BALANCING PUNISHMENT IN JEWISH LAW: Examining Conflicting Purposes and Inconsistencies within Modern Judaism

Jonathan Hasson & Abraham Tennenbaum

Abstract

Jewish law—the halakha atop its Pentateuchal understructure (the 'Written Law') and its Mishnaic and Talmudic elaboration (the 'Oral Law' or 'Oral Torah')—is unique in multiple key respects. Its stringent evidentiary and procedural restrictions often prevent conviction of the guilty and entailed the establishment of two pragmatic complementary legal systems—'the King's justice' and 'courts that administer punishments and beatings without regard to Torah'—that grant the monarch and the judiciary broad discretion to punish as they deem fit. And while modern codes focus on crimes against persons, Jewish law also centers on crimes against God. Many contemporary scholars conclude that the deistic character of Jewish law and its reliance on complementary legal systems rules it out as a model for secular law. If this is so, Jewish law will have nothing to contribute to discussions regarding capital punishment and other crucial topics. We argue contrarily, seeing Jewish law as a pragmatic system that indeed addresses crimes against human victims. Drawing on Ancient Near Eastern and other historical sources, we show that the provisions that diminished the efficacy of Jewish law were later adaptations to changing social circumstances. Jewish law is unique is its incidence over millennia across national borders and within other governing systems. Marginalizing this ancient legal system instead of using it to develop contemporary legal systems squanders a valuable source of 'wisdom capital'—foremost where capital punishment is concerned.

Keywords: Jewish law, Halacha, punishment, capital punishment, spiritual criminology

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Introduction

Legal scholars have long debated the legitimacy of the death penalty in modern secular law; the argument rages on today. While nearly all European states have banned capital punishment, some have not. In the United States, matters are more sharply divided: twenty-seven states allow it; twenty-three do not. Even though the U.S. has seen fewer executions in recent years, 1,575 American death-row inmates have been put to death from 1973 to the present writing (2023) and some counties in certain states continue to put prisoners to death year after year.[1]

At first glance, Jewish law, an amalgam of biblical law and rabbinical law,[2] should have something to contribute to this ongoing debate. After all, capital punishment appears on numerous occasions in the Bible and is addressed extensively in the Talmud.[3] Yet according to the prevailing scholarly perspective,

1. Angela April Sun, *"Killing time" in the valley of the shadow of death: Why systematic preexecution delays on death row are cruel and unusual*, Colum. L. Rev. 1585, 1587 (2013); T. L. Snell, Cap. Punishment, 2011—Stat. Tables 2 n.1 (U.S. Dep't of Just., Bureau of Just. Stat. 2013)

2. Briefly put, two central components combine to form what is traditionally termed Jewish law: the Written Law and the Oral Law. The Written Law refers to explicit or implicit legislation in the Torah. The Oral Law refers to rabbinic derivations from the Torah, ancient traditions, and enactments of the Sages. Many rules in Written and Oral Law appear in the *Mishna*, a compilation redacted in approximately 200 C.E. The rabbis who appear in the Mishna and contemporary literature external to it (known as *beraitot*) are collectively called Tannaim (instructors). *The Babylonian Talmud*, compiled in the centuries following the Mishna, is the primary document that interprets and elaborates upon the Mishna; its expounders are called Amoraim (rabbis who 'say' or 'tell' the Mishnaic law).

3. There are two Talmuds: the Babylonian and the Palestinian. The former commands greater authority in Jewish law than the latter. It alone is referenced in this article and is referred to simply as the Talmud.

Jewish law is so fundamentally different from secular legal systems that it cannot serve as a model for contemporary discussions of themes in Western law, such as the purpose of punishment and the legitimacy of capital punishment. Scholars dismiss Jewish law on two general grounds: its impracticality and its unique approach to the fundamental purpose of punishment. Many authors also pronounce Jewish law fundamentally different from secular legal systems due to its religious origin and character.

The scholarly consensus, however, is not convincing. We will argue contrarily that Jewish law is much closer to secular law than is generally understood and, therefore, should be incorporated into contemporary legal debates. To this end, we will first show that the historical record does not support the conclusions of the complementary systems theory, on which scholars rely to explain the ostensible inability of Jewish law to confront criminality. Instead, Jewish criminal law, like other legal systems, is not static but has adapted to changing historical circumstances and social needs. Further, the extent of its relevance to independent legal system is clouded by its millennia of operation under the constraints of other governing systems. To dismiss this ancient system instead of utilizing it to develop contemporaneous law is, therefore, to squander a valuable resource.

Continuing, we will critique the prevailing view by examining the purpose of punishment in Jewish law from a historical and analytical perspective. Proceeding chronologically from biblical times through the Mishnaic and Talmudic eras, we demonstrate that during these seminal phases, Jewish criminal law was conceived as a practical system of punishment. It even evinces the same conflicting purposes of punishment—retribution, deterrence, prevention, rehabilitation, atonement, reconciliation, and restitution—as do its modern counterparts. Contrary to the position argued by most scholars, then, Jewish criminal law requires no exclusive theoretical framework.

Pursuant to this line of reasoning, we build this article of five sections. In Section I, we outline the scholarly claims that Jewish law is impractical and can be understood only against the backdrop of the complementary systems theory. We trace the emergence of this theory and how scholars used this theoretical model to marginalise Jewish criminal law. In Section II, we briefly review the contemporary legal discourse concerning the primary purposes of punishment (retribution, deterrence, prevention, and rehabilitation) and scholars' claim that Jewish law operates under a qualitatively different set of assumptions. Section III challenges the validity of the complementary systems theory by situating the relevant biblical and rabbinical texts in their historical context. Section IV shows how these texts, much like the works of contemporary legal theorists, express a wide range of purposes of punishment that are fundamentally relevant to the concerns of secular law. Taken together, Sections III and IV demonstrate that Jewish criminal law is not qualitatively different from other systems of law and exacts

punishment for the same purposes. Having shown that Jewish law can bear on contemporary debates concerning punishment, Section V discusses the relevance of Jewish law for the moral and legal implications of capital punishment.

I. Scholarly Claim 1: Jewish Law is Impractical

Scholars pronounce Jewish law, as religious law, qualitatively different from contemporary legal systems and therefore unfit as a template for secular legal systems. Their first argument is that Jewish law cannot operate without a complementary judiciary and executive system.

It must be conceded that Jewish criminal law, as codified in rabbinical texts, operates under its own unique process that may not be empowered to convict individuals in a modern, secular legal system. The Torah proclaims many discrete acts punishable by death but provides neither a set of rules nor even a framework that suffices to establish a functioning criminal-justice system. The same is true of rabbinic law, even though it is much more developed. Many crimes, such as armed robbery, are left unpunished under Jewish criminal law in the conventional sense.[4] The treatment of other crimes, such as bribery and murder, is too limited in scope to ensure that all offenders are punished. For example, murder for hire and conspiracy to commit murder fall outside human jurisdiction; their punishment is in God's hands.[5] Moreover, it goes without saying that Jewish law does not address a plethora of modern crimes, such as cybercrimes and environmental offences.

From the standpoint of procedural and evidentiary rules, too, Jewish criminal law is severely limited. Circumstantial evidence is largely inadmissible as grounds for conviction.[6] Similarly, an offender's confession does not suffice to establish guilt. According to the Talmud, visual identification of the offender by an eyewitness who testifies in court and submits to cross-examination is needed.[7]

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4. Talmudic Encyclopaedia, vol 5 406–7 (Meir Bar Ilan & Shlomo Josef Zevin eds., 1952).

5. Talmud, *Kiddushin* 42b. All Talmudic citations refer to the Schottenstein Edition (Mesorah Pub. Ltd 2005).

6. Arnold N. Enker, *Aspects of Interations between the Torah Law, the King's Law, and the Noahide Law in Jewish Criminal Law*, 12 Cardozo L. Rev. 1137, 1137–9 (1990); Mishneh Torah, Hilchot Sanhedrin 12, 3; Yehoshua Ben Meir, *Reayot 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] (Ph.D. dissertation, Hebrew University, 1974); Yehoshua' Ben Me'ir, '*Re'ayot Nesibatiyot Bamishpaṭ Ha'ivri*' 18 Diné Israel 87, 141–42 (1995); Ḥayim Shlomo Ḥefets, '*Gidre* '*Umdena Veḥezḳa Bedine Nefashot Bamishpaṭ Ha'ivri*' 8 Diné Israel 45, 47–48 (1976–1977); See also Maimonides, Laws of the Courts and the Penalties Placed under their Jurisdiction 12:3.

7. Talmud, *Sanhedrin* 5b. See also Maimonides, The Commandments: Proscriptive Commandment *(*Soncino Press, 1967); Maimonides, 'Law of Witnesses'; Shalom Albeck, Yesodot Ha'avera Bedine Hatalmud 131–33, 136, 172 (Bar Ilan UP 1997).

Other forms of identification used in modern courts, such as voice recognition, foot impressions, and handwriting analysis, do not successfully prove guilt.[8]

Jewish law also places strict limitations on eyewitness testimony. Witnesses must be male and at least two in number. Even then, witness testimony may be rejected for a myriad of reasons. Relatives may not testify.[9] If two groups of witnesses offer conflicting testimony, both testimonies are voided. Neither the number of witnesses nor the judge's impression that one group is telling the truth makes any difference.[10] Finally, if a single witness within a group of witnesses is ineligible to testify for any reason, the testimony of the entire group is invalidated. Given the above requisites, finding an acceptable witness is unlikely. Absent eligible testimony, the accused must be acquitted.[11]

In capital crimes, another significant constraint is that offenders must be warned in advance that the behavior is forbidden by law and punishable by death.[12] Maimonides's articulation of this requirement aptly summarises the difficulty of finding anyone guilty of a capital offence in Mishnaic and Talmudic law:

> Whether a person is a commoner or one of the Sages, he requires a warning, for the only reason that a warning is required is to distinguish between the unintended and the wilful, for if he had not been warned, perhaps he did not intend to do what he did. And how is he warned? He is told: Stop, or do not do this, for it is an offence, for which the punishment is death or a beating by order of the court. . . . And it is also necessary that he perpetrate the transgression immediately following the warning, even as the warning is uttered, but if any time has elapsed after the warning was uttered, he requires another warning.[13]

The precondition of an immediate warning combined with the strictures placed on eyewitness testimony and the disallowance of confession makes convicting and punishing a capital offence extremely unlikely.[14]

In all these respects, rabbinical law is mindful of the possibility of convicting the innocent. In his elaboration of the Pentateuchal commandments, Maimonides captures its approach by pronouncing it 'better and more satisfactory to acquit a thousand guilty persons than to put a single innocent one to death'.[15]

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8. Babylonian Talmud, *Hullin* 95b 96a. See Yaakov Shapirah, *Veed ein Bah" al Reayot Nesibatiot* [And There Is None to Testify—Regarding Circumstantial Evidence] 440 Gilyonot Parashat Hashavua 1, 1–4 (2014).
9. Mishna *Sanhedrin* 3:1.
10. Babylonian Talmud, Bava Batra 31 31a b.
11. Aharon Enker, Ikarim Bamishpat Haplili Haivri [Principles of Jewish Criminal Law] 179–181, 194 (2007).
12. Meir Bar Ilan and Shlomo Josef Zevin (eds), *Talmudic Encyclopaedia* vol 11 (1965) 291–314; Numbers 15:32–33.
13. Mishneh Torah, Hilchot Sanhedrin, law and the courts, 12: 2.
14. Ido Rechnitz, *Lama ein Bahalakha Din Plili Effectivi?* [Why Is There Not Effective Criminal Law in Halacha?] 41 Alon Hamishpat Haivri 8, 8–9 (2017).
15. Maimonides, *supra note* 7, at 269–271, 290.

It is on these grounds that legal scholars have raised significant concerns about the efficacy of Jewish law in addressing criminal-justice issues. Aharon Enker argues that the system is fundamentally ill-equipped to enforce even the most basic social norms crucial for societal safety. This inadequacy, he adds, is not a recent development influenced by secularisation but an inherent limitation of the Jewish legal framework.[16] Aaron Kirschenbaum offers a more direct critique, pronouncing traditional Jewish law wholly ineffective in addressing social challenges related to crime and punishment. Scholarly assessments such as these, coupled with the aforementioned stringent procedural requirements, suggest that the limitations of Jewish law in the realm of criminal justice are not circumstantial but are deeply embedded within its foundational principles.[17]

Scholars offer different explanations for this inefficacy of Jewish law. According to one school of thought, Jewish law was never intended to be efficient. For example, in 1938, the legal scholar Paltiel Dykan argued that after the destruction of the Temple and the Roman government's replacement of the Sanhedrin (High Court) as the ruling power, the Sages purposefully imposed the aforementioned evidentiary and procedural limitations.[18] More recently, the legal scholar Israel Zvi Gilat made this claim for both biblical and rabbinic law, attributing the inefficiency of Jewish law to the Sages' belief that punishment is reserved to God and that humans should not usurp His role. Gilat, however, provides no substantive proof for this argument.[19]

Other scholars, including Aaron Enker, Aaron Kirschenbaum, and Ido Rechnitz, find Jewish criminal law impractical because its purpose differs from that of modern criminal law. Enker, for example, defines the primary purpose of Jewish law as religious; thus, it focuses on the blasphemy that results from the offence:

> The 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.

16. Aharon-(Arnold)-N.-Enker,-*Yesodot-bamishpaṭ-hapelili-ha'ivri*-[Foundations-of-Jewish-criminal-law],-24 Mishpaṭim 177,-184–86 (1994).

17. Aharon Kirschenbaum, *Mekoma shel Ha'anisha Bamishpat Ha'ivry Haplili, Perek Behashkafa Hapenologit shel Hazal VeShel Harishonim* [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, 253–4 (1987); Ben Menahem and Neil S. Hecht (eds), *Selected Topics in Jewish Law*, vol 3 25–26, 39–31, 41–44 (Institute of Jewish Law Boston University School of Law 1993).

18. Paltiel Dycan, Penal Code: With special attention to Jewish Law and the law prevailing in the Land of Israel [Dinei Onshin: Besimat Lev Meyoohedet Lamishpat Haivri Velamishpat Hanoheg Beerets Israel Bazman Hazeh] 12, 12–15 (1983).

19. Israel Zvi Gilat, '*Haha'anasha Lefi Dinei Hatorah—Hida Vehatsaat Peshara* [Punishment under Torah Laws—A Conundrum and a Proposed Solution] 9 Shaarei Mishpat 223, 225–7, 241, 243–4 (2018).

Kirschenbaum[20] argues similarly, stating that while contemporaries assume that criminal law is intended to preserve the social order, the role of canonised Jewish law is primarily mystical, spiritual, and educational—aiming to ennoble humankind and bring humans closer to God, not to regulate society as a whole.[21] Rechnitz shifts the focus slightly, asserting that Jewish criminal law, as the 'true just law', has just one purpose: retribution. This deontological emphasis, he argues, means that Jewish criminal law addresses only serious crimes rather than the plethora of other crimes with which modern systems contend.[22]

If codified Jewish law cannot handle ordinary criminal activity, how can it ensure the cohesion of the social order? Enker, Kirschenbaum, and Rechnitz resolve this dilemma by turning to the complementary systems theory. Within this construct, they focus on two complementary legal systems that, under Jewish law, may circumvent canonised Jewish law in criminal cases: 'the King's justice' and 'courts that administer punishments and beatings without regard to Torah'.[23] These systems permitted a Jewish monarch or national court, when necessary, to preserve the social order by meting out punishments for crimes that could not be punished effectively under codified Jewish law.[24] Since neither system was bound by the Torah, the above authors claim, they had the flexibility to adapt to changing circumstances.[25] The authors also astsert that Jewish law purposefully left the parameters of these two residual systems vague in order to give them sufficient freedom to meet changing social needs.

In advancing this solution, Enker, Kirschenbaum, and Rechnitz rely primarily on the writings of the Spanish Talmudic scholar Rabbi Nissim ben Reuven of Gerona (Ran, 1290–1376). Ran described the primary purpose of Jewish law as 'enforcing' humanity's relationship with God 'so that divine plenitude would apply to the people'.[26] Pentateuchal law, Ran clarifies, is intended for religious and educational purposes and should not be wielded as a tool for preserving the

20. Enker, '*Yesodot Bamishpaṭ Hapelili Ha'ivri', supra* note 16, at 19.

21. Kirschenbaum, *supra note* 17, at 65.

22. Ido Rechnitz, *Lama ein Bahalakha Din Plili Effectivi?* [Why Is There Not Effective Criminal Law in Halacha?] 41 Alon Hamishpat Haivri 8, 8–9 (2017); Enker, *supra note* 6, at 1139.

23. Enker, '*Al Shiḳul Hada'at Hashipuṭi Ba'anisha',*,270 *Gilyonot Parashat Hashavua'* 1, 2 (2006).

24. Kirschenbaum, *supra note* 17, at 265–67.

25. Hershel (Tsvi) Schachter, B'ikvei Hatzoan 1 3 (Flatbush Bet Midrash 1997(; Samuel J. Levine, 'Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts' (1997) 24 *Hastings Constitutional Law Quarterly* 441, 453, and 457. On rabbinic law's adaptation due to altered circumstances, see Samuel J. Levine, *An Introduction to Legislation in Jewish Law, with References to the American Legal System*, 29 Seton Hall L. Rev. 916, 935 5 (1998) (Adaptation of Rabbinic laws due to altered circumstances); Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 Hastings Const. L.Q. 453–7 (1997).

26. Enker, '*Al Shiḳul Hada'at Hashipuṭi Ba'anisha*' (n 103) 1–4.

social order. Following Ran, it is not surprising that national criminal codes offered a more effective means of punishing crimes against persons and maintaining order. Ran elaborates:

> It is known that the human race needs a judge to adjudicate between individuals, for otherwise, one person would swallow up the other, and the entire world would be destroyed . . . . 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.[27]

Thus, the King's justice, in Ran's view, preserves the social order until the advent of the Messiah.[28] Philip David Foster points out that both the Bible and the apocryphal Ben Sira view a ruler's authority as emanating from God; he cites Ben Sira 10:4–6 and Psalm 2:7 as evidence and discusses this further in his book *The Semantics of* רע *(bad) in Ancient and Mishnaic Hebrew*.[29] According to Foster, the anointing of a king by a prophet symbolises this divine delegation. This practice is not limited to Israelite rulers; some non-Israelite kings are anointed too. In sum, Foster argues that any monarch in Antiquity is considered an agent of God's authority, whether he or she exercises this power effectively or not.[30]

Thus, many scholars invoke the complementary systems theory in concert with the contention that Jewish law is qualitatively different from secular law. At its baseline, they say, the Jewish legal system is intended not to maintain civil order in society but merely to ensure adherence to purely religious matters. The kings and courts, in turn, complement the baseline system by taking appropriate measures to ensure that society continues to function properly. If this is the case, it follows that, as an outgrowth of its religious nature and purposes, Jewish law is structured in a qualitatively different fashion from secular legal systems and does not provide a useful analogue for discussions of contemporary criminal law.

II. Scholarly Claim #2: The Purpose of Punishment

The second scholarly argument in support of the uniqueness of Jewish criminal law relates to the purpose of punishment. To understand this contention, we begin with a brief review of the history and varied purposes of punishment.

Punishment is known in nearly all human societies. Greek mythology offers examples, *inter alia*, of punishments meted out to Sisyphus and Prometheus for

27. Nissim ben Reuven, 'Chapter 11:3 on Deuteronomy 16:18' in Derashot HaRan 74–75 (Yitsḥaḳ Goldman 1875).

28. Kirschenbaum, *supra* note 17, at 279, 305.

29. Philip David Foster, *The Semantics of* רע *(bad) in Ancient and Mishnaic Hebrew* (Peeters 2022), 252.

30. Ibid., 253.

their sinful conduct[31]—the former for betraying the whereabouts of Zeus to the River God Asopus[32] and the latter for giving humans fire.[33] Their penalties were severe and eternal. Sisyphus was condemned to roll a boulder up a mountain only to have it roll back down, forcing him to repeat this effort unto eternity. Prometheus was tethered to a rock, where a vulture ate his liver during the day only to have it grow back at night and be consumed the next day again. The first biblical stories, too, are narratives of behaviors considered morally wrong or in violation of divine laws. Adam and Eve are expelled from the Garden of Eden for eating from the Tree of Knowledge.[34] Cain is doomed to wandering for killing his brother,[35] and the Deluge inundates the earth as punishment for the corruption of the flesh.[36]

Although these myths provide detailed explanations of the sins for which punishments are given, they do not explicitly communicate the purposes of the penalties. Scholars, too, struggle to define the purpose(s) of punishment as such: Can one punishment serve more than one purpose? May the purpose vary with the transgression or is uniformity of purpose required?

In the present article, we examine purposes of punishment in Jewish law from a historical analytical perspective. Proceeding chronologically from biblical times, through the Mishnaic and Talmudic eras, to *Mishne Torah* (compiled by the twelfth-century Spanish Jewish philosopher Moses ben Maimon [Maimonides]), *Shulhhan ʻArukh* (compiled by Rabbi Joseph Karo, Bulgaria, sixteenth century), and the responsa literature subsequent to the foregoing, we demonstrate that Jewish criminal law takes a practical approach toward punishment of perpetrators of certain offences, be it administered by God or by empowered earthly authorities. Moreover, Jewish criminal law evinces the same conflicting purposes of punishment—retribution, deterrence, prevention, rehabilitation, atonement, reconciliation, and restitution—as do its modern counterparts and applies similar solutions to balance them. Thus, Jewish criminal law requires no separate theoretical framework, notwithstanding the conventional wisdom and the claims of most scholars today.

Conventional wisdom sees Jewish criminal law as quintessentially different from modern criminal law in an additional sense. While modern law focuses on crimes against persons and maintaining social order, Jewish criminal law centers on crimes against God and safeguarding the individual's relationship with Him. The reliance of Jewish law on the Pentateuchal commandments for interpretation and application is said to deny the system the flexibility it needs to

31. Homer, *The Odyssey* (Robert Fagles tr, Penguin Classics 1996), 32–34.
32. Theogony Hesiod, *Works and Days* (M. L. West tr, OUP 1988), 525–26.
33. Ibid., 524.
34. Genesis 3:14–19, 23. All biblical citations are taken from the New Revised Standard Version (National Council of Churches, 1989).
35. Genesis 4:14.
36. Genesis 4:12 and 5:12.

adapt to changing social needs, and its rigid evidentiary and procedural requirements compromise its ability to convict the guilty.[37]

Due to these features, Jewish law is compelled to recognise the residual authority of the two aforementioned complementary systems that enabled it to punish offenders outside the Torah—'the King's justice' and royal courts.[38] As our analysis will show, however, the historical record does not support the conclusions of the complementary systems theory. Jewish criminal law is not static; rather, it adapts to historical circumstances and social needs. Its inefficacies appeared later in its history and, like those in modern systems, resulted from partial and imperfect attempts to reconcile the conflicting purposes of punishment. The uniqueness of Jewish law lies in its incidence for millennia and within the constraints of other governing systems. Thus, to marginalise this ancient system rather than use it to develop laws in today's legal systems is to squander a valuable source of 'wisdom capital'.

A. The Purposes of Criminal Punishment

Modern legal literature on punitive theory emphasises four primary purposes of punishment: retribution, deterrence, prevention, and rehabilitation. These purposes are almost universally accepted.[39] Here we briefly review each.

The prevailing assumption is that retribution is a refined form of vengeance that aims to satisfy the victim's vindictive feelings while assigning punitive responsibility to an impartial authority, namely the state.[40] In vengeful thinking, the offender should suffer the same injury as did the victim, that is, 'an eye for an eye'.[41] The retributive approach to punishment, however, does not require

37. Theodore Spector, 'Some Fundamental Concepts of Hebrew Criminal Jurisprudence' (1924) 15 *Journal of Criminal Law and Criminology* 317, 320; Aaron Kirschenbaum, 'Meḳoma shel ha'anisha bamishpaṭ ha'ivri hapelili: Pereḳ bahashḳafa hafenologit shel hḥazal ṿeshel harishonim' (1987) 12 *Iyune mishpaṭ* 253, 253.

38. Arnold N. Enker, *Aspects of Interations between the Torah Law, the King's Law, and the Noahide Law in Jewish Criminal Law*, 12 Cardozo L. Rev. 1137, 1137–9 (1990); Irene Merker Rosenberg & Yale L. Rosenberg, *Guilt: Henry Friendly Meets the Maharal of Prague*, 90 Mich. L. REV. 604, 614–15 (1991).

39. Lindsay Farmer, *The Aims of Punishment and the Aims of the Criminal Law*, in The Aims of Punishment 1, 1–14 (2020); Richard S. Frase, *Punishment purposes*, 58 Stan. L. Rev. 67, 69–73 (2005); Kent Greenawalt, *Punishment*, in Encyclopedia of Crime and Justice 1282–94 (Joshua Dressler ed., 2nd ed. 2002); Gerard V. Bradley, *Retribution and the secondary aims of punishment*, 44 Am. J. Juris. 105, 122–3 (1999).

40. Richard A. Posner, *Retribution and Related Concepts of Punishment*, 9 J. Leg. Stud. 71, 72, 76 (1980); Erez D. Bazak, Haanisha Haplilit: Derakheiha Veekronoteiha [Criminal Punishment: Its Methods and Principles] 112–5 (1998).

41. 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] (1984); Manfred Oming, *Mida Keneged Mida' KeIkaron Mishpati Bahok Hamikrai: Lashon, Heksher Vetoldot Hamassoret* [Measure for Measure as a Legal Precept in Biblical Law: Language, Context and History of Tradition] 2 Beit Mikrah 183, 191–3 (2015); Jan Rothkamm, Talio Esto: Recherches Sur Les Origines De La Formule, Oeil Pour Dent, Dans Les Droits Du

a judicial response of crime and punishment.[42] The generally accepted rule is 'measure for measure', which, according to the eighteenth-century German philosopher Immanuel Kant, means the existence of an apt and commensurate correspondence between the severity of an offence and the punishment.[43] This penalty may not necessarily repair the damage done but it reinforces social laws and prevents victims and their families from seeking personal retribution.

Kant also posits the existence of an absolute moral imperative to punish an offender regardless of any benefit that society may gain from the punishment[44] because retributive punishment restores the moral balance that the offence has disrupted.[45] Kant goes so far as to claim that if only two persons are left in the world and one is a convicted murderer, it would remain the other survivor's moral obligation to kill him.[46]

The second purpose of punishment is deterrence, so that that 'all the people shall hear and fear'.[47] By this reasoning, punishment is given in order to dissuade the public from committing the offence (general deterrence) and to keep the apprehended offender from repeating it (specific deterrence). Unlike retribution, which addresses the past, deterrence offers a prospective benefit. The eighteenth-century English philosopher and jurist Jeremy Bentham saw deterrence as the only rational purpose of punishment and found punishment unnecessary if there was only a minimal risk of recurrence of the crime.[48]

Bentham's position raises several questions: To what extent does punishment deter? Do some punishments deter more effectively than do others? Are all people equally deterred by punishment? Although the conventional wisdom has

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Proche-Orient Ancien, Et Sur Son Devenir Dans Le Monde Grecoromain [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).

42. Abraham P. Bloch, A Book Of Jewish Ethical Concepts: Biblical And Postbiblical 201–2, 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. Pers. Soc. Psychol.284, 297 (2002); Hans Crombag, Eric Rassin & Robert Horselenberg, *On Vengeance*, 9 Psychology, Crime and Law 333, 335–6 (2003).

43. Immanuel Kant, Metaphysics of Morals 315 (1797); Immanuel Kant, The Philosophy Of Law 242 (1887).

44. Arthur Shuster, *Kant on the role of the retributive outlook in moral and political life*, 73 Rev. Politics 425, 431 (2011); Mark Tunick, *Is Kant a retributivist?*, 17 Hist. Political Thought 60 (1996).

45. Georg Wilhelm Fredrich Hegel, Elements of the Philosophy of Right 70–1, 127–9 (Cambridge University Press, [1821] 1991); James J. Stephen, General View Of The Criminal Law Of England (1890).

46. Immanuel Kant, The Metaphysics of Morals 86–7, 105, 123–4 (Cambridge University Press,1996); Matthew C. Altman, *Subjecting Ourselves to Capital Punishment: A Rejoinder to Kantian Retributivism*, 19 Public Aff. Q 274, 247–9 (2005); J. Angelo Corlett, *Making sense of retributivism*, 76 Philos. 77, 83–4, 94–5 (2001).

47. Deuteronomy 17:13, Bazak, *supra note* 40.

48. Jeremy Bentham, Principles of Penal Law 393 (White and Cadell 1771).

it that punishment deters, little is known about the type or severity of punishment that makes for the most effective deterrence in the vast majority of cases. Moreover, past theorists such as Kant and contemporaneous ones such as Michael S. Moore deem it inappropriate to punish one person to prevent others from breaking the law. Every individual, in their view, is an end in his or her own right and not a means for improving others' lives.[49]

The third purpose of punition is specific prevention. Incapacitating offenders, as in removing them from society, is said to have a broad reparative effect that corresponds to the Jewish moral concept of *tikkun 'olam*. In this sense, punishment seeks to keep an apprehended criminal from repeating the offence. Similarly, if an individual's hand is amputated for striking another person, that individual will find it challenging to repeat the offence. Today, offenders are removed from society through incarceration for a set period or in other ways such as electronic monitoring, house arrest, and probationary supervision. Such punitive measures, however, do not exist in biblical or rabbinic Jewish law. In biblical times, imprisonment was used only to hold offenders until legal proceedings could be carried out, as in the following:

> When the Israelites were in the wilderness, they found a man gathering sticks on the Sabbath day. Those who found him gathering sticks brought him to Moses, Aaron, and the whole congregation. They put him in custody because it was not clear what should be done to him. Then the Lord said to Moses, 'The man shall be put to death; all the congregation shall stone him outside the camp'. The whole congregation brought him outside the camp and stoned him to death, just as the Lord had commanded Moses.[50]

Thus, custody was not used as a legal form of punishment. The Bible does recount the incarceration of several individuals, such as Joseph after his master's wife falsely accused him of rape and Jeremiah by Zedekiah for prophesying Babylonian victory in the impending war. These imprisonments, however, were royal officials' responses to a subject's impudent behavior and not the outcome of legal proceedings.[51]

In any case, in both instances, one might argue that the government—Egyptian or even Jewish—did not feel bound by Jewish law. This ostensible difference in regard to the role of prevention, particularly the much more limited role assigned to imprisonment in Jewish law, may be invoked as grounds for differentiating between Jewish law and secular law.

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49. See Immanuel Kant, The Metaphysical Elements of Justice 331–33 (John Ladd tr, Bobbs Merrill 1965). For a relatively new theory inimical to deterrence, see Michael S. Moore, *Justifying Retributivism*, 27 Isr. Law Rev. 1, 34–5 (1993).

50. Numbers 15:32–36.

51. On Joseph's imprisonment, see Genesis 37:20. On Jeremiah's, see Jeremiah 37:21. Another possible explanation is that these stories depict custodial punishment as foils to Jewish law, which prohibits it.

As for the death penalty, obviously once offenders are executed, their criminality ceases. Thus, capital punishment has been conceptualised as the ultimate preventive measure since biblical times. The amputation of the hand of an individual who has struck another person has much the same anti-recidivist effect. Such a provision appears in the Torah: 'If men get into a fight with one another and the wife of one intervenes to rescue her husband from the grip of his opponent by reaching out and seizing his genitals, you shall cut off her hand; show no pity'.[52]

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 their behaviors and habits so that they can return to society as law-abiding members of the community.[53] To return to the example of capital punishment, the death penalty has no rehabilitative purpose, of course; its supporters presumably deem capital offenders beyond rehabilitation.

These four primary purposes of punishment—retribution, deterrence, prevention, and rehabilitation—often conflict.[54] If the purpose is rehabilitation, for example, it often entails a different punishment than one applied for a retributive or deterrent purpose. Say we have two first-time offenders who perpetrated the same offence, but one appears amenable to rehabilitation. This offender, if imprisoned, is likely to become a hardened criminal and commit more serious offences in the future. In contrast, the other offender seems beyond rehabilitation and therefore should receive the stiffest sentence that the law allows. Sentencing these equally culpable offenders differently, however, violates the principles of uniformity and proportionality that underpin retributive punishment. Scholars remain deeply divided about which purpose or purposes should be prioritised in sentencing criminals; the preference of one purpose over another shifts depending on the place, time, and circumstances.

In Jewish law, while the emphasis is often on interpersonal repentance for moral and spiritual reconciliation, the system also acknowledges lesser-known purposes such as 'appeasement' and 'restitution'. In appeasement, the victim

52. Deuteronomy 25:11–12.

53. Francis A. Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. Crim. Law Criminol. 226, 226–32 (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 (200); Shlomo G. Shoham Et. Al., Averot Veonashim: Mavo Lepenologia—Al Torat Haanisha Vehashikum, Meniat Pesha Veakifat 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 and Ta'anit 23b.

54. Kevin M. Carlsmith, John M. Darley, & Paul H. Robinson, *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. Pers. Soc. Psychol.284, 297 (2002); Igor Primoratz, *The Middle Way in the Philosophy of Punishment*, in Issues In Contemporary Legal Philosophy: The Influence Of H. L. Hart 217–8, 320 (R. Gavison, ed.,1987).

must offer judicial forgiveness; in restitution, the offender owes financial compensation for harm done. These formal mechanisms aim for societal redress and stand in contrast to the more subjective nature of interpersonal repentance. Legal scholars like Andrew Ashworth and Thaddeus Metz have explored similar complexities in secular law, highlighting the challenges that arise in balancing punishment with reconciliation—issues that resonate with the inherent limitations of the Jewish legal framework.[55]

In distinguishing between Jewish criminal law and secular criminal law, some scholars find several central concepts of Jewish punishment inapplicable to secular law. Perhaps the most salient of them for our discussion is atonement, a somewhat nebulous aim that purports to expiate the misdeed such that it never happened, as it were. The idea is that punishment cleanses the offender of a sin or transgression that has 'undermine[d] the unity of the individual personality with the cosmos in its entirety'.[56] The emphasis is on repairing the moral and spiritual integrity of the individual offender rather than on rectifying the harm done to society.[57] Thus, it is the offender, rather than society, who must perform the reparative act in response to the damage she or he has caused.

Further, in Judaism, offenders' rehabilitation is closely connected with both atonement and the broader principle of *teshuva* [literally, 'return'], which includes repentance.[58] According to Maimonides, this process entails crying out to God, giving charitable donations, undertaking to refrain from recidivism, avoiding the scene of the transgression, and changing one's name. By renaming themselves, offenders carry out a symbolic change of identity and, as it were, cease to be the same person.[59] Another important aspect of repentance, Maimonides finds, is exile, which facilitates atonement by helping one to become submissive, humble, and meek. While *teshuva* can also take place between

55. On restitution, see Andrew Ashworth, *Punishment and Compensation: Victims, Offenders*, *and the State*, 6 Oxf. J. Leg. Stud. 86, 86–122 (1986). On restorative justice, see Thaddeus Metz, *Why Reconciliation Requires Punishment, but not Forgiveness*, in Conflict And Resolution: The Ethics Of Forgiveness, Revenge, And Punishment 265, 265–281 (Krisanna Scheiter and Paula Satne, eds., 2021); Bill Wringe, *Punishment, Forgiveness, and Reconciliation*, 44 Philosophia 1099, 1099–1124 (2016).

56. Abraham Isaac Kook, Orot Hateshuva 8:3 (Jerusalem 1925).

57. Albeck, *supra note* 7, at 9–11, 14, 18, 26, 106, 114, 121, 123–28, 140, 165, 175.

58. Elliot N. Dorff, Love Your Neighbor and Yourself: A Jewish Approach to Modern Personal Ethics 207–31 (Philadelphia: Jewish Publication Society, 2003); Samuel J. Levine, *Teshuva: A Look at Repentance, Forgiveness, and Atonement in Jewish Law and Philosophy and American Legal Thought*, 27 Fordham Urb. L.J. 1677 (2000); Elliot N. Dorff, To Do the Right and the Good: A Jewish Approach to Modern Social Ethics 184–212 (Philadelphia: Jewish Publication Society, 2002); Abraham R. Besdin, Reflections of the Rav: Lessons In Jewish Thought 45 (Ahva Co-op Press 1979); Aryeh Kaplan, *Teshuva: A Look at Repentance, Forgiveness, and Atonement in Jewish Law and Philosophy and American Legal Thought*, in 2 The Handbook Of Jewish Thought, 205, 205–221 (Abraham Sutton ed., 1992).

59. Maimonides, *Mishne Tora: Sefer HaMada*, 'Laws of Repentance' 2:4 (Eliyahu Touger tr, Moznaim 1987).

two people, the same correction after having sinned against God is, of course, a central category of repentance.

This emphasis on atoning for misdeeds, of Pentateuchal origin and also found in rabbinical teachings, led scholars such as Enker and Shalom Albeck to find Jewish criminal jurisprudence and modern punishment irreconcilable.[60] 'Atonement', Albeck notes, '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'.[61] Ostensibly, criminal jurisprudence distances itself from such aims. Further, one might argue that Jewish criminal law is qualitatively different from secular law because secular law places the power to implement punishment strictly in the hands of humans, whereas Jewish law, as a divine, theistic system, accommodates punishments implemented by God as well as those applied by flesh-and-blood judges.[62]

Considering these questions, most scholars assume that Jewish law cannot be considered a legitimate template for a response to these challenges by contemporary legal scholars and systems. According to this prevalent position, Jewish criminal law is quintessentially different from modern criminal law in that modern law focuses on crimes against persons and maintaining the social order while the latter concentrates on crimes against God and man and safeguards individuals' relationships with both. What is more, Jewish law is unique in that punishment is meted out by both God and people, unlike secular legal systems, which leave God out. The reliance of Jewish law on Torah commandments and traditions supposedly initiated by Moses and handed down through the generations in interpreting and applying the law, some also claim, deprives the system of enough flexibility to adapt to changing social needs and, as noted, to convict the guilty. Taken together, these features forced Jewish law to recognise the residual authority of two complementary systems—the King's justice and royal courts—to punish offenders outside the Torah.[63] Yet in truth, we will presently argue that scholars' reliance on R. Nissim's complementary systems theory is overdone; on closer scrutiny, the theory cannot be invoked to account for the apparent gaps in biblical or rabbinical law.

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60. Aharon N. Enker, *'Iḳarim Bamishpaṭ Hapelili Ha'ivri* 39, 41, 201–02, 263 (Bar Ilan UP 2007).

61. Albeck, *supra note* 7, at 9.

62. Aaron Kirschenbaum, Jewish pentology: the theory and development of criminal punishment among the Jews throughout the ages 14, 78 (Hebrew University 2013); Psalms 37:10, 73, 92:7–10.

63. 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, 1139 (1991); Irene Merker Rosenberg & Yale L. Rosenberg, *Guilt: Henry Friendly Meets the MaHaRal of Prague*, 90 Mich. L. Rev. 604, 614–15 (1991)

III. Refuting the Jewish Complementary Systems Theory

Contemporary scholarship's reliance on Ran to explain the inability of Jewish law to address criminality is problematic for multiple reasons. No biblical sources support Ran's theory of separate royal law that coexists with Torah law. His theory, formulated roughly 1,200 years after the destruction of the Temple, also clashes with available historical evidence. The first-century CE Roman Jewish historian Flavius Josephus provides numerous examples of Jewish law being used to adjudicate capital cases. Thus, despite our limited knowledge of the historical legal system operating in Josephus' era, that of the early Sages, we can safely conclude that classical Jewish law was not a purely theoretical tool, as Ran and some contemporary scholars claim. It is more likely that *dina de'malkhutha dina*—the rule that set aside the broad incidence of Jewish law by mandating Jews' compliance with the laws of their countries of residence—developed in the absence of an institutionalised Jewish legal system during the Middle Ages.[64]

The argument that Jewish law was never a pragmatic legal system, in turn, mirrors that expressed by scholars who study known codices from the Ancient Near East such as those of Ur Nammu, Lipit Ishtar, and Hammurabi. Meir Malul, for example, writes of these ancient documents: '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 aggrandise the name of the inscriber more than they convey any historical information'.[65] Similarly, Jacob Finkelstein and Martha Roth construe the codices as royal apologia and self-laudatory texts that glorify a given judge's justness.[66] To be clear, this does not mean that these Ancient Near Eastern parallels did not include many rules that helped ensure social stability. Instead, it is to say that many surviving legal records from Antiquity should not be misconstrued as comprehensive law codes in the modern style. It also likely means that legal systems were still evolving and had not yet attained the maturity and comprehensiveness that modern law codes have sought to achieve.

Elsewhere, Malul invokes the writings of the early twentieth-century German theologian Ludwig Köhler to contend that the foregoing argument applies to rabbinical law.[67] Köhler underscored the Talmudic distinction between

64. Beth Berkowitz, *Approaches to Foreign Law in Biblical Israel and Classical Judaism through the Medieval Period*, *in* Companion to Judaism and Law 128, 128–56 (Christine Hayes ed., 2017); *Warren Zev Harvey, Law in Medieval Judaism, in* Cambridge Companion to Judaism and Law 157, 157–186 (ed. Christine Hayes, 2017).

65. Meir Malul, Law Compendiums and Other Legal Collections 123–24 (2010).

66. Jacob J. Finkelstein, *Ammiṣaduqa'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,* in La codification des lois dans l'antiquite: Actes du Colloque de Strasbourg 9, 9–31 (E. Levy, ed., 2000); Callum M. Carmichael, The Origins of Biblical Law: The Decalogues and the Book of the Covenant 17–21 (Cornell UP 1992).

67. Meir Malul, *Society*, *Law, and Custom in the Land of Israel in Biblical Times and in*

normative legal statements and those intended for practical application. By integrating ethnographic and other contextual materials into the study of rabbinical law, Malul believes, it may be possible to uncover previously unrecognised legal practices within the halakha. One such example is the disrobing of suspected adulteresses before the masses, a procedure not explicitly recorded in the Bible.[68]

Drawing on Köhler's analysis, Malul argues that Jewish rabbinical texts offer valuable insights into the processes of law creation, evolution, and application by community leaders such as elders and judges. Essentially, he asserts, they serve as practical guides to understanding how the law functions in practice. Even though they may not comprehensively address every detail or nuance of the legal system, they provide a comprehensive overview of positive law, which represents a pragmatic approximation of the ideal legal framework that shapes the system but may not delve into its exhaustive specifics.[69]

The argument that applied Jewish law does not always conform to the letter of the recorded law is further buttressed by the acceptance of the rabbinical view that voided the laws of the suspected adulteress,[70] the decapitated heifer (in the case of a corpse found between two cities),[71] and the rebellious son.[72] Undoubtedly, the Sages introduced other changes as well. Jewish law was not static; instead, like other legal systems, it evolved. Therefore, there is no need to introduce the complementary systems theory as a solution because Jewish law, both the biblical (based on its parallels to other Ancient Near Eastern legal texts) and the rabbinical (per Malul's application of Köhler), evolved continually in order to apply its basic principles to new cases that arose. It was never intended to be a fully developed system.

The claim that 'the King's justice' provides the basis for an efficient criminal-justice system is also questionable. The Bible presents several objections to the institution of monarchy as such.[73] In Yotam's parable, for example, the prophets paint a dark portrait of monarchy.[74] Similarly, when the nation asks Samuel to anoint a king, Samuel is displeased and warns the nation of the entitlements that a king will claim over them. God also frowns on the nation's request,

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the Ancient Near Eastern Cultures (Bar Ilan UP 2006), 10, 34–36, 71–72, and 103–104; Meir Malul, *Knowledge, Control and Sex: Studies in Biblical Thought, Culture and Worldview* (Tel Aviv 2002), 62–66 and 436–41.

68. Ludwig Köhler, *Archäologisches*, 34 Zeitschrift *für die altestamentliche Wissenschaft* 146, 149 (1916); Ludwig Köhler, 'Die Adoptionsform von Rt 4 16 29 *Zeitschrift für die altestamentliche Wissenschaft* 312–14 (1909).

69. Malul, *Law Compendiums, supra note* 65, at 123–24.

70. Numbers 5:11–31; Mishna *Sotah* 9:15.

71. Deuteronomy 21:1–9 and Mishna *Sotah*., 9:9.

72. Deuteronomy 21:18–21 and Talmud, *Sanhedrin* 71a.

73. Abraham N. Tennenbaum, '*Ye'amarta 'Aśima Alay Melekh Kekhol Hagoyim 'Asher Sevivotay': Hayesh Mishṭar Medini Haratsuy 'al Pi Hahalakha*?' 17 Gilyonot parashat hashavua' 1, 1–2 (2004)

74. See, for example, the parable of Yoram in Judges 9:7–15.

seeing it as a rejection of His rule: 'And the Lord said to Samuel, '"Listen to the voice of the people in all that they say to you; for they have not rejected you, but they have rejected me from being king over them"'[75] Given that the Bible regularly critiques monarchy as a less-than-ideal institution—and given the rampant corruption of so many biblical kings—it does not stand to reason that the ideal biblical conception of law includes authorizing the monarch to execute justice.[76] Of course, there were no Jewish monarchs during the late biblical and rabbinic periods, so then, too, one cannot contend that the monarch was supposed to step in and help restore order by donning the judges' robes.

Similarly, alleging the existence of alternative Jewish courts—the other instance cited by complementary legal systems theorists—is dubious for multiple reasons. First, this claim is based on a single statement by Rabbi Eliezer ben Yaakov, the first-century CE *tanna* (Mishnaic sage): 'I heard that there are courts that administer punishments and beatings without regard to Torah, and they do not do this to violate the words of the Torah—but to establish boundaries for the Torah . . . and not because it is appropriate to do so, but because it was necessary at that time'.[77] Had the courts been given responsibility for developing and not only implementing criminal law, other sources would have noted this development, and the one source that we do have would not have related to it as mere hearsay ('I heard . . . '). Second, Rabbi Eliezer's choice of words—'necessary at that time'—suggests that these courts' punitive authority was temporary. Maimonides clearly indicates that he understands the passage this way: 'Once the court sees that people have violated the rules, they have the power to reinforce

75. I Samuel 8: 7–8.

76. Later scholars concur with the assessment that the Bible forwards a critical view of monarchy. The fifteenth century Spanish Jewish statesman and biblical scholar Rabbi Yitzchak Abarbanel concluded that from a historical perspective, monarchy was an unmitigated disaster and should not be considered even as an emergency measure. See Avraham Melamed, '*Abravan'el: Shelilat Hamelukha*' in *Aḥotan Haḳṭana shel Haḥokhmot: Hamaḥshava Hamedinit Hayehudit Bime Habenayim* (Open University of Israel 2011) 250, 268; Levi Smoller and Moshe Averbach, '*Hamelukha Behashḳafat 'Olamo shel Abravan'el*' in Menahem Zohori (ed.) *Hagut 'Ivrit Be'Ameriḳa*, vol 2 (Tel Aviv Yafo 1973) 155–56. In his commentary on Deuteronomy 17:14–20, the sixteenth century Italian biblical scholar and philosopher Rabbi Ovadia ben Jacob Sforno similarly noted that the Torah recognized the difficulty of counteracting the human desire to be ruled by a king, and thus permitted it.
Maimonides note with emphasis that efforts were made to curtail the king's extensive authority to administer punishment. From the medieval period and on, many scholars supported Maimonides's position. See Aaron Kirschenbaum, '*Ma'arakhot Shipuṭiyot Maḳbilot Bamishpaṭ Ha'ivri* (*Seder Hadin Hapelili Hama'aśi Be'ene Hakhme Yeme Habenayim Bikhlal Uve'ene Harambam Bifraṭ*)' (1998) 10 (4) *Jewish Political Studies Review* 1, 3; Benjamin Rabinowitz Teomim, '*Mishpeṭe Nefashot Bedin Hasanhedrin Uvedin Hamalkhut*'(1952) 4 *Hatora Vehamedina* 64, 65–66; Isaac Herzog, '*Sidrei Shilton Vemishpat Bamedina Hayeudit*' in Itamar Wahrhaftig (ed), *Teḥuḳa Leyiśra'el 'al Pi Hatora*, vol 1 (Mossad Harav Kook 1989) 279 and 282.

77. Babylonian Talmud, *Sanhedrin* 37a.

and restore order as they see fit, all as a limited time bound provision, which is not intended to become a law for future generations'.[78] Finally, no mention of the courts' broad latitude appears before circa the second century CE.[79]

Further, complementary systems theorists are undoubtedly correct in noting that many modern criminal offences cannot be prosecuted under Jewish law. This limitation, however, recurs in earlier versions of contemporary legal systems. In England until the Norman invasion in the eleventh century, for example, murder was not a criminal offence but a private matter.[80] Similarly, in the Ottoman Empire, murder and assault fell under private law. The heirs of a murdered individual could choose between 'blood revenge' and 'blood ransom'. If they chose the former, they forfeited the right to financial compensation.[81] The criminal penalties we associate today with murder have not always existed; their appearance in codes of law is the product of the historical development of law in different times and places. Jewish law likewise developed and evolved. The Sages voided the Sotah laws that required suspected adulteresses to undergo a priestly ritual to determine their guilt.[82] The early Sages must have revised Pentateuchal law in other ways as well.

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78. Yitzchak Warhaftig, *Kokho Hakhoreg Shel Beit Din Leumat Kokho Shel Melekh* [The Exceptional Power of the Court as Compared with the Power of the King]10 Jewish Political Stud. Rev. 41–55 (1998); Frieshtick, *supra* note Error! Bookmark not defined.; Enker 2007, *supra* note 11, at 37–41, 210–14; Aharon Kirschenbaum, *"Anisha Plilit 'shelo min haTorah": Maamar Talmudi asher Itsev shita mishpatit* [Criminal Punishment "Outside the Rule of Torah": A Talmudic Saying that Shaped a Legal Method] 13 Alei Mishpat 261, 275, 283 (2016).

79. 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 Sanhedrin 5: 1. Maimonides made this into a halacha, stating that God "commanded us to nominate judges." See *Seffer Hamitsvot*, 176. the history of the courts, see Shalom Albek, Batei Hadin Beyemei Hatalmud [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 (Chaim Herzog ed., 2003).

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 Maimonides, *Book of Commandments*, vol 2 (Berei Bell tr, *Sichos in English* 2006) 176. For q history of the courts, see Shalom Albeck, Bate Hadin Be'yemey Hatalmud (Bar Ilan UP 1980) 88; Isaac Herzog, *The Administration of Justice in Ancient Israel*, in Judaism: Law and Ethics (Chaim Herzog ed., 1974); Isaac Herzog, '*Ma'arekhet Hamishpaṭ Beyiśra'el Ha'atiḳa*', *in* Yahadut, Hoḳ Umusar: Ma'amarim 15, 35 (Chaim Herzog ed., 2003).

80. Bertha Surtees Phillpotts, Kindred and Clan in the Middle Ages and After: A Study in the Sociology of the Teutonic Races 124–25 (CUP Archive, 1913).

81. Leah Makovetsky-Bornstein, *"Kofer dam" ve "geulat dam" bamishpat haplili shel haimperia a'ottomanit bamehot ha-16 ve 17 ve bituyam 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, 85 (Moshe Halamish, ed.,1990); Boecker, *supra note* 41, at 28–29, 131, 140, 152.

82. Mishna *Sotah* 9:15; Talmud, *Sanhedrin* 71a.

Therefore, the development of rabbinic law does not differ qualitatively from that of other legal systems. The problems identified by complementary systems theorists are not unique to Jewish law due to the religious nature of Jewish law; they are simply organic to the historical development of any long-standing legal system. That is not to say that this process unfolds in the same way in every legal system or that there is a predetermined endpoint. It does mean, however, that the inconsistencies and contradictions of Jewish law are products of historical developments that any legal system faces as it becomes more comprehensive and confronts changing circumstances.

IV. The Variety of Punishments in Jewish law

A. Purposes of Punishment in the Hebrew Bible

The Hebrew Bible, centering on the Torah (the Written Law), offers no comprehensive theory of punishment or of its goals. As noted above, scholars contend that the approach to punishment differs qualitatively in Jewish law from that of secular law. In fact, however, it bears many similarities. Like secular law, in which scholars often need to work hard to retrospectively uncover the reasoning for various punishments, Jewish law presents no explicit comprehensive theory of the purpose(s) of punishment. What is more, while Jewish law includes many penalties, only on occasion does the text explain their reasons. Given that a full analysis of all phases of Jewish law exceeds the scope of this article, it suffices here to visit the biblical, Talmudic, and Amoraic eras, three essential phases in the development of Jewish law, to illustrate our point. We will then mobilise Maimonides as a foil that serves as an exception that proves the larger rule.

It should be acknowledged at the outset that, as noted, the Torah rarely explains the reason for any particular punishment; mostly, it seems to deem this information either extraneous or self-evident. Further, a large majority of biblical texts may have no bearing on legal discussions because they are narrative; this further limits the range of texts that bear on our topic. Accordingly, we can draw on only a limited set of prooftexts to analyze the purpose of punishment in the Bible. Even so, an analysis of relevant verses demonstrates that the Bible covers all four major purposes of punishment as well as the lesser-known purposes advanced by contemporary theorists—further supporting our contention that Jewish law is fundamentally analogous to secular law.

A biblical justification for retributive justice may appear in Genesis 9:6—'Whoever sheds the blood of a human, by a human shall that person's blood will be shed, for He created man in the image of God'. The literary parallelism of crime and punishment and the logic of *imagio dei* may suggest a retributive motif.[83]

83. Admittedly, the verse leaves open the question of whether this punishment is to be enforced by God or humanity. Indeed, the Talmud (*Sanhedrin* 58b) explains that this verse

Even more explicit is the well-known phrase 'an eye for an eye'; it appears in multiple places in the Bible,[84] always in the context of a violent transgression. The first occurrence is in Exodus 21:23–25: 'If any harm follows, then you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe'. Leviticus 24:19–20 also justifies retribution explicitly: 'Anyone who maims another shall suffer the same injury in return; fracture for fracture, eye for eye, tooth for tooth; the injury inflicted is the injury to be suffered'. True, the rabbis understood this Pentateuchal mandate as entailing a system of commensurate monetary compensation.[85] Whether we believe the verses are intended to be taken literally or metaphorically, the point remains the same for our purposes: the Written Law recognises a form of retributive punishment that requires proportionality of punishment and crime.[86] The principle of retribution may also find post-Pentateuchal expression in regard to the commensurability of the crime to the punishment when the Prophet Ezekiel declares, 'O house of Israel, I will judge all of you according to your ways'.[87]

Deterrence as a purpose of punishment also appears in the Torah in the phrase, 'The entire nation will see and hear, and will not sin further'. Deterrent language is invoked in Deuteronomy 13:11–12 in a warning against idolatry, in Deuteronomy 17:13 as an admonition against acting presumptuously, in Deuteronomy 19:20 as counsel against bearing false witness, and in Deuteronomy 21:21 in reproaching the stubborn and rebellious son. Prima facie, the penalties prescribed in each case are intended to deter.[88]

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denotes divine punishment. That said, as we argue below, divine and human punishments should not necessarily seen as radically different sorts of punishments through the prism of Jewish law.

84. Genesis 4:10–11; Deuteronomy 19:21; Exodus 21:23–25; Leviticus 24:19–20; Numbers 35:33–34.

85. Mishna *Bava Kamma* 8:1.

86. Maimonides notes this point in his reading of the biblical text. See Guide of the Perplexed, 3:41 (M. Friedlander trans., 2nd ed, Routledge 1904).

87. Ezekiel 33:20.

88. The writings of the Sages and subsequent authorities echo the biblical rationale for punishment as a form of deterrence. Maimonides, for example, rules that a rebellious elder should be executed neither in his city nor at the end of his trial, but rather taken to Jerusalem, where he should be executed before the masses at the next pilgrimage festival. A highly public execution, he declares, would spark such fear among the masses that no one would repeat the offence. See Maimonides, 'Laws of the Rebellious Ones' 7:6, 'Laws of the Courts' 8:5. The fourteenth century Jewish philosopher Rabbi Hasdai Crescas concurs, stating that God does not punish vengefully but rather to deter a person from sinning. See Hasdai ben Abraham Crescas, Or Hashem 214 (Shlomo Fischer ed, rev edn Ramot 1989–1990).

Similarly, in discussing the sin of Akhan, who unlawfully pilfered enemy spoils (Joshua 7), the eleventh century French scholar Rashi references deterrence. According to Rashi, when his sin was discovered, Akhan and the entire Jewish nation were punished so that all would 'see his depravity and take care themselves not to further pillage the consecrated loot'. See Rashi's commentary on *Sanhedrin* 44a, William Davidson Talmud: 9.

Although usually described as 'repentance,' rehabilitation also appears in the Bible—foremost in Proverbs—as a purpose of punishment. Three examples follow:

> He who spares the rod hates his son, But he who loves him disciplines him early. (13:24)
>
> When a scoffer is punished, the simple man is edified; When a wise man is taught, he gains insight. (21:11)
>
> Do not withhold discipline from a child; If you beat him with a rod he will not die. (23:13)

While many of the admonitions in Proverbs are addressed directly and specifically to parents, others, such as that in v. 21:11, are aimed at society in general. Since a court of law is the extended arm of a society, it is fair to infer that Proverbs would similarly encourage punishment for the sake of rehabilitation or education.

Other lesser-known purposes of punition, such as atonement, appeasement, and restitution, also appear in the Bible.[89] A series of punishments is understood by biblical scholars to be aimed at purifying the sinner or the Land of Canaan from the lingering effects of sin, making it a form of atonement. Deuteronomy 19:13 is a case in point: 'You shall purge the guilt of innocent blood from Israel, so that it may go well with you'. Mary Douglas[90] notes that the literary centerpiece of Leviticus is the service of the High Priest on Yom Kippur, who atones for sins committed in the sanctum by applying blood in the Holy of Holies and elsewhere in the Temple.[91] Numbers 35:33–34 cautions against polluting the land with bloodshed and establishes that atonement 'can be made only through the blood of the offender who caused the harm'. Deuteronomy states, 'You shall purge the evil from your midst' in relation to a host of transgressions—incitement, idolatry, rebelliousness, incest, adultery, and kidnapping—for which the punishment is death.[92] Similar phrasing is utilised to describe the appropriate punishment for murderers, framing capital punishment as the ultimate preventive measure.

The biblical account addresses itself to reconciliation and/or appeasement in several non-criminal contexts. In Genesis 32:20, the clause 'I will appease him' encapsulates Jacob's earnest effort to reconcile with his estranged brother, Esau, following a history of familial discord and deceit. Jacob, who previously acquired Esau's birthright and deceived their father, Isaac, extends an olive branch to pacify Esau's lingering resentment by dispatching a series of gifts. This act of

89. Hanina Ben Menahem, 'Accepting Restitution from a Robber' in Hanina Ben Menahem & Neil S. Hecht (eds), Selected Topics in Jewish Law, vol 3 25–26 (Boston University School of Law 1993).

90. Mary Douglas, Leviticus as Literature 141–151 (Oxford University Press, 1999).

91. Leviticus 16:16–19.

92. See Deuteronomy 13:6 (incitement), 13:12 (incitement), 17:7 (idolatry), 17:12 (rebellious elder), 21:21 (rebellious son), 22:21–24 (incest and adultery), and 24:7 (kidnapping).

appeasement reflects Jacob's sincere aspiration to mend their fractured relationship and redress past wrongs.[93] Notably, the Bible presents additional instances of appeasement as a potent means of averting conflict and fostering reconciliation. In Samuel, Abigail approaches David with offerings to appease his anger and prevent bloodshed between him and her husband, Nabal.[94] Similarly, David's harp-playing serves as a soothing form of appeasement for the troubled spirit of King Saul.[95] These examples underscore the biblical theme of using gestures, gifts, and acts of contrition to bridge divides and seek forgiveness, highlighting the role of appeasement in reconciliation and forgiveness in the biblical narrative.

Compulsory restitution is attested in Pentateuchal tort law. It is a central theme in Exodus 21–23, which emphasises the obligation of a person who harms his friend to correct the harm in this manner. One who injures another who recovers must pay for the victim's idleness and medical expenses. One who causes a miscarriage must pay for the loss of the fetus. If someone digs a pit and an animal falls in and is injured, the excavator must pay damages. There are similar requirements for theft or negligence in minding an object placed in deposit.[96]

As for the concept of atonement, it is note above that some scholars differentiate Jewish law from secular law due to its emphasis on this nebulous response to miscreance. Several leading scholars, however, have in fact argued for a secular analogue to the notion of atonement and the related category of forgiveness. Some contemporaneous philosophers, including Jeffrie Murphy, Martha Nussbaum, and Stephen Garvey, argue that atonement also applies in a secular context; by so stating, they bridge the gap between punishment and reconciliation. When a perpetrator expresses remorse and asks the victim for forgiveness, the severity of the offence and the retributive punishment that it brings in train are mitigated. For Nussbaum, atonement also fulfills the victim's need to secure an expression of regret from the perpetrator. She criticises retributive punishment systems for prioritizing victims' anger at the expense of their need to reconcile.

In sum, the Hebrew Bible addresses itself to all known purposes of punishment and at times, as in modern jurisprudence, one penalty satisfies multiple purposes and other times only one. Again like today, no single purpose enjoys clear preference.

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93. Genesis 32:13–21.

94. 1 Samuel 25:18–35.

95. 1 Samuel 16:23.

96. At least in one non legal context (Genesis 20:7–18), we also find the notion of appeasement in the story of Abraham and the king Avimelekh, in which Avimelekh is not forgiven by God for having kidnapped Sarah until he asks Abraham to pray on his behalf. The implication seems to be that Avimelekh must appease Abraham before God is willing to forgive him.

B. Purposes of Punishment in Tannaitic Literature

Here we analyse various ways in which the Tannaitic literature, spanning roughly the first through the third century CE, addresses the purposes of punishment. Like the Hebrew Bible, this literature discusses punishments at length but rarely addresses their underlying purpose explicitly. Thus, once again, our discussion is limited to a relatively small number of prooftexts.

In Jewish law, the concept of the city of refuge serves as a critical mechanism for balancing vengeance and retribution. The Mishna outlines stringent conditions under which a blood avenger may pursue and kill a perpetrator of negligent homicide, effectively shifting the focus from unchecked vengeance to judicially regulated retribution. Negligent killers have the option to flee to a city of refuge, where they are protected but must also comply with specific residency requirements. This framework both limits the actions of blood avengers and places a greater emphasis on the intent behind the act, thereby prioritizing calculated retribution over blind vengeance. The overarching aim of these guidelines is to prevent unchecked revenge and ensure that punishment is meted out in a manner that is both just and proportionate.[97]

The Tannaim endorse deterrence similarly. In a *beraita* (a Tannaitic teaching external to the Mishna), it is stipulated that 'four [offenders] require an announcement [of their punishment by the court]: the inciter [to idolatry], the rebellious son, the rebellious elder, and false witnesses'.[98] These are the same four regarding whom the Torah emphasises the goal of deterrence. In an apparent reinforcement of this explanation, the Tannaim similarly require a public announcement in order to ensure that the goal of public deterrence is realised.

The Tannaim also address the benefits of prevention. Notwithstanding their aforementioned emphasis on deterrence in regard to the stubborn and rebellious son, they also utilise the story of this wayward juvenile to address prevention, explaining that 'the rebellious son is killed based on his end [eventual activities]; let him die innocent and not guilty'.[99] The Talmud elaborates, citing the view of the Tanna R. Yose Hagelili that the son's punishment is intended to prevent

97. On retribution as a goal of punishment, the Talmud, elaborating on the Mishna, cites Rabbi Yitzhak's dictum: 'A man is judged only according to his deeds at the time, as it is stated [with regard to Ishmael]: "For God has heard the voice of the lad where he is" (Genesis 21:17) (Talmud, *Rosh Hashanah* 16b). Put differently, it is the offender's crime, not some future objective or extraneous motive, that determines the verdict. Consequently, the Talmud teaches that punishment must be commensurate with the offence: 'All of God's qualities are measure for measure' and 'as he measures, so shall he be measured' (Talmud, *Sanhedrin* 90a).

98. Talmud, *Sanhedrin* 89a. The deterrent ability of a punishment also depends on the criminal's past. The Talmud explains that someone who transgresses multiple times becomes 'rooted' in sin and begins to view the transgression as permissible: 'Ula agreed with Rav Hunah who said: Once a person sins and repeats his transgression—it is as if he has received permission' (Talmud, *Kiddushin* 40a).

99. Mishna *Sanhedrin* 8:5.

him from committing more severe offences: 'The Torah penetrated the ultimate mind-set of the stubborn and rebellious son that in the end he will squander his father's property, and, seeking [the pleasures] to which he had become accustomed but not finding [them], he will go out to the crossroads and rob people'.[100] This is an explicit case of prevention-oriented punishment.

The Sages re-emphasise prevention elsewhere. The Talmud quotes Rabbi Akiva, a Tanna who suffered greatly and who sought to mollify his teacher R. Eliezer, who had fallen ill. Rabbi Akiva taught in regard to the evil king Manasseh, who repented toward the end of his life:

> 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 [2 Chronicles 33:11–13]: '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)[101]

Although Rabbi Akiva is describing the effects of natural suffering, he clearly recognises the power of suffering to prevent people from committing future sins.[102] This too is consistent with the motif of prevention.

The Sages also performed a cost-benefit analysis to explain why the Torah imposes a harsher punishment on an ox rustler who slaughters or sells the stolen beast than on one who merely steals it, again citing Rabbi Akiva:

> Why did the Torah say that he who has slaughtered and sold [an ox] pays four and five [times the value of the animal as a punishment]? 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.[103]

The sale and slaughter of the ox attests to the criminal's audacity and his rootedness in crime, necessitating more severe punition than that required for an ordinary thief.[104] The risk of apprehension and punishment must outweigh the

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100. Talmud, *Sanhedrin* 72a.

101. Talmud, *Sanhendrin* 101b and *Megillah* 12b.

102. Later scholars, including Rabbi Hasdai Crescas and the sixteenth century philosopher and mystic Rabbi Judah Loew, similarly underscore that punishment should frighten sentenced criminal in order to deter them from future offences. See Aharon F. Kleinberger, *Hamaḥshava Hapedagogit shel Hamaharal Miprag* 190 (Raphael Ḥayyim Hacohen 1962); Mordechai Frishtik, *Anisha Veshiḳum Bayahadut: Hashva'at 'Eḳronot 'im Hamishpaṭ Vehaḳriminologya Mamoderniyim; Ḳayim Leyiśum* 89–92, 154–57 (Mekhon Sanhedrin 1986).

103. Babylonian Talmud, , *Bava Kamma* 68: 1. 68a.

104. Frishtik *supra note 102*, at 94.

benefits of the crime because criminals precede their offences with cost-benefit reckonings.[105] This too reflects concern for prevention.

As for rehabilitation, the Sages instituted many regulations to facilitate it—some in contravention of existing Jewish law. To make repentance easier, for example, they nullified the thief's legal and moral duty to return stolen property. The Talmud tells the story of a man who wishes to repent for stealing but is chastised by his wife on this account: 'Idiot, if you repent, even the belt that holds your pants up is not yours'! Realizing that his repentance would cost him everything; he does not repent. Hearing 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 whoever accepts their payment'.[106] Although Jewish law establishes a clear legal obligation to return stolen property, the Sages encouraged victims to waive repayment if such forbearance would facilitate rehabilitation.

This encouragement extends to cases in which the stolen item is no longer in its original form but has been transformed into something more valuable. For example, basing themselves on the principle in the aforementioned *beraita*, the rabbis issued an enactment that allows for 'repenter relief'. A penitent thief who uses the stolen object as part of a larger project, they reasoned, may be dissuaded from returning the object because this would cause him far more loss or inconvenience than its mere value. Thus, a thief who steals wool yarn and turns it into a piece of clothing must repay only the original value of the stolen item; he need not surrender the piece of clothing or repay the present value of the yarn. The purpose is to encourage repentance by reducing the loss that the offender would incur by repenting.

It is true that the application of 'repenter relief' was heatedly debated in the Mishnaic period between two major schools of Jewish thought—the House of Shamai and the House of Hillel. The House of Shamai demanded letter-of-the-law restitution: if a thief steals a beam and incorporates it into a building, he or she must destroy the building so that the original beam can be returned. In contrast, the House of Hillel argued in favor of applying 'repenter relief': leaving the building intact and having the thief compensate the victim for the price of the beam. The House of Hillel acknowledged the House of Shamai's stance but stood its ground in favor of 'repenter relief'.[107] Its stance became the accepted one within Jewish law.

Pursuant to that outcome, the Tannaitic Sages even extended rehabilitative punishment to recidivists[108] and made no distinction between them and first-

105. As the eleventh century thinker Bahya ben Joseph ibn Pakuda put it, 'If it is clear in [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' (*Ḥovot Halevavot* 7:3).

106. Talmud, *Bava Kamma* 94b.

107. Ibid. 10b.

108. Frishtik, *supra* note 102, at 14.

time offenders: 'All are accepted, for it is written [Jeramiah 3:22]: "Return, ye backsliding children"'.[109] Moreover, as the *tanna* R. Shimon bar Yohai teaches, 'Even a person who has been a complete villain throughout his life, and repented at last, no mention of his past should ever be made'.[110]

Generalizing, one gets the impression from the foregoing that the Tannaim—the Sages of the Mishnaic period—may have placed greater emphasis on deterrence, prevention, appeasement, and rehabilitation than does the Written Law, possibly softening the hard edges of retribution.

C. Purposes of Punishment in Amoraic Literature

In Tractate *Berakhot* of the Babylonian Talmud, tracing to the Amoraic period, rehabilitation is again identified as a goal of punishment. Here the Tanna Rabbi Meir prays for the death of his neighborhood bullies. His wife, Beruriah, shows him his error by emphasizing it is the sin, not the sinner, that should be eradicated. On these grounds, she successfully urges him to pray for the bullies' repentance rather than their death.[111]

As for atonement, the Talmud cites a *beraita* in support of the position that 'suffering cleanses all of a person's sins'.[112] The Talmudic text turns to the Mishna, which references Deuteronomy 25:3 to underscore how the goal of atonement imposes limits on the severity of punishment: If a person is found guilty of an offence for which the prescribed penalty is flogging, the judge is instructed to make the culprit lie down and be flogged in his presence with the number of lashes the crime deserves. However, 'Forty lashes may be given but not more; if more lashes than these are given, your neighbour will be degraded in your sight'. 'The beating,' the Mishna explains, 'should not be excessive because "he is your brother"'.[113]

As for atonement, the Amoraim list the conditions for its attainment, chief among them repentance: 'All those sentenced by the court must confess their sin so that their death shall constitute atonement for their sin'.[114] In crimes against persons, unlike crimes against God, appeasement and compensation for the victim are 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 [the transgressor] appeases his fellow man'.[115]

Thus, like the Written Law, the Oral Law recognises multiple purposes of punition and demonstrates no clear preference for any one of them. Instead, it issues a mosaic of views that, like those in present-day law, do not always coexist

109. Saul Lieberman, '*Demai*,' in *Tosefta Kifshuṭah*, vol 1 2:7 (2nd ed, Jewish Theological Seminary 1992).
110. Talmud, *Kiddushin* 40b.
111. Talmud, *Berakhot* 10a.
112. Talmud, *Berakhot* 5a.
113. Mishna *Makkot* 3:15.
114. Talmud, *Berakhot* 5a.
115. Mishna *Yoma* 8:9.

harmoniously. These various emphases necessitate careful balancing and do not lend themselves to straightforward resolutions.

Our overview of Tannaitic and Amoraic positions, apart from its content per se, yields a crucial verdict on a point of controversy noted above: the claim in scholarship that the presence of divine punishment sets Jewish law fundamentally apart from secular legal systems. Yet one who studies the Mishna and/or the Talmud immediately notices that the possibility of divine punishment, while certainly present, does not preclude the Sages from applying much the same reasoning in determining Jewish law as one might find in a secular law school course. Notably, divinely implemented punishments are far and away the exception rather than the rule in Jewish law. More important, the nature of the rabbinical legal discourse is essentially strongly reminiscent of general legal discussions today. Precedents must be brought and their relevance to the case at hand debated. Logic plays a key role and case law, natural law where relevant, and other determinants of justice are debated passionately. Local practice has its place, too. Thus, the divine source of punishment in Jewish law, both in its overarching sense and in the specific sense of occasional punishment directly by God, in no way radically mitigates the nature and the relevance of the halakhic discourse for general contemporary debates in law and justice.

D. A Post-Talmudic View: Maimonides's Approach to Punishment in The Guide to the Perplexed

Moses Maimonides (1138–1204) is one of the few halakhic thinkers who advanced a comprehensive system of punishment. In his *The Guide of the Perplexed*, Maimonides devotes an entire chapter to the topic. In brief, he contends:

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

1. The magnitude of the crime in terms of harm caused. Grievously harmful actions are punished severely and those that cause little harm less so.
2. The frequency of the crime. A crime committed repeatedly must be put down by severe punishment; crimes of rare occurrence may be suppressed by lenient punishment on grounds of their rarity.
3. The power of temptation. Only fear of severe punishment restrains against actions for which great temptation exists, either because we crave such actions passionately, or are accustomed to them, or feel unhappy without committing them.
4. The facility of committing the crime secretly, unseen and unnoticed. People are deterred from such acts only by fear of great and terrible punishment.[116]

By specifying these four considerations, Maimonides intends to deter crime in order to maintain social order. Using deterrence as a guiding principle,

116. Maimonides, *The Guide of the Perplexed*, *supra note* 86, at 3:41.

Maimonides explains why, according to the Torah, one who steals chattel pays a smaller fine than does one who rustles a lamb or an ox and subsequently slaughters or sells it. In the first case, the offender must pay twice the value of the stolen asset; in the latter, the fine for stealing is four times the value of a lamb and five times the value of an ox.[117] Maimonides's rationale stems from the difficulty of catching someone who steals herd animals, thereby making the crime more tempting:

> As a rule, sheep always remain in the fields and therefore cannot be minded as carefully as would objects kept in town. Thus, a sheep rustler generally sells the animal quickly before the theft becomes known or slaughters it and thereby changes its appearance. As such theft happens frequently, the punishment is severe. The compensation for a stolen ox is greater still by one fourth because the theft is easily carried out . . . . Oxen are very widely scattered when grazing, as is also mentioned in Nabatean agriculture, and a shepherd cannot watch them properly; thus, ox-rustling is more frequent [than shee]-rustling].[118]

Accordingly, the severity of punishment is commensurate with the ease of the crime, all of which for the purpose of deterring would-be offenders.

We quote Maimonides in this matter for two reasons. First, this is one of the few halakhic texts that articulates a comprehensive system of punishment. Second and more importantly, according to Maimonides, punishment has one primary purpose—deterrence. It should reduce the likelihood of future criminal activity by the offender and discourage criminality among others. To impose an appropriate punishment, several variables must be factored in, including the likelihood of recidivism and the temptation of the crime.

Maimonides recognises the merits of deterrence in other writings. In his halakhic code *Mishne Torah*, for example, in reference to perpetrators of manslaughter, he writes:

> The king has a right to kill them 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 to instill fear, and break the hands of the world's evil doers. Public punishment should instill fear and teach the public a lesson in morality and legality.[119]

Maimonides' approach, like that of modern systems, blends multiple rationales for punishment such as restitution, atonement, and retribution. In his system, however, these rationales are always subordinated to deterrence, which he unequivocally considers the primary purpose of punishment.[120] Maimonides's view, however, is exceptional. The stronger thrust of biblical and Tannatic law, as we have demonstrated, is that Jewish law shows no firm preference of any

117. Exodus 21:37, 23:3.

118. Maimonides, *The Guide of the Perplexed*, *supra note* 86, at 3:41.

119. Maimonides, 'Laws of Kings and Their Wars' 3:10; Maimonides, 'Laws of Murderers and the Protection of Life' 2:5.

120. Bazak, *supra note* 40.

reason for punishment. Maimonides, while internally consistent, is the exception rather than the rule.

V. Capital Punishment

Having shown that Jewish law can, in principle, have a bearing on contemporary debates over punishment in criminal law, we may now consider its relevance to the question of capital punishment. We first briefly consider the implications of the four major approaches toward the purpose of the death penalty; then we consider whether Jewish law has anything unique to contribute to the discussion.

In regard to retribution, some scholars support the death penalty as a retributive measure for murder.[121] Kant's stringent approach is presented above. Other thinkers, such as Bentham, deny the moral legitimacy of retribution for punishments generally and for the death penalty *a fortiori*.

The invocation of deterrence to justify the death penalty is similarly disputed. The criminological literature is rife with debates over the ability of capital punishment to deter. Some theorists claim that every execution prevents seven to ten murders; others deny the deterrent value of the death penalty altogether.[122] Whether capital punishment or any punishment acts as an effective deterrent remains a topic of intense debate.

By contrast, prevention and rehabilitation are much more straightforward. Once offenders are executed, their criminality is of course deterred forever. It is equally obvious that the death penalty does not serve the ends of rehabilitation. In such cases, we either find rehabilitation too unlikely to consider or conclude that some other consideration—retribution, deterrence, or prevention—must take precedence.

Where may Jewish law enter this conversation?

In regard to retribution, we have previously argued that the Written Law appears to endorse retribution as a sufficient cause for punishment, including

121. Immanuel Kant, The Metaphysics of Morals 86–87, 105 (first published 1797, CUP 1996), and 123–24; Matthew C. Altman, *Subjecting Ourselves to Capital Punishment: A Rejoinder to Kantian Retributivism*, 19 Public Affairs Quarterly 247, 247–49 (2005); J. Angelo Corlett, *Making Sense of Retributivism*, 76 Philosophy 77, 83–84, 94–95 (2001).

122. For a positive assessment of the deterrent effect of capital punishment, see, for example, Dane Archer and Rosemary Gartner, Violence and Crime in Cross National Perspective 118–19, 123–30, 132–33, 137–38 (Yale UP 1984); Calvert Stephen K. Layson, *Homicide and Deterrence: A Re-examination of the United States Time Series Evidence*, 52 Southern Econ. J. 68, 87–88 (1985); Joanna M. Shepherd, *Deterrence versus Brutalization: Capital Punishment's Differing Impacts among States*, 104 Michigan L. Rev. 203, 210–19 (2015). For the negative, see William J. Bowers & Glenn L. Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 Yale L.J. 187, 200–06 (1975); Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 Oxf. J. Leg. Stud. 173, 199–204 (2004).

death for murder. In this respect, like Kant, biblical law appears to support retribution as justified grounds for capital punishment.

Turning to deterrence, both the Written Law and the Oral Law support the idea that, at least in certain cases, implementing the death penalty is a legitimate way to force 'the entire nation [to] hear and listen'.

As for prevention, we noted that secular Western scholars debate the use of the death sentence for this purpose. Given that offenders who are executed will never indulge in crime again, capital punishment has been conceptualised as the ultimate preventive measure since biblical times. Similarly, if an individual's hand is cut off for striking another person, she or he will be hard-pressed to repeat the offence. Such a provision appears in the Torah: 'If men get into a fight with one another and the wife of one intervenes to rescue her husband from the grip of his opponent by reaching out and seizing his genitals, you shall cut off her hand; show no pity'.[123]

We also noted the case of the rebellious son, in which rabbinical law appears to support prevention as grounds for execution: 'all of his townsmen shall stone him to death' (Deuteronomy 21:21). Yet the accepted rabbinical view does away with this punishment in practice, as it does in several other cases. What is more, many leading Tannaitic scholars expressed skepticism about the lasting value of implementing the death penalty.

The authoritative biblical and Talmudic commentator Rashi (Rabbi Shlomo Yitzchaki, 1040–1105, France), however, appears to be skeptical of this conclusion. Commenting on the rescue of Abraham's son Ishmael, who is cast out by his father in accordance with God's command to Sarah in Genesis 21:

> 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?' [with which to quench Ishmael's third], to which He responds: 'What is he now? Righteous or evil?' '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 of the lad where he is"', in that condition in which he now is.[124]

According to Rashi, the ministering angels wish to deprive Ishmael of water because of the danger that his progeny will pose to the Jews. God, however, declares this purpose invalid, allowing only present behavior to determine punishment.

Conclusion

The significance of the ostensible inability of Jewish law to handle criminality has been widely debated. According to many scholars, the stringent evidentiary and procedural restrictions in Jewish law prevent conviction of the

123. Deuteronomy 25:11–12.

124. Genesis 21:17, Genesis Rabbah 53:14, and Rashi, commentary on Genesis 21:17.

guilty and entailed the establishment of two pragmatic complementary legal systems—'the King's justice' and 'courts that administer punishments and beatings without regard to Torah'. They further argue that religious aims such as atonement further demonstrate the uniqueness of Jewish law. Namely, while modern codes focus on crimes against persons, Jewish law centers on crimes against God. These characteristics, these scholars conclude, demonstrate the uniqueness of Jewish law and its inapplicability to contemporary punishment debates.

Our analysis shows that Jewish criminal law developed not as a theoretical exercise but as a practical instrument for punishing offenders and regulating social life. Like other legal systems, it underwent revisions in response to changing historical circumstances and social needs. The Mishnaic and Talmudic sages modified Jewish law to enhance the likelihood of repentance. Other changes came about due to the Jewish nation's loss of autonomy. Thus, the claim among proponents of the complementary systems theory that Jewish law could not adapt to changing circumstances does not reflect historical realities. Some of the aforementioned changes did mitigate the efficacy of Jewish criminal law. Yet one would be hard pressed to identify any legal system that failed to introduce modifications that later became obsolete, unwieldy, or rife with unintended consequences.

Finally, the argument that the goals of Jewish law are quintessentially different from those of modern law codes is not borne out by historical evidence. As our analysis shows, Jewish criminal law exhibits the same purposes of punishment as does modern law—retribution, deterrence, prevention, rehabilitation, atonement, restitution, and reconciliation—with no clear preference for any of them. Moreover, then as now, practitioners and theoreticians of Jewish law and of modern law recognise the conflicting nature of these purposes and endeavour to balance them in determining appropriate punishment. These efforts, then as now, sometimes led to heated debates among those who prioritise different aims. Thus, the idea that Jewish law requires a separate theoretical framework to explain its challenges and solutions is incorrect. If Jewish law is unique, it is only because it managed to function in so many contexts, at times within the constraints of other systems. Thus, to relegate this ancient system of law to the margins, instead of using it to develop laws in today's legal systems, would be an unfortunate waste of 'wisdom capital'.[125]

125. Natti Ronel & Yitzhak Ben Yair, *Spiritual Criminology: The Case of Jewish Criminology*, 62 Int. J. Offender Ther. Comp. Criminol. 2081, 2082 (2018) (2018); Sylvia Clute, Beyond Vengeance, Beyond Duality: A Call for a Compassionate Revolution 49 (Hampton Roads Publishing 2008); Donald R. Davis Jr., 'Before *Virtue: Halakhah, Dharmasastra, and What Law Can Create*, 71 Law & Contemp. Probs. 99, 106–109 (2008).