and women into sanctioned sexual activities and liaisons."


\textsuperscript{61} Foucault also discusses this mechanism in the context of sexual norms (what he defines as "technologies of sex"). However, his study of public executions provides, I believe, the clearest example of the mechanism's operation. \textit{See Michel Foucault, The History of Sexuality\textit{, Vol. 1}}, ch. 4 (Random House 1980).

\textsuperscript{62} \textit{Michel Foucault, Discipline and Punish: The Birth of the Prison} 47 (Random House 1979).
challenged the sovereign’s authority, and the sovereign resurrects his authority through mutilation of the disobedient individual’s body, using shock and awe to remind the masses of the consequences of disobedience so as to keep them in their appropriate place. The body of the disobedient individual ceases to belong to him or her, but instead is transformed into a site for the manifestation of the sovereign’s power and authority exercised over both the individual and the community. The execution is thus a “ceremonial by which a momentarily injured sovereignty is reconstituted” through mutilation or mortification of a criminal’s body, much like a morality play, with “justice, humility and the threat of death displayed in order to warn and edify spectators.”

In terms of this analysis (keeping in mind, of course, that public executions were not merely “textual” rituals!), the second change—so the argument goes—reconstructs the Biblical narrative as a political ritual: a carefully managed dramatic performance by which gender hierarchies are reproduced and reinforced. Just like the body of the disobedient citizen in the case of the public execution, the body of the disobedient woman, the sotah, ceases to belong to her and is transformed instead into a symbolic site for the manifestation of patriarchal control over women’s sexuality and women’s subordinate position in society.

This analysis is concerned only with the second change of theatricalization. It does not seek to explain the first and third changes, and it is questionable whether these changes will indeed fit coherently into the structuralist/Foucauldian framework. If the rabbis’ aim is to “scare [women] into proper behavior,” then why harden the legal conditions for staging the ritual while weakening the conditions for terminating it? More importantly, why announce the cancellation of the ritual when doing so will clearly reduce its didactic effect? Why should anyone learn a lesson from the ritual when even the rabbis have deemed it inappropriate and therefore have cancelled it? This by itself does not show the analysis to be incorrect. Perhaps only the second change is driven by concern for “maintenance of order,” while the other two changes are driven by different considerations. But this, I think, is not
the case.

All three changes, I suggest, are driven by a single, overarching concern which, although having to do with the reinforcement of prevailing sexual mores, is nevertheless very different from the motives described in the analysis above. This concern is essentially about the logical implications of the actual practice of the *sotah* ritual. The Mishnaic discussion, I argue, is constructing its arguments assuming the ritual to be actual, rather than merely “textual.” That is, it treats the ritual as a procedure that is intended to be applied in actual practice. The purpose of this procedure is indeed to reinforce cultural sexual mores, as the above analysis suggests. Yet, it fulfills this purpose not so much by “scaring women into proper behavior,” but rather by informing the public at large precisely where the line is drawn between proper and improper sexual behavior. The *sotah* woman merely serves as a concrete, physical (as opposed to “textual”) reference point for defining society’s boundaries of acceptable sexual behavior and for establishing the differences between legitimate experiences that belong within the group and illegitimate experiences that belong outside it. All three changes, I argue, rest on this basic understanding of the *sotah* ritual, representing three different responses to the same perceived threat. That is, paradoxically, while the ritual is intended to reinforce the normative boundaries of society, were it ever to be actually performed, it would end up undermining these boundaries.

The major merit of this interpretation, as I will attempt to demonstrate shortly, is that, apart from establishing the connection between the seemingly disconnected parts of Mishnah *sotah*, and providing a coherent framework for understanding all three changes as addressing the same basic concern, it situates the Mishnaic discussion within a wider conceptual and theoretical context than is usually done in conventional analyses. That is, the Mishnaic discussion is concerned not with a particular problem facing a particular social-political system at a particular point in time (e.g. reinforcing existing gender hierarchies at a time where the rabbis had limited juridical power). Rather, it is concerned with a general conceptual problem facing any social-political system that is based, as any social-political system is, on the fundamental social dichotomy between the allowed and the prohibited, or the normal and the deviant.
II. VISIBILITY AND THE NORMALIZATION OF DEVIANCE

A. Opposition and Contrast

In his well known account of the dialectic between master and slave, G.W.F. Hegel has established that the relationship between one consciousness and another is always a relationship of negation. Consciousness achieves independence—it becomes capable of substantiating itself—only by way of negating another consciousness that confronts it. This negation, Hegel explains, permits the possessor of consciousness, the “subject,” to be substantial because it illuminates his or her identity on the background of all that is insubstantial and external to him or her—the “object.” The subject as substantial, therefore, depends on the ability to define that which is opposed to it—the Other—as insubstantial, as object.68 This dialectic, which according to Hegel forms the basis of the acquisition of self-identity, applies, of course, to social and cultural systems as well. As the French ethnographer and anthropologist Claude Levi-Strauss observes, virtually all cultures perceive opposition to be a basic axiom of cultural and social reality, and accordingly, attempt to organize their reality in a binary scheme.69 The category of the Other, he says, is as primary as consciousness itself, perhaps even taking precedence over it. From the earliest cultural eras and in all mythological systems, one can always find this duality between the Self and the Other. In fact, only by being distinct from some other can the self truly and completely define and understand itself as “I.”70

Classic examples of the centrality of opposition and contrast to the workings of social systems are provided by Emile Durkheim’s and Kai T. Erikson’s works on social deviance and by Michele Foucault’s analysis of the category of madness. Deviance, Durkheim says, is not a property inherent in any particular kind of behavior, but rather a property conferred upon that behavior by society in order to establish through it, and in contrast to it, its unique identity and distinct shape. By applying a focus for group feeling, deviant behavior permits the members of society to develop a tighter bond of solidarity than existed earlier, creating a climate in which their private sentiments are fused

70. CLAUDE LEVI-STRAUSS, STRUCTURAL ANTHROPOLOGY (Basic Books 1963). See also PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 124 (Cambridge Univ. Press 1977): “To bring order is to bring distinction, to divide the universe into opposing entities.”
together into a common sense of morality.71 Deviance, therefore, is “an integral part of all healthy societies,”72 a precondition for defining normative boundaries, enhancing cohesion and rigidity, and maintaining the identity of the social system.73 As Kai T. Erikson writes, drawing on Durkheim’s analysis:

Like a war, a flood, or some other emergency, deviance makes people more alert to the interests they share in common and draws attention to those values which constitute the “collective conscience” of the community. Unless the rhythm of group life is punctuated by occasional moments of deviant behavior, presumably, social organization would be impossible.... Each time the community moves to censure some act of deviation, then, and convenes a formal ceremony to deal with the responsible offender, it sharpens the authority of the violated norm and restates where the boundaries of the group are located. For these reasons, deviant behavior is not a simple kind of leakage which occurs when the machinery of society is in poor working order, but may be, in controlled quantities, an important condition for preserving the stability of social life.74

Foucault makes a similar observation in his historical-social analysis of the category of madness.75 This category, Foucault claims, emerged together with the emergence of formal institutions for incarceration of the insane. Until the modern age, insanity was viewed as a part of the spectrum of social behavior. But with the advent of medical institutions dedicated to treatment of the insane, insanity or emotional illness was established as a distinct social category, as a kind of deviance placed unambiguously outside the realm of normative life. The clinical institutionalism that emerged from this new definition of madness created an oppositional ordering distinguishing between one who is part of the normative society (the sane) and one who is not (the insane). This opposition is reflected well in the dictionary definition of madness prevalent in the eighteenth century: “The simplest and most

71. EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 70-110 (Free Press 1965).
73. See id. at 70.
74. Erikson, Wayward Puritans, supra note 11, at 4, 13.
general definition we can give of classical madness is indeed delirium: This word is derived from lira, a furrow; so that deliro actually means to move out of the furrow, away from the proper path of reason.\textsuperscript{76}

This definition, claims Foucault, is an excellent example of how society develops and preserves its moral codes through opposition and contrast. The conscious professional choice to define madness as the expression of characteristics not to be found in a normative person (one who is guided by "reason") is primarily intended to anchor the notion of madness as a paradigmatic expression of anti-normativity—i.e. as the primary signifier of deviance from all that is considered by society "the proper path of reason." It thus reflects the critical function of deviance in confirming the substantiality of prevailing social practices (guided, as they are, by "reason") as cohesive. For the public of eighteenth-century Europe, he writes, the mental asylum "was no longer only the lazaret house at the city's edge; it was leprosy itself confronting the town."\textsuperscript{77} Or, in the words of the eighteenth-century French dramatist and writer, Louis-Sébastien Mercier, "A terrible ulcer upon the body politic, an ulcer that is wide deep, and draining...a place of violence, an asylum of degradation and infortune...the receptacle for all the most monstrous and vile things to be found in society."\textsuperscript{78}

B. Keeping Deviance Invisible

Social systems, then, are constructed through opposition and contrast. They create and preserve the identity—their distinct structure and unique shape—by emphasizing the dichotomic distinction between their own characteristics and practices and the characteristics and practices of the Other, considered a deviance.\textsuperscript{79} An important implication of this dynamic is that the social system remains intact only as long as the deviant retains the status of an Other—as one who stands in a place opposed to the legitimate order. Or put more simply, as long as deviance retains the status of deviance and the public does not come to regard deviance as normal. A crucial question, then, is how can society ensure that deviance remains outside of the focus of what is considered normative behavior?

\textsuperscript{76} Robert James, Dictionnaire Universel de Médecine 972 (Paris 1746-48), quoted in Foucault, Madness and Civilization, supra note 75, at 94.
\textsuperscript{77} Foucault, Madness and Civilization, supra note 75, at 202.
\textsuperscript{78} Louis-Sébastien Mercier, Tableau de Paris 233-34 (Amsterdam 1783), quoted in Foucault, Madness and Civilization, supra note 75, at 202-03.
\textsuperscript{79} Ben-Yehuda, Deviance and Moral Boundaries, supra note 6, at 20: "Deviance is the mirror-image of conventional morality and therefore of existing boundaries."
There may be multiple answers to this question. One very plausible possibility, implied by Foucault’s analysis of the asylum, proposes that society keep deviance hidden, never letting it occupy central stage and relegating it to the outskirts of the city (as in the case of the lepers) or to the mental asylum (as in the case of the insane). This solution involves dialectical engagement with deviance. While the public must be aware of its existence, so as to know where the boundaries of society are located, they must not come across it in their daily reality. It must not be present in their immediate environment. Rather, it must remain abstract; intangible; invisible to the eye; a mere conceptual possibility. For once it becomes visible, showing itself to have an actual and undeniable presence in reality, there is an increased likelihood that it will come to be perceived as normal. That which is undeniably present in reality, not merely as a conceptual reference point, is normal by virtue of its very presence, undermining its own claim as exceptional.

Deviance remains deviance, then, as long as the public keeps regarding it as not belonging to the realm of “us” and not truly present in “our” world. It becomes normal once the public starts seeing it as an integral feature of social life, as being typical of, rather than an exception to, everyday reality. Thus, we can say that the ability of society to insulate the prevailing social order from disturbance—to ensure that deviance remains deviance—depends in large measure on its ability to conceal the presence of deviance in social life. If deviance is concealed, the public may be aware of its possibility, but they will have minimal exposure to its actual presence in their daily reality.

The expression “coming out of the closet,” which metaphorically describes the journey of the homosexual from a secretive way of life to an open way of life, serves as a typical example of the tension between the reality of what is perceived as normal and the unreality (or lack of presence) of what is perceived as deviant, and of the connection between visibility and normality in the context of sexual deviance. Homosexuality has traditionally been regarded as a paradigm of deviance; it is a characteristic of the Other in contrast to which the normative boundaries of society are defined. Within many pre-modern

80. But see also Foucault’s analysis of “discourse” in The Order of Discourse, in LANGUAGE AND POLITICS 108-28 (Michael Shapiro ed., Blackwell 1984); Pierre Bourdieu’s analysis of “doxa” in THE LOGIC OF PRACTICE ch. 3 (Stanford Univ. Press 1990); OUTLINE OF A THEORY OF PRACTICE, supra note 70, ch. 4.

81. See, e.g., Lev 18: 22, 24-27:

Thou shall not lie with mankind as with womankind, because it is an abomination. . . . .

Defile not yourselves with any of these things with which all the nations have been
societies, certainly within monotheistic religions, homosexuality has been kept zealously hidden, invisible not only formally but also conceptually; a mere ghost possibility; something that can exist only in the closet, together with vampires, skeletons or demons whose very nature is to remain hidden from daylight. Homosexuality may exist, but not in "our" world—only in the world of the Other.82

This long-standing perception of homosexuality in the Judeo-Christian world began to change once the concept of human rights encouraged homosexuals to make themselves visible, coming as it were "out of the closet," and thus affirming the presence of homosexuality in reality. The fact that the public has begun to acknowledge the actual existence of such a proclivity and can no longer ignore or deny it brought about a change in social categories. This change, in turn, obliged institutions of law and justice, on which the task of preserving and defending society's boundaries is entrusted, to confer on homosexuality the formal existential status of normal (i.e. lawful). In this respect, the transition of homosexuality from inside the closet outside into wide daylight, from its perception as a mere ghost possibility to its recognition as an actual phenomenon in reality, has eventually led to its transition from the realm of deviance to the realm of the normal.

This change in social categories is still considered by many to be an imminent threat to religious integrity. The system's self-identity, based in large measure on traditional categories of sexuality, begins to unravel. As described by Pierre Bourdieu,83 after fighting fiercely the aberration using all the weapons at its disposal—excommunications, boycotts, curses, imprecations, forfeiture of the World to Come, etc.—the religious system must find ways to amend its identity and boundaries, or else it may lose its relevance and even collapse. The wave of secularization sweeping though Western society in the last 250 years may perhaps attests to such a crisis facing religious systems.

82. See, e.g., the Babylonian Talmud, tractate Kiddushin 82b: "R. Judah said: An unmarried man must not tend cattle, nor may two unmarried men sleep together under the same cover. But the Sages permitted it. [What is the reason?] It was taught: They said to R. Judah: Israel is suspected of neither pederasty nor bestiality."

83. BOURDIEU, OUTLINE OF A THEORY OF PRACTICE, supra note 70, at 159-71.
C. The Sotah Ritual and the Normalization of Deviance

I suggest that the rabbinic discussion of the sotah ritual, as described in the first part of the article, should be understood in light of this deep connection between the visibility of deviance and its normalization. The rabbis of the Mishnah, as stated in the outset, conceive of the sotah ritual as a legal instrument designed to reinforce the normative boundaries of society with regard to sexual conduct. It is intended to be a “status degradation ceremony,” in which the sexually deviant is “ritually separated from a place in the legitimate order . . . [and] defined as standing at a place opposed to it.” 84 The sotah is rejected from the custody of moral society and is remanded into the custody of God, so that society can “reenact a sense of its own order and redraw its boundaries.” 85 “We,” the normative society, can bring her to the place of judgment, but as a paradigmatic Other, only God can deal with her. The ritual’s function is thus to enable society to draw a sharp line between what belongs to it and what does not belong to it, between what characterizes “us” and what characterizes the Other.

What concerns the rabbis of the Mishnah, however, is that the ritual may, in actual practice, bring about the opposite outcome. 86 To understand why, one must discern between the ritual’s content and the form in which this content is spoken. The content spoken of in the ritual is sexual deviance (adultery), while theatricality is the form in which it is spoken. The problem with the ritual, as the rabbis of the Mishnah see it, is that, on the one hand, it is necessary to speak about sexual deviance—to impose a degraded status on the sotah—to reinforce the normative boundaries of society. But on the other hand, the form in which the sotah ritual speaks about it—the theatrical manner in which the “status degradation ceremony” is performed (e.g. the disheveling the sotah’s hair, her drinking of the bitter waters, the priest pronouncing a fearful curse)—could, paradoxically, have the effect of undermining society’s boundaries. In effect, the theatricality of the ritual removes the deviance from the realm of the abstract and bestows on it an added measure of actuality. It provides embodiment to an otherwise shadowy notion, lending it a concrete sustenance. From now on, instead of just thinking about deviance, theater has brought it into life, given it presence, shape and voice, and converted it into a living image active in

84. Garfinkel, Conditions of Successful Degradation Ceremonies, supra note 9, at 423.
86. By “actual practice” I mean when actually performed. The rabbis, in this respect, are not concerned with a “textual” ritual, as some scholars have suggested (see Sect. I.E supra), but with an actual ritual that is intended to be performed in practice.
the imagination of people as a concrete, graspable reality. When deviance is allowed to perform at the center of the stage, no matter what its role in the play—the arch villain, the domineering evil, the ultimate threat to peace and concord—because it is the protagonist of the play and the very reason for its existence, it necessarily ceases to be hypothetical and becomes actual and concrete. Paradoxically, then, rather than separating and excluding the deviant—the sotah—from an intelligible place within the legitimate order, the ritual may actually end up establishing a place for her at the very center of it. Instead of confining her to the shadows, the ritual brings her into the limelight. Rather than leave her a total incomprehensible Other necessarily departed from everyday reality, it legitimizes her as a misunderstood, avant-garde figure, a harbinger of alternative lifestyles.

In short, while the sotah ritual is designed to reinforce the normative boundaries of society with regard to sexual conduct, the rabbis of the Mishnah are concerned that by drawing sexual deviance out of its obscurity and emphasizing its presence in everyday reality, the ritual may, in actual practice, lead the public to regard such deviance as normal, thus undermining, rather than reinforcing, the normative boundaries. What can be done, then? How are we to prevent the ritual from creating the wrong effect? How should we safeguard the deviance from becoming or even appearing as normal? These questions underlie the three rabbinic changes to the Biblical law of sotah discussed in the first part of this article. In the following section, I shall attempt to show how these changes reflect three distinct methods for addressing this one

88. As Stone Peters puts it, *Legal Performance Good and Bad*, supra note 13, at 183: “theatricality calls attention to itself, preens itself in the viewer’s gaze, effectively waves to the spectator and says, ‘look at me!’”
89. My analysis here of course assumes that the ritual is performed in front of the public. To be sure, the Biblical passage relating to sotah does not mention any audience, and it is questionable whether the ritual, in its historical form, was indeed open to the public. However, the Mishnaic discussion, to repeat again, is concerned not with how the ritual had been performed, but with how it should be performed. In this case, since the purpose of the ritual is to inform the public about where the boundaries of society are located, it must necessarily be performed in front of them. Otherwise, it will fail to fulfill its function.
90. Lake and Questier make a similar point in their analysis of public executions in post-Reformation England. While the purpose of the public execution is to create order, they argue, it may, paradoxically, create disorder by prompting, if not quite legitimizing, “the symbolic violence of the people.” *PETER LAKE & MICHAEL QUESTIER, THE ANTICHRIST’S LEWD HAT: PROTESTANTS, PAPISTS AND PLAYERS IN POST-REFORMATION ENGLAND* 274 (Yale Univ. Press 2002).*
major problem: assuming that a primary purpose of the criminal law is to maintain societal boundaries, how should the Biblical law of *sotah* be revised so as to ensure that it does not work against its own purposes by making deviance appear normal?

To clarify the differences between the three methods, I will present them as they are reflected in the three changes, and thus in an order different from that in which the changes were presented in the first part of the article. Thus, I will start with the method reflected in the third change (elimination), continue with the method reflected in the first change (regulation), and conclude with the method reflected in the second change (theatricalization).

### III. THREE METHODS FOR MANAGING THE THREATPOSED BY THE THEATER OF DEVIANCE

#### A. The Elimination Method

The Mishnah informs us that Rabban Yohanan b. Zakkai cancelled the *sotah* ritual when the “adulterers became many.” The natural reading of this Mishnah, as discussed in the first part of the article (Section I.D), is to view the immorality of contemporary sexual practice as the cause of the ritual’s formal cancellation. With the advance of moral decadence, it had become clear that there was no longer any place for the *sotah* ritual in the legal system, either because there was no longer any justification for performing it, it stopped working or it had become devoid of meaning. Therefore, Yohanan b. Zakkai cancelled it. But this reading of the Mishnah has a significant weakness. It explains why the ritual ceased to be performed, but it does not explain why Yohanan b. Zakkai took the initiative of cancelling it. After all, reality may change again in the future, and if reality changes, the ritual may resume its justification, effectiveness and meaningfulness. If so, what led Yohanan b. Zakkai to cancel the ritual altogether, eliminating it formally from legal practice?91

The reason, I suggest, lies in the ritual itself rather than in some historical reality. What concerns Rabban Yohanan b. Zakkai are the inevitable logical consequences of the practice, and the very real possibility that, regardless of the context in which the ritual is performed, it will turn out detrimental to its own cause. This possibility

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91. Consider another legal institution, the Sanhedrin, which for various historical and cultural reasons has ceased to operate. Yet no rabbinical authority has seen fit to abolish it, in the hope that one day it will be appropriate to reinstate it.
looms as a concrete threat due to the deep connection that exists between the visibility of deviance and the process of its normalization. By transforming sexual deviance from an abstract thought into a living image, drawing it out of obscurity and proclaiming its actual presence, the ritual will effectively create a public sphere in which what society should consider deviant becomes counterproductively a natural (if not almost legitimate) component of everyday social life. By its very existence the ritual will attest to the system’s breakdown, contributing to a reality in which going “apart with whores” is perceived as normative behavior. Rabban Yohanan b. Zakkai identifies this problem, we can conclude, as intrinsic to the ritual and completely independent of the social and moral realities of contemporary life. Even if the circumstances justify performing the ritual, there will remain the very real possibility that its performance may undermine rather than reinforce the normative order. His method for solving this problem is to revise the Biblical law of *sotah* in such a way as to uproot the problem from its source: eliminate the theater that creates the danger. If we are to ensure that the normative order remains intact and deviance retains its status as abnormal, there should be no place for the *sotah* ritual in our legal system.

B. The Regulation Method

The regulation change to the Biblical law reflects a different method for dealing with the problem. Its point of departure is not entirely different from the first elimination method; it too supposes that the problem lies in the ritual itself because it creates an excessively lively image of deviance. But unlike the elimination method, it does not regard this problem as a reason for eliminating the ritual from the legal practice altogether, mainly because it does not perceive such an image of deviance to be completely harmful. The public must be informed where the normative boundaries of society are located, and a lively image of deviance might be the most effective way to convey this information to the public. It is only harmful when the public is exposed to it regularly enough to start seeing it as typical of, rather than as exceptional to, their everyday reality. So to prevent it from becoming harmful, one needs only to regulate the public’s exposure to it; the theatrical need not be abandoned altogether, but instead used moderately, vigilantly and prudently. Thus, according to the regulation method, the way to ensure that deviance remains exceptional is not by eliminating the theater completely, but rather by regulating the intensity of the public’s contact.
with the image it creates. This is achieved by revising the Biblical law so as to limit the possibility that the ritual—the theater that creates the image—will be performed.

We can now understand the reasons behind the two exegetical paths discussed previously in the context of the regulation change (Section I.A). The first of these, recall, dealt with legal regulation of criteria for permitting the ritual to take place. The husband’s subjective feeling—the “spirit of jealousy”—which sufficed in the Biblical narrative to proceed with the ritual, was supplanted by objective legal criteria such as testimony and prior warning. The second path concerned further regulation once the initial legal criteria for proceeding with the ritual have been met. First, the woman is given the possibility of terminating the ritual without admitting guilt; second, forms of testimony that would have been inadmissible in other legal processes are admissible in the case of the sotah to prevent the ritual from taking place.

At first glance, the two regulatory processes may seem to pull in opposite directions. Whereas the first tightens the legal criteria regarding the ritual, the second loosened them. But we can now see why they actually pull in the same direction. The first regulatory principle is meant essentially to prevent the transition from the stage of mere suspicion to the stage of justification of the suspicion. The second principle is designed to retard the transition from the stage of justification to the practical staging of the ritual itself. Together they comprise a two-fold regulation intended to limit the possibility of the ritual being performed, while forbearing to annul it formally as the elimination method proposes to do. This way, society can triumph on both fronts. On the one hand, the ritual will still be performed occasionally, fulfilling its political function of an instrument of order—communicating to the public where the normative boundaries of society are located. On the other hand, it will be performed infrequently enough to prevent deviance from appearing normal rather than as a mere abstract idea.

C. The Theatricalization Method

A third method for managing the threat is reflected in the theatricalization change which, as the reader may remember, focuses on intensifying and broadening the dramatic-theatrical tone of the original Biblical narrative. The first dramatic principle to appear in the Biblical story is the priest’s disheveling the accused woman’s hair, intended to
symbolize the change of her legal status. In the tannaitic sources this principle is intentionally theatricalized. The priest tramples the woman’s head scarf underfoot, strips her of her jewelry, swathes her in black, exposes her breasts and strips her naked before the eyes of the public. As we have seen, careful analysis of this novel spectacle shows a complex process built on two theatrical levels. The first stage, stripping her of jewelry and draping her in black, concerns the woman’s “exterior,” its function being to peel away the masks that portray her as someone she is not (i.e. a normative person). The second stage, exposing her breasts, tying them to her shoulders, and displaying her naked, concerns her “interior” and aims to convey a full impression of what she truly is: an embodiment of sin and corruption, a paragon of disgrace and depravity. Thus, while the first stage uses theatrical devices to eliminate a normative image of the woman as some might imagine her to be, the second stage uses these devices to create a new, anti-normative image of her as all should perceive her to be.

As in the case of the first two changes, the motivation behind this change is to prevent the sotah ritual from transforming deviance from an abstract idea into concrete reality. The theatricalization of the ritual is meant to jerk the discussion from the realm of day-to-day conduct and thrust it into the realm of the symbolic and imaginary alone, as far removed as can be from daily reality. The accused woman is transformed through the two stages of the theater into a figure no longer connected with a true flesh and blood person, becoming a sort of spirit or demon, a figure whose only place is in myth, outside familiar reality.92 The Mishnah rewrites the ritual such that it is understood to revolve not around a flesh and blood person—the woman that happens to undergo it—but around a mythic symbol of that which is dedicated to uprooting the order of the world,93 taking place not in the realm of the immediate, social and political, but in the realm of the metaphoric and symbolic.94 The woman occupying center stage in the ritual is merely the representative of the threatening, mythic arch-type;95 she is not the degraded and humiliated physical woman, but the mythic threat she symbolizes.

92. See id. at 89, n.151.
93. In the words of R. Simlai, Jerusalem Talmud, Tractate Sotah, 17a: “Anywhere one finds whoring, mass destruction comes to the world.”
94. Compare to Alfred R. Radcliffe-Brown’s understanding of religious rituals in RADCLIFFE-BROWN, supra note 24, at 125.
95. Grushcow, Writing the Wayward Wife, supra note 41, at 266: “[T]he suspected wife becomes the personification of sexual sin in general, and adultery in particular”; see also Rosen-Zvi, The Rite that Was Not, supra note 23, at 68, and ch. 5.
Thus, like the legalization method, and unlike the elimination method, the theatricalization method seeks to maintain a place for the sotah ritual in the legal system despite the threat it poses to the social order. However, contrary to the legalization method, it proposes to manage this threat not by limiting the ritual’s performances, but rather by performing the ritual in a way that establishes its subject, deviance, as a generalized image, a sort of fable or metaphor, representing it not as it can be in reality, but only as our most floating imagination could imagine it to be. Through theatrical devices, the accused woman is transformed from a random, particular example of illegitimate behavior, one of many in the political realm, into the manifestation of deviance in the realm of the mythic and metaphoric, a symbol of all that threatens the foundations of society, something to which a normal member of society can react only with revulsion and dread. It is therefore very unlikely, if not impossible, that watching such a performance will lead the public to regard deviance as normal, and thereby to social disorder.

CONCLUSION:
PRELIMINARY INSIGHTS REGARDING CRIMINAL LAW

The primary focus of this article has been the sotah ritual, the problem inherent to its functioning as an instrument of order, and the methods applied by the rabbis of the Mishnah in addressing it. However, as pointed out at the outset of the article, this problem should be seen as a special case of a more generalized problem familiar to criminal law. A natural question, then, is: can the Tannaitic discussion of sotah suggest any useful ideas contending with this more general problem? I would like to propose that it could. Although the limits of this article do not permit me to elaborate fully on the subject, I wish to conclude the article with a brief remark on how the ancient discussion of sotah could be relevant to a present discussion of the problem raised by criminal law.

Recall that the function of criminal law (as an instrument of order) is to degrade the deviant in status, reclassify him or her as an Other—as one who stands at a place opposed to the legitimate order—so as to inform the public of “the differences between kinds of experience which belong within the group and kinds of experience which belong outside it.” In the past, the way to convey this information to the public was by performing the criminal procedure—the “status degradation ceremony” of criminalization—in the town square, where everyone could see and internalize. Nowadays we might no longer parade deviants in the town
square or expose them to a carnival atmosphere. But criminal procedures still maintain a performance-like communicative character, unfolding "in rites and ceremonies, orchestrations, liturgies, images, staging itself for the spectators of the state." As David Garland notes, although the theater of law is no longer staged in the town square, there are still performative elements in current practice which are deliberately designed for public consumption and which are communicated to a social audience.

One thinks particularly of the judicial declaration of sentence, and any remarks which the judge chooses to append to his crucial speech-act: a declaration or performative statement which is directed not just at the offender but also—via the press and the public gallery to victims, to potential offenders, and to the public at large. In the late twentieth century, as in the eighteenth, the moment of sentencing is understood as "an occasion for addressing the multitude" and there is seldom a newspaper which appears without carrying an account of some judge's remarks and the circumstances which prompted them.
Yet this theatrical dimension of criminal law may pose a grave threat to the stability of the social system, as we have seen in the case of the *sotah* ritual. Since the social system remains intact only as long as deviance remains extraordinary—that is, as long as the public does not come to regard deviance as normal behavior—the ability of society to insulate the prevailing social order from disturbances depends considerably on its ability to paradoxically conceal the presence of deviance in social life. While the public has to be aware of the existence of deviance, so as to know where the boundaries of society are located, it would still have minimal exposure to actual deviant presence in everyday reality. Yet part of what criminal law does, by virtue of the publicity of criminal procedure, is precisely to emphasize the presence of deviance in everyday reality. It publicly confirms the ordinariness of deviance as a manifested feature of social life. As a result, by showing the public “what evil looks like, what shapes the devil can assume,” criminal law itself effectively forges for this evil a powerful presence in social reality. Thus, it paradoxically undermines the boundaries of society, rather than reinforcing them.

Although referring to a specific instance of the problem, I suggest that the three methods applied by the rabbis of the Mishnah to the case of *sotah* can be viewed more generally as three basic methods for managing this threat posed by the theatrical dimension of criminal law. It seems that all three methods identify the threat as inserted in the transformation of deviance from an abstract idea into concrete reality. The methods differ in their treatment of the problem. The first method, elimination, proposes to prevent the transformation from occurring by eliminating the theater that allows it to occur altogether, that is, by eliminating all theatrical elements from the criminal process. The theatrical element may have an important role in the psychological construction of the criminal law, but the price it exacts exceeds its benefits. Without the theater, and hence without the public being exposed to a living image of deviance, deviance is kept in an abstract form, a mere conceptual possibility. This diminishes the risk of deviance being perceived as normal and thereby undermining society’s normative boundaries.

The second method, regulation, proposes to prevent the transformation from occurring by regulating, rather than completely eliminating, the theater that allows it to occur. According to this

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method, the theatrical element is too important to be rejected. The public must be informed where the normative boundaries of society are located, and a living image of deviance, as created by the theater of criminal law, is probably the most effective way to convey this information to the public. It is only harmful when the ritual is performed too often, exposing the public to the lively image of deviance regularly enough that they begin to see it as typical of, rather than as exceptional to, their daily reality. Thus, to prevent the theater from becoming harmful, the criminal justice system needs only to regulate the frequency at which the ritual is performed, limiting the public’s exposure to it, but not abandoning it altogether. This way, society can triumph on both fronts. On the one hand, the theater is still performed occasionally, fulfilling its important function of informing the public where the normative boundaries of society are located. On the other hand, it will be performed infrequently enough to prevent deviance from being transformed into concrete reality, thereby preventing it from appearing normal rather than as a mere abstract idea.

Finally, the third method, theatricalization, insists like the second method on the importance of the theatrical element, but proposes to manage its possible hazards not by limiting its frequency, but rather by intensifying its theatricality. Intensifying the theatricality removes it from the realm of day-to-day conduct and thrusts it into the realm of the symbolic and imaginary alone. Under this method, the performance should establish deviance as a generalized image, a sort of fable or metaphor (or perhaps even a dream), representing it not as it can be in reality, but only as our fantasy or most floating imagination could perhaps imagine it to be. This way, deviance will remain in the realm of the incomprehensible or abnormal.

To illustrate the difference between the three methods, consider the theatrical performance of criminal trials. As Julie Stone Peters observes,

[T]he central events of law—trials—(it is observed) are normally performed before live audiences by those specially trained to shed their own identities and “represent” others. Trials are the re-enactment of a conflict (an agon), whose essential narrative form is dialogue. They exploit iconic props as crucial clues to the unfolding of the narrative, and often rely on space, staging, costume, and spectacle in an attempt to bring back to life the dramatic event they are attempting to recount. 100

All three methods will identify the theatricality of criminal trials as a

100. Stone Peters, Legal Performance Good and Bad, supra note 13, at 180-81.
possible threat to the stability of the social system. Yet they will differ in their approach of treatment. The first method, elimination, may propose to avoid the threat by eliminating the theatrical elements from criminal trials by prohibiting, for instance, the attendance of an audience in the courtroom, or by transforming the trial into a dry, formal procedure (e.g., by directing prosecutors, defenders, judges and jurors to restrict themselves only to boring, professional language). The second method, regulation, may propose to avoid the threat by regulating the public’s exposure to the performance of criminal trials by limiting, for example, the access of the public to such performances (e.g. reports about the trial can only be found in certain designated journals, etc.), or by diminishing the intensity of the exposure (e.g. sensational coverage of criminal trials would be assiduously avoided, the coverage would be minimal, visual material would be prohibited, etc.) Finally, the third method, theatricalization, may propose to avert the threat by intensifying the theatricality of the performance, according it a distinct aura of exaggeration and excessive imagination by closing, for example, the trials themselves to the public and then restaging them in front of the public in a fictitious setting, where professional actors play the different roles of the offender and the legal staff.

Of course, much more should be said about the meaning, implications and application of these methods before presenting them as viable solutions to the problem raised by criminal law. Each method raises important practical and ethical questions requiring further attention and considerations. It is beyond the scope of this article to discuss the full range of issues relating to this proposal. However, as stated at the outset, the aim of this article was not to offer unequivocal solutions, but to explore possible sources of inspiration for the ongoing contention with various social problems, drawing on the ancient, formally “religious” text of the Mishnah. I hope that the reader has been convinced that the Mishnaic discussion of sotah has indeed something to teach us today about possible unexpected approaches to the problem raised by criminal law.