

**AN EXPLORATION OF THE *ARBAH MEITOT BEIT DIN*
THROUGHOUT THE BIBLE, THE SECOND TEMPLE,
TANNAITIC AND AMORAIC TIME PERIODS**

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The goal of this thesis was to explore the historical laws of capital punishment as they developed from the Bible through the Second Temple period, the Mishnah and Tosefta and the Talmud. I proposed an intensive study of both primary and secondary sources focusing on the development of the laws, the alterations to the original biblical injunctions and the motives behind those changes. I hoped the conclusions I reached would help modern Jews form educated and informed opinions about the application of capital punishment.

This thesis will contribute to the continuing debate surrounding the Jewish opinion of the death penalty. While supporters and critics of capital punishment often utilize historical Jewish texts to buttress their opinions, I believe this method is biased and inauthentic to the intent of the original authors of Jewish law. The conclusions herein point to a continued struggle to articulate both attitudes, though it is important to note the ultimate decision of all four time periods was to include capital punishment in their law codes.

The thesis is divided into six sections: an introduction, four chapters and a conclusion. The chapters are divided chronologically. The first chapter focuses on the original biblical laws as well as their significance when compared to The Code of Hammurabi and The Middle Assyrian Laws. The second chapter concentrates on the laws in The Apocrypha, Pseudepigrapha, The Dead Sea and sectarian scrolls, Philo and Josephus. The third chapter analyzes the texts found in the Tosefta and Mishnah. The fourth chapter explores the laws as they progressed in tractate Sanhedrin of the Babylonian Talmud. Each chapter utilizes secondary sources to help clarify the intent of the original documents.

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INTRODUCTION

Since its reinstatement by the Supreme Court in 1976, the death penalty has been a source of disagreement between liberals and conservatives, Republicans and Democrats, religious and secular citizens alike. While some inclinations are provided by religion and politics, people's attitudes concerning the death penalty are generally founded on their own sense of morality. In 2001 the issue came to the forefront of the political spectrum with the execution of Oklahoma City bomber Timothy McVeigh and remains on the radar screen as the debate surrounding theoretical punishment for Osama bin Laden and other international terrorists is disputed.

Where do modern Jews derive their position on the death penalty? Traditionally we are required to base our decisions on a range of factors. We are encouraged to look at the import of the issue in current times taking moral and ethical viewpoints into consideration, explore the opinions of other Jewish scholars, and examine the historical background of a given subject. In the case of capital punishment, our tradition provides a clear record of opinions.

In order to arrive at an informed decision regarding modern capital punishment practices, a full understanding of the origin and subsequent limitation of the practice according to Jewish law is required. While it may be unrealistic to allege knowledge of the intent of earlier Jewish communities concerning the death penalty, by examining both primary and secondary texts from the biblical, Second Temple, Tannaitic and Amoraic periods, it is indeed possible to gain insight into their opinions. Accurate statements about the historical application of the death penalty may also be posited.

In preparation for researching and writing this thesis, certain goals have been articulated. My objectives are as follows:

1. Catalog texts from the biblical, Second Temple, Tannaitic and Amoraic periods.
2. Trace the origins and development from its earliest mention in the Bible to the end of the Amoraic period.
3. Understand the philosophical underpinnings of the rabbinic views of capital punishment.
4. Make educated conjecture about the actual use of capital punishment during the Tannaitic and Amoraic time periods.

Some of these goals will serve to bring forward new information, some will clarify seemingly divergent opinions in tradition regarding the issue.

In addition, I hope to provide answers to some remaining questions. The primary texts of all four time periods seem to indicate a dispute as to the purpose of the death penalty. Some statements emphasize capital punishment's importance as punishment, while others question its ethical suitability. While all four sources discuss its viability, each also imposes limitations stemming from apparent discomfort with its usage. Whether based on ethical concerns or the practical ability to follow the strict standards required, the source of this discomfort will be addressed.

METHODOLOGY

Each text will be examined for its significance to the Jewish community. The sources will be considered both in terms of their application for the community for which it was written, as well as their relationship to the texts which came before. The biblical record offers opportunity for unique analysis as it originates the laws for the Jewish community.

As the Jewish people changed and matured, so did their texts, fulfilling a more interpretive purpose. This tendency will be evaluated as a major factor in the changing laws of capital punishment. The personal and communal biases which affected the laws and lawmakers will be addressed.

Secondary texts will shed light on the background of the authors of the primary texts and on their role as leaders. The secondary texts will contextualize the communities' role within the larger society. Details about surrounding communities and their normative practices will be explored. The Bible, Second Temple period literature, Mishnah and Talmud did not occupy the same position for each of its constituents. The secondary readings will help to clarify those roles and the role the Jewish laws fulfilled in their lives.

I will attempt to research the original intent of the laws as they were formed. I will not include the modifications and attitudes of later theologians and commentators. While the Jewish community does look to the religious interpretation of text to frame its behavior, this thesis will focus on the writers and lawmakers of the specific time periods mentioned.

The biblical chapter will focus on the purpose of setting up specific capital laws for the Israelite community. Attention will be paid to the capital crimes identified and why they were considered the most dangerous. In addition, the Bible will be compared to other legal documents employed by neighboring communities. Information about surrounding cultures may help to clarify some of the biblical practices and attitudes. As

Levine explains, "biblical literature, as a whole, tells us little about the operation of the criminal justice system in ancient Israel."¹

The Second Temple period chapter will focus on the many emerging communities in this tumultuous time. The leaders of these communities were among the first to modify and interpret biblical injunctions. Specific attention will be paid to the Apocrypha and Pseudepigrapha, The Dead Sea and sectarian scrolls, as well as Philo and Josephus. The factors encouraging these adaptations will be explored. The different tactics taken by the sectarian and Dead Sea community leaders will be researched using secondary sources to help explain the peculiarities of their lifestyle. Similarly, Philo and Josephus' motivations for changing biblical law will also be examined as they responded to a hellenized Jewish community.

The Tannaitic rabbis responded to a different need. Though perhaps unbeknownst to them, their compendium of laws would act as a continued standard for acceptable Jewish behavior. The secondary sources will clarify some of the motivations behind the Tannaitic modifications of biblical law. Additionally, some conclusions will be posited as to the rabbis' ethical opinion regarding capital punishment. Whether or not capital punishment was in fact practiced will also be addressed.

The last time period explored will be that of the Amoraic rabbis. Capital punishment is dealt with thoroughly in the Talmud specifically in tractate Sanhedrin. Practical application, rationale, ethical considerations and theological implications are interspersed throughout the gemara. While it may be difficult to come to absolute

¹ Baruch A Levine, "Capital Punishment." *What the Bible Really Says*. Eds. Morton Smith and R. Joseph Hoffmann. (Buffalo: Prometheus Books, 1989), 21.

conclusions regarding the rabbis' opinions, detailed analysis of the gemara should help clarify their positions. The amount of material in tractate Sanhedrin is more than can be appropriately dealt with in this thesis, therefore only some gemara will be examined. Those sections chosen will show the methods employed, the modifications made and the rationalizations provided for those modifications.

I do not intend to answer every question surrounding the practice of capital punishment in historical Judaism. By exploring each time period's laws for capital crimes in reference to their purpose, practical use, modifications and ethical implications, the thrust of historical Jewish opinion may become more clear. This clarification can only help the modern Jewish community form their own opinions about capital punishment.

CHAPTER 1

THE BIBLE

The Bible does not institute capital punishment with its first opportunity. After murdering his brother, Cain is forced to walk the earth with a mark signifying his actions, but is not sentenced to death. Cain's punishment is questioned only in response to our knowledge of the use of capital punishment later in the biblical narrative. The Bible's institution of the death penalty was a postdeluvian invention as the utter immorality of the Noahide generation allowed the biblical author to introduce a new kind of law. The biblical laws of capital punishment allowed for retributive punishment of criminals, marking an important characteristic of the biblical God.

The laws and regulations surrounding capital punishment are well defined in the Bible. The Bible administers the most severe of its punishments in two ways. The phrase "*mot yumar*" is used when the sentence is immediate death. At other points, the criminal behavior is punishable by specific actions. Of the four types of capital punishment qualified by the rabbis, stoning is mentioned most often in the Bible, while burning is mentioned only a handful of times, decapitation and strangling least of all. The use of capital punishment in other Near Eastern cultures, its severity and the limitations surrounding its application are factors which add to understanding its place in the Bible.

To appreciate the purpose and severity of capital punishment in the Bible, attention must be paid to the Israelite justice system. While other cultures in the ancient Near East attributed their laws to gods, rulers of the time had the authority to commute a sentence, as well as interpret or change the laws. The Israelite law, in contrast, was given

by God. No human could change the law nor alter the justice system set in place by God. According to the biblical belief system, the death penalty is just a part of the larger corpus of God-given law. As Moshe Greenberg explains, "The very formulation is God's; frequently laws are couched in the first person, and they are always referred to as 'words of God,' never by man. Not only is Moses denied any part in the formulation of the Pentateuchal laws, no Israelite king is said to have authored a law code, nor is any king censured for so doing. The only legislator the Bible knows of is God; the only legislation is that mediated by a prophet (Moses or Ezekiel)."²

Biblical capital crimes are varied and difficult to link together. Though many are understandable by applying a modern day sense of morality, some are well outside of that realm and must be attributed to the distinct culture of the ancient Israelites. The general categories of biblical capital crimes are as follows:

1. Apostasy
2. Blasphemy
3. Sorcery
4. Violation of the Sabbath
5. Sexual improprieties (including rape, incest, adultery, bestiality, and homosexuality)
6. Kidnapping
7. Disrespect towards one's parents.³

² Moshe Greenberg, "Some Postulates of biblical Criminal Law." *Yehezkel Kaufmann Jubilee Volume*. ed. Menahem Haran. (Jerusalem: Magnes Press, 1960), 11.

³ Raymond Westbrook, "Punishments and Crimes." *Anchor Bible Dictionary*. Vol V. ed. David Noel Freedman. (New York: Doubleday, 1992), 548-555.

These specific examples required execution because of their effect on the community as a whole. The Anchor Bible Dictionary explains, "The link between the act and its retribution was understood as an intangible pollution by the offender of his environment. It was society through its official organs that took the initiative to protect itself by removing the pollution, usually by killing or exiling the offender, thereby appeasing divine anger."⁴ Each of the biblical capital crimes, in its own way, challenged the ultimate power of God and God's law. The criminal in these circumstances questioned the system, whether it be the importance of procreation, God's authority or the hierarchical system which placed God at the forefront of the human experience.

CAPITAL PUNISHMENT IN THE TORAH

One of the first examples of divinely authorized capital punishment acts as a guiding principle throughout the Bible. Genesis 9:6 states, "Whoever sheds the blood of man, by man shall his blood be shed; For in God's image did He make man."⁵ This law is provided with a justification. The sin is not in the disrespect of one's fellow human being, but in destroying the image of God. The theology accentuates God's authority and requires a special sense of respect. The acceptance of the biblical law of capital punishment and when it was to be meted out was predicated on the Israelite's belief in this theology.

The theophany created a perfect opportunity to use capital punishment as a threat. Exodus 19:11-13 states:

(11) Let them be ready for the third day, for on the third day the Lord will come down, in the sight of all the people on Mount Sinai. (12) You shall set bounds for the people round about, saying, "Beware of going up

⁴Ibid., 548-549.

⁵ Rabbi David E. Sulommm Stein, ed. *The Tanakh*. (Philadelphia: Jewish Publication Society, 1999.) All subsequent citations from the Bible are taken from the JPS translation.

the mountain or touching the border of it. Whoever touches the mountain shall be put to death: (13) no hand shall touch him, but he shall be either stoned or shot; beast or man, he shall not live. When the ram's horn sounds a long blast, they may go up on the mountain.

The use of both the general warning and the specific application serve to underscore the weight of God's admonition. The people are concurrently made aware of the boundaries of their own behavior, as well as empowered to punish anyone in the community who breaks the law.

Biblical law and Hammurabi's Code are strikingly similar in the manner in which they utilize forms of *lex taliones*, retaliatory law. They are both geared towards equal retaliation, but Hammurabi's laws include a provision for different classes which is absent in the Bible. Exodus 21:12-27:

(12) He who fatally strikes a man shall be put to death. (13) If he did not do it by design, but it came about by an act of God, I will assign you a place to which he can flee. (14) When a man schemes against another and kills him treacherously, you shall take him from My very altar to be put to death. (15) He who strikes his father or his mother shall be put to death. (16) He who kidnaps a man-whether he has sold him or is still holding him-shall be put to death. (17) He who insults his father or his mother shall be put to death. (18) When men quarrel and one strikes the other with a stone or fist, and he does not die but has to take to his bed-(19) if he then gets up and walks outdoors upon his staff, the assailant shall go unpunished, except that he must pay for his idleness and his cure. (20) When a man strikes his slave, male or female, with a rod, and he dies there and then, he must be avenged. (21) But if he survives a day or two, he is not to be avenged, since he is the other's property. (22) When men fight and one of them pushes a pregnant woman and a miscarriage results, but no other damage ensues, the one responsible shall be fined according as the woman's husband may exact from him, the payment to be based on reckoning. (23) But if other damage ensues, the penalty shall be life for life, (24) eye for eye, tooth for tooth, hand for hand, foot for foot, (25) burn for burn, wound for wound, bruise for bruise. (26) When a man strikes the eye of his slave, male or female, and destroys it, he shall let him go free on account of his eye. (27) if he knocks out the tooth of his slave, male or female, he shall let him go free on account of his tooth.⁶

⁶James Pritchard, *The Ancient Near East: An Anthology of Texts and Pictures*. Trans. Theophile J. Meek, (Princeton: Princeton University Press, 1958.) All subsequent citations of the Code of Hammurabi and the Middle Assyrian Laws utilize the Pritchard translation.

The Bible reasserts these ideas in Leviticus 24:17-22:

(17) One who kills any human being, he shall be put to death. (18) One who kills a beast, he shall make restitution for it: life for life. (19) If anyone maims his fellow, as he has done so shall it be done to him; (20) fracture for fracture, eye for eye, tooth for tooth. The injury he inflicted on another shall be inflicted on him. (21) One who kills a beast shall make restitution for it; but one who killed a human being shall be put to death. (22) You shall have one standard for stranger and citizen alike; for I the Lord am your God.

Hammurabi's laws 195-212 read as follows:

(195) If a son struck his father they shall cut off his hand. (196) If a segnior has destroyed the eye of a member of the aristocracy, they shall destroy his eye. (197) If he has broken a (nother) segnior's bone, they shall break his bone. (198) If he has destroyed the eye of a commoner or broken the bone of a commoner, he shall pay one mina of silver. (199) If he has destroyed the eye of a segnior's slave or broken the bone of a segnior's slave, he shall pay one-half his value. (200) If a segnior has knocked out a tooth of a segnior of his own rank, they shall knock out his tooth. (201) If he has knocked out a commoner's tooth, he shall pay one-third minna of silver. (201) If a segnior has struck the cheek of a segnior who is superior to him, he shall be beaten sixty (times) with an oxtail whip in the assembly. (203) If a member of the aristocracy has struck the cheek of a (nother) member of the aristocracy who is of the same rank as himself, he shall pay one mina of silver. (204) If a commoner has struck the cheek of a (nother) commoner, he shall pay ten shekels of silver. (205) If a segnior's slave has struck the cheek of a member of the aristocracy, they shall cut off his ear. (206) If a segnior has struck a (nother) segnior in a brawl and has inflicted injury on him, that segnior shall swear, "I did not strike him deliberately;" and he shall also pay for the physician. (207) If he has died because of his blow, he shall swear (as before), and if it was a member of the aristocracy, he shall pay one-half mina of silver. (208) If it was a member of the commonality, he shall pay one-third mina of silver. (209) If a segnior struck a (nother) segnior's daughter and has caused her to have a miscarriage, he shall pay ten shekels of silver for her fetus. (210) If that woman has died, they shall put his daughter to death. (211) If by a blow he has caused a commoner's daughter to have a miscarriage, he shall pay five shekels of silver. (212) If that woman has died, he shall pay one-half mina of silver. (213) If he struck a segnior's female slave and has caused her to have a miscarriage, he shall pay two shekels of silver. (214) If that female slave has died, he shall pay one-third mina of silver.

While there are important similarities, it is the differences that require attention. The differences point to a divergent understanding of justice. The Exodus pericope begins with laws pertaining to murder, the punishment for which is weighty. As Milgrom explains, "Whereas compensation for murder is provided for in all law codes of the ancient Near East, Israel alone maintains that the homicide must pay with his life."⁷

Where Hammurabi punishes the disobedient son by cutting off the instrument of disrespect, his hand, the Bible's law is far more severe. Sarna explains, "There is also here the unassailable conviction that the dissolution of the family unit must inevitably rend to shreds the entire social fabric."⁸ Since the value of the family is more important than people's compensatory claims, crimes against the family are included in a different realm of crime, one deserving the most severe punishment available to the biblical author. Hammurabi and the Bible may have understood certain crimes to be condemned by human law, but the most unjust behavior required the most irreversible punishment.

The case of the biblical "goring ox" is also comparable to Hammurabi's law.

Exodus 21:28-29 states:

(28) When an ox gores a man or woman to death, the ox shall be stoned and its flesh shall not be eaten, but the owner of the ox is not to be punished.
(29) If, however, that ox has been in the habit of goring, and its owner, although warned, has failed to guard it, and it kills a man or a woman—the ox shall be stoned and its owner, too, shall be put to death.

Although Hammurabi institutes a different punishment, the situation is almost exactly the same. Law 251 reads:

If a segnior's ox was a gorer and his city council made it known to

⁷Jacob Milgrom, ed. *Commentary to Numbers*. General ed. Nahum Sarna. (Philadelphia: Jewish Publication Society, 1990), 295.

⁸Nahum Sarna, ed. *Commentary to Exodus*. Torah Commentary. General ed. Nahum Sarna. (Philadelphia: Jewish Publication Society, 1991), 122.

him that it was a gorer, but he did not pad its horns (or) tie up his ox, and that ox gored to death a member of the aristocracy, he shall give one half mina of silver.

While both rules hold the owner responsible for the damage done by the ox,

Hammurabi's emphasis is of a more compensatory nature.

The Bible and the Middle Assyrian Laws suggested death as punishment for people involved in sorcery and the occult. Exodus 22:17 states, "You shall not tolerate a sorceress." Though commonly translated as "tolerate," "*lo techieh*" should more correctly be understood as "allow her to live."⁹ This coheres with later biblical laws. Leviticus 20:27 states, "A man or a woman who has a ghost or a familiar spirit shall be put to death; they shall be pelted with stones-their bloodguilt shall be upon them." In perhaps the most all-encompassing law, Deuteronomy 18:9-14 asserts:

(9) When you enter the land that the Lord your God is giving you, you shall not learn to imitate the abhorrent practices of those nations. (10) Let no one be found among you who consigns his son or daughter to the fire, or who is an augur, a soothsayer, a diviner, a sorcerer, (11) one who casts spells, or one who consults ghosts or familiar spirits, or one who inquires of the dead. (12) For anyone who does such things is abhorrent to the Lord, and it is because of these abhorrent things that the Lord your God is dispossessing them before you. (13) You must be wholehearted with the Lord your God. (14) Those nations that you are about to dispossess do indeed resort to soothsayers and augurs; to you, however, the Lord your God has not assigned the like.

The Middle Assyrian laws are similarly direct in response to diviners. Tablet A 47 states, "If either a man or a woman made up magical preparations and they were found in their possession, when they have prosecuted them (and) convicted them, they shall put the maker of the magical preparations to death." The implications of the power a sorcerer may have presented a distinct danger to the community as a whole. As Westbrook

claims, "Sorcery was considered a public danger."¹⁰ The similarity in these laws is most likely based on the distinctiveness of divine power. If humans were permitted to change the natural order of the world, or engage in work specific to their gods, the gods themselves would no longer hold dominion. The Israelite's belief in one God could not be challenged by the work of people.

Similar to Exodus 21:15 and 17, and later, Deuteronomy 21:18-21, Leviticus 20:9 punishes the disobedient child. "If anyone insults his father or mother, he shall be put to death; he has insulted his father and his mother— his bloodguilt is upon him." This law puts much responsibility of the sanctity of the family on the head of the child. While parents are inherently accountable for the propagation of a family line, the children must share in the respect afforded the institution as a whole. Respect of the hierarchy in the family system which models humans' relationship with God must be recognized. As Plaut explains, "Respect for parents is mentioned here because it strengthens family life, which the offenses next destroy."¹¹

The description of the identification and subsequent punishment of the disobedient son might have served to minimize the chance of this punishment being administered. Deuteronomy 21:18-21 states:

(18) If a man has a wayward and defiant son, who does not heed his father or mother and does not obey them even after they discipline him, (19) his father and mother shall take hold of him and bring him out to the elders of his town at the public place of his community. (20) They shall say to the elders of his town, 'This son of ours is disloyal and defiant, he does not heed us. He is a glutton and a drunkard.' (21) Thereupon the men of the town shall stone him to death. Thus you will sweep out evil from your midst: all Israel

⁹Gunther Plaut, ed. *The Torah: A Modern Commentary*. (New York: UAHC, 1981), 578.

¹⁰Westbrook, 549.

¹¹Plaut, 904.

will hear and be afraid.

The many steps incumbent on the parents act as a deterrent to the actual execution of a child. The law may intend to force them to think through their accusations. The gravity of the crime itself should be noted. The death penalty is identified as just punishment. The phrase "sweep away evil" is included as a common phrase used in death penalty warnings. The community itself was worried about the effects of the acts of just a few. Tigay explains, "The community must act to remove the guilt because its welfare is endangered on account of God's anger over the crime."¹² Spitz explains succinctly, "It was not just the offender who needed punishment, but the offensive behavior demanded branding and ostracizing as unacceptable. The death penalty, the strongest statement of reproach, reflected God's call 'to put away the evil from the midst of thee.'"¹³ Furthermore, in this section, an additional warning is included. As explained earlier, disrespect for one's parents implies a larger disrespect for God. Attaching an extra admonition accentuated its importance.

The laws in Leviticus chapters 18 and 20 deal with issues of sexual immorality and their punishment. These two chapters seem to parallel one another, but chapter eighteen states the rules without mentioning retribution or punishment, while chapter twenty is explicit in describing the sentence. Though not all specifically related to sexual misconduct, the rules address the realm of procreation and behaviors that may inhibit

¹²Jeffrey Tigay, ed. *Commentary to Deuteronomy*. Torah Commentary. General ed. Nahum Sarna. (Philadelphia: Jewish Publication Society, 1996), 207.

¹³Elie Spitz, "The Jewish Tradition and Capital Punishment." *Contemporary Jewish Ethics and Tradition*. eds. Elliot N. Dorff and Louis E. Newman. (New York: Oxford University Press, 1995), 345.

fulfillment of the commandment "*pru urvu*," being fruitful and multiplying. Leviticus 20:1-2:

(1) And the Lord spoke to Moses: (2) Say further to the Israelite people: Anyone among the Israelites, or among the strangers residing in Israel who gives any of his offspring to Molech, shall be put to death; the people of the land shall pelt him with stones.

It is unclear exactly what is meant by this verse. It may be referring to child sacrifice, or perhaps to devoting one's offspring to the worship of another God.¹⁴ In either case, this behavior lures a child away from the Israelite God. This would be an active sin against God, not only for the parent, but because of the implications, for the child as well.

The laws specific to sexual behavior are explicit. Leviticus 20: 10-17 (excepting Verse 14 to be discussed later):

(10) If a man commits adultery with a married woman, committing adultery with another man's wife, the adulterer and the adulteress shall be put to death. (11) If a man lies with his father's wife, it is the nakedness of his father that he has uncovered; the two shall be put to death – their bloodguilt is upon them. (12) If a man lies with his daughter-in-law, both of them shall be put to death; they have committed incest – their bloodguilt is upon them. (13) If a man lies with a male as one lies with a woman, the two of them have done an abhorrent thing; they shall be put to death – their bloodguilt is upon them... (15) If a man has carnal relations with a beast, he shall be put to death; and you shall kill the beast. (16) If a woman approaches any beast to mate with it, you shall kill the woman and the beast; they shall be put to death – their bloodguilt is upon them.

Whether those involved are men, women, or beasts, each of them must accept some culpability in the crime. But, the gravity of the action is not only due to its unacceptable nature in the social culture. In relation to Leviticus 20:10 Greenberg maintains, "there is no question of permitting the husband to mitigate or cancel the punishment. For adultery is not merely a wrong against the husband, it is a sin against

¹⁴Westbrook, 549.

God, an absolute wrong."¹⁵ Greenberg continues, "To be sure the law also recognized that adultery is a breach of faith with the husband (Num. 5:12), yet the offense as such is absolute, against God. Punishment is not designed to redress an injured husband for violation of his rights; the injured party is God, whose injury no man can pardon or mitigate."¹⁶ The only adequate punishment for sinning against God, is to take away that which was given by God, namely, life. The preservation of the Israelite line was dependent on moral and acceptable behavior which would insure safe procreation according to the biblical mind. Any behavior outside of this was dangerous to the community as a whole.

The last law in this section is difficult to understand in its context. Leviticus 20:27: "A man or a woman who has a ghost or a familiar spirit shall be put to death; they shall be pelted with stones—their bloodguilt shall be upon them." Verse 27 is probably connected to an earlier law stated in the chapter.¹⁷ Leviticus 20:6 asserts, "And if any person turns to ghosts or similar spirits and goes astray after them, I will set My face against that person and cut him off from among his people." The intensity of verse six seems to be similar to the anger and passion associated with the capital crimes described throughout the rest of this passage. It is possible that a scribal error split them apart from one another, or that the latter verse was brought in to clarify the first. Regardless as to why they are separated, their connection to this section as a whole is undetermined.

The story of the blasphemer in Leviticus 24:10-23 further supports the Bible's earlier reproach. Exodus 22:27 states, "You shall not revile God, nor put a curse upon the chieftans of your people." Although the Exodus passage does not designate a punishment for blasphemy, the Leviticus passage establishes the appropriate legal

¹⁵Greenberg, 12.

¹⁶Ibid., 13.

¹⁷Baruch A Levine, ed. *Commentary to Leviticus*. General ed. Nahum Sarna. (Philadelphia: Jewish Publication Society, 1989), 140.

remedy. In this case, though, the narrative emphasizes the importance of this law by "dramatiz[ing] the concept."¹⁸ Even Moses must go to God for guidance as to how to deal with the situation. Leviticus 24:10-16, 23:

(10) There came out among the Israelites one whose mother was Israelite and whose father was Egyptian. And a fight broke out in the camp between that half Israelite and a certain Israelite. (11) The son of the Israelite woman pronounced the name in blasphemy, and he was brought to Moses – now his mother's name was Shelomith daughter of Dibri of the tribe of Dan – (12) and he was placed in custody, until the decision of the Lord should be clear to them. (13) And the Lord spoke to Moses, saying: (14) Take the blasphemer outside the camp; and let all who were within hearing lay their hands upon his head, and let the whole community stone him. (15) And to the Israelite people speak this: Anyone who blasphemes his God shall bear his guilt; (16) if he also pronounces the name Lord, he shall be put to death. The whole community shall stone him; stranger or citizen, if he has thus pronounced the Name, he shall be put to death... (23) Moses spoke thus to the Israelites. And they took the blasphemer outside the camp and pelted him with stones. The Israelites did as the Lord had commanded Moses.

This narrative may serve to accentuate the gravity of the crime of blasphemy. By using an anecdote, the biblical author separates this crime from other capital crimes. The story may also function to remind the Israelite community of the most significant laws. The fact that the entire community should be involved in the punishment emphasizes the seriousness of the crime. The criminal endangers the whole society and the very fabric of their belief. It is in a sense a reminder to the community on what they should be focusing. Levine explains, "The entire community has a responsibility to root out blasphemy because it adversely affects everyone, even if it is committed by a single individual. Such a direct affront to God awakens His anger."¹⁹

A second death penalty narrative is found in Numbers 15:32-36. This narrative, too, has its roots in an earlier section of the Bible. Exodus 31:14 originally mandates,

¹⁸Ibid., 166.

"you shall keep the Sabbath, for it is holy for you. He who profanes it shall be put to death: whoever does work on the Sabbath day shall be put to death." The Numbers passage is as follows:

(32) Once, when the Israelites were in the wilderness, they came upon a man gathering wood on the Sabbath day. (33) Those who found him as he was gathering wood brought him before Moses, Aaron, and the whole community. (34) He was placed in custody, for it had not been specified what should be done to him. (35) Then the Lord said to Moses, "The man shall be put to death; the whole community shall pelt him with stones outside the camp. (36) So the whole community took him outside the camp and stoned him to death – as the Lord had commanded Moses.

Like the example of the blasphemer, this narrative serves to heighten the importance of the law. The two crimes, blasphemy and desecrating the Sabbath, speak directly to the unique character of the Israelite community. They lived in a monotheistic society which differentiated them from their neighbors. They were committed to honoring their God by respecting God's sanctioned day of rest, based on their understanding of their history. The significance given to these laws by the narratives and the reported communication by God to Moses of their importance lends to their weight in the corpus of law as a whole.

While the crime must be punished, in both stories the community is not sure exactly how to carry out the prescribed execution. In two rare biblical instances the accused is held captive. As Spitz remarks, in general "it is important to note that the Bible was seemingly unaware of the option of prison....Indeed, jails did not exist in the ancient Near East, Greece, or Rome except as a place to await trial."²⁰ It is precisely for this purpose that the biblical culprit is held. They awaited their sentences from the supreme judge. Both reports are also careful to point out that the community did exactly as God commanded. They wanted to be sure to follow God's law as they were ultimately responsible for displaying their obedience and innocence.

¹⁹Ibid., 167.

²⁰Spitz, 344.

The capital crime of intentional murder is revisited in Numbers 35:16-34. These verses differentiate between first and second degree murder, along with ascribing punishments to each. They also describe the burden of proof necessary for prosecution of a capital crime.

(16) Anyone who strikes another with an iron object so that death results is a murderer; the murderer must be put to death. (17) If he struck him with a stone tool that could cause death, and death resulted, the murderer must be put to death. (18) Similarly, if the object with which he struck him was a wooden tool that could cause death, and death resulted, he is a murderer; the murderer must be put to death. (19) The blood-avenger himself shall put the murderer to death; it is he who shall put him to death upon the encounter. (20) So, too, if he pushed him in hate or hurled something at him on purpose and death resulted (21) or if he struck him with his hand in enmity and death resulted the assailant shall be put to death; he is a murderer. The blood-avenger shall put the murderer to death upon the encounter. (22) But if he pushed him unintentionally, (23) or inadvertently dropped upon him any deadly object of stone, and death resulted – though he was not an enemy of his and did not seek his harm – (24) in such cases the assembly shall decide between the slayer and the blood-avenger. (25) The assembly shall protect the manslayer from the blood avenger, and the assembly shall restore him to the city of refuge to which he fled, and there he shall remain until the death of the high priest who was anointed with the sacred oil. (26) But if the manslayer ever goes outside the limits of the city of refuge to which he has fled (27) and the blood-avenger comes upon him outside the limits of the city of refuge, and the blood-avenger kills the manslayer, there is no bloodguilt on his account. (28) For he must remain inside his city of refuge until the death of the high priest; after the death of the high priest, the manslayer may return to his land holding. (29) Such shall be your law of procedure throughout the ages in all your settlements. (30) If anyone kills a person, the manslayer may be executed only on the evidence of witnesses; the testimony of a single witness against a person shall not suffice for a sentence of death. (31) You may not accept a ransom for the life of a murderer who is guilty of a capital crime; he must be put to death. (32) Nor may you accept ransom in lieu of flight to a city of refuge, enabling one to return to live on his land before the death of a priest. (33) You shall not pollute the land in which you live; for blood pollutes the land, and the land can have no expiation for blood that is shed on it, except by the blood of him who shed it. (34) you shall not defile the land in which you live, in which I Myself abide, For I the Lord abide among the Israelite people.

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another human being, the punishment for that crime would be death. The differentiation between intentional versus unintentional killing resembles the modern day understanding of murder versus manslaughter. The punishment could not be equal for two very different situations. Active disregard for human life symbolized an active disrespect towards God. The hierarchy established in Genesis still remains intact. Humans are regarded as the most important of the earthly beings and their lives therefore must be treasured and accounted for. Moshe Greenberg explains that rules such as these place the value of human life above all other values. "Life may not be equated through a ransom or payment of any kind." He continues, "Compensation of any kind is ruled out. The guilt of the murderer is infinite because the murdered life is invaluable; the kinsmen of the slain man are not competent to say when he has been paid for. An absolute wrong has been committed, a sin against God which is not subject to human discussion."²¹

The second section of this passage may be the Bible's way of protecting the sanctity of human life. Terse requirements are outlined for the actual assignment of blame of an alleged murderer. First, there had to be obvious intent, tools used which had the capacity for killing, enmity between the victim and murderer and ultimately two witnesses, both of whom were prepared to testify as to what they saw. As much as the biblical audience needed a sense of divine justice, they also required proper procedural rules to ensure this justice was not misused. As they were told, the land was honored and holy because the Lord dwelt there with the Israelites. They, as a people, were therefore liable for their actions, particularly if they were in response to divine laws.

Deuteronomy 13:1-12 deals with cases of instigation to worship other gods. One element that makes this crime so insidious is the agitator's use of the Israelite God's own methods of persuasion. The idea that people in the community would actively try to convince others to believe in other gods is not only deserving of capital punishment based

²¹Greenberg, 16.

on its roots in blasphemy. It also becomes a crime involving the community by its nature, as it attempts to convince others of truths outside of the community's norms. The cases are described with a cautionary tone for the Israelites. As a young people, with a tenuous hold on their religion, they may have been inclined to believe:

(1) Be careful to observe only that which I enjoin upon you; neither add to it nor take away from it. (2) If there appears among you a prophet or a dream-diviner and he gives you a sign or portent, (3) saying, "Let us follow and worship another god" – whom you have not experienced – even if the sign or portent that he named to you comes true, (4) do not heed the words of that prophet or that dream-diviner. For the Lord your God is testing you to see whether you really love the Lord your God with all your heart and soul. (5) Follow none but the Lord your God, and revere none but Him; observe His commandments alone, and heed only His orders; worship none but Him, and hold fast to Him. (6) As for that prophet or dream-diviner, he shall be put to death; for he urged disloyalty to the Lord your God – who freed you from the land of Egypt and who redeemed you from the house of bondage – to make you stray from the path that the Lord your God commanded you to follow. Thus you will sweep out evil from your midst. (7) If your brother, your own mother's son, or your son, or daughter, or the wife of your bosom, or your closest friend entices you in secret, saying, "Come let us worship other gods" – whom neither you nor your fathers have experienced – (8) from among the gods of the peoples around you, either near to you or distant, anywhere from one end of earth to the other: (9) do not assent or give heed to him. Show him no pity or compassion, and do not shield him (10) but take his life. Let your hand be the first against him to put him to death, and the hand of the rest of the people thereafter. (11) Stone him to death, for he sought to make you stray from the Lord your God, who brought you out of the land of Egypt, out of the house of bondage. (12) Thus all Israel will hear and be afraid, and such evil things will not be done again in your midst.

It is important to note the attention paid to detail in this passage. The inciters are all accused of using similar language to try to sway the people's belief in God. Prophets and dream-diviners are believable specifically because they have the power to use signs to convince their audience of their statements. Telling the people not to believe those signs and portents puts the community in a difficult position. They are expected to know when the signs are divine, but should be careful not to believe them when they are false. The deed itself is deemed destructive to the community, and therefore deserving of

capital punishment. Later, in Deuteronomy 18:22, God specifically commands that people should "not stand in dread of" a false prophet or oracle but instead should "punish him."

In the case of the relatives, the difficulty is found in the identification of who may be guilty of the crime. The people named are those who would be most difficult to accuse. Not only is the accusation itself distressing, but its subsequent punishment would be nearly impossible. But this passage emphasizes its importance. The Israelites were commanded to remember and honor God who took them out of bondage. This pericope acts as a reminder of the covenant between God and the Israelite community. It continuously emphasizes the importance of the belief in one God, assigning the most severe punishment to those who would try to sway others' belief. A sentence of stoning implied the perpetration of a grievous act. Tigay explains, "it was used mostly for crimes that challenged God's authority or proper authority...Such crimes constituted acts of 'high treason' against God or society...Punishment of these crimes by stoning enabled the entire public to participate and thereby express its outrage against the threat it posed to society's welfare."²² In this case though, the directive may be strong precisely because the execution would be difficult to perform against one's family or close friend.

Deuteronomy 17:1-7 reiterates laws already stated throughout the biblical narrative:

- (1) You shall not sacrifice to the Lord your God an ox or a sheep that has any defect of a serious kind, for that is abhorrent to the Lord your God.
- (2) If there is found among you, in one of the settlements that the Lord your God is giving you, a man or a woman who had affronted the Lord your God and transgressed His covenant—
- (3) turning to the worship of other gods and bowing down to them, to the sun or the moon or any of the

²²Tigay, *Deuteronomy*, 133.

heavenly host, something I never commanded—(4) and you have been informed or have learned of it, then you shall make a thorough inquiry. If it is true, the fact is established that the abhorrent thing was perpetrated in Israel, (5) you shall take the man or woman who did that wicked thing out to the public place, and you shall stone them, man or woman, to death.— (6) A person shall be put to death only on the testimony of two or more witnesses; he must not be put to death on the testimony of a single witness.— (7) Let the hands of the witnesses be the first against him to put him to death, and the hands of the rest of the people thereafter. Thus you sweep out evil from your midst.

These laws remind the biblical audience of the importance of focusing one's worship on the Israelite God and re-emphasize the practice of just legal proceedings. The crime of idolatry itself is mentioned because it is another example of how the Israelites might be engaging in apostasy. The primacy of the biblical law and divine dominion had to be re-emphasized in order to combat the influence surrounding cultures may have had on the Israelites. Crimes deserving execution are not minor. Both the case as well as the culprit had to be dealt with seriously and fully. Deuteronomy 19:15-21 emphasizes the same point:

(15) A single witness may not validate against a person any guilt or blame for any offense that may be committed; a case can be valid only on the testimony of two witnesses or more. (16) If a man appears against another to testify maliciously and gives false testimony against him, (17) the two parties to the dispute shall appear before the Lord, before the priests or magistrates in authority at the time, (18) and the magistrates shall make a thorough investigation. If the man who testified is a false witness, if he has testified falsely against his fellows, (19) you shall do to him as he schemed to do to his fellow. Thus you will sweep out evil from your midst; (20) others will hear and be afraid, and such evil things will not again be done in your midst. (21) Nor must you show pity: life for life, eye for eye, tooth for tooth, hand for hand, foot for foot.

This section focuses on all the important characteristics of the biblical law of capital punishment. It includes the need for honesty, the ultimate goal of ridding the community of corruption, a threatening tone for the community as a whole and the retaliatory concept of eye for eye.

As noted, one of the Bible's categories of capital crime is that of sexual impropriety. It is shared by the Middle Assyrian laws. Deuteronomy 22:20-27 states:

(20) But if the charge proves true, the girl was found not to have been a virgin (21) then the girl shall be brought to the entrance of her father's house, and the men of her town shall stone her to death; for she did a shameful thing in Israel, committing fornication while under her father's authority. Thus you will sweep away evil from your midst. (22) If a man is found lying with another man's wife, both of them – the man and the woman with whom he lay – shall die. Thus you will sweep away evil from Israel. (23) In the case of a virgin who is engaged to a man – if a man comes upon her in town and lies with her, (24) you shall take the two of them out to the gate of the town and stone them to death; the girl because she did not cry out for help in the town, and the man because he violated another man's wife. (25) But if the man comes upon the engaged girl in the open county, and the man lies with her by force, only the man who lay with her shall die, (26) but you shall do nothing to the girl. The girl did not incur the death penalty, for this case is like that of a man attacking another and murdering him. (27) He came upon her in the open; though the engaged girl cried for help, there was no one to save her.

Adulterous or forced unions are punished with the most exacting penalty not only because of the disgrace of the father or the woman's family, but in order to enact God's justice which was assumed to be infallible. The guidelines and safeguards were in place to assure correct sentencing, but once guilt was determined, the punishment was prompt. The punishment itself is not only for the guilty parties, but also served as a warning to the rest of the community.

Not all Near Eastern cultures sentenced their criminals to death based on the same transgressions. This law is echoed in the Middle Assyrian laws, but with a few noticeable differences. Tablet A 12 explains:

If, as a segnior's wife passed along the street, a (nother) segnior has seized her, saying to her, "let me lie with you," since she would not consent (and) kept defending herself, but he has taken her by force (and) lain with her, whether they found him on the segnior's wife or witnesses have charged him that he lay with the woman, they shall put the segnior to death, with no blame attaching to the woman.

Tablet A 55 offers a similar idea:

In the case of a segnior's daughter, a virgin who was living in her father's house, whose [father] had not been asked (for her in marriage), whose hymen had not been opened since she was not married, and no one had a claim against her father's house, if a segnior took the virgin by force and ravished her, either in the midst of the city or in the open country or at night in the street or in a granary or at a city festival, the father of the virgin shall take the wife of the virgin's ravisher and give her to be ravished; he shall not return her to her husband (but) take her; the father may give his daughter who was ravished to her ravisher in marriage. If he has no wife, the ravisher shall marry her (and) not cast her off. If the father does not (so) wish, he shall receive the (extra) third for the virgin in silver (and give his daughter to whom he wishes.)

The Deuteronomic law conflates the Middle Assyrian laws, but both rephrase some common concepts. Each actively places the blame on the man. While the Middle Assyrian laws require the death sentence only in the case of the rape of a married woman, the law from tablet A 55 still requires action on the part of the man while rendering the young woman blameless. The biblical account may seem more severe, but all the laws exact retribution from the criminal. One difference between the approaches is that the biblical laws in this section deal specifically with unmarried or engaged women, never discussing the fate of married women at all. As Tigay explains:

This choice may have been due to experience. Since married girls were relatively young (many probably by their mid-teens), engaged and unmarried girls were usually minors and were less likely to have deliberately sought sexual experience than were married women, who were more sexually mature. Hence, of those who had been involved in extramarital sex, it was the engaged and unmarried girls who were most likely to have been forced, and laws dealing with them were the more natural context in which to present the guidelines for deciding the issue of consent.²³

The treatment of women, specifically in relation to their bodies as sexual vessels owned by the dominant male figures in their lives, was a foundational concept in these cultures.

²³Tigay, *Deuteronomy*, 207-208.

Like the biblical and Middle Assyrian Laws, Hammurabi is quick to punish a man who takes advantage of a virgin. Law 132 reads "If a segnior bound the (betrothed) wife of a(nother) segnior, who had had no intercourse with a male and was still living in her father's house, and he has lain in her bosom and they have caught him, that segnior shall be put to death, while that woman shall go free." While this law mixes some of the characteristics separated in the earlier laws by referring to an engaged virgin, the message is still clear and the punishment commensurate with their understanding of the crime.

Burning, a second type of execution found in the biblical narrative appears in a handful of cases with a common thread, though perhaps utilizing a different method than ultimately identified by the rabbis. Execution by burning was reserved for the most critical crimes, often specific sexual crimes limited to women. The first incidence of burning is found within the story of Tamar, though, it is significant that the actual execution does not take place. Genesis 38:24-26:

(24) About three months later, Judah was told, "Your daughter-in-law Tamar has played the harlot; in fact, she is with child by harlotry." "Bring her out," said Judah, "and let her be burned." (25) As she was being brought out, she sent this message to her father-in-law, "I am with child by the man to whom these belong." And she added, 'Examine these: whose seal and cord and staff are these?' (26) Judah recognized them, and said, "She is more in the right than I, inasmuch as I did not give her to my son Shelah." And he was not intimate with her again.

Since Tamar actively engaged in a sexual union with a partner prohibited to her, she should have been punished by capital law. While Judah's deceit saves her life, according to biblical law, he too should have been put to death. The fact that this is not the course of the story may attest to the reality of different strata of law in the Bible. The expectation of punishment by burning demonstrates that it is an accepted punishment at the time.

Burning is mandated in Leviticus 20:14 for both the man and women. "If a man marries a woman and her mother, it is depravity; both he and they shall be put to the fire, that there be no depravity among you." These were laws that were applicable to every aspect of Israelite lifestyle and the implication of acceptable sexual morals is inherent in this verse. For some, the level of immorality decided the weight of the punishment. Levine claims that "it was the custom to impose death by burning in the case of serious sexual offenses."²⁴ This idea is underscored by Leviticus 21:9. "When the daughter of a priest defiles herself through harlotry, it is her father whom she defiles; she shall be put to the fire." The seriousness of this offense is explicit. Not only does the young woman behave in a sexually immoral manner, but she is the daughter of God's representative and has to remain pure. Her punishment serves not only to teach a lesson to other women, but also to restore the priest's place as an honored and respected authority figure.

CAPITAL PUNISHMENT IN THE PROPHETS AND WRITINGS

By the time of the Prophets and Writings, the laws of stoning and burning were well known and seemingly enacted in the Jewish communities, both in Israel as well as in the diaspora. There are a handful of examples of stoning and burning, though not every case requiring execution is detailed in the later biblical books. The first instance is found in Joshua 7:15. The verse states the following, "Then he who is indicated for proscription, and all that is his shall be put to the fire, because he broke the Covenant of the Lord and because he committed an outrage in Israel." Joshua 7:19-25 goes on to describe Achan's guilt in this situation:

²⁴Levine, *Leviticus*, 144.

(19) Then Joshua said to Achan, "My son, pay honor to the Lord, the God of Israel, and make confession to Him. Tell me what you have done and do not hold anything back from me, " (20) Achan answered Joshua. "It is true that I have sinned against the Lord, the God of Israel. This is what I did: (21) I saw among the spoil a fine Shinar mantle, two hundred shekels of silver, and a wedge of gold weighing fifty shekels, and I coveted them and took them. They are buried in the ground in my tent, with the silver under it. " (22) Joshua sent messengers, who hurried to the tent; and there it was buried in his tent, with the silver underneath. (23) They took them from the tent and brought them to Joshua and all the Israelites, and displayed them before the Lord (24) Then Joshua, and all Israel with him, took Achan son of Zerah— and the silver, and the mantle, and the wedge of gold—his sons and daughters, and his ox, his ass, and his flock, and his tent, and all his belongings, and brought them up to the valley of Achor. (25) And Joshua said, "What a calamity you have brought upon us! The Lord will bring calamity upon you this day." And all Israel pelted him with stones. They put them to the fire and stoned them.

Joshua and the Israelites knew the punishment that had to be instituted. It is perhaps the seriousness of the offense which allows for the most severe punishment to have been administered. It is a new interpretation of the law of retributive justice that Achan's entire family is killed with him. Greenberg explains that this is because the objects lay under his tent, contaminating everyone in his family. "Each of the inhabitants of Achan's tent incurred the *herem* (in Hebrew) status for which he was put to death, though, to be sure, the actual guilt of the misappropriation was Achan's alone."²⁵ In this case the people are told what to do and decide to enact it based on their knowledge of biblical law and God's anger at the broken covenant. They wanted their community to be innocent once again.

It seems that the Israelite community did indeed eventually begin to institute their own justice system utilizing the earlier prescribed methods of execution. As I Kings

²⁵Greenberg, 24.

12:18-19 and II Chronicles 17-19 illustrate, stoning was not reserved only for the cases described in the Torah:

(18) King Rehoboam sent Adoram, who was in charge of the forced labor, but all Israel pelted him to death with stones. Thereupon King Rehoboam hurriedly mounted his chariot and fled to Jerusalem. (19) Thus Israel revolted against the House of David, as is still the case.

This incident details an active offensive tactic on the part of the Israelites. Their action, though perhaps acceptable by modern moral standards, was a detour from legal behavior as initially outlined in the biblical law.

I Kings 21:11-13 is an example of the Israelites following the biblically ordained regulation calling for the execution of a blasphemer, albeit in a case that was unjustified:

(11) His townsmen—the elders and nobles in the town did as Jezebel had instructed them, just as was written in the letters she had sent them:
(12) They proclaimed a fast and seated Naboth at the front of the assembly
(13) Then the two scoundrels came and sat down opposite him; and the scoundrels testified against Naboth publicly as follows: “Naboth has reviled God and king.” Then they took him outside the town and stoned him to death.

By this point, the laws seem to have been understood and accepted as part of the Israelite culture. Although Naboth was not in fact guilty, the law is followed quite carefully. Two witnesses publicly accuse Naboth of the same capital crime and they ultimately begin the stoning.

The law was known not only to the men of the community, but the women as well, as Jezebel was able to explain exactly what she wanted done. She was also familiar with the crimes that would be identified as worthy of the death penalty. Her knowledge and their simple execution of the punishment lend credence to the idea that by this time, the biblical law was accepted as authoritative by the Israelites.

Ezekiel 23:46-49 does not give an example of an actual execution, but rather emphasizes the extent to which the laws were incorporated into daily life. While Oholah

and Oholiab symbolize the transgressions of Samaria and Jerusalem, their punishment seems appropriate according to earlier laws:

(46) For thus said the Lord God: Summon an assembly against them, and make them an object of horror and plunder. (47) Let the assembly pelt them with stones and cut them down with their swords; let them kill their sons and daughters, and burn down their homes. (48) I will put an end to wantonness in the land; and all the women shall take warning not to imitate your wantonness. (49) They shall punish you for your wantonness, and you shall suffer the penalty for your sinful idolatry. And you shall know that I am the Lord God.

The women received the established punishment for wantonness and idolatry.

The extreme severity of the proclamation should be attributed to the seriousness of their offenses, the symbolism which is inherent in the incident, and the general tone of the Prophets in general. The use of stoning for another crime for which it was prescribed again gives weight to its acceptance within the community.

The biblical application of the death penalty was focused on divine justice. While not every capital crime seemed deserving of the most severe punishment, the Israelites were not anxious to question God's law in these cases. The laws seemed to correlate with surrounding culture's laws, giving them credence and a more acceptable foundation from which to view them. The application of the laws allowed for swift justice. The legal system set in place by God required the community to act together to rid themselves of guilt in a common fight for innocence and purity. The laws were ultimately accepted by the Israelites and instituted as the norm. They served to constantly remind the community of God's ultimate power and demand for pure justice.

CHAPTER TWO

SECOND TEMPLE PERIOD

The Second Temple period marked a cardinal change in chronicling the life of the Jews in Palestine and the diaspora. The authors of the books of the Second Temple period strove to be faithful to the laws and practices of their communities, while realizing their works simultaneously needed to address current issues. The Apocrypha, Pseudepigrapha, Dead Sea Scrolls, Philo and Josephus, each furthered Jewish thought and practice. These writings advanced new ideas and acted as a bridge between the "unalterable" word of God and the interpretive rabbinic Judaism that would follow. The process itself took place slowly as the communities, already unstable in their diaspora existence, looked to their leaders for new codes by which they could maintain their activities.

The Dead Sea Scrolls stand alone as a compendium of laws, while the other writings serve a more descriptive function. The Apocrypha, Psuedepigrapha, Philo and Josephus are more concerned with detailing current lifestyles, rewriting past events, and highlighting important concepts for their time. Therefore it is difficult to know much about their attitudes towards capital punishment. The laws that are available briefly touch on capital crimes and the justice system in place to mete out punishment, but more often than not, the material is a minor part of the writings as a whole.

Of all the Second Temple period writings the Apocrypha and Pseudepigrapha deal with capital punishment the least. The foremost collections on the subject, The Apocrypha and Pseudepigrapha of the Old Testament and The Old Testament Pseudepigrapha by R.H. Charles and James H. Charlesworth respectively, don't even list capital punishment or the death penalty in their indexes. Only a thorough scouring of the literature turned up even the most tenuous connections. This may indicate the rare application of the death penalty at the time, but more likely, it was simply not part of the

message the authors were intent on forwarding. Much of these works are literature as opposed to law.

APOCRYPHA AND PSEUDEPIGRAPHIA

The 13 Apocryphal books are "not included in the canon of the Bible although they are incorporated in the canon of the Roman Catholic and Greek Orthodox churches."²⁶ They are generally dated to the Second Temple period, though some biblical scholars maintain they are from the beginning of this time and others attribute them to the end. The books of the Apocrypha were written under the assumption that prophecy had come to an end.²⁷ More so than other Second Temple period documents, the Apocrypha specifically lacks allusions to mandated capital punishment. While some of the stories hint at people's involvement in execution based on human crime, none emphasize a detailed account. Judith's beheading of Holofernes in Judith 13:8 is one example, but does not satisfy the stringent laws instituted by the Bible and should therefore not truly be discussed as a purposeful inclusion to describe capital punishment practices of the time. Moreover, it is not a legal body's decision, but a military action which requires different behavior on the part of the people.

The Pseudepigrapha includes more examples of capital punishment, though, still only a limited number of detailed cases. "A fundamental difference between the Apocrypha and the Pseudepigrapha is that whereas the Apocrypha deal mainly with the struggle against idolatry, believing prophecy to have come to an end (cf. Judith 11:17), the Pseudepigraphists believed that prophecy continued and that through its agency they

²⁶Yehoshua M. Grintz, "Apocrypha and Pseudepigrapha." *Encyclopedia Judaica*. CD-ROM. Ohio: Judaica Multimedia Ltd., 1997.

²⁷ Ibid.

could make laws (see Jubilees) and know the past and the future."²⁸ Charlesworth's definition is more expansive, claiming:

The present description of the Pseudepigrapha is as follows: Those writings 1) that, with the exception of Ahiqar, are Jewish or Christian; 2) that are often attributed to ideal figures in Israel's past; 3) that customarily claim to contain God's word or message; 4) that frequently build upon ideas and narratives present in the Old Testament; 5) and that almost always were composed either during that period 200 B.C. to A.D. 200 or, though late, apparently preserve, albeit in an edited form, Jewish traditions that date from that period.²⁹

Charlesworth and Grintz both point out a critical feature in the Pseudepigrapha.

The authors understood Jewish law to be fluid. Their interpretations and alterations were accepted in the normative Jewish community, leading the way for later commentary. The gravity of this innovation should not be minimized. Though the changes were not as radical as later Jewish law would be, their existence as a whole served to open Jewish communities to the influence of their surrounding cultures. While the Pseudepigrapha interpreted law, it must be noted that the basis for its ideals, ethics and legal system was certainly rooted firmly in the Hebrew Bible. Charlesworth explains, "the Pseudepigrapha illustrate the pervasive influence of the Old Testament books on early Judaism...Judaism became for all time a religion of the Book, God's eternal message."³⁰

Baruch 4 is one Pseudepigraphal book that includes an allusion to the biblical act of stoning. It is dated to the first third of the second century and was probably written in either Palestine or Jerusalem.³¹ Though commonly understood to include later Christian redaction, the last chapter focuses on Jeremiah who is stoned to death by the community. Although there is not much narrative describing the motivation behind the act nor the community's rationalization for choosing this method of execution, its very inclusion is

²⁸Ibid.

²⁹James H. Charlesworth, *The Old Testament Pseudepigrapha*. 2 Vols. (Garden City, New York: Doubleday & Company, Inc., 1983), xv.

³⁰Ibid., xviii.

³¹Stephen E. Robinson, "Baruch, Book of 4." *Anchor Bible Dictionary*, Vol. I. ed. David Noel Freedman. (New York: Doubleday, 1992), 622.

telling. As with the examples in the biblical Writings and Prophets, the lack of justification implies its legitimacy. The writers felt no need to explain its presence because by the time the narrative was written, the act itself may have been an accepted method of communal punishment.

The conduct of the community, however, should not be understood as an act that was biblically authorized. Jeremiah had not transgressed the biblical injunctions deserving of the death penalty. The community's visceral response should therefore be understood as further evidence of the community's tacit acknowledgment of changes in biblical law. Either the community was truly accustomed to punishment by stoning, or the author wanted later readers to think that they were.

Jubilees is another Pseudepigraphal book that includes references to capital punishment. Written between 135-105 B.C.E, the book attempts to defend Judaism against ever popular Hellenistic ideas.³² Vanderkam claims the author most likely, "belonged to the movement that was later called Essene, whatever might have been its original name."³³ Like other Pseudepigraphal works it focuses on Messianic hope and redemption, but also includes rules and laws to help bring about that ultimate redemption. Jubilees continues the trend of adding new ideas to biblical law.

Stone explains, "the author adds to biblical stories halakhic commentaries, which often begin with the expression, 'For this reason it is written (or ordained) in the heavenly tablets that' In these commentaries the author utilizes some biblical narrative as the springboard for his exposition on a point of law."³⁴ The author's dependence on the biblical tradition lends more integrity to his own commentary. His commentary may

³²R.H. Charles and D. Litt, *The Apocrypha and Pseudepigrapha of the Old Testament in English*. 2 Vols. (Oxford: Clarendon Press, 1963), 1.

³³James C. VanderKam, "Jubilees, Book of." *Anchor Bible Dictionary*. Vol. III. ed. David Noel Freedman. (New York: Doubleday, 1992), 1030.

³⁴Michael E. Stone, ed. *Jewish Writings of The Second Temple Period*. (Assen: Van Gorcum, 1984), 97-98.

seem less like an adaptation of the previous law and more like a reiteration. Stated simply by Charlesworth, "the author was concerned to demonstrate the authoritative status of his laws."³⁵

There is some question as to whether the author of Jubilees was writing from a Pharisaic, Saduceean or sectarian point of view. Stone offers an important clarification: "To what extent these laws reflect early practice that was later relaxed and to what extent they represent sectarian innovation is a question in need of investigation. It does seem likely, however, that in some cases the author is protesting current practice in the Second Temple period."³⁶ Jubilees seems to promulgate what will be considered absolute law regardless of its additions, defenses or disagreements with the community of the time.

One overriding principle specific to the death penalty is prominent in Jubilees. While Jubilees does encourage human punishment, there is an aspect of divine punishment as well. As Charles explains:

The doctrine of retribution is strongly enforced by our author. It is to be individual and national in this world and the next. As regards the individual law of exact retribution is according to our author not merely an enactment of human justice – the ancient *lex talionis*, eye for eye, tooth for tooth; it is observed by God in His government of the world. The penalty follows in the line of the sin. ...The final judgment was to take place at the close of the Messianic kingdom (xxiii. 30). This judgment embraces the human and superhuman worlds (v. 10 seq., 14). At this judgment there will be no respect of persons, but all will be judged according to their opportunities and abilities (v.15 seq.).³⁷

As we will see, human retributive justice was certainly acceptable, but any remaining discipline would surely be meted out by God and punishment would not be escaped.

In his midrashic retelling of Genesis, the author of Jubilees manages to interweave later biblical law into this story. Some of the statements made by the author are consistent with biblical law, others, though, take some liberty with the exact nature of

³⁵Charlesworth, 38.

³⁶Stone, 100.

³⁷Charles, Vol. II, 10.

the earlier code. Jubilees has many references to capital punishment. Most of them follow their biblical precedent closely, generally, the only difference being the placement of the laws. The laws are obviously paraphrased, but include some of the biblical transgressions requiring the death penalty.

Jubilees Chapter 2:24-29

(24) And to this (Jacob and his seed) it was granted that they should always be the blessed and holy ones of the first testimony (25) and law, even as He had sanctified and blessed the Sabbath day on the seventh day. He created heaven and earth and everything that He created in six days, and God made the seventh day holy, for all His works; therefore He commanded on its behalf that, whoever does any work thereon (26) shall die, and that he who defiles it shall surely die. Wherefore do thou command the children of Israel to observe this day that they may keep it holy and not do thereon any work, and not to (27) defile it, as it is holier than all other days. And whoever profanes it shall surely die, and whoever does thereon any work shall surely die eternally, that the children of Israel may observe this day throughout their generations, and not be rooted out of the land; for it is a holy day and a blessed (28) day. And every one who observes it and keeps Sabbath thereon from all his work, will be holy and (29) blessed throughout all days like unto us. ³⁸

The Sabbath laws are reiterated at the end of the book in chapter 50:6-13, emphasizing their importance to the author. These laws are far more strict than their biblical predecessors, though, as explained earlier by Stone, the author attempts to lend credence by referencing the "Holy Tablets" as their point of origin. Knowing Jubilees was in part intended to keep the Jewish community apart from Hellenism explains its strict interpretation.

Jubilees Chapter 50:6-13

(6) And behold the commandment regarding the Sabbaths -I have written (them) down for thee- (7) and all the judgments of its laws. Six days shalt thou labour, but on the seventh day is the Sabbath of the Lord your God. In it ye shall do no manner of work, ye and your sons, and your men- (8) servants and your maid-servants, and all your cattle and the sojourner also who is with you. And the man that does any work on it shall die: whoever desecrates that day, whoever lies with

³⁸ R.H Charles, and D. Litt. *The Apocrypha and Pseudepigrapha of the Old Testament in English*. 2 Vols. (Oxford: Clarendon Press, 1963), All subsequent citations of Jubilees utilize the Charles and Litt translation.

(his) wife, or whoever says he will do something on it, that he will set out on a journey thereon in regard to any buying or selling: and whoever draws water thereon which he had not prepared for himself on the sixth day, and whoever takes up any burden to carry it out of his tent or out of his house (9) shall die. Ye shall do no work whatever on the Sabbath day save what ye have prepared for yourselves on the sixth day, so as to eat, and drink, and rest, and keep Sabbath from all work on that day, and to bless the Lord your God, who has given you a day of festival and a holy day: and (10) a day of the holy kingdom for all Israel is this day among their days for ever. For great is the honour which the Lord has given to Israel that they should eat and drink and be satisfied on this festival day, and rest thereon from all labour which belongs to the labour of the children of men save burning frankincense and bringing oblations and sacrifices before the Lord for days and for (11) Sabbaths. This work alone shall be done on the Sabbath-days in the sanctuary of the Lord your God; that they may atone for Israel with sacrifice continually from day to day for a memorial well-pleasing before the Lord, and that He may receive them always from day to day according as thou (12) hast been commanded. And every man who does any work thereon, or goes on a journey, or tills (his) farm, whether in his house or any other place, and whoever lights a fire, or rides on any beast, or travels by ship on the sea, and whoever strikes or kills anything, or slaughters a beast or a bird, or (13) whoever catches an animal or a bird or a fish, or whoever fasts or makes war on the Sabbaths: The man who does any of these things on the Sabbath shall die, so that the children of Israel shall observe the Sabbaths according to the commandments regarding the Sabbaths of the land, as it is written in the tablets, which He gave into my hands that I should write out for thee the laws of the seasons, and the seasons according to the division of their days.

Retributive justice was introduced earlier in Jubilees than in the biblical Genesis. The thrust of Genesis 9:6, a human's ultimate responsibility for killing another, is introduced here with the story of Cain and Abel and reiterated in 6:6-11 in the Noahide Code.

Jubilees Chapter 4:30-33

(31) ...At the close of this jubilee Cain was killed after him in the same year; for his house fell upon him and he died in the midst of his house, and he was killed by its stones; for with a stone he had killed Abel, and by a stone was he killed in (32) righteous judgment. For this reason it was ordained on the heavenly tablets: With the instrument with which a man kills his neighbour with the same shall he be killed; after the manner that (33) he wounded him, in like manner shall they deal with him.

Jubilees Chapter 6:6-11

(6) ... And behold I have given unto you all beasts, and all winged things, and everything that moves on the earth, and the fish in the waters, and all

(7) things for food; as the green herbs, I have given you all things to eat. But flesh, with the life thereof, with the blood, ye shall not eat; for the life of all flesh is in the blood, lest your blood of your lives be required. At the hand of every man, at the hand of every (beast) will I require the (8) blood of man. (9) Whoso sheddeth man's blood by man shall his blood be shed, for in the image of (10) God made He man. And you, increase ye, and multiply on the earth.' And Noah and his sons swore that they would not eat any blood that was in any flesh, and he made a covenant before the (11) Lord God for ever throughout all the generations of the earth in this month...

Chapters twenty, thirty and forty-one each refer to capital laws specific to sexual purity. The multiple occurrence of these laws may point to their importance to the author of Jubilees. They may also be due to the fact that these are the narratives which occur in Genesis, while most of the other capital laws are found in the later books of the Bible. It is important to note, though, that some laws introduced in chapter 30 do not appear in the Bible until much later. This gives weight to the idea that the presence of these laws in Jubilees is more due to their import in the community's ideals. Jubilees strives to be consistent with the Bible's punishments requiring that sexual impurity be avenged through execution by burning, but again, changes some of the details.

Jubilees Chapter 20:1-5

(4)...And if any woman or maid commit fornication amongst you, burn her with fire and let them not commit fornication with her after their eyes and their heart; and let them not take to themselves wives from the daughters of Canaan; for the seed of Canaan will be rooted out of (5) the land. And he told them of the judgment of the giants, and the judgment of the Sodomites, how they had been judged on account of their wickedness, and had died on account of their fornication, and uncleanness, and mutual corruption through fornication.

Most notably, in chapter 30, Jubilees changes the laws previously detailed in the Bible by requiring only the woman be burned in the cases mentioned of sexual impropriety. The author also advances a restrictive standard requiring the separation of Jews from the Gentile community. He uses this opportunity to include the laws pertaining to Molech. While modern commentators do not conclusively define what is meant by one who, "gives any of his offspring to Molech," as written in Leviticus 20:1-2,

the author of Jubilees has no problem classifying the specific sin intended. In order to help further his ideals, the author utilizes the phrase "root out...from the midst of Israel" reminiscent of the biblical requirement to do the same with evildoers. Again, he hoped to gain support by resting on the accepted biblical tradition and language.

Jubilees Chapter 30:7-19

(7)...And if there is any man who wishes in Israel to give his daughter or his sister to any man who is of the seed of the Gentiles he shall surely die, and they shall stone him with stones; for he hath wrought shame in Israel; and they shall burn the woman with fire, because (8) she has dishonoured the name of the house of her father, and she shall be rooted out of Israel. And let not an adulteress and no uncleanness be found in Israel throughout all the days of the generations of the earth; for Israel is holy unto the Lord, and every man who has defiled (it) shall surely die: (9) they shall stone him with stones. For thus has it been ordained and written in the heavenly tablets regarding all the seed of Israel: he who defileth (it) shall surely die, and he shall be stoned with (10) stones. And to this law there is no limit of days, and no remission, nor any atonement: but the man who has defiled his daughter shall be rooted out in the midst of all Israel, because he has given (11) of his seed to Molech, and wrought impiously so as to defile it. And do thou, Moses, command the children of Israel and exhort them not to give their daughters to the Gentiles, and not to take for (12) their sons any of the daughters of the Gentiles, for this is abominable before the Lord.

Jubilees' narrative of Tamar and Judah is quite similar to the biblical narrative.

The same points are emphasized, though Tamar's escape from the required law is more fully explained in this version. Judah's mistake is underplayed, while Tamar's innocence is emphasized. After explaining the initial circumstances of the Tamar incident, Jubilee's Chapter 41:17-20 states:

(17) 'Behold Tamar, thy daughter-in-law, is with child by whoredom.' And Judah went to the house of her father, and said unto her father and her brothers: 'Bring her forth, and let them burn (18) her, for she hath wrought uncleanness in Israel.' And it came to pass when they brought her forth to burn her that she sent to her father-in-law the ring and the necklace, and the staff, saying: (19) 'Discern whose are these, for by him am I with child.' And Judah acknowledged, and said: 'Tamar (20) is more righteous than I am. And therefore let them burn her not' And for that reason she was (21) not given to Shelah, and he did not again approach her And after that she bare two sons...

The Apocrypha and Pseudepigrapha display the authors' ability to work within the biblical framework while trying to adapt the law to the changing climate and culture. They did not intend to open up the floodgates of commentary and interpretation. In fact, they struggled to connect their minor changes to biblical precedent, obviously attempting to keep law firmly rooted in the Bible. The strict nature of their laws indicates their desire to erect barriers which would successfully insulate the Jewish community. Their aim was not to give more freedoms, but to respond to the obvious influence of Hellenism while minimizing their admission of that effect as much as possible.

DEAD SEA SCROLLS AND SECTARIAN CODES

The Dead Sea Scrolls and sectarian codes must be understood as having been based heavily on biblical law. Schiffman succinctly explains, "the sect considered itself as continuing the tradition of biblical Israel."³⁹ The scribes, like the authors of the Apocrypha and Pseudepigrapha, did not want to change the biblical law or the perceived strength of the Divine message. Their intent was to further limit the behavior of the Jewish community, requiring strict devotion to what they understood to be the purest interpretation of the law. The Dead Sea Scrolls and Qumran literature do, though, move in an interpretive direction.

The codes written for the sectarian communities were varied. In some cases they differ in their emphasis on the import of certain laws, but they are similar in terms of highlighting the importance of following the prescribed laws. Ulrich states, "From the eleven caves at Qumran fragments of roughly 800 manuscripts were recovered."⁴⁰ He goes on to explain that the bulk of the manuscripts were biblical in nature and that at least

³⁹Lawrence H. Schiffman, *The Halakha at Qumran*. (Leiden: E.J. Brill, 1975), 10.

⁴⁰Eugene Ulrich, *The Dead Sea Scrolls and the Origins of the Bible*. (Grand Rapids, MI: William B. Eerdmans Publishing Co., 1999), 19.

one of each of the books of the Hebrew Bible was found (except for Esther and Nehemiah.)⁴¹ Of the remaining material, new interpretations were added to previously stated laws, in some cases changing the very nature of the law altogether. Ulrich claims, "sometimes the scribes intentionally inserted new material that helped interpret or highlight for their contemporary congregation in a new situation the relevance of the traditional text."⁴² Schiffman goes even further stating, "We can state with certainty that the Qumran legal traditions are derived exclusively through exegesis...According to Talmon, The Dead Sea sectarians saw themselves as continuing the biblical tradition."⁴³ The differences between biblical laws and Dead Sea laws should not be understood as a desire on the part of the sectarians to change the biblical law, rather to allow for its use within their specific culture.

According to Kimbrough, the Damascus Document can be dated between 100 B.C. and 70 A.D.⁴⁴ It includes one of the most obvious deviations from biblical law in sectarian code. While the Pseudepigrapha intended to limit Sabbath behavior, this code requires a less severe punishment than the narrative in Numbers 15:32-36.

CDC XII, 4-5:

And whoever strays by profaning the Sabbath or the feast, he shall not be put to death but it shall be incumbent on men to watch him; and if he is cured of this sin, he shall be watched for a period of seven years and afterwards he shall enter the Assembly (once more).

Assuming this was an accepted law, this rule effectively abolishes the death penalty for this transgression for the sectarian community. The punishment instituted is still severe, but the change suggests two significant realities. The first is that the sectarian

⁴¹Ibid.

⁴²Ibid., 11.

⁴³Schiffman, *The Halakhah*, 19-20.

⁴⁴S.T. Kimbrough, "The Concept of Sabbath at Qumran." *Revue De Qumran* 20, 5 (July.1966): 483.

community was not inclined towards instituting the death penalty because they were concerned about their population as it was. Kimbrough explains, "The thought of execution of any member for most any offense without another chance would not have seemed too practical."⁴⁵ The majority of the members were not married and procreation was not common. The effect of the change was to maintain the severity of the crime, while simultaneously retaining their membership.

The second point to be aware of is that the sectarian scribes were obviously willing to change the written law. Kimbrough claims that, "the ethical attitude of Qumran was such that compromising the law was possible through Halakhic discussion. The ethical attitude was one of limited flexibility which viewed certain matters of Halakhah as left to the discretion and decision of the sect."⁴⁶ He goes on to say, "we may have in Qumran's disregard of Numbers 15:35 evidence of the evolving strength and authority of oral tradition which would have made possible the dismissing of a law in the light of custom and circumstances."⁴⁷

Schiffman does not go quite as far in his assessment of the change. Rather, he maintains, "Rabin attempts to show that the sect 'abolished the death penalty.' Since the death penalty is biblical in origin, the term 'abolish' here is inappropriate. One must bear in mind that even if the death penalty remained 'on the books,' it need not ever have been carried out."⁴⁸ Schiffman's attitude is reminiscent of the rabbinic position, specifically in reference to the *ben sorer umoreh* discussed in Mishnah Sanhedrin chapter 8. The

⁴⁵Ibid., 500.

⁴⁶Ibid.

⁴⁷Ibid.

sectarian inclination towards changing the law was not to ease the punishment. It served to maintain the severity while adopting different customs the community agreed upon for the sake of its survival.

The Damascus Document does recognize some capital crimes. As in the Bible, there are restrictions about the witnesses for these cases, and they must be particularly certain of what they saw.

CDC 9:16-10:3:

Regarding any case in which a man transgresses against the Torah and his neighbor witnesses it, and he is the only witness: If it is a capital case, he (the witness) shall report it in his (the offender's) presence to the examiner (*mevaqquer*) with reproving (*be-hokheah*). The examiner shall record it (the offense) with his (own) hand until (such a time as) he (the offender) should repeat it (the offense) in the presence of one (witness). Again he (the witness) shall report (it) to the examiner. If he (the offender) should again be apprehended in the presence of one (witness) (i.e. a third time), his verdict is complete. If, however, two witnesses testify to one case, he (the offender) shall only be removed from the pure food, provided they are reliable (witnesses). On the very day the person (the witness) shall see it, he shall report it to the examiner. Concerning property (cases), they may accept two reliable witnesses, and (rely) on a single (witness) only to remove (the offender) from pure food. Let no witnesses be accepted by the judges to put someone to death by testimony, whose days are not sufficient to pass among the mustered (and who is not) God-fearing. Let no man be trusted against his neighbor as a witness, who violates any of the commandment(s) intentionally, unless (his deeds) have been purified (sufficiently for him) to return.⁴⁹

These laws are based on the biblical injunctions about witnesses in a capital case. They do however go even farther in their limiting nature than Numbers 35:30, Deuteronomy 17:6 and Deuteronomy 19:15. They require that the witness pass muster, reinterpret the number of witnesses, and require witnesses to be God-fearing as well as good citizens within the community. These conditions limit the possibility for capital

⁴⁸Schiffman, *The Halakha*, 78.

⁴⁹Florentino Garcia Martinez. *The Dead Sea Scrolls Translated*. Trans. Wilfred G.E. Watson. (Leiden: E.J. Brill, 1994), All subsequent citations of Dead Sea and sectarian scrolls will utilize the Martinez translation.

cases, but also serve to highlight the need for validity in capital cases. These limitations may have been of benefit to an ever-shrinking community, but the ethical implications should not be disregarded. The community placed a great deal of importance on these laws because they were unwilling to mistakenly enact the execution of an innocent man.

The Temple Scroll is another document which includes examples of the death penalty. Similar to Deuteronomy 13:2-6, the scroll, "mandat[es] the death penalty for what is termed a 'prophet' who advocates worship of other gods. The scroll also restates the law of the enticer to idolatry, found in Deuteronomy 13:7-12 (Temple Scroll 54:19-55:1). As in Deuteronomy, such a person is to be put to death. Here again, the scroll introduces no significant legal innovations."⁵⁰ The law in reference to the individual idolater also undergoes little significant change.

TS Fragment 20:

[If your brother, the son of your fa]ther or[the son of your mother, or your son or your daughter, or the woman] [who lies in your embrace or your soul] mate [provokes you in secret saying; 'Let us go and let us serve other gods'] [whom you do not know and neither do your fa]thers, of the gods of [the peoples who surround you, close to you] [or far from] you, from one side of the land to the [other side of the land; you shall not go to him nor] [shall you listen to him, nor shall your sig]ht [take pity] on him, nor shall you have compassion on [him, and you shall not conceal him, but instead you shall kill him;] [your hand will be] the first one [over him] to kill him and the hand of [all the people after you. You shall stone him with stones,] [because he tried to turn] you aside. *Blank[...]*

The authors of the Temple Scroll expected to mandate strict adherence to their laws. It is therefore understandable why they chose to parallel the laws in Deuteronomy. The author of this law, as Schiffman explains, "is concerned almost exclusively with eliminating idolatrous worship from among the Jews, an agenda that fits both the author of Deuteronomy and the author/redactor of the scroll."⁵¹

⁵⁰Lawrence H. Schiffman, *Reclaiming the Dead Sea Scrolls*. (Philadelphia and Jerusalem: The Jewish Publication Society, 1994), 375.

⁵¹*Ibid.*, 377.

The Scroll later goes on to explain the process by which an informer or escapee must be punished:

TS. 64:6-13

If a man has informed against his people and has delivered his people up to a foreign nation and has done evil to his people, you shall hang him on the tree and he shall die. On the evidence of two witnesses and on the evidence of three witnesses he shall be put to death and they shall hang him on the tree. If a man committed a crime punishable by death and has run away to the midst of the Gentiles and cursed his people and the children of Israel, you shall hang him also on a tree and he shall die; and you shall not leave their bodies upon the tree in the night but you shall bury them the same day, for the hanged upon the tree are cursed by God and men; and you shall not defile the land which I gave you as an inheritance.

This text points out some innovations, but it generally preserves the thrust of the biblical precedent. The community had to deal strictly with informers because, as pointed out earlier, it was close-knit and relied on its members loyalty'. One way to ensure adherence was to include this transgression as a capital crime.

The question of how many witnesses were required is difficult. It seems as though two or three witnesses were acceptable, but in light of other examples it should be assumed that three witnesses was the preferred option. Schiffman suggests, "It may be that whereas in regard to other capital crimes the sect required three witnesses, it was less rigorous here and executed informers on the testimony of only two. Such tendencies would be expected in a sectarian group which saw itself as fighting for its survival."⁵² In order to further encourage members to follow their path, laws which were already strict, became even more so.

The section which deals with the method of execution must certainly be a

⁵²Lawrence H. Schiffman, *Sectarian Law in the Dead Sea Scrolls*. (Rhode Island: Brown University, 1983), 78.

reference to Deuteronomy 21:22-23 which is as follows:

(22) If a man is guilty of a capital offense and is put to death, and you impale him on a stake, (23) you must not let his corpse remain on the stake overnight, but you must bury him the same day. For an impaled body is an affront to God; you shall not defile the land that the Lord your God is giving you to possess.

It is unclear what method the Temple Scroll mandates. Some scholars believe this is a reference to crucifixion, while others believe that it "refers not to crucifixion, but to hanging after death, which is the original intent of the Torah."⁵³ Although the similarity between this law and Deuteronomy may give credence to the idea of hanging after an execution, there are other examples of the sectarians interpreting the Bible in ways that were more symbolic of their own lifestyle. In either case, it is clear that the punishment was drastic based on the gravity of the crime.

The Zaddokite Fragments were another collection of documents chronicling life in Second Temple period times. For this community too, the death penalty was not used for all of the biblically mandated capital crimes. Their laws were interpreted by their leaders, and they were open about this leniency. Schiffman explains, "over and over we are told that only the sect and leadership is capable of properly interpreting Jewish law."⁵⁴ Their separation from the Pharisees and Sadducees allowed for a new understanding of the law, one which fit with their cultural norms. But, they were not completely separate from all other cultures. They did allow for capital punishment to be, "carried out 'by the statutes of the Gentiles.'"⁵⁵ They reserved this punishment for only the most extreme crimes for their community. One of these crimes, though, based on a biblical injunction, may indeed have been in reference to a more salient situation for their community.

⁵³Schiffman, *Reclaiming*, 378-379.

⁵⁴Schiffman, *Sectarian Law*, 7.

⁵⁵G.R. Driver, *The Judean Scrolls*. (Oxford: Basil Blackwell, 1965), 70.

Zaddokite Fragments 9:1

Any man who shall condemn (or destroy) any man according to the laws of the nations is to be put to death.

The law initially seems to be an amalgamation of Leviticus 27:29 and Genesis 9:6 mentioned earlier.

Leviticus 27:29:

No human being who has been proscribed can be ransomed: he shall be put to death.

Genesis 9:6

Whoever sheds the blood of man, by man shall his blood be shed; For in God's image did God make man."

These two laws, though, do not make up the connotation of this law as understood by scholars. While the biblical law seems fairly general in nature, the sectarians were speaking to a specific crime. Schiffman maintains, "It is most probable that in our passage, we are dealing with a law condemning to death one who turns to non-Jewish courts to accuse a fellow Jew of a crime, since in so doing one has informed against one's fellow Jew."⁵⁶ Schiffman goes on to explain, "As we know from somewhat later rabbinic texts, informing on Jews to non-Jewish authorities was such a problem during this period that strong measures were considered necessary to prevent it."⁵⁷ The scribes and leaders were able to constantly impress upon the members the importance of staying faithful to their community not only because of its benefits, but because of the punishment for violating the law.

The Manual of Discipline includes infractions that, although not necessitating the death penalty still require a strict penalty. These infractions are similar to those found in other sectarian writings that do follow the biblical model of capital punishment. Some of the rules in the Manual of Discipline are easily traceable to larger pieces of the Zaddokite Fragments.⁵⁸ The Manual's main section is legalistic and, "defines the nature and

⁵⁶Schiffman, *Reclaiming*, 374.

⁵⁷Ibid., 375.

⁵⁸Driver, 67.

structure of the group."⁵⁹ It is focused on the internal organization of the group and can be understood as a document which is, "the product of an evolutionary process rather than of the efforts of a redactor who assembled the entire text at one time from its various documents."⁶⁰ This definition furthers the idea that the sectarians were involved in a slow but solid process of interpreting the Bible.

The Manual asserts in vii 1-2 and vii 16-17:

(vii 1-2) permanent expulsion from the community for blaspheming through fear of persecution or for any other cause when reading Scripture or giving a blessing, (vii 16-17), for spreading tales about the Many and murmuring against the principles of the society and for apostasy after ten years' membership of the society.

For this community permanent expulsion was a strict penalty. It should be no surprise that it is used for blasphemy, informing, and apostasy. Apparently, these offenses were high priority cases for the sectarian community.

The Qumran community had insulated itself in order to follow the Jewish religion in the way they felt best. Rooted in that decision they began to interpret some of the biblical laws in ways appropriate to their culture. Their understanding of "true Judaism" was different than their Pharisaic and Saducean brethren. They felt their counterparts were abusing the law, while they were prepared to return it to purity.

The earliest of the sectarians moved into the wilderness because they were, "motivated by the desire to observe strictly God's laws in the ways that they believed to be right."⁶¹ It would be naive to think that the authors of the sectarian scrolls did not realize they were in fact changing biblical law. They did, however, believe it to be for the right reasons. They, like their Talmudic successors, believed that certain laws were

⁵⁹Schiffman, *Sectarian Law*, 3.

⁶⁰Ibid., 4.

⁶¹Michael A. Knibb, *The Qumran Community*. (Cambridge: Cambridge University Press, 1987), 129.

nigleh, revealed, and certain laws were *nistarot*, hidden. It was their duty to find those hidden laws and introduce them into their society. Ulrich explains:

These creative biblical scribes were actively handing on the tradition, but they were adding to it, enriching it, and attempting to make it adaptable and relevant...The word, heard in earlier times with significance in that situation, is now heard with revived significance in this new situation.⁶²

This revival is precisely the method by which Jewish law changed and grew, each generation adapting the basic law for its own community, standards and morals.

PHILO

Philo's impact on Jewish commentary and interpretation should not be underestimated. Born around 25 BCE, he would ultimately write some of the most profound analysis of Jewish tradition. Continuing the trend of his Second Temple period contemporaries, he created a categorization of Jewish law by interpreting the Bible according to allegory and bringing the biblical laws into contemporaneous relevance.

He was not only the first theologian, i.e. the first who tried to bring into harmony the teachings of supernatural revelations and the conclusions of speculative thought, but also the first psychologist of faith, the first mystic among professors of monotheism, and – last but not least – the first systematizer of biblical allegory.⁶³

Philo's knowledge of Greek law and his wealthy upbringing allowed him the freedom to consider Jewish law and how it could be understood by his fellow Jews. Philo was motivated to write for them, hoping they too could benefit from a methodical appreciation of Jewish Law.

Philo's goal was to integrate the Greek culture he knew with the Jewish religion he lived. His work entitled *On The Special Laws* deals specifically with this aim. "On

⁶²Ulrich, 11.

the Special Laws in effect sets forth the specific requirements for living virtuously."⁶⁴

This ideal was only available through a careful amalgamation of behavior and belief. In order to convey that message, Philo engaged in a distinct form of exegesis. He created a system whereby:

the symbolical, though higher and more important, practically never invalidates the literal. (Exceptionally, Philo discards the literal meaning altogether or allows it only a limited role.) Philo combines literal and symbolic methods of exegesis, stressing symbolism against literalists and the literal sense against over-spiritualization.⁶⁵

The levels of meaning sit solidly atop one another. Neither literalism nor symbolical interpretation alone could correctly show the Bible's relevance to modern day life.

Philo includes many of the biblically ordained capital offenses in his writings. He incorporates laws about murder, the disobedient son, blasphemy, harlotry and sexual impropriety, dishonest oaths, the Sabbath and the informer thereby imparting his own sense of morality to his community.

In "On Flight and Finding," Philo, while addressing the use of the plural noun for God in Genesis 1:26, addresses those who are guilty of capital crimes:

(74)...Very naturally, therefore, does God give up those who have done deeds worthy of death to the hands of others for punishment, wishing to teach us that the nature of evil is banished to a distance from the divine choir, since even punishment, which, though a good, has in it some imitation of evil, is confirmed by others.⁶⁶

He further addresses the punishment for murderers in "Questions and Answers on

⁶³ Alexander Altmann, Isaak Heinemann, and Hans Lewy, eds. *Three Jewish Philosophers*. (New York: Meridian Books, 1960), 7.

⁶⁴ Samuel Sandmel, *Philo of Alexandria*. (New York: Oxford University Press, 1979), 114.

⁶⁵ Stone, 261.

⁶⁶ C.D. Yonge, Trans., *The Works of Philo*. Peabody, MA: Hendrickson, 1993. All subsequent translations from Philo will be taken from this translation.

Genesis, II," when he comments on Genesis 9:5:

...he employs the appellation of brothers in order to warn men of the implacable and severe punishment which is reserved for murderers; that they, without meeting any compassion, shall suffer what they have inflicted; for they have not slain strangers, but their own brothers

and Genesis 9:6

What is the meaning of the expression, "whoso sheddeth man's blood, by man shall his blood be shed?" There is no excess in this declaration, but rather an indication of a still more formidable denunciation, because he says, "he Himself shall be poured out like blood who pours out blood." For that which is poured out flows and is lost, so that it no longer has any power or substance. And by this he shadows forth the fact that the souls of those who perpetrate unworthy actions imitate the mortal body in its corruption, as far as corruption is accustomed to come upon individuals; for the body is then dissolved into those parts of which it was composed, returning to its proper elements. But the miserable soul, laboring under distresses, is borne hither and thither by the overflow of a lascivious life; and the very evils which have grown up along with it are accustomed to suffer the same overflow, in the manner of the parts of the limbs.

In discussing his opinion of sinners, Philo's theology and views on death appear simultaneously. He obviously believes in a strict system of justice. While the body may be corporeal, the soul is ultimately judged by God. Not only should sinners worry about their demise here on earth, they should be concerned with God's ultimate judgement. His indignation is clear as he incorporates current thinking of his day with the fairly simple statements of the Bible.

Philo then proceeds to write about honoring one's parents. Sometimes he focuses directly on the commandment and its corollary punishment. Other times, Philo uses the parental model to explain other commandments. In the following case, he is quick to assign the death penalty for drunkenness, but is willing to attribute it to many different sins. He includes dishonoring one's parents, assuming, like the Bible, the behaviors go hand in hand.

On Drunkenness XXIV(95)

Very naturally, therefore, the sacred law commands the disobedient and

contentious man— who brings contributions of evil, that is to say, who joins together and heaps up sin upon sin, great crimes on little ones, fresh guilt upon ancient, intentional upon involuntary misdeed; and who, like a person inflamed by wine, is always intoxicated and drunk, and raging with ceaseless and unrestrained drunkenness, during the whole of his life—to be stoned; because he has drunk of the unmixed and abundant cup of folly, and because he has destroyed the injunctions of right reason, his father, and the legitimate expositions of his mother's instruction. And though he had an example of excellence and virtue in his brothers, who were approved by his parents, he did not imitate their virtue, but on the contrary, he thought fit to go to an additional length in his transgressions, so as to make a god of the body, and to make a god of Typhus, who is especially honored among the Egyptians...

He includes dishonoring one's parents in his understanding of blasphemy.

On Flight and Finding XVI 83-84

(83) Therefore, having further commanded the unholy man who is a speaker of evil against divine things to be removed from the most holy places and to be given up to punishment...

He proceeds to say, "Whosoever hateth his father or mother, let him die." And in a similar strain he says, "He who accuseth his father or his mother, let him die."

(84) He here all but cries out and shouts that there is no pardon whatever to be given to those who blaspheme the Deity. For if they who bring accusations against their mortal parents are led away to death, what punishment must be that those men deserve who venture to blaspheme the Father and Creator of the universe...

Philo sets up a system that mimics the hierarchical standard in place in his own community. He places parents just under God, claiming they are responsible for the well-being, education, moral instruction, and safety of their children, having created them, much as God created humans. But it is ultimately the child's responsibility to respect this hierarchy. Although his opinion may not be different than that of the biblical community, his rhetoric is much more vehement and detailed.

In reference to homosexual behavior, Philo is direct in his condemnation. He describes the practices of homosexuals and transvestites in great detail, obviously describing a common practice in the community, whether Jewish or at large. His ultimate censure is as follows:

The Special Laws III (38)

And it is natural for those who obey the law to consider such persons worthy of death, since the law commands that the man-woman who adulterates his precious coinage of his nature shall die without redemption, not allowing him to live a single day, or even a single hour, as he is a disgrace to himself, and to his family, and to his country and to the whole race of mankind...

In The Special Laws III (39) he likewise condemns pedophiles to death, claiming their behavior is immoral because they are not allowing for procreation while "wasting seed" with boys. His frustration is apparent, claiming the pedophile "allows fertile and productive lands to lie fallow, contriving that they shall continue barren, and labors day and night at cultivating that soil from which he never expects any produce at all." Philo's contempt is substantial. Part of his displeasure may have been rooted in a similar cause to the sectarian's extreme dealings with the informer. Philo was worried about a community that was in danger of becoming Hellenized. Not only did this behavior signify close interaction with Greek practice, it also put his own community at risk. His allegiance to the biblical mandate to "be fruitful and multiply," may have been vested in a desire to follow the Bible, as well as act as a guardian for his faith.

Philo is consistent with biblical law in reference to rape. If the woman was unmarried, she could become the rapist's wife if the man paid the bride price for her. If they both agree to sexual relations in a partnership not yet made legal, they are both punished by stoning. In the case of violent rape, Philo requires the death penalty for the man alone. He explains in the Special Laws III, XIII (76)

Therefore justice in every case pursues the man who has committed violence, nor is his iniquity excused by the difference of the place, so there cannot be any pleas to defend him from the consequences of his violence and lawlessness...

Philo slightly changes the laws in regard to Sabbath offenders. In certain situations he makes the law more lenient, but in others he makes the law even more strict. He includes no explanation for his leniency, but it does correspond with later Mishnaic laws.

The Special Laws, II XLV (249)

Again, let the man who has profaned the sacred seventh day as far as it may have lain in his power, be liable to the punishment of death.

Although Philo includes an intent clause, he expands the law a bit when he goes on to talk about the case brought forth in Numbers 15:32-36. He agrees with the execution of the Sabbath offender but then includes gathering fuel for a fire on the Sabbath in the list of capital offenses. He seems to be caught between making the laws more stringent, and providing an escape clause.

Philo does little to change the injunction of the false prophet of Deuteronomy 13:1. He does give a more detailed explanation of why the crime is dangerous. As in biblical law, he includes the guilt of the friends and relations, but is not as vengeful as the Bible in detailing punishment to one's own family:

The Special laws I LVIII 315-316

(315) And if, indeed, anyone assuming the name or appearance of a prophet, appears to be inspired and possessed by the Holy Spirit, were to seek to lead the people to the worship of those gods in the different cities, it would not be fitting for the people to attend to him being deceived by the name of a prophet. For such an one is an imposter and not a prophet, since he has been inventing speeches and oracles full of falsehood, (316) even though a brother, or a son, or a daughter, or a wife, or a steward, or a firm friend, or any one else who seems to be well-intentioned towards one should seek to lead one in a similar course; exhorting one to be cheerful among the multitude, and to approach the same temples and to adopt the same sacrifices; but such an one should be punished as a public and common enemy, and we should think but little of any relationship, and should relate his recommendations to all the lovers of piety, who with all speed and without delay would hasten to inflict punishment on the impious man, judging it a virtuous action to be zealous for his execution.

In general, Philo's explanation of the biblical laws through the lens of the ten commandments serves the function of uniting all the laws. Wolfson articulates:

These laws are each intended to promote a certain particular moral virtue... However, this classification of the laws according to virtues, we are warned by Philo, should not be taken too rigidly, for each of the ten commandments, as well as the particular laws which fall under it, 'separately and all in common incite and exhort us to wisdom, and justice and godliness and the rest of the company of virtues.'⁶⁷

Philo interpreted the laws according to his own morals. His opinions of Jewish law and appropriate behavior were well defined. He expected people to recognize the importance of his values and to agree that they were concurrent with traditional values of the time.

JOSEPHUS

Although Josephus's reputation is that of an informer who was traitorous to his own Jewish community, his writings certainly give a rare and critical view into the lifestyle of the Jews in the latter half of the Second Temple period. His writing highlights what must have been the laws that were considered central to the Jewish community.

One must remember though that he was not writing for the Jews. Quoting Albeck, Schiffman reminds us that, "Philo is motivated by a Jewish feeling more than by Jewish teachings, while Josephus is writing for a non-Jewish audience and wanted to amalgamate Judaism with Greek points of view."⁶⁸ During the most tumultuous time in Jewish history, with the destruction of the Second Temple and the emergence of a new type of Pharisaic Judaism, exegesis and interpretation were, at that point, a more common endeavor. Josephus's writings followed in that tradition.

⁶⁷Harry Austryn Wolfson, *Philo*. Vol. II. (Cambridge, MA: Harvard University Press, 1947), 222.

While Albeck claims that Philo and Josephus, "Both often derive their statements from Scriptural exegesis of their own, and may represent the normative *halakha* of their day,"⁶⁹ Feldman and Hata maintain otherwise. They claim that it, "would seem to be that Josephus represents actual practice in his circle of his own days, whereas the Mishnah represents the later practice or that Josephus represents a minority or sectarian point of view."⁷⁰ In either case, Josephus' attitude must have demonstrated accepted ideas, or his literature would never have become so eminent. In light of his questionable motive, Feldman and Hata seem to be the most realistic about using Josephus as a source for understanding his time period.

I have used the technique of interpreting Josephus in the light of what can be known about his contemporaries and their attitudes. Since Josephus' testimony is a basic source of information about the community, the problem is doubly delicate. Yet to tackle it promises the reward of understanding not only the individual writer, but also the Jews and Romans of his day.⁷¹

In his rewriting of Genesis and the beginning of Exodus, Josephus manages to weave in other laws from the biblical narrative. Though relocated, he tends to include the general message of the laws, with some deviations from the biblical injunction. Like his contemporaries, his exegesis is a combination between the law as it was written, how he felt it should be interpreted and its actual application in his time. Like his predecessors, he discusses general laws of retaliation, the disobedient son, witnesses, adultery and incest, virgins, blasphemy and informers.

⁶⁸Schiffman, *The Halakhah*, 13.

⁶⁹Ibid.

⁷⁰Louis H. Feldman, and Gohei Hata, eds. *Josephus, The Bible and History*. (Detroit: Wayne State University Press, 1989). 416.

⁷¹Ibid., 4-5.

Josephus' restatement of the laws of Genesis 9:6 and Exodus 21 certainly mirror the message of the biblical injunctions, but they are not exact. While he includes an allusion to retaliatory law, his laws do not carry the same strength. He does not include the death penalty mandate at all in the Genesis pericope. He intimates the biblical idea, but does not quite duplicate it. The laws he does include seem to be standard laws he felt comfortable with, hence the inclusion of some that are not even found in the Bible:

Antiquities 1:3:8

8. When Noah had made these supplications, God, who loved the man for his righteousness, granted entire success to his prayers, and said, that it was not he who brought the destruction on a polluted world, but that they underwent that vengeance on account of their own wickedness; and that he had not brought men into the world if he had himself determined to destroy them, it being an instance of greater wisdom not to have granted them life at all, than, after it was granted, to procure their destruction; "But the injuries," said he, "they offered to my holiness and virtue, forced me to bring this punishment upon them. But I will leave off for the time to come to require such punishments, the effects of so great wrath, for their future wicked actions, and especially on account of thy prayers. But if I shall at any time send tempests of rain, in an extraordinary manner, be not affrighted at the largeness of the showers; for the water shall no more overspread the earth. However, I require you to abstain from shedding the blood of men, and to keep yourselves pure from murder; and to punish those that commit any such thing. I permit you to make use of all the other living creatures at your pleasure, and as your appetites lead you; for I have made you lords of them all, both of those that walk on the land, and those that swim in the waters, and of those that fly in the regions of the air on high, excepting their blood, for therein is the life. But I will give you a sign that I have left off my anger by my bow [whereby is meant the rainbow, for they determined that the rainbow was the bow of God]. And when God had said and promised thus, he went away.⁷²

Antiquities 4:8:33-35

33. If men strive together, and there be no instrument of iron, let him that is smitten be avenged immediately, by inflicting the same punishment on him that smote him: but if when he is carried home he lie sick many days, and then die, let him that smote him not escape punishment; but if he that is smitten escape death, and yet be at great expense for his cure, the smiter shall pay for all

⁷² William Whiston Trans., *The Works of Josephus*. Peabody, MA: Hendrickson, 1987. All subsequent translations of Josephus will be from this edition.

that has been expended during the time of his sickness, and for all that he has paid the physician. He that kicks a woman with child, so that the woman miscarry, (28) let him pay a fine in money, as the judges shall determine, as having diminished the multitude by the destruction of what was in her womb; and let money also be given the woman's husband by him that kicked her; but if she die of the stroke, let him also be put to death, the law judging it equitable that life should go for life. Let no one of the Israelites keep any poison (29) that may cause death, or any other harm; but if he be caught with it, let him be put to death, and suffer the very same mischief that he would have brought upon them for whom the poison was prepared.

35. He that maimeth any one, let him undergo the like himself, and be deprived of the same member of which he hath deprived the other, unless he that is maimed will accept of money instead of it (30) for the law makes the sufferer the judge of the value of what he hath suffered, and permits him to estimate it, unless he will be more severe.

Josephus addresses the disobedient son in a much more lenient way than the Bible or Philo. While the Bible may offer some leeway to the son, Josephus attempts to deal with the situation in a much more human manner. Because he was acting as an interpreter of sorts, he was able to include more current understandings of behavioral psychology. He realized sometimes children rebel against their parents. He required the parents be involved in mature discussions with the child. He even went so far as to mandate that the parents offer the child flattery, but if it was to no avail, he required stoning. While his initial consideration of the situation may have seemed possible, his ultimate adherence to the biblical injunctions seems unrealistic.

Antiquities 4:8:24

24. As to those young men that despise their parents, and do not pay them honor, but offer them affronts, either because they are ashamed of them or think themselves wiser than they, - in the first place, let their parents admonish them in words, (for they are by nature of authority sufficient for becoming their judges,) and let them say thus to them: That they cohabited together, not for the sake of pleasure, nor for the augmentation of their riches, by joining both their stocks together, but that they might have children to take care of them in their old age, and might by them have what they then should want. And say further to him, "That when thou wast born, we took thee up with gladness, and gave God the greatest thanks for thee, and brought them up with great care, and spared for nothing that appeared useful for thy preservation, and for thy instruction in what was most excellent. And now, since it is reasonable to forgive the sins of those that are young, let it suffice thee to have given so many indications of

thy contempt of us; reform thyself, and act more wisely for the time to come; considering that God is displeased with those that are insolent towards their parents, because he is himself the Father of the whole race of mankind, and seems to bear part of that dishonor which falls upon those that have the same name, when they do not meet with dire returns from their children. And on such the law inflicts inexorable punishment; of which punishment mayst thou never have the experience." Now if the insolence of young men be thus cured, let them escape the reproach which their former errors deserved; for by this means the lawgiver will appear to be good, and parents happy, while they never behold either a son or a daughter brought to punishment. But if it happen that these words and instructions, conveyed by them in order to reclaim the man, appear to be useless, then the offender renders the laws implacable enemies to the insolence he has offered his parents; let him therefore be brought forth (27) by these very parents out of the city, with a multitude following him, and there let him be stoned; and when he has continued there for one whole day, that all the people may see him, let him be buried in the night. And thus it is that we bury all whom the laws condemn to die, upon any account whatsoever. Let our enemies that fall in battle be also buried; nor let any one dead body lie above the ground, or suffer a punishment beyond what justice requires.

Josephus clusters together many of the laws pertaining to women and their sexual behavior. While he maintains the biblical rigor, he also manages to include his own commentary. His doubt in people's responsible sexual behavior is clear. Although that sensibility may already have been obvious in the Bible, it is even more apparent because Josephus chose to combine all the laws together. His condemnation of men and women is equal in his assignment of accountability. It seems that women are no more guilty than men of being irresponsible about their bodies:

Antiquities 4:8:23

...If any one has been espoused to a woman as to a virgin, and does not afterward find her so to be, let him bring his action, and accuse her, and let him make use of such indications (24) to prove his accusation as he is furnished withal; and let the father or the brother of the damsel, or some one that is after them nearest of kin to her, defend her. If the damsel obtain a sentence in her favor, that she had not been guilty, let her live with her husband that accused her; and let him not have any further power at all to put her away, unless she give him very great occasions of suspicion, and such as can be no way contradicted. But for him that brings an accusation and calumny against his wife in an impudent and rash manner, let him be punished by receiving forty stripes save one, and let him pay fifty shekels to her father: but

if the damsel be convicted, as having been corrupted, and is one of the common people, let her be stoned, because she did not preserve her virginity till she were lawfully married; but if she were the daughter of a priest, let her be burnt alive... He that hath corrupted a damsel espoused to another man, in case he had her consent, let both him and her be put to death, for they are both equally guilty; the man, because he persuaded the woman willingly to submit to a most impure action, and to prefer it to lawful wedlock; the woman, because she was persuaded to yield herself to be corrupted, either for pleasure or for gain. However, if a man light on a woman when she is alone, and forces her, where nobody was present to come to her assistance, let him only be put to death. Let him that hath corrupted a virgin not yet espoused marry her; but if the father of the damsel be not willing that she should be his wife, let him pay fifty shekels as the price of her prostitution.

Josephus deals with some sexual improprieties comparatively lightly. In reference to incest, some forms of adultery, having sexual relations with a woman during her menstrual cycle, bestiality, and homosexuality, Josephus seems to merely mention their appearance in the Bible, but does not spend much time discussing them. While in other cases he is quick to assign blame, here he seems to skirt the issue. This is surprising in light of how seriously the Bible dealt with these crimes. Writing for a Hellenized society, some of these practices were doubtless transpiring and he needed to deal with the subjects carefully. It would have been impossible for him to alter the punishment, as his contemporaries (like Philo) were quite outspoken on the issues, but he did not need to disparage his own community.

Antiquities 3:12:1

As for adultery, Moses forbade it entirely, as esteeming it a happy thing that men should be wise in the affairs of wedlock; and that it was profitable both to cities and families that children should be known to be genuine. He also abhorred men's lying with their mothers, as one of the greatest crimes; and the like for lying with the father's wife, and with aunts, and sisters, and sons' wives, as all instances of abominable wickedness. He also forbade a man to lie with his wife when she was defiled by her natural purgation: and not to come near brute beasts; nor to approve of the lying with a male, which was to hunt after unlawful pleasures on account of beauty. To those who were guilty of such insolent behavior, he ordained death for their punishment.

Josephus' interpretation of the law pertaining to blasphemy is interesting in that he combines two laws, Leviticus 24:15-16 and Deuteronomy 21:22-23. The punishment seems oddly severe. Feldman and Hata in quoting M. Weil claim that Josephus was "consistent with the customs of his day."⁷³ It should be noted that since the Deuteronomy law requires anyone executed be hung, Josephus does not go beyond interpretive limits by intertwining these laws. Feldman and Hata also defend his choice based on an apologetic method, "in short, the purport of Josephus in presenting this law is to confirm that the Jews do not dare blaspheme any god, be it their own god or the gods of any other religion: the Jews are not 'atheists,' as it was being rumored."⁷⁴

Antiquities 4:8:6

6. He that blasphemeth God, let him be stoned; and let him hang upon a tree all that day, and then let him be buried in an ignominious and obscure manner.

Josephus seems to have been torn between being faithful to his religion and faithful to his culture. By comparing some of his opinions with other commentary of his day, it is easier to understand what the culture may have looked like. It was a time of adjustment for the Jews. They had to learn how to incorporate their secular lives with their Jewish leanings, and Josephus was one person who was fairly successful in this endeavor. While there are discrepancies between his laws and the Bible, Feldman and Hata in quoting Goldenberg maintain, "Josephus' deviations from the Bible pertaining to Jewish law are paralleled in Tannaitic sources, Ben Sira, Philo, the New Testaments and *targumim*. He suggests that Josephus possessed written sources for his interpretation of laws..."⁷⁵ If this is true, Josephus' accounts seem more reliable. Perhaps both his greatest strength and weakness are found in his method of writing the laws. He obviously has knowledge of biblical law, yet his informal style of writing leaves the reader without

⁷³Louis H. Feldman, and Gohei Hata, eds. *Josephus, Judaism and Christianity*. (Detroit: Wayne State University Press, 1987), 192.

⁷⁴*Ibid.*

⁷⁵Feldman and Hata, *Josephus, The Bible*, 418.

the same sense of conviction that one hears in Philo's writings. Josephus' constant tension between pleasing both the Jews and non-Jews of his time is apparent and takes away from his veracity.

The Second Temple period was one of great change for the Jewish community. New theologies, religions and interpretations of Judaism were appearing. The leaders of each of these groups realized the need to offer relevant alternatives to their constituents. For some, adherence to the biblical system was the most important detail in their practice. For others, a new type of Judaism was introduced. This Judaism responded to their daily lives, incorporating their practice and behavior into an applicable Jewish system. In all cases, these leaders realized the need for change within their communities. This change, though, was not labeled as such. Each of these models claimed adherence to authentic Jewish law while interpreting the Bible according to their own needs.

Whereas the Apocrypha rarely mentions capital punishment, the Psedepigrapha includes some examples, most of which are found in Jubilees. Jubilees' depiction of capital punishment includes an aspect of divine punishment which is not as evident in the Bible. While many of the biblical capital crimes are noted in Jubilees, they are not in the biblical order. In fact, the author included laws which appear in later books of the Bible. The author of Jubilees was careful to formulate legal changes within a biblical context, often referring to biblical laws and their intent as a method of anchoring his opinion.

The Sectarian community also addressed the issue of capital punishment. While demanding exact adherence to the Bible, they too changed some of its commandments. Some, like the authors of the Damascus Document and the Zaddokite Fragments, removed the death penalty from their communities. In these cases, though, the biblical capital crimes were still addressed and required severe punishment. The change may have been due to their policies regarding marriage and the role of women and procreation in their cultures. In the case of the Damascus Document specifically, while they did not impose the death penalty, they were more strict about their laws for witnesses, suggesting

they were still concerned with the criminal legal process. In the case of the Zaddokite Fragments, they retained the death penalty only for informers, a category of crime which threatened the very security of the community itself.

Similarly, The Manual of Discipline mandates expulsion from the community rather than enforcing capital punishment laws. Again, this punishment is applied in cases analogous to biblical capital crimes. Blasphemy, informing and apostasy were set aside as crimes which deserved the most extreme punishment available. While the method of punishment differs in these communities, they all emphasize the importance of the safety and security of their members.

Philo's education in Jewish and Greek law provided him with a special ability to communicate with the Jews of his time. He was able to present the Jews with interpretations and commentary that were not solely based on the Bible, but were informed by his secular life as well. In some cases, though, his own ethical biases are apparent in his commentary. He addressed the crimes of murder, the disobedient son, blasphemy, harlotry, sexual impropriety, dishonest oaths, crimes regarding Sabbath observance and the informer in a strict fashion. His opinions generally agree with the biblical authors, but in some cases, he is more virulent in his judgment.

Josephus also addressed the concerns of his Second Temple period colleagues. His aim was almost the opposite of Philo, as he tried to integrate Judaism into Greek culture. Although he relocated biblical laws within his narrative, he did tend to retain the intent of the biblical laws of the death penalty. While he was more lenient with regard to some sexual improprieties, he was more strict in his dealing with blasphemy. This may have been a public defense of Jewish belief in God. In which case, his law is intended more as a sign for the Gentile community than a realistic expectation for the Jews.

CHAPTER 3

TANNAITIC SOURCES (TOSEFTA AND MISHNAH)

By the end of the Second Temple period and the beginning of the codification of the Mishnah, the rabbis of the era realized the agricultural basis of the Bible and its commandments were no longer feasible. The destruction of the Second Temple rendered the sacrificial commandments obsolete and a new system was needed. The rabbinic laws filled that void. They encompassed aspects of ritual, prayer, business practices, eating habits, marriage and divorce practices, and court proceedings. The laws of capital punishment were clearly delineated, clarifying any lingering questions as to their place in the community as well as instructions on how to carry out executions. These laws were put in place to help maintain an ordered and controlled society. Samuel Mendelsohn explains, "The main object of law—the rabbinic jurists argue—is the promotion of the good of society, not its detriment."⁷⁶

Although the rabbis did make some changes to biblical law, they knew that they had to keep at least a remnant of the laws familiar to people. They realized their responsibility to be authentic to the Bible, while adapting the law to their present reality. This was not an easy process. They had to be aware of the changing Jewish and secular climates, responding to both in a way that would be fulfilling to their constituents. As Segal explains:

The Tannaitic period was one of great political turmoil and dramatic change and development in Jewish law... The legal sources, literary sources and institutions of Jewish law reflect the nature of this particular political-legal situation and the changing needs and functions that

⁷⁶ Samuel Mendelsohn, *The Criminal Jurisprudence of the Jews*. Studies in Jewish Jurisprudence, Vol. 6. (New York: Sepher-Hermon Press, 1991), 30.

transformed Jewish law throughout this period."⁷⁷

Regarding capital punishment specifically, the rabbis included all the laws detailed in the Bible, but added restrictions rendering an actual execution almost impossible. Why were the rabbis so careful with regard to capital punishment? Presumably, they, like their Second Temple period predecessors, had the opportunity to change the law to include people they felt threatened their community. They, too, could have added their own personal biases similar to the Qumran scribes and Philo, but chose to go in a different direction for a compelling reason.

Judith Hauptman claims, "the rabbis' aversion to capital punishment stems, apparently, from a reasonable fear of putting an innocent person to death."⁷⁸ The rabbis may have based their decisions on their own ethics, but were unwilling to make a mistake about guilt. According to their system, such a mistake would itself require punishment. They understood their responsibility in reference to reinterpreting law and were careful with their lenient tendency. They recognized as, Neusner clarifies, "the single most drastic exercise of power is judicial termination of a human life."⁷⁹

The Tannaitic sources include most of the laws pertaining to capital punishment in four chapters. Mishnah Sanhedrin chapters 6, 7, 9 and 11 carefully define the four types of capital punishment, now commonly referred to as the *arbah meitot beit din*. The four types are: stoning, burning, beheading and strangulation. The rabbis give little explanation for employing different techniques than are biblically prescribed.

⁷⁷ Peretz Segal, "Jewish Law During the Tannaitic Period." *An Introduction to the Sources and History of Jewish Law*, eds. N.S. Hecht, B.S. Jackson, S.M. Passamanek, D. Piattelli, and A.M. Rabello. (Oxford: Clarendon Press, 1996), 101-102.

⁷⁸ Judith Hauptman, *Rereading the Rabbis*. (Colorado: Westview Press, 1998), 15.

The rabbis' aim was to cultivate a Jewish community based on biblical injunctions, but they included some Roman practices as well.

MISHNAH SANHEDRIN CHAPTER 6

Mishnah Sanhedrin 6 begins with a detailed description of the opportunity for acquittal. The guilty party is given a number of chances to redeem him/herself. The law allows for last minute testimony even on one's own behalf, and if this testimony is found to be "substantial" the defendant is set free. The judges, the convicted criminal, and even the public are all allowed opportunities to bring forth evidence of a person's innocence, even after the trial has ended and a verdict has been given. Although this may appear to be a tremendous leniency on the part of the courts, in fact, it emphasizes the rabbis' need to be certain of their actions. Their job was to punish guilty parties, not to execute innocent people. This is seen in the Tosefta as well. Tosefta Sanhedrin 3:11 states:

Rabbi Dostai b. Judah says, "Those who have been declared subject to the death penalty who fled from the land to a foreign country—they put them to death forthwith. And those who fled from abroad to the Land—they do not put them to death forthwith, but try them afresh."⁷⁹

The rabbis were inclined towards letting people live. Defendants had the opportunity to save themselves, but the rabbis could not ignore behavior that indicated guilt.

Mishnah Sanhedrin 6:2 is as follows:

When he was about ten cubits distance from the place of stoning they said to him, 'Make confession, for such was the manner of those about to be put to death to make confession, for everyone that confesses has a portion in the world to come. For thus we have found it in the case of Achan: For Joshua said to

⁷⁹ Jacob Neusner, *Rabbinic Political Theory*. (Chicago: The University of Chicago Press, 1991), 113.

⁸⁰ Jacob Neusner, *Tractate Nezikin*. The Tosefta. (New York: K'tav Publishing House Inc., 1981), All subsequent citations from the Tosefta will utilize the Neusner translation.

him, 'My son, give, I pray thee, glory to the Eternal, the God of Israel, and make confession unto Him, etc. And, 'Achan answered Joshua and said: Of a truth I have sinned against the Eternal and thus, etc. And whence [do we infer] that his confession made atonement for him? As it is said, 'And Joshua said, why hast thou troubled us? The Eternal shall trouble thee this day' - 'this day art thou troubled, but thou shalt not be troubled in the world to come'. And if he do not know how to make confession, they say to him, 'Repeat: "May my death be an atonement for all my sins."' R. Judah says, If he knew that he had been sentenced through false evidence he says, 'Let my death be an atonement for all my sins save this sin'. [The Sages] said to him, If so, then all men would speak in this way in order to clear themselves.⁸¹

Mishnah Sanhedrin 6:2 explains that the condemned person was encouraged to make a final confession which would "secure for him his place in the world to come." This opinion is derived from both the Mishnah and the Tosefta. Tosefta Sanhedrin 9:5 states:

There was a person who went out to be stoned. They said to him, "Confess." He said, "let my death be atonement for all my sins, but if I did this thing, let Him not forgive me, and let the Israelite's court be free [of guilt for my blood, which they shed now]." Now when this was reported to the Sages, their eyes filled with tears. They said to him, "To bring him back is not possible, for there will be no end to the matter. But lo, his blood is on the head of those who have testified against him."

The rabbis' reluctance is apparent, but they also realize they have to finish the process. The Tosefta passage attributes a more sympathetic response to the rabbis, but for the sake of maintaining authority they may not have wanted to portray themselves as too sensitive. The small changes between the Mishnah and Tosefta may have been for this reason.

In Mishnah Sanhedrin 6:2 a dispute arises between Rabbi Judah and the sages. As a consistent voice of compassion, R. Judah would allow the convict to give a

⁸¹ Philip Blackman, Trans. *Mishnah Nezikin*. The Mishnah. (Gateshead: Judaica Press Ltd., 1990), All subsequent translations of the Mishnah will be taken from this edition.

confession that still intimates his own innocence. The rabbis disagree, arguing everyone would use this formula whether guilty or not. Their logic may be correct, but the fact that Rabbi Judah's opinion was mentioned may signify some minority inclination to agree with him.

Mishnah 6:3 outlines what the convicted person was to wear for the stoning.

Rabbi Judah disagrees with his colleagues again. He maintains that both men and women were to be covered. The rabbis assert only the women should be covered. Rabbi Judah's argument is on behalf of the convict, while the rabbis are less benevolent. The implication is that the covering was not for the sake of the convicted, but rather for the people participating in the execution.

Mishnah Sanhedrin 6:4 states:

The place of stoning was as the height of two men. One of the witnesses pushed him down by his loins; if he turned over face downward, he turned him on his loins. If he died thereby, that was sufficient; but if not, the second [witness] took a stone and set it on his heart. If he died thereby, that sufficed; but if not, his stoning [had to be carried out] by all Israel, as it is said, 'The hand of the witnesses shall be first upon him to put him to death and afterward the hand of all the people.' All that were stoned were [then] hanged; this is the view of R. Eliezer; but the Sages say, no one is hanged, excepting the blasphemer and the idolater. They hanged the a man [with his face] towards the people and a woman with her face towards the gallows; this is the opinion of R. Eliezer; but the Sages say, The man is hanged, but the woman is not hanged. R. Eliezer said [to them], But did not Simon ben Shetach hang women in Ashkelon? [The Sages] replied to him, eighty women did he hang—yet two [persons] should not be tried [on a death charge] in one day. How did they hang him? They sank a post into the ground and a piece of wood protruded from it; and one placed together his two hands one upon the other and hanged him. R. Jose says, the post is leaned against a wall and one hangs him [thereon] in the way that butchers do. And they undid him at once, for if it remained [suspended] overnight, a negative command would be transgressed thereby, as it is said, 'his body shall not remain all night upon the tree, but thou shalt surely bury him on the same day; for he that is hanged is a reproach unto God etc.' meaning, why was this man hanged? Because he blasphemed the Name, and the Name of heaven was found profaned.

Mishnah 6:4 outlines the exact method for carrying out a stoning. The rabbis require the witness be pushed from the height of two men and afterward if this has not killed the convict the accusers should drop a large stone onto him from above. If this method also does not work, the rabbis decree the people should all participate in the stoning. The technique may be different than the Bible intended, but they maintain that they are following biblical law by quoting Deuteronomy 17:6 which says, "The hand of the witnesses shall be the first to put him to death and afterward the hand of all the people." Adherence to biblical law was of utmost importance to the rabbis, but only in the sense that they felt compelled to base their decisions in biblical precedent. This is seen in the second half of 6:4 as well.

Mishnah 6:4 goes on to explain a disagreement between Rabbi Eliezer and the Sages about whether or not the criminal should then be hanged. Rabbi Eliezer felt all criminals should be hanged after a stoning, while the Sages believed only the blasphemer and idolater deserved such treatment. Similarly, Rabbi Eliezer claimed that men and women should both be hanged, while the Sages held only men were eligible. The Sages' opinion was upheld based on a biblical proof-text: Deuteronomy 21:22-23, "his body shall not remain all night upon the tree, but thou shalt surely bury him the same day; for he that is hanged is a reproach unto God." While their proof did not establish hanging as an appropriate behavior, the practice of hanging was already a custom by their time having been put into place by the Second Temple period community. This is indicated in the Temple Scroll:

TS. 64:6-13

If a man has informed against his people and has delivered his people up to a foreign nation and has done evil to his people, you shall hang him on the tree and he shall die.

Hanging was an inherited practice. They chose, therefore, to focus on the negative commandment they might have transgressed if they implemented the practice. They did not, however, want to be guilty of breaking biblical injunctions. The rabbis believed, "The basic principle of Jewish law is that any violation against the commandments or precepts of God as expressed in the Scriptures is a punishable act."⁸² Their job was to interpret the correct mode of punishment.

MISHNAH SANHEDRIN CHAPTER 7

Mishnah Sanhedrin chapter 7 provides very explicit details concerning who should be convicted of capital crimes and how the executions should be carried out. While the details may seem gory, they provide the community with a concise set of laws regarding the death penalty. Believing there was no room for error, the rabbis were concerned with the proper implementation of the death penalty and the legitimacy of their own power and authority. As Neusner explains, "The most impressive mode of legitimate violence is killing...The earthly court may justly kill a sinner or felon. This death-dealing priority accorded to the earthly court derives from the character of the power entrusted to that court."⁸³

Chapters seven and nine delineate exactly which crimes deserve which punishment. While the rabbis preserved most of the capital crimes and their biblical sentences, they added a fourth method of execution, strangulation, requiring some changes. Throughout these chapters the rabbis repeatedly defend their choices. They include discussions and disagreements to demonstrate to the reader that they did not

⁸² Gershfield, 184.

reach conclusions easily. They include biblical proof-texts in an attempt to defend their choices based on the Torah and Divine mandate. Their defense is tedious, but necessary to uphold their claims to authenticity.

Neusner explains the classifications of crime:

Put to death by stoning are those who have sexual relations with close female relatives, males, or beasts, those who blaspheme, worship an idol, profane the Sabbath, curse parents, mislead the people to idolatry, and a rebellious and incorrigible son. Put to death by burning are one who has sexual relations with a woman and her daughter and a priest's daughter who committed adultery. Put to death through strangling are one who hits his father and mother, steals an Israelite, defies the decision of a court; also a false prophet, a prophet who calls on the name of an idol; he who has sexual relations with a married woman; those who bear false witness against a priest's daughter and one who has sexual relations with her. Put to death through decapitation are the murderer, the people of an apostate town, and the like.⁸⁴

Gershfield points out that "strangling seems to have been a most general punishment in spite of its being ignored by the Bible. The Talmud states a general rule that where the mode of punishment is not mentioned, strangulation is meant. The reason is that it has been considered the least painful, and so the culprits have been given the benefit of the silence of the law."⁸⁵ The rabbis preserved the general categories established in the Bible. Blasphemy, idolatry, sexual crimes, disrespect towards one's parents, breaking the laws about the Sabbath, are still considered capital crimes, but the rabbis take some liberties in defining them, as well as adding new categories such as defying the decision of the courts. It seems that their intent was to secure their own strength and influence.

⁸³ Neusner, *Rabbinic Political Theory*, 49.

⁸⁴ Jacob Neusner, *A History of the Mishnaic Law of Damages*. Studies in Judaism in Late Antiquity. Vol. 35.(Leiden: E.J. Brill, 1985), 171.

⁸⁵ Gershfield, 232.

The exact wording of Mishnah 7:1 leaves room for interpretation as to who gave the courts the right to try capital crimes using the methods employed. It states:

[The infliction of] four kinds of death penalty was vested in the court; stoning, burning, beheading, and strangling. R. Simon says, [The descending order of severity was:] burning, stoning, strangling, and beheading. This is the ordinance of those to be stoned.

This mishnah does not identify where authority comes from to determine these four methods of capital punishment, and yet it establishes their power for the community at large. The fundamental message is that these decisions should not be questioned.

Mishnah 7:2 describes the method for burning a convict:

Sanhedrin 7:2

This is the ordinance of those to be burned. They set him in manure up to his armpits and put a [twisted] scarf of coarse material within a soft one and wound it around his neck; one [witness] pulled [the other end] towards him until he opened his mouth; and one lit a twisted thread and threw it into his mouth, and it went down into bowels and burnt his entrails. R. Judah says, Though he thus died at their hands they would not have fulfilled thereby the ordinance of burning, but they should open his mouth with pincers by force and then light the twisted thread and throw it in his mouth, and it descends into his stomach and burns his intestines. R. Eliezer ben Zadok said, It once happened in the case of a priest's daughter who committed adultery, and they placed round her bundles of branches and burned her. [The Sages] said to him, because there was not at that time a court versed [in the law].

The discussion included in this mishnah points out the rabbis' need to defend their method, as well as maintain very strict boundaries regarding procedure. The example brought by Rabbi Eliezer ben Zaddok functions in two ways. First, it strengthens the position of the rabbis by pointing out mistakes that were made when they were not in power, and secondly, it reasserts the appropriate method.

Mishnah 7:3 explains the process of killing someone by beheading or

strangulation.

Sanhedrin 7:3

[This is] the ordinance of those to be beheaded; they used to cut off his head with a sword just as the government does. R. Judah says, this is a hideous method; but they should lay his head on a block and cut it off with an axe.

[The Sages] said to him, There is no more hideous death than this. [This is] the ordinance of those to be strangled: they set him in manure up to his armpits and put a [twisted] scarf of coarse material inside a soft one and wrapped it round his neck; one [witness] pulled [one end] towards him and another [witness] pulled [the other end] towards him until his soul his departed.

Rabbi Judah's objection again serves as a voice of compassion, although it is denied.

Neusner explains that Judah's opposition:

Leaves no doubt that carrying out the law ("way of life") realizes a particular world-view. Specifically his language implies that the felon remains a human being, in God's image. Clearly then, at stake in the theoretical discussions at hand is how to execute someone in manner appropriate to his or her standing after the likeness of God. This problem obviously presupposes that in imposing the penalty in the first place and in carrying it out, the court acts wholly in conformity with God's will. This being the case, a political myth of a dominion belonging to God and carrying out God's plan and program certainly stands behind the materials at hand.

By including Judah's view, the rabbis inherently convey the message that their power is not only humanly ordained, but divinely accepted as well. Their behavior is in fact holy, putting to rest any question the community may have had. Their constant attention to process and rationale may also have served as a strong defense against their own doubts.

Mishnah 7:4 describes the specific crimes which warrant death by stoning. They are the same crimes as are listed in the Bible, but the rabbis defend almost all of them with biblical proof-texts. The rabbis' objective was to limit the occurrence of various acts of capital punishment and their attention to detail and precise arguments strengthen the legitimacy of their decisions. They had another goal in mind when they set down the

laws in Sanhedrin. Rabbi Moshe Avigdor Amiel explains:

Punishment as understood in the Halachah, is not intended to be punitive. Who can truly weigh the exact punishment accruing to a given criminal act? Rather it is preventative and exhortatory, warning others not to repeat this act in the future...Judaism...views each individual capital punishment case with trepidation.⁸⁶

The rabbis were exact in their explanation of capital punishment in order to inform the community that if a case did arise they would implement the practice with divine approval.

Mishnah 7:7 identifies the Molech worshipper and necromancer. The Molech worshipper is mentioned in the Bible and the new definition by the rabbis points out a specific phenomenon:

Sanhedrin 7:7

He who offers from his seed to Molech is not guilty until he hands it over to Molech and has caused it to pass through the fire; if he gave it up to Molech, but did not cause it to be passed through fire, or if he passed it through fire, but did not give it over to Molech, he is not guilty – [he is only culpable] when he [both] surrenders it to Molech and passes it through the fire. A necromancer is a sorcerer that makes [the dead] speak from his armpit, and the soothsayer is he that speaks with his mouth. These [must be slain] by stoning, and one that enquires of them [transgresses] against an admonition.

The rabbis' designation of these offenders pushes the boundaries of the biblical injunction. The rabbis allow for a lenient identification of a Molech worshipper, leaving room for some questionable behavior. Likewise, by narrowing the definition of necromancy to a very specific crime, the rabbis do not require the same level of stringency as the Bible prescribes. This is one of numerous examples of the rabbis' attempt to limit the focus of the capital punishment laws.

Mishnah 7:8 continues this trend. While discussing the transgressions of breaking the Sabbath rules and cursing one's parents, the rabbis again allow exceptions to the rules.

Sanhedrin 7:8

One who desecrates the Sabbath by an act which renders him liable to excision if he [transgressed] wantonly, or [is liable] to a sin offering if [he transgressed] in error, He that curses his father or his mother is not guilty until he curses them with the Name. If he cursed them with a substitute name, R. Meir declares him liable, but the Sages acquit him.

The biblical injunction regarding the Sabbath is unambiguous. Numbers 15:32-36 even includes a narrative to emphasize its severity. The rabbis, however, had to be realistic about their community. They were undergoing change, responding to the destruction of the Second Temple, and undoubtedly breaking some of the Sabbath laws. Some of this behavior may have stemmed from governmental forces. Roman rule or economic conditions could have conspired to make them violate Sabbath laws. The rabbis had to respond to this reality. It would have been impossible for them to enforce a rule as strict as the Bible's leading them to alter the meaning in some way.

Similarly, they may have been responding to common adolescent frustration, occurring still today, when they modified the law for children. Their response was focused on limiting the number of child executions due to normal pubescent angst rather than maintaining an honest reading of the biblical text. The rabbinic mind had to be simultaneously concerned with their constituents and their responsibility to be true to their faith.

⁸⁶ Rabbi Moshe Avigdor Amiel, *Ethics and Legality in Jewish Law*. Trans. Rabbi Menachem Slae and Bracha Slae. (Jerusalem: The Rabbi Amiel Library, 1992), 63.

Mishnah Sanhedrin 7:9 and 7:11 show two more examples of rabbinic adaptations of biblical laws.

Sanhedrin 7:9

He that has sexual intercourse with a betrothed maiden is not liable [to be stoned] unless she is a betrothed virgin (maiden) and is still in her father's house. If two had sexual connexion with her, the first (is punishable) by stoning and the second by strangling.

The rabbis do not change the original text of the biblical law regarding the betrothed virgin. They do, however, add to it. Deuteronomy 22:23 does identify this crime but the rabbis' explanation serves to place boundaries around the application of an execution in the aforementioned case. The addition of the phrase "and is still in her father's house," limits the viability of finding a person guilty of this specific crime.

Mishnah 7:11 includes new addition not mentioned in the Bible. The rabbis included this section relying on the defense that the second man did not actually break the law of raping a betrothed virgin. The first man raped a virgin, the second was only guilty of raping a betrothed woman.⁸⁷ The second man deserves the death penalty, but cannot be held to the laws of stoning. The rabbis were intent on being consistent.

Sanhedrin 7:11

The sorcerer is he that performs an act [of sorcery] and is guilty [and is to be stoned], but not one that deceives the eyes. R. Akiba quotes in the name of R. Joshua, if two gather cucumbers, and one that gathers is not guilty and the other that gathers is guilty – [how so?] he that performs the act [of sorcery] is guilty, but he that only deceives the eyes is not guilty.

Blackman defines the sorcerer who does not "deceive the eyes," as a person who performs acts "without sorcery, necromancy or witchcraft. i.e., genuine conjury,

⁸⁷ Chanoch Albeck, ed. *Mishnah Nezikin*. (Hebrew) The Mishnah. (Jerusalem, Bialik Institute, 1959), commentary to Mishnah 7:9.

legerdemain etc., that amuse and interest but have no evil spiritual effects."⁸⁸ There does not seem to be earlier support for this exemption, but the rabbis defend it nonetheless. In the case of the cucumber gatherers Blackman maintains that the one who is guilty "actually gathers by the aid of sorcery...It seems to onlookers that he gathers them."⁸⁹ In this mishnah the rabbis focus on the behavior of the defendant. If he intended to trick the onlooker, he should be convicted. If his actions were not intended with malice, he should be found innocent.

MISHNAH SANHEDRIN CHAPTER 9

Sanhedrin 9:1 identifies the convicts deserving death by burning and beheading. The requirements for both punishments are clearly explained in the initial mishnah, and in the following mishnayot which further limit the application of either punishment.

Sanhedrin 9:1

And these are they that must be burned: he who has sexual intercourse with a woman and her daughter, and a priest's daughter that has committed adultery. Under the general law of *a woman and daughter* are included [the cases wherein one has sexual connexion with] his daughter, or his daughter's daughter, or his son's daughter, and his wife's daughter, or her daughter's daughter, or her son's daughter, (his mother-in-law, or his father-in-law's mother). And these are they who must be beheaded: The murderer, and the people of an apostate city. If a murderer struck his fellow with a stone or with an iron [object], or if he forced him down into the water or into the fire, and he was unable to come out thence and died, he is guilty. If he pushed him into the water or into the fire, and he could get out thence, but died, he is exempt. If he set a dog on to him or incited a serpent to bite him, R. Judah declares him guilty, but the Sages declare him exempt. If one struck his fellow, whether with a stone or with his fist, and [the experts] considered that he would die [of his injuries], but his condition improved, yet

⁸⁸ Philip Blackman, *Mishnah Nezikin*. (Gateshead: Judaica Press Ltd., 1990), commentary to Mishnah 7:11.

⁸⁹ Ibid.

afterward it was aggravated and he died, he is guilty. R. Nehemiah says, he is exempt, for there is a reason for it.

Mishnah 9:1 describes the laws pertaining to burning and beheading. In both cases the rabbis seem to follow the original biblical intent, but they do add their own interpretations. For example, Leviticus 18:17 states:

Do not uncover the nakedness of a woman and her daughter; nor shall you marry her son's daughter or her daughter's daughter and uncover her nakedness: they are kindred; it is depravity.

The rabbis did not follow the exact list provided by the Bible. Regarding the priest's daughter, however, they did not choose to make any additions. The law remains the same as the biblical injunction.

Regarding the laws of beheading, the rabbis again chose to maintain the tone of the biblical reference, but their examples do include one important difference. Numbers 35:16-21 details examples of murder and manslaughter which require "the assembly" to determine the outcome. The Tannaitic rabbis do not include this type of nuanced distinction. They distinguish between intentional murder and manslaughter, do not include the community in that decision. In general the rabbis retain the biblical focus on purposeful behavior.

Mishnah 9:1 begins to list crimes for which intent is considered a deciding factor, Mishnah 9:2 continues explaining these cases.

Sanhedrin 9:2

If one intended to kill a beast and killed a human being, or [if he meant to kill] an untimely birth and killed one that might have lived, he is exempt. If he intended to strike one on the loins, but not [with such force] as to kill him [with a blow] upon the loins, but [the blow] lighted upon his heart [with such force] as to cause death [when it lighted] on his heart, and he died, he is exempt. If he intended to strike him upon the heart [with such force] as to slay him [if it hit] the heart, but it lighted on his loins and

[the blow had] not enough [force] to cause death through the loins, and nevertheless he died, he is exempt. If he intended to strike a grown-up person, but [the force] was not enough to kill a grown-up person, and [the blow] lighted on a child and [it had] sufficient [force] to cause the child's death, and it died, he is exempt. If he intended to strike a child, and [the blow] was sufficiently great to kill the child, and it alighted on a grown-up person, yet he died, he is exempt. But if he intended to strike someone on the loins, and [the blow] was great enough to kill [if it fell] on his loins, and it alighted on his heart and he died, he is liable. If he intended to kill a grown-up person, and there was enough [force] therein [in the blow] to kill the grown-up person, and it fell on a child and he died, he is liable. R. Simon says, Even if one intended to slay one, but killed another, he is exempt.

There is an obvious tendency towards differentiating between intentional and unintentional killing. In almost all cases, intent affects the outcome. While this trend is seen in the Bible, it is not defined to this extent. The unit is described by Neusner:

Sages maintain that if the death is caused in such wise that the person's original intent in no way leaves him culpable, he is exempt. But if what he did would have caused death to the person to whom he intended to do it, he is liable on account of the death of the person to whom he actually did the deed.⁹⁰

The rabbis' apprehension is apparent. The more limitations they apply to the rules of capital punishment, the less likely there will be an actual case that passes the requirements. They do, though, feel justified in their application of capital punishment. Neusner questions, "Why put the man to death? The balance that has been upset is in the future. The murdered person will have no heirs, so the murderer is to have no more heirs. The future stops now."⁹¹

The rabbis now focus on the order of the severity of the methods. They begin this discussion in Mishnah 9:3, and continue in 9:4.

Sanhedrin 9:3

If a murderer were confused among others, they are all exempt. R. Judah

⁹⁰ Neusner, *A History*, 171.

⁹¹ Neusner, *Rabbinic Political Theory*, 114.

says, They put them [all] into prison [for life]. All who are liable to [different kinds of] death penalties and were confused, they must [all] be executed by the lightest [death-penalty]. If those to be stoned [were confused] with those to be burned, R. Simon says, They must be put to death by stoning, for burning is the more severe [death]. But the Sages say, they are to be killed by burning, since stoning is the severer. R. Simon said to them If burning were not the severer, it would not have been imposed for the priest's daughter who had committed adultery. They replied to him, If stoning were not the more severe, it would not have been prescribed for the blasphemer and the idolater. If those to be beheaded were confused with those to be strangled, R. Simon says, [They must all be slain] with the sword, but the Sages say, By strangling.

Sanhedrin 9:4

Whosoever has become liable to two [different] death-penalties by order of the court must be slain by the severer one. If one committed a transgression for which he was sentenced to two of the death-penalties, he must be put to death by the more severe one. R. Jose says, he must be condemned [to that death] for that offense for which he first became liable.

Although Rabbi Jose's opinion is rejected, it does point to a more rational voice in the rabbinic community. It is surprising that the rabbis chose instead to apply the more severe punishment in light of their previous inclination towards caution. This ruling, though, does reflect the gravity of the situation. By choosing to implement the more severe method, they send a clear message about the significance of breaking these rules. This is reinforced when one sees the differences in the correlating Tosefta passage:

Tosefta Sanhedrin 12:5

Those who are convicted to be executed by more severe modes of execution who were also convicted to be put to death by less severe forms of execution—they put him to death with the less severe mode of execution.

The Tosefta mandates the exact opposite of the Mishnah. There was clearly some disagreement about this matter. The law that is codified in the Mishnah was the majority opinion, but there was also a more compassionate voice in the rabbinic community.

Mishnah 9:5 reestablishes the original trend of the rabbinic laws.

Sanhedrin 9:5

Whoever had received stripes and was then scourged again, the court puts him into a prison-cell and feeds him with barley until his stomach bursts. If one murdered a human being, and there were no witnesses, they put him into a prison-cell and feed him with sparing bread and scant water.

This mishnah emphasizes the need for witnesses. The rabbis had no reason to change the biblical law in this situation. The biblical law required a strict burden of proof that the rabbis could use for their own benefit.

MISHNAH SANHEDRIN CHAPTER 11

Criminals deserving of strangulation are listed in Sanhedrin 11:1. The rabbis record these crimes, but as in the previous situations, they interpret them loosely. They are quick to establish ways for criminals to be declared exempt of capital crimes.

Sanhedrin 11:1

These are they who are to be strangled: one who strikes his father or his mother, and he who steals a soul from Israel, and an elder who rebels against a decision of the court, and a false prophet, and he that prophesies in the name of an idol, and one who has sexual intercourse with another's wife, and the false witness against a priest's daughter and her paramour. He that strikes his father or his mother is not guilty unless he causes a wound in them. In this respect greater severity applies to one that curses [them] than to him who strikes – for he that curses [his parents] after [their] death is culpable, but one that strikes [them] after [their] death is exempt. He that steals a soul from Israel is not liable unless he brings such into his own domain. R. Judah says, Unless he brings such into his own domain and makes use of him, as it said, and he deal with him as a slave, and sell him. If one steal his own son, R. Ishmael the son of R. Jochanan ben Baroka declares [him] guilty, but the Sages exempt [him]. If one stole anyone that was half bondman and half freedman, R. Judah declares [him] culpable, but the Sages exempt [him.]

Rabbi Ishmael's and Rabbi Judah's arguments reemphasize the idea that the rabbis could have been more strict in their interpretations. The inclusion of the minority opinion provides the community with knowledge about the decision making process.

The threat of more severe restrictions was needed to strengthen the authority of the rabbinic court.

Sanhedrin 11:5 provides a rare example of the rabbis' overt dependence on divine involvement with regard to capital punishment. They add certain categories not included in the Bible, and ultimately rely on God to find people guilty of such crimes. Their limitations may be obvious to later readers of the text, but for their community, their changes were well within the biblical meaning and intent.

Sanhedrin 11:5

The false prophet is he that prophesies what he has not heard or what has not been told to him; his death is by the hands of man. But he that withholds his prophecy, or he who disregards the words of [another true] prophet, or the prophet who transgressed his own words, his death is at the hands of Heaven, as it is said, *I will require it of him.*

This case is an example of the rabbis' uncertainty regarding their own system. The penalty was in the hands of God and they seem willing to cede their control.

The last examples identify people subject to the death penalty by strangulation.

They are described in Sanhedrin 11:6 and further deviate from biblical classification.

Mishnah Sanhedrin 11:6

He that prophesies in the name of other gods and says, "Thus said the strange god," even if he conformed with the [traditional] law to declare unclean what is clean or to declare clean what is unclean, [he is guilty and liable to punishment by strangulation]. He who has sexual intercourse with another man's wife, immediately she has come under the control of the husband in wedlock, even though she had not yet been copulated with [by her lawful husband], he that has sexual connection with her [shall suffer death] by strangling. And the false witnesses against a priest's daughter and her paramour: for all false witnesses must suffer that same death [which the accused would have had to suffer if found guilty], except the false witness against a priest's daughter and her paramour.

These seem to be similar to biblical categories, but are much more specifically defined and their crimes are explained as well as the reason for their guilt. As a whole this

mishnah is more strict than some of the others. Concerning sexual improprieties, this mishnah seems to have a more exacting tone than Mishnah Sanhedrin 7:9. This mishnah is also more rigorous in regard to one who "prophesies in the name of other gods." Even if he adheres to the laws of the community, if it is done so in the name of other gods, he is still guilty of the crime. This crime, as in biblical and Second Temple period law codes, is dealt with firmly. The community was still aware of the pull of other religions and the rabbis were intent on being clear about their opinion of such behavior.

Although the rabbis spend the majority of tractate Sanhedrin discussing the intricacies of the implementation of the death penalty, modern scholars generally agree that the rabbis probably never utilized any of the methods they describe. In reference to Mishnah 7:3 Segal points out, "from the language of the dispute itself, we are unable to discern whether it accurately reflects the actual practice of an autonomous Jewish jurisdiction functioning according to Jewish law."⁹² Alon supports this theory explaining:

One way or another, the historical situation seems to have been that the Sanhedrin continued to exercise capital jurisdiction right up to the Destruction, whether or not the Romans gave their legal approval. But immediately after the Destruction that jurisdiction came to an end -- once and for all. Be it noted that this was Roman practice throughout the Empire. From the days of the very first Caesars, capital punishment was taken out of the hands of even autonomous city-states, not to speak of subjugate areas.⁹³

Not only did the political climate make the implementation questionable, the laws themselves seem to discount the realistic accomplishment of an execution.

⁹² Segal, 103.

Miller elucidates:

Jewish tradition agonized over carrying out executions. Procedural difficulties placed around a trial involving the possibility of a death sentence made it almost impossible to carry it out. The fact that the rabbis disagreed on the ways an execution should be done makes one suspect that they probably never saw it carried out.⁹⁴

The community was limited in their jurisdiction by both the political reality and their own questions about the morality of the death penalty. Abraham Bloch may be too extreme when he claims, "They were obviously opposed to capital punishment on moral grounds."⁹⁵ His understanding of the rabbinic texts, though, is not far off. His mistake is imposing his own modern day standards on a different culture and community.

Modern ethicists and liberal thinkers may be inclined to apply current values onto the Tannaitic rabbis, but the reason for the rabbinic reticence in regard to capital punishment is not solely based on modern ethical values. The rabbis imposed strict limits because of their own ethical considerations about taking a life as well as their concern about their interpretation of the laws. The Bible clearly mandated the acceptability of this punishment. Their Second Temple predecessors had begun the process of interpreting biblical law and they were comfortable continuing the trend, but they did feel a certain responsibility to God and to their understanding of God's acceptance of their interpretations.

The rabbis ultimately felt comfortable with their rules and the possibility of their implementation, because they believed that "God participates in the execution,

⁹³ Gedaliah Alon. *The Jews in their Land in the Talmudic Age*. Trans. and ed. Gershon Levi. Jerusalem: The Magnes Press, 1980), 208.

⁹⁴ Judea B. Miller, "Judaism and the Death Penalty." *Midstream* 41, 9 (Dec. 1995): 12.

⁹⁵ Abraham P. Bloch, *A Book of Jewish Ethical Concepts*. (New York: Ktav Publishing House, Inc., 1984), 64.

supervising the use of legitimate power even unto death.”⁹⁶ They would not have been able to manipulate the laws if they did not consider their changes beneficial to both the community and divine systems in place. The attention they paid to detail, the limitations and the need to base their decisions on biblical proof-text and divine desire came from their understanding of their role in general. They were acting as a tool by which God could impart divine intent. Neusner explains:

The political ambition of the politics of this Judaism is to form of Israel a holy community and to make of the Israelite what that person always is, which is the this-worldly representation of God's image and likeness. Political Israel, then, is to form on earth what the Heavenly court comprises in Heaven.

The rabbis may have wanted to balance earthly values with their understanding of God's laws, but they were realistic about their needs as well as those of the community. They crafted laws and a system for capital punishment which required a strict burden of proof and certain behaviors of the community, but one which also kept an eye on the actual behavior of the people. They realized some of the biblical laws would not have been realistic to apply to their constituents, and struggled with how to maintain their authenticity while still being fair. The system may have obvious modifications, but the factors motivating them and the amount of careful consideration that must have gone into this code should not be minimized.

⁹⁶ Neusner, *Rabbinic Political Theory*, 118.

CHAPTER 4

THE TALMUD

The Amoraim continued the trend of their Tannaitic predecessors by further limiting the application of the death penalty. They, too, seemed to understand their role as purveyors of God's law, and were intent on explaining these laws to the Jewish community in a clear and detailed fashion. The rabbis attempted to clarify the Mishnaic rules and most of the Talmudic laws surrounding capital punishment are found in tractate Sanhedrin.

The Amoraim believed they were expanding on biblical law. "The Talmud adopts all the conditions and provisos under which the Mosaic law punishes crime."⁹⁷ They did not want to change the laws for the sake of change, but did adapt them to the changing needs of the community. They wanted their laws and writings to be understood as authentic Jewish law. As Neusner points out, "We now realize that the Bavli's framers wished to present a system in the guise of a tradition, and hence set a high priority upon relating their ideas to received traditions."⁹⁸ The Talmud uses biblical proof-text to establish its opinions, even more so than the Mishnah did previously. This is perhaps because the framers realized the importance of continuing a chain of tradition, rather than creating a new interpretation.

The Bavli does not change much of the Mishnaic law regarding capital punishment. Most of the commentary focuses on explaining the Tannaitic choices that

⁹⁷ Mendelsohn, 29.

⁹⁸ Jacob Neusner, *The Mind of Classical Judaism Vol. I*. Eds. Jacob Neusner, Bruce D. Chilton, Darrell J. Fasching, William Scott Green, Sara Mandell, James F. Strange. (Atlanta, GA: Scholars Press, 1997), 164-165.

were made. There seems to be an ethical voice that is present. While it is not found throughout, it does play a significant role in these passages.

It is important to outline the requirements set in place by the Talmud by which criminals could be tried and found guilty of a capital crime. Although this explanation is not specifically related to the punishments themselves, it does shed some light on the mindset of the rabbis when they dealt with capital crimes. Mendelsohn explains:

Unless the culprit was fully conscious of culpability of his action, knowing while committing the deed, that it was against the spirit and the letter of the law, and unless his guilt was subsequently proved, beyond the least doubt, by at least two trustworthy witnesses, and before a competent tribunal, he could not be capitally or even corporally punished. And even when there appeared a legal number of duly qualified witnesses, their testimony was insufficient to convict, unless they agreed not only with regard to the prisoner's offense, but also with regard to the mode of committing it. rabbinic law does not subject a person to capital, nor even to corporal punishment, unless all witnesses charge him with the one and the same criminal act, their statements fully agreeing in the main circumstances, and declaring that they saw one another, while seeing him engaged in the same crime.⁹⁹

The burden of proof, therefore, was not on the culprit himself, rather, on the witnesses and court. Why were the rabbis so careful about the rules of capital punishment? Their reasoning may have been rooted in their theological convictions. Mendelsohn goes on to explain "In all doubtful cases, and especially where a crime not capable of notorious proof was charged, the combat was awarded; and God, they deemed, was the judge."¹⁰⁰ Ultimately they believed it was better to have God act as the final arbiter, especially if there was a question about a person's guilt or innocence.

Beginning with Mishnah Sanhedrin 6:1, the Talmudic rabbis respond to their predecessors' ruling. It does not seem as though they disagree with the Mishnaic rabbis,

⁹⁹ Mendelsohn, 29.

¹⁰⁰ Ibid. 29.

rather, that they want to clarify even the smallest detail that may be misunderstood. One example, which refers to all four types of death, is seen in Sanhedrin 43a:

"A man was stationed." R. Huna said: It is obvious to me that the stone with which one is stoned, the gallows on which one is hanged, the sword with which one is decapitated, and the cloth with which one is strangled, are all provided by the Community. And why so? Because we could not tell a man to go and fetch his own property to kill himself. But, asked R. Huna, who provides the flag for signaling and the horse on which one rides to stop them? Seeing that they are for his protection, must they be provided by him, or rather, since the court is bound to endeavour to save him, by them?¹⁰¹

R. Huna's response to the Mishnah signifies two rabbinic inclinations. The first is an attentiveness to detail. The rabbis wanted to refine the details of the process. If they wanted their laws to be accepted, they had to be applicable. They could not simply remain theoretical options, the practical details needed clarification. Whether or not the death penalty was in fact used might have been irrelevant. If their mandate was to explain the Mishnaic laws, they had to do so as if they were applicable and binding.

R. Huna also posits an ethical response to punishment by worrying about the culprit, even after he has been convicted of a crime. He reminds the community that even if a person is guilty, they still need to be aware of that person's needs. This ethical tendency may have been rooted in the rabbinic understanding of repentance, which allows even the worst sinner a place in the world to come if preceded by *t'shuvah*. It is also possible that R. Huna gives voice to a segment of the rabbinic community who was uncomfortable with the practice of capital punishment.

Barry Holtz helps place Talmudic opinion in context. In discussing the objective of the Talmud as a whole he explains "Its chief purpose it to preserve the record of earlier

generations studying their own tradition and provide materials for later generations wishing to do the same."¹⁰² Their discourse was provided to help the community grapple with issues that arose after the Mishnaic laws had been accepted. Talmudic law required its adherents to give great consideration to the laws which were governing their lives.

STONING

If the Tannaitic rabbis instituted laws that responded to biblical law as well as common practice, the Amoraic rabbis had an even more daunting task. While responding to the same needs, the Amoraim had to advance the laws in a way that seemed consistent with the Mishnah. They had to make logical and reasonable inferences from accepted law.

Throughout tractate Sanhedrin the rabbis discussed the proper method and reasoning behind stoning. They spent time explaining both the crimes that were associated with this punishment as well as its proper execution. The rabbis commented on every aspect of the Mishnaic laws. They addressed the procedure as well as the grammar and language used and how it should be interpreted. They were not the first, though, to institute this mode of execution. "Precipitation was practiced by the most ancient nations. The Greeks precipitated the convict into a pit, which was a noisome hole with sharp spikes at the top and bottom."¹⁰³

¹⁰¹ Rabbi Dr. I Epstein, Trans. and ed., *Tractate Sanhedrin*. The Soncino Talmud. (London: The Soncino Press, 1935), All subsequent translations from the Talmud will be taken from this edition.

¹⁰² Barry W. Holtz, ed. *Back to the Sources*. (New York: Simon and Schuster, 1984), 156.

¹⁰³ Mendelsohn, 158.

Sanhedrin 43a continues by addressing Mishnah Sanhedrin 6:1. In addition to the announcement of the stoning it explains:

Abaye said; It must also be announced: On such and such a day, at such and such an hour, and in such and such a place [the crime was committed], in case there are some who know [to the contrary], so that they can come forward and prove the witnesses *zomemim*.

Abaye, a fourth generation Amora, added to the Tannaitic decree. He did not change the intent of the law. His additions, like R. Huna's, appear to have been for the benefit of the criminal. He required more information be given during the announcement to offer yet another opportunity for the criminal to be discharged, thereby saving his life. It is also possible that Abaye's aim may have been to defend the rabbis if a mistake was made and an innocent person was executed. If their rules were sufficiently stringent, but an innocent person was still killed, the rabbis would at least be able to defend their actions by claiming there were strict guidelines in place before an execution took place. If they were careful to follow all the regulations, they ultimately may have been less culpable.

One way the Amoraic rabbis supported their commentary was by grounding it in biblical proof-text. The Torah had been accepted as a divine set of rules and laws which regulated Jewish life. By basing their observations in biblical precedent, they added authenticity to their own opinions.

Sanhedrin 45a expounds upon Mishnah Sanhedrin 6:3:

Our rabbis taught: One part of a man was covered, in front and two parts of a woman, in front and behind, because she is wholly shameful [when naked]: this is R. Judah's opinion. The Sages said: A man is stoned naked, but not a woman, What is the rabbis' reason? — Scripture states, And they shall stone *otho* [him]. Why state '*otho*'? Shall we say, '*otho*' but not '*othah*,' [her]? but it is written, Then shalt thou bring forth

that man or that woman! What then is the significance of 'otho'. —
That only he [is stoned] without his garments, but she is stoned in
her clothes.

In formulating their reasoning in this manner, the rabbis may have been accomplishing two tasks, both with the same purpose in mind. They were able to align their thinking with the rabbis that came before them, bolstering their own position by agreeing with an already accepted system. Further, the rabbis were able to strengthen the opinion by rooting it in the Bible. They may, though, have had altogether different reasons than the biblical authors for wanting to enforce the rule as stated. For example, they later discuss issues of modesty and men's weakness in front of feminine nudity, but by using Deuteronomy 17:5, they made their argument more persuasive.

Sanhedrin 45a also interprets Mishnah Sanhedrin 6:4:

A Tanna taught: And with his own height, there were three [men's heights] in all. Yet do we really require so much height? For the following contradicts it: 'Just as a pit to be reckoned as causing death must be ten handbreadths [deep], so must all other [excavations] be sufficient to cause death, viz., ten handbreadths'? — R. Nahman said in Rabbah b. Abbahu's name: Scripture states, Love thy neighbour as thyself; i.e., choose an easy death for him. But if so, it [sc.the place of stoning] should be still higher! — [That, however, is not so] to prevent disfiguration.

R. Nahman, a Babylonian Amora explained his opinion which he derived from Abbahu, a second generation Babylonian Amora. Though perhaps not far removed from the original Tanna quoted, they seem to have a different consideration in mind than their earlier rabbinic counterpart. Apparently, the Tanna was worried about the legal implications of the height. He was focused on following the practical specifications. The Amoraim claim to be more concerned with the ethical aspect of the decision. It should be kept in mind that because the Amoraic rabbis were responding to an earlier voice that had no opportunity for response, they had a distinct advantage. Abraham Bloch explains,

"the Talmudic amplification of biblical social laws reflected a progressive development of perceptions of compassion...as a result, the quality of mercy became deeply rooted in the Jewish psyche."¹⁰⁴ These rabbis were focused at least partially on ethics and morals which affected their responses to Mishnaic law.

The Amoraic rabbis approached the issue of specific crimes which deserved stoning in a similar way to the Tannaim. They all looked for ways to limit the law's application, in some cases changing the biblical laws altogether. In certain situations, they even used the biblical language to create more loopholes. In addressing the law prohibiting Molech worship, the rabbis used a few methods to justify their opinion. They based it on biblical and Mishnaic precedent while including their own modifications.

Sanhedrin 64a-b explains part of Mishnah Sanhedrin 7:4:

The Mishnah teaches idolatry and giving to Molech. R. Abin said: Our Mishnah is in accordance with the view that Molech worship is not idolatry. For it has been taught, [if one causes his seed to pass through the fire,] whether to Molech or to any other idol he is liable [to death]. R. Eleazar son of R. Simeon said: If to Molech, he is liable; if to another idol, he is not.

To begin with, the Amoraic R. Abin was quick to point out that an earlier argument made on page 53a already distinguished giving one's seed to Molech from regular idolatry. This will be the starting point for a number of arguments defending a person who gave over his seed. The rabbis go on to explain the laws surrounding the practice. They did not ignore it altogether, but created a subcategory under idolatry into which they could place this behavior. They may have wanted to be more lenient, but still realized the need to maintain biblical laws.

¹⁰⁴ Bloch, 60.

The rabbis provided further explanation of the laws:

R. Jannai said: Punishment is not incurred unless one delivers his seed to the acolytes of Molech, for it is said, And thou shalt not give of thy seed to pass through the fire to Molech. It has been taught likewise: I might think, that if one caused his seed to pass through the fire to Molech, without first delivering it to the priests, he is liable: therefore the Writ teaches, Thou shalt not give. If he gave it to the priests, but did not cause it to pass through the fire, I might think that he is liable: therefore the Writ states, to pass through. If one delivered it [to the priests of Molech], but caused it to pass through to some other deity, I might think that he is punished: therefore the Writ teaches, to Molech. Now, if he delivered it to the priests and caused it to pass to Molech, but not through the fire, I might think that he is liable: but, as here is written, to pass through; and elsewhere it is stated, There shall not be found among you any one that maketh his son or his daughter to pass through the fire: just as there, the reference is to fire, so here too; and just as here the reference is to Molech, so there too.

R. Aha the son of Raba said: If one caused all his seed to pass through [the fire] to Molech, he is exempt from punishment, because it is written, of thy seed implying, but not all thy seed.

It seems as though the rabbis were comfortable using the Bible, not only as proof-text, but also creatively to defend their limiting inclination. In the aforementioned gemara, the rabbis use the very language of the Bible to change its own meaning. The biblical authors had made their intentions clear. Idolators and Molech worshippers were to be killed. They did not mince words. By parsing the language carefully, the rabbis were able to change the intent. They may have done this in order to further their own attempts to limit the application of stoning. Neusner claims that they were apt to quote "verses of ancient Israel's scripture as prooftexts for their own respective propositions."¹⁰⁵

The Amoraic rabbis also responded to the rules about breaking the laws of Shabbat. In Sanhedrin 66a, they respond to part of Mishnah Sanhedrin 7:4:

¹⁰⁵ Neusner, *The Mind of*, 162.

Mishnah Sanhedrin 7:4:

He who desecrates the Sabbath [is stoned], providing that it is an offense punished by extinction if deliberate, and by a sin-offering if unwitting.

Sanhedrin 66a:

This proves that there is a manner of desecrating the Sabbath for the deliberate committal of which there is no extinction, nor is a sin offering to be brought for its unwitting transgression. What is it? — The law of boundaries, according to R. Akiba, and kindling a fire, according to R. Jose.

In this case the Amoraic rabbis used the Tannaitic rabbis' words to create a loophole in the Tannaitic interpretation of the biblical law. As in the case of using the biblical language as a defense for their interpretations, here they manipulated the earlier rabbis' language to strengthen their opinion. They may have wanted to offer acceptable defenses to the public for their behavior if they transgressed the rules of Shabbat. By including justifications in the text itself, members of the community were provided with excuses for their behavior.

BURNING

The rabbis continued to interpret the laws of the *arbah meitot beit din* when they discussed burning. The Romans also used burning as a form of execution, but employed a different method. "Among the Romans, the convict was wrapped in a garment covered with pitch, and then set on fire and burned."¹⁰⁶ Sanhedrin 52a explains the details of execution by burning. The rabbis again chose to root their interpretation in biblical precedent:

What is meant by a "wick?" — R. Mathna said: A lead bar.

Whence do we know this? — It is inferred from the fact that burning is decreed here; and was also the fate of the assembly of Korah, just as there the reference

¹⁰⁶ Mendelsohn, 159.

is to the burning of the soul, the body remaining intact, so here too. R. Eleazar said: It is deduced from the employment of the word 'burning' here and in the case of Aaron's sons; just as there the burning of the soul is meant, while the body remained intact, so here too.

In this case, the rabbis felt comfortable interpreting both the Mishnaic law as well as the biblical stories. They may have been using commonly accepted explanations of the demise of Korah, Nadav and Avihu, but they do take some liberty with the biblical narrative in order to defend their position. Later glosses may attribute crimes that deserve burning to Korah, Nadav and Avihu, but the Torah does not explicitly accuse them of such. It is interesting that the rabbis didn't use examples from the Bible that refer directly to burning as a punishment for specific crimes. Instead, they play on stories in which characters were burned by divine intervention.

The Amoraic rabbis may have used these stories specifically because of the divine aspect. If they wanted to carry out burning in the most appropriate way, perhaps they looked to God to model the appropriate procedure. It is also possible that they depended on a theory that Chajes suggests, "in cases where the laws are clear and need only some written evidence, one may use even a far-fetched analogy, so long as it is applied in a scholarly way, to gain for these laws a basis in the written Torah."¹⁰⁷

The Amoraic rabbis continued their focused interpretation of the Mishnaic laws of burning when they explain Mishnah Sanhedrin 9:1 Sanhedrin 75a states:

The Mishnah does not state, 'He who commits incest with a woman whose daughter he has married', but 'he who commits incest with a woman and her daughter'; this proves that both are forbidden. Who are they then? His mother-in-law and her mother.

¹⁰⁷ Chajes, Z.H. *The Student's Guide Through the Talmud*. Trans. and ed. Jacob Shachter. (New York: Philipp Feldheim, Inc., 1960). 14.

It is difficult to know whether or not the Amoraic rabbis have changed the intent of the Tannaitic statement. The rabbis were concerned with family purity, but it is almost impossible to know what the Tannaitic rabbis meant. It is this very ambiguity that leads the Amoraic rabbis to clarify the meaning. Their understanding of the law may have been different, but without clear guidelines about the Mishanaic law, some interpretation was needed.

The Amoraic rabbis also tried to settle differences between Tannaitic rabbis. In 75a, Abaye appears as an arbiter:

Our rabbis taught: [And if a man take a wife and her mother, it is wickedness: they shall be burnt with fire,] both he and they [*ethe'en*]. [This means], he and one of them. That is R. Ishmael's opinion. R. Akiba said: [It means], he and both of them. Wherein do they differ?— Abaye said: They differ as to the text from which the law is derived: R. Ishmael maintains that '*he and ethe'en*' means 'he and one of them', for in Greek 'one' is '*henna*.' Hence [incest with] his mother-in-law's mother [as a punishable offence] is arrived at [only] by [biblical] interpretation. But R. Akiba maintained, '*he and ethe'en*' means 'he and both of them', hence his mother-in-law's mother is explicitly interdicted in this verse.

In this case the rabbis are not concerned with changing the law. All agreed that the punishment for certain types of incest was burning. The rabbis, both Tannaim and Amoraim, were consistent with their interpretation of biblical law. Since the Bible prescribed burning for sexual improprieties, they maintained a similar level of strict punishment. The Amoraic rabbis, instead chose to focus on a discrepancy between rabbis which is not even mentioned in the Mishnah itself. Perhaps the Amoraic rabbis knew of this disagreement and decided to clarify the positions on their own. The clarification introduces some new aspects of the rabbinic lifestyle. The fact that Ishmael's opinion is derived from Greek language implies his awareness of the Hellenistic society that surrounded him. The interpretation is also an example of the rabbis' comfort with

analysis of the text. According to their stated beliefs, even the Tannaitic rabbis went beyond the explicit meaning.

BEHEADING

In describing the method of beheading in Mishnah Sanhedrin 7:3, the Tannaitic rabbis referred to the method of the civil authorities. There were different methods employed, and the gemara in Sanhedrin 52b itself addresses that issue.

GEMARA. It had been taught: R. Judah said to the Sages: I too know that this is a death of repulsive disfigurement, but what can I do, seeing that the Torah hath said, neither shall ye walk in their ordinances? But the rabbis maintain: Since Scripture decreed the sword, we do not imitate them [when using their method]. For if you will not agree to this, then how about that which was taught: Pyres may be lit in honour of deceased kings, and this is not forbidden as being of the 'ways of the Amorites': but why so? Is it not written, neither shall ye walk in their ordinances? But because this burning is referred to in the Bible, as it is written, [But thou shalt die in peace:] and with the burnings of thy fathers...[so shall they burn for thee], it is not from them [the heathens] that we derive the practice. So here too, since the Torah decreed the sword, it is not from them [the Romans] that we derive the practice.

The rabbis seem to be creating their own defense for using the Roman method. They knew they could not defend the practice from a biblical proof-text. Unfortunately, there was no clear definition in the Bible. They did, however, want to make clear that their decision was biblically-based, not instituted as an outgrowth of the Roman practice. They must have known that according to Roman practice:

Execution by the axe after flogging, previously confined to slaves, was revised in the early Empire and applied to citizens too. Beheading by the sword ('*decollatio*') was also common.¹⁰⁸

¹⁰⁸ Rabbi Dr. I Epstein, Trans. and ed. *Tractate Sanhedrin*. The Soncino Talmud. London: The Soncino Press, 1935.

Dr. Epstein, in his commentary to the Soncino translation goes on to conclude:

With the introduction of the latter, the former was prohibited and therefore R. Judah stigmatizes beheading by the sword as a Roman practice, and prefers axes instead, though that too was formerly employed by the Romans.¹⁰⁹

The Tannaitic rabbis seem to lean in the direction of sympathetic concern for the culprit. By the time of the Amoraim, this tendency is much more obvious. The gemara concludes:

R. Nahman said in the name of Rabbah b. Abbuha: Scripture teaches, But thou shalt love thy neighbour as thyself¹ choose an easy death for him. Now we find this law [of execution by the sword] when one murdered a slave; whence do we know that this law holds good if he murdered a free man? — Surely this can be deduced by reasoning from the minor to the major: if the murderer of a slave is decapitated, shall he who slays a free man be only strangled! Now, this answer agrees with the view that strangulation is an easier death; but what of the view that strangulation is more severe? It is then deduced from the following: It has been taught: [The verse], So shalt thou put away the guilt of the innocent blood from among you, serves to denote that all that shed blood are likened [in treatment] to the atoning heifer: just as there, it is done with a sword and at the neck, so here too, execution is with the sword and at the neck [i.e., the throat]. If so, just as there it was done with an axe, and on the nape of the neck, so here too? — R. Nahman answered in the name of Rabbah b. Abbuha: Scripture saith: But thou shalt love thy neighbour as thyself: choose an easy death for him.

R. Nahman's voice weaves throughout this passage as a continued voice of compassion. He accepted the reality that the execution may have had to occur, but showed that he too could use a biblical proof-text to prove that even a criminal should be treated with respect. Part of the difficulty of this passage is the fact that the rabbis were ultimately unclear about which method of execution was the most severe. Some argued strangulation was more severe than decapitation and others held the opposite opinion. These discrepancies made the discussions more theoretical than practical. Depending on one's opinion, R. Nahman's answer would apply differently.

¹⁰⁹ Ibid.

The Amoraic rabbis continued to explain beheading according to their interpretation of Mishanic law. Sanhedrin 76b responds to Mishnah Sanhedrin 9:1

"Or kept him down under water." The first clause teaches the extreme limit of the law, and so does the last. Thus, the first clause teaches the extreme limit of the law, that though he himself did not push him [into the water], yet since he could not ascend, [through being held down], and so died, he is executed. The last clause likewise teaches the extreme limit, that though he actually pushed him into the water, yet since he could have ascended, but died, he is free from death.

Whence do we know that [he is liable to death] for keeping him down?-Samuel answered: The Writ sayeth, Or if with enmity he smote him with his hand: this extends the law to one who keeps his neighbour fast [e.g., in water, thus causing his death].

By the time the laws about beheading reached the Amoraic rabbis, the guidelines were narrowly defined. They could have focused it further, allowing the intentional pusher an escape, but instead decided to defend the Tannaitic reasoning. Not only do they add their own support, they include biblical evidence which corroborates their opinion. This biblical quote may seem implausible, but, as Dr. Cohen explained, "the rabbis wanted the law to correspond to the contextual framework they inherited."¹¹⁰ The biblical argument may have been supplied for additional support.

STRANGULATION

According to the Tannaitic rabbis, strangulation was the method employed for all crimes not otherwise identified with a specific mode of execution. It only applies to six crimes: adultery, bruising a parent, kidnapping, maladministration (the "Rebellious Elder"); false prophecy and prophesying in the name of heathen deities.¹¹¹ Strangling is

¹¹⁰ Discussion with Dr. Martin Cohen about the role of the Amoraic rabbis 2/13/02.

¹¹¹ Mendelsohn, 52.

established as the least severe of all the capital punishments. There is some question about its legitimacy because, "strangling seems to have been a most general punishment in spite of its having been ignored by the Bible."¹¹² By the time of the Mishnah, though, it is explained and described in language similar to that of the other modes of execution. The Amoraic rabbis accept it and discuss the circumstances surrounding a case of strangulation, but also address its more recent appearance.

Regarding Mishnah Sanhedrin 6:3, Sanhedrin 52b and 53a refer to the absence of strangulation in the Bible. The rabbis wrote:

Our rabbis taught: [And the man that committeth adultery with another man's wife, even he that committeth adultery with his neighbour's wife, the adulterer and the adulteress shall surely be put to death]. 'The man 'excludes a minor; 'that committeth adultery with another man's wife' excludes the wife of a minor; 'even he that committeth adultery with his neighbour's wife' excludes the wife of a heathen; 'shall surely be put to death', by strangulation. You say, by strangulation; but perhaps one of the other deaths decreed by the Torah is meant here? — I will answer you: Whenever the Torah decrees an unspecified death penalty, you may not interpret it stringently but leniently: this is R. Josiah's view. R. Jonathan said: Not because strangulation is the most lenient death, but because by every unspecified death in the Torah strangulation is meant. Rabbi [proceeding to demonstrate this] said: Death by God is mentioned in Scripture; and death by man is also decreed. Just as the death by God leaves no mark [of violence on the body], so also death by man must leave no mark [of violence], a condition which only strangling fulfils. But may it not apply to burning.

Tractate Sanhedrin 53a:

Now, R. Jonathan's view raises no difficulty, its reason being explained by Rabbi. But on R. Josiah's view, how do we know that there is death by strangulation at all; perhaps the sword is meant? — Rabbah replied: It is a tradition that there are four deaths.

¹¹² Gershfield, 232.

The Amoraic rabbis did not add their own opinions in this pericope. Instead they relied on the discourse carried on between late Tannaitic rabbis. They chose to follow in the tradition of their predecessors. Strangulation was a relatively newly accepted method. The Amoraic rabbis may not have wanted to question a less established law. Their inclusion of the argument itself may have helped to dispel issues people had with a method that was not biblically ordained. The rabbis did, though, choose to add Rabbi's comments. This may have served two purposes. First, it anchored their reasoning in biblical precedent. Secondly, Rabbi was one of the greatest interpreters of law of the time, adding strength to their opinion. The final statement from Rabbah should also not be disregarded. The rabbis were committed to tradition. Their religious beliefs and practices had been handed down and the customs instituted by earlier generations were attributed a great deal of import. The Amoraim secured the method by assigning it both biblical and Tannaitic endorsement.

The Amoraic rabbis return to the argument of whether or not strangulation is biblically ordained. Though it is not the majority of the discussion surrounding Sanhedrin 84b, while explaining Mishnah Sanhedrin 11:1, the rabbis do mention it:

Whence do we know it of him who strikes his father or mother? — From the verse, And he that smiteth his father or mother shall surely be put to death: and by every unspecified death sentence decreed in the Torah strangulation is meant. But say! perhaps it is only if he kills [not merely strikes] them? — You surely cannot think so: for killing any other person he is decapitated, whilst for his father's murder he is [only] strangled! Now, this [answer] is correct on the view that strangulation is more lenient: but on the view that the sword is more lenient, what canst thou say? — But since it is written, He that smiteth a man, so that he dies, shall surely be put to death: and also, or in enmity smite him with his hand, that he die, it follows that whenever an unqualified smiting is mentioned, it does not mean slaying.

This argument is fraught with defense on the part of the rabbis partially

because they are discussing strangulation, a questionable method of execution. The rabbis also masterfully include in this argument a statement about the order of severity of the death penalties. There was some question about whether strangulation was more severe than beheading. This gemara identifies strangulation as the most lenient. It goes on to conclude that because striking one's parents is less offensive than killing another person, the method employed should be strangulation. Their mode of argument and conclusion is a bit difficult to follow, but consistent in maintaining previously stated rules and laws specific to interpreting biblical laws of capital punishment.

The Amoraic rabbis felt a need to preserve their policies in the most stable way possible. Neusner explains the intent of the Talmud as an institution was, "to gather together traditions and to impose upon them the form and structure of a system."¹¹³ With the introduction of the Mishnah, the Jewish community was ready to accept a new authority and the Amoraic rabbis worked to advance that objective. Neusner continues, "We now realize that the Bavli's framers wished to present a system in the disguise of a tradition, and hence set a high priority upon relating their ideas to received writings."¹¹⁴ The rabbis used biblical proof-text as well as Tannaitic tradition to put forward their own ideas about how Judaism should be shaped for their generation.

Although the Amoraic rabbis were intent on interpreting and discussing the laws and tradition handed down to them, they too were not likely to have employed the death penalty. Steinsaltz claims, "since there were standing instructions to courts to refrain, insofar as possible, from passing the death sentence, it was customary to remove from the bench any man who was believed to be incapable of maintaining an impartial attitude

¹¹³ Neusner, *The Mind of*, 162.

toward the defendant."¹¹⁵ Mendelsohn echoes this opinion, "On close examination into the spirit of Talmudic jurisprudence, one cannot help perceiving that the rabbis aimed at the ultimate abolition of capital punishment."¹¹⁶

The rabbis were motivated by a certain sense of ethical obligation. Their continued focusing and limiting of the application of the death penalty supports the idea that they themselves may not have been comfortable with its application. Most of the changes they instituted restricted the laws allowing more justification for otherwise illegal behavior. The Amoraim were obviously not able to disregard the practice altogether, but wanted to monitor its rules carefully by including their own opinions and extending the practical limitations on capital punishment.

¹¹⁴ Ibid.

¹¹⁵ Adin Steinsaltz, *The Essential Talmud*. Trans. Chaya Galai. (New York: Basic Books Inc., 1976), 165.

¹¹⁶ Mendelsohn, 36.

CONCLUSION

Historically, what is the Jewish opinion of the death penalty? Is it, as some claim, that our tradition recognizes and encourages its application even during its earliest biblical roots? Or, do those from a more liberal point of view, who highlight the Talmudic rabbis' reluctance, stand on more firm ground? How can the opinion of the Second Temple period authors be incorporated? Do the Tannaim act only as a bridge between the interpretive inclination of their predecessors and the ethical leanings of their successors? There is no definitive answer. Each answer must be understood within the constraints of modernity.

The desire to root one's theory in historic proof-text is powerful, and our tradition, at different junctures allows for each of these opinions. In order, though, to come to an honest answer, one must take into account the entirety of the text. Basing a decision about the death penalty, as some choose to do, on one text, or even one strain of thought through many texts, does not allow the richness of our tradition to show through.

Ultimately, Jews have grappled with the implications, methods, ethical nature, and value of the death penalty as a preventative measure against crime since its first mention in the Bible. While our tradition does not offer one final answer, it is important to note that the ultimate decision of all four time periods was to include capital punishment in their law codes. Our tradition acknowledges the questions and reservations which surround the issue today, because they are the same issues which have always existed, constantly requiring serious consideration.

What I found in researching the biblical author's opinion toward capital punishment, is that there seem to be two strains of thought concerning a community's

right to kill. The first addresses the very real issue of the institution of a corpus of laws that required adherence from its members. The second speaks to the biblical author's need to include some boundaries which limit the application of those laws. This need may have been rooted in part in an ethical concern, or may have spoken to the requirement of implementing a realistic legal system.

The Bible identifies the following categories of capital crime:

1. Apostasy
2. Blasphemy
3. Sorcery
4. Violation of the Sabbath
5. Sexual improprieties (including rape, incest, adultery, bestiality, and homosexuality)
6. Kidnapping
7. Disrespect towards one's parents.¹¹⁷

Each category and the offenses it includes are described throughout the five books of the Torah. The description of these offenses allows the biblical author to delineate the crimes which are most dangerous to the community. In my comparison of the Israelite capital crimes to those of Hammurabi and the Middle Assyrian laws, the similarities were obvious. These communities, like those after them, were intent on encouraging group cohesion.

The crimes deemed most dangerous were those that threatened the most important messages of the community. I believe the inclusion, for example, of the stubborn and rebellious son in the capital crimes of the Israelites is based on the import they placed on a hierarchical society. The son's disobedience may have indicated a disrespect for the

¹¹⁷ Westbrook, 548-555.

system. His behavior may have been seen as a further disregard for the ultimate power of God.

Similarly, the biblical author included the narrative of the Sabbath offender. For a community based upon the belief of a common theology, that theology had to be emphasized by the legal system. I believe the observance of a Sabbath which differentiated them from their neighbors had to be included in the list of the most important behaviors required by the members. The Bible was written with the intent to encourage adherence to its laws. By instituting the death penalty for breaking its most important injunctions, it reemphasized the appropriate behavior.

My research leads me to conclude that the Bible also includes a more realistic and compassionate tendency. There is an inclination towards the limitation of the death penalty. The examples in Deuteronomy chapters 17 and 19 specify strict requirements for the witnesses in a capital case. Biblical law makes it difficult to accuse another of a capital crime. Not only was more than one witness necessary, but the witnesses themselves were responsible for carrying out the punishment. I am inclined to believe this was instituted to discourage accusations altogether. The Bible also includes its own safeguards against the prospect of too many capital cases. While describing the crimes, each of them is defined specifically. The biblical author did not want to leave much room for confusion. Examples of this are seen in the identification of illegal sexual unions and in the case of the enticer. I also maintain that the many steps incumbent on the parents of the aforementioned stubborn and rebellious son served to reduce the application of the death penalty in that situation.

The Bible includes only a few cases of capital punishment in the Writings and the Prophets. I believe these examples were included to emphasize what the author wanted

later generations to believe. If they had read about capital crimes which were not addressed as such, they may have wondered why. The later books do not apply the death penalty to every character who would seem to deserve it. In fact some stories do not follow the laws at all. Ultimately, though, the decision was made to include examples of capital punishment in some cases, by which the Jewish community could connect these stories with the laws included in the Torah.

Whether the biblical authors intended capital punishment to be applied is almost impossible to ascertain. The Bible's identification, though, of capital crimes is most certainly an indication of the most dangerous behaviors for the Israelites. The fact that they all deal, in one way or another, with the maintenance of the community and its unique beliefs emphasizes this thesis. I believe that the Bible introduced capital punishment into a community that was already familiar with it from surrounding groups and its exclusion would have seemed unusual. The Bible's recognition of the ethical concerns and suggestion of limited application was echoed throughout later texts.

The Second Temple period authors were the first to begin interpreting biblical injunctions. After much consideration, I do not believe these authors intended to change the laws. I am not even convinced they were aware of the impact they were to make on later Jewish commentary. I do believe, however, that they were intent on making Jewish laws applicable to their own communities. I believe that in most cases, they were focused on changing the laws to fit the actual behaviors of their constituents.

One way the Second Temple period authors distanced themselves from being identified as interpreters was by claiming biblical or divine approval of their alterations. Though other Second Temple period authors make some capital laws more lenient, the

author of Jubilees as a model of Apocryphal and Pseudepigraphal writings does not. In regard to the Sabbath offender and sexual improprieties, the author identifies more transgressions deserving of death than the Bible. Likewise, he changes the story of Cain and Abel, punishing Cain with a much more exacting death.

The authors of the Dead Sea and sectarian scrolls also adapted the laws. Generally, though, they had different goals in mind than the author of Jubilees. While they wanted to emphasize important rules, they were obliged to limit the application of the death penalty to near impossibility. I believe they were fighting for their very existence. The Damascus Document removes capital punishment in some cases and in others requires very strict evidence against an alleged criminal. The Temple Scroll includes biblical capital crimes in its law compendium, but it too requires evidence that is more strict than the Bible. Whereas the Bible requires two witnesses, the Scroll requires three. The Zaddokite Fragments include mentions of capital punishment, but merge some of the biblical laws together. The Manual of Discipline seems to ignore capital punishment altogether.

The Qumran community wanted to adhere to biblical law, but their own reality would not let them. Their laws concerning marriage and interaction with women severely limited their membership. They did, though, demand strict observance of the intent of biblical law. In the cases when they changed the laws, they still applied severe punishments to the guilty parties. The crimes that led to the punishments were not changed, rather, the punishments themselves. Each community applied the punishment considered most exacting to the capital crimes the Bible identified.

Philo's commentary played a different role than the Apocrypha, Pseudepigrapha and Dead Sea Scrolls. He attempted to offer the Jews of his time a way to connect to the Jewish laws they were expected to follow. His background in Jewish and Greek law should not be overlooked, but I argue his writings were based equally on his knowledge and his own personal beliefs. Taking this into account, I do believe that he thought he was being absolutely authentic to the intent of Jewish law. He seems to have known that he was interpreting the laws, but implied that his changes were acceptable. Philo addressed issues such as Sabbath observance, sexual improprieties, murder, parental respect, and blasphemy. Depending on his understanding of the danger of the crimes to the community, he alternated between limiting the application of the death penalty and vehemently supporting the biblical application.

Josephus also acted as an interpreter of sorts. In his case though, my impression from secondary sources was that Josephus's commentary was much more self-serving than that of his contemporaries. He was focused on incorporating Jewish law for Greek society. His fellow writers were engaged in an almost opposite endeavor. Josephus also had an excellent education, but his interpretation of murder, sexual improprieties and blasphemy is different than others. He was more lenient in regard to sexual improprieties and murder. The one time he is strict is in reference to blasphemy, but this may have also been a response to the Hellenized audience.¹¹⁸ I am left with the sense that although Josephus' writings provide us with an important perspective on life in the Second Temple period, it is heavily skewed towards a Greek audience.

¹¹⁸ Feldman and Hata, *Josephus, Judaism*, 192.

In writing this chapter I learned that understanding the Second Temple period authors' opinion of capital punishment must begin with understanding their position regarding the Bible. Their changes and adaptations did not always arise from ethical or moral choices. Making this leap would be an inauthentic representation of their motives. Their changes were rooted in their dedication to the audiences they addressed. The Pseudepigrapha was careful in its wording because the entire initiative of changing the Bible was relatively new. The Dead Sea and sectarian scrolls changed laws for the maintenance and existence of their communities. Philo incorporated his commentary into his understanding of people's realistic behavior. Josephus responded to the Hellenized community which required laws they could accept without changing their established lifestyles too radically. The fact that almost all of these authors limited the application of the death penalty may not have been due to their ethical inclinations, but I do believe from my research, they would not have felt comfortable doing so if they did not believe there was some authentic biblical basis for their modifications.

The Tannaitic rabbis addressed the issue of capital punishment in the Mishnah and Tosefta. It seems as though their goal was to strike a delicate balance between adherence to biblical law and faithfulness to their own practical reservations about the death penalty. The rabbis included four methods in their explanation of capital punishment, and by the codification of the Mishnah, stoning, burning, beheading and strangling were identified as the *arbah meitot beit din*. The Tannaitic rabbis categorize the methods, discussing their utilization, appropriate implementation and the rights of the defendant in each case. They also include some discussion about the secular methods employed at the time. I believe that the rabbis felt a need to include a remnant of the

biblical laws in their code, but were nervous about the implications of killing an innocent person. Their limitations and laws indicate this struggle.

Mishnah Sanhedrin chapter six primarily details the procedures for a stoning. It emphasizes the importance of allowing a defendant ample opportunity to be acquitted. This inclination, though, does not seem to be borne only out of an ethical tendency. The rabbis seem to impart a meta-message alleging God is responsible for a person's ultimate judgment. I maintain their reluctance to perform an execution was based in this belief.

Mishnah Sanhedrin chapter seven focuses on specific crimes and their punishments. This chapter demonstrates the rabbis' knowledge of Jewish law and their ability to brilliantly manipulate it to meet their needs. They understood they had to discuss the actual implementation of the methods of execution. I believe they detailed each method in order to inform the Jewish community they could follow biblical law in the event of a legitimate case. Their interpretations of the laws, though, may have diminished such an opportunity. By the time they finished explaining the minutiae of each law, many were rendered obsolete.

Mishnah Sanhedrin chapter nine focuses on the details regarding burning and beheading. Again, the rabbis are careful to respond to many of the biblical laws and maintain the intent of the biblical law. Their aim was not to legalize previously illegal behavior, but to define the capital crimes precisely and narrowly. In chapter nine the rabbis also address issues of confusing evidence or multiple defendants. In these cases the Tannaim again offer alternate punishments. My research leads me to believe that this, like earlier justifications, is based on their discomfort with their own power to enact a capital sentence.

Mishnah Sanhedrin chapter eleven introduces the rules for strangulation. Though it is not mentioned in the Bible, the rabbis seem comfortable attributing biblical capital crimes with this method. The rabbis continue to create loopholes for defendants, while maintaining their observance of biblical law. Their dependence on divine judgment is re-emphasized and their theology is further accentuated in Mishnah 11:6. This is one case when the rabbis create boundaries which are more exacting than the Bible. In dealing with the false prophet, the rabbis preserve the strict laws for a similar reason to their Second Temple period predecessors. I believe they did this in order to strengthen their authority. Their theology and unique behaviors separated their community from their neighbors. The false prophet questioned and challenged that theology in a way in which the Tannaim were highly uncomfortable.

It is questionable as to whether or not the Tannaim ever employed the death penalty. Their rules and inclination towards limitation lead me to believe that generally they did not. I am not comfortable saying, however, that they did not want to leave the opportunity open should a case arise which met their stringent requirements. I think the rabbis were well aware of the fact that such a possibility existed. Their intent was not to dispose of the death penalty altogether. They did not want to undermine the biblical laws, but were concerned with interpreting those laws correctly.

My research leads me to believe the Amoraic rabbis shared the Tannaitic Rabbi's concern for appropriate interpretation of biblical law. While I do believe that the Amoraim were worried about their culpability regarding divine judgment, they seemed more occupied with human ethics than divine retribution. The Bavli did not change many of the Mishnaic laws. In most cases the Amoraim preserved the exact law, but

often added justification for its interpretation, or slightly altered the interpretation so it contained a more ethical basis. The Amoraim also added more biblical proof-text in an effort to authenticate their analysis.

Regarding stoning, the Amoraim explore the language, grammar, method and offenses by which it was defined. They aligned themselves with both the Bible and Tannaim, continuously emphasizing their connection to accepted authority. The rabbis were not averse to using biblical language to support their changes, basing the loopholes and limitations they instituted on biblical verses. They did the same with Tannaitic reasoning. Though they often agreed with the Tannaim, they still manipulated some of their language to further strengthen their own opinions. I do not believe, though, that the rabbis meant to defy biblical law. I think they believed they were interpreting the law correctly for their own community.

Regarding the laws of burning, the rabbis continued to define the crimes with narrow boundaries. They added even more limitations to the crimes than the Tannaim, but concerning burning specifically, the rabbis did not always change the deserved punishment. I believe this was because there was a clear tradition of capital punishment being applied for sexual improprieties. While the rabbis knew they could not change this custom, they did, however question the method. Challenges of this type may have helped to destabilize the integrity of capital punishment as a whole.

The Amoraim were realistic when they dealt with the method of beheading. They addressed the fact that it existed in the secular community and even looked to it as a possible model for implementation. Ultimately, though, the Amoraim followed the Tannaim. They chose not to change the general laws. In some cases they had otherwise

created exemptions for defendants, in this case they did not. They also began to address the question of the order of the severity of the *arbah meitot beit din*. They did not finalize a succession, but identified the need.

Throughout these passages an ethical inclination is apparent. Although the ultimate decisions may not always be in favor of the defendants, their needs are represented and a moral conscience is noticeable. I think this tendency is based on the rabbis' anxiety regarding the ethical suitability of capital punishment. I think there was at least a minority voice which challenged the practice and encouraged the rabbis to include some leniency.

Strangling is ultimately identified as the least severe form of capital punishment. The rabbis apply it to the capital crimes in the Bible which have no other method connected to them. The Amoraic rabbis acknowledge the fact that it is not mentioned in the Bible, but still insist upon its authenticity. They rely on Tannaitic interpretation to defend their acceptance of this method. I find it to be circular reasoning and assume there must have been a strong tradition of four types of capital punishment they felt the need to defend. They even tried to base their defense in biblical proof-text, but it is not as strong as previous arguments.

The Amoraic inclination was to retain the biblical laws, defend their Tannaitic predecessors and heed their own propensity toward ethical behavior. It is obvious to me that they did not all agree on appropriate implementation of the death penalty. Again, I must conclude, though, that the rabbis did not intend to dispose of the punishment altogether. I don't even think it was within their mindset to be able to do so. Their allegiance was to the biblical code. The Amoraim may have been interested in the ethical

question of capital punishment, they may have been committed to rational discussion of punishment and its application, but I do not believe they were interested in eliminating the biblically ordained laws. I cannot say with certainty, though, whether or not they truly intended to apply these laws. Some of the discussion seems theoretical to a point that I imagine they were interested in engaging in the discussion, without really being certain they would ever have to employ the methods.

Upon completion of my exploration of the historical Jewish opinion of capital punishment I find that I understand the issue differently than when I began. I originally expected to find an ethical progression which ultimately abolished its use. I have found the issue to be more nuanced. I now maintain that each generation has grappled with similar issues. While it is difficult to claim absolute knowledge of the intent of any of the authors examined, their discussions and the laws they advanced can be used as an indicator of their opinions.

Beginning with the Bible, there are conflicting positions which are echoed in later generations. The conflict between commitment to Divine law and whether or not leaders felt it appropriate to kill a member of the community is evident in every era examined. Each generation did, though, have other considerations which affected their decisions. The Second Temple period authors had to be cautious with their newfound ability to interpret biblical law. The Tannaim felt a specific need to maintain a close connection and devotion to biblical law, as they themselves began to encourage acceptance of oral tradition. The Amoraim hoped to follow in the Tannaitic model but seemed to have been more concerned with their constituents, and less concerned with strict adherence to the Bible.

While some claim the Talmud included a more lenient tendency than previous documents, this is an irresponsible conclusion. I believe each generation included as much discussion as was possible according to their theological convictions and expected behavior. The Talmud does position the implementation of the *arbah meitot beit din* as an unrealistic possibility, but, this was a response to their reality which allowed them wider latitude in interpreting biblical laws. All four of these communities realized the importance of highlighting the most dangerous behaviors, but questioned the most appropriate way to punish offenders.

In terms of a responsible modern Jewish response to capital punishment I believe we should continue in the tradition concretized by our historical ancestors. We, too, should struggle with the varied aspects of this discussion. We, like, the generations before us have widened the scope of acceptable discussion with and interpretation of biblical and traditional law. We should not, though, forget our own connection to a sense of divine inspiration that encourages us to punish the most heinous acts against other humans. One's ultimate decision should not be based only on biblical proof-text or Talmudic defense, but on an intense exploration into our tradition and one's own effort to make the difficult choice about the import of one human life.

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