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by

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Introduction

The purpose of this study is to investigate the traditional Jewish attitude toward the subject of juvenile delinquency as reflected in Jewish literature, and then to compare this attitude with the modern point of view of child control.

To achieve this end the following procedure was adopted: using the Biblical source (Deut. 21.18-21 the law of the "stubborn and rebellious son") as the starting point, we turned to the Talmudic sources Sanhedrin pages 68b to 71b and the Maimonidean formulation found in the Maimonidean Code Yad Ha-Hazakah, Book 14, Topic Mamrim, Chapter VII. Since, according to Professor Cronbach, the only reference to juvenile delinquency that is found resides in the above cited Talmudic passage and the Maimonidean discussion, our presentation of the Rabbinic attitude is based upon these two sources.

After a careful study of these sources with the aid and guidance of our referee, we attempted to systematically organize the Rabbinic attitude toward this subject. This attitude divided itself into two general categories: (1) Factors which must

be present cumulatively to support the law of the "stubborn and rebellious son", and (2) factors each of which nullify this law.

Then, taking the conclusions thus arrived at, a comparison was drawn with modern attitudes toward the treatment of juvenile delinquents. The results of this comparison are presented in the conclusion of this study.

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W.S.

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I. BIBLICAL BASIS FOR THE LAW OF THE "STUBBORN AND REBELLIOUS SON"

Deut.XXI.18 If a man have a stubborn and rebellious son, that will not hearken to the voice of his father, or the voice of his mother, and though they chasten him, will not hearken unto them:

19 then shall his father and his mother lay hold on him, and bring him out unto the elders of the city, and unto the gate of his place;

20 and they shall say unto the elders of his city: 'This our son is stubborn and rebellious, he doth not hearken to our voice; he is a glutton, and a drunkard.'

21 And all the men of his city shall stone him with stones, that he die; so shalt thou put away the evil from the midst of thee; and all Israel shall hear, and fear.

The section of the Book of Deuteronomy central to our study as noted above is chapter twenty-one, verses eighteen through twenty-one. The larger portion of this chapter deals with the various laws of domestic life. The particular portion of the chapter in which we are interested is that which deals with the relationship of parents and children.

The Mosaic law recorded in this chapter of Deuteronomy gives us a picture of the filial relationship. Furthermore, these verses prescribe the general principles by which family and domestic life is to be regulated, specifying a case ("stubborn and rellious

son") which might occur. These verses find themselves among that group which comprises the "Code of special laws".[1] While the particular law of the "stubborn and rebellious son" is peculiar to Deuteronomy, respect towards parents is inculcated in the Decalogue itself. Death is prescribed in the Book of the Covenant (Ex.21.15) as the penalty for smiting, as also, in the same code (Ex.21.17) and in the Holiness code (Lev.20.9), for cursing, father and mother. In Deuteronomy 27.16 he that "setteth light by his father or his mother" is pronounced accursed. Both in Jer.5.23 and in Psalm 78.8 the words סרה ומרה are employed to show "disobedience and rebelliousness" against God.[2]

Deuteronomy 21.19 "and shall bring him forth" cf. Deut.17.5, 22.21,24--"unto the elders of the city", whose duty it was to take cognizance of offences against social and family right: see on 19.12 and 16.18. "And unto the gate of his place" signified the Oriental forum in which the elders sat and where the law was administered. As Driver points out to us the "gate--more properly the gateway, with a depth corresponding to the thickness of the wall in which it was constructed, having a gate at the inner and outer ends, and doubtless seats along each side."[3]

The words זולל וסבא "glutton and a drunkard" in Deut.21.20 are intended to hint a the ground of the young man's stubborness and disobedience. Smith, in his commentary to Deuteronomy, employs the word "prodigal" --"one who lavishes or squanders with flesh".[4] The same combination זולל וסבא is found in Proverbs 23.21 "be not among those that drink wine, that squander flesh upon themselves". Hertz's commentary upon this particular verse points out that סבא includes not only gluttony but is a term for general debauchee--'riotous liver'.[5]

After the lad had been adjudged a "stubborn and rebellious son", it was the duty of "all the men of his city" to stone him -Deut. 21.21. It was to the common interest for all to take part in putting down the wrong.

The Biblical law of the כבד את אביך insisted on respect being paid to parents. Hebrew moralists did not hesitate to commend the rod as means of education and correction, the father's authority, however, was not despotic. The Hebrew parent, according to this law, did not possess the power of life and death over his

child. However, an incorrigible son whom milder measures failed to reclaim, might be tried by the elders at the gate, and was liable to death by stoning. The parents must first appeal to the decision of an impartial tribunal; while the death-penalty could be inflicted only by the community with the sanction of this tribunal.

II. FACTORS WHICH MUST BE PRESENT CUMULATIVELY TO SUPPORT THE LAW

The law of the בן סורר ומורה "stubborn and rebellious" son is applicable to a child only from that period known as the beginning of adolescence until partial maturity. משיביו את שערות ועד שיביץ לכן התחיל[1] During this period the child is referred to as a נער as distinguished from a man איש גמור or a minor קטן The Mishnah is careful to point out that the law is not applicable prior to complete pubescence. Bertinoro in commenting on the latter point informs us that the child must be a נער subsequent to incipient pubescence.[2]

Maimonides in commenting on the liability of a child as a בן סורר ומורה states that we have learned from tradition that a lad is guilty as "stubborn and rebellious son" only after he has reached the age of thirteen years and one day and has grown two pubic hairs and has reached complete pubescence: כאן כיצד אבי המשנה למדנו שאין בן פחות מבן שלש עשרה ויום אחד שהביאו שתי שערות עד שיביץ כל הפיד[3]

Both the Mishnah and Maimonides clearly point out that a minor is exempt from the penalty of a "stubborn and rebellious son" since he does not come within the scope of the commandments שלפי כאן לכלל המצות[4]

After the lad has reached complete pubescence, Maimonides

states he is no longer under parental care and therefore is not likely to be stoned as a "stubborn and rebellious son".[5]

The Gemara as well as Maimonides points out that the extreme limits of a "stubborn and rebellious son" are only three months [6] Maimonides further defines this period from the time that the child produces two hairs. He further goes on to say that if the boy grew a beard, before the three month period has elapsed, he is exempt fromliability as a [7]

A child must be a male in order to be held liable to the charge of being a "stubborn and rebellious son". This is clearly stated in the Mishnah which reads: "When a Man Has a Son; not a daughter...[8] Likewise we read in the Gemara; "It has been taught: R. Simeon said, Logically, a daughter should come within the scope of a 'stubborn and rebellious child', since many frequent her in sin, but that it is a divine decree: 'a son', butnot a daughter."[9]

Maimonides further points out in this connection that the child must be a male in order to be held liable under the law of the . He states:

"It is the decree of scripture that the 'stubborn and rebellious child' be stoned, but the female is not judged according to this law for it is not the practice of the female to go to excess in matters of eating and drinking as would the male, as it is said, a son and not a daughter and not an individual of undetermined sex nor an hermaphrodite".[10]

Likewise Maimonides qualifies the statement concerning the sex of the child by adding the words; עד שיהיה בן משעת התראה "a male from the time of warning," or as another variant has it עד שיהיה בן משעת הויה "a male from the time of birth". He makes this point quite clear when he states: ונמצא זכר אינו נעשה בן סורר ומורה "One of undetermined sex who was operated upon and was found to be a male cannot be considered a "stubborn and rebellious son."[11]

The next important problem in connection with the "stubborn and rebellious son" is: Under what conditions does a child become liable as a בן סורר ומורה. The Mishnah points out that a child is liable when he eats a <u>tartemar</u> of meat, and drinks half a <u>log</u> of Italian wine.[12] R. Jose in the same text states that one must eat a <u>mina</u> of flesh and a <u>log</u> of wine.[13] Since R. Jose doubled the amount of wine necessary for consumption, we are led to believe that the <u>tartemar</u> is half a <u>mina</u>. According to

Bertinoro, however, the law does not follow the ruling of R. Jose. Maimonides, in fixing the amount of food necessary to cause one to become a בן סורר ומורה if eaten, use the measure of the <u>dinar</u>. He states: if one's eating is the flesh of cattle and one finishes out the prescribed amount necessary to cause him to become liable as a "stubborn and rebellious son" with the flesh of fowl, he is then liable. וכן אכל אכילה זו מבשר בהמה והשלים החמשים דינרים מבשר העוף

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The Gemara states that R. Hanan b. Moladah said in R. Huna's name: "He is not liable unless he buys meat and wine cheaply and consumes them, for it is written, He is a <u>Zolel</u>, and a <u>Sobe</u>.

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Rashi i n commenting on this statement shows that there is a play upon words. זולל "glutton" is connected with זול "cheap". This does not prove the point in question but merely lends support. Further the Gemara states that R. Hanan b. Moldah said in R. Huna's name: He isnot liable unless he eats raw meat and drinks undiluted wine. The argument is presented, however, that Rabbah and R. Joseph both say: If he ate raw meat or drank undiluted wine, he does not become a 'stubborn and rebellious son'. To which Rabina replied, by 'undiluted wine' insufficiently diluted wine is meant, and raw meat means only partially

cooked, like charred meat eaten by thieves.[16] In a note the Soncino translation gives the following explanation of the above. "Thieves, always fleeing, have no time for properly cooked meat, so they place it hastily on a very hot fire, with the result that it is partly burnt and partly raw. Eating such meat and drinking strong drink is a sign of a voraciousness and drunkeness which justifies fear for his future."[17]

The source of the stolen food or the money to purchase the food next comes under discussion. The Mishnah points out that the boy may derive his food by stealing it from others and eating this food at home and yet he is not considered a "stubborn and rebellious son". On the other hand, the Mishnaic text shows that he may steal from his father and mother and eat the stolen stuff at home and he would not be held liable as a סורר ומורה.[18] The Mishnaic text is best understood when charted as below:

Stealing	Eating	Guilty
Home	Home	No
Home	Outside	Yes
Outside	Home	No
Outside	Outside	No

R. Jose, son of R. Judah adds in this connection that the boy must steal that which belongs to both parents

and eat the stolen stuff away from home; then he can be held liable as a"stubborn and rebellious son". Bertinoro in commenting on this last point tells us that the law does not follow R. Jose.[19]

The Gemara very logically points to the reason that only when the boy steals from home and eats what he has stolen, only then can he be held as a "stubborn and rebellious son." "If He Stole of His Father's and Ate It in His Father's Domain: though this is easily within his reach, he is afraid; or of strangers and ate in in the domain of strangers: though he is not afraid, yet it is not easily within his reach; how much more so if he stole of strangers andate in his father's domain, this not being easily attainable, and he in addition, is afraid. Until he steals of his father's and eats it in the domain of strangers, which is easily within his reach and does not cause him fear."[20] A note found in the Soncino translation of the Talmud Sanhedrin states that a boy would be afraid to steal from his father, eventhough that which belongs to his father is easily within his reach. As a result, a boy would likely "do this often, and hence will not be led into evil ways."[21]

The Gemara further clarifies the statement of R. Jose son of R. Judah in which he said: Until He

Steals Of His Father's and Mother's." It would seem according to the interpretation of the Gemara that it would be impossible to steal anything belonging to his mother, since whatever a woman possesses belongs to her husband. R. Jose, son of R. Hanina answers this difficulty by pointing out that the statement means the boy must steal from a meal prepared for his father and mother. However, the Gemara further states that according to R. Hanan b. Molad who spoke in the name of R. Huna: "He is not liable unless he buys meat and wine cheaply and consumes them?" --But say thus: from the money set aside for a meal for his father and mother. An alternative answer is this: a stranger had given her something and said to her, 'I stipulate that your husband shall have no rights therein.'"[22] In explaining the words of the Gemara "from the money set aside for a meal for his father and mother", Rashi explains that the mother has an exclusive share in this money since it is the obligation on the part of the husband to provide food for his wife.

Rashi in commenting on the statement made by R. Hanan b. Molad in the name ofR. Huna: אינו חייב אלא אם כן לקח בשר בזול ויין בזול ואכלן "He is not liable unless he buys meat and wine cheaply and consumes them", stresses the fact that the child is guilty only when he steals the money and purchases the food and drink cheaply.

Maimonides points out this fact very definitely also.[23] The reason for the stressing of this point by Rashi and Maimonides lies in the consideration that, if the child cannot obtain the food and drink cheaply, he will not be as likely to attempt this thievery and consequently will not go to excess.

The associates the "stubborn and rebellious son" chooses is considered an important factor in establishing his liability. Futhermore , the occasion at which the food and wine is consumed also has an important bearing in this connection. From the Gemara comment upon the statement אוכל קדרנית מצוה "If He Ate In A Company (Celebrating) A Religious Act"; we might infer that if the boy ate in the company among which were present rascally and worthless people who were participating in a non-mizwah affair, the boy would then be considered a בן סורר ומורה. "R. Abbahu said: "He is not liable unless he eats in a company consisting entirely of good-for-nothings. But did we not learn, 'If He Ate In A Company (Celebrating) A Religious Act....He Does Not Become A Rebellious Son Thereby'. Hence, it is only because they were celebrating a religious act, but otherwise, (he becomes a rebellious son) even if they are not all wastrels? The Mishnah teaches that even if they were all wastrels, yet if they were celebrating at a mizwah affair, he is not liable.[24]

It is definitely shown in the Gemara, by the use of the biblical phrase ואינו שומע בקלנו that the parents must be disobeyed in order for the child to be liable as a "stubborn and rebellious son".. And what is the reason?--The Bible reads ואינו שומע בקולנו he will not obey our voice; this excludes disobedience to God's voice.[25] Rashi points out that in this phrase from Deuteronomy XXI.20 the word בקלנו is used as distinguished from either בקולותינו or בקולינו we see, them, that in order for the child to become liable as a בן סורר ומורה he must disobey both parents.

Both parents must likewise be willing to bring charges against the child. The Mishnah clearly states that both the child's father and mother must concur in his condemnation.

We have noted the various factors which make the child liable as a בן סורר ומורה such as; the age of the child, the sex of the child, the acts performed which cause his liability and against whom these acts are committed. Now we turn to the final warning before the child becomes "a stubborn and rebellious son" and then the subsequent trial by an impartial tribunal.

In order for a child to be liable he must have been warned prior to his committing his act of insubordination. This warning must take place in the presence of three persons according to the Mishnah; then he is beaten. If the lad transgress again afterwards, he is tried by a court of twenty-three, but he cannot be stoned unless the three original witnesses are present; for it is written, This Is Our Son, as if to say, "This is he who was beaten in your presence."[26]

The Gemara questions the necessity of the admonishment before three individuals. "Why so? Are not two sufficient? Abaye answered: The Mishnah means this: He is admonished in the presence of two, and ordered lashed by a court of three."[27] Two individuals must be present at the time of warning, since the lad cannot be executed on his parent's testimony alone. However, it is necessary to have three persons order lashes. Maimonides states even more definitely, in this connection, that in the event that lashes must be ordered for the child, three persons must comprise this court. However, he also points out that only two witnesses are necessary to testify that the youth has committed the crime causing him to become liable. Maimonides makes clear to us that after the boy has been warned

and beaten and then still persists in his delinquency, he must be brought before a court of twenty-three among whom the original three individuals who ordered the lashes must be present in this larger court. Or as the Mishnah puts it the words found in Deuteronomy XXI.20 זה בננו This Is Our Son, as if to say, "This is he who was beaten in your presence."[28] The emphasis being placed on THIS ONE; to show, according to Maimonides, that the boy is stoned only if the judges before whom the boy was beaten are present.[29]

If this lad, who has formally been tried by a court of twenty-three and sentenced, escapes after his trial was completed and subsequently the pubic hair came to surround the sexual zone completely; according to the Mishnah, he is liable to the penalty of the "stubborn and rebellious son".[30] Maimonides goes even farther when he asserts that if the trial of a lad has been completed and he has been judged a בן סורר ומורה and then flees, even though he mature subsequent to the judgment, he may be stoned whenever he be found[31] Maimonides states that such an individual is considered

as dead; once sentenced he is considered as dead and the altered status of maturity does not free him from the penalty.

III. FACTORS EACH OF WHICH NULLIFY THE LAW.

We have shown in the previous section of this thesis that only the male child who has come within the scope of the commandments is liable to the penalty of the "stubborn and rebellious son".[32] Consequently, if the lad is a minor he has not yet reached that stage or moral responsibility involved on reaching the age of thirteen years and one day, and is not subject to the law. Likewise, when he reaches the status of manhood שיקיף זקן התחתון he is no longer liable.[33]

The conditions which make a boy of the correct age liable to the penalty of the בן סורר ומורה are many. Furthermore, all of these must exist in order for the law to apply. Maimonides sums up the Talmudic position by explaining gluttony and inebriacy to mean the condition which results from ravenous eating and drinking. He writes: זולל וסובא מפי השמועה למדנו שזולל הוא

האוכל בשר ברעבתנות וסובא השותה יין ברעבתנות

"Gluttony and drunkeness, we have learned from tradition that the glutton is one who eats meat ravenously and the drunkard is one who drinks wine ravenously.[34]

However, if the אכילה מגונה "unseemly eating"[35] of the lad takes place in a company (celebrating) a religious act even though all those present at this affair are good-for-nothings, the lad is not considered a "stubborn and rebellious son".

Forinstance, if he ate at the ceremony in which the participants have gathered for the purpose of intercalating the month, he would not be held liable. But according to Bertinoro, at the intercalation ceremony they normally ascended only with wheat bread and beans, and the lad brought up meat and wine and ate. Yet, since he was engaged in a religious act, he would not be likely to go to excess. Likewise, if he ate the second tithe in Jerusalem he would not be liable. Since he eats it in the normal way, he is not likely to go to excess.[36]

"If He Ate Nebeloth Or Terefoth, Abominable Or Creeping Things. Raba said: If he eats the flesh of fowl, he does not become a 'stubborn and rebellious son'. But did we not learn: If He Ate Nebeloth Or Terefoth, Abominable Or Creeping Things...He Does

Not Become A Stubborn and Rebellious Son' Thereby. (This implies:) but if he ate (the flesh of) clean (fowl), he does?--The Mishnah refers only to the completion (of the necessary amount). The note to this section in the Socino translation of Sanhedrin points out that if he ate less than a tartemar of permitted flesh, and completed it by eating nebeloth etc. he is not punished. But if the whole tartermar was the flesh of clean fowl, he would also be exempt.[37]

If the boy's eating involved a religious act or a transgression, even though these were prescribed by the Rabbis, the boy would then be exempt. The Gemara explains that by a סעודת מצוה is meant the meal for comforting mourners; תענית ציבור means eating on a public fast day. Again, the Biblical verse is employed "he will not obey our voice: this excludes disobedience to God's voice.[38]

Maimonides points out in connection with the lad's stealing and eating food that even if he stole from his father and ate in another's domain if this eating was in connection with a relious act preseribed by the rabbis, he is exempt.[39]

In connection with food stolen from his own home and the place the lad chooses to consume this food, we have found many possibilities which exempt him from the law. We have found, for example, that if the boy steals at home and consumes the stolen stuff at home, he is not held liable. Ifhe steals away from his own home and eats the stolen stuff at home he is again not held liable. Furthermore, if he steals outside of his own home and eats the stolen stuff away from his own home he is not liable. In exempting the boy from liability in this connection, there is both the element of fear and also of the relative hardship in attaining his desire to steal. The Gemara points out that while it is easier to obtain the desired food in his father's domain the boy would necessarily fear the arrival of his father and consequently of being caught. On the other hand, while he is not as afraid to steal in the domain of strangers as he would be in his own home, this is not easily accomplished. A combination of these factors makes it relatively difficult for the lad to pursue an evil course.

Among the category of factors exempting the boy from liability are those which deal with the manner

in which the food has been prepared or the state in which the food is found. The Gemara states that he is not liable unless he eats raw meat and drinks undiluted wine.[40] Maimonides adds to this point the discussion concerning the state of the food: אוכל בשר חי ושתה יין חי בארי שנה קרי היסו ואין אדם יכול להמשך בכך

"If the boy eats raw meat and drinks unfermented wine he is exempt, for it was merely an accident; no man is able to go to excess therein." Furthermore, Maimonides with the Gemara points out that if one eats salted meat and drank wine from the vat, he does not become a "stubborn and rebellious son". For no one is likely to go to excess in this manner of eating.[41] Salted meat is meat that has lain in the salt three days and wine from the vat is wine that is still fermenting. This consumption of food and drinking of the wine must, according to Maimonides, take place at one eating or at one drinking otherwise he is not liable.

The Gemara in commenting on the statement of the Mishnah אם לאו היתה אמו הראויה לאביו אינו נעשה בן סורר ומורה

"If His Mother Is Not Fit For His Father, He Does Not Become A "Stubborn And Rebellious Son", questions what this "fitness" means. In coming to its conclusion the

Gemara decides that this "fitness" means that both parents must be physically compatible. R. Judah employs the Biblical phrase: If His mother is not like his father in voice, appearance and stature, he does not become a "stubborn and rebellious son". Scripture says: ואין קולו דומה אלא and since they must be alike in voice, they must be also in appearance and stature.[42]

We see that both parents must concur in the condemnation of their child as a "stubborn and rebellious son". The Mishnah states: "If either of them be maimed in the hands, lame, dumb, blind or deaf, he cannot become a בן סורר ומורה. For it is written: 'They Shall Seize' -- so they must not be lame; 'And Say' -- so they must not be dumb; 'This Our Son' -- so they must not be blind; 'He Will Not Obey Our Voice' -- so they must not be deaf."[43] The Mishnah clearly leans on the Biblical verses found in Deuteronomy XXI.19-20.

"then shall his father and his mother lay hold on him, and bring him out unto the elders of his city, and unto the gate of his place; and they shall say unto the elders of his city: 'This our son is stubborn and rebellious, he doth not hearken to our voice; he is a glutton and a drunkard.'"[44]

In connection with the procedure before the court, we have seen that the boy must have been warned in the presence of three witnesses and beaten. If, then, he again becomes delinquent he must be tried before a court of twenty-three judges among whom must be the original three who ordered the lashes. He cannot be stoned unless the first three witnesses are there to fulfill the implication of the Biblical phrase זה הוכה "this is he who was beaten in your presence".[45] Maimonides makes clear to us the point that after the testimony of the witnesses has been received, the boy must be examined to ascertain whether or not he has already reached the status of manhood, and/ or the three month period from the time of the boy's reaching the age of thirteen years and one day has not elapsed, he may then be punished according to the law of the "stubborn and rebellious son."

If the lad escaped before his trial was completed and subsequently he matures, he is no longer liable as a "stubborn and rebellious son". Maimonides adds the point that if the lad's father and mother

forgive him before judgment has been decided, he
is exempt.[46]

IV. CONCLUSIONS CONCERNING RABBINIC DEVELOPMENT

If one is to understand the penal code of the Hebrews, one must not rely soley upon the Pentateuch. It is necessary to turn to the traditional writings -- the discussions of the Rabbis; the ideas which Maimonides held upon this subject.

Our investigation of the subject of the זקן ממרא led us to the practical administration of this law. In the course of this investigation we have found that the original injunction as it appears in Deuteronomy XXI.20 had long before fallen into desuetude. However, throughout the whole of the penal code of the Talmud -- as in its various stages of development -- the Divine origin of the Hebrew legal system is never lost sight of.[1] The Jews, in the interpretation of their ancient laws, as in the application of new ordinances, were ever mindful of the Divine source of their system of jurisprudence.

"The Mosaic prescriptions, which in the course of time had fallen into desuetude, and had in fact become altogether obsolete, included many of the characteristic laws of the Pentateuch. Among such ordinances was the

injunction which determined the punishment of a "stubborn and rebellious son."[2] Or we may read with R. Simeon in the Gemara: "Because one eats a tartemar of meat and drinks half a log of Italian wine, shall his father and mother have him stoned? But it never happened and never will happen. Why then was the law written? -- That you may study it and receive reward."[3]

R. Jonathan, however, dissents from the opinion that there never was a "stubborn and rebellious son." He makes the statement in the Gemara that he actually saw a בן סורר ומורה 'I saw him (a rebellious son who was executed at his parents' demand) and sat on his grave'.[4]

The process in case of the "stubborn and rebellious son" as defined in the Mishnah and its Gemara reads more like juristic theory than actual practice. But the mitigating tendency is clearly evident. The Rabbinic discussion provides us with an insight into the ingenuity the interpreters of this law employed to render Deuteronomy 18-21 null and void. The Talmudic treatment consists almost entirely in lopping off one area after the other from the field of the law's application. Ultimately, the Biblical statute is cancelled completely.

The Talmudic and Maimonidean treatment of the law of the "stubborn and rebellious son" attempts mainly to diminish the period of responsibility to the law. Likewise the legalistic exactness employed by the Rabbis practically makes the law inoperative. The offence cannot be committed by a minor child -- Mishnah Sanhedrin 8.1; both parents must unite in the action -- Mishnah Sanhedrin 8.4; for a first offence the son is formally warned and flogged by the local court of three -- Mishnah Sanhedrin 8.4; if he continues stubborn he is tried before the court of twenty-three, but he can only be executed when the first judges are present -- Mishnah Sanhedrin 8.4. The penal code of the Hebrews remained unchanged -- but the practical application of its various laws assumed new meaning for the rabbis.

The requirements which the rabbis stipulated must be present for a lad to be guilty as a "stubborn and rebellious son" were numerous. Their very number and character made conviction as a בן סורר ומורה extremely difficult. The penalty for being guilty under the law was probably obsolete long before these circumstantial procedures were defined in the second century. About this time a number of the Mosaic

ordinances had become utter anachronisms. Some were perfectly impracticable. Yet the Rabbis in dealing with these laws never cease to presuppose the Divine origin of the Hebrew legal system. They accordingly employ various devices to circumvent the law as originally formulated in the Pentateuch.

V. COMPARISON WITH MODERN IDEAS ON CHILD CONTROL

"Somewhere in the neighborhood of 100 years ago a 12-year-old boy was sentenced to death in London. Inexorable justice, as conceived in that day, took account of the law and the crime and ignored the age and circumstances of the offender. The sentiment of human pity was not wanting, however, and the reporter indulged in verse to describe the heart-rending scene:

> Whe he was sentenced at the bar,
> The court was drowned in tears,
> To see a child so soon cut off
> All in his tender years.

Public opinion gradually prevailed against a system which made little or no distinction in the treatment of children and adults when guilty of the same offenses and sought a more constructive method of dealing with young delinquents. The old concept that justice could be done only when all persons were treated alike was abandoned in the treatment of children for the newer idea that justice could be achieved only when all were treated differently. In theory, for the juvenile at least, justice had had her eyes unbandaged."[1]

In the address of the Honorable Frederick P. Cabot at the White House Conference Meetings on the Delinquent Child, it was pointed out "that we live under a government of laws and not of men...Our inherited ideas and basic cultural attitude, as crystallized in the criminal law, were stated fifty years ago by Mr. Justice Holmes...of the Supreme Court of the United States...

> 'For the most part, the purpose of the Criminal Law is only to induce external conformity to rule, (and the state) is ready to sacrifice the individual so far as necessary to accomplish that purpose....'

Since that statement was made there have been great changes, a period of rapid growth, of countless new discoveries, new ways, new cultural attitudes. Outside the law there was a steady development in humanism. About the beginning of the twentieth century this had marked influence in the law. We have been coming through a period of growth in allthings, particularly in the law. New attention has been given to the study of people."[2]

For a historical perspective on the treatment of juvenile delinquents, Henry W. Thurston, in his recent volume Concerning Juvenile Delinquency, cites the sentences pronounced by judges in England in 1819 and 1821: on a fourteen -year-old boy who stole a cotten gown, value two shillings, "Seven years transportation"; on a thirteen-year-old girl for stealing a hat, "To be imprisoned six months"; on two boys, eleven and thirteen, accused of stealing about seventeen shillings, "Guilty--Death."[3]

To show the legal basis for the various

punishments cited, Thurston quotes from the classical legal authority, Blackstone, relating to the punishment in England of youth of different ages for felonies:

> By the law as it now stands, and has stood at least ever since the time of Edward the third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. For one lad of eleven years may have as much cunning as another of fourteen; and in these cases our maxim is, that "malitia supplet aetatum." Under seven years of age indeed an infant cannot be guilty of felony; for then a felonious discretion is almost an impossibility in nature; but at eight years old he may be guilty of felony. Also, under fourteen, though an infant shallbe prima facie adjudged to be doli incapax; yet if it appear to the court and jury, that he was doli capax, and could discern between good and evil, he may be convicted and suffer death. Thus a girl of thirteen has been burnt for killing her mistress, and one boy of ten, and another of nine years old, who had killed their companions, have been sentenced to death, and he of ten actually hanged; because it appeared upon their trials that one had hid himself, and the other had hid the body he had killed, which hiding manifested a consciousness of guilt, and a discretion to discern between good and evil. And there was an instance in the last century, where a boy of eight years old was tried at Abington for firing two barns; and it appearing that he had malice, revenge and cunning, he was found guilty, condemned, and hanged accordingly.[4]

For a comparison between the attitude in the United States and that held in England, Thurston cites from the report of the State of New Jersey Juvenile

Delinquency Commission this general statement as to death penalties:

> Until about a century ago there was very little distinction in the treatment accorded offenders against the rigorous criminal laws, whether these were children of tender years, youths, or adults. Mere children have been hanged for a variety of offenses. Under the general laws adopted by the Plymouth Colony, death was the penalty for sixteen different offenses, some of them particularly pertaining to children. A child convicted of assaulting or cursing his parents of of persistent disobedience or stubborness was to be hanged....This provision was included in the criminal code of the Province of East Jersey adopted in 1688.[5]

We learn that it was not until the latter of the nineteenth century that any definite action was taken to change the court procedure and the treatment of juvenile delinquents. The first official step was made in Massachusetts in 1869, when a law was passed requiring the governor to appoint a visiting agent who was to work, not for the punishment of the child, but for the child's welfare. Before any child under the age of sixteen could be committed to jail or to an institution, notice had to be given to the visiting agent. The following year separate hearings were required for the trial of juvenile offenders. New York, Rhode Island, and a few other states followed the example set by Massachusetts by providing for the separate hearings of children's cases. While these steps were made in some

states to help remedy the treatment of juvenile delinquency, conditions were still very bad as late as 1898. Again we notice that Massachusetts was among the pioneers to shift to needed reforms in the procedure preceding punishment or conviction. The reforms took the shape of special personnel, social investigations, and the gradual relaxation of the strict, technical criminal procedure when applied to child offenders.

Toward the close of the last century, a number of states adopted many of these features or contributed still others to the general movement to humanize justice which culminated in the juvenile court. Doctors Sheldon and Eleanor Glueck, who are prominent co-workers in the field of juvenile delinquency, point out that all the contributions to the general modification of procedure and administration in children's cases were primarily stimulated by a growing humanitarianism, and only secondarily, and more recently by a scientific attitude toward misbehavior and its motivations.[6]

The first court created to deal specifically with problems of juvenile delinquency was the Juvenile Court of Cook County, Illinois, established in 1899. An observation into the treatment of juvenile delinquents in Chicago previous to that year, is given by

Timothy D. Hurley, a Chicago lawyer who was the first chief probation officer of the new juvenile court.

> Until then, July 1, 1899, the law viewed mankind, its varied distinctions as to sex, age, environment and mental equipment notwithstanding, as a single class. Before the bar of a criminal court there was no difference, from the viewpoint of the law, between the adult and the infant. It is true that in the administration of the law, magistrates moved by feelings of humanity and oftentimes ignoring declared legal principles, leaned to the side of mercy and sympathy, and shaped their judgments in accordance with charity and common sense, and in defiance of the medieval rigor of the courts which were often influenced by the dictates of vengeance for so-called offenses against society, without taking into account the peculiar circumstances and mental condition affecting the accused, who was in truth, in too many instances, alas, more sinned against than sinning. But for such manifestations of humanity the law was not to be thanked. The judge folowed the promptings ofhis heart and not of his head. Too often because of absolute absurdities which hampered the law, what kindness dictated was in fact prohibited by the cold, heartless, unrelenting canons of jurisprudence. To reconcile this contradiction, or rather to abolish it, was the task essayed by the projectors of the juvenile law. To obtain a closer view of the ludicrous procedure referred to, let us examine it in detail. When charged with a so-called criminal offense, it might be the stealing of an apple, which his childish appetite craved, or the picking up of a few lumps of coal to warm shivering brothers and sisters at home, no matter what it was, the child was arraigned at the same bar, under the same law, with circumstances similar, every one of them, to those which would attend the trial of the most hardened criminal charged with the most heinous offense. If a boy was arrested for

> something which the law books termed a felony, and he was over ten years of age, he was taken before a grand jury and indicted. Then he was tried before a petit jury, the theory being (oh, blessed reverence for precedent and Magna Charta!) that the little fellow should not be deprived of his liberty without first being convicted by a jury of his peers. Imagine the solemn farce of proceedings where the child rarely understood a scintilla of their nature or purpose.
>
> But he was convicted, the LAW convicted him, and the LAW branded him with a brand as indelible as if it was seared into his forehead with a hot iron. Henceforward, among men, he was a CRIMINAL. No matter where he went, no matter how long he lived, foul taint of the convict remained with him. The LAW with all the solemnity of judge, jury, bailiffs and frenzy-consumed prosecutors, proclaimed him a CRIMINAL, that is, an enemny to organized society, and nothing short of a miracle prevented the child from growing up to verify this description in the fullest manner possible. Conviction for the diminutive prisoner meant ruin--ruinas certain and unerring as if the virus of crime could be injected into his childish blood. For society it meant an additional costly incubus, another enemy to be fought with police and prisons, another zealous missionary in the grand army of the devil.[7]

As we have already seen, before the establishment of the juvenile court system children were tried and treated the same as adults in criminal courts. Children under seven years of age were eleminated from the general jurisdiction of the court. They were regarded as not responsible for their acts. In some states the age limit was raised to ten and in a few to twelve years. After these ages had been reached the law made no

distinction. If a child had been charged with some specific criminal act, the whole matter was presented to a jury and the question for the jury to answer was, "Is the accused guilty or innocent of the specific crime with which he is charged?" If found guilty, the child was sentenced the same as any other offender. With the establishment of the juvenile court an entirely new procedure was instituted in handling children's cases. The ideal juvenile court now asks the questions, "What are you?" "How have you become what you are?" "Whither are you tending, and how can we direct you?"[8]

The purpose of the juvenile court, according to Clinton W. Areson, is not necessarily to discover whether the child has committed a specific crime, but to aid him in meeting his needs normally, practically, and in harmony with the higher ideals of the community.[9]

The legal basis of procedure of the juvenile courts is based upon equity or chancery jurisdiction. Equity courts stand for flexibility, guardianship and protection rather than rigidity and punishment. Various state supreme courts haved upheld this interpretation of the juvenile court laws, and they have permitted them to exercise their chancery powers of "parens patriae" to

protect children. The supreme court of Pennsylvania has stated, that:

> To save a child from becoming a criminal or from continuing in a career of crime, to end in maturer years in public punishment and disgrace, the legislature surely may provide for the salvation of such child, if its parents or guardian be unable or unwilling to do so, by bringing it into one of the courts of the state without any process at all, for the purpose of subjecting it to the state's guardianship and protection.
>
> The action is not for the trial of a child charged with a crime, but is mercifully to save it from such an ordeal, with the prison or penitentiary in its wake, if the child's own good and the best interests of the state justify such salvation. Whether the child deserves to be saved by the state is no more a question for a jury than whether the father, if able to save it, ought to save it. The act is but an exercise by the state of its supreme power over the welfare of its children.[10]

Yet, in a statement made by Dean Roscoe Pound as cited by the Gluecks in their book <u>One Thousand Juvenile Delinquents</u>, we find this point of view:

> On the other hand, it must be remembered that the English courts of equity never presumed to have jurisdiction over children because they vidated the <u>criminal</u> law. Hence American decisions purporting to find in English chancery authority the justification for the power of juvenile courts over delinquent, as opposed to neglected or dependent, children seem to be partially <u>ex post facto</u> legal rationalizations of practices of certain humanitarian judges in criminal cases involving juveniles.[11]

Perhaps, it was a combination of factors such

as we have noticed above which brought the juvenile court and its accompanying humanitarian action into being. "The idea that the community is the final arbiter of parental rights and duties and the idea that the child who has begun to go wrong, who is incorrigible, and has broken a law or an ordinance, is to be taken in hand by the state not as an enemy but as a protector, as the ultimate guardian, because either the unwillingness or inability of the natural parents to guide the child toward good citizenship has compelled the intervention of the public authorities."[12]

While the motivation of the procedure of the juvenile court system is "protection based on understanding rather than punishment based on the establishment of a technical status of guilt"[13] nevertheless, the legal machinery to carry these procedures out varies in the several states.

Sullenger reports that one-third of the states extend their jurisdiction to children under sixteen, one-third to children under seventeen, and most of the remaining third to children under eighteen. Likewise, most of the states allow jurisdiction to continue during the child's minority if jurisdiction is taken by the juvenile court before the maximum age is reached. The age limitation

variations is decribed by H.H.Lou as follows:[14]

> A juvenile court law defines the legal meaning of "a child." The age limit under which a court may obtain jurisdiction in children's cases varies from sixteen to twenty-one years in different states. The age limit for all classes of children of both sexes is eighteen in fourteen states, seventeen in four states, sixteen in thirteen states, and nineteen in one state. Twenty years as the age limit is adopted for boys in Maryland except in the city of Baltimore. Twenty-one years, the highest age limit, is adopted in Arkansas (jurisdiction is concurrent with criminal courts) and California (jurisdiction is exclusive to eighteen only). In all other states, a distinction in age limit, ranging from sixteen to eighteen, is made according to sexes, classes of children, and, in a few instances, localities. Whenever a distinction is made, the age limit for girls is usually higher than that for boys, and the age limit for dependent and neglected children is usually lower than that for delinquent children. True to the purpose of the juvenile court there is generally no minimum age limit under which the court cannot take cognizance, but in a few places, such as Newark, Buffalo, and New York City, a minimum age limit, usually seven years, is fixed by law. In view of the inconsistent disparity of age limit among states, there seems no sound reason for not adopting a uniform age limit for all classes and both sexes. The tendency of the more recent statutes has been to increase the age limit to the eighteenth birthday in conformity with the recommendation of the committee appointed by the United States Children's Bureau in 1921 to formulate juvenile court standards.

The juvenile court laws in most of the states cover dependent, neglected and delinquent children. However, Walter A Lunden in his Systematic Source

Book in Juvenile Delinquency points out that the term "delinquency" has no uniform and commonly understood meaning. Just what constitutes "delinquency" depends upon the statute of each state. Legally delinquency is one thing, but socially it is another. The White House Conference reflected the popular conception of delinquency.[15]

> "The Committee agreed that in general delinquency has meant merely apprehended delinquency...Delinquency is any such juvenile misconduct as might be dealt with under the law."

While the wording of this definition is "apprehended delinquency" the purpose is to meet the problem before "delinquency" arises.

Massachusetts statute defines the term as a child "between seven and seventeen who vidates any city ordinance or town by-law or commits an offense not punishable by death or by imprisonment for life." (General Laws of Massachusetts, 1932, chap.119, Sec.52).

While delinquency is thus defined the Statute in the next section qualifies the situation. Children brought into the court "shall be treated, not as criminals, but as children in need of aid, encouragement and guidance... proceedings against...children shall not be deemed criminal proceedings." (Ibid., Sec. 53.)

The definition of Delinquency is made broader when the jurisdiction of the court is further explained. This relates to the "Wayward Child" which is also subject to the jurisdiction of the Juvenile Court in Massachusetts.

> "Wayward child" is one "between seven and seventeen years of age who habitually associates with vicious or immoral persons, or who is growing up in circumstances exposing him to lead an immoral, vicious or criminal life." (Ibid., Sec.52)

While the wayward child, technically is not a delinquent child, the Juvenile Court has jurisdiction in both instances.

In order to know the exact meaning of the term delinquency it is necessary to consult the General Statute of each state. The Pennsylvania General Assembly of 1933 in Act Number 312 defined the terms "delinquency" as follows:

> "The words 'delinquent child' shall mean a child--
> a. who violates any law of the State or any ordinance or regulation of any subdivision thereof, or
> b. who is habitually disobedient or beyond the control of his parents or other lawful authority, or
> c. who so deports himself as to injure or endanger the morals, health or general welfare of himself or others."

The Wisconsin Statute of 1933 defines delinquency as follows:

> "The words 'delinquent child' shall mean

any child under the age of eighteen years who has violated any law of the state of any county, city, town or village ordinance; or who by reason of being wayward or habitually disobedient is uncontrolled by his parent, guardian or custodian; or who is habitually truant from school or home; or who habitually so deports himself as to injure or endanger the morals of health of himself or others." (Laws of Wisconsin, (Statute, 1933), State Board of Control of Wisconsin, 1934, p.571.)

The New York Statute of 1924 defines "delinquent Child" as follows:

"The words 'delinquent child' shall mean a child over seven and under sixteen years of age who violates any law of this state or any ordinance of the city of New York, or who commits any act which if committed by an adult would be an offense punishable otherwise than by death or life imprisonment; who is incorrigible, ungovernable or habitually disobedient and beyond the control of his parents, guardian, custodian or other lawful authority; who is habitually truant; who, without just cause and without the consent of his parent, guardian or other custodian, deserts his home or place of abode; who engages in any occupation which is in violation of law; who begs or solicits alms or money in public places; who associates with immoral or vicious persons; who frequents any place the maintenance of which is in violation of law; who habitually uses obscene or profane language; or who so deports himself as willfully to injure or endanger the morals or health of himself or others." New York Laws 1924, Chap.254.

H.H. Lou has combined the juvenile court statutes in the several states in formulating the following legal definition[16] of the term:

A delinquent child is commonly defined by statutes

as any child under a certain year of age who

1. violates a state law or local ordinance (offenses which, if committed by an adult, are punishable by death or life imprisonment are often excepted);
2. is wayward, incorrigible, or habitually disobedient;
3. associates with thieves, criminals, prostitutes, vagrants, or vicious persons;
4. is growing up in idleness or crime;
5. knowingly visits a saloon, pool room, billiard room, or gambling place;
6. knowingly visits a house of ill fame;
7. wanders about streets at night;
8. wanders about railroad yards, jumps on moving trains, or enters any car or engine without authority;
9. habitually uses or writes vile, indecent, or obscene language;
10. absents himself from home without just cause or without the consent of parent or guardian;
11. is immoral or indecent; or
12. is an habitual truant.

"we regard this so-called delinquent child as a mis-directed normal human being. He represents a cross section of juvenile society. His potentialities are expressed in terms of his individual or group stimuli. If his behavior happens to be in harmony with the prevailing ethical standards of society his conduct is approved, but if he deviates from these standards he is classed as a social problem or a "delinquent". He comes into conflict with the laws of the state because they are merely the crystallized mores or standards of society at a particular time...a knowledge of the causation of his delinquency is of greater importance than a categorical classification of delinquents or their offenses...a recognition of human

values, as expressed in terms of sympathy, personal understanding, imagination, tact and courtesy, and a desire and willingness to help persons in difficulty or distress are more important in dealing with delinquency than mechanical perfection."[17]

In order to deal with the problems confronting the mis-directed and delinquent child, socially-minded and humanitarian leaders created the juvenile court system. The full extent of the role they may play in the treatment of delinquency has not yet been fully understood. As stated in the White House Conference report on The Delinquent Child, "Their primary function hinges on the fact that they are not looking outwardly at the act, but scrutinizing it as a symptom, are looking forward to what the child is to become."[18]

The court is concerned to understand why the particular child is delinquent, and, on the basis of this understanding, to attempt intelligent treatment for proper adjustment toward responsible future living.

"We want to say to the child," declared one of the speakers in the course of the debate on the Children's Bill in the House of Commons, "that if the

world or the world's law has not been his friend in the past, it shall be now. We say that it is the duty of this Parliament, and that this Parliament is determined to lift, if possible, and rescue him; to shut the prison door and to open the door of hope."[19]

CONCLUSION

Through the study of various passages in Biblical and Rabbinic literature, the author of this thesis has attempted to ascertain the traditional Jewish viewpoint on the subject of juvenile delinquency. After investigating the Jewish sources for references to the problem of juvenile delinquency, the author then turned to the contemporary aspect of this problem; the object being to draw some comparison between the Jewish viewpoint and modern ideas on child control.

The Biblical basis for our study is the the law in Deuteronomy 21.18-21 relating to the death penalty imposed upon the youngster who commits gluttony and inebriacy. This law is found as late as the year 1672 in the Connecticut Code (General Laws 1672, p. 9, sec. 14, 15.) as the basic definition for a juvenile delinquent.

The corresponding Talmudic discussion consulted in reference to our problem was the section in Sanhedrin 68b to 71b. The Maimonidean formulation in connection with the "stubborn and rebellious son" is found in the Maimonidean Code Ya Ha-Hazakah, Book 14, Topic Mamrim, Chapter VII.

For the study of the contemporaneous literature in connection with the problem of juvenile delinquency, the author consulted a number of the authorities on the subject. Their respective works are to be found in the bibliography for this section.

After comparing these two main sources: (1) traditional Jewish literature and (2) the contemporaneous literature on this subject; we find that the two have virtually nothing in common. The basic thought and sentiment of the modern views and the traditional Jewish views are found to be poles apart from one another. However, we are able to discover an underlying humanitarianism both in the traditional Jewish viewpoint and the modern viewpoint in regard to the problem of juvenile delinquency.

The Talmudic treatment as we have noticed in section three of our study consists in lopping off one area after another from the field of operation of the law of the "stubborn and rebellious son". The mitigating tendency is clearly evident therein. Finally the Biblical statute is completely cancelled. We discover that the essence of the Rabbinic position is that of contriving, behind a guise of legalistic exactness, to give humaneness such scope as to wipe the

Biblical law our of existence.[1]

In connection with the modern ideas on child control, we noticed that originally the fundamental thought in criminal jurisprudence even as it dealt with the juvenile delinquent was not reformation of the criminal, but punishment; punishment for his wrong-doing; punishment as a warning to other possible wrong-doers. However, during the last century ameliorating influences have mitigated the severity of this viewpoint. We have seen how the juvenile courts have been able to take the cold letter of the statutes, and to build up and incorporate into them an unwritten law of social service based on human understanding.

The Talmudic treatment of the law of the "stubborn and rebellious son" contains the note of an underlying humanitarianism. The same humanitarian note was sounded in the establishment of the juvenile court movement. In this spirit was the law in Deuteronomy 21.18-21 interpreted and administered; in this spirit are we dealing with the problem of our delinquent children today.

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2. Driver, S.R., A Critical and Exegetical Commentary on Deuteronomy, New York, 1895, p. 247.

3. Ibid., p. 247.

4. Smith, G.A., The Book of Deuteronomy, Cambridge, 1918, p. 257.

5. Hertz, J.H., (editor) The Pentateuch and Haftorahs, London, 1938. p. 841.

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1. M. Sanhedrin VIII. 1.

2. Ibid., (Bertinoro).

3. Maimonides VII.5.

4. Ibid., VII.5.

5. Ibid., VII.5.

6. Sanhedrin 69a line 14.

7. Maimonides VII.6.

8. M. Sanhedrin VIII.1.

9. Sanhedrin 69b lines 52ff

10. Maimonides VII.11.

11. Ibid., VII.12.

12. M. Sanhedrin VIII.4.

13. Ibid.

14. Maimonides VII.5.

15. Sanhedrin 70a line 16.

16. Ibid., Line 17.

17. Sanhedrin (Soncino Translation) . 475 note 4.

18. M. Sanhedrin VIII.3.

19. Ibid., (Bertinoro).

20. Sanhedrin 71a lines 14-19.

21. Sanhedrin (Soncino Translation) p. 482. note 1.

22. Sanhedrin 70a lines 18-24.

23. Maimonides VII.2.

24. Sanhedrin 70b lines 22-25.

25. Ibid., lines 37-39.

26. M. Sanhedrin VIII.4.

27. Sanhedrin 71b lines 1-3.

28. M. Sanhedrin VIII.4.

29. Maimonides VII.7.

30. M. Sanhedrin VIII.4.

31. Maimonides VII.9

32. See above section II. p. 7.

33. M. Sanhedrin VIII.1.

34. Maimonides VII.1.

35. Ibid., VII.1.

36. Sanhedrin 70b line 38.

37. Sanhedrin (Soncino Translation) p. 480, note 5.

38. See above section II. p. 16.

39. Maimonides VII.2.

40. See above section II p. 10-11.

41. Maimonides VII.4.

42. Sanhedrin 71a lines 23-25.

43. M. Sanhedrin VIII.4.

44. The Holy Scriptures. (JPS Translation) Deut. XXI.19-20.

45. See above section II. p. 17.

46. Maimonides VII.8.

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2. Ibid., p. 19.

3. Sanhedrin 71a line 32.

4. Sanhedrin 71a line 32.

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Conclusion

1. This explanation I owe to Professor Abraham Cronbach

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