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# The Death Penalty and Due Process in Biblical Law

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# THE DEATH PENALTY AND DUE PROCESS IN BIBLICAL LAW

RICHARD H. HIERS\*

This is the provision for the manslayer, who by fleeing there may save his life. If anyone kills his neighbor unintentionally without having been at enmity with him in time past . . . he may flee to one of these cities . . . lest the avenger of blood in hot anger pursue the manslayer and overtake him, because the way is long, and wound him mortally, though the man did not deserve to die . . . lest innocent blood be shed in your land which the LORD your God gives you for an inheritance, and so the guilt of bloodshed be upon you. (*Deuteronomy* 19:4-10)

## INTRODUCTION

Modern opponents and proponents of capital punishment, alike, often turn to "the Bible" in order to support their respective viewpoints. Those with either secular or religious "liberal" (or humane) concerns tend to emphasize certain biblical texts that can be read to oppose the death penalty, while "conservatives," especially religious conservatives, often advocate capital punishment, citing other biblical texts as authority.<sup>1</sup>

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1. See, e.g., Glen H. Stassen, *Biblical Teaching on Capital Punishment*, & Jacob J. Vellenga, *Is Capital Punishment Wrong?*, in *CAPITAL PUNISHMENT: A READER* 119-36 (Glen H. Stassen ed., Pilgrim Press 1998). Both articles are reprinted in *TAKING SIDES: CLASHING VIEWS ON CONTROVERSIAL ISSUES IN RELIGION* 186-01 (Daniel K. Judd ed., McGraw-Hill/Dushkin 2003). Citations *infra* are to the 1998 publication. See generally JAMES J. MEGIVERN, *THE DEATH PENALTY: AN HISTORICAL AND THEOLOGICAL SURVEY* 9-19 (Paulist Press 1997) (noting certain problematic aspects of biblical interpretation, and critiquing several contemporary treatments of biblical passages as proof-texts favoring capital

Biblical texts occasionally are even cited as authority in judicial opinions.<sup>2</sup> This article does not undertake to resolve current debates as to the propriety or effectiveness of capital punishment.<sup>3</sup> The intent here, rather, is to achieve a more complete and accurate understanding of biblical perspectives and concerns in regard to the death penalty, in contrast to understandings that rely primarily upon selected proof-texts.

When relevant biblical laws and texts are understood both for what they actually say and in their respective historical contexts, it can be seen that biblical perspectives are more complicated than either modern proponents or opponents of the death penalty usually recognize. Moreover, it will become evident that biblical laws provided a rather remarkable array of due process protections for persons accused of capital offenses. These due process provisions appear especially in some of the later biblical law codes. Strangely, the subject of biblical due process protection has been virtually ignored by both biblical and legal scholars.<sup>4</sup> "Due process" is not, of course, a term found in biblical texts. Nevertheless, utilization of this

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punishment). The fact that states such as Texas and Florida, which carry out the greatest number of executions, are located in what once was designated "the Bible Belt," may not be entirely co-incidental. See *infra* notes 354, 382.

2. See a collection of such citations by Michael Medina, *The Bible Annotated: Use of the Bible in Reported American Decisions*, 12 N. ILL. U. L. REV. 187, 189-91, 195, 198-99, 202, 214, 216-18, 221, 226, 247 (1991).

3. Several law journal symposia on death penalty issues have appeared in recent years. See, e.g.: 53 DEPAUL L. REV. No. 4 (2004); 33 N.M. L. REV. No. 2 (2003); 86 JUDICATURE No. 2 (2002); 81 OREGON L. REV. No. 1 (2002); 29 HOFSTRA L. REV. No. 4 (2001); and 33 CONN. L. REV. No. 3 (2001). See also Jonathan Alter, *The Death Penalty on Trial*, NEWSWEEK, June 12, 2000, at 24-34; Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987); FRANK G. CARRINGTON, NEITHER CRUEL NOR UNUSUAL: THE CASE FOR CAPITAL PUNISHMENT (Arlington House 1978); CAPITAL PUNISHMENT (Thomas Draper ed., H. W. Wilson Co. 1985); Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 42 U. MICH. L. QUAD. NOTES 82-94 (1999); ERNEST van den HAAG & JOHN P. CONRAD, THE DEATH PENALTY A DEBATE (Plenum Press 1983); CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES (Kenneth C. Haas & James A. Inciardi eds., Sage 1988); FACING THE DEATH PENALTY: ESSAYS ON A CRUEL AND UNUSUAL PUNISHMENT (Michael L. Radelet ed., Temple Univ. Press 1989); MICHAEL L. RADELET, HUGO ADAM BEDAU, & CONSTANCE E. PUTNAM, IN SPITE OF INNOCENCE (Northeastern Univ. Press 1992); GREGORY D. RUSSELL, THE DEATH PENALTY AND RACIAL BIAS: OVERTURNING SUPREME COURT ASSUMPTIONS (Greenwood Press 1994); CAPITAL PUNISHMENT: A READER, *supra* note 1; LLOYD STEFFEN, EXECUTING JUSTICE: THE MORAL MEANING OF THE DEATH PENALTY (Pilgrim Press 1998); and articles in PHI KAPPA PHI FORUM 82:1 (2002), pp. 19-27. Most such studies evaluate the effectiveness or propriety of capital punishment without reference to biblical texts or norms.

4. But see Steven A. West, *Scripture Can Advocate Capital Punishment*, 12 CHRISTIAN LEGAL SOC. QUARTERLY 9, 11-12 (no. 3, 1991) (describing certain biblical provisions as "due process" protections). See also Edwin M. Good, *Capital Punishment and Its Alternatives in Ancient Near Eastern Law*, 19 STAN. L. REV. 947, 972-74 (1967). Good discusses certain "procedural requirements in capital cases" found in Ancient Near Eastern (ANE), including biblical law, though not in terms of "due process" procedures or protections.

concept and other modern jurisprudential categories when appropriate may illuminate the function if not also the intent of a number of biblical laws with respect to capital punishment.

The first part of this article reviews those biblical texts that have been (or could plausibly be) read as condemning or repudiating capital punishment. The next, and necessarily more detailed and extensive part, discusses the many texts that explicitly call for, or illustrate application of the death penalty. This section also describes the different prescribed methods for executing offenders, identifies the persons assigned responsibility for carrying out executions, and examines biblical rationales for capital punishment. A third part describes a variety of biblical provisions that, using modern legal terminology, may be said to afford certain due process procedures and protections. The conclusion notes that although both proponents and opponents of capital punishment commonly misconstrue certain biblical texts, a great many biblical texts express fundamental concerns which might well be considered relevant and important in evaluating contemporary United States death penalty jurisprudence and practice.

This article assumes that biblical tradition — including biblical laws — developed or evolved over many centuries. The relative sequence and dating of the biblical "sources" or components considered here for the most part follows the general consensus of current biblical scholarship. Thus, as will be noted below, the Ritual Decalogue (*Exodus* 34:17-28) is regarded as the earliest segment of biblical law, dating possibly from the 13th century B.C.E. The Covenant Code (*Exodus* chapters 20-23) is thought to have been set down or "codified" a century or so later. The Deuteronomic Code (here identified as *Deuteronomy* chapters 5 and 20-26), followed, perhaps as early as 1000 B.C.E. The Holiness Code (*Leviticus* chapters 17 or 18-26) is dated around the middle of the 7th century B.C.E. and was succeeded a few decades later by what is designated here the Revised Deuteronomic Code (*Deuteronomy* chapters 12-19). Priestly or P tradition generally, including the so-called Priestly Code, is thought to have been formulated in the 6th or 5th centuries B.C.E. The Priestly Code is the term used to describe the large body of laws found in *Exodus*, *Leviticus* and *Numbers* that are not attributable to earlier codes.

Narrative traditions and other biblical writings often presuppose or apply various laws relating to the death penalty or due process standards. Such writings also are examined in this article on the basis of their likely dating and historical setting. Proceeding in this manner makes it possible to trace certain developments or changes in law within the biblical period. It will be seen that some laws appear to have been modified or qualified in the course of time, and that new laws evidently were added, while others, if not repealed or abandoned, were no longer included in later codes or instanced in later narrative traditions.

According to biblical tradition, all laws set out in the books of Exodus, Leviticus, Numbers, and Deuteronomy were understood to have been given to, and for, the people of Israel. In this article, "Israel" is understood inclusively, and thus to refer not only to the descendants of Jacob and the subsequent tribal confederation prior to the establishment of the monarchy, *circa* 1000 B.C.E, but also to both the Northern and Southern Kingdoms (Israel and Judah, respectively) during the divided monarchy, as well as to the Jewish people during and after the time of the Exile, and down to the close of the biblical period in the 2nd or 1st century B.C.E. As presented in the Bible itself, these laws were intended for the instruction or direction of the people of Israel, not as laws for other peoples either during the biblical period or in later times.

### I. AGAINST CAPITAL PUNISHMENT

Several texts can be understood to have meant that people — at any rate, the people of Israel — should never kill other people under any circumstances. Those who harm others should be forgiven, and even murderers should be permitted to live, whether banished or as fugitives in exile. At any rate, retribution, if called for, should be left to the Almighty.

At the outset, it is to be observed that reading or translating biblical language necessarily often involves some degree of interpretation. The old *Book of Common Prayer*, for instance, rendered the Decalogue's sixth commandment narrowly: "[t]hou shalt do no murder."<sup>5</sup> On the other hand, the more literal, modern Revised Standard Version translates the same text without qualification, "[y]ou shall not kill." Some interpreters have urged that this "commandment" was intended or understood to prohibit capital punishment.<sup>6</sup> Perhaps it was; however, it is not certain which translation more closely represents the original "legislative intent."

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5. THE BOOK OF COMMON PRAYER 69 (Harper & Bros. 1944) (1928). See also the New Revised Standard Version, *Exodus* 20:13 and *Deuteronomy* 5:17: "[y]ou shall not murder"; the New English Bible (same verses): "[y]ou shall not commit murder"; the Revised English Bible (same verses): "[d]o not commit murder." Biblical quotations in this article follow the translations adopted by the Revised Standard Version. These generally come closer to a literal rendering of the underlying ancient manuscript texts than do other modern translations. For the present writer's approach to biblical scholarship generally, see his book, RICHARD H. HIERS, *THE TRINITY GUIDE TO THE BIBLE* (Trinity Press Int'l 2001).

6. See, e.g., RAMSEY CLARK, *CRIME IN AMERICA: OBSERVATIONS ON ITS NATURE, CAUSES, PREVENTION, AND CONTROL* 314-15 (Pocket Books n.d.). Cf. WALTER HARRELSON, *THE TEN COMMANDMENTS AND HUMAN RIGHTS* 108 (Fortress Press 1980): "[t]here can be no question . . . of our sixth commandment's having the initial meaning that human life is never, under any circumstances, to be taken by another human being or by the appointed authorities in Israel." But see Gerald J. Blidstein, *Capital Punishment: The Classic Jewish Discussion*, in *CAPITAL PUNISHMENT: A READER*, *supra* note 1, at 107-17, 108 (observing that in Hebrew and in Rabbinic interpretation, the verb "to kill" (*razach*) in the Sixth Commandment does not distinguish between justifiable homicide and murder).

Various texts suggest that it was understood that offenders might or should be spared alive. Cain, the first murderer, was not sentenced to death. Rather, he was condemned to be "a fugitive and a wanderer on the earth" (*Genesis* 4:8-14). Moreover, as the story is told, YHWH<sup>7</sup> "marked" Cain in some visible manner to protect him from any would-be, self-help avengers (*Genesis* 4:15).<sup>8</sup> The author of *Proverbs* 28:17 advised that anyone who was "burdened with the blood of another" should be allowed (or condemned) to "be a fugitive until death." In effect, these texts suggest that murderers were to receive a life sentence as fugitives or exiles.<sup>9</sup> As his story continues, Cain had a wife and children, and "built a city" (*Genesis* 4:17). It may be inferred from his descendant Lamech's braggadocio, that afterwards someone did kill Cain, and that YHWH then made good on his warning of seven-fold vengeance against Cain's killer.<sup>10</sup> A story found in 2 *Samuel* 14:1-11 shows that during the time of the monarchy, a king might spare the life of a murderer if, as a mitigating factor, his execution would leave his parents without any heir, and a sequel to this scene shows that a murderer might be allowed to live indefinitely under house arrest.<sup>11</sup>

Frequently biblical prophets called on their contemporaries to turn from their transgressions in order that God might spare, rather than destroy them. Thus, for example, *Amos* 5:14-15:

Seek good, and not evil, that you may live; and so [YHWH], the God of hosts, will be with you, as you have said. Hate evil, and love good, and establish justice in the gate; it may be that [YHWH], the God of hosts, will be gracious to the remnant of Joseph.<sup>12</sup>

Several biblical texts urge that people were not to seek or execute vengeance against others. The Apostle Paul construed earlier biblical tradition in his classic admonition: "[b]eloved, never avenge yourselves,

7. In this article, the divine name commonly used in biblical Hebrew is rendered by the consonants YHWH.

8. See Julian H. Wright, Jr., *Pardon in the Hebrew Bible and Modern Law*, 3 REGENT U. L. REV. 1, 16 (1993): "[t]he first act of 'executive clemency' in the Hebrew Bible occurs in *Genesis* when God commutes the sentence given to the first murderer, Cain." In the story as told, however, there was no death sentence to "commute." Likewise, Stassen overstates this point when he comments that the Torah (or Biblical law) "forbids the death penalty for the prototype of all murderers, Cain, who killed his brother, Abel." Stassen, *supra* note 1, at 120 (emphasis added). Stassen correctly points out that Cain, as well as Moses and David were not subjected to the death penalty for murders they committed. *Id.* Other biblical figures could be mentioned as well, such as Absalom and Solomon.

9. Thus, see e.g., GARDNER C. HANKS, *AGAINST THE DEATH PENALTY: CHRISTIAN AND SECULAR ARGUMENTS AGAINST CAPITAL PUNISHMENT* 26 (Herald Press 1997).

10. *Genesis* 4:23-24; cf. 4:15.

11. See *infra* Part III.C.3. of this article.

12. See also, e.g., *Jeremiah* 4:1-4, 14; *Ezekiel* 18:21-32; *Amos* 5:6-7; *Jonah* 3:9.

but leave it to the wrath of God; for it is written, '[v]engeance is mine, I will repay, says the Lord.'" (*Romans* 12:19).<sup>13</sup>

This text does not authorize humans to act as avenging agents of the Almighty; on the contrary, any and all vengeance is to be left to God. The text Paul apparently had in mind was *Deuteronomy* 32:35: "[v]engeance is mine, and recompense . . ." <sup>14</sup> Other biblical texts likewise characterize vengeance as a proper basis for God's or YHWH's actions against the unrighteous or ungodly,<sup>15</sup> implying, arguably, that humans — at any rate, God's people — should refrain from taking vengeance themselves.

More typically, biblical texts refer to God or YHWH as the Judge who, in times past, justly punished the wicked for their depravity, and could be expected to do so again in or at the end of history. Classic stories of such past actions include the flood saga (*Genesis* 6-9);<sup>16</sup> the Sodom and Gomorrah narrative (*Genesis* 18:16-19:25); and the Deuteronomic Historian's commentary on the demise of the kingdom of Israel.<sup>17</sup> It was also believed that YHWH or God judged and would judge nations and individuals in the future as well.<sup>18</sup>

Some biblical texts imply that divine justice is self-executing without explicit reference to God as Judge. Such texts declare that in this life the righteous are rewarded, typically with longevity and wealth, while the wicked either are cut off in the midst of their sinning, or otherwise come to grief.<sup>19</sup> Somewhat later, perhaps, the author of *Wisdom of Solomon* urged that the righteous would be vindicated and the wicked punished in the next life if not this one.<sup>20</sup> Texts which maintain that God judges or will judge those who do wrong could be read to mean that his people should refrain from condemning others — how much more from administering the death penalty — and should leave it to God to execute vengeance or retribution on those so deserving. Moreover, according to Ezekiel, God preferred that offenders change their ways than perish:

13. See also *Hebrews* 10:30.

14. See also *Proverbs* 20:22, "[d]o not say, 'I will repay evil'; wait for [YHWH] and he will help you." And see *Sirach* 28:1, "[h]e that takes vengeance will suffer vengeance from the Lord . . ." See also *Leviticus* 19:18, "[y]ou shall not take vengeance . . . against the sons of your own people . . ."

15. See, e.g., *Leviticus* 26:25; *Micah* 5:15; *Sirach* 39:28-31.

16. See *Genesis* 6:5, "[YHWH] saw that the wickedness of man was great in the earth, and that every imagination of the thoughts of his heart was only evil continually."

17. *2 Kings* 17:1-20.

18. See, e.g., *Exodus* 22:21-24 (individuals); *Deuteronomy* 34:6-7 (individuals); *2 Samuel* 12:7-12 (Nathan's pronouncement against King David); *Micah* 4:1-4 (nations); *Jeremiah* 2:33-35 (unrighteous individuals); *Ezekiel* 7:1-27 (the nation Judah). See also *Psalms* 9:7-8; 10:15-18; 96:10-13; *Proverbs* 22:22-23; *Sirach* 16:6-14; 35:12-20.

19. See, e.g., *Psalms* 37; *Proverbs* 2:20-22; 10:3-4, 7, 30; 11:17-19; 12:7, 21.

20. See *Wisdom of Solomon* 1:16-5:23; see also *Daniel* 12:1-3. Similar hopes and expectations are expressed in *2 Esdras* and many New Testament writings.

But if a wicked man turns away from all his sins which he has committed and keeps all my statutes and does what is lawful and right, he shall surely live; he shall not die. None of the transgressions which he has committed shall be remembered against him; for the righteousness which he has done he shall live. Have I any pleasure in the death of the wicked . . . ?

(*Ezekiel* 18:21-23).<sup>21</sup>

In this vein, *Sirach* 27:30-28:7 commended forgiveness and mercy, and renunciation of enmity, anger and wrath. In the New Testament, Jesus called on his hearers to refrain from judging others (*Matthew* 7:1-2; *Luke* 6:37), and to forgive others' offenses (*Matthew* 6:14; 18:35; *Mark* 11:25-26). He warned that it was not enough to keep the sixth commandment, "[y]ou shall not kill." People should also refrain from being angry with or insulting others (*Matthew* 5:21-22). In the story of the woman who had been "caught" in adultery,<sup>22</sup> Jesus seems to countermand or over-rule the "law of Moses."<sup>23</sup> Under that law, adultery was a capital offense; both the adulterer and adulteress were to be executed.<sup>24</sup> According to *John* 8:5, Mosaic law required that the woman be stoned to death.<sup>25</sup> But Jesus' response was, "[l]et him who is without sin among you be the first to throw a stone at her." (*John* 8:7). Jesus did not pronounce the woman forgiven, but stated that he did not condemn her, admonishing her not to "sin again."<sup>26</sup> Would Jesus have said the same to a person convicted of murder? There is no New Testament case on point.<sup>27</sup>

21. See also *Ezekiel* 18:27-28, 31-32. Stassen urges that in practice, even during biblical times, the death penalty was gradually, if not progressively, abandoned: "[o]ne almost never hears of it in the Prophets and the Writings . . ." Stassen, *supra* note 1, at 127. On the other hand, Vellenga insists that the prophets "were opposed to the laws being flouted and criminals not being punished." Vellenga, *supra* note 1, at 133. To substantiate this claim, Vellenga quotes *Isaiah* 59:14-18. *Id.* This text accords with others affirming that vengeance belongs to YHWH. See *supra* text accompanying note 14. But the *Isaiah* text does not in its terms refer to, much less, endorse capital punishment by human agency.

22. *John* 8:1-11, according to some manuscripts. See also *Matthew* 1:18-19, discussed *infra* note 153.

23. Probable reference is to *Leviticus* 20:10 and *Deuteronomy* 22:22.

24. *Id.*

25. Stoning is specified in *Deuteronomy* 22:23-24 in a somewhat different context, but not in *Leviticus* 20:10 or *Deuteronomy* 22:22. In the Johannine story, nothing is said about punishing the adulterer.

26. See generally HANKS, *supra* note 9, at 41; Baruch A. Levine, *Capital Punishment*, in WHAT THE BIBLE REALLY SAYS 11, 29 (Morton Smith & R. Joseph Hoffmann eds., Prometheus 1989).

27. Barabbas, who, according to two gospel accounts had committed murder, was spared execution under Roman law: *Mark* 15:6-15; *Luke* 23:18-25. See generally Edward M. Gaffney, Jr., *Scripture Does Not Advocate Capital Punishment*, 12 CHRISTIAN LEGAL SOC. QUARTERLY 9 (n. 3 1991) (arguing in effect that New Testament texts qualify if not over-rule Old Testament capital laws). Christian commentators also oppose the death penalty as applied in the United States on the basis of their understandings of faith and



From these texts, it certainly can be argued that at least some biblical figures or writers opposed capital punishment. Judgment should be left to God, who preferred that offenders be permitted to live, so that they might turn around or repent; or at any rate live out their lives as exiles or fugitives. On the other hand, a great many texts rather clearly authorized and ordained capital punishment for a wide range of offenses.

## II. CAPITAL OFFENSES, PENALTIES, EXECUTIONERS, AND RATIONALES

Although many biblical texts and traditions commonly cited by death penalty proponents do not, in fact, advocate or illustrate capital punishment,<sup>28</sup> a great many biblical laws do enumerate capital offenses.<sup>29</sup> Additionally, various narratives, including a few trial scenes, report executions with evident approval. The types of offenses subject to the death penalty will be described first. Next, the several methods of execution specified in these laws and narratives will be reviewed. Persons charged with responsibility for carrying out the death penalty will be identified. Finally, all explicit biblical theories or rationales for capital punishment will be considered. As will be seen, many biblical laws calling for capital punishment are grounded upon conviction that all human lives are of great value.

### A. Capital Offenses in Biblical Laws and Narratives

Modern scholars generally agree that biblical law was codified in several stages during the long history of Israel, Judah, and the Jewish

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ethics, without direct reference to biblical texts. See, e.g., Timothy W. Floyd, "What's Going On": *Christian Ethics and the Modern American Death Penalty*, 32 TEX. TECH L. REV. 931 (2001).

28. See, e.g., comments by death penalty advocates quoted in Irene Merker Rosenberg & Yale L. Rosenberg, *Lone Star Liberal Musings on "Eye for Eye" and the Death Penalty*, 1998 UTAH L. REV. 505, 539 (1998); Vellenga, *supra* note 21; MEGIVERN, *infra* note 129, on use of *Genesis* 9:5-6. For further discussion of uses and misuses of biblical texts in capital trials in the United States., see Gary J. Simson & Stephen P. Garvey, *Knockin' on Heaven's Door: Rethinking the Role of Religion in Death Penalty Cases*, 86 CORNELL L. REV. 1090, 1091, 1109-25 (2001).

29. See Elie Spitz, *The Jewish Tradition and Capital Punishment*, in CONTEMPORARY JEWISH ETHICS AND MORALITY: A READER 344 (Elliot N. Dorff & Louis E. Newman, eds., Oxford Univ. Press 1995) "[c]apital punishment was not an ethical problem for the Bible. Indeed, it was a commanded punishment for a whole range of offenses, from witchcraft to striking a parent to murder." See also GARDNER C. HANKS, CAPITAL PUNISHMENT AND THE BIBLE 53-54 (Herald Press 2002) (listing numerous biblical capital offenses). On the other hand, early and subsequent rabbinic tradition interpreted such texts so as to make it difficult, if not impossible, to justify capital punishment. See, e.g., HAIM HERMANN COHN, HUMAN RIGHTS IN JEWISH LAW 217 (KTAV 1984); Aaron Kirschenbaum, *The Role of Punishment in Jewish Criminal Law: A Chapter in Rabbinic Penological Thought*, in JEWISH LAW AND LEGAL THEORY 451-74 (Martin P. Golding ed., New York Univ. Press 1993); Irene Merkel Rosenberg & Yale L. Rosenberg, *The Legacy of the Stubborn and Rebellious Son*, 74 MICH. L. REV. 1097, 1163-65 (1976).

people, between *circa* 1200 and 400 B.C.E. Capital offenses found in each code will be identified and described beginning with the earliest and coming down to more recent codes.<sup>30</sup> This procedure makes it possible to trace several developments in the law.<sup>31</sup> Generally capital laws set out in a given code share significant features or concerns. For this reason, each code's capital laws will be considered together. Similar laws, modifications, and new laws found in subsequent codes will then be examined. For purposes of this study, biblical law codes are understood to have been set down in the following sequence: first the Ritual Decalogue (RD), then the Covenant Code (CC), followed by the Deuteronomic Code (D), the Holiness Code (H), the Revised Deuteronomic Code (RDC), and finally, the Priestly Code or laws (PC).<sup>32</sup> New offenses are added in each of the later codes, while most of those promulgated earlier are omitted (though never formally repealed) or modified.<sup>33</sup> Other biblical writings,

30. See generally ROLAND DE VAUX, *ANCIENT ISRAEL: ITS LIFE AND INSTITUTIONS* 158 (McGraw Hill 1961) (listing categories of capital offenses).

31. See in this connection, Raymond Westbrook's observation at the conclusion of his magisterial study of Biblical and Ancient Near Eastern law:

Biblical law is neither a mass of internal contradictions nor a monolith, but reflects a single, coherent common law, upon which different opinions were expressed. These opinions coincide, not surprisingly, with the major sources identified by modern biblical criticism.

RAYMOND WESTBROOK, *STUDIES IN BIBLICAL AND CUNEIFORM LAW*, in *Cahiers de la Revue Biblique* No. 26, 135 (J. Gabalda 1988) [hereinafter WESTBROOK, *STUDIES*]. As to connections between biblical and other ANE capital laws, see Raymond Westbrook, *A Matter of Life and Death*, 61-70 *JANES* 25 (1997) [hereinafter Westbrook, *A Matter*]. Compare studies that simply describe or list capital laws without attempting to note connections or developments. See, e.g., ROBERT M. BOHM, *DEATHQUEST: AN INTRODUCTION TO THE THEORY AND PRACTICE OF CAPITAL PUNISHMENT IN THE UNITED STATES* 177-80 (Anderson 1999); MARK COSTANZO, *JUST REVENGE: COSTS AND CONSEQUENCES OF THE DEATH PENALTY* 130 (St. Martin's Press 1997); HANKS, *supra* note 29; VERNON W. REDEKOP, *A LIFE FOR A LIFE?: DEATH PENALTY ON TRIAL* 25-27 (Herald Press 1990).

32. As to various law codes, see generally, DAVID DAUBE, *STUDIES IN BIBLICAL LAW* 74-101 (KTAV 1969); and the classic, JULIUS WELLHAUSEN, *PROLEGOMENA TO THE HISTORY OF ANCIENT ISRAEL* (Meridian 1957) (1878). Modern scholars diverge as to the dating, characteristics, and even the existence of biblical law codes. The system of codes identified in this article provides a convenient framework for classifying and analyzing biblical law, but must be considered tentative.

33. Albrecht Alt, some decades ago, proposed that "apodictic" laws (typically beginning "[t]hou shalt . . ." or "[t]hou shalt not . . .") should be distinguished from "casuistic" laws (formulated, e.g., "[w]hen a man . . ." or "[w]hoever . . ."). See ALBRECHT ALT, *THE ORIGINS OF ISRAELITE LAW*, reprinted in *ESSAYS ON OLD TESTAMENT HISTORY AND RELIGION* 101-71 (R. A. Wilson trans., Doubleday & Co., Anchor 1968) (1967). Alt urged that only laws set out in the apodictic format should be considered genuinely Israelite, and that the casuistic laws were borrowed or adapted from Canaanite or other Ancient Near Eastern sources. Alt's thesis has been accepted by many, but criticized by other scholars. See, e.g., THEOPHILE JAMES MEEK, *HEBREW ORIGINS* 72-81 (Harper & Row 1960). For purposes of this study, all biblical laws, whatever their possible or putative ANE parallels or origins, are considered to express concerns of the Israelite communities that drafted or selected, and then perhaps modified them for inclusion in their collections of statutory law.

particularly narratives, occasionally illustrate codified laws.<sup>34</sup> In some instances, statutory penalties may have been mitigated in practice.

1. *The "Ritual Decalogue:" Exodus 34:17-25*

The earliest identified code, the "Ritual Decalogue" (RD), found in *Exodus 34:17-28*<sup>35</sup> may date from as early as the 13th century B.C.E. This code enumerates a series of prohibitions, several of which are repeated in later codes, which in some instances provide that violators are to be executed. The RD itself, however, includes no mention of capital punishment or any other penalties. It may have been understood that those who committed these offenses would be subject either to divine retribution or to retaliation at the hands of victims' relatives.

2. *The Covenant Code: Exodus 20-23*

Nearly as early, perhaps, was the Covenant Code or Book of the Covenant, an extensive codification of Israelite law, found in *Exodus 20-23*.<sup>36</sup> This code is identified in the present study by the symbol, "CC." It begins with the Decalogue or "Ten Commandments," *Exodus 20:2-17*, which may have been recorded earlier.<sup>37</sup> Like the Ritual Decalogue, the Decalogue itself includes no penalty provisions. Several capital offenses are set out elsewhere in the CC, however, notably in *Exodus* chapters 21 and 22.

a. *Exodus 21:12-14: Homicide, Premeditated and Otherwise*

The first capital offense mentioned in the CC is homicide (*Exodus 21:12-14*): "[w]hoever strikes a man so that he dies shall be put to death."

34. One modern scholar has suggested that most or all biblical laws were developed relatively late in the biblical period, in response to situations described in earlier biblical narratives. See CALUM M. CARMICHAEL, *LAW AND NARRATIVE IN THE BIBLE* 210-24 (Cornell Univ. Press 1985), and *BIBLICAL LAWS OF TALION* 21-39 (Oxford Centre for Postgraduate Hebrew Studies, 1986). Carmichael's position has been critiqued by many reviewers. See, e.g., Carol Meyers, *Book Review*, 17 *J.L. & RELIGION* 397 (2002) (reviewing CALUM M. CARMICHAEL, *THE ORIGINS OF BIBLICAL LAW: THE DECALOGUES AND THE BOOK OF THE COVENANT* (1992)); Richard Hiers, *Book Review*, 1 *WASH. U. GLOBAL STUD. L. REV.* 537 (2002) (reviewing CALUM CARMICHAEL, *THE SPIRIT OF BIBLICAL LAW* (1996)).

35. See generally KLAUS KOCH, *THE GROWTH OF THE BIBLICAL TRADITION: THE FORM-CRITICAL METHOD* 48-51 (Scribner's Sons 1969).

36. See generally ANTHONY PHILLIPS, *ANCIENT ISRAEL'S CRIMINAL LAW* 158-61 (Schocken 1970).

37. Another version of the Decalogue is to be found in *Deuteronomy 5:6-21*. It need not be determined here whether the Decalogue was codified prior to or apart from the larger codes with which it is now associated. On the Decalogue, see generally, *THE TEN COMMANDMENTS IN HISTORY AND TRADITION* (Ben-Zion Segal & Gershon Levi, eds., The Magnes Press, Hebrew Univ. 1990); HARRELSON, *supra* note 6; KOCH, *supra* note 35, at 44-51.

This law goes on, however, to distinguish between premeditated murder, when "a man willfully attacks another to kill him treacherously,"<sup>38</sup> and unpremeditated, though apparently intentional homicide, when the offender "did not lie in wait for [the victim], but God let him fall into his hands." Some interpreters read this language to mean negligent or accidental homicide.<sup>39</sup> That category appears later in *Deuteronomy* 19:4-13 and *Numbers* 35:9-23, but is not indicated here.<sup>40</sup> This language seems to refer to a chance encounter with an enemy, rather than to a fatal attack prompted by sudden "heat of passion."<sup>41</sup> The opportunistic or chance homicide perpetrator is seen as a less serious offender; he may flee to a designated sanctuary, presumably to escape self-help revenge at the hands of the victim's friends and relatives, and there await further proceedings.<sup>42</sup> The willful or premeditated murderer, on the other hand, was to suffer the death penalty (*Exodus* 21:14).

### b. Negligent Homicide

Conduct or inaction unintentionally resulting in loss of human life was subject to the death penalty in two particular circumstances. Arguably both situations involve culpable negligence. At any rate, both call in effect for strict liability when the offender's conduct violates the terms of the respective statutes.

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38. We see here the equivalent of "malice aforethought," an element of first-degree murder in modern criminal law. See WAYNE R. LAFAVE, *CRIMINAL LAW* 653-55, 692-98 (West Group 3d ed. 2000). As to counterparts in Ancient Near Eastern (ANE) or cuneiform law, see Good, *supra* note 4, at 951-53, and WESTBROOK, *STUDIES*, *supra* note 31, at 47-49.

39. See, e.g., GEORGE E. MENDENHALL, *LAW AND COVENANT IN ISRAEL AND THE ANCIENT NEAR EAST* 16 (Biblical Colloquium 1955). In modern criminal jurisprudence, this offense could be regarded as second-degree murder. See LAFAVE, *supra* note 38, at 698-99.

40. Carmichael, following Daube, attributes to the Exodus law what he calls a "more profound religious view of accidental homicide": "the visible agents of a killing-hand, axe, stone-are equally directed by the ultimate mover, and the matter is fundamentally equated with accident in which no human cause is discerned at all." CALUM M. CARMICHAEL, *THE LAWS OF DEUTERONOMY* 113 (Cornell Univ. Press 1974). See also ZE'EV W. FALK, *RELIGIOUS LAW AND ETHICS: STUDIES IN BIBLICAL AND RABBINICAL THEONOMY* 58 (Mesharim 1991) ("The responsibility for killing another human being could not extend to cases which were actually acts of God, i.e., where God had 'let the victim fall into the hand of the person who caused the death.'"). Modern jurisprudence characterizes as "acts of God" only those accidents that involve no human agency, or at any rate no foreseeability or duty of care. It is not at all clear that *Exodus* 21:12-14 refers to either accidental homicide or "acts of God." See *infra* text accompanying notes 111-14 and 136-41.

41. In modern criminal jurisprudence, such homicide is generally classified as voluntary manslaughter. See LAFAVE, *supra* note 38, at 703-17.

42. *Exodus* 21:13. See *infra* Part III.B.

i. *Exodus 21:22-24: A Pregnant Woman Harmed by Brawling Males*

One such situation occurs when a married, pregnant woman suffers miscarriage and dies after being struck by one of two (or more) brawling males. The man responsible for the fatal injury was to be put to death: "[y]ou shall give life for life . . ." (*Exodus 21:22-24*).<sup>43</sup> Even though the responsible male did not intend the woman's death, he is held strictly liable for the consequences of his conduct. This provision is the earliest instance of the commonly so-called biblical "*lex talionis*," or law of retribution in kind.<sup>44</sup> Under its terms, if the pregnant woman is permanently injured, but does not die, the man responsible for the injury is to have the same kind of injury inflicted upon him: "eye for eye, tooth for tooth . . ." This law implies an irrebuttable presumption that such conduct was reckless or otherwise culpable.<sup>45</sup> If the woman survives, however, or is not permanently impaired, the brawling male responsible for the miscarriage is subject to a fine, rather than the *lex talionis*. In its terms, this law does not apply if the victim was pregnant but unmarried, or married but not pregnant.

ii. *Exodus 21:28-32: Failure to Confine a Goring Ox with a History*

The other circumstance involves death at the horns of another's goring ox (*Exodus 21:28-32*). An ox that gores a man, woman, or child to death is to be killed.<sup>46</sup> Moreover, the ox's owner must be put to death "if the ox has been accustomed to gore in the past, and [the] owner has been warned, but has not kept it in" (*Exodus. 21:29*). Here, the death penalty is applied because the owner knowingly failed to take appropriate measures to prevent foreseeable risk of fatal harm. Evidently, the owner would not be subject to the death penalty even if he knew of the ox's goring proclivity, *unless* he also had been *warned*.<sup>47</sup> This law allows two exceptions. One is that, at the option of the victim's relatives or representatives, the culpable

43. In the Code of Hammurabi, HC 209-10, under these circumstances, the *daughter* of the person who caused the fatal injury was to be put to death. In the biblical law, there is no mention of the offender's daughter, and it may be assumed — though it is not specifically stated — that the offender himself was the person subject to the death penalty.

44. See *infra* Part III.F.2. For other ANE parallels, see Good, *supra* note 4, at 953-54.

45. The implicit rationale is that risk of harm was foreseeable: the man should have known better than to take part in brawling in the vicinity of a pregnant woman. See Levine, *supra* note 26, at 14 (referring to "the gross negligence and indifference to human life exhibited by the fighting men").

46. The ox is to be stoned to death, but its flesh is not to be eaten. As to various rationales for these procedures see WESTBROOK, *STUDIES, supra* note 31, at 83-88, and THEODOR H. GASTER, *MYTH, LEGEND AND CUSTOM IN THE OLD TESTAMENT* 243-50 (Peter Smith, vol. 1, 1981)

47. The text does not indicate whether such warning was to have been given officially, e.g., by one of the local elders, or by any person in the community.

owner may be required to pay compensation instead of being put to death.<sup>48</sup> In that case, however, he must pay "whatever is laid upon him" for the "redemption of his life" (*Exodus* 21:30). In modern terms, the victim's relatives may seek damages in tort rather than the offender's death at the hands of the criminal justice system.<sup>49</sup> The other exception is obtained only if the gore victim is a slave (whether male or female). In that case, the ox's owner is to pay the slave's master thirty silver shekels in damages.<sup>50</sup>

c. *Exodus 22:2-3: Killing the Nighttime House-Breaker*

Homicide or killing a man in one other special circumstance also may have been considered a capital crime. When a householder strikes a *burglar* (understood, as at common law, to mean a thief or robber who enters the premises at night)<sup>51</sup> and the burglar dies, "there shall be no blood guilt." (*Exodus* 22:2). The fact that it was nighttime excuses the killing.<sup>52</sup> However, "if the sun has risen upon" the intruder, "there shall be blood guilt for him." (*Exodus* 22:3). Here even the life of the burglar is understood to be valued. Whether the householder was then subject to the death penalty is not explicitly stated. Perhaps a fine or compensatory damages could be paid, or a sacrificial offering presented instead. The fact that no specific penalty was prescribed *could* mean that the judges or court might exercise discretion.<sup>53</sup>

48. *Exodus* 21:32. As to Canaanite and Babylonian parallels and influence, see MEEK, *supra* note 33, at 70-71; WESTBROOK, STUDIES, *supra* note 31, at 57-61.

49. It could have been presumed that negligent tort-feasors generally would rather pay substantial damages than be executed. As to ransom as an option to killing the murderer in cuneiform law, see WESTBROOK, STUDIES, *supra* note 31, at 49-55.

50. *Exodus* 21:32. Compare *Exodus* 21:20: if a man strikes his slave (male or female) with a rod, and the slave dies subsequently as a result, the slave owner is to be "punished," but evidently not subjected to the death penalty. *But see* Levine, *supra* note 26, at 13-14 (contending that *Exodus* 21:20 meant that the slave's master would be subject to the death penalty if the slave died immediately).

51. See WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 713-14 (West Publ'g Co. 1972). For ANE parallels, see Westbrook, *A Matter*, *supra* note 31, at 62.

52. The rationale may have been either the nocturnal robber's crime was more serious since the sleeping householder would be vulnerable to assault; or that the householder, unable to see clearly whether the intruder was armed, would be entitled to act in self-defense. See ZE'EV W. FALK, LAW AND RELIGION: THE JEWISH EXPERIENCE 124-25 (Mesharim 1981); FALK, *supra* note 40, at 60: "[t]he justification for killing a thief who was caught while breaking in at night is based on the right of self-defense, but also on the probability of violence against the owner of the home." Surprisingly, perhaps, no biblical law explicitly provides for the "self-defense" defense in cases of homicide or other violent offenses.

53. Cf. *Deuteronomy* 25:1-3; *Ezra* 7:25-26. Compare Levine, *supra* note 26, at 15: "[i]t is doubtful whether this law actually mandates the death penalty. More likely, the case could be disposed of in less severe ways."

*d. Exodus 21:15, 17: Striking and Cursing Parents*

Two laws make offenses against parents capital crimes: either striking or cursing one's father or mother (*Exodus* 21:15, 17).<sup>54</sup> Both implicitly involve violations of the fifth commandment, "[h]onor your father and your mother." (*Exodus* 20:12). Such violation may have been thought so extreme as to imperil Israelite society.<sup>55</sup> The prohibition against striking parents would, of course, function to protect them from physical harm. Cursing one's parents would show disrespect and could have been thought likely to cause them both emotional and physical harm. The verb translated to "curse" might also mean to "degrade" or "shame."<sup>56</sup>

*e. Exodus 21:16: Kidnapping*

This law includes certain particular elements: "[w]hoever steals a man, whether he sells him or is found in possession of him, shall be put to death." Here, "man" (Hebrew *'ish*) could have been understood to include any person, whether man, woman, or child, and may therefore better be translated as "person" instead.<sup>57</sup> Implicitly, kidnapping was a way of obtaining slaves who could then be sold or kept as such.<sup>58</sup> This law makes no distinction between kidnapping Israelites or foreigners, or between selling them to other Israelites or to foreign buyers outside the community.<sup>59</sup> In its terms, the death penalty would not apply if the person stolen had later been given away or set free.

*f. Exodus 22:18-20: Other Capital Offenses*

*Exodus* 22:18-20 lists three additional capital crimes. It is unclear why these three are separated from the other capital offenses found earlier in the Covenant Code. Possibly the several laws providing for restitution (damages, including multiple damages) in cases of stolen or damaged property found in *Exodus* 22:1, 4, 5-17 were inserted into an earlier compilation of capital offenses. Textual problems at the beginning of chapter 22 suggest that some material may have been added or interpolated here.

54. As to cursing parents, see also *Leviticus* 20:9, considered *infra* text accompanying notes 91-93.

55. *Exodus* 20:12 implies that failure to observe the fifth commandment could shorten Israel's tenure in the promised land.

56. See Levine, *supra* note 26, at 13. As to possible tangible harm resulting from cursing, see *infra* note 93.

57. The New Revised Standard Version so translates this text. Compare Good, *supra* note 4, at 953 ("*ish* . . . can only mean male").

58. Cf. *Deuteronomy* 24:7.

59. Cf. PHILLIPS, *supra* note 36, at 130-31. Phillips finds these distinctions implicit in the text.

i. Exodus 22:18: *Sorceresses*

The first of these laws states, without further elaboration, "[y]ou shall not permit a sorceress to live." (*Exodus* 22:18). According to the account in 1 *Samuel* 28:3-25, King Saul had attempted to *deport* all mediums and wizards, and any who remained did so at peril of his or her life (1 *Samuel* 28:3, 9). This story, which seems to reflect favorably on the female medium (or "witch") at Endor, suggests that at least in Saul's time, a sorceress might nevertheless live — provided she either left the country or discontinued practicing her art. At any rate, the story instances an occasion when the severity of the *Exodus* 22:18 provision was mitigated in practice.

ii. Exodus 22:19: "*Buggery*" or "*Bestiality*"

*Exodus* 22:19 makes what was known in earlier Anglo-American law as one form of "buggery" a capital crime: "[w]hoever lies with a beast shall be put to death." "Whoever" appears to mean either male or female.<sup>60</sup> Here there is no provision for the death of the "beast." Sodomy is not mentioned in the CC. No reports of either buggery or its punishment are to be found anywhere in biblical tradition.

iii. Exodus 22:20: *Sacrificing to Other Gods*

Several later biblical laws make allotheism, or the worship of other gods, a capital offense. Possibly the last capital crime listed in the CC is that of *sacrificing* to any god other than YHWH. Those who do so "shall be utterly destroyed" (*Exodus* 22:20). This may mean, as in *Exodus* 22:21-24, that YHWH himself would destroy such persons;<sup>61</sup> but more likely, as in *Exodus* 22:18-19, the meaning is that the Israelite community or its representatives are to apply the death penalty.<sup>62</sup>

### 3. The Deuteronomic Code: Deuteronomy 5, 20-26

This collection of laws was early recognized as (and thus named) the "second" Israelite law code. It includes a few laws found in the CC and adds many more. Initially, it may have been written down between 1100

60. Cf. *Leviticus* 20:15-16, considered *infra* text accompanying note 96. Good, *supra* note 4, at 960-61 identifies provisions in the Hittite Code that make male intercourse with certain beasts a capital offense.

61. According to *Exodus* 22:21-24, YHWH or God says that *he* will kill any Israelite who afflicts widows or orphans, and also, perhaps, any who wrong or oppress strangers. It is not said, explicitly, that Israelites or their agents were to execute such allotheists.

62. That understanding is implicit in certain early biblical narrative traditions. See, e.g., *Exodus* 32:25-28 (pursuant to the "golden calf" episode); *Numbers* 25:1-17 (the somewhat incoherent story of Israelite sacrifice to Moabite gods and/or the "Baal of Peor"); 1 *Kings* 18:40 (following Elijah's contest at Mt. Carmel).



and 1000 B.C.E.<sup>63</sup> Several provisions, particularly those calling for sacrificial worship in only one place (*viz*, Jerusalem) and various accommodations to that requirement, probably were added more recently, perhaps in the latter part of the seventh century B.C.E. In this article, the symbol "D" is used to designate what may have been the earlier, if not original version of the Deuteronomic Code. Laws found in Deuteronomy 12-19 generally relate to centralization of sacrificial worship in Jerusalem. In this study, these chapters are referred to as the Revised Deuteronomic Code or "RDC." Capital laws found in the RDC will be considered below in Part II.A.5. of this article.

a. *Hold-over Capital Legislation: Kidnapping, Abduction or "Man-Stealing": Deuteronomy 24:7*

Surprisingly, perhaps, only one of the several capital offenses defined in the CC is repeated in D: that concerned with kidnapping. All the other capital offenses found in D appear there for the first time.<sup>64</sup> It may well be asked whether the other capital offenses set out in the CC, but omitted from D, were still thought to apply, or whether their absence from D meant that they had been forgotten, abandoned, or at least tacitly repealed.

*Deuteronomy 24:7*, the Deuteronomic law making kidnapping a capital offense, is drafted more narrowly and precisely than its early counterpart in the CC, *Exodus 21:16*. Under the Deuteronomic version, the death penalty applies only if the person kidnapped (or stolen) is a fellow-Israelite. Moreover, it is not enough if the person kidnapped is found in the kidnapper's possession, as in *Exodus 21:16*. In order to warrant execution, the kidnapper must have treated his victim "as a slave" or as merchandise.<sup>65</sup> Both versions of the law make it a capital offense if the kidnapper *sells* the abducted person. In that case, implicitly, the person would have been sold as a slave.

b. *New Capital Offenses in the Deuteronomic Code*

The four new capital laws found in D all relate to the horizontal dimension of the covenant: that is, to interactions between or among persons who were members of the Israelite community. One concerns parent-child relations. The other three have to do with adultery.

63. Absence of any allusion to the monarchy suggests dating prior to the time of Saul and David. Some interpreters suggest a more recent date, for instance in the 8th or 7th century BCE. This question need not be decided for present purposes.

64. *Deuteronomy 19:4-13* (in regard to manslaughter, murder and cities of refuge) will be considered *infra* text accompanying notes 224-26 in connection with the RDC.

65. See PHILLIPS, *supra* note 36, at 131-32. Phillips notes somewhat similar laws in the Code of Hammurabi and the Hittite Law Code. *Id.* at 132.

i. *Ungovernable Sons: Deuteronomy 21:18-21*

This law reads as follows:

If a man has a stubborn and rebellious son, who will not obey the voice of his father or the voice of his mother, and though they chastise him, will not give heed to them, then his father and his mother shall take hold of him and bring him out to the elders of his city at the gate of the place where he lives.<sup>66</sup>

According to *Deuteronomy* 21:20, the parents then were to recite the following allegations: "[t]his our son is stubborn and rebellious; he will not obey our voice; he is a glutton and a drunkard."<sup>67</sup> Perhaps it was expected that the elders would inquire further before proceeding to carry out the death penalty; but there is no mention of such inquiry in this context. Possibly, the offender would be put to death only if the elders believed the parents' testimony.<sup>68</sup> This law could be seen as an extension of, or at least related to, the provisions in the CC making it a capital offense to strike or curse one's parents (*Exodus* 21:15-17). It might be noted that in its terms, this law applies only to sons, not to daughters. Possibly, Israelite daughters were expected to be more amenable to the exercise of parental authority.<sup>69</sup> Falk suggests that the harsh nature of the punishment provided here was intended to prevent such a son "from attacking his parents" and to deter others from engaging in stubborn and rebellious conduct.<sup>70</sup> Again, there are no reported cases where this law was carried out. Perhaps its being "on the books" had some deterrent effect.

ii. *Adultery: Deuteronomy 22:13-27*

A series of three new capital laws relates to sexual offenses or allegations of such offenses involving women who were either married or

66. *Deuteronomy* 21:18-19. Elders function as judges in other biblical cases at trial. See, e.g., *Deuteronomy* 22:13-21; *Joshua* 20:4; *Jeremiah* 26:7-19; *Susanna*, v. 50.

67. Gluttony and dipsomania may have been considered typical behavioral characteristics of "stubborn and rebellious sons." However, these conditions, without more, were not prohibited in any biblical law, much less criminalized as capital offenses. Cf. TAKING SIDES: CLASHING VIEWS ON CONTROVERSIAL ISSUES IN RELIGION, *supra* note 1, at 185 (asserting that "gluttony and excessive drinking" were capital offenses as such). Note that both the mother and father were to bring their son before the elders and both were to prefer charges. See generally, CAROLYN PRESSLER, *THE VIEW OF WOMEN FOUND IN THE DEUTERONOMIC FAMILY LAWS 17-20* (Walter de Gruyter 1993).

68. Some sort of proceeding is implicit here. See FALK, *LAW AND RELIGION*, *supra* note 52, at 80 ("The [father of a rebellious son] is asked to submit his grievance to a judicial tribunal rather than to exercise the *ius vitae necisque* and the *patria potestas*."). Compare Levine, *supra* note 26, at 18 ("If all efforts at disciplining him fail, the elders are to condemn such a son to death . . ."). However, there is no indication in the biblical text that mediation or discipline were contemplated as alternative or preliminary measures.

69. But see, *Sirach* 7:23-25; 22:3-5; 26:10-12; 42:9-11 (noting parental problems with daughters, but not indicating recourse to capital punishment).

70. FALK, *supra* note 40, at 60.

betrothed. These are grouped together in *Deuteronomy* 22:13-27. Adultery was prohibited under the "seventh commandment" of the decalogue (*Exodus* 20:14; *Deuteronomy* 5:18). But neither adultery nor any other sexual activity — aside from buggery — had been criminalized, much less subject to capital punishment in the CC. Both D and the later Holiness Code (H) treat adultery as a capital offense.<sup>71</sup>

(a) *Deuteronomy 22:13-21: Alleged Prenuptial Promiscuity*

This law sets out procedures to be followed when a newly married husband charges his bride with having been engaged in sexual intercourse prior to their marriage. If, after evidentiary examination, the woman is found guilty as charged, she is to be put to death. However, if the evidence does not support the allegation, the husband who has falsely charged her is to be punished both by whipping and a 100-shekel fine.<sup>72</sup>

(b) *Deuteronomy 22:22: Adultery with a Married Woman*

Here adultery is made a capital offense when "a man is found lying with the wife of another man." Adultery was not specified as a capital offense under the CC. In this D law, both "the man who lay with the woman" and the woman are to be put to death.<sup>73</sup> In its terms, this law applies whether the male adulterer was married or single. The law is silent as to what must be done if a married man is found lying with a single woman. No other biblical law addresses the latter situation either.

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71. Phillips states that prior to "the Deuteronomic legislation" an adulterous wife was not subject to punishment, but her adulterous lover could be "tried, convicted, and executed for the crime of adultery." PHILLIPS, *supra* note 36, at 110. That may have been the case, but it is not clear that the evidence cited (*Deuteronomy* 7:3-4) warrants so concluding. Phillips suggests that the Deuteronomic Reform made women "equal members of the covenant community" and thus equally liable under the law. *Id.* As to adultery in the Holiness Code, see *infra* text accompanying notes 94-95. Good, *supra* note 4, at 957-58 discusses ANE parallels.

72. See generally PRESSLER, *supra* note 67, at 22-31 (for a careful and detailed analysis of *Deuteronomy* 22:13-21). Pressler suggests that the text also indicates that a slandered woman's parents could bring charges against the husband for defamation and receive monetary damages. As to evidentiary procedures, see *infra* text accompanying notes 270-73.

73. This law, obviously, was not applied in the case of King David. David was condemned for marrying Bathsheba after murdering her husband, but not for his previous adultery with her. 2 *Samuel* 12:9. Nor was he condemned for earlier taking Paltiel's wife, Michal, Saul's daughter. 2 *Samuel* 3:12-16. In regard to the complex character of biblical and ANE law and practice as to punishment for adultery, see Raymond Westbrook, *Adultery in Ancient Near Eastern Law*, in *REVUE BIBLIQUE* 97, 542-80 (1990).

## (c) Deuteronomy 22:23-27: Intercourse with a Betrothed Virgin

This law applies when a man "meets" a virgin who is betrothed (presumably to another man) and lies with her. No due process procedures are specified. However, certain presumptions were to apply. If the meeting (or assignation) occurred in town ("in the city"), both the man and the woman were to be put to death: the woman "because she did not cry for help though she was in the city" (*Deuteronomy* 22:24). It appears to have been presumed both that if the woman had been sexually assaulted or raped in a city, she would have been able to cry for help, and that someone would have heard her cry and either then come to rescue her or later appeared to testify. Perhaps, if someone did hear the cry and render assistance or later testify on her behalf, it would be a different case and the woman would be spared. But absent such third-person rescue or testimony, the irrebuttable presumption appears to be that she had consented to the liaison.

A different presumption operated if a man meets, seizes, and lies with a betrothed young woman "in the open country" (*Deuteronomy* 22:25). In that circumstance, the man is to be executed, but "to the young woman you shall do nothing; in the young woman there is no offense punishable by death." (*Deuteronomy* 22:26a-b).<sup>74</sup> This law is based by analogy on the "case of a man attacking and murdering his neighbor" (*Deuteronomy* 22:26c).<sup>75</sup> Here, the irrebuttable presumption is that if the encounter occurred in open country, the woman had not consented, had cried out for help, but no one was there to hear, and so she was to be deemed innocent. How it was to be determined whether the man had "seized" her, that is, taken her by force is unclear.<sup>76</sup> Evidently the woman's own testimony would be credited.

## 4. The Holiness Code: Leviticus 18-26

Biblical scholars do not agree entirely as to the exact scope of the Holiness Code or "H."<sup>77</sup> For present purposes, it is considered to comprise

74. T. J. Meek points to somewhat similar presumptions in the Hittite Code, §197 (If a man seizes a woman in the mountains, since it is the man's wrong, he shall be put to death. But if he seizes her in the house, since it is the woman's fault, the woman shall be put to death. If the husband finds them and then kills them, he is not to be punished.).

MEEK, *supra* note 33, at 62.

75. In such a case where there are no witnesses, and one person was dead, the other — evidently according to otherwise unreported biblical or ancient near eastern common law — would be presumed to have caused his death, i.e., murdered the deceased.

76. *Deuteronomy* 22:25; cf. *Deuteronomy* 22:23, where there is no mention of the man's seizing the woman.

77. On H, see generally GERHARD VON RAD, *STUDIES IN DEUTERONOMY* 25-36 (SCM Press 1953).

*Leviticus* 18-26.<sup>78</sup> The Holiness Code appears to have been set down after the original portion of the Deuteronomic Code, but prior to the Deuteronomic Reform and the chapters of Deuteronomy that reflect the innovations introduced by it.<sup>79</sup> Several of the capital laws found in H repeat, extend, modify, or qualify earlier legislation, while others define new capital offenses. As in the case of the earlier codes, a few H laws refer primarily to the "vertical" relationship of Israel or individual Israelites with YHWH. Most, however, concern relations between or among persons (or in a few instances, persons and animals).

a. *Laws Relating to God or Religious Practices*

The Holiness Code contains no provisions applying the death penalty to the worship of other gods. This absence could mean that, at the time H was codified, such worship was no longer considered a capital offense. Possibly, the several new capital laws against allotheism subsequently set out in *Deuteronomy* chapters 13, 17, and 18 reflect renewed concern on the part of the Deuteronomic reformers about such worship.<sup>80</sup> Alternatively, the earlier capital law against sacrificing to other gods (*Exodus* 22:20) may have been considered still in effect. Three H laws concern religious practices: one extends and modifies prior law, two others are new.

i. *Leviticus 20:6, 27: Mediums or Wizards*

The Covenant Code had called for the death of any sorceress (*Exodus* 22:18). The Holiness Code extends the death penalty to male as well as female practitioners of the occult arts: "[a] man or a woman who is a medium or a wizard shall be put to death." (*Leviticus* 20:27).<sup>81</sup> Moreover, H makes it unlawful to "turn to" or consult mediums or wizards, but does not prescribe the death penalty for such consultation (*Leviticus* 19:31; 20:6). The latter text warns that YHWH would set his face against any who consulted mediums or wizards, and "cut them off from among" their

78. Scholars sometimes include chapter 17 as well. As to the present topic, however, the question is moot, since *Leviticus* 17 includes no laws sanctioned by capital punishment.

79. See *infra* text accompanying notes 109-10. The Holiness Code does not call for or presuppose sacrificial worship in only one place. See favorable references to plural "sanctuaries" in *Leviticus* 21:23 & 26:31. However, H includes some expressions that suggest possible later editing under Priestly auspices.

80. In this article, "Deuteronomic reformers" designates those responsible for much if not all of the legislation found in Deuteronomy chs. 12-19. See *infra* text accompanying notes 115-24.

81. But see *Leviticus* 19:26b, which, though banning augury or witchcraft, provides no penalty. See also *Deuteronomy* 18:10-14, which seems to call for banishment, though not execution, of "any one who practices divination, a soothsayer, or an augur, or a sorcerer, or a charmer, or a medium, or a wizard, or a necromancer." These practitioners were not necessarily allotheists. Possibly, the Deuteronomic reformers were more tolerant of such practices than were those who had established the death penalty for sorcerers, mediums, and wizards in the CC and H.

people. In other words, it seems, the administration of any penalty for these offenses would be left to YHWH.

ii. *Leviticus 20:1-5: Offering Children to Molech*

This new law prohibited Israelites from offering or giving their children to Molech. Molech, according to 1 *Kings* 11:7, was the god worshiped by Ammonites, a neighboring people. *Leviticus* 18:21 prohibits the practice of offering or devoting children by fire to Molech; and *Leviticus* 20:1-5 apparently makes doing so a capital crime. Such offerings would constitute apostasy and allotheism, by acknowledging and honoring Molech as a god. They also would violate the covenant's horizontal dimension, by causing the death of Israelite children.<sup>82</sup> *Leviticus* 20:4-5, however, seems to acknowledge or recognize the prospect of non-compliance with its capital penalty requirement:

And if the people of the land do at all hide their eyes from that man, when he gives one of his children to Molech, and do not put him to death, then I will set my face against that man and against his family, and will cut them off from among their people, him and all who follow him in playing the harlot after Molech.

This "but if" provision evidently meant that if Israelites failed to put such Molech worshipers to death, YHWH himself would banish them.<sup>83</sup> Alternately, "cut them off from among their people" could have meant that YHWH himself would cause them to die. Either way, the provision suggests that the drafters recognized their contemporaries' hesitancy to apply the death penalty in such cases.

iii. *Leviticus 24:10-16: Blaspheming "the Name"*

This new law criminalizes blasphemy or blaspheming "the Name" of YHWH.<sup>84</sup> Unlike most of the laws traditionally attributed to Moses, this one derives from a reported "case" rather than from YHWH's purported pronouncements upon Mts. Sinai or Horeb. A man whose mother was Israelite and father Egyptian, while quarreling with an Israelite, had "blasphemed the Name, and cursed" (*Leviticus* 24:10-11). The substance of the "blasphemy" is not indicated; but probably involved some inappropriate, possibly derogatory use of the divine name. The blasphemer was then brought before Moses, who, however, did not yet know what should be done since there was no previous statute on point. "So they put

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82. *Deuteronomy* 12:29-31 and 18:10, both part of the RDC, also warn against such practices.

83. Cf. *Genesis* 4:12. *Deuteronomy* 18:10 also may have meant that Molech worshipers ("anyone who makes his son or his daughter pass through fire") were to be banished or exiled.

84. Cf. *Exodus* 22:28a: "[y]ou shall not revile God." No penalty for doing so is indicated in the CC.

him in custody, till the will of YHWH should be declared to them." (*Leviticus* 24:12).<sup>85</sup> Subsequently, as the story is told, YHWH instructs Moses to order the blasphemer executed.<sup>86</sup> The resulting rule or law of the case is stated in *Leviticus* 24:16: "[h]e who blasphemes the name of [YHWH] shall be put to death; all the congregation shall stone him; the sojourner as well as the native, when he blasphemes the Name, shall be put to death."

Although blasphemy is not mentioned as a capital offense in earlier law codes, it may have been so treated in previous Israelite common or case law. If so, the point of this episode might have been to make clear that the law applied to resident aliens as well as to native-born Israelites, or as in the reported case, to persons of mixed nationality who blasphemed.

*b. Laws Affecting the Community: the Horizontal Dimension*

Several earlier laws concerning relations within the community are repeated in H, generally with some variations or modifications. Also, some new laws with this focus appear for the first time in H. Several of the laws concern illicit or improper sexual activity.

*i. Modifications or Variations on Earlier Laws*

Over time, older laws become modified, whether by new case law or "construction" as to their meaning and scope, or through new "legislative" enactments. The H laws noted in this subsection present relatively slight variations on earlier "statutes."

*(a.) Leviticus 24:17, 21b: Homicide*

Here, as in the CC (*Exodus* 21:12), a person who commits homicide is subject to the death penalty: "[h]e who kills a man shall be put to death." Unlike the CC, however, these H texts do not distinguish between accidental and intentional homicide.<sup>87</sup> Moreover, H contains no provision for cities of refuge where those who have killed other persons may seek sanctuary pending further proceedings.<sup>88</sup> If H is properly dated prior to the Deuteronomic Reform, this omission may be accounted for on the theory that prior to that reform persons seeking refuge as "manslayers" could find sanctuary at any of the numerous local religious shrines scattered

85. This text and *Numbers* 15:34 are the only explicit references in the Old Testament or Hebrew Scriptures to arrest and custody pending trial or sentencing. As to cities of refuge, where offenders might seek refuge pending trial, see *infra* Part III.B.

86. It is not said whether this instruction was derived from or conveyed through the ephod or "lot" or received through some other medium. The *ex post facto* aspect of this decision is noted *infra* note 198.

87. Cf. *Exodus* 21:13-14 and *Deuteronomy* 19:4-13.

88. See *infra*, Part III.B.

throughout Israel. Closing or destroying those shrines was a core feature of the Deuteronomic Reform.

The fact that the homicide law is repeated twice (as is the law regarding killing "a beast," *Leviticus* 24:17, 21a) suggests possible scribal error in copying. Or it may be that one version was originally part of the *lex talionis* at *Leviticus* 24:19-20. These verses, for the first time, extend that *lex* from its narrow context in *Exodus* 21:22-25 so as to apply to mayhem or permanent disfigurement generally.<sup>89</sup> In addition, *Exodus* 21:23 and *Leviticus* 24:17 and 21b require taking "life for life," that is, execution of the one who has killed another person.<sup>90</sup>

(b.) *Leviticus 20:9: Cursing Father or Mother*

Like D, H does not include any laws making it a capital offense for a person to strike his parents.<sup>91</sup> *Leviticus* 20:9, however, like *Exodus* 21:17, makes it a capital crime to *curse* one's father or mother, another offense not included in D. The only addition to the earlier provision is in *Leviticus* 20:9b: "[h]e has cursed his father or his mother, [therefore] his blood is upon him[self]." Thus it is said that those who have cursed a parent are responsible for their own death.<sup>92</sup> Perhaps this added statement was intended to ease the consciences of those who might otherwise feel hesitant to apply the death penalty in this setting.<sup>93</sup>

(c.) *Leviticus 20:10: Adultery*

The version of the Decalogue found in the Covenant Code (*Exodus* 20:14) prohibits adultery, but does not provide any penalty for its commission.<sup>94</sup> But here, H, like D,<sup>95</sup> treats adultery as a capital offense. Neither the D nor the H version of the law defines or penalizes adultery in a case where a married man has sexual intercourse with an unmarried woman.

89. At common law, mayhem originally referred to the kinds of disfigurement or disablement that would adversely affect the victim's ability to fight. In American statutory law, mayhem generally means any kind of dismemberment or permanent disfigurement. See LAFAYE, *supra* note 38, at 749-50.

90. As to the *lex talionis*, see *infra* Part III.F.2.

91. Cf. *Exodus* 21:15.

92. The expression, "his blood is upon him," places responsibility for adverse consequences on those who have committed capital offenses. See, e.g., *Leviticus* 20:11, 12, 13, 16, & 27.

93. Several biblical texts suggest that cursing could operate *ex opere operato* (or automatically) with tangible, deleterious consequences. See, e.g., the Balaam-Balak story in *Numbers* 22-24 and the recitation of curses in *Deuteronomy* 27:13-26. Cf. *Psalms* 109:17-19. Thus, cursing parents could have been understood to cause them tangible or physical harm. See Good, *supra* note 4, at 956.

94. See also the version in *Deuteronomy* 5:18.

95. See *Deuteronomy* 22:22.



*(d.) Leviticus 20:15-16: Buggery with a Beast*

The CC had provided that anyone who lay sexually with a beast would be put to death (*Exodus* 22:19). The H version specifies that the anti-buggery law is gender inclusive: it applies both to men and to women. The provision as to women, however, contains an additional element: "[i]f a woman approaches any beast and lies with it . . ." (*Leviticus* 20:16). Conceivably, this provision was intended to excuse a woman in the unlikely event that she was approached by a beast, that is, victimized by the animal.<sup>96</sup> At least she could have so contended as a defense under this H revision.

*(e.) Leviticus 19:20-22: Sexual Intercourse with a Betrothed Female Slave*

This law modifies or limits the scope of the D provisions that made it a capital offense for a man to have sexual intercourse with another man's betrothed, virgin "wife" inside city limits (*Deuteronomy* 22:23-24). This H law carves out an exception when the betrothed woman is a slave who has not yet been ransomed or given her freedom. In this situation, neither is to be put to death. The woman is excused "because she was not free," a rationale somewhat similar to the D presumption of innocence on the part of a betrothed virgin when the sexual encounter occurred in the countryside (*Deuteronomy* 22:25-27).<sup>97</sup> The H provision does not excuse the male; he is guilty of sin (*Leviticus* 19:22). However, he can absolve himself of that sin by offering a prescribed guilt offering, administered by "the priest," in order that his sin will be forgiven (*Leviticus* 19:21-22).<sup>98</sup>

*ii. New Capital Laws*

The new capital laws regarding community interactions first articulated in H all define illicit sexual conduct. One series condemns various types of incest. Homosexual intercourse is prohibited for the first (and only) time. And another new law provides for the execution of priests' daughters who engage in prostitution.

*(a) Leviticus 20:11-12, 14: Incest*

Twelve different categories of incestuous sexual liaisons are prohibited in *Leviticus* 18:6-18.<sup>99</sup> Generally, it seems, these prohibitions

96. Such circumstances may be imagined if not instanced in ancient folklore, but there are no biblical examples.

97. *Leviticus* 19:20-22 does not distinguish between urban and rural settings.

98. For alternative interpretations of this law, see WESTBROOK, *STUDIES*, *supra* note 31, at 101-09.

99. None of the offenses proscribed in *Leviticus* 18 includes punishment directives or sentencing guidelines. There it may have been understood that YHWH himself would punish the offenders.

were meant to apply both to marriage and to extra-marital sexual intercourse. Some, but not all of *Leviticus* 18's proscribed categories, were made subject to capital punishment under the provisions of *Leviticus* 20.<sup>100</sup>

Only three categories are subject to the death penalty under *Leviticus* 20. *First*, sexual relations between a son and his father's wife (*Leviticus* 20:11). This apparently would include intercourse with either the son's own mother, or with his father's other wife or wives.<sup>101</sup> *Second*, intercourse between a man and his daughter-in-law (*Leviticus* 20:12). And *third*, a man's "taking" both a woman and her mother (*Leviticus* 20:14).<sup>102</sup> All sexual partners in these incest categories were to be put to death.<sup>103</sup>

(b.) *Leviticus* 20:13: Male Homosexual Intercourse

Such intercourse was not mentioned in any other law code. Here it is characterized as an "abomination" or morally repugnant, and listed with other capital sexual offenses:<sup>104</sup> "[i]f a man lies with a male as with a woman, both of them have committed an abomination; they shall be put to death" (*Leviticus* 20:13).<sup>105</sup> No biblical traditions explain why homosexual conduct was disapproved or sanctioned by the death penalty for the first time in H. Such conduct may, of course, have been criminalized in earlier Israelite or ANE common law. Homosexual conduct is neither condemned

100. On biblical incest laws, see generally DAUBE *supra* note 32, at 77-82. Categories prohibited in *Leviticus* 18, but *not* subject to the death penalty under chapter 20, include the following relationships: brother-sister (18:9, 11; see also 20:17; cf. 2 *Samuel* 13:1-14); grandfather-granddaughter (18:10); nephew-aunt (18:13-14; see also 20:19); brother-brother's wife (18:16; see also 20:21); husband-wife's granddaughter (18:17); husband-wife's sister (18:18).

101. See also *Amos* 2:7b. According to *Genesis* 35:22 and 49:3-4, Jacob's son, Reuben, lay with Bilhah, Jacob's concubine (described also as Jacob's wife in *Genesis* 30:4), but was not punished for so doing. See also 2 *Samuel* 16:21-22. Neither *Leviticus* 18 nor 20 prohibit sexual intercourse between a man and his daughter or between a man and his niece.

102. A man's having sexual intercourse with his mother-in-law is not specifically forbidden in either chapters 18 or 20, but this meaning is implicit in *Leviticus* 20:14. See also *Deuteronomy* 27:23.

103. *Leviticus* 20:17, and 19-21 address four types of incest noted also in *Leviticus* 18, but mandate or anticipate non-capital forms of punishment: brother-sister; nephew-aunt, nephew-uncle's wife; and brother-brother's wife liaisons. Those engaged in the latter two modes of incest, it is said, will be (or will die) childless (*Leviticus* 20:20-21). Curiously, one late tradition purports to require certain classes of relatives to marry. See *Tobit* 6:12, according to which a father must give his daughter to her only eligible kinsman-suitor on pain of death. Reference to the death penalty here is probably only a literary fiction intended to heighten the drama. There is no such biblical law or ANE legal equivalent to this requirement. As to incest in other ANE laws, see Good, *supra* note 4, at 959-60.

104. *Leviticus* 20:1-16 lists a series of capital offenses; those enumerated in vv. 10-16 all pertain to sexual activities.

105. A number of early texts could be read to suggest that David and Jonathan enjoyed with impunity a relationship that extended beyond conventional male bonding: 1 *Samuel* 18:1, 3; 19:1; 20:17, 30, 41; 2 *Samuel* 1:26. But see Good, *supra* note 4, at 960 n. 62 and text (concluding otherwise).

nor even mentioned again in the later RDC or PC. Homosexual *assault* or *rape* was clearly disapproved in the old story of the angels' visit to Sodom (*Genesis* 19:4-11).<sup>106</sup> Neither this nor any other biblical law or narrative concerns lesbian or female homosexual relations.

(c.) *Leviticus 21:9: A Priest's Daughter who "Plays the Harlot"*

Chapters 21 and 22 detail numerous directions as to the conduct and responsibilities of priests. Priestly purity and ritual procedures are emphasized for the first time in H, though not to the same extent as in the later PC. Here, as in the PC, it is understood that priests must be descendants of Aaron,<sup>107</sup> and must remain "holy" (*qadosh* or *qadash* (*Leviticus* 21:6, 7)) or separate from "unclean" persons or things. Thus, priests might not marry harlots or divorced women (*Leviticus* 21:7).<sup>108</sup> A priest's daughter who "plays the harlot" (probably meaning, having consensual sexual intercourse with anyone other than her husband) "profanes" both herself and her father, and is, therefore, to be put to death.

5. *The Revised Deuteronomic Code (RDC)*

At some period in the late eighth or seventh century B.C.E., possibly during the long, corrupt, and apostate reign of King Manasseh, a major reform movement became active in Judah. The reformers were no doubt aware of the fate of the Northern Kingdom, Israel, which had been over-run by Assyria in 722 B.C.E. Various prophets had interpreted that catastrophe prospectively or contemporaneously as YHWH's judgment against Israel for its chronic pattern of turning away from YHWH to the worship of other gods, and the numerous injustices consequent upon its failure to keep his commandments.<sup>109</sup> The Deuteronomic historians so understood such matters in retrospect.<sup>110</sup> The Deuteronomic reformers, understandably, were concerned that the peoples' persistent pattern of apostasy — turning from YHWH and to the worship of other gods — would likely bring divinely ordained catastrophic judgment upon the surviving Southern Kingdom, Judah, as well. The major literary or statutory product of — if not inspiration for — the Deuteronomic Reform was the new collection of laws found in *Deuteronomy* 12-19 characterized in this article as the Revised Deuteronomic Code.

106. See also *Judges* 19:22-30. In the New Testament, Paul comments unfavorably on both lesbian and male homosexual passion and acts (*Romans* 1:26-27).

107. Unlike the PC, however, H does not distinguish between priests and Levites.

108. It may have been assumed, but not explicitly stated that priests themselves were to refrain from having sexual intercourse with harlots.

109. See, e.g., *Hosea* 4:1-10:15; *Amos* 2:6-9:8b.

110. See *2 Kings* 17:1-18.

The key feature of the Deuteronomic reform was the requirement that YHWH now be worshiped with sacrifices, tithes, and other offerings *only in the one place* (Jerusalem), and that the many cult shrines where in previous years, decades and centuries, YHWH had been worshiped — along with indigenous Canaanite deities — must be closed down and destroyed. The reformers' intent, evidently, was to discourage the continuing love affair of the people of Judah with such deities, lest YHWH bring disaster upon that nation in the same way that he had done to Israel nearly a century earlier. These provisions, along with a series of related accommodations to the closing of the cult shrines, are set out in *Deuteronomy* 12-19. These chapters may also include other or earlier laws, some deriving, perhaps, from D, the earlier or original Deuteronomic Code. For purposes of this study, *Deuteronomy* 12-19 is considered as a separate Code, labeled, as a convenience, the Revised Deuteronomic Code, or RDC.

*a. An Old Law Amended: Deuteronomy 19:4-13 — Homicide*

The RDC includes only one capital law somewhat similar to an earlier provision: a law distinguishing between separate categories of homicide and adding certain arrangements for the protection of the accused.

The Revised Deuteronomic Code contains an extensive section governing arrangements dealing first with "the manslayer" and then with intentional murder (*Deuteronomy* 19:4-13). The CC did not refer to manslaughter or accidental homicide.<sup>111</sup> Instead, it provided that a man who fatally struck another, but without plotting to do so in advance, might flee to a "place" or sanctuary of some sort (*Exodus* 21:13), perhaps one of the many old rural and urban cult shrines functioning prior to the Deuteronomic Reform. In some modern jurisdictions, this kind of offense might be classified as second degree murder.<sup>112</sup> The RDC specifically defines manslaughter, namely, as an offense when "any one kills his neighbor unintentionally without having been at enmity with him in the past" (*Deuteronomy* 19:4). This definition is followed immediately by the example: "as when a man goes into the forest with his neighbor to cut wood, and his hand swings the axe to cut down a tree, and the head slips from the handle and strikes his neighbor so that he dies . . ." (*Deuteronomy* 19:5).

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111. The CC did address two narrowly defined instances of negligent homicide: (a) where a married pregnant woman dies from injury caused by brawling males that resulted in a miscarriage (*Exodus* 21:22-24), and (b) where an ox fatally gores someone after its owner had notice of its proclivity to gore, but failed to provide adequate fencing (*Exodus* 21:28-32). See *supra* text accompanying notes 43-50. The CC also distinguished between premeditated murder and cases where "God let [the victim] fall into [the offender's] hands." See *supra* text accompanying notes 38-42.

112. See LFAVE, *supra* note 38, at 698.

The accidental or negligent manslayer may flee to one of several cities of refuge and there obtain protection, "lest the avenger of blood in hot anger pursue [him] and overtake him . . . and wound him mortally, though the man did not deserve to die, since he was not at enmity with his neighbor in the past" (*Deuteronomy* 19:6).<sup>113</sup>

The manslayer was to be protected not only for his own benefit, but also to prevent "the guilt of bloodshed" from coming upon the community as a whole. Such guilt would result if "innocent blood" were "shed" — *i.e.*, by the execution of a merely negligent manslayer (*Deuteronomy* 19:10).

The Deuteronomic definition of intentional homicide likewise is more exact than its earlier counterpart, particularly with regard to the elements of subjective intent and planning: "[b]ut if any man hates his neighbor, and lies in wait for him,<sup>114</sup> and attacks him, and wounds him mortally so that he dies . . ." (*Deuteronomy* 19:11), the murderer was to be executed. As read, *Exodus* 21:14 could include *attempted* murder. The Deuteronomic version specifies that in order for the offender to be liable, the intended victim must have died as a result of the premeditated assault.

#### *b. New Capital Laws*

Several new capital laws found in the RDC penalize worshiping or inciting others to worship alien deities. Two other new laws criminalize as capital offenses certain types of conduct that would disrupt important structural aspects of community existence. Both of these community laws relate directly to the judicial system.

##### *i. False Prophecy, Apostasy, and Inciting to Allotheism*

Five of the seven new capital laws found in the RDC are directed against worship of other gods (allotheism) and/or false prophecy. These are all found between chapters twelve and eighteen, and may well reflect the Deuteronomic Reform's concern with the persistent tendency of Judahites (if not also earlier Israelites) to "go after," that is, turn to and serve such other deities.<sup>115</sup> At any rate, these new laws, unlike *Exodus* 22:20, make clear that the community is responsible for the punishment of such offenders. Moreover, while *Exodus* 22:20 said that any who *sacrificed* to other gods would be destroyed, these new laws apply to any kind of worship or incitement to worship or serve such deities. Nevertheless, each of the new provisions is somewhat narrowly tailored.

113. As to cities of refuge and "the avenger of blood," *see infra* Part III.B.

114. *Cf. Exodus*. 21:13-14 (where lying in wait is only by implication an element in the definition of premeditated murder).

115. *See generally* CALUM M. CARMICHAEL, *THE LAWS OF DEUTERONOMY* 70-77 (Cornell Univ. Press 1974).

(a) Deuteronomy 13:1-5: *Incitement to Allotheism — Prophets and Dreamers of Dreams*

This law focuses on "prophets" or "dreamers of dreams"<sup>116</sup> who attempt to authenticate their credibility by performing or foretelling certain "signs" or "wonders." If the signs or wonders "come to pass," that is, occur, *and* if such prophets or dreamers call on others to "go after" and serve other gods, those prophets or dreamers are to be put to death. Nothing is said as to prophets or dreamers of dreams who give signs or wonders that do *not* come to pass. Perhaps such persons would have been considered thereby sufficiently discredited and therefore less dangerous, and possibly tolerated as mere eccentrics.<sup>117</sup>

(b) Deuteronomy 13:6-11: *Secret Incitement to Allotheism — Family and Friends*

Secret incitement by immediate family members or dear friends to worship other gods was evidently considered a very serious threat to the community's relationship with YHWH.

If your brother, the son of your mother, or your own son, or your daughter, or the wife of your bosom, or your friend who is as your own soul, entices you secretly, saying, "Let us go and serve other gods," . . . you shall not yield to him or listen to him, nor shall your eye pity him, nor shall you spare him, nor shall you conceal him; but you shall kill him . . . .

(Deuteronomy 13:6-9a). In the biblical perspective generally, and especially in the view of Deuteronomic tradition, constant fidelity to YHWH was a matter of life and death for the whole community. YHWH had brought Israel "out of the land of Egypt, out of the house of bondage" (Deuteronomy 13:10). So long as his people remained faithful to him, YHWH would continue showering his blessings upon them (Deuteronomy 28:1-14); but the consequences of apostasy — turning from YHWH and his law — would be utterly catastrophic (Deuteronomy 28:15-68). There are no recorded biblical instances where this deadly serious law was carried out.

In its terms, this law does not provide for punishing persons outside the circle of intimate family members or friends who promote allotheism. Perhaps such outsiders were thought less dangerous because they were less likely to succeed with their enticements. Or it may already have been understood that such other persons were to be executed; in that case, the purpose of Deuteronomy 13:6-11 would have been to ensure that no one, not even family members or dearest friends, would be exempt from its penalties. Interestingly, this law does not provide for punishing any such

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116. These categories could have included primitive fortune-tellers or astrologers.

117. Cf. 1 Samuel 21:10-15.

persons who might *publicly* incite or encourage friends or relations to idolatry or allotheism. Possibly open encouragement was considered tolerable because it could be corrected or countered by others.

(c) *Deuteronomy 13:12-18: Inciting Cities to Allotheism*

Here it is said that if "certain base fellows" from among the Israelites succeed in "drawing away" the inhabitants of an Israelite (or Judahite) city from YHWH and in enticing them to "go and serve other gods," all the inhabitants of that city are to be destroyed, along with their cattle.<sup>118</sup> Again, this law may reflect the ideology of the Deuteronomic Reformers, which is expressed also in the *herem* tradition.<sup>119</sup> The explicit rationale for this drastic action was to assuage the ferocity of YHWH's anger, which otherwise would be inflicted upon all Israel, and thereby induce him to show them mercy and compassion (*Deuteronomy* 13:17). The law is somewhat narrowly crafted in that it applies only if those who incited Israelite towns to commit apostasy were themselves Israelites.<sup>120</sup> Moreover, it may be that the *herem* was supposed to apply only if *all* "the inhabitants of the city" had turned to other gods (*Deuteronomy* 13:13).

(d) *Deuteronomy 17:2-7: Allotheism Generally*

This law made it a capital offense for a man or woman in any Israelite town to go, serve, and worship other gods or celestial beings.<sup>121</sup> Implicitly, this law against allotheism would apply to Israelites and foreigners alike, but not, in its terms, to persons living in rural areas. As will be noted, certain due process protections for the accused are provided in

118. Perhaps it was understood that the apostates had ritually contaminated their cattle by offering some to alien deities. Because the laws included in the RDC are all attributed to Moses (or YHWH's giving the laws to him in the era of Israel's sojourn in the wilderness) they are phrased as if intended for all Israel, not just for Judah in the period following the Assyrian conquest of Israel. After the demise of Israel, the Northern Kingdom, Judah, the surviving Southern Kingdom is often identified in biblical terms as "Israel" and its people as "Israelites."

119. The *herem* was the practice of destroying (or otherwise consecrating to YHWH) persons defeated in war, and sometimes their livestock and other property. See DE VAUX, *supra* note 30, at 260-63. In Deuteronomic editing of early tradition following the Deuteronomic Reform, this archaic practice apparently was re-emphasized in order to underscore the critical importance of remaining faithful to YHWH and avoiding worship of other gods. Because the *herem* supposedly was practiced against enemies defeated in battles during the conquest of Canaan, it is not considered as a form of capital punishment in this article. *But see* Good, *supra* note 4, at 971-72 (noting texts where the *herem* may have been applied against Israelites who failed to observe the practice).

120. Such appears to be the meaning of the expression, persons "who have come out among you."

121. Cf. *Exodus* 22:20, *supra* text accompanying note 61-62. The Deuteronomic law specifically prohibited worshiping "the sun or the moon or any of the host of heaven." *Deuteronomy* 17:4.

*Deuteronomy* 17:4-6: diligent inquiry as to the facts<sup>122</sup> and corroborating testimony by one or two additional witnesses.<sup>123</sup>

(e) *Deuteronomy 18:20: Allotheism and Presumptive, False Prophets*

Two types of prophets are made subject to the death penalty under this law. Any prophet who "speaks in the name of other gods . . . shall die." The law also assigns the same fate to any prophet "who presumes to speak a word" in the name of YHWH which YHWH had "not commanded him to speak." Whether or not such a prophet had been so commanded was to be determined by observing whether the "word" that had been spoken came to pass, i.e., came true (*Deuteronomy* 18:21-22). Thus, even a prophet who thought he was speaking on YHWH's behalf might be put to death.<sup>124</sup> This provision does not appear to take into consideration the possibility that YHWH might change his mind, as is suggested in *Amos* chapter five or illustrated in the *Jonah* story (*Jonah* 3:10). There is no evidence that this law was ever enforced.

ii. *Offenses Against the Community: Protecting the Innocent and Upholding Judicial Integrity*

Two of the new Deuteronomic laws refer to judicial proceedings. One provides penalties for malicious false testimony. The other sanctions refusal or failure to abide by the court's decision. Both may have been part of the RDC, or they may have been laws originally included in D, but now relocated in chapters 12-19 among the laws emanating from the Deuteronomic Reform.

(a) *Deuteronomy 19:16-21: Malicious, False Witnesses*

This law, based on, or further applying the *lex talionis*, calls for the death penalty when a malicious witness is found to have accused his brother (or fellow citizen) falsely of a capital offense: "[y]ou shall do to him as he had meant to do to his brother." (*Deuteronomy* 19:19). The language here may have been understood to be gender inclusive. This law is illustrated in the story of *Susanna and the Elders*, where two elders (who were also judges) are put to death after they were found to have accused Susanna maliciously and falsely of adultery.<sup>125</sup> The apparent purpose of

122. See *infra*, Part III.D.

123. See *infra* text accompanying notes 281-85.

124. This law does not conflict with *Deuteronomy* 13:1-5. In that law, a prophet whose signs or wonders came to pass would be put to death only if he called upon people to worship and serve other gods.

125. *Susanna* vv. 52-62. The situation set out in *Deuteronomy* 22:13-21 may be distinguishable. There the husband whose allegation against his new bride is found false



this law is to uphold the integrity of the judicial process and also to protect innocent persons from harm. Here, it could be said, the law presumes that the innocent were understood to have a *right* to be free from abuse of judicial process by malicious persons.

(b) Deuteronomy 17:8-12: *Refusal to Accept the Court's Ruling*

Under this law, it is a capital offense to refuse to accept a court's verdict — at any rate in difficult cases that have been decided by the presiding Levitical priest and/or "the judge who is in office" at the Jerusalem temple: "[t]he man who acts presumptuously, by not obeying the priest who stands to minister there before YHWH your God, or the judge, that man shall die . . . ." (*Deuteronomy* 17:12.)

This law clearly reflects the Deuteronomic Reform, which centralized worship in the Jerusalem temple and closed all other religious sanctuaries or shrines. The priest or judge in Jerusalem functioned, in effect, as the supreme court. To ignore or disobey its orders would constitute anarchy, if not also apostasy and treason. Here we see a severe penalty for what would be equivalent in modern jurisprudence to contempt of court.

6. *The Priestly Code or Priestly Legislation*

This is the latest of the biblical law codes. Priestly laws may or may not have been promulgated in a single code. Perhaps it would be more accurate to refer to priestly *legislation*.<sup>126</sup> Priestly laws are found in portions of *Exodus*, *Leviticus*, and *Numbers*, and are generally thought to have been written down between 450 and 400 B.C.E. By then, the kingdoms of Israel and Judah both had been over-run by other nations, and the Jewish people, along with their former homelands, were now encompassed within the Persian Empire. The Jerusalem temple, the Sabbath, and various other holy days or festivals<sup>127</sup> were Judaism's main religious institutions. After the Deuteronomic Reform, sacrifices could be offered to God or YHWH only at the Jerusalem temple. Such sacrifices were now presented by priests, rather than by lay individuals.

The PC was composed and promulgated under the auspices of the Jerusalem priesthood, and probably embodies earlier as well as more recent laws. Most of these laws had to do with sacrificial offerings, how they were to be presented, and the duties and prerogatives of priests. Priests were now differentiated from Levites. The latter — notwithstanding

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evidently is presumed to have made "the shameful charges against her" (*Deuteronomy* 22:17) mistakenly, but without malice. For further analysis of the *lex talionis* in *Deuteronomy* 19:16-21, see *infra* Part III.F.2. As to ANE parallels to the biblical law against perjury, see Good, *supra* note 4, at 968.

126. See generally PHILLIPS, *supra* note 36, at 183-89.

127. See T. H. GASTER, *FESTIVALS OF THE JEWISH YEAR* (Morrow Quill 1978).

provisions of the Deuteronomic Reform guaranteeing them equal standing with the Jerusalem priesthood<sup>128</sup> — were now relegated to the status of lower ranking temple functionaries or *assistants* to the priests. Some of the new capital laws found in the PC were intended to legitimate the superior status of priests and keep Levites and others in their place. Others dealt with Sabbath violations. Case law narratives purporting to date from early times were recorded in P traditions to illustrate such laws.

In contrast to RDC, the PC, as such, contains no provisions calling for the execution of those who worshiped other gods. Moreover, the PC includes only one law or set of capital laws pertaining to offenses proscribed by earlier laws.<sup>129</sup>

### a. Religious Practices

Most of the new capital laws found in the PC relate to religious institutions. Two or three had to do with protecting or preserving the exclusive pre-eminence of the Jerusalem priests and their proto-typical predecessors who, according to Priestly tradition, enjoyed similar status when officiating at the tabernacle or tent of meeting in ancient times.

#### i. Protecting Priestly Prerogatives

Although the text of *Numbers* 3:38 is phrased as narrative rather than law, its import is unmistakable:

And those to encamp before the tabernacle on the east, before the tent of meeting toward the sunrise, were Moses and Aaron and

128. See *Deuteronomy* 18:1-8.

129. See the law or laws regarding manslaughter and murder, *Numbers* 35:6-34, discussed *infra* text accompanying notes 136-45. But see the P account of God's warning to Noah, the forefather of all later humankind: "[f]or your lifeblood I will surely require a reckoning; of every beast I will require it and of man; of every man's brother I will require the life of man. Whoever sheds the blood of man, by man shall his blood be shed; for God made man in his own image." (*Genesis* 9:5-6). This "natural" or "divine" law evidently was thought to apply to all humankind, not only to Israel. See *Genesis* 9:5-6; see generally MEGIVERN, *supra* note 1, at 14-16. Megivern writes, "[i]n the history of Christian theological legitimation of the death penalty, *Genesis* 9:6 has probably been cited more frequently than any other text as basic proof of the propriety of humans executing fellow human malefactors." *Id.* at 15. He notes several problems with taking this text as justification for latter-day application of the death penalty, including its failure to distinguish between negligent and intentional homicide. He further observes:

Those who appeal to [*Genesis* 9] as their authority for blanket approval of the death penalty invariably narrow its application without further ado to the single [category] of first-degree murder. This kind of arbitrary restriction, devoid of any textual basis, is a good example of why such proof-texting has been thoroughly discredited.

*Id.* Modern interpreters who rely on *Genesis* 9 to legitimate capital punishment, like those who rely on *Genesis* 2:26 and 2:28 to justify (or lay blame for) latter-day environmental abuse, tend to ignore the rather substantial number of relevant biblical texts that follow these early chapters of *Genesis*.

his sons, having charge of the rites within the sanctuary, whatever had to be done for the people of Israel; and anyone else who came near was to be put to death.

According to P law, only priests ("Aaron" and his male descendants) were to enjoy the privileges and perquisites associated with performing the sacred ceremonies in the central sanctuary. Others who ventured to "come near" were to be put to death.<sup>130</sup>

The Priestly story as to the fates of the Levites, Korah, Abiram, and On, along with their supporters, found in *Numbers* 16, illustrates the point that Levites were supposed to be content with their subordinate status in the priestly hierarchy. According to *Numbers* 18:1-7, YHWH instructed Aaron — the fore-father of all priests, according to P tradition — that the tribe of Levi, that is, all Levites, should minister to him and his sons, but must keep their distance from the "vessels of the sanctuary," "the altar and all that is within the veil." Levites or any others besides priests who ventured to "come near" were to be put to death.<sup>131</sup>

## ii. Sabbath Violations

That Israelites and their farm animals should do no work on the Sabbath had been specified in three earlier codes,<sup>132</sup> but none of these codes had made non-compliance a criminal offense. Under the PC, however, working on the Sabbath became not only criminal, but a capital offense.<sup>133</sup> These laws do not say *how* Sabbath violators were to be executed. The kinds of activities that constituted work still remained to be defined.<sup>134</sup> A story in *Numbers* 15:32-36, probably part of the P narrative, addresses that matter. A man had been caught "gathering sticks on the Sabbath day." Because "it had not been made plain what should be done to him,"<sup>135</sup> the man was put "in custody," pending further disclosure of divine intent (*Numbers* 15:34). Whereupon, as the story goes, YHWH told Moses that the man was to be put to death by stoning at the hands of "all the

130. See also *Numbers* 1:51; 3:10; 18:7, and other texts relating to priestly practices discussed by Good, *supra* note 4, at 968-69.

131. See also *Numbers* 18:21-22, which warns that any Israelites other than priests or Levites who came near the tent of meeting must die. In P tradition, the tent of meeting or tabernacle was understood as the ancient prototype for the later Jerusalem temple where priests officiated after it was rebuilt in 515 B.C.E.

132. RD: *Exodus* 34:21; CC: *Exodus* 20:8-11; 23:12; D: *Deuteronomy* 5:12-15.

133. *Exodus* 31:12-17; 35:2-3.

134. That issue is considered later both in the New Testament and Talmud, especially the latter's tractate *Shabbath*. See, e.g., *Mark* 2:23-3:6; *Luke* 6:1-11; THE TALMUD, *Shabbath* I & II, tr. H. Freedman (Soncino Press 1938). See, e.g. *Shabbath* 11a-b (I: 41-45); 12a-b (I: 45-50); 365-37a (I: 169-73).

135. According to *Exodus* 35:3, a PC provision, *kindling a fire* on the Sabbath was prohibited; but there was no specific prohibition against gathering sticks preliminary to doing so.

congregation" or community, which then proceeded to "stone him to death with stones" as directed in *Numbers* 15:35-36.

*b. Community Inter-relations: Manslaughter and Murder*

The only capital law in the PC concerned with relations between or among members of the community is that dealing with manslaughter (or unintentional homicide) and murder, found in *Numbers* 35:6-34. The earlier version of this law in the RDC, *Deuteronomy* 19:4-13, has been considered previously.<sup>136</sup> Several aspects of this law will be considered later, for instance, due process arrangements and, particularly, cities of refuge. Three points stand out with respect to the definition of capital offenses in *Numbers* 35.

In the first place, this PC law provides a much more detailed inventory of indicia for intentional homicide or murder. The type of weapon used was considered dispositive: if one person fatally struck another "with an instrument of iron," or with a stone or wooden weapon of lethal weight or proportions ("by which a man may die"), the crime was murder, and the killer was to be put to death (*Numbers* 35:16-18). Use of such weapons raised an irrebuttable presumption of intent to kill.<sup>137</sup>

Intent, as well as *modus operandi*, was critical in other circumstances: "[i]f [one person] stabbed [another] from hatred, or hurled [something] at him, lying in wait, so that he died, or in enmity struck him down with his hand, so that he died, then he who struck the blow shall be put to death; he is a murderer." (*Numbers* 35:20-21.)

Additionally, this law gives a somewhat different set of illustrations as to actions deemed to constitute manslaughter or unintentional homicide:

But if he stabbed him suddenly without enmity, or hurled anything on him without lying in wait, or used a stone, by which a man may die, and without seeing him cast it upon him, so that he died, though he was not his enemy, and did not seek his harm . . . [the offense may be deemed manslaughter].

(*Numbers* 35:22-23).<sup>138</sup> This text does not make clear under what circumstances one person might stab another "suddenly without enmity."<sup>139</sup>

136. See *supra* text accompanying notes 111-14.

137. See FALK, LAW AND RELIGION, *supra* note 52, at 124. In effect, a person who struck another with such weapons would be strictly liable and subject to execution if the battery victim subsequently died. It is not clear whether such weapons might constitute sufficient circumstantial evidence to convict, or whether, in addition, it would have been necessary for two or more witnesses to have observed the fatal attack. See *infra*, text accompanying notes 281-84. In modern American jurisprudence, use of deadly weapons such as iron bars, baseball bats, bricks, or stones is considered evidence of intent to kill. See LAFAVE, *supra* note 38, at 661-63.

138. Cf. *Deuteronomy* 19:5.

139. Under *Exodus* 21:12-13, a man who fatally struck another might avoid the death penalty "if he did not lie in wait for [the victim], but God let him fall into his hand."

Here, as in *Exodus* 21:12-13, an impromptu rather than premeditated act is considered less serious than a fatal, willful, or intentional attack. Perhaps the act might have been provoked by a sudden argument or insult and carried out on the spur of the moment or in "heat of passion."<sup>140</sup> The hurled stone example clearly illustrates accidental (if reckless) conduct.<sup>141</sup> Such types of homicide evidently were considered less serious (or more excusable) and therefore not subject to the death penalty.

Finally, the *Numbers* law adds a new, though somewhat odd, provision. If a "manslayer," who has found sanctuary in a city of refuge and has been judged innocent as to intentional homicide, subsequently ventures beyond that city's boundaries any time before the death of the high priest then in office,<sup>142</sup> he may be killed by the victim's "avenger of blood" (*Numbers* 35:26-28).<sup>143</sup> But if the manslayer remains in the city of refuge until the high priest's death, he is then free to return to his home fully protected by law (*Numbers* 35:28).<sup>144</sup> The text does not explain why a person found innocent of murder must nevertheless be compelled to live confined in a city of refuge afterwards, at risk of permissible execution by his victim's "avenger" if he leaves that city; nor is it explained why the death of the high priest triggers his release from such constraint. Possibly, this arrangement was intended to appease victims' friends or relatives who might still harbor desire for vigilante self-help justice notwithstanding the verdict of innocence, while keeping adjudged manslaughterers safe from such would-be avengers through protective detention. By the time of the high priest's death, perhaps avengers' rage would have dissipated. Or, the high priest's death might have been regarded as a divine signal that the manslayer had served enough time.<sup>145</sup>

140. See LAFAYE, *supra* note 38, at 698-99, 703-17 (on common law manslaughter and second-degree murder).

141. Compare the flying axe head example in *Deuteronomy* 19:4-5.

142. Presumably, the high priest would be in office in Jerusalem.

143. See *infra* Part II.C.2. See also *infra* text accompanying notes 214-33 as to "the avenger of blood" and cities of refuge.

144. If "the avenger of blood" should kill him in these circumstances, the avenger would be "guilty of blood" (*Numbers* 35:27), and therefore subject to punishment, probably the death penalty. It is not clear whether *Numbers* 35:32 means that the manslayer must pay ransom after the death of the high priest in order to be free to leave, or simply that he could not obtain his freedom by paying ransom until the high priest had died. The latter meaning may be more likely.

145. Westbrook suggests another possibility: that here the term the "high priest" referred to the priest or chief priest in whichever cities the homicide occurred, and that such priest would have been ritually polluted if the manslayer returned during his lifetime. WESTBROOK, *STUDIES*, *supra* note 31, at 81. It is not apparent, however, what priests would be doing in cities other than Jerusalem a century or more after the Deuteronomic Reform; why any such priests would be designated as "the high priest;" or why the manslayer's return would not ritually pollute any successor local priest.

### 7. Capital Laws Continuing in Effect, Repealed, or Abandoned?

As has been seen, capital offenses are to be found in each of the main law codes. But how were these codes understood in relation to one another? Was each code intended to include only those capital laws thought to be in effect at the time it was promulgated? In that case, capital offenses articulated in earlier codes, but not included in the new ones would have been effectively repealed or considered no longer operative. Or were provisions in the later codes meant to supplement those set down in earlier codes? Since all of the first four, and possibly the first five, books of the Bible were preserved, edited, and published under priestly auspices, it would not be surprising if the P editors and publishers understood that capital laws contained in the earlier codes remained in effect, along with those added in the PC. On the other hand, the P editors evidently were interested in preserving old traditions, and might have included earlier laws simply out of respect for their antiquity, without intending them to remain binding in actual practice. Likewise, we cannot be certain regarding the extent to which the later codes were meant to replace, or only to supplement laws and codes promulgated or operative in still earlier times. Some laws may indeed have fallen into disuse or otherwise been effectively repealed. At all events, it may be instructive to conclude this section on capital offenses by tracking particular laws as they appear in, or were omitted from, subsequent codes.

Comparison of the capital laws found in each of the codes indicates that, in many instances, the new laws were intended to amend or replace earlier provisions. Surprisingly, few capital laws detailed in one code are repeated in later codes. Arguably, such laws could, in effect, have been considered abandoned. On the other hand, each code includes some number of new capital laws. Consequently, it cannot accurately be said that the concept of capital punishment as such was abandoned in biblical times. Several laws, however, do appear to mitigate the severity of earlier provisions.

Only one of all the capital offenses, murder, appears in as many as three codes: the CC (*Exodus* 21:12-13); the RDC (*Deuteronomy* 19:4-13); and the PC (*Numbers* 35:6-34). In each instance, these laws undertake to distinguish between murder and some less serious type of homicide.<sup>146</sup> Each of the later versions modifies or adds to the earlier formulation(s). For instance, both *Deuteronomy* 19:4-13 and *Numbers* 35:6-34 distinguish between intentional murder and manslaughter and make clear that the latter is not a capital offense.<sup>147</sup> It appears likely that these later versions were intended to supercede or replace the earliest.

146. Compare *Leviticus* 24:17, 21 in H, which does not distinguish murder from manslaughter, but simply makes it a capital offense if a person "kills a man."

147. See *supra* text accompanying notes 38-42, 111-14, and 136-45.

Only five other capital laws are found in as many as two codes. One is the provision against kidnapping in CC (*Exodus* 21:16) and D (*Deuteronomy* 24:7). The later, Deuteronomic law provides for capital punishment only if the kidnapped victim was an Israelite, and if the kidnapper has treated his victim as a slave or sold him. Here again, the later version evidently qualifies the earlier.<sup>148</sup> Another is the offense of cursing either parent, found in the CC (*Exodus* 21:17) and H (*Leviticus* 20:9), both stated in similar terms.<sup>149</sup> The third is the prohibition against "buggery" or sexual intercourse with an animal. This is stated tersely in the CC (*Exodus* 22:19) and then re-stated in H, in somewhat qualified terms (*Leviticus* 20:15-16).<sup>150</sup> The fourth is adultery with a married woman, found in both D (*Deuteronomy* 22:22) and H (*Leviticus* 20:10). Finally, both the CC (*Exodus* 22:20) and the RDC (*Deuteronomy* 17:2-7) include provisions that make offering sacrifices to and worshiping and serving other gods capital offenses. Kidnapping is not mentioned in H, RDC, or PC; and neither the laws against cursing parents nor those against buggery with beasts are repeated in D, RDC, or the PC. Adultery is not included in the two latest codes, RDC and PC. However, the relatively late stories of Susanna<sup>151</sup> and "the woman taken in adultery" (*John* 8:3-11) suggest that adultery may have continued to be regarded as a capital offense in the late biblical period.

Three other laws found in early codes appear to have been complemented or qualified in later codes. The Covenant Code condemns sorceresses to death (*Exodus* 22:18). Later, H provides for the execution of mediums or wizards, whether male or female (*Leviticus* 20:27). Evidently, these laws were not always enforced in practice.<sup>152</sup> Nothing is said about sorceresses, mediums, or wizards in D, or in the later RDC, or the PC. The Covenant Code made it a capital offense to offer sacrifices to other gods (*Exodus* 22:20). Similarly, but more broadly, the RDC prescribed the death penalty for individuals who worshiped or served other gods (*Deuteronomy* 17:2-7); this law would apply whether or not such worshipers offered sacrifices. Such laws are not to be found in D or H, and were not repeated in the PC. Finally, D made it a capital offense for a man to have sexual intercourse with a woman betrothed to another man within city limits (*Deuteronomy* 22:23-27). Here, both the man and the woman

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148. See *supra* text accompanying notes 57-59, and Part II.A.3.a. of this article.

149. Compare *Proverbs* 20:20, which may or may not imply that the offender will be subject to capital punishment: "[i]f one curses his father or his mother his lamp will be put out in utter darkness." This text could be read to mean that those who curse their parents need not be put to death, but would instead experience divine retribution.

150. See *supra* text accompanying notes 60, 96.

151. See *Susanna* v. 41, and *infra* Part III.C.9.

152. See 1 *Samuel* 28:3-25 (Saul had *deported* other wizards and mediums and consulted the medium at Endor). See also *Ezekiel* 13:18-23 (which seems to say that *YHWH* would punish female occult practitioners).

were to be put to death.<sup>153</sup> The Holiness Code subsequently added an exception in the case of a betrothed woman who was a slave. In that circumstance, neither the woman nor the man would be subject to the death penalty (*Leviticus* 19:20-22). This H law evidently presupposes that the provisions of *Deuteronomy* 22:23-27 were otherwise still operative.

All other capital offenses are found only once: in one code or another. This fact, as such, does not tell us whether such laws were still considered to apply in later times. Some appear to have been abandoned or mitigated. Others may have remained in effect.

The following capital offenses articulated in CC are not repeated in any later codes: children striking either parent (*Exodus* 21:15); wrestling males inadvertently causing the death of a pregnant woman (*Exodus* 21:22-24); and failure to restrain an ox previously known to gore that then kills someone (*Exodus* 21:28-32).<sup>154</sup> From *Proverbs* 19:26, it appears that a son who struck (or "did violence") to his father in later times, though causing "shame and reproach," would not be put to death. Possibly these laws, unique to the CC, fell into abeyance or were otherwise mitigated in practice.

The Deuteronomic Code mandates the death penalty for two categories of offenders not mentioned in any other code: the ungovernable son (*Deuteronomy* 21:18-21); and the new bride whose husband accuses her of lacking "tokens of virginity" when such "tokens" are not subsequently produced (*Deuteronomy* 22:13-21).<sup>155</sup> *Proverbs* 19:26 suggests that ungovernable sons may not have been executed in later times. The laws and underlying presumptions of guilt concerning tokens of virginity (*Deuteronomy* 22:13-21) and adultery with betrothed virgins in cities (*Deuteronomy* 22:23-24) readily could have proven impractical as well as morally objectionable. From the facts that no biblical narratives report instances when these laws were enforced and the absence of such laws in the later codes, it might be concluded that these laws had been abandoned or tacitly repealed.

Five new and unique types of capital offenses appear only in H. One concerns the practice of giving (or sacrificing) children to Molech (*Leviticus* 20:1-5). Several types of incestuous relationships are condemned (*Leviticus* 20:10-12, 14). Males who engage in homosexual intercourse are to be put to death (*Leviticus* 20:13). A priest's daughter

153. See *supra* text preceding and accompanying notes 74-76, which describes different presumptions depending on whether the encounter occurs in urban or rural areas. The Gospel of Matthew's account of Joseph's reaction upon discovering that Mary, his betrothed, was pregnant, could suggest that by late biblical times, this kind of offense was no longer considered capital: "Joseph, being a just man and unwilling to put her to shame, resolved to divorce her quietly." (*Matthew* 1:18-19).

154. See *supra* text accompanying notes 46-50.

155. See *supra* text accompanying notes 66-70 and 72, and *infra* text accompanying notes 270-73.



who practices harlotry is to be executed (*Leviticus* 21:9).<sup>156</sup> Finally, blaspheming "the Name" is made punishable by death (*Leviticus* 24:10-23). Again, there are no subsequent biblical cases of execution for these offenses. That such laws are not found in the RDC or the PC may or may not mean that they were abandoned in later times.

The revised Deuteronomic Code also promulgates six unique capital laws. Three of these concern enticing Israelites to worship other gods (*Deuteronomy* 13:1-5, 6-11, and 12-18). Another concerns false prophets and prophets who prophesy in the name of other gods (*Deuteronomy* 18:20-22). The fifth makes "presumptuous" refusal to obey a court order a capital offense (*Deuteronomy* 17:12). And the sixth prescribes the death penalty for any malicious adverse witness who offers false testimony in a capital case (*Deuteronomy*. 19:16-21).

Enticing others to commit apostasy and allotheism can be seen as extensions of the capital offense of sacrificing to other gods (*Exodus* 22:20; *Deuteronomy* 17:2-7). Concern about false prophets also was expressed by Jeremiah and Ezekiel,<sup>157</sup> whose early careers may have been contemporary with the Deuteronomic Reform. Earlier biblical tradition also reported favorably the execution of prophets (and priests) who served and advocated worship of other gods.<sup>158</sup> On the other hand, there was no biblical precedent for killing YHWH prophets who prophesied falsely. Their fate was to be left to YHWH's judgment.<sup>159</sup> The provision governing prophets prophesying on behalf of other gods may have put prior common law into statutory form. The law regarding failure to obey court orders also may have derived from earlier practice or case law. If the late biblical story of Susanna is taken as evidence, the provision as to malicious, false witnesses remained in effect throughout the remainder of the biblical period.<sup>160</sup> None of these six new RDC laws is repeated in the PC.

As noted, homicide is the only earlier capital offense included in the PC.<sup>161</sup> The new capital laws found in the PC concerned working on the Sabbath (*Exodus* 35:2-3; *Numbers* 15:32-36); Levites encroaching on the prerogatives of priests (*Numbers* 3:38; 16:1-49); and all other persons

156. It is not certain whether this provision was meant to apply only if the woman became a professional prostitute, or whether it might also apply if, while unmarried, she had sexual intercourse with a male. Compare *Genesis* 38:24 where, in an early tradition, Tamar, a widow who became pregnant after her husband's death was accused of harlotry, here assumed to have been a capital offense. But see Westbrook, *supra* note 73, at 572 (suggesting that Tamar's father-in-law, Judah, representing his minor son to whom she was tacitly betrothed under the law or practice of levirate marriage, accused her of adultery).

157. See, e.g., *Jeremiah* 23:9-40; *Ezekiel* 13:1-16.

158. 1 *Kings* 18:40. See also the fate of the priests of Bel in the late biblical story of *Bel and the Dragon*. Here, however, the Persian monarch executes the priests in accordance with his own authority (vv. 8, 21-22), not under Israelite law.

159. See, e.g., *Micah* 3:5-12; *Jeremiah* 28:12-17.

160. See *Susanna* vv. 61-62.

161. See *supra* text accompanying notes 136-41.

except priests coming too close to the tabernacle's (or Jerusalem temple's) sacred precincts (*Numbers* 8:7, 22).

It remains unclear whether earlier capital laws omitted from later codes were thought no longer in effect, or whether, from the standpoint of later biblical jurisprudence, all capital laws were thought to remain operative. In several instances, the later laws seem to have been meant to modify or qualify earlier ones. But in other instances, the later laws seem to presuppose that earlier ones remained in effect. If at any particular time only the capital offenses contained in the latest code were applicable, less than a dozen such offenses then would have been "on the books." But if the capital offenses contained in the codes were cumulative, that is, retained and added to by the promulgation of each new code, the total such offenses would have come to nearly fifty as of the final compilation of the laws found in *Exodus* through *Deuteronomy*.

### B. Methods of Execution

As has been seen, various laws found in all major biblical codifications required the death penalty for certain offenses.<sup>162</sup> The majority of such laws leave the mode of execution open, stating simply, in effect, that the offender is to die or be put to death.<sup>163</sup> The CC is entirely silent as to the matter. Laws found in other codes sometimes specified the means or method to be followed. The usual method indicated is stoning. Burning is prescribed in a few instances, and "the sword" once. Whether other methods of execution were to be employed is unclear.<sup>164</sup>

#### 1. Stoning

Stoning is the most commonly indicated form of capital punishment. This punishment is applied in RDC to those found guilty of worshipping or enticing others to worship other gods (*Deuteronomy* 13:6-11; 17:2-7), and in D in the case of an ungovernable son (*Deuteronomy* 21:21) and certain types of pre- or extra-marital sexual intercourse (*Deuteronomy* 22:21, 23-24).<sup>165</sup> The Holiness Code provides for stoning those found to have given

162. See generally DE VAUX, *supra* note 30, at 159-60.

163. See, e.g., *Exodus* 21:12, 14, 16, 17; 22:18 ("shall not permit . . . to live"), 19, 20 ("shall be utterly destroyed"); *Deuteronomy* 17:12; 22:22; *Leviticus* 20:9, 10, 11, 12, 13, 15-16; 24:17, 21; *Numbers* 3:38; 18:3, 7; 35:17-21.

164. Interpreters have suggested that certain other methods of execution were mandated in biblical law, including decapitation and strangulation. See S. MENDELSON, *THE CRIMINAL JURISPRUDENCE OF THE ANCIENT HEBREWS* 44-52 (Hermon Press 2d ed. 1968), cited in MEGIVERN, *supra* note 1, at 10. This language is quoted without attribution by STEFFEN, *supra* note 3, at 147. Biblical evidence for execution by decapitation and strangulation is notable by its absence.

165. Cf. *John* 8:1-11 (as to adultery). No biblical law calls for punishing adultery by stoning. Executing a woman by stoning for purported sexual impropriety has occurred under Islamic law in modern Nigeria. See Shannon V. Barrow, *Nigerian Justice: Death-by-*

(that is, sacrificed) their children to Molech (*Leviticus* 20:1-2), those who were mediums or wizards (*Leviticus* 20:27), and those who have "blasphemed the Name" (*Leviticus* 24:10-16, 23). According to *Numbers* 15:32-36, part of the PC, Sabbath violators were to be stoned to death. Under relatively early biblical and/or Ancient Near Eastern common law, stoning was considered an appropriate punishment for treason.<sup>166</sup>

## 2. Burning

Burning is prescribed in a few instances. The earliest, perhaps, is reflected in *Genesis* 38:24 when Judah, learning that Tamar, his widowed daughter-in-law, was pregnant, ordered her to be brought out and burned. Tamar was subsequently spared and vindicated when she proved that Judah himself had gotten her pregnant (*Genesis* 38:25-26). This scene not only represents the earliest version of a biblical trial, but one at which the outcome turned on the introduction of physical evidence.<sup>167</sup> The Tamar story was not likely meant to require burning as punishment in subsequent cases, and necessarily purports to describe practice that was obtained long before the time of Moses and YHWH's giving Israel the law in the wilderness era. The Holiness Code prescribes burning as the form of death penalty for two types of sexual offenses: when a man marries and/or has sexual intercourse with both his wife and her mother (*Leviticus* 20:14); and when a priest's daughter "plays the harlot" (*Leviticus* 21:9). Burning is also ordained against allotheistic cities where, however, the inhabitants first were to be put to death by "the sword" (*Deuteronomy* 13:12-18).

## 3. The "Sword"

According to *Deuteronomy* 13:12-18, if the inhabitants of an Israelite city were enticed to "go and serve other gods," they (and their cattle) were to be put to the sword and everything in that city then burned "as a whole burnt offering to YHWH." This is the only text where "the sword" is to be applied as an instrument of capital punishment.<sup>168</sup> This text, like *Deuteronomy* 13:6-11 and 17:2-7, under which allotheism was punished by

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*Stoning Sentence Reveals Empty Promises to the State and the International Community*, 17 EMORY INT'L L. REV. 1203 (2003).

166. 1 *Kings* 21:8-14. See Weingreen, *infra* note 247.

167. See *infra* note 238 and Part III.C.1. of this article. As to Tamar's purported offense, see *supra* note 156.

168. But see *Susanna* vv. 55 and 59, where, in the course of badgering the wicked witnesses, Daniel intimates that they will die by the sword (or other sharp instrument) for giving false testimony. Interpreters sometimes suggest that biblical methods of execution included beheading, citing, for example, 2 *Kings* 6:31-32 and 2 *Samuel* 16:9. These texts, however, describe individual acts of violence, rather than punishments for violating particular laws. In *Numbers* 25:6-8, it is said that a certain Phineas ran a spear through an Israelite man and his Midianite female companion. It is not said that this was an official execution, but the story commends Phineas for his zeal, in consequence of which his descendants were ordained to a "perpetual priesthood" (*Numbers* 25:10-13).

stoning, is part of the RDC which may reflect the concerns or ideology of the seventh century B.C.E. Deuteronomic Reform. These reformers took very seriously the critical importance of worshipping YHWH alone. Thus, these capital laws may be understood better as symbolizing that concern, rather than as laws that actually had been promulgated and enforced in earlier centuries.

#### 4. Under "the Wheel" and Hanging

Two other forms of possible capital punishment are mentioned in biblical texts. The more enigmatic is mentioned in *Proverbs* 20:26: "[a] wise king winnows the wicked, and drives the wheel over them." This *may* refer to an established means of executing offenders, but it is not otherwise attested in biblical tradition. Alternately, "driving the wheel over" the wicked may merely be a metaphor for subjecting such persons to royal authority. There are no reported instances of execution in this manner.

The other method mentioned is hanging. *Deuteronomy* 21:22-23 cautions that if a man has committed a capital crime *and* is put to death, *and* hung on a tree, his body shall not remain on the tree all night, "for a hanged man is accursed by God." It is not entirely clear whether hanging is understood here to be a method of execution, or as something that is done to the offender's body after he has been executed otherwise. *Numbers* 25:1-5 recounts that following Israel's apostasy at Peor, YHWH told Moses to "hang" the Israelite chiefs "in the sun before [YHWH]," as well as to "slay" the offending Israelite males. Two texts in *Joshua* report the hanging of enemy kings captured in battle. In one instance, *Joshua* 8:29, the king of Ai was executed by hanging. In the other, five Amorite or Canaanite kings were hung, but only after they had been put to death (*Joshua* 10:16-27). Neither the Numbers nor either of these Joshua texts involves execution of an Israelite or violation of Israelite law.<sup>169</sup> Later, David, then king only of Judah, ordered executed the two men who had assassinated Ishbosheth, the titular king of Israel. Apparently, they were first killed and then hanged (2 *Samuel* 4:11-12). It therefore remains uncertain whether hanging was an approved method of capital punishment in biblical tradition. No biblical *law* calls for execution by hanging.

#### C. Executioners

The Covenant Code is silent as to who should carry out the death penalty. None of the later codes suggests that there was any formal office

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169. 2 *Samuel* 21:1-9 reports that David handed over seven of Saul's sons to "the Gibeonites" who executed them by hanging. But according to 2 *Samuel* 21:2, the Gibeonites were Amorites, not Israelites, so it is not clear that these executions took place under Israelite law. de Vaux suggests that in both *Numbers* 25 and 2 *Samuel* 21, those "hung" had previously been executed. DE VAUX, *supra* note 30, at 159. *Esther* 7:10; 8:7; 9:13-14, 25 report, somewhat redundantly, the "Jews" hanging the despicable Haman, their alien (Agagite) enemy, and his sons under *Persian* royal authority.

of executioner in biblical times. Nor were any other institutional authorities appointed to so function. Instead, executions were performed either by the "congregation" or "people" as a whole, sometimes with accusing witnesses leading the way; or else, in certain circumstances, by victims' relatives or other apparently self-selected persons in the role of "the avenger" or "the avenger of blood."

### *1. Execution by the Community*

Portions of D, H, and particularly, the RDC command that executions for certain offenses be carried out by "the people" or "congregation" of Israel.<sup>170</sup> The Priestly Code, on the other hand, contains no such provisions.

A law found in the RDC declared that if even one's dearest friend or family member should seek to entice a person secretly to worship other gods, one should take the leading role in implementing the death penalty: "[y]our hand shall be first against him to put him to death, and afterwards the hands of all the people. You shall stone him to death." (*Deuteronomy* 13:9-10).<sup>171</sup> In effect, the prosecuting witness, reluctant though he may be, was to cast the first stone. The expression "all the people" in 13:9 probably refers to persons (perhaps adults or males) in the local community or neighborhood, rather than to all Israel. All Israel, of course, could not have gathered together in one place for such occasions.

Another RDC law, *Deuteronomy* 17:2-7, provides for the execution of any man or woman in any Israelite town who has worshiped and served other gods or celestial beings.<sup>172</sup> Here, specifically, it is required that adverse witnesses themselves throw the first stone: "[t]he hand of the witnesses shall be first against him to put him to death, and afterwards the hand of all the people." (*Deuteronomy* 17:7). The expression "all the people" in these texts is not gender specific. Whether custom or common law limited those who threw stones as executioners to adult males cannot be determined on the basis of biblical evidence.<sup>173</sup> By way of contrast, *Deuteronomy* 21:21 provides that an ungovernable son is to be stoned to death by "all the men of the city." The term translated here as "men"

170. Compare the modern democratic idea in certain United States jurisdictions, such as California, where "the people" are the prosecuting parties when criminal charges are brought against an indicted offender.

171. See *Deuteronomy* 13:11, which explains the rationale for such harsh action: "[a]nd all Israel shall hear, and fear, and never again do any such wickedness among you."

172. In its terms, this law does not seem to apply to allotheism in rural settings. Possibly, that offense was deemed more dangerous in towns because there, given relatively larger nearby populations, it would be more likely that others might be led astray.

173. No biblical law expressly requires that only adult *males* could testify or serve as witnesses. Two laws do provide that women (mothers) might testify or offer evidence: *Deuteronomy* 21:18-20 and 22:15. See also *Genesis* 38:25; 1 *Kings* 3:16-27 (where women speak on their own behalf).

probably was gender specific. The same is true of *Deuteronomy* 22:21, where "the men" of the city are to stone to death the young bride whose parents could not produce the requisite exculpatory evidence ("tokens") of her virginity.

Two laws in H likewise call on the people generally to carry out executions. In *Leviticus* 20:1-5, "the people of the land" are instructed to stone to death any Israelite or resident alien male who gives (or sacrifices) his children to Molech. Here again, both men and women *may* have been assigned the role of executioners. Presumably only local "people of the land" would function as executioners. In the case of the man of mixed ancestry who had "blasphemed the Name," (*Leviticus* 24:10-16), the witnesses, that is, "all who [had] heard him," were to "lay their hands upon his head," after which "all the congregation" or assembly stoned the offender. Here, the witnesses lay their hands on the head of the accused, rather than cast the first stones.<sup>174</sup> Perhaps, by doing so, they were understood to affirm their responsibility for the testimony they gave, and implicitly to vouch for its truthfulness.<sup>175</sup>

In all these instances, where "the people" or local community acts as executioner, each thereby is called on to take partial responsibility for the offender's death, also, tacitly signifying their assent to the verdict. As with the latter-day practice of execution by firing squad, each also was able to avoid bearing full responsibility for the accused's death, a matter that might provide some moral comfort in case of doubt as to the verdict or the matter of taking another's life.<sup>176</sup>

## 2. The "Avenger" or "Avenger of Blood"

Biblical laws calling for the death of persons who have committed homicide usually do not specify who is to serve as executioner.<sup>177</sup> None of the laws calling for community execution applies in homicide cases. Two laws indicate that responsibility for executing those who have committed homicide is left to a single individual: "the avenger" (*ha go'el*) or "the avenger of blood" (*ha go'el ha dam*). These laws are found at *Deuteronomy* 19:1-13 and *Numbers* 35:9-28. Neither of these laws identifies "the avenger of blood"<sup>178</sup> nor explicitly authorizes such persons

174. In another biblical trial scene, two wicked elders likewise lay their hands upon the head of the accused (*Susanna* v. 34), prior to giving their (false) testimony against her charging a capital offense.

175. Necessarily, witnesses did not take oaths on copies of the Bible in that period.

176. See PETER L. BERGER, *INVITATION TO SOCIOLOGY: A HUMANISTIC PERSPECTIVE* 160-61 (Anchor Books, Doubleday & Co. 1963) (describing attempted avoidance of responsibility for carrying out executions in modern times by dispersing related tasks among multiple parties).

177. See *Exodus* 21:12-14, 22-24; *Leviticus* 24:17, 21.

178. The term *ha go'el* is sometimes translated also as "next of kin" or "redeemer." It may have been understood that the avenger or avenger of blood would usually be the

to act in that capacity.<sup>179</sup> Instead, these laws apparently assume that someone will voluntarily take on that role.<sup>180</sup> Both laws apply in the setting when a person who has killed someone seeks sanctuary in a "city of refuge."<sup>181</sup> And both involve the distinction between murder and manslaughter.

*Deuteronomy* 19:4-13 distinguishes between manslaughter and murder with malice aforethought. A person who has accidentally and unintentionally killed another may flee to one of the refuge cities to escape "the avenger of blood" who was expected to "pursue the manslayer in hot anger." Once there, the manslayer could find protection, whether permanently, or pending trial (*Deuteronomy* 19:4-6). On the other hand, in case a *murderer* seeks refuge in such a city, its elders were to "fetch him from there, and hand him over to the avenger of blood, so that he may die." (*Deuteronomy* 19:11-12). In effect, this provision harnesses a private party's desire for revenge by limiting its exercise to cases where, under the law, and, presumably, as judged by the community's elders, the person who committed the homicide deserved to die.<sup>182</sup>

*Numbers* 35:9-20, written down perhaps 200 years later during the Persian period, likewise distinguishes between unintentional manslaughter and murder, and similarly provides for cities of refuge. As in *Deuteronomy* 19:11-13, it seems to have been understood that a person who had committed homicide might seek temporary protection from "the avenger of blood" in a city of refuge. The *Numbers* law expressly states that the offender might find refuge "from the avenger" in such a city "until he stands before the congregation for judgment" (*Numbers* 35:12). "The congregation" would then determine if the manslayer was indeed innocent of intentional homicide. In these proceedings, the "avenger of blood" would act as prosecuting attorney (*Numbers* 35:24). It is not altogether clear whether such proceedings would take place where the homicide occurred, or at the city of refuge. If the "congregation" found the accused innocent, it would thereby "rescue [him] from the hand of the avenger of blood," and afterwards "restore him to the city of refuge to which he had

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victim's nearest male kinsman. As to the *go'el* as avenger of blood in these laws, possibly in certain biblical narratives, and in other ANE laws, see Good, *supra* note 4, at 951-52. *But see* AARON M. SCHREIBER, *JEWISH LAW AND DECISION-MAKING. A STUDY THROUGH TIME* 54 (Temple Univ. Press 1979) (raising the question "[w]hat happens if the victim has no relative who can act as 'redeemer [avenger] of blood,' or if the relatives are unable or unwilling to carry out the killing?").

179. See also *Joshua* 20:3, 5.

180. Cf. *Genesis* 4:14-15 (where Cain expresses concern lest someone pursue and kill him to avenge Abel's death). The text does not state explicitly whether this potential avenger was expected to be one of Abel's relatives. YHWH "marked" Cain in order to warn off any such avenger.

181. As to places or cities of refuge, see *infra* Part III.B. of this article.

182. The text does not, however, indicate whether, when, or how the elders would proceed in order to distinguish the manslayer from the murderer. See *infra*, Part III.D.

fled" (*Numbers* 35:25).<sup>183</sup> Though exonerated as to murder, the manslayer nevertheless would be required to remain at this city "until the death of the high priest" (*Numbers* 35:25, 28). Should he stray beyond that city's boundaries, "the avenger of blood" might kill him with impunity (*Numbers* 35:26-27).<sup>184</sup>

*Numbers* 35 makes no provision for restraining "the avenger of blood" in a case of murder. Instead, "the avenger of blood shall himself put the murderer to death, when he meets him" (*Numbers* 35:19, 21b). The law does not indicate who, if anyone, other than "the avenger of blood," would determine whether all the elements constituting murder were present, or what procedures would be followed in this connection. This law implicitly delegated the role of executioner to that avenger, who, presumably, would have been a blood relative or close friend of the murder victim. There is no mention of any "avenger of blood" in the CC or the early core of D. If *Deuteronomy* 19:4-13 was part of the Deuteronomic reform legislation, the provisions found in *Deuteronomy* 19 and *Numbers* 35 relating to "the avenger of blood" may have been relatively late additions to biblical homicide jurisprudence.

#### D. Rationales: Why Capital Punishment?

Most of the texts that offer a rationale or justification for capital punishment are to be found in D and the RDC. The CC provides no rationales or explanation whatsoever. The Holiness Code does so only once; and the PC likewise presents such justification in only one instance. Taken together, the laws embodied in these codes articulate three distinct rationales or purposes: (1) vindicating the image of God inherent in human life, (2) purifying the community or the land by disabling or removing offenders, and (3) deterring others from committing like offenses.

##### 1. Vindicating the Image of God

The flood narrative suggests a distinctive rationale for the death penalty in homicide cases. After the flood was over, God tells Noah: "[f]or your lifeblood I will surely require a reckoning; of every beast I will require it and of man; of every man's brother I will require the life of man. Whoever sheds the blood of man, by man shall his blood be shed; for God made man in his own image." (*Genesis* 9:5-6).

Here the rationale is, in effect, that because a human being is in some sense in God's image, as well as made by God, it is an act of sacrilege to kill a human, an act so heinous that anyone (even a beast) who fails to

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183. This language suggests that the trial would be held somewhere other than at this city of refuge.

184. See *supra* text accompanying notes 142-45.



respect that image deserves to die.<sup>185</sup> Implicitly, also, this rationale suggests that every man is a "brother" of every other man and should therefore respect the other's life.<sup>186</sup> *Genesis* 9:5-6 does not specifically distinguish between manslaughter and murder.<sup>187</sup> It would be tempting to read "intentionally" before "sheds" or "innocent" before "blood of man," so as to reconcile this text with the distinction elaborated in *Numbers* 35:9-34. Such distinction *may* have been intended in *Genesis* 9, which quite possibly, like *Numbers* 35, represents P narrative. On the other hand, if *Genesis* 9 represents more ancient tradition,<sup>188</sup> it could be that the distinction between manslaughter and murder made in *Deuteronomy* 19:4-13 and *Numbers* 35:9-34 was meant to delimit the broad scope of *Genesis* 9:5-6 (and also, perhaps that of *Leviticus* 24:17, 21b) in the same way that a similar distinction set out in *Exodus* 21:13-14 qualifies *Exodus* 21:12 which reads, "[w]hoever strikes a man so that he dies shall be put to death."

## 2. *Purging the Land and Israel by Disabling or Removing Offenders*

The Priestly Code provides a somewhat different justification for the death penalty. *Numbers* 35:31-32 declares that neither a murderer nor a manslayer sheltered in a city of refuge may be ransomed. Prior to this law, perhaps, ransom was allowed: by paying ransom, murderers might spare their lives, and manslaughter (those who have fled to a city of refuge) might "return to dwell in the land before the death of the high priest."<sup>189</sup> Such ransom no longer would be allowed:

You shall not thus pollute the land . . . and no expiation can be made for the land, for the blood that is shed in it, except by the blood of him who shed it. You shall not defile the land in which you live, in the midst of which I dwell; for I [YHWH] dwell in the midst of the people of Israel.

(*Numbers* 35:33-34).

Here the ultimate rationale for executing (or allowing the avenger of blood to execute) a murderer is to prevent pollution of the land, which in

185. IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT 158 (Humanities Press Int'l 1989). See Norman P. Dake, *Who Deserves to Live? Who Deserves to Die? Reflections on Capital Punishment*, in CAPITAL PUNISHMENT: A READER, *supra* note 1, at 162. See also *supra* note 129.

186. Cf. the Cain/Abel story in *Genesis* 4:1-16. See generally MEGIVERN, *supra* note 1, at 14-16. Conversely, both the "image of God" and "every man a brother" rationales could equally justify refusal to execute persons who have committed homicide. See SCHREIBER, *supra* note 178, at 42: "[d]oes this supply the reason for the extremely severe punishment provided for murder? Could it, on the other hand, be utilized to protect the accused, who was also created in God's image?" See also Blidstein, *supra* note 6, at 113.

187. See also *Leviticus* 24:17, 21b.

188. JOSEPH BLENKINSOPP, WISDOM AND LAW IN THE OLD TESTAMENT: THE ORDERING OF LIFE IN ISRAEL AND EARLY JUDAISM 92-93 (Oxford Univ. Press, rev. ed., 1995).

189. *Numbers* 35:31-32.

turn would be an affront to YHWH.<sup>190</sup> Since the only expiation for shedding (innocent) blood is the blood of the murderer, the murderer's blood must be shed. It is unclear how this rationale relates to the requirement that the manslayer remain confined within his city of refuge until the death of the high priest.<sup>191</sup>

A somewhat similar theory for applying the death penalty in a murder case is indicated in *Deuteronomy* 19:13: "[y]ou shall purge the guilt of innocent blood<sup>192</sup> from Israel, so that it may be well with you." Again we see here, implicitly, the idea that shedding innocent blood pollutes the land, which can then be purified only by shedding the blood of the murderer. The one, so to speak, counteracts the other. *Deuteronomy* 21:1-9 casts some additional light on this matter. This text sets out what is to be done if a person has been murdered in open country, but the murderer cannot be identified.<sup>193</sup> The elders of the nearest city are to perform a ceremony involving breaking the neck of a young heifer in a particular kind of setting, and then reciting a statement asking YHWH to forgive "the guilt of innocent blood" that otherwise would be imputed to the people of Israel (*Deuteronomy* 21:7-8). This ceremony would thereby "purge the guilt of innocent blood" from Israel's midst (*Deuteronomy* 21:9). One way or the other, Israel would be absolved from "the guilt of innocent blood," and thereby, it was to be hoped, spared any future tangible expression of YHWH's disfavor.

A similar rationale for the death penalty is repeated in both D and RDC laws with respect to a number of capital offenses: "[s]o shall you purge the evil from your midst" or "from Israel."<sup>194</sup> This rationale appears in explanation for the death penalty in the following instances: prophets or "dreamers" who urge Israelites to go and serve other gods (*Deuteronomy* 13:5); urban persons who have gone, served, and worshiped other gods (*Deuteronomy* 17:7); persons who fail to obey judicial verdicts (*Deuteronomy* 17:12); malicious witnesses who falsely charge others with capital offenses (*Deuteronomy* 19:19); ungovernable sons (*Deuteronomy*

190. Cf. *Deuteronomy* 23:12-14.

191. See *Numbers* 35:31-32, and *supra* notes 144-45 and accompanying text. Possibly this requirement reflects an underlying belief that manslaughter must make expiation for the blood they have shed, even though they did not intend to kill their victims. In such cases, somehow, keeping manslaughter in custody would be enough to prevent pollution of the land. We see here a mitigation of the unqualified requirement of *Genesis* 9:6, "[w]hoever sheds the blood of man, by man shall his blood be shed; for God made man in his own image." There, no distinction is made between manslayer and murderer; both were to be put to death. See *Genesis* 9:5-6, and MEGIVERN, *supra* note 129.

192. Alternate translation: "the blood of the innocent."

193. Strangely, there is no corresponding provision in case the murder took place within a city. Perhaps it was assumed that in cities, murderers always would be found out.

194. Compare *Leviticus* 20:14, which justifies application of the death penalty in the case of a man who "takes a wife and her mother also" as a way of purifying the community: "[t]hat there may be no wickedness among you."

21:21); adulterers (*Deuteronomy* 22:22); betrothed virgins found lying with another man inside city limits (*Deuteronomy* 22:24); and certain kinds of kidnapers (*Deuteronomy* 24:7). Here the evident intent is to remove persons who have committed serious offenses from the community. In effect, capital punishment would permanently *disable* the offenders, who would thus never re-commit these offenses. It also seems to have been understood that doing so would somehow remove or cancel out the evil deeds they had done as well. Implicitly, of course, executing such offenders could have a deterrent effect on others contemplating similar illicit activities.

### 3. Deterrence

Several laws in D and the RDC explicitly include a statement of intent to *deter* others from committing similar offenses in future. Thus with respect to executing (by stoning) close family members or friends who promote allotheism it is said: "[a]nd all Israel shall hear, and fear, and never again do any such wickedness as this among you." (*Deuteronomy* 13:11). So also in the case of persons executed for acting "presumptuously" by disobeying court orders: "[a]nd all the people shall hear, and fear, and not act presumptuously again." (*Deuteronomy* 17:13). And again in the case of those punished under the *lex talionis* for maliciously offering false, incriminating testimony: "[a]nd the rest shall hear, and fear, and shall never again commit any such evil among you." (*Deuteronomy* 19:20). Finally, as to the execution of an ungovernable son: "[a]nd all Israel shall hear, and fear." (*Deuteronomy* 21:21). *Deuteronomy* 21:22-23 refers to the practice of hanging on a tree a person who has been put to death for committing a capital crime. Given its context, following immediately after a statement regarding deterrence in *Deuteronomy* 21:21, it may be inferred that executed criminals were sometimes hung on trees in order to deter others from committing capital offenses.<sup>195</sup>

Clearly, biblical laws provided for the execution of persons who had committed a number of what were deemed serious offenses against other persons or against YHWH. What is striking is the extent to which persons accused of capital crimes were accorded what, in modern jurisprudential terms, could be characterized as due process protections.

## III. DUE PROCESS PROVISIONS

Biblical law contains no due process clause as such.<sup>196</sup> And, of course, the precise meaning of due process is ever subject to interpretation.

195. See *supra* text accompanying note 169. See also Spitz, *supra* note 29, at 345.

196. As will be observed, several laws do provide in effect for equal protection. See *infra*, Part III.A. of this article. Implicitly, equal protection is an aspect of due process, as may be seen in contemporary United States Fifth Amendment jurisprudence which has

Nevertheless, the relatively modern concept of "due process" serves as an apt characterization of a number of biblical laws that served to protect the innocent accused, and thus also the larger society from miscarriage of justice. Such laws are considered here.

One aspect of due process is the requirement that in order for a person to be convicted of a crime, that person should have been "on notice" that the conduct in question was a punishable offense prior to engaging in such conduct. To satisfy this requirement, the person charged should either have known, because "the law" had already been announced or "published," or because he or she had been personally warned, that such conduct was unlawful and subject to penalty. To the extent that biblical law was periodically read or recited in public, written down, or otherwise made known to those subject to its terms,<sup>197</sup> the *notice* element of due process would have been satisfied.<sup>198</sup> Thus there should have been little room for doubt as to the kinds of unlawful conduct that would be subject to the death penalty. Many other biblical "due process" provisions give expression to the fundamental concern that only those who actually committed capital offenses with the requisite elements of intent should be executed, and that the innocent should be spared.

A number of laws provide, in effect, for equal protection, or perhaps more aptly, the equal standing of certain classes of persons before the law. These laws call for impartiality in judgment, a basic due process concern, lest the accused be convicted or punished because of who they are, rather than what they had done. Several other laws provide that persons who had committed homicide might seek protection from self-help justice by finding refuge in certain sanctuaries or "cities of refuge," pending further inquiry or trial. Here, concern was to protect the innocent from the fate deserved only by the guilty. Biblical tradition records a few trial scenes that illustrate various features of criminal procedure, including what may aptly be described as due process protections. Several biblical laws could be read as expressing what has come to be known as concern for fundamental fairness. In this connection, it will be noted that many laws (and some

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construed that amendment's Due Process Clause to contain an "implied" equal protection component.

197. Several biblical texts describe periodic occasions when arrangements were made to read or otherwise bring the substance of the law formally to the attention of all Israelites or Jews. See, e.g., *Exodus* 24:2-3; 34:31-32; *Deuteronomy* 4:1-40; 6:1-25; 27:1-3; *Joshua* 8:30-35; 24:1-28; *Nehemiah* 8:1-8. See COHN, *supra* note 29, at 225. See generally, MARTIN NOTH, *THE HISTORY OF ISRAEL* 100-01 (Harper & Bros. 1958). *Exodus* 21:29 presents another instance of notice: the goring ox's owner must have been warned. See *supra* text accompanying notes 46-47.

198. In some instances, however, the terms of certain biblical laws appear overbroad. Those prosecuted under such laws might well have complained that they did not receive adequate notice, or were being prosecuted under laws promulgated *ex post facto*. See *supra* text accompanying notes 133-35 (the case of the man charged with picking up sticks on the Sabbath). See also *supra* the text accompanying notes 84-86 (the case of the blasphemer).

reported cases) emphasize the importance of investigating the facts or examining evidence. Some provisions evidently were intended to assure truthful testimony by witnesses in order to protect the rights or interests of the innocent accused. In the sentencing phase, several laws mandate that punishments, including the death penalty, be narrowly tailored, applied impartially, and only to those persons found guilty of the offense charged.

#### A. *Impartiality in Judging and Equal Protection*

A rather large number of biblical laws and other biblical texts emphasize that judges (or others who decide cases) must do so impartially: that judges should be no respecters of persons; *i.e.*, that the law should apply regardless of the status of the parties before the court. Perhaps the broadest statement is in the RDC's admonition at the investiture of new (secular) judges: "[y]ou shall not pervert justice; you shall not show partiality; and you shall not take a bribe . . . . Justice, and only justice, you shall follow . . . ." (*Deuteronomy* 16:19-20).<sup>199</sup>

Similar admonitions are to be found in the wisdom writings.<sup>200</sup> Several wisdom texts likewise emphasize the importance of judging impartially the righteous or innocent, on one hand, and the wicked on the other.<sup>201</sup> In this connection, the CC warns particularly against putting to death innocent and righteous persons: "[k]eep far from a false charge, and do not slay the innocent and righteous, for I will not acquit the wicked." (*Exodus* 23:7).<sup>202</sup> The implication seems to be that if there is any serious

199. See also *Deuteronomy* 1:16-17:

And I charged your judges at that time, "Hear the cases between your brethren, and judge righteously between a man and his brother or the alien that is with him. You shall not be partial in judgment; you shall hear the small and the great alike; you shall not be afraid of the face of man, for the judgment is God's; and the case that is too hard for you, you shall bring to me, and I will hear it."

This text may have been part of the RDC, or it may have been added subsequently. With the closing of rural cult shrines pursuant to the requirement that YHWH might be worshiped only at the Jerusalem temple, local priests who had, likely, functioned there as judges, evidently were replaced by local secular judges.

200. See, *e.g.*, *Proverbs* 18:5: "It is not good to be partial to a wicked man, or to deprive a righteous man of justice." See also *Proverbs* 24:23, and *Sirach* 42:1-2. See generally, T. B. MASTON, *BIBLICAL ETHICS* 94-95 (Mercer Univ. Press 1982).

201. See, *e.g.*, *Proverbs* 17:15; 18:5; 24:23-25; *Sirach* 4:9; 42:2.

202. See *Genesis* 18:22-33. Here is told the ancient story of Abraham's bargaining with YHWH over the fate of Sodom. Because of that city's reported wickedness, YHWH is thinking about destroying it and all its people. Abraham raises the crucial question, whether it is right for YHWH to "destroy the righteous with the wicked." (*Genesis* 18:23.) "Far be it from [God] to do such a thing, to slay the righteous with the wicked, so that the righteous fare as the wicked . . . . Shall not the Judge of all the earth do right?" Abraham asks. At first YHWH agrees to spare the city if fifty righteous persons can be found; and at the end, following negotiations with Abraham, YHWH agrees to spare the city if even ten such persons could be found. (*Genesis* 18:32.) (Compare *Jeremiah* 5:1 and *Ezekiel* 22:30, where just one righteous person would be enough to cause God to spare the people of Jerusalem

question as to the truth of adverse evidence in a capital case, the accused should not be executed; moreover, that YHWH himself would attend to the just fate of the real offender, whether the accused or some other person. At any rate, here, and elsewhere thematically in Biblical law, it is critically important to protect the lives of the innocent accused.

The principle of impartial judgment is most consistently articulated in connection with cases involving the poor and sojourners or resident aliens. It is applied also in regard to gender, though less consistently or emphatically, but does not extend to slaves.<sup>203</sup>

### 1. The Poor

The Covenant Code cautions those who judge suits — who may be either elders or officials of some sort — to be impartial in judging the poor, neither favoring or disfavoring their cause, and to decide on the facts, rather than with respect to persons or corrupt influence:

Nor shall you be partial to a poor man in his suit . . . You shall not pervert the justice due to your poor in his suit. Keep far from a false charge, and do not slay the innocent and righteous, for I will not acquit the wicked. And you shall take no bribe, for a bribe blinds the officials, and subverts the cause of those who are in the right.

(*Exodus* 23:3, 6-8). The Holiness Code likewise admonishes those who will decide such cases: "[y]ou shall do no injustice in judgment; you shall not be partial to the poor or defer to the great, but in righteousness shall you judge your neighbor." (*Leviticus* 19:15). Some of the classical prophets emphasized this concern, pronouncing YHWH's judgment against the wealthy and powerful who had failed to protect the rights or interests of the poor.<sup>204</sup>

### 2. Sojourners or Resident Aliens

The principle of equal or impartial justice is applied broadly to *gerim*, that is, sojourners or persons of foreign origin living in Israel. Several such

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and the land of Judah.) The story does not condemn capital punishment as such; but it does expressly challenge the propriety of punishing the innocent along with the guilty. As will be seen, many biblical laws were intended to assure that only those who had actually committed capital crimes would be subjected to the death penalty. See *infra* Part III.A., D., E., and F. of this article.

203. As to the principle of equality in biblical and Jewish law, see generally FALK, LAW AND RELIGION, *supra* note 52, at 90-103, and FALK, *supra* note 40, at 32-35.

204. See, e.g., *Amos* 2:6-7; 4:1; 5:11-12; 8:4-6; *Isaiah* 1:16-17, 23; 3:14-15; *Jeremiah* 2:34-35; 5:28-29. See also *Proverbs* 29:7: "[a] righteous man knows the rights of the poor; a wicked man does not understand such knowledge"; *Proverbs* 29:14: "[i]f a king judges the poor with equity, his throne will be established for ever." Cf. *Jeremiah*. 22:16 (commending King Josiah for having "judged the cause of the poor and needy"). See generally Richard Hiers, *Biblical Social Welfare Legislation*, 17 J.L. & RELIGION 49, 57-63 (2002).

texts appear in H. Thus, for instance, *Leviticus* 19:33-34: "[w]hen a stranger sojourns with you in your land, you shall not do him wrong. The stranger who sojourns with you shall be to you as the native among you, and you shall love him as yourself; for you were strangers in the land of Egypt: I am [YHWH] your God." Likewise, in *Leviticus* 24:22: "[y]ou shall have one law for the sojourner and one for the native; for I am [YHWH] your God."<sup>205</sup>

Equal protection also meant equal liability under the law. Aliens who sacrificed their children to Molech would have been subject to the same death penalty that applied to Israelites who did so (*Leviticus* 20:2). Likewise, resident aliens who "blaspheme the name" would be just as accountable as native-born Israelites (*Leviticus* 24:16).<sup>206</sup> Implicitly the *lex talionis* was grounded in and gave expression to the idea of equality or impartial justice: any person who injured another, or took another's life, was to experience the same kind of deprivation in return.<sup>207</sup>

Two provisions of the PC also apply specifically to both sojourners and native-born. As read in its immediate context, the equal protection provision of *Numbers* 15:14 seems to have applied only to the matter of presenting offerings by fire or burnt offerings:

All who are native shall do these things in this way, in offering an offering by fire, a pleasing odor to [YHWH]. And if a stranger is sojourning with you, or any one is among you throughout your generations, and he wishes to offer an offering by fire, a pleasing odor to [YHWH], he shall do as you do.<sup>208</sup>

However, as the text continues, this principle evidently was generalized so as to apply to all types of laws:

For the assembly, there shall be one statute for you and for the stranger who sojourns with you, a perpetual statute throughout your generations; as you are, so shall the sojourner be before [YHWH]. One law and one ordinance shall be for you and for the stranger who sojourns with you.

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205. It is not clear from the context whether this equal treatment requirement was intended as a general principle applicable in connection with all laws, or whether it related particularly to those laws immediately preceding this version of the *lex talionis* (*Leviticus* 24:19-20), killing cattle (or "beasts") and homicide (*Leviticus* 24:21), and/or blaspheming the name (*Leviticus* 24:10-16, 23).

206. See *supra* text accompanying notes 84-86. See also *Leviticus* 18:26-30, calling for both natives and sojourning strangers to keep YHWH's "ordinances and statutes" and to keep from doing any of the enumerated "abominations."

207. See FALK, LAW AND RELIGION, *supra* note 52, at 96. As to the *lex talionis*, see *infra* Part III.F.2. of this article.

208. *Numbers* 15:13-14.

(Numbers 15:15-16).<sup>209</sup> Unlike earlier provisions as to cities of refuge<sup>210</sup> which are silent on this point, the PC explicitly provides that strangers and sojourners, as well as Israelites, might seek protection in such cities (Numbers 35:15).

### 3. Gender

Equal protection provisions are somewhat ambiguous with respect to gender. Striking or cursing either a father or mother was a capital crime (*Exodus* 21:15, 17; *Leviticus* 20:9), as was failing to obey "the voice" of either parent (*Deuteronomy* 21:18-19). Male and female slaves were both covered under the law against fatal battery by their owners (*Exodus* 21:20-21). A man who, in certain circumstances, negligently caused the death of a married, pregnant woman was to be put to death (*Exodus* 21:22-24). The Covenant Code's provisions regarding oxen that gored people to death were to be applied equally, whether men or women, sons or daughters, were victims (*Exodus* 21:28-31). Equal liability is specified in some contexts. Both men and women were subject to capital punishment for "buggery" (*Leviticus* 20:15-16) and also for allotheism (*Deuteronomy* 17:2-5) and adultery (*Deuteronomy* 22:22-27; *Leviticus* 20:10). And, while the Covenant Code applied the death penalty only for sorceresses (*Exodus* 22:18), the Holiness Code extended that form of punishment to both male and female mediums and wizards (*Leviticus* 20:27).

On the other hand, while a new bride might be executed if her parents failed to produce adequate evidence of her virginity, her accusing husband would only be subject to whipping and fine if his suspicions were proven false (*Deuteronomy* 22:13-21).<sup>211</sup> Perhaps the accusing husband would have been subject to the death penalty if it was shown that he had *maliciously* offered false testimony against his bride (*Deuteronomy* 19:16-21).<sup>212</sup> There are no laws providing for punishment, let alone capital punishment, in the case of new husbands who are later found to have "sown their wild oats" before marriage.

### 4. Slaves

Clearly the concept of equal protection did not extend to the status of slaves *vis a vis* free persons. *Exodus* 21:20 provided that a man who fatally struck his male or female slave with a rod would be punished, but not, it

209. Cf. *Exodus* 12:43-49, which says in effect that only *circumcised* alien sojourners might partake of the passover meal. See FALK, LAW AND RELIGION, *supra* note 52, at 23-24.

210. See *infra* Part III.B. of this article.

211. See *supra* text accompanying note 72. Compare the absence of any penalty or punishment for the suspicious husband whose wife might be vindicated after undergoing trial by ordeal in the form of the "cereal offering of jealousy" (*Numbers* 5:11-31).

212. The "tokens of virginity" law of *Deuteronomy* 22:13-21 seems to presume good faith suspicion on the part of the accusing husband.



seems, subject to the death penalty.<sup>213</sup> Moreover, if the slave survived a day or two, the owner would not be punished at all, "for the slave" was "his money" (*Exodus* 21:21). None of the other homicide laws exempted perpetrators from penalties if their victims did not die immediately. Similarly, the CC's law providing the death penalty for owners of oxen that gored persons to death did not apply if the goring victim was a slave. In that case, the ox's owner would only be required to pay the slave's owner thirty shekels of silver, evidently the going market price for a slave (*Exodus* 21:32). It may or may not be significant that these laws providing unequal protection for slaves, all found in the CC, were not repeated in the later law codes. Perhaps these laws were still considered to be in effect. Or perhaps they had been abandoned or repealed *sub silentio*.

## B. Manslaughter, Murder, and Places or Cities of Refuge

Laws distinguishing between manslaughter and murder already have been considered.<sup>214</sup> These laws regularly provided protection against "avengers of blood" or other seeking self-help justice by calling for the establishment of sanctuaries where persons who had committed homicide might seek refuge pending some sort of judicial proceedings. Though the nature of such proceedings is not spelled out, some of the laws provide clues.

### 1. Exodus 21:12-14: a "Place" of Asylum

The earliest such law is in the CC, *Exodus* 21:12-14. Both the willful murderer and the man who fatally injures another but without "lying in wait" to do so may escape to "a place" which YHWH would "appoint" (*Exodus* 21:13-14). The willful murderer must be taken from YHWH's altar and put to death. No fact-finding procedures are indicated, but some kind of evidentiary hearing may be implicit.<sup>215</sup> Or it may have been presumed that everyone involved would know whether or not the attack had been premeditated.

This law refers to "a place" to which homicide perpetrators might flee, but does not specifically mention Jerusalem, Shechem, or any other particular location. Reference to God's "altar" (*Exodus* 21:14) suggests that the place of refuge was a religious sanctuary or cult shrine. Prior to the Deuteronomic Reform, there had been many such sanctuaries throughout

213. Compare *Exodus* 21:12-14 (regarding free persons). But see Levine, *supra* note 26, at 13-14. WESTBROOK, *STUDIES*, *supra* note 31, at 89-100 (on the basis of other ANE laws, proposes that the death penalty was meant to apply in this circumstance).

214. See *supra* text accompanying notes 111-14, 136-41.

215. See PHILLIPS, *supra* note 36, at 100: "[i]f the elders judged that the killing was premeditated, they were to take the murderer from the altar and execute him (*Exodus* 21:14)." See also *id.* at 100-01 (reconstructing "the procedures which would have been adopted following an alleged accidental killing").

the land of Judah.<sup>216</sup> Perhaps all such sanctuaries could have served as places of refuge.<sup>217</sup>

## 2. 1 Kings 1:49-53; 2:28-29: "The Horns of the Altar"

Two instances when a religious altar functioned or was sought as a place of refuge are found early in 1 *Kings*. Both may be part of the "J" or Yahwist "court history" dating back to the 10th century B.C.E.<sup>218</sup> The first, 1 *Kings* 1:49-53, describes how Adonijah, David's oldest surviving son, whose expectation to succeed him as king was thwarted by young Solomon's sudden enthronement, "went and caught hold of the horns of the altar" (presumably a sanctuary in Jerusalem).<sup>219</sup> By doing to, he hoped to be spared his brother Solomon's purge of possible rivals to the throne.<sup>220</sup> Soon afterwards, Joab, David's faithful head officer and friend, also fled to "the tent of [YHWH] and caught hold of the horns of the altar" (1 *Kings* 2:28-29), hoping to escape Solomon's purge of Adonijah's erstwhile supporters.<sup>221</sup> Nevertheless, Solomon ordered Joab's execution, on the ground that he (Joab) had previously shed blood "without cause" (1 *Kings* 2:28-34).<sup>222</sup> Even though in these circumstances this rationale is probably pretextual, Solomon's order was permissible under *Exodus* 21:14, since Joab had willfully murdered others.<sup>223</sup>

## 3. Deuteronomy 19:1-13: Cities of Refuge — "Lest Innocent Blood be Shed in Your Land"

No biblical text explicitly states that other ancient cult shrines had ever served as places of refuge for persons who had committed homicide. However, certain provisions that were part of the Deuteronomic Reform

216. See *supra* text following notes 109-10.

217. See also DE VAUX, *supra* note 30, at 160: "[t]he 'place' thus denoted . . . a sanctuary, where there is an altar, apparently any lawful sanctuary of Yahweh . . ."

218. See B. DAVIE NAPIER, *THE SONG OF THE VINEYARD: A GUIDE THROUGH THE OLD TESTAMENT* 128-37 (Fortress Press rev. ed. 1981).

219. Solomon had not yet had the Temple built in Jerusalem. Previously, David had an altar erected there. According to 2 *Samuel* 7:2, the ark of the covenant was placed in a tent. Earlier, the ark had been located in the Temple at Shiloh (1 *Samuel* 3:2-3, 21).

220. Solomon later had Adonijah put to death on a minor pretext. See *infra* note 222.

221. Joab had supported Adonijah prior to the palace revolution that placed Solomon on the throne.

222. Another text (possibly added later in order to present Solomon's actions in a more favorable light) states that on his deathbed, David had instructed Solomon to kill Joab and Shimei. 1 *Kings* 2:5-6. Solomon also sent an assassin to kill Adonijah, his own brother, on the pretext that Adonijah had dared to ask to have Abishag, David's former nurse (if not also concubine) as his wife. 1 *Kings* 2:13-25. First *Kings* 1:1-31 can be read to mean that Solomon had usurped the throne which rightfully should have passed to Adonijah, as David's oldest surviving son.

223. See 2 *Samuel* 3:26-30; 18:9-15; 20:8-13.

program prompt the inference that prior to that Reform, such shrines had so functioned. Once all shrines other than the Jerusalem Temple were closed down pursuant to the Deuteronomic Reform, it would have been a *long* way to Jerusalem for any manslayer seeking to escape would-be avengers. Consequently, the Revised Deuteronomic Code provided for the establishment of six cities<sup>224</sup> to which a manslayer might "flee . . . and save his life; lest the avenger of blood in hot anger pursue . . . and overtake him, because the way is long, and wound him mortally, though the man did not deserve to die." (*Deuteronomy* 19:5-6).

It may reasonably be inferred that these six cities of refuge were meant to replace some (or possibly all) of the cult shrines that, prior to the Deuteronomic Reform, had served a similar purpose. The RDC provided initially for three cities of refuge, one it seems, in each of three regions (*Deuteronomy* 19:1-3); but then goes on to call for the establishment of three additional such cities when the territory of Israel expanded (*Deuteronomy* 19:8-10). Experience may have shown that three such cities were not enough to replace the numerous cult shrines that had so served in earlier times. The provision in *Deuteronomy* 19:6 calling for the establishment of three additional cities of refuge underscores emphatically the fundamental principle implicit in many other biblical laws: innocent persons must not be put to death. The innocent accused might seek protection in such additional sanctuaries "*lest innocent blood be shed in your land . . . and so the guilt of bloodshed be upon you.*"<sup>225</sup> Applying the death penalty to an innocent person not only greatly wrongs that person, but also brings "the guilt of bloodshed" upon the entire community that allowed the execution to proceed.

The Jerusalem Temple also may have continued to function as a place of refuge.<sup>226</sup> If so, by the late 7th century B.C.E., there would have been seven such places. The Revised Deuteronomic Code does not identify the six cities. Somewhat later biblical texts provide for and name several more such cities of refuge or sanctuaries.

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224. *Deuteronomy* 19:1-10.

225. *Deuteronomy* 19:2-10. As will be seen, numerous other biblical due process laws likewise were intended to protect innocent persons from wrongful or mistaken execution for capital offenses. See *infra* Parts III.D., E., and F.1. of this article. For an excellent discussion of capital homicide in connection with the biblical cities of refuge, see Craig A. Stern, *Torah and Murder: The Cities of Refuge and Anglo-American Law*, 35 VAL. U. L. REV. 461 (2001). Stern suggests ways in which Anglo-American law may have been influenced by biblical law as to cities of refuge.

226. See *supra* text accompanying notes 218-23 as to the Jerusalem altar in earlier times. Compare *Jeremiah* 7 and 26, where the prophet warns his contemporaries that they will not be spared YHWH's judgment by seeking sanctuary or safety in the Jerusalem Temple, for it too would be destroyed. See *infra* Part III.C.6. of this article.

4. Deuteronomy 4:41-43; Joshua 20-21 — *More Such Provisions*

A text attributable to the Deuteronomic Historian (DH) names three such cities, all "in the east beyond the Jordan:" "Bezer . . . for the Reubenites, . . . Ramoth . . . for the Gadites, and Golan . . . for the Manassites" (*Deuteronomy* 4:41-43). Possibly DH thought of these as three *more* cities of refuge, bringing the total to nine, apart from Jerusalem. Or DH may have assumed that each "tribe" of Israel, like these three in the trans-Jordan, had its own city of refuge, in which case there would have been twelve or thirteen. The Deuteronomic Historian probably was writing and editing earlier traditions *circa* 550 B.C.E., well after the closing of the numerous local altars, sanctuaries or cult shrines mandated by the Deuteronomic Reform nearly a century earlier.

Another tradition, also perhaps attributable to DH, names a total of six cities of refuge: the same three in trans-Jordan, Bezer, Ramoth, and Golan, together with "Kedesh in Galilee in the hill country of Naphtali," "Shechem in the hill country of Ephraim," and "Kiriath-arba (that is, Hebron) in the hill country of Judah" (*Joshua* 20:1-9). The text in Joshua includes specific procedures for hearing cases involving manslaughter who killed "without intent or unwittingly."<sup>227</sup> Five of these cities are identified generically in *Joshua* 21 as "the city of refuge for the slayer": Hebron, Shechem, Golan, Kedesh, and Ramoth.<sup>228</sup> Here Hebron is said to have been given to the descendents of Aaron, and the other cities of refuge to various "families of the Levites," the Kohathites, Gershonites, and Merarites. These texts may contain vestiges of tradition or recollection that priests or Levites once officiated at shrines in those cities that later became secular cities of refuge following the Deuteronomic Reform.<sup>229</sup>

5. Numbers 35; 1 Chronicles 6 — *More Such Cities*

*Numbers* 35, in the PC, provides the most extended description of provisions concerning cities of refuge. The cities are not named, but there were said to be six of them, all given to "the Levites":<sup>230</sup> "three . . . beyond the Jordan, and three . . . in the land of Canaan" (*Numbers* 35:13). Here explicit mention is made of a trial or hearing "before the congregation."<sup>231</sup> On the other hand, 1 *Chronicles* reports that "the sons of Aaron" were

227. See *infra* Part III.D.2. of this article.

228. *Joshua* 21:13, 21, 27, 32, and 38. Bezer is mentioned, but not characterized here as a city of refuge (*Joshua* 21:36). Chapter 21 distinguishes between priests (descendents of Aaron) and Levites; the latter are divided into various Levitical families. These distinctions are characteristic of P tradition, and suggest that *Joshua* 21 may have been edited under Priestly auspices. Much of chapter 21 substantively resembles P provisions in *Numbers* 35.

229. See generally DE VAUX, *supra* note 30, at 160-62.

230. Compare *Joshua* 21:13, according to which one of the six cities, Hebron, was to be given to the sons of Aaron.

231. *Numbers* 35:12, 24-25. See *supra* text accompanying notes 182-83. See also *infra* text following note 249 and text accompanying notes 255-63.

given eleven "cities of refuge": Hebron, Libnah, Jaffir, Eshtemoa, Hilen, Debir, Ashan, Beth-shemesh, Geba, Alemeth, and Anathoth (1 *Chronicles* 6:57-60), while the sons of Kohath (one of the Levitical families according to 1 *Chronicles* 6:1, 16)<sup>232</sup> were given eight cities of refuge: Shechem, Gezer, Jokmeam, Beth-horon, Aijalon, Gath-rimmon, Aner, and Bileam (1 *Chronicles* 6:66-70). On this count, there would have been nineteen cities of refuge, apart from Jerusalem. The Chronicler is not generally considered a reliable historian,<sup>233</sup> but here again we may see hints of recollection or acknowledgment that priests or Levites had once officiated at locations that later became secular cities of refuge. We may also see that at least in theory, if not also practice, increasing numbers of such cities were required in the course of time, from the days of the Deuteronomic Reform and the RDC, through those of DH, to those of the Chronicler in the early or mid-fourth century B.C.E.

### C. *Trial Scenes in Biblical Tradition*

Arguably, much of biblical law derives from case law decided by kings, courts or individual priests, judges, or elders.<sup>234</sup> A few narrative texts afford glimpses into actual cases or trials. Some of these indicate procedural features that will be examined more fully later. All but two involve capital offenses. Here these scenes are summarized briefly, beginning with those probably most ancient, and ending with those composed more recently. The first five trial scenes to be considered may date back to the 8th century B.C.E., if not earlier. The next two scenes found in *Leviticus* 24 (H) and *Numbers* 15 (PC) probably were set down between the seventh and the fifth centuries. The story of Susanna and the elders, which concludes this section, may have been written as late as the second or first centuries B.C.E.

#### 1. *Genesis 38:24-26: Tamar's Evidence*

The aging patriarch Judah, on being informed that his daughter-in-law, Tamar, was pregnant long after her husband's demise, issued orders for her to be brought out and burned. Evidently in Judah's mind, Tamar's pregnancy under these circumstances presented an equivalent to what in

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232. The Chronicler, writing possibly as late as 350 B.C.E., like the PC and P, distinguishes between priests ("the sons of Aaron") and Levites.

233. See WELLHAUSEN, *supra* note 32, at 215: "[o]ne might as well try to hear the grass growing as attempt to derive from such a source as this a historical knowledge of the conditions of ancient Israel."

234. See generally HANS JOCHEN BOECKER, *LAWS AND THE ADMINISTRATION OF JUSTICE IN THE OLD TESTAMENT AND THE ANCIENT EAST* (Jeremy Moiser trans., Augsburg Publishing 1988) (1976). Cf. CARMICHAEL, *supra* note 34.

traditional tort law might be considered a case where *res ipsa loquitur* ("the thing speaks for itself").<sup>235</sup>

According to *Genesis* 38:28, her alleged offense was that she had "played the harlot," that is, become a prostitute, and consequently became pregnant. Possibly prostitution was a common law crime. There was as yet no statutory (Mosaic) law,<sup>236</sup> and no subsequent biblical law makes prostitution as such a capital offense. In fact, Judah himself had gotten Tamar pregnant, supposing her to be a prostitute, and not recognizing her as his widowed daughter-in-law. At that time, she had prudently secured from him certain items of personal property which could identify their owner: his signet, cord, and staff. Acting in her own defense, she produced these as evidence, and Judah immediately recognized and acknowledged them as his. Moreover, he commended her for undertaking to become pregnant, and admitted his own failure to provide his third son as her husband, as seems to have been expected under the customary law of Levirate marriage.<sup>237</sup> Here there is no mention of a formal trial, but obviously Tamar had opportunity to speak and produce this critical evidence in a timely manner.<sup>238</sup>

## 2. 2 Samuel 12:1-16: Nathan's Parable: David as Judge

As King of Israel and Judah, David was also chief judicial officer.<sup>239</sup> Having committed adultery with Bathsheba, and after attempting unsuccessfully to induce her husband, Uriah, to sleep with her in order to cover up the affair, David arranged for Uriah to die in battle. Subsequently, the prophet Nathan approached David in the latter's judicial

235. See W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 39 (5th ed. 1984). See also Westbrook, *supra* note 156.

236. According to biblical tradition, it would be at least another generation before Moses was born. See *Exodus* 1.

237. See generally DONALD A. LEGGETT, THE LEVIRATE AND THE GOEL INSTITUTIONS IN THE OLD TESTAMENT; WITH SPECIAL ATTENTION TO THE BOOK OF RUTH (Mack Publ'g Co. 1974).

238. This episode could be considered the first biblical instance of items being entered into physical evidence, though they were not, of course, labeled exhibits "A, B, and C." Another early biblical scene (though not involving a trial) also focused on physical evidence: *Genesis* 44:1-17. Here Joseph had his assistant "plant" his silver cup in his brother Benjamin's sack, so that he might later accuse the latter of theft. Two earlier portions of the Joseph story also involve production of fabricated or misleading physical evidence: *Genesis* 37:29-33, where Joseph's brothers dip his robe in animal blood in order to make their father think he had been killed; and *Genesis* 39:13-18, where Potiphar's wife seizes, preserves, and later produces Joseph's "garment" as evidence that he had attempted to assault her sexually. *Deuteronomy* 22:13-21 describes a later biblical law providing for introduction of physical evidence at trial. See *infra* text accompanying notes 271-73.

239. See also 2 *Samuel* 15:1-6, where Absalom attempts to gain supporters by proclaiming that if he were king (instead of David, his father), he would decide justly Israelites' suits brought before him for judgment. He implies that David was failing to do so.

role, and told him a story about a rich man and a poor man. Although the former had numerous flocks and herds, he took the poor man's one little pet lamb, killed and cooked it, and served it to a guest for dinner (2 *Samuel* 12:1-4).

Then David's anger was greatly kindled against the man; and he said to Nathan, "As [YHWH] lives, the man who has done this deserves to die; and he shall restore the lamb fourfold, because he did this thing, and because he had no pity." Nathan said to David, "You are that man."

(2 *Samuel* 12:5-7).

King David understood that Nathan had presented him with an actual case at law. Nathan had, but the case was that of YHWH vs. David. In pronouncing judgment against "the man," David unknowingly pronounced it against himself. Although there is no biblical law making the taking of another's pet animal a capital offense, David nevertheless declared that "the man . . . deserved to die."<sup>240</sup> However, since the alleged offense was theft and killing a sheep, the actual sentence David pronounced called for four-fold restitution, as provided by the CC in *Exodus* 22:1.<sup>241</sup>

### 3. 2 *Samuel* 14:1-11: A Hypothetical Case Prompts Mitigation and Alternative Sentencing

Absalom, David's ambitious, and now oldest surviving son, had arranged the murder of his older brother (2 *Samuel* 13:23-29), and for the past three years had taken refuge in a nearby foreign land (2 *Samuel* 13:34-38). David wanted to restore Absalom, but felt unable to do so. In this setting, Joab, David's army commander and friend, staged a mock trial in order to induce him to allow Absalom to return. David, however, was led to believe that this was a real case at law that called for his decision as chief judge.

An unnamed woman selected by Joab, came before David reciting the story Joab had put in her mouth: she was a widow with two sons who had quarreled, one had killed the other, and now her family demanded the death of the surviving son. She had come to the King for help, since if this other son were put to death, she and her husband would have no heir. That situation, as she put it, would both "quench" her "coal," and leave her husband "neither name nor remnant upon the face of the earth" (2 *Samuel* 14:1-7). Specifically, she begged the King to "invoke YHWH [his] God, that the avenger of blood slay no more and [her] son not be destroyed."

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240. Nathan implies that David had committed a capital offense, but that while YHWH would spare him, he would cause the death of David's (and Bathsheba's) new-born son. See also 2 *Samuel* 21:1-9 (which also seems to treat arranging the death of others as a capital offense). See *infra* note 303.

241. *Exodus* 21:37 in the Hebrew text.

David then declared that her son would indeed be spared, and that "not one hair" of her son would "fall to the ground" (2 *Samuel* 14:11).

David soon began to suspect and then discovered that the entire proceeding had been arranged by Joab, but in consequence, decided to permit Absalom to come back to Jerusalem and live, in effect, under house arrest (2 *Samuel* 14:12-24). After two years, David and Absalom were temporarily reconciled (2 *Samuel* 14:28-33). We see here that the King, in his role as chief judge, might spare the life of a known murderer under certain circumstances. In the woman's case, the circumstance was the fact that — as her story was told — to kill (or allow the "avenger of blood" to kill) the offender would leave his parents with no heir. In the case of Absalom, David mandated an alternative sentence.<sup>242</sup>

#### 4. 1 Kings 3:16-28: A Maternity Suit

This is the famous story — whether legend or history — about the two prostitutes who each claimed to be the mother of a sole surviving infant. They came before Solomon in his judicial capacity, and each testified that the child was hers. Solomon proceeded to solve the case in the courtroom by proposing to carve the living child in two, giving half to each claimant. This horrible prospect prompted the true mother to renounce her claim in order to spare the child, thereby demonstrating that she, indeed, was the child's mother. Solomon's proposal could be seen as an ancient instance of cross-examination, albeit on the inquisitorial rather than adversarial trial model. In effect, he was asking each claimant, do you really care about this child's welfare, or do you have some other agenda? Here also we see another case where, obviously, women's testimony was admissible in court.<sup>243</sup> In this trial scene, there is no death penalty issue.

#### 5. 1 Kings 21:1-16: A Case of Malicious Prosecution

King Ahab of Israel wanted to acquire Naboth's vineyard that adjoined the royal premises, but Naboth, a good Israelite, declined to part with his ancestral inheritance. Ahab's Phoenician wife, Jezebel, then arranged to have two "base fellows" charge Naboth falsely with having cursed both God and the king. Cursing God may have been a capital offense under the law.<sup>244</sup> Cursing a ruler of Israel was prohibited (*Exodus* 22:28), but not necessarily a capital crime.<sup>245</sup> Under ANE common law<sup>246</sup> however,

242. There are no biblical instances where subsequent kings followed these precedents.

243. See also *Deuteronomy* 21:18-21, discussed *supra* text accompanying notes 66-70; 2 *Samuel* 14:1-11, *supra* Part III.C.3. of this article.

244. See *Exodus* 22:28; *Leviticus* 24:15 (neither of which includes a penalty clause). *Leviticus* 24:16 specifies the death penalty for those who "blaspheme the name" of YHWH. In *Leviticus* 24:10-16, 23, the verbs translated as "blaspheming" and "cursing" are used interchangeably.

245. Cf. 2 *Samuel* 16:9-14; 1 *Kings* 2:8-9.



treason was a capital offense, and if anyone was found guilty of treason, his property would go to the state instead of passing to family heirs by inheritance or bequest.<sup>247</sup> Thus, by having Naboth "framed" and executed under a charge of treason, Jezebel was able to obtain title to the property for her husband, the king. The trial (or "kangaroo court") took place in Jezreel, Naboth's home city, "in the presence of the people" who believed the false charges, and stoned him to death. Two witnesses testified falsely, evidently the requisite minimum number under common law to sustain a capital charge.<sup>248</sup>

#### 6. *Jeremiah 26:7-24: Defendant Testimony and Argument from Precedent*

In Jeremiah's famous "temple sermon" (*Jeremiah 7*) this prophet declared that his contemporary countrymen who violated YHWH's requirements of justice and mercy would not be spared divine judgment even were they to take refuge in YHWH's "house," that is, the Jerusalem temple. Centuries before, Jeremiah declared, YHWH had destroyed his "place" at Shiloh; YHWH would again "pour out" his anger and wrath on "this place" — the Jerusalem temple. Chapter 26 reports an abbreviated version of this same episode, and then describes the reactions of various priests and other prophets: "[t]his man deserves the sentence of death because he has prophesied against this city . . . ." (*Jeremiah 26:11*). In effect, Jeremiah was charged with sedition or treason.<sup>249</sup>

A trial of some sort then was held before "all the princes and all the people." Speaking in his own defense, Jeremiah — like a later Socrates — urged the court, "[d]o with me as seems good and right to you;" but reminded them that it was YHWH who had sent him "to prophesy against this house and this city" (*Jeremiah 26:12-15*). The "princes and all the people" reportedly found this argument persuasive, and declared, "[t]his

246. Similar versions of many Ancient Near Eastern laws appear in more than one nation's legal tradition. Some such laws, though not part of biblical law as recorded, may underlie certain narratives. On ANE common law, see generally WESTBROOK, *STUDIES, supra* note 31. For comparison of relevant biblical and ANE laws in convenient, modern translation, see Good, *supra* note 4 at 947-77, and VICTOR H. MATTHEWS & DON C. BENJAMIN, *OLD TESTAMENT PARALLELS: LAWS AND STORIES FROM THE ANCIENT NEAR EAST* 83-123 (Paulist Press 1997).

247. See J. Weingreen, *The Case of the Daughters of Zelophehad*, 16 *VETUS TESTAMENTUM* 521-22 (1966), and Raymond Westbrook, *Property and the Family in Biblical Law*, J. STUDY OLD TESTAMENT, Supp. Series no. 11, 123-24 (JSOT Press, Sheffield 1991).

248. Biblical laws specifying a minimum of two witnesses probably were written later than the time of Ahab. See *Deuteronomy* 17:6; 19:15; *Numbers* 35:30. See *infra* Part III.E. of this article.

249. See Levine, *supra* note 26, at 23-24. Levine concludes that during the period of the monarchy, sedition was a capital offense. *Id.* at 24. See also Good, *supra* note 4, at 966-67, citing other possible biblical instances of execution for treason.

man does not deserve the sentence of death for he has spoken to us in the name of [YHWH] our God." (*Jeremiah* 26:16). In addition, "some elders of the land" then cited precedent in the prior case when the prophet, Micah, had declared that YHWH would destroy his "house" at Shiloh for similar reasons, but was not put to death.<sup>250</sup> Jeremiah's life was then spared. Here we can see a "court" swayed by persuasive argument based on policy considerations — in effect, that prophets speaking on YHWH's behalf should be accorded "free speech." In addition, we see clearly the importance of precedent or prior case law — a basic feature of modern-day jurisprudence which values precedent, among other reasons, so that persons may govern their conduct to accord with established law, and so that courts will not have to re-work their policy analyses each time they confront a new case.

### 7. *Leviticus 24:10-23: A Case of Blasphemy*

A man of mixed (Egyptian-Israelite) parentage, while arguing (if not fighting) with another man, "blasphemed the name and cursed" (*Leviticus* 24:10-11).<sup>251</sup> Because there was no specific precedent or statutory law on point, the offender was placed in custody pending further authoritative instructions. Unlike the cities of refuge which provided protective custody, in this story, custody was intended to secure the prisoner pending further legal procedures (*Leviticus* 24:10). As the story is told, YHWH then instructed Moses to order the death penalty. A new procedure is indicated here: "all who [had] heard" the man cursing or blaspheming were called on to "lay their hands upon his head," thereby in effect testifying against him.<sup>252</sup> Again, as the case is reported, multiple witnesses testified, as was now required by statutory law in capital cases.<sup>253</sup> The law of the case is then articulated in terms clearly intended as binding precedent in the future: "[h]e who blasphemes the Name of [YHWH], shall be put to death; all the congregation shall stone him; the sojourner as well as the native, when he blasphemes the Name, shall be put to death." (*Leviticus* 24:16).

Here, clearly, case law was understood to supplement statutory authority.<sup>254</sup> The story concludes in v. 23, reporting that "the people of Israel" stoned the blasphemer to death.

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250. *Jeremiah* 26:17-19, 24. Another prior case also is cited in this narrative: that of a prophet named Uriah who was put to death for making a similar proclamation. *Jeremiah* 26:20-23. Possibly the "court" was confronted with two conflicting lines of precedent and chose to go with that of the Micah case. Alternatively, some interpreters suggest, the Uriah case may have been added to the story later in order to emphasize the perilous nature of Jeremiah's life.

251. See *supra* text accompanying notes 84-86.

252. *Leviticus* 24:14. See also *Susanna* v. 34.

253. See *infra* text accompanying notes 277-84.

254. Although the incident is reported as part of the Holiness Code, it may reflect Priestly editing.

### 8. Numbers 15:32-36: A Case of Possible Sabbath Violation

Here another episode or story contributes to the growth of the law. A man was found gathering sticks on the Sabbath day. According to *Exodus* 35:2, which, like *Numbers* 15, probably represents the PC or P tradition, anyone who "worked" on the Sabbath was to be put to death. But what sort of activity on the Sabbath would constitute "work"? As in the previous instance, absent statutory law or decisional precedent on point, the accused was "put in custody, because it had not been made plain what should be done to him" (*Numbers* 15:34). Again, as the story is told, YHWH then informed Moses that the offense in question was capital and that the offender should be executed. In both instances, the accused might have objected that new law was being applied against them *ex post facto*, or retroactively. Here the accused had no expressed notice that the act of gathering sticks would constitute a Sabbath violation. Although the law or rule of the case is not spelled out, those similarly situated afterwards would, presumably, know better than to gather sticks on the Sabbath.

### 9. Susanna vv. 28-62: Cross Examination Catches the Culprits in the Courtroom

Court was held regularly at Joakim's house, he being a wealthy and honored member of the Jewish community.<sup>255</sup> Two elders, recently appointed as judges, frequently presided over trials at Joakim's house. These two elders/judges independently became infatuated with Joakim's beautiful wife, Susanna. Discovering their common lust, they conspired to coerce her into having sexual intercourse with them: "[g]ive your consent, and lie with us. If you refuse, we will testify against you that a young man was with you." (*Susanna* vv. 20-21). Susanna refused — even though she knew that the judges' false testimony could lead to her death.<sup>256</sup> They then charged her with adultery. Trial took place at Joakim's house before "the people." Susanna was summoned to appear, and with her came her parents, children, and other family members. The two elders/judges stood up, laid their hands on Susanna's head,<sup>257</sup> and recited their false testimony. The "assembly," acting as jury, believed this testimony and "condemned her to death" (*Susanna* v. 41).

Young Daniel, inspired by God, now appeared as Susanna's advocate or defense counsel, and called for further proceedings:

Taking his stand in the midst of them, he said, "Are you such fools, you sons of Israel? Have you condemned a daughter of Israel without examination and without learning the facts?"

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255. Joakim, himself, strangely, does not appear until the end of the story. The story of Susanna may belong more in the category of fiction than history. Nevertheless, it probably portrays accurately various late-biblical legal traditions and practices.

256. See *Leviticus* 20:10; *Deuteronomy* 22:22.

257. Cf. *Leviticus* 24:14.

Return to the place of judgment. For these men have borne false witness against her."

(Susanna vv. 48-49). Earlier laws provided, in some instances, for examination or inquiry into "the facts," but what follows is the first explicit instance of cross-examination by counsel in courtroom proceedings.<sup>258</sup> First, Daniel orders the two adverse witnesses (the elders/judges) separated or sequestered during examination. After preliminary "badgering," Daniel elicits conflicting testimony from each witness as to the exact site of the alleged adulterous affair. Daniel then charges them both with bearing false witness, after which the assembly found them guilty and put them to death "in accordance with the law of Moses"<sup>259</sup> (*Susanna* vv. 60-82). The story illustrates application of the law governing penalties for false malicious witnesses (*Deuteronomy* 19:16-21). It also, again, illustrates the law requiring a minimum of two adverse witnesses to sustain a charge alleging capital crimes.<sup>260</sup> Implicitly, in both the story and the related witness laws, the accused is presumed innocent until proven guilty. The concluding clause in v. 62 underscores the result of the proceedings: "[t]hus innocent blood was saved that day."<sup>261</sup>

#### D. Investigation, Hearing, Evidence, and Cross-Examination

Some of the trial scenes just considered mention certain instances of "courtroom" inquiry or fact-finding.<sup>262</sup> However, relatively few biblical laws, capital or otherwise, explicitly indicate what sort of investigation or fact-finding procedures are to be followed prior to or at trial. Yet some such determination is implicit in connection with many if not all of the statutory capital offenses. Implicit procedures are considered here first.

##### 1. Implicit Procedures

Some sort of inquiry as to relevant facts is often presumed in biblical legislation, based on the nature of the offense. For instance, in the CC, the

258. The court evidently consisted of both "all the people" and other "elders" (*Susanna* v. 50). It is unclear who these other "elders" were. No "elders" other than the two malicious judges are mentioned in the first phase of the trial. Whether there was a presiding judge at either phase of the trial is not indicated. Daniel's appearance here as defense counsel evidently was *pro bono*, not for fee.

259. It might be asked how Daniel and the assembly knew that *both* were lying, since, on the record evidence, either one of them might have been telling the truth, while the other had lied.

260. See *supra* note 248 and accompanying text and *infra* text accompanying notes 277-85.

261. As will be seen elsewhere in this article, much of biblical law functioned, and no doubt was intended to prevent the execution of innocent persons. See Part III. A., D., and E of this article.

262. See, e.g., in the case of Tamar, her presentation of evidence identifying Judah; witness testimony in all of the cases; representation and cross-examination by counsel in the case of Susanna.

law applying the *lex talionis* when a pregnant woman suffers miscarriage and injury resulting from contact with brawling males (*Exodus* 21:22-25), some procedure would have been necessary in order to ascertain whether all elements of the offense had been met: (a) that the woman had been injured, and in what way (b) by brawling males, and (c) which male was responsible for the injury. Or in a case where an ox gores some one to death, several elements must be determined: (a) whether the ox had "been accustomed to gore in the past," (b) whether its owner had "been warned," and (c) whether its owner, notwithstanding such warning, had failed to keep the animal penned in; or whether, for example, some one else had let the ox out of its pen (*Exodus* 21:28-32). Likewise some sort of evidentiary hearing is implicit in the laws set out in *Numbers* 35:16-18, where the critical issue is what type of weapon was used in commission of the homicide. In this kind of case, it is likely that physical evidence, namely, the alleged weapon itself, would have been introduced for examination. In later biblical codes, if not in earlier common law, conviction on a capital offense required testimony of at least two witnesses.<sup>263</sup> Thus, some sort of hearing would have had to take place at which such witnesses could submit their testimony to persons having judicial authority.

A number of laws and other traditions insist that persons responsible for holding trials distinguish between the guilty and the innocent.<sup>264</sup> In particular, *Exodus* 23:7 cautions against executing "the innocent and righteous . . ." <sup>265</sup> If in doubt, it seems that innocence was to be presumed, for YHWH himself would deal with any who were acquitted though guilty.<sup>266</sup> Determining guilt or innocence necessarily required careful fact-finding procedures. Several capital laws expressly call for some kind of fact-finding inquiry.

## 2. *Explicit Requirements*

Certain capital laws mandate inquiry or investigation as to relevant facts. Such inquiry is called for in two versions of the law establishing secular cities of refuge for "the manslayer." The version in *Joshua* 20 provides that the manslayer would have opportunity to "explain his case" to the elders of the city of refuge "at the entrance to the gate of the city." Assuming his explanation is found adequate, the manslayer then would be granted protection from any avenging kinsman of the deceased "until he has stood before the congregation for judgment."<sup>267</sup> The term '*edah*', here

263. See *Deuteronomy* 17:6; *Numbers* 35:30.

264. See *supra* text accompanying notes 111-14 & 136-41.

265. See *supra* notes 201-02 and accompanying text. See also *Jeremiah* 22:3 and 23:17, where Jeremiah warns the king of Judah and his officials not to "shed innocent blood" in their judicial capacities.

266. *Exodus* 23:7b: "for I will not acquit the wicked." See also *supra* text accompanying notes 14-18.

267. *Joshua* 20:6; 20:9.

translated as "congregation," may also be rendered as "people" or "assembly," in effect, the jury. Presumably the manslayer would then have opportunity to repeat his explanation or defense before this assembly which would also hear any charges brought against him. The version in *Numbers* 35 lists a series of fact questions that function as indicia of intent, evidently for the purpose of determining whether the accused had committed manslaughter or murder.<sup>268</sup> Likewise, the *Numbers* law, in language virtually identical with that of *Joshua* 20, provides that the manslayer will be protected from any avenger "until he stands before the 'edah for judgment" (*Numbers* 35:12). Additionally, *Numbers* 35:24 indicates that there would be an adversarial proceeding at which "the 'edah" was to "judge between the manslayer and the avenger of blood." The implication is that any avenging kinsman would also have opportunity to state his case. Though the context is not entirely clear, it seems likely that the issue to be decided is whether the homicide was intentional, performed without malicious intent, or only accidental.<sup>269</sup> Presumably, in order to make his case for capital punishment, the avenger would also have to produce relevant evidence including adverse testimony from at least two witnesses (*Numbers* 35:30).

Possibly the earliest law incorporating specific provisions for an evidentiary hearing is that concerning "tokens of virginity" found only in D (*Deuteronomy* 22:13-21).<sup>270</sup> This law details procedures to be followed when a man charges his new bride with having had previous sexual experience. Both the accuser and the woman's father are to offer evidence before "the elders at the gate,"<sup>271</sup> where the bride's father then speaks in her defense. The main focus of the proceeding is on the presentation and examination of "the tokens of virginity" in evidence before the court ("the elders of the city in the gate") (*Deuteronomy* 22:15). The garment in question (presumably bed clothing) is to be "spread before the elders of the city" for their examination. Evidently the elders had discretion to decide what would constitute sufficient "tokens" or evidence. If "the tokens" were not found, the men (or people) of the city were to stone the woman to death. Although the husband was to initiate the charge by claiming not to have found his new bride's "tokens of virginity," the woman's father and mother are assigned the task of producing these "tokens" in or on "the

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268. *Numbers* 35:16-18, 20-23: the type of weapon used, the accused's motive, whether the accused had lain in wait, whether the fatal act was done suddenly or whether the act was merely negligent.

269. See *supra* text accompanying notes 38-41. See generally, Stern, *supra* note 225.

270. See *supra* text accompanying note 72. Several biblical narratives describe procedures where physical evidence was produced or introduced as evidence. See *supra* note 238 and text accompanying notes 235-38.

271. It is not clear whether the statements by the parties set out in *Deuteronomy* 22:14 and 16-17 were to be recited as written ("boiler-plate" language) or whether they were meant to illustrate the kinds of testimony appropriate in such cases.

garment" that was to be presented in evidence before the elders. These procedures suggest that the newlyweds were expected to spend their first wedding night together in the bride's parents' home.<sup>272</sup> The bride's parents thus would have opportunity to discover and produce exculpatory evidence.<sup>273</sup>

The RDC provides for some sort of inquiry (if not also hearing) in connection with several other alleged capital offenses. Most of these provisions relate to themes associated with the Deuteronomic Reform, and may have been new law rather than part of the original Deuteronomic Code. Four such texts are summarized as follows.

*Deuteronomy* 13:12-17 calls for the destruction of any city whose inhabitants have been induced by "certain base fellows" from among the Israelites to go and serve other gods. First, however, the law stipulates: "[y]ou shall inquire and make search and ask diligently" in order to determine "if it be true and certain that such an abominable thing has been done among you" (*Deuteronomy* 13:14). Exact investigative procedures are not indicated, but the importance of diligent inquiry as to the facts is certainly emphasized. Presumably, as required by *Deuteronomy* 17:6, the testimony of at least two witnesses would be required as part of such a proceeding.

*Deuteronomy* 17:2-7 makes it a capital offense for a man or woman in any Israelite town to go, serve, and worship other gods, the sun, the moon, "or any of the host of heaven." Before condemning anyone to death under this law on mere hearsay, however, diligent fact-finding inquiry must likewise be undertaken. This "[i]f . . . it is told you and you hear of it; then you shall inquire diligently, and [ascertain] if it is true and certain that such an abominable thing has been done in Israel." (*Deuteronomy* 17:2-4). This law specifically requires corroborating testimony of at least two or three witnesses if the alleged offender is to be put to death (*Deuteronomy* 17:6). Moreover, it requires that "the hand of [these] witnesses shall be first against [the accused] to put him to death." (*Deuteronomy* 17:7). Thus the accusing witnesses must throw the first stones — a sobering consideration if the witnesses were persons of conscience and at all in doubt as to the facts.

*Deuteronomy* 17:8-9 assigns the task of deciding difficult cases to the "Levitical priests" and "the judge who is in office" in Jerusalem.

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272. See *Tobit* 7-8.

273. Absent modern methods for analyzing blood, blood-like stains could derive from many sources. The familiar story of Joseph and his brothers (*Genesis* 37:29-33) might have suggested to anxious parents the possibility of substituting animal blood for human. Modern gynecologists might question the presumption that intercourse with a virgin inevitably produces such "tokens." Requiring "tokens of virginity" the morning after the wedding night could also have a chilling effect on a woman's willingness to engage in pre-marital intercourse even with her affianced, in the event he might later wish to "spurn" her for other reasons.

If any case arises requiring decision between one kind of homicide and another, one kind of legal right and another, or one kind of assault and another, any case within your towns which is too difficult for you, then you shall arise and go up to the place which [YHWH] your God will choose, and coming to the Levitical priests, and to the judge who is in office in those days, you shall consult them, and they shall declare to you the decision.

The text does not indicate what sort of testimony, or other evidence would be considered by the panel of priests and the judge. Presumably they would attempt to determine material facts as well as apply appropriate law. Possibly these "difficult" cases could involve adversarial proceedings and/or cross examination, as intimated in *Proverbs* 18:17: "[h]e who states his case first seems right, until the other comes and examines him." Perhaps when evidence and testimony left the court in doubt, difficult cases may have been decided by "lot" or the sacred ephod.<sup>274</sup>

*Deuteronomy* 19:16-21, the law regarding malicious witnesses, provides specifically for a hearing and diligent inquiry as to the facts:

If a malicious witness rises against any man to accuse him of wrongdoing, then both parties to the dispute shall appear before [YHWH], before the priests and the judges who are in office in those days; the judges shall inquire diligently [whether] the witness is a false witness and has accused his brother falsely . . .

(*Deuteronomy* 19:16-18). Nothing is said here as to testimony by witnesses for the defense, but, presumably, hearing their testimony, as well as considering any tangible evidence, would be part of the judges' diligent inquiry.<sup>275</sup>

One law in H also provides for "an inquiry." This is the law concerning what is to be done if or when a man has sexual intercourse with a woman who is a slave and betrothed to another man (*Leviticus* 19:20-22). In such circumstances, "an inquiry shall be held" (*Leviticus* 19:20), evidently in order to ascertain relevant facts, such as whether the woman actually was a slave, or whether she had been freed. In the latter event, evidently, she would be considered responsible for her role in the affair, and, therefore, possibly culpable under *Deuteronomy* 22:22-27, if that was still considered good law when H was codified.

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274. See *Proverbs* 18:18: "[t]he lot puts an end to disputes and decides between powerful contenders." Here we see an early counterpart to the purported value of "finality" if not also "judicial economy." Presumably, it was believed that, through divine providence, casting the lot (possibly *Urim* and *Thummim*) would reveal the truth and result in a just outcome. See *Proverbs* 16:33.

275. See *Jeremiah* 26:12-19 where Jeremiah himself, and then others speak in his defense. See *supra* Part III.C.6. of this article.



The most developed depiction of fact-finding at trial, of course, is in the story of Susanna.<sup>276</sup> There we see witness testimony, albeit false (*Susanna* vv. 34-40), a defense attorney's demand for examination and determination of "the facts" (*Susanna* v. 48), sequestration of the witnesses (*Susanna* v. 51), and their subsequent cross-examination by counsel as to the alleged offenders' exact location at the time of the purported offense (*Susanna* vv. 52-58).

### E. Witnesses

Although some capital laws as formulated suggest that circumstantial evidence might suffice for conviction,<sup>277</sup> most, at least by implication, require the testimony of witnesses. The critical question in such cases would be the veracity of the testimony. At least one of the Ten Commandments is concerned with such veracity: "[y]ou shall not bear false witness against your neighbor." (*Exodus* 20:16; *Deuteronomy* 5:20). This "commandment" may pertain to defamation<sup>278</sup> as well as testimony in court. The commandment against taking the name of YHWH in vain (*Exodus* 20:7; *Deuteronomy* 5:11) also probably referred to perjury or false testimony under oath in court.<sup>279</sup> Earlier, the CC had warned against testifying falsely or maliciously, whether suborned on behalf of conspiracy with another, or to please some crowd or popular majority: "[y]ou shall not utter a false report. You shall not join hands with a wicked man, to be a malicious witness. You shall not follow a multitude to do evil; nor shall you bear witness in a suit, turning aside after a multitude, so as to pervert justice." (*Exodus* 23:1-2).<sup>280</sup>

#### 1. Minimum of Two Adverse Witnesses

Possibly early common law, and at any rate, later statutory law required testimony of at least two witnesses in order to convict a person of a capital crime. The earliest narrative instance is the account of Jezebel's arranging to have Naboth accused of a capital offense by two perjuring

276. See *supra* Part III.C.9.

277. See, e.g., *Deuteronomy* 22:25-27.

278. See also *Leviticus* 19:16.

279. See *Leviticus* 19:12: "[a]nd you shall not swear by my name falsely, and so profane the name of our God: I am [YHWH]." See also *Jeremiah* 7:9 and *Zechariah* 5:3, condemning those who swear falsely.

280. As to witnesses in biblical and talmudic tradition, see DAVID DAUBE, WITNESSES IN BIBLE AND TALMUD 2-20 (Oxford Centre for Postgraduate Hebrew Studies 1986). Daube collected and discussed a large number of relevant texts from these and also from extra-biblical sources. This study has been republished in CALUM M. CARMICHAEL, COLLECTED WORKS OF DAVID DAUBE 401-23 (Berkeley: Univ. of Calif. Press ed. 1992). Subsequent citations in this article are to the earlier (1986) publication.

witnesses.<sup>281</sup> The earliest statutory provision requiring two (or three) witnesses is found in the Revised Deuteronomic Code. *Deuteronomy* 17:6 required testimony of at least two witnesses to sustain capital punishment in cases of alleged allotheism. As broadly phrased, this requirement may have been meant to be applicable in all kinds of death penalty cases: "[o]n the evidence of two witnesses or of three witnesses he that is to die shall be put to death; a person shall not be put to death on the evidence of [only] one witness." (*Deuteronomy* 17:6.)<sup>282</sup>

A century or two later, *Numbers* 35:30, part of the Priestly Code, evidently required two or more witnesses not only in trials for murder, but for conviction on any capital charge: "[i]f anyone kills a person, the murderer shall be put to death on the evidence of witnesses; but no person shall be put to death on the testimony of [just] one witness." The requirement of two adverse witnesses may have been implicit in the D law regulating ungovernable sons: there both parents were required to bring charges and testify (*Deuteronomy* 21:18-20.)<sup>283</sup> This sort of requirement was still operative as late as the story of Susanna, where two false witnesses testify against her. Here, as a further precaution in the interest of truthful fact-finding, the witnesses are sequestered and subjected to cross-examination separately (*Susanna* vv. 51-59).<sup>284</sup>

Requiring more than one witness no doubt was meant to assure factually accurate as well as honest testimony. Such requirement, of course, could not guarantee the truth, since witnesses might, nevertheless, testify falsely and maliciously, as in the Naboth and Susanna stories. However, testimony by two or more witnesses could reasonably be

281. 1 *Kings* 21:8-13. See *supra* Part III.C.4. of this article. SCHREIBER, *supra* note 178, points out that the United States Constitution, art. III, §. 3, provides: "[n]o person shall be convicted of treason unless on the testimony of two witnesses to the same overt act."

282. According to *Deuteronomy* 19:15, also perhaps part of the RDC, the multiple witness requirement extended to any crime or offense, not only those punishable by death:

A single witness shall not prevail against a man for any crime or any wrong in connection with any offense that he has committed; only on the evidence of two witnesses, or of three witnesses, shall a charge be sustained.

In the New Testament, Paul applied the multiple witness requirement to alleged wrongdoing by church members: "[a]ny charge must be sustained by the evidence of two or three witnesses." (2 *Corinthians* 13:1). Reference here, evidently, is to non-capital offenses. See also *Matthew* 18:16 (two or three witnesses to be present for attempted dispute resolution). In reversing a lower court treason decision, the United States Supreme Court quoted both *Matthew* 18:16 and *Deuteronomy* 19:15. *Cramer v. United States*, 325 U.S. 24, nn.36 & 37 (1945).

283. In this instance, clearly, a woman's testimony was to be credited. Cf. FALK, *supra* note 68 (referring only to the father's testimony).

284. Later rabbinic law required witnesses to recall detailed particulars in identifying offenders, and barred admission of confessions by the accused. See Spitz, *supra* note 29, at 346. See generally DAUBE, *supra* note 280, at 16-17. See also Irene Merker Rosenberg & Yale L. Rosenberg, *In the Beginning: The Talmudic Rule against Self-Incrimination*, 63 N.Y.U.L. REV. 955, 980, 1028 (1988).

considered more reliable than that of only one witness.<sup>285</sup> The basic underlying concern here, obviously, is to try to prevent the execution of innocent persons.

## 2. Promoting True Testimony

Truthful testimony was mandated by the Ninth of the Ten Commandments: "[y]ou shall not bear false witness against your neighbor."<sup>286</sup> It may also be implicit in the Third Commandment: "[y]ou shall not take the name of YHWH your God in vain."<sup>287</sup> Neither of these commandments, however, provided sanctions.

The Revised Deuteronomic Code adds a potent legal provision aimed at deterring *malicious* false testimony. If a person is found to have so testified:

Then you shall do to him as he had meant to do to his brother; so shall you purge the evil from the midst of you. And the rest shall hear, and fear, and shall never again commit any such evil among you. Your eye shall not pity; it shall be life for life, eye for eye, tooth for tooth, hand for hand, foot for foot.

(Deuteronomy 19:19-21). The denouement of the story of Susanna instances an application of this law: "[a]nd they did to [the two elders] as they had wickedly planned to do to their neighbor; acting in accordance with the law of Moses, they put them to death."<sup>288</sup> The Book of Proverbs offers a series of sayings commending true, and condemning false witnesses, appealing in effect to the conscience or moral judgment of readers. For example:

He who speaks the truth gives honest evidence,  
but a false witness utters deceit. (*Proverbs* 12:17).

A truthful witness saves lives,

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285. See West, *supra* note 4, at 11, suggesting that the biblical two-witness rule "required a high degree of certainty, more than, perhaps, the [beyond] reasonable doubt standard" of contemporary American criminal jurisprudence. See the careful discussion of this question by Monika Jain, Comment, *Mitigating the Dangers of Capital Convictions Based on Eyewitness Testimony Through Treason's Two-Witness Rule*, 91 J. CRIM. L. & CRIMINOLOGY 761 (2001).

286. *Exodus* 20:16; *Deuteronomy* 5:20. This commandment may also have applied more broadly to slander or defamation.

287. *Exodus* 20:7; *Deuteronomy* 5:11, which may have referred to testimony given under oath. See also *Exodus* 23:7: "[k]eep away from a false charge, and do not slay the innocent and righteous . . . ."

288. *Susanna v. 62*. Here *Deuteronomy* 19:19-21 is obviously construed to apply gender-inclusively against men who maliciously accuse a woman of wrong doing.

but one who utters lies is a betrayer. (*Proverbs* 14:25).<sup>289</sup>

Moreover, *Proverbs* also invokes the further sanction of self-interest against those who would offer false testimony:

A false witness will not go unpunished,  
and he who utters lies will not escape. (*Proverbs* 19:5).

Indeed, testifying falsely could prove fatal: "[a] false witness will perish" (*Proverbs* 21:28).<sup>290</sup> These sayings clearly imply that even if false witnesses might get away with perjury in the courtroom, they would nonetheless come to grief at the hand of divine providence or justice.<sup>291</sup>

Another new law found in the RDC requires witnesses to throw the first stones when the persons against whom they testified are condemned to die: "[t]he hand of the witness shall be first against him to put him to death, and afterward the hand of all the people." (*Deuteronomy* 17:7). This provision may have been part of the law condemning Israelites who practiced allotheism for which the penalty was death by stoning.<sup>292</sup> Or it may have been intended to apply in all cases where the penalty was capital punishment.<sup>293</sup> This law, too, seems to have been intended to encourage true testimony. If one was going to testify that a person had committed a capital offense, one would presumably wish to be certain that what one said was true since one might later have to play a leading role in the actual execution.<sup>294</sup>

### 3. The Duty to Testify

Another type of law has to do with encouraging reluctant witnesses to come forward: "[i]f any one sins in that he hears a public adjuration to testify and though he is a witness, whether he has seen or come to know the matter, yet does not speak, he shall bear his iniquity." (*Leviticus* 5:1).

This provision, like *Numbers* 35:30, probably was part of the Priestly Code. No explicit penalty is attached to this law; however, the idea seems

289. See also *Proverbs* 14:5; 19:28; 25:18. On false witnessing or testimony in biblical tradition, see generally PHILLIPS, *supra* note 36, at 142-48.

290. See also *Proverbs* 19:9: "[a] false witness will not go unpunished, and he who utters lies will perish."

291. This meaning probably is expressed also in the Third Commandment: "for YHWH will not hold him guiltless who takes his name in vain." (*Exodus* 20:7 and *Deuteronomy* 5:11, referring to the consequences of swearing falsely under oath.) Possibly that prospect remains implicit in the continuing Western court room practice of "swearing in" witnesses.

292. See also *Deuteronomy* 13:6-11, which requires witnesses to throw the first stones when their dearest family members or friends have committed allotheism.

293. The preceding verse, *Deuteronomy* 17:6, appears to apply in this broader sense.

294. COHN, *supra* note 29, at 39: "[t]his provision [was] probably intended to impress potential witnesses with the gravity of the responsibility they are taking upon themselves."

to be that those who failed to testify when they should have done so would know who they were. To clear their iniquity, which otherwise could result in indeterminate deleterious consequences, such persons were to confess their sins, probably to a priest, and bring their guilt or sin offerings to YHWH.<sup>295</sup>

#### F. *The Punishment Phase: Sentencing Guidelines*

Punishments, particularly in earlier portions of biblical tradition, were not always narrowly tailored. Not only the offender, but also others, including the offender's whole family, might be put to death. And punishments may have been excessive or inordinate compared to the offense. One type of biblical law evidently was intended to limit punishments to guilty parties. Another was meant to limit punishments according to the nature of the offense, that is, to let the punishment more nearly fit the crime.

##### 1. *Fathers, Sons, and Families; or only the Offender?*

In early biblical times, it was not uncommon for both the perpetrator of an offense and some or all of his family to be punished, whether officially or by avenging kinsmen. In some traditions, God or YHWH himself ordered or wreaked such vengeance. Both later biblical law and prophetic pronouncements on behalf of YHWH limited punishment to the offender alone.

The principle or practice of extended (if not completely unlimited) vengeance is indicated in Lamech's boast to his wives (*Genesis* 4:23-24). YHWH had "marked" Cain "lest any who came across him should kill him." The mark was to signify that if any one killed Cain, "vengeance" would "be taken upon him sevenfold" (*Genesis* 4:15). If Lamech, a descendent of Cain, can be believed, someone nevertheless had killed Cain, and "sevenfold" vengeance had been inflicted on his killer — meaning, probably, that seven members of the killer's family had been killed in retaliation (*Genesis* 4:24). Later, when a male Israelite stole property that had been "devoted" to YHWH,<sup>296</sup> not only he, but also his sons, daughters, and cattle were put to death (*Joshua* 7:1-25).<sup>297</sup>

Early tradition in the Ritual Decalogue endorsed the idea that YHWH, himself, would punish both the wicked and their descendants. YHWH was "merciful and gracious, slow to anger, and abounding in steadfast love and faithfulness," *but* would visit "the iniquity of the fathers upon the children and the children's children, to the third and the fourth generation" (*Exodus*

295. *Leviticus* 5:5-6, 7-13.

296. The property evidently consisted of items plundered from Jericho that had been set apart for use in the future as religious implements or fixtures.

297. See also 2 *Samuel* 12:13-14, where the prophet, Nathan, declared that David's *son* would die in punishment for David's having murdered Uriah and marrying Uriah's widow.

34:6-7). This principle also appears in identical language in both versions of the Decalogue, specifically in the case of those who also worshiped other gods before or besides YHWH:

You shall not make for yourself a graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; you shall not bow down to them or serve them; for I [YHWH] your God am a jealous God, visiting the iniquity of the fathers upon the children to the third and fourth generation of those who hate me . . . .

(*Exodus 20:4-5; Deuteronomy 5:8-9*).

The Deuteronomic Code, however, established a new guideline for punishment of capital offenders: "[t]he fathers shall not be put to death for the children, nor shall the children be put to death for the fathers; every man shall be put to death for his own sin." (*Deuteronomy 24:16*.) So far as official proceedings were concerned, subsequent to promulgation of the Deuteronomic Code, only the offender might be executed. An instance of this law's application is reported in an account of events in the tumultuous days of the divided kingdoms:

And as soon as the royal power was firmly in his hand, [Amaziah] killed his servants who had slain the king his father. But he did not put to death the children of the murderers; according to what is written in the book of the law of Moses, where [YHWH] commanded, "The fathers shall not be put to death for the children, or the children be put to death for the fathers; but every man shall die for his own sin."

(*2 Kings 14:5-6*). This text is repeated, nearly verbatim, in *2 Chronicles 25:3-4*.

Moreover, according to the prophets Jeremiah and Ezekiel, YHWH changed his own way of dealing with offenders. Now, or at any rate, once YHWH restored the fortunes of his people after the exile, "every one shall die for his own sin."<sup>298</sup> This new theology (or theodicy) correlated with and undergirded the sentencing guideline set out in *Deuteronomy 24:16* and the practice remembered in *2 Kings 14:5-6*.

## 2. *The Lex Talionis*

A number of biblical laws, particularly in the CC, provide for restitution, compensation or damages when one person's actions (whether

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298. *Jeremiah 31:29-30. See also Ezekiel 18:1-20, 30.* An early narrative tradition also implicitly repudiated the principle of collective guilt or guilt by association: the story of Abraham's reminding YHWH that it was not right to punish the guilty with the innocent. See *supra* note 202.

intentional or negligent) cause another's property loss.<sup>299</sup> But what if one person permanently injures or kills another? Biblical law generally does not require (or allow) monetary compensation for such injuries or death. Instead, under certain circumstances, pursuant to the so-called *lex talionis*, if a permanent injury resulted, the same injury was to be inflicted on the person responsible for it.<sup>300</sup> Similar provisions are found elsewhere in ANE law.<sup>301</sup> Biblical law codes include three distinct versions of the *lex talionis*: *Exodus* 21:23-25; *Leviticus* 24:19-20; and *Deuteronomy* 19:16-21. One modern scholar proposes that all three biblical versions of the *lex talionis* were inserted by a late "Pentateuchal editor," and urges that this editor intended to "stress the principle of compensation" rather than "a retaliatory theory of punishment."<sup>302</sup> Modern jurisprudential sensibilities might prefer that such was the intent, but indications to that effect are largely absent from the biblical texts in question.<sup>303</sup>

299. See *Exodus* 21:33-36; 22:1, 4, 5-15. See also *Numbers* 5:5-10; *Leviticus* 6:1-5; 24:19, 21a.

300. The Latin noun, *talio*, means "retaliation." The genitive singular form is *talionis*. Thus *lex talionis* means, literally "law of retaliation" or "law of retribution in kind." The expression is a term of art used by interpreters of biblical and other laws. The term is not found in the biblical text. But see DAUBE, *supra* note 32, at 102-503 (as to the biblical *lex talionis*). See also WESTBROOK, *STUDIES*, *supra* note 31, at 39-88; Irene Merker Rosenberg & Yale L. Rosenberg, *Lone Star Musings on "Eye for an Eye" and the Death Penalty*, 1998 UTAH L. REV. 505, 505-41 (1998).

301. See, e.g., the Code of Hammurabi, ch. 196, 197 and 200. See generally WESTBROOK, *STUDIES*, *supra* note 31, at 47-49.

302. PHILLIPS, *supra* note 36, at 96-99. See also Edward McG. Gaffney, Jr., *Biblical Law and the First Year Curriculum of American Legal Education*, 4 J.L. & RELIGION 63, 85-86 (1986); Bernard S. Jackson, *Models in Legal History: The Case of Biblical Law*, 18 J.L. & RELIGION 1, 6-55 (2002-03); Rosenberg & Rosenberg, *supra* note 300, at 525-28. Later rabbinic law did construe the *lex talionis* to provide for compensatory damages rather than retaliation in kind, though retaining the death penalty for certain types of cases, at least in theory. See Spitz, *supra* note 29, at 345. See also Louis E. Newman, *Covenant and Contract. A Framework for the Analysis of Jewish Ethics*, 9 J.L. & RELIGION 89, 106 (1991) ("The rabbis effectively eliminated capital punishment (though, of course, the Bible mandates it) by introducing extraordinarily stringent conditions which had to be met before a person could be convicted of a capital offense.").

303. The only laws expressly providing for ransom or monetary compensation for homicide are found in *Exodus* 21:28-32 (when an ox gores a person). See *supra* text accompanying notes 46-50. *Exodus* 21:22 provides for a *fine* (arguably compensation payable to the husband) when his wife has a miscarriage resulting from injury inflicted by brawling males, but there is no provision for ransom or monetary compensation in the event of her death. See *supra* text accompanying notes 43-45. 2 *Samuel* 21:1-9 can be read to imply that ransom may have been an alternative to capital punishment when a former King had wrongfully ordered the execution or murder of persons contrary to treaty. See WESTBROOK, *STUDIES*, *supra* note 31, at 51. Neither *Exodus* 21:28-32 nor 2 *Samuel* 21:1-9 refer to the *lex talionis*. Westbrook possibly over-generalizes when, on the basis of the Samuel text, he concludes that in "the biblical system," "premeditated murder gives the right to revenge by the victim's relatives, with the choice of accepting ransom." *Id.* at 77. Westbrook urges that provisions for ransom in other ANE laws are implicit in various biblical texts that specifically call for the death penalty, on the theory that absent explicit

The earliest version of the *lex talionis* is found in the CC in regard to the narrowly defined circumstance when a pregnant woman is injured by brawling males, has a miscarriage, and sustains some permanent, disfiguring or debilitating injury, or dies as a result: "[i]f any harm follows, then you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe." (*Exodus* 21:23-25).<sup>304</sup> Conceivably a pregnant woman could suffer a burn injury, for instance, if pushed against an oven or into a fire, or even "stripes," if one of the brawling males was wielding a whip or stick. Alternatively, the list of possible harms and punishments may have been added to the text to reconcile it with later versions of the *lex talionis*. In any case, if the woman dies, the man who caused the fatal injury is to be put to death.

Unlike many of the other laws found in *Deuteronomy* 12-19, the law providing punishment for malicious, false witnesses (*Deuteronomy* 19:16-21) is not directly associated with themes or institutional changes characteristic of the Deuteronomic Reform. This law may, therefore, date back to an earlier if not the original version of D. In any case, we see here another limited context in which the *lex talionis* was to apply. If it was determined (pursuant to diligent inquiry) that a person had maliciously and falsely accused someone of a crime, the accuser was to suffer the same penalty that would have been imposed on the accused had the latter been found guilty: "[t]hen you shall do to him as he meant to do to his brother. . . . Your eye shall not pity; it shall be life for life, eye for eye, tooth for tooth, hand for hand, foot for foot." (*Deuteronomy*. 19:19-21).<sup>305</sup> It has been said that *Deuteronomy* 19:21 is the "most popular" biblical text quoted by prosecutors to jurors in modern capital murder trials.<sup>306</sup> If so, such prosecutors (or others arguing from this text) should also point out that as read in context, it refers explicitly and solely to the punishment of malicious, false witnesses.

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statement to the contrary, it would have been *assumed* that ransom was available. *See id.* at 78-83.

304. *See supra* text accompanying notes 43-45. From the context in *Exodus* 21:22, it appears that "harm" here refers to an injury to the woman, rather than to the fetus. Perhaps it was understood that a pregnant woman would be especially vulnerable to harm under these circumstances.

305. Reference to eye, tooth, hand, and foot, among the provisions for punishing malicious, false witnesses, might suggest that under biblical common law, punishment for some offenses may have included dismemberment. Interpreters sometimes cite *Deuteronomy* 25:11-12 as an additional instance of the *lex talionis*. That text requires cutting off a wife's hand if she assists her husband while he is fighting, by seizing his opponent's "private parts." The text, however, does not call for retaliation in kind, since the antagonist's *hand* would not have been injured. *See infra* note 318. The question is moot, for present purposes, since *Deuteronomy* 25:11-12 does not call for capital punishment. There are no reported instances of this law's application, and it is not repeated in the later law codes.

306. COSTANZO, *supra* note 31.



The *lex talionis* is applied in another limited context, *Leviticus* 24:19-20, the only other biblical text where it is found. Here it relates specifically to those who commit mayhem,<sup>307</sup> that is, cause another person some permanent, disfiguring injury: "[w]hen a man causes a disfigurement in his neighbor, as he has done it shall be done to him, fracture for fracture, eye for eye, tooth for tooth; as he has disfigured a man, he shall be disfigured."<sup>308</sup> This text adds, "fracture for fracture," but unlike *Exodus* 21:23-25, makes no mention of "hand for hand" or "foot for foot." Here, as in *Exodus* 21:22-25, it seems to make no difference whether the harm or here, disfigurement, resulted from intentional, reckless, or negligent conduct by the offending party. As stated, this version of the *lex talionis* does not call for capital punishment, "life for life." Homicide, of course, goes beyond mayhem or disfigurement. However, *Leviticus* 24:17 and 21b add, "[h]e who kills a man shall be put to death."<sup>309</sup> It is not clear whether these verses were intended to be part of the *lex talionis*, or to constitute a separate requirement.<sup>310</sup> As in the case of *Genesis* 9:5-6, *Leviticus* 24:17 and 21b make no special provision for negligent or accidental homicide.

How and when the provisions distinguishing murder from manslaughter and establishing certain due process protections for the latter would have interfaced with the life-for-life element of the *lex talionis* is unclear. Perhaps the earlier version of that *lex talionis* at *Exodus* 21:22-25 would have been subsumed into or superceded by the more general mayhem law in *Leviticus* 24. The Holiness Code makes no provision for cities of refuge where a negligent manslayer might find sanctuary pending further proceedings.<sup>311</sup> It may be that the detailed procedures set out in

307. See *supra* text accompanying note 89.

308. An implicit exception to this version of the *lex talionis* appears in *Exodus* 21:26-27, where it does not apply in the case of permanently disfiguring injuries to slaves. On the other hand, slaves are not here treated as mere "property." Instead, slaves who are disfigured are to be compensated by being given their freedom: "for the eye's" or "for the tooth's sake."

309. See MICHAEL DAVIS, *JUSTICE IN THE SHADOW OF DEATH: RETHINKING CAPITAL AND LESSER PUNISHMENTS* 234 (Rowman & Littlefield 1996)

(The general principle of the *lex talionis* (as traditionally understood) is *equivalence* between harm done and punishment imposed. The punishment is not for an act as such, for what was intended or risked, but for what was done ("an eye for an eye," as the Bible says). So, for example, to kill someone, even "by accident," would justify the same penalty . . . as would killing deliberately.).

But see *supra* text accompanying notes 38-42, 46-53 (discussing texts where punishment clearly does vary according to the perpetrator's intent and other factors).

310. Both verses are separated from the language of the *lex talionis* (vv. 19-20) by the quite different requirement, "[h]e who kills a beast should make it good" (*Leviticus* 24:18, 21a). The entire block of laws found in *Leviticus* 24:17-21 (if not also v. 22) appears to have been inserted somewhat carelessly into the story about the man of mixed ancestry who blasphemed the Name (*Leviticus* 24:6-16, 23).

311. See *supra* Part III.B. of this article. Special cities of refuge would have been unnecessary if H is correctly dated prior to the Deuteronomic Reform, since prior to that

*Deuteronomy* 19 and *Numbers* 35 were intended to qualify the over-broad language of *Leviticus* 24:17 and 21b.

As noted, the laws set out in *Deuteronomy* 19 and *Numbers* 35 distinguish between manslaughter and other degrees of homicide, provide cities of refuge where perpetrators may be safe while awaiting trial, require two or more witnesses, call for both parties to appear at trial, and for judges to "inquire diligently," and apply the *lex talionis* to any who offer false and malicious testimony.<sup>312</sup> Read in this context, the *lex talionis* was not a general rule of life for life in any and all circumstances. Instead, in its terms, it was to apply only in cases where brawling males injured or caused the death of a married, pregnant woman; where someone gave false and malicious testimony in court; or in a case where someone had committed mayhem. Even if *Leviticus* 24:17 and 21b are read as an extension of or additions to the *lex talionis* as stated in *Leviticus* 24:19 and 20, the requirement "[h]e who kills a man shall be put to death," is substantially narrowed and qualified by due process provisions set out in the later codes RDC, as in *Deuteronomy* 19, and the Priestly Code, as in *Numbers* 35.<sup>313</sup>

In any event, the *lex talionis* set a limit to retribution: the perpetrator's punishment was to equal but not exceed the injury inflicted on the victim.<sup>314</sup> It is not clear whether the victim or his representative was expected to execute such punishment himself, or whether such punishment would be carried out by a judge or other representative of the community.<sup>315</sup> Conceivably, as in *Exodus* 21:30, the victim (or the victim's family) could choose to receive compensation rather than insist on the

Reform, local religious shrines would have functioned as places of refuge. See *supra* text preceding and following note 111.

312. See *supra* Parts III.B., D., and E. of this article.

313. See also earlier and other due process protections for the accused noted *supra* in Part III.A., B., C., D., and E. of this article.

314. MENDENHALL, *supra* note 39, at 16-17. See also Howard Zehr, *Restoring Justice*, in CAPITAL PUNISHMENT: A READER, *supra* note 1, at 29: "[a]n eye for an eye' is not what it seems. In a society unused to the rule of law, it was intended as a limit on, rather than a command to do, violence. It established a rule of proportion which laid the basis for restitution." Compare, e.g., the pattern of unlimited retribution illustrated in the ancient story of seven-fold revenge in the case of Cain (*Genesis* 4:15, 24); the legendary feud between the Hatfields and McCoys, or on-going retaliatory killings by modern Israelis and Palestinians.

315. None of the biblical *lex talionis* texts identifies "the government" or the Israelite or Jewish state, let alone any modern state, as the agency divinely authorized to punish malefactors. Cf. Millar Burrows, *Old Testament Ethics and the Ethics of Jesus*, in ESSAYS IN OLD TESTAMENT ETHICS 235 (James L. Crenshaw & John T. Wilson eds., KTAV Publishing House, Inc. 1974) ("[a]gainst a primitive background of blood revenge and unlimited retaliation (*Genesis* 4:5, 24), Hebrew law had sought to regulate the age-old customs, . . . restricting the execution of the *lex talionis* to the established civil authorities (*Exodus* 21:23ff.; *Leviticus* 24:19f.; *Deuteronomy* 19:15-21)"). It is not clear, however, that the "you" referred to in these texts stands for either local or national "civil authorities."

offender's corporal or capital punishment.<sup>316</sup> But no biblical texts relating to the *lex talionis* contain any indication of that alternative.

Biblical tradition reports only one case when the *lex talionis* was carried out in the form of capital punishment.<sup>317</sup> There are no reported instances of mutilation as punishment for loss of or injury to a victim's bodily member.<sup>318</sup> It may be, of course, that there were unreported instances. In practice, the *lex talionis* provisions may have been mitigated. Two texts suggest that victims' relatives might exact ransom (damages or compensation in tort) rather than require the offender's execution, *Exodus* 21:30 and *Numbers* 35:31-32. The *Exodus* law applies only when the offender's ox has a known propensity for goring, and, after the owner has received due warning and failed to pen the animal in. The *Numbers* text, which bars ransom for the life of a murderer, could be read to imply that ransom or compensation might be acceptable for other categories of capital offenders. However, the late Ze'ev Falk probably overstated the case for such compensation in stating: "[i]n practice the principle [of the *lex talionis*] was not realized as such, but was commuted by the payment of ransom."<sup>319</sup>

316. MENDENHALL, *supra* note 39, at 17. See also *supra* text accompanying notes 48-49, 303.

317. *Susanna* vv. 61-62, referring to *Deuteronomy* 19:16-21 (malicious false witnesses). There are a few other narrative instances when murderers were executed. *E.g.*, 2 *Samuel* 4:5-12; 1 *Kings* 2:31-35, but there is no reference to the *lex talionis* in those accounts.

318. *Deuteronomy* 25:11-12 requires that if a woman rescues her husband from a brawl by seizing his opponent's "private parts," her hand is to be cut off. This is not, obviously, a case of a "hand for a hand," and is the only biblical law, other than what may be implicit in the *lex talionis*, calling for mutilation. Calum Carmichael, on the other hand, insists that both *Exodus* 21:22-25 and *Deuteronomy* 19:16-21 call for capital punishment "to be followed by the systematic mutilation of the offender's corpse." CALUM M. CARMICHAEL, *THE SPIRIT OF BIBLICAL LAW* 107 (1996). *Judges* 1:6-7 refers to treatment of prisoners of war. The execution and subsequent mutilation of assassins described in 2 *Samuel* 4:12, while possibly illustrating Carmichael's theory, is not a case of "hand for hand." This article does not attempt to trace the interpretation or application of the *lex talionis* in post-biblical times. The newspaper account that follows, however, here quoted in its entirety, illustrates a recent application of such law in Pakistan:

Multan, Pakistan A judge has ruled that a Pakistani man convicted of attacking his 17-year-old fiancée with acid be blinded with acid himself, police said Friday. Mohammed Sajid, 19, poured acid on the face of his fiancée on June 24. His two brothers were also convicted of taking part. The woman lost both eyes and her face was burned in the attack, which police said followed a minor dispute between the couple. Judge Afzal Sharif ruled that Sajid and his brothers were guilty of the attack and be jailed for seven years, and that Sajid be blinded by acid. The judge ordered that a doctor perform the punishment publicly at a sports stadium.

*Judge Rules Man Must Be Blinded*, READING EAGLE, READING, PA, Dec. 13, 2003, at A4.

319. FALK, *supra* note 40, at 48. Westbrook, *supra* note 247, at 122-23 (discussing Middle Assyrian laws that allow the deceased avenger either to kill the offender or to accept ransom along with the offender's inheritance).

## CONCLUSIONS

Although the point may be obvious, it should not be overlooked that according to biblical tradition, biblical law was given to, and intended for, the guidance or direction of Israel, Judah, and the Jewish people. It was not regarded as the law of the land for other nations, peoples, or jurisdictions. There is, therefore, no biblical warrant for supposing (or proposing) that biblical laws pertaining to the death penalty, or to any other matters of importance in biblical times, were meant to apply in the United States of America.

Moreover, when read in their contexts, several biblical laws (and other biblical texts) do not clearly stand for the propositions for which they are often cited by modern proponents or opponents of capital punishment.

A. *Modern Interpretation of Biblical Texts*

Many texts purportedly opposing the death penalty do not so state clearly or categorically. For instance, the account of YHWH's marking Cain (*Genesis* 4:15) does not *forbid* capital punishment.<sup>320</sup> It is unlikely that the Sixth Commandment, "[t]hou shall not kill," was intended to prohibit use of the death penalty.<sup>321</sup> Nor is it apparent that the *lex talionis* was understood to allow capital offenders to pay damages or ransom in lieu of being put to death.<sup>322</sup> Nor is there any evidence that elders might undertake to reform or rehabilitate ungovernable sons before, or instead of, inflicting the death penalty.<sup>323</sup>

Conversely, many biblical texts commonly said to justify applying the death penalty in modern times do not say what those citing them contend. For instance, *Genesis* 9:5-6 says that God told Noah, "[w]hoever sheds the blood of man, by man shall his blood be shed; for God made man in his own image." Yet the broad (if not overbroad) scope of this instruction is significantly qualified by specific Mosaic laws that distinguish various types of homicide depending on circumstances and the perpetrators' intent.<sup>324</sup> James Megivern points out that latter day death penalty advocates generally construe *Genesis* 9:5-6 through the lenses of these qualifying laws, as if the *Genesis* text referred only to first degree murder.<sup>325</sup> As read

320. Stassen, *supra* note 8. The same commentator also may exaggerate when proposing that capital punishment was gradually abandoned in biblical times, *supra* note 21.

321. See *supra* notes 5-6 and accompanying text.

322. See *supra* notes 302-3 and accompanying text. See also FALK, *supra* text accompanying note 319.

323. See Levine, *supra* note 68.

324. See *supra* text accompanying notes 38-53, 111-14, and 136-45. But see *Leviticus* 24:17, 21b, discussed *supra* text accompanying notes 87-90 and 309-10. These *Leviticus* texts, like *Genesis* 9:5-6, do not distinguish among different categories of homicide.

325. See MEGIVERN, *supra* note 129. The "image of God" rationale is somewhat problematic, since it could be applied to the life of the accused offender. See *supra* note 178. To be sure, *Genesis* 9:5-6 as read does not suggest such application.

literally, however, the text is not so narrowly tailored or focused. Many other texts cited by modern death penalty proponents do not, in fact, say what such proponents claim, either.<sup>326</sup>

The most notable example is the often-cited *lex talionis* or "law of retaliation." This law sometimes is said to authorize use of the death penalty in all homicide cases, at least in all cases of first degree murder.<sup>327</sup> As has been seen, however, the biblical *lex talionis* was not set out as a broad or general rule, but rather as providing sentencing guidelines in three quite specific circumstances: (1) when a married, pregnant woman is injured by brawling men (*Exodus* 21:22-25);<sup>328</sup> (2) in mayhem cases (*Leviticus* 24:19-20);<sup>329</sup> and (3) as punishment for malicious, false witnesses (*Deuteronomy* 19:16-21).<sup>330</sup> It has been said that prosecutors often quote the Deuteronomic version to jurors in capital murder trials.<sup>331</sup> So doing would constitute prosecutorial misconduct unless such prosecutors also point out that this text refers specifically and solely to the punishment of malicious false witnesses.<sup>332</sup> Likewise, those who quote the *Exodus* version as authority for capital punishment, if truthful, should add that it applies only to fatal injuries inflicted on pregnant married women by brawling males.<sup>333</sup>

326. See, e.g., Vellenga, *supra* note 21.

327. As with *Genesis* 9:5-6 and *Leviticus* 24:17, 21b, modern death penalty advocates generally read some qualifying language such as "only in cases of first degree murder" into these texts. See MEGIVERN, *supra* note 129.

328. See *supra* text accompanying notes 43-45 and 304.

329. See *supra* text accompanying notes 307-10.

330. See *supra* text accompanying notes 125 and 305-06. One can only speculate as to how this law would be applied in modern times in situations such as the following:

Melendez was convicted in 1984 at the age of [thirty-three] with no physical evidence linking him to the crime and testimony from questionable witnesses. In fact, prosecutors hid the evidence and lied to the court in order to protect the real killer, a police informant. Melendez's conviction fell apart when the police informant's confession came to light in 1999 — a confession that prosecutors knew about before they took Melendez to trial.

Electronic Memorandum from Kenneth B. Nunn, Professor at Levin College of Law of the University of Florida, to Law Faculty (Feb. 21, 2005) (on file with author).

331. See *supra* text accompanying note 306.

332. Arguably, prosecutors who quote this version of the *lex talionis* without such qualification thereby themselves act as malicious, false witnesses. See generally, Welsh White, *Curbing Prosecutorial Misconduct in Capital Cases: Imposing Prohibitions on Improper Penalty Trial Arguments*, 39 AM. CRIM. L. REV. 1147, 1177-79 (2002); Elizabeth A. Brooks, Note, *Thou Shalt Not Quote the Bible: Determining the Propriety of Attorney Use of Religious Philosophy and Themes in Oral Arguments*, 33 GA. L. REV. 1113 (1999) (esp. pp. 1119-39); and Brian C. Duffy, Note, *Barring Foul Blows: An Argument for a Per Se Reversible Error Rule for Prosecutors' Use of Religious Arguments in the Sentencing Phase of Capital Cases*, 50 VAND. L. REV. 1335 (1997).

333. The *Leviticus* version, in its terms, applies only to *mayhem*, which was not a capital offense.

It appears to be the case that neither death penalty proponents nor opponents read or propose to apply all biblical death penalty texts literally. It is not certain that either category of interpreters intend to apply *any* such texts literally. For example, death penalty opponents are not known to advocate allowing estates of negligent homicide victims to demand and receive unlimited compensatory damages when the victim was gored by an ox.<sup>334</sup> Nor do such opponents propose establishing cities of refuge in Israel where those found to have committed manslaughter may find shelter pending the death of a high priest.<sup>335</sup> Modern death penalty proponents do not generally call for capital punishment for such offenses as sorcery (*Exodus* 22:18; *Leviticus* 20:6, 27),<sup>336</sup> kidnapping (*Exodus* 21:16; *Deuteronomy* 24:7),<sup>337</sup> worship of other gods or inciting other persons to so do (*Exodus* 22:20; *Deuteronomy* 13:1-18; 17:2-7),<sup>338</sup> incest (*Leviticus* 20:11-12, 14, 17),<sup>339</sup> striking or cursing parents (*Exodus* 21:15, 17, *Leviticus* 20:9),<sup>340</sup> adultery (*Deuteronomy* 22:13-27; *Leviticus* 20:19),<sup>341</sup> ungovernable sons (*Deuteronomy* 21:18-21),<sup>342</sup> violating the Sabbath (*Exodus* 31:12-17; 35:23),<sup>343</sup> blaspheming the Name (*Leviticus* 24:10-16),<sup>344</sup> buggery or bestiality (*Exodus* 22:19; *Leviticus* 20:15-16),<sup>345</sup> false prophecy (*Deuteronomy* 17:8-12),<sup>346</sup> male homosexual intercourse (*Leviticus* 20:13),<sup>347</sup> refusal to accept court rulings,<sup>348</sup> or malicious, false testimony (*Deuteronomy* 19:16-21).<sup>349</sup>

Nor do biblically oriented death penalty proponents generally advocate adherence to the methods of execution commonly mandated in biblical law, notably stoning<sup>350</sup> or burning the offender to death.<sup>351</sup> Neither do those so oriented insist upon execution by the entire local populace<sup>352</sup> or

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334. *Exodus* 21:28-32. See *supra* text accompanying notes 46-50.

335. *Deuteronomy* 19:4-13; *Numbers* 35:6-34. See *supra* text accompanying notes 111-13 and 136-45.

336. See *supra* text following note 59 and text accompanying note 81.

337. See *supra* text accompanying notes 57-59 and 64-65.

338. See *supra* text accompanying notes 61-62 and 115-23.

339. See *supra* text accompanying notes 99-103.

340. See *supra* text accompanying notes 54-56 and 91-93.

341. See *supra* text accompanying notes 71-76 and 94-95.

342. See *supra* text accompanying notes 66-70.

343. See *supra* text accompanying notes 132-35.

344. See *supra* text accompanying notes 84-86.

345. See *supra* text accompanying notes 60 and 96.

346. See *supra* text accompanying note 124.

347. See *supra* text accompanying notes 104-06.

348. See *supra* text following note 125.

349. See *supra* text accompanying note 125.

350. See *supra* text accompanying notes 165-66.

351. See *supra* text accompanying note 167.

352. See *supra* text accompanying notes 170-76.

by a private individual acting in the role of "the avenger of blood."<sup>353</sup> Nor do those who cite with approval the *lex talionis* often (or ever) commend punishing offenders by dismemberment or otherwise inflicting injuries in kind (eyes, teeth, hands, feet, burns, wounds, stripes or fractures). For that matter, few if any so-called biblical literalists propose enslaving grandsons whose fathers happen to see their grandfather naked in the course of a drunken stupor (*Genesis* 9:20-25), or selling daughters into slavery (*Exodus* 21:7-11). Nor do they propose to prohibit daughters from inheriting property if they have brothers (*Numbers* 27:1-8), or to require men to marry their deceased brothers' childless widows (*Deuteronomy* 25:5-10), or require owners of fields, orchards, and vineyards to allow the poor, widows, orphans or aliens to enter their lands in order to glean or pick fruit and produce (*Deuteronomy* 24:19-22; *Leviticus* 19:9-10; 23:22). Nor do modern biblical "literalists" mandate tithing all crops every third year and the establishment of a national system of food banks to provide for the needs of orphans, widows, aliens and Levites (*Deuteronomy* 14:28-29).<sup>354</sup>

As has been suggested, biblical death penalty laws do not appear to have been written in order to function as the basis for statutory enactments or judicial decisions in these United States. Nor do many, if any, modern biblically-oriented moralists, social philosophers or jurisprudes actually propose to apply biblical laws literally in our time. Nevertheless, many people in our time do quite plausibly consider biblical law — and other biblical texts — instructive and important, even in regard to such problematic matters as capital punishment.

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353. See *supra* text accompanying notes 177-84.

354. It has been suggested that biblical literalists, sometimes characterized as "fundamentalists," are often unfamiliar with the contents of the Bible or the findings of biblical scholarship, but instead attribute biblical authority to secular beliefs and values shared by others in their cultural settings. See generally Charles Hudson, *The Structure of a Fundamentalist Christian Belief-System*, in RELIGION AND THE SOLID SOUTH 122-42 (Samuel S. Hill, Jr., ed., Abingdon Press 1972). This pattern has been examined in connection with white Southern Protestant attitudes toward racial segregation. See, e.g., EVERETT TILSON, SEGREGATION AND THE BIBLE (Abingdon Press 1958). Christian beliefs and values have frequently been merged or confused with secular ideologies in many other cultural settings as well. See generally, H. RICHARD NIEBUHR, CHRIST AND CULTURE 83-115 (Harper & Bros 1951). As to white fundamentalist and biblical literalist views regarding the death penalty, see Robert L. Young, *Religious Orientation, Race, and Support for the Death Penalty*, 205-18, in CAPITAL PUNISHMENT: A READER, *supra* note 1. Proclivity towards violence as a means for resolving perceived concerns has been long recognized as an aspect of American society, particularly in the "old" or "deep" South. See Sheldon Hackney, *Southern Violence*, in THE HISTORY OF VIOLENCE IN AMERICA: A REPORT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE 505-27 (Bantam Books 1969); W. J. CASH, THE MIND OF THE SOUTH (Vintage 1969), and DAVID CHALMERS, BACKFIRE: HOW THE KU KLUX KLAN HELPED THE CIVIL RIGHTS MOVEMENT (Rowan & Littlefield 2003).

### B. The Basic Value of Human Life

This article's review of biblical laws has identified certain underlying concerns, values or objectives. First and foundational, is consistently high regard for human life. This value comes to expression both in the creation story, which affirms that God created human beings, both male and female, "in his own image" (*Genesis* 1:26-27),<sup>355</sup> and also in the P account of God's instructions to Noah following the flood: "[w]hoever sheds the blood of man, by man shall his blood be shed; for God made man in his own image." (*Genesis* 9:6).<sup>356</sup> The basic value of human life<sup>357</sup> is also implicit in all other laws that make homicide a capital offense, both those laws expressed in general terms (notably *Leviticus* 24:17, 21b)<sup>358</sup> and those referring to particular circumstances, such as premeditated murder (*Exodus* 21:12-14),<sup>359</sup> the death of a pregnant woman (*Exodus* 21:22-24),<sup>360</sup> death caused by a goring ox (*Exodus* 21:28-32),<sup>361</sup> sacrificing children to a foreign god (*Leviticus* 20:1-5),<sup>362</sup> and giving malicious and false testimony which could result in the execution of an innocent person (*Deuteronomy* 19:16-21).<sup>363</sup>

Laws making the worship of other gods a capital offense correlate with the recurrent biblical affirmation of God (or YHWH) as the source and valuer of all that is,<sup>364</sup> and in particular, as the one and only God to whom Israel owed its existence and allegiance. With this, also, is the understanding, expressed both in numerous biblical laws and by many of the prophets, that this God, YHWH, would bring judgment upon his people in the form of catastrophe if not total destruction, should they turn away

355. Biblical Hebrew expresses emphasis by repetition of key terms. That God made human beings in his own "image" is stated three times in these two verses. Whether that "image" was conceived in terms of physical appearance or otherwise need not be determined for present purposes.

356. See *supra* note 129.

357. Notwithstanding assumptions and claims by many proponents and opponents of environmental exploitation, a great deal of biblical tradition underscores the positive value of all kinds of living beings. See generally Richard Hiers, *Reverence for Life and Environmental Ethics in Biblical Law and Covenant*, 13 J. L. & RELIGION 127 (1996-98), revised version available on-line in *Forum on Religion and Ecology*, (2001): at [http://environment.harvard.edu/religion/religion/christianity/essays/chris\\_hiers\\_index.html](http://environment.harvard.edu/religion/religion/christianity/essays/chris_hiers_index.html). [For text of article substitute "body" for "index," for endnotes, substitute "notes"].

358. See *supra* text accompanying notes 87-90.

359. See *supra* text accompanying notes 38-42.

360. See *supra* text accompanying notes 43-45.

361. See *supra* text accompanying notes 46-50.

362. See *supra* text accompanying notes 82-83.

363. See *supra* text accompanying note 125 and Part III.E.2. of this article.

364. See generally, H. RICHARD NIEBUHR, *RADICAL MONOTHEISM AND WESTERN CULTURE* (Westminster/John Knox Press 1993).



from him and instead worship other deities.<sup>365</sup> Thus, biblical laws making worship of other gods a capital offense also are grounded implicitly, where not explicitly, on concern to preserve the lives of YHWH's people.<sup>366</sup>

Several other capital laws, though not concerned with homicide, likewise express concern for the bodily or moral integrity of persons. For instance, the following laws penalize kidnapping (*Exodus* 21:16; *Deuteronomy* 24:7),<sup>367</sup> "buggery" (*Exodus* 22:19; *Leviticus* 20:15-16),<sup>368</sup> adultery (*Deuteronomy* 22:13-27; *Leviticus* 20:10),<sup>369</sup> and incest (*Leviticus* 20:1-12).<sup>370</sup> Some of these laws also evidently were intended to preserve family and community social structures, notably those prohibiting various types of extra-familial sexual activity. Other such capital laws include the laws against cursing or striking parents (*Exodus* 1:15, 17; *Leviticus* 20:9),<sup>371</sup> and the ungovernable (or delinquent) son law (*Deuteronomy* 21:18-21).<sup>372</sup> The law penalizing refusal to obey court rulings (*Deuteronomy* 17:8-12)<sup>373</sup> obviously was intended to promote a just social order. Such concern likewise is implicit in the many biblical laws establishing due process protections for the accused.

### C. *The Critical Importance of Not Executing Innocent Persons*

Closely related to concern for the value of human life, biblical laws implicitly, and often explicitly, insist that only those persons who deserve to die should be put to death. In this connection, attention is often directed to the alleged offender's intent. Moreover, several laws are designed to assure that only those who actually committed a capital offense are executed. And some of these laws caution in particular against biased or

365. See, e.g., *Deuteronomy* 6:14-15; 8:11-20; 11:6-17; *Jeremiah* 7:1-15, 30-34; 11:9-17; *Hosea* 11:1-7 & 13:1-16.

366. See, e.g., *Exodus* 22:20; *Deuteronomy* 13:1-18; 17:2-7; & 18:20. See *supra* text accompanying notes 61-62 and 116-24. Thus also, probably, laws calling for the death of sorceresses, mediums and wizards (*Exodus* 22:18; *Leviticus* 20:6, 27), *supra* text following note 59 and text accompanying note 81, and the law against blaspheming the Name (*Leviticus* 24:10-16, 23), *supra* text accompanying notes 84-86. The law prohibiting work on the Sabbath may also have been prompted by such concern, to the extent that Sabbath observance was intended to honor YHWH. See, e.g., *Exodus* 20:8-11 (indicating this purpose).

367. See *supra* text accompanying notes 57-59 and 64-65.

368. See *supra* text accompanying notes 60 and 96.

369. See *supra* text accompanying notes 71-76 and 94-95.

370. See *supra* text accompanying notes 99-103.

371. See *supra* text accompanying notes 54-56 and 91-93.

372. See *supra* text accompanying notes 66-70. See also Good, *supra* note 4, at 976: "[i]t would seem . . . that the solidarity and integrity of the family was a quite central value for the Hebrews . . . . Further, the authority of and the honor and respect owed to parents are especially noticeable, and the mother in this regard stands equal to the father."

373. See *supra* text following note 125.

preferential treatment of the accused on the basis of their economic and social or ethnic status.

The alleged offender's intent is the focal inquiry mandated in most of the homicide statutes.<sup>374</sup> What may have been the earliest biblical capital law clearly articulates such inquiry: "[w]hoever strikes a man so that he dies shall be put to death . . ." but only in those cases when "a man willfully attacks another to kill him treacherously . . ." (*Exodus* 21:12-14).<sup>375</sup> The owner of an ox that fatally gores someone is to be executed only if his conduct constitutes gross negligence or reckless endangerment and then, only after he has been warned to take corrective action (*Exodus* 21:28-32).<sup>376</sup> Laws in the RDC (*Deuteronomy* 19:4-13) and the PC (*Numbers* 35:6-34) specifically distinguish between capital murder and manslaughter on the basis of the offender's intent or lack of same.<sup>377</sup> The Deuteronomic law explicitly observes that the accidental or merely negligent manslayer does "not deserve to die" and cautions against allowing "innocent blood" to be shed by those carrying out executions. Cities of refuge — places where those who had committed homicide could find sanctuary pending trial — were to be established specifically "lest innocent blood be shed . . . and so the guilt of bloodshed be upon you." (*Deuteronomy* 19:4-10.) Intent to commit the prohibited act is an implicit element in virtually all other capital offenses, for example, striking or cursing parents (*Exodus* 21:15, 17; *Leviticus* 20:9), buggery or bestiality (*Exodus* 22:19; *Leviticus* 20:15-16), kidnapping (*Exodus* 21:16; *Deuteronomy* 24:7), adultery (*Deuteronomy* 22:13-27; *Leviticus* 20:10), incest (*Leviticus* 20:11-12); and inciting to allotheism or the worship of other gods (*Deuteronomy* 13:1-18; 17:2-7).<sup>378</sup>

In biblical jurisprudence, it was critically important that only those found guilty of a capital offense should be punished accordingly. This

374. As noted elsewhere, *Leviticus* 24:17, 21b, are apparent exceptions. See *supra* text accompanying notes 87-90.

375. See *supra* text accompanying notes 38-42. Biblical law does not, however, address the questions whether minors, mentally retarded persons, or persons with mental illnesses were to be deemed capable of acting with culpable intent. As to these questions, See generally, Symposium, *Beyond Atkins: A Symposium on the Implications of Atkins v. Virginia*, 33 N.M. L. REV. No. 2 (Spring 2003); and Jeffrey A. Fagan & Valerie West, *The Decline of the Juvenile Death Penalty: Scientific Evidence of Evolving Norms*, in CRIMINAL LAW WORKING PAPERS, NELCO Legal Scholarship Repository, available at <http://lsr.nelco.org/columbia/pllt/papers/0476>. Quite recently, the United States Supreme Court has held the execution of juveniles to be unconstitutional. *Roper v. Simmons*, No. 03-633, 2005 U.S. LEXIS 2200 (U.S. Mar. 1, 2005).

376. See *supra* text accompanying notes 46-50. The same meaning may be implicit also in the case of the *lex talionis* regarding harm to pregnant wives. See *supra* text accompanying notes 43-45.

377. See *supra* text accompanying notes 111-14 and 136-45.

378. Notable exceptions are the cases of the man who blasphemed the Name (*Leviticus* 24:10-16, 23) and the man who gathered sticks on the Sabbath (*Numbers* 15:32-36), both P traditions, where the offenders had no previous specific notice as to the offenses, both being cases of first impression where capital sentences were applied *ex post facto*.

concern is stated explicitly in the CC: "[k]eep far from a false charge, and do not slay the innocent and righteous . . . ." (*Exodus* 23:7). The Deuteronomic Code applies this principle to inter-generational punishment: "[t]he fathers shall not be put to death for the children, nor shall the children be put to death for the fathers; every man shall be put to death for his own sin." (*Deuteronomy* 24:16).<sup>379</sup> This fundamental principle comes to expression also in the early narrative account of Abraham's negotiation with YHWH over the fate of Sodom (*Genesis* 18:16-33).<sup>380</sup> The core issue there is whether it would be right for YHWH to kill any innocent persons along with the wicked. At the outset, Abraham addresses YHWH in the following strong language:

Wilt thou indeed destroy the righteous with the wicked? Suppose there are fifty righteous within the city; wilt thou then destroy the place and not spare it for the fifty righteous who are in it? Far be it from thee to do such a thing, to slay the righteous with the wicked, so that the righteous fare as the wicked! Far be that from thee! Shall not the Judge of all the earth do right?

(*Genesis* 18:23b-25). Eventually, as the story is told, YHWH agrees to spare the city if as few as ten innocent persons could be found there. That the innocent might wrongly be put to death was clearly a matter of great concern. Executing persons who were innocent or did "not deserve to die" would bring "the guilt of bloodshed" upon the entire community.<sup>381</sup> It might be suggested that the same would be particularly true in a democratic society, where the criminal justice system has been established by its citizens.<sup>382</sup>

379. See *supra* text preceding and accompanying notes 296-98.

380. See *supra* note 202. The story probably is part of the J narrative that may be dated circa 950 B.C.E. See generally, Timothy D. Lytton, *Shall Not the Judge of the Earth Deal Justly?: Accountability, Compassion, and Judicial Authority in the Biblical Story of Sodom and Gomorrah*, 18 J.L. & RELIGION 31 (2002-03). Lytton suggests that the story illustrates God's "accountability and compassion" in judging, norms which human judges would do well to emulate. *Id.* at 51.

381. *Deuteronomy* 19:4-10. See *supra* text accompanying notes 113 and 377.

382. As to execution of innocent persons in United States jurisdictions, see Ursula Bentele, *Does the Death Penalty, by Risking Execution of the Innocent, Violate Substantive Due Process?*, 40 HOUS. L. REV. 1359 (2004); Hugo Adam Bedau, Michael L. Radelet, & Constance E. Putnam, *Convicting the Innocent in Capital Cases: Criteria, Evidence, and Inference*, 52 DRAKE L. REV. 587 (2004). See also, Bedau & Radelet, *supra* note 3; Gross, *supra* note 3; frequently appearing newspaper items, e.g.: *High Court Shuns Death-row Appeal*, (Knight-Ridder), THE TAMPA TRIBUNE, Dec. 3, 1991, at 5; *Execution and Inconsistency*, THE WASHINGTON POST, Jan. 4, 1995, at A14; James L. Hamon, *The Blindness of 'an eye for an eye'*, THE GAINESVILLE SUN, May 4, 1998, at A6; Molly Ivins, *Hurricane Carter's Case a Good Example of Criminal Injustice*, THE GAINESVILLE SUN, Jan. 18, 2000, at 9A; Susan Greenbaum, *Mistakes Land Too Many on Death Row*, THE TAMPA TRIBUNE, Feb. 28, 2000, at 6; William Raspberry, *Bush Needs to Stop Texas Executions*, THE REGISTER GUARD (Eugene, Oregon), June 26, 2000, at 9A; Toni Lacy, *Push to Reform Death Penalty Growing*, USA TODAY, Feb. 20, 2001, at 5A; *Study Finds Flaws in Death*

Several biblical "due process" laws apparently were intended to assure that only those who had committed capital offenses would be put to death. These laws evidently were meant both to identify the actual offenders, and also to make certain that all the elements of the charged offense had been met. Thus various laws call for evidentiary hearings or diligent inquiry as to relevant facts.<sup>383</sup> Several biblical trial scenes illustrate both explicit and implicit due process procedures intended to determine relevant facts in capital cases.<sup>384</sup>

Perhaps the most significant such due process law was the two (or more) witness requirement first found in the RDC (*Deuteronomy* 17:6), and later extended in the PC (*Numbers* 35:30). As stated broadly in both versions, this law apparently was intended or understood to apply in all capital cases.<sup>385</sup> Thus, circumstantial evidence would no longer suffice for conviction as it may have done in earlier times.<sup>386</sup> In modern United States jurisprudence, convictions may be, and often are based solely on circumstantial evidence,<sup>387</sup> so long as the trier of fact is persuaded of the accused's guilt "beyond reasonable doubt." This article does not advocate adoption of a two-witness requirement for capital convictions in contemporary law. However, the biblical rule clearly was intended to assure that convictions in capital cases were based upon the best evidence available. Those who find biblical norms instructive for later social policy might wish to implement standards and practices that offer similar assurance.<sup>388</sup>

The two-witness rule was buttressed in P tradition by a new law, requiring eye- or otherwise knowledgeable witnesses to testify (*Leviticus*

*Penalty*, GAINESVILLE SUN, Feb. 12, 2002, at 2B. See also Elizabeth Mannion, *Death Penalty Moratorium, & News and Views from the League of Women Voters*, THE FLORIDA VOTER (Winter 2004), at 1.

383. See *supra* text accompanying notes 267-76. Other laws implicitly require evidence or testimony in order to identify offenders or establish the elements of the offenses in question. See also *supra* text preceding and accompanying notes 262-66. Laws providing for cities of refuge were intended to provide sanctuary for offenders pending subsequent hearings or trials in homicide cases. See generally text accompanying notes 214-33.

384. See *supra* Part III.C.

385. See *supra* text accompanying notes 281-85.

386. See, e.g., the case of Tamar, *supra* text accompanying notes 235-38; the adultery laws in D and H, *supra* text accompanying notes 71-76 and 94-95; the homicide laws in the CC and H, *supra* text accompanying notes 38-53 and 87-90.

387. See *supra* note 285 and accompanying text.

388. In modern times, such evidence likely would include fingerprint, hair, blood type, and DNA analysis. See Jain, *supra* note 285 at 783. Jain notes that Connecticut law provides: "[no] person shall be convicted of any crime punishable by death without the testimony of at least two witnesses, or that which is equivalent there to." CONN. GEN. STAT. §§ 54-83 (1960). *Id.* at note 119. See also *DNA Tests Help Free Men After 12 Years* (AP), THE GAINESVILLE SUN, Apr. 16, 1999, at 3A; Jonathan Alter *et al.*, *The Death Penalty on Trial*, NEWSWEEK, June 12, 2000, at 24-34.

5:1).<sup>389</sup> The RDC also set out one other new, though related law evidently intended to promote truthful testimony: the *lex talionis* provision for punishing false, malicious witnesses (*Deuteronomy* 19:19-21).<sup>390</sup> In addition, still another new RDC law required witnesses in capital cases to throw the first stones if the accused was found guilty (*Deuteronomy* 17:7).<sup>391</sup> All these provisions clearly were intended to enhance the likelihood that no innocent person would be put to death on a capital charge.

A related matter of great concern in biblical law was fair and equal treatment of persons without regard to their social-economic or alien status. Laws that specifically admonish persons judging suits involving the poor to be impartial are found both in the CC (*Exodus* 23:3, 6) and H (*Leviticus* 19:15).<sup>392</sup> Biblical law was especially solicitous as to the rights or interests of sojourners, foreigners or aliens residing in Israel — as if Mosaic law included an Equal Protection clause. Thus laws were to be applied equally to aliens as to natives of Israel.<sup>393</sup> Such sojourners would have constituted what now might be called "ethnic minorities." In the context of capital trials, these laws were meant to ensure that guilt or innocence was determined on the basis of relevant facts, not the economic or social status, or the race or national origin of the accused.

In summary, biblical law gave expression to a highly positive evaluation of human life, and affirmed the bodily and moral integrity of persons individually, in families, and as an ordered and just society. Those whose conduct violated laws that served these interests might, therefore, be

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389. See *supra* text accompanying note 295.

390. See *supra* text accompanying notes 286-91.

391. See *supra* text accompanying notes 292-94.

392. See *supra* text accompanying notes 203-04. See also *supra* note 199 and accompanying text. Economic or class-based discrimination in application of capital punishment remains an issue in United States jurisprudence. See STEFFEN, *supra* note 3, at 100-01 and 125-25; HANKS, *supra* note 9, at 107-10.

393. See, e.g., *Leviticus* 19:33-34; 24:22; *Numbers* 15:14-16; 35:15; see also *Deuteronomy* 1:16-17. See *supra* notes 199 and 205-10 and accompanying text. In the United States, the category of resident aliens could be understood to include persons who themselves, or whose ancestors, came from other nations, in brief, ethnic and racial minorities. Racial discrimination in application of the death penalty continues to be a matter of concern. See, e.g., Charles J. Ogletree, Jr., *Black Man's Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 14 (2002); MEGIVERN, *supra* note 1, at 399 and 402; HANKS, *supra* note 9, at 95-100; Friends Committee on National Legislation and FCNL Education Fund, *The Death Penalty, Information Packet*, at 4-5 (no date). Reports regarding such discrimination appear commonly in newspapers: See, e.g., Tom Wicker, *Court Ignores Death Penalty Bias*, GAINESVILLE SUN, Apr. 28, 1987, at 8A; Robin Lowenthal, *Study Says Death Given More to Killers of Whites*, THE FLORIDA TIMES-UNION, Nov. 14, 1991, at 1; Elizabeth Olson, *U.N. Report Criticizes U.S. for "Racist" Use of Death Penalty*, N.Y. TIMES, Apr. 7, 1998, at A15; *Study Shows Race a Factor in Death Penalty Decisions*, THE FLORIDA ALLIGATOR, Jan. 8, 2003, at 9.

subject to the death penalty.<sup>394</sup> Biblical law was particularly concerned lest innocent persons be wrongly executed. Moreover, only those who had recklessly or intentionally committed capital offenses were to be put to death. Numerous due process procedures were designed to effectuate these concerns. And those who sat in judgment were strongly admonished to do so impartially, according equal protection of the laws, whether the accused were rich or poor, native born or foreigners.

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394. Although cities of refuge and custodial arrangements provided for temporary confinement pending trial or judicial decision, *see supra* note 85 and accompanying text, the biblical criminal justice system did not contemplate use of prison sentences or possibilities for rehabilitation or restorative justice; nor were such conditions as insanity, mental retardation, a history of abuse, or other mitigating factors considered in making sentencing decisions. *See supra* Part III.C.3. of this article as to alternative sentencing. Biblical law likewise, and necessarily, did not address the question whether someone who had committed homicide, been incarcerated and genuinely rehabilitated, so as to become, in effect, a different person, might or should on that account be spared execution. *But see supra* note 21 and accompanying text.

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