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> *The law is what it is today because of what the law was yesterday; it cannot escape its ancestry.*
> Alison Reppy, *Common Law Pleading*, 2 N.Y. LAW FORUM 1, 5 (1956).

THE SYSTEM of appellate review[1] in the United States has been criticized for its form and limited scope.[2] These concerns are reflected in the various appellate procedures developed by Talmudic law. Since jurisprudential systems typically establish methods of review, the Talmudic choices are important as they reveal some basic precepts of that system and by comparison allow insights into our own. A comprehensive analysis of the appeal procedure in Talmudic law is lacking.[3] To what extent appellate review existed in Talmudic law, and how justice was administered and the litigant protected under this system, will be the subject of the following inquiry.[4] The Talmudic judicial struc-

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[1] Appellate review or appeal has been defined as one tribunal reviewing the proceedings of another or, more narrowly, as the carrying of a cause from a lower to a higher tribunal for a rehearing. It is frequently regarded as a continuation of an original suit rather than as the inception of a new action. We, however, will treat "appeal" more broadly as encompassing procedures whereby a case will be reheard or reviewed by the same or another tribunal.

[2] Some writers question the broad scope of review. Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SY. L. REV. 635 (1971). On the other hand, others criticize the inability to appeal fact finding. Hood, *The Right of Appeal*, 29 LA. L. REV. 498 (1969). Also criticized is the inability to appeal sentencing. Kaufman, *Appellate Review of Sentences*, 32 F.R.D. 249 (1962).

[3] Various scholars have discussed procedure in Talmudic law. *See, e.g.*, H. Goldin, HEBREW CRIMINAL LAW AND PROCEDURE (1952); Hirshberg, *Jurisprudence among the Ancient Jews*, 11 MARQ. L. REV. 25 (1926); S. MENDELSOHN, THE CRIMINAL JURISPRUDENCE OF THE ANCIENT HEBREWS (1890). Specific discussions of appeals have been cursory, erroneous and often conflicting. Thus, May, in *Jewish Criminal Law and Legal Procedure*, 31 J. AM. INS. CRIM. L. & C. 438 (1941), writes: "No appeal against a sentence was provided for in Jewish law," while P. BENNY, THE CRIMINAL CODE OF THE JEWS 48 (1880), claims that in Jewish law a "[r]ight of appeal existed."

[4] This attempt will not be an easy one, as "the question of appellate jurisdiction in Talmudic law is somewhat confusing and conflicting opinions may be reconciled only with difficulty." D. SHOHET, THE JEWISH COURT IN THE MIDDLE AGES 207 (1931).

ture and its role in Jewish society will be examined, followed by an exploration of the various appellate procedures. Finally, the effectiveness of these procedures in fulfilling the traditional functions of an appeal will be evaluated.

The Talmud, compiled and written during the first five centuries of the common era, was the legal, ethical, and religious corpus of the Jews. These people functioned under a highly developed legal system which evolved and was minutely delineated in the Talmud. The appellate procedures utilized in this system will be reconstructed through the use of sources dating from the Mishnah (circa 200 C.E.) to the Gemara (circa 500 C.E.) and will depict a system which existed during the Second Temple period — 517 B.C.E.-70 C.E.[5]

I. THE BASIC SYSTEM

The Talmudic legal system differed fundamentally from modern western systems. To evaluate that system's use of the appeal process it is necessary to first delineate the structure of the system. In viewing this structure and the functions of its various parts, the religious character of the society will become apparent. The Bible commanded the appointment of judges and executive officials in every city and district,[6] and partly in compliance with the Biblical imperative, three types of courts appeared.[7] The Beth Din was a three-judge court utilized by settlements of less than one hundred and twenty persons. The Sanhedrin, a twenty-three-judge court, sat in larger cities. In Jerusalem there were two such Sanhedrins, one at the foot of the Temple Hill and another at the entrance of the court of the Temple.[8] The Great Sanhedrin, a seventy-one judge court, was also located in Jerusalem.[9]

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[5] The bulk of the materials consist of discussions of legal theory rather than actual cases. *See generally* Z. FALK, INTRODUCTION TO JEWISH LAW OF THE SECOND COMMONWEALTH (1972).

[6] "Judges and officers shalt thou make thee in all thy gates." DEUTERONOMY XVI, 18; Maimonides, HILCHOTH SANHEDRIN I, 1. Maimonides (1135-1204) codified all the Talmudic literature.

[7] In civil cases, experts in the law — *mumheh* — could on occasion adjudicate cases alone. SANHEDRIN 5a. However, the sages frowned upon such a procedure since "there was no true single judge other than God alone." AVOT IV, 8. In any event, a litigant could not be compelled to submit to the jurisdiction of a single judge. Shulchan Aruch, HOSHEN MISHPAT, III, 2 (16th century code).

[8] There may have been an additional court in Jerusalem because that city was more populated than other cities in Palestine and also because there were certain unique functions which the extra court performed.

[9] Tosefta, SOTAH IX, 1.

The various multi-judge courts had differing subject matter jurisdiction. The Beth Din had jurisdiction only over civil cases which included robberies, personal injuries, rape, and seduction.[10] In addition, certain ritual functions required the presence of the Beth Din.[11] The Sanhedrins had original jurisdiction in capital cases[12] and could consider almost all civil, criminal, and religious cases. The Great Sanhedrin was the highest court in the land with exclusive jurisdiction in declaring a tribe idolatrous, determining a false prophet, judging a high priest,[13] testing a woman suspected of adultery,[14] and sentencing a recalcitrant judge.[15] This court was further charged with tending to certain ritual functions, such as: supervising the Temple service,[16] burning the red heifer,[17] evaluating the harvest tithes,[18] and providing copies of the Torah scrolls for the king.[19] The Great Sanhedrin possessed legislative and executive powers as well. These included: declaring an offensive war,[20] changing the boundaries of Jerusalem and the Temple courts,[21] and deeming a city to be apostate.[22]

All the Talmudic courts had the power to legislate. Their en-

[10] In Talmudic law, cases such as robbery and rape were designated as civil because the transgression entailed a civil remedy of paying a monetary fine to the injured parties.

[11] SANHEDRIN, I, 1. *E.g.*, redemption of unvalued tithes, the rites of *halizah* (a ceremony releasing the brother-in-law of a childless widow from his duty to marry her) (DEUTERONOMY XXV, 5-10), and certain calendar decisions upon which ritual was based.

[12] SANHEDRIN I, 4. Certain capital cases were tried only by the Great Sanhedrin. *See* notes 13-15 *infra* and accompanying text.

[13] SANHEDRIN I, 5.

[14] SOTAH I, 4.

[15] SANHEDRIN XI, 2-4. A member of a superior court was recalcitrant if he refused to abide by the ruling of the Great Sanhedrin. Such a judge was in jeopardy of indictment and capital punishment. SIFRE II, 52; SANHEDRIN 86b. The Talmudic sages did not adopt the strict Biblical injunction of DEUTERONOMY XVII, 12. Thus a judge who continued to expound law contrary to a Sanhedrin was not executed. If a judge, however, ruled contrary to the decisions of the Great Sanhedrin he would be undermining the very foundations of the judiciary and would be subject to capital punishment.

[16] YOMA I, 3.

[17] SANHEDRIN III, 4. The Biblical imperative was that a red heifer "wherein is no blemish, and upon which never came a yoke," should be burned and her ashes used to cleanse those ritually unclean. NUMBERS XIX.

[18] PEAH II, 6.

[19] Tosefta, SANHEDRIN IV, 4.

[20] SANHEDRIN I, 5. Every war was considered offensive (*i.e.*, not obligatory) by the rabbis except wars of self defense and those commanded in the Bible, *i.e.*, the war against the Amalekite tribes, DEUTERONOMY XXV, 17-19, and those wars led by Joshua against the Canaanite tribes, DEUTERONOMY XX, 16-18.

[21] SANHEDRIN I, 5.

[22] DEUTERONOMY XIII, 13-18. The Sanhedrin had additional non-judicial functions, *e.g.*, arranging the calendar. ROSH HASHONAH II, 5.

actments were, however, subject to repeal by another court which was both greater in number and comprised of superior scholars.[23] However, a court could stipulate in enacting a law that any other court seeing fit to abrogate the law could do so.[24]

The several Talmudic courts had different methods for selection of judges and formation. The Beth Din was not a permanent court, but was formed when necessary from a pool of judges who normally had other occupations. These judges were certified by the Great Sanhedrin which applied certain minimum qualifications.[25] To assemble a court of three, plantiff and defendant each chose one eligible judge, and these two judges chose the third.[26] The Sanhedrin and the Great Sanhedrin were permanent courts whose membership was appointed as follows:

> It is stated by the Rabbis that the Great Sanhedrin used to send messengers throughout the Land of Israel to examine (candidates) for the office of judge. Whoever was found to be wise, sinfearing, humble and contrite, of unblemished character, and enjoying the esteem of his fellow men were installed as local judge. From the local court, he was promoted to the court situated at the entrance of the Temple Mount; thence to the court situated at the entrance of the Court; thence to the Supreme Court.[27]

To be certified for the position of judge in a Sanhedrin, the candidates had to satisfy criteria which measured their character as well as their knowledge. A candidate who gambled, lent or borrowed money on interest, or did not engage in a decent profession was disqualified.[28] A potential judge was disqualified if he were

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[23] EDIOTH I, 5. *See also* BAVA KAMMA 82b; BEROCHOTH 22b.

[24] The logic being that if a law were promulgated to meet the demands of a specific situation and the conditions no longer warrant such a law, then it should be revoked by a later day court.

[25] Mosaic law required that the three judges be authorized and competent, but Rabbinic law allowed all three to be laymen in cases concerning loans where it would be difficult to assemble a court. Maimonides, HILCHOTH SANHETRIN V, 8.

The rationale of the rabbis was that if the lender were put to the trouble of assembling a court of authorized judges to collect his loan, "it would shut the door to borrowers," hence credit would be more difficult to obtain. SANHEDRIN 2b, 3a.

Mosaic or Biblical law consists of the precepts explicitly stated in the Torah and those which the Talmudic savants interpreted to be Biblical in origin. Rabbinic law consists of the enactments of the Talmudic savants.

[26] Various rules were in effect concerning ineligibility of a judge in a given case because of prejudicial interest, *e.g.*, judges who were relatives, friends, or enemies of any of the litigants. SANHEDRIN 28b and 29a.

[27] Maimonides, HILCHOTH SANHEDRIN II, 8, trans. by A. Hershman, THE BOOK OF JUDGES (1949); TOSEFTA SANHEDRIN VIII, 1. The Great Sanhedrin was apparently organized by Moses. NUMBERS XI, 16.

[28] SANHEDRIN III, 3.

aged, a eunuch, childless,[29] or marred by any physical blemish,[30] since the concept of a theocracy made the appointment of judges not only a civil ceremony but also a religious one.[31] A judge needed to know "the answer to any problem and phase of Jewish law and custom."[32] Wisdom, understanding, and fame were also required.[33] Candidates had to be able, God fearing men who hated unjust gain.[34] The candidate who met all the qualifications was eligible to receive 'Semikhah' (ordination) — a certification which entitled him to act in the capacity of a judge in a Sanhedrin.

The requirements for membership to the Great Sanhedrin of seventy one were even more exacting. One had to have been a man of stature, wisdom, good appearance, mature age, versed in sorcery,[35] conversant with all the seventy languages, [36] and skilled in dialectics.[37]

The Talmudic courts, consisting of highly qualified judges, were part of a jurisprudential system; they did not function independently. Under certain circumstances, cases would come before more than one court. Therefore, it is appropriate to examine the instances where this "review" occurred.

II. The Appellate Process

Talmudic law allowed six procedures which permitted one court to consider matters originally brought to another court or otherwise permitted redetermination of previously settled matters. Each of these procedures will be discussed with a view to the purpose it fulfilled and the modern procedures which might have similar functions.

First, if the original court felt it were incapable or unqualified to consider a question of law it could send the case to a higher

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[29] "Because a member of the Sanhedrin must have compassion." Maimonides, HILCHOTH SANHEDRIN II, 3.

[30] TOSEFTA SANHEDRIN VIII; SANHEDRIN 36b.

[31] J. Newman, SEMIKHAH vii (1950).

[32] YERUSHALMI HAGIGAH I, 8.

[33] The Jewish sages adduced these qualities from DEUTERONOMY I, 13. Midrash Rabbah, DEUTERONOMY I.

[34] These qualities were adduced from EXODUS XVIII, 21.

[35] Maimonides explains that this knowledge was important so that the court in sentencing sorcerers would be able to differentiate between what was and was not sorcery.

[36] The reason for this requirement was so that the court would not have to hear evidence through an interpreter.

[37] The dialectical proficiency required was that one prove that a reptile was clean even though the Bible considered it ritually unclean.

court and eventually to the Great Sanhedrin for determination.[38] This procedure represented an acknowledgement of the court's limitations[39] which was Biblically mandated.[40] As a result, a court was never compelled to give a decision in a case it did not feel secure and competent adjudicating. However, this option to send the case to a higher court was available to the court rather than the litigants[41] and the utilization of the procedure did not terminate or suspend the original court's responsibility in the case. The court appointed a muflah[42] — official pleader of the court — to accompany the litigants to each successive court and present the question.[43] As in common law jurisdiction the lower court would make

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[38] The appeal proceeded from the original court to the Sanhedrin of a local town, to the Sanhedrin sitting at the foot of the Temple mound, to the Sanhedrin sitting at the entrance of the court of the Temple, and finally to the Great Sanhedrin. The appellate process proceeded through these stages until the question was brought to a court which was able to answer the question. The Great Sanhedrin, as the court of last resort, was required to resolve all issues brought before it. TOSEFTA SANHEDRIN VII, 1; SIFRE II, 152; SANHEDRIN 88b; YERUSHALMI SANHEDRIN IV, 1.

[39] Philo described the need for such a procedure:

> Let no judge be ashamed to confess that he is ignorant of that which he is ignorant. . . . When, therefore, the case looks to him obscure by reason of the perplexed and unintelligible nature of the circumstances which throw uncertainty and darkness around it, he ought to decline giving a decision and send the matter before judges who will understand it more accurately.

Quoted in S. BELKIN, PHILO AND THE ORAL LAW 190 (1940).

[40] The Biblical ordinance required that:

> If there arise a matter too hard for thee in judgment, between blood and blood, between plea and plea, and between stroke and stroke, even matters of controversy within thy gates; then shalt thou arise, and get thee up unto the place which the Lord thy God shall choose. And thou shalt come unto the priests the Levites, and unto the judge that shall be in those days; and thou shalt inquire; and they shall declare unto thee the sentence of judgment.

DEUTERONOMY XVII, 8-9; SANHEDRIN XI, 2; TOSEFTA HAGIGAH II, 9. The Great Sanhedrin was viewed as "the place . . . God shall choose."

[41] Under Federal procedure an unresolved case may come before an appellate court for a determination of difficult and controlling legal questions. However, the district court judge must make some order regarding the issue which also states that the order involves a controlling question of law as to which there is substantial ground for difference of opinion. Then the *parties* may appeal the order and the court of appeals may in its discretion permit the appeal. 28 U.S.C. § 1292(b) (1970).

[42] See H. MANTEL, STUDIES IN THE HISTORY OF THE SANHEDRIN 135-39 (1961).

[43] This practice of the lower court communicating personally with the upper court differs from modern United States practice where:

> [t]he trial judge is walled off from the upper-court judges. They may not consult him. They learn about the trial only from a formal printed record. This practice complicates and artificializes appeals. I think that, at any rate whenever the upper-court judges deem it desirable, the trial judge should sit with them on the hearing of an appeal, but that he should have no vote. He could then point to facts in the record to which neither litigant had directed the upper court's attention. This is not a new idea. It means a return to a

all factual determinations before the case entered the appellate system and the appellate court would consider only questions of law. While the appellate court would not disturb factual findings made below, the lower court was bound to follow the law as determined by the higher court.

A second procedure for obtaining a higher court's consideration of a case was also initiated by the lower court judges. In cases where a judge had not agreed with the majority of the court[44] he had the option of appealing the decision to a higher court.[45] Since the right was not given to the party aggrieved by the court's decision, the procedure differs from the modern right of appeal.

Third, if the plaintiff felt he could not receive a fair trial from the local Sanhedrin, he could initiate the litigation in another Sanhedrin.[46] The defendant could not demand as of right a change of venue to another Sanhedrin, however, he could insist that the case be removed from the local court to the Great Sanhedrin.[47] When a defendant's request for removal from one local court to another was denied by the plaintiff,[48] the defendant could demand that the court submit its reasons in writing (they usually handed down an oral verdict)[49] so that he would be aware of the legal reasoning the

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practice which once prevailed in some English and in some American courts [and the Talmudic courts as well.]

J. FRANK, COURTS ON TRIAL, 252-53 (4th ed. 1969).

[44] Decisions were reached by majorities. SANHEDRIN 2a.

[45] *See* note 38 *supra.*

[46] SANHEDRIN 31b. The defendant was considered subordinate to the plaintiff because of a verse in PROVERBS XXII, 7, "The borrower is a servant to the lender."

[47] BAVA KAMMA 112b. See Tosafoth (12th century commentary) *ad. loc.*; Rashba (thirteenth century commentary) *ad loc.*; YAM SHEL SHLOMO, (sixteenth century commentary) X, 10. *But see* Maimonides, HILCHOTH SANHEDRIN, VI, 6. *See generally* L. FINKELSTEIN, JEWISH SELF-GOVERNMENT IN THE MIDDLE AGES 379-381 (1972).

[48] In the United States the defendant may request dismissal of a case or removal of a case to another court for a variety of reasons: (1) The court chosen by the plaintiff is not convenient for trying the case. However, such removal is not a matter of right but rather is in the discretion of the original court. 28 U.S.C. § 1404 (2) The case was brought in a state court and a Federal district court has "original jurisdiction." 28 U.S.C. § 1441. This "original jurisdiction" can be based on the amount in controversy and the diversity of citizenship between the parties. 28 U.S.C. § 1332. Permitting removal for diversity may reflect a concern that the defendant could not receive a fair trial at the hands of a court of the plaintiff's state. Pease v. Peck, 59 U.S. 595 (1855); Asher v. Pacific Power & Light Co. 249 F. Supp. 671 (N.D. Cal. 1965). (3) There is improper venue since the court is not in the district "in which the claim arose," or is not in the district in which the defendant resides. 28 U.S.C. § 1391.

[49] Scribes recorded the verdicts and opinions in capital cases. Maimonides, HILCHOTH SANHEDRIN XII, 3.

court employed.[50] Since this option of removal was invoked before the actual commencement of the trial it was not a true appellate procedure.[51]

Fourth, cases could be reopened after judgment on presentation of new evidence. In criminal cases only the defendant could exercise this privilege. While the privilege could be utilized twice as a matter of right,[52] thereafter the defendant had to convince two judges from the court which convicted him that there was new evidence which might effect the case before it would be reopened.[53] In civil cases either party could obtain a new hearing by submitting new evidence to the same court.[54] However, to prevent abusive tactics there was a thirty day limit on the exercise of the privilege.[55] A court also could review its decision if it had any misgivings,[56] except in criminal cases where only convictions could be reconsidered.[57]

Fifth, in cases in which it was permissible to have a single justice,[58] the decisions were subject to appellate review by a court "superior in both learning and number."[59] Appellate review was limited to questions of law rather than fact.[60] If the decision was

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[50] The discretion to approve a defendant's request for change of venue to another sanhedrin rested entirely with the plaintiff. In American civil procedure the judge exercises his discretion.

[51] SANHEDRIN 31b; Maimonides, *Hilchoth Sanhedrin*, VI, 6.

[52] SANHEDRIN IV, 1. OVADIAH BERTINORO (commentary of the fifteenth century) explains that the first times the convicted exercised this right the validity of his contentions was not challenged, for under such emotional strain and fright he might be unable to express himself properly. A herald would go forth before the convicted crying, "So and so is going to be killed, in that he has committed such and such an offense. So and so are his witnesses. Anyone knowing any information in his defense, let him come and urge it." SANHEDRIN VI, 1.

[53] Maimonides elaborates that the defendant was brought back to the court where the judges considered his arguments. Maimonides, *Hilchoth Sanhedrin* XIII, 1. Rashi, however explains that the procession stopped while the judges contemplated the arguments of defendant who remained outside. *Loc. cit.* SANHEDRIN 42b.

[54] SANHEDRIN III, 8.

[55] NEDARIM 27a, R. Nissim; which might be analogized to a statute of limitations. Its purpose was not to bar the bringing of an action but to make actions final. In the United States the principles of res judicata and collateral estoppel would bar the reopening of the case.

[56] *Cf.* Maimonides, *Hilchoth Sanhedrin* XXIV.

[57] SANHEDRIN 33b. This and the exclusive privilege of the defendant to submit new evidence in criminal trials in effect accomplish the Fifth Amendment's prohibition against retrials after acquittals because of double jeopardy. *Cf.* Silverstein, *Double Jeopardy and Hung Juries: United States v. Castellanos*, 5 RUTG. CAM. L.J. 218 (1974).

[58] *See* explanation, note 7 *supra.*

[59] SANHEDRIN 33a.

[60] *Id.*

held erroneous the case was retried in accordance with the appellate ruling.[61]

Sixth, if one convicted in a foreign court escaped to Palestine, his former judgment would be vacated.[62] This was a special right unique to Palestine courts, "the merit of Palestine."[63] However, modern courts often give foreign judgments — whether criminal or civil — limited effect.[64]

Although there were six different ways for a qualified, limited type of appellate review in Talmudic law, there is little evidence in the contemporary literature of frequent invocation of these procedures.[65]

III. THE FUNCTIONAL SIGNIFICANCE OF TALMUDIC APPELLATE PROCEDURES

Although there was only a limited appellate process in Talmudic law, the basic purposes of appellate view in a legal system were achieved. The Talmudic procedures enabled the system to prevent occasional miscarriages of justice, provided sufficient uniformity in the application of the law, allowed the losing litigant an additional chance in some cases,[66] and facilitated further development of Jewish law as a jurisprudential system.

One basic function of the appeal is that:

> It provides the judicial process with the means of preventing occasional miscarriages of justice which would otherwise from time to time occur. Every person convicted of a crime is wisely given access to our appellate courts so as to assure, in so far as the issue of guilt or innocence is involved, that justice has been done, that a fair trial has, in fact, been held, and that the evidence is sufficient to justify, beyond any reasonable doubt, the findings against him.[67]

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[61] SANHEDRIN 32a.

[62] MAKKOTH 7a.

[63] Rashi (11th century commentary) and Ritvah (14th century commentary) explain that perhaps the court will find some grounds to acquit the fugitive.

[64] *See Hilton v. Guyot*, 159 U.S. 113 (1895); *Huntington v. Attrill*, 146 U.S. 657 (1892).

[65] There are only two instances in the Mishnah of final decisions being handed down by the Great Sanhedrin: EDIOTH, VII, 4; PEAH II, 6. Only a limited number of actual cases are recorded in the Talmud. *See* S. HOENIG, THE GREAT SANHEDRIN, 264 n. 27 (1953) for a partial listing.

[66] *See e.g.*, notes 58-61 *supra*, and accompanying text and notes 62-63 and accompanying text.

[67] Sobeloff, *Appellate Review of Criminal Sentences*, in R. SCIGLIANO, THE COURTS 264 (1962).

One view of due process thus dictates that safeguards exist to avoid error[68] and review by another court is one such safeguard.

Although under Talmudic law the courts employed judges who, like all judges, were fallible,[69] the chances of error occurring were not as great as in other legal systems for divers reasons.

Since Talmudic courts consisted of so many judges, review occurred while the trial court was contemplating a decision.[70] Each judge gave his verdict and his reasons, and thus in criminal cases each judge had an opportunity to hear the arguments of more than twenty of his colleagues.[71] Error of opinion could be tolerated because so many judges were free to offset it. The number of justices also greatly reduced the chances of bribery, bias, or prejudice.[72] More judges reviewed the case that had merely gone to trial under this system than review a case that has gone to the United States Supreme Court.[73]

The rigid selection standards for judges was one factor helping to assure accurate rulings. Another one was that the judges were particularly familiar with the law since even laymen were well versed in the law which governed every aspect of their conduct.[74] "Jewish jurisprudence . . . does not depend on judges. The func-

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[68] Other conceptions of due process do not view the possibility of an appeal as indispensable:

> It has frequently been held that due process of law is not violated merely because the decision in the lower court was erroneous. One hearing is all that is necessary, provided that one be fair and impartial. It therefore follows that due process does not guarantee a right of appeal to a higher court.

R. MOTT, DUE PROCESS OF LAW 236-37 (1926). Mott cites over 70 cases to buttress this conclusion. *But see* E. CAHN, THE MORAL DECISION 253 (1955); "Moreover, even after an accused has been found guilty, due process of law requires that we provide some sort of remedial procedure to uncover and correct any serious error that may have been committed in the trial of his case."

[69] Even the United States Supreme Court has often times overturned its own rulings, showing its own susceptibility to error or else demonstrating that conditions change.

[70] *See* notes 6-9 *supra*, and accompanying text.

[71] Leaving aside the practical issues of having so many judges, it could be argued that this method of adjudicating was far more advantageous and desirable than the common law system employed in the United States for it provided that a greater number of judges would hear any given case.

[72] Such a preponderance of judges enhances the chances of justice by negating many of the human shortcomings that one judge is not only susceptible to, but an inevitable victim of. *See generally* J. FRANK, COURTS ON TRIAL 147-56 (4th ed. 1969) for a presentation of the many pitfalls in giving a proper judicial decision including: idiosyncracies, unconscious prejudiced identifications and personal bias.

[73] In Talmudic law all cases had the benefit of many judges viewing it on the trial level, while in America only those cases appealed even approach such a procedure.

[74] *See* M. SILBERG, TALMUDIC LAW AND THE MODERN STATES 51-53, 92 (1973). *Cf.* SANHEDRIN 94b which states that in the time of Hezkiah (700 B.C.E.) every man, woman, and child knew the complex laws of purity and defilement.

tion of the law is not to prescribe for the judge how to decide; it prescribes for the person how to conduct his life."[75] Since the judges considered the execution of their duties a religious obligation,[76] they acted with the same zeal and care as they manifested in the performance of other religious duties. To them, a mistake would not have resulted in a miscarriage of justice but rather a religious transgression.[77] The adjudication of cases was so religious a duty that the judges could not receive any remuneration for their services.[78] When judges are religiously motivated in hearing a case the chances of error are reduced.

Talmudic law provided further safeguards against error through very strict laws regarding testimony,[79] witnesses,[80] and admissibility.[81] The rules were particularly stringent in cases of criminal concern.[82] Moreover, judgeships were a lifetime appointment,[83] thus reducing external pressures on judges.[84] When an error did occur, a dissenting justice could always ask the Great Sanhedrin to review the case.

It is apparent that Talmudic law took great care in securing the judicial process from error, at least for the benefit of the criminal defendant. The emphasis placed on acquitting a criminal defen-

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[75] *Id.* at 48.

[76] DEUTERONOMY XVII, 12; XIII, 15.

[77] *See* HORAYOTH 2a ff. outlining the situations in which reliance by the people on mistaken judicial rulings required the offering of sacrifices.

[78] BEKOROTH 29a.

[79] All cross examination was conducted by the judges, since there were no defense counsel or prosecutors. Criminal suits were initiated by the accusation of two witnesses. Perjury was a very serious offense sometimes punished by giving the false witness the punishment which would have befallen the accused had the false testimony gone undiscovered. DEUTERONOMY XIX, 16-19; MAKKOTH I.

[80] If the witnesses in any way contradicted each other in testimony which they gave the authorities while secluded from each other — even in insignificant details — their testimony was declared inadmissible. SANHEDRIN V, 2.

[81] For example in American law the Fifth Amendment protects a man from being compelled to be a witness against himself in criminal cases, while in Talmudic law a witness cannot even voluntarily testify against himself in such cases. TOSEFTA SHAVUOTH V, 4. *See generally* A. KIRSCHENBAUM, SELF-INCRIMINATION IN JEWISH LAW (1970).

[82] *E.g.*, the court would have warned a witness: If you saw the accused running with his sword in his hand after the victim, and you then found the accused standing over the dying body, if you did not actually see the act of murder, then your testimony is valueless. SANHEDRIN 37b. "It is better to risk saving a guilty person than to condemn an innocent one." E. Voltaire, ZADIG. chap. 6, reflects the Talmudic view.

[83] The disadvantages were recognized early by Aristotle, "That judges of important causes should hold office for life is not a good thing, for the mind grows old as well as the body." POLITICS, Book II, trans. by D. Jowett.

[84] SANHEDRIN 86.

dant resulted in there being few convictions.[85] Once one was judged innocent, even if new evidence were presented or the judges admitted an error had been committed, the decision could not be reversed. This was based on the Biblical verse: "The innocent and the righteous slay not,"[86] which the Talmudic sages interpreted as meaning that the innocent and righteous though later found in fact guilty should not be punished.[87] However, some maintain that since it was so hard to get a conviction, the King of Israel had the discretionary power to execute.[88] Since most verdicts were *not guilty* and the courts and people wanted such decisions,[89] there was little demand or need for appellate review to guarantee protection from error.

The Talmudic law's leniency toward the criminal defendant is at odds with the common law perception of criminal law as a deterrent to crime. One explanation for the Talmudic approach is that:

> [s]uch was the concern of Jewish law for the life of a human being and the treatment afforded him out of respect for the dignity of the individual. This was the logical result of the basic concept that man was created in God's image.[90]

It must be borne in mind, moreover, that Talmudic law was a legal system guided and determined by religious principles that were considered sacred law. Consequently the court had perfect faith that the transgressor would be punished by divine means if he escaped his deserved retribution in the courtroom.[91] Thus, given the con-

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[85] A court which executed one man in seven years and according to others one in seventy years was considered tyrannical. MAKKOTH I, 10. Rabbis Tarfon and Akiba claim that had they been in the Sanhedrin, then no one would ever have been put to death, *Id.* They would have scrutinized the testimony of the witnesses until a reason for inadmissibility would have been discovered. Rabbi Simeon B. Gamaliel, however, responded to Rabbis Tarfon and Akiba by saying, "They would have multiplied murderers in Israel." *Id.*

[86] EXODUS XIII, 7.

[87] SANHEDRIN 33b; MEKHILTA KASPA. The prohibition on double jeopardy was scrupulously upheld.

[88] *See* Maimonides, *Hilchoth Rotzeach* II, 4.

[89] Numerous passages in Josephus clearly reflect his satisfaction and that of his contemporaries with the Talmudic legal system. *See e.g.*, Josephus, AGAINST APION II, Sec. 21; II, Sec. 32; II, Sec. 38.

[90] Auerbach, *The Talmud — A Gateway to the Common Law*, 3 W. RES. L. REV. 5 (1951).

[91] The Talmud often articulated the concept: "acquitted according to the laws of man, but guilty according to divine law." BAVA KAMMA 29a, 55b, 56a; BAVA METZIAH 82b. The divine methods for retribution were detailed by the Talmudic sages:

> He who would have been sentenced to stoning, either falls down from the

ceptual philosophy under which jurisprudence operated in Talmudic law,[92] the possibility of an occasional error would not give rise to a need for complete appellate review.

Appeals also insure uniformity in the interpretation of laws by courts within one jurisdiction. As demonstrated in America, without uniformity there is a search by the litigants for the court whose legal precedents and interpretations will be most sympathetic.[93] Moreover, there is a general offensiveness in a procedure whereby all are not given similar justice in the application of all laws governing all the people.[94]

Although a true appeal process did not exist in Talmudic law, the courts had other means to assure uniform application of the law. If a judge felt his colleagues had erred in their decision the case could be brought to the Great Sanhedrin for a final interpretation of the law and uniformity would be thereby achieved.[95] Since each local court had exclusive jurisdiction within a territory and since a court would generally be consistent with its own prior rulings, uniformity would be found within any court's individual locale.[96] However, since all judges were given the power to interpret the law, it would be inconceivable to demand that one court's opinion be vacated or overturned merely because other courts had decided differently. Since the Talmud never maintained there was

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roof or a wild beast treads him down. He who would have been sentenced to burning, either falls into a fire or a serpent bites him. He who would have been sentenced to decapitation, is either delivered to the government or robbers come upon him. He who would have been sentenced to strangulation, is either drowned in the river or dies from suffocation.

KETUBOTH 30b.

[92] The concept of acquittal of the guilty only applied to criminal cases. In civil cases to take the money from A unjustly and give it to B, although A will surely be compensated by divine means, would be culpable since it would cause unjustified pain and suffering to the innocent A.

[93] *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74, 76-77 (1938). Perfect uniformity, however, does not exist in the United States. *See generally* Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954).

[94] Although some do not agree that a Supreme Court of the land is necessary to resolve contradictions, there is agreement that contradictions within the laws cannot be tolerated. L. FULLER, THE MORALITY OF THE LAW 112 (2d ed. 1969).

[95] SANHEDRIN 86b.

[96] Historically the autonomy of the cities in Palestine in Talmudic times could be likened to states in America. This structural analogy answers not only the lack of necessity for uniformity, but also highlights a duty to uphold the differences between the political divisions, as is done in our states.

a specific correct answer to a question,[97] a decision which followed a minority rule was also considered correct.[98]

The lack of uniformity was not considered to be offensive to justice. As the Talmudic sages explained:

> Had the Torah been given as an unflexible, rigid code of laws, there would be no reason for courts to deliberate or pass judgments . . . Moses prayed, 'Lord of the Universe, explain me what the law is'; to which the retort: 'There is not a fixed law, only the principle of — majority rules', and one on trial is judged according to this decision. Therefore the law will change with the same frequency as the opinion of the majority varies.[99]

The existence of the Great Sanhedrin was a safeguard which placed reasonable limits (measured by tradition, basic principles, and inalienable rights) on the freedom of the local court to interpret the law. Excessive forum shopping was discouraged by the transportation difficulties involved.[100] Since the Talmudic law did not strive for uniformity and the practice of forum shopping was limited, a right of appeal was not needed to assure uniform application of the law.

There also seems to be a consensus of opinion that a losing party should at least have another chance to present his case before another judge. Society has always been concerned that the people have faith in the availability of judicial equity.[101] Giving the litigant another opportunity in court helps minimize any allegations or complaints that he may have.[102] This consideration was not significant in Talmudic law because people were usually satisfied with the original hearing.[103] The lack of an appellate review did not deny the litigant the opportunity to have his case heard by many while it avoided some inequities present in other systems.[104] Since

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97 "Even though Rabbinical opinions may be diametrically opposed, they are both inspired by the Living God." ERUVIN 13b.

98 When declaring the law, the majority opinion was followed in the disputations and the debates in the rabbinic academies in the Talmud. BAVA METZIAH 59b.

99 YERUSHALMI SANHEDRIN IV, 2.

100 *See* S. BARON, A SOCIAL AND RELIGIOUS HISTORY OF THE JEWS II, 245, 249 (2d ed. 1952).

101 *Cf.* J. MARSHALL, LAW AND PSYCHOLOGY IN CONFLICT 119-20 (1969).

102 It has even been suggested that the entire court process is perhaps for the psychological satisfaction of the litigants. *See* Smith, *Components of Proof in Legal Proceedings* 51 YALE L.J. 537 (1942).

103 *See* note 89 *supra.*

104 For example, in the Federal procedure in the United States for appellate review, the District Court and the Court of Appeals might hand down unanimous decisions in favor of the plaintiff, and the Supreme Court might reverse on a 5 to 4 decision; plain-

on balance the participants in the Talmudic system did not feel they were denied justice, the lack of a second hearing did not render the system inadequate.[105]

In other court systems, the appeal is important as a medium for developing and improving the law, frequently preparing the way for reform by the courts or legislatures.[106] A judge's remarks can often attract the attention of the legislature to areas warranting correction.[107] Such an opportunity for focusing on legislative needs was unnecessary in Talmudic law since the courts themselves had the sole power to legislate.[108]

IV. CONCLUSION

The right of appeal, according to current standard, did not exist in Talmudic law. But various quasi appellate procedures coupled with other judicial safeguards guaranteed due process and equitable verdicts without that right.

A right of appeal may not enhance the administration of justice. In some cases a trial judge may not pursue his task with the necessary sense of responsibility since he may not feel his decision is essential when he realizes his judgment is not final, but is subject to appeal by either party.[109] Clearly, the Talmudic approach to appeals is not being advocated for other systems. However, it is both interesting and important for the legal profession to consider the ways in which other legal orders have dealt with problems endemic to all systems.

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tiff is certainly not happy knowing more courts and more judges ruled in his favor but the defendant has received a favorable judgment.

[105] Of course our legal procedures as they exist serve social purposes. But it is when they lack validity or reality that the laws will tend to be held in contempt. It should be apparent that our courts are not giving satisfaction today. J. MARSHALL, LAW AND PSYCHOLOGY IN CONFLICT 119-20 (1969).

[106] L. MAYERS, THE MACHINERY OF JUSTICE 66 (1963).

[107] *See, e.g.*, the remarks of Justice Stewart: "Since 1879 Connecticut has had on its books a law . . . I think this is an uncommonly silly law. . . . But we are not asked in this case to say whether we think this law is unwise or even asinine." *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[108] *See* notes 23-24 *supra* and accompanying text.

[109] *Contra*,

In truth the purpose of review is prevention quite as much as correction of mistakes. The possibility of review by another tribunal, especially a bench of judges, as distinguished from a single administrative official of first instance. . . . It is also a stimulus to care and thoroughness so as not to make mistakes.

R. POUND, 5 JURISPRUDENCE 607 (1959).