

Jewish Perspectives on Restorative Justice

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Judaism is a ‘traditional’ religion in that its revealed scriptures are mediated and interpreted by a historical tradition, known as the ‘oral Torah.’ The word ‘Torah’ means ‘instruction’ and is applied narrowly to the first five books of the Bible. Although the Jewish Bible includes all the books of the standard Christian ‘Old Testament,’ the books of the Torah are considered more important and authoritative than the others. Indeed, the other books of the Hebrew Bible are perceived by Jews primarily as exhortations and object lessons aimed at strengthening their devotion to the Torah.¹ At the core of the Torah is a variegated collection of commandments which, according to the normative Jewish belief, were revealed directly by God through Moses, greatest of the prophets, to the assembled people of Israel at Mount Sinai. Study and observance of these precepts forms the supreme measure of piety. Thus, spirituality is related more to adherence to the divine law than to acceptance of doctrinal truth or to the attainment of a mystical state. The legal component of Jewish religious discourse is known in Hebrew as “halakhah” (literally: ‘walking’), as distinct from the more theoretical realms of “aggadah” (‘talking’), which is normally not considered binding or normative.²

Assuredly, the Bible presents us with several fundamental aggadic value-concepts that form the foundation of the Torah way of life. Some beliefs that have a bearing on the current topic include: the “divine image” that bestows value and dignity upon each person (Genesis 1:26); the common origin of all humanity (Genesis 5:1); peace (e.g., Psalms 34:13); love for one’s fellow human being (Leviticus 19:18);

liberty (e.g., Jeremiah 61:15–17); the dialectical interplay of justice and mercy; and the freedom of will that allows sinners to turn from evil. Nevertheless, Jewish tradition has translated these general ideals into very specific rules and laws to guide the actions of the individual and the community.

The Torah's capacity to respond to the fluid nuances of the human situation is enhanced by the belief in the oral Torah, which both complements and interprets the written Torah. It is said to contain additional teachings revealed divinely through Moses, as well as authoritative interpretations of the written scriptures, and new regulations enacted in response to changing historical conditions. Through this interplay between Scripture and unwritten teaching, Judaism has continued to evolve since biblical times and remains a vibrant religion that encompasses diverse forms. In examining Jewish teaching about the judicial process and the punishment of wrongdoers, we must keep in mind that we are not required to extrapolate practical applications from general moral principles. Nor, in fact, are we permitted to do so once the tradition itself has already formulated specific rules and regulations. Once an opinion has been accepted as codified law it is difficult—though not necessarily impossible—to alter it.³

The most authoritative post-biblical compendia of Jewish legal teachings include: The Mishnah (completed in Palestine, early third century); the Babylonian Talmud (an encyclopedic record of debates and interpretations on the Mishnah, completed around the sixth century); Rabbi Moses Maimonides' *Mishneh Torah* (twelfth-century Egypt); and Rabbi Joseph Caro's *Shulhan 'Arukh* (sixteenth-century Palestine).⁴

For all its practical orientation, there is a markedly theoretical dimension to the Jewish treatment of criminal law. This follows from the fact that, through virtually all the formative eras of their legal traditions, Jews have lived under foreign rule. Medieval halakhic authorities were conscious that the sanctions that stood at their disposal for the enforcement of the law differed significantly from those delineated in the authoritative literary sources. Though modern Jewish denominations have been less bound to historical precedent and authority, they have not undertaken to perpetuate a separate Jewish judicial system. The contemporary State of Israel is a secular democracy whose legal system derives from British common law and which restricts the authority of religious courts to matters of family law and personal status. At present there seem to be no opportunities within the Jewish religious tradition to apply

principles of Restorative Justice to actual cases of legal or correctional procedure.

The Torah rarely draws lines between such ostensibly diverse realms as moral principles, cultic rituals, social welfare, and norms of civil litigation, seeing all the precepts as deriving from one source and intertwined in a single unity.⁵ Nevertheless, the Jewish sages of the Talmudic era did develop a rudimentary conceptual vocabulary in order to facilitate discourse, comparison, and analysis of their sacred laws without thereby denying the integral connections that exist between the different realms. Thus, Rabbinic sources draw discrete distinctions: between monetary and capital cases; human-divine and interpersonal matters; civil law and ritual prohibitions; between financial recompense [reparative] and punitive payment (*k'nas*);⁶ between the 'line of the law' as enforced by the judiciary, and 'within the line of the law,' or acting according to higher or more compassionate standards than the law can demand.⁷ The need for differentiations between the civil, criminal, moral, and narrowly 'religious' realms does not contradict the fundamental fact that in many areas of biblical and Rabbinic laws the realms operate in an intricate counterpoint whose ultimate goal is to achieve a harmony among persons and with God.

The guidelines that govern individual behavior, or dealings between private persons can differ from what is expected of a court; nevertheless, the domains can overlap in some intriguing ways. To cite one example, a fundamental Jewish belief proclaims the possibility of repentance, of escaping the momentum of past misdeeds, and turning over a new leaf. As systematized by Maimonides (*Teshuvah* 2:2), full repentance involves stages of confession, remorse, and a determination to improve one's future conduct. Individuals, including those who have been wronged, are encouraged to treat the reformed sinner with compassion, forgiving the sins of the past. As we shall observe, however, even the most earnest repentance does not exempt the court from the obligation to punish the sinner. On the contrary, punishment is perceived as a crucial stage in the atonement process, so that a judge who avoids passing sentence is evading his sacred responsibility.

The character of the Jewish judicial system differs from the familiar Western model in several ways that bear upon a discussion of the restorative dimension of justice. Proponents of Restorative Justice, for example, have lamented the prevailing Western courtroom procedure in which debate between disinterested attorneys supplants meaningful encounters between the criminal and victim.

For the most part, Jewish courts follow an inquisitorial model, where the judge is in charge of investigating the claims; this distinguishes them from the accusatorial or adversarial procedures that are standard in our own courts. Talmudic sages, of course, were very familiar with the adversarial character of the Roman courtroom, which provided much of the dramatic homiletic imagery for rabbinic portrayals of the 'Heavenly Court' with its *synegoros* (defense attorney) and *kategoros* (prosecutor). Jewish law has typically frowned upon the employment of professional attorneys, insisting on direct confrontation between the litigants and the judges.⁸ Court procedure usually insists on direct testimony before the judge and the other litigant.⁹ Nonetheless an institution of 'rabbinic pleaders' has arisen in recent years, particularly in Israel, where religious courts have been incorporated into the general judiciary for matters related to family law and personal status.¹⁰ Victims, however, play a particular role in cases dealing with property and persons.

Lacking the bureaucratic resources that are a precondition for our full-time police forces and state attorney offices, judicial proceedings related to property or persons are normally initiated by the victims. Thus, several acts that we would consider criminal 'offenses against society' (e.g., theft) are adjudicated in Jewish law as civil suits. Significantly, incarceration is not known as a form of punishment in classical Jewish law, though it was employed in some medieval communities.¹¹

Questions of restitution, punishment and atonement all play a role in the laws of robbery as set out in Leviticus 5:20–26. The Torah treats the crime on at least three levels: 1) restoration to its rightful owner of the stolen object; 2) an additional punitive payment to the victim, probably deterrent in purpose, consisting in this case of one fifth of the total; 3) atonement for the trespass against God, to be administered by a priest, through the bringing of an "*asham*" sacrifice, the so-called guilt-offering. The Jewish oral tradition has of course studied, expounded, and expanded each element of this structure in meticulous detail. Let me share with you some insights that appear in Rabbinic texts.

Restoration

That misappropriation or destruction of property requires the restoration of the stolen object or its equivalent value is a clear premise of biblical law. We find this set forth, for example, in the

laws of theft (Exodus 22:3), damage caused by one's chattels (Exodus 22:5), arson, loss of a bailment (Exodus 22:12), killing someone's animal (Leviticus 24:21). It was clear to the Jewish sages that atonement, understood as the effecting of divine forgiveness, was conditional upon the criminal's repairing the damage caused to the victim.¹² To expect expiation while the effects of the damage have not been removed is, according to the Talmudic proverb, analogous to immersing oneself in purifying waters while still grasping the defiling carcass of the "creeping thing."¹³ Significantly, the Jewish sages tried to create circumstances in which it would be easier for a repentant robber to make amends. Thus, if the misappropriated object has been lost or destroyed, the criminal can appease the victim by restoring its monetary value. The following citation from the Mishnah (*Baba Qamma* 9:5) illustrates the seriousness with which the requirement of restoration was regarded:

One who robbed his fellow and submitted to an oath must carry it to him all the way to Media. It is not allowed to hand it to the victim's child or agent, though it may be turned over to a court-appointed bailiff.¹⁴

An instructive exception to the above stringency is the case of a person who used a stolen beam in order to construct a building. It was understood that the law of the Torah demanded that the building be dismantled, if necessary, so that the original beam could be restored to its legal owner. However, the sages of Israel determined that the resulting financial loss would be so burdensome upon the culprits that it might impede repentance. And repentance, of course, was the overriding purpose of the judicial structures in the first place. Therefore they enacted that financial compensation would suffice in such circumstances.¹⁵

This ruling invites an illuminating comparison with the ostensibly similar ruling in Roman law. The Romans, however, had an eminently pragmatic reason for this rule: "to avoid the necessity of having buildings pulled down."¹⁶ Unlike the Jewish jurists, the Roman courts were disinterested in repentance. In the same spirit, the rabbis encouraged victims to forego their claims to restitution where that would facilitate the rehabilitation of the criminal. Thus we learn in the Talmud (*TB Baba Qamma* 94b):

Our rabbis taught: When robbers or usurers come to make restitution, one should not accept it from them; and

the spirit of the sages is not pleased with one who does accept it from them.

Said Rabbi Yohanan: This teaching was expounded during the days of Rabbi [Judah the Prince], because of what was taught:

It once happened that a certain man wished to repent. His wife said to him: "Idiot! If you were to make full amends, then even your belt is not your own!" Consequently, he refrained from repenting.

It was at that point that they declared: When robbers or usurers come to make restitution, one should not accept it from them; and the spirit of the sages is not pleased with one who does accept it from them.

Maimonides paraphrases this rule in his code of Jewish law (Laws of Robbery 1:13) as follows:

Whoever robs their fellow of even the value of a penny, it is as if they had taken their soul . . . Nevertheless, if the stolen item was no longer in existence and the robber wished to repent, and came of his own volition to repay the value of the stolen goods, the sages have enacted that we should not accept the payment from him.¹⁷ Instead we assist him, and forego the claim in order to bring the straight path closer to the penitents. And as for anyone who does accept restitution for the robbery, the spirit of the sages is not pleased with such a person.

In dealing with the repayment of a theft, Exodus 22:3 observes that "if he [the thief] have nothing, then he shall be sold for his theft." As expounded in the Jewish oral tradition, this was the basis of the institution of the "Hebrew bondman" whose duties and privileges are outlined in Exodus 21:1–6 and elsewhere. Underlying the law is the recognition that most thieves steal out of economic distress. By ordering the thief to become the victim's servant, the Torah satisfies the demand for restoration of the misappropriated property, while at the same time removing the root cause of the crime by providing honest employment for the criminal.¹⁸ That the servitude was perceived primarily as an act of benevolence to the thief is confirmed by several regulations: the obligation to provide

for the servant's entire family; the requirement that the master provide the servant with a generous stipend upon the conclusion of his term; the expectation (though severely discouraged) that many servants would prefer to continue their indentures beyond the six-year maximum. The matter is aptly summarized in the following Talmudic tradition:¹⁹

"And if thy *brother* . . . be sold unto thee" (Deuteronomy 15:12)—You must treat him in a brotherly manner . . . [cf. Ben-Sira 33:35–36].

"Thou shalt not compel him to serve as a slave" (Leviticus 25:39)—That he should not walk behind you carrying a litter, nor should he walk before you carrying your clothes to the bathhouse . . .

"[And it shall be, if he say unto thee, I will not go away from thee; because he loveth thee and thine house,] because he is well *with thee*" (Deuteronomy 15:16)—"With thee" in food and "with thee" in drink. That you should not be eating quality bread while he is eating coarse bread, you should not be drinking wine while he is drinking new wine, you should not be sleeping upon a mattress while he sleeps on straw. For this reason they have declared that whoever acquires a Hebrew servant is as if he has acquired a master.

Punishment

The precise purpose of this payment in the biblical law of robbery is not specified. It fits the classic definition of a '*k'nas*,' described above, in that it causes the criminal's payment to exceed the amount of the actual damage. In other cases of '*k'nas*' payments, the oral tradition declared that perpetrators can be exempted from this penalty if they confess to their crimes, rather than being sentenced by the court. While this strikes our modern minds as akin to plea-bargaining, or else as a pragmatic incentive for cooperation with the judicial system, it is not construed that way in any of the traditional sources.²⁰

The one-fifth additional payment for a robbery is paid only if the robber confessed to the crime, not if he was convicted on the testimony of witnesses.²¹ This indicates that the penalty was regarded as having an atoning power analogous to that of confes-

sion; for this reason it was unwarranted where there was no confession to demonstrate a sincere desire to make amends.

Aside from the imposition of financial penalties, the range of punitive measures mentioned in the traditional Jewish sources is basically limited to the following options: capital punishment, fines, exile, corporal punishment, and atonement.²² Significantly, the 'eye for an eye' stipulations of Exodus 21:22–24 were expounded by the rabbis to furnish the source for a sophisticated system of compensation for injuries, including payments for medical expenses, suffering, lost work time, humiliation, and permanent depreciation.

Capital punishment, which also includes supernaturally executed punishments, is most often associated with specifically 'religious' and cultic violations. Out of its reverence for human life, early Rabbinic law effectively interpreted the death penalty out of existence by insisting on unreasonably difficult standards of testimony. (It insisted, for example, that the witnesses must have explicitly warned the culprit of the criminal status of the act and its penalty; and that the culprit must have stated that he or she was going to commit the crime despite this warning). The Mishnah (Makkot 7a) teaches:

A Sanhedrin that passes the death penalty once in seven years is called a murderous court.

Rabbi Eleazar ben Azariah says that this is true of a court that passes such sentence even once in seventy years.

Rabbi Tarfon and Rabbi Akiva say: Had we been members of the Sanhedrin, no one would have been executed.

This approach was formulated during times when Jews, living under foreign occupation, did not administer their own criminal justice system. There were at any rate dissenting voices among the rabbis, such as that of the Patriarch Rabban Simeon ben Gamaliel who countered the previous dicta with the charge that, through their reluctance to enforce capital punishment, "they would have caused a proliferation of murderers in Israel."²³ The execution of the death penalty was viewed by the rabbis as an important stage in the atonement process for the gravest of sins. Hence, it was to be accompanied by a confession (Mishnah Sanhedrin 6:2). The destruction of the Second Temple and the ensuing abrogation of the sacrificial cult and capital punishment were initially perceived as a terrible crisis that deprived the Jews of the opportunity for atonement,

thus leading the rabbis of those generations to posit various substitute means of atonement; e.g., death or physical suffering.²⁴

Exile is a special case in point. According to the Torah (Numbers 6:9–29) a "blood-avenger" can pursue anyone guilty of unintentional manslaughter unless the latter succeeds in escaping to a city of refuge. Rabbinical interpretation effectively transformed this institution into a court-administered exile to the sanctuary city. Here one might mention as well the venerable Jewish judicial sanction of the ban of excommunication, a form of social and economic ostracism with strong religious overtones. During the medieval era, when Jewish communities had little authority to impose punishments on their members, the ban came into frequent use and was identified with Jewish judicial autonomy. Its use was normally not punitive in nature, so much as a means of enforcing the law.

Corporal punishment has detailed prescriptions. For example, the administration of lashes, mandated by the Torah (Deuteronomy 25:1–3), was strictly regulated in light of the criminal's health, and at any rate was never to exceed thirty-nine strokes. It was viewed primarily as a means of atonement. "Lashes are precious, for they atone for sins . . ." ²⁵ Or again, "For all who are liable to the penalty of *karet* [divinely executed premature death], if they have been subjected to lashes, they are exempted from their penalty of *karet*, for it states '[Forty stripes he may give him, and not exceed: lest, if he should exceed, and beat him above these with many stripes,] then thy brother should seem vile unto thee'—Once he has submitted to the stripes, he is 'thy brother.'"²⁶

The Torah's unambiguous insistence on punishing offenders seems to position it at odds with the ideals of Restorative Justice as described by some of its proponents from whose writings we would suppose that restorative and retributive approaches stand in polar opposition, and that the Western judicial tradition has been exclusively retributive. Indeed, if we portray the institution of judicial punishment as some sort of barbaric act of vengeance that seeks sadistically and futilely to erase past wrongs by inflicting them on the perpetrators, then the entire process is discredited.

The ancient rabbis were well aware of the law's obligation to impose suffering on criminals, both for their moral discipline and in order to discourage other potential offenders. From this perspective, any stance that entirely rejects judicial punishment seems seriously flawed with respect to its understanding both of prevailing legal ideologies, and of the role of punishment in a Restorative Justice paradigm. As can be seen from Conrad Brunk's contribution to this

volume, many modern ethicists have followed a utilitarian interpretation of judicial punishment, for which punishment serves chiefly to deter offenders from future crime.²⁷ Admittedly, there is nothing in the model of Restorative Justice that would contradict the need for the fair and impartial imposing of punishments on wrongdoers.

The following quotation illustrates the view that shortsighted compassion can be the cause of a long-term societal catastrophe:

Said Rabbi Joshua ben Levi: If a person acts compassionately in a situation where cruelty is required, in the end that person will act cruelly when compassion is required.²⁸

An eminently balanced rationale for punishment was advanced eloquently by Maimonides:

The utility of this is clear and manifest, for if a criminal is not punished, injurious acts will not be abolished in any way and none of those who design aggression will be deterred. No one is as weak-minded as those who deem that the abolition of punishments would be merciful on men. On the contrary, this would be cruelty itself on them as well as the ruin of the order of the city. On the contrary, mercy is to be found in His command, may he be exalted: *Judges and officers shalt thou make thee in thy gate* (Deuteronomy 16:18).²⁹

Atonement

As perceived by the rabbis, the laws of robbery in the Torah had in mind sinners or criminals who had already taken their first hesitant steps towards restitution. Their interpretation of the crime of "robbery" was such that in most instances the criminals could have remained immune from judicial punishment had they been willing to persist in their perjury. The very fact that the issue of restitution has arisen implies that they have a desire to repent. Such persons are offered guidance with regards to correcting or minimizing the specific damage that was inflicted upon their victims. However even after amends have been made on the human plane, the sinner will remain troubled by a separation from God.³⁰ Talmudic sources focus especially on cases where the wrongdoer has invoked the Lord's name in a false oath. The reconciliation with God is accompanied by the bringing of a ram as 'guilt-offering.'

The Jewish teachers were aware of the interdependence and apparent overlap of the variegated biblical ordinances related to restoration, punishment, and spiritual cleansing of a criminal. The general rule is that intentional sins must be atoned for by subjecting oneself to the prescribed penalties, whereas the sacrifices (usually accompanied by a confession) are required for sins of negligence or ignorance. There is considerable interpretative diversity with regards to the specific roles of other elements, such as repentance, the Day of Atonement, and its special rites. The following passage from the Mishnah (end of Tractate Yoma) provides a powerful illustration of the intricacy of the system. Among other things, it sheds light on two types of guilt, 'certain' and 'doubtful.' The certain guilt offering is made when the offender is aware of his or her deed, whereas the doubtful guilt offering is made on behalf of persons who are uncertain whether they have committed a transgression.

The sin-offering and the certain guilt-offering effect atonement.

Death and the Day of Atonement effect atonement when combined with repentance.

Repentance effects atonement for less serious transgressions: for the violation of positive or negative precepts. With respect to grave transgressions, it suspends them until the Day of Atonement arrives and effects the full atonement . . .

For transgressions between a person and the Almighty the Day of Atonement effects atonement. For transgressions between persons the Day of Atonement does not effect atonement until the person has conciliated his/her fellow.

Rabbi Eleazar ben Azariah expounded: ". . . that ye may be clean from all your sins *before the Lord*" (Leviticus 16:30)—[This implies that] it is for transgressions between a person and the Almighty that the Day of Atonement effects atonement; however, for transgressions between persons the Day of Atonement does not effect atonement until the person conciliates his/her fellow.

Said Rabbi Akiva: How fortunate are you, Israel!, Before whom are you cleansed, and who cleanses you? It is your Father in heaven . . . (Mishna *Yoma* 8:9)

The process of forgiveness and atonement commences with reconciliation between the sinner and the wronged party, and when done in sincerity, culminates in a cleansing by the Almighty himself.

The Jewish legal tradition is ambivalent when it comes to the appropriateness of taking compassionate factors into account. Much of the controversy revolves around the following case cited in the Talmud.³¹

Some porters broke a barrel of wine belonging to Rabbah son of Rav Huna. He seized their garments. They went and told Rav. He said to them: "Give them back their garments."

He said: "Is that the law?"

He said: "[Yes.]³² 'That thou mayest walk in the way of good men.'"

He gave them their garments. They said to him, "We are poor men, have worked all day, and are in need; are we to get nothing?"

He said to him: "Go and pay them their salaries."

He said: "Is that the law?"

He said: [Yes] "and keep the path of the righteous (Proverbs 2:20)."

The ambiguities and textual variants of this story have provoked disagreements regarding its normative legal status.³³ The classic commentators characterize Rav's decision as 'within the line of the law,' that is, as based on compassionate, rather than legal, motives, since the porters were clearly liable for the damage that they occasioned. Nevertheless, in view of the fact that Rav was evidently acting in a judicial capacity, one may wonder whether the case should be regarded as a legal precedent. Taking Rav's words as a normative law, a number of medieval authorities, especially in central and eastern Europe, upheld the courts' power to compel the observance of standards that are technically 'beyond the letter of the law.' Thus the sixteenth-century Polish Rabbi Joel Sirkes writes: "And this is the custom of all Jewish courts, to compel the wealthy to act according to what is right and fitting, even where the law does not demand it."³⁴ Authorities from Spain and north Africa, on the other hand, were uneasy with such an apparent abrogation of the integrity of the law. They interpreted Rav's words as

moral persuasion that carried no legal sanctions. They felt that the introduction of subjective considerations into legal decisions would serve to undermine the law's authority.

Restorative Justice themes like compromise, conciliation, and arbitration prompt the question as to whether the judicial system should be bypassed in favour of compromise between the parties. The Talmudic sources are not consistent in distinguishing between conciliation (direct negotiation between the disputants) and arbitration (mutual agreement to abide by the decision of a third party). Owing to the restrictions on Jewish judicial autonomy during the Talmudic era, it appears that arbitration courts did in fact become the normative venue for litigation.³⁵ Although the topic of extrajudicial arbitration is more readily applicable to civil disputes than to cases of criminal wrongdoing, the option can in principle be applied to relations between criminal and victim. Talmudic tradition records that the advisability of this course was debated in the early third century.³⁶

Rabbi Eliezer the son of Rabbi Yosé the Galilean says: It is forbidden to effect a compromise, and anyone who does effect a compromise is a sinner, and anyone who blesses the one who effects a compromise is blaspheming . . . Rather, the law must pierce the mountain.

Moses also declared that the law must pierce the mountain, as it states "For judgment is God's" (Deuteronomy 1:17).

On the other hand, Aaron loved peace and pursued peace and established peace between people.

Rabbi Joshua ben Qorhah says: We are commanded to effect compromise, as it states "execute the judgment of truth and peace in your gates" (Zechariah 8:16). But is it not the case that in the place where there is judgment there is no peace, and in the place where there is peace there is no judgment? Rather, what is judgment that includes peace? Necessarily, it is compromise . . .

It would appear that the disputed issue was roughly as follows: Rabbi Eliezer felt that unless the verdict was issued unambiguously by the court, the parties would feel that it was lacking 'closure,' and resentments might continue to fester. Indeed, the Talmud speaks of the cleansing feeling that results at the end of a

trial, when guilt and innocence have been clearly established, and the guilty party is instructed how to remedy the situation.³⁷ Rabbi Joshua, on the other hand, believed that a solution worked out through a process of give-and-take between the two parties would be more lasting than one imposed from without, in which justice precluded the establishment of peace. This view was accepted as normative. Judges are urged to encourage litigants to agree to conciliation before taking their cases to court. Post-Talmudic law has generally favored the path of compromise.

In short, Jewish halakhah shares several of the features that have been proposed by supporters of Restorative Justice, such as an interest in the criminal's repentance, direct confrontation between litigants, and avoidance of punitive incarceration. It is, however, too diverse to be categorized unambiguously as a restorative system, especially since it has relatively little practical experience with criminal law or violent offenses. It is crucial to keep in mind that the judicial aspects of halakhah are inseparable parts of a *religious* structure that integrates legal, moral, and spiritual matters. To transplant individual features into a secular-liberal legal system would alter their purpose in significant ways.

Notes

1. Following are some readable introductions to Judaism: Steinberg (1947); Epstein (1939); Schwarz and Baron, (1956); Seltzer (1980) and Seltzer (1989).

2. For matters related to the commandments, the halakhah and Jewish jurisprudence see: Elon (1975), Steinsaltz (1976), Berkovits (1983), Urbach (1986), 286–292, 315–97, Urbach (1987), Elon (1994).

3. On decision making in the Jewish legal system see Roth (1986), 49–67.

4. On the classic texts of Jewish law see Strack, Stemberger, et al. (1991), Part Two; Elon (1975), Chapters 25–40.

5. An extreme, but not untypical, example would be the "Holiness Code" of Leviticus 19:3 ff.

6. The Hebrew "*k'nas*" apparently derives from the Latin "census" in the sense of an extension of the Roman censor's authority over public morals. Cf. Justinian's Code (IV, vi, 16 ff.) which employs a classification very similar to that of Talmudic law: In Roman law, those legal actions that result in the restoration of property to its lawful owners are "*rei gratia*

comparatae"; that is, reparative. Those that result in payments that are greater than the original damage or misappropriation are "*poenae*"; that is, punitive. See Moyle (1964), 551–5; Moyle (1955), 177–9; and Albeck (1965), 40–41.

7. This classification is roughly equivalent to our English distinctions between "the letter of the law" and "beyond the letter of the law," though the difference in the wording is instructive. Commentators and jurists have encountered considerable difficulty in formulating precise borders between the two realms, but in general they have noted two chief criteria: (i) "The line of the law" is enforceable by the court, whereas "within the line" is a voluntary moral stance. As we shall note below, this claim was a disputed issue among the Jewish jurists; (ii) "Within the line" refers to voluntarily foregoing a right or privilege to which the party has a legal claim. See Berkovits (1983); Cohen (1966) 31–121; and Federbusch (1943).

8. Thus, Mishnah Avot 1:8 is traditionally rendered as: "Do not behave like the lawyers" (but cf. [Kutscher 1965], 89–92).

9. For example, TB *Shebu'ot* 30a–31a. The concern there is chiefly to prevent one litigant from gaining an advantage over the other.

10. Herring (1984), 91–120; Rakover (1972), 308–53.

11. Biblical instances such as Numbers 11:28 (cf. commentaries) or 15:34 refer always to temporary detention pending clarification of the law. Regarding Mishnah Sanhedrin 9:5 see Lieberman (1970), 10–13.

12. This view also underlies Matthew 5:23: "First be reconciled to thy brother and then come offer thy gift."

13. TB *Ta'anit* 16a.

14. This leniency is explained by the Talmud as intended to facilitate repentance. A central concern of the Bible and Oral Law traditions is what to do in cases where restitution is impossible; e.g., where the crime was committed on a collectivity, and we can no longer determine what was taken from whom. The rabbis debate whether or not it is sufficient in such cases to leave the object in front of the claimants and allow them to sort the matter out. The sources also deal with situations where the victim has since died. See Mishnah and TB Baba Qamma 110b.

15. This, at any rate, was the position of the House of Hillel, which became normative by the first century C.E. The view of the House of Shammai (Tosefta Baba Qamma 10:5 and parallels) was that the structure ought to be demolished in order to allow proper restitution.

16. Justinian, II i 29; Moyle (1964), 204 (text); 41 (translation). An extensive bibliographical survey is found in Cohen, *Jewish and Roman Law*, 19–20.

17. This detail is not spelled out explicitly in the Talmudic text that served as Maimonides' source. However several commentators understood the ruling similarly as referring only to cases where the court has tangible reason to believe that the criminals are sincerely determined to turn over a new leaf. As discussed in the *Maggid Mishneh* commentary by Rabbi Vidal di Tolosa (Spain, fourteenth century), the authorities were concerned that this well-intentioned enactment could easily be manipulated by criminals as a way in which to hold on to their ill-gotten gains. Rabbi Jacob Tam (France, twelfth century) therefore interpreted the Talmud's statements such that the enactment had been in effect *only* during the single generation of Rabbi Judah the Prince; he justified the thesis by citing the Talmud's many anecdotal reports of robbers who were ordered to return their stolen goods (see *Tosafot* to Talmud *ad loc.*, and Schlesinger, 1959, #551). Advocates of the opposing view countered that those cases involved uncooperative criminals who had not demonstrated any desire to repent. See (Schlesinger, 1963), 275.

18. Documentary sources suggest that by the close of the Biblical era this institution was not actually practiced, and some rabbinic works found Scriptural grounds for its abolition. Nevertheless, variants of this practice are mentioned in anecdotal evidence from the Talmudic era. See Urbach (1979), and Gulack (1939), 1:15–31.

19. *Sifra* Behar ch. 7; cf. TB *Qiddushin* 20a, 22a, etc.

20. The issue was a topic of debate among the ancient rabbis.

21. Actually, according to the accepted Talmudic ruling, it is one-fifth of the value of the robbery *plus the penalty*; i.e., one quarter of the value of the stolen item.

22. Note, for example, how the Jewish oral tradition developed its laws of personal injury (as found chiefly in Talmudic sources related to Mishnah *Baba Qamma* ch. 8).

23. A readable survey of the issue based on primary sources is found in Herring's *The Jewish Imagination* (1989), 149–173.

24. Urbach (1987), 432–36.

25. Hoffmann (1909), 164; cf. TB *Shevu'ot* 21a.

26. Finkelstein (1939).

27. See for example Rawls (1955) and literature cited therein; also Rawls (1972), Ezorsky (1972), Barry (1973), Ewing (1970), Hospers (1996), Baker, Stalker et al. (1987).

28. Ecclesiastes Rabbah 7:25.

29. Maimonides, Pines, et al. (1963), 536.

30. The medieval Rabbi Phineas Ha-Kohen of Barcelona in his popular *Sefer Ha-Hinnukh* (beginning of Leviticus). Wengrov Aaron, et al. (1978) suggest an additional reason for ordaining the sacrifice: if the crime were adjudicated purely as a property violation that can be remedied by financial payment, then potential criminals might perpetrate their crimes in the expectation that they could make amends after their economic situation had improved.

31. (TB *Baba Mesi'a* 83a).

32. This crucial word is absent from most texts here and in the instance below. This variant is, of course, related to the questions discussed below, namely whether Rav intended his statement as a binding legal precedent.

33. Urbach (1987), 330–5.

34. Rabbi Joel Joel Sistees, Bayit Hadash to Hoshen Mishpat, #12.

35. Gulack (1967), 4:178–9

36. TB *Sanhedrin* 6a and commentary of *Tosafot*.

37. Cf. Cohen (1966), 656–7.