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REFLECTIONS ON THE TALMUDIC AND AMERICAN DEATH PENALTY

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I. INTRODUCTION

Judaism has always had a death penalty. The procedures and restrictions for capital punishment in ancient Israel were set forth in the great text of Jewish law and thought — the Talmud.[1] It is commonly said that rigorous proof and procedural requirements limited the actual number of executions. But Judaism still permitted, even required, that certain wrongdoers die for their crimes.

The United States today also has a death penalty. Proof and procedural requirements also are rigorous, though not as stringent as those created by the rabbis of the Talmud. The death penalty is controversial for us, as it was for them.

This article attempts to deepen the death penalty debate in America by introducing into that debate some of the themes raised by Talmudic sources. While the authors are not specialists in the field of Talmudic penology, we are confident that we have chosen representative perspectives from the Talmud to compare with modern views. Each of the themes we introduce here is obviously deserving of fuller treatment than we give it. Brief treatment is helpful, however, in seeing the death penalty itself illuminated by each light in turn. This article presupposes familiarity by the reader of the basic debates in modern American constitutional law and thus in a general way with the concepts of interpretavism and non-interpretavism.

II. THE TALMUDIC AND AMERICAN DEATH PENALTIES

The death penalty in America is familiar to most readers. In 1972, the United States Supreme Court struck down the death penalty as applied.[2] But in 1976, the Court upheld the death penalty as not violative in principle of the prohibition of cruel and unusual punishment in the Eighth Amendment to the United States Constitution. At the same time, the Court upheld the validity of particular death penalty statutes in Texas,[3] Florida,[4] and Georgia.[5] Since 1976, the Court has outlined specific procedures that must be incorporated in any death penalty statute, including a separate sentencing proceeding

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1. No introduction to the Talmud could be adequate, of course. These are the first words of the Reference Guide at the beginning of the Steinsaltz edition of the Talmud:

> [T]he Talmud is the central pillar supporting the entire spiritual and intellectual edifice of Jewish life. The Talmud, in the broader sense of the term, is made up of two components: the Mishnah, which is the first written summary of the Oral Law, and the Gemara (called Talmud in the more restricted sense of the term), which is formally an explanation and commentary on the Mishnah.

THE TALMUD i (Rabbi Adin Steinsaltz ed., 1989).

2. Furman v. Georgia, 408 U.S. 238 (1972).
3. Jurek v. Texas, 428 U.S. 262 (1976).
4. Proffitt v. Florida, 428 U.S. 242 (1976).
5. Gregg v. Georgia, 428 U.S. 153 (1976).

after the conclusion of the trial on guilt. Today thirty-seven states and the federal government have death penalty statutes, under which more than 2,800 prisoners on death rows across the nation await execution.

The Talmudic death penalty is difficult to describe. The Talmud represents a compilation of discussions on various topics of Jewish law and learning that took place over hundreds of years in the academies of Babylonia and Palestine. When discussing a specific topic like the death penalty, the detailed discussions in the Talmud falsely suggest that the discussions corresponded to practice. The extent of correspondence is not known. The Talmud was not fully compiled until hundreds of years after the loss of Jewish political sovereignty in Israel. It is not clear how much of its pronouncements were ever enforced.

The Talmud describes two different types of executions. One, the formal/legal penalty, was imposed and carried out by a court of twenty-three. This system reflects the onerous procedural and evidentiary requirements for which the Talmudic death penalty is known.

A very few examples will suffice to demonstrate the difficulty of convicting a defendant in a capital case.[6] According to Gerald Blidstein, "It has long been a truism that Jewish law is so weighted as to make execution a virtual impossibility."[7] In most trials, civil as well as criminal, a legal decision could not be reached on the evidence of only one witness.[8] But in capital cases, the two witnesses both must have seen the accused while he was committing the offense.[9] The witnesses also must have warned the accused of the punishment for the offense before he committed it, and the accused must have expressly acknowledged the penalty before proceeding.[10] There were in addition a number of procedural and standard-of-proof protections for the accused.[11] Perhaps the most dramatic was that if the twenty-three-member court voted unanimously for conviction upon hearing the evidence, the accused was acquitted; only if some members voted to acquit was a conviction permissible.[12]

Obviously, if these rules were followed, there would be almost no convictions in capital cases. And, indeed, a court that ordered an execution once

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6. These examples also apply in some cases which are not capital cases. The two witness rule applied in cases in which flogging or the death penalty was authorized and in certain civil cases. *See* AARON M. SCHREIBER, JEWISH LAW AND DECISION-MAKING 277, 357 (1979). Most of the rules described *infra* were also used in cases other than capital. *See* THE CODE OF MAIMONIDES, 14 Judges 32, ch. 5, § 4 [hereinafter MISHNEH TORAH].

7. Gerald J. Blidstein, *Capital Punishment—The Classic Jewish Discussion*, *in* CONTEMPORARY JEWISH ETHICS 317 (Menachem Marc Kellner ed., 1978).

8. *See* MISHNEH TORAH, *supra* note 6, at 32, ch. 5, § 1.

9. *Id.* at 89.

10. *Id.* at 34.

11. *See, e.g.*, MISHNEH, *Sanhedrin*, ch. 4, § 1.

12. MISHNEH TORAH, *supra* note 6, at 28.

in seven years was condemned as "destructive."[13] Other voices in the tradition applied that epithet if a court condemned to death one person in seventy years.[14]

At the same time that this imposing legal structure operated, however, a parallel system or systems of execution also existed. The Sanhedrin retained the capacity to execute without recourse to legal formality in a time of emergency. The King maintained the same authority. In addition, if an obviously guilty criminal escaped condemnation in the formal system through operation of a procedural or evidentiary requirement, he was poisoned.[15]

III. LIMITS OF COMPARISON

The differences between Israel in the period before the redaction of the Talmud and America today are obviously great. Comparing them could not resolve issues besetting us. The most significant difference between ancient Israel and modern America is the level of violence. Even proponents of the death penalty in the Talmud appeared to accept the perspective noted above that a court that ordered an execution "once in seven years" is considered destructive. No American jurisdiction with a death penalty today could afford such a diffident approach. If we are to have a death penalty at all, with over 20,000 homicides a year, it must be a massively widespread penalty compared to that of Israel.

The rabbis of the Talmud could not have accepted the routinization of the death penalty necessitated by such large numbers. Illustrative of this reluctance is the surrender of capital case jurisdiction by the Sanhedrin over thirty years before Rome destroyed the Second Temple.[16] The Gemara accounts for this action with the seemingly peculiar explanation that the Sanhedrin, observing the number of murders increasing, decided that capital trials could "not properly be dealt with judicially" any longer.[17] The rabbis did have experience with temporary upsurges in violence and dealt with them by reducing procedural and evidentiary requirements for the death penalty[18] — something like what the Burger and Rehnquist Courts have done in the face of public anxiety in America about violent crime. But these departures were temporary. In contrast, the American condition of violent crime is not an emergency in the sense of being a temporary upsurge. A high level of violent crime is a permanent American condition. The Talmudic death penal-

13. THE MISHNAH 403 (Herbert Danby trans., 1933). The word translated here as "destructive" is elsewhere defined as "tyrannical" (THE MISHNAH (Philip Blackman trans., 1954)) and "murderous" (FRANCINE KLAGSBURN, VOICES OF WISDOM 361 (1980)).

14. *Id.*

15. BABYLONIAN TALMUD, *Sanhedrin* 81b.

16. BABYLONIAN TALMUD, *Sanhedrin* 15a.

17. BABYLONIAN TALMUD, *Abodah Zarah* 8b.

18. *See infra* text accompanying notes 31-32.

ty was designed for only occasional use.

Aside from the enormous size of our crime problem, the American death penalty differs from that of the Talmud in that it is part of a secular criminal justice system. Americans like to think of themselves as religious — as descended from the Judeo-Christian tradition. We like to think of our public policy as embodying religious ideals. But the death penalty shows that at least in some contexts, a culture either has a religious perspective or it does not. An important part of the Talmudic death penalty — some say its overriding purpose — was to attain atonement for the condemned through a trial functioning as a religious service.[19] The Talmudic death penalty is unfathomable apart from atonement and ritual.[20]

The American death penalty does not have and cannot have, given the assumptions of our constitutional order, any focus on ritual and atonement. It would probably be reversible error for a jury even to consider that by condemning a defendant to death, they might be guaranteeing to him "a portion in the world to come."[21]

The secular nature of the American death penalty is not a function of judges imposing a radical separation of Church and State on an unwilling population — which is how some Americans look at the ban on prayer in the public schools, for example. Americans simply do not think about ritual and atonement in deciding the death penalty policy question. Retribution — restoring the balance in the moral order — does have a religious origin. And clearly, retribution is one of the goals served by the American death penalty. But retribution is now only a pale reflection of that religious origin.[22] Nor does retribution exhaust a religious viewpoint.

For these, and for other reasons, simply incorporating Talmudic practice in the American legal system would not be coherent or possible. Nor would it make sense to grant normative supremacy to the Talmud, per se. The two systems are different; the two societies are different.

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19. SCHREIBER, *supra* note 6, at 277.

20. *See infra* text accompanying notes 44-46.

21. *Cf.* MISHNAH, *Sanhedrin*, ch. 6 § 2. The Pennsylvania Supreme Court has excluded religious references in death penalty cases twice in recent years. In Commonwealth v. Chambers, 599 A.2d 630 (Pa. 1991), *cert. denied*, 112 S. Ct. 2290 (1992), the court reversed a sentence of death because the prosecutor urged the jury to follow God's law and return a sentence of death. Then, on authority of *Chambers*, an equally divided court upheld a sentence of death in Commonwealth v. Daniels, 612 A.2d 295 (Pa. 1992), despite a trial court ruling that "religion" not be discussed by counsel during closing argument. Apparently, it is now error in Pennsylvania for anyone in a death penalty case to mention the *Bible*.

A California prosecutor actually did argue to a capital jury that imposing the death penalty could save a defendant's soul. The California Supreme Court held that such a suggestion was improper, although harmless error in the particular case. People v. Sandoval, 52 Cal. Rptr. 1307 (Ca. 1992).

22. *Cf.* Beruria's discussion with her husband, R. Meir, *infra*. note 44. While both secular and religious viewpoints seek to restore the moral order, in a secular world this is done by infliction of pain, without hope or care for the criminal's redemption. In Jewish thought, the moral order is restored by repentance.

So, why compare them? The Talmud is a legal system that aspired to reflect God's purpose in the world. If such a system could confidently put men and women to death, then perhaps so can we. If, on the other hand, the rabbis of the Talmud agonized over execution, limited its reach, and sought to excuse where possible, perhaps we need to imitate their voices.

IV. THE ROLE OF THE JUDGE

Both the American legal tradition and the Talmudic tradition have had to deal with the conflict of obedience and innovation faced by a judge. As Robert Cover described in his book about the nineteenth century anti-slavery judges, *Justice Accused*,[23] the conflict can be particularly acute when a judge is dealing with a practice felt to be unjust, but which has perceived legal legitimacy.

One possible response to such conflicts in America is for the judge to declare the challenged practice unconstitutional. A major focus of American conservative legal theory is to argue that this response is not legitimate — that constitutional interpretation should not be based on morality. Instead it should be based on history or language or some other basis that is said to be more predictable and objective than morality. Justice Scalia recently echoed this criticism in dissenting from a decision banning prayer at public school graduation ceremonies: "Today's opinion shows more forcefully than volumes of argumentation why our Nation's protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people."[24]

In regard to a practice sanctioned by the revealed Word of God, as was the death penalty under the Talmud, the situation of the rabbis was far more constricted than is that of the American judge. Haim Cohn, Justice of the Supreme Court of Israel, describes that restriction as follows:

> Like all theocratic law, the laws prescribing punishments and allocating them to various offenses are emanations of God's will, and their primary purpose is expiation, to turn away God's blazing anger. Not only are criminals and their crimes an abomination in the eyes of God and must for this reason alone be eliminated, but the very character of punishment as God's command leaves no alternative.[25]

Nevertheless, Justice Cohn describes a number of ways in which the

23. ROBERT M. COVER, JUSTICE ACCUSED (1975).
24. Lee v. Weisman, 112 S. Ct. 2649, 2679 (1992) (Scalia, J., dissenting).
25. Haim Cohn, *The Penology of the Talmud*, 1 ISRAEL L. REV. 53 (1970).

rabbis did modify penal practice, from changing the modes of execution (while keeping the names the same as in the Bible) to the elimination of most talionic punishments. These reforms were accomplished by a complex reinterpretation of God's word, in light of deeply held rabbinic ideals — ideals, it was felt, that God would surely share.[26] Such radical reform took place outside the penal context as well.[27] As we shall see below, the confidence the rabbis had in God rendered reform more easily attainable than reform is in our positivist age, which skeptically views any talk of ideals and morality. That is, it was easier for the rabbis to depart from the Word of God than it is for American judges today to depart from the voice of the people. But, however easily reform could be accomplished, neither the American Judge nor the Talmudic Rabbi felt himself free simply to abolish the death penalty as an exercise of personal moral insight.

V. TALMUDIC VOICES ADDRESSING THE DEATH PENALTY

The Talmud does not explain why the law is as it is. One would look in vain for an explanation of why this rabbi or that rabbi favored or opposed the death penalty. In fact, it is not accurate to speak of opposition to the death penalty in the American sense. All of the rabbis were bound to some notion of the death penalty because the Bible — the Word of God — approved of it and demanded it. Nor does it make sense to speak of support for the death penalty in the American sense. No rabbi looked with anything but horror upon both violent crime and violent punishment.

Within those limits, however, there is among the rabbis more or less commitment to the death penalty. And there are snatches of comments that help to put these commitments in perspective.

A. *Deterrence*

The most famous exchange in the Talmud on the subject of the death penalty occurs in Makkoth:

> A Sanhedrin that effects an execution once in seven years, is branded a destructive tribunal; R. Eliezer B. Azariah says: once in seventy years. R. Tarfon and R. Akiba say: Were we members of a Sanhedrin, no person would ever be put to death. [Thereupon] Rabban Simeon b. Gamaliel remarked, [yea] and they would also multiply shedders of blood in Israel![28]

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26. *Id.*

27. *See* Israel J. Kazis, *Judaism and the Death Penalty*, *in* CONTEMPORARY JEWISH ETHICS 326 (Menachem Marc Kellner ed., 1978) (discussing the elimination of cancellation of debts by Hillel).

28. MISHNEH, *Makkoth*, ch. 1, § 10.

The terseness of this exchange should not obscure its significance. The Talmud selects carefully. This exchange demonstrates the well-known rabbinic reluctance to execute in the formal death penalty system. All four rabbis mentioned in the story appear to accept the one-in-seven-year frequency of the death penalty as an appropriate interval. R. Simeon B. Gamaliel does not appear to wish to speed up the existing system, nor to bring more wrongdoers to justice. And there were wrongdoers who avoided execution. The tone of the first part of the exchange suggests that there were other guilty parties apprehended during the seven years, but that for various reasons they were not executed.

R. Tarfon and R. Akiba reflect the most extreme rabbinic reluctance to execute. The Gemara explains how they would preclude the death penalty without denying its divine legitimacy. The rabbis would ask improbable and obscure questions of the witnesses — such as whether it were not possible that the victim had been suffering from some fatal disease, which actually killed him. A lack of certainty by the witnesses on any material point would bar formal execution.

R. Tarfon and R. Akiba are outside the rabbinic mainstream. The Gemara states that the "Rabbis," here apparently the mainstream rabbis not opposed to capital punishment, would not ask such searching questions, thus permitting the formal death penalty to be imposed more easily. This is an illustration of the disagreement among the rabbis in regard to the death penalty that Gerald Blidstein has noted was never resolved.

What can be said about the reasons R. Tarfon and R. Akiba opposed the death penalty? Nothing can be said with confidence. From the fragment above we know only that they were opposed to the death penalty for anyone. Elsewhere, R. Akiba is quoted as teaching, "Whoever spills blood destroys the image [of God]."[29] Presumably, this idea represents the foundation of R. Akiba's opposition to the death penalty.

If the reasons for rabbinic opposition are unclear, the source of support for the death penalty in this fragment is unambiguous — deterrence. For R. Gamaliel, the absence of the death penalty would lead to an increase in violent crime. There was a widespread Talmudic concern about the threat of breakdown in the social order. For example, when one left a city, one was to pray that he not be attacked on the way.[30] The existence of alternative systems of execution may possibly be explained by such fear.

Nevertheless, even given such fear, R. Gamaliel's view is difficult to understand. He does not dispute that the Sanhedrin should refrain from executing more than once every seven years. What kind of deterrence would be possible in such a setting? Of course a Talmudic exchange should not be

29. TOSEFTA YEBUMOTH 8:4.

30. BABYLONIAN TALMUD, *Berakoth* 60a.

looked at as a conversation. R. Gamaliel was not necessarily responding to the first part of the paragraph; he may have been discussing the idea of abolition of the death penalty.

By arranging this exchange in its current form, the Talmudic redactor has suggested the following: that a broad rabbinic consensus existed favoring an infrequently invoked formal death penalty; that the same consensus preferred to overlook the informal capital practices probably in use at the same time; that a substantial rabbinic view held that the use of the formal death penalty should be reduced even further; and that two minority viewpoints confronted each other — one that would have abolished the death penalty altogether and another that would have strengthened it in the name of deterrence.

This Talmudic exchange has parallels to the America experience with death penalty debate. Americans against the death penalty generally would oppose the death penalty even if it were established as an effective deterrent of violent crime. So, too, presumably do R. Tarfon and R. Akiba.

The American proponent of the death penalty, however, argues today from a broader perspective than did R. Gamaliel. The American proponent does, of course, criticize abolitionists for undermining deterrence, as did R. Gamaliel. But, American death penalty proponents often also insist that the death penalty is a just and, in some contexts, the only just sanction.

R. Gamaliel's sole reliance on deterrence may stem from two sources. First, the rabbis were very concerned about deterrence and societal breakdown. They seem to have had more confidence in the unique effectiveness of, and need for, the death penalty than we have today. This is not too surprising since ancient Israel lacked large scale reliable institutions of incarceration.

Illustrative of the rabbinic fear of social breakdown, two stories are told in the Talmud about punishments imposed that were not legally justified. In the first, a man was stoned to death for riding on the Sabbath because at that time adherence to rabbinic religious pronouncements was weak.[31] In the second, a husband was flogged for having sexual relations with his wife in public "because the times required [the flogging]."[32]

There is, however, a more fundamental reason for R. Gamaliel's sole reliance on deterrence. A call for justice in favor of the death penalty would have conflicted with deeply held rabbinic attitudes toward the relationship of justice and mercy.

31. Attributed to Rashi in the SONCINO TALMUD 303 n.8 (1935).
32. BABYLONIAN TALMUD, *Sanhedrin* 46a.

B. *Justice and Mercy*

The American death penalty debate is beset by the justice issue. American opponents of the death penalty do not, by and large, agree that murderers — or other wrongdoers — deserve to die. Nor is there a consensus in America about the standards of morality that would allow the death penalty question to be resolved. Proponents of the death penalty may have convinced a majority of voters that murderers deserve to die, but they cannot demonstrate this proposition by reasoning from generally accepted premises. The rabbis did not have this problem. The proper punishments for crime were set forth in God's Word. Even the abolitionist rabbis could hardly claim that the death penalty was conceptually illegitimate.

The death penalty debate in the Talmud, therefore, can be viewed as not so much about justice, as about mercy. Gerald Blidstein suggests that the death penalty debate in classic Jewish thought manifested contrasting Jewish understandings of the nature of mercy. One point of view equated justice and mercy, whereas the other point of view found in mercy the dynamic divine quality that controls and limits the demand for justice.[33] Several classical Jewish sources regard the Biblical command to deliver the murderer to execution — "Thine eye shall not pity him"[34] — as a warning against any reluctance to execute.[35]

But this view — the harsh demand of the law for punishment — contrasts with a general rabbinic reluctance to invoke justice in punishment. This reluctance is illustrated in the following Talmudic story.

> In the neighborhood of R. Joshua b. Levi there was a Sadducee who used to annoy him very much with [his interpretations of] texts. One day the Rabbi took a cock, placed it between the legs of his bed and watched it. He thought: When this moment arrives I shall curse him. When the moment arrived he was dozing. [On waking up] he said: We learn from this that it is not proper to act in such a way. It is written: *And His tender mercies are over all His works.* And it is further written: *Neither is it good for the righteous to punish.*[36]

In the classic Jewish tradition, mercy occupies a central role. This helps explain why a proponent of the death penalty would argue from deterrence — for only in deterrence is harsh punishment merciful, merciful at least to potential innocent victims. Such a position could support the death penalty

33. Blidstein, *supra* note 7, at 318-21.
34. *Deuteronomy* 19:13.
35. Blidstein, *supra* note 7, at 318-19.
36. BABYLONIAN TALMUD, *Berakoth* 7a.

without denying the centrality of mercy. And, insofar as the tradition's existing limitations on the death penalty manifested mercy, R. Gamaliel does not criticize them.

A love of mercy and a dread of strict justice are common Talmudic themes. In the same discussion in which the story of R. Joshua b. Levi appears, the Talmud tells a beautiful tale about the prayer of God. The prayer God prays is that his mercy may overcome His anger.

> R. Johanan says in the name of R. Jose: How do we know that the Holy One, blessed be He, says prayers? Because it says: *Even them will I bring to My holy mountain and make them joyful in My house of prayer.* It is not said, "their prayer," but "*My prayer*"; hence [you learn] that the Holy One, blessed be He, says prayers. What does he pray? — R. Zutra b. Tobi said in the name of Rab: "May it be My will that My mercy may suppress My anger, and that My mercy may prevail over My [other] attributes, so that I may deal with My children in the attribute of mercy and, on their behalf, stop short of the limit of strict justice." It was taught: R. Ishmael b. Elisha says: I once entered into the innermost part [of the Sanctuary] to offer incense and saw Akathriel Jah, the Lord of Hosts, seated upon a high and exalted throne. He said to me: Ishmael, My son, bless Me! I replied: May it be Thy will that Thy mercy may suppress Thy anger and Thy mercy may prevail over Thy other attributes, so that Thou mayest deal with Thy children according to the attribute of mercy and mayest, on their behalf, stop short of the limit of strict justice! And He nodded to me with his head.[37]

Here the tradition displays its two minds. The anger of God is just and deserved. The wrongdoer should be punished harshly. But mercy is the highest attribute. It is invoked as even a "blessing" to God. R. Joshua links the mercy God would bestow on man to the mercy that the righteous should bestow on wrongdoers.

The Talmud also tells of God's suffering at the death of the wicked. The Mishnah teaches that the hanged body must be buried before nightfall, for he that is hanged is a reproach to God. In interpreting the phrase, "reproach to God," the Mishnah attributes to R. Meir the following description of God's suffering when even the wicked are punished:

> R. Meir said, When a man undergoes suffering.[38] What does the Shechinah say (as it were)? "My head is in pain, My arm is

37. *Id.*

38. "Because of his sins" is added here in THE MISHNAH, *supra* note 13, at 265.

> heavy." If this be so, and the Omnipresent is troubled because of the blood of the wicked that is shed, how much more [is He sorely troubled] at the blood of the righteous.[39]

The Soncino edition of the Talmud[40] comments concerning the phrase "The Name of Heaven is profaned," which refers to the effect of a publicly displayed hanged body: "Man's sin reflecting, in a manner of speaking, on God."[41]

The Gemara attributes to R. Meir a parable illustrating how the hanged man's death reflects on God:

> R. Meir said: A parable was stated; To what is this matter comparable? To two twin brothers [who lived] in one city; one was appointed king, and the other took to highway robbery. At the king's command they hanged him. But all who saw him exclaimed, "The king is hanged!" Whereupon the king issued a command and he was taken down.[42]

Now, any tradition that teaches that Ted Bundy is God's twin brother takes very seriously the description of man as created in the "image of God." And, obviously, such a tradition would be deeply troubled by any execution. On the other hand, the Rabbis of the Talmud were also moved powerfully by the death of the crime victim. This is perhaps why murder is usually the example of a capital crime discussed in the Talmud though there are many other such crimes. And this is perhaps why the death penalty always remained the norm, even when it was rarely invoked.

C. *Repentance and Atonement*

There is a justification for mercy that goes beyond a dread of punishment. Mercy gives space for repentance by the wrongdoer. The ultimate goal of the Talmudic criminal justice system was not justice, but repentance. This can be seen in a story parallel to that of R. Levi,[43] but with the emphasis on repentance rather than on mercy:

> Certain criminals lived in the vicinity of R. Meir and they subjected him to much harassment, and he prayed that they might die. His wife Beruria said to him: How do you justify such a

39. MISHNEH, *Sanhedrin*, ch. 6, § 5.
40. THE BABLONIAN TALMUD (Rabbi Dr. Isidore Epstein ed., 1953).
41. *Id.* at 304 n.8.
42. BABYLONIAN TALMUD, *Sanhedrin* 46b.
43. *See supra* note 33 and accompanying text.

> prayer? Is it because it is written: "Let sinners cease from the earth" (Ps. 104:35)? But the word as written means literally "sin," not "sinners." Moreover, consider the last part of the verse: "and let the wicked be no more." When sins will cease, the wicked will be no more. You should rather pray that they repent, and then the wicked will be no more. He prayed that they repent, and they repented.[44]

Now doubtless in part the point of this story is the effect of such prayer on R. Meir. In this the story is like that of R. Levi: the righteous should not punish.

But Beruria's comment goes further than that. She knows, where R. Meir has forgotten, that the purpose of law is repentance rather than proper and just judgment. The Jewish moral order is repaired not by punishment of the wrongdoer but by his repentance. Why did such a tradition not abolish the death penalty? The answer is, of course, that to an extent it did. And to an extent, given the Word of God, it felt it could not.

The continuation of the death penalty may also be explained by the problem of atonement. The Talmud clearly explained that God could forgive offenses against himself but could not forgive offenses against other persons. "Transgressions between man and God may be atoned on the Day of Atonement, but transgressions between man and man will not be atoned on the Day of Atonement until one has appeased his fellowman."[45]

Although there were many capital crimes, it is no accident that murder dominates in Talmudic discussion of the death penalty. In murder, appeasement is not possible. It is noteworthy in this regard that R. Levi and R. Meir are the victims of crime who pray for the criminal's repentance. It may even be that the atonement brought about by the execution takes the place of appeasement of the murder victim in accomplishing acceptance of repentance. The Mishnah contains a full and obviously important treatment of atonement, including the following explanation of the need for confession at an execution: "Everyone that confesses has a portion in the world to come."[46] If the wrongdoer did not know how to make confession, he was instructed.

The need for atonement where repentance was not sufficient may be why the early tradition — The Bible[47] — insisted that of all punishment, the punishment of the murderer in particular must be carried out. The change in the tradition to a stance of some opposition to the death penalty may have re-

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44. BABYLONIAN TALMUD, *Berakhot* 10a.

45. MISHNA YOMA 8:9.

46. MISHNEH, *Sanhedrin*, ch. 6, § 2.

47. The Hebrew Bible was redacted into its canonical form several hundred years before the beginning of the compilation of the Mishnah. *See generally* HANS KÜNG, JUDAISM 108, 132-38 (1992).

flected a new and difficult insight — that even in murder, even without forgiveness by the victim, mercy and acceptance of repentance are possible without application of strict justice.

D. *Innocence*

Unlike the American death penalty debate, there is no indication that the chance of wrongly executing an innocent person affected Talmudic death penalty debate. All of the rabbis seem to have regarded such wrongful execution as totally unacceptable. The fanatic procedural and evidentiary hurdles employed in the Talmud's formal death penalty system can be understood as in part stemming from an abhorrence of convicting and executing — or even punishing in other ways — the innocent. The proof requirements assured that the accused was in fact the perpetrator. The required warning assured that the accused acted intentionally. Thus, although it is commonly and accurately said that these requirements prevented the execution of almost anyone, these requirements primarily prevented the execution of anyone who was innocent. The rabbinic determination to protect the innocent no doubt furthered the universal acceptance of these strict requirements.

The rabbinic determination to avoid punishment of the innocent could lead to extreme results, as the evidentiary rejection of circumstantial evidence and confessions illustrates. The Gemara describes the rejection of circumstantial evidence in the following well-known passage: "[The judge] says to them: Perhaps you saw him running after his fellow into a ruin, you pursued him, and found him sword in hand with blood dripping from it, while the murdered man was writhing [in agony]: If this is what you saw, you saw nothing."[48]

But despite all the precautions, and the rigid proof requirements, conviction or acquittal in a Talmudic capital case still depended on potentially fallible or even corrupt witnesses. The rabbis recognized that there could be no guaranty against the execution of an innocent person. The consciousness of this potentiality is demonstrated in a revealing Mishnah. The prescribed confessional prayer was "let my death be an atonement for my sins." After explaining how the condemned person was to be helped to confess his sin, the Mishnah adds: "R. Judah says, If he knew that he had been sentenced through false evidence he says 'let my death be an atonement for all my sins save this sin'."[49]

This suggestion by R. Judah shows that despite the precautions, there were some accused who made a sufficiently plausible claim of innocence that a minority of rabbis felt a ritual amendment was needed. Even more to the

48. BABYLONIAN TALMUD, *Sanhedrin* 37b.
49. MISHNEH, *Sanhedrin*, ch. 6, § 2.

point, the tradition rejected R. Judah's amended confession on the ground that "everyone would speak in this fashion to show his innocence."[50] In the Philip Blackman edition of the Mishnah, the editor's comment to this passage points to the rabbinical fear that "judges and witnesses would be discredited and justice held in contempt" if the condemned went to their deaths officially proclaiming their innocence.[51] Some of the rabbis apparently did not believe the evidentiary and other requirements for conviction fully eliminated the possibility of executing the innocent.

In the American death penalty debate, innocence has played a different, indeed partisan, role. American opponents of the death penalty have attempted to show that the death penalty has and will lead to the executions of innocent persons.[52] The response from proponents of the death penalty has taken two different paths. On one hand, proponents argue that because of already existing procedural and evidentiary requirements, innocent persons are unlikely to receive the death penalty. This is the sort of response R. Gamaliel would have made, although, unlike a rabbinic court, the American criminal courts do not always have jurisdiction to handle claims of innocence after the trial is over.[53]

But the other response — what might be called the road response — is more demonstrative of the difference between Talmudic and American consciousness. American proponents of the death penalty often acknowledge the inevitability of error. They defend even the possibility of substantial numbers of erroneous executions. When we build a road, we know that a certain number of workers will die. Yet we continue to build roads. Thus it is with the death penalty.[54] In this response, more than in any other discussion, we can

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50. *Id.*

51. THE MISHNAH (Philip Blackman trans., 1954).

52. *See, e.g.*, Hugo Adam Beau & Michael Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

53. Some would say that such a lack of jurisdiction killed Roger Coleman. *Cf.* Coleman v. Thompson, 112 S. Ct. 1845 (1992) (Blackmun, J., dissenting) (denial of stay of execution). The United States Supreme Court has recently held that, at least absent extraordinary circumstances, innocence is not an independent ground for relief under federal habeas corpus, even in a death penalty case. Herrera v. Collins, 113 S. Ct. 2325 (1993).

54. Lest the reader think we exaggerate:

> In capital cases, miscarriages of justice are more grave than in other cases. Nonetheless, some will occur, however much we try to avoid them, since courts are fallible. Innocents are killed in most human activities, not just in war. Truck traffic kills innocent pedestrians every year. Construction debris may kill innocent passersby; so may policing. We don't give up these activities because the advantages statistically outweigh foreseeable accidents. Miscarriages of justice are just as unintended, accidental *and* foreseeable. Here too the advantages—the morality and deterrent usefulness of the death penalty—outweigh the disadvantages. Execution would be disadvantageous only if miscarriages were so frequent as to cause the risk innocents run to be executed to rival that of murderers. Not even the most fanatic abolitionist contends that this is the case.

Ernest Van den Haag, *For Capital Punishment*, 25 ISRAEL L. REV. 460, 463-64 (1991).

see the rabbis' moral seriousness and compare it with our morally frivolous culture.

VI. AMERICAN AND JEWISH EXPERIENCE WITH THE ANTI-CRUELTY PRINCIPLE: THE SIXTH COMMANDMENT VERSUS THE EIGHTH AMENDMENT

One of the striking failures of the American legal community has been an inability to formulate and implement a coherent vision of the anti-cruelty principle. In contrast, classic Jewish law had a fairly stable sense of which sorts of punishment would be permitted and which would not be permitted.

Francine Klagsburn has noted that it was the value of human life that originally led to the biblical code providing for capital punishment.[55] The alternatives to the death penalty at the time — monetary compensation or substituted punishment — had the effect of exalting certain wrongdoers over others or devaluing certain victims compared to other victims. The biblical insistence on execution focused on the precious life the murderer had taken: "Your eye shall not pity him, but you shall purge the guilt of innocent blood from Israel, so that it may be well with you."[56]

The Talmud condemns all murder equally. Life history does not matter; neither do the circumstances of the crime; nor the survivors left behind. But if all life is precious, so that it does not really matter who killed or who was killed, then does not the same principle of the preciousness of life lead to abhorrence of the death penalty as well? This is the point made by Gerald Blidstein when he traces the root of the Hebrew word in the Sixth Commandment — r-z-ch — to the same root used to describe permitted killings in the Bible and judicially imposed executions in the Talmud.[57] Thus, according to Blidstein, the Sixth Commandment has been inaccurately translated as "You shall not murder" when the sense of the Hebrew phrase is "you shall not kill." Such a translation does not invalidate Biblical law, which demands execution in numerous contexts. But it does express the reluctance to execute that Blidstein considers a characteristic of Talmudic thought. As Moshe Sokol has put it, various sources in the Jewish tradition suggest that there is "*some* dimension of wrong" in even morally justified killing.[58]

There are a number of other sources also associated with rabbinic discomfort with the death penalty. Justice Haim Cohn identifies the Talmudic reform that led to changes in the methods of execution with the injunction

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55. KLAGSBURN, *supra* note 13, at 358.

56. *Deuteronomy* 19:13.

57. Blidstein, *supra* note 7, at 310-15.

58. Moshe Sokol, *Some Tensions in the Jewish Attitude Toward the Taking of Human Life*, 7 JEW. L. ANN. 97, 102 (1988) (emphasis in original).

"love your neighbor as yourself,"[59] which was interpreted to mean "devise an easy death for him."[60] J.H. Hertz suggests that Deut. 25: 3, which limits flogging to forty blows lest "your brother should be dishonored before your eyes," identifies a general notion that "punishment must have a decidedly moral aim; viz. the improvement of the criminal."[61] And, of course, R. Meir's story appealing to the likeness of God in every man would also cause one to pause about the death penalty.[62]

These ideas do not state a single principle, but they do bear resemblances. And in all of them, every human life is uniquely important. From this bedrock, the rabbis set out to reform a number of aspects of the capital punishment system. The psychological assurance necessary to such action was "their belief in a merciful God who would surely approve of their abhorrence of cruel and inhuman punishments."[63]

But if we contrast rabbinic faith that reality favors mercy with modernity, we find skepticism and weariness instead of faith. American judicial decisions implementing fundamental rights are criticized today by many legal thinkers as an illegitimate substitution of rule by judge for rule by law or by majority. What makes such decisions illegitimate in this argument is that there is no unchanging moral foundation establishing fundamental rights; there is only "one's own moral view:"

> [N]o argument that is both coherent and respectable can be made supporting a Supreme Court that "chooses fundamental values" because a Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society. The man who understands the issues and nevertheless insists upon the rightness of the Warren Court's performance ought also, if he is candid, to admit that he is prepared to sacrifice democratic process to his own moral views. He claims for the Supreme Court an institutionalized role as perpetrator of limited coups d'etat.[64]

This attack is traditionally made on so-called non-interpretivism, whereby the courts protect rights not present, in some sense, in the text of the Constitution. Conceivably, decisions implementing the anti-cruelty provision in the Eighth Amendment would not be subject to the same criticism. That text provides: "Excessive bail shall not be required, nor excessive fines imposed,

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59. *Leviticus* 19:18.
60. Cohn, *supra* note 22, at 58.
61. JOSEPH HERMAN HERTZ, THE PENTATEUCH AND HAFTORAHS 854 (1938).
62. *See supra* note 38 and accompanying text.
63. Cohn, *supra* note 25, at 72.
64. Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6 (1971).

nor cruel and unusual punishments inflicted."[65]

One would imagine that the task of a society bound by this anti-cruelty principle would be to understand its application to everyday life. That is, one would ask what makes a particular punishment "cruel and unusual." In this way a culture would through time and precedent develop an understanding of what cruelty is and why it is forbidden.

This is what the rabbis of the Talmud did, in effect, with the Sixth Commandment and other norms expressive of the value of human life. They let those norms speak in a critique of existing practices. Thus did they effect reform.

But despite a clear text, many legal thinkers today do not want to reason about the meaning of human cruelty or any other norm. Instead, in parallel to the critique of non-interpretivism, they wish to subject the Eighth Amendment to some sort of "objective" analysis. Raoul Berger, for example, appeals to the original intention of the framers in interpreting the Eighth Amendment.[66] From the skeptical perspective, a court that interprets even specific language beyond clear history or demonstrable community values also is making rather than implementing value choices.

This jurisprudence of skepticism now dominates judicial decisions. The United States Supreme Court, even the more liberal Justices, appeal to objective indicia of a developing national consensus in interpreting the Eighth Amendment. In *Thompson v. Oklahoma*,[67] Justice Stevens reasoned from such objective criteria in concluding that the Eighth Amendment prohibits the execution of a 15-year-old: "[I]ndicators of contemporary standards of decency, [legislation, jury verdicts and so forth] [indicate that] the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community."[68] And if tomorrow that consensus should change, presumably 15-year-olds could again be executed.

What occurs in argument of this sort reflects, as Hadley Arkes has noted, the American legal tradition's current belief that reasoning about morality is impossible.[69] According to this skeptical view, we can never get to the truth of an issue such as whether the death penalty is cruel or not. All we are left with are our own opinions on the matter.

VII. CONCLUSION: THE MEANING OF AN EXECUTION

Professor Aaron Schreiber writes of the Talmudic criminal trial: "It may be that criminal trials in Jewish law were in essence a mode of divine ser-

65. U.S. CONST. amend. VIII.
66. RAOUL BERGER, DEATH PENALTIES 29-111 (1982).
67. 487 U.S. 815 (1988) (plurality opinion).
68. *Id.* at 832. Justice Stevens did attempt to make a judgment about the matter as well. *Id.* at 833-38.
69. HADLEY ARKES, BEYOND THE CONSTITUTION 11-16 (1990).

vice, or ritual, whose function was to attain atonement for the convict, and not necessarily to fathom the truth."[70]

Professor Schreiber captures here a core of Talmudic thought — man's need for atonement through ritual acts. The death penalty is a part of, and not separate from, this general attitude. An execution, though awesome, is not an act of hostility. It is a ritual opportunity for the condemned prisoner to attain atonement.

In contrast with the Talmud, what do we in America today believe we are doing when we execute a murderer? Not many Americans believe that the criminal is atoning for his crime through a ritual act. In execution, we may be deterring crime, satisfying the victim's family, saving money or even getting rid of the garbage. Not one of these is atonement. Each of these purposes is something done to the criminal, not for him and not with him. By doing to the criminal and not for him, we in America have severed the link of humanity with the criminal, a motivation that never occurred to the rabbis.

It might be said that the execution restores the moral balance destroyed by the murder and thus is an act of just retribution. And the most profound death penalty proponent would say that every member of society is a participant in the collective quest for justice — even the criminal about to be executed.

This attitude, if we felt it truly, could transform the American death penalty from today's bored bureaucratic function alternating with occasional sensational media event, to the highest shared ritual of which a secular society is capable. But then, we would have to take seriously what we do. Our process, to be worthy, would have to be thought about as seriously as was death penalty law in the Talmud.

Compare our trials with the Sanhedrin that left the Temple rounds when the rising murder rate rendered it impossible for the trials to be dealt with "properly."[71] Since the criminal trial was a ritual, for the glory of Heaven the trial had to be done properly and with proper intention. A ritual cannot be bureaucratized and remain a ritual.

We today would not give up the death penalty in the face of a rising murder rate. We would move to summary procedures, more courts, a weakening of procedural and evidentiary restrictions, a cutback in habeas corpus jurisdiction. In short, we would do what we have done.

The greatest horror in an American execution is that the taking of human life is done frivolously. The horror is that we feel no horror for what we do. In that absence we see the clearest contrast between American and Talmudic life.

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70. Schreiber, *supra* note 6, at 278.

71. *See supra* notes 15-16 and accompanying text.