

HARMONIZING DIVERGENT PURPOSES OF PUNISHMENT IN JEWISH CRIMINAL LAW: INTEGRATING CONTEMPORARY RELIGIOUS, CRIMINOLOGICAL, AND LEGAL PERSPECTIVES

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ABSTRACT

This article investigates the purposes of punishment in Jewish law, a subject that has been contentious in recent scholarly discussions. It scrutinizes whether these punishments align with religious, educational, or conventional punitive principles like deterrence, retribution, rehabilitation, and prevention. A historical examination shows that contemporary punitive goals such as retribution, deterrence, prevention, rehabilitation, compensation, and atonement have roots in Hebrew law throughout various epochs. Notably, each advocated objective faced counterargument in a certain era, with none achieving supremacy. The article posits that the theoretical underpinnings of punishment in Hebrew law are fundamentally akin to those in general punitive theory. This similarity extends to the nature of the queries posed, the challenges encountered, the argumentative styles, and the fragmented and inconsistent answers offered. Consequently, the pursuit of a unique punitive theory within Hebrew law is deemed unproductive, as no such distinctive framework exists or has existed. Modern theories of punishment, akin to their historical Jewish law counterparts, are plagued by inherent paradoxes that appear unresolvable. Jewish legal texts add to the complexity and disarray in categorizing punitive objectives, as different goals frequently conflict. This mirrors the larger domain of penal theory policies, which constantly grapple with reconciling opposing objectives to find an appropriate equilibrium in each case.

INTRODUCTION

Punishment has been a fundamental aspect of human societies since the dawn of civilization. The Bible's first stories revolve around sinful behaviors and their corresponding punishments. Adam and Eve were expelled from the Garden of Eden for having eaten from the Tree of Knowledge.¹ Cain was doomed to

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It should be noted that the authors translated all Hebrew sources and citations unless noted otherwise.

1. *Genesis* 3:14–19, 3:23 (King James).

wander eternally for having murdered his brother, Abel, and the Deluge flooded the earth as punishment for the corruption of all flesh.²

Although these stories provide an audience with a detailed explanation of the sins for which punishments are meted out, they do not explicitly communicate the purposes of the punishments. *Prima facie*, we are supposed to understand the purpose without having it explained to us. For scholars, however, defining the purpose(s) of punishment is one of the most challenging issues: Can a single punishment have more than one purpose? Can the purpose of punishment change from one transgression to another or is uniformity of purpose required? Since punishment has existed much longer than its investigators, any attempt to understand its nature and goals can only be made retrospectively—a fact that makes it more complicated to expose the true purpose of punishment but does not absolve us from the attempt.

In the present article, we examine the purposes of punishment in Jewish Law from a historical analytical perspective. Proceeding chronologically from biblical times, through Mishnaic and Talmudic times, to Maimonidean *Mishnah Torah*, the *Shulchan Aruch*, and the responsa literature, we demonstrate that Jewish Criminal Law was a practical system of punishment and enforcement, whether in being meted out by God, or by earthly authorities that were given the power to carry out punishment for certain offenses. Moreover, it evidences the same conflicting purposes of punishment—retribution, deterrence, prevention, rehabilitation, atonement, reconciliation, and restitution—as its modern counterparts and applies similar solutions in balancing these purposes. Thus, Jewish Criminal Law requires no separate theoretical framework, as most scholars today argue.

According to the prevailing position, Jewish criminal law is quintessentially different from modern criminal law. While modern law focuses on crimes against persons and maintaining the social order, Jewish criminal law concentrates on crimes against God and safeguarding an individual's relationship with God. The reliance of Jewish Law on eternal Torah commandments in interpreting and applying the law prevents it from having sufficient flexibility to adapt to changing social needs. Additionally, its rigid evidentiary and procedural requirements prevented it from convicting the guilty.³

These features necessitated that Jewish Law recognizes the residual authority of two complementary systems to punish offenders outside the Torah—King's Law and the religious courts.⁴ However, as our analysis shows, the historical

2. *Id.* at 4:12, 5:12.

3. Theodore Spector, *Some Fundamental Concepts of Hebrew Criminal Jurisprudence*, 15 J. CRIM. L. & CRIMINOLOGY 317, 320 (1924); Aharon Kirschenbaum, *Mekoma shel Ha'Anisha Bamishpat Ha'Ivry Ha'Pili, Perek BeHashkafa Ha'Penologit shel Hazal Ve'Shel Ha'Rishonim* [The Place of Punishment in the Jewish and Criminal Code, A Chapter on the Penological Perspective of the Sage and of the Rishonim] 12 IYOONEI MISHPAT 253 (1987) (analyzing classical Hebrew criminal law's practical challenges, witness eligibility criteria, and the disparity between theoretical harshness and lenient application, with insights into the historical and philosophical influences on the Sages' legal interpretations).

4. Arnold N. Enker, *Aspects of Interaction Between the Torah Law, the King's Law, and the Noahide Law in Jewish Criminal Law*, 12 CARDOZO L. REV. 1137 (1991); Irene Merker Rosenberg & Yale L. Rosenberg, *Guilt: Henry Friendly Meets the Maharal of Prague*, 90 MICH. L. REV. 604 (1991).

record does not support the conclusions of complementary systems theory. Jewish criminal law was not static but rather evolved in response to historical circumstances and social needs. Its inefficacies appeared later in its history and, like those in modern systems, resulted from partial and imperfect solutions to the difficult task of balancing the conflicting purposes of punishment. The uniqueness of Jewish Law was that it operated for millennia in many nations and within the constraints of other governing systems. Thus, to relegate this ancient system of law to the margins, rather than use it to develop laws in today's legal systems, is a waste of a valuable resource.

The article consists of four sections. In Section I, we outline the primary purposes of punishment (retribution, deterrence, prevention, and rehabilitation), demonstrate their applicability to Hebrew law, and show how rabbinic scholars, like contemporary practitioners and theoreticians, endeavored to balance the conflicting nature of these purposes. Section II explains why the lessons that can be learned from these ancient debates have not been incorporated into contemporary debates on punishment. Specifically, the section details the emergence of complementary systems theory and how this theoretical model marginalized Jewish Criminal Law in contemporary legal debate. Section III situates the relevant biblical and rabbinical texts in their historical context to challenge the validity of complementary systems theory. Having established that Jewish Criminal Law is not inherently different from other systems of law and evidences the same purposes of punishment, Section IV turns to a discussion of Jewish Law's relevance for contemporary debates on the moral and legal implications of capital punishment for society.

I. THE PURPOSES OF CRIMINAL PUNISHMENT

Modern legal literature dealing with punitive theory highlights four primary purposes of punishment: retribution, deterrence, prevention, and rehabilitation. These purposes are almost universally accepted.⁵ We shall briefly review each of these purposes, illustrating each purpose and discussing how capital punishment does or does not realize the purpose.

The prevailing assumption is that retribution is a refined form of vengeance in that it aims to satisfy the victim's vengeful feelings while giving responsibility for punishing offenders to an impartial authority, the State.⁶ The essential idea of vengeance is that one should do to the offender the same as the offender did to the victim, that is, "an eye for an eye."⁷ Nonetheless, the retributive approach or

5. Lindsay Farmer, *The Aims of Punishment and the Aims of the Criminal Law*, in THE AIMS OF PUNISHMENT 1, 1–14 (Charis Papacharalambous ed., 2020); Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67 (2005); Kent Greenawalt, *Punishment*, in ENCYCLOPEDIA OF CRIME & JUSTICE 1282–94 (Joshua Dressler ed., 2d ed. 2002); Gerard V. Bradley, *Retribution and the Secondary Aims of Punishment*, 44 AM. J. JURIS. 105, 122–23 (1999).

6. Richard A. Posner, *Retribution and Related Concepts of Punishment*, 9 J. LEGAL STUD. 71 (1980).

7. HANS JOCHEN BOECKER, RECHT UND GESETZ IM ALTEN TESTAMENT UND IM ALTEN ORIENT [LAW AND THE ADMINISTRATION OF JUSTICE IN THE OLD TESTAMENT AND ANCIENT EAST] (1976); Manfred Oming, *Mida Keneged Mida Kelkaron Mishpati Babok Hamikrai: Lashon, Heksher Vetoldot HaMassoret* [Measure for Measure as a Legal Precept in Biblical Law: Language, Context and History of

Jus Talionis does not require an identical response.⁸ The generally accepted rule is “measure for measure,” which according to eighteenth century German philosopher Immanuel Kant meant that an apt and commensurate correspondence should exist between the severity of the offense and the appropriate punishment. The suffering meted out by the punishment should correspond to the suffering caused by the offense.⁹

This punishment may not necessarily fix the damage done, but it serves to reinforce societal laws and prevent the victim or their family from seeking personal retribution. Retribution is different from revenge in that it is carried out by neutral parties.¹⁰ Criminal justice is distinct from other areas of law where parties can come to a resolution on their own. It requires that society, through its courts and judges, uphold societal standards and determine what actions are morally condemnable.

According to Kant, an absolute moral imperative to punish the offender exists regardless of any benefit that society may gain from the punishment.¹¹ Retributive punishment restores the moral principle that has been negated and rights the moral balance disrupted by the offense.¹² In the case of murder, some scholars support the death penalty solely as a retributive measure.¹³ The biblical justification for this stance is clear: “Whoso sheddeth man’s blood, by man shall his blood be shed”¹⁴ Kant went so far as to claim that even if only two

Tradition], 2 BEIT MIKRAH 183 (2015) (delineating five forms of ‘measure for measure’ justice within biblical law, ranging from direct retribution to theologically driven responses. It explores how these forms function as deterrents, educational tools, and reflections of divine justice, aiming to reduce violence and promote order); JAN ROTHKAMM, TALIO ESTO: RECHERCHES SUR LES ORIGINES DE LA FORMULE, OEIL POUR DENT, DANS LES DROITS DU PROCHE-ORIENT ANCIEN, ET SUR SON DEVENIR DANS LE MONDE GRÉCO-ROMAIN [TALIO ESTO: RESEARCH ON THE ORIGINS OF THE FORMULA, EYE FOR TOOTH, IN THE LAW OF ANCIENT NEAR EAST AND ON ITS APPEARANCE IN THE GREGORIAN WORLD] (2011).

8. ABRAHAM P. BLOCH, A BOOK OF JEWISH ETHICAL CONCEPTS: BIBLICAL AND POSTBIBLICAL 201–02, 272 (1984); Kevin M. Carlsmith, John M. Darley, & Paul H. Robinson, *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCH. 284 (2002); Hans Crombag, Eric Rassin & Robert Horselenberg, *On Vengeance*, 9 PSYCH., CRIME & L. 333, 335–36 (2003).

9. IMMANUEL KANT, METAPHYSICS OF MORALS 105 (M. Gregor trans., Cambridge Univ. Press 1996) (1797).

10. Laurie L. Levenson, *Judaism and Criminal Justice*, in THE OXFORD HANDBOOK OF JEWISH ETHICS AND MORALITY 472, 474 (E. N. Dorff & J. K. Crane eds., 2012); Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 CAMBRIDGE L.J. 145 (2008).

11. Arthur Shuster, *Kant on the Role of the Retributive Outlook in Moral and Political Life*, 73 REV. POL. 425, 431 (2011); Mark Tunick, *Is Kant a Retributivist?*, 17 HIST. POL. THOUGHT 60 (1996).

12. G. W. F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 70–71, 127–29 (Allen W. Wood ed. & H. B. Nisbet trans., Cambridge Univ. Press 1991); JAMES FITZJAMES STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND (1890).

13. *Numbers* 35:31 (King James); MOSES MAIMONIDES, MISHNEH TORAH, HILCHOT MELACHIM UMILCHAMOT 3:10 (hereinafter HILCHOT MELACHIM UMILCHAMOT); JEFFRIE G. MURPHY, KANT: THE PHILOSOPHY OF RIGHT 141 (1970).

14. *Genesis* 9:6 (King James).

persons were left in the world and one of them was a convicted murderer, the other survivor still had a moral obligation to kill the murderer.¹⁵

Retribution, which comes from the Latin word *retribuō*, meaning “I pay back,” justifies punishment as a means of addressing the harm done to the individual and to society by a specific individual’s violation of societal law. Since individuals are accountable for their actions, they are obligated to recognize their wrongdoing and, to the extent feasible, repair the harm caused to the direct victims of their actions and to the moral foundation of society.¹⁶

The second purpose of punishment is deterrence so that “all the people shall hear and fear.”¹⁷ According to this purpose, punishment should deter the apprehended offender from repeating the offense (private deterrence), and the public should fear the punishment so that they too are deterred (public deterrence). Unlike retribution, which addresses the past, deterrence is directed toward a future benefit. The eighteenth century English philosopher and jurist Jeremy Bentham claimed that deterrence was the only justified rational purpose of punishment. He noted that if there was only a minimal risk of the crime being repeated, imposing a punishment was unnecessary.¹⁸

Bentham’s claim raises several questions: To what extent does punishment deter? Are some punishments more effective at deterring future transgressions than others? Are all people equally deterred by punishment? The prevalent assumption is that punishment deters; however, little is known about the type or severity of punishment that provides the most effective deterrence. Moreover, past and contemporary theorists, such as Immanuel Kant and Matthew C. Altman consider it inappropriate to punish one person to prevent others from breaking the law. Every person, in their view, is an end in his/her own right and not a means for improving the lives of others.¹⁹

Criminological literature is rife with debates over the power of capital punishment as a deterrent. Some theorists have claimed that every execution prevents seven to ten murders, while others have argued that the death penalty has no deterrence value.²⁰ Whether capital punishment or any punishment acts as a deterrent remains a topic of hot debate.

15. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 106 (Mary Gregor trans., Cambridge Univ. Press 1996); Matthew C. Altman, *Subjecting Ourselves to Capital Punishment: A Rejoinder to Kantian Retributivism*, 19 PUB. AFFS. Q. 247 (2005).

16. Levenson, *supra* note 10, at 474.

17. *Deuteronomy* 17:13 (King James).

18. JEREMY BENTHAM, *Principles of Penal Law*, in 1 *THE WORKS OF JEREMY BENTHAM* 365, 393 (John Bowring ed., 1962).

19. The classic critique of deterrence is offered by Kant. See IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 331–33 (John Ladd trans., Bobbs-Merrill Co. 1965). For a relatively new theory that is also inimical to the idea of deterrence, see Michael S. Moore, *Justifying Retributivism*, 27 ISR. L. REV. 15, 34–35 (1993).

20. For a positive assessment of capital punishment’s deterrent effect, see DANE ARCHER & ROSEMARY GARTNER, *VIOLENCE AND CRIME IN CROSS-NATIONAL PERSPECTIVE* (1984); Stephen K. Layson, *Homicide and Deterrence: A Reexamination of the United States Time-Series Evidence*, 52 S. ECON. J. 68, 68–69 (1986); Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment’s Differing Impacts Among States*, 104 MICH. L. REV. 203, 210–19 (2005). For the negative, see William J. Bowers & Glenn

The third purpose is prevention, or as stated in Deuteronomy 17:7, “Thou shalt put the evil away from among you.” The idea is that by removing the offender from society, the world is repaired, that is, *tikkun olam* is achieved. Today, removing the offender from society is accomplished through incarceration in prison for a set period or through other means of restraint such as electronic monitoring, house arrest, and parole officer supervision. However, such punitive measures do not exist in Jewish Law. During biblical times, imprisonment was used only as a means of holding the offender until legal proceedings could be carried out; it was not used as a legal form of punishment. While the Hebrew Bible includes several stories of individuals being incarcerated, such as Joseph being imprisoned after his owner’s wife falsely accused him of rape and Jeremiah being jailed by Zedekiah for prophesying that the Babylonians would win the war, these imprisonments were not the result of legal proceedings. Instead, they were the regime’s response to a subject’s impudent behavior and no time limitations were imposed on the period of incarceration.²¹

As for the death penalty, obviously once offenders are executed, they can no longer continue their criminal activities. In this regard, capital punishment has been conceptualized as the ultimate preventive measure since biblical times. Similarly, if an individual’s hand is cut off for striking another person, that individual will find it challenging to repeat the offense in the future.

The final primary purpose of punishment is rehabilitation. The idea of rehabilitation, established in legal practice in the nineteenth century, entails giving offenders either training or treatment to alter the offenders’ behavior and habits, so that they can return to society as law-abiding members of the community.²² Of course, the death penalty has no rehabilitative purpose; its supporters presumably believe that the person sentenced to death is beyond rehabilitation.

These four primary purposes of punishment—retribution, deterrence, prevention, and rehabilitation—however, often come into conflict.²³ For example,

L. Pierce, *The Illusion of Deterrence in Isaac Ehrlich’s Research on Capital Punishment*, 85 YALE L.J. 187, 200–06 (1975); ROBERT G. HANN, DETERRENCE AND THE DEATH PENALTY: A CRITICAL REVIEW OF THE ECONOMETRIC LITERATURE 9–10, 47–57 (1976); Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 199–204 (2004).

21. On Joseph’s imprisonment, see *Genesis* 37:20 (King James). On Jeremiah’s incarceration, see *Jeremiah* 37:21 (King James). Another possible explanation is that these stories do depict custodial punishment, and Hebrew Law goes against them.

22. Francis A. Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L. & CRIMINOLOGY 226 (1959); Francis T. Cullen & Paul Gendreau, *From Nothing Works to What Works: Changing Professional Ideology in the 21st Century*, 81 PRISON J. 313, 313–38 (2001); SHLOMO G. SHOHAM ET. AL., AVEROT VEONASHIM: MAVO LEPENOLOGIA—AL TORAT HAANISHA VEHASHIKUM, MENIAT PESHA VEA KIFAT HOK [OFFENSES AND PUNISHMENTS: INTRODUCTION TO PENOLOGY—ON THE DOCTRINE OF PUNISHMENT AND REHABILITATION, PREVENTION OF CRIME, AND ENFORCEMENT OF LAW] (2009); BABYLONIAN TALMUD, SANHEDRIN 37a; BABYLONIAN TALMUD, TA’ANIT 23b.

23. Carlsmith, Darley & Robinson, *supra* note 8, at 297; Igor Primoratz, *The Middle Way in the Philosophy of Punishment*, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H. L. A. HART 217–18, 320 (Ruth Gavison ed., 1987); Abraham Tennenbaum, *Mipnei Hasi’akeh al Matarot HaAnisha Vehataot BeNissayon Livkhor Ya’ad Anisha Merkazi* [Mapping the Discourse Regarding Punitive

if the purpose of punishment is rehabilitation, it often requires a different punishment than if the purpose is either retribution or deterrence. Let us say that we have two first-time offenders who have perpetrated the same offense, but one shows indications of being amenable to rehabilitation. In fact, this offender, if imprisoned, we believe, is likely to become a hardened criminal and commit more serious offenses in the future. In contrast, the other offender, in our view, appears beyond rehabilitation and therefore should receive the stiffest possible sentence under the law. However, giving different sentences to these equally culpable offenders violates the principles of uniformity and proportionality that underpin retributive punishment. Retributive punishment dictates that offenders who commit the same offense receive identical punishments.

Throughout history, in different places and at different times, one purpose of punishment has dominated at the expense of the others. For example, roughly two hundred years ago, rehabilitation became the preferred punitive purpose and remained so until the 1970s, after which its prevalence declined until very recently.²⁴ In Israel, retribution, along with a certain measure of rehabilitation, received a boost in 2012 following the amendment of Hok HaOnshin. Under the amended section 40(b), it states, “[T]he guiding principle of punishment is an appropriate correspondence between the severity of the offense under its circumstances and the culpability of the accused, and the type and extent of the punishment meted out to him.”²⁵ Under Israeli law, the judge must set the “range of punishment” in accordance with the principle of proportionate (retribution) punishment, and cannot deviate from it, except for considerations of rehabilitation.²⁶ Nevertheless, the principle of retribution cannot be said to have triumphed over the other principles, and it is still unclear how long this policy will apply, as many continue to remonstrate against the above amendment.²⁷

Purposes and the Mistake in Attempting to Select a Central Punitive Purpose]; 18 TSOHAR LEBATEI HASOHAR—AVIROT VEONASHIM BEISRAEL, TEORYA VEYISOOM 14 (2017).

24. Cullen & Gendreau, *supra* note 22, at 313–15; Robert Martinson, *What Works?—Questions and Answers about Prison Reform*, 35 PUB. INT. 22 (1974); Francis T. Cullen, John B. Cullen, & John F. Wozniak, *Is Rehabilitation Dead? The Myth of the Punitive Public*, 16 J. CRIM. JUST. 303, 303 (1988).

25. Hok HaOnshin [Penal Law] 5737–1977 § 40B; Ministry of Justice, *Hava'ada Hatsiboorit Lebkhat Medinyot HaAnisha VeHatipool Beavriyanim* (Dokh Vaadat Dorner) [*The Public Committee for Examining the Punitive Policy and Treatment of Offender* (Dorner Committee Report)], ISR. DEP'T. JUST. (2015), <https://www.gov.il/BlobFolder/reports/2528-07-2022-2/he/08-201522.pdf>. (The Committee report evaluates Israel's punitive practices, advocating for reduced incarceration and more rehabilitative approaches. It indicates that despite high imprisonment rates, alternatives focused on community treatment and proportionate sentencing could be more effective and cost-efficient.).

26. Neither public nor individual deterrence has been mentioned as a legitimate punishment consideration for deviating from the range. Deterrence is only addressed as a reason to set the punishment within the range. Hok HaOnshin [Penal Law] 5737–1977 § 40C–H.

27. Oren Gazal-Ayal, *Mitchamim Lo Holmim: Al Ikaron HaAlima Bekviat Mitkham HaOenesh Haaoleim* [*Inappropriate Ranges: Regarding the Principle of Proportionality in Determining the Range of Punishment*], 6 MISHPATIM AL ATAR 1, 1–34 (2013); Yaniv Vaki & Yoram Rabin, *Harnayat Shikul HaDaat HaShiputi BeAnisha: Temunat Matsav Vehirburim al HeAtid Lavo* [*Construction of Judicial Considerations in Punishment: Current Status and Thoughts for the Future*], 52 HAPRAKLIT 413 (2013); Tennenbaum, *supra* note 23, at 22–26.

Other purposes of punishment also exist; perhaps the most salient to our discussion is that of atonement—a somewhat mystical and religious term that also appears as an aim of punishment. Atonement purports to expiate the deed so that it is like it never happened. The idea is that the punishment cleanses the person of the sin or transgression that has “undermine[d] the unity of the individual personality with the cosmos in its entirety.”²⁸ Thus, it is the offender, rather than the social order, that requires the damage to be corrected.²⁹

Atonement, as one of the purposes of punishment, is mentioned in the Bible in the context of murder. The Torah emphasizes that there is no expiation for murder, except through capital punishment; neither a fine nor a ransom can redeem the murderer: “[Y]e shall take no satisfaction for the life of a murderer, which is guilty of death: but he shall be surely put to death. . . . So ye shall not pollute the land wherein ye are: for blood it defileth the land: and the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it.”³⁰ This may explain why the Torah repeats several times the admonition, “[T]hou shalt put the evil away from among you.”³¹

Samson Raphael Hirsch,³² a nineteenth century German rabbi, who is best known as the intellectual founder contemporary of Orthodox Judaism, notes, “According to our Sages, every punishment is atonement, that is not an atonement of the infringed measure of justice, but the atonement of the sinner himself.”³³ Thus, punishment, rather than serving the purpose of retribution, is intended to help the wrongdoer spiritually. Accordingly, offenders who serve their sentences are considered to have repented and once again are deserving of respect. This perspective supports a rehabilitative approach, as seen in Jewish law regarding a thief who is sold into slavery and must be treated with even more respect by his master:

Our Rabbis taught: “Because he is well with thee”: he must be with [i.e., equal to] thee in food and drink, that thou shouldst not eat white bread and he black bread, thou drink old wine and he the new wine, thou sleep on a feather bed and he on straw. Hence it was said: Whoever buys a Hebrew slave is like buying a master for himself.³⁴

This passage illustrates the idea of collective societal responsibility, which emphasizes the importance of society supporting the offender’s rehabilitation rather than just seeking to restore the justice that was disrupted by the crime. The

28. Abraham Kook, OROT HATESHUVA 8:3.

29. SHALOM ALBECK, YESODOT HAAVERAH BEDINEI HATALMOOD [FOUNDATIONS OF OFFENSE IN TALMUDIC LAW] (1997).

30. *Numbers* 35:31, 35:33 (King James); MOSES MAIMONIDES, THE GUIDE FOR THE PERPLEXED 344 (M. Friedlander trans., 1904) [hereinafter THE GUIDE FOR THE PERPLEXED]; MOSES MAIMONIDES, MISHNEH TORAH, HILCHOT ROTSEAH 13:14; 5 TALMUDIC ENCYCLOPEDIA 220–33 (1952).

31. See e.g., *Deuteronomy* 17:7, 17:21 (King James).

32. Rabbi Samson Raphael Hirsch, *Hirsch Commentary on the Torah* [Responsa Project Version] (2001), <http://www.responsa.co.il/default.aspx>.

33. *Genesis* 9:6 (King James).

34. BABYLONIAN TALMUD, Tractate Kiddushin, ch. 20A.

example of the slave and their master shows how society, represented by the master, has a duty to treat the enslaved individual humanely, as their enslavement is part of the process of rehabilitation.

In Judaism, the rehabilitation of offenders is closely connected to the principle of *teshuvah*, (meaning, “return”) which is the act of repentance.³⁵ As a religion that emphasizes self-improvement, Judaism underscores the importance of repentance. According to Maimonides, the process of *teshuvah* and repentance involves crying out to God, giving charitable donations, avoiding what was transgressed, and symbolically changing one’s identity by changing one’s name. The act of changing one’s name seemingly indicates that the person who committed the wrongdoing is no longer the same person.³⁶ Maimonides believed that exile is an important aspect of repentance as it helps one to become submissive, humble, and meek, which in turn can serve as atonement for one’s transgressions.

This emphasis on atoning for one’s sins found in rabbinic teachings and in the Torah led scholars, such as Aaron Ankar and Shalom Albeck, to argue that Jewish criminal jurisprudence differs from modern punishment.³⁷ Shalom Albeck notes, “Atonement is achieved through suffering, or death, or the bringing of a sacrifice and repentance, all in accordance with the extent of the sin, and in this way the sinner will become pure again for his own benefit.”³⁸

However, some contemporary philosophers including Jeffrie Murphy, Martha Nussbaum, and Stephen Garvey, argue that atonement also can apply in the secular context. They see atonement as a means of bridging the gap between punishment and reconciliation.³⁹ When the perpetrator expresses remorse for the offense and asks the victim for forgiveness, it diminishes the severity of the offense against the victim and therefore can reduce the retributive punishment required for the crime. Nussbaum contends atonement also fulfills the victim’s need to receive an expression of regret from the perpetrator. She criticizes retributive punishment systems for prioritizing the crime victim’s anger at the expense of the victim’s need for reconciliation.⁴⁰

Other lesser-known purposes, such as appeasement, which calls on the perpetrator to find ways to gain the victim’s forgiveness and restitution, which requires the perpetrator to compensate the victim financially for the harm done, have also been advanced.⁴¹ However, scholars remain deeply divided as to which

35. Elliot N. Dorff, LOVE YOUR NEIGHBOR AND YOURSELF: A JEWISH APPROACH TO MODERN PERSONAL ETHICS 207–31 (2003); Elliot N. Dorff, TO DO THE RIGHT AND THE GOOD: A JEWISH APPROACH TO MODERN SOCIAL ETHICS 184–212 (2002).

36. THE GUIDE FOR THE PERPLEXED, *supra* note 30, at 2, 4.

37. AARON ANKAR, IKARIM BAMISHPAT HAPILULI HAIVRI 39–41, 201–02, 263 [PRINCIPLES OF JEWISH CRIMINAL LAW] (2007).

38. ALBECK, *supra* note 29, at 9.

39. JEFFRIE G. MURPHY, CHARACTER, LIBERTY, AND LAW 59 (1998); MARTHA NUSSBAUM, ANGER AND FORGIVENESS: RESENTMENT, GENEROSITY, JUSTICE 13, 85–88 (2016); Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1804–06, 1827–29 (1999).

40. NUSSBAUM, *supra* note 39, at 85–88.

41. On restitution, see Andrew Ashworth, *Punishment and Compensation: Victims, Offenders, and the State*, 6 OXFORD J. LEG. STUD. 86, 86–122 (1986). On restorative justice, see Thaddeus Metz, *Why*

purpose or purposes should be prioritized in sentencing criminals, and the preference for one purpose over another continues to shift depending on place, time, and circumstances.

A. *Purposes of Criminal Law in the Hebrew Bible*

The Hebrew Bible offers no comprehensive theory of punishment or its purposes. That said, numerous biblical verses describe and justify punishments for specific offenses, while others make general statements on punishment. Through an analysis of the phrasing of relevant verses, we demonstrate that the Bible covers all four major purposes of punishment as well as the lesser-known purposes advanced by contemporary theorists.

The retributive purpose finds expression in the phrase “an eye for an eye,” which appears in the Hebrew Bible in several places.⁴² In each case it is used in the context of a violent transgression. The first reference appears in Exodus: “And if any mischief follows, then thou shalt give life for life, Eye for eye, tooth for tooth, hand for hand, foot for foot, Burning for burning, wound for wound, stripe for stripe.”⁴³ In Leviticus, the justification of retribution is made explicit: “And if a man cause a blemish in his neighbor, as he hath done, so shall it be done to him. Breach for breach, eye for eye, tooth for tooth: as he hath caused a blemish in a man, so shall it be done to him again.”⁴⁴

Moreover, as early as Genesis, the Bible makes clear that an offender should be punished for the offense perpetrated rather than for some future risk: “For God hath heard the voice of the lad where he is.”⁴⁵ Drawing on the teachings of the Sages, the medieval French Rabbi Shlomo Yitzchak (Rashi) explains that the expression “where he is” in this verse means that “he is sentenced according to the deeds that he does now and not according to what he is destined to do in the future.”⁴⁶

The principle of retribution also finds expression in the commensurability of the crime to the punishment: “O ye house of Israel, I will judge you everyone after his ways.”⁴⁷ The Sephardic medieval Jewish philosopher Moses ben Maimon (Maimonides) quotes several additional Biblical verses justifying the principle of retribution. In *Moreh Nevuchim*, he explains:

Punishes every offender against another person, by doing to the offender what he himself has done, in equal measure: If he harmed the body, his body is harmed; if his harm was financial, then he too is

Reconciliation Requires Punishment, but Not Forgiveness, in CONFLICT AND RESOLUTION: THE ETHICS OF FORGIVENESS, REVENGE, AND PUNISHMENT 265 (Krisanna Scheiter and Paula Satne, eds., 2021); Bill Wringer, *Punishment, Forgiveness, and Reconciliation*, 44 PHILOSOPHIA 1099 (2016).

42. Genesis 4:10–11 (King James); Deuteronomy 19:21 (King James); Exodus 21:23–25 (King James); Leviticus 24:19–20 (King James).

43. Exodus 21:23–25 (King James).

44. Leviticus 24:19–20 (King James).

45. Genesis 21:17 (King James).

46. RASHI, COMMENTARY ON GENESIS 21:17.

47. Ezekiel 33:20 (King James).

financially harmed . . . and if he harmed a bodily organ, then an equivalent organ is harmed in his own body, ‘as he hath caused a blemish in a man, so shall it be done to him again’ (Leviticus 24:20) . . . and he who has caused financial damages—will sustain the exact same value of damage,” and whom the judges shall condemn, he shall pay double unto his neighbor” (Exodus 22:9), whatever the thief took, its value is taken from the thief in payment.⁴⁸

Yet, it should be noted that the rabbis later transformed this biblical mandate into a system of monetary compensation.⁴⁹

Deterrence, as a purpose of punishment, can also be found in the Bible. The expression “and they shall fear” appears four times in the Bible. In Deuteronomy 13:11, the expression is used in a warning against idolatry; in Deuteronomy 17:13, in an admonition against acting presumptuously; in Deuteronomy 19: 20 in a counsel against bearing false witness, and finally in Deuteronomy 21:21 in a reproach concerning a stubborn and rebellious son. Prima facie, the explicit purpose of the above punishments is deterrence. Furthermore, these are sins for which it is evident that the punishment (death) is not appropriate for the crime, so indisputably their goal is public deterrence.

As for prevention, Deuteronomy explicitly states, “[T]hou shalt put the evil away from among you” with reference to a whole range of different transgressions—incitement, idolatry, rebelliousness, incest, adultery, and stealing—for which the punishment is death.⁵⁰ Similar phrasing is also utilized to describe the appropriate punishment for murderers: “[T]hou shalt put away the guilt of innocent blood from Israel, that it may go well with thee.”⁵¹ The idea is that punishment will prevent the spilling of innocent blood in the future. Thus, the verse frames capital punishment as the ultimate preventive measure, since with the offender’s death, no future transgression can occur.

Although usually described as “repentance,” rehabilitation also appears in the Hebrew Bible as a purpose of punishment. Speaking in the name of God, the prophet Ezekiel states: “Say unto them, As I live, saith the Lord God, I have no pleasure in the death of the wicked; but that the wicked turn from his way and live: turn ye, turn ye from your evil ways; for why will ye die, O house of Israel?”⁵² This emphasis on offenders receiving God’s mercy if they follow God’s “path to rehabilitation” can be found in other books of the Hebrew Bible as well. For example, in Isaiah 55:7, it says: “Let the wicked forsake his way, and the unrighteous man his thoughts: and let him return unto the Lord, and he will have mercy upon him; and to our God, for he will abundantly pardon.” Another

48. THE GUIDE FOR THE PERPLEXED, *supra* note 30, at 344.

49. Mishnah Bava Kamma 8:1.

50. See *Deuteronomy* 13:6, 13:12 (incitement); 17:7 (idolatry); 17:12 (rebellious elder); 21:21 (rebellious son); 22: 21–24 (incest and adultery); 24:7 (stealing) (King James).

51. *Id.* at 19:13.

52. *Ezekiel* 33:11 (King James).

example can be found in Proverbs 28:13: “He that covereth his sins shall not prosper: but whoso confesseth and forsaketh them shall have mercy.”⁵³

Other lesser-known purposes of punishment, such as atonement, appeasement, and restitution, also appear in the Bible. As noted earlier, the Hebrew Bible addresses atonement for murder, stating that only the death of the perpetrator can bring expiation. Maimonides explains this biblical principle as follows: “[W]ere the sinner and pillager to go unpunished, the damage could in no way be removed.”⁵⁴ However, unlike *lex talionis*, compensation for stolen goods goes beyond repayment of what was stolen. Closely related to atonement is appeasement. In Genesis, the expression—“I will appease him”—refers to the annulment of the sin, and in Proverbs, the appeasement of ire through atonement is captured: The wrath of a king is as messengers of death: but a wise man will pacify it.”⁵⁵ Finally, in Exodus, an ox thief is required to pay double the value of what he has stolen.⁵⁶ This last punishment can be seen as combining restitution with retribution.

In summary, the Hebrew Bible covers all known purposes of punishment, and as today, sometimes a punishment displays multiple purposes while other times it satisfies only one. Also, like today, no clear preference is given to any one purpose.

B. *The Purposes Of Punishment According to Classical Rabbinic Literature*

This section analyzes examples of the various ways that classical Rabbinic Literature (or Chazal), that is the literature by scholars responsible for interpreting and codifying Jewish tradition from approximately the third century BCE to the fifth century CE—addressed the purposes of punishment. Like the Hebrew Bible, classical rabbinical literature offers no explicit punitive creed, but rather provides an extensive and detailed interrogation of Jewish Law (Halacha) based on the Torah.

On retribution as a purpose of punishment, the early Sages state: “[O]ne only judges a person by his deeds of the moment.”⁵⁷ Put differently, the offender’s crime determines the verdict, not some future purpose or extraneous motive. Consequently, the punishment must be commensurate with the offense: “All of God’s qualities are measure for measure” and “as he measures—so shall he be measured.”⁵⁸

As previously noted, in modern society, retributive justice has replaced vengeance as a punitive purpose. Yet, retributive justice’s emphasis on the wrongdoer being deserving of punishment has prompted some to describe

53. See *Deuteronomy* 30: 2–3 (King James); *Isaiah* 55: 7 (King James); *Proverbs* 10:13, 28:13 (King James).

54. THE GUIDE FOR THE PERPLEXED, *supra* note 30, at 330.

55. See *Genesis* 32:31 (King James); *Proverbs* 16:14 (King James).

56. *Exodus* 22:3 (King James).

57. Mishnah, Rosh Hashanah, 16:1.

58. BABYLONIAN TALMUD, SANHEDRIN 90a.

retribution as sublimated vengeance while others endeavor to differentiate it as “just dessert.”⁵⁹ While we usually think of this topic as a modern one, early Jewish Sages were familiar with the problematic close relationship between vengeance and retribution and debated it. Rabbi Eliezer ben Hyrkanos, one of the most prominent Sages of the first and second century, wrote on this problem: “Great is the sanctuary given between two letters, for it is said ‘Thou shalt bring them in, and plant them in the mountain of thine inheritance, in the place, O Lord, which thou hast made for thee to dwell in, in the Sanctuary, O Lord, which thy hands have established (Exodus 16:17).’”⁶⁰ In other words, Rabbi Eliezer claims that the very act of writing the word “sanctuary” between two names of God indicates its importance. The Talmud continues: “Rabbi Aha challenged him and asked: if a word placed between two names is important, then vengeance is important too, for it too is placed between two divine names for it is said: ‘O Lord God, to whom vengeance belongeth; O God, to whom vengeance belongeth, shew thyself’ (Psalms: 94:1).”⁶¹ The challenge posed by Rabbi Aha indicates that he believed that Rabbi Eliezer assigned no importance to vengeance—a claim that Rabbi Aha rejects. Rabbi Eliezer responds to Rabbi Aha that in certain (unspecified) cases vengeance is required. His qualified affirmative response highlights the tensions that exist between the natural desire for revenge and its rejection for rational reasons.

The writings of the Jewish Sages also reinforce the biblical rationale for punishment as a form of deterrence. For example, Maimonides argues that a rebellious elder should not be executed in his own city, nor at the end of his trial, but rather should be taken to Jerusalem, where he should be held until the next pilgrim’s festival at which time he can be executed before the masses. This public display, he declares, will spark fear among the masses, so that they will heed the warning and not repeat the offense.⁶² The fourteenth century Jewish philosopher, Rabbi Hasdai Crescas notes that God does not punish vengefully but only to deter a person from committing a sin.⁶³

The Sages also utilize the story of King Ahasuerus to illustrate punishment’s power to deter. They note that the countless warnings given by prophets and prophetesses failed to convince the Jewish nation, which had strayed from the righteous path, to return to it. However, when King Ahasuerus transferred his ring of power to Haman ben Hamedata, an enemy of the Jewish people, the Jewish people were united in their mourning and repented. The third century Talmudic scholar Rabbi Abba Bar Kahana explains: “The removal of the ring was greater than forty-eight prophets and seven prophetesses who prophesied for Israel, for not a single one made them repent, while the removal of the ring made them repent.”⁶⁴

59. Posner, *supra* note 6, at 77, 80; Monica M. Gerber & Jonathan Jackson, *Retribution as Revenge and Retribution as Just Deserts*, 26 SOC. JUST. RES. 61, 61–80 (2013).

60. Mishnah Berakhot 33b.

61. *Id.* at 33:71.

62. MOSES MAMONIDES, MISHNEH TORAH, SHOFTIM AND HILCHOT MAMRIM 3:12.

63. Or Adonai 2:5.

64. BABYLONIAN TALMUD, MEGILLAH 14a.

Similarly, Rashi addresses the issue of deterrence in his discussion of Achan's sin. Achan stole from the spoils of Jericho after God forbade it. When his sin was discovered, not only Achan but the entire Jewish nation was punished so that all would "see his depravity and take care themselves not to further pillage the consecrated loot."⁶⁵

The stories related above largely focus on public deterrence, but the Sages also address the benefits of deterring the individual. For example, regarding Manasseh's sin:

Is it possible that Hezekiah, who taught Torah to all, did not teach his son Manasseh? Rather, no matter how much he toiled over him, and no matter how many efforts he made, nothing made him repent except suffering, for it is written: "the captains of the host of the king of Assyria, which took Manasseh among the thorns, and bound him with fetters, and carried him to Babylon. And when he was in affliction, he besought the Lord his God, and humbled himself greatly before the God of his fathers and prayed unto him: and he was intreated of him, and heard his supplication, and brought him again to Jerusalem into his kingdom (2 Chronicles 33:11–13)." This shows that suffering can be a boon. For even the most hurtful suffering that aggrieves the soul can be very beneficial.⁶⁶

Others Talmudic scholars, including Rabbi Hasdai Crescas and the sixteenth century philosopher and mystic Rabbi Judah Loew, underscore that punishment is intended both to frighten the sentenced criminal and to deter him from committing further offenses.⁶⁷

The Sages also engage in a deterrence cost-benefit analysis to explain why the Hebrew Bible imposes a harsher punishment on the ox thief who slaughters or sells the stolen ox than on the thief who merely steals the ox:

Rabbi Akiva asks: Why did the Torah say that he who has slaughtered and sold pays four and five? Because he has become rooted in sin? When? If you say he did this before the owner despaired of his loss, then you can't say that the thief had become rooted in sin. Rather, one must say that it happened after the owners have despaired, and it is then plausible to assume that the thief has become rooted in his sin.⁶⁸

65. RASHI, COMMENTARY ON SANHEDRIN 44a, WILLIAM DAVIDSON TALMUD: 9.

66. BABYLONIAN TALMUD, SANHEDRIN 101b, Megillah 12b.

67. AHARON F. KLEINBERGER, HAMAKHSVAH HAPEDAGOGIT SHEL HAMAHARAL MEPRAG [THE PEDAGOGICAL THOUGHT OF THE MAHARAL OF PRAGUE] (1962); MORDECAI FRIESHTICK, ANISHA VESHKOOM BAYHADOOT: HASHVAAT EKRONOT IM HAMISHPAT VEHAKRIMINOLOGIA HAMODERNIM: KAVIM LEYISOOM [PUNISHMENT AND REHABILITATION IN JUDAISM: COMPARISON OF PRINCIPLES WITH MODERN LAW AND CRIMINOLOGY: PRINCIPLES OF APPLICATION] (1986).

68. BABYLONIAN TALMUD, BAVA KAMMA 68a: 23–24.

The sale and slaughter of the ox indicate the extent of the criminal's audacity and his rootedness in crime, which necessitates a more severe punitive measure than that required for an ordinary thief according to the Babylonian Talmud.⁶⁹

The above story highlights how the punishment must be proportionate to the crime to have a deterrent effect. However, the ability of a punishment to deter also depends on the criminal's past. The Talmud explains that a person who transgresses more than once becomes "rooted" in sin and begins to view the transgression as something "permitted" and allows himself to repeat the offense. Ulla agreed with Rav Huna who said: Once a person sins and repeats his transgression—it is as if he has received permission. But how can you even think that he has been permitted to sin? Rather: it is as if he has received permission.⁷⁰ Thus, one must investigate the criminal's past to know what punishment will achieve the desired deterrent effect. The risks of getting caught and punished must outweigh the benefits that the perpetrator gains by committing the crime: "Always calculate the loss of a good deed against reward, and the reward of an offense against its loss."⁷¹ The eleventh century Torah scholar Rabbi Bahya Ben Yoseph clarifies that criminals undertake a cost-benefit analysis before they perpetrate an offense: "If it is clear in his [the perpetrator's] mind that he will be punished for it . . . he will consider the punishment for the crime against its sweetness, and the sweetness of the good reward against the sorrow."⁷²

The Sages also utilize the story of the stubborn and rebellious son, who disobeys his parents, overeats meat, and drinks in excess to address punishment as prevention: "If a man has a stubborn and rebellious son who will not obey the voice of his father or the voice of his mother, and who, when they have chastened him, will not heed them. . . . And all the men of his city shall stone him with stones, that he die: so shalt thou put evil away from among you; and all Israel shall hear, and fear."⁷³ Besides stoning him so that the people should "hear and fear [deterrence]," the Talmud explains that the son's punishment is also intended to prevent him from more severe offenses, such as thievery and murder, in the future, the stubborn and rebellious son is punished for what he may do in the future.⁷⁴

However, some Jewish scholars, like their modern counterparts, objected to using the death sentence as a means of prevention. For example, Rashi writes the following comments on the saving of Ishmael:

The ministering angels were denouncing and saying: "Oh Master of the World, this person, whose progeny are destined to cause your sons to die of thirst—how is it that you conjure him a well?" To which He responds: "What is he now? Righteous or wicked?" "Righteous," they responded. So, God told them: "I judge him according to his deeds right now, and this is the meaning of . . . for God hath heard the voice

69. FRIESHTICK, *supra* note 67.

70. BABYLONIAN TALMUD, KIDDUSHIN, 40a:15.

71. Mishnah, Avot 2:1.

72. BAHYA BEN YOSEPH, HOVAT HALEVAVOT, HILCHAT TESSHUVA, 7:3.

73. *Deuteronomy* 21:18, 21:21 (King James).

74. Mishnah Sanhedrin 8:5.

of the lad where he is” (Genesis Rabbah 53:14), in that condition in which he now is.⁷⁵

The ministering angels wanted to deprive Ishmael of water because of the future danger that Ishmael’s progeny would pose to the Jews. God, however, declares this purpose invalid; only the present behavior should be considered in determining the appropriate punishment.

As for rehabilitation, the Sages instituted many regulations that allowed for the offender’s rehabilitation. These regulations, at times, even contradicted existing Jewish Law. For example, they nullified the legal and moral duty of the thief to return stolen property to make it easier to repent. The Talmud relates the story of a man who wished to repent for having stolen, but his wife chastised him: “Idiot, if you are going to repent, even the belt that holds your pants up is not yours!” Realizing he would even lose the clothes on his back, he refrained from repenting. On hearing of this, the Sages ordained: “It is prohibited to accept anything from robbers and usurers who wish to return what they robbed; and the Sages are not pleased with whosoever accepts their payment.”⁷⁶ Even though under existing Jewish Law the robber had a clear legal obligation to return what he had taken, the Sages encouraged the victim to forgo demanding return of the stolen property if doing so would facilitate the offender’s rehabilitation.

This regulation, known as “repenter’s relief” or “rehabilitation of offenders,” had other applications. According to Halacha, a thief must return what he has taken.⁷⁷ But what if the item stolen is no longer in its original form and the new form is more valuable than the original? For example, a thief takes wool yarn and turns that wool yarn into an article of clothing. Is the thief obligated to return the article of clothing, which is worth more than the original item stolen? The answer is no; the thief is only obligated to return exactly what he stole or pay the value of the original item that was stolen. As with the other scenario, this application was designed to encourage offenders to repent by reducing the loss that the offender would suffer by repenting.

However, during the Mishnaic period (10–220 CE), a heated debate erupted between two major schools of Jewish thought—the House of Shammai and the House of Hillel—over how broadly “repenter’s relief” should be applied. The House of Shammai contended that if a thief stole a beam and incorporated that beam into a building, the thief must destroy the building so that the original beam, which had not been transformed, could be returned. In contrast, the House of Hillel argued in favor of applying “repenter’s relief” to this scenario. Rather than the thief destroying the building and returning the original beam, they argued that the thief should be allowed to pay the victim the price of the beam.⁷⁸ The House of Hillel acknowledged that the House of Shammai was correct that the letter of the law demanded that the thief destroy the building and return the beam, but the

75. RASHI, COMMENTARY ON GENESIS, 21:17.

76. BABYLONIAN TALMUD, BAVA KAMMA, 94b.

77. *Id.* at 94b:5.

78. Tosefta Bava Kamma 10:2; MOSES MAIMONIDES, MISHNEH TORAH, BOOK OF DAMAGES, LAWS OF THEFT AND LOSS, ch. 1, Halacha 4.

goal of rehabilitation supported applying the “repenter’s relief.”⁷⁹ The position of the House of Hillel became the accepted position within the Halacha.

The Sages even extended rehabilitative punishment to recidivist offenders who had been undeterred by previous punishments.⁸⁰ In fact, they made no distinction between these offenders and first-time offenders: “All are accepted, for it is written: ‘Return, ye backsliding children.’”⁸¹ Moreover: “[E]ven a person who has been a complete villain throughout his life, and repented at last, no mention of his past should ever be made.”⁸²

In the Talmudic tractate Berakhot, rehabilitation is also described as a purpose of punishment. It describes how Rabbi Meir, who lived in the time of the Mishnah, prayed for the death of the bullies in his neighborhood. His wife Beruriah showed him his error, pointing out that it was the sin and not the sinner that should be eradicated. Thus, he should pray for the bullies’ repentance rather than their death.⁸³

As for atonement as a purpose of punishment, the Sages claim that punishment and suffering lead to the sinner’s purification: “[T]he suffering cleanses a person’s transgressions, purifying him for a more sublime existence.”⁸⁴ The Sages cite Deuteronomy 25:3 to underscore how the goal of atonement imposes limits on a punishment’s severity: “Forty stripes he may give him, he shall not exceed; lest, if he should exceed, and beat him above these with many stripes, then thy brother should be dishonored before thine eyes.”⁸⁵

Unlike in cases where the offender has transgressed against God, in case involving other people, the Sages demand that the victim be compensated and appeased as preconditions for atonement: “Where the transgression is against God, Yom Kippur atones; where the transgression is against another person, Yom Kippur does not atone until he appeases his fellow man.”⁸⁶

Thus, like the Hebrew Bible, the Jewish Sages recognized multiple purposes of punishment and did not demonstrate any clear preference for one purpose over another. Instead, we find a mosaic of opinions that like today did not always coexist harmoniously.

C. Maimonides’s Approach to the Purposes of Punishment in Moreh Nevuchim: Deterrence

The twelfth century Maimonides is one of the few Halachic thinkers who advanced an organized system of punishment. Although he wrote in the twelfth century, his halachic positions on punishment are still relevant to the Jewish world today. In *Moreh Nevuchim*, Maimonides devotes an entire chapter to the topic of punishment:

79. BABYLONIAN TALMUD, TOSEFTA BAVA KAMMA 10:5.

80. FRIESHTICK *supra* note 67; *Makot* 7b.

81. *Jeremiah* 3:22 (King James).

82. Mishnah, Kiddushin 40b:3.

83. BABYLONIAN TALMUD, BERAKHOT 10a:2.

84. *Id.* at 5a:19.

85. *Deuteronomy* 25:3 (King James).

86. Mishnah, Yoma 8: 9.

Whether the punishment is great or small, the pain inflicted, intense or less intense, depends on the following four conditions.

The greatness of the sin. Actions that cause great harm are punished severely, whilst actions that cause little harm are punished less severely.

The frequency of the crime. A crime that is frequently committed must be put down by severe punishment; crimes of rare occurrence may be suppressed by a lenient punishment considering that they are rarely committed.

The amount of temptation. Only fear of a severe punishment restrains us from actions for which there exists a great temptation, either because we have a great desire for these actions, or are accustomed to them, or feel unhappy without them.

The facility of doing the thing secretly, and unseen and unnoticed. From such acts we are deterred only by the fear of a great and terrible punishment.⁸⁷

These four considerations are intended to deter so that that the social order is maintained. Using deterrence as a guiding principle, Maimonides explains why according to the Hebrew Bible someone who steals chattels pays a more lenient fine than someone who steals a lamb or bull and subsequently slaughters or sells the animal. In the first case, the offender must pay double the value of the stolen asset.

However, the fine for stealing a lamb is four times the value of the animal, and the fine for stealing a bull is five times the value of the animal.⁸⁸ Maimonides's explanation centers on the difficulty of catching the person who steals the herd animals, which makes the crime more tempting to commit:

As a rule, the sheep remained always in the fields, and could therefore not be watched so carefully as things kept in town. The thief of a sheep used therefore to sell it quickly before the theft became known, or to slaughter it and thereby change its appearance. As such theft happened frequently, the punishment was severe. The compensation for a stolen ox is still greater by one-fourth, because the theft is easily carried out. The sheep keep together when they feed, and can be watched by the shepherd, so that theft when it is committed can only take place by night. But oxen when feeding are very widely scattered, as is also mentioned in the Nabatean Agriculture, and a shepherd cannot watch them properly; theft of oxen is therefore a more frequent occurrence.⁸⁹

Thus, given the ease with which this crime can be carried out, it requires a harsher punishment to deter the would-be offender or thief of other movable property.

We have quoted the above two Maimonidean texts, *Moreh Nevuchim* 3:41, for two reasons. First, they constitute one of the few halachic texts that articulate a clear and comprehensive system of punishment. Second and more importantly,

87. THE GUIDE FOR THE PERPLEXED, *supra* note 30, at 345.

88. *Exodus* 23:3, 21:37 (King James).

89. THE GUIDE FOR THE PERPLEXED, *supra* note 30, at 344.

according to Maimonides punishment has one primary purpose—deterrence. It should reduce the likelihood of future criminal activity by the offender and discourage others from engaging in criminal activity. Imposing the appropriate punishment requires factoring in several variables, including the likelihood of recidivism and the temptation of the crime.

Maimonides recognized the merits of deterrence in his other writings. For example, with reference to individuals who commit manslaughter, he writes: “[T]he king has a right to kill them in order to put the world in order in accordance with the needs of the times, and he kills many in a single day, and leaves them hanging for many days in order to instill fear, and break the hands of the world’s evil-doers.”⁹⁰ Public punishment was intended to instill fear and to teach the public a lesson in morality and in legality.

Like modern systems, Maimonides’s approach incorporated other punishment rationales, such as restitution, atonement, and retribution. However, these rationales in his system were always subordinated to deterrence, which he unequivocally believed was the primary purpose of punishment.⁹¹

II. CURRENT SCHOLARLY APPROACHES: JEWISH CRIMINAL LAW AS THEORETICAL LAW

Several new approaches to Jewish Law have developed in recent years, which we term “Jewish Theoretical Criminal Law.” Each of these approaches seeks to explain the inability of Jewish Law to handle crime effectively. Under Jewish Law, it is almost impossible to convict and punish an offender, owing to procedural and evidentiary constraints.

This section addresses the elusive central questions: What is the role of criminal law, including punishment, in Jewish Law? Why was it written? Was it written strictly for religious purposes? Or was it intended for practical use? And if illegality and crime are so difficult to prosecute under Jewish Law, how and where should crime and other illegal actions be handled? The answer given by current scholarship is that other legal frameworks—kings and courts that issue verdicts in contradistinction to the Torah—offer the solution.⁹²

No one would argue that Jewish Criminal Law in its present form is capable of convicting criminals for multiple reasons.⁹³ First, in the conventional sense, many crimes go unpunished under Jewish Law. For example, armed robbery under Jewish Law goes unpunished.⁹⁴ Other crimes, such as bribery and murder, are too limited in scope to ensure that all offenders are punished. For example, someone who engages in murder for hire or conspiracy to commit murder but who does not

90. HILCHOT MELACHIM UMILCHAMOTEIHEM, *supra* note 13, at 3:10; Hilchot Retsach 2:5.

91. EREZ D. BAZAK, HAANISHA HAPILIT: DERAKHEIHA VEEKRONOTEIHA [CRIMINAL PUNISHMENT: ITS METHODS AND PRINCIPLES] 48–50, 67 (1998).

92. J. David Bleich, *Jewish Law and the State’s Authority to Punish Crime*, 12 CARDOZO L. REV. 829 (1991).

93. Aaron Ankar, *Yesodot Bamishpat HaPlili Haivri* [Foundations of Jewish Criminal Law] 24 MISHPATIM 177, 184–86 (1994).

94. 5 TALMUDIC ENCYCLOPEDIA 406–07 (1952); 18 TALMUDIC ENCYCLOPEDIA 291–314 (1952).

commit the actual murder falls outside the jurisdiction of Jewish Law; their punishment is placed in the hands of God according to Maimonides.⁹⁵ Moreover, it goes without saying that Jewish Law does not address a plethora of modern crimes, such as cybercrimes and environmental offenses. This lack of punishment in part reflects the different emphases of modern criminal law and Jewish Law. While modern criminal law's primary purpose is protecting the public order, Jewish Law's primary object is safeguarding man's relationship with God. The latter's focus means that crimes against persons are marginally addressed, and the punishments for such crimes are mild.⁹⁶

From the standpoint of procedural and evidentiary rules, the limitations of Jewish Law are even more severe. Circumstantial evidence largely cannot be used as grounds for conviction.⁹⁷ So, for example, if someone saw the suspected killer running from the scene of the crime, but did not see the suspect kill the victim, it would not be admissible as proof of the suspected killer's guilt. Similarly, if an offender confesses to the crime, under Jewish Law, the offender's confession does not suffice. Again, the Halacha requires a witness to the crime who must testify in court and undergo cross-examination.⁹⁸ The Babylonian Talmud emphasizes that the witnesses must visually identify the offender. Other forms of identification used in modern courts, such as voice recognition, foot impressions, and handwriting are not enough to convict.⁹⁹

Moreover, under Jewish law, eyewitness testimony must be provided by two male witnesses. One male witness does not suffice, and female witnesses are excluded from providing testimony. Also, even if there are two male witnesses to a crime, their testimony can be rejected for a myriad of reasons. For example, the testimony of relatives cannot be used.¹⁰⁰ Also, if two groups of witnesses offer conflicting testimony, it voids the testimony of both groups. Neither the number of witnesses nor the judge's impression that one group is telling the truth makes any difference; the testimony of both groups must be thrown out.¹⁰¹ Finally, if a single witness within a group of witnesses is a relative or is ineligible to testify for any reason, the testimony of the entire group is void. Without any eligible

95. MOSES MAIMONIDES, MISHNEH TORAH, HILCHOT ROTEACH 2:1–4.

96. Ido Rechnitz, *Lama ein BaHalakha Din Pili Effectivi? [Why Is There Not Effective Criminal Law in Halacha?]*, 41 ALON HAMISHPAT HAIVRI 8, 8–9 (2017).

97. Enker, *supra* note 4, at 1137; MOSES MAIMONIDES, MISHNEH TORAH, HILCHOT SANHEDRIN 12, 3 (hereinafter HILCHOT SANHEDRIN); Yehoshua Ben-Meir, *Reyot Nesibatiot Bamishpat Haivri [Circumstantial Evidence in Jewish Law]*, 18 DINEI ISRAEL (1995); HAIM SHLOMO HEFETZ, GIDREI OMDANA & HAZAKA BEDINEI NEFASHOT BAMISHPAT HA'IVRI [PARAMETERS OF ESTIMATION AND PRESUMPTION IN CAPITAL CASES IN JEWISH LAW], 1974 (Ph.D. dissertation, Hebrew University).

98. BABYLONIAN TALMUD, SANHEDRIN 5b; MOSES MAIMONIDES, MISHNEH TORAH, HILCHOT EDUT 2:1–5 (hereinafter HILCHOT EDUT).

99. BABYLONIAN TALMUD, HULIN 95b, 96a; Yaakov Shapirah, *Veed ein Bab'al Reyot Nesibatiot [And There Is None to Testify—Regarding Circumstantial Evidence]*, 440 GILYONOT PARASHAT HASHAVUA 1, 1–4 (2014).

100. HILCHOT EDUT, *supra* note 98, at 9:1.

101. BABYLONIAN TALMUD, BAVA BATRA 31.

testimony, the accused must be acquitted.¹⁰² Given the above conditions, it is almost impossible to bring an acceptable witness before the court.

Another significant limitation, at least where capital crimes are concerned, is the requirement of advance warning.¹⁰³ According to this requirement, the offender must receive a warning that his behavior is forbidden by law and punishable by death. Maimonides's articulation of this requirement demonstrates how difficult it would be to find anyone guilty of a capital offence:

Whether the accused is scholarly or ignorant, a warning is required, inasmuch as the purpose of warning is that of distinguishing between the unwitting and the willful transgressor, since he might have committed the offense unintentionally. How should he be warned? The witnesses should say to him: "Abstain, you must not do this; it is an offense for which you are liable to suffer death at the hands of the court of justice, or be lashed." If he abstained, he is free. . . . He is liable only in case he commits the offense immediately after the warning, within as much time as is needed for an utterance. But if the interval is longer than the duration of an utterance, another warning is required.¹⁰⁴

How many offenders commit a capital offense before two male witnesses immediately after having been warned explicitly against doing so? The precondition of an immediate warning that spells out the consequences of the action, the strictures placed on eyewitness testimony, and the disallowance of confession as grounds for conviction make it extremely unlikely any suspect will be found guilty and punished for a capital offense.¹⁰⁵ Moreover, as already noted, murder for hire and conspiracy to commit murder are offenses that fall outside the jurisdiction of the courts; the punishment of these offenders is left to God under Jewish Law.¹⁰⁶

These limitations led the legal scholar Aaron Ankar to conclude that the Torah's criminal code cannot enforce the minimal norms of conduct that protect society from offenders and allow for everyday social life. This assessment, in his estimation, applies to any society past or present. In other words, Jewish law's enforcement issues cannot be attributed to society's secularization in recent history.¹⁰⁷ Aharon Kirschenbaum, professor emeritus of Jewish Law at Tel Aviv University, is even blunter in his assessment of Jewish Criminal Law: "[T]he city of classic Jewish Law and its inability to handle any of the social problems involving crime and its punishment scream to high heaven."¹⁰⁸

102. Ankar, *supra* note 93, at 179–81, 194.

103. 11 TALMUDIC ENCYCLOPEDIA, 291–314 (1952); *Numbers* 15:32–33.

104. HILCHOT SANHEDRIN, *supra* note 97, at 12:2; MOSES MAIMONIDES, MISHNEH TORAH, trans. by Eliyahu Touger. Jerusalem, Moznaim Pub. c1986-c2007.

105. Rechnitz, *supra* note 96, at 8–9.

106. YITZCHAK MAYO, SHORSHEI HAYAM ON MISHNEH TORAH, HILCHOT ROTSACH 2:3.

107. Ankar, *supra* note 93, at 182.

108. Kirschenbaum, *supra* note 3, at 253.

A. Explaining Jewish Law's Inefficiency: Intentionality and Differing Punishment Purposes

Scholars have offered different explanations for why Jewish Law is inefficient. The legal scholar Zvi Gilat attributed Jewish Law's inefficiency to the Sage's belief that punishment was reserved for God, and therefore, humans should not assume this divine role; however, Gilat provides no substantive proof for this claim.¹⁰⁹

Other scholars of Jewish Law, including Aaron Ankar, Aharon Kirschenbaum, and Ido Rechnitz, contend that Jewish Criminal Law's inefficacy is because its purpose differs from that of modern criminal law. For example, Ankar notes that the primary purpose of Jewish Law is religious and thus it focuses on the blasphemy that results from the offense:

[T]he punishments provided by Jewish law are directed towards the anti-religious aspect of the transgression, which is directed by the offender towards God, rather than towards its anti-social aspect . . . by punishing an offender for blasphemy, the court does not do so to protect society from the damages caused by criminals but to cleanse society from blasphemy.¹¹⁰

Kirshenbaum argues similarly; he explains that although today we assume the role of criminal law is to preserve the social order through the enforcement and imposition of legal sanctions, the role of classical Jewish Law was mainly mystical, spiritual, and educational. Unlike its modern counterpart, Jewish Law aimed to ennoble humankind and bring humans closer to the God of Justice.¹¹¹ Rechnitz shifts the focus slightly from that of Ankar and of Kirschenbaum but like them attributes Jewish Criminal Law's inefficiency to its purpose. Rechnitz asserts, that Jewish Criminal Law, as the "true just law," has one purpose only—retribution. Thus, under Jewish Criminal Law, each case must be judged on its merits and retributive aims alone determine who may be punished and what the punishment is. This deontological emphasis, Rechnitz argues, meant that Jewish Criminal Law addressed only serious crimes rather than the plethora of other crimes with which other criminal law systems contend.¹¹²

B. Complementary Systems as Solution to Jewish Law's Inefficiency

If Jewish Law's purpose(s) precluded it from handling run-of-mill criminal activity, then the question arises how societies operating within the boundaries of Jewish Law handled run-of-the-mill criminal activity. Ankar, Kirschenbaum, and Rechnitz resolve this dilemma by focusing on the way in which Jewish Law established two separate legal systems that were not required to apply Halacha in

109. Israel Zvi Gilat, *Haanasba Lefi Dinei HaTorah—Hida Vebatsaat Pesbara* [Punishment under Torah Laws—A Conundrum and a Proposed Solution], 9 SHAAREI MISHPAT 223, 225–27, 241, 243–44 (2018).

110. Ankar, *supra* note 93, at 193.

111. Kirschenbaum, *supra* note 3, at 265.

112. See Rechnitz, *supra* note 96; see also Enker, *supra* note 4.

criminal cases: “The King’s Law” and “Courts that punish and beat without regard to Torah.”¹¹³ In short, they possess a residual authority, when necessary to preserve the social order, to mete out punishments for crimes that cannot be punished effectively under Jewish Law.¹¹⁴ Since neither system was bound by the eternally binding laws of the Torah, the above authors claim, they had the flexibility to adapt to changing circumstances.¹¹⁵ The authors also assert that the Halacha purposefully left the parameters of these two residual systems vague, so that they would have sufficient freedom of action to meet the changing societal needs.

In advancing this solution to Jewish Law’s inability to handle criminality, Ankar, Kirschenbaum, and Rechnitz primarily rely on the solution of the medieval Spanish Talmudic scholar, Rabbi Nissim ben Reuven of Gerona (Ran). Ran described the primary purpose of Jewish Law as “enforcing” humankind’s relationship with God, “so that divine plenitude would apply to the people.”¹¹⁶ The Torah’s law, Ran clarified, was intended for religious and educational purposes, and thus should be studied at Yeshivas and academies. They were not intended, according to Ran, as a tool for preserving the social order. The criminal codes of nations offered a more effective means of punishing crimes against persons and maintaining order:

It is known that the human race needs a judge to adjudicate between individuals, for otherwise, one person would have swallowed up the other, and the entire world would have been destroyed. Every nation needs this, a social order, to the point that the wise man has said that even a band of thieves agree to play fair between them. The People of Israel need this just like other nations, and they also need them for another reason, which is to properly establish the Laws of the Torah . . . even when a transgression does not cause any loss for the public order . . . and the blessed God has assigned each of these matters to a different section, and commanded that judges be nominated to adjudicate the true just law . . . and because this is not enough in itself to also achieve the social order, God has completed its good function by providing the authority of the king.¹¹⁷

Thus, the King’s Law, in Ran’s view, is tasked with preserving the social order until the coming of the Messiah.¹¹⁸

113. Aaron Ankar, *Parashat Vaishlahb, Al Shikul Hadaat HaShiputi BeAnisha* [Weekly Portion of Vaishlahb: Regarding Judicial Discretion in Punishment], 270 GILIONOT PARASHAT HASHAVUA (2007), <https://www.daat.ac.il/mishpat-ivri/skirot/270-2.htm>.

114. Kirschenbaum, *supra* note 3, at 253.

115. See also HERSHEL SCHACHTER, B’IKVEI HATZOAN 1–3 (1997); Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L.Q. 441, 453–57 (1997); Samuel J. Levine, *An Introduction to Legislation in Jewish Law, with References to the American Legal System*, 29 SETON HALL L. REV. 916, 932–35 (1998) (adaptation of Rabbinic laws due to altered circumstances).

116. Ankar, *supra* note 113.

117. NISSIM OF GERONA, DERASHOT HARAN 11, on *Deuteronomy* 16:18.

118. Kirschenbaum, *supra* note 3, at 253.

III. OUR REFUTATION OF THE COMPLEMENTARY SYSTEMS THEORY

Contemporary scholarship's reliance on Ran to explain Jewish Law's inability to address criminality, however, is problematic for multiple reasons. First, there are no biblical sources that support Ran's theory that a separate royal law existed alongside the law of the Torah. His theory, formulated roughly 1,200 years after the destruction of the Temple, also does not conform with available historical evidence. Titus Flavius Josephus, a first century Roman Jewish historian, provides numerous examples where Jewish Law was used to adjudicate capital cases.¹¹⁹ Thus, while our knowledge of the "true" legal system at the time of the early Sages is limited, we can conclude that classical Jewish Law was not seen as purely a theoretical tool as Ran and contemporary scholars have claimed. Most likely, the principle of *dina d'malkutha dina*, that is, the principle that Jews are religiously mandated to obey the civil laws of the countries in which they live, developed in the absence of an institutionalized Jewish legal system during the Medieval era.¹²⁰

The arguments of the above scholars do not differ significantly from those made by scholars, who study the known codices of the Near East, such as the Code of Ur-Nammu, the Code of Lipit-Ishtar, the Laws of Eshnunna, and the Code of Hammurabi. For example, Meir Malul emphasizes that the various ancient "codices" were not intended to serve as rules of law to be implemented by the courts: "The legal codices were not the type of texts that reflect reality, and were more like acts that had a declarative-propaganda purpose, such as regal inscriptions that aggrandize the name of the inscriber more than they convey any historical information."¹²¹ Similarly, Jacob Finkelstein and Martha Roth argue that the codices were royal self-laudatory texts.¹²²

Elsewhere, Malul drew on the writings of the early twentieth century German theologian Ludwig Köhler, to contend that the above argument applies to Jewish Law.¹²³ Köhler underscored the distinction made in the Babylonian Talmud between normative Halachic statements and those intended for practical implication. He believed by incorporating ethnographic and other materials into the study of Halacha, it might be possible to identify additional legal procedures found in the Halacha, such as disrobing adulterous women in front of the masses,

119. Flavius Josephus, *The Jewish War* II.20, IV.5 (William Whiston, trans., Peabody, MA: Hendrickson Publishers, 1987).

120. Beth Berkowitz, *Approaches to Foreign Law in Biblical Israel and Classical Judaism through the Medieval Period*, CAMBRIDGE COMPANION TO JUDAISM AND LAW 128, 129, 146–47, 154 (Christine Hayes ed., 2017); Warren Zev Harvey, *Law in Medieval Judaism*, CAMBRIDGE COMPANION TO JUDAISM AND LAW 157, 166, 177 (Christine Hayes ed., 2017).

121. MEIR MALUL, *LAW COMPENDIUMS AND OTHER LEGAL COLLECTIONS* (2010).

122. Jacob J. Finkelstein, *Ammisaduqa's Edict and the Babylonian 'Law Codes'*, 15 J. CUNEIF. STUD. 91, 91–104 (1961); Martha T. Roth, *The Law Collection of King Hammurabi: Toward an Understanding of Codification and Text*, LA CODIFICATION DES LOIS DANS L'ANTIQUITE: ACTES DU COLLOQUE DE STRASBOURG 9, 9–31 (E. Levy ed., 2000).

123. See generally MEIR MALUL, *SOCIETY, LAW, AND CUSTOM IN ISRAEL IN BIBLICAL TIMES AND IN THE CIVILIZATIONS OF THE NEAR EAST* (2006).

that were not inscribed in the Hebrew Bible.¹²⁴ Based on Köhler's assessment, Malul concluded that rabbinical literature outlines the legislative process, its transformations, and its application by the elders and the judges. In short, it details positive law, that is, a pragmatic approximation of the ideal.¹²⁵

The argument that applied law was not always identical to the law of the Torah is justifiable given the Sages voided the laws of Sotah,¹²⁶ Eglah Arufah,¹²⁷ and Ben Sorer Umorerh.¹²⁸ Undoubtedly, the Sages introduced other changes as well. Thus, Jewish Law changed and developed like the laws of any other legal system.

The claim that "The King's Law" and "Courts that punish and beat without regard to Torah" provide the basis for an efficient criminal judicial system is also questionable. Objections to monarchy, as an institution, appear in the Hebrew Bible.¹²⁹ For example, in the parable of Yoram, the prophets offer a negative assessment of monarchy, depicting it as an institution that gives rise to a bad outcome.¹³⁰ Similarly, when the Jewish people ask Samuel to anoint a king to rule over them, Samuel is displeased by the request and warns the Jewish People of the rights which a king will claim over them and the risks entailed. God also views the request negatively, seeing it as a rejection of divine rule: "And the LORD said unto Samuel, Harken unto the voice of the people in all that they say unto thee: for they have not rejected thee, but they have rejected me, that I should not reign over them."¹³¹ This negative assessment is taken up by other Talmudic scholars. For example, in his commentary on Deuteronomy, the Italian sixteenth century physician, biblical scholar, and philosopher Rabbi Ovadia ben Jacob Sforno noted that the Torah recognized the difficulty of going against the human desire to be ruled by a king, and thus permitted it.¹³² The fifteenth century Portuguese Jewish statesman and biblical scholar Rabbi Yitzchak Abarbanel concluded that from a historical perspective, monarchy as an institution was an unmitigated disaster, and

124. Malul, *supra* note 123, at 9–10; Ludwig Köhler, *Archäologisches [Archaeological]*, 34 ZEITSCHRIFT FÜR DIE ALTTESTAMENTLICHE WISSENSCHAFT 146, 146–49 (1914).

125. Malul, *supra* note 123.

126. Mishnah Sotah 9:15.

127. *Id.* at 9:9.

128. BABYLONIAN TALMUD, SANHEDRIN 71a.

129. Abraham Tennenbaum, *Parashat Shoftim—Hayesh Mishtar Me'dinei HaRazui al pi HaHalacha?* [*What Kind of Government Is Desired According to Jewish Law (Halacha)?*], Department of Justice, Department of Hebrew Law], 177 GILYONOT PARASHAT HASHAVUA 1, 1–4 (2003), <https://www.daat.ac.il/mishpat-ivri/skirot/177-2.htm>. (contrasting the detailed political structure in the U.S. Constitution with the Torah's minimal discussion on governance, focusing on ethical leadership and responsibilities rather than specific governmental systems. It highlights a debate within Jewish law about the role of monarchy and suggests that Jewish tradition is indifferent to the form of government, emphasizing moral governance over any specific political structure.).

130. For the parable of Yoram, see, e.g., *Judges* 9:7–15 (King James).

131. 1 *Samuel* 8:7–8 (King James).

132. See OVADIA SFORNO, COMMENTARY ON DEUTERONOMY 17:14–20 (Eliyaho Munk & HaChut Hameshulash, trans., Lambda Publishers ed., 2003).

therefore it should not be considered even as an emergency measure.¹³³ He compares the institution to the laws of the “beautiful captives”—another case in which the Torah allows less-than-ideal actions to prevent even worse eventualities.¹³⁴

In short, the argument that Jewish Law, based on the Torah, viewed the kingship as necessary or desirable, is not supported by the evidence. In fact, Maimonides underscored those efforts were made to curtail the extensive authority given to the king to punish and from the Rishonim period forward, many scholars supported Maimonides’s position.¹³⁵

Similarly, the courts—the other authority cited by proponents of complementary legal systems theory as providing an alternative forum for handling criminal offenses that fell outside the boundaries of the Torah—is also a dubious claim for multiple reasons. First, the claim is based on a single statement by Rabbi Eliezer ben Yaakov: “I heard that there are courts that punish and beat without regard to Torah, and they do not do this to violate the words of the Torah—but in order to establish boundaries for the Torah . . . and not because it is appropriate to do so, but because it is necessary at that time.”¹³⁶ Had the religious courts been given responsibility for criminal law, other sources would have noted this development and the one that we do have would not relate it as hearsay—“I heard that.”

Second, Rabbi Eliezer’s words suggest that the authority of the courts to punish is temporary. This conclusion can also be surmised from Maimonides’s comments on the court’s authority:

The court has the authority to beat a person, though it is not mandatory to beat him according to the laws of the Torah, and to kill a person, though he does not have to be executed according to the laws of the Torah, and this is not to violate the Torah, but to set boundaries for the Torah. Once the court sees that people have violated the rules, they have the power to reinforce and restore order as they see fit, all as a

133. Avraham Melamed, *Abarbanel: Denial of the Monarchy* [*Abarbanel: Shlilat HaMelucha*], in WISDOM’S LITTLE SISTER: MEDIEVAL JEWISH POLITICAL PHILOSOPHY [ACHOTAN HAKTANA SHE’L HACHACHAMOT HAMACHAVA HAMEDINIT HAYEUDIT BEYEMEI HABEYNAIM] 250, 250–68 (2011); MOSES ABERBACH & LEVI SMOLLER, THE MONARCHY IN ABRABANEL’S WORLDVIEW [HAMELUCHA BEHASHKAFAT HOLAMO SHE’L ABRABANEL] 155–56 (1973).

134. See Hayyim Angel, *Abarbanel: Commentator and Teacher Celebrating 500 Years of His Influence on Tanakh Study*, 42 TRADITION: J. ORTHODOX JEWISH THOUGHT 9, 11 (2009).

135. ISAAC HERZOG & ITAMAR WARHAFTIG, TEHUKA LE-ISRAEL AL-PI HA’TORAH [LEGISLATION FOR ISRAEL ACCORDING TO THE TORAH] (1989); S. Israeli, *Tokef Mishpatei HaMelookha Beyameinoo* [*The Validity of the King’s Law in Our Time*], 1 BETSOMET HA’TORAH VE’HAMEDINA 115, 115–26 (1950); Aharon Kirschenbaum, *Maarkehot Shipootiot Makbilot Bamishpat Haivri* [*Parallel Judicial Systems in Jewish Law*] 10 JEWISH POL. STUD. REV., 1–23 (1998); Benjamin Rabinovitch-Teomim, *Mishpatei Nefashot BeDin HaSanhedrin Uvedin Malchut* [*Capital Trials According to the Laws of the Sanhedrin and the Law of the King*], 4 HATORA VE’HAMEDINA 64, 64–66 (1952).

136. BABYLONIAN TALMUD, SANHEDRIN 37a.

limited time-bound provision, which is not intended to become a law for future generations.¹³⁷

Maimonides's above qualification of the court's authority to punish "as a limited time-bound provision" leaves no question that the courts did not replace the regular authority.¹³⁸ Finally, no mention of the "courts" appears prior to circa the second century CE.¹³⁹

The claim, made by proponents of complementary legal systems theory, that many modern criminal offenses are unpunishable under classical Jewish Law is not without merit. However, they fail to consider that this limitation applies to other ancient systems of law and not unique to Jewish Law. For example, in England until the Norman invasion in the eleventh century, murder was not a criminal offense, but rather a private matter.¹⁴⁰ Similarly, in the Ottoman Empire, murder and assault fell under private law. The heirs of the murdered individual could choose between "blood revenge" or "blood ransom." If they chose the former, they forfeited their right to receive financial compensation.¹⁴¹ The criminal penalties we associate today with murder have not always existed, and their appearance in codes of law is the product of the law's historical development in different times and in different places in response to changing societal needs.

Jewish Law likewise developed and evolved over time. As we saw earlier, the Sages introduced "repenter's relief" to increase the likelihood an offender would

137. HILCHOT SANHEDRIN, *supra* note 97, at 24:4.

138. Yitzchak Warhaftig, *Kokho Hakborg shel Beit Din Leumat Kokho shel Melekh* [The Exceptional Power of the Court as Compared with the Power of the King], 10 JEWISH POL. STUD. REV. 41–55 (1998); FRIESHTECK, *supra* note 67; Aaron Ankar, *Ikarim Bamishpat HaPili Haivri* [Principles of Jewish Criminal Law] 37–41, 210–14 (2007); Aharon Kirschenbaum, "Anisba Pilit 'Shelo min HaTorah': Maamar Talmudi asher Isef Shita Mishpatit [Criminal Punishment "Outside the Rule of Torah": A Talmudic Saying that Shaped a Legal Method], 13 ALI MISHPAT 261, 275, 283 (2016) (analyzing the texts of Rabbi Eliezer ben Jacob, focusing on the rabbinical courts' power to issue rulings diverging from traditional Torah law. It clarifies his statement's meanings, particularly the *bora'at sha'ah* concept, and explores the interplay between practical Jewish law and classical halachic interpretation.).

139. Based on Deuteronomy 16:18, the Sages concluded that it was necessary to establish a court in every city and district based on Deuteronomy 16:18. See Mishnah Sanhedrin 5:1. Maimonides made this into a *halacha*, stating that God "commanded us to nominate judges." See Maimonides, *Sefer Hamitsvot Positive Commandments*, Mitzvah 176, SEFARIA (Francis Nataf trans., Sifre on Deuteronomy ed. 1969), https://www.sefaria.org/Sefer_HaMitzvot%2C_Positive_Commandments.176.1?lang=bi&with=About&lang2=en (last updated Oct. 25, 2023). For the history of the courts, see SHALOM ALBEK, BATEI HADIN BEYEMEI HATAMUD [COURTS IN TALMUDIC LAW] (1980); ISAAC HERZOG, THE ADMINISTRATION OF JUSTICE IN ANCIENT ISRAEL (1974); Isaac Herzog, *Ma'Arechet HaMishpatit Be'Israel Ha'Atika* (Ancient Legal System of Israel, in TEHUKA LE-ISRAEL AL-PI HATORAH 41–51 (Isaac Herzog ed., 2003).

140. BERTHA SURTEES PHILLPOTTS, KINDRED AND CLAN IN THE MIDDLE AGES AND AFTER: A STUDY IN THE SOCIOLOGY OF THE TEUTONIC RACES 232–33 (1913).

141. Leah Makovetsky-Bornstein, "Kofer Dam" ve "Geulat Dam" BaMishpat HaPili shel HaImperia A'Ottomani BaMehot ha-16 ve 17 ve Bitnyam Bachevra HaYehudit [Blood Feud and Blood Revenge in the Ottoman Criminal Law and Their Manifestations in the Jewish Society in the Ottoman Empire in the Sixteenth and Seventeenth Centuries], in ISH BI-GEVUROT, MAAMARIM BEMORESHET ISRAEL HUBETOLDOT^{AV}, MUKDASH LECHVOD HA'RAV DOCTOR ALEXANDRE SAFRAN [ISH BI-GEVUROT, STUDIES IN JEWISH HERITAGE AND HISTORY: PRESENTED TO RABBI ALEXANDRE SAFRAN] 79, 84–85 (Moshe Halamish ed., 1990).

seek atonement for his crimes. This revision voided existing Jewish law that made restitution a prerequisite for atonement. The Sages also voided the laws of Sotah, which required women suspected of adultery to undergo a priestly ritual to determine their guilt.¹⁴² No doubt other changes were made to the law of Torah during the lives of the early Sages. These changes most likely improved the law's efficacy since complaints of the law's inefficacy only arose in recent history.

According to legal scholars, such as Israel Z. Gilat, Mortimer J. Adler, and Uri Desberg, the procedural and evidentiary restrictions, outlined earlier in this article, were introduced later for practical and historical reasons. For example, the legal scholars Gilat and Adler contend that the requirement that the offender must be warned of an action's illegality for the offense to be punishable is a relatively recent addition to Jewish Criminal Law, and Desberg attributes this expansion in evidentiary and procedural rules to the period of Rabbi Akiva and later.¹⁴³ In short, these revisions too were responses to historical circumstances.

Jewish Law's developmental path therefore does not differ significantly from that of other systems of law. Like other law systems it has experienced periods of change and stagnation; practitioners and theoreticians have introduced over the course of time amendments in response to changing historical circumstances and societal needs. Thus, rather than seeing the problems identified by proponents of complementary systems theory as unique to Jewish Law, because it is eternally binding and unchanging, we see them as part of a historical developmental process. This is not to say, that this process plays out the same in every legal system or that there is a predetermined endpoint. However, it does mean that the inconsistencies and contradictions found in Jewish Law are not inherent, but rather like modern systems of law the product of historical adaptations and the effort to balance conflicting purposes of punishment.

As discussed earlier, even in Biblical times, the purposes and types of punishment existed in a disharmonious relationship to one another. This is particularly true when it concerns capital offenses. To understand the Hebrew Bible's justification of death penalty laws, it's important to consider the historical context. During biblical times, there were no prisons, and the available methods of punishment were limited to exile, execution, or fines. Capital punishment was reserved for crimes that posed a significant threat to individuals or to the moral and religious foundations of Jewish society.¹⁴⁴

The Halacha establishes four methods of execution: burning, stoning, killing (by sword), and suffocation. These punishments were imposed for thirty-six

142. Mishnah Sotah 9:15; *id.* at 9:9 [Egla Arufa (The Axed Heifer)]; *see also* BABYLONIAN TALMUD, SANHEDRIN 71:1 [Rebellious Son (Ben Sorer U'Moreh)]; BABYLONIAN TALMUD, SANHEDRIN 71a.

143. Gilat, *supra* note 109, at 225, 229, 247; Mortimer J. Adler, *Im Yesh Lebatrot al HaAvera HaMedooyeket* [Should One Give Warning of the Precise Offense], 8 SHEVILIN LAGMARAH VEHALACHA 9, 9–32 (2020); Uri Desberg, *Hatraa—Mekor HaDin VeTaamo* [Warning—The Source of the Law and Its Reason] 12 TEHUMIN 307, 307–26 (1991).

144. Levenson, *supra* note 10, at 475.

distinct offenses, including murder,¹⁴⁵ idolatry,¹⁴⁶ incest,¹⁴⁷ sexual relations with animals,¹⁴⁸ and even disrespecting one's parents,¹⁴⁹ and failure to observe the Sabbath.¹⁵⁰ Given the number of capital offenses, we would assume that capital punishment's use was commonplace and morally acceptable under Jewish Law.

Yet, in practice the death penalty was seldom used, and its morality was not clear cut. The Mishnah states, "[A] Sanhedrin that executes a transgressor once in seven years is characterized as a destructive tribunal,"¹⁵¹ and Rabbi Elazar Ben Azarya, based on the witness requirements, claims this categorization applies to a Sanhedrin who executes a person "once in seventy years."¹⁵²

A halachic argument between Sages on the death penalty also exists. Two of the most influential Mishnaic Sages, Rabbi Tarfon and Rabbi Akiva, advocate for avoiding the death penalty's use even when Torah commandments demand it: "[W]ere we sitting on the Sanhedrin, no person would ever be put to death."¹⁵³ When asked how they would avoid its use, they respond that they would conduct the trial so it would be impossible to be executed. They would investigate and question the witnesses, disqualifying their testimonies on grounds of evidence.¹⁵⁴ In his commentary on this debate in the Mishnah, the nineteenth century German Rabbi Israel Lipschitz elaborates, "[T]hey would have asked the witnesses so many questions and examined them in so many ways, that it would have been impossible for the witnesses not to contradict each other, thereby avoiding the testimony."¹⁵⁵

However, not all the Sages agreed with the above approach which explicitly went against Torah commandments. While Tarfon and Akiva presumably rejected the death penalty based on a moral and social obligation to protect life, even that of a murderer, Rabban Shimon ben Gamliel argued that Tarfon and Akiva's approach negated the death penalty's deterrent effect and thus would "increase the number of blood-shedders in Israel."¹⁵⁶ In his nineteenth century commentary, *Tiferet Israel*, Rabbi Israel Lipschitz (1782–1860, Germany) explained that Rabban Shimon believed that leniency in convicting murderers would lead would-be murderers to no longer to fear the consequences of their actions.¹⁵⁷

This halachic disagreement, articulated in Judea in the first century CE, remains relevant today. In Israel and the United States, proponents and opponents of the death penalty advance arguments that closely parallel those made by the Sages, although in recent years, the views of Rabbi Tarfon and Rabbi Akiva (who

145. *Exodus* 21:12 (King James).

146. *Deuteronomy* 5:8 (King James); *Leviticus* 20:10 (King James).

147. *Leviticus* 20:11–12, 17 (King James).

148. *Id.* at 20:16.

149. *Exodus* 21:27; *Deuteronomy* 21:18–21 (King James).

150. *Exodus* 31:14 (King James).

151. BABYLONIAN TALMUD, TRACTATE MAKKOT, 7a.

152. *Id.*

153. Mishnah Makkot 1:10.

154. BABYLONIAN TALMUD, MAKKOT 7a.

155. Israel Lipschitz, *Tiferet Israel*, Makkot [Commentary on the Mishnah], Makkot 1:10.

156. BABYLONIAN TALMUD, MAKKOT 7a.

157. Israel Lipschitz, *Tiferet Israel* [Commentary on the Mishnah], *Makkot* 1:10.

unilaterally opposed the punishment of death)¹⁵⁸ seemingly have gained the upper hand over those of Rabban Shimon Ben Gamliel.¹⁵⁹

The Torah and the rabbinic literature established strict procedures for imposing the death penalty. For example, it requires two¹⁶⁰ impartial¹⁶¹ witnesses to the crime, as well as that the potential offender is warned of the consequences of the act immediately prior to committing the act.¹⁶² Additionally, circumstantial evidence,¹⁶³ an admission of guilt by the defendant (confession),¹⁶⁴ and testimony by an informant (*masiach lefi tumo*) cannot be used as proof of guilt.¹⁶⁵ The decision to convict must be unanimous and every effort must be made to identify mitigating factors, such as the redeeming qualities of the defendants.¹⁶⁶ Given these stringent requirements, the death penalty's use was rare under Jewish Law.¹⁶⁷ Thus, rather than representing how the law was applied, Jewish law's enumeration of capital offenses should be seen as an "ethical ranking" of the severity of different offenses, that is, a guide for understanding the danger that certain crimes pose to individuals and to society.¹⁶⁸

The prevalence of capital punishment, at least in democratic nations, is slowly declining.¹⁶⁹ In the contemporary State of Israel, the use of death penalty is

158. Mishnah Makkot 1:10.

159. STEPHEN NATHANSON, AN EYE FOR AN EYE? THE MORALITY OF PUNISHING BY DEATH (1987); Davison M. Douglas, *God and the Executioner: The Influence of Western Religion on the Use of the Death Penalty*, 9 WM. & MARY BILL. RTS. J. 137, 137 (2000) (assessing the Christian and Jewish opposition to the death penalty); Samuel J. Levine, *Capital Punishments and Religious Arguments: An Intermediate Approach*, 9 WM. & MARY BILL. RTS. J. 179, 179 (2000).

160. *Numbers* 35:30–34 (King James); *Deuteronomy* 17:5, 19:15 (King James).

161. Mishnah Sanhedrin 3:4.

162. MOSES MAIMONIDES, MISHNEH TORAH, LAWS OF SANHEDRIN 12:2.

163. Enker, *supra* note 4, at 1139; Spector, *supra* note 3, at 320; Mishnah Sanhedrin 4:5.

164. Mishnah Yevamot 25b; B. Ketubbot 18b; B. Sanhedrin 9b, 25a.

165. Tractate Sanhedrin 24b; Mishna Sanhedrin 4:5.

166. BABYLONIAN TALMUD, SANHEDRIN 17a (In capital cases, if the court finds unanimously against the defendant, the verdict is overturned, based on the principle that if no judge can find merit in the defendant's case, there may be a lack of deliberation.); Mishna Sanhedrin 4:5.

167. Enker, *supra* note 4, at 1139 (The infeasibility of halachic capital punishment makes obtaining a conviction and carrying out an execution highly unlikely.); Aaron M. Schreiber, *The Jurisprudence of Dealing with Unsatisfactory Fundamental Law: A Comparative Glance at the Different Approaches in Medieval Criminal Law, Jewish Law and the United States Supreme Court*, 11 PACE L. REV. 535, 546 (1991).

168. Levenson, *supra* note 10, at 476.

169. AMNESTY INTERNATIONAL, GLOBAL REPORT: DEATH SENTENCES AND EXECUTIONS 4, 37–9 (2020), <https://www.amnesty.org/en/documents/act50/3760/2021/en/>; BRIAN P. BLOCK & JOHN HOSTETTLER, HANGING IN THE BALANCE: A HISTORY OF THE ABOLITION OF CAPITAL PUNISHMENT IN BRITAIN 89, 109 (1997); DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2020: YEAR END REPORT, <https://dpic-cdn.org/production/documents/reports/year-end/YearEndReport2020.pdf>; ROGER HOOD & CAROLYN HOYLE, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE (2014). Bruce Jacobs and John Kleinig note that public opinion supports punishing murder with the severest measures available under the legal system of any regime: a life sentence or a long sentence at a minimum. Bruce A. Jacobs, *A Typology of Street Crime Retaliation*, 41 J. RES. CRIME DELINQ. 295, 295–323 (2004); JOHN KLEINIG, VALUING LIFE (1991).

restricted to two specific offenses: genocide¹⁷⁰ and committing treason during a time of war.¹⁷¹ It has only been carried out twice since the nation's establishment. In 1948, Meir Tobianski was executed by firing squad after being found guilty of treason, and in 1962 Adolf Eichmann was executed by hanging after being found guilty on fifteen counts of crimes against humanity, war crimes, crimes against the Jewish people, and membership in a criminal organization.¹⁷² Yet even these two executions were fraught with controversy. One year after his execution, Tobianski was exonerated of the crime of treason and, in 2021, the Jerusalem municipality announced that a street would be renamed in his honor. His wrongful execution served as a painful reminder of the flaws of the death penalty.¹⁷³

As for Eichmann, while there was no doubt of his guilt, several prominent Jewish intellectuals and philosophers, such as Martin Buber and Gershom Scholem, objected to the death penalty for Eichmann. Buber described it as a “great mistake” explaining that Israel’s role should have been that of the accuser and not of judge.¹⁷⁴ Scholem wrote, “It will be said that the Israelis have captured the chief organizer of the murder; let them hang him and be done with it. . . . One fears that instead of opening up a reckoning and leaving it open to the next generation, we have foreclosed it.”¹⁷⁵ Each, according to Smadar Ben-Natan, a specialist in international law, “disfavor[ed] the role of the judge and executioner, for their violence and for their finite quality, and prefer the role of the accuser[,] which does not stain the moral stance of the victim with the violence of imposing punishment.”¹⁷⁶

These objections to the use of the death penalty even in rare circumstances highlight the potential moral costs of its use by any society. Holding individuals accountable for their actions is important, but so too is it important to hold society accountable for the decisions that it makes. The potential for executing an innocent person as well as the potential that an offender’s race, gender, or religion will determine the likelihood of the death penalty’s use is too significant to overlook. For example, in the United States where the use of the death penalty is more widespread than in Israel, people of color have accounted for forty-three percent of total executions since 1976 and fifty-five percent of those currently

170. Hok Beedvar Meniato Veanishato shel Hapesha Hashmadat Ham [Law on the Prevention and Punishment of the Crime of Genocide], 1950 §§ 1–2, Nazis and Nazi Collaborators (Punishment) Law, 5710–1950, 4 LSI 154 (1950–1951) as amended (Isr.).

171. Hok HaOnshin [Penal Law] 5737–1977 §§ 97–99.

172. Smadar Ben-Natan, *The Shadow of the Death Penalty in Israel: Constructing Enemies, Citizens, and Victims*, in COMPANION ON CAPITAL PUNISHMENT AND SOCIETY (Ben Fleury-Steiner & Austin Sarat eds., Edward Elgar Publishing Ltd, 2023); Smader Ben-Natan, *The Shadow of the Death Penalty in Israel: Why Is a Legal Punishment Never Used*, UNIV. OF WASHINGTON: STROUM CTR. JEWISH STUD., <https://jewishstudies.washington.edu/israel-hebrew/death-penalty-in-israel-history/>.

173. Hanan Greenwood, *73 Years After Israel’s First Execution, Street to Honor Wrongfully Accused*, ISRAEL HAYOM (Oct. 26, 2021, 7:16 PM), <https://www.israelhayom.com/2021/10/26/73-years-after-israels-first-execution-street-to-honor-wrongfully-accused/>.

174. Lawrence Fellows, *Buber Calls Eichmann Execution Great ‘Mistake’*, N.Y. TIMES, June 5, 1962.

175. Gershom Scholem, *On Sentencing Eichmann to Death*, 4 J. INT. CRIM. JUST. 859, 860–61 (2006).

176. Ben-Natan, *supra* note 172.

awaiting execution. These numbers led the American Civil Liberties Union to conclude, “A systematic racial bias in the application of the death penalty exists at both the state and federal level.”¹⁷⁷ The American civil rights activist Martin Luther King, Jr., described capital punishment as “against the better judgment of modern criminology and, above all, against the highest expression of love in the nature of God.”¹⁷⁸

These contemporary moral objections to the death penalty illustrate, once more, that the arguments of Jewish Law on punishment do not differ significantly from those of modern legal codes. It follows that Jewish Law’s positions on punishment and its purposes are not unique and so no parallel system of justice is required to explain its provisions, inconsistencies, and contradictions, as they mirror those of modern codes. Its only unique feature as a legal system is its longevity, that is, its ability to function for such a long period in different nations and even under other systems of government.

CONCLUSION

As our analysis has shown, Jewish criminal law was not developed as a theoretical exercise, but rather as a practical measure. It was used to punish offenders and to regulate social life. Like other systems of law, practitioners and theoreticians introduced revisions over the course of its history in response to changing historical circumstances and societal needs. As we saw, the Sages modified Jewish Law to enhance the likelihood that offenders would repent. Still other changes were a consequence of the Jewish nation’s loss of autonomy. Thus, the claim by some proponents of complementary systems theory that Jewish Law could not adapt to changing circumstances does not reflect historical realities.

Undoubtedly, some changes reduced Jewish Criminal Law’s efficacy. Yet, one would be hard pressed to identify another system of law that over the course of its history did not introduce modifications that later became obsolete, unwieldy, or had unintended consequences. Additionally, as discussed, the failure of Jewish Law to punish some offenses is not peculiar to Jewish Law; murder was considered a private matter in Britain until the Norman Invasion and in some countries on the European continent remained so until the seventeenth century. Thus, the absence of some crimes from Jewish Law and its leniency on others, only underscores that like legal codes elsewhere, Jewish Law underwent a historical developmental process.

Finally, the argument that the purposes of Jewish Criminal Law are quintessentially different from those of modern codes is also not borne out by historical evidence. As our analysis showed, Jewish Criminal Law evidences the same purposes of punishment as modern law—retribution, deterrence, prevention, rehabilitation, atonement, restitution, and reconciliation—and shows no clear

177. *Race and the Death Penalty*, AM. C.L. UNION (Feb. 26, 2003), <https://www.aclu.org/other/race-and-death-penalty>. See also Randolph N. Stone, *The Killing of Charles Walker: Racial Bias and the Death Sentence*, 7 CRIM. JUST. 22, 22–27 (1992).

178. *Dr. Martin Luther King’s Moral Opposition to the Death Penalty*, EQUAL JUSTICE INITIATIVE (Jan. 15, 2024), <https://eji.org/news/dr-martin-luther-kings-moral-opposition-to-the-death-penalty/>.

preference for one purpose over another. Moreover, then as now, practitioners and theoreticians recognized the conflicting nature of these purposes and endeavored to balance them in determining the appropriate punishment for an offense. These efforts, no different from today, sometimes led to heated debates between those who prioritized different purposes. In debating the merits of the death penalty, the early Sages struggled with the same issue that confronts society today. Thus, the idea that Jewish Criminal Law requires a separate theoretical framework to explain its challenges and its solutions is simply incorrect. If Jewish Law is unique, it is only because it succeeded in functioning in so many nations and at times within the constraints of other systems. Thus, to relegate this ancient system of law to the margins, rather than use it to develop laws in today's legal systems would be a waste of a valuable resource, or rather "wisdom capital."¹⁷⁹

179. Natti Ronel & Y. Ben Yair, *Spiritual Criminology: The Case of Jewish Criminology*, 62 INT'L J. OFFENDER THERAPY COMPAR. CRIMINOLOGY 2081, 2082 (2018); SYLVIA CLUTE, BEYOND VENGEANCE, BEYOND DUALITY: A CALL FOR A COMPASSIONATE REVOLUTION 49 (2008); Natti Ronel, *The Experience of Spiritual Intelligence*, 40 J. TRANSPERSONAL PSYCH. 100, 112–14 (2008).