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THE MOTIVATION

behind the safeguards around the defendant

IN CAPITAL CASES AT TALMUDIC LAW

THESIS

submitted in partial fulfillment
of requirements for the degree of
rabbi

by

William Franklin Rosenblum, A.B., L.L.B.

Hebrew Union College
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To

Mrs. Leopold Jonas Nashville, Tenn.

Mr. Lee J. Loventhal Nashville, Tenn.

Rev. Dr. William Rosenau Baltimore, Md.

in appreciation of the
threefold blessing of
their friendship

Grateful acknowledgment
is made of the co-opera-
tion rendered by the Pro-
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P R E F A C E

This thesis is intended as one part of a proposed larger treatment of "COURT PROCEDURE IN MOSAIC AND TALMUDIC LAW," the general title submitted to cover the present study. The topic of our immediate concern will be "THE MOTIVATION BEHIND THE SAFEGUARDS AROUND THE ACCUSED IN CAPITAL CASES AT TALMUDIC LAW," a subject which is of sufficient importance and extent to warrant an independent study. Although reference to such safeguards is included in general works on the legislation of the Talmud, there has been no systematic presentation of them from the point of view of the motivation which must have prompted their promulgation.

The aim here will be to draw from the different Talmudic dicta which bear on the subject, some conclusion as to the attitude of the rabbis towards the position of the accused in cases involving the death penalty. The popular impression, of course, would have it that the Mosaic "lex talionis" (1) is the common denominator of the Jewish attitude in such cases--an impression which orthodox Christian homiletics fosters to this day. An analysis of the Talmudic provisions covering capital cases, however, clearly proves that this is not the case.

An unbiased examination of Jewish law shows that there was a meticulousness of provision and procedure to the end that the death penalty might not be imposed precipitately or out of a mere desire for retribution. "Strafe ist nicht Rache" (2), as Bloch remarks, is a truth which the rabbis recognized. They looked upon punishment as a necessity, not as an occasion for venting their spleen upon wrongdoers.(3)

INTRODUCTION

I

Every modern system of jurisprudence contains certain checks and presumptions calculated mechanically to assure the accused, as well as the accuser, that justice will prevail. The Common Law, somewhat like our own תורה שבעל פה , being a body of jurisprudence that has developed more out of custom and precedent than out of specific formulation and codification, contains such safeguards in abundance--provisions with reference to the manner in which the defendant is to be brought to bar; how the pleadings shall be brought; how and what evidence is to be admitted; what shall be the weight of the defendant's confession; themanner in which arguments shall be prosecuted; which particular points shall be within the province of the judge and which for the jury to decide; the manner in which to effect reversal of judgment; the ultimate source of repeal, and so on. The French Law, based upon the Code Criminelle, which is itself the crystallization of preceding codes, incorporates similar provisions. Infact, every modern code or system, ad did ancient codes, concerns itself with the rights of the defendant, as well as those of the s tate.

However, there is a varying motivation underlying the respective systems (#). Blackstone sums up the attitude of the Common Law in the administration of criminal justice in these words:(4) "This is not by way of atonement or expiation for the crime committed; for that must be left to the just determination of the Supreme being, but as a precaution against future offenses of the same kind. This is effected...either by amendment of the offender himself...or by deterring others by the dread of his example from offending in the like way."

(#) דין originally meant championship, so בית דין had to champion the rights of the defendant as well as the community.

Analyzing the criminal jurisprudence of the Talmud we find that the rabbis recognized that a wrong done must be rectified and also that they desired to serve warning against the repetition of an offense. Nevertheless they did not permit these considerations to interfere with their solicitousness for the rights of the individual before them for judgment.

The view that he who causes one Jewish life to be snuffed out may be regarded as annihilating the whole universe (5) or that the court which has had one execution in a septiad is to be classified as חובלנית (destructive) (6), would hardly have been stressed in a system of justice that was intended to be retributive or consciously devoted to punishing offenders for the effect on other possible culprits.

How far we may be justified in accepting such a postulation of the Jewish spirit, or what Rappaport rather happily terms "L' esprit du Talmud" (7) (the spirit of the Talmud), will be seen as we proceed.

II

In the preparation of this thesis the chief recourse has been to the Talmud, Mishnah and Tosefta. References are to the passages in the Babylonian Talmud except where there is some significant variation in text when note is taken of others. The compilation of Maimonides on the subject (8) has also been employed as well as modern studies in French, German and English dealing with the general question of the Criminal Legislation of the Talmud. (9)

The purpose has not been so much to discover or formulate an original concept of the spirit that actuated the rabbis in their

formulation of the specific principles in question. It has rather been to present the "safeguards " that were placed around the defendant in order to enhance the probability of a verdict favorable to him, and an evaluation of the motives underlying them. This, as may be readily understood, is more attainable in a special analysis such as our present study than is possible within the ramifications of a general treatment of the Laws of the Talmud or even of a review of the general Criminal Law within its pages.

III

The spirit that animates the Jewish law in דיני נפשות, capital cases, would seem to be more generous than that underlying the modern criminal codes. It is true that in the latter, as also in the Talmudic system, we have the presumption dominant that the defendant is innocent until proved guilty(10). Nevertheless, the stress that is placed upon trying to find זכות for the accused in Jewish cases, as is seen from many regulations, leads us to believe that the underlying aim of Talmudic justice was not so much to secure a conviction as to secure an acquittal without doing violence to the Law or prostituting the spirit of Justice. One is tempted to aphorize that the modern juridical view holds the defendant innocent until efforts to prove him guilty have succeeded or have been exhausted, while the tenor of the Talmud is that the accused is presumed innocent until every strict test and effort have been exhausted to refute charges of guilt.

That this claim is neither fanciful nor exaggerated may be readily deduced from a few of the provisions governing capital cases. The biblical basis which is cited in Sanhedrin as requiring a court of twenty-three members in criminal cases, savors strongly

of this tender preferment (11). Two verses in Nu. 35 (12) are cleverly employed for this purpose. It matters little that the logic is strained or that the reasoning is somewhat specious. What interests us is the attitude that must have necessitated such manifest manipulation of the text in order to find warrant for a desired condition.

As will be seen later, there are no prosecutors in Talmudic procedure, another detail which bears out our contention (13). Moreover it is significant that the deliberations of the court after the witnesses had been heard and the preliminaries were concluded, should have begun with arguments in favor of acquittal (14), a procedure which is in direct antithesis to that of modern courts. There the case of the prosecution is first presented and the reasons for a verdict of guilty are first impressed upon the jury that is to determine the fate of the accused (15). It needs no extended scientific, psychological discussion to conclude that a specification such as this must have been corporated out of a desire to have a reasonable doubt, if any had to arise, in favor of the defendant rather than against him.

Again, the provision that the judge who had argued for the prisoner's acquittal could not then retract and plead for his conviction (16), while the judge who had argued for conviction could the next day plead for acquittal (17), leaves little room for questioning the premise that the aim of the Talmudic capital trial was not so much to exact justice (in the sense of retribution) "from the criminally charged individual" as to assure justice "for" him (18).

Another condition which arrests our attention is that whereas the Common Law and other systems of modern jurisprudence place

great dependence upon the process of appeal and the provision for pardon by the crown or executive, the Talmudic code aims to safeguard the accused by so ordering the character and machinery of justice in advance of and during trial, and in advance of and during execution of judgment, that a miscarriage of justice might be difficult of occurrence.

Of course it is not suggested as an indisputable or highly probable fact that the rabbis of the Mishnah or the Gemara, who put the Jewish law into its final mould (that is, asfar as substance is concerned) (19), wished to have it accepted that the fixed purpose of the court was to work for the acquittal of the defendant, or to labor for the establishment of his previously acknowledged innocence. There is no direct evidence to warrant such an assumption.

However, our study of the Talmudic law does make us feel that, consciously or unconsciously, more so the latter, the stipulations governing the trial of defendants in capital cases, carry out the idea suggested--of the obligation of the court to further an acquittal עדה מצלת rather than the conception of the court as purely an עדה שופטת , that is, an austere body disposing of the life of an individual under certain adopted warrants.

There is one notable exception to this tendency and that is in the case of the מסית or the one who incites to idolatry (20), (as well as of the מדיח involving the inciting of an entire community to idolatrous worship). Here the motivation, because of understandable religious zeal and the need for heroic measures in the battle against alien worship, seems to have been to facilitate the establishment of guilt and the execution of the death penalty. For instance, the Talmudic law meticulously insists

that before an accused may be declared guilty, there should have been a warning given to him (21) just before his commission of the crime (22), an acknowledgment of this warning by him and his expressed disregard of the same notwithstanding (23). But these important safeguards were waived in the cases of the מסית and the מדיח , although there has been some contention that the language of the mishnah אמור מה שאמרת לי ביחוד implies that the מסית received at least a constructive warning.

To the writer it seems that the very provision for secreting witnesses in order to entrap the מסית is so alien to the general spirit of the Jewish law that the whole device took shape in the minds of the rabbis because of their desperation at the numbers of the people who flirted with foreign cults.

The above safeguards were also waived in trials of those who bore false witness. Naturally, no one could determine that false witness was about to be presented and it was only after the evidence had been submitted that its falsity became established.

IV

In pursuing this inquiry into rabbinic motivation, the Jewish Criminal Law will be progressively analyzed with reference to the chief divisions covering a capital case and affecting its trial.

1. The Organization of the Court and the Character of the Judges.
2. Witnesses and Testimony--Bringing the Case to Bar.
3. The Trial.
   a) Provisions as to argumentation during trial.
   b) Provisions as to the verdict.
4. Procedure after trial and before execution.

Thus we shall endeavor to see how before trial, during trial and after trial, the Jewish attitude was watchful of the interests of theaccused and gave direction to the effort to establish his innocence or, at least, to procure his exception from the death penalty.

The above division, of course, is arbitrary and does not follow the detailed method of standard writers on legal subjects, but it is selected as being most appropriate for a study as brief as this. Our chief interest is in the broad intent of the Talmudic Criminal Law and not in the minutiae. The method of painstaking division and sub-division is left to those who are concerned with a recodification of all the provisions of Jewish criminal legislation.

CHAPTER TWO

THE COURT AND THE JUDGES

I

There are many distinctions between a court for consideration of civil cases דיני ממונות (those, generally, involving cases that may be settled in full by money damages) and a court for the consideration of capital cases. They are listed in the Mishnah (24), and Talmud (25) and by Maimonides (26) with the qualifying introductory phrase אין בין דמים ודמים אלא . This gives us an insight into the psychology underlying the regulations regarding the organization of the courts. Justice must be assured in all cases, no matter what the wrong involved and no matter who the parties, and the wheels of justice, in the main, move the same way in both דיני ממונות and דיני נפשות . But there is this distinction, that expansions or modifications are made in order to provide for more thorough discussion of the criminalcase, for the presence of more expert and experienced authority, for a more contemplative outlook on the part of the judges.

The criminal case must be heard before a court of twenty-three (27) and it has already been pointed out that in ascribing a biblical warrant for this number there is the assumption or hope that as many as ten or an עדה will be representative of the עדה מצלת 1 , those who will seek to secure the freedom of the accused. Then, the reasoning of the rabbis, which superimposes three additional members upon the twenty warranted by the interpretation of the verses in Nu. 35, while artificial, reveals further caution for the rights of the prisoner. Two other members are added because a capital conviction demands a majority of at least two (28) which, added to the עדה מצלת and the שופטת ע would

give twenty-two. And since אין בית דין שקול (29), one more is added.

II

Among the provisions governing the selection of judges for the Sanhedrin there are several that merit our consideration because the motivation back of them must have been to safeguard the defendant as much as to insure the triumph of truth.

The requirement that all judges must be amicably disposed towards each other (30) can have been engendered only by the fear that the life of the accused might become forfeit to the antipathies existing between two men (31), however exalted their rank and scholarly their attainments. In modern criminal administration it is not rare for a prisoner to be sacrificed because of some personal or political enmity that exists between the judge on the bench and some of the defendant's proponents. The Talmudic law was framed by men who had a keen insight into the psychology of the human mind and they provided against the possibility of judgment being influenced by personal antipathies.

The further qualification that a judge should be AFFABLE but not popular, found in Tractate Ketuboth (32) and applying with greater force to the criminal judge, is of extreme importance, more important than its occasional offhanded citation by most writers would indicate. The man who is popular with the masses or with his fellows is, even if unconsciously, influenced in every action and decision by the probably effect on such popularity. The rabbis were anxious that their judges should be singularly free from entanglements which would act on them intangibly as wine does palpably, that is, drug their pure understanding of the merits

of a case and deaden their regard for the individual before them at bar (33).

III

In all ages and among all peoples, the judge has always held an honored position, after he had attained to that dignity. It is so in our own day and in our own land. Election or appointment to office usually come to him because of his legal training or apparent judicial fitness. But this is not always a bidding requirement and many judges in Common Law countries--for instance, masters and referees who dispose of purely legal matters--have had no preparation for their exalted task, which committing magistrates and petty justices frequently have had no previous knowledge to qualify them for disposing of offenders who come before them for preliminary or final trial.

The Talmudic system however, under which the same court that held the trial, also conducted the inquest and the preliminary examination, provided that theindividual be particularly trained for and worthy of the position before he could occupy it. A system of apprenticeship was in vogue, whereby judges apparently served first in lesser courts and then were advanced from tribunal to tribunal as vacancies occurred, until they reached to the exalted occupancy of a place in the Great Sanhedrin (34). Or, by serving as disciples in a particular Sanhedrin, they advanced from the rows of "talmidim" to the places of the "dayanim" (35). The significant point is that judges were selected for that particular honor and service, not by political whim, nor by official preference alone, (if such methods were employed at all) but on the basis of assiduous self-preparation.

The judge, provides the Talmud, had to be thoroughly versed in all the written and unwritten laws and familiar with many languages (36). He had to be conversant with the sciences of the times (37), to be advanced in years but not too old (38), and to be the father of a family (39). Consulting the pages of the law book itself and the remarks of the commentators we find the reasons back of these hedges to be as sound today as then (40). Since there were no prosecuting or defense attorneys to point out the scientific elements present in a case, the judges had to be prepared to decide upon matters requiring medical and other specialized knowledge (41). Benny, (41) for example in support of this contention, cites the case of Baba Bar Boutah, who was able to direct a judgment by proving that a witnesshad attempted to palm off the albumen of an egg as spermatic fluid.

The requirement that he had to be proficient in "seventy languages" must not be taken literally. It means that the judge had to be sufficiently fluent in the several languages of the jurisdiction so that he could hear testimony in the original words of the witnesses and the accused and not be compelled to depend upon an interpreter for his information. (42) Knowing,as we do, how the institution of the מתורגמן in Israel gradually developed into that of the commentator it can easily be seen how wary the rabbis were of having a life placed in jeopardy on thestrength of interpretation. Interpretation is not always translation.

The rabbis believed that wisdom increased with age and a judge had to be at least forty years old (43), but they did not approve of a judge who was too far advanced in years because his distemper might affect his decision and thus a human life would be hanging on the irritability of some fleeting moment. In modern

jurisprudence there is, of course, the age of retirement for judges, after which they may leave the bench upon a pension, but there is no such note of definite disparagement of the viewpoint of old age in criminal jurisprudence as there is in this view of our own rabbis (44).

The exaction that the judge be a father of a family was clearly inspired by the intuitive feeling of the rabbis that the man who has witnessed the mystery of birth and who has known the joys of parenthood would deliberate more earnestly upon the fate of the fellow being before him for judgment. How much stress they placed upon the quality of mercy רחמים , which they predicated as axiomatic of fatherhood, (for was not God Himself an אב רחום וחנון) may be gathered from the statement in Maccoth (45) that the court which executed one man in a septiad is to be designated as חובלנית "a court which does not spare human lives." Towhich Rabbi Eliezer b. Azariah added that such designation should be applied to a court that has one execution in seventy years while Rabbi Tarphon and Rabbi Akiba went to the extreme of urging that if they were members of a court the death penalty would never be imposed. There is a comment on this passage that has it that the judges "would examine witnesses in such wise that they would not know how to answer" (46) while still another comment would have it that they examined the witness so persistently that one might negate the testimony of the other (47).

Moreover, the admonition to the judges, in the midst of all this criminal legislation that "man was created as a lone individual to impress upon you that he who causes the death of one Israelite is viewed by scripture as destroying the whole of mankind" (48), because of the very fact that it must have been a

conscious interpellation, leads us to assume that the spirit of the Talmud was more genuinely eager to avert the necessity for finding the accused guilty than that of our own Common Law, for instance. The statement of Blackstone does not minimize this conclusion for his evaluation of the Common Law came centuries after its inception, its development and its formulation.

Zechariah Frankel emphasizes this tendency. "Die judischen Gerichtshofe waren der Todesstrafe abgeneigt," he writes. "Man stellte ein unge einen strenges Examen uber die Beweise an so dass sie nur selten in einem so klaren Lichte hervortraten, dass die im Gesetze verfugte Todesstrafe verhangt werden konnte." (49) Rabinowicz is more positive in his conclusion. "Dans la procedure," he says of the Talmudic criminal process, "on employait tous les moyens possibles pour arriver a l'acquittement." (50) While Rabinowicz has been criticized for this dogmatic postulation of the purpose of the procedure, we cannot but agree, after considering all the provisions affecting the conduct of the trial that a "<u>feeling</u>" to this effect is warranted.

CHAPTER THREE

WITNESSES AND TESTIMONY--BRINGING THE CASE TO BAR

I

A capital case was brought to the attention of the court by actual witnesses to the commission of the offense and it required at least two such witnesses who were both simultaneously present and who were within sight of each other (51). These witnesses had to meet certain qualifications, many of them depending upon Mosaic religious conceptions, but that aspect of the problem is not germane to our discussion. The important thing is that even if the judges themselves were witnesses to the crime, or a number of individuals who were in all respects normal and competent except that they were not religiously כשר, the offender could not be brought to bar (52). There is some question about the binding effect of the provision but the principle is ennunciated that כל הכשר לדון כשר להעיד. The general interpretation seems to have been that this requires witnesses to be as highly qualified as judges, but such conclusion is a non-sequitur. All qualified toact as judges were indisputably qualified to be witnesses but there were those qualified as witnesses who could not serve as judges (53). Under our modern jurisprudence, while at bottom there is the general principle that all citizens are bound to bring criminals to book (54), it is the officer of the law who is specifically charged with this task. One individual suffices to bring the criminal before the court and questions of the competency of witnesses are only material after arraignment.

There was no indictment, under the Talmudic dispensation, in the sense that we have it today. Indictment was by accusation (55), and it had moreover to be proved that the accusing witnesses,

or others in their presence, specifically warned the accused that the crime he was about to commit constituted a capital offense and that it carried such and such a penalty, and still more that the accused acknowledged his cognizance of these facts but that he nevertheless wilfully and even defiantly proceeded to the crime (56). From this need for warning were excepted, 1) the מסית , or inducer to idolatry, as we have already had occasion to mention, 2) the false witness, and 3) the thief who broke in at night (57). The reasons for excluding the first and second have already been adduced, while the very nature of the crime of breaking in at night as in the case of bearing false witness forestalls warning. The offender has committed the crime before the crime can become apparent and there are never any to see him beforehand.

The simple provision regarding התראה as we can immediately realize, made it the more difficult to bring capital cases into court because the way of humans, the one constant factor in life, is such that most crimes in the list we have appended to this study (58), were either of impulsive type or the kind that are most frequently committed in the retreats of loneliness and seclusion. Sex crimes, as we have seen, are in the preponderance, and one does not speak of his intention to commit such acts, or seek the crowded thoroughfares for their indulgence. Murder is a crime that is often premeditated and threatened in the heat of passion so that many may become aware of the purpose to commit it. (#) Likewise,

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#) We must qualify this statement. Since the rule requires the התראה to have been given by two witnesses, and the מסית ordinarily approached one individual at a time, forewarning was not a possibility in all such cases. But in the case of the מדיח, him who sought to incite a community to idolatry, it is plain that the moment he started his utterance many warnings could have been given to him.

the seduction to idolatry is an offense that lends itself to forewarning but in this very case, because of religious expediency, the provision for warning was purposely omitted, an omission which makes it all the more clear that the object of the rabbis, in any but the three exceptions noted above, was to make conviction in capital cases an infrequency.

II

Analyzing the various stipulations regarding the manner of bringing the case to trial (and using the summary of Maimonides as a handy and inclusive dassification thereof) (59) we note a number of significant things.

When the witnesses come before the court with an accusation, they must be asked " מכירין אתם אותו התריתם בו ". "Did you recognize him, did you forewarn him?" (60) Rashi interprets the first part of this inquiry to refer to recognition of the slain man, for it was material whether or not he were an Israelite. Maimonides takes it to mean the slayer basing himself on the text in הלכות עדות where it reads ההורג . The context would make it appear that the latter is the better and more logical view and that the slayer is referred to (the commentators take a murder case as an example)(61).

There must not be a mere speculative identification <u>after the deed</u>, but a definite statement that there was clear recognition of the criminal at the moment of the deed (62). And the forewarning must be given to all, even to the תלמיד חכם who is judicially known to know the law (63). This is in clear contradistinction to the common law principle which holds that "ignorance of the law is no excuse" and therefore charges even the ignorant and those

not able to read or understand the provisions of the law, with its admonitions (64).

There seems to be behind the Jewish principle the view that even if the state has promulgated the laws, even if the individual may be presumed to have knowledge of them, there is an additional duty to recall the law clearly at the time of stress and passion, because then the memory of man is faulty (65). The Jewish social state is charged with the duty of crime prevention as well as punishment for crime. It is regarded as a party present at the commission of every crime, and if it fails in coming to the rescue of the accused, it is as if the state and not the individual was then regarded as culpable, for all those present at the crime were representatives of the state.

III

If the accusers have satisfied the court with reference to the positiveness of their identification and of the הזהרה having been given, it became the duty of the Beth Din to impress them with the seriousness and awe of their status as witnesses (66). Whereas אימה is sometimes taken to mean "to intimidate," the better connotation is "to impress withawe and solemnity" and this alone was the aim of the court, to inspire the witnesses with such a sense of the gravity of having a fellow being's life in the power of their utterance that they would weigh every word before giving testimony (67).

And how was this impression produced? By reminding these witnesses with solemnity to be certain that they did not speak out of conjecture or hearsay or on the strength of some one who had witnessed the deed and told them (68), no matter if such individual

happened to be one upon whom reliance could be placed. And moreover by suggesting that perhaps they were notaware of the fact that the procedure provided for a thorough formal examination by חקירות and בדיקות (69) which were searching, definite methods of ascertaining the truth. Also by adding the reminder that in criminal cases the matter was not as in civil mases (70). There mere money damages sufficed and the party was relieved, but in capital cases the fate of a man and that of his posterity to the end of time were involved. To effect a man's execution without strict warrant- for it was an unspeakable offense to be compared to that of Cain who was condemned to hear the outcry of his brother's blood and that of his posterity unto all generations.

What can have been the object of such admonishing of the witnesses? None other than to make them so meticulous about their testimony that they, the witnesses, would mention only those facts about which they had no reasonable doubt. Once again our contention is illustrated, that the Talmudic procedure sought to place hedges around the freedom of the accused BEFORE the trial came to verdict rather than after, while our modern law, equally eager to have justice, leaves too much to the appelative phrases of process.

But even during trial, modern process is too subordinate to the play of psychological factors. The prosecutor's personal interests which not too rarely cause him to sacrifice the defendant on the altar of his political or professional self-aggrandizement; the defense attorney's adroitness, on the other hand, which will frequently defeat the truth in order to reap a harvet of personal gain or favor; the jury's personal prejudices (#) and the judges manner of "giving the law" in the case.

Under our procedure the defense attorney has the right to challenge certain jurors if he believes them prejudicial to his client's cause and the prosecutor has similar right on his side (71) but under the Jewish law the court was at once the advocate and the prosecutor and the court combined within itself a triple duty and desire to safeguard the interests of the accused, with the emphasis, as we have said and reiterate, on its duties as advocate. This process of careful, sometimes over-careful examination of witnesses, 1) this dwelling upon their religious aversion to the taking of life; 2) this painting for them of the gruesome fantasy of generation after generation of the prisoner's blood descendants crying out against his execution (if it be unwarranted), especially in those ancient times when the hand of superstition lay heavy upon our people, was calculated sometimes to confuse even the individual who did see an offense committed. And perhaps this was the hope of the rabbis.

IV

As with the other portions of our study, so in treating of the manner of examination of witnesses, only enough will be adduced to indicate again the motivation of the Talmud. In "impressing" the witnesses the court spoke of the "bedikoth" and "hakiroth" to which they would be subjected in order to make falsehood improbable. The only apparent reason for making a distinction between the two seems to be that the latter was the more basic examination, the

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Page 18, #) It is notable that in our country, for the past five years or so, it has become increasingly difficult to find juries who are unaffected by the antipathies which have been engendered by certain creed and color propoganda.

"seven questions" therein raised having to be answered against the accused by both witnesses as a positive knowledge. These questions dealt with time, place, person and warning, fundamental details in the commission of the offense, and if one of the witnesses answered "I do not know" to any of these (e. g. as to the hour of commission,) the case was immediately dissolved (72). The "bedikoth" however, not limited as to number, concerned themselves with the minor circumstances in the case. Here, if one witness or even both pleaded ignorance of any fact, it did not stop the process. In "bedikoth" there had to be a contradiction between the witnesses in order to relieve the accused (73).

While on the point, it is significant to note the emphasis placed upon the stipulation of Rabbi Simeon b. Elezar that, during the examination, the witnesses were to be taken quickly ממקום למקום. And that one so methodical in transmitting the minutiae of the commandments and so conscious of the ancient Jewish intention as Maimonides should insist that this instruction מסיע את העדים וגו'. did not purpose to take the witness from place to place but from subject to subject so that, if any דופי incongruity in the testimony resulted, he was compelled to keep silent or retract.

However, whether the view of Maimonides prevails or the words of the Talmud are taken in their literal sense, the object, as the commentator כסף משנה remarks was לשרוף את דעתו, "to bewilder him" so that he might become confused and retract (74). In view of this motivation, the reminder that all who multiply the number of inquiries or take more time in conducting the "bedikah" are משובח praiseworthy(75), should be taken to encourage such extensive examination for the purpose of effecting the release of the accused. Any other conclusion would be incongruous in view of

the juxtaposition of this principle with the powerful admonition that he who causes the destruction of a single soul in Israel causes the whole world to perish while he who wins his release may be accounted as having saved the whole world.

V

It is also of interest that, once accepted, the testimony of the witnesses could not be contradicted nor was interpretation thereof allowed (76). Witnesses who had been so solemnly enjoined by the method of התראה and who realized that, once submitted, the testimony was beyond recall; and who also knew that in the event of their testimony being proved false the fate they had intended for their victim would be suffered by them, were naturally inclined to be more careful about their statements. Such caution was bound to operate to the advantage of the accused.

No one was exempt from examination and the testimony was oral and in the presence of the court (77), the witnesses appearing singlyso that their statements were independent and thus collusion made more difficult (78).

VI

The validity of a confession in a capital case is, at common law, made dependent upon certain conditions. It must not, for example, have been procured by duress or by false assurances, and there must be evidence of the finding of the corpus delicti. But a confession is admitted (79). The Talmudic system, on the other hand, specifically holds that if the accused endeavors to make a confession he must be discouraged. "A man must not testify against himself" is the principle (80).

On the other hand, every opportunity is given him to present matter in his favor, even after trial and while at the threshhold of his execution (81). The only condition under which a confession is admitted is that there be two qualified witnesses who will minutely corroborate the details (82). This amounts to regarding the statement of the accused as having no more effect than the testimony of any ordinary witness. "Only on the strength of the testimony of witnesses and proper warning, can a Beth Din enter a conviction," remarks the Tosefta (83).

In the same chapter of the Tosefta Sanhedrin as the above, R. Jose expresses the view that since conviction depends, among other things, upon the certainty of a warning having been administered, and since a warning can only be given by others, an unsupported confession will render the accused פטור. The rabbi who reasons thus may be suspected of pure rationalization but it is apparent that here we have an example of the wish to clear the defendant being father to a new explanation for one of the "safeguards" found in the code.

CHAPTER FOUR

THE DELIBERATIONS OF THE COURT

The Talmudic rules governing the deliberations of the court, after presentation of evidence, reveal a definite hope towards arriving at the prisoner's acquittal. We are not concerned here so much with listing these provisions as in going behind the probable intent of some of the more purposeful "safeguards:"

I

First of all, it is specified that the opening argument must be for acquittal (84). This is the reverse of our entire Common Law and Code Civile procedure where the prosecution opens in presentation of evidence and in the argument to the jury. The desire of the Talmudic law seems to have been to create an atmosphere of sympathy forthe prisoner, a leaning towards acquittal. This in the light of current legal thought, can be taken to amount to a presumptive reasonable doubt of his guilt. Thus it required clearest evidence and strong arguments to secure a conviction.

Our modern procedure whereby the prosecution makes the first address to the jury and creates an atmosphere of antagonism, and in addition is also given the privilege of a closing rebuttal, may be regarded as its antithesis. Moreover, one who has presented an argument in favor of the defendant could not later give an argument against him while a judge who had argued for guilt was permitted to change his attitude and argue for release (85).

More significant, even, is the provision that all, even the disciples who were seated in the three rows before the judges, might take part in the deliberations if they spoke for the accused,

while only the judges themselves might present arguments for guilt (86). The Talmud makes it clear that this is one of the distinctions between civil and criminal suits, that in the latter only judges might present arguments לחובה whereas in civil cases all including the disciples were permitted to talk on both sides.

Again, in stipulating the order of procedureduring argument, it is provided that the speaking should begin from the ends (87). The court sat in a semi-circle with the most learned judge in the center and the others on each side in a tapering order of expertness and wisdom (88). Therefor, in this instance too, the rabbis gave clear evidence of their desire to arrange details of trial mechanically in such wise as to favor the defendant and of their understanding of the operations of the human mind. Whereas in civil cases, only money being involved, the argument could be started by the chief of the judges, in criminal cases they were careful to have the younger and less experienced judges speak first. Thus their opinions could not be influenced by awe and reverence for those more important than they or the fear of negating the view of their superiors. Bearing in mind that there were no attorneys to be jealous of the rights of the defendant, it is exhilarating to note how completely his interests were guarded by the procedure itself.

II

Two capital cases were not to be tried in the same day, except in the instances of the מסית and the מדיח (89#). Nor could a verdict of guilty be entered upon the first day of the

(#) We find many safeguards specifically excluded in the cases of these two offenses for the reasons which have already been adduced.

trial (90). If the vote, after deliberation, stood for guilt then the case was laid over until the following day for another division (91). During the intervening night, the judges were specifically charged to refrain from wine and to continue to study thepoints at issue (92). The following morning the court reconvened and there was a restatement of arguments. While the one who had voted for acquittal the day before was permitted to change his vote for conviction (93), he was not allowed to give any reasons for such change (94). The one who had voted for conviction however, could not only change his vote but could state the reasons for his change (95). And it is also said that if one who had argued for acquittal the day before, (everyone had to restate his position if it were the same as the day before or to give a new argument if he were changing from conviction to acquittal) became confused in his reasoning, the secretaries who had taken minutes of the proceedings, were required to help him out (96); while no such assistance was rendered to the judge who was restating an argument for conviction.

In view of the several statements just epitomized, human psychology being constant, we are face to face with the conclusion that Jewish law, while declaring its devotion to pure justice, added proviso after proviso concerning the conduct of the capital case in order to relieve the prisoner, hedging in the procedure at every step and making it more probable for the prisoner to escape a verdict of guilty.

III

A remarkable stipulation, which at first blush seems illogical, is that when a Sanhedrin found a unanimous verdict of guilty on the first day of trial, the prisoner should be released immediately.

But, bearing in mind the motivation for which we are here contending, the words of R. Kahana give us the clue to the reasoning. "What is the reason?" (for this unusual rule), he says, "We are admonished that the verdict had to be postponed over night, in order to discover some fact towards the prisoner's release, which would be impossible in this case (97). Apparently, the rabbis considered that there was little likelihood that the judges would then be in the proper frame of mind to look for the points in the defendant's favor, after such a precipate unanimity on his guilt, thus rendering it impossible to fulfill one of the conditions precedent to a verdict, and therefore the acquittal.

We may also sumise that the rabbis had political exigencies in mind when they incorporated the above regulation. They wished to guard against just that disposition to be precipitate in condemnation which governs men in the heat of such controversy. As now, there were those charged with the administration of the people's rights who were tempted to throw over the traces and seek to climb the ladder of success on the rungs of their official tasks. Maimonides, in his paraphrase of this provision, holds that such unanimous verdict of guilty relieves the defendant of responsibility until some of the judges have changed for acquittal and then the number for conviction properly outnumbered those for acquittal. The commentator הרבד׳ remarks that the apparent difference in the statements of R. Kahana and Maimonides is easily removed. The statement of R. Kahana, he points out, referred to the procedure in the Great Sanhedrin. Maimonides, on the other hand, agreed. Maimonides, on the other hand, agreed that the accused was immediately set free if the trial was before the Great Court. However the procedure Maimonides suggests, holds הרבד׳ was the rule in the smaller body (98).

Whatever be the authority attributed to this commentator, the provision has especial significance for us because of the unexpected and unusual effect given to such a conclusive verdict of guilty. A unanimous verdict of acquittal was not suspected. The accused was immediately released. The opposite verdict, however, was not given its expressed effect. No such differentiation exists in our modern law. In fact, in most jurisdictions, it is required that the verdict of guilt be unanimous and if the trial could be consummated in one day there would be no bar to execution (99) (#).

IV

Under the Talmudic dispensation, the judge was required to come to a decision independently. It was regarded as a violation of a prohibitive commandment (and therefore a religious offense) not only to decide a certain way because another judge has done so but to base one's decision on the reasoning of another (100). Each judge had to reach his conclusion on the basis of his own reasoning so that the opinion was entirely his own. It is clear, without much expatiation on the subject, how different this is from the common law procedure which leaves the jury at the mercy of some eloquent prosecutor or subject to the blandishments of some histrionically gifted defense counsel. A common law verdict often depends upon whether the prosecutor or the defender is the better orator or actor. The Talmudic verdict depended upon calm consideration of the facts by each of the judges individually. Those דיינים were saturated with the spirit of mercy, but they were also devoted to the Torah which they regarded as embodying the divine legislation,

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(#) During the past several months, because of a "crime wave," and in our Southern States, in the trials of colored men accused of capital crimes, there have been several such instances of

the intent of which, if not every jot and tittle thereof, they were consecrated to enforce.

The rule under discussion had another feature in its favor. Since each judge had to reason out his own conclusion and since it was necessary for such reasoning to be based upon recognized authority (either a precedent or a new interpretation of a scriptural verse) there was more opportunity for all possible angles of judgement to be brought out BEFORE verdict. And since the most praiseworthy feat was to add an ar gument לזכות it can be assumed that rarely indeed was any reasoning tending to acquittal overlooked. We are aware that our modern systems provide for assignments of error on the part of the judge in handing down the law to the jury but it is beyond dispute that where a life is in the balance, prevention of an unwarranted execution is superior to the opportunity of "cure" by appeal.

Another insight into the motivation behind the Talmudic legislation on capital trials may be gathered from the casual indication that the disciple or probationer who had advanced an argument for acquittal and had died overnight is regarded on the following day as being still in his place and as repeating his contention (101)of the day before. It seems to us that no lesser purpose could have accounted for this rule than the determination to employ every reasonable technicality to secure a decision for the defendant.

V

Witnesses were not permitted to take part in the deliberations. Once their testimony had been concluded, their participation in the

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guilty verdicts rendered within a few hours, even an hour. And they have been carried into effect.

trial was at an end (102). The defendant, however, was at liberty to argue his own cause. In fact, it would seem that at any stage of the proceedings, during trial and up to the moment of acutual execution, the defendant could interrupt the proceedings with contention in his own behalf. If there were some cogency in his statements he could do so again and again (103), even after verdict he could postpone the execution as many as five times (104).

At modern law the defendant also has this right but only at stated times during the trial and once having elected to have an attorney he is bound to content himself with the status of a defendant witness (105). The superiority of the Talmudic procedure over thatprevalent today will be apparent to all who have familiarized themselves with the practical effects of the modern court trial. The defendant often whispers to his lawyer who may or may not accept the suggestion of fact or argument submitted. Thus, the jury, the men who have his life in their hands, may not get the real claim the defendant advances. Under the Jewish system the judges heard the arguments of the accused directly and when there was something material it influenced their decision. Since the accused was not permitted to argue that he was guilty but only to present reasons for his release (106), the provision was an added safeguard for his welfare.

CHAPTER FIVE

THE VERDICT

In the manner of arriving at the verdict, there is much room for deduction along the lines of the thesis we have been pursuing.

I

We have already seen that a unanimous verdict of conviction was tantamount to a verdict for acquittal or at least to postponement of the decision until there had been further deliberation. The unanimous verdict for acquittal, however, while not required, was welcomed and the prisoner immediately discharged.

Of paramount significance, however, is the rule that a verdict of acquittal might be reached by a simple majority of one while at least a preponderance of two votes was demanded for conviction (107). Twenty-three being the number of judges, it could very well happen that the division could not afford the requisite majority of two for conviction or even of one for acquittal, because a judge who was undecided was accounted as not being present (108).

An analysis of the stipulations shows that the rabbis anticipated the various possibilities and legislated for them with their bias towards acquittal, apparently, ever before them. Thus:

a) If one judge was undecided and the vote of the rest stood eleven to eleven, two disciples were added as members of the court for that trial (109).

b) If the votes stood twelve for conviction and eleven for acquittal, two disciples were added to the court as members for thattrial (110).

c) When two had been added in the above case, since the judge in doubt did not count, there was a possibility that the division would be twelve to twelve. Now, in modern procedure, if a jury divides in this manner, or, where a unanimous verdict is required, pronounces itself unable to agree, the case is declared mistrial and the prisoner held over for another trial. Only when there are three successive disagreements is he set free. But the eagerness of the Jewish law to avoid the imposition of the death penalty motivated them to provide such a safeguafd for the defendant as in the case of the twelve to twelve vote.

d) If the original vote stood twelve for guilty and eleven for not guilty and, upon addition of two others, the vote then stood twelve for conviction and twelve for acquittal while one refused to commit, in this case also two others were added and the process of adding two was continued until the required majority of one for acquittal or two for conviction was secured, or until seventy-one judges had been seated (111). There appears to be an incongruity in this provision, but only at first blush. The original vote showed a preponderence for conviction but when one of the two additions to the court refused to commit himself, the vote of these men was neutralized and had no influence whatever on the previous result. It was therefore only logical that further additions should be made when the other accretion had proved valueless in determining the cause.

e) Having reached the limit of seventy-one, (beyond which no additions were made because that was the number of the Great Sanhedrin, the supreme court of the land) if there were yet no majority of two for guilty or one for acquittal, there was continued deliberation and balloting until a decisive vote was reached.

And if such a result seemed impossible, the elder of the judges was required to rule that the case had become נראה which may be rendered as "maturely considered" or "too difficult" or "clear," all of which interpretations are offered(112). The intent of this pronouncement was the same under all interpretations--to record the case as ended--"maturely enough considered" to preclude the probability of any new turn of events, or "too difficult" to decide upon a clear cut majority, or "clear" that nothing is to be gained by further deliberation.

However, different from moder procedure, the prisoner was then not remanded for further trial, but he was acquitted. Here again, it was said that if thirty-five were for conviction and thirty-five against while one judge declared himself undecided, the accused was to be set at liberty (113). There was no effort of one side to convince the other; there being a technical equal division of opinion, the prisoner was released. It is to be emphasized that the Mishnah text of this stipulation says that one group was Stellung judge against the other until "one of those who had been for conviction sees the 'words' of those who are for acquittal" (114). Maimonides in his Mishneh Torah adds the words או שמי זכות אותו (115) but the language of the Mishnah gives us an insight into the intention that the authors of the legislation wished to serve. This, perhaps unconscious, failure of the original text, to add "or one of those who had been acquittal sees the words of those arguing for conviction," may be taken as an earnest of their real attitude.

CHAPTER SIX

AFTER VERDICT

I

It has already been indicated that the merit of the Talmudic procedure lies in the fact that precautions were taken before verdict by specifying safeguards and technicalities aimed at such a result to promote an acquittal. However, even the procedure after verdict had features pointing to a similar motivation. The opportunity to escape a sentence of execution was many times open to the convicted man. The very machinery of imposing the death penalty was so designed as to encourage a postponement of execution and bring about a possible reversal.

I

As we have seen there were no attorneys and the court functioned in part as advocate of the accused. It was therefore appropriate that the court should have been prepared to move towards reversal on its own initiative if it were seen that the verdict had been due to error. Such was the case. When a verdict of guilty was entered and it later became apparent to the court or any member of it without any statement of the defendant himself, that a mistake had been made, the process was declared annulled and a retrial was held for the purpose of entering an acquittal (116). Under modern procedure, juries, once having handed in a verdict of guilty, may not, after trial, ask for the case to be reopened before them for the purpose of correcting the judgment. A learned lawyer may secure the necessary statements from members of the

jury and have a higher court send the case back to the lower court for retrial. In such case he pleads that definite evidence has come to light showing that the jury's verdict was due to material error, on their part or on the part of the court in accepting or rejecting certain evidence or in instructing the jury. But how much more meticulous the Talmudic law which lays it down as a positive instruction that the court which had completed the trial and reached a verdict of guilty, and then discovered a reason or argument for upsetting that verdict for one of acquittal, was required to hold a retrial in order thatsuch decision me be reversed.

II

The Talmudic law, it is important to note, contains the proviso that if the verdict entered in error was one of acquittal, noretrial was allowed. The common law and modern systems generally contains a similar rule on the theory that no man's life should be twice placed in jeopardy by the courts. The Talmudic principle, however, was not alone due to an aversion to jeopardize a man's life twice, but appears to have been added as another safeguard against carelessly or precipitately rendering the accused culpable and thus subject to the death penalty. From this restriction not only the מסית was excepted but Maimonides repeats the Talmud and points out that if an error had been made in rendering a verdict of acquittal with reference to a belief to which the צדוקים adhered, such a verdict had also to be considered as set aside and a new trial held. We are not here concerned with just what the term צדוקים connotes, in the passage, whether Sadducees or כותיים בעיקר , as we need not analyze the Talmud chronologically as to the various passages in order to catch its spirit.

We merely note that the exceptions to the latter rule, which would postulate a departure from the general attitude of conern for the accused, occurs in religious crimes. The Pharisees could not be expected to be so superhuman as to look upon the religious offender with pitying eyes.

II

The outline of procedure after verdict includes a detailed description of the manner in which the condemned is to be led to execution and here we see how no emergency is overlooked that might upset the conviction (117). Under the Talmudic rule, once the verdict of guilty had been pronounced in the legal way, the execution had to take place the same day. Astonishment may be expressed that a system which is claimed to be so jealous of the defendant's interests should be so hasty to effect the extreme penalty. However, it must be remembered that the rabbis had an uncanny insight into human psychology and realized that the state of mind of the condemned between his sentence and his execution was comparable to a living death. Mercifully, they wished to relieve him of this torture.

Moreover, the communities, in the days of the formulation of the Jewish law as well as of its compilation, were small communities. Even Jerusalem could not have been a city of more than 30,000 (118). News of the sentence spread quickly and, because of the special provisions which will be shortly discussed, anyone who knew a fact that would upset the verdict or anyone who had falsely led the court astray might be counted upon more dramatically to appear and correct theerror. Far from being cruel, this method of the rabbis was calculated to spare the truly guilty man the

excruciating and soul-racking experience of prolonged anticipation of death and to afford less time for those who had material facts in their possession or who had sworn falsely, to rationalize their natural impulse to make a clean breast of things and save the victim from the imminent calamity.

III

The place of execution was required to be at a distance from the court house (119). Although a biblical verse is used as the reason for this, we can easily understand, from an analysis of the manner of leading the condemned man to execution, that there was a more practical reason in the minds of the rabbis. At any rate they must have sensed this other reason too. The distance between the place of execution and the court allowed for a solemn procession. During the march there were many opportunities for some one who had a new fact, or for the accused himself, or for a member of the Court who became cognizant of a reversible error, to stop the whole procession and bring the condemned man back for another trial. In the first place, it was arranged that one man should be stationed at the door of the Court House with a flag in his hand (or scarf, used for signalling) while another on horseback accompanied the unfortunate man. The two had to remain in sight of each other (120). If a member of the Court announced that he had found reason to believe an error had been made, or if some one appeared at the door of the Court House and claimed to have new evidence or a new reason for acquittal; or if the accused himself said he had something else to present to the court which would prove his innocence, the procession was quickly halted and reversed (121).

If the request for presentation of new matter was made at

the Court House, the man stationed there simply waved his scarf, the man on horse back caught the signal and all returned to the court. There the new matter was heard and if innocence was then established, the accused was immediately released (122). The Talmud says that the condemned man could repeat his claim or having new evidence of his innocence as many as four and five times, provided there were merit in what he advanced(123). However, after he had halted the procession twice in succession and nothing cogent had been found in these claims, it was provided thattwo תלמידי חכמים , two disciples should henceforth accompany the procession. Then, if the accused wished to make further claims for acquittal he had to present the matter to these disciples. They would first weigh it and decided whether or not the accused should again be taken before the court for a reconsideration (124).

The first two times the accused made his appeal of שו' ללמד עלי זכות he was taken back without question because it was assumed that at the trial, the stress of the proceedings made it difficult for him to think clearly and therefore to present his contentions in all their clearness. But after these two attempts, it seems to have been the opinion of the rabbis, and justly so, that the time and attention of the Court should not be usurped by the condemned with impossible or frivolous claims.

During the time of the procession a herald preceded and clearly announced that so and so had been condemned for commiting such and such crime, that such and such were the witnesses and that all who knew anything tending towards the acquittal of the condemned should immediately step forward and say so (125). Thus the Jewish court, as we have insisted, of its own motion actively sought to upset the verdict which it had delivered (provided it could be legi-

timately done) and save the life of the defendant.

IV

Most significant of all, with reference to the effort to discourage injustice in the administration of the capital penalty, is that provision which required the witnesses to be the first to throw the stone that was to crush out the life of the condemned man (126). This provision has become a universal admonition to those who would be hasty in judging their neighbors. It bespeaks the realization of the rabbis that when all else failed to prevent a miscarriage of justice, the reluctance of the false accuser to be the actual executioner of the object of his calumny would, in most cases, establish the truth at the extreme moment.

Today, the executioner is always someone not remotely connected with the crime or any of the figures in it. Where the method of electrocution is used, he does not even witness the havoc that his fingers upon the switch will produce. Generally speaking, the witnesses to the execution are few and rarely are those whose complaint have brought the man to justice in the audience. The rabbis must have understood how urgent it was to employ the dramatic possibilities of the final moment in the interests of justice. All else failing they hoped that the sight of the victim on the very threshhold of death would suddenly bring the false witness to his sense of justice. (#) They were especially clear-sighted in this regard because theirs was an age when the people were steeped in superstition and believed that the spirit of the wronged dead would forever haunt the man who brought him to his untimely grave.

(#) The same reasoning applied to death by חנק, though the method of execution was different. שרפה al-

C O N C L U S I O N

It is believed that the preceding chapters have served the purpose of revealing the underlying motivation of the Talmudic law in capital cases with regard to the solicitude of the court for the welfare of the defendant. However, a more thorough study of the entire criminal procedure, comparing it with the modern common law and other systems of pleading, is needed. Such an effort required more painstaking devotion to the task than is possible for the average student who is preparing himself for the rabbinical degree. It is the writer's hope that the brief analysis submitted will merit him the encouragement for such an undertaking.

APPENDIX

CAPITAL CRIMES

While not compellingly germane to this analysis, it may be well to list the crimes that merited the capital penalty under the Talmudic dispensation (#).

I

There are thirty-six in all and various classifications have been proposed. Mendelssohn (127), for instance, would separate these under thirteen heads as to their nature and under four general heads as to the penalty imposed, since the Talmud provides four different modes of execution and specifies in each instance which manner of death shall be the convicted man's fate: stoning, burning, strangulation and decapitation. But we prefer to group them under a broader classification viz:

1. Capital crimes that violate MORAL laws, i. e. which may be regarded as against the NATURAL commandments.
2. Capital crimes that are offenses against Yahweh and the Religious State, i. e. RELIGIOUS VIOLATIONS.
3. Capital crimes that violate SOCIAL laws, i. e. acts subversive of the moral standards arising out of the social order.

It should be at once noted that a thirty-seventh crime merits the capital penalty, that of bearing false witness in any

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(#) Perhaps the fact that there were so many capital crimes made the rabbis more cautious in imposing the death penalty. They did not want the courts to become

of the thirty-six crimes here listed because according to the rule, the false witness whose testimony would have brought about the execution of the accused, when confounded, was tosuffer the punishment that the original accused would have had to undergo, if found guilty. Naturally, it cannot be classified as belonging exclusively in any one of the categories but is an appendix to all three lists.

II

THE MORAL CRIMES

1. Criminal Conversation with mother.
2. Criminal Conversation with step-mother.
3. Criminal Conversation with mother-in-law.
4. Criminal Conversation with betrothed virgin.
5. Pederasty.
6. Bestiality--by man.
7. Bestiality--by woman.
8. Sacrifice to Moloch.
9. Criminal Commerce with priest's daughter.
10. Criminal Commerce with own daughter.
11. Criminal Commerce with daughter's daughter.
12. Criminal Commerce with son's daughter.
13. Criminal Commerce withstep-daughter.
14. Criminal Commerce with step-daughter's daughter.
15. Criminal Commerce with step-son's daughter.
16. Criminal Commerce with mother-in-law.
17. Criminal Commerce with mother-in-law's mother.
18. Criminal Commerce with father-in-law's mother.

19. Adultery.

20. Murder.

THE RELIGIOUS CRIMES (#)

1. Blasphemy.
2. Idolatry.
3. Inducing another to idolatry.
4. Inducing a community to alien worship.
5. Sabbath Violation.

(##)6. Pythonism.

7. Necromancy.
8. Magic.
9. Maladministration or crime of "the rebellious elder."
10. False Prophecy.
11. Prophesying in name of other deities.
12. Communal Apostasy from Judaism to idolatry--crime of the עיר הנדחת where the entire community was subject to death by decapitation.

THE SOCIAL CRIMES

1. Cursing parent.
2. Vilation of filial duty.
3. Bruising a parent.
4. Kidnapping.

(#) The word "religious" is used here, of course, in the modern sense of the term because all crimes were religious offenses to the Talmud since the authority for declaring them such was the Torah or written word of God.

(##) Pythonism, necromancy and magic are included under this heading because they were methods of divining the course of fate, an offense against Yahweh.

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N O T E S

1. Ex. 21:23-25.

2. Bloch, 1 §2.

3. Ib. - "sie ist vielmehr ein Act der Gerechtigkeit undeder Nothwendigkeit zur Erhaltung und Kraftigung des Staatswohles. Der Verbrecher ist das kranke Glied an dem grossen Staatskorper, er muss geheilt, oder, wo dies unmoglich ist, amputiert werden."

4. Blackstone III:25.

5. Sanh. 37a - נברא אדם יחידי ללמדך שכל המאבד נפש אחת מישראל מעלה עליו הכתוב כאילו אבד עולם מלא וכל המקיים נפש אחת מישראל מעלה עליו הכתוב כאילו קיים עולם מלא

6. Macc. 7a - סנהדרין תמורגת אחד בשבוע נקראת חובלנית רבי אלעזר בן עזריה אומר אחד לשבעים שנה רבי שרפון וכ' עקיבא אומרים אלו היינו בסנהדרין לא נהרג ארם מעולם

Rashi makes the comment בדקו העדים עד אין יודעין להשיב, that is, they cross-examined the witnesses in such wise as to put the witnesses at a loss to answer. In this wise they promoted defeat of an unfavorable verdict. Credibility has never been accorded uncertain testimony.

7. Rapoport, 9 - "l'esprit du Talmud consiste en ce que l'on n'admet comme valable que les principes recus de Dieu par Moise sur le mont Sinai." This conviction, thatbin administering the law, they were representing the Creator, the divine Giver of the Law, which constituted the spirit animating the rabbis in their compilation of the Talmudic principles, is the Jewish spirit. The rabbis regarded the Law as having a divine motivation and they could not conceive of precipitate execution as a divine desire. The safeguards and technicalities which they devised were based on a wish to have mercy tempered with justice as much as justice tempered with mercy.

8. משנה תורה (יד) ספר שופטים הלכות סנהדרין

9. Such authorities are listed in the Bibliography.

10. Am. & Eng. Encyc. XXII:1281 - "It is a well settled principle running through the whole cousse of the Criminal Law that a person accused of a crime, whether the offense charged is malum in se or malum prohibitum, is presumed to be innocent until his guilt is proved." In the Jewish law, the simple provision that the argument must open לזכות, FOR the accused, predicates this principle.

11. One verse begins with the injunction, "then the congregation shall judge" (that is, between the slayer and the avenger) while the next begins with the phrase "and the congregation shall <u>deliver</u> the slayer out of the hand of the avenger". In the latter the Talmud finds an admonition to look for reasons for acquittal. The community must bring the criminal to trial ושפטו העדה but there must also be some one to be jealous of his freedom and life והצילו העדה.

12. Nu. 35:24-25.

13. There was no such official as our state's attorney or prosecuting attorn or any public servant charged with the duty of bringing offenders to trial. Witnesses to the crime were the only ones that could do so and all were required to consider it their duty to bring accusations and to give testimony.

14. Sanh. 32a - דיני נפשות פותחין לזכות ואין פותחין לחובה

15. Blackstone III:367 - "the pleadings as opened then by counsel or that side which holds the affirmative of the question at issue". Since the state or the prosecution brings the case to bar, at Common Law, the affirmative or burden of proof is upon them. The arguments to the jury therefore begin with reasons for convictimn, the very antithesis of the Talmudic procedure noted above.

16. Sanh. 32a - דיני נפשות המלמד חובה מלמד זכות אבל המלמד זכות אין יכול לחזור וללמד חובה

17. Ib.- Maim. Sanh. III:1 המלמד חובה מוזר ומלמד זכות

18. Originally at Common Law, in capital cases, the accused or adversary of the crown was permitted to submit nothing in his favor. The right of the defendant to offer any defense, that is, to argue for his rights or give testimony in his own behalf, was first granted by Mary I who happened to be "humane and generous before her marriage to Philip I. Before that time the crown exacted punishment at will. (Blackstone III:341) Of French procedure it is said, "The interrogation and browbeating of the prisoner by the judge, consistent as it may be with the inquisitorial theory of their procedure is strange to English lawyers." (Encyc. Brittanica on "CRIMINAL LAW"). But in the Talmud the right of the accused to justice was inherent and the "inquisitorial system", that is, the חקירות and בדיקות, were, if anything, manipulated in his behalf.

19. Encyc. Rel. & Eth. VII:857 - "The Talmud brought Jewish law to a fixed system". Mielziner, 3 - "The Talmud is the work which embodies the mental labors of the ancient Jewish teachers...in expounding and developing the civil and religious law of the Bible."

20. Maim. Sanh. 11:5 - Maimonides sums up the Talmudic attitude towards the מסית. There should be no astonishment on our part at such apparent rigor. It is only a few years, as eternity is measured, since the formal Inquisitions of Spain and Portugal. And right now the man who opposes ~~from~~ the organized religious group is the subject of persecution. The rabbis truly believed, as Maimonides says, that to show mercy to such seducers was indeed cruelty. They regarded the welfare of the group as of paramount importance and idolatry as the highest form of self-destruction.

21. Maim. Sanh. 12:2 - Here is found a convenient summary of the provisions regarding warning which appear in various parts of Talmud Sanhedrin (40b, 41a, 81b et al.).

22. Ib.

23. Ib. He says על מנת כן אני נושה. A provision like this, technically used, could controvert the general provisions of the law at almost any time. It can not be imagined that many, if any, perpetrators stopped to make such declaration of intent to disregard the law.

Chapter Two

24. Sanh. 4:1.

25. Sanh. 32a.

26. Sanh. 11:1 . Or סנה בזיך דיני ממונות ובזין דיני נפשות

27. Sanh. 1a - Naturally, this provision is repeated again and again. The very first statement in the tractate indicating that capital cases are tried before a court of twenty-three is found on the first דף and reads מוציע שם יש בעשרה ושלשה מינוי שישבו דיני נפשות

28. Sanh. 32a and many other passages. דיני נפשות משין...על מי שנים לחובה

29. Ib. - אין בזות דין שקול

30. Sanh. 29a - שני תי"ח ששו נאין זה את זה שאין יושבין בדין אחד

31. The mere fact that judges are required to be בעלי חכמה (Sanh. 17a) did not blind the rabbis to the workings of human nature. קנאת סופרים תרבה חכמה was an approved principle but קנאת דיינים, when there was a life in the balance, was quite another thing.

32. Keth. 105b ושותר לא תקח איש צדיק ליתר שותר ממון אלא שוחד דברים

33. At Common Law, in the absence of express statutory provision, judges were not disqualified because of bias or partisanship. Even if judges exhibited partisanship it was not enough. The bias had to be proved to be because of a direct interest in the litigation. The Jewish Law was more scrupulous. (See Am. & Eng. Encyc. XVII:738.

34. Sanh. 88b.

35. Sanh. 37a. הוצרכו לסמוך סומכין מן הראשונה וכו'

36. Sanh. 17a.

37. Sanh. 17a.

38. Ib.,Ab. Zara 19b- he had to be at least forty years of age.

39. Sanh. 36b מי שאין לו בנים, because he might not be possessed of the quality of mercy. The meaning of the rabbis is clear because the passage expressly exempts the case of the מסית from such necessity because scripture provides לא תחמול ולא תכסה עליו (Deut. 13:9).

40. Rashi in commenting on the qualification that the judge had to be au courant with "seventy languages" in order that he might receive testimony without the intervention of an interpreter adds that such testimony would constitute hearsay evidence. Thus interposing a distinction which is very fine and which modern courts do not recognize. (On מפני המתורגמן, Sanh. 17a: כשבאין עדי לועזים לבעלי הלשונות שלא יצטרכו להעמיד מליצים ביניהם דהוה ליה עד מפי עד.

41. Talmudic law did not have the system of placing expert witnesses on the stand, therefore the judges had to be acquainted with the sciences of the day. (Sanh. 17a)

42. Benny, 39 .

43. Supra note 38.

44. The passage in 36b (supra, note 39, remarks that זקן או סריס, an old man or eunuch is not to sit in a capital case. The context makes it clear that by זקן is meant a man whose faculties are impaired so that he may no longer be considered as in full possession The term בעלי זקנה in 17a is, however, apparently used in the sense of "men of maturity".

45. Macc. 7a. See note 6, supra.

46. Rashi commenting on the above statement of R. Tarphon and R. Akiba remarks: בימים שסנהדרין דנין דיני נפשות לא נמצא בה אדם כדמי' בגמ' שבדקו את העד

47. העדים בדבר שלא ידעו להשיב was, in a measure, the acknowledged object of the cross-examination of witnesses. Of course, modern procedure is based upon a similar objective on the part of the defense but the distinction is that in the Talmudic procedure the entire court was so motivated and not a paid representative of the accused.

48. Supra, note 5.

49. Frankel, 49.

50. Rabinowicz, XIV.

Chapter Three

51. Sanh. 30a - This is deduced from the requirement that the witnesses must see "as one" which is possible only when they are at least within sight ~~from~~ of each other, that is, almost occupying the same point of vantage.

52. Bloch, 35-40 (§20-25) and Mendelssohn, 110 (§70) and 116 (§77) contain full treatments of the points here involved. English and American courts also have rules regarding qualifications of witnesses and admissibility of evidence which are detailed and technical but the mere fact that circumstantial evidence is admissible makes it less rigorous than the Talmudic Law, for those not actual witnesses to the crime can bring about the arrest and trial of the offender.

53. Sanh. 34b - כל הכשר לדון כשר להעיד ויש שכשר להעיד ואין כשר לדון וא"ר יוחנן לאתויי סומא באחד מעיניו, or a man who merely has no children.

54. May, §90 -"The common form of indictment is dependent upon an accusation, and it is found by the grand jury under oath. Arrest is almost universally by a specially constituted officer, and in a vast proportion of instances one who has himself not seen the crime committed.

55. It may be imagined that the rabbis, in requiring witnesses to bring criminals to justice, opened the way for what is known to modern criminal practice as the "frame up". But the provision that false witnesses were to suffer the fate intended for the victim was a deterrent. In addition we have emphasis on the principle that היודע עדות לחבירו ואינו מעיד לו פטור מדיני אדם "he who knows facts beneficial to his neighbor but does not testify for him is to be considered outside the pale of social laws."

56. Sanh. 40b מכירין אתם אותו נכרי הרג ישראל הרג התריתם בו קבל עליו התראה התיר עצמו למיתה המית בתוך כדי דבור

Supra note 21.

57. Macc. 4b, 13b; Sanh. 72a.

58. See Appendix A.

59. Maim. Sanh. 12:1-2.

60. Sanh. 40b.

61. כסף משנה on Maim. Sanh. 12:1 where this is summed up.

62. Supra, note 60.

63. אחד (עם הארץ) ואחד (תלמיד חכם), says Maimonides (Maim. Sanh. 12:2) which corresponds with the position of the rabbis who held that all those placing themselves liable to the penalty of death had to be warned. (Sanh. 8b). R. Jose b. Judah dissented and said חבר אינו צריך התראה. The commentator הרדב"ז ז"ל approves of Maimonides' concurrence with the rabbis. לסלק כל טעות צריך התראה, to forestall any possibility of error, to which even learned men and experts are susceptible, it is best to treat the תלמיד חכם and עם הארץ alike.

64. The Common Law assumes that all men have heard the law; the Talmudic law undertakes to have all men hear the law at the moment they need the information most.

65. The object of the warning was not only to save the accused from rash deeds but to prevent the commission of the deed and thus save others from injury. The halting power of a command to "stop" is calculated to be most effective when least expected. The rabbis realized the psychological and dramatic possibilities of the warning in the prevention of crime.

66. Sanh. 37a.

67. Jastrow Talm. Dict. אים, page 50.

68. Sanh. 37a.

69. Ib.

70. Ib.

71. Blackstone III:363. Jurors may be challenged for suspicion of bias or partiality, but each side has only a certain number of challenges.

72. Sanh. 40a. - חקירות אחד אומר איני יודע עדותן בשרילה

73. Ib.- בדיקות אחד אומר איני יודע ואפילו שנים אומרים אין אנו יודעין עדותן קיימת בזמן שמכחישין זה את זה עדותן בשרילה

Sanh. 30b contains the statement of of R. Hisda illustrating the above. "If one witness testify that he slew him with a sword while the other says with a dagger," he says, "such testimony is not acceptable but if one say his (the murderer's)clothes were black and the other says they were white, this is acceptable." In the first instance the contradiction is to the merits, in the latter a minor circumstance is involved.

74. Sanh. 32b - מסיעין את העדים ממקום למקום כדי שתתרוק דעתן ויחזרו בהן. Maimonides (Maim. Ed. 1:4) renders מסיעין לעדין in the sense of ממקום למקום and ascribes as the reason אין יחזרו בהן אחר ידיעת הדין.

75. Sanh. 40a.

76. Sanh. 29a.

77. Ib.

78. Ib.

79. May, §128

80. The principle is several times enunciated e. g. Sanh. 9b, B. Kama 74b. "A man is his own kin and never should a man convict himself." He is disqualified on grounds of relationship. This seems naive but is really a subtle technicality. There are several provisions that when the accused attempts to testify against his own interest, that is, למזיקו, he is silenced.

81. Sanh. 42b and 43a.

82. Sanh. 9b points out it cannot be otherwise since a condition precedent to conviction was proof that two witnesses had warned him.

83. Tos. 11:5.

84. Sanh. 32a דיני נפשות פותחין לזכות ואין לחובה

85. Supra, note 17.

86. Sanh 34a; 40a אמר אמר מן התלמידים יש לי ללמד עליו חובה משתקין אותו

87. Sanh. 36a - דיני נפשות מתחילין מן הצד and Rabbi Aha b. Papa explains it by homiletically emnding the scriptural verse לא תענה על ריב to read לא תענה על רב, i. e. "thou shalt not give an opinion after that of the GREATER in position."

88. Maim. Sanh. 1:3 gives a clear picture of the arrangement of the court.

89. Sanh. 46a אין דנין שנים ביום אחד. But the instance is cited of the tradition that Simeon b. Shetach had hanged 80 women in one day. And the explanation is offered that it was a case of השעת צריכה, of expediency.

90. Sanh. 40a.

91. Ib.

92. Ib.

93. Ib.

94. Ib.

95. Ib.

96. Ib.

97. Sanh. 17a - מנהגי שיראו כולן לחובה פושרין אותן מאי שנעמא כיון דאמרי הלנת דין למעבד ליה זכות אית ביה לא חזו ליה

The purpose of postponing conviction overnight was to secure more consideration of the case which could hardly be hoped for if the judges were so unanimous in their first decision. Thus, an important safeguard for the accused became impossible and the rabbis preferred to believe that the release of the prisoner in such cases would better serve the ends of justice. Rashi in commenting on the parralel provision Sanh. 40a says that the object of the postponement of conviction was "that they might find reasons for acquittal".

98. His comment on Maim. Sanh. 9:1.

99. The Common Law makes no provision for length of time of trial or deliberation of jury. The current cry is for speeding up justice. Such a cry would be foreign to the spirit of Jewish Law which would not have two capital cases in one day.

100. Maim. Sanh. 10:1 - "If one of the judges in a capital case voted for acquittal or for guilt, not because his reasoning brought him to that opinion, but because he followed the opinion of his associate, such a one transgresses a negative commandment לא תאנה על ריב לנטות. Tradition teaches that on voting thou shalt not say 'it is enough that I vote like so and so' but speak of your own accord." Rashi points out that Maimonides is enlarging upon the actual text of the Talmud. אמנם כאמת דפסוק לא נזכרה שם, he remarks, but הרדב"ז points out that in the Mechilta (משפטים) there is this injunction to the judge שלא יהא אלא לכף זכות. Here we see again the motivation we have been contending for: if there is to be any dependence upon others is should be only in behalf of acquittal.

101. Sanh. 34a; Maim. Sanh. 10:3.

102. Sanh. 33b; 40a. Under the rule הכל מן הסנדרין לזכות it would seem that witnesses were permitted to take part in the deliberations provided they argued for acquittal but Sanh. 34a expressly says that witnesses were not allowed to participate on the ground that עד אחד לא יעיד.

103. Sanh. 40a.

104. Sanh. 43a; Maim. Sanh. 13:1.

105. Under Talmudic procedure the mere statement of the accused, "I have something to offer in my defense" sufficed to get him a hearing. Modern procedure usually insists that such statement with the facts counted upon to substantiate it, be presented for the consideration of the court after certain regulations as to form, bond, etc., have been observed. The one system prefers to have the cry of "wolf, wolf" raised in the hope that a real fact will be uncovered, the other guards against deceit and thus freq ently promotes a miscarriage of justice.

106. Supra, note 80.

107. Sanh. 32a, 40a.

108. Sanh. 40a; Maim. Sanh. 9:2.

109. Ib.

110. Ib.

112. Sanh. 42a; Maim. Sanh. 9:2.

113. Maim. Sanh. 9:1.

114. Mishna Sanh. 5:5.

115. Maim. Sanh. 9:1 and 9:3.

116. Sanh. 32a.

117. Sanh. 42b, 43a; Maim. Sanh. 13:1.

118. Morgenstern - Lectures Bible 11.

119. Sanh. 42b; Maim. Sanh. 12:3.

120. Sanh. 42b and 43a; Maim. Sanh. 13:1. The first passage deals with the procedure immediately after the decision and contains no mention of the herald while the second passage deals with the final procedure apparently, after several claims for reversal had been made and the procession had been turned back for that purpose. Here the herald is specifically mentioned.

NOTE: Correction should be made of the statement on page 36. The rider apparently did not head the procession but remained within sight of the man with the signal flag who would despatch him when the occasion arose.

121. Ib. 42b.

122. Ib. 42b.

123. Ib., 42b.

124. Sanh. 43a.

125. Sanh. 43b; Maim. Sanh. 13:1.

126. Sanh. 45a basing on Deut. 17:7; Maim. Sanh. 13:1