**Part One: Introduction**

All societies, whether ancient or modern, have criminal justice systems. These systems may be comprehensive and detailed or limited and simple, but every human collective has laws that protect the individual’s body and possessions from other people. Often, they protect the society itself and its central values. One of the biblical stories from Noah’s time about humanity’s beginnings—that of the Flood—teaches that a human society suffused with corruption and thievery cannot stand.

Be that as it may, whatever set of crimes and misdemeanors a society defines for itself must be accompanied by a corresponding set of punishments. In modern judicial systems, and in many ancient ones, there can be no penalty without an accompanying prohibition: *nullum crimen sine poena*. In contrast, in the Torah, for example, the punishment for committing homicide does not appear with the prohibition “You shall not murder” but appears elsewhere. However, in other legal codes, the prohibition rarely appears without the punishment. Indeed, the prohibition usually appears in the context of its punishment. This does not imply that the punishment is central and the transgression relatively minor; rather the logic of such a formulation is, in part, related to punishment’s “anthropological purpose”. Since criminal jurisprudence reflects a society’s needs and values, punishments express society’s repulsion for acts that violate these needs and values and clearly condemns these criminals through the law. Punishment emphasizes how seriously a society views particular crimes, and, therefore, it serves to educate the citizenry and helps it to internalize the society’s values and live by them. Punishment defines the redlines that may not be crossed, if one wishes to be deemed an upstanding member of society.

However, punishment has other purposes, directed at both criminals and law-abiding citizens. We will only take the time to depict the most prominent ones. First, punishment contains an element of threat and deterrence. Even a citizen who does not identify with the societal values anchored in criminal law may avoid transgressing because of the threat of punishment. A person who sees that these threats are not only on the books but are actually applied to criminals may avoid transgression. For this reason, in many justice systems, including various layers of Jewish law, the punishments were either carried out publicly or publicized in some other fashion. Deterrence is an important utilitarian motive. Obviously, someone who is executed cannot commit another crime, and someone who is incarcerated will be prevented from committing crimes he could have committed had he not been in prison.

Second, two twin goals of punishment are vengeance and retribution. Many see these as having the same goal: the attempt to somehow balance the transgressive act and provide society with a sense of justice. The distinction between these two is merely that retribution is a more delicate way of referring to vengeance. Vengeance is clearly part of human nature. Humans want to avenge themselves on those who have hurt them or those they hold dear. As we will see below, the Bible is aware of this impulse, particularly in relation to homicide; however, it also circumscribes vengeance and tries to protect society from it. As stated in the well-known biblical law, situated after a list of interpersonal transgressions (Lev 19:18): “You shall not take vengeance or bear a grudge against members of your people. Love your fellow as yourself I am the Lord.” Various legalistic approaches have tried to control the natural desire for vengeance, by, among others attempts, removing the authority to administer punishment from the hands of the wronged individual or his relatives and placing it in the hands of the rulers and the legal authorities.

Does Jewish law vouchsafe these goals in its various iterations throughout different time periods and levels of written works? The answer is a resounding yes, and some of them are even explicitly spelled out in the sources cited below. The fact that the Halakhah also includes crimes that may be defined as ‘religious’ or ethical, which are absent from secular or modern legal approaches, does not mitigate this assertion. These crimes are considered particularly heinous and threatening to the very welfare of society, and, therefore, as we shall see, in many cases the punishment for crimes such as idolatry are similar to the punishment for crimes such as murder.

However, there are, of course, certain reasons for punishment in a religious system that we are unlikely to find in a secular one. As we will see below, in biblical law atonement prominent, for instance, in the case of murder. The shedding of the victim’s blood defiles the land and the atonement for this is the shedding of the murderer’s blood. It is difficult to translate such terminology into contemporary language. Furthermore, atonement must be made even in cases of blood shedding in which no one is to blame for the murder, such as in the archetypal case of unintentional homicide in the Bible. This requirement flies in the face of one of the principles fundamental to the normative, criminal justice system: *nullum crimen sine culpa*—without guilt, one cannot be punished. In addition to other matters, this requires that the transgressor only be punished if he is sufficiently aware of the consequences of his actions.

Rabbinic literature stresses the religious component, which led to some medieval scholars understanding law in that way too. In the Tannaitic sources, the Tannaim (Sages of the Mishnah) engage in a radical hermeneutic endeavor that makes it almost impossible to mete out punishment for some biblical transgressions. Ipso facto this also prevents the Tannaim from offering the prevailing accepted rationale for punishment, so they offer exclusively religious reasons, such as the claim that the punishment for murder is primarily meted out due to the murderer’s revolt against heaven, not the damage done to the victim, the victim’s family, or society as a whole.

However, such matters are never straightforward. Classic Jewish law assumes a crucial component which does not exist in secular law—the presence of God and Divine Providence, which includes rewarding and punishing God’s creatures. Therefore, we are quite justified in arguing that even if recompense does not occur in the earthly realm, it may very well be administered in the divine realm.

Below we will examine sources that clearly make this assumption, as the Rabbis explain that the biblical punishment—which their revolutionary hermeneutics (discussed extensively later in this chapter) have made almost impossible to carry out—is meted out by God. Throughout the ages, Jewish law has recognized the need for Divine punishment in many cases. Due to limited space, we cannot delve into this matter, which has engendered much discussion in the last few years.[[1]](#footnote-1) Instead we will focus on human punishment, and, there is not even sufficient space here to cover all types of human punishment. This chapter will focus on corporal or physical punishment: capital punishment, lashes or beatings, and exile (even these will not receive an exhaustive and thorough treatment).[[2]](#footnote-2) This chapter will not discuss monetary fines.[[3]](#footnote-3)

However, lack of space is not the only reason we will not delve into these matters. Even though Jewish sources ranging from the Bible to rabbinic and contemporary literature discuss Divine punishment, and it is clear that a faith-based society should be influenced by such punishment, practically speaking the most meaningful punishment is meted out by human hands, certainly, in terms of deterrence. R. Yochanan ben Zackai expressed this notion best when he told his students: “The latter puts the honour of the slave on the same level as the honour of his owner, whereas the former does not put the honour of the slave on the same level as the honour of the master.”[[4]](#footnote-4)

The Bible teaches that even when human awareness of God is corroborated by revealed miracles and hearing God’s words with one’s own ears, this does not prevent many people from committing the most heinous of crimes—crimes that seem to negate belief in the very existence of God and which constitute open rebellion against Him. Therefore, it may be appropriate for the punishment in such cases to be administered by humans, for instance, the Sin of the Golden Calf and the killing of the prophets of Baal on Mount Carmel.[[5]](#footnote-5)

Another important issue that must be addressed is the juridical procedure in penal or criminal law. Many legal approaches distinguish between procedural matters and many aspects of evidentiary law in civil and criminal. The criminal justice system’s greater impact on society, as compared to that of the civil justice system, and the very real punishments that are administered upon criminal conviction, demand different evidentiary standards. Thus, acceptable evidence in a civil case is either deemed unacceptable in a criminal one or will require additional corroboration to be accepted. In general, the burden of proof that falls on prosecutors in a criminal case is greater: they must persuade the court that the crime was committed beyond any reasonable doubt. Jewish law also makes significant distinctions between procedural matters in these two branches.[[6]](#footnote-6) An outstanding example of such a distinction is the fact that the defendant’s admission of culpability or guilt will be accepted as a strong proof in civil proceedings but will be summarily rejected in criminal ones.[[7]](#footnote-7)

As we shall see, partial versions of the evidentiary requirements and legal procedures are already found in biblical law. However, as mentioned above, the Rabbis worked assiduously to minimize the implementation of biblical punishments. One of the main ways in which they accomplished this was by designing uncompromising procedural and evidentiary systems, which made conviction and, ipso facto, punishment almost impossible. In comparing the Sages’ interpretations in the fields of criminal and civil law, we find that while in the latter they created a detailed and practical system of jurisprudence—though not one without its flaws—which functions as the basis for biblically-based legal Jewish procedures until today, in the former they created a system that is impossible to apply. In other words, it seems that for some reason the Sages wished to transform the corporal punishments in the Bible into punishments that could not be carried out, and, thus into abstract fodder for academic discussion alone. They created procedural and evidentiary proceedings that seem quite odd in contrast to those found in other known legal approaches. For obvious reasons, the Rabbis preferred to make biblical law impossible to apply by adopting a detailed hermeneutical-interpretive process, instead of outright abolishing it.

These observations clearly raise an important question: How can such a legal system provide the foundation for a proper, functioning society? This abstraction of punishment into a theoretical construct whose only purpose is religious was already a cause for concern during the rabbinic period, because the very idea of social order cannot exist without punishment and deterrence. As mentioned above, the assumption that the fear of God will prevent people from committing crimes often fails in real life. As we will see, very early on, the Rabbis created a parallel system of punishment alongside the one they had essentially abolished, a system that was not subject to the classical system’s safeguards and limitations. This system continued to develop over the centuries in Jewish communities as they attempted to cope— to varying degrees of success—with the various transgressions and crimes that members of the Jewish community committed, and with deviations that threatened communal values and the very integrity of the community.

It is difficult to reconcile this juridical approach with the prevailing ones for several reasons. First, most systems simply reveal the identity of their sources and underlying principles. Jewish criminal law, however, does not; we need to determine exactly which approach we are addressing. The reason for this is that the halakhic criminal justice system actually consists of two parallel, but different, approaches to criminal law, which appear side-by-side in the same halakhic-legal compositions.[[8]](#footnote-8) It is true that in justifying their approach, the Rabbis are careful to note that the case is temporary or ad hoc emergency legislation and not fixed law, extrajudicial punishment (emphasizing that according to the “real” law, punishment cannot be given) or a one-time occurrence demanded by the exigencies of time or place. However, given the inadequacies of the classical approach, it is not surprising that this approach was made permanent. This development led medieval thinkers to argue that this approach always existed alongside the classical criminal code, even in the days of the Monarchy and the Sanhedrin. For this reason, it is difficult to compare the duality present in Jewish criminal law to the duality in other approaches that include normative law and “emergency laws” that allow the government to waive normative legal provisions under emergency conditions such as war or natural disasters.

In Jewish law not only is extrajudicial punishment an integral part of the fixed, normative law, but the gap between it and the classical law is so great that it is hard to compare the Jewish legal system with other approaches that contain far more modest gaps.

Another difficulty in comparing the two systems stems from a trait of all contemporary, and many ancient legal approaches: the principle of legality—*Nullem crimen, nulla poena sine lege*—“no crime, no punishment without law.” A person, by definition, cannot commit a crime or face criminal punishment for an act that was not criminalized by law at the time the act was performed. John Rowles expanded this definition:[[9]](#footnote-9)

I begin by defining the institution of punishment as follows: a person is said to suffer punishment whenever he is legally deprived of some of the normal rights of a citizen on the ground that he has violated a rule of law, the violation having been established by trial according to the due process of law, provided that the deprivation is carried out by the recognized legal authorities of the state, that the rule of law clearly specifies both the offense and the attached penalty, that the courts construe statutes strictly, and that the statute was on the books prior to the time of the offense.

As we have seen, classical Jewish law clearly conforms to most of these demands and even is more stringent than some other traditions in applying them. The basic legality principle is encapsulated in the rule “if an interdict is not explicitly stated but merely inferred a fortiori, its violation is not punishable”; this principle has its roots in the halakhic midrashim.[[10]](#footnote-10) In contrast, in many cases, practical criminal law does not fully or even partially live up to this standard. The very notion that the court (or king or head of the community) may punish based on an *a fortiori* inference is extremely problematic.

Given what we have said so far, we can at least partially understand the significant gap between halakhic criminal law and contemporary justice systems. Thus, the question arises: To what degree can Jewish law make a meaningful contribution to the contemporary discourse on punishment? This question, of course, is part of a much larger one concerning the ability of a modern legal system to take ideas from Jewish law, which is a fundamentally religious legal system.[[11]](#footnote-11) However, the gaps between the two systems in the field of criminal law are far greater than those in civil law. Thus, for instance, Jewish law has been cited as a source in the contemporary debate over capital punishment, both in the State of Israel and in the United States of America.[[12]](#footnote-12) However, some of the arguments—even those that distinguished between the classical approach and the pragmatic, applied one (not all did) —seem very problematic in the context of modern jurisprudence.[[13]](#footnote-13)

This chapter will, therefore, continue in a primarily academic direction. The sources analyzed in this chapter are not intended to support either approach prevailing in contemporary discourse, but rather to present Jewish legal principles in their own historical contexts, to the degree that space permits. This exposition of fundamental principles will be of interest to those scholars particularly interested in Jewish law and to those with an interest in comparative law. The unique aspect of Jewish law in general, and Jewish criminal law in particular, is that unlike most other approaches, it was largely developed in the absence of a Jewish state, and in the many nations in which the Jews happened to live. Therefore, the Jewish courts’ ability to mete out punishment was circumscribed by and depended on the government they lived under. Furthermore, classic criminal law developed as a purely academic exercise during a period in which it could not be applied, irrespective of its contents. Thus, anyone who is familiar with a penal system that derives its punitive authority from the laws of an existing state should find great interest in Jewish penal law.

**Part Two: Sources**

Note to the Reader:

As noted in the introduction, in this chapter we will focus on the Torah’s three physical punishments: death, exile, and lashes. However, during the transition from biblical to rabbinic literature[[14]](#footnote-14) the understanding of these punishments and their application underwent a dramatic and revolutionary transformation, whose impact naturally also influenced post-Talmudic Jewish law. This interpretive revolution that the Tannaim spearheaded in penal law was so comprehensive and significant that it is difficult to discuss the various punishments in and of themselves, without involving the Sages’ overarching philosophy of punishment. It is almost impossible to present the punishments, as they were shaped in rabbinic literature alongside the biblical punishments, without reviewing the various conceptual frameworks within which each one developed. This is certainly true with respect to the principle of not punishing someone based on an extra-judicial inference. Although this has some certain similarity to the biblical punishment, it is based on a concept of punishment that is completely different from that which the Sages attributed to biblical punishment. In light of this situation, and in contradistinction to how the other chapters in this anthology are organized, the following sources and their analysis will follow their chronological order. The sources will be divided into three historical strata: the Bible, rabbinic literature, and post-Talmudic literature. Although unusual, I believe that this approach will allow us to most successfully emphasize the various conceptual approaches of punishment in general, and of those forms of corporal punishment addressed herein, in particular.

1. Bible: Capital Punishment, Exile, and Lashes and Their Goals

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1. Rabbinic Literature: Capital Punishments, Lashes, and the Legal Proceedings Relevant to Them

**Midrash Tannaim Deut 25:3**

Lest he strike him more than these – the court cannot give him more lashes than these, but he may get more rabbinic lashes. For it [adding blows] will violate a biblical prohibition, but rabbinic lashes will not violate it. Here are the differences between court lashes and rabbinic lashes:

A. Court lashes are administered by the court; rabbinic lashes outside of the court.
B. Court lashes have a set amount; rabbinic lashes have no set amount.
C. Court lashes come with a medical evaluation; rabbinic lashes have no medical evaluation.
D. Court lashes are with a strap; rabbinic lashes are either with or without a strap.

מדרש תנאים דברים כה ג:

"פן יסיף להכתו על אלה" - על אלה אין את מוסיף להכתו, מוסיף את להכותו על מכת מרדות: על אלה הוא עובר בלא תעשה אינו עובר בלא תעשה על מכת מרדות: אלא שהפרש בין מכות בית דין למכות מרדות מכות בית דין בבית דין מכות מרדות שלא בבית דין מכות בית דין במנין מכות מרדות שלא במנין מכות בית דין באומד מכות מרדות שלא באומד מכות בית דין ברצועה מכות מרדות ברצועה ושלא ברצועה:

1. Medieval Sources: Various Forms of Punishment, Its Goals and Application in the Present

**Maimonides’ *Commentary on the Mishnah*, Hullin 1:2**

And know [this] that a tradition has been transmitted to us by our forefathers as they received it, transmitted orally from group to group, for we live during the exilic period when we do not adjudicate capital crimes except for an Israelite who performed a capital crime, but the heretics and Sadducees and Boethusians who have all changed their approach. Hence anyone who began this approach will, in the best case scenario, be executed so that no Israelite may be misled and his faith corrupted, and this has already been carried out upon many people in practice throughout the many lands of the West… and, therefore, it is customary among us and well-known that in practice if someone commits a transgression that makes him liable for a court-administered death penalty, since we cannot adjudicate capital crimes today, after he is lashed, he is excommunicated in perpetuity, according to the Torah, and this ban is never lifted.

פירוש המשנה לרמב"ם, חולין פרק א ב:

ודע כי מסורת בידינו מאבותינו כפי שקבלוהו קבוצה מפי קבוצה כי זמנינו זה זמן הגלות שאין בו דיני נפשות אינו אלא בישראל שעבר עברת מיתה, אבל המינים והצדוקים והביתוסים לכל שינוי שיטותיהם הרי כל מי שהתחיל אותה השטה תחלה ייהרג לכתחלה כדי שלא יטעה את ישראל ויקלקל את האמונה, וכבר נעשה מזה הלכה למעשה באנשים רבים בכל ארץ המערב... וכן מן המקובל בידינו המפורסם למעשה כי האדם שעושה עברה שהוא חייב עליה מיתת בית דין כיון שאין אנו יכולים היום לדון דיני נפשות מחרימין אותו חרם עולם בספרי תורות אחרי שמלקין אותו ואין מתירין אותו לעולם.

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**Responsa of Rashba, Pt. 3, 393**

…And it seems to me: If the adjudicators believe that the witnesses are trustworthy, they [the adjudicators] are permitted to levy a monetary fine or mete out corporal punishment, as they see fit, for this ensures societal stability. For if we base everything on the laws stipulated in the Torah, and do not mete out punishment, except for in the ways stipulated by the Torah—for personal injuries, and similar matters—the world would be left in ruins, for we would require witnesses and forewarning. As our Sages, of blessed memory, said: “Jerusalem was destroyed because they based their laws on the biblical ones.” And this would be even truer outside the Land of Israel where the Jewish courts of law are not authorized to levy monetary fines, creating a situation in which the simpleminded would breach the bounds of society and civilization would be left in ruins…And they told an even more audacious tale in Chapter *Nigmar ha-Din*: Concerning R. Shimon b. Shetah, who hanged eighty women in Ashkelon on one day, even though we do not hang women, and two [capital cases] are not to be judged on one day…this action was not taken to transgress the words of the Torah, but rather to make a fence around it. And thus, they asserted in Yevamot in Chapter *Ha-Ishah Rabbah* regarding one who rode a horse on the Sabbath in the time of the Greeks, and they brought him to the Jewish court of law, and they stoned him; and with regard to one who engaged in intercourse with his wife under a fig tree, they gave him lashes; and all of this transpired because “the times required it.” And this is the way we behave in every place and every time when we see that “the times require it,” in order to chastise the fools and the youth who are setting forth on crooked and deceitful ways.

שו"ת הרשב"א חלק ג סימן שצג

...ורואה אני: שאם העדים נאמנים אצל הברורים, רשאים הן לקנוס קנס ממון או עונש הגוף, הכל לפי מה שיראה להם, וזה מקיים העולם. שאם אתם מעמידין הכל על הדינין הקצובים בתורה, ושלא לענוש אלא כמו שענשה התורה: בחבלות, וכיוצא בזה, נמצא העולם חרב, שהיינו צריכים עדים והתראה. וכמו שאמרו ז"ל: לא חרבה ירושלים אלא שהעמידו דבריהם על דין תורה. וכ"ש בחוצה לארץ, שאין דנין בה דיני קנסות, ונמצאו קלי דעת פורצין גדרו של עולם, נמצא העולם שמם... וגדולה מזו אמרו בפרק נגמר הדין: בשמעון בן שטח שתלה שמונים נשים באשקלון ביום אחד, ואעפ"י שאין תולין אשה, ושאין דנין /שנים/ ביום אחד, ... שלא לעבור על דברי תורה, אלא לעשות סייג לתורה. וכך אמרו ביבמות בפרק האשה רבה: באחד שרכב על סוס בשבת בימי יונים, והביאוהו לב"ד, וסקלוהו; ובאחד שהטיח את אשתו תחת תאנה, והלקהו; וכל זה שהיתה השעה צריכה לכך. וכן עושין בכל דור ודור ובכל מקום ומקום, שרואין שהשעה צריכה לכך, ולייסר השוטים והנערים המטים עקלקלותם.

**Responsa of Rashba, Pt. 4, 311**

The Question Asked: We were appointed as adjudicators by public consensus to expunge the transgressions, and so we swore to do. The amendments to the agreement state that we have permission from those who govern the state to torment and punish in body or treasure, as we see fit. Please inform us: If close relatives testify that Reuven broke his oath, and the witnesses are worthy of our trust, or if a woman or a minor testifies, and they are speaking in an ingenuous fashion, should we torment Reuven or not? And furthermore, if one or both of the witnesses is a relative of Reuven’s and we notice compelling explanations (*amtala’ot)* indicating that they are telling the truth, can we rely upon their testimony even though their testimony is not definitive and clear (*berurah*).

Response: The response to your question seems simple to me. You are permitted to do all that you see fit. For all these issues that you have brought up are only relevant to a Jewish court of law, like a Sanhedrin or some similar legal body. However, someone whose authority derives from the laws of the country is not actually adjudicating the laws of the Torah, but rather doing what he must do, as the time requires, with the permission of those ruling the realm. For if this were not the case, they [the adjudicators] could not [even] levy monetary fines or mete out corporal punishment, for ‘the laws of fines are not adjudicated in Babylonia [outside the Land of Israel] and neither are unusual cases.’ We do not even adjudicate the laws of loans as biblically-mandated law, for to do so, we must have ‘Elohim,’ experts [in Jewish law] and we are only ordinary men. Rather we function as their [the experts’] emissaries. And we function as their emissaries in matters that are commonplace, such as admissions and loans. But we do not function as their emissaries in matters that are not commonplace, such as robbery, personal injury, and the other transgressions. And, a person may not be lashed or punished based on his own testimony because as a point of law ‘no one may deem himself a wicked person,’ and even if there are valid witnesses, he may not be lashed, unless they *hitnu* [probably, we should read *hitru*, warned] him, for a Jewish court of law may not mete out lashes unless the defendant received a legally-valid warning [not to commit the crime]. However all of these matters only apply to a Jewish court of law that adheres to the laws of the Torah. For we see that [King] David himself relied upon his own authority to kill the Amalekite proselyte. As they said, “We mete out lashes and punishments without legal basis, but not so as to transgress the Torah, but rather so as to place a fence around it.” And there was an incident involving one who rode a horse on the Sabbath, and they brought him to the Jewish court of law and stoned him, not because he deserved that punishment according to Jewish law, but because the time required it. As we find in tractate Yevamot, Chapter *Ha-Ishah Rabbah* 80b. All the more so in your case where the fundamental agreement was that you should act as you see fit, which is even written in the missive containing the decree which you mentioned. And this is quite simply the way we do things as it is in all the regions where such decrees are issued in matters such as these.

שו"ת הרשב"א חלק ד סימן שיא

שאלתם: הסכימו דעת הקהל, למנות אותנו ברורים לבער העבירו', וכן נשבענו לעשות כן. וכתוב בתיקוני ההסכמה: שיהא רשות בידינו, משלטון המדינה, ליסר ולענוש בגוף וממון, לפי ראות עינינו. הודיענו: אם יעידו עדים קרובים על ראובן, שעבר על שבועתו, והעדים ראוים לסמוך עליהם. או אם יעידו אשה וקטן, מסיחים לפי תומם, יש לנו ליסר את ראובן, או לא? וכן, אם העדים או אחד מהן קרובים לראובן, ורואין אנו אמתלאות, שאלו העדים אומרים אמת, יש לנו רשות לעשות על פיהם, אף על פי שאין שם עדות ברורה?

תשובה: דברים אלו נראין פשוטים בעיני, שאתם רשאי' לעשות כפי מה שנראה בעיניכם. שלא נאמרו אותן הדברים שאמרתם, אלא בב"ד שדנין ע"פ דיני תורה, כסנהדרין או כיוצא בהם. אבל מי שעומד על תקוני מדינה, אינו דן על הדינים הכתובים בתורה ממש, אלא לפי מה שהוא צריך לעשות, כפי השעה, ברשיון הממשלה. שאם לא כן, אף הם לא יקנסו בגוף ולא בממון, לפי שאין דנין דיני קנסות בבבל, ולא בדברים שאינם מצוים. לפי שאין אנו דנין עכשיו, אפי' בדיני ההלואות מדין התורה, דבעינן: אלהים; שהם המומחין, ואנן הדיוטות אנן. אלא בשליחותייהו קא עבדינן. וכי עבדינן שליחותייהו, במילי דשכיחי, כהודאות והלואות. אבל במילי דלא שכיחי, כגון גזילות וחבלות ושאר עבירות, לא. וכן, לא ילקה ולא יענש על פי עצמו. לפי שאין אדם משים עצמו רשע, מן הדין, ואפי' יש עדים כשרים, לא ילקה, אא"כ התנו /שמא צ"ל: התרו/ בו. שאין בית דין מלקין, אלא אחר התראה. אלא שבכל אלו הדברים, אינם אלא בבית דין הנוהגין ע"פ התורה. הלא תראו, דוד שהרג ע"פ עצמו גר העמלקי. וכן אמרו: מכין ועונשין שלא מן הדין, ולא לעבור על דברי תורה, אלא לעשות סייג לתורה. ומעשה באחד שרכב [על] סוס בשבת, והביאוהו לב"ד, וסקלוהו. ולא שהלכה כן, אלא שהיתה השעה צריכה לכך. כדאיתא ביבמות פרק האשה רבה (צ ע"ב). כל שכן אתם, שעיקר ההסכמה לא היתה אלא לעשות מה שיראה בעיניכם, כמו שכתוב באגרת התקנה אשר אמרתם. וכן הדבר פשוט בינינו, ובין כל המקומות שיש תקנה ביניהם, על דברים אלו.

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**Novellae of the Ritva, Tractate Makkot 22b**

And is it well known that the matters discussed in the Mishnah and Gemara only relate to biblically-mandated lashes for this is what is being discussed, and in our exilic time, we do not mete out lashes because we do not have a court composed of judges who are worthy of doing so, so all the lashes we mete out are only rabbinic lashes. The Commentators, the earlier and the later Sages, may their memory be a blessing, differed on this matter for some said that when it comes to rabbinic lashes we do not punctiliously apply the many unique laws pertaining to lashes; rather we lash with a stick or a strap, lashing as the court sees fit based on the degree of rebelliousness of the person being lashed. And Rashi seems to support this approach in the first chapter of tractate Sanhedrin (7b) when he comments on the implements the judges used, for they said that regarding a stick and a strap, the stick is to be employed for rabbinic lashes and the strap for flogging, and this is the meaning of *mardut* (rebelliousness) which comes from the word *ridui*, when a man beats someone with a stick or a strap as he wishes, like a father might wish to lash his son or the rabbi his disciple, and they strike him wherever they wish whether on his front or on his back. And some write that rabbinic lashes were enacted to mirror biblically-mandated ones: to strike him both in front and in back, with blows that tear off [flesh], and with whips for a calf or donkey, but we are not punctilious about applying all the particulars that are learned in this text, not about tying the individual to a post, and this also seems to be the correct understanding for it concurs with Rabbenu Meir’s remarks on tractate Ketubbot.

He wrote that we do not add to the forty lashes, and in fact the opposite is true, we always decrease their number, and my Teacher, of blessed memory, used to say that the number of whipping was given over to the court who would see what he was capable of enduring with full cognizance of his wickedness and his rebelliousness. And if he was being lashed for a transgression he had already committed the amount would be decreased, but if he was being lashed for something that he had not done yet, for instance, if he was disparaging [the Torah], claiming that he will not observe a Torah precept or a rabbinic one, they lash him until he forsakes his rebelliousness, similar to what the Sages said about the biblically-mandated lashes, “As it is learned in the Baraita, ‘They said to him: Perform the mitzvah of the sukkah, and he does not do so; Perform the mitzvah of the palm branch, and he does not do so, the court strikes him an unlimited number of times, even until his soul departs,’” and this seems to be Maimonides’ understanding in his *Commentary on the Mishnah*.

חידושי הריטב"א מסכת מכות דף כב עמוד ב:

והדבר ידוע שלא נאמרו כל הדברים האלו שבמשנה וגמרא אלא במלקות של תורה דהא עלה קיימא, ואין מלקות בזמן הזה לפי שאין לנו ב"ד סמוך הראוי לכך, וכל מלקיותינו אינן אלא מכת מרדות. והמפרשים הראשונים והאחרונים ז"ל נחלקו בזה כי יש אומרים שאין מדקדקין על מכת מרדות משום דבר מכל זה אלא שמכין אותו בין במקל בין ברצועה מכות שיראו ב"ד לפי מרדו, וכן נראה מדבר רש"י ז"ל שכתב בפ"ק דסנהדרין (ז' ב') גבי כלי הדיינין שאמרו שם מקל ורצועה מקל למכת מרדות ורצועה למלקות, וזהו מרדות לשון רידוי כאדם הרודה במקל או ברצועה כמו שירצה כאב הרודה את בנו והרב את תלמידו, ומכין באיזה מקום שירצו בין מלפניו בין מלאחריו, ויש שכתבו דמכות מרדות כעין דאורייתא תקנוה קצת להכותו לפניו ולאחריו ומכות המשתלשות וברצועות של עגל ושל חמור, אלא שאין מדקדקין בכל אלו דברים השנויים כאן ולא בכפיתה על העמוד, וכן נראה מדברי רבינו מאיר ז"ל במסכת כתובות.

וכתב הוא ז"ל שאין מוסיפין על מלקות ארבעים ואדרבה פוחתין מהם לעולם, ומורי ז"ל היה אומר כי מנין הרצועות כפי מה שיראו ב"ד שיכול לקבל כפי רשעו ומרדו, ואם הוא של עבירה שכבר עשה יהיה במנין פחות ממלקות, אבל אם הוא על דבר העתיד כגון שמזלזל שלא לקיים דבר של תורה או של דבריהם מכין אותו עד שיחזור ממרדו, וכעין מה שאמרו לענין מלקות דאורייתא דתניא (כתובות פ"ו א') אמרו לו עשה סוכה ואינו עושה טול לולב ואינו נוטל מכין אותו עד שתצא נפשו, וכן נראה מדברי הרמב"ם ז"ל בפירוש המשניות שלו.

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**Responsa of Rivash, 251:**

However, if the doctors declared that he had already healed from his wounds, but that he harmed himself with the substances of foreigners that they use to kill themselves, if it was only because of the flogging, we could be stringent with them and try them for this, if the time requires it; however, it is both feasible and fitting to act leniently with them so as not to have them lose a limb, but merely to punish them financially, and to incarcerate them, and to lash them, and ostracize and exile them for days or years

אמנם, אם אמרו הרופאים שכבר נתרפא המוכה, אלא שהוא פשע בעצמו בדברים הנכרין שהם ממיתין מעצמם, עם היות שמפני ההכאות לבד היה אפשר להחמיר עליהם ולדונם בזה, אם השעה צריכה לכך, מ"מ, אפשר וראוי להקל עליהם לבלתי יחסרו אבר, רק לענוש נכסין ולאסורין ובמלקיות ונדויין וגלות ימים ושנים.

**Responsa of Rivash, 351:**

And, in any case, the matters seem to be publicly acknowledged, and he also admits to the fact, and this notwithstanding, even though our Torah law stipulates that “the adulterer and the adulteress shall surely die” (Lev 20:10), and they are executed by strangulation, in any case, according to black-letter law two witnesses must witness the transgression *in flagrante delicto.* As the Sages said with regard to adulterers: “until you see them committing adultery”; for seeing him alone with her nakedness is insufficient cause to execute him. And they must also warn him before he commits the transgression, just before he commits the transgression—within the time-span of an utterance; for if not, we might argue that at the time he committed the crime, he had already forgotten the warning, as Chapter *Elu Na’arot* (33) explains, as does Maimonides (MT, “Laws of Sanhedrin,” Chpt. 12). And even if the transgressor confesses to the act and declares that it was premeditated, we do not execute him, and neither do we lash him with biblically-mandated lashes; rather, we lash him because of the needs of the times, just like Joshua killed Akhan or [King] David the Amalekite proselyte, or, as Maimonides wrote (Ibid., Chpt. 18), because it was the Law of the Land (*din malkhut*). And all this notwithstanding, after it became clear that he committed a premeditated crime it is appropriate to torment him so that the others see this and learn the lesson. And, as Maimonides writes (Ibid., 16), it is fitting to lash him with rabbinic lashes. For all the lashes meted out by justices who live outside the Land of Israel are merely rabbinic lashes. And, furthermore, since he has a bad reputation, and all the people gossip about him saying that he habitually acted licentiously; therefore, he should be lashed in any place and at all times. As Maimonides wrote (Ibid., 24): “Similarly, at any time, and in any place, a court has the license to give a person lashes if he has a reputation for immorality and people gossip about him, saying that he acts licentiously….”] And since he performed this act with pre-meditation, with contempt and with a [brazen] uplifted hand, it is appropriate to add to his punishment, landing the lashes harshly and steadfastly on the flesh of his body without anything separating [the lash from the flesh], and he must walk about all the Jewish neighborhoods or in the common passageways, walking and being lashed with the strap. And following this, if they see fit [they may] imprison him with iron chains, until his uncircumcised heart knuckles under and you see that he has repented his evil. All in accord with what the judges see fit.

שו"ת הריב"ש סימן שנא

ומ"מ, לפי הנראה הענין מפורסם, וגם הוא מודה בדבר, ועכ"ז, אף כי בדין תורתנו מות יומת הנואף והנואפת /ויקרא כ, י/, ומיתתם בחנק, מ"מ, לפי קו הדין צריך שיראו שני עדים העברה בשעת מעשה. כמו שאמרו ז"ל במנאפים: עד שיראום מנאפים; ואין די להמיתו כשיראו אותו מתיחד עם הערוה. וכן צריך שיתרו בו קודם מעשה, וסמוך למעשה תוך כדי דבור; שאם לא כן, אפשר לומר שבשעת מעשה כבר שכח ההתראה; כמו שמבואר זה בפרק אלו נערות (ל"ג), וכתוב לר"ם ז"ל (בפרק י"ב מהלכות סנהדרין). ואף אם העובר מודה שעבר, ובמזיד, אין ממיתין אותו, וגם לא מלקין אותו המלקות של תורה, אלא בהוראת שעה, כמו שהרג יהושע את עכן, או דוד לגר עמלקי, או דין מלכות היה, כמ"ש זה לר"ם במז"ל (פי"ח מהלכות סנהדרין). ועם כ"ז, אחר שהדבר ברור שעבר העברה במזיד, ראוי ליסרו, למען הנשארים יראו ויקחו מוסר. וראוי להכות לזה מכת מרדות; כמ"ש הר"ם ז"ל (פט"ז מהלכות סנהדרין). שכל מלקות שמלקין דייני חוצה לארץ, אינה אלא מכת מרדות. ועוד, שזה שמועתו רעה, וכל העם מרננין עליו שהוא עובר על העריות, והתמיד בעברה זו, ולכן ראוי להלקותו בכל מקום ובכל זמן. כמ"ש לרמב"ם ז"ל (פכ"ד מהלכות סנהדרין), וז"ל: יש לב"ד בכל מקום ובכל זמן להלקות אדם ששמועתו רעה וכו'. ולפי שעשה זה בזדון, בשאט בנפש וביד רמה, ראוי להוסיף בענשו, שיהיו מכותיו רעות ונאמנות על בשרו בלי דבר חוצץ, ושיסבב כן כל שכונת היהודים, או המבואות הרגילין, הלוך והכות ברצועה. ואחר כן, אם תראו לאסרו בכבלי ברזל, עד יכנע לבבו הערל ותראו שנחם על הרעה, הכל לפי מה שיראו הדיינין.

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Part Three: Analysis

As mentioned at the beginning of the previous section, if we wish to study halakhic punishment, in general, and corporal punishment, in particular, we must to address the gaps between the biblical and rabbinic perceptions of punishment (and the latter’s continuing evolution in post-Talmudic literature). Therefore, our analysis will focus on three corporal punishments originally found in the Torah—death, exile, and lashes—and on the juridical proceedings relevant to their application. Comparing the way in which they are presented in the Bible with the way they are interpreted in later halakhic literature will teach us much about the way in which Jewish legal literature over the millennia has perceived punishment and the role it has played.

**Bible**

**The Death Penalty**

The Torah contains many crimes punishable by death, some of which may be denoted as ‘religious’ crimes such as idolatry or blasphemy, and some of which may be denoted as ‘legal’ or ‘societal.’ The latter two have parallels in contemporary law, such as murder.[[15]](#footnote-15) Thus, we find two such crimes side by side in the Bible (Lev 24):

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In later periods, the Sages enumerated the crimes punishable by death (and included an internal division based on the four types of capital punishment[[16]](#footnote-16)). According to the Mishnah, there are twenty-eight capital crimes: seventeen crimes require stoning (mSan 7:4), two burning (Ibid., 9:1), two slaying through decapitation by the sword (Ibid.), and seven by strangulation (Ibid., 11:1). Maimonides’ enumeration differs slightly from that suggested by a straight-forward reading of the Mishnah, as he enumerates thirty-six crimes punishable by the death penalty (Source #).[[17]](#footnote-17) Most of the cases in the Torah that evoke capital punishment neither provide any explanation of the goal of such punishment nor in any way depict the legal procedures necessary to apply it. Thus, for instance, see the list of capital crimes in Exodus 21 (Source #).[[18]](#footnote-18)

This notwithstanding, there are several Pentateuchal sources that provide insight into the purpose of capital punishment. Thus, seven times in the book of Deuteronomy, where the text deals with an assortment of crimes, we find the phrase “and you expunged [lit., burnt] the evil out of your midst.” All these passages (except for the law of the conspiring witnesses (*ed zomem*) in Deut 19:19—and this only to a certain degree) deal with capital crimes. The simple interpretation of this phrase goes as follows:[[19]](#footnote-19) “the punishment removes a palpable evil from the people’s midst,” the assumption being that if the transgressor is not executed the sin will remain and the whole collective will be punished as a result. This approach demands the transgressor’s execution because the sin which he created must be expunged. Apparently, it is stuck to him and there is no other way of removing it. The sin created a quite real and dangerous reality in the material world.[[20]](#footnote-20)

A similar conception of the reality of the sin and role of punishment in nullifying it appear in Numbers 35:31–34’s depiction of both the premeditated and involuntary murderer’s punishment (Source # and Cf. Deut 21:8). The perception here is that the blood of the victim ritually defiles the land and therefore endangers its inhabitants. The sole way to atone—that is to say, to cover up the blood that was shed or to nullify its danger—[[21]](#footnote-21) is by performing an equal and opposite action (meting out justice “measure for measure”): shedding the murderer’s blood. This public endangerment which the murderer’s continued existence creates seems to be alluded to in the following verses from Deuteronomy 19:11–13 (Source #) that describe the obligation of the rulers of a City of Refuge to expel the premeditated murderer who fled to the city. We see that by shedding the victim’s blood, the murderer endangers the entire community and since the only way to eliminate this danger is by shedding the murderer’s blood, the community’s leaders are obligated to hand over the murder to the *blood avenger* (lit., redeemer of blood) who will kill him.[[22]](#footnote-22) Only after the murderer is slain and the bloodguilt removed can the community return to the state of “it will be well for you.”[[23]](#footnote-23)

The fundamental perspective expressed on murder in Gen 9:5–6 provides another religious perspective to this crime (Source #).[[24]](#footnote-24) These verses teach us that the murderer has not only committed a crime against the victim—his fellow man— and his family but also against God, Who created man in His image. The murder has, as it were, injured the Deity and this wrong can only be righted by shedding the murderer’s blood, be the murderer human or animal. However, alongside the Torah’s religious rationale for the death penalty, we also find a universal rationale in it: recompense, vengeance, and deterrence.[[25]](#footnote-25) The first two appear explicitly in the context of executing the murderer and the third is mentioned in the context of judicial execution for various other sins.

**Recompense:** In the verses cited above mandating the death penalty for murder,[[26]](#footnote-26) the notionof measure for measure appeared, especially in the words “whoever sheds human blood, by human [hands] shall that one’s blood be shed.” We can add to these words, Numbers 35’s aforementioned declaration that we may not allow the murderer to cheat the death penalty by paying some form of restitution or ransom.[[27]](#footnote-27) The principle of restitution also appears in another, more generic discussion, in Deuteronomy 19:18–21 (Source #). Here, in discussing the lying witness who plotted to convict an innocent person and bring punishment down upon him, the witness receives punishment measure for measure; therefore, if the testimony invoked the death penalty, for instance by alleging premeditated murder, the false witness will be executed (“life for life”).

**Vengeance:** [[28]](#footnote-28) The term ‘vengeance’ only explicitly appears once in the biblical laws concerning murder in Exodus 21:20–21 (Source #).[[29]](#footnote-29) However, above and beyond this, perhaps the fact that the murderer is turned over specifically to the blood avenger indicates that vengeance is part of the package. The Torah emphasizes turning the murderer over to the blood avenger several times. See, for instance, Numbers 35:19 (Source #).

**Deterrence:** The phrase “shall hear, and fear” is addressed to the Israelite nation four times in the book of Deuteronomy[[30]](#footnote-30) (13:12 – one who instigates others to idolatry; 17:13 – one who does not obey the priest or judge [the Sages refer to this as the case of a “rebellious elder”]; 19:20 – a conspiring witness; 21:21 – a wayward and rebellious son). In the first three cases, the phrase is even followed by an explanation that boils down to: the punishment is intended to deter those who witness it or hear about it. Thus, in its first appearance: XXXX

However, deterrence also seems to play a role in other cases, in which the Bible indicates that a large crowd should attend the execution. For instance, Leviticus 34, in the case of one who blasphemes God: XXXX, and in other cases, such as Numbers 15:35 (the one who gathered wood on the Sabbath); Deuteronomy 17:7 (idol worship); Ibid., 21:21 (the wayward and rebellious son).

**Exile**

The Torah mandates a special punishment[[31]](#footnote-31) for someone who involuntarily murdered someone else: exile. This topic appears in the Torah three times (Exodus 21:13; Numbers 35:9–34; Deuteronomy 19:1–13), and on all three occasions the Torah explicitly differentiates between the case of the involuntary murderer who flees to the City of Refuge and the premeditated murderer who has but one punishment: death.

The most detailed depiction appears in Numbers 35 (Source #). In verses 13–14, the Bible notes that six cities were chosen to function as Cities of Refuge:[[32]](#footnote-32) Moses established three on the eastern side of the Jordan (Deut 4:41–43) and Joshua founded three on the western side of the Jordan (Joshua 20:7–8).

These three biblical passages also make it abundantly clear that the primary goal of the Cities of Refuge (note that the very name describes the cities’ role) is to protect the involuntary murderer from the blood avenger, not to punish the murderer. The verses in Numbers (Source #) teach us that the blood avenger does not need to follow due legal process in order to execute his relation’s murderer; therefore, he can kill the murderer anywhere, except for the City of Refuge (vv. 26–27). This is even true when the murder’s involuntary nature has already been confirmed by legal proceedings (vv. 24–25). The cities’ role as protectors of the involuntary murderer is also indicated by a verse in Deuteronomy which dictates that the Cities of Refuge must be spread out equidistantly from one another throughout the length of the land. The reason given is to ensure that the distance from a City of Refuge not be too great, a situation that would imperil the fugitive whose blood avenger would presumably be in hot pursuit.[[33]](#footnote-33) The Torah also indicates that the involuntary murderer does not have to flee to a City of Refuge if he does not value his life or if he has other ways to protect himself.[[34]](#footnote-34) The flight into exile is not a form of punishment, but a gift of protection. After the legal proceedings, if the murder is adjudged involuntary, the murderer’s dwelling place shifts to the city he has chosen to flee to on his own initiative.

This notwithstanding, it is clear that there is also an element of punishment here. If the murderer wishes to ensure his continued well-being and avoid living under the constant threat of being slain, he must go into exile, leaving his hometown and staying in the City of Refuge he chooses because if he leaves the city limits he is putting his life at risk. It seems like the exilic punishment with which the Bible threatens the entire nation if it sins is found here in minor key. There is a reason why the Sages often referred to the residence in the City of Refuse as ‘exile’ and to the murderer forced to flee there as a ‘refugee.’ In later periods, there were even those who wished to identify the Cities of Refuge with penal incarceration.[[35]](#footnote-35) However, we still need to explain why the involuntary murderer received such a harsh punishment for a crime that he committed unintentionally and with no criminal negligence.[[36]](#footnote-36) The answer seems to be found in the Torah’s perception of all murder as bloodshed that ritually defiles the land, and thus requires atonement.

The atonement component, which we saw explicitly mentioned in connection to the death penalty for premeditated murder, is also explicitly mentioned in the law regarding involuntary murderer. Verses 31–34 (Source #) stress that there is a certain similarity between premeditated and involuntary murder. In both, the punishment (be it death or exile) cannot be obviated by paying a ransom. This is due to the fact that shedding blood defiles the land, a situation that can only be atoned for by death or exile, respectively. As far as biblical law is concerned, all bloodshed, whether intentional or not, defiles the land and cannot be atoned for except through the murderer’s blood. Even involuntary homicide requires the spilling of the murderer’s blood by the blood avenger to atone for the murder committed; however, the Torah offers the murderer a reduced sentence (or, one might say, offered him mercy). The necessary atonement for the blood he spilled can also be accomplished through the High Priest’s death, so the murderer can receive the protection of the City of Refuge until the High Priest dies.[[37]](#footnote-37) The High Priest’s death atones for the spilling of the victim’s blood and removes the blood avenger’s justification for killing the murderer. The idea seems to be that just as the High Priest bore the nation’s transgressions and atoned for them during his lifetime (Exodus 28:38; Leviticus 16:16, 21; Numbers 18:1), so too his death atones for the involuntary shedding of blood, which can only be atoned for by an actual death.[[38]](#footnote-38)

Thus, the religious motif of atonement is palpable in the case where exile is mandated as well.

**Lashes**

Lashes only explicitly appear once in the entire Torah: Deuteronomy 25 (Source #).[[39]](#footnote-39) The passage does not identify the crime punished by these lashes; however, Deuteronomy 25:1 implies that the case involves a conflict between two people.[[40]](#footnote-40) The passage also informs us that in contrast to the death penalty carried out by the community, the witnesses, or the blood avenger, the lashes were given by the judges themselves. Some explain that the Bible’s great concern for giving the correct number of lashes was the reason why the judges themselves performed them.

The passage contains no religious element whatsoever, and the punishment is presented as exclusively juridical in nature, apparently intended to deter others: causing pain to the convicted person in the framework of a ritual whose purpose is also to humiliate the convicted person before the spectators. As we will observe below, the Sages revolutionized this ritual by endowing the punishment with a prominent religious dimension.

**Juridical Proceedings and the Evidence**

All three punishments that we have addressed teach us something about the juridical processes that lead to these punishments. This notwithstanding, these teachings are merely an assortment of directives, not a systematic description of how a system of juridical proceedings and evidence should run. Most of the sins described in the Torah, including those demanding the death penalty, do not include a systematic protocol on these topics.[[41]](#footnote-41)

**Lashes** – We find verses depicting a penal process handled by the judge, in which more than one judge seems to be involved (note the plural form of the last three verbs in verse one). These verses are juxtaposed to the aforementioned passage and follow a description of the juridical process initiated by the parties to the dispute.[[42]](#footnote-42)

**Capital Punishment** – In the passage from Numbers 30 cited above about the punishment of exile, the Bible depicts a legal process in which the murderer and the victim’s blood avenger confront one another “before the community”—that is to say, before a juridical institution whose authority is vested in the people.[[43]](#footnote-43) The “community” is tasked with identifying the type of murder and it has the power to acquit the accused of premeditated murder and return him to the City of Refuge or to convict him of premeditated murder and turn him over to the blood avenger to be killed. As long as the murderer resides in the City of Refuge, the blood avenger is prohibited from killing him, even before the juridical process takes place; however, if the murderer leaves the city, the blood avenger may kill him based upon the witnesses’ testimony, even without due legal process. The judges’ active involvement in the juridical process that concludes with punishment, also appears in the biblical passage devoted to witness giving false testimony (Deut 19:18, Source #).[[44]](#footnote-44)

This passage devoted to witnesses giving false testimony and their punishment unintentionally imparts that the witnesses are central to the conviction and punishment of the defendant, and, therefore, they are punished measure for measure, including by execution when called for, in order to deter people from giving false testimony in the future (Ibid., 19:21).

The passage in Numbers (Source #) also teaches us about the evidentiary requirements for at least two witnesses necessary to convict and execute the murderer (verse thirty). This interrogation of the two witnesses in the context of capital punishment also appears in the passage about idolatry in Deuteronomy 17. There we also find the witnesses throwing the first stone upon the murderer’s execution:[[45]](#footnote-45)

Notably, though, the requirement of at least two witnesses is not restricted to capital crimes (homicide and idolatry, for instance). It applies across to the board as a juridical requirement for all crimes (Deut 19:19, Source #).[[46]](#footnote-46)

In the prophetic books, there are several narratives that describe the judicial process for capital punishment.[[47]](#footnote-47) We will only spend time on three of them. In 1 Kings 21, the Bible describes the kangaroo court that King Ahab set up to execute Naboth and inherit his vineyard. Curiously, even though Naboth was framed, Isabella and Ahab took care to provide the trappings of a legitimate trial [conducted in the manner described above]. The trial took place before the city elders and its wise men, who seem to have functioned as judges; the witnesses, albeit it false witnesses, appeared before them and testified to Naboth’s sin.

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The other two stories are about King David (2 Sam 1:1–16; Ibid., 4:5–12). In both stories he orders the execution of the murderers based on their own admissions of guilt—which they bragged about to him—and not based on witnesses. Furthermore, in the first case, the admission was false: David had the Amalekite youth killed even though he did not really kill Saul (See 1 Sam 31:4.). This seems to indicate that David—universally regarded as far more God-fearing than Ahab—was also not punctilious when it came to the biblical requirement for witnesses. Alternatively, we could argue that even without the witnesses’ testimony, the defendant’s self-incrimination is admissible and sufficient, as it is in other legal systems, though not in rabbinic literature.[[48]](#footnote-48) Other explanations proffered by medieval exegetes[[49]](#footnote-49) suggest that these were ‘special circumstances’ or that the king has the right to deviate from normative law—especially in the case of murder—and he is not subordinate to the evidentiary requirements which, according to the Sages, apply specifically to the courts of law. Below, in our discussion of the medieval sources, we will return to this issue; however, it is noteworthy that we may have already found a source in the Bible that provides a leader with the authority to punish his people, not only for those crimes enumerated in the Torah, but also for those in the purview of a foreign king and even by employing punishments not mentioned in the Torah. The authority for this is the laws or interdicts issued by a foreign king. By this I mean, for instance, the decree of the Persian King Artaxerxes that granted Ezra authority in the Land of Israel (Ezra 7:26):

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This assertion leads us to an investigation into the sources attributed to our Sages, of blessed memory, and the revolution they engendered in the application of the three punishments we are discussing and their goals.

**Rabbinic Literature**

An examination of the three punishments’ sources in rabbinic literature reveals that the Tannaim made them essentially impracticable or inoperable, in particular by mandating juridical proceedings and evidentiary requirements that would be almost impossible to reach or carry out.[[50]](#footnote-50) Somewhat paradoxically, alongside the practical obsolescence of these punishments came a vast and intense and detailed academic-theoretical discussion of the punishments. This teaches us that the Sages, obviously, wished to abolish these practices on a practical level, and *ipso facto* also highlights the way in which they perceived their goal.

On the other hand, we can see that rabbinic literature is well-acquainted with the societal need for the existence of punishment and deterrence, and, therefore, at the same time as the Rabbis downgraded the classical, biblical punishments, they created a criminal justice system that included, among others, punishments that were similar to the death penalty and lashes which they were discussing. However, they declared that this system was not subordinate to the harsh, unbending juridical proceedings they had formulated for the biblical penal system.

Before we turn to the sources, I must make two preliminary comments. First, I will not speak to the historicity of these rabbinic sources. This is especially important to note given the widely-accepted and correct belief that most of the Tannaitic laws were formulated during a period in which the Rabbis did not have the broad powers necessary to adjudicate capital crimes.[[51]](#footnote-51) Furthermore, this reticence stems from the serious doubt we have about whether the Sanhedrin—which possessed the exclusive authority to carry out capital punishment and, perhaps, even lashes— depicted by rabbinic sources, ever existed.[[52]](#footnote-52) I am exclusively interested in the Sages’ perception, so even if we assume that the Tannaim once had a historically-based conception of the Sanhedrin, the strict juridical principles they formulated would have never allowed corporal punishment to be carried out in this actual Sanhedrin.

I should also note that most of the sources I will cite here address capital punishment, which was already referred to as “death at the hands of the court of law” in Tannaitic sources. This notwithstanding it is important to note that most of the discussion below applies equally to the two lesser punishments we have discussed: exile meted out to the unintentional murderer and lashes. The reason for this is that almost all of the strict juridical proceedings and evidentiary requirements necessary for capital cases also apply to these punishments. Space prevents me from adducing all the Talmudic sources for this,[[53]](#footnote-53) so I will suffice with citing Maimonides’ summary of this issue:[[54]](#footnote-54)

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As we have mentioned, the Rabbis did not deny the existence of corporal punishment in the Torah. In fact, the opposite is true, they explored these punishments extensively. This is especially clear in the Mishnah where eight of eleven chapters in tractate Sanhedrin (4–11) are primarily devoted to capital punishments and their juridical proceedings, and even present a detailed enumeration of those sins requiring the death penalty.[[55]](#footnote-55) This discussion continues in tractate Makkot where the first chapter is dedicated to the laws of witnesses, in general, and the laws of witnesses to capital crimes, in particular. The second chapter is wholly devoted to the unintentional murderer’s punishment of exile, and the third enumerates the crimes that require lashes and describes in great detail how these punishments are carried out. And, all this notwithstanding, the entire discussion seems to become theoretical when we arrive at and read the first chapter of Makkot’s final Mishnah—the Mishnah that essentially closes the discussion of the Laws of Capital Crimes (Source #).

It seems that the first three opinions agree that capital punishment is extremely rare and most undesirable.[[56]](#footnote-56) Be that as it may, these Sages’ primary motivation,[[57]](#footnote-57) living in a period when, in any event, the death penalty was effectively abolished, was expressing the unavoidable reality that transpires if one takes the Tannaitic laws of juridical proceedings and evidence relating to corporal punishment seriously.[[58]](#footnote-58) The Mishnah also imparts that in this new reality, the role of such punishments has no societal dimension as deterrence is non-existent. Rabban Simeon ben Gamliel, who as the president of the Sanhedrin was certainly sensitive to the societal impact of such statements, responds to them by stating that they essentially rob such punishment of any deterrence value. For, indeed, this is crystal clear: A legal system that proclaims that it has no intention or ability to punish, and, perhaps, even more so, that it has no interest in carrying out punishments, will lead to anarchy, including an increase in the homicide rate. Note that Rabban Simeon ben Gamliel specifically emphasizes the deleterious effect his colleagues’ approaches will have on the homicide rate. Furthermore, he does not explicitly state that capital punishment should be abolished across the board.[[59]](#footnote-59)

The approach of R. Tarfon and R. Akiva seems to be the dominant one in Talmudic literature, and, for the most part, later generations accepted them as representing the Talmudic stance. This, as mentioned above, is not much of a surprise, and the effective abolishment of the death penalty is a given, in light of the radical juridical proceedings required to convict someone. We will only present two of these.

The Mishnah in Sanhedrin 5:1–2 (Source #) depicts the complex, interrogation process the witnesses were subjected to. Firstly, these texts clearly indicate the difficulty the witnesses faced in substantiating their testimony and in ensuring that their testimonies were identical. Clearly, the purpose of such a harsh interrogation was to diminish the likelihood that their testimony would be accepted. For this reason, the second Mishnah decrees that any judge who increases the number of interrogations (seemingly *ad infinitum*) is praiseworthy. This principle is expressed in the story about Rabban Yohanan ben Zakkai who interrogated the witnesses regarding the type of figs growing upon the tree that they testified the murder was committed under. Secondly, this Mishnah introduces the fact that the witnesses were asked whether they forewarned the transgressor.[[60]](#footnote-60) The details of such a forewarning appear in Sanhedrin 11 (Source #). The realization of both these requirements—the necessary contents and the forewarning (certainly according to R. Yosei bar Judah’s approach), and the response of the person who was forewarned—seems like an impossible scenario. And, again, the Babylonian Talmud in Sanhedrin seems to assert that these conditions are not limited to capital crimes but even to lashes, as Maimonides notes in “Laws of Sanhedrin” 12:2:

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As we have mentioned, this is merely one of the many elements that must be fulfilled in order to convict and execute a defendant. The Tannaim (Source #)[[61]](#footnote-61) tell the story of Judah ben Tabbai who served as the president of the Sanhedrin (or as the Chief Justice, according to some sources) in the era before the Sanhedrin ceased to adjudicate capital crimes. Presumably, they eventually did so because of the evidentiary requirements, which precluded a conviction even when the facts of the case were clear beyond a doubt. (In doing so, they effectively returned to God the authority to mete out punishment that the Torah had endowed them with.)

However, another story about the same Judah ben Tabbai relates that the juridical limitations were created over a long period of time by the Sages, and Judah himself—a venerable Sage—had executed many defendants because he was unfamiliar with one of these principles (Source #).[[62]](#footnote-62)

Clearly, the Sages were well aware that in the course of their hermeneutic processing of juridical procedures they were effectively abolishing the Torah’s corporal punishments—punishments whose operational elements they had shaped and that they themselves had labored to enumerate in great detail—ultimately, transforming the entire discussion into a theoretical exercise for the study hall.[[63]](#footnote-63) The Sages explicit assertion that two of the most detailed capital crimes in the Torah—the subverted or outcast city and the wayward and rebellious son—“never were and never will be” and that they were inscribed in the Torah for purely academic reasons, so biblical scholars can “Expound upon it, and receive a reward,”[[64]](#footnote-64) lead to their reapplication to other capital crimes, to exile, and to lashes, following their hermeneutic revolution.

We find a beautiful example of their awareness of the revolution they had wrought—of their power and their creativity—in the Babylonian Talmud. In discussing the Mishnah’s declaration that the maximum number of lashes is 39–notwithstanding the Torah’s explicit assertion that the maximum is forty (Source #): “The guilty one may be given up to forty lashes but not more”—the important Amora Rava emphasizes the Sages’ superiority over the Written Torah (bMakkot 22b):

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The Sages’ rationale for creating a system that prevented transgressors from being convicted and, ipso facto, from being punished according to Torah law becomes clear when we examine how they relate to the requirement that justices mete out *mishpat tzedek* (righteous judgment),[[65]](#footnote-65) which appears four times in the Torah, among these, once in Deuteronomy 16:

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A systematic study of the Tannaitic midrashim that relate to the appearance of this biblical requirement reveals a clear dichotomy between monetary punishment (that is to say, civil law) and the death penalty. While in the former, *tzedek* is interpreted to connote the demand for a true verdict, which would seem to be the literal meaning of the phrase “*mishpat tzedek*,” the denotation of *tzedek* in the latter— the realm of death penalty law, is *zekhut* (acquittal).[[66]](#footnote-66) The latter interpretation is quite apparent in *Sifrei Deuteronomy*’s (Source #) commentary on the phrase “*tzedek, tzedek tirdof*” (justice, justice you shall pursue) from the verse referenced above. The second midrash deals with monetary law. The plaintiff is advised to lodge his court case in an especially well-thought of court of law (*beit din muvhar*). The very fact that the plaintiff can choose the court of law, accompanied by the fact that all the courts mentioned in the midrash are Tannaitic ones, staffed by the leading scholars of the day, who were active in the period following the Temple’s destruction and ipso facto were not adjudicating capital crimes, leaves us with no doubt about the sort of law being adjudicated in these courts. The midrash confirms that the pursuit of justice means choosing a choice court of law to adjudicate your case, a court of the law whose reputation assures that it will examine the case in the best manner possible, better than a court of law staffed by inferior justices would. In this case, “*din tzedek*” means a true verdict.

While the first midrash deals with *tzedek* as it relates to death penalty law, the midrash juxtaposes this verse with the tannaitic teaching that once someone has been tried for a capital crime and been acquitted, he may not be tried again for the same crime even if new incriminating evidence is discovered or even if the court of law realizes that it made a mistake in acquitting him. However, if the opposite occurred, the court is obligated to retry and potentially acquit the defendant. This directive is unique to death penalty law as the Mishnah in Sanhedrin 4:1, which enumerates the differences between death penalty and criminal law, makes clear. Thus, we find an explicit parallel between *tzedek* and *zekhut* accompanied by the court of law being ordered by the Mishnah to pursue the possibility of acquitting the defendant.

The Torah’s straightforward interdiction that justices pursue a *din tzedek*, a true verdict, does not seem to reconcile with the Sages shaping of the juridical process and evidentiary requirements in death penalty law, a shaping which leads to the defendant being acquitted even when the facts make it almost impossible for the justice to believe in his innocence (for instance, in the case of Judah ben Tabbai and the ruin). Therefore, the Tannaim offer another way of understanding the word *tzedek*: acquittal. In doing so, they try to reconcile the Torah’s demand for a *mishpat tzedek* and the way in which they have shaped the death penalty laws.

Nevertheless, the Sages’ grand and impressive hermeneutical revolution still leaves us with a gigantic problem. The Torah’s penal code has been rendered inoperable, has been transformed into fodder for academic study, and has been stripped of all the well-known goals of punishment, especially that of deterrence.[[67]](#footnote-67) Ipso facto, any society in which such a criminal justice system (henceforth to be referred to as “classical law”) holds way may very well degenerate into complete anarchy, “for were it not for the fear the government inspires, every man would swallow his neighbor alive” (*Ethics of the Fathers* 3:2). Rabban Simeon ben Gamliel already addressed this concern when he declared: “They would also multiply murderers in Israel.” This problem seems to have hovered over the world of the Sages, so alongside of their essential abolition of the Torah’s punishments, they created a parallel criminal justice system which derives it authority from the Sages themselves and is not subject to the restrictions they had placed on the Torah’s penal system.[[68]](#footnote-68)

**Death Penalty** – The Tanna, R. Eliezer ben Ya’akov, provides us with the basic formulation of this method of punishment in bSanhedrin 46a (Source #).[[69]](#footnote-69) The two instances (at least one of which is presented as very early—‘in the time of the Greeks’) teach us that notwithstanding their abolition of the biblically-mandated death penalty and lashes, the Sages reproduced these very same punishments in the practicable system they created. The Sages, based on their own intuition, punished those people who damaged the moral fabric or social order of the society that the Sages found desirable, even though they themselves admitted that such damage is not considered a biblical transgression by the Torah. The gap between these two systems was expressed most vividly in a story that appears in the Mishnah upon which the following *Baraita* in bSanhedrin (Source #) is based. While Rabbi Eliezer assumed that Shimon ben Shetah employed the canons of classical law; and, therefore, his case history would make an excellent resource for determining how to design the punishment of stoning,[[70]](#footnote-70) the Sages informed him that Shimon ben Shetah’s case was both anomalous and extra-judicial—a case not subject to classical law’s principles of execution, and, therefore, not an authoritative source to be learned from. Furthermore, we should note that this is the same Shimon ben Shetah whom we met above,[[71]](#footnote-71) who when carrying out a legal trial punctiliously fulfilled all the requirements espoused by the midrash in order to avoid executing the defendant! Maimonides summarizes the conclusions drawn from these sources quite elegantly (Source #).

Both in Talmudic literature and beyond, we find additional sources pertaining to the Sages’ stance on execution; however, most of them raise some doubts.[[72]](#footnote-72) The Talmuds also contain stories about King David’s seemingly extra-judicial executions where the rules were not followed. These stories may have had an influence on Maimonides’ legal rulings, which we will examine below.[[73]](#footnote-73)

**Rabbinic Lashes** – These lashes receive a relatively thorough treatment in the Talmudic literature, beginning with the Tannaitic texts.[[74]](#footnote-74) A clear distinction is made between these lashes and the original biblically-mandated ones in the Midrash Tannaim commenting on the biblical verse depicting lashes (Source #).[[75]](#footnote-75)

In contrast to the ambiguity surrounding the death penalty, we can be fairly confident in asserting that the Sages meted out lashes in order to punish and deter those whose behavior they deemed immoral or whose behavior had the potential to destabilize society and the legal system. The Babylonian Amora Rav seems to be a standard bearer for this approach (Source #).[[76]](#footnote-76)

Thus, we may conclude that the Talmudic literature reveals that, on the one hand, the Torah’s corporal punishments were practically speaking abolished and transformed into either fodder for academic study or precepts with an exclusively religious purpose; but, on the other hand, the Sages engendered the expansion of an extra-judicial criminal justice system that leaves the decisions up to the courts and the Jewish community’s religious leadership’s discretion. These are the actors who are supposed to address breaches in the social order, as criminal law does in many juridical systems.

**Medieval Jewish Law and Thought**

Of course, the revelation that according to classical law it was impossible to punish criminals, troubled various thinkers, who assumed that a society without punishment and deterrence would ultimately fall.[[77]](#footnote-77) I will present two central responses, shaped by three important men who were thinkers and rabbinic-decison-makers.

**Maimonides**

Predictably, in his *Code of Jewish Law*, Maimonides presents the strict penal code formulated by the Sages. He also presents this approach in his earlier *Book of the Commandments* where he even provided reasons for it (Source #). Maimonides explains that the Sages created such harsh limitations in order to prevent the unjust conviction and execution of the innocent, a phenomenon that plagues many justice systems both ancient and modern.

Maimonides in his later work *Guide for the Perplexed* also emphasizes that the Torah’s legal system in its entirety reaches the highest degree of perfection of all legal systems, both on the religious and societal levels (Source #).[[78]](#footnote-78)

This notwithstanding, in *Guide for the Perplexed* itself, we find Maimonides addressing the possibility of extra-judicial punishment that fails to conform to the Torah’s legal code. In explaining the ceremony of the Decapitated Calf, which is intended to spread the news of the murder far and wide, so that the killer may be caught, he notes that if the killer is caught, he may be executed by the river, without any of the normative juridical requirements being fulfilled.[[79]](#footnote-79)

Maimonides position championing the king’s right to execute criminals who cannot be found guilty in the courts appears in the *Code of Jewish Law* twice (Source #, Source #).[[80]](#footnote-80)

The rationale underlying this Jewish law, that is to say, the need for deterrence, is in no doubt, and Maimonides mentions it explicitly in the phrases “repairing the world” and “casting fear.” The question is whether Maimonides’ remarks about the king have a Talmudic source, as does the extra-judicial power given to the courts.

Maimonides’ commentators suggest a number of possible sources, most containing stories about King David.[[81]](#footnote-81) It is difficult to know whether these are Maimonides’ sources, but, as we have seen, the Bible records King David’s executing murders (or suspected murderers) without the biblically-mandated testimony of two witnesses, and, certainly without the Sages fulfilling the Sages’ evidentiary requirements.

We may conclude that Maimonides believed that the penal law system designed by the Sages was the optimal criminal justice system, both in terms of its humanity and of its contribution to society. This notwithstanding, Maimonides understood that occasionally extraordinary occasions would arise wherein the need to repair the world would require the king or court of law to abandon normative law, an exigency familiar to us from the emergency measures present in various modern legal systems.

**The Rashba and the Ran**

Two Sephardi Torah scholars, who functioned as rabbis in Barcelona and belonged to the scholarly school started by Nahmanides, adopted an approach different than Maimonides’.[[82]](#footnote-82) According to them, the harsh legal limitations in the Talmudic criminal justice system require us to assume that alongside the detailed Sanhedrin system, there was always another criminal justice system at work, founded on different principles. This having been said, we need to distinguish between these two scholars. As we will demonstrate, Rashba makes his remarks in the context of a contemporary practical halakhic situation. The Ran, in contrast, makes his argument in the context of a sermon, and this argument even seems to contradict other statements he made in other halakhic or interpretive contexts. Some have therefore suggested that we should consider the Ran’s remarks as polemical in nature.[[83]](#footnote-83) This notwithstanding other academic scholars, as well as some later rabbinic thinkers, have taken his words at face value, as a deeply held opinion, which lays the foundations for the belief that the Halakhah recognizes judicial dualism in criminal law. According to this approach, criminals who could not be punished by the Sanhedrin were supposed to be punished by the king or the rulers of the state, thus ensuring that social order would be restored.[[84]](#footnote-84)

Rashba was asked about the *kahal*’s communal authority to punish criminals. In both the question and the answer, the writers stress that the Christian monarchy had transferred its authority to the Jewish court of law, and the questioners are interested in finding out what the foremost sage of the generation thought Jewish law thought about such a move (Source #). The questioners are well aware of the serious limitations placed on evidentiary laws in the Talmud that prevent a conviction in the overwhelming majority of criminal cases. The beginning of the responsum is of great interest to us as Rashba states that it seems obvious to him that the Talmudic evidentiary laws have no relevance whatsoever to Jewish courts of law adjudicating under the rubric of “the proper functioning of the country.” Even though he feels the need to adduce Talmudic precedents to support his claim, it is evident that his argument is founded on the simple assumption that it is impossible to run a properly functioning country using Talmudic evidentiary laws.

This assumption is explicitly stated in another of Rashba’s responsa on the same topic (Source #).[[85]](#footnote-85) According to the Rashba, if we required the application of Torah law, society would be destroyed! This approach is very different from that of Maimonides, who claimed that Torah law is the key to societal perfection and the rulers of the country (perhaps, only the king) can in extraordinary circumstances—perhaps only murder—deviate from it.[[86]](#footnote-86)

This approach is presented in an even more comprehensive fashion in Ran’s famous sermon. This sermon was given on *Shoftim*, the Torah portion that begins with the commandment to set up a true (*tzedek*) justice system and later contains the laws pertaining to the appointment of an Israelite king and the laws of the king. Ran notes the relationship between these two commandments (Source #).

It is worth paying attention to the ideas expressed in this passage. The Ran begins by noting that the law’s primary function, no matter where, is to keep the country functioning. Since the king is responsible for this, the king of Israel’s role is no different from the gentile kings’ role in this regard, and, therefore, “the king may pass judgment without forewarning as he deems fit for the political collective.” We should note that the Ran’s remarks reflect a simple reading of the Bible. The Torah presents the king’s appointment as the people’s initiative, since the people are motivated by a desire to mimic other countries’ political regimes (Deut 17:14).[[87]](#footnote-87) If so, what is the role of the judicial system the Torah espouses? The Ran’s surprising response, which is in complete opposition to Maimonides’ approach discussed above, is that the system’s purpose is exclusively religious, just like the laws of sacrifices, and it has nothing to do with maintaining social order. It seems like the comparison to sacrifices is no coincidence. The only logical reason for offering sacrifices is the desire to adhere to God and come closer to him. It is hard, if not impossible, to endow the sacrifices with any sort of societal purpose. The Ran compares the sacrifices with biblical criminal law and comes to the conclusion that their goals are identical: “to effect the investiture of the Divine Immanence within our nation and to cause it to cleave to us.”[[88]](#footnote-88)

The purpose of the criminal justice system is to punish those who transgress the Torah’s religious commandments, such as profaning the Sabbath; however, it is not effective in policing the societal commandments that appear in the very same Torah, such as “Thou shalt not murder.” Based on this dichotomy, Ran assumes that we can actually find a logic to the Torah’s harsh juridical procedures and evidentiary requirements; however, this logic takes a back seat to society’s need for deterrence, and, therefore it is only applied to religious transgressions.[[89]](#footnote-89)

Where is the king supposed to take his justice system from? According to Ran, the answer is simple: The king’s laws will imitate foreign legal systems, which are superior to the Torah’s laws in terms of maintaining social order.[[90]](#footnote-90)

**Punishment in the Post-Talmudic Period**

Corporal punishment—under the aegis and authority of the courts of law—continued to be carried out to differing degrees in different Jewish communities. Simcha Assaf’s truly unique, important, and pioneering work reviews the sources testifying to the various punishments being carried out.[[91]](#footnote-91) In his footsteps, Aharon Kirschenbaum summarizes many other sources.[[92]](#footnote-92) This type of punishment existed to varying degrees and was subject to the authority the Christian monarchy chose to bestow on the Jewish community,[[93]](#footnote-93) for the majority of the post-Talmudic period extending from the Geonim to the Aharonim (Later Sages). This authority, obviously, did not extend to all the death penalty crimes mentioned in the Torah or enumerated by the Tannaim, and on the other hand the punishment was meted out for crimes that the court of law or the communal leaders thought should be punished (or that they received special permission from the government to carry out), even if they were not mentioned in the ancient sources, as the Talmud had already permitted such punishments when “the times required it.”

We will now bring a few sources to demonstrate this reality and the difficulties it created.

**Capital Punishment**[[94]](#footnote-94)

Twice, Maimonides recalls the death penalty being carried out in Spain. The first is in his *Commentary on the Mishnah* (Source #). This passage is quite fascinating. At the beginning, Maimonides asserts that in Spain the Jewish community executed heretics and people who might corrupt the faith of the Jewish community. This is clearly extra-judicial punishment. The passage concludes with those transgressions that elicit the death penalty according to the Talmud, that is to say, those defined as capital crimes. On this occasion, Maimonides presents the well-known law prohibiting the adjudication of capital crimes in our post-exilic Diaspora era; however, he adds that in this case the original punishment was exchanged for another punishment—one only slightly less harsh than the original one—which, of course, was not mentioned as a replacement in Talmudic literature. The punishment under discussion is lashes (rabbinic lashes, of course) and perpetual banishment, not subject to repeal. We can easily understand the harsh impact of a ban such as this, which prevents someone from leading a normal life in the Jewish community.

Maimonides’ *Mishneh Torah* also attests to the state of affairs in Muslim Spain (Source #).[[95]](#footnote-95) In this source, Maimonides touches upon one of the most anxiety-provoking phenomena that plagued the various medieval Jewish communities throughout their many years of existence.[[96]](#footnote-96) The “informers” were Jews who informed on their co-religionists to the authorities on various pretexts. This led to the Jews punishment or the confiscation of their property. Maimonides adds that the very threat of informing was sufficient cause to execute the potential informer. The danger that these informers placed the community in and the fear that they would return to their evil ways was enough to make the community feel that oftentimes the only way to ensure its welfare was by executing the informer. One of the most vivid descriptions of such an act and the deterrence it was intended to create was carried out by the Ri Migash, Maimonides’ father’s rabbi, whom Maimonides venerated greatly:[[97]](#footnote-97)

And we have heard that R. Yosef Halevi ibn Migash stoned an informer in Lucena on the Day of Atonement which fell on the Sabbath during *Ne’ilah*.

This stoning, which most would agree was carried out at the holiest point in time on the Jewish calendar, which on that year also fell on the Sabbath—a day on which the laws prohibiting labor are even more stringent than that of the Day of Atonement that falls on a weekday—emphasizes the Jewish community’s abject terror, their feeling that their very lives were endangered by the informer’s actions. This situation permitted them to profane the Sabbath and the Day of Atonement by executing him. Furthermore, this execution was probably carried out in public as the whole community gathered to pray. Or, put another way, this execution was also intended to educate and deter any other potential informers.

Executions also continued to be carried out in Spain under the Christian rulers who permitted executions in certain cases.[[98]](#footnote-98) The Rosh’s responsa provide a fascinating window on this phenomenon as he fled Germany and arrived in Spain during the beginning of the fourteenth century.[[99]](#footnote-99) Notably, Rosh’s initial distaste for executions, a consequence of his Ashkenazi background, was palpable, as he expressed great surprise at the local Spanish custom (Source #).[[100]](#footnote-100)

As we can see, Rosh thinks that even in our post-exilic Diaspora age we should adjudicate capital crimes using the canon of classical law that is to say, that we should not adjudicate capital crimes because we do not have the Sanhedrin (that having been said he is far less troubled by cutting out the informer’s tongue[[101]](#footnote-101)). He is willing to listen to the arguments his Spanish interlocutors raise that they are carrying out executions with royal approbation, that it is preferable for the Jewish community to execute its own members convicted of capital crimes instead of having the gentile court execute them, and most importantly the halakhic argument that there are Talmudic precedents for executing someone as “a protective measure” (“to create a safeguard”). Even if Rosh ultimately chooses not to interfere with this practice, he goes out of his way to note that he is not comfortable with it because “I never agreed with them about the loss of life.” This notwithstanding, Rosh may have softened his stance later on. His son and heir, R. Yehudah, definitely maintained that there was no problem with carrying out executions. In a responsum that addresses the case where a Jew beat another Jew to death, he supports convicting the murderer of a capital crime on condition that the matter is properly investigated. He asserts that we must distinguish between the classical law that took place in the Sanhedrin (of course, in saying so, he adopts his father’s stance) and the customary law that enables the Jewish court of law to carry out executions that are not in keeping with Torah law, based on the authority granted it by the monarchy.[[102]](#footnote-102)

**Lashes and Corporal Punishments**

We already mentioned amputating limbs as a form of punishment. Lashes were also given in various locales at different times, including in communities that eschewed the death penalty.[[103]](#footnote-103) Many of these sources explicitly distinguish between classical lashes, which are limited to a maximum of thirty-nine lashes and are carried out in the fashion depicted in the Mishnah, in tractate Makkot’s third chapter, and the lashes carried out in post-exilic Diaspora times that are rooted in the Talmudic rabbinic lashes. In a responsum that some sources ascribe to R. Sherira Gaon, we find a detailed description of punishment in the Babylonian Talmudic academies, including the emphasis on its being performed in a fashion distinct from biblical lashes (for instance, with a rope and not a strap).[[104]](#footnote-104) However, there were rabbinic scholars who disputed this assertion arguing that post-exilic Diaspora lashes should be meted out in a fashion reminiscent of classical lashes. The Ritva, the Rashba’s Spanish disciple, describes these approaches (Source #).

This passage raises the issue of whether even when we mete out lashes that are not prescribed by classical law it is still preferable to compare them with classical or court lashes to preserve their memory. Perhaps because there is no connection between court lashes and rabbinic lashes and the goals of rabbinic lashes are to punish the transgressor until he repents and to deter others, then there is no reason to mimic the earlier lashes, and the form and severity of the punishment remain up to the court of law.

This distinction between various forms of lashes also appears in a practical halakhic responsum written by Rivash, who lived two to three generations after Ritva and is considered to be a member of the same Spanish school. Rivash was asked about a man who had committed adultery with a married woman and even confessed to the fact (Source #).[[105]](#footnote-105)

We should note that throughout the responsum the author distinguishes between Torah law as it is interpreted by the Talmud and punishment in the present case. Torah law demands that the adulterers be condemned to death by strangulation, but the evidentiary requirements demand two witnesses and a forewarning right before the transgression. The confession is not accepted in this legal system. Rivash stresses that these principles also apply to biblically-mandated lashes; however, this does not prevent the court from meting out rabbinically-mandated lashes. The very fact that his reprehensible actions are already public knowledge allows the court to lash him as much as they deem necessary. Their goal is not just to punish him with lashes, but also to publicly humiliate him, so the lashing takes place as he walks around all the Jewish neighborhoods. His punishment does not even end there, as he can also be bound in chains and whatever other punishments the justices deem fitting. From this, we may conclude that not only were cruel corporal punishments carried out by the Jewish communities but that these punishments were often harsher than the biblical punishments, whose use had been severely curtailed. This harshness played out both in terms of the diminished evidentiary requirements necessary to carry them out and by the way the punishments were carried out (for instance, the lashes could take place in more than one location, as the convicted person walked around the streets, and the court was permitted to mete out more than thirty-nine lashes).

**Exile**

One of the punishments which gained a new lease on life in the medieval period and which even continued to be used in later periods was the punishment of exile (and sometimes banishment). This punishment was employed in both Spain and in the Franco-German communities[[106]](#footnote-106) and was, of course, only similar in its external form to the original exile—the exile of the unintentional murderer to the City of Refuge. However, the two punishments of exile are still similar in some ways. We learn from various sources that the criminal was exiled when the Jewish community feared he would be a danger to it. This, of course, is similar to the classical exile which we have demonstrated is primarily concerned with protection, albeit protecting the murderer from the blood avenger. Furthermore, we may conclude that in certain cases exile was perceived to be a form of atonement, not unlike the prolonged residence in the City of Refuge until the death of the High Priest, which seems to indicate, as we saw above, that atonement is part of the package.

Simcha Assaf found a case of exile that seems to be an act of self-defense in the Sephardic community notebook from Hamburg, dating from the second half of the seventeenth century.[[107]](#footnote-107) The communal leadership was required by the authorities to ensure that its merchants did not cause injury to the other merchants in the city. Therefore, we find, for instance, the following announcement:

…some foolish people dwell among us whose only concern is themselves and they pay no attention to the good of the community and they engage in forbidden commerce or they negotiate in bad faith… not only will the committee not protect them from the punishments meted out by the government but they will also be expelled by the committee from the community (*kahal*) and driven from the city.

Of course, we also find that the aforementioned informers are also exiled as they too endanger the community.[[108]](#footnote-108)

However, the most fascinating use of exile as a punishment is, of course, its application to the crime that it was originally established for in the Torah: murder. R. Yehudah, the son of the Rosh, delineates various punishments for murder in his responsa, mentioned above.[[109]](#footnote-109) They are listed in order of the quality of the available evidence. When the evidence is solid, as mentioned above, the punishment will be death. However, when the evidence is less than solid a few different punishments are recommended, exile among them:

And in addition to that which was publicized about him, that he struck him, and even if all the testimony is negated it is appropriate to punish him with exile for it is public knowledge that he killed him, so we carry out what it says in the Torah, “and you shall expunge the evil from your midst.”

In other words, when the evidence is insufficient to punish the murderer with death or other corporal punishments, the community must exile him from its midst and, in so doing, perform the biblical commandment to “expunge the evil from your midst,”[[110]](#footnote-110) that is to say, to purify yourself from the defilement of this sort of person.[[111]](#footnote-111)

Rivash also mentions exile as the appropriate punishment for someone who mortally wounds another, only to have him heal and then later die. If we assume there was some connection between the blows and the death, exile is a fitting punishment (Source #).

**Bibliography**

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1. See, for instance, Segal, Copper, Shafat and the many sources they cite in their introductions. [↑](#footnote-ref-1)
2. For instance, I will not address the important matter of how the various forms of capital punishment were designed by the Rabbis. On this matter, see, for instance, the books by Shemesh, Lorberbaum, Berkowitz, and Steinmetz. [↑](#footnote-ref-2)
3. This notwithstanding, there are certain similarities between corporal and monetary punishment, for instance, in the substantial mitigation of their use during the rabbinic period. On fines, see Radzyner. [↑](#footnote-ref-3)
4. bBaba Kama 89b and its parallels. See too, remarks he made to his disciples Ber 28b: “May it be the will of God that the fear of heaven be upon you like the fear of flesh and blood.”  [↑](#footnote-ref-4)
5. Exod 33:27–-28; 1 Kngs 18:40 [↑](#footnote-ref-5)
6. Obviously, it is difficult to apply contemporary distinctions between criminal and civil proceedings to Jewish law (such as, various bodily injuries that are deemed serious crimes in modern criminal jurisprudence, but in various halakhic sources are only perceived to be actionable in the framework of a tort suit initiated by the injured party.) Nevertheless, I believe that they can be cautiously used within our narrow framework. [↑](#footnote-ref-6)
7. B. Kirschenbaum, 133–134. [↑](#footnote-ref-7)
8. On this point, we should add another interesting distinction. Law students usually take courses in criminal or penal law where they learn the principles and particulars relevant to the system of law that they may practice in the future. However, in traditional Torah study halls, most of the time spent on criminal law revolves around studying classical law which never actually functions in the real world. [↑](#footnote-ref-8)
9. Rawles, 10. [↑](#footnote-ref-9)
10. There is a Tannaitic dispute regarding the principle that “one does not administer punishment based on an a fortiori inference”. However, ultimately, Jewish law enshrined this principle and a halakhic court does not mete out punishment unless the transgression was explicitly written (before the crime was committed). [↑](#footnote-ref-10)
11. On this, for instance, see B. Radzyner and the many relevant sources cited therein. [↑](#footnote-ref-11)
12. See, for instance, Warhaftig, 451, 453; Enker, 64–65; Diament. [↑](#footnote-ref-12)
13. For a harsh critique in this vein, see Leibowitz, 167. [↑](#footnote-ref-13)
14. Due to space constraints, I will not be able to address the literature on criminal law from the Second Temple period that is found in the Apocrypha and the Dead Sea Scrolls. On this, for instance, see Kirschenbaum, 273–275; Shemesh, Chpt. 3; Werman, 254–273. [↑](#footnote-ref-14)
15. For a list of these crimes organized by field, see <https://en.wikipedia.org/w/index.php?title=List_of_capital_crimes_in_the_Torah&redirect=no> For another system of classification, see EB, vol. 4, 947–950. For a categorization of these crimes by type of death penalty, see Dykan, 1246–7. [↑](#footnote-ref-15)
16. As mentioned above, I will not address the Tannaitic shaping of the four court-administered types of capital punishment herein. In the Torah, only twelve crimes explicitly mention what death penalty is to be administered: nine cases of stoning, two of burning, and, in only one case, slaying by the sword via decapitation. Strangulation, as a type of death penalty, does not appear in the Torah. For a detailed discussion of Mishnaic lists, see Kirschenbaum, Chpt. 5. [↑](#footnote-ref-16)
17. Maimonides, “Laws of Sanhedrin” 15:10–13. For the biblical sources of the crimes Maimonides enumerates, see the footnotes in *Rambam Le-Am* (Mossad HaRav Kook, 73–75). [↑](#footnote-ref-17)
18. This notwithstanding, elsewhere, the Torah does provide an explanation for the execution of the intentional homicide as we shall soon see. [↑](#footnote-ref-18)
19. Tigay, 31. [↑](#footnote-ref-19)
20. The material existence of the sin is alluded to by the phrase *u-vi’arta*, which in most cases means “to burn.” Cf. 1 Kngs 14:10. [↑](#footnote-ref-20)
21. See EB, Vol. 4, 233–234. [↑](#footnote-ref-21)
22. This notwithstanding, the tales told in Sam 2:14—concerning the Tekoan woman’s request of King David and of King David’s reaction to Avshalom—indicate that the law of the blood avenger was not always carried out. Perhaps these cases were different because these were cases of fratricide. Cf. Cain’s defense in Gen 4:15. [↑](#footnote-ref-22)
23. On the sin of murder endangering the entire community and the process of atonement when the murderer is not caught, see Deut 21:1–9. [↑](#footnote-ref-23)
24. For a discussion of the raw concept found in these verses and its comparison to those in other criminal justice systems, see, for instance, Greenberg, 338–343. [↑](#footnote-ref-24)
25. I am referring to those goals explicitly mentioned in the Torah. Obviously, capital punishment is inherently a deterrent as are other punishments (to a lesser degree). Most legal systems that we know of do not usually provide their punishments’ rationale alongside their statutes. [↑](#footnote-ref-25)
26. This rationale famously plays a central role among death penalty advocates till this day. [↑](#footnote-ref-26)
27. See the verse in Leviticus 24:21: “One who kills a beast shall make restitution for it; but one who kills a human being shall be **put to death**.” The concept of avenging one’s self on the murderer already appears immediately after the first human homicide in biblical history in Gen 4:15, 24. In at least the first verse concerning vengeance upon Cain, the verse is talking about Divine vengeance. [↑](#footnote-ref-27)
28. On the notion that biblical law forsook punishment as vengeance at the hand’s of humankind leaving it in the hands of the Lord, see EB, Vol. 2, 392–393; Vol. 5, 917–921. [↑](#footnote-ref-28)
29. This notwithstanding there is a debate over both what the term ‘vengeance’ actually means in this verse and over whether the verse instructs its readers to execute someone who kills a slave. For a summary of the interpretive approaches, see Jackson 246–249. [↑](#footnote-ref-29)
30. The Sages deduce from this phrase that the leadership is obligated to publicize these executions and they also noted the unusual requirement that an audience be present to be deterred by the proceedings. See bSan 89a. [↑](#footnote-ref-30)
31. Many perceive exile to be a form of punishment (though the Sages probably did not perceive it as such. See bMakkot 2b.) Below we will demonstrate that such a categorical understanding is difficult to support. [↑](#footnote-ref-31)
32. Deuteronomy’s parallel passage also mentions six cities, but the depiction of their founding is different. See there. [↑](#footnote-ref-32)
33. Deut 19:3. The Cities of Refuge’s geographical distribution recorded in Joshua 20:7–8, indeed, affirms that this was carried out as planned. The Sages noted this and even added elements to make the city more accessible so that the murderer could get there without delay. See *Sifrei Deuteronomy*, *Shoftim*, 180; bMak 10a–b. [↑](#footnote-ref-33)
34. It seems as if it was only during the Tannaitic period that there arose a presumption that the murderer was obligated to flee to the City of Refuge whether or not he wanted or needed to. See, for instance, *Sifrei Deuteronomy* 181. In the *Book of the Commandments*, Positive Commandment 225, Maimonides rules that there is an obligation to exile the murderer. [↑](#footnote-ref-34)
35. Kirschenbaum, 437. In the biblical story about King Solomon and Shimi ben Gera (1 Kngs 2:36–44), we get a sense of the many limitations Shimi—who was prohibited from leaving his house—lived under. When he was drawn into doing so because his slaves had fled, this led to his execution. [↑](#footnote-ref-35)
36. Indeed, the Sages were troubled by the absence of both intent and negligence, so they innovated many different types of involuntary homicide, some of which did not require exile. See, for instance mMakkot 2:1–3 and its extensive development in the Gemara which made the likelihood of exile very poor. Maimonides sums these up in “Laws of the Murderer,” Chapters 3–6. [↑](#footnote-ref-36)
37. The Mishnah (Makkot 2:6) declares that the death of the High Priest atones for the bloodshed not for the exile (which is merely protective in nature, not an act of atonement). This is stated explicitly in the Talmudic folio in the BT dedicated to elucidating this Mishnah (bMak 11b). This notwithstanding, see too, ibid., 2b. [↑](#footnote-ref-37)
38. EB, Vol. 6, 386; Milgrom, 294. [↑](#footnote-ref-38)
39. Some Bible scholars claim that the word *va-yesuru*, which appears in Deuteronomy 21:18, 22:18 means *makkot* (lashes). Several Tanaaim also understood the word this way in the halakhic midrash called Sifri, *ad loca*. On this, see Shemesh, 82–84. [↑](#footnote-ref-39)
40. However, our Sages, of blessed memory, (and to some degree this is evident in Josephus) expanded the scope of the punishment based on the adjacent verses, particularly the transgressions between man and God. See EB, Vol. 4, 1161. [↑](#footnote-ref-40)
41. On the Torah’s evidentiary laws, see Falk 47–48. For a review of the elements found throughout the entire Pentateuch on juridical proceedings and evidence, see EB, Vol. 6, 82–83. [↑](#footnote-ref-41)
42. The process is initiated by one or both of the participants, and not by a third party, as is the norm in contemporary criminal proceedings. Cf. Job 9:19; 23:4. [↑](#footnote-ref-42)
43. The Torah does not provide a systematic depiction of either the justice system or the evidentiary laws and juridical proceedings. For a summary of the biblical material, see Falk, 47–65; Westbrook, 35–52. We should note that the Tannaim were certain that “the community” denotes a court of law. See, for instance, *Sifrei Numbers* 150. In Deuteronomy 19:12 this juridical function is fulfilled by “the city elders” (*ziknei ha-ir*) (Source #)*.* On the city elders as judges, see Reviv, Chpt. 5. [↑](#footnote-ref-43)
44. In Deuteronomy 17:4, in the context of suspected idolatry, the need for a thorough enquiry is mentioned, but no explicit mention is made of who carries out this enquiry. [↑](#footnote-ref-44)
45. The reason for the interrogation may be to deter the witnesses from testifying falsely which would later make them directly responsible for the murder of an innocent man. This reasoning is stated explicitly in the Mishnah which whole-heartedly adopts the notion of the witnesses throwing the first stones (Sanhedrin 6:4). However, before this passage, the Mishnah describes a process in which the witnesses are intimidated and threatened. It is made clear to them that false testimony in a capital crimes case is essentially premeditated murder, like Cain’s murder of Hevel (Ibid., 4, 5). [↑](#footnote-ref-45)
46. This notwithstanding, compare this with the laws of the proselytizer (Deut 13:7–12) where there seems to be no need for witnesses. The Sages, however, did not rescind the requirement for witnesses in the proselytizer’s case, though they were more lenient in the evidentiary requirements for his conviction, because of the seriousness of the crime and the danger it posed to society. See Sanhedrin 7, 10; *Tosefta*, ibid., 10, 11; BT, ibid., 88b. [↑](#footnote-ref-46)
47. See Falk, 57, for further details. [↑](#footnote-ref-47)
48. For more on self-incrimination in Jewish law, see B. Kirschenbaum who devoted a whole book to the topic and in pages 121–127 discusses various biblical sources, including the stories mentioned above. He cites various scholars who believe that the Bible accepts self-incrimination as proof. [↑](#footnote-ref-48)
49. B. Kirschenbaum, 172, 208–209. [↑](#footnote-ref-49)
50. And, we should also note, the delimitation of unintentional homicide’s scope discussed above. See footnote above. [↑](#footnote-ref-50)
51. First and foremost because of the Roman government. See, for instance, Safrai, 222–223; Harris. This notwithstanding, on various occasions, the Sages claim that the abolishment of these punishments was an internal Jewish process. See, for instance, bSabbath 15a and its parallels: the Sanhedrin was exiled from the Temple Mount forty years before the Destruction, so that it could not adjudicate capital crimes (Avodah Zerah 8b indicates that the Sanhedrin chose to exile itself so that it could not adjudicate capital crimes which were on the rise); See too Makkot 2, 4 and *Sifrei Zuta*, 332 which require that all six, biblical Cities of Refuge be functioning so that the unintentional murderer could be exiled to them. We should also note that the Torah made the punishment of exile contingent on the existence of the office of the High Priest; see Makkot 2:7). According to Maimonides (Sanhedrin 16:2) lashes can be meted out when the Jews are in exile, an assertion that has been hotly debated and is certainly disputed by the Geonim. See, for instance, *Teshuvot ha-Geonim Sha’arei Tzedek*, Pt. 4, Gate 7, Sct. 38. [↑](#footnote-ref-51)
52. Historians hotly dispute every detail connected to the Sanhedrin, its character and its functions. Undoubtedly, some of the rabbinic sources describing the Sanhedrin were written later and cannot be deemed authentic historical sources. For instance, the scholars dispute whether the Sanhedrin ever had the authority to adjudicate capital cases and, if so, when they lost it. For a review of these disputes, see Shaye Cohen, 103; Maclaren, 10–27. [↑](#footnote-ref-52)
53. For a detailed list of the Tannaitic and Amoraic sources, see C. Radzyner, 77–78, n. 71. See too, for instance, the comparison of testimony in *Sifrei Zuta* 35, v. 29. [↑](#footnote-ref-53)
54. Maimonides, “Laws of Sanhedrin” 11:4. With this in mind, the claim that capital punishment should be employed less is because of the value of life, is called in to question. See, for instance, Greenberg, 343, or Y. Lorberbaum, Chpt. 7. We should also note another argument that has recently been tendered in the scholarly literature: the Tannaim intended to prevent the *karet* punishment by replacing it with lashes (Shemesh, 91), and, therefore, they even “championed” the lashing of the transgressor (Lorberbaum, 215–218). The problem is that, as we have mentioned, the Tannaim also subordinate lashes to the strict juridical proceedings of capital punishment that make the latter impracticable. (Perhaps the defendant is exonerated from *karet* by living through the earthly court’s adjudication of his punishment by lashes, even if he is not ultimately lashed. This theory requires further investigation.) The argument above also calls into the question the claim that capital punishment is unique for various reasons, and this led the Rabbis to arduously work to diminish its application. For relatively recent proponents of this argument, see Berkowitz, Chpt. 2. [↑](#footnote-ref-54)
55. Above, next to note ….? [↑](#footnote-ref-55)
56. Y. Lorberbaum, 197–8. Lorberbaum delineates the Mishnah’s literary structure which step-by-step increases in its rejection of performing capital punishment. [↑](#footnote-ref-56)
57. The Sages’ motivation has been the subject of much contradictory speculation. One approach has argued, in one form or another, that the Sages in principle opposed capital punishment for ethical or religious reasons. See above HS 54. Above and beyond the difficulties with this explanation, which are mentioned in the footnote above, we should note that a principled opposition to capital punishment or lashes does not fit in with the Sages’ permission to carry out extra-judicial capital punishment (or lashes) without the many safeguards promulgated for carrying out the biblically-mandated punishments, which we will see below. [↑](#footnote-ref-57)
58. Y. Lorberbaum, 198–201. Indeed the Babylonian Talmud explains this Mishnah (bMakkot 7a) by adducing the amoraic passages which depict the interrogation methods employed by R. Tarfon and R. Akiva to rebuff the testimony of homicide witnesses. [↑](#footnote-ref-58)
59. For a similar approach concerning the need to attempt to execute murderers, see *Sifrei Deuteronomy* 187 and *Midrash Tannaim*, Deuteronomy 19:12, and R. Eliezer’s remarks ad locum regarding the societal benefit of capital punishment. In making this assertion, R. Eliezer comes before Rabban Simeon ben Gamliel. [↑](#footnote-ref-59)
60. This Mishnah seems to conform to R. Yosei’s approach in Makkot 1:9 which decrees that both witnesses must forewarn the transgressor. [↑](#footnote-ref-60)
61. *Mekhilta de-R. Yishmael*, *Mishpatim*, *Masekhta de-Kaspa* 20 [Horowitz-Rabin ed., 327]. The parallels to this narrative are about Simeon ben Shetah, his partner. See, for instance, *Tosefta*, *Sanhedrin* 8:3. The notion that true justice would ultimately be carried out by God is also expressed in the beautiful Amoraic text—that is rooted in the *Mekhilta*—found in *bMakkot* 10b. [↑](#footnote-ref-61)
62. *Tosefta*, *Sanhedrin* 6:6 and its two parallels in the BT. Some of the Talmudic commentators were, indeed, surprised that Judah ben Tabbai could have erred on such a matter. [↑](#footnote-ref-62)
63. Regarding the degree to which the Sages were aware of the interpretive revolution they carried out, including t the realm of abolishing corporal punishment, see Halbertal, Chpt. 8. We should note that some scholars have argued there may have been a political motivation to the Sages rereading of the death penalty code. For instance, Berkowitz’ main argument, in her book, is that the Sages’ discussion of capital punishments, in an era where they could not carry them out in any event, was conceived to provide a foundation for their authority and boost their leadership in the community. [↑](#footnote-ref-63)
64. *Tosefta*, *Sanhedrin* 11:6, 14:1. For a discussion of both topics, see Halbertal, Chpt. 2, 6. R. Yonathan the Babylonians assertion in Sanhedrin 71a, which implies that both had, indeed, occurred, seems to be a polemical response to the Tannaitic assertion and not an objective, historical fact. See Urbach, 87–88. [↑](#footnote-ref-64)
65. The sources for the following discussion appear in C. Radzyner. [↑](#footnote-ref-65)
66. A multitude of ways to understand *tzedek* and *zekhut* appear in the aforementioned article. I will suffice by noting that in the language of the Bible, we find that the word *tzadik* denotes someone who has been acquitted in court, just as *rasha* (literally, evil or wicked) denotes someone who has been found guilty in court. See, for instance, the text near footnote thirty-nine above. [↑](#footnote-ref-66)
67. Many scholars have addressed this problem. See, in particular, Enker, Chpt. 1, and Kirschenbaum (esp. p.70). These two scholars argue that Jewish criminal law is composed of two layers. The first layer is composed of the classic Jewish law, found in the Torah, which was reworked in an interpretive process overseen by the Tannaim we discussed above. The second pragmatic layer, which we will discuss below, is not subject to the delimiting juridical processes we have seen above. Both scholars argue that while the purpose of the first layer is exclusively religious and pedagogical, the goal of the second layer is identical to that of other criminal justice systems which are concerned with preserving societal stability. In fact, all of Kirschenbaum’s massive tome is based on the distinction between these two layers. [↑](#footnote-ref-67)
68. The nature of the *kippah* punishment meted out to murderers (mSanhedrin 9:5) is unclear. A literal reading of the Mishnah indicates that it is not a form of execution, but rather of incarceration. It seems to have been developed for murders who could not be convicted due to the strict evidentiary laws the Tannaim developed. However, in the BT, we find an approach that describes it as a slow form of death and, therefore, the Talmud is forced to add further impediments to its being carried out. On this, see Kirschenbaum, 256–267; Shafat, 244–252. [↑](#footnote-ref-68)
69. bSanhedrin 46a. This passage’s parallels are found in the BT, PT, and Scholion on the Scroll of Esther with various and sundry differences. See Kirschenbaum, 276, n. 32. [↑](#footnote-ref-69)
70. Did R. Eliezer make this assumption because he happened to support the classical death penalty (see note 59 above)? [↑](#footnote-ref-70)
71. Near footnote 62. [↑](#footnote-ref-71)
72. For a detailed list, see Kirschenbaum 285–291. [↑](#footnote-ref-72)
73. See the text next to footnote 80. [↑](#footnote-ref-73)
74. See Kirschenbaum, 364–374. [↑](#footnote-ref-74)
75. See as well Makkot 4:17; Responsa of R. Netronai Gaon, Siman 420. [↑](#footnote-ref-75)
76. bYevamot 52a; yKiddushin 6 8, 64b. These lashings are attributed to Shmuel. [↑](#footnote-ref-76)
77. Our discussion here will obviously only scratch the surface of this matter, and punishment itself is only one part of a far broader discussion dealing with Jewish political philosophy. On the topic of medieval political philosophy there are several recent publications. See, for instance, Walzer, Menachem Lorberbaum, and Ravitzky. See too Bleich who examines the medieval thinkers’ stances and their influence on later generations. [↑](#footnote-ref-77)
78. *Guide for the Perplexed* 3:27. See Maimonides analysis of the Torah’s punishments and their purposes ibid., 41. [↑](#footnote-ref-78)
79. Ibid., 40. [↑](#footnote-ref-79)
80. The regnant interpretation of Maimonides argues that Maimonides only grants the king such extra-judicial power to punish criminals in the case of murder (and in the case of treason to the crown: “Laws of Kings” 3:8). Enker believes that it would be wrong to limit the king’s authority to homicide. [↑](#footnote-ref-80)
81. bYevamot 79a; bSanhedrin 27a (with regard to the Exilarch who has the status of a monarch on various occasions); bSanhedrin 48b–49a; ySanhedrin 6, 3 23:3 [↑](#footnote-ref-81)
82. For a detailed analysis of this school’s position and its sources, see M. Lorberbaum, Pt. 2. [↑](#footnote-ref-82)
83. See the recent work by B. Brand. [↑](#footnote-ref-83)
84. We should note that according to Blidstein, 57–58, the Ran was also interested in finding a basis for the contemporary, Spanish Jewish courts’ authority to mete out punishment. See, for instance, footnote 67. [↑](#footnote-ref-84)
85. See too his responsum, part of which was originally published in *Beit Yosef*, *Hoshen Mishpat*, *Siman* 388. The responsum was also more recently published from manuscript in *Responsa of the Rashba*, # 345. The responsum rejects the claims of the relatives of a Jewish informer who was executed by the Barcelona community. These relatives argued that, among other things, he was executed without due Talmudic juridical procedures. This responsum is very long and among other things it mentions that the execution received the approbation of the gentile king and, therefore, the relatives’ claims have no basis. [↑](#footnote-ref-85)
86. See too Lorberbaum’s contrast of the Rashba and R. Joseph ibn Migash’s approaches. The latter, famously had a profound influence on Maimonides. [↑](#footnote-ref-86)
87. The well-known and lengthy dispute that spans the generations over whether appointing a king is inherently worthwhile or whether it is only legitimized ex post facto because of the people’s request. 1 Sam 8 seems to imply the latter. See, for instance, Ravitzky, Chpt. 3. The Ran himself, later in the sermon, addresses the question of what sin the people could have committed to so outrage Samuel. [↑](#footnote-ref-87)
88. Later, Ran notes that it is, of course, no coincidence that the Sanhedrin presided in the Chamber of Hewn Stone on the Temple Mount. (Translation by Shraga Silverstein, *Derashot HaRan*, Sefaria.org.il) [↑](#footnote-ref-88)
89. For further on the religious idea underlying Ran’s conceptualization, see Enker, Chpt. 1, esp. 34–38. [↑](#footnote-ref-89)
90. We should note that a similar notion to the one innovated by Ran in his sermons, albeit in a more moderate fashion, is suggested by R. Yaakov Lorberbaum of Lissa, the author of *Netivot ha-Mishpat*, in his sermons entitled *Nahalat Yaakov*, on the Torah portion of *Shoftim*. [↑](#footnote-ref-90)
91. Assaf. [↑](#footnote-ref-91)
92. Kirschenbaum, Pt. 2. I also need to add the detailed summary in Ginzberg, 22–41. [↑](#footnote-ref-92)
93. Thus, for instance, we can see the dissonance between Maimonides’ ringing declaration in “Laws of the Sanhedrin” 24:4–10 and the more limited authority to mete out punishment captured in *Shulhan* *Arukh* and *Rama* (*Hoshen Mishpat* 2; *Rama*, ibid., 425:1). [↑](#footnote-ref-93)
94. On capital punishment in the medieval Jewish community and on the difference between Franco-Germany and Spain, see Assaf, 18–21; Kanarfogel [↑](#footnote-ref-94)
95. “Laws of Personal Injury and Damages” 8:1–11. The harsh punishment of the informer is made abundantly clear by comparing it with Maimonides’ basic law forbidding informing to the gentiles, ibid., 9. [↑](#footnote-ref-95)
96. Assaf, 19–20. [↑](#footnote-ref-96)
97. *Responsa Zikhron Yehudah*, *Siman* 75. [↑](#footnote-ref-97)
98. Baer, 265–268 and 273–274. There is clearly a connection between this discussion and the Rashba’s two responsa cited above, after footnote 84. [↑](#footnote-ref-98)
99. [↑](#footnote-ref-99)
100. For a discussion of the Rosh’s response, see Westreich, 178–181. [↑](#footnote-ref-100)
101. On amputating limbs as a form of punishment in the Jewish tradition, especially in Spain and in Franco-Germany, see Assaf, 21–22; Kirschenbaum, 406–415. [↑](#footnote-ref-101)
102. *Responsa Zikhron Yehudah* 58. See too, his responsum on informers, above footnote 97. [↑](#footnote-ref-102)
103. Assaf, 22–Kirschenbaum, 374–387. [↑](#footnote-ref-103)
104. Assaf, 55–56. [↑](#footnote-ref-104)
105. *Responsa of the Rivash*, *Siman* 351. [↑](#footnote-ref-105)
106. For further details, see Assaf, 35–38; Kirschenbaum, 421–425. [↑](#footnote-ref-106)
107. Assaf, 37, 99. [↑](#footnote-ref-107)
108. Assaf, 89–90. [↑](#footnote-ref-108)
109. Above note 101. [↑](#footnote-ref-109)
110. Deut 13:6. This commandment originally applied to the false prophet whom the Bible condemned to death. [↑](#footnote-ref-110)
111. The midreshei halakhah ad locum already assert that this principle is not limited to its immediate biblical context. *Sifrei Deuteronomy*, *Parashat Re’eh*, 81: “and you shall expunge the evil from your midst, expunge the evil doer from Israel.” Curiously, bSanhedrin 78a and bHullin 139a use the verse as a source for executing murderers in difficult cases. [↑](#footnote-ref-111)