Old Testament Justice: The Mirror of Justice Lecture

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THE MIRROR OF JUSTICE LECTURE¹

“OLD TESTAMENT JUSTICE”

Clifford S. Fishman²

As you know, Jews do not use the expression, “Old Testament.” To us, there is only one “testament,” the Hebrew word for which is Tanakh,³ a mnemonic derived from the first letters of Torah (the first five books of the Bible), Nevi’im (Prophets), and Ketuvim (writings). Moreover, the phrase “Old Testament Justice” is often used to mean harsh, rigid,

¹ The Mirror of Justice award is given each year by the Pope John Paul II Guild of Catholic Lawyers, a student organization at The Columbus School of Law, The Catholic University of America, “to recognize and support the law school faculty whose commitment to the teaching of the law and whose scholarship advances our insights towards achieving justice through law in contemporary society. . . . The Mirror of Justice Award and Lecture are dedicated to the ideals of charity and wisdom that are summed up in the title of the Guild’s patroness: Mary, Mirror of Justice.” Brochure from Lecture given March 26, 2001.

² Professor of Law, The Columbus School of Law, The Catholic University of America. This is the somewhat expanded text of the presentation I delivered on March 26, 2001, upon receiving the Mirror of Justice award. I acknowledge with gratitude the inspiration, assistance, and advice of my friend and faculty colleague, Rabbi Benjamin Mintz, in the preparation of this paper; the research assistance of Gabriel Sol, The Columbus School of Law, The Catholic University of America, class of 2003; and the further assistance of Beira Organic, Librarian, Isaac Franck Library, The Board of Jewish Education, Rockville, Maryland.

Before beginning my formal presentation, I thanked the Guild for honoring me as the first non-Catholic to receive the Mirror of Justice award, and I acknowledged with gratitude the role the law school has played as my knowledge, appreciation, and observance of my own religion, Judaism, has grown and deepened during my twenty-four years on the faculty. For example, the law school provided funds to purchase a Sukkah so Jewish faculty, students, and staff could celebrate the holiday of Sukkot on campus and has helped arrange a minyan so that I could recite the evening service and say the memorial prayers for a loved one when my teaching schedule prevented me from attending such a service at a synagogue. In addition, the school has avoided, to the extent possible, scheduling important events on Jewish holidays and has assured that meals at such events include foods consistent with Jewish dietary laws. More generally, but equally important, The Columbus School of Law and The Catholic University of America have provided an atmosphere where not only are we permitted, but we are encouraged to think and speak about how religion can and should affect society and the law, and, even more radical in today’s world, we are encouraged to ask the fundamental question: “What does God expect of us, as individuals and as a profession?”

³ Non-Jews sometimes call the Tanakh the “Hebrew Bible.”
unyielding, and retributive. I have chosen to entitle my talk "Old Testament Justice" as a way of confronting this pejorative and inaccurate concept of what the Tanakh, and particularly the Torah, teaches us about justice.

Jewish beliefs about the Tanakh, and, particularly, the Torah, can be divided roughly into three different approaches. The first approach regards the entire Torah as the literal word of God, dictated to Moses at Mount Sinai. The second believes that a profound and world-changing revelation occurred at Sinai, and that the Torah emerged over the ensuing centuries as the divinely inspired, but nevertheless very human, attempt by the Israelites to understand that experience and its implications. A third approach regards the Torah as the founding myth

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Similar references are found in the popular media. See, e.g., Liam Clark, Ardoyne: The Bitter Heart of a Divided Province, SUNDAY TIMES (LONDON), Sept. 9, 2001 (reporting that following the death of a Protestant in Belfast, "loyalist paramilitaries" were preparing to retaliate; "[s]ome have already told the press to expect Old Testament justice – an eye for an eye"); Joan Mooney, Books in Brief, N.Y. TIMES SUNDAY, Jan. 14, 2001, at p. 19 (reviewing The Breadmaker's Carnival by Andrew Lindsay, the author summarized the novel by stating that ",by the end, what started as a light-hearted story has dealt with primal fear, evil, forgiveness, Old Testament justice and a community's catharsis").

6. Id. at 13-17.
7. Id. at 17-21.
of Jewish civilization, perhaps inherently no better or worse than other founding myths, but precious because it is our own.  

Because I will be speaking to you today about the Torah it is only fair to tell you in advance how I read it. Although I struggle with the question, I place myself in the second of the three categories. As Abraham Joshua Heschel, of blessed memory, put it, the Torah itself is a Midrash, an interpretation, an explanation, or an attempt to understand and derive guidance from the experience our ancestors underwent at Mount Sinai.

I teach criminal law, criminal procedure, and evidence. I am far from being a Biblical scholar, yet over the years, as my familiarity with the Torah and with Jewish law has grown, I have become increasingly impressed that many of the fundamental values articulated in areas of secular law, and even, remarkably, some quite specific rules and procedures, have their origins in the Torah. My goal this afternoon is to discuss a few examples.

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8.  *Id.* at 22-25.
9.  Heschel was born in a Polish Hasidic community in 1907, moved to the United States in 1940, and taught at the Jewish Theological Seminary (JTS) in New York City from 1945 until his death in 1972. At JTS, Heschel exerted a profound influence on several generations of Rabbis in the Conservative movement and upon Judaism generally. His two best-known books are *Man is Not Alone: A Philosophy of Religion*, originally published in 1951, and *God in Search of Man: A Philosophy of Judaism*, originally published in 1959.
10.  "Midrash" may be defined as "[t]he discovery of meanings other than literal in the Bible." *Encyclopedia of the Jewish Religion* 261 (1966). A midrash may be based on one or more Biblical episodes, or on a particular verse or word, or even a single letter. Needless to say, there is no single “official” midrash or interpretation of a particular passage in the Torah.
11.  We must not try to read chapters in the Bible dealing with the event at Sinai as if they were texts in systematic theology. Its intention is to celebrate the mystery, to introduce us to it rather than to penetrate or to explain it. As a report about revelation the Bible itself is a midrash.
12.  Other examples exist in addition to those discussed herein. *See generally Helene E. Schwartz, Justice by the Book, Aspects of Jewish and American Criminal Law* (1976). For example, some have speculated that a jury at common law consists of twelve jurors and corresponds to the twelve tribes of ancient Israel. *See* Williams v. Florida, 399 U.S. 78, 88 n.23 (1970). Similarly, it is worth noting that the court (Sanhedrin) that would try a capital case under Jewish law consisted of twenty-three judges, 3 *The Babylonian Talmud: Seder Nezikin* 1 (1935), the same number that comprises a grand jury in English common law and current federal law. 3 *Sir William Searle Holdsworth, A History of English Law* 321-22 (1931) (reporting that the grand jury emerged in the thirteenth century and came to be comprised of twenty-three men). Some have speculated that English law “borrowed” the number twenty-three from the Sanhedrin. 3 *See, e.g., Marvin E. Frankel & Gary P. Naftalis, The Grand Jury: An Institution on Trial* 18 (1977) (noting, but discounting, such speculation).
First, I would like to explore certain aspects of criminal procedure. Justice Louis Brandeis praised the men who drafted our Constitution because "[t]hey conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."¹³ That right is codified in the Fourth Amendment of the U.S. Constitution, the first clause of which provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."¹⁴

The value our society places on privacy is not a new concept. It was recorded explicitly in Deuteronomy 24:10-11, which reads: "When you make a loan of any sort to your [neighbor], you must not enter his house to seize his pledge. You must remain outside, while the man to whom you made the loan brings the pledge out to you."¹⁵ At a time when "government," as we know it today, did not exist, the Torah mandated that the rich and powerful respect the dignity, and the privacy, of the poor and vulnerable.¹⁶

The rabbis derived further support for the right to privacy from the story of Balaam.¹⁷ Balak, the king of Moab, bribes Balaam, a local prophet, to curse the Israelites; but, when Balaam looks out over the

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14. U.S. CONST. amend. IV. The Fourth Amendment reads, in its entirety:
   The right of the people to be secure, in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the places to be searched, and the persons or things to be seized.

15. Deuteronomy 24:10-11. All references to passages from the Torah are translations from Tanakh – The Holy Scriptures: The New JPS Translation According to the Traditional Hebrew Text (1985) unless otherwise noted.
16. See, e.g., Exodus 22:24-26. This passage reads:
   If you lend money to My people, to the poor among you, do not act toward them as a creditor: exact no interest from them. If you take your neighbor's garment in pledge, you must return it to him before the sun sets; it is his only clothing, the sole covering for his skin. In what else shall he sleep? Therefore, if he cries out to Me, I will pay heed, for I am compassionate.

Israelite encampment, God has him say, “How fair are your tents, O Jacob, Your dwellings, O Israel!” A rabbinic gloss on this verse explains that Balaam was praising the Israelites’ encampment because, out of respect for privacy, they had positioned their tents so that the entrance of no one’s tent faced the entrance of another. While the *midrash* on the verse was not intended to be a statement of historical fact (the rabbis of the *Talmud* could not possibly know how their ancient ancestors positioned their tents), it does show how deep the respect for privacy is embedded in Jewish law – privacy against higher secular authority and against curious neighbors. This rabbinic gloss on the story of Balaam is an example of how the rabbis have for more than two thousand years studied the *Tanakh* for ethical and moral rules and ritual observances that teach us how to strive toward holiness, and how to deal on a day-to-day basis with the ups and downs of ordinary life.

Traditional Jewish belief holds that when God gave Moses the written *Torah* on Mount Sinai, God also gave him an Oral Law, by which the *Torah* could be interpreted and applied to changing circumstances. *Halachah*, Jewish Law, consists of both the Written Law and the Oral Law. In the first six centuries of the common era, the Oral Law was greatly developed and expanded in the *Mishna* and the *Talmud*. It has subsequently been enriched by another fifteen centuries of rabbinic debate, discussion, and exegesis. Here is an imperfect, but still helpful, analogy: the *Tanakh* is the Constitution and the Oral Law is more than twenty centuries of Supreme Court, circuit court, and district court opinions interpreting and applying it to every conceivable aspect of life.

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18. *Numbers* 24:5.
20. Consider the often-cited *midrash* about the “Oven of Akhnai.” See SALIS DAICHES & H. FREEDMAN, *BABA MEZIA* 352-53 (1935). A fierce debate arose among the sages over the ritual purity of an oven that had broken and was repaired in a certain way. See id. at 352. A majority of the sages said that such an oven was impure, while Rabbi Eliezer insisted that it was pure. See id. To support his position, Rabbi Eliezer appealed directly to heaven, whereupon, according to the *midrash*, a heavenly voice said to the sages, “Why are you disputing Rabbi Eliezer? The *Halachah* is in accordance with him in all circumstances!” See id. at 353. In reply Rabbi Yehoshua rose to his feet, saying, “The *Torah* is not in heaven,” meaning that once God gave the *Torah* to Israel at Sinai, it was the responsibility of human sages, not heavenly voices, to interpret and apply it. See id. A majority of the sages voted against Rabbi Eliezer. See id. The *midrash* concludes that when Rabbi Yehoshua said “the *Torah* is not in heaven,” God smiled and said, “My children have defeated me! My children had defeated me!” See id. That is, they had properly won the argument. See id.
21. *Halachah* is a derivative of the verb “l’lechet,” which means “to go.” Thus, “*Halachah*” is “the right path.”
Second, I would like to discuss aspects of criminal justice. In Chapter 9 of the Book of Genesis, the text relates that after the flood receded, God vowed never again to “doom the earth because of man.”

“God blessed Noah and his sons,” and told them to “[b]e fertile and increase, and fill the earth.” According to verses 5 and 6, God then commanded, “I require a reckoning for human life, of every man for that of his fellow man! Whoever sheds the blood of man, [b]y man shall his blood be shed; because be-tzelem elokim (in the Image of God), [d]id God make man.”

This passage, particularly verse 6, shows us how central the concept of criminal justice is to Judeo-Christian civilization, while also articulating two fundamental principles of criminal justice. First, consider the passage as a whole. It relates that among the first commandments that God gave after the flood was for man to create a system of criminal justice.

Henceforth, man, not God, was to be responsible for punishing the wrongs that people did to one another: “[b]y man shall his blood be shed.” Man now has this responsibility because “be-tzelem elokim (in the Image of God), [d]id God make man.”

Rabbinic commentary on this verse points out that although this is not the first time God used the term “be-tzelem elokim,” in discussing humans, this verse is the first time God tells humans that they are created in God’s image. Perhaps God chose to do so at this point, the rabbis wrote, because until then, God alone had dispensed justice. In Genesis 9:5-6, Noah and his descendants were commanded to take on that responsibility. As of that moment, we became God’s partners in the dispensation of justice. We were given this extra responsibility because of our special status as creatures made “be-tzelem,” and God informed us of that special status, the rabbis concluded, to remind and admonish us to use that responsibility wisely.

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25. See id.
26. Id.
29. Id.
30. Id.
31. See id.
32. Id.
However, this verse does more than establish the importance of, and man’s responsibility for, criminal justice; it also states several fundamental principles of criminal justice. Consider the first word of verse six: “Whoever sheds the blood of man, [b]y man shall his blood be shed.” This tells us that everyone is subject to the law. This principle is set forth even more explicitly in Leviticus 24:22: “You shall have one standard for stranger and citizen alike: for I the LORD am your God,” and again in Deuteronomy 16:18-19: “[Judges] shall govern the people with due justice. You shall not judge unfairly; you shall show no partiality; you shall not take bribes, for bribes blind the eyes of the discerning and upset the plea of the just.” Thus, the concept of “equal justice under law,” an ideal we still strive to achieve, with at best mixed success, is an essential component of “Old Testament Justice.”

Let us consider Genesis 9:6 one more time: “Whoever sheds the blood of man, [b]y man shall his blood be shed.” The shedder of blood, i.e. the perpetrator, is punished, but no one else. This is reiterated even more explicitly in Deuteronomy 24:16: “Parents shall not be put to death for children, nor children be put to death for parents: a person shall be put to death only for his own crime.”

34. Leviticus 24:22.
36. This phrase is carved over the entrance to the United States Supreme Court.
37. The next verse after the passage just quoted from Deuteronomy instructs, “Justice, justice you shall pursue, that you may thrive and occupy the land that the LORD your God is giving you.” Deuteronomy 16:20. Rabbinic commentary on this verse no doubt fills volumes. Consider, for example, the repetition of the word “justice.” Rabbi J.H. Hertz, in his commentary on the Torah, reports that one rabbi, reasoning from the principle that no word in the Torah can be superfluous, concluded that the repetition was designed to teach the lesson, “[d]o not use unjust means to secure the victory of justice.” HERTZ, supra note 36. It is worth noting that “tsedek,” the Hebrew word translated as “justice,” implies more than merely dealing even-handedly with others; it is akin to holiness. Id. at 821. Thus, a “tsadik” is a holy person. ENCYCLOPEDIA OF THE JEWISH RELIGION, supra note 10, at 391 (defining “tsadik”; however, in this source the English transliteration is given as “Tzaddik”). “Tsadek,” is the root of the word “tsedakah,” which is usually translated as “charity.” Id. Tsedakah, however, means more than merely voluntary giving; it implies a much broader moral obligation, which includes not only giving to the poor, but also treating them with dignity and respect. Id. Also see the exalting directive in Micah 6:8: “He has told you, O man, what is good, and what the LORD requires of you; only to do justice and to love goodness [mercy], and to walk modestly [humbly] with your God . . . .” Micah 6:8. These words are carved over the entrance of Catholic University’s law school.
38. Genesis 9:6 (emphasis added).
Today, this is axiomatic. But it was anything but axiomatic in Biblical times. Contemporaneous Assyrian and Babylonian civilizations explicitly codified vicarious punishment to be imposed, not upon the offender, but on someone close to him.\textsuperscript{40} Such laws included directives such as: if a man rapes a virgin, his wife is raped as punishment;\textsuperscript{41} if an assailant causes a pregnant woman to miscarry, the assailant’s daughter is put to death;\textsuperscript{42} if a builder erects a house that collapses and kills the owner’s son, the death penalty is imposed, not on the builder, but the builder’s son.\textsuperscript{43} Although the \textit{Tanakh} itself relates examples of vicarious punishment,\textsuperscript{44} the \textit{Torah} is explicit in forbidding vicarious punishment of the innocent for the crimes of the guilty:\textsuperscript{45} “a person shall be put to death only for his own crime.”\textsuperscript{46}

\begin{itemize}
  \item \textsuperscript{40}See generally Nahum M. Sarna, Exploring Exodus: The Heritage of Biblical Israel 176 (1986).
  \item \textsuperscript{41}This directive appears in a Middle Assyrian statute. \textit{Id.} at 176 (citing James Pritchard, Ancient Near Eastern Texts Relating to the Old Testament (ANET) 185, § 55 (1955)); see also Martha T. Roth, Law Collections from Mesopotamia and Asia Minor 174-75 (1995).
  \item \textsuperscript{42}This directive appears in the Code of Hammurabi. \textit{Sarna, supra} note 40, at 176 (citing ANET at 175, § 210); see also \textit{Roth, supra} note 41, at 122.
  \item \textsuperscript{43}\textit{Sarna, supra} note 40 (citing ANET at 176, §§ 229-31); see also \textit{Roth, supra} note 41, at 125.
  \item \textsuperscript{44}See, e.g., Joshua 7:24-25; \textit{II Samuel} 3:29; \textit{II Samuel} 21:1 (relating incidents in which Joshua and King David put to death, not only those who had attempted to rebel, but also the rebels’ children).
  \item \textsuperscript{45}The prohibition against vicarious punishment apparently became firmly established in Israelite society only during the reign of King Amaziah, who ascended to the throne of Israel after the assassination of his father Joash in 796 B.C.E. Thus, \textit{II Kings} 14:5 relates that Amaziah had the assassins put to death:
    \begin{quote}
    But he did not put to death the children of the assassins, in accordance with what is written in the Book of the Teaching of Moses, where the \textit{LORD} commanded, “Parents shall not be put to death for children, nor children be put to death for parents; a person shall be put to death only for his own crime.”
    \end{quote}
\textit{II Kings} 14:5 (quoting Deuteronomy 24:16); see also \textit{II Chronicles} 25:4.
  \item \textsuperscript{46}\textit{II Kings} 14:5 (emphasis added). The prohibition against vicarious punishment appears to be inconsistent with the passage in the Commandment against worshiping graven images: “For I the \textit{LORD} your God am an impassioned God, visiting the guilt of the parents upon the children, upon the third and upon the fourth generations of those who reject Me, but showing kindness to the thousandth generation of those who love Me and keep My commandments.” \textit{Exodus} 20:4-6; see also \textit{Deuteronomy} 5:9-10. The Rabbis acknowledged the apparent inconsistency and sought explanations for it. See generally Nehama Lebowitz, Studies in Devarim (Deuteronomy) 236-42 (World Zionist Organization 1980). The simplest explanation is that God is not subject to the rules by which man is expected to live (even though God is the source of those rules). Another explanation is that the reference to third and fourth generations was intended to remind the Israelites that parents teach their children by example. Thus, in the natural course of events, the sins of the fathers will be repeated, and therefore “visited upon,” the children, but only if the children continue to commit those sins. A third, even more imaginative,
To review, the high value we place on privacy, and the centrality of criminal justice, with its fundamental principles that justice must be impartial regardless of who is before the court and that only the guilty must be punished for their wrongdoing, trace their origins back to "Old Testament Justice."

Now, let us discuss a rule of evidence. What kind of evidence should be considered in administering criminal justice? Here, we turn to the Biblical narrative of the Tower of Babel. Genesis 11:1-4 describes how, in the generations after the flood, humanity decided to build a city with a tower that would reach the heavens. Verse 5 reads: "The LORD came down to look at the city and tower that man had built."\textsuperscript{49}

It goes without saying that the rabbis rejected a literal reading of this verse. There was no need for God physically to come "down to see" what man had built. Rashi, the great scholar of eleventh-century France, used this apparent anthropomorphism as a basis for a fundamental lesson about justice and evidence: "And the Lord came down to see—He really did not need to do this," Rashi wrote, "but Scripture intends to teach the judges that they should not proclaim a defendant guilty before they have seen the case and thoroughly understood the matter in question."\textsuperscript{50}

To take the principle a step further, this verse teaches us that a tribunal should base a judgment only on reliable evidence obtained from witnesses with first-hand knowledge. Is it totally fanciful to point to this verse as the origin of the rule against hearsay?\textsuperscript{51}

The rabbis drew similar lessons from two other very familiar incidents in Genesis. In Genesis 3:13, after Adam and Eve ate the forbidden fruit of the tree of knowledge of good and evil, God asked Eve, "What is this approach begins with the assumption that God did not mean this passage to be taken literally. Rather, it provides a basis to establish a rule of evidence that children could not testify against their parents, nor parents against their children, in a capital case. See THE CODE OF MAIMONIDES, BOOK XIV, THE BOOK OF JUDGES: EVIDENCE CHAPTER XIII 110 (Yale Judaica Series vol. III, Abraham M. Hershman trans., 1949).

\textsuperscript{47} See supra notes 15-19 and accompanying text.

\textsuperscript{48} Genesis 11:1-4.

\textsuperscript{49} Genesis 11:5.

\textsuperscript{50} PENTATEUCH WITH RASHI'S COMMENTARY 45 (Rev. M. Rosenbaum & Dr. A.M. Silbermann trans., 1965).

\textsuperscript{51} In any event, procedures developed in the Mishna and Talmud for the trial of capital offenses do include requirements corresponding to the hearsay rule. THE BABYLONIAN TALMUD, SEDER NEZIKIN V, SANHEDRIN 37A at 233 (1935). Witnesses were told that their testimony must not be based on conjecture or rumor, but upon what they had seen with their own eyes, and that they would be subject to cross-examination. Id.
that you have done!" Similarly, in Genesis 4:9-10, after Cain killed Abel, God asked him, "Where is your brother Abel? . . . What have you done?"

The rabbis raised the rhetorical question: Why would God bother asking, when, of course, He already knew the answers? By doing so, they reasoned, God taught an important lesson to human judges. God did not punish Adam or Eve or Cain until He first questioned them. This serves to remind human judges that no one should be condemned, however conclusive the evidence may seem, until the accused is given the opportunity to present his defense.

Now let me refer again to the title of my presentation. When someone uses the expression "Old Testament Justice," the passage that comes most often to mind is the so-called Lex Talionis, the "Law of Retribution" set forth in Exodus 21:23-25, which reads: "But if other damage ensues, the penalty shall be life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise." This passage sounds cruel, unforgiving, rigid, and even barbaric. And it would be all of those things, if this passage related to criminal law, if it related to punishment. But it does not. This passage constitutes a code for civil damages: where a tortfeasor has caused injury to another, he must compensate the injured party commensurate with the extent or value of the damage. This compensation is the monetary value of an eye for the loss of an eye, the value of a tooth for a tooth, of a hand for an injury that causes the loss of a hand, and so on. Indeed, these verses had the effect of limiting the measure of retribution that the injured party or his clan could impose on the tortfeasor. A victim was entitled to the economic value of the injury caused, but could exact no greater revenge, economic or otherwise.

55. Id.
57. CULI, supra note 54, at 292. Note that this is only one of many Midrashim developed from these episodes. For example, other rabbis reasoned that God asked the questions to give the wrongdoers the opportunity to acknowledge their guilt or to compound it by trying to hide it. MIDRASH TANCHUMA, TAZRI’A 1:9; PENTATEUCH WITH RASHI’S COMMENTARY, supra note 50, at 18.
58. For contemporary examples of assumptions that “Old Testament Justice” is summarized by the verse, “an eye for an eye.” See Willson, supra note 4; Clark, supra note 4.
That this passage speaks to compensatory damages is clear from the context in which it appears: *Exodus* 21:18-27, which includes the above-quoted passage, focuses on how the victim of an injury is to be compensated by the tortfeasor. This is how the rabbis have always understood and applied this passage.59

Where the offense goes beyond personal injury and economic hardship, however, or when the perpetrator has wrongfully caused the death of another human being, the *Torah* makes it clear that economic compensation for the family of the victim is not enough.60 This is evident in *Genesis* 9:6, as discussed earlier, which states “Whosoever sheds the blood of man, [b]y man shall his blood be shed.”61 It is reiterated in *Exodus* 21:14: “When a man schemes against another and kills him treacherously, you shall take him from My very altar to be put to death.”62

I will return shortly to the *Torah’s* laws governing homicide, but first, I wish to comment on the death penalty. The *Torah’s* reliance upon the death penalty should be viewed in light of the primitive nature of the society for which this code was drafted, and the practical unavailability of any other penalty for behavior that was seen as threatening the moral, political, and military viability of that society.63 I deeply believe that

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63. Although the *Torah* mandates the death penalty for a variety of offenses, it is noteworthy that, unlike comparable law in civilizations extant at the time of its creation, the *Torah* does not mandate capital punishment for economic crimes. The *Torah* mandates the death penalty for the following offenses:

   (a) Acts of violence: homicide (*Exodus* 21:12; *Leviticus* 24:17-21; *Numbers* 35:16); assault on a parent (*Exodus* 21:15); kidnaping (*Exodus* 21:16); culpable negligence, for example, when one’s ox gores a person (*Exodus* 21:29).

   (b) Sexual transgressions: Adultery, for both the adulterer and the adulteress (*Leviticus* 20:10; *Deuteronomy* 22:22); pre-marital sex (*Deuteronomy* 22:20-21) for a bride discovered not to be a virgin (*Deuteronomy* 22:23-24); if the male culprit is caught with a betrothed virgin both die (*Deuteronomy* 20:23-24), unless the intercourse occurred in the country, then he alone is liable (*Deuteronomy* 22:25). Note, however, that if a man sleeps with a non-betrothed woman, he is liable for a fine and an irrevocable wedding is required (*Deuteronomy* 22:28-29). Sexual relations between men (“If a man lies with a male as one lies with a woman.”) (*Leviticus* 20:13); carnal relations with an animal (*Exodus* 22:18; *Leviticus* 20:15-16); sexual relations with stepmother or daughter-in-law (*Leviticus* 20:11-12); sexual relations with both a woman and her mother (*Leviticus* 20:14); being a prostitute, if the offender is the daughter of a priest (*Leviticus* 21:9).
every rule enunciated in the Torah, indeed every word, must be regarded with respect and veneration. But the death penalty, as mandated in the Torah, is no more binding on our own society than the Torah’s tolerance of other aspects of Biblical life, such as slavery and polygamy, which our society has thankfully outgrown.

Today, the death penalty is a very controversial subject. The controversy existed in Biblical times as well, and it has continued in Jewish law throughout time. Indeed, in the Talmud the rabbis placed substantive and procedural restrictions and qualifications on the death penalty, with the clear purpose of assuring, to the extent humanly possible, that it would never be employed mistakenly, even if that meant it might never be employed at all.

(c) Acts contrary to Israel’s commitment to God: idolatry in general (Exodus 22:30; Deuteronomy 17:2-7); offering offspring to Molech (Leviticus 20:2); breaking the Sabbath (Exodus 31:14; Numbers 15:32-36); being a female sorcerer (Exodus 22:17), or a medium or wizard (Leviticus 20:27); blasphemy (Leviticus 24:10-16); attempting to act as priest, if one is not of the right lineage (Numbers 3:10); marrying Moabites and worshiping Ba’al (Numbers 25:1-17); prophesying falsely (Deuteronomy 18:20).

d) Social disorder: Cursing one’s parents (Exodus 21:17); being a rebellious son (Deuteronomy 21:18-21).

This note is adapted from material prepared by Harold W. Attridge, Professor of New Testament at the Yale University Divinity School, for his presentation at a conference on "The Morality of the Death Penalty" on March 29, 2001, at The Catholic University of America.

64. Although the Torah tolerates slavery, it differs from other legal codes extant at that time in that it regards slavery as a necessary evil, strictly regulates how the slave must be treated, and sets forth the rights of the slave, even against his or her master. See, e.g., Sarna, supra note 40, at 180-82.


67. CAPITAL PUNISHMENT, supra note 66, at xxv-xxvi, 6-7 (discussing the debate over the death penalty in Biblical times).

68. Levine, supra note 65, at 1046-48 (detailing a debate among rabbis regarding the death penalty).

69. The Torah itself significantly limits application of the death penalty by providing that it can be imposed only on the testimony of two or more witnesses. See Numbers 35:30. The rabbis in the Talmud went even further: the witnesses themselves must have actually simultaneously observed the defendant committing the crime; circumstantial evidence would not suffice. See THE CODE OF MAIMONIDES, supra note 46, at 89. Moreover, the prosecutor must establish that these witnesses admonished the defendant and warned him that he faced the death penalty if he went ahead with the crime. Id. For a critique of those who cite Jewish law in support of capital punishment in the United States today, see Levine, supra note 65, at 1039-40. Levine also elaborates on the procedural and substantive safeguards. Id. at 1044-46.
All of this attention on rules of criminal law, criminal procedure, and evidence may seem a curious focus of rabbinic attention when you consider that after the destruction of the Second Temple in the year 70 of the Common Era, there was no Jewish political or judicial entity anywhere in the world with jurisdiction over criminal justice. Why then, was there so much focus on something that could never be put into effect?

At least three reasons exist for such a focus. First, the rabbis considered everything in the Torah to be worth studying. Second, although the rules governing criminal law, criminal procedure, and evidence had no direct application, they taught significant lessons about other aspects of life. Third, throughout nearly 2,000 years of exile, the rabbis believed—the rabbis knew, with a knowledge based firmly on faith—that some day Jewish principles of criminal and civil law again would be relied on in courts in a sovereign Jewish state. And since 1948, when Israel declared its independence and successfully defended its existence against the armies of Egypt, Syria, Lebanon, Iraq, and Jordan, Halachah, that vast body of rabbinc interpretation and exegesis, is once again being applied in Israeli courtrooms. Law in the State of Israel is a curious amalgam of English law that was in effect when Israel won its independence and legislation enacted by the Knesset, the Israeli parliament. However, it is quite common for Israeli courts to look also to Halachah in deciding matters of public policy and procedure in civil and criminal cases that come before them.

The final focus of my talk is the thirty-fifth chapter of the Book of Numbers. First, let us review some of the basic principles of contemporary homicide law and how criminal cases are tried today. In

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70. Levine, supra note 65, at 1046-48 (detailing a debate among rabbis regarding the death penalty).
71. Sarna, supra note 40, at 175 (discussing the editorial nature of the Torah).
72. Id. at 174 (noting the holistic nature of the rules).
73. For a review of the destruction of the Kingdom of Israel in the first century of the Common Era, the subsequent exile of Jews from the land by Rome in the second century, see Solomon Grayzel, A History of the Jews, From the Babylonian Exile to the Present 136-78 (2d ed. 1968).
74. For a detailed discussion the events leading up to the establishment of the State of Israel, see Conor Cruise O'Brien, The Siege: The Saga of Israel and Zionism 250-308 (1986).
75. See supra note 21.
every American state, and, I believe, in every English speaking country, perhaps throughout the western world, homicide law follows the same pattern. With minor variations, in the absence of compelling, mitigating circumstances, an intentional, unlawful killing is classified as murder. An accidental, unlawful killing is classified as a lesser degree of homicide, frequently called involuntary manslaughter. In the American legal system, a jury makes the decision of whether a homicide is murder or involuntary manslaughter. The prosecutor's burden of proof is to demonstrate guilt beyond a reasonable doubt. A wealthy person cannot buy his way out of having to stand trial for homicide because unlawfully killing another human being harms not only the individual victim and his family, but also society at large.

These concepts seem to us so self-evident that it is easy to assume that this was always the law. However, someone, somewhere, at some point in time, must have developed them as original concepts, which begs the questions of who, where, and when?

Chapter 35 of the Book of Numbers spells out the substantive law of homicide in verses 16-21. The passage states that a man who intentionally and unlawfully kills another "is a murderer [and] the murderer must be put to death." If the killing was inadvertent or
accidental, however, the “manslayer” may flee to a “city of refuge,” a sanctuary where he is protected from being executed, albeit in exile from his home, his family, and his lands.\(^8\) He must remain in the city of refuge for the rest of his life, or until the death of the high priest.\(^7\)

The concept of a place of sanctuary is not original to these verses. Many societies employed it during this period of history. What apparently is unique and original to this code, however, is that sanctuary is conditional—the manslayer is safe in the city of refuge only until the question of guilt is determined.\(^8\) Again recall the words of Exodus 21:14: “When a man schemes against another and kills him treacherously, you shall take him from My very altar to be put to death.”\(^8\)

How, and by whom, was the decision made whether the killing was intentional or accidental? The Torah describes a time when the Israelites had no state, nation, government, police, or prisons. Israelite society who strikes another with an iron object so that death results is a murderer; the murderer must be put to death. If he struck him with a stone tool that could cause death, and death resulted, he is a murderer; the murderer must be put to death. Similarly, if the object with which he struck him was a wooden tool that could cause death, and death resulted, he is a murderer; the murderer must be put to death. The blood-avenger himself shall put the murderer to death; it is he who shall put him to death upon encounter. So, too, if he pushed him in hate or hurled something at him on purpose and death resulted, or if he struck him with his hand in enmity and death resulted, the assailant shall be put to death; he is a murderer. The blood-avenger shall put the murderer to death upon encounter.

Numbers 35:1, 10, 16-21.

86. Numbers 35:10-15. The passage states:
When you cross the Jordan into the land of Canaan, you shall provide yourselves with places to serve you as cities of refuge to which a manslayer who has killed a person unintentionally may flee. The cities shall serve you as a refuge from the avenger, so that the manslayer may not die unless he has stood trial before the assembly . . . . These six cities shall serve the Israelites and the resident aliens among them for refuge, so that anyone who kills a person unintentionally may flee there.

Id.

Moses' third discourse, in Deuteronomy 19:1-6 also discusses the cities of refuge. See particularly verses 4 and 5:
Now this is the case of the manslayer who may flee there and live: one who has killed another unwittingly, without having been his enemy in the past. For instance, a man goes with his neighbor into a grove to cut wood; as his hand swings the ax to cut down a tree, the ax-head flies off the handle and strikes the other so that he dies.

Deuteronomy 19:4-5.

87. Numbers 35:25-28. The death of the high priest served as a symbolic extirpation of the wrong, i.e. the high priest’s death atoned for the death of the victim. The Pentateuch, supra note 59, at 644-47 (describing the atonement by death of the priest).

88. Numbers 35:12 (describing the conditions relating to the cities of refuge).

89. Exodus 21:14 (emphasis added).
consisted of clans grouped into tribes with similar, but some conflicting interests.90 Thus, in a homicide case, the deceased's family, clan, or tribe had the responsibility to appoint a "blood avenger"91 to see that justice was done.

Verses 31 to 34 make it clear that unlike the "eye for an eye" passage from Exodus 21, discussed earlier, these rules are not designed merely to right the private wrong done by the killer to the victim's family.92 The victim's survivors do not have the option of allowing the killer to "buy" his way out of the sentence of exile or death.93 The victim's family cannot accept a "ransom" in lieu of a death penalty or banishment to a city of refuge: "You shall not pollute the land in which you live, for blood [that is, the unpunished death of the victim] pollutes the land . . . . You shall not defile the land in which you live, in which I Myself abide, for I the LORD abide among the Israelite people."94

Recall my earlier question: how is the determination made, between intentional and unintentional killing? Examine verses 24-25. They mandate that a trial be held.95 The "assembly"96 brings the "manslayer" back from his city of refuge, protecting him from the "blood-avenger" until it can decide whether the killing was intentional and punishable by

91. In Hebrew "blood avenger" is "go-el ha-adam." In other contexts, go-el is translated "redeemer."
92. Numbers 35:12 n.a (providing translation); THE PENTATEUCH, supra note 59, at 694 (discussing the role of the advocate); SCHWARTZ, supra note 12, at 37 (providing translation). Chapter 35 also states:
You may not accept a ransom for the life of a murderer who is guilty of a capital crime; he must be put to death. Nor may you accept ransom in lieu of flight to a city of refuge, enabling one to return to live on his land before the death of the priest. You shall not pollute the land in which you live; for blood pollutes the land, and the land can have no expiation for blood that is shed on it, except by the blood of him who shed it. You shall not defile the land in which you live, in which I Myself abide, for I the LORD abide among the Israelite people.
Numbers 35:31-34.
95. Numbers 35:24-25 reads:
[I]n such cases the assembly shall decide between the slayer and the blood-avenger. The assembly shall protect the manslayer from the blood-avenger, and the assembly shall restore him to the city of refuge to which he fled, and there he shall remain until the death of the high priest who was anointed with the sacred oil.
96. "Assembly" in Hebrew is "Ha-edah." Other translations read "congregation" or "community."
death, or unintentional and punishable by exile. Verse 30 sets out procedures for such a trial: "If anyone kills a person, the perpetrator may be executed only on the evidence of witnesses; the testimony of a single witness against a person shall not suffice for a sentence of death."98

Recall our brief review of contemporary law. Today, criminal charges are brought not by the individual victims, but in the name of the State or the Federal Government.99 The victims, particularly in homicide cases, do not have the choice of whether to prosecute, because the impact of criminal conduct injures the entire community.100 If we fail to impose punishment, we all suffer; we are all diminished by the deterioration of the code of conduct, which binds us together as a civilized society.101

These concepts, which are the foundation of our own system of justice are set forth in Numbers chapter 35.102

Today, intentional killing is punishable by death (or life imprisonment); killing committed under extenuating circumstances, or done recklessly or negligently rather than intentionally, is punishable by a period of imprisonment.103 This concept too, is set forth in Numbers chapter 35.104 Today, the accused cannot be punished until a jury decides the case.105 The jury plays the same role as did the "assembly" in chapter 35.106

Today, to convict someone of a crime, a mere preponderance of the evidence is not enough. Rather, guilt must be proven beyond a reasonable doubt.107 The Book of Numbers enunciated a similar requirement by mandating that the testimony of one witness would not suffice; that, rather, it took two or more witnesses to the homicidal act to justify a verdict of guilt punishable by death.108

98. Numbers 35:40 (emphasis added). The two-witness rule is reiterated in Deuteronomy 17:6 and again in Deuteronomy 19:15.
100. 3 Encyclopedia of Crime and Justice 1272-74 (1983); Blackstone, supra note 83, at *5.
102. Numbers 35:33-34.
105. U.S. Const. amend. VI.
106. See Numbers 35:12, 24-25.
In sum, the rules, laws, and procedures that we employ today, are fundamentally similar to those spelled out in chapter 35 of the Book of Numbers.\(^99\)

Think about that. According to most historians, the Torah is 2,500 years old.\(^{100}\) For twenty-five centuries since this code was written down, the finest legal minds in so many societies, cultures, and civilizations, have struggled with the basic questions of the law of homicide: how to define and how to punish the unlawful taking of another human life. And after 2,500 years, the best we have come up with today are minor variations on chapter 35 of the Book of Numbers.

As I said at the outset, the phrase “Old Testament Justice” is usually used to mean harsh, cruel, and unyielding.\(^{110}\) Yet, the Torah mandates respect for individual privacy and dignity;\(^{112}\) admonishes that everyone, however wealthy or powerful, must answer to the law for his wrongdoing;\(^{113}\) insists that only the guilty may be punished for a crime;\(^{114}\) directs that a judge consider only reliable, first-hand evidence\(^{115}\) and must hear both sides of a dispute before deciding;\(^{116}\) commands that restitution for a private wrong be neither too harsh nor too lenient;\(^{117}\) forbids someone who has killed unlawfully from buying his way out of punishment;\(^{118}\) and even includes technical legal definitions and specific

109. See generally Numbers 35; see also Schwartz, supra note 12, at 1-3.

110. It is not possible to determine with any certainty when the Torah, or any part of it, was first given, or written down, or codified. See generally John J. Bimson & David Livingston, XIII Biblical Archaeology Review 40 (Sept.-Oct. 1987). The Israelites did not enter Canaan, most scholars believe, until roughly 1150 or 1200 B.C.E. 8 Encyclopedia Judaica 578-83 (1996), although some date it as early as 1450 B.C.E. See generally Bimson & Livingston, supra, at 40-41, 44-45, 48-53 (giving a vigorous archaeological defense of the latter view). If its creation is chronologically consistent with the Biblical narrative, this would make it between 3,100 and 3,500 years old.

Modern scholars believe that the fifth book, D'varim (Deuteronomy), is the “book of law” which, as related in II Kings 22-23, was found by the prophet Hilkiah in 621 B.C.E.; the first four books presumably existed in some form for some time before then. II Kings 22-23. Most scholars conclude that the Torah was canonized in an agreed-upon final text some time before 444 B.C.E. See 4 Encyclopedia Judaica 823 (1996); Encyclopedia Britannica 771 (15th ed. 1992) (dating the final redaction and canonization of the text to the period of the Babylonian exile, sixth century to fifth century B.C.E.).

111. See supra note 4 and accompanying text.

112. See supra text accompanying notes 14-18.

113. See supra text accompanying notes 33-37.

114. See supra text accompanying notes 38-46.

115. See supra text accompanying notes 48-51.

116. See supra text accompanying notes 52-57.

117. See supra text accompanying notes 58-59.

118. See supra text accompanying notes 60-62.
rules of procedure which, with only minor variations, are embodied in contemporary law.119

This, then, is the nature and quality of the justice to be found in the “Old Testament.” Written for a time and a society radically different from our own, it sets forth concepts, rules, and procedures that underlie many of the values which we cherish—values which we still struggle to effectuate.120 Let us do what we can to live up to this heritage.121

119. See supra text accompanying notes 78-109.
120. See supra note 36-37 and accompanying text.
121. I concluded my presentation as follows:
Allow me to close, as I began, on a personal note. This law school has its imperfections; it has on occasion acted unwisely or unfairly, as do all human institutions. But we strive to be a school where those who wish to can integrate the study of man’s law and God’s law and learn to live, and practice our profession, accordingly. This is a noble Mission, and I am proud and grateful to be a part of that endeavor. Thank you.