

COMPARATIVE AMERICAN
AND TALMUDIC CRIMINAL
LAW

BY

IRENE MERKER ROSENBERG AND YALE
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PREFACE

In 1986 my husband, Yale L. Rosenberg, and I started writing law review articles comparing various criminal law provisions in Jewish law and their American law counterparts. It took a little adjusting to write as a team, but once we got the hang of it we loved being co-authors. At the same time we were also writing separately in our secular fields (juvenile law and criminal procedure) and (federal jurisdiction and civil procedure) but our true love was Jewish law. Comparing the law of our secular subjects and Jewish law provided a way to meld our varied interests. We learned a great deal both about ourselves and the subject matter.

Yale died of cancer in 2002. I am now retired and I wanted to publish this book to honor Yale. It is, however, as much Yale's book as mine. I have drawn deeply on the articles we wrote together and updated them when necessary. I hope that you will enjoy the book as much as we enjoyed writing it.

Irene Merker Rosenberg
October 2010

PREFACE

Irene Merker Rosenberg and Yale L. Rosenberg were our colleagues at the University of Houston Law Center until they passed away from cancer – Yale in 2002 and Irene in 2010. They shared many values including a belief in excellence, a love of learning and scholarship, a passion for justice, and their devotion to Judaism. Both of them had their own areas of legal scholarship in which they excelled (Irene – juvenile law and criminal procedure and Yale – the law of habeas corpus and federal jurisdiction). They also collaborated on articles about juvenile law, criminal law and on the comparative American and Jewish criminal law studies that are compiled in this work. Irene Merker Rosenberg began this book as a tribute to Yale’s memory. Unfortunately she was unable to have the manuscript published before her passing. With the support of Dean Baynes and the University of Houston Law Center we have been able to publish an online version of the manuscript. We know this book can be helpful, not just to legal scholars, but also to Jewish scholars.

COMPARATIVE AMERICAN AND TALMUDIC CRIMINAL LAW reflects the journey undertaken by the late Irene Merker Rosenberg and Yale L. Rosenberg in their pioneering comparative studies of Jewish and secular criminal and juvenile law. They did not argue that contemporary secular law should be modeled on Jewish law. Rather, the authors presented the two legal systems side by side, transcended clichés about the Bible that were all too often misused to justify harsh treatment, and deeply considered the ethical underpinnings of law. Irene Merker Rosenberg’s Introduction is an Overview of Jewish Law—Written and Oral—including the Bible, the Oral Law, and the major commentators. It is meant to be accessible to beginners but also includes detailed footnotes in which the author delves deeply into the subject. Chapter One is her Overview of the Talmudic Criminal Justice System that explains how the rabbinic legal system functioned. It demonstrates that Jewish criminal law was constrained by very strict procedural rules that created many obstacles to conviction. The chapters that follow compile their work of nearly thirty years in which the co-authors explored concepts of guilt, the force of precedent in the law, the “actus” requirement in criminal law, the dangers of predicting criminal behavior based on prior conduct, the eye-for-eye justification for capital punishment, the distinction between murder and manslaughter, the causation requirement in criminal law, circumstantial evidence, self-incrimination, and the law of capital punishment. In each case, the Rosenbergs seriously interrogated a specific Jewish legal provision for its own sake but also in order to learn something important about secular criminal law. Infused with the authors’ spirit of humanity and deep understanding of the law, this work is truly unique in its ambition and in its execution.

Ellen Marrus and Laura Oren
Houston, February 9, 2016



Irene Merker Rosenberg (1939-2010) was born in the Bronx, New York and was educated at The City College of New York where she earned a B.A., and went on to receive a LL.B. from New York University School of Law in 1964. At NYU she was a Florence Allen Scholar and an editor of the Law Review. Professor Rosenberg started her legal career by working with the Department of Health, Education and Welfare, Office of the General Counsel, Washington, D.C. as a staff attorney for two years. In 1967 she joined the Juvenile Rights Division of the Legal Aid Society of New York. As the attorney in charge of the Bronx office, she passionately and zealously represented juveniles and was responsible for the training and supervision of sixty attorneys. She developed and wrote the first training manual for juvenile attorneys, and with very few modifications this manual continues to be used to this day. It was as a trial attorney at Legal Aid that she was instrumental in bringing the case, *In re Winship*, to the United States Supreme Court. The Court found that the standard of proof for delinquency proceedings was beyond a reasonable doubt as it is in adult criminal cases. After joining the University of Houston Law

Center faculty in 1974 she ran a juvenile justice clinic and taught Constitutional Law, Criminal Procedure, Criminal Law, Juvenile Law, and Legal Analysis. She was the first woman professor to obtain tenure at UHLC, was the first law professor to receive a University wide award for research, and was the Royce R. Till Professor of Law. As a scholar she was an expert in juvenile justice, children's law, and constitutional law and published numerous articles in top law reviews. She also co-authored many articles with Yale Rosenberg on juvenile and criminal law and on the comparative study of American and Jewish criminal law.

Yale L. Rosenberg (1939-2002) was born in Houston, Texas where he was one of the first Jewish students to attend Rice University. He graduated summa cum laude in 1959 with a degree in business administration and economics. He was on the Dean's list and inducted into Phi Beta Kappa. He left Texas to attend law school at New York University as a Root-Tilden Scholar. At NYU, he was Research Editor for the Law Review and a member of the Order of the Coif. He graduated 7th in a class of 296 in 1964. Upon graduation from NYU he started his legal career by clerking with the Honorable Judge Oscar H. Davis of the United States Court of Appeals in Washington, D.C. He then went to work at the law firm of Arnold & Porter. In 1966 he joined the New York Mayor's Task Force as a legal advisor on the Constitutional Convention, and in 1967 he became an Assistant United States Attorney in the Southern District of New York. He remained there until 1973 when he returned to Houston to join the faculty at the University of Houston Law Center where he taught Civil Procedure, Federal Jurisdiction, Jewish Law, Administrative Law, Professional Responsibility, and Seminars in Federal Habeas Corpus. Recognized as an outstanding teacher, he influenced over 3,000 students over his career, and in 2000 was the first law professor to receive the Teaching Excellence Award from the University. His years as a scholar brought him national recognition in the areas of habeas corpus, civil procedure, federal jurisdiction, and Jewish law. Over the years Yale produced over thirty articles, three of which won him the M.D. Anderson Foundation Award at the University of Houston. The articles that he co-authored with his wife, Irene Merker Rosenberg, that combined Jewish and secular law are the foundation of this manuscript.

COMPARATIVE AMERICAN AND TALMUDIC CRIMINAL LAW
Irene Merker Rosenberg and
Yale L. Rosenberg

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INTRODUCTION

Overview of Jewish Law—Written and Oral*

The Old Testament Bible is composed of five books—*Genesis*, *Exodus*, *Leviticus*, *Numbers*, and *Deuteronomy*. The corresponding Hebrew titles are taken from the first significant word in each book¹: *Bereishes* (Creation), *Shemos* (Names), *Vayikra* (Call), *Bamidbar* (Desert, Wilderness), and *Devarim* (Words). Each book is divided into sections called *parshiyot*, the plural of *parsha*, which is from the root meaning separated or set aside.² There are fifty-four *parshiyot* in the five books, and they are read out loud in Hebrew on the Sabbath and holidays over the course of a year.³ At the end of the year all the *parshiyot* will have been read and the cycle starts all over again.⁴

The language in the original Hebrew is aesthetically elegant, but it is difficult to convey its euphonic beauty in English. So, for example, the first *parsha* in *Genesis* states that before Creation the world was *tohu ve vohu*. There is much scholarly discussion as to the meaning of these words. Rashi, the famed eleventh century commentator on the Torah and Talmud, translates them as astonished or baffled, emptiness, desolation, a void;⁵ nice, but not poetic.

Translation of the Bible, however, has even greater perils. Hebrew is in many ways an ambiguous language. The translations of the Bible, initially into Aramaic and Greek, and thereafter into a plethora of other languages, including English,⁶ often resolve rather than preserve ambiguities in the text, and of necessity favor one interpretation over another.

The original Hebrew text has no vowels or punctuation—it is "a stream of contiguous letters, without division into words."⁷ As is the case with many languages, in Hebrew a vowel can drastically change the meaning of a word, just as a comma can change the sense of a sentence in English. However, the root of the word may connect to other words with the same root but different vowels. For example, the root "d,b,r"⁸ means either a word or a thing, or to combine separate items into one.⁹ The root of the words talk (*diber*), thing (*davar*), and pestilence (*dever*) are identical;¹⁰ the vowels, however, are different. Nonetheless, there may be a connection, even if tenuous, and choosing one meaning over the other does not allow the reader to fully grasp all the possible meanings and nuances that God may have intended to convey." As it is said, the Torah is read on four levels, has seventy meanings, and is like a rock which, when struck, splits into many pieces, and while it may yield a plethora of conflicting opinions, all are, at least in a mystical sense, correct, constituting the words of the living God.¹¹

The matter is further complicated by the Oral Law. Traditional Judaism takes the view that during his many days on Mount Sinai, Moses received not only the written Torah, but also the Oral Law. "When Moses descended from Sinai, he held the Tablets in his hands and the Oral Law in his mind. The words to the Law would be contained in the Written Torah, but their meaning and application would be transmitted from teacher to student in an eternal chain of generations."¹² Therefore, the Written and Oral Law must be read together,¹³ and, indeed, if there is an oral tradition that seems contrary to the Written Law, the Oral Law governs.¹⁴

The Talmud, which is over 5,000 pages and is contained in over sixty tractates, comprises the Sinaitic and rabbinic Oral Law of Judaism.¹⁵ It consists of the Mishnah and the

* Irene Merker Rosenberg.

Gemara. The Mishnah, which was reduced to writing in approximately 200 C.E., is a codification of basic Jewish law derived from Biblical text and the law which had been transmitted orally during the preceding centuries.¹⁶ The far lengthier Gemara, often referred to in and of itself as the Talmud, is a series of commentaries and debates of the Sages in the Babylonian and Palestinian academies of learning over the next three centuries.¹⁷ Taking as their springboard the casuistic hornbook law of the Mishnah, the Gemara scholars argued, searched, extrapolated, and attempted to reach conclusions on legal issues of every conceivable kind.¹⁸ But it is the debates themselves, rather than the rules propounded, that are the glory of the Talmud. In the far ranging discussions of the Sages, no question is too hypothetical,¹⁹ no subject is deemed irrelevant²⁰ or taboo.²¹ Profound conceptualization²² and logic²³ are found alongside mysticism and stories,²⁴ and free, though not random, association of legal subjects and concepts is the norm. All this and more is reflected in the editing of the Talmud, which is a synopsis of these debates.

A typical page of the Talmud contains both the text of the Talmud and commentaries thereon. In its center are the Mishnah and Gemara. Surrounding this text, in a smaller script that is a variant of Hebrew known as Rashi script, there are two commentaries, one by Rashi (an acronym for Rabbi Solomon ben Isaac), the famed eleventh century rabbi, philologist and commentator on the Bible and Talmud, who lived in France, and the second by the Tosafists, who were descendants and pupils of Rashi, including his sons-in-law, grandchildren, and great-grandchildren, and who lived during the twelfth and thirteenth centuries in France and Germany. The commentaries of the Tosafists, which are referred to as the Tosafot (additions), were compiled by a Tosafist of a later generation. The Rashi commentaries are always found on the inside of the folio page near the binding, while the Tosafot are always found on the outside.

Rashi gives what are called *pshat* interpretations. Although the root meaning of *pshat* is "plain," "simple," or "literal," the Rashi commentaries are brilliant, concise, didactic line-by-line explanations of almost the entire Talmud, which tend to derive their meanings from the language and context of the particular passage of Mishnah or Gemara.²⁵ The scholarly discussions of the Tosafists, on the other hand, focus on particular issues, and often resolve ostensible contradictions between the text being commented upon and material elsewhere in the Talmud. Thus, while the commentaries of the Tosafists are likely to be in greater depth, they do not provide the broad sweep and background of Rashi's coverage.

In the margins of the folio pages, surrounding these two primary commentaries, are various cross-references. Three of these are major and appear with frequency throughout the Talmud: (a) to the Bible; (b) to other parts of the Talmud treating the topic of the referenced Talmudic passage; and (c) to the major post-Talmudic codes of Jewish law.²⁶ In addition, the margins may contain notes by other authorities.

Thus, it is said that Talmud students read down the page using both index fingers, one on the text of the Talmud itself, and the other, on an accompanying commentary, and that they move from the "inside," that is, the text of the Talmud, to the "outside," that is, the commentaries.

The material reproduced below is page 5b of the *Makkoth* tractate of the Babylonian Talmud. Each number points to the particular texts that are often found in the Talmud:

- (1) the text of the Mishnah;
- (2) the text of the Gemara;
- (3) the Rashi commentary;
- (4) the Tosafot commentary;
- (5) cross references to the Torah;
- (6) cross references to other parts of the Talmud;
- (7) cross references to the Code of Maimonides
(the Mishnah Torah);
- (8) cross references to the *Shulchan Aruch*; and
- (9) other authorities.

Talmud for students, explains:

[The Talmud] is not a book, it is a literature without a parallel in the literatures of the world. Furthermore, this vast edifice accommodates not only the religious, civil, criminal, and ethical laws which are usually embraced by the term *Halacha*; it embodies also legendary lore, moral maxims, and a rich material of historical and ethnographical value, together with witty sayings, personal reminiscences, and some references to science as it existed in those days.

According to Adin Steinsaltz, a famous contemporary translator of the Talmud:

Talmudic discussion . . . constructs various hypothetical situations, from the analysis of which the inherent abstract principle comes to the fore. Since these situations do not necessarily stem from real life, these cases may deal with unrealistic or nearly impossible problems; . . . however, the main function of the Talmud is to serve not as a compendium of practical law but as a vehicle of theoretical explication. . . . Even though there was a need to rule in practice among different options within the *halachah*, [Jewish law] on the theoretical plane (which constitutes the bulk of the Talmud) the *halachah* is best understood by comparison to a complex equation with a number of possible solutions. From this follows the talmudic saying, "Both of these are the words of the living God, and the *halachah* follows so-and-so. . . ." Each solution is deserving of full clarification in its own right. The fact that a given approach is not accepted for purposes of *halachic* decision-making does not deny its truth value or its importance in principle.³²

In a review of Adin Steinsaltz's English translation of the Talmud, Leon Wieseltier captured the essence of the Talmud in the following terms:

The texts of the Talmud take no prisoners. They appear to be formless. They are sublimely, maddeningly concise. They think silently. They reverberate endlessly, and seem to have all of the Talmud in mind all of the time. They digress to a degree that puts modernism to shame. They seem the very enemy of style, the very enemy of system. And yet, as the generations of glossators saw, they are never what they seem. They are, in fact, masterpieces of style, of a precise, chiseled, classical language rarely equaled for the intensity of its beauty. And they are the unsystematic records of some of the earliest monuments of systematic thought.³³

Yet the Talmud is not disorganized. The Gemara is arranged according to the six divisions or "orders" of the Mishnah. Since, however, these orders were broad and general classifications, and since the debates usually used the Mishnaic laws as starting points and then often proceeded into other areas by way of structural association, the discussions are generally not confined to strict categories of subject matter.³⁴ Many dialogues meander (for lack of a better word), albeit purposefully, from one subject to another without losing sight of the issue originally presented, or of the permutations along the way. Thus, although the discussion at the end of a Gemara may

appear unrelated to the opening statement, a careful reading of the entirety reveals that the path was not random.

The rose among the thorns is that these conceptual, textual, linguistic, and organizational impediments to easy access assured the Talmud's organic development over the succeeding centuries. Generations of scholars, including Rashi, the Tosafists and Maimonides, pored over its text and attempted to decipher its meaning, and they in turn provided intellectual grist for their heirs.³⁵ These scholars were not mere commentators, but rather bearers of the Talmudic genius and methodology, utilizing its analytical approach to problem solving. It is not possible to understand the Talmud without reference to these commentaries and, indeed, without study of commentaries on the commentaries, etc.³⁶

¹ For example, the book of *Shemos* starts with *ve ela*, meaning "these are." The next word is *shemos*, meaning "names." The latter is central to the theme of the *parsha* and the book.

² MARCUS JASTROW, *DICTIONARY OF THE TARGUMIM, THE TALMUD BABLI AND YERUSHALMI, AND THE MIDRASHIC LITERATURE, WITH AN INDEX OF SCRIPTURAL QUOTATIONS* 1228 (1985).

³ On certain Sabbaths two *parshiyot* are read. THE ARTSCROLL SERIES, THE TALMUD BAVLI: THE GEMARA: THE CLASSIC VILNA EDITION, *Megillah* 29b (Schottenstein ed., 2007) [hereinafter BABYLONIAN TALMUD].

The Babylonian Talmud contains sixty odd volumes, and is over 5,000 pages in length. It took Mesorah Publications several years to publish their version of the Babylonian Talmud in English. Thus, while the volumes are sold together and are regarded as one entity, many of the volumes have different publishing dates.

Though the ArtScroll edition in English is the version of the Babylonian Talmud we choose to use, one looking to find the factual information contained herein can use any version of the Babylonian Talmud in Aramaic and Hebrew. The page "*Megillah* 29b" is universal, and contains the same text in all editions. "*Megillah*" is the title of the particular volume, "29b" is the pertinent page number.

⁴ There is also a triennial tradition that calls for reading the Torah over a period of three years. BABYLONIAN TALMUD, *supra* note 3, *Baba Kamma* 82a.

⁵ The English words are of course translations of Rashi's explanation in Hebrew as to the meaning of *tohu ve vohu*. THE ARTSCROLL SERIES, THE TORAH WITH RASHI'S COMMENTARY, *Bereishis/Genesis* 1/2–4:5 (Rabbi Meir Zlotowitz & Nosson Scherman trans., 1995) [hereinafter RASHI'S COMMENTARY].

The page "5" is particular to the Mesorah Publications version of Rashi's commentary. However, the page of reference can be found in any version of Rashi's commentary in Hebrew on page "*Bereishis/Genesis* 1/2–4."

⁶ HARRY M. ORLINSKY, *ESSAYS IN BIBLICAL CULTURE AND BIBLE TRANSLATION* 349–53 (1974).

⁷ THE ARTSCROLL SERIES, RAMBAN, THE TORAH WITH RAMBAN'S COMMENTARY TRANSLATED, 12 (Rabbi Meir Zlotowitz & Nosson Scherman trans., 2004) [hereinafter RAMBAN COMMENTARY ON THE TORAH].

⁸ The Hebrew letters are *daled*, *bet*, and *raish*.

⁹ See MATITYAHU CLARK & SAMSON RAPHAEL HIRSCH, *ETYMOLOGICAL DICTIONARY OF BIBLICAL HEBREW BASED ON THE COMMENTARIES OF RABBI SAMSON RAPHAEL HIRSCH* 46 (1999).

¹⁰ In Hebrew, the letters "v," "vet," and "b," "bet," look the same and are often used interchangeably.

¹¹ The source of the concept in the text is found in BABYLONIAN TALMUD, *supra* note 3, *Erubin* 13b.

¹² ARTSCROLL SERIES, THE MISHNAH, SEDER NEZIKIN, VOL. II(A), *Sanhedrin*, front cover flap (Matis Roberts trans., 1987) [hereinafter THE MISHNAH].

¹³ See GEORGE F. MOORE, *JUDAISM* 251 (Cambridge Harvard University Press, 1927) ("By the side of Scripture there had always gone an unwritten tradition, in part interpreting and applying the written Torah, in part supplementing it."); YEHUDA NACHSHONI, *STUDIES IN THE WEEKLY PARASHAH: THE CLASSICAL INTERPRETATION OF MAJOR TOPICS AND THEMES IN THE TORAH, Sh'mos* 491 (Shmuel Himelstein trans., 1988) ("If we do not trust [the Sages'] interpretation, we will be unable to fully understand the [commandments]. Just as we received the Written Torah from our ancestors, so did we receive its oral interpretation. The two are inseparable.") (quoting a twelfth century source).

¹⁴ THE MISHNAH, *supra* note 12, *Sanhedrin* 1:3, at 199 ("There is a greater stringency attached to the words of the Scribes [the Oral Law] than to the words of the Written Torah.").

¹⁵ The basic division of Jewish law is between the written and the oral. The "written" law is the Torah, the first five books of the Old Testament, which constitute the heart of the Jewish Bible. The Torah is sometimes called the *Chumash*, from the Hebrew word for five. The word Pentateuch, which is used in English to denote the first five books of Scripture, is taken from the Greek word meaning five. The term Torah, coming from the Hebrew root meaning "to instruct," is the one most frequently used for the written law, although the same term may also be used in a broader sense, to include both the Written and Oral Law. Modern Biblical scholarship, especially by non-Jewish scholars, conjectures that there were several stages of transmission, both oral and written, of the material finally recorded in the Old Testament. See e.g., BERNHARD W. ANDERSON, UNDERSTANDING THE OLD TESTAMENT 18–21, 198–225, 267–70, 422–36 (3d ed. 1975). However, in orthodox Jewish legal discourse the Torah is called the written law because, in the traditional accounts, Moses wrote it at God's behest. See, e.g., PENTATEUCH WITH TARGUM ONKELOS, HAPHTAROTH AND RASHI'S COMMENTARY, *Exodus* 24:4, at 129 (A.M. Silbermann ed., 1973); *id.* at *Deuteronomy* 34:5, at 177; see also *Deuteronomy* 31:24 (Moses "[wrote] the words of this law in a book").

The "oral" counterpart of the written law is the Talmud. The word Talmud itself means learning. Of course, the Talmud now exists in written form as well, but it is called Oral Law because the Sages and Rabbis transmitted it by word of mouth for centuries after the Torah was written. According to orthodox Judaism, the Oral Law was also given at Sinai—thus the adjective "Sinaitic"—though unlike the written Torah, it was passed on orally thereafter. This account of its origin is itself an indication of the Oral Law's present authority. In Hellenistic and Roman times, the binding character of the Oral Law was rejected by the Sadducees, who accepted only the written Torah. By the end of the first century C.E., however, their opponents, the Pharisees, who adhered to Talmudic tradition as well as the Written Law, had prevailed. Judaism since then has followed the Pharisees.

While the Torah is the central authority of Jewish law, the oral tradition of the Talmud is not merely interstitial. Rather, it interprets and complements the Bible and is a comprehensive codification of the meaning of the Torah, and of Jewish customs, traditions, and precedents. It is fully binding on the Orthodox Jew. Indeed,

[i]t is clear, in principle, that every written code of law must be accompanied by an oral tradition. . . . [T]he oral tradition is inherent in the very act of transmitting the use of words, in the very preservation and study of a language. Every idea, every word in the written law must be handed down from generation to generation and explained to the young. . . . [E]ven in the most conservative society, language evolves and changes and the written documents of one era may be unclear to the next generation.

ADIN STEINSALTZ, THE ESSENTIAL TALMUD 11 (1976) [hereinafter STEINSALTZ, ESSENTIAL]. See generally ZEVI CHAJES, THE STUDENT'S GUIDE THROUGH THE TALMUD 1–16 (J. Shachter trans., 2d rev. ed. 1960) (discussing relation of oral and written law); DAVID FELDMAN, MARITAL RELATIONS, BIRTH CONTROL, AND ABORTION IN JEWISH LAW 3–15 (1974) (describing in chronological order authorities of Oral Law).

¹⁶ The word Mishnah stems from a verb root meaning "to repeat," and suggests oral teaching, that which is learned by repetition. For centuries after the Bible was written, the traditions later codified in the Mishnah were transmitted without being written down, except perhaps for hidden personal manuscripts of individual scholars. There was indeed an early prohibition against writing the Oral Law. See BABYLONIAN TALMUD, *supra* note 3, *Gittin* 60b. Ultimately, however, the *Tannaim* (literally meaning "teachers"), that is, the Mishnaic scholars who were active during the early Roman empire, found it necessary to organize and collate this body of law, and then to reduce it to writing. It was deemed essential to do so, because of, inter alia, the political strife of the times which made learning difficult, the voluminous quantity of material that had been generated, and the emergence of different schools of interpretation that threatened to undermine the uniformity of the law and to impede its effective conveyance. This process of organization, collation, and redaction, begun in the first century C.E., was finished by Rabbi Yehuda Hanassi, who codified the Mishnah and completed its written version in about 200 C.E.

The Mishnah is arranged in six orders, entitled "Seeds," "Holidays," "Women," "Damages," "Sanctities," and "Purities." Each order consists of tractates, the total being sixty three, each tractate is divided into chapters, of which there are approximately 520, and each chapter in turn is divided into paragraphs.

Although exceedingly terse, the Mishnah does include both majority and dissenting opinions. It does not, however, incorporate all the material surviving from Mishnaic times. Some of these excluded statements, called *Braitot* ("that which is external," or "outside material"), are referred to and relied on in the subsequent Gemara debates concerning the meaning of the Mishnah. Another collection of Mishnaic era material, systematically arranged, is known as the *Tosefta*, meaning "supplement" or "addition." It is used to shed light on the Mishnah proper. See generally Boaz Cohen, *foreword* to ABRAHAM COHEN, EVERYMAN'S TALMUD xvi–xxxi (1949) [hereinafter A. COHEN TALMUD]; JOSEPH HERTZ, *foreword* to BABYLONIAN TALMUD, *Baba Kamma* (I. Epstein ed. 1935). For a more detailed version of the history and origins of the Oral Law, see ME'IR TSEVI BERGMAN,

GATEWAY TO THE TALMUD 34–60 (1985).

Finally, the *Midrash Halacha* is a work of the Mishnaic era that provides a sentence-by-sentence interpretation of *halachic* (or legal) concepts learned from the verses of *Exodus*, *Leviticus*, *Numbers*, and *Deuteronomy*. Its constituent parts are the *Mechilta* (treating the book of *Exodus*), the *Sifra* (*Leviticus*), and the *Sifrei* (*Numbers* and *Deuteronomy*). See generally BABYLONIAN TALMUD, *Megillah* 28b (Gemara discussion of *Sifra*, *Sifrei*, and *Tosefta*).

For standard English translations of the *Sifrei*, see MIDRASH SIFRE ON NUMBERS (P. Levertoff trans., 1926); SIFRE: A TANNAITIC COMMENTARY ON THE BOOK OF DEUTERONOMY (Reuven Hammer trans., 1986); see also SIFRE TO NUMBERS: AN AMERICAN TRANSLATION AND EXPLANATION (Jacob Neusner trans., 1986).

¹⁷ See A. COHEN TALMUD, *supra* note 16, at xxxi–xxxvii. The term Gemara means "learning" or "scholarship" in Aramaic and "completion" in Hebrew. The commentary and debate on the Mishnah that the Gemara records took place from about 200 C.E. to about 500 C.E. in the Talmudic academies of Jewish communities in Mesopotamia (Babylon) and Palestine. *Id.* at xxxi. The scholars of both groups during that period were called Amoraim, meaning "speakers" or "expounders." *Id.* However, the Gemara of one group varied, in extent and selection, from the material preserved by the other. *Id.* at xxxii.

There are thus two Talmuds, one called the Babylonian and the other the Palestinian or Jerusalem Talmud. *Id.* For various reasons, the Babylonian Talmud has long been of primary importance, and citations to the Talmud in this book are to its Babylonian version.

Standard citation to the Babylonian Talmud follows the conventions set by Daniel Bomberg, who published the first complete editions in Venice in the early sixteenth century. Its numbering is by folio, and page, and the pagination is based on a system that assigns numerical values to the letters of the Hebrew alphabet. Each folio leaf bears a Hebrew numeral. Each leaf has two sides, referred to by the first two letters of the alphabet, which correspond to the numbers one (*alef*) and two (*bet*); the verso is *alef* and the recto *bet*, since Hebrew is written from right to left. Although modern editions include page numbers in Arabic numerals, it is considered a sign of ignorance and bad form to use them in Talmudic discourse. Thus, for example, the Arabic page number 202 of a given tractate is properly referred to as *koof-alef* (the equivalent in Hebrew numerals of 101, which is half of 202), side *bet* (2)—or as page 101b.

¹⁸ For example, the Gemara discusses and analyzes laws relating to the Sabbath, marriage and divorce, damages, contracts, crimes, bailments, sacrifices, and ritual uncleanness. For a capsulized statement of the content of the Gemara, see STEINSALTZ, ESSENTIAL, *supra* note 15, at 279–83. Rabbi Steinsaltz comments that

[t]he purpose of the Talmud is *talmud Torah* (literally study of Torah) in the widest sense of the word, that is, acquisition of wisdom, understanding, and knowledge, since Torah is regarded as encompassing everything contained in the world. An allegory in the Talmud and the commentaries depicts the Torah as a kind of blueprint for construction of the world. Elsewhere, the Talmud calculated that the scope of Torah was several times that of the world. Thus all of life is of interest to scholars and constitutes fit subject matter for the Talmud, to be discussed in brief or at length. The concept of Torah is immeasurably wider than the concept of religious law, and while Jewish religious jurisprudence encompasses all spheres of life and overlooks almost nothing, the scope of Torah is even wider.

Id. at 95.

¹⁹ The Gemara itself suggested that the refusal to deal with ostensibly absurd questions was understandable in terms of the limitations on human tolerance, but was ultimately a mistake. No matter how baldly hypothetical a question appeared, it might nonetheless raise issues warranting careful consideration. Consider, for example, the following: one of the Rabbis was viewed askance for asking whether a two-headed man was required to wear two sets of tefillin (phylacteries). Just then, another man entered the academy, announcing that his wife had given birth to a two-headed boy (Siamese twins?) and asking whether he must make one or two contributions for *pidyon haben* (redemption of the first born son). BABYLONIAN TALMUD, *supra* note 3, *Menachot* 37a.

²⁰ See, e.g., BABYLONIAN TALMUD, *supra* note 3, *Berakoth* 6a (discussing how to find footprints of demons surrounding one's bed at night by sprinkling sifted ashes).

²¹ This is not surprising, since traditional Judaism regulates the entire lives of its adherents, including sexual relations and bodily functions. Thus, the Sages were necessarily required to discuss the minutiae of these matters. See, e.g., BABYLONIAN TALMUD, *supra* note 3, *Nidah* 33a (discussing sex); *id.*, *Shabbath* 41a (discussing appropriate posture for males leaving communal bath); see also STEINSALTZ, ESSENTIAL, *supra* note 15, at 96. Rabbi Steinsaltz notes that

although the talmudic sages were marked by their almost excessively modest approach to sexual

life and the naked human body and were shocked by profanity, there was no taboo on study of the minutest details of these subjects. Discussions were based on euphemisms and used the most delicate terms; however, the scholars could dwell on both normal and deviant details as long as these were considered pertinent.

Id.

²² For instance, in BABYLONIAN TALMUD, *supra* note 3, *Menahoth* 29b, in the middle of a discussion about the circumstances in which an imperfection in a letter of the alphabet inscribed on a religious object renders that object invalid, one of the Rabbis introduces a poignant story that raises the most basic questions about good and evil, reward and punishment, and God's inscrutability. Moses ascended to heaven, saw God affixing crowns to the letters of the alphabet and asked the reason for His doing so. God told Moses that there would come a man named Rabbi Akiba who would expound the law on the basis of these crowns. Moses was then permitted to see Rabbi Akiba engaging in a legal discourse with his disciples, one that Moses had difficulty in following. On his return to heaven, Moses asked God why, if there were a man such as Rabbi Akiba, He had chosen Moses to give the law. God replied, "Be silent, for such is My decree." Moses then asked that God, having shown him Rabbi Akiba's learning, should show him his reward. God told Moses to turn around, and Moses saw the flesh of Rabbi Akiba (who suffered a martyr's death when his skin was repeatedly raked with iron combs by the Romans) being weighed in the market place. Moses cried to God, "Such Torah [learning], and such a reward." God answered, "Be silent, for such is My decree." *Id.*

²³ An example of Gemara logic is BABYLONIAN TALMUD, *supra* note 3, *Baba Mezia* 218, which discusses with almost mathematical precision, whether a finder of scattered fruit may keep this produce or must instead make a public announcement of the discovery, factoring in the acreage and the amount and type of produce.

²⁴ Approximately one-quarter of the Talmud is *aggadic*, that is, it consists of anecdotes, legends, history, and interpretation of a nonlegal nature. See STEINSALTZ, *ESSENTIAL*, *supra* note 15, at 251–58. There is thus an embarrassment of riches. See, e.g., BABYLONIAN TALMUD, *supra* note 3, *Shabbath* 88b–89a (where Moses successfully argued with angels concerning why Torah should be given to man). Perhaps the most famous example with regard to mysticism concerns what happened to four Sages who entered *pardes*, which usually means orchard, but which in this context means paradise, heaven, Kabbalah or the mystical secrets of creation. The story tells that only Rabbi Akiba emerged unscathed. Of the others, one died, one went insane and one became an apostate. *Id.*, *Hagigah* 14b.

²⁵ See ME'IR TSEVI BERGMAN, *Rashi As Commentator*, 1 TRADITION 104 (Fall 1958).

²⁶ The two most important of these codes are the *Shulchan Aruch* and the *Mishnah Torah*. The *Shulchan Aruch*, by Rabbi Joseph Caro, a sixteenth century codifier and mystic who lived in Turkey and Israel, is the basic and most widely used codification of Jewish law.

The *Mishnah Torah* is by Maimonides, or Rabbi Moses ben Maimon, also known as the Rambam, the noted twelfth century commentator, codifier, philosopher, and physician, who lived in Spain, Morocco, and Egypt. The fourteen-volume *Mishnah Torah* arranges its codification of Jewish law by topic, spanning theology, ritual law, civil law, and criminal law. The code as a whole is an overarching work. According to one modern scholar, the *Mishnah Torah* "changed the entire landscape of rabbinic literature. . . . The *Mishnah Torah* was like a prism through which practically all Talmudic study had to pass." ISADORE TWERSKY, *A MAIMONIDES READER* 33 (1972).

The other major codes cited in the Talmud are the *Sefer Mitzvot Gadol* by Moses ben Jacob of Coucy (known as the SeMaG, after his codification), a thirteenth century French scholar and Tosafist; and the *Arba'ah Turim* by Jacob ben Asher (also known as the Tur, after his masterwork), a fourteenth century legal scholar who lived in Germany and Spain.

²⁷ One commentator writes: "Some writers speak of the sphinx-like nature of the Talmud. They are baffled by its enormous size, its intricacy, and its mysterious architecture." JULIUS KAPLAN, *THE REDACTION OF THE BABYLONIAN TALMUD* 1 (1933); see also ABBA EBAN, *HERITAGE: CIVILIZATION AND THE JEWS* 93 (1984) ("A page of the Talmud in Hebrew and Aramaic goes on and on, without any periods or commas or other punctuation. The Talmud cannot be read. It has to be learned, or studied . . .").

²⁸ Although the standard edited versions of the Gemara do include cross-references in the page margins to other parts of the Talmud dealing with the same material, it is impossible to find all conceptually related materials on any given issue, unless, of course, one is already familiar with and understands the entire Talmud.

There are, however, Hebrew-language topical indices available. See, e.g., M. SAVOR, *MICHLAL MAAMARIM VEPITGAMIM [COMPILATION OF THOUGHTS AND STATEMENTS]* (1961); Y. SCHECHTER, *OTZER HATALMUD [A TREASURE OF THE TALMUD]* (2d ed. 1965). In addition, *THE BABYLONIAN TALMUD* (I. Epstein ed. 1935), an English-only translation published by Soncino Press, includes a good index for each of its 35 volumes.

²⁹ The Hebrew alphabet contains 22 letters, each of which represents a consonant, with the exception of two silent letters. In addition, there are ten vowels that are represented by symbols placed below, above, and to the side of the letters. Most verbs in Hebrew consist of three letter roots, from which all verb tenses as well as related nouns and adjectives are derived. Without vocalization, a given set of letters may have a number of different meanings. Familiarity with the language and context often assist in determining meaning. See EHUD BEN-YEHUDA & DAVID WEINSTEIN, BEN-YEHUDA'S POCKET ENGLISH-HEBREW HEBREW-ENGLISH DICTIONARY ii-v, xi-xii (1961).

Although closely related to Hebrew and similar in structure, the Aramaic of the Talmud is abbreviated and colloquial, and creates an additional language barrier. See ARYEH CARMELL, AIDING TALMUD STUDY 48 (5th ed. 1986) [hereinafter A. CARMELL]; see also MARCUS JASTROW, DICTIONARY OF THE TARGUMIM, TALMUD BABLI, YERUSHALMI AND MIDRASHIC LITERATURE v-xiii (1985) (describing difficulties of translating terms from the Gemara).

The lack of punctuation further impedes understanding, since it is often difficult to determine who the speaker is, where a sentence ends, whether a statement is being made or a question asked, whether a point has been concluded, and so forth.

³⁰ This is not to suggest that the Talmud was written in a sloppy or unprofessional manner. Indeed, the opposite is true. Because the Sages were obliged to memorize huge bodies of material, of necessity they developed shorthand techniques for expressing laws, concepts, and ideas. Since the Rabbis had intimate knowledge and understanding of the law, they had no difficulty comprehending the truncated expressions they used. With the passage of 1,500 years, however, what may have originally been clear and straightforward to them has become cryptic and terse to us. See STEINSALTZ, ESSENTIAL, *supra* note 15, at 33–36. In addition, there may have been a concern that redaction of this material would rigidify its meaning and would thus be antithetical to the oral tradition. That is, even though the Sages deemed it essential to reduce the Talmud to writing, they did so in a truncated manner calculated to permit the ongoing development of the Oral Law. See A. COHEN TALMUD, *supra* note 16, at xxxi.

All this helps to explain why translations of the Talmud into English are of limited assistance to the beginning student. Indeed, Hebrew-speaking Israelis attempting to read the Talmud for the first time are almost stymied as English speakers dependent on the translation. It was this inaccessibility that led Rabbi Adin Steinsaltz to undertake translation of the text into modern Hebrew with vowels and punctuation. Rabbi Adin Steinsaltz, *Giving the Talmud to the Jews: An Israeli Rabbi Makes the Sacred Pages Accessible to Everyone*, TIME, Jan. 18, 1988, at 64.

³¹ See S. HA-NAGID, INTRODUCTION TO THE TALMUD, *reprinted in* A. CARMELL, *supra* note 29, at 68–76;

³² ADIN STEINSALTZ, THE STRIFE OF THE SPIRIT 80–81 (1988).

³³ Leon Wieseltier, *Unlocking the Rabbis' Secrets*, N.Y. TIMES, Dec. 17, 1989, § 7, at 3.

³⁴ In most instances, the Gemara discussion will begin with a direct reference to the Mishnah that precedes it and on which it is based. Thereafter, the discourse will often follow a path of relatively free association. That discussion, however, generally relates to the Mishnah in some way, either directly or indirectly.

Sometimes the associations are quite free indeed. Thus, the mere mention of a certain Sage's view on one issue might prompt a discussion of his opinions of completely unrelated matters. For example, the Babylonian Talmud contains a debate concerning the propriety of muzzling oxen—a practice generally prohibited by the Torah, see *Deuteronomy* 25:4. Rabbi Papa's views on this subject are followed by his opinion concerning whether one may knead dough with milk. BABYLONIAN TALMUD, *supra* note 3, *Baba Mezia* 91a. Often the purpose of such juxtapositions is to facilitate memorization.

³⁵ See generally STEINSALTZ, ESSENTIAL, *supra* note 15, at 64–73 (describing process of Talmudic exegesis over centuries in various diaspora communities).

³⁶ See *id.* at 73 ("The standard method of study consists of utilizing the great classic exegetic works, the commentaries on them, and the exegesis on the commentaries themselves (known as the 'arms bearers' by later generations)."); see also Warburg, *A Bibliographic Guide to Mishpat Ivri: Books and Articles in English*, 1 NAT'L JEWISH L. REV. 61 (1986) (providing bibliography of Jewish law material in English).

CHAPTER ONE

Overview of the Talmudic Criminal Justice System*

The judges of the rabbinic courts were deemed to be agents of God,¹ and indeed the word used for such judges in the Bible is often the same as one of the names of God—a name that denotes His aspect of strict justice.² The judges themselves were compassionate men of the highest intellectual and moral standing and were very fearful of committing judicial error, seeking to emulate God's justice by taking exquisite care to adhere to the rules, thus assuring that the innocent were not convicted.³ These rabbinic tribunals were courts of general jurisdiction, with authority to adjudicate both criminal and monetary cases.⁴ The rules governing criminal matters were of course stricter,⁵ as is true in American law.⁶ Thus, for example, only three judges were necessary to hear monetary matters,⁷ whereas twenty-three-judge courts were given exclusive authority to adjudicate capital cases.⁸ Furthermore, the rabbinic courts dealt not only with violations of what would be viewed as religious tenets, such as desecration of the Sabbath and idolatry,⁹ but also what we would define as common law crimes, such as murder and kidnapping.¹⁰ Thus, in Jewish law there is no distinction between religious law and civil law; all of Jewish law is religious—that is, of divine origin.¹¹

The rabbinic legal system itself is *sui generis* and so extreme in protecting both the innocent and the guilty that some argue the safeguards afforded the defendants in criminal cases were merely idealistic and pedagogical, and were never actually implemented or intended to be implemented.¹² Regardless of the validity of this assertion,¹³ it is undisputed that the rules constraining the rabbinic courts in criminal cases constitute normative Jewish law.

The various evidentiary, procedural, and substantive barriers to imposition of punishment by the rabbinic courts amount to a supercharged Bill of Rights. These barriers served to make capital punishment or flogging a rarity. This truth is captured in a Mishnah that discusses whether the "Bloody *Sanhedrin*" was a court that had sentenced *one* person to death within a *seven-* or in a *seventy-*year period.¹⁴ Two Rabbis then assert that, had they been on the court, no person would ever have been convicted or executed.¹⁵ This extreme position prompted one of their contemporaries to warn that the effect would be to multiply murderers in Israel.¹⁶

What, however, is the meaning of the two Rabbis' extreme statement? Surely they are not asserting that they would simply disregard the law of capital punishment and try to outdo even God's mercy. How then would these Rabbis have prevented infliction of the death penalty? Later Sages opine that they would have asked the witnesses whether they could swear that the victim was not a *treifah*—one who is so ill that he would die within twelve months and therefore considered legally dead for purposes of capital punishment law.¹⁷ Moreover, even if a witness could answer that the person was not a *treifah*, the two Rabbis would then have asked him to swear that there was no wound already present at the point where the blade entered the victim's body, which, if true, would still render the victim a *treifah* for whose death the defendant could not be

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executed.¹⁸ Since it is always possible that the weapon obliterated a preexisting wound, no one could ever be lawfully executed, thus rendering capital punishment more theoretical than real.

Leaving aside this admittedly evasive strategy, the obstacles to conviction are formidable. The substantive, procedural and evidentiary safeguards afforded the defendant are, particularly when viewed in their totality, simply breathtaking. The most famous is the two-witness requirement.¹⁹ These witnesses must be competent²⁰ and must warn the suspect that the conduct in which he is engaging is prohibited, and that, if carried out, will subject him to capital punishment.²¹ Furthermore, the suspect must verbally acknowledge receipt of the warning and then proceed to commit the crime completely in the witness' view.²² Such eyewitness testimony is the only valid method of proof. This means that circumstantial evidence, no matter how convincing,²³ and confessions, no matter how voluntary and trustworthy, are irrelevant in establishing guilt.²⁴ Moreover, if there are discrepancies between the witnesses, even as to relatively minor matters, their evidence is excluded. The twenty-three judges who hear the capital cases interrogate the witnesses rigorously, inquiring even with respect to the most tangential facts, such as whether the stems on a fig tree, the situs of the crime, were thick or thin.²⁵ The judges then discuss the case overnight, seeking any possible basis for acquittal.²⁶

As the convicted defendant is being led to the execution site, which must be at a distance from the court, officials shout out the defendant's name and crime and ask if any persons have information that would exculpate him.²⁷ Moreover, even at this late stage, the condemned as well may ask to be returned to court to offer an argument in favor of acquittal.²⁸

Substantive barriers to conviction likewise abound. There is no accomplice liability, no matter how much assistance the actor may have rendered to the principal.²⁹ Crimes are strictly defined; murder, for example, requires intent (not recklessness) and premeditation,³⁰ and is governed by extremely stringent rules of causation. Thus, if the accused ties up his victim so that he will die of starvation, that is viewed as an indirect killing that is not punishable by the rabbinic courts.³¹ Penal provisions must be explicitly stated and may not be expanded by logical deduction to cover other offenses that are analogous.³²

These substantive restrictions apply not only to *malum in se* wrongs such as murder, but also to offenses that are, so to speak, *malum prohibitum*. For example, the law of the stubborn and rebellious son in *Deuteronomy* 21:18–21 illustrates the substantive limitations placed on a "statutory offense" whose sanction of death by stoning seems unduly harsh and disproportionate.³³ Talmudic law requires, inter alia, that the "wayward and rebellious" boy be between the ages of thirteen and thirteen and six months,³⁴ that he eat and drink a certain amount of meat and wine,³⁵ that he steal money from his parents to buy that amount of food and drink,³⁶ that the parents not be lame, mute, deaf, or blind, and that they consent to their child's execution.³⁷ Indeed, these many restrictions led one Sage to conclude that there "never has been a stubborn and rebellious son . . . and never will be."³⁸

Given these and numerous other safeguards, Jewish law makes it almost impossible for the rabbinic courts to condemn an innocent person.³⁹ Indeed, the breadth and depth of these limitations make even the conviction of the guilty in that forum an

unlikely prospect. At the same time, the Jewish jurisprudential system did include escape valves that facilitated convictions in certain limited circumstances. The separate king's court was not bound by all of the constraints applicable in the rabbinic courts,⁴⁰ and in the rabbinic courts themselves the rules could be relaxed temporarily in times of emergency⁴¹ and in the case of certain repeat offenders who, although factually guilty, had previously escaped conviction because of a "technical loophole."⁴² These exceptions notwithstanding, it is clear that normative Jewish law operative in the rabbinic courts would make that judicial system a criminal defense attorney's dream tribunal and a prosecutor's worst nightmare.

Thus, notwithstanding these formidable strictures making it almost impossible to convict, the rabbinic courts were not helpless in the face of widespread lawlessness. The rabbinical courts⁴³ were empowered to suspend certain procedural guarantees and, in circumscribed situations, to mete out punishments not ordinarily allowed by law. These powers existed in two contexts. First, the courts could take such action in times of emergency, when there was a substantial threat to the community as a whole, as when there was widespread or general public disregard of the law and severe remedial action was required.⁴⁴ Faced with such conditions, the rabbis were authorized to dispense with evidentiary safeguards,⁴⁵ and to mete out punishments, including the death penalty, that were not otherwise prescribed for given misconduct.⁴⁶ The wrongdoers on whom such punishment was imposed were not necessarily habitual offenders; nor were the offenses necessarily the most serious ones.⁴⁷ Although there are a few recorded instances of the exercise of the emergency authority in Talmudic times, its use seems related primarily to the post-Talmudic loss of ordination authority, which resulted in the inability of the rabbinic courts to impose criminal sanctions without resort to the exigency jurisdiction.⁴⁸ All in all, this emergency exception was of limited duration, confined to extraordinary situations, and subject to other restrictions as well.⁴⁹ As Maimonides, the renowned twelfth century commentator, codifier, and philosopher, noted, "Whatever measure [the court] adopts is only a temporary one, and does not acquire the force of the law, binding for all time to come."⁵⁰

Second, in specified cases involving murderers and certain repeat offenders, procedural irregularities and enhanced punishments were also permitted in rabbinical courts. Rather than emphasizing general societal breakdown, the focus in the two Mishnahs⁵¹ applicable to this exception is on the individual wrongdoer who may otherwise escape punishment because of certain procedural defects.⁵² In such cases, the court is empowered to imprison the malefactor, give him bread and water to shrink his intestines and then feed him barley bread "until his stomach bursts."⁵³ The first Mishnah deals with an habitual offender who has repeatedly committed transgressions punishable by extinction through an act of God;⁵⁴ he is punished by the worldly tribunal because "he has abandoned himself to death," with the court merely hastening that process.⁵⁵ The Mishnah applies this punishment to those who have been flogged twice for their misdeeds,⁵⁶ thus establishing procedural regularity with regard to the prior convictions.⁵⁷ The Gemara, however, extends the punishment to a transgressor who escaped prior sanctions because he remained silent in the face of a warning that he was about to commit a punishable offense. Jewish law requires that a defendant explicitly acknowledge receipt of such a warning, and if a defendant is silent or merely nods his head in response thereto, he may not be punished.⁵⁸ This is the only example of procedural irregularity

given by the Gemara with regard to this Mishnah. Thus, the Gemara leaves unclear whether other procedural irregularities nonetheless allow the defendant to be subjected to the barley bread punishment, and, if this one is merely illustrative, the Gemara does not specify what other kinds of defects may similarly be ignored.⁵⁹ Finally, the rules permitted transfer of the defendant to the jurisdiction of the king's court, where there were far fewer restrictions on the factfinding process. Similarly, if there were defects precluding conviction the rabbinical court could turn the defendant over to the blood avenger (a person who would inherit from the victim).⁶⁰

These exceptions, however, were limited by time and context. Excluding these limited exceptions, normative Jewish law seeks to make conviction a rarity notwithstanding the possible danger to the social order. Why does Jewish law do that?

The talmudic Sages give us rules, but generally not rationales, other than God's inscrutable Will. Nonetheless, working backward inductively from the law's results, we can formulate various hypotheses to explain the extremes of making acts criminal while at the same time making it almost impossible to punish the transgressors.

We can conjecture that life is precious and holy, and should be taken only when the defendant's acts publicly demonstrate total disregard for God's law and utter contempt for His rules, as well as the lives and souls of others. Or that Jewish law is a symbol of divine perfection, in that it never permits the conviction of an innocent person—with only one possibility of legal error which is authorized in order to preserve the distinction between man and God. Or that punishment inflicted by man is of necessity imperfect, and therefore to assure perfection in this arena, God opted to punish most transgressors Himself. Or that the rules precluding easy conviction comprise a resolution of the tension between the need to put a value on human life, which has meaning and purpose, by declaring that the murderer's life is forfeit, and at the same time, given the fallibility of human justice, making it difficult to take even that life away. Or that condemnation of only the manifestly guilty assures complete respect for all the laws. Or that obedience to these rules allows people to exercise their faith in God by adhering to laws that defy human logic, and seemingly permit murderers and other wrongdoers to proliferate. Or that lax rules would result in greater judicial error, which in turn would lead to divine punishment for judges, God's agents for dispensing justice in the world. Or that the judges' careful and painstaking adherence to the laws is a way of demonstrating how God Himself judges. Or that God wanted to set an example for interpersonal relations in judging one's fellow human beings, that is, not to judge adversely too swiftly or too harshly.⁶¹ Or that the numerous rules precluding easy conviction show how punctiliously and carefully people should act in obeying all of God's commandments. Or that this body of law deepens the understanding of the gulf between man and God. Or that the law is simply a manifestation of God's abundant mercy.

Whatever the rationale or rationales, and here we must bow to enigma, it is clear that normative Jewish law is *sui generis*, an extraordinary criminal justice system that seeks at almost any cost—including acquittal of the guilty—to preclude conviction of the innocent, in a sense making the law hortatory and pedagogical in nature—arguably a suitable result for the People of the Book.

¹ See, e.g., *Exodus* 21:6 (describing the procedure when a slave refuses his freedom, stating that the "master

shall bring [his bondsman] to the court"; the original Hebrew text for court is one of the names of God). Furthermore, when the Temple was destroyed the Great Sanhedrin could no longer convene there; the rabbinic courts could no longer exercise capital jurisdiction. See THE ARTSCROLL SERIES, THE TALMUD BAVLI: THE GEMARA: THE CLASSIC VILNA EDITION, *Shabbos* 15a (Schottenstein ed., 2007) [hereinafter BABYLONIAN TALMUD]. All references to the Talmud in this chapter are to the ArtScroll edition, unless specified otherwise. According to many authorities, the Great Sanhedrin left the Temple forty years prior to its destruction because the judges discerned signs of the coming disaster. See, e.g., *id.*; 1 EMANUEL B. QUINT & NEIL S. HECHT, JEWISH JURISPRUDENCE: SOURCES AND MODERN APPLICATIONS 9 (1980) [hereinafter QUINT & HECHT]. According to others, however, the courts continued to hear capital cases at least until the destruction of the Temple in 70 C.E.

² In the story of Creation, the Hebrew name used for God describes His attribute of justice. Because of human frailties, however, a system based solely on justice could not prevail, and, therefore, in *Genesis* 2:4 a different name for God, a term denoting mercy, is used.

³ THE CODE OF MAIMONIDES, BOOK 14: THE BOOK OF JUDGES, *Sanhedrin* 2:1–14, at 7–10 (Abraham M. Hershman trans., 1949) [hereinafter THE CODE OF MAIMONIDES]; see also HAIM H. COHN, HUMAN RIGHTS IN JEWISH LAW 199 (1984) (citations omitted) [hereinafter COHN, HUMAN RIGHTS]:

It is not only the imitation of God's justice and mercy that distinguishes the human judge; it is said that the judge who passes true judgment is like God's partner in the creation of the world, brings God's presence down into the world, and radiates light like heaven.

⁴ See THE ARTSCROLL SERIES, THE MISHNAH, *Sanhedrin* 1:1–6, at 5–25 (Matis Roberts trans., 1987) [hereinafter THE MISHNAH] prescribing the jurisdictions of three-judge courts, which heard monetary cases and criminal offenses punishable by lashing; twenty-three-judge courts, referred to as Lesser *Sanhedrins*, which heard capital cases; and the Great *Sanhedrin* of seventy-one judges, whose jurisdiction included cases against false prophets and apostate towns, and resolving legal questions in dispute.

⁵ See *id.* at 4:1, at 61–67 (describing the more stringent rules in capital cases); BABYLONIAN TALMUD, *supra* note 1, *Sanhedrin* 36b (referring to ten differences between monetary and capital cases).

⁶ See, e.g., *In re Winship*, 397 U.S. 358, 364–65 (1970) (requiring proof beyond a reasonable doubt in criminal trials and delinquency hearings); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (finding the Sixth Amendment right to the assistance of counsel in criminal cases to be fundamental and thus applicable to the states).

⁷ THE MISHNAH, *supra* note 4, *Sanhedrin* 1:1, at 5.

⁸ *Id.* *Sanhedrin* 1:4, at 17.

⁹ *Numbers* 15:32–36 (prescribing death by stoning for one who violates the Sabbath); *Deuteronomy* 17:2–5 (prescribing stoning for idol worshippers).

¹⁰ *Exodus* 21:12–14 (making intentional, premeditated murder a capital offense); *Exodus* 21:16 (making kidnapping a capital offense under certain circumstances, such as selling the victim as a slave).

¹¹ See Menachem Elon, *The Sources and Nature of Jewish Law and Its Application in the State of Israel*, 2 ISR. L. REV. 515, 517–18 (1967) ("The Ten Commandments enjoins the observance of the Sabbath and the prohibition of taking the name of the Lord in vain in the same breath, so to speak, as 'Thou shalt not steal,' and 'Thou shalt not murder.'").

¹² See GEORGE HOROWITZ, THE SPIRIT OF JEWISH LAW, § 96, at 165–67 (1953).

¹³ See AARON M. SCHREIBER, JEWISH LAW AND DECISION-MAKING: A STUDY THROUGH TIME 278 (1979) ("It is difficult to maintain that talmudic criminal law was ideal only, since a tremendous amount of discussion in the Talmud is devoted to very detailed discussions of these norms. Furthermore, some of the incidents recorded in the Talmud purport to report the application in practice of these rules."); see also AARON KIRSCHENBAUM, SELF-INCRIMINATION IN JEWISH LAW 34–36 (1970) [hereinafter KIRSCHENBAUM] (noting that the absolute prohibition against self-incrimination had its origins in early mishnaic times, i.e., when the rabbinic courts were in existence. Thus, presumably the rules were put into practice and were not simply ideals).

¹⁴ THE MISHNAH, *supra* note 4, *Makkos* 1:10, at 35–37. Although the implication is that such a tribunal is a "hanging court," the Gemara discussing this Mishnah questions whether the Sage in the Mishnah meant that a court executing one person in seventy years was a "destroyer," or whether it was "an acceptable number of executions." The Gemara does not resolve this question, instead simply stating *taykoo*, meaning "let it stand," that is, this is a question for the Messiah to resolve. BABYLONIAN TALMUD, *supra* note 1, *Makkos* 7a.

¹⁵ THE MISHNAH, *supra* note 4, *Makkos* 1:10, at 35.

¹⁶ *Id.* at 35–37. For an insightful analysis of this colloquy, see Gerald I. Blidstein, *Capital Punishment: The Classic Jewish Discussion*, in CAPITAL PUNISHMENT: A READER 107, 112–14 (Glen H. Stassen ed., 1998).

¹⁷ BABYLONIAN TALMUD, *supra* note 1, *Makkos* 7a.

¹⁸ *Id.*

¹⁹ *Deuteronomy* 17:6, 19:15; *Numbers* 35:30.

²⁰ *See, e.g.*, THE MISHNAH, *supra* note 4, *Sanhedrin* 3:3–4, at 47–53 (disqualifying evil persons and kinsmen); *Shevuos* 4:1, at 63–65 (disqualifying women); *Makkos* 1:8, at 29 (disqualifying persons related to one another); BABYLONIAN TALMUD, *supra* note 1, *Bava Basra* 128a (disqualifying insane, blind, and deaf persons); *Bava Basra* 155b (disqualifying youths). The foregoing characteristics did not go to the weight or credibility of the witnesses, but rather absolutely precluded their testimony. Cumulatively these categorical disqualifications, in and of themselves, made it extremely difficult to convict.

²¹ BABYLONIAN TALMUD, *supra* note 1, *Sanhedrin* 80b.

²² *Id.* at 81b.

²³ *Id.* at 37b.

²⁴ *Id.* at 9b.

²⁵ *Id.*; THE MISHNAH, *supra* note 4, *Sanhedrin* 5:2, at 79–81.

²⁶ THE MISHNAH, *supra* note 4, *Sanhedrin* 4:1, at 65–67, *Sanhedrin* 5:5, at 87.

²⁷ *Id.*, *Sanhedrin* 5:5, at 91–93.

²⁸ *Id.*

²⁹ *Id.*, *Baba Kamma* 6:4, at 339–40.

³⁰ *See, e.g.*, *Numbers* 35:20–23; *Exodus* 21:14. Unintentional killings were punished by exiling the wrongdoer to a city of refuge. *Deuteronomy* 4:41–43, 19:2–10.

³¹ BABYLONIAN TALMUD, *supra* note 1, *Sanhedrin* 77a.

³² COHN, HUMAN RIGHTS, *supra* note 3, at 227.

³³ *Deuteronomy* 21:18–21.

³⁴ THE MISHNAH, *supra* note 4, *Sanhedrin* 8:1 (specifying a six-month window). *But see id.*, *Sanhedrin* 69a(2) (providing a window of only three months).

³⁵ *Id.*, *Sanhedrin* 8:2, at 137–41.

³⁶ *Id.* at 141–43.

³⁷ *Id.* at 143–45.

³⁸ BABYLONIAN TALMUD, *supra* note 1, *Sanhedrin* 71a.

³⁹ The only possibility of convicting an innocent person occurs if the prosecuting witnesses lie and are not found out during the course of the proceeding, despite vigorous judicial admonitions and cross-examination. If, however, the testimony of the original witnesses is refuted by additional witnesses, the defendant cannot be convicted. Such refutation can occur in two ways. The second set of witnesses can either dispute the facts of the crime (contradicting witnesses) or can testify that the first set of witnesses was with them elsewhere at the time of the offense and thus could not have seen the event in question (plotting witnesses). In the first situation the court simply rejects both sets of testimony because it cannot determine which set was truthful. In the second scenario, if the court has rendered its verdict but not yet carried out the sentence, the first set of witnesses will suffer the same fate that they plotted to have inflicted on the defendant. If the discovery of the plotting witnesses is either too early or too late, they are not punished by the court. *See* THE MISHNAH, *supra* note 4, *Makkos* 1:4, at 19–20. For explanations as to why the witnesses are punished only after judgment but before imposition of the sentence on the defendant victim, and concerning the differences between plotting and contradicting witnesses, see 5 YEHUDA NACHSHONI, STUDIES IN THE WEEKLY PARASHAH: THE CLASSICAL INTERPRETATION OF MAJOR TOPICS AND THEMES IN THE TORAH, 1302–10 (Shmuel Hirnelstein trans., 1989).

⁴⁰ For example, in the Jewish royal courts the prohibition against self-incrimination was apparently inapplicable. *See* KIRSCHENBAUM, *supra* note 13, at 67; THE MISHNAH, *supra* note 4, *Sanhedrin* 18:6, at 52–53.

⁴¹ Exercise of the exigency jurisdiction was limited to times of lawlessness, was of temporary, short duration, and its decrees did not acquire the status of law binding for all time. THE CODE OF MAIMONIDES, *supra* note 3, *Sanhedrin* 24:4, at 73. For an extensive analysis of the exigency jurisdiction which was used primarily in post-talmudic times after the destruction of the Temple when rabbinic judges lost their power

to inflict capital punishment, see QUINT & HECHT, *supra* note 1, at 139–213.

⁴² In certain cases, usually of murderers, and certain repeat offenders, where guilt was clear, procedural irregularities and enhanced punishments were permitted in rabbinical courts. The court would imprison the wrongdoer, feed him sparingly to shrink his intestines and then feed him barley bread "until his stomach bursts." THE MISHNAH, *supra* note 4, *Sanhedrin* 9:5, at 165–67. Note that the form of execution is indirect, which is termed a *gruma*, a form of killing which is not punishable by the courts.

⁴³ In this chapter we treat the rules governing rabbinical courts of the Talmudic era, thus excluding from consideration Jewish courts of the post-Talmudic periods. For a fascinating discussion of the extent to which inquisitorial practices were permitted in the Jewish courts of medieval Spain, see KIRSCHENBAUM, *supra* note 13, at 82–92.

Nor do we discuss the Jewish royal courts, in which the prohibition against self-incrimination was apparently inapplicable. See THE CODE OF MAIMONIDES, *supra* note 3, *Sanhedrin* 18:6, at 52–53; *id.*, *Kings and Wars* 3:8–10, at 213–14; KIRSCHENBAUM, *supra* note 13, at 67. Joshua and David both carried out ostensibly confession-based executions. Maimonides attempted to explain them either on the ground that they involved emergencies or that they were permitted to be inflicted by state law; that is, by royal courts. Elsewhere, however, in describing the powers of royal courts, Maimonides writes:

If a person kills another and there is no clear evidence, or if no warning has been given him, or there is only one witness, or if one kills accidentally a person whom he hated, the king may, if the exigency of the hour demands it, put him to death in order to insure the stability of the social order. He may put to death many offenders in one day, hang them, and suffer them to be hanging for a long time so as to put fear in the hearts of others and break the power of the wicked.

THE CODE OF MAIMONIDES, *supra* note 3, *Kings and Wars* 3:10, at 214. The rules surrounding confessions are conspicuous by their absence from the listing of procedural safeguards that the king's court was not required to follow. It might well be, however, that since Maimonides had already discussed confessions in connection with Joshua and David, he felt no need to do so again. See also KIRSCHENBAUM, *supra* note 13, at 67 (quoting Rabbi Solomon ben Adreth (the Rashba) to effect that royal courts could impose punishment even on basis of confessions).

⁴⁴ See QUINT & HECHT, *supra* note 1, at 139–213. According to these authors, extralegal punishment could be meted out even where the community was not dissolute either in general or with respect to a particular type of offense as, for example, in the case of an habitual offender. *Id.* at 174–75; see also BABYLONIAN TALMUD, *supra* note 1, *Sanhedrin* 58b (hand of habitual assaulter ordered cut off). To the extent that such sanctions could be imposed absent danger to the community, there is an overlap between this emergency exception and the "barley bread" exception.

⁴⁵ Indeed Maimonides states that flogging could be administered on the basis of persistent rumors of immoral conduct. THE CODE OF MAIMONIDES, *supra* note 3, *Sanhedrin* 24:5, at 74; see BABYLONIAN TALMUD, *supra* note 1, *Kiddushin* 81a. The extent to which procedural safeguards could be relaxed was, however, unclear. See QUINT & HECHT, *supra* note 1, at 178–83.

⁴⁶ In exercising emergency authority, the court was given broad discretion concerning the kinds of punishment that might be imposed. It was not restricted to sanctions permitted by the Torah, namely, flogging and capital punishment by stoning, burning, slaying by the sword (decapitation), or strangulation. Compare THE CODE OF MAIMONIDES, *supra* note 3, *Sanhedrin* 14:1, 16:1, at 39, 44–45 (giving normative sanctions) with BABYLONIAN TALMUD, *supra* note 1, *Sanhedrin* 27a (blinding of murderer); *id.* at 55b (amputation of hand of habitual assaulter); *id.* at 52b (priest's daughter who committed adultery burned to death in manner not permitted by Torah). The commentators disagree concerning whether all of these involve the exercise of emergency jurisdiction. For instance, the Tosafot assert that the amputation sanction is based on *Job* 31:22, *id.* at 55b (Tosafot commentary), whereas Rashi contends that it is an example of an extraordinary remedy, *id.* (Rashi commentary). THE CODE OF MAIMONIDES, *supra* note 3, *Sanhedrin* 24:8–9, at 74 (in exercise of their emergency authority, judges were empowered to pluck hair, bind hands and feet, knock down and drag offenders, as well as imprison them). It has been suggested that extraordinary punishments were chosen so as to demonstrate their extraordinary nature, thus clarifying that they were not authorized by Torah law and preventing any confusion in that regard. See 6 ENCYCLOPEDIA JUDAICA, Extraordinary Remedies, at 1073–74 (1971).

The following key Gemara deals with extraordinary sanctions:

R. Eliezer ben Jacob said: I have heard that the Beth din may, [when necessary,]

impose flagellation and pronounce [capital] sentences even where not [warranted] by the Torah; yet not with the intention of disregarding the Torah but [on the contrary] in order to safeguard it. It once happened that a man rode a horse on the Sabbath in the Greek period and he was brought before the court and stoned, not because he was liable thereto, but because it was [practically] required by the times. Again it happened that a man once had intercourse with his wife under a fig tree. He was brought before the Beth din and flogged, not because he merited it, but because the times required it.

BABYLONIAN TALMUD, *supra* note 1, *Sanhedrin* 46a; *see also id.*, *Yebamoth* 90b (substantially repeating Gemara of *Sanhedrin* 46a). On its face, the Gemara appears to grant the rabbis authority only to enhance punishment, since neither of the offenses referred to is punishable by flogging or death, and there is no mention that the court disregarded procedural guarantees. The Mishnahs on which this Gemara is commenting do, however, involve cases in which procedural irregularities occurred, and accordingly it appears that rabbinic authority in this context extended to elimination of procedural protection as well as imposition and enhancement of punishment.

THE MISHNAH, *supra* note 4, *Sanhedrin* 6:4, at 390, reprinted in BABYLONIAN TALMUD, *supra* note 1, *Sanhedrin* 45b, is discussing whether female idolaters and blasphemers could be hanged after being stoned. The Sages' response was in the negative, whereupon Rabbi Eliezer reported the case of Simeon ben Shetah, who hanged eighty women in Ashkelon. In attempting to refute that case as precedent by categorizing it as exceptional, the rabbis answered that Simeon ben Shetah "hanged eighty women, notwithstanding that two [malefactors] must not be tried on the same day," thus distinguishing the matter as an emergency in which procedural irregularities were countenanced. *Id.*

Similarly, in *Yebamoth*, the Mishnah is discussing the law concerning a woman who received a divorce on the basis of the testimony of one witness that her husband was dead. THE MISHNAH, *supra* note 4, *Yebamoth* 10:1 at 232, reprinted in BABYLONIAN TALMUD, *supra* note 1, *Yebamoth* 87b. She then remarried, after which her first husband reappeared. The Gemara's question is how the court could have allowed remarriage on the basis of the testimony of only one witness. The Gemara passage quoted above then follows, with the answer that the prescribed procedure need not always be followed by the rabbis.

Maimonides refers to further procedural irregularities:

There is also the incident of Simeon son of Shetah (at whose instance) eighty women were hanged on the same day at Ashkelon, without the legally prescribed inquiry and query, due warning, and conclusive evidence. He (Rabbi Simeon son of Shetah) felt that the emergency of the hour demanded drastic action.

THE CODE OF MAIMONIDES, *supra* note 3, *Sanhedrin* 24:4, at 73. Maimonides' source for the specific procedural irregularities to which he refers is unclear. He may have deduced them from the apparent impossibility of completing eighty trials in one day while complying with these particular guarantees. Rashi's commentary to *Sanhedrin* 45b suggests that it would have been impossible to conduct, during a single day, the required examination into mitigating factors with respect to each of the eighty women sentenced to death. Rashi's explanation for the haste in carrying out the multiple executions was a concern that relatives of the women would combine in an effort to save them. *See* BABYLONIAN TALMUD, *supra* note 1, *Sanhedrin* 45b (Rashi commentary).

⁴⁷ *See* BABYLONIAN TALMUD, *supra* note 1, *Sanhedrin* 46a, *Yebamoth* 90b (giving examples of conduct punished under emergency power). Although desecrating the Sabbath is a violation of the Torah punishable by death, *see Exodus* 31:15, 35:2, the injunction against riding an animal on the Sabbath is only a rabbinic rule designed as a fence to prevent actual violation of the Sabbath. *See* THE MISHNAH, *supra* note 4, *Betzah* 5:2, at 186–87, reprinted in BABYLONIAN TALMUD, *supra* note 1, *Betzah* 37b. Copulation with one's spouse in public, although implicating concerns of public morality, was not the subject of any specific Biblical or rabbinic prohibition.

⁴⁸ *See* BABYLONIAN TALMUD, *supra* note 1, *Gittin* 88b; *id.*, *Baba Kamma* 84b. As one commentary put it:

[U]nder traditional Jewish law, the broad general jurisdiction of the judicial system depended on courts composed of ordained judges. Accordingly, with the lapse of ordination around 350 C.E., Jewish communities, both in the Land of Israel and in the Diaspora, were faced with problems resulting from a severely limited judiciary [T]hose courts [of nonordained judges] were not authorized to act in cases involving criminal-type conduct or transgressions of religious laws and practices. . . . Their

response was to expand the doctrine of extrajudicial authority.

QUINT & HECHT, *supra* note 1, at 139–40.

⁴⁹ There was, for example, a question whether the court imposing such punishment could consist of an ordinary judge or whether it had to be presided over by either "an outstanding person of the generation" or "leaders of the community" selected by the people. QUINT & HECHT, *supra* note 1, at 148. Quint and Hecht go on to note that

Jewish courts do not lightly assume extraordinary powers; nor do they lightly impose extraordinary sanctions. The court, or leaders, exercising this authority must do a great deal of soul-searching before assuming such authority; for it is recognized that the abuse of such powers can cause a breakdown in respect for law and order in the same manner as can the failure of the court to avail itself of such authority when emergency occasions demand it.

Id. at 172–73.

⁵⁰ THE CODE OF MAIMONIDES, *supra* note 3, *Sanhedrin* 24:4, at 73.

⁵¹ In fact, there is only one Mishnah, THE MISHNAH, *supra* note 4, *Sanhedrin* 9:5, at 396, but its two parts are reprinted separately as two Mishnahs in the Talmud. *See id.*, *Sanhedrin* 81b. For ease of reference, we are referring to each of the two segments as a separate Mishnah.

⁵² The two Mishnahs read as follows:

He who was twice flagellated [for two transgressions, and then sinned again,] is placed by Beth Din [court] in a cell and fed with barley bread, until his stomach bursts.

One who commits murder without witnesses is placed in a cell and [forcibly] fed with bread of adversity and water of affliction.

THE MISHNAH, *supra* note 4, *Sanhedrin* 9:5, at 396, reprinted in BABYLONIAN TALMUD, *supra* note 1, *Sanhedrin* 81b.

⁵³ THE MISHNAH, *supra* note 4, *Sanhedrin* 9:5, at 396, reprinted in BABYLONIAN TALMUD, *supra* note 1, *Sanhedrin* 81b. The Gemara asks why there is a difference in the texts of the two Mishnahs regarding the punishments meted out, and the response is: "In both cases he is fed with 'bread of adversity and water of affliction' for his intestines to shrink . . . and then is fed with barley bread until his stomach bursts." BABYLONIAN TALMUD, *supra* note 1, *Sanhedrin* 81b (quoting Mishnah, *Sanhedrin* 9:5, at 396).

One commentator views these provisions as primarily authorizing detention to protect the public, rather than as creating a parallel system permitting execution of certain murderers and recidivists. *See* COHN, HUMAN RIGHTS, *supra* note 3, at 49–51. Rashi appears to agree. *See* BABYLONIAN TALMUD, *supra* note 1, *Sanhedrin* 81b (Rashi commentary).

Maimonides may accept both of these possibilities—detention and execution. In his Code of Law, he divides his treatment of the two Mishnahs. He discusses the Mishnah with respect to murderers in the chapter of his Book of Torts that deals with murder. THE CODE OF MAIMONIDES—TORTS, *supra* note 3, , *Murder and the Preservation of Life* 4:8, at 207. Here, after considering the circumstances in which the Mishnah applies, he concludes that "the rule in all such cases is that the murderer is put into a cell and fed on a minimum of bread and water until his stomach contracts and then he is given barley so that his stomach splits under the stress of sickness." *Id.* Thus, at least with respect to this category, Maimonides seems to view the sanction as dealing primarily with capital punishment rather than detention.

The Code treats the Mishnah concerning habitual offenders in the Book of Judges, in its *Sanhedrin* volume, which discusses procedure. *See* THE CODE OF MAIMONIDES, *supra* note 3, *Sanhedrin* 18:4–5, at 51–52. Here, Maimonides distinguishes those who were punished because of their earlier misdeeds from those who, due to specified procedural irregularities, had not been punished at all. *Id.* As to the former, he concludes that the offender "is put in a prison cell—a narrow place of the offender's height, with no room to stretch out—and is fed on bread of adversity and water of affliction until his intestines shrink and he wastes away, then he is fed on barley until his stomach bursts." *Id.* at 52. An individual in the latter category, however, "is put in a prison cell and kept there until he dies." *Id.* It may well be that Maimonides omits any reference to the specifics of the barley bread ordeal in the latter case merely because he has already given such details in the preceding paragraph and thinks it unnecessary to repeat them. On the other hand, Maimonides was a commentator who used language very precisely, and he may have wished to distinguish, in terms of punishment, between habitual offenders who, because there was full compliance with all procedural safeguards, had been previously flagellated for their misdeeds, and those who had not been previously punished, due to noncompliance with procedural rights. Maimonides' position

may have been that the former were subject to the barley bread death penalty because there could have been no question about their guilt and because their recidivism was clearly established—notwithstanding prior punishment, they continued to engage in the same misconduct. The latter, whose recidivist propensity was less clear because they had not been subjected to sanctions for their earlier misdeeds, were, according to this interpretation of Maimonides, imprisoned for life rather than receiving a death penalty.

⁵⁴ The Rashi commentary to this Mishnah states that it is part of the Oral Law received by Moses on Sinai; it is alluded to in *Psalms* 34:22: "Evil shall slay the wicked." Rashi is thus saying that the Mishnah is not of rabbinic origin. BABYLONIAN TALMUD, *supra* note 1, *Sanhedrin* 81b (Rashi commentary).

⁵⁵ THE MISHNAH, *supra* note 4, *Sanhedrin* 9:5, at 396, reprinted in BABYLONIAN TALMUD, *supra* note 1, *Sanhedrin* 81b. While the Mishnah itself does not state that the accused was flagellated for crimes for which he was subject to extinction by God, the Gemara makes this point clear. *Id.* The Gemara also makes a distinction between persons who committed different sins, each of which was subject to punishment by extinction, and those who repeatedly committed a single sin warranting such a penalty. Only the latter are subjected to the barley bread punishment, since it is evident from their own acts that rehabilitation is impossible. In the former situation, however, "it may merely be his desire to experience sin, and not a complete abandonment thereto;" consequently, this extraordinary punishment is deemed inapplicable. BABYLONIAN TALMUD, *supra* note 1, *Sanhedrin* 81b.

⁵⁶ There is a dispute in the Gemara about whether the accused was subjected to the barley bread sanction on the third or the fourth transgression. One rabbi took the position that before the wrongdoer could be subjected to this punishment, he first had to be warned of such consequences, and therefore the penalty could not be imposed until the fourth misdeed. *Id.*

⁵⁷ The defendants could not have been flogged for their prior offenses absent compliance with the prescribed procedural safeguards.

⁵⁸ *See id.*; Moses Jung, *The Jewish Law of Theft* (1929), reprinted in 4 *STUDIES IN JEWISH JURISPRUDENCE* 1, 21 (Abraham M. Fuss ed., 1976) ("It is only by means of this 'acceptance of the warning,' . . . which must have been tendered in the manner mentioned, that the full *kawwanah* [the intention coupled with the desire to do a certain act, knowing the consequences of the act to be illegal and punishable] . . . of the malefasant manifests itself and may be used as evidence in a Court of Justice.").

Discussing whether a person can be disqualified as a witness if two witnesses saw him commit an offense but did not warn him, Maimonides states: "The general principle is: if the transgression is such as to make it clear to the witnesses that the offender knew that he was a transgressor and committed it wantonly, he is disqualified, though he had not been given warning and is not subject to flogging." THE CODE OF MAIMONIDES, *supra* note 3, *Evidence* 12:1, at 108.

⁵⁹ Although this defect of non-acknowledgment is of a lesser order than the failure to give a warning at all, it too involves an aspect of the defendant's *mens rea*. Presumably the requirement of recidivism made it fairly clear that the defendant possessed the requisite intent, but his non-acknowledgment might be the response not only of a wily career criminal, but also that of someone who in truth failed to apprehend the impropriety of his conduct. In his commentary, however, Rashi takes the former view, suggesting that although the defendant's failure to acknowledge the warnings was enough to preclude flogging, he really understood these admonitions but through non-acknowledgment "he did not allow himself to be flogged." BABYLONIAN TALMUD, *supra* note 1, *Sanhedrin* 81b (Rashi commentary). Rashi concluded that "nevertheless they are deemed warnings so as to consider him a wicked person." *Id.*

⁶⁰ *See Deuteronomy* 19:11–12. *See also infra* chapter 8 note 42.

⁶¹ Jewish law requires persons who see others do something that seems to violate the law, to give them the benefit of the doubt and conceive of a scenario that would make the conduct legal. *See* ZELIG PLISKIN, *LOVE YOUR NEIGHBOR* 42–43 (1977) (describing the obligation to judge people favorably); HANOCH TELLER, *COURTROOMS OF THE MIND* 89–93 (1987) (noting contemporary cases in which the actor turned out to be innocent). The law is akin to the prohibition against the use of circumstantial evidence to convict a person of a crime.

CHAPTER TWO

Guilt: Henry Friendly Meets the MaHaRaL of Prague^{*}

In 1970, when for a brief moment in time federal collateral review was broadly available for both federal and state prisoners,¹ Henry J. Friendly, "the preeminent appellate judge of his generation,"² questioned whether innocence had become irrelevant in the litigation of constitutional claims in federal habeas corpus.³ Advancing finality, frivolity, and floodgate concerns,⁴ he argued that, with certain exceptions—such as challenges to "the very basis of the criminal process"⁵—prisoners seeking collateral relief should be required to make a colorable showing of innocence. Under Judge Friendly's formulation, the petitioner would have to demonstrate "a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted . . . , the trier of the facts would have entertained a reasonable doubt of his guilt."⁶ The effect of the proposal would be to exclude from federal collateral attack most nonguilt-related constitutional claims,⁷ and in particular *Mapp*⁸ and *Miranda*⁹ exclusionary rule violations.

Almost four decades later, it is clear that the probability a habeas petitioner in fact committed the crime is not merely relevant but often dispositive as a basis for denying relief. Indeed, going well beyond remedies, the issue of factual guilt now pervades American criminal constitutional law,¹⁰ often in ways that do not rest comfortably alongside the Bill of Rights' guarantees limiting government power in the criminal justice process.

Factual guilt affects federal habeas corpus primarily in two ways. First, in accord with Judge Friendly's recommendation,¹¹ it is a potentially omnivorous rationale.¹² Second, with respect to other allegations of unconstitutionality, some showing of innocence is a prerequisite to availability of relief if the petitioner has defaulted in state court¹³ or has filed any previous federal writs¹⁴ or has asserted a claim that is not based squarely on existing precedent.¹⁵ Not merely in the foreground, factual guilt, along with federalism and finality, is now one of the dominant themes of federal habeas corpus.¹⁶

This ascendancy of innocence has not, however, been limited to collateral attacks. It is becoming increasingly important in direct review as well,¹⁷ affecting the substantive content of constitutional rights, the circumstances in which their violation will be excused, and the applicability of barriers to their adjudication.

The Justices have infused the guilt-innocence issue into the very substance of Bill of Rights' guarantees in various ways. Assertions of ineffective assistance of counsel under the Sixth Amendment, for example, require a showing of prejudice, that is, a reasonable probability that, but for counsel's incompetence, the outcome would have been different.¹⁸ Similarly, availability of the Due Process right to counsel at a probation or parole revocation hearing turns in part on whether the petitioner can make a "colorable claim" that she has not violated the terms of parole or probation.¹⁹

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In addition to including innocence as a specific element of the constitutional safeguard, the Court often looks to that factor in determining the proper breadth of a right. The less guilt-related a right, the more likely its interpretation will be narrow. This phenomenon is apparent in the Fourth Amendment exclusionary rule case law,²⁰ and it also influences the continuing constriction of the scope of the amendment itself, subsumed under the rubric of effective law enforcement.²¹ Indeed, the Court has stated explicitly that innocence of the accosted person is a factor in determining whether there was a seizure within the meaning of the Fourth Amendment.²² On the other hand, the Justices seem unconcerned that their approval of new and not necessarily reliable police techniques such as drug courier profiles may subject innocent persons to unwarranted stops.²³ Nor has the Fifth Amendment been unaffected by this concentration on guilt. As Justice O'Connor noted in a decision facilitating waivers of *Miranda* rights, admissions "are essential to society's compelling interest in finding, convicting, and punishing those who violate the law."²⁴

Similarly, the Court is contracting constitutional protection by using factual guilt defensively, as a means of expanding the scope of rules that inhibit consideration or application of constitutional rights. Doctrines such as harmless error,²⁵ inevitable discovery,²⁶ and impeachment,²⁷ which in effect excuse or partially excuse constitutional violations, as well as barriers to adjudication such as standing²⁸ and consent,²⁹ arguably are responses to concern over freeing the guilty. The ultimate barrier preventing courts from reaching the merits of constitutional claims—a restriction premised in large part on the guilt of the accused³⁰—is of course the rule that voluntary guilty pleas constitute waivers precluding defendants from asserting most antecedent constitutional violations.³¹ This prohibition, in conjunction with the high percentage of guilty pleas, masks the extent to which the Constitution may leave improper police investigatory techniques and other official misconduct unregulated.³²

Taken together, these doctrines severely impede application of constitutional rights. They also reinforce the Court's substantive dilution of constitutional guarantees as well as its evisceration of federal remedies for their vindication. Cumulatively, all these substantive, procedural, and remedial restraints, which are based in whole or in part on considerations of factual guilt, have seriously undermined the constitutional balance struck by the Bill of Rights.

While the Court has rather freely insisted on colorable claims of innocence as a means of preserving convictions of the guilty, peppering its opinions with graphic descriptions of the crime and the defendant's connection to it,³³ the Justices have seemed less in touch with the converse principle, namely, assuring acquittal of the innocent or less culpable. Although the reasonable doubt standard has been constitutionalized,³⁴ and requires the prosecution to establish each material element of the crime beyond a reasonable doubt, this standard has yielded to federalism considerations. States now may conflate degrees of criminality,³⁵ permitting, for example, the punishment of manslaughterers as if they were murderers, and they may shift burdens with respect to defenses that define culpability, such as requiring defendants accused of murder to prove self-defense.³⁶

The cognate concept of the presumption of innocence, which prevents punishment prior to conviction, has fared no better. In *Bell v. Wolfish*,³⁷ which upheld body cavity searches and other intrusions on incarcerated persons awaiting trial, the Court redefined³⁸

this presumption as merely a "doctrine that allocates the burden of proof in criminal trials . . . [but] has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."³⁹ Similarly, in upholding the constitutionality of preventive detention against Due Process and Eighth Amendment bail claims, the majority elevated the legal consequences of indictment while stripping the presumption of any substantive vitality.⁴⁰

Given its preoccupation with law and order, the Court's emphasis on factual guilt, at least as a ground for upholding convictions, is hardly unexpected. Nonetheless, the present majority has wavered occasionally between establishing standards that assure conviction of the guilty and adhering to rules that prevent prosecutorial or police overreaching regardless of the defendant's culpability. The Justices, for instance, have expanded *Miranda* protection for suspects in custody who have invoked their right to counsel,⁴¹ and have required that police officers legitimately on the premises establish probable cause even for minimal inspections of items in plain view,⁴² although these categories of claims are usually unrelated to factual guilt. Such straying, however, often provokes admonitions from the true believers. For example, in *Powers v. Ohio*⁴³ the Court held that a prosecutor's use of the state's peremptory challenges to exclude otherwise qualified jurors on the basis of their race violated equal protection and that the defendant had standing to raise the excluded black jurors' claims even though he was white. Dissenting together with the then Chief Justice, Justice Scalia accused the majority of reprising *Miranda*:⁴⁴ "[T]he Court uses its key to the jail-house door not to free the arguably innocent, but to threaten release upon the society of the unquestionably guilty unless law enforcement officers take certain steps that the Court newly announces to be required by law."⁴⁵

In short, the factual guilt credo has limitations. Even its foremost enthusiasts have never suggested either that the Bill of Rights is merely hortatory or that all constitutional guarantees are conditioned on showings of innocence. That the Constitution expresses at least some values that transcend guilt and innocence may be regretted, but it has never been doubted.⁴⁶

The constitutional safeguards governing the criminal process may be viewed as an extension of the long common law history of evidentiary rules and privileges, many of which deflect accurate factfinding.⁴⁷ In Anglo-American jurisprudence, a criminal trial is concerned primarily, but not exclusively, with adjudication of guilt. Unrelated but important societal concerns often affect the outcome. Over the centuries, we have protected marital,⁴⁸ spiritual,⁴⁹ and medical⁵⁰ relationships because in general we have considered them to be more important than determining guilt in individual cases. The Bill of Rights, much of which is derived from English law,⁵¹ embodies yet another set of values that are intimately related to the criminal process and that define the relationship between the government and the governed. The desire to protect this spectrum of interests in the criminal adjudicative process impinges on the need to assure punishment of wrongdoers.⁵²

The resulting tension between factual and legal guilt is thus not a new problem. Any legal system that does not depend on summary justice must come to grips with this issue, and the more elaborate the rules governing determination of guilt and the more attenuated such rules are from factual guilt, the harder the problem.

We have never been moved by the Court's emphasis on innocence as a

precondition to constitutional relief. Factual guilt has always seemed elusive.⁵³ The best one can do in a criminal trial is to approximate truth, and only rather grossly at that.⁵⁴ Ascertaining factual guilt through a dry appellate record is more slippery still.⁵⁵ The safeguards in the Bill of Rights, on the other hand, represent this country's historical view of what is essential to prevent government oppression and to assure accuracy, fairness, and just punishment in the criminal process.⁵⁶ Linking factual guilt and constitutionality is one way of effectively diminishing the Bill of Rights without directly addressing whether we as a polity should do so, and that appears to be what is happening now to the Fourth Amendment.⁵⁷ Notwithstanding its role as the countermajoritarian branch in our constitutional scheme, the Court has embraced the political branches' manipulation of public concern over crime, correlating constitutional protection with wrongdoing and making *Mapp* and *Miranda* the fall guys for the crack epidemic.

As proverbial card-carrying ACLU members, we give primacy to constitutional limitations on state power. For us, McCarthyism was not merely an aberrational excess. And as Jews, both our history and our law make us wary of venerating factual guilt and sacrificing procedural rights in the process. Our history is *res ipsa*: it teaches us to be cautious when government flexes its police power. Our law represents a triumph of legal guilt, a complex superstructure of rules whose violation necessitates dismissal of criminal charges regardless of the defendant's apparent culpability.⁵⁸ Jewish law offers a striking contrast to the Supreme Court's blossoming love affair with factual guilt as a basis for preserving judgments of conviction.

To be sure, Jewish law may be considered irrelevant to American constitutional analysis, separated as the two systems are not only by millennia, but by religious, cultural, social, and economic differences. In fact, Jewish and American criminal jurisprudence arguably start from different premises. Among the underlying assumptions in Jewish criminal law are that the human courts must operate within strict constraints designed to assure absolutely reliable determinations of guilt, and that in any case of acquittal of the factually guilty, God will ultimately assess culpability correctly and completely and punish accordingly. That American law does not accept an omniscient and omnipotent God as the ultimate enforcer or backstop does not, however, preclude comparison of the two legal systems. This country is in many ways religiously oriented, and, in any event, moral and ethical beliefs, which surely pervade our society, may provide a roughly equivalent deterrent to wrongdoing and an underpinning for the notion that evil is its own retribution.

Furthermore, the differences between Jewish and American law should not obscure their similarities. After all, the purpose of both is to set normative standards of social conduct that everyone is required to obey. Like its American counterpart, Jewish law seeks to deter wrongdoing, as exemplified by the Biblical refrain, "all Israel shall hear, and fear," which accompanies particular punishments and legal requirements.⁵⁹ Indeed, Jewish law is a fundamental building block of Western civilization. Consciously or not, the United States has adopted basic concepts of Jewish criminal procedure, such as double jeopardy,⁶⁰ the privilege against self-incrimination,⁶¹ notice, and the ex post facto prohibition.⁶² Moreover, the Supreme Court itself has referred to Jewish law in support of some of its most important rulings.⁶³ Finally, notwithstanding their differences, both systems address the core concern of dealing properly with those accused of crime, and both set up rules limiting and canalizing the criminalization process. Jewish

law does so as a religious imperative; American law does so based on philosophical concern with fairness and government oppression. Given these lines of convergence, that the two systems may approach the problem of criminal wrongdoing from somewhat different angles does not preclude meaningful comparison of the Jewish and American views on factual and legal guilt. Notwithstanding its emphasis on procedure, Jewish law is deeply concerned with factual guilt, so much so that it is absolutely clear that only the guilty (with one narrow exception⁶⁴) can be convicted.

Many of the substantive, evidentiary and procedural rules in Jewish law can be explained on reliability grounds. Yet some are so attenuated from that concern that they appear to be unrelated to guilt; as a result, authorities view them as divine decrees.⁶⁵ Whatever the reason for these limitations, which no doubt prevent conviction of the factually guilty, distrust of human courts is clearly implicated. It was understood and accepted that the slack would be taken up by higher authority.⁶⁶

The Jewish law relating to criminal punishment consequently presents an ostensible contradiction. The rules are so strict that they assure conviction of only the factually guilty, and at the same time the very same rules make it almost impossible to convict even the factually guilty.⁶⁷ Thus, the preoccupation with factual guilt resulted in an extremely elaborate system of legal guilt.

Coming from this background, we view the restrictions embodied in the Bill of Rights as rather tepid. *Miranda* does, after all, pale beside an absolute prohibition against confessions. Over the ages Jewish law authorities were not unaware of the extreme nature of some of these requirements and, when necessary and possible, they applied exceptions, particularly in eras in which crime flourished.⁶⁸ Nonetheless, these safeguards constitute normative Jewish law, just as the guarantees in the Bill of Rights are normative law in this country.

The MaHaRaL,⁶⁹ a highly individualistic sixteenth-century philosopher, mathematician, and commentator who was Chief Rabbi of Prague,⁷⁰ "a brilliant thinker and one of the most renowned scholars in medieval Jewry,"⁷¹ undertook to answer the seven most difficult types of challenges that skeptics raised concerning rabbinic Judaism.⁷² In this connection he considered a prohibition against unanimous verdicts, which in turn led him to discuss a rabbinic law providing that a court may not adjudge the defendant guilty without reflecting on the evidence overnight.⁷³ If it fails to do so, the defendant goes free. The paradox is quite compelling. Envision a situation where the evidence is so strong, so overwhelming that the court does not feel the need to deliberate until the next day. The judges are so convinced of the defendant's guilt that they enter a judgment of conviction on the same day that they hear the testimony. And in just such a case, where the evidence of guilt appears indisputable, Jewish law frees the suspect on the basis of an apparent technicality. On the other hand, in a case where the evidence is weaker, so that the judges feel the need to contemplate their decision overnight before rendering a guilty verdict, the suspect is convicted. Why such disparate results?

The MaHaRaL gave two related reasons for this law. He claimed that the failure of the court to retire before rendering a guilty verdict showed an impairment in the factfinding process.⁷⁴ A verdict depends on consideration of factual details that are necessarily incomplete and unclear. Man, who is limited because he is of the physical world, must think hard about the details and explore the issue deeply because that is the only way he can determine culpability. A judge who does not find at least some merit in

the defendant's case and who instead votes immediately for guilt is not truly deliberating and using that part of his intellect necessary to make such a judgment. An intuitive belief that the accused is guilty is not enough to do justice. God can immediately discern absolute truth and distinguish between good and evil and their gradations, but humans cannot. In effect, the law demands a differentiation between the quality of God's omniscient justice and the fragile, fallible justice of the worldly courts. Therefore, when a court issues a verdict without deliberating overnight, it is failing to acknowledge that critical distinction between divine and human justice.⁷⁵

The MaHaRaL's alternate explanation goes beyond the reliability concerns underlying his first reason. He argues that the function of a worldly court is not to do justice, but to be righteous, which, according to the MaHaRaL, means finding evidence of innocence rather than guilt.⁷⁶ Justice is of such transcending importance that we demand perfection in its pursuit. Perfection, however, can come only from God. Because no human court can do what God does, the Jewish court does not claim that it can get to the bottom of the matter and discern factual guilt. Rather, Jewish law embodies a more limited conception of the function of the courts, which is not to determine the absolute truth, but simply to lift the cloud of guilt from the accused. In the course of that process, it may be that sometimes the evidence is so overwhelming that the cloud of guilt cannot be lifted so the defendant must be found guilty. That, however, is simply incidental, and the judgment of guilt is entered so as not to pervert justice. But the court's main function is to find the defendant innocent.⁷⁷

When a court makes an immediate determination of guilt, it is no longer considering the possibility of innocence, and the judges are thus no longer acting in a righteous way. When this occurs, the court is deemed to be improperly constituted, the judicial proceeding consequently is rendered *void ab initio*, and the defendant is set free.⁷⁸ Stated another way, when a court does not do its job of searching for innocence, it is simply not acting as a court. The underlying assumption is that ultimately God will deal appropriately with all who are guilty, and thus the human courts should not be so concerned about punishing those who have committed a wrong. The court should, in a manner of speaking, stick to its business of finding merit in the defendant's cause.⁷⁹

The MaHaRaL's first argument in support of the overnight deliberation requirement, grounded primarily on reliability concerns, is quite traditional.⁸⁰ His second explanation, based as it is on the notion that a court's function is to search out the defendant's merit, is truly remarkable and may be viewed as adopting the functional equivalent of either a substantive presumption of innocence or a heightened reasonable doubt standard.⁸¹

In the course of his commentary, the MaHaRaL addresses the contention that enforcement of such stringent procedural requirements allows the guilty to go free.⁸² He responds that preserving the court's role as a righteous court that seeks to free the innocent is more important than the incidental fact of the defendant's factual guilt. That we sometimes free guilty people is not significant. What is critical is preserving the character of the court.⁸³

Thus, as to Judge Friendly's question whether innocence is irrelevant, the MaHaRaL presumably would agree that it certainly is not. In fact, in the MaHaRaL's view, innocence is central in a criminal justice process in which the court's *raison d'etre* is to remove the taint of guilt from the accused whenever possible. With a difference in

degree, the MaHaRaL's position is echoed by American courts, which also are quite concerned that no innocent person be convicted.⁸⁴

The MaHaRaL might add, however, that perhaps the question Judge Friendly really was asking in 1970, and the question that the Court is asking today, is a slightly different one, namely, is factual *guilt* irrelevant? To be sure, Judge Friendly was solicitous of "those few" habeas applicants in whose cases "injustice may have been done," but his real concern was with regard to the "great multitude of applications not deserving [the court's] attention" because the petitioners are "steeped in guilt."⁸⁵

To Judge Friendly's reformulated question the MaHaRaL would answer, contrary to Judge Friendly, that factual guilt is irrelevant, because preserving the function of the court is more important than convicting the guilty. Judge Friendly might suggest that there is really no disagreement, giving a two-pronged apples-and-oranges rebuttal: (1) that the purpose of the overnight deliberation requirement is to assure reliable verdicts, whereas he, Henry Friendly, sought to prevent the application of rules that deflect accurate factfinding, and (2) that the Jewish law deals with the judicial process itself, whereas *Mapp* and *Miranda*, the focus of the Friendly article, relate to law enforcement activities outside the courtroom. In effect, Judge Friendly would be arguing that the overnight deliberation rule falls within his first exception to the innocence requirement as a challenge to the "very basis of the criminal process."⁸⁶

To Judge Friendly's first point, the MaHaRaL might answer that what is involved is a question of degree rather than kind. While it is true that the overnight deliberation requirement may help to assure reliability by encouraging more thorough consideration of the merits of each case,⁸⁷ the more immediate effect of the rule may be to compel the court to set free a person about whose guilt the judges were so certain that they neglected to continue the deliberation process overnight. Moreover, the second basis the MaHaRaL offered for freeing the accused when the judges violate the rule goes beyond reliability; it is that the court, by its failure to search for innocence, is not fulfilling its role as a court. To assure proper judicial functioning, Jewish law requires the release of the accused, even though in a particular case the defendant was factually guilty and therefore a judgment of conviction would have been perfectly reliable.

The MaHaRaL even might argue that this value—the proper functioning of the court—is being protected by a prophylactic rule that is not that different from the prophylactic rules of *Mapp* and *Miranda*, except that it is one designed for judges rather than law enforcement officials. Just as the American exclusionary rules are intended to prevent unconstitutional police conduct, release of the guilty defendant acts to deter judges from violating Jewish law by rendering a decision without waiting until the next day.⁸⁸

In response to the second prong of Judge Friendly's argument, the MaHaRaL would of course have to acknowledge that the overnight deliberation requirement relates to the judicial process, whereas the exclusionary rules on which Judge Friendly focused deal with police activity outside the courtroom. The MaHaRaL might point out, however, that although illegal police methods in obtaining evidence work a wrong at the time the seizure occurs, such misconduct works a further wrong when the illegally secured evidence is introduced at trial.⁸⁹ The use of this evidence implicates judicial integrity, which, like the overnight deliberation rule, is an aspect of the proper functioning of the court. In fact, the *Mapp* majority embraced the judicial integrity concept as an alternative

basis for its decision,⁹⁰ although admittedly this rationale has since fallen on hard times⁹¹ and has been dismissed in favor of the more malleable deterrence argument.⁹² The *Miranda* exclusionary rule also involves the judicial process: the requirement of warnings conserves judicial resources by eliminating the need to determine voluntariness on a case-by-case, totality of the circumstances basis, and also facilitates more accurate factfinding with respect to the voluntariness of admissions.⁹³

So while the overnight deliberation rule is at least partially bound up with the question of reliability and relates to the judicial process itself, the broader and more fundamental issue raised by this law is whether we should free the guilty to preserve a value that we deem necessary to proper working of the criminal justice process, regardless of the culpability of individual defendants. To this Judge Friendly's answer is generally no, and the MaHaRaL's is yes. For in our imperfect world there is only one kind of ascertainable guilt, and that is legal guilt.⁹⁴ The search for more is nothing less than arrogance.⁹⁵

¹ The modern expansion of federal habeas corpus began in 1953 with *Brown v. Allen*, 344 U.S. 443 (1953), making the remedy generally available to state prisoners pursuant to 28 U.S.C. § 2254 (1988). In 1963, a banner year for federal habeas, the Court broadened § 2254 in three important decisions: *Fay v. Noia*, 372 U.S. 391 (1963), authorizing petitions by state prisoners who had committed procedural defaults unless they had deliberately bypassed state procedures for vindicating their federal constitutional claims; *Townsend v. Sain*, 372 U.S. 293 (1963), requiring full and fair evidentiary hearings for petitioners who had not received them in state court; and *Sanders v. United States*, 373 U.S. 1 (1963), downplaying finality concerns for federal prisoners making successive motions for relief under the companion provisions of 28 U.S.C. § 2255 (1988), and making clear that the same rules would govern state prisoners. The final expansion was in 1969, when the Court held that Fourth Amendment claims could be asserted under § 2255. *Kaufman v. United States*, 394 U.S. 217 (1969). Rolling back federal habeas, the Court in *Stone v. Powell*, 428 U.S. 465 (1976), effectively barred Fourth Amendment claims by state prisoners. Even before *Stone*, *Davis v. United States*, 411 U.S. 233 (1973), had held that federal prisoners who failed to object to the composition of the grand jury by appropriate motion under the Federal Rules of Criminal Procedure could not make that claim under § 2255. *Wainwright v. Sykes*, 433 U.S. 72, 89–91 (1977), substantially enlarged the *Davis* exception, rejecting *Noia*'s reasoning with respect to all trial-type defaults in state court and holding that procedural defaults preclude habeas corpus relief absent showings of cause and prejudice. *Noia* was completely overruled in *Coleman v. Thompson*, 501 U.S. 722, 750–51 (1991). Other recent decisions have curtailed federal habeas corpus still further. See LARRY W. YACKLE, *POSTCONVICTION REMEDIES* §§ 19–21 (1981 & Supp. 1987) for a historical overview of federal habeas corpus.

² Wilfred Feinberg, *In Memoriam: Henry J. Friendly*, 99 HARV. L. REV. 1709, 1713 (1986). For a collection of such accolades, see Pierre N. Leval, *Henry J. Friendly—In Memory of a Great Man*, 52 BROOK. L. REV. 571, 572 n.2 (1986).

³ Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 CHI. L. REV. 142 (1970) [hereinafter Friendly].

⁴ *Id.* at 142–51.

⁵ Judge Friendly enumerated four exceptions to the innocence requirement: (1) attacks relating to "the very basis of the criminal process," such as lack of counsel; (2) claims grounded on evidence outside the record and thus not considered on appeal; (3) attacks based on state failure to provide a "proper procedure for making a defense at trial and on appeal," such as not permitting a prior determination of the voluntariness of a confession before its consideration by the jury; and (4) contentions stemming from new constitutional developments given retroactive application, such as double jeopardy claims. *Id.* at 151–54.

⁶ *Id.* at 160 (footnote omitted). Judge Friendly's standard would allow the federal habeas petitioner to argue for the exclusion of unreliable evidence, including evidence unconstitutionally obtained, and for the inclusion of evidence that was improperly excluded or that became available only after trial. *Id.*

⁷ *Id.* at 160–61. "[T]he exclusionary rule is a bonanza conferring a benefit altogether disproportionate to any damage suffered." *Id.* at 161.

⁸ *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁰ The majority in *Stone v. Powell*, 428 U.S. 465 (1976), cited the Friendly article in support of its ruling. See 428 U.S. at 480 n.13, 489 n.27, 491 n.31.

¹¹ See *Stone*, 428 U.S. at 481–82 (precluding Fourth Amendment claims in federal habeas corpus as long as there was an opportunity for full and fair litigation thereof in state court).

¹² The rationale of *Stone* seemingly authorizes the elimination of whole subject matter areas from the federal habeas jurisdiction whenever the implicated constitutional right is not guilt-related. *Id.* at 489–91. So far, however, the Court has refused to extend *Stone* in this manner. See *Rose v. Mitchell*, 443 U.S. 545, 559–64 (1979) (claim of racial discrimination in grand jury selection cognizable in federal habeas); see also *Brewer v. Williams*, 430 U.S. 387, 413–14 (1977) (Powell, J., concurring) (responding to the dissent of Chief Justice Burger by arguing that the question of extending *Stone* to Fifth and Sixth Amendment claims was not properly before the Court).

¹³ *Wainwright v. Sykes*, 433 U.S. 72 (1977), required the defaulting state prisoner to show cause for the default and prejudice resulting therefrom. *United States v. Frady*, 456 U.S. 152 (1982), defined prejudice to require a showing by petitioner that the constitutional error "worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Frady*, 456 U.S. at 170. Because the evidence of homicide was overwhelming and Frady had not substantiated his claim that he had acted without malice, the Court concluded that there was "no risk of a fundamental miscarriage of justice." *Id.* at 171–74. In *Murray v. Carrier*, 477 U.S. 478, 495–96 (1986), the Court clarified this miscarriage of justice standard, stating that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."

¹⁴ See *McCleskey v. Zant*, 499 U.S. 467 (1991), redefining the successive petition requirements of *Sanders v. United States*, 373 U.S. 1 (1963), and holding that second or successive writs filed by habeas petitioners will be deemed an abuse of the writ absent showings of cause and prejudice or proof of a fundamental miscarriage of justice. *McCleskey*, 499 U.S. at 493–502.

¹⁵ *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), held—with two narrow exceptions—that claims based on a "new" rule would not be applied retroactively to cases on collateral review. The second of these exceptions was with respect to cases announcing new procedural rules that were both "implicit in the concept of ordered liberty" and "without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 311, 313 (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring and dissenting)). *Butler v. McKellar*, 494 U.S. 407 (1990), made it clear that most habeas claims would involve new rules, defining that term to include any contention concerning which reasonable judges might differ. *Butler*, 494 U.S. at 413–16.

¹⁶ Federalism and finality are the primary policy rationales that the Court has offered for severely restricting federal collateral review. See, e.g., *Teague*, 489 U.S. at 309–10 (1989) (plurality opinion); *Engle v. Isaac*, 456 U.S. 107, 134 (1982). The Justices have been willing, however, to relax such restraints if the petitioner demonstrates some likelihood of innocence.

¹⁷ In this respect the Court has gone well beyond Judge Friendly's proposal to make innocence relevant in habeas. Indeed, Judge Friendly acknowledged that innocence "may continue to be largely [irrelevant] on direct appeal." Friendly, *supra* note 3, at 172. In a similar spirit of doing the Creator one better, the Rehnquist Court adopted the recommendation in Justice Harlan's concurring opinion in *Mackey v. United States*, 401 U.S. 667, 675 (1971), that habeas be available for the litigation of new claims only if the asserted procedural rights were necessary to assure fundamental fairness implicit in the concept of ordered liberty, but added the requirement that the likelihood of an accurate conviction would be seriously diminished absent the right. *Teague*, 489 U.S. at 311–13.

¹⁸ *Strickland v. Washington*, 466 U.S. 668, 694 (1984). In her majority opinion, Justice O'Connor stressed that the reviewing court, in its determination of prejudice, must consider the totality of the evidence; thus "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696. In his dissenting opinion, Justice Marshall objected to the ruling because, *inter alia*, it rested on the theory "that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted." *Id.* at 711. Cf. *Kimmelman v. Morrison*, 477 U.S. 365, 391 (1986) (Powell, J., concurring) (questioning whether "the admission of illegally seized but reliable evidence can ever constitute 'prejudice' under *Strickland*").

¹⁹ *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973).

²⁰ *See, e.g., United States v. Leon*, 468 U.S. 897, 907 (1984) (creating a good faith exception to exclusionary rule for officer relying on defective warrant, and referring to "inherently trustworthy tangible evidence"); *Herring v. United States*, 129 S. Ct. 695 (2009) (finding an arrest made pursuant to a rescinded warrant to be negligent as opposed to grossly negligent or reckless and therefore the exclusionary rule to be inapplicable).

²¹ *See, e.g., California v. Acevedo*, 500 U.S. 565, 575–81 (1991) (expanding automobile exception to warrant requirement, based in part on alleviating confusion of police officers that may impede law enforcement); *Illinois v. Gates*, 462 U.S. 213, 237–38 (1983) (stating that probable cause may be established by totality of the circumstances because a more stringent rule interferes with effective police investigations).

²² *See Florida v. Bostick*, 501 U.S. 429, 437–38 (1991), the bus sweep case, in which the majority said, "We . . . reject . . . Bostick's argument that he must have been seized because no reasonable person would freely consent to a search of luggage that he or she knows contains drugs. This argument cannot prevail because the 'reasonable person' test presupposes an *innocent* person."

²³ *See United States v. Sokolow*, 490 U.S. 1, 13 (1989) (Marshall, J., dissenting) ("Reflexive reliance on a profile of drug courier characteristics runs a far greater risk than does ordinary, case-by-case police work of subjecting innocent individuals to unwarranted police harassment and detention. This risk is enhanced by the profile's 'chameleon-like way of adapting to any particular set of observations.'").

²⁴ *Moran v. Burbine*, 475 U.S. 412, 426 (1986). The Court also held that police deception of defendant's attorney was not sufficiently egregious to constitute a Due Process violation. 475 U.S. at 432–34.

²⁵ In *Chapman v. California*, 386 U.S. 18 (1967), the Court ruled that constitutional error did not require reversal of the conviction if it was harmless beyond a reasonable doubt. Justice Black noted that harmless error rules "serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." *Chapman*, 386 U.S. at 22. Although the *Chapman* Court suggested that some errors, such as admission of coerced confessions, could never be harmless, 386 U.S. at 23 n.8, in *Arizona v. Fulminante*, 499 U.S. 279 (1991), five Justices concluded that harmless error analysis was also applicable to involuntary confessions. Chief Justice Rehnquist asserted that the "harmless error doctrine is essential to preserve the 'principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence.'" 499 U.S. at 308 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)).

²⁶ In *Nix v. Williams*, 467 U.S. 431 (1984), the Court held that physical evidence obtained in violation of the Sixth Amendment right to counsel nonetheless could be used at trial if the police could establish by a preponderance of the evidence that the challenged information would in any event have been discovered by lawful means. Chief Justice Burger observed that a contrary view "fails to take into account the enormous societal cost of excluding truth in the search for truth in the administration of justice." *Nix*, 467 U.S. at 445.

²⁷ For instance, *Harris v. New York*, 401 U.S. 222 (1971), concluded that statements obtained in violation of *Miranda* could be used to impeach a defendant who testified on his own behalf at trial. *Harris*, 401 U.S. at 226. The *Harris* majority viewed the impeachment process as helpful to the jury in assessing the credibility of the accused and stressed that defendants who testify have no right to commit perjury. *Id.* at 225–26.

Thus, although a confession obtained in violation of *Miranda* may not be used as evidence in the case in chief, the violation is partially excused when use of the statement is permitted for impeachment purposes.

²⁸ In *Rakas v. Illinois*, 439 U.S. 128 (1978), although purporting to eschew standing analysis, the Court decided that passengers in an automobile could not object to the search of its glove compartment and passenger seat because they had no expectation of privacy in those portions of the vehicle. The holding therefore precluded the Court from determining whether there was a lawful basis for the stop and search. The broad rationale underlying the restriction was that

[e]ach time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights [Thus,] misgivings as to the benefit of enlarging the class of persons who may invoke that rule are properly considered when deciding whether to expand standing to assert Fourth Amendment violations.

Rakas, 439 U.S. at 137–38 (footnote omitted). *But see* *Bond v. United States*, 529 U.S. 334, 337 (2000) (bus passenger has expectation of privacy in bags placed in overhead bins of bus); *Minnesota v. Olson*, 495 U.S. 91 (1990) (overnight guest has expectation of privacy in the home in which he is staying).

²⁹ *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), determined that consent to a search could be voluntary even though the defendant had not been advised of his right to refuse permission, and that such waiver was to be determined by examining the totality of the circumstances. A finding of consent legitimizes a search, even if the police did not have probable cause or a warrant. Justifying this result, the majority emphasized that "the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may ensure that a wholly innocent person is not wrongly charged with a criminal offense." *Schneckloth*, 412 U.S. at 243. *Illinois v. Rodriguez*, 497 U.S. 177 (1990), expanded the consent doctrine, ruling that if the police reasonably, albeit mistakenly, believed that a third party had authority to consent to search of a home, the resulting search was reasonable.

³⁰ In *McMann v. Richardson*, 397 U.S. 759, 773 (1970), the Court held that a plea of guilty constitutes a waiver of the right to attack the voluntariness of defendant's confession, and noted that defendant was "convicted on his counseled admission in open court that he committed the crime charged against him." *Cf.* *North Carolina v. Alford*, 400 U.S. 25 (1970) (holding that an express admission of guilt is not a constitutional requirement for acceptance of a guilty plea and imposition of punishment, at least where there is factual support for the plea).

³¹ *See* *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970). *But see* *Menna v. New York*, 423 U.S. 61 (1975) (double jeopardy claim not waived by counseled guilty plea).

³² It is estimated that up to 90% of all criminal convictions are obtained by guilty pleas. *See, e.g.*, DONALD J. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* 3 (1966). Thus, the likelihood that unconstitutional action will go undetected is very high.

³³ *See, e.g.*, *United States v. Frady*, 456 U.S. 152, 155 (1982) ("Inside Bennett's house, police officers . . . found . . . blood-spattered walls. Thomas Bennett lay dead in a pool of blood. His neck and chest had suffered horseshoe-shaped wounds from the metal heel plates on Frady's leather boots and his head was caved in by blows from a broken piece of a tabletop One of Bennett's eyes had been knocked from its socket.").

³⁴ *In re Winship*, 397 U.S. 358 (1970). Relying on *Winship*, the Court in *Sandstrom v. Montana*, 442 U.S. 510 (1979), held unconstitutional jury instructions creating a mandatory presumption with respect to a material element of the crime. *Sandstrom* thus reinforces *Winship* by requiring that juries be permitted to resolve issues of fact relating to material elements of the crime. *Rose v. Clark*, 478 U.S. 570 (1986), undercut *Sandstrom* by making violations thereof subject to harmless error analysis. *Yates v. Evatt*, 500 U.S. 391 (1991), however, established stringent requirements for finding a *Sandstrom* error to be harmless.

³⁵ *Compare* *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (state not permitted to shift burden of proving heat of passion to defendant accused of murder) *with* *Patterson v. New York*, 432 U.S. 197 (1977) (no violation of *Winship* for state to shift burden of proving extreme emotional disturbance to defendant charged with murder).

³⁶ *See* *Martin v. Ohio*, 480 U.S. 228 (1987).

³⁷ *Bell v. Wolfish*, 441 U.S. 520 (1979).

³⁸ *Compare* *Bell* *with* *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (finding that bail set higher than necessary to assure presence at trial is excessive under the Eighth Amendment and noting that "[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning").

³⁹ *Bell*, 441 U.S. at 533. *Contra* 441 U.S. at 582 (Stevens, J., dissenting) ("Prior to conviction every individual is entitled to the benefit of a presumption both that he is innocent of prior criminal conduct and that he has no present intention to commit any offense in the immediate future." (footnote omitted)).

⁴⁰ *United States v. Salerno*, 481 U.S. 739 (1987). In *Salerno* the majority upheld the preventive detention provisions of the Bail Reform Act of 1984. In his dissenting opinion Justice Marshall noted the relationship between the presumption of innocence and the reasonable doubt standard:

Our society's belief, reinforced over the centuries, that all are innocent until the state has proved them to be guilty, like the companion principle that guilt must be proved beyond a reasonable doubt, is "implicit in the concept of ordered liberty," and is established beyond legislative contravention in the Due Process Clause.

Id. at 763 (citations omitted).

⁴¹ *Minnick v. Mississippi*, 498 U.S. 146, 154–56 (1990). *But see* *McNeil v. Wisconsin*, 501 U.S. 171 (1991) (holding that an invocation of the Sixth Amendment right to counsel during a bail hearing does not constitute an invocation of the right to counsel derived from *Miranda*, and that therefore confession obtained through police-initiated questioning of jailed suspect with respect to another charge was admissible in evidence).

⁴² *Arizona v. Hicks*, 480 U.S. 321 (1987). Justice Scalia's majority opinion noted "nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." *Id.* at 329. Justice Scalia premised his decision on the language of the Fourth Amendment. Where such textual support is in his view missing, Justice Scalia is likely to emphasize instead the question of factual guilt.

⁴³ *Powers v. Ohio*, 499 U.S. 400 (1991).

⁴⁴ *Id.* at 430–31 (Scalia, J., dissenting).

⁴⁵ *Id.*

⁴⁶ *See, e.g., James v. Illinois*, 493 U.S. 307, 311, 320 (1990) (holding that the prosecution could not use illegally obtained statements of the defendant to impeach the credibility of a defense witness, and noting that "various constitutional rules limit the means by which government may conduct [the] search for truth in order to promote other values embraced by the Framers and cherished throughout our Nation's history.").

⁴⁷ With respect to privileges:

Their effect . . . is clearly inhibitive; rather than facilitating the illumination of truth, they shut out the light. . . . Their warrant is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some sacrifice of availability of evidence relevant to the administration of justice.

KENNETH S. BROUN ET AL., *MCCORMICK ON EVIDENCE* § 72, at 171 (Edward W. Cleary 3d ed., 1984) (footnotes omitted).

⁴⁸ *See, e.g., Trammel v. United States*, 445 U.S. 40, 43, 53 (1980) (acknowledging the "ancient roots" of spousal privilege, but refusing to permit defendant in criminal case to invoke it to prevent testimony of spouse willing to do so, and ruling instead that "the witness-spouse alone has a privilege to refuse to testify adversely"); *People v. Fields*, 328 N.Y.S.2d 542 (App. Div. 1972) (reversing conviction because based in part on privileged spousal communication). *See generally* 8 JOHN HENRY WIGMORE, *EVIDENCE* §§ 2332–33, at 642–45 (McNaughton rev. ed., 1961) [hereinafter WIGMORE] (discussing history and policy of the marital communications privilege, and referring to policy underpinning that "the injury that would inure to [the relationship] by disclosure is probably greater than the benefit that would result in the judicial investigation of truth").

⁴⁹ *See generally* WIGMORE, *supra* note 48, §§ 2394–95, at 869–77 (although priest-penitent communications were not privileged at common law, such a privilege has been recognized by statute or judicial decision in two thirds of the states); *id.* § 2396, at 878 ("Would the injury to the penitential relation by compulsory disclosure be greater than the benefit to justice? Apparently it would.").

⁵⁰ *See, e.g., People v. Stritzinger*, 668 P.2d 738, 742–45 (Cal. 1983) (reversing conviction because, *inter alia*, trial court's admission of testimony violated defendant's psychotherapist-patient privilege). *See generally* WIGMORE, *supra* note 48, § 2380, at 818–20 (while rejected at common law, the privilege for physician-patient communications has been adopted by two thirds of the states, where it "is a settled part of the law"). *But see id.* § 2380a, at 830 ("The injury to justice by the repression of the facts of corporal injury and disease [due to invocation of the privilege] is much greater than any injury which might be done by disclosure.").

⁵¹ *See SOURCES OF OUR LIBERTY* (Richard L. Perry ed., 1959).

⁵² Although there may be remedies other than exclusion of evidence at the criminal trial, such as civil rights actions under 42 U.S.C. § 1983 (1988), see *Monroe v. Pape*, 365 U.S. 167, 168–72 (1961), administrative quasi-judicial proceedings, see *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 422–24 (1971) (Burger, C.J., dissenting), and administrative rulemaking by police, see, e.g., Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 810–15 (1970), we question the effectiveness of these alternatives, none of which speaks to the issue of judicial integrity. *See Mapp v. Ohio*, 367 U.S. 643, 659–60 (1961), and discussion *infra* notes 90–92 and accompanying text.

⁵³ As our colleague David Dow has noted:

"Guilt" is a term of art. It does not mean that the defendant "did it," for that statement would raise difficult, perhaps unanswerable, epistemological questions in many, though not all, cases What we really mean by "guilt" is that a jury of the defendant's peers believed beyond a reasonable doubt that the defendant did it This legal idea of guilt is simply not the same as the question of whether the defendant "did it," for the legal category acknowledges that in many cases it is, as a matter of epistemology, impossible to answer with certainty the question of whether he "did it."

David R. Dow, *Teague and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 301, 317–18 (1991).

⁵⁴ See Richard M. Markus, *A Theory of Trial Advocacy*, 56 TUL. L. REV. 95 (1981). Markus states: A trial presents selected witnesses who recite selected portions of their respective memories, concerning selected observations of the disputed event Manifestly, the recited data are a fraction of the remembered data, which is a fraction of the observed data, which is a fraction of the total data for the event.

Id. at 97–99.

⁵⁵ See Justice Marshall's dissent in *Strickland v. Washington*, 466 U.S. 668 (1984):

On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.

Strickland, 466 U.S. at 710 (Marshall, J., dissenting) (footnote omitted).

⁵⁶ *But see* John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 705–10 (1990) (stating that the argument for collateral review of nonguilt-related defaulted claims on the basis of their symbolic value is wrong because it denies that there is a hierarchy of constitutional rights).

⁵⁷ The assault on the Fourth Amendment has come from many directions. To mention only a few, the Warrant Clause has been significantly restricted, see, e.g., *United States v. Watson*, 423 U.S. 411 (1976) (warrants not required for routine arrests in public); the probable cause requirement has been diluted, see, e.g., *Illinois v. Gates*, 462 U.S. 213 (1983) (substituting a "totality of the circumstances" test for determining probable cause); the category of permissible stop and frisk situations has been expanded, see, e.g., *Michigan v. Long*, 463 U.S. 1032 (1983) (permitting protective search of automobile interior based on reasonable suspicion); the exclusionary rule has been limited, see, e.g., *United States v. Leon*, 468 U.S. 897 (1984) (evidence obtained by officers relying in good faith on defective warrant is admissible); the definition of a seizure has been narrowed, see, e.g., *Florida v. Bostick*, 501 U.S. 429 (1991) (invalidating *per se* prohibition on evidence garnered by police who randomly boarded bus and asked passengers for permission to search luggage); and courts have increasingly used the balancing test, and, as a result, have more frequently upheld administrative or regulatory searches. See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (upholding school official's search of student's purse if reasonable under all the circumstances).

⁵⁸ See generally HAIM COHN, *HUMAN RIGHTS IN JEWISH LAW* 208–16, 225–30 (1984) [hereinafter COHN, *HUMAN RIGHTS*] (discussing panoply of procedural and legislative safeguards in the Jewish criminal process).

⁵⁹ See *Deuteronomy* 13:7–12 (punishment of solicitors of idolatry); *id.* at 21:18–21 (punishment of stubborn and rebellious son); *id.* at 17:8–13 (requiring obedience to judges and stating that "all the people shall hear, and fear"); *id.* at 19:16–20 (punishing perjury and stating that "those that remain shall hear, and fear, and shall henceforth commit no more any such evil in the midst of thee"). These translations are from the Soncino Press edition of the Old Testament, entitled *THE PENTATEUCH AND HAFTORAHS* (Joseph Herman Hertz ed., 2d ed. 1960).

⁶⁰ If a defendant's act constituted a violation of two separate laws, he was generally punished only for the greater offense. See discussion of multiple punishments in *THE ARTSCROLL SERIES, THE TALMUD BAVLI: THE GEMARA: THE CLASSIC VILNA EDITION, Kethuboth* 30a–35b (Schottenstein ed., 2007) [hereinafter *BABYLONIAN TALMUD*].

⁶¹ See COHN, *HUMAN RIGHTS*, *supra* note 58, at 212–14.

⁶² The warning requirement, together with the Talmudic rule that no act is punishable unless it is expressly stated in the Bible, gave the suspect notice that his acts were criminal and served as a safeguard against retrospective criminal legislation, *See* COHN, HUMAN RIGHTS, *supra* note 58, at 210, 226–29.

⁶³ *See, e.g.,* Bowers v. Hardwick, 478 U.S. 186, 192 (1986) (stating that "[p]roscriptions against [homosexual] conduct have ancient roots," and citing *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV., 521, 525 (1986), which in turn notes the absolute Mosaic prohibition against homosexuality), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roe v. Wade*, 410 U.S. 113, 160 & n.57 (1973) (the view that life does not begin until live birth "appears to be the predominant, though not the unanimous, attitude of the Jewish faith"); *Miranda v. Arizona*, 384 U.S. 436, 458 n.27 (1966) (stating that "[t]hirteenth century commentators found an analogue to the privilege grounded in the Bible," and citing Maimonides).

⁶⁴ An innocent person can be convicted only if the prosecution witnesses lie and are not found out in the course of the proceeding, despite vigorous admonitions and cross-examination. If, however, additional witnesses refute the testimony of the original witnesses, the defendant cannot be convicted. Such refutation can occur in two ways. The second set of witnesses can either dispute the facts of the crime ("contradicting witnesses") or can testify that the first set of witnesses was with them elsewhere at the time of the offense and thus could not have seen the event in controversy ("plotting witnesses"). In the first situation the court simply rejects both sets of testimony, because it cannot determine which was truthful. In the latter situation, if the court has rendered its verdict but not yet carried out the sentence, the first set of witnesses will suffer the same fate that they had plotted to have inflicted on the defendant. If the discovery of the plotting witnesses is either too early or too late, they are not punished by the court. *See* ARTSCROLL SERIES, THE MISHNAH, SEDER NEZIKIN, VOL. II(A), *Makkos* 1:4, at 19–20 (Avrohom Y. Rosenberg trans., 1987) [hereinafter THE MISHNAH]. For explanations concerning why the witnesses are punished only after judgment but before imposition of the sentence on the defendant victim, and concerning the differences between contradicting and plotting witnesses, see 5 YEHUDA NACHSHONI, STUDIES IN THE WEEKLY PARASHAH: THE CLASSICAL INTERPRETATION OF MAJOR TOPICS AND THEMES IN THE TORAH 1302–10 (Shmuel Himelstein trans., 1989).

⁶⁵ For example, the Jewish rule against admissibility of confessions is only tenuously related to reliability concerns, since even obviously voluntary, in-court confessions were excluded. Thus, while Maimonides conjectured that confessions were barred because mentally ill persons might accuse themselves falsely, he ultimately concluded that the prohibition was a divine decree beyond human comprehension. *See* THE CODE OF MAIMONIDES, BOOK 14: THE BOOK OF JUDGES, *Sanhedrin* 18:6, at 52–53 (Abraham M. Hershman trans., 1949) [hereinafter THE CODE OF MAIMONIDES].

⁶⁶ This view is epitomized in a Talmudic discussion in tractate *Makkos* on the meaning of a Biblical verse:

What is this verse talking about? About two people—each of whom killed a person. One killed inadvertently and one killed intentionally. This one has no witnesses to testify against him, and this one has no witnesses. Since neither event was witnessed, the unintentional killer was not exiled and the intentional killer was not executed. The Holy One, Blessed is He, summons them to the same inn, where the one who killed intentionally sits under a ladder, while the one who killed inadvertently descends the ladder and falls upon him and kills him. The result of this chain of events is that the one who had killed intentionally is killed, as he deserved, and the one who had previously killed inadvertently is exiled, since he has now killed inadvertently in the view of witnesses.

BABYLONIAN TALMUD, *supra* note 60, *Makkos* 10b. Moreover, if the court was unable to convict a murderer, he remained subject to the vengeance of the victim's relatives.

⁶⁷ Given such stringency, some commentators have argued that these rules were simply ideals that were never actually applied. *See* chapter one, *supra* note 12 and accompanying text.

⁶⁸ The primary exception was for emergency situations, when general lawlessness was prevalent. *See* EMANUEL B. QUINT & NEIL S. HECHT, JEWISH JURISPRUDENCE: SOURCES AND MODERN APPLICATIONS 139–213 (1980). The rights of certain habitual offenders also were curtailed. *See* THE MISHNAH, *supra* note 64, *Sanhedrin* 9:5, at 165–66.

⁶⁹ MaHaRaL is a Hebrew language acronym whose letters stand for our teacher Rabbi Loew. The MaHaRaL's actual name was Judah Loew ben Bezalel.

⁷⁰ *See* 10 ENCYCLOPEDIA JUDAICA 374–79 (1972).

⁷¹ BEN ZION BOKSER, FROM THE WORLD OF THE CABBALAH: THE PHILOSOPHY OF RABBI JUDAH LOEW OF PRAGUE 17 (1954); see also Yitzchok Adlerstein, *Unraveling the Mystery: The Power and Elegance of Aggada According to MaHaRaL*, JEWISH ACTION, Summer 1991, at 31 ("[The MaHaRaL's] works are one of the most important resources in making the words of our Sages come alive.").

⁷² The work, SEFER BE'ER HA-GOLAH (Prague 1598), is not translated into English.

⁷³ See THE MISHNAH, *supra* note 64, *Sanhedrin* 4:1, 5:5, at 63–66, 86–87 (explaining the overnight deliberation requirement). The Talmudic Sages also decided that if a court rendered a unanimous guilty verdict, the defendant must be acquitted. See BABYLONIAN TALMUD, *supra* note 60, *Sanhedrin* 17a, 115a, in which Rabbi Kahana gives the overnight deliberation rule as a reason for the unanimity-acquittal provision. He suggests that the purpose of overnight reflection is to give judges supporting acquittal an opportunity to convince judges favoring conviction to change their minds. If, however, the members of the court unanimously favor conviction, the overnight deliberation requirement would be rendered ineffective, because no judges would be available to persuade those in favor of guilt that they are in error. Because of the interrelationship of the overnight deliberation and non-unanimity requirements, the MaHaRaL's arguments in support of the former support the latter as well.

⁷⁴ See MAHARAL, SEFER BE'ER HA-GOLAH 26 (L. Honig & Sons ed., 1960) [hereinafter MaHaRaL].

⁷⁵ *Id.*

⁷⁶ *Id.* at 26–27.

⁷⁷ Rabbi Yitzchok Adlerstein of the Yeshiva of Los Angeles, himself a MaHaRaL devotee offers a possible explanation of the MaHaRaL's second rationale, which is based in turn on a commentary by Rabbi Yitzchok Hutner, an important contemporary authority on the sixteenth-century Sage. When the MaHaRaL emphasizes that the essential function of the court is to find merit and that it adjudicates guilt only incidentally as a necessary byproduct of this process, he may be applying the philosophical notion that God seeks primarily to find merit in this world, but, to do so, guilt must trail behind it as a necessary adjunct. That is, the reason that there is a concept of judgment is only to serve the notion of merit. Awards of merit for doing good deeds through the exercise of free will cannot exist in the absence of accountability. God will therefore confirm merit only if the idea of judgment for wrongdoing is also present, thus giving reality to the choices that individuals make. In a free will context, reward cannot exist in the absence of punishment. Nonetheless, punishment is ancillary to reward. Likewise, in an imitation of God, the Jewish court seeks to find merit and punishes the guilty only incidentally. Telephone conversation between the authors and Rabbi Adlerstein on Oct. 11, 1991.

⁷⁸ See MAHARAL, *supra* note 89, at 26–27.

⁷⁹ *Id.* at 26. Rashi, who lived in the eleventh century and who is perhaps the foremost commentator on the Bible and the Talmud, expressed this same notion in his commentary to *Exodus* 23:7. In explaining the verse "For I will not justify the wicked," Rashi states: "It is not (incumbent) upon you to [find him guilty], for I shall not justify him in My court. If he has gone forth from your hand acquitted, I have many messengers to slay him with the death of which he is guilty" 2 THE PENTATEUCH AND RASHI'S COMMENTARY 271 (Abraham Ben Isaiah & Benjamin Sharfman trans., 1949) [hereinafter RASHI'S COMMENTARY].

⁸⁰ For example, Maimonides describes the overnight deliberation process as follows: [T]he judges meet in pairs to study the case, eat but little and drink no wine at all; all night each judge discusses the case with his colleague or deliberates upon it by himself. The following day, early in the morning, they come to court. THE CODE OF MAIMONIDES, *supra* note 65, *Sanhedrin* 12:3, at 35.

⁸¹ The MaHaRaL's position can be viewed in this way not because he considered that Jewish law assumes the defendant's innocence, but on the basis of the MaHaRaL's understanding that the legal process has a limited goal, namely, to clear the names of those who are innocent.

Rashi observed that the overnight deliberation rule was designed to give the court one last chance to find a basis for declaring the defendant innocent. See THE MISHNAH, *supra* note 64, *Sanhedrin* at 66. His position can be interpreted as based either on reliability concerns or on a view similar to the MaHaRaL's alternate explanation.

⁸² See Rashi's commentary to *Exodus* 23:7 ("[T]he righteous slay thou not."). Rashi states: "And this man is righteous since he was acquitted in court." RASHI'S COMMENTARY, *supra* note 94, at 271.

⁸³ MaHaRaL, *supra* note 89, at 27.

⁸⁴ Although innocence by itself is not generally a basis for post-conviction relief, that concern is subsumed under Due Process rules relating to sufficiency of the evidence, perjured testimony, and

suppression of evidence favorable to the defendant. *See, e.g., Ex parte Adams*, 768 S.W.2d 281 (Tex. Crim. App. 1989) (granting relief in the "thin blue line" case to defendant who claimed innocence).

⁸⁵ Friendly, *supra* note 3, at 150; *see also id.* at 148 n.25, suggesting that most habeas petitioners are "black with guilt." Much of Judge Friendly's article treats nonguilt-related claims as an impediment to conviction of the guilty.

⁸⁶ Judge Friendly might also contend that because the overnight deliberation rule assured reliability in the factfinding process, it would be held retroactive and thus would fall within his fourth exception to the innocence requirement.

While it is true that Judge Friendly could pretermit this entire fanciful dialogue with the MaHaRaL by simply pointing out that his article deals only with collateral review, whereas the MaHaRaL discusses the criminal trial itself, we nonetheless consider it reasonable to discuss the distinctions made in the text because Judge Friendly opposed the fulsome application of *Mapp* and *Miranda*, the *betes noires* of his article, on direct review as well. *See* Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, in *BENCHMARKS* 235, 247–65 (1967).

⁸⁷ On the other hand, although both *Mapp* and *Miranda* may exclude reliable evidence of guilt, enforcement of the *Miranda* rule may also prevent police coercion that can lead to unreliable confessions. *Miranda v. Arizona*, 384 U.S. 436, 470 (1966). In addition, the *Miranda* Court noted that custodial interrogation "subject[s] large numbers of innocent persons to detention and interrogation." *Id.* at 482.

⁸⁸ *Cf. United States v. Leon*, 468 U.S. 897, 917 (1984) (prophylactic exclusionary rule inapplicable in cases of good faith reliance on defective warrants, because, *inter alia*, it will not "in any way reduce judicial officers' professional incentives to comply with the Fourth Amendment, encourage them to repeat their mistakes, or lead to the granting of all colorable warrant requests" (footnote omitted)).

⁸⁹ *See id.* at 933 (Brennan, J., dissenting) ("Because seizures are executed principally to secure evidence, and because such evidence generally has utility in our legal system only in the context of a trial supervised by a judge, it is apparent that the admission of illegally obtained evidence implicates the same constitutional concerns as the initial seizure of that evidence.").

⁹⁰ *See Mapp v. Ohio*, 367 U.S. 643, 660 (1961) ("Our decision . . . gives . . . to the courts[] that judicial integrity so necessary in the true administration of justice.").

⁹¹ *See, for example, Stone v. Powell*, 428 U.S. 465, 485 (1976), in which the Court concluded that the judicial integrity concern "has limited force as a justification for the exclusion of highly probative evidence" (footnote omitted).

⁹² *See, e.g., Illinois v. Krull*, 480 U.S. 340, 352 (1987) (discussing "whether exclusion of evidence seized pursuant to a statute subsequently declared unconstitutional will 'have a significant deterrent effect' on legislators enacting such statutes," and finding no such effect (citation omitted)); *United States v. Janis*, 428 U.S. 433, 457–58 (1976) ("Working, as we must, with the absence of convincing empirical data, common sense dictates that the deterrent effect of the exclusion of relevant evidence is highly attenuated when the 'punishment' imposed upon the offending criminal enforcement officer is the removal of that evidence from a civil suit by or against a different sovereign."); *United States v. Calandra*, 414 U.S. 338, 351 (1974) ("Whatever deterrence of police misconduct may result from the exclusion of illegally seized evidence from criminal trials, it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal.").

⁹³ *See Miranda v. Arizona*, 384 U.S. 436, 468–69 (1966).

⁹⁴ Jewish law's emphasis on legal guilt has a downside, however. If a conviction is obtained in compliance with all procedural and evidentiary requirements, it cannot be set aside even on the basis of innocence. Witnesses are not permitted to recant their testimony. *See* *BABYLONIAN TALMUD*, *supra* note 60, *Sanhedrin* 44b; *id. Makkos* 3a; *id. Kethuboth* 18b. This is illustrated by a Rashi commentary to the Jerusalem Talmud that tells of the son of Rabbi Shimon ben Shetach. The enemies of Rabbi Shimon ben Shetach hired false witnesses to concoct testimony that his son had murdered someone. After the son's conviction, the witnesses publicly recanted. The son refused to permit his father to save him, calling out to the judges who had convicted him: "Fulfill the sentence on me rather than transgress the Torah-law which states that the witnesses cannot revoke their testimony!" The execution proceeded. 2 *MOSHE WEISSMAN, THE MIDRASH SAYS* 218 (1980). While this result is harsh, it does demonstrate the respect that Jewish law gives to the concept of legal guilt. By comparison, it is difficult but not impossible to reopen American convictions on the basis of recanted testimony. *See, e.g., United States v. Mazzanti*, 925 F.2d 1026 (7th Cir. 1991) (using the lenient test that jury might have reached a different conclusion absent the false testimony, and

discussing stricter tests used in other circuits, such as probability that the false testimony would lead to acquittal on retrial, and requirement that conviction be based substantially on tainted evidence).

⁹⁵ The related rule requiring acquittal in the case of a unanimous guilty verdict also supports the view that in any conflict between legal and factual guilt, the former must prevail. Like the overnight deliberation requirement, the unanimity-acquittal rule appears to be a counterintuitive mandate, because unanimity might be considered a guarantor of correctness. *Cf. Apodaca v. Oregon*, 406 U.S. 404 (1972) (upholding nonunanimous jury verdicts in state criminal cases). Unanimity, however, arguably impinges on reliability, because judges speaking only in one voice may have failed to consider the issues deeply and, in the alternative, may not have fulfilled the function of the court to look for righteousness on the part of the accused.

CHAPTER THREE

How to Read Precedent*

The core of law is precedent—how should we interpret prior decisions? This issue bedevils American law as well as Jewish law.

For example, in the tractate entitled *Yebamoth*¹ (literally meaning sisters-in-law and dealing with levirate marriages),² the Rabbis are considering a ruling that allows a woman to remarry based on her statement in court that her husband is dead.³ If the court rejects the woman's testimony, she may not be able to establish death by any other means, and, as a result, she will never be able to remarry.⁴ If the court instead accepts her testimony and the putative widow does remarry, but then it turns out that the husband is in fact alive, the woman may be deemed an adulteress,⁵ and any children from that second union may be considered illegitimate, a status that has serious legal and social consequences.⁶

The precedential case permitting the wife's testimony to establish her spouse's death is described as follows:

It was the end of the wheat harvest when ten men went to reap their wheat and a serpent bit one of them and he died [of the wound]. His wife, thereupon, came and reported the incident to the Beth din (court), who, having sent [to investigate], found her statement to be true. At that time it was ordained: If a woman stated, 'My husband is dead,' she may marry again⁷

In the Mishnah, the schools of Shammai and Hillel, familiar talmudic antagonists,⁸ initially appear to construe the contours of the rule quite differently. Beth (School of) Hillel, usually the liberal in these arguments,⁹ seems to assert that, inasmuch as the precedential case occurred at harvest time and involved a husband whose death occurred in the same country as the one in which the wife was located, the ruling is limited to that factual context. Beth Hillel's position means that a woman will be able to remarry only if her husband died at harvest time and in the same country as she, thus significantly narrowing the class of cases in which the woman will be permitted to remarry. Beth Shammai, generally known for its stricter interpretations, adopts a more expansive approach here, arguing that the law is "the same whether the woman came from the harvest or from the olive-picking, or from one country to another, for the Sages spoke of the harvest only [because the incident to which they referred] occurred then."¹⁰

At this point, the respective positions of the two schools appear to reflect a fundamental controversy about how narrowly or broadly prior rulings should be read.¹¹

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The Mishnah then goes on, however, to report that, on the basis of Beth Shammai's argument, Beth Hillel changed its viewpoint and ruled "in accordance with the opinion of Beth Shammai."

Yet the Mishnah leaves the precise bases for both the initial Hillel-Shammai dispute and its resolution unclear. Did the School of Hillel at first disagree with Beth Shammai's conceptual approach to reading decisions, and, upon hearing Beth Shammai's arguments, capitulate and accept the latter's methodology in reading precedent? Or is it that Beth Hillel never disagreed with Beth Shammai about the general principles of case interpretation, but merely felt that there was no reasoned basis for applying the ruling beyond the facts of the precedential case, and indeed that there might be good reasons not to extend the ruling? This problem is also reflected in the Gemara's analysis of the issue.

Immediately following the Mishnah, the Gemara quotes another Mishnaic era source containing a more detailed version of the argument:

Beth Shammai said to Beth Hillel, According to your view, one would only know the law concerning the wheat harvest; whence, however, [the law concerning] the barley harvest? And, furthermore, one would only know the law in the case where one harvested; whence, however, [the law in the case where] one held a vintage, picked olives, harvested dates, or picked figs? But [you must admit] it is only the original incident that occurred at harvest time and that the same law is applicable to all [the other seasons]. So here also [we maintain that] the incident occurred with [a husband who died] in the same country, and the same law is applicable to all [other countries].

Beth Hillel's response to this argument is, "In the case of the same country, where people freely [move about], she is afraid (to bring a false report for fear it will be discovered); [coming however] from one country to another, since people do not freely [move about], she is not afraid." Beth Shammai counters, "Here also (from country to country) caravans frequently [move about]."

This dialogue suggests that much of the Hillel-Shammai dispute has vanished. Since Beth Hillel's response discusses only the country of the occurrence and omits any reference to the harvest issue, presumably it agrees with Beth Shammai that the season in which the matter took place was irrelevant to the original ruling. Thus, Beth Hillel apparently concedes that at least one of the facts in the precedential case was not essential to the core concern of the rule.

With respect to the husband's death in the same country, however, Beth Hillel maintains that there is a substantial reason for limiting the ruling in this manner—a reason firmly linked to the law's basic concerns, namely, to facilitate remarriage, but only when it is likely that the husband is dead. Accordingly, Beth Hillel asserts, the decision must apply only in those limited circumstances. We can read this position to mean that Beth Hillel supports a presumption in favor of reading cases narrowly, but is willing to extend rulings when logic and experience dictate. Or it can mean that Hillel's school agrees with Shammai's that rulings are generally to be applied broadly, but thinks that in this particular case there is ample reason not to do so with respect to the

geographical limitation.

Beth Shammai's response is an attempt to undercut Beth Hillel by showing that the argument the latter gave to limit the rule—the wife's fear of discovery—applies in broader circumstances, that is, beyond a country's borders. Consequently, although the two schools may differ on which facts are essential to the prior ruling, there is nonetheless substantial agreement between them, since both accept the view that precedent must be analyzed so as to assure that it is read at the proper level of generality, a level that will accomplish the main purpose of the original ruling, in this case facilitation of remarriage.

The Gemara attempts to understand the nature of the Hillel-Shammai dispute by comparing it to another controversy, this time between the Sages and Rabbi Hanania ben Akabia in a case in which a piece of a corpse clinging to a boat contaminated sacramental objects on board. The Sages taught the following law:

No man shall carry water of purification or ashes of purification across the Jordan on board a ship He may, however, convey them across a bridge. [These laws are applicable] as well to the Jordan as to other rivers. (But) R. Hanania b. Akabia said: They (the Sages) spoke only of the Jordan and of [transport] on board a ship, as was the case in the original incident.

The question posed by the Gemara is whether the Sages in the above matter hold the same view as Beth Shammai in the case of women who report their husbands dead, and whether Rabbi Hanania ben Akabia holds the same view as Beth Hillel. To determine that issue, the Gemara first asks whether there is a way in which the Sages in the Jordan River boat case could agree with Beth Hillel in the remarrying wife case, thus demonstrating that the Sages were not adopting Beth Shammai's view on the general applicability of precedents. Yes, there is. Arguably Beth Hillel held as it did in the earlier case and only there, because the wife is believed solely because she is afraid to tell a lie, and it is only in a place that is close by that she fears being found out, whereas in a distant place she is not afraid. But in the boat matter, the Gemara asks rhetorically, what difference does it make whether the incident took place on the Jordan or any other river? This argument makes Beth Hillel look a lot more like Beth Shammai. It supports the view that Beth Hillel can be understood as taking an expansive position that cases are generally to be read broadly, with limitations imposed only where reason so requires.

Similarly, according to the Gemara, Rabbi Hanania ben Akabia can assert that his view is in accordance with Beth Shammai. It can be argued that Beth Shammai maintained its opinion only in the case of the wife, because, to avoid possible adultery charges and bastardization of her children, a woman will make careful inquiries and investigations before remarrying. Therefore, it makes no difference whether the locality is near or far, and thus there is a reason for Beth Shammai to extend the ruling in the wife case but not in the boat case. The Gemara adds that in the matter of the boat the prohibition is due to an actual incident, and therefore the rule is against transport on the Jordan and on board a ship, where the incident occurred. The Rabbis did not enact their preventive measure against other rivers where the incident did not occur.¹² Under this contrarian interpretation of Beth Shammai's position, that school can be understood as

generally reading cases narrowly, and as willing to extend a ruling only when there is good reason for doing so. In other words, the Gemara is likewise making Beth Shammai look a lot more like Beth Hillel.

The long of the matter is that there is no conclusive proof either that the Sages agree with Beth Shammai or that Rabbi Hanania agrees with Beth Hillel. What is important, however, is that the arguments the Gemara proffers to distinguish the cases are rooted in logic and a deep understanding of human nature, and relate to the core concerns of the respective rulings. In any event, however one reads the dispute between the schools of Hillel and Shammai, it is clear that the Sages, who represent the majority, opt for broad application of precedent.¹³

This fundamental issue concerning how to determine the contours of precedent was addressed explicitly by Justices Antonin Scalia and William Brennan in *Michael H. v. Gerald D.*,¹⁴ a case involving the right of a putative natural father to visit his child conceived by a married woman. In assessing the level of specificity at which history and cases should be read, Justice Scalia's majority opinion, stripping away facts such as the father's longstanding relationship with the mother and child, argued for the most specific level to assure neutral adjudication,¹⁵ and on that basis rejected the putative father's Due Process challenges to a California statute that effectively denied him the opportunity to establish parental rights. Justice Scalia emphasized, "We have found nothing in the older sources, nor in the older cases, addressing specifically the power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man."¹⁶

On the other hand, in his dissent, Justice Brennan, espousing a more dynamic mode of constitutional interpretation,¹⁷ looked to the core concerns of prior cases and found that they protected a broader right of parenthood that encompassed the putative father's claim.¹⁸ Denigrating the majority's "pinched conception of 'the family,'"¹⁹ Justice Brennan examined earlier decisions dealing with the rights of unwed fathers, and asserted, "Though different in factual and legal circumstances, these cases have produced a unifying theme: although an unwed father's biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with that child, such a link combined with a substantial parent-child relationship will do so."²⁰

Although the Court in *Michael H.* opted for a more restrictive view of precedent, even so a majority of the Justices stopped short of taking the ultimate step. In *Michael H.*, only the Chief Justice joined Justice Scalia's famous footnote six argument that history and precedent should be interpreted at the most specific level.²¹

Times change, however. Ever so quietly, the majority now appears to have adopted Justice Scalia's approach, at least in the Court's recent criminal procedure retroactivity rulings with respect to collateral review.²² In these cases, beginning with the 1989 plurality decision in *Teague v. Lane*,²³ decided in the same year as *Michael H.*, the Justices have, for the most part, denied retroactive application of "new rules" in federal habeas corpus proceedings.²⁴ Yet what is new is often a nice question.²⁵ The Court's answer has been generally to read prior decisions very narrowly,²⁶ so that a subsequent case will be governed by an earlier ruling and thus found to be "old" only if it is "dictated"²⁷ or "compelled"²⁸ by that ruling, or if it neither "breaks new ground" nor "imposes a new obligation on the state;"²⁹ or if it invokes a rule concerning which reasonable jurists could not differ.³⁰ The "reasonable jurist" test, established in *Butler v.*

McKellar,³¹ is more stringent than any of the other formulations. The *Butler* Court stated that even if claims were "controlled by" or "governed by" or "within the logical compass" of a prior decision, they would still be viewed as new so long as reasonable judges could have differed with respect to such claims.³²

Butler is a paradigm of the Court's retroactivity methodology. At issue was whether the decision in *Arizona v. Roberson*³³ was a new rule, or merely an application of the earlier ruling in *Edwards v. Arizona*³⁴ to new facts.³⁵ *Edwards* held that if a defendant in custody invokes his Fifth Amendment right to counsel, the police may not reinitiate interrogation unless an attorney has been made available. In *Edwards* the police had reinterrogated the suspect with respect to the same offense. The *Roberson* decision applied *Edwards* to interrogation about a different crime, asserting that the factual differences between the two cases were irrelevant.³⁶ In fact, *Roberson* seemed so clearly governed by *Edwards* that the state of Arizona unsuccessfully sought in *Roberson* to have the Court create an "exception" to *Edwards* with respect to separate offenses.³⁷

In *Butler*, therefore, the Court was obliged to acknowledge that even if a decision was controlled by a prior ruling, that would not in and of itself be dispositive of whether the habeas petitioner was invoking an old rule entitled to retroactive application. Instead, the majority looked to whether reasonable jurists could differ on the issue, pointing to lower court decisions holding that *Roberson* was not compelled by *Edwards*. The Chief Justice concluded that "[i]t would not have been an illogical or even a grudging application of *Edwards* to decide that it did not extend to the facts of *Roberson*."³⁸

The *Butler* dissent took a different approach. Justice Brennan looked first to the pre-*Edwards* law, noting that the 1966 decision in *Miranda*³⁹ was based on the need to dissipate the coercion inherent during custodial interrogation. *Miranda* itself stated that if a defendant asks for counsel, the interrogation must cease until an attorney is made available.⁴⁰ *Edwards* was, in his view, simply an application of *Miranda* to a situation where the police violated that landmark decision by continuing to interrogate a defendant who had invoked his right to counsel.⁴¹ Like *Miranda*, *Edwards* also focused on police coercion, and that problem exists regardless of whether the police initiate interrogation about the same or a different crime. The dissent concluded, therefore, that not only did *Roberson* not establish any new Fifth Amendment principles, neither did *Edwards*.⁴²

Justice Brennan's position in *Butler* is supported by the Court's decision that same year in *Minnick v. Mississippi*,⁴³ holding that, under *Edwards*, if a defendant has invoked his right to counsel the police cannot reinitiate dialogue with the suspect unless his attorney is physically present at the interrogation. Justice Scalia dissented in *Minnick*, arguing that the Court was creating a "prophylaxis built upon prophylaxis,"⁴⁴ and that *Edwards*' *per se* rule was itself a break with precedent.⁴⁵

In his opinion for the Court, Justice Kennedy responded that the *Minnick per se* ruling was necessary to prevent police coercion, noting that the right against police coercion protected by *Edwards* was not new but derived from *Miranda*.⁴⁶ The Court emphatically rejected Mississippi's request to create an exception to *Edwards*.⁴⁷ The majority's analysis closely tracked Justice Brennan's methodology in *Butler*, attempting to assess the essence of prior case law.

Thus, notwithstanding the Justices' willingness on occasion to view *Miranda* rather expansively in other contexts,⁴⁸ the *Butler* majority saw the same cases through virtually the narrowest of lenses. And *Butler* is of a piece with the Court's other criminal

procedure retroactivity rulings. Application of the various tests for determining a new rule has resulted in the designation of almost all contentions as new rules.⁴⁹ As Justice Brennan complained in his dissenting opinion in *Butler*, "the majority would label 'new' any rule of law favoring a state prisoner that can be distinguished from prior precedent on any conceivable basis, legal or factual."⁵⁰

The end result is that the federal habeas court cannot carry out its traditional role of determining the constitutionality of state court convictions. For the most part, the federal courts are no longer able to ask what is constitutional, but rather are reduced to asking what is old. And the answer is, not very much at all.

Indeed, the Court's decisions regarding the dividing line between old and new rules appear to be quite arbitrary. For example, in *Penry v. Lynaugh*⁵¹ one of the rare cases finding a claim to be based on an old rule,⁵² the Justices overturned a death sentence because the trial judge failed to instruct a Texas jury that it could consider testimony of mental retardation and childhood abuse as mitigating evidence in making its sentencing decision. Because the Court believed that mental retardation and abuse could be viewed as either mitigating or aggravating circumstances,⁵³ it determined that failure to charge appropriately meant "that the jury was not provided with a vehicle for expressing its 'reasoned moral response.'"⁵⁴ The majority concluded that Penry's claim was not based on a new rule because it was governed by *Eddings v. Oklahoma*⁵⁵ and *Lockett v. Ohio*,⁵⁶ which required sentencers in capital cases to consider any relevant mitigating evidence. The Court went on to hold that the claim was also governed by *Jurek v. Texas*,⁵⁷ an even earlier decision upholding the facial constitutionality of the Texas capital sentencing scheme. The *Penry* majority read *Jurek* broadly as standing for the proposition that the statute was constitutional only because the special issues submitted to the jury would be interpreted so as to require the sentencer to consider mitigating evidence. While this is a perfectly reasonable reading of *Jurek*, such relative expansiveness is in obvious analytical tension with the manner in which the Court viewed *Edwards* and *Roberson* in the *Butler* case.

Moreover, notwithstanding its ruling in *Penry*, the Court's 1993 decision in *Graham v. Collins*⁵⁸ upheld a Texas death sentence in a case in which the jury was not specifically instructed to give mitigating consideration to the defendant's evidence of youth, background and character. Such testimony, said the majority, was different from the evidence in *Penry*, since proof of mental retardation could be viewed as aggravating within the context of the special issue relating to future dangerousness.⁵⁹ Graham's evidence, on the other hand, could be viewed only as mitigating.⁶⁰ In the fashion of *Butler*, the Justices concluded that neither *Jurek*, *Lockett*, *Eddings* nor *Penry* dictated the relief that Graham was requesting because whether such a ruling was compelled by the earlier cases was susceptible to debate among reasonable jurists.⁶¹

The line that the Justices have drawn between direct appeal and collateral review—permitting retroactive application of new rules in the one case but not the other—was intended to lend certainty to an area of the law then in disarray.⁶² The reality, however, seems to be otherwise. That the life and death of a human being turns on such fragile distinctions as the one proffered in *Graham* is at odds with the notion that the "new rule" rule would provide clarity.

Furthermore, when old rules are alchemized into new, as in *Butler* and *Graham*, the underlying rationale of the Court's criminal retroactivity decisions is effectively

subverted. The Court has justified its refusal to apply new rules in federal habeas corpus proceedings on the theory that the overarching purpose of the federal habeas remedy is to deter state courts from violating federal constitutional requirements.⁶³ Since petitioners relying on a new rule have been, by definition, convicted in accordance with existing constitutional standards, this deterrence rationale is inapplicable to them, thus supporting denial of a habeas remedy in such cases. If, however, the Justices in effect allow state courts to determine which rules are new by the "reasonable jurist" test, state courts that are so inclined are encouraged to give the most grudging gloss to Supreme Court decisions, thereby creating the illusion of newness. This means that defendants who are convicted pursuant to procedures which, if reasonably interpreted, would be unconstitutional because governed by an earlier decision mandating such a result, are being denied application of the law currently prevailing at the time of their conviction. It is accordingly incorrect to say that such defendants' convictions were in accordance with the Constitution. What has happened is that the state court deterrence rationale has been turned on its head. In an Orwellian twist, deterrence has become inducement.⁶⁴

Similarly, although the retroactivity decisions are clearly driven by their federal habeas context, habeas being a well-known *bete noire* of the Burger and Rehnquist Courts,⁶⁵ the *Teague* line of cases involves more than the unavailability of a collateral forum. Rather, these cases also affect the substantive content of federal constitutional law. The Court is tacitly permitting state judges to uphold convictions only minutely different from Supreme Court precedents, rewarding the failure to adhere to common law principles that mark the evolving nature of law. It may be that in states with conservative judiciaries, the effect of the *Teague-Butler* series of cases will be to place federal constitutional safeguards in a state of suspended animation until the Justices dot their i's and cross their t's at some point in the near or not so near future.⁶⁶ Those defendants convicted in the interim, however, are simply denied their constitutional rights.

Yet prosecutors are in no such straitjacket. Under *Lockhart v. Fretwell*⁶⁷ they are entitled to avail themselves of new rules of constitutional law as a means of defeating federal constitutional claims. In that case, defendant's attorney failed to make an objection that under prevailing federal appellate law would have rendered it impossible for the defendant to receive the death penalty. According to the *Strickland v. Washington*⁶⁸ test for ineffective assistance of counsel, the defendant should have succeeded in establishing his claim, since there is a "reasonable probability" that, but for counsel's error, the defendant would not have been sentenced to death. Indeed, in this case there is no question that the defendant would not have been sentenced to death. After the conclusion of defendant's direct appeal, however, the Eighth Circuit reversed its ruling that would have precluded the death sentence.⁶⁹ On appeal to the Supreme Court, the Chief Justice's majority opinion found that there was no Sixth Amendment violation because failure to object did not make the proceeding unreliable and unfair,⁷⁰ and because such a ruling was necessary to prevent the defendant from receiving a windfall.⁷¹ In effect, the Court is allowing the state to avail itself of post-conviction changes in the law, whereas under *Teague* and friends, habeas petitioners can succeed only by invoking rules that were quite clearly in existence at the time of their trial and direct appellate proceedings.⁷²

Even members of the *Teague* and *Butler* majorities sometimes find that their own

creation fits too tightly. In *Wright v. West*,⁷³ the majority addressed the power of the federal habeas court to conduct *de novo* review of mixed questions of fact and law.⁷⁴ Justice Thomas's plurality opinion invoked *Teague* for the proposition that that case had established a deferential standard of review of state court resolutions of federal law.⁷⁵ *A fortiori*, he suggested, the same rule should apply with respect to mixed questions⁷⁶—blandly distinguishing a long line of cases holding otherwise.⁷⁷

Concurring in the judgment, Justice O'Connor complained that Justice Thomas had mischaracterized *Teague*, arguing that the test for a new rule under *Teague* is "whether the rule a habeas petitioner seeks can be meaningfully distinguished from that established by binding precedent at the time his state court conviction became final," and noting that the "mere existence of conflicting authority does not necessarily mean a rule is new."⁷⁸ She concluded that "[i]f a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful, and any deviation from precedent is not reasonable."⁷⁹ Justice O'Connor's approach in *Wright* is not too far removed from Justice Brennan's methodology in his dissent in *Butler*. This presumably led Justice Thomas to charge that Justice O'Connor's view of *Teague* was in conflict with the Court's precedents, which, he said, insulated state court judges' reasonable and good faith interpretations of federal constitutional law.⁸⁰

The dispute over the new rule requirement turns essentially on the level of specificity at which prior case law should be read.⁸¹ Explicit recognition of the nature of the retroactivity controversy came in the Court's 1990 ruling in *Sawyer v. Smith*⁸² finding that a case that prohibited imposition of the death penalty if the sentencer had been led erroneously to believe that final responsibility for the punishment lay elsewhere, established a new rule. The defendant argued that this ruling was dictated by earlier cases requiring reliability in capital sentencing. The majority noted that the new rule "test would be meaningless if applied at this level of generality."⁸³ Similarly, in *Gilmore v. Taylor*,⁸⁴ a 1993 case, the Court held that a lower court decision invalidating an Illinois charge to the jury that had the effect of allowing a jury to find a defendant guilty of murder without considering the defendant's defense of a mitigating mental state, also established a new rule within the meaning of *Teague*. Rejecting every attempt by the defendant to bring his case within the ambit of several lines of cases,⁸⁵ the Chief Justice noted that "the level of generality at which respondent invokes this line of cases is far too great to provide any meaningful guidance for purposes of our *Teague* inquiry."⁸⁶

⁸⁷ Yet that is what the Court seems to have been doing in the cases discussed in this chapter. *Michael H.* viewed the constitutional rights of natural parents through the narrowest prism. But even in *Michael H.* only Justice Scalia and the Chief Justice were willing to go so far as to embrace explicitly the view that precedent must be interpreted at the most specific level. In the criminal procedure retroactivity cases, however, the majority has shifted—it is marching to the beat of a more radical drummer and a more radical drum—namely the one being sounded by Justice Scalia in footnote six in the *Michael H.* case. In effect, the current majority is guilty of pilpuling in its negative sense. While the overrefined distinctions that that process entails appear to be and often are intellectually rigorous, millimetric differences ultimately engender disrespect for the law, for they signal a refusal to be conceptually faithful to precedent,⁸⁸ or to grapple with the core meanings of cases, and demonstrate a disregard for unifying legal principles, atti-

tudes that the schools of both Hillel and Shammai, as well as the Sages, would surely frown on.

¹ See THE ARTSCROLL SERIES, THE TALMUD BAVLI: THE GEMARA: THE CLASSIC VILNA EDITION, *Yebamoth* (Schottenstein ed., 2007) [hereinafter BABYLONIAN TALMUD].

² The law concerning levirate marriages is found in *Deuteronomy* 25:6–10:

If brethren dwell together, and one of them die, and have no child, the wife of the dead shall not be married abroad unto one not of his kin; her husband's brother shall go in unto her, and take her to him to wife, and perform the duty of a husband's brother unto her. And it shall be, that the first-born that she beareth shall succeed in the name of his brother that is dead, that his name be not blotted out of Israel. And if the man like not to take his brother's wife, then his brother's wife shall go up to the gate unto the elders, and say 'My husband's brother refuseth to raise up unto his brother a name in Israel; he will not perform the duty of a husband's brother unto me.' Then the elders of his city shall call him, and speak unto him; and if he stand, and say: 'I like not to take her'; then shall his brother's wife draw nigh unto him in the presence of the elders, and loose his shoe from off his foot, and spit before him; and she shall answer and say: 'So shall it be done unto the man that doth not build up his brother's house.' And his name shall be called in Israel, the house of him that had his shoe loosed.

³ BABYLONIAN TALMUD, *supra* note 1, *Yebamoth* 116b. In general, Jewish law requires that a matter be established in judicial proceedings through the testimony of two competent eyewitnesses. See THE CODE OF MAIMONIDES, BOOK 14: THE BOOK OF JUDGES, *Evidence* 5:1, at 91 (Abraham M. Hershman trans., 1949) [hereinafter THE CODE OF MAIMONIDES] ("Neither in civil nor in capital cases is a legal decision given on the evidence of one witness, as it is said: *One witness shall not rise up against a man for any iniquity, or any sin* (Deut. 19:15)").

The purpose of the matrimonial exception to the two-witness rule, permitting a single witness who is an interested party at that, is to facilitate remarriage, thereby assuring that women will not live out their lives in marital limbo.

⁴ BABYLONIAN TALMUD, *supra* note 1, *Yebamoth* 114b.

⁵ See BABYLONIAN TALMUD, *supra* note 1, *Yebamoth* 87b–94a.

⁶ See BABYLONIAN TALMUD, *supra* note 1, *Kiddushin* 69a, 72b–73a, limiting those whom a *mamzer* (usually translated as a bastard, but which actually means the offspring of a married woman and a man not her husband or of any other Biblically prohibited relationship, such as incest) may marry.

⁷ BABYLONIAN TALMUD, *supra* note 1, *Yebamoth* 116b.

⁸ See BABYLONIAN TALMUD, *supra* note 1, *Sotah* 47b ("When the disciples of Shammai and Hillel multiplied who had not served [their teachers] sufficiently, dissensions increased in Israel and the Torah became like two Torahs.>").

When particular Sages have a dispute with one another, there are various rules for determining who prevails and what the law is. In the case of legal arguments between Beth Hillel and Beth Shammai, the law generally follows Beth Hillel.

In BABYLONIAN TALMUD, *Erubin* 13b, the Gemara notes about the disputes between the Schools of Hillel and Shammai that "[The utterances of] both are the words of the living God, but the . . . [law] is in agreement with the rulings of Beth . . . Hillel.' Since, however, 'both are the words of the living God' what was it that entitled Beth Hillel to have the . . . law fixed in agreement with their rulings? Because they were kindly and modest . . ."

⁹ Beth Shammai is not always stricter than Beth Hillel and vice versa. Beth Hillel is, however, so well known for its lenient rulings and Beth Shammai for its strict rulings, that, as a counterpoint, the Gemara, in tractate *Eduyoth* (meaning testimonies), gives several examples "of the lenient rulings of Beth Shammai and of the rigorous rulings of Beth Hillel." BABYLONIAN TALMUD, *supra* note 1, *Eduyoth* 6a.

¹⁰ BABYLONIAN TALMUD, *supra* note 1, *Yebamoth* 116b.

¹¹ In BABYLONIAN TALMUD, *supra* note 1, *Yebamoth* 116b, the editorial comment on Beth Shammai's statement in the Mishnah says: "The ruling of the Sages was given in connection with a

particular case where it so happened that the woman returned from a harvest. The same ruling, however, is applicable in all circumstances."

¹² It is difficult to follow this portion of the Gemara's argument, since the Hillel-Shammai dispute also appears to have been based on an actual incident. The Gemara may be making a distinction between cases like that of the boat, in which the ruling is based solely on an incident that exposed the need for a rule and thus involved a problem that the Sages would not otherwise have grappled with, as opposed to the more generalized problem of remarriage of widows, in which the fact that there was an actual case is largely incidental, since the issue would have inevitably arisen and would have been dealt with through a general pronouncement.

¹³ Jewish law accepts the view of the Sages. See THE CODE OF MAIMONIDES, BOOK 10: THE BOOK OF CLEANNESS, *The Red Heifer* 10:2, at 127–28 (Herbert Danby trans., 1954).

¹⁴ 491 U.S. 110 (1989). The debate between Justices Scalia and Brennan can also be seen as a battle between rules and standards in constitutional interpretation. See Kathleen M. Sullivan, *Foreward: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 78–79 (1992).

¹⁵ *Michael H.*, 491 U.S. at 125. For an analysis and critique of Justice Scalia's approach in the *Michael H.* case, see LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 97–117 (1991). As noted by Tribe and Dorf, Justice Scalia has "abstracted some information that many people would see as quite relevant." *Id.* at 103.

¹⁶ *Michael H.*, 491 U.S. at 125.

¹⁷ *Id.* at 141 (Brennan, J., dissenting) (arguing that Justice Scalia's interpretative approach produces a document that "is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past.").

¹⁸ *Id.* at 142 ("The better approach—indeed, the one commanded by our prior cases and by common sense—is to ask whether the specific parent-child relationship under consideration is close enough to the interests that we already have protected to be deemed an aspect of 'liberty' as well.").

¹⁹ *Id.* at 145 (Brennan, J., dissenting).

²⁰ *Id.* at 142–43 (Brennan, J., dissenting) (footnote omitted).

²¹ *Id.* at 127 n.6. Justice O'Connor, joined by Justice Kennedy, specifically declined to concur in footnote six, citing Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 542, 544 (1961), which looked to unifying principles as a way of rationalizing seemingly disparate cases. See Tribe & Dorf, *supra* note 15, at 76–79. Justice O'Connor also noted that footnote six "may be somewhat inconsistent with our past decisions in this area." *Michael H.*, 491 U.S. at 132 (O'Connor, J., concurring in part). Justice Stevens concurred only in the judgment. *Id.* at 132.

²² Foreshadowing the *Teague* line of cases, in *Griffith v. Kentucky*, 479 U.S. 314 (1987), the Court abandoned the three-prong *Linkletter* test (see *Linkletter v. Walker*, 381 U.S. 618, 636 (1965), which examined the purpose of the rule, the effect on the administration of justice, and police reliance), and held instead that all new criminal rules must be applied retroactively to cases pending on direct appeal. The Court emphasized that retroactivity was necessary to assure equality, that is, treating similarly situated parties the same, and to prevent the Court from acting as a legislature.

In *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993), the Court applied *Griffith* to civil cases, holding that "[w]hen this Court applies a [new] rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Id.* at 97. It is not clear whether the *Harper* Court abandoned the definition of what constitutes a new civil rule announced in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). See *Harper*, 509 U.S. at 110–11 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 121–22 (O'Connor, J., dissenting). Under *Chevron*, a rule is new if it overrules clear precedent on which the parties may have relied, or if it addresses a question of "first impression whose resolution was not clearly foreshadowed." *Chevron*, 404 U.S. at 106. The *Chevron* standard is a much more expansive view of newness and retroactivity than that articulated in *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), and *Butler v. McKellar*, 499 U.S. 407 (1990).

²³ 489 U.S. 288 (1989). *Teague* was decided on February 22, 1989; *Michael H.* was decided some four months later on June 15, 1989.

²⁴ The *Teague* plurality determined that claims based on new rules will not be given retroactive effect on collateral review unless the conduct cannot constitutionally be criminalized or the case involves a procedural rule "implicit in the concept of ordered liberty" and "without which the likelihood of an accurate conviction is seriously diminished." *Id.* at 311–13. *Teague* also decided that the retroactivity issue should be "treated as a threshold question." *Id.* at 300. Thus, once the Court holds that the rule is new and that it does not fit within the two narrow exceptions, the Justices will not reach the merits of the claim. The effect is to limit the input from the lower federal courts regarding constitutional adjudication.

For an analysis of the pre-*Teague* era, see, e.g., Francis X. Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557 (1975); John Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied"*, 61 N.C. L. REV. 745 (1983).

²⁵ See *Desist v. United States*, 394 U.S. 245, 263 (1969) (Harlan, J., dissenting) ("The theory that the habeas petitioner is entitled to the law prevailing at the time of his conviction is, however, one which is more complex than the Court has seemingly recognized."); *Saffle v. Parks*, 494 U.S. 484, 488 (1990) ("The explicit overruling of an earlier holding no doubt creates a new rule; it is more difficult, however, to determine whether we announce a new rule when a decision extends the reasoning of our prior cases.").

²⁶ See James Liebman, *More Than "Slightly Retro": The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in Teague v. Lane*, 18 REV. OF L. & SOCIAL CHANGE 537, 545 (1990–91) ("By defining the concept of 'new rules of law' so broadly, the Court insists that virtually every imaginable act on its part of what used to be called constitutional law-finding adjudication is exposed instead as an act of lawmaking or legislation that, as such, deserves merely prospective effect.").

²⁷ *Teague*, 489 U.S. at 301 (emphasis in original).

²⁸ *Saffle v. Parks*, 494 U.S. 484, 488 (1990).

²⁹ *Teague*, 489 U.S. at 301. See John Blume & William Pratt, *The Changing Face of Retroactivity*, 58 U.M.K.C. L. REV. 581, 588 (1990), arguing that the two definitions of new rules in *Teague*, breaking new ground or dictated by precedent, are at opposite ends of the spectrum. The first involves either overrulings or cases of first impression, whereas the latter involves adherence to precedent. The authors assert that "[t]he Court ignored the great difference between these definitions." *Id.* at 588.

³⁰ *Butler v. McKellar*, 494 U.S. 407, 414 (1990).

³¹ 494 U.S. 407 (1990).

³² *Id.* at 414. In her dissenting opinion in *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 124 (1993), Justice O'Connor, perhaps wistfully, described the *Butler* reasonable jurist test as teaching that "whether an opinion is new depends not on its language or tone but on the legal landscape from which it arose"

³³ 486 U.S. 675 (1988).

³⁴ 451 U.S. 477 (1981).

³⁵ The petitioner's conviction had become final after *Edwards* but before *Roberson*. Since *Butler* based his claim on *Roberson*, he could succeed only if that case did not articulate a new rule.

³⁶ *Roberson*, 486 U.S. at 685–88. The Court not only saw *Roberson* as controlled by *Edwards*; it also viewed *Edwards* as merely an application of *Miranda v. Arizona*, 384 U.S. 436 (1966). *Roberson*, 486 U.S. at 680.

³⁷ *Roberson*, 486 U.S. at 677.

³⁸ *Butler*, 494 U.S. at 415. The Chief Justice's conclusion was not altogether surprising, inasmuch as he was one of the dissenters in *Roberson*, a 7-2 decision. See *Roberson*, 486 U.S. at 688.

³⁹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁴⁰ *Id.* at 474.

⁴¹ *Butler*, 494 U.S. at 419 (Brennan, J., dissenting).

⁴² *Id.* at 420 (Brennan, J., dissenting).

⁴³ 498 U.S. 146 (1990).

⁴⁴ *Id.* at 164–65 (Scalia, J., dissenting).

⁴⁵ *Id.* at 162 (Scalia, J., dissenting) (arguing that *Edwards* "simply adopted the presumption that no waiver is *voluntary* in certain circumstances, and the issue before us today is how broadly those circumstances are to be defined. They should not, in my view, extend beyond the circumstances present in *Edwards* itself where the suspect in custody asked to consult an attorney, and was interrogated before that attorney had ever been provided.").

⁴⁶ *Id.* at 151.

⁴⁷ *Id.* at 153. In *Greenawalt v. Ricketts*, 943 F.2d 1020 (9th Cir. 1991), a panel held that since several courts had erroneously carved out the exception to *Edwards* that the Supreme Court rejected in *Minnick*, the latter was a new rule. *See also* *Greenawalt v. Ricketts*, 961 F.2d 1457 (9th Cir. 1991) (Reinhardt, C.J., dissenting from denial of rehearing *en banc*).

⁴⁸ In addition to *Minnick*, see, e.g., *Withrow v. Williams*, 507 U.S. 680 (1993) (rejecting state's contention that *Miranda* claims should not be cognizable in federal habeas).

⁴⁹ *See* *Caspari v. Bohlen*, 510 U.S. 383 (1994) (concluding that double jeopardy challenge to successive noncapital sentence enhancement proceedings was seeking a new rule); *Gilmore v. Taylor*, 508 U.S. 333 (1993) (ruling that Due Process challenge to sequential instructions that might lead the jury to disregard evidence concerning an affirmative defense was a claim based on a new rule); *Graham v. Collins*, 506 U.S. 461 (1993) (holding that an attack on a state capital punishment law preventing the jury from fully considering defendant's age, childhood, and positive character traits as mitigating evidence was based on a new rule); *Saffle v. Parks*, 494 U.S. 484 (1990) (finding prisoner's claim that an anti-sympathy charge violated the Eighth Amendment was seeking a new rule); *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion) (finding petitioner's claim that the Sixth Amendment ruling in *Taylor v. Louisiana*, 419 U.S. 522 (1975), requiring that the jury venire represent a fair cross-section, should be extended to trial jury, was seeking a new rule); *Sawyer v. Smith*, 497 U.S. 227 (1990) (holding that a case prohibiting the imposition of the death penalty by a sentencer who has been led erroneously to believe that responsibility for the sentence rests elsewhere, is new). *But see* *Penry v. Lynaugh*, 492 U.S. 302 (1989) (holding that case invalidating procedure which prevents a sentencer from giving full effect to mitigating evidence was not a new rule); *Stringer v. Black*, 503 U.S. 222 (1992) (finding that case holding invalid the use of a vague aggravating factor was not a new rule).

In *Yates v. Aiken*, 484 U.S. 211 (1988), decided a year before *Teague*, the Court also grappled with the new rule concept and found that an instruction allowing the jury to presume malice from the use of a deadly weapon was unconstitutional, being governed by the earlier decision in *Sandstrom v. Montana*, 442 U.S. 510 (1979), holding that such charges impermissibly shifted the state's burden of proof.

⁵⁰ *Butler*, 494 U.S. at 421 (1990) (Brennan, J., dissenting).

⁵¹ 492 U.S. 302 (1989).

⁵² In *Stringer v. Black*, 503 U.S. 222 (1992), the Court found a rule was not new notwithstanding Fifth Circuit cases to the contrary, a finding that is hardly compatible with *Butler's* reasonable jurist test. As one commentator noted, "The Court was thus saying that the various holdings of the Fifth Circuit were utterly unreasonable in light of existing precedent, a powerful rebuke from one federal court to another." Karl Metzner, *Anatomy of an Upset: The Supreme Court's Shocker on Habeas Retroactivity*, 28 CRIM. L. BULL. 521, 550 (1992).

⁵³ *Penry*, 492 U.S. at 324.

⁵⁴ *Id.* at 328.

⁵⁵ 455 U.S. 104 (1982).

⁵⁶ 438 U.S. 586 (1978).

⁵⁷ 428 U.S. 262 (1976) (plurality opinion).

⁵⁸ 506 U.S. 461 (1993).

⁵⁹ *Id.* at 473.

⁶⁰ *Id.* at 473–75.

⁶¹ *Id.* at 477.

⁶² *See* *Teague*, 489 U.S. at 302 ("The *Linkletter* retroactivity standard has not led to consistent results.").

⁶³ *Id.* at 306; *Saffle*, 494 U.S. at 488. The Court has also articulated other policy reasons for the restrictions on habeas in this context. See Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 115, 176 (1991) (giving a number of policy reasons including equality, finality, and federalism).

⁶⁴ See Karl Metzner, *Retroactivity, Habeas Corpus, and the Death Penalty: An Unholy Alliance*, 41 DUKE L.J. 160, 174 (1991) ("[T]he deterrence function embraced by the majority is actually weakened by the broadened definition [of new rule]. . . . [S]tate courts have little incentive to interpret conscientiously federal constitutional law.").

⁶⁵ See, e.g., *Stone v. Powell*, 428 U.S. 465 (1976) (largely prohibiting Fourth Amendment claims in federal habeas corpus); *Wainwright v. Sykes*, 433 U.S. 72 (1977) (precluding federal habeas review of defaulted claims in state court unless stringent requirements of cause and prejudice are met); *McCleskey v. Zant*, 499 U.S. 467 (1991) (barring successive federal habeas petitions absent showings of cause and prejudice).

⁶⁶ See Joseph Hoffmann, *Retroactivity and the Great Writ: How Congress Should Respond to Teague v. Lane*, 1990 B.Y.U. L. REV. 183, 211 (1990) ("All that the state courts need do, in order to avoid reversal on habeas, is to obey the most obvious federal constitutional precedents."). Professor Woolhandler takes the argument a step further, arguing that "a reasonable interpretation of law approach to federal habeas corpus frequently accords . . . final interpretive authority to the states." Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 640 (1993) (footnote omitted).

⁶⁷ 506 U.S. 364 (1993).

⁶⁸ 466 U.S. 668 (1984).

⁶⁹ *Lockhart*, 506 U.S. at 368.

⁷⁰ *Id.*

⁷¹ *Id.* at 370.

⁷² *Id.* at 376 (Stevens, J., dissenting) ("The Court's aversion to windfalls seems to disappear, however, when the State is the favored recipient. For the end result in this case is that the State, through the coincidence of inadequate representation and fortuitous timing, may carry out a death sentence that was invalid when imposed.").

The Court has also given the state greater latitude in asserting *Teague* claims. Although the *Teague* nonretroactivity barrier is not jurisdictional (*Collins v. Youngblood*, 497 U.S. 37, 40–41 (1990)) and consequently may be waived by the state (*Schiro v. Farley*, 510 U.S. 222, 227–29 (1994)), nonetheless the Justices have been lenient to the prosecution in determining what constitutes a waiver. Thus, in *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994), a case in which the "primary" question presented in the state's petition for certiorari was the substantive issue of application of the double jeopardy clause, the Court concluded that the *Teague* issue was "a subsidiary question fairly included" therein. *But see Schiro v. Farley*, *supra* (finding that the state had waived its *Teague* assertion by failing to make the "new rule" argument in its opposition to the petition for certiorari); *Godinez v. Moran*, 509 U.S. 389, 396 n.8 (1993) (declining to reach *Teague* issue because state had not raised it in lower courts or in petition for certiorari).

⁷³ 505 U.S. 277 (1992).

⁷⁴ The Court ultimately found it unnecessary to resolve the state's broad contention that, since *Teague* established a deferential standard of review for legal questions, the same rule should apply with respect to mixed questions. *Id.* at 293–96.

⁷⁵ *Id.* at 289–93.

⁷⁶ *Id.* at 294–95.

⁷⁷ *Id.* at 288–93. See also *id.* at 301–03 (O'Connor, J., concurring in the judgment), discussing and listing scores of cases applying on habeas a *de novo* standard of review as to mixed questions.

⁷⁸ *Wright v. West*, 505 U.S. 277, 304 (O'Connor, J., concurring in the judgment).

⁷⁹ *Id.*

⁸⁰ *Id.* at 291 & n.8.

⁸¹ The dispute in these cases also concerns the scope of habeas corpus review. See *Butler v. McKellar*, 494 U.S. 407, 417 (1990) (Brennan, J., dissenting) (asserting that the retroactivity decisions were a manifestation of the Court's "growing hostility toward Congress' decision to authorize federal collateral review of state criminal convictions . . .").

Other commentators have viewed the new rule doctrine as part of a comprehensive constitutional analysis. *See, e.g.*, Daniel Fallon, Jr. & Richard Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733 (1991) (arguing that several new law doctrines raise issues relating to constitutional remedies rather than the applicability of new rulings).

⁸² 497 U.S. 227 (1990).

⁸³ *Id.* at 236.

⁸⁴ 508 U.S. 333 (1993).

⁸⁵ *Id.* at 340–44.

⁸⁶ *Id.* at 344 (citation omitted).

⁸⁷ *See* Fallon & Meltzer, *supra* note 81, at 1794 (arguing that the "threshold for newness . . . should be high," and that "legal newness is best analyzed as a matter of a decision's relative predictability").

⁸⁸ This phrase was coined by Justice Fortas in his dissenting opinion in *Desist v. United States*, 394 U.S. 244, 277 (1969) ("The vitality of our Constitution depends upon conceptual faithfulness and not merely decisional obedience.").

CHAPTER FOUR

The Ten Commandments: The Prohibition Against Coveting and the Problem of No *Actus Reus**

The Ten Commandments,¹ from which commentators believe all of the 613 commandments of Jewish law are derived,² can be categorized in several ways. They reflect three types of precepts—those of the heart,³ tongue,⁴ and hand (act).⁵ The first five commandments deal with the relations between man and God (all of the first five have God's name in them), and the second with relations between man and man.⁶ In the first two commandments God refers directly to Himself in the first person, and in the other eight he refers to Himself in the third person.⁷ Further, they are divided into positive obligations and negative rules,⁸ and are arranged on two tablets.⁹ They also appear in two places in the Torah: *Exodus* 20:2–14, and *Deuteronomy* 5:6–18. The two versions of the verses are not identical and thus provide a rich source for commentary.¹⁰

The last admonition—do not covet—is called the "most puzzling of all the Ten Commandments, which is a prohibition applying to the sphere of thought and feeling."¹¹ On its face, the offense of coveting is a completely mental crime, without a trace of *actus reus*. It is even less than an omission, which, under certain circumstances, can be punished.¹² In Jewish law failure to perform a positive commandment can be punished only if it is open and brazen. Thus, the Ten Commandments encompass the entire gamut of wrongdoing acts, words, omissions, and thoughts.

There is of course another completely mental crime in the Ten Commandments—the first one which simply says "I am the Lord your God, Who delivered you from the land of Egypt, from the house of slavery." It is framed as a statement rather than an order.

Many traditional commentators, however, interpret it as a positive commandment to believe in God.¹³ Thus, while it is a mental crime—a precept of the heart—it is an affirmative obligation, whereas the admonition against coveting is a negative commandment. Nonetheless, the First Commandment, to believe in God, is not as moving as much as the prohibition against coveting because it is natural for the Giver of the Law Who performed miracles and redeemed the Jewish people from slavery, to demand belief in His existence and power. As with coveting, it is a completely mental offense, addressed to the hidden mind, heart and soul. Thus, mental crimes introduce and end the Ten Commandments, which in Hebrew are called the *Aseret Ha Dibrot*, literally, the ten statements, or words, or sayings. As we shall see, however, despite their seeming polarity, there is a strong connection between the two.

The concept of punishing mental crimes in American law is problematic. Commentators are even wary of conspiracy,¹⁴ solicitation,¹⁵ and, to a lesser extent, attempts.¹⁶ Concededly, conspiracy usually requires an overt act in furtherance of the

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conspiracy,¹⁷ although at common law all that was necessary was the agreement (which was considered the act),¹⁸ a tradition followed in some jurisdictions¹⁹ and with respect to certain crimes.²⁰ Furthermore, the overt act, if that is necessary to establish, need not be a crime itself, nor even an attempted crime.²¹ It can be as innocent as talking on the phone, making plane reservations, or buying a soda pop, as long as it is in furtherance of the conspiracy.²² In other words, preparatory conduct by one person which has not yet ripened into an attempt, and which therefore cannot be criminally punished, can be if there is an agreement between two or more persons and one of the co-conspirators commits that very same act. Moreover, in some states, the ultimate objective of the conspiracy need not even be criminal.²³

The act requirement is deeply embedded in the common law. As Blackstone noted in his Commentaries:

Indeed, to make a complete crime, cognizable by human laws, there must be both a will and an act. For though, in *foro conscientiae*, a fixed design or will to do an unlawful act is almost as heinous as the commission of it, yet, no temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know. For which reason in all temporal jurisdictions an overt act, or some open evidence of an intended crime, is necessary, in order to demonstrate the depravity of the will, before the man is liable to punishment.²⁴

The modern echo of this requirement is found in the Model Penal Code: "[i]t is fundamental that a civilized society does not punish for thoughts alone."²⁵ The Spanish Inquisition is a model for the barbarism that can result when the law seeks to punish for thoughts and beliefs. And who can forget the terror of the Thought Police in George Orwell's *1984*.

As Blackstone noted, punishing for thoughts alone presents serious evidentiary problems.²⁶ Arguably, confessions might obviate the difficulty, although at the cost of creating others—an inquisitorial system of justice in which torture and coercion might gain a foothold. Even if confessions could be obtained voluntarily,²⁷ it would create an environment in which disturbed people would come forward and confess,²⁸ just as they do with respect to crimes that have an act requirement. The only difference is that there would be more of them, because all of us have evil thoughts. This would also necessitate a large police force. In addition, it would also undercut the rule that one cannot be convicted based solely on his confession; there must be at least corroborative evidence that the crime was actually committed.²⁹ When a crime is mental, such corroboration is impossible.

There are other institutional concerns. It allows expansion of the criminal law net and concomitant police intrusion into our private affairs,³⁰ at a point where harm to society has not been manifest, nor may it ever. Almost all of us, at one time or another, think evil thoughts, and some may even formulate a scheme to achieve the desired end. But few of us take any steps in accordance with those thoughts.³¹ What would life be like if we constantly had to govern our negative feelings? Presumably there would be constant fear and guilt.³²

Jews are constantly asked to examine their behavior as well as thoughts that may ultimately lead to harm, and, therefore, as the old joke goes, we all suffer from varying degrees of guilt, a not unexpected result when Jewish law imposes 613 commandments, some positive, some negative, and some thankfully not required outside of Israel, or in modern times, or are applicable only to certain people.³³

The prohibition against coveting is even more problematic when viewed in the context of Jewish criminal law. It is almost impossible to convict anyone of a crime in the rabbinic courts, whether they are innocent or guilty. Two competent³⁴ witnesses must observe the actor about to commit the crime,³⁵ admonish him as to the consequences if he completes the act,³⁶ and he, in turn, must verbally acknowledge the witness' warnings, and then go on to commit the crime in their presence.³⁷ Confessions are inadmissible,³⁸ no matter how voluntary; even guilty pleas are prohibited. There is no accomplice liability³⁹ and circumstantial evidence is worthless.⁴⁰

Furthermore, just as in American law, the defendant must commit an act,⁴¹ the whole act—attempts are not cognizable.⁴² Words are not considered an act⁴³ unless the words themselves are prohibited, such as inciting people to worship idols.⁴⁴ Given that backdrop, the prohibition against coveting seems even more disparate.

Yet there is a value in prohibiting this mental offense. It is the ultimate deterrence to bad acts, and indeed it is argued that all crimes stem from coveting.⁴⁵ If one must root out the fantasy, thought, wish, desire or intent, the likelihood of turning the thoughts into fixed plans and then into actions such as theft or robbery or murder or rape becomes much less likely.

Still, the lack of *actus reus* and the legal apparatus that would be needed to enforce this law makes for some uneasiness. But as it turns out, however, the concerns about the lack of *actus reus* for coveting is not as dangerous as it seems. In *Deuteronomy* 7:25 God is telling the Jewish people that when they occupy the land of Israel, they should burn the graven images of other gods, and admonishes that "you shall not covet and take for yourself the silver and gold that is on them, lest you be ensnared by it." Since the word "covet" is followed by the action of "take for yourself," commentators argue that the word covet in the Ten Commandments is similarly circumscribed.⁴⁶ In accordance with this view, the *Sefer Ha Hinnuch*, a thirteenth century commentary on the commandments, notes that the ban on coveting is not "truly, finally broken until some action is taken about it."⁴⁷ That does not, however, completely solve the problem.

Recollect, that the Decalogue is given twice. Thus the prohibition against coveting is written once in *Exodus* 20:14 and once in *Deuteronomy* 5:18. The Hebrew word used for covet in *Exodus* 20:14 is *tachmod*. In *Deuteronomy* 5:18 the commandment reads: "And you shall not covet (*tachmod*) your fellow's wife, you shall not desire (*titaveh*) your fellow's house," Some commentators note the distinction and ascribe different meanings to the two words. Desire is in the heart, whereas covet requires an action. This is learned from biblical sources. We have already noted that covet in *Deuteronomy* 7:25 is followed by the word "take," connoting action. The meaning of the word *titaveh* in *Deuteronomy* 20:18 is learned from *Deuteronomy* 12:20: "when your soul desires (*titaveh*) meat."

Maimonides follows this distinction in his book *The Commandments*. In the volume dealing with negative commandments, Maimonides gives two separate commandments dealing with the issue of wanting what others have. In commandment

265,⁴⁸ entitled "Planning to Acquire Another's Property," he says:

By this commandment we are forbidden to occupy our minds with schemes to acquire what belongs to another of our brethren. . . . The prohibition applies only to putting the desire into practice. . . . [T]his negative commandment forbids us to scheme in order to acquire anything belonging to our brethren which we covet, even if we buy it and pay its full price.⁴⁹

On the other hand, in commandment 266,⁵⁰ entitled "Coveting Another's Belongings," he says "By this prohibition we are forbidden to set our thoughts to covet and desire what belongs to another, because this will lead us to scheming to acquire. . . . The first, (#265) prohibits the actual acquisition of what belongs to another; the second (#266) forbids us even to desire and covet it."⁵¹

The upshot is that, according to Maimonides and many other commentators,⁵² there is a prohibition against mere desire, without a need for an act.⁵³ In light of the strictness of Jewish criminal law, why do they take this position?

A modern commentator on the 613 commandments, Rabbi Chill, follows Maimonides and also breaks the sin of coveting into two categories.⁵⁴ In the first scenario, the person desires another's possessions, but he is merely daydreaming or fantasizing. That violates the commandment in thought but not act. In the second case, there is coveting, but the actor attempts to talk the owner into giving up his possessions, or even to use undue influence to persuade the owner to sell the article. That is a violation of the sin of coveting in deed. If the covetor goes on to steal the article, he is guilty of three offenses: "envy in thought, envy in deed, and theft."⁵⁵

Another commentator argues that the difference between the words *tachmod* and *titaveh* is that the latter refers to desire regarding an object without having seen it, whereas *tachmod* applies to one whose desire is stimulated by seeing the object.⁵⁶ On the other hand, the *Sefer Mitzvot Gadol* says flatly that *tachmod* and *titaveh* "mean the same thing."⁵⁷ The latter's difficulty is if one accepts that there is a difference between *tachmod* and *titaveh*, it means that wanting someone's house is worse than wanting someone's wife, which is somewhat problematic. On the other hand, they are not absolute synonyms.⁵⁸ Torah scholars spend their lives parsing words and even letters in the Torah to derive the true meaning. Why should the Torah use two different words unless it sheds some light on what God is trying to communicate? Therefore, there must be a reason for God to prohibit mere naked desire of another's goods.⁵⁹

One possible answer is that given by Maimonides—to prevent the progression from thought to scheme to action. Maimonides claims that mere desire will lead to coveting and then to robbery:

[I]f one sees a beautiful object in his brother's possession, and he sets his heart on it and desires it, he infringes the prohibition contained in . . . *Neither shalt thou desire*. Then his love for the object will become stronger, until he devises some scheme to obtain it, and does not cease to beg and press the owner to sell it to him; . . . and if he succeeds in this, he thereby breaks another commandment, namely *Thou shalt not covet*; since

by his persistence and his scheming he has acquired a thing which the owner did not want to sell. Thus he has broken two commandments If, however, the owner because of his love for the object, refuses to sell or exchange it, and the covetor because of his great craving for it proceeds to take it by force and compulsion, he also transgresses the commandment, *Nor shalt thou rob him.*⁶⁰

In Maimonides' Code on the *Mishnah Torah* he also makes the above distinction, but then goes on to note that if the owner resists the covetor's attempt to rob him, the covetor will then be led to bloodshed.⁶¹ In this view, God is creating a fence around the Torah prohibitions against evil acts, pushing the fence far back, beyond attempts or conspiracy. Many rabbinic laws, perhaps in imitation of God, are promulgated for the same reason.⁶² For example, the Torah prohibits certain activities on the Sabbath. The Rabbis then decreed that one is not permitted to handle objects which, if used for its purpose, will result in violating the Sabbath. So one cannot handle a pencil or pen because one might come to write with it and thus desecrate the Sabbath.⁶³

Another possibility is to provide proof that the Torah comes from God. It is clear that violation of a "thought crime" cannot be punished by the human courts. Judgment must then be up to God, since He would not impose a law which cannot be enforced. We know that God can judge guilt to a hair's breadth, unlike the human courts, and will not over or under punish us. As Rabbi Samson Hirsch noted, the prohibition against coveting is itself proof that the Torah comes from God.⁶⁴ Human kings and rulers can only punish deeds, that which is seen, but God can read our most intimate thoughts and therefore the prohibition against coveting is there to tell us of God's omniscience. What God prohibits, God can punish. He leaves deeds to the human courts and thoughts to Himself.

The commandment against coveting has yet a deeper thrust. When God tells us not to covet, it is incumbent upon us to try to root out the envy we feel. We can do this by physical means, such as banging our heads against a wall, or running around and screaming to get rid of the idea, or we can do it intellectually, by reasoning and exercising faith in God who decreed that we should not have that which we want, thus creating a connection between the First and Tenth Commandments.⁶⁵ If one believes in God, he will not transgress any of His commandments. Being covetous is thus a sign of a lack of faith in God.

Furthermore, by prohibiting coveting, God demonstrates that humans have control over their feelings and emotions and intellect, not just their acts, and can sanctify their thoughts until they are pure. If that were not true, God would not have promulgated the Tenth Commandment. It is a belief of traditional Judaism that God is good, and when He tells us to do or not to do something, we have the power to obey, and if we do not, we are punished accordingly. As the *Sefer Ha Chinuch* stated: "Man is fully capable of quelling his desires, and it is up to him to decide what to seek out and what to reject. His will is his own. He directs it wherever he wishes."⁶⁶ In other words, the dictate against coveting is a sign of man's free will at the highest level of abstract thought and desire. Just as we can prevent ourselves from the act of stealing, we can drive out evil thoughts.

Thus, God's determination to prohibit coveting creates a new class of commandments:

We may . . . speak not only of commandments devoted to the relation between man and his fellow man, and those between man and God, but also of those devoted to man and himself, his inner moral perfection, a catharsis of emotion and attitudes.⁶⁷

That being the case, the lack of *actus reus* is not as problematic as it would appear to the traditional notions of American criminal law.

¹ The Ten Commandments as given in *Exodus* 20:2–14:

I am *HASHEM* [the Lord] your God, Who has taken you out of the land of Egypt, from the house of slavery. You shall not recognize the gods of others in My presence. You shall not make yourself a carved image nor any likeness of that which is in the heavens above or on the earth below or in the water beneath the earth. You shall not prostrate yourself to them nor worship them, for I am *HASHEM*, your God—a jealous God, Who visits the sin of fathers upon children to the third and fourth generations, for My enemies; but Who shows kindness for thousands [of generations] to those who love Me and observe my commandments. You shall not take the Name of *HASHEM*, your God, in vain, for *HASHEM* will not absolve anyone who takes His Name in vain.

Remember the Sabbath day to sanctify it. Six days shall you work and accomplish all your work; but the seventh day is Sabbath to *HASHEM*, your God; you shall not do any work—you, your son, your daughter, your slave, your maidservant, your animal, your convert within your gates—for in six days *HASHEM* made the heavens and the earth, the sea and all that is in them, and He rested on the seventh day. Therefore, *HASHEM* blessed the Sabbath day and sanctified it.

Honor your father and your mother, so that your days will be lengthened upon the land that *HASHEM*, your God, gives you.

You shall not kill; you shall not commit adultery; you shall not steal; you shall not bear false witness against your fellow.

You shall not covet your fellow's house. You shall not covet your fellow's wife, his manservant, his maidservant, his ox, his donkey, nor anything that belongs to your fellow.

The word *HASHEM* literally means "the name," and is used in place of God's actual name so that it is not said frivolously or in vain. When it is read for religious purposes, His actual name is spoken. That name denotes God's mercy. Other names of God reflect other aspects of His Essence. The commandments are addressed to the Jewish people using the singular form of "you" in Hebrew. Commentators say that this reflects the traditional view that the Jews heard the first two commandments directly from God and the others from Moses. See, e.g., *THE MIDRASH SAYS, THE BOOK OF SH'MOS 185* (Moshe Weissman trans., 1980) [hereinafter *MIDRASH*].

² See, e.g., *THE ARTSCROLL SERIES, THE TALMUD BAVLI: THE GEMARA: THE CLASSIC VILNA EDITION, Makkos 23b* (Schottenstein ed., 2007) [hereinafter *BABYLONIAN TALMUD*] ("Six hundred and thirteen are included in the Ten Commandments"); *MIDRASH*, at 185 ("The Ten Commandments altogether contain 620 letters, thereby symbolizing that the Ten Commandments are the essence of the Torah. For the Torah contains 613 . . . [commandments], and the . . . [Sages] instituted seven additional . . . [commandments], yielding a total of 620 . . . [commandments]."). Each Hebrew letter has a numerical value giving rise to a form of exegetical analysis called *gematria*.

³ To believe in God and not to covet.

⁴ Not taking God's name in vain and not bearing false witness. Ordinarily, words do not constitute an act in Jewish law, see, e.g., *BABYLONIAN TALMUD, supra* note 2, *Makkos* 4b, nor does it in American law, see, e.g., *SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES* 181 (7th ed. 2001) ("[It should be remembered that while] the common law requires an act as well as an accompanying state of mind (*mens rea*) and does not generally consider a verbal declaration of the *mens rea* a sufficient act in itself, but words are a kind of act and are treated as such for some purposes. In cases of treason, seditious utterance, solicitation, conspiracy, or aiding and abetting another to commit a crime through instruction or encouragement, for example, words are sufficient to constitute the *actus reus* of the crime").

Jewish law is to the same effect. *See, e.g.*, 2 MAIMONIDES, THE COMMANDMENTS 17 (Charles B. Chavel trans., 1967) (noting that negative commandment 15, "Summoning People to Idolatry," is punishable by stoning).

⁵ Jewish law generally requires an act. *See, e.g.*, BABYLONIAN TALMUD, *supra* note 2, *Makkos* 13b (referring to the accepted rule that lashes can only be inflicted for prohibitions involving action).

⁶ Although the Fifth Commandment to honor one's father and mother does not appear to govern man's relation to God, commentators argue that the act of creation requires man, woman and God. Therefore, when the Fifth Commandment adjures us to honor our parents, it includes God Who is a partner with them. As such, it is perfect bridge between the two kinds of commandments. *See, e.g.*, *Exodus* 321 (Charles B. Chavel trans., 1973): "Thus, of the Ten Commandments, there are five which refer to the glory of the Creator, and five for the welfare of man, for [the Fifth Commandment], *Honor thy father*, is for the glory of God, since it is for the glory of the Creator that He commanded that one honor one's father who is a partner in the formulation of the child. Five commandments thus remain for the needs and welfare of man."

⁷ *See, e.g.*, YEHUDA NACHSHONI, STUDIES IN THE WEEKLY PARASHAH: THE CLASSICAL INTERPRETATION OF MAJOR TOPICS AND THEMES IN THE TORAH, *Sh'mos* 475 (Shmuel Himelstein trans., 1988) (reflecting the traditional view that the Jews heard the first two commandments directly from God Himself and the others from Moses) [hereinafter NACHSHONI]. *But see* RAMBAN, *supra* note 6, at 305 (arguing that the people heard all the commandments from God, but that they understood only the first two; Moses had to explain the others to them).

⁸ Jewish law distinguishes between violations of negative commandments and positive commandments. *See, e.g.*, RAMBAN, *supra* note 6, at 310 ("punishment for violation of the negative commandments is great—the court punishing the transgressor with whipping or death—whereas no punishment at all is meted out in the case of failure to fulfill the positive commandments, excepting when one is in brazen rebelliousness"). The failure to perform a positive commandment is an omission, and Jewish law, like American law, generally requires an affirmative act. Furthermore, it is a precept of Jewish law that there can be no punishment without a warning, and that is difficult to achieve with omissions.

⁹ *See Exodus* 31:18. These tablets were destroyed by Moses when he saw the people of Israel sacrificing to idols. *Exodus* 32:19. The second set of tablets was carved by Moses rather than God; God, however, inscribed the commandments. *Exodus* 34:1. *See also* RAMBAN, *supra* note 6, at 322–23 (explaining that "there were two Tablets, for up to Honor thy father, it corresponds to the Written Torah, and from there on it corresponds to the Oral Torah").

¹⁰ In the *Deuteronomy* version the prohibition against coveting reads as follows: "You shall not covet your fellow's wife, you shall not desire your fellow's house, his field, his slave, his maidservant, his ox, his donkey, or anything that belongs to your fellow." In the *Exodus* version the prohibition reads: "You shall not covet your fellow's house. You shall not covet your fellow's wife, his manservant, his maidservant, his ox, his donkey, nor anything that belongs to your fellow." There is much commentary about the order of what should not be coveted, i.e., why in *Exodus* does it first prohibit coveting another's wife, whereas in *Deuteronomy* it first prohibits coveting another's house. *See, e.g.*, RAMBAN, *supra* note 6, at 320–21. At pages 306–07 the Ramban also discusses the reason the *Exodus* version provides "remember the Sabbath," and the *Deuteronomy* version states "observe the Shabbath."

¹¹ NEHAMA LEIBOWITZ, STUDIES IN SHEMOT-EXODUS 343 (Aryeh Newman trans., 1981).

¹² MODEL PENAL CODE § 2.01 (3)(a)(b) (1985) states:

Liability for the commission of an offense may not be based on an omission unaccompanied by action unless: (a) the omission is expressly made sufficient by the law defining the offense; or (b) a duty to perform the omitted act is otherwise imposed by law.

See also Jones v. United States, 308 F.2d 307 (D.C. Cir. 1962) (noting that there are four situations in which a person can be held liable for an omission: when there is a statutory duty, when one is in a status relationship, when there is a contractual duty, and when one has voluntarily assumed the care of another thereby secluding that person from assistance by others).

¹³ *See, e.g.*, MAIMONIDES, *supra* note 4, at 1 ("By this injunction we are commanded to believe in God; that is, to believe that there is a Supreme Cause who is the Creator of everything in existence. It is contained in His words (exalted be He): 'I am the Lord thy God, who brought thee out of the land of Egypt'"); 2 SAMSON R. HIRSCH, COMMENTARY ON THE TORAH, *Exodus* 258 (Isaac Levy trans., 2d ed. 1966) ("[T]his verse is not to be taken as a declaration, but as . . . one of the commandments."). Some commentators

contend that faith in God is not one of the 613 commandments, but rather a preface to or foundation for the other commandments. In this view the First Commandment of the Decalogue is the prohibition against idolatry. The correct number is achieved by counting "You shall have no other gods beside Me" and "Do not make for yourself any carved idols," as two separate commandments. *See* discussion in NACHSHONI, *supra* note 7, at 469–75; LEIBOWITZ, *supra* note 11, at 303–06.

¹⁴ MODEL PENAL CODE § 5.03:

A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he: (a) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

¹⁵ MODEL PENAL CODE § 5.02(1): "A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to such crime or which would establish his complicity in its commission or attempted commission."

¹⁶ MODEL PENAL CODE § 5.01(1)(c): "A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he: . . . (c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."

¹⁷ *See, e.g.*, MODEL PENAL CODE § 5.03(5): "No person may be convicted of conspiracy to commit a crime, other than a felony of the first or second degree, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or a person with whom he conspired."; 18 U.S.C. § 371 (2003) ("If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be [punished] under this title."). *See also* MINN. STAT. § 609.175 (2); N.Y. PENAL CODE § 105.20 (McKinney 2003); TEXAS PENAL CODE ANN. § 15.02 (Vernon 2003). Note that the Model Penal Code provision eliminates the overt act requirement for the most serious offenses.

¹⁸ *See, e.g.*, *Mulcahy v. The Queen*, L.R. 3 E & 1 App. 306 (H.L. Ire. 1868).

¹⁹ *See* *People v. Cain*, 2003 WL 193504 (Mich. Ct. App. 2003) ("In Michigan the crime of conspiracy is complete upon formation of the agreement and therefore unlike many other states and federal law, proof of an overt act in furtherance of the conspiracy is not necessary."); *Mitchell v. State*, 752 A.2d 653, 667 (2000), *cert. granted*, 759 A.2d 230 (2000) and *judgment rev'd on other grounds*, 767 A.2d 844 (2001) ("In Maryland, the agreement is the crime and the crime is complete without any overt act.").

²⁰ *See* 21 U.S.C. § 846 (2002) (punishing conspiracies to distribute drugs without any overt act requirement). The United States Supreme Court has declined to read such a requirement into the statute. *See* *United States v. Shabani*, 513 U.S. 10, 11–12 (1994); NEV. REV. STAT. ANN. § 199.490 (2002) (punishing conspiracies to commit murder, kidnapping, robbery and sexual assault and stating that "In any such proceeding for violation of NRS 199.480, it shall not be necessary to prove that any overt act was done in furtherance of such unlawful conspiracy or combination").

²¹ *See, e.g.*, *Garcia v. State*, 46 S.W.3d 323, 327 (Tex. Ct. App.) (Aug. 29, 2001) ("In conspiracy . . . the overt acts do not have to be criminal . . ."); *State v. Guillory*, 540 So. 2d 1212, 1216 (La. Ct. App. 3d Cir. 1989): ("An overt act need not be unlawful; it may be any act, innocent or illegal, accompanying or following the agreement, which is done in furtherance of its object."); *cf.* *Hyde v. United States*, 225 U.S. 347 (1912) (Holmes, J., dissenting) (arguing that unlike attempts which are close to achieving the desired result, with conspiracies "it does not matter how remote the act may be from accomplishing the purpose, if done to effect it; that is, I suppose, in furtherance of it in any degree").

²² Some states do require that the overt act be substantial. *See, e.g.*, MAINE REV. STAT. tit. 17, § 151.4 (2001) (requiring a "substantial step" so that it strongly corroborates the firmness of the actor's intent to commit the crime; furthermore, "speech alone may not constitute a substantial step").

²³ *See, e.g.*, NEV. REV. STAT. § 199.480 (1999) (defining a conspiracy as including *inter alia*: "To commit any act injurious to the public health, public morals, trade or commerce, or for the perversion or corruption of public justice or the due administration of the law"); OKLA. STAT. § 421.A (5) (1999) (same). Query if these laws would withstand a Due Process vagueness claim. *See* *Papachristou v. City of Jacksonville*, 405

U.S. 156 (1972) (invalidating ordinance which punished "rogues and vagabonds," "common drunkards," and "lewd, wanton and lascivious persons"). *But see* Shaw v. Director of Public Prosecutions, [1962] A.C. 220 (House of Lords) (upholding conviction for "conspiracy to corrupt morals" when defendant published a directory of prostitutes containing explicit descriptions of their services even though prostitution was legal).

²⁴ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *21 (1765–1769).

²⁵ MODEL PENAL CODE § 2.01(1), Commentaries, Comment to § 2.01 at 214–15 (1985).

²⁶ In George Orwell's famous negative utopia book *1984*, the Thought Police were experts at ferreting out "criminals" by their expressions and movements. As a result people trained themselves not to show any expression which could give them away. *See* GEORGE ORWELL, *1984* (1992).

²⁷ *See* John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978) (describing the medieval European practice of torture to extract "voluntary" confessions).

²⁸ *See* Colorado v. Connelly, 479 U.S. 157 (1986) (finding that absent police misconduct confession by mentally ill person is voluntary and thus admissible in evidence, and noting that whether the confession is reliable is governed by the state's evidentiary rules, not Due Process). *See also* Susan Saulny, *Why Confess to What You Didn't Do?*, N.Y. TIMES, Dec. 8, 2002, at p. 5 (noting that "when false confessors are later asked why they confessed, the No. 1 answer is 'something like I just wanted to go home'").

²⁹ *See, e.g.*, 7 JOHN HENRY WIGMORE, EVIDENCE AT TRIALS AT COMMON LAW, § 2071, at 516 (James H. Chadbourne ed., rev. ed. 1978) (noting that a confession "'requires' some proof that a crime has been committed"). *But see* Connelly, 479 U.S. at 183 (Brennan, J., dissenting) (arguing that a mentally ill person's confession should be corroborated by "physical evidence link[ing] the defendant to the alleged crime").

³⁰ *Cf.* ORWELL, *supra* note 26, at 26: "Always the eyes watching you and the voice enveloping you. Asleep or awake, working or eating, indoors or out of doors, in the bath or in bed—no escape. Nothing was your own except the few cubic centimeters inside your skull." And of course, with the Thought Police everywhere, even those few cubic centimeters were not your own.

³¹ GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 2 (2d ed. 1961) (noting that the better reasons for not punishing for intent are "(1) the difficulty of distinguishing between daydream and fixed intention in the absence of behavior tending towards the crime intended, and (2) the undesirability of spreading the criminal law so wide as to cover a mental state that the accused might be too irresolute even to begin to translate into action").

³² *See* Gerald Dworkin & David Blumenfeld, *Punishment for Intentions*, 75 MIND 396 (1966) (noting that if intentions were punishable "[t]he resultant guilt would tend to impoverish and stultify the emotional life").

³³ *See* RAMBAN, *supra* note 6, at 347 (discussing which of the commandments are applicable in modern times).

³⁴ There are many disqualifications for being a witness. *See, e.g.*, BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 24b (disqualifying specified wrongdoers and relatives).

³⁵ The requirement that two witnesses observe the act is found in three places in the Torah: *Numbers* 35:30, *Deuteronomy* 17:6, 19:15.

³⁶ BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 80b (discussing whether the warning must include the particular death penalty for which the actor would be liable if he completed the act).

³⁷ *Id.* at 81b.

³⁸ *Id.* at 9b.

³⁹ *See, e.g., id.*, *Kiddushin* 42b (noting that "there can be no agency to commit an act of transgression").

⁴⁰ *Id.*, *Sanhedrin* 37b ("The judge says to the witnesses, 'Perhaps this is how you saw it happen: That someone ran after his fellow into a ruin and you ran after the pursuer, and you found a knife in the pursuer's hand, with the victim's blood dripping from it, and the body of the victim twitching on the floor. If this is what you saw, you in effect did not see anything.'") (footnote omitted).

⁴¹ *Id.*, *Makkos* 4b (noting that "a person does not receive lashes for any prohibition whose transgression involves no action") (footnote omitted).

⁴² This can be inferred from the rule against circumstantial evidence.

⁴³ BABYLONIAN TALMUD, *supra* note 2, *Makkos* 4b (noting that "[j]ust as defaming is a prohibition whose transgression involves no action—merely defamatory speech, which is not legally considered an action") (footnote omitted).

⁴⁴ RAMBAN, *supra* note 6, at 17 (regarding commandment number 15, "summoning people to idolatry," the Ramban says "[t]he punishment for contravention of this prohibition is stoning") (footnote omitted).

⁴⁵ *Id.* at 251 (quoting the *Mechilta* for the proposition "that coveting is the root from which all crimes spring").

⁴⁶ HARAV BORUCH HALEVI EPSTEIN, *THE ESSENTIAL TORAH TEMIMAH: Shemoth* 132 (Shraga Silverstein trans., 1989) (footnote omitted): "You shall not covet—I might think even by word [without act]; it is therefore written (7:25): 'You shall not covet the silver and gold upon them and take them.' Just as there, transgression is conditional upon act, here, too."

⁴⁷ 1 SEFER HA HINNUCH (THE BOOK OF [MITZVAH] EDUCATION) 190 (Charles Wengrov trans., 1989). This book is ascribed to Rabbi Aaron ha Levi.

⁴⁸ RAMBAN, *supra* note 6, at 250.

⁴⁹ *Id.*

⁵⁰ *Id.* at 251.

⁵¹ *Id.*

⁵² See LEIBOWITZ, *supra* note 11, at 343, 346–48.

⁵³ See ARTSCROLL, *THE TEN COMMANDMENTS* 60 (Avroham Chaim Feuer trans., 1986) (stating that "desire refers to an unrealized wish, while covetousness refers to a desire that is realized"); BABYLONIAN TALMUD, *supra* note 2, *Yoma* 38b (explaining the reason for the prohibition against mere desire: "A person cannot encroach upon what is set aside for others").

⁵⁴ ABRAHAM CHILL, *THE MITZVOT, THE COMMANDMENTS AND THEIR RATIONALE* 53 (n.d.).

⁵⁵ *Id.*

⁵⁶ LEIBOWITZ, *supra* note 11, at 347–48 (quoting Malbim and Solomon Wertheimer).

⁵⁷ *Id.* at 346.

⁵⁸ LEIBOWITZ, *supra* note 11, at 347.

⁵⁹ The Tenth Commandment does not preclude one from envying and wanting another's knowledge or good character traits. This is not anomalous since coveting in that instance takes nothing away from the possessor and spurs the covetee to achieve that which he desires by his own efforts. Note that all of the coveted items in the Tenth Commandment are capable of possession and are unique, and therefore wanting and taking them deprives the owner of them.

⁶⁰ See RAMBAN, *supra* note 6, at 251–52.

⁶¹ LEIBOWITZ, *supra* note 11, at 346.

⁶² See IRVING M. BUNIM, *1 ETHICS FROM SINAI* 36 (Shubert Spero & Charles Wengrov eds.) (1964):

People wonder about the need for the many Talmudic laws that we are required to observe. Essentially they are a "fence," instituted to protect the biblical commandments against the danger of violation. This is a basic approach found in the Bible itself. The *nazir* is a person who took upon himself a vow of abstinence which forbade him to drink any wine or other intoxicating liquors. The Bible, however, imposes upon him further restrictions: he may not drink vinegar derived from wine, or eat dried grapes, raisins or anything else derived from the grape vine. These are fences designed to keep the individual distant and remote from the area where danger might lurk. Man is only human and can succumb to temptation. The least association with the forbidden item can ignite a chain reaction which could shortly lead to the most flagrant transgressions. The Sages of the Talmud had a most realistic view of human nature and the power of the attraction of sin.

⁶³ BABYLONIAN TALMUD, *supra* note 2, *Beitzah* at xxxiv (Introduction) (discussing the rabbinic laws of *muktzeh*).

⁶⁴ See HIRSCH, *supra* note 13, at 280: "It is just this . . . [coveting and desiring] which sets the seal of God on the Decalogue. A mortal lawgiver could also have decreed 'thou shall not murder[,] etc. But 'thou shall not covet,' only God can forbid . . . Before Him, not only deeds but thoughts and inclinations are manifest."

⁶⁵ ARTSCROLL, *THE TEN COMMANDMENTS*, *supra* note 53, at 61 (notes) ("[T]hat the First and the Tenth Commandments are interdependent and interrelated. A person who believes firmly in I [alone] *am HASHEM your God* will not question His providence and will experience no desire for that which God bequeathed to another. But someone who covets another man's property will eventually question and even deny God's sovereignty . . . [In addition], [t]he man who becomes obsessed with a burning passion for his Maker has not room in his heart to covet another's belongings.").

⁶⁶ NACHSHONI, *supra* note 7, at 483.

⁶⁷ ISADORE TWERSKY, INTRODUCTION TO THE CODE OF MAIMONIDES (*Mishnah Torah*) 442 (1980).

CHAPTER FIVE

The Stubborn and Rebellious Son and the Prediction of Future Criminality*

The rules governing rabbinic courts in criminal cases also apply to what seem at best to be quasi-criminal offenses. *Deuteronomy* 21:18–21 says:

If a man have a stubborn and rebellious son, that will not hearken to the voice of his father, or the voice of his mother, and though they chasten him, will not hearken unto them; then shall his father and his mother lay hold on him, and bring him out unto the elders of his city, and unto the gate of his place; and they shall say unto the elders of his city: "This our son is stubborn and rebellious, he doth not hearken to our voice; he is a glutton, and a drunkard." And all the men of his city shall stone him with stones, that he die; so shalt thou put away the evil from the midst of thee; and all Israel shall hear, and fear.

The rules governing the rebellious son present an immediate contradiction. Jewish law has very strict requirements concerning adjudication and punishment of wrongdoers by the rabbinic courts. The suspect must be warned by two¹ competent witnesses,² who admonish him before he commits the act,³ and the suspect must verbally acknowledge the admonition⁴ and then go on to commit the completed offense before the eyewitnesses.⁵ Confessions,⁶ circumstantial evidence, and hearsay are inadmissible in criminal cases.⁷ The judges interrogate witnesses intensively to assure that their testimony is reliable and accurate.⁸ These rules necessarily mean that convictions will be difficult to secure and that many factually guilty defendants will be acquitted. They also mean, however, that absent collusion between the two witnesses no innocent person can be convicted.

The purpose of Jewish law in this context, then, is righteous judgment,⁹ that is, absolutely assuring acquittal of the innocent.¹⁰ Justice is thus being defined narrowly, as focusing solely on the accused and mandating acquittal except in highly circumscribed situations. Given this exclusive focus on precluding conviction of the innocent, social utility concerns are virtually irrelevant in the rabbinic courts, except for certain habitual offender cases and, on rare occasions, in times of emergency.¹¹ Filling the gap is the king's court, which is not constrained by many of these procedural safeguards, and the possibility that the blood avenger would exact retribution extra-judicially.¹² Also omnipresent, albeit in the background, is the notion of divine intervention, both in this world and the next, to punish factually guilty defendants who escape conviction by the

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human courts.¹³

The tension between the foregoing procedural rules and the law of the stubborn and rebellious son is clear. On the one hand, normative Jewish law manifests a preoccupation—some might say an obsession—with assuring that innocent persons will never be punished, coupled with an apparently deep distrust of fallible human courts. Seemingly at the opposite pole is the rebellious son provision, which permits execution based on the non-criminal acts of gluttony and drunkenness because, *inter alia*, it is feared that the child ultimately will rob and kill to support his addiction. We will attempt to reconcile these ostensibly contradictory provisions of Jewish law and, in the process of analyzing the law of the stubborn and rebellious son, will expose some of the intricacies and beauty of talmudic methodology.

At the same time, the issue presented by the rebellious son provision is not without contemporary relevance. Prediction of future criminality is a matter of growing significance in American jurisprudence, evidenced not only by the increasing prominence of the issue in academic circles,¹⁴ but also by the proliferation of statutes designed to prevent future crimes, ranging over a wide spectrum¹⁵ that includes recidivist sentencing,¹⁶ preventative detention,¹⁷ civil commitments,¹⁸ and capital punishment.¹⁹ Undoubtedly, such legislative activity will be given added impetus by the Supreme Court's decision in *Kansas v. Hendricks*,²⁰ reaffirming the government's power to incarcerate offenders to prevent future crimes.²¹

Although measures for predicting and preventing future crime are very much in vogue, a substantial body of literature suggests that prophecy of this sort is a very speculative business,²² resulting in massive inclusion of persons who would not, in fact, engage in the predicted anti-social behavior.²³ The Supreme Court has spoken to this issue on a number of occasions, acknowledging that "some in the psychiatric community are of the view that clinical predictions as to whether a person would or would not commit violent acts in the future are 'fundamentally of very low reliability,'"²⁴ and further noting that "psychiatric predictions of future dangerousness were wrong two out of three times."²⁵ At the same time, however, the Justices have concluded that, although a prediction of future behavior "is difficult, . . . [that] does not mean that it cannot be made,"²⁶ and that, moreover, "there is nothing inherently unattainable about a prediction of future criminal conduct."²⁷

These somewhat facile statements suggest a lack of appreciation of the inherent difficulty of the task and the consequences of using inadequate methodologies to identify the dangerous predator. To be sure, the stakes are high on both sides; however, in our constitutional system, primacy presumably should be given to individual liberty,²⁸ and if mistakes in predicting future criminality are to be made—as they surely will be—they should be on the freedom side of the ledger,²⁹ particularly when dealing with gross deprivations, such as long-term incarceration and capital punishment.

In contrast, the rabbinic transmitters and interpreters of Jewish law showed a healthy respect for the dangers of predictive assessments in criminal contexts. When dealing with prediction of future criminality, talmudic law, like American law, looks closely at the acts of the individual that suggest a propensity for future violence. Unlike contemporary law, however, those acts were not the rabbis' primary focus. They also considered any behavior or conditions tending to diminish the likelihood of future criminality and, as a matter of law, afforded exemption on the basis of such factors, no

matter how attenuated they might be.

At the very least, this substantial body of Jewish law³⁰ reminds us that there is nothing new under the sun.³¹ Then, as now, lawmakers grappled with the problem of how to identify persons who would go on to commit serious crimes in the future. Two millennia have passed since the talmudic Sages spun out their complicated prescription for prediction of future criminality. Their painstaking efforts to reconcile the competing values at stake provide valuable lessons, and an examination of the talmudic approach may be helpful to those concerned with this exceedingly intractable and very important issue.

In this chapter, we examine the stubborn and rebellious son law in its biblical context, analyzing the elements of the crime and comparing the stubborn and rebellious son law to other relevant verses in the Old Testament. We will also look at the law in its broader talmudic context, considering the structure of tractate *Sanhedrin* in which it is found and comparing the rebellious son provisions with the normative Jewish law of criminal procedure, and analyze the Mishnah and Gemara's restrictions of this singular law. We conclude that, although there may be several rationales for the stubborn and rebellious son law, all of its numerous limitations may be viewed as serving to assure that only those who are certain to commit serious crimes will be punished.

A. The Biblical Rule

Immediately before its discussion of the stubborn and rebellious son, the Torah, the first five books of the Bible, deals with two other seemingly unrelated topics: marriage to women "of goodly form" captured in wartime;³² and the equitable treatment of spurned wives and their offspring.³³ Relying on much earlier sources,³⁴ Rashi, the eleventh century master exegetist of the Torah and the Talmud, suggests a cause-and-effect or chain reaction relationship between the verses concerning captive women, spurned wives, and rebellious sons.³⁵ A Jewish soldier who takes a war bride based on her physical attributes will learn that beauty is ephemeral and unimportant and will eventually hate and spurn this woman, and, moreover, their son will be a glutton, drunkard, and rebel.³⁶ Interpreted in this manner, the verses are interrelated and have a pedagogical thrust, teaching selectivity in the choice of a spouse which would produce a harmonious marital relationship which would in turn result in good and obedient children. As we shall see, the verses dealing with the stubborn and rebellious son also have been viewed, in and of themselves, as at least in part didactic.

The Torah's terminology for a stubborn and rebellious son is *ben sorer umoreh*. The Hebrew word *ben* means son. The word translated as stubborn, or sometimes wayward,³⁷ is *sorer*, from a root meaning to rebel, to be stubborn or brazen, or to be unaccepting of authority.³⁸ Using a different root form the definition of which is to stray or turn, Rashi explains that *sorer* means the boy is turning away from proper behavior.³⁹ The Hebrew word for rebellious is *moreh*, which, according to Rashi, denotes rebellion against his father's words.⁴⁰ A kindred Hebrew root means to teach,⁴¹ and the Torah may have been implying that the child is teaching himself or others to do evil.⁴²

The verses can be divided into three parts. Verse eighteen describes the elements of the crime, referring to a stubborn and rebellious boy who refuses to listen to his parents even after they discipline him.⁴³ Verses nineteen and twenty prescribe the

adjudicative procedure, requiring the father and mother to bring their son to court and to declare to the judges that he is stubborn and rebellious, a drunkard and a glutton, and does not heed their admonitions.⁴⁴ Verse twenty-one gives the punishment and its rationale,⁴⁵ seemingly providing two reasons for the imposition of stoning: One is uprooting the evil in society's midst, and the other is that "all Israel shall hear, and fear."⁴⁶ Although the first goal of eliminating the wrongdoer from society can be viewed as resting on a punitive rationale that seeks incapacitation or specific deterrence, it is arguable that both of the proffered reasons relate solely to societal interests, that is, bad persons have a deleterious effect on society and must be extricated, and others must be deterred from engaging in similar conduct—a goal of general deterrence. It is also possible to read the final verse as providing only one reason, uprooting evil for the purpose of general deterrence.⁴⁷ These latter two alternative interpretations thus suggest an exclusively utilitarian approach, punishing the son only because of the effects his acts have on society.

Commenting on the "hear and fear" terminology, Nachmanides, also known by the acronym "Ramban," the thirteenth century commentator and philosopher, emphasizes the general deterrence aspect and notes that this language appears only four times in the Bible.⁴⁸ Aside from the stubborn and rebellious son, the Torah provides the cases of the rebellious elder who defies a decree of the Great Sanhedrin,⁴⁹ the witnesses who plot to condemn someone to a wrongful judicial sanction,⁵⁰ and those who incite others to worship idols.⁵¹ In the latter cases, the Torah defines the crime in terms of conduct rather than result. The rebelling elder is punished whether or not he succeeds in fomenting dissension with respect to Torah law, plotting witnesses are convicted although they have not succeeded in causing the intended victim's punishment,⁵² and the inciter is condemned even when others have not listened to him or worshiped idols as a result. Similarly, the stubborn and rebellious son is punished on the basis of his present misconduct in order to deter similar actions by others and out of a concern for the far more serious wrongdoing that will develop from this form of behavior.⁵³

At the same time, the stubborn and rebellious son provisions remain unique and can be distinguished from the other "hear and fear" cases in a number of respects. First, the rebellious son alone is punished on the basis of predicted future misconduct that is significantly attenuated and different in kind from the original wrongdoing,⁵⁴ i.e., gluttony and drunkenness leading to robbery and murder, as opposed to the other three cases in which conduct and result are closely linked and directly related. For example, the connection between inciting others to worship idols and idol worship itself is indisputable. Second, the rebellious son's immediate misbehavior seemingly hurts only himself, whereas the others' misconduct implicates and may injure third parties. Third, in our case, the original rebelliousness is misconduct of a considerably less serious nature than the predicted future criminal acts, whereas the original wrongdoing of the rebellious elder, plotting witnesses, or inciters to idol worship is itself inherently dangerous. Fourth, in each of the other three "hear and fear" cases, the future result that the Torah is seeking to prevent is crystal clear, whereas the *Deuteronomy* verses on the stubborn and rebellious son leave the undesirable repercussions in doubt. Finally, in the case of the stubborn and rebellious son, the predicted future criminal acts that the Torah wishes to preclude are committed only by the rebellious youth himself. In the other three cases, however, the actors' misconduct enmeshes others in the resulting wrongdoing—others are

persuaded to rebel against the Torah or to condemn an innocent person or to worship idols.

Though clearly distinguishable from the other "hear and fear" verses, the rebellious son provision also shares a commonality with them, for each one is attempting to deter future wrongdoing. The underlying assumption, therefore, is that punishment to prevent such future misconduct is a valid aim, at least in those particular cases.

Ostensibly contradicting that assumption is the talmudic analysis of the narrative passage in *Genesis* dealing with the expulsion of Hagar and her son, Ishmael, from Abraham's house.⁵⁵ Mother and child are in the desert and have run out of water, prompting a cry of anguish from Hagar, who cannot bear to watch her son's impending death.⁵⁶ God hears her voice, and an angel calls out to her, "What ails thee, Hagar? [F]ear not; for God has heard the voice of the lad where he is."⁵⁷ Rashi's commentary focuses on the phrase "where he is," which appears to be superfluous.⁵⁸ Rashi explains it means that God judges persons by their present deeds, rather than by what they will do in the future.⁵⁹ He cites a fascinating Midrash,⁶⁰ in which the angels question God's judgment in saving Ishmael by creating a well for him, arguing that this is inappropriate because his seed is destined to kill the Jewish people by thirst. God then engages the angels in dialogue, asking, "At present, what is [Ishmael], righteous or wicked?' They said to Him, 'Righteous.' He said to them, 'In accordance with the deeds of the present I judge him.'"⁶¹ Rashi also relies on a talmudic statement by Rabbi Isaac that "[m]an is judged only according to his actions up to the time of judgment, as it says, 'God hath heard the voice of the lad as he is there.'"⁶²

On the surface, this midrashic interpretation and Rabbi Isaac's pronouncement would appear to be at odds with the execution of the stubborn and rebellious son based on his future wrongdoing rather than his present conduct. Differences, of course, do exist between the two cases. The angels were accusing Ishmael's seed rather than Ishmael himself of wickedness.⁶³ Indeed, the angels were obliged to acknowledge that Ishmael was, at the present time, righteous.⁶⁴ If, then, Ishmael was righteous at the time of judgment, his case is distinguishable from that of the rebellious son, who is, at the least, guilty of gluttony, drunkenness, and refusal to obey parental commands.⁶⁵ Thus, taken together, the Ishmael story and the stubborn and rebellious son law set forth parameters for punishment to preclude future crimes. The subsequent crimes sought to be prevented must be those of the accused himself and not of his descendants,⁶⁶ and there must be present wrongdoing on the part of the accused, so that he can be adjudged wicked rather than righteous. In addition, the companion "hear and fear" cases, although also requiring present wrongdoing by the respective defendants, permit punishment based on anticipated future conduct by third parties.

These distinctions between the stubborn and rebellious son verses, the Ishmael narrative, and the other "hear and fear" cases, help to clarify the rebellious offspring law but do not resolve its many ambiguities. The Torah's terse language regarding the rebellious son raises a number of questions. Obvious definitional issues exist with respect to gender, age, gluttony, and drunkenness. Does the law apply to daughters as well as sons? What are the age limits of rebellious sons? What and how much must be eaten and imbibed to constitute gluttony and drunkenness? Beyond these questions, somewhat more subtle issues are presented. For example, aside from their role as accusers, what else, if anything, is expected of the parents? Can the boy be adjudicated a stubborn and

rebellious son even if he is neither a glutton nor a drunkard on the theory that excessive eating and drinking are included in the procedural segment of the verses—treating the parents' recitation to the court—only as examples of rebelliousness? That is, is the sole element of the crime rebelliousness in any form or must rebelliousness take only the form of gluttony and drunkenness? Alternatively, assuming that the boy *is* a glutton and a drunkard, can he be adjudicated stubborn and rebellious if these are not the areas of misconduct that disturb his parents and prompt their admonitions, but rather his rebelliousness against them takes some other form (e.g., refusal to clean his tent)? In any event, since gluttony and drunkenness are not capital offenses, why is the youth stoned to death? For a serious effort to grapple with all of these questions, it is necessary to turn to the Talmud, the Oral Law of Judaism.

B. Placing the Law of the Stubborn and Rebellious Son in its Broader Talmudic Context

The Babylonian Talmud is arranged in sixty-odd tractates,⁶⁷ which, with a few exceptions, consist of segments of the Mishnah, a codification of the Jewish Oral Law redacted around 200 C.E., and of the Gemara, a commentary on the Mishnah completed three centuries later.⁶⁸ Tractate *Sanhedrin*, which discusses the stubborn and rebellious son, is divided into eleven chapters.⁶⁹ Chapters one through five deal, in general, with court procedure, jurisdiction, and rules of evidence.⁷⁰ Chapter six examines stoning, one of the four biblically prescribed death penalties, and chapter seven continues the discussion of stoning and also treats the other death penalties, namely, burning, strangulation, and decapitation by sword.⁷¹ The fourth mishnah of chapter seven lists the wrongdoers subject to stoning and mentions among them the stubborn and rebellious son.⁷² Chapter seven continues with eight *mishnayot* dealing with the particulars of the offenses subject to stoning.⁷³

Although referred to in chapter seven, the stubborn and rebellious son offense is not elaborated on until chapter eight, whose separate discussion of the recalcitrant offspring is far more extensive than the earlier delineations of the other offenses subject to stoning.⁷⁴ In addition, chapter eight treats the circumstances in which one can slay both a burglar and a *rodef* (pursuer), the latter being a person who, in the prescribed circumstances, may be killed because he is pursuing and trying to murder another.⁷⁵ The remaining chapters describe those subject to burning, decapitation, and strangulation, as well as those who do not have a share in the world to come.⁷⁶

In examining the structure of tractate *Sanhedrin*, it seems apparent that, at least as a matter of logic, chapter eight's discussion of the stubborn and rebellious son should have been included in the preceding chapter, which considers all the other offenses subject to stoning. Instead, the rebellious child is placed in a separate chapter, and, moreover, the details of the offense are set forth together with a discussion of two other offenders, neither of whom is subject to stoning.

The basis for this seemingly curious juxtaposition of the rebellious son, the burglar, and the pursuer, is that each of these offenders is being punished for predicted future criminality rather than for proven past misconduct, even though attempts generally are not punishable under Jewish law.⁷⁷ If successful in carrying out their plans, the pursuer and the burglar would commit murder, an offense punishable by decapitation.⁷⁸

According to the Talmud, both may be killed to prevent murder, and their execution is accomplished by self-help.⁷⁹ Thus, *Sanhedrin* permits *private actors* to render judgment without a trial or court proceeding simply by the use of presumptions based on predicted future criminality—an analogue to our own law of self-defense. As we shall see, the stubborn and rebellious son provision permits the *court* to punish for predictive behavior. Although, on the surface, it may seem more radical to permit private executions, not to do so would effectively facilitate murder by prohibiting self-defense. Unlike the cases of the pursuer and the burglar, however, judicial involvement is required with respect to the stubborn and rebellious son, presumably because the relationship between the conduct and the predicted future criminality is much more tenuous, indirect, and belated.

Thus, the stubborn and rebellious son, the burglar, and the pursuer represent a spectrum of predictive behavior. The most predictive conduct is that of the pursuer, who is on the verge of killing someone unless stopped immediately; slightly less predictive is that of the burglar, who enters at night when the occupants are likely to be present, and who is consequently presumed to be willing to kill someone who gets in his way. Far more attenuated is the case of the stubborn and rebellious son. Jewish law requires the court to execute him because of his gluttony and drunkenness, based on a conclusion that otherwise he will, in the future, take to the highways and rob and murder innocent travelers.⁸⁰ Again, as in the previous comparison to rebellious elders, plotting witnesses, and inciters to idolatry, the stubborn and rebellious son has relatives but they are distant. Although comparable in some respects to the pursuer and burglar, the rebellious son is nonetheless unique because the connection between his wrongdoing and the ultimate result is not direct, clear, or imminent. The activities of the burglar and the pursuer more than suggest a murder waiting to happen, whereas the link between gluttony and homicide is neither manifest nor immediate.

Presumably because of this tenuous relationship, Jewish law imposes a number of extremely stringent prerequisites to liability as a rebellious offspring. These severe impediments to a finding of guilt in the case of a stubborn and rebellious son are not, however, out of sync with normative Jewish law. Indeed, limitations on capital offenses permeate the Talmud. One can view such restrictions as either arbitrary barriers promulgated by the Sages to prevent infliction of the death penalty, or as divinely mandated Oral Law requirements, some of whose rationales are unknown and unknowable, or as restrictions designed to assure that only the guilty are punished.

C. The Stubborn and Rebellious Son in the Mishnah

Although its standard English translation is approximately eight hundred pages long,⁸¹ the Mishnah is essentially a terse compendium of black-letter law, for which it does not usually provide rationales.⁸² Its brevity is attributable at least in part to the Mishnah being a redaction of law theretofore memorized and transmitted orally for many centuries, a phenomenon that facilitated an ongoing rabbinic dialogue concerning the meaning of the law.⁸³ The Mishnah adds extensive restrictions to prosecution of the stubborn and rebellious son. The majority opinion—quoted in the Mishnah without attribution and known as the *stam*⁸⁴—and the dissenting opinions restrict and define the juvenile, his actions, his parents, and the court. Viewed in the raw, these restrictions appear to be little more than *ad hoc*, arbitrary limitations designed to thwart application

of the biblical law. On more careful inspection, they can be seen instead as links created pursuant to a unified principle that is of the very essence of an effective and humane criminal justice system—one that examines the universe of offensive behavior running the gamut from the merely annoying to the unquestionably dangerous, reserving criminalization for the most serious and aberrant forms of misconduct and then substantively defining those crimes in such a way as to capture only that detrimental behavior.

i. Summary of the Mishnaic Rules

At the outset, the mishnaic majority significantly limits the pool of individuals subject to liability, comprising only males who have reached the physiological age of adulthood (evidenced by their having two pubic hairs), but who are not yet completely adults (signified by a "full beard"—a euphemistic reference to full pubic hair).⁸⁵ According to the Mishnah, the defining activities of the rebellious son are gluttonous eating and excessive drinking, both of which are strictly delineated.⁸⁶ The prospective defendant must consume a *tartemar* of meat and one-half of a *log* of Italian wine.⁸⁷ If he eats a *tartemar* of another foodstuff or drinks one-half of a *log* of another beverage, even if intoxicating, he does not qualify as a stubborn and rebellious son.⁸⁸ The Mishnah further restricts this eating and drinking by defining the setting in which it must occur. If the accused consumes the prescribed amounts of meat and wine while involved with a group that is engaged in a religious activity such as a wedding celebration, that consumption also cannot qualify him as a stubborn and rebellious son.⁸⁹ Paradoxically, if he eats non-kosher food or food otherwise restricted from consumption, he is also immune from liability.⁹⁰ In addition, the young rebel must both steal from his father and consume the requisite amount of meat and wine away from home.⁹¹

The Mishnah also places limitations on the wrongdoer's parents, as well as the court. Both parents must admonish the youth, both must bring him to court, and both must consent to his execution.⁹² In addition, the tribunal cannot proceed if either parent is missing an arm or is lame, mute, blind, or deaf.⁹³ The court must follow a defined procedure. The boy is warned in a three-judge court, which orders him flogged.⁹⁴ Should he continue in his ways, he is brought before a court of twenty-three,⁹⁵ which judges him and, if he is found guilty, executes him by stoning.⁹⁶ If, however, the youth runs away prior to judgment, and his pubic hair is fully grown at the time of apprehension, he is immune from further prosecution.⁹⁷ On the other hand, if the boy escapes after conviction, he is executed even if his "lower beard" is fully grown when he is captured.⁹⁸

The mishnaic dissenters argue with the majority concerning three points. Rabbi Jose disagrees as to the volume of wine and meat that the youth must consume, requiring double the amount of each.⁹⁹ A second Rabbi Jose, known as Rabbi Jose the son of Judah, argues that the stubborn and rebellious son must steal from both parents, not merely from his father.¹⁰⁰ Rabbi Judah, the father of the second Rabbi Jose, adds the following restriction: "If his mother is not fit for his father, he does not become a 'stubborn and rebellious son.'"¹⁰¹ This cryptic pronouncement is discussed at length in the Gemara.

ii. Analysis of the Mishnaic Rules

What is the goal behind these stringent and seemingly arbitrary restrictions? What is the

Mishnah trying to accomplish with them? We can only resolve these questions by determining the Mishnah's understanding of the biblical law.¹⁰²

The Mishnah explains the reasoning behind the stubborn and rebellious son's execution as follows: A rebellious son "is condemned because of [what he may become in] the end: the Law has said, Let him die innocent and let him not die guilty [of a capital crime]."¹⁰³ This somewhat ambiguous statement might mean that the legal basis for allowing the boy's execution is his ultimate end; if that is true, he is being punished for the commission of a capital crime *in futuro*. Although it is a virtual truism that one is punished for crimes committed in the past rather than the future,¹⁰⁴ here it is different—it is in order that he may "die innocent." Thus, first the Mishnah gives the legal mechanism—namely, the entire procedure specified for adjudication of a stubborn and rebellious son—and, second, it provides an explanation why such a radical and rare legal mechanism is employed here.

This explanation nonetheless remains rather murky, because it does not make clear whether the rebellious son is killed to protect himself, in the sense that he will die without sin, to protect society, or to protect both. The Mishnah does, thereafter, append a series of maxims, the first of which states that the death of the wicked is beneficial to the wicked person and to society.¹⁰⁵ This would seem to indicate a concern for both, but it does not specifically state which basis or bases apply to the recalcitrant offspring. In other words, the Mishnah may believe that only one of these reasons applies to support the execution of the rebellious son, but it quotes a maxim that happens to contain another reason, in addition to the actual motivating factor. In any case, the Mishnah clearly views the law as predicated on future criminality, namely, the boy's ultimate destiny—his "end." A hint in the biblical language itself buttresses this mishnaic conclusion: While the Torah states that, even after being flogged, the boy still does not "listen" to his parents, the verb form in this instance is in the future tense, reading literally that he *will* not listen to them in the future. Although the nature of the subsequent criminality is not made clear in the Bible or the Mishnah, the Gemara, as well as later sources, indicate a fear that the youthful offender will ultimately commit robbery and murder to support his addiction to meat and wine.¹⁰⁶

The mishnaic restrictions support and refine this understanding of the biblical law. All of these limitations can be understood as an attempt to assure absolutely accurate predictions—that is, to guarantee that the only ones who will be condemned are those whose addiction is so firmly entrenched that it will lead inexorably to robbery and murder. At the same time, concededly, the restrictiveness of these rules virtually assures, as do almost all of the normative Jewish law criminal procedure rules, that some who are "guilty"—in this case, addicted beyond the point of no return—will escape conviction. Thus, when the Mishnah says the rebellious boy is killed on account of his ultimate "end," it means he is put to death because we are sure he is a person who cannot be rehabilitated and whose addictive behavior will ultimately lead him to do great evil to support that addiction. But how do we make this elusive prediction? Although the Mishnah does not provide rationales for all its rules, subsequent commentators, as well as a careful reading of the Mishnah itself, suggest the Mishnah's limitations all work to assure that only those who are clearly destined to commit serious crimes are executed.

The law applies only to males. Using typically terse language, the Mishnah states this point in three words, *ben velo bat*, literally, "son and not daughter," that could mean

something in the nature of males makes them more susceptible to gluttony, drunkenness, and rebelliousness, which in turn lead to pursuing a life of crime.¹⁰⁷ Although the Gemara commentary can be read as asserting that this restriction is a divine decree,¹⁰⁸ Maimonides, the twelfth century exegetist, codifier, philosopher, and physician, arguably interprets the *ben velo bat* language to mean males are far more prone to lustful physical addictions that lead to crime,¹⁰⁹ thus seemingly discerning a rational basis for the gender exclusion. Indeed, modern studies disclose that males are in fact far more likely to be alcoholics¹¹⁰ and to commit crimes, particularly violent ones.¹¹¹ While an increase in female crime and violence has occurred,¹¹² men retain the dubious distinction of a commanding lead in this regard. Thus, in terms of assuring accuracy in prediction, if women, as a class, are eliminated from the universe of potential defendants, far less likelihood of conviction of the innocent exists.¹¹³

The rebellious son must be an adult, signified by two pubic hairs.¹¹⁴ The Mishnah's explanation for this limitation is that a minor, that is, one who does not have two pubic hairs, has not entered the rule of *mitzvot*.¹¹⁵ *Mitzvot*, often translated as good deeds, are better defined as the commandments that a Jewish adult must obey.¹¹⁶ This choice of terminology to describe adulthood is quite instructive. The defining element of adulthood is being obligated to adhere to the law. It is only in adulthood that we can be sure the youth is in fact rebelling against lawful authority, thereby providing evidence that he will continue in this path; that is, when a minor transgresses that which he is not yet obligated to observe, we cannot be as sure that he is a rebel and that his behavior is predictive of future adult criminality.

On the other hand, the youth cannot have reached the physiological age of full adulthood, that is, having a "full beard," meaning complete pubic hair growth.¹¹⁷ The apparent rationale is that if the rebellious offspring *starts* his destructive behavior at an early age, we can see in that behavior evidence of a non-rehabilitatable person.¹¹⁸ While gluttony and excessive drinking on the part of a young adolescent are aberrant and thus indicative of a person out of control, that same behavior by an adult, although not laudable, does not establish with the same degree of certainty that his proclivity will develop into the kind of criminality that the Torah is trying to prevent through the stubborn and rebellious son law.¹¹⁹ In any event, although line-drawing with regard to age is in some sense arbitrary, distinctions between adults and children often must be made even though the resulting classifications may be over- or underinclusive.¹²⁰ Thus, most states make age seventeen or eighteen the cutoff for prosecution as a juvenile,¹²¹ even though we know that some nineteen-year-olds function on a pre-adolescent level and some sixteen-year-olds are quite mature.¹²² The Mishnah's physiological line drawing would appear to be at least as rational as its contemporary counterparts.

The prospective wrongdoer must consume a *tartemar* of meat and one-half of a *log* of wine.¹²³ Given the other Mishnah restrictions on prosecution, some of which seem quite extreme, one would expect the Mishnah to require consumption of voluminous amounts of meat and wine. Yet a *tartemar* of meat is merely one-half pound, and one-half of a *log* of wine is the equivalent of only three eggs. Also puzzling is that the Mishnah, the Gemara, and later commentaries are not particularly concerned about these seemingly small quantities. Perhaps this is because the Tosefta, a mishnaic era codification, states, "The stubborn and rebellious son—even if he has on his table the meals of [King] Solomon—does not qualify [to be judged as such], unless he places in

his mouth the proper volume."¹²⁴ Presumably based on the Tosefta, Maimonides explains the boy must consume the requisite quantity of meat "in one mouthful" and also "gulps down half a *log* of wine in one draught,"¹²⁵ thus emphasizing the *manner* together with the volume of consumption, which fits comfortably with *Deuteronomy's* characterization of the boy as a glutton and a drunkard. Since he is consuming meat and wine in such a fashion, it is a sign that he is addicted and will need to steal in the future to support his habit.

Also puzzling is that consumption of a *tartemar* of a food other than meat or one-half a *log* of a beverage other than wine does not subject the boy to prosecution.¹²⁶ Why should that be the case? If a boy gorged on fish or cake and swilled beer or hard liquor (and indeed the Gemara notes that figs, milk, and honey are intoxicating),¹²⁷ why is that insufficient to make him a rebellious son? The Mishnah says, "And though there is no absolute proof, there is a suggestion for this, as it is written [*Proverbs* 23:20]. 'Be not among wine [guzzlers]; [and] gluttonous eaters of flesh.'"¹²⁸ Thus, although it is possible that the rebellious son provision is referring to someone who overindulges in any food and any alcoholic beverage and that the verse from *Proverbs* is addressing only a specific problem or is referring to the specifically designated overindulgences only as examples, the similarity of the words glutton and guzzler in both verses indicates, but does not prove, that the *Deuteronomy* provision is referring specifically to meat and wine. At the same time, unlike other food and drink, meat and wine may be considered particularly addictive. The uniqueness of meat and wine may also be related to their color—red. Wine reminds one of blood.¹²⁹ Meat, of course, is red by virtue of its blood, and indeed the Gemara requires that the rebellious son eat his meat very rare.¹³⁰ Red may be viewed as the color of lust, arousing and symbolizing unbridled passions and desires that cannot be controlled and that ultimately lead to bloodletting, that is, murder.¹³¹

The Mishnah further specifies that a prospective defendant is exempt if he eats the prescribed amounts of meat and wine in various settings of a religious nature.¹³² These settings appear to follow a logical progression from situations in which any food and beverage consumption is optional to a case in which the communal activity involves consumption of meat and wine. Thus, the alleged rebellious son is immune if he eats and drinks with a group engaged in a religious activity that may or may not include food;¹³³ with persons gathered to publicize the one-day extension of the month, where consumption of bread, but not meat and wine, is part of the activity;¹³⁴ when eating the second tithe in Jerusalem, where it is common to consume meat and wine;¹³⁵ or in situations in which all gathered are partaking of meat and wine, such as a meal to comfort mourners.¹³⁶

The explanation for these rules seems clear. It is logical that gluttonous consumption in a religious setting will not have the same deleterious effect as uncontrolled and *ad hoc* orgies. Moreover, if the offender is involved in good deeds, however tenuously, we cannot predict with certainty that his gluttony will lead him down the road of no return. Maybe he will become more attentive to the commandments and in the process control his compulsive behavior. Finally, looking at the two foregoing situations in which it is most common to eat meat and wine, namely, the second tithe and the mourner's meal, the Gemara, apparently seeking to exclude nonaberrational conduct, observes that if "he eats it in the normal way . . . he is not drawn [to wickedness]."¹³⁷ At the opposite end of the spectrum, if the youth eats non-kosher or other religiously

proscribed food and drink, e.g., eating on a fast day, he also cannot be convicted.¹³⁸ This rule appears to be counterintuitive. If the youth is violating the dietary laws and thus defying God as well as disobeying his parents, would that not be stronger evidence of unbridled misconduct inevitably leading to criminal behavior?¹³⁹ The young adolescent who has no respect for any authority, divine or human, can, however, be viewed in a different light. One who has no faith and for whom all religious law is irrelevant, and who consequently engages in this conduct, arguably does not show aberrational behavior. Because he has not accepted the yoke of religious observance, his lack of self control is less exceptional, and his behavior does not necessarily evidence active rebellion. He is simply a young hooligan and hedonist rather than a natural born killer. On the other hand, one who has a strong internal barrier against rebellion from the religious laws and who nonetheless overcomes his religious scruples and engages in gluttony and drunkenness has thereby demonstrated with far greater clarity that he is prepared to do whatever is necessary to satisfy his lusts. His actions evidence the direct rebellion against authority (symbolized by rebellion against parents) that is the seminal predictor of the stubborn and rebellious son's conduct. Alternatively, one who violates the religious laws as well may be viewed as having neither the propensity nor the ability to hide his evil deeds. Therefore, we need not punish him now, for if matters get worse he will certainly be caught. Such is not the case, however, with the rebellious son, who is a hypocrite and knows how to maintain a facade of religiosity. We are afraid his deeds may get worse but that they will remain undetected. He must consequently be eliminated now.

According to the Mishnah, the boy must steal from his father rather than a stranger.¹⁴⁰ Stealing from a parent is logistically easier than theft from an outsider, and, thus, he will be able to continue stealing until theft too becomes an ingrained habit. In tandem with that limitation, the Mishnah requires the youth consume the food and drink away from home. When eating among strangers, he does not fear detection, because less likelihood exists that his gluttony and drunkenness will be observed by his parents.¹⁴¹ Because the boy knows how to conceal his evil ways, his parents will not administer appropriate discipline, and he will continue with his addictive behavior.

Thus, the characteristics and conduct of the rebellious son himself that establish his criminal destiny are his sex, his age, and his excessive consumption of addictive food and drink in settings and circumstances that encourage the addiction. And it is his ultimate destiny rather than his present acts that, according to the Mishnah, doom the stubborn and rebellious son.

The traits and behavior of the son alone, however, are insufficient to establish liability. The parents, too, play a key role. To begin with, both parents must prosecute him in order for the court to proceed.¹⁴² Presumably the father and mother, whose natural instincts are to love and protect their offspring, will initiate court proceedings solely as a last resort. Therefore, only if both determine the boy is beyond redemption are we prepared to predict future criminality, assuring a further safeguard that only the unredeemable will be subjected to capital punishment.

Moreover, only parents who possess certain characteristics may commence such prosecutions. If either parent is missing an arm or is lame, mute, blind, or deaf, the child cannot be so adjudicated.¹⁴³ Why does the Mishnah seize on these physical characteristics? It explains that these limitations are derived from the scriptural verses themselves, that is, the parents must have arms because the Torah specifies that his

"father and mother lay hold on him;" they must be able to talk to fulfill the requirement that they "say" he is stubborn and rebellious; they must have vision to tell the court, "this, our son;" and they must be able to hear to declare to the court that he is not "listening to our voice."¹⁴⁴

Hermeneutical derivation of these seemingly nonrational requirements from Torah verses does not preclude us from understanding them as also having a rational basis that is connected to accurate prediction of future criminality. The internal safeguard that both parents bring their offspring to court arguably cannot be satisfied if one of them is handicapped and, as a result, is, at least in some measure, dependent on the other parent physically, which may in turn create psychological dependence impairing that parent's exercise of independent judgment about his or her child.¹⁴⁵ Moreover, brushing political correctness still farther aside, parents who are seriously physically handicapped may be less able to provide an environment of firm discipline, so that the boy's rebellion cannot be viewed as totally aberrant and indicative of a bad seed, but merely the product of a permissive upbringing. Alternatively, the physical act of bringing the child to court impresses on the parent the seriousness of what he or she is doing, and without that act we cannot be sure that the parent has internalized the gravity or reality of initiating the court process.

Nonetheless, that the Mishnah chooses to employ hermeneutics to explain these particular restrictions, as well as the gender exclusion, suggests more is at play than logical derivation based on a desire to assure accurate prediction and prevention of future criminality, the articulated rationale of the law. We will explore this possibility further in the Gemara analysis.

Finally, beyond the boy and his parents, the third essential actor in this drama is the judiciary. After bringing their son to a three-judge court, the parents warn him to desist from his rebellious conduct, and the court orders him flogged.¹⁴⁶ It is only if he persists in his misbehavior that he is then brought before a court of twenty-three judges, tried as a rebellious son and, if convicted, executed.¹⁴⁷ Thus, the judicial system is enlisted to screen out inappropriate cases involving parents who have not fulfilled the requirements of the law by attempting to discipline their child, who has refused to "listen to their voice."¹⁴⁸ The aberrant parent who declines or fails to take action as his or her son becomes more enmeshed in addictive behavior is not permitted to invoke the judicial machinery. At the other extreme, the court also presumably precludes prosecution by parents who are overly strict and consequently mistake normal adolescent *sturm* and *drang* for true rebellion. Similarly, the court filters out boys who do not meet the law's age and conduct requirements, as well as those who will in fact respond to severe discipline in the form of flogging, reserving the ultimate sanction for the rare individual who is beyond rehabilitation.

The final Mishnah provision dealing with judicial proceedings against a rebellious son discusses a boy who runs away during his trial. If flight occurs before conviction and prior to apprehension his "lower beard" grows around, the Mishnah says he is exempt from punishment.¹⁴⁹ If, however, he escapes after conviction, following which his pubic hair growth is completed, he remains liable.¹⁵⁰

The second scenario is unremarkable, in that it prevents a convicted wrongdoer from profiting by his own improper flight.¹⁵¹ Indeed, contemporary law goes farther, barring appellate review in such circumstances.¹⁵² Moreover, this result is consistent with

the preventative rationale, because conviction by the twenty-three-judge court, notwithstanding the hyperstringent requirements of the law, makes it abundantly clear that the defendant is destined to be a murderer and can be saved from this fate only by capital punishment. This final defiance marks him as a truly rebellious son.

The first part of this Mishnah provision is decidedly more difficult to understand. Why should the boy be able to gain by running away during his trial, perhaps when he sees the proceedings moving in the direction of conviction? Looking at its plain meaning, the Mishnah may be telling us that the age limitation—from two hairs to full pubic growth—is an absolute, nonwaivable jurisdictional prerequisite. To the extent that the age requirement is consonant with a preventative rationale, its application in this context may be justifiable on the same basis. This rule may also be the Mishnah's final effort to thwart conviction through a purely arbitrary limitation that has the effect of encouraging a stubborn and rebellious son to escape. Yet even here, in this most extreme case, there may be at least undertones of the preventative rationale, at least if we view the youth's escape and the Mishnah's response to it in a different light, one that admittedly neither the Mishnah nor the Gemara addresses and that is also admittedly strained.

The Mishnah restrictions on prosecution can be seen as a series of warnings escalating in severity: the parents discipline the boy and warn him privately; then, if he still persists, they warn him formally before two witnesses;¹⁵³ if he nonetheless continues to rebel, he is brought before a three-judge court and flogged. At least some boys can dismiss all of these actions, even the flogging, as adult bluffs or attempts to bully them into submission. The convening of a twenty-three-judge court, with authority to impose the death penalty, is, however, of a different order. The youth may finally realize that his behavior has in fact been beyond the pale all along, that the adult actors in this drama are indeed serious, and that the only way he can halt his inexorable march toward death by stoning is through an escape. Then, after his flight, the court does not know whether the boy has changed his ways or not. Perhaps, then, this is the Mishnah's ultimate gift of the benefit of the doubt—affording the boy a last clear chance to redeem himself, even if by another act of rebellion. The door closes, however, when the court renders its judgment of conviction.

The Mishnah's tripartite division, with stringent requirements regarding the boy, his parents, and the court, brings the stubborn and rebellious son proceeding into the fold of normative Jewish criminal law, which severely circumscribes the use of capital punishment. All of these requirements are expressed in anonymous opinions in the Mishnah, which, according to mishnaic structure, reflect the majority view.

The mishnaic dissenters, too, may easily be viewed as concerned with accuracy in prediction. Two of the debated points regard the circumstances of the gluttony. Rabbi Jose requires the rebellious son to consume a larger volume of meat and wine for liability.¹⁵⁴ Clearly he can be understood as trying to assure absolute accuracy in prediction because the greater the amounts the more likely that the boy is both aberrant and truly addicted and that he will need to rob to support his habit. Rabbi Jose the son of Judah requires the youth to steal from both of his parents to qualify for prosecution,¹⁵⁵ a requirement that also can be understood as enhancing accuracy in prediction. One who steals even from his own mother must be desperate to sustain this addiction.¹⁵⁶ Thus, this is not a case of a child who is rebelling against only one parent, but rather one who knows no limits or boundaries.

The third dissent, that of Rabbi Judah, is quite interesting, as well as more problematic. He says that "if his mother was not fit for his father, he cannot be condemned as a stubborn and rebellious son."¹⁵⁷ Generally speaking, when the Mishnah states "not fit," it is referring to religiously forbidden marriages.¹⁵⁸ As such, Rabbi Judah's rule falls easily into the realm of prediction. If the basic marital relationship is flawed, the parents may not teach their son to obey the law or discipline him properly and perhaps cannot be trusted to make an accurate assessment of their son's criminal propensities.¹⁵⁹ Thus, a boy raised in such an environment may not himself be sufficiently blameworthy or aberrant for conviction as a rebellious son. Furthermore, rebellious behavior of a young adolescent living with parents who may be ostracized by society for their wrongdoing may not be predictive of criminal behavior on the boy's part at a later time and place. As we shall see, however, the Gemara interprets Rabbi Judah's position differently.

In sum, although the Mishnah does give nonrational, hermeneutically derived explanations for a few of its restrictions, at the same time each facet of both the majority and the dissenting opinions in the Mishnah may be understood as assuring the accurate prediction of future criminality. Nonetheless, at least some of these requirements are admittedly quite attenuated from that rationale and can be seen either as divine decrees or pedagogical rules or as arbitrary limits that in effect legislate the law out of existence. The Gemara's extensive discussions of the stubborn and rebellious son explore all of these possibilities.

D. The Stubborn and Rebellious Son in the Gemara

Like the original verses in *Deuteronomy*, the Mishnah's spare recitation of the rules governing the stubborn and rebellious son still leaves many questions unanswered. The Gemara's gloss resolves some, but not all, of these ambiguities and affords additional rationales for this mysterious law.

Because the Gemara consists of the statements and opinions of many scholars, the different ideas expressed therein are not necessarily consistent with one another. On the other hand, the redactors' decision to include these diverse ideas is an acknowledgment that the varying opinions are all deemed to be relevant and legitimate.¹⁶⁰ Although rules exist to resolve disagreements between particular Sages,¹⁶¹ the Gemara itself, in a frequently quoted statement, declares, regarding these disputes, "[The utterances of] both are the words of the living God."¹⁶² This dictum epitomizes the view that truth is inclusive and holistic in nature.¹⁶³

Just as the Mishnah interprets, amplifies, and analyzes the Deuteronomic provisions, the lengthier and more expansive, albeit still terse, Gemara discussion does the same for both the Mishnah and the biblical verses. The Gemara tracks the Mishnah's tripartite approach, looking to the child, his parents, and the court. In contrast, whereas the Mishnah gives what appears to be a single, overarching explanation for the law, that is, to prevent future criminality,¹⁶⁴ the Gemara's analysis, while clearly focused on defining the legal parameters of the rebellious son provision, suggests a more complex and multifaceted understanding of its underlying rationales. Similarly, although the Mishnah's limitations appear to be geared primarily to its future criminality rationale and thus emphasize accuracy in prediction, the Gemara incorporates a variety of rationales for

the law, resulting in restrictions that are more diverse and, in some instances, quite extreme—indeed so extreme they appear to render the law nugatory.

The Gemara's very first discussion of the stubborn and rebellious son law is a brief colloquy that is illustrative of the brilliance, conciseness, and poetic cadence of talmudic discourse, as well as the breadth of knowledge and understanding necessary to enable the reader to study this vast repository of Jewish law.¹⁶⁵ Highlighting the unusual nature of the law, the Sages consider the Mishnah's assertion that a minor is not subject to prosecution under the law.¹⁶⁶ The Gemara asks, How do we know a minor is exempt from punishment—that is, what is the source of this legal ruling?¹⁶⁷ It responds sharply, belittling its own question and noting that for two reasons such an inquiry should not have been made at all. First, from a procedural perspective, the answer thereto is already explicitly stated in the text of the Mishnah itself, that is, that a minor "has not yet come within the scope of the commandments,"¹⁶⁸ meaning he is not yet obligated to obey the law.¹⁶⁹ Second, using the time-honored Jewish custom of answering a question with another question, the Gemara asks pointedly, rhetorically, and substantively, Does the Torah ever punish a minor? Stated another way, we all know that it is an axiom of Torah law that minors are never punishable.¹⁷⁰

On the defensive, the Gemara then clarifies its own original inquiry, stating, "This is our question,"¹⁷¹ that is, this is what we meant to say: Because (as the Mishnah itself makes clear) a rebellious son is executed because of his eventual sin rather than his past conduct,¹⁷² one might have thought that even a minor could be condemned.¹⁷³

How does the Gemara's terse statement respond to the two difficulties that the Gemara raised concerning its own question? With respect to the substantive argument that Jewish law does not hold a minor responsible, the Gemara is saying punishment for future crimes is so aberrational that it is conceivable that a law of this nature could also abrogate one of the most basic limitations on criminal punishment—that only those who are bound by the law can be sanctioned for its violation. Moreover, if we are punishing solely on the basis of predicted future misconduct rather than for past wrongs, it makes no difference that the triggering actions are those of a child,¹⁷⁴ because when the boy would have committed the future crimes for which he is now being punished, he already would have been an adult. Therefore, the axiom of Torah law that minors are never punishable should be inoperable here.

Regarding the procedural argument that the Mishnah had already articulated the rationale for exempting minors, the Gemara is saying that the Mishnah's explanation is incomprehensible. What difference does it make that the boy has not reached the age of obligation? The Mishnah says that he is not executed for any sin that he has already committed but, rather, based on his ultimate "end"—his future sins. Therefore, what does it matter that in the present he has not reached the age of obligation? Indeed, the Gemara goes even farther, stating, not only is there no reason *not* to apply the law to a minor, but the scriptural text indicates the law *should* apply specifically to a minor, for the Torah calls the offender a "son," meaning a boy, as opposed to a "man," meaning an adult male.¹⁷⁵ At this point, therefore, it is clear why the Gemara posed its initial question concerning exemption of minors from the law. The Mishnah had stated that minors are exempt, and the Gemara could not understand why this should be the case.

The Gemara answers that we understand the verse in *Deuteronomy*, which states "*if there will be to a man a son [that is stubborn and rebellious],*"¹⁷⁶ to mean, when a son

will come into manhood.¹⁷⁷ Although it is true that the word "son" on its face refers to a minor, and although it is also true that the axiom against punishing minors theoretically should *not* apply here (because of his ultimate end), the Torah says, however, that a son is subject to punishment only when he has already become a man.¹⁷⁸ As we will see, this interpretation also provides the basis for the law that the rebellious youth is only culpable for a short period of time after reaching majority. After growing two pubic hairs—the indicia of majority—the youth remains subject to prosecution only until his pubic hairs are fully grown, at which point he is no longer a son. Thus, it is only when the son is *in the process* of coming into manhood that he remains subject to liability.

Two points seem clear from the Gemara's inquiry. First, by asking the question, the Gemara is assuming that a minor, one who is not obligated to comply with Jewish law, could theoretically have qualified as a rebellious son. The Gemara in effect is suggesting rebellion against Jewish law, the *mitzvot*, is not a necessary element of the offense, because a minor is not bound by that law. Second, by considering the possibility that a minor, who by definition cannot be culpable for violation of the law, may be executed, the Gemara is intimating that prevention of criminality by itself is sufficient ground for imposing the death penalty and that the perpetrator is not being punished for his gluttony and drinking *per se*; rather, these acts are being considered only for their significance as predictors of future criminality. It is therefore clear that the Gemara's initial premise is that future criminality is the sole reason for killing the stubborn and rebellious son.

What then are we to make of the Gemara's answer, specifically, its interpretation of *Deuteronomy's* literal wording, "to a man a son"—as the basis for concluding a minor is exempt from the law? Is this an instance of supercession? That is, does the Gemara's hermeneutic derivation indicate it is rejecting the prevention of future criminality rationale of the Mishnah and instead taking the position that the law of the stubborn and rebellious son is a divine decree without any obvious rational explanation? Because the Gemara itself refers to the Mishnah's ultimate end rationale in the course of this very discussion¹⁷⁹ and, as a rule, the Gemara does not ignore mishnaic statements,¹⁸⁰ the superceding alternative rationale seems inconceivable. The far more plausible explanation is that the Sages are adopting one or another variant of a hybrid rational approach that combines hermeneutics and prediction. They may be espousing the view that while the law is a divine decree, it can also be rationally explained as based on preventing future criminal acts. Or the Gemara may be suggesting that, while the ultimate rationale for the law is preventing future crime, at least some of its limitations are hermeneutically derived and not directly linked to preventing future criminality. Or, conversely, perhaps the entire law of the stubborn and rebellious son is a divine decree, but with some limitations that can be explained as rationally related to preventing future crime.

A hybrid approach can be of two kinds. Either the rationales have independent significance, or they are intertwined. For example, although the adulthood requirement is derived hermeneutically, adulthood may also be a necessary element of the crime because it is a predictor of future criminality—a minor is not responsible for what he does, so his acts by definition may not be predictive of future criminal conduct as an adult. In this sense, the divine decree and predictive rationales arguably coalesce.¹⁸¹

Support for this understanding that the Gemara is using a hybrid rationale is found

in a later discussion about why a female is not subject to prosecution. The Gemara quotes a *baraita*, a mishnaic era ruling not included in the Mishnah by the redactors, but which is persuasive authority. The *baraita* states: "Rabbi Simeon said, Logically, a daughter should come within the scope of a 'stubborn and rebellious child', since many frequent her in sin, but that it is a divine decree: *a son*, but not a daughter."¹⁸² By use of the words, "since many frequent her in sin," Rabbi Simeon presumably means that the daughter will become a prostitute to support her gluttony and drunkenness,¹⁸³ thus both leading men to sin¹⁸⁴ and, if she marries, bringing herself to adultery, a capital offense.¹⁸⁵ Accordingly, Rabbi Simeon is implicitly adopting the position that future criminality is the basis for the law.

Why then does Rabbi Simeon exclude females from the law based on a divine decree rationale? This duality, incorporating both hermeneutics and future criminality in almost a single breath, is evidence that Rabbi Simeon embraces a hybrid approach to the rebellious son law. Such an approach can, however, be of two kinds. The duality can be based on two independent and coextensive rationales, each affording a complete explanation of the law. Alternately, the two rationales may be of different breadths and strengths. It may be that the future criminality approach explains the entire stubborn and rebellious son law, whereas hermeneutics is addressing only particular limitations on the applicability of the law, namely, in this case, gender. This exclusion, however, even though hermeneutically based, may, like the hermeneutic exemption based on age, be fully consonant with the future crime rationale, because, as noted earlier, it may be explained as assuring accuracy in prediction on the theory that females, as a class, are less prone to addiction and criminality.

Maimonides discusses the gender exclusion in a similar vein, asserting that "the stoning of a stubborn and rebellious son is a divine decree. However, the daughter is not subject to this law as she is not likely to be drawn to eating and drinking, as a man is. As it says, 'a son and not a daughter.'"¹⁸⁶ Maimonides, like Rabbi Simeon, is adopting a dual approach. At the same time, he appears to contradict Rabbi Simeon's statement in the Gemara, quoted above. Rabbi Simeon gives a logical basis for *including* girls within the law, whereas Maimonides seems to offer a logical basis for their *exclusion*. Furthermore, whereas Rabbi Simeon apparently concludes that the *exclusion* is a divine decree, Maimonides seems to place *the entire law* of the stubborn and rebellious son within the category of divine decrees.

The *Lechem Mishnah*, one of the commentaries on Maimonides,¹⁸⁷ argues, however, that Rabbi Simeon and Maimonides do not contradict each other, and that, in fact, the latter is basing his statement of the law on Rabbi Simeon's *baraita*. According to the *Lechem Mishnah*, when Rabbi Simeon says, "It is a divine decree," Maimonides interprets the pronoun "it" as referring, not to what immediately follows in the sentence ("a son but not a daughter"), but rather as referring to the entire rebellious son law.¹⁸⁸ In other words, Maimonides views the whole Deuteronomic law as a divine decree that does not appear to follow the dictates of justice as we know them—namely, that a person may be tried only for crimes already committed.

Why then does Maimonides bother even to give the rational distinction that females are less prone to addictive eating and drinking? The *Lechem Mishnah* explains Maimonides' approach on the basis of a principle that states, "[a divine decree] is novel; therefore we only have its novelty,"¹⁸⁹ meaning one must confine a divine decree to its

specific facts. This principle, says the *Lechem Mishnah*, is the underpinning of Maimonides' seemingly cryptic interpretation of Rabbi Simeon, which Maimonides arrived at through a three-step thinking process: (1) Logically, a daughter should be treated the same as a son; no reason exists to distinguish them, and, in fact, *ben* should be read as non-gender specific, encompassing males and females; (2) The stubborn and rebellious son law is a novelty (divine decree) and, therefore, must be interpreted restrictively; and (3) Inasmuch as there is a slight difference in the temperament of a female and she is not drawn to meat and wine as much as a male, she is excluded from the law.¹⁹⁰ Thus, Maimonides (per *Lechem Mishnah*) holds to the reasoning that a daughter is not "drawn to eating and drinking" would not be sufficiently strong to justify distinguishing between a son and a daughter absent the special divine decree context. It is only because the entire stubborn and rebellious son law is a divine decree, one going against the grain of established legal or ethical principle, that it is by definition limited to the specific case mentioned in Scripture. Because the Torah says male, the talmudic Sages therefore restricted the law to "male and not female."

If this is a correct reading of Maimonides, he is taking the position that the ultimate basis for the stubborn and rebellious son law is that it is a divine decree but at least some of its constituent parts are logically related to the prediction of future criminality. If so, Maimonides rejects the ultimate end rationale, because it is at odds with the basic dictate of Jewish law that persons are punished only for the sins they have committed. Accepting the future criminality rationale would create a slippery slope that conflicts with basic tenets of Jewish jurisprudence, and it is far preferable that the law be labeled a divine decree, a one-time exception to the principles of justice, which is to be limited to its particular facts and never to be applied beyond its restrictive context. Reading Maimonides this way is consistent with the approach he takes concerning the absolute prohibition against circumstantial evidence in criminal cases, which he explains on the basis of a slippery slope rationale. Although Maimonides acknowledges that some circumstantial evidence can be highly probative, he argues that admission of such evidence would lead to the use of progressively less reliable proof, eventually resulting in conviction and execution of an innocent person based on mere supposition.¹⁹¹

Seeking to delineate further the characteristics of the offenders, the Gemara, focusing on the word *ben*, meaning son,¹⁹² cites Rabbi Ishmael for the proposition that one who is a "father" cannot be prosecuted as a stubborn and rebellious "son."¹⁹³ The Gemara then quotes later scholars who interpret Rabbi Ishmael's rule. One of them understands Rabbi Ishmael's words, "son and not a father," also to exclude one who is *capable* of fathering a child.¹⁹⁴ Another scholar, Rabbi Kruspedai, understands him in an even more extreme sense. Reasoning that one would be called a father if the woman he has impregnated displays physiological signs of pregnancy and that occurs after the first trimester, and assuming the male seed is potent only after the appearance of two pubic hairs, the later Sage concludes that once a boy reaches three months after the appearance of two pubic hairs, he is no longer eligible for prosecution because he is now a "father," meaning one who could in theory be referred to as a father, and thus he is not a "son."¹⁹⁵

Rabbi Ishmael's rule has now been interpreted so as to confine prosecution to a much narrower window of time—three months.¹⁹⁶ Thus, the effect of this Gemara interpretation is to limit prosecution to the period from the appearance of two pubic hairs until either three months thereafter, or until the boy has a "full beard," whichever is

earlier.¹⁹⁷ While the Mishnah's physiological limitation—from two pubic hairs to full beard—reflects a developmental reality of early adolescence, arguably designed to select only clearly aberrant youth destined for a life of crime, the Gemara's embrace of this three-month temporal definition shifts the focus from accuracy in prediction to a nonrational hermeneutic derivation.¹⁹⁸ In this colloquy at least, the divine decree approach seems to be given primacy.

Nonetheless, even this ostensibly arbitrary limitation may have rational foundations. Although the Gemara does not explain its three-month time frame on this basis, it may be that when a boy either fathers a child or realizes that he is capable of doing so, he recognizes his impending full adulthood and consequently feels a greater sense of responsibility, which may in turn draw him away from gluttony, drunkenness, and other addictive pursuits. Alternatively, just as the two-pubic-hairs to full-beard criterion cabins only those youths whose aberrant behavior occurs so early in their lives that it is clear they are destined for later criminality, the three-month period further refines this class by narrowing prosecution to its younger subset. Perhaps more persuasively, the use of a time limitation selects for prosecution the child who, knowing that he may be charged only during this single, clearly defined three-month period of his life,¹⁹⁹ nonetheless is unable or unwilling to desist from his ruinous, addictive behavior, thereby demonstrating either a total loss of self-control or arrogant rebellion going far beyond normal adolescent striving for individuation. Thus, instead of being an arbitrary attempt to limit the scope of the law, the three-month period may be viewed in precisely the opposite manner, that is, as a deliberately short time period calculated to capture only the unquestionably bad seed.

Turning from the youth himself to his conduct, the Gemara requires that the boy steal money from his father²⁰⁰ and use it to purchase meat²⁰¹ and wine inexpensively; that the meat he consumes be fresh and unsalted,²⁰² that it be charred on the outside and raw on the inside, in the manner of thieves on the run;²⁰³ and that the wine he drinks be mature and only partially diluted.²⁰⁴ Such extensive restrictions give off strong nonrational emanations, that is, these food and drink limitations may again be divine decrees that defy human logic and understanding.

On the other hand, these limitations do relate to assuring accuracy in predicting future criminality. First and foremost, we are dealing not merely with an addicted glutton and drunkard, but with a thief as well—one who, at least in modern law,²⁰⁵ has crossed the line from self-destructive behavior to crimes against others. Furthermore, fresh meat and partially diluted, mature wine taste better and are thus more likely to be addictive,²⁰⁶ and the low price enables the youth to be drawn into his addiction because he need not engage in the difficult endeavor of stealing large amounts of money to sustain it, whereas higher prices might have a preclusive effect.²⁰⁷

The Gemara explicitly uses an *imshuchai* analysis in this context, strongly suggesting the future criminality rationale. *Imshuchai* means literally, it "draws" or attracts or seduces, that is, that the proscribed behavior is addictive, drawing the son to future criminality. Thus, in explaining why consumption of salted meat cannot qualify as gluttonous eating, the Gemara states "it is on account of its seductiveness, and when a short period has passed, [the salted meat] no longer attracts."²⁰⁸ That is, one will not become addicted because such aged, salty meat is less tasty.

A variant of the *imshuchai* analysis is also invoked to distinguish between normal

and aberrational behavior. The Torah commands the people to spend the tithes of their produce and animals for consumption in Jerusalem of oxen, sheep, wine, strong drink, or "whatsoever thy soul desireth."²⁰⁹ The Mishnah states that if a boy uses such tithed money to eat and drink in Jerusalem, he does not become a rebellious son. Explaining this immunity, the Gemara observes that "since he eats it in the normal way . . . he is not drawn [to wickedness]."²¹⁰ In other words, if the youth is simply doing what everyone else is doing, no basis exists for inferring that he is an addictive person who will go on to eat and drink gluttonously at other times.

The application of the *imshuchai* mode of analysis makes it clear that the Gemara is excluding all behavior that does not definitely lead to future criminality. It is also further evidence that the Sages understood the law, at least as it relates to the boy's conduct, to be motivated by concern for the prediction and prevention of future criminality.

Although the Gemara does not explicitly invoke the concept of "drawing" in its analysis of other limitations, that approach nevertheless appears to be present. For example, in explaining why the boy must steal from his father, the Gemara says the parents' money is more readily accessible, thus facilitating the addiction.²¹¹ For the same reason, the Gemara mandates that the boy eat the food away from home, so that he is in a place where he is not fearful of being discovered by his parents.²¹² These requirements seem related to the "drawing" analysis, i.e., requiring that the gluttony be facilitated by lack of parental intervention, thus leading to addiction.²¹³

The Gemara's dichotomous approach regarding gluttony and drunkenness, invoking both divine decree and prevention of future crime rationales, is reflected in its further discussion of the context in which the youth's excesses must occur. The Mishnah's statement that consumption of the food and wine as part of a religious observance immunizes the boy from prosecution,²¹⁴ in turn suggests that such imbibing in any other circumstances would qualify him as a rebellious son. The Gemara, however, finds further restrictions. Rabbi Abbahu states the youth is liable only if he eats among a group who are *all empty*,²¹⁵ meaning that they are, in a word, bums. According to Rabbi Abbahu, eating in any setting where someone is present who is not a ne'er do well, also precludes liability. A later Sage, seeking to reconcile Rabbi Abbahu's statement with the inference from the Mishnah that consumption of the requisite food and drink other than in connection with a religious observance qualifies the youth for prosecution, suggests, instead, that the Mishnah is discussing a group that is all empty but is nonetheless performing a religious duty.²¹⁶ In effect, then, the Gemara's last interpretation of the Mishnah on this point is that prosecution as a rebellious son is permitted only in the case of consumption together with a group that is not involved in a religious observance *and* whose membership consists *entirely* of good-for-nothings—a small universe indeed.²¹⁷ Acceptance of the latter understanding would lend support to the view that these Mishnah and Gemara limitations concerning the setting are at least partially of a nonrational nature, even though the Gemara itself uses the "drawing" concept to explain why a boy involved in performance of a commandment will not persist in overindulgence, and the Sages continue thereafter to embrace the prediction of future criminality rationale.

Thus, although these restrictions may at first blush seem arbitrary, perhaps stemming from a desire to limit the death penalty particularly when it is being inflicted on the basis of future criminality, we think more is going on here. The "more" certainly

relates to the uniqueness of the stubborn and rebellious son provision in permitting imposition of capital punishment for what we think a youth will do in the future, namely, to commit a crime that is seemingly unrelated to gluttony and drinking. But there is still more to it than that. Accuracy in predicting future behavior is problematic. We have enough difficulty in assuring accuracy in fact-finding with respect to past behavior. To execute the rebellious son for the crimes of robbery and murder *in futuro*, we need to be absolutely sure that the present behavior is sufficiently linked to those crimes.²¹⁸ What look like arbitrary restrictions may represent reasoned limitations designed to prevent application of what would otherwise be an overinclusive offense. The law should be reserved only for someone who will, beyond any doubt, continue to steal and then rob to support his habit, and who will ultimately commit murder. Factors which detract from that probability, no matter how tenuous, should render the law inapplicable. Thus, the presence of even one decent person in a group of miscreants with whom the boy is dining may be evidence that he has not given himself over completely to sin. Alternately, that single person witnessing the boy's overindulgence is required by Jewish law to rebuke him, which may lead the youth to repent.²¹⁹ Although more attenuated than the original mishnaic restriction, the Gemara requirements nonetheless may be viewed as finely calibrated rules designed to catch only the future murderer.

Moving on to the parents, the Gemara, again relying on the *Deuteronomy* verse stating, "when there will be to a man (*ish*) a son," concludes that because *ish* means a man who has reached his majority, the rebellious son must be the offspring of an adult male.²²⁰ This is a scriptural approach, although one can surely argue a minor parent is unable to provide proper guidance and discipline, and therefore it cannot be proved that his offspring is an inherently evil child who will necessarily go on to commit serious crimes. The other restrictions that the Gemara places on the parents, however, may be of a different order.

Dissenting in the Mishnah, Rabbi Judah asserts that if the stubborn and rebellious son's mother is "unfit" for her husband, the boy's father, the law does not apply.²²¹ As noted above, the most obvious explanation is that she is unfit in the sense that the marriage is not legal in some way. The Gemara questions this understanding of Rabbi Judah's dissent, pointing out that "after all, [the boy's] father is his father, and his mother is his mother."²²² In other words, what difference does it make that they are not legally married?²²³ Although it is arguable that the parents' disobedience of the law does bear directly on accuracy in predicting the child's future criminality,²²⁴ the Gemara's explanation of the mother's "fitness" takes an altogether different tack. The Sages assert that Rabbi Judah is instead discussing the physical similarities of the mother and father. Rabbi Judah had once said in a *baraita* that a child cannot become a rebellious son if his mother is not similar to his father in voice, appearance, or height.²²⁵ Rabbi Judah then asked rhetorically, what is the basis for this requirement? He answered that *Deuteronomy* says, "He does not hearken to our voice."²²⁶ Note the reference to our voice, not *voices*, combining a singular noun and a plural possessive pronoun.²²⁷ And, says Rabbi Judah, because their voices must be similar, so must their appearance and height.²²⁸

Having brought forward this extreme opinion that would make application of the rebellious son law practically impossible,²²⁹ the Gemara infers from Rabbi Judah's position that he is also the author of another *baraita*—one that provides a crucial insight with respect to the stubborn and rebellious son, as well as a new rationale for the law.

The *baraita* states there "never has been a stubborn and rebellious son . . . and never will be."²³⁰ It goes on to ask, "Why then was the law written?" and answers, "[t]hat you may study it and receive reward."²³¹ In other words, according to this view in the Gemara, because the provision never was and never will be applied and indeed was never intended to be applied, the *Deuteronomy* law is hypothetical and thus purely pedagogical.²³²

An alternative Gemara explanation is that Rabbi Simeon, rather than Rabbi Judah, is the author of the "never has been and never will be" *baraita*, because he asked rhetorically in another *baraita* whether just "[b]ecause one eats a *tartemar* of meat and drinks half a *log* of Italian wine, shall his father and mother have him stoned?"²³³ The implication is that parents would never prosecute their son in this manner for such behavior, and, therefore, no boy ever could have been charged under this law, meaning that its purpose is solely for study.²³⁴

Regardless of the author's identity, the Gemara, by quoting the "never has been and never will be" *baraita*, is expressing a pedagogical view of the law. Although articulating this pedagogical rationale, the manner in which the Gemara engages in its search for authorship for this *baraita* indicates it is not the opinion of the majority.²³⁵

What does the pedagogical rationale mean? The law may be viewed as didactic in several respects. It teaches parents the types of behavior by their children for which they must be on guard, as well as the necessity for unified and appropriate discipline. At the same time, the law issues a similar warning to children concerning the dangers of sensual excesses and lends authority to parental attempts to curb youthful misconduct. The law can also be viewed as teaching the level of commitment to God required of individuals, the standard being Abraham's willingness to sacrifice his son Isaac at God's command.²³⁶ There is also the concept that the Torah should be studied for its own sake, without regard to its practical value. Stated another way, studying the word of God is its own virtue. Finally, pedagogy may take a mystical form. In that sense, the *Deuteronomy* verses may be read allegorically as dealing with the relationship between the Almighty and the Jewish people.

The Gemara follows its provocative hypothesis that the rebellious son is merely hypothetical with an equally provocative response. Rabbi Jonathan claims that he saw and sat on the grave of a stubborn and rebellious son,²³⁷ meaning that at least one individual was prosecuted and executed under this law. That assertion directly contradicts the notion that the law is exclusively pedagogical. In choosing to articulate this rebuttal, the Gemara may be saying that the pedagogical rationale is not as strong as that of prediction of future criminality, a rationale that the Gemara never explicitly challenges.

Indeed, the limitations regarding parental similarities in voice, appearance, and height that prompt some of the Sages to adopt the pedagogical approach, can also be understood to be related to accuracy in predicting future criminality, at least if we view them more broadly as requiring a consistent and united approach on the part of the father and mother in parental discipline and childrearing, so that the boy *sees* and *hears* them as *one* with respect to his behavior and their administration of discipline.²³⁸ Thus, this unified front is a signal to the boy that the two people who love him most and know him best are as one in their condemnation of his conduct, so that he can no longer fool himself into thinking that his behavior is innocuous or that he can seek refuge by playing off the sympathetic parent against the stricter one.

The Gemara, however, then seemingly sets aside this pedagogical approach,

making no reference to it in discussing other physical characteristics of the parents. The Mishnah states neither the father nor the mother can be blind, lame, missing an arm, deaf, or mute.²³⁹ Although, as noted above, these requirements can be understood in terms of assuring accuracy in prediction, the Gemara, like the Mishnah, chooses not to explain the parents' physical exclusions in these terms. Instead, it, too, sees them as a literal fulfillment of the scriptural verse²⁴⁰ and, indeed, seeks to derive from here a general concept that "the Bible must be taken literally as it is written," that is, a general rule that every Torah verse must be followed literally, strictly, narrowly, and precisely.²⁴¹ The Sages then debate the issue and ultimately conclude that this Mishnah provision does not provide proof of an across-the-board rule that every biblical verse must be interpreted in that manner.²⁴²

The Gemara has thus proffered three understandings of the law: a means of preventing future criminality, a divine decree, and a pedagogical provision.²⁴³ The Gemara, however, begins with a discussion of future criminality and discusses that rationale extensively without ever explicitly challenging it. By doing so, the Gemara seems to be saying that rationale is the most likely or strongest explanation for the law, and that the others, both of which are challenged, are possible but less likely alternate explanations.²⁴⁴ Indeed, at the conclusion of the stubborn and rebellious son analysis and discussion, the Gemara considers the mishnaic statement that he is prosecuted because of his ultimate destiny.²⁴⁵ Incredulous, the Sages ask whether a boy is to be stoned simply because he eats and drinks too much, the same question posed in an earlier *baraita*, to which the answer was pedagogical: "Why then was the law written?—That you may study it and receive reward."²⁴⁶ Here, however, the Gemara responds, "[F]or at the end, after dissipating his father's wealth, he would [still] seek to satisfy his accustomed [gluttonous] wants but being unable to do so, go forth at the cross roads and rob."²⁴⁷

On the other hand, the Gemara may simply be saying that the limitations placed on the different actors in or elements of this crime are explainable in different manners. In support of that idea, it is noteworthy that only the requirements dealing with the parents are explained as either pedagogical or nonrational, and, as will be noted, only those relating to the court proceeding are explained exclusively as nonrational, whereas the limitations regarding the son are all explained by the Gemara as relating to preventing future criminality, although some are intertwined with a divine decree rationale.²⁴⁸

Finally, we come to the Gemara limitations on the judicial procedures, many of which are explicitly stated in *Deuteronomy*. The Mishnah appears to envision a two-step process. First, it states, "He is admonished in the presence of three, and flagellated [by the court]."²⁴⁹ Then if he repeats his misconduct, he is tried before a twenty-three-judge court and, if convicted, sentenced to death.²⁵⁰ The Gemara asks, Why must the youth be warned before three, when only two witnesses are required to secure conviction in ordinary criminal cases? Its answer is that the Mishnah means the boy is warned by his parents in front of two witnesses; then, if he continues his misbehavior, he is tried before a court of three and, if convicted, flogged before that court. If the youth still persists in his wrongdoing, he is tried before a twenty-three-judge court.²⁵¹ Thus, the Gemara has effectively converted the adjudicatory phase into a three-step process.

In the course of this discussion, the Gemara asks, What is the source of the requirement of flogging?²⁵² In its response, the Gemara resorts to what is called a *gezeirah shavah*, a hermeneutical rule that, in certain limited circumstances, allows two

separate biblical verses sharing the same word or words to shed light on the laws explicated in the verses.²⁵³ In the present case, the word *son* appears in both the rebellious son verses and the verse elsewhere in *Deuteronomy* that describes the general institution of flogging.²⁵⁴ Thus, according to the *gezeirah shavah* interpretative rule, this commonality of words teaches that a rebellious son is also lashed.²⁵⁵

Whether the Gemara's reinterpretation of the Mishnah—to include a preliminary requirement of parental warning before witnesses and the juvenile's refusal to comply—is viewed as simply a clarification or as an extension of the Mishnah, the Gemara is clearly making conviction more difficult. Rashi asserts that the Gemara is simply trying to fit the rebellious son provision into normative Jewish criminal procedure, which would make this requirement procedural rather than substantive.²⁵⁶ According to this view, the limitations are merely technical. The procedures themselves, however, are designed to assure only the guilty are convicted; substantively, requiring the parental warning before two witnesses assures that the parents have fulfilled their responsibility and that they have put the boy on clear notice that he is treading on dangerous ground and that continued misbehavior will lead to court proceedings against him. Thus, these pre-trial and trial procedures are intimately related to accuracy in predicting future criminality.²⁵⁷

The Talmud's concern about future criminality embodies two separate ideas. On the one hand, there is a concern for society.²⁵⁸ The Sages do not want others to become victims of the rebellious son's future crimes. Additionally, there is a concern for the individual boy who is on a course of moral self-destruction, a desire to protect him from himself, so to speak, by executing him. Taken as a whole, the talmudic discussions reflect this duality, with some colloquies focusing on social harm and others on harm to the potential rebel. For example, Rabbi Simeon's statement that females should qualify for prosecution, because "many frequent her in sin,"²⁵⁹ appears to bear primarily on the youth's potential damage to society. Rashi echoes this point in his comments on this phrase. He writes, "She will accustom people to sin for her *etnan* [prostitution payment],"²⁶⁰ seemingly placing the emphasis on detriment to society. On the other hand, although the mishnaic statement that the youth is killed because of his "ultimate destiny" is ambiguous in this regard, we see a clear concern for the defendant in the Mishnah's follow-up statement, "Let him die innocent and let him not die guilty."²⁶¹ Nonetheless, although seemingly emphasizing the benefit to the boy by enabling him to die without sin, this phrase may also incorporate a concern for societal good as a proliferation of guilty rebels will have a negative impact on the community.

In the end, we cannot know for sure which rationale the Gemara views as paramount—deterrence of future crime, pedagogical instruction, or divine decree. Strong indications, however, suggest that the Gemara's primary interest is prediction and prevention of future criminality. And, in the end, we cannot know for sure whether this preventative rationale is prompted by a concern for the safety of society or the salvation of souls. What we do have is a group of concrete limitations, which, if applied, have the effect of isolating and singling out for prosecution the child who is, beyond any doubt, unredeemable and is destined, beyond peradventure, to persist in destructive conduct that will lead to murder. Threshold restrictions with respect to gender and age exclude a broad range of children who, as a class, are less likely to develop into full-fledged murderers. Then, within the narrow remaining class of young adolescent boys, the law identifies the one whose conduct is wholly aberrational—the one who steals from his own parents,

hangs out with bums, and, on the sly, consumes food and drink of a type and in a manner likely to be addictive—and who does so even though he has had an upbringing by parents who discipline him in a consistent and appropriate manner. Notwithstanding his model home, the boy cannot desist even during a carefully defined three-month period or even after he is officially warned by his parents and flogged by order of a three-judge court. Despite all these opportunities to repent, he continues relentlessly on his path of self-destruction. Thus, the Talmud, the Oral Law of Judaism, provides a series of interrelated restrictions rendering conviction so extremely difficult that it may well be that "there never was and never will be" a stubborn and rebellious son.

E. Concluding Thoughts on the Stubborn and Rebellious Son Law

The Torah's stubborn and rebellious son law superficially appears to be vastly overinclusive and to consider only three indicia of guilt—gluttony, drunkenness, and rebelliousness. Using the biblical provisions and the companion Oral Law as their guide, the Mishnah and the Gemara set forth a multi-factor test for ferreting out the child who will ultimately commit murder, a test so underinclusive that it virtually precludes conviction as a stubborn and rebellious son.

The Talmud proffers what seem to be three separate rationales or understandings of this law and its restrictions: a means of assuring accuracy in the prediction of future wrongdoing, a teaching tool for the guidance of parents and children, and a divine decree beyond human comprehension. These understandings may be interrelated and may even coalesce. That is, the comprehensive restrictions facilitate accuracy in fact-finding, and at the same time give lessons in both childrearing and appropriate juvenile behavior, and in some instances remain so esoteric and seemingly unrelated either to prediction, pedagogy, or any other rational end, that they constitute divine decrees. Or, from another perspective, perhaps what the Talmud is saying is that, although predicting future criminality is theoretically possible, the necessity for assuring accuracy requires a test so finely calibrated as to make it impossible for mere humans to apply, and, therefore, what the law really teaches is that such prediction is a matter to be left to God's omniscient justice, a justice that we are incapable of understanding, much less administering.

In Jewish law, the stringent standards for conviction of a past crime are in sync with the even more stringent standards for prediction of future criminality. While convictions for both past and future crimes are theoretically possible, the primary goal of these requirements is apparently not to convict the guilty but to effect comprehensive protection of the innocent.

American law, on the other hand, is dissonant in this respect, treating the determinations of guilt and of future criminality in disparate fashions. While the American reasonable doubt standard necessary for criminal conviction²⁶² is not nearly as stringent as its Jewish law counterpart and, thus, can sometimes result in conviction of the innocent,²⁶³ the American standard is, at the same time, sufficiently rigorous that, like Jewish law, it permits acquittal of at least some guilty persons. In other words, for the most part, the reasonable doubt standard convicts only the guilty.²⁶⁴ On the other hand, although enabling the incapacitation of some persons destined to commit crimes, the array of American statutes designed to prevent future criminality achieves this result at a cost of massive over-incarceration. Roughly two of every three persons found to

constitute a continuing danger to society are erroneously classified²⁶⁵—the cost in wrongful deprivation of freedom or life is enormous.

Characterization of the overinclusion stemming from inaccurate prediction of dangerousness as "enormous" is not hyperbole. As one authority has noted:

Assume that one person out of a thousand will kill. Assume also that an exceptionally accurate test is created which differentiates with ninety-five per cent effectiveness those who will kill from those who will not. If 100,000 people were tested, out of the 100 who would kill 95 would be isolated. Unfortunately, out of the 99,900 who would not kill, 4,995 people would also be isolated as potential killers.²⁶⁶

That a ninety-five percent rate of success is unheard of in this context,²⁶⁷ and that the rate is more like thirty-three percent, should give pause to even the staunchest devotees of predictive punishment. Although conceivably one might be willing to accept a gaping margin of error in false positives with respect to certain forms of state intervention, such as short-term civil commitment or denial of bail, should we be willing to tolerate it for life sentences of recidivists or with respect to the death penalty?²⁶⁸

In the Supreme Court's 1927 decision in *Buck v. Bell*,²⁶⁹ Justice Holmes, a strong foe of substantive Due Process,²⁷⁰ upheld a state law authorizing the sterilization of institutionalized, mentally retarded persons. The case is perhaps most famous—and most criticized²⁷¹—for Holmes's summary dismissal of the Due Process claim with the statement, "[t]hree generations of imbeciles are enough."²⁷² Today that discredited aphorism makes us cringe. The contemporary counterpart, cribbed from sports jargon, is "three strikes and you're out"²⁷³ in the case of recidivists.²⁷⁴ Holmes's adage, however, at least had the pseudo-scientific support supplied by the eugenics movement,²⁷⁵ whereas we have a catchy slogan wrenched from the great American pastime, which we apply, knowing full well that our predictive ability is one for three—not bad for a batting average but somewhat more problematic for long-term imprisonment and execution.

What the stubborn and rebellious son provisions teach us are the virtue of caution and the necessity for meticulous refinement of the factors employed in predicting future criminality. It may be that in contemporary American society we cannot afford to depend on a divine backstop to prevent future violent crime. But if we cannot achieve God's omniscience, that is, if we cannot achieve perfection, we should at least be less imperfect. And if one for three is the best that we can do given our present state of knowledge, perhaps it may be time for a time out in the prediction game.

F. The Stubborn and Rebellious Son in Modern Times

In 1646, the Massachusetts Bay Colony enacted a stubborn and rebellious son law:

If a man have a stubborne or rebellious sonne, of sufficient yeares & und^rstanding, viz, 16, w^{ch} will not obey y^e voyce of his fath^r or y^e voyce of his moth^r, & y^t when they have chastened him will not harken unto y^m, yⁿ shall his fath^r & moth^r, being his naturall parents, lay hold on him, & bring

him to y^e ma^{trates}, assembled in Co^rte, & testify unto y^m, by sufficient evidence, y^t y^s their sonn is stubborne & rebellious, & will not obey their voyce & chasticem^t, but lives in sundry notorious crimes, such sonne shalbe put to death.

Sound familiar?

Every state has a separate juvenile justice system that has jurisdiction over two forms of misconduct by children: criminal law violations and status offenses. The criminal law violators, delinquents, are ordinarily defined as minors who commit acts which if committed by adults would constitute crimes. Status offenders are those who commit acts that are criminal only for children, such as curfew violations, consumption of alcohol, truancy, and running away from home, and also encompass minors who are beyond parental control, incorrigible, ungovernable, or in need of supervision.

Prior to the 1960s, these two types of offenders were lumped together and designated delinquents and stubborn and rebellious children were treated almost exactly the same. Thus, runaways and truants were incarcerated in the same secure facilities with rapists, murderers, and robbers. These practices drew extensive criticism and prompted legislative and judicial action. In particular, the Juvenile Justice and Delinquency Prevention Act of 1974 sought to give an impetus to deinstitutionalization of status offenders by conditioning receipt of federal funds on state plans to terminate status offenders' placement in detention and correction facilities. In that same year, both the Department of Health, Education and Welfare and the National Council on Crime and Delinquency recommended elimination of juvenile court jurisdiction over ungovernable children. Perhaps the most important set of proposals came in 1977 in a report issued by the American Bar Association, Institute of Judicial Administration, Juvenile Justice Standards Project. The ABA recommended that status offenders be removed from the jurisdiction of the juvenile courts. The Standards permitted limited custody of a juvenile for up to six hours if a substantial and immediate danger threatened the child's safety, and urged a broad range of services be made available to the child and his or her family. The status offender Standards, however, were never approved by the ABA House of Delegates because they were too controversial.

In addition to these proposals, intense scholarly criticism condemned the status offender jurisdiction and the way it operated in practice. Furthermore, several successful federal court class action suits attacked the inhumane and often barbaric treatment of both delinquents and status offenders in state training schools.²⁷⁶

In response to widespread attacks on the juvenile court status offender jurisdiction, states have categorized status offenders separately and generally have treated them differently from delinquents. The main difference now between delinquents and status offenders is that the latter are usually not incarcerated in state facilities, or, even if they are, they are not committed to secure facilities that also house delinquents, criminal law violators. Furthermore, police officials and intake probation divert many status offender children from formal juvenile court action. The downside of this diversion is to force children into "treatment" options, including "voluntary" commitment to state mental hospitals, without a Due Process precommitment hearing.²⁷⁷

The other major change has been to define status offender misconduct with greater specificity. The older status offender statutes used very vague terminology to

describe the underlying status offender misconduct, such as being "in danger of leading an idle, dissolute, lewd or immoral life." The conduct also was often expressed in terms of a condition or status (hence status offender), such as being "incorrigible" or "unruly" or "beyond parental control." Modern statutes instead tend to spell out the detrimental conduct, e.g., truancy, curfew violations, and running away from home.

The danger of the older, vaguer terms was that they failed to give fair notice of the proscribed acts. The purpose of the Due Process requirement that laws be framed with sufficient specificity so as to give notice of the underlying illegal conduct is not because we think criminals, adult or juvenile, will go to the law library to see if their intended behavior is unlawful. Rather, the notice requirement is a way of assuring compliance with certain institutional values. Amorphous language gives police and courts unlimited discretion to determine what behavior constitutes a violation of the law, a matter that is in the province of the legislature.

The modern trend of separately categorizing and punishing delinquents and status offenders is, however, often circumvented by manipulation of definitional terms. In almost all jurisdictions, criminal law violating delinquents can be placed in secure state training schools. The rub is that in some jurisdictions a delinquent is defined as either a criminal law violator or a child who has violated a lawful court order. This means that a status offender who has violated probation or a specific directive of the court not to engage in certain conduct (e.g., truancy), may be converted to a delinquent simply by engaging in further conduct that is in itself not criminal, and the status offender can then be committed to a state training school for delinquents who have committed true criminal acts. Analogous results occur in jurisdictions that define the crime of escape so as to include unauthorized departures by status offenders from facilities to which they have been judicially committed—conduct functionally equivalent to running away from home. By defining such conduct as "escape" under the penal law, the state makes possible the conversion of status offenders into criminal law violators who can then be placed in secure state facilities with delinquents. The same result can be reached by labeling the violation of the court order criminal contempt. Not all states permit such circumvention, recognizing that it conflicts with the state's juvenile law policy.

To further complicate matters, the juvenile courts also have jurisdiction over dependent, neglected and abused children. In these cases, the caregiver, usually the parent, is charged with harming the child physically, emotionally or sexually. In many states the behavior that can be the basis of a dependency or neglect action may also constitute status offender behavior. So, for example, if a young child is found wandering in the street at night, depending on the circumstances, usually the age of the child, he or she can be treated either as a status offender or a neglected child. Many courts prefer the status offender route because it is easier than charging the parent with neglect, which often results in protracted proceedings. In contrast, most status offender cases are quickly resolved by the child admitting the allegations of the petition.

Some states combine status offenders and neglected children into one category, calling them "children in need of aid" or some variant thereof. In yet another twist, children in need of aid or care may also include children who commit a felony, but because of their "extreme youth" delinquency proceedings are deemed inappropriate. Thus, the separate categories are not airtight and give courts enormous discretion in determining the dispositions, which often depend on the available facilities rather than

the appropriate treatment.

The status offender jurisdiction is based on the theory of preventing future criminal acts. The status offender laws are subject to much abuse. As noted above, it enables courts to treat neglected children as status offenders and status offenders as delinquents. Paradoxically, it also allows courts to circumvent the *Gault*²⁷⁸ and *Winship*²⁷⁹ cases, which imposed constitutional restraints on the juvenile courts. Some courts take the position that those rulings only apply to delinquent criminal law violators. Thus, if there is insufficient proof to permit adjudication for commission of a criminal act, some courts drop the delinquency charges and adjudicate the children as status offenders.

In one famous case, two girls, eleven and thirteen, were alleged to have engaged in sexual activities and drug use with adults. The adults were arrested and the children were identified as victims. Nonetheless, the girls were charged as delinquents and status offenders. The evidence at the girls' adjudicatory hearings included statements that the girls had given to police regarding the police investigation of adults, and the testimony of one of the girls who had been called as a witness by the prosecutor at her hearing over counsel's objection. The trial judge found them to be status offenders. This was affirmed on appeal on the grounds that *Gault* did not apply to status offenders and therefore, there was no right against self-incrimination. The delinquency charges got lost in the shuffle.²⁸⁰ Similarly, in some states, the burden of proof in status offender cases is either a preponderance or clear and convincing evidence rather than beyond a reasonable doubt standard required to establish delinquent conduct.

It is unclear if the status offender jurisdiction can be tamed so as to prevent its misuse. Many critics claim that it is the very nature of the jurisdiction itself that is the problem and that no amount of tinkering would help. On the other hand, for as long as the status offender jurisdiction is here to stay, zealous advocacy may ameliorate its most harmful effects.²⁸¹

In comparing the biblical stubborn and rebellious son to modern status offenders, one might conclude that the biblical version is much harsher—a death penalty. The various talmudic restrictions, however, make conviction very unlikely. As the Talmud says, there has never been and never will be a stubborn and rebellious son. The modern versions, on the other hand, are frequently invoked, sometimes for trivial misbehavior, and allow children to be institutionalized, often inappropriately. Furthermore, there is no evidence that incarcerating status offenders prevents them from committing crimes in the future; indeed, there is evidence that the judicial intervention results in "labeling" the child deviant, and the child then fulfills the prophecy of future criminality.²⁸²

¹ See *Deuteronomy* 19:15, 17:6; *Numbers* 35:30.

² See THE ARTSCROLL SERIES, THE TALMUD BAVLI: THE GEMARA: THE CLASSIC VILNA EDITION, *Sanhedrin* 24b (Schottenstein ed., 2007) [hereinafter BABYLONIAN TALMUD] (specifying categories of persons disqualified as witnesses in judicial proceedings).

³ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 80b (requiring prior warning in capital cases, with respect to the crime and the sanction therefore); THE CODE OF MAIMONIDES, BOOK 14: THE BOOK OF JUDGES, *Sanhedrin* 12:2, at 34 (Abraham M. Hershtman trans., 1949) [hereinafter THE CODE OF MAIMONIDES—JUDGES] ("How is he warned? He is told: 'Abstain, or Refrain, from doing it, for this is a transgression carrying with it a death penalty,' or, 'the penalty of flagellation.'").

⁴ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 81b (remaining silent or nodding one's head in response to a warning is insufficient acknowledgment).

⁵ See *id.*, *Sanhedrin* 30a; *id.*, *Kethuboth* 26b.

⁶ See *id.*, *Sanhedrin* 9b; see also AARON KIRSCHENBAUM, SELF-INCRIMINATION IN JEWISH LAW 114–15 (1970).

⁷ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 37a–37b.

⁸ *Id.*, *Sanhedrin* 40a.

⁹ But see Arnold N. Enker, *Error Juris in Jewish Criminal Law*, 11 J.L. & RELIGION 23, 30 (1994–1995) (arguing that the purpose of the extreme procedural safeguards, in particular the warnings that witnesses are required to give to the wrongdoer, is to limit liability to those who have deliberately and brazenly rebelled against God, as opposed to a heightened concern with factual innocence and societal protection). See also Aaron Kirschenbaum, *The Role of Punishment in Jewish Criminal Law: A Chapter in Rabbinic Penological Thought*, in 9 JEWISH L. ANN. 123, 127, 142 (1991) (arguing that the purpose of the rabbinic criminal procedure rules is not maintenance of the social order, but rather "sacral, mystical, educational [and designed] to elevate man spiritually and to bring him near to Divine Law").

¹⁰ It is theoretically possible to convict an innocent person even under these stringent rabbinic rules if the two witnesses against the defendant perjure themselves, they persist in their lies notwithstanding judicial admonitions and rigorous cross-examination, and their perjury is not discovered in the course of the trial. If their perjury is discovered before the sentence is carried out against their victim, the perjurious witnesses receive the punishment that would have been inflicted on the victim by their testimony. For explanations and analyses of these complex provisions, see ARTSCROLL SERIES, THE MISHNAH, SEDER NEZIKIN, VOL. II(B), *Makkos* 1:4, at 19–21 (Avrohom Y. Rosenberg trans., 1987) [hereinafter THE MISHNAH]; 5 YEHUDA NACHSHONI, STUDIES IN THE WEEKLY PARASHAH: THE CLASSICAL INTERPRETATION OF MAJOR TOPICS AND THEMES IN THE TORAH 1302–310 (Shmuel Himelstein trans., 1988). The judges' reluctance to take upon themselves the responsibility of inflicting punishment (the death penalty or flagellation) may stem from such biblical provisions as the prohibition against murder, see *Exodus* 20:13, the notion of man created in the divine image, see *Genesis* 1:27, and the admonition to pursue justice, see *Deuteronomy* 16:20.

¹¹ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 81b (dealing with certain repeat offenders who have escaped punishment because of technical defects in the proof); 1 EMANUEL B. QUINT & NEIL S. HECHT, JEWISH JURISPRUDENCE: ITS SOURCES AND MODERN APPLICATIONS 139–213 (1980). Rabbis Quint and Hecht discuss emergency jurisdiction of the talmudic and post-talmudic courts and note that the assumption of such extraordinary powers was not lightly undertaken. See *id.* at 172–73.

¹² See THE CODE OF MAIMONIDES—JUDGES, *supra* note 3, *Kings and Wars* 3:10, at 214.

¹³ See, e.g., BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 37b (recounting incident in which the prohibition against circumstantial evidence precluded Rabbi Shimon ben Shatah from offering virtually conclusive evidence against a murderer, but "before they moved from the [scene of the crime] a serpent came and bit [the murderer] so that he died"). See also *id.*, *Aboth* 7a (reiterating the notion of divine intervention in the following pithy metaphor: "[Hillel] saw a skull floating on the face of the water and he said unto it, Because [you drowned others] they drowned [you] and at the last they that drowned [you] shall be drowned."). Accord, *id.*, *Makkos* 10b. In fact, the talmudic Sages went so far as to speculate concerning the divinely imposed counterparts of the four authorized forms of capital punishment, equating falling from a rooftop to stoning; dying in a fire or from a snakebite to burning; being captured by a rogue government or by thieves to beheading; and drowning to strangulation. See *id.*, *Kethuboth* 30b.

¹⁴ For example, at the 1997 annual meeting of the Association of American Law Schools, the Sections on Criminal Justice and Law and Mental Disability jointly sponsored a program, *Predicting and Controlling Criminal Behavior: The Collision of Law and Science*. The issue is likewise often featured in law journals. See, e.g., John Kip Cornwell, *Confining Mentally Disordered "Super Criminals": A Realignment of Rights in the Nineties*, 33 HOUS. L. REV. 651 (1996); Leonard J. Long, *Rethinking Selective Incapacitation: More at Stake Than Controlling Violent Crime*, 62 U.M.K.C. L. REV. 107 (1993); Cecilee Price-Huish, *Born To Kill? "Aggression Genes" and Their Potential Impact on Sentencing and the Criminal Justice System*, 50 SMU L. REV. 603 (1997); Christopher Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97 (1984); Jack F. Williams, *Process and Prediction: A Return to a Fuzzy Model of Pretrial Detention*, 79 MINN. L. REV. 325 (1994); Elyce H. Zenoff, *Controlling the Dangers of Dangerousness: The ABA Standards and Beyond*, 53 GEO. WASH. L. REV. 562 (1985). For a historical survey of preventive

detention, see Alan Dershowitz, *The Origins of Preventive Confinement in Anglo-American Law—Part I: The English Experience*, 43 U. CIN. L. REV. 1 (1974).

¹⁵ See JOHN MONAHAN, U.S. DEP'T OF HEALTH & HUMAN SERVICES, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR* 2–3 (1981) (listing fifteen "points in the legal process at which estimates of future harmful conduct are taken").

¹⁶ See, e.g., CAL. PENAL CODE § 667(a)(1) (West Supp. 1999) ("[A]ny person convicted of a serious felony who previously has been convicted of a serious felony . . . shall receive, in addition to the sentence imposed by the court for the present offense a five-year enhancement for each such prior conviction."); D.C. CODE ANN. § 22-104a(a)(1) (1996) ("If a person is convicted . . . of a felony, having previously been convicted of 2 prior felonies . . . , the court may . . . impose such greater term of imprisonment as it deems necessary, up to, and including, life."); GA. CODE ANN. § 17-10-7(a) (1997) ("[A]ny person convicted of a felony offense . . . who shall afterwards commit a felony . . . shall be sentenced to undergo the longest period of time prescribed for the punishment of the subsequent offense."); N.J. STAT. ANN. § 24:21-29(a) (West 1997) ("Any person convicted of any offense under this act, if the offense is a second or subsequent offense, shall be punished by a term of imprisonment of up to twice that otherwise authorized . . .").

¹⁷ See, e.g., CONN. GEN. STAT. ANN. § 54-64a(b)(2) (West 1994) (allowing court to take into consideration, in determining conditions of release for those charged with crime, the defendant's history of violence and likelihood of committing a crime while released); D.C. CODE ANN. § 23-1322(b)(2), (c)(1) (1996) ("If, after a hearing . . . the judicial officer finds by clear and convincing evidence that no condition or combination of conditions will reasonably assure . . . the safety of any other person and the community, the judicial officer shall order that the person be detained before trial." That criterion is satisfied if there is a "substantial probability that the person . . . [c]ommitted a dangerous crime or a crime of violence."); GA. CODE ANN. § 17-6-1(e) (Supp. 1998) ("A court shall be authorized to release a person on bail if the court finds that the person . . . [p]oses no significant threat or danger to any person, [or] to the community . . . [and] poses no significant risk of committing any felony pending trial . . ."). The Bail Reform Act of 1984, 18 U.S.C. § 3142(e)–(f) (1994), the provisions of which are similar to those of the District of Columbia Code, was upheld in *United States v. Salerno*, 481 U.S. 739 (1987).

¹⁸ See, e.g., CAL. WELF. & INST. CODE § 5200 (West 1998) (authorizing court-ordered evaluations of persons who, because of a mental disorder, are alleged to be dangerous to others or themselves); 405 ILL. COMP. STAT. ANN. § 5/1-119(1) (West 1997) (defining a "[p]erson subject to involuntary admission" as one "with mental illness and who because of his or her illness is reasonably expected to inflict serious physical harm upon himself or herself or another in the near future"); N.Y. MENTAL HYG. LAW § 9.01 (McKinney 1996) (defining a person "in need of involuntary care and treatment" as one with "a mental illness for which care and treatment as a patient in a hospital is essential to such person's welfare").

¹⁹ See, e.g., MO. ANN. CODE OF 1957 art. 27 §§ 413(d)(2), (8), 413(g)(1), (7) (Supp. 1998) (listing as aggravating factors for consideration in connection with imposition of capital punishment that "[t]he defendant committed the murder at a time when he was confined in any correctional institution," and that "[a]t the time of the murder, the defendant was under sentence of death or imprisonment for life," and listing as mitigating factors that "[t]he defendant has not previously . . . been found guilty of a crime of violence," and that "[i]t is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society"); TEX. CODE CRIM. P. ANN. art. 37.071 § 2(b)(1) (West Supp. 1999) (providing that "[o]n conclusion of the presentation of evidence, the court shall submit the following issues to the jury: (1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"); VA. CODE ANN. § 19.2-264.2 (Michie 1995) ("In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society.").

²⁰ 521 U.S. 346 (1997) (upholding statute authorizing involuntary civil commitment of defendant after expiration of his term of imprisonment for conviction as a sexual violent predator and rejecting substantive due process, double jeopardy, and ex post facto challenges to the statute). The statute required prior conviction of a sexually violent offense, as well as a finding of dangerousness to one's self or others, and it further required that the defendant "suffer[] from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence." *Id.* at 352 (citing KAN. STAT. ANN. § 59-29a02(a) (1994)).

²¹ See *id.* (citing *Heller v. Doe*, 509 U.S. 312, 323 (1993); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *Schall v. Martin*, 467 U.S. 253, 278 (1984); *Allen v. Illinois*, 478 U.S. 364, 366 (1980); *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 271–72 (1940)).

²² See, e.g., MONAHAN, *supra* note 15, at 47–49 (concluding "the 'best' clinical research currently in existence indicates that psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior over a several-year period among institutionalized populations that had both committed violence in the past (and thus had high base rates for it) and who were diagnosed as mentally ill"). This frequently cited monograph summarized various studies showing very little predictive capability by mental health professionals. *But see* Randy K. Otto, *On the Ability of Mental Health Professionals to "Predict Dangerousness": A Commentary on Interpretations of the "Dangerousness" Literature*, 18 LAW & PSYCHOL. REV. 43, 60 (1994) (arguing these "first generation" research efforts in the 1970s contained limitations restricting their accuracy and that second generation literature in the 1980s and 1990s "suggest[s] that mental health professionals have *some* predictive abilities when it comes to identifying people who are at increased risk for violence"). *But cf.* Robert Menzies et al., *The Dimensions of Dangerousness Revisited: Assessing Forensic Predictions About Violence*, 18 LAW & HUM. BEHAV. 1, 25 (1994) (The authors of an earlier study disclosing that prediction of future criminality was not very accurate, attempted to refine their methodology to assure greater accuracy. Notwithstanding these improvements, the authors noted that "we were in general not able appreciably to elevate the accuracy of forensic forecasts over those achieved in the earlier article." They also concluded that "the objective of a standardized, reliable, generalizable set of criteria for dangerousness prediction in law and mental health is still an elusive and distant objective [T]he error terms remained immense and were only marginally reduced in comparison to our previous findings.").

²³ See, e.g., Williams, *supra* note 14, at 343–44 ("In summary, studies on predicting dangerousness have shown that experts are accurate in predictions of future dangerousness about one-third of the time and that experts overpredict dangerousness, yielding a false positive rate of sixty percent.") (footnotes omitted); see also MONAHAN, *supra* note 15, at 44–45 (citing a study showing that "between 54 and 61 percent of the patients predicted by the staff to be dangerous actually were found to be safe"). *Cf.* Slobogin, *supra* note 14, at 126:

Current depictions of the research on dangerousness predictions exaggerate their inaccuracy. Nonetheless, read in their best light the data suggest that neither the clinical nor the actuarial method of prediction provides information that will permit an accurate designation of a 'high risk' group whose members have more than a forty to fifty percent chance of committing serious assaultive behavior.

Id.

²⁴ *Estelle v. Smith*, 451 U.S. 454, 472 (1981) (citations omitted).

²⁵ *Barefoot v. Estelle*, 463 U.S. 880, 900 n.7 (1983). While state courts have been willing to allow the testimony of prosecution experts whose predictive accuracy is problematic, they are sometimes loathe to allow defense experts to testify concerning such deficiencies in prediction. See *Rachal v. State*, 917 S.W.2d 799, 815–16 (Tex. Crim. App. 1996) (upholding trial judge's refusal on relevance grounds to allow testimony by defense expert regarding the general inaccuracy of predictions of future dangerousness). On the other hand, some jurisdictions seem to have allowed their reservations about predictability to influence their decisions. See *People v. Murtishaw*, 631 P.2d 446, 466–71 (Cal. 1981) (reversing death sentence because of testimony by expert, who examined defendant only once, that in a prison setting defendant would continue to be violent, and finding such testimony unreliable, citing studies showing psychiatrists are particularly prone to overprediction of violence); *State v. Barnes*, 818 P.2d 1088, 1092–93 (Wash. 1991) (reversing trial court's imposition of exceptional sentence going beyond prescribed sentencing guidelines and noting in this connection the unreliability of predictions of future dangerousness).

²⁶ *Jurek v. Texas*, 428 U.S. 262, 274–75 (1976). *Jurek* upheld the constitutionality of the Texas death penalty scheme. An earlier Texas capital punishment statute had, along with most such legislation in this country, been invalidated in *Furman v. Georgia*, 408 U.S. 238 (1972) (plurality opinion). After the *Furman* decision, the Governor of Texas commuted the death penalties of 47 inmates who were on death row at the time of the decision. A study of these releasees showed that 86% "were not convicted of a new felony while in the free community." See JAMES W. MARQUART ET AL., *THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923–1990*, at 125 (1994).

²⁷ *Schall v. Martin*, 467 U.S. 253, 278 (1984).

²⁸ See, e.g., *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action").

²⁹ But cf., e.g., *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free."). Compare the Jewish law counterpart: "[I]t is better and more satisfactory to acquit a thousand guilty persons than to put a single man to death once in a way." 2 MAIMONIDES, THE COMMANDMENTS 270 (Charles B. Chavel trans., 1967) [hereinafter THE COMMANDMENTS].

³⁰ We use the term "substantial" in the sense that the Talmud discusses the stubborn and rebellious son law at considerably greater length than its discussion of other crimes subject to the sanction of stoning. On the other hand, this analysis occupies a relatively small number of pages (specifically, eight folio pages) in one of the sixty-odd tractates of the Talmud.

³¹ See *Ecclesiastes* 1:9.

³² See *Deuteronomy* 21:10–14. The Torah allows Jewish soldiers to marry captive women but establishes stringent prerequisites for doing so, requirements that are designed to discourage such marriages. See THE CHUMASH, *Deuteronomy* 21: 10–14, *Commentary* at 1046 (Rabbi Nosson Scherman et al. eds., Stone ed. 1993) [hereinafter CHUMASH] (observing that "the purpose of the long delay [in the marriage] is so that the captor's desire will evaporate in the interim and he will set her free"); 5 THE PENTATEUCH AND RASHI'S COMMENTARY, *Deuteronomy* 21:12–13, at 194 (Abraham Ben Isaiah & Benjamin Sharfman trans., 1950) [hereinafter PENTATEUCH AND RASHI'S COMMENTARY] (relying on midrashic source, in observing that the purpose of requiring the captive to let her nails grow long and take off her beautiful clothing is to render her unattractive). See also *Deuteronomy* 21:14 (prohibiting the soldier from selling such a captive into slavery; if he finds her unattractive, he must free her).

Chapter 21 of *Deuteronomy* does not deal with captive women until verse 10. The Old Testament's division into chapters is a Christian convention, whereas the Sages of the Talmud divided the Torah into different segments to be read sequentially in synagogues over the course of the year. According to this rabbinical division, the discussion of women captured in wartime begins the weekly Torah reading.

³³ See *Deuteronomy* 21: 15–17. These verses state that in the case of two wives, one beloved and the other hated, the Jewish husband must give the prescribed double portion to the firstborn son, even if he is the child of the disdained wife.

Rabbi Gershom, who lived in Germany around 1000 C.E., issued a decree prohibiting bigamy and polygamy by Ashkenazi (European) Jews. See 2 MENACHEM ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES* 784–85 (Bernard Auerbach & Melvin J. Sykes trans., 1994). Moreover, "[a]s early as the Talmudic period, there were Sages who ruled that 'whoever marries an additional wife must divorce his first wife and pay her *ketubbah* [marriage contract];' and it was customary in the post-Talmudic period for a husband to promise in the *ketubbah* that he would not take an additional wife." *Id.* at 785 (citations omitted).

³⁴ Rashi relies on the *Midrash Tanchuma*, a compilation of midrashic sources dating as far back as the talmudic era.

³⁵ See 5 PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 32, *Deuteronomy* 21:11, at 193–94 (relying on talmudic era sources).

³⁶ See *id.* Rashi asserts that the Torah allows the marriage because otherwise Jewish soldiers would do so illicitly, and then he goes on to make the causal connection.

³⁷ See CHUMASH, *supra* note 32, *Deuteronomy* 21:18, 20, at 1047, 1049.

³⁸ The Hebrew root may be either *samech, resh, hay*, meaning "rebellion, revolt, perversion, sin, or transgression;" or *samech, resh, resh*, meaning "stubborn, defiant, rebellious." REUBEN ALCALAY, THE COMPLETE HEBREW-ENGLISH DICTIONARY 1818, 1826 (1965). See also ABRAHAM IBN SHOSHAN, THE NEW CONCORDANCE 807, 816 (1989) (listing *sorer* as a four-letter root word, *samech, vav, resh, resh*, meaning "to rebel," and later listing *sorer* as a derivative of the *samech, resh, resh*, root, also meaning "rebellion").

³⁹ See 5 PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 32, *Deuteronomy* 21:18, at 196. Rashi asserts that *sorer* has a two-letter root, *samech, resh*. According to the modern understanding of Hebrew grammar, however, all words are built from three-letter roots or, less commonly, four-letter roots. EHUD BEN-YEHUDA & DAVID WEINSTEIN, BEN-YEHUDA'S POCKET ENGLISH-HEBREW HEBREW-ENGLISH DICTIONARY at xi-xii (1964).

⁴⁰ 5 PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 32, *Deuteronomy* 21:18, at 196.

Rashi derives the meaning of *moreh* as rebellious from earlier passages (*Deuteronomy* 9:7, 24), in which Moses, using the same word root, admonishes the Jewish people for being rebellious against God. Use of this term both with respect to the stubborn and rebellious son and in admonitions to the Jewish people supports a pedagogical, mystical view of the rebellious son law, as describing the relationship between God and the Jewish people.

⁴¹ See ALCALAY, *supra* note 38, at 959, 1494 (The root used in the Torah verse is *mem, resh, hay*, whereas the root meaning to teach is *yud, resh, hay*).

⁴² See 5 NACHSHONI, *supra* note 10, at 1331.

⁴³ "If a man have a stubborn and rebellious son, that will not hearken to the voice of his father, or the voice of his mother, and though they chasten him, will not hearken unto them." *Deuteronomy* 21:18.

⁴⁴ These verses read: "19. [T]hen shall his father and his mother lay hold on him, and bring him out unto the elders of his city, and unto the gate of his place; 20. and they shall say unto the elders of his city: 'This our son is stubborn and rebellious, he doth not hearken to our voice; he is a glutton, and a drunkard.'" *Id.* at 21:19–20. Thus, in modern legal parlance, verse 19 appears to treat pre-trial procedure, while verse 20 concerns the trial.

⁴⁵ "And all the men of his city shall stone him with stones, that he die; so shalt thou put away the evil from the midst of thee; and all Israel shall hear, and fear." *Deuteronomy* 21:21.

⁴⁶ *Id.*

⁴⁷ Cf. *Deuteronomy* 19:19–20, which, although worded in a slightly different fashion, also speaks of removing evil from your midst, stating, "those that remain shall hear, and fear, and shall henceforth commit no more any such evil in the midst of thee"—a clear reference to societal concerns.

⁴⁸ See RAMBAN (NACHMANIDES), COMMENTARY ON THE TORAH, *Deuteronomy* 21:18, at 259 (Charles B. Chavel trans., 1976) [hereinafter RAMBAN].

⁴⁹ See *Deuteronomy* 17:12–13.

⁵⁰ See *id.* at 19:16–20

⁵¹ See *id.* at 13:7–12.

⁵² Indeed, plotting witnesses who have testified falsely can be punished only if their conspiratorial plan is discovered after judgment has been rendered and before the punishment of the innocent victim. See THE MISHNAH, *supra* note 10, *Makkos* 1:6, at 21–25. The law of plotting witnesses was a bone of contention between the Pharisees and Sadducees, with the latter taking the view that the provisions of *Deuteronomy* 19:18–19 prohibiting such false testimony should be read literally and applied only when the plot succeeded, resulting in punishment of the innocent. The Pharisees, however, accepted the Oral Law tradition, applying the provision only with respect to failed plots. For a general discussion of this esoteric law, see 5 NACHSHONI, *supra* note 10, at 1302–10.

⁵³ See RAMBAN, *supra* note 48, at 259.

⁵⁴ This factor also distinguishes the stubborn and rebellious son law from the case of the informer (*mosser*), i.e., one who gives or is about to give information against a fellow Jew to non-Jewish authorities. See, e.g., BABYLONIAN TALMUD, *supra* note 2, *Berakoth* 58a (describing an incident in which Rabbi Shila killed an individual who was about to inform the Gentile authorities that Rabbi Shila had called them donkeys; Rabbi Shila justified his actions by analogizing to the law of the pursuer, arguing that, because the authorities would have killed him for such an insult, the informer was in fact a pursuer); THE CODE OF MAIMONIDES, BOOK 11: THE BOOK OF TORTS, *Wounding and Damaging* 8:1 et seq., at 188–91 (Hyman Klein trans., 1954) [hereinafter THE CODE OF MAIMONIDES–TORTS]. Maimonides explains, "[a]n informer may be killed anywhere, . . . and it is permissible to kill him even before he has informed. As soon as one says that he is about to inform . . . , he surrenders himself to death. He must be warned and told, 'Do not inform,' and then if he is impudent and replies, 'Not so! I shall inform against So-and-So,' it is a religious duty to kill him." *Id.* 8:10, at 190–91. Cf. BABYLONIAN TALMUD, *supra* note 2, *Baba Kamma* 117a (describing the approach for dealing with an individual who protects his own assets at the expense of another's assets by informing).

⁵⁵ See *Genesis* 21:14–17.

⁵⁶ See *id.* at 21:16.

⁵⁷ *Id.* at 21:17.

⁵⁸ See 1 PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 32, *Genesis* 21:17, at 193.

⁵⁹ See *id.*

⁶⁰ See MIDRASH RABBAH, 1 *Genesis* 53:14, at 473 (H. Freedman & Maurice Simon eds. & trans., 3d ed. 1983). *Midrash* is a genre of rabbinic literature that includes stories, parables, and the like, serving as means of exposition of the verses of the Torah.

⁶¹ 1 PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 32, *Genesis* 21:17, at 193 (relying on talmudic era sources).

⁶² BABYLONIAN TALMUD, *supra* note 2, *Rosh Hashanah* 16b (italics and footnotes omitted).

⁶³ Although one might argue it is unnecessary to reconcile the moral and ethical stories of the Bible with the more rigid, legalistic approach of the Talmud—in fact, there is an old Yiddish saying, *uf a meiseh mir fregt nisht a kasha*, meaning that one should not pose hairsplitting legal questions about a story—the rabbinic commentators nonetheless do often engage in such reconciliations. See, e.g., YEHUDA ROSENS, PARASHAT DERACHIM 7–23 (n.d.) (attempting to reconcile the fights between Joseph and his brothers through legalistic analysis of their respective positions).

⁶⁴ This concession on their part, as described by the *Midrash*, seems to be at odds with a different midrashic interpretation of the reason for expelling Ishmael and his mother from Abraham's house, and the two *Midrashim* may indeed reflect different schools of thought concerning Ishmael's character. A few verses earlier, Sarah sees Ishmael "making sport" and, as a result, tells her husband to cast the pair out, a position agreed with by God Himself, who tells Abraham to hearken to Sarah's voice. See *Genesis* 21:9–12. The question is what "making sport" means. Rashi gives two definitions, idol worship and incest, based on use of the same term elsewhere in the Torah. See 1 PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 32, *Genesis* 21:9, at 190. Seemingly not satisfied with these interpretations, he offers a third meaning, namely, murder, based on II *Samuel* 2:14. Rashi buttresses this definition with another *Midrash*, this one describing a quarrel between Ishmael and Isaac, Sarah's son, about the inheritance from their father Abraham, with Ishmael claiming a double portion as the first born son. The *Midrash* describes how the two lads went out into the field, and Ishmael shot arrows at Isaac, saying, "Am I not in sport"—an apparent effort to disguise his murderous intent. *Id.*, *Genesis* 21:9, at 190. It is difficult to reconcile this *Midrash* with the one set forth in the text.

⁶⁵ Rabbi Eliyahu Mizrachi, in his super-commentary on Rashi, distinguishes Ishmael from the stubborn and rebellious son on the additional ground that the latter is killed because he has already engaged in activities that directly lead to his later crimes. Ishmael, however, has not committed any wrongdoing that can be connected to the misdeeds of his descendants. See 1 ELIYAHU MIZRACHI 60 (Abraham I. Friedman publisher, n.d.).

⁶⁶ *Cf.* *Buck v. Bell*, 274 U.S. 200 (1927).

⁶⁷ See MEIR ZVI BERGMAN, GATEWAY TO THE TALMUD 52–53 n.14 (1985) (pointing out that different methods of counting may result in a total of 60, 61, or 63 tractates).

⁶⁸ See Boaz Cohen, *Introduction* to A. COHEN, EVERYMAN'S TALMUD at xxvi, xxxii (1949). Almost all the tractates include both Mishnah rules dealing with the particular subject and Gemara commentary thereon. A few tractates, however, include only Mishnah provisions. See, e.g., BABYLONIAN TALMUD, *supra* note 2, *Pe'ah* (dealing with the portion of the harvest required to be given to the poor); *id.*, *Kil'ayim* (discussing the biblical prohibitions against mixing heterogeneous seeds, yoking together different kinds of domestic animals, and wearing of clothes containing both linen and wool).

⁶⁹ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin*.

⁷⁰ See *id.*, *Sanhedrin* 2a–42a.

⁷¹ See *id.*, *Sanhedrin* 42b–68a.

⁷² See *id.*, *Sanhedrin* 53a. The term "Mishnah" is used in two senses. It refers to the entire body of Oral Law redacted in the second century of the common era and to the individual rules comprising the corpus.

⁷³ See *id.*, *Sanhedrin* 54a–68a

⁷⁴ See *id.*, *Sanhedrin* 68b–72a.

⁷⁵ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 72a–75a. The *rodef* category in the Mishnah includes not only one who pursues another with the intent to murder him, but also one who pursues "a male [with intent to sodomize], or after a girl that is betrothed [with intent to rape her]." See *id.*, *Sanhedrin* 73a. Using hermeneutical derivation based on *Deuteronomy* 22:26, the Gemara expands the category to include a man's pursuit of a woman forbidden to him on pain of death or extinction, i.e., an adulterous or incestuous relationship. See *id.*, *Sanhedrin* 73a.

⁷⁶ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 75a–113b.

⁷⁷ See *id.*, *Kiddushin* 40a ("[I]ntention which does not bear fruit, the Holy One, blessed be He, does not combine with deed.").

⁷⁸ See *id.*, *Sanhedrin* 76b. Likewise, with respect to the other categories of pursuers, the punishment is death. See *id.*, *Sanhedrin* 53a (ruling that male homosexual sodomy and intercourse with a betrothed maiden are punishable by stoning; the latter is a woman who has married, but has not yet consummated the relationship). See also *id.*, *Sanhedrin* 84b (listing relations with a married woman as being an offense punishable by strangulation). See generally THE CODE OF MAIMONIDES–TORTS, *supra* note 54, *Murder and the Preservation of Life* 1:11, at 197 (observing that the pursuer rule applies to all forbidden relations other than bestiality).

⁷⁹ In the case of the burglar, see BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 72a, "Raba said: What is the reason for the law of breaking in [*Exodus* 22:1]? Because it is certain that no man is inactive where his property is concerned; therefore this one [the thief] must have reasoned, 'If I go there, he [the owner] will oppose me and prevent me; but if he does, I will kill him.' Hence the Torah decreed, 'If he come to slay thee, forestall by slaying him.'" Accord 2 PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 32, *Exodus* 22:1, at 251. The Talmud goes on to point out, however, that if it is clear that the burglar has no murderous intent, the owner may not slay him, giving as an example a father who robs his son. See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 72a–72b. The presumption is otherwise if it is a son who is robbing his father; the theory is that fathers are more compassionate. See *id.*, *Sanhedrin* 72b. With regard to the pursuer, the Gemara, see *id.*, *Sanhedrin* 73a, reasons that self-defense is an appropriate response by analogy to the case of a betrothed maiden who is attacked.

⁸⁰ To warrant execution, however, numerous prerequisites must be met.

⁸¹ The Danby translation is 789 pages in length, which includes minimal footnoting to explain technical and esoteric matters.

⁸² See ELLIOT N. DORFF & ARTHUR ROSETT, *A LIVING TREE: THE ROOTS AND GROWTH OF JEWISH LAW* 152–53 (1988).

⁸³ See generally ADIN STEINSALTZ, *THE ESSENTIAL TALMUD* 3–32 (Chaya Galai trans., 1976) [hereinafter STEINSALTZ, *ESSENTIAL*] (describing the nature of the Oral Law and its transmission over the centuries prior to the redaction of the Mishnah).

⁸⁴ The Mishnah often cites an opinion without attributing it to a specific author. Such non-attribution indicates "Rabbi Yehuda HaNasi [the redactor of the Mishnah], ascribed particular importance to [the unattributed opinion], and quoted it anonymously in order to indicate that he himself considered it authoritative [Additionally,] [t]here is a general principle in the Talmud that attributes anonymous *Mishnayot* to the viewpoint of Rabbi Meir, since Rabbi Yehuda HaNasi tended to rely on the traditions according to the formulation by Rabbi Meir and his school." See ADIN STEINSALTZ, *THE TALMUD: THE STEINSALTZ EDITION, A REFERENCE GUIDE* 95 (Israel V. Berman ed. & trans., 1989) [hereinafter STEINSALTZ, *TALMUD REFERENCE GUIDE*]. Further, rabbinical scholars generally consider an unattributed opinion to be binding. See COHEN, *supra* note 68, § 170, at 37. In fact, an unattributed opinion is often assumed to represent the majority's position. See BABYLONIAN TALMUD, *supra* note 2, *Bezah* 2b (Rashi commentary) (asserting that the redactors would often choose not to attribute an opinion so that it would appear to be that of the majority). In a statement somewhat contrary to the above traditions, the Sages assert that one who attributes opinions brings redemption to the world. See *id.*, *Megillah* 15a.

⁸⁵ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 68b(1) n.4. The Talmud often uses sanitized or euphemistic expressions. See, *id.*, *Pesahim* 3a (admonishing against utterance of a "gross expression").

The commentary to the ArtScroll edition of the Talmud points out that the onset of adulthood for a Jewish boy—and the starting point of potential liability as a stubborn and rebellious son—is "when he grows two pubic hairs after turning thirteen." *Id.*, *Sanhedrin* 68b n.3 (citing BABYLONIAN TALMUD, *Niddah* 46a). At age thirteen, a Jewish male becomes obligated to obey the commandments of Jewish law and is designated a Bar Mitzvah (literally "son of the commandments"). See *id.*, *Temurah* 2b (stating that a male is liable for his actions at the age of thirteen and one day); JOSEPH TELUSHKIN, *JEWISH LITERACY* 611–13 (1991) (noting that "[i]n Judaism boys become obligated to fulfill Jewish laws at thirteen, girls—who generally mature earlier—at twelve."). Adulthood at thirteen years and one day is based on the legal presumption that by then the boy has two pubic hairs. See BABYLONIAN TALMUD, *supra* note 2, *Niddah* 45a.

⁸⁶ See BABYLONIAN TALMUD, *Sanhedrin* 70a.

⁸⁷ See *id.* In the text we have used the Soncino Talmud's transliteration of *tartemar* rather than the Danby Mishnah's *tritmor*, because the former is closer to the actual modern pronunciation of the word in question.

According to Rabbi Steinsaltz, a noted contemporary commentator and translator of the Talmud, a *tartemar* weighed approximately one-half pound. See STEINSALTZ, TALMUD REFERENCE GUIDE, *supra* note 84, at 292–93. Accord THE CODE OF MAIMONIDES—JUDGES, *supra* note 3, *Rebels* 7:2, at 158 (referring to the amount consumed as "fifty denar," which is one-half pound).

With respect to the amount of wine that must be imbibed, a *log* is a liquid measure equaling six eggs. See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 70a n.9. Accord STEINSALTZ, TALMUD REFERENCE GUIDE, *supra* note 84, at 290. Italian wine was viewed as both superior and more intoxicating than others. See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 70a n.10. Some commentators state the Mishnah mentioned Italian wine, although it was difficult to obtain and therefore less likely to be habit forming, but that other wines, which were more readily available, would also have qualified. See ISRAEL LIPSHUTZ, THE GLORY OF ISRAEL 236, in 7 MISHNAYOT WITH SEVENTY-THREE COMMENTARIES (Jacob P. Katz et al. eds., Amsterdam 1735). See also MEIR TURDOS HALEVI BULAFIA, YAD RAMAH, CHIDUSHEI HARAMAH AL MASECHET *Sanhedrin* 70a, at 133 [hereinafter YAD RAMAH] (understanding the word "Italian" to be modifying the *log* measurement and not the type of wine and noting that an Italian *log* is larger than a standard *log*).

⁸⁸ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 70a. But see the *Sifre*, another mishnaic era legal treatise, which views the stubborn and rebellious son from an entirely different perspective. Rather than focusing on excessive eating and drinking, the *Sifre* suggests, in somewhat cryptic fashion, that the boy's rebellion is more general, broadly directed against the Torah and the Prophets. *Sifre*, *Deuteronomy* 21:18, reprinted in 2 OTZER HAPERUSHIM: MALBIM 1528 (n.d.). Ibn Ezra, a medieval commentator, embraces this position, suggesting that the boy is rebelling against both positive and negative Torah commandments. IBN EZRA, 3 COMMENTARY ON THE TORAH, *Deuteronomy* 21:18, at 275 (Asher Viser ed., 1976). MOSHE HALBERTAL, MAHAPEHOT PARSHANIUT V'HITHAVTAN 64–66 (1997) (noting that, according to Josephus, the law is not predicated on eating, but is rather based on general rebellion against parental authority. and arguing that Josephus's interpretation amounted to an attempt to conform Jewish law to Roman law).

⁸⁹ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 70a.

⁹⁰ See *id.* The Mishnah gives a few examples of foods that are "otherwise restricted," including foods that have not yet been tithed. See *id.* But see YAD RAMAH, *supra* note 87, at 133 (stating that because meat is not subject to the first tithe, inclusion of this clause is an error, and it is not found in many editions of the Talmud). It would seem that the only way to resolve this difficulty is by reading "eating" loosely to mean "consuming," which would encompass the drinking of untithed wine.

⁹¹ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 71a. The Mishnah is not clear whether the rebellious son must actually steal the food, whether he must steal money to buy the food, or whether either would suffice.

⁹² See *id.*

⁹³ See *id.*

⁹⁴ See *id.*

⁹⁵ See *id.* The Mishnah requires that the three judges who ordered the boy to be flogged either be members of the 23-judge panel or that they be present. Compare the Danby translation, which simply states the original three judges must be "there" at the 23-judge proceeding, with the translation in the ArtScroll edition, which specifies they are members of the larger panel. See BABYLONIAN TALMUD, *supra* note 82, *Sanhedrin* 71a(5).

⁹⁶ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 71a.

⁹⁷ See *id.*

⁹⁸ See *id.*, *Sanhedrin* 71b.

⁹⁹ See *id.*, *Sanhedrin* 70a. The majority opinion requires one-half *log* of wine (equivalent to three eggs), while Rabbi Jose requires one *log* (six eggs). The majority requires a *tartemar* of meat (225 grams), while Rabbi Jose requires a *mana* (450 grams). See STEINSALTZ, TALMUD REFERENCE GUIDE, *supra* note 87, at 279–93 (listing conversion tables for talmudic units of measurement).

¹⁰⁰ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 71a.

¹⁰¹ *Id.*

¹⁰² Rationality can be determined only by examining the relationship between means and ends, as in modern American Due Process and Equal Protection analysis. See, e.g., Gerald Gunther, *The Supreme Court*, 1971 Term—Foreword: *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer*

Equal Protection, 86 HARV. L. REV. 1 (1972) (arguing that the ends of legislation must be articulated in order to assure that the means are rationally related to them).

¹⁰³ BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 71b.

¹⁰⁴ It is true that American law punishes attempts and conspiracies thus expanding the criminal law net to catch behavior that has not yet reached the ultimate acts that the law wants to prevent. However, typically the conspiracies and attempts are closely related to the ultimate harm, both in time and the nature of the ultimate harm.

¹⁰⁵ *See* BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 71b.

¹⁰⁶ *See id.*, *Sanhedrin* 72a.

¹⁰⁷ *See id.*, *Sanhedrin* 68b. It is the Gemara that makes clear that the youth's intemperance will drive him to crime. *See id.*, *Sanhedrin* 72a.

¹⁰⁸ *See* BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 69b–70a

¹⁰⁹ *See* THE CODE OF MAIMONIDES–JUDGES, *supra* note 3, *Rebels* 7:11, at 160 (noting that "[t]he stoning of a stubborn and rebellious son is a scriptural decree and therefore does not apply to a daughter, who is not likely to be led to intemperance in the manner of eating and drinking, as a man is").

¹¹⁰ *See, e.g.*, PUBLIC HEALTH SERVS., U.S. DEP'T OF HEALTH & HUMAN SERVS., SUBSTANCE ABUSE AND MENTAL HEALTH STATISTICS SOURCEBOOK 35 (Beatrice A. Rouse ed., 1995) (finding, with respect to persons age 15–54, that male rates of substance abuse, including alcohol, were double those of women).

¹¹¹ *See, e.g.*, FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 225 (1995) (finding that 85.1% of persons arrested for violent crimes were males and 14.9% were females).

¹¹² *E.g., compare* FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 191 (1975) (finding that 89.7% of violent crimes were committed by males, whereas only 10.3% were committed by females), *with* FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 225 (1995) (finding the female percentage had risen to almost 15%). *See also* Christine Alder, *Violence, Gender and Social Change*, 44 INT'L SOC. SCI. J. 267 (1992) (discussing conflicting studies concerning whether there has been a significant increase in the number of women committing crimes of violence); Deborah W. Denno, *Gender, Crime, and the Criminal Law Defenses*, 85 J. CRIM. L. & CRIMINOLOGY 80 (1994) ("Gender is among the strongest predictors of crime, particularly violent crime This pattern persists despite data indicating that crimes committed by females may be rising.").

¹¹³ Under American law such a gender based distinction would receive heightened Equal Protection scrutiny, making invalidation of such laws more likely. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190 (1976). *But cf.* *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (plurality opinion) (upholding statutory rape law punishing only male partners and reasoning the legislature might have concluded the female's pregnancy risk was sufficient punishment, thus equalizing the deterrents on the sexes). Thus, the result in the *Michael M.* case is consistent with the female gender exclusion for stubborn and rebellious children.

¹¹⁴ *See* BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 68b.

¹¹⁵ *See id.* (translating the phrase in question as "within the scope of the commandments").

¹¹⁶ *See* TELUSHKIN, *supra* note 85, at 495–96.

¹¹⁷ *See* BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 68b.

¹¹⁸ Youth is a factor that correlates with future violence. *See, e.g.*, Deidre Klassen & William A. O'Connor, *A Prospective Study of Predictors of Violence in Adult Male Mental Health Admissions*, 12 Law & Hum. Behav. 143, 145 (1988). *Cf.* Vijoy K. Varma et al., *Correlates of Early- and Late-Onset Alcohol Dependence*, 19 ADDICTIVE BEHAVIORS 609, 618 (1994) (noting that in a comparison of early- and late-onset alcoholics, the former demonstrated more alcohol related problems and tended to display more aggression, violence, and general disinhibition during drinking).

¹¹⁹ *Cf.* Sally Squires, *Study: Alcoholism Risk Tied to Early Drinking*, HOUS. CHRON., July 10, 1998, at D9 (reporting that, according to a National Institute of Alcohol Abuse and Alcoholism study of almost 28,000 people, "[c]hildren who begin drinking regularly by age 13 are more than four times as likely to become alcoholics as those who delay consuming alcohol until age 21 or older").

¹²⁰ *See, e.g.*, *Roper v. Simmons*, 543 U.S. 555 (2005), 568 (holding that the death penalty is not applicable for those who committed the crime while he or she is under the age of 18). In *Roper*, the Court acknowledged that to a certain degree, age limits are arbitrary. *See id.*, at 574 (stating that "[d]rawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules" and

noting that the "qualities that distinguish juveniles from adults do not disappear when an individual turns 18" but nevertheless concluding that "a line must be drawn.").

¹²¹ See, e.g., ARIZ. REV. STAT. ANN. § 8-201 (3) (West Supp. 1998) (defining child as person under the age of 18); COLO. REV. STAT. § 19-1-103(8)(a) (1997) (defining adult as person aged 18 or older); TEX. FAM. CODE ANN. § 51.02(2)(A) (West 1996) (defining a child as under 17); WIS. STAT. ANN. § 48.02(1)(d) (West Supp. 1998) (defining an adult as 18 or older).

¹²² See, e.g., GUY J. MANASTER, ADOLESCENT DEVELOPMENT—A PSYCHOLOGICAL INTERPRETATION 306 (1989) ("There is such great variability in development during adolescence that 'normal' levels and 'normal' timings of developments are very broad. [For example, there is an] approximately six-year 'normal' range for the onset of puberty, [and a] large disparity in moral judgment level among adolescents of any one age and across all adolescent ages").

¹²³ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 70a.

¹²⁴ TOSEFTA, *Sanhedrin* 11:2, at 8 (Ram ed., 1781).

¹²⁵ THE CODE OF MAIMONIDES—JUDGES, *supra* note 3, *Rebels* 2:2, at 158

¹²⁶ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 70a.

¹²⁷ See *id.*, *Sanhedrin* 70b.

¹²⁸ *Id.*, *Sanhedrin* 70a.

¹²⁹ See *id.*, *Shabbath* 129a (equating wine to blood because of its color).

¹³⁰ See *id.*, *Sanhedrin* 70a.

¹³¹ Cf. *Isaiah* 1:18 ("Though your sins be as scarlet . . . though they be red like crimson"); 4 PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 32, *Numbers* 19:22, at 200 (relying on the above verse from *Isaiah*, and observing that "sin is called 'red'").

¹³² See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 70a.

¹³³ Neither the Mishnah nor the Gemara gives examples of cases within this category. One example might be a group traveling together to visit a sick person. See BABYLONIAN TALMUD, *supra* note 2, *Baba Mezia* 30b (referring to the requirement of visiting the sick); accord 1 PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 32, *Genesis* 18:1, at 148 (relying on BABYLONIAN TALMUD, *Baba Mezia* 86b).

¹³⁴ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 70b (Rashi's commentary).

¹³⁵ See *id.*; *Deuteronomy* 14:22–26 (establishing this commandment and directing that persons who do not wish to bring their tithe of grain, wine, and oil to Jerusalem may sell such produce, take the proceeds with them, and spend these funds for whatever they desire, including meat and wine).

¹³⁶ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 70b. A rabbinic decree mandates the drinking of wine at the houses of mourners. *Id.*, *Kethuboth* 8b.

Comforting of mourners is the Gemara's only example in this category. At such meals, the community is gathered together to comfort the mourners, and all are partaking together of a repast that contains meat and wine. This is the opposite extreme of eating on a fast day, in which the stubborn and rebellious son explicitly goes against the actions of the community. YAD RAMAH, *supra* note 87, at 135. Others interpret the significance of the mourner example as being a meal that is only rabbinic in origin. That is, even though the repast is only a rabbinic as opposed to a Torah commandment, the mourners' meal nonetheless releases the stubborn and rebellious son from prosecution. See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 70b (Rashi's commentary).

¹³⁷ BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 70b & n.23. This rationale is given only with respect to the second tithe, concerning which it is normal to eat and drink large amounts, and consequently the rebellious son's gorging is not viewed as sufficiently aberrational.

¹³⁸ See *id.*, *Sanhedrin* 70a.

¹³⁹ The Gemara's answer to this question is simply that the stubborn and rebellious son law applies only to a youth who does not heed his parents, rather than one who ignores the voice of God. See *id.*, *Sanhedrin* 70b.

¹⁴⁰ See *id.*, *Sanhedrin* 71a. It is unclear whether the boy must steal the actual meat and wine from his father, or whether he must steal money from him to buy these provisions.

¹⁴¹ See *id.*

¹⁴² See *id.*

¹⁴³ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 71a.

¹⁴⁴ See *id.*

¹⁴⁵ See MOSHE DAVID VALLI, EXPLANATION OF THE MISHNAH TORAH (1989) (explaining the parents have testimonial roles akin to those of witnesses, and it is paramount that the testimony of each parent stand on its own and not be influenced by that of the other).

Jewish law sets stringent standards regarding the testimony of witnesses. Not only must there be two witnesses to the offense, but they must also be competent. Among the prerequisites for competency are that the witnesses cannot be related either to one another or to the accused. See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 27b (disqualifying relatives of parties as witnesses); *id.*, *Rosh Hashanah* 22a (disqualifying relatives from testifying together); *id.*, *Makkos* 6a (same). In the unique circumstances of the stubborn and rebellious son, both of these precepts are violated.

¹⁴⁶ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 71a. Read literally, the Mishnah does not comport with normal rules of criminal procedure. According to those rules, close relatives are prohibited from testifying against the defendant. See *id.*, *Sanhedrin* 23a, 27b. The witnesses must warn the defendant that his conduct is illegal, and he must then acknowledge the admonition. The Gemara clarifies these matters.

¹⁴⁷ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 71a.

¹⁴⁸ See *id.*

¹⁴⁹ See *id.*, *Sanhedrin* 71b.

¹⁵⁰ *Id.*

¹⁵¹ See *id.*, *Makkos* 7a (giving the general rule that one who has been convicted and thereafter escapes and is apprehended and brought before the same court, remains subject to the judgment).

¹⁵² See, e.g., *Estelle v. Dorough*, 420 U.S. 534, 537 (1975) (per curiam) (referring to the "longstanding and established principle of American law" that permits "dismissal of pending appeals of escaped prisoners," and upholding state law dismissing the appeal of a prisoner who had been returned to custody within two days after escape).

¹⁵³ This is the manner in which the Gemara interprets the Mishnah's warning requirement.

¹⁵⁴ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 70a.

¹⁵⁵ See *id.*, *Sanhedrin* 71a.

¹⁵⁶ Cf. *id.*, *Kiddushin* 30b–31a (observing that a son is likely to honor his mother more than his father, even though he may have greater fear of the latter).

¹⁵⁷ *Id.*, *Sanhedrin* 71a.

¹⁵⁸ See e.g., *id.*, *Kethuboth* 29b.

¹⁵⁹ Although one may also understand the basis of Rabbi Judah's position to be that parents who engage in serious violations of the law do not set a good example for their child, the text of his dissent does not support this view because it focuses only on forbidden relationships without referring to any other transgressions by the parents.

¹⁶⁰ See ARYEH KAPLAN, 1 HANDBOOK OF JEWISH THOUGHT 234–36 (1979) (listing many sources for the idea that all statements in the Talmud "are equally sacred"). Cf. STEINSALTZ, ESSENTIAL, *supra* note 83, at 57 ("A large part of the lure of the Talmud, as well as its indecipherable and enigmatic qualities, results from its unique form, the fact that it records discourses and debates and contains not only definitive conclusions but also the alternative solutions proposed and rejected").

¹⁶¹ See BERGMAN, *supra* note 67, at 95–97 (giving rules for resolving disputes between various talmudic rabbis).

¹⁶² BABYLONIAN TALMUD, *supra* note 2, *Erubin* 13b, *Gittin* 6b. Alternatively, the phrase could be translated as "the Living words of God." Interestingly, while the identical statement is made in both tractates, the dispute in *Erubin* is legal, whereas the one in *Gittin* is factual. Although relevant and legitimate, such disparate positions of course cannot both be legally binding at the same time. See *id.*, *Kethuboth* 57a (Rashi commentary) (observing that, although both positions may stem from truth, depending on the particular circumstances one position may be "truer" than the other). As a rule, the Talmud does not resolve disagreements that do not have legal significance. See 1 KAPLAN, *supra* note 160 at 236. When a concrete rule is needed, the Talmud generally applies a majority rule. Thus, in the disputes between the disciples of Hillel and those of Shammai, which occur throughout the Talmud, including the one prompting the "these and these" statement in *Erubin*, the former almost always prevail because they were in the majority. See BABYLONIAN TALMUD, *supra* note 2, *Shabbath* 13b (noting an instance in which Shammai's adherents were in the majority). The Gemara in *Erubin* adds, however, that the rules of Hillel's disciples prevailed because they were kind and modest. See *id.*, *Erubin* 13b. With the coming of the Messiah, however, at least according to folk wisdom, the rulings of the school of Shammai will govern.

¹⁶³ *But cf.* REGINA M. SCHWARTZ, *THE CURSE OF CAIN: THE VIOLENT LEGACY OF MONOTHEISM* (1997) (arguing that monotheism is inherently violent because of its claim to embody one absolute truth).

¹⁶⁴ The Mishnah does, however, rely on biblical hermeneutics to determine specific limitations that appear to have no rational basis.

¹⁶⁵ Unlike the sentence in the text accompanying this footnote, the Gemara does not launch its discussion with a lengthy drum roll, or any drum roll at all, for that matter. Instead, the Gemara simply begins its discussion of the issue without fanfare, for this colloquy is comparable to hundreds of others appearing throughout the Talmud.

¹⁶⁶ *See* BABYLONIAN TALMUD, *supra* note 2 *Sanhedrin* 68b.

¹⁶⁷ *See id.*

¹⁶⁸ *Id.*

¹⁶⁹ *See id.*

¹⁷⁰ *See id.*; BABYLONIAN TALMUD, *supra* note 2, *Hagigah* 2b (noting that "minor(s) lack understanding"); *id.*, *Yoma* 43a; *id.*, *Gittin* 23a.

¹⁷¹ BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 68b.

¹⁷² *See id.*, *Sanhedrin* 71b.

¹⁷³ *See id.*, *Sanhedrin* 68b

¹⁷⁴ *See id.*

¹⁷⁵ *See id.*

¹⁷⁶ *Id.*, *Sanhedrin* 68b.

¹⁷⁷ "This teaches that the laws of [the stubborn and rebellious son] apply to a son who has nearly attained the strength of a man, i.e., to a boy who sinned soon after becoming an adult." BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 68(b).

¹⁷⁸ From a linguistic standpoint, this is a plausible rather than a contrived stretch.

¹⁷⁹ *See* BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 68b.

¹⁸⁰ *See, e.g.*, SHMUEL SAFRAI, *The Era of the Mishnah and Talmud*, in *A HISTORY OF THE JEWISH PEOPLE* 342 (H.H. Ben-Sasson ed. 1976) ("Any [legal] ruling appearing in the Mishnah . . . is more authoritative than one that occurs only in the Gemara . . . and a ruling by an *amora* [Gemara era scholar] is rejected if it is found to clash with the ruling of a *tanna* [Mishnaic era Sage]").

¹⁸¹ Whereas our discussion of the Gemara passage concerning exemption of minors has extended over several pages, the Gemara itself completes its analysis, from beginning to end, in 63 words. *Cf.* WILLIAM B. HELMREICH, *THE WORLD OF THE YESHIVA: AN INTIMATE PORTRAIT OF ORTHODOX JEWRY* 105 (1982).

The above [transcript of a] discussion [in a yeshiva class] dealt with only six or seven lines in the [Gemara] text but took almost two hours. Moreover, the class spent another three days elaborating and arguing various points regarding this brief segment of the Talmud! When one considers that the Talmud comprises 63 volumes which totals 800 folio pages, not to mention thousands of pages of commentaries, it becomes clear why he who undertakes such study is referred to as plunging into "the sea of the Talmud." Small wonder, then, that no more than a few dozen people in the world today are thoroughly familiar with the entire Talmud.

Id.

¹⁸² BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 69b–70a (footnote omitted). In addition to Rabbi Simeon's *baraita*, a similar gender analysis appears three other times in the talmudic era literature—in the *Tosefta*, in the JERUSALEM TALMUD (*Sanhedrin* 7:1) and in YALKUT SHIMONI, COMMENTARY ON THE TORAH, *Deuteronomy* 21:18, at 636 (1960), a compilation of Midrashim (attributed to Rabbi Jose in the latter two instances). There are important variants in these texts. Those attributed to Rabbi Simeon only discuss the gender exclusion, while Rabbi Jose's statements discuss three exclusions (age, gender, and stealing from parents). Secondly, the *baraita* quoted in the text to this footnote attempts to include the daughter within the scope of the rebellious son law, while the three latter texts argue that *logically* the law should apply to the daughter and *not* to the son. This position can be explained on the basis of the future criminality rationale. On the one hand, it can be argued that gluttony on the part of a young woman is more aberrational and thus more predictive of future wrongdoing. Alternatively, the first two *baraitot* that are attributed to Rabbi Simeon may be saying that a young woman's involvement in prostitution is more likely to lead to future criminality than a young man's gluttony, bypassing the gluttony issue with respect to women completely. The divine decree aspect of Rabbi Simeon's position is thus the Torah's focus on gluttony rather than some other misbehavior, such as promiscuity. *See* ABRAHAM CHAIM SCHOR, *TORAT*

CHAIM 50, *reprinted in* YALKUT M'FARSHIM L'MASECHET SANHEDRIN (n.d.).

¹⁸³ BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 70a (Rashi commentary).

¹⁸⁴ *See id.*, *Sanhedrin* 70a n.7.

¹⁸⁵ *See id.*, *Sanhedrin* 70a (articulating this rationale); REUVEN MARGOLIS, 2 MARGALIT HAYAM—SANHEDRIN, *Sanhedrin* 70a, at 66 (10th ed. 1977) (arguing that the woman would commit adultery, which is punishable by stoning, if she were betrothed; this interpretation skirts the problem that adultery committed by a married woman is punishable by strangulation). In making these arguments, the commentators are attempting to align the factual circumstances for liability in the cases of the son and the daughter, in order to make it clear that the only basis for distinguishing their cases is the specific language, "son and not daughter."

¹⁸⁶ THE CODE OF MAIMONIDES—JUDGES, *supra* note 3, *Rebels* 7:11, at 160. The quotation in the text to this footnote is the authors' translation. The English translation cited in this footnote differs in subtle but important ways from our own, and is, in our view, less accurate. In this connection, see *infra* note 188.

¹⁸⁷ LECHEM MISHNAH, *Rebels* 7:11, in 7 COMMENTARIES ON THE MISHNAH TORAH 130 (Warsaw-Vilna ed., 1983).

¹⁸⁸ Even according to the English translation of Maimonides quoted in *supra* note 109 (THE CODE OF MAIMONIDES—JUDGES, *supra* note 3, *Rebels* 7:11, at 160), this interpretation is not implausible. Although the English translation usually reads, "it is a divine decree: male and not female," if the colon were replaced with a dash, the alternative reading becomes more tenable. Substitution of a dash is not necessarily inappropriate because the Gemara in its original text contains no punctuation at all. Consequently, the translator's decision to use a colon instead of a dash is based on his understanding of the text. *See also* MENACHEM MEYER (MEIRI), BEIT HABACHIRA 66, *reprinted in* YALKUT M'FARSHIM L'MASECHET SANHEDRIN (1978) [hereinafter MEIRI] (asserting that, although the law of the rebellious son is a divine decree, its emphasis on addictive behavior relates to future criminality).

¹⁸⁹ LECHEM MISHNAH, *supra* note 187, *Rebels* 7:11, at 130.

¹⁹⁰ *See id.*

¹⁹¹ *See* 2 THE COMMANDMENTS, *supra* note 29, at 270. Maimonides's position on the stubborn and rebellious son is far more complex than suggested in the text, encompassing such considerations as respect for parents, see, e.g., THE CODE OF MAIMONIDES—JUDGES, *supra* note 3, *Rebels Introduction*, at 137, and concern with overindulgence, see MOSES MAIMONIDES, THE GUIDE FOR THE PERPLEXED 327 (M. Friedlander trans., 2d ed. 1956); 2 THE COMMANDMENTS, *supra* note 29, at 191–92. Maimonides may also view the stubborn and rebellious son provisions as two separate laws—the threshold law involving disobedience of one's parents and gluttony, both having a rational basis and punishable by lashes, in conformance with normative Jewish law, and the follow-up law consisting of continued wrongdoing of a similar nature, a divine decree punishable by stoning. *See* CHAIM HALEVI SOLOVEITCHIK, CHIDUSHEI RABBEINU CHAIM HALEVI 112 (1936) (explaining THE CODE OF MAIMONIDES—JUDGES, *supra* note 3, *Rebels* 7:7, at 159–60); RAMBAN, *Commentary on the Commandments*, in 1 COMMENTARIES ON THE MISHNAH TORAH, at 73 (critiquing 2 THE COMMANDMENTS, *supra* note 29, No. 195, at 191–92). *See also* Hanan Schlesinger, *The Stubborn and Rebellious Son—And Because He Ate . . . and Drank . . . Should He Be Taken Out to Be Stoned?*, 17 MICHLOL 5, 19–25 (1998) (providing an insightful analysis of Maimonides' position, and concluding that Maimonides adopted the divine decree rationale because of the many difficulties with the alternative approaches).

¹⁹² Use of the Hebrew word *ben* in *Deuteronomy* 21:18–21, does not, in and of itself, prove that females are excluded from liability, since the Bible sometimes uses the word more inclusively. *See, e.g., Numbers* 23:19; *Deuteronomy* 22:6, 25:2; *Job* 16:21.

¹⁹³ *See* BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 69a.

¹⁹⁴ *See id.*

¹⁹⁵ *See id.*

¹⁹⁶ *But see* JERUSALEM TALMUD, *Sanhedrin* 8:1 (specifying a six-month window).

¹⁹⁷ *See* BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 69a.

¹⁹⁸ It is interesting to observe how the redactors of the Gemara carefully fashion these two seemingly irreconcilable positions into one. *See* BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 69a. The understanding embraced in the Gemara—namely, three months or full growth, whichever comes first—is the binding one. *See* 1 KAPLAN, *supra* note 160, at 234–35.

¹⁹⁹ Because the boy, by definition, has reached the age at which he is obligated to learn the law and be bound by it, we assume knowledge of the law on his part.

²⁰⁰ The Gemara tries to understand Rabbi Jose's dissenting opinion in the Mishnah that a boy cannot become a stubborn and rebellious son unless he steals from both his father and his mother. The difficulty is that, pursuant to a rabbinic decree that is designed to prevent marital discord and that recognizes that the husband has a duty to support his wife, generally speaking whatever a wife possesses belongs to her husband. One Sage argues that perhaps the boy stole the meat and wine from a meal prepared for his father and mother, and that, because the father has a duty to support the mother, the boy can be deemed to have stolen from both. An objection is raised that a youth is not liable unless he *buys* the meat and wine cheaply and thereafter eats and drinks them. To reconcile these opinions, the Gemara concludes that Rabbi Jose is discussing a theft of money by the son either from funds set aside to purchase a meal for both his parents or from a gift made to his mother by a third party on condition that her husband does not acquire rights in it. See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 71a. See also YAD RAMAH, *supra* note 87, at 136 (discussing whether the woman needs to have actual ownership of the money or food, or if this requirement is satisfied as long as these items are *called* hers, i.e., in the case where the money is set aside to buy food, it is not legally hers, but it has been designated for her meal).

²⁰¹ Fowl does not qualify as meat for this purpose. See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 70b.

²⁰² See *id.*, *Sanhedrin* 70a (Rashi commentary) (explaining that usually fresh meat is considered "joy producing" for two days, and that therefore a person fulfills his obligation of rejoicing on the holidays with such meat; and noting that, for the stubborn and rebellious son law, however, the meat must be considerably fresher, and that once twelve hours pass, the meat is not considered "high quality" anymore and is not addictive).

Unsalted means that the meat cannot have been preserved through salting, see *id.* The meat can have some salt on it, and in fact, because the meat must be kosher, see *id.*, *Sanhedrin* 70b, slight salting is required. See THE CODE OF MAIMONIDES–HOLINESS, *Forbidden Foods* 6:10–12, at 183–84 (Louis I. Rabinowitz & Philip Grossman trans., 1965) (describing salting process necessary for preparation of kosher meat).

²⁰³ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 70a.

²⁰⁴ See *id.*, *Pesahim* 108b, and Rashi and Tosafot commentaries thereon (observing that dilution of wine to a 1:4 ratio was common in the times of the Talmud and that the stubborn and rebellious son is required to drink wine that is diluted but stronger than the 1:4 ratio). In addition, it is possible that wine in that era was stronger than our own. See RABBEINU TOM, SEFER HAYOSHER 252 (Shimon Schlesinger 4th ed. 1985).

²⁰⁵ Under Torah law, theft is an offense punishable by fines and compensatory damages. See *Exodus* 21:37, 22:3 (imposing various fines depending on the nature of the theft).

²⁰⁶ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 70a.

²⁰⁷ See *id.*, *Sanhedrin* 70a.

²⁰⁸ *Id.*

²⁰⁹ *Deuteronomy* 14:26.

²¹⁰ BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 70b.

²¹¹ See *id.*, *Sanhedrin* 71a (Rashi commentary). It may also be that a parent is less likely than a stranger to detect the theft.

²¹² See *id.*

²¹³ See *id.*

²¹⁴ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 70a.

²¹⁵ See *id.*, *Sanhedrin* 70b. The Hebrew word that we have translated as empty (*sarak*) literally refers to a barren tree, that is, one which bears no fruit. See *id.*, *Sanhedrin* 70b(2).9.

²¹⁶ See *id.*, *Sanhedrin* 70b. See MARGOLIS, *supra* note 185, at 70 (noting that the Torah requires eating in a group because it constitutes evidence that the rebellious son is causing others to sin with him). This rationale fits better with one of the hybrid explanations, for if the boy is killed exclusively because of his ultimate end, the current influence he is having on others should not be relevant. *But cf.* YAD RAMAH, *supra* note 87, at 134 (explaining that a group is required because the group will influence the boy to continue on his bad path).

²¹⁷ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 70b.

²¹⁸ *Cf.* Klassen & O'Connor, *supra* note 118, at 146 (finding alcoholics to be among those who "more frequently display antisocial and aggressive behavior").

²¹⁹ See YAD RAMAH, *supra* note 87, at 134.

²²⁰ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 68b. Previously the Gemara invoked the same verse to establish the converse proposition that one who is capable of fathering a child could not himself be a stubborn and rebellious son. The Gemara's tacit assumption there is that a minor is not biologically capable of fathering a child, whereas here it is making the opposing assumption.

The issue whether a minor is biologically capable of fathering a child is debated at *Sanhedrin* 70a. One commentator reconciles this seeming contradiction by arguing that, although normally a minor is not capable of fathering a child, in rare circumstances this is possible. See MEIRI, *supra* note 188, at 66.

²²¹ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 71a. Although neither the Torah, nor the Mishnah or Gemara, explicitly states the boy's father and mother are married to one another, there is evidence that in fact they are married. For example, the Gemara discussion, *id.*, concerning whether the boy must steal from his mother as well as his father is grappling with the question whether a wife can have her own property that is capable of being stolen.

²²² BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 71a.

²²³ See *id.*, *Sanhedrin* 71a (Rashi commentary).

²²⁴ On the other hand, one might argue that, in terms of predicting future criminality, it makes no difference whether the child is inherently evil or became evil as a result of parental inadequacies. In either case, the child is destined to commit future crimes. The Talmud, however, takes the position that pure rebellion—that is, rebellion undiluted by parental blame—is the *sine qua non* of rebellious son liability.

²²⁵ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 71a.

²²⁶ *Deuteronomy* 21:20.

²²⁷ In Hebrew the word for our voice is *koleinu*, and that is the term used in *Deuteronomy* 21:20. The Torah would have written *kolateinu*, had it intended to refer to our voices.

²²⁸ The commentators question Rabbi Judah's logic. First of all, what is the basis for asserting that the parents' voices must be similar? Second, even if that is justified, on what basis does Rabbi Judah extend the inference to require similarity in height and appearance?

Schor interprets the position of Rabbi Judah to be completely allegorical. He quotes an allegorical homily from the *Kabbalah* about *Deuteronomy* 21:19, "his father and mother will take hold of him."

We learned: When God taught [the stubborn and rebellious son laws] to Moses, Moses suggested to God that this text should be left out of the Bible. He said, is there a father that would do this to his son? God replied, write it and be rewarded At that time, God hinted to Yupiel, the master of the Torah. [Yupiel] said to Moses "I will expound on this text: 'If there will be to a man, , the man [referred to] is God, as it says, 'God is a man of war.' '[A] son,' this is Israel. 'Stubborn and rebellious,' as it says, 'as a cow which strays, Israel has strayed,' 'Who does not listen to the voice of his father or to the voice of his mother,' this [father and mother] is the Holy One Blessed Be He, and the congregation of Israel. (. . . 'congregation of Israel' refers to the female aspect of the Divine Presence—the crown—while Holy One Blessed Be He, refers to the male aspect, the glory.) 'And they rebuke him,' as it says, 'God sent in the hands of every prophet,' [i.e., God sent prophets to admonish Israel], 'And he [Israel, the stubborn and rebellious son] did not listen to them,' as it says, 'and they do not listen to God.' 'And his father and mother take hold of him,' one in love one in agreement."

SCHOR, *supra* note 182, at 51.

Schor explains the stubborn and rebellious son is included in the Bible to teach the above allegory. That being so, Rabbi Judah's position can be explained with reference to this allegory. Given that the father and mother refer to two aspects of the one God, their voices are equal, as God is One. Just as the voices are equal, so is their appearance and height, for again, God is One, without any division or separation.

Ben Yehoyada, another commentator, also quotes this kabbalistic interpretation, explaining the Torah is teaching the Jewish people that they should not rely on their designation as God's son and assume that they will not be punished for their sins. A father does not always forgive; at times, a father will punish his son if the latter acts inappropriately. Ben Yehoyada interprets the "son and not daughter" exclusion along the same lines, observing that the other nations of the world are referred to as God's daughters and that this allegory is specifically directed to the Jewish people. See BEN YEHOYADA 24, 25 (1958). In Jewish thought, horrible punishment is always directed at the Jews while the other nations are governed by the rules of nature. See BABYLONIAN TALMUD, *supra* note 2, *Kethuboth* 66b.

²²⁹ The commentators discuss whether it is possible for the parents' voices to be similar.

See, e.g., YEHOYADA, *supra* note 228, at 25 (arguing that it is impossible); *but see* BABYLONIAN TALMUD,

supra note 2, *Sanhedrin* 71a (Rashi commentary) (taking the contrary position). At issue is a portion of the Talmud which says that if an individual has the voice of the opposite sex, it is an indication that he or she cannot procreate. Rashi understands that the voice is a dispositive indicator, while Ben Yehoyada argues that voice is only one indicator among many and that the presence of one indicator is not dispositive.

²³⁰ BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 71a (footnote omitted).

²³¹ *Id.* What is the reward that will be gained from this study? One commentator explains by quoting the maxim that "the reward of a commandment is another commandment." Usually, he says, when one teaches others about the commandments, the teaching is itself performance of a commandment. The people are motivated to observe what they have learned, and that observance is a reward. In the case of the stubborn and rebellious son, the students will not observe the commandment *per se*; rather, they will take heart and repent, and that is the additional reward which accrues. See YEHOYADA, *supra* note 228, at 25.

One can also argue that the Torah had to contain a commandment with no practical application in order to demonstrate that the study of Torah is an end in itself, not merely a means to achieve observance of the commandments. Finally, it may be that, although the purpose of study is to bring one to good deeds, every letter of the Torah contains secrets of wisdom, and the study of that letter is a connection to the "mind" of God.

²³² One commentator asserts that the phrase used in the Talmud, whose literal translation is, "It never was and will not be in the future," is problematic. See YEHOYADA, *supra* note 228, at 25 (paraphrasing Iyun Yaakov). According to him, a more concise expression would be, "It never was and will not be." *Id.* He answers that before his sin, Adam kept all of the Torah on a spiritual plane, and that in the future, after the resurrection of the dead, all of Israel will keep the commandments in a spiritual sense; the stubborn and rebellious son law, however, cannot be observed on a spiritual plane because it has no basis in reality, and that is why it is purely pedagogical. *Id.*

²³³ BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 71a. There are several ways to read Rabbi Simeon's statement. It could mean that a father and mother *should not* have their son stoned, that is, it would be wrong for them to do so; or it could mean that they *would not* have him stoned, meaning that, realistically speaking, parents would not follow this law, thereby rendering it nugatory. See HALBERTAL, *supra* note 88, at 61–62 (pointing out that, according to Rabbi Judah, there is a third way that the son will never be prosecuted—Rabbi Judah's many limitations will make it impossible, as a practical matter, to establish liability).

²³⁴ See YAD RAMAH, *supra* note 87, at 136 (explaining that although Rabbi Simeon believes it is unlikely that parents would ever have their child stoned, those authorities accepting the stubborn and rebellious son law as a practical reality think that some parents would prosecute their offspring because they want to prevent such children from becoming murderers.)

Indeed, in the Middle Ages there were those who, relying on the law of the stubborn and rebellious son, killed their children rather than allowing them to be captured by the Crusaders, who would have forced them to convert. See HALBERTAL, *supra* note 88, at 50–51 n.15.

²³⁵ See COHEN, *supra* note 68, § 334, at 79, § 406, at 91 (stating that while use of the term *mahn* usually indicates that the opinion being attributed is the law unless the text seems clearly to support the other position, the word *k'mahn*, which the Gemara uses here, is a neutral term that of itself indicates neither a majority nor a minority view, and that is instead dependent on the specific context).

²³⁶ See BACHYA IBN PEKUDA, 3 COMMENTARY ON THE TORAH 391 (Dov Shavel 5th ed. 1981).

²³⁷ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 71a. Perhaps Rabbi Jonathan is simply stating poetically and metaphorically his opinion that nothing appears in the Torah that is exclusively pedagogical or hypothetical and that all laws are meant to be carried out. Thus, it may be that in principle Rabbi Jonathan cannot accept that any law is merely hypothetical.

Rabbi Yehudah Henkin, a contemporary commentator, asks three questions about Rabbi Jonathan's statement: (1) How is it conceivable that the Sages were arguing about a question of fact? (2) In what sense did the other Sages rebut Rabbi Jonathan's factual assertion? (3) How could Rabbi Jonathan have seen the execution of a rebellious son, since he lived in a period when the rabbinic courts no longer imposed capital punishment? Furthermore, Rabbi Henkin notes, Rabbi Jonathan claimed that he had sat on the ruins of a condemned city, an even more problematic statement, because even if execution of a stubborn and rebellious son went unnoticed by others, surely the destruction of an entire city would not have been unknown. See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 71a. He answers that Rabbi Jonathan would surely agree that there never was an adjudication of a stubborn and rebellious son. Rather,

he is testifying that he observed a youth who was either worthy or almost worthy of prosecution as a rebellious son, and who died prematurely at the hand of Heaven, thus enabling Rabbi Jonathan thereafter to view his grave. Similarly, he knew of a city that merited condemnation and that had likewise been destroyed by the Almighty. Rabbi Henkin goes on to note that Rabbi Jonathan's position is that there is value only in studying matters that exist and have a reality in the world, so that one who engages in such study will know to avoid the apprehended dangers. If such matters did not exist, there would be no benefit or reward in studying them. *See* Yehuda Henkin, *Chiba Y'tera*, in 2 RESPONSA B'NEI BANIM 73 (1992). In a subsequent conversation that the Authors had with Rabbi Henkin in Jerusalem in June 1997, he raised additional problems with regard to Rabbi Jonathan's statement. First, Rabbi Jonathan was a *kohen*, or priest, and thus under Jewish law he would not have been permitted to enter a cemetery, and in any event it is doubtful that sitting on a grave is appropriate behavior. These difficulties can be resolved by interpreting the word *al* in the *baraita* to mean near, rather than on, the boy's grave.

²³⁸ *See* MAHARAL OF PRAGUE, NOVELLAE ON THE AGGADOT, *Sanhedrin* 71a (opening phrase, *lo haita imo*).

²³⁹ *See* BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 71a.

²⁴⁰ Literal fulfillment is a canon of interpretation somewhat analogous to Justice Scalia's approach in *Michael H. v. Gerald D.*, 491 U.S. 110, 125, 127 n.6 (1989), in which he interprets Due Process by looking at history and case law at their most specific level.

²⁴¹ BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 71a. *See id.*, *Sanhedrin* 45b, at which Samuel argues that where the Torah prescribes a procedure, it must be followed exactly, and if it is impossible to do so, the procedure is not to be followed at all.

There is a relationship between divine decrees and literal fulfillments of Torah verses. According to Maimonides, laws considered to be divine decrees are interpreted strictly and limited to the specific case mentioned in the Torah. Maimonides presumably would view the Gemara passage requiring a verse to be fulfilled exactly as it is written as supporting his approach. The Gemara says that even though in general we might not agree with the claim that all Torah verses must be interpreted strictly or narrowly or literally, here we do so because we have seemingly superfluous words describing the pretrial procedure. Maimonides might instead assert that here we do so because the whole law is a divine decree.

²⁴² BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 71a–71b. The Gemara avoids answering the question by determining that even if such a rule of literal fulfillment were generally true, it cannot be derived from the rebellious son, because the verses describing the pre-trial procedures are superfluous, inasmuch as the Torah could have omitted them and stated simply that the boy was to be punished by stoning. Since, however, these ostensibly superfluous verses are included, they are to be applied with exactitude. Thus, the general rule might still be that nonsuperfluous verses are to be followed literally. *See* BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 71a, 71b.

²⁴³ The future criminality rationale is stated in the Mishnah itself, whereas the other two alternatives are from *baraitot*. Thus, one might view the Mishnah rationale as more authoritative, and, indeed, as a rule of thumb, Mishnah rulings trump *baraitot*. Ultimately, however, the Gemara is the final binding authority. Accordingly, although excluded by the redactor from the Mishnah, a *baraita* that was nonetheless included in the Gemara starts off on the same footing as a Mishnah rule in terms of precedential significance. *See* I KAPLAN, *supra* note 160, at 190–91 (stating that the Gemara is the final binding authority in this context).

²⁴⁴ Although we can thus detect a preference for the future criminality rationale, the Gemara does not reject an alternate understanding of the law unless doing so has practical legal significance. Applying this principle to our context, the Gemara would only be put in a position of having to reject rationales if it believes the law is purely pedagogical, because in that case the law could never be applied. On the other hand, the Gemara could accept the future criminality and divine decree rationales without rejecting the pedagogical approach. This lends support to the view that the latter is not paramount.

²⁴⁵ BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 71b.

²⁴⁶ *Id.*, *Sanhedrin* 71a.

²⁴⁷ *Id.*, *Sanhedrin* 72a. The question of what exactly the son's "end" might be is the subject of much discussion. Of primary concern to the commentators is the Talmud's statement that his end will be to *melastem*, which is usually translated as robbing, and robbery is not a capital crime. There is a wide variety of responses to this issue. The Jerusalem Talmud mentions not only armed robbery but murder as well. *See* JERUSALEM TALMUD, *Sanhedrin* 8:7 ("God saw that in the end [the stubborn and rebellious son] will dissipate the property of his father and of his mother; he will [lie in wait] at the crossroads, rob people, and kill [them]. And his end [will be to] forget his learning"). The ArtScroll translation of the Babylonian

Talmud states that the rebellious son will not only rob, but also "possibly kill anyone who resists." BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 72a.

Another commentator says that stoning is justified, because the boy's rebellion is similar to one who curses his parent and who is consequently put to death in that manner. See Da'at Zekeinim Mibaalei Tosafot, in 5 CHUMASH MIKRAOT GEDOLOT 257 (1971) (quoting *Exodus* 21:17). Others justify this sanction on the ground that the boy will eventually both kill and violate the Sabbath; that he will kill in the future makes the boy a pursuer, who is punishable by death (beheading), whereas violating the Sabbath is punishable by stoning. See YAD RAMAH, *supra* note 87, at 138; YEHOYADA, *supra* note 228, at 25. Yet another explains that, since he is a pursuer, he can be killed in any fashion. See MARGOLIS, *supra* note 185, at 74.

Nevertheless, the Talmud's use of the term *melastem* remains puzzling. The Gemara could have stated explicitly the crime that warrants the penalty of stoning, whatever infraction it may be. Ben Yehoyada quotes unnamed commentaries stating that the Gemara used the term *melastem* to forestall the questions relating to Ishmael. In other words, to distinguish Ishmael's case, the Talmud is pointing out that the rebellious son's end comes from an activity that he has already begun, namely, stealing. See YEHOYADA, *supra* note 228, at 25.

²⁴⁸ But see LECHEM MISHNAH, *supra* note 187, at 130 (arguing that Maimonides viewed the entire stubborn and rebellious son law as a divine decree and that his view was based on the Gemara).

²⁴⁹ BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 71a.

²⁵⁰ See *id.*

²⁵¹ See *id.*, *Sanhedrin* 71b.

²⁵² See *id.*

²⁵³ *Id.* For a concise explanation of this exegetical rule, see THE COMPLETE ARTSCROLL SIDDUR 50 n.2 (Rabbi Nosson Scherman trans., 1984) ("In strictly limited cases, the Sinaitic tradition teaches that two independent laws or cases are meant to shed light upon one another. The indication that the two laws are complementary can be seen in two ways: (a) The same or similar words appear in both cases . . . ; (b) When two different topics are placed next to one another . . .").

²⁵⁴ See *Deuteronomy* 22:13–19.

²⁵⁵ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 71b.

²⁵⁶ See *id.*, *Sanhedrin* 71b (Rashi commentary).

²⁵⁷ Although mainly concerned with a different topic, that of the Noahide laws, the Gemara's interpretation of the Mishnah rules with respect to flight by the youth reflects somewhat differing perspectives on the stubborn and rebellious son law. According to the Gemara Sages, the pre-conviction flight rule may indicate that the rebellious son law is strikingly different from other laws, whereas its post-conviction counterpart may be subsumed within a general rule of criminal procedure.

On the one hand, the Gemara suggests that the pre-conviction escapee whose beard grows around is exempted, just as a convert to Judaism is exempt from prosecution for blasphemy occurring prior to his conversion, due to the intervening change in his legal status. The Gemara rejects this analogy on the ground that the rebellious son's change in legal status is more extreme than the convert's. Even if he repeats his misdeeds, the youth will never again be subject to execution as a rebellious son because he is now too old, whereas one who blasphemes after his conversion remains subject to execution. See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 71b. Thus, the Gemara's analysis shows how narrow the time frame for prosecution and conviction of a rebellious son is, making clear that at the time of judgment the youth must meet all jurisdictional requirements, and that, even if it is his own wrongdoing (flight) that results in his becoming a totally different person, judgment cannot be rendered against him.

On the other hand, once the boy is convicted, there is no change in legal condition if he escapes and his beard grows round, for following conviction, the accused, like all others found guilty and sentenced to death, is considered to be already dead. See *id.*

²⁵⁸ This is the approach of Nachmanides. See 5 RAMBAN, *supra* note 48, *Deuteronomy* 21:18, at 259 ("[The rebellious son] was not executed due to the greatness of his sin, but in order to discipline the public, and so that he not become a menace to others").

²⁵⁹ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 69b–70a.

²⁶⁰ *Id.* (Rashi commentary).

²⁶¹ *Id.*, *Sanhedrin* 71b.

²⁶² See *In re Winship*, 397 U.S. 358, 372 (1970).

²⁶³ *But see* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 35–36 (1987) (finding that, in a study of 350 defendants sentenced to death, 40% were innocent).

²⁶⁴ In contrast, in civil commitment proceedings, the Court has rejected both the preponderance and the beyond reasonable doubt standards, instead requiring clear and convincing evidence, based in part on the elusiveness of the test for commitment, namely, dangerousness to oneself or others, and in part on the fallibility of psychiatric diagnosis. *See* Addington v. Texas, 441 U.S. 418, 429 (1979).

²⁶⁵ *See, e.g., supra* notes 22 & 23 and accompanying text.

²⁶⁶ Joseph M. Livermore et al., *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 84 (1968).

²⁶⁷ *See* ALAN A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 28 (1975).

A test which would predict with 95 percent accuracy is by behavioral science standards an extraordinarily high cutting point. Surely in the mental health area one would have to hope at best for a 60 percent or 70 percent rate. That would produce a cutting line in this example which would produce tens of thousands of false positives. As we shall see, what we now have is much more crude than even that.

Id.

²⁶⁸ *See, e.g.,* Barefoot v. Estelle, 463 U.S. 880, 916 (1983) (Blackmun, J., dissenting).

The Court holds that psychiatric testimony about a defendant's future dangerousness is admissible, despite the fact that such testimony is wrong two times out of three [B]ecause, it is said, the testimony is subject to cross-examination and impeachment. In the present state of psychiatric knowledge, this is too much for me [W]hen a person's life is at stake—no matter how heinous his offense—a requirement of greater reliability should prevail. In a capital case, the specious testimony of a psychiatrist, colored in the eyes of an impressionable jury by the inevitable untouchability of a medical specialist's words, equates with death itself.

Id. (Blackmun, J., dissenting).

The psychiatrist testifying on behalf of the state of Texas in the punishment phase of Mr.

Barefoot's trial was Dr. James Grigson, a/k/a "Dr. Death," based on his "enthusiastic testimony in capital murder cases." Cameron Barr, *Paging Dr. Death*, AM. LAW. 165 (1989). Dr. Grigson had testified as to the defendant's future dangerousness without ever having met him. *See* Aric Press & Diane Camper, *Arguing Life and Death*, NEWSWEEK, July 18, 1983, at 56, 57. According to the report of an investigator for the Dallas County District Attorney's Office, Dr. Grigson's predictions of dangerousness have proved to be "wildly inaccurate." Nonetheless, he "has testified for the prosecution in at least 140 Texas capital trials; jurors imposed death sentences in more than 98 percent of these cases." AMNESTY INTERNATIONAL REPORT, THE DEATH PENALTY IN TEXAS: LETHAL INJUSTICE 12 (March 1998). Dr. Grigson is perhaps best known for his testimony against Randall Adams of "The Thin Blue Line" fame, who was subsequently proved innocent of the crime. Dr. Grigson continued to maintain that Mr. Adams, even if innocent of that crime, was a sociopath. *See id.; see also* MONAHAN, *supra* note 15, at 13.

As the consequences of prediction vary, so may its moral component. In the case of civil commitment, for example, the consequences of long-term hospitalization to the person committed on the basis of an inaccurate prediction of violence are very great. Yet, the situation may be otherwise with predictions of imminent violence which result in "only" several days commitment, after which the person is released. While such detention is plainly a deprivation of liberty, it would be highly disingenuous to compare it to . . . lifelong confinement.

MONAHAN, *supra* note 15, at 35.

²⁶⁹ 274 U.S. 200 (1927).

²⁷⁰ *See, e.g.,* Meyer v. Nebraska, 262 U.S. 390 (1923), in which the majority reversed, on substantive Due Process grounds, the conviction of a teacher of German for violation of a state law prohibiting foreign language instruction to children. Justice Holmes dissented. *See id.* at 412.

²⁷¹ *See, e.g.,* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1339–40 (2d ed. 1988) (describing as "callous" Justice Holmes's characterization of the plaintiffs as "imbeciles," and generally disapproving the result).

²⁷² *Buck*, 274 U.S. at 207.

²⁷³ *See, e.g.,* United States v. Rasco, 123 F.3d 222, 225–26 (5th Cir. 1997) (upholding the constitutionality of 18 U.S.C. § 3559(c) (1994), a mandatory life imprisonment provision for those who commit three

serious, violent felonies, known as the "three strikes" statute); *State v. Thorne*, 921 P.2d 514, 519 (Wash. 1996) (upholding state law requiring persistent offenders to be sentenced to life terms without possibility of parole and noting that "[m]any other states have enacted 'three strikes' types of legislation").

²⁷⁴ The Supreme Court has waxed and waned in its assessments of the "three strikes" provisions. *Compare e.g.*, *Rummel v. Estelle*, 445 U.S. 263 (1980) (upholding a sentence of life imprisonment, with possibility of parole, in the case of a habitual offender who had committed three underlying nonviolent felonies), *with Solem v. Helm*, 463 U.S. 277 (1983) (invalidating, on Eighth Amendment grounds, a life sentence without possibility of parole imposed on a habitual offender who had committed seven underlying nonviolent felonies). It has also upheld a sentence of life without possibility of parole for a non-capital offense. *Harmelin v. Michigan*, 501 U.S. 957 (1991).

²⁷⁵ *See, e.g.*, DANIEL J. KEVLES, *IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY* (1985) (giving the history of the eugenics movement). Although Justice Holmes does not specifically refer to the eugenics movement in *Buck v. Bell*, his opinion resonates with that philosophy, alluding to society's need "to prevent our being swamped with incompetence." *Buck*, 274 U.S. at 207. *See also* Yosaf Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213, 251 (1964) ("[Holmes] was as convinced as any other adherent of Malthusian or Darwinian or Eugenicist doctrines").

²⁷⁶ *See e.g.*, *Nelson v. Heyney*, 491 F.2d 352 (7th Cir. 1974) (holding that disciplinary beatings and one-size-fits-all tranquilizing drugs constitute cruel and unusual punishment); *Morales v. Turman*, 383 F. Supp. 53 (E.D. Tex. 1974) (prohibiting *inter alia* random beatings and isolation).

²⁷⁷ *See Parham v. J.R.*, 442 U.S. 584 (1979).

²⁷⁸ *In re Gault*, 387 U.S. 1 (1967).

²⁷⁹ *In re Winship*, 397 U.S. 358 (1970).

²⁸⁰ *In re Spalding*, 332 A.2d 246 (Md. 1975).

²⁸¹ For an analysis of the dangers of modern status offender jurisdiction see Irene Merker Rosenberg & Yale L. Rosenberg, *The Legacy of the Stubborn and Rebellious Son*, 74 MICH. L. REV. 1097 (1976).

²⁸² EDWIN M. SCHUR, *RADICAL NONINTERVENTION: RETHINKING THE DELINQUENCY PROBLEM* (Prentice Hall 1973).

CHAPTER SIX

"Eye for an Eye"*

The "eye for eye" aphorism appears in three different places in the Bible: *Exodus* 21:23–25, *Leviticus* 24:19–20, and *Deuteronomy* 19:18–21.¹ Although the contexts are different, the wording is almost identical: "Life for life, eye for eye, tooth for tooth," and so forth. Read literally, the verses may appear to reflect the concept of *lex talionis*. Indeed, the "measure for measure" law of retaliation is found in the pre-Sinaitic Hammurabi Code, where it is explicit: "If a man has put out the eye of a free man, they shall put out his eye. If he breaks the bone of a (free) man, they shall break his bone. If he puts out the eye of a villein or breaks the bone of a villein, he shall pay 1 *maneh* of silver."² These explicit class-based distinctions leave no doubt that in at least some instances retaliation in kind is not only allowed but required. By comparison, the generally worded "eye for eye" verses in the Bible are more ambiguous, permitting the inference that "eye for eye" means paying the value of an eye, rather than blinding the aggressor. And there is in fact no evidence that the counterpart Jewish provisions were ever applied literally.³ In fact, it may well be that pre-Mosaic Jews permitted monetary compensation even in murder cases, and that *Numbers* 35:31—"Ye shall take no ransom for the life of a murderer, that is guilty of death"—was directed at such a practice.⁴

While it is true that in two of the biblical references, the "eye for eye" provision is preceded by a "life for life" verse, it was not at all clear that the latter inexorably meant the death penalty. Commenting on the "life for life" verse in *Exodus* 21:23, Rashi, the eleventh century exegetist, states:

Our Rabbis differ in the matter, some say "an actual life" while others say (he shall pay with) money but not with actual life. For one who intends to kill this (person) and kills another (person) is free from (the penalty of) death, and he pays to the victim's heirs his value as though he were sold in the market place.⁵

Thus, when the Torah says "life for life," it does not mean that Jewish law prescribes the death penalty for every killing, even intentional ones.

This is not to say that murder is never punished by the death penalty—it is. *Leviticus* 24:17 specifically provides, "He that smiteth any man mortally shall surely be put to death."⁶ Convicted murderers are to be punished by the sword—that is, beheading.⁷ The catch, and a very big catch at that, is that normative Jewish law makes it almost impossible for the courts to convict murderers or any other alleged wrongdoers, relying instead on God to settle accounts.⁸

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As a result of the stringent rules and regulations governing capital cases, normative Jewish law makes it extremely difficult to convict a murderer. Under Jewish law, the factually innocent can rarely be convicted, but the rules for conviction are so stringent that they practically preclude conviction of the factually guilty as well.⁹

The contrast between Jewish law and its American counterpart in this context is striking. Since 1976, when the Supreme Court made it clear that the death penalty, at least in certain instances, was not unconstitutional,¹⁰ 1,174 persons have been executed,¹¹ and there are currently over 3,200 inmates on death row.¹² Although the Court has erected substantive, procedural, and evidentiary barriers to capital punishment,¹³ several habeas corpus decisions¹⁴ and federal legislation¹⁵ make it extraordinarily difficult for those sentenced to death to mount challenges either to conviction or punishment. While the federal habeas legislation authorizes a successive petition to be entertained if, *inter alia*, there is "clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense,"¹⁶ claims of actual innocence based on newly discovered evidence do not themselves afford a basis for federal habeas relief in the absence of an independent constitutional violation in the state court proceeding.¹⁷

Further, most defendants sentenced to death are indigent,¹⁸ and assigned counsel often do not perform effectively, even when judged by the mushy and minimal standards of *Strickland v. Washington*.¹⁹ Indeed, horror stories abound.²⁰ Racial minorities are overrepresented on death row,²¹ and the disproportionate application of the death penalty to black persons whose victims are white raises no Equal Protection claim.²² Thus, color is often dispositive; color of money and color of skin. Persons opposed to capital punishment in all circumstances cannot sit on juries considering the death penalty,²³ thereby heightening the possibility of hanging juries.²⁴

Confessions, whose trustworthiness and voluntariness are inherently suspect,²⁵ are a sufficient basis for conviction when corroborated merely by evidence that the crime occurred.²⁶ In one third of the states and in the federal courts, uncorroborated accomplice testimony suffices to support the judgment.²⁷ Circumstantial evidence is freely admissible and sufficient for conviction,²⁸ and sometimes quite tenuous; in most jurisdictions and in the federal courts, juries need not even be charged that to convict, the circumstantial evidence must exclude every hypothesis but that of guilt.²⁹ Nontriggerman accomplices can also be executed.³⁰ Furthermore, a substantial proportion of those on death row were subjected to severe physical, sexual, or emotional abuse as children.³¹

Although at least some innocent people are being sentenced to death in the United States,³² the more pervasive problem is that murderers who should not be executed, are. The capital punishment schemes in this country purport to recognize that only the worst of the worst should receive the death penalty. That is, not *all* murderers are to receive capital punishment. The Supreme Court has prohibited the use of mandatory capital punishment laws,³³ and it has required that the sentencer be permitted to consider all mitigating factors in order to assure a "reasoned moral response"³⁴ to the crime.³⁵ State supreme courts have been admonished to assure that the penalty is being applied in a consistent and rational manner in their jurisdictions.³⁶ Yet, we are not seeing that. Prosecutorial overcharging and incompetent defense counsel are facilitating capital punishment for those for whom it was not intended.³⁷ Indeed, before the Court, and then Congress, gutted the Great Writ,³⁸ a substantial percentage of defendants sentenced to

death ultimately had their sentences overturned in federal habeas proceedings.³⁹ However, recent constriction of federal habeas corpus makes it far less likely that unconstitutional applications of the death penalty will be remedied. Thus, while biblical law could only rarely result in "life for life," its contemporary American counterpart all too often not only does so, but does so in an arbitrary fashion and in inappropriate cases, including cases in which the biblical sanction could never be imposed.

Whatever ambiguities are present in the case of "life for life" in the Bible, the interpretation of "eye for eye" makes clear that the latter is not a law of retaliation. The biblical provisions themselves, as well as the Mishnah and Gemara, demonstrate that this aphorism instead means only compensatory damages.

This monetary interpretation is consonant with the Torah's general emphasis on making the victim whole rather than punishing the wrongdoer. Thus, for example, robbery and theft are not treated as crimes requiring lashes. Instead, the Torah demands that the miscreant merely return what he has stolen or at most pay a fine.⁴⁰ Requiring retaliation rather than compensation as a remedy for assault would be in tension with this approach, for retaliation is a punishment and does not assist the victim in any meaningful way.

Moreover, while the foregoing crimes may be distinguished as involving only harm to property rather than personal injury, *Exodus* 21:18–19 specifies that, in the case of a nonfatal assault, the aggressor shall "be quit; only he shall pay for the loss of [the victim's] time, and shall cause him to be thoroughly healed," thus providing a seemingly exclusive damages claim.⁴¹ If retaliation rather than compensation were the sanction intended by "eye for eye"—which comes several verses later in *Exodus* 21:24—it would arguably render the preceding verses redundant and deprive the victim of a more helpful remedy. As Nachmanides, the great thirteenth century Spanish commentator, put it:

[I]f we were to do to the assailant exactly as he has done to the injured man, why does [the wrongdoer] have to pay after that? He himself is in need of amends for the loss of his own time and costs of his own healing!⁴²

Turning to the "eye for eye" text itself, the original Hebrew version of "eye for eye" is *ayen tachat ayen*. *Ayen* means eye, and the phrase is translated as "eye for eye."⁴³ *Tachat*, however, can mean not only "for," but also "in place of," "on account of," "instead of," or "as a substitute for."⁴⁴ For example, *Exodus* 21:27 deals with a master who knocks out his slave's tooth; it commands that the master let him go free—*tachat sheno*—on account (or because) of his tooth.⁴⁵ The use of the word *tachat* here and in other biblical verses supports the notion that it is not employed to denote an identity or parity between the parties.⁴⁶ More specifically, it is not blinding the wrongdoer that will serve "as a substitute for" the victim's loss, but rather compensatory damages that are better suited to achieve this result.⁴⁷

Furthermore, in the *Exodus* version, the verb preceding "eye for eye" is the root "n," "t," "n," (the Hebrew letters *nun, tav, nun*), which is most frequently translated as "give" in both biblical and modern Hebrew.⁴⁸ The *Leviticus* counterpart uses the same verb⁴⁹—not a felicitous choice to express the infliction of punishment, but a good one to connote compensation that must be given to, rather than inflicted on, the injured party.

The Mishnah reinforces these biblical textual interpretations. The opening Mishnah provision dealing with the law of personal injury specifies: "[If] he blinded [another's] eye, cut off his hand, [or] broke his leg, we view [the injured person] as if he were a slave being sold in the market, . . . and appraise how much he was worth [beforehand] . . . and how much he is worth [now]."⁵⁰ In other words, by this clear reference to "eye" and "hand" at the outset of its discussion, the Mishnah, with consummate brevity, reads "eye for eye" as mandating compensatory damages for injuries, rather than *lex talionis*. The Mishnah then goes on to outline the other elements of damages for personal injury, namely, "pain" (pain and suffering), "healing" (medical expenses), "loss of time" (lost earnings), and "disgrace" (an element with no obvious American counterpart),⁵¹ thereby underscoring the point that "eye for eye" is an integral part of a civil damages scheme.

Foreshadowing modern-day Christian fundamentalists, the Gemara's very first question, albeit rhetorical, is why the Mishnah requires compensation rather than retaliation, when the verses literally seem to call for the latter. The response of the Gemara is, "Let not this [interpretation] enter your mind,"⁵² and it then proceeds to give a series of proofs that "eye for eye" does not mean retributory justice in the case of personal injury.

The first such proof is based on an exegetical rule that permits meanings to be derived based either on the proximity of biblical verses to one another, or the use of the same or similar words in different verses. This rule, called a "*gezera shava*" only applies if there is a long-standing tradition authorizing the particular comparison.⁵³ The "eye for eye" provisions in *Leviticus* are preceded by a verse that states, "He that *smiteth* a beast mortally shall make it good: life for life."⁵⁴ The next law provides, "And if a man *maim* his neighbour . . . eye for eye."⁵⁵ Either the proximity of these verses or their use of similar terms, "smite" and "maim," suggests that just as compensation is to be paid by those who strike animals, it should also be rendered in the case of injuries to persons.⁵⁶

This argument is not conclusive because another verse in the same chapter uses the word "smite" with reference to human beings and mandates the death penalty.⁵⁷ The Gemara therefore offers a supplementary proof, one which is more logical, although also dependent on text. Since the Torah says that one cannot accept a ransom for the life of a murderer,⁵⁸ the negative implication is that ransom (compensation) is acceptable in the case of injuries, even though limbs, like lives, cannot be restored.⁵⁹ This proof, too, is not completely sufficient, since it can be read to mean that ransom is permitted, but not required.⁶⁰ The Gemara then weaves these two arguments together, offering rebuttals and surrebuttals and grappling with various biblical texts, as a means of demonstrating that the Written Law is in tandem with the Oral Law view of compensation as the exclusive remedy for personal injury. These two arguments, although imperfect individually, when spliced together, make a complete response. Buttressing this combination's persuasiveness is its anonymity, for anonymous talmudic opinions reflect more widespread acceptance and thus are generally more authoritative.⁶¹

Logic dominates the next proof. How can the "eye for eye" verse be implemented as a law of retaliation when the eye of the victim and that of the aggressor may be of different sizes?⁶² If it is argued that in such cases compensation is required, then this interpretation seemingly runs afoul of the Torah provision requiring "one manner of law,"⁶³ that is, parity. The rejoinder is that parity can be achieved by viewing the sanction

in terms of eyesight rather than individual eyes—that is, if one destroys another's vision, his, too, should be destroyed. Indeed, argues the Gemara, if this interpretation were not accepted, it would preclude executing a large man who murdered a small man, and vice versa.⁶⁴ Because it is possible to read the verse that way, this does not constitute dispositive proof that the Bible mandates compensation rather than retaliation for personal injuries.

The follow-up argument is along the same lines. The Gemara asks, What if a blind man puts out the eye of one who is not blind, or an already disabled person cuts off another's hand—cases in which necessarily there can be no parity?⁶⁵ Its response is, Why not say that the "eye for eye" verse applies only if it is possible to take out the aggressor's eye, but that if it is impossible, he should be freed from any liability?⁶⁶ If this reasoning is not accepted, what would we do in the case of a *treifah*, a person with a fatal disease who will die within a year, who kills a healthy person? In such a case under Jewish law, the *treifah* cannot be convicted and must be released.⁶⁷ But just because that is true, does not mean we cannot execute murderers in general.⁶⁸ Thus, since the verses can be interpreted to mean that *lex talionis* applies unless it is impossible to do so, this approach is also not completely persuasive. At the same time, however, the talmudic argument is, in its own way, quite compelling, because once it is conceded that literal application of a retaliation rule is impossible in every situation, it then "becomes more logical to establish a monetary understanding of the phrase, for this makes possible uniform execution of justice across the board."⁶⁹

Yet another argument is based on two principles: that language ordinarily should be given its plain meaning,⁷⁰ and that no verse or phrase or word or letter in the Torah is superfluous.⁷¹ The School of Rabbi Ishmael, a Mishnaic-era Sage, takes the view that the word "given" in the "eye for eye" provision of *Leviticus* 24:20 ("so shall it be *given* to him") plainly refers to monetary compensation, since one does not *give* retaliation, but rather *inflicts* it.⁷² The difficulty is that the same verb root, "to give," is used in the immediately preceding verse in a context that makes it clear that it means to inflict rather than to give: "And if a man maim [literally, *gives* a wound to] his neighbour . . ."⁷³ The Gemara's response is to suggest that the position taken by the School of Rabbi Ishmael is based on the need to eliminate a redundancy.⁷⁴ *Leviticus* 24:19, the earlier verse, states, "And if a man maim his neighbor, as he has *done* so shall it be *done* to him."⁷⁵ If that expresses a retaliatory punishment, why then does it need to say in the very next verse, "so shall it be *given* to him?"⁷⁶ The seeming redundancy is obviated by interpreting the word "given" in the "eye for eye" verse as referring to compensation rather than retribution, thus making it clear that "so shall it be done to him" does not mean retaliation. The Gemara nonetheless remains troubled by the Torah's use of the root "to give" in a context in which it clearly means to inflict injury. The resolution it suggests is that, since it was necessary to use that verb at the end of the verse in order to make clear that monetary compensation was intended, the same verb was employed earlier simply as a literary device to provide parallelism.⁷⁷

The Gemara then gives a mirror image of the preceding proof, albeit with regard to the version of "eye for eye" that appears in *Deuteronomy*.⁷⁸ The School of Rabbi Hiyya taught that the phrase "hand in hand"⁷⁹ means something given by one person to another, which is a reference to money.⁸⁰ The difficulty is that the verse then says "foot in foot,"⁸¹ a phrase not amenable to such an interpretation. The Gemara suggests that this School's

interpretation is, like that of the School of Ishmael in the earlier proof, based on the need to prevent redundancy.⁸² A preceding verse in *Deuteronomy* states, "[T]hen shall ye do unto him, as he had [conspired] to do unto his brother."⁸³ Since that verse appears to deal with infliction of injury as a sanction for giving corrupt testimony, the phrase "hand in hand" would be superfluous if it meant the same thing, and consequently it must instead refer to compensation, once more making it clear that the latter was the original intent.⁸⁴ Again, the Gemara persists: What about "foot in foot"?⁸⁵ And again its response is in terms of literary parallelism.

The next argument is once more a combination of logic and text. *Exodus* 21:23–24 states "eye for eye" and "life for life," rather than "life and eye for eye."⁸⁶ That is, it is possible that during the blinding of an aggressor who has blinded another, the wrongdoer may die, and consequently retaliation would result in disproportionate punishment contrary to the biblical text.⁸⁷ The Gemara's response is that perhaps all the verse means is that, if it is possible to blind the perpetrator without killing him, we will do it, but if we think that he will die during the blinding then we do not apply *lex talionis*.⁸⁸ If our estimate is wrong, and he dies, then he dies. Such an approach is consistent with the law of lashes: If a court concludes that a person found guilty of a crime punishable by flogging cannot survive this punishment, then he is not flogged.⁸⁹ If instead the court decides that the offender can survive the lashing, he is flogged, and if he dies, he dies, and there is no liability incurred by the court officer who executed the judgment.⁹⁰

Again invoking text and logic, the Gemara cites Rabbi Zebid's pronouncement that *Exodus's* inclusion of "wound for wound" establishes that there is to be separate recompense for pain and suffering, on the one hand, and for depreciation (the functional equivalent of diminution of the victim's future earning capacity) on the other.⁹¹ If, however, "wound" is taken to refer to retaliation, a single retaliatory act would collapse the two elements, producing both pain and depreciation in one fell swoop and precluding such dual elements.⁹² The Gemara has difficulty with this argument, suggesting that these two separate elements would be present even if the remedy were retaliation, in situations where there were differences in the pain thresholds of the parties, thus requiring the difference to be made up by compensation.⁹³

The next argument is once more a mirror image of the preceding proof, this time dealing with the requirement that separate recompense be made for both medical expenses and depreciation. Again, retaliation would collapse the two elements, but again the Gemara suggests that, because some individuals heal more quickly than others, in such cases the duality would be preserved by requiring compensation as well.⁹⁴ Because of this possibility, both this argument and the preceding one are not conclusive.

The final proof, offered by Rav Ashi, seemingly based on the exegetical rule of linguistic similarity,⁹⁵ is that compensation can be inferred from use of the word *tachat* both in connection with injury to a man and injury to an ox. *Exodus* 21:24 states, "eye for eye," and *Exodus* 21:36 states, "he shall surely pay ox for ox."⁹⁶ Since the latter requires compensatory damages, so, too, with respect to injuries to persons.⁹⁷ An objection is made because there is no reason to link such disparate verses, one dealing with animals and the other with people.⁹⁸ Rather, it is suggested, let us link the "for" in "eye for eye" with the verse that deals with the killing of a person. *Exodus* 21:23 states that in such cases the punishment shall be "life for life." Since retaliation is exacted for the killing of a person, so too should it be required for injury of a person. A different

objection is made to that logic. Why compare a case of injury with a case of murder? The response is: Is it not more logical to link two laws that deal with human beings than it is to link a law about a person to a law about an ox?⁹⁹ Apparently not altogether satisfied with his original analogy, Rav Ashi, who had offered the proof based on the case of the ox, responds by proffering an alternative argument, asserting that the compensatory theory can be derived by analogy from the verse "for [*tachat*] he has humbled her," in *Deuteronomy* 22:29, a verse that deals with the rape of a woman and thus encompasses both a human being (rather than an animal) and an injury (rather than a death).¹⁰⁰

Finally, however, the Gemara adduces a Mishnaic-era authority who seemingly espouses the view that "eye for eye" does mean a law of retaliation. Rabbi Eliezer said: "'Eye for eye' literally refers to the eye."¹⁰¹ The Gemara is taken aback, stating, "Literally, you say? Could Rabbi Eliezer be against all those Tannaim [the Mishnaic-era Sages discussed above who argue in favor of compensatory damages]?"¹⁰² The Gemara therefore opines that all Rabbi Eliezer intended to say was that, in computing compensatory damages, the victim is not to be valued as if he were a slave being auctioned in the marketplace.¹⁰³ This is immediately challenged on the ground that there is no way to compute the depreciated value of a human being other than as a slave.¹⁰⁴ Rav Ashi brings the matter to closure by suggesting that what Rabbi Eliezer really must have meant was a compensatory damages scheme in which valuation was based not on the value of the victim's eye, but that of the aggressor.¹⁰⁵

Critics have suggested that the very multiplicity of proofs and the weakness of some of them demonstrate that the Gemara Sages were protesting too much—that they were in fact changing the meaning of the written text to conform it to contemporary notions of morality, just as the original biblical text prescribed *lex talionis* as a heightened moral response to prevailing customs providing disproportionate punishment such as execution as a sanction for nonfatal assault.¹⁰⁶ Indeed, the dispute over the meaning of "eye for eye" is symptomatic of the divide between Orthodox and non-Orthodox denominations within Judaism regarding the divine nature and immutability of the Law.

From our perspective, looking at the Gemara's arguments in their totality, they appear persuasive, although some seem obviously stronger than others. That is not unusual, since the Gemara itself often raises seemingly weak contentions as a means of clarifying for future generations that these arguments have already been duly considered and rejected,¹⁰⁷ and as a means of complying with the commandment to study the Torah in depth by looking at a problem from every possible angle to see if that perspective will shed light on the matter.¹⁰⁸ As it is said, the Torah is read on four levels, has seventy meanings, and is like a rock which, when struck, splits into many pieces, and while it may yield a plethora of conflicting opinions, all are, at least in a mystical sense, correct, constituting the words of the living God.¹⁰⁹

More importantly, since the meaning of "eye for eye" is at the fault line between Oral Law and Written Law—an Oral Law that seems to contradict the written text of the Torah—the Gemara may have taken this opportunity to make clear that one cannot read the written text without the Oral Law, and that indeed, a careful reading of the Written Law in conjunction with the hermeneutical rules of biblical interpretation makes it plain that the written text always meant compensation rather than retaliation.¹¹⁰ Judged in this light, Rav Ashi's seemingly tortured reconciliation of Rabbi Eliezer's ostensibly literal

interpretation of "eye for eye"—that is, that Rabbi Eliezer was simply measuring compensatory damages by the value of the aggressor's eye rather than that of his victim—may be a way of expressing the view that the compensatory damage scheme was interposed as a form of atonement.¹¹¹ In other words, when paying damages based on his own eye's worth, the aggressor should recognize that, as a matter of strict justice, his eye should be blinded, and that compensatory damages is a compassionate substitute remedy that, at the same time, provides recompense to the victim.¹¹²

Measuring damages on the basis of the value of the wrongdoer's eyesight resonates with the Jewish law of sin offerings. Jews committing certain unintentional offenses were required to bring prescribed sacrifices to the Temple in expiation of their sins.¹¹³ But why should sacrifice of an animal atone for an individual's wrongdoing? One of the Rabbinic responses is that the sinner watching the animal as it is being offered on the altar should do so with the understanding that it is he rather than the animal whose life should be taken, and that a merciful God has instead spared him¹¹⁴—a soul for a soul.¹¹⁵

In a sense, the difference between what should be (namely, retribution) and what is (compensation) reflects different attributes of God. In *Genesis*, when God is creating the world, the word used for Him is a term denoting strict justice. Recognizing, however, that the world could not function on that basis alone, God invoked the attribute of mercy and gave precedence to it, signaling this shift by using the divine name expressing that quality.¹¹⁶

Finally, it is perhaps not irrelevant that the Bible is great literature, combining style, elegance, economy of language, gripping stories, and, last but not least, law.¹¹⁷ While the stories are inherently memorable, law tends to be dry as dust and just as forgettable. What better way to bring the law to life than to infuse it with the excitement of drama and to use language that stirs the emotions and imagination? The Mishnah's listing of the nitty gritty elements of compensatory damages is essential but hardly exciting. The Torah's rendition—"eye for eye"—rivets the attention of the reader, evoking a visceral emotional response that endures. Even though most people may misinterpret "eye for eye," at least they do not forget it. In this view, the Torah, the Written Law, is poetry, and the Talmud, the Oral Law, is its prose counterpart—neither one complete without the other.¹¹⁸

Which is not to denigrate the Oral Law as a literary work. As the Talmud itself provides, judges instructing witnesses in capital cases are required to give the following admonition:

Know then that capital cases are not like monetary cases. In civil suits, one can make monetary restitution and thereby effect his atonement; but in capital cases he is responsible for [the] blood [of the accused] and the blood of his [potential] descendants until the end of time For this reason was man created alone, to teach thee that whosoever destroys a single soul of Israel, Scripture imputes [guilt] to him as though he had destroyed a complete world; and whosoever preserves a single soul of Israel, Scripture ascribes [merit] to him as though he had preserved a complete world.

Not bad for prose.

¹ The *Exodus* version of "eye for eye" reads as follows:

But if any harm follow [when men strive together], then thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe.

Exodus 21:23–25.

The *Leviticus* counterpart states:

And if a man maim his neighbour; as he hath done, so shall it be done to him: breach for breach, eye for eye, tooth for tooth; as he hath maimed a man, so shall it be rendered unto him.

Leviticus 24:19–20.

Finally, *Deuteronomy* provides:

And, the judges shall inquire diligently; and behold, if the witness be a false witness, and hath testified falsely against his brother; then shall ye do unto him, as he had purposed to do unto his brother; so shalt thou put away the evil from the midst of thee. And those that remain shall hear, and fear, and shall henceforth commit no more any such evil in the midst of thee. And thine eye shall not pity: life for life, eye for eye, tooth for tooth, hand for hand, foot for foot.

Deuteronomy 19:18–21.

² 2 THE BABYLONIAN LAWS 77 (G.R. Driver & John C. Miles eds. and trans., 1960).

³ See THE PENTATEUCH AND HAFTORAHS, *Exodus—Additional Notes*, at 405 (J.H. Hertz ed., 2d ed. 1989) (comparing "eye for eye" with counterpart provisions in the Hammurabi Code, pointing out that Jewish formulation is now "recognized as one of the most far-reaching steps in human progress," and noting that "there is no instance in Jewish history of its literal application ever having been carried out").

⁴ *Id.*

⁵ 2 THE PENTATEUCH AND RASHI'S COMMENTARY 242 (Abraham Ben Isaiah & Benjamin Sharfman trans., 1949) [hereinafter PENTATEUCH AND RASHI'S COMMENTARY].

⁶ See also *Numbers* 35:30–31 ("Whoso killeth any person, the murderer shall be slain at the mouth of witnesses . . . [Y]e shall take no ransom for the life of a murderer, that is guilty of death; but he shall surely be put to death."); *Exodus* 21:12–14 ("He that smiteth a man, so that he dieth, shall surely be put to death. And if a man lie not in wait, but God cause it to come to hand; then I will appoint thee a place whither he may flee. And if a man come presumptuously upon his neighbour, to slay him with guile: thou shalt take him from Mine altar, that he may die.").

⁷ ARTSCROLL SERIES, THE MISHNAH, SEDER NEZIKIN, VOL. II(A), *Sanhedrin*, 9:1, at 153–54 (Avrohom Y. Rosenberg trans., 1987) [hereinafter THE MISHNAH]. Murder is not the only offense punishable by death. See THE CODE OF MAIMONIDES, BOOK 14: THE BOOK OF JUDGES, *Sanhedrin* 15:10–13 (Abraham M. Hershman trans., 1949) (giving brief description of 35 other capital crimes) [hereinafter THE CODE OF MAIMONIDES–JUDGES].

⁸ See, e.g., THE ARTSCROLL SERIES, THE TALMUD BAVLI: THE GEMARA: THE CLASSIC VILNA EDITION, *Makkoth* 10b, (Schottenstein ed., 2007) [hereinafter BABYLONIAN TALMUD] (describing "two persons who had slain, one in error and another with intent, there being witnesses in neither case. The Holy One, blessed be He, appoints them both [to meet] at the same inn; he who had slain with intent sits under the step-ladder and he who had slain in error comes down the step-ladder, falls and kills him. Thus, he who had slain with intent is [duly] slain, while he who had slain in error [duly] goes into banishment.").

⁹ See, e.g., Irene Merker Rosenberg & Yale L. Rosenberg, *Guilt: Henry Friendly Meets the MaHaRaL of Prague*, 90 MICH. L. REV. 604, 618 (1991) (noting that Jewish law rules governing criminal procedure are seemingly contradictory, because they "are so strict that they assure conviction of only the factually guilty, and at the same time the very same rules make it almost impossible to convict even the factually guilty") (footnote omitted). Even with all of the procedural safeguards, it remains at least theoretically possible, notwithstanding rigorous cross-examination, to convict a factually innocent person through the testimony of plotting witnesses who conspire to frame the defendant. See *id.* at 616 n.67.

¹⁰ See *Gregg v. Georgia*, 428 U.S. 153, 169, 187 (1976) (plurality opinion); *Proffitt v. Florida*, 428 U.S. 242, 247 (1976) (plurality opinion); *Jurek v. Texas*, 428 U.S. 262, 268 (1976) (plurality opinion).

¹¹ See *Death Penalty Information Center Fact Sheet* (last modified Sept. 17, 2009) available at <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last visited Oct. 12, 2009).

¹² See *id.* (providing death row statistics as of Jan. 1, 2009).

¹³ The basic safeguards are delineated in *Gregg v. Georgia*, 428 U.S. at 196–98, 204–06. Substantively, the punishment must conform to evolving standards of decency, and it must accord with the "dignity of man," meaning that it must not be "excessive"—that is, it "must not involve the unnecessary and wanton infliction of pain," and it must not be "grossly out of proportion to the severity of the crime." *Id.* at 172–75 (citation omitted). Further, the punishment must achieve the penological goals of retribution or deterrence. *See id.* at 182–83. Procedurally, there must be a bifurcated process, with guilt and punishment separately determined, and the sentencer must be given adequate guidance concerning matters relevant to the sentencing decision. *See id.* at 190–95.

Translating these general guidelines into concrete rulings, the Court has provided limited additional substantive safeguards. *See, e.g.,* *Enmund v. Florida*, 458 U.S. 782, 798–801 (1982) (invalidating capital punishment in case of defendant who drove getaway car in robbery, but did not kill victim, had no intent to do so, and had not anticipated killing); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion) (holding that imposition of death penalty for raping adult woman is disproportionate punishment and violates the Eighth Amendment). *But see, e.g.,* *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (holding that substantial participation combined with reckless indifference in commission of murder is sufficient to warrant death penalty even though defendant is not person who actually committed killing).

With respect to additional procedural safeguards, *see, e.g.,* *Turner v. Murray*, 476 U.S. 28, 36–37 (1986) (holding that "capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias") (footnote omitted); *Eddings v. Oklahoma*, 455 U.S. 104, 110–12 (1982) (concluding that, except in rarest of cases, sentencer must be allowed to hear all mitigating factors and circumstances offered by defendant in opposition to death penalty); *Beck v. Alabama*, 447 U.S. 625, 637–38 (1980) (prohibiting imposition of death penalty where jury was not allowed to consider verdict on lesser-included noncapital offense and evidence would have supported the latter verdict); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (same holding as *Eddings*). *Lockett v. Ohio* is qualified by *Burger v. Kemp*, 483 U.S. 776, 791–95 (1987) (rejecting capital defendant's claim that his lawyer's failure to present mitigating evidence at sentencing constituted ineffective assistance of counsel). Subsequently, the Court has been more amenable to Sixth Amendment ineffective assistance of counsel claims in death penalty cases. *See* *Wiggins v. Smith*, 539 U.S. 510 (2003).

¹⁴ *See, e.g.,* *McCleskey v. Zant*, 499 U.S. 467, 493–97 (1991) (requiring prisoners who have filed successive habeas corpus petitions to meet onerous requirements of cause and prejudice before their claims can be considered on the merits); *Teague v. Lane*, 489 U.S. 288, 301, 310 (1989) (plurality opinion) (establishing general rule of nonretroactive application of new constitutional rules on federal habeas corpus review, and defining new rules as those based on claims not dictated by prior case law); *Butler v. McKellar*, 494 U.S. 407, 415 (1990) (further tightening noose on availability of federal habeas by broadening definition of new rule to include any contention concerning which reasonable judges might differ).

¹⁵ *See Antiterrorism and Effective Death Penalty Act of 1996*, Pub. L. No. 104-132, 110 Stat. 1214, 1214–16 (1996) (restricting availability and scope of federal habeas corpus even beyond already highly restrictive case law). For example, 28 U.S.C. § 2254(d)(1) (Supp. 1996), which governs the scope of review of questions of law and mixed questions of fact and law, arguably adopts the draconian minority view of Chief Justice Rehnquist and Justices Thomas and Scalia in *Wright v. West*, 505 U.S. 277, 291 (1992) (plurality opinion) (reading *Teague v. Lane* as rejecting *de novo* habeas corpus review of questions of law).

¹⁶ 28 U.S.C. § 2244(b)(2)(B)(ii) (Supp. 1996).

¹⁷ *See* *Herrera v. Collins*, 506 U.S. 390, 400 (1993) (holding that the purpose of habeas corpus courts is to protect Constitution, not correct errors of fact).

¹⁸ *See, e.g.,* Lisa R. Duffett, Note, *Habeas Corpus and Actual Innocence of the Death Sentence After Sawyer v. Whitley: Another Nail into the Coffin of State Capital Defendants*, 44 CASE W. RES. L. REV. 121, 128 (1993) (noting that 99.5% of death row inmates are indigent).

¹⁹ 466 U.S. 668, 690–91, 695 (1984) (requiring court to "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance," given strong presumption that lawyers provide adequate representation, and also requiring defendant to prove "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt"). In capital cases, the defendant must show a reasonable probability that, absent the errors, the sentencer would not have imposed the death penalty. *See id.*

For articles plumbing the depths of ineffective assistance, particularly in capital cases, see Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 YALE L.J. 1835 *passim* (1994); Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433 *passim* (1993); David R. Dow, *Teague and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 23, 63–71 (1991) (reciting statistics comparing death penalty convictions in cases defended by court-appointed counsel versus those defended by public defenders).

²⁰ See, e.g., Bright, *supra* note 19, at 1835. Bright explains:

Tragically, murders of abusive spouses are not rare in our violent society, but seldom are they punished by the death penalty. Yet this woman was sentenced to death. Why?

It may have been in part because one of her court-appointed lawyers was so drunk that the trial had to be delayed for a day after he was held in contempt and sent to jail. The next morning, he and his client were both produced from jail, the trial resumed, and the death penalty was imposed a few days later.

Id. (footnote omitted).

Another horror story is as follows:

[The 18-year-old homicide defendant's] lawyer, a woman then 35 years-old, became emotionally involved with [the defendant], who is mildly retarded, while she was preparing for the trial. Later, she had sexual relations with him in a holding cell. . . . His present lawyer . . . says this emotional involvement contributed to mistakes that the lawyer made . . . , among them not having him plead guilty in exchange for a life sentence and not putting him on the stand.

Shirley Christian, *Lawyer-Client Intimacy Prompts Death Row Plea*, N.Y. TIMES, Feb. 16, 1998, at A10.

Here, too, however, Texas refuses to be outdone:

A federal judge has overturned the capital murder conviction of one of seven women on Texas' death row, paving the way for her possible third trial in the 18-year-old case.

[The federal judge] said Pam Perillo's right to a fair trial was compromised because her attorney had a close personal and professional relationship with the prosecution's chief witness. . . .

He also said [that defense counsel] failed to tell Perillo of his personal relationship with the witness—a relationship that began in 1980 when [he] represented [the witness] on murder charges in the same case. . . .

Deborah Tedford, *Murder Conviction Reversed*, HOUS. CHRON., June 23, 1998, at A1.

²¹ See Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 3, 34 (1996) (observing that, according to NAACP Legal Defense and Educational Fund statistics, blacks, although only 12–13% of country's population, make up over 40% of those on death row, and that minorities make up a majority of death row population); see also Elizabeth Olson, *U.N. Report Criticizes U.S. for "Racist" Use of Death Penalty*, N.Y. TIMES, Apr. 7, 1998, at A15 (quoting report, which stated that "race, ethnic origin and economic status appear to be key determinants of who will, and who will not, receive a sentence of death [in the United States]. . . . [A]llegations of racial discrimination in the imposition of death sentences are particularly serious in southern states such as Alabama, Florida, Louisiana, Mississippi, Georgia and Texas, known as the 'death penalty belt.'").

²² See *McCleskey v. Kemp*, 481 U.S. 279, 292–97 (1987) (holding that, to establish equal protection violation, defendant must show purposeful discrimination, and that proof of disproportionate application of death penalty to black persons is insufficient to meet burden).

²³ See *Logan v. United States*, 144 U.S. 263, 298 (1892) (upholding exclusion for cause of prospective jurors with "conscientious scruples" against death penalty, because such scruples on that or any subject would prevent them from "standing indifferent between the government and the accused"). *But see* *Adams v. Texas*, 448 U.S. 38, 49–51 (1980) (holding unconstitutional exclusion from jury service of persons who said they would be "'affected' by the possibility of the death penalty," meaning that they would treat it with more seriousness or might become emotionally affected) (footnote omitted); *Witherspoon v. Illinois*, 391 U.S. 510, 522–23 (1968) (reversing imposition of death penalty where panelists were excluded simply on basis of general objections to capital punishment); see also *Witherspoon*, 391 U.S. at 528 (Douglas, J.,

concurring) ("I see no constitutional basis for excluding those who are so opposed to capital punishment that they would never inflict it on a defendant. Exclusion of them means the selection of jurors who are either protagonists of the death penalty or neutral concerning it. That results in a systematic exclusion of qualified groups, and the deprivation to the accused of a cross-section of the community for decision on both his guilt and his punishment.").

²⁴ *Witherspoon* was the case that provided the impetus for more intensive research concerning jurors who favored the death penalty and their predisposition for conviction. The *Witherspoon* Court brushed aside two surveys and a study as being "too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt." *Witherspoon*, 391 U.S. at 517 (footnote omitted). In a footnote, however, the Court acknowledged that it might be possible for a defendant in the future to show that the jury was not neutral with respect to guilt. *See id.* at 520 n.18.

Since then, considerable research has been conducted on the subject, and it can be summed up as follows: (1) jurors who are forbidden to serve because of their feelings against the death penalty are more likely to favor the accused; (2) excluded jurors are more likely to be black or female; (3) excluded jurors would be more apt to acquit the accused. *See* Michael Finch & Mark Ferraro, *The Empirical Challenge to Death Qualified Juries: On Further Examination*, 65 NEB. L. REV. 21, 25 (1986); *see also* Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUMAN BEHAV. 31, 46 (1984) (summing up study on excluding potential jurors because of their convictions against death penalty, and concluding that excludable group represents more than one sixth of community, that exclusionary practice discriminates against female and black jurors, and that person's attitude toward death penalty is important indicator of that person's attitude toward crime control and Due Process); David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 590-95 (1991) (criticizing [then Chief] Justice Rehnquist's dismissal, in *Lockhart v. McCree*, 476 U.S. 162, 183-84 (1986), of studies and empirical evidence concerning impartiality of jurors who favor death penalty); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 359 (1995) ("An impressive body of social science research has shown that 'death-qualified' juries are considerably more likely to return guilty verdicts, to convict on more serious charges, and to be less receptive to diminished capacity defenses than non-death-qualified juries") (footnote omitted).

²⁵ *See, e.g.*, *Colorado v. Connelly*, 479 U.S. 157, 160-63, 167 (1986) (holding that to find defendant's statement involuntary under Due Process Clause there must be police misconduct causally relating to defendant's confession, and upholding admission of "volunteered" confession of chronic schizophrenic suffering from auditory hallucinations); *New York v. Quarles*, 467 U.S. 649, 655-57, 659-60 (1984) (creating "public safety" exception to warning requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966), and holding that immediately after apprehension, officers could question unwarned defendant regarding whereabouts of gun).

²⁶ *See* 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2071, 2072 (J. Chadbourn ed., rev. ed. 1978) (explaining how confessions must be corroborated by facts that "tend to produce a confidence in the truth of the confession," but that need not be limited to *corpus delicti*) (footnote omitted); *Smith v. United States*, 348 U.S. 147, 153-54 (1954) (discussing general rule that guilt of accused can be based on confession corroborated only by evidence that the crime occurred).

²⁷ *See, e.g.*, *United States v. Augenblick*, 393 U.S. 348, 352-53 (1969) (noting that accomplice testimony does not usually raise any constitutional concerns); *United States v. Carrasco*, 830 F.2d 41, 44 (5th Cir. 1987) (observing that "[a] conviction may rest solely on the uncorroborated testimony of one accomplice if the testimony is not insubstantial on its face") (citation omitted); Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 131 (1992) (pointing out that, "[a]lthough some jurisdictions require accomplice testimony to be corroborated, the federal system and many states have no such rule") (footnotes omitted). *But see* Christine J. Saverda, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 YALE L.J. 785, 790-91 & n.40 (1990) (noting that sixteen states require accomplice corroboration by statute because of "perceived unreliability" of uncorroborated accomplice testimony).

²⁸ *See, e.g.*, 1A JOHN H. WIGMORE, EVIDENCE § 26 (P. Tillers ed., 1983) (stating that generally there is no difference between direct and circumstantial evidence).

²⁹ *See e.g.*, *Holland v. United States*, 348 U.S. 121, 139 (1954) (holding that judge need not charge the jury that to convict it must find that the Government's case negates every reasonable hypothesis of innocence,

even in a circumstantial evidence case).

³⁰ See *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (concluding that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the . . . culpability requirement [for capital murder]").

³¹ See Dorothy O. Lewis et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 584, 585–87 (1988) (finding history of extensive physical and sexual abuse in study of fourteen juveniles on death row); Peter Linebaugh, *The Farce of the Death Penalty*, THE NATION, Aug. 14, 1995, at 165, 168 (asserting that 94% of death row inmates convicted of homicide suffered child abuse).

³² See Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 35–36 (1987) (concluding that, in study of 350 defendants sentenced to death, 40% were innocent); Robert P. Shapiro, *The Wrong Men on Death Row*, U.S. NEWS & WORLD REP., Nov. 9, 1998, at 22 ("For every 7 executions—486 since 1976—1 other prisoner on death row has been found innocent.").

³³ See *Sumner v. Shuman*, 483 U.S. 66, 78, 85 (1987) (rejecting mandatory death penalty even for narrowly defined offenses); *Woodson v. North Carolina*, 428 U.S. 280, 303–05 (1976) (plurality opinion) (same).

³⁴ *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (asserting that "sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion," and that judge's instructions "must clearly inform the jury that they are to consider any relevant mitigating evidence").

³⁵ See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (concluding that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death") (footnotes omitted).

³⁶ See *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (plurality opinion) (noting that in capital punishment context, "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action").

³⁷ See E. Michael McCann, *Opposing Capital Punishment: A Prosecutor's Perspective*, 79 MARQ. L. REV. 649, 669 (1996) (observing that unscrupulous prosecutors may overcharge case or improperly seek death penalty); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 409, 419 (1992) (referring to "the prosecutor's exercise of virtually uncontrolled charging discretion . . . in capital cases," and asserting that "the prosecutor's power to manipulate capital sentencing decisions continues to make the death penalty the most arbitrary form of punishment in America"); Bright, *supra* note 19, at 1836–41 (using graphic examples to establish that it is poor representation that prompts imposition of death penalty rather than facts of particular cases).

³⁸ See, e.g., *Fay v. Noia*, 372 U.S. 391, 399–400 (1963) ("[B]ear[ing] in mind the extraordinary prestige of the Great Writ . . . in Anglo-American jurisprudence . . ."). *Fay* itself, one of the Warren Court's landmark decisions expanding the availability of federal habeas corpus, has long since been overruled. See *Coleman v. Thompson*, 501 U.S. 722, 744–51 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 87–88 (1977).

³⁹ See Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513, 520–21 (1988) (citing success rates of over 60% in federal habeas corpus capital proceedings in 1980s).

⁴⁰ See *Leviticus* 5:23 (requiring return of goods taken by robbery); *Exodus* 22:2 (requiring burglar to make restitution); *Exodus* 22:3 (mandating that burglar found with stolen livestock pay double their value); *Exodus* 21:37 (providing that those who steal oxen or sheep and kill or sell them must pay fine of four times value of sheep and five times value of oxen).

⁴¹ See *Exodus* 21:18–19. One might argue that, by thereafter inserting the "eye for eye" provision, *Exodus* 21:24, the Torah intended to provide retaliation as a supplementary remedy, just as in American law one can be imprisoned for an assault and also required to pay damages therefore in a civil action. Under Jewish law, however, such a result would implicate concerns about disproportionality and multiple punishments. See, e.g., BABYLONIAN TALMUD, *supra* note 8, *Kethuboth* 30a ("[He who desecrates] the Sabbath forfeits his life and is free from payment.") (footnote omitted).

⁴² RAMBAN (NACHMANIDES), COMMENTARY ON THE TORAH, *Exodus* 368 (Charles B. Chavel trans., 1973) [hereinafter RAMBAN].

⁴³ See *Exodus* 21:23–24 ("But if any harm follow, then thou shalt give life for life, eye for eye, tooth for tooth . . ."). Other versions translate the phrase as "an eye for an eye."

⁴⁴ NEHAMA LEIBOWITZ, *STUDIES IN VAYKIRA (LEVITICUS) 252–53* (Aryeh Newman trans., 1983) [hereinafter LEIBOWITZ, LEVITICUS].

⁴⁵ *Exodus* 21:27 ("And if [the owner] smite out his bondman's tooth, or his bondwoman's tooth, he shall let him go free for his tooth's sake.").

⁴⁶ See LEIBOWITZ, LEVITICUS, *supra* note 44, at 252–53. *But see* Arnold Enker, *Lex Talionis: The "Plain Meaning" of the Text*, 2 S'VARA No.1, at 52 (1991) (asserting that argument based on definition of *tachat* is "by no means conclusive," since same word is used in phrase "life for life," referring to capital punishment and meaning "in retaliation for").

⁴⁷ The Torah is expounded on four levels: (1) the plain meaning (in Hebrew, *pshat*), see BABYLONIAN TALMUD, *supra* note 8, *Shabbath* 63a (stating that "a verse cannot depart from its plain meaning"); (2) hinted meaning (in Hebrew, *remez*), a means of inferring laws from Scripture that are not suggested by the simple meaning of the Torah, see, e.g., *id.*, *Nedarim* 39b (deriving duty to visit sick by using *remez*); *id.*, *Sanhedrin* 46b (using same technique to derive law of burial); (3) extrapolation (in Hebrew *drash*), which is a deeper form of interpretation, as exemplified by Rabbi Yishmael's thirteen rules of biblical exegesis, which are reproduced, translated into English, and accompanied by explanations and examples in THE COMPLETE ARTSCROLL SIDDUR 48–50 (Nosson Sherman trans., 1984); and (4) secret meaning (in Hebrew, *sod*), usually Kabbalistic and referring to the inner meaning of the commandments or to Torah concepts that are not to be revealed to the masses, see BABYLONIAN TALMUD, *supra* note 8, *Hagigah* 11b (prohibiting teaching esoteric and mystical accounts of heavenly worlds and of creation to untutored individual); *id.*, *Pesahim* 49b ("[W]e do not reveal a secret (*sod*) to [unlearned people].").

According to the Vilna Gaon, a towering figure in Jewish law who lived in the nineteenth century, there is a hint of monetary damages in the "eye for eye" verse's use of *tachat* rather than another appropriate preposition. See YEHUDA NACHSHONI, *STUDIES IN THE WEEKLY PARASHAH: THE CLASSICAL INTERPRETATION OF MAJOR TOPICS AND THEMES IN THE TORAH, Sh'mos* 495 (Shmuel Himelstein trans. 1988) [hereinafter NACHSHONI]. *Tachat* also means "below," while the Hebrew word *ayen* can mean "look" as well as eye. Thus, if one looks below the letters in *ayen*, that is, the letters after each letter in *ayen*—those letters are an anagram of the Hebrew word *kesef*, which means money. See *id.* at 495.

⁴⁸ See *Exodus* 21:23–24.

⁴⁹ See *Leviticus* 24:19–20. The Leviticus version is translated, "so shall it be rendered unto him," again meaning that it shall be "given" to him. See 3 PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 5, *Leviticus* 24:20, at 248 ("Our Rabbis have explained that it does not (imply) actually maiming, but an indemnity of money . . . Therefore there is written here the term 'giving,' (i.e.,) something which is given from hand to hand." (citation omitted)).

For two reasons, the *Leviticus* version is not as clear in this regard as the provision in *Exodus*. First, the above clause, "so shall it be rendered unto him" arguably refers to the wrongdoer rather than the victim. Second, *Leviticus* 24:19 uses the same verb root ("n," "t," "n") in connection with maiming, suggesting that it can mean "to inflict," as well as "to give." The Gemara, however, has an explanation with respect to the second point.

⁵⁰ THE MISHNAH, *supra* note 7, *Baba Kamma*, 8:1, at 165–67.

⁵¹ *Id.* 8:1, at 167–69. The "disgrace" element is designed to compensate victims for embarrassment caused by their injury.

⁵² BABYLONIAN TALMUD, *supra* note 8, *Baba Kamma* 83b.

⁵³ THE COMPLETE ARTSCROLL SIDDUR, *supra* note 47, at 48–50 (translating Rabbi Yishmael's thirteen rules of biblical exegesis and describing *gezera shava* in these terms: a rule establishing "[t]hrough tradition that similar words in different contexts are meant to clarify one another").

⁵⁴ *Leviticus* 24:18 (emphasis added).

⁵⁵ *Id.* at 24:19–20 (emphasis added).

⁵⁶ The proximity of the two verses may not be critical to this analysis. The argument instead may be based solely on the linguistic similarity of the terms. Each is considered to be a *gezera shava*. See BABYLONIAN TALMUD, *supra* note 8, *Baba Kamma* 83b (stressing proximity of verses). However, Rabbeinu Asher, a thirteenth century commentator and codifier, states that the Hebrew words *samech leh* in the Gemara, meaning that the verses are "next to" one another, were erroneously inserted in the text, and that there was in fact another version from which these words were omitted.

⁵⁷ See *Leviticus* 24:21.

⁵⁸ See *Numbers* 35:31.

⁵⁹ See BABYLONIAN TALMUD, *supra* note 8, *Baba Kamma* 83b.

⁶⁰ Cf. Enker, *supra* note 46, at 53 (characterizing this argument as "forceful . . . [but] not irrefutable," and asserting that "[a]rgument from negative inference is never conclusive. There is always the possibility that local concerns caused the special stress, without yielding an inference that opposite conclusions were intended for other cases.").

⁶¹ See 2 ENCYCLOPEDIA TALMUDICA 18 (Harry Freedman trans., 1974) (noting inverse proposition that opinion of specific Sage or Sages is minority view).

Rabbi Obadiah of Bartenura, the fifteenth century supercommentator on the Mishnah, cites only these anonymous proofs from the Gemara in support of the proposition that "eye for eye" means compensatory damages, omitting all the other proofs discussed thereafter, and thereby strongly suggesting that he views these arguments alone as dispositive. See 7 OBADIAH OF BARTENURA, MISHNAYOT YAKHIN UBAOZ, *Baba Kamma* 8:1, at 39 (n.d.).

⁶² See BABYLONIAN TALMUD, *supra* note 8, *Baba Kamma* 83b–84a.

⁶³ *Leviticus* 24:22.

⁶⁴ See BABYLONIAN TALMUD, *supra* note 8, *Baba Kamma* 83b–84a. To the modern mind, this argument may appear hokey. Professor Leibowitz points out, however, in conjunction with the kindred following argument in the Gemara, that this was the Sages' way of saying that a law of retaliation cannot be practically implemented. See LEIBOWITZ, *LEVITICUS*, *supra* note 44, at 247. For example, how does one replicate the destruction of only one-third of the victim's eyesight? See *id.* (quoting Ibn Ezra, who is in turn quoting Saadya Gaon). Or, a serious internal injury? Compare the related talmudic argument based on the disproportionality of *lex talionis*.

⁶⁵ See BABYLONIAN TALMUD, *supra* note 8, *Baba Kamma* 84a.

⁶⁶ See *id.*

⁶⁷ See *id.*

⁶⁸ Cf., *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976) (asserting that "procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions"); *New York v. United States*, 326 U.S. 572, 583 (1946) (arguing that "[t]he process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency").

⁶⁹ NACHSHONI, *supra* note 47, at 492 (relying on Sa'adiah Gaon, who lived during the tenth century and was the greatest scholar and author of the Geonic period). As Nachshoni notes, however, it can be argued that the compensation approach does not completely obviate the uniformity concern, since an aggressor may not have the financial resources to pay the required compensation. See *id.* One response is that the impoverished attacker may later become wealthy, whereas blindness is irreversible. See *id.*; see also RAMBAN, *supra* note 42, *Exodus*, at 368 (stating that if aggressor "has no money to pay, it lies as a debt on him until he acquires the means to pay, and then he is redeemed"). In addition, there is the biblical possibility that the impoverished attacker can be sold as an indentured servant for six years in satisfaction of his debt. Cf. *Exodus* 22:2 (allowing court to sell into servitude thief unable to make restitution).

⁷⁰ See BABYLONIAN TALMUD, *supra* note 8, *Yebamoth* 24a (stating that "throughout the Torah no text loses its ordinary meaning"); 2 ENCYCLOPEDIA TALMUDICA, *supra* note 61, at 95–97 (discussing this rule of interpretation). Rashi, who often gives midrashic interpretations of the Torah, usually first seeks to provide the plain meaning of the text. See, e.g., 1 PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 5, *Genesis* 14:13, at 118.

⁷¹ See, e.g., NEHAMA LEIBOWITZ, *STUDIES IN BERESHIT (GENESIS)* 230 (Aryeh Newman trans., 4th rev. ed. 1974) (noting the "Torah's sparing use of words and avoidance of every unnecessary repetition, even the addition or subtraction of a letter").

⁷² See BABYLONIAN TALMUD, *supra* note 8, *Baba Kamma* 84a.

⁷³ *Leviticus* 24:19.

⁷⁴ See BABYLONIAN TALMUD, *supra* note 8, *Baba Kamma* 84a.

⁷⁵ *Leviticus* 24:19 (emphasis added).

⁷⁶ See BABYLONIAN TALMUD, *supra* note 8, *Baba Kamma* 84a (emphasis added). In THE PENTATEUCH AND HAFTORAHS, *supra* note 3, the two verses read in their entirety: "And if a man maim his neighbour; as he

hath done, so shall it be done to him: breach for breach, eye for eye, tooth for tooth; as he hath maimed a man, so shall it be rendered unto him." *Leviticus* 24:19–20.

⁷⁷ See BABYLONIAN TALMUD, *supra* note 8, *Baba Kamma* 84a; see also NACHSHONI, *supra* note 47, at 494–95. Here, Nachshoni refers to the Malbim, a nineteenth century commentator who stressed the unity of the Oral and Written Law, and who explained the resolution of the redundancy problem dealt with in the text as follows: *Leviticus* 24:19 says, "so shall it be done [in Hebrew, *yeahseh*] to him," whereas *Leviticus* 24:20 says, "so shall it be rendered [in Hebrew, *yenaten*] unto him." *Id.* The first of these verses "refers to what ought to be," while the second "refers to the punishment actually carried out." *Id.* at 495.

⁷⁸ See *Deuteronomy* 19:21 ("And thine eye shall not pity: life for life, eye for eye, tooth for tooth, hand for hand, foot for foot.").

⁷⁹ See BABYLONIAN TALMUD, *supra* note 8, *Baba Kamma* 84a. The English translation of the biblical verse in the Talmud is "hand *in* hand," *id.* (emphasis added), whereas the English translation of the same verse in the Bible is "hand *for* hand," *Deuteronomy* 19:21 (emphasis added). The Hebrew word used in *Deuteronomy* is *buh*, which can mean either "for" or "in." The other two versions of "eye for eye," in *Exodus* and *Leviticus*, instead use the preposition *tachat*. One possible explanation for the substitution is that the *Deuteronomy* provisions are dealing with lying or plotting witnesses, and under the law such witnesses are to receive the same punishment that they intended, through their false testimony, to have the court inflict on the defendant victim. If the latter punishment has already been exacted, the corrupt witnesses are not punished by the court. See THE MISHNAH, *supra* note 7, *Makkos* 1:4, at 19–20. Therefore, the principle of *lex talionis* is not strictly applicable, because the intended injury remains inchoate, having never taken place. In any event, since Jewish law does not prescribe mutilation as a sanction, "eye for eye" could not literally be applied in this context.

Although *Deuteronomy* 25:11–12 appears to prescribe amputation of the hand of a woman who grabs the genitals of a man fighting with her husband, it, too, is interpreted as a monetary remedy, intended to compensate the victim for his disgrace. In his exegesis of these verses, Rashi raises the possibility that the Torah might be interpreted literally. His refutation is that, immediately after the amputation provision, the Torah says, "thine eye shall have no pity," the same statement that is found in *Deuteronomy* 19:13, dealing with plotting witnesses, and, says Rashi, "just as above (it refers to) a fine in money, so here (it refers to) a fine in money." 5 PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 5, *Deuteronomy* 25:12, at 226. Accord YAKOV ZVI MEKLENBURG, 2 KTAV VE-HAKABALAH, *Deuteronomy* 19:19 (rev. ed. 1985). Rabbi Meklenburg, a major nineteenth century commentator, brings numerous examples from the Torah of when the word *buh* is used rather than *tachat*. He concludes that the former is employed when the intention is to denote an event or action that will occur in the future (as is the case in *Deuteronomy*, with respect to corrupt witnesses), whereas the latter is used when the action has already occurred (as is the case in *Exodus* and *Leviticus*, with respect to assaults). See *id.*

⁸⁰ See BABYLONIAN TALMUD, *supra* note 8, *Baba Kamma* 84a.

⁸¹ *Id.*

⁸² See *id.*

⁸³ *Deuteronomy* 19:19.

⁸⁴ See BABYLONIAN TALMUD, *supra* note 8, *Baba Kamma* 84a.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See *id.*

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ See BABYLONIAN TALMUD, *supra* note 8, *Baba Kamma* 84a (relying on THE MISHNAH, *Makkos* 3:14, at 101–03; BABYLONIAN TALMUD, *Makkoth* 22b).

⁹¹ See *id.*

⁹² See *id.*

⁹³ See *id.*

⁹⁴ See *id.*

⁹⁵ This exegetical rule, called *gezera shava*, can be based only on long-standing tradition handed down from earlier generations by Mishnaic-era Sages (Hebrew, *tannaim*), whereas this exegesis is by Rav Ashi, a Sage of the period of the Gemara, who is not speaking in the name of any rabbi from the period of the Mishnah. Thus, it may be that Rav Ashi is offering his own textual analysis, rather than relying on the

exegetical rule.

⁹⁶ See BABYLONIAN TALMUD, *supra* note 8, *Baba Kamma* 84a.

⁹⁷ See *id.*

⁹⁸ See *id.* The Gemara makes a similar argument with respect to the first proof that it discusses, although that argument was omitted from our truncated version.

⁹⁹ See BABYLONIAN TALMUD, *supra* note 8, *Baba Kamma* 84a.

¹⁰⁰ See *id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See *id.*

¹⁰⁴ See *id.* ("Said Abbaye to him: How else could he be valued? As a freeman? Could the bodily value of a freeman be ascertained by itself?").

¹⁰⁵ See BABYLONIAN TALMUD, *supra* note 8, *Baba Kamma* 84a. Such an interpretation is supported by analogy to a dispute concerning the ransom that must be paid by the owner of an ox that gores someone to death. See *id.*, *Makkoth* 2b. Everyone agrees that the ransom is for atonement on the part of the owner of the ox. See *id.* The disagreement is whether the ransom should be based on the value of the life of the victim, or that of the owner of the ox. See *id.* Rabbi Yishmael takes the latter view, because the subject of the biblical verse is the owner rather than the victim. See *id.* Since it is the owner who must make atonement, the valuation should be based on his life, just as "eye for eye" means the wrongdoer deserves to lose his eye. See *id.* Therefore, since the atonement is for his eye, it must be evaluated with respect to his eye. See *id.*

For further explanation of this seemingly illogical basis for evaluation of damages, see *infra* notes 111–15 and accompanying text.

¹⁰⁶ Nachshoni adds:

For anyone not deeply imbued with faith, [the Sages'] interpretation of these words, seemingly different from the text, are impossible to understand. [The Sages] dedicated a number of Talmudic utterances to proving how much we must respect the Rabbinic tradition that the Torah meant not physical, but monetary retribution. Yet, most of these [Talmudic arguments] are intended for those who believe so strongly that Rabbinic tradition stems from Sinai that they need no proof. Anyone without this will not be swayed by the logic of those [arguments], for a refutation follows almost every proof they offer. Most likely, the source of the law is not these Talmudic proofs, but Rabbinic tradition itself.

NACHSHONI, *supra* note 47, at 489 (citation omitted). *But see* LEIBOWITZ, LEVITICUS, *supra* note 44, at 245–46 ("[O]ur Sages and commentators adduced many and varied proofs indicating that the plain immediate sense of the text can be no other than monetary compensation. . . . The Talmud . . . adduces a whole battery of arguments proving that these verses must allude to monetary compensation for the injury inflicted.").

¹⁰⁷ See, e.g., LOUIS JACOBS, *THE TALMUDIC ARGUMENT* 1 (1984). Rabbi Jacobs states:

The Babylonian Talmud consists almost entirely of arguments having as their aim the elucidation of the law, ruling, religious teaching or ethical idea. Theories are advanced and then contradicted. They are examined from many points of view and qualified where necessary. One argument leads to another when logic demands it. The claims of conflicting theories are investigated with great thoroughness and much subtlety. Fine distinctions abound between apparently similar concepts. The whole constitutes reasoning processes which have received the most careful study on the part of generations of Jewish scholars and have contributed more to the shaping of the Jewish mind than any other factor.

Id.

¹⁰⁸ See NETZIV (RABBI NAFTALI ZVI JUDAH BERLIN), 1 COMMENTARY TO SH'ILTOS OF RAV ACHAI GAON, INTRODUCTION 14 (1975) (explaining that one has obligation to try to discern every meaning of Torah verse and, in so doing, to raise any possible interpretation); see also SFORNO COMMENTARY ON PIRKEI AVOS 5:21, at 179 (Raphael Pelcovitz trans., 1996) ("Ben Bag Bag says: Delve in it [the Torah] and continue to delve in it [the Torah] for everything is in it; look deeply into it; grow old and gray over it, and do not stir from it, for you can have no better portion than it." (bracketed phrases in original)).

¹⁰⁹ See BABYLONIAN TALMUD, *supra* note 8, *Erubin* 13b.

¹¹⁰ See, e.g., THE CODE OF MAIMONIDES–JUDGES, *supra* note 7, *Rebels* 1:3, at 139 (explaining that with regard to laws received at Mount Sinai as part of the Oral Tradition, there is no disagreement, for they have been handed down from generation to generation since the time of Moses). In Maimonides' untranslated introduction to his Book of Commandments, he points out that the purpose of employing hermeneutical rules in such cases is not to establish what the law is from the written text, but merely to find the sources in that text that hint at the Oral Law. 1 MAIMONIDES, SEFER HAMITZVOT, SHORESH SHENI 29 (1968). Specifically, with regard to the "eye for eye" provisions in the Torah, Maimonides states:

Although these laws appear plausible from the context of the Written Law, and were all made clear by Moses, our Teacher, from Mount Sinai, they have all come down to us as practical rules of law. For thus did our forebears see the law administered in the court of Joshua and in the court of Samuel, the Ramathite, and in every court ever set up from the time of Moses, our Teacher, until the present day.

THE CODE OF MAIMONIDES, BOOK 11: THE BOOK OF TORTS, *Wounding and Damaging* 1:6, at 161 (Hyman Klein trans., 1954) [hereinafter THE CODE OF MAIMONIDES–TORTS].

¹¹¹ See also Enker, *supra* note 46, at 55 (viewing "eye for eye" law as calculated ambiguity, combining multiple goals: "assisting the injured party, reconciliation of the tortfeasor and his victim, and reconciliation with God").

¹¹² See THE CODE OF MAIMONIDES–TORTS, *supra* note 110, *Wounding and Damaging* 1:3, at 160. Maimonides states:

When Scripture says, As he hath maimed a man, so shall it be rendered unto him [Leviticus 24:20], it does not mean that the injurer himself is to be wounded in the manner he wounded the other, but only that the injurer deserves to be deprived of a limb or to be wounded to the same extent, and consequently that he need only pay for the injury he inflicted.

Id.; accord NACHSHONI, *supra* note 47, at 494 (pointing out that, in addition to Maimonides, several other medieval commentators explain that Torah used expression "eye for eye" because it "wished to inform us that in terms of absolute justice, whoever bruises his neighbor deserves an identical physical punishment in return").

¹¹³ See *Leviticus* 4:1–35.

¹¹⁴ See RAMBAN, *supra* note 42, *Leviticus* 21:

All these [sacrificial] acts [of the sin offering] are performed in order that when they are done, a person should realize that he has sinned against his God with his body and his soul, and that "his" blood should really be spilled and "his" body burned, were it not for the loving-kindness of the Creator, Who took from him a substitute and a ransom, namely this offering, so that its blood should be in place of his blood, its life in place of his life, and that the chief limbs of the offering should be in place of the chief parts of his body.

Id.

¹¹⁵ See 3 PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 5, *Leviticus* 2:1, at 13 (stating that, even with respect to meal offerings given voluntarily by poor persons wishing to atone—as opposed to sin offerings, which are obligatory—God considers it as if poor man "had offered his (very) soul").

¹¹⁶ See *id.*, *Genesis* 1:1, at 3.

¹¹⁷ See, e.g., ROBERT ALTER, THE WORLD OF BIBLICAL LITERATURE (1992) (studying literary character of Bible); BUCKNER B. TRAWICK, THE BIBLE AS LITERATURE: OLD TESTAMENT HISTORY AND BIOGRAPHY (1963) (discussing language and style of Bible). Indeed, in its discussion of "eye for eye," the Gemara recognizes the Torah's literary quality, rejecting objections to its proofs on the ground that the Torah was employing literary parallelism in those instances.

¹¹⁸ Or, as Anne Elliot, the heroine in Jane Austen's novel, *Persuasion*, cautioned that because poetry evokes such strong feelings, too much of it unleavened by prose is dangerous. See JANE AUSTEN, *PERSUASION* 73–74 (Modern Library ed. 1995).

CHAPTER SEVEN

"Cain Rose Up Against His Brother Abel and Killed Him": Murder or Manslaughter?*

A. Introduction

The world's first case of man slaying man,¹ and, indeed, the earliest recorded crime,² is dealt with in a series of terse verses in *Genesis*, the first of the five Books of the Torah.³

1. Now the man had known his wife Eve, and she conceived and bore Cain, saying, "I have acquired a man with [the Lord]."
2. And additionally she bore his brother Abel. Abel became a shepherd, and Cain became a tiller of the ground.
3. After a period of time, Cain brought an offering to [the Lord] of the fruit of the ground;
4. and as for Abel, he also brought of the firstlings of his flock and from their choicest. [The Lord] turned to Abel and to his offering,
5. but to Cain and his offering He did not turn. This annoyed Cain exceedingly, and his countenance fell.
6. And [the Lord] said to Cain, "Why are you annoyed, and why has your countenance fallen?"
7. Surely, if you improve yourself, you will be forgiven. But if you do not improve yourself, sin rests at the door. Its desire is toward you, yet you can conquer it."
8. Cain spoke with his brother Abel. And it happened when they were in the field, that Cain rose up against his brother Abel and killed him.
9. [The Lord] said to Cain, "Where is Abel your brother?" And he said, "I do not know. Am I my brother's keeper?"
10. Then He said, "What have you done? The blood of your brother cries out to Me from the ground!"
11. Therefore, you are cursed more than the ground, which opened wide its mouth to receive your brother's blood from your hand.
12. When you work the ground, it shall no longer yield its strength to you. You shall become a vagrant and a wanderer on earth."
13. Cain said to [the Lord], "Is my iniquity too great to be borne?"
14. Behold, You have banished me this day from the face of the earth—can I be hidden from Your presence? I must become a vagrant and a wanderer on earth; whoever meets me will kill me!"

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15. [The Lord] said to him, "Therefore, whoever slays Cain, before seven generations have passed he will be punished." And [the Lord] placed a mark upon Cain, so that none that meet him might kill him.
16. Cain left the presence of [the Lord] and settled in the land of Nod, east of Eden.⁴

Most authorities view Cain's act as murder.⁵ For example, fast forward fifty-seven centuries,⁶ and consider the case of Will Borrer,⁷ charged with the murder of his neighbor, to whom he had previously complained about the victim's cattle getting into his field. According to the prosecution, defendant went into the field where the victim was plowing, laid in wait, and then shot him. Borrer claimed self-defense, and he was convicted of manslaughter and sentenced to two years imprisonment.

On appeal, Borrer raised numerous points of error, including the prosecutor's allegedly inflammatory remarks to the jury that the case reminded him of the first "assassination," referring specifically to Cain and Abel.⁸ The court rejected defendant's argument, reasoning that "the state's evidence, if believed, would indicate that the homicide was an assassination,"⁹ whereas the jury rejected that version of the events by finding Borrer guilty only of manslaughter and assessing the lowest possible punishment. Consequently, said the court, it was not likely that there was any impropriety in the remarks.¹⁰

Improper or not,¹¹ the prosecutor's argument and the events in *Borrer* do resonate with the biblical account. And, as we shall see, just as the jury in that case believed the defendant was guilty only of manslaughter and not murder, there is a basis for viewing Cain's act in a similar way.

B. Cain and Abel Under American and Jewish Law

Pursuing this anachronistic exercise a bit further, let us consider the case of *People v. Cain*, first according to contemporary American law, and then under Jewish law. At least at first glance, one is struck by a jarring discrepancy: In the biblical account, Cain's punishment was exile, a seemingly lenient sanction if the crime was in fact cold-blooded murder.¹² If modern American law were applied, could such a slayer expect better or worse? Would he fare as well as Borrer did? Of course, the result would turn largely on the underlying facts and circumstances, which we have not yet explored, but a lot would also depend on the jurisdiction in which Cain was brought to trial.

Murder in the common law jurisdictions is typically defined as a malicious, unlawful killing that requires either proof of intent to kill or to do grievous bodily harm or proof of a depraved heart.¹³ In such states, to establish murder in the first degree, there is usually a requirement of deliberation or premeditation, or of both elements,¹⁴ which are generally defined as cool reflection for some period of time.¹⁵ Without these mental states, the killing constitutes murder in the second degree.¹⁶ As we shall see, depending on which version of the Cain saga the jury finds to be credible, there is a basis for a finding of either first or second degree murder.

Under the Model Penal Code, on the other hand, murder requires proof of either purpose or knowledge,¹⁷ or a very high degree of recklessness, "manifesting extreme indifference to the value of human life."¹⁸ Under the Code, there are no degrees of

homicide.¹⁹ Diminished culpability is evaluated through the extreme emotional disturbance doctrine, proof of which reduces murder to manslaughter.

Turning from murder to manslaughter, the common law states define the latter as an intentional killing "without malice aforethought,"²⁰ in the heat of passion.²¹ The requisite provocation must be reasonable or adequate and is usually very strictly defined, *e.g.*, being assaulted or seeing a spouse in *flagrante*, and not having time to cool off. It is judged by an objective standard.²² Some common law states have more expansive definitions of provocation,²³ but even in these states it is often difficult to get to the jury on the issue.²⁴ Furthermore, some jurisdictions require the victim rather than a third party to be the provoker.²⁵ Thus if one views God rather than Abel as the provocateur, in such jurisdictions Cain might be convicted of murder even if he acted in the heat of passion.

To establish manslaughter under the Model Penal Code, the defendant must have acted recklessly²⁶ or "under extreme mental or emotional disturbance for which there is a reasonable explanation or excuse."²⁷ The test is more subjective than the common law counterpart of heat of passion; unlike the latter, there is no *per se* requirement that the provocation be legally adequate, although there are objective elements to it. Thus, the "reasonableness" of the "explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."²⁸ As a result, Code jurisdictions make it far easier to secure jury consideration of manslaughter. There need not even be real external provocation; rather, it can stem from the defendant's psyche. For example, in one case, the wrongdoer was afraid of his brother and killed him, even though there was no basis in fact for his fear.²⁹ Accordingly, the Model Penal Code would give Cain a realistic possibility of getting to the jury on a manslaughter charge. It is not, however, a slam dunk. Even in Code states, courts will sometimes refuse manslaughter instructions, finding the provocation to be inadequate.³⁰ In addition, even if Cain received jury consideration for manslaughter, there is no guarantee that the jurors would accept his mitigation claim.

Taking this millennium-hopping comparison a few steps backward, we learn that the Jewish law of homicide affords an interesting contrast, as well as an uncertain result, in the case of Cain. To be guilty of murder in the rabbinic courts, one must kill intentionally and with premeditation. For example, according to *Exodus* 21:14, one who "act[s] intentionally against his fellow to kill him with guile" is guilty of a capital crime,³¹ whose punishment is death by beheading.³² On the other hand, *Exodus* 21:13 states that one who kills but who "ha[s] not lain in ambush" for his victim is subject only to banishment in a city of refuge. This exile, which echoes Cain's sentence, saves the wrongdoer from the blood avenger,³³ and living with the priestly Levites in a city of refuge permits him to contemplate his sin and refine his character.³⁴ Similarly, in *Numbers* 35:20–23, the verses suggest that one is guilty of murder only if he lies in wait, that is, in "ambush."³⁵ If, however, he kills another "with suddenness, without enmity,"³⁶ he is not culpable for murder and is instead consigned to a city of refuge.³⁷ The barebones *Genesis* account does not provide sufficient information to establish whether Cain lay in wait and was consequently a murderer, or whether the killing was even intentional.

Be that as it may, safety from the blood avenger in a city of refuge is available only to one who is guilty of an "inadvertent" killing,³⁸ which is roughly a synonym for negligent homicide.³⁹ There is also a category of killings known as "close to intentional,"

describing a reckless or perhaps even grossly negligent homicide or an intentional slaying without premeditation.⁴⁰ Such killings are not punished in the human courts but are left either to the blood avenger or to God, being too serious for exile to a city of refuge, but not quite evil enough for infliction of capital punishment by the human courts.⁴¹ Cain's act might fit within this category as well, depending on the manner in which he killed Abel.

The net effect is that, under either American or Jewish law, determining whether Cain might be guilty of something less than intentional, premeditated murder will turn on a careful examination of the "facts" of the case. At this point, however, it must be conceded that the evidence is fairly stale. How, then, do we ascertain the facts?

From a Jewish perspective, assessing the Cain-Abel conflict and ascertaining Cain's level of culpability involves more than scrutinizing the skeletal language of the Torah text and then applying the law to these "facts." In Judaism, the words of the Torah itself are of course the natural starting point, but they are merely the beginning of the exegetical process. Understanding can be achieved only after examination of a far more extensive corpus, including the Talmud,⁴² the Midrash Aggadah, rabbinic interpretations of Torah verses that include moral and ethical teachings disguised as stories, parables, riddles, legends and the like, that often appear contradictory to one another;⁴³ medieval commentaries by such luminaries as Rashi, the Rambam, the Ramban, the Sforno, Ibn Ezra, and the Malbim; and modern commentaries by authorities such as Hirsch, Nachshoni, and Leibowitz.⁴⁴ The first step, however, is to scrutinize the Torah narrative itself.

C. The Not-So-Plain Meaning of the Torah Text

Starting with the verses in *Genesis* themselves, initially the key word in the biblical narrative seems to be the verb describing Cain's sin of taking his brother's life. The Hebrew word used in the original text is a form of the root *harag*, whose translation is generally "kill."⁴⁵ The Hebrew root for murder, on the other hand, is usually *ratsach*,⁴⁶ the act prohibited and the term used in the Decalogue.⁴⁷ By using the verb *harag* in this context, is the Bible suggesting that Cain did not commit an intentional premeditated murder, as most people seem to think, but is guilty only of some lesser form of homicide?

As it turns out, relying on the *harag-ratsach* distinction is not that helpful in determining the degree of homicide committed by Cain. Although *ratsach* means murder when used in the noun form,⁴⁸ when used as a verb, both Hebrew terms, *harag* and *ratsach*, can denote either killing or murdering.⁴⁹ For instance, in *Exodus* 21:14, the Torah uses a form of the verb *harag* in describing the punishment inflicted on one who "act[s] intentionally against his fellow to kill him with guile," a clear instance of intentional, premeditated murder. Conversely, in *Deuteronomy* 4:42, Scripture employs *ratsach* to denote a form of negligent homicide.⁵⁰

Since the key verb describing the slaying turns out to be inconclusive in ascertaining the moral level of Cain's crime, perhaps the threshold question should be, "What's in a name?" The names "Cain" and "Abel" may provide a clue to their respective characters. Indeed, it is often the case in Scripture that names disclose significant information about the person.⁵¹

The root of Cain is *kinyan*—acquire. Abel is derived from the word for vanity—*hevel*.⁵² One can view these meanings in various ways, one of which is that Cain wanted to acquire material possessions, and Abel sought prestige, a form of vanity.⁵³ In this view, neither brother is an apostle of virtue. In fact, one modern commentator argues that Adam's children symbolize "the twisted path of corrupting the essence of creation,"⁵⁴ and their names show it. Cain loves material possessions, and Abel, who is at an arguably somewhat higher level, disdains work because it is vain. Thus, Cain's acquisitive nature may afford a basis for inferring a motive for premeditated murder, namely, a desire to take his brother's share of the wealth.⁵⁵ On the other hand, the symbolism of Cain's name may be benign and in fact praiseworthy, for Eve declares that she "acquired a man (Cain) with God,"⁵⁶ which Rashi, the famed eleventh century French exegetist, interprets to mean with God's help, viewing God as a partner in the process of procreation.⁵⁷

The biblical text provides other subtle clues concerning the nature of the brothers' characters, which may in turn bear on Cain's level of culpability. Consider their respective professions. Cain chose to be a tiller of the soil, and Abel became a shepherd.⁵⁸ The Sforzo, a sixteenth century Italian exegetist and physician, says that the latter was a more skilled occupation than the former, arguably borne out by the emergence of leaders of the Jewish people from the ranks of shepherds, to wit, Jacob, Moses, and David.⁵⁹ Moreover, shepherding allows one to contemplate spiritual matters and build the character of mercy, because shepherds are isolated and must care for and nurture living creatures.⁶⁰ This is supported by the text, which mentions Cain's occupation after his brother's, even though Cain is the elder.⁶¹ On the other hand, the Malbim, a nineteenth century Russian exegetist, argues that farming was the preferred occupation reserved for the first born, whereas shepherds were viewed with disfavor, so it was perfectly respectable for Cain to engage in agriculture.⁶²

It is also possible, however, that Abel actually wanted to become a shepherd rather than a farmer because God had cursed the earth after Adam and Eve had sinned.⁶³ Following this line of reasoning, Cain nonetheless opted for farming perhaps because he was stubborn or because he believed the curse against the earth applied only to his father, Adam. One difficulty with farming is that it requires hard work, leaving little time for spiritual matters.⁶⁴ Cain may also have become obsessed with tilling the land and deluded himself that his wealth came from his own efforts rather than God's will.⁶⁵ Such an interpretation fits with God's punishment that Cain would no longer be able to farm successfully and indeed that he would become a wanderer on the earth,⁶⁶ rendering him entirely unable to farm.⁶⁷ In this view, Cain's character, usually irrelevant in assessing criminal liability,⁶⁸ was not of the highest order. He was arrogant and spiritually blunted, devoting himself to physical labor for material gain. For whatever reason, a Midrash concludes that Cain was one of "[t]hree [who] had a passion for agriculture, and no good was found in them."⁶⁹

Proceeding to the details of the plot line, even a cursory inspection of the Torah text reveals that it is laden with ambiguity. For example, one is struck by the phrase, "Cain rose up against his brother Abel."⁷⁰ Since he "rose up," does this mean that Cain was literally (or figuratively) underneath Abel, and, if so, why was Cain down? Was he crouching down in the field, lying in wait? Or lying prostrate, because Abel had knocked him down? Or lying placidly asleep? Or is the language simply metaphorical? The text does not explain. The Oral Law, however, suggests that Abel, who was the stronger of

the two, pinned Cain down during a quarrel,⁷¹ whereupon Cain pleaded with his brother to let him go, arguing that if Abel killed him, Adam and Eve would be distressed and would know who the killer was,⁷² there being no other humans in the world.⁷³ Consequently, Abel, in pity, released Cain,⁷⁴ who then "rose up" against his brother.⁷⁵ Such a scenario of assault could support either manslaughter or murder: on the one hand, Cain's play on Abel's sympathy, together with the subsequent killing, may indicate premeditation. Alternatively, however, although this is not the sense of the Midrash, assuming Cain considered the release only a temporary respite from his brother's wrath, the killing even may be viewed as an instance of justifiable self-defense if Cain was not the aggressor—or at least imperfect self-defense, which permits one who is an aggressor and therefore cannot claim perfect self-defense to be found guilty of manslaughter rather than murder.⁷⁶

Also fraught with ambiguity is the phrase, "and it happened in the field."⁷⁷ "Happened" could suggest a sudden encounter without premeditation or planning. Or it could mean simply that the event took place in the field. While the Torah states that Cain initiated a conversation with Abel, it does not even specify whether the brothers actually argued,⁷⁸ although, if contemporary case law involving fratricide affords any guidance, these are usually not carefully conceived, cold blooded, dispassionate murders, and the sentences imposed often reflect that reality.⁷⁹ Assuming, as is likely, that the brothers did argue, it is likewise unclear whether Cain argued with Abel only immediately preceding the killing, or whether there had been harsh words previously. In other words, was there time for cooling off, making the heat of passion defense problematic, at least in the strict common law jurisdictions?⁸⁰ Additionally, of what significance is it that the killing occurred in the field, which was in Cain's dominion? Did Abel enter there on his own, or did Cain lure him to this locale so that he could kill his brother in the absence of witnesses?⁸¹ Did Cain bare his heart to his brother, "sharing his deep hurt" with him, as the Sforno suggests,⁸² or did he pick a fight with Abel, as Rashi says, in order to have an excuse to kill his sibling,⁸³ or did the argument suddenly flare up? What did they argue about?

In short, one may scrutinize the Torah's Cain-and-Abel saga long and hard without arriving at any firm conclusion concerning the degree of Cain's blameworthiness. Perhaps the answer lies in an analysis of the talmudic, medieval and modern commentators, whose contributions we now consider.

D. The Torah Text As Seen by the Midrash and the Commentators⁸⁴

Somewhat surprisingly, and perhaps stemming from the ambiguities of the *Genesis* account, a number of the commentaries give explanations of the argument that are independent of the sacrifice episode that figures centrally in the scriptural text. A midrashic source asserts that Cain and Abel were archetypes rather than mere individuals, and that they were arguing about that which people usually fight, namely, land (wealth), religion, and sex.⁸⁵

The Midrash gives three explanations of these universal bones of contention that lead to bloodshed. The first is that Cain and Abel decided to divide the world.⁸⁶ Cain took the land, and Abel, the personalty. Cain said, "The land you stand on is mine," directing Abel to "fly [off the ground]," and his brother responded, "What you are wearing is

mine," ordering Cain to take his apparel off.⁸⁷ In the course of the fight that ensued, Cain killed Abel. The second version is that the brothers divided the land and the personalty, but each one wanted the future Temple to be built on his share.⁸⁸ Finally, one sage opined that the brothers were fighting about sexual access to their mother Eve. Alternatively, the sexual quarrel concerned one of the twin sisters born along with Abel.⁸⁹ The interests of these midrashic commentators transcend the particular individuals involved; instead, they are seeking to ascertain a universal truth and are thus unhampered by the literal text.⁹⁰

In a variant Midrash dealing with the brothers' division of the world, Cain's blameworthiness is highlighted, and he is given a motive that accords with premeditated murder, namely, that he "was impatient to possess the whole world."⁹¹ Furthermore, the Midrash says that after dividing the property, "Cain thought of a plan to remove Abel from this world."⁹² Cain then ran after his brother, shouting, "Get away from my property,' until he finally rose up against him and slew him."⁹³ This Midrash concludes by referring to Cain, "whose eye was so evil against his brother."⁹⁴

The biblical text itself, however, says nothing of a division of the world, suggesting instead that the cause of the dispute was God's evaluation of the brothers' respective offerings.⁹⁵ Abel gave of "the firstlings of his flock and from their choicest," whereas Cain gave only "the fruit of the ground."⁹⁶ God accepted Abel's sacrifice for two reasons: it was the best of the flock,⁹⁷ and it came from *his* flock, whereas Cain brought only "of the fruit of the ground" rather than choice fruit that he had worked to produce, that is, Cain made no real sacrifice in the offering he submitted to God. Or, as the Midrash puts it, Cain brought, "of the inferior crops," and was consequently, "like a bad tenant who eats the first ripe figs but honours the king with the late figs."⁹⁸

Abel, however, was not responsible for God's action, so why would Cain direct his wrath toward his brother rather than the real culprit? It is of course conceivable that Abel gave of his choicest to upstage Cain, the usually favored elder son.⁹⁹ Yet given Abel's temporal closeness to the Creation, it is more likely that he gave a superior sacrifice out of a genuine love of God and recognition that everything belongs to God, Who deserves thanks for creation. Moreover, if Abel did have such faith and love, presumably he believed that God could plumb his secret thoughts and, if his motives were improper, God would accordingly reject his sacrifice as He did Cain's.¹⁰⁰

On the other hand, aside from simply being consumed by jealousy, Cain may have concluded that Abel's sacrifice, which came after his elder brother's, was offered to curry favor with the Master of the Universe.¹⁰¹ Thus, Cain may have held Abel responsible for God's rejection of his sacrifice and for God's rebuke. Had Abel not offered his best sheep, God would not have been able to distinguish between the two, at least by virtue of their deeds. Cain cannot tangle with God, but his brother is a different matter. If Cain gets rid of Abel, God would, according to this perception of Cain's view, have no choice other than to accept his offering.

When God rejected that offering, Cain became exceedingly angry,¹⁰² "and his countenance fell,"¹⁰³ denoting shame.¹⁰⁴ God then admonished Cain, asking him why he was reacting in this manner, and telling him that he could repent and rule over his evil inclination; that is, Cain could exercise his free will and achieve spiritual elevation.¹⁰⁵ Perhaps this revelation was a shock to Cain, since he might have believed that, inasmuch as an omniscient and omnipotent God had created the world and human beings, it was He Who determined all events.¹⁰⁶ Now, however, after God's lecture, Cain understood that

he had a responsibility to improve his character.

Cain nonetheless rejected God's admonition to look at his own motives and deeds and repent. Instead, his reaction was in the opposite direction—grossly compounding his original misconduct by taking the life of his brother.¹⁰⁷ Thus, Cain missed the opportunity that God had given man to conquer sin. Just as Adam and Eve had sinned against God, Cain now sinned against both his fellow man and God. Indeed, the Torah and the commentaries emphasize the gravity of that sin. When God tells Cain that the "blood" of his brother called out to Him from the ground, the Hebrew word for blood (*dom*) is pluralized (*dimei*).¹⁰⁸ Why? According to the Midrash, the point of the pluralization is to establish that Cain killed not only Abel, but also his descendants, "the blood[s] of his posterity."¹⁰⁹

The medieval commentaries on this episode give various explanations of the occurrence.¹¹⁰ Rashi opts for murder as the "plain meaning" of the biblical text, asserting simply that Cain began an argument as a pretext to kill Abel.¹¹¹ Yet this explanation does not render Cain completely unsympathetic. If he were a cold-blooded killer, what need would he have for a prefatory pretextual argument? Even in this view there is something in Cain's character that requires him to stir himself up to hot bloodedness before he can kill.¹¹²

The Ramban (Nachmanides), a thirteenth century Spanish exegetist, kabalist and poet, reaches the same ultimate conclusion of murder, albeit by a somewhat more circuitous path. He opines that the biblical words, "and Cain spoke to Abel his brother," are connected to "it came to pass, when they were in the field," and on that basis he concludes that Cain invited Abel to the field and then "secretly killed him."¹¹³ He also considers the possibility that Cain's intent in killing Abel was to build the world up through himself rather than Abel, which was unlikely absent the killing, since it was Abel's sacrifice that had been accepted.¹¹⁴

The Sforno also effectively opts for murder one, making an interesting textual argument based on the Hebrew word for "rose up."¹¹⁵ He states that there was no prior argument between the two brothers, because, in another passage in the Torah, the same verb was used in a case where the aggressor ambushed his victim without any warning.¹¹⁶ As such, Cain would be viewed as a murderer lying in wait for his brother.

Others are not quite as hard on Cain. According to Ibn Ezra, a twelfth century Spanish exegetist, grammarian, astronomer and physician, Cain told Abel what God had said to him and blamed Abel for God's chastisement and admonitions.¹¹⁷ This interpretation suggests that, rather than lying in wait for his brother, Cain engaged Abel in conversation and became progressively more enraged in the course of the exchange, which ultimately led to the slaying—arguably a basis for a mitigation claim.

Even more sympathetically, the Malbim states that Cain killed Abel because he misunderstood God's admonition that, "sin crouches at his door within," but that he could overcome it.¹¹⁸ According to this authority, Cain thought that God was telling him Abel was a sinner and would try to lure him, Cain, into wrongdoing.¹¹⁹ The killing therefore was, in a sense, justified in Cain's eyes as a case of spiritual self-defense.¹²⁰

Another factual issue, also bearing on the nature of Cain's crime, is the manner in which he slayed his brother, and how he knew how to do so.¹²¹ As to the method of killing, the Midrash suggests either a staff, that is, a weapon that inflicts a bruise, or a stone,¹²² which is a more formidable weapon. On the question of knowledge, one

Midrash reports that Cain told God that he did not know that hitting Abel with a rock would kill him, but God immediately pronounced sentence on Cain, thus indicating divine understanding that his argument was specious.¹²³ Another Midrash says that Cain might have deduced how to kill his brother by observing his father slaying animals for sacrifices.¹²⁴ Presumably when the rabbinic authors of this Midrash referred to animal sacrifices, they intended the traditional method, which would require a clean slitting of the throat.¹²⁵ On the other hand, a Mishnah states that Abel's blood "was cast over the trees and stones,"¹²⁶ perhaps indicating a less than precise multiple wounding, and Rashi says further that in fact Cain inflicted many wounds on Abel because he did not know which spot would be fatal.¹²⁷ A single, clean incision would be more suggestive of murder, whereas the flailing approach is ambiguous. If the multiple wounds are solely the result of ignorance, that, too, is consistent with murder. Indeed, a Midrash states that, not knowing which part of the anatomy was susceptible to a mortal wound, Cain inflicted many injuries on his brother's body, until he reached the neck and succeeded in killing Abel.¹²⁸ On yet another hand, such wounds might also be the product of a frenzied emotional state that would not meet the standard for a cool, premeditated killing.¹²⁹ As one contemporary commentator puts it, Cain was "filled with blind fury and hate, . . . chok[ing], kick[ing] [and] bit[ing]" his brother's body.¹³⁰

Arguably cutting in the other direction and suggesting a more culpable slaying is Cain's encounter with God after the killing. God asks, "Where is your brother," obviously knowing what had happened but giving Cain an opportunity to confess and repent, just as He had done with Adam and Eve.¹³¹ Cain lies to God, saying "I know not; am I my brother's keeper?"¹³² As Rashi states, Cain "acted as if he could deceive the mind of the Most High."¹³³ Or, as a Midrash metaphorically puts it, God knocked on Cain's "flask . . . only to find it a chamber pot."¹³⁴ Again, however, although attempting a cover-up in response to divine interrogation may indicate that Cain was not the sharpest tool in the shed, it does not necessarily suggest murder rather than manslaughter. After all, the latter is also a very serious crime and, given our protagonist's apparent propensity to lie, might also warrant a cover-up on his part.

Be that as it may, Cain's flippant rejoinder reveals a serious character flaw that is highlighted in the midrashic literature, in which Cain expresses no contrition. Instead, he gives excuse after excuse for the slaying, and conveniently forgets God's recent lecture to him on the subject of free will.¹³⁵ He likens God to a derelict watchman who apprehends the thief only after the theft and is met with the defense that it is the thief's job to steal and the watchman's to prevent theft, therefore the latter is to blame, not the thief.¹³⁶ Alternatively, Cain admits the killing but criticizes God for having given him the evil inclination. Shifting to God's omnipotence, Cain again asserts divine blame, this time based on God's role as Guardian over all the world, Who nonetheless allows Abel to be killed.¹³⁷ Never at a loss for excuses, he says to God, with even more awesome temerity, "It is Your fault, for if You had accepted my sacrifice, I would not have been jealous." Finally, Cain asks rhetorically, "Did I know if I hit Abel with a rock that it would kill him?"¹³⁸

Following Cain's disingenuous disclaimer of responsibility for his brother's welfare, God metes out punishment—inability or diminished ability to till the soil, banishment and wandering the earth.¹³⁹ Banishment suggests manslaughter rather than murder. As already noted, under Jewish law, the punishment for intentional premeditated

murder is death by beheading. The sentence for inadvertent, that is, negligent killings, however, is exile to a city of refuge. That fact is not conclusive, because, while banishment fits nicely with consignment to a different location, wandering the earth does not.¹⁴⁰ Indeed, Rashi's commentaries seem to reflect this uncertainty. Even though he apparently regards Cain's slaying as murder, Rashi also comments on *Genesis* 4:16, which says that Cain "settled in the land of Nod, east of Eden." Rashi notes that that locale was a shelter for negligent killers, and observes that the cities of refuge set up by Moses were in the east,¹⁴¹ thus at least inferentially lending support to the notion that Cain's act was something other than premeditated murder.

It is also conceivable that, although Cain's act was murder, his punishment could "not be as the judgment of other murderers,"¹⁴² and was consequently mitigated to reflect Cain's lesser moral blameworthiness, just as modern statutes give a wide range of punishments for various degrees of homicide.¹⁴³ As the Midrash explains, he "had none from whom to learn [the enormity of his crime], but henceforth, All who slay shall be slain."¹⁴⁴

Upon hearing of his relatively lenient sanction, Cain continues to parry with God, protesting that "whoever meets me will kill me,"¹⁴⁵ and arguing that, far from leniency, this is a death sentence. But rather than viewing Cain as an ingrate, the Ramban interprets the slayer's statements collectively as evidence of genuine contrition¹⁴⁶ and recognition of God's omnipotence, stating:

The correct plain interpretation is that it is a confession The sense of this is that Cain said before God: 'Behold, my sin is great, and You have punished me exceedingly, but guard me that I should not be punished more than You have decreed upon me for by being a fugitive and wanderer and unable to build myself a house and fences at any place, the beasts will kill me for your shadow has departed from me.' Thus Cain confessed that man is impotent to save himself by his own strength but only by the watchfulness of the Supreme One upon him.¹⁴⁷

According to one translation, God's rejoinder to Cain's concerns is in the nature of a threatening reassurance; He announces that "whosoever slays Cain, vengeance shall be taken on him sevenfold,"¹⁴⁸ referring to Cain's future killer.¹⁴⁹ Although one may consider the proposed punishment of Cain's potential assailant to be wildly disproportionate,¹⁵⁰ the passage may also be viewed as directed not only to the assailant, but also to Cain, as a figurative declaration of divine comfort, designed to assure Cain that no one will dare to kill him.

An alternative translation of God's "sevenfold" declaration suggests instead that the divine sanction against Cain went beyond a curse on his labor, together with banishment and consignment to wandering. The latter version has God responding to Cain's "dead man walking" concerns by saying that it is only after seven generations that Cain will be slain.¹⁵¹ This translation is based on an interpretation of the passage by Rashi,¹⁵² who refers to a Midrash positing that Cain was killed unintentionally by his descendant, Lamech,¹⁵³ a nice, albeit diluted, "measure for measure" touch—Cain killed his brother and was in turn killed by his several-greats grandson.¹⁵⁴ Thus, according to the Rashi exegesis, "sevenfold" refers to the amount of time God wishes to wait before

exacting final payment for Cain's crime.¹⁵⁵

On the other hand, this deferral, which enabled Cain to marry and procreate,¹⁵⁶ suggests divine leniency. By the same token, however, Cain did not die of old age or natural causes.¹⁵⁷ God shortened his life, which may be viewed as a punishment in addition to exile and wandering the earth. The same is true even if one accepts the alternative midrashic view that God suspended judgment on Cain "until the Flood came and swept him away."¹⁵⁸

Yet another midrashic account is somewhat sympathetic, suggesting that God was half-lenient in response to Cain's half-repentance. Commenting on the colloquy between the two protagonists, the Midrash presents an anguished defendant, who responds plaintively to the divine inquiry, "Where is Abel thy brother": 'Sovereign of the Universe,' replied he, 'Abel and I brought Thee a gift; Abel's Thou didst accept, while me Thou didst turn away with aching heart.'"¹⁵⁹

Then, moving from defense to offense, Cain continues: "Seekest Thou him from me? Surely he is to be sought from none but Thee, for Thou keepest watch over all creatures."¹⁶⁰ Clearly unpersuaded, God curses Cain, whose rejoinder was nothing if not persistent, noting that in the future God would forgive "sixty myriads" of the Jewish people for multiple sins committed in the desert following the exodus from Egypt.¹⁶¹ The divine reaction is simply extraordinary. Abruptly shifting ground, God says: "'If I do not forgive Cain, I will shut the door in the face of all penitents.' Consequently God forgave him half; yet because his repentance was incomplete, He did not forgive him all his sins."¹⁶² God considered Cain's repentance incomplete because he played the lawyer, demanding his *right* to a pardon, rather than appearing as a supplicant seeking mercy.¹⁶³

In still another example of the conflicting views of Cain's character, commenting on his response to God and his attitude after the killing, one Midrash gives Cain's acknowledgment that his sin was more severe than Adam's, whereas another has the wrongdoer protesting his punishment as too stringent,¹⁶⁴ when he says, "My sin is too great to bear."¹⁶⁵ Again, when God places a protective mark on Cain in response to his lament that he will be killed while wandering the earth,¹⁶⁶ the midrashic rabbis argue about the nature of the sign. One suggests that it was a special glow, like an "orb of the sun," prompting the rejoinder that Cain was a "wretch" who received leprosy rather than sunshine to distinguish him.¹⁶⁷ Another says he was given a dog,¹⁶⁸ which is viewed as a contemptible animal.¹⁶⁹ A pair of rabbis debate whether Cain was made a divine example to murderers or to penitents.¹⁷⁰ Seizing on the verse that Cain then "left the presence" of God,¹⁷¹ the Midrash asks rhetorically how this is possible, since God is everywhere, with two rabbis asserting that he went out as a divine deceiver and another responding that he departed "rejoicing" and that "Adam met him and asked him, 'How did your case go?' 'I repented and am reconciled,' replied he. Thereupon Adam began beating his face, crying, 'So great is the power of repentance, and I did not know!'"¹⁷² Thus, viewed in their totality, the midrashic assessments of the extent of Cain's blameworthiness and punishment can fairly be characterized as consistently inconsistent or at least ambivalent—a not uncommon feature of the midrashic literature.

E. Conclusion

What is one to make of these inherently conflicting midrashic accounts with

respect to Cain's culpability and character? The rabbinic sages were unfazed by such seeming contradictions and in fact welcomed them. Even if the Sages "present a number of differing views on the same subject, they all contain a certain aspect of the truth. Although they may be contradictory on the surface, they all hold true in a certain sense."¹⁷³

Variegated perceptions of the truth are indeed part and parcel of the human condition. The Torah, and the book of *Genesis* in particular, is on one level a collection of stories, and that is probably because "we are more persuasive when we tell stories,"¹⁷⁴ and indeed narratives have become an accepted albeit controversial aspect of legal scholarship.¹⁷⁵ How people understand a particular story depends in turn on their own collections of stories that make up their memories. So when people hear stories, even new ones, as listeners, they hear them as old stories—one of their stories.¹⁷⁶ Thus, on the one hand, Cain may be an evil, greedy, premeditated, unrepentant, cold-blooded murderer, or, on the other, an anguished, shamed, less favored child, whose anger explodes in a frenzied attack on his brother that may not even have been an intentional killing, and is, in any event, one that he deeply regrets. To the extent persons have stories of their own—stories of sibling rivalry or of their role in the family or of their relationship to God or other authority figures—that will in large part determine their understanding of the story of Cain and Abel. As is their wont, the Torah, the Talmud, the aggadic literature, and the numerous commentaries, leave the matter in delicious equipoise. And, as is the case elsewhere in Judaism, the journey may be more important than the destination.¹⁷⁷

¹ See 9 MIDRASH RABBAH, *Esther—Proem* 10, at 10 (H. Freedman & Maurice Simon eds. & trans., 3d ed. 1983) (asserting that God appointed "Cain the first of slayers, Abel the first of all slain"); RAMBAN (NACHMANIDES), COMMENTARY ON THE TORAH, *Genesis* 4:23, at 96 (Charles B. Chavel trans., 1971) [hereinafter RAMBAN] (referring to Cain as "the first murderer"); 1 MIDRASH TANCHUMA, *Lech Lechah* 7, at 57 (Hanoah Zundel ed., 1968) (giving God's characterization of Cain as evil because he brought the sword [killing] into the world).

² It is the first crime unless, of course, one counts Adam's and Eve's disobedience to God when they ate the forbidden fruit. *Genesis* 3:1–19.

³ The term "Torah" comes from the Hebrew root meaning "to instruct." In Orthodox Jewish legal discourse the Torah was received at Sinai, written by Moses at God's command. See, e.g., *Deuteronomy* 31:24 (Moses "[wrote] the words of this Torah onto a book"); accord THE CODE OF MAIMONIDES, MISHNAH TORAH, *The Book of Knowledge* lb (Moses Hyamson trans., 1981). Modern biblical scholarship, especially by Christian and non-Orthodox Jewish scholars, conjectures that there were several stages of transmission, both oral and written, of the material finally recorded in the Old Testament. E.g., BERNHARD W. ANDERSON, UNDERSTANDING THE OLD TESTAMENT 19–23, 151–80, 289–90, 451–66 (4th ed. 1986); RICHARD E. FRIEDMAN, WHO WROTE THE BIBLE? 24–32 (1987). Cf. ALAN M. DERSHOWITZ, THE GENESIS OF JUSTICE 16 (2000) (eschewing reliance on the "J author" and the "E author" to resolve conflicts in the *Genesis* text, "[b]ecause I want to engage the (traditional) commentators and the text on the terms accepted by their readers over the millennia").

Although generally it refers to the first five books of the Bible, "Torah" is also used in a far broader sense, encompassing not only the "Prophets" and "Writings" segments of the Old Testament, but also the entirety of Jewish religious learning, including, *inter alia*, the Talmud, post-talmudic legislation and codes, medieval commentaries, midrashic literature and response. In this chapter, however, we will use the word "Torah" in its limited sense, referring to the first five books of the Old Testament.

⁴ THE CHUMASH, *Genesis* 4:1–16, at 19–23 (Nosson Scherman et al. eds., Stone ed. 1993) [hereinafter THE CHUMASH]. Unless otherwise noted, quotations of the Torah in this chapter will be from this edition.

"Chumash," the Hebrew word meaning "five," is a synonym for the Torah, as is Pentateuch, its Greek counterpart.

The Torah, in its original form, has neither punctuation nor vowels, both of which can alter meanings drastically. The translations of the Bible, initially into Aramaic and Greek and thereafter into numerous languages including English, often resolve rather than preserve ambiguities, thereby favoring one interpretation over another. This means that different English translations will sometimes produce differing interpretations of the text.

⁵ See, e.g., DAVID W. AMRAM, LEADING CASES IN THE BIBLE 34 (1905) ("The record of the first murder case is found in the fourth chapter of *Genesis*"); DERSHOWITZ, *supra* note 3, at 48–59 ("Chapter 2. Cain Murders—and Walks"); DAVID MAX EICHHORN, CAIN: SON OF THE SERPENT 62 (2d ed. 1985) ("Cain decided to murder Abel"); ALEXANDER FRANKLIN, SEVEN MIRACLE PLAYS 23–37 (1963) (including one such medieval play entitled "Cain and Abel," that depicts Cain as a premeditated murderer whose sacrificial tithe is solely the result of his religious brother's persistent urging, and is given grudgingly, even shortchanging God; when Cain's sacrifice is rejected, Abel says it is not his fault, and Cain attacks him with a bone, saying "So may this cheek bone burst thy brain, That life and thee shall part in twain So lie down there and take thy rest. And thus I rid me of a pest"); RICARDO J. QUINONES, THE CHANGES OF CAIN 3 (1991) (observing that "[t]he dramatic elements of the [Cain and Abel] story are powerful . . . the first murder").

⁶ See, e.g., ELLIOT N. DORFF & ARTHUR ROSETT, A LIVING TREE—THE ROOTS AND GROWTH OF JEWISH LAW 6 (1988) (noting that "[t]he Jewish tradition has its own system for numbering years from the date of the creation of the world, under which the first half of 1987 falls in the year 5747."). To be sure, the Cain and Abel story has mythical dimensions, see, e.g., QUINONES, *supra* note 5, at 3: "Out of the vast repertoire of Western myth, one myth stands apart for the extraordinary longevity and variousness of its appeal. This is the Cain-Abel story . . . one of the defining myths of our culture."). It is, however, the traditional Jewish version of which we write, and that tradition dates the crime as indicated in the text accompanying this footnote. Even within the Jewish tradition, it should be noted, Cain and Abel have been depicted as archetypes.

⁷ See *Borror v. State*, 204 S.W. 1003 (Tex. Crim. App. 1918).

⁸ See *id.* at 1004.

⁹ *Id.*

¹⁰ See *id.*

¹¹ There is a split as to whether prosecutorial reliance on biblical verses, such as "eye for eye," is reversible error in capital cases. Compare *State v. Rouse*, 451 S.E.2d 543, 562 (N.C. 1994) (affirming death penalty even though the prosecutor had told the jury that "eye for eye" was an appropriate basis for imposing capital punishment), and *State v. Shum*, 866 S.W.2d 447, 464–65 (Mo. 1993) (en banc) (affirming first degree murder conviction and finding that prosecutor's reliance on "eye for eye" during closing argument was not plain error), with *People v. Sandoval*, 841 P.2d 862, 883–84 (Cal. 1992) (prohibiting either district attorney or defense counsel from relying on Biblical authority in arguments to jury), and *Commonwealth v. Chambers*, 599 A.2d 630, 644 (Pa. 1991) (reversing death penalty and warning prosecutors that using Biblical authority to get a death sentence is *per se* reversible error).

¹² Professor Dershowitz is somewhat exercised by this ostensible divine leniency, especially in comparison to the punishment meted out to Adam and Eve as a result of their fateful encounter with the serpent and the fruit of the tree of good and evil. DERSHOWITZ, *supra* note 3, at 50.

¹³ See WAYNE R. LAFAVE, CRIMINAL LAW § 7.1, at 653–55 (3d ed. 2000). Most states also classify killings during the commission of serious felonies as murder. *Id.* at 653.

¹⁴ See *id.* § 7.7, at 692–96; see also *United States v. Chagra*, 638 F. Supp. 1389, 1399 (W.D. Tex. 1986) (defining deliberation as requiring "a cool mind that is capable of reflection" and premeditation as requiring reflection "at least for a short period of time" before the killing), *aff'd*, 807 F.2d 398 (5th Cir. 1986).

¹⁵ See LAFAVE, *supra* note 13, § 7.7, at 693; see, e.g., *People v. Anderson*, 447 P.2d 942, 948 (Cal. 1968) (observing that "the legislative classification of murder into two degrees would be meaningless if 'deliberation' and 'premeditation' were construed as requiring no more reflection than may be involved in the mere formation of a specific intent to kill"); accord *State v. Solomon*, 421 N.E.2d 139 (Ohio 1981); but see, e.g., *Commonwealth v. Carrol*, 194 A.2d 911, 916 (Pa. 1963) (quoting an earlier case that "no time is too short for a wicked man to frame in his mind the scheme of murder"); *Young v. State*, 428 So. 2d 155,

158 (Ala. Crim. App. 1982) (noting that "[p]remeditation and deliberation may be formed while the killer is 'pressing the trigger that fired the fatal shot'") (citation omitted).

¹⁶ See LAFAVE, *supra* note 13, § 7.7, at 692–96.

¹⁷ See MODEL PENAL CODE § 210.2(1), 120 (1985), stating that "criminal homicide constitutes murder when: (a) it is committed purposely or knowingly." In § 2.02(2)(a), the Code defines "purposely" as follows:

A person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result;

In turn,

[a] person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

Id. § 2.02(2)(b).

¹⁸ *Id.* at § 210.2(1)(b), at 120.

¹⁹ See *id.* Explanatory Note for Criminal Homicide, at 117, 118.

²⁰ See LAFAVE, *supra* note 13, § 7.9, at 703.

²¹ See *id.* § 7.10, at 703–17.

²² See *Girouard v. State*, 583 A.2d 718, 722 (Md. 1991) (reaffirming common law rule that words alone are insufficient for a manslaughter instruction); *State v. Shane*, 590 N.E.2d 272, 278 (Ohio 1992) (same).

²³ See *Commonwealth v. Berry*, 336 A.2d 262, 264–65 (Pa. 1975) (permitting manslaughter instruction if any circumstances, including words, would provoke a reasonable person to lose self-control); *Maher v. People*, 81 Am. Dec. 781 (Mich. 1862) (holding that what constitutes reasonable provocation is usually a matter for the jury rather than the court).

²⁴ See *Stahl v. State*, 712 S.W.2d 783, 788–89 (Tex. App. 1986) (finding a ten-minute lapse of time between killing and provoking act adequate cooling time as a matter of law).

²⁵ See *Lopez v. State*, 716 S.W.2d 127, 129 (Tex. Crim. App. 1986) (upholding murder conviction of defendant who in a rage killed a third party, based on penal code provision stating that "[s]udden passion" means passion directly caused by and arising out of provocation by the individual killed." TEX. PENAL CODE ANN. § 19.02(2) (West 2000).

²⁶ See MODEL PENAL CODE § 210.3(1) (1985). The recklessness required for manslaughter is less egregious than that mandated for murder, which necessitates proof of "extreme indifference to the value of human life." *Id.* § 210.2(1)(b). In § 2.02(2)(c), the Code defines "recklessly" in these terms:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

²⁷ *Id.* § 210.3(1)(b).

²⁸ *Id.* The drafters' comments make clear that there is a wholly subjective requirement regarding whether the defendant did in fact act under extreme emotional disturbance, whereas the "reasonableness" requirement is objective. MODEL PENAL CODE AND COMMENTARIES: Part II, § 210.3, at 49–50 (1980).

²⁹ See *State v. Elliot*, 411 A.2d 3 (Conn. 1979). There is a split of opinion on the underlying rationale for provocation, that is, whether it is a quasi-justification or a quasi-excuse, and the alternative one chooses can alter the result. For example, if provocation is considered a semi-justification, some states take the position that if the killer accidentally slays someone other than the provoker, there is no defense. *E.g.*, *Lopez v. State*, 716 S.W.2d 127 (Tex. Crim. App. 1986). If semi-excuse is the rationale, one focuses on the defendant's state of mind rather than the culpability of the victim. In the latter circumstances, the killer cannot be deterred, and his rage is more understandable. See Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 456–58 (1982) (arguing that the justification rationale is in tension with society's belief in the value of human life).

³⁰ See *People v. Walker*, 473 N.Y.S.2d 460 (App. Div. 1984) (affirming trial court's refusal of manslaughter instruction in case of defendant who shot his drug dealer for refusing to sell him more drugs), *aff'd*, 475 N.E.2d 445 (N.Y. 1984); *People v. Mejia*, 561 N.Y.S.2d 265 (App. Div. 1990) (refusing manslaughter instruction for defendant who shot victim without giving him an opportunity to retreat, even though the deceased had menaced the defendant with a screwdriver, albeit from a distance).

³¹ Jewish law, however, contains an array of procedural, substantive and evidentiary safeguards that render conviction exceedingly difficult. Not all of these barriers, however, apply to non-Jews. Cain was not Jewish—the first Jew was Abraham—and, in any event, the Torah had not yet been given to man. Even the Noahide laws, which are applicable to all human beings and which include a prohibition against murder, may not have been imposed in Cain's era. See THE ARTSCROLL SERIES, THE TALMUD BAVLI: THE GEMARA: THE CLASSIC VILNA EDITION, *Sanhedrin* 56a–56b (Schottenstein ed., 2007) [hereinafter BABYLONIAN TALMUD]; see also 4 ENCYCLOPEDIA TALMUDICA 362 (Shlomo J. Zevin ed., 1992) (noting disagreement among talmudic Sages "regarding the number of precepts given to Adam. All agree, however, that after the Flood Noah's descendants were commanded to obey all seven precepts"). Presumably, however, the prohibition against murder was one of the laws given to Adam. Indeed, it is a *malum in se* offense, and ignorance of the law is not a defense in such circumstances. DERSHOWITZ, *supra* note 3, at 53. There is, however, a Midrash stating that God mitigated Cain's punishment on notice grounds, i.e., no one had told him of the seriousness of his crime. *But see* OTZER HA-MIDRASHIM, *Leviticus* 5:1, at 222 (Eisenstein ed. undated) (asserting that Cain loved possessions and did not study Torah, whereas Abel did study and that the sign placed on Cain after the killing was either boils or leprosy, as a penalty for his failure to learn Torah; the underlying assumption appears to be that long before Sinai some form of the Torah was available, and there was an obligation to learn it).

³² See THE MISHNAH, *Sanhedrin* 9:1, at 395 (Herbert Danby trans., 1933) [hereinafter MISHNAH], *reprinted in* BABYLONIAN TALMUD, *supra* note 31, *Sanhedrin* 76b.

³³ See *Numbers* 35:19, 22–28; *Deuteronomy* 4:41–43, 19:2–10.

³⁴ See THE PENTATEUCH—THE HIRSCH COMMENTARY, *Numbers* 35:34, at 647 (Ephraim Oratz ed. & Gertrude Hirschler trans., 1986) [hereinafter HIRSCH COMMENTARY ON THE TORAH].

³⁵ See *Numbers* 35:20.

³⁶ *Id.* at 35:22.

³⁷ See *id.* at 35:22–28; *Deuteronomy* 4:41–43, 19:2–10.

³⁸ See THE CODE OF MAIMONIDES, BOOK 11: THE BOOK OF TORTS, *Murder and the Preservation of Life* 5:1, at 209 (Hyman Klein trans., 1954) [hereinafter THE CODE OF MAIMONIDES—TORTS] (noting that "[i]f one slays inadvertently, he must go into exile from the district where he has slain to a city of refuge").

³⁹ See BABYLONIAN TALMUD, *supra* note 31, *Makkos*, Introduction to ch. 2, at 1 (defining "inadvertent killing" as one "which results from some measure of negligence, but not gross negligence. This is the type of unintentional killing for which the Torah decrees . . . exile").

⁴⁰ *Id.* (translating the Hebrew phrase as "bordering on the intentional" and defining it as "a killing which results from gross negligence and an obvious disregard for the safety of the victim. The Torah . . . [considers the crime] too severe to be atoned for by mere exile").

⁴¹ See *id.* For a fuller exposition of these gradations of homicide and the allocation of jurisdiction to human and heavenly tribunals, see Arnold N. Enker, *Error Juris in Jewish Criminal Law*, 11 J.L. & RELIGION 23, 27–33 (1994–95).

⁴² For a comprehensive exposition and analysis of the Talmud, see ADIN STEINSALTZ, THE TALMUD: THE STEINSALTZ EDITION, A REFERENCE GUIDE (Israel V. Berman ed. & trans., 1989). Its constituent parts, the Mishnah and the Gemara, were redacted around 200 C.E. and 500 C.E. respectively.

⁴³ See, e.g., MOSHE WEISSMAN, *Foreword to* 1 THE MIDRASH SAYS vii–xiii (Moshe Weissman ed., 1980) (explaining the nature of the Midrash Aggadah); JAMES L. KUGEL, *Foreword to* 1 LOUIS GINZBERG, THE LEGENDS OF THE JEWS xv (1998) (observing that "the (mostly anonymous) creators of midrash, who began to flourish as early as the third or fourth centuries B.C.E., did not seek to explain the Bible in an objective, dispassionate way. They were, on the contrary, engage[d] interpreters who sought everywhere to bring out what they believed to be the eternal, relevant, and fundamentally religious significance of the biblical text.").

⁴⁴ It should be noted that, although the Talmud, Midrash Aggadah, and medieval and modern commentaries are discrete categories, the midrashic literature is incorporated throughout the Talmud, and it is likewise cited, quoted and relied on by the commentators.

⁴⁵ See MARCUS JASTROW, A DICTIONARY OF THE TARGUMIM, THE TALMUD BABLI AND YERUSHALMI, AND THE MIDRASHIC LITERATURE 365 (1985) (translating *harag* as "to kill, put to death"); REUBEN AVINOAM, COMPENDIOUS HEBREW-ENGLISH DICTIONARY 91 (M.H. Segal rev. ed. 1938) (giving modern Hebrew translation as "to kill, slay"); *but see* MATITYAHU CLARK, ETYMOLOGICAL DICTIONARY OF BIBLICAL HEBREW 61 (1999) (translating *harag* as "kill, murder").

⁴⁶ See JASTROW, *supra* note 45, at 1493 (translating *ratsach* as "to slay, murder"); AVINOAM, *supra* note 45, at 359 (giving the translation as "to murder, slay, kill"); CLARK, *supra* note 45, at 248 (translating *ratsach* solely as "murder").

⁴⁷ See *Exodus* 20:13; *Deuteronomy* 5:17. Even Jewish translations differ in their interpretation of the Hebrew word used, *tirtsach*, which comes from the root *ratsach*. See, e.g., THE CHUMASH, *supra* note 4, *Exodus* 20:13, at 411, *Deuteronomy* 5:17, at 971 (using "kill," but referring repeatedly to murder in the footnote commentary, *id.* at 411); THE PENTATEUCH AND HAFTORAHs, *Exodus* 20:13, at 299, *Deuteronomy* 5:17, at 767 (J.H. Hertz ed., 2d ed. 1989) ("murder"); THE JERUSALEM BIBLE, *Exodus* 20:13, at 86, *Deuteronomy* 5:17, at 217 (Harold Fisch ed., 1989) ("murder"); THE TORAH: A MODERN COMMENTARY, *Exodus* 20:13, at 554, *Deuteronomy* 5:17, at 1357 (W. Gunther Plaut ed., 1981) ("murder"). For non-Jewish translations, see, e.g., A READER'S GUIDE TO THE HOLY BIBLE—KING JAMES VERSION, *Exodus* 20:13, at 89, *Deuteronomy* 5:17, at 222 (1972) ("kill"); NEW AMERICAN STANDARD BIBLE, *Exodus* 20:13, at 110, *Deuteronomy* 5:17, at 267 (1960) ("murder").

⁴⁸ See JASTROW, *supra* note 45, at 1493 (defining the noun form as "murderer, assassin").

⁴⁹ See THE TORAH: A MODERN COMMENTARY, *supra* note 47, at 1357 (observing that while in English there is a distinction between 'kill' (which may be authorized by the state or be accidental) and 'murder' (which is unauthorized and malicious), the Hebrew 'ratsach' cannot be clearly distinguished from the more frequent 'harag.' However, the commandment deals obviously with homicide, and hints those supporting pacifism or the abolition of capital punishment cannot justifiably base themselves on this word but must look to other reasons).

(footnote omitted).

⁵⁰ *Deuteronomy* 4:42 refers to one who "killed his fellow without knowledge, but was not an enemy of his from yesterday and before yesterday." See COMMENTARY OF THE RASHBAM, 1 *Mikraot Gedolot Ha-Maor*, *Exodus* 20:13, at 468 (Aaron Samet & Daniel Biton eds., 1990) (contending that *ratsach* is used in *Deuteronomy* 4:42 merely for stylistic reasons).

⁵¹ For example, Rashi states that Cain's descendant, Tubal-Cain, who, according to one set of Midrashim, was responsible for Cain's death, was so named, because "he improved the work of Cain. 'Tubal' is an expression based on 'tavleen' (spices). He seasoned and improved the work of Cain in making implements of war for murderers." 1 THE PENTATEUCH AND RASHI'S COMMENTARY, *Genesis* 4:22, at 45 (Abraham Ben Isaiah & Benjamin Sharfman trans., 1950) [hereinafter PENTATEUCH AND RASHI'S COMMENTARY].

⁵² See RAMBAN, *supra* note 1, *Genesis* 4:1, at 87:

Now she [Eve] called one son by a name indicating 'acquisition,' and the second one she called Abel, denoting 'vanity' because man's acquisition is likened to vanity. But she did not wish to say so explicitly. Therefore, no reason is written for the name of the second son. The secret received by tradition concerning Abel is very profound.

(footnote omitted).

⁵³ See YEHUDA NACHSHONI, STUDIES IN THE WEEKLY PARASHAH: BEREISHIS 17 (Shmuel Himelstein trans., 1988). See also 1 LOUIS GINZBERG, THE LEGENDS OF THE JEWS 107 (Henrietta Szold trans., 1909) (noting that "Eve bore her second son, whom she named Hebel, because, she said, he was born but to die"). Another Midrash tells of Eve's dream in which she "had seen the blood of Abel flow into the mouth of Cain, who drank it with avidity, though his brother entreated him not to take all." *Id.*

⁵⁴ NACHSHONI, *supra* note 53, at 17.

⁵⁵ See 8 MIDRASH RABBAH, *supra* note 1, *Ecclesiastes* 6:3, at 159 (asserting that Cain "was not satisfied with [what he possessed of] the world's good things"); PIRKEI D'RABBI ELIEZER, ch. 23, at 70 (M.H. Horwitz ed., 1973) (accusing Cain of murdering his brother in order to take possession of his property).

⁵⁶ *Genesis* 4:1. According to one Midrash, however, Cain is the evil offspring of Eve and the serpent. 1 GINZBERG, *supra* note 53, at 105.

⁵⁷ See PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 51, *Genesis* 4:1, at 37. Rashi favors the plain meaning of biblical passages throughout his exegesis of the Torah. See, e.g., *id.*, *Genesis* 3:24, at 37. He

gives aggadic interpretations as well when he feels that they are necessary for a fuller understanding of the text. *See, e.g., id., Genesis 1:1*, at 1.

⁵⁸ *See Genesis 4:2*.

⁵⁹ *See 1 SFORNO, COMMENTARY ON THE TORAH, Genesis 4:2*, at 34 (Raphael Pelcovitz trans., 1987). *See EICHHORN, supra* note 5, at 36 (referring to Moses and David as exemplars and asserting that "Abel displayed wisdom and strength of character when he decided to become a shepherd rather than a farmer").

⁶⁰ *See SFORNO, supra* note 59, *Genesis 4:2*, at 34; *cf. MEYER SIMCHA, MESHECH CHACHMAH 5* (Abraham Abraham ed., 1972) (asserting animals were preferred sacrifices because of the effort required in raising them).

⁶¹ *See SFORNO, supra* note 59, *Genesis 4:2*, at 34.

⁶² *See 1 MALBIM, COMMENTARY ON THE TORAH, Genesis 4:2*, at 299–300 (Zvi Faier trans., 1982).

⁶³ *See PENTATEUCH AND RASHI'S COMMENTARY, supra* note 51, *Genesis 1:11*, at 7–8 (noting that during Creation God had commanded the earth to put forth "fruit tree bearing fruit," but the earth merely produced "tree bearing fruit." According to Rashi, God's command was intended to make the trees themselves taste like fruit. Therefore, "when Adam was cursed because of his sin, it [the earth] too was remembered [punished] because of its sin and was cursed.").

⁶⁴ *See HIRSCH COMMENTARY ON THE TORAH, supra* note 34, *Genesis 4:2*, at 22 ("Agriculture calls primarily for the use of all man's physical energies. . . . The tiller of the ground is dragged down more and more to the level of the soil he cultivates.").

⁶⁵ *See id.*

⁶⁶ *See 9 MIDRASH RABBAH, supra* note 1, *Esther 6:3*, at 74 (asserting that the biblical statement that Cain was a tiller of the earth implied "that he was predestined for banishment").

⁶⁷ *See Genesis 4:12; see also 1 MIDRASH RABBAH, supra* note 1, *Genesis 22:10*, at 190 (discussing various interpretations of God's curse with respect to farming).

⁶⁸ This is, of course, true unless defendant places his or her character in issue. *See, e.g., FED. R. EVID. 404(a)(1)*. Character, however, is often relevant in sentencing.

⁶⁹ *1 MIDRASH RABBAH, supra* note 1, *Genesis 36:3*, at 289. The other two agricultural miscreants specified in the Midrash were Noah and Uzziah.

⁷⁰ *Genesis 4:8*.

⁷¹ The Torah itself makes no explicit reference to a quarrel, stating only that Cain "spoke" with Abel, after which they were in a field, and Cain "rose up" and killed his brother. *Genesis 4:8*. A number of Midrashim, however, assume that a quarrel preceded the slaying. *See, e.g., 3 MIDRASH RABBAH, supra* note 1, *Exodus 30:17*, at 366 (footnote omitted) ("Nothing good or peaceful ever results from strife. It was only after a quarrel that Cain smote his brother.").

⁷² *See 1 MIDRASH RABBAH, supra* note 1, *Genesis 22:8*, at 187.

⁷³ The midrashic literature, however, states that Eve gave birth to a girl together with Cain and to either one or two girls at the time of Abel's birth. *1 MIDRASH RABBAH, supra* note 1, *Genesis 22:2*, at 180; *id.* 22:3 & n.5, at 181; *id.* 22:7, at 187; *2 MIDRASH RABBAH, supra* note 1, *Genesis 61:4*, at 543. *See also BABYLONIAN TALMUD, supra* note 31, *Yebamoth 62a* (discussing the duty to propagate and relying on an extra word in the Genesis text to denote that each brother was born together with a sister); *id., Sanhedrin 58b* (suggesting that Adam did not marry his daughter so that Cain would be able to do so). According to another Midrash, the brothers were allowed to marry their sisters notwithstanding the prohibition against incest, *Leviticus 18:9*, because of the need to populate the world. *PIRKEI D'RABBI ELIEZER, supra* note 55, at 69.

⁷⁴ *See MIDRASH ZUTA, Shir HaShirim 7:10* (Buber ed. undated) (describing God's warning to Abel not to have compassion on Cain, "this evil one," meaning that he should kill Cain; but, continues the Midrash, Abel rejected the divine advice).

⁷⁵ *See 1 MIDRASH RABBAH, supra* note 1, *Genesis 22:8*, at 187. According to another Midrash, God admonishes Cain for killing his brother even though Abel had compassion on Cain when the latter was beneath him. *1 MIDRASH TANCHUMA, supra* note 1, *Breishis 9*, at 18.

⁷⁶ *See LAFAVE, supra* note 13, § 7.11 (a), at 718. Under the Model Penal Code, imperfect self-defense is viewed as a problem of reckless manslaughter or negligent homicide, depending on whether the actor's belief was reckless or negligent. *MODEL PENAL CODE cmt. to § 210.3*, at 51 (1985).

⁷⁷ *Genesis 4:8*. Others translate the verb as "came to pass" (e.g., *THE PENTATEUCH AND HAFTORAHS, supra* note 47, *Genesis 4:8*, at 14), although the Hebrew verb literally means "was".

⁷⁸ See *Genesis* 4:8 ("Cain spoke with his brother Abel"); cf. See MIDRASH ZUTA, *supra* note 74, *Shir HaShirim* 7 (labeling Cain a man of "evil speech").

⁷⁹ See, e.g., *Commonwealth v. Puksar*, 740 A.2d 219, 222–23 (Pa. 1999) (affirming murder convictions, as well as death sentence for slaying of sister-in-law and life imprisonment for killing of brother, with whom defendant had recently fought over transaction involving model trains; court noted that the brother's "body was found surrounded by scattered boxes of model trains"), *cert. denied*, 531 U.S. 829 (2000); *Miller v. State*, 939 S.W.2d 681, 684 (Tex. App. 1996) (noting "dysfunctional family relationships which culminated in . . . fratricide," in which defendant killed his brother because victim turned off television and told him to leave the house; defendant was sentenced to life imprisonment); *Commonwealth v. Jones*, 640 A.2d 914, 915 (Pa. Super. 1994) (upholding sentence of 18–60 months for voluntary manslaughter, where defendant stabbed his half-brother "during the course of a heated argument"; jury acquitted defendant on murder charge); *State v. Gonsalves*, 553 A.2d 1073, 1074 (R.I. 1989) (stating that defendant was convicted of manslaughter for killing his brother, and that they were "embroiled in a bitter argument"); *Gilchrist v. State*, 409 S.W.2d 329, 330 (Ark. 1966) (affirming murder two conviction and 21-year sentence, based on slaying committed after a "ruckus" between defendant and his brother; original charge was murder in the first degree); *State v. Parker*, 403 S. W.2d 623, 624 (Mo. 1966) (upholding manslaughter conviction and ten-year sentence for fratricide in the course of an argument; defendant originally charged with murder two); *Hackman v. State*, 148 So. 2d 253, 254 (Ala. Ct. App. 1962) (affirming murder two conviction for fratricide on an indictment for murder in the first degree); *State v. Ward*, 86 S.E.2d 275 (N.C. 1955) (reversing conviction on other grounds, in a case involving slaying of brother during a fight, where defendant was originally charged with murder in the second degree); *Jureczki v. State*, 211 S. W.2d 231, 232 (Tex. Crim. App. 1948) (upholding conviction of murder without malice and five-year sentence, where defendant killed his brother during the course of a fight).

See also *Dressler*, *supra* note 29, at 421 n.4 (suggesting that, since Cain and Abel were apparently embroiled in a familial dispute in which jealousy may have been a factor, the killing might be considered manslaughter, committed in the heat of passion or as a result of extreme emotional disturbance).

⁸⁰ See, e.g., *State v. Copling*, 741 A.2d 624 (N.J. App. Div. 1999) (ruling that 2 1/2 hour delay between provoking incident and killing was sufficient cooling off period, and that consequently no manslaughter instruction was required); *State v. Follin*, 947 P.2d 8 (Kan. 1997) (finding that 1 1/2 hour delay was enough cooling time and justified trial court's refusal to give manslaughter instruction); *State v. Robinson*, 185 S.W.2d 636 (Mo. 1945) (affirming murder conviction, and holding that combination 30–40 minute interim between fight and killing, and defendant's cool demeanor, was sufficient basis to deny manslaughter instruction); *but see* *People v. Brooks*, 230 Cal. Rptr. 86 (Cal. App. 1986) (reversing murder conviction for failure to instruct jury on manslaughter even though 2 hours had elapsed, relying on earlier decision ruling that even with 20 hour lapse defendant had acted in heat of passion).

⁸¹ See *Deuteronomy* 22:23–27 (distinguishing cases of rape in the field and in the city. If the rape occurred in the city, where there were people who could hear if the victim, a betrothed woman, called for help, both the man and the woman are culpable, whereas, in the case of a rape in the field, the woman is excused, because it is assumed that she called for help, and there was no one to hear her). See also SFORNO, *supra* note 59, *Genesis* 4:8, at 36 n.8 (stating that although Cain was prepared to "harm" Abel, he was not "so callous and cruel as to do so in the presence of his parents!").

⁸² SFORNO, *supra* note 59, *Genesis* 4:8, at 36 n.5.

⁸³ PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 51, 4:8, at 39.

⁸⁴ Attesting to the view of law as a "seamless web," 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW* 1 (2d ed. 1909), the previous section of this chapter examining the ambiguities of the Torah text, necessarily refers to the positions of some of the authorities cited and discussed in this section, which deals more directly with the Midrash and the biblical commentaries. The short of the matter is that it is a central tenet of Jewish law and learning that the written Torah cannot be understood in a vacuum. Cf. ARTSCROLL SERIES, *THE MISHNAH, SEDER NEZIKIN, VOL. II(A), Sanhedrin*, front cover flap (Matis Roberts trans., 1987) ("When Moses descended from Sinai, he held the Tablets in his hands and the Oral Law in his mind. The words of the Law would be contained in the Written Torah, but their meaning and application would be transmitted from teacher to student in an eternal chain of generations."); Michael Wyschogrod, *Was the Oral Law Given at Sinai?*, *MOMENT MAGAZINE*, 12 (April 1991) ("It might even be argued that the oral law is more central to Judaism than the written. Christianity, after all, also reveres the Bible as the word of God. What it does not do is accept the oral Torah.").

⁸⁵ See NEHAMA LEIBOWITZ, *STUDIES IN BERESHIT (GENESIS) 39* (Aryeh Newman trans., 4th rev. ed. 1974) (categorizing the midrashic explanations of the brothers' quarrel in this manner).

⁸⁶ See 1 MIDRASH RABBAH, *supra* note 1, *Genesis 22:7*, at 187. The Midrash does not specify which brother initiated the plan.

⁸⁷ *Id.* In a variant Midrash concerning the property, Cain tries to take credit for Abel's sacrifice, arguing that, since he was the eldest, he should receive a double portion, and that portion should include the land on which Abel offered his sacrifice. 1 MIDRASH TANCHUMA, *supra* note 1, *Breishis 9*, at 17.

⁸⁸ See 1 MIDRASH RABBAH, *supra* note 1, *Genesis 22:7*, at 187.

⁸⁹ See *id.* Another Midrash adds that Cain was jealous of Abel and hated him because, *inter alia*, the latter's sister was more beautiful than his, and Cain desired her. PIRKEI D'RABBI ELIEZER, *supra* note 55, ch. 23, at 70.

⁹⁰ See LEIBOWITZ, *supra* note 85, at 39.

⁹¹ 3 MIDRASH RABBAH, *supra* note 1, *Exodus 31:17*, at 399; see also EICHHORN, *supra* note 5, at 62.

⁹² 3 MIDRASH RABBAH, *supra* note 1, *Exodus 31:17*, at 399.

⁹³ *Id.*

⁹⁴ *Id.* at 399–400.

⁹⁵ At the same time, the midrashic explanation concerning the brothers' division of the world is consistent with the biblical account of their respective sacrifices, for "Cain brought of the fruits of the ground—his immovable property, and Abel brought the firstborn of his sheep—his movable property." *Id.* at 399 n.4.

Cf. 4 MIDRASH RABBAH, *supra* note 1, *Leviticus 27:5*, at 348 (discussing the assertion that God "demands satisfaction for the blood of the pursued at the hands of the pursuers," and giving as proof thereof that, "Abel in fact was pursued by Cain," and therefore God chose Abel's offering). See also 8 MIDRASH RABBAH, *supra* note 1, *Ecclesiastes 3:15*, at 99.

⁹⁶ *Genesis 4:3*. See PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 51, *Genesis 4:3*, at 38 (stating that Cain's sacrifice was "from the inferior" fruit and that "there is an Aggadah which says that it was flax seed."). See also 1 MIDRASH TANCHUMA, *supra* note 1, *Breishis 9*, at 17 (observing that Cain's sacrifice was leftovers or surplus that he did not need, consisting of flax seeds); 1 GINZBERG, *supra* note 53, at 107 (noting that "Cain ate his meal first, and after he had satisfied his appetite, he offered unto God what was left over, a few grains of flax seed.").

⁹⁷ See PIRKEI D'RABBI ELIEZER, *supra* note 55, ch. 23, at 69 (noting Abel's sheep were not only the fattest of his flock, but also unshorn, meaning that he received no benefit from these animals, giving them fully to God).

⁹⁸ 1 MIDRASH RABBAH, *supra* note 1, *Genesis 22:5*, at 182 & n.5 (noting that the early figs were "a special delicacy").

⁹⁹ See *Deuteronomy 21:15–17* (giving first born son a double portion). See also RAMBAN, *supra* note 1, *Genesis 4:7*, at 88 (interpreting this verse, in which God advises Cain that if he improves, he will be forgiven, as meaning, "If you will mend your ways you will have your rightful superiority in *se'eth* (dignity) over your brother since you are the firstborn.").

On the other hand, first born sons do not always prevail over younger brothers who are spiritually superior to them. See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 20 (1983) (giving as examples the stories of Ishmael and Isaac, *Genesis 21:1–14*, Esau and Jacob, *id.*, 25:29–34, 27:1–40, and Joseph and his brothers, *id.*, 37:1–47:12). Professor Cover also notes that in the Cain and Abel scenario, their younger brother, Seth, becomes the "progenitor of the human race." Cover, *supra*, at 20.

¹⁰⁰ *Cf. Isaiah 1:11–17* (expressing God's disdain for insincere sacrifices, and instead urging the people to "[I]earn to do good, seek justice, vindicate the victim, render justice to the orphan, take up the grievance of the widow"); to the same effect, see *id.*, 58:3–12; 1 *Samuel 15:22*; *Micah 6:6–8*.

¹⁰¹ See EICHHORN, *supra* note 5, at 41–42 (referring to Cain's comment to Abel that the latter "went out and got all [his] animals together to make sure that [he] would not be outdone by [Cain and Adam]"). See also *id.* at 46 (where Cain perceives Abel's behavior as a "deliberate plot to supplant him as God's favorite").

¹⁰² The Hebrew term used is *vayihar*, which "is derived from *harah*, to burn . . ."; thus, the biblical verse might mean that Cain was "burnt up, i.e., blackened." 1 MIDRASH RABBAH, *supra* note 1, *Genesis 22:6*, at 184 n.5. One might also argue that Cain's "blackened" face was a sign of deep shame, or reflected a combination of shame and anger. *Cf.* Thomas Scheff & Suzanne Retzinger, *Shame, Anger and the Social Bond: A Theory of Sexual Offenders and Treatment*, 3 ELECTRONIC J. SOC. 1, 8 (1997) ("propos[ing] a

theory of shame/rage loops leading to verbal or physical violence," and noting that such "[s]hame/anger loops may also be the emotional basis for institutionalized conflict between individuals and between groups, as in duels, feuds, vendettas, and wars").

¹⁰³ *Genesis* 4:4.

¹⁰⁴ See RAMBAN, *supra* note 1, *Genesis* 4:7, at 88 (observing that "he who is ashamed presses his face downward"). See also Scheff & Retzinger, *supra* note 102 (discussing the connection between shame and anger).

¹⁰⁵ See *Genesis* 4:7; see also RAMBAN, *supra* note 1, *Genesis* 4:7, at 89:

[Y]our sin longs to cleave to you at all times. Nevertheless *thou mayest rule over it* if you so desire, for you may mend your ways and remove it from upon you. Thus He taught him [Cain] concerning repentance, that it lies within his power to return anytime he desires and He will forgive him.

¹⁰⁶ See 1 MIDRASH RABBAH, *supra* note 1, *Genesis* 22:9, at 189, in which Rabbi Simeon bar Yohai gives the following parable: "Think of two athletes wrestling before the king; had the king wished, he could have separated them. But he did not so desire, and one overcame the other and killed him, . . ." See also *id.*, *Genesis* 30:8, at 236 (asserting that "Cain was predestined to exile.").

Indeed, invoking this perspective and quoting the above Midrash, Professor Dershowitz suggests that God mitigated Cain's punishment because the latter was provoked, not by Abel, but by the Master of the Universe Himself. See DERSHOWITZ, *supra* note 3, at 52 ("If God's action and inaction provoked Cain into killing Abel, then it becomes understandable why God would mitigate Cain's punishment. Provocation has traditionally been recognized as a mitigating consideration, though the victim is generally the provocateur.").

¹⁰⁷ LEIBOWITZ, *supra* note 85, at 40–42.

¹⁰⁸ See *Genesis* 4:10.

¹⁰⁹ See MISHNAH, *supra* note 32, *Sanhedrin* 4:5, at 388, reprinted in BABYLONIAN TALMUD, *supra* note 31, *Sanhedrin* 37a; accord 1 MIDRASH RABBAH, *supra* note 1, *Genesis* 22:9, at 289. The Mishnah's alternative explanation is that the plural denotes that Abel's blood was widely scattered.

¹¹⁰ It should be noted that for Judaism, the Middle Ages begin earlier and ended slightly later than Western historical chronology: "From the viewpoint of Jewish history, the Middle Ages may be defined as the period stretching from the early Moslem-Arab conquests in 632 C.E., to the spiritual crisis experienced by Jewry during the second half of the seventeenth century . . ." HAIM H. BEN-SASSON, *THE MIDDLE AGES, in A HISTORY OF THE JEWISH PEOPLE* 385 (Haim H. Ben-Sasson ed., 1976).

¹¹¹ See PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 51, *Genesis* 4:8, at 39 (alluding to other aggadic interpretations, but contending that his "is the plain meaning of the passage"). As we shall see, however, Rashi's position is not so simple.

¹¹² According to another Midrash, however, Cain's jealousy and hatred, stemming from God's rejection of his sacrifice and Cain's desire for Abel's beautiful sister, as well as Abel's property, led Cain to declare, "I will kill Abel, my brother"—clearly indicating premeditation. See PIRKEI D'RABBI ELIEZER, *supra* note 55, ch. 23, at 69–70.

¹¹³ RAMBAN, *supra* note 1, *Genesis* 4:8, at 89.

¹¹⁴ See *id.* (contending that Cain thought his father would not have any more children).

¹¹⁵ SFORNO, *supra* note 59, *Genesis* 4:8, at 36 n.8.

¹¹⁶ See *Deuteronomy* 19:11 (stating: "But if there will be a man who hates his fellow, and ambushes him and rises up against him, and strikes him mortally and he dies . . .").

¹¹⁷ See MIKRAOT GEDOLOT MA-MAOR, *Genesis* 4, at 101 (Aharon Samet & Daniel Biton eds., 1980); see also RAMBAN, *supra* note 1, *Genesis* 4:8, at 89 (contrasting the views of Rashi and Ibn Ezra).

¹¹⁸ MALBIM, COMMENTARY ON THE TORAH, *supra* note 62, *Genesis* 4:8, at 306.

¹¹⁹ See *id.*

¹²⁰ See *id.* (commenting on the verse, "Cain rose up against his brother Hevel and killed him," the Malbim states: "Exactly in fulfillment of what the Lord had told him: that you can master him").

¹²¹ At first glance, Cain's age at the time of the crime would also appear to be relevant. The Torah does not specify the brothers' ages, but, according to one Midrash, they were forty years old (1 MIDRASH TANCHUMA, *supra* note 1, *Breishis* 9, at 17); considering, however, the lengthy life expectancies of that period (e.g., *Genesis* 5:1–32), age forty may only have constituted adolescence. Compounding the uncertainty is 1 MIDRASH RABBAH, *supra* note 1, *Genesis* 22:4, at 182 (stating that "all agree that Abel was

not in the world more than fifty days") (footnote omitted). *But see* MIDRASH RABBAH, *supra* note 1, at 29 (noting that "[a]ll the children were also born as full-grown adults").

¹²² See 1 MIDRASH RABBAH, *supra* note 1, *Genesis* 22:8, at 188.

¹²³ See 1 MIDRASH TANCHUMA, *supra* note 1, *Breishis* 9, at 18.

¹²⁴ See *id.*

¹²⁵ See MISHNAH, *supra* note 32, *Hullin* 1:2–4, at 513–14, *reprinted in* BABYLONIAN TALMUD, *supra* note 31, *Hullin* 15b, 18a, 19b.

¹²⁶ MISHNAH, *supra* note 32, *Sanhedrin* 4:5, at 388, *reprinted in* BABYLONIAN TALMUD, *supra* note 31, *Sanhedrin* 37a.

¹²⁷ See PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 51, 4:10, at 40 (relying on BABYLONIAN TALMUD, *supra* note 31, *Sanhedrin* 37b).

¹²⁸ See 1 MIDRASH TANCHUMA, *supra* note 1, *Breishis* 9, at 18.

¹²⁹ See *People v. Anderson*, 447 P.2d 942 (Cal. 1968) (reducing a charge of murder one to murder two, where the defendant had inflicted more than sixty wounds all over the victim's body). *But see* DERSHOWITZ, *supra* note 3, at 53 (arguing Cain inflicted multiple wounds to make sure Abel died).

¹³⁰ EICHHORN, *supra* note 5, at 67.

¹³¹ *Genesis* 3:9–13.

¹³² 1 MIDRASH RABBAH, *supra* note 1, *Genesis* 22:9, at 188:

[Cain's question] may be compared to a prefect who was walking in the middle of the road, and found a man slain and another standing over him. 'Who killed him?' he demanded. 'I will ask you [that question] instead of your asking me,' rejoined the other. 'You have answered nothing,' he retorted (footnote omitted). Again, it is like the case of a man who entered a garden, and gathered mulberries and ate them. The owner of the garden pursued him, demanding, 'What are you holding?' 'Nothing,' was the reply. 'But surely your hands are stained [with the juice]!'

On the other hand, Professor Leibowitz views Cain's response as an "attempt to deaden the voice of his conscience [which] was in vain." LEIBOWITZ, *supra* note 85, at 48.

¹³³ PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 51, *Genesis* 4:9, at 39. *See also* PIRKEI D'RABBI ELIEZER, *supra* note 55, ch. 23, at 70 (noting Cain thought he could deceive God by burying his brother in the earth). There is another Midrash, however, stating that Adam and Eve did not know what to do with Abel's body until they saw a raven burying his mate. *See* THE BOOK OF LEGENDS 24 (Hayim N. Bialik & Yehoshua H. Ravnitzky eds., 1992).

¹³⁴ 1 MIDRASH RABBAH, *supra* note 1, *Genesis* 19:11, at 156. Even more graphically, see 6 MIDRASH RABBAH, *supra* note 1, *Numbers* 20:6, at 791, which refers to Cain as a "vessel full of urine," because he tried to deceive God rather than immediately confessing.

¹³⁵ *Genesis* 4:7.

¹³⁶ See 1 MIDRASH TANCHUMA, *supra* note 1, *Breishis* 9, at 18; *see also* 1 GINZBERG, *supra* note 53, at 110.

¹³⁷ See 1 GINZBERG, *supra* note 53, at 110.

¹³⁸ 1 MIDRASH TANCHUMA, *supra* note 1, *Breishis* 9, at 18; 1 GINZBERG, *supra* note 53, at 110. *See also* EICHHORN, *supra* note 5, at 74 ("For all You know, I never intended to kill him. I just meant to give him a sound thrashing.").

¹³⁹ See *Genesis* 4:12.

¹⁴⁰ In fact, if a person convicted of negligent homicide wanders outside the city of refuge, he is liable to death at the hand of the blood avenger. THE CODE OF MAIMONIDES–TORTS, *supra* note 38, *Murder and Preservation of Life* 5:9, at 211.

¹⁴¹ PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 51, *Genesis* 4:16, at 42. *See also* 1 MIDRASH RABBAH, *supra* note 1, *Genesis* 21:9, at 178 ("In every case the east affords an asylum.").

¹⁴² 1 MIDRASH RABBAH, *supra* note 1, *Genesis* 22:12, at 191.

¹⁴³ Under contemporary American law, there is a range of sanctions for murder. *See, e.g.*, CAL. PENAL CODE § 190(a), (b) (Deering 2000) (imposing sanctions of death, life imprisonment without possibility of parole, or 25 years to life imprisonment for murder in the first degree, and sanctions of fifteen years to life imprisonment for murder in the second degree); OHIO REV. CODE ANN. §§ 2903.01, 2903.02, 2929.02(a) (Anderson 2000) (providing sentence of death or life imprisonment and a fine of up to \$525,000 for aggravated murder, and imposing sentence of fifteen years to life imprisonment and a fine of up to \$525,000 for murder); TEX PENAL CODE ANN. §§ 12.31, 12.32, 19.03, 19.04 (West 2000) (making capital

murder punishable by death or life imprisonment, and murder punishable by life imprisonment or a term of 5-to-99 years and a fine of up to \$10,000).

¹⁴⁴ I MIDRASH RABBAH, *supra* note 1, *Genesis* 22:12, at 191 (footnote omitted). Professor Dershowitz takes issue with the Midrash's reasoning, based, *inter alia*, on (1) murder's status as a *malum in se* offense; (2) Cain's understanding of death through his experience with animals and his brother's sacrifices thereof; and (3) his cover-up denial to God. DERSHOWITZ, *supra* note 3, at 53–54. Professor Dershowitz concludes that "God was not doing a very good job deterring crime . . . He was allowing humans to get away with murder!" *Id.* at 58.

As noted earlier, however, at least under Jewish law, only deliberate, premeditated murder subjected the slayer to capital punishment. Moreover, numerous safeguards such as the two-eyewitness rule rendered conviction difficult. Consequently, under Jewish law, Cain could not have been convicted in a human court, but was of course subject to punishment at the hands of God. As we note hereafter, that Cain "got away with murder" is far from clear.

¹⁴⁵ *Genesis* 4:14. According to Rashi, Cain was concerned that animals would kill him, for the only other humans were his parents, of whom he was not afraid. PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 51, *Genesis* 4:14, at 42.

¹⁴⁶ See RAMBAN, *supra* note 1, *Genesis* 4:13, at 91. *But see* PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 51, *Genesis* 4:13, at 40 (relying on a Midrash in interpreting the verse, "My punishment is greater than I can bear," as a question rather than a confession). The question, according to Rashi, is, "You (God) bear the worlds above and below and my iniquity can you not bear?" Depending on Cain's intonation, the question can be viewed as arrogant or simply inquisitive. Rashi says it is asked in "wonderment."

¹⁴⁷ RAMBAN, *supra* note 1, *Genesis* 4:13, at 91 (footnote omitted).

¹⁴⁸ See, e.g., THE PENTATEUCH AND HAFTORAHS, *supra* note 47, *Genesis* 4:15, at 15 (using the translation quoted in the text).

¹⁴⁹ See RAMBAN, *supra* note 1, *Genesis* 4:23, at 95 (stating that the meaning of the passage is, according to its real sense, that God said: "Therefore, whosoever slayeth Cain will have vengeance taken on him sevenfold, for I will punish his slayer seven times for his sin, since I have promised Cain that he will not be slain in view of his fear of Me and his confession before Me.").

¹⁵⁰ This is essentially the position taken by Professor Dershowitz, who asserts "Yet another unjust threat of disproportionate punishment!" He concedes, however, that potential wrongdoers have been duly warned and that sevenfold may be difficult to calculate "in the context of killing another," DERSHOWITZ, *supra* note 3, at 51.

Cf. David Daube, *Judas*, 82 CAL. L. REV. 95, 102 (1994) (noting that "[t]o this day, an educated Western public just cannot brook Asian irrationalism"). See, for example, Cain utterly damned for a monstrous deed in *Genesis* 4:11–12 and fully re-elevated in *Genesis* 4:15–18.

¹⁵¹ See THE CHUMASH, *supra* note 4, *Commentary to Genesis* 4:15, at 21:

Our rendering follows *Rashi* who interprets this as 'an abbreviated verse with an implied clause: *Whoever slays Cain will be punished* (this phrase is unstated, but understood). As for Cain himself, only *after seven generations will I execute My vengeance upon him*, when Lamech, one of his descendants, will arise and slay him.'

¹⁵² PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 51, *Genesis* 4:15, at 41.

¹⁵³ *Id.*, *Genesis* 4:23, at 45. Rashi's account of this slaying is as follows:

[F]or Lamech was blind and Tubal-cain [Lamech's son] led him, and he [Tubal-cain] saw Cain who appeared to him like an animal. He [therefore] said to his father to draw the bow, and he killed him. As soon as he [Lamech] learned that it was Cain his grandfather, he struck one hand against the other (in remorse), and struck his son (accidentally) between them and killed him.

Lamech thereafter argued to his wives, who had, according to a Midrash, separated from him sexually, that since the punishment of Cain, who had "killed intentionally," was deferred for seven generations, he, who had killed inadvertently, should have his sanction deferred for many times seven generations. *Id.*, *Genesis* 4:24, at 46–47.

According to the Ramban, Lamech assured his wives that God would not punish him because he "did not slay a man by wounds, nor a child by bruises, as did Cain, . . ." RAMBAN, *supra* note 1, *Genesis* 4:23, at 96. In response to his wives' concerns that he would be punished for teaching his son Tubal-cain to make swords and other instruments of war, Lamech argued that "death caused by wounds and bruises [the

method used by Cain to kill Abel] is a worse death than by the sword."

¹⁵⁴ The concept known as "measure for measure," or, in Hebrew, *mida k'neged mida*, essentially provides that, as you have done, so will it then be done to you. According to the Midrash, Cain was killed by Lamech, his descendant, seven generations later, but the slaying was not intentional. Thus, arguably, although not perfectly congruent, just as Cain killed Abel intentionally, but perhaps without premeditation, and was not punishable in the human court he, too, was killed by a blood relative without premeditation, although concededly unintentionally. Since such killings cannot be punished by the court, God Himself imposes the appropriate sanction. For example, *Exodus 21:13* provides, "And if a man not lie in wait, but God cause it to come to hand; then I will appoint thee a place whither he may flee." The Gemara gives the following explanation of this verse:

For what is Scripture here speaking about? About two men, one of whom killed a person with premeditation and the other killed inadvertently, and in neither case were there witnesses to the deed who could testify about it. Consequently, the former was not put to death and the latter was not forced into banishment to a city of refuge. . . . Now God brings them together at the same inn. He who killed with premeditation happens to sit beneath a ladder, and the other who killed inadvertently ascends the ladder and falls when descending it, upon the man who killed with premeditation, and kills him. Witnesses now being present they testify against him, so compelling him to be banished to one of the cities of refuge. The result is that he who killed inadvertently is actually banished and he who killed with premeditation actually suffers death.

BABYLONIAN TALMUD, *supra* note 31, *Makkoth* 10b; PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 51, *Exodus 21:13*, at 235–36.

¹⁵⁵ See PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 51, *Genesis 4:15*, at 41; see also *id.*, *Genesis 4:19*, at 43 (interpreting the text about Lamech to establish that, by having offspring, Lamech had raised "a seventh generation" before he killed Cain).

¹⁵⁶ See 3 MIDRASH RABBAH, *supra* note 1, *Exodus 31:17*, at 400 (noting that Cain "begat a hundred children"); see also 8 MIDRASH RABBAH, *supra* note 1, *Ecclesiastes 6:3*, at 159.

¹⁵⁷ See RAMBAN, *supra* note 1, *Genesis 4:17*, at 93, saying of Cain that "his hoary head did not go down to the grave in peace, rather he saw his destruction and all his seed with him" (footnotes omitted). *But cf.* 3 MIDRASH RABBAH, *supra* note 1, *Exodus 31:17*, at 400 & n.4 (stating that "Cain lived as long as Adam—So that the days of his years are many—for he outlived his father by seven hundred and twenty-six years."). *But see* 1 MIDRASH RABBAH, *supra* note 1, *Genesis 23:4*, at 195, in which Lamech and his two wives go to Adam for advice on whether they should continue to procreate, which means that Adam was alive at the time Lamech killed Cain.

¹⁵⁸ 1 MIDRASH RABBAH, *supra* note 1, *Genesis 32:5*, at 252. See also RAMBAN, *supra* note 1, *Genesis 4:17*, at 93 (noting Cain's death in the flood after living "many years.").

¹⁵⁹ 2 MIDRASH RABBAH, *supra* note 1, *Genesis 97*, at 903.

¹⁶⁰ *Id.*

¹⁶¹ See *id.* (citing *Numbers 14:18–20*).

¹⁶² *Id.* at 903–04 (footnote omitted).

Another Midrash presents the conflicting views of two rabbis regarding atonement. One takes the position that repentance brings half atonement, and prayer, complete atonement, while the other takes the directly opposite position. Conjecturing on the source of the first rabbi's belief that repentance effects half atonement, the Midrash cites the case of Cain, concerning whom, "half of the decree was withheld" when he repented. Asking how it is known that Cain repented, the Midrash relies on Cain's poignant statement, "[m]ine iniquity is too great to be forgiven." 4 MIDRASH RABBAH, *supra* note 1, *Leviticus 10:5*, at 126. Further asking how it is known that "half the sentence was withheld," the Midrash interprets the Torah text as imposing a sanction of wandering, but not making Cain a fugitive. *Id.* See also 7 MIDRASH RABBAH, *supra* note 1, *Deuteronomy 8:1*, at 147–48.

¹⁶³ 2 MIDRASH RABBAH, *supra* note 1, *Genesis 97*, at 904 & n.1. The Midrash thereafter explains that God first cursed Cain, condemning him to be a fugitive and a wanderer, and then relented by allowing him to dwell in the land of Nod, which means wandering. Thus, he remained a wanderer but was not a fugitive. The Ramban says that the meaning of the biblical verse "is that Cain did not traverse the entire world, but he dwelt in that land, perpetually wandering therein and not resting at all in anyone place thereof, and so it was forever called 'the land of Nod (wandering)' after him." RAMBAN, *supra* note 1, *Genesis 4:16*, at 92; see

also IBN EZRA, COMMENTARY ON THE TORAH (Mehokkai Yehuda), *Genesis* 4:12, at 84–85 (n.d.) (noting that Cain was both in exile (in "Nod") and wandering therein); COMMENTARY OF RABBI KRINSKI ON IBN EZRA, *Genesis* 4:12, at 85 (pointing out that Cain's original punishment included exile (Hebrew, *Nod*) and wandering (Hebrew, *nah*), but he received only the penalty of exile, relying on *Genesis* 4:16, referring only to "Nod").

¹⁶⁴ 1 MIDRASH RABBAH, *supra* note 1, *Genesis* 22:12, at 191; *but see* 2 MIDRASH RABBAH, *supra* note 1, *Genesis* 75:9, at 695 (suggesting that Esau drew support for his evil plot to slay his brother Jacob from God's treatment of Cain, by reasoning that "Cain slew his brother, yet God did nothing to him"). Another Midrash has Esau drawing the lesson that "Cain was a fool, for he killed his brother during his father's lifetime, not knowing that his father would be fruitful and multiply. I will not do so, . . ." 4 MIDRASH RABBAH, *supra* note 1, *Leviticus* 27:11, at 356; *see also* 9 MIDRASH RABBAH, *supra* note 1, *Esther* 7:23, at 101.

¹⁶⁵ *Genesis* 4:13.

¹⁶⁶ *See id.* at 14–15.

¹⁶⁷ *See* 1 MIDRASH RABBAH, *supra* note 1, *Genesis* 22:12, at 191. Rashi asserts that the sign was a letter from God's Holy Name placed on Cain's forehead. PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 51, *Genesis* 4:15, at 41.

¹⁶⁸ *See* 1 MIDRASH RABBAH, *supra* note 1, *Genesis* 22:12, at 191.

¹⁶⁹ *See* RAMBAN *supra* note 1, *Genesis* 4:13, at 92.

¹⁷⁰ *See id.*

¹⁷¹ *Genesis* 4:16. The Ramban says this means that Cain would never again stand before God. RAMBAN *supra* note 1, *Genesis* 4:16, at 92.

¹⁷² 1 MIDRASH RABBAH, *supra* note 1, *Genesis* 22:13, at 191–92.

¹⁷³ 1 WEISSMAN, *supra* note 43, at ix.

¹⁷⁴ ROGER C. SCHANK, TELL ME A STORY: A NEW LOOK AT REAL AND ARTIFICIAL MEMORY 10 (1990).

¹⁷⁵ *E.g., compare* ROBIN WEST, NARRATIVE, AUTHORITY AND LAW (1993) (endorsing narratives as a means of understanding the experiences of traditionally excluded classes), with Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 280–85 (1994) (advising caution in the use of stories for purposes of legal analysis). *Cf.* Cover, *supra* note 99, at 4: "No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture." (footnotes omitted). *See also* Sally Frank, *Eve Was Right To Eat the "Apple": The Importance of Narrative in the Art of Lawyering*, 8 YALE J.L. & FEMINISM 79, 118 (1996) (arguing that "[w]ithout an examination of how people tell and understand stories, lawyers may be missing opportunities to convince others of their clients' positions," and that, "[b]y showing that Eve can be defended plausibly by a creative lawyer, I have shown that lawyers can develop defenses for even their most vilified clients").

¹⁷⁶ *See* SCHANK, *supra* note 174, at 58.

¹⁷⁷ LOUIS JACOBS, THE TALMUDIC ARGUMENT 1 (1984) ("The Babylonian Talmud consists almost entirely of arguments having as their aim the elucidation of the law, ruling, religious teaching or ethical idea The whole constitutes reasoning processes which . . . have contributed more to the shaping of the Jewish mind than any other factor.").

CHAPTER EIGHT

Murder by *Gruma*: Causation in Homicide Cases Under Jewish Law*

When a crime is defined without reference to a result, such as attempt, perjury, or burglary, causation is irrelevant.¹ However, if the law requires that the defendant intentionally, recklessly or negligently bring about a particular harm, as in homicide cases, sticky causation problems often surface.² American criminal law demands not only an antecedent "but-for" relationship, causation in fact,³ but also legal or proximate cause, that is, a connection between conduct and result that is not excessively attenuated or grossly at variance from the actor's actual intent or risk creation.⁴ As this definition suggests, the relationship between act and result can sometimes be fairly tenuous or indirect.⁵ Illustrating this nexus, the Model Penal Code provides that an actor may be liable for injuring an unintended victim, provided that the harm is "not too remote or accidental . . . to have a [just] bearing on the actor's liability or on the gravity of his offense."⁶

Although the foreseeability of the harm generally satisfies the proximate cause requirement, it is not necessary that the harm occur in the precise form the defendant contemplated.⁷ For example, where a defendant committed arson and the victim perished while reentering the building to save his dog, the court upheld the arsonist's felony murder conviction.⁸ The court reasoned that the victim's return to the burning premises was not unforeseeable and thus did not constitute an intervening cause.

In the ordinary homicide case where the perpetrator shoots the victim in the head and the victim dies of the gunshot wound, establishing causation does not present difficulties. Problems may arise, however, as the plot thickens. What happens if the wound itself is not mortal, but its negligent treatment by a doctor makes it so,⁹ or the wound becomes mortal because of the victim's pre-existing physical weakness,¹⁰ or if the victim, distracted by pain, throws himself into the path of an oncoming automobile?¹¹ Or, as in a leading Supreme Court case on this issue, what happens if a negligent truck driver hits a highly intoxicated robbery victim who was wandering on the shoulder of a rural road without his eyeglasses or his outer clothing in freezing weather?¹² Or, as in the Ronald Opus urban legend posted at several joke sites on the Internet, what result if the deceased, intending to commit suicide, plunges from the top of a ten-story building, and, as he falls past the ninth floor, a shotgun blast through a window kills him instantly, but the owner of the weapon is unaware that it is loaded and so forth?¹³

Another variant of classical homicide-causation cases involves two or more wrongdoers, who, acting independently, bring about the victim's death. For example, one actor stabs a person mortally and then another shoots the languishing victim, again

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mortally, and the victim subsequently dies from both wounds.¹⁴ Causation questions do not arise when the two perpetrators act in concert. Under accomplice liability doctrine, a person who does not carry out the actual killing nonetheless may be convicted of murder and even sentenced to death.¹⁵ If a robber murders in the course of his robbery, the driver of the getaway car may incur the same liability as the principal.¹⁶

The felony murder doctrine, which permits conviction without proof of intent to kill, appears to dispense with the causation requirement. Felony murder, however, does require some causal relationship between the felony and the ensuing death.¹⁷ Thus, if during the course of a robbery, there is an earthquake or a third party terrorist attack that kills the robbery victim, the robbers would not be liable.¹⁸ Here, the robbery victim's death is coincidental to the occurrence of the robbery and, by definition, the causation requirement cannot be met. In less clear-cut cases, however, American law permits a homicide conviction in a variety of contexts in which the causation is diluted, attenuated, or even indirect. Moreover, in some instances, even though causation is lacking, the defendant nonetheless may be found guilty of an attempt or some other lesser offense.¹⁹

Jewish law, on the other hand, presents a stark contrast. A rabbinic court cannot convict a person of murder unless that person caused the victim's death directly and not by a *gruma*²⁰ or indirect cause.²¹ One consequence then of Jewish law's focus on direct causation is that solicitation of an offense cannot be criminally punished.²² Moreover, no matter how much assistance a co-conspirator gives to a principal, accomplice liability is virtually nonexistent in Jewish law.²³ This principle of immunity from criminal liability for an agent's action is expressed in the Talmud in the form of a rhetorical question, "[When] the words of the master [of the universe] and the words of the pupil [are in conflict], whose are obeyed?"²⁴

Indeed, as will be discussed later, even when a single wrongdoer intentionally carries out an apparently homicidal act from start to finish, the rabbinic court must exempt the wrongdoer from criminal liability if the cause of death is "indirect." In drawing the line between direct and indirect, Jewish law makes distinctions that are at once complex and subtle, and at other times seemingly incomprehensible. This chapter will explore these distinctions and analyze the overall framework of the Jewish law of causation in homicide cases.

A. Homicide and Causation in the Torah

"In the Torah, the cryptic and the elliptic are more prevalent than the explicit,"²⁵ and the law of causation in homicide cases is no exception. The Torah says much about homicide but very little on the subject of causation. Rather, the requirements of causation are developed in the Oral Law. Yet, as we will see, the detailed biblical and talmudic delineations of the laws of slaying may bear intimately on the extreme causation requirements in homicide cases.

The prohibition against murder first appears as one of the seven Noahide laws, which are the basic commandments applicable to all people:²⁶ "Whoso sheddeth man's blood, by man shall his blood be shed; for in the image of God made He man."²⁷ The most widely known source of the biblical injunction against the unlawful taking of life, however, is found in *Exodus* 20:13 as one of the Ten Commandments. Although sixth, it

is the first of the commandments to treat the relationship between "man and man."²⁸ It proclaims in simple grandeur: "Thou shalt not murder."²⁹

The remaining Torah verses relating to homicide define the crime of murder and distinguish it from other forms of killings. The Torah differentiates intentional premeditated murder, punishable by death, from unintentional killing, which is subject to exile to a city of refuge.³⁰ After the general directive against intentional murder in *Exodus* 21:12,³¹ the next verse, 21:13, treats unintentional killing: "[a]nd if a man *lie not in wait*, but God cause it to come to hand; then I will appoint thee a place whither he may flee."³² The following verse, 21:14, together with the "lie not in wait" language of the preceding one, makes it clear that murder requires intent and premeditation. Capital punishment is only prescribed for one who comes "presumptuously upon his neighbour, to slay him with guile."³³

The crime of murder next appears in *Leviticus* 24:17, which provides that if a person strikes another mortally, he is to be put to death.³⁴ Another verse in *Leviticus*, 19:16, implicitly discusses the category of justifiable homicides. Through exegesis, scholars have interpreted this verse, which states, "neither shalt thou stand idly by the blood of thy neighbour,"³⁵ to require a person to intervene and, if necessary, kill an attempted murderer even if the pursuer has not yet taken life.³⁶

The Torah further discusses murder and unintentional killing in *Numbers* 35,³⁷ beginning with a commandment to Moses to set up cities of refuge for "every one that killeth any person through error."³⁸ The Torah then fleshes out *Exodus's* distinction between unintentional killers and murderers, describing each of the categories in considerable detail.³⁹

Deuteronomy, the final book of the Torah, is known as *Mishnah Torah*, meaning repetition of Torah, because it is primarily comprised of the summary of the law that Moses taught the Jewish people in the days prior to his death. *Deuteronomy* repeats the Ten Commandments,⁴⁰ including the prohibition against murder,⁴¹ and it again clarifies that cities of refuge are only available to those who commit negligent homicide and not for those who kill intentionally.⁴²

Considering the homicide verses together, it appears that the biblical text explicitly addresses only two of the seven normative categories of killings: intentional, premeditated homicide, on the one hand, and negligent homicide, on the other. It is the Oral Law that treats the other five such classifications, namely, intentional but unpremeditated homicides, reckless, grossly negligent, and completely accidental homicides, as well as those that are justifiable.

At the outset, the Torah specifies that a perpetrator who lies in wait *and* kills with guile, thus committing an intentional premeditated murder, is subject to capital punishment. This case is analogous to common law first degree murder.⁴³

Next, in decreasing severity, is intentional but non-premeditated murder, comparable to murder in the second degree in common law jurisdictions.⁴⁴ Presumably, Scripture did not need to discuss this category, since capital punishment is not permitted in this context because it would be impossible to give the prescribed warnings to the wrongdoer in such cases. Thus, in the Jewish legal system it appears that jurisdiction over such non-premeditated but intentional murders is not within the authority of the earthly court.⁴⁵

The other case of killing the Torah addresses is that of negligent homicide, for

which the consequence is exile. Although the Torah directly refers to this category as "unpremeditated" killing, "unpremeditated" is a broad term, at least *theoretically* encompassing not only intentional unpremeditated killings, but also reckless, grossly negligent, negligent, accidental and justifiable killings. A close reading of the relevant texts reveals, however, that the sanction of exile applies only in a limited subset of cases. The text refers specifically to the case in which the killer did "lie not in wait, but [rather] God cause it to come to [his] hand."⁴⁶ Use of the phrase "God cause it to come to hand," alerts the reader that the Torah limits the cases in which exile is the appropriate sanction to unintentional killings in which the actor bears some level of lesser responsibility.⁴⁷ On the other hand, intentional, unpremeditated killings and those that fall into the category referred to in Jewish law as "close to intentional,"⁴⁸ that is, acts of gross negligence or recklessness, are not subject to exile, although the perpetrator must still face the blood avenger.

The Sages of the Talmud explain that exile is available only for one who kills negligently.⁴⁹ Although not sanctioned by the earthly court, the grossly negligent, reckless, or intentional but unpremeditated killer is subject to divine retribution or death by the blood avenger.⁵⁰ This seemingly cryptic compartmentalization of divine and human justice, as well as the extremely pro-defendant causation requirements of Jewish law, may be explained, in part, by several underlying tenets of Judaism.⁵¹

Thus, the Torah sets forth various categories of slayings and develops the distinction between intentional murder and unintentional killings. These provisions, however, do not address the issue of causation in homicide cases. That question is dealt with, albeit subtly, in a somewhat surprising framework.

In one of its most famous narratives, the Torah discusses murder⁵² and gives the earliest source for the concept of *gruma*, indirect causation. Joseph's brothers hated him, in part because of his dreams of grandeur and in part because of his status as the favorite son of their father, Jacob.⁵³ Joseph's brothers conceived a plan to kill Joseph, throw him into a pit, and tell their father that he was devoured by a wild animal.⁵⁴ Reuven, the eldest, interjected, "Let us not take his life . . . [s]hed no blood; cast him into this pit that is in the wilderness, but lay no hand upon him."⁵⁵ Thus, originally the brothers wanted to kill Joseph and then throw him into the pit. Reuven, however, suggested that they throw him in, leaving him to languish and die, for "the pit was empty, there was no water in it,"⁵⁶ and, according to rabbinic interpretation, there were snakes and scorpions there.⁵⁷ Although the text testifies that Reuven's intention was ultimately to save Joseph,⁵⁸ the brothers, who had a moment earlier intended to kill him, acquiesced to Reuven's suggestion only because they were sure he would die in the pit in any event. If so, that is, if the brothers agreed to throw Joseph into the pit because of the certainty of death therein, what is the meaning of Reuven's statement to his brothers, "Let us not take his life?"⁵⁹

Some of the commentators interpret the brothers' dialogue to mean that they grasped the law of causation and thus were seeking a way to kill without legal responsibility.⁶⁰ They reasoned that if they merely threw Joseph into the pit and left him there to be poisoned by the snakes and scorpions, they would not be murderers because the death was caused indirectly, by other forces.

Another possible interpretation of the dialogue between Reuven and his brothers is that Reuven was saying that if they killed Joseph directly they would never know if

Joseph really deserved to die, whereas if they threw him into the pit alive he would die only if it was God's will.⁶¹ This explanation reflects a divide in Jewish philosophy between those who believe that nothing happens without God's direction, including the growth of a blade of grass,⁶² and those who believe, as the brothers did according to the above interpretation, that human actors can sometimes determine events.⁶³

Why would Joseph's brothers believe that God would save Joseph from death by scorpions or thirst, but would not prevent them from murdering Joseph? The answer may lie in the fact that in Judaism free will is the foundational element of the world scheme, and as such God will contract even His own omnipotence to facilitate its exercise.⁶⁴ Thus, the decision by the brothers to throw Joseph into a pit rather than killing him outright may constitute the Torah's implied legal basis for distinguishing direct and indirect causation in Jewish law or may serve as an illustration of the paramount importance of free will.

Consequently, with the exception of a possible reference in the story of Joseph, the Torah does not address the issue of indirect causation. That key aspect of Jewish law is left to the Talmud.

B. Causation in the Mishnah

The Mishnah's discussion of causation in murder cases appears in the tractate entitled *Sanhedrin*. *Sanhedrin* treats, *inter alia*, the judicial system, court procedure, rules of evidence, and substantive crimes. To appreciate the Rabbis' resolution of the causation requirement, it is important to consider two preliminary matters, one contextual and one jurisprudential.

First, although the Bible unequivocally prohibits murder and mandates the death penalty for its commission,⁶⁵ numerous procedural, evidentiary and substantive barriers render conviction highly unlikely. For example, Jewish law requires that there be two competent eyewitnesses to the crime.⁶⁶ They must warn the perpetrator that his contemplated action is prohibited and punishable.⁶⁷ The wrongdoer must acknowledge the warning⁶⁸ and nonetheless proceed apace in the view of the witnesses. Circumstantial evidence is absolutely prohibited, no matter how compelling.⁶⁹ Confessions, the darling of modern police investigation, are also of no evidentiary value. Even guilty pleas are prohibited.⁷⁰ Substantively, Jewish law does not provide for accomplice liability.⁷¹ In addition, intentional but unpremeditated murders, as well as reckless and grossly negligent homicides, are not punishable by human courts. Rather, Jewish law leaves punishment for these acts to the blood avenger and to divine intervention. Jewish law imposes a stringent intent requirement for capital murder, mandating that the defendant must have intended to kill the particular person he killed. There is no concept of transferred intent, so that if the perpetrator intends to kill A but kills B instead, he cannot be punished by the human court.⁷² Similarly, hurling a deadly stone into a crowd and killing one of its members, a possible reckless homicide, is likewise not a basis for conviction.⁷³ Thus, the extreme requirements of direct causation elaborated in the Mishnah and the Gemara fit comfortably alongside these equally extreme procedural, evidentiary and substantive prerequisites to conviction.

Second, a word of caution against viewing the hypotheticals in the Mishnah and the Gemara as absurdly unrealistic and perhaps even silly. These extreme cases are the

means by which the Sages test the limits of the causation requirement. In spinning out such seemingly outlandish hypotheticals here and, indeed, throughout the Talmud,⁷⁴ the goal of the Rabbis is nothing less than to determine the will of God, that is to say, absolute truth. As a result, policy and pragmatic considerations, which often drive or at least inform American jurisprudence, are noticeably absent from Jewish homicide law.

In our view, a key to understanding the Mishnah's (as well as the Gemara's) intricate hypotheticals distinguishing direct and indirect causation of murder is the notion that, to establish the offense, the wheels of death must have started to turn at the time of the murderous act. Without this element, mere foreseeability that death may occur, no matter how strong, is insufficient. Under Jewish law, the *actus reus* of the crime requires that every element of the particular mode of death chosen by the defendant be present and operative. It must be absolutely clear that the victim will die as a result of the defendant's actions, with no inferences, no matter how small, necessary to reach that conclusion. In effect, the rule requiring direct causation is the substantive criminal law analogue to the Jewish law evidentiary rule prohibiting conviction based on circumstantial evidence, regardless of how convincing it may be.

The Mishnah describes a continuum of cases ranging from murder that is clearly directly caused by the perpetrator to killings that, while plainly foreseeable, are of a more indirect nature. The Mishnah lists five scenarios, the first four of which produce unanimous opinions by the Sages. The fifth is the subject of some controversy.

In the first case, the perpetrator hits and kills the victim with a stone or iron implement, and he is consequently held liable for murder.⁷⁵ In this case, the wrongdoer created a contextual framework in which all the elements of the crime are present. He placed the victim in a life-threatening situation, performed the murderous act with the appropriate intent, and clearly and directly caused the requisite result—death. This is the easiest case because intent, act and result occur almost simultaneously. Extrapolating from this principle of direct causation, if the actor were to push the victim into water or fire and restrain him there, he too would be liable for the resulting death. With intent to cause death, the actor has intentionally placed the victim in a life-threatening situation and prevented his escape, thereby directly bringing about his demise.⁷⁶

The second case goes a step further, finding liability where the perpetrator chances upon a victim under water or in a fire, a life-threatening situation that the perpetrator did not create. The perpetrator thereafter prevents the victim from saving himself, causing his death.⁷⁷ Consequently, the second case features an actor who comes upon a contextual situation, i.e., the potential victim who is in danger, namely, someone who is under water or in a fire. The perpetrator then restrains the victim in his life-threatening situation, preventing escape and thus causing his death. Although the perpetrator did not create the initial scenario the victim in the water or fire, his actions took advantage of and used the existing circumstances, which resulted in death. Thus, the second example tells us that one need not put all the pieces in place to create liability. Instead, merely capitalizing on an existing dangerous situation—that is, an opportunistic homicide—will suffice.⁷⁸ The Gemara comments on this case, asserting that it "teaches us the novel point that even though [the perpetrator] did not push [the victim] into the water or fire, since [the victim] was not able to escape, and he died, [the perpetrator] is liable to execution."⁷⁹ The Gemara, however, seeks a scriptural source for the ruling, intimating that, absent such a source, the defendant would not be held liable by virtue of

the *gruma* doctrine, because he himself had not pushed the victim into water or fire.⁸⁰

The third scenario in the Mishnah discusses a situation in which the perpetrator appears to have created a contextual requisite for murder by pushing his victim into fire or water. Here, however, the perpetrator is not considered to have caused the ensuing death because the victim could have escaped but did not do so.⁸¹ This third case is in a sense the converse of the preceding hypothetical and is also viewed by the Gemara as a novel insight.⁸² In case two, the defendant is liable for restraining the victim, even though he did not push the victim into the fire. On the other hand, in case three the defendant is not guilty of homicide because of the possibility of escape, even though the defendant administered the fatal shove.

Thus, in the third hypothetical, the contextual framework is defective or incomplete by virtue of the avenue of escape. Harm ensues, but the defendant's actions are not sufficiently linked to the resulting death. There is but-for causation, because had the actor not pushed the victim into the fire or water, he presumably would not have died. The wrongdoer's act was at least a substantial factor bringing about the death. Since the victim could have escaped, however, the act of placing him in mortal danger by itself does not meet the causation requirement of Jewish law.⁸³ Rather, Jewish law requires strict fulfillment of every element of a crime. It is essential that the perpetrator's act unquestionably produced death and that, at the time of the act, all the factors inexorably leading to death were already operative without making any inferences.⁸⁴

American law, on the other hand, would hold the defendant liable in this scenario, because his initial act arguably rendered the victim irresponsible, thus "causing" the latter to forego escape. Consequently, American law does not view the victim's act or failure to act in these circumstances as an independent, superceding cause. The outcome effectively permits the jury to find the defendant guilty of murder even though that may not have been his intention or within his risk creation. It further permits the jury to read the mind of the victim as a basis for establishing the causal link.

In the Mishnah's fourth case, a defendant is not liable for inciting a dog or a snake to attack the victim.⁸⁵ This hypothetical initially bears a strong resemblance to the first one, hitting with a stone or iron implement, insofar as the perpetrator apparently creates the death producing context. Unlike the first case, however, the fourth case requires the intervention of a third "party." The dog and snake are alive, and each is deemed to have its own sentient "will."⁸⁶ Although the actor created the context, the independent wills of the animals—who, after all, may "decide" to decline the defendant's invitation—are viewed as superceding causes.⁸⁷

Even though the actor sends the animal to attack the victim, the Mishnah considers the animal to be an intervening third party, analogous to the victim who did not escape in the preceding example. Consequently, the perpetrator either did not commit the entire crime or committed the crime indirectly. Indeed, one can view the wrongdoer as soliciting rather than committing the homicide, and just as solicitation is not punishable under Jewish law, this defendant has also not caused the victim's demise.

The facts of the fifth and final case in the Mishnah are unclear. Either the perpetrator places a snake *on* the victim's body, holding it so that its fangs are on his flesh,⁸⁸ or the wrongdoer presses the fangs *into* the victim's flesh, piercing it. This scenario tests the scope of the rule set forth in the previous case where the perpetrator sent an animal to attack the victim.

The Sages do not find liability in the fifth case, whereas Rabbi Judah would hold the wrongdoer responsible.⁸⁹ Presumably the Sages are of the view that neither putting a snake on the victim's flesh nor pressing its fangs into the victim's flesh changes the fact that the reptile has its own will. Rabbi Judah, on the other hand, would impose liability, because he sees the perpetrator as causing the murderous act with no exercise of free will on the animal's part.

What the Mishnah may be saying here is no matter how close the perpetrator comes to achieving his objective, if an iota of inference remains necessary—i.e., the inference that the snake will instinctively inject the venom—the defendant remains immune from liability for murder. In other words, in the perennial debate over rules versus standards, Jewish law opts for rules, as opposed to the Model Penal Code standard of excessive attenuation.⁹⁰

Skipping ahead a bit, the final Gemara discussion of these Mishnah laws concerns the above debate. The Gemara seems to understand the Mishnah as involving a perpetrator who causes the snake's fangs to pierce the victim's flesh. It explains, according to Rabbi Judah, that "the poison of a snake is between its fangs,"⁹¹ and therefore one who inserts the snake's fangs into a victim is in effect injecting him with poison and directly causing death. The perpetrator is therefore liable, and the snake is not.⁹²

The Rabbis, on the other hand, are of the opinion that even after piercing the victim's flesh, the snake brings up its venom by itself when biting. Although the defendant knew that the snake would almost certainly expel its venom into the victim, the actor's own force did not accomplish this result. Therefore, the actor is not culpable⁹³ and the snake is condemned to death by stoning.⁹⁴

In each of the Mishnah's five cases, there is a dead victim whose foreseeable demise would not have occurred but for the act of the perpetrator. Judged by American standards, all five cases satisfy factual and legal causation requirements and would result in conviction or at least be sufficient to get to the jury. Jewish law, however, finds the defendant guilty only in the first two hypotheticals.

The outcome under Jewish law reflects the almost mathematical structure of Mishnaic law. One practical consequence of the Mishnah's not-guilty-on-the-basis-of-*gruma* rulings in the last three cases is that they assure that only clearly intentional killings are subject to capital punishment. These final three cases, to some degree, can be viewed as reckless homicides, because the defendant is never absolutely certain that the victim will die. In case three, the victim may escape, and in cases four and five, the animals may not kill.

The human court cannot know with absolute certainty that the defendant intentionally brought about the death of another. The defendant arguably engaged in risk creation, though admittedly of a very high order and offensive to God's justice even though unintentional. Where the human court is not absolutely certain that the accused intentionally sought to bring about the victim's death, it must acquit the defendant and leave justice to the blood avenger and divine judgment. Such is generally the case with reckless homicides.⁹⁵

The next section examines the numerous and even more intricate hypotheticals in the Gemara, further refining the distinction between direct and indirect causation. The Gemara pushes the rule of *gruma* to its logical and arguably illogical extremes, extremes

which, as we shall see, accord well with what we believe to be the philosophy underlying the Jewish law of crime and punishment.

C. Causation in the Gemara

In an attempt to elucidate the distinction between direct and indirect cause in homicide cases, the Gemara analyzes each of the examples in the Mishnah and refines the Mishnaic causation rules, primarily through a long series of additional hypotheticals.⁹⁶ In the first case ("Case A"), the Gemara acquits the perpetrator even though he tied up the victim who subsequently died from starvation.⁹⁷

Case A effectively tests the limits of case two in the Mishnah. Case two in the Mishnah involved the liable wrongdoer who comes upon a victim already under water or in a fire and then confines him so that he cannot escape. The Gemara's case appears similar, in that both hypotheticals involve confined victims whose death results after a period of time. The difference, however, is that, in the Gemara, the hunger that causes death was not present when the victim was bound.⁹⁸ Thus, even though the hunger emanates from the victim's own body, which is obviously present at the time of binding, the hunger itself was absent at that time. In contrast, in the Mishnah, the death-producing condition—fire or water—is present at the time of confinement and, at that time, is strong enough to cause death.

To comprehend fully the distinction between the Mishnah's and Gemara's cases, one must photographically capture the *actus reus* and attendant circumstances when the wrongdoer commits the act. When the wrongdoer in the Mishnah begins to hold the victim down under water or in fire, death is present in the picture. When the wrongdoer in the Gemara restrains the victim, death is missing from the snapshot. The snapshot is both spatial *and* temporal, because "it is only after some time elapse[s] that the hunger escalate[s] to a fatal degree."⁹⁹

The second case in the Gemara ("Case B") also involves an actor who ties up his victim and places him in peril of death. This time, however, the actor knows that the sun or cold *will* soon bring about the victim's demise.¹⁰⁰ As in the Gemara's Case A, where the perpetrator is not guilty because the victim's hunger was not yet present, in Case B the perpetrator is not liable because the death-producing heat or cold is absent at the time of the wrongful act of confinement.¹⁰¹

The third case in the Gemara ("Case C") describes a victim tied up and left to perish in the elements. In this case, however, the perpetrator is guilty because, at the time of the binding, the sun or the cold was already present.¹⁰² This time the snapshot does include death at the outset.¹⁰³

Through Cases A, B, and C, the Gemara develops two legal categories of causation. In the first, the death-producing factor is present in full force at the moment the perpetrator confines the victim. This category includes the cases of restraining a person under water or in a fire, or tying up a victim in the blazing sun. In these instances, the defendant is guilty of murder. In the second category, the death-producing element is completely missing at the time of confinement, such as where the victim is bound before sunrise. In cases of this category, the defendant is not liable, because there is a required inference that the sun will in fact rise and be of sufficient strength to kill.

The Gemara continues its discussion with hypotheticals that question whether the

defendant is guilty if the fatal force is partially present at the outset. For example, what result if the wrongdoer ties up a person who is already hungry, although not starving?¹⁰⁴ The Talmud studies this intermediate category through a series of cases in which two Sages disagree on culpability. The controversies include overturning a barrel on an individual, thereby suffocating him; putting a hole in a roof over a sleeping person, who dies from exposure to the cold; and confining a victim in an airtight marble chamber and the lighting of a lamp, again producing a corpse.¹⁰⁵

The Gemara is primarily concerned with factual questions such as whether the air inside the barrel is sufficiently foul at the outset to cause suffocation, or whether the victim's own breathing pollutes the air and causes death, or whether lighting the lamp itself creates polluted air, which in turn depends on how large the marble chamber or barrel is.¹⁰⁶ One Sage argues that liability ensues only if the death-producing agent is present at the outset to an extent sufficient to cause the fatality, whereas his opponent argues that liability will ensue if the fatal force is present to some degree at the time of the act.¹⁰⁷

The Gemara's fourth and fifth hypotheticals ("Case D" and "Case E") revisit the scenario raised in cases four and five of the Mishnah, dealing with animals as a superceding cause. These hypotheticals also have a conceptual relationship to case two in the Mishnah, in which the wrongdoer confines a person whom he finds under water or in a fire. Recall that where the actor uses an animal to inflict harm, the *gruma* doctrine bars conviction, whereas the opportunistic criminal who prevents escape in case two of the Mishnah is guilty.

In the Gemara's Case D, the perpetrator ties the victim in front of a lion,¹⁰⁸ and, as in case four in the Mishnah, where the owner incites a dog or snake to attack the victim, the wrongdoer is not liable for the ensuing death. One must still reconcile this result with the second case in the Mishnah, which finds liability in a seemingly similar confinement context. One can explain Case D not only as a case of superceding cause, but also on the theory that, tied or untied, the victim could not escape the lion and death was therefore inevitable.¹⁰⁹ That is, the lion was already in the picture, and the snapshot was complete prior to the wrongful act of the defendant, thereby effectively rendering his misconduct irrelevant. As an aside, presumably because they are focused on testing the limits of the law of indirect causation, the Sages do not explore such mundane questions as why the perpetrator himself was not killed by the lion in the process. One might hypothesize, however, that he was a lion tamer.¹¹⁰

Case E is similar to Case D except that a swarm of mosquitoes, rather than a lion, kills the bound victim.¹¹¹ In this instance there is a disagreement between two Sages concerning culpability. One finds the wrongdoer liable, apparently on the theory that, unlike the lion case, had the victim not been tied up, he could have escaped death by fending off the mosquitoes.¹¹²

The other Sage reasons that the particular mosquitoes bringing about the victim's demise were probably not present at the time of the binding. According to the latter's reasoning, the case is analogous to the after-appearing sun or cold in Case B and thereby precludes liability.¹¹³ This view significantly stretches the concept of *gruma* because, in terms of causing death, mosquitoes would appear to be fungible. Nonetheless, expounding on the second Sage's view, the snapshot is incomplete because at the fateful moment we do not know which mosquitoes did the deed.¹¹⁴

The first Sage counters that the insects should be considered a single unit, making this case analogous to that of holding a person under flowing water until he drowns.¹¹⁵ According to this reasoning, the water ultimately causing the victim's death, like the final mosquito, is not the same water as that in which the killer began holding him down. Since, however, the water is viewed as a single unit, the defendant is liable.¹¹⁶

The next set of cases discussed in the Gemara ("Case F" and "Case G") consists of variations on the third case in the Mishnah. Recall that in the Mishnah there is no liability for the protagonist because the victim could have escaped at the time of the act. Cases F and G expand the Mishnah's release from liability, essentially holding that even if the perpetrator himself closes the escape route subsequent to his wrongful act, he remains not guilty.

Case F involves a wrongdoer who pushes someone into a pit that contains a ladder, which he or a third party then removes. In this scenario, the defendant or third party withdraws the ladder after the defendant has pushed the victim but before the victim begins to fall, that is, when he is tottering on the brink.¹¹⁷ The result is that even if the perpetrator himself removes the ladder, thereby making his initial act death producing, he is nonetheless not liable. At the moment of the original wrongdoing, the ladder was in the pit, permitting escape, as in case three of the Mishnah.¹¹⁸ If, however, the perpetrator retrieved the ladder after the victim was already in the pit, the perpetrator is presumably guilty. Such a result is in accordance with the second case in the Mishnah, in which the defendant finds a person in a life-threatening situation (e.g., under water) and then prevents the victim from saving himself.

One might legitimately ask the following question: Why should the defendant or a third party who removes the ladder while the victim is falling not be found liable on the basis of that act rather than the initial push into the pit, i.e., on the basis of the "snapshot" taken at the later moment in time? Surely the wheels of death are then in motion. Why is removal of the ladder while the victim is in free fall not the same as holding him under water so that he cannot escape, as in case two of the Mishnah? Viewed from another perspective, why is this sequence of events not considered to be a single continuing transaction? The next two Gemara hypotheticals ("Case G" and "Case H") raise these issues even more sharply.

In Case G the perpetrator shoots an arrow at a victim holding a shield and then, faster than a speeding arrow, runs and pulls away the shield before the arrow strikes the victim dead.¹¹⁹ Here the perpetrator is not liable even though he happens to be successfully capitalizing on existing circumstances as in the Mishnah's second case—indeed, circumstances that the wrongdoer himself has created.¹²⁰

In Case H, the perpetrator has once again shot an arrow. This time, however, the victim has no shield but does have a miraculous drug that will cure the wound that is about to be inflicted.¹²¹ The defendant, again obviously a paradigm of evil, quickly runs over and scatters the medicine so that it cannot be used in time. Here, too, the defendant is not liable.¹²²

Cases F, G, and H introduce situations in which the perpetrator has committed the whole crime, but his conduct takes the form of two distinct acts that, under Jewish law, apparently cannot be combined.¹²³ The first act by itself, pushing into the pit or shooting the arrow, is legally insufficient because of the escape route rule set forth in the third case in the Mishnah. The second act, removing the ladder, shield or medicine, is

complementary to Gemara Cases A and B. In A and B, one could not combine the hunger or elements that were not yet present in the picture frame with the existing act of tying up the victim. Similarly, in Cases F, G, and H, one cannot combine the withdrawal of the escape route with the defendant's actions that *preceded* such action, e.g., pushing into a pit or shooting an arrow.

At the same time, the defendant's withdrawal of the ladder, shield, or medicine is unlike the wrongful act in the Mishnah's second case, where the perpetrator found the victim in water or fire and held him there. The difference is that the defendant's actions in the Mishnah affirmatively caused death, whereas in Cases F, G and H, the wrongdoer is eliminating an escape route, thus only *indirectly* bringing about death.¹²⁴

In the following case ("Case I"), the Gemara expands the scope of Case H. Case I states that the release from liability which is created when the victim has medicine on his person also extends to medicines that are available in the marketplace.¹²⁵ In other words, the mere availability of medicine disqualifies the shooting as an *actus reus*. Therefore, no matter how remote the possibility of escape is at the time of the wrongful act, its existence suffices to preclude liability.¹²⁶ Alternatively, one can view this as a case of intervening cause on the ground that the victim is responsible for his own death because he failed to obtain the medicine.¹²⁷

From a Western perspective, this rule immunizing a wrongdoer even though the possibility of escape is remote seems counterintuitive, but it accords well with the rules-based focus of Jewish law. The rule in question, i.e., the existence of an escape route precluding liability, works well in the generality of cases, but, as seen, it produces bizarre results at the margins. But like *Miranda*,¹²⁸ an overinclusive rule under the Fifth Amendment that keeps out confessions that would be deemed voluntary under the standards-based totality-of-the-circumstances test under Due Process,¹²⁹ the Talmudic law of *gruma* assures that only the person whose acts will inevitably cause death is convicted. Furthermore, the hypotheticals above are unlikely to occur, making it clear that their only purpose is to test the limits of the rule.

In Cases F, G, H and I, the Gemara found the perpetrator's action insufficient to trigger liability because there was an escape route at the time of the initial wrongful action. In the next scenario ("Case J"), the defendant shoots an arrow wounding the victim at a time when no medicine is available to cure his wound, but the medicine thereafter becomes available.¹³⁰ The Gemara decides that even if at the time of the wrongful action there was no escape route, but one materialized after the evil deed, the perpetrator is likewise not liable.¹³¹ This result is explainable on the theory that the victim's act of omission constitutes a superseding cause.

Note that in Case J, the defendant is immune notwithstanding the general rule that if all the elements of the crime coalesce at the same time there is liability. In Case J, the elements of the crime did coalesce at the time of the act; the perpetrator shot an arrow at a victim who at that moment had no escape route. Only *after* the act did the curative medicine become available for the languishing victim to prevent his death. Strict adherence to the time-of-action rule would require a finding of liability regardless of subsequent events.

Jewish law prevents liability in Case J by erecting a superseding causation limit on liability. This bar is also present in Case I, where the medicine is in the marketplace at the time of wounding. In Case I, however, it is not necessary to reach the question of

superseding causation because the act itself is defective by virtue of the medicine's availability at the time of the wrong.¹³²

The next group of cases in the Gemara ("Case K" and "Case L") examines variants of the Mishnah's first case, which found liability for hitting a victim directly with a stone or iron implement. In Case K the perpetrator, apparently intending to kill the victim by throwing a stone at him,¹³³ instead hits a wall first, the projectile then killing the victim on the ricochet.¹³⁴ The defendant is guilty in this scenario even though the killing did not occur in the precise manner intended.¹³⁵ The Gemara focuses on whether the rebounding stone is considered the product of the defendant's direct force. The Sages conclude that it is.¹³⁶ Case K therefore determines that a projectile thrown against a wall is deemed to be the direct action of the perpetrator, both with respect to throwing it against the wall and the object's rebound.¹³⁷

Case L relates to the preceding hypothetical because it, too, attempts to distinguish between primary (direct) and secondary (indirect) force. This scenario involves a perpetrator who ties up his victim near a body of water and causes a breach in the dam to inundate the victim and drown him.¹³⁸ Since the perpetrator withdraws a barrier to the water flow, he in effect propels the water, which is considered the equivalent of shooting an arrow.¹³⁹ Unlike the previous hypothetical of throwing a rock against a wall, in which the projectile's force is deemed to come from the perpetrator, here the onrushing water does not stem directly from the wrongdoer. Instead, the wrongdoer merely removed an impediment to the water's flow. Nonetheless, the Gemara rules that the perpetrator's removal of the impediment is sufficient to affix liability.¹⁴⁰ The Gemara qualifies that liability attaches only where the water that drowns the victim flows as a "direct" result of the defendant's action. If, however, the water reaches the victim as a result of the wrongdoer's "secondary force," the defendant is not liable.¹⁴¹

The Gemara does not define direct and secondary force explicitly. According to Rashi, in the direct scenario, a perpetrator ties a victim in close proximity to a dam and releases water that kills him. The perpetrator's force is deemed to be direct because the water hits the victim as soon as it gushes out. In Rashi's indirect case, a perpetrator ties up a person at some distance from the dam, so that by the time the water reaches the victim it is no longer propelled by the primary action of the perpetrator.¹⁴² Thus, according to Rashi, whether force is primary or secondary turns on how much time has elapsed between the actions of the perpetrator and the resulting effects. This, in turn, may be a function of distance.

Other Gemara commentators understand the direct/secondary dichotomy exemplified in Case L somewhat differently. In their view, the perpetrator is liable for direct action where waters, flowing as an immediate result of the perpetrator's actions—that is, the first waters released, kill the victim. The time that has passed between the water's release and the victim's death is irrelevant under this view. When the flow of subsequent waters causes the victim's death, the perpetrator's action is indirect.¹⁴³ This example establishes that merely releasing a deadly force—the water from the dam—is enough like actively propelling a force—the rebounding ball—to constitute murder.¹⁴⁴

In the Gemara's final case ("Case M"), the perpetrator creates only part of the force propelling the deadly projectile. Where the wrongdoer throws up a stone that falls at a 45 degree angle and kills someone as it descends, the thrower is liable even though the trajectory of the object is a function of the perpetrator's force and that of gravity.¹⁴⁵

One of the Sages questions this result, arguing that if defendant's force were propelling the stone, the stone would continue upward in the direction in which it was thrown.¹⁴⁶ Others respond that if his force were not propelling the stone downward—that is, if gravity were the exclusive force determining the downward trajectory—it would fall straight down rather than at an angle. Consequently, his force, although "weak" because gravity joins it, remains in effect during the fall, and the actor remains responsible for propelling the stone.¹⁴⁷ By contrast, the defendant is not liable if the stone he throws falls straight down and kills someone, because gravity, and not the wrongdoer's force, caused the death.¹⁴⁸ In sum, the Gemara hypotheticals not only elaborate on and refine the causation cases in the Mishnah but also attempt to resolve issues not explicitly treated there, such as the distinction between direct and indirect force. Brilliant pilpul aside, the common thread appears to be that more than a few defendants who seem guilty as sin, so to speak, walk. Again, one might ask what the Sages are up to, and again, as with the cases in the Mishnah, the answer might be that the stringent causation requirements for murder serve to eliminate any possibility that those who committed reckless homicide will be convicted of intentional murder.

To reach this conclusion with regard to the Gemara examples, however, one must accept two points. First, the defendant's initial wrongful conduct is the pivotal act. Second, all the elements for causing death must be present at the moment of the defendant's conduct. For instance, in Case G of the Gemara, in which the wrongdoer shoots an arrow at the victim and then snatches away the victim's shield, the initial wrong arguably manifests no more than reckless behavior; when the wrongdoer shoots the arrow, the victim is protected. At the same time, these Gemara hypotheticals are generally more extreme than their Mishnah counterparts. The Gemara declines to fuse two wrongful acts, e.g., shooting the arrow and snatching away the shield, that together clearly establish intentional homicide. The Mishnah cases involve single acts of misconduct that may be no more than reckless, such as unleashing a snake or dog to attack the victim.

The Mishnah and Gemara cases share another bond that applies with equal strength to both sets of hypotheticals. The rule-based approach of Jewish jurisprudence explains all of the decisions in the Mishnah and the Gemara. Under the rule-based approach, the Sages test the limits of the law of *gruma*, even if it produces absurd results, such as acquitting the marksman who beats his arrow to the victim and takes away the victim's shield.

From an American law perspective, some of the hypotheticals seem absurd. This perception stems, at least in part, from the standard-based approach of causation in American law. The American system permits a more calibrated balancing to assure justice in individual cases. At the same time, American law may also permit condemnation in cases in which the result does not accurately reflect the actor's actual intent.¹⁴⁹ Additionally, the American scheme lacks the clarity of the Jewish law requirement of a very tight fit between act and result.

The Jewish methodology is objective and easily applied. On the downside, Jewish law acquits defendants who appear very clearly to be factually guilty. The converse, however, can never occur: a defendant lacking the requisite *mens rea* for intentional murder cannot be convicted in the rabbinical courts. Questions remain, however: why

were the Sages so gun shy? Why were they willing to let obviously guilty people escape conviction in their courts?

D. The Causation Requirement and the Allocation of Criminal Jurisdiction

Examining the relationship between three basic tenets of Judaism, "measure for measure," God's perfect judgment, and free will, offers one way of understanding Jewish law's hyper-stringent causation requirements and the ensuing results—acquittal of many who are factually guilty. First, God punishes all wrongdoing and rewards all good deeds in a manner similar to the evil or good deed (a doctrine capsulized as "measure for measure").¹⁵⁰ For example, one who gives charity is rewarded with a secure and bountiful livelihood;¹⁵¹ similarly, punishment fits the crime precisely.¹⁵² Second, humans err, whereas divine judgment is perfect: Man sees the external, and God sees the heart.¹⁵³ As such, God's preferential method of dealing with criminals is to punish them Himself, because He alone knows every wrongdoer's precise level of culpability.¹⁵⁴

One might question why there is a court system at all: Let God punish all wrongdoers. The answer may lie in a third central principle of Judaism, free will.¹⁵⁵ If God were to punish wrongdoers in an open and recognized fashion, that would necessarily impinge on free will, since it would be manifestly clear that there is a God who must be obeyed, or else.

On the basis of these three interrelated principles—measure for measure, human inability to provide finely calibrated justice coupled with God's perfect judgment, and free will—we may posit the following framework: When a person kills in an indirect fashion—by *gruma*—then the punishment that he or she deserves is likewise indirect. Because in such cases the relationship between the crime and the punishment will not be clear to mortals, the Master of the Universe will inflict the punishment. God's punishment does not impinge upon free will in these circumstances. The potential wrongdoer may freely choose to perform or not perform the evil act inasmuch as he or she cannot be certain that punishment will follow. The unseen hand of God will impose the appropriate sanction, eliminating the distinct possibility of human error.

The problems arise, however, when a person commits a crime in an obvious and direct way, e.g., tying someone up in the blazing desert sun. The principle of measure for measure demands that this direct crime be punished in a direct manner, that is, judicial imposition of the death penalty. If God were to do so directly and openly, such action would impinge on free will. Accordingly, in the limited context of cases in which guilt is clear beyond peradventure, God is "forced" to rely on human courts to provide the proper punishment. In this view, the courts function as a default mechanism.¹⁵⁶

Such an approach also explains the warning requirements and the other stringent procedural safeguards of talmudic law. When the requisite warnings are given in front of two competent witnesses, and the wrongdoer acknowledges receipt of the warnings and proceeds nonetheless to commit the crime in the witnesses' sight, the human courts must inflict punishment.¹⁵⁷ The warnings assure certainty in fact-finding to a degree that may seem unrealistic or even obsessive, but do so in order to confine human courts to their appropriate jurisdiction—imposing punishment only on defendants who are manifestly guilty.¹⁵⁸ Similarly, the other stringent procedural requirements, such as the absolute prohibition against confessions (they may be forced or the product of a deranged

mind)¹⁵⁹ and the absolute prohibition of circumstantial evidence (it may not be one hundred percent accurate)¹⁶⁰ assure that the court imposes punishment only where guilt is direct, i.e., human fact-finders do not need to make any inferences. In the remaining cases the court is unwilling to convict and must leave punishment to God. The warnings requirement and other safeguards reflect a judicial reluctance to assume power and render punishment where the courts see their role not as tribunals that hand out justice,¹⁶¹ but rather as backstops to divine judgment invoked only when there is no other alternative. Together, the numerous procedural guarantees and the substantive *gruma* limitation make it impossible for the courts to impinge on God's turf.

By contrast, in a secular judicial system, in which courts are not free to abdicate jurisdiction but must render punishment as warranted, a sense of responsibility to assure law and order counterbalances the fear of mistakes.¹⁶² Because the Jewish courts see their role as secondary, they do not share such policy objectives. Rather, they focus on assuring that they do not exceed jurisdictional limits by entering inappropriate convictions.¹⁶³

This is not to say that public policy considerations are totally disregarded in the Jewish scheme of justice. First, although not a judicial institution, the blood avenger is lurking in the wings, as a possible means of preserving the social order through familial self-help. In addition, while the rabbinical courts are the expositors of normative Jewish law and are bound by constraints that make conviction unlikely, there is extra-systemic jurisdiction in the form of the King's court that is not restricted by all these limitations.¹⁶⁴

Even the rabbinical courts themselves are authorized to dispense with certain safeguards in emergency situations to preserve public order.¹⁶⁵ The rabbinical courts also can imprison certain repeat offenders who are clearly guilty but have escaped conviction because of procedural limitations. Such wrongdoers receive only bread and water to shrink their intestines and then are fed barley bread until their stomachs burst.¹⁶⁶

Still, each of these policy-oriented mechanisms within Jewish law has built-in limitations. For example, the victim may not have a blood avenger, or the avenger may be unwilling or unable to perform his function. The rabbinical courts may exercise extralegal jurisdiction only in the emergency exception and the barley bread exception. The court's exigency authority is of limited duration and can be invoked only when public order is at stake.¹⁶⁷ Furthermore, even though the barley bread jurisdiction applies only when the defendant is clearly guilty,¹⁶⁸ the execution itself is indirect: by a *gruma*. Finally, the king's court exists only because there is a king. This was a result of the Jewish people clamoring for a king, despite God's displeasure at Israel's desire for a monarch other than Himself.¹⁶⁹ Thus, in the original scheme there would have been no royal court. God would have dispensed justice indirectly in the vast majority of cases, restricting the jurisdiction of the rabbinical courts to open and direct wrongdoing.

We can test this theory of allocation of jurisdiction between divine and human courts through the vehicle of DNA, a contemporary evidentiary breakthrough that some believe assures virtual certainty in fact-finding.¹⁷⁰ Under Jewish law, DNA presumably would have no evidentiary value. Unless there are two eyewitnesses to the entire wrongdoing, making it an event so public that it requires a public response, the matter is left to God to "adjudicate" in a hidden, indirect fashion. For example, interpreting both the two-witness rule and the absolute prohibition against circumstantial evidence, the Gemara recounts a scenario in which a famous rabbi observes an aggressor chasing his

victim with a knife. The rabbi loses sight of the pair for an instant and then comes upon the wrongdoer standing over the dying victim, brandishing a bloody knife. The rabbi says to the perpetrator:

Wicked man, who slew this man? It is either you or I! But what can I do, since thy blood [i.e., life] does not rest in my hands, for it is written in the Torah, *At the mouth of two witnesses etc. shall he that is to die be put to death?* May He Who knows one's thoughts exact vengeance from him who slew his fellow! It is related that before they moved from the place a serpent came and bit him [the murderer] so that he died.¹⁷¹

Since only a single individual observed the aggressor's action, and that individual did not witness the actual infliction of the mortal wound, a human court may not convict the aggressor. Admittedly, in this case, divine retribution is not altogether opaque. Nonetheless, it is consistent with the doctrine of measure for measure; the evidence is quite powerful, and consequently God's justice is somewhat more open. Because, however, when all is said and done, the snake's venom caused death, the matter is left in equipoise, and free will is preserved.

Presumably, a rabbinical court would not accept DNA evidence. The point of the two-witness requirement is to assure that the human courts act only when the evidence is certain and direct, and the crime is open and public, requiring a commensurately frontal response by the courts. Why should the result differ in the case of DNA if it is absolutely foolproof?¹⁷² Should not DNA also require a public response, perhaps even more so than eyewitnesses, whose credibility and accuracy are often questionable as in the case of mistaken identifications.¹⁷³

There are three possible answers. First, DNA is simply not foolproof. As the O.J. Simpson defense demonstrated, reliability may plummet if there is contamination at the scene of the crime or mishandling in the laboratory.¹⁷⁴

Second, assuming that DNA evidence is 100% certain, DNA may warrant an exceptional rabbinical court ruling. For the sake of issuing a public response to the open injustice, a rabbinical court might appropriately impose punishment on the basis of DNA evidence. There are indications that this is the law.¹⁷⁵

Finally, uncertainty may not be the sole or primary reason for excluding DNA or other "foolproof" evidence. DNA findings may be excluded because they constitute indirect evidence, evidence requiring one to make logical inferences to arrive at the correct determination.¹⁷⁶ Evidence of two eyewitnesses is direct because they are present—in the picture, so to speak. Even though witnesses could lie or be mistaken, their evidence is still direct. With two eyewitnesses, all the elements of liability are present, and guilt does not rest on any inference.¹⁷⁷ The possibilities of perjury or mistaken identification are negative inferences that merely destroy the witnesses' credibility, thereby moving the witnesses out of the snapshot rather than preventing them from getting there in the first place. On the other hand, certain or not, linking the source of the DNA with the crime requires inferences. Thus, it is indirect evidence, requiring the hidden hand of God to effect punishment.

The required warnings of two witnesses fit the theory that Jewish law leaves nothing to inference. As previously noted, warnings assure certainty; they give notice to

the defendant that he is about to commit a crime that is subject to a specified punishment. The wrongdoer is then required to acknowledge the warning verbally—thus firmly establishing *mens rea*.¹⁷⁸ Alternatively, the warnings show what a direct crime is, because they focus the perpetrator and the witnesses on the criminal act.

In effect, the warnings add a third dimension to the photograph of that act. The snapshot captures not only the *actus reus*, but also the evil heart of the killer, the *mens rea*. Even *mens rea* is not left to inference. Without warnings and defendant's acknowledgment of them, commission of an act observed by witnesses is still not sufficiently direct to warrant a human court's punishment. The actor's intent is not sufficiently obvious and clear to require an open, human judicial response. Rather, God, who acts in a hidden manner, becomes responsible for executing perfect judgment.

E. Conclusion

Notwithstanding constitutional guarantees, including the reasonable doubt standard of proof,¹⁷⁹ it is a given that innocent people are punished and even executed in the American scheme of justice.¹⁸⁰ We accept this result as the price of a judicial system that metes out punishment to wrongdoers, thereby preserving the social order.

Punishment of the innocent is antithetical to the Jewish criminal justice system. As the Mishnah states: "If one destroys a single soul, it is as if he has destroyed a complete world."¹⁸¹ Judicial ascertainment of guilt in other than an open and shut case does not merely create a risk of error.¹⁸² It is an encroachment of God's role. It also conveys a lack of faith that God will punish wrongdoers in His own time and in His own way, and that public order will be preserved. Thus, unlike their American counterparts, the rabbinic judges looked at every aspect of the case that might lead to acquittal, for fear that they would exceed their jurisdiction and take an innocent life.¹⁸³ The Sages were men of faith who understood their role in the courtroom and in the world.

Given this understanding, the talmudic law of causation is logical, not bizarre. The law of *gruma* follows a rule-based system that effectively eliminates the possibility of erroneous conviction, leaving nothing to inference in the determination of guilt. It ferrets out reckless killers and leaves them to the refined assessment of culpability assured by divine judgment. At the same time, it reflects an allocation of responsibility between God and man in the universe, and a view of God as the Creator and the One who "in His goodness renews daily, perpetually, the work of creation."¹⁸⁴

¹ See, e.g., WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW § 6.4(a), at 331 (4th ed. 2003): [S]ome crimes are so defined that conduct accompanied by an intention to cause a harmful result may constitute the crime without regard to whether that result actually occurs. Thus it is perjury to tell a material lie on the witness stand with intent to mislead judge and jury, though the lie is so transparent that no one who hears it believes it and thus the outcome of the case is not affected.

² See *id.*

³ "Causation in fact" requires that, but for the actor's conduct, the result would not have occurred. However, when two actors independently inflict mortal wounds that together cause the victim's death, causation is defined as whether the defendant's act was a substantial factor in bringing about death. See *id.* § 6.4(b), at 333–36; see also MODEL PENAL CODE § 2.03(1) (1985) (requiring but-for causation); PAUL H. ROBINSON, CRIMINAL LAW § 3.2, at 155 (1997) (defining factual causation).

⁴ See MODEL PENAL CODE, *supra* note 3, § 2.03(2).

⁵ See, e.g., *Stephenson v. State*, 179 N.E. 633, 649 (Ind. 1932) (permitting prosecution for homicide when the victim committed suicide due to a mental condition caused by the defendant's rape of the victim); *State v. Angelina*, 80 S.E. 141, 142–43 (W. Va. 1913) (dictum) (noting that the victim's self-inflicted wound that results in death, after a mortal wound inflicted by the defendant, is not an intervening act of a responsible agent; rather it is an irresponsible act causally related to the initial mortal wound); *Cunningham v. People*, 63 N.E. 517, 525 (Ill. 1902) (stating that if the defendant inflicted a wound on a person "enfeebled by disease," the defendant is guilty even though the injury would not have caused a healthy person to die).

⁶ MODEL PENAL CODE, *supra* note 3, § 2.03(2)(b). The provision reads in full as follows: (2) When purposely or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the purpose or the contemplation of the actor unless:

(a) the actual result differs from that designed or contemplated, as the case may be, only in the respect that a different person or different property is injured or affected or that the injury or harm designed or contemplated would have been more serious or more extensive than that caused; or

(b) the actual result involves the same kind of injury or harm as that designed or contemplated and is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense.

Id. § 2.03(2)(a)(b). There is a similar provision in the Code with respect to reckless and negligent crimes. *See id.* § 2.03(3). Indeed, even strict liability crimes require causation. *See id.* § 2.03(4).

⁷ See *ROBINSON*, *supra* note 3, § 3.2, at 157–58.

⁸ See *Bonhart v. United States*, 691 A.2d 160, 163 (D.C. Ct. App. 1997) ("[E]ven if Della voluntarily and deliberately reentered the building, this course of conduct is so natural and commonplace a reaction that it cannot constitute a legal cause of Della's death superseding Bonhart's felonious act of setting the fire.").

⁹ See, e.g., *State v. Harris*, 230 N.W.2d 203, 206–07 (Neb. 1975) (rejecting defense based on intervening events and quoting with approval an earlier case stating "that even if unskillful treatment contributed to the death it was no defense"). If, however, the medical treatment was grossly negligent, it will be deemed an intervening or superseding cause of death. *See, e.g., McKinnon v. United States*, 550 A.2d 915, 917 (D.C. Ct. App. 1988) (noting that "a physician's gross negligence can provide an exception to the rule" of unskilled treatment being no defense); *State v. Rueckert*, 561 P.2d 850, 860 (Kan. 1977) (adopting a similar holding).

¹⁰ See, e.g., *State v. Shaw*, 921 P.2d 779, 785 (Kan. 1996) (deciding that the victim's unhealthy heart did not absolve defendant of felony murder when the victim died from a heart attack after being beaten and bound by the defendant); *State v. Lane*, 444 S.E.2d 233, 236–37 (N.C. Ct. App. 1994) (holding that the defendant's single punch to victim's head could be the proximate cause of death even though victim had brain swelling from a preexisting condition of chronic alcoholism); *cf. People v. Wattier*, 59 Cal. Rptr. 2d 483, 485 (Cal. Ct. App. 1996) (ruling that in a vehicular manslaughter case, the victim's failure to wear a seat belt was irrelevant to a determination of the defendant's guilt).

¹¹ See, e.g., *Stephenson v. State*, 179 N.E. 633 (Ind. 1932); *State v. Angelina*, 80 S.E. 141 (W. Va. 1913).

¹² See *Henderson v. Kibbe*, 431 U.S. 145, 155–56 (1977) (holding that the failure to instruct the jury on causation was not an error under the facts of the case because the defendant acted recklessly which thus necessitated "a determination that the ultimate harm was foreseeable").

¹³ The language "so forth" includes the following:

Unbeknownst to all parties involved, there was a safety net on the eighth floor that would have prevented the suicide. The ninth floor shooting resulted from an altercation between an elderly man and his wife. The old guy claimed that it was an accident because he did not know the gun was loaded. In fact, the old man did keep the gun unloaded for normal use in threatening his spouse; however, several weeks earlier, a witness saw the elderly couple's son loading the gun. Apparently, his mother had cut off his allowance, and the son, knowing of his father's propensity to threaten mom by pulling the trigger of the empty shotgun, loaded it expecting his father to shoot his mother. Unfortunately, his father's aim was poor and he hit the victim instead. Of course, the victim was none other than their son, Ronald. The medical examiner ruled his death a suicide.

¹⁴ See, e.g., *Holseback v. State*, 443 So. 2d 1371, 1382 (Ala. Crim. App. 1983) (involving two wrongdoers who independently stabbed the victim who eventually died and deciding that "if each inflicted

an injury that caused, contributed to, or accelerated" the death, each could be held responsible for the killing); ROBINSON, *supra* note 3, § 3.2, at 158–60 (discussing multiple causes of death).

¹⁵ Compare *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (ruling that "substantial" participation combined with reckless indifference in commission of murder is sufficient to warrant the death penalty even though the defendant is not the person who actually committed the killing), with *Enmund v. Florida*, 458 U.S. 782, 798–801 (1982) (invalidating capital punishment in a case where the defendant drove the getaway car in a fatal robbery, but had no intent to murder and had not anticipated the killing).

¹⁶ See *Enmund*, 458 U.S. at 798–801.

¹⁷ See, e.g., *Commonwealth v. Cotton*, 487 A.2d 830, 832–33 (Pa. Super. Ct. 1984) (affirming a jury determination that the defendant's robbery caused the victim's heart attack and subsequent death five days later).

¹⁸ See, e.g., *People v. Mulcahy*, 149 N.E. 266, 269 (Ill. 1925) (reversing a misdemeanor-manslaughter conviction of a police officer whose gun went off accidentally in a bar, killing a patron where the underlying misdemeanor was the officer's failure to arrest intoxicated persons in the bar); ROBINSON, *supra* note 3, § 3.2, at 156 (illustrating causation that is too remote through a hypothetical where the perpetrator "shoots at, but misses, his intended victim, who flees to escape the attack and four blocks later is struck and killed by a falling piano").

¹⁹ See, e.g., *People v. Dlugash*, 363 N.E.2d 1155, 1162–63 (N.Y. 1977) (reducing a murder conviction to attempted murder because of the state's failure to prove that the victim was alive at the time the defendant shot him); see also LAFAVE & SCOTT, *supra* note 1, § 6.4(c), at 337 & n.40 (asserting that, although the defendant cannot be found guilty of the homicide because of failure to establish causation, he should not "be entirely free of criminal sanctions").

²⁰ "Gruma" is pronounced similarly to "drum-ah" with emphasis on the first syllable.

²¹ In addition, civil liability under Jewish law also cannot be based on a *gruma*. Although questions of civil liability are beyond the scope of this chapter, it is noteworthy that the *gruma* rules in this context are more relaxed. In certain instances, referred to as *garmi*, because of the immediacy of the damage, liability is found notwithstanding an indirect cause. See THE ARTSCROLL SERIES, THE TALMUD BAVLI: THE GEMARA: THE CLASSIC VILNA EDITION, *Baba Bathra* 22b (Schottenstein ed., 2007) [hereinafter BABYLONIAN TALMUD] (including the Tosafot commentary thereon).

²² See THE CODE OF MAIMONIDES, BOOK 11: THE BOOK OF TORTS, *Murder and the Preservation of Life* 2:2, at 199 (Hyman Klein trans., 1954) [hereinafter THE CODE OF MAIMONIDES–TORTS] (observing that one who hires an assassin or directs his slave to kill another is not subject to capital punishment). Maimonides gives two biblical sources for the rule that solicitors are not punished in the human courts, stating:

How do we know that this is the rule? Because Scripture says, *Whoso sheddeth man's blood by man shall his blood be shed* (Gen. 9:6), referring to one who commits the murder himself and not through an agent; . . . *and at the hand of man, even at the hand of every man's brother, will I require the life of man* (Gen. 9:5), referring to one who hires others to kill someone. In these . . . cases, the verb *require* is explicitly used to show that the judgment is reserved for Heaven.

Id., *Murder and the Preservation of Life* 2:3, at 199.

Inciting others to worship idols is only arguably an exception to the general rule that those who solicit others to commit an offense are not liable. Defined as inducement, it is irrelevant whether the solicitee in fact commits idol worship. Therefore, the crime is based on the action of the solicitor rather than on the conduct of the solicited party. See *Deuteronomy* 13:7–12 (prohibiting the seduction of another into idolatry); see also BABYLONIAN TALMUD, *supra* note 21, *Kiddushin* 40a (suggesting that evil intention alone is not punished except in the case of idolatry).

²³ See, e.g., THE MISHNAH, *Baba Kamma* 6:4, at 339–40 (Herbert Danby trans., 1933) [hereinafter MISHNAH], reprinted in BABYLONIAN TALMUD, *supra* note 21, *Baba Kamma* 59b (giving hypotheticals): *cf. id.*, *Baba Mezia* 43a (describing an exceptional case where a treasurer of the Temple gives loose money to a money changer who then uses it resulting in the court imposing a form of vicarious liability where both men are found guilty of misuse of Temple funds).

²⁴ BABYLONIAN TALMUD, *supra* note 21, *Kiddushin* 42b; see also *id.*, *Baba Kamma* 56a ("Where the words of the Master are contradicted by words of a disciple, whose words should be followed?").

²⁵ YEHUDA HENKIN, *EQUALITY LOST: ESSAYS IN TORAH COMMENTARY, HALACHA, AND JEWISH THOUGHT* 22 (1999) (footnote omitted); *cf.* MISHNAH, *supra* note 23, *Hagigah* 1:8, at 212 (comparing laws that "hover in the air and have naught to support them," with laws "hanging by a hair for . . . [scriptural support] is scanty," and laws that have clearer textual support in the Torah).

²⁶ *See* BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 56a–56b (setting forth the seven Noahide laws which are as follows: judgments, meaning the obligation to establish a court system; blessing the Name, a euphemistic reference to the prohibition against cursing God; idol worship; forbidden sexual relationships; and the prohibitions against murder, theft, and eating a limb from a live animal).

²⁷ *Genesis* 9:6. Biblical translations in the text and footnotes of this chapter are from the Soncino Press edition entitled *The Pentateuch and Haftorahs* (J.H. Hertz 2d ed. 1960).

²⁸ The first five commandments deal with the relationship between "man and God," while the final five govern human relationships. The fifth commandment, "honor thy father and thy mother," *Exodus* 20:12, is the bridge between these two categories because God is the parent's partner in the act of procreation. 1 THE PENTATEUCH AND RASHI'S COMMENTARY, *Genesis* 4:1, at 37 (Abraham ben Isaiah & Benjamin Sharfman trans., 1949) [hereinafter PENTATEUCH AND RASHI'S COMMENTARY] ("And the man knew Eve his wife; and she conceived, and bore Cain; and she said: I have gotten a man with (the help of) God."). Rashi comments, "When He created me and my husband, He by Himself created us; but with this one (Cain) we are partners with Him." *Id.*; *see also* RAMBAN (NACHMANIDES) COMMENTARY ON THE TORAH, *Exodus* 20:12, at 318 (Charles B. Chavel trans., 1971) [hereinafter RAMBAN] ("Having finished all that we are obligated towards the Creator Himself and His glory, He turns now to command us about those matters which concern created beings."); NEHAMA LEIBOWITZ, *STUDIES IN SHEMOT (EXODUS)* 351 n.1 (Aryeh Newman trans., 1981) ("The precept of honouring parents belongs to the first category since it parallels the honour due to God").

²⁹ *Exodus* 20:13. Following the narrative of the Revelation at Sinai, the Torah begins: "Now these are the ordinances which thou shalt set before them." *Exodus* 21:1. The Torah thereby introduces a detailed elaboration of the fundamentals of Jewish law, beginning with a discussion of the law relating to Jewish slaves. *See id.* at 21:2–11. Rabbinic tradition interprets the Torah's discussion of slavery to require slave owners to treat slaves humanely. *See* BABYLONIAN TALMUD, *supra* note 21, *Arakin* 30b (stating that owner must provide slave with the same quality wine, food, and sleeping arrangements as his own). Immediately following that discussion, however, *Exodus* details the strictures against murder. *See Exodus* 21:12–14.

Since the Torah appears to be intent on elaborating the laws given in the Decalogue, why is a discussion of slavery, a topic not found in the Ten Commandments, interjected at this point? The discussion of slavery appears at this point in the text because the receipt of the Torah at Mount Sinai provided the Jewish people with true freedom. *See* NOSSON SCHERMAN, *AKDMUS MILLIN* xlv (1978) (explaining that prior to Sinai the Jewish people were not free to share in the destiny of creation); *see also* MISHNAH, *supra* note 23, *Aboth* 6:2, at 459 ("[t]here is no free man but he who engages in the study of Torah."). As a free nation, both physically and spiritually, it became incumbent upon the Jews to learn that they should not treat others as they had been treated by the Egyptians. *See e.g.*, *Exodus* 22:20, 23:9; *Leviticus* 19:34 (reflecting the understanding of these laws with their stringent rules governing the treatment of slaves; PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 28, *Leviticus* 24:39, at 266 (prohibiting the owner from demanding demeaning service such as carrying the master's clothes to the bath house or helping the master put on his shoes). The rabbis say that he who buys a slave "almost buys a master of himself." BABYLONIAN TALMUD, *supra* note 21, *Arakin* 30b.

The Torah next discusses the details of the prohibition against murder. As the initial commandment dealing with relationships between human beings, the prohibition against murder first appears in a slavery context. The Torah states, in effect, that although the lives of the Jewish slaves were not valued as a free person's, the Jews must respect all human beings regardless of the individual's station in life. Viewed in this way, the detailed discussion of murder is a natural sequel to the slavery provisions. Just as the humane treatment of slaves elevates the worth of the individual, albeit a slave, the prohibition of murder promotes the universal value of human life. *See* 1 SEFER HAHINNUCH 185 (Charles Wengrov trans., rev. ed. 1989) (authorship ascribed to Rabbi Aaron haLevi of thirteenth century Barcelona) (noting that the prohibition against murder applies even if the victim is drawing his last breath).

³⁰ The Torah does not explicitly discuss intentional unpremeditated murder. If the killing is completely accidental, the perpetrator is exempt from any sanction. If, however, the killing is judged negligent, the wrongdoer is exiled and must remain in a city of refuge until the death of the reigning high priest. *See Numbers* 35:25. If the perpetrator does not go to the city of refuge, or leaves prematurely, the blood avenger,

that is, anyone eligible to inherit from the victim, had the right and even the duty to kill him. *See id.* at 35:19, 25–28; THE CODE OF MAIMONIDES–TORTS, *supra* note 22, *Murder and the Preservation of Life* 1:2, at 195.

³¹ "He that smiteth a man, so that he dieth, shall surely be put to death." *Exodus* 21:12.

³² *Exodus* 21:13 (emphasis added). Rabbinic tradition further teaches that the phrase, "God cause it to come to hand," refers to divine justice, signifying that God will ultimately judge and punish accordingly those who kill intentionally or unintentionally but are not convicted in the human courts because of evidentiary deficiencies. *See* PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 28, *Exodus* 21:13, at 235–36 (relying on BABYLONIAN TALMUD, *Makkoth* 10b). *See also* chapter 7 note 154 *supra* (discussing the Gemara's explanation of *Exodus* 21:13).

³³ *Exodus* 21:14. According to exegesis, the Torah intends not only to condemn the premeditated killing, but also to exclude certain killings from punishment. For example, a physician carrying out medical treatment, a parent or teacher disciplining their child or student, and a court official imposing the sanction of lashes all act intentionally but have no intent to kill. *See* PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 28, *Exodus* 21:14, at 236; THE CODE OF MAIMONIDES–TORTS, *supra* note 22, *Murder and the Preservation of Life* 5:5–6, at 210 (stating that "a father who strikes his son [while teaching him], a teacher who chastises his pupil, and a court official [are exempt from exile] inasmuch as they slay inadvertently while performing a duty").

³⁴ *See Leviticus* 24:17. This verse immediately follows the verse discussing the case of the blasphemer, who is also subject to capital punishment. *See id.* at 24:10–16. The connection between these two verses is that just as cursing God diminishes His honor, so, too, if one kills another it is a divine desecration. For, "in the image of God created He [man]." *Genesis* 1:27. Thus, even though the prohibition against murder is classified as a commandment governing human relationships, it is also intimately and inextricably bound to the relationship between man and God.

³⁵ *Leviticus* 19:16.

³⁶ *See* BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 72b ("[T]he Torah hath said, 'Whosoever would shed the blood of a man, (to save) that man shall his own blood be shed,' meaning, save the blood of the pursued by the blood of the pursuer!"); *see also* THE CODE OF MAIMONIDES–TORTS, *supra* note 22, *Murder and the Preservation of Life* 1:6–8, at 196 (suggesting that the intervening party may only kill the pursuer after he has been warned and the pursuer rejects the warning).

In addition, *Exodus* 22:1–2, permits a homeowner to kill a nighttime burglar entering his premises, on the theory that the burglar came with intent to kill, knowing that the homeowner would attempt to prevent the theft. *See* BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 72a ("Because it is certain that no man is inactive where his property is concerned; therefore this one (the thief) must have reasoned, 'If I go there, he (the owner) will oppose me and prevent me; but if he does, I will kill him.' Hence the Torah decreed, 'If he come to slay thee, forestall by slaying him.'"); PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 28, *Exodus* 22:1, at 251 (stating the same proposition); *see also* RAMBAN, *supra* note 28, *Exodus* 22:2, at 376–78 (explaining that homicide is not justifiable in the case of the daytime burglar, because he has no intent to kill, knowing that he will be recognized).

³⁷ This discussion of murder appears in a somewhat curious context, namely, the final sub-portion of *Numbers* entitled *Maaseh*, meaning "travels." *Maaseh* immediately precedes *Deuteronomy*, the final book of the Torah. *See* RAMBAN, *supra* note 28, *Deuteronomy Introduction*, at 3 & n.1 (noting that the title *Deuteronomy* means a restatement of the law and that "a major part of the book is devoted to such a restatement").

Maaseh is regarded as the final chronological portion of the Torah because it begins by chronicling the travels of the Jews from the time of the Exodus until their entry into Israel, the concluding event of the Torah. *Numbers* 43:1–50. *Maaseh* also addresses the division of the land of Israel among the twelve tribes, further evidencing *Maaseh's* terminal status. In addition, *Maaseh* includes the decision that women are entitled to inherit the land. *See id.* at 36:1–12. Between the division of the land among the tribes and women's right to inherit land, the Torah discusses the laws relating to murder and manslaughter. *See id.* at 35:16–33. There is a logical segue between the division of land and the laws of murder in that the cities of the Levites were cities of refuge for those who killed unintentionally. *See id.* at 35:13–15, 22:29, 22:32. It is odd, however, that the Torah should wait until this point to detail further the laws of homicide. One possible explanation of this seeming anomaly could be that intentional homicide was almost nonexistent in the desert.

³⁸ *Numbers* 35:15.

³⁹ As the Torah states:

But if he smote him with an instrument of iron, so that he died, he is a murderer; the murderer shall surely be put to death. And if he smote him with a stone in the hand, whereby a man may die, and he died, he is a murderer Or if he smote him with a weapon of wood in the hand, whereby a man may die, and he died, he is a murderer

Numbers 35:16–18.

Subsequent verses give additional examples of both intentional and unintentional killings and the distinctions between them:

And if he thrust him of hatred, or hurled at him any thing, lying in wait, so that he died; or in enmity smote him with his hand, that he died; he that smote him shall surely be put to death But if he thrust him suddenly without enmity, or hurled upon him any thing without lying in wait, or with any stone, whereby a man may die, seeing him not, and *cast it upon him*, so that he died, and he was not his enemy, neither sought his harm [he is judged a manslaughterer and sent to a city of refuge].

Id. at 35:20–23 (emphasis added).

The italicized language, "cast it upon him," has been interpreted to include only objects released by downward motions (for example, by a woodcutter chopping down) as requiring exile, and concomitantly to exclude upward motions, in which case the actor is free from any liability. See BABYLONIAN TALMUD, *supra* note 21, *Makkos* 7b(1) (explaining that injuries occurring from upward motion are exceptional occurrences for which we do not expect the actor to take precautions. Injuries resulting from descending actions occur frequently and likely result from the actor's negligence, thereby warranting exile); THE CODE OF MAIMONIDES–TORTS, *supra* note 22, *Murder and the Preservation of Life* 6:12–14, at 214–15 (summarizing the proposition).

⁴⁰ See *Deuteronomy* 5:6–18.

⁴¹ See *id.* at 5:17.

⁴² See *id.* at 4:41–43, 19:2–10 (setting aside cities of refuge for one who "slayeth his neighbour unawares, and hated him not in time past"); *id.* at 19:11–13 (prohibiting intentional murderers from residing in such cities and prescribing their expulsion therefrom; see also RAMBAN, *supra* note 28, *Deuteronomy* 19:2, at 227–28 ("And he also went on to teach us [the rules of] the matter of 'error' [which requires the unintentional murderer to seek refuge]") (alterations in original).

The deuteronomic provisions also further delineate the distinction between intentional and unintentional homicide:

And this is the case of the manslayer, that shall flee thither [to the city of refuge] and live: whoso killeth his neighbour unawares, and hated him not in time past; as when a man goeth into the forest with his neighbour to hew wood, and his hand fetcheth a stroke with the axe to cut down the tree, and the head slippeth from the helve, and lighteth upon his neighbour, that he die; he shall flee unto one of these cities and live; lest the avenger of blood pursue the manslayer, while his heart is hot, and overtake him, because the way is long, and smite him mortally; whereas he was not deserving of death, inasmuch as he hated him not in time past.

Deuteronomy 19:4–6.

In contrast, *Deuteronomy* also states the following with respect to the intentional killer:

But if any man hate his neighbour, and lie in wait for him, and rise up against him, and smite him mortally that he die; and he flee into one of these cities; then the elders of his city shall send and fetch him thence, and deliver him into the hand of the avenger of blood, that he may die.

Deuteronomy 19:11–12.

The Talmud understands these verses to mean that the killer is handed over to the court for trial. See BABYLONIAN TALMUD, *supra* note 21, *Makkoth* 10b. Another explanation, more in line with the plain meaning of the text, is that the slayer is given to the blood avenger because of a technical defect in the proof that would preclude conviction. See DON ISAAC ABARBANEL, 5 COMMENTS ON THE TORAH 186 (Poel HaMizrachi ed. 1984) (asserting that the court gives the killer to the blood avenger when there is a defect in the two-witness or warning requirements).

⁴³ See, e.g., *State v. Wilds*, 515 S.E.2d 466, 471–73 (N.C. Ct. App. 1999) (affirming conviction of murder

in the first degree based on evidence of malice, premeditation, and deliberation).

⁴⁴ See, e.g., *Green v. State*, 715 So. 2d 940, 943 (Fla. 1998) ("Premeditation is the essential element that distinguishes first-degree murder from second-degree murder.").

⁴⁵ Such slayers are, however, subject to death at the hands of the blood avenger.

⁴⁶ *Exodus* 21:13.

⁴⁷ See Chaim ben Attar (Ohr Hachaim), *Comments on Exodus* 21:13, in 2 MIKRAOT GEDOLOT 349 (Friedman ed. 1971) (understanding that, in using the phrase, "God cause it to come to hand," the Torah indicates that the actor bears less responsibility for the wrong).

⁴⁸ See BABYLONIAN TALMUD, *supra* note 21, *Makkos*, Introduction to ch. 2 (translating the Hebrew phrase as "bordering on the intentional" and defining it as "a killing which results from gross negligence and an obvious disregard for the safety of the victim. The Torah . . . [considers the crime] too severe to be atoned for by mere exile"). For a more refined exposition of these gradations of intent in the Jewish law of homicide, see Arnold N. Enker, *Error Juris in Jewish Criminal Law*, 11 J.L. & RELIGION 23, 27–33 (1994–1995).

⁴⁹ Although the Hebrew root in question—*shen, gimmel, gimmel*—is generally translated as "inadvertent," the description of such offenses in the Torah and Talmud encompasses actions that would be roughly equivalent to simple negligence in American law. See BABYLONIAN TALMUD, *supra* note 21, *Makkos* 7a (defining the word *shogeg* in an explanatory note as "the state of inadvertence which is nevertheless subject to a sentence of [exile] because of the degree of negligence involved"). Thus, although the English term "inadvertent" may connote accidental killings, its Hebrew counterpart, defined above, does not. Rather, the Hebrew word for accident is *oness*, which the ArtScroll Talmud defines as a "complete accident." See *id.*, *Makkos* 7b(2); see also *id.*, *Makkos* 7b(1)–(2) (discussing the distinction between inadvertent slayings and slayings without awareness); *id.*, *Makkos*, Introduction to ch. 2 (defining "inadvertent killing" as one "which results from some measure of negligence, but not gross negligence. This is the type of unintentional killing for which the Torah decrees . . . exile"); cf. THE CODE OF MAIMONIDES—TORTS, *supra* note 22, *Murder and the Preservation of Life* 6:23, at 212 (stating that one who "slays inadvertently and in complete unawareness," is subject to exile, whereas one who "slays inadvertently in a manner that is almost an accident" is exempt from both exile and the blood avenger. Maimonides includes both of the foregoing types of killers within the category of "slayers without intent." *Id.*, *Murder and the Preservation of Life* 6:1, at 212. He also includes within that category a third class, namely, those who slay "inadvertently but in a manner that approximates willfulness because there is present a circumstance tantamount to negligence, or because he should have been careful but was not." *Id.*, *Murder and the Preservation of Life* 6:4, at 212–13); but see Enker, *supra* note 48, at 27 n.15 ("The similarity [of *shogeg*] to negligence is obvious. Still, I hesitate to equate the two. There is no concept in Jewish law precisely equivalent to the common law's 'reasonable man.' The standard in Jewish law seems to me to be somewhat stricter than 'reasonableness,' which involves a balancing of interests. What is at stake in Jewish law is compliance with God's command, whose ultimate consequences may reach beyond human comprehension. In this setting, balancing the material interests involved may miss much of the point.").

The better to complicate matters still further, one Rabbi's "gross negligence" may be another's "near accident." The Talmud discusses the case of a man turning a comer with a knife in his hand, who then bumps into the victim and kills him. See BABYLONIAN TALMUD, *supra* note 21, *Makkos* 7b(2). One rabbinic authority classifies the wrong as nearly accidental, because the victim should have seen the danger coming and taken precautions, while another classifies the wrong as intentional, because we expect one walking around with a knife to be especially careful. See *id.* (describing contrast between the Ritva's and Rambam's interpretations). The difference in classification is not academic. If the actor's conduct was close to accidental, he is free from both exile and the blood avenger, whereas if the actor's conduct is close to intentional, the actor is subject to divine retribution, and the actor must spend the remainder of his life trying to elude the blood avenger.

⁵⁰ See BABYLONIAN TALMUD, *supra* note 21, *Makkos*, Introduction to ch. 2 (noting that the reckless or grossly negligent killer is "subject to the vengeance of the victim's relatives [and] . . . has no protection from their attempts to kill him").

⁵¹ In addition, completely accidental killings are not subject to exile or any other sanction. Similarly, one who commits justifiable homicide is not punished.

⁵² The first incident of what looks like murder in the Bible is that of Cain and Abel. See *Genesis* 4:8. Arguably, the killing occurred in the heat of passion or under extreme emotional disturbance and thus only

amounted to manslaughter. See Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 421 n.4 (1982) ("The first crime reported in the Bible was the killing of Abel by Cain Although the facts surrounding the event are less than clear, in light of the fact that this was a familial killing, in which jealousy appears to have been a factor, this may constitute *le crime passionel*.").

⁵³ See *Genesis* 37:3–9.

⁵⁴ See *id.* at 37:18–20.

⁵⁵ *Id.* at 37:21–22.

⁵⁶ *Id.* at 37:24. Rashi, the great medieval exegetist, picks up on the redundancy in the text, stating: "From the implication of the statement, 'And the pit was empty,' do I not know that there was no water in it? Then what is the need for . . . 'There was no water in it?' There was no water in it, but there were in it snakes and scorpions." PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 28, *Genesis* 37:24, at 377.

⁵⁷ Nachmanides raises questions about this interpretation. See RAMBAN, *supra* note 28, *Genesis* 37:22, at 458.

⁵⁸ See *Genesis* 37:22.

⁵⁹ *Id.* at 37:21.

⁶⁰ See Ohr Hachaim, *supra* note 47, *Comments on Genesis* 37:20–23, in 2 MIKRAOT GEDOLOT 471–72; *cf.* RAMBAN, *supra* note 28, *Genesis* 37:22, at 458:

Now Reuben did not say, "Shed not his blood," [but instead, he said, "*Shed no blood*,"] in order to make it appear that he is not saying it because he loves him, but in order that they should not spill blood. Thus he taught them that the punishment of he who indirectly causes death is not as great as that of he who personally spills blood.

⁶¹ See Ohr Hachaim, *supra* note 47, at 471; RAMBAN, *supra* note 28, *Genesis* 37:22, at 458 (responding to the rabbinic interpretation that the pit contained serpents and scorpions, and suggesting that:

If so, the serpents and scorpions must have been in the cracks in the pit, or it was deep and they did not know about them. Had they seen them and known that they did not harm Joseph, it would have become clear to them that a great miracle had been done to him, and that he was indeed a perfectly righteous man. They would then have known that his merits would save him from all evil,)

⁶² See 1 MIDRASH RABBAH, *Genesis* 10:6, at 74 (H. Freedman & Maurice Simon eds. & trans., 3d ed. 1983) ("There is not a single herb but has a constellation in heaven which strikes it and says 'Grow'"); BABYLONIAN TALMUD, *supra* note 21, *Berakoth* 58a, 67b (even the supervisor of a well, that is, a minor functionary, is appointed by God); BABYLONIAN TALMUD, *supra* note 21, *Chulin* 7b (one does not bang his finger unless it has been decreed by God).

⁶³ See Ohr Hachaim, *supra* note 47, at 471; NISSIM BEN GIRONDI, DRASHOT HARAN 139 (Leon A. Feldman ed., 1973) (asserting that the problem of evil is not intractable because God does not run every minor aspect of life). Even according to this second opinion, there is still divine guidance for all major and some minor events. *Id.* at 139.

There is also a third interpretation of the brothers' actions, namely, that they constituted themselves a court of law and found Joseph guilty of attempting to deprive them of their birthrights as leaders of the twelve tribes of Israel. See 1 THE MIDRASH SAYS 352 (Moshe Weissman ed. 1980) ("The brothers sat in judgment over Yosaif and came to the conclusion that he must be put to death.").

⁶⁴ See, e.g., BABYLONIAN TALMUD, *supra* note 21, *Berakoth* 33b & n.3 (observing that "[e]verything is in the hand of heaven except the fear of heaven," to which the editor appends a footnote stating, "[A]ll a man's qualities are fixed by nature, but his moral character depends on his own choice.").

⁶⁵ *Exodus* 21:12; *Leviticus* 24:17; *Numbers* 35:16–18, 20:21, 30:31.

⁶⁶ See *Numbers* 35:30 (explicitly requiring two witnesses to convict); *Deuteronomy* 17:6, 19:15; BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 24b, 27b (disqualifying certain wrongdoers and specified relatives from being witnesses).

⁶⁷ See BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 80b; THE CODE OF MAIMONIDES, BOOK 14: THE BOOK OF JUDGES, *Sanhedrin* 12:2, at 34 (Abraham M. Hershman trans., 1949) [hereinafter THE CODE OF MAIMONIDES–JUDGES] ("How is he warned? He is told: 'Abstain, or Refrain, from doing it, for this is a transgression carrying with it a death penalty,' or, 'the penalty of flagellation.'").

⁶⁸ See BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 81b ("If he [the transgressor] was warned [of his liability to flagellation], but remained silent, or . . . nodded his head, the first and second time he is to be

warned, but on the third occasion he is placed in a cell") (alteration in original).

On the other hand, if the transgressor does not heed a warning and continues to pursue another in order to slay him (or her, in the case of certain forbidden sexual contacts), an onlooker may kill such a pursuer if necessary. THE CODE OF MAIMONIDES—TORTS, *supra* note 22, *Murder and the Preservation of Life* 1:6–7, 1:10–11, 1:15, at 196–98. Thus, the law of the pursuer, or *rodef*, may blunt the force of the warning and two-witnesses requirements, at least in a subset of cases.

⁶⁹ See, e.g., BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 37b (providing the following as an example of a judicial admonition to be given to prospective witnesses in a homicide case: "Perhaps ye saw him running after his fellow into a ruin, ye pursued him, and found him sword in hand with blood dripping from it, whilst the murdered man was writhing [in agony]: If this is what ye saw, ye saw nothing").

⁷⁰ See BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 9b; AARON KIRSCHENBAUM, SELF-INCRIMINATION IN JEWISH LAW 114–15 (1970).

⁷¹ Jewish law also does not generally punish attempts. See BABYLONIAN TALMUD, *supra* note 21, *Kiddushin* 40a. If, however, the crime is defined as an attempt, liability ensues. For example, there is a law that punishes "plotting witnesses" who falsely testify that the defendant committed a particular crime. If subsequent witnesses testify that the original witnesses were with them at the time of the crime (and therefore testified falsely), the first set of witnesses will suffer the same punishment, e.g., death penalty, flogging, that they plotted to have inflicted upon the defendant. This punishment can occur only if the court has rendered its verdict but has not yet carried out its sentence. If the discovery of the plotting witnesses is too early or too late, they cannot be punished. Therefore, this law, in effect, punishes attempt. See ARTSCROLL SERIES, THE MISHNAH, SEDER NEZIKIN, VOL. II(B), *Makkos* 1:4, at 19–23 (Avrohom Y. Rosenberg trans., 1987) [hereinafter THE MISHNAH]. For explanations concerning why plotting witnesses are punished only after judgment but before implementation of sentence, see YEHUDA NACHSHONI, 5 STUDIES IN THE WEEKLY PARASHAH 1302–10 (Shmuel Himelstein trans., 1989).

⁷² See BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 79a; accord PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 28, *Exodus* 21:23, at 242.

⁷³ THE CODE OF MAIMONIDES—TORTS, *supra* note 22, *Murder and the Preservation of Life* 4:1, at 205.

⁷⁴ See, e.g., BABYLONIAN TALMUD, *supra* note 21, *Yebamoth* 27a (describing a hypothetical family of five sons, in which three of the brothers are married to three sisters and the remaining two brothers are single, and then discussing how the commandment of levirate marriage would be fulfilled if the three married brothers were to die simultaneously); see generally ADIN STEINSALTZ, THE ESSENTIAL TALMUD 234–38 (Chaya Galai trans. 1976) (discussing, in a chapter entitled "Strange and Bizarre Problems," the various reasons for inclusion of such problems in the Talmud).

⁷⁵ See BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 76b.

⁷⁶ While this hypothetical is not included in the Mishnah, since, as noted in the text following this footnote, the next Mishnah example is a harder case than this one, the result in this case follows *a fortiori*. Such an omission is in accord with the terse style of the Mishnah, which thus generally includes only information that is not otherwise derivable.

Maimonides suggests the hypothetical accompanying this footnote, see THE CODE OF MAIMONIDES—TORTS, *supra* note 22, *Murder and the Preservation of Life* 3:9, at 204, and also adds an analogous example: "[I]f one puts his hand over another's mouth and nose and releases him when the latter is convulsive and unable to live, . . . the offender must be put to death . . . inasmuch as he himself is deemed to have suffocated the victim." *Id.*

⁷⁷ See BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 76b.

⁷⁸ For the civil counterpart of this rule, see BABYLONIAN TALMUD, *supra* note 21, *Babba Kamma* 10a, the background of which is as follows: under Jewish law one is fully responsible for another's non-fatal damages caused by a pit that he has dug, regardless of its depth. If, however, the injured animal dies, there is a presumption that, if the pit was less than ten handbreadths deep, the animal's death was partially due to pre-existing causes, and the digger is not liable for the death. If, however, an individual happened upon a pit that was nine handbreadths deep and deepened it by one more handbreadth, he is held liable for the resulting death.

⁷⁹ See BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 76b.

⁸⁰ See *id.*

⁸¹ See MISHNAH, *supra* note 23, *Sanhedrin* 9:1, reprinted in BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 76b.

⁸² See BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 76b.

⁸³ One is left to wonder why the victim failed to escape. According to Rashi, "the hour" caused his death—the contemporary analogue might be that it was "not his day" suggesting a divine determination that the victim's time was up. *See id.*

⁸⁴ See BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 77a (Tosafists, famed early medieval commentators, arguing with respect to a kindred hypothetical in the Gemara, that in cases in which the perpetrator confines the victim, he is liable only when the death-producing conditions are present at the time that the victim is restrained.).

⁸⁵ See MISHNAH, *supra* note 23, *Sanhedrin* 9:1, reprinted in BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 76b.

⁸⁶ See BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 78a; cf. David Ignatius, *By 2029, Your Computer Could Be Feeling Lonely*, INT'L. HERALD TRIBUNE, June 30, 1999, at 9 (discussing possibility that "over the next 30 years computers will progress to the point that their intelligence will be indistinguishable from that of a human being . . . [and that] the machines of the future will have all the attributes of humans: personality, emotion, humor, and appreciation of beauty . . .").

⁸⁷ In contrast, under American law even one who keeps a vicious animal on his premises may be held criminally liable if it attacks someone. *See, e.g.,* *People v. Berry*, 2 Cal. Rptr. 2d 416, 422 (Cal. App. 4th 1991) (affirming conviction for involuntary manslaughter and rejecting defendant's claim that parents had failed to exercise proper supervision of their child who was killed by the dog); *People v. Sandgren*, 98 N.E.2d 460, 466 (N.Y. 1951) (affirming conviction for second degree manslaughter for knowingly keeping vicious dogs that had previously attacked people).

⁸⁸ See BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 76b.

⁸⁹ See MEIR TURDOS HALEVI BULAFIA, YAD RAMAH, CHIDUSHEI HARAMAH AL MASECHET *Sanhedrin* 67b, at 147 [hereinafter YAD RAMAH] (According to the Yad Ramah, a thirteenth century commentator, in the last Mishnah scenario the perpetrator actually pushes the snake's fangs into the victim's flesh. The Yad Ramah asserts that the Sages would hold there was no liability even in that case. Presumably he concluded that pushing the fangs did not release the venom, which was left to the snake to do.).

⁹⁰ See Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (discussing the implications and effects of rule-based and standard-based decision making). For an insightful discussion of rules and standards under Jewish law, see Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparison and Contrast*, 24 HASTINGS CONST. L.Q. 441, 448–501 (1997).

⁹¹ See BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 78a.

⁹² *See id.*, *Sanhedrin* 78a & n.41.

⁹³ *See id.*, *Sanhedrin* 78a.

⁹⁴ Cf. *Exodus* 21:28–30 (prescribing death by stoning in cases of oxen who gore persons to death).

⁹⁵ See BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 77b (demonstrating that one of the difficulties with judicial punishment of reckless homicide is that the warnings required may be uncertain and therefore invalid).

⁹⁶ *See id.*, *Sanhedrin* 76b–78a (While these hypotheticals take up less than three folio pages in the original Hebrew and Aramaic text, the discussions are extremely dense, so much so that their almost equally dense English translation with explanatory notes in the ArtScroll edition of the Talmud occupies approximately eleven pages).

⁹⁷ *See id.*, *Sanhedrin* 77a.

⁹⁸ *See id.*, *Sanhedrin* 77a (Rashi's commentary).

⁹⁹ *See id.*

¹⁰⁰ *See id.*

¹⁰¹ See BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 77a (demonstrating, according to Rashi's commentary, that in such cases the defendant is instead subject to divine judgment).

¹⁰² *See id.* (demonstrating, on the other hand, that the Gemara concludes that one is not liable for damages for killing another's animal by confining it under the same circumstances).

¹⁰³ See YAD RAMAH, *supra* note 89, at 147 (According to the Yad Ramah, in case C the sun is already on the scene, whereas in case A, the victim has food in his digestive system at the time he is restrained. It is only when the food has been totally absorbed that hunger ensues.).

¹⁰⁴ See BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 77b.

¹⁰⁵ See *id.*, *Sanhedrin* 77a–77b.

¹⁰⁶ See *id.*

¹⁰⁷ See *id.*, *Sanhedrin* 77b. Maimonides summarizes these cases as follows:

[A]n appraisal should be made [I]f one builds an enclosed space around another and deprives him of air, or if one puts another into a cave or a room and fills it with smoke so that he dies, or if one puts another into a room of marble and keeps a lamp alight there until he is killed by the foul air . . . the offender must be put to death . . . inasmuch as he himself is deemed to have suffocated the victim.

THE CODE OF MAIMONIDES–TORTS, *supra* note 22, *Murder and the Preservation of Life* at 204.

¹⁰⁸ See BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 77a.

¹⁰⁹ See *id.* (explaining that in the lion scenario, "the victim could not have saved himself in any case" since he was probably a prisoner thrown into an arena to be "torn by lions"); *id.*, (Rashi explaining that in the lion scenario, "the victim would have perished in any case").

¹¹⁰ See BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 77a (citing Meiri).

¹¹¹ See *id.* (stating that if one person bound another "before gnats who bit him to death, he is not liable").

¹¹² See *id.* ("The victim could have fended off the gnats had he not been tied up. Hence, the one who tied him is guilty of murder."). Unlike the cases in the Mishnah, where the animal is considered an independent supervening cause, mosquitoes are not, because they will always attack. See YAD RAMAH, *supra* note 89, at 147.

¹¹³ See BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 77a (stating that there is no liability in the mosquito case).

¹¹⁴ See *id.* (stating that some mosquitoes go and others come).

¹¹⁵ See *id.* (stating that, in Rava's view, "the entire swarm of gnats is reckoned as one unit").

¹¹⁶ See *id.* (comparing the gnats to flowing water).

¹¹⁷ See *id.*, *Sanhedrin* 77b (citing Rashi for the presumption that the wrongdoer removes the ladder before the victim "falls").

¹¹⁸ See *id.* (explaining that the perpetrator is not liable because the victim still had an "avenue of escape" at the moment of the push).

¹¹⁹ See BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 77b (setting forth the arrow scenario).

¹²⁰ See *id.* (stating that the arrow shooter "is not liable, because when he shot the arrow its force was spent").

¹²¹ See *id.* (setting forth the scenario).

¹²² See *id.* (stating that the shooter is not liable because the victim could have been healed at the time of the shot).

The sequence of Cases F, G, and H is in accordance with the mishnaic structure known as "not only this, but even this," meaning that justification of the result becomes progressively more difficult. In Case F the perpetrator's push into the pit was not sufficient to kill the victim. In Case G, however, the shot of the arrow did have sufficient energy to kill, and one might have thought that the perpetrator would consequently be liable. Nonetheless, the Gemara teaches us that even in Case G the wrongdoer is not guilty. Case H is the most difficult, because the defendant actually inflicted a mortal wound. The Gemara instructs that, even so, since the victim could have been healed, the actions are separated and no liability attaches in Case H either. See AVRAHAM YEHOSHUA HESCHEL BORENSTEIN, *SANHEDREI KITANA* § 77b, at 235.

¹²³ See THE MISHNAH, *supra* note 71, *Shabbath* 1:1, at 100 (suggesting the principle in Jewish law that what looks like a seamless action may be viewed as composed of discrete parts). Compare with LAFAVE & SCOTT, *supra* note 1, § 6.3(c), at 326:

The basic facts common to all of these cases are that the defendant has engaged in two separate acts: first, an act done with intent to kill which, unknown to the defendant, does not bring about death; and second, an act done to conceal the crime or dispose of what is thought to be a dead body, which does bring about death. . . . Is it not true that a murder conviction is foreclosed because of a lack of concurrence, in that the act done with intent to kill did not kill and the act which did kill was not done with intent to kill? Some courts have so held, although the weight of authority is to the contrary. (footnotes and citations omitted).

¹²⁴ See BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 77b ("One is not liable . . . for committing murder unless one's act will *inevitably* lead to the victim's death. . . . [The perpetrator is not liable for acts which bring] about the victim's death only indirectly."); *but see id.* (spelling out one Sage's

argument that removal of the shield or destruction of the curative medicine is like confining a victim where a deadly element is present, which would appear to be governed by case two of the Mishnah).

¹²⁵ See BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 77b ("E]ven if there were medicines in the marketplace that the victim could have purchased, the one who shot the arrow is not liable . . .").

¹²⁶ See *id.* (stating that one cannot be liable for murder unless one's act will *inevitably* cause a victim's death); see also *id.* (giving Rashi's view that even if the medicine subsequently became unavailable, the defendant would still not be liable because of its availability at the time of the initial wrongful act).

¹²⁷ See BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 77b ("[The victim] could have used [the medicine] to heal himself but he did not do so.").

¹²⁸ *Miranda v. Arizona*, 384 U.S. 436, 467–73 (1966) (holding that the Fifth Amendment precludes the use of confessions obtained from a suspect during custodial interrogation absent prescribed warnings).

¹²⁹ See *Arizona v. Hicks*, 480 U.S. 321, 324–25 (1987) (holding that if a police officer who wants to make a minimal inspection moves an object, no matter how minimally, this constitutes a search under the Fourth Amendment, thus requiring probable cause).

¹³⁰ See BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 77b (setting forth the scenario).

¹³¹ See *id.* (stating that the perpetrator in this scenario would not be liable).

¹³² It is also possible to understand the immunity from liability in Case J on that same basis, namely, absence of death from the snapshot at the time of the wrongful act. The phrase used by the Talmud in Case J is, "He has left the court an innocent man," BABYLONIAN TALMUD, *Sanhedrin* 77b, meaning not guilty as a matter of law, as opposed to factually innocent. The implication is that, as in the preceding hypotheticals, the defendant's initial wrongful act is incomplete because prior to death the curative medicine has become available. That is, at the time of judgment there is an escape route. Therefore, even though at the actual time of wrongdoing all the elements necessary to establish guilt are present because there is no escape route, the perpetrator is nonetheless acquitted because at some future point he would be found not guilty. According to this explanation, the victim's inaction is not a superceding cause. Rather, the snapshot of the crime is taken in slow motion so that although the original act was death-producing with no means of escape, the subsequent availability of curative medicine becomes part of the picture and precludes liability. This explanation, however, appears to be in tension with the notion that two distinct acts cannot be combined, such as shooting the arrow and taking away the shield. One way of distinguishing the two situations is by saying that combination is permitted for the purpose of excusing conduct, but not in order to establish liability.

¹³³ See BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 77b (giving Rashi's interpretation, as explained by the Maharsha).

¹³⁴ See *id.* (setting forth the scenario).

¹³⁵ See *id.* (stating that the thrower is liable).

¹³⁶ See *id.* (stating Rava's theory that the thrower is liable because "even after the stone rebounded off the wall, it was still carried by [the thrower's] direct force."). This scenario raises the question of the adequacy of any warning the witness gave the defendant in this context. The warning here would be: "Do not throw the stone because it *might* rebound and kill someone, in which case you will be subject to capital punishment." Some consider this warning to be defective because of its qualified nature. See *id.* (stating that "a warning against a deed that might not result in the commitment of the crime" is an uncertain warning and is therefore invalid). The Gemara, however, cites a mishnaic era source asserting that the warning is not uncertain, because it is certain that the object will rebound and kill the victim. See *id.*

¹³⁷ The Gemara tests this standard by applying it to various cases of religious ritual, concluding that the Mishnah verses dealing with religious ritual (that suggest an opposite result) are distinguishable. See BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 77b.

The Gemara goes on to treat ricochet cases in the context of unintentional homicide, in which the lesser sanction of exile to a city of refuge applies. In the case of unintentional homicide, the defendant must still intend to do the act that causes death. Since, however, warnings are necessarily not required in such cases—if given, the wrong would then be intentional—the court must find a rule of thumb to ascertain intent. Thus, in the case of one who kills another unintentionally while playing ball, if the victim is standing close to the wall (less than 4 cubits away), the defendant is not guilty, whereas he *is* culpable if the victim is standing farther away from the wall, based on the generalization that those who play the game will come close to the wall with intent to throw the object with great force, thereby propelling it a greater distance. The generalization appears to be valid, because in the game one player would throw the ball

against the wall, and his opponent would attempt to catch it on the rebound and hit his adversary with it before the latter could run away. Therefore, it behooves the original player to hurl the ball with great force so that he can escape before his opponent retrieves the ball and sends it back in his direction. *See id.*

According to Maimonides, if the wrongdoer is warned in this context, he is not liable if the victim was standing less than four cubits from the wall, but he is liable if the victim is at a greater distance, even "one hundred cubits away, provided that the ball had sufficient force to kill." THE CODE OF MAIMONIDES—TORTS, *supra* note 22, *Murder and the Preservation of Life* 3:12, at 205.

¹³⁸ *See* BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 77b (setting forth the scenario). The Gemara does not make clear whether the defendant ruptures the dam at the same time or immediately following his binding of the victim.

¹³⁹ *See id.*

¹⁴⁰ *See id.* Rav Pappa said: there was this person who bound his fellow by the seashore and caused a gush of water to sweep over him, and thereby killed him. It is deemed his arrow; i.e., the water is like an arrow, which he shot at the victim and therefore he is liable to execution. *Id.*

¹⁴¹ *See* BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 77b ("However, these words [imposing liability] apply only where the water that killed the victim reached him by means of the murderer's primary force. But where it reached him by means of the murderer's 'secondary' force, it is a case of mere causation, and the murderer is not liable.").

¹⁴² *See id.*

¹⁴³ *See id.* This result may seem at variance with our snapshot metaphor, requiring that all the death-producing elements be present "in the picture" at the same time, unless the Gemara hypothetical means that the binding and the breach of the dam occur simultaneously. The Gemara may not have dealt with that issue because it had already established the rule that all elements must be present at the time of the wrongful act in the earlier cases. Now the Gemara is interested in resolving the question of primary and secondary force, and therefore it focuses only on that issue.

¹⁴⁴ *See id.*, *Sanhedrin* 78a.

It should be noted . . . that if one merely releases a stone, allowing it to drop downward, and it kills someone, the perpetrator *is* liable to execution. Removing an impediment to a projectile's natural motion is deemed tantamount to actively propelling the projectile, as is evident from the preceding case in which one killed another by breaching a barrier that was containing water.

Id. (emphasis in original) (citations omitted).

¹⁴⁵ *See* BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 77b ("And Rav Pappa said: if one threw a stone upwards but it went somewhat to the side and killed someone, [the thrower] is liable to execution.").

¹⁴⁶ *See id.* (noting that Mar bar Rav Ashi argues that a stone falling downward is no longer under the force of the thrower).

¹⁴⁷ *See id.*, *Sanhedrin* 78a (explaining that the stone's trajectory has a vertical component, which gravity opposes, and a horizontal component, which gravity does not affect).

¹⁴⁸ *See id.* ("The Gemara refers to this horizontal force as a "weak force," because it is only a part of the thrower's initial force."); *see also* THE CODE OF MAIMONIDES—TORTS, *supra* note 22, *Murder and the Preservation of Life* 4:6, at 206–07 (interpreting *Leviticus* 24:17 to mean that there is no capital punishment "until one person takes the life of another [So] if two persons push another into water or press him down under it, . . . [they] are [both] exempt").

The final case in the Gemara discusses causation questions of a somewhat different nature. At issue is a scenario in which ten people with clubs hit the victim, either seriatim or concurrently, until he dies. Each assault is a mortal wound, but the victim does not die until after the tenth perpetrator beats him. The Gemara rules that there is no liability for anyone in either scenario, consecutive or concurrent beatings. The only disputed issue is whether, in the seriatim situation, the last wrongdoer can be held liable, as argued by a dissenting Sage. *See* BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 78a, for a lengthy discussion of this question. Causation, however, is not the main focus of the Sages' debate. Rather, the Rabbis deal primarily with the substantive doctrine of whether one can be held liable for killing a dying person.

An analogue to the *gruma* role set forth in the *Sanhedrin* tractate can also be found in another talmudic discussion. One of the Sages taught that if a person threw a clod of earth at a tree and struck a stem, which in turn caused a cluster of fruit to fall off, thereby killing a bystander, the perpetrator would

not be subject to exile, because the case involves a secondary, indirect force. See BABYLONIAN TALMUD, *supra* note 21, *Makkos* 8a. The concept of a secondary force can be explained in the same manner as the *gruma* rules. Since the killing force's relationship with the perpetrator's act is attenuated, the punishment therefore is left to the heavenly court.

¹⁴⁹ See, e.g., *United States v. Fleming*, 739 F.2d 945, 947–48 (4th Cir. 1984) (upholding murder conviction of drunken motorist driving at excessive speed, and noting that murder does not require proof of intent to kill, only gross recklessness, so that jury could infer that defendant was aware of a serious risk of death or grave bodily harm).

¹⁵⁰ See 2 ARYEH KAPLAN, HANDBOOK OF JEWISH THOUGHT 271 (Abraham Sutton ed., 1992) ("Just as God makes the punishment fit the crime, so does He make the reward fit the good deed") (footnote omitted).

¹⁵¹ See BABYLONIAN TALMUD, *supra* note 21, *Shabbath* 119a (giving examples of persons whose charitable deeds were rewarded with wealth).

¹⁵² See 2 Kaplan, *supra* note 150, at 270 ("In order to demonstrate His moral law, and magnify His name, God often makes the punishment fit the crime") (footnotes omitted); see also TANACH: THE TORAH/PROPHETS/WRITINGS, *Obadiah* 1:15, at 1371 (Nosson Scherman ed., 1996) ("[A]s you have done, [so] shall be done to you; your requital shall return upon your head.").

¹⁵³ See, e.g., *Psalms* 44:22 ("Is it not so that God can examine this, for He knows the secrets of the heart.").

¹⁵⁴ See Irene M. Rosenberg & Yale L. Rosenberg, *Guilt: Henry Friendly Meets the MaHaRaL of Prague*, 90 MICH. L. REV. 604, 620 (1991) (explaining that according to the MaHaRaL, a great medieval philosopher and commentator, the requirement that judges deliberate overnight before rendering a guilty verdict, unlike God who can discern absolute truth instantly, reflects the imperfection of human courts which must explore the issues deeply).

¹⁵⁵ See 1 KAPLAN, *supra* note 150, at 24 ("Free will is required by God's justice. Otherwise, man would not be given or denied good for actions over which he had no control"); *id.* at 29 ("Since free will is a prime ingredient of God's purpose, He does not do anything in this world that might destroy or diminish man's choice between good and evil. Therefore, He does not openly reward the good or punish the wicked in this world; it would diminish man's freedom to sin.").

¹⁵⁶ See 2 PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 28, *Exodus* 23:7, at 271 (commenting on the biblical verse, "For I will not justify the wicked," Rashi states: "It is not (incumbent) upon you to [find him guilty], for I shall not justify him in My court. If he has gone forth from your hand acquitted, I have many messengers to slay him with the death of which he is guilty"); cf. Enker, *supra* note 48, at 30 (asserting that the purpose of the extreme procedural safeguards, in particular the warnings that witnesses are required to give to the wrongdoer, is to limit liability to those who have deliberately and brazenly rebelled against God, rather than reflecting heightened concern with factual innocence).

¹⁵⁷ But see Enker, *supra* note 48, at 26 (viewing the warning requirements as applicable only in the context of "the mandatory Biblical punishments of death and whipping, because such mandatory punishments are imposed only when the defendant violates the law in deliberate and contumacious disobedience of God's Will and in openly declared rebellion against Him").

¹⁵⁸ See THE TALMUD: THE STEINSALTZ EDITION PART I 3 (David Strauss ed. & trans., 1996) ("Jewish law contains special procedures and laws of evidence, all of which serve the end of achieving absolute certainty. In the event of even the slightest doubt, the accused is not found guilty.").

¹⁵⁹ THE CODE OF MAIMONIDES—JUDGES, *supra* note 67, *Sanhedrin* 18:6, at 52–53 (explaining that no one may "be declared guilty on his own admission" because coercion, confusion or misery rather than guilt may have caused the confession).

¹⁶⁰ 2 MAIMONIDES, THE COMMANDMENTS 270 (Charles B. Chavel trans., 1967) (explaining that the prohibition of circumstantial evidence prevents the punishment of the innocent).

¹⁶¹ Cf. MAHARAL, SEFER BE'ER HA-GOLAH 26–27 (L. Honig & Sons ed., 1960) (asserting that the function of the human court is not to do justice, but to ferret out evidence of the defendant's innocence).

¹⁶² See, e.g., *Davis v. United States*, 512 U.S. 452, 460 (1994) (observing that "a rule requiring the immediate cessation of questioning" when the defendant makes an ambiguous reference to a lawyer "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate investigative activity") (internal quotation marks omitted); *Moran v. Burbine*, 475 U.S. 412, 424 (1986) (upholding conviction even though police lied to defendant's attorney and failed to advise defendant that he had an attorney, and noting the need for a "proper balance between society's legitimate law enforcement interests and the protection of the defendant's Fifth Amendment rights"); *Terry v. Ohio*, 392 U.S. 1, 15–16 (1968)

(upholding the stopping and frisking of suspects upon reasonable suspicion and noting that "a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime").

¹⁶³ Even in civil cases there is a reluctance to render judgment unless the matter is seen by live witnesses. See THE CODE OF MAIMONIDES–JUDGES, *supra* note 67, *Evidence* 5:1, at 91 (interpreting the two-witness rule of *Deuteronomy* 19:15 to apply to civil litigation).

¹⁶⁴ See THE CODE OF MAIMONIDES–JUDGES, *supra* note 67, *Kings and Wars* 3:10, at 214 ("If a person kills another and there is no clear evidence, or if no warning has been given him, or there is only one witness, or if one kills accidentally a person whom he hated, the king may, if the exigency of the hour demands it, put him to death in order to insure the stability of the social order"); see also THE CODE OF MAIMONIDES–TORTS, *supra* note 22, *Murder and the Preservation of Life*, at 199 (noting that those who solicit murder or cause murder indirectly, such as by tying up the victim in the presence of a lion, may be put to death by royal decree or by the court as an emergency measure if warranted).

¹⁶⁵ See BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 46a (describing invocation of exigency jurisdiction to preserve public morality); 1 EMANUEL QUINT & NEIL HECHT, *JEWISH JURISPRUDENCE: ITS SOURCES AND MODERN APPLICATIONS* 139–213 (1980) (discussing the exigency jurisdiction in detail).

¹⁶⁶ MISHNAH, *supra* note 23, *Sanhedrin* 9:5, reprinted in BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 81b.

¹⁶⁷ See 1 QUINT & HECHT, *supra* note 165, at 148. According to Maimonides, however, if the king's court does not exercise jurisdiction with respect to solicitors of murder and those who cause death indirectly, and if the circumstances are insufficient for the rabbinic courts to invoke the exigency jurisdiction, it is the duty of the rabbinic courts, as a deterrent measure, to flog such wrongdoers almost to the point of death and to imprison them at length. THE CODE OF MAIMONIDES–TORTS, *supra* note 22, *Murder and the Preservation of Life* 2:5, at 199–200.

¹⁶⁸ The Gemara makes it clear that the exception applies only to defendants who either receive no warnings or receive warnings that they fail to acknowledge, or whose witnesses are "disjoined," that is, witnesses who saw the crime committed but who are physically separated from one another. See BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 81b.

¹⁶⁹ See 1 *Samuel* 8:4–22 (describing God's disappointment at Israel's request for a king).

¹⁷⁰ But see George B. Smith & Janet A. Gordon, *The Admission of DNA Evidence in State and Federal Courts*, 65 *FORDHAM L. REV.* 2465 (1997); James P. O'Brien, Jr., *DNA Fingerprinting: The Virginia Approach*, 35 *WM. & MARY L. REV.* 767, 780 (1994) ("The current lack of independent proficiency testing of the forensic laboratories conducting DNA fingerprinting calls into question the reliability of the various scientists, making the whole procedure questionable."); see also Bob Herbert, "How Many Innocent Prisoners?" *N.Y. TIMES, Weekly Review*, July 18, 1999 (describing Cardozo Law School's "Innocence Project," which uses DNA testing to discover wrongful convictions, so far resulting in the release of 64 prisoners, including eight on death row).

¹⁷¹ BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 37b (brackets in original).

¹⁷² DNA testing, however, is not infallible.

¹⁷³ American courts have responded to the perceived weaknesses of eyewitness identification testimony. See, e.g., *United States v. Telfaire*, 469 F.2d 552, 557–59 (D.C. Cir. 1972) (constructing a model instruction for identification testimony); *State v. Long*, 721 P.2d 483, 487–95 (Utah 1986) (adopting a mandatory cautionary charge for eyewitness testimony); Robin Sanders, Note, *Helping the Jury Evaluate Eyewitness Testimony: The Need for Additional Safeguards*, 12 *AM. J. CRIM. L.* 189, 222–24 (1984) (proposing a model instruction for cases involving identifying eyewitness testimony).

Mistaken identification would be far less likely under talmudic law, for the witnesses have warned the defendant and received his acknowledgment, during which time they undoubtedly had ample opportunity to observe the wrongdoer.

¹⁷⁴ See Norah Rudin & Keith Inman, *Exonerated By Science*, 37 *JUREMETRICS J.* 319, 320 (1997) ("The trial of O.J. Simpson for homicide and recent allegations of misconduct at the FBI laboratory bring into sharp relief issues of quality assurance, laboratory and analyst qualifications, ethical standards and the continuing evolution of the practice of forensic science.").

¹⁷⁵ See BABYLONIAN TALMUD, *supra* note 21, *Shebuoth* 34a, 46b (Tosafot advocating use of circumstantial evidence of seemingly unquestionable trustworthiness in both civil and capital cases, based on example of victim leaving defendant's home with a knife in his back that could not have been put there either by the

victim or a third party); *but see* YAD RAMAH, *supra* note 89, at 78–79 (concluding that such evidence would be admissible in civil but not capital cases).

¹⁷⁶ See WILLIAM WILLS, AN ESSAY ON THE PRINCIPLES OF CIRCUMSTANTIAL EVIDENCE 48–49 (Philadelphia, T. & J.W. Johnson, 1853):

There is another source of fallacy and danger, to which . . . circumstantial evidence is peculiarly liable, and of which it is necessary to be especially mindful. Where the evidence is direct; if the testimony be credible, belief is the immediate and necessary result; whereas, in cases of circumstantial evidence, processes of inference and deduction are essentially involved;—frequently of a most delicate and perplexing character,—to numberless causes of fallacy, inherent in the very nature of the human mind itself, which has been profoundly compared to the disturbing power of an uneven mirror, imparting its own nature upon the true nature of things.

See also Lyman R. Patterson, *The Types of Evidence: An Analysis*, 19 VAND. L. REV. 1, 6 (1965):

[T]he inferential process in using direct evidence is a simple one, requiring only a direct inference, which coincides with the proposed conclusion. The inferential process in using circumstantial evidence is much more complicated, requiring a series of inferences, and the ultimate inference which coincides with the proposed conclusion is an indirect one.

¹⁷⁷ Direct evidence may also require inferences, but they are generally far less attenuated, such as an inference that the bullet lodged in the victim's chest in fact caused his death. *See* Commonwealth v. Hannan, 4 Pa. 269, 273 (1846) (stating that "[a]ll evidence is more or less circumstantial, the difference being only in the degree").

¹⁷⁸ See HAIM COHEN, HUMAN RIGHTS IN JEWISH LAW 229 (1984) (regarding the warning requirement as "not only the most potent safeguard against retrospective criminal legislation, but also the most liberal measure to ensure that the *mens rea* of the accused do comprise, in addition to the intention to commit the act which constitutes the offense, an actual intention to break the law").

¹⁷⁹ See, e.g., *In re Winship*, 397 U.S. 358 (1970).

¹⁸⁰ See, e.g., Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 35–36 (1987) (concluding that, in study of 350 defendants sentenced to death, 40% were innocent); Robert P. Shapiro, *The Wrong Men on Death Row*, U.S. NEWS & WORLD REPORT, Nov. 9, 1998, at 22 ("For every 7 executions—486 since 1976—1 other prisoner on death row has been found innocent.").

¹⁸¹ MISHNAH, *supra* note 23, *Sanhedrin* 4:5, reprinted in BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 37a.

¹⁸² Nonetheless, the Jewish system is not foolproof. It is theoretically possible for an innocent person to be convicted if the prosecution witnesses, who must have survived extremely rigorous cross-examination by the judges, lie successfully. *See generally* NACHSHONI, *supra* note 71, at 1302–10 (delineating the law of plotting witnesses).

¹⁸³ Cf. Gideon Alon & Moshe Reinfeld, *No Death Penalty Seen for Murders of Spouses, Children*, HA'ARETZ (English version), July 27, 1999, at 3 (quoting the new Justice Minister of Israel, who refused to form a committee to study imposition of the death penalty for murders, emphasizing that "[w]e can't create a situation in which a human being, even if he is a judge, will take the life of another human being.").

¹⁸⁴ THE COMPLETE ARTSCROLL SIDDUR 85 (Meir Zlotowitz & Sheah Brander eds., 2d ed. 1987). Compare Professor Enker's trenchant observation that the "uniqueness [of Jewish law] lies in its subtle interplay between the divine and the human. To miss this aspect of Jewish law is to fail to fathom its depths." *See* Enker, *supra* note 48, at 61.

CHAPTER NINE

"Perhaps What Ye Say is Based Only on Conjecture"— —Circumstantial Evidence, Then and Now^{*}

The Talmud, which is a redaction of the Jewish Oral Law,¹ addresses many legal issues that are quite familiar to the modern observer. The resolutions provided by Jewish law are, however, another matter. While grappling with the same questions as those presented in American law, the rabbis sometimes articulate doctrines that only vaguely resemble their contemporary counterparts or that, indeed, have never been considered in American jurisprudence.²

This phenomenon occurs frequently in the criminal law area, in part because Jewish law places a high priority on protection of the innocent in the fact finding process, allowing conviction in only those cases in which there can be practically no doubt concerning the guilt of the accused,³ and relying on an omniscient and omnipotent God to punish wrongdoers who escape conviction in the human courts.⁴

In this chapter, we will examine the talmudic prohibition against use of circumstantial evidence in criminal proceedings and compare that rule to the various approaches adopted by American courts with regard to this significant evidentiary question. The comparison and critique are important because the rules governing circumstantial evidence, particularly the special cautionary instruction, as well as the appellate sufficiency review standard, present intrinsically significant issues. The subject takes on added importance because circumstantial evidence vitally affects the determination of guilt or innocence in the criminal justice process,⁵ and it is closely intertwined with the constitutionally mandated standard of proof beyond a reasonable doubt.

A. Then—The Talmudic Prohibition Against *Omed*, Testimony Based on Conjecture

1. Biblical Sources

In three different places, the Torah, the first five books of the Bible, sets forth the requirement that guilt be established by two or more witnesses. While two of these provisions treat only capital cases,⁶ *Deuteronomy* 19:15, which applies to all criminal⁷ and most civil actions,⁸ flatly rejects liability based on the testimony of a single witness, instead mandating that "at the mouth of two witnesses, or at the mouth of three witnesses, shall a matter be established." These verses, however, do not deal explicitly with the nature or quality of the testimony that witnesses are required to give in a judicial pro-

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ceeding. That issue is addressed by the Oral Law.

Like most other tractates of the Talmud, *Sanhedrin*, which analyzes the courts and judicial procedure, includes both provisions of the Mishnah, a codification of the Oral Law redacted around 200 C.E., and of the Gemara, redacted three centuries later.⁹ One Mishnah law in *Sanhedrin* describes the manner in which the court charges witnesses in capital cases in order to assure that their testimony will be truthful and reliable. The Mishnah asks,

How were the witnesses inspired with awe? Witnesses in capital charges were brought in and intimidated [thus]: Perhaps what ye say is based only on conjecture, or hearsay, or is evidence from the mouth of another witness, or even from the mouth of a trustworthy person . . .¹⁰

The first question posed by the Gemara is, "What is meant by 'based only on conjecture?'"¹¹ The root of *omed*, the Hebrew word for conjecture used in tractate *Sanhedrin*, means to estimate or guess.¹² Rather than providing such a definition, the Gemara answers its question by giving an illustrative example drawn from the Tosefta,¹³ a Mishnaic era collection of laws:

He [the judge] says to them: Perhaps ye saw him running after his fellow into a ruin, ye pursued him, and found him sword in hand with blood dripping from it, whilst the murdered man was writhing [in agony]: If this is what ye saw, ye saw nothing.¹⁴

In other words, according to classical Jewish law, *omed*, or circumstantial evidence, is absolutely worthless in criminal cases tried in the rabbinic courts. In such proceedings, only direct eyewitness testimony by two competent witnesses who saw the complete *actus reus* is admissible in evidence.¹⁵ Moreover, while the Mishnah speaks only of capital cases,¹⁶ subsequent commentary in tractate *Sanhedrin* suggests that the rule against circumstantial evidence may apply in civil proceedings as well.¹⁷ The Gemara follows the story above with another based on almost the same facts, except that there appears to be only one witness, Rabbi Simeon ben Shatah.¹⁸ When he comes upon the bloody scene described above, he says to the sword wielder,

Wicked man, who slew this man? It is either you or I! But what can I do, since thy blood [i.e., life] does not rest in my hands, for it is written in the Torah, *At the mouth of two witnesses etc. shall he that is to die be put to death?* May He Who knows one's thoughts exact vengeance from him who slew his fellow! It is related that before they moved from the place a serpent came and bit him [the murderer] so that he died.¹⁹

An obvious question is why the Gemara adds the second episode. It seems quite similar to the first, except that it appears to involve only a single witness, whose conjectural testimony could not be any stronger than that of the two witnesses in the prior version, even though he is a renowned rabbi.

One possible response is that the Gemara does not need a reason to add a second

account with apparently only minor variations. It may be doing so merely to reinforce the original version or to provide additional clarifying information. Specifically, whereas the first version is a hypothetical, the second is rooted in an actual incident,²⁰ thus informing the reader that the rule against conjecture has concrete applicability and that the hypothetical account was not an exaggeration.

According to talmudic methodology, it may nonetheless remain appropriate to search for additional reasons underlying the highly similar second account in order to ascertain whether the Gemara is trying to teach something new. Viewed in this light, the second scenario suggests at least two additional points. First, there is the implicit admonition that we not be concerned about the concededly broad loophole permitted by the no conjecture rule: God will take care of actual murderers when human courts cannot. In the account of Rabbi Simeon ben Shatah's experience, the fatal snakebite indicates that those who are factually but not legally guilty will be punished by God in His own time and in His own way.²¹

Second, the reference to the biblical verse containing the two witness requirement may mean that just as a single witness's testimony is insufficient to convict, so is testimony based on circumstantial evidence, and that both rules come from the Torah, one explicitly and one implicitly. Alternatively or in addition, it indicates that the rule prohibiting testimony based on conjecture stems from the quoted biblical passage requiring two witnesses for conviction,²² meaning that one who does not see the entire *corpus delicti* is simply not a witness under Torah law.

This is the position taken by the Tosafists, twelfth and thirteenth century commentators on the Gemara, who explain that the reference in the Torah verse to two witnesses is to eyewitnesses who actually saw the denouement of the attack.²³ On that basis, they assert that the two witness verse of the Torah is the source of the prohibition against conjecture evidence. To reach this conclusion, the Tosafists contend that Rabbi Simeon ben Shatah was accompanied by another witness to the crime, and that the latter's presence went unmentioned out of respect to the honor of the revered rabbi.²⁴ They argue that there must have been a second witness because otherwise the inability to establish guilt could be based on a straightforward application of the two witness rule, and the account would be inapposite since it could not teach us the law against conjecture evidence. In other words, the two witness requirement would so obviously govern the matter that it would preclude any discussion of evidentiary difficulties based on the use of conjecture evidence.²⁵

Viewing the circumstantial evidence rule as a gloss on the two witness requirement is not incongruous, inasmuch as the two rules share common features. For example, both have nonrational, as well as rational, underpinnings. On the one hand, they have a counterintuitive aspect because a single trustworthy witness can certainly provide proof beyond a reasonable doubt, as can highly probative circumstantial evidence. Thus, both rules may be in the nature of divine decrees.²⁶ On the other hand, the two requirements also have a reliability aspect, insuring greater accuracy in fact finding; one relates more to the quantity of evidence and the other to its quality. Maimonides associates the two rules in his book *The Commandments*, which enumerates and explains the 613 commandments binding on Jews.²⁷ The master codifier, whose choices concerning sequence of commandments may be regarded as purposeful rather than random, places the two rules on either side of the prohibition against killing a human

being, suggesting that these two requirements are necessary to prevent conviction of the innocent.²⁸

The Mekilta, a mishnaic era commentary on the legal sections of the book of *Exodus*, provides a different biblical source for the prohibition against circumstantial evidence. It includes a variant of the bloody sword hypothetical recounted in the Gemara, one that presents an even more compelling case of factual guilt, for in it the witnesses give the assailant the required warning under Jewish law that puts him on notice that his contemplated action is a crime, and the defendant scoffs, saying, "I know all about that."²⁹ This version is given as an illustration of the meaning of *Exodus* 23:7: "[A]nd the innocent and righteous slay thou not; for I will not justify the wicked." Elsewhere in the Gemara, the Hebrew words for "innocent" and "righteous" in this verse are interpreted to mean, respectively, factually innocent and legally not guilty.³⁰ The Mekilta's recital of the story in this context and its reliance on *Exodus* 23:7 suggest that an accused person against whom the only evidence is circumstantial should be regarded as innocent, both legally and factually.³¹

Invoking the Gemara bloody sword hypothetical and its Mekilta variant, Maimonides also cites *Exodus* 23:7 as the source of the rule against circumstantial evidence, noting that "I might think that [the pursuer] should be declared guilty. Scripture therefore says, *The innocent and righteous slay thou not.*"³² Because, however, Maimonides was undoubtedly well aware of the Gemara's specific reference to the two witness rule, he was presumably not rejecting that Torah provision as an alternate source of the prohibition against conjecture. It is more likely that he instead intended to emphasize the prohibition against slaying the innocent and righteous as the primary, or at least coequal, source of the rule.

It may well be that the circumstantial evidence rule is based on both biblical provisions. These two scriptural sources for the *omed* rule need not be regarded as mutually exclusive, and, in fact, they complement one another. The two witness rule can be viewed as a specific means of implementing the more general prohibition against slaying the innocent and righteous. Furthermore, the second half of the *Exodus* verse barring conviction of the innocent and righteous—"for I will not justify the wicked"³³—explains that divine retribution will take care of cases in which a factually guilty person must be acquitted by virtue of Jewish law, whether pursuant to the two witness rule, the circumstantial evidence prohibition, or any of the other broad safeguards afforded defendants in criminal cases.³⁴ Indeed, in a sense, the Simeon ben Shatah bloody sword account in the Gemara brings the two sources together, for although Simeon ben Shatah invokes the two witness rule as the basis for finding the assailant not guilty as a matter of law, the propitious snakebite appears to exact divine justice in accordance with the final clause of the alternative source, *Exodus* 23:7.

In addition to the talmudic explication of the prohibition against conjecture evidence, the Torah itself gives specific examples that, by analogy, illustrate the importance of direct eyewitness testimony as a prerequisite to infliction of punishment, even when guilt is beyond doubt. *Genesis* 11:5 relates the activities of the generation that built the Tower of Babel, stating: "And the Lord came down to see the city and the tower, which the children of men builded." Again, *Genesis* 18:20–21 states, "And the Lord said: 'Verily, the cry of Sodom and Gomorrah is great, and, verily, their sin is exceedingly grievous. I will go down now, and see whether they have done altogether according to the

cry of it, which is come unto Me; and if not, I will know.'" These are anthropomorphic expressions that Rashi, the famed eleventh century exegetist of both the Torah and the Talmud, explains in his commentary to *Genesis* 11:5 as pedagogical tools: "He really did not need to do this, but Scripture intends to teach the judges that they should not proclaim a defendant guilty before they have seen the case and thoroughly understood the matter in question."³⁵ Rashi's commentary to *Genesis* 18:21 reinforces this point, stating, "This teaches the judges that they should not give decisions in cases involving capital punishment, except after having carefully looked into the matter"³⁶

Unlike the Almighty, judges cannot themselves witness the events controverted in court. Rather, they have to rely on witnesses whose testimony must be of such a nature as to be the functional equivalent of the judge actually observing the commission of the crime. Thus, the talmudic rules demanding evidence of impeccable reliability, accepting nothing short of actually witnessing the crime itself, are at least arguably related to the Torah verses mandating judicial care in criminal cases. These laws are of such transcending importance that an all-powerful and all-knowing God, in a sense, either feels bound by them as an elemental, natural law aspect of justice, or is willing to illustrate their centrality in the fact finding process by recounting events that can be viewed as limiting the Limitless, in effect risking human theological error. At the same time, given the nonrational aspect of rules such as the absolute prohibition against circumstantial evidence, which bars evidence that may be highly probative of guilt, one is left to wonder whether the risk is worth it.

2. Rationales

Ordinarily, that a law is based on a passage in the Torah obviates the need to search for its underlying rationale. Nonetheless, particularly when a rule seems counterintuitive, scholars seek to explain the reason for it so that God's law may be better understood and its wisdom perceived.

The circumstantial evidence rule, as illustrated in the Gemara, is very difficult to comprehend. True, the evidence in the Gemara's example is circumstantial, but it is of the highest order. The witnesses missed the crime's climax by seconds, and there seems to be little doubt that the bloody sword wielder standing over the victim writhing in his death agony is culpable, that is, the required inferences are completely rational, and, indeed, no reasonable inference other than the guilt of the accused is tenable.

One may ask why the Gemara gives such an extreme example, since, after all, most circumstantial evidence cases are not almost completely devoid of doubt concerning the guilt of the accused. Presumably, less clear-cut and more typical cases would instruct us that the reason for the rule is to prevent conviction of the innocent. That point, however, can be regarded as obvious, and the Talmud often rejects an illustrative interpretation of the law on the ground that it is too obvious and therefore does not teach anything new.³⁷ Thus, the Gemara may have invoked this marginal example to convey the more difficult point that the no conjecture rule is absolute; even in the worst case scenario, when there is no apparent doubt concerning the defendant's guilt, such testimony is without evidentiary value. The corollary would seem to be, *a fortiori*, that when circumstantial evidence is less probative, it remains inadmissible, and by

implication, when such conjectural evidence is less compelling, the accused may well be innocent notwithstanding the appearance of guilt.

This explanation is consistent with the one offered by Maimonides, who explains the rationale of the circumstantial evidence rule as follows:

Do not let this puzzle you, or think the law unjust. For among events which are within the bounds of possibility, some are very probable and others highly improbable, and still others are in between the two. The bounds of possibility are very wide. If, then, the Torah had permitted us to decide capital cases on the basis of a very strong probability, which might seem absolutely convincing, as in the case of the example we have given, we should next be deciding on a slightly smaller probability, and so on gradually, until we should be giving judgment in capital cases and putting people to death on the basis of unwarrantable presumptions, according to the judge's caprice. Hence the Exalted One has shut this door, so to say, ordaining that no punishment is to be inflicted unless there are witnesses who testify that they know for certain what happened, without any doubt whatever, and there is no other possible explanation. If we do not give judgment even on the basis of a very strong presumption, the worst that can happen is that the sinner will be acquitted; but if we punish on the strength of presumptions and suppositions, it may be that one day we shall put to death an innocent person; and it is better and more satisfactory to acquit a thousand guilty persons than to put a single innocent man to death once in away.³⁸

Maimonides' analysis focuses on the slippery slope dilemma. In effect, he is saying that God recognizes the frailties of humans and knows that if fact finders are permitted to consider conjectural evidence when such evidence is compelling or highly persuasive, they will soon subvert such standards by allowing conviction based on progressively less probative evidence. That happens in part because each additional whittling of the rule sets a new benchmark for what is permissible. The result is that we judge lawfulness by the last encroachment rather than by the original prohibition. In the Maimonidean view, the only way to assure adherence to the law in this context is through an absolute, *per se* rule that does not permit weighing and balancing.

Yet notwithstanding this carefully reasoned slippery slope rationale, which is rooted in reliability concerns, one is left with a law that, at least at its margins, is nonrational, as the bloody sword case amply illustrates. Perhaps the explanation for such an absolute prohibition against conjectural evidence in criminal cases can best be ascertained by returning once more to its biblical sources.

That two Torah verses³⁹ are invoked as sources for the circumstantial evidence rule suggests that it may be viewed in two ways. The *Exodus* prohibition against slaying the innocent and righteous has a substantive, ethical thrust—that is, a defendant against whom the only evidence is circumstantial may be innocent, and it is wrong to convict such a person. *Deuteronomy's* two witness requirement, on the other hand, may be viewed as procedural, although it, too, has a reliability aspect. It is, however, primarily a formal, constitutional type of rule for determination of guilt in criminal judicial proceed-

ings, not unlike, for example, the Fifth Amendment privilege against self-incrimination, prohibiting admissibility of even reliable confessions absent specified warnings to the defendant.⁴⁰ Thus, even in cases like the bloody sword wielder in which accuracy might not really be a concern, the no conjecture requirement still precludes conviction because receipt of the evidence would violate the formal procedural rules established for ascertainment of guilt. That is, in Jewish law, as in our own, criminal cases are governed by an extra dimension of procedural regularity, albeit relating to the attainment of spiritual rather than social perfection.⁴¹

Apparently not all commentators agree about this duality. For example, in the talmudic tractate *Shebuoth*, which generally addresses oaths both in and out of court, the Sages discuss a civil damages action for assault in which the victim emerges from the alleged wrongdoer's premises with a back wound that could not have been either self-inflicted or inflicted by a third person.⁴² They decide that the victim can recover in this situation on the basis of testimony by witnesses who saw him enter the premises uninjured and come out wounded.⁴³ The Tosafists conclude that such testimony, which appears to be circumstantial evidence, would be admissible even in a capital case.⁴⁴ Thus, the Tosafists express the belief either that highly trustworthy evidence of this sort, when there is no possibility of the defendant's innocence, is simply not circumstantial evidence, or that the no conjecture requirement has only a substantive concern, namely accuracy, and when that concern is obviated the evidence is admissible both in civil and criminal cases.

On the other hand, the Yad Ramah, a thirteenth century commentator on the *Sanhedrin* tractate, seems to believe that the circumstantial evidence rule has both substantive and procedural components. He attempts to reconcile two Gemara discussions that are in apparent conflict. A passage in *Sanhedrin* appears to preclude the use of circumstantial evidence in civil cases,⁴⁵ whereas in tractate *Shebuoth*, the Gemara allows circumstantial evidence in the aforementioned wound-in-the-back civil action.⁴⁶ The Yad Ramah concludes that the latter is simply not circumstantial evidence, because there is no possibility of inaccuracy, and that therefore this evidence is admissible in civil cases.⁴⁷ He states, however, that in capital cases such evidence is nonetheless unacceptable,⁴⁸ in effect defining circumstantial evidence differently in civil and criminal proceedings. Thus, the Yad Ramah implicitly recognizes that even when there is no substantive question regarding the accuracy of the circumstantial evidence, formal procedural constraints continue to preclude its use in criminal cases.

Maimonides also perceives the duality of the rule against conjecture. To be sure, his primary focus is on its substantive, moral underpinning, focusing on reliability and concluding with the ringing declaration that "it is better . . . to acquit a thousand guilty persons than to put a single innocent man to death."⁴⁹ On the other hand, in the *Mishnah Torah*, Maimonides' comprehensive codification of the entirety of Jewish law, he includes the circumstantial evidence prohibition in the book entitled *Sanhedrin*,⁵⁰ dealing primarily with court procedure, rather than in the book of *Evidence*, treating rules that relate more to reliability in fact finding.⁵¹

Thus, based on such commentators as Maimonides and the Yad Ramah, we can say that the force of *Exodus*'s ethically motivated prohibition against slaying the innocent and of *Deuteronomy*'s procedurally driven two witness rule combine to create a categorical barrier to conjectural evidence in criminal cases—one that applies even when

reliability concerns are nonexistent.

One may legitimately question the contemporary relevance of a rule based in part on a formal procedural requirement designed for an ideal criminal justice system predicated on belief in a divine backstop. To the extent that the talmudic circumstantial evidence rule is based on such formal procedural considerations, it may be of limited value to modern American law. Accordingly, we do not advocate a *per se* exclusionary rule with respect to circumstantial evidence. What we do suggest, however, is that more attention be paid to the need for a procedural mechanism, akin to the absolute talmudic rule, that will guard against irrational inferences based on circumstantial evidence—in other words, a procedural mechanism that will protect the fundamental substantive concern underlying the talmudic rule barring conjectural testimony, namely, preventing conviction of the innocent. That overarching concern remains relevant in all ages and in all ethically rooted societies.

While the common law rule permitted the use of circumstantial evidence, it significantly limited the jury's power to convict on the basis of such testimony, primarily through an instruction requiring the jury, with respect to circumstantial evidence, to exclude every reasonable hypothesis other than guilt. A key purpose of this cautionary charge, as in the case of its more venerable talmudic counterpart, was to preclude conviction of the innocent. The modern American trend, however, has been to abandon the common law instruction concerning circumstantial evidence. This has the effect of creating the very danger that the talmudic rule sought to eliminate.

B. Now—Abandoning the Common-Law Constraints on Circumstantial Evidence

1. *Holland v. United States* Rejects the Common Law

The tale of the bloody sword wielder has passed into the lore of the law as part of English legal history without acknowledgment of its talmudic origins. Although early English authorities invoked the bloody sword hypothetical,⁵² the common law apparently never absolutely prohibited convictions based on circumstantial evidence. Early common law did, however, distrust circumstantial evidence, viewing it as inferior to direct testimony, fearing that its use might result in conviction of the innocent, and consequently allowing it only in exceptional cases, such as secret crimes.⁵³ But gradually the English courts came to regard such evidence as favorably as direct evidence, and some even considered it superior on the theory that whereas witnesses may lie, circumstances do not.⁵⁴ By the eighteenth century, both forms of evidence were regularly used to support convictions,⁵⁵ albeit with an important qualification. As noted by William Wills, "[i]n order to justify the inference of legal guilt from circumstantial evidence, the existence of the inculpatory facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt."⁵⁶

In the United States, the leading nineteenth century case was *Commonwealth v. Webster*,⁵⁷ in which Chief Justice Shaw of Massachusetts expounded on the requirement of proof beyond a reasonable doubt and on the limitations regarding circumstantial evidence. Reasonable doubt, he stated, although "not easily defined," is a doubt that

"leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."⁵⁸ In the case of circumstantial evidence, the court emphasized that, because of its inferential nature, "great care and caution ought to be used in drawing inferences from proved facts."⁵⁹ To that end, when such evidence is relied on, "[i]t is essential . . . that the circumstances taken as a whole, and giving them their reasonable and just weight, and no more, should to a moral certainty exclude every other hypothesis [but guilt]."⁶⁰ Courts throughout the United States, both federal and state, adopted *Webster's* view, requiring that the jury be instructed that circumstantial evidence must exclude reasonable possibilities of innocence.⁶¹

Critics, however, challenged *Webster's* underlying premise that circumstantial evidence was in some way inferior to direct evidence or warranted special treatment,⁶² and argued that a separate cautionary charge only served to confuse the jury.⁶³ Ultimately, over a century later, in *Holland v. United States*,⁶⁴ a unanimous Supreme Court held that there was no difference between the two types of evidence, and that consequently in federal court there was no requirement that the trial judge charge the jury that the evidence must be such as to exclude every reasonable hypothesis but that of guilt.⁶⁵ Justice Clark reasoned that if the jury was properly instructed on the standards for reasonable doubt, a circumstantial evidence instruction was "confusing and incorrect."⁶⁶

Holland involved a prosecution for willful evasion of income tax based on proving an increase in the defendants' net worth,⁶⁷ a method that the Court had previously approved in cases against gangsters and known criminals,⁶⁸ thereby allowing the government to establish "taxable income from undisclosed sources when all other efforts failed."⁶⁹ Although *Holland* is usually cited broadly for the proposition that a reasonable doubt instruction obviates the need to give the jury a cautionary circumstantial evidence charge,⁷⁰ those relying on it often fail to discuss other significant aspects of the Court's opinion, including the Justices' declaration that the net worth method "involve[s] something more than the ordinary use of circumstantial evidence in the usual criminal case"⁷¹ and "is so fraught with danger for the innocent that the courts must closely scrutinize its use."⁷² In particular, the Court was concerned that the government had extended the use of the net worth method, as a matter of first rather than last resort, to ordinary tax evasion cases in which "the allegedly unreported income comes from the same disclosed sources as produced the taxpayer's reported income."⁷³

Notwithstanding the attendant dangers, the *Holland* Court permitted such net worth prosecutions to proceed even against ordinary taxpayers, perhaps in part because it faced a class of cases—somewhat analogous to the secret crimes exception at early common law⁷⁴—that sometimes could not be prosecuted effectively without the use of circumstantial evidence.⁷⁵ Although the Court approved net worth prosecutions, at the same time it delineated a series of limitations on such actions, emphasizing "the dangers that must be consciously kept in mind in order to assure adequate appraisal of the specific facts in individual cases."⁷⁶ The Court addressed six such potential pitfalls,⁷⁷ and concluded that

they do require the exercise of great care and restraint. The complexity of the problem is such that it cannot be met merely by the application of general rules. Trial courts should approach these cases in the full

realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute. . . . Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation.⁷⁸

As part of its effort to prevent innocent defendants from being "ensnared," the Court made clear that mere underreporting was not sufficient to establish that the defendant willfully evaded taxes.⁷⁹ The government also must provide independent evidence that the accused concealed the unreported income.⁸⁰

Holland can be viewed in two ways. On the one hand, the Court believed that proof under the net worth method was far more dangerous than most circumstantial evidence, and because of these risks, the Justices placed strict limitations on net worth prosecutions. At the same time, despite these dangers, the Court eliminated the cautionary instruction. That being the case, it may be argued that if the Court was willing to reject a demand for the cautionary charge in a class of prosecutions in which the use of such evidence posed special dangers to defendants who might be innocent, *a fortiori* such instructions are unnecessary with respect to garden variety common law crimes in which such dangers are less acute or nonexistent. Moreover, it may be contended that the limitations imposed on the use of circumstantial evidence relate only to net worth determinations in willful tax evasion actions, and therefore it is appropriate to apply them only in such cases. Given the broad language used by the Court in establishing parity between direct and circumstantial evidence and in abolishing the cautionary instruction even in extreme situations, and given its largely fact specific limitations,⁸¹ this may be the more likely, or at least a more straightforward, reading of the *Holland* opinion.

Alternatively, one may take a different tack, starting from the premise that because *Holland's* holding eliminating the circumstantial evidence charge is applicable across the board, the Justices' caveats with respect to the use of circumstantial evidence in net worth cases were also meant to apply beyond that specific context. That is, in addition to a series of limitations on net worth prosecutions, the Court may have set forth a general analytical framework for evaluating all circumstantial evidence of a suspect nature. After all, the reason given by the Court for engrafting a series of safeguards on net worth prosecutions was that they were "fraught with danger for the innocent."⁸² Such dangers may likewise be present in other classes of cases and in individual cases in which circumstantial evidence might point erroneously to guilt. Under this reading of *Holland*, the Court observed that special limitations were appropriate in all cases in which the circumstantial evidence was particularly equivocal. In fact, one of the safeguards articulated by Justice Clark protected the same value as that embodied in the cautionary charge. Specifically, the Court required the government to negate "reasonable explanations by the taxpayer inconsistent with guilt"⁸³ and stated that "[w]hen the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury."⁸⁴

Read in this manner, *Holland* views circumstantial evidence as fact specific and recognizes that the quality of such evidence will vary from case to case, requiring trial courts to take adequate precautions to prevent wrongful conviction. Thus, the decision at least suggests that limitations be imposed not only in prosecutions for willful tax evasion

pursuant to the net worth method, but in other cases in which circumstantial evidence poses more dangers than usual.

2. The Lower Court Reaction to *Holland*

For the most part, the state courts that have opted to follow *Holland* have accepted the first, more straightforward reading of the decision, ignoring its qualifications and caveats, which comprise most of the opinion, and focusing instead on the brief, but broad concluding discussion that dispenses with the cautionary charge in the federal courts.⁸⁵ Thus, while *Holland* recognized the dangers of circumstantial evidence in prosecutions based on the net worth method and established explicit limitations to curtail such dangers, the state courts have freely invoked *Holland* to eliminate the special instruction across the board, even in cases in which the proof is weak, without adopting alternative techniques for preventing erroneous convictions.⁸⁶

Interestingly, although *Holland* was decided in 1954, of the states following its lead, many did not do so until after the 1970 decision in *In re Winship*,⁸⁷ which constitutionalized the reasonable doubt standard and thereby afforded defendants protection against wrongful conviction.⁸⁸ *Winship* created a constitutional floor for the protection of defendants with respect to sufficiency of the evidence. At the time of the *Winship* decision, every jurisdiction already required that crimes be proved beyond a reasonable doubt,⁸⁹ and apparently unmoved by *Holland*,⁹⁰ many states still required a cautionary charge in cases proved substantially or entirely through circumstantial evidence.⁹¹ In effect, as a result of the state courts' collective embrace of the *Holland* standard after *Winship*, the floor became the ceiling.

It is unclear why these states made such a belated response to *Holland*. The delay may merely represent the lengthy time lag required for the Court's decision to filter down to the states in the form of concrete cases raising the issue. Or perhaps the gravitation to *Holland* after *Winship* reflected a conservative tug in the state courts, many of which had not been ardent supporters of the Warren Court's liberal criminal law rulings. *Winship* may have served as a reminder that, while the reasonable doubt standard was constitutionally mandated, under *Holland* the common law rule requiring a cautionary circumstantial evidence charge was not.

This result is analogous to the willingness of many state courts, when construing their own constitutions, simply to follow the Supreme Court's interpretation of the federal constitution more or less in lock step fashion,⁹² notwithstanding the New Federalism with its emphasis on state experimentation above the federal constitutional floor.⁹³ But the *Holland* decision, of course, has no aura of constitutionality. Rather, the state courts have given reflexive deference to an evidentiary ruling applicable, by its terms, only within the federal judicial system.

The jurisdictions adopting the *Holland* rule have focused on the brief segment of the opinion that cursorily dismissed the differences between direct and circumstantial evidence,⁹⁴ emphasized the possibility that the special charge would confuse the jury, and concluded that the reasonable doubt instruction was an adequate substitute.⁹⁵ Thus, the Supreme Court of Iowa pointed out that it had "routinely observed that circumstantial evidence often may be equal or superior to direct evidence,"⁹⁶ and the Arizona Supreme Court held that "to instruct further [than the standard for reasonable doubt] is to invite the

confusion of semantics."⁹⁷ Similarly, Alaska's highest court noted that "[s]uch an instruction is unnecessary and may well be confusing and therefore should be dispensed with. Proper instructions on the standards for reasonable doubt should suffice."⁹⁸

The courts refusing to abandon the common law rule in the wake of *Holland* and *Winship*, have asserted that jury charges with respect to both circumstantial evidence and reasonable doubt are not confusing, and that instead, given the inferential nature of circumstantial evidence, both charges are necessary to protect the accused adequately. For example, responding to the prosecution's request to overturn the requirement of a cautionary charge, an Idaho appellate court wrote, "The state has not identified, and we do not find, the precise source of the 'confusion' that the state claims. To the contrary, . . . a 'reasonable hypothesis' instruction gives 'sharpened clarity' to the meaning of reasonable doubt in a circumstantial evidence case."⁹⁹ The New York Court of Appeals elaborated on the reason underlying heightened scrutiny of circumstantial evidence in a case in which the defendant was observed pacing up and down in a car lot that was being burgled. Reversing the burglary and larceny conviction, the court stated, "[C]ircumstantial evidence is as nothing unless the inferences to be drawn from the circumstances are logically compelling. The danger, therefore, with the use of circumstantial evidence is that of logical gaps—that is, subjective inferential links based on probabilities of low grade or insufficient degree—which, if undetected, elevate coincidence and, therefore, suspicion into permissible inference."¹⁰⁰

Be that as it may, today the circumstantial evidence charge is clearly a fading minority rule whose receding acceptance was perhaps hastened by the Court's reaffirmation of *Holland* in its 1979 decision in *Jackson v. Virginia*.¹⁰¹ Over half of the states have eliminated the special charge, subsuming it within the reasonable doubt instruction.¹⁰² A minority of jurisdictions, however, still requires a charge that the circumstantial evidence must either exclude every reasonable hypothesis but that of guilt, or must be inconsistent with any reasonable theory of innocence.¹⁰³

While several of the state courts substituting *Holland* for the common law rule have done so in detailed, analytical opinions,¹⁰⁴ for the most part the old rule seems to be the victim of a bandwagon effect.¹⁰⁵ Many of the states following *Holland* do so without meaningful discussion of the issues presented, merely citing the Supreme Court decision, quoting its conclusory final paragraphs, and pointing to the growing number of states that have already eliminated the cautionary charge. These jurisdictions seem to regard the common law rule as no more than an antiquated doctrine waiting to be jettisoned in favor of the enlightened modern trend. The question, though, is whether the old or the new is really the preferred view.

C. A Critique of the Majority View and Its Rationale

Although *Holland* and its state court progeny have suggested that the concerns addressed by the special circumstantial evidence charge are adequately protected by the reasonable doubt instruction,¹⁰⁶ this outcome depends at least in part on how reasonable doubt is defined and explained to the jury and on the appellate review standard for sufficiency of the evidence claims.¹⁰⁷ As it turns out, under current law, neither the reasonable doubt charge nor the appellate review standard is an appropriate substitute for the circumstantial evidence instruction, and neither precludes conviction even though a

reasonable possibility of innocence exists.

1. The Reasonable Doubt Charge

While the *Holland* Court suggested that a proper reasonable doubt charge could be framed "in terms of the kind of doubt that would make a person *hesitate* to act,"¹⁰⁸ it nonetheless affirmed the conviction even though the charge below referred to the kind of doubt on which the jurors would be *willing* to act.¹⁰⁹ Justice Clark then proceeded to discourage definitions altogether, quoting with approval the statement that "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury."¹¹⁰ Although the *Holland* Court thus questioned the efficacy of definitions of reasonable doubt, at the same time it observed that "the better rule is that where the jury is properly instructed on the standards for reasonable doubt, . . . an additional instruction on circumstantial evidence is confusing and incorrect."¹¹¹ How a proper instruction concerning reasonable doubt standards is to be accomplished in the absence of a definition of that term was left unclear.

While *Holland* was a federal case, *Winship*,¹¹² decided sixteen years later, made the reasonable doubt instruction of constitutional import. It was not, however, until *Cage v. Louisiana*,¹¹³ a unanimous 1990 *per curiam* decision, that the Court, for the first—and only—time, invalidated a charge defining reasonable doubt.¹¹⁴ That charge described a reasonable doubt as a "substantial" doubt and a "grave uncertainty."¹¹⁵ The Justices stated, seemingly unequivocally, "It is plain to us that the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard."¹¹⁶ The charge, however, also included the instruction that "[w]hat is required is not an absolute or mathematical certainty, but a *moral certainty*."¹¹⁷ After the above pronouncement regarding grave and substantial doubts, the Court continued, "When those statements are then considered with the reference to 'moral certainty,' rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause."¹¹⁸ Accordingly, although the Court's language strongly suggested that the substantial doubt and grave uncertainty terminology, in and of itself, was constitutionally deficient,¹¹⁹ the issue was not completely free from doubt.

Victor v. Nebraska,¹²⁰ decided in 1994, resolved *Cage*'s ambiguity, but—given the reasonable doubt instruction's basic purpose of preventing conviction of the innocent—not as one would have expected. The *Victor* Court limited *Cage* to its narrowest constitutional scope by finding that its deficiency was inclusion of all the suspect definitions, coupled with omission of any counterbalancing instructions.¹²¹ The *Victor* majority¹²² ruled that even questionable definitional terms will not be deemed violative of Due Process as long as the instruction, "taken as a whole,"¹²³ provides a permissible definition of reasonable doubt, such as an abiding conviction of the defendant's guilt based on the evidence in the case,¹²⁴ or a doubt that would cause a reasonable person to hesitate to act.¹²⁵ On this basis, the Court upheld the use of terms such as "moral evidence"¹²⁶ and "moral certainty,"¹²⁷ both taken from the 1850 Massachusetts decision in *Webster*,¹²⁸ and also allowed phrases requiring a "substantial doubt" to acquit and permitting conviction based on "strong probabilities."¹²⁹

Perhaps even more importantly, although a substantial argument can be made that Due Process requires a proper definition of reasonable doubt to enable juries to apply the standard rationally,¹³⁰ the *Victor* Court, without discussion, stated that "the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course."¹³¹ Justice O'Connor continued,

Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proven beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. Rather, "taken as a whole, the instructions [must] correctly convey the concept of reasonable doubt to the jury."¹³²

Thus, although the Court had previously ruled that errors in reasonable doubt instructions cannot be harmless,¹³³ after the decision in *Victor*, with its totality test, it is possible that even misleading state court instructions defining reasonable doubt will not be deemed constitutionally deficient, and it is certain that state courts can avoid federal constitutional scrutiny in this regard simply by declining to provide any definition whatever of reasonable doubt.

Even before the Supreme Court ruled in *Victor*, a number of jurisdictions had either prohibited¹³⁴ or discouraged¹³⁵ trial courts from defining the reasonable doubt standard. After *Victor*, states that previously may have been deterred by constitutional doubts, as well as states that tend to follow the Supreme Court in more or less lock step fashion, may well join this group. When the trial court gives no explanation at all with regard to the meaning of reasonable doubt, it seems hard to maintain that a cautionary circumstantial evidence charge is superfluous.

The counterargument is that no such specific charge is necessary because the phrase "beyond a reasonable doubt" by itself already contains within it the notion of excluding reasonable hypotheses of innocence. Inferential support for this position can be found in the portion of *Holland* indicating that an actual definition of reasonable doubt is unnecessary because it may confuse the jury.¹³⁶ Studies, however, indicate confusion on the part of jurors who are not instructed about the meaning of reasonable doubt.¹³⁷ If jurors do not understand the term reasonable doubt, they will necessarily be unable to know that the phrase comprehends exclusion of reasonable hypotheses of innocence. The notion that the words "reasonable doubt" by themselves already embody the circumstantial evidence instruction is, moreover, not an universally accepted view, for clearly the jurisdictions still adhering to the common law charge believe that the reasonable doubt instruction, with or without definition, is insufficient to convey this requirement.¹³⁸

Nor do many of the state court instructions defining reasonable doubt appear to succeed in transmitting the concept of excluding reasonable hypotheses of innocence.¹³⁹ Of the states that permit or require definitions, four broad overlapping categories are discernible. Some jurisdictions have approved the use of various synonyms, either individually or collectively, such as "actual,"¹⁴⁰ "fair,"¹⁴¹ "logical,"¹⁴² "substantial,"¹⁴³ or "real"¹⁴⁴ doubt—synonyms that may require jurors to possess stronger doubts than what is constitutionally required.¹⁴⁵ Conversely, another group looks to antonyms, stating, for

example, that reasonable doubt is not merely a "possible,"¹⁴⁶ "imaginary,"¹⁴⁷ "speculative,"¹⁴⁸ "vague,"¹⁴⁹ or "capricious,"¹⁵⁰ doubt—terminology that the *Victor* Court viewed with favor, but that may improperly suggest to jurors that, to acquit, they must be able to articulate or give a specific reason for their doubt.¹⁵¹ Other jurisdictions use a state of mind definition, either following the suggestion in *Holland* that reasonable doubt should be defined as the kind of doubt that would cause a prudent person to hesitate to take action in matters of importance,¹⁵² or employing a reverse-*Holland* instruction that a reasonable doubt is the kind of doubt on which a reasonable person or juror would be willing to act.¹⁵³ Such definitions are not only ambiguous,¹⁵⁴ but also may "analogiz[e] the decision whether to convict or acquit a defendant to the frequently high-risk personal decisions people must make in their daily lives,"¹⁵⁵ such as whether to marry or take a job.¹⁵⁶ Finally, still other states permit level-of-certainty instructions, charging, for example, that the jury must have an "abiding conviction to a moral certainty"¹⁵⁷ or that it must be "firmly convinced";¹⁵⁸ others put it conversely, providing that a "wavering or vacillating mind" indicates the presence of a reasonable doubt.¹⁵⁹ Although the "firmly convinced" and "abiding conviction" terminology has been lauded¹⁶⁰ and perhaps comes closest to a proper definition of reasonable doubt, it still does not specifically incorporate *Winship's* notion of "a subjective state of certitude,"¹⁶¹ or *Jackson v. Virginia's* slightly less rigorous "subjective state of near certitude."¹⁶²

In any event, no matter how the reasonable doubt standard is defined, it cannot capture the weighing and balancing required of the jury under the standard demanding, with respect to circumstantial evidence, the exclusion of every reasonable hypothesis but that of guilt. *Holland's* answer that there are no meaningful differences between direct and circumstantial evidence¹⁶³ is not wholly responsive. Although the two categories of evidence may not be entirely discrete,¹⁶⁴ there is a distinction between them,¹⁶⁵ even if it is only a matter of degree or emphasis.¹⁶⁶ With regard to the former, the jury must determine whether the particular assertion is true, whereas in the latter case, the jury must not only decide whether it is true, but also whether guilt logically can be inferred from such evidence.¹⁶⁷

Because circumstantial evidence requires the jury to make such inferences concerning the ultimate fact of guilt, the fact finder is necessarily given a more active role, one that is unrelated to determining credibility and therefore arguably calls for closer judicial supervision. The jury must assess probabilities of guilt from individual facts at varying levels of ambiguity.¹⁶⁸ The explicit, cautionary circumstantial evidence charge directs the jury's attention to the difference in process and the ambiguities of the evidence. In a burglary case, it is one thing for the jurors to decide to believe a witness who testified that she actually saw the defendant break into the victim's home through a window late at night, and leave thereafter with a television set.¹⁶⁹ It is another matter for the jury to conclude that the defendant is guilty of burglary because, instead, the police apprehended him several days later in possession of the victim's television set.¹⁷⁰ As New York's highest court has stated:

The reason for the current application of [the cautionary instruction] rule is not that circumstantial evidence is thought to be weaker than direct evidence, since the reverse is frequently true. Rather, the rule draws attention to the fact that proof by circumstantial evidence may require

careful reasoning by the trier of facts. By highlighting this aspect, the rule hopefully forecloses a danger legitimately associated with circumstantial evidence—that the trier of facts may leap logical gaps in the proof offered and draw unwarranted conclusions based on probabilities of low degree.¹⁷¹

In effect, analysis of circumstantial evidence is a more intellectual process, requiring jurors to engage in lawyer-like scrutiny and forcing them to see both sides. After concluding that a particular fact is true, the individual juror is called upon to ask: First, can I infer guilt from this fact? Second, if so, is there any reasonable explanation other than guilt? This process may prevent the jurors individually and collectively from deciding the case on a more emotional and intuitive basis.¹⁷² Consequently, a cautionary charge with respect to circumstantial evidence provides a framework channeling the jury's deliberative process along more rational lines.¹⁷³

The reasonable doubt charge, on the other hand, does not direct the jury's attention to the appropriate manner in which to evaluate evidence. Instead, it permits the finder of fact to make a cumulative, comprehensive assessment of the probative value of all the evidence adduced at trial.¹⁷⁴ To be sure, the concept of reasonable doubt embodies rationality, but it is not method oriented. It does not describe with any degree of precision the process the jury is to employ in reaching its ultimate conclusion. Thus, assuming as we must that jurors do in fact listen to the judge's instructions,¹⁷⁵ a special circumstantial evidence charge, rather than being "confusing and incorrect,"¹⁷⁶ complements an instruction properly defining reasonable doubt as a subjective state of certitude or near certitude, by delineating the appropriate basis for assessing circumstantial evidence and reaching the determination that guilt has or has not been established beyond a reasonable doubt.¹⁷⁷

2. The Appellate Review Standards for Sufficiency of the Evidence Claim

The appellate standards for determining reasonable doubt sufficiency claims likewise fail to assure that the jury has excluded every reasonable hypothesis of innocence in circumstantial evidence cases.¹⁷⁸ Even before *Holland*, a federal appellate court had observed:

[It is sometimes said] that unless the evidence excludes the hypothesis of innocence, the judge must direct a verdict [and] that if the evidence is such that a reasonable mind might fairly conclude either innocence or guilt, a verdict of guilt must be reversed on appeal. But obviously neither of those translations is the law. Logically, the ultimate premise of that thesis is that if a reasonable mind might have a reasonable doubt, there is, therefore, a reasonable doubt. That is not true. . . . [I]f a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make. . . . If [the judge] concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter.¹⁷⁹

In its 1979 decision in *Jackson v. Virginia*,¹⁸⁰ the Supreme Court gave its

imprimatur to such pronouncements. Although *Jackson* rejected the far less demanding "no evidence" test¹⁸¹ and instead held that the *Winship* reasonable doubt standard applied to sufficiency of the evidence claims in federal habeas corpus actions by state prisoners,¹⁸² the Court went on to rule that a habeas petitioner was entitled to relief on that basis only if, after reviewing the record in the light most favorable to the prosecution, the appellate court was convinced that no rational jury could have found the accused guilty beyond a reasonable doubt.¹⁸³ Justice Stewart's majority opinion noted that "[t]his familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts."¹⁸⁴ Indeed, tacitly acknowledging the difference between the circumstantial evidence and reasonable doubt standards, the majority stated explicitly:

Only under a theory that the prosecution was under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt could this petitioner's challenge be sustained. That theory the Court has rejected in the past [*Holland*]. We decline to adopt it today.¹⁸⁵

By taking this position, the *Jackson* Court refused to apply a standard of review that would have properly determined whether there was sufficient evidence to meet the reasonable doubt standard of proof in circumstantial evidence cases. The reasonable hypothesis sufficiency review standard would allow the appellate court to oversee whether the jury's inferences from circumstantial evidence were in fact rational and sufficient to establish proof beyond a reasonable doubt. Thus, paradoxically, the *Jackson* opinion contained within it the seeds for destruction of the *Jackson* marriage of *Winship*'s burden of persuasion to sufficiency review. By rejecting the reasonable hypothesis test, the *Jackson* Court gave almost complete deference to the jury's right not only to resolve issues of weight and credibility, but also to draw justifiable inferences of fact. Under this review standard, the appellate court will disturb a verdict based on circumstantial evidence only when the jury has no justifiable or rational bases for its inferences, in effect applying the discredited no-evidence test rather than *Jackson*'s own reasonable doubt formulation. As a result, it is relatively rare for appellate courts to reverse on the basis of insufficiency of evidence.¹⁸⁶

Such a limited test may be appropriate when only direct testimony is given and the jury need only resolve credibility issues, with which the court normally should not interfere.¹⁸⁷ In the case of circumstantial evidence, however, the ultimate determination of guilt is based also on inferences from the evidence and the court is in as good, if not better, position to assess the rationality of these inferences and whether they establish guilt beyond a reasonable doubt. Thus, use of the reasonable hypothesis standard for appellate sufficiency review would preserve the appropriate roles of judge and jury in circumstantial evidence cases.¹⁸⁸

In addition, application of the *Jackson* test means that jury verdicts will be upheld in circumstantial evidence cases even if reasonable persons might conclude the defendant is either guilty or not guilty.¹⁸⁹ In other words, the appellate review standards for sufficiency focus exclusively on the reasonableness of a jury finding of guilt rather than upon the reasonableness of a finding of innocence,¹⁹⁰ enhancing the possibility that wrongful convictions will be upheld on appeal.¹⁹¹

State courts typically require application of either the *Jackson* standard,¹⁹² or a substantial evidence test,¹⁹³ which has been equated with the *Jackson* standard,¹⁹⁴ or some variant of either.¹⁹⁵ Indeed, even a majority of the minority jurisdictions that still require a cautionary instruction with respect to circumstantial evidence do not use an analogous sufficiency of the evidence test on appellate review.¹⁹⁶ Only a few states use both a cautionary jury charge and an appellate review standard requiring that the evidence exclude every reasonable hypothesis other than guilt,¹⁹⁷ and even in these states the reviewing courts tend to defer to jury findings.¹⁹⁸ Finally, three states that have eliminated the cautionary instruction nonetheless continue to use the more stringent standard for appellate review of sufficiency claims,¹⁹⁹ with a somewhat discordant result.²⁰⁰

To sum up, neither the reasonable doubt charge nor the counterpart, any-rational-trier-of-fact appellate review standard comes to grips with the separate issue addressed by use of the reasonable hypothesis of innocence test at the trial and appellate levels, namely, the proper evaluation of circumstantial evidence. The reasonable doubt charge does not alert the jury to the problematic nature of inferences or tell the jury how to determine guilt when the evidence is circumstantial; further, it allows the jury to convict even though the inferences from the circumstantial evidence offer a reasonable basis for acquittal. Likewise, the reasonable doubt sufficiency standard used in most states permits a conviction to stand despite the possible irrationality of the jury's inferences, and despite the existence of a reasonable theory on which to predicate the defendant's innocence.

At stake here is a basic value choice between, on the one hand, upholding broad jury discretion and attempting to assure conviction of those who are guilty, and, on the other, attempting to prevent conviction of those who are innocent. *Winship's* choice was undoubtedly the latter. In his concurring opinion in *Winship*, Justice Harlan, echoing Maimonides, stated unequivocally, "I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."²⁰¹ The *Winship* majority was equally emphatic, noting that the reasonable doubt standard "provides concrete substance for the presumption of innocence."²⁰² It does so, however, only roughly with respect to circumstantial evidence,²⁰³ whereas the reasonable hypothesis standard seeks to accomplish this end in a more refined and discriminating manner by providing a framework for assessing circumstantial evidence.²⁰⁴ That is, while reasonable doubt is the substantive standard for determining innocence or guilt, the reasonable hypothesis test establishes a procedural mechanism for proper implementation of the reasonable doubt criterion in circumstantial evidence cases. We are not arguing that elimination of the circumstantial evidence charge or the counterpart appellate review standard is constitutionally suspect, for *Holland* and *Jackson* foreclose any such contention. At the same time, however, while the reasonable doubt charge and the *Jackson* sufficiency standard may be all that is constitutionally required as a matter of Due Process, the states are free to go above this rudimentary constitutional floor in order to guard against wrongful convictions.

Indeed, although the reasonable hypothesis test is not of constitutional dimension, there is a tension between the test for Due Process, which looks to the history and tradition of guarantees essential to our Anglo-American system of law,²⁰⁵ and the wholesale abandonment of the venerable reasonable hypothesis standard with respect to

circumstantial evidence. In fact, no case captures this tension better than the Supreme Court's 1994 decision in *Victor v. Nebraska*.²⁰⁶ Justice O'Connor's majority opinion cited extensively and quoted at length from the 1850 Massachusetts decision in *Webster*,²⁰⁷ whose formulation of the reasonable doubt standard long served as the model in other states.²⁰⁸ While some of the *Webster* terminology was not "condone[d]" by the Court,²⁰⁹ in the end none of its definitions was found unconstitutional. Yet it is the same case, *Webster*, that laid the groundwork for acceptance of the common law circumstantial evidence charge in this country—the charge that, as a matter of federal practice, was unceremoniously jettisoned by the Court one hundred years later in *Holland*.²¹⁰ Of course, *Webster* and the common law rules concerning reasonable doubt and circumstantial evidence that it embodies can be half right and half wrong, but at least the same care should be given in assessing the circumstantial evidence charge as was given in evaluating the reasonable doubt segment of the case. Thus, rather than hopping on the late twentieth century bandwagon, the states should be cautious about casting off a safeguard that relates to protection of the innocent, one that, like many traditional Due Process guarantees, has common law roots and that also resonates with the still more ancient, absolute talmudic prohibition.

D. Conclusion

Our society rightfully places great value on its attempt to assure that only the guilty are convicted. This tradition was the impetus for *Winship*'s requirement that every material element of the crime be proved beyond a reasonable doubt. Preoccupation with the possibility of wrongful conviction also has deep Judaic roots, hearkening back to the preference for acquittal of a thousand guilty persons over punishment of even a single innocent defendant. The talmudic rule entirely prohibiting circumstantial evidence is one way of assuring this result.

Somewhat ironically, modern authorities have used variants of the Gemara's bloody sword hypothetical as proof of their claim that there is no substantial difference between direct and circumstantial evidence,²¹¹ and that, consequently, a special circumstantial evidence instruction is unnecessary and confusing. After all, it is hard to imagine direct evidence that would amount to more conclusive proof of guilt than the talmudic example—even though it is of course possible, albeit not entirely reasonable, that during the missing moments when the witnesses lost sight of the defendant and victim, a third party leapt forward, grabbed the sword, stabbed the victim, thrust the bloody weapon back into the shocked defendant's hand, and raced off, leaving the accused standing somewhat suspiciously over the dying victim—or, alternatively, that the ostensible victim suddenly turned around, wrested the sword from the pursuer, and stabbed himself, after which the accused frantically attempted to save the dying man's life by pulling out the sword, at which point the witnesses arrived on the scene.²¹²

Stated another way, the bloody sword wielder is not really the problem. The Gemara example is one in which circumstantial evidence and direct evidence virtually merge, and there is in fact little difference between them.²¹³ The problem lies in cases in which circumstantial evidence is far less probative, such as evidence that the defendant made threats against the victim and was seen with the victim shortly before he or she was killed.²¹⁴ Unlike the talmudic Sages, we do not suggest these facts and circumstances lack

evidentiary value. The jury has a right to consider them as part of the totality of circumstances surrounding commission of the crime.

Our concern, though, is that the jury evaluate such evidence in a more careful manner, one that obliges it to make rational inferences and to recognize both the possibility of guilt and of innocence.²¹⁵ To that end, the jury should be instructed in circumstantial evidence cases that it may convict only if the evidence excludes every reasonable hypothesis²¹⁶—conceding that "reasonable" is a fudge word—other than the guilt of the accused. At the very least, such a charge should be required when the evidence is weak,²¹⁷ although admittedly what is weak cannot be delineated with mathematical precision. To assure jury compliance with this instruction, the standard for appellate review of sufficiency of the evidence claims should focus on whether there is any reasonable possibility of innocence, and the reviewing court should assess the rationality of inferences from circumstantial evidence to assure that guilt has been established beyond a reasonable doubt.

Although such a charge and standard for review impinge to some extent on the jury's fact finding role, they do not intrude on the jury's authority to assess credibility, because only the rationality of the jury's inferences from circumstantial evidence and their sufficiency are being tested. In any event, we believe this intrusion, like the general requirement of proof beyond a reasonable doubt, is outweighed by the countervailing benefit of added assurance against conviction of the innocent. To the argument that direct evidence is sometimes weaker than circumstantial evidence, as in the case of eyewitness testimony of strangers, we respond that a cautionary charge and more stringent appellate review might well be appropriate in those circumstances also.²¹⁸

Adoption of these recommendations would result in conceptual parallelism between the American and talmudic law of circumstantial evidence. Just as talmudic law uses the procedural mechanism of total exclusion of circumstantial evidence as a means of protecting the substantive concern of preventing conviction of the innocent, American law would attempt to achieve that substantive end through the less rigorous counterpart procedural devices of a cautionary circumstantial evidence charge and a reasonable hypothesis sufficiency review standard.

In Jewish law, fear of convicting the innocent is not limited to the courtroom. Jewish law includes a rule of personal behavior that, in some ways, reflects the same values as those underlying the talmudic circumstantial evidence rule.²¹⁹ This behavioral requirement, which applies to both direct and circumstantial evidence, mandates that a person who sees another engaging in conduct that appears to violate the law visualize circumstances under which the other's conduct would be legal, and then believe that those circumstances did in fact exist.²²⁰ It is one of the most difficult commandments to follow,²²¹ asking one to disregard his or her natural inclination to suspect the worst of people when the facts themselves appear suspicious or even conclusive.²²²

Our Rabbis taught: He who judges his neighbour in the scale of merit is himself judged favourably. Thus a story is told of a certain man who descended from Upper Galilee and was engaged by an individual in the South for three years. On the eve of the Day of Atonement he requested him, 'Give me my wages that I may go and support my wife and children.' 'I have no money,' answered he. 'Give me produce,' he demanded; 'I have

none,' he replied. 'Give me land.'—'I have none.' 'Give me cattle.'—'I have none.' 'Give me pillows and bedding.'—'I have none.' [So] he slung his things behind him and went home with a sorrowful heart. After the Festival his employer took his wages in his hand together with three laden asses, one bearing food, another drink, and the third various sweetmeats, and went to his house. After they had eaten and drunk, he gave him his wages. Said he to him, 'When you asked me, "Give me my wages," and I answered you, "I have no money," of what did you suspect me?' 'I thought, Perhaps you came across cheap merchandise and had purchased it therewith.' 'And when you requested me, "Give me cattle," and I answered, "I have no cattle," of what did you suspect me?' 'I thought, they may be hired to others.' 'When you asked me, "Give me land," and I told you, "I have no land," of what did you suspect me?' 'I thought, perhaps it is leased to others.' 'And when I told you, "I have no produce," of what did you suspect me?' 'I thought, Perhaps they are not tithed.' 'And when I told you, "I have no pillows or bedding," of what did you suspect me?' 'I thought, Perhaps he has sanctified all his property to Heaven.' 'By the [Temple] service!' exclaimed he, 'it was even so; I vowed away all my property because of my son Hyrcanus, who would not occupy himself with the Torah, but when I went to my companions in the South they absolved me of all my vows. And as for you, just as you judged me favourably, so may the Omnipresent judge you favourably.²²³

To be merciful is divine; to err, all too human. While we most assuredly are not claiming constitutional, much less divine support for enhanced safeguards in the contemporary fact finding process, at the same time, in some sense the evidentiary safeguards in prosecutions based on circumstantial evidence can be viewed as a means of bridging the gap between the human proclivity to judge too rashly and too harshly and the measured and perfect judgment of God.

¹ Broadly stated, the first five books of the Bible are the "Written Law" of Judaism, and the Talmud, which was transmitted orally for centuries prior to its redaction, is the "Oral Law" counterpart. See, e.g., Z.H. CHAJES, *THE STUDENT'S GUIDE THROUGH THE TALMUD 1* (Jacob Shachter trans., 2d ed. 1960); Boaz Cohen, *Introduction to A. COHEN, EVERYMAN'S TALMUD xv–xxxii* (1949).

² For example, the defendant must be warned by the witnesses to the crime that his impending act violates the law, and he must acknowledge receipt of that warning to them at that time. See THE ARTSCROLL SERIES, *THE TALMUD BAVLI: THE GEMARA: THE CLASSIC VILNA EDITION, Sanhedrin 80b, 81b* (Schottenstein ed., 2007) [hereinafter BABYLONIAN TALMUD].

³ Under Jewish law, a defendant in a criminal case can be convicted only on the basis of testimony by two competent eyewitnesses. See BABYLONIAN TALMUD, *supra* note 2, *Baba Kamma* 114b (discussing competency of witnesses). These witnesses must have warned the defendant that his act is a crime and must have withstood searching cross-examination by the court. Thus, when a defendant is found guilty, the conviction is absolutely accurate except in two very narrow sets of circumstances: (1) when the eyewitnesses who testified against the accused are lying and are not discovered, and (2) when extrinsic facts not immediately observable by the witnesses negate culpability.

Witnesses who lie with respect to their presence at the scene of the crime are dealt with very severely in the Bible. Whatever punishment they sought to impose on the defendant is instead

imposed on them. *Deuteronomy* 19:18–19. The evidence of witnesses who testify falsely in other respects is merely rejected. See ARTSCROLL SERIES, THE MISHNAH, SEDER NEZIKIN, VOL. II(B), *Makkos* 1:4, at 19–20 (Avrohom Y. Rosenberg trans., 1987) [hereinafter THE MISHNAH] (discussing the differences between the two types of lying witnesses). In any event, the court severely admonishes prospective witnesses and cross-examines them so carefully that witnesses are not likely to lie successfully. See *id.*, *Sanhedrin* 3:6, 4:1, 4:5, 5:1–5:4, at 55–56, 61–67, 71–77, 77–87.

The second exception is, in a sense, the converse of circumstantial evidence. Circumstantial evidence can be viewed as "knowing without seeing;" that is, the witnesses may know full well that the accused is guilty, but they have not seen the actual commission of the crime. BABYLONIAN TALMUD, *supra* note 2, *Shebuoth* 33b. On the other hand, witnesses can also "see without knowing." *Id.* For example, under Jewish Law, one who kills a *treifah*, that is, someone suffering from an incurable terminal disease, is not guilty of murder, for it is deemed tantamount to killing a dead person. *Id.*, *Sanhedrin* 78a. So witnesses who see an assault on a *treifah* may be unaware of the victim's status, and their testimony may lead to a legally wrongful conviction. These sorts of situations are, however, rare, because the vast majority of people are not *treifahs* and are not presumed to be so. See THE MISHNAH, *supra*, *Makkos* 1:10, at 33–37.

⁴ The paradigm of this reliance is found in the following talmudic discussion on the meaning of a biblical verse:

Of whom does the . . . text speak? Of *two* persons who had slain, one in error and another with intent, there being witnesses in neither case. The Holy One, Blessed be He, appoints them both [to meet] at the same inn; he who had slain with intent sits under the step-ladder and he who had slain in error comes down the step-ladder, falls and kills him. Thus, he who had slain with intent is [duly] slain, while he who had slain in error [duly] goes into banishment (because there are now witnesses to his negligence).

BABYLONIAN TALMUD, *supra* note 2, *Makkoth* 10b (brackets in original and parenthetical material added).

⁵ The question of innocence, upon which the use of circumstantial evidence has a fundamental impact, has concerned the Supreme Court in many contexts. See, e.g., *House v. Bell*, 547 U.S. 518, 555 (2006) (stating "whatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it"); *Herrera v. Collins*, 506 U.S. 390, 397–98 (1993) (ruling that a claim of actual innocence based on newly discovered evidence is not a basis for federal habeas corpus relief); *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993) (requiring defendants claiming ineffective assistance of counsel to show that the results of their trials were unreliable or fundamentally unfair); *Sawyer v. Whitley*, 505 U.S. 333, 338–39 (1992) (holding that in order to demonstrate actual innocence which would permit a federal habeas court to consider the merits of an otherwise barred claim, petitioner must show by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found petitioner eligible for the death penalty).

⁶ See *Numbers* 35:30 ("Whoso killeth any person, the murderer shall be slain at the mouth of witnesses; but one witness shall not testify against any person that he die."); *Deuteronomy* 17:6 ("At the mouth of two witnesses, or three witnesses, shall he that is to die be put to death; at the mouth of one witness he shall not be put to death.").

Translations of the Torah in this chapter are taken from the Soncino Press edition entitled THE PENTATEUCH AND HAFTORAHS (J.H. Hertz ed., 2d ed. 1960).

⁷ See CHUMASH WITH TARGUM ONKELES, HAPHTAROTH AND RASHI'S COMMENTARY, *Deuteronomy* 19:15, at 98–99 (A.M. Silbermann trans., 1973) [hereinafter RASHI'S COMMENTARY ON CHUMASH] (noting that *Deuteronomy* 19:15 precludes both bodily and monetary punishment in the absence of two witnesses).

⁸ See THE CODE OF MAIMONIDES, BOOK 14: THE BOOK OF JUDGES, *Evidence* 5:1–3, at 91–92 (Abraham M. Hershman trans., 1949) [hereinafter THE CODE OF MAIMONIDES–JUDGES] (noting that the two witness rule applies in civil as well as capital cases, with certain exceptions).

⁹ See DAVID M. FELDMAN, MARITAL RELATIONS, BIRTH CONTROL, AND ABORTION IN JEWISH LAW 3–6 (1968) (succinctly describing the Mishnah and Gemara which, together, comprise the Talmud).

¹⁰ BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 37a (brackets in original); see also THE MISHNAH, *supra* note 3, *Sanhedrin* 4:5 at 71–77.

¹¹ BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 37b.

¹² See MARCUS JASTROW, A DICTIONARY OF THE TARGUMIM, THE TALMUD BABLI AND YERUSHALMI, AND THE MIDRASHIC LITERATURE 1052 (1971).

¹³ See THE TOSEFTA: FOURTH DIVISION: NEZIQIN, *Sanhedrin* 8:3, at 222–23 (J. Neusner trans., 1981) [hereinafter THE TOSEFTA] (describing the running swordsman example).

¹⁴ BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 37b (brackets in original). While the Sages do not speak in terms of either admissibility or sufficiency, it is clear that conviction based on circumstantial evidence is impossible, because such evidence is by definition worthless (i.e., "ye saw nothing"). Although the distinction between admissibility and sufficiency may be critical in a system using juries composed of laypersons, it is of less consequence when the fact finders are legal experts, as is the case in Jewish law.

Analogous to circumstantial evidence, because of the two-witness requirement, the testimony of a single witness is likewise invalid. The Gemara makes this point quite graphically in an example that seems to treat the question as one of sufficiency.

[T]he Holy One, Blessed be He, hates . . . (one) who sees something indecent in his neighbour and testifies against him alone. As it once happened that Tobias sinned and Zigud alone came and testified against him before R. Papa, [whereupon] he had Zigud punished. "Tobias sinned and Zigud is punished!" exclaimed he. "Even so," said he to him, "for it is written, *one witness shall not rise up against a man*, whereas you have testified against him alone: you merely bring him into ill repute."

BABYLONIAN TALMUD, *supra* note 2, *Pesahim* 113b (brackets in original and parenthetical material added).

In a similar vein, confessions have no evidentiary value and if a person incriminates himself while testifying, that portion of his testimony is simply not heard. BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 9b.

Consequently, in this chapter when we speak in terms of admissibility or sufficiency with respect to circumstantial evidence under Jewish law, we are not using these words as terms of art. We simply mean to convey that defendants cannot be convicted on the basis of circumstantial evidence.

¹⁵ There is, however, a dissenting opinion in the Gemara on this issue. Rabbi Aha appears to accept circumstantial evidence even in capital cases. See BABYLONIAN TALMUD, *supra* note 2, *Shevuoth* 34a. *But see id.*, *Sanhedrin* 37b (stating that although Rabbi Aha accepts circumstantial evidence in civil actions, he apparently rejects it in capital proceedings).

Furthermore, in the case of certain offenses that by their nature would not readily be seen by third parties, Jewish law does not require that the witnesses see the entire act. For example, the Gemara considers the questions that should be propounded when examining witnesses in cases involving forbidden sexual relations. Whereas Abaye and Raba suggest the witnesses be asked explicitly whether they saw carnal connection, the majority accepts Samuel's maxim that "being caught in the attitude of the unchaste is sufficient evidence." BABYLONIAN TALMUD, *supra* note 2, *Makkoth* 7a. Maimonides, reflecting the majority opinion of the Sages, states that those who embrace one another like persons having sexual intercourse are presumed to have engaged in illicit intercourse and "[t]he witnesses to the deed are not bound to see the culprits initiate intercourse, like a painting stick being inserted in the paint tube." THE CODE OF MAIMONIDES: BOOK 5, *Forbidden Intercourse* 1:19, at 15 (Louis I. Rabinowitz & Philip Grossman trans., 1965).

¹⁶ The evidentiary rules in capital cases generally apply in trials involving criminal offenses punishable by flogging. See THE CODE OF MAIMONIDES–JUDGES, *supra* note 8, *Sanhedrin* 11:4, 16:4, at 32, 45. Indeed, these rules apply to a considerable extent in civil proceedings as well. See THE MISHNAH, *supra* note 3, *Sanhedrin* 4:1, at 61–67 (providing that capital and noncapital cases are similar in examination and inquiry); *see also* THE CODE OF MAIMONIDES–JUDGES, *supra* note 8, *Sanhedrin* 11:1, at 31–32 (discussing the procedural differences between civil and capital cases).

¹⁷ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 37b (concluding that although circumstantial evidence is also inadmissible in civil cases, the witnesses in civil proceedings are not required to be admonished concerning testimony based on conjecture). However, a

discussion in tractate *Shebuoth* apparently reaches an opposite conclusion; namely, that circumstantial evidence of high probative value is admissible in certain civil actions. *Id.*, *Shebuoth* 46b. Refer to notes 45–48 *infra* and accompanying text for a discussion of the apparent contradiction.

See generally Chaim S. Heifetz, *Circumstantial Evidence in Jewish Law*, 23 CHITTY'S L.J. 318 (1975) (summarizing Heifetz's doctoral dissertation, which traces the development of the Jewish law of circumstantial evidence from biblical to modern times, focusing primarily on civil cases).

¹⁸ This second version is derived from the same Tosefta as the first one. See THE TOSEFTA, *supra* note 13, at 222–23.

¹⁹ BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 37b (brackets in original).

²⁰ In the original version in the Tosefta it is stated even more clearly that Rabbi Simeon ben Shatah personally participated in the incident. See THE TOSEFTA, *supra* note 13, at 222–23.

²¹ There is, however, a difficulty in viewing the snakebite as divine retribution for the murder. The judicially prescribed sanction for murder is decapitation, see THE MISHNAH, *supra* note 3, *Sanhedrin* 9:1, at 153–57, whereas the snakebite is a divine substitute for a different form of judicially imposed capital punishment, burning. See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 37b. Burning is the penalty for certain sexual offenses, such as carnal connection with a woman and her daughter or adultery by a priest's daughter. THE MISHNAH, *supra* note 3, *Sanhedrin* 9:1, at 153. Thus, presumably the sword wielding assailant had committed an earlier offense punishable by burning and his later criminal act of murder triggered the sanction for that earlier offense. See Ritva commentary on BABYLONIAN TALMUD, *supra* note 2, *Shebuoth* 34a. He died by snakebite, therefore, in accordance with the rule providing that when a person is subject to two forms of execution for different crimes, he receives the more severe punishment, which in this case is burning and its divine substitute, death by snakebite. See THE MISHNAH, *supra* note 3, *Sanhedrin* 9:4, at 163–65.

²² See *Deuteronomy* 17:6 ("At the mouth of two witnesses, or three witnesses, shall he that is to die be put to death; at the mouth of one witness he shall not be put to death.").

²³ See Tosafist commentary to BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 37b. The Tosafist commentaries, found on virtually every page of the Talmud, are written in Hebrew and Aramaic.

²⁴ Although the text of the Gemara quotes Rabbi Simeon ben Shatah's statement to the assailant that it was either "you or I," see BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 37b, the Tosafists assert that this use of the first person singular is not to be taken literally.

²⁵ The Tosafists may view *Exodus* 23:7, the other possible biblical source for the circumstantial evidence rule as only an *asmachta*, or secondary support, for the prohibition rather than as its source.

²⁶ Torah laws include *mishpatim*, which are provisions with clearly understood rationales, such as the prohibitions against murder and theft, and *chukim*, divine decrees that appear to lack a rational basis, such as the laws relating to the red heifer, see *Numbers* 19:1–22, and the dietary rules, see *Leviticus* 11:1–47.

²⁷ 2 MAIMONIDES, THE COMMANDMENTS (Charles B. Chavel trans., 1967) [hereinafter THE COMMANDMENTS].

²⁸ Commandment 288 prohibits the imposition of punishment or fine on the basis of the testimony of a single witness, no matter how trustworthy. *Id.* at 268. Commandment 290 precludes infliction of capital punishment based on circumstantial evidence. *Id.* at 269. Between them is commandment 289, which prohibits the killing of a human being. *Id.*

²⁹ 3 MEKILTA DE-RABBI ISHMAEL 169–70 (Jacob Z. Lauterbach trans., 1935).

³⁰ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 33b.

³¹ This is the position taken by the Malbim, a nineteenth century commentator. See TORAH AL-PEH MALBIM [COMMENTARY ON EXODUS 23:7, *Mekilta* 211], at 422–24.

³² 2 THE COMMANDMENTS, *supra* note 27, at 270; accord THE CODE OF MAIMONIDES–JUDGES, *supra* note 8, *Sanhedrin* 20:1, at 60.

³³ *Exodus* 23:7 ("[A]nd the innocent and righteous slay thou not; for I will not justify the wicked.").

³⁴ In his commentary on *Exodus* 23:7, Rashi, the eleventh century commentator on both the Torah and the Talmud, relies on the *Mekilta* in interpreting the final clause of the verse as an embodiment of divine justice: "It is not your duty . . . to bring the man back to the court, for if he is really guilty, 'I' will not acquit him in My court. Although [sic] he has left your hands as innocent 'I' have many agents (many means) to inflict upon him the death to which he has made himself liable." RASHI'S COMMENTARY ON CHUMASH, *supra* note 7, *Exodus* 23:7, at 123.

³⁵ RASHI'S COMMENTARY ON CHUMASH, *supra* note 7, *Genesis* 11:5, at 45 (emphasis omitted).

³⁶ *Id.*, *Genesis* 18:21, at 74 (emphasis omitted). Rashi's alternative explanation of the text statement, "I will go down now," is as follows: "I will go down to the very end of their doings (I will fathom the depths of their wickedness.)" *Id.*

See Haim H. Cohn, *The Proof in Biblical and Talmudical Law*, in LA PREUVE EN DROIT 77, 78 (C. Perelman & P. Foriers eds., 1981) (noting that in *Genesis* 18:20–21, God did not need to go down to see what was going on in Sodom and Gomorrah but that He did so to show judges that "they must first satisfy themselves of the facts by legal proof," thus elevating "[a]djudication on the strength of legal proof . . . to an act of Imitatio Dei") (citations omitted).

The primary sin of the residents of Sodom and Gomorrah was legal institutionalization of cruelty, as exemplified by a midrashic story of a young woman who, knowing it was forbidden, surreptitiously fed a poor man. See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 109b. When this act of kindness was discovered, the authorities bound her and poured honey over her, as a result of which bees killed her. *Id.* The story is offered as an alternative explanation for the phrase, I will go down . . . according to the cry of it," *Genesis* 18:21 (emphasis added), namely, that the words refer to the death cries of the young woman. See RASHI'S COMMENTARY ON CHUMASH, *supra* note 7, *Genesis* 18:21, at 74.

³⁷ See, e.g., BABYLONIAN TALMUD, *supra* note 2, *Nazir* 21b; *id.*, *Kiddushin* 60b.

³⁸ 2 THE COMMANDMENTS, *supra* note 27, at 270. By the time of Blackstone, this ratio had fallen to 10-1, see 4 WILLIAM BLACKSTONE, COMMENTARIES *358, while Lord Hale halved it to 5-1. 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN *289. By 1970, Justice Harlan implied a 1-1 ratio: "[I]t is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372 (Harlan, J., concurring). According to Chief Judge Newman, "If you would tolerate as many as one hundred guilty persons going free in preference to convicting one innocent person, then you will insist that no one be convicted unless the factfinder is sure of guilt to a degree approaching absolute certainty. If your ratio is ten to one, then you will likely impose a somewhat less rigorous standard upon the factfinder but still require a high degree of certainty." Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. REV. 979, 981 (1993); See also CARLETON K. ALLEN, LEGAL DUTIES AND OTHER ESSAYS IN JURISPRUDENCE 286–87 (1931):

I dare say some sentimentalists would assent to the proposition that it is better that a thousand, or even a million, guilty persons should escape than that one innocent person should suffer; but no sensible and practical person would accept such a view. For it is obvious that if our ratio is extended indefinitely, there comes a point when the whole system of justice has broken down and society is in a state of chaos. In short, it is only when there is a reasonable and uniform probability of guilty persons being detected and convicted that we can allow humane doubt to prevail over security.

³⁹ See *Deuteronomy* 17:6 (the two witness rule); *Exodus* 23:7 (the prohibition against slaying the innocent and righteous).

⁴⁰ See *Miranda v. Arizona*, 384 U.S. 436, 479 (1966) (holding that to protect a defendant's privilege against self-incrimination, the defendant must be warned that "anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning").

⁴¹ Professor Kirschenbaum, an expert in Jewish criminal law, observed that counterintuitive rules such as the prohibition against circumstantial evidence make sense only if one sets aside the notion that, as in other legal systems, the main purpose of the rules is maintenance of the social order. Aaron Kirschenbaum, *The Role of Punishment in Jewish Criminal Law: A Chapter in Rabbinic Penological Thought*, 9 JEWISH L. ANN. 123, 127 (1991). Instead, he suggests, these classical tenets of Jewish criminal law may be viewed primarily as "sacral, mystical,

educational [and designed] to elevate man spiritually and to bring him near to Divine Law." *Id.* at 142.

⁴² BABYLONIAN TALMUD, *supra* note 2, *Shebuoth* 46b.

⁴³ *Id.*

⁴⁴ Tosafist commentary to BABYLONIAN TALMUD, *supra* note 2, *Shebuoth* 34a.

⁴⁵ See BABYLONIAN TALMUD, *supra* note 2, *Sanhedrin* 37b (noting that while capital witnesses are admonished about the inadmissibility of circumstantial evidence, circumstantial evidence is also inadmissible in civil cases, although the witnesses are not so admonished).

⁴⁶ See *id.*, *Shebuoth* 46b.

⁴⁷ YAD RAMAH, CHIDUSHEI HARAMAH AL MASECHET *Sanhedrin* 37b, at 78–79.

⁴⁸ *Id.*

⁴⁹ 2 THE COMMANDMENTS, *supra* note 27, at 270.

⁵⁰ See THE CODE OF MAIMONIDES–JUDGES, *supra* note 8, *Sanhedrin* 20:1, at 60.

⁵¹ *Id.* at 82–136.

⁵² See, e.g., EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 1, 6b (1628) (using the hypothetical to illustrate the strength of presumptions in the law of property); see also Walter Ullmann, *Medieval Principles of Evidence*, 62 L.Q. REV. 77, 86 (1946) (noting use of the hypothetical by continental authorities).

⁵³ See BARBARA J. SHAPIRO, BEYOND "REASONABLE DOUBT" AND "PROBABLE CAUSE" 206–12 (1991) (noting that English jurists accepted circumstantial evidence and presumptions as a replacement for eyewitness testimony in crimes like witchcraft for which eyewitnesses were unlikely to be found); *id.* at 214 (noting that Sir Edward Coke and Sir Matthew Hale "recognized that circumstantial evidence must often be employed by courts, but they expressed considerable caution as to its use").

Jewish law is likewise concerned with the difficulty of proof in secret crimes, such as sex offenses. In a perceptive Hebrew-language article on circumstantial evidence and presumptions in Jewish law, Chaim S. Heifetz noted the tension between the rule prohibiting circumstantial evidence on the one hand, and the rule permitting presumptions on the other. See Chaim S. Heifetz, *Gidrei Umdanah V'Chazakah B'Dinei Nafashot B'Mishpat Ivri [Aspects of Circumstantial and Presumptive Evidence in Jewish Criminal Law]*, 8 DINE ISRAEL 45 (1977). The distinction between the two is that the permitted presumptions generally relate to attendant circumstances of the crime, such as the parent-child relationship in the above incest case, whereas the excluded circumstantial evidence pertains to the prohibited act or result itself. Dr. Heifetz did not regard this distinction as convincing and found it difficult to divorce the prohibited act or result from its surrounding circumstances or conditions. *But see* MODEL PENAL CODE §§ 1.13(9), 2.02 (1974) (allowing different levels of culpability with regard to the elements of a crime, which include the attendant circumstances). Moreover, the distinction, Dr. Heifetz asserted, did not apply in the adultery case discussed at note 15 *supra* in which the majority accepted the presumption that those who acted lasciviously committed the prohibited act of intercourse itself. Dr. Heifetz suggested that the distinction lay between crimes that can generally be proved through direct testimony of eyewitnesses and those that cannot, that is, offenses committed secretly.

⁵⁴ WILLIAM PALEY, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY 551–52 (1786) ("A concurrence of well-authenticated circumstances composes a stronger ground of assurance, than positive testimony, unconfirmed by circumstances, usually affords. Circumstances cannot lie.").

⁵⁵ SHAPIRO, *supra* note 53, at 216–20.

⁵⁶ WILLIAM WILLS, AN ESSAY ON THE PRINCIPLES OF CIRCUMSTANTIAL EVIDENCE 171 (Philadelphia, T. & J.W. Johnson, 1853). Wills expanded on this point, stating: "Every other possible supposition by which the facts may be explained consistently with the hypothesis of innocence must be rigorously examined and successively eliminated; and only when no other supposition will reasonably account for all the conditions of the case, can the conclusion of guilt be legitimately adopted." *Id.* at 172. In addition, other limitations on the use of circumstantial evidence existed. See 1 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 754–65 (Philadelphia, T. & J.W. Johnson & Co., 1860). Starkie argued that for circumstantial evidence to be admitted, several factors should be shown. First, the circumstances from which the conclusion is drawn should be fully established. *Id.* at 754. Second, all the facts should be consistent with the hypothesis. *Id.* at 756. Third, the circumstances should be of a conclusive

nature and tendency. *Id.* at 757. Fourth, in agreement with Wills, Starkie proposed that the circumstances should exclude every hypothesis but the one proposed to be proved. *Id.* at 759. Finally, Starkie argued that circumstantial evidence should be excluded when a prosecutor willfully withholds direct, positive evidence. *Id.* at 766.

⁵⁷ 69 Mass. (5 Cush.) 295 (1850). The defendant was a professor of chemistry at "the medical college, in Boston, attached to the university at Cambridge." *Id.* at 296. He allegedly murdered a physician to whom he owed money; authorities discovered parts of the victim's body in his laboratory. *Id.* at 296–300.

⁵⁸ *Id.* at 320.

⁵⁹ *Id.* at 312. Chief Justice Shaw acknowledged that both direct and circumstantial evidence have "advantages and disadvantages." *Id.* at 311–12.

⁶⁰ *Id.* at 319.

⁶¹ See, e.g., *Dimmick v. United States*, 135 F. 257, 264–65 (9th Cir. 1905) (approving the trial court's cautionary circumstantial evidence charge); *State v. Andrews*, 61 P. 808, 809 (Kan. 1900) (reversing the trial court's guilty verdict for lack of a cautionary circumstantial evidence charge); *Hunt v. State*, 7 Tex. App. 212, 238 (1879) (same); see also *Hankins v. State*, 646 S.W.2d 191, 205 (Tex. Crim. App. 1983) (Onion, P.J., dissenting) ("Apparently following Lord Hale's lead, Chief Justice Shaw of Massachusetts in *Commonwealth v. Webster* adopted for the court the requirement of a cautionary jury instruction on the law of circumstantial evidence, which soon became known as the 'Webster Charge' and its use spread throughout the mid-nineteenth century United States.") (citations omitted). Each of these jurisdictions, however, has since abandoned the *Webster* rule.

⁶² See, e.g., 1 JOHN H. WIGMORE, EVIDENCE § 26, at 401 (3d ed. 1940) ("[I]t is out of the question to make a general assertion ascribing greater weight to one class [of evidence] or to the other.").

For an analysis of the differences between circumstantial and direct evidence, see *id.* §§ 25–26, at 398–406; Lyman R. Patterson, *The Types of Evidence: An Analysis*, 19 VAND. L. REV. 1 (1965).

⁶³ See, e.g., *United States v. Becker*, 62 F.2d 1007, 1010 (2d Cir. 1933) (L. Hand, J.) (opining that a cautionary circumstantial evidence charge might lead jurors to believe they should use circumstantial evidence instead of testimonial evidence).

⁶⁴ 348 U.S. 121 (1954).

⁶⁵ *Id.* at 139–40.

⁶⁶ *Id.*

⁶⁷ The government attempts to prove willful evasion of income tax by establishing a total net value of the taxpayer's assets at the beginning of a given year, proving increases in the taxpayer's net worth for each succeeding year during the time period under examination, and then calculating the difference between the adjusted net values of the taxpayer's assets at the beginning and end of each of the relevant years. *Id.* at 125. The taxpayer's nondeductible expenditures are added to these increases, and if the resulting figure for any year is substantially greater than the taxable income reported by the taxpayer for that year, the government claims that the excess represents unreported taxable income. *Id.* See generally HARRY G. BALTER, TAX FRAUD AND EVASION § 13.03[4][a]–[c] (5th ed. 1983) (describing the net worth method and its case law development after *Holland*).

⁶⁸ See, e.g., *United States v. Johnson*, 319 U.S. 503, 515–17 (1943) (noting, in a case against a notorious gambler, that financial transactions of vast illicit businesses are not likely to appear by direct proof); *Capone v. United States*, 51 F.2d 609, 619 (7th Cir.) (finding no error in the admission of proof that the defendant pursued an illegal beer business that produced proceeds exceeding \$1.5 million), *cert. denied*, 284 U.S. 669 (1931).

⁶⁹ *Holland*, 348 U.S. at 126.

⁷⁰ See, e.g., *Henry v. State*, 298 A.2d 327, 330 (Del. 1972) (approving, in light of *Holland*, an instruction that circumstantial evidence "is no different" from testimony or direct evidence in a case involving assault with intent to commit murder); *State v. O'Connell*, 275 N.W.2d 197, 204–05 (Iowa 1979) (affirming, in a murder case, the trial court's deletion from the state's uniform instruction a provision that requires the exclusion of every reasonable hypothesis of innocence before circumstantial evidence may by itself support a conviction); *Vincze v. State*,

472 P.2d 936, 937–38 (Nev. 1970) (finding no error in a charge to the jury that did not provide an additional instruction on circumstantial evidence but properly instructed on reasonable doubt in a conviction for obtaining money by false pretenses).

⁷¹ *Holland*, 348 U.S. at 124.

⁷² *Id.* at 125.

⁷³ *Holland*, 348 U.S. at 126.

⁷⁴ Circumstantial evidence was sometimes allowed to prove secret crimes such as poisoning and witchcraft when there was no other evidence of the crime. *See* SHAPIRO, *supra* note 53, at 211 (concluding that hesitancy existed over the full use of circumstantial evidence despite its application in limited cases).

⁷⁵ *See Holland*, 348 U.S. at 126 (justifying the evolution of the net worth method in criminal tax cases as "a potent weapon" to establish undisclosed sources of taxable income when other methods fail); *see also The Supreme Court, 1954 Term*, 69 HARV. L. REV. 119, 155 (1955) (discounting the dangers of a net worth prosecution by noting that the considerable time and effort it requires restricts its use to only the most flagrant cases, such as those in which direct evidence is unavailable and the discrepancy is so large that the errors of a net worth prosecution are absorbed).

⁷⁶ *Holland*, 348 U.S. at 127.

⁷⁷ Briefly stated, the pitfalls were as follows: defendants may have difficulty in proving the existence of substantial cash at the beginning of the first, contested tax year; the assumption that unexplained increases in net worth are due to unreported taxable income is not always valid; the taxpayer may be unable to recount the details of her financial history; jurors may infer willfulness when there are no books or records; the government may be able to rely on uncorroborated statements made by the taxpayer in an effort to reach an early settlement of the controversy; and unexplained income over a period of years may be incorrectly attributed to a particular tax year. *Id.* at 127–29.

⁷⁸ *Id.* at 129 (citations omitted).

⁷⁹ *See id.* at 139.

⁸⁰ *See id.* (finding the requirement of independent evidence met by a consistent pattern of underreporting large amounts of income and defendants' failure to include all of their income in their records).

⁸¹ *See id.* at 127–29.

⁸² *Holland*, 348 U.S. at 125.

⁸³ *Id.* at 135.

⁸⁴ *Id.* at 136. Because the Court only required the government to track down relevant leads furnished by the taxpayer, which, if true, would establish the taxpayer's innocence, the government is not required to look into every possible source of income. *Id.* at 135–36. This burden on the government is therefore consistent with the requirement in a circumstantial evidence charge that the evidence negate every *reasonable* hypothesis other than guilt. *Id.*

Apparently, however, the government's obligation in this regard "has turned out to be almost an empty victory for the taxpayer." *See* BALTER, *supra* note 67, § 13.03[4][b][iii], at 13–25 (noting that an investigator's duty to follow through on a lead is not absolute but is limited to a reasonable effort, and that even when a taxpayer furnishes leads that appear reasonably susceptible to investigation, the duty will be defeated if there is other credible evidence sufficient to establish the understatement of income by the net worth method).

⁸⁵ *See, e.g., State v. Jackson*, 331 A.2d 361, 365 (Me. 1975); *Finke v. State*, 468 A.2d 353, 366 (Md. Ct. Spec. App. 1983), *cert. denied*, 474 A.2d 218 (Md.), *cert. denied*, 469 U.S. 1043 (1984); *State v. Gosby*, 539 P.2d 680, 684–85 (Wash. 1975).

⁸⁶ *Cf. In re Use by Trial Courts of Standard Jury Instructions in Criminal Cases*, 431 So. 2d 594, 595 (Fla. 1981) (approving the elimination of the special circumstantial evidence charge but noting that, in his or her discretion, the trial judge may still give the instruction when "necessary under the peculiar facts of a specific case").

⁸⁷ 397 U.S. 358 (1970). For example, the following cases adopted the *Holland* rule shortly after the decision in *Winship*: *State v. Wilkins*, 523 P.2d 728, 737 (Kan. 1974); *Vincze v. State*, 472

P.2d 936, 937 (Nev. 1970); *State v. Gosby*, 539 P.2d 680, 685 (Wash. 1975); *Blakely v. State*, 542 P.2d 857, 861–62 (Wyo. 1975).

⁸⁸ See *In re Winship*, 397 U.S. 358, 362–64 (1970). See generally Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 457–62 (1989) (analyzing the scope of the reasonable doubt ruling and its relationship to the presumption of innocence).

⁸⁹ As the *Winship* Court noted, in criminal proceedings there was "virtually unanimous adherence to the reasonable-doubt standard." 397 U.S. at 361. The issue came to the Court as a constitutional challenge to a New York statute that authorized adjudications of juvenile delinquency based on a preponderance of the evidence. *Id.* at 360.

⁹⁰ Because *Holland* announced an evidentiary rule binding only on the federal system, the state courts were free to ignore it.

⁹¹ Most jurisdictions that have retained the cautionary charge restrict its use to cases based wholly or substantially on circumstantial evidence. See, e.g., *Nichols v. State*, 591 N.E.2d 134, 136 (Ind. 1992); *Hampton v. State*, 285 N.W.2d 868, 875 (Wis. 1979). In such jurisdictions a special charge is often not required when the only element proved by circumstantial evidence is intent. See, e.g., *State v. Fast Horse*, 490 N.W.2d 496, 498 (S.D. 1992).

⁹² See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 788–93 (1992) (noting that state courts often interpret their constitutional provisions identically to the counterpart federal provisions).

⁹³ The moving force behind the New Federalism was Justice Brennan. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977) (urging state courts to "step into the breach" left by the Burger Court's retreat from protection of individual rights by looking to state constitutions as more generous guarantors of individual rights); see also Stewart G. Pollack, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983) (characterizing Brennan's article as the Magna Carta of state constitutionalism).

⁹⁴ See, e.g., *State v. Gosby*, 539 P.2d 680, 685 (Wash. 1975) ("It is simply untenable to assume that circumstantial evidence is less reliable than is direct evidence.").

⁹⁵ See, e.g., *State v. Adcock*, 310 S.E.2d 587, 607 (N.C. 1983) (concluding that the reasonable hypothesis instruction would confuse the jury by requiring "unnecessary and repetitious application" of the same measures of proof to the evidence and holding that such instruction is unnecessary when a correct instruction on reasonable doubt is given); *State v. Derouchie*, 440 A.2d 146, 149–50 (Vt. 1981) (arguing that directing the juror's attention to an "additional, yet unnecessary, level of analysis" only confuses the real issue).

⁹⁶ *State v. O'Connell*, 275 N.W.2d 197, 205 (Iowa 1979).

⁹⁷ *State v. Harvill*, 476 P.2d 841, 846 (Ariz. 1970).

⁹⁸ *Allen v. State*, 420 P.2d 465, 468 (Alaska 1966).

⁹⁹ *State v. Nelson*, 731 P.2d 788, 794 (Idaho App. 1986) (quoting *State v. Holman*, 707 P.2d 493, 501 (Idaho App. 1985)).

¹⁰⁰ *People v. Cleague*, 239 N.E.2d 617, 619 (N.Y. 1968).

The argument in favor of retaining the common law charge seems particularly compelling in jurisdictions that do not permit jury instructions to include a definition of reasonable doubt. *But see Blakely v. State*, 542 P.2d 857, 861–63 (Wyo. 1975) (holding that a circumstantial evidence charge need not be given even though state law does not permit explanation of reasonable doubt to the jury).

Holland's determination that a special charge was unnecessary was predicated on the presence of a reasonable doubt charge as a preferable substitute. See *Holland v. United States*, 348 U.S. 121, 139–40 (1954). Unless the reasonable doubt concept is explained to the jury in a meaningful manner, however, it is difficult to see how the reasonable doubt charge by itself can be an adequate replacement. Although *Holland* discouraged definitions of reasonable doubt, it approved a particular definition. See *Holland*, 348 U.S. at 140 (approving instructions that defined reasonable doubt as "the kind of doubt that would make a person hesitate to act" but affirming the trial court's definition, "the kind of doubt . . . which you folks in the more serious and important affairs of your own lives might be willing to act on" (alteration in original)). Therefore it is arguable that *Holland* did not intend to eliminate the circumstantial evidence charge when that

requirement is not explained to the jury at all.

In any event, there remains "the question of how in eliminating a cautionary instruction on circumstantial evidence and utilizing only a nondefinitional reasonable doubt instruction the accused is protected from jury speculation." *Hankins v. State*, 646 S.W.2d 191, 213 (Tex. Crim. App. 1983) (Onion, P.J., dissenting). Be that as it may, *Victor v. Nebraska*, 511 U.S. 1 (1994), makes it clear that definitions of reasonable doubt are not constitutionally mandated, at least "as a matter of course," *id.* at 1243, and this general rule presumably extends to circumstantial evidence cases as well.

¹⁰¹ 443 U.S. 307, 326 (1979).

¹⁰² In this and the other state-by-state analyses in this chapter, our research includes all cases decided prior to the end of 1993. Of the 50 states and the District of Columbia, 31 jurisdictions appear to have eliminated a mandatory circumstantial evidence charge. Of these, 29 have done so in a fairly clear manner: Alaska, *Allen v. State*, 420 P.2d 465, 468 (Alaska 1966); Arizona, *State v. Harvill*, 476 P.2d 841, 846 (Ariz. 1970); Colorado, *People v. Austin*, 523 P.2d 989, 992 (Colo. 1974); Delaware, *Henry v. State*, 298 A.2d 327, 330 (Del. 1972); Florida, *In re Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases*, 431 So. 2d 594, 695 (Fla. 1981); Hawaii, *State v. Bush*, 569 P.2d 349, 350–51 (Haw. 1977); Illinois, *People v. Bryant*, 499 N.E.2d 413, 419 (Ill. 1986); Iowa, *State v. O'Connell*, 275 N.W.2d 197, 204–05 (Iowa 1979); Kansas, *State v. Wilkins*, 523 P.2d 728, 737 (Kan. 1974); Kentucky, *Armstrong v. Commonwealth*, 517 S.W.2d 233, 236 (Ky. 1974) (ruling that the judge rather than the jury determines whether the evidence is as consistent with innocence as with guilt and accordingly rejecting a contention that the jury be so charged); Maine, *State v. Little*, 343 A.2d 180, 185 (Me. 1975); Maryland, *Hebron v. State*, 627 A.2d 1029, 1031–37 (Md. 1993) (same ruling as the Kentucky court in *Armstrong*); Michigan, *People v. Seabrooks*, 354 N.W.2d 374, 381–82 (Mich. Ct. App. 1984) (confining the cautionary circumstantial evidence charge to situations in which the evidence against the defendant is weak); Minnesota, *State v. Turnipseed*, 297 N.W.2d 308, 312–13 (Minn. 1980); Missouri, *State v. Grim*, 854 S.W.2d 403, 407–08 (Mo. 1993); Nevada, *Bails v. State*, 545 P.2d 1155, 1156 (Nev. 1976); New Jersey, *State v. Ray*, 202 A.2d 425, 431–32 (N.J. 1964); New Mexico, *State v. Bell*, 560 P.2d 925, 928 (N.M. 1977); North Carolina, *State v. Adcock*, 310 S.E.2d 587, 607 (N.C. 1983); Ohio, *State v. Jenks*, 574 N.E.2d 492, 502 (Ohio 1991); Oklahoma, *Johnson v. State*, 632 P.2d 1231, 1233 (Okla. 1981) (noting that the reasonable hypothesis test may be used only in an instruction to the jury to cure some other grossly misleading instruction or by the court in assessing the strength of circumstantial evidence); Oregon, *State v. Draves*, 524 P.2d 1225, 1228 (Or. Ct. App. 1974); Pennsylvania, *Commonwealth v. Sanders*, 551 A.2d 239, 247–48 (Pa. Super. Ct. 1988); Rhode Island, *State v. Roddy*, 401 A.2d 23, 35 (R.I. 1979); Texas, *Hankins v. State*, 646 S.W.2d 191, 197 (Tex. Crim. App. 1983); Utah, *State v. Eagle*, 611 P.2d 1211, 1213 (Utah 1980); Vermont, *State v. Derouchie*, 440 A.2d 146, 150 (Vt. 1981); Washington, *State v. Gosby*, 639 P.2d 680, 686 (Wash. 1975); Wyoming, *Blakely v. State*, 542 P.2d 857, 862 (Wyo. 1975).

In the remaining two jurisdictions in this group, Connecticut and the District of Columbia, the law is unclear, although both probably follow *Holland*: Connecticut, *State v. Mercer*, 544 A.2d 611, 622 (Conn. 1988) (holding that it is error for the trial court to use a "more probable than not" charge with respect to circumstantial evidence); District of Columbia, *Chaconas v. United States*, 326 A.2d 792, 797–98 (D.C. 1974) (holding that the government need not negate all inferences of innocence).

¹⁰³ Of the twenty jurisdictions apparently adhering to the common law rule, in eighteen the law to that effect is clear: Alabama, *Raper v. State*, 584 So. 2d 544, 545 (Ala. Crim. App. 1991); California, *People v. Towler*, 641 P.2d 1253, 1259 (Cal. 1982); Georgia, *Mainor v. State*, 387 S.E.2d 882, 884 n.2 (Ga. 1990); Idaho, *State v. Nelson*, 731 P.2d 788, 794 (Idaho Ct. App. 1986); Indiana, *Nichols v. State*, 591 N.E.2d 134, 136 (Ind. 1992); Louisiana, *State v. Captville*, 448 So. 2d 676, 678 (La. 1984); Massachusetts, *Commonwealth v. Pires*, 451 N.E.2d 1155, 1159 (Mass. 1983); Mississippi, *Keys v. State*, 478 So. 2d 266, 267 (Miss. 1985); Montana, *State v. Lucero*, 693 P.2d 511, 513–14 (Mont. 1984); Nebraska, *State v. Leisy*, 295 N.W.2d 715, 721 (Neb. 1980); New York, *People v. Ford*, 488 N.E.2d 458, 464–66 (N.Y. 1985); North Dakota, *State v. Steele*, 211 N.W.2d 855, 866–67 (N.D. 1973); South Carolina, *State v. Manning*, 409 S.E.2d 372, 374

(S.C. 1991), *cert. denied*, 502 U.S. 914 (1992); South Dakota, *State v. Breed*, 399 N.W.2d 311, 312–13 (S.D. 1987); Tennessee, *State v. Tharpe*, 726 S.W.2d 896, 900 (Tenn. 1987); Virginia, *Brown v. Commonwealth*, 381 S.E.2d 225, 229–30 (Va. 1989); West Virginia, *State v. Bratcher*, 206 S.E.2d 408, 410 (W. Va. 1974); Wisconsin, *State v. Wyss*, 370 N.W.2d 745, 751 (Wis. 1985), *overruled on other grounds by State v. Poellinger*, 451 N.W.2d 752 (Wis. 1990) (overruling *Wyss* as to sufficiency of the evidence).

In the remaining jurisdictions, Arkansas and New Hampshire, the law is unclear, although both states probably follow the common law rule.

The Arkansas lines of cases conflict. In *Ridenour v. State*, 43 S.W.2d 60, 61 (Ark. 1931), the court wrote, "[T]he refusal to give any instructions on circumstantial evidence, where the case depends wholly upon such evidence, is not error if [the judge] had already fully and correctly instructed the jury on the credibility of witnesses, the weight of evidence, the presumption of innocence, and reasonable doubt." This rule was followed in *Murray v. State*, 462 S.W.2d 438, 442–43 (Ark. 1971). However, in *Ward v. State*, 658 S.W.2d 379, 381 (Ark. 1983) (citations omitted), in the context of a sufficiency of the evidence claim, the court stated, "When the prosecution is based on circumstantial evidence the jury should be informed, as it was here, that circumstantial evidence must be consistent with the guilt of the defendant and inconsistent with any other reasonable conclusion." *See Lane v. State*, 702 S.W.2d 806, 807 (Ark. 1986) (citing *Ward* with approval).

In New Hampshire, the court has rejected defendants' requests for additional specific instructions with regard to circumstantial evidence, albeit in the context of cases in which the trial judge instructed the jury that if two inferences can be drawn, one consistent with innocence and one consistent with guilt, the defendant is entitled to the former inference. *See State v. Sands*, 467 A.2d 202, 230–31 (N.H. 1983).

¹⁰⁴ *See, e.g., State v. Adcock*, 310 S.E.2d 587, 602–08 (N.C. 1983); *State v. Jenks*, 574 N.E.2d 492, 496–503 (Ohio 1991); *State v. Gosby*, 539 P.2d 680, 684–86 (Wash. 1975).

¹⁰⁵ *See, e.g., Hankins v. State*, 646 S.W.2d 191, 197 (Tex. Crim. App. 1983) ("[W]e join the growing trend of state courts on this issue."); *Blakely v. State*, 542 P.2d 857, 862 (Wyo. 1975) ("Upon authority of *Holland*, many states are now turning to the concept that circumstantial evidence should be measured upon the same basis as direct evidence."); *cf. State v. Adcock*, 310 S.E.2d 587, 606 (N.C. 1983) (noting, in the course of a fairly detailed analysis, that "both state and federal courts are increasingly abandoning the requirement that there be special instructions on proof of guilt by circumstantial evidence").

¹⁰⁶ *See Holland v. United States*, 348 U.S. 121, 139–40 (1954).

¹⁰⁷ *Cf. Newman, supra* note 38, at 991–97 (arguing that the reasonable doubt instruction should advise jurors that they must be "sure of guilt to a high degree" and urging a more exacting appellate review standard for sufficiency claims).

¹⁰⁸ *Holland*, 348 U.S. at 140 (emphasis added).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (quoting *Miles v. United States*, 103 U.S. 304, 312 (1880)).

¹¹¹ *Id.* at 139–40.

¹¹² *In re Winship*, 397 U.S. 358 (1970).

¹¹³ 498 U.S. 39 (1990).

¹¹⁴ *Id.* at 41. *Cage's* test for determining the constitutionality of a reasonable doubt instruction—"how reasonable jurors could have understood the charge as a whole"—was, however, almost immediately placed in doubt. *Id.* In *Boyde v. California*, 494 U.S. 370 (1990), the Court settled instead on a "reasonable likelihood" test for determining whether the jury misapplied the challenged instruction, concluding that an instruction was not unconstitutional if there was only a possibility of such misapplication. *Id.* at 380. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991), reaffirmed *Boyde* and also held that to constitute a Due Process violation, the instruction must infect the fairness of the entire trial. In *Sullivan v. Louisiana*, 508 U.S. 275, 278 n.1 (1993), responding to the state's contention that *Cage* was inconsistent with *Boyde* and *McGuire*, Justice Scalia noted that "we do not consider whether the instruction given here would survive review under the *Boyde* standard." *Victor v. Nebraska*, 511 U.S. 1, 5 (1994), made it clear that the appropriate constitutional test was the one articulated in *Boyde* and *McGuire*, rather than in *Cage*,

namely "whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard."

¹¹⁵ *Cage*, 498 U.S. at 41; see also *Taylor v. Kentucky*, 436 U.S. 478, 488 (1978) (suggesting, in the course of an opinion concerning the circumstances under which the jury must be instructed on the presumption of innocence, that the trial court's reasonable doubt charge, which included the terms "substantial doubt, a real doubt," was too abbreviated and was unclear).

¹¹⁶ *Cage*, 498 U.S. at 41.

¹¹⁷ *Id.* at 40.

¹¹⁸ *Id.* at 41.

¹¹⁹ See *Victor v. Nebraska*, 511 U.S. 1, 28–32 (1994) (Blackmun, J., concurring in part and dissenting in part).

¹²⁰ 511 U.S. 1 (1994).

¹²¹ See *id.* at 16, 20–21.

¹²² Justice O'Connor's majority opinion was joined in its entirety by the Chief Justice and by Justices Stevens, Scalia, Kennedy and Thomas. Justice Ginsburg wrote an opinion concurring in part and concurring in the judgment. *Id.* at 23. Justice Blackmun wrote an opinion concurring in part and dissenting in part, joined by Justice Souter except with respect to the concluding paragraph, reiterating Blackmun's view that the death penalty is unconstitutional in all cases. *Id.* at 28. Justice Kennedy wrote a brief concurring opinion adding an "observation." *Id.* at 23.

¹²³ *Id.* at 22 (quoting *Holland v. United States*, 348 U.S. 121, 140 (1954)).

¹²⁴ *Victor*, 511 U.S. at 19–22.

¹²⁵ *Id.* at 17–20. Although approved in *Holland*, see 348 U.S. at 140, and now in *Victor*, the hesitate-to-act formulation leaves much to be desired.

¹²⁶ The majority discussed the historical origins of the term "moral evidence" at length, see 511 U.S. at 10–14, acknowledging that it is "not a mainstay of the modern lexicon," see *id.* at 12, but concluding that the other instructions requiring that the decision be based on the evidence in the case made "the reference to moral evidence unproblematic" *Id.* at 13. In his separate concurrence, Justice Kennedy found use of the term "moral evidence" "most troubling" and "quite indefensible." *Id.* at 23.

¹²⁷ The majority stated that it was "concerned" with the "moral certainty" terminology, noting that "a jury might understand the phrase to mean something less than the very high level of probability required by the Constitution in criminal cases," but it nonetheless concluded that other instructions give "content" to the phrase. *Victor*, 511 at 14.

¹²⁸ *Id.* at 8–20; see *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295 (1850).

¹²⁹ *Victor*, 511 U.S. at 19–22. Specifically, in the companion case *Sandoval v. California*, the Court found that the term "moral evidence" was permissible because the instruction elsewhere made it clear that this was a reference to proof adduced at the trial. *Id.* at 10–13. Although the majority did not "condone" its use, the term "moral certainty" was likewise permissible because the instruction that the jurors must have an "abiding conviction" of the defendant's guilt correctly articulated the state's burden. *Id.* at 16. The Court further found that the charge that a reasonable doubt is "not a mere possible doubt" was acceptable because, by definition, the requisite doubt must be reasonable. *Id.* at 17.

In the *Nebraska* case, the Court emphasized that much of the charge was taken from the *Webster* instructions and from cases using hesitate-to-act language. *Victor*, 511 at 19. The Justices upheld a charge containing the term "substantial doubt," finding it permissible because that language was juxtaposed to distinguishing terms such as a doubt stemming "from mere possibility, from bare imagination, or from fanciful conjecture," see *id.* at 20, and because the instruction gave the alternative hesitate-to-act definition of reasonable doubt that had been approved in *Holland*. *Id.* at 20–21. The "moral certainty" language in the instruction, which the Court made clear it did not "countenance," was upheld because of the trial court's additional instruction that the jury must have an abiding conviction of the defendant's guilt and that equated a reasonable doubt with one that would cause a reasonable person to hesitate to act. *Id.* at 21–22. Finally, language in the instruction referring to "strong probabilities" of guilt was upheld because it was coupled with language requiring the jury to exclude every reasonable

doubt. *Id.* at 22.

¹³⁰ See Henry A. Diamond, Note, *Reasonable Doubt: To Define, or Not To Define*, 90 COLUM. L. REV. 1716, 1721–29 (1990) (making this constitutional argument and relying principally on the statement in *Jackson v. Virginia*, 443 U.S. 307 (1979), that *Winship* requires juries to apply the reasonable doubt standard rationally, and on studies suggesting that juries do not understand the term reasonable doubt without explanation).

¹³¹ *Victor*, 511 U.S. at 5. The Court reached this conclusion on the basis of scant authority, merely citing *Hopt v. Utah*, 120 U.S. 430, 440–41 (1887), introduced by a "cf." signal. *Id.* In her opinion concurring in part and concurring in the judgment, Justice Ginsburg pointed out that "contrary to the Court's suggestion, [we have never] held that the Constitution does not require trial courts to define reasonable doubt." *Id.* at 26 (citations omitted).

¹³² *Id.* at 5 (quoting *Holland v. United States*, 348 U.S. 121, 140 (1954)) (citations omitted and brackets in original).

¹³³ See *Sullivan v. Louisiana*, 508 U.S. 275, 281–82 (1993).

¹³⁴ See, e.g., *United States v. Langer*, 962 F.2d 592, 600 (7th Cir. 1992) (commenting that "any use of an instruction defining reasonable doubt presents a situation equivalent to playing with fire"); *People v. Speight*, 606 N.E.2d 1174, 1177 (Ill. 1992) (stating that neither the court nor counsel should attempt to define the reasonable doubt standard for the jury); *State v. Dunn*, 820 P.2d 412, 416 (Kan. 1991) (noting that reasonable doubt does not need to be defined because the words themselves describe the meaning); *Castro v. State*, 844 P.2d 159, 173 (Okla. Crim. App. 1992) (stating that it is error for a prosecutor to define or attempt to define reasonable doubt), *cert. denied*, 510 U.S. 844 (1993).

¹³⁵ See, e.g., *United States v. Russell*, 971 F.2d 1098, 1108 (4th Cir. 1992) (disapproving of instructions defining reasonable doubt but suggesting that they be given when a demonstrably confused jury requests one), *cert. denied*, 506 U.S. 1066 (1993); *United States v. Littlefield*, 840 F.2d 143, 146–47 (1st Cir.) (commenting that no definition of reasonable doubt need be included in jury instructions but allowing judges to provide proper explanations "if and to the degree they are so inclined"), *cert. denied*, 488 U.S. 860 (1988); *State v. Kimmel*, 703 P.2d 525, 526 (Ariz. Ct. App. 1985) (characterizing efforts to define reasonable doubt as ineffective); *State v. Marra*, 610 A.2d 1113, 1129 (Conn. 1992) (noting that judicial attempts to clarify the meaning of reasonable doubt by explanation, elaboration, or illustration tend to confuse or mislead); *State v. Manning*, 409 S.E.2d 372, 375 (S.C. 1991) (concluding that reasonable doubt is best understood when the jury is simply instructed to give it its plain and ordinary meaning), *cert. denied*, 503 U.S. 914 (1992).

¹³⁶ *Holland v. United States*, 348 U.S. 121, 139–40 (1954).

¹³⁷ See Jacquelyn L. Bain, Comment, *A Proposed Definition of Reasonable Doubt and the Demise of the Circumstantial Evidence Charge Following Hankins v. State*, 15 ST. MARY'S L.J. 353, 372–76 (1984) (describing studies); Diamond, *supra* note 130, at 1722–23 (same); see also *Victor v. Nebraska*, 511 U.S. 1, 26 (1994) (Ginsburg, J., concurring in part and concurring in the judgment) (noting that "the words 'beyond a reasonable doubt' are not self-defining for juries").

¹³⁸ Compare *State v. Powell*, 551 P.2d 902, 908 (Kan. 1976), in which, in an interesting twist, the defendant on appeal claimed that because the state had abandoned the cautionary charge, it was error for the trial court to give one. The state supreme court affirmed the conviction, noting that "the giving of such an instruction is generally beneficial to the defendant," and thus tacitly acknowledging the independent value of the special instruction. *Id.*

¹³⁹ Cf. *Victor*, 511 U.S. at 25 (Ginsburg, J., concurring in part and concurring in the judgment) (criticizing as circular the Nebraska charge that included the following statement: "[The jury] may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable." (brackets in original)).

¹⁴⁰ E.g., *Ex parte Adkins*, 600 So. 2d 1067, 1071 (Ala. 1992); *State v. Morley*, 474 N.W.2d 660, 670 (Neb. 1991).

¹⁴¹ E.g., *Hoskins v. State*, 441 N.E.2d 419, 425 (Ind. 1982); *People v. Jackson*, 421 N.W.2d 697, 698 (Mich. Ct. App. 1988).

¹⁴² E.g., *Hoskins*, 441 N.E.2d at 425.

¹⁴³ *E.g.*, *Wintjen v. State*, 398 A.2d 780, 781 (Del. 1979); *State v. Smith*, 600 So. 2d 919, 922 (La. Ct. App. 1992). "Substantial doubt" is, of course, the specific terminology that was disapproved in *Cage* and allowed to stand in *Victor*, 511 U.S. at 22.

¹⁴⁴ *Commonwealth v. Jones*, 563 A.2d 161, 164 (Pa. Super. Ct. 1989), *aff'd on other grounds*, 602 A.2d 820 (Pa. 1992).

¹⁴⁵ *See, e.g.*, *Victor*, 511 U.S. at 20 (acknowledging that the reference to substantial doubt is "somewhat problematic" because one of its accepted dictionary definitions "could imply a doubt greater than required for acquittal under *Winship*.").

¹⁴⁶ *E.g.*, *Brown v. State*, 565 So. 2d 304, 307 (Fla.), *cert. denied*, 498 U.S. 992 (1990); *State v. Thorpe*, 429 A.2d 785, 789 (R.I. 1981). *But see* *State v. Ireland*, 773 P.2d 1375, 1379–80 (Utah 1989) (directing trial courts not to use an instruction that a reasonable doubt is not a mere possible doubt).

¹⁴⁷ *E.g.*, *State v. McGranahan*, 206 N.W.2d 88, 91 (Iowa 1973); *State v. Brewer*, 197 N.W.2d 409, 410 (S.D. 1972).

¹⁴⁸ *E.g.*, *State v. Ireland*, 773 P.2d at 1380.

¹⁴⁹ *E.g.*, *Starr v. State*, 410 S.E.2d 180, 182 (Ga. Ct. App. 1991).

¹⁵⁰ *Wade v. State*, 401 S.E.2d 701, 703 (Ga. 1991), *cert. denied*, 502 U.S. 1060 (1992).

¹⁵¹ *Cf.* Newman, *supra* note 38, at 983:

A juror hearing the "doubt based on reason" formulation might think that a generalized uneasiness or skepticism about the prosecution's evidence is not a valid basis to resist entreaties to vote for conviction. That is probably a distortion of the concept that courts are seeking to implement.

¹⁵² *Holland v. United States*, 348 U.S. 121, 140 (1954); *e.g.*, *DuBois v. State*, 494 S.W.2d 700, 703 (Ark. 1973); *State v. Sheets*, 628 P.2d 320, 324 (N.M. Ct. App. 1981).

¹⁵³ *See, e.g.*, *People v. Noland*, 739 P.2d 906, 907 (Colo. Ct. App. 1987); *State v. Lucero*, 693 P.2d 511, 516 (Mont. 1984). The *Holland* Court gently criticized this definition of reasonable doubt, but nonetheless affirmed on the ground that, "taken as whole, the instructions correctly conveyed the concept of reasonable doubt to the jury." 348 U.S. at 140.

¹⁵⁴ *See* Newman, *supra* note 38, at 982–83 (musing that even if a juror discerns a doubt that would cause her to hesitate to act, such instructions do not tell her what to do with that information).

¹⁵⁵ *Victor v. Nebraska*, 511 U.S. 1, 34 (1994) (Blackmun, J., concurring in part and dissenting in part).

¹⁵⁶ *See* FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS 28–29 (1987) (commentary on Instruction 21) (stating that decisions made in the most important affairs of a person's life, such as choosing a spouse, a job, a place to live, and the like, generally involve a high level of uncertainty and risk taking and are therefore unlike the decisions jurors ought to make in criminal cases).

¹⁵⁷ *E.g.*, *People v. Noguera*, 842 P.2d 1160, 1179 (Cal. 1992), *cert. denied*, 512 U.S. 1253 (1994); *State v. Estes*, 418 A.2d 1108, 1116 (Me. 1980).

¹⁵⁸ *E.g.*, *State v. Antwine*, 743 S.W.2d 51, 62 (Mo. 1987), *cert. denied*, 486 U.S. 1017 (1988); *State v. Van Gundy*, 594 N.E.2d 604, 606 (Ohio 1992). This is, in part, the formulation used in the federal pattern jury instructions, which provide as follows:

As I have said many times, the government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

FEDERAL JUDICIAL CENTER, *supra* note 156, at 28 (Instruction 21).

¹⁵⁹ *E.g.*, *Brown v. State*, 565 So. 2d 304, 307 n.8 (Fla.), *cert. denied*, 498 U.S. 992 (1990).

¹⁶⁰ *See, e.g.*, *Victor v. Nebraska*, 511 U.S. 1, 27 (1994) (Ginsburg, J., concurring in part and concurring in the judgment).

¹⁶¹ *In re Winship*, 397 U.S. 358, 364 (1970).

¹⁶² 443 U.S. 307, 315 (1979).

¹⁶³ *See* *Holland v. United States*, 348 U.S. 121, 140 (1954); 9 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 26, at 961 (James H. Chadbourn rev., 1981) ("Wigmore's view that circumstantial evidence may be as persuasive and as compelling as testimonial evidence, and sometimes more so, is now generally accepted."). Wigmore noted, however, that "each class [of evidence] has its special dangers and its special advantages." *Id.* at 957. Elsewhere he concluded that comparisons should not be made between the two types of evidence as a class because "[S]ome circumstantial evidence is more valuable and convincing than some testimonial evidence; and 'vice versa.' That is all that can be said." JOHN H. WIGMORE, THE SCIENCE OF JUDICIAL PROOF § 320, at 794 (3d ed. 1937).

¹⁶⁴ *See, e.g.*, *People v. Bryant*, 499 N.E.2d 413, 418 (Ill. 1986) (observing that it is often difficult to distinguish between direct and circumstantial evidence); *Ex parte Jefferies*, 124 P. 924, 924–25 (Okla. Crim. App. 1912) (illustrating the same point with a graphic example).

¹⁶⁵ *See* *Patterson*, *supra* note 62, at 6:

[T]he inferential process in using direct evidence is a simple one, requiring only a direct inference, which coincides with the proposed conclusion. The inferential process in using circumstantial evidence is much more complicated, requiring a series of inferences, and the ultimate inference which coincides with the proposed conclusion is an indirect one.

See also *United States v. Masiello*, 235 F.2d 279, 289 (2d Cir.) (Frank, J., concurring) (noting that direct testimony "rests entirely on the jury's belief in the credibility—reliability—of the testimony of some witness," whereas circumstantial evidence involves "inferences as to the existence or occurrence of facts concerning which no one has testified"), *cert. denied*, 352 U.S. 882 (1956).

¹⁶⁶ *See, e.g.*, *Commonwealth v. Harman*, 4 Pa. 269, 273 (1846) (stating that "[a]ll evidence is more or less circumstantial, the difference being only in the degree"). *But see* *United States v. Becker*, 62 F.2d 1007, 1010 (2d Cir. 1933) (L. Hand, J.):

A jury tests a witness's credibility by using their experience in the past as to similar utterances of persons in a like position. That is precisely the same mental process as when they infer from an object what has been its past history, or from an event what must have preceded it.

¹⁶⁷ To be sure, direct evidence may also require inferences, but they are generally far less attenuated, such as an inference that the bullet lodged in the victim's chest in fact caused his death. *See, e.g.*, *Jefferies*, 124 P. at 924.

¹⁶⁸ *See* WILLS, *supra* note 56, at 48–49:

There is another source of fallacy and danger, to which . . . circumstantial evidence is peculiarly liable, and of which it is necessary to be especially mindful. Where the evidence is direct; if the testimony be credible, belief is the immediate and necessary result; whereas, in cases of circumstantial evidence, processes of inference and deduction are essentially involved;—frequently of a most delicate and perplexing character,—liable to numberless causes of fallacy, inherent in the very nature of the human mind itself, which has been profoundly compared to the disturbing power of an uneven mirror, imparting its own nature upon the true nature of things.

¹⁶⁹ This sort of direct evidence based on eyewitness identification is also not without its perils.

¹⁷⁰ *Compare* *Ward v. State*, 658 S.W.2d 379, 382 (Ark. 1983) (Hickman, J., dissenting) ("I seriously doubt whether a legal inference can be drawn which would support a conviction for burglary based on the simple fact that one is in possession of recently stolen property.") *with* *State v. Wilkins*, 523 P.2d 728, 730–31 (Kan. 1974) ("Possession by an accused of property recently stolen in a burglary is sufficient to sustain a conviction of burglary and theft where satisfactory explanation for such possession is not given."). *See generally* Charles R. Nesson,

Reasonable Doubt and Permissive Inferences: The Value of Complexity, 92 HARV. L. REV. 1187 (1979) (discussing the constitutionality of permissive inferences in criminal cases).

¹⁷¹ *People v. Ford*, 488 N.E.2d 458, 465 (N.Y. 1985) (citations omitted). *But see State v. Jenks*, 574 N.E.2d 492, 502 (Ohio 1991) ("Since circumstantial evidence and direct evidence are indistinguishable so far as the jury's fact-finding function is concerned, all that is required of the jury is that it weigh all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt.").

¹⁷² *See Hankins v. State*, 646 S.W.2d 191, 221 (Tex. Crim. App. 1983) (Teague, J., dissenting) (citations omitted):

When Iago left Desdemona's handkerchief in Cassio's lodgings, Othello could surely have profited from consideration of some cautionary advice as to the unreliability of circumstantial evidence. And we all know what happened to Othello, don't we? Let us, however, hope and pray that the same tragic ending is not in store for accused criminal defendants of this State, who are confronted with beguiling evidence of suspicious circumstances, but who are judged by juries which are not favored with an instruction on the law of circumstantial evidence.

¹⁷³ *Cf. People v. Kennedy*, 391 N.E.2d 288, 290–91 (N.Y. 1979):

[C]ases involving circumstantial evidence must be closely reviewed because they often require the jury to undertake a more complex and problematical reasoning process than do cases based on direct evidence. . . . [T]he jury must attempt a careful and close analysis of the evidence and determine what inferences can and should be drawn not merely from each separate piece of evidence, but from the whole complex of interrelated information which is presented in evidence. . . . [T]he reasoning process tends to be more complex, and is thus more subject to error. Hence, close judicial supervision is necessary to ensure that the jury does not make inferences which are based not on the evidence presented, but rather on unsupported assumptions drawn from evidence equivocal at best.

¹⁷⁴ *See United States v. Pape*, 144 F.2d 778, 781 (2d Cir.) (noting that the reasonable doubt charge is "directed to the case as a whole, not to each detail"), *cert. denied*, 323 U.S. 752 (1944).

¹⁷⁵ *See, e.g., Yates v. Evatt*, 500 U.S. 391, 403 (1991) (referring to "a sound presumption of appellate practice, that jurors are reasonable and generally follow the instructions they are given").

¹⁷⁶ *Holland v. United States*, 348 U.S. 121, 140 (1954).

¹⁷⁷ *See State v. Derouchie*, 440 A.2d 146, 149 (Vt. 1981). The court stated:

Although some decisions appear to equate the 'exclusion of every reasonable hypothesis of innocence' with the reasonable doubt standard, the concepts are fundamentally different. Reasonable doubt is the requisite standard of proof. 'Exclusion of every reasonable hypothesis of innocence' is simply a method for evaluating whether the reasonable doubt standard has been met.

Id. (citations omitted). *But see United States v. Wroblewski*, 105 F.2d 444, 449 (7th Cir. 1939) (asserting that the cautionary instruction is merely another way of expressing the reasonable doubt standard).

¹⁷⁸ *See Robert J. Gregory, Whose Reasonable Doubt? Reconsidering the Appropriate Role of the Reviewing Court in the Criminal Decision Making Process*, 24 AM. CRIM. L. REV. 911, 949–81 (1987), for an excellent analysis of this issue.

Claims based on sufficiency of the evidence must be distinguished from those based on the weight of the evidence. As pointed out in *Tibbs v. Florida*,

[A] conviction rests upon insufficient evidence when, even after viewing the evidence in the light most favorable to the prosecution, no rational factfinder could have found the defendant guilty beyond a reasonable doubt. A reversal based on the weight of the evidence, on the other hand, draws the appellate court into questions of credibility. The "weight of the evidence" refers to "a determination [by] the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other."

457 U.S. 31, 37–38 (1982) (citing *Tibbs v. State*, 397 So. 2d 1120, 1123 (1981)). Therefore, when a conviction is reversed based on the weight of the evidence, the double jeopardy clause does not preclude retrial, as it does with respect to reversals based on sufficiency. *Id.* at 42.

¹⁷⁹ *Curley v. United States*, 160 F.2d 229, 232–33 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947). *Curley* was in fact a progressive decision, incorporating the reasonable doubt standard within sufficiency review, in contrast to Judge Learned Hand's opinion in *United States v. Feinberg*, 140 F.2d 592, 594 (2d Cir.), *cert. denied*, 322 U.S. 726 (1944), ruling that the test for sending a case to the jury was the same in criminal and civil actions.

¹⁸⁰ 443 U.S. 307 (1979).

¹⁸¹ *See Jackson*, 443 U.S. at 320 (rejecting the rule of *Thompson v. Louisville*, 362 U.S. 199, 206 (1960), which held that a conviction unsupported by any evidence was violative of Due Process, as inadequate to protect against misapplication of the reasonable doubt standard).

¹⁸² *Id.* at 318–21. Although *Jackson's* holding related to habeas petitioners, many state courts have applied it to direct appeals, assuming it to be of constitutional proportion in that context as well.

¹⁸³ *Id.* at 319, 324. *Jackson* also stated that the test for determining sufficiency was "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Id.* at 318. Chief Judge Newman has suggested that these are two different tests:

The first . . . , correctly in my view, applies the traditional test for determining sufficiency of evidence—namely, whether . . . a reasonable jury, could find the matter proven . . . beyond a reasonable doubt. The second . . . , however, shifts the emphasis away from the law's construct of the reasonable jury and conjures up the image of a vast random distribution of reasonable juries, with the risk of creating the misleading impression that just one of them need be persuaded beyond a reasonable doubt.

Newman, *supra* note 38, at 987. Chief Judge Newman concluded that the "any rational trier" of fact test should be abandoned in favor of the "reasonable jury" formulation. *Id.* at 992.

¹⁸⁴ *Jackson*, 443 U.S. at 319.

¹⁸⁵ *Id.* at 326. The *Jackson* Court seemed to recast the circumstantial evidence charge rejected in *Holland* in a way that made use of such a charge appear completely untenable. In *Holland*, the instruction sought by the defendants was framed in terms of excluding only *reasonable* hypotheses other than that of guilt, see *Holland v. United States*, 348 U.S. 121, 139 (1954), whereas in *Jackson*, the Justices omitted the reasonableness qualification in the context of a totally improbable self-defense claim that surely would have failed under the traditional reasonable hypothesis standard.

¹⁸⁶ *See Newman, supra* note 38, at 996 ("[C]ourts do not take seriously their obligation to assess sufficiency of evidence in light of the 'reasonable doubt' standard.").

¹⁸⁷ Chief Judge Newman suggested, however, that in certain circumstances it is appropriate for the reviewing court to reassess credibility. *See id.* at 997–98 (arguing that there is no need to defer blindly to the jury's acceptance of seriously impeached testimony).

¹⁸⁸ The trial level counterpart of appellate sufficiency of the evidence review is the directed verdict of acquittal. Although there are cases suggesting otherwise, the standard for directing a verdict and reversing for insufficient evidence is generally the same. Gregory, *supra* note 179, at 919; *see also Tibbs v. Florida*, 457 U.S. 31, 45 n.22 (1982) (suggesting a correlation between appellate review and a trial court's power to order new trials).

¹⁸⁹ *See, e.g., State v. Henning*, 599 A.2d 1065, 1067 (Conn. 1991) ("We . . . determine . . . whether any rational trier of fact could have concluded that the cumulative effect of the evidence established the defendant's guilt beyond a reasonable doubt. 'We do not sit as a thirteenth juror who may cast a vote against the verdict based upon our feeling that some doubt of guilt is shown by the cold printed record.'" (citations omitted)) (quoting *State v. Stepney*, 464 A.2d 758, 770 (Conn. 1983), *cert. denied*, 465 U.S. 1084 (1984)).

¹⁹⁰ *See York v. Tate*, 858 F.2d 322, 330 (6th Cir. 1988) ("By applying the [reasonable hypothesis] rule, the district court turned the *Jackson* standard on its head. Rather than asking whether any reasonable juror could have found petitioner guilty, the district court considered whether any reasonable juror could have found the petitioner *not* guilty.), *cert. denied*, 490 U.S. 1049 (1989); *see also David N. Dunn, Note, Judicial Review of Criminal Convictions Based on Circumstantial Evidence*, 6 VT. L. REV. 197, 208–10 (1981) (arguing that the reasonable hypothesis appellate sufficiency standard, at least as applied in Vermont, looks to whether a reasonable theory consistent with innocence was present, and contending that this standard invades the province of the jury).

¹⁹¹ See *State v. Jenks*, 574 N.E.2d 492, 497 (Ohio 1991). The *Jenks* court described, although ultimately rejected, the two step process used by appellate courts in assessing sufficiency of the evidence under a reasonable hypothesis of innocence standard:

First, as is done in a case involving direct evidence of guilt, an appellate court must determine whether there is sufficient probative evidence to support the defendant's guilt beyond a reasonable doubt. The second step, employed only when the state relies entirely on circumstantial evidence to prove an essential element of the offense, requires an appellate court to reexamine the circumstantial evidence to determine if the defendant's theory of innocence is reasonable or plausible. In other words, the appellate court must weigh two competing theories, one pointing to guilt and the other to innocence. In order for the conviction to stand, the appellate court must be satisfied not only that the circumstantial evidence supports a finding of defendant's guilt beyond a reasonable doubt, but, in addition, that the circumstantial evidence is of sufficient force as to exclude every reasonable hypothesis of innocence put forward by the defense.

Id. (citations omitted).

¹⁹² See, e.g., *Davis v. State*, 453 A.2d 802, 803 (Del. 1982) ("whether . . . any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt") (quoting *Jackson*); *Collins v. State*, 337 S.E.2d 415, 419 (Ga. Ct. App. 1985) ("[whether] the evidence is sufficient to enable any rational trier of facts to find the existence of the offense charged beyond a reasonable doubt") (quoting *Benson v. State*, 322 S.E.2d 339, 340 (Ga. Ct. App. 1984) and citing *Jackson*); *State v. Carmouche*, 508 So. 2d 792, 799 (La. 1987) ("all evidence, both direct and circumstantial, must be sufficient under *Jackson* to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt"); *Jenks*, 574 N.E.2d at 503 ("whether any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt"); *State v. Stevens*, 580 A.2d 493, 495 (Vt. 1990) ("[whether] the evidence is sufficient on each element of the crime charged to convince a reasonable trier of fact that the defendant is guilty beyond a reasonable doubt") (citing *Jackson*).

¹⁹³ See, e.g., *Cigainero v. State*, 838 S.W.2d 361, 362 (Ark. 1992) ("[W]e will affirm the trial court's decision if there is substantial evidence to support the verdict. Substantial evidence is evidence that is of sufficient certainty and precision to compel a conclusion one way or another, forcing or inducing the mind to pass beyond a suspicion or conjecture." (citations omitted)); *State v. Vigil*, 794 P.2d 728, 729 (N.M. 1990) ("In reviewing the sufficiency of the evidence . . . we inquire whether substantial evidence, either direct or circumstantial in nature, exists to support a verdict of guilty beyond a reasonable doubt.").

¹⁹⁴ See, e.g., *People v. Johnson*, 606 P.2d 738, 751 (Cal. 1980) (arguing that the substantial evidence standard is plainly consistent with *Jackson*); *Melendez v. State*, 498 So. 2d 1258, 1260–61 (Fla. 1986) (using the *Jackson* test as equivalent to a finding of support by competent substantial evidence), *cert. denied*, 510 U.S. 934 (1993); *State v. Peite*, 839 P.2d 1223, 1237 (Idaho Ct. App. 1992) (stating that a conviction will be upheld when there is "substantial evidence upon which any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"); *State v. Ramirez*, 485 N.W.2d 857, 860 (Iowa Ct. App. 1992) (equating *Jackson* with the substantial evidence standard).

¹⁹⁵ See, e.g., *Commonwealth v. Griscavage*, 517 A.2d 1256, 1257 (Pa. 1986) ("sufficient evidence to find every element of the crime beyond a reasonable doubt") (quoting *Commonwealth v. Harper*, 403 A.2d 536, 538–39 (Pa. 1979)); *Sudduth v. State*, 662 So. 2d 67, 72 (Miss. 1990) ("reviewing court will not disturb a circumstantial evidence conviction unless it is opposed by a decided preponderance of evidence"); *State v. Sabers*, 442 N.W.2d 259, 266 (S.D. 1989) ("evidence in the record which, if believed by the jury, is sufficient to sustain a finding of guilt beyond a reasonable doubt").

¹⁹⁶ Of the twenty states that require a reasonable hypothesis circumstantial evidence charge, twelve judge sufficiency of the evidence by a less stringent standard. See *People v. Thomas*, 828 P.2d 101, 112 (Cal. 1992) ("substantial evidence . . . from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt"), *cert. denied*, 506 U.S. 1063 (1993); *State v. Crabb*, 688 P.2d 1203, 1212 (Idaho Ct. App. 1984) ("judgment of conviction . . . will not be set aside where there is substantial evidence to support it") (quoting *State v. Fenley*, 646 P.2d

441, 445 (Idaho Ct. App. 1982)); *Jones v. State*, 500 N.E.2d 1166, 1168 (Ind. 1986) ("a substantial body of probative evidence from which the jury reasonably could have inferred guilt"); *State v. Carmouche*, 508 So. 2d 792, 799 (La. 1987) ("whether a rational fact-finder, after viewing the evidence in the light most favorable to the prosecution, could have found beyond a reasonable doubt that defendant was guilty"); *Commonwealth v. Lydon*, 597 N.E.2d 36, 39 (Mass. 1992) ("whether the evidence, considered in the light most favorable to the Commonwealth, was sufficient to satisfy a reasonable jury of each element of [the crime] beyond a reasonable doubt") (quoting *Commonwealth v. Martino*, 688 N.E.2d 661, 655 (Mass. 1992)); *Sudduth v. State*, 562 So. 2d 67, 72 (Miss. 1990) ("reviewing court will not disturb a circumstantial evidence conviction unless it is opposed by a decided preponderance of evidence"); *State v. Greenwell*, 670 P.2d 79, 82 (Mont. 1983) ("if the verdict is supported by substantial evidence"); *State v. Reed*, 423 N.W.2d 777, 781 (Neb. 1988) ("the province of the Supreme Court, on appeal from a conviction, [is] to refrain from resolving conflicts in the evidence and to sustain the judgment of conviction if, taking the view most favorable to the State, there is sufficient evidence to support the conviction"); *State v. Valley*, 479 N.W.2d 480, 483 (N.D. 1992) ("whether there is substantial evidence that reasonably tends to prove guilt and fairly warrants the conviction"); *State v. Sabers*, 442 N.W.2d 259, 266 (S.D. 1989) ("evidence in the record which, if believed by the jury, is sufficient to sustain a finding of guilt beyond a reasonable doubt"); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982) ("if the evidence is insufficient for a rational trier of fact to find guilt of the defendant beyond a reasonable doubt"); *State v. Poellinger*, 451 N.W.2d 752, 755 (Wis. 1990) ("an appellate court may not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt").

¹⁹⁷ The states include South Carolina (*compare State v. Manning*, 409 S.E.2d 372, 374 (S.C. 1991) (jury charge), *cert. denied*, 503 U.S. 914 (1992) *with State v. Miller*, 337 S.E.2d 883, 885 (S.C. 1985) (appellate review)); Virginia (*compare Brown v. Commonwealth*, 381 S.E.2d 225, 229–30 (Va. 1989) (jury charge) *with Stamper v. Commonwealth*, 257 S.E.2d 808, 817 (Va. 1979) (appellate review), *cert. denied*, 445 U.S. 972 (1980)); West Virginia (*compare State v. Bratcher*, 206 S.E.2d 408, 410 (W. Va. 1974) (jury charge) *with State v. Walker*, 425 S.E.2d 616, 622–23 (W. Va. 1992) (appellate review)).

¹⁹⁸ *See, e.g., Seales v. State*, 581 So. 2d 1192, 1193, 1197 (Ala. 1991) (noting that "it was the jury's call" whether the evidence excluded every reasonable hypothesis except guilt); *Stamper v. Commonwealth*, 257 S.E.2d 808, 818 (Va. 1979) (holding that the jury could have properly concluded that the circumstances proved guilt beyond a reasonable doubt), *cert. denied*, 445 U.S. 972 (1980); *State v. Walker*, 425 S.E.2d 616, 622–23 (W.Va. 1992) (ruling that a plausible reading of the evidence supports the jury's guilty verdict).

¹⁹⁹ These states are Florida, Minnesota, and Oklahoma; Florida (*compare In re Use by the Trial Courts of Standard Jury Instructions in Criminal Cases*, 431 So. 2d 594, 595 (Fla. 1981) (eliminating the circumstantial evidence charge) *with State v. Law*, 559 So. 2d 187, 188 (Fla. 1989) ("Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence.")); Minnesota (*compare State v. Turnipseed*, 297 N.W.2d 308, 312–13 (Minn. 1980) (finding the special charge unnecessary) *with State v. Miller*, 488 N.W.2d 235, 240 (Minn. 1992) ("A jury conviction based on circumstantial evidence warrants a higher [rational hypothesis] standard of review.")); Oklahoma (*compare Johnson v. State*, 632 P.2d 1231, 1233 (Okla. Crim. App. 1981) (sustaining a refusal to give a reasonable hypothesis instruction and leaving its use to the trial court's discretion in limited circumstances) *with Berry v. State*, 834 P.2d 1002, 1003 (Okla. Crim. App. 1992) ("The standard of review in a criminal case based entirely on circumstantial evidence is whether the State's evidence tends to exclude every reasonable hypothesis other than guilt.")).

²⁰⁰ The tension between a more lenient charge and a more stringent review standard was discussed in *Geesa v. State*, 820 S.W.2d at 159–61. As the court observed:

Given the fact that a jury is to be guided by the charge in reaching their verdict, and given the fact that juries are no longer instructed on the law of circumstantial evidence, it no

longer makes sense for appellate courts to use the circumstantial evidence 'construct' to review the jury's verdict and to determine, thereby, whether the jurors acted 'rationally'. To do so evaluates the jurors' rationality by a different standard than that by which they were instructed to reach their verdict.

Id. at 159. The court went on to outline several specific problems generally resulting from the use of the reasonable hypothesis standard for determining sufficiency of the evidence on appeal: It invaded the province of the jury to weigh the evidence and judge credibility, and it spawned confusion in the appellate courts with respect to several issues, such as whether the evidence should be viewed in the light most favorable to the state or in light of the presumption of innocence. *Id.* at 159–60. Based on these considerations, the court rejected the reasonable hypothesis appellate review standard. *Id.* at 161. In *Paulson v. State*, the Texas Court of Criminal Appeals overruled *Geesa* case regarding failure to instruct the jury as to reasonable doubt but did not discuss the standard for appellate review. 28 S.W.3d 570 (Tex. Crim. App. 2000).

²⁰¹ 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

²⁰² *Id.* at 363. There is no *per se* constitutional requirement to charge the jury regarding the presumption of evidence. *See Kentucky v. Whorton*, 441 U.S. 786, 789 (1979) (*per curiam*) (holding that the failure to give an instruction on presumption of innocence does not violate the Due Process Clause).

²⁰³ The reasonable doubt standard has, over the years, been significantly eroded. *See generally* Note, *Winship on Rough Waters: The Erosion of the Reasonable Doubt Standard*, 106 HARV. L. REV. 1093 (1993) (arguing that legislatures and prosecutors have eroded the substantive import of *Winship* through statutes, procedures, and techniques that allow the imposition of punishment without proof beyond a reasonable doubt).

²⁰⁴ *Compare State v. Bratcher*, 206 S.E.2d 408, 410 (W. Va. 1972), in which a jury found the defendant guilty of theft notwithstanding an almost total lack of evidence. The Supreme Court of Appeals reversed and remanded for a new trial on evidentiary grounds, including the failure to give a cautionary instruction. *Id.*

²⁰⁵ *See Medina v. California*, 505 U.S. 437, 445 (1992) (state decision concerning burden of proof "is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'") (citations omitted); *Duncan v. Louisiana*, 391 U.S. 145, 147–58 & n.4 (1968) ("The question thus is whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty.") (citations omitted).

²⁰⁶ 511 U.S. 1.

²⁰⁷ *See Victor*, 511 U.S. at 8–10, 19.

²⁰⁸ *See id.* at 8–10.

²⁰⁹ *See id.* at 16.

²¹⁰ *See Holland v. United States*, 348 U.S. 121 (1954).

²¹¹ *See, e.g., Commonwealth v. Harman*, 4 Pa. 269, 272 (1846) (describing a hypothetical witness who sees a man discharge a gun at another and then sees the person fall lifeless); WILLS, *supra* note 56, at 43–45 (responding to authorities who made the "astonishing" argument that circumstantial evidence was superior to direct evidence, and noting, that "extreme cases—the strongest ones of circumstantial, and the weakest of positive evidence—have been selected for the illustration and support of a general position").

²¹² These scenarios are admittedly somewhat farfetched, at least in the absence of additional facts, such as evidence that there was a third person hiding nearby who had a grudge against the victim and blood on his clothing or evidence that the victim suffered from melancholia. It is facts such as these, or their absence, that determine the reasonableness of the inference.

²¹³ Compare the bloody sword hypothetical with BABYLONIAN TALMUD, *supra* note 2, *Shebuoth* 44b–46b, in which the Gemara treats two civil assault actions differently based on the probative value of the evidence in the respective cases. In one, the victim went into the wrongdoer's dwelling, and shortly thereafter the victim emerged with his hand cut off. The Gemara views that case as involving circumstantial evidence. When, however, the victim leaves the dwelling with a knife in his back, evidence to that effect is not considered circumstantial.

²¹⁴ See, e.g., *People v. Towler*, 641 P.2d 1253, 1260–61 (Cal. 1982) (affirming a conviction in such circumstances even though there was no proof that the victim was murdered); *State v. Scott*, 251 S.E.2d 414, 419 (N.C. 1979) (reversing a conviction in a case in which the only evidence connecting the defendant to the murder was a thumbprint at the scene of the crime); *Bails v. State*, 545 P.2d 1155, 1157–58 (Nev. 1976) (affirming a conviction in a similar thumbprint case); *State v. McCue*, 589 A.2d 580, 586–88 (N.H. 1991) (affirming the murder conviction of a defendant who was the last person seen with the victim, notwithstanding exculpatory evidence); *State v. Krummacher*, 523 P.2d 1009, 1017 (Or. 1974) (affirming a murder conviction notwithstanding numerous inferences of innocence that could be made from the evidence).

²¹⁵ See, e.g., *State v. Nelson*, 731 P.2d 788, 794 (Idaho Ct. App. 1986) ("Such an instruction may force a jury to think extra carefully about its choices of inferences, but that is wholly appropriate where life or liberty may turn on the inferences drawn.").

²¹⁶ See *Berry v. State*, 834 P.2d 1002, 1003 (Okla. Crim. App. 1992) (stating that "circumstantial evidence need not exclude every possibility other than guilt," only reasonable hypotheses).

²¹⁷ See, e.g., *People v. Seabrooks*, 354 N.W.2d 374, 381–82 (Mich. Ct. App. 1984) (authorizing the special charge in cases in which the evidence is weak); see also Donald L. Gaffney, Note, *The Circumstantial Evidence Charge in Texas Criminal Cases: A Retrograde Doctrine*, 55 TEX. L. REV. 1255, 1278–79 (1977) (advocating a cautionary charge in the trial court's discretion when evidence is weak).

²¹⁸ See *State v. Poellinger*, 451 N.W.2d 752, 755 (Wis. 1990) ("Regardless of whether the evidence presented at trial to prove guilt is direct or circumstantial, it must be sufficiently strong and convincing to exclude every reasonable hypothesis consistent with the defendant's innocence in order to meet the demanding standard of proof beyond a reasonable doubt."); see also *United States v. Telfaire*, 469 F.2d 552, 557–59 (D.C. Cir. 1972) (constructing a model instruction for identification testimony); *United States v. Barber*, 442 F.2d 517, 528 (3d Cir.) (same), *cert. denied*, 404 U.S. 958 (1971); *State v. Long*, 721 P.2d 483, 487–95 (Utah 1986) (adopting a mandatory cautionary charge for eyewitness testimony); Robin Sanders, Note, *Helping the Jury Evaluate Eyewitness Testimony: The Need for Additional Safeguards*, 12 AM. J. CRIM. L. 189, 222–24 (1984) (proposing a model instruction for cases involving identifying eyewitness testimony).

²¹⁹ See ZELIG PLISKIN, *LOVE YOUR NEIGHBOR* 42–43 (1977). Commenting on the judge's duty to investigate a matter thoroughly, and drawing a parallel between that obligation and each individual's duty in his or her relationships to others, the author noted:

In a broad sense, there is a lesson here for everyone, not only for judges of a court. For we are all judges—we all judge the actions of others. Let us not condemn anyone on the basis of hearsay or circumstantial evidence. We must view a person favorably unless we have carefully investigated the matter and have established beyond a doubt that he is guilty of the charges against him.

Id. at 43.

²²⁰ *Id.* at 257–61 (delineating the requirement and concluding with a description of a group in Jerusalem "that regularly discusses practical ways to judge people favorably. A member of the group gives true-to-life situations, and everyone else offers explanations that would present the person involved in a favorable light,"); see also HANOCH TELLER, *COURTROOMS OF THE MIND*, 89–93 (1987) (recounting contemporary incidents that illustrate the implementation of this law). The talmudic source of the requirement is stated in the Mishnah: "[W]hen thou judgest any man incline the balance in his favour." THE MISHNAH, *supra* note 3, *Aboth* 1:6. This Mishnah rule is in turn based on *Leviticus* 19:15, which states, "[I]n righteousness shalt thou judge thy neighbor." The foregoing command concludes a verse that begins with accuracy and impartiality in court proceedings.

²²¹ Most commentators agree that the obligation to give the benefit of the doubt does not apply to wicked people. See, e.g., PAUL FORCHHEIMER, *MAIMONIDES' COMMENTARY ON PIRKEY AVOTH* 30 (2d ed. 1983) (stating that a wicked man whose evil deeds are well known does not benefit from the "favourable interpretation" presumption). However, one authority noted that in modern times few individuals can be characterized as wicked, because one is deemed an evil person only if he or she has disregarded properly administered rebukes and warnings, and there are not many people these days who are able to give such admonitions properly.

²²² See TELLER, *supra* note 220, at 92 (noting that "[t]he Torah actually mandates violating human nature, commanding us not only to judge such situations favorably, but to believe sincerely in that judgment"). Teller gave the following true story as an example: An Orthodox rabbi sees an official of his synagogue eating at an obviously non-kosher restaurant. The rabbi, mindful of the commandment to give every benefit of the doubt, concludes that the only possible explanation is that his congregant suffers from ulcers, and consequently, on suffering an attack he is permitted to eat immediately in order to prevent danger to his life—an answer that turned out to be true. *Id.* at 85–93.

²²³ BABYLONIAN TALMUD, *supra* note 2, *Shabbath* 127b. On the same page, the Talmud gives other examples of the implementation of this commandment. The rule is also considered in a number of other places in the Gemara. See, e.g., *id.*, *Shabbath* 119a, *Shebuoth* 30a, *Yoma* 19b, *Taanith* 21b–22a.

CHAPTER TEN

The Talmudic Rule Against Self-Incrimination*

The contemporary American law of confessions has fostered a lingering suspicion that admissions in criminal prosecutions are the end-product of a war of attrition between police officer and suspect—a forced surrender, or at best the result of some not so friendly persuasion.¹ The question persists whether the rules governing the use of a defendant's self-inculpatory statement are compatible with our accusatorial system of justice and worthy of a mature and civilized society in the twenty-first century. One way to rethink the problem of confessions and to gain new perspectives is to compare the modern American approach with one from the past, one that appears to be almost totally antithetical in conception and application.

In this chapter, we contrast the American privilege against self-incrimination with the cognate Talmudic principle that no man may render himself an evil person. We explore how the Jews of the Talmudic era interpreted a unique rule of their law that, with few exceptions, effectively precluded the admission of any confession of guilt in both criminal and quasi-criminal cases, whether by defendant or witness, in-court or out-of-court, voluntary or coerced, spontaneous or elicited.

The American counterpart of this ancient Talmudic doctrine is *Miranda v. Arizona*,² which established a *per se* exclusionary rule as its mechanism for preventing the use of coerced statements. It is easy to forget, however, that *Miranda*, often viewed as the darling of the Warren era,³ was *Tuckered* to near-death by the Burger-Rehnquist Courts,⁴ and has also long been criticized for its timidity in assuring the voluntariness of confessions.⁵ Instead of constitutionalizing the *McNabb-Mallory* rule,⁶ or requiring the presence of counsel during police questioning,⁷ or absolutely prohibiting custodial interrogation,⁸ or, even more straightforwardly, banning the use of confessions altogether,⁹ the *Miranda* majority settled for rote police warnings.¹⁰ And, as to the efficacy of *Miranda's* compromise, the surprise attackers from the left have been proven at least partially right. Far from hamstringing law enforcement officials, the ruling may merely have created the facade of an effective mechanism against coercive police behavior. In particular, the concept of waiver developed in the opinion itself¹¹ arguably rendered the newly created safeguards illusory, dooming them from the outset. Given Chief Justice Warren's graphic description of intimidating and oppressive police station practices,¹² the possibility of a knowing and voluntary relinquishment of the privilege in such circumstances has always been at best problematic.¹³ Empirical studies conducted after the decision have reinforced these concerns, suggesting that, if given at all, the staccato admonitions pitched at suspects neither effectively inform them of their rights nor did they have any significant impact on confession or conviction rates.¹⁴ More recent

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studies, however, argue that "*Miranda* has significantly harmed law enforcement efforts in this country,"¹⁵ an argument that is sharply disputed by others.¹⁶

Thus, even as originally crafted, *Miranda's* application of the Fifth Amendment to custodial interrogation could have lived up to neither the majority's hopes nor the dissenters' fears.¹⁷ The contemporary *Miranda*, however, may be able to do just that. Subsequent case law all but snuffing out the ruling's progressive potential¹⁸ has ironically reversed the expectations of the two sides—it is the current majority that now has hopes for more effective law enforcement, while the dissenters fear for our accusatorial system of justice.¹⁹ The descent from *Miranda's* promise to the reality created by its successors has been marked by exceptions, evasions, and erosions—exceptions for public safety²⁰ and impeachment,²¹ and for "civil proceedings" to commit persons as sexually dangerous,²² the evasion of converting a constitutional guarantee into a mere "prophylactic" rule whose technical violation can be easily cured,²³ and the erosion achieved by effective validation of police deception of suspects and their attorneys,²⁴ thereby fostering the kind of incommunicado interrogation that was prevalent before the *Miranda* ruling. And perhaps the saddest facet of this assault on free choice in making confessions is that it often comes in the form of a denial of information and an exploitation of ignorance that have the effect of excluding the poor and uneducated from Fifth Amendment protection.²⁵ The Court has, however, stopped short of overruling *Miranda* in the context of a case involving a federal statute which in effect purportedly reversed *Miranda* and its "prophylactic" safeguards.²⁶

To be sure, *Miranda* and its progeny should not be viewed in isolation. There are other constitutional safeguards bearing on the permissible limits of state conduct in eliciting self-inculpatory statements. Yet these afford only limited additional protection. Although the Fourth Amendment is sometimes implicated in confession cases, its coverage generally relates to admissions tainted as a result of arrest of the defendant without probable cause.²⁷ Under the misplaced trust doctrine, neither the Fourth nor the Fifth Amendment precludes the admissibility of confessions made to secret government informers.²⁸ While the Sixth Amendment often has afforded a remedy after the initiation of judicial criminal proceedings,²⁹ the Court has been reluctant to extend it to pre-charging situations.³⁰ Because of *Miranda's* sway, the voluntariness requirement embodied in the Due Process clause of the Fourteenth Amendment has received little attention from the Court and remains underdeveloped.³¹ Finally, none of the available constitutional guarantees has been applied in such a way as to prevent misuse of the process by which the state secures the most serious and far-reaching confession of all—the in-court plea of guilty.³²

Although other constitutional provisions thus give some additional criteria for assessing the legality of self-inculpatory statements, their coverage is spotty, and, at least in contemporary Supreme Court jurisprudence, it is the Fifth Amendment that has supplied the main standards for determining the admissibility of confessions.³³ Viewed from that perspective, the recent assault on *Miranda's* timid compromise is ominous rather than *de minimis*. The Court appears to be returning to the ad hoc voluntariness, "under all the circumstances" test for admissibility of confessions³⁴—the same ineffective standard that originally provided an impetus for the Justices to create their *per se* remedy in *Miranda*.³⁵ If this onslaught continues, our law will have come full circle on the confession issue, and we will be forced to resolve once again how best to assure that

police interrogation does not become the foundation for an underground inquisitorial system.³⁶

There is a complex of values implicated whenever the state seeks to elicit information of wrongdoing from a suspect. Against the backdrop of a need for effective law enforcement, it is necessary to consider such interests as the guarantee of equal treatment before the law; maintenance of the accusatorial system; prevention of oppressive police conduct and preclusion of unreliable confessions; preservation of human dignity, including the exercise of free will in deciding whether to help the state;³⁷ and assurance of the individual's reasonable expectation of privacy, including the freedom to talk spontaneously and freedom from fear that the state is insinuating itself into one's personal affairs.³⁸ Moreover, these objectives must be achieved within a framework that provides reasonably clear guidelines to the police and lower courts, and that operates effectively within our system of limited power of review by federal courts.³⁹

While the present state of the law reflects each of these policies in one or more constitutional contexts, even if only dimly, it does not fit them into a unified conceptual scheme, and offers no satisfying resolution of the historical tension between individual liberties and community safety. Instead, there is patchwork protection depending on which constitutional guarantee is applicable.⁴⁰ What is especially lacking is a coherent approach affording consistent protection to the suspect from whom the state, in the exercise of its law enforcement powers, seeks a confession of guilt.

The Talmudic rule against confessions, with its almost absolute bar in all criminal (and quasi-criminal) cases, provided just such a unitary approach. We are not intimating that this Talmudic rule governing a small, cohesive, and relatively religious people can be transplanted and applied almost two millennia later *in haec verba* to our far larger, industrialized, secular, and heterogeneous society.⁴¹ We do, however, suggest that much can be learned from the Talmudic Sages who fashioned a startling doctrine that prevents admissibility of what many believe to be the most reliable evidence of guilt.⁴² In an era in which both politicians and prosecutors are wont to invoke the Old Testament in support of law and order, if not vengeance,⁴³ it may not be amiss to point out that the extraordinary protections embodied in Jewish criminal procedure⁴⁴ make the Warren Court's progressive decisions cushioning suspects from the worst excesses of the criminal justice system appear moderate, if not minimal.⁴⁵ So even though a return to the past may not be feasible, a study of it may at least prevent major distortions of history and biblical law which could have an adverse impact on contemporary jurisprudence.

A. Biblical and Mishnaic Origins of the Prohibition Against Self-Incrimination

1. Biblical Sources

Two legal precepts expressed in the first five books of the Old Testament (also known as the Torah or Chumash) appear to be the textual source of the rule in Jewish law barring self-incriminating testimony.⁴⁶ According to *Deuteronomy* 19:15:

One witness shall not rise up against a man for any iniquity, or for any sin, in any sin that he sinneth; at the mouth of two witnesses, or at the mouth of three witnesses, shall a matter be established.⁴⁷

This provision was interpreted literally, and constituted the exclusive method for determination of guilt in criminal proceedings.⁴⁸ Taken by itself, however, the verse still allows the possibility that a confessing defendant could be counted as one of the two witnesses required to convict. That possibility was ruled out by a somewhat surprising source.

Deuteronomy 24:16, the other biblical foundation for the Talmudic prohibition against confessions, provides:

The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers; every man shall be put to death for his own sin.

Read literally, this verse would seem to be concerned solely with preventing conviction based on consanguinity. Rashi the master commentator on the Torah and the Talmud, tells us, however, that, on the authority of the oral tradition, the Sages interpreted the law as also relating to the exclusion of testimony by relatives.⁴⁹ The Rabbis went on to ask, who is closer to a person than himself? And they concluded that the accused was his own kinsman and that his own confession was consequently precluded in criminal matters.⁵⁰

Taken together then, these two passages from *Deuteronomy* afford a Scriptural basis for the proposition that the testimony of the accused could not be included in determining whether there were the prescribed number of witnesses necessary to establish guilt.⁵¹ Therefore, even if there was one witness or other evidence corroborative of the defendant's guilt, his confession remained inadmissible.⁵²

Perhaps the most striking aspect of this examination of sources is that such an important rule of law was left to be deduced rather than being explicitly stated in the Torah. A subsidiary question is why the rule against self-incrimination was derived from the broad requirement of two witnesses to convict and the more specific prohibition against testimony by kinsmen.

Why the bar against confessions was left to be deduced is ultimately unknowable. It is part of the larger question of the basis for the division between Written and Oral Law in Judaism, that is, why "[w]ords were given orally and words were given in writing." We do know, however, that the Chumash is concise, with no wasted words.⁵³ According to the Rabbis, everything that is there, is there to teach us.⁵⁴ One of Scripture's pedagogical techniques is to require the derivation of rules from text.⁵⁵ That very process enables the reader to gain a deeper understanding of the Torah.⁵⁶ Thus, although explicit statements of the law in the Chumash may arguably be of greater legal weight,⁵⁷ for the individual student the implicit is not necessarily less important than the explicit. On the contrary, that which must be elicited by painstaking study, analysis and comparison, may be considered more valuable than a specifically articulated directive.⁵⁸ In this sense, the bar against self-incrimination is not merely an important evidentiary rule, but also a valuable tool for teaching and learning.

The question why the self-incrimination prohibition was derived in part from the two-witness rule—or, stated another way, why the two-witness rule is explicit and the prohibition implicit—can be answered both logically and philosophically. The two-

witness requirement is a broad law of general applicability, a basic prerequisite for criminal conviction. It is a positive enactment that is at the core of the Jewish system of criminal justice. The prohibition against self-incrimination, on the other hand, is a more specific evidentiary provision, precluding admissibility of a particular type of testimony. While admittedly reflecting a basic philosophical view concerning the extent to which the individual is required or permitted to assist the government in its prosecution of him, it is ultimately a negative command on which the rest of the system is not logically dependent. Although both the two-witness rule and the bar against inculpatory statements may be viewed as means of assuring reliability in the fact-finding process, the reliability effected by the two-witness rule is all-embracing, whereas the trustworthiness attained by virtue of the prohibition against confessions relates to its more limited context. Thus, while the overarching two-witness rule provides a framework within which the privilege easily rests, the two-witness rule could not have been derived from the bar against inculpatory statements. At the same time, the two-witness rule, as interpreted by the rabbis, defined society's expectations of its members' obligations in the criminal process, but perhaps on an even more fundamental level than the prohibition against confessions. Using the two-witness rule as a springboard, the Sages made it extremely difficult to convict anyone of a crime and thereby affirmed the sanctity of each individual's life, no matter how evil his conduct might appear. Accordingly, although the no-confession precept does not flow inexorably from the two-witness rule, its derivation is neither strained nor illogical.

It may be harder to ascertain the appropriate connection between the prohibition against confessions and the kinsmen testimonial rule. To be sure, once one accepts the validity of the kinsmen rule, it is not irrational to assert that the prohibition against self-incriminating statements is an extension of it. Presumably the same grounds for regarding a kinsman's testimony as inadmissible would apply to the ultimate kinsman, that is, the accused himself. Indeed, both the kinsmen rule and the prohibition arguably share common concerns of privacy. Nevertheless, in some ultimate sense the suspect's confession can be viewed as *sui generis*,⁵⁹ at least if one accepts the conventional wisdom that only the accused knows for sure. Certainly, in terms of impact, a confession is one of the most persuasive kinds of evidence in a criminal trial. From that perspective, the basis for derivation of the prohibition against admissions from the kinsmen testimonial bar remains unclear.

The question then is why a relative's testimony was made inadmissible. The argument that kinsmen were barred from testifying because of their natural bias in favor of the accused is belied by the rule's prohibition of such testimony both for and against the defendant.⁶⁰ Furthermore, the Mishnah's specific rejection of a similar rule of disqualification for unrelated friends and enemies of the suspect suggests that prejudice of the witness either in favor of or against the defendant may not have been the underlying rationale for disqualification of kinsmen.⁶¹ On the other hand, the kinsmen prohibition may reflect a basic distinction in this regard between relatives and friends—a view that, unlike bias based on friendship, family prejudices in either direction are simply too deep-seated to be overcome. Moreover, friendship is subjective, and in a small community or tribal setting, it might encompass so many people that few would remain eligible to testify if all friends were barred, whereas consanguinity is an objective criterion whose application can be more easily contained. Testimony of a friend has a

limited social impact, for the most part affecting only a particular relationship, while testimony by a relative may disrupt an entire family unit. However that may be, the traditional teaching is that the rule barring familial testimony is a decree, that is, a law whose rational basis cannot be discerned by human beings.⁶² That the transcendent rule against self-incrimination was left to inference, and was ultimately derived in part from a law based on divine fiat is, depending on one's point of view, either sublimely reassuring or intellectually disquieting.⁶³

Designation of a particular law as a divine decree does not, however, preclude humans from attempting to understand its underlying rationale.⁶⁴ In this connection, we may also ask what the derivation of the prohibition against self-incrimination from the kinsmen testimonial rule can teach. It may appear paradoxical that the prohibition, whose nature is quintessentially individualistic, effectively permitting the accused to hold the state at bay unless it can convict by extrinsic evidence,⁶⁵ should be inferred in part from a doctrine based on family relationships. Yet, not unlike our heightened Due Process protection of family integrity as a bulwark against state intrusion on individual freedom,⁶⁶ the connection here between family and individual rights may be a way of asserting that the primary unit of the social order is the family, not the state, or that liberty for the person can best be achieved through the family network.⁶⁷ Creating a testimonial bar for kinsmen may have been a way of preserving the privacy interests of the family and its constituent members against governmental invasion.

The Torah teaches, moreover, that while a person is unique,⁶⁸ he or she is not an isolated organism adrift in the mass of humanity, but rather a link in a genetic chain that transmits character and characteristics.⁶⁹ Natural human egocentricity might nonetheless lead us to think that the family-based kinsman rule would be inferred from the individualistic prohibition against self-inculpatory statements. Such a deduction, however, would be quite difficult to make. The opposite derivation, which reasons from the kinsman rule to the prohibition by way of the intermediate thought that a person is most closely "related" to himself, is simpler, albeit not easy. This way of tracing the linkage between family and self—between the rule against kinsmen's testimony and the prohibition against self-incrimination—may also be seen as a means of reinforcing the biblical teaching that who you are depends at least in part on who your forebears were. Thus, the seemingly paradoxical derivation may be designed to help us view ourselves from this broader familial perspective. What may therefore initially be regarded as no more than a series of antiquated and hypertechnical rules revolving around consanguinity,⁷⁰ may upon reflection be understood as delineating the relationship of the individual to the family, and as providing the source of one of the most fundamental rules defining the individual's relationship to the state.

We may ask one final question about these biblical roots of the prohibition: Why was it necessary to derive the prohibition against confessions from two verses rather than one? To the extent that the two-witness requirement is based on reliability concerns, the ban against confessions may, like its source in the two-witness rule, reflect an interest in the trustworthiness of the fact-finding process. At the same time, although the kinsmen rule may also have a reliability aspect, it manifests privacy concerns as well, and the self-incrimination law may likewise reflect a privacy value. Thus, the multiplicity of sources suggests a multidimensional facet to the ban on confessions. Taking this hypothesis a step further, even if an absolute bar against inculpatory statements was deemed

unnecessary to assure trustworthiness in all cases, as in the case of a fully corroborated confession, for example, core privacy concerns would still afford a basis for the unparalleled scope of the Jewish rule against self-incrimination.

2. Mishnaic Era Sources

A number of texts from the early Mishnaic, or *tannaitic*, period⁷¹ (redacted approximately 200 C.E.) indicates that the law precluding confessions was already entrenched at that time.⁷² Two of these sources have as their focal point the criminal justice process.⁷³ They describe the respective roles of witnesses, judges, the judges' disciples, and the accused at the trial. According to these texts, after the testimony has been completed, if the judges do not immediately acquit the accused, they begin their deliberations.⁷⁴ During this stage witnesses are not permitted to speak either for or against the defendant.⁷⁵ If one of the judges' disciples wishes to speak on behalf of the defendant, he and his statement are received graciously by the judges.⁷⁶ If the accused says, "I wish to argue on my own behalf," he is heard.⁷⁷ If, however, the accused wishes to speak against himself, he is silenced with a rebuke.⁷⁸ Only judges may speak both for and against the defendant.⁷⁹ Since the person charged is not allowed to make a negative statement, these texts arguably provide support for a prohibition against self-incriminating testimony. Because, however, all parties are discussed together in this context, these two sources alone leave it unclear whether the inability of the defendant to speak against himself stems independently from the prohibition against self-incrimination or from a more general rule governing procedure during the deliberative process and authorizing only judges to speak against the accused at that stage, or whether it is derived from both.⁸⁰ Two other Mishnaic sources refer explicitly to the bar against self-inculpatory statements in criminal cases, but do so in the framework of debates concerning civil litigation.⁸¹ In a discussion about the status of admissions in civil cases, the Sages asked:

Or shall we say that just as in capital cases a person's confession cannot be used as a basis for his conviction, so too in monetary cases? [No.] The Torah teaches that if a person admits he injured another's foot, he must pay.⁸²

The point of this somewhat oblique passage is that even though many court procedures applied in both criminal and civil cases,⁸³ the Rabbis determined that the prohibition against self-incrimination was not within this category; consequently, one who admitted injuring another person was thereby liable to pay compensatory damages. In concluding that the prohibition against confessions did not apply in this civil context, the above statement suggests that the rule precluding self-inculpatory statements in criminal cases was already well established.

Similarly, in examining whether the testimony of a single witness could require a defendant to take an oath in a civil case, another *tannaitic* text states, almost as an aside, that even though a defendant cannot join together with another witness to make himself guilty of a crime, the defendant by his own admission can render himself liable for an oath in civil cases in certain instances.⁸⁴ Again, the prohibition against confessions in the

criminal arena is apparently taken for granted.

Another affirmation, albeit indirect, of the rule barring confessions in criminal matters appears in an early *tannaitic* discussion of admissions in cases involving fines.⁸⁵ In such proceedings, for example, an action against a thief to recover a multiple of the value of the stolen goods,⁸⁶ a confession generally rendered the defendant immune from liability for the fine.⁸⁷ On the other hand, an admission of indebtedness in a garden-variety civil monetary proceeding, such as an action on a promissory note, was treated as a binding concession of liability, the *tannaitic* maxim being that admission of an obligation was equivalent to the testimony of one hundred witnesses.⁸⁸

Criminal cases thus appear to occupy the middle ground in the *tannaitic* legal world. The effect of confessions in civil cases involving monetary compensation was to render the defendant absolutely liable, whereas with regard to penalties the effect was generally the opposite, namely, immunization. It was only in criminal proceedings that the admission of the accused was not made dispositive.⁸⁹ It was rather, in a sense, completely disregarded. The accused who confessed was neither immunized nor found guilty on that basis; instead, if there was sufficient extrinsic evidence—two witnesses—he could be convicted notwithstanding his confession.⁹⁰

One way to explain the differing evidentiary rules in civil, criminal, and fine proceedings is as a function of the varieties of judicial authority under Jewish law. In cases in which a court had to determine *ab initio* whether liability existed, it was exercising true judicial power, and therefore the strict evidentiary rules governing such proceedings, including the prohibition against self-incrimination, were operative. Where, however, the court was sitting as a ratifying body, merely confirming preexisting obligations that could be objectively established, its status was more akin to that of an enforcement agency. Some of the evidentiary rules were therefore relaxed, and as a result, admissions that established such preexisting liability were received in evidence.

Thus, a defendant was permitted to testify against himself in a civil case involving mere monetary restitution because the court was, in theory, making an objective decision about entitlement to property. Such a ruling arguably did no more than confirm the existence of the debt, which was in turn based on the acts of the parties themselves. If, for example, the defendant borrowed money from the plaintiff, at that time, and by that act, the obligation to repay came into being. A court order requiring payment of this pre-existing liability on the basis of an admission did not constitute punishment. It simply recognized that that was what the defendant owed.⁹¹

In criminal proceedings, by contrast, a defendant's alleged offense did not render him liable until a judgment of conviction issued from a competent tribunal after a trial held in accordance with prescribed substantive, procedural and evidentiary rules.⁹² In criminal cases, therefore, since the court was creating liability where none existed before, the defendant's confession could not be received in evidence.⁹³ The adjudication of fines also fits within this framework and provides a helpful analogue. Like criminal prosecutions, these cases involve the imposition of punishment, or at least a form of punishment, for misconduct, on the basis of a judicial determination establishing liability. So, for example, a thief's admission of wrongdoing was sufficient to enable the court to enter a judgment in favor of the victim for compensatory damages (a purely civil monetary claim for the value of the stolen article), but could not be the foundation for a fine based on a multiple of the value of the stolen item. In these circumstances, the thief's

obligation to pay the fine theoretically did not exist until the court entered a judgment to that effect.⁹⁴ In other words, the court can be seen as creating rather than confirming liability, thus exercising true judicial authority, and consequently a confession could not impose an obligation on the defendant to pay the penalty.⁹⁵

It is true that in fine cases, the defendant's statement of wrongdoing was not simply rendered inadmissible, as a confession in a criminal case was; it also generally resulted in exemption from liability for the fine.⁹⁶ That the prohibition against inculpatory statements operated in a somewhat different manner with respect to fines than it did in criminal cases does not, however, affect the foregoing analysis, which is based on the difference between penal liability and civil obligation. At the same time, while the distinction between creative and confirmatory jurisdiction may help to explain the disparate treatment of admissions in civil cases on the one hand, and fine and criminal proceedings on the other, it does not tell why confessions were treated differently in the latter two categories of cases, unless one views immunization as merely a corollary, variant, or extension of the prohibition against self-incrimination.

It may be argued, however, that the immunization of defendants in fine cases was not a function of the prohibition. Indeed, there were differences between the two doctrines sufficient to indicate that they were analytically severable. In criminal matters, the confession of the accused was simply not heard, whereas in penalty suits, the defendant's admission was made the basis for immunization. Moreover, in the case of fines, the Sages did not rely on the two-witness and kinsmen provisions of *Deuteronomy*. As Scriptural authority for immunization they instead invoked *Exodus 22:8*: "[H]e whom the judges shall condemn shall pay double unto his neighbor."⁹⁷ The reference in the verse to "judges" was used to argue that, although a court could find a person liable in this context, the defendant, through his confession, could not achieve the same result.⁹⁸

These distinctions notwithstanding, immunity can be seen as closely allied to the prohibition, since the effect of confessions in both criminal and fine cases was to protect the defendant from punishment in greater or lesser degree—that is, while the prohibition is a roadblock to conviction, immunity simply goes a step farther and bars punishment altogether. The relationship between immunity and the rule against self-incrimination is also reflected in American law. It is only through a grant of immunity that the defendant is required to disclose damaging information.⁹⁹ The twist is that in the United States immunity effectively prompts a confession, whereas in Jewish penalty cases, the confession is what creates the immunity. In essence, the Jewish system generally provides the confessing defendant in fine proceedings with the equivalent of transactional immunity precluding any prosecution,¹⁰⁰ whereas in criminal cases, under both American and Mishnaic law, invocation of the self-incrimination rule results in the equivalent of use immunity, permitting prosecution if there is independent evidence of guilt.¹⁰¹

It may also be that in Jewish law the distinction between transactional immunity in fine cases and use immunity in their criminal counterparts was more apparent than real, or at least that the distance between the two was not so substantial. In fact, whether a confessing thief was exempt from payment of the penalty where there was extrinsic evidence of guilt—two witnesses—was a matter of dispute in the Talmud.¹⁰² Some of the Gemara Sages took the position that immunity was conferred only if the confession constituted a genuine act of contrition rather than a means of avoiding liability for the penalty. On this view, immunity attached only if the wrongdoer's admission rendered him

liable for the principal.¹⁰³ Thus, complete transactional immunity was viewed with some caution. However, whatever the precise scope of immunity in fine cases, it clearly seems to have been available in at least some instances, whereas no immunity appears to have resulted from confessions in criminal actions.

It may appear curious to treat confessions more generously in fine cases than in criminal matters, but close examination of the nature of these suits suggests several bases for such differing treatment. Penalty cases involved serious infractions¹⁰⁴ that might lead to even more dangerous acts.¹⁰⁵ Although the fine went to the victim,¹⁰⁶ its primary purpose may have been to purify the wrongdoer.¹⁰⁷ The latter's confession of guilt and concomitant repentance can be viewed as achieving that end. In such a situation, the victim was made whole by compensatory damages, and the additional fine could be considered superfluous. Moreover, since as a result of restitution and confession, the defendant had arguably fulfilled both his secular and his spiritual obligation, immunization with respect to the fine may be viewed as consistent with the Scriptural requirement that punishment be "according to the measure of [the wrongdoer's] wickedness."¹⁰⁸

From a contemporary vantage point, remission of the fine may appear to be a dramatic example of underkill, since the wrongdoing involved was in some instances quite grave, rape, for example.¹⁰⁹ But, in certain circumstances, American law is also willing to consider more lenient measures—probation—even as to such serious wrongs,¹¹⁰ in order to make the punishment fit the criminal and his crime. In addition, it is necessary to take into account that the Talmud's starting point in this case is the Bible, and that as to the offenses in question, Scripture established fines as the appropriate sanctions. Given this frame of reference, leniency in a deserving case meant forgiveness of the penalty altogether.

With respect to criminal conduct, however, the Torah had established a different benchmark. Offenses warranting capital punishment or flogging generally had to be viewed as more serious.¹¹¹ In such cases, therefore, purification of the offender required more severe means than those used in connection with violations punishable by fine.¹¹² To assure expiation, punishment was prescribed notwithstanding the defendant's confession and contrition.¹¹³ Moreover, as a practical matter, to allow confessing defendants in criminal cases to be immunized, even though there was independent evidence sufficient to establish guilt, would have undercut the deterrent effect of sanctions. Malefactors might then commit crimes in the hope that their later insincere confessions would be deemed genuine acts of penitence precluding punishment.¹¹⁴

Despite the need for an effective deterrent, however, even in criminal cases, leniency was the order of the day. The Sages effectively limited the application of criminal sanctions by close adherence to procedural rules, by strict interpretation of the substantive elements of offenses,¹¹⁵ and by mitigation of the severity of punishment. These barriers to the imposition of sanctions in criminal cases may be viewed as the functional counterpart of immunity in fine proceedings.

Thus, the varying treatment of admissions in criminal and penalty cases may have turned on the extent to which confession could serve an expiatory function. In the less serious context of fines, confessions may have served as an expiatory device, and so led to immunization. In criminal proceedings, however, confessions were not allowed to be used as either a snare or an escape hatch for the accused. Inculpatory statements were

instead made completely inadmissible.

Another explanation for immunity in fine cases—again on the interface between religion and law, which in Judaism are unitary—may stem from the view of the Sages, expressed in the context of a double jeopardy discussion, that the category of cases punishable by fines was decreed by God and beyond human comprehension.¹¹⁶ By contrast, the rationale for punishing a crime such as murder is something humans are fully capable of discerning. Hence, although it was necessary to abide by the established procedure excluding confessions, if the two-witness rule and all other prerequisites for conviction and capital punishment were met, there was no reason not to proceed with imposition of the prescribed sanction simply because the defendant had confessed. The crime and the need for punishment were well understood. Fine cases are otherwise. Where the infraction was, for example, the goring of a bondsman by an ox, the Bible decreed a fine of thirty shekels to be paid by the animal's owner,¹¹⁷ and the reason that this particular offense was selected to be the basis for imposition of a fine, and in this particular amount, was unknown. When one cannot fathom the basis for attaching a noncompensatory fine to a particular misdeed, reluctance to impose such a sanction against a contrite wrongdoer may seem appropriate. In other words, the whole concept of penalty was regarded as a divine innovation, applicable only in a few discrete cases and authorizing such punishment where it could not have been imposed on strictly rational grounds. So the Sages, in effect, recognized a limitation on the already limited category of fines by refusing to impose these penalties on confessing wrongdoers, just as they also refused to allow the double jeopardy of exacting a fine in addition to the death penalty.

Alternatively, one of the purposes of immunization in fine cases may have been to encourage an otherwise reluctant wrongdoer to come forward and confess. He would thereby avoid liability for the fine but would still be required to pay compensatory damages—for example, the restoration of stolen property to its victim.¹¹⁸ Without such an incentive to confess, a thief might, in the absence of two witnesses, remain undiscovered or escape responsibility to pay the principal.¹¹⁹ On the other hand, unlike the fine cases, where encouragement of confessions might bring about restoration of the status quo ante, no such result could be achieved in criminal cases such as murder, perhaps the paradigmatic capital offense. Similarly, since many capital crimes, such as blasphemy or desecration of the Sabbath, threatened the spiritual rather than the physical welfare of individuals and the community, there were no specific victims to recompense in these cases. In such contexts, therefore, it may have made less sense to permit the defendant to immunize himself by an act of confession.

Whatever the ultimate rationale for the differing treatment of admissions, these fragmentary references in texts from the Mishnaic era dealing with criminal, civil, and fine cases reflect an almost matter-of-fact acceptance of a long-standing rule prohibiting confessions in criminal and quasi-criminal proceedings. This doctrine was apparently so embedded in the law that it was deemed unnecessary to distinguish ostensibly contrary contemporary authority,¹²⁰ or to provide the underlying biblical support, even though Scripture contained passages in which confessions of the accused were arguably used as a basis for imposition of punishment.¹²¹ Nor did the Sages make any reference to the rationale or policy underpinning for the law against self-incrimination. Only the rule *simpliciter* emerges from these early works.¹²²

B. Self-Incrimination in the Gemara

1. Disqualification of Witnesses

The texts from Mishnaic times discussed above treat confessions either in the context of their admissibility or to the extent to which they confer immunity. The Gemara's later (redacted approximately 500 C.E.), and more extensive, treatment of self-incrimination deals with the question from a somewhat different perspective, that of disqualification of witnesses. Jewish law designates a person guilty of certain offenses as a *rasha*, a wicked person, and bars him from testifying as a witness.¹²³ In a famous colloquy, at page 9b of the tractate *Sanhedrin* (or "higher courts") of the Talmud, the Gemara Sages discuss whether a person whose testimony would be self-incriminating (literally, would make him a *rasha*) is disqualified from serving as a witness:

R. Joseph again said: If a man says that so and so committed sodomy with him against his will, he himself with another witness can combine to testify to the crime. If however, he admits that he acceded to the act, he is a wicked man [and therefore disqualified from acting as witness] since the Torah says: *Put not thy hand with the wicked to be an unrighteous witness*. Raba said: Every man is considered a relative to himself, and no one can incriminate himself.¹²⁴

Parts of this exchange between Rabbi Joseph and Raba appear somewhat obscure. While it is clear that both Sages agree that the innocent victim in a sodomy case is not disqualified from serving as a witness, the status of the willing wrongdoer is uncertain. Apparently Rabbi Joseph, relying on the Scriptural prohibition against testimony by an "unrighteous witness," would disqualify him,¹²⁵ but what is Raba's position?

Commentary by Rashi makes it clear that the two rabbis are at odds about the rule with respect to the voluntary sodomite. According to Rashi, Raba is arguing that the prohibition against testimony by kinsmen precludes any witness from rendering himself a *rasha*, that is, incriminating himself. Thus, Raba would allow the miscreant to testify, but only as to his confederate's acts and not his own. Since the witness is not testifying as to his own misconduct, he has not rendered himself an evil person, and he is therefore not disqualified from testifying.¹²⁶

Other Talmudic debates reinforce the view that Rabbi Joseph would disqualify the witness based on his incriminating statement, while Raba would bifurcate his evidence, allowing the witness to testify but accepting only that portion implicating the accused.¹²⁷ In an exchange elsewhere in the *Sanhedrin* tractate, the Gemara Sages, commenting on a Mishnaic discussion of the types of persons who are disqualified as witnesses, said that both lenders and borrowers of money with interest are precluded from testifying.¹²⁸ The Gemara then describes the following case:

Two witnesses testified against Bar Binithus. One said, "He lent money on interest in my presence." The other said, "He lent me money on interest." [In consequence,] Raba disqualified Bar Binithus [from acting as witness].

But did not Raba himself rule: A borrower on interest is unfit to act as witness? Consequently he is a transgressor, and the Torah said: Do not accept the wicked as witness?—Raba here acted in accordance with another principle of his. For Raba said: Every man is a relative in respect to himself, and no man can incriminate himself.¹²⁹

Bar Binithus could be convicted of lending money on interest only on the basis of evidence from two competent witnesses. The testimony of the second witness in the case, however, disclosed that he himself was a *rasha*, because he had violated the prohibition against borrowing money on interest, and, if such testimony were excluded, Bar Binithus could be neither convicted nor in turn disqualified as a witness. Since Bar Binithus was disqualified, it is clear that he had been convicted, and that to secure conviction Raba must have used the bifurcation theory, accepting the witness's testimony that Bar Binithus had lent money on interest, but rejecting that portion of the testimony that the loan was to the witness himself.¹³⁰

A complicated but even more explicit exposition of the differences between Rabbi Joseph and Raba can be found in tractate *Yebamoth*—the title means "sisters-in-law" or "levirate wives" and the tractate deals generally with marriage. It appears in a colloquy in which the Sages discuss the following Mishnah:

A man who brings a letter of divorce from a country beyond the sea and states, "It was written in my presence and it was signed in my presence", must not marry the [divorcer's] wife. [Similarly, if he states], "He died", "I killed him", or "We killed him", he must not marry his wife. R. Judah said: [If the statement is], "I killed him", the woman may not marry [anyone]; [If, however, it is], "We killed him", the woman may marry again.¹³¹

Since this is a matrimonial matter, and the rules of evidence concerning proof of death are somewhat relaxed in such cases, the woman can be granted permission to remarry on the basis of the testimony of only one competent witness.¹³² The witness himself may not marry the woman, since the matter rests entirely on his word, and there is concern that he may be lying in order to marry her himself.¹³³ If the witness's testimony is accepted, however, she will be able to marry any other man. If the witness testifies, "I killed him," or "We killed him," the majority view articulated in the Mishnah is that the witness may not marry the woman, but that she may marry anyone else. The minority view of Rabbi Judah is that where the witness testifies, "I killed him," the woman may not remarry at all. This follows because the witness's testimony is self-incriminating; he is, according to Rabbi Judah's position, a *rasha*, disqualified as a witness, and his evidence is not admissible.¹³⁴

The majority's acceptance of the witness's testimony—"I killed him"—and its authorization of remarriage on that basis make it appear that these Mishnah Sages took an across-the-board position that self-incriminating statements did not disqualify a witness. There are, however, other ways of viewing this ruling, as the Gemara's discussion of the passage reflects:

Only he, then, must not marry his wife, she, however, may be married to

another man? But, surely, R. Joseph said: [If a man stated], "So-and-so committed pederasty with me against my will", he and any other witness may be combined to procure his execution; [if, however, he said], "with my consent", he is a wicked man concerning whom the Torah said, *Put not thy hand with the wicked to be an unrighteous witness!* And were you to reply that matrimonial evidence is different because the Rabbis have relaxed the law in its case, surely, [it may be pointed out,] R. Manasseh stated: "One who is rabbinically regarded as a robber is eligible to be a witness in matrimonial matters; one, however, who is Biblically regarded as a robber is ineligible to act as witness in matrimonial matters; would it then be necessary to assume that R. Manasseh holds the same opinion as R. Judah?—R. Manasseh can answer you: My statement may be reconciled even with the view of the Rabbis, but the reason of the Rabbis here is the same as that of Raba. For Raba said, "A man is his own relative and consequently no man may declare himself wicked."

Must it then be assumed that R. Joseph is of the same opinion as R. Judah?—R. Joseph can answer you "My statement may be in agreement even with the view of the Rabbis, but matrimonial evidence is different, since the Rabbis relaxed the law in its case; and it is R. Manasseh who adopted the view of R. Judah."¹³⁵

This debate, while perhaps somewhat opaque 1,500 years after its occurrence,¹³⁶ is typical Gemara fare. First, the Rabbis raise the possibility that the Mishnah is in conflict with Rabbi Joseph's statement of the law regarding consensual sodomites, because the Mishnah allows the messenger confessing to murder to testify, while Rabbi Joseph would disqualify a witness testifying to his own criminal acts. Attempting to reconcile these two positions, the Gemara scholars raise the point that the rules of evidence are relaxed in matrimonial cases, and thus it is possible that Rabbi Joseph's rule of disqualification is simply inapplicable in this family law context. Standing in the way of this neat resolution of the problem, however, is Rabbi Manasseh's statement of the law that the dispensation regarding the rules of evidence would not be operative here, since the disqualification in this instance is biblical rather than rabbinic; that is, a murderer is biblically ineligible to serve as a witness, even in matrimonial matters, and it is only those whose disqualification is merely rabbinic who may testify in divorce cases.

Rabbis Joseph and Manasseh are thus in disagreement. For either of these competing positions to be accepted, it must be placed within the Mishnah's majority position.¹³⁷ The Talmudic scholars attempt to make Rabbi Manasseh's view consistent with that of the Mishnah majority by utilizing the reasoning of Raba; that is, by arguing that the Mishnaic ruling accepting the witness's testimony concerning murder is based on Raba's bifurcation principle. Since Rabbi Joseph did not agree with Raba on this issue, acceptance of Rabbi Manasseh's argument would place Rabbi Joseph within the minority position of Rabbi Judah in the Mishnah. The Sages, however, try to reconcile Rabbi Joseph's view with the Mishnah majority by asserting that the exception with regard to matrimonial cases permits even a murderer to testify. This would put Rabbi Manasseh in the minority. The entire matter remains in equipoise. The debate thus leaves unclear whether the Sages of the Mishnaic era viewed the self-incrimination rule as one that

prohibited disqualification as well as conviction, whether they accepted bifurcation of the witness's testimony, or whether they simply adopted an exception for matrimonial cases.

This Talmudic exchange, however, does help to clarify the nature of the disagreement between Rabbi Joseph and Raba. Rabbi Joseph would permit the witness's own words to disqualify him, whereas Raba would apparently allow disqualification only through extrinsic evidence presented by two qualified witnesses. Stated another way, there seems to be a significant difference between the positions of these two scholars, for the one is, at the least, permitting an adverse consequence (disqualification) to flow from a self-incriminating statement, and at the most, authorizing the imposition of what is arguably a form of punishment on that basis,¹³⁸ whereas the other appears to insist on an accusatorial process to determine if an individual has committed a disqualifying offense. Thus, even though the foregoing discussions in *Sanhedrin* and *Yebamoth*, unlike the earlier Mishnaic era texts, treat disqualification rather than conviction, there is an intimate relationship between the two, since disqualification may be viewed as an attribute of punishment, which generally comes only after conviction for the disqualifying offense.

Throughout all these debates, however, it remains clear that, while Rabbi Joseph and Raba differ about whether a self-incriminating statement necessitates disqualification of a witness, neither of these Gemara Sages is suggesting that a confession may be used to convict the declarant of any crime. Plainly, under Talmudic law, it may not.¹³⁹

Thus, we may better understand Rabbi Joseph's position on self-incrimination and disqualification, as well as the significance of the dispute in *Sanhedrin* 9b, by considering Rabbi Joseph's approach at three different points along a spectrum. At one end of the spectrum, is the case in which a defendant charged with a crime attempts to confess. It is clear that, like Raba, Rabbi Joseph would not permit such a defendant to incriminate himself at his own trial—the earlier Mishnaic prohibition against self-incrimination was clearly binding on both Rabbis and would preclude any other result. At the other end of the spectrum is the narrow case presented in *Sanhedrin* 9b, namely, where one comes to court as a witness to testify against another who is on trial for commission of a crime, and, incidentally, in the course of his testimony as a witness, makes self-inculpatory statements. In this circumstance, Rabbi Joseph hears the self-incriminating evidence and disqualifies the witness's entire testimony on that basis. Raba, on the other hand, hears the admission of wrongdoing only for the purpose of disregarding it, and is then able to listen to the remaining evidence that is not self-incriminating; that is, he partitions the testimony.

Why is Rabbi Joseph willing to disqualify this witness, given the maxim that no person may render himself a *rasha*? Confessions were barred presumably because they could not be believed and because punishment could not be inflicted on that basis. Where, however, an individual is appearing in court to testify against someone else and makes a self-inculpatory statement, it can be heard and believed because it is incidental to his main testimony, and thus may possess greater indicia of reliability, and because its acceptance is for the limited purpose of disqualification, which is not as severe as punishment in criminal proceedings. That is, disqualification, which can be viewed as merely a change in status or an adverse consequence, lies somewhere between civil monetary damages, where the defendant's admission is fully accepted, and penalties, flogging, and capital punishment, where it is not. Thus, it is the nature of disqualification,

taken together with the enhanced reliability of testimony in this context, that warrants acceptance of the witness's self-incriminating testimony.¹⁴⁰

These issues of credibility and punishment are, however, presented more directly at the third or intermediate point along the spectrum, the case in which a person who has not been charged with any offense comes to court *sua sponte* and attempts to incriminate himself. Certainly Raba would not accept such evidence. But what would Rabbi Joseph do? Presumably he would also reject the confession. We may infer this result from the fact that this case is quite similar to the first¹⁴¹ and that *Sanhedrin* 9b does not use this intermediate case as its example. If the result in this case were different from that in the first, that is, if this *sua sponte* confession were deemed admissible, *Sanhedrin* 9b would have used this third case to teach the new rule, for the result of admissibility surely could not be derived from the first case. Moreover, if such a *sua sponte* confession were admissible, it would have been better to use it in *Sanhedrin* 9b in place of the example actually given of the confessing witness, for the result in the latter case would be derivable from it.¹⁴² On the other hand, had such an intermediate case reaching the *same* result as the first case been set forth in *Sanhedrin* 9b, it would not have been possible to derive the rule reached in the example actually given there, for that rule creates an exception, in effect, to the general rule against self-incrimination. That is, because the intermediate case still falls within the general rule, we would not be able to tell from it whether a more attenuated example—the confessing witness—would be treated differently. By the same token, we may infer that it is *only* in the narrow circumstances set out in *Sanhedrin* 9b that Rabbi Joseph would be willing to permit disqualification. Had he been willing to accept the confession and impose sanctions on that basis in a broader category of cases, those cases must logically have been included in this Talmudic discussion, because the appropriate result cannot be inferred from the narrower exception provided in *Sanhedrin* 9b. Thus, it appears that the dispute between Raba and Rabbi Joseph was a fairly narrow one, and that with respect to the generality of cases involving inculpatory statements, both Sages quite clearly agreed that self-incriminating admissions could not be heard.

2. An Analysis of the Competing Positions of Rabbi Joseph and Raba

Although Rabbi Joseph and Raba disagree only with respect to a narrow band of cases, the differences between their approaches are nevertheless not insubstantial. Theoretically at least, Raba's bifurcation approach in *Sanhedrin* 9b would prevent an accomplice from torpedoing the case against the defendant simply by coming forward to testify as to both his own criminal conduct and that of the accused.

Strange as it may seem, if an accused were permitted to testify that he was guilty, one might contend under Talmudic law that the testimony of all other witnesses to the crime would fall, since all evidence as to the same matter is treated as a unit, and since disqualification of any of the component parts disqualifies the whole. Thus, because one of the witnesses against the defendant would be a *rasha*, or evil person, namely the defendant himself, the entire case against the accused would arguably disintegrate.¹⁴³

The Gemara grappled with this sabotage issue in the tractate of *Makkoth* (meaning "lashes"). In *Makkoth*, the Sages were analyzing a Mishnah concerning the biblical requirement that a person may be executed only on the basis of testimony of two

witnesses or three witnesses.¹⁴⁴ In the Mishnah, Rabbi Akiba had explained why the Torah added a reference to three witnesses even though two were sufficient to convict.¹⁴⁵ Noting that all the witnesses testifying to a crime formed a single entity, he observed that, just as disqualification of one of two witnesses effectively disqualified the second witness, so too, disqualification of one of three or more witnesses disqualified them all, and thereby rendered all the evidence against the defendant void.¹⁴⁶

In discussing Rabbi Akiba's statement of the law, the Gemara Sages suggested that such a rule would, as a practical matter, make it impossible to apply capital punishment because the very presence of the victim at the murder, as an eyewitness and an interested party, would nullify the prosecution's case.¹⁴⁷ Abaye said that the penalty could still be exacted in situations where the victim was not an eyewitness, as where he had been attacked from behind. To this, Rabbi Papa asked why the presence of the accused himself would not disqualify all the evidence, to which Abaye apparently had no answer.¹⁴⁸ Rabbi Papa brought this question to Raba, who stated, "The Holy Writ prescribes *at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter* be established; the text thus refers only to those who have to *establish* the matter."¹⁴⁹ It appears, then, that Raba considered litigants as a category separate and distinct from witnesses—litigants have allegedly "done" the matter, whereas witnesses thereafter "establish" it—and thus he did not view the accused as a witness within the meaning of the biblical requirement.¹⁵⁰ The result under Raba's approach is that the defendant's presence at the scene of the crime does not affect the admissibility of the testimony of the other witnesses.¹⁵¹

Similarly, Raba's bifurcation theory in *Sanhedrin* 9b in effect prevents an *accomplice* from destroying the case against the *defendant* by offering self-incriminating testimony. It is unlikely that this partition procedure was offered for the purpose of preventing *defendants* from invalidating all the testimony against *themselves*, since the *Makkoth* tractate suggests that Raba did not consider the principal in a criminal case to be a witness whose disqualification would void the entire prosecution.¹⁵² Therefore, the bifurcation principle in *Sanhedrin* 9b is unnecessary in this context. It would thus appear that the *Sanhedrin* theory precludes accomplice sabotage, whereas the *Makkoth* principle complements *Sanhedrin* by precluding sabotage by defendants, who could otherwise nullify the prosecution by offering incriminating testimony. The two concepts are not, however, rigidly compartmentalized; Raba's *Makkoth* principle can be viewed as working in tandem with his bifurcation technique in *Sanhedrin* to preclude accomplice sabotage. Like the accused himself, the confederate is one who has "done" the matter as opposed to one who is thereafter called upon to "establish" it. Thus, to the extent that the testimony of the accomplice is self-incriminating, it is not heard, for under the *Makkoth* theory it is like that of a party.¹⁵³ However, because the accomplice has already qualified as a witness against the defendant, his testimony is bifurcated under the *Sanhedrin* theory, and he is permitted to offer evidence that is not self-inculpatory.

Taken together, the *Makkoth* and *Sanhedrin* principles can also be viewed as supportive of an accusatorial rather than an inquisitorial system.¹⁵⁴ To be sure, the doctrine articulated by Raba in *Makkoth* addresses, at least contextually, the problem of a defendant's theoretical ability to disqualify all witnesses. At the same time, however, this same theory which prevents the defendant from thwarting his own prosecution, and so enables the case against him to proceed, also has the paradoxical effect of keeping the

defendant from being a part of the state's fact-gathering and prosecutorial process. Instead, guilt must be independently established by the testimony of two witnesses. Concededly, the bifurcation principle in *Sanhedrin* 9b obliges the accomplice to testify against the accused, but at the same time, it gives him the equivalent of use immunity, thereby requiring that any prosecution against the witness/accomplice himself be based on extrinsic evidence secured under an accusatorial system of justice. Thus, neither the defendant nor his uncharged accomplice is required, or even permitted, to aid the state in gathering evidence for his *own* prosecution.

Under Rabbi Joseph's approach, however, an accomplice theoretically might be able to thwart conviction by coming forward to testify and being found a *rasha*, thus accomplishing not only his own disqualification, but that of all other witnesses as well. Such a result is obviated only by application of either Raba's ruling in *Makkoth* or of other rules independently delineating the circumstances under which persons are to be considered witnesses.¹⁵⁵ In other words, Rabbi Joseph's assertion that one who incriminates himself is to be disqualified as a witness against a confederate does not, in and of itself, preclude such an individual from engaging in sabotage. Thus, considered in isolation, his approach has the paradoxical effect of allowing the witness's own words to be used against him—they are the very basis for his disqualification—while, at the same time, precluding the prosecution of the accused altogether. However, operating in conjunction with Raba's distinction between parties and witnesses, Rabbi Joseph's view would not produce these extreme consequences.

Even assuming that Rabbi Joseph's position would not result in total disqualification of all the witnesses to the crime, his theory still has the disadvantage of removing what might otherwise be credible evidence from the trier of fact. This rule of complete exclusion precludes the admissibility of any testimony of the presumed *rasha*. In American jurisprudence, by contrast, the fact that the testimony is that of an accomplice goes to its weight rather than its admissibility, although in approximately thirty percent of the states there is in effect a quasi-exclusionary rule, in the form of an accomplice corroboration requirement.¹⁵⁶

Under Talmudic law, however, once a witness is accepted as valid—in itself no small feat¹⁵⁷—the court is required to give full credence to his testimony.¹⁵⁸ The effect of Rabbi Joseph's position is the equivalent of automatic disqualification. This result might be premised on the theory that such a confederate in crime could never pass the rigorous test of inquiry and cross-examination required of prospective witnesses under Jewish law,¹⁵⁹ or that across-the-board disqualification was a preferable alternative to the remote possibility that, after interrogation, such a witness would nonetheless have been allowed to testify.¹⁶⁰ Whatever the underlying rationale, the result is that conviction based on such testimony is impossible. This interpretation of Rabbi Joseph's approach simply takes the accomplice corroboration principle one step further, converting it into a *per se* exclusionary rule. Whether one views this procedure as superior to an accomplice corroboration requirement depends on the faith one has in the trier of fact's ability to assess the testimony of an accomplice.

Raba's bifurcation theory, on the other hand, would require the trier of fact to accept the testimony of the alleged accomplice as to his confederate's guilt, provided that the accomplice was found otherwise qualified to be a witness. It does, however, assure that cases will not be automatically dismissed when there are only two witnesses to the

act, including the accomplice.¹⁶¹ The positions of Rabbi Joseph and Raba, considered together with the range of American corroboration requirements,¹⁶² display a spectrum of views concerning the extent to which an accomplice can assist the state in securing conviction of the accused. At one end is Rabbi Joseph, who, through his disqualification ruling, effectively prohibits all accomplice testimony. At the other extreme is the American rule which permits conviction on the basis of the uncorroborated evidence of a coconspirator.¹⁶³ In between, there is the other rule prevalent in this country, requiring that such testimony be corroborated.¹⁶⁴ Raba's position appears to be the same as the middle approach, but conceptually it is not. Corroboration is required only by virtue of the biblically prescribed two-witness rule, rather than by anything intrinsic in Raba's bifurcation theory.¹⁶⁵ Presumably, Raba would have allowed conviction on the basis of the testimony of two accomplices, even where no other independent evidence existed.¹⁶⁶

Analysis of the rabbis' positions on self-incrimination through the prism of the accomplice corroboration requirement reveals an important facet of Talmudic learning. Rabbi Joseph, whose insistence on disqualifying a witness because of his incriminating statement—arguably a form of punishment—would place him in the "conservative" camp, is seen instead as a "liberal" who will not permit accomplices to testify at all, let alone in support of conviction. Raba, on the other hand, a putative liberal by virtue of his refusal to permit a person to incriminate himself, does allow an accused to be convicted on the basis of accomplice testimony.¹⁶⁷ Ostensible ideological shifts, such as those of Rabbi Joseph and Raba, do not reflect inconsistency on the part of the Sages. Rather, each rabbi's positions are the product of his particular approach to the law—an approach that does not necessarily yield rulings that fall into neat ideological pigeonholes. Seemingly chameleonic determinations may instead be viewed as an affirmation of conceptual integrity and wholeness in the Rabbi's methods of problem solving.¹⁶⁸

The Gemara is filled with debates between Sages, the resolution of which did not occur until centuries later.¹⁶⁹ A general principle utilized for determining the law,¹⁷⁰ when the Talmud itself does not decide a particular controversy between Gemara Sages, provides that the law is in accord with a later opinion except when a disciple disagrees with his teacher.¹⁷¹ This rule, however, applies only up to the generation of Raba. From his time forward, the later opinion prevails, even in the case of a student challenging his teacher.¹⁷² Therefore, even though Rabbi Joseph was one of Raba's teachers,¹⁷³ the latter's bifurcation theory ultimately carried the day.¹⁷⁴

C. Criminal Cases in the Talmudic Rabbinical Courts: The Scope of the Self-Incrimination Rule and Its Rationale

1. The Scope of the Prohibition

Notwithstanding their differences on the questions of disqualification of witnesses and bifurcation of testimony, both Raba and Rabbi Joseph fully accepted the doctrine that no person could make himself a *rasha*, thereby reflecting the rule's general acceptance in the Jewish legal system. It is of course true that the Talmudic rule against self-incrimination was neither all-encompassing nor inflexible. The prohibition, as we have seen, was altogether inapplicable in purely civil monetary cases. By freely permitting civil admissions of liability, the Sages apparently recognized the individual's right in this

context to dispose of his property in any manner he wished. Thus, admissions in civil cases can be viewed either as acknowledgments of bona fide liabilities or as akin to making gifts.¹⁷⁵ In effect, the Talmudic scholars concluded that the defendant could come to court in a civil monetary proceeding and say to the plaintiff, "I owe you money (or I give you money); take it," but that the accused could not say to the state in a criminal case, "I did wrong; I owe you my body (or life); take it."¹⁷⁶ This is in contrast to the contemporary American approach,¹⁷⁷ which places great value on both out-of-court and in-court confessions of guilt in criminal proceedings.

In addition, under certain circumstances, Talmudic law may have made the prohibition against self-incrimination inapplicable even in criminal cases before the rabbinic courts.¹⁷⁸ As noted in chapter one, the courts could also relax procedural requirements in times of emergency and in the case of individuals who "get off" because of non-compliance with "technical" rules, such as the failure of the defendant to acknowledge warnings.

The particular defect of non-acknowledgment of warnings, although not directly implicating the rule against self-incrimination, nonetheless illustrates the extent to which the defendant's silence could preclude punishment. On the one hand, the repeated muteness of the accused in the face of warnings could in effect be used against him on the third offense, thus demonstrating the ability of the rabbis to deal with persistent offenders and perceived abuse of the safeguards in the criminal justice process. At the same time, however, the evidentiary requirement that the defendant must acknowledge warnings enabled him at least temporarily to avoid punishment by remaining silent and refusing to accept the admonitions.¹⁷⁹

The other Mishnah creating a "barley bread" exception deals with those who commit murder in the absence of witnesses. The Gemara asks how we can then know that the accused committed murder, and gives three responses. Two involve classic "technical loopholes." They are errors that do not go to the substance of the claim, in cases in which the accused clearly appears to be guilty. One is an instance of disjointed testimony, that is, testimony of witnesses who saw the perpetration of the offense from different vantage points and consequently did not meet the requirement of being together at the time they observed the crime. The other involves witnesses who contradicted one another, but only with regard to minor circumstances of the offense. The third example is more difficult. It concerns a defendant who did not receive a warning.¹⁸⁰ The warning cannot be viewed solely as a technicality, because, as in contemporary law, not all killings constituted murder,¹⁸¹ and the warning assured that the accused possessed the requisite level of *mens rea*.¹⁸²

From the Gemara itself, it is difficult to determine whether these three instances are meant to be exclusive or merely illustrative. The Rashi commentary suggests that while they are illustrative, the principle they establish, which acts in effect as a limitation on rabbinic authority, is that only persons who we know have committed murder can be subjected to the barley bread punishment.¹⁸³ Rashi therefore has no difficulty with disjointed testimony and the contradiction of minor details. He would impose the barley bread punishment even if the testimony suffered from either of these two technical defects. But he then goes further and states that conviction on the basis of the testimony of one witness would be insufficient to meet the criterion of true knowledge of guilt, for a single witness's testimony might be inaccurate. Rashi does not, however, discuss the third

alternative of conviction absent prescribed warnings, and the omission is telling since the warnings can be viewed as establishing a material element of the crime. Presumably, if Rashi discounts the testimony of a single witness, he would also preclude imposition of the barley bread punishment solely on the basis of the defendant's confession. What, however, of a situation where there is the testimony of a single witness and the confession of the accused? One might argue that the two combined are sufficient to corroborate one another and establish the truth. On the other hand, if each individually is insufficient, how can their combination amount to reliable evidence of guilt?¹⁸⁴

Taken together, these exceptions to the strict procedural safeguards otherwise in effect might appear to be quite sweeping; they arguably create a parallel criminal justice system affording considerably less protection to the rights of the accused. It must be remembered, however, that the emergency authority was limited both by time and context. Furthermore, the barley bread exception was restricted to certain kinds of habitual offenders and to murderers,¹⁸⁵ and disregard of procedural requirements even in those situations appears to be limited to cases in which factual guilt was obvious. In any event, whether the rule against self-incrimination was among the guarantees suspended in these proceedings is not altogether clear.

Nor should these limited nullifications of certain procedural rights in the Talmudic criminal justice process be viewed as the rough equivalent of the many restrictions placed on *Miranda* rights. The Gemara Sages fashioned exceptions within the framework of a panoply of safeguards that were both more comprehensive and more stringent than those of any society before or after. In a complex of almost airtight guarantees, such departures from the norm were arguably an essential safety valve. While the protections which our Bill of Rights affords the accused in criminal cases are surely not to be disparaged, they are not nearly as broad and deep as those in Jewish law, and the appropriateness of exceptions in the American scheme based on such concerns as public safety is correspondingly more questionable.

2. The Rationale of the Prohibition

On the whole, therefore, the Talmudic rule against self-incrimination, while not unlimited, remained quite expansive, applying throughout the entire range of criminal and quasi-criminal offenses. We are left to grapple with the bases for such a sweeping prohibition. Why would Jewish law embody a rule that denied use of an individual's incriminating statement to secure conviction? The biblical requirement that guilt be established through two or more witnesses need not necessarily have precluded admissibility of the defendant's confession. Nor did the Scriptural prohibition against the testimony of kinsmen require that the accused himself be included in that category.¹⁸⁶

The Talmudic scholars themselves, although analyzing the rule's intricacies, gave no specific indication of its underlying rationale. The prohibition, however, should not be viewed in isolation, but as one strand of an entire fabric of protections afforded the accused in the Jewish criminal justice process. In many respects the Talmudic system appears to be a modern defense lawyer's nirvana.¹⁸⁷ Penal laws were strictly construed.¹⁸⁸ There was a requirement of two witnesses to convict; in addition, these witnesses had to be qualified,¹⁸⁹ meaning, *inter alia*, that they had to be adult men with no interest in the outcome, who were not themselves incompetent or evil and were not related to the

defendant or to each other.¹⁹⁰ Furthermore, the witnesses had to give advance warning to the suspect that he was about to commit a punishable offense,¹⁹¹ the suspect had to orally acknowledge the warning, and the witness had to observe that the defendant had in fact committed the *corpus delicti* of the crime.¹⁹² Circumstantial evidence was not probative of guilt.¹⁹³ Accomplice liability was virtually nonexistent.¹⁹⁴ Nor was there any culpability for attempts.¹⁹⁵ Multiple punishments were prohibited.¹⁹⁶ The court subjected each witness to searching cross-examination designed to elicit any inconsistencies in the testimony.¹⁹⁷ Moreover, the prerequisites for serving as a judge were so rigorous that only compassionate persons of the finest intellect and highest integrity could qualify.¹⁹⁸

In this complex of civil libertarian guarantees, the Talmudic rule against self-incrimination does not appear at all alien. Indeed, it fits comfortably alongside the famous Mishnaic debate concerning the death penalty, in which the Sages consider whether the "Bloody *Sanhedrin*" was one that ordered capital punishment once during a seven-year period or once during a seventy-year period, and in which Rabbis Tarphon and Akiba state flatly: "Had we been members of the court, no man would ever have been executed."¹⁹⁹ From another perspective, however, a system including such expansive safeguards could have compelled the conclusion that confessions must be admissible, lest convictions be rendered impossible.²⁰⁰ As Rabbi Simeon ben Gamaliel stated in response to Rabbis Tarphon and Akiba during the above colloquy: "[You] would have also multiplied murderers in Israel."²⁰¹ To the extent that the latter view was intended to condone relaxation of any of the strict procedural safeguards, it did not prevail. These sophisticated yet highly pragmatic geniuses, who generally had secular occupations²⁰² and who were capable of discussing adultery, usury, or Temple rites,²⁰³ opted for comprehensive protection of the accused.²⁰⁴

One value served by the Talmudic prohibition against self-incrimination was to assure preservation of the spectrum of procedural and evidentiary safeguards established by the Torah. The absolute prohibition of confessions, including even the ultimate confession, namely, a guilty plea, made it certain that conviction could occur only after a trial that included the testimony of two qualified witnesses and adhered to all of the other prescribed rules as well. By preventing reliance on evidence that is almost instinctively regarded as dispositive, the prohibition effectively assured that no shortcuts would be taken in the fact-finding process.²⁰⁵

The American counterpart presents a stark contrast. An overwhelming proportion of the cases within our criminal justice system are decided by guilty pleas that are negotiated outside the courtroom with minimal judicial supervision and that effectively preclude the assertion of almost all preexisting constitutional claims.²⁰⁶ Moreover, such wholesale abdication of rights may often be prompted by the rendering of an out-of-court confession to the police.²⁰⁷ As for the small percentage of defendants who do proceed to trial, if they have previously made a confession, it is all but conclusive.²⁰⁸ Indeed, even in the case of nonconfessing defendants who decline to testify, juries may, despite admonitions, presume guilt.²⁰⁹ The Talmudic system, by contrast, with the absolute prohibition as its linchpin, precludes such broad waivers and insures that all procedural protections are not merely apparent, but real. Under the rabbinical system of justice, we may safely assume that there were no backroom deals; if conviction occurred, it occurred in the courtroom, after a trial at which defendant's failure to testify was irrelevant. There was both due process and the appearance of due process.

In an analogous way, by guaranteeing a trial with all the attendant procedural safeguards, the rule against self-incrimination assured equal treatment before the law. In accord with the biblical injunction against treating litigants differently, the prohibition guaranteed that every accused, whether rich or poor, naive or sophisticated, would be accorded the same judicial process. Or, as the Torah admonished judges: "Thou shalt not wrest judgment; thou shalt not respect persons; neither shalt thou take a gift; . . . Justice, justice, shalt thou pursue."²¹⁰

Subsequent scholars, who gave post hoc explanations for the Talmud's exclusionary rule, provide insights concerning the philosophical and psychological reasons underlying this specific aspect of the protections afforded defendants in criminal cases. Maimonides²¹¹ offered two, or perhaps three, reasons.²¹² He suggested the possibility that the defendant might have been "confused in mind," asserting, either as an example of such confusion or perhaps as a separate basis, that an innocent person might confess because he was suicidal.²¹³ Maimonides' ultimate conclusion, however, was that the prohibition against using confessions in criminal proceedings is a divine decree, meaning, apparently, that it is a rule of law for which human beings are incapable of discerning a rationale.²¹⁴

We may also understand Maimonides' arguments as complementing one another. He may be explaining that, because there are instances of disturbed or suicidal individuals who have a compulsion to confess falsely, a divine decree in the form of a prophylactic rule prohibiting self-incrimination in all cases was necessary.

To the extent that Maimonides is raising only reliability concerns, his explanation remains unsatisfying,²¹⁵ since the Talmudic rule operated to exclude confessions even where there was strong corroborating evidence short of the two prescribed witnesses necessary for conviction.²¹⁶ American jurisprudence reflects concern with the reliability of confessions both in the prohibition against admissibility of involuntary statements,²¹⁷ and in the requirement either that the *corpus delicti* of the crime be established by evidence independent of the confession or that the truthfulness of the confession be corroborated.²¹⁸ There is, however, generally no need to establish independently that the defendant was linked to the crime.²¹⁹ Yet, under Jewish law, even where there is no question of coercion, and where there is independent evidence of the guilt of the accused, such as the testimony of a witness, the confession remains inadmissible to prove guilt. Reliability is thus presumably not Maimonides' sole concern.

Maimonides' focus on the rule as a divine ordinance raises another important consideration. The prohibition against self-incrimination must be viewed not only as an integral part of the criminal justice system, but also in the context of the religious and cultural life of the Jewish community at that time. It is important to remember that we are concerned with a rule that was operative in a deeply religious society in the lives of whose members divine commandments played a central role.²²⁰ In other words, while the people of that time were not intrinsically better, they may well have been more obedient to the religious, ethical, and moral strictures of the Bible and of the rabbis.

Furthermore, Scripture, as the central religious source, focused on divine retribution. Not every crime was to be punished by human courts.²²¹ Rather, perhaps recognizing the fallibility of human beings, the Torah delegated to worldly tribunals the authority to convict and punish pursuant to scrupulous guidelines designed to assure absolutely, at least within the limits humanly possible, that only the guilty, both in terms

of *actus reus* and *mens rea*, would be held to answer for the commission of crimes. This meant that many who were factually guilty could not be legally condemned. It was understood and accepted that God would exact retribution for sin and crime in His own time and in His own way. This view is capsulized in a famous Mishnah in "Ethics of the Fathers":

[Hillel] saw a skull floating on the water; he said to it: Because you drowned the others, they drowned you; and ultimately those who drowned you will themselves be drowned.²²²

Commentators on this Mishnah explain it as a metaphorical statement that God uses human instruments to achieve justice.²²³ For whatever reason, God leaves alive murderers for whom there is no possibility of conviction in the human courts so that they can be killed by others who in turn may have committed crimes and who, depending on their *mens rea*, will either be killed or will be condemned to a city of refuge, where they contemplate their offense and do penance.²²⁴ Without impinging on our free will, God is able to effect His will through human action.

It is in this sense perhaps that Maimonides' view of the confession rule as divine decree dovetails with the rationale offered by David ben Solomon ibn Abi Zimra (the "Radbaz"), a sixteenth century Talmudic scholar and Kabbalist who lived in Spain, Israel, and Egypt. The Radbaz, who, like Maimonides, thought the law a divine decree, also surmised that confessions were absolutely inadmissible in criminal cases because, although a man's property was his own, his life belonged to God.²²⁵ To confess to a crime would therefore be tantamount to disposing of property—his body—that is not the defendant's own, and in a capital case, would enable the accused to commit a form of suicide.²²⁶ The Anglo-American doctrine that a person may not consent to a criminal act against himself may be relevant in this context.²²⁷ The consent rule has been viewed both as the embodiment of a moral principle protecting the sanctity of human life and the physical integrity of the person,²²⁸ and as a paternalistic exercise of government power to protect people from themselves.²²⁹ Whatever the ultimate rationale for the rule in American law, one may not generally consent to be the victim of a crime.²³⁰ The provision in Talmudic law is arguably analogous: one is not permitted to offer his life or his body through the vehicle of a confession in a criminal case. Even though man has free will that affects his moral culpability,²³¹ his life is not, according to the Radbaz, subject to forfeiture on his word.²³²

To be sure, one might argue that if a confession were corroborated by other testimony, the defendant's life would not then be subject to forfeiture solely on the basis of his own statement, even though the conviction would then be predicated on two types of evidence, each of which was by itself considered worthless under Talmudic law. However, the conviction and punishment would then rest at least in part on the admission of the accused. So even if confessions were accepted in evidence only when corroborated, we might in time forget that our lives are not our own to be given away freely. This in turn might lead to permitting confessions to form the sole basis for conviction, and in turn ultimately to the use of coerced confessions.²³³ Thus, the total exclusion of self-inculpatory statements serves as a fence around the two-witness rule and other commandments relating to the sanctity of human life, and as a constant reminder of

God's omniscience and omnipotence.²³⁴

This overarching concern with the sanctity of human life is reflected in a Mishnah in the *Sanhedrin* tractate setting forth the chilling admonitions that judges were to give potential witnesses in capital cases to assure that the latter would testify truthfully only to what they actually observed. The Mishnah teaches:

[W]hosoever destroys a single soul of Israel, Scripture imputes [guilt] to him as though he had destroyed a complete world; and whosoever preserves a single soul of Israel, Scripture ascribes [merit] to him as though he had preserved a complete world. . . . For if a man strikes many coins from one mould, they all resemble one another, but the Supreme King of Kings, the Holy One, Blessed Be He, fashioned every man in the stamp of the first man, and yet not one of them resembles his fellow. Therefore every single person is obliged to say: The world was created for my sake.²³⁵

This soaring proclamation of the uniqueness, centrality, and divinity of individual man implicitly dispels any notion that self-incrimination is permissible.²³⁶ Having been created in the image of God, and constituting a world unto himself, no person may attempt to destroy or injure that world by confessing to crime.

To the extent that the prohibition against confessions, taken together with the other Talmudic procedural safeguards, emphasized the sacredness of human life, it also accorded value to the individual *qua* individual, separate and distinct from the state. In particular, the prohibition forced the authorities to convict by extrinsic evidence, and had the effect of distancing the suspect from the state. While a rule permitting voluntary confessions could arguably achieve the same end, the refusal to allow such admissions can be viewed as a recognition that in any encounter between individual and government, the exercise of free will by the accused is illusory. Thus, the self-incrimination prohibition may have stemmed from an understanding that only an absolute bar can make it certain that the human will has not been overborne in the confession context, and that ultimately, no matter how tightly drawn, no rule allowing confessions into evidence can absolutely assure against such an invasion. By eliminating confession as an individual option, the prohibition may have taken into account that paradoxically the only way to assure free choice was to give no choice.²³⁷ In this sense, the Talmudic prohibition stands as guarantor of the individual's separateness from the state and as upholder of his free will.

Whether confessions were barred because they would lead to torture; or because they were unreliable; or because sick minds might falsely accuse themselves; or because their prohibition served as a mechanism for assuring preservation of all the other procedural safeguards or as a guarantee of equal treatment for all persons accused of crime; or because the use of confessions would lead to laxness in fact-finding; or because man's life and body were not his to forfeit; or because of the uniqueness and dignity of man; or because of a recognition that in dealing with the state there could be no real free choice; or because it was deemed morally reprehensible to allow a person to convict himself; or because the privilege reflected a divine and ineffable understanding of mankind—whatever the rationale, acceptance of the absolute prohibition was a re-

markable societal accomplishment.

D. Relevance *Vel Non*: The Talmudic Rule As a Benchmark

Comparative law is tricky. The danger (or absurdity) of trying to stuff a whale into a molted snakeskin is obvious.²³⁸ There is nonetheless an irresistible temptation to try to derive at least some insights from a legal system two thousand years old,²³⁹ that was quite advanced and sophisticated not only for its time, but for ours, and that some claim to be the source of the self-incrimination clause of the Fifth Amendment.²⁴⁰

Both cultures faced head on the question of the appropriate stance for government with respect to inculpatory statements in criminal cases. On the surface, the United States and ancient Israel appear to have made dissimilar choices. Yet the two approaches are not unrelated, and their touch points can perhaps assist in an analysis of contemporary law.

The rock bottom teaching of the Talmud is that a unitary, *per se* exclusionary rule with respect to confessions is the preferred way to deal with this issue. In this country, we have no single, absolute rule; instead, various provisions give piecemeal protection. Although the Fourth, Sixth, and Fourteenth Amendments all have a role to play in the American constitutional law of confessions, the extent of protection afforded by these guarantees relates to the particular values that are encompassed within them; that is, preventing illegal searches and seizures, affording the assistance of counsel, and assuring Due Process, rather than the preclusion of illegal confessions itself: It is the Fifth Amendment that is primarily directed at concerns relating to the elicitation and use of confessions. Unlike the Talmudic law, it is a relative pronouncement, making the admissibility of confessions turn on voluntariness. However, American law has chosen as the means for making that determination a *per se* rule, namely *Miranda*—that is, we have an absolute rule to effectuate a relative standard.

Whatever the differences in means and ends, both systems appear to share at least some common goals, including the elimination of coercion and the preservation of human dignity. The Talmudic prohibition against confessions made it impossible for government officials to use torture or other coercive tactics. Nothing stops improper behavior more effectively than making it futile. *Miranda*, however misguided or ineffectual, attempted to accomplish the same result.²⁴¹ But *Miranda's* method is more tenuous because the very people responsible for obtaining evidence of crime are also made responsible for assuring voluntariness.²⁴² When judicial inroads and excisions are added to that inherent systemic weakness—inroads and excisions that tend to make the means as relative as the ultimate standard²⁴³—there is a corresponding increase in the possibility of abusive police methods. The danger of a relative rule with respect to confessions is that one's starting point is already at, or near, the cusp, and any relaxation enhances the risk that resulting confessions will fall into the realm of involuntariness and perhaps unreliability.²⁴⁴

Blurring the boundary that separates voluntariness and compulsion is serious business, not only because of the possibly adverse effect on police behavior and the ensuing doubts about reliability, but for another reason as well. If the Fifth Amendment reflects the extent of the "individual's attornment to the state,"²⁴⁵ then the incursions on *Miranda*, and the Court's philosophical bent in favor of confessions, may be elevating fealty at the expense of human dignity.²⁴⁶ Inability to choose freely whether to assist the prosecution in securing one's own conviction—no matter how reliable or ostensibly

imperative that assistance may be—is by any other name coercion. In the age old tension between individuation and fusion, the American law of confessions seems to be caught in the inescapable pull of a form of patriotism—the siren call of all for one, and one for all. The Court seems increasingly to insist that it is the citizen's duty to assist the state—and refusal to admit to crime is almost tantamount to treason.²⁴⁷ Concerns of dignity and individuality seem a small price to pay if more confessions mean more effective law enforcement, which in turn means a better way of life. The good old days of porch swings and safe streets may be only a few confessions away. Indeed, the so-called jealous God of the Old Testament is being called upon to lead us there.

Quite surprisingly, it appears that at the time He had different plans. One might think that a society like Israel in the biblical and Talmudic eras would have embraced voluntary, and perhaps not so voluntary, confessions in criminal cases. Here was a civilization beset by enemies, but nonetheless intent on preserving the concept of monotheism, a people enticed by the temptations of assimilation, whose leaders demanded adherence to a minute, detailed body of law.²⁴⁸ Rarely has there been a greater need for national cohesiveness and law abiding behavior.

The importance of unity notwithstanding, at the very core of this civilization—in its legal system—was an enormous chasm between society and individual, in the form of an unflinching prohibition against the use of any and all confessions in normative criminal and quasi-criminal proceedings. Despite the deterrent effect of certainty of punishment,²⁴⁹ it was deemed better to allow guilty parties to escape sanction by the human courts than to permit the use of even voluntary admissions by defendants.

Reliability concerns alone cannot have been at the heart of such a doctrine,²⁵⁰ for we know now what they must surely have known then—rules may be fashioned which, for the most part, assure truthfulness.²⁵¹ Rather, the Sages may have been disturbed by the prospect of forced inculpatory statements—true but forced.²⁵²

The confession rule and all the other protections afforded the defendant in the Jewish criminal justice system thus collectively formed a bright line whose effect was to preclude official misconduct, assure accuracy in fact-finding, and preserve free will. Maimonides postulated that any encroachment, no matter how minor, invited far-reaching inroads, and "[h]ence the Exalted One has shut this door."²⁵³ So it was that exceptions to the absolute prohibition against self-incrimination and other safeguards were not part of the normative law itself. Punishments pursuant to these exceptions were made distinctive in order to clarify that the regular Talmudic process was not being invoked. No blurring of the bright line was permitted.

Miranda is the bright line in American law, our functional equivalent of the Talmudic no-confession rule. In a system seeking to prohibit all involuntary confessions rather than all confessions, *Miranda*, whatever its original imperfections, was intended to be the guarantor of free choice. That we opted to permit voluntary confessions does not mean that we rejected human dignity as an underlying concern. Indeed, even the traditional voluntariness standard embraced free will as a core value.²⁵⁴ *Miranda's* irrebuttable presumption was an attempt to confine the vagaries of relativity, and every modification of it resonates ominously.²⁵⁵ The more *Miranda* is devitalized, the greater and more reasonable the doubts as to voluntariness of confessions in this country. This once bright line has become enshrouded with restrictive interpretations that form part of the rule and impede its essential purpose. By a shift in philosophical focus, the Court has

succeeded in elevating the need for effective law enforcement to the point where it is deemed coequal to, if not of greater importance than, the need to assure free choice.²⁵⁶ And this has occurred despite the existence of safety valves in our system of criminal justice that make conviction without confessions far less difficult to secure than under the Talmudic regime.²⁵⁷

To be sure, giving added backbone to the Fifth Amendment is not without risk. This and other guarantees afforded the accused by the Bill of Rights are admittedly constitutional impediments to conviction whose expansive interpretation may have an impact on law enforcement. For one who is bracing for the next mugging, the sweeping Talmudic procedural safeguards may be regarded as a quixotic fantasy. In fact, some scholars take the position that because the Talmudic protections allegedly rendered conviction impossible, they must simply have been idealistic proposals that were never in fact implemented or intended to be implemented.²⁵⁸ Yet, given the Talmud's extended discussions of these guarantees and its inclusion of incidents that seem to involve their actual application, the foregoing hypothesis seems doubtful.²⁵⁹ Furthermore, as we have seen, while not explicitly set forth in Scripture, the rule was derived by the Sages from the Bible and the oral tradition, and there can be no doubt that conceptually it formed a part of the normative Jewish law. Indeed, whether the prohibition against confessions represents a divine ideal or a pragmatic human creation may be irrelevant.²⁶⁰ One commentator who contends that the Talmudic safeguards were not used in practice nonetheless notes:

[For the Sages] the mere study of those rules was a meritorious act This legislation, moreover, served as an occasion to give expression to the highest conceptions of justice and humanity, for they were expounding not a penal code merely, of some governmental authority, but holy writ, the words of a 'God, merciful and gracious, long suffering, and abundant in goodness and truth, keeping mercy unto the thousandth generation, forgiving iniquity and transgression and sin'²⁶¹

The *tanna* Ben Bag Bag, a convert to Judaism who lived in the first century C.E., said:

Turn [the Torah] over, and [again] turn it over, for all is therein. And look into it; and become gray and old therein; neither move thou away therefrom, for than it thou hast no better standard of conduct.²⁶²

According to one commentator,

[a] warning lies in these words, not to forsake any part of the Torah after a cursory examination . . . because it seems illogical or unreasonable. Turn to it again and again. Delve deeper, find more explanations, and you will discover that 'everything is in it.' All will soon become clear, understandable, rewarding.²⁶³

While it may be debatable whether everything is in the Torah or in the Talmud as

its oral exposition, these masterpieces undoubtedly contain universal insights. One of these is the proposition, *Ein adam mayseem atzmo rasha*—"No man may render himself an evil person." The Talmudic rule is simple; it is absolute; it is profound. We could do worse than to look to it for guidance.

¹ See OTIS STEPHENS, *THE SUPREME COURT AND CONFESSIONS OF GUILT* 5–6 (1973) ("[S]harp disagreement exists as to the amount of illegal police conduct in recent years. It seems clear that the forms of illegality, whatever their extent, have, for the most part, become less extreme."); Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 753–54 (1987) (discussing contemporary cases holding doubtful or marginal confessions admissible); Stephen J. Schulhofer, *The Fifth Amendment at Justice: A Reply*, 54 U. CHI. L. REV. 950, 956 (1987) (referring to "the dramatic, well-documented evidence of interrogation violence that persists to this day"); Welsh W. White, *Defending Miranda: A Reply to Professor Caplan*, 39 VAND. L. REV. 1, 13 (1986) ("A perusal of the cases . . . indicates that if the 'worst practices' have disappeared, some pretty bad ones are still taking place."); 4 Former and Suspended Officers Are Accused in 2d Stun Gun Trial, N.Y. TIMES, Jan. 10, 1988, A1, at 29 (describing commencement of one of four trials of New York City police officers accused of torturing suspects with electronic stun gun that "can deliver a jolt of up to 40,000 volts"); cf. Shenon, F.B.I. Study Hints Some Lied to Hide Ginsburg Drug Use, N.Y. TIMES, Jan. 13, 1988, at A1 (responding to criticism that the F.B.I. had failed to learn of Judge Ginsburg's drug use before his Supreme Court nomination, "[o]ne Federal law-enforcement official said: 'You've got to remember that this is not a criminal investigation. An F.B.I. agent can't sit these people down and threaten them and force them to tell the truth.'" *Id.* at D27.).

² 384 U.S. 436 (1966).

³ See, e.g., FRED GRAHAM, *THE SELF-INFLICTED WOUND* 157 (1970) ("*Miranda* was the highwater mark of the due process revolution . . ."); LEONARD LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 439, 518 (1968) (describing *Miranda* as "the most important decision that [the Supreme Court] ever made on the right against self-incrimination"); Office of Legal Policy, U.S. Dep't of Justice, Report to the Attorney General on the Law of Pre-Trial Interrogation 115 (1986) [hereinafter Attorney General's Interrogation Report] (acknowledging *Miranda*'s "symbolic status as the epitome of Warren Court activism in the criminal law area," yet urging its overruling not only in order to remedy the decision's specific shortcomings, "but also as a critical step in moving to repudiate a discredited criminal jurisprudence"); Gerald Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1470 (1985) (in an article otherwise critical of *Miranda*, the author states: "In this setting [the civil rights movement and protests of the 1960s], *Miranda* stood out like a crownjewel."); see also LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* 407 (1983) ("In a historical context *Miranda* was a statement of aspiration. It had been 700 years in the writing, counting only from Magna Carta").

⁴ See *Michigan v. Tucker*, 417 U.S. 433, 443–46 (1977). *Tucker*, along with *New York v. Quarles*, 467 U.S. 649, 653 (1984), and *Oregon v. Elstad*, 470 U.S. 298, 309 (1985), states that the *Miranda* warnings themselves are not required by the Constitution, but are instead merely "prophylactic" rules designed to safeguard the privilege against self-incrimination. By denying the constitutional origins of the *Miranda* warnings and effectively illegitimizing them, the Court has provided a theoretical underpinning for *Miranda*'s ultimate demise. See Joseph Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 111 (1985); Geoffrey Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 123.

Whether the Court will go the final mile is uncertain. See *Rhode Island v. Innis*, 446 U.S. 291, 304 (1978) (Burger, C.J., concurring in the judgment) ("I would neither overrule *Miranda*, disparage it, nor extend it at this late date."). *Miranda* may escape with its shrunken core intact simply because it has been so severely limited already. The Court has, however, declined to completely overrule *Miranda*. See *Dickerson v. United States*, 530 U.S. 428 (2000).

⁵ See, e.g., Francis Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 539–40 ("Strangely enough, one of the most serious criticisms of the [Warren] Court is that often, having embarked upon a problem it did not go far enough. This was true . . . in *Miranda* . . ."); Anthony Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 809 (1970) ("*Miranda* does not go far enough. Although its standards governing waiver of the

right to counsel are strict, it does permit findings of waiver to be made."); Charles Ogletree, *Are Confessions Really Good for the Soul? A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1830 (1987) ("[I]n my view, the *Miranda* rules do not go far enough in protecting the due process and fifth amendment values that underlie the decision.").

⁶ See *McNabb v. United States*, 318 U.S. 332, 344–45 (1943) (holding, under Court's supervisory authority, that confessions secured from suspects detained in violation of federal law requiring that they be taken promptly before a magistrate were inadmissible in federal court); *Mallory v. United States*, 354 U.S. 449, 451–56 (1957) (same, applying Fed. R. Crim. P. 5(a)). *But see* 18 U.S.C. § 3501(c) (1982) (1968 statute easing rigor of *McNabb-Mallory* rule by providing that confession not inadmissible solely because of delay in bringing suspect before magistrate if confession is voluntary and either made within six hours following arrest or, if made beyond six hour limit, delay found to be reasonable).

⁷ The Court did, however, prohibit the use of a confession obtained during custodial interrogation after the indicted defendant stated that he wanted an attorney. See *Minnick v. Mississippi*, 498 U.S. 146 (1990) (decided on Fifth Amendment grounds).

For articles critiquing *Miranda's* shortcomings regarding the presence of counsel during custodial interrogation see Stephens, *supra* note 1, at 205 ("Probably nothing short of a blanket requirement that no suspect be questioned except in the presence of his attorney could be expected to remove the elements of psychological coercion to which the Court has so long objected."). See also George Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, 1975 WASH. U. L.Q. 275, 326 (assistance of counsel "is a generally acknowledged need"); Lawrence Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DEN. L.J. 1, 49–50 (1970) (proposing that right to counsel at police interrogation be made nonwaivable).

⁸ See LLOYD WEINREB, DENIAL OF JUSTICE 129–30 (1977) (advocating interrogation by magistrates rather than police); Edwin Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 59 (1968) ("The *Miranda* warnings fail to provide safeguards against the social psychological rigors of arrest and interrogation except to the extent that they prevent interrogation altogether.").

⁹ See Richard Kuh, *Interrogation of Criminal Suspects—Some Views on Miranda v. Arizona*, 35 FORDHAM L. REV. 233, 235 (1966) ("Had the United States Supreme Court recognized what I think is clear—at least the improbability, if not the impossibility, of an intelligent waiver of the fifth amendment privilege—the justices might have squarely wrestled with the issue and said: 'Confessions are *no longer usable* in our adversary system.'). *But see id.* at 236, 240 (author, who is former prosecutor and, as he himself states, "pro-police," concludes that "reasonable interrogation *is* necessary" and that he would support amendment of Fifth Amendment to ensure reasonable interrogation of "rich and poor" alike).

¹⁰ See Stephen Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 460–61 (1987). Professor Schulhofer states the following:

[T]he *Miranda* decision, of course, was a compromise. It did not eliminate all possibilities for abusive interrogation, and it stopped far short of barring all pressured or illconsidered waivers of fifth amendment rights. . . . Nevertheless, . . . *Miranda* reaffirms our constitutional commitment to limited government; it provides a measure of reassurance to arrested suspects who may fear abuse; and . . . [it reduces] the permissible level of interrogation pressure

Whether *Miranda* represents the best possible compromise is a different and more difficult question. Those who do not like *Miranda's* code-like rules and would strip them from the opinion will be left with the much more stringent principle that the isolated suspect in custody cannot be questioned at all.

Id.

¹¹ See *Miranda v. Arizona*, 384 U.S. 436, 473–76 (1966). The Court stated that "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id.* at 475 (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938)). This standard for waiver, however, has been weakened in subsequent cases. See, e.g., *Colorado v. Connelly*, 479 U.S. 157, 167–69 (1986) ("heavy burden" of proving waiver can be met by preponderance of evidence); *Fare v. Michael C.*, 442 U.S. 707, 728 (1979) (invocation of *Miranda* rights must be explicit, and if not explicit, waiver depends on totality of the circumstances); *North Carolina v. Butler*, 441 U.S. 369, 373 (1979) (waiver need not be express and can be inferred from defendant's actions and words).

¹² *Miranda*, 384 U.S. at 446–55.

¹³ See Ogletree, *supra* note 5, at 1827 ("Although *Miranda* warnings may seem adequate from the detached perspective of a trial or appellate courtroom, in the harsh reality of a police interrogation room they are woefully ineffective.").

¹⁴ See, e.g., John Griffiths & Richard Ayres, *A Postscript to the Miranda Project: Interrogation of Draft Protesters*, 77 YALE L.J. 300 (1967); Richard J. Medalie et al., *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968); see also White, *supra* note 1, at 19 n.99 ("The great weight of empirical evidence supports the conclusion that *Miranda's* impact on the police's ability to obtain confessions has not been significant."); Richard Seeburger & R. Stanton Wettick, *Miranda in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1, 22–24 (1967) (significant drop in confessions after *Miranda*, while clearance and conviction rates remained the same, and guilty pleas rose); Michael Wald et al., *Interrogation in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967). But see Attorney General's Interrogation Report, *supra* note 3, at 57 ("[B]efore-and-after studies . . . indicated that the implementation of *Miranda's* system had a major adverse effect on the willingness of suspects to respond to police questioning."); Stephen J. Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering Miranda"*, 54 U. CHI. L. REV. 938, 945–48 (1987) (a number of studies "found immediate dramatic reductions in statements and admissions").

¹⁵ Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 390 (1996).

¹⁶ See e.g., Stephen G. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996).

¹⁷ Compare *Miranda*, 384 U.S. at 466 (Warren, C.J.) ("The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege.") with *id.* at 516–17 (Harlan, J., dissenting) ("There can be little doubt that the Court's new code would markedly decrease the number of confessions. . . . How much harm this decision will inflict on law enforcement cannot fairly be predicted with accuracy.") and *id.* at 542 (White, J., dissenting) ("In some unknown number of cases the Court's rule will return a killer, a rapist, or other criminal to the streets . . . to repeat his crime whenever it pleases him.").

¹⁸ See, e.g., *Colorado v. Connelly*, 479 U.S. 157, 167–69 (1986) (waiver of *Miranda* rights need only be established by preponderance of evidence); *Allen v. Illinois*, 478 U.S. 364, 374–75 (1986) (*Miranda* inapplicable to "civil" proceedings to commit persons as sexually dangerous); *Moran v. Burbine*, 475 U.S. 412, 418, 421–24 (1986) (upholding finding of trial court that defendant had waived *Miranda* rights, notwithstanding police misconduct in advising attorney that client would not be questioned and in failing to inform suspect of his attorney's communications); *Oregon v. Elstad*, 470 U.S. 298, 318 (1985) (suspect's initial statement made without *Miranda* warnings did not render inadmissible subsequent statement made after warnings were given) modified by *Missouri v. Seibert*, 542 U.S. 600 (2009) (invalidating confession because officer deliberately intended to come under *Elstad* ruling); *New York v. Quarles*, 467 U.S. 649, 655–56 (1984) (creating public safety exception to *Miranda*); *California v. Beheler*, 463 U.S. 1121, 1123–25 (1983) (per curiam) (defendant voluntarily accompanying police to stationhouse and giving incriminating statement has not been subjected to "custodial" interrogation; thus *Miranda* warning not required); *Michigan v. Mosley*, 423 U.S. 96, 102–03 (1975) (invocation of right to silence does not *per se* prohibit further interrogation); *Michigan v. Tucker*, 417 U.S. 433, 451–52 (1974) (permitting derivative use of testimonial evidence secured in violation of *Miranda*); *Harris v. New York*, 401 U.S. 222, 224–26 (1971) (permitting use of statements obtained in violation of *Miranda* to impeach defendant's trial testimony).

Not all aspects of *Miranda* have been subject to such evisceration. See, e.g., *Berkemer v. McCarty*, 468 U.S. 420, 429–33 (1984) (*Miranda* applicable to custodial interrogation regarding misdemeanor traffic offenses); *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981) (invocation of right to counsel precludes further police-initiated questioning). However, in *Oregon v. Bradshaw*, 462 U.S. 1039 (1983) (plurality opinion), the Court ruled that, despite the ambiguity of his remarks, the suspect had initiated the conversation and waived his right to remain silent and his right to counsel. *Id.* at 1045–47. Similarly, in *Rhode Island v. Innis*, 446 U.S. 291, 298–302 (1980), the Court, while giving broad definition to "interrogation," applied its test very narrowly, and in *Arizona v. Mauro*, 481 U.S. 520, 524–30 (1987), found no violation of *Innis* despite questionable circumstances.

¹⁹ Compare *Quarles*, 467 U.S. at 659 (Rehnquist, J.) ("The exception which we recognize today . . . will simply free [police officers] to follow their legitimate instincts when confronting situations presenting a

danger to the public safety.") *with id.* at 679–81 (Marshall, J., dissenting) ("This case is illustrative of the chaos the 'public-safety' exception will unleash. . . . The majority . . . invites the government to prosecute through the use of what necessarily are coerced statements.").

²⁰ *See id.* at 655–56.

²¹ *See Oregon v. Hass*, 420 U.S. 714 (1975); *Harris*, 401 U.S. at 224–26; *cf.* *United States v. Havens*, 446 U.S. 620 (1980) (credibility may be impeached by physical evidence obtained in violation of Fourth Amendment).

²² *See Allen*, 478 U.S. at 374–75.

²³ *See, e.g., Oregon v. Elstad*, 470 U.S. 298, 318 (1985) *modified by* *Missouri v. Seibert*, 542 U.S. 600 (2009) (invalidating confession because officer deliberately intended to come under *Elstad* ruling); *Michigan v. Tucker*, 417 U.S. 433, 451–52 (1974).

²⁴ *See Moran v. Burbine*, 475 U.S. 412, 418, 421–24 (1986).

²⁵ *See, e.g., California v. Prysock*, 453 U.S. 355, 356 (1981) (per curiam) (defendant a minor); *North Carolina v. Butler*, 441 U.S. 369, 370–71, 371 n.1, 378 (1979) (defendant with eleventh grade education; dispute about his literacy); *see also* Leiken, *supra* note 7, at 15–16, 33 (indicating that 45% of suspects in study erroneously thought that oral confessions were inadmissible).

²⁶ *See Dickerson v. United States*, 530 U.S. 428 (2000).

²⁷ *Compare Taylor v. Alabama*, 457 U.S. 687 (1982) (excluding confessions) *and* *Dunaway v. New York*, 442 U.S. 200 (1979) (same) *and* *Brown v. Illinois*, 422 U.S. 590 (1975) (same) *with Rawlings v. Kentucky*, 448 U.S. 98 (1980) (confession admissible notwithstanding unlawful detention). Under this line of cases, the Court examines several factors in determining whether the confession was obtained as a result of the unlawful arrest, namely, the amount of time between the arrest and confession, the presence of any intervening factors, and the "purpose and flagrancy" of the constitutional violation. *See, e.g., Taylor*, 457 U.S. at 689–94.

²⁸ *See United States v. White*, 401 U.S. 745 (1971) (plurality opinion); *Hoffa v. United States*, 385 U.S. 293 (1966); *Lewis v. United States*, 385 U.S. 206 (1966); *Lopez v. United States*, 373 U.S. 427 (1963); *On Lee v. United States*, 343 U.S. 747 (1952); *see also* Joseph Grano, *Supreme Court Review: Foreword, Perplexing Questions About Three Basic Fourth Amendment Issues: Fourth Amendment Activity, Probable Cause, and the Warrant Requirement*, 69 J. CRIM. L. & CRIMINOLOGY 425, 436 (1978) ("From the view of informational privacy interests against government, one would have a heavy burden explaining why the fourth amendment addresses the inspector's attempt to enter at the front door to gather evidence and yet stands oblivious to the government's undercover entry in the rear for the same purpose." (footnote omitted)).

²⁹ *See Michigan v. Jackson*, 475 U.S. 625 (1986); *Maine v. Moulton*, 469 U.S. 206 (1985); *United States v. Henry*, 447 U.S. 264 (1980); *Brewer v. Williams*, 430 U.S. 387 (1977); *Massiah v. United States*, 377 U.S. 201 (1964). *But see Kuhlmann v. Wilson*, 477 U.S. 436 (1986) (defendant's incriminating statement made to government informant placed in his cell, who did not encourage conversation, was admissible); *cf. Nix v. Williams*, 467 U.S. 431 (1984) (physical evidence admissible, even though obtained as result of confession secured from defendant in violation of Sixth Amendment, where such evidence would inevitably have been found by police).

³⁰ For example, in *Kirby v. Illinois*, 406 U.S. 682, 689 (1972), the Court limited to its facts *Escobedo v. Illinois*, 378 U.S. 478 (1964), a pre-indictment case finding a Sixth Amendment violation. Although *Miranda* is a Fifth Amendment decision, 384 U.S. at 439, 491, it also implicates the right to counsel. That right, however, is a limited one, designed to protect Fifth Amendment interests. *Id.* at 469.

Although the Court has traditionally denied Sixth Amendment protection in the precharging context, and afforded it in the post-indictment phase, placing great emphasis on the absence or presence of adversary judicial proceedings, the Justices nonetheless held, in *Patterson v. Illinois*, 487 U.S. 285 (1988), that it did not violate the Sixth Amendment right to counsel for government officials to initiate interrogation of an indicted, in-custody defendant who was not represented by counsel and had not requested counsel. The *Miranda* warnings were held sufficient to apprise defendant of his Sixth Amendment rights.

³¹ Reversal on the basis of the voluntariness standard under Due Process is both unusual and grudging. For example, in *Mincey v. Arizona*, 437 U.S. 385 (1978), based on the following facts, the Court ruled that the defendant's confession was involuntary and could not be used for impeachment purposes. Defendant, who was shot, was taken to a hospital intensive care unit where tubes were inserted into his throat to help him breathe, and in his stomach to prevent vomiting, and a catheter was inserted in his bladder. He had received

various drugs and had an intravenous unit attached to his arm; he could only respond to questions by writing answers on a sheet of paper, and some of these answers were not coherent. The defendant repeatedly asked for the interrogation to stop until he could secure counsel, yet the officer continued to question the defendant from 8:00 P.M. to midnight. *Id.* at 398–401. The Court reversed the conviction, but went out of its way to say that "[t]here were not present in this case some of the gross abuses that have led the Court in other cases to find the confessions involuntary, such as beatings . . . or 'truth serums' . . ." *Id.* at 401 (citations omitted).

Moreover, the voluntariness test under the Due Process clause is being severely constricted. In *Colorado v. Connelly*, 479 U.S. 157, 164 (1986), the Court held that "[a]bsent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." On this basis, the majority upheld the admission of an inculpatory statement made by a defendant suffering from severe mental illness. Similarly, in *Moran v. Burbine*, 475 U.S. 412, 432–33 (1986), the Court ruled that police deception of defense counsel and failure to advise defendant of his attorney's communications were insufficiently egregious to constitute a Due Process violation. *See also* White, *supra* note 1, at 12 n.67 (describing questionable lower court determinations in which confessions were found to be voluntary and which were not accepted for review by Supreme Court). *See generally*, Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 877–78 (1981) (*Miranda* and scholarly commentary thereon leave impression that "'old' due process voluntariness test is dead").

³² *See, e.g.*, *Corbitt v. New Jersey*, 439 U.S. 212, 225–26 (1978) (upholding statutory scheme mandating life imprisonment for those convicted of murder after trial, but permitting lesser punishment for those convicted by plea); *Bordenkircher v. Hayes*, 434 U.S. 357, 358–59, 365 (1978) (life sentence upheld after defendant refused plea bargain); *McMann v. Richardson*, 397 U.S. 759, 768–69 (1970) (guilty plea barred later constitutional claim that confession was unlawfully obtained). In *Bordenkircher*, the defendant was convicted for uttering a forged check in the amount of \$88.30, a crime punishable by 2–10 years in prison. 434 U.S. at 358–59. The prosecutor advised defendant and his attorney that if he did not plea bargain for a 5-year term, the prosecutor would indict the defendant for being an habitual offender, subjecting him to a mandatory life sentence. *Id.* The Court upheld the subsequent imposition of a life sentence. Although vindictive enhancement of punishment by prosecutors or judges based on the defendant's exercise of legal rights violates Due Process, the Court did not find a violation at the plea bargaining stage because at that point "the accused is free to accept or reject the prosecution's offer." *Id.* at 363.

See generally Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629 (1972).

³³ Prior to *Miranda*, out-of-court confessions were generally assessed under the voluntariness standard of the Due Process clause of the Fourteenth Amendment. *See, e.g.*, *Rogers v. Richmond*, 365 U.S. 534 (1961); *Spano v. New York*, 360 U.S. 315 (1959); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *Brown v. Mississippi*, 297 U.S. 278 (1936). *But see* *Bram v. United States*, 168 U.S. 532 (1897) (invalidating confession on basis of self-incrimination clause). Although Due Process claims continue to be made, most modern confession cases instead raise, and are decided on, Fifth Amendment contentions. For a comprehensive discussion of the *pre-Miranda* law of confessions, see *Developments in the Law—Confessions*, 79 HARV. L. REV. 935 (1966) [hereinafter *Developments*].

³⁴ *See, e.g.*, *Moran*, 475 U.S. at 432–33. In *Moran*, the majority upheld the trial court's finding of waiver notwithstanding police deception of defense counsel and failure to inform defendant that his attorney had called the police station. *Id.* In dissent, Justice Stevens noted that "[i]n applying this heavy presumption against the validity of waivers, this Court has sometimes relied on a case-by-case totality of the circumstances analysis." *Id.* at 451 (Stevens, J., dissenting); *see also* *New York v. Quarles*, 467 U.S. 649, 655 n.5 (1984) (in creating a public safety exception to *Miranda*, Justice Rehnquist stated that "respondent is certainly free on remand to argue that his statement was coerced under traditional due process standards. Today we merely reject the . . . argument that . . . the statement must be *presumed* compelled because of Officer Kraft's failure to read him his *Miranda* warnings.").

³⁵ *See, e.g.*, Yale Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and Old "Voluntariness" Test*, 65 MICH. L. REV. 59, 94–104 (1966).

³⁶ In the Attorney General's Interrogation Report, it is argued that "[f]ollowing an abrogation of *Miranda*, a wide range of fundamental issues . . . would once again become amenable to study, debate, negotiation and resolution through the democratic process, restoring 'the initiative in criminal law reform to those forums where it truly belongs.'" Attorney General's Interrogation Report, *supra* note 3, Executive Summary at 5

(quoting *Miranda v. Arizona*, 384 U.S. 436, 524 (1966) (Harlan, J., dissenting)). The Report suggests that, pending such an overruling, the Justice Department should adopt administrative policies that would "make the point effectively that the replacement of *Miranda* with superior alternative rules offers major advantages in relation to the legitimate interests of suspects and defendants, as well as major gains in promoting effective law enforcement." *Id.* It urges consideration of the following policies: (a) videotaping or recording all interrogations; (b) limiting the length and frequency of interrogations; and (c) promulgating rules "concerning behavior and demeanor in questioning suspects." *Id.*

³⁷ See, e.g., Stephens, *supra* note 1, at 17–62; Dix, *supra* note 7, at 343–46; Joseph Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 864–68, 924–26 (1979); Developments, *supra* note 33, at 964–84.

³⁸ See *United States v. White*, 401 U.S. 745, 787 (1971) (Harlan, J., dissenting) ("Were third-party bugging a prevalent practice, it might well smother that spontaneity—reflected in frivolous, impetuous, sacrilegious, and defiant discourse—that liberates daily life.").

³⁹ See Schulhofer, *supra* note 10, at 451. As Professor Schulhofer has phrased the problem:

The flexible [Due Process] test had left lower courts without usable standards and thus had created disproportionate demands for case-by-case review in the federal courts. The problems of judicial review also meant that intense interrogation pressures were inadequately controlled in practice. . . . [C]ase-by-case review left police themselves without adequate guidance.

Id. See also *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Stone v. Powell*, 428 U.S. 465 (1976); Yale L. Rosenberg, *Kaddish for Federal Habeas Corpus*, 59 GEO. WASH. L. REV. 362 (1991) (discussing the Supreme Court's decisions that limit the availability of federal habeas corpus to only very narrow circumstances).

⁴⁰ Compare *Michigan v. Mosley*, 423 U.S. 96 (1975) (invocation of right to remain silent does not bar further police interrogation) with *Edwards v. Arizona*, 451 U.S. 477 (1981) (invocation of right to counsel prohibits further police interrogation unless suspect initiates subsequent communication with authorities) and *Arizona v. Roberson*, 486 U.S. 675 (1988) (applying *Edwards* rule to interrogation concerning a different crime).

⁴¹ But see Joseph Glaser, *A New/Old Look at the Fifth Amendment—Some Help from the Past*, 1 JEWISH L. ASSOC. STUDIES 29, 38 (1985) (suggesting that word "compelled" in the Fifth Amendment could be interpreted so as to convert privilege against self-incrimination into prohibition, thereby negating inference of guilt often made when someone asserts privilege, but acknowledging that such transformation "may be more than the human mind, at this stage of evolution, can handle").

⁴² See, e.g., S. Rep. No. 1097, 90th Cong., 2d Sess. 38, reprinted in 1968 U.S. Code Cong. & Admin. News 2112, 2124 (reporting Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–20 (1982 & Supp. IV 1986) ("[Voluntary confessions] have long been recognized as strong and convincing evidence—often called the best evidence of guilt."); EDWARD W. CLEARY, MCCORMICK ON EVIDENCE § 144, at 364 (3d ed. 1984) ("A confession, especially one that survives the multiple attacks that can be made upon its admissibility, has traditionally been regarded as extraordinarily reliable evidence of the defendant's guilt."); Kuh, *supra* note 9, at 240 ("I suggest . . . that it is human nature . . . to want to know if a defendant has 'owned up to his crime.' . . . There is always that seed of doubt that remains until the defendant, in effect, rises and admits his guilt.").

⁴³ See, e.g., PAT ROBERTSON, ANSWERS TO 200 OF LIFE'S MOST PROBING QUESTIONS 199 (1984) (in chapter on "Christian Life and Practice" under subheading "Christians and Government," the Reverend Mr. Robertson observes, "The biblical model [of ancient Israel] is far wiser [than today's law]. . . . The hardcore habitual criminal was permanently removed from society through capital punishment."); In 37 Cases, Fiery Prosecutor Wins a Jury Verdict of Death, N.Y. TIMES, Dec. 25, 1985, at A9 ("At one point [the prosecutor] draped [the victim's] torn, bloody shirt across the jury box; later, he waved the Bible over his head and quoted passages that prescribe death for murderers."); Haberman, The Koch Method for Winning Audiences and Influencing Voters, N.Y. TIMES, Apr. 20, 1981, at B1 (New York's Mayor Koch "laid out yet one more time his arguments in favor of the death penalty . . . that capital punishment is accepted by the Bible, the United States Supreme Court and the Pope—and to me that's good government"); see also *State v. Oliver*, 307 S.E.2d 304, 326 (1983) ("Defendants argue strenuously that the prosecutor's 'divine law' argument was prejudicial. . . . The prosecutor argued that the Bible does not prohibit the death penalty. He quoted portions of scripture to support his statement. . . . [W]e find nothing, in the absence of objection, that amounts to plain error which would justify reversal.").

⁴⁴ See Moshe Greenberg, *Some Postulates of Biblical Criminal Law*, in YEHEZKEL KAUFMANN JUBILEE VOLUME: STUDIES IN BIBLE AND JEWISH RELIGION 5, 19–20 (M. Haran ed. 1960) ("The conditions that had to be met [under Jewish criminal procedure] before the death penalty could be inflicted were made so numerous, that is to say, the concern for the life of the accused became so exaggerated, that in effect it was impossible to inflict capital punishment.").

⁴⁵ Cf. A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 249 (1968) ("There may be a legitimate difference of opinion whether these [Warren Court] changes constitute a 'criminal law revolution' or merely an orderly evolution toward the application of civilized standards to the trial of persons accused of crime.").

⁴⁶ See generally AARON KIRSCHENBAUM, SELF-INCRIMINATION IN JEWISH LAW 40–41 (1970). This treatise, which was a doctoral dissertation, is a scholarly and comprehensive examination of the Jewish rule against the use of confessions, replete with references to the original literature, and with a substantial portion devoted to post-Talmudic exegesis. The book presupposes at least a basic knowledge and understanding of Jewish law and source material on the part of the reader.

For a review-essay of Professor Kirschenbaum's book, presenting the alternative view that only one of the two legal precepts noted hereafter, namely, the two-witness rule, is the source of the Talmudic prohibition, see Arnold Enker, *Self-Incrimination in Jewish Law—A Review-Essay*, 4 DINÉ ISRAEL cvii (1973).

⁴⁷ *Deuteronomy* 19:15. Biblical translations in the text and footnotes of this chapter are from the Soncino Press edition entitled *The Pentateuch and Haftorahs* (J. Hertz 2d ed. 1960).

Two other Scriptural verses deal with the two-witness requirement. *Numbers* 35:30 provides: "Whoso killeth any person, the murderer shall be slain at the mouth of witnesses; but one witness shall not testify against any person that he die." In addition, *Deuteronomy* 17:6 states: "At the mouth of two witnesses, or three witnesses, shall he that is to die be put to death; at the mouth of one witness he shall not be put to death." These two verses are directed specifically to capital cases. *Deuteronomy* 19:15, quoted in the text, is broader, applying to all criminal cases, as well as civil actions. See THE CODE OF MAIMONIDES, BOOK 14: THE BOOK OF JUDGES, *Evidence* 5:1, at 91 (Abraham M. Hershman trans., 1949) [hereinafter THE CODE OF MAIMONIDES—JUDGES] ("Neither in civil nor in capital cases is a legal decision given on the evidence of one witness. . . .").

⁴⁸ See CHUMASH WITH TARGUM ONKELES, HAPHTAROTH AND RASHI'S COMMENTARY, *Deuteronomy* 19:15, at 98–99 (A.M. Silbermann trans., 1973) [hereinafter RASHI'S COMMENTARY ON CHUMASH] (this verse is "the classic passage from which the general principle is derived that wherever the term 'witness' occurs in the Torah, it means two witnesses, unless it specifically mentions in connection with it the word 'one.'"). Rashi also notes that this provision does not allow either bodily or monetary punishment based on the testimony of a single witness, and that the testimony of the two witnesses must be oral and may not be delivered by an interpreter. *Id.* The Talmud points out the crucial role of the two-witness rule through the following example:

As it once happened that Tobias sinned and Zigud alone came and testified against him before R. Papa, [whereupon] he had Zigud punished. "Tobias sinned and Zigud is punished!" exclaimed he. "Even so," said he to him, "for it is written, *one witness shall not rise up against a man*, whereas you have testified against him alone: you merely bring him into ill repute."

THE ARTSCROLL SERIES, THE TALMUD BAVLI: THE GEMARA: THE CLASSIC VILNA EDITION, *Pesahim* 113b (Schottenstein ed., 2007) [hereinafter BABYLONIAN TALMUD].

⁴⁹ See RASHI'S COMMENTARY ON CHUMASH, *supra* note 48, *Deuteronomy* 24:16, at 120. The commentary notes:

"Fathers shall not be put to death"—i.e., by the evidence of their children. But if you say it means "for the sin of their children", then it would be redundant for it goes on to state "every man shall be put to death for his own sin". . . .

Id. (citation omitted).

Like Rashi's interpretation, the discussion of this verse in the Gemara illustrates the perils of biblical literalism, as well as an analytical mode of the Sages. The Gemara questions:

Whence is this law [prohibiting testimony of kinsmen] derived?—From what our Rabbis taught: *The fathers shall not be put to death for . . . the children*. What does this teach? Is it that fathers shall not be executed for sins committed by their children and vice versa? But is it not already explicitly stated, *Every man shall be put to death for his own sin*? Hence, *Fathers shall not be put to death on account of children*, must mean, fathers shall not be put to death on the testimony of

their sons and similarly, *and sons shall not be put to death on account of fathers*, means, nor sons on the testimony of their fathers.

BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 27b.

For an analysis of the differences between the above verse and *Exodus* 20:5 ("visiting the sins of the fathers on the children"), see NEHAMA LEIBOWITZ, *STUDIES IN DEUTERONOMY* 236–42 (1980).

⁵⁰ See BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 9b.

⁵¹ *But see* Enker, *supra* note 46, at cix–cx. Enker, former Dean of the Faculty of Law at Bar Ilan University in Israel and an expert in both the Talmudic and contemporary law of confessions, presents the thesis that the rule governing confessions of *defendants* in criminal cases and the rule governing disqualification of *witnesses* confessing to criminal acts are separate and distinct, and that the two-witness rule is the exclusive Biblical source of the former, whereas the latter is based on the kinsman rule.

Although some of Dean Enker's arguments are persuasive, others are somewhat problematic. For example, he asserts that "the most obvious and elementary difference" between the defendant confession rule and the witness disqualification rule can be seen in the results effected by their application. *Id.* at cix. While it is true that both the defendant's confession and the witness's self-incriminating statement are excluded, the defendant rule, as Dean Enker points out, is wholly exclusionary, whereas the witness rule permits the admission of the latter's non-incriminating testimony, which is of great probative value in the proceeding. He asserts that the different result "strongly suggests the possibility that, their similarities notwithstanding, the two rules may not really be related to each other and that in fact they are concerned with totally different problems." *Id.* at cix–cx.

There are, however, two difficulties with this analysis. The only basis for admitting any portion of the witness's testimony is the bifurcation principle, a doctrine that has exceptions precluding its applicability. In situations governed by these exceptions, the result is the total exclusion of testimony, just as in the case of defendants' confessions.

Leaving aside the problem of exceptions to the bifurcation principle, it is necessary to take into account that, at the time of the Gemara debates themselves, it was controversial whether the testimony of a witness could be split up at all. In the key debate in *Sanhedrin* 9b, one rabbi advocates bifurcation, while his adversary argues in favor of disqualification of the witness whose testimony is incriminating, and total exclusion of the latter's testimony. See BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 9b. To be sure, the former position ultimately carried the day, but the fact the dispute arose at all shows that Dean Enker's distinction is not necessarily conceptually mandated, since it was not viewed as mandated by all of the Gemara Sages themselves.

In addition, Dean Enker argues that his position is supported by Maimonides' systematic distinction between a defendant's confession and a witness's disqualification. *Id.* at cx–cxi. Although both are dealt with in THE CODE OF MAIMONIDES–JUDGES *supra* note 47, the former is treated in the *Sanhedrin* treatise thereof, and the latter, in the *Evidence* treatise. *Id.*, *Sanhedrin* 18:6, at 52–53; *id.*, *Evidence* 12:2, at 108. According to Dean Enker, this suggests that Maimonides regarded these matters as distinct and analytically severable. It is not clear, however, that Maimonides intended such a pristine dichotomy. For instance, it seems apparent that one who testifies at the trial of another and makes a self-incriminating statement presents a case of witness disqualification, whereas one who confesses in a prosecution against himself just as plainly falls in the other category. What of the case, however, in which an individual who is neither a witness nor charged with a crime simply appears in court and admits wrongdoing? Presumably Dean Enker would classify this as a case of a confessing defendant, which would place it in *Sanhedrin*. Yet Maimonides introduces what appears to be such a case in his *Evidence* treatise:

For example: If a person appears in court and says that he has stolen or robbed, . . . he is not disqualified as a witness. Likewise, if he says that he has . . . cohabited with a woman forbidden to him, he is not disqualified—unless there are two witnesses who testify against him—for no man can incriminate himself.

Id.; see also 1 ENCYCLOPEDIA TALMUDICA 244, 672 (1969) (treating exclusion of incriminating testimony, under the entries entitled "A man is considered a relative of himself," and "No man can make himself out to be wicked").

⁵² See BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 9b; KIRSCHENBAUM, *supra* note 46, at 114–15. The confession also remained inadmissible even if there were two or more witnesses, since the latter provided the sole basis for a determination of guilt. The confession was in effect irrelevant.

⁵³ See, e.g., NEHAMA LEIBOWITZ, *STUDIES IN BERESHIT (GENESIS)* 230 (A. Newman trans., 4th rev. ed.

1981) (referring to "the Torah's sparing use of words and avoidance of every unnecessary repetition, even the addition or subtraction of a letter"); *id.* at 513 ("The choice of every word [in the Torah] is deliberate and there is nothing accidental or coincidental in it but the imparting of some specific lesson.")

The importance of every word and letter of Scripture is perhaps best illustrated by a story in the Talmud, describing (with pictures in the Tosafot commentaries) how Rabbi Akiba derived law by interpreting the crowns on the letters in the Torah. BABYLONIAN TALMUD, *supra* note 48, *Menachot* 29b; *see also, e.g., id., Baba Kamma* 41b, *Pesahim* 22b, *Kiddushin* 56b–57a, *Berachos* 6b.

⁵⁴ For example, in explaining the meaning of *Genesis* 9:20 ("And Noah, the husbandman, began and planted a vineyard"), Rashi notes that the word in Hebrew for "began" (*vayachel*) may also be connected with the root meaning of "profane" (*cholin*), thereby allowing us to read the verse as follows: "He profaned (degraded) himself, for he should have occupied himself first with planting something different." *See RASHI'S COMMENTARY ON CHUMASH, supra* note 48, *Genesis* 9:20, at 39. *See also* MAIMONIDES, *THE GUIDE FOR THE PERPLEXED*, pt. 3, ch. 50, at 381 (M. Friedlander trans., 2d ed. 1904) ("Every narrative in the Law serves a certain purpose in connexion with religious teaching. It either helps to establish a principle of faith, or to regulate our actions, and to prevent wrong and injustice among men.").

⁵⁵ This is in keeping with the biblical commandment to learn the wisdom of the Torah and to teach it. *See Deuteronomy* 6:7; *Joshua* 1:8; *see also* 1 MAIMONIDES, *THE COMMANDMENTS* 16–18 (C. Chavel trans. 1967) [hereinafter *THE COMMANDMENTS*] (Commandment no. 11, "Studying the Torah"). For a recitation of Rabbi Yishmael's hermeneutical rules governing the interpretation of Torah, which can be found in any *Siddur*, or daily prayer book, *see, e.g., Siddur Tehillat HaShem* (In Praise of God) 25–26 (N. Mangel trans. 1981); *see also* BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 45b–46a (Gemara Sages describe dispute between *tannaitic* rabbis and Rabbi Eliezer concerning hermeneutical rules applicable to particular situation). Even when the Rabbis are deriving law through the oral tradition rather than the hermeneutical rules, they must be able to analyze the basis for deducing a particular law from a particular Biblical source.

⁵⁶ *See, e.g., THE MISHNAH, Aboth* 5:22, 5:23, 6:1, at 458–59 (Herbert Danby trans., 1933) [hereinafter *MISHNAH*], *reprinted in* BABYLONIAN TALMUD, *supra* note 48, *Aboth* 15a.

⁵⁷ There is a dispute concerning whether rules explicitly stated in the Torah are of greater weight than rules derived by application of hermeneutical principles. Commenting on a suggestion in the Talmud that there is greater latitude in annulling a betrothal based on monetary payment than one based on sexual intercourse, Rashi quoted as one explanation for that position the view that marriage based on money is authorized through application of one of the hermeneutical rules, whereas marriage by intercourse is explicitly permitted by the Torah. This suggestion is thus apparently based on the proposition that explicit Torah law is of greater weight than laws of hermeneutical origin. Rashi, however, strongly disagrees with that position, arguing that the rules are of the same weight, whether stated explicitly or hermeneutically derived. *See* BABYLONIAN TALMUD, *supra* note 48, *Kethuboth* 3a (Rashi commentary).

Maimonides also appears to make this distinction between explicit Torah laws and those that are hermeneutically derived. There is in effect a tripartite division of Jewish law in this context. There are explicit Torah laws, Torah laws derived through application of the hermeneutical principles, and rabbinic laws. The latter are newly created by the Sages and are treated more leniently, whereas the first two categories of rules are generally both considered Biblical and are accorded greater weight. Maimonides, however, designates betrothal by money as *Scribal*, meaning rabbinic, even though it is a Torah law that is hermeneutically derived. *See* THE CODE OF MAIMONIDES, BOOK FOUR: THE BOOK OF WOMEN 1:2, at 5 (I. Klein trans. 1972). An untranslated commentary by Nahmanides, a thirteenth century Spanish Talmudist and philosopher, takes Maimonides to task for suggesting that rules derived through hermeneutical principles are of lesser status than explicit Torah rules. 1 SHITA MIKUBETZET (Collection of Opinions) 23 (A. Friedman ed. 1966). Nahmanides also disputed Maimonides' exclusion of certain commandments that were hermeneutically derived from the latter's enumeration of the 613 commandments of Jewish law. MAIMONIDES, *MISHNAH TORAH* (The Code of Law), SEFER HAMITZVOT (The Commandments) 37–40 (Books Export Enterprises ed.) (Nahmanides commentary). *See* 2 THE COMMANDMENTS, *supra* note 55, at 367, 373–77 (discussing the "Second Principle" for enumerating the 613 commandments). *See generally* H. CHAIM SCHIMMEL, *THE ORAL LAW* 49–63, 82–91 (1978).

⁵⁸ For example, the Mishnah lists fifteen categories of women exempted from the biblical law of levirate marriage. *See Deuteronomy* 25:5–9. *MISHNAH, supra* note 56, *Yebamoth* 1:1, at 218, *reprinted in* BABYLONIAN TALMUD, *supra* note 48, *Yebamoth* 2a–2b. The Gemara questions why daughters should be the first such category listed. One of the responses is that since this category has been derived through

"exposition" (i.e., interpretation), it is "beloved" or "given preference." See BABYLONIAN TALMUD, *supra* note 48, *Yebamoth* 2b–3a.

⁵⁹ Cf. *Watkins v. Sowders*, 449 U.S. 341 (1981) (upholding hearings on the admissibility of identification testimony held in presence of jury, even though rule is otherwise with respect to confessions). The *Watkins* Court stated that the rule on confessions was based on "the peculiar problems the issue of the voluntariness of a confession presents." *Id.* at 347.

⁶⁰ THE CODE OF MAIMONIDES–JUDGES, *supra* note 47, *Evidence* 13:15, at 112–13.

⁶¹ See MISHNAH, *supra* note 56, *Sanhedrin* 3:5, at 386, reprinted in BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 27b.

⁶² See THE CODE OF MAIMONIDES–JUDGES, *supra* note 47, *Evidence* 13:15, at 112–13. The Torah distinguishes three types of laws. See, e.g., *Deuteronomy* 4:45. *Mishpatim* are ordinances whose rationales are apparent, such as the prohibitions against murder and theft. *Edot* are commemorative laws governing such matters as the celebration of holidays. *Chukim* are divine decrees that appear to have no rational basis, such as the laws relating to the red heifer, whose ashes both purified and contaminated. See *Numbers* 19:1–22. A contemporary example is the dietary or kosher laws. See *Leviticus* 11:1–47.

Striving to understand all laws is nonetheless an underpinning of Jewish study: "Attempts to provide rationalizations for the commandments, to uncover their deeper meaning or profound logic, have their roots in early Talmudic-Midrashic literature . . . and peak in Maimonides' rationalization, which is the most comprehensive and ambitious attempt." ISADORE TWERSKY, INTRODUCTION TO CODE OF MAIMONIDES (MISHNA TORAH) 373 (1980); see also *id.* at 374–430 (discussing whether there are reasons for laws, whether they can be learned, and whether they should be studied).

⁶³ Even if one assumes that the rule against self-incrimination was invented by the rabbis, one would still have to ask why they chose to create this absolute bar and to derive it from the scriptural verse relating to the testimony of kinsmen.

⁶⁴ See MAIMONIDES, THE GUIDE FOR THE PERPLEXED, *supra* note 54, pt. 3, chs. 26, 31, at 310–12, 321–22.

⁶⁵ Cf. *In re Gault*, 387 U.S. 1, 47 (1967) ("The roots of the privilege . . . tap the basic stream of religious and political principle because the privilege reflects the limits of the individual's attornment to the state and—in a philosophical sense—insists upon the equality of the individual and the state.").

⁶⁶ See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating state law criminalizing homosexual acts by consenting adults in private); *Moore v. City of East Cleveland*, 431 U.S. 494, 504–06 (1977) (strong constitutional protection of family not limited to nuclear unit but applied also to living arrangements for extended family); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (statute prohibiting use of contraceptives is "repulsive to the notions of privacy surrounding the marriage relationship"); *Pierce v. Society of Sisters*, 268 U.S. 510, 518–19 (1925) (statute requiring attendance only at public schools invades parents' rights to educate their children as they see fit); *Meyer v. Nebraska*, 262 U.S. 390, 399–403 (1923) (state law prohibiting foreign language instruction in private schools unconstitutional in part because it violates parents' right to educate children).

⁶⁷ Cf. *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) ("[T]he tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter.").

⁶⁸ See MISHNAH, *supra* note 56, *Sanhedrin* 4:5, at 387–88, reprinted in BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 37a ("Whoever saves one life, it is as if he had saved the whole world."). Discussing this Mishnah, Rabbi Joseph Soloveitchik noted that "Judaism has always looked upon the individual as if he were a little world (microcosm); with the death of the individual, this little world comes to an end. A vacuum which other individuals cannot fill is left." Rabbi Joseph Soloveitchik, *The Community*, 17 TRADITION 7, 10 (Spring 1978) (footnote omitted).

⁶⁹ The Torah's treatment of Noah's offspring is a classic example of its emphasis on genealogy. *Genesis* 9:22 states: "Ham, the father of Canaan, saw the nakedness of his father [Noah]." Some of the rabbis explained the ostensibly irrelevant inclusion of Canaan and Ham's relationship to him by noting that it was Canaan who originally saw his grandfather's nakedness and told Ham about it—an instance of like son, like father. Scripture goes on to say that, without looking at Noah, his other two sons, Shem and Japheth, covered him. *Genesis* 9:23. Rashi notes that the Hebrew grammar, through use of a singular verb, teaches that Shem was the initiator of this project and Japheth merely followed him. RASHI'S COMMENTARY ON CHUMASH, *supra* note 48, *Genesis* 9:23, at 40. Because of the three sons' respective roles in this incident, Rashi, relying on the prophets Ezekiel and Isaiah, and on the Midrash, says that the descendants of Ham, Shem, and Japheth had markedly different fates corresponding to their ancestors' deeds. *Id.*

The Torah goes on to trace the genealogy of the three sons. See *Genesis* 10:1–32. It is not, however, a traditional chain-like genealogical table for it contains omissions, interruptions, and lateral additions. Cf. *Genesis* 5:3–32, 11:11–27. One of its purposes is to show that at least some of the descendants fulfilled their ancestors' promise for good or bad. Ham was the progenitor of Nimrod, who caused rebellion against God, while Abram (later Abraham) descended from Shem. See RASHI'S COMMENTARY ON CHUMASH, *supra* note 48, *Genesis* 10:8–10, at 41–42. The Torah does not, however, suggest that genealogy is dispositive, since Terach, Abraham's father, was an idolmaker and worshipper, and it was only Abraham who had the merit to realize the potential of his ancestor, Shem. See *id.*, *Genesis* 10:1–11:32, at 41–48.

⁷⁰ See BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 27b–28b (demonstrating how Sages derived various relationships of consanguinity and affinity that fall within the testimonial prohibition). Generally speaking, the disqualifying relations include not only a father, but also a brother, a paternal or maternal uncle by blood or marriage, a brother-in-law (either a sister's husband or a wife's brother), a step-father, and a father-in-law, as well as all sons, sons-in-law and stepsons. Women were disqualified as witnesses in capital cases and consequently are not included in the list. See *id.* at *Sanhedrin* 27b; see also THE CODE OF MAIMONIDES–JUDGES, *supra* note 47, *Evidence* 13:1–15, at 110–13.

With the exception of the spousal testimonial privilege, familial privileges, even as between parent and child, are generally not recognized in this country. See generally *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1563–92 (1985); Note, *Parent-Child Loyalty and Testimonial Privilege*, 100 HARV. L. REV. 910, 912 (1987).

⁷¹ The rabbinic scholars of the Mishnaic era were known as *tannaim*; the singular, *tanna*, means teacher or one who studies. See ADIN STEINSALTZ, *THE ESSENTIAL TALMUD* 24 (Chaya Galai trans., 1976) [hereinafter STEINSALTZ, *ESSENTIAL*]. Hence the adjective *tannaitic* may sometimes be interchangeable with "Mishnaic."

⁷² There is a dispute among modern scholars as to whether the law excluding confessions in criminal cases existed in the early Mishnaic era, or whether it instead developed in the later Mishnaic era, superseding an earlier role to the contrary. Professor Kirschenbaum is of the opinion that the rule barring criminal confessions is a product of the early Mishnaic period, approximately the third or second century B.C.E. He rejects the view that in that era the use of confessions was permitted, and that the prohibition did not develop until the later *tannaitic* period, approximately the third century C.E. See KIRSCHENBAUM, *supra* note 46, at 41–49.

⁷³ MISHNAH, *supra* note 56, *Sanhedrin* 5:1–5, at 388–89, reprinted in BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 40a; 4 THE TOSEFTA, *Sanhedrin* 9:1–4, at 224–27 (J. Neusner trans. 1981) [hereinafter TOSEFTA]. The Tosefta, a text of the Mishnaic era, consists of supplemental material that is often used to shed light on the Mishnah.

⁷⁴ Absent an immediate acquittal, the judges are prohibited from taking action against the accused until the following day. During the interim they eat lightly, drink no wine, study the law, and deliberate. MISHNAH, *supra* note 56, *Sanhedrin* 5:5, at 389, reprinted in BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 40a; TOSEFTA, *supra*, *Sanhedrin* 9:1, at 225.

⁷⁵ Unlike the TOSEFTA, *Sanhedrin* 9:2, at 226, the Mishnah does not discuss whether a witness may speak against the defendant. The Mishnah does say, however, that a witness is not permitted to speak in favor of the accused, MISHNAH, *supra* note 56, *Sanhedrin* 5:4, at 389, reprinted in BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 40a, and even without the Tosefta, one might be able to infer from the Mishnah that the witness is not permitted to speak against him either. The Mishnah often does not include material that is inferable, and this is explained both as a pedagogical technique and as an authoritative interpretive principle of the oral tradition.

Indeed, one of the Gemara's teaching devices is called a *tsrichutah*, that is, a "necessity." It is used when something in a Mishnah appears to be unnecessary, but is in reality essential. See, e.g., BABYLONIAN TALMUD, *supra* note 48, *Baba Metzia* 66a. The same rule—that that which is readily inferable is not explicitly stated—is also applicable to the Torah. See also RASHI'S COMMENTARY ON CHUMASH, *supra* note 48, *Exodus* 20:12, at 104–05. Commenting on the words "Honour thy father and thy mother: that thy days may be long," Rashi notes that if one honors them his days will be long, but if he does not his days will be short, "for the words of the Torah may be explained as concise statements: from what is included in a positive statement *we may infer* the negative and from what is included in a negative statement *we may infer* the positive." *Id.*

⁷⁶ Although the Tosefta is silent in this regard, the Mishnah specifically notes that, if a disciple wishes to argue against the defendant, he is silenced. MISHNAH, *supra* note 56, *Sanhedrin* 5:4, at 389, *reprinted in* BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 40a.

⁷⁷ The Mishnah adds that the defendant may be heard, "provided there is aught of substance in his words." *Id.*

⁷⁸ Only the Tosefta contains the specific prohibition against self-incriminating statements by the defendant, TOSEFTA, *supra* note 73, *Sanhedrin* 9:2, but it is inferable from the Mishnah's affirmative authorization of arguments by the accused in his favor. MISHNAH, *supra* note 56, *Sanhedrin* 5:4, at 389, *reprinted in* BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 40a.

⁷⁹ Only the Mishnah contains this point. It says:

He who is in favour of acquittal states, "I declared him innocent and stand by my opinion;" while he who is in favour of condemnation shall say: "I declared him guilty and stand by my opinion."

One who [previously] argued for conviction may now argue for acquittal, but not vice versa.

BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 40a (alternative translation of Mishnah also reprinted in MISHNAH, *supra* note 56, *Sanhedrin* 5:5, at 389).

Judges may not, however, change their minds in order to speak in favor of an accused idolator. *See* BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 29a.

⁸⁰ These are not mutually exclusive rationales. While one might argue that a general rule permitting only judges to speak against defendants governs all participants, it may be that there are independent bases for prohibiting all of the other categories of participants from doing so. For example, a disciple is not permitted to argue against the defendant on the basis of the biblical verse *Numbers* 35:30, which states that "[o]ne witness shall not testify against any person that he die." *See* BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 34a. Witnesses are not allowed to speak in the defendant's favor for fear that they will change their testimony in an inaccurate manner so as to avoid charges that they were untruthful. *Id.*

⁸¹ In a sense the dichotomy between criminal and civil proceedings is artificial. As Rabbi Steinsaltz has noted:

The Talmud sees no basic distinction between criminal and civil law, just as there is no clear division between offenses committed by one man against another and religious transgressions "between man and God." All the spheres of legal activity are seen only as different aspects of one comprehensive body of teaching. At the same time, certain distinctions are made between the laws pertaining to monetary matters and those dealing with criminal offenses and corporal punishment.

STEINSALTZ, ESSENTIAL, *supra* note 71, at 163.

⁸² TOSEFTA, *supra* note 73, *Shevuot* 3:8, at 283. The translation in the text, which is our own, is not literal. A literal rendering would be as follows: "Or just as cases of souls that he admitted from his own mouth also cases of monies so? Teaching to say 'a foot': He shall pay." *Id.* (punctuation added). The actual meaning of the quoted material must be derived in part by simply knowing what certain terms and expressions mean—"teaching to say," for example, really means "the Torah teaches"—and in part from the context. The Tosefta in question is a commentary on *Leviticus* 24:17–22, which states:

And he that smiteth any man mortally shall surely be put to death. And he that smiteth a beast mortally shall make it good: life for life. And if a man maim his neighbor; as he hath done, so shall it be done to him: breach for breach, eye for eye, tooth for tooth; as he hath maimed a man, so shall it be rendered unto him. And he that killeth a beast shall make it good; and he that killeth a man shall be put to death. Ye shall have one manner of law, as well for the stranger, as for the home born.

Leviticus 24:17–22. These provisions were interpreted by the rabbis so as to require the death penalty only with respect to murder, whereas injuries to animals and persons were instead to be treated as civil wrongs and compensated by money damages. *See* BABYLONIAN TALMUD, *supra* note 48, *Baba Kamma* 83b–84a. Further, on the basis of the "one manner of law" verse quoted above, the rabbis had determined that certain other court procedures were equally applicable in capital and in civil monetary cases. *See* MISHNAH, *supra* note 56, *Sanhedrin* 4:1, at 386–87, *reprinted in* BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 32a. The issue raised in this Tosefta was whether the verses quoted from *Leviticus* above taught that, just as confessions were inadmissible in capital cases, they must also be inadmissible in civil damage actions. The concept of parity in this respect was rejected, however, on the basis of *Exodus* 21:24, which states, in a similar context, "[E]ye for eye, tooth for tooth, hand for hand, foot for foot." Since the wording of this verse in *Exodus* is similar to that in *Leviticus* 24:19, the Sages concluded that the former would be

superfluous unless it had been written to teach a different point—namely, that an admission of injury was sufficient to require compensation. Thus, the Sages, who were fully familiar with the entire Torah and expected others to be equally knowledgeable, could abbreviate their reasoning, and simply state "A foot will pay."

The rabbis' approach is akin to the modern maxim of construction that, if possible, the language of constitutional and statutory provisions should not be interpreted so as to render any parts thereof nugatory. *See, e.g.,* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803); 2A C. SANDS, SUTHERLAND ON STATUTORY CONSTRUCTION § 46.06, at 104 (4th ed. 1984).

⁸³ *See* MISHNAH, *supra* note 56, *Sanhedrin* 4:1, at 386–87, *reprinted in* BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 32a, giving the general rule that "both civil and capital cases demand inquiry and examination," and then summarizing the differences between the two types of proceedings.

⁸⁴ TOSEFTA, *supra* note 73, *Shevuoth* 5:3. The crucial point is included in a clause at the beginning of each of these sources, which states that one may not "join his mouth with that of another for [the infliction of] death." The remainder of each cited text is an explanation of the circumstances in which one may be liable to give an oath in civil damage actions, and the source of liability for this oath. *See* KIRSCHENBAUM, *supra* note 46, at 35–36; BABYLONIAN TALMUD, *supra* note 48, *Kethuboth* 87b.

⁸⁵ In fine cases, the payments for injuries do not correspond to the actual amount of damage inflicted. *See* BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 3a–3b. For examples of fines, see *Exodus* 21:32 (owner of ox which gores another's bondsman liable for fine of 30 shekels); *Exodus* 22:16 (seducer of virgin whose father refuses to permit marriage must pay father equivalent of dowry); *Deuteronomy* 22:19 (man who mistakenly charges that his bride is not a virgin is liable to her father for 100 shekels); *cf.* *Kelly v. Robinson*, 479 U.S. 36 (1986) (restitution order in state criminal case is not debt dischargeable in bankruptcy). Justice Marshall's dissent in *Kelly* noted that "[w]ere the restitution order purely penal, the statute would not connect the amount of restitution to the damage imposed. Tying the amount of restitution to the amount of actual damage sustained by the victim strongly suggests that the payment is meant to compensate the victim." *Id.* at 55 (Marshall, J., dissenting).

⁸⁶ *See Exodus* 21:37 ("If a man steal an ox, or a sheep, and kill it, or sell it, he shall pay five oxen for an ox, and four sheep for a sheep."). If, however, the thief stole the animal but did not slaughter or sell it, he was only liable for double payment. *Exodus* 22:3.

⁸⁷ MISHNAH, *supra* note 56, *Kethuboth* 3:9, at 249, *reprinted in* BABYLONIAN TALMUD, *supra* note 48, *Kethuboth* 41a ("This is the general rule: whosoever must pay more than the cost of damage done does not pay on his own admission."). The sense of the rule is that any person who has committed an act punishable by fine is not obligated to pay the fine if he confessed to such misconduct, although he remains liable for any prescribed compensatory damages.

⁸⁸ TOSEFTA, *supra* note 73, *Baba Metzia* 1:10, at 74–75 ("A man's admission of his own liability is equivalent to one hundred witnesses."); *see also* BABYLONIAN TALMUD, *supra* note 48, *Baba Metzia* 3b (quotation repeated in Gemara); *id.*, *Gittin* 40b (same).

American law also treats admissions in civil and criminal cases differently from one another. *See* 3 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 815, at 287 (James H. Chadbourn rev., 1981) ("[I]n a civil case the admissions of an opponent, when offered, are not to be tested or excluded by any rules of confession applicable to the accused in a criminal case."); *see also* *Terpstra v. Niagara Fire Ins. Co.*, 308 N.Y.S.2d 378 (1970) (voluntary confession of arson to police without warning of rights under *Escobedo v. Illinois*, 378 U.S. 478 (1964), held admissible in civil case).

⁸⁹ *But see* BABYLONIAN TALMUD, *supra* note 48, *Makkoth* 5a (Rashi commentary). Rashi appears to suggest that by confessing, a defendant in a criminal case can effectively immunize himself from liability, just as he would be able to do in a fine proceeding. *Id.* However, Rashi seems to be outside the mainstream of thought on this issue. Thus, the Tosafot commentary on this Gemara vehemently disagrees with Rashi's position, pointing out that no other authority had accepted such a rule and arguing that under Rashi's view, wrongdoers would be able to immunize themselves by simply confessing. *Id.* (Tosafot commentary).

⁹⁰ *See* THE CODE OF MAIMONIDES—JUDGES, *supra* note 47, *Evidence* 12:2, at 108 ("[I]f he says that he has . . . cohabited with a woman forbidden to him, he is not disqualified—unless there are two witnesses who testify against him—for no man can incriminate himself."); *id.*, *Evidence* 3:7, at 88 ("If the witnesses say, 'We were ineligible . . . on the ground of religious delinquency,' or 'We were bribed . . .' they are not believed, unless there are witnesses to testify that they are transgressors, for no man can incriminate himself."); *see also* TOSEFTA, *supra* note 73, *Sanhedrin* 11:1, at 233 ("As to all others liable to the death

penalty imposed by a court, . . . they convict them only on the testimony of witnesses, after warning. . ."). It should be noted that the above statement of Maimonides has reference to proceedings for disqualification of witnesses and not criminal actions. In this chapter we have adhered to the position that the rule governing confessions in these two types of suits is the same, and that it stems from the same biblical sources. Thus in our view, even though Maimonides is discussing witness disqualification, his statement supports the assertion in the text concerning defendants in criminal cases. As pointed out, however, there is a scholarly dispute in this regard, and Dean Enker has argued that the self-incrimination rule in criminal cases is analytically distinct from the counterpart provision barring disqualification of witnesses on the basis of their inculpatory statements. Enker, *supra* note 46, at cix–cx. If this latter approach is correct, Maimonides' contention would not support the proposition that confessing criminals may be prosecuted and convicted if there is sufficient extrinsic evidence. It is then arguable that, as Rashi contended, the immunization rule with respect to fines, also applies in criminal proceedings. Under this interpretation, with respect to both fines and crimes, confessions would not only be inadmissible, but would also generally serve to immunize the accused from prosecution. It would therefore only be witnesses who, after confessing, would be subject to sanctions (in the form of disqualification) based on extrinsic evidence. This approach may obviate the necessity of attempting to distinguish between fine and criminal proceedings in the manner suggested in *infra* notes 97–119 and accompanying text. But it would require making a distinction between fines and crimes on the one hand, and disqualification of witnesses on the other, which may be a somewhat simpler task, although still not an easy one.

⁹¹ See KIRSCHENBAUM, *supra* note 46, at 38–39 ("[I]n simple monetary matters it was the original act of the (losing) litigant which created his (presently adjudged) liability . . ."). There is discussion in the Talmud about whether a money judgment entered in a penal case should thereafter be viewed as a civil obligation, or whether its penal nature continues. See BABYLONIAN TALMUD, *supra* note 48, *Kethuboth* 42a. If it is considered civil, the defendant's subsequent admission of liability will not exempt him from payment, whereas, if it is penal, the confession will afford immunity. The question is why a money judgment entered by a court in a penal case should be considered a civil matter. One way of explaining such a result is that once the court reduces to judgment a claim for money damages, whether compensatory or penal, that judgment represents a debt owing, just as in any other debtor-creditor situation. Therefore, when a subsequent court enforces that money judgment, it is merely confirming an already existing liability, just as when a court in an ordinary civil case confirms the debtor's liability to the creditor. *Cf.* *Kelly v. Robinson*, 479 U.S. 36 (1986) (restitution order entered as condition of probation in state criminal trial for welfare fraud not a debt that could be discharged in bankruptcy).

⁹² See BABYLONIAN TALMUD, *supra* note 48, *Makkoth* 5a; Haim H. Cohn, *The Privilege Against Self-Incrimination Under Foreign Law: Israel*, 51 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 175, 178 (1960).

⁹³ Although in general the procedural requirements for civil and criminal proceedings were the same, there were some significant differences between the two. For a discussion of these differences, see BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 32a–36b.

⁹⁴ Our text suggests that in cases of fines and crimes, unlike simple monetary actions, no legal liability exists until the court enters judgment. It could of course be argued instead that in these categories of cases, as well as in regular civil monetary actions, liability comes into existence at the time of the underlying primary conduct, that is, when obtaining the loan, stealing the cow, committing the murder. Then, whether a judgment is rendered simply depends on procedural and evidentiary contingencies, such as the availability of sufficient proof. This perfectly acceptable view does not, however, help to explain the differing treatment of admissions in civil, criminal, and fine proceedings.

⁹⁵ While the Gemara scholars and commentators do not talk in terms of creating and confirming jurisdiction, their analyses are nonetheless compatible with this theory. Thus, the Gemara discusses the circumstances in which perjurious witnesses in criminal and fine cases—who would generally be subject to the same penalty that their perjury would have inflicted on the defendant—may avoid liability. BABYLONIAN TALMUD, *supra* note 48, *Makkoth* 5a. In the Tosafot commentary on this Gemara, a distinction is drawn between civil monetary cases and capital cases. *Id.* (Tosafot commentary). The Tosafot conclude that in the former, false witnesses are not obligated to pay the civil monetary damages that the defendant would have been required to pay because, at the time they perjured themselves, the defendant was already obligated to pay the amount of the principal even without a judgment of the court to that effect, therefore making the perjurious testimony irrelevant. *Id.* In capital cases, however, the Tosafot state that such perjurious witnesses could be convicted, because a defendant in such cases is not liable until the court

enters a judgment of conviction. Until that time, therefore, the witnesses' testimony can affect the defendant's liability. *Id.*

The reason proffered by the Tosafot for this distinction between civil monetary cases and capital cases relates to the probability of a finding of liability. According to the Tosafot, in civil monetary cases it is almost certain that witnesses will come forward and testify, and there is a great likelihood of a resulting judgment. *Id.* In capital cases, however, because of the careful scrutiny of potential witnesses, it is not at all clear that qualified witnesses will be forthcoming. Therefore, one cannot say with any degree of certainty that the defendant will be convicted and subject to the death penalty prior to the actual entry of judgment.

In his commentary on this Tosafot, Rabbi Akiva Eiger, a famed nineteenth century scholar from Germany, takes issue with the above analysis turning on the availability of witnesses. In Rabbi Eiger's view, the defendant in a civil monetary case would remain obligated to pay, even in the absence of witnesses and the consequent inability of the court to render judgment. However, this would not be so in either fine proceedings or capital cases, where the defendant remains free of obligation in the absence of a judicial decree. *Id.* (Eiger commentary). Rabbi Eiger cites to another Tosafot commentary involving a double jeopardy question, in which the Tosafot say that in fine cases, defendants are not obligated except on the basis of a court judgment. *Id.* (Eiger commentary) (citing BABYLONIAN TALMUD, *supra* note 48, *Kethuboth* 33b (Tosafot commentary)). Thus, the analysis of Rabbi Eiger lends support to the distinction between confirmatory jurisdiction in civil monetary cases and creative jurisdiction in fine and criminal proceedings—a distinction that ultimately relates to whether a court is exercising true judicial power. *Accord* 5 ENCYCLOPAEDIA JUDAICA, *Confession* 877, 878 (1971) ("A 19th-century jurist (Mordechai Epstein) pointed out that the real difference between civil admissions and criminal confessions was that by an admission an obligation was created which had only to be enforced by the court, whereas in a criminal conviction it is the court which creates the accused's liability to punishment.").

Similarly, according to Maimonides, the law is that if a thief steals an article or an animal that is subsequently destroyed or lost, and that has either depreciated or appreciated in market value in the interim, the thief must repay the value of the article on the basis of its value at the time of the theft. The amount of the fine, however, is determined by the value of the article or animal at the time the court enters judgment. *See* THE CODE OF MAIMONIDES, BOOK 11: THE BOOK OF TORTS, *Theft* 1:14, at 62–63 (Hyman Klein trans., 1954) [hereinafter THE CODE OF MAIMONIDES–TORTS]. The question is why Maimonides determines these two valuations on the basis of different time frames. It can be argued that the principal is determined by the item's value at the time of theft, since that is when the liability for compensatory damages came into existence. One way of explaining why the fine is instead linked to the time of judgment is that the penalty has no reality, that is, it does not exist until it is created by the court. This is, in turn, a way of saying that there is no obligation to pay the penalty until the court creates it.

⁹⁶ *See* MISHNAH, *supra* note 56, *Kethuboth* 3:9, at 249, *reprinted in* BABYLONIAN TALMUD, *supra* note 48, *Kethuboth* 41a.

⁹⁷ *See* BABYLONIAN TALMUD, *supra* note 48, *Baba Kamma* 64b. It is unclear whether the immunity extended to confessing defendants accused of offenses punishable by fine was based on the prohibition against self-incrimination taken together with *Exodus* 22:8, or whether it was adduced independently from the Scriptural provision.

⁹⁸ *See* BABYLONIAN TALMUD, *supra* note 48, *Baba Kamma* 75a.

⁹⁹ *See, e.g.,* *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964); 18 U.S.C. § 6002 (1982).

¹⁰⁰ *Cf. Kastigar v. United States*, 406 U.S. 441, 453 (1972) ("Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted.").

¹⁰¹ *See, e.g., id.* at 460–62; *Murphy*, 378 U.S. at 79, n.18. Use immunity provides approximately the same scope of protection as that granted for violation of most constitutional guarantees. *See, e.g.,* *Nix v. Williams*, 467 U.S. 431 (1984) (inevitable discovery rule); *Brown v. Illinois*, 422 U.S. 590 (1975) (fruit-of-the-poisonous-tree doctrine); *Chapman v. California*, 386 U.S. 18 (1967) (harmless error rule).

¹⁰² The extent to which a person who admitted wrongdoing could subsequently be punished for that offense if two competent witnesses thereafter testified against him was debated extensively in the Talmud. *See* BABYLONIAN TALMUD, *supra* note 48, *Baba Kamma* 74b–75b. The Mishnaic ruling that serves as the springboard for discussion in the Gemara concerning immunity provides as follows:

If the theft [of an ox or a sheep] was testified to by two witnesses, whereas the slaughter or sale of

it was testified to by only one witness or by the thief himself, he would have to make double payment but would not have to make four-fold and five-fold payments.

MISHNAH, *supra* note 56, *Baba Kamma* 7:4, at 341, reprinted in BABYLONIAN TALMUD, *supra* note 48, *Baba Kamma* 74b. This Mishnaic rule is based on biblical commandments providing that a thief caught with the live animal he stole must pay double its value, *Exodus* 21:37, whereas a thief who has slaughtered or sold it must pay four times its value in the case of a sheep, or five times its value for an ox. *Exodus* 22:3. Thus, the two witnesses testifying as to theft are sufficient to render the defendant liable to pay double the animal's value, but a single witness's testimony, or the thief's confession as to sale or slaughter will not render him liable for the four- or five-fold fine.

The Gemara Sages proceeded to debate whether the thief's confession immunized him from paying the four- or five-fold fine where two witnesses testified with respect to the slaughter or sale. Issue was joined as follows between Rab and Samuel, two famous Sages in the first generation of the post-Mishnaic period in Babylonia, whose debates influenced the development of the Gemara for generations to come: "It was stated: If a man confesses to liability for a fine, and subsequently witnesses appear [and corroborate the confession], Rab held that he would be quit, whereas Samuel held that he would be liable." BABYLONIAN TALMUD, *supra* note 48, *Baba Kamma* 75a.

¹⁰³ See BABYLONIAN TALMUD, *supra* note 48, *Baba Kamma* 75a. The Gemara states as follows:

Rab might rejoin: My statement can hold good even according to [another Sage whose position he is attempting to distinguish]. For [that Sage] would not have expressed the view he did there save for the fact that the thief made his confession because of his fear of the witnesses, whereas here he confessed out of his free will. . . .

R. Hamnuna stated: It stands to reason that the ruling of Rab was confined to the case of a thief saying, "I have committed a theft" and witnesses then coming [and testifying] that he had indeed committed the theft, in which case he is quit, as he had [by the confession] made himself liable at least for the principal. But if he first said, "I did not commit the theft," but when witnesses appeared and declared that he did not commit the theft, he turned round and said, "I even slaughtered [the stolen sheep or ox] or sold it," and witnesses subsequently came [and testified] that he had indeed slaughtered it or sold it, he would be liable to pay [four- or five-fold payment], as [by this confession] he was trying to exempt himself from any liability whatever.

Id.

¹⁰⁴ The types of offenses that resulted in imposition of fines included theft, rape and seduction of a virgin, and slander of a bride. Classified as purely civil matters, on the other hand, were commercial cases and suits involving personal or property damage caused by persons or animals. See 1 EMANUEL B. QUINT & NEIL S. HECHT, *JEWISH JURISPRUDENCE: SOURCES AND MODERN APPLICATIONS* 39–49 (1980).

With respect to criminal matters, Maimonides calculated that there were 207 offenses punishable by flogging, including the creation of an idol, eating of harvested crops before they were tithed, eating meat with milk, eating leavened bread on Passover, failing to return collateral received from a widow, accepting as collateral implements necessary for food preparation, and cohabitation with a harlot. See THE CODE OF MAIMONIDES—JUDGES, *supra* note 47, *Sanhedrin* 19:1–4, at 53–59. As Rabbi Steinsaltz notes: "The most common punishment was flogging. The Torah specified a fixed number of lashes (thirty-nine) as punishment for any person deliberately transgressing against the negative ('thou shalt not . . .') injunctions. Excluded from this ruling were monetary offenses (theft, robbery, etc.) . . ." STEINSALTZ, *ESSENTIAL*, *supra* note 71, at 172.

The other punishment for criminal offenses was the death penalty, by stoning, burning, strangulation, or beheading, which was imposed for a variety of offenses including premeditated murder, *Exodus* 21:14, blasphemy, *Leviticus* 24:10–16, violation of the Sabbath, *Exodus* 31:15, 35:2, kidnapping and selling of a human being, *Exodus* 21:16, and striking or cursing a parent, *Exodus* 21:15,17. Although some offenses appear to be judicially punishable by death, the oral tradition makes it clear that in general the sanction for such wrongdoing is left to God. RASHI'S COMMENTARY ON CHUMASH, *supra* note 48, *Exodus* 21:29, at 114a, *Leviticus* 22:9, at 100, *Numbers* 1:51, at 6. Unintentional killings were punished by exile in one of the cities of refuge. *Exodus* 21:13.

¹⁰⁵ Jewish law sometimes inflicted punishment based on a prediction of future criminality. The stubborn and rebellious son, *Deuteronomy* 21:18–21, for example, was condemned to death on the theory that he would ultimately become a dangerous robber. See BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 72a. For a detailed analysis of the stubborn and rebellious son, see chapter 5 *supra*.

¹⁰⁶ See, e.g., *Numbers* 5:7.

¹⁰⁷ See BABYLONIAN TALMUD, *supra* note 48, *Baba Kamma* 40a (referring to payment of *kofer* (type of fine) as "an act of atonement"). Rabbi Moshe Chaim Luzzatto (the "Ramchal"), a noted eighteenth century Italian Kabbalist, stated:

Punishment was only created to exist in the absence of repentance. What God truly desires is that man not sin in the first place, and if he does sin, that he should repent. If one does not repent, however, he can still be purified through these punishments and thus not be annihilated completely.

MOSHE LUZZATTO, *THE WAY OF GOD* 117 (A. Kaplan trans., 4th rev. ed. 1983); *cf.* THE CODE OF MAIMONIDES–JUDGES, *supra* note 47, *Sanhedrin* 17:7, at 49 ("After the offender has received the penalty of flogging, he is restored to his former status. . . . [H]e is (again) th[y] brother."); *see also id.*, *Evidence* 12:4, at 109 (offender eligible again to testify after flogging).

¹⁰⁸ *Deuteronomy* 25:2. The Sages interpreted this provision so as to take into account not only the gravity of the offense, but also, in the case of flogging, the ability of the defendant to endure punishment. See THE CODE OF MAIMONIDES–JUDGES, *supra* note 47, *Sanhedrin* 17:1–2, at 47–49.

¹⁰⁹ See *Deuteronomy* 22:28–29.

¹¹⁰ See, e.g., *State v. Brinkley*, 681 P.2d 351 (Alaska Ct. App. 1984) (disapproving, but not altering, sentence of five years and 45 days, with all but 45 days suspended, in case of first degree sexual assault); *Bridges v. State*, 664 S.W.2d 98 (Tex. Crim. App. 1984) (affirming ten year probated sentence for defendant convicted of rape); Wis. Stat. Ann. §§ 940.225, 973.09 (West 1982) (authorizing probation for wide variety of felonies, including sexual assault).

¹¹¹ See BABYLONIAN TALMUD, *supra* note 48, *Kethuboth* 33a–36b (discussing relative severity of fines, flogging, and capital punishment, in context of double jeopardy).

¹¹² For example, one could not ransom himself from the death penalty by the payment of a fine. *Numbers* 35:31. On the other hand, the Talmudic double jeopardy provision precluded the imposition of dual punishments, so that one subject to capital punishment would not also be liable for a fine based on the same act. See, e.g., BABYLONIAN TALMUD, *supra* note 48, *Kethuboth* 37a–38a.

¹¹³ This is not to say that confession was irrelevant to expiation of sin. As Rabbi Joshua b. Levi stated in the Gemara:

He who sacrifices his [evil] inclination and confesses [his sin] over it, Scripture imputes it to him as though he had honoured the Holy One, blessed be He, in both worlds, this world and the next; for it is written, *Whoso offereth the sacrifice of confession honoureth me.*

BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 43b (quoting *Psalms* 50:23). Indeed, even when a criminal was about to be executed, he was exhorted to confess in order to assure his portion in the world to come. *Id.*; *see also* THE CODE OF MAIMONIDES, MISHNAH TORAH, *The Book of Knowledge* 81b–82a (Moses Hyamson trans., 1981) (condemned obtains forgiveness by repentance and confession, not by execution of judicial penalty).

¹¹⁴ BABYLONIAN TALMUD, *supra* note 48, *Makkoth* 5a (Tosafot commentary).

¹¹⁵ For example, the offense of being a stubborn and rebellious son, *Deuteronomy* 21:18–21, required, *inter alia*, that the son eat gluttonous amounts of wine and meat, that both parents desire the punishment, and that they be neither blind, deaf, lame, or dumb, nor have a missing finger or hand. BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 71a. See chapter 5 *supra* for a detailed analysis of the stubborn and rebellious son.

¹¹⁶ In the course of a discussion on double jeopardy, one of the Sages argued: "It might have been presumed that since the law of a monetary fine is an anomaly which the Torah has introduced, a man must pay it even though he also suffers the death penalty." BABYLONIAN TALMUD, *supra* note 48, *Kethuboth* 38a. The Hebrew word which is translated as "anomaly" is *chidush*, which more accurately means "innovation." The idea expressed is that this law is "different from other laws . . . and cannot be justified on logical grounds." *Id.* The Rashi commentary on this discussion states that what is meant is that fine payments rest upon divine decrees, without which human beings could not impose such penalties. *Id.* (Rashi commentary).

¹¹⁷ *Exodus* 21:32.

¹¹⁸ See BABYLONIAN TALMUD, *supra* note 48, *Baba Kamma* 75a (Sages discuss extent of liability of defendants in cases involving theft of domestic animals). Several rabbis conclude that precedent supports immunization of a thief from fines only where he had by his confession made himself liable for the principal.

¹¹⁹ See HAIM H. COHN, *HUMAN RIGHTS IN JEWISH LAW* 92–93 (1984). Justice Cohn notes:

It is not only that the law prohibits interfering with the property of another, whether by larceny (Exod. 5:15, 21:37; Lev. 19:11; Deut. 5:19), or robbery (Lev. 5:21, 19:13), or embezzlement (Exod. 22:6–12), or trespass (Deut. 19:14), but that, rather than making such interferences criminal offenses, the law insists that restitution be made to the owner, often with the addition of double or three or four or five times the value by way of punitive damages (Exod. 21:37, 22:3, 6, 8, 11, 13; Lev. 5:23–24). . . . It was always regarded as more important that the property should be restored to the owner than that the offender should suffer punishment.

Id.

¹²⁰ The Mishnaic era texts relied on by those scholars who maintain that the law of that period allowed confessions in criminal cases are not, however, free from ambiguity. They each involve one of the following: (1) expiatory confessions made by the condemned person after trial in an effort to assure his place in the world to come, see BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 43b, 44b; MISHNAH, *supra* note 56, *Sanhedrin* 6:2, at 390, reprinted in BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 43b; TOSEFTA, *supra* note 73, *Sanhedrin* 9:5; (2) reliance on the aphorism, applicable only in civil cases, that a man's admission of guilt is equivalent to the testimony of a hundred witnesses, see TOSEFTA, *supra* note 73, *Baba Metzia* 1:10; (3) a deduction that the two-witness rule applied only in cases in which the defendant denied the allegations, based on the Talmudic rule that one witness can force a defendant to make an oath, BABYLONIAN TALMUD, *supra* note 48, *Kethuboth* 87a–87b; *id.*, *Shevuoth* 40a; (4) judicial proceedings outside the framework of Talmudic law, such as those of royal courts. THE CODE OF MAIMONIDES–JUDGES, *supra* note 47, *Sanhedrin* 18:6, at 52–53. For a detailed refutation of these seemingly contrary authorities, see KIRSCHENBAUM, *supra* note 46, at 41–49.

¹²¹ In *Joshua* 6:17–7:26, after capturing Jericho, Joshua consecrates the city, and all therein, except the property of Rahab, to God and admonishes the people not to touch any of the articles set aside for the Lord. Afterwards, however, the children of Israel suffer a defeat in battle. God tells Joshua that the defeat came because of sin and directs him to convene the people in order that the guilty party be identified by the casting of lots. When Achan is brought forward, Joshua adjures him to confess, which he does. Achan's confession is corroborated by discovery of the forbidden articles in his tent. He is then burned and stoned to death. This biblical episode does not, however, necessarily predicate guilt on Achan's confession. Rather, it is the lot, which is deemed a manifestation of God's judgment, that determines guilt. The confession serves an expiatory function, and as an after-the-fact validation of the judgment. See BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 43b, 44b.

In 2 *Samuel* 1:1–16, 4:4–12, there are two instances in which David sentences men to death for having killed King Saul and his son, after the men confess to the killings and supply evidence supporting their statements. It is unclear in both cases, however, whether a trial is being conducted. *But see* KIRSCHENBAUM, *supra* note 46, at 32 ("[There is] little doubt the proceedings were judicial in nature"). Even assuming that there were trials, what is involved is at best a summary proceeding during wartime. More pertinently, the offense involves the killing of God's anointed ruler or his son, thus constituting an attack on both divine authority and the orderly functioning of society. The context was therefore an emergency. In addition, normative Jewish law did not apply to royal courts, and, even though David was not yet king, he may well have been exercising royal prerogatives.

Even if these Biblical passages could be cited literally to show that confessions could be introduced as evidence in criminal trials, or at least that they could support a conviction if corroborated by other evidence, this showing would not be dispositive of what Jewish law is. The Bible can only be understood by reading it in conjunction with the Jewish Oral Law. See STEINSALTZ, *ESSENTIAL*, *supra* note 71, at 11–13. There are numerous instances in which the Torah, on its face, appears to require one rule, while the Talmud makes clear that a different interpretation is the correct one. To use a famous example, the "eye for eye" aphorism, set forth in *Exodus* 21:24, often invoked by fundamentalists in support of capital punishment, does not in fact embody the *lex talionis*; instead, it mandates a form of compensatory damages. See BABYLONIAN TALMUD, *supra* note 48, *Baba Kamma* 83b–84a.

¹²² See Bernard Jackson, *Reflections on Biblical Criminal Law*, 24 J. JEWISH STUD. 8 (1973) (noting dangers of comparative studies based on ancient law and of attempting to derive principles and postulates therefrom). Professor Jackson states: "Ancient legal texts . . . rarely provide express statements of principle, and are far from comprehensive in the information they provide as to the legal life of the people." *Id.* at 12.

¹²³ On the basis of *Exodus* 23:1, "put not thy hand with the wicked to be an unrighteous witness," persons guilty of Biblical offenses such as robbery are disqualified as witnesses. In addition, rabbinic law in a small class of cases disqualifies those committing analogous offenses. See MISHNAH, *supra* note 56, *Sanhedrin* 3:3, at 385 ("And these are ineligible [to be witnesses or judges]: A gambler with dice, a usurer, a pigeon-trainer, and traders [in the produce] of the sabbatical year . . ."), reprinted in BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 24b. For a full description of disqualifying offenses, see THE CODE OF MAIMONIDES—JUDGES, *supra* note 47, *Evidence* 10:1–5, at 102–05.

¹²⁴ BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 9b (quoting *Exodus* 23:1).

¹²⁵ See KIRSCHENBAUM, *supra* note 46, at 50–51. Another authority has taken the position that Rabbi Joseph intended to disqualify the witness only in the instant case. *Id.* at 164 n.13 (citing S. Shkop, *Kethuboth* 18:4–5). Yet another has suggested the converse, that Rabbi Joseph wished to accept the present testimony of the witness and disqualify him thereafter. E. LANDAU, NODA BI'YEHUDA, EVEN HAEZER SECTION, *Tshuva* 72 (1776). The Shkop and Landau writings are in Hebrew and remain untranslated.

¹²⁶ The passage from Rashi reads as follows:

"Raba said"—A person is not disqualified from testifying by his own admission. for a person is related to himself. Therefore, a person cannot make himself a "*rasha*." That is to say, regarding testimony about himself he does not become a "*rasha*," for indeed the Torah disqualified a relative from testifying. And the sodomizer is killed, for we partition the statement, and we believe him about his confederate, and we do not believe him about himself to disqualify him from testifying. BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 9b (Rashi commentary); see also LOUIS JACOBS, THE TALMUDIC ARGUMENT 168–73 (1984). Rabbi Jacobs writes:

[O]n the question of *palginan be-dibbura* [bifurcation of testimony] R. Joseph and Rava disagree. R. Joseph rejects the *palginan be-dibbura* principle, hence since A's testimony regarding his own participation is rejected the whole of the testimony is rejected. Rava, on the other hand, does accept the *palginan be-dibbura* principle, hence while A's testimony regarding his own willing participation is rejected, the rest of the testimony stands that C has committed sodomy and C is convicted on the strength of A and B's testimony.

Id. at 170. Rabbi Jacobs transliterates the Sage's name as "Rava," while we have adopted the transliteration "Raba" used in BABYLONIAN TALMUD, *supra* note 48, from which our citations and quotations are taken. The spellings differ because in Hebrew there is a single letter which is either a "b" or a "v" depending on whether it is vocalized.

¹²⁷ The rules regarding bifurcation of testimony are very difficult. It is, for example, not always possible to bifurcate. A Tosafot commentary in the Talmud analyzes and gives numerous examples of the rule prohibiting bifurcation of testimony that relates exclusively to a single person, known as the "one body" rule. See BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 9b (Tosafot commentary). Its apparent rationale is that it is illogical to admit one portion of an individual's statement about himself while excluding another portion thereof—in contradistinction to the case referred to in the Gemara text of *Sanhedrin* 9b, in which bifurcation would be permitted because the witness's testimony relates both to himself and another, to wit, the defendant. There is thus arguably nothing illogical in accepting his testimony about the witness but rejecting the testimony about himself.

One of the cases that the Tosafot use to prove the "one body" exception is found in BABYLONIAN TALMUD, *supra* note 48, *Kethuboth* 18b. It concerns witnesses to a contract who thereafter claim that they were forced to sign the document. The law is that a threat of death is a valid basis for acceding to the pressure and signing the contract as a witness, and that consequently the witness's claim of such a threat is a proper reason for subsequently invalidating the agreement. Threats of economic injury are not, however, a valid excuse for the witness to sign the contract, and therefore statements by the signer that economic threats were made are not believed, because crediting them would render the witness a *rasha* or evil person. Raba, who is involved in this Gemara discussion, does not ask what appears to be a critical question, namely, why such a witness's testimony cannot be bifurcated, so that his testimony verifying the signature is believed, but references to monetary coercion are disregarded. The Tosafot rely on Raba's failure to raise this question as proof that Raba adhered to the "one body" exception to the bifurcation principle.

The above Tosafot commentary also quotes another Gemara as support for the "one body" exception. See BABYLONIAN TALMUD, *supra* note 48, *Baba Batra* 134b. This Gemara deals with the case of a husband who claims that he previously divorced his wife. If such testimony for some reason cannot be believed, can it nonetheless be accepted prospectively, that is, can the woman be considered divorced from the date of his

statement? Two Sages disagree about the divisibility of his testimony. One asks, is this case not the same as the one given by Raba in which bifurcation was permitted? In Raba's case, a husband testified that X committed adultery with his (the husband's) wife, and the husband and another witness were allowed to combine their testimony so as to bring about the adulterer's conviction, but not the wife's. The husband is a relative of the wife, and his testimony as to her is consequently disqualified, but his bifurcated testimony as to X is allowed as a basis for the latter's conviction. The Gemara explains the distinction between the adultery case and the divorce case as follows: "In [the case of] two individuals we [may] divide [a statement]; in [the case of] one individual [it is possible that we may] not divide." *Id.*

¹²⁸ BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 24b–25a.

¹²⁹ *Id.*, *Sanhedrin* 25a.

¹³⁰ See THE CODE OF MAIMONIDES–JUDGES, *supra* note 47, *Evidence* 12:2, at 108. Maimonides writes: "[I]f A testifies that B loaned money on interest, and C testifies, "He [B] made a loan to me on interest," B is disqualified on the evidence of A and C. As to C, though he admits that he contracted a loan on interest, he cannot incriminate himself. He is accounted trustworthy with regard to B, but not with regard to himself.

Id.

¹³¹ MISHNAH, *supra* note 56, *Yebamoth* 2:9, at 221, reprinted in BABYLONIAN TALMUD, *supra* note 48, *Yebamoth* 25a.

¹³² See BABYLONIAN TALMUD, *supra* note 48, *Yebamoth* 87b; THE CODE OF MAIMONIDES–JUDGES, *supra* note 47, *Evidence* 5:2, at 92.

¹³³ See MISHNAH (Hebrew, untrans.), *Yebamoth* (Levirate Marriage) 2:9 (1973) (Y. Lipman commentary). This is an untranslated Hebrew commentary on the Mishnah by Rabbi Lipman, a seventeenth century scholar. It is not printed in the Hebrew-English Edition of the BABYLONIAN TALMUD, *supra* note 48, but appears on each page of the standard Hebrew Mishnah, surrounding it just as the Rashi and Tosafot commentaries encircle the Gemara.

¹³⁴ Rabbi Judah would not, however, disqualify the witness if he says, "We killed him." Rabbi Judah interprets that statement to mean that the speaker was merely present together with the actual murderers, BABYLONIAN TALMUD, *supra* note 48, *Yebamoth* 25b, and since there is generally no accomplice liability in Jewish law, the witness is not incriminated.

¹³⁵ *Id.*, *Yebamoth* 25a–25b. If the English word "pederasty," in the second sentence quoted above connotes sodomy with a young boy, the better translation of the Hebrew word *ravani* used in the Gemara is simply "sodomy." See BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 9b.

¹³⁶ It must be understood that the debates memorialized in the Gemara, including the one discussed in the text, may not actually have taken place. The Sages whose positions are recorded often lived not only in different geographical locations, but also in different generations and even in different centuries. As Rabbi Steinsaltz has noted:

R. Ashi's work of editing [the Gemara] did not consist of the summarizing of the discussions of each generation; he created a complex structure and the end result was a kind of symposium of views on halakhic problems, spanning all the generations. . . . The editors aimed at extracting the most important and representative rulings and dicta from the hundreds of thousands recorded and tried to weave them together into a complete fabric.

STEINSALTZ, *ESSENTIAL*, *supra* note 71, at 56–57.

¹³⁷ Mishnaic majority rulings are binding on subsequent generations. See BABYLONIAN TALMUD, *supra* note 48, *Berachot* 9a; *id.*, *Shabbath* 60b; *id.*, *Baba Metzia* 59b. In the *Baba Metzia* passage, the Sages and Rabbi Eliezer were arguing a point of law, and called upon God to decide their dispute. Through a series of supernatural events and, finally, a heavenly voice, God signaled His agreement with Rabbi Eliezer. The Sages nonetheless said that their view was the law, for, once the Torah was given to man, decisions as to the law were to be made by majority rule, as commanded in the Torah itself. God's reaction was to laugh with joy, stating "My sons have defeated Me, My sons have defeated Me." *Id.*

¹³⁸ Cf. THE CODE OF MAIMONIDES–JUDGES, *supra* note 47, *Evidence* 12:1, at 107–08 (noting that requirement of antecedent warning was generally dispensed with in case of person sought to be disqualified as witness, although such warning was prerequisite to criminal prosecution).

Whether or not disqualification for unlawful conduct technically constituted punishment under Jewish law may not be so important, since such a declaration of ineligibility to testify may well have resulted in stigmatization in the community. In this sense at least, disqualification may have constituted punishment.

But see COHN, *supra* note 119, at 176 (stating that potential witnesses actually tried to disqualify themselves from testifying). Further, whether disqualification is viewed as punishment may also depend on the extent of the disqualification, which is a matter of debate. The more extended the disqualification, the more likely it is to be viewed as punishment. In addition, disqualification could have tangible financial repercussions. One who was disqualified as a witness could not take an oath and the inability to do so could result in financial loss. Thus, for example, when goods in the keeping of a gratuitous bailee were allegedly stolen or lost, the bailee could escape liability by swearing that the goods were in fact lost or stolen and that he no longer had them in his possession. *See* BABYLONIAN TALMUD, *supra* note 48, *Baba Metzia* 33b, 35a. If, however, he were unwilling or unable to take this oath, he would be obligated to reimburse the owner for the value of the goods, although in these circumstances the owner would be required to take an oath to prevent him from taking unfair advantage of such a bailee. *See id.*, *Baba Metzia* 35a (Tosafot commentary). Accordingly, to the extent that potential monetary loss can be considered a form of punishment, the disqualified witness was subject to it.

On the other hand, disqualification can also be seen as merely an adverse consequence or a change of status. Perhaps this very ambiguity as to whether disqualification was truly punishment helps to explain why Rabbi Joseph was willing to disqualify a self-incriminating witness. He simply may not have viewed disqualification as punishment, or as punishment sufficiently severe to be of the same quality as criminal punishment. In cases where the consequences of incriminating testimony would result in true punishment, such as flogging, Rabbi Joseph would not hear such testimony and therefore would not disqualify the witness.

¹³⁹ *See* THE CODE OF MAIMONIDES—JUDGES, *supra* note 47, *Sanhedrin* 18:6, at 52 ("It is a scriptural decree that the court shall not put a man to death or flog him on his own admission (of guilt). This is done only on the evidence of two witnesses.").

There may, however, be one authority who maintained that Raba's statement that no man may make himself a *rasha*, BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 9b, applied only to disqualification of witnesses. Solomon ben Simeon Duran (the Rashbash), an Algerian rabbi of the fifteenth century, arguably asserted that a person's confession may serve as the basis for a criminal conviction, but the proofs that be offered in support of this thesis may be instances of exercise of the emergency power of the rabbinical courts. SEFER HARASHBASH, *RESPONSA* 531–32, 544 (Livorno ed. 1968) (untranslated); *see also* KIRSCHENBAUM, *supra* note 46, at 68–72 (discussing Rashbash's thesis). The Rashbash's work forms part of the *responsa* literature, which consists of legal opinions by leading scholars of various generations offered in response to specific questions or cases posed by rabbis.

Dean Enker interprets the Rashbash *responsa* as saying merely that the maxim prohibiting a person from making himself a *rasha* applies only to witness disqualification, whereas the prohibition against confessions in criminal cases stems from the two-witness rule. *See* Enker, *supra* note 46, at cxi. The Rashbash *responsa* in question are sufficiently ambiguous to be susceptible to either the Kirschenbaum or the Enker interpretation.

¹⁴⁰ Both of these factors—reliability and the nature of disqualification—must be present, since, even if the statement is reliable, we would not inflict ordinary punishment on a witness making incidental self-inculpatory statements.

¹⁴¹ We are just as concerned in both cases that the confession may not be trustworthy. Indeed, we may be even more suspicious of someone who attempts to initiate charges against himself by confessing, than of one who admits to a crime after having been charged. In addition, the possibility of criminal punishment is the same in both cases.

¹⁴² If the court had been willing either to disqualify or to inflict a punishment such as flogging on the basis of a *sua sponte* confession, an admission with fewer indicia of reliability than that of a self-inculpatory witness, who is subject only to disqualification, then the confession of the latter would, *a fortiori*, be admissible. The failure to use the former as an example in *Sanhedrin* 9b tells us that a *sua sponte* confession is inadmissible.

¹⁴³ *See* BABYLONIAN TALMUD, *supra* note 48, *Makkoth* 5b; *see also* THE CODE OF MAIMONIDES—JUDGES, *supra* note 47, *Evidence* 5:5, at 92 ("If among the would-be witnesses is one who is a kinsman or ineligible for other reasons, the entire evidence is null."). Rabbi Hirsch wrote:

[A] larger number united to give the same evidence form an undivisible unit just as two do. . . .

[I]f amongst three or a hundred witnesses united to give evidence, only one is found to be ineligible on account of relationship to the accused or on any other count, the whole evidence

(treated as one unit . . .) is inadmissible just as it would be if it consisted of only two witnesses.

5 SAMSON HIRSCH, THE PENTATEUCH TRANSLATED AND EXPLAINED: *DEUTERONOMY* 17:6, at 322 (I. Levy trans., 2d ed. 1971) [hereinafter HIRSCH'S *DEUTERONOMY*].

¹⁴⁴ See BABYLONIAN TALMUD, *supra* note 48, *Makkoth* 5b.

¹⁴⁵ MISHNAH, *supra* note 56, *Makkoth* 1:7–8, at 402, *reprinted in* BABYLONIAN TALMUD, *supra* note 48, *Makkoth* 5b.

¹⁴⁶ BABYLONIAN TALMUD, *supra* note 48, *Makkoth* 5b; RASHI'S COMMENTARY ON CHUMASH, *supra* note 48, *Deuteronomy* 17:6, at 89. Rabbi Akiba's initial explanation was that inclusion of the reference to the third witness was necessary to make it clear that if a group of three witnesses were found to be perjurers (*zomemim*), the liability of the third witness would be just as severe as that of the first two. After this observation, the Mishnah gives the rule regarding disqualification of all witnesses if one is found to be a kinsman or is otherwise disqualified. It is not absolutely clear from the Mishnah itself whether it is Rabbi Akiba or the Mishnah majority who offer this as an alternative rationale for the Scriptural reference to three witnesses. The Gemara discussion, however, suggests that Rabbi Akiba is the author of the statement in question. BABYLONIAN TALMUD, *supra* note 48, *Makkoth* 6a.

¹⁴⁷ BABYLONIAN TALMUD, *supra* note 48, *Makkoth* 6a (R. Papa observed to Abaye: "But, then, [admitting such extreme pretexts against capital punishment] let the very presence of the murdered man himself [at the murder] save [the delinquent from the death penalty]?").

¹⁴⁸ *Id.* ("Abaye remained silent").

¹⁴⁹ *Id.* (emphasis in translation).

¹⁵⁰ The Rashi commentary on Raba's statement is: "'Shall the matter be established'—It is written in this verse that [the Torah] makes all of them [the witnesses] equal to two, that is to say, the witness, but not the ones who do the thing." BABYLONIAN TALMUD, *supra* note 48, *Makkoth* 6a. The thrust of this commentary is that it is the very same biblical verse disqualifying all witnesses as a unit that also teaches us that it is referring only to witnesses and not to perpetrators.

¹⁵¹ Alternatively, the same ruling could flow from a law generally requiring that persons constituting a group of witnesses have the intent to act in that capacity. See THE CODE OF MAIMONIDES—JUDGES, *supra* note 47, *Evidence* 5:5, at 92–93. Maimonides' analysis is as follows:

When many witnesses constituting one group appear in court, they are asked, "When you came to the scene of the murder, or of the assault, was it with the intention of giving evidence or for the purpose of looking on?" Those who reply that they had come with the crowd as mere spectators are placed on one side; those who declare that it was their purpose to act as witnesses, to give accurate information, are placed on another side. If among the would-be witnesses is one who is a kinsman or ineligible for other reasons, the entire evidence is null.

This obtains only if among the would-be witnesses is one who is a kinsman or ineligible for other reasons, but if all are eligible, even those who did not intend to testify are included among the witnesses and the case is decided on their evidence, seeing that they have been eyewitnesses of what has taken place and are in a position to give accurate evidence, and the culprit has received due warning.

Id.; see also BABYLONIAN TALMUD, *supra* note 48, *Makkoth* 6a (distinguishing "mere onlookers" from those who intended to act as witnesses).

What constitutes a "group" of witnesses within the meaning of Maimonides' analysis is often a nice question. See, e.g., MISHNAH, *supra* note 56, *Makkoth* 1:9, at 402–03, *reprinted in* BABYLONIAN TALMUD, *supra* note 48, *Makkoth* 6b. Consider the following analysis:

If two persons see the malefactor from one window and two other persons see him from another window and one standing midway utters the pre-admonition to him, then, if some on one side and some on the other side can see one another, they constitute together one body of evidence, but if they cannot [partly see one another], they are two bodies of evidence.

Id.

¹⁵² BABYLONIAN TALMUD, *supra* note 48, *Makkoth* 6a.

¹⁵³ See TALMUD (Hebrew ed.), *Makkoth* 50 (Rabad commentary, as quoted by Rosh commentary 2:13) (the Rabad was Abraham ben David of Posquieres, a twelfth century Talmudist who lived in France). The Rabad is discussing a dispute in the Talmud involving these facts: A and B, who were close kinsmen to a loan guarantor, had evidence concerning the loan transaction, and the question was whether they might testify in an action between the debtor and creditor. BABYLONIAN TALMUD, *supra* note 48, *Makkoth* 7a.

Rabbi Papa said that their testimony was admissible because they were unrelated to either party to the litigation. Rabbi Huna disagreed, noting that if the debtor could not pay, the creditor would look to the guarantor for reimbursement. One might ask, could not the testimony of A and B be bifurcated, so as to reject that portion of their evidence relating to the guarantor? The Rabad says that if a witness is disqualified because of the problem of relationship, then his entire testimony is nullified. This is in contradistinction to the testimony that a person gives about himself, concerning which the Gemara says that he cannot make himself a *rasha*, or evil person. Bifurcation is permissible when one is purporting to give evidence about oneself, because that is not testimony. A person vis-à-vis himself is not considered an unfit witness. If he were an unfit witness, then his entire testimony, and that of all others in the group, would be completely nullified. Rather than being a witness, a person who is testifying about himself is like a party, one who establishes the matter. For further discussion of the Rabad's position, see ISADORE TWERSKY, *RABAD OF POSQUIERES* 65 n.112 (rev. ed. 1980).

¹⁵⁴ Cf. LEVY, *supra* note 3, at 433 ("Talmudic criminal procedure was strictly accusatorial in character, reflecting a humane concern for life and liberty.").

¹⁵⁵ According to the Encyclopedia Talmudica, there are two theories for disqualifying a person's testimony; one based on the kinsmen rule, and the other on the proposition that a person's testimony about himself does not constitute legal evidence. 1 ENCYCLOPEDIA TALMUDICA 244, 246–48 (1969) ("A man is considered a relative of himself"). The biblical source for the former conception is *Deuteronomy* 24:16. The source for the latter is *Deuteronomy* 19:15, the two-witness rule. A third possible basis for disqualification—perhaps a variant of the second—is that the wrongdoer did not "really intend to appear before the court in the capacity of witness against himself." 1 ENCYCLOPEDIA TALMUDICA, *supra*, at 246. The consequences differ depending on which theory is accepted. Thus, consider whether the defendant's self-incriminating statements should invalidate the other testimony offered against him. Under the view that disqualification occurs because the accused is a kinsman, his testimony effectively invalidates the other evidence offered. Under the theory that self-incriminating evidence does not constitute testimony at all, the witness's statements have no such effect. Under the third theory, defendant's lack of intention to act as a witness would presumably separate him from the group of witnesses and hence his evidence would not affect the validity of theirs.

¹⁵⁶ See Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. Davis L. Rev. 1487, 1533. There appears to be no *per se* constitutional impediment to conviction based on uncorroborated accomplice testimony. See, e.g., *United States v. Augenblick*, 393 U.S. 348, 352 (1969) (accomplice testimony governed by statutory rules of evidence which "do not customarily involve constitutional questions"). In individual cases, however, the reasonable doubt standard might mandate reversal. Cf. *Jackson v. Virginia*, 443 U.S. 307 (1979) (holding that *In re Winship*, 397 U.S. 358 (1970), requires appellate and habeas courts to apply reasonable doubt standard when reviewing sufficiency of the evidence claims).

¹⁵⁷ See MISHNAH, *supra* note 56, *Sanhedrin* 5:1–4, at 388–89, reprinted in *BABYLONIAN TALMUD*, *supra* note 48, *Sanhedrin* 40a. There were two categories of questions that judges put to witnesses, inquiries or *hakiroth*, that is, as to date, time, and place of the crime, and *bedikoth*, or cross-examinations as to circumstances surrounding the offense. Inconsistencies between witnesses, even as to seemingly inconsequential matters, could result in disqualification of their evidence. The Mishnah explains: They [the judges] used to examine them with seven [*hakiroth*] searching queries: In what septennate? In what year? In what month? On which day of the month? On what day? At what hour [of the day]? And, at what place?

. . . The more exhaustive the cross-examination [*bedikoth*] the more praiseworthy the judge. It once happened that Ben Zakkai cross-examined [the witnesses] even as to the stalks of the figs. What is the difference between *hakiroth* and *bedikoth*?—In *hakiroth*, if one [of the witnesses] answers: 'I do not know,' their evidence is void. With respect to *bedikoth*, however, if one answers: 'I do not know,' or even if both say: 'We do not know,' their evidence is valid. But if they [the witnesses] contradict each other, whether in the *hakiroth* or the *bedikoth*, their evidence is void. *Id.*; accord THE CODE OF MAIMONIDES—JUDGES, *supra* note 47, *Evidence* 1:4–2:5, at 82–85.

¹⁵⁸ Under Talmudic law, a witness's testimony is either accepted or rejected *in toto*; it may not be viewed as partially accurate and partially inaccurate. This rule is implicit in the Mishnaic system of inquiries and cross-examinations. Cf. THE CODE OF MAIMONIDES—JUDGES, *supra* note 47, *Sanhedrin* 24:1, at 72 ("[W]hy does the Torah require two witnesses? The answer is: when two witnesses give testimony, the judge is

bound to decide on their evidence, although he does not know whether the evidence submitted by them is true or false." In addition, the Gemara describes the case of a woman who remarries after two witnesses have testified that her husband was dead, following which the allegedly dead man appears in court. BABYLONIAN TALMUD, *supra* note 48, *Yebamoth* 88a. Tosafot ask: What difference should the husband's appearance make, since two witnesses have already testified that he died? Tosafot respond that, where the proper resolution of an evidentiary question becomes obvious to the whole world, we do not say that the contrary testimony of two witnesses nonetheless remains the strongest proof. The implication is that in any other circumstances, the testimony of two witnesses is dispositive. *Id.* (Tosafot commentary).

¹⁵⁹ One might have opted for this result on the theory that the extensive interrogation procedure was foolproof, and that it was therefore unnecessary for judges to conduct such elaborate examinations, since all accomplices would inevitably fail and be disqualified. Automatic disqualification of accomplices could thus be justified on considerations of judicial economy. However, the numerous laws dealing with perjurious and plotting witnesses show that the Sages recognized that mistakes could be made. *See, e.g.*, BABYLONIAN TALMUD, *supra* note 48, *Makkoth* 5a (describing how witnesses are condemned as perjurers). There is yet another reason to think that Rabbi Joseph's rule might not have rested on the premise that judicial interrogation was foolproof. The premise leads to the logical conclusion that if an accomplice passed the rigorous cross-examination tests, he would be permitted to testify against his confederate. This conclusion would place Rabbi Joseph in agreement with Raba on the issue of bifurcation, and as we have learned, they disagreed on this point.

¹⁶⁰ It might be argued that there should be no objection to such testimony, because an accomplice who passed the stringent tests of inquiry and cross-examination would theoretically no longer be suspect. However, one could take the position that all accomplice testimony was irremediably tainted, and that, because the cross-examination procedure was not foolproof, automatic disqualification was the only way to assure that an accomplice did not somehow slip through the elaborate interrogation process.

¹⁶¹ Raba's approach would also have the salutary effect of preventing individuals from disqualifying themselves as witnesses. Under *Leviticus* 5:1, witnesses to crime were required to testify in court. Being a witness was a grueling experience and entailed awesome responsibilities. *See* THE CODE OF MAIMONIDES—JUDGES, *supra* note 47, *Sanhedrin* 12:3, at 34–36; *id.*, *Evidence* 1:1–6, at 82–84. The witness was subjected to a searching inquiry and cross-examination, and was charged by the court that he would be held "accountable for the blood of the man and the blood of his (potential) posterity until the end of time." *Id.*, *Sanhedrin* 12:3, at 35. Finally, in capital cases it was the duty of the witnesses to execute the defendant. *Id.*, *Sanhedrin* 13:1, at 37.

Just as many in our society try to avoid the often considerably less onerous task of jury service by claiming bias and the like, people of the Talmudic era might have tried to escape serving as witnesses by making incriminating statements concerning relatively minor offenses. Raba's bifurcation theory prevented that tactic. *See* COHN, *supra* note 119, at 176.

A possible adverse effect of Raba's approach, however, might be to encourage a sort of race to the courthouse. To escape punishment, each of the accomplices might be willing to initiate charges against his confederate and, together with another person, testify against him. If his adverse testimony against the confederate was accepted and the confederate was convicted, the latter would become a *rasha* and would be disqualified from future testimony against the initial accuser. If there were not two additional witnesses, the testifying accomplice might then go free. This possibility resembles modern plea bargaining and immunity practices, which also give the advantage to the first confederate to turn state's evidence.

¹⁶² *See* Wong Sun v. United States, 371 U.S. 471, 489 n.15 (1963); 7 WIGMORE, *supra* note 88, § 2056, at 404–17.

¹⁶³ *See* 7 WIGMORE, *supra* note 88, § 2056, at 414.

¹⁶⁴ *See id.*

¹⁶⁵ Clearly, however, Raba must have formulated his position with the Biblical two-witness rule in mind. *Cf.* BABYLONIAN TALMUD, *supra* note 48, *Makkoth* 6a (where Raba, in another context, cites to the two-witness rule of *Deuteronomy* 19:15).

¹⁶⁶ *Cf.* 7 WIGMORE, *supra* note 88, § 2059, at 421–22 ("It is usually said that the testimony of *another accomplice* is not sufficient; yet the circumstances may sometimes render it sufficiently trustworthy.").

¹⁶⁷ *Cf.* BABYLONIAN TALMUD, *supra* note 48, *Taanith* 24b (referring to a case in which a man sentenced to flogging by Raba died as a result).

¹⁶⁸ *See* Louis Jacobs, *How Much of the Babylonian Talmud Is Pseudepigraphic?*, 28 J. JEWISH STUD. 46,

46 (1977) ("Statements are attributed to teachers in such a way as to demonstrate beyond doubt that these teachers held consistent views which can frequently be seen to have been occasioned by the particular conditions obtaining in a particular time."); *see also* STEINSALTZ, ESSENTIAL, *supra* note 71, at 244. Rabbi Steinsaltz notes:

In various centers, particularly Hungary, the method of *leshitato* was developed. It was an attempt to expound the teaching of the mishnaic and talmudic sages by compiling material of a single personality from various sources and using a certain degree of *pilpul* to link it together. This method is ancient, and the Talmud itself often engages in the same elemental clarifications to find the common denominator in the theories of a particular scholar on dissimilar issues.

Id.

¹⁶⁹ *See* STEINSALTZ, ESSENTIAL, *supra* note 71, at 246–50.

¹⁷⁰ There are also quite specific principles for resolution of disputes between Gemara Sages. For example, in a debate between Rabbi Huna and Rabbi Nachman, the views of the former prevail in matters of ritual law, and those of the latter in civil law. MEIR ZVI BERGMAN, GATEWAY TO THE TALMUD 96 (Nesanel Kasnett trans., Tzvi Zev Arem ed., 1985). When Rabbi Joseph argued with Rabbah, "based on their analyses of the issues, and not upon traditions they received from their teachers," the law follows Rabbah except in three instances. *Id.*

Note that the Rabbah discussed here is not the same as the Raba with whom Rabbi Joseph debated concerning self-incrimination. There are a number of identical or nearly identical names sounding like "our" Raba, and it is only possible to keep score by knowing the Hebrew spellings and the names of their fathers, or by looking to context and chronology.

¹⁷¹ *Id.* at 97. There is a different set of rules for the Sages of the Mishnaic era. In addition, there are general rules for determining law that are applicable to both the Mishnah and Gemara, as well as general rules based on the terminology used in the Talmud. *See id.* at 92–98.

¹⁷² *Id.* Rabbi Steinsaltz notes that the reason for this change with respect to student-teacher disputes was that prior to Raba's generation, scholars had largely engaged in studying traditions handed down by their teachers, whereas Raba and his colleague Abaye, who engaged in literally hundreds of debates, focused more on critical analysis, individual research, and the development of new methods of learning. Therefore, the conclusions of later generations able to examine prior learning were deemed to be of greater significance. STEINSALTZ, ESSENTIAL, *supra* note 71, at 46.

¹⁷³ *See* BABYLONIAN TALMUD, *supra* note 48, *Hullin* 133a; ALFRED KOLATCH, WHO'S WHO IN THE TALMUD 177 (rev. ed. 1981). Rabbi Joseph was a wealthy landowner and head of a major Babylonian academy of learning. He became blind and was referred to as *Sinai* because of his prodigious memory and knowledge of all the law. The illness which apparently caused Rabbi Joseph's blindness also led him to lose his memory and forget all his learning, but his disciple Abaye restored it to him. BABYLONIAN TALMUD, *supra* note 48, *Nedarim* 41a. Known for his wit, Rabbi Joseph stated on his sixtieth birthday: "No matter how much I misbehave now, I will never die young." KOLATCH, *supra*, at 146; *see also* BABYLONIAN TALMUD, *supra* note 48, *Kiddushin* 31a; *id.*, *Berakoth* 64a.

His student, Raba, also wealthy and the head of a famous academy, emphasized logical reasoning and inference. He was well known for his kindness. A story is told that Raba refused to accept the return of property stolen from him after it had been recovered from thieves, stating that since the thieves had risked their lives in taking his property, it should belong to them. *See* KOLATCH, *supra*, at 178; STEINSALTZ, ESSENTIAL, *supra* note 71, at 45–46.

¹⁷⁴ *See* JOSEPH CARO, BEIT YOSEF COMMENTARY ON THE *TUR SHULCHAN ARUCH*, *Hoshen Mishpat* 34:37. This is not to denigrate Rabbi Joseph's position, for, as was said in the oft-quoted characterization of the disputes between the disciples of Hillel and those of Shammai:

'[The utterances of] both are the words of the living God, but the *halachah* [law] is in agreement with the rulings of Beth [the house of] Hillel. Since, however, 'both are the words of the living God' what was it that entitled Beth Hillel to have the *halachah* fixed in agreement with their rulings?—Because they were kindly and modest . . .

BABYLONIAN TALMUD, *supra* note 48, *Erubin* 13b.

¹⁷⁵ *See* KIRSCHENBAUM, *supra* note 46, at 78–81 (giving various explanations for believing defendant's admission in civil monetary case).

¹⁷⁶ This rule freely permitting admissions in civil monetary cases did not mean that the Sages believed that individuals valued their money more than their lives, and that a person admitting civil liability was less

likely to lie in this regard. Even where it was clear that the confession in a criminal case was credible, it remained inadmissible. Thus, the differing treatment of admissions need not have stemmed from competing assessments of veracity in the two contexts.

¹⁷⁷ Indeed, it appears at times that American law places greater restrictions on an individual's power to effect transfers of property than on his or her ability to relinquish life or liberty by confessing to the commission of a crime. *Compare* *Colorado v. Connelly*, 479 U.S. 157 (1986) (holding that it did not violate Due Process for state to admit confession of severely mentally ill criminal defendant absent coercive police conduct) *and* *Schuessler v. State*, 719 S.W.2d 320 (Tex. Crim. App. 1986) (reinstating rejection by jury of insanity defense after reversal of murder conviction by intermediate appellate court, and leaving undisturbed intermediate court's holding that volunteered confession was admissible) *with* *Graham v. Darnell*, 538 S.W.2d 690 (Tex. Civ. App. 1976) (affirming denial of application to admit wills to probate based on lack of testamentary capacity due to insane delusions of testator).

¹⁷⁸ The rabbinic courts had the power, in certain instances, to refer cases to the royal courts, where not all of the stringent rules applied or to turn the defendant over to the blood avenger. In such cases the court would, in effect, divest itself of jurisdiction.

Our focus is the criminal justice process and consequently we do not discuss confessions in other Jewish legal contexts. For instance, we do not consider whether a confession could disqualify a person from taking an oath that would release him from financial liability. *See* BABYLONIAN TALMUD, *supra* note 48, *Baba Metzia* 33b (confession would not disqualify person from taking oath that would release him from financial liability). Nor do we discuss how a confession of religious infractions could affect one's status in the eyes of the law. For example, a priest whose wife confessed to unfaithfulness was originally required to divorce her; later, however, the Sages required the wife to provide proof corroborative of her confession. This was to prevent her from securing a divorce by simply confessing, so that she could marry another man. *See* MISHNAH, *supra* note 56, *Nedarim* 11:12, at 280, *reprinted in* BABYLONIAN TALMUD, *supra* note 48, *Nedarim* 90b; *see also* KIRSCHENBAUM, *supra* note 46, at 95–129 (discussing range of applicability of rule against self-incrimination and effect of corroborating factors accompanying confessions).

¹⁷⁹ Even in the case of the first two misdeeds that occurred without acknowledgment of warnings, the defendant was not allowed to emerge completely unscathed, however. The rabbis were empowered to administer "disciplinary" beatings in such circumstances. *See* THE CODE OF MAIMONIDES—JUDGES, *supra* note 47, *Sanhedrin* 18:5, at 2. Maimonides states:

If a man commits a transgression involving the penalty of excision or that of death by order of the court and due warning was given him but he nodded his head or remained silent, i.e., he did not (explicitly) accept the warning, he is not put to death, . . . nor is he flogged. If he commits the transgression a second time, after due warning was given him and he nodded his head or remained silent, he is not put to death, nor is he flogged. If he commits the transgression a third time after due warning, even if he nodded his head or remained silent, he is put in a prison cell and kept there until he dies.

All who refuse to accept warning incur the penalty of disciplinary beating, for, at all events, they are guilty of a transgression. Even one who disregards a rabbinical prohibition suffers beating for disobedience.

Id. Maimonides thus appears to have extended the Gemara to include offenses punishable by court-ordered death, although he makes no reference to the use of barley bread to hasten the defendant's demise.

¹⁸⁰ *See* THE CODE OF MAIMONIDES—TORTS, *supra* note 95, *Murder and the Preservation of Life* 4:8, at 207 (third response is "if one commits murder in the presence of witnesses without first receiving a warning"). *But see* BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 9:5 (Bartenura commentary) (asserting that the Mishnah is referring to an insufficient warning, rather than no warning at all).

¹⁸¹ *See* *Exodus* 21:13–14.

¹⁸² *See* HIRSCH'S *DEUTERONOMY*, *supra* note 143, at 318–19. Here, it is noted:

A crime [could] only reach judicial recognition if [it] . . . had been committed with the consciousness that thereby one was . . . breaking His covenant [,that is,] if the criminal at the moment of committing the crime had in mind the declaration of the Torah that it was forbidden and the judicial punishment that it entailed[,] . . . [a] condition that could only be proved . . . by the witnesses having warned the criminal of it at the moment he was about to commit it, and by the latter's . . . having declared that nevertheless and in spite of the consequences he would still do it.

Id.; see also COHN, *supra* note 119, at 229. Justice Cohn points out that the requirement that every offender have been warned by two witnesses that the act he was about to commit was a criminal offense was "not only the most potent safeguard against retrospective criminal legislation, but also the most liberal measure to ensure that the *mens rea* of the accused do comprise, in addition to the intention to commit the act which constitutes the offense, an actual intention to break the law." *Id.* Under this view, therefore, mistake or ignorance of the law is always a complete defense. On the other hand, in American law such ignorance is generally irrelevant. See, e.g., *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558 (1971). However, where the statute specifically includes knowledge of the law as a material element of the crime, ignorance thereof will be a defense. *Liparota v. United States*, 471 U.S. 419 (1985).

¹⁸³ Rashi's commentary runs as follows:

"On a 'disjoined' evidence"—That two testified concerning him, and their testimony is true, but the court is unable to execute him [due to a technical reason]. For example, two see him, one from this window, and one from that window, as it said in *Makkoth* 6b, that he cannot be executed on it [that testimony]. And nevertheless we learn here in this Mishnah that we put him in a cell. But according to the testimony of only one witness, it is considered only the dissemination of gossip.

"As to the stalks of figs"—These are extra inquiries. Granted that ben Zakkai exempted him [the defendant] from being killed [by virtue of] this inconsistency [see BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 40a]. However, it is still considered true testimony, and he goes to jail.

BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 81b (Rashi commentary).

¹⁸⁴ Cf. BABYLONIAN TALMUD, *supra* note 48, *Kiddushin* 65a–65b. In this passage, the Sages are arguing about the validity of a marriage in which, instead of the two witnesses normally required, there is only the testimony of a single witness plus the acknowledgment of the putative husband and wife. One of the Sages says that such a purported marriage may be "disregarded," whereas another states that it is necessary to "pay heed" to the betrothal. *Id.* Rashi's commentary indicates that the betrothal is not accepted because two witnesses are an integral part of the marriage itself. *Id.* (Rashi's commentary). A possible implication flowing from his suggestion is that in other contexts, where two witnesses are necessary only for clarification or confirmation, such evidence of one witness and an interested party might be sufficient.

¹⁸⁵ Maimonides stated that

[t]his [barley bread punishment], however, is not done to other persons guilty of crimes involving the death penalty at the hand of the court; rather if one is condemned to death, he is put to death, and if he is not liable, he is allowed to go free. For although there are worse crimes than bloodshed, none causes such destruction to civilized society as bloodshed" If one has committed this crime, he is deemed wholly wicked

See THE CODE OF MAIMONIDES—TORTS, *supra* note 95, *Murder and the Preservation of Life* 4:9, at 207.

¹⁸⁶ For the orthodox Jew, the question of rationale is, at least in one sense, less problematic. At the risk of oversimplification, the traditional view is that Jewish law embodies an absolute prohibition against the use of confessions in criminal and quasi-criminal cases because God has so decreed, and the interpretations of the two-witness rule and the kinsmen rule come from the oral tradition received by Moses. Faith does not, however, preclude intellectual grappling with such issues.

¹⁸⁷ Lawyers themselves were not, however, viewed with great favor in the Talmudic system, the fear being that they would corrupt justice. See MISHNAH, *supra* note 56, *Aboth* 1:8, 4:5, at 447, 453, reprinted in BABYLONIAN TALMUD, *supra* note 48, *Aboth* 5b; AARON SCHREIBER, *JEWISH LAW AND DECISION-MAKING* 391 (1979). The attorney's functions appear to have been exercised by the judges.

¹⁸⁸ Conviction could be only for specifically forbidden offenses. See BABYLONIAN TALMUD, *supra* note 48, *Makkoth* 5b ("No penalty is inflicted on the strength of a logical inference.").

¹⁸⁹ See BABYLONIAN TALMUD, *supra* note 48, *Baba Kamma* 114b; *id.*, *Yebamoth* 39b.

¹⁹⁰ See MISHNAH, *supra* note 56, *Sanhedrin* 3:3, 3:4, at 385, reprinted in BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 24b, 27b (disqualifying evil persons, kinsmen); *id.*, *Makkoth* 1:8, at 402, reprinted in BABYLONIAN TALMUD, *supra* note 48, *Makkoth* 6a (disqualifying persons related to one another); *id.*, *Shevuoth* 4:1, at 413, reprinted in BABYLONIAN TALMUD, *supra* note 48, *Shevuoth* 30a (disqualifying women); BABYLONIAN TALMUD, *supra* note 48, *Baba Batra* 43a (disqualifying persons interested in the outcome); *id.*, *Baba Batra* 155b (disqualifying youths); *id.*, *Baba Batra* 128a (disqualifying insane, blind, and deaf persons); *id.*, *Gittin* 71a (disqualifying deaf-mutes). See generally THE CODE OF MAIMONIDES—JUDGES, *supra* note 47, *Evidence* 9:1–15:6, at 100–17 (describing ten classes of ineligible witnesses).

¹⁹¹ See BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 80b. There is a dispute in this Gemara as to whether the witnesses must have informed the accused of the specific death penalty that he would receive if he committed the crime. *Id.*

¹⁹² See BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 30a; *id.*, *Kethuboth* 26b; *id.*, *Gittin* 33b.

¹⁹³ See THE CODE OF MAIMONIDES–JUDGES, *supra* note 47, *Sanhedrin* 20:1, at 60. Maimonides states: The court does not impose the penalty of death on mere conjecture but on the conclusive testimony of witnesses. Even if the witnesses saw him (the assailant) chasing the other, gave him warning, and then lost sight of him, or they followed him into a ruin and found the victim writhing (in death agony), while the sword dripping with blood was in the hands of the slayer, the court does not condemn the accused to death, since the witnesses did not see him at the time of the slaying. Concerning this and similar cases, Scripture says: And the innocent and righteous slay thou not (Exodus 23:7).

Id. The Talmudic passage on which Maimonides' hypothetical is based, alludes simply: "If this is what ye saw, ye saw nothing." BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 37b.

¹⁹⁴ See, e.g., MISHNAH, *supra* note 56, *Baba Kamma* 6:4, at 339–40, reprinted in BABYLONIAN TALMUD, *supra* note 48, *Baba Kamma* 59b; BABYLONIAN TALMUD, *supra* note 48, *Shabbath* 3a, 92b–93b; *id.*, *Kiddushin* 42b (discussing Mishnah of *Baba Kamma* 59b). *Baba Metzia* 43a gives an example of an exceptional case in which a form of vicarious liability was imposed: where the treasurer of the Temple gives loose money to a money changer who then uses it, both are guilty of misuse of Temple funds. BABYLONIAN TALMUD, *supra* note 48, *Baba Metzia* 43a.

The Torah defines as a crime the seduction of another into idolatry. *Deuteronomy* 13:7–12; see MISHNAH, *Sanhedrin* 7:4, 7:10, at 391–92, 393, reprinted in BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 67a. While this may appear to be an instance of accomplice liability, it is not; liability is based on what the seducer himself did, rather than on the basis of the acts of the seduced party.

¹⁹⁵ See BABYLONIAN TALMUD, *supra* note 48, *Kiddushin* 40a; cf. MISHNAH, *supra* note 56, *Baba Metzia* 3:12, at 352, reprinted in BABYLONIAN TALMUD, *supra* note 48, *Baba Metzia* 43b (school of Shammai makes bailee liable for damage to bailment from moment he forms intent to misappropriate, whereas prevailing school of Hillel renders bailee liable only after actual misappropriation).

¹⁹⁶ If a defendant committed an act that, at the moment of its commission, constituted a violation of two laws, the lesser punishment was absorbed into the greater. If, however, liability for the two violations did not occur simultaneously, the perpetrator was liable for both punishments. See, e.g., BABYLONIAN TALMUD, *supra* note 48, *Shabbath* 91b; *id.*, *Kethuboth* 30a–35b. Similarly, if the same act injured two parties, the defendant was liable for both penalties. See *id.*, *Sanhedrin* 10a.

¹⁹⁷ See LEVY, *supra* note 3, at 433–34 ("If there was anything inquisitorial in the procedure, it was the severe examination by the court of the witnesses for the prosecution, matched by excessively harsh penalties for false or refuted testimony.").

¹⁹⁸ See THE CODE OF MAIMONIDES–JUDGES, *supra* note 47, *Sanhedrin* 2:1–14, at 7–10. In particular: [The following] are eligible to serve as members of the *Sanhedrin*: . . . [those] who are wise men and understanding, that is, who are experts in the Torah and versed in many other branches of learning. . . . Neither a very aged man nor a eunuch is appointed to any *Sanhedrin*, since these are apt to be wanting in tenderness; nor is one who is childless appointed, because a member of the *Sanhedrin* must be a person who is sympathetic

Every conceivable effort should be made to the end that all the members of that tribunal be of mature age, imposing stature, good appearance, that they be able to express their views in clear and well-chosen words, and be conversant with most of the spoken languages, in order that the *Sanhedrin* may dispense with the services of an interpreter.

Id., *Sanhedrin* 2:1, 2:3, 2:6, at 7–8; see also COHN, *supra* note 119, at 198–207 (describing qualifications of judges in Jewish law); Jeffrey I. Roth, *Responding to Dissent in Jewish Law: Suppression Versus Self-Restraint*, 40 RUTGERS L. REV. 31, 50–53 (1987) (discussing capital punishment inflicted against "rebellious judges" who rendered verdicts contrary to mandate of High Court).

¹⁹⁹ MISHNAH, *supra* note 56, *Makkoth* 1:10, at 403, reprinted in BABYLONIAN TALMUD, *supra* note 48, *Makkoth* 7a.

²⁰⁰ Cf. John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 4–5 (1978). Professor Langbein comments:

In the history of Western culture no legal system has ever made a more valiant effort to perfect its

safeguards and thereby to exclude completely the possibility of mistaken conviction [than the medieval Italian Glossators]. But . . . [t]hey had set the level of safeguard too high. . . . Because society cannot long tolerate a legal system that lacks the capacity to convict unrepentant persons who commit clandestine crimes, something had to be done to extend the system to those cases. The two-eyewitness rule was hard to compromise or evade, but the confession rule seemed to invite the "subterfuge" that in fact resulted. To go from accepting a voluntary confession to coercing a confession from someone against whom there was already strong suspicion was a step that began increasingly to be taken. The law of torture grew up to regulate this process of generating confessions.

Id. at 4–5.

²⁰¹ BABYLONIAN TALMUD, *supra* note 48, *Makkoth* 7a (Mishnah) (authors' revision of translation; alternate translation in MISHNAH, *supra* note 56, *Makkoth* 1:10, at 403).

On one level, in this debate, the Rabbis are arguing about the abolition of capital punishment. Yet the admonition of *Deuteronomy* 19:13 not to pity an intentional killer suggests that their dispute is deeper. See Gerald J. Blidstein, *Capital Punishment—The Classic Jewish Discussion*, 14 JUDAISM 159, 167 (1965). In this article, the following questions are posed:

[C]an man's moral insight, an insight implanted by God and further educated by Him, ever become self-reliant? Can man ever be master in his own house? In fact, any slackening of the rigor of the law is censured; again we hear that the universal terminus of such a course is moral bankruptcy. However generous the motive, the perversion of justice is evil, its motivation misguided. The Rabbis feared that true love of humanity could only be undermined by indiscriminate recourse to "mercy," which, as R. Gamaliel pointed out, would deny to an innocent society the concern shown the criminal.

Id.

²⁰² See MISHNAH, *supra* note 56, *Aboth* 2:2, at 447–48, reprinted in BABYLONIAN TALMUD, *supra* note 48, *Aboth* 6b–7a; STEINSALTZ, ESSENTIAL, *supra* note 71, at 25, 28, 98–99.

²⁰³ See, e.g., MISHNAH, *supra* note 56, *Sota* 5:1, at 298, reprinted in BABYLONIAN TALMUD, *supra* note 48, *Sota* 27b (adultery); BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 25a (usury); *id.*, *Yoma passim* (Temple rites).

²⁰⁴ At the same time, however, it should be noted that some of these evidentiary rules governing criminal cases may not have been articulated prior to the destruction of the Second Temple in 70 C.E., see COHN, *supra* note 119, at 229, whereas the *Sanhedrin* had lost jurisdiction of capital cases forty years before that time. See BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 41a; *id.*, *Shabbath* 15a. To this extent, the rules propounded may not have been fully applied by the Sages; they did, however, remain applicable to the cases still within the jurisdiction of the rabbinical courts. See RAMBAN (NACHMANIDES) COMMENTARY ON THE TORAH, *Numbers*, at 398 (Charles B. Chavel trans., 1975) ("Scripture is . . . saying that we should always have, throughout all generations, and even after the destruction [of the Sanctuary], 'a congregation that judges' [i.e., a *Sanhedrin*, or court] in order to adjudicate upon the laws of fines, robberies, personal injury, and all monetary matters, and to deal with the law of forty stripes." (footnote omitted)).

²⁰⁵ *Cf.* *Escobedo v. Illinois*, 378 U.S. 478 (1964). In *Escobedo*, the Court noted:

We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.

Id. at 488–89; see also 5 ENCYCLOPAEDIA JUDAICA, CONFESSION 878, 878 (1971) (noting that, according to Joseph ibn Migash, "if confessions were accorded any probative value at all, courts might be inclined to overrate them, as King David did (II Sam. 1:16), and be guilty of a dereliction of their own fact-finding task").

²⁰⁶ It has been estimated that 90% of all criminal cases in this country culminate in a guilty plea. See, e.g., DONALD NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 (1966). Moreover, the Supreme Court's decisions in this area have gone to considerable length to insulate pleas from subsequent attack. See, e.g., *Tollett v. Henderson*, 411 U.S. 258, 266–67 (1973) (guilty plea made on advice of counsel may not later be changed if plea is knowing and voluntary, which depends on whether counsel's advice was within the standard set forth in *McMann v. Richardson*, 397 U.S. 759, 771 (1970); *Bordenkircher v. Hayes*, 434 U.S. 357, 362–63 (1978) (prosecutor's threat to bring greater charges

if defendant pleads not guilty does not affect voluntary nature of guilty plea). *But see* *Menna v. New York*, 423 U.S. 61 (1975) (plea of guilty does not waive antecedent double jeopardy claim).

The bases for placing such value on confessions and pleas are both pragmatic and philosophical. Many believe that if all criminal cases were to proceed to trial, the system would come to a halt. *See, e.g.*, *Santobello v. New York*, 404 U.S. 257, 260 (1971). At the same time, when the defendant pleads guilty or confesses, some view this action as psychologically cleansing and a prerequisite to rehabilitation. *See* *Miranda v. Arizona*, 384 U.S. 436, 538 (1966) (White, J., dissenting). *But see In re Gault*, 387 U.S. 1, 51–52 (1967) (punishment of juveniles after involuntary confession is antithetical to rehabilitation).

The Talmudic Sages presumably were not concerned with caseloads, since problems of this sort were undoubtedly irrelevant to their framework. With respect to the psychological aspects of confession, the rabbis were interested in spiritual penitence and, to the extent that confession related thereto, defendants in capital cases were exhorted to make post-conviction confessions prior to infliction of the death penalty.

²⁰⁷ *See, e.g.*, *McMann v. Richardson*, 397 U.S. 759, 766–68 (1970).

²⁰⁸ *Cf. Lego v. Twomey*, 404 U.S. 477, 483 (1972) ("Precisely because confessions of guilt, whether coerced or freely given, may be truthful and potent evidence, we did not believe a jury could be called upon to ignore the probative value of a truthful but coerced confession" (citing *Jackson v. Denno*, 378 U.S. 368 (1964))).

²⁰⁹ *Cf. United States v. Robinson*, 485 U.S. 25 (1988) (prosecutor's comment on defendant's failure to take stand, made in response to defense counsel's argument that government had denied his client opportunity to explain his actions, did not violate fifth amendment).

²¹⁰ *Deuteronomy* 16:19–20; *see also Exodus* 23:6–8 (requiring impartiality from judges). The Rashi commentary on the words "Thou shall not respect persons" is as follows:

This is an admonition addressed to the judge that he should not be lenient to one and harsh to the other, e.g., letting one stand and the other sit; because as soon as he (the party treated harshly) observes that the judge shows more respect to his fellow his ability to plead is hampered (i.e., he loses self-confidence and cannot put his case with assurance).

RASHI'S COMMENTARY ON CHUMASH, *supra* note 48, *Deuteronomy* 16:19, at 87.

²¹¹ *See* THE LIFE OF MOSES MAIMONIDES, IN THE GUIDE FOR THE PERPLEXED, *supra* note 54, at xv–xxv. On the tombstone of Maimonides (whose real name was Moses, son of Maimon) in Tiberias, Israel, is the inscription: "From Moses to Moses, there was none like Moses." *Id.* at xxv.

²¹² Maimonides stated:

The *Sanhedrin* . . . is not empowered to inflict the penalty of death or of flagellation on the admission of the accused. For it is possible that he was confused in mind when he made the confession. Perhaps he was one of those who are in misery, bitter in soul, who long for death, thrust the sword into their bellies or cast themselves down from the roofs. Perhaps this was the reason that prompted him to confess to a crime he had not committed, in order that he might be put to death. To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree.

THE CODE OF MAIMONIDES—JUDGES, *supra* note 47, *Sanhedrin* 18:6, at 52–53.

²¹³ *Id.*; *see* Norman Lamm, *The Fifth Amendment and Its Equivalent in the Halakhah*, 5 JUDAISM 53, 56–59 (1956). Rabbi Lamm analyzes Maimonides' position in light of twentieth century theories of psychoanalysis. He explains that the "Death Instinct operates not only by destroying or injuring the self physically, but even by casting aspersions on one's own character and exposing the ego to opprobrium in public." Lamm, *supra*, at 58. This leads him to conclude that Jewish law recognizes the introjected Death Wish as expressing itself on three levels: as complete physical self-annihilation, when the confession is to a crime punishable by death; as partial self-destruction, when the confession is to a crime punishable by flogging (these two recognized by Maimonides); and finally, as "moral masochism" when the confession results in "*psul eiduth*", in the confessant's disqualification as a *bona fide* witness, due to his self-assumed status as a "*rasha*".

Id.; *see also* Bernard Susser, *Worthless Confessions: The Torah Approach*, 130 NEW L.J. 1056 (1980). Susser describes the contemporary British case of a 19-year-old man who confessed to raping an 11-year-old girl, supplying corroborating details that apparently only the actual rapist could know. There was no allegation of impropriety in the interrogation, and it seemed quite clear that he was the wrongdoer. Forensic evidence based on blood tests established, however, that he could not have been the rapist, and ultimately two reputable witnesses provided the accused with an alibi. It seemed clear that the intimate

details were supplied to him by the police and that, like many others in our society, he was susceptible to suggestion. *Id.* at 1056. To the same effect, see Ronald Smothers, *Confession in '63 Bombing of Church Is Called a Fake*, N.Y. TIMES, Oct. 22, 1988, at 6. This story describes how officials have disproved the confession of a dying, mentally ill cancer patient that he had bombed an Alabama church in 1963, killing four black children.

²¹⁴ The term used by Maimonides—*gezerat hakatuv*, literally meaning "written decree" and most often translated as "divine decree"—is not free from ambiguity. The word generally used to indicate a nonrational law is *chok* (plural *chukim*). Whereas a *chok* is totally beyond human grasp, see *id.*, the *gezerat hakatuv* may be viewed as a lesser included concept, that is, a decree that seems counterintuitive or that human beings would have difficulty in arriving at or implementing on their own. As for the no-confession rule, people might be able to see some theoretical rationale for it, but might still reject it because of other, perhaps practical, concerns. Classifying it as a *gezerat hakatuv* precludes any such cost-benefit analysis. Compare KIRSCHENBAUM, *supra* note 46, at 63 (stating that Maimonides' use of this term is "a sure sign that he considered the rule nonrational") with MALVINA HALBERSTAM, THE RATIONALE FOR EXCLUDING INCRIMINATING STATEMENTS: U.S. LAW COMPARED TO ANCIENT JEWISH LAW, in JEWISH LAW AND CURRENT LEGAL PROBLEMS 177, 178 n.8 (N. Rakover ed. 1984) (quoting Rabbi and Professor J. David Bleich to the effect that term means "only that it is an absolute biblical rule admitting of no exception").

²¹⁵ According to one authority, however, Maimonides' emphasis on reliability is evidence that the rule with respect to defendants' confessions and the witness disqualification rule are unrelated doctrines. See Enker, *supra* note 46, at cxiv–cxviii.

Dean Enker points out that under Talmudic law, witnesses and parties had separate statuses. *Id.* Unlike a witness, a party could not testify; instead, he was entitled only to plead before the court. Thus, if a defendant's confession were to be accepted at all, it would be deemed dispositive as in civil cases, making witnesses' evidence unnecessary. The question therefore was whether the defendant could be convicted on the basis of his confession alone. In these circumstances, an exclusionary rule predicated on reliability concerns, such as those expressed by Maimonides, makes sense. *Id.* Dean Enker's argument to this effect is persuasive, however, only if one assumes that a plea or confession in criminal cases would have to be treated the same as an admission in civil cases; that is, as dispositive.

Dean Enker also suggests that the psychological motivations mentioned by Maimonides are valid only in the context of confessions by defendants and do not apply with respect to self-incriminating statements by witnesses. *Id.* at cxvi. This assertion is less persuasive. The same suicidal compulsion that may exist with respect to a defendant who is on trial may also be present in the case of a witness who has not (yet) been charged. Each may think that his confession is sufficient to bring about death—or publicity or whatever form of gratification he is seeking thereby.

²¹⁶ See KIRSCHENBAUM, *supra* note 46, at 114. If there were two witnesses testifying against the accused, he could of course be convicted. His confession in such circumstances was simply superfluous.

²¹⁷ See, e.g., *Lisenba v. California*, 314 U.S. 219, 236 (1941) ("The aim of the rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence.").

²¹⁸ See 7 WIGMORE, *supra* note 88, § 2071, at 511, 516.

²¹⁹ See *id.* § 2072, at 526 (characterizing as "absurd" view that corroboration of *corpus delicti* includes identity of accused); cf. *Smith v. United States*, 348 U.S. 147, 153–54 (1954) (noting general rule that once existence of crime is established, guilt of accused can be based on his own uncorroborated confession, but stating that in crimes where there is no tangible *corpus delicti*, such as tax evasion, corroborative evidence must implicate accused in order to show that crime has been committed).

²²⁰ Consider, for example, the following description:

The entire domain of human life was to be conducted under the sanctions of the Law and was largely determined by the common weal. . . . These [communal bonds] were further enhanced by the strong, and yet widely accepted, leadership of the rabbinic group, working hand in hand with the patriarchs and exilarchs. . . . Indoctrinated from early youth in the rabbinic ideals by a highly effective system of child and adult education, the people readily submitted to this guidance. Law enforcement was relatively easy, therefore, and could be secured by a small lay and professional judiciary with the application of a minimum of force.

2 SALO W. BARON, A SOCIAL AND RELIGIOUS HISTORY OF THE JEWS 291 (2d ed. 1952).

²²¹ For example, *Numbers* 1:51 states: "And when the tabernacle setteth forward, the Levites shall take it down; and when the tabernacle is to be pitched, the Levites shall set it up; and the common man that

draweth nigh shall be put to death." The Rashi commentary on this verse explains that the death penalty in this instance is to be inflicted by Heaven rather than human courts. RASHI'S COMMENTARY ON CHUMASH, *supra* note 48, *Numbers* 1:51, at 6.

²²² MISHNAH, *supra* note 56, *Aboth* 2:7, at 448, *reprinted in* BABYLONIAN TALMUD, *supra* note 48, *Aboth* 7a.

²²³ *See, e.g.*, 1 IRVING M BUNIM, *ETHICS FROM SINAI* 157 (2d ed. 1964). Drawing on rabbinic and classical sources, Bunim explains that

[t]he drowned person of whom this skull was once part—he had originally drowned someone else.

And if this means that a new killer is now at large—the one who drowned this one—be assured, says Hillel, that Divine Providence will punish this evil-doer with a similar fate.

The Almighty acts in the world: He shapes human destiny and arranges human affairs both large and small, in accordance with the principle of reward and punishment. This is a fundamental tenet of Judaism.

Id.

²²⁴ *See* BABYLONIAN TALMUD, *supra* note 48, *Makkoth* 10b (discussing *Exodus* 21:13, which provides: "And if a man lie not in wait, but God cause it to come to hand; then I will appoint thee a place whither he may flee."). In his commentary on the same verse, Rashi repeats the explanation given in *Makkoth* 10b. *See* RASHI'S COMMENTARY ON CHUMASH, *supra* note 48, *Exodus* 21:13, at 110b (footnote and citation omitted); Chapter 7 n.154 and accompanying text *supra*.

²²⁵ *See* MAIMONIDES, MISHNAH TORAH (THE CODE OF LAW), *HILCHOT SANHEDRIN* (THE BOOK OF JUDGES) 18:6 (1963) (Radbaz commentary). The Radbaz's commentary, which has not been translated from the Hebrew, is published in the inside margins of the Hebrew version of Maimonides' Code. The observations of the Radbaz concerning confessions appear adjacent to the passage in the Book of Judges, *Sanhedrin*, in which Maimonides gives his position with regard to self-incrimination. *Id.* The Radbaz commentary is not printed in the English version, THE CODE OF MAIMONIDES—JUDGES, *supra* note 47. The Radbaz states as follows:

[In the case of] one who comes to court and says, "Punish me," we do not punish him. And thus we say in Jewish law: a man may not make himself a *rasha* [evil person]. The [suicide] rationale that our rabbi [Maimonides] gave [as a basis for the prohibition against self-incrimination] does not apply [in the case of] lashes. Therefore he [Maimonides] wrote . . . that it is a divine decree, and we do not know the reason. It is possible to look for a reason, [to wit:] Because a person's soul does not belong to him, but is the possession of the Holy One Blessed Be He, as it is said, "Behold, all souls are Mine," Ezekiel 18:[4]. Therefore, a person may not give a confession concerning something that is not his, and [this is why] flogging is the same as killing [and included in the confession rule]. But his money is his, and . . . we say [in this context] that a party's confession is the equivalent of one hundred witnesses. . . . A man is not permitted to kill himself, and thus a man is not permitted to confess that he committed a sin that would make him liable to death, because his soul is not his own. And beside all this, I agree that it is a divine decree of the Master of the World concerning which one must not speculate.

MAIMONIDES, MISHNAH TORAH, *supra*, *HILCHOT SANHEDRIN* 18:6 (Radbaz commentary).

²²⁶ Although most jurisdictions in this country no longer criminally punish persons for attempted suicide, state mental health codes often utilize danger to oneself as a basis for commitment proceedings. *See* Model Penal Code § 210.5, commentary at 94 (1980). *See generally* Thomas J. Marzen, Mary K. O'Dowd, Daniel Crone & Thomas J. Balch, *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 1, 148–242 (1985) (describing applicable state mental health code and criminal law provisions).

²²⁷ *See generally* Joseph H. Beale, *Consent in the Criminal Law*, 8 HARV. L. REV. 317 (1895) (expositing doctrine of consent); Glanville Williams, *Consent and Public Policy*, 1962 CRIM. L. REV. 74. Consent to an assault on one's person is also not a defense in Jewish law. *See* MISHNAH, *supra* note 56, *Baba Kamma* 8:7, at 343, *reprinted in* BABYLONIAN TALMUD, *supra* note 48, *Baba Kamma* 92a.

²²⁸ *See* PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 135 (1965).

²²⁹ *See* H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 31 (1963).

²³⁰ The exceptions to the consent doctrine relate to patients on whom surgery is performed and persons engaging in traditional sports activities. *See Recent Cases: Assault and Battery—Consent*, 81 HARV. L. REV. 1339, 1339 (1968).

²³¹ See MISHNAH, *supra* note 56, *Aboth* 3:16, at 452 ("All is foreseen, but freedom of choice is given."), reprinted in BABYLONIAN TALMUD, *supra* note 48, *Aboth* 9b; BABYLONIAN TALMUD, *supra* note 48, *Makkoth* 10b; *id.*, *Niddah* 16b.

²³² Cf. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990) (holding that persons had a constitutionally protected liberty interest in refusing unwanted medical treatment).

²³³ Haim Cohn, a retired justice of the Supreme Court of the state of Israel, has stated:

While it is nowhere said in so many words, the reason for the exclusion of all self-incriminatory evidence may well have been the desire to prevent confessions being elicited by torture or other violent means. It is a fact that—unlike most contemporaneous law books—neither Bible nor Talmud provide for or know of any interrogation of the accused as part of the criminal proceedings, so that there was no room at all for attempts to extort confessions.

COHN, *supra* note 119, at 214. There is some irony in these words. Modern Israeli law governing civilian courts does permit a confession to be used, if it is "free and voluntary." See 2 Laws of the State of Israel (new version), Evidence Ordinance, ch. 1, art. 2, para. 12 (1972). In courts martial, the test for admissibility is whether the statement was made "voluntarily." 9 Laws of the State of Israel, Military Justice, § 477 (1955). See generally Zaltzman, *The Israeli Approach to Evidence Obtained in Violation of the Right to Privacy*, 18 ISRAEL L. REV. 215, 221–23 (1983) ("free will" out-of-court confessions generally admissible into evidence in Israeli law).

In 1987, the Israeli Supreme Court reversed a 1980 conviction for treason and espionage against Izat Nafsu, a member of the Israel Defence Forces. See *Confessions to Interrogators Not a Legal Basis for Conviction*, JERUSALEM POST, May 26, 1987, at 4. The defendant claimed that Shin Bet officials (members of the government's domestic security agency) coerced a false confession that formed the basis of his conviction. He alleged that he had been beaten, repeatedly made to take cold showers, not permitted to sleep, and forced to stand for hours in the cold, and, further, that Shin Bet officials had lied to the court regarding the facts surrounding his confession. *Id.* The officials claimed that the *Nafsu* case could not be viewed in isolation and that the agency's methods of interrogation used in the *Nafsu* case reflected standard Shin Bet practices. On appeal, the government admitted that most of the defendant's allegations were true. Seeking to make law conform to practice, Shin Bet, with the approval of the Attorney General, submitted proposed legislation to the Israeli Cabinet that would make confessions obtained involuntarily admissible in evidence. See *Shin Bet Out to Prevent Criminal Probe of Agents*, JERUSALEM POST, May 26, 1987, at 1; *The Year of the Shin Bet*, JERUSALEM POST, May 26, 1987, at 4; *Nafsu Released, Cleared of Treason and Espionage*, JERUSALEM POST, May 25, 1987, at 1; *Outrage over Bid to Change the Law*, JERUSALEM POST, May 11, 1987, at 1; *Of Secrets and Scandals*, NEWSWEEK, June 1, 1987, at 28 (midwest ed.).

An official commission appointed in the aftermath of the *Nafsu* decision to investigate the Shin Bet concluded that security agents had systematically lied in court over a period of sixteen years to assure conviction of suspected terrorists. The commission, chaired by a retired Supreme Court justice, condemned the policy of perjury, but concluded that the limited use of physical force during interrogation was justifiable, and that no action should be taken against Shin Bet officials. *Israel Inquiry Says Security Agents Lied at Trials of Terrorist Suspects*, N.Y. TIMES, Oct. 31, 1987, at 1. The subsequent investigation of the suspicious death of a young Palestinian while in Shin Bet custody cast doubt on the commission's conclusion concerning limited use of physical pressure during interrogation and on its view that perjury by agency officials was a thing of the past. *Israel Examines Death of Arab Held by Shin Beth*, N.Y. TIMES, Nov. 12, 1987, at A6; see also *Israeli Police Challenged on Palestinian Death*, N.Y. TIMES, Jan. 10, 1988, at 14.

Meanwhile, in England, another nation in which the privilege has deep roots, the fear of terrorism is also endangering the rule's continuing vitality. The British government recently proposed legislation for Northern Ireland that would allow judges to draw negative inferences from a suspect's refusal to talk to either police or courts. Whitney, *Civil Liberties in Britain: Are They Under Siege by Thatcher Government?*, N.Y. TIMES, Nov. 1, 1988, at 6 (int'l ed.).

The war on terrorism has also resulted in "harsh or enhanced" interrogation methods—often termed torture—in the United States. The government has defended its action on the ground that these tactics are necessary to illicit intelligence which helps in preventing terroristic attacks on the United States and elsewhere. See e.g., Mark Mazzetti, *Intelligence Chief Says Al Qaeda Improves Ability to Strike in U.S.*, N.Y. TIMES, Feb. 6, 2008, at A1 ("As part of his testimony to the Senate Intelligence Committee, Gen. Michael V. Hayden, director of the Central Intelligence Agency, also offered the government's most

extensive public defense for the use of waterboarding, saying that the C.I.A. had used the harsh interrogation technique against three Qaeda operatives in 2002 and 2003 in a belief that another terrorist attack on the United States was imminent.").

²³⁴ In his *Sefer Ha-Mitzvot* (or Book of Commandments), Maimonides lists and explains the 613 commandments embodying the basic requirements of Jewish law. In volume two, which sets forth the 365 negative commandments, Maimonides gives as number 289 the prohibition against killing another human being. 2 MAIMONIDES, THE COMMANDMENTS, *supra* note 55, at 269. Interestingly, Maimonides, whose choices with respect to sequence should not be viewed as random, includes as the commandments immediately preceding and following this central precept, two rules that may bear an intimate relationship to the stricture against killing a human being. The first of these, number 288, prohibits punishment on the basis of the testimony of a single witness, "even though he be perfectly trustworthy." *Id.* at 268. On the other side, commandment number 290 is a prohibition against use of circumstantial evidence in capital cases. *Id.* at 269–71. After reiterating the rather extreme example of impermissible, albeit highly trustworthy, circumstantial evidence found in THE CODE OF MAIMONIDES–JUDGES, *supra* note 47, *Sanhedrin* 20:1, at 60, Maimonides states:

Do not let this puzzle you, or think the law unjust. For among events which are within the bounds of possibility, some are very probable and others highly improbable, and still others are in between the two. The bounds of possibility are very wide. If, then, the Torah had permitted us to decide capital cases on the basis of a very strong probability, which might seem absolutely convincing, as in the case of the example we have given, we should next be deciding on a slightly smaller probability, and so on gradually, until we should be giving judgment in capital cases and putting people to death on the basis of unwarrantable presumptions, according to the judge's caprice. Hence the Exalted One has shut this door, so to say, ordaining that no punishment is to be inflicted unless there are witnesses who testify that they know for certain what happened, without any doubt whatever, and there is no other possible explanation. If we do not give judgment even on the basis of a very strong presumption, the worst that can happen is that the sinner will be acquitted; but if we punish on the strength of presumptions and suppositions, it may be that one day we shall put to death an innocent person; and it is better and more satisfactory to acquit a thousand guilty persons than to put a single innocent man to death once in a way.

2 MAIMONIDES, THE COMMANDMENTS, *supra* note 55, at 270 (Commandment no. 290).

Commandment number 286 prohibits a judge from receiving a wicked man's testimony, and commandment number 287 is a similar bar against the testimony of a kinsman. *Id.* at 266–67. In a sense, these commandments, which underlie the Talmudic rule against self-incrimination, complete the "fence" around the prohibition against the taking of human life.

²³⁵ MISHNAH, *supra* note 56, *Sanhedrin* 4:5, at 388, *reprinted in* BABYLONIAN TALMUD, *supra* note 48, *Sanhedrin* 37a (translation from BABYLONIAN TALMUD). The text of the Mishnah can be found in chapter 9 n.10 *supra*.

²³⁶ See M. LEW, THE HUMANITY OF JEWISH LAW 66–67 (1985) ("Some held that self-incrimination was not admissible as evidence because man, having been created in the image of God, cannot himself deny his natural attribute of decency and dignity with which he is endowed at birth." (footnote omitted)).

²³⁷ Thus, rather than viewing the bar on confessions as a product of benevolent paternalism or as a restriction on the individual's free will, it may be seen as a legitimate response to the reality of a necessarily unequal confrontation. *But cf.* *Brewer v. Williams*, 430 U.S. 387, 419 (1977) (Burger, C.J., dissenting) (criticizing Court's invalidation of confession as paternalistic since it "denigrates an individual to a nonperson whose free will has become hostage to a lawyer so that until a lawyer consents, the suspect is deprived of any legal right or power to decide for himself that he wishes to make a disclosure").

²³⁸ *But see* Moshe Silberg, *Law and Morals in Jewish Jurisprudence*, 75 HARV. L. REV. 306, 318 (1961) (when comparing Talmudic law to modern English legal system, "we shall have to make a certain 'discount' for their dissimilarities. But the nucleus of the question is essentially the same, and a comparison between them is possible in spite of the great differences").

²³⁹ See Enker, *supra* note 46, at cxxii–iv. Because of the ramifications of his view that the rule regarding a defendant's confession in a criminal case was analytically distinct from the witness disqualification rule, Dean Enker concluded that the issue in Jewish law was one of the sufficiency of a confession, standing alone, as a basis for conviction. Because the issue in American law is instead the admissibility of confessions, Dean Enker believed that the Jewish rule was not particularly relevant in resolving the

contemporary debate concerning confessions. Nevertheless, even he could not resist using the Jewish law of confessions as "a warranted lesson" for modern judges to exercise an "increased sensitivity" to the limitations of confessions as proof of guilt. *Id.* at cxxiii–iv.

²⁴⁰ See George Horowitz, *The Privilege Against Self-Incrimination—How Did It Originate?*, 31 TEMPLE L.Q. 121 (1958) (arguing that Puritan leaders of seventeenth century England, principally John Selden, disseminated information concerning the Talmudic confession rule, which information was utilized by Coke, who formulated privilege as part of an effort to curtail authority of ecclesiastical courts); accord Isaac Braz, *The Privilege Against Self-Incrimination in Anglo-American Law*, in JEWISH LAW AND CURRENT LEGAL PROBLEMS 161, 164–67 (N. Rakover ed. 1984); Wolchover, *The Descent of the Maxim Nemo Tenetur Seipsum Prodere from Sanhedrin 9b: A Developmental Aspect of the Privilege Against Self-Incrimination* (1973) (privately published essay on file at New York University Law Library) (contending that the British privilege stemmed from the work of Hebraist William Tyndale in the first half of the sixteenth century, and that the presentation of maxim in Latin was a way of establishing its authority and deflecting church antagonism toward Jewish teachings). *But see* KIRSCHENBAUM, *supra* note 46, at 19–21 (disputing Horowitz thesis); LEVY, *supra* note 3, at 439–41 (same).

In his opinion in *Miranda*, Chief Justice Warren finessed the question, suggesting that the origin of the privilege was English, but also observing that "its roots go back into ancient times," and that the analogue to the privilege was, according to Maimonides, grounded in the Bible. *Miranda v. Arizona*, 384 U.S. 436, 458–59 & 458 n.27 (1966); see also Goldman, at 90, *Judaic Scholarship Is Still Finkelstein's Passion*, N.Y. TIMES, Sept. 1, 1985, § 1, at 57 (describing Sabbath visit by retired Chief Justice Warren to the Jewish Theological Seminary in New York, where, according to Dr. Louis Finkelstein, "[t]he Chief Justice was amazed to find that [the] concepts [of double jeopardy and self-incrimination] come straight from the Talmud").

²⁴¹ *Miranda v. Arizona*, 384 U.S. 436, 467–79 (1966) (custodial interrogation is inherently coercive and therefore failure to advise suspect of constitutional rights and obtain valid waiver makes any resulting confession *per se* inadmissible).

²⁴² *Id.* at 444–45 (police to give warnings).

²⁴³ See, e.g., *New York v. Quarles*, 467 U.S. 649, 657 (1984) ("We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination. ").

²⁴⁴ Cf. ABRAHAM COHEN, EVERYMAN'S TALMUD xvi–xxxi (1949) *supra* note 48, at 150. Rabbi Cohen notes that

[o]ne manifestation of this love for the Torah was the erection of a 'fence' around it as a protection against its violation. It was therefore recommended that one should not carry out a religious precept with just the exactitude necessary for compliance with the law, but should add to it for the purpose of being quite certain that the duty had been fulfilled.

Id.

²⁴⁵ *In re Gault*, 387 U.S. 1, 47 (1967).

²⁴⁶ See *Moran v. Burbine*, 475 U.S. 412, 426–27 (1986) ("Admissions of guilt . . . are essential to society's compelling interest in finding, convicting and punishing those who violate the law. . . . [A] rule requiring the police to inform the suspect of an attorney's efforts to contact him . . . might have convinced respondent not to speak at all. ").

²⁴⁷ See Caplan, *supra* note 3, at 1475 (In criminal investigations "[t]here is no neutral position. One must lean toward the government or subversion. ").

²⁴⁸ See A HISTORY OF THE JEWISH PEOPLE 201–356 (H. Ben-Sasson ed. 1976).

²⁴⁹ See FRANKLIN E. ZIMRING & GORDON J. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 160-63 (1973). At least some of the Sages shared this view.

²⁵⁰ The two-witness rule could have required in effect that the confession be corroborated by the testimony of at least one other witness, thus offering some assurance of the truthfulness of the inculpatory statement.

²⁵¹ Under American law generally, the only corroboration necessary for a confession is evidence that the crime occurred; there need be no corroboration of defendant's connection with the crime. However, a more stringent corroboration rule could still, for the most part, obviate reliability concerns. For example, in New York prior to 1972, to establish guilt in a rape case, evidence of every material element of the crime, including defendant's connection with it, was required. See N.Y. PENAL LAW § 130.16, Practice Commentaries, at 582 (McKinney 1987). For another example, Texas has an unusual statute making an oral

confession admissible if it "contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused, such as the finding of secreted or stolen property or the instrument with which he states the offense was committed." TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3(c) (Vernon Supp. 1988); see *Port v. State*, 738 S.W.2d 787, 789 (Tex. Ct. App. 1987) (requiring that oral confession contain fact not then known to police, which is later found to be true); cf. *North Carolina v. Alford*, 400 U.S. 25, 37–39 (1970) (upholding plea of guilty even though accompanied by protestation of innocence, where record contained strong evidence of defendant's guilt of murder).

²⁵² See COHN, *supra* note 119, at 214; see also HALBERSTAM, *supra* note 214, at 186–87 (concluding that when confessions are excluded even though there are no official misconduct or reliability concerns, basis for exclusion must be moral, as in ancient Jewish law, under which "it is morally wrong to convict a person on the basis of his/her own words").

²⁵³ 2 MAIMONIDES, THE COMMANDMENTS, *supra* note 55, no. 290, at 270.

²⁵⁴ See *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963); *Malinski v. New York*, 324 U.S. 401, 404–10 (1945); *id.* at 420–30 (Rutledge, J., dissenting in part); *id.* at 432–34 (Murphy, J., dissenting in part); *Lisenba v. California*, 314 U.S. 219, 236 (1941). *But see* *Colorado v. Connelly*, 479 U.S. 157 (1986) (insane defendant's confession is admissible if the state did not cause the defendant to confess, thus eliminating free will).

²⁵⁵ For example, in *Michigan v. Tucker*, 417 U.S. 433 (1977), and *Oregon v. Elstad*, 470 U.S. 298 (1985), the Court's rulings not only permitted the police to use derivatively obtained evidence, but also uprooted *Miranda* from its constitutional mooring and illegitimated it. Then, in *New York v. Quarles*, 467 U.S. 649, 654–56 (1984), based on the determination in *Tucker* that *Miranda* warnings are not of constitutional dimension, the Court was free to weigh and balance and to conclude that public safety is more important than the prophylactic rules, thus creating an open-ended exception under the ambiguous "public safety" rubric and opening the door to future exceptions. *Id.* Subsequently, in *Dickerson v. United States*, 530 U.S. 428 (2000), however, the Court reaffirmed *Miranda*'s constitutional roots and refused to overrule it.

²⁵⁶ See *Moran v. Burbine*, 475 U.S. 412 (1986). In *Moran*, Justice Stevens, in dissent, noted the following:

In all these cases—indeed, whenever the distinction between an inquisitorial and an accusatorial system of justice is implicated—the law enforcement interest served by incommunicado interrogation has been weighed against the interest in individual liberty that is threatened by such practices. . . . In the past, that kind of balancing process has led to the conclusion that the police have *no right* to compel an individual to respond to custodial interrogation, and that the interest in liberty that is threatened by incommunicado interrogation is so precious that special procedures must be followed to protect it. The Court's contrary conclusion today can only be explained by its failure to appreciate the value of the liberty that an accusatorial system seeks to protect.

Id. at 459–60 (Stevens, J., dissenting).

²⁵⁷ Notwithstanding the reasonable doubt standard mandated for conviction in criminal trials by *In re Winship*, 397 U.S. 358 (1970), and the other constitutional guarantees contained in the Bill of Rights, in general "the odds favor conviction over acquittal," although the statistics vary depending on the type of crime involved. See YALE KAMISAR, WAYNE R. LAFAVE & JEROLD H. ISRAEL, MODERN CRIMINAL PROCEDURE 14 (6th ed. 1986) (relying on Department of Justice statistics).

²⁵⁸ See LOUIS GINSBERG, ON JEWISH LAW AND LORE 6 (1970); 2 G. MOORE, JUDAISM 186–87 (1930).

²⁵⁹ See SCHREIBER, *supra* note 187, at 278. Furthermore, if these procedural safeguards were not intended to be, and were in fact not, applied, there would have been no need to develop exceptions thereto. Finally, inferential support for the proposition that the safeguards were actually applied can be drawn from the Mishnaic debate regarding capital punishment. See notes 199–200 and accompanying text *supra*. The rarity of executions—either once every seven or once every seventy years—indicates that the extensive procedural guarantees were in place and made conviction difficult.

²⁶⁰ That the prohibition is not explicitly written in the Bible is largely irrelevant in Jewish law since: [A]lthough the system posits the Torah as its unassailable *grundnorm*, it also takes the position that the meaning of the Torah is determined by the sages and that their interpretations alone are normative. Consequently, since rabbinic interpretation and exegesis of the Torah constitute its definitive meaning, it is impossible to contend systemically, that any particular meaning is at variance with the Torah.

JOEL ROTH, THE HALAKHIC PROCESS: A SYSTEMIC ANALYSIS 153 (1986).

²⁶¹ GEORGE HOROWITZ, THE SPIRIT OF JEWISH LAW 166 (1953) (quoting *Exodus* 34:6).

²⁶² MISHNAH, *supra* note 56, *Aboth* 5:22 at 458, *reprinted in* BABYLONIAN TALMUD, *supra* note 48, *Aboth* 15a.

²⁶³ 3 BUNIM, *supra* note 223, at 239.

CHAPTER ELEVEN

Of God's Mercy and the Four Biblical Methods of Capital Punishment: Stoning, Burning, Beheading, and Strangulation*

A. Introduction

According to a popular stereotype, the Old Testament deity is a jealous and vengeful God who decrees the death penalty for a large number and variety of offenses, some apparently trivial, at least to modern sensibilities.¹ Furthermore, the death penalties prescribed by Jewish law—stoning, burning, beheading, and strangulation²—appear barbaric, especially in comparison to the seemingly sanitized, quick, and painless procedure of death by lethal injection,³ the most commonly used method of execution in contemporary America.⁴

Execution by injection is, however, of relatively recent origin, having been instituted in this country less than three decades ago.⁵ During much of the twentieth century, the predominant manner of execution was the electric chair,⁶ which was in turn considered a humane alternative to hanging.⁷ Yet it was a mode of killing that was not designed with the squeamish in mind. The Georgia Supreme Court found that electrocution violated the state constitution's cruel and unusual punishment clause, noting:

The autopsy reports and autopsy photographs prepared as part of the State's execution protocol establish that some degree of burning of the prisoner's body is present in every electrocution . . . The autopsies also reference the sloughing or "slippage" of a large portion of the scalp and the skin at the back of the head and also on the legs caused by the execution. . . . Two of the State's experts testified that, while cardiac functioning is affected by the electricity, the primary mechanism of death . . . is the "denaturing" or cooking of the brain from the heat created by the passing of electricity through the electrical resistance of the brain tissue. . . . No evidence was presented which indicated that a Georgia execution has yet involved the sparks, flames, and smoke that have plagued executions by electrocution outside of Georgia.⁸

Yet even the mutilating and brain-frying aspects of electrocution appear compassionate in comparison to an account of an execution for regicide in eighteenth century France. According to the judgment,

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[T]he flesh will be torn from his breasts, arms, thighs and calves with red-hot pincers, his right hand, holding the knife with which he committed the said parricide, burnt with sulphur, and, on those places where the flesh will be torn away, poured molten lead, boiling oil, burning resin, wax and sulphur melted together and then his body drawn and quartered by four horses and his limbs and body consumed by fire, reduced to ashes and his ashes thrown to the winds.⁹

The modern methods of execution in this country—lethal injection, electrocution, gassing, shooting squad, hanging—while not in the same league as the savage procedure of execution for regicide, *all*, to one degree or another, not excluding lethal injection, cause pain and suffering.¹⁰

Killing a human being is untidy, especially when done by untrained laypeople rather than doctors, who are prohibited from participating in executions except to confirm death.¹¹ Of course, there are those who think that such affliction is good and should be part of the execution process.¹²

In one sense, making comparisons and looking for the most humane mode of killing are ways of promoting the death penalty. We search for less painful ways of execution so that we may kill more people. Indeed, many anti-capital punishment groups refuse to participate in such efforts because it obscures the issue of whether the death penalty itself is permissible.¹³

The five types of execution used in America have been amply analyzed and described in detail elsewhere, and we will not address them here. Rather, here we are trying to reconcile the biblical death penalties with the notion of a God of mercy, long forbearing, and abundant in kindness.¹⁴ Examining these issues from the perspective of traditional Judaism, we focus on the talmudic interpretations of the rules and restrictions binding on the rabbinic courts in capital cases, including the particulars surrounding each of the four death penalties.

B. Matching Offenses and Sanctions

In the United States, at least so far, capital punishment is reserved for murderers, but the Bible mandates the death penalty for numerous offenses.¹⁵ Each capital crime, however, is assigned a specific form of execution.¹⁶ In this chapter, we will analyze the Sages' debates concerning the relative severity of the four forms of execution and consider how the various crimes to which each penalty applies affect that determination.

According to the Mishnah, stoning is reserved for the following types of wrongdoing: (1) commission of sexual prohibitions, such as adultery and incest; (2) blasphemy; (3) idol worship and instigation of others to idolatry; (4) Sabbath desecration; (5) cursing one's father or mother; (6) sorcery; and (7) being a stubborn and rebellious son.¹⁷

The category of those burned is much smaller and includes only two sex offenses: adultery committed by the daughter of a priest and having sexual relations with a woman and her daughter.¹⁸ Similarly, only two types of offenders are beheaded, murderers and inhabitants of a city a majority of whom were led to idol worship.¹⁹ Finally, a child who

strikes his or her father or mother, a kidnapper, a Sage who refuses to follow the rulings of the Great Sanhedrin, a false prophet, one who prophesies in the name of a false god, an adulterer, a false witness testifying against a priest's daughter, or one who illicitly cohabits with a priest's daughter, are all subject to the penalty of strangulation.²⁰

There is extensive Mishnah and Gemara discussion as to which penalties are the most severe, presumably based on a concern that each form of execution fit the particular crimes for which it was imposed.²¹ Execution is deemed an atonement for the offense committed;²² thus, it is critical that each person receives the death penalty that he or she deserves—deserves in the sense that it would effectuate atonement for that crime. At the same time, the Sages are apprehensive about overpunishment, which would distort God's justice, inflicting unnecessary pain and suffering.²³

An anonymous Mishnah rule, which usually signifies a majority opinion,²⁴ lists the penalties in descending order of severity as stoning, burning, beheading, and strangulation. There is a dissent by Rabbi Shimon, who argues that the proper sequence is burning, stoning, strangulation, and beheading.²⁵ The Gemara, after first ascertaining that the Mishnah Sages did intend to list the four death penalties in descending order of stringency,²⁶ goes on to discuss the basis for the ranking.

The debate focuses primarily on whether stoning is worse than burning, looking at the nature of the crimes subject to each of these penalties.²⁷ The Rabbis opine that stoning is the most severe, because it is the punishment for blasphemy and idol worship, applicable to those who breach the most fundamental tenets of Judaism.²⁸ The Gemara counters that it could be argued that burning is the most severe because it applies to the daughter of a priest who commits adultery, and that such an act profanes her father.²⁹ Why is profaning her father a worse offense than profaning God? Because God is not harmed by idolatrous acts or blasphemy, whereas the priest is injured by his daughter's promiscuity.³⁰ The Gemara responds that only a fully married daughter of a priest is subject to burning, whereas a betrothed daughter of a priest is, like all other betrothed adulterous women, stoned, thus proving stoning is more severe.³¹ Why should it be worse to commit adultery when one is merely betrothed, as opposed to being married? One possible answer is that a betrothed woman is still within her father's domain, and her adulterous act is consequently a sin against both God and her father, whose reputation will be damaged.³² There is a similar distinction between married and betrothed daughters of nonpriests. The adulterous married woman is subject to strangulation, whereas the betrothed adulterous woman is subject to stoning, just as the priest's daughter would be. Thus, because adultery by a betrothed woman is considered to be a more serious crime than adultery by a married woman, and because the former crime is punished by stoning, it follows that stoning is the more stringent sanction.³³

How one views the harshness of the four death penalties has practical implications. For example, what happens if someone sentenced to death by stoning becomes intermingled with those sentenced to be burned, making it impossible to determine which wrongdoer is subject to which method of execution? The Mishnah says that they all receive the more lenient penalty.³⁴ As Rashi, the brilliant medieval exegete of the Torah and the Talmud, observes, a rabbinic court does not have permission to impose a more severe penalty on someone who is not guilty of an offense punishable by that more severe sanction.³⁵ Thus, while defendants in this situation will receive lesser sanctions than they deserve, and consequently will not achieve total atonement for their

sins, the trade off is apparently justified because it precludes the overpunishment of a single wrongdoer.³⁶

In some situations involving a choice of penalties, however, a more severe sanction is imposed. For instance, what if a person becomes subject to two different death penalties? Rabbi Yose says he is subject to the type of execution for violation of the prohibition chronologically first imposed on him.³⁷ So, according to Rabbi Yose, if, for example, an unmarried woman is prohibited to a man because she is his mother-in-law, a biblical offense,³⁸ and the punishment for this violation is burning,³⁹ and then she becomes prohibited to him because she marries, in which case the punishment is strangulation (for the crime of adultery),⁴⁰ the son-in-law is subject to burning on the basis of his illicit relations with his mother-in-law, because that sin occurred first. If, however, the woman was first prohibited to him because she was married, and only later did she become his mother-in-law, then he is subject to death by strangulation, which is the lesser penalty.⁴¹

The majority, however, disagrees with Rabbi Yose and rules that the multiple wrongdoer is subject to the more severe punishment, regardless of the sequence of the crimes,⁴² as otherwise the offender would derive a leniency on the basis of being a multiple sinner.⁴³ The majority position is not inconsistent with the rule in the case of the intermingled prisoners, in which the *least* severe penalty is imposed. In the latter case, it is possible that a person would be subject to a more severe form of execution for a crime that he did *not* commit. In the multiple-sin scenario, the defendant has in fact committed the more serious crime normally warranting the more severe punishment, and thus there is no overpunishment.

The reader may wonder why so much effort is devoted to argumentation about what is arguably minutiae, and unlikely minutiae at that. One response is that there is more to these colloquies than exquisite *pilpul*. Viewed in their totality, what we see in, or at least can infer from these rabbinic discussions of the relative severity of the forms of execution in the context of serial criminals or intermingled prisoners, is an emphasis on proportionality, fairness, and leniency when warranted. These results are completely consonant with the role of the rabbinic courts in emulating God in the dispensation of justice.

C. Pre-Execution Procedure

Assume that despite the extensive substantive, procedural and evidentiary barriers to conviction, a malefactor is adjudged guilty of a capital crime and sentenced to the proper form of execution. What happens next? As the convicted person is being led to the execution site, he is given frankincense and wine "to dull his senses."⁴⁴ The execution site must be situated "outside the courthouse" and outside the city.⁴⁵ Why? The Gemara gives two answers: that in the absence of sufficient geographic distance from the place of execution, the court itself, having ordered an execution, might be viewed as being comprised of murderers;⁴⁶ or, alternatively, that the remoteness of the execution locale gives the condemned person the possibility of rescue.⁴⁷ The Sages are not referring to an unlawful rescue by friends or family. Rather, the law requires that there be a sufficient distance for the defendant to travel while court officials ride with him, shouting out his name, his crime, and the names of the prosecuting witnesses, and asking anyone who has

exculpatory information to come forward.⁴⁸ While he is being escorted, one person stands at the courthouse door holding flags, and another is astride a horse at some distance from him, yet close enough for the rider to see the flags. If someone comes forward and states that he has grounds to acquit, or if one of the judges thinks of a new argument, the flagman waves the banners and the horse rider races to halt the execution.⁴⁹ During this same period of time, the accused himself may also assert arguments in favor of acquittal, and, indeed, he is brought back to the court "even four or five times as long as there is substance to his words."⁵⁰

The Gemara asks what action would be taken if a court disciple states that he has grounds to argue in favor of acquittal, and then, before he can explain, he is struck mute.⁵¹ Does the court simply disregard the occurrence, or must the case be retried before a different panel of judges? Arguing in favor of disregarding the disciple's bald assertion, Rabbi Sheishess contends that if such a case must be retried, then every capital case must be dismissed because perhaps somewhere in the world there is a person with an argument in favor of acquittal.⁵² The Gemara rejects that reasoning, because in all other situations no one has come forward, whereas in our case the mute disciple has done so.⁵³

Still seeking an answer to the question of the mute disciple, the Gemara cites a mishnaic-era uncoded ruling called a *baraisa*, which says that if a disciple argues for acquittal and then dies, he is considered still alive and in favor of acquittal when the voting ensues.⁵⁴ The Gemara's initial take is that the *baraisa* implies that it is only when the disciple actually articulates his acquittal argument that his position is relevant. If, however, as in the mute disciple case, the argument is never made, his words are irrelevant.⁵⁵

The Sages reject this inference because it is unclear from the *baraisa* whether this is the *only* case in which the disciple's argument is considered significant, or whether it chose the particular case of death after making an argument simply because it is a more common event.⁵⁶ That is, it is unlikely for a person to state that he has an argument and then die or be struck mute before he can articulate his position. If the example in the *baraisa* of death after articulation of an argument is chosen because it is the more common situation, then it is not significant that the disciple actually state his argument. The *baraisa* is simply not addressing that question.⁵⁷ According to this view, whether the disciple favoring acquittal does or does not state his argument, is irrelevant, and, as applied to the mute disciple scenario, this precedent supports retrial of the accused.

This concludes the Talmud's discussion of a disciple who announces that he has an argument for acquittal and is then rendered speechless. Thus, the end result of these rabbinic ruminations about mute disciples seems to leave the matter in equipoise, a not infrequent occurrence in Gemara discussions.⁵⁸ Such open-ended Gemara colloquies highlight a fundamental difference between the Mishnah and the Gemara. Whereas the Mishnah's mission is to lay out the law, the Gemara's primary function is "to serve . . . as a vehicle of theoretical explication [of the law]."⁵⁹

The mute disciple colloquy also illustrates the intensive efforts expended by the Gemara Sages to find a basis upon which to preclude conviction. In more general terms, what the Sages seem to be saying is that, even with respect to very unlikely occurrences, the court should always be on the lookout for bases to absolve the accused, or at least to afford him further judicial consideration.⁶⁰

The Gemara then turns its attention to the Mishnah's statement that if the

condemned man says he has new exculpatory arguments, he can be returned "four or five times as long as there is substance in his words."⁶¹ But how will it be known that his argument is substantial? The Gemara's explanation is that from the third time onward, two Torah scholars accompany the convicted person to determine if there is enough merit in the new argument he raises to warrant returning him to court for consideration of his claim. But why not let the Torah scholars accompany the execution party from the very beginning, rather than to give the prisoner the equivalent of two frivolous appeals? The Gemara's answer is that the prisoner may be so frightened at the prospect of execution that he will be unable to make his argument coherently. Therefore, in the first two instances he is returned to court, which is some distance away, in the hope that when he arrives there, he will be able to compose himself and present his case more clearly.⁶²

Before his execution, the condemned man is urged to confess his sin. Rabbi Judah took the position that the prisoner could say "let my death be an atonement for all my sins, except for this one."⁶³ The Sages countered that such confessions were disallowed because they would cast aspersions on the court and the witnesses by implicitly suggesting that the court was executing an innocent person.⁶⁴ The Gemara then recounts a *baraisa* in which the prisoner said:

If I have truly committed this sin for which I have been condemned, let my death not atone for any of the sins I have accumulated over my lifetime. But if I have *not* committed this sin let my death atone for all my sins and let the court and all of Israel be free of blame for my death. But the witnesses who conspired against me, let them never find forgiveness for what they have done.⁶⁵

This creates a difficulty for the court because even if the defendant's accusations are true and the witnesses wish to recant their false testimony, they cannot do so; the law provides that after witnesses testify, they cannot alter their testimony.⁶⁶ American courts have similar concerns about allowing witnesses to recant their trial testimony.⁶⁷ Thus, even though in this particular case the witnesses wanted to recant their testimony, the court could not overturn the conviction, and the prisoner was executed.⁶⁸

There are only two instances in which perjured testimony that is exposed can obviate execution. First, if two witnesses testify that they saw the defendant commit the act, and two other witnesses then come forward and testify that they too saw the crime and the accused did not commit it, the testimony of both sets of witnesses is disregarded on the ground that it is impossible to determine who is truthful. Second, if the second set of witnesses testify that at the day, hour, and place the first pair of witnesses testified that they saw the defendant commit the crime, the impeaching witnesses saw them in another locale, making it impossible for the first pair of witnesses to have observed the crime, and if the defendant has been convicted but not yet executed, the first witnesses most suffer the same form of death they sought to have imposed on the defendant.⁶⁹

Thus, aside from prohibiting recanted testimony, talmudic law gives the defendant a continuing opportunity to air every argument in favor of acquittal. Indeed, although the Gemara states that the defendant can be returned to court "four or five" times for consideration of a meritorious argument,⁷⁰ that expression is not to be taken literally. It is the Sages' way of saying that the defendant can return to court as many times as

necessary to articulate all possible exonerating arguments.⁷¹ Contrary to contemporary cries that there are far too many appeals in capital cases,⁷² Jewish law encourages the reopening of cases to assure consideration of all nonfrivolous arguments.⁷³

D. The Four Methods of Execution

Suppose, however, that neither the defendant nor anyone else has any new arguments to make or claims to assert. Primed with wine and frankincense, the condemned person must die. We now consider the four methods of execution in descending order of severity.

1. Stoning

When a male prisoner is a few feet from the stoning grounds, court officials remove all his clothing, save for a piece of material to cover the man's genitals.⁷⁴ One of the mishnaic Sages, Rabbi Yehudah, argues that the only difference between a condemned man and woman is that "both in the front and in the back" she is covered, but otherwise she, too, is naked.⁷⁵ The Sages argue, however, that only a man is stoned unclothed.⁷⁶ Why? The Gemara contends that a redundancy in the biblical text, "and they shall stone *him*," establishes that a male prisoner is to be stoned naked, but not a woman.⁷⁷ Rabbi Yehudah, on the other hand, explains the extra word as implying that each prisoner is to be stoned without clothing, and that gender is irrelevant.⁷⁸

The Gemara then proceeds to parse this mishnaic debate between Rabbi Yehudah and the Sages. Why are the Sages so concerned that the woman be clothed? Is it because they are worried that those attending the execution would otherwise become sexually aroused?⁷⁹ The Gemara concludes that is not the issue. Rather, there is a principle that a condemned person is entitled to "a favorable death," derived from the commandment in *Leviticus* 19:18 to "love your fellow as yourself." Rabbi Yehudah and the Sages are arguing about whether "a favorable death" means a person would choose not to be humiliated and instead suffer a prolongation of the death agony by wearing clothes, thereby preventing the stones from achieving full impact. The Sages believe that women are more concerned about personal degradation, while Rabbi Yehudah thinks they would care more about not prolonging the death throes.⁸⁰ The law is in accordance with the Sages, providing that a woman is to wear a simple, thin layered garment when being stoned.⁸¹ The debate illustrates the Sages' attentiveness to even the most minute details in an effort to minimize both the suffering of the defendant and unnecessary humiliation, even in cases in which the incremental benefit may be minimal.

This tension between hastening death and avoiding indignity is also reflected in a talmudic colloquy relating to the procedure for stoning. The Mishnah states that the condemned person is required to stand on a precipice that is twice the height of a man. One of the witnesses pushes him by the hips so that he will fall to the ground on his side. If he falls on his chest, he is turned onto his hips. If the fall kills the defendant, no stones are cast. If he survives, then the other witness casts a stone upon his chest. If he dies from this blow, no further stones are cast. If he survives, "all of Israel," that is, all those present at the execution, stone him until he dies.⁸²

The Gemara discusses why the Mishnah chose the height it did when it is clear

from other sources that a fall from a lesser height is sufficient to cause death. The answer is, again, that the Sages wished to bring about a "favorable death," one that would not prolong his death agony, and that a push from a greater height will cause death sooner and with less pain. Why then not raise the stoning ground even higher? The answer is that it would cause the body to become "grotesque," that is, the fallen body would be smashed, thus "add[ing] markedly to the indignity of his execution."⁸³ The objective of hastening death is also illustrated by the Gemara's discussion of the witnesses' involvement in the stoning. A mishnaic-era source states that the second stone was so heavy it had to be lifted by two men, but then it goes on to say that "he [in the singular] would take it and throw it on the chest of [the condemned]."⁸⁴ The resolution is that although the two witnesses must lift the stone, only one must hurl it on the defendant. Why not have both witnesses lift and throw the stone? Presumably two throwing a stone would be more forceful and result in a quicker death. The Gemara disagrees, concluding that the stone will have a greater velocity if it is thrown by one person. If the two were to throw the stone, it would be difficult to coordinate the exact moment of release, and thus one witness might still be lifting the stone while the other was releasing it.⁸⁵

In contrast to the Mishnah rule that if the defendant does not die as a result of the stone hurled at him, then all Israel must stone him, another mishnaic era source says that "it never happened that a person repeated [the stoning procedure]."⁸⁶ The Gemara Sages resolve the seeming contradiction, asserting that the Mishnah is only giving the law *if* the stone does not kill the defendant. If that is not the case, however, that is, the condemned man dies, then no additional stoning by the congregation is required.⁸⁷

The Gemara grapples with yet another statement of the law, which is that if the witnesses' hands are severed before they can carry out the execution, then the defendant must not be killed.⁸⁸ It is based on *Deuteronomy* 17:7, which states that "the hand of the witnesses shall be upon him first to put him to death." Therefore, the talmudic ruling assumes that Torah directives must be carried out exactly as the verse is written.⁸⁹ The Gemara challenges this premise and brings forth various proofs which it then refutes. Finally, the Gemara finds a mishnaic era source supporting the view that generally biblical verses must be followed literally.⁹⁰ Thus, even in the case of stoning, which is the most severe form of capital punishment and is presumably reserved for the worst offenses, being necessary for expiation of the particular sin, the Rabbis sought in the first instance to prevent conviction (i.e., by reopening the case as often as necessary), and, if that failed, to prevent execution (i.e., by requiring that the biblical verse be followed literally), and, at the very least, to minimize suffering and indignity and bring about a "favorable death."

2. Burning

Notwithstanding its second place ranking in the severity index, execution by burning seems especially cruel and painful, raising the spectre of persons being burned alive at the stake. That, as it turns out, is not the case under talmudic law.

The Mishnah sets forth the procedures for this mode of execution.⁹¹ The defendant is put in manure up to his knees. A coarse scarf is wrapped in a soft scarf, and the witnesses wind them around the defendant's neck, pulling in opposite directions until he opens his mouth.⁹² One witness then throws a "lighted wick" into the defendant's

mouth, and it goes down into his stomach and burns his intestines.⁹³

One of the Mishnah Sages argues that this procedure runs the risk of strangulation, which would make it impossible to fulfill the commandment that the condemned man die by burning. Rabbi Yehudah opines, therefore, that one of the witnesses pries open the defendant's mouth with tongs and then throws in the "lighted wick."⁹⁴ But all agree that the burning is internal. The Mishnah, however, questions that premise, recounting an incident in which the adulterous daughter of a priest was burned at the stake, that is, burned externally.⁹⁵ The Mishnah dismisses this event as precedent, asserting that it was the work of a court that was not expert,⁹⁶ which, according to the Gemara, means that the judges were Sadducees who did not follow the Oral Law.⁹⁷

The Sages question the derivation of the law requiring internal burning and, after analyzing various verses and laws, conclude that indeed the burning must be internal, because the relevant Torah verses indicate that while burning destroys the soul, the body must remain intact. One of the biblical supports for this law is the death of Nadab and Abihu, the two sons of Aaron, the high priest and brother of Moses. The sons, who sinned,⁹⁸ are killed by divine fire at the altar but their bodies remained unblemished.

Why is the defendant put in manure up to his knees, a seemingly gratuitous indignity? According to Rashi, the manure prevents the defendant from jumping around and causing the molten lead to spill on his body, resulting in an external rather than an internal burning, as mandated by Jewish law.⁹⁹ Alternatively, the manure, or, some say, mud or dirt, hides bodily excretions that occur at death, thereby preserving the defendant's dignity.¹⁰⁰ Yet another explanation is that the smell of the manure hastens death.¹⁰¹

Where does Rashi derive that molten lead is used? The Mishnah speaks only of a "lighted wick." The Gemara explains that the "wick" mentioned in the Mishnah is actually molten lead that is poured down the defendant's mouth causing an immediate internal burning.¹⁰² According to yet another authority, the molten lead was to be long and thin like a wick, so that it melted quickly, and thus the defendant would not have to suffer delay in his execution.¹⁰³ Consequently, the prescribed biblical death by burning is a far cry from being burned alive at the stake. It is speedier, it is less painful, and, because the external body is left intact, it is less degrading. Again, with regard to this severe form of execution as well, to the extent possible, the Sages sought to reduce the evildoer's pain and anxiety, as well as to preserve his dignity.

3. Beheading

The Mishnah contains an argument concerning the procedure for beheading. The majority contends that the defendant is decapitated with a sword in a procedure similar to that of the civil authorities (the Romans). Rabbi Yehudah responds that that mode of execution disgraces the condemned person, and he argues that the prisoner's head is instead placed on a block and chopped off with an ax. The majority retorts that "there is no more disgraceful manner of death than this," apparently because the blade of the ax is not as sharp as that of a sword.¹⁰⁴

The Gemara cites a *baraisa* recording Rabbi Yehudah's statement to the Sages acknowledging that his interpretation of beheading with an ax is a disgraceful death, but asserting that decapitation by sword is prohibited because the Torah proscribes following

the ways of the nations; thus, because it is a gentile custom to behead by sword, it is forbidden for the rabbinic courts to do so. The Gemara concludes, however, that beheading by sword is derived not from the nations, but from the Torah. Therefore, even though both a sword and an ax are encompassed by the use of the term "sword" in the Torah,¹⁰⁵ that the Sages chose the sword rather than the ax is not an imitation of gentile customs.¹⁰⁶

The Gemara next examines the sources for determining who is punished by beheading. Two types of criminals are beheaded: citizens of a subverted city (a city in which a majority of people practice idol worship) and murderers.¹⁰⁷ The source for the former is explicitly stated in *Deuteronomy* 13:16: "[S]mite the inhabitants of that city by the edge of the sword." But what is the source in the Torah from which we derive the form of death penalty for murderers? The Gemara learns the law from a *baraisa* that in turn relies on *Leviticus* 26:25, which states that if a person strikes and kills his slave, "he shall be avenged." But what form does vengeance take? That same Torah verse also proclaims, "I will bring upon you a sword, avenging the vengeance of the covenant," thereby proving that the method of execution for murderers is death by the sword. But how do we know that the sword is for beheading? Maybe it means that the murderer should be stabbed. That interpretation is rejected because the Torah says of the inhabitants of the subverted city that they should be executed by "the edge of the sword," indicating slicing rather than stabbing.¹⁰⁸

Pursuing the issue further, the Gemara opines that perhaps the condemned man is to be cut in half lengthwise. The Gemara's response is, again, *Leviticus* 19:18, "You shall love your fellow as yourself," meaning choose for your coreligionist a favorable death. Clearly it is less gruesome to behead than to split someone lengthwise in half. In other words, the Gemara seems to suggest that there is an option between the two types of killing by sword, and mercy requires the less gruesome death.¹⁰⁹

The Rabbis then return to the earlier question of the source of the death penalty for murderers. The Gemara had initially relied on the Torah verse that a slave who is killed by his master shall be avenged, concluding, by a process of exegesis, that "avenged" means "beheaded." With respect to the penalty for murderers of free persons, however, the Torah is silent. *Numbers* 35:17 says only that "the murderer shall be put to death."

The Gemara first advances a *kal vachomer* argument, that is, a *fortiori* reasoning—if one who killed a slave is executed by the sword, should a person who killed a free man be executed by strangulation, a less severe form of execution?¹¹⁰ That argument, however, only works for those who think strangulation is more lenient than beheading. What about those who believe that strangulation is a more severe penalty? Such a person can derive beheading from *Deuteronomy* 21:9, "And you shall purge the innocent blood from your midst," which appears following the section of the Torah dealing with the *eglah arufah*, that is, the calf who is decapitated as a form of expiation in the case of a corpse found equidistant between two cities, where the murderer is unknown.¹¹¹ What is the relevance of this juxtaposition of verses? From it we derive that if the murderer is thereafter found, he is still put to death. This hints that a murderer is killed in the same manner as the calf—by beheading. But, argues the Gemara, as the calf is killed by an ax to the back of the neck, so, too, should the murderer. The Gemara's response again is, "And you shall love your fellow as yourself"—choose for him a favorable death, that is, the less painful form of execution by the sword.¹¹²

4. Strangulation

The Mishnah prescribing the procedure for strangling is quite succinct. "They would submerge him in manure up to his knees and place a coarse scarf inside a soft one and wind it around his neck. This [witness] pulls toward himself and this [witness] pulls toward himself until his soul departs."¹¹³ Note the similarity to execution by burning; there, too, the witnesses pull the scarves in opposite directions, but in that case only to force the defendant's mouth open to receive the molten lead. Also, as in the case of burning, the defendant is submerged in manure to his knees. Why the manure? According to commentators, akin to the case of burning, its purpose is to prevent the defendant from jumping around, which would prolong the process, thereby causing him more pain.¹¹⁴

The Gemara initially questions the source mandating death by strangulation for adulterers.¹¹⁵ *Leviticus* 20:10 simply states, "[The adulterer and adulteress] shall surely be put to death." How do we know that this means death by strangulation? One Sage argues that whenever a death penalty is mentioned in the Torah without specifying the method of execution, we have no right to interpret the verse so as to impose a harsher punishment. That is, we must choose the most lenient type of death, and there is an oral tradition that strangulation is the least onerous capital penalty.¹¹⁶

Another Sage, however, contends that the reason an unspecified death penalty requires strangulation is not because we must choose the most lenient form of capital punishment, but rather because the lack of specification itself means strangulation.¹¹⁷ His argument is grounded in an exegetical rule known as *gezeirah shavah* that permits derivation of a law by inference when the same word or words occur in different biblical verses, provided the inference is supported by a long standing tradition;¹¹⁸ the contention is that when the Torah decrees death "at the hand of" Heaven, it leaves no mark on the body, and therefore when the Torah mentions death "at the hand of" man (without specifying the mode of killing), it must also mean that the method of execution leaves no mark on the body, as is true with strangulation.¹¹⁹

The Gemara objects to this hermeneutical argument, asserting that, because it is internal, burning also leaves no external mark on the body. The response is that the Bible specifically mandates death by burning for a priest's daughter who commits adultery, and, therefore, the penalty for those who do not fit into this category—that is, others guilty of adultery—must mean strangulation.¹²⁰

The Rabbis then pose a fundamental question for the first Sage, who argued that strangulation is inferred because it is the most lenient. How does he know that strangulation is a prescribed death penalty at all?¹²¹ Perhaps there are only three forms of capital punishment—the ones specifically mentioned in the Bible, namely, stoning, burning, and beheading.¹²² The Gemara answers that the four death penalties are known because of the Oral Law.¹²³

The Gemara then seeks a deeper understanding of two related issues. One deals with the nature of the above noted rabbinical dispute on the appropriate mode of execution when no method is specifically prescribed in the Torah. The second considers the analysis required for application of the exegetical rule of *gezeirah shavah*. This analysis is conducted by recourse to the laws governing execution by stoning.¹²⁴

The Mishnah specifies the various acts that are punishable by stoning, a penalty

that is specifically mentioned in the Bible for certain offenses.¹²⁵ What about the other capital crimes for which stoning is the Mishnah's prescribed method of execution, even though the form of death for these offenses is not specified in the Torah? They, too, are derived by means of a *gezeirah shavah*.¹²⁶ *Leviticus* 20:27 states that those who commit certain forms of sorcery "shall surely be put to death; they shall pelt them with stones, their blood is upon them."¹²⁷ Rabbi Zeira asks from which words in *Leviticus* 20:27 is the inference of stoning for unspecified cases made—from the words "they shall surely be put to death," which precede the requirement of stoning, or from the phrase "their blood is upon them," which follows that requirement.¹²⁸ Abaye says it is derived through the latter, because if it were derived from the words "they shall surely be put to death," the words "their blood is upon them" would become superfluous, adding nothing to the verse, and it is a rule of biblical construction that no word or even letter in the Torah is redundant.¹²⁹

The Gemara then asks whether the converse position is problematic. That is, if the penalty for unspecified cases of stoning comes from "their blood is upon them," what is the point of "they shall surely be put to death"? Is it also superfluous? The Gemara's answer is that the phrase "they shall surely be put to death" is needed as a basis for a different law and thus is not superfluous. What other law? A *baraisa* teaches that "he who struck [the man] shall surely be put to death; he is a murderer." The penalty for murder, as we have seen, is beheading. But what if one cannot execute the murderer by that method? For example, what if he flees after conviction and can only be prevented from escaping by shooting him with a bow and arrow? The law is that the escapee then can be executed by any method, even if it is not one of the four prescribed death penalties. And that law is learned from the language, "shall surely be put to death." Thus, "their blood is upon them" is the source of the implied penalty of stoning in unspecified cases, whereas "shall surely be put to death" serves as the authority for executions other than by the four means generally prescribed.¹³⁰

If, however, the Sages would have derived the penalty of stoning in unspecified cases from the words, "they shall surely be put to death," would that create another difficulty? Perhaps the difficulty would be that strangulation is the punishment for adultery with a married woman, and the Torah verse in *Leviticus* 20:10 concerning this offense also contains the phrase, "they shall surely be put to death." If we use a *gezeirah shavah* to derive strangulation from the words "they shall surely be put to death" that are included in *Leviticus* 20:10 concerning adultery with a married woman, what are we to make of the appearance of that same phrase in *Leviticus* 20:27 regarding sorcery, which is punishable by stoning—in which case adultery with a married woman should also be punished by stoning. That, however, cannot be true because the Torah states explicitly that adultery with a "betrothed" woman is punishable by stoning, and thus we can infer that the lesser offense of adultery with a married woman is not punished in that same manner. Therefore, the use of a *gezeirah shavah* based on the phrase in *Leviticus* 20:10, "they shall surely be put to death," would be inapplicable in the case of a fully married woman, but it would continue to apply to *other* crimes with unspecified punishments.¹³¹

Perhaps then the difficulty is that those who strike their father or mother are subject to strangulation, even though *Exodus* 21:15 uses the words "he shall surely be put to death" with respect to that wrongdoing. Why can't we derive from *Leviticus* 20:27 regarding sorcery, which uses the same phrase, that such persons are subject to stoning?

That possibility does not present a difficulty, because there is a rule that in interpreting the law we must not choose the more stringent form of execution, but rather the more lenient. So as between the *Leviticus* sorcery verse's use of "surely be put to death" to infer stoning, and the use of the same phrase with respect to adultery with a married woman to infer punishment by strangulation, we must choose the latter.¹³²

Finally, the Gemara determines the real problem that would be presented by using "shall surely be put to death" to infer stoning as the sanction for crimes with unspecified punishments. Why are those who are subject to stoning in unspecified cases stoned? That is, if we attempt to derive the punishment of stoning from the phrase "they shall surely be put to death" appearing in *Leviticus* with respect to sorcerers, as it is forbidden to choose a more stringent penalty, we should reject the *gezeirah shavah* based on sorcery and instead derive the penalty of strangulation in unspecified cases based on a *gezeirah shavah* from the case of the married woman who is subject to strangulation. However, as the inference of stoning is made from the words "their blood is upon them" in the sorcery verse, there is no difficulty, because this phrase does not appear in connection with the penalty for a married woman.¹³³

Thus, when the same phrases appear several times in the Torah, which then creates the possibility of choice, the Sages apply the *gezeirah shavah* rule in a manner that results in the most lenient punishment. So even this hermeneutical analysis, which seems to be almost mechanical in nature, leaves room for play in the joints, and the play is on the side of mercy.

E. Concluding Thoughts About "A Favorable Death" and the Eighth Amendment

In determining the meaning of the Eighth Amendment's prohibition of cruel and unusual punishment, the United States Supreme Court requires that that constitutional guarantee "draw its meaning from the evolving standards of decency that mark the progress of a maturing society"¹³⁴—which is largely dependent on contemporary values. In addition, the punishment must accord with the "dignity of man."¹³⁵ This in turn requires that the penalty not be excessive.¹³⁶ Excessiveness has two prongs: first, that the punishment not inflict unnecessary and wanton pain; second, that the punishment not be grossly disproportionate to the severity of the crime.¹³⁷

If, however, a substantial number of states permit the form of punishment in general or in particular situations, the Court tends to uphold state law.¹³⁸ As the Court has noted, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. "We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved."¹³⁹

Taken together, these are mushy standards that are, to some extent, in tension with one another. On the one hand, the Court does not require the states to select the least severe sanction, but on the other hand, the penalty imposed by the state must accord with the dignity of man and not inflict unnecessary pain. A similar tension lies at the core of death penalty law itself,¹⁴⁰ which demands that defendants receive individualized sentencing¹⁴¹ and at the same time prohibits arbitrariness and discrimination in the administration of capital punishment.¹⁴²

The Supreme Court has invalidated applications of particular noncapital

punishments, such as incarceration for twelve years in chains at hard labor for the crime of embezzlement¹⁴³ and life imprisonment for a recidivist who committed several nonviolent offenses.¹⁴⁴ However, so far at least, the Court has substantively limited the death penalty to murder, making it inapplicable to the crime of rape of an adult woman.¹⁴⁵ Furthermore, the Court has placed numerous procedural limitations on application of the death penalty, such as mandating consideration of individual mitigating factors.¹⁴⁶ But the Justices have never held a particular form of capital punishment, such as electrocution, unconstitutional.¹⁴⁷ When the Court recently granted certiorari to consider the constitutionality of a Florida law mandating electrocution,¹⁴⁸ that state's legislature expeditiously amended the statute to permit death by lethal injection as an alternative.¹⁴⁹ The Supreme Court then dismissed the writ as improvidently granted.¹⁵⁰ Nebraska, the last holdout, finally concluded that under state law electrocution was unconstitutional.¹⁵¹

In some ways the Court's Eighth Amendment jurisprudence is not too dissimilar from the talmudic interpretations of the biblical modes of execution. Like the Supreme Court, the talmudic Sages focus on assuring that the defendant die a dignified death and on assuring that there be no unnecessary prolongation of the process, in order to prevent any unnecessary pain and suffering. While the Court has said that it will not require the least severe form of punishment,¹⁵² the Talmud does impose such a requirement, at least in cases in which the appropriate death penalty is unclear. Furthermore, even where the particular mode of execution is clear, within the context of that form of punishment, the Sages attempt to prevent unnecessary pain and to assure "a favorable death." Given the technology that then existed, the biblical death penalties were inflicted in as humane a manner as possible, with due regard to the sanctity and dignity of life and the paramount importance of mercy.

There are some aspects of Jewish capital punishment law that are harsher, or at least appear to be harsher, than American law.¹⁵³ For example, under Jewish law, for purposes of capital punishment, a male is deemed to be an adult at age thirteen.¹⁵⁴ Under American law, however, a person is not subject to capital punishment for a murder committed when the defendant is under the age of eighteen.¹⁵⁵

There is another facet of American capital punishment law that appears to be more lenient than its Jewish counterpart—namely, the number of crimes subject to the death penalty. So far, contemporary capital punishment in this country has been upheld only for murderers,¹⁵⁶ leaving it unclear if the death penalty could, for example, be applied in cases of rape of a child, kidnapping, espionage, or treason,¹⁵⁷ while under Jewish law the death penalty applies to a wide variety of offenses, including wrongs such as adultery that do not appear to threaten the physical safety of the community.¹⁵⁸ Because it is of divine origin, Jewish law of necessity looks also to protect the spiritual well-being of society.

On the other hand, although the Supreme Court has, up to now, upheld the death penalty only for crimes of murder, it also has permitted its use in cases of felony murder, even when the defendant neither committed the killing nor intended to kill. As the Court noted: "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy . . . [the necessary] culpability."¹⁵⁹ On the other, other hand, Jewish law defines murder as an intentional premeditated homicide carried out by the defendant himself,¹⁶⁰ there being no accomplice liability.¹⁶¹ Thus, in the felony

murder context, a defendant other than the "triggerman" could not be convicted under Jewish law. Furthermore, because of these requirements, Jewish law would not permit the application of capital punishment even to triggermen causing accidental or negligent deaths during the course of a felony, issues that the United States Supreme Court has not yet addressed.¹⁶²

Nonetheless, the numerous Jewish capital punishment provisions at first glance appear primitive and even barbaric. On closer inspection and examination of their talmudic interpretations, however, one finds almost the opposite to be true. It is almost impossible to convict an innocent person for a capital offense, a marked contrast to American law,¹⁶³ in which the debate is not about *whether* innocent people are convicted and sent to death, but about *how many* such people have met that fate.¹⁶⁴ With the advent of DNA,¹⁶⁵ release of convicted but innocent persons has become almost commonplace,¹⁶⁶ prompting some states to put a moratorium on capital punishment.¹⁶⁷ Second, Jewish law makes it extremely difficult to convict even the guilty. While Jewish law's apparent inability to convict those who are factually guilty may be regarded as a weakness of its criminal justice system, there is some virtue in curtailing the number of executions. The difficulty of conviction effectively emphasizes the sanctity of beings created in God's image. In America, on the other hand, executions have become almost numbingly routine,¹⁶⁸ particularly in some jurisdictions,¹⁶⁹ making ours, in a sense, a death-oriented society in which life, if not cheap, at least has less value.

¹ Cf. NEHAMA LEIBOWITZ, STUDIES IN VAYIKRA (LEVITICUS) 245 (Aryeh Newman trans., 1983) ("Few are the verses of the Bible which have been so frequently and glaringly misunderstood This misconception has transformed . . . [the 'life for life, eye for eye' verses] into a symbol, the embodiment of vengeance at its crudest level.").

² See generally THE CODE OF MAIMONIDES, BOOK 14: THE BOOK OF JUDGES, *Sanhedrin* 14:1, at 39 (Abraham M. Hershman trans., 1949) [hereinafter THE CODE OF MAIMONIDES–JUDGES]:

The court is empowered to inflict four modes of death: stoning, burning, slaying by the sword, and strangulation. The penalties of stoning and burning are expressly stated in the Bible. By a tradition reaching back to Moses, our teacher, it has been learned that whenever the Bible decrees the death penalty without specifying the mode, strangulation is meant, and that one who slays another is put to death by decapitation, as are the inhabitants of a seduced city.

³ Nonetheless, "executions are difficult to carry out," including death by lethal injection. Arif Khan & Robyn M. Leventhal, *Medical Aspects of Capital Punishment Executions*, 47 J. FORENSIC SCI. 847 (2002). This Article describes how the five methods of execution used in this country (lethal injection, electrocution, hanging, shooting squad, and gas chamber) are actually administered. The authors conclude that the "lethal injection method consisted of the longest duration of time in the death chamber." *Id.* at 849. Furthermore, lethal injection and electrocution took about the same amount of time between the start of execution and death. *Id.* Finally, lethal injection is also subject to "botched executions." *Id.*; see Deborah W Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63 (2002). Professor Denno argues that lethal "injection also involves unnecessary pain, the risk of such pain, and a loss of dignity." *Id.* at 63. She asserts that "[t]hese failures seem to be attributed to vague lethal injection statutes, uninformed prison personnel, and skeletal or inaccurate lethal injection protocols." *Id.* Her article explores these issues in depth. See also ROBERT J. LIFTON & GREG MITCHELL, WHO OWNS DEATH?: CAPITAL PUNISHMENT, THE AMERICAN CONSCIENCE, AND THE END OF EXECUTIONS 42–69 (1st ed. 2000) (describing the death penalties in detail); Ian Fisher, *Merits of Lethal Injection Are Questioned by Its Foes*, N.Y. TIMES, Feb. 17, 1995, at B5 (describing botched lethal injections, including searching the prisoner's body for 40 minutes for a clean vein, allergic reactions to the drugs, and a tube bursting, spraying the execution fluids toward the

witnesses); Adam Liptak, *Critics Say Execution Drug May Hide Suffering*, N.Y. TIMES, Oct. 7, 2003, at A1 (noting that one of the drugs in lethal injection cocktails is no longer being used to euthanize pets and that critics argue the drug causes paralysis that "masks intense distress, leaving a wide-awake inmate unable to speak or cry out as he slowly suffocates").

Recently the governor of Ohio postponed executions in the state after a failed execution by lethal injection and problems with the procedures in other executions. In one of the cases the technicians tried for over two hours to inject the prisoner with lethal drugs. The state is attempting to revise the protocol for lethal injections so as to avoid such problems. See Bob Driehaus, *In Aftermath of Failed Execution, Ohio Governor Orders Postponement of 2 Others*, N.Y. TIMES, Oct. 6, 2009, at A11.

⁴ See *Baze v. Rees*, 128 S. Ct. 1520, 1532 (2008) (observing that "[t]hirty-six States that sanction capital punishment have adopted lethal injection as the preferred method of execution.").

⁵ In 1977, Oklahoma became the first state to adopt lethal injection. See Rebecca Brannan, *Sentence and Punishment: Change Method of Executing Individuals Convicted of Capital Crimes from Electrocutation to Lethal Injection, Review of Selected 2000 Georgia Legislation*, 17 GA. ST. U. L. REV. 116, 121 (2000) (citing Death Penalty Information Center, *History of the Death Penalty, Part I*, at <http://www.deathpenaltyinfo.org/article/php?scid=15&did=410> (last visited Jan. 27, 2004)).

⁶ Jonathan S. Abernethy, *The Methodology of Death: Reexamining the Deterrence Rationale*, 27 COLUM. HUM. RTS. L. REV. 379, 400 (1996) (noting that by the late 1920s electrocution was used in over one half of the states that had capital punishment laws).

⁷ *Id.* at 401 (arguing that because of the concern "for 'decency' in execution methods, the electric chair became the execution method of choice in the mid-twentieth century"); see also *In re Kemmler*, 136 U.S. 436, 444 (1890) (noting the description of hanging as "barbaric" by the then governor of New York).

⁸ *Dawson v. State*, 554 S.E.2d 137, 141–42 (Ga. 2001) (footnotes omitted); see also Clive Stafford-Smith, *Killing the Death Penalty with Kindness*, in *MACHINERY OF DEATH: THE REALITY OF AMERICA'S DEATH PENALTY REGIME* 269 (David R. Dow & Mark Dow eds., 2002). Stafford-Smith tells of a death row inmate who gave the author the following note which was in turn given to the client by a sadistic prison guard:

When the executioner throws the switch that sends the electric current through the body, the prisoner cringes from torture, his flesh swells and his eyes pop out. In some cases I have been told the eyeballs rest on the cheeks of the condemned. His flesh is burned and smells of cooked meat. When the autopsy is performed the liver is so hot it cannot be touched by human hand.

Id. at 269.

⁹ MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 3 (Alan Sheridan trans., 2d ed. 1995) (internal quotations omitted) (quoting the judgment).

¹⁰ See *Botched Executions*, N.Y. TIMES, Oct. 3, 2009, at A22 ("The execution team in Ohio spent about two hours trying to access a vein on Mr. Broom's arms and legs. They stuck him with a needle about 18 times, returning to areas that were already bruised. In one case, the needle reportedly hit a bone."). See also *Fierro v. Gomez*, 865 F. Supp. 1387, 1415 (N.D. Cal. 1994) (examining the scientific evidence regarding gassing and concluding that the evidence "strongly suggests that the pain experience by those executed is unconstitutionally cruel and unusual"), *aff'd*, 77 F.3d 301 (9th Cir. 1996), *vacated*, 519 U.S. 918 (1996); CAPITAL PUNISHMENT 145–53 (Thomas Draper ed., 1985) (describing execution by lethal injection); Roberta M. Harding, *The Gallows to the Gurney: Analyzing the (Un)constitutionality of the Methods of Execution*, 6 B.U. PUB. INT. L.J. 153 (1996) (analyzing the five methods of execution under various tests, such as history and whether death is instantaneous and painless, and concluding that all such methods are constitutionally suspect); Ryk James & Rachel Nasmyth-Jones, *The Occurrence of Cervical Fractures in Victims of Judicial Hanging*, 54 FORENSIC SCI. INT'L 81, 91 (1992) (concluding that "[s]hould any government re-introduce the death penalty the use of hanging as a suitable means must be seriously questioned"); L.D.M. Nokes, A. Roberts & D.S. James, *Biomechanics of Judicial Hanging: A Case Report*, 39 MED. SCI. L. 61, 64 (1999) (concluding that "using the system of hanging described above, it is not possible on the basis of a person's mass alone to determine how long a drop should be employed to pull apart the spinal cord or brainstem reliably without pulling off the head"); Michael W. Spence, Michael J. Shkrum, Alison Ariss & John Regan, *Cranio-cervical Injuries in Judicial Hangings: An Anthropologic Analysis of Six Cases*, AM. J. FORENSIC MED. & PATHOLOGY 309, 321 (1999) (studying six skeletons of people who were executed by hanging and concluding that there was "a surprising degree of variability in the results"); Ron Sufrin, *"Everything is in Order, Warden": A Discussion of Death in the Gas Chamber*, 6

SUICIDE & LIFE-THREATENING BEHAV., 44, 49 (1976) (describing a gassing in which the condemned shrieked and moaned and had to be forcibly strapped into a chair); Sabra Chartrand, *Given a Push, Maryland Alters Its Death Penalty*, N.Y. TIMES, Mar. 25, 1994, at B18 (describing a gassing in which "the prisoner appears to retain consciousness for even several minutes, moaning and struggling for breath all the while"); Carla McClain, *Lethal Injection Bill Getting Little Support*, TUCSON CITIZEN, Apr. 7, 1992, at 2A (noting that "Arizona switched from death by hanging to death by lethal gas for humane reasons. That happened after an infamous Arizona execution in 1930, when a heavy woman, Eva Dugan, was beheaded by the hangman's noose when the trapdoor fell open."). See generally *Campbell v. Wood*, 18 F.3d 662, 687 (9th Cir. 1994); NEGLEY K. TEETERS & JACK H. HEDBLUM, ". . . HANG BY THE NECK . . .": THE LEGAL USES OF SCAFFOLD AND NOOSE, GIBBET, STAKE, AND FIRING SQUAD FROM COLONIAL TIMES TO THE PRESENT (1967) (examining hanging from colonial times to the present).

¹¹ W. Noel Keyes, *The Choice of Participation by Physicians in Capital Punishment*, 22 WHITTIER L. REV. 809, 809–10 (2001) (noting that the American Medical Association has issued a policy statement that doctors' participation in any aspect of an execution is unethical).

¹² Michael deCourcy Hinds, *Making Execution Humane (or Can It Be?)*, N.Y. TIMES, Oct. 13, 1990, at 1 ("Many advocates of capital punishment say pain and suffering are part of the penalty.").

¹³ *Id.* (noting that "people who oppose the death penalty do not lobby for more humane forms of execution, saying a more humane method would only derail their efforts to abolish it" and citing antideath penalty groups who argue that "lobbying for more humane methods would undercut their fundamental opposition to the penalty and would weaken their crusade by defusing public outrage").

¹⁴ *Exodus* 34:6–7 (referring to "God, Compassionate and Gracious, Slow to Anger, and Abundant in Kindness and Truth"). Unless otherwise noted, biblical translations in the text and footnotes of this chapter are from The Stone Edition of the Torah, which is part of the ArtScroll Series. THE CHUMASH, (Nosson Scherman et al. eds., Stone ed. 1993) [hereinafter THE CHUMASH].

¹⁵ Thirty-six offenses are subject to the death penalty. THE CODE OF MAIMONIDES–JUDGES, *supra* note 2, *Sanhedrin* 15:13.

¹⁶ *Id.*, *Sanhedrin* 15:10–13.

¹⁷ ARTSCROLL SERIES, THE MISHNAH, SEDER NEZIKIN, VOL. II(A), *Sanhedrin* 7:4, at 113–17 (Avrohom Y. Rosenberg trans., 1987) [hereinafter MISHNAH].

¹⁸ *Id.*, *Sanhedrin* 9:1, at 153–57.

¹⁹ *Id.*

²⁰ *Id.*, *Sanhedrin* 11:1, at 191–95.

²¹ *Id.*, *Sanhedrin* 7:1, at 107; THE ARTSCROLL SERIES, THE TALMUD BAVLI: THE GEMARA: THE CLASSIC VILNA EDITION, *Sanhedrin* 50a–52a (Schottenstein ed., 2007) [hereinafter BABYLONIAN TALMUD].

²² BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 47b (noting that persons achieve atonement if they are put to death pursuant to an order of the rabbinic courts and thereafter buried).

²³ *Id.*, *Sanhedrin* 45a (requiring that a convicted defendant receive the most favorable death).

²⁴ See *id.*, *Beitzah* 2b & n.5 (observing that rabbinical scholars generally consider an unattributed opinion to be binding); see also ADIN STEINSALTZ, THE TALMUD: THE STEINSALTZ EDITION, A REFERENCE GUIDE 95 (Israel V. Berman ed. & trans., 1989) [hereinafter STEINSALTZ, REFERENCE GUIDE] (noting that citation of an opinion without attribution indicates "Rabbi Yehuda HaNassi [the redactor of the Mishnah], ascribed particular importance to [the unattributed opinion], and quoted it anonymously in order to indicate that he himself considered it authoritative").

²⁵ MISHNAH, *supra* note 17, *Sanhedrin* 7:1, at 107.

²⁶ BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 49b (debating whether, when the Mishnah lists items, it intends to give the order of enumeration significance).

²⁷ See *id.*, *Sanhedrin* 49b–52a.

²⁸ *Id.*, *Sanhedrin* 49b.

²⁹ *Id.*, *Sanhedrin* 49b & n.42.

³⁰ *Id.*, *Sanhedrin* 49b.

³¹ *Id.*, *Sanhedrin* 50a.

³² BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 50a & n.1.

³³ *Id.*

³⁴ MISHNAH, *supra* note 17, *Sanhedrin* 9:3, at 161–63.

³⁵ BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 79b & n.15.

³⁶ *Id.*

³⁷ MISHNAH, *supra* note 17, *Sanhedrin* 9:4, at 163–65.

³⁸ *See Leviticus* 18:17.

³⁹ MISHNAH, *supra* note 17, *Sanhedrin* 9:1, at 153.

⁴⁰ *Id.* *Sanhedrin* 11:1, at 191.

⁴¹ BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 81a.

⁴² MISHNAH, *supra* note 17, *Sanhedrin* 9:4, at 163–65.

⁴³ BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 81a.

⁴⁴ *Id.*, *Sanhedrin* 43a & n.19. One might think that an alcoholic drink or a tranquilizer would be given to those about to be executed. I put this question to C. Larry Fitzgerald, an official with the Texas Department of Criminal Justice who has witnessed over 160 executions. In a telephone interview with him on February 6, 2002, he said that tranquilizers could not be administered because a prisoner about to be executed has to have all his faculties intact.

⁴⁵ MISHNAH, *supra* note 17, *Sanhedrin* 6:1, at 91; BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 42b.

⁴⁶ BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 42b & n.13.

⁴⁷ *Id.*, *Sanhedrin* 42b.

⁴⁸ *Id.*

⁴⁹ MISHNAH, *supra* note 17, *Sanhedrin* 6:1, at 91–93.

⁵⁰ *Id.* at 93.

⁵¹ BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 43a.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*, *Sanhedrin* 43a & n.27.

⁵⁷ BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 43a.

⁵⁸ Later Sages promulgated rules for determining the ultimate resolution of such debates. *See, e.g.*, MEIR ZVI BERGMAN, GATEWAY TO THE TALMUD 32–33 (Nesanel Kasnett trans., Tzvi Zev Arem ed. 1985) (discussing the resolution of debates between the schools of Hillel and Shammai); STEINSALTZ, REFERENCE GUIDE, *supra* note 24, at 246–50 (discussing how legal disputes were resolved).

⁵⁹ ADIN STEINSALTZ, THE STRIFE OF THE SPIRIT 80 (1988):
 [U]nlike the Mishnah, which is primarily a code of law whose primary purpose is to instruct the individual or the Jewish community how to act, the [Gemara] discussions are essentially theoretical and are directed toward clarifying the basic principles of the law and the different schools of thought therein; practical inferences are considered essentially derivative, secondary conclusions drawn, for the most part, from the abstract discussion.

⁶⁰ *See* MAHARAL, SEFER BE'ER HA-GOLAH 26 (L. Honig & Sons 1960) (arguing that the function of the rabbinic courts is to find bases upon which to acquit the defendant).

⁶¹ MISHNAH, *supra* note 17, *Sanhedrin* 6:1, at 93.

⁶² *Id.*

⁶³ *Id.*, *Sanhedrin* 44b.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*, *Makkos* 3a.

⁶⁷ *See* Tim A. Thomas, Annotation, Standard for Granting or Denying New Trial in State Criminal Case on Basis of Recanted Testimony—Modern Cases, 77 A.L.R. 4th 1031 (1990) (discussing what a defendant must establish before obtaining a new trial where a witness recants his or her testimony).

⁶⁸ MISHNAH, *supra* note 17, *Sanhedrin* 44b & n.42.

⁶⁹ *See id.*, *Makkos* 1:4, 1:6, at 19–21, 23.

⁷⁰ *Id.*, *Sanhedrin* 6:1, at 93.

⁷¹ *Id.* at 92.

⁷² *See, e.g.*, *Fearance v. Scott*, 56 F.3d 633, 639–40 (5th Cir. 1995) (explaining that the defendant was on death row for seventeen years because of his numerous appeals and writs); Fox Butterfield, *Behind the Death Row Bottleneck*, N.Y. TIMES, Jan. 25, 1998, § 4, at 1 (“Conservatives . . . insist the problem lies with the willingness of too many judges to hear endless appeals [in capital cases], so that the average length of

time spent by a convict on death row is 8.8 years."); Anthony Lewis, *A Rage to Kill*, N.Y. TIMES, May 18, 1990, at A31 ("The Chief Justice said a system that allows such delays 'verges on the chaotic.'").

⁷³ Compare *Jones v. Barnes*, 463 U.S. 745, 763–64 (1983) (holding that an attorney's refusal to raise non-frivolous claims does not constitute ineffective assistance of counsel).

⁷⁴ MISHNAH, *supra* note 17, *Sanhedrin* 6:3, at 97.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 45a. The redundancy is clear only in Hebrew, which permits combining the verb with its direct object so as to create one word. Such a combination is the tersest way of expressing "and they shall stone him." In the Torah verse, however, the verb and direct object, "stone" and "him," are separate words, thus making the pronoun "him" arguably superfluous and therefore included for another reason, namely, limiting nakedness before being stoned to male prisoners.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*, *Sanhedrin* 44b & n.46; *id.*, *Sanhedrin* 45a & nn.17, 20–21.

⁸² MISHNAH, *supra* note 17, *Sanhedrin* 6:4, at 99. According to Rabbi Eliezer, all those who are stoned to death are thereafter briefly hung, since it is not permitted for a corpse to remain on the gallows into the night. The Sages, however, conclude that only blasphemers and idolators may be hung after the stoning. *Id.* BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 45b.

⁸³ BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 45a & n.32.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*, *Sanhedrin* 45b.

⁸⁹ BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 45b.

⁹⁰ *Id.* Of course, if the words are contrary to the Oral Law, the latter governs.

⁹¹ MISHNAH, *supra* note 17, *Sanhedrin* 7:2, at 107–09.

⁹² *Id.* According to 18 THE TALMUD: THE STEINSALTZ EDITION, PART IV, *Sanhedrin* 52a, at 37 nn., (Rabbi David Strauss trans. & ed. 1998) [hereinafter STEINSALTZ GEMARA], a soft scarf alone was insufficient, for it would tear when pulled in opposite directions, thereby unnecessarily prolonging the execution.

⁹³ MISHNAH, *supra* note 17, *Sanhedrin* 7:2, at 107–09.

⁹⁴ *Id.* at 109.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 52b.

⁹⁸ There are various explanations of the exact nature of their sins, ranging from being intoxicated, using an "alien fire" on the altar, and arrogance in not consulting Moses. *Leviticus* 10:2, 10:9.

⁹⁹ MISHNAH, *supra* note 17, *Sanhedrin* 7:2, at 109; *see also id.* at 107 nn.

¹⁰⁰ STEINSALTZ GEMARA, *supra* note 92, *Sanhedrin* 52a, at 37 nn.

¹⁰¹ RAIVID COMMENTARY ON THE SIFRA, *quoted in* 16 ENCYCLOPEDIA TALMUDICA 382 n.22 (Shlomo Y. Sevin ed., 1980).

¹⁰² BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 52a.

¹⁰³ STEINSALTZ GEMARA, *supra* note 92, *Sanhedrin* 52a, at 37–38 & nn.

¹⁰⁴ MISHNAH, *supra* note 17, *Sanhedrin* 7:3, at 111.

¹⁰⁵ BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 52b.

¹⁰⁶ *Id.*, *Sanhedrin* 52b; *see also id.*, *Sanhedrin* 52b n.6 (noting that according to one commentator the executioner would decapitate the defendant from the front as he was standing, "severing his trachea and esophagus and killing him instantly"). That is also how the Roman authorities of the time would behead condemned persons.

¹⁰⁷ *Id.*, *Sanhedrin* 52b.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* *But see* *Sawyer v. Whitley*, 772 F. Supp. 297, 307 (E.D. La. 1991) ("The fact that the design of Louisiana's electric chair is subject to improvement, does not necessarily mean that an execution in the

chair will not meet constitutional standards."), *aff'd*, 945 F.2d 812 (5th Cir. 1991), *aff'd*, 505 U.S. 33 (1992).

¹¹⁰ BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 52b. As we will see, if a mode of execution is not specifically mentioned in the Torah, the prescribed method is by strangulation, the least severe form of death.

¹¹¹ *Deuteronomy* 21:1–8.

¹¹² BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 52b & n.30.

¹¹³ MISHNAH, *supra* note 17, *Sanhedrin* 7:3, at 111.

¹¹⁴ BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 52b n.31. In the case of burning, the Sages seemed more concerned that jumping around could cause external burning, which would be contrary to the law. The other reasons given for the use of manure in the burning context—masking bodily excretions and the odor as a means of hastening death—are also discussed in connection with strangulation. In addition, the manure prevents the condemned from defecating on the executioners during his death throes. MISHNAH, *supra* note 17, *Sanhedrin* 7:3, at 111.

¹¹⁵ BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 52b.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ THE COMPLETE ARTSCROLL SIDDUR 48–50 (Nosson Sherman trans., 1984).

¹¹⁹ BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 52b.

¹²⁰ *Id.*

¹²¹ This is not an issue for second Sage, because he believes that the phrase "at the hand of," denotes strangulation.

¹²² *Id.*, *supra* note 21, *Sanhedrin* 53a.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ MISHNAH, *supra* note 17, *Sanhedrin* 7:4, at 113–17. The Mishnah lists several sex offenses punishable by stoning.

¹²⁶ BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 53a.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ BABYLONIAN TALMUD, *supra* note 21, *Sanhedrin* 53a.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

¹³⁵ *Id.* at 100.

¹³⁶ *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

¹³⁷ *Id.*

¹³⁸ *See Stanford v. Kentucky*, 492 U.S. 361, 379–80 (1989).

¹³⁹ *Gregg*, 428 U.S. at 175. *But see* Peter S. Adolf, Note, *Killing Me Softly: Is the Gas Chamber, or Any Other Method of Execution, "Cruel and Unusual Punishment?"*, 22 HASTINGS CONST. L.Q. 815, 862–63 (1995) (arguing that the Constitution requires the use of the least cruel method of execution).

¹⁴⁰ *But see* David R. Dow, *The Third Dimension of Death Penalty Jurisprudence*, 22 AM. J. CRIM. L. 151, 169–70 (1994) ("The principles identified by *Furman* and *Lockett* are not in conflict.").

¹⁴¹ *See Lockett v. Ohio*, 438 U.S. 586, 600 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

¹⁴² *See Gregg*, 428 U.S. at 167.

¹⁴³ *See Weems v. United States*, 217 U.S. 349, 380–81 (1910).

¹⁴⁴ *See Solem v. Helm*, 463 U.S. 277 (1983). *But see Harmelin v. Michigan*, 501 U.S. 957, 1027 (1991) (plurality opinion) (upholding sentence of life imprisonment without possibility of parole for possession of cocaine).

¹⁴⁵ *See Coker v. Georgia*, 433 U.S. 584, 595–97 (1977) (plurality opinion). Justice Powell in his concurrence in the judgment noted that rapes accompanied by aggravating factors might permit use of the death penalty. *Id.* at 602.

¹⁴⁶ *See Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett*, 438 U.S. at 600.

¹⁴⁷ In *In re Kemmler*, the Court upheld the New York law mandating electrocution, but it did so on the ground that the Eighth Amendment did not apply to the states. 136 U.S. 436, 437 (1890). In *Malloy v. South Carolina*, the Court ruled that changing the method of execution from hanging to electrocution was not an increase in punishment. 237 U.S. 180, 184–85 (1915). In *Louisiana ex rel. Francis v. Resweber*, the Court allowed Louisiana to execute the defendant after the first attempt by electrocution was botched. 329 U.S. 459, 470–71 (1947) (plurality opinion).

¹⁴⁸ See *Bryan v. Moore*, 528 U.S. 960 (1999).

¹⁴⁹ 2000 Fla. Laws ch.00-2.

¹⁵⁰ *Bryan v. Moore*, 528 U.S. 1133 (2000). A similar situation occurred in California. See *Fierro v. Gomez*, 77 F.3d 301, 309 (9th Cir. 1996) (holding death by gassing unconstitutional), *vacated*, 519 U.S. 918 (1996). The United States Supreme Court granted certiorari and vacated and remanded the case to the Court of Appeals in view of the recently amended law, CAL. PENAL CODE § 3604(b) (Deering Supp. 2004), giving prisoners a choice of gassing or lethal injection. See *Fierro*, 519 U.S. at 918.

¹⁵¹ See *State v. Mata*, 745 N.W.2d 229, 261–62 (Neb. 2008).

¹⁵² *Gregg v. Georgia*, 428 U.S. 153, 175 (1976).

¹⁵³ There appears to be no structured appellate review system in Jewish law. *But see* SFORNO, COMMENTARY ON THE TORAH, *Exodus* 18:21 (Raphael Pelcovitz trans., 1987), stating that there is. In *Exodus* 18:21, Jethro advises Moses to set up courts over "thousands, hundreds, fifties and tens," and when such courts find a matter to be "major," they will bring the case to Moses for judgment. *Id.* There is also a method of certifying questions to the Great Sanhedrin. Furthermore if a court felt it was not competent to hear the case it could be referred to another twenty-three judge court or the Great Sanhedrin. See *Deuteronomy* 17:8.

¹⁵⁴ When he reaches thirteen, a Jewish male becomes obligated to comply with the commandments of Jewish law and is designated a Bar Mitzvah (literally "son of the commandments"). See BABYLONIAN TALMUD, *supra* note 21, *Temurah* 2b (stating that a male is liable for his actions at the age of thirteen and one day); JOSEPH TELUSHKIN, JEWISH LITERACY 611–13 (1991) (observing that "[i]n Judaism boys become obligated to fulfill Jewish laws at thirteen, girls—who generally mature earlier—at twelve").

¹⁵⁵ See *Roper v. Simmons*, 543 U.S. 551, 573–76 (holding that the Eighth and Fourteenth Amendments bar imposition of death penalty on persons under age of 18 when their crimes were committed).

¹⁵⁶ See *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion) (holding the death penalty inapplicable to rape of adult woman who was otherwise not injured). In *Coker*, the Court does not explicitly hold that capital punishment is constitutional in murder cases only. The Court's judgment is simply that "death is indeed a disproportionate penalty for the crime of raping an adult woman." *Id.* However, much of the plurality's analysis is based on comparing rape to murder—"rape by definition does not include the death of or even the serious injury to another person." *Id.* at 598. The plurality goes on to state that "[i]t is difficult to accept the notion, and we do not, that the rapist, with or without aggravating circumstances, should be punished more heavily than the deliberate killer as long as the rapist does not himself take the life of his victim." *Id.* at 600. The plurality intimates that death or serious injury might be standards with which to measure the validity of the death penalty, but that is not the central holding. *Id.* at 598. In any event, "[c]ommentators and courts have generally agreed that the *Coker* decision prohibits the death penalty for crimes against individuals that do not involve taking of another human life, such as kidnapping or the rape of a child." See Ryan Norwood, Note, *None Dare Call It Treason: The Constitutionality of the Death Penalty for Peacetime Espionage*, 87 CORNELL L. REV. 820, 833 (2002) (footnote omitted).

¹⁵⁷ See Norwood, *supra* note 155, at 833 (arguing that *Coker* stands for the proposition that the death penalty is unconstitutional for crimes not involving the taking of human life, and citing *Eberheart v. Georgia*, 433 U.S. 917 (1977) (per curiam), vacating in part *Georgia v. Eberheart*, 206 S.E.2d 12 (Ga. 1974), which had upheld the death penalty applied to a convicted kidnapper and rapist). In support of the view that *Coker* prohibits the death penalty for nonmurder offenses, see Pamela J. Lormand, Comment, *Proportionate Sentencing for Rape of a Minor: The Death Penalty Dilemma*, 73 TUL. L. REV. 981, 996 (1999); Emily Marie Moeller, Comment, *Devolving Standards of Decency: Using the Death Penalty to Punish Child Rapists*, 102 DICK. L. REV. 621, 633–35 (1998); David W. Schaaf, Note, *What If the Victim Is a Child? Examining the Constitutionality of Louisiana's Challenge to Coker v. Georgia*, 2000 ILL. L. REV. 347, 349–50. *But see* *State v. Wilson*, 685 So. 2d 1063, 1073 (La. 1996) (upholding a state law permitting the death penalty for child rapists), *cert. denied*, 520 U.S. 1259 (1997).

In 1994, Congress made capital peacetime espionage a capital offense. Federal Death Penalty Act, 18 U.S.C. §§ 794(a), 3591(a)(1) (2000). Professor Norwood analyzes § 794(a) of the Federal Death Penalty Act by referring to *Coker's* proportionality tests. Since § 794(a) "does not require a showing of death, or any other actual harm to the national security," he concludes § 794(a) cannot meet the murder standard in *Coker*. Norwood, *supra* note 155, at 840.

¹⁵⁸ The Supreme Court had held that states may criminalize behavior that is only immoral. In *Bowers v. Hardwick*, 478 U.S. 186, 194–97 (1986), the Supreme Court upheld, on substantive Due Process grounds, a Georgia law criminalizing sodomy as applied to homosexuals even between consenting adults in private. The Court found that morality was a legitimate state interest. However, in *Lawrence v. Texas*, 539 U.S. 558, 576–78 (2003), the Court overruled *Bowers* and specifically embraced language in Justice Stevens's dissent in that case stating that immorality was not a sufficient basis for upholding the law in question.

¹⁵⁹ *Tison v. Arizona*, 481 U.S. 137, 158 (1987). The Court in *Tison* distinguished its earlier decision in *Enmund v. Florida*, 458 U.S. 782, 801 (1982), which held that the Eighth Amendment prohibits the death penalty against a co-felon who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed.

¹⁶⁰ See *Exodus* 21:12–14.

¹⁶¹ See, e.g., MISHNAH, *supra* note 17, *Bava Kamma* 6:4, at 129–43 (noting that if a person employs another to commit an offense, only the latter is guilty).

¹⁶² In *Tison*, the Court required major participation in the felony combined with reckless indifference to human life as a predicate for imposition of the death penalty on a nontriggerman. 481 U.S. at 175–76. The felony murder rule, which can make participants in the felony guilty of murder even if committed accidentally or negligently by either the triggerman or the nontriggerman, enhances the possibility that people who are not guilty of the most heinous killings can be executed along with those who commit deliberate, premeditated murder. See Dana K. Cole, *Expanding Felony-Murder in Ohio: Felony-Murder or Murder-Felony?*, 63 OHIO ST. L.J. 15, 15 (2002) (arguing that Ohio's "unwarranted expansion of the felony-murder rule . . . will potentially select for death those who are not necessarily the most deserving of this ultimate punishment"); David McCord, *State Death Sentencing for Felony Murder Accomplices under the Enmund and Tison Standards*, 32 ARIZ. ST. L.J. 843, 845 (2000) (examining "189 cases in which defendants were death-sentenced because of their participation in a group felony murder"); Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1136 (1990) (noting the "contradictions between the felony murder rule and the goals underlying the Supreme Court's eighth amendment capital jurisprudence"); Carla Mullins, Note, *Criminal Law: Guilty of Something: Gilson v. State and the Death Penalty for Omission in Oklahoma*, 54 OKLA. L. REV. 647, 647 (2001) (claiming "that the State of Oklahoma inappropriately sentenced Gilson to death. The sentence resulted from a trial replete with error and a non-unanimous verdict based, at least partially, on his omission to act").

¹⁶³ See, e.g., Anti-Terrorism Act of 1995, 28 U.S.C. § 2244 (2000) (providing that in a successive writ case a claim of actual innocence cannot be a stand alone basis for habeas relief; some other constitutional violation must be claimed); *Herrera v. Collins*, 506 U.S. 390, 417–19 (1993) (holding that in a successive writ case a claim of innocence absent some independent constitutional violation that makes the trial a miscarriage of justice is not cognizable in federal habeas); see also 28 U.S.C. § 2254(e)(2)(B) (2000) (mandating that in an original writ the applicant must show that "but for constitutional error, no reasonable fact finder would have found the defendant guilty of the underlying offense").

¹⁶⁴ See, e.g., Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 25 (1987) (noting that in 1964 a list of eighty-five persons was compiled who were wrongly arrested, convicted or tried for a capital crime over a one-hundred-year period); DAVID R. DOW, *Introduction to MACHINERY OF DEATH: THE REALITY OF AMERICA'S DEATH PENALTY REGIME*, *supra* note 8, at 1, 2 (arguing that innocent people are executed and supporters of capital punishment must "get used to the idea of, every now and then, executing someone who did not do the crime"); Alex Kozinski & Stephen Bright, *The Modern View of Capital Punishment*, 34 AM. CRIM. L. REV. 1353, 1361 (1997) (reporting that since 1976, sixty-three innocent people were released from death row and that everyone agreed these people were innocent and the DNA evidence was conclusive).

In *United States v. Quinones*, the district court found the Federal Death Penalty Act of 1994 violated Due Process because DNA testing demonstrates innocent people are convicted of capital crimes with some frequency. 196 F. Supp. 2d 416, 420–21 (S.D.N.Y. 2002), *rev'd*, 313 F.3d 49 (2d Cir. 2002). On appeal, the

Second Circuit reversed, holding that a "statistical or theoretical possibility that a defendant might be innocent" does not violate Due Process in light of history and Supreme Court death penalty precedent. *United States v. Quinones*, 313 F.3d 49, 63 (2d Cir. 2002).

¹⁶⁵ Although DNA evidence may exonerate the innocent, it is, however, a double edged sword in that many persons are convicted based on DNA evidence even though it may have been contaminated at the crime scene or laboratory. See Adam Liptak, *Prosecutions Are a Focus in Houston DNA Inquiry*, N.Y. TIMES, June 9, 2003, at A20 (discussing the closing of a Houston police crime laboratory "after [a] state audit found widespread flaws in its work, including sloppy record-keeping, misinterpreted data and contaminated evidence.").

¹⁶⁶ See, e.g., Francis X. Clines, *DNA Clears Virginia Man of 1982 Assault*, N.Y. TIMES, Dec. 10, 2001, at A14; Jim Dwyer, *Cornered Minds, False Confessions*, N.Y. TIMES, Dec. 9, 2001, § 4, at 14; Susan Saulny, *Convictions and Charges Voided in '89 Central Park Jogger Attack*, N.Y. TIMES, Dec. 20, 2002, at A1; Jodi Wilgoren, *Three Cleared by DNA Tests Enjoy Liberty After 15 Years*, NY TIMES, Dec. 6, 2001, at A20; Michael Wilson, *None of the Former Defendants Were Able to Hear the News Firsthand*, N.Y. TIMES, Dec. 6, 2002, at B5.

¹⁶⁷ See e.g., Jodi Wilgoren, *Citing Issues of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. TIMES, Jan. 12, 2003, at 1 (commuting the death sentences of 167 people on death row). Governor Ryan, a Republican, stated:

[R]eviewing each and every one of these cases raised questions not only about the innocence of people on death row, but about the fairness of the death penalty system as a whole. . . . Our capital system is haunted by the demon of error: error in determining guilt and error in determining who among the guilty deserves to die.

Wilgoren, *supra*, at 1 (internal quotations omitted).

¹⁶⁸ See *Death Penalty Information Center Fact Sheet* (last modified Sept. 17, 2009) available at <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last visited Oct. 12, 2009). Currently, there are over 3,200 people on death row.

¹⁶⁹ Texas has executed more people since 1976 than any other state. Virginia is a distant second with 103. *Id.*