

Overeating, Overdrinking, & Disobeying your
Parents: The Halakhic Challenge

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Abstract: *This thesis examines the development of the law of the stubborn and rebellious son (Deut. 21) from its Biblical origin through the Halakhic process. There are two goals achieved by this thesis. The first is to demonstrate the evolution of Halakha and to explain the relevancy of this halakha in a modern context. The second is to draw conclusions for Jewish law in general and more specifically for the continued study of Jewish literature in a Reform Jewish context. In the first chapter, the law in the Bible and scholars' treatment of it is presented in order to ground and analyze this cornerstone of the Halakhic process. The chapter examines the difficulty generated by the inconsistency within the Biblical text. In addition, this chapter explores multiple strategies for reconciling this difficulty. The second chapter is a survey of significant themes that arise in the development of the halakha of the stubborn and rebellious son. In specific, it highlights the debates of the sages of the Mishnah and the Gemara in chapter eight of tractate Sanhedrin. These debates reveal a discomfort with the enforcement and application of the law of the stubborn and rebellious son. Additionally, the second chapter continues to trace the themes of the early Halakhic discourse through later codes of Jewish law. The third chapter addresses in detail three Halakhic issues that are raised in the previous two chapters. The first part examines the failure of the law of the stubborn and rebellious son to transform and save the offender. The second studies the issues of criminality and intent and their role in the application of the law. The third is the issue of predicting future criminality. The fourth chapter presents two significant conclusions. The first concerns the charge within this material to continue studying the text rather than apply it as law. The second presents an argument that the study of this law may produce an 'ethic of interpretation' whose essence is the struggle with a fixed text, and the effort to reconcile the words of the Biblical text with our evolving sense of justice.*

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Introduction

Disobeying parents, overeating, and overdrinking are a bad idea. Many are aware of the Bible's dictum to honor one's parents and to not insult them. On the other hand, overeating and overdrinking may seem more commonplace. Certainly, gluttony and drunkenness have been associated with godlessness, or simply bad behavior. In a Jewish context, it may seem that overindulgence in food and drink are part of certain holidays and celebrations. But, despite these loosely associated labels and views, these three behaviors might have more in common than you would have assumed before reading this thesis.

The tradition of studying the Bible continues in every Jewish community today in vastly different ways. That activity of study is not unique to Judaism, but the results may, in fact, be more than uniquely Jewish; they may define a primary activity of Jewish life. The pursuit of comprehending how and why the Jewish people have made choices about canonizing the Bible, reading the Bible, and commenting on the Bible, takes us on a journey to understand and know the Jewish perspective on many issues and ideas. The Jewish perspectives on disobedience to parents, overeating, and overdrinking are painted into one large picture by the halakha of the stubborn and rebellious son.

The authors of Jewish law have made decisions in producing, reading, and understanding the Bible that make up the development of Halakha, and many of us feel personally charged to continue to question and challenge much of its text. This kind of study has long been associated with a task of deriving law from the Bible. Jewish law's constitution is the Bible. How Jews have read the Bible informs the Jewish legal system

in each generation. This is an interpretive process that seeks to know how to apply the laws of the Bible and understand their purposes. This process is called Halakha, which may be described as, “an arena of discussion in which the generations converse with one another, forward and backward in time, in a never-ending argument.”¹ The study of this process is not easy, and it requires time, effort, and engagement in order to learn from its dialectical discourse.

The Bible maintains a distinctive place as the basis of all of Jewish law. The text of the Bible presents many laws and how to apply them. Because the Bible itself makes a claim of Divine origin, by definition, its content is just. The assumption inherent in the Bible is that these laws are meant to be applied. It is our interpretive failure if the law’s application does not demonstrate justice. This process uses the Bible as its constitutional text, and therefore, demonstrates its unique value in the evolution and study of Jewish law. The struggle is the constant aim of finding justice in the conclusions of that development. The law of the stubborn and rebellious son is a case that demonstrates this struggle. From the beginning of this process to the text before you, it is continually present in the rabbinic writing on the subject. This struggle raises a number of ideas and themes for our study and consideration. Our study will hopefully lead to greater understanding of the unfolding of Jewish law and an appreciation of our notion of justice vis-à-vis the requirements set out by Jewish law texts.

Our examination of the law of the stubborn and rebellious son will highlight our need to see justice done, while remaining true to the letter and the spirit of the law. In making claims about how to administer justice based on the laws of the Bible, the

¹ Mark Washofsky, *Jewish Living: A Guide to Contemporary Reform Practice* (New York, NY: UAHC Press, 2001), xviii.

rabbinic writing creates an intricate system of laws based on the *mitzvot* of the Bible paired with an equally complex litany of punishments for damage caused by transgression. One of the main aims of this system of punishments is an attempt to protect the community from harm. This is another major theme of Jewish law in general, and of the rabbinic writing about the law of stubborn and rebellious son. So, rabbinic writings reflect divergent interests: 1) to punish transgressions and 2) to protect the community from the damage that may be caused by transgressions before they occur. These two goals of Halakha are operating together and the law of the stubborn and rebellious son is a showcase of negotiating this balance.

The previous two paragraphs present the core issues of what we will learn by studying this law, which is the balance of values in tension. The journey we are about to embark on will trace the evolution of the law of the stubborn and rebellious son. The main stops on this itinerary include understanding the Biblical law, reading the Talmudic chapter entitled *בן סורר ומורה*, examining related themes in the Post-Talmudic Halakhic literature, and inquiring into work of modern scholars on this law. In the following pages, I will identify the major themes raised in this thesis. In addition, I will describe the methodology and strategy employed in this process. Finally, I will allude to the conclusions drawn at the end of the manuscript before you. All of this is an attempt to provide you with a rough map of the road ahead. The nature of this material is quite complex and extremely technical in parts, but I am confident that there are valuable lessons to be learned in studying this material, and hopefully by reading this thesis. The law of the stubborn and rebellious son in its Biblical form leaves many questions unanswered, and this thesis will examine those questions, some of their responses, and

the values observed in the process. As stated above, the Halakha begins in the Bible. In the Book of Deuteronomy, we read this law and recognize the complexity of its conditions and we take notice with two issues within its text. One is confusion about how to apply this law because it seems to contradict a principle of Jewish law; a second is that its own inconsistency makes the application difficult, if not impossible. At first glance, it may seem that the text of the law of the stubborn and rebellious son contradicts the widely held policy of Jewish law that minors are not liable for the *mitzvot*. Therefore, since the subject of this law is a son and indicates he is a minor, an interpretive process must begin in order to reconcile this contradiction. The Biblical law of the stubborn and rebellious son is difficult to read because its four short verses are inconsistent. Despite its casuistic (*if-then* statement) formulation, the protasis and apodosis are not mirror images of one another.² This makes it quite difficult to precisely determine the conditions required to punish for breach of this law.

Additionally, there is a question of the application of justice in this law. We understand that justice is the administration of the law in an attempt to right wrongs, repair (or remunerate for) damage, and mete out punishment for transgression. The law of the stubborn and rebellious son, however, provides a different model; it is one, as we have already mentioned, from a slightly different perspective, which is to protect the community. The final verse of this law states that its purpose is to sweep out evil from the midst of the community.³ This does not say anything about righting a wrong, repairing damage caused by a transgression, or punishing for an act committed. Rather, it serves as a protective measure for others in the Israelite community to learn from. This

² Joseph Fleishman, "Legal Innovation in Deuteronomy 21:18-21," *Vetus Testamentum*, 53, no. 3 (2003): 311.

³ Deuteronomy 21:21.

idea later gives rise, perhaps, to the enigmatic statement in the Gemara that this law was not meant to be applied, but it was meant to be studied in order to receive a reward.⁴

From this statement, some may derive an argument that the study of the law provides its own virtue without its application. Some who have written about this law state that, “There is also the concept that the Torah should be studied for its own sake, without regard to its practical value. Stated another way, studying the word of God is its own virtue.”⁵ Whether the purpose is for the law to be studied for its own sake or if it is meant to be applied, is left for the next layer of rabbinic writers to argue. This is a theme of the thesis that runs throughout its text, and the manuscript before you will guide you to my conclusion that the law is not meant to be applied as it is written; rather, the study of it presents various themes and ideas to be applied as tools for determining justice and differentiating a system that seeks justice from one that prevents damage in the future.

The purpose of law is another theme explored in this thesis. The strategy in this regard encompasses two goals. One is to determine, as alluded to above, the purpose of law in general: to establish a system of punishment for certain crimes or to prevent future harm or damage. Additionally, there is an aim to know the purpose of this law of the stubborn and rebellious son. This is similar to the “spirit” of the law, which we often hear in regards to aspects of the American legal system. Knowledge about the purpose of the law allows us to better understand how it may be applied. Additionally, when this awareness about its aims is applied, justice is better served based on the assumption that the Divine law is inherently just. One of the interesting features about the purpose of the law of the stubborn and rebellious son is its altered application from the classical view of

⁴ BT Sanhedrin 71a.

⁵ Yale and Irene Rosenberg, Bentzion Turin, “Return of the Stubborn and Rebellious Son: An Independent Sequel on the Prediction of Future Criminality,” *Brandeis Law Journal*, 37, no. 4 (1998-9): 572.

implementation to the purpose of study. This altered application leads to various ideas about what that curriculum of study might be, and what its own enduring understandings may teach us. What we will see throughout this journey is that we are engaging, through learning about and studying this law, in that purpose of study. This activity has its own merits. One of them is to gain a better and more complete view of the Jewish perspective on various themes we recognize within the material.

Earlier I mentioned that the rabbinic writing about the law of the stubborn and rebellious son illustrates a balance between two goals of Jewish law. This balance reflects a tension between two values of Jewish law. I have already mentioned that two purposes of law are to prevent future harm and damage and to punish for crimes committed. This raises the issue of two opposing values when they are viewed in the context of this material. That is the value of preserving life versus the value of realizing the law (when life is threatened through that realization). The interpretive process, which begins in the eighth chapter of Mishnah Sanhedrin, links two other subjects that may seem unrelated to the law of the stubborn and rebellious son, but they are connected by this idea of values in tension. Additionally, these latter two subjects express these themes that exist in the material relating directly to the *בסור"מ*. One of the common threads is the aim of law in general to prevent future crime and damage to the community. While this operates differently in the distinct sections, it is present as a unifying feature. We will examine the focus of this idea of preventative measures within the law, and specifically in the way they demonstrate the realization of justice. As I mentioned above, the Bible is inherently just because it is of Divine origin. However, the law of the stubborn and rebellious son, in its expression of the competing values, questions the justice in the law.

In the attempt to balance the preventative measures with the need to punish transgression, there rises a need to address the issue of justice in Jewish law and the law of the stubborn and rebellious son. The rabbinic writing addresses the question of whether or not it is a just measure to accuse, try, and convict the youth based on his future behavior while basing that presumption on his past activities. Additionally, the authors of Jewish law recognize the stubborn and rebellious son's inability to correct his behavior through the judicial procedure put in place to transform him. This assumes that Jewish law serves to transform the individual to lead a life that realizes the law and is devoted to the values the system espouses. The stubborn and rebellious son is a troubled youth who has addictive tendencies that cannot be altered by way of punishment that aims to rehabilitate the offender. The idea presented in this thesis is that rabbinic writing demonstrates a level of discomfort with punishing this youth for his addiction.

Furthermore, one view is examined that equates the youth's behavior with a Biblical conception of psychopathy. Following this theory, the law of the stubborn and rebellious son not only punishes one for being an addict by execution, but it makes a claim that psychopathy is a capital crime. The Halakhic writing about this law eventually limits its applicability, and therefore may demonstrate this uneasiness of the sages with punishing either an addict or a psychological disorder with capital punishment.

The previously mentioned themes –study for its own virtue, application of the law, the purpose of the law, the issue of justice, and the balance of values in tension – raise multiple Halakhic issues that are examined in this thesis in light of the *בס"מ*. In the third chapter, there are three sections that present and examine these issues. The first is the failure of law. In the previous paragraph, I mentioned the law's inability to transform

the youth's behavior. If the law seeks to rehabilitate the offender, then this indicates that the law fails to meet its own goals. But, additionally, there is an issue that law has reached a boundary in its ability on a much larger scale. This rises out of the difficulty the sages had, as was also assumed in the previous paragraph, in punishing addiction or psychopathy. Perhaps this represents a limit of the efficacy of law to legislate punishments that both demonstrate justice and prevent future harm, all while protecting the victim. A second area of study about the Halakhic issues involves those of criminality and intent. This section considers the nature of the stubborn and rebellious son's criminality. In addition, the intention of the potential transgressor is presented in order to better understand the purpose of the law and its possible application. The final issue is the prediction of future criminality, and the law of the stubborn and rebellious son clearly presumes the youth's future criminality and on that basis he is convicted.⁶ These three areas of inquiry frame the law of the stubborn and rebellious son in a way that builds upon the second chapter.

By the conclusion of the thesis, it is my hope that you will have grounded yourself in the material and the study of it in a way that reinforces your Jewish perspective of Jewish law, justice, and the evolution of Halakha. This thesis will demonstrate that the halakha of the stubborn and rebellious son has evolved over time. Furthermore, it will establish the idea that Halakha in general evolves in order to continually balance the various values in tension reflected in the rabbinic material and this thesis. Most specifically, you will understand how rabbinic writing about the stubborn and rebellious son presents this struggle as an attempt to address the issue of justice and maintain it as an assumed goal inherent in the law.

⁶ Mishnah Sanhedrin 8:5, BT Sanhedrin 71b.

Before turning to the material let us consider the methodological issues that arise in this thesis. The first chapter examines the Biblical text itself using modern scholarship to understand more clearly its meaning, application, and purpose. While this may not be a classical Jewish approach, it is essential to a Reform Jewish perspective for multiple reasons. The first is the belief that, as Reform Jews, we read our texts critically. This requires that we dissect them with the help of modern scholarship that incorporates the cultural, historical, sociological, ideological, and religious milieus of the Ancient Near East in an attempt to better understand how these texts were read in their own time. This also aids our effort to read the text of the Bible in a similar way to the rabbis of the Mishnah and Gemara and to better understand the influences of their world. Additionally, this critical approach enriches our search for truth and knowledge about the text, its application, its purpose, and its origins. In this section of the thesis we will examine various scholars' views that include viewing the law of the stubborn and rebellious son as an innovation of the law, an expansion of other laws, an explanation of other laws, or even as an application of multiple laws together. The aim in this chapter is to lay the foundation of this construction and firmly ground our knowledge of this law in its Biblical origin.

The second chapter explores the Halakha of the stubborn and rebellious son. More than any other section, this chapter examines the entire Talmudic chapter entitled בן סורר ומורה. While the first chapter presents the textual material in a more direct and complete approach, this chapter does not. Rather, it presents a survey of a number of themes raised in the rabbinic writing. The three largest areas of study are: identifying the "crime," identifying the punishment, and addressing the issue of justice. The

overarching aim of this chapter is to build upon the foundation in the first chapter and arrive at the remaining Halakhic issues raised in the third chapter. However, in doing so, one of the major conclusions moves to the fore, and that is the issue of justice.

The third chapter, as mentioned above, raises and addresses the Halakhic issues in the material about the stubborn and rebellious son. While they were identified previously, I want to point out how these issues first arise within chapters one and two, and in the third chapter we will consider them in a contemporary light. In this chapter, I will present various concerns that we recognize in our world today that may be equated with, or compared to, these Halakhic issues. Similar to the argument in the first paragraph about the methodology and strategy, this also uniquely serves a Reform context. A constant challenge and mission in the Reform Jewish world is to find valued meaning and understanding of our world today from the traditional Jewish perspective that is grounded in our people's history, experience, and textual tradition.

As you engage in reading this thesis, it is important to know that the study of the מ"ב material is an activity of high value in Judaism. The study of Torah from the Jewish perspective is the study of Jewish continuity of ideas and existence. Bernard Jackson wrote, "That foundation of the Bible and rabbinic interpretation provides Jewish law its central idea of continuity."⁷ This dialectical process of interpretation, extending over time and geographical boundaries, is the substance of the study of Torah. There is an argument to this effect in this thesis and there are various other themes mentioned, addressed, and examined for your knowledge and consideration. However, the ultimate goal is for the modern liberal Jew to recognize how this study of the law of the stubborn

⁷ Bernard S. Jackson, *Modern Research in Jewish Law*. (Leiden, Netherlands: E.J. Brill, Netherlands, 1980), 144.

and rebellious son and its implication for Jewish law in general is meant to be studied. In that engagement with the text for its own sake we come out richer as Jews, and richer as human beings.

Chapter 1

The law of the stubborn and rebellious son has been read and interpreted in various ways. While the text itself may be read in isolation of rabbinic writing as a complex casuistic formulation of law, the scholarly works examine various aspects of the text and present arguments about the meaning of the law, the development of it, and ways to understand it. An examination of such ideas paints an elaborate picture about the origins, the developments, and the forms of the law of the stubborn and rebellious son, both as it may have been applied in antiquity and later. In addition to the form it may have taken, there is obvious interest in examining the roots of the law to determine its meaning in the Biblical context. Furthermore, scholars attempt to compare and contrast this Biblical law to our modern laws concerning juveniles. This worthwhile endeavor exposes many of the intricacies of language within the four short verses of this law. Another approach considers the law of the stubborn and rebellious son as it is situated in the whole Biblical text, thereby showing whether this law coheres with other topically related laws within the Biblical text. All of these strategies have at least one goal in common: to understand the Biblical law of the stubborn and rebellious son. While each may have its own motivation, it remains that understanding is an aim that informs the reader about the law, its application, and its meaning.

While our goal is reflective of this commonality between the scholarly arguments presented in this chapter, there is an additional aim. By the conclusion, the Biblical law will be explored through the perspectives and the ideas presented. This is in a conscious order of three layers. Each layer of the research and ideas about the law of the stubborn and rebellious son is an important building block to a different view of this Biblical law.

These layers mirror aspects of the early rabbinic reading of the law and expose the different elements of it. Through a clear view of these different pieces, our construction of this law at the end of the chapter will provide a firm ground to examine the Biblical law. (This will eventually serve two main purposes, but for our purposes, the Biblical law and the scholarship written about it remain our focus.⁸)

We begin in an attempt to deconstruct the law of the stubborn and rebellious son using terms introduced by modern scholarship to describe aspects of written law. While this may be considered an inappropriate approach because it is sometimes difficult to apply modern terms to ancient texts, it is necessary to describe the law as it is in its Biblical context with terms that inform our modern view of law, and specifically Biblical law. This entails breaking the law down into the protasis and the apodosis.⁹ This initial work draws on the previous work of other scholars; however, the deconstruction is my own. This is important because it explains my own view of this law in terms of the syntax of the four verses comprising the law.

Following this entrée into the law, we examine an argument that it constitutes an innovation. This approach draws on the extant legal material of the Ancient Near East. This argument is made through comparing both the laws that exist in other codes of law and examining the deconstruction of the law itself. This idea of an innovation from a previous law offers a perspective that aids our understanding of how a law like this may have been applied in ancient times. While we cannot conclusively demonstrate this evolutionary hypothesis, the comparison of Biblical and other Ancient Near Eastern

⁸ Later chapters will explore the applicability of this law in the Jewish legal tradition and the Halakhic issues that are raised throughout the rabbinic process of interpretation.

⁹ In the casuistic formulation of law, there are two main parts to the law. These are the protasis and the apodosis. The protasis is the initial conditional clause (or the *if* clause) and the apodosis is the resulting actions to be carried out should the conditions be met (or the *then* clause).

material suggests that the law was intended for application. Indeed, the differences between the Biblical and other Ancient Near Eastern materials may shed light on the unique approach towards the stubborn and rebellious son employed by the Biblical authors and editors. The comparative perspective, therefore, teaches us a great deal about how this Biblical law may have been composed, perceived, read, and understood in context. Finally, if the law was *not* applied, we glean an entirely different view of the Biblical text and notions of law from the time period and the community that held its text in high regard but not for implementation. Although we cannot demonstrate this hypothesis either, the questions raised in attempts to theorize the answer inform us about the law of the stubborn and rebellious son.

This leads directly into a third section of this chapter that presents the synoptic approach in examining the Biblical law of the stubborn and rebellious son. In doing so, we are able to discern if the laws in the context of the Bible cohere throughout its text, or whether there may be different layers that not only represent different content, but different time periods of application. In addition to responding to this question of application, the synoptic approach provides information about the values of the community that used the Biblical text as its code of law. This is because they express social circumstances and expectations of such a community.

From here, our study of this law moves to a reading of the Biblical text that compares the law to a modern statute, to explicitly make connections between them. The modern laws used for comparison are juvenile delinquent laws. They are not presented in our text; however, included are the conclusions drawn from this approach of comparison. The value of this strategy is that it presents a view of both status in the ancient context of

the Biblical law, and status in our society today. Specifically, it presents the status of a juvenile and to what extent may one who is described by such status be liable under this law, or law in general.

The final stage is an approach that seeks to compare the seriousness of offenses in the Biblical text. This study draws on multiple case studies, but for our purposes, the focus is on its chapter that covers the law of the stubborn and rebellious son. The argument relevant for our study is that this law represents the repercussions for two offenses. While they may not be exclusive of one another or both committed in order to be liable as a stubborn and rebellious son, the point is made that we find in this Biblical law a serious offense that warrants the death penalty. This punishment teaches us something about the offense, the subject of the offense, and the community in which it occurs.

All of this information is valuable because when it is read along with the other arguments in this chapter, we find the three layers described above and in the conclusion. The Biblical law of the stubborn and rebellious son as it is written in the Bible seems straightforward. However, as we continue to examine it in light of various scholars' arguments and different views of the text, we may begin to read it differently. This chapter argues that among the ways to read this law, there exists an additional view that includes all three of these layers. Beginning with the semantics and the syntax of the law itself, continuing with the synoptic view of the whole Biblical text and therefore the covenantal community's social expectations, and concluding with an assessment of how the punishment may inform our understanding, we are granted a comprehensive view of this Biblical law. This perspective shows us the various tools of interpretation used by

modern scholarship and portrays an interpretive process that is valuable in an endeavor to understand the law of the stubborn and rebellious son.

The law of the stubborn and rebellious son is in the final book of the Torah – Deuteronomy. Chapter 21:18-21 contains a concise dictum to mete out punishment as a community on the son of one family whose behavior is described therein.

כִּי־יִהְיֶה לְאִישׁ בֶּן סוֹרֵר וּמוֹרֵה אֵינָנו שְׁמֵעַ בְּקוֹל אָבִיו וּבְקוֹל אִמּוֹ
וַיִּסְרּוּ אוֹתוֹ וְלֹא יִשְׁמַע אֲלֵיהֶם: וַתִּפְּשׁוּ בוֹ אָבִיו וְאִמּוֹ וְהוֹצִיאוּ אוֹתוֹ
אֶל־זִקְנֵי עִירוֹ וְאֶל־שַׁעַר מִקְדָּמוֹ: וְאָמְרוּ אֶל־זִקְנֵי עִירוֹ בְּנֵנוּ זֶה סוֹרֵר
וּמוֹרֵה אֵינָנו שְׁמֵעַ בְּקוֹלֵנוּ זֶה לֹא יִשְׁמָע: וְרָגְמָהוּ כָּל־אָנָּשִׁי עִירוֹ בָּאֲבָנִים
וּמֵת וּבַעֲרֹתָ הָרַע מִקִּרְבְּךָ וְכָל־יִשְׂרָאֵל יִשְׁמְעוּ וְיִרְאוּ:

Deuteronomy 21:18-21 If a man has a stubborn and rebellious son, who does not heed his father or mother and does not obey them even after they discipline him, his father and mother shall take hold of him and bring him out to the elders of his town at the public place of his community. They shall say to the elders of his town, "This son of ours is stubborn and rebellious; he does not heed us. He is a glutton and a drunkard." Thereupon the men of his town shall stone him to death. Thus you will sweep out evil from your midst: all Israel will hear and be afraid.

The entire passage is conditional and based on the opening statement, "כי יהיה לאיש."

From this point forward, the list of actions to be carried out rest on the fulfillment of this condition, and further conditions presented in the passage.

There is an easily discernable "if – then" clause presented. This casuistic formulation presents a list of conditions that "if" they are met, "then" the stipulations laid out in our text are to be carried out. In this case, the initial condition is the behavior the son (i.e. the stubborn and rebellious son) might display.¹⁰ The responsibility for

¹⁰ The initial condition might in fact be the existence of a son in the first place. This however is taken for granted and the conditions are first described as the behavior displayed by the son. The rabbis of the Talmud, do however, raise many questions about the conditions the son, as he exists, must meet. See Mishnah Sanhedrin chapter eight, *mishna* 1 and the corresponding Gemara, BT Sanhedrin 68b-70a.

punishment, should the conditions of this law be met, belongs to the parents and eventually the community. The behavior, that might cause him to be liable, is introduced as, "איננו שומע בקול אביו ובקול אמו," "He does not heed to the voice of his father or the voice of his mother."

In addition to this claim that the son's behavior is not heeding the voice of both his father and his mother, the conditional "if" also refers to the parenting. The entirety of verse eighteen contains the required conditions for the law to take effect. This requirement of the parents is that they have already disciplined their son.¹¹ This text, therefore, is a complex casuistic formulation that provides conditions for both the potential *בסו"מ* and his parents. Therefore, the conditions required for the application of this law have multiple subjects.

Furthermore, the "then" clause, verses 19-21, presents consequences that are not entirely consistent with verse eighteen. Here, the parents are the first level of response to the behavior of their son. Verse nineteen requires the parents to grab hold of their liable son, bring him out to the elders of his city, and [bring] him to the public place (literally the gate). Once before the elders, the parents are obliged to pronounce before them that their son is stubborn and rebellious, and to state that he is a glutton and a drunkard. At this point, the law requires the men of the town to carry out the prescribed punishment of death by stoning. The final stage presented in the Biblical text is upon all of Israel to, "שמעו ויראו"-hear and be afraid."¹²

¹¹ Deut. 21:18, "ויסרו אותו" – *Even after they discipline him.*"

¹² Duet. 21:21.

From this brief analysis of the Biblical text, it is obvious that there is a discrepancy between the protasis (*if* clause) and the apodosis (*then* clause).¹³ This is evident from the Biblical text itself even without reference to its rabbinic interpretation. The two clauses are not entirely congruent as the protasis presents certain requirements of the son's behavior to become liable as a בְּסוֹ"מ, while the apodosis introduces a condition that is not in verse eighteen, the protasis. This is the claim of the parents that their son, in addition to being heedless, rebellious, and stubborn, is a glutton and a drunkard. As we will see later on, the discrepancy between the apodosis and protasis offers an opportunity to employ a semantic reading of this material and demonstrate the value of such a reading.

Joseph Fleishman claims that this lack of complete correspondence between the protasis and the apodosis of this law indicates a legal innovation.¹⁴ His argument is that the further identification of "סוֹרֵר וּמוֹרֵד-stubborn and rebellious" with "זוֹלֵל וְסוֹבֵא-glutton and drunkard" constitutes a further explanation of the youth's behavior and an innovation of the law from a customary form.¹⁵ He argues that this reflects a change in the definition of the required conduct for a delinquent child to be put to death.¹⁶ According to Fleishman, this also represents a reform of this law as the responsibility for punishment has changed.¹⁶ The customary law *was* such that the jurisdiction remained in the father's charge, but now it *is* the community's responsibility. This is a unique interpretation and draws on material from the cultural milieu of the Ancient Near East and Biblical scholarship. The value of Fleishman's argument is the distinction of a customary (or

¹³ The protasis is in verse 18 and the apodosis is in verse 21.

¹⁴ Joseph Fleishman, "Legal Innovation in Deuteronomy 21:18-21," *Vetus Testamentum*, 53, no. 3 (2003): 311.

¹⁵ Fleishman, *Legal Innovation*, 311.

¹⁶ Fleishman, *Legal Innovation*, 327.

original) law that has been innovated, the awareness of this discrepancy between the protasis and the apodosis, and the possibility that rather than an innovation, this may represent a verbal expansion of other laws.¹⁷ While Fleishman considers other Biblical texts and Ancient Near Eastern texts to advance his argument, this is one perspective of the law of the stubborn and rebellious son.

Elizabeth Bellefontaine presents a synoptic view of the law of the stubborn and rebellious son.¹⁸ Her argument relies on other aspects of the Biblical text for coherence between both the behavior and the punishment of the potential offender. Bellefontaine argues that the *בסור* text relates to the laws found in Exodus, Leviticus, and elsewhere in Deuteronomy.¹⁹ According to Bellefontaine, the conditional requirements of the potential *בסור* are the behavior of not “honoring” or “insulting” one’s parents. Therefore, her argument is that the behavior of stubbornness, rebelliousness, gluttony, and drunkenness are ways to both dishonor and insult one’s parents. While her synoptic view clearly must use various understandings of a narrative approach, her work is based heavily on the meanings of the words alone. She uses other words to define and describe the words found in the law of the stubborn and rebellious son. The extent to which she uses the narrative context is based on the topic of parent-child relationships and the fifth commandment of the Decalogue. She claims that the lack of submission or compliance to one’s parents negates all parental authority to such an extent that such behavior cannot be tolerated.²⁰ It is this conditional lack of submission that is the opposite of “honoring”

¹⁷ Fleishman, *Legal Innovation*, 319. Here, Fleishman is quoting: Herbert Chanan Brichto, “The Problem of the ‘Curse’ in the Hebrew Bible,” *Journal of Biblical Literature Monograph Series*, 13 (1963): 134, note 41.

¹⁸ Elizabeth Bellefontaine, “Deuteronomy 21:18-21: Reviewing the Case of the Rebellious Son,” *Journal for the Study of the Old Testament*, 13 (1979): 17.

¹⁹ See Exodus 20:12, 21:15, 17, Leviticus 20:9, & Deuteronomy 27:16.

²⁰ Bellefontaine, *Reviewing the Case*, 17.

one's parents and is the "insulting" behavior that calls for the extreme measure of capital punishment.

Bellefontaine poses the idea that, "the most significant question to be asked about the text concerns the legal basis for the sentencing to death of the defiant son."²¹ It is this connection between the conditions for the son's behavior and the prescribed punishment in the text that she sets out to find. Yet, the requirements of his behavior and a connection to the law dictating the punishment are not completely apparent from the Biblical context in Deuteronomy alone. There is evidence to suggest the use of the death penalty was imposed in Israel when the corresponding crime – the corresponding behavior in our case – was already prohibited.²² For this reason, her work associates the law of the stubborn and rebellious son with a customary law and an ancient custom. In this way, her argument mirrors Fleishman's. Nevertheless, Bellefontaine claims this is consistent with and explains or expands other Biblical laws, whereas Fleishman describes this law as an innovation from a customary law to a *new* law in the formulation found in Deuteronomy 21:18-21.

Both scholars draw on Biblical and extra-Biblical material from the Ancient Near East. Bellefontaine draws conclusions that are similar to rabbinic views expressed in the Babylonian Talmud.²³ Similar to her argument, the work of the rabbis does make a claim that the one who is liable as a *בסור* is a "bad lot."²⁴ His conduct will only lead to the demise of others and therefore, on account of his end, he is put to death.²⁵ Bellefontaine

²¹ Bellefontaine, *Reviewing the Case*, 13-14.

²² Bellefontaine, *Reviewing the Case*, 14.

²³ While this is not the aim of this chapter, it is important to point out this similarity and bear it in mind. BT Sanhedrin Chapter 8 – *בן סורר ומורה*.

²⁴ Bellefontaine, *Reviewing the Case*, 21.

²⁵ Mishnah Sanhedrin 8:5. BT Sanhedrin 71bff.

writes, "These particular vices [gluttony and drunkenness] suggest that he was a non-productive, non-contributing parasite in the community. Being undisciplined and unpredictable, he would be untrustworthy in time of crisis such as war."²⁴ It is the title of being unpredictable that raises a distinction between not only the rabbinic interpretation, but other scholars' views as well. This idea will be explored further later in the chapter.

Bellefontaine's comparison of the stubborn and rebellious behavior with other passages in the Bible requires further examination because the laws juxtaposed are not entirely consistent. There are multiple points in the Deuteronomy text concerning the conditions for the potential בְּסוֹרֵם that are not semantically uniform with other laws offered in her work. For example, Exodus 20:12 claims that a child must honor his parents, and 21:17 mandates the death penalty for one who insults his father or mother; yet, in Deuteronomy 21, the בְּסוֹרֵם has not committed the behavior(s) stated in the Exodus verses. The verbs used in each case are different. As Fleishman argues, this could be either a redefinition, innovation, or perhaps (according to Brichto) an elaboration of other laws.²⁶

In a continued attempt to understand the law of the stubborn and rebellious son in the context of the Bible, Bellefontaine's work presents a concise understanding of the relationship between the son and his parents. She contends that it is analogous to the relationship between God and the Israelites in the form of the covenantal relationship. Therefore, the law of the stubborn and rebellious son is analogous to the infidelity with which the Israelites are charged at various times in the Prophetic writings.²⁷ From this point of view, the son is committing acts that force him out of relationship with his

²⁶ Fleishman, *Legal Innovation*, 319. Here, Fleishman is quoting: Herbert Chanan Brichto, *The Problem of the 'Curse,'* 134, note 41.

²⁷ Bellefontaine, *Reviewing the Case*, 18ff.

parents. For just as Israel is cast into exile or punished severely for its actions (or inactions), so too the *בס"מ* would be by way of capital punishment. This is a very important point about the *בס"מ* material. The presentation that one liable and eventually punished as a *בס"מ* is ultimately cast out of the community, informs us that this law may describe a communal boundary. In addition, a point is being made here that the youth's behavior is unable to change. Therefore, he cannot be rehabilitated through further chastisement, parenting, or even communal governance.

This punishment, however, is not based on the commission of one act according to our Biblical text. As the text indicates, the one liable as a *בס"מ* displays a pattern of behavior. There is actually more than one transgression occurring in this text.²⁸ The view that we are discussing a pattern of behavior claims that the first offense is in verse eighteen and the result is the parental chastisement. The second offense is cause to bring the case before the community. This pattern of transgressions must be so grave as to warrant capital punishment, even if the offender has not committed a single action identified as a capital crime. If the severity of the punishment indicates anything regarding the seriousness of the offense, we may conclude that the offender's behavior is not only serious, but also unchangeable. This inability to change the behavior and the presumed path the youth will take is quite an extreme interpretation. Its plausibility is supported by the severity of the punishment presented in the text, i.e. capital punishment. Furthermore, the seriousness of the offense is such that death is warranted, which indicates for us behavior that is otherwise unstoppable.²⁹

²⁸ Don C. Benjamin, *Deuteronomy and City Life*, (New York: University Press of America, 1983), 212ff. See also: Jonathan Burnside, *The Signs of Sin: Seriousness of Offence in Biblical Law*, *Journal for the Study of the Old Testament: Supplement Series* 364. (New York, NY: Sheffield Academic Press, 2003).

²⁹ Mordercai Rotenberg, and Bernard L. Diamond, "The Biblical Conception of Psychopathy: The Law of

While Bellefontaine's analogy between the relationship of Israel to God and the *בסור* and his parents allows one to observe the similarities of the offenses and their punishments, the question remains as to why such a severe punishment for the son? If, in fact, his behavior warrants capital punishment and his behavior is analogous to the infidelity of Israel, how did Israel survive each exile while the *בסור* is executed? This remains to be worked out, but the point is made that the offense described as the behavior of the stubborn and rebellious son is such that he is cast out of the community of Israel permanently. The argument here is that it is more than the severing of a familial bond, as it extends to the severing of the community bond and the *בסור* is literally cut off from Israel. As we will explore later in the chapter, this is reflective of a breach of the covenant.

As noted above, other scholars present different interpretations of the law of the stubborn and rebellious son. The arguments presented by Bellefontaine and Fleishman provide a firm foundation for understanding the intricacies of this Biblical statute based on the language of the Bible, the context of the Scriptural text, and other laws from the Ancient Near East. They explain connections between the various Biblical laws concerning a child's relationship to his parents, including the law of the stubborn and rebellious son. Their presentation of the Deuteronomy text argues that it is an innovation from an earlier form of a similar law. In other words, there existed a law or a custom that set forth conditions for punishment of a stubborn and rebellious son. The innovation lies in the apodosis and transfers the conditional punishment to the elders of the juvenile's city. Therefore, the parents and the community have separate requirements should the

the Stubborn and Rebellious Son," *Journal of the History of the Behavioral Sciences* 7, (1971).

conditions of this law be met. In addition, their arguments describe how the discrepancy between the protasis and apodosis may be understood as an explanation or expansion in order to apply the law. This leads to the question of application of the Biblical law. While this is an idea that may never be firmly resolved, it is a worthwhile activity to explore how it may have been applied and to what end.

When Bellefontaine describes the behavior of the *בסור* as unpredictable, her argument diverges from the traditional rabbinic understanding.³⁰ She offers a reading wherein punishment in accordance with this law prevents future unpredictability and misbehavior. Rabbinic interpretations of the law of the stubborn and rebellious son tend to regard the son's behavior as predictable. Indeed, much of the rabbinic Halakha on this issue is founded in this view. This argument is also championed by modern scholars. The idea of prediction manifests itself first in the Mishnah and is based on the prediction of future criminality.³¹ One missing piece of information within the material, whether rabbinic or modern, is that there is no explicit indication of who or what makes such a prediction. It is possible that this prediction falls on the parents, elders, and court of twenty three mentioned in the Gemara, but it is unclear.³² The other way to view this is that the prediction is used as a justification to carry-out this Biblical precept once the conditions are met. Thus, punishment is not arbitrary, but rather a deliberate attempt to secure the community's future and prevent damaging and injurious behavior. It is this latter view that makes the most sense given the material. This point is made most clear in light of the statement at the end of the Biblical law in verse twenty-one, "ובערת הרע מקרבך" - Thus you will sweep out evil from your midst." Connecting the argument that the son's

³⁰ Mishnah Sanhedrin 8:5. BT Sanhedrin 71bff.

³¹ Mishnah Sanhedrin 8:5.

³² The court of 23 is first mentioned in the Gemara on 70a of BT Sanhedrin.

behavior has a predictable "evil" outcome with this idea of sweeping evil from the midst of Israel juxtaposes evil with the son's behavior. Therefore, the predicted outcome of inaction is evil.

The Gemara continues this line of reasoning as its discourse includes other cases when prediction of the future outcome is used as a legal presumption for the purposes of meting out punishment or suspending liability in other capital cases.³³ Therefore, whether it is the *בסור"מ* or the tunneling thief mentioned in chapter eight of Talmud Sanhedrin, the prediction is not only a focus, but it is clearly how the law operates.³⁴ While Bellefontaine's reasoning of unpredictability does not cohere with the rabbinic understanding of prediction, there is a correlation between these views based on the youth's early manifestations of his behavior. Whether or not the detail of this behavior can be predicted, it is considered evil, and on this point both viewpoints agree. It is important to recall that Bellefontaine is concerned with the correlation between other instances of capital punishment in the Bible and the conditions leading to capital punishment in the passage describing the law of the stubborn and rebellious son.³⁵ Her reasoning leads to the conclusion that the son's behavior is unpredictable. However, consistency and predictability would constitute a stronger basis for justifying capital punishment in this case.

Yale and Irene Rosenberg argue that the purpose or function of the law of the stubborn and rebellious son is the prediction of future criminality.³⁶ Their methodology clearly differs from both Fleishman and Bellefontaine in their explicit use of the rabbinic

³³ Mishnah Sanhedrin 8:6-7. BT Sanhedrin 72aff.

³⁴ *Ibid*

³⁵ Bellefontaine, *Reviewing the Case*, 13-14.

³⁶ Yale and Irene Rosenberg, Bentzion Turin, "Return of the Stubborn and Rebellious Son: An Independent Sequel on the Prediction of Future Criminality," *Brandeis Law Journal*, 37, no. 4 (1998-9).

material. This strategy leads them to understand that the law is here to teach us something about the rabbinic process of interpretation and the ability to predict future criminality. While they liken this principle to modern legal systems' repeat offender laws, they recognize a difference. The Rosenbergs find support for the claim that the rabbis seek to predict future criminality in the expression of two rabbinic ideas. The first is the fact that according to the Mishnah, the stubborn and rebellious son is judged on account of his [presumed] end – גידון על שם סופו.³⁷ The second is that the Gemara maintains a halakhic debate about whether this law is intended to be carried out or if it exists only for the purpose of study.³⁷ The debate itself remains unresolved; however, the narrow reading of the rabbis reduces the law to nugatory.³⁸ Therefore, the rabbis make a claim that this law remains on the "books" for the purpose of study. That purpose of study is interpreted by the Rosenbergs to be a manual for youth and their parents. The prediction aspect serves in the manual as a guidepost of *what not to do* for youth and *how to respond* for parents.

The Rosenbergs' argument is based on the similarities between the law of the stubborn and rebellious son and American juvenile status offender laws. They arrive at a conclusion that, as stated above, the law of the בסי"מ is a paradigm for predicting future criminality, or at least strengthening support for repeat offender rules.³⁹ They espouse this connection between "status-offender" laws and the בסי"מ because of the incorrigibility of the potential offender and that his behavior will have two outcomes. First, the pattern of behavior required to meet the conditions of the law of the stubborn and rebellious son demonstrates such misbehavior that punishment will not suffice in

³⁷ BT Sanhedrin 71a.

³⁸ Rosenberg, *The Law of the Stubborn and Rebellious Son*, 554.

³⁹ *Ibid.* 511ff & 580ff.

correcting the situation. Second, one can therefore predict the additional and more severe crimes the son will commit in order to continue this pattern. This prediction is quite important because the Jewish law system has very strict requirements concerning adjudication and punishment of wrongdoers by the rabbinic courts. Jewish law requires that conviction be the product of the application of due process and be founded in the testimony of witnesses, corroborated evidence, and certainty regarding both the acts committed and the intentions underlying them. These requirements of due process may not seem unusual to us, yet the convicted stubborn and rebellious son is not found guilty of the commission of acts that would entail capital punishment in themselves, but instead is executed for what he *will* do in the future.²⁵ The Rosenbergs set out to reconcile this contradiction as it appears in the primary material.⁴⁰

In addition to this contradiction, the Rosenberg article raises another issue in its interpretation of the material. Just as in the case with juvenile status offender laws or "non-adult" status laws, the potential בן סור ומר is liable because of the commission of certain acts while a juvenile. Should he commit them or some of them as an adult, he would not be liable to the same punishment. This may seem incongruent in the way they are differentiated for adults and non-adults and yet, according to the Rosenbergs, this has a clear purpose: To prevent future criminals on the basis of punishing, or perhaps even correcting, their behavior at an earlier stage.⁴¹ However, when the behavior is a pattern that meets the conditions presented in the Bible, the Mishnah, and the Gemara, there is no remedy. Here lies the divergence in this interpretation of this law from Bellefontaine's claim of unpredictability. The predictable nature of this behavior pattern is precisely

⁴⁰ *Ibid*, 517.

⁴¹ *Ibid*, 515.

what is required to carry out the death penalty according to the Rosenbergs' argument and the rabbinic reading.²⁵

The claim that this law is about prediction of future criminality is much more complex than the argument that the law of the stubborn and rebellious son is about an incorrigible juvenile delinquent. It requires a closer look at the intricate nature of the rabbinic interpretive process that the Rosenbergs use as primary material. For a successful prosecution of a בטר"מ to occur various figures of authority and enforcement have to collaborate. That means that the role of the son's parents and the son's community are necessary for all of the conditions to be met. In addition, the argument of prediction of future criminality is wrought through the interpretations of the rabbis. This argument does not rise out of the Biblical material alone. Rather, it is the product of first understanding the narrative reading and then the use of the exegetical activity of the rabbis of the Talmud. As the Gemara interprets, there are certain ways in which the son must exhibit the broad behavior of stubbornness, rebelliousness, gluttony, and drunkenness. The first four *mishnayot* of Sanhedrin chapter eight contain the various and intricately detailed requirements a potential stubborn and rebellious son must meet. These conditions include the son's age, stubbornness, rebelliousness, gluttony, and drunkenness. In addition, the Gemara commentary elaborates those *mishnayot* rulings to further restrict the type of excessive eating, drinking, and incorrigibility one must exhibit in order to be liable. The Rosenbergs' argument therefore, is not entirely consistent with this rabbinic reading of the Biblical text. However, their references to modern legal systems as well as their emphasis on the concern with future criminality enrich our understanding of the law of the stubborn and rebellious son of the Bible. While they

employ certain rabbinic readings to formulate a coherent understanding of the Biblical law of the *בסור"מ*, they fail to consider these rabbinic interpretations in context and to treat them as links in the ever growing chain of Halakhic creativity.

Thus, the argument advanced by the Rosenbergs that this law is about predicting future criminality relies on the restrictive reading of rabbinic interpretation. According to them, these interpretations of the rabbis indicate the need to prevent the incorrect conviction of an innocent individual. Fleishman, however, sees the Biblical law as an expansion via an innovation to other laws. Bellefontaine, likewise, argues that this law is a development of, or an explanation of, other Biblical laws governing the relationship between parents and child. Both Fleishman and Bellefontaine maintain the view that the law describes actions that are to be punished, while the Rosenbergs are making a completely different argument about predicting future criminality. These views represent competing perceptions of the overarching systemic aims of Jewish law, while according to one view the law seeks to regulate inter-human relationships and emphasizes the requirements of due process, another view considers crime prevention and social protection a principal objective of the law.

Rabbinic restrictions recorded in the classical literature may either constitute an arbitrary collection of rabbinic traditions, or alternatively be regarded as a series of guidelines intended to limit the application of this law. The argument that they are arbitrary is, however, unfounded. The Halakhic tradition maintains that there is deliberate intention in all of its discourse. To this effect, the Talmud does not only contain the reports of the majority opinion, but goes to great lengths to include the opinions of the minority and those discarded altogether along the way to the final

conclusion.⁴² The notion that they are intentionally limiting may be more plausible. Aaron Kirschenbaum argues that the restrictive interpretation renders this "law" totally inoperative.⁴³

Assuming that the restrictive rabbinic interpretation found in chapter eight of Sanhedrin reflects a coherent agenda, what, then, does this material tell us about the purpose of this law? Kirschenbaum's argument of a restrictive interpretation, making this law almost inapplicable, points to a significant difference between law as a general category and halakha: "Law is ordinarily perceived as a system for the maintenance of order and the meting out of sanctions, scriptural law [on the contrary] is perceived as essentially educative, spiritually elevating."⁴⁴ While this may be an extreme understanding of scriptural law and may not describe its entirety, it does offer an explanation of the law of the stubborn and rebellious son should it not be operative. Therefore, the restrictive reading renders the law nugatory while maintaining its pedagogic value for youth and parents. This argument and the Rosenbergs' argument present a worthwhile approach to the use of this law of the stubborn and rebellious son. The law of the stubborn and rebellious son, as they see it, is for pedagogic purposes and as presented by the Rosenbergs, the education might be primarily for the parents. However, this may only represent one aspect of this law. Therefore, the purpose of this law is that it should be studied. As the Rosenbergs argue, the curriculum for study would be the ability to predict future criminality as in the case with the stubborn and rebellious son.

⁴² Mishnah Eduyot 1:5.

⁴³ Aaron Kirschenbaum, "The Role of Punishment in Jewish Criminal Law: A Chapter in Rabbinic Penological Thought," *Jewish Law Annual*, 9, (1991): 131.

⁴⁴ *Ibid* p. 131.

Jonathan Burnside terms this idea of predicting future criminality as preventative. He claims this law – whether it is truly operable, for pedagogic purposes alone, or to instill fear in members of the community – seeks to be preventative. He goes so far in his argument to state that capital punishment as advocated in the case of the stubborn and rebellious son is a preventative measure.⁴⁵ However, this is not the final conclusion of his case. In his aim to categorize and describe the seriousness of various offenses, he takes a different approach than the scholars presented previously in this chapter. His methodology strives to avoid becoming ahistorical by applying a modern view of law to the Biblical text. This requires one to read the Biblical text as it is and attempt to understand it in a synoptic way, much like Bellefontaine. The difference lies in her reliance on other scholars' view that the discrepancy between the apodosis and the protasis constitutes an "obvious example of the generally disordered and dissolute life."⁴⁶ Burnside, taking a different approach, argues that the discrepancies between the two clauses of the legal formula present a social stereotype that had specific meaning in its own milieu.⁴⁷

This lifestyle that represents the social stereotype as it is described by Burnside represents two basic violations. While these violations can be categorized into two kinds, there are multiple aspects of them presented in his argument. For the purpose of this paper, we will only explore the two broad groups within which the seriousness of offense or violations is described. Similar to other scholars, Burnside first illustrates the law of

⁴⁵ Burnside, *The Signs of Sin*, 43.

⁴⁶ Burnside, *The Signs of Sin*, 45. Burnside is quoting part of Bellefontaine's article, specifically p. 23.

⁴⁷ Burnside, *The Signs of Sin*, 24, 45, 58. This idea is also presented in various places in chapter two. The other references, however, do not necessarily use the exact term, 'social stereotype.' Rather, the idea being presented is the assumption that the society of the Bible would recognize certain behaviors and patterns of behavior as indicative as a lifestyle. Such a lifestyle is observable as stubbornness, rebelliousness, incorrigibility, gluttony, and drunkenness. Therefore, once such behavior is observed, the one leading such a lifestyle becomes liable as a stubborn and rebellious son.

the stubborn and rebellious son as an infringement on the fifth commandment.⁴⁸ This is important in order to describe against whom, and maybe even what, the youth is rebelling. From a strictly semantic reading of the text the son is defiant against his parents. But, from various places within the Biblical text, the metaphor of God and Israel having a relationship similar to father and son (or child) describes this rebellion against parents, and also against God.⁴⁹

Burnside writes, "Part of the honour due to parents under the fifth commandment is tied to respect for the teaching they impart (see. Deut. 4:9)." ⁵⁰ Clearly, the example here is that the parents have an expectation that their children will continue to be standard bearers of Israel's identity. Therefore, when a child, specifically a son, rebels against his parents, this expectation is left in question. This respect that is due parents does not, however, fully explain the use of the "elders of the community," or the semantic differences between the protasis and the apodosis. ⁵¹ This is addressed in the second category where Burnside argues that the son's violation constitutes a breach of the covenant.

Rather than viewing the statement that their son is a "זולל וסוֹבֵא – glutton and drunkard," as an innovation of the protasis, as Fleishman, as an expansion of it, as Brichto, or as a second offense altogether from the protasis, as Benjamin, Burnside describes both clauses as the same.⁵² He argues, "the charge of being 'a glutton and a drunkard' explicates what it means to be 'stubborn, rebellious and not heed the parents'

⁴⁸ The fifth commandment as Exodus 21:17. Burnside, *The Signs of Sin*, 59.

⁴⁹ Burnside, *The Signs of Sin*, 59-64. See specifically the section on the *Content*, p. 61 (2.5.1.2).

⁵⁰ *Ibid* p. 61.

⁵¹ Deuteronomy 21:19-20.

⁵² *Infra*, 7, 10, 21.

voice.”⁵³ Burnside’s argument rests on three claims. The first is that gluttony and drunkenness is a more serious charge than it might appear. The second is that the literary context of the law of the stubborn and rebellious son has significant bearing on understanding this Biblical law. The third is this second category and that the violation is one against the Covenant Community established by the Bible.⁵⁴

The charge of gluttony and drunkenness presents an indictment that one is no longer participating (properly) in the community. Eating and drinking are representative of social, political, and religious relationships.⁵⁵ The abuse of eating and drinking constitutes an over-indulgence that goes against the grain of societal expectations. There is a sense of reciprocity and mutuality amongst those who eat together. One who is a glutton and a drunkard acts in ways that reflect disrespect and disregard for communal structures and expectations. Therefore, this charge of being a glutton and a drunkard is not simply one’s over-indulgence that affects only the offender. Rather, it is quite different, as it tears at the complex web connecting a community. The expectations of proper conduct in use of resources (i.e. food and drink) are broken for the sole advantage of the one violator.

The literary context of Deuteronomy 21 is Moses’ valedictory speech to the Israelites as they cross from the wilderness into the Promised Land.⁵⁶ This presents two issues that, according to Burnside, make the case that the law of the stubborn and

⁵³ Burnside, *The Signs of Sin*, 64.

⁵⁴ This argument is made by Burnside in chapter 2, pp. 64-77. There is, however, a strong relationship between the first violation and this second one. That is that the affront against one’s parents inevitably is also an affront against the community, the social order, the religious life, and inexorably against God (Burnside p. 64).

⁵⁵ D. Neufeld, 159, as cited by Burnside, *The Signs of Sin*, 64 note #109.

⁵⁶ Burnside, *The Signs of Sin*, 40.

rebellious son is a violation of the covenantal community.⁵⁷ The first is that the Israelites have spent forty years scrounging through the wilderness completely (at least in theory) reliant on God for sustenance. They are at the threshold of the Land that is flowing with milk and honey. As they begin the activity of establishing their community of Israel in the Promised Land, the abundance must not be abused. This breach of the relationship among members of the community is a violation of the rules the Israelites are to live by in their new homeland. The rebellion is described as gluttony and drunkenness because these behaviors reflect disrespect for the natural resources used to produce food and wine, the labor invested in the production of nutrition, and the needs of others to consume these vital resources. This is further explained by the second issue raised by the literary context and that is that the covenant between God and the Israelites is tri-fold: progeny, wealth, and land.⁵⁸ With land granted to the Hebrews in the context of the covenant, any overuse of the land could constitute an abuse of the covenantal relationship. The overindulgence of resources, more specifically food and drink, is such a violation. Therefore, the overindulgence describes disrespect for God's gift to the Israelites.⁵⁹ So not only is the charge of gluttony and drunkenness more grave than might be thought at first reading, it is an egregious affront to the covenant amongst the people and with God.

When the land is considered part of the inheritance in the fulfillment of the covenantal relationship, the abuse of them describes someone who is not only a bad lot, but additionally a bad heir.⁶⁰ Not only does the stubborn and rebellious son not meet the expectations of his parents as the cultural standard bearer, he is tearing at the social fabric

⁵⁷ Burnside, *The Signs of Sin*.

⁵⁸ Genesis 15.

⁵⁹ Burnside, *The Signs of Sin*, 40, 73, 74.

⁶⁰ *Ibid*, 71.

in a similar way. This point is further supported by the Biblical text itself. As we recall, Fleishman makes the argument that the jurisdiction of the law of the stubborn and rebellious son transfers from the patriarch of the family to the elders of his community. This transfer is indicative, according to Burnside, of two things. The first is that the misbehavior as a glutton and drunkard is a public offense and not something only recognized by the family, like being stubborn and rebellious and not heeding one's parents' voice. Burnside supports this view by pointing out that, "Everyone knows the town drunk."⁶¹ In addition, the transfer is demonstrative of the claim that the son is a bad heir. The difference from the opening point of this paragraph is that the son is a bad heir not only to the community in violation of the covenantal relationship, but also as a son. There is a protective measure from an unruly father provided by the Biblical text. It ensures that one accused of being a stubborn and rebellious son is truly a bad heir within the family because of the requirement that the mother be involved. Furthermore, the son must be publicly deemed a bad heir on the communal level.⁶² Burnside's additions to this discussion of the Biblical law of the stubborn and rebellious son provide an insight that may correspond to Bellefontaine's reference to a breach of the covenantal relationship.

The arguments described in these few pages enrich our reading of the Biblical text and generate associations with other Biblical passages, Ancient Near Eastern material, and contemporary jurisprudence. We began the chapter exploring the idea of innovation and expansion of other laws. One author suggested that the innovation that took place was from a customary or older law within the Ancient Near Eastern culture to our current

⁶¹ *Ibid* p. 70.

⁶² This protective measure is the condition that the mother's voice is also not heeded and that she is part of bringing out the son to the elders of the community. Not only do the conditions require the agreement and presence of the mother to protect against an unruly father, the jurisdiction for capital punishment is the community in the end and not the father alone.

Biblical law of the stubborn and rebellious son. Other authors regard this law in the context of other laws in the Bible. These authors seek to find consistency between various laws governing the relationships between parents and child and the use of capital punishment. Yet others, find concern for the prediction of future criminality in the same text. As we have seen, it has also been argued that capital punishment itself constitutes a preventative measure. Finally, scholars have sought to determine the seriousness of the offense of the *בסור ומר* and associate it with the severe punishment that would result from successful prosecution. Using the ideas of innovation and expansion, the Rosenbergs explored the rabbinic readings of the text to indicate the Biblical law is about prediction of future criminality. This idea was later altered slightly to indicate that the use of capital punishment is more of a preventative measure than a prediction. This is more in line with the Biblical text itself, excluding the rabbinic works, because of the desire to rid the community of evil. The final layer draws on the seriousness of the offense and concludes that this law is about a violation against parents and eventually against the community. This ultimately presents three layers to the understanding of the Biblical law of the stubborn and rebellious son. The first is to describe exactly what the words of the Bible mean in order to make sense of the law. The second is in view of the underlying purpose of the law, which is as a preventative measure. The third is the proverbial "line in the sand" as a communal boundary.

Each of these layers requires various tools to interpret the Biblical law of the stubborn and rebellious son. There are four that were used specifically in this chapter. The first was that of Fleishman who argued that the law of the stubborn and rebellious son demonstrates a legal innovation from a customary law. While this does not require

much interpretation of the text itself, it does shed light on how the law was applied and understood in its time to the best of this scholar's view. That application could be associated with either the customary law prior to the innovation or post-innovation, but the point is that an innovation from a widespread practice is what made its way into the Biblical text. The second tool is that of expansion. The synoptic reading of the Bible provides the necessity to interpret various laws to cohere within one system. The law of the stubborn and rebellious son was explained by some scholars as an expansion of other laws relating to the relationship between parent and child. A third tool is to explain the meaning of the text. This serves the purpose of also working and interpreting the Bible to cohere within its text; however, the end product is a narrowing of a law's application. Following this idea, the law of the stubborn and rebellious son serves to describe, in further detail, what other laws relating to the relationship between parent and child mean in more depth. The fourth tool is a combination and serves to bring together various laws within the Bible to be applied as one coherent unit. This stems from both the expansion and explanation, but serves a different purpose in its outcome. Each of these tools provides the mechanics of interpreting the text and while they are employed by various scholars, the next chapter will examine how they are also used within the exegetical tool belt of the rabbinic writers.

Chapter 2

Introduction

While the first chapter dealt with the Biblical material, this chapter examines the Biblical, early Rabbinic, and later Rabbinic material on the *בן סורר ומורה* (בסו"מ). However, this chapter does not offer a strict survey, but rather addresses a number of themes. We begin with a brief overview of the material and the context in which the bulk of the rabbinic writing on the stubborn and rebellious son is found. Then we will explore the rabbinic attempt to identify the "crime," the punishment, and address the issue of justice for the בסו"מ. Beginning with the Biblical law in Deuteronomy and continuing through the rabbinic sources and the later codes of Halakha, there are examples of how this law has been interpreted and reformulated. The interpretive process that this law has undergone demonstrates its continual presence in Halakha, yet its discontinuity in application is suggested by certain Talmudic sources.⁶³ This chapter will explore this juxtaposition of continuity and discontinuity as it is displayed in the Jewish sources and modern scholarship. This exploration presents an understanding of this Biblical law as it has been preserved and understood throughout centuries of commentary and elaboration. This development yields, perhaps, a new application of this law based upon the context in which it is transmitted and how it is read and reformulated in the Halakhic process.

This chapter will examine both the application and purpose of this law. It uses the rabbinic sources from the Mishnah, Gemara, and later codes of Halakha, as well as modern scholarship. After analyzing the application of the law of the בסו"מ, the offense(s), the offender, and the interests that are preserved in this material will be made clear. The law of the stubborn and rebellious son forces one to question the purpose of

⁶³ BT Sanhedrin 71a. "לא היה ולא עתיד להיות" – *There never has been nor will there ever be.*"

law in general. Specifically, it conflates a system that seeks to punish those who commit crimes with a system that seeks to prevent future crime.⁶⁴ This fusion leads to a conflict between intention and interests that must be balanced. The goal of this chapter is to present an argument about how this law of the stubborn and rebellious son has evolved over time, what we learn from that evolution, and what this development means.

Some of the Biblical scholarship has proposed that the purpose of this law is to transfer the authority to discipline a child from a patriarchal system to the communal authority of judges and elders.⁶⁵ The first declaration of the son's reckless behavior and damaged relationship with his parents is originally dealt with in the realm of the family. And yet, the Biblical law provides the opportunity for the family to rid itself of this incorrigible behavior. Once the "case" has moved to the community, it is now the problem of the larger society to rid itself of such behavior exhibited by the son⁶⁶. However, this transfer of authority does not appear to be the main issue in the rabbinic writing. The earliest sources in the Mishnah and Gemara dwell on the specific circumstances of the potential בסי"מ, his behavior, and his liability.

Furthermore, this transfer of ultimate authority in the application of this law ensures that each case of an accused בסי"מ will be tried under a certain protocol and judiciary process. Discovering the nature of the son's behavior by identifying the crime may provide an understanding of what this law is about in the view of the rabbis. However, there is disagreement in the early rabbinic sources about the applicability of

⁶⁴ Yale and Irene Rosenberg, Bentzion Turin, "Return of the Stubborn and Rebellious Son: An Independent Sequel on the Prediction of Future Criminality," *Brandeis Law Journal*, 37, no. 4 (1998-9): 557.

⁶⁵ Elizabeth Bellefontaine, "Deuteronomy 21:18-21: Reviewing the Case of the Rebellious Son," *Journal for the Study of the Old Testament*, 13 (1979): 14, 22. David Marcus, "Juvenile Delinquency in the Bible and the Ancient Near East," *Journal of Ancient Near East Studies*, 13 (1981): 46.

⁶⁶ Bellefontaine, *Reviewing the Case*, 23.

this law. This leads to possible conclusions about the purpose of this halakha, and what we learn from the interpretive process. These varying views continue through the Halakhic development into later codes of Jewish law. This demonstrates an evolution of both application and purpose, of identifying the crime and the punishment, and how the law may serve us today.

The Biblical material is dissected by the rabbis to show that the law of the stubborn and rebellious son contains five distinct elements that describe the behavior of the *בסור ומורה*. The five elements are: 1) *בן סורר ומורה* – A stubborn and rebellious son, 2) *אינו שומע בקול אביו ובקול אמו* – He does not heed the voice of his father or the voice of his mother, 3) this behavior is a pattern as we learn from the chastisement from his parents as it states, “*ויסרו אותו*” – Even after they discipline him,” 4) *זולל וסובא* – gluttony and drunkenness, and 5) “*ובערת הרע מקרבך*” – Thus you will sweep out the evil from your midst,” this labels the behavior as the ‘evil’ that will be swept from Israel’s midst. These are the five elements that describe and label the son’s behavior. They are the conditions of this law that are required for its application. Each of these elements is an aspect of the rabbinic interpretation of this law.

The work of the sages describes how this law is to be applied and while this teaches us about the law, we may understand it even more clearly by studying its purpose. In examining the purpose of this law and how it is explained, interpreted, and commented on throughout the Halakhic process, we will see how Halakhic interpretation has unfolded. The contemporary significance of this Halakhic material may be highlighted by investigating the debate on application and purpose as it has developed in history. Therefore, it is an assumption of this paper that there exists a development of

Halakha, as we will see. Its evolution is not an aberration unique to this law though; rather, it is indicative of a process definitive of the Halakhic process. I will present an argument that the outcome for this law is a charge to students of the Halakha to engage in this study, and that this process and the lesson of this halakha is about justice.

The Mishnah contains an entire chapter entitled בס"מ. The first section refers directly to the son and his transgression. There are two other distinct sections in this chapter as well. In Mishnah six, the content changes topically to include a Biblical reference from Exodus chapter twenty-two. This represents the second grouping, or section of the chapter. It does, however, represent the development of the interpretive process as it is a claim that this material is related to the stubborn and rebellious son. The sages have moved from mishnah five to mishnah six based on the principle of a חזקה (a legal presumption) that both the thief and the בס"מ are judged on account of their (presumed) end.⁶⁷ In addition, both the stubborn and rebellious son and the thief, the subject of this second section, are Biblical in origin and therefore contain that connection. The Mishnah continues to weave another topic into the chapter. The seventh mishnah explores this same concern of presumption in a slightly different bent. The illustrative material the rabbis discuss is dramatically different. Here, the rabbis present the cases in which one should be stopped before committing a sin even at the cost of his own life.⁶⁸ This final section is not only significant and of a much larger scope than the previous two sections of the Mishnah, but it also makes up a significant portion of the post-Talmudic material relating to the law of the stubborn and rebellious son. Principles of Jewish law

⁶⁷ Exodus 22:1. Mishnah Sanhedrin 8:6. BT Sandhedrin 72. They all address the tunneling thief. The terminology used in both the Mishnah and Talmud is that they are, "נידון על שם סופו" – *Judged on account of his end*," that demonstrates presumption.

⁶⁸ Mishnah Sanhedrin 8:7.

are drawn into question by the בן (mishnayot one through five) and the גנב (mishnah six) material, so that they must be addressed in this final Mishnah. Herein the following situation is presented: transgressions from which one can be prevented even at the cost of his own life.⁶⁹ Therefore, an overarching theme exists that juxtaposes the value of life against the realization of Jewish law. This theme leads to the argument that this material is a rabbinic attempt to address the issue of justice, at least as it is viewed in the case of the stubborn and rebellious son, and whether or not the process created by the rabbis provides justice.

The context as a whole moves from issues about the בסור"מ to other laws, but there is a common thread within the chapter. The commonality is presented as the transition between the first and second sections and the second and third sections: the son will inevitably become a thief and eventually engage in the transgressing behavior included at the end of the chapter.⁷⁰ The Biblical text states that there is a desire to sweep evil from the midst of the community. This force of evil driving the son's behavior may also be behind the case of the tunneling thief and the רודף in the third section.⁷¹ It is presumed that the son of the first section is a pursuer of every desire and his beginning was petty theft from his parents, which is a gateway to more heinous crimes, and ultimately deserving of capital punishment.⁷² The common thread between the three sections is this motivation or force, which in the Biblical text is called evil, and the pattern of behavior it leads to. Additionally, all three sections attempt to describe and identify the "crime" and

⁶⁹ Mishnah Sanhedrin 8:7: "These may be prevented at [the cost of] their lives: he who pursues after his fellow to slay him, or [he that pursues] after a male [for unnatural sexual intercourse], or [he that pursues] after a betrothed maiden [to violate her]; but one who pursues after a beast, or he that desecrates the Sabbath, or one who practices idolatry – they may not be prevented at the cost of their lives.

⁷⁰ BT Sanhedrin 72a. חנן שלזינגר, "וכי מפני שאכל ושתה יצא לבי"ד ליסקל", מורשתינו, 13 (9-1998): 139.

⁷¹ Mishnah Sanhedrin 8:7. BT Sanhedrin 73a-75a. שלזינגר, "וכי מפני", 142.

⁷² BT Sanhedrin 72a.

the punishment, in an effort to decide how to apply justice in each case. This final stage in the mishnaic chapter is presented in mishnah seven. It dictates that just as the law for the tunneling thief permits a capital offense (homicide) and does not bring any bloodguilt for the action, so too other cases may exist that permit an extra-judicial killing with no liability.⁷³ Here the concern is what transgressions one must prevent from happening at the cost of the potential transgressor's life.⁷⁴ All three sections of the Talmudic chapter have three elements in common. The first is all three potential offenders are killed. In the case of the *בסור"מ*, the convicted offender is executed, whereas the tunneling thief and the pursuer are killed extra judicially. The second is that the killing in all three cases is justified by the presumption of future criminality. The third most significantly is that each of these cases presents a situation wherein the potential offender is killed before he has an opportunity to commit crimes that are deemed capital offenses.

Part I - Identifying the "Crime"

Now that we have explored the content and its context briefly, we identify the "crime" beginning with the *בסור"מ* case in the first distinct section. Strictly speaking, the offense described in both the Biblical and rabbinic texts is stubbornness and rebelliousness coupled with gluttony and drunkenness. Normally, in rabbinic law, these are not offenses that carry capital punishment. The Gemara expands on the Mishnaic description of the law of the stubborn and rebellious son. The nature of the offense, the

⁷³ The capital offense of murder is seemingly permitted on the part of the householder. He is permitted to kill the tunneling thief. This is reasoned that he kills the potential thief in order that he (the thief) does not kill the homeowner should he (and it is presumed he of course will) stand in the thief's way to protect his property. See BT Sanhedrin 72.

⁷⁴ This cost is the life of the potential transgressor and it is reasoned rather than known. This creates a situation of prediction and presumption rather than a decision based on solid facts. In other words, we are dealing with a law that prevents more heinous crime following lesser, in terms of quality, crimes for the sake of protecting the innocent.

qualifications of the offender, and the description of the accusers (i.e. the parents and the elders of the community) are discussed in depth.⁷⁵ The aim of the sages in the Gemara is to understand how to apply this law. They are debating the characteristics of the conditions described in the Biblical text. In order to make sense of this Biblical law, the Mishnah and Gemara set the qualifications for each condition as they interpret them in the Bible in order to identify the “crime” that has been committed by being stubborn and rebellious, a glutton and a drunkard. Yet, the sages debate their way into a difficult conclusion.⁷⁶ The description of the conditions in the Gemara does this on two accounts. One is that the parents of the accused are also required to meet certain conditions that are all but impossible to satisfy, and thereby limit the applicability of this law. The Gemara text states that the parents need to be suitable (ראויה) for one another in order to convict a stubborn and rebellious son.⁷⁷ The second is that while the sages quote a *baraita* stating that there never has been, nor will there be in the future, a בסי”מ, a different sage states that he saw one and sat on his grave.⁷⁸ We will return to this majority versus minority opinion later in the chapter, but here this demonstrates the difficulty in identifying the actual “crime,” of the בסי”מ. The conclusion here indicates that we are *not* to identify a “crime” but we are to prevent one by educating others. However, much has been written in the Halakha in an attempt to identify the “crime” of the stubborn and rebellious son. We will now explore what activities or actions determine the criminal status of the youth, how it is a transgression, and what determines his liability according to authors of later rabbinic writing.

⁷⁵ BT Sanhedrin 68b – 71a.

⁷⁶ BT Sanhedrin 71 – 72a.

⁷⁷ BT Sanhedrin 71a. We will return to discuss this limiting effect later in part III.

⁷⁸ BT Sahnhedrin 71a.

The Activity, the Transgression, and Liability

In his Mishneh Torah, Rambam writes, “אכל בשר חי ושתה יין חי פטור שזה קרי הוא ואין”⁷⁹ The use of the word קרי demonstrates that Rambam’s focus is on the idea of rebelliousness of the potential בסו”מ. While the term itself indicates a single occurrence, it is related to an act of rebellion as well. Moreover, this material is in his section on ממרים – *Rebels*. Clearly, from the outset, he is making a distinct statement about what type of behavior the son is demonstrating, and while the specifics of the conditions are being spelled out, the meta-theme is the nature of the youth’s behavior as a rebel. Rambam offers the reader a hint of his approach when he suggests that the rebellion addressed here is of the worst kind, justifying the use of capital punishment. In addition, the conditions of this law include the inability to transform the son’s behavior through a judicial process for his initial acts of stubbornness, rebelliousness, gluttony, and drunkenness.

Prior to stating who the object of the son’s angst is, Rambam adds a nuance that is an innovation in his first halakha of the chapter. It offers a new understanding for the type of appetite the son is displaying when he engages in his eating and drinking. He writes, “לא תאכל אכילה המביאה לידי שפיכות דמים וזו אכילה בסו”מ שאינו נהרג אלא על אכילה מכוערת”⁸⁰ It is immediately following this explanation of the type of behavior the juvenile displays that Rambam describes the eating of meat and the drinking of wine. He writes, “

⁷⁹ Rambam, Mishneh Torah, *Sefer Shofetim, Hilchot Mamrim* 7:4: “The one who eats live meat (i.e. the blood is still within) and drinks live wine (i.e. undiluted) is exempt because this is simple rebellion (for the use of this translation see Leviticus 26:27-28) and one could not continue in this manner.

⁸⁰ Rambam, Mishneh Torah, *Sefer Shofetim, Hilchot Mamrim* 7:1: “Do not eat food [in manner] that brings blood shed, and this is the manner of eating of the stubborn and rebellious son. He is only executed for the ugly manner in which he ate.”

זולל הוא האוכל בשר ברעבתנות וסובא השותה יין ברעבתנות.⁸¹ There is a clear connection made between this “hunger” of the son and the type of eating he engages in. This description makes the case that we have an irreversible and uncontrollable appetite that is detrimental to others because Rambam describes it as leading to the spilling of blood.⁸²

Despite this innovation in the text of the Mishneh Torah, his first halakha in that work and other major Halakhic work ספר המצוות להרמב"ם argue a slightly different approach to identify the “crime” of the stubborn and rebellious son.⁸³ He recapitulates a statement from the preceding chapter of Sanhedrin where we learn that the crime of the בן סורר ומורה is the breaking of the negative precept – לא תאכל על הדם.⁸⁴ But, as we learn in chapter eight, it is the prediction of the son’s future and an assessment of his disposition that remains the underlying force of the law.⁸⁵ This contradiction in the application of the law of the stubborn and rebellious son is difficult to reconcile. Rambam, in his ספר המצוות, describes the conditions of this law as the transgression against the negative precept – לא תאכל על הדם, while the son is ultimately executed not for those offenses, but rather for being a stubborn and rebellious son. In this way, he is strictly keeping to the Biblical text. There must be, in his mind, a clear statement of warning in order to convict and therefore punish someone by execution for his actions.⁸⁶ And yet, Rambam is struggling with this in his attempt to describe the pattern of behavior, and he cannot

⁸¹ Rambam, Mishneh Torah, *Sefer Shofetim, Hilchot Mamrim* 7:1: “Glutton is the one who eats ברעבתנות and a drunkard is one who drinks רעבתנות. The use of this word is new in the process of interpretation. This offers a new perspective of a way to understand the appetite of the liable בסור”מ.

⁸² Rambam, Mishneh Torah, *Sefer Shofetim, Hilchot Mamrim* 7:1.

⁸³ Rambam, Mishneh Torah, *Sefer Shofetim, Hilchot Mamrim* 7:1. Rambam, *Sefer HaMitzvot L'haRambam*, Negative Precept 195.

⁸⁴ BT Sanhedrin 63a.

⁸⁵ BT Sanhedrin 71b.

⁸⁶ Rambam, *Sefer HaMitzvot L'haRambam, Shores* 9.

depart from the philosophy of law as a system of crime and punishment.⁸⁷ Contrary to this, is the view that law can be preventative, as we see in mishnah five where the youth is judged on account of his end. In the latter view, there is the assumption that one can presume the outcome of certain actions. In this case, the crime is the demonstration of certain behaviors which inevitably lead to other illicit activity.

There is a ripe criticism of Rambam's work in the *Sefer HaMitzvot*. Ramban's commentary claims there is a contradiction, or at least an inconsistency, in Rambam's efforts. He describes the situation of punishing the youth with lashes for his first two offenses of breaking the general prohibition: *לֹא תֹאכְלוּ עַל הַדָּם*. But Ramban states that this does not jive with Rambam's ninth shoreish because he cannot have the same warning (*התראה*) for two different punishments.⁸⁸ Ramban's contention is: If the warning regards the capital crime of the *בס"מ*, then it cannot also serve as warning or discipline for a lesser crime. While Ramban's critique is extremely important, it does not provide an alternative to understand this complex issue. According to Ramban, if in fact the identification of the crime was the transgression against *לֹא תֹאכְלוּ עַל הַדָּם*, and the youth is lashed and executed for this activity, it would contradict Rambam's ninth shoreish. However, Rambam is adhering much more closely to the Biblical text, as we discussed above. His identification of the "crime" is engaging in this behavior repeatedly between the ages of thirteen years old and one day, and thirteen years and three months. Its

⁸⁷ Rambam has three major works that relate to the material of the *בס"מ*. They are the *Mishneh Torah*, *Sefer Sho'etim*, *Hilchot Mamrim*, *Sefer HaMitzvot L'HaRambam Negative Precept 195*, and his Commentary to the Mishnah Sanhedrin chapter eight. In the first two he does not acknowledge the Mishnah's claim that the stubborn and rebellious son is judged on account of his [presumed] end (*Mishnah Sanhedrin 8:5*). In his commentary to the Mishnah, he comments that the claim here in the Mishnah is to use evidence from the youth's life as a minor, prior to liability for the *mitzvot*, to convict him as an adult. In all three, there is no acceptance of the purpose of this law of the stubborn and rebellious son to be about prevention. He does reference the *בס"מ* in the *The Guide of the Perplexed*, part III, and we will see that shortly.

⁸⁸ Rambam, *Sefer HaMitzvot L'haRambam, Shoreish 9*.

importance is the clear demonstration, as we have seen amongst many of the authors we have discussed, that the source of this law, its punishments, its warnings, and its purposes are not held in consensus. Therefore, there is a continued development of the law of the stubborn and rebellious son, and identifying the crime is increasingly more difficult over time.

Despite this potential contradiction illuminated by Ramban, Rambam's interpretation of the *בסור* in relation to the perfect law offers a further insight into his understanding, and perhaps the development, of this law. Despite Rambam's difficulty with legislating a preventative measure, we discover that he too identifies the "crime" of the stubborn and rebellious son as a pattern of behavior. Rambam, too, viewed this law as an opportunity to protect the future by legislating that a specific pattern of behavior violated certain *mitzvot*. Therefore, it remains a system of crime and punishment rather than a paradigm for preventative measures. In his *Guide of the Perplexed*, he writes:

"Do you not see how the texts of the Torah command to kill him who manifestly has an excessive longing for the pleasure of eating and drinking? For he is *the stubborn and rebellious son*, to whom its following dictum applies: *He is a glutton and a drunkard*. He commands stoning and cutting him off speedily before the matter becomes serious and before he brings about the destruction of many and ruins by the violence of his lust the circumstances of righteous men."⁸⁹

He states quite clearly here that the criminality of the *בסור* is in relation to his excessive longing, his *רעבתנות*. There is a fear that the fulfillment of such desires can "become

⁸⁹ Rambam, *The Guidet of the Perplexed*, translated by Shlomo Pines (Chicago, IL: University of Chicago Press, 1963), 3:33.

serious” and lead to further harm to the community. In the same chapter, he makes another connection to his Mishneh Torah based on the Gemara text as well. He continues: “To sum up the dictum: Their outward appearances are clean and universally known as unsullied and pure, whereas innerly they are engaged in the pursuit of their desires and the pleasures of their bodies.”⁹⁰ This description matches that of the Gemara stating that the youth must steal from his father and conceal his actions in the domain of others who are *all* good-for-nothings in order to be liable.⁹¹

The Sefer Hahinuch continues with a different approach to describe the offense of the juvenile offender. Here, the description of the son’s offense is related to his spiritual make-up. This is much different than what we have already studied in that it begins to address the issue of whether the son’s behavior is exogenous or endogenous. The author creates a distinction in the introduction to the work that claims there are two essences that construct the human being. He writes, “והענין הוא, לפי שהמזונות הם עסת החמר, והתבוננות, והפכים גמורים במשכל וביראת אלהים ובמצותיו היקרות, הוא עסת הנפש, והנפש והחמר, הפכים גמורים.”⁹² He continues with this notion that the sum of these two essences is always one hundred percent of the human being. Therefore, when one is augmented, the other is lacking. This holds especially true when one over-indulges. Because the excess of חומר creates a lack in the נפש, and causes less potential of the נפש, this means less thoughtfulness, awe of God, and observance of *mitzvot*. It follows then, that the one who engages in overindulgence will be less capable of suppressing the desire for further gluttony and

⁹⁰ Ibid.

⁹¹ BT Sanhedrin 70b, 71a.

⁹² *Sefer HaHinuch*, 248, וסובא, שלא לאכל ולשתות כדרך זולל וסובא – *Do not eat and drink as a glutton and a drunkard*. “This is the matter, because the sustenance they are the essence of material [matter, i.e. the body], but the building of an idea, the awe of God, and the precious mitzvot, that is the essence of the soul. The soul and the physical matter are total opposites, just as I have written at the introduction of the book.”

drunkenness. Therefore, the *Sefer HaHinuch* identifies the “crime” as having two elements. One is the loss of the נפש is the result of the initial engagement in overindulgence. But the “crime” that leads to capital punishment is the second element, and it is the loss of control that leads to no awe of God and the lack of observing the *mitzvot*. This also demonstrates that one act of this nature leads to more and there is a concern about the resulting pattern of behavior.

The “Crime” as a Series of Acts

Rambam presents a clear pattern of behavior, rather than the commission of a few ill-advised acts as the “crime” of the stubborn and rebellious son. We observed this idea in his *Sefer HaMitzvot* in the idea that the youth must demonstrate such illicit activity in the days of his youth. Similar to the Gemara, other Halakhic authorities, and modern scholars, Rambam also makes this claim in his *Mishneh Torah*. He makes this quite clear when he writes, “אכילה זו שהוא חייב עליה דברים הרבה יש בהם והן כולן הלכה מפי הקבלה.”⁹³ In other words, there is more to the son’s status as an offender than any one or two transgressions; there are many transgressions and they are all stipulated by Halakha. Because his liability has its origins in his ultimate end, then his actions of eating, drinking, stubbornness, and rebelliousness are indicators of what the potential בסו”מ will become. This raises the possibility that they enable the prediction of that ultimate end – סופו. This idea of prediction is presented in the Mishnah, Gemara, and later Halakhic sources.⁹⁴ The use of prediction is possible only if the behaviors in which the youth

⁹³ Rambam, *Mishneh Torah, Sefer Shoftim, Hilchot Mamrim 7:2*: “This type of eating, for which he is liable, has many components to it and they are all part of the law according to the received tradition.”

⁹⁴ Mishnah Sanhedrin 8:5. BT Sanhedrin 71bff. Eliezer b. Samuel, *Sefer Yereim*, Paragraph 275. *Sefer HaHinuch*, 248, שלא לאכל ולשתות כדרך זולל וסוֹבָא – *Do not eat and drink as a glutton and a drunkard*.

engages can be repeated often enough to demonstrate the unwanted pattern. The Talmudic material reveals a concern with the continuation of unwanted overeating and overdrinking using the words *לא ממשיך* and *ממשיך*.⁹⁵ This terminology indicates that the pattern must be continual for the offender to be liable. The Halakha is concerned with the son's ability to continue such behaviors.⁹⁶ In addition to the son's ability to continue the behavior, there are certain acts of eating described both by the company with which he is eating and for the observance of certain *mitzvot* that exempt the youth from this law, and this would be an example of *לא ממשיך*. Rambam claims that these cases are the consumption of certain items not always available, like *מעשר שני*, or eating at a meal for the purpose of comforting mourners, and they are events that only occur at certain times.⁹⁷ No matter how "ugly" the eating may be, the simple consumption of such items or in this particular company makes it a less frequent activity and the youth cannot continue (*לא ממשיך בזה*) such behavior. This qualification is also presented in the Gemara material.⁹⁸ It is my point here that Rambam is expanding the understanding of these specific qualifications. He understands them as indicators of the type of consumption in which the potential *בסור"מ* engages, and that they must always be available to him. The issue of the insatiable hunger described by *רעבתנות* is the identity of the "crime" as Rambam views it. However, he also includes the notion of continuing behavior, as was pointed out in the beginning of the previous section. It is more than the insatiable appetite that defines the "crime" because certain types of consumption and in certain

⁹⁵ BT Sanhedrin 70b. Rambam, *Mishneh Torah, Sefer Shoftim, Hilchot Mamrim 7:4*.

⁹⁶ Rambam, *Mishneh Torah, Sefer Shoftim, Hilchot Mamrim 7:2-4*.

⁹⁷ Rambam, *Mishneh Torah, Sefer Shoftim, Hilchot Mamrim 7:2*.

⁹⁸ BT Sanhedrin 70aff.

settings may in fact be gluttonous or drinking in excess, but they could not be continued.

Therefore, those activities do not make one liable as a stubborn and rebellious son.

In an altogether different effort to frame the law of the stubborn and rebellious son, Rabbi Eliezer b. Samuel of Metz, the Re'em, concurs with the notion of continual behavior as what defines the "crime." However, his presentation is different. He writes, "ולא מקרי זולל וסובא אלא במידי דמימשיך אבתריה"⁹⁹ This quotation bolsters the notion of continual behavior, but there is also an attempt to describe the motivation behind the son's behavior. There is a change in the traditional understanding of what (general) prohibition the youth has transgressed, indicating a different motivation behind the juvenile's behavior.¹⁰⁰ The Re'em states at the outset of this work a different warning for the *בסור*. He claims that this comes from *פרשת קדושים* in the book of Leviticus (20:23), "לא תלכו בחוקות הגוי." He then continues to claim that the laws of the nations are those of drunkenness and gluttony. Ibn Ezra also mentions that the specific drinking and eating of the stubborn and rebellious son is that of an apostate, which supports the Re'em's view relating this to other nations' behaviors.¹⁰¹ The Re'em indicates a very specific type of behavior as the crux of the son's liability as a *בסור*. There is one connection among the bulk of interpretations that seems to remain despite the warning or the authorship, and that is that we are dealing with a series of acts that demonstrate a pattern of behavior.

The rabbis explain, and later commentators and scholars develop even further, that the son's behavior as a youth demonstrates a specific pattern that can only lead to the

⁹⁹ Eliezer b. Samuel, *Sefer Yere'im*, Paragraph 275.

¹⁰⁰ According to BT Sanhedrin 63a, the original prohibition is a general prohibition – לאו שבכללות – and has certain stipulations that only one punishment can result, which cannot be lashes. This is ultimately changed in order to make sense of the law of the stubborn and rebellious son.

¹⁰¹ Deuteronomy 21:20, Ibn Ezra's (Rabbi Avraham ben Ezra) Commentary.

outcome that is trying to be prevented according to the rabbi's interpretation.¹⁰²

Therefore, we are dealing with a specific group of actions or a behavior pattern that, according to the rabbinic interpretation, is presented by the Biblical text. The pattern of behavior must include each of the conditions identified by the rabbis. More specifically, the previously mentioned five elements of the son's behavior described above signify such a pattern.¹⁰³ When the rabbis of the Talmud explain these elements, they represent the behavior of the son as a pattern and one that continues.¹⁰⁴ Once this pattern is identified as the "crime," the fear for the future and the goal of preventing future detriment move to the fore, and the liable activity becomes more severe.

Becoming a Capital Offense

According to this view that the pattern must be perpetual, the stubborn and rebellious son may exhibit behavior(s) that is not only a pattern, but it is also indicative of a deeper problem. This problem manifests itself with four indicators that are the definitive conditions required to become a בְּסוּרָם: stubbornness, rebelliousness, gluttony, and drunkenness. Therefore, the attempt to identify the "crime" becomes a different task. Now, its aim is to identify behaviors that demonstrate those four indicators. Once these are identified, the "crime" is no longer any *one* of them, but rather it is a behavior pattern that becomes a capital offense.

¹⁰² BT Sanhedrin 70b. Rambam, *Mishneh Torah, Sefer Shoftim, Hilchot Mamrim*: 7:4. Mordercai Rotenberg, and Bernard L. Diamond, "The Biblical Conception of Psychopathy: The Law of the Stubborn and Rebellious Son," *Journal of the History of the Behavioral Sciences* 7, (1971).

33. Yale and Irene Rosenberg, Bentzion Turin, "Return of the Stubborn and Rebellious Son: An Independent Sequel on the Prediction of Future Criminality," *Brandeis Law Journal*, 37, no. 4 (1998-9): 557.

¹⁰³ *Supra* page 40.

¹⁰⁴ BT Sanhedrin 70b.

Whether it is stubbornness, rebelliousness, gluttony, or drunkenness, the individual is *judged on account of his* [presumed] *end*.¹⁰⁵ The crime is identified as the illicit acts of overindulgence, transgressing *mitzvot*, and rebellion, and the crime is also identified as a pattern of behavior. While there is no clear offense or crime that leads to the drastic measure of capital punishment, this law refers to a pattern of behavior that is a capital offense as deemed by the Biblical text.¹⁰⁶ It is the consistent disregard of authority, the pursuer of desire, the lack of adherence to social norms, and unchangeable behavior that are the characteristics of the *בן סורר ומורה*.¹⁰⁷ The thief in the second section of the chapter demonstrates unwanted behavior differently. In this case, the presumption is the main operating principle. As the Gemara text indicates, it is understood (according to the *חזקה* – legal presumption) that the thief will kill the homeowner should the latter stand in the thief's way, and this makes him liable to be killed without penalty to the homeowner. Likewise, in the final section of the chapter, there is an assumption of future detriment that is intended. It is unclear from the Gemara text alone how the presumption operates, but it is my view that because the first two sections operate on this principle, it must carry through to this final section. As mentioned earlier, the catch phrase – *נידון על שם סופו* – becomes – *מצילין אותן בנפשו*.¹⁰⁸ The future detriment in the final section of the Gemara is described by mishnah five in its appraisal of the differences between righteous and wicked people. There, the claim is that the death of the wicked (presumed to be those who would engage in the acts described in mishnah seven) is not only a benefit to them because they will die innocent,

¹⁰⁵ Mishnah Sanhedrin 8:5, 6, 7. BT Sanhedrin 71b, 72a, 73a.

¹⁰⁶ Deuteronomy 21:21.

¹⁰⁷ Joseph Fleishman, "Legal Innovation in Deuteronomy 21:18-21," *Vetus Testamentum*, 53, no. 3 (2003): 311, 317, 319, 322. Rotenberg & Diamond, *Biblical Conception of Psychopathy*, 33, 37.

¹⁰⁸ שלזינגר, "וכי מפני," 139, note 2.

but also a benefit to the world, because they will no longer be around to impact others.¹⁰⁹

While the two latter sections function quite differently in their description of a capital offense, it is the fear of what will happen that forces the rabbis to maintain the Biblical punishment of death by stoning for the troubled youth.

The offenses of the *בן סורר ומורה*, the *גנב במחזרת*, or the *רודף* have three things in common. First, they are all judged on account of their ultimate (presumed) end. In each case, there is the idea that future actions may be predicted based on the fulfillment of certain conditions. Secondly, the anti-social and destructive behaviors demonstrate a pattern of behavior, and such conduct will inevitably lead to more harm than good; and therefore, this allows for the presumption of future criminality and judgment on the account of one's end. Finally, the third shared element is that as they are judged prior to the commission of prohibited acts and their behavior demonstrates, at least for the rabbis, an irreversible behavior pattern; they are all punished for being dangerous to the public. It is this progression from identifying the "crime" as a pattern to punishing dangerousness as the "crime," that makes both the described pattern of behavior and the quality of dangerousness capital offenses.

Acquittal of the Innocent at all Costs

The amount of difficulty present in the rabbinic writing on this law clearly demonstrates its complexity in determining the "crime." Later we will explore the limiting factors in the law's application, but here it is worth mentioning a different purpose altogether argued by modern scholars. Yale and Irene Rosenberg write, "The purpose of Jewish law in this context, then, is righteous judgment, that is, absolutely

¹⁰⁹ Mishnah Sanhedrin 8:5.

assuring acquittal of the innocent.”¹¹⁰ If this is a correct assessment of the purpose of the Jewish legal system in the context of the law of the stubborn and rebellious son, then under what circumstances can this law be enforced? If the rabbis are interested in righteous judgment in every case and the complete acquittal of the innocent, then under what circumstances can we prosecute on the basis of this law? On the other hand, assuming that the presumption of future criminality is reliable under the circumstances laid down by the rabbis, the stringent restrictions limiting potential prosecutions may result in the endangerment of society if prosecutions are not undertaken to prevent future harm.

The Rosenbergs draw a solid connection between modern juvenile delinquent laws and the *בסור*. Their argument claims that this law is one aimed toward predicting future criminality. The application of this view relies on the rabbinic interpretation because it claims that the law of the stubborn and rebellious son is one of presumption.¹¹¹ The offense of the youth is deemed as a pattern of behavior that requires him to be judged on account of his ultimate end – *גידון על שם סופו*.¹¹² The Rosenbergs write, “It is also further evidence that the sages understood the law, at least as it relates to the boy’s conduct, to be motivated by concern for the prediction and prevention of future criminality.”¹¹³ This idea of prediction is also present, as discussed above, in the other two sections of the Talmudic chapter. The thread connecting the three topical divisions of the Mishnah and Gemara appears to be this idea of presuming the outcome of specific behavior and/or actions. In the case of the thief, it is presumed that he will kill in order to

¹¹⁰ Rosenberg, “The Law of the Stubborn and Rebellious Son,” 515.

¹¹¹ *Ibid*, 554.

¹¹² Mishnah Sanhedrin 8:5.

¹¹³ Rosenberg, “The Law of the Stubborn and Rebellious Son,” 556.

remain undetected.¹¹⁴ The final division claims the pursuer will be obligated to death for his presumed outcome for one of three crimes: murder, sodomy, or rape of a betrothed woman.¹¹⁵

This use of presumption is a challenge to the truism of Jewish law that punishments are due for crimes committed: "Although it is a virtual truism that one is punished for crimes committed in the past rather than the future, here it is different, in order that he may *die innocent*."¹¹⁶ On the other hand, Jewish law also insists on the value of predicting criminality and ensuring the death of certain potential criminals in innocence. The case of the stubborn and rebellious son is particularly problematic precisely because it represents a compromise between these two mutually exclusive, competing aims. In this case, the judicial process that has been created contains so many qualifications and safeguards that successful prosecution is unlikely. At the same time, any successful prosecution, conviction, and execution of a בסי"מ would punish an offender in a way that is disproportional to the actions committed.¹¹⁷

Yale and Irene Rosenberg champion the argument that this law is about predicting future criminality. Their views are grounded in the reading of the Biblical text, the aim of the Mishnah, and the conclusion of the Gemara: "In any case, the Mishnah clearly views the law as predicated on future criminality, namely, the boy's ultimate destiny – his "end." A hint in the biblical language itself buttresses this mishnaic conclusion: While the Torah states that the boy still does not "listen" to his parents even after he is flogged, the verb form in this instance is in the future tense, reading literally that he *will* not listen

¹¹⁴ BT Sanhedrin 72a.

¹¹⁵ BT Sanhedrin 73a.

¹¹⁶ Rosenberg, "The Law of the Stubborn and Rebellious Son," 540.

¹¹⁷ These are safeguards against improper or false conviction. Especially in a capital case, it is necessary to ensure the guilt of the accused.

to them in the future. Although the nature of the subsequent criminality is not made clear in the Bible or the Mishnah, the Gemara, as well as later sources, indicate a fear that the youthful offender will ultimately commit robbery and murder to support his addiction to meat and wine."¹¹⁸ According to this view, the concern for protecting the community in the future from the youth's detrimental misconduct appears to be the law's purpose. Therefore, the behavior exhibited by the youth is his lack of adherence to the *mitzvot*. However, as a minor, it is difficult to make a claim against him as liable for transgression: "The Gemara in effect is suggesting rebellion against Jewish law, the *mitzvot*, is not a necessary element of the offense, because a minor is not bound by that law. Furthermore, by considering the possibility that a minor, who by definition cannot be culpable for violation of the law, may be executed, the Gemara is intimating that prevention of criminality is sufficient ground for imposing the death penalty and that the perpetrator is not being punished for his gluttony and drinking per se; rather, these acts are being considered only for the significance as predictors of future criminality. It is therefore clear that the Gemara's initial premise is that future criminality is the sole reason for killing the stubborn and rebellious son."¹¹⁹ Although the Rosenbergs do not state this explicitly, they may be touching on an additional argument that this law serves to set an example, and therefore, it is a forewarning against such behavior.

The prediction of future criminality appears to be a purpose of the law of the stubborn and rebellious son, but perhaps the process in place to predict suggests an additional aim. The process described in the Gemara indicates an attempt to educate the youth, and this has the goal of transforming the youth's behavior. This implies that a

¹¹⁸ Rosenberg, "The Law of the Stubborn and Rebellious Son," 540.

¹¹⁹ Rosenberg, "The Law of the Stubborn and Rebellious Son," 557.

purpose of Jewish law in general, and the law of the stubborn and rebellious son specifically, is a transformative process. This idea is grounded in the Mishnah and expanded by the Gemara, but it is brought together by the Rosenbergs in their argument stating that this law is about prediction of future criminality. In mishnah four, the sages include the concern that the youth may flee. The Rosenbergs claim that this may in fact be the point at which the youth realizes the gravity of the situation. Prior to this realization, the boy may simply be thumbing his nose at the authority of his parents and his community.¹²⁰ And yet, the situation is more serious when there is a court of twenty-three judges assembled and they have the authority to impose the death penalty. Despite the lengths the rabbinic writings go to in order to define the crime and assess the punishment, their limitations make the law all but impossible to apply. We will discuss this idea at length later, but since the Rosenbergs make claims about acquitting the innocent, about predicting future criminality, and about limiting the application of the law, they do not identify the crime at all. Rather, they describe how the activity, the liability, the behavior pattern, and the capital punishment for the transgression demonstrate a principle of presumption that is meant for study, and not for application.¹²¹

Part II - Identifying the Punishment

Now that we have identified the “crime” of the stubborn and rebellious son as a behavior pattern and a series of acts rather than a discrete act, we now examine what that means for the punishment. In this section, we will begin by discussing the changing punishment from the youth’s initial acts of gluttony, drunkenness, stubbornness, and

¹²⁰ Rosenberg, “The Law of the Stubborn and Rebellious Son,” 551.

¹²¹ BT Sanhedrin 71b. This is not their conclusion. Rather, this is my conclusion based on their work and everything discussed previously in this chapter.

rebelliousness, to the conclusion made via presumption that he is liable to capital punishment. Once that is explained, we will return to an element of the Biblical text that states that this law serves to remove evil from the midst of the community.¹²² This ultimately serves to protect the community, and, as we will see, this idea is rooted in the classical sources as well. Finally, we will compare the claim of modern scholars that the “evil” being removed from the community is synonymous with the modern psychological condition of psychopathy. By the conclusion of this section, we will have followed the progression of the changing punishments, the idea that the punishment serves to protect the community, and pose the idea that the punishment serves to root out psychopathy.

Changing the Punishment

In the course of prosecuting a stubborn and rebellious son there are two types of punishment administered. The initial punishment is lashes for his behavior while under his parents’ jurisdiction, but it is lashes again once he is brought before the elders.¹²³ However, we know that the Bible condemns the *בסור* to execution, and the rabbis must adhere to this Biblical foundation. The shift in punishment from lashes to execution requires appropriate justification. The rabbis identify a pattern of behavior that extends beyond the administration of lashes. While the aim of the initial punishment of lashes is to change the youth’s behavior, the eventual shift to capital punishment has a different aim that is to remove evil from the midst of the community. It is this transition that also makes for later difficulties in attempts to codify the *mitzvot*. Above, we discussed the Halakhic debate between Ramban and Rambam. Therefore, the change in the

¹²² Deuteronomy 21:21.

¹²³ BT Sanhedrin 71b.

punishment is the result of different identifications of the crime. It follows that since the initial judicial process of conviction seeks to transform the youth's behavior resulting in the punishment of lashes but does not succeed, the punishment is altered to execution for being a stubborn and rebellious son once his behavior is deemed irreversible.

The offense referred to in this chapter is acting as a danger to society. This view relies on the fact that the Mishnah and Gemara, and later sources, claim that one's ultimate (presumed) end is the "crime," and on that basis the specific punishment for being dangerous is determined. However, this does not necessarily cohere with the layperson's view of a system of law. Justice seeks to match punishment to certain crimes. Yet, this collection of laws found in chapter eight of Sanhedrin makes a different claim, which is about preventing future crime. This is one that is originally found in Midrash Tannaim.¹²⁴ That text is part of a collection of midrashim whose origin is difficult to determine, but was likely written during the Tannaitic period, and therefore nestles its date in between the Mishnaic origins of the Oral law and the sealing of the Talmud with the Gemara exposition of the Mishnah.¹²⁵ Its date is significant because it demonstrates the ideas possibly in circulation at the time that inform the sages' understanding of this law, and therefore inform our views as well. Midrash Tannaim states, "ומפקח על הדרכים ומאבד נפשות הרבה, ואמרה תורה מוטב שתאבד נפש אחת ואל יאבדו נפשות הרבה."¹²⁶ It is clear that the application of this law seeks to protect the public from the threat of the potential offender. This aim is achieved by the changing punishment, once the youth's behavior is not transformed, to capital punishment.

¹²⁴ Midrash Tannaim *Devarim* 21.

¹²⁵ Strack and Sternberger, *Introduction to the Talmud and Midrash*, (Minneapolis, MN: Fortress Press 1992), 275.

¹²⁶ Midrash Tannaim *Devarim* 21.

The Result of Punishment: Removing Evil from the Community

Hanan Schlesinger makes the point in his argument that it is for the protection of the future, and the purpose of that prevention is for the sake of the general public.¹²⁷ In this view, he is advancing a previous argument a step further. In doing so, his work is enormously helpful in understanding both the application and the purpose of this law. He concurs with the earlier statement that we are dealing with a conflict of interests between seeking justice by punishing those who commit crimes and the prevention of future crime, i.e. punishing dangerousness.¹²⁸ A legal commentary by Paul Robinson offers, by way of extension, an interesting critique of the Talmud Sanhedrin material.¹²⁹ Robinson questions the purpose of trials in the case of preventative detention by the same critique that one is punished, in this case, for an offense that has not yet been proven, let alone not yet committed.¹³⁰ Following this reasoning, we are left with this question: *if in fact the laws presented in chapter eight of Sanhedrin seek to judge on account of one's (presumed) end based on prediction that is determined by meeting detailed conditions, then why include a judicial process in the same chapter?* From the perspective of application, the process described may simply be to explain how the conditions for these laws are to be met and examined in order to identify first the "crime," and then the punishment. Another explanation that does not require the reconciliation or balancing of these differing views of law is simply that dangerousness is legislated as an offense.

¹²⁷ וְכִי מַפְנִי, , שלזינגר 140, note 5.

¹²⁸ וְכִי מַפְנִי, , שלזינגר 142. Here the argument is that the dangerousness of the potential בַּסֵּוֹר is known for sure by God, therefore it is not prophecy on anyone's part, rather for the protection of the many.

¹²⁹ Paul Robinson, "Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice," *Harvard Law Review*, 1429, (2001): 7.

¹³⁰ *Ibid.*

Therefore, the punishment is for *being* dangerous in terms of character. The net effect of this is to remove the "evil" of dangerousness from the community.

Punishing Psychopathy

Mordechai Rotenberg and Bernard L. Diamond make an argument that the law of the stubborn and rebellious son represents the biblical conception of psychopathy, and therefore identify this psychological disorder with the mention of "evil" in the Biblical text.¹³¹ The crux of this argument hinges on the severity of the behavior as defined by the punishment. Since the Biblical law mandates the death penalty, there is great severity attributed to the behavior itself.¹³² This drastic punishment informs us that the youth's criminal tendency is something that cannot be remedied. The Ancient world did not recognize psychological disorders separately from criminal conduct the way many do today. Therefore, to begin the punishment of lashes aims to alter the offender's behavior; however, the threat of capital punishment also represents the loss of hope of ever altering the criminal path or trajectory of the offender. Because of the innate nature of the disorder, the sages saw no way to remedy the situation except by execution. It is not only the punishment that indicates such severity, but according to Rotenberg and Diamond, there is also the argument that a condition exists that is irreversible. It is the motivation, or the driving force, behind the offenders' actions, whether it is the *בסי"מ*, the thief, or the pursuer. It is their contention that the motivation of the stubborn and rebellious son is best described as a mental disorder synonymous with psychopathy.

¹³¹ Rotenberg & Diamond, "The Biblical Conception of Psychopathy."

¹³² Rotenberg & Diamond, "The Biblical Conception of Psychopathy," 31, "It is of particular interest that both the Talmud and modern psychiatry emphasize the fixed, irreversible nature of the condition." This statement is supported by the Biblical command to stone the transgressor and the Mishnaic dictum that the offender is, "נידון על שם סופי".

Rotenberg and Diamond argue that there is a link between two pieces of the rabbinic exegesis. The first is that the Biblical law seeks to sweep evil from the community's midst. The second is that the explanation for the death penalty is derived from the seriousness of the pattern of behavior exhibited by the youth. If the motivation is the result of psychopathy and that is the "evil" within the community's midst, then this link can be drawn between the behavior pattern that is antisocial and so detrimental to the community that it justifies the severe punishment in order to protect the community. This is so detrimental that, according to the Biblical text and the rabbinic interpretation, should all of the conditions be met, such behavior leads to execution. This still requires that the penalty is an act of prevention of future criminality that is sure, according to the interpretation, to be the natural progression of the youth's current exhibited behavior. Rotenberg and Diamond are successful to this point in labeling the exhibited behavior of the son via modern psychology. In terms of the purpose of this law, their argument demonstrates a case where Halakha legislates a policy for dealing with a psychological disorder.

Rotenberg and Diamond make their claim that the *בסי"מ* is the Biblical conception of psychopathy based on the idea that the son is demonstrating behavior that is irreversible.¹³³ In the rabbis' explanations in the Gemara and the representation of those ideas by Rambam, we are looking for two criteria to establish the status of the youth's behavior. In the words of Rotenberg and Diamond, the first is "whether or not overindulgence in eating, drinking, etc., was indicative of an unchangeable form of addiction;" and the second is, "whether the cause of this behavior pattern was

¹³³ Rotenberg & Diamond, "The Biblical Conception of Psychopathy," 31.

endogenous rather than exogenous.”¹³⁴ The rabbis of the Talmud discuss in much detail the conditions under which one will most likely form evil habits of eating and drinking. For example: ‘If he ate raw meat or drank undiluted wine, he does not become a *stubborn and rebellious son*’ because in their view, one cannot become habituated to eating raw meat and drinking undiluted wine.”¹³⁵ In light of this added perspective to the work of Diamond and Rotenberg by Rambam and the Gemara, we can see that the behavior pattern is described as detrimental to the larger community and it is such that the youth’s execution allows him to die innocent while protecting the community. However, it is unclear if the rabbis, or later sages who we have discussed, address the issue of the behavior as caused by something endogenous or exogenous. This is a question that remains unanswered by the material, but the pedagogic aim of the material, and therefore, the transformative power of learning may indicate that the cause is endogenous and the results are exogenous. But if we follow the argument of Rotenberg and Diamond, the removal of evil from the community is the result of punishing psychopathy. This, from a modern sensibility to advancements in understanding psychology, may seem outrageous. It is the view that this is punishing an addict who may have limited, if any at all, control over this רעבתנות – insatiable hunger, that questions the justice of this law.

Part III – The Issue of Justice

Ultimately, this law and its interpretations demonstrate ongoing attempts to associate the Biblical material with evolving notions of justice. There is a limiting effect

¹³⁴ Rotenberg & Diamond, “The Biblical Conception of Psychopathy,” 33.

¹³⁵ Rotenberg & Diamond, “The Biblical Conception of Psychopathy,” 33. Rambam, *Mishneh Torah*, *Shofetim*, *Halakhot Mamrim* 7:4. BT Sanhedrin 70a.

on the application of this law created by the rabbinic writings and this may indicate the sages' inability to see justice in this law. However, there is more to this effect than rendering the law nugatory. The qualifications and conditions are restrictively interpreted to that end, but it is the later Halakhic works that support and reinforce this reading of the Talmudic material as limiting the applicability of this law. I will argue that the later authorities of Jewish law continue this limiting and restrictive interpretation by default. Specifically, that Alfasi and Asheri are also making an argument about limiting this law by the absence of the material related directly to the *בסור"מ* in their codes. The conclusion of this section is that while the claim within the material is that this law is for the purpose of study, that pedagogic aim serves additional purposes.

Eliezer Lerner and Justice Through Presumption

While the conviction of a minor is reconciled in this case because of his "certain" outcome, the ability to convict the stubborn and rebellious son based on future criminality does have its problems. Herein there exists a possible conflict in the rabbinic understanding of presumption. This idea as interpreted by the rabbis requires certain conditions to be met. Once these requirements are fulfilled, the potential *בסור"מ* has begun a pattern of behavior that must be corrected, but apparently cannot. Therefore, according to the rabbinic presentation of the material in the Talmud and later sources, the stubborn and rebellious son is beyond rehabilitation and is on the path to becoming a robber and eventually a murderer.¹³⁶ The Halakhic conclusion stands that one who meets the stated requirements is subject to capital punishment to protect the community and the world.¹³⁷

¹³⁶ BT Sanhedrin 72a. Rosenberg, "The Stubborn and Rebellious Son," 540.

¹³⁷ Mishnah Sanhedrin 8: 5.

The Mishnah states, "A 'stubborn and rebellious son' is tried on account of his [presumed] end: let him die innocent and let him not die guilty. The death of the wicked benefits them and benefits the world."¹³⁸ The idea presented in this mishnah is that when the son is executed in order that he die innocent, he is therefore presumed to be wicked in the end. The death of the wicked is not only in the desire to protect the innocent remainder of society, but also to protect the wicked himself, as the mishnah indicates. The benefit to the potential wicked individual is to die innocent (perhaps of further crimes not yet committed).

Eliezer Lerner presents a concise reading of the law of the stubborn and rebellious son and addresses the difficulties with prediction of future criminality.¹³⁹ Additionally, his work presents a new idea about the rabbinic writing on the *בס"מ*. He explains how the material exhibits a desire to find justice in presuming future criminality, which leads to difficulties that must be addressed. Lerner's strategy explores various rabbinic readings of this law. His aim is to explore various interpretations within the material and articulate his view of the most clear and defensible understanding of this law that demonstrates justice. Through this work, he presents a new idea about the son's liability as a *בס"מ* that is not addressed in the Talmudic chapter. In addition to this new idea concerning the nature of the potential *בס"מ*'s liability, he also presents a possible

¹³⁸ Mishnah Sanhedrin 8:5. The remainder reads, "...of the righteous is bad for them and bad for the world. Wine and sleep for the wicked benefits them and benefits the world, for the righteous it is bad for them and bad for the world. The scattering of the wicked benefits them and benefits the world, for the righteous it is bad for them and bad for the world. The gathering of the wicked is bad for them and bad for the world, for the righteous it benefits them and benefits the world. Tranquility of the wicked is bad for them and bad for the world, for the righteous it benefits them and the world."

¹³⁹ אליעזר לרנר, "פרשת בן סורר ומורה," *דמעין*, 45:2, (5-2004), 66-58.

contention with the idea that the son is נידון על שם סופו – judged on account of his [presumed] end.¹⁴⁰

By examining this concern more closely, it is more clear how the rabbinic interpretation demonstrates the son's liability and its justice. It is important to recall that Rabbi Jose the Galilean raises this question in the Gemara, "Did the Torah decree that the rebellious son shall be brought before Beth din and stoned merely because he ate a tartemar of meat and drank a log of Italian wine? But the Torah foresaw his ultimate destiny. For at the end, after dissipating his father's wealth, he would seek to satisfy his accustomed [gluttonous, drunkenness, rebelliousness, and stubbornness] wants but being unable to do so, go forth at the cross roads and rob."¹⁴¹ This statement explicitly demonstrates for us that the ultimate destiny of the stubborn and rebellious son's behavior is inevitably a life a crime, at least according to the rabbinic interpretation. The rabbinic work elucidates how the Biblical material describes indicators of behavior that will *rob* the community of its social order. In addition, we recognize now the complexity of the son's behavior in relation to the *mitzvot*. Lerner also recalls the Biblical commentary of both Ramban and Ibn Ezra in their descriptions of how the conditions for the law of the stubborn and rebellious son are the transgressions of both positive and negative precepts.¹⁴² Despite the fact that it states he is executed for his ultimate end, his ultimate end is established based on the indicators of eating, drinking, stubbornness, and rebelliousness. And yet, punishing dangerousness as a character trait, as we have

¹⁴⁰ לרנר, פרישת בן סורר ומורה, 63ff.

¹⁴¹ BT Sanhedrin 72a.

¹⁴² Ramban on Deuteronomy 21:18. Ibn Ezra (Rabbi Avraham ben Ezra) on Deuteronomy 21:19. It is also of note that both of them come to this conclusion from different verses. This is an additional layer to the evolution of this law and its continued development.

discussed, does not fit within a classical understanding of justice.¹⁴³ Similar to the idea of punishing psychopathy, punishing acts not yet committed is difficult for a modern sensibility. Nonetheless, the argument is made that the justice is achieved in protecting the community; however, presumption does cause difficulty for the goal of justice.

The Difficulties of Justice Based on Presumption

As a comparison, Lerner presents a notable dissonance within the Gemara to challenge the idea of presumption as it has been argued thus far.¹⁴⁴ This conflict is raised based on the words of Rabbi Isaac in tractate Rosh Hashanah: "Man is judged only according to his actions up to the time of judgment, as it says, God hath heard the voice of the lad as he is there."¹⁴⁵ The mention of the 'lad' at the end of this quotation is from Genesis 11:17, when Ishmael and Hagar are stranded in the desert. From this, one could argue that only after acts are committed can one be punished as a result. If we follow the reasoning of presumption laid out above that the youth is נידון על שם סופו – judged on account of his [presumed] end, then we could question the rescue of Ishmael from the desert. Such reasoning would deem Ishmael liable for future, but not yet committed, acts resulting in harm to the community. For the tradition indicates that certainly the result of his living in the end of the story causes sin.¹⁴⁶ Rabbi Isaac uses this as the proof text, and more specifically, he uses the idea that even Ishmael was "heard" by God and rescued

¹⁴³ On this same idea and its connection to this material see Rosenberg, "The Stubborn and Rebellious Son," 560.

¹⁴⁴ לרנר, פרשת בן סורר ומורה, 65.

¹⁴⁵ BT Rosh Hashanah 16b.

¹⁴⁶ לרנר, פרשת בן סורר ומורה, 65ff.

from his peril.¹⁴⁷ Therefore, how could the potential stubborn and rebellious son be liable to death for acts not *yet* committed?¹⁴⁸

There is more than one response to this problem. One is that the sins attributed to Ishmael are not his own. Therefore, because the sins are only a result of his future progeny, he could not be judged negatively on account of *his* end. Rather, it is the ultimate result of God's rescue Hagar and Ishmael in the desert, Ishmael's eventual procreation, and his progeny's sins that cause harm to the community. Lerner presents another response to the issue that the potential בסי"מ has begun the path that will lead to his own liability.¹⁴⁹ Not only are the prohibited acts, or the conditions required for conviction, already in progress, but they be directly attributed to the individual. Both justifications explain the differences between the case of Ishmael and the stubborn and rebellious son. Yet, neither of them explains how one can be judged for acts that have not yet been committed, nor do they explain the justice achieved through presumption.

The Talmudic Material Limits the Possibility of Conviction

Rabbinic readings of the law of the stubborn and rebellious son contain numerous restrictive interpretations. The ever-diminishing possibility for the occurrence of a בסי"מ indicates this element of the interpretive process as described by the Talmudic sages.¹⁵⁰ And yet, in the same chapter and in the same line of the Gemara, the conclusion concerning the actual occurrence of a stubborn and rebellious son is left undecided. One

¹⁴⁷ BT Rosh Hashanah 16b.

¹⁴⁸ There is another question of much grander importance: *Why is God, or the Law for that matter, unable to save the stubborn and rebellious son?* This is one of the larger Halakhic issues raised in this material. This will be explored further in chapter three, Part I.

¹⁴⁹ לרנר, פרשת בן סורר ומורה, 65-66.

¹⁵⁰ BT Sanhedrin 71a.

sage claims that the law only exists for the purpose of study, which leads to a reward; another, Rabbi Jonathan, claims otherwise. The vacuum of the text leaves unclear the ultimate purpose of this law if one will never exist. However, our examination of the interpretive process reveals much about the desired aims, or purposes, of the law of the stubborn and rebellious son. This chapter has already mentioned some: the prediction of future criminality and the purpose of study. Additionally, this difficult conclusion is of great significance in the development of this law. It is the catalyst for later authors of Jewish law to wrestle with the application and purpose of this law. Rabbinic interpretations of the law of the stubborn and rebellious son have grown increasingly restrictive and the possibilities for its enforcement and prosecution have become ever more remote; however, rabbinic discussions concerning the purpose of the law have continued to grow.¹⁵¹ It is made almost impossible to apply in any real, sense and there is a desire to avoid conviction of anyone as a *בן סורר ומורה*.¹⁵²

The following discussion will demonstrate how it is possible to read the Talmudic material as limiting the application of this law. The first element is the status of the youth as between a minor and a major. Second, the time span for conviction is limited to only three months, thereby making liability all but impossible to achieve. Third, there are other conditions that must be met that make conviction not only unlikely, but make it almost unattainable. Finally, the stated purpose in the Gemara that this law is for the purpose of study reinforces the limited applicability of the law, and as a result, presents a different purpose. In addition to these elements, later codes of Halakha make a case about the limiting of this law by not including its specifics in their text.

¹⁵¹ Ruth Sandberg, *Development and Discontinuity in Jewish Law*, (Lanham, MD, Oxford: University Press of America, 2001): 88.

¹⁵² David Marcus, "Juvenile Delinquency in the Bible," 50.

The Status of the Youth – “Is the בֶּסוּ”ם a Minor or a Major?”

While the offense(s) is described in the case of the בֶּן, it is still unclear who exactly he is. This is so important for the rabbis that it is their first question in the Gemara in response to the Mishnah. The crux of this line of questioning is that the traditional notion of a son is one who is a minor, and therefore not liable for the commandments. In an attempt to interpret the Bible and the Mishnah and reformulate the law of the stubborn and rebellious son, the rabbis define the age restrictions for one who may be liable as a בֶּסוּ”ם.¹⁵³ In the first two mishnayot, the rabbis lay out the clear rules for who the בֶּסוּ”ם is and what he must do in order to satisfy the conditions of the law of the stubborn and rebellious son. The first topic tackled by the sages is the youth’s age and the first question they answer through their interpretation is: Who can become a בֶּסוּ”ם?

The Biblical text starts, “כִּי יִהְיֶה לְאִישׁ בֶּן סוֹרֵר וּמוֹרֵד”, and yet the rabbis are compelled to stipulate boundaries for who may become liable as a stubborn and rebellious son. The sages are attempting to understand exactly what can occur to lead to a situation in which a son, a seeming minor according to Jewish law and therefore not liable to the *mitzvot*, is guilty of transgressing the *mitzvot*. This is especially difficult for the sages because of the severity of the punishment.¹⁵⁴ The tension exists between when he becomes liable for punishment via the *mitzvot* in general, and the existence of a

¹⁵³ BT Sanhedrin 68b.

¹⁵⁴ The severity of the punishment is called into question later by the sages of the Gemara. In the BT Sanhedrin 71a רבי שמעון calls the punishment’s severity into question, “וְכִי מִפְּנֵי שֶׁאֵכֵל זֶה תִּרְטִימָר בָּשָׂר וְשֵׁתָה זֶה”, “חֲצִי לֹג יֵין הָאֵיטְלָקִי אֲבִיו וְאִמּוֹ מוֹצִיאִין אוֹתוֹ לְסָקְלוֹ.”

biblical mandate to prosecute someone described as a בן by the biblical text.¹⁵⁵ This establishes clear boundaries for the potential בטרם in that he must be a male between the ages of thirteen and one day, and thirteen and three months. This window of opportunity is established by the Gemara. This reconciles the tension of holding a youth liable for the *mitzvot*. By claiming that he has already reached the age of thirteen, the son is therefore liable for the commandments in general. To remain consistent with the Biblical text, the rabbis have to interpret the text to indicate why he is still called a בן – a son – and is somehow already liable for the commandments. This is done by making a claim that the בן in this case is older than thirteen, but cannot yet procreate. This is done by way of the Biblical text itself because it states, “כי יהיה לאיש בן.”¹⁵⁶ The rabbis reason that this indicates a בן who is about to be a איש. Therefore, the window of opportunity is from the time one is bound by the *mitzvot* but is not yet a full man, which is now defined as one who is capable of procreation. In this exegetical work, they remain, through their interpretation, consistent with the Biblical text.¹⁵⁷

While this seems to reconcile the tension of holding a youth liable for the *mitzvot*, it does limit the law’s applicability.¹⁵⁸ This is an important development within the law because it raises a question about the boundaries established for the youth’s age. The first boundary is that he must be thirteen to be liable for the *mitzvot*. That much is clear, but why the latter boundary of not being able to procreate? It is possible that the sages are alluding to the motivation, or the driving force discussed above. If this is the case, the

¹⁵⁵ The tension lies in the fact mentioned above that without the interpretive process a בן would not be liable for the *mitzvot*.

¹⁵⁶ Deuteronomy 21:18.

¹⁵⁷ BT Sanhedrin 68bff.

¹⁵⁸ The law is limited to such an extent that it is almost inapplicable partly because of the judicial process required as it is set up by the Gemara. There must be two quasi hearings, which would be difficult to occur within the short three month window.

rabbis may be legislating (through their restrictive interpretation) to protect the youth from a psychological disorder, which is something they most likely do not fully recognize. Therefore, it makes sense that preventing the youth from procreation may seem to rid the community of this driving force, or this “evil,” as it is called in the Biblical text. Whatever the motivation for the rabbis to limit prior to procreation was, the result is a critical three month period in which all of the accusations, convictions, and trials must occur to reach a final conviction for a *בסור*.¹⁵⁹

Three Month Window of Opportunity – A Critical Period of Development

The *Sefer Hahinuch* makes a point about the short time span in which one can be liable as a stubborn and rebellious son. It states that the law of the *בסור* applies in the very first days during which a young man is responsible for the maintenance of his two essences.¹⁵⁹ While we know the youth must be between thirteen years and one day, and thirteen years and three months, here the argument is about how this short time span is a critical period of development for the youth and his adherence to the law. The three-month window in which the law may be applied carries the burden of the whole of Torah and all of its commandments. The moment the youth becomes thirteen, he is liable for the mitzvot. This window of opportunity works in both directions. According to the author, the youth is full of excitement at this moment because it is the beginning of his freedom to be responsible for his own soul. During this time, his actions will surely follow him throughout his days. In other words, the type of behavior that manifests within him at this beginning of his manhood will be his for all time. This is an echo of all

¹⁵⁹ See section on “Activity, Transgressing, and Liability.”

we have heard before in that there is a fear of the evil road he is traveling down. The author here adheres to that understanding, but has presented a very different perspective.

Limiting Requirements and Conditions¹⁶⁰

This pattern of behavior leads to the prediction of future criminality, as described above. And yet, this conflict of interests between punishing crimes already committed and predicting future crimes is difficult to balance completely. There appears to be a conflict even in the rabbinic interpretation about how to reconcile these two ideas. In the Mishnah, Rabbi Jose the Galilean questions the suitability of the punishment with the crime. It is this question that leads to the conclusion of predicting future criminality and that this law is for the purpose of study.¹⁶¹ But even prior to this, there are many restrictions placed on the application of this law. Earlier, we discussed the limiting factors in relation to the parents and their fitness to one another.¹⁶²

In addition to the requirements about the youth's parents and the short time span, the Gemara establishes a variety of underlying rationales for the law. The implications are a number of restrictions that are so diverse and extreme that they render the law almost inapplicable.¹⁶³ The Rosenbergs read the rabbinic writing to be about predicting future criminality, while attempting to maintain the purpose of Jewish law to assure the acquittal of the innocent.¹⁶⁴ This tension seems to pervade the rabbis interpretation as well. Their limiting the possibility of conviction falls into multiple categories, some of which we have already discussed. They limit the window of opportunity for conviction.

¹⁶⁰ Rosenberg, "The Law of the Stubborn and Rebellious Son," 554.

¹⁶¹ BT Sanhedrin 71 – 72a.

¹⁶² See the section on "Identifying the Crime."

¹⁶³ Rosenberg, "The Law of the Stubborn and Rebellious Son," 554.

¹⁶⁴ Rosenberg, "The Law of the Stubborn and Rebellious Son," 515.

They narrow the times, the types, and the places one can engage in the necessary activity to result in liability. And, as we just mentioned, they limit the ability to convict based on the physical attributes of the youth's parents. All of these demonstrate that the Talmudic material, in its attempt to identify the crime, identify the punishment, and address the issue of justice in this law, can be read as limiting the law.

The Restrictive Reading of the Talmudic Material Reinforced

The *baraita* mentioned earlier states that there never has been, nor will there ever be, a case of a stubborn and rebellious son, and sets the stage for the restrictive reading of the Talmudic material.¹⁶⁵ Rabbi Jonathan claims in a counterargument that he has witnessed a case of a stubborn and rebellious son, and even sat on his grave. The third view in this conflict is the statement that this law is for the purpose of study, “דרוש וקבל שכר.”¹⁶⁶ It is in the interest of justice that laws are typically applied, but here we find that the application of this law is for education.¹⁶⁷

In the interpretative work of the Talmudic sages, the law of the stubborn and rebellious son is required to demonstrate a specific pattern of behavior. The judicial process beginning in the home, moving to the community, and eventually involving capital punishment, describes multiple stages prior to the boy's flight from conviction, should he flee. Each stage offers its own punishment for the exhibited behavior of the youth. If, in fact, the purpose of this law is pedagogic, as suggested by the Gemara and expounded by Schlesinger, then perhaps that educative goal is for the boy to transform his behavior. This assumes that study in itself is a transformative process, and it is the

¹⁶⁵ BT Sanhedrin 71b.

¹⁶⁶ BT Sanhedrin 71a.

¹⁶⁷ 145, וכי מפני, שלזינגר.

activity that causes growth. Through the study of this law, one may be able to transform such behaviors described in the material, and therefore, the transformative quality of this law is plausible and may in fact be its ultimate purpose: to have a pedagogic aim.

The pedagogic aim is reliant on the argument that the law of the stubborn and rebellious son is about a pattern of behavior because there must be single events to learn from and transform one's behavior to a "better" path. Many of the Post-Talmudic Halakhic authorities come to similar conclusions as modern scholars. Among them, Rambam carries this idea of a pattern of behavior as a main issue of the material on the מ"בסו. In his *Mishneh Torah*, he writes, "אכל בשר חי ושתה יין חי פטור שזה קרי הוא ואין אדם יכול להמשך בזה".¹⁶⁸ While this is not Rambam's original language, he organizes the material in such a way to make a point about the rationale behind the sages of the Talmud. Rava and Rav Joseph make a similar claim in the Talmud, but their claim does not dwell on the qualities of the types of food and drink as Rambam does. Therefore, Rambam develops the claim in the Gemara about a pattern of behavior even more explicitly, and in doing so, he narrows the law's applicability.¹⁶⁹

Isaac Alfasi, in his ספר ההלכות, maintains this status of the potential מ"בסו as a high point of material in chapter eight of Sanhedrin, yet his editing of the material reveals a different purpose for the law of the stubborn and rebellious son.¹⁷⁰ His organization of the material suggests that the purpose of this material is for one to preserve the status of being innocent in regards to the law. Alfasi's re-organization presents the latter section of the Mishnah and Gemara as the core of the material. His introductory material to

¹⁶⁸ *Mishneh Torah, Sefer Shoftim, Hilchot Mamrim 7:4*. Translation: the one who eats live meat (i.e. the blood is still within) and drinks live wine (i.e. undiluted) is exempt because this is simple rebellion (for the use of this translation see Leviticus 26:27-28) and one could not continue in this manner.

¹⁶⁹ BT Sanhedrin 70a.

¹⁷⁰ Isaac Alfasi, *Sefer HaHalakhot*, "The Stubborn and Rebellious Son, Chapter Eight, Sanhedrin."

chapter eight includes the first mishnah in its entirety. He transitions from there to the final Mishnah of the chapter.¹⁷¹ The exclusion of the bulk of the Mishnah material presents us with two possibilities for understanding his work. The first is that the son's qualifications are the indicative factors in carrying out the law as presented in the Gemara text because there is little or no *chidush* offered by Alfasi. The second is that this law is no longer about the *בס"מ* exclusively, as was stated in the Gemara. Alfasi makes a judgment that the text actually concerns the later section that concentrates on the juxtaposition of Jewish values and the preservation of innocence. This lack of material does provide information; however, it is unclear what the purpose of it may be, as he does not directly state a halakha in relation to the *בס"מ*. Rather, he states a halakha regarding the circumstances wherein one may commit a transgression when one's life is on the line.¹⁷² He restates a rule about martyrdom that draws the boundaries for which transgressions may never be committed *even* to save one's life. There is the preservation of the community and its beliefs in the death of one who is forced to either commit a sin or die. When this notion is related back to the youth and his behavior pattern that indicates a future life of crime, we see that perhaps Alfasi is arguing that he should die a martyr rather than cause damage to the community. If this is correct, then Alfasi's aim is in reinforcing communal identity and protecting communal authority. To this end, Alfasi seems willing to execute the stubborn and rebellious son, and sacrifice him for the greater good. Additionally, my argument about Alfasi's omission is that the law is limited to such an extent, it may no longer be applied. But, the lessons learned through the pedagogic aim of this halakha are found in the latter sections of the chapter on the *בס"מ*.

¹⁷¹ Mishnah Sanhedrin 8:7. This claims there are certain transgressions that one must be prevented from committing even at the cost of his own life.

¹⁷² This is the following rule: יעבור ואל יהרג או יהרג ואל יעבור.

Just as Alfasi anchors the theme of his work in the final section of the Gemara, another authoritative voice of the tradition also launches his argument from this section. Rabbeinu Asher (the *rosh* – ראש) fails to include any direct references to the *בס"מ*.¹⁷³ However, while the details may not be present, there is no doubt of a connection to the material as a whole. The Rosh is not compelled to restate or edit the material regarding the first two sections, but draws on the principles and ideas raised in those sections. His interpretive endeavor begins with the words, "*בס"מ*," but moves right into quoting Mishnah seven. There is a clear objective to address, discuss, and codify the laws relating to this final section of the Gemara. There is a new idea presented in his material that is of interest in our discussion about the purpose of this law. The detail he uses to describe the pursuer from the final mishnah of the chapter is unprecedented in the interpretations of the *בס"מ* material. He examines the motivation, or the intent, of the pursuer and argues the importance of this issue within the *בס"מ* material. Asheri is making an argument that the intent and the offense each carry merit in the determination of punishment. To drive home his point, he relates the text about Esther from the Talmud to another illustration concerning intent.¹⁷⁴ One of the astounding aspects of Asheri's work is that he is able to represent the three capital offenses one may not violate, even at the cost of his own life, in a new light. He describes them based on the motivation behind the actions. They are recapitulations of the Gemara and yet they are new to our interpretive process because they demonstrate a remolding of the purpose of this law.

In relation to his discussion of the character of Esther, Asheri recalls the text from the Babylonian Talmud that mentions the role Esther had in rescuing the Jewish people

¹⁷³ *Piske HaRosh, Ben Sorer U'Moreh.*

¹⁷⁴ BT Sanhedrin 74b.

from certain demise. The difficulty he deals with is whether this act of engaging in sexual relations with an "*idol worshipper*" (a euphemism in rabbinic texts for non-Jew) was in public. According to our Gemara, she should NOT have done this, even at the cost of her own life. Asheri concludes that this was an act in private and therefore permissible to save her life and certainly to save the Jewish people. Here, Asheri could be relating his insights to the goal of predicting future criminality to serve justice for the whole of the community in rooting out the evil. However, his lack of material relating specifically to the בסו"מ, like Alfasi, indicates that specific law's inapplicability due to the restrictive interpretations. However, just like Alfasi, the lessons learned through the activity of study in this material lead to the conclusions Asheri reaches about the intent and motivation. Furthermore, the attention he gives to the notion of קרקע עולם – *mere dust of the Earth* may be related to the stubborn and rebellious son. Similar to the argument by Rotenberg and Diamond that the youth is a psychopath, and therefore a victim of his own body, Asheri may be indicating his view that the בסו"מ is a victim and an offender simultaneously. Thus, the restrictive Talmudic reading, as well as later codes, address the issue of justice in the case of the stubborn and rebellious son by learning from the law about its preventative measures and its inapplicability. The inability to apply the law is because of the view that there is really no justice in presumption when dealing with addiction. In addition, the preventative measures are found in the study of the material itself, and thus the material becomes a manual for how to avoid the situation altogether.

Conclusions

The pattern of behavior, whether it is the constant battle between חומר and נפש or it is the constant rebellion against parents and Torah, in the law of the stubborn and rebellious son is based on presumption. The goal, so it seems, is to prevent future criminality more so than punish for damage that has been caused. This, perhaps, is the impetus for the rabbis to draw in the discussion of the tunneling thief from the Book of Exodus.¹⁷⁵ The similarities between the biblical accounts of the בסו"מ and the הבא במחתרת (גנב במחתרת) surface because of this issue of presumption. In addition, the claim in the Gemara informs us that the youth's continued behavior will lead him to become a thief. Mishnah five is the transitional piece from the בסו"מ to the הבא במחתרת. The opening phrase of both Mishnah five and Mishnah six are identical except for the subject. This is a clear attempt to root the connection between the separate cases in this notion of presumption because each is נידון על שם סופו – Judged on account of his [presumed] end. The relationship between this phrase and the ideal of ימות זכאי ועל ימות חייב leads to the final section of the Mishnah and Gemara, which focus on the sins one may never commit even at the cost of his life. All three maintain this notion of predicting the future outcome of one's actions. The difference lies in the scope of the detriment. With the case of the disorderly juvenile, his potential harm reaches his family and the community around him. The law about the thief begins to show the bigger picture in which he affects others outside of that familial circle. The final section contains the most heinous of offenses: גילוי עריות, שפיכות דמים, and עבודה זרה are mentioned to indicate the scope of detriment as far-reaching. The point is that the behavior pattern of the youth is indicative of one who will eventually cause harm to those far outside his family and community circle.

¹⁷⁵ Exodus 22:1.

Therefore, it is for the protection of others from the potential harm he will subject others to that lead to his execution.

It could be argued that the provision of the stubborn and rebellious son encompasses two laws. This notion is supported by a specific reading of the classical sources and Rambam. On the one hand, there is the *סורר ומורה* of disobedience to one's parents. This law requires the use of certain rules to judge the nature of the acts/behavior, the qualifications of the parents, and the makeup of the court. The ultimate punishment for this law is lashes for the son. It is additionally possible that this law includes gluttony and drunkenness on the part of the son. However, the second dyad that describes the facts of the case could be the grounds for the second law, the one that apparently is a capital offense. It is more likely, though, that this second law is the issue of repeat criminality.¹⁷⁶ Much like our American legal system that contains statutes that allow for more stringent punishment and the sentencing of convicted criminals with a record, the Jewish legal system seems to as well. This is not only an element of the purpose of this law, but it also speaks to the judiciary procedures. Because of the rationale of preventing future detriment, whether to the individual or to the community, and in accord with the pedagogic aim the law of the stubborn and rebellious son, we now have two assumptions to be aware of. The first is that the judicial process in place for the potential rebellious son must assert that it is a transformative process¹⁷⁷. The transformation of the individual is the first goal of the legal proceedings. The second assumption is that the ultimate end

¹⁷⁶ Rambam's issue of *מעשיך* and *רעבתנות* from his *Mishneh Torah, Hilchot Mamrim: 7*. Rosenberg, "The Law of the Stubborn and Rebellious Son," 562, note 239.

¹⁷⁷ Kirschenbaum, "The Role of Punishment," 127, 128, 142. Rosenberg, "The Law of the Stubborn and Rebellious Son," 515, note 29.

of such a system would be to preserve the customs and order of the community, all in the attempt to seek justice.

It is clear from this examination of the various stages in the Halakhic process of the law of the stubborn and rebellious son that the law has evolved. Beginning in the Bible, the Mishnah develops the law in two significant ways. The first is the inclusion of two other topics that are related to the *בס"מ* material. Their inclusion demonstrates other aspects that are related to the core Biblical material and demonstrate how the law's scope has grown. In addition, the fifth mishnah describes how the son is ultimately judged on account of his end. These two significant evolutions of the law of the stubborn and rebellious son are the beginnings of a process that continues through the Gemara, the post-Talmudic literature, and modern scholarship.

We learn from this process that Halakha does evolve. What is left to be decided is whether that evolution is a process inherent in Halakha or a process based on the needs of different authors of Jewish law in history. It is my contention that it is both. The power of the sages' initial work is that it initiated a process that is described through their interpretive process in the Mishnah and Gemara. Their project is worthy of being examined and studied so that our learning can be applied in other contexts. We may also realize that the authority and legitimacy of applying added meaning to Biblical laws and their interpretations is a completely justifiable process within the boundaries established through the process itself. Further, on the basis of our analysis in this chapter, we may now hypothesize with respect to the motivations and purposes of continued rabbinic interpretation. One argument that I wish to advance is that rabbinic reinterpretation of difficult Halakhic passages, such as the material regarding the *בס"מ*, is motivated by an

attempt to reconcile the text with Halakhic authorities' sense of justice. The debates concerning the application of this halakha, its purpose, and the justification of punishments associated with its enforcement, all reflect this need to reconcile the requirements of the Divine Will with the rabbis' sense of justice. This emerges in the tension between the perception that legal systems function to prevent harm to society and maintain social order and the concern for procedural propriety and due process. Our study in this chapter demonstrates that our world view and life experience may teach us new things about the world that force us to reexamine our views of crime, punishment, and justice.

Chapter 3

Part I – A Failure of Law – Testing the Limits of Law

The rabbinic writing on the law of the stubborn and rebellious son raises the issue of the law's efficacy. Here, I will argue that a purpose of Jewish law is to present a Jew with a legal system by which to live. However, the law of the stubborn and rebellious son presents a difficulty in meeting this goal. This difficulty we have with the law is largely the result of disagreement with statements to the effect that the stubborn and rebellious son is judged on account of his end, rather than acts he has already committed. While his previous conduct meets the conditions of the law, it is ultimately what he "will become" that leads to his execution.¹⁷⁸ There are specific conditions that must be met, and a detailed procedure follows to change the liable youth's behavior.¹⁷⁹ While this procedure is in place, the law, when enacted to its full force of capital punishment, fails to meet those goals to transform the son. The entire chapter of סוֹרֵר וּמוֹרֵה centers around the notion that we may presume future criminality. It is this ability to predict the end of a potential offender that creates a failure of this law specifically, and a failure of law in general.

This juxtaposition between the finding of guilt on the basis of a presumption of future criminality versus prosecution with respect to acts already committed cannot be resolved. The justification of capital punishment in the case of the *בס"מ* requires the acceptance of a preference that the potential offender die innocent rather than guilty. This presents two core values of Jewish law that exist in tension with one another. The

¹⁷⁸ BT Sanhedrin 71a.

¹⁷⁹ BT Sanhedrin Chapter 8 – סוֹרֵר וּמוֹרֵה בן 68bff. Yale and Irene Rosenberg, Bentzion Turin, "Return of the Stubborn and Rebellious Son: An Independent Sequel on the Prediction of Future Criminality," *Brandeis Law Journal*, 37, no. 4 (1998-9).) 13 מורשתינו, "ליסקל", יצא לבי"ד ליסקל, "וכי מפני שאכל ושתה יצא לבי"ד ליסקל", *Brandeis Law Journal*, 37, no. 4 (1998-9).) 13 מורשתינו, "ליסקל", יצא לבי"ד ליסקל, "וכי מפני שאכל ושתה יצא לבי"ד ליסקל", *Brandeis Law Journal*, 37, no. 4 (1998-9).

inability to balance them in this law eventually leads to this failure. While it is an important value to realize the law through innocence, the value of life is also of high regard. The Halakha demonstrates in various places the great lengths one is required to go in order to preserve and save life. The value of life and the emphasis on its preservation are inconsistent with the focus on piety and on life and death in a state of innocence. The law of the stubborn and rebellious son, in addition to raising this issue of juxtaposed values, demonstrates its own failure to transform the youth's behavior. Therefore, in an attempt to preserve life through that transformation, the value to die innocent rather than guilty trumps the value of saving life. It is an ultimate loss of hope for recovery that leads to conviction and capital punishment. In addition to this failure in relation to the law of the stubborn and rebellious son, the rabbinic writing on this subject extends to a rule relating to martyrdom. The presentation of this rule and the discussion surrounding it demonstrate a failure different from the first one we will examine. In this case, it is a lose - lose situation, and it prevents one from both upholding the law and preserving life.

The thread that stitches the entire chapter of Talmud together is the rabbinic notion: "so that he may die innocent," "ימות זכאי ואל ימות חייב."¹⁸⁰ This law is compiled in chapter eight of Sanhedrin of the Babylonian Talmud. In this collection of Halakhic discourse are three sections, the first of which contains the conditions specifically for the law of the stubborn and rebellious son.¹⁸¹ More expressly, the Talmudic sages describe the conditions of the son's crime, the three-stage process of conviction, and the ultimate

¹⁸⁰ Mishnah Sanhedrin 8:5.

¹⁸¹ Mishnah Sanhedrin 8:1-5. BT Sanhedrin 69b-72a.

ruling to condemn him to death on account of his end.¹⁸² The second section encompasses another Biblical case that also operates on presumption. In addition, the law presents the situation of a permitted homicide.¹⁸³ Exodus twenty-two presents the case of a tunneling thief who may be killed upon entry by the homeowner without repercussions for the latter. As it does in the case of the son, the principle of presumption operates in this case of the tunneling thief, because he is also judged on account of his end.¹⁸⁴ The third section addresses the preservation of law and the preservation of life, and has the same underlying principle as the previous two sections: for one to die innocent rather than guilty.¹⁸⁵ In this section, the preservation of law and the preservation of life are in conflict and call into question specific values, and this brings about a very difficult and challenging situation.

The conflict between the value of פיקוח נפש – saving a life and the institution of capital punishment demands reconciliation.¹⁸⁶ The balance struck between these paramount values is Biblically derived, and therefore has great force in Jewish law. The text is from the Book of Leviticus where it states, “*ושמרתם את חקתי ואת משפטי אשר יעשה* – *You shall keep My laws and My rules, by the pursuit of which man*

¹⁸² BT Sanhedrin 68b-72a.

¹⁸³ Mishnah Sanhedrin 8:6. BT Sanhedrin 72a-72b.

¹⁸⁴ Mishnah Sanhedrin 8:6. This mishnah states, “[The thief] who enters through a tunnel (Exodus 22:1), is judged on account of his end. Should he enter through a tunnel and break a jar, if there is blood guilt for him he is obligated for the jar. If there is no bloodguilt for him, he is exempt.”

¹⁸⁵ Mishnah Sanhedrin 8:7. BT Sanhedrin 73a-75b. The mishnah states, “These are those that are saved with their own life: the one who pursues after his fellow to kill him, the one who pursues after a male [for unlawful sexual purposes], and the one who pursues after a betrothed maiden. But, the one who pursues after an animal [for unlawful sexual purposes], the one who desecrates the Sabbath, and the idol worshipper are not saved with their own life.” The presumption in this case operates as presuming the outcome of their pursuit will be the desired one by the perpetrator. Therefore, they are presumed to be pursuing these unlawful ends and are killed so that they may die innocent rather than guilty.

¹⁸⁶ Mishnah Sanhedrin 8:5,7. Stephen Passamaneck, “The Jewish Mandate of Martyrdom: Logic and Illogic in the Halakhah.” *Hebrew Union College Annual* 74, (2003): 241.

shall live."¹⁸⁷ To this verse the rabbis add the following conclusion: ולא שימות בהם – *And not die by them.*¹⁸⁸ Therefore, we learn two things from the use of this verse. The first is that the ultimate goal of the *mitzvot* is to live by them. We also learn that the observance and fulfillment of the *mitzvot* should not lead to someone's death. All three sections of this Talmudic chapter appear to be in conflict with this verse. However, there is another way to read this verse and its rabbinic addendum. If we read the conclusion: *And not die by them*, only as indicating that one should not die in the fulfillment of the *mitzvot*, then the stubborn and rebellious son and the tunneling thief are justifiable uses of capital punishment. Their execution is the result of *not* just fulfilling the *mitzvot*, but of breaking the *mitzvot*.

In the case of the stubborn and rebellious son, the use of the death penalty raises two Halakhic issues. The first is that the attempted transformation through the process of punishment laid out in the law of the stubborn and rebellious son in the Mishnah and Gemara sometimes fails. There fails to be a change in the son's behavior and this results in his execution. The extension of the Biblical text in this interpretation hopes to transform the son's behavior; however, when the behavior continues and deteriorates even further, it is clear that the law has failed in its purpose. Further, this failure to transform and protect the life of the *בסור* may reflect a weakness of Halakha in general. The law's competing values of preserving life, seeking justice for the victim, and upholding the law, fail to achieve the desired results. The second issue is that the value of life comes into tension with the realization of the law. Living a life according to the *mitzvot* (realization of the law) is given higher priority than living life at all. It is only

¹⁸⁷ Leviticus 18:5.

¹⁸⁸ BT Yoma 85b, Sanhedrin 74a, Avodah Zarah 27b, 54a.

within the bounds of the communal structure that life is valued and therefore preserved.¹⁸⁹

The justification for the execution of a stubborn and rebellious son is that his ultimate end is to become a robber and murderer.¹⁹⁰ And yet, there is an entire judicial procedure in place to punish the youth for his earlier misbehavior, and that clearly does not work to rehabilitate his behavior according to the conclusion of the text on the *בסו"מ*. The value of saving the son's life is eventually trumped by presuming his future guilt. There is no longer a hope of rehabilitating him to conform to society. Likewise, the tunneling thief has made choices that cast him outside of a life of fulfilling *mitzvot*. He has placed someone else, the homeowner, in an impossible situation. The rabbis indicate this to be the case by claiming that the homeowner would certainly, "אין אדם מעמיד עצמו על – ממנו – *no man would stand by [holding] himself at [the possibility of losing] his property,*" so the homeowner is given permission by the Halakha to commit a homicide.¹⁹¹ While this appears to be permitted, it is ultimately an impossible situation under the classic rules of the Halakha because the thief has not done anything yet. But since this is a Biblical law, the rabbis interpret the permitted homicide as justified by way of this presumption. The act of stealing alone contradicts the behavior demanded when *living by the [mitzvot] them*. Because the thief has put his own life and the life of the homeowner in jeopardy, he is not living a life of *mitzvot*. In these ways, the thief is also liable to death and not in contradiction to the rabbinic dictum from Leviticus chapter

¹⁸⁹ *Piske HaRosh, Yom HaKippurim*, Yoma 82a.

¹⁹⁰ BT Sanhedrin 72a. The Gemara text states that the "end" of the stubborn and rebellious son will be as a thief. The next mishnah discusses the fate of a thief will present a situation where life is lost. The implication is that the son's pattern of behavior as a glutton and drunkard will eventually lead to thievery, murder, or even worse, which will all be in an attempt to feed the son's addiction.

¹⁹¹ BT Sanhedrin 72a.

eighteen.¹⁹² While the case of the tunneling thief may constitute an exception rather than demonstrating a failure of law, the stubborn and rebellious son is different. In that case, the judicial procedure interpreted by the rabbis from the Biblical text fails to work. The Biblical text itself reflects the failure of the law to transform the youth's behavior.

Another question about the efficacy of the law appears in the culmination of the Talmudic chapter beginning with the seventh mishnah.¹⁹³ This third section of the chapter presents a conflict of two competing values by what is essentially an "impossible situation."¹⁹⁴ These are the values of realizing the law against preserving life. The impossibility of the circumstances is the result of the need to preserve both life and the law. While the cases of the *בסור"מ* and the tunneling thief describe situations when one does not live up to the *mitzvot*, the situation here is different. In this case, it is the fulfillment of *mitzvot* themselves that may cause one's death, and which is the bulk of the Halakhic discourse in this section. The seventh mishnah begins in quite a different place, but it mirrors the two earlier sections. It deals with the prevention of committing a future, but more imminent, transgression. However, its content transitions to the issue at hand: balancing the preservation of life with the realization of law when they become competing values. This leads to a rule that should be followed when one finds himself in a situation when he is forced to transgress the law. The rule is: *יעבור ואל ידרג* and *ידרג ואל יעבור* – *be killed rather than transgress and transgress rather than be killed*.

¹⁹² Leviticus 18:5. BT Yoma 85b, Sanhedrin 74a, Avodah Zarah 27b, 54a.

¹⁹³ Mishnah Sanhedrin 8:7.

¹⁹⁴ "The Bill W. – Carl Jung Letters," *Grapevine*, January 1963.

The concise representation of this rule and the juxtaposed values in action is found in Joseph Caro's שולחן ערוך.¹⁹⁵ His recapitulation of this final section, which includes ten centuries of ideas between the Talmud and Caro's work, succinctly presents the conflict of values. One conclusion from his work is that the value of קידוש השם - sanctification of God's name is higher in the hierarchy of *mitzvot* than פיקוח נפש - saving a life when it is one's own life in peril.¹⁹⁶ This is the basic rule when one is forced to either transgress or die in regards to one of the three grave transgressions: murder, incest, and idolatry. In these situations, it is paramount to sanctify God's name (martyrdom) rather than transgress according to this rule. In this case, therefore, the value in conflict with the charge of martyrdom is the preservation of life. It is clear from the Halakhic tradition that the sanctity of life is of the highest value so that it trumps even the observance of the Sabbath, the desecration of which is a capital offense.¹⁹⁷ Despite this concern for life, it is evident that the value of preserving life through the *mitzvot* is of more importance than simply the preservation of life. That means the integrity of Jewish life is compromised when inevitable transgression becomes a factor. In other words, if you cannot live within the commandments, it is better to die in the act of sanctifying God's name (martyrdom), than to have transgressed. What is unclear, however, is whether life alone presents such impossible situations or whether the law creates such stringent requirements that it undermines the lives of believing Jews. Is the result that one must die rather than sin in certain cases another example of the failure of law? It seems that it is, when the aim is to have this principle cohere within a system that includes the interpretation of Leviticus

¹⁹⁵ Joseph Caro, *Shulkhan Aruch*. *Yoreh De'ah*, *Hilchot Avodat Kochavim*: 157. See also: *Beit Yosef* on Jacob ben Asher's *Arbah Turim*, *Yoreh De'ah*, *Hilchot Devarim Shetzarich L'hizaher Bahem*: 157.

¹⁹⁶ Ad loc. "ואם ירצה להחמיר על עצמו וליהרג רשאי" - If one desires to be more stringent with regard to himself and be martyred, he may."

¹⁹⁷ BT Yoma 82b. *Piske HaRosh*, *Yom HaKippurim*, Yoma 82a.

chapter eighteen. In other words, why should one, when living up to the Leviticus verse, have to lose his life in the fulfillment of the *mitzvo*?

This charge for martyrdom is found in three different places in the Talmud, but the most pertinent to this study is found in Sanhedrin: "Rabbi Johanan said in the name of Rabbi Simeon ben Jehozadak: By a majority vote, it was resolved in the upper chambers of the house of Nithza in Lydda, every law of the Torah, if a man is commanded: 'Transgress and suffer not death' he may transgress and not suffer death, excepting idolatry, incest (which includes adultery), and murder."¹⁹⁸ The principle derived from this passage is *יהרג ואל יעבור* or *יעבור ואל יהרג*, which presents options for the possible human situations. We can use these phrases to answer the following question: *what is the proper course of action for one to take when forced to commit either a transgression or die?* The law has put in place the mechanism for dealing with such a situation. In a clear and concise way, this statement provides the proper course of action for all situations of this sort and makes a claim that life is to be preserved except in three cases. As we now learn from chapter eight of Talmud Sanhedrin, there are three cases in which we make use of the latter phrase: *יהרג ואל יעבור* – die rather than sin.

This is a clear mandate for martyrdom in the Halakha and it is addressed by the Talmudic discussion, Caro, and modern scholars.¹⁹⁹ In his article, "The Jewish Mandate of Martyrdom: Logic and Illogic in the Halakha," Stephen Passamanek argues that *קידוש השם* - martyrdom has assumed higher status over the sanctity of life.²⁰⁰ The focus

¹⁹⁸ BT Sanhedrin 74a. While this is not the final ruling, the case is being made that the preservation of law in some cases supersedes the preservation of life.

¹⁹⁹ BT Sanhedrin 73a-75b. Joseph Caro, *Shulkhan Aruch*. *Yoreh De'ah, Hilchot Avodat Kochavim*: 157. *Beit Yosef, Arbah Turim, Yoreh De'ah, Hilchot Devarim Shetzarich L'hizaher Bahem*: 157. Passamanek, "The Jewish Mandate of Martyrdom," 215-241.

²⁰⁰ Passamanek, "The Jewish Mandate of Martyrdom," 241.

of his argument is that the logical analyses of the rabbis are misshapen more as rhetoric and mottos of preserving Judaism than the triumph of פיקוח נפש – *saving life*. In addition, the limiting factors of the rule יעבור ואל יהרג, make for almost certain martyrdom.²⁰¹

Passamaneck disagrees vehemently with the ruling of the *Shukhan Aruch*. His analysis leaves the mandate for martyrdom as the only course of action when all of the rule's limitations are enacted and reality is taken into account. But, as he sees it, the issue is largely the lack of reason applied to ferreting out the halakhic conclusions of יעבור ואל יהרג and the three exceptions.²⁰² In addition to this point, Passamaneck is also concerned with the absence of real possible human situations addressed by the limitations. Most specifically, one of the limiting factors relates that one must not be living under anti-Jewish rule. It is, however, unlikely that an individual Jew would be given the ultimatum to commit one of these grave transgressions or die while *not* under anti-Jewish rule.²⁰³ This also raises the issue of intent, which will be explored more at length in the next section of this chapter. Intent is also another limiting factor that must be weighed which leads Passamaneck to his conclusions. The limit is that the intent of the forceful party is for his own personal benefit, rather than intent on making a Jew transgress his religion. Passamaneck argues that, "the net effect, however, is to withdraw the excuse [that there was a death threat imminent] just when people would be most in need of some excuse or justification for transgression committed only in order to save their lives."²⁰⁴

²⁰¹ Passamaneck, "The Jewish Mandate of Martyrdom," 239-240.

²⁰² Passamaneck, "The Jewish Mandate of Martyrdom," 241.

²⁰³ BT Sanhedrin 74a. Jacob ben Asher, *Arbah Turim, Yoreh De'ah, Hilchot Devarim Shetzarich L'hizaher Bahem*: 157. Joseph Caro, *Shulkhan Aruch, Yoreh De'ah, Hilchot Avodat Kochavim*: 157. Passamaneck, "The Jewish Mandate of Martyrdom," 223, 241.

²⁰⁴ Passamaneck, "The Jewish Mandate of Martyrdom," 223.

While the rule appears to be a clear one to follow, its limiting factors, as Passamaneck points out, make the preservation of life all but impossible when the realization of the law is at stake. These limiting factors in the case of this legal provision are reminiscent of similar limitations of the law of the stubborn and rebellious son. The juxtaposition of values in the third section of the chapter is also reflective of a similar issue in the case of the בַּסֵּרִיס. The first section presents the case when the son is tried on account of his end. The youth is liable for capital punishment as a stubborn and rebellious son. Outside of this law, he has not yet committed acts that are liable for such an extreme measure. It is a case of realizing and preserving the law while attempting to preserve life. In the case of the בַּסֵּרִיס there is an added element of attempting to preserve the Bible's account of the law despite the rabbis sensibilities to its stringency on capital punishment.

The failure, in this case, is the law's inability to provide a system of transformation and rehabilitation that works. The law's efficacy is lacking in its inability to transform the youth's behavior, but this is not simply an aberration; it is a failure of law altogether. In the attempt to preserve the law as it is in the Bible, the son's life is not preserved. The youth is a victim of his own desires, and the law is unable to see him as the victim, albeit an unusual case of being a victim. Halakha, while seeking justice, protection of the community, and the preservation of its own legal system, sometimes fails to protect those living under its authority. The law fails to balance these two interests simultaneously, and while this is a unique case, it demonstrates that the law is not able to prosecute on the basis of presumption or to promote preventative measures successfully.

Similarly, the final section deals with the element of presumption. The mishnah itself presumes the outcome of certain acts and that one should die innocent rather than guilty.²⁰⁵ The mandate of martyrdom also presumes the outcome based on the situation that homicide, idolatry, or incest will imminently take place, and that one is required to lose his life first while still innocent and before anything else has progressed. It is by no accident that the chapter as it is presented in the Mishnah and Gemara leads to the principle of יהרג ועל יעבור. There is a direct progression from the בס"מ material with its "impossible situation" to the also "impossible situation" of the potential martyr. The impossibility of the stubborn and rebellious son is partly reconciled by the rabbis of the mishnah. The rabbis resolve the issue of trying a minor before he is liable for the *mitzvot*.²⁰⁶ However, the part that is not resolved is the halakha itself. The rabbis conclude that there never has been, nor will there ever be, a stubborn and rebellious son, and almost in the same breath another sage adds the contrary opinion that he saw one and even sat on his grave.²⁰⁷ It is unclear what led to the reason for the inconclusive nature of the rabbis' work in this regard. Another reason for the labeling of the stubborn and rebellious son as an impossible situation is because the normal admonitions for his misbehavior do not work; however, it is still unclear what is the motivation or "evil" from the Biblical text that drives his behavior.

One explanation comes from Rotenberg and Diamond, as we have discussed, and their conclusion that his behavior is indicative of addiction and the psychological disorder

²⁰⁵ BT Sanhedrin 73aff.

²⁰⁶ This is resolved in two ways. One is that he is not liable until he is between the ages of thirteen years and one day and thirteen years and three months. (BT Sanhedrin 68bff) The other is that he is judged on account of his ultimate end. (BT Sanhedrin 71bff)

²⁰⁷ BT Sanhedrin 71a.

of psychopathy.²⁰⁸ It could also be described as an "Impossible situation," which is a term used in relation to an alcoholic who has reached the stage of hopelessness with regard to science and medicine. The source of this characterization is from letter correspondence between Carl Jung and one of the founders of Alcoholics Anonymous, Bill W. The relationship to this material is most clear in the stubborn and rebellious son, but may be applied to the latter sections of the Talmudic chapter as well. His behavior has been compared to that of an addict who is a victim of his own compulsion and therefore reaches the state of hopelessness. In a similar way, the בָּסוּר's execution is justified by the inability to transform his behavior. He is someone who is addicted to food and drink to such an extent that he will commit any other acts to acquire the objects of that desire, or that compulsion. Rotenberg and Diamond characterize the misbehaving youth as a psychopath who is unable to control his detrimental behavior to both himself and society.²⁰⁹ Is this not also the case of the alcoholic or drug-addict who has gone to whatever means necessary to quench the compulsion to fulfill this need? It is deemed an impossible situation when the judicial procedure to attempt rehabilitation has failed so the situation is beyond repair, and he is ultimately liable for execution for being a stubborn and rebellious son.²¹⁰

The characterization of the rule to יִהְיֶה וְעַל יַעֲבֹר as an impossible situation is slightly more tenuous, but the comparison can still be made. Here, the impossible label is because of the accepted obligation to law in the situation. One who finds himself under such duress causing him to either sin in order to save his own life or die at the hands of

²⁰⁸ Mordercai Rotenberg, and Bernard L. Diamond, "The Biblical Conception of Psychopathy: The Law of the Stubborn and Rebellious Son," *Journal of the History of the Behavioral Sciences* 7, (1971): 33.

²⁰⁹ *Ibid*, 29-38.

²¹⁰ Cf. BT Sanhedrin 71a-71b. Cf. Rambam Mishneh Torah, *Sefer Sho'etim*, *Hilchot Mamrim* 7:7 for a well codified description of the judicial procedure for the stubborn and rebellious son.

the situation or the party placing him in such a predicament, must use this rule to make a decision. In this case, the preservation of the Halakha is at stake. In our case from Talmud, one is commanded to observe the commandments. Included among them is the dictum from Leviticus to observe in order that one may live by them, *and not die by them* (the italics are mine because they are added as the logical inverse of the command by the rabbis).²¹¹ Herein lies the impossibility of the situation. We can clearly see now the lack of coherence of the Halakha when one is left to the forceful commands independent of God. In the case of the youth suffering as a psychopath, it is the “disease” of being an addict that is driving the youth’s actions, and eventually creates the impossible situation. Similar to this case is the individual who is forced, presumably by a non-Jew, to commit specific acts that are in direct opposition to the law. They force the individual to weigh two competing values, as we have discussed. They are the preservation of life, a commandment, and the commission of a capital crime, also a command. Again, this is an impossible situation when one is living according to the Halakha.

This case of potential martyrdom is not a failure of the law as we see with the stubborn and rebellious son, but it does present its own difficulty. It is the circumstances of the world that create the impossible situation. Such a situation is characterized by the inability to enable continued life. The law is unable to exist without the law-abiding individual who is lost to martyrdom. In this case, the victim is the Jew, and the world (the specific circumstances that cause the impossible situation) is colliding against the Jew whose law requires death.

²¹¹ BT Sanhedrin 74a, Pesachim 25a, Yoma 82a. Leviticus 18:5 and the rabbinic interpretation of this verse is found in BT Yoma 85b, Sanhedrin 74a, Avodah Zarah 27b, 54a.

In this material, law appears to serve two competing purposes.²¹² The first is the traditional view of law as a system of crime and punishment. In this case, there are specific warnings against prohibited acts and should one commit such acts, he will be punished. The second is an attempt to prevent detrimental situations to both individuals and to the community at large. The discussion of *יהרג ואל יעבור* and *יעבור ואל יהרג*, as a result, describes the tension between the value of preserving life through the *mitzvot* and fully realizing the law. More closely examined in the context of the stubborn and rebellious son it becomes more clear. There are specific requirements or conditions laid out for this law and when these conditions are met, the son is punished.²¹³ This is one view of law as the system of justice that punishes individuals for their committed crimes. However, the son in this case is judged on account of his end to presumably protect the world.²¹⁴ In this case, it is not the fulfillment of certain criminal requirements that require capital punishment for the son, but rather it is the description of a pattern of behavior that indicates possible future detriment and harm for the community; therefore, he is put to death to protect others. Ultimately, this is an entirely different view that presumes his end as dangerous to society. If one's view is that Halakha aims for criminal activity to lead to punishment, then the common element between the three sections of the Talmudic chapter is the preservation of a legal system. On the other hand, if one's view is that the role of Halakha is to prevent criminal behavior altogether, the connection is the element of presumption. More clearly, the system is established to presume the future outcome of specific actions and maintain a safety net to protect the community.

²¹² Cf. Chapter 2.

²¹³ BT Sanhedrin 69b-71b.

²¹⁴ Mishnah Sanhedrin 8:5.

This is also the case in the final section that demands martyrdom in specific cases. The value of law through its observance and preservation are valued more than that of one's life, and the result is an impossible situation. One of the values has to come out on top. As the restatement of the rule by Joseph Caro indicates, it is the preservation of the law by the sanctification of God's name (martyrdom) that is of paramount importance. Furthermore, Passamaneck makes the case that this rule represents a failure of law to cover every possible situation.²¹⁵ In these cases the failure of law to effectively legislate conduct is apparent.

This represents a failure of law to work according to both the system of justice and the system of presumption or protection simultaneously. The case of the stubborn and rebellious son demonstrates this on two accounts. One is that the law itself fails because the youth fails to be transformed. Therefore, the system of justice is unable to correct the youth's behavior through its classical means of punishment. There is an inherent inability for the troubled son to alter his behavior as a result of the lashes in the initial two trials. The second is that his status as a criminal and a victim at the same time goes against the purpose of protecting the community and preserving life. Once we identify the youth as an addict, he is a victim of his disease. It is difficult, if not impossible, to protect the community, including him as a victim, while preserving his life. The presumption cannot operate in the same way once we do identify his behavior as indicative of addiction.

The mandate for martyrdom, on the other hand, demonstrates a different kind of failure. In this case, it is the failure of the world to leave room for the pious Jew to live according to the Halakha. It is the circumstances of the world that fail the Jew as well as

²¹⁵ Passamaneck, "The Jewish Mandate of Martyrdom," 225, see note on "optional martyrdom."

the Halakha. In both cases, the law fails, but in the case of the stubborn and rebellious youth, it is the law's inability to attain its own lofty goals. Instead of the law's failure, the rule for martyrdom demonstrates the failure of the world to exist with Halakha.

The failure of law in general is best described when we realize that the rabbis are unsure how to seek justice in the case of a psychological disorder. There is less clear information about the nature of the "evil" manifested by the stubborn and rebellious son. In addition, while the youth may not intend to inflict harm on others, there is damage caused by his actions and the community must be protected since we are fairly confident, if not totally sure, the youth will use almost any means possible to feed his addiction. The inconclusive nature of the Gemara concerning the stubborn and rebellious son demonstrates the failures we have mentioned, but also a failure of law in general. The law has run up against a boundary for its own application, and it is in regard to the changing criminality, the presumed criminality, and the issues of intent that are raised in the rabbinic writings and modern scholarship on the stubborn and rebellious son that present this failure. In this context of the law for the stubborn and rebellious son, law fails to balance all of these themes and ideas in a way required to meet the requirements of justice. There must be levels of fairness and righteousness that accompanies its application, whether in this law or all of Halakha. Once we identify the youth's behavior as addiction, and in turn when addiction is defined as a disease, the law has no way to deal with the damage caused by, or at least attributable to, the disease rather than to assess the intent of the transgressor in conjunction with the criminality.

Part II – Criminality & Intent – The Components of Liability

The relationship between criminality and intent helps us understand more about the purpose of a specific law and a legal system in general. A purpose of Halakha is to provide a manual of conduct for living according to God's command and reaping the benefits of such a life, while knowing the consequences as well. However, the criminality of certain acts is less clear in the rabbinic writing on the stubborn and rebellious son. Criminality is altered and the issue becomes more about presumed criminality than a fact of past transgression. Halakha serves to protect Jewish identity and communal life. With that ideal it balances the principle to establish procedures that are fair and will punish transgressors on the basis of their actions in transgressing the law and their intentions. The intent of the offender is considered in the determination of guilt and punishment, and therefore, on a criminal's criminality as well. Understanding the intent of the law helps us understand what is trying to be achieved when one is accused, liable, and/or convicted. Additionally, the intent of the indicted individual, when it may be determined, may alter the punishment and procedures for determining liability. So, if the purpose of this law is to protect the community, then the presumption of future criminality is a function of the law that protects Jewish identity and communal life. If, however, seeking justice and meting out punishment is the law's intent, then proper procedures to do so based on actions and intent will fulfill that goal. However, when we attempt to claim that the stubborn and rebellious son is judged on account of his presumed criminality without any intent to transgress, but the safety of the community and the communal identity become threatened, we must strike a balance between these two aims.

This section will present the material on the stubborn and rebellious son to explore the issues of criminality, presumed criminality, and intent. We will begin by indicating how this law portrays the nature of the son's offense as a series of acts rather than one committed at a particular time and place. As the material makes a case for being able to presume criminality in the future, we will explore how that alters the law's view of criminality and intent. Once this idea is established, the intention behind the son's behavior pattern will demonstrate the complexity of this issue in the Halakha. Finally, we will explore the relationship of criminality and intent as the material transitions to cover the issue of dying innocent rather than guilty, which leads to the discussion of martyrdom. This latter example presents a paradigm for understanding criminality and intent that has broader implication than its own context.

We have learned in this material that someone who kills may not necessarily be a murderer; therefore, he may not be a criminal either.²¹⁶ However, the consequences and the outcomes of the act or acts are the same. This forces us to examine the nature of the stubborn and rebellious son's criminality, and more specifically how the Halakha incorporates presumption and intent in determining criminality. A בן סור ומר must meet specific requirements, and among them are a series of disciplinary steps. As discussed above in the previous section, the judicial procedure is an attempt to reform the youth's behavior. This process indicates that we are dealing with a pattern of behavior for which the son is liable, rather than an individual act or group of acts. The judicial procedure determines that the youth is completely incorrigible. Mordecai Rotenberg and Bernard

²¹⁶ M. Sanhedrin 8:6, 8:7. Mishnah six deals with the tunneling thief who is killed in the act of breaking into the home, and yet the homeowner is not liable for murder. Additionally, the seventh mishnah presents the situations when a permitted homicide is the proper course of action to prevent one's fellow from committing a crime.

Diamond state, "It is of particular interest that both the Talmud and modern psychiatry emphasize the fixed, irreversible nature of the condition," when referring to the case of the stubborn and rebellious son.²¹⁷ We also know from the primary text of the Talmud itself that there is concern about the son's ultimate outcome as a robber and murderer.²¹⁸ It is the pattern of behavior that the youth exhibits in feeding his desires that leads to the judgment concerning his end.

In addition to the Talmudic account and this modern approach, Rambam, who is chronologically between the Talmud and the modern scholarship, also makes the case about the behavior pattern as the crime of the stubborn and rebellious son.²¹⁹ His presentation in this material, while it does receive ripe criticism from Ramban, indicates that the *בסור*'s criminality is based on ongoing behaviors. This part of his restatement of the Biblical precept is not the subject of that criticism though. Rambam writes, "הזהירונו זולל וסובא במאכל ובמשתה מימי הנערות -we are warned from being a glutton and a drunkard with food and drink in the days of youth."²²⁰ It is the final two words that make the connection to the youth's criminality as a behavior pattern because the text states "*in the days of youth*." As Rambam states the law, we see the description of the time in the plural. This suggests for us, that Rambam's view is that the transgression is behavior that occurs over a period of time, and that it does not constitute a set of random, discrete, illicit acts.

²¹⁷ Rotenberg & Diamond, "The Biblical Conception of Psychopahty," 31.

²¹⁸ BT Sanhedrin 72a. The Gemara text states that the "end" of the stubborn and rebellious son will be as a thief. The next mishnah discusses the fate of a thief will present a situation where life is lost. The implication is that the son's pattern of behavior as a glutton and drunkard will eventually lead to thievery, murder, or even worse, which will all be in an attempt to feed the son's addiction.

²¹⁹ Rambam, *Sefer HaMitzvot L'HaRambam*, Negative Mitzvah 195.

²²⁰ *Ibid.*

We can draw a conclusion about the nature of the son's behavior from the indication that we are dealing with a series of acts that define the criminality of the stubborn and rebellious son. The Biblical text indicates that we are dealing with the consumption of food and alcohol in excess.²²¹ The compulsivity of his desire is pointed out by the irreversible nature of such misbehavior.²²² Rotenberg and Diamond also indicate that this compulsivity is described as behavior that has become habituation.²²³ The son's inability to be transformed from his current behavior is because of his overwhelming desire, and that desire is the result of compulsion and eventually becomes habit.

Rambam describes this hunger with a term that offers insight into the nature of what drives his behavior. He calls it רעבתנות – insatiable hunger.²²⁴ This indicates not only how powerless the youth, or anyone else for that matter, is to quench the desire, but also that the motivation is so uncontrollable that perhaps the intent is only the fulfillment of that desire rather than the classically understood transgression. Rotenberg and Diamond add another dimension to this situation. They write, "Implied in the prescribed procedures was the necessity to prove that the state of drunkenness, stubbornness, etc., was inherent rather than attributable to parents or circumstances."²²⁵ They go on to develop this idea even further by adding, "that there was a concern over the nature of the behavioral disorder itself."²²⁶ There is a disorder involved in what is driving the son's

²²¹ Deuteronomy 21:20.

²²² Rotenberg & Diamond, "The Biblical Conception of Psychopathy," 31.

²²³ *Ibid*, 33.

²²⁴ Rambam, *Mishneh Torah. Shoftim, Halakhot Mamrim* chapter 7:1.

²²⁵ Rotenberg & Diamond, "The Biblical Conception of Psychopathy," 35.

²²⁶ Rotenberg & Diamond, "The Biblical Conception of Psychopathy," 37.

behavior, and this manifests as his "state of drunkenness, stubbornness, etc."²²⁷

Therefore, his criminality is not the fulfillment of a specific desire, a group of desires, or because of rebellion, but rather is the consequences of his actions. His criminal status results from the symptoms of his "state" and his "disorder" that define his criminality, and his continued behavior is the pattern described, and feared, in the rabbinic writing.

Having identified the youth's criminality as the symptoms of a disorder, let us consider the definition of alcohol addiction as a comparison: *chronic loss of control over the consumption of alcoholic beverages, despite obvious psychological or physical harm to the person. Increasing amounts are required over time, and abrupt discontinuance may precipitate a withdrawal syndrome. Following abstinence, relapse is frequent.*²²⁸ The points of connection are quite remarkable to the stubborn and rebellious son. The youth in the Biblical case demonstrates a loss of control by the repeated use. He is subject to physical harm as described in the Talmudic text.²²⁹ The withdrawal that frequently leads to relapse, or continued use, is reflective of the judicial process's inability to transform the youth's behavior as a result of the prescribed punishments. The definition of an alcoholic also has great similarities. An alcoholic is a: *person who has experienced physical, psychological, social or occupational impairment as a consequence of habitual, excessive consumption of alcohol.*²³⁰ The criminality is the result of the symptoms of the youth's addiction to food and

²²⁷ Rotenberg & Diamond, "The Biblical Conception of Psychopathy," 35.

²²⁸ Rinaldi et. al. "Clarification and Standardization of Substance Abuse Terminology." *Journal of American Medical Association* 259, no. 4. (January 22/29 1988): 556.

²²⁹ BT Sanhedrin 71b.

²³⁰ Rinaldi et. al., "Clarification and Standardization," 556.

alcohol. However, we learned in mishnah five and through reading Rambam clarification that it is the pattern of these symptoms and behaviors motivated by his addiction that constitute his criminal status.²³¹ Using the comparison to an alcoholic, the behavior pattern, and the inability to transform the youth, the rabbinic writing demonstrates the use of presumed criminality to condemn the youth to capital punishment.

It is now clear that both the criminality and the intent of the youth are quite different than we might have learned from the majority of the rabbinic writing on the subject. Most of the material focuses on the rebelliousness and the stubbornness of the youth. While those are the symptoms found in the youth, they do not appear to be the true "evil" to which the Biblical text is referring.²³² We now recognize the criminality of the youth as a series of acts rather than one discrete act. Also, the youth's acts are indicative of a pattern of behavior that is irreversible and will cause future harm to the youth and to others. The intent of the youth is the simple fulfillment of his desires, rather than the repercussions of the behavior pattern and disorder. The addictive nature and the compulsivity of the youth appear to be the true issues behind his intent, and therefore his disorder is his criminality. This raises the issue of intent in a more complex fashion. What is unclear is whether the Halakha treats the intent of an offender as a deciding factor in the determination of punishment.

We have first defined the criminality of the stubborn and rebellious son as a series of acts and a specific pattern of behavior. However, the ultimate

²³¹ Rambam, *Sefer HaMitzvot L'HaRambam*, Negative Mitzvah 195.

²³² Deuteronomy 21:21.

conviction is based on presuming the criminality of the youth in the future and it is based on the "fact," as viewed by the rabbis, of his incorrigible nature. The issue of intent is related to the criminality in that a determination about intent may alter the criminal status of an offender. The intent in the material on the stubborn and rebellious son becomes an issue during the discussion specific to the youth and his punishment. The concern is whether there is an active defiance of the *mitzvot*, or passivity in the behavior pattern that leads to his criminality. While this question is not addressed in direct relation to the youth, it does become a significant issue later in the סורר ומורה chapter. The third section of the chapter deals with the rule: יעבור ואל יהרג and יהרג ואל יעבור. In this section, the issue of intent is discussed in two ways. The first relates to the question of active transgression versus passive commission of sin. The second relates to the larger issue of the intent of the situation that leads to the transgression. This will be elaborated on shortly, but it deals mostly with the impossible situation that may lead to martyrdom as was explored in the first section of this chapter.

We have identified the youth's behavior as similar, if not synonymous, with that of an addict, and more specifically an alcoholic. There is a distinction made between the label of alcoholism as a disease and that of a bad habit. Accepting the terminology of alcoholism as a disease leads us to discuss the relationship of intent of criminality as it relates to the behavior of an alcoholic: "James Prochaska of the University of Rhode Island's Cancer Prevention Research Center said, "The disease model is predicated on the idea that alcoholism is something that happens to you, and it puts us into a passive-reactive

mode that doesn't help us prevent or solve the problem."²³³ While this quote is taken from a brief article that argues for addicts to take more responsibility for the initial choices they make, there is merit in this notion that we are dealing with a different form of intent when it comes to chemical dependence and alcohol abuse. This is especially true when the criminality is the behavior pattern rather than the act itself of overeating or drinking in excess. The relationship between the stubborn and rebellious son and this, "idea that alcoholism is something that happens to you, and it puts us into a passive-reactive mode," is that the son may not intend to commit acts that lead to his criminality.²³⁴ The youth may intend only to feed his compulsion to drink, which is an addiction more closely associated with a dependence on the substance of alcohol than a desire to be drunk, or to steal in order to obtain the desired substance. It seems that from this reasoning and the analogy to addiction, we are dealing with an entirely different kind of criminality because of this different intent. We presume the youth's criminality based on his earlier acts of eating and drinking in excess. From there, an argument about his intent of only fulfilling his desires based on this passive-reactive model demonstrates that while the youth manifests the negative behavior pattern described by the law of the stubborn and rebellious son, justice might be better served in the ability to transform him, rather than creating a preventative measure. It is presumed criminality and the state of hopelessness that leads the rabbinic writing to conclude capital punishment. And yet, the inconclusiveness of

²³³ Leo, John, "Thank you for not Smoking," *U.S. News & World Report*, 15/22 July 1996, 18.

²³⁴ John Leo, "Thank You for Not Smoking," 18.

the material may hint at the sages being uncomfortable with convicting the youth under this law. They, too, may have been seeking a better way to serve justice.

The question of intention has bearing on the degree of one's criminality that ultimately affects one's liability, even to the point of removing conviction in order to find justice. This results from a discussion about the three limitations to the rule discussed earlier concerning martyrdom. Above, we discussed the rule: יעבור ואל יהרג and ירהג ואל יעבור. In the presentation of this rule in Sanhedrin, there are various possible situations debated that would result in the use of this rule.²³⁵ The three limitations are derived from that discourse and they are: לא בשעת הגזרת – *not while under an [anti-Jewish] decree by the ruler*, whether it is in פרהסיא – *public* versus צינעא – *private*, and for whose benefit or pleasure the act is being committed.²³⁶ They operate in the following ways. The first limitation indicates that one may not transgress any law if it is during a period of Jewish persecution.²³⁷ The second limitation does not allow anyone to commit even a minor transgression if it is to take place in public, which is defined as ten adult Jewish males. The third limitation allows one to transgress the law when it is

²³⁵ BT Sanhedrin 74aff.

²³⁶ BT Sanhedrin 74aff. Joseph Caro, *Shulkhan Aruch, Yoreh De'ah, Hilchot Avodat Kochavim*: 157. See also: *Beit Yosef* on Jacob ben Asher's *Arbah Turim, Yoreh De'ah, Hilchot Devarim Shetzarich L'hizaher Bahem*: 157.

²³⁷ Stephen Passamaneck in his article, "The Jewish Mandate of Martyrdom: Logic and Illogic in the Halakhah," relates that this text in Sanhedrin was recounting the vote taken in the early part of the second century C.E. in Lydda, "when the brutality of the war fought in the previous generation was still quite fresh in living memory. Roman troops and officials were everywhere in Judea and doubtless ill-disposed to Jews and their faith, and matters were building toward another Judean revolt. Discussions and decisions on a subject like martyrdom do not arise when times are quiet and inter-group relations are good." 222.

intended only for the benefit of the forceful party or for his pleasure with the three exceptions of homicide, incest, and idolatry.²³⁸

It is the use of these limitations that raise the question of intent. The Gemara takes issue with these limitations on the account that Esther engaged in acts that would make her liable under this rule to be killed rather than commit such acts. However, the course of the dialogue exempts Esther for two reasons. One is that Ahasueras was only out for his own pleasure, and this reasoning comes directly from the third limitation. The second interpretation that exempts her is more related to the first two limitations. While Esther's acts occurred in privacy, they were public knowledge, and therefore, she should *not* have taken that course of action. But, even despite this difficulty, the sages conclude that Ahasueras was not aware of Esther's religion because she was instructed to conceal that fact.²³⁹

In relation to this discussion, the fourth century sage, Abaye, remarks that Esther was merely קרקע עולם – *mere dust of the Earth*.²⁴⁰ The meaning of this is further elaborated in Rashi's commentary to indicate that she did not commit the act, but instead she was passive and it was King Ahasueras who engaged in sexual relations with her.²⁴¹ It is this conclusion that makes the argument that intent has a large bearing in the liability of an individual. One who is simply passive and

²³⁸ BT Sanhedrin 74b. Joseph Caro, *Shulkhan Aruch*. Yoreh De'ah, Hilchot Avodat Kochavim: 157. See also: *Beit Yosef* on Jacob ben Asher's *Arbah Turim*, Yoreh De'ah, Hilchot Devarim Shetzarich L'hizaher Bahem: 157.

²³⁹ Esther 2:10.

²⁴⁰ BT Sanhedrin 74b.

²⁴¹ Rashi ad loc. BT Sanhedrin 74b under קרקע עולם.

forced, or compelled, with no other option does not demonstrate criminality because of the lack of intent.

This idea of intent became a major focus for both Alfasi and Asheri. Their efforts point to this issue in their respective commentaries on chapter eight of Sanhedrin as an important theme. While Alfasi condensed the chapter of Talmud, he focused most of his work on the latter section of the Talmudic chapter. In this way, he narrowed the focus away from the specifics of the case of the stubborn and rebellious son and concentrated more on the final mishnah to include the discussion of all three limitations placed on the rule decided upon in Lydda.²⁴² Asher ben Yehiel, the Rosh, elevated this issue of intention as a major theme, if not *the* major theme, in his commentary to chapter eight. In his work, he extends the discussion concerning Esther and weaves together other textual sources to support the claim of קרקע עולם. The Rosh's Halakhic formulation of the material in this chapter highlights the importance he attaches to intent and recognizes the need to clear those who lack intent.

The Halakha is demonstrating how it views justice in the attempt to work out the issues of criminality, presumed criminality, and intent. The first conclusion reached in the Gemara and through the work of later authorities is that criminality can be viewed in three ways. The first is the classical view that one's liability is based on his acts that meet conditions of the law. This indicates that one's criminality relates to one discrete act on one occasion. However, the case of the stubborn and rebellious son demonstrates that we are dealing not with one

²⁴² BT Sanhedrin 74aff. Isaac Alfasi, *Sefer HaHalakhot*, "The Stubborn and Rebellious Son, Chapter Eight, Sanhedrin."

or even two discrete acts, but rather with a series of acts. It is a sequence that ultimately leads to a progression demonstrating a pattern of behavior. While the texts do not indicate directly that this behavior is of one who is a victim of his own body as an addict, the connections are clear from the discussion above. Secondly, the progression from discrete acts of drinking in excess and gluttony lead to presumed future criminality that defines the youth's criminal status. The third issue is that of intention. In the course of the discussion, the idea that one can become so passive as to be considered קרקע עולם – *mere dust of the Earth* makes it possible to remove criminality for acts committed. Therefore, it is demonstrative of a case when even the rule of יעבור ואל ידרג and its opposite cannot be invoked because the forceful nature of the situation is too much and allows no choice. In addition, both ideas that criminality can be defined as a pattern of behavior and that intent becomes an issue to determine whose benefit is being served, indicate a desire to preserve the law. More specifically, this is to preserve Judaism. In turn, this demonstrates the protection and solidification of communal boundaries by more clearly defining how one remains within the fold, either by remaining alive or by sanctifying God's name (*Kiddush HaShem* – martyrdom).

Finally, it is my contention that the principle of קרקע עולם- *mere dust of the Earth* is invoked in this collection of rabbinic writings to make a point about the criminality and the presumed criminality of the stubborn and rebellious son. The end of chapter eight of Sanhedrin uses the allegory of a man who is overwhelmed by sexual desire toward a woman. The story continues that he should die rather

than consummate his desire with the woman. While it is unclear whether she was married or not, the heart of the allegory is that this man may not act on his desires for it will bring destruction for many.²⁴³ Similarly, as we have discussed, the youth's "disorder" is called רעבתנות – insatiable hunger by Rambam, and the youth is sentenced to death rather than continuing to fulfill that desire. However, the idea of קרקע עולם – *mere dust of the Earth* is used to address the reality of this "disorder" and that the youth is powerless over his desire once he has begun the path. Essentially, he has become like dust of the Earth and is only demonstrating a passive-reactive response to the situation. The criminality is initially his rebellion against his parents that becomes addiction. The presumed criminality is based on this unconquerable situation of רעבתנות – insatiable hunger, similar to the allegory at the Talmudic chapter's conclusion. The intent becomes an issue because we are trying to limit damage to society by punishing for action(s) committed with the intent to cause damage. However, the stubborn and rebellious son does not demonstrate that intent and this leads to the sages claim that there never has been nor will there ever be a stubborn and rebellious son.²⁴⁴ The youth is, in a way, like dust of the Earth once he has begun the pattern of behavior; but, as John Leo pointed out, he *is* responsible for his initial choices.²⁴⁵

²⁴³ BT Sanhedrin 75a.

²⁴⁴ BT Sanhedrin 71a.

²⁴⁵ John Leo, "Thank you for Not Smoking," 18.

Part III – Predicting Future Criminality – Community Notification

The law of the stubborn and rebellious son demonstrates a struggle to hold a minor liable under the classical Halakha.²⁴⁶ In this attempt, the conclusion is that the youth has in fact reached the age of majority, but has yet to reach the stage of physical development required for procreation.²⁴⁷ In the Gemara's final conclusion about this troubled youth, the son demonstrates a pattern of behavior that will ultimately lead to more heinous crimes and, in turn, he is judged on account of that end.²⁴⁸ There is a narrow window of opportunity for the law to hold one liable as a stubborn and rebellious son; it begins at thirteen years and one day, and ends at thirteen years and three months.²⁴⁹ Therefore, the law of the בטר"ם holds one liable for acts not yet committed, but for the "warning signs" of the behavior pattern that must occur within this narrow window of time; the judicial procedure must also occur within this short time span. This reconciliation is the basis for understanding this law as a preventative measure against future detriment, and as a result, there is clearly a concern about future criminality.

This section of the chapter will focus on the ability of the law of the stubborn and rebellious son to make a claim about future criminality as a Halakhic issue, and about its implications. The criminality defined in this material teaches us that it may be a pattern of behavior, or a series of acts rather than a discrete act, that constitute liability. The Halakha makes a claim of presumption about future criminality because this pattern is deemed irreversible and there is no ability to transform the youth's behavior. As discussed in the previous section, there is a direct and firm connection between the

²⁴⁶ BT Sanhedrin 68b.

²⁴⁷ BT Sanhedrin 68b-69b.

²⁴⁸ BT Sanhedrin 71b.

²⁴⁹ BT Sanhedrin 69a.

behavior demonstrated by the youth in question with that of an addict and/or an alcoholic. While the state of being a glutton and a drunkard does not always indicate such a label, it is the symptoms and behavior resulting from the youth's abuse of food and alcohol that create this connection. The modern definition of chemical dependency as a disease helps us understand more about why this behavior is irreversible, and may elucidate how the sages learned through their world view and life experience that such a pattern was indicative of a deeper problem and would certainly lead to future criminality.

There are two additional elements of the law of the stubborn and rebellious son that demonstrate how we are dealing with this issue of future criminality. Both of them deal mostly with the purpose of protection, but the second is more concerned with who is being prevented from future criminality and who protected from future criminality. One is that the youth will ultimately cause harm to others and therefore be a drain on society.²⁵⁰ This first element makes the claim that crime is a downward spiral that eventually becomes, in this case, irreversible. The second is the underlying belief that the "evil" (as mentioned in the Biblical text) has a genetic component, and therefore, there is an added purpose to prevent this youth, who manifests such behaviors as indicated in the law, from procreating.²⁵¹ This indicates that crime may have a genetic component, or that the criminality of the stubborn and rebellious son, described as "evil" in the Biblical text, may run in the family.

As indicated in the fifth mishnah of chapter eight of Sanhedrin, the stubborn and rebellious son is judged on account of his end.²⁵² The full text of this mishnah makes a

²⁵⁰ 140 "וכי מפני", שליונר, note 5. Midrash Tanna'im, *Devarim*, 21.

²⁵¹ This is my conclusion and it is linked directly to the text of the Gemara. See the discussion on the window of opportunity: BT Sanhedrin 68b-69a.

²⁵² Mishnah Sanhedrin 8:5.

case that this presumption of future criminality serves to protect the majority. The key phrase from that text is, "For the death of the wicked benefits themselves and the world."²⁵³ This is also derived from the Midrash Tannaim, which states that it is preferred by Torah for one soul to be lost than many.²⁵⁴ The indication here is that the sin of the youth in question in this law will ultimately harm and even murder more if he continues his pattern of behavior. Midrash Tannaim also makes the claim that his behavior is a result of the home in which he lives.²⁵⁵ This is more a case of nurture than nature, so it is not a genetic component in this regard, and this addresses the concern of future criminality only to prevent the youth's future activity and behavior. This midrashic collection presents both the elements of future criminality we have discussed. A stubborn and rebellious son, as we have argued before, is a victim of his own compulsion. The fulfillment of his desires is his only aim, and he will not be stopped by anything. Therefore, the rabbinic argument is that he will find himself at the crossroads robbing, and perhaps even murdering, in order to attain the fulfillment of his desires.²⁵⁶ It is in regard for the prevention of this situation that the youth's "future" criminality becomes the justification for his execution.

Hanan Schlesinger makes this argument of protecting the majority in his article, "בן סורר ומורה - וכי מפני שאכל ושתה יצא לבית דין ליסקל."²⁵⁷ The reasoning in his work is

²⁵³ Mishnah Sanhedrin 8:5. The argument is thus: the benefit to the world is clear, and the benefit to the wicked person is to die innocent rather than *more* guilty as indicated by the beginning of the mishnah stating that the stubborn and rebellious son shall die innocent rather than guilty.

²⁵⁴ 140 "וכי מפני", שלוינגר, note 5. Midrash Tannaim, *Devarim*, 21.

²⁵⁵ Midrash Tannaim, *Devarim*, 21. The midrashic argument is that his father is interpreted to be an individual who has taken a woman as a bride resulting from war, the *יפת תואר* (Deuteronomy 21:11). The result of this mixed message to the son results in bringing an evil into the home which manifests itself in the son as the stubbornness and rebelliousness.

²⁵⁶ For more on the idea that the youth's path will be progressively more serious see Mishnah Avot 4:2.

See also: Rosenberg, "The Law of the Stubborn and Rebellious Son," 540.

²⁵⁷ שלוינגר, "וכי מפני".

derived from the connection between the Mishnah's claim that the stubborn and rebellious son is judged on account of his end (mishnah five), and the Bible's charge to notify the community in the final verse of the Biblical account.²⁵⁸ Schlesinger's argument is that the כס"מ is a sacrifice made on behalf of all of Israel.²⁵⁹ It is because of the ultimate regard for the community at large that the youth is executed. The future criminality of others is ostensibly prevented by this notification because it is an announcement to the entire community, and it serves as a preventative measure so that no one will follow the behavior of the stubborn and rebellious son. We will return to this idea of notification shortly, but first we will further explore the law's claim that the youth's behavior is progressively worse and irreversible. Because of this, a claim may be made about his future criminality.

In order to demonstrate the progressive nature of the youth's behavior, let us re-examine the stages of conviction. The Talmudic text on this law presents a three phase process of prosecution. As discussed in the first section of this chapter, the process of conviction does not *always* work, and thus demonstrates a failure of the law itself. However, this also presents the case as one that is progressively more serious. This being the case, the claim of future criminality may be made more palatable for the sages. The judicial procedure is best succinctly described in the Code of Rambam.²⁶⁰ The process begins in the home and holds the parents responsible for the rebelliousness and stubbornness of the youth. This is also attested to in the Biblical text, as it is the parents who are ultimately responsible for bringing the case out of the home and to the

²⁵⁸ Deuteronomy 21:21 states, "Thereupon the men of his town shall stone him to death. Thus you will sweep out evil from your midst: all Israel will hear and be afraid."

²⁵⁹ שלזינגר, "וכי מפני", 140.

²⁶⁰ Mishneh Torah, *Sefer Shoftim*, *Hilchot Mamrim* 7:7.

community elders.²⁶¹ But, this does not occur until the parents have first attempted to discipline the youth.²⁶² From this point, there are two trials, each progressively more serious. The first accounts of discipline, the one in the home and the court of three, are not capital cases and only result in lashes for the youth.²⁶³ They are more sobering for the accused youth, because while the first consists only of three members of the court, the second must have twenty three because at this point it becomes a capital case. In the end, it is deemed that his behavior is irreversible because he is executed on account of the path he has begun and its inevitable result. Capital punishment becomes the only proper course of action based on predicting his future criminality. This serves to protect the community at large, and ensures that the youth will die innocent rather than guilty. And yet, there may be another aim with regard to preventing the youth's procreation, as we will discuss below.

Yale and Irene Rosenberg also present an argument that the prevention and prediction of future criminality is the central theme of the *בס"מ* material. They claim that, "the Mishnah clearly views the law as predicated on future criminality, namely, the boy's ultimate destiny – his 'end.'"²⁶⁴ While they maintain this as the underlying purpose of the law, their argument strengthens the idea that his criminality is such that it indicates a downward spiral of crime.²⁶⁵ The Rosenbergs' view is based on their analogy between the boy's conduct and addictive behavior.²⁶⁶ Their premise is that the type of eating and drinking described by the sages supports the view that he must be able to maintain the

²⁶¹ Deuteronomy 21:19.

²⁶² Deuteronomy 21:18. BT Sanhedrin 71b. ,140 "וכי מפני", note 5.

²⁶³ Mishneh Torah, *Sefer Shoftim, Hilchot Mamrim* 7:7. See also BT Sanhedrin 71b and the discussion of Rabi Abahu on *ויתרו* making the *gezerah shavah* argument that the parents have administered lashes.

²⁶⁴ Rosenberg, "The Law of the Stubborn and Rebellious Son," 540.

²⁶⁵ Rosenberg, "The Law of the Stubborn and Rebellious Son," 557.

²⁶⁶ Rosenberg, "The Law of the Stubborn and Rebellious Son," 565.

fulfillment of his desire and continue in the fashion specified by the Gemara.²⁶⁷ The behavior must be continual, and therefore it is the prediction based on this continued and irreversible behavior that the sages are attempting to prevent. The Rosenbergs continue this line of reasoning and state, "It is also further evidence (*the fact that he must be able to continue the type of eating and drinking he has begun*) that the sages understood the law, at least as it relates to the boy's conduct, to be motivated by concern for the prediction and prevention of future criminality."²⁶⁸

The final element that bridges this notion of predicting future criminality to the prevention of future detriment is made by the Biblical text itself.²⁶⁹ The condition to notify the entire community of Israel, which was also raised above by Schlesinger, is an attempt to inform all of Israel of how *not* to behave. A modern analogy to this is community notification statutes. Eric Lotke describes the realities and complexities of such statutes and raises the issue of placing a hierarchy on the seriousness of crimes.²⁷⁰ While the community notification statutes deal with sex offenders, he raises the following concerns: "Is a sex crime more serious than a murder? Should the neighborhood be told if a murderer moves in? A former drug addict?" He continues this reasoning to add, "Maybe police should tell the town that a man beats his wife – to subject him to the social stigma of his offense...It is difficult to draw lines in notification."²⁷¹ Lotke's difficulties with community notification raise the notion that these statutes could be a possible preventative measure in place of capital punishment. It would be the social barriers

²⁶⁷ BT Sanhedrin 70a.

²⁶⁸ Rosenberg, "The Law of the Stubborn and Rebellious Son," 566.

²⁶⁹ Deuteronomy 21:21.

²⁷⁰ Eric Lotke, "Politics and Irrelevance: Community Notification Statutes," *Federal Sentencing Reporter* 10, no. 2 (September/October 1997). from <http://www.igc.org/ncia/cns.html>.

²⁷¹ Lotke, "Politics and Irrelevance: Community Notification Statutes," 5 of 7 from <http://www.igc.org/ncia/cns.html>.

created through notification that keep people away from the offender. While the individual may still have criminal urges, the notification prevents by scaring others away. Although this is not his argument, his extension of this idea to other crimes raises this possibility.

In addition, Lotke distinguishes between the myth that suggests sex offenders are fundamentally different, and the truth about them.²⁷² One of his points is that many, if not most, sex offenders were victims of abuse in the past. Additionally, he sees the knowledge of this fact as helpful in preempting intergenerational cycles of abuse.²⁷³ In this case, there is the concern that the environment and circumstances of one's upbringing will result in criminal behavior. The knowledge of this fact, as Lotke sees it, will help governmental agencies and social welfare programs achieve much more success than notification statutes currently reap. For the purpose of our study of the stubborn and rebellious son, an analogy exists on two accounts. One is that perhaps this notification idea presented by Lotke, the modern American legal system, and the Biblical text, could prevent future criminality. Secondly, sex offenders and addicts are viewed similarly.²⁷⁴ Lotke points out that both addicts of substances and sex require treatment that is an ongoing process, and that recovery is a permanent state.²⁷⁵ Addicts of any kind, whether it is of sexual desire or chemical dependency, are never cured and they are continuously

²⁷² Lotke, "Politics and Irrelevance: Community Notification Statues," 3 of 7. from <http://www.igc.org/ncia/cns.html>.

²⁷³ Lotke, "Politics and Irrelevance: Community Notification Statues," 3 of 7. from <http://www.igc.org/ncia/cns.html>.

²⁷⁴ It is crucial to note that not all sex addicts are sex offenders, but the majority, if not all, sex offenders suffer from addictive tendencies and their condition is described and treated in similar ways to addiction to substances. Cynthia Haines, MD, "Sexual Addiction Causes, Symptoms, Diagnosis, and Treatment," *MedicineNet.com*, February 2006, Source: Sex Addicts Anonymous. <http://www.medicinenet.com/sexual_addiction/article.htm> (9 February 2006).

²⁷⁵ Lotke, "Politics and Irrelevance: Community Notification Statues," from <http://www.igc.org/ncia/cns.html>. Haines, http://www.medicinenet.com/sexual_addiction/article.htm

working at recovery. But even if notification is a more palatable alternative, it does not address the second issue of future criminality: namely, that there may be a genetic component to addiction, and perhaps to crime as well.

If there is a genetic component to crime, then there is the question of whether therapy, notification, incarceration after procreation, or even capital punishment after procreation, can truly be a preventative measure. The Gemara text raises this issue by creating the window of opportunity to convict someone as a stubborn and rebellious son based on the youth's procreative ability. It is concluded that since he is liable for the commandments at thirteen, he is liable to be condemned to death for this law. But, since the Biblical text states a "son," he must not yet be capable of impregnating a woman.²⁷⁶ Therefore, the Talmud makes this the prominent feature in determining the age limitations for conviction. While the sages do not state directly that the "evil" they are attempting to extirpate from the community can be passed on from generation to generation, the claim does exist.

The genetic argument is made stronger by the analogy between the youth's behavior pattern and that of an alcoholic. There is a solid argument that both nature and nurture are involved in alcoholic tendencies, and chemical dependence in general. Familial alcoholism is defined as a pattern of alcoholism occurring in more than one generation within a family, due to either genetic or environmental factors.²⁷⁷ This indicates that an addict not only genetically contributes to his offspring becoming an addict, but the environment in the home contributes as well. As mentioned above, the issue of the environment appears first in rabbinic writing in the Midrash Tannaim. This

²⁷⁶ Deuteronomy 21:18-21. BT Sanhedrin 69a.

²⁷⁷ Rinaldi et. al., "Clarification and Standardization," 557.

now becomes a clear stance already taken by the rabbis in their concern for the procreative ability of the youth in question with regard to the law of the stubborn and rebellious son. Whether it is the environment or genetics, the rabbis recognized a correlation from generation to generation, and the manifestation of such behaviors indicative of the "evil" described by this law. The window of opportunity limited to the youth who cannot procreate anatomically but has reached majority, the analogy between the youth's behavior and addiction, and the sages determined effort to stand on the principle of predicting future criminality indicate a fear that this behavior may be passed to the next generation. Most likely, the awareness of a genetic component or an environmental cause comes from the life experience of the sages, rather than a technical understanding of addiction; however, the fear of the genetic component is clear.

The law of the stubborn and rebellious son raises the Halakhic issue of prevention in regards to predicting future criminality. Many arguments have been put forth describing and defending this tendency of the Halakhic sources on this material. The conclusion is that the youth is judged on account of his end, and it relies on using this principle of predicting future criminality; this presents the Halakhic issue of future criminality addressed in this section of the chapter. There are two elements significant to this issue. The first is that crime may lead to a downward spiral; and therefore, the only prevention of future criminality is to remove the offender from the community. The ultimate exclusion is capital punishment, which is the course of action in this case. The second is that there may be more to this evil than the manifestation of addictive tendencies and behavior that drives the youth to commit other violent acts. The narrowing of the time span in which the youth may be convicted makes the strongest case

that there may be a genetic component to crime. The youth, in this case, must be convicted before he is capable of procreation and this leaves room for the argument that the rabbis are attempting to prevent him from bearing children. Since there is a fear of bearing children, there is the possibility that the law recognizes the role of not only nurture in raising a child, but also the nature of the individual. The prediction of future criminality is difficult business. Nonetheless, the fear exists already in the Biblical text that the "evil" was so intense that it calls for capital punishment. This is ultimately the result of generations of interpretation, but the tradition maintains the origins in the Scriptural constitution of the Bible. The prediction of future criminality tests the opinion that the legal system seeks justice, and attempts to err on the side of protection for the majority. Judgment based on a pattern of behavior predicting future criminality and notification to the community become the protective measures. The remaining question is whether this coheres within the scope of Jewish law, or whether this preventative measure twists the classical view of justice and goes too far.

Chapter 4 – Conclusions

I would like to share my conclusions on two levels. The first is to address some of the themes and ideas already raised in the body of the thesis. They were addressed as the inherent themes of this thesis. They have value for how we understand the Jewish perspective of these ideas, both for the sake of study itself and because studying them is a charge within the halakha of the *בס"מ*. The second is to expand an issue that was addressed in the second chapter, but I would like to add a dimension to not only how we understand this idea, but also to how it may be applied beyond the scope of the present study. This is the issue of justice and how it has been present as an ongoing idea, and eventually a theme, throughout this thesis. It is not explicitly stated as part of the rabbinic writing about the *בס"מ*; however, its presence is addressed in the second chapter, and I believe its prominence is of significant importance. I will present an argument based on the material we have just studied together, as well as a metaphor to demonstrate how justice is an ultimate aim of the law of the stubborn and rebellious son and as an extension of this material to Jewish law in general.

While justice may not be achieved in total by this law, the desire for it is present and this has far-reaching value for understanding the Jewish perspective on justice and the role of justice in Jewish life. The two levels I mentioned at the outset can be described in the following way: the theme of studying the material both for its own merits and because it is a charge within the text itself is a goal. While this takes the terminology that educators often associate with one lesson amongst many, the second level conclusion is the enduring understanding. This terminology means that whatever its content is (that whatever the enduring understanding), it has long-lasting value for

multiple lessons and has far-reaching implications. Since we are studying Jewish law, which we have said serves to instruct Jewish life, this enduring understanding also has implications for Jewish life more generally.

We will now discuss, from the perspective of the conclusion, the themes of the first chapter. In that chapter, we began with the Biblical material and explored how modern scholarship has approached the law of the stubborn and rebellious son. There were four arguments presented in the chapter of how we can read the Biblical law. One was the idea of innovation of a customary law by Joseph Fleishman.²⁷⁸ A second argued that the law of the stubborn and rebellious son was an expansion of other laws found within the Bible dealing with the relationship between parents and child. This was raised by Elizabeth Bellefontaine and David Marcus in two separate articles.²⁷⁹ The third is the idea of explanation. This is brought in to the conversation in two ways by multiple scholars. This essentially builds upon the theme of expansion, but has a much more narrow focus. This is primarily raised as an argument mentioned within the text of Fleishman's article by Herbert Brichto.²⁸⁰ In arguing that this law may verbally alter other laws, it is therefore intended to explain the law for the purpose of application to a more broad or more narrow (depending on the explanation) set of circumstances. The fourth is an argument put forth mainly by Don Benjamin, but the work of Jonathan

²⁷⁸ Joseph Fleishman, "Legal Innovation in Deuteronomy 21:18-21," *Vetus Testamentum*, 53, no. 3 (2003): 311-327.

²⁷⁹ Bellefontaine, Elizabeth. *Deuteronomy 21:18-21: Reviewing the Case of the Rebellious Son*. Journal for the Study of the Old Testament, 13 (1979) pp. 13-31. David Marcus, "Juvenile Delinquency in the Bible and the Ancient Near East," *Journal of Ancient Near East Studies*, 13 (1981) 31-51.

²⁸⁰ Herbert Chanan Brichto, "The Problem of the 'Curse' in the Hebrew Bible," *Journal of Biblical Literature Monograph Series*, 13 (1963): 134.

Burnside independently makes a similar case.²⁸¹ From their work, we may conclude that the law of the stubborn and rebellious son constitutes multiple laws combined into one law. While Burnside states that the qualifications of drunkenness and gluttony may explicate the stubborn and rebellious behavior, he also claims that they are independent behaviors. It is the social stereotype of being a glutton and a drunkard that are combined with the violation of the fifth commandment of the Decalogue that constitute the law of the stubborn and rebellious son.²⁸²

These four ideas are essentially tools for reading the Biblical text. They become the four categories in which the Biblical law may be understood, in part or in total. We may read the law of the stubborn and rebellious son in its Biblical form and view it as an innovation from another law that better suits one purpose, achieves a higher level of justice, or simply makes more sense as a law. The tools of explanation and expansion, while similar, have significant differences for the application of the law. The explanation describes how this law serves to make better sense of other laws, and by this token may not be its own law.²⁸³ While, on the other hand, expansion may either broaden or narrow the law's application. This is achieved by placing additional conditions on a law that must be met for its use. The expansion as a tool for understanding the Biblical law functions by adding conditions to a law. This is best described by looking at how the

²⁸¹ Jonathan Burnside, *The Signs of Sin: Seriousness of Offence in Biblical Law*, *Journal for the Study of the Old Testament: Supplement Series* 364. (New York, NY: Sheffield Academic Press, 2003). Don C. Benjamin, *Deuteronomy and City Life*, (New York: University Press of America, 1983), 212.

²⁸² Burnside, *The Signs of Sin: Seriousness of Offence in Biblical Law*, 24, 45, 58.

²⁸³ This is a point that has been made specifically in the second chapter. This relates directly to the debate between Ramban and Rambam, based on the latter's *Sefer HaMitzvot*. In this case, Rambam makes a distinct claim that the law of the stubborn and rebellious son has its own place as a transgression with its own punishment independent of the earlier behaviors that lead to the final punishment of execution, while Ramban takes issue with this view and is asserting, based on Rambam's rules for counting the *mitzvot*, that we cannot have two separate punishments for the same crime, despite the recidivism of the criminal.

conditions of gluttony and drunkenness are added to the fifth commandment of the Decalogue to become the law of the stubborn and rebellious son.

The second chapter focused on the Halakhic material and explored the rabbinic writing about the law of the stubborn and rebellious son as a survey of a number of themes. Those themes included the crime, the punishment, the intent, the issue of criminality, and the issue of presumption. There was a sixth theme that was addressed and that was justice. Justice will be a large focus of the conclusion, so for now we will discuss the conclusions drawn from the material about the other five themes just mentioned. In that chapter, we explored how these themes arise in a desire to identify both the crime and the punishment. The themes became intertwined in various ways throughout the material and within this thesis.

The themes of crime and criminality present one example of a how attaining our goal of studying the material provided an additional perspective on the law of the stubborn and rebellious son. As you may recall, the crime was originally identified with two clauses or conditions. The Biblical material presented the idea that the subject of this law is a youth who is both stubborn and rebellious, a glutton and a drunkard. This identified the crime from the perspective of the Bible alone. Using similar ideas and tools to the scholars we studied in the first chapter, the rabbis of the Mishnah and Gemara presented various interpretive conclusions to make sense of the law. This was an attempt to make sense of the crime for the purpose of applying the law, and to make sense of the criminality in order to understand the purpose of the law. We must know the crime in order to apply it. The criminality describes behaviors that we wish to prevent and identifying the criminality offers insight into the law's purpose.

This presented us with the first product of our study. The conclusion reached in the Mishnah was that while the misbehavior of the youth by overeating and overdrinking required punishment, it was rather for the sake of preventing future damage that the law was written. It was decided that on account of the youth's end he should be executed. This alters both the crime and the criminality of the youth in question. The crime becomes more than disobeying parents, overeating, and overdrinking. Now, it is the demonstration of a behavior pattern that meets conditions described by a series of acts. This series of acts is indicative of a deeper problem that cannot be altered by the system of punishment already in place for the initial rebellion against the youth's parents, gluttony, and drunkenness. Therefore, the son's criminality is defined by this behavior pattern rather than discrete acts. This thesis concluded earlier that the crime is a behavior pattern and while the youth's criminality is no longer disobeying parents, overeating, and overdrinking, it is the behaviors associated with addiction that are representative of a deeper problem.

In our continued study of the Halakha of the stubborn and rebellious son, we examined the theme of punishment with the goal of identifying it, and we also explored the issue of presumption. We have already recalled that the punishment actually changes during the course of the law's full application from the youth's initial misbehavior to the point when he meets the full requirements to be liable for capital punishment. The issue of presumption is raised when the youth is judged on account of his ultimate end for acts not yet committed, and at this point the punishment changes from lashes to execution by

a court of twenty-three.²⁸⁴ Ultimately, this change in the punishment and the use of presumption are in place to meet the desire to prevent future damage and harm to the community.²⁸⁵

The course of identifying the punishment and concluding that the criminality was based on the youth's addictive behaviors, leads to the additional conclusion that this law punishes addiction. There are a couple of issues we may have with this from our modern perspective. As was mentioned in chapter three, alcoholism is identified as a disease.²⁸⁶ Therefore, the application of this law forces us to execute someone for his disease. Furthermore, we also looked at the argument of Rotenberg and Diamond that the stubborn and rebellious son represents the Biblical conception of psychopathy.²⁸⁷ This raises the same difficulty with how this law punishes a disease, and in this case it is a psychological disorder that is identified by modern psychology. The implications of these identifications are two. One is that the law of the stubborn and rebellious son punishes the victim. The youth is essentially a victim of his own body. The second is that when we consider the limiting effects of the rabbinic interpretations, we can draw the conclusion made in the second chapter that this is an attempt to address the level of justice in the law.²⁸⁸ Another part of this implication is that the sages recognize the inability of the law to rehabilitate the youth's behavior with the punishment of lashes, and

²⁸⁴ As we recall from chapter two, the punishment begins with the parents administering lashes. Then, a court of three finds the youth guilty and also administers lashes. Then, if all the conditions continue to be met, the youth is executed based on the conviction of a court of twenty-three.

²⁸⁵ Mishnah Sanhedrin 8:5. Midrash Tannaim, Hoffman, 131.

²⁸⁶ Chapter 3, Part II, p. 114.

²⁸⁷ Mordercai Rotenberg, and Bernard L. Diamond, "The Biblical Conception of Psychopathy: The Law of the Stubborn and Rebellious Son," *Journal of the History of the Behavioral Sciences* 7, (1971).

²⁸⁸ Chapter 2, Part III, p. 65.

yet, as demonstrated by the limiting interpretations, they are unwilling to execute the youth for his disease.²⁸⁹

The idea of presumption raises further implications that we have already discussed. The most prominent among them is how it demonstrates a constant balance within the Jewish legal system. Kirschenbaum writes, "In sum, whereas law is ordinarily perceived as a system for the maintenance of order and the meting out of sanctions, scriptural law is perceived as essentially educative, spiritually elevating."²⁹⁰ So, while Jewish law may be an instrument for character training, it also maintains the desire to protect the social order and the community.²⁹¹ This represents the tension between a system of crime and punishment and the prevention of future damage for protection. This is a tension that comes to the fore when we recognize the presumption operating within the law of the stubborn and rebellious son. The remaining question is why did the sages rely on this function of presumption rather than convict the youth for simply meeting the requirements described in the Biblical law?

One response to this question ties together all of the ideas that have been presented thus far in this concluding chapter. The interpretive activity is a primary one in the Halakhic process. It requires the use of exegetical skills that include the tools of innovation, expansion, explanation, and combination. While those terms were brought to us after studying modern scholars' arguments, they are part of how the rabbinic writing has described the interpretive process. The crime is identified by combining various acts that demonstrate a pattern of behavior. While this is not the combination mentioned in

²⁸⁹ For the discussion on the failure of the law to transform the youth's behavior see Chapter 3, Part I.

²⁹⁰ Aaron Kirschenbaum, "The Role of Punishment in Jewish Criminal Law: A Chapter in Rabbinic Penological Thought," *Jewish Law Annual*, 9, (1991): 131.

²⁹¹ Kirschenbaum, *The Role of Punishment*, 127.

regard to the first chapter, it is essentially the process used to define this series of discrete acts. The use of a pattern of behavior as demonstrative of criminality may in fact be an innovation from laws admonishing one from disobeying parents. This uses the synoptic view of the Bible to make sense of multiple texts or laws within it, and how they may cohere.

The tools of explanation and expansion also play a role amongst these themes addressed within the Halakhic process. The use of expansion operates to expand the punishment from the initial lashes during the first two trials to the use of capital punishment. The expansion functions on two levels. The first is that it is the expansion from lashes to execution. The second is that the seriousness of the offense expands to have much broader implications. This widening effect of the youth's behavior leads to the use of explanation. This tool is used to make the presumption that the youth will eventually cause more damage to himself and the community and must be removed from the community's midst. The rabbinic writing explains that disobeying parents, overeating, and overdrinking during the days of one's youth cannot bring capital punishment, or any other punishment, because the "son" is not liable for the *mitzvot*. There must be another explanation for how the youth is convicted, and that is presumption with the aim of preventing future damage in order to protect the community.

The study of these themes and the tools that help identify them is our goal as mentioned at the beginning of this concluding chapter. So far, we have identified the tools that were presented by the modern scholars examining the Biblical text. Not all of them stated that this was their intent; however, through examining their arguments in the context of the law of the stubborn and rebellious son, we realize how these tools describe

their efforts. We have also studied, from this concluding perspective, the themes raised in the Halakhic process. Finally, in the preceding eight paragraphs, I have presented to you how both the tools (of innovation, expansion, explanation, and combination) and the themes (of identifying the crime and the punishment and addressing the issues of criminality and presumption) are intertwined. The goal of study is achieved through our examination, and the product of this learning is our new perspective on studying both the Biblical material with the modern scholarship and the Halakhic process together.

The fifth theme that does not connect as readily to the preceding discussion was that of intent. If we mete out punishment based largely on the damage caused, the intent plays less of a role in the legal system. However, once we begin to work on the idea of criminality defining punishment, and that criminality is based on the behavior of the youth, which we have defined as a disease, the issue of intent must be considered. We examined this theme from multiple perspectives, both from the view of the potential transgressor's intent as well as the intent (or purpose) of the law. The issue of intent became a large part of the discussion once we examined the latter sections of the Talmudic chapter and most specifically, the work of Asheri on this chapter. One conclusion is the idea that someone whose actions may be compared to קרקע עולם – *mere dust of the Earth* is not necessarily liable for the transgression or the criminal behavior that results. This has significant merit when we discuss the stubborn and rebellious son as suffering from addiction and/or psychopathy, as he may be considered as קרקע עולם. This may also, in large part, be a realization of the sages as they continue to limit the application of the law of the stubborn and rebellious son. This is part of our goal of study

in that we only realize the nature of the youth's behavior as similar to, if not synonymous with, addiction and psychopathy.

This goal of study can also be applied to Jewish law more generally. From this perspective, we now know two things about Halakha overall and they have value with regard to other subject areas within the Jewish textual tradition. The first is how employing modern scholarship to Jewish texts can broaden our understanding of their meaning and underlying issues. Additionally, this adds meaning in the modern context in which we live to the texts of Jewish tradition. In so doing, lessons and the conclusions we may draw from their study augment our Jewish perspective of these issues, their meaning, and our conclusions. While this first idea is extremely important in helping to make more complete our Jewish perspective, the second has a much more far-reaching value for how we understand our Jewish identity and the Jewish legal tradition. We now know that Halakha evolves. This is ultimately one of the most valuable lessons we can learn through achieving this goal to study the material. This demonstrates for us, not only that we are part of that evolution in how we understand and apply Jewish law, but also that the material has always evolved from the Biblical cornerstone to the individual halakhot, and even to the contexts in which they are found. The context demonstrates this evolution by the careful editing that links related subject matters. The theme of presumption, for example, stitches this eighth chapter of Sanhedrin from the כס"מ to the tunneling thief to the rule for dying innocent and martyrdom. The Halakha evolves in order to continue to be applied to whatever aims are deemed necessary by the system itself. For example, the Gemara claims that the law of the stubborn and rebellious son is meant for study. And while one sage claims the contrary, we continue to engage in the

study of this material. The remaining question is: what does that continual engagement in the study produce for us today as more than a goal? From the perspective of education, the question is: What is the enduring understanding of the material itself that is learned through studying it with the methodology and strategy that we have?

The answer to that question is the second level conclusion that was mentioned at the beginning of this chapter. The law, as we learn from the Gemara, is not meant to be applied as it is written; rather, the study of it presents various themes and ideas to be applied as tools for determining justice and balancing a system that punishes for crimes from one that prevents future damage. This is essentially the Jewish view of justice as it is presented in the rabbinic writing about the *בן סורר ומורה*. The issue of justice is presented primarily in the second chapter, and the application of justice is most readily observed in the first part of chapter three in the argument that the law demonstrates its own failure.²⁹² This failure is the product of realizing that when the behavior of the stubborn and rebellious son is defined as an addiction, the victim is punished. This is hardly justice, and this is attested to by the limiting effects of the rabbinic interpretations. However, the rabbis did not recognize addiction or addiction as a disease, as we do today. The sense that this is hardly justice is our sense on the basis of all we know about addiction, psychology, and criminal intent. Through limiting the law's applicability, the authors of the Halakha are expressing their uneasiness with the reality this law presents, however differently understood.

The enduring understanding of my conclusion about justice is that the struggle to reconcile our view of justice with Jewish texts and tradition has a significant purpose

²⁹² Chapter 3, Part I makes an argument that the rabbinic writing about the *בן סורר ומורה* demonstrates its own failure and puts forth an extension from that argument that this law points out a potential failure of law more generally. This is significant in the way it indicates for us the limits of law.

which is to provide a view that justice is of paramount value in Judaism. Yet, there is a continuous recognition that this reconciliation may require that, that struggle is ongoing through interpretation of the text, which leads us back to our goal of study. This requires the use of the exegetical tools of study to examine not only the Biblical text, but also the themes presented during the process of interpretation. While the law evolves through this process, certain Halakhic issues are raised and must be addressed with the same strategy to continue to raise the level of justice. In this latter process, a new layer of the law's evolution rests upon all that came before. It is important, if not completely essential, to mention that each layer, according to the classical Jewish perspective of Halakha, becomes less authoritative because it becomes further removed from the Biblical constitution. While this may be the classical view, I am arguing from a different premise. It is based on the Reform Jewish view, as articulated by the various platforms adopted by the Central Conference of American Rabbis, that the Torah is a human document that reflects the Divine within the human being in its attempt to present law and ethics for the Jewish people. From this premise, the modern world and the cultures in which Jews have been embedded for over two thousand years, have forced us to examine the morality and reasoning that may be in conflict with our tradition. In that vein, much of the tradition has been innovated, expanded, explained, or combined with other views to remain in constant dialogue with the tradition, and yet claims a level of authority not diminished by its distance from the Biblical constitution.

To demonstrate this enduring understanding and how its constituent parts fit together, I will use the metaphor of a house. This house is much less than an average house, and for our purposes we could compare it to the simple drawing of a house by a

five-year-old that consists of four walls, five rooms, and one roof. There are deliberate identifications for each piece of this house in how it functions as a structure. It is important to remember that a house is, for the Western world, the quintessential form of shelter. Our houses provide us protection from harm and damage caused by the elements of nature. They often provide us with comfort and become associated with the "home" we build with family, memories, and experiences. So too it is with this house. It is the process of interpretation based on the memory and experiences of the rabbinic writers over the generations that have provided us with our constituent parts. The ultimate goal of these parts is to consistently find justice within the law and realize that when it fails the test of justice, our interpretive process has failed and we must re-arrange its contents in order to raise the level of justice.

This house has four load-bearing walls, five rooms that can be rearranged and redecorated, and one roof that must fit over the various configurations possible within the four walls and five rooms. In this way, we can recognize that the four walls are less movable and they are the essential building blocks for the eventual roof. The walls provide the structure its shape and define the boundaries for the size of the roof. Additionally, they ultimately bear the weight for allowing the roof to rest over the house. The five rooms, as stated before, are more flexible. Their dimensions can even be altered while keeping the roof intact over the house. The roof, however, must rest securely to provide its main function to protect the interior and everything within the house's walls.

The tools applied to the Biblical text are the four load-bearing walls. Innovation, explanation, expansion, and combination provide the house with its shape and define the dimensions of the roof. They are all fixed and it requires serious carpentry work, as we

may imagine, to move one of them or even get rid of one. In this way, they also represent the all but immutable nature of the Biblical text, accorded by the classical view. The tools we apply to reading the text of the law of the stubborn and rebellious son in the Bible allow us to better understand its application and its purpose. However, we may have these tools, but they are limited because they cannot alter the words of the Bible from the classical Jewish perspective. This is why they are described as load-bearing walls.

The five rooms of the house are the five themes recalled earlier in this chapter of crime, punishment, criminality, presumption, and intent. While each of these themes are necessary subjects of discourse to make sense of the law's application and purpose, they are not mutually exclusive. They help define the boundaries of each other respectively. As we discussed, identifying the crime aids our understanding of the criminality. The nature of that criminality makes sense for how the punishment changes, and therefore, identifying it is based on that knowledge of the criminality in the law of the *בסור*. The use of presumption also helps to make sense of the youth's crime, criminality, and punishment. This operates by defining the crime as a series of acts and the youth's criminality as the behavior associated with those actions. Furthermore, the changing punishment is based largely, if not entirely, on the presumption that this behavior pattern is irreversible. The intent figures into the discussion as a mitigating factor to force the sages to limit the application of this law. All of these themes must be explored in order to determine how much they figure into understanding the law of the stubborn and rebellious son. As they are studied as parts of the law, they rely on the products of the "walls," or the tools used to study the Biblical law. Once the themes are identified, their

own dimensions are decided based on how important they are in determining the level of justice in the law of the stubborn and rebellious son. It is this final stage that determines the size and shape of each theme when we describe them as the five rooms of the house.

When the four walls and the five rooms are defined and examined in a way that determines how the law is to be understood both for its purpose and application, we attempt to set the roof of justice on top. The remaining Halakhic issues raised in the study of the material represent the places where the roof does not lay flush on the house. Therefore, the failure of the law, the criminality, the intent, and the prediction of future criminality are the areas of concern for this study. In addressing these four issues, it is possible to come to final conclusions about their affect, or effect, on the application of the law of the stubborn and rebellious son.

The final point to be made is that this metaphor of a house may not always work because the roof of justice may have flaws, and that may be the power of it. It is through the continued study and reapplication of the four walls and the continual rearrangement of the five rooms and their contents that describe the search for justice. The enduring understanding holds that we are constantly trying to balance the two aims of the law, and that while certain situations may present a lack of justice, we recognize that, in the arena of discussion that is Halakha, this is an interpretive failure. This provides almost non-existent boundaries to the Halakhic process, since we may apply the tools of chapter one over and over again until the shape of the house and the rooms of chapter two allow for a completely flush roof. This remains as long as we avoid Halakhic issues similar to those of chapter three. Perhaps that means there are no boundaries for the Jewish community. But, there remains a problem. The nature of the human world is dynamic and ever-

changing. We cannot legislate for every possible situation. This realization forces us to recognize the need for continued study, and return to that goal of searching for a new perspective of the enduring understanding. Even with the recognition that we are on a never-ending journey of continued study in search of constantly raising the level of societal justice, there remain boundaries to Jewish life. This is the presence of the three-fold rule in the latter section of the Talmudic chapter. We find that murder, idolatry, and incest represent a breach of this boundary that is irreversible. Combining this final piece with the metaphor of the house, we recognize that as long as we remain within those boundaries, and use the tools acquired in this study, we may construct a house capable of donning a roof of justice.

In the introduction and in this conclusion, I have made various references to the importance of this thesis for Reform Jews. What I hope is clear at this point is how absolutely necessary continued study of Jewish law is for Jews. It is in the attempt to address these issues that we turn to the textual tradition. This study provides us a framework for how others have understood these various ideas, issues, and themes. The idea of pursuing justice is not unique to the modern world, but the perspective of what justice is and may be evolves together with the law. When we realize how our predecessors have arrived at their conclusions, we will be better equipped to draw our own conclusions about justice. In the aim of raising the level of legal justice we mete our punishment. However, in the aim of protecting the community and preventing future damage, we aim to raise the level of societal justice. It is in that endeavor that the balance of those two aims becomes a necessary activity. This is the Jewish perspective of

justice and our knowledge of it is the product of this thesis, the product of continued study, and a product of Jewish law.

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