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**MERCY IN AMERICAN LAW:  
THE PROMISE OF THE ADOPTION OF THE OUTLOOK OF  
JEWISH LAW**

*Yehiel Kaplan\**

**ABSTRACT**

Under Jewish law, mercy and compassion are essential principles to ensure the presence of a just legal system. Not only do mercy and compassion in the law preserve traditional values of human dignity, implementing a more compassionate legal system has practical benefits in both the spheres of legal judgment and of legal punishment. This article will compare the Jewish legal system's application of these necessary doctrines to how other modern legal systems, including the American legal system, implement mercy and compassion. As a result of this in-depth comparison, this article recommends that the American legal system, and other modern legal systems, should borrow from the Jewish legal system in order to place a greater importance on mercy by focusing more on rehabilitation of the offender rather than demanding strict adherence to harsh punishment policies that only end up doing more harm than good.

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## I. INTRODUCTION

American law has granted less weight to mercy and compassion and more weight to the strict path of “get-tough” punishment and correctional policies.<sup>1</sup> When these policies were adopted, they were not necessitated by concerns of deterrence.<sup>2</sup> They were also problematic from a constitutional standpoint, since the Eighth Amendment prohibited cruel and unusual punishment.<sup>3</sup> However, the Supreme Court of the United States interpreted this Amendment in a manner that limited the implementation of mercy in

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<sup>1</sup> See Angela J. Thielo et al., *Rehabilitation in a Red State: Public Support for Correctional Reform in Texas*, 15 CRIMINOLOGY & PUB. POL’Y 137, 137-38 (2015) (concerning the adoption of the get-tough correctional policy in the state of Texas).

<sup>2</sup> See David A. Dana, *Rethinking the Puzzle of Escalating Penalties for Repeat Offenders*, 110 YALE L.J. 733, 769-70 (2001) (“[P]eculiarly severe punishments are reserved for offenders who have been caught committing one offense right after another. This pattern suggests, once again, that something other than deterrence concerns – or more precisely, optimal-deterrence concerns – are driving our sanctions practices.”).

<sup>3</sup> The foundation for the interpretation of the words “cruel and unusual” can be found in the United States Supreme Court decision of *Weems v. United States*. 217 U.S. 349 (1910). In this case, the Court decided that “[t]he punishment of fifteen years’ imprisonment was a cruel and unusual punishment, and, to the extent of the sentence, the judgment below should be reversed on this ground.” *Id.* at 359. The Court explained:

[T]he highest punishment possible for a crime which may cause the loss of many thousands of dollars, and to prevent which the duty of the State should be as eager as to prevent the perversion of truth in a public document, is not greater than that which may be imposed for falsifying a single item of a public account. And this contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice. The State thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal.

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[E]ven if the minimum penalty of cadena temporal had been imposed, it would have been repugnant to the bill of rights. In other words, the fault is in the law, and, as we are pointed to no other under which a sentence can be imposed, the judgment must be reversed, with directions to dismiss the proceedings.

*Id.* at 381-82.

the American legal system. According to this interpretation, it contained no proportionality guarantee in the sphere of criminal-sentencing.<sup>4</sup> This decision was a deviation from the policy in the prior decision of this Court in which the ban upon cruel and unusual punishment included a prohibition upon the implementation of a disproportionate punishment.<sup>5</sup> According to the perspective of the Supreme Court, the Constitution prevents the legislature from authorizing particular forms or modes of punishment and, specifically, cruel methods.<sup>6</sup> However, it also ruled that when capital punishment was not involved, there was no mercy requirement.<sup>7</sup> Outside of the capital punishment context, this requirement was not necessary, due to the qualitative difference between death and all other penalties.<sup>8</sup>

There were attempts to limit the negative effects of the policy of strict punishments. Public support for correctional reform was evident even in conservative states in the United States, such as Texas.<sup>9</sup> There was a shift to mercy and compassion, in certain aspects, in laws of certain states or rulings in case-law.<sup>10</sup> However, the basic

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<sup>4</sup> See *Harmelin v. Michigan*, 501 U. S. 957, 963 (1991). In *Harmelin*, the Court held that this punishment, while severe, might be cruel but is “not unusual in the constitutional sense” since it has “been employed in various forms throughout” the history of the American nation. *Id.* at 994-95. In *Harmelin*, the accused received a life sentence without the possibility of parole for possessing 672 grams of cocaine. *Id.* at 961.

<sup>5</sup> See *Solem v. Helm*, 463 U.S. 277, 284 (1983), *overruled by Harmelin*, 501 U. S. 957.

<sup>6</sup> See *Solem*, 463 U.S. at 284. In this case the Supreme Court held that a prison punishment, a life sentence without parole, was cruel and unusual. The relevant standard was the “gravity of the offence and the harshness of the penalty.” The Eighth Amendment prohibits this disproportionate punishment, given the crime.

<sup>7</sup> See *Harmelin*, 501 U. S. at n.4 (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)).

<sup>8</sup> *Id.*

<sup>9</sup> See Thielo et al., *supra* note 1, at 137.

<sup>10</sup> The merciful policy was adopted in the *Penry* cases. In *Penry v. Lynaugh*, the Supreme Court held that Mr. Penry had been sentenced to death in violation of the Eighth Amendment as a result of the fact that Texas’ special instruction questions did not permit the jury to consider mitigating evidence involving his mental retardation. See 492 U.S. 302, 340 (1989). In *Penry v. Johnson*, the Supreme Court ruled that the judgment of the lower court was reversed in part because the jury instructions failed to adequately instruct the jury regarding mitigating evidence. See 532 U.S. 782, 787 (2001).

foundations of the American legal system in the sphere of judgment of suspects and punishment of criminals did not change.<sup>11</sup>

Adoption of this strict punishment policy is not desirable. There are many advantages to a legal system adopting a more human perspective, as is evident in Jewish law, and considering mercy as an essential element on the path leading to justice.<sup>12</sup>

Mercy is required in the sphere of legal judgment. The harsh perspectives of judges and juries who convict and impose severe punishments, and sometimes do not consider the possibility of more merciful alternatives, are undesirable. When the facts and evidence do not lead to one unquestionable conclusion and legal tribunals convict and do not attribute due weight to the benefit of doubt, injustice may ensue. Harsh punishment policies, including imposition of the most severe punishment (i.e., the death penalty) in unjustified circumstances, or the imposition of punishments in a disproportionate and excessive manner,<sup>13</sup> are especially undesirable when the decision to convict the accused might not be justified. Many unfortunate mistakes of the legal system can be avoided or reduced when mercy and kindness are important considerations and are granted the required due weight. Controversial, strict, and severe judgments and punishments can erode societal trust in the just outcome of the proceedings in the legal system. This undermining of public trust is a problematic outcome because “[w]ithout trust, our modern systems of government, commerce, and society itself would crumble.”<sup>14</sup>

Mercy is important in the sphere of punishment as well. The goal of the crime prevention system is the reduction of the crime rate and deterrence of criminals. However, laws and policies of courts designed to deter crime by focusing mainly on increasing the severity of punishment are ineffective, partly because deterrence is the

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<sup>11</sup> See Martin H. Pritkin, *Fine-Labor: The Symbiosis Between Monetary and Work Sanctions*, 81 COLO. L. REV. 343, 389 (2010). In 2010, the general trend in American law was an insistence upon strict and severe punishment. *Id.*

<sup>12</sup> See Robert L. Minser, *A Strategy for Mercy*, 41 WM. & MARY L. REV. 1303, 1318-30 (2000) (concerning the advantages of adopting a more human perspective).

<sup>13</sup> See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (concerning proportionality in punishment in the decision of the Supreme Court of the United States). In this case, the Court held that the death penalty for rape of an adult woman was grossly disproportionate and excessive punishment, and therefore unconstitutional under the Eighth Amendment to the United States Constitution. *Id.*

<sup>14</sup> Neil Richards & Woodrow Hertzog, *Taking Trust Seriously in Privacy Law*, 19 STAN. TECH. L. REV. 431, 433 (2016).

behavioral response to the perception of sanction threats. However, the conclusion that crime decisions are affected by sanction risk perceptions is not sufficient to conclude that policy can deter crime.<sup>15</sup> Severe punishments do not achieve this goal, and many times after a long time served in prison, convicted criminals revert to their criminal habits. The implementation of severe punitive measures has not reduced the crime rate in the United States. Research findings have shown that criminal recidivism was not reduced as a result of the shift from mercy to a stricter punishment policy in the United States.<sup>16</sup> In addition, the psychological benefits of mercy and compassion, when they are justified in light of the circumstances, are evident in human behavior.<sup>17</sup> Harsh punishments, especially when they are not justified, do not enhance positive human behavior.<sup>18</sup> The shift from a greater emphasis upon offender rehabilitation to a greater emphasis upon punishment of offenders has not borne good fruit. The result has been an expansion of the correctional system and an increase in the rate of

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<sup>15</sup> See Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 204 (2013).

<sup>16</sup> See Daniel P. Mears et al., *Recidivism and Time Served in Prison*, 106 J. CRIM. L. & CRIMINOLOGY 81, 83-123 (2016).

<sup>17</sup> See *id.* at 93.

<sup>18</sup> See Adrian Grounds, *Psychological Consequences of Wrongful Conviction and Imprisonment*, 46 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 165 (2004) (concerning the psychological damage as a result of unjustified and unnecessary convictions of criminals); see also Adrian T. Grounds, *Understanding the Effects of Wrongful Imprisonment*, 32 CRIME & JUST. 1 (2005); Seri Irazola et al., *Study of Victim Experiences of Wrongful Convictions*, IFC INC. 20-51 (Nov. 2013).

incarceration in the United States.<sup>19</sup> This reality has imposed a financial strain upon the public budget in the United States.<sup>20</sup>

The main focus of this article is upon the presentation of the better alternative. This desirable outlook is evident in many Jewish sources. In Jewish law (*Mishpat Ivri*), mercy and compassion are essential and complement strict legal doctrines. By the essential integration of strict legal norms and mercy, a Jewish judge may arrive at the “ultimately true” verdict (*din emet la-amitto*).<sup>21</sup> Additionally, implementing mercy in law is essential because Jewish texts require a significant implementation of Jewish values – especially mercy and compassion – in Jewish law. These texts further require a legal mechanism that focuses on the maintenance and dignity of human beings, who are created in God’s image.

I will explain how the Jewish legal system attempts to implement these basic foundations of Judaism, in an appropriate manner, in judging suspects and sentencing criminals after their conviction. I will also suggest that this approach should inspire modern legal systems, including the American legal system. Jewish law has a much more comprehensive and demanding outlook concerning the significance of mercy in the legal system. The American legal system would do well to adopt the kinder and more generous outlook of Jewish law and grant greater weight to the significance of mercy, compassion, and mitigating circumstances in its legal system. This shift in the American legal system should include

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<sup>19</sup> See ROY WALMSLEY, WORLD PRISON POPULATION LIST, INT’L CTR. FOR PRISON STUD. 1 (8th ed. 2009); see also Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1333 (2008) (regarding the failure of the policy of severe punishment, was that these are “punitive, unforgiving times”). In her article, Barkow offered explanations for several facts. In 2008, she wrote there were:

more than two million people behind bars in the United States. Over five million people [were] on probation or some other form of supervised release. Prisoners [were] serving ever-longer sentences. Presidential and gubernatorial grants of clemency [were] rare events. The use of jury nullifications to check harsh or overbroad laws was viewed by judges and other legal elites with suspicion.

*Id.*; see also Michael Welch, *Ironies of American Imprisonment*, in HANDBOOK ON PRISONS 359 (Yvonne Jewkes et al., eds., 2d ed. 2016).

<sup>20</sup> See *United States v. Simmons*, 375 F. Supp. 3d 379, 385 (E.D.N.Y. 2019).

<sup>21</sup> See discussion *infra* Part III(A) (concerning the ultimate truth in Jewish law).

a return to emphasis upon the rehabilitation of offenders.<sup>22</sup> The outcome of this policy should be positive for all members of society.<sup>23</sup>

Indeed, there are scholars who claim that the emphasis upon mercy in punishment, including the perspective presented in the Jewish texts, is incompatible with the concept of retributive justice and the principle of equality in law. They claim that the implementation of mercy in the legal system can lead to dangerous offenders, who are morally accountable, escaping appropriate punishment.<sup>24</sup> They are also opposed to granting significance, in criminal law, to certain circumstances that might justify the mitigation of the punishment in courts, such as the prisoner's age or the suffering of his or her family.<sup>25</sup> They claim certain factors that the legal system defines as mitigating factors – such as the offender's belief that he or she was acting in justified circumstances, including justified civil disobedience – are irrelevant to the penal process and an obstacle for a legal system when it attempts to achieve the goal of retribution in an effective manner.<sup>26</sup> However, Kathleen Dean Moore, who justifies the institution of pardons based on a retributive conception of justice, nevertheless claims that the legal system should grant pardons not only for false convictions and convictions of the insane.<sup>27</sup> It should also grant

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<sup>22</sup> See John Steer & Paula K. Biderman, *Impact of the Federal Sentencing Guidelines on the President's Power to Commute Sentences*, 13 FED. SENT'G REP. 154, 156 (2001) (“A post-sentencing development that historically has provided a basis for altering the punishment imposed is recognition of extraordinary defendant initiatives that convincingly demonstrate rehabilitation. Today, however, a defendant's opportunity to shorten a prison sentence through post-sentence rehabilitative conduct is quite limited. With its abolition of parole, restrictions on post-sentence motions for a reduced sentence under Rule 35, and tight limits on good-time credits to reduce the term of imprisonment required to be served, the [Sentencing Reform Act] clearly shifted from a rehabilitation philosophy (insofar as a purpose of imprisonment) to an approach emphasizing certainty of punishment and other sentencing purposes.”).

<sup>23</sup> See Hannah Fuetsch, *The Progressive Programming Facility: A Rehabilitative, Cost-Effective Solution to California's Prison Problem*, 48 U. PAC. L. REV. 449, 449-63 (2017) (concerning the benefits of rehabilitation for criminals and all members of society).

<sup>24</sup> See Daniel Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1453-73 (2004).

<sup>25</sup> *Id.* at 1436.

<sup>26</sup> See *id.* at 1443 n.70.

<sup>27</sup> See KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 97-98 (1989); see also Robert Weisberg, *Apology, Legislation, and Mercy*, 82 N.C. L. REV. 1415, 1421-23 (2004) (concerning the positive effect of mercy in capital punishment cases).

pardons to reduce the sentences of criminals who were treated too harshly. According to her, a policy that grants due weight to mercy for good and sufficient reasons should be part of the path leading to true justice in the legal system.<sup>28</sup>

Several aspects of adopting an approach that favors mercy in the Jewish legal system, especially the significance of mercy in the Bible and in the writing of prominent rabbis in ancient times, the medieval period, and the twentieth century, are presented in this article.<sup>29</sup> Additionally, interpretations of many sources pertaining to mercy in Jewish law are presented. There is also a focus upon the gradual development of Jewish law pertaining to the significance of mercy. The message broadcast by these Jewish sources, whereby mercy has an essential role in the legal system, will be emphasized. The article presents a comprehensive outlook that stems from a number of important Jewish sources pertaining to mercy. The legal principles in these texts, and their interpretation and analysis, are applicable in many spheres of Jewish law. They lead one modern Israeli legal scholar to the conclusion that “Jewish law is comprehensive . . . ‘It includes also charity, morality, compromise, education, and in this legal system, compromise is more dominant than strict law and the activity beyond the strict latter of law is preferable.’”<sup>30</sup>

## II. MAJOR TRENDS IN AMERICAN LAW

One approach in American criminal law is to grant less weight to mercy and a lenient judgment, while giving greater weight to a strict

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<sup>28</sup> *Id.*

<sup>29</sup> Many new sources and aspects of mercy in Judaism are presented in this article. There are also other presentations regarding the significance of mercy in Jewish law in English. See Samuel J. Levine, *Looking Beyond the Mercy/Justice Dichotomy: Reflections on the Complementary Roles of Mercy and Justice in Jewish Law and Tradition*, 45 J. CATH. LEG. STUD. 455, 455-71 (2006); see also Samuel J. Levine, *Capital Punishment in Jewish Law and its Application to the American Legal System: A Conceptual Overview*, 29 ST. MARY'S L.J. 1037, 1037-53 (1998) (presenting the outlook in certain sources in Jewish law pertaining to capital punishment); Daniel A. Rudolph, *The Misguided Reliance in American Jurisprudence on Jewish Law to Support the Moral Legitimacy of Capital Punishment*, 33 AM. CRIM. L. REV. 437, 437-62 (1996).

<sup>30</sup> Ariel Rosen-Zvi, *Tarbut Shel Mishpat - Al Meoravut Shiputit, Akhifat Hok ve-Hatma'at Arakhim*, 17 TEL AVIV U. STUD. L. 689, 692-93 (1993).

legal policy and severe punishments. I will focus upon the effect of this approach in two spheres in American law: the policy pertaining to three-strikes laws and the policy pertaining to capital punishment.

### A. Three-Strikes Laws

Between 1993 and 1997, twenty-six states and the Federal Government enacted three-strikes laws.<sup>31</sup> California adopted a three-strikes law, reflecting a shift in its sentencing policies regarding the incapacitation and deterrence of repeat offenders. The California three-strikes law was an attempt “to increase the prison terms of repeat felons.”<sup>32</sup> Under the three-strikes law there was a “go-tough” policy, even concerning defendants serving a life sentence, at the stage in which they become eligible for parole.<sup>33</sup> The purpose of this legislation was “to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offences.”<sup>34</sup>

The three-strikes laws were controversial. Critics doubted the wisdom of these laws, their cost-efficiency and their effectiveness, and claimed they do not achieve the goals of the law enforcement system in the United States.<sup>35</sup> In addition, the Eighth Amendment’s ban on the imposition of “cruel and unusual” punishment prohibits “excessive

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<sup>31</sup> James Austin et al., *Three Strikes and You’re Out: A Review of State Legislation*, NAT. INST. JUST. 1 (Sept. 1997), <https://www.ojp.gov/pdffiles1/nij/grants/181297.pdf>.

<sup>32</sup> *People v. Romero*, 917 P.2d 628 (Cal. 1996).

<sup>33</sup> Under the three-strikes law:

[defendants] become eligible for parole on a date calculated by a reference to a “minimum term,” which is the greater of (a) three times the term otherwise provided for the current conviction, (b) 25 years, or (c) the term determined by the court pursuant to § 1170 for the underlying conviction, including any enhancements.

*Ewing v. California*, 538 U.S. 11, 16 (2003) (citing CAL. PENAL CODE § 667(e)(2)(A)(i)-(iii) (West 1999); CAL. PENAL CODE § 1170.12(c)(2)(A)(i)-(iii) (West Supp. 2002)).

<sup>34</sup> *Id.* at 47 (citing CAL. PENAL CODE. § 667(b) (West 1999)). “California . . . [was] the second state to enact a three-strikes law. In November 1993, the voters of Washington State approved . . . [a] three-strikes law.” *Id.* at 16.

<sup>35</sup> See Michael Vitiello, *Three Strikes: Can We return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 423 (1997); Brian P. Janiskee & Edward J. Erler, *Crime, Punishment, and Romero: An Analysis of the Case Against California’s Three Strikes Law*, 39 DUQ. L. REV. 43, 45-46 (2000).

sanctions.”<sup>36</sup> Faithful to the requirements stemming from this Amendment, the Supreme Court ruled that the Constitution directs judges to apply their best judgment in determining the proportionality of fines and other forms of punishment, including the imposition of a death sentence.<sup>37</sup> However, the path of mercy was not adopted when the California Court of Appeals<sup>38</sup> and the Supreme Court rejected Ewing’s claim that his sentence, under the three-strikes law of the state of California, was grossly disproportionate under the Eighth Amendment.<sup>39</sup> The Supreme Court ruled that “[t]he Eighth Amendment, which forbids cruel and unusual punishment, contains a ‘narrow proportionality principle’ that ‘applies to noncapital sentences.’”<sup>40</sup> It also stressed that three-strikes laws achieve an important goal: they deter repeat offenders.<sup>41</sup>

## B. Capital Punishment

Capital punishment is controversial, and its opponents claim it is cruel, inhumane, and degrading.<sup>42</sup> In the United States, the methods of legal execution are cruel: death by electrocution, firing squad, lethal gas, hanging, and lethal injection.<sup>43</sup> Moreover, this punishment is irreversible. There is no option of correcting a mistake of the legal system after the execution. The critics claim that the imposition of this punishment is a severe violation of human rights. Specifically, the

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<sup>36</sup> See *Atkins v. Virginia*, 536 U.S. 304, 311 (2002).

<sup>37</sup> See *Stack v. Boyle*, 342 U.S. 1, 5 (1951); *Coker v. Georgia*, 433 U.S. 584, 592 (1977); *United States v. Bajakajian*, 542 U.S. 321, 334-36 (1998).

<sup>38</sup> See *People v. Ewing*, No. B143745, 2001 WL 1840666, at \*1, \*4 (Cal. Ct. App. Apr. 25, 2001) (relying on *Rummel v. Estelle*, 445 U.S. 263 (1980)).

<sup>39</sup> See *Ewing v. California*, 538 U.S. 11, 20 (2003).

<sup>40</sup> *Id.* (citing *Harmelin v. Michigan*, 501 U.S. 957, 996-97 (1991) (Kennedy, J., concurring in part)). See *Weems v. United States*, 217 U.S. 349, 371 (1910); see also *Robinson v. California*, 370 U.S. 660, 667 (1992) (concerning the application of the Eighth Amendment to the States via the Fourteenth Amendment).

<sup>41</sup> See *Ewing*, 538 U.S. at 27.

<sup>42</sup> *Abebe-Jira v. Negewo*, 72 F.3d 844, 845 (11th Cir. 1996) (concerning the action of the courts in the United States in an attempt to combat illegal cruel, inhumane, and degrading treatment of human beings); *Paul v. Avril*, 812 F. Supp. 207, 209 (S.D. Fla. 1993).

<sup>43</sup> See Kristina E. Beard, *Five Under the Eighth: Methodology Review and the Cruel and Unusual Punishments Clause*, 51 U. MIAMI L. REV. 445, 460-65 (1997).

right to life is an important right, and imposition of this punishment is a violation of this right, sometimes unnecessarily.<sup>44</sup>

Advocates of the death penalty claim it is necessary in order to combat crime in an effective manner, deterring potential criminals and ensuring that convicted criminals do not commit additional crimes.<sup>45</sup> However, the findings of one study, based upon analysis of international data, showed that there were declining murder rates after the abolition of the death penalty in certain countries.<sup>46</sup> The death penalty abolition correlated on average with a decline in murder rates in eleven countries for which data was available. Death penalty advocates' fears that the state relinquishing the ultimate punishment will encourage potentially dangerous criminals to commit crimes, or at least weaken deterrence, have proven unfounded in light of this evidence.<sup>47</sup> Therefore, those opposed to the death penalty claim that there should be a total abolition of capital punishment in the United States. They sometimes stress that it was abolished in Germany, Austria and Italy right after World War II. Indeed, the European Union will not admit a country with a death penalty, since Article Two of the Charter of Fundamental Rights of the European Union prohibits the use of capital punishment.<sup>48</sup> The Council of Europe, too, conditions membership, *inter alia*, upon abolition of the death penalty, and none of its member states has carried out an execution since 1997. This pattern is dominant in Europe.<sup>49</sup>

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<sup>44</sup> See N.B. Smith, *The Death Penalty as an Unconstitutional Deprivation of Life and the Right to Privacy*, 25 B.C. L. REV. 743, 745-46, 748-50 (1984); Kevin M. Barry, *The Death Penalty and the Fundamental Right to Life*, 60 B.C. L. REV. 1545, 1545-1603 (2019).

<sup>45</sup> Moin A. Yahya, *Deterring Roper's Juveniles: Using a Law and Economics Approach to Show That the Logic of Roper Implies that Juveniles Require the Death Penalty More Than Adults*, 111 PENN ST. L. REV. 53, 53-106 (2006); Robert Blecker, *Current Issues in Public Policy: But Did They Listen? The New Jersey Death Commission's Exercise in Abolitionism: A Detailed Reply*, 5 RUTGERS J.L. & PUB. POL'Y 9, 20-21 (2007).

<sup>46</sup> *What Happens to Murder Rates when the Death Penalty is Scrapped? A Look at Eleven Countries Might Surprise You*, ABDORRAHMAN BOROUHAND CTR. (Dec. 13, 2018), <https://www.iranrights.org/library/document/3501>.

<sup>47</sup> *Id.*

<sup>48</sup> See 2000 J.O. (C 364) 9.

<sup>49</sup> See Peter Hodgkinson, *The Twenty-Third Annual Law Review Symposium—The Ultimate Penalty: A Multifarious Look at Capital Punishment: Europe—A Death Penalty Free Zone: Commentary and Critique of Abolitionist Strategies*, 26 OHIO N.U.L. REV. 529, 625-28 (2000).

In the United States, the death penalty has not been abolished, although its scope has been limited. There was hope it might be abolished in 1972 when the Supreme Court, in *Furman v. Georgia*,<sup>50</sup> ruled that the Eighth Amendment imposed significant restraints on the imposition of the death penalty.<sup>51</sup> It ruled that the death penalty, if not implemented in the appropriate manner, could be a violation of the prohibition in the U.S. Constitution. The Court, in the majority opinion, declared that the “imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”<sup>52</sup> Thus the decision in that case effectively abolished the death penalty in the United States.<sup>53</sup> For the first time in the history of the United States, there was an understanding, as a result of this decision, that it was illegal to execute a defendant. The decision in the *Furman* case caused all death sentences pending at that time to be commuted to life imprisonment.<sup>54</sup> It also forced the states and the U.S. Congress to rethink the rules in the state and federal statutes enabling the imposition of capital punishment, in an attempt to ensure that the death penalty would be administered in an appropriate manner.<sup>55</sup> However, the ruling in *Furman* was concerned largely with the form in which the death penalty in the United States was carried out in certain cases, rather than with the substantive issue of whether this cruel and irreversible punishment was an appropriate method of punishment. The decision of the Court related to the lack of procedural safeguards and did not state that in all cases, this punishment was a violation of the rule in the U.S. Constitution.

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<sup>50</sup> 408 U.S. 238 (1972).

<sup>51</sup> See *id.* at 239-40.

<sup>52</sup> *Id.*

<sup>53</sup> See Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?* 29 SETON HALL L. REV. 147, 152-53 n.15 (1998) (“Chief Justice Burger predicted privately that there would never be another execution in the United States” (quoting BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 259 (1979))).

<sup>54</sup> See Michael Mello, “*In the Years When Murder Wore the Mask of Law*”: *Diary of A Capital Appeals Lawyer (1983-1986)*, 24 VT. L. REV. 583, 665 (2000).

<sup>55</sup> See Rory K. Little, *Forward: The Federal Death Penalty: History and Some Thoughts About the Department of Justice’s Role*, 26 FORDHAM URB. L.J. 347, 377-78 (1999).

Later, in *Gregg v. Georgia*,<sup>56</sup> the United States Supreme Court adopted a more accepting approach toward the implementation of the death penalty. The Court described the two main features that were required in capital sentencing procedures in order to avoid cruel and unusual punishment as prohibited by the Eighth Amendment. However, acceptance of imposition of the death penalty in the United States was reaffirmed: in particular, Mr. Gregg's death sentence was upheld.<sup>57</sup> The Supreme Court ruled that imposition of the death penalty in this case was not a violation of the rule in the Constitution so long as the procedures involved in the execution were not a violation of the Eighth Amendment.<sup>58</sup> This decision essentially ended *Furman*'s moratorium on the death penalty. In the aftermath of the *Gregg* case, the death penalty was imposed frequently in the United States.<sup>59</sup>

During this period, an approach affording weight to mercy was also sometimes evident in certain aspects pertaining to capital punishment, in state legislation in the United States or in case law. The new outlook was especially evident in several rulings of the Supreme Court of the United States that limited the imposition of this punishment in certain spheres.

The Supreme Court ruled that “a sentence of death was grossly disproportionate and excessive punishment for the crime of rape,” and therefore, in these circumstances, it was a “cruel and unusual”

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<sup>56</sup> 428 U.S. 153 (1976).

<sup>57</sup> *Id.* at 154.

<sup>58</sup> *Id.* at 187.

<sup>59</sup> *See, e.g.*, *Gilmore v. Utah*, 429 U.S. 1012 (1976). Utah was the first state that resumed the use of capital punishment after the 1967-1976 national moratorium on capital punishment, in 1977. Gary Gilmore was

[an] American murderer whose execution by the state of Utah in 1977 ended a de facto nationwide moratorium on capital punishment that had lasted nearly 10 years.

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Gilmore's death did not bring on an immediate wave of executions. By the end of 1982, only five more criminals – three of whom, like Gilmore, had voluntarily given up the appeal process – had been put to death. But the pace subsequently quickened: in the first 40 years after Gilmore's death, 1,443 convicts were executed in the United States.

*See* Robert Lewis, *Gary Gilmore*, ENCYC. BRITANNICA (Jan. 13, 2021), <https://www.britannica.com/biography/Gary-Gilmore>.

punishment, in violation of the Eighth Amendment.<sup>60</sup> The Court also held that the rule pertaining to a “cruel and unusual” punishment prohibited the imposition of the death penalty for the rape of a child in cases in which the victim did not die and death was not intended.<sup>61</sup>

In another case, the Supreme Court ruled that capital punishment was not appropriate for a defendant who was a participant in a robbery in which his codefendant killed two victims.<sup>62</sup> There was no evidence that the defendant either killed or intended to kill the victims, or that he intended that deadly force be used. The Supreme Court stated that allowing capital punishment in these circumstances was a violation of the rule in the Eighth Amendment, and it reversed and remanded the defendant’s death sentence.<sup>63</sup>

In other cases, the Supreme Court ruled, as a result of a merciful interpretation of the rules in the Constitution pertaining to harsh punishment, that capital punishment was not appropriate for criminals with developmental disabilities. At the first stage, the Supreme Court ruled that execution of criminals with developmental disabilities is not cruel and unusual punishment.<sup>64</sup> However, in the *Atkins* case it ruled that the death penalty for criminals with developmental disabilities is cruel and unusual punishment which violates the Eighth Amendment ban on such punishment.<sup>65</sup>

Mercy is evident also in the context of the death penalty for juvenile murderers in the *Thompson* case.<sup>66</sup> The merciful outlook in *Thompson* was expanded in the decision of the Supreme Court concerning death sentences for juveniles in the case of *Roper v. Simmons*,<sup>67</sup> where the Court ruled that the Constitution prohibited the execution of juveniles who were under the age of eighteen when they committed a murder.<sup>68</sup>

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<sup>60</sup> See *Coker v. Georgia*, 433 U.S. 584, 592 (1977). “We have the abiding conviction that the death penalty, which ‘is unique in its severity and irrevocability’ . . . is an excessive penalty for the rapist.” *Id.* at 598.

<sup>61</sup> See *Kennedy v. Louisiana*, 554 U.S. 407, 412 (2008).

<sup>62</sup> See *Enmund v. Florida*, 458 U.S. 782, 801 (1982).

<sup>63</sup> *Id.*

<sup>64</sup> See *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989).

<sup>65</sup> See *Atkins v. Virginia*, 536 U.S. 304, 311 (2002).

<sup>66</sup> See *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

<sup>67</sup> 543 U.S. 551 (2005).

<sup>68</sup> See *id.* at 562.

The policy of merciful punishment for juvenile offenders was evident also in the sphere of the sentence of life without parole. At the first stage, the Supreme Court prohibited the sentence of life without parole for non-homicide juvenile offenders.<sup>69</sup> Eventually it prohibited mandatory sentences to life without parole for juveniles, regardless of the crime they committed.<sup>70</sup>

In addition, the Supreme Court removed limitations that had been imposed upon the presentation of mitigating evidence, or upon the best defense, in capital punishment cases. In *Lockett v. Ohio*,<sup>71</sup> the Court ruled that the death penalty statute was unconstitutional when a court imposed mandatory capital punishment based on three narrowly-drawn mitigating factors, and did not permit individualized consideration of a wider range of mitigating circumstances. The Court stated that the Constitution requires, in all but the rarest cases, that those who impose a sentence should consider all mitigating factors surrounding the accused before they reach the decision that the penalty should be death.<sup>72</sup>

In another case, a criminal was convicted and sentenced to death. The Supreme Court ruled that the exclusion of evidence pertaining to the guilt of a third party in this case was unlawful.<sup>73</sup> In a criminal trial, a conviction based on the strength of the prosecution's case with little or no examination of the credibility of the prosecution's witnesses or the reliability of its evidence violated the constitutional right of a criminal defendant to have a meaningful opportunity to present a defense.<sup>74</sup> A court could not exclude evidence presented by a criminal defendant to the effect that a third party committed the crime simply because the prosecution had a strong case.<sup>75</sup> In another capital punishment case, the Supreme Court reversed the judgment of the lower court, ruling that when the only aggravating factor was the particularly egregious ("outrageously or wantonly vile") nature of the

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<sup>69</sup> See *Graham v. Florida*, 560 U.S. 48 (2010).

<sup>70</sup> See *Miller v. Alabama*, 567 U.S. 460 (2012).

<sup>71</sup> 438 U.S. 586 (1978).

<sup>72</sup> See *id.* at 604-05. The issue facing the Supreme Court in the *Lockett* case was whether the Ohio death penalty scheme, where the jury could only consider three mitigating factors, violated Lockett's Eighth Amendment protection against cruel and unusual punishment. See *id.* The Court ruled that it did. *Id.*

<sup>73</sup> *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006).

<sup>74</sup> See *id.*

<sup>75</sup> *Id.* at 330-31.

murder, the death sentence could not be imposed, since that factor did not help avoid arbitrary imposition of the death penalty on the part of judges or juries.<sup>76</sup>

The Supreme Court also ruled that the aggravating factor necessary under Arizona law to impose a death sentence must be determined by a jury, not a judge.<sup>77</sup> Since the death penalty was not possible without the finding of aggravating factors, a jury had to determine that those factors are present unless the defendant waives the right to a jury trial.<sup>78</sup> The defendant should be able to exercise his right under the Sixth Amendment to benefit from the advantages of a jury trial. A jury must evaluate all facts essential to the imposition of a death penalty, including aggravating sentencing factors, before rendering a decision as to whether the death sentence is appropriate.<sup>79</sup> This Amendment requires that the jury ascertain, in an independent act, the presence of the aggravating factors necessary for the imposition of the death penalty. The Court determined that if a particular fact exposed the defendant to a greater punishment, the jury should find it.<sup>80</sup>

The willingness to consider the adoption of the path of mercy concerning the implementation of capital punishment in the United States in a more significant manner was evident in the minority opinions of Jewish justices in the Supreme Court of the United States. In recent years, in his minority opinion in *Glossip v. Gross*,<sup>81</sup> in which he was joined by Justice Ginsburg, Justice Breyer focused upon the evidence that the administration of the death penalty in the United States was flawed and fraught with human risk.<sup>82</sup> His dissenting opinion was an attempt to implement a mild form of mercy in capital punishment cases. Although Justice Breyer did not reach the general conclusion that the imposition of the death penalty was a violation of the Constitution, he laid the foundation for this conclusion. He noted that when the Supreme Court upheld the death penalty in 1976 in

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<sup>76</sup> *Godfrey v. Georgia*, 446 U.S. 420, 420 (1980).

<sup>77</sup> *See Ring v. Arizona*, 536 U.S. 584, 592 (2002).

<sup>78</sup> *Id.* at 602.

<sup>79</sup> *See id.* at 611-13 (Scalia, J. & Thomas, J., concurring).

<sup>80</sup> *Id.*

<sup>81</sup> *Glossip v. Gross*, 576 U.S. 863 (2015).

<sup>82</sup> *See id.* at 908-46 (Breyer, J., dissenting).

*Gregg* and accompanying decisions,<sup>83</sup> it did so on the assumption that the statutes in the United States “contain safeguards sufficient to ensure that the penalty would be applied reliably . . . .”<sup>84</sup> However, Justice Breyer stated that since then, circumstances have changed.<sup>85</sup> Administration of the death penalty at this time suffered from fundamental constitutional defects:

(1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty’s penological purpose. Perhaps as a result, (4) most places within the United States have abandoned” the use of capital punishment.<sup>86</sup> This led to his conclusion that “those changes, taken together with my own 20 years of experience on this Court, lead me to believe that the death penalty, in and of itself, now likely constitutes a legally prohibited ‘cruel and unusual punishment.’”<sup>87</sup>

The total shift towards mercy in this sphere – the abolishing of all forms of capital punishment – is not the general rule in the United States at present. The decisions of the Supreme Court that displayed mercy were the outcome of the implementation of specific restrictions engendered by rules in the Constitution, especially the Eighth Amendment. The interpretation of this Amendment led to the conclusion that “the death penalty is reserved only for the most culpable defendants committing the most serious offences.”<sup>88</sup> However, under this interpretation, the death penalty was not totally abolished. In 2020, the United States is the only Western country at present that has the death penalty.<sup>89</sup> Capital punishment is currently

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<sup>83</sup> See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242, 247-52 (1976); *Jurek v. Texas*, 428 U.S. 262, 272 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 331 (1976).

<sup>84</sup> *Glossip*, 576 U.S. at 908.

<sup>85</sup> See *id.* at 908-46 (Breyer, J., dissenting).

<sup>86</sup> *Id.* at 909-10.

<sup>87</sup> *Id.* at 909.

<sup>88</sup> *Miller v. Alabama*, 567 U.S. 460, 476 (2012).

<sup>89</sup> *Death Penalty*, AMNESTY INT’L (2021), <https://www.amnesty.org/en/what-we-do/death-penalty>.

authorized in twenty-seven states, by the federal government and the U.S. military.<sup>90</sup>

Ultimately, the Court ruled to prohibit the execution of mentally retarded and juvenile offenders in an attempt to comply with the Eighth Amendment's ban on cruel and unusual punishment.<sup>91</sup> However, this resulted in the Court adopting an alternative punishment, which is also cruel and unusual. Life without parole sentences replaced executions of juvenile and mentally retarded offenders. This move does not constitute the adoption of the path of mercy, and it could also be a violation of the obligation to act in a manner which is not "cruel and unusual" in the sphere of punishment.<sup>92</sup> For juveniles, the severe, unmerciful punishment of life without parole is a sentence that, not unlike capital punishment, imposes a "terminal, unchangeable, once-and-for-all judgment upon the whole life of a human being and declares that a human being is forever unfit to be a part of civil society."<sup>93</sup>

### III. JEWISH LAW

Mercy is an essential element and a compelling factor in the process of judging the acts of another individual in Judaism and Jewish law. The outlook of mercy is essential also to the path that could lead to a conviction in a Jewish court. Conviction at the end of the process of judgment should be the outcome only of a firm conclusion that an individual acted in a manner that was a violation of the principles of Jewish law. The Creator of the World directed us to grant due weight to mercy and compassion also in this sphere. Moreover, mercy is an

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<sup>90</sup> *States and Capital Punishment*, NAT'L CONF. STATE LEGS. (Aug. 11, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx>.

<sup>91</sup> See *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (concerning criminals with developmental disabilities and the limitation of the implementation of the death penalty); *Roper v. Simmons*, 543 U.S. 551, 562 (2005) (deciding that the Eighth Amendment prohibits the imposition of the death penalty on juvenile offenders).

<sup>92</sup> See Barry C. Feld, *A Slower Form of Death: Implications of Roper v. Simmons for Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 9, 10 (2008) (concerning the constitutional criticism of this harsh punishment).

<sup>93</sup> Brief for Petitioner at 5, *Sullivan v. Florida*, 560 U.S. 181 (2010) (No. 08-7621); Michelle Marquis, *Graham v. Florida: A Game-Changing Victory for Both Juveniles and Juvenile-Rights Advocates*, 45 LOY. L.A. L. REV. 255, 266-67 (2011).

important and essential consideration at the stage of evaluating the appropriate punishment of an individual who has been convicted.

**A. Goal of the Jewish Legal System – The Ultimate Truth**

There are two levels of truth in Jewish jurisprudence. The regular truth, *emet* in Hebrew, and *din emet la'amito* in Hebrew (literally: the law that is the truth in its true form), which, as this concept has been understood in Jewish sources, should be translated as “the ultimate truth.” The definition of the Jewish ultimate legal truth and the method of implementation of the rules guiding rabbis and Jewish courts in this sphere are important when rabbis or Jewish courts evaluate a Jew’s acts. This evaluation should stem from the comprehension that the deep and more significant legal *desideratum* is to do what is necessary in light of the ultimate truth – *din emet la'amito*. This should be the aim of the decision-making process of rabbis, at the stage of judgment, and of the rulings of the Jewish court (*Beit Din*), at the stage of punishment.

In Jewish sources, one finds different interpretations of the concept *din emet la'amito*. I will present all the interpretations but will focus in particular on one of the major trends in Jewish law that grants due weight to mercy. According to this interpretation, *din emet la'amito* is achieved through a process that determines the merciful and compassionate essence of each legal decision. Implementation of this approach should lead to the adoption of the legal perspective which is “outside the [strict] letter of the law,” in the appropriate circumstances.<sup>94</sup>

According to this perspective, mercy is an essential element in the process of Jewish judgment and punishment. Adoption of the more lenient and generous outlook of mercy, “outside the letter of the law,” at the appropriate time and place, should lead to just judgments and punishments of Jewish courts, or of rabbis, in their halakhic rulings. In this desirable process, the legal decision is not only the outcome of the evaluation of the case in light of the principles of the Jewish legal system pertaining to a certain legal dilemma, and their correct implementation. The legal decision-making process should also be an

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<sup>94</sup> See Babylonian Talmud, Bava Metzia 30b (concerning the directive to adopt this perspective in Jewish law).

expression of the attempt to do what is correct and necessary in light of Jewish values. The Jewish judge and rabbi should evaluate, in each case, what they should do to implement these values, including mercy. Their legal decision-making policy, in the sphere of punishment as well, should aspire to be merciful in appropriate circumstances. They should search for the correct conclusion after evaluating all the facts, rules of Jewish law, and circumstances, and attempt to implement the values of Judaism in this process. Jewish judges and rabbis should take seriously their obligation to act in the image of the Creator of the World and in accordance with what is required by the Lord from all Jews. Jewish judges and rabbis who strive to act in the image of the Lord understand that the implementation of Jewish values is necessary in the process of application of the existing rules in every case that they analyze or adjudicate. In the ideal process, the Jewish court and the rabbi, in addition to examining all the important facts and legal arguments in the matter at hand in light of the principles of Jewish law, will endeavor to apply the required Jewish values in the Jewish legal arena to the greatest extent possible. They should act, when necessary, beyond the letter of the strict and uncompromising law in a merciful and compassionate manner. They should also grant due weight to the just outcome, fairness and impartiality, avoid bias, adopt the path of pleasantness and peace and enhance compromise and peace in the world.

When Jewish courts or rabbis attempt to implement Jewish values and determine what is *din emet la'amito* and adopt the approach that grants due weight to Jewish values in their judgments and rulings, mitigating circumstances are important, and occasionally such mitigating circumstances justify acting in a kind and compassionate manner. The Jewish court should grant due weight to these special circumstances and act in a milder and more generous manner in its decisions, when appropriate.

*i. Development of the Principles of Jewish Law:  
Biblical, Tannaitic, and Amoraic Law*

Truth in law is important in the Bible. In biblical law, Jewish judges should be individuals who are guided by an aspiration to achieve truth in their proceedings and decisions.<sup>95</sup> The ideal law in the

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<sup>95</sup> Exodus 18, 21.

Bible is law that grants significant weight to the truth. At the Biblical stage of the development of Jewish law, there is a requirement that the goal of the judge and legal system be that the outcome of their activity will be the truth.<sup>96</sup>

At the next stage of the development of Jewish law, i.e., the *Tannaitic* and *Amoraic* period, an important goal of the judge and the legal system is the ultimate truth (*din emet la'amito* in Hebrew, lit. true law of truth).<sup>97</sup> The state of mind required when Jewish courts or rabbis set goals for their judicial activity, including their activity when they determine the fate of another individual, should be a sincere and serious attempt to do what they can to achieve not only mere truth, but the ultimate truth (*din emet la'amito*). In sources from the *Tannaitic* and *Amoraic* period, the ancient Jewish Sages encouraged the Jewish judge to adopt the path leading to the ultimate truth in his judgment. They praised the Jewish judge who sought to achieve the ultimate truth and stated that if he acts in this desirable manner for “even one hour,” he becomes a partner of the Creator of the World in the important mission of the creation of the world.<sup>98</sup> The aspiration to achieve the ultimate truth in law and to act in a merciful and compassionate mode when the circumstances justify the adoption of this approach should also lead to the granting of due weight to mitigating circumstances. Implementation of the values of Judaism, in the appropriate circumstances, is possible when the judgment in Jewish law is the outcome of an evaluation of whether mercy is necessary in a certain case, in light of the specific circumstances.

ii. *Development of the Principles of Jewish Law: Medieval Jewish Literature*

In medieval Jewish literature there are several explanations of *din emet la'amito* – the goal of the activity of a Jewish court and the decision-making process of rabbis. In interpreting the statements and

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<sup>96</sup> Ezekiel 18:8.

<sup>97</sup> See Menachem Elon, *Truth, Peace, and Conciliation: The Pillars of Law and Society*, 14 BAR-ILAN L. STUD. 269, 272 n.13 (1998). Professor Elon stressed that there are doubts if “ultimate truth” is the goal of the legal system in tannaitic sources. *Id.* However, those sources include Mishnah Peah 8:9, which mentioned that the goal of the judgment is to discover the ultimate truth. *Id.*

<sup>98</sup> See Babylonian Talmud, Shabbat 10a; Eruvin 54b; Megilah 15b; Chagigah 14b; Bava Batra 8b; Sanhedrin 7a, 111b.

debate in texts of the ancient Sages concerning *din emet la'amito*, many medieval commentators explained that the requirement to achieve the ultimate truth is the obligation to avoid decisions that are a result of mistakes in the evaluation of facts or circumstances. According to this definition, the ultimate truth in Jewish law is the outcome of an attempt to determine all the relevant true facts and circumstances in a particular matter.<sup>99</sup> When a Jewish judge or rabbi is not sure of the true relevant facts, especially when they have doubts about the conviction of a suspect in a criminal trial, they should investigate the matter and attempt to reach a decision after determining the true relevant facts. Their investigation should be careful and sensitive and as a result their determination of the true facts should lead to the true verdict. Particularly when Jewish authorities suspect that their decision in a case might be tainted as a result of perjury, their decision should be made only after fulfillment of the obligation to ensure a comprehensive investigation of the facts and details relevant to the case. The Spanish Jewish scholar, Rabbi Solomon ben Abraham Aderet, stressed the Jewish court that seeks to implement the ultimate truth should take care to investigate the matter thoroughly and examine all the relevant facts.<sup>100</sup>

At times, the Jewish medieval scholars required that this investigation also be conducted outside the courtroom when it was necessary in order to enable a litigant to prove his claims and determine the relevant facts precisely so as to avoid unfortunate mistakes of the legal system. The activity conducted outside the courtroom could be an announcement in the synagogue that any person who had information that could be helpful for the Jewish judge or a scholar in a certain case should come forward and testify about the facts and details. The additional determination of what is true and what is not, which arises from this testimony, assists those attempting to arrive at *din emet la'amito*. Such an announcement is essential when further investigation regarding these facts and details could be critical.<sup>101</sup> Measures to avoid a tainted decision of a Jewish judge or rabbi, who is acting in light of his obligation to implement law that is

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<sup>99</sup> For more about this legal policy in the medieval responsa literature, see Responsa of Rambam 427; Responsa of Rashba 3:88, 186; Responsa of Ritva 97, 208; Responsa of Rashbash 229, 411.

<sup>100</sup> See Responsa of Rashba 3:92.

<sup>101</sup> See Responsa of the Sages of Provence 1:60.

the ultimate truth, sometimes include the examination and cross-examination of witnesses, so that the final conclusion and verdict will be *din emet la'amito*.<sup>102</sup>

The fifteenth century Jewish law scholar, Rabbi Joseph Colon, wrote that the objective of determining *din emet la'amito* puts the responsibility upon the Jewish judge and rabbi to determine the truth by means of a thorough investigation of the facts and consideration of the circumstances in light of the arguments of the litigants.<sup>103</sup> In addition, he wrote that the reasoning of the Jewish court should reflect an analysis of all relevant facts and details leading to the goal: the ultimate truth. According to his perspective, the requirement to achieve the goal of *din emet la'amito* imposes upon the Jewish courts and rabbi, who are expected to reach a conclusion concerning a certain matter, especially when there are doubts, the obligation to do everything they can in order to find out the truth.<sup>104</sup> Mercy is the outcome of uncertainty about this truth. They should determine the true convicting facts only after they are sure they can reach a solid conclusion about a conviction, or an obligation in civil matters. They should grant the Jewish individual the right to receive a merciful verdict when the fact-finding process leads to the conclusion that he can enjoy the benefit of doubt.

Furthermore, some Jewish law scholars in the Middle Ages wrote that the objective of achieving the ultimate truth in the legal system will be achieved when a Jewish court or rabbi attributes appropriate importance to the combined application of the values of Judaism and the principles of Jewish law in the legal process and in their judgments. The implementation of these values is necessary to allow, not only for a review of all relevant factors, but also for a significant dialogue between values and law that should ultimately lead to the ultimate truth. There were rabbis who explained that, when Jewish courts and rabbis attempt to ensure that their rulings are not only true but also the ultimate truth, they must focus on the need to adopt a pattern of action that is beyond the letter of law in appropriate

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<sup>102</sup> See Tosafot, Shabbat 10a, s.v. *din emet la'amito*; Tosafot, Bava Batra 8b, s.v. *din emet la'amito*.

<sup>103</sup> See Responsa of Rabbi Joseph Colon 118 (Jerusalem 5748); see also RABBI YAACOV BEN ASHER, SEFER HATURIM (TUR), HOSHEN MISHPAT ch. 75 (Jerusalem 1975). The basis of this policy was the rule in the codification of Jewish Law of Rabbi Yaacov ben Asher. *Id.*

<sup>104</sup> *Id.*

circumstances. When the object is the implementation of the ultimate truth, in light of what is required at a certain time and place, the Jewish judges and rabbis should grant priority, in the appropriate circumstances, to a decision-making process that is beyond the letter of the law (which is the ultimate truth). Adoption of this outlook is better than the implementation of a decision-making process that is guided only by strict and formal legal doctrines.

In this spirit, Jewish scholars in the Middle Ages wrote that, since the object of a Jewish court or rabbi is a legal decision that is the ultimate truth, he should attempt to find out, in the specific case and where appropriate, how he can ameliorate the plight of an individual, deviate from the general strict rules, and choose the path that is “straighter,” that is beyond the strict letter of the law. The severe principles of strict Jewish law, which are only one part of Jewish law – its “general assumptions” – should be mitigated.

This is the view of the Jewish medieval scholar, Rabbi Yitzhak Aramah. He stressed that there is a correct approach when a Jewish court or rabbi attempts to act in light of the ultimate truth. When the Jewish decision-making process is an attempt to achieve the ultimate truth, rabbis and Jewish courts should deviate from the strict general norms of the legal system and adopt the “straighter” path.<sup>105</sup> The Jewish court or rabbi should understand that in certain circumstances, they are required to deviate from the regular strict norms and demands of the legal system, and rule in a manner that is appropriate in light of the specific and special circumstances of each case. When they choose this path and “straighten” the severity of regular law, the ultimate truth ensues. Jewish judges who seek to apply the approach of the ultimate truth prefer mercy and compassion, which are significant factors in their legal analysis. This preference prevents the unnecessary and undesirable harsh fate of individuals that might ensue when the dominant standard in the legal system is the strict approach of “let the law cut through the mountain.”<sup>106</sup> Rabbi Aramah stressed that when

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<sup>105</sup> See Yitzhak Aramah, *Akedat Yitzhak, Shemot, Yitro*, ch. 43.

<sup>106</sup> See Babylonian Talmud, Sanhedrin 6b. The Sages there stressed that this is the approach attributed to Moses, but according to the alternative mild perspective – that of compromise – attributed to Aaron, the better legal policy combines the values of mercy and peace in the legal evaluation. They mentioned the strict standard, of no compromise and no peace: “Let the law cut through the mountain,” attributed to Moses and not to his brother, Aaron. The Babylonian Talmud, Sanhedrin 6b states:

the legal system chooses this undesirable path and is willing to achieve its objectives in a manner that is not appropriate, the ultimate goal of justice in law is not achieved. Strict law is implemented, and the outcome for human beings is cruel and non-proportional.<sup>107</sup>

Rabbi Aramah wrote: “[I]ndeed, rabbinical court judges who always judge according to the general assumptions, judge in an attempt to implement the true law (they apply the basic foundation of law: ‘truth’). However, they are the destroyers of the world (because they do not also apply the significant additional foundation of ‘ultimate truth’).”<sup>108</sup> These judges granted significant weight to the general truth and did not attempt to “straighten” it in circumstances that justified deviation from the strict law (they did not invoke the perspective of “ultimate truth” in their legal activity). They adopted the strict policy: “Let the law cut through the mountain.”<sup>109</sup> The Psalmist said: “They shall not know, nor shall they understand in the darkness they shall walk, all the institutions of the earth shall be overthrown.”<sup>110</sup> This statement is applicable concerning the most damaging and corrupt group of Jewish judges.<sup>111</sup>

A similar point of view is reflected in the writings of the Jewish scholar and Bible commentator, Rabbi Don Yitzhak Abravanel.<sup>112</sup> He

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Rabbi Eliezer the son of Rabbi Jose the Galilean says: It is forbidden to mediate a dispute, and he who mediates thus offends, and whoever praises such a mediator [boze’a] is cursing God . . . . But let the law drill through the mountain, for it is written: For the judgment is God’s. And so, Moses would say . . . Aaron, however, loved peace and pursued peace and made peace between man and man, as it is written: “The law of truth was in his mouth. Unrighteousness was not found in his lips, he walked with Me in peace and uprightness and did turn many away from iniquity.”

*Id.*

<sup>107</sup> See *supra* note 105.

<sup>108</sup> At this point Rabbi Aramah quotes from Babylonian Talmud, Bava Metzia 30b. In this text, the Sages state that in the generation of the destruction of the Temple the judges implemented the strict law (lit. the law of the *Torah*) and did not judge according to the principles that are *lifnim mi-shurat ha-din* (“beyond the letter of the law”).

<sup>109</sup> See Babylonian Talmud, Sanhedrin 6b.

<sup>110</sup> *Psalms* 82:5.

<sup>111</sup> Yitzhak Aramah, *Akedat Yitzhak, Shemot, Yitro*, ch. 43.

<sup>112</sup> See RABBI YITZHAK ABRAVANEL, *COMMENTARY ON THE TORAH, DEUTERONOMY 17:11*, s.v. *ve’omer shehineh beheter hasafek hashishi*. He wrote:

[The Temple in] Jerusalem was destroyed because the judges at that time implemented only the law of the *Torah* (lit. biblical law). They implemented the general rules of truth (not ultimate truth) but would not

explained that the special authority of the Jewish court to act outside the boundaries of law that is implemented in regular circumstances when necessary in order to act in light of special needs of society, can be exercised both when a more strict and severe law is necessary and also when a milder policy of mitigation and mercy is necessary. Exercise of this authority may also sometimes be necessary in order to rectify the severe result when acting in a lenient manner is preferable. When the Jewish court or rabbi believes, in a particular case, that his decision should be kind and lenient, he should deviate from the regular rules and prefer the lenient policy of the path of kindness and mercy, in order to achieve the ultimate truth in the decision. In these circumstances, it is necessary to reject the strict policy: “let the law cut through the mountain.”<sup>113</sup> There is an obligation to soften the severity of the law that is implemented in regular circumstances, mitigate it, adopt rules and policies that are irregular and unique and to act beyond the strict and rigid law.

Rabbi Yitzhak Aramah and Rabbi Don Yitzhak Abravanel stressed that truth and mercy together lead to the just outcome. The ultimate truth is the outcome of an attempt to determine the accommodating, specific, and unique circumstances, including the mitigating circumstances that may lead to the justified implementation of the path of mercy in jurisprudence. The “pure heart” of mercy and compassion is sometimes essential when the Jewish legal system attempts to reach the just outcome.<sup>114</sup>

This approach is probably an outcome of the influence of the perspective in Aristotle’s philosophical writings in the writings of

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straighten the law when it was necessary at a certain time. Their policy was: ‘let the law cut through the mountain’ . . . . When their rulings were guided by the limited perspective of the general principles of law their decisions would not be straight and appropriate [in light of the required values that should be implemented] at a certain time . . . . The directive of the Sages was to rule in a manner that is the best answer to the needs at a certain time.

*Id.* There were scholars who claimed that this outlook was identical to the outlook of Rabbi Yitzhak Aramah. See SARAH HELER-VILENSKY, RABBI YITZHAK ARAMAH AND HIS PHILOSOPHY 50-57 (1956); Aaron Kirschenbaum, *Maimonides and Equity*, in MAIMONIDES AS CODIFIER OF JEWISH LAW 143-44 (Nahum Rakover ed., 1987).

<sup>113</sup> See Babylonian Talmud, Sanhedrin 6b.

<sup>114</sup> See *Psalms* 51:12 (“Create in me a pure heart, G-d and renew a steadfast spirit within me.”).

Maimonides.<sup>115</sup> Aristotle wrote: “When the law speaks universally . . . this is the nature of the equitable, a correction of law where it is defective owing to its universality. In fact, this is the reason why all things are not determined by law.”<sup>116</sup> Maimonides emphasized the importance of ensuring that the general norms in the legal system be adapted to meet the requirements stemming from the special circumstances of each case. He explained that a mechanism for correction of the severity or leniency of the regular principles of law is necessary.<sup>117</sup> In appropriate circumstances that justify the exercise of the special authority granted to the Jewish court or rabbi, they should provide a fitting response, and act in a different manner. This activity of the court and rabbis might include the enactment of new regulations, adopting rules which are different from those that were binding in Jewish law in the past, when the needs at a certain time justify this enactment.<sup>118</sup>

Later, Rabbi Yehoshua Falk Katz, a Jewish scholar who was active in the sixteenth and seventeenth century, emphasized that there is a connection between the “ultimate truth” and the need to apply compassion and mercy, beyond the strict “*din Torah*,” in the Jewish legal system. Rabbi Falk Katz instructed Jewish courts and rabbis, who aspire to the ultimate truth in their decisions to keep in mind, their obligation to apply Jewish values and as a result to reach a conclusion

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<sup>115</sup> Concerning this influence, see MAIMONIDES, *STUDIES IN METHODOLOGY, METAPHYSICS AND MORAL PHILOSOPHY* 93-123 (Chicago & London, 1990).

<sup>116</sup> See ARISTOTLE, *NICOMACHEAN ETHICS* 71-90, 145-62 (W.D. Ross trans., 1999).

<sup>117</sup> See Maimonides, *Guide for the Perplexed*, 3:53. The chapter includes a definition of mercy, law and charity. Law is the exact rule. Could be merciful or could be revenge. But the desirable activity is in the path of mercy. The desirable activity is to be good to others although the law does not demand this activity. The path of mercy is the path of the Lord. Mercy and Charity are behaviors that are in the path of equity and purify our soul. See JOSEPH ISAAC, *MAIMONIDES ON ETHICS*, ch. 8 (Gorfinkle ed. & trans., 1912) (concerning the cure of the diseases of the Soul, Maimonides wrote that “the really praiseworthy is the medium course of action, to which everyone should strive to adhere, always weighing his conduct carefully, so that he may attain the proper mean . . . the saintly ones . . . deviated somewhat, by way of [caution and] restraint.”).

<sup>118</sup> See Itzhak Englard, *The Problem of Equity in Maimonides*, 21 *ISR. L. REV.* 296, 303 (1986); Itzhak Englard, *The Problem of Equity in Maimonides*, 14-15 *SHENATON HA-MISHPAT HA-IVRI* 31, 37-40 (1989) (Hebrew); Shalom Rosenberg, *For the Most Part* (*‘Al Derekh ha-Rov*), 14-15 *SHENATON HA-MISHPAT HA-IVRI* 189, 194 (1989).

that is beyond the strict law (*din Torah* (lit. biblical law)).<sup>119</sup> When the Jewish court and rabbi act in the proper, flexible, manner, they grant significant weight to the values which are beyond the limited scope of *din Torah* (strict, rigid law) and take into consideration all the possible consequences of their rulings, now and in the future, in the day-to-day life of those who will be affected, directly and indirectly, by their decisions. In his opinion, Jewish judges and rabbis were given a range of discretion and flexibility in exercising the principles of Jewish law in order to achieve the desirable goal in their decision-making process: their decisions should be not only the “truth” but also the just decision in particular circumstances – ultimate truth.<sup>120</sup> In his view, the “ultimate truth” is not only the outcome of a process applied by Jewish courts and rabbis, who have sufficient knowledge concerning the relevant legal rules, and who try to reveal and expose, through careful investigation, all the true relevant facts. Justice in law is the ultimate truth. Determination of the “ultimate truth” requires the proper operation of the jurisdiction of the Jewish court and rabbi. This process takes place in the heart and soul of the Jewish judge and rabbi. Their clean and pure souls should strive for a moral process of introspection. Their thoughts should be about the moral way to enhance the implementation of justice in the world. This is essential in the process leading to the “ultimate truth.”

The viewpoint of Rabbi Yehoshua Falk Katz is based on the assumption that the concept *emet le-amito* is tied to the concept of “*lifnim mi-shurat ha-din*,” or the obligation to act in a merciful manner that is beyond one’s formal and minimal obligation – “beyond the letter of the [strict and harsh] law.”<sup>121</sup> He wrote that the Jewish judge should act in his decision-making process in the following manner:

One must judge according to the [requirements of] place and time (Judgment that is appropriate in a particular place and time), so that his desirable actions may be *la’amito* (they will be the ultimate truth). This approach excludes the decision-making process that

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<sup>119</sup> *Din Torah* (lit. biblical law) was the strict law that was implemented during the generation of the destruction of the Temple. See Babylonian Talmud, Bava Metzia 30b.

<sup>120</sup> See RABBI YAACOV BEN ASHER, SEFER HATURIM (TUR), HOSHEN MISHPAT ch. 1 (Jerusalem:1975) s.v. *be’omram kol hadan din emet la’amito*.

<sup>121</sup> On the obligation to act “beyond the letter of the law” see *supra* note 100.

always follows the literal [strict] law of the *Torah* (the implementation of the exact [strict and uncompromising] rules of *din Torah*). The Jewish judge should not always follow the literal law of the *Torah* (lit. biblical Jewish law). Sometimes he should take into consideration the circumstances and perspectives of human beings, at a particular time and place, and may need to rule *lifnim mi-shurat ha-din*, according to the requirements of the time and the place (human circumstances of the case).<sup>122</sup> Should he fail to do so (when he does not adopt this approach), even though his ruling is the truth according to the narrow and formal definition of the concept *emet*, it is not the deeper and full meaning of the concept of truth: - *emet la'amito*.<sup>123</sup>

The final conclusion, in light of the writings of these rabbis, is that Jewish courts and rabbis who attempt to achieve the goal of ultimate truth in the decision-making process should grant due weight to the needs of the persons involved and other human beings who are affected by these decisions. In the appropriate circumstances, they should demonstrate empathy towards individuals who will be affected by their decisions, and they must adopt a merciful and compassionate approach in these decisions. Their activity must include an in-depth consideration of the ramifications of their decisions, in an attempt to discover all the possible impacts of any decision on the human life of the affected human beings. If there is a possibility that deciding in a strict manner is unnecessary, especially when they anticipate that it will probably lead to undue suffering and difficulties for the persons concerned, there is an obligation to act in a merciful manner that will lead to the ultimate truth. The outcome of this approach of an appropriate evaluation of all the relevant circumstances in light of the

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<sup>122</sup> In the next stage of presentation of the desirable policy Rabbi Yehoshua Falk Katz presents the point of view of the ancient Jewish Sages in Babylonian Talmud, Bava Metzia 30b, With respect to a court that adopts this wrong path: "[The Temple in] Jerusalem was destroyed as a result of the activity of the judges [in the period of the destruction of the Temple], who judged according to the law that was *din Torah* (strict, rigid law) and did not add to their judgments an evaluation in light of the second essential foundation: "beyond the letter of law" (ultimate truth).

<sup>123</sup> *Derisha on Sefer Haturim* (Tur), *Hoshen Mishpat* 1, s.v. *be'omram kol hadan din emet la'amito*.

principles of Jewish law should be a deeper, more complete, humane, fair process in Jewish law.

**B. Mercy – Essential Element in Judaism and the Jewish Decision-Making Process**

Jewish Sages in ancient times stressed that mercy is essential as the dominant perspective in Judaism and complementary to the strict rules of law. Some Sages stated that when the Lord created the world and acted in the world, His final conclusion was that His main teaching must be the teaching of the attribute of mercy.<sup>124</sup> According to these Sages, there was an essential shift in Judaism and Jewish law from the perspective of strict law to that of mercy. This shift reflected an attempt to adopt a pattern of activity that is in the image of the Lord. The Sages explained that He knew, after He created the world, that if He operates only according to the principles of strict law, the world will not survive as a base for the successful activity of human beings since they have their mistakes and sins. Therefore, the shift from strict law to mercy is essential. According to the Sages, the Lord understands that mercy is required as an essential component of His evaluation and the human evaluation in the human judgment process. The Creator uses this outlook to run the world:

The Lord said: “If I create the world only with the attribute of mercy, there will be many sinners; if I create it only with the attribute of strict law, the world will not survive; rather, I will create it with [the attribute and outlook of] strict law and the complementary essential

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<sup>124</sup> See *Otiyot de-Rabbi Akiba* 1 (“With the attribute of mercy, I created the world; with the attribute of mercy, I direct it; with the attribute of mercy, I will renew it.”); see also *Sifrei Bambidbar*, *Pinhas* 133 (“He who spoke and created the world has mercy on all His creatures”); *Tanna De-vei Eliyahu Zuta* 6 (“By learning from the ways of the Holy One, blessed be He, in the world, you can learn that he acts in great mercy in the world.”); *Midrash Shoher Tov*, Ps. 119 (“David said: ‘Impose upon me the mercies in which you created the world.’” Concerning this, we are told in the verse: “You shall bring upon me to your mercy.” *Psalms* 119:77 (discussing the activity of the lord in the world in the math of mercy); see also Babylonian Talmud, *Ketubot* 50b; *Midrash Tanhumah*, *Noah* 6; *Genesis*, *Rabba* 33:3; *Exodus Rabba* 2:1; *Genesis*, *Zohar* 21.

component, mercy, and [I wish that in this pattern] may the world last.”<sup>125</sup>

The significance of mercy in the world is evident in the Bible after the creation of the world too, when the Lord shows Moses His attributes as a response to the request, “[s]how me Your glory.”<sup>126</sup> He clarifies to Moses that as a human being, Moses can only see His “back,” not His “face”; therefore, He shows him His attributes, the foundations of Judaism.<sup>127</sup> When “G-d” explains to Moses His dominant outlook, He stresses that beyond truth, He acts in light of many other important values, and He is “abundant in kindness.”<sup>128</sup> Many divine attributes, as mentioned in this statement concerning the attributes of the Creator of the World, involve compassion and mercy. The Creator stated: “Lord, Lord, merciful and gracious G-d, slow to anger, abundant in kindness and truth, keeping kindness for thousands, forgiving sin, transgression and error.”<sup>129</sup> “Truth” is sometimes harsh, but all the other attributes are attributes of kindness and mercy. Mercy is the dominant attribute.

The ancient Jewish text, the Babylonian Talmud, contains an explanation of the statement in the Bible. The Sages explained that

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<sup>125</sup> Genesis, Rabba 12:19 (Theodor-Albeck ed.); cf. Pesikta Rabbati 45 (concerning a similar outlook). A similar idea is expressed in the Babylonian Talmud, Avoda Zara 3b. In this source, there is a statement about the essential move of God from the throne of strict law to the throne of mercy. Similarly, see this shift in heaven toward mercy in the context of the outcome of blowing the ram’s horn (*shofar*) during prayer in the Jewish period of repentance. Leviticus Rabba 29:3.

<sup>126</sup> Exodus 33, 18.

<sup>127</sup> See Exodus 33, 17-23; 34, 1-7.

<sup>128</sup> See Exodus 34, 6.

<sup>129</sup> Exodus 34, 6-7. At the end of this statement, according to one possible interpretation of this verse in the Bible, there is a one more attribute: “Who clears” - this is the thirteenth attribute of mercy, according to the interpretation in Babylonian Talmud, Shevuot 39a. Rabbi Elazar’s explanation there is that the Lord “clears” after repentance. In addition, in the Babylonian Talmud, Rosh Hashanah 17b, the thirteen attributes of mercy are mentioned. However, the simple meaning of “who clears,” as the commentator, Rashi notes ad loc., is that this term is attached to the next clause concerning the significance of mercy in ancient Jewish texts. See also Rabbi Menachem ben Shelomo Hameiri, Beit Ha-Bechira, Rosh Hashana 17b. See also Nehemiah 9, 31 (“Nevertheless in Your manifold mercies You did not make a full end of them, nor forsake them; for You are a gracious and merciful G-d.”). In addition, G-d is called “The Merciful One” in the Jewish Grace After Meals. See Deuteronomy 8, 10 (concerning the scriptural requirement to recite a blessing after a meal).

mercy should be the final and dominant stage. In the Babylonian Talmud, Rabbi Elazar explained that the conclusion is that mercy is the dominant attribute.<sup>130</sup> In similar vein, the Sage Iffi contrasted two statements in the biblical verse:<sup>131</sup> “It is written, ‘abundant in kindness,’ and then it is written, ‘and truth.’ [How is this]? - At first, ‘truth,’ and at the end ‘abundant in kindness.’”<sup>132</sup> At the beginning of the biblical verse describing the attributes of the Creator of the World, His name is mentioned twice in a row: “Lord, Lord.” This designation of the Creator, according to the Sages, refers to His merciful nature.<sup>133</sup>

The thirteen traits in this verse are known collectively as the Thirteen Attributes of Mercy.<sup>134</sup> In the Jewish prayer, especially on fast days – including *Yom Hakipurim*, the major day of atonement – when every Jew seeks to benefit from the mercy of the Lord, these thirteen attributes are recited several times. An ancient Jewish Sage, Rabbi Judah, stated: “A covenant has been made [between the Lord and human beings], pertaining to the thirteen attributes, that [when they are recited] they will not be turned away [by the Lord, who will leave the requesting individuals] empty-handed.”<sup>135</sup> Under this covenant, recitation of these attributes of mercy arouse the mercy of the Lord in Heaven, and the requests of human beings are not rejected.<sup>136</sup>

The Sages also explained that the noble “power” of the Lord is not physical strength nor His power in nature. His noble “power” is expressed when He holds back from using his power and acts with pardon and mercy towards His creatures. His noble choice not to overuse His power is heroic.<sup>137</sup> The ideal course of action is

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<sup>130</sup> See Babylonian Talmud, Rosh Hashanah 17b.

<sup>131</sup> See Exodus 34, 6-7.

<sup>132</sup> Babylonian Talmud, Rosh Hashanah 17b.

<sup>133</sup> A number of sources indicate that the meaning of the term “Lord,” when the Bible mentions the Creator of the World, is the Creator that adopts the path of mercy. See Mekhilta, Beshalah 13; Sifrei, Va’et’hanan 27; Genesis, Rabba 33:3; Babylonian Talmud, Rosh Hashanah 17b; see also Rashi *ad loc.*, s.v. “Lord, Lord” (explaining that the repetition of the name of the Creator - “Lord, Lord” - refers to His mercies before and after sin, respectively).

<sup>134</sup> See Midrash Numbers Rabba 21:17.

<sup>135</sup> Babylonian Talmud, Rosh Hashanah 17b.

<sup>136</sup> See Rashi on Rosh Hashanah 17b, s.v. *berit keurtah lishlosh esreh midot*.

<sup>137</sup> In Babylonian Talmud, Megilla 31a, Rabbi Yohanan equates the Lord’s greatness with His humility. In light of the verses in which it is written that the Creator of the World cares for the weak in society, for the orphan and for the widow, for the victim

established in Scripture: “[t]he Lord is slow to anger, abundant in kindness, forgiving sin and transgression”;<sup>138</sup> “G-d Lord, You have begun to show Your servant Your greatness and Your strong hand.”<sup>139</sup> The Sages explained how the greatness of the Lord is evident when He is “slow to anger, abundant in kindness, forgiving sin and transgression.”<sup>140</sup> The strong right hand of the Lord is stretched out in kindness, mercy, forgiveness, and pardon for all the creatures in the world. His “[right strong] hand” is strong because He prefers the path of mercy over the path of strict law. He suppresses the overuse of strength, ensures there is no unnecessary stubbornness, or arbitrary decision-making or cruelty, in His activity<sup>141</sup> The Sages presented their outlook that the Lord prefers the path of forgiveness and compassion.<sup>142</sup>

The Sages also stressed that a human being should adopt this way of the Lord. He should adopt the path of mercy, and the readiness to forbear and not be trapped in negative emotions. This is true human power. Overcoming anger, vengeance, and other negative emotions in

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of the oppressor and for the individual who is low in spirit, he states that the “greatness” of the Lord is His activity in a “humble” manner. *Id.*

<sup>138</sup> Numbers 14, 18.

<sup>139</sup> Deuteronomy 3, 24.

<sup>140</sup> See Exodus 34, 6-7.

<sup>141</sup> See SIFREI BAMIDBAR, 180-81 (H.S. Horovitz ed., Jerusalem 1966) (“‘Your greatness’ - this is Your goodness, as is stated: ‘And now the strength of the Lord will grow.’ ‘And your hand’ this is Your right hand, stretched out [in kindness and mercy] to all the people in the world . . . ‘The strong [hand]’ - You conquer with mercy the strictness in law. This is stated in the verse: ‘Who is like you [the Lord] - who bears a sin and transgresses a crime.’”). See Micah 6,18-20; see also Deuteronomy 3, 24).

<sup>142</sup> Some claimed that enforcement in the ancient Jewish criminal law system was weak, leading to the policy of the ancient Jewish courts not to convict criminals although they were morally culpable, only stating only that they are morally culpable. According to this perspective, the legal acquittal of those who are suspects in Jewish criminal law is a result of the weakness of the enforcement system in Jewish law. See P. Dickstein, *Development of the Jewish Criminal Law System Until the Redaction of the Talmud*, 1 HA-MISHPAT HA-IVRI 198 (1926). However, I believe that many acquittals may have resulted from the Sages’ views concerning the significant weight of mercy in the Jewish legal system, especially in capital punishment cases. The Sages believed that Jews have to follow the directives of the Lord and choose His path. The “greatness” of a Jewish court is not the adoption of a harsh policy, with many convictions. The path of mercy leads to many acquittals or milder punishments of individuals who should be given the benefit of doubt or who perpetrated their crimes in mitigating circumstances.

the relationship between Jews, in the Jewish legal system and in other spheres of activity of Jews, is the appropriate expression of power. The Jewish hero “conquers his temptation.”<sup>143</sup> Implementation of this policy contributes to strengthening social values such as mutual support and hope for a better future for all members of society.

The way of mercy of the Creator when requests in prayer are presented to Him is evident in a passage in the Babylonian Talmud explaining the format of G-d’s decision-making process when deciding if He will be merciful concerning requests of Jews in their prayers. The Talmud states that an individual should not recite the *Mussaf* prayer in the first three hours of the day. During these hours, the Holy One focuses upon the exact, uncompromising principles of Judaism and His pattern of activity, concerning requests of the creatures in the world, is the adoption of the strict standard. The Jewish individual should recite the *Mussaf* prayer during the next three hours of the day

because [at that stage] the Lord, who implemented at the first stage the strict standard of ‘law,’ reaches the conclusion that the world will be destroyed if the standard of His evaluation will be strict. He therefore abandons this approach (lit. abandons his seat of ‘law’) of severe and strict judgment, and adopts the perspective of mercy.<sup>144</sup>

At this stage, His acceptance of the petition of the person who prays to him is not limited to a narrow and strict perspective, based upon what should be accepted and not accepted according to the strict standard.<sup>145</sup> During the hours that are suitable for the *Mussaf* prayer, “The Holy One, blessed is He, grants due weight to the standard [of mercy] which is beyond the strict letter of law.”<sup>146</sup> He does not judge human beings only according to the strict letter of law. The prayer during this appropriate time – of compassion and fulfillment of

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<sup>143</sup> Mishnah, Avot 4:1.

<sup>144</sup> See Babylonian Talmud, Avodah Zarah 3b.

<sup>145</sup> Rashi on Avodah Zarah 3b, s.v. *din lo ketiv bey emet*. The outcome of this commentary should be that judges in a Jewish court, who should act in light of the guidance of the Lord, should also prefer the approach of mercy in the decisions of a Jewish court.

<sup>146</sup> Babylonian Talmud, Avodah Zarah, 4b.

requests – could enhance the probability of achievement of the goal. The Lord will be kind and accept the requests in prayer.

*i. Mercy in Jewish Courts and Rulings of Rabbis*

1. The Ancient Sages

In the ancient biblical texts, there are no explicit directives to judges to act in accordance with to their obligation to follow the path of mercy of the Lord. However, all Jews, including Jewish judges, are bound to act, in a manner that is in the image of the Lord.<sup>147</sup> The attributes of mercy are an ideal, and should guide all Jews in their activity, since every Jew must walk in the path which was paved for him by the Lord and imitate the pattern of conduct of the Creator. In court, too, they must act in light of Jewish morals and ethics and fulfill the obligation of all Jews to imitate the ways of the Lord and adopt His path of mercy.<sup>148</sup>

In the *Tannaitic* and *Amoraic* period that followed, the Sages stressed in their exegesis that adoption of this pattern, the act of *imitatio Dei*, is essential for all Jews.<sup>149</sup> In the medieval period, Jewish law and Jewish philosophy sources provided an explanation

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<sup>147</sup> See Deuteronomy 26, 16-17; 28, 9.

<sup>148</sup> Biblical law requires that every Jew will walk in the ways of the Lord. *See id.*

<sup>149</sup> The Sage Abba Shaul, interpreting Exodus 15, 2, stated that a Jew should act in the image of the Creator: "I shall act like him. He is merciful and gracious, You too should be merciful and gracious." 3 MEKHILETA DE-RABBI YISHMAEL, BESHALAH, PARASHAH 127 (Horowitz-Rabin ed., 1931); Babylonian Talmud, Shabbat 133b; *see also* Yalkut Shim'oni, Exodus 15, 245; Maimonides, Mishneh Torah De'ot 1:6. This approach of the Sages is evident in another source, Sifrei, Ekev 49t: "The attribute of the Lord is merciful, you also should be merciful. The Holy One, blessed be He, pardons and is gracious, you also should pardon and be gracious." *Cf.* Midrash Tanchuma, Vayishlach 10:4, s.v. *yelamdenu rabbenu*; Tanna De-bei Eliyahu Rabba 24, s.v. *bi-zman she-adam mekhabbed*; Babylonian Talmud, Sotah 14a. A similar outlook is evident in the ancient sources that state that the Lord implanted mercy in the hearts of human beings. *See* Jerusalem Talmud, Berakhot 5:3; Tanna De-bei Eliyahu Rabba, 29; *see also* the Rabbi David Kimchi (Radak) & Metzudat David, Commentary, I Kings 2:3. However, in some ancient sources, the perspective is different. According to these sources, at the first stage there is no mercy of the Lord. His shift to mercy emerges in His response to requests in prayers of pious individuals. *See* Babylonian Talmud, Sukkah 14a; *see also* Tanna De-bei Eliyahu Zuta, 7; Jerusalem Talmud, Ta'anit 4:5 (concerning the requirement that individuals perform the desirable acts that lead to the mercy of the Lord).

concerning the essence of this pattern of desirable activity for all Jews. One of these medieval sources was the *Sefer Hahinukh*,<sup>150</sup> probably authored by a Jewish scholar in Spain in the thirteenth or fourteenth century.<sup>151</sup> In this work, the essence of all commandments in the Bible is explained. One of these commandments is the obligation to walk in the path which was paved for each Jew by the Lord. The author explains:

It is a commandment to imitate the good and righteous ways of the Lord . . . . He commanded us to do all our deeds in our relationship with other individuals in the path of kindness and mercy, with all our power. We should divert all our activity, in our relationships with other people, to the path of mercy and compassion, since we know that in the Bible this is the path of the Lord, and He desires that human beings will adopt the path of mercy. If they act in this manner they will benefit from the goodness of the Creator, since He desires that they be kind and gracious, and this commandment is stated in the words in the verse: “And you shall walk in His ways.”<sup>152</sup> The Lord is Merciful, you also should be merciful.<sup>153</sup>

This guidance is also applicable in a Jewish court. Mercy and rulings which are beyond the strict letter of law are essential in the sphere of the activity of judges as well and should also be evident when they evaluate facts and legal arguments of individuals according to the principles of Jewish law. The result of the deliberations of Jewish judges and rabbis, who adopt the ways of the Lord, should be a desirable relationship among law, truth, compassion and mercy.<sup>154</sup> It

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<sup>150</sup> A book that explains the essence of all the commandments of the Creator in the Bible.

<sup>151</sup> There are different views about the identity of the author of this book.

<sup>152</sup> See Deuteronomy 28, 9; see also Deuteronomy 5, 30; 8, 6; 10, 12; 11, 22; 13, 5; 19, 9; 26:17; 30,16 (concerning the commandment 611).

<sup>153</sup> *Sefer Hahinukh*, Commandment 611.

<sup>154</sup> See Babylonian Talmud, Rosh Hashanah 17b. In this text, the Sages explained that G-d's activity as a judge is as follows: first He acts according to the strict letter of the law, and subsequently, following further evaluation, He acts in light of the assumption that mitigation of the strict law is necessary because the world cannot survive when the strict laws are implemented. See Babylonian Talmud, Rosh Hashanah 17b; see also Tosafot ad loc. s.v. *ba-tehila*.

should lead to the adoption of a merciful and compassionate outlook, in the appropriate circumstances. Implementation of this policy should lead to the achievement of the goal: an appropriate and just outcome.<sup>155</sup> Mercy in the judgments and punishments of Jewish courts, and in the *halakhic* rulings of rabbis, is essential in the appropriate circumstances.

The ancient Sages stressed that the commandment to act in a merciful manner is even more important for powerful individuals, who can inflict more damage by misusing their power. These individuals in particular, including judges, must have mercy on their fellow men when determining their fates, and act beyond the letter of the strict law, in the appropriate circumstances.<sup>156</sup> There is a moral demand that these individuals act, in appropriate circumstances, beyond the strict letter of law.<sup>157</sup>

The principle that judges should act in a merciful manner, when possible, is evident in the literature of the Sages in various contexts. In certain areas of judicial activity, the Sages grant great significance to mercy. One context is the eligibility for nomination as a judge in the Sanhedrin, the ancient supreme Jewish legislating instance and supreme Jewish court. The Sages stated that an elderly, castrated or childless individual is ineligible for nomination as member of the Sanhedrin.<sup>158</sup> The common medieval reason given for this rule is that these individuals do not feel the grief of child-rearing, and therefore, they may act in an unjustifiably cruel manner in their activity in the Sanhedrin.<sup>159</sup> This rule might apply only to the criminal sphere, when judges must decide a person's fate, and the decision might impinge on one's life, good name, and honor. The consequences of the judgment

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<sup>155</sup> See Zohar, Leviticus, 65 (explaining the clear view that wherever justice exists, mercy exists).

<sup>156</sup> The commandment is directed to the king as well. He should ensure the world is corrected and not do any evil; he should be a leader of the people of his subjects adopting the path of mercy. See RABBI DAVID ADANI, MIDRASH HA-GADOL, EXODUS 21:1, 452 (Jerusalem 1976).

<sup>157</sup> See Y. Rosenberg, *Kol Ha-omer...Eino Ela To'eh*, 4 NETUIM 79, 79-88 (1998).

<sup>158</sup> See Babylonian Talmud, Sanhedrin 36b. In the medieval period, there were those who interpreted this rule as follows: even if the judge was fit to be a judge at the time of appointment but has become elderly or castrated, he is disqualified at present and must be removed. See Responsa of Rashba 6:191. See also Responsa of Hatam Sofer, Yoreh De'ah 7.

<sup>159</sup> See Rashi, Commentary, Sanhedrin 36b, s.v. *zaken*; Maimonides, Mishneh Torah, Sanhedrin 2:3.

in criminal law, especially the punishment, may be particularly severe. Maimonides states that this rule applies to “capital punishment law.”<sup>160</sup> However, capital punishment in Jewish law was abolished before his day, at the time of the ancient Sages,<sup>161</sup> Maimonides did not state that this rule is irrelevant in the medieval period. It is possible that in the writings of Maimonides, the category “capital punishment law” belongs in the sphere of Jewish criminal law. It includes crimes that do not lead to the death penalty. According to Menachem Elon, who does not interpret “capital punishment” literally but according to the context of its implementation in Jewish sources – “capital punishment law” in Jewish law refers to all spheres of Jewish criminal law.<sup>162</sup>

According to the medieval interpretation of the rule in the Talmud, the elderly, castrated or childless are not totally disqualified in the Jewish courts. Medieval Jewish law scholars stated that these individuals can testify in legal proceedings and can also adjudicate in monetary matters, as mercy is not needed in the same manner in this area.<sup>163</sup> The main rationale for these rules is that in testifying, an individual does not fulfill the role of a judge who determines the fate of the suspect in criminal cases. In addition, in monetary matters, mercy shown to one litigant could lead to a harsh and unjustified outcome from the point of view of the other litigant. In civil conflicts – in which the fate of a person is not usually determined with the same severe ramifications as are common in criminal law, especially in serious cases – the legal system does not impose strict eligibility requirements to ensure that the Jewish judge will be merciful and compassionate, when the implementation of such a policy is possible.

## 2. No Pity is to be Shown?

Indeed, Rabbi Akiba, the Tannaitic Sage, states: “No pity is to be shown when there are rules in the law pertaining to a legal

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<sup>160</sup> See Mishneh Torah, Testimony 16:6.

<sup>161</sup> See *infra* note 233 and accompanying text.

<sup>162</sup> See MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES (HA-MISHPAT HA-IVRI) 149-50 (2d ed., 1978).

<sup>163</sup> See Maimonides, Mishneh Torah, Testimony 16:6 (stating that they may testify but not judge capital cases); see also Rabbi Joseph Karo, Commentary, Kessef Mishneh (explaining that a similar rationale is applicable to the childless, as they too are not merciful. However, the elderly, childless and the castrated may judge monetary cases).

matter.”<sup>164</sup> However, this does not negate the use of mercy in criminal law, since the context of this statement is important.<sup>165</sup> This was the rule pertaining to a monetary dispute. The dispute mentioned in the Mishnah concerned a man who died and left a wife, who claimed she was entitled to her monetary rights stemming from the marriage, granted to her in the *ketubah*. However, a creditor claiming the repayment of his debt, and heirs expecting their inheritance, had their own monetary claims. The deceased husband had a deposit or a loan in the possession of others. In this case, Rabbi Tarfon ruled that the money would be given to the individual in this dispute who is under the greatest disadvantage. Rabbi Akiba had a contrary point of view: “No pity is to be shown when there are rules in the law pertaining to a legal matter.”<sup>166</sup> In criminal law, however, Rabbi Akiba supported the implementation of mercy as an important consideration. He rejected bias in the legal process in favor of the weak litigants in monetary civil conflicts, in which the bias in favor of one side is necessarily an unjustified bias, from the perspective of the other parties, against the other side. This position was based on the Biblical prohibitions of showing favoritism to a pauper.<sup>167</sup> In criminal law, his general position was expressed in his rejection of capital punishment. This punishment would require the use of the cruelest punishment: death. Mercy in criminal law requires the shift from biblical law to the law of the Sages: *de facto* the death penalty is abolished. Rabbi Akiba and Rabbi Tarfon were in agreement about capital punishment. They stated that if they were members of the superior legislative body and Supreme Court — the Sanhedrin — “No one would be killed” as a result of the legal process in this Court.<sup>168</sup> Maybe this would be the special policy

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<sup>164</sup> Mishnah Ketubot 9:2.

<sup>165</sup> Indeed, Rabbi Samson Rafael Hirsch favored a general policy of a strict approach in relation to punishments of court. In his commentary, he wrote that in a legal system, there is no need to give the benefit of the doubt to the accused. *See* Rabbi Samson Rafael Hirsch, Commentary, Leviticus 19, 15 (2012). However, this outlook seems to contradict the policy in many other Jewish sources, according to which the court must argue and raise claims that may lead to the acquittal of the accused, particularly in capital punishment cases.

<sup>166</sup> Mishnah Ketubot 9:2.

<sup>167</sup> *See* Exodus 23, 3; *see also* Leviticus 19, 15.

<sup>168</sup> *See* Mishnah, Makot 1:10. The Mishnah also presents the strict point of view of Raban Gamliel, that as a result of the implementation of the policy of Rabbi Akiba and Rabbi Tarfon there will be less deterrence and more murders in the population. *Id.*

pertaining to capital punishment, which is irreversible, since after this punishment, there is no option of correcting mistakes. However, this is probably the outcome of a general policy. Rabbi Akiba held that the biblical prohibition on showing favoritism to the poor forbids twisting the law in a civil case to benefit the disadvantaged and weak.<sup>169</sup>

The statement of Rabbi Akiba and Rabbi Tarfon coincides with the shift from biblical law to the law of the Sages that abolished, *de facto*, the death penalty in the period of the Sages. The general trend in Jewish law in the period of the Sages is a shift from the strict outlook of biblical law to an approach that focuses upon mercy in relation to the most severe ultimate penalty – capital punishment. Rabbi Akiba also interprets the rule pertaining to mercy in a verse in the Bible<sup>170</sup> as forbidding the execution of minors along with the rest of the residents of an apostate city.<sup>171</sup> The same verse is used in the literature of the Sages as support for mercy being a defining characteristic of Jews.<sup>172</sup>

### 3. The Medieval Period

The desire to avoid unnecessary harsh activity of judges in the sphere of Jewish criminal law is evident also in sources in the medieval period. Rabbi Solomon ben Abraham Aderet stressed that especially when the decision of the court concerning the punishment of a criminal might be powerful and too severe, it is important that the Jewish judges exercise more “supervision” and caution and ensure that their mode of activity is mild and moderate.<sup>173</sup> They should take into consideration the human factor and the significance of mercy and try to avoid decisions that are the outcome of anger.<sup>174</sup> The guiding

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<sup>169</sup> His opposition is not to mercy in the legal process but rather to unfairly favoring a weak litigant in this process. In the Mishnah, the question is whether preference should be given to the widow, who is considered to be disadvantaged over other litigants, such as the heirs. J.D. EISENSTEIN, OTZAR DINIM U-MINHAGIM 82 (1917) (arguing that the rule of Rabbi Akiba applies to a certain type of civil claim: mercy towards a damager in the context of fines).

<sup>170</sup> Deuteronomy 13, 18.

<sup>171</sup> See Tosefta Sanhedrin 14:3 (Zuckerman ed.).

<sup>172</sup> See Babylonian Talmud, Yebamot 79a; Deuteronomy Rabba, Ekev 3, 4.

<sup>173</sup> See *supra* note 97 and accompanying text.

<sup>174</sup> See Responsa of Rashba 5:238; see also Rabbi Menachem ben Shlomo Hameiri in BEIT HA-BEHIRAH, Gittin 241 (Jerusalem 5724-1964) (stating in another context, “Never shall a person act in a manner that is contrary to the desirable attributes [of the Lord], and he should not be strict and cruel to his enemies and should not act in

principle in decision making concerning punishments in Jewish law is expressed in the following statement: “Most Jewish scholars (courts and rabbis) acted with extreme caution when they exercised their power of punishment and were very careful not to impose an [unjustified] extreme punishment.”<sup>175</sup>

It is clear that even in the dispute between litigants in the realm of monetary matters, some medieval rabbis praised the practice in Jewish decision making of judgments in favor of the weaker party. When there is no significant harm to the other party as a result of bias by the judge in favor of the weak and the weaker litigant, the “pauper,”<sup>176</sup> which harms another litigant unlawfully, even in monetary matters the judge or rabbi should rule “beyond the letter of the strict law,” in light of the attribute of mercy. Rabbi Chaim Ben Yechiel, a medieval Ashkenazi Sage, dealt with a monetary dispute between a widow and her orphaned son. He wrote that in his opinion, the legal claims of the orphan were more convincing and the case should not be judged in favor of the weaker litigant, the widow, since in monetary matters the rule is, “No pity is to be shown when there are rules in the law pertaining to a legal matter.”<sup>177</sup> Nevertheless, at the end of his ruling on this matter, he attributed certain weight to the attribute of mercy even though the matter was a monetary one. He wrote that he was willing to allow an additional act to be performed in favor of the widow “beyond the strict letter of the law.” She had eight days in which she could consult with other individuals who were familiar with the principles of Jewish law regarding his ruling and his reasoning. If their claims on appeal would be convincing, he would retract this ruling, and rule in favor of the widow.<sup>178</sup>

Another medieval scholar of Franco-German Jewry, Rabbi Jacob Molin, discussed the request of a widow to allow her to live in a place where a “ban on settlement in the place [of nonresidents]” applied. It was argued, *inter alia*, that she was “forced” to remain there since she was ill. Initially, Rabbi Molin rejected the claim that he should rule in favor of the widow since she was the poor, weaker,

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a manner that is contrary to morality as a result of his hatred or his desire to revenge.”).

<sup>175</sup> Eliyahu Ben-Zimra, *Considerations of Punishment in Jewish Criminal Law as Reflected in Responsa Literature*, 8 SHENATON HA-MISHPAT HA-IVRI 36 (1981).

<sup>176</sup> See Exodus 23, 3; Leviticus 19, 15.

<sup>177</sup> Mishnah, Ketubot 9:2.

<sup>178</sup> See Responsa of Maharam 249.

litigant and “needed assistance.”<sup>179</sup> He explained that as long as she did not have a right to settle in that place according to the law, due to the ban on settlement in the place, enacted by the Jewish community, the residents of that place were not obligated to act more charitably than other Jews.<sup>180</sup> According to the principles of strict law, all Jews share the burden of charity equally. Only if there is a custom in this community to permit the settlement of weaker non-residents would the widow have a solid legal claim. Nevertheless, he wrote that although the rule of the Sages is that “No pity is to be shown when there are rules in the law pertaining to a legal matter,” and therefore it is not appropriate to rule in favor of the widow because we feel sorry for her, there is a new medieval rule in Jewish Franco-German sources. According to the new rule, when possible, in light of the circumstances of the case, a Jew is bound by Jewish law to fulfill his obligation to act beyond the letter of the strict law.<sup>181</sup> According to this medieval outlook, the rule “No pity is to be shown when there are rules in the law pertaining to a legal matter” does not prohibit the implementation of mercy and compassion in appropriate circumstances.<sup>182</sup> However, in this case the rule pertaining to the “ban on of settlement in the place” was important and enhanced the welfare of the members of the local community. It prevented commercial competition that could endanger the economic stability of the members of the local community. Therefore, Rabbi Molin’s conclusion was that only in special extraordinary circumstances, such as the settlement in the community of a rabbi who teaches the principles of Jewish law, was this general rule not applicable. Mercy on behalf of a widow does not justify deviation from this important rule.

#### 4. Mercy and Ruling Beyond the Strict Letter of the Law in Jewish Law and Courts in the Twentieth Century

The obligation to act in a merciful manner in a Jewish court and in the halakhic decisions of rabbis is evident in modern times in

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<sup>179</sup> See Responsa of Maharil ha-Hadashot 147.

<sup>180</sup> *Id.*

<sup>181</sup> In this responsum, he mentioned the point of view of Rabbi Eliezer Ben Yoel Halevi, quoted at the end of *Mordechai*, *Bava Batra* 482, that it is “appropriate to have mercy on the poor, when the circumstances justify this activity.”

<sup>182</sup> See Responsa of Maharil ha-Hadashot 147.

the writings of influential Chief Rabbis of the Land of Israel in the twentieth century. In his commentary to the Jewish prayer book, Rabbi Abraham Yitzchak Hacoheh Kook, the first Chief Rabbi of the Land of Israel, explained the deeper meaning of statements in verses in Psalms that are part of the Sabbath morning prayer:

The law of the Lord is perfect, restoring the soul; the testimony of the Lord is sure, making wise the simple. The precepts of the Lord are right, rejoicing the heart; the commandment of the Lord is pure, enlightening the eyes. The fear of the Lord is clean, enduring forever; the ordinances of the Lord are true, they are righteous altogether. More to be desired are they than gold, yea, than much fine gold; sweeter also than honey and the honeycomb. Who can discern his errors? Clear Thou me from hidden faults.<sup>183</sup>

According to Rabbi Kook, the ultimate goal of Jewish law is stated in these verses. The verse states: “The ordinances of the Lord are true, they are righteous altogether.”<sup>184</sup> Rabbi Kook explained that human private law is not perfect and pure: it is “very complicated and vague . . . serves material interests . . . and has many defects . . . many defects lead to the conclusion of absence of truth.”<sup>185</sup> On the other hand, Jewish law, the law of the Lord, is an attempt to remedy all these defects, and as a result His law is “true . . . righteous altogether,” a law of truth and justice.<sup>186</sup> The implementation of this law leads to good feelings of “light,” “happiness,” and “total perfection” in the eternal soul of human beings.<sup>187</sup> He stressed that the goal of the laws of the Lord is not only to “solve temporary disputes in life of human beings,” but to “elevate life and universe from the low place of the sinner to the ‘High Holy’ Place of the ‘Holy of Holies.’”<sup>188</sup> The overall appropriateness of the details of the Jewish legal system to all that life

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<sup>183</sup> *Psalms* 19:7, 10-13.

<sup>184</sup> *See Psalms* 19:10.

<sup>185</sup> *See* RABBI ABRAHAM YITZCHAK HACHOHEH KOOK, *OLAT REIYA* II 57-58 (Jerusalem 1949) (“The ordinances of the Lord are true, they are righteous altogether.”).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 56 (“The law of the Lord is perfect, restoring the soul.”).

<sup>188</sup> *Id.* at 59 (“Moreover, by them is Thy servant warned; in keeping of them there is great reward.”).

and the universe need, is the element of sweetness of the laws of the Lord.<sup>189</sup>

His other writings also emphasize the significance of mercy in Jewish law in a more direct manner. Rabbi Kook, who was also active in the sphere of decision-making in Jewish law, cited the text from the Talmud declaring that the temple in Jerusalem was destroyed because the judges, members of the court in the Destruction generation, based their verdicts solely “on the basis of [strict] Torah law and did not go beyond the letter of the law.”<sup>190</sup> He explained that the policy of implementing strict law should not prevent the implementation of mercy in law, including the practice of showing favoritism to a pauper.<sup>191</sup> In justified circumstances, the principle pertaining to the pauper does not preclude mercy and acting beyond the letter of the law in Jewish judicial process:

The attribute of mercy is an important guideline, especially in legislation in Jewish law . . . also in the decisions of Jewish judges in private matters . . . . The obligation to act beyond the letter of the law, in appropriate circumstances, is part of the rule of law. The Sages stated that the Temple in Jerusalem was destroyed because the judges in the generation of the Destruction only implemented the strict principles of law and did not judge beyond the strict letter of the law [when that was required].<sup>192</sup> This basic approach is also relevant when we interpret the commandment in the [Biblical] verse: “Do not favor a pauper in his dispute.”<sup>193</sup> This verse determines that according weight to mercy is not permitted [in behalf of the pauper] only when the judge does not pay attention at all to the strict rules of the law, but issues his decision only as a result of his mercy for the pauper. However,

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<sup>189</sup> See *id.* at 58 (“More to be desired are they than gold, yea, than much fine gold; sweeter also than honey and the honeycomb.”).

<sup>190</sup> See Babylonian Talmud, Bava Metzia 30b (utilizing this author’s translation and explanation); cf. Yalkut Shimoni, *Iggeret Ha-Rav Kook*, in SEFER ZIKARON LE-AVRAHAM SPIEGELMAN 1085 (1991) (“Jerusalem was destroyed solely due to corruption of justice.”).

<sup>191</sup> See Exodus 23, 3; Leviticus 19, 15.

<sup>192</sup> See Babylonian Talmud, Bava Metzia 30b.

<sup>193</sup> Exodus 23, 3; see also Leviticus 19, 15.

when proper weight is also given in the decision-making process to the regular principles of law and the fundamental principles of Jewish law, the judge should also act, when appropriate, in light of his legal right to incorporate in the legal process the attributes of mercy and compassion, in order to assist the unfortunate, lost, and oppressed human beings.<sup>194</sup>

Later in the twentieth century, two influential Chief Rabbis of the Land of Israel, Rabbi Yitzchak Herzog and Rabbi Benzion Chai Ouziel, stressed yet again that adopting the path of mercy, paved by the Lord, is an essential activity of a Jewish judge.

According to Rabbi Herzog, the judge should attribute importance to basic Jewish values in the judicial process.<sup>195</sup> This includes granting preference to mercy over the severity of strict law in a manner leading to “just law” and doing “what is good” in the judicial process whenever possible.<sup>196</sup>

Rabbi Herzog cited the talmudic interpretation of the verse in Micah: “It hath been told thee, O man, what is good, and what the Lord doth require of thee: only to do just law, and to love mercy, and to walk humbly with your Lord.”<sup>197</sup> The Sages explained that in this verse, the prophet Micah condensed the commandments of the Five Books of Moses into three basic principles: “To do justice, to love kindness and to walk humbly with your Lord.”<sup>198</sup> Rabbi Herzog explained that these are also the three guidelines for judges in a Jewish court who implement principles of Jewish law.<sup>199</sup> The highest level of mercy is the love of kindness and mercy.<sup>200</sup> There should be a “constant desire to act in a merciful manner.”<sup>201</sup> He stressed that:

strict law is not the height of the Jewish ideal [in the judicial process]; rather, this ideal is going beyond the letter of the law: The prophet Micah condensed the

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<sup>194</sup> RABBI ABRAHAM YITZCHAK HACOEN KOOK, *IGGERET HA-RAV KOOK*, SEFER ZIKARON LE-AVRAHAM SPIEGELMAN 67 (A. Morgenstern ed., 5739-1979).

<sup>195</sup> See Yitzchak Herzog, *Battei Din Be-Yisrael*, 7 *TECHUMIN* 278-29 (5746-1986).

<sup>196</sup> *See id.*

<sup>197</sup> Micah 6, 8.

<sup>198</sup> *See* Babylonian Talmud, Makkot 24a.

<sup>199</sup> See Yitzchak Herzog, *Battei Din Be-Yisrael*, 7 *TECHUMIN* 278-279 (5746-1986).

<sup>200</sup> *See id.*

<sup>201</sup> *See id.*

basic principles of Judaism to three basic principles: “To do justice, to love kindness.” There are three degrees [of activity of judges], each one superior to the other: “To do justice” – is [acting in the sphere of regular strict] law; above this degree is “to love kindness” – acting in a merciful manner, beyond the letter of the strict law. And there is also a higher aspect to this degree. In Judaism, mercy in a person’s actions is not sufficient. Judaism not only mandates the implementation of the attribute of kindness in practice: the higher level is kindness, mercy and compassion in the heart – “to love kindness.” This “love” is the constant desire to act in a merciful manner – the inner desire to perform kind deeds. The third, higher and ultimate level is “to walk humbly with your Lord” – to always be filled with the internal knowledge that the whole world is filled with His glory. Certainly, strict law is not the height of the Jewish ideal [in the judicial process]; rather, the ideal is to go beyond the letter of the biblical law.<sup>202</sup>

He further explained that only in extraordinarily specific cases, the special aggravating circumstances lead to the conclusion that “[w]e do not show mercy in law”<sup>203</sup> or that judges should “let the law cut through the mountain.”<sup>204</sup> But, this is not the general rule guiding the activity of Jewish judges. The basic principle in Jewish courts is stated in Deuteronomy: “And thou shalt do that which is right and good in the sight of the Lord.”<sup>205</sup> According to this principle, a Jewish judge must act in light of the assumption that the general overarching principles of Jewish law “are rooted in abundant mercy and morality.”<sup>206</sup> According to Rabbi Herzog’s outlook in this text, in order to prevent “distortion of the law,” a clear and direct integration of the principles of Jewish law with mercy is essential, when it is

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<sup>202</sup> Yitzchak Herzog, *Battei Din Be-Yisrael*, 7 *TECHUMIN* 277, 278-79 (5746-1986) (emphasis added).

<sup>203</sup> See Mishnah Ketubot 9:2; see also Babylonian Talmud, Ketubot 84a.

<sup>204</sup> See Babylonian Talmud, Sanhedrin 6b.

<sup>205</sup> Deuteronomy 6, 18.

<sup>206</sup> Yitzchak Herzog, *supra* note 202 at 278-79.

possible.<sup>207</sup> Compassion and mercy are necessary in all aspects of the Jewish legal proceedings, including the judgment of litigants and criminals and the process leading to the halakhic rulings of rabbis.<sup>208</sup>

The essential nature of mercy in the Jewish legal process, as well as in the activity of judges in the Rabbinical Courts, is also evident in the writings of Rabbi Benzion Chai Ouziel, the Sephardic Chief Rabbi of the Land of Israel at the time of Rabbi Herzog, after the period of Rabbi Kook:

In his directive to the public, Rabbi Ouziel stressed that adoption of the path of mercy is the desirable manner of conduct of Jewish individuals. They should implement mercy in their relationships with other people, and as a result, the Lord will reward them and will be merciful to them, when that is necessary.<sup>209</sup> He also stressed that all Jews should accord due weight to the directive to always act in a merciful manner when possible, and fulfill their obligation to act in a manner that adopts the ways of the Lord. The Lord is merciful and therefore every Jew too should be merciful. Mercy is essential in Judaism and Jewish law.<sup>210</sup>

He also discussed the proper mode of action of every Jewish judge, who acts in the image of the Creator, who is his role model. His directive to the Jewish judge was that he should act in light of the guidance of the Sages and be merciful in legal proceedings.<sup>211</sup> He stressed:

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<sup>207</sup> *See id.*

<sup>208</sup> *See id.*

<sup>209</sup> Rabbi Ouziel and Rabbi Amiel wrote to Jews who lent money and pleaded on behalf of those who in difficult financial times could not return the money on time: “Behave with mercy in your relationship to other human beings. This mercy will result in the same attitude of the Lord toward us, and there will be a merciful response to our requests.” Rabbi Benzion Meir Chai Ouziel & Rabbi Mosheh Avigdor Amiel, *An Appeal to Debtor and Creditors to be Merciful to Those who Have Debts*, MIKHMANEY OUZIEL 466-67 (5769-2009).

<sup>210</sup> *See* 2 BENZION MEIR CHAI OUZIEL, HEGYONEI OUZIEL 106 (5752-1992) [hereinafter: HEGYONEI OUZIEL]. *See also id.* at 49-50. “The Bible states: ‘His mercies are on all He created.’” *Psalms* 145:149; *see also* Babylonian Talmud, Bava Metzia 85a.

<sup>211</sup> *See* HEGYONEI OUZIEL, *supra* note 210, at 106.

Our Sages, of blessed memory, stated: “Whoever judges [in a manner that is an attempt to achieve the goal of *din emet la-amito* becomes a partner of the Holy One Blessed be He in the creation of the world.”<sup>212</sup> Jewish law is not like the law of other nations . . . The Jewish judges (*Dayanim*) are the messengers of the Lord of justice . . . They derive their basic outlook from a higher place. This sublime recognition implants the holy dread of G-d in the heart and soul of Jewish judges, witnesses and litigants. That leads them to proper conduct, of imitating the ways of the Lord of judgment in all their actions, and the attempt to achieve the goal of *Din Emet La-amito*.<sup>213</sup>

Similarly, according to Rabbi Ouziel, rulings of a Jewish judge or rabbi should attempt to act with mercy and rule beyond the strict letter of the law. Jewish judges or rabbis should find out, in each case, if the implementation of the merciful outlook is possible. There is no clear-cut rule in the Jewish books dictating how to act in a merciful manner in each case, but the general trend should be that these officials should always implement their wisdom and prefer the merciful decision.<sup>214</sup> When a Jewish judge or rabbi adopts the ways of the Lord and attributes due weight to his obligation to act in a merciful manner, he should attempt to achieve

absolute justice . . . beyond the strict letter of law, and act in the path of the righteous, doing what is good and straight according to the perspective of the Lord and human beings. The Lord guided us to act in a combined manner that promotes justice, law, mercy and truth.<sup>215</sup>

Similarly, he wrote that the Jewish judge and the rabbi, in their rulings according to the principles of Jewish law, should assume that it is very important to act in a merciful manner, and implement in the legal sphere.

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<sup>212</sup> See Babylonian Talmud, Shabbat 10a; cf. Babylonian Talmud, Shabbat 119b.

<sup>213</sup> 2 BEN-ZION MEIR HAI UZIEL, HEGYONEY UZIEL 49-50, 63 (1953 & 1954).

<sup>214</sup> See 3 BEN-ZION MEIR HAI UZIEL, MISHPETEY UZIEL HOSHEN MISHPAT 1 (Jerusalem, 5760-2000).

<sup>215</sup> See *id.*

Pure kindness. It is an act of mercy that is the result of thought [about the desirable outcome] . . . and this leads to the adoption of the policy which is beyond then strict letter of law . . . “He is merciful -you also should be merciful. He is gracious- you also should be gracious.” . . . You should create an essence of life, in your internal world, and a reality of mercy and pardon, avoid anger, and attempt to be holy. The Lord is merciful in his rulings [concerning the fate of human beings], pardoning when he judges, pious when he implements his power, the Lord of judgment mercy and truth. . . . You also should be merciful and gracious, avoid anger, and the implementation of mercy and compassion should be your dominant choice. . . . [You should be] the imitator of the Lord and an individual who desires to cling to his ways.<sup>216</sup>

Similarly, he also stressed that the activity of a Jew should be the implementation of the directive of the prophet Micah: to “love kindness.”<sup>217</sup> Rabbi Ouziel stressed, in light of the statement of the prophet Micah, that the rules of law and mercy are highly intertwined in Jewish law:

The good way in the eyes of man and G-d is based on two principles . . . “to do [justice in] law and to love kindness”<sup>218</sup>. . . performing all of our activities in law in the spirit of kindness, love and clemency . . . kindness which emerges from the love of man who was created in the Image of the Lord, to raise his consciousness to the heights of his goal in life and the understanding of his mission . . . Law and love of kindness, combined, raise the human being from his troubled lowly life and bring him close to the Lord.<sup>219</sup>

Rabbi Aharon Lichtenstein, an influential twentieth-century rabbi, wrote about the obligation of a Jew to harmonize between the rules of Jewish law and the demands of an extralegal morality that are

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<sup>216</sup> HEGYONEI OUZIEL, *supra* note 210, at 106.

<sup>217</sup> *See* Micah 6, 8.

<sup>218</sup> *Id.*

<sup>219</sup> HEGYONEI OUZIEL, *supra* note 210, at 105-06.

beyond the strict letter of law.<sup>220</sup> He stressed that mere implementation of the law without an attempt to do what is necessary according to Jewish values leads to bad results in Jewish courts. Therefore, the Jewish Sages stated that there is a link between the destruction of the Temple and a rigid legal judicial system, which does not apply in judicial proceedings along the merciful path, which is “beyond the letter of the law.”<sup>221</sup>

### C. The Development of Jewish Law: From Strict Law to Mercy

Throughout the generations, Jewish law concerning punishment has evolved, and there is an evident shift from strict law to mercy. This change in focus initiated the significant degree of compassion inherent in the Sages’ interpretations of the biblical texts, which has caused the biblical rules to be substantially moderated. Favoring merciful interpretation of the rules of Jewish law, rather than inflicting severe punishment, is not only evident in the period of the ancient Jewish Sages addressing many crimes in biblical law. It is also evident in sources of Jewish law in subsequent generations.

A particularly prominent example of an interpretation with a high degree value in mercy can be found in the Sages’ non-literal exegesis of biblical rules pertaining to penalties. One evident illustration of the growing status of compassion in Jewish punishment is the Sages’ interpretation of the biblical dictum: “An eye for an eye.”<sup>222</sup> This is interpreted as mandating monetary punishment, rather than the amputation of a limb. The removal of an organ in the body is not necessary, and this penalty is converted to a monetary fine.<sup>223</sup>

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<sup>220</sup> See AHARON LICHTENSTEIN, HALAKHAH VEHALKHM KE’OSHYOT MUSAR: HIRHURIM MACHSHAVTIYIM CHINUKHIYIM, ARAKHM BE-MIVHAN MILHAMAH 13, 21-24 (Jerusalem, 5743-1983).

<sup>221</sup> See Concerning the demand to act “beyond the letter of the law.” Babylonian Talmud, Bava Metzia 30b. In this text, the statement of the Sages is that in the generation of the destruction of the Temple, the judges implemented the strict law (lit. the law of the *Torah*-Biblical law) and did not judge according to the principles that are *lifnim mi-shurat ha-din* (“beyond the letter of the law”).

<sup>222</sup> Exodus 21, 24.

<sup>223</sup> See Babylonian Talmud, Ketubot 38a; Bava Kama 83a; 84a; see also Mishneh Torah, Hovel Umazik 1:2; Maimonides, *Guide for Perplexed*, 1:44. The scholar Nisani explained that the gap between biblical law and the law of the Sages in this sphere is not significant. He claims that in biblical law, only in the case of a murderer

Conviction for some crimes in the Bible entails the punishment of lashes. The merciful interpretation of the Sages is evident in the biblical statement concerning lashes: “Lest your brother be humiliated before your eyes.”<sup>224</sup> The Sages stated that when courts understand that lashes are an inappropriate form of punishment, since it is unduly harsh and causes unjustified humiliation of the sinner, they should decide to abandon this path.<sup>225</sup> Before lashes are administered, the court should evaluate the sinner and decide how many lashes the sinner can absorb without entailing undesirable involuntary discharges from his body, which would cause humiliation or degradation.<sup>226</sup> If the court sentences an offender to lashes, and the offender who is being flogged “soils himself either by urine or feces, he is exempt [from further punishment of lashes].”<sup>227</sup> Later, in the medieval period, in appropriate circumstances, rabbis who acted as Jewish judges adopted the path of mercy in their rulings and replaced a severe physical punishment with a milder punishment.<sup>228</sup>

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is there no exemption from punishment, but when the crime is less severe, then in biblical law too, the removal of a limb is not always necessary, and often, the punishment for bodily harm can be converted to a monetary fine. He claims that there was a gap between the theoretical biblical statement, “an eye for an eye,” and the reality that, in many cases, enabled implementation of the option to convert the damage to the eye to a fine. See David Nisani, “*Eye for an eye*” - *An eye or a monetary fine? On the Status of the Victim in Jewish Criminal Law*, 347 WKLY. PORTION SHEETS, ISRAEL MINISTRY OF JUST., JEWISH L. DIV., 347 EMOR WKLY. PORTION (5769-2009).

<sup>224</sup> Deuteronomy 25, 3; see Responsa of Rashba 5:130-131; see also Responsa of Rashba 5:239 (concerning the principle that we should avoid the outcome: “Lest your brother be humiliated before your eyes.”).

<sup>225</sup> See Rashi on Makkot 22b, s.v. *nitkalkel*.

<sup>226</sup> See Mishnah Makkot 3:11.

<sup>227</sup> Mishnah Makkot 3:14.

<sup>228</sup> See the responsum of the fourteenth century Jewish scholar in Spain and North Africa. See, e.g., Responsa of Rabbi Yitzhak Ben, Sheshet Barafat (Ribash) 281. In this responsum, he wrote that, at first glance, the punishment of an offender should be lashes. However, since there are mitigating circumstances, it is preferable not to act in a manner involving total humiliation of the sinner. Therefore, his conclusion was that in order to avoid unnecessary shaming of the offender, the appropriate punishment is to “secretly, and in a modest manner, perform the punishment in the presence of three or four individuals, and not more than ten individuals, and this punishment [of lashes] may be mitigated.” Mercy is an evident factor in another responsum. In an attempt to avoid unnecessary shaming, he raises the possibility of replacing a physical punishment with a punishment that is less severe. See Responsa of Ribash 432. In yet another responsum, he took into consideration mitigating

The shift to mercy in line with the Sages' interpretation of biblical law, is especially apparent in ancient sources pertaining to capital punishment. The death penalty is common in the Bible.<sup>229</sup> Later, however, there has been a substantial moderation of the rules in the literature of the Sages pertaining to the death penalty; these changes instituted a *de facto* abolition of the death penalty, probably in order to avoid the irreversible outcome of the execution of innocent individuals as a result of false convictions. The Sanhedrin was defined as "murderous" if it killed criminals once in seven<sup>230</sup> or in seventy years.<sup>231</sup> Rabbi Tarfon and Rabbi Akiba go so far as to determine: "Had we been members of the Sanhedrin, no one would have ever been executed."<sup>232</sup> In accordance with this statement, an ancient text states that "[f]orty years before the destruction of the [Second] Temple, the Sanhedrin was exiled and settled in the storefront."<sup>233</sup> According to this tradition, capital punishment was abolished *de facto* when the Sanhedrin was moved to another place in Jerusalem since capital offenses could no longer be adjudicated anywhere after the

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circumstances and ruled that the severe punishment, that was appropriate in other circumstances would be replaced by a fine. See Responsa of Ribash 352. Mercy was also evident when medieval Ashkenazic rabbis vacated a verdict of lashes due to concern about excessive punishment. See Hagahot Maimoniyot, Sanhedrin 17:1. Rabbi Jacob Weil, the fifteenth century rabbi of Franco-German Jewry also suggested the possibility of fines replacing the regular, physical punishment. See Responsa of Mahari Weil 147. In the sixteenth century, Rabbi Moses Isserlis, in his codification of Jewish law of Ashkenazi medieval Jewry, stated the rule that four gold coins may replace the punishment of lashes. See Hagahot Ha-Rema, Hoshen Mishpat 2:1.

<sup>229</sup> In biblical law, the death penalty is the punishment for several deliberate crimes. These include blasphemy, cursing parents, striking parents, idolatry, false prophecy in the name of idolatry, missionizing individuals to be idol worshipers, desecration of the Sabbath, witchcraft and sorcery, several types of prohibited sexual relations, adultery involving an engaged women or the daughter of a priest, a rebellious son, kidnapping and sale of the kidnapped Jew, murder, a rebellious elder, and false scheming witnesses who seek to kill another human being as a result of their testimony.

<sup>230</sup> See Mishnah Makot 1:10.

<sup>231</sup> See *id.* (discussing the view of Rabbi Elazar ben Azarya).

<sup>232</sup> *Id.* This is the view of Rabbi Tarfon and Rabbi Akiba, but Rabban Shimon ben Gamliel remarks there: "They increase shedders of blood in Israel." *Id.*

<sup>233</sup> Babylonian Talmud, Avoda Zara 8b; see Babylonian Talmud, Sanhedrin 41a. Rashi explained that after the removal of the Sanhedrin from its original location – "Lishkat hagazit" – near the Temple to another location in Jerusalem – "the storefront" – it did not retain the authority to impose the death penalty. *Id.*

Sanhedrin's dislocation – "*lishkat hagazit*" – from its original location near the Temple.

Moreover, even when capital punishment was in force, there were a number of rules in ancient Jewish law, during the Tannaitic and Amoraic periods, that were designed to prevent courts from issuing capital punishment to the greatest extent possible. Consequently, the implementation of capital punishment in the period of their activity was uncommon.

Jewish judges first had to warn the witnesses in capital punishment cases to set before their eyes the value of human life of the accused human being, who was created in the image of G-d, and think about his fate if he were to be convicted.<sup>234</sup> After this warning, the witnesses knew they must be careful, as they may cause irreversible damage to the innocent. The judges also added another essential element in this warning to the witnesses to ensure that their testimony would be fully accurate and to prevent the conviction and execution of innocent Jews: an explanation of the very detailed cross-examination process of witnesses in capital punishment.<sup>235</sup> Judges warned witnesses that the court will subject them to this interrogation and cross-examination. He will ask them identical questions and compare their answers in order to ensure, before a conviction, that the testimony is true.<sup>236</sup> This type of cross-examination exposes potentially false testimonies and any significant discrepancy in the testimony invalidates the witness's credibility.<sup>237</sup>

Another remarkable element in capital punishment cases is the requirement to warn the person about to commit a qualifying offence that, if he does so, his conviction may entail the death penalty. Two qualified witnesses must warn the possible offender that he is about to commit an offense, and the offender must verbally acknowledge, before acting, that he is aware that his possible criminal activity does not comport with the rules of Jewish law mentioned in this warning, and commit the criminal act immediately thereafter.<sup>238</sup>

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<sup>234</sup> See Mishnah Sanhedrin 4:5 (discussing the intimidating speech given to the witnesses).

<sup>235</sup> See *id.*

<sup>236</sup> See *id.*

<sup>237</sup> See Mishnah Sanhedrin 5:1-3.

<sup>238</sup> See Babylonian Talmud, Sanhedrin 40b-41a; Mishneh Torah, Sanhedrin 12:2; see also Mishnah Sanhedrin 10:4; see also Rashi on Sanhedrin 111b s.v. *utzerikhim*.

Other special requirements for capital punishment cases include a judicial panel of twenty-three judges,<sup>239</sup> and when there is a conviction in capital punishment cases, there must be at least two more judges voting to convict than to acquit.<sup>240</sup> Additionally, in capital punishment cases, a verdict that is not merciful to convict should be issued one day after the closing of proceedings in court and not on the same day.<sup>241</sup> This delay enables the judges to grant due weight to the option of adoption of a merciful outlook.

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<sup>239</sup> See Mishnah, *Sanhedrin* 4:1 (“What is the difference between civil monetary cases and capital punishment cases? Civil cases [are tried] by three [judges], but capital punishment cases [are tried] by twenty-three. The arguments of the judges in Civil cases may be opened [by arguments] either for acquittal or conviction, while in capital punishment cases, charges must be opened [by arguments] for acquittal but may not be opened [by arguments] for conviction. Civil monetary cases may be decided by a majority of one, either for acquittal or conviction; whereas capital punishment charges are decided by a majority of one for acquittal, but [at least] a majority of two for conviction. Decisions regarding civil monetary cases may be reversed both for acquittal and for conviction; while decisions regarding capital punishment charges may be reversed for acquittal only but not for conviction. Regarding civil monetary cases, all [including the rabbinic students, observing the activity of the Jewish court in this case] may argue for or against the defendant. Regarding capital punishment charges, anyone [including observing students], may argue in favor of the accused but not against him. Regarding civil monetary cases, he who has argued for conviction, may [change his mind and] argue for acquittal, and he who has argued for acquittal, may argue for conviction; whereas, in capital punishment charges, one who has argued for conviction may subsequently argue for acquittal, but one who has argued for acquittal may not argue for conviction. [One verse states: “And they shall judge the people at all times,” (Exodus 18, 22) thus, implying that judgement may take place both during daytime and nighttime, another verse states: “Then it will be on the day that he bequeaths,” (Deuteronomy 21, 16) thus, limiting judgment to daytime? [Rather], civil monetary cases are tried by day [meaning that the trial must be initiated by day], but [they may continue into, and be] concluded, with a ruling, at night. However, [regarding capital punishment charges the verse states: “Hang them before the sun,” (Numbers 25, 4) indicating that] capital charges must be tried by day and be concluded by day. Civil monetary cases can be concluded on the same day, whether for acquittal or conviction; but capital punishment charges may be concluded on the same day for acquittal but only on the next day for conviction. Therefore, [capital punishment] trials are not held on Friday or on the eve of a Festival [since if the verdict is guilty, it must be postponed till the next day and death sentences may not be executed on Shabbat or on a Festival. Delaying the execution until Sunday is considered cruel and is not an option].”).

<sup>240</sup> See *id.*

<sup>241</sup> See *id.*

These requirements do not exist in relation to the activity of the Jewish court in monetary matters.<sup>242</sup> In monetary cases, the judicial panel consists of three judges.<sup>243</sup> The decision is issued on a simple majority of the panel judges.<sup>244</sup> Finally, the decision, whether in favor of or against a litigant, is issued on the same day, after the end of the proceedings in court.<sup>245</sup>

Another restriction on convictions in capital punishment cases stems from the obligation to judge defendants in all criminal cases as favorably as possible. This policy is part of a general Jewish trend to fortify the rights of the accused in Jewish criminal proceedings as much as possible and protect him or her from irreversible mistakes in the verdict. If a Jewish court does not judge the defendant in all criminal cases, especially in capital punishment cases, as favorably as possible, and does not ensure that criminal proceedings are conducted in a mild and balanced manner, the unfortunate consequences could be false convictions and severe punishment of innocent people. According to the Sages' interpretation of biblical law, there is an imperative in Jewish law to judge defendants, in all criminal cases, as favorably as possible.<sup>246</sup> In a situation of uncertainty, the interpretation of the Jewish individual and Jewish court regarding the actions of other Jews should be kind and merciful.<sup>247</sup> When there is uncertainty, the court can interpret the facts and situation and reach the unfavorable conclusion that a Jew committed a crime. It could also interpret the same facts and situation and reach the favorable conclusion that he did not commit an offense. When there is a reasonable doubt in criminal cases, the court must adopt the path of mercy and not convict the suspect. This is a clear and evident rule also in the interpretation of medieval Jewish scholars of Jewish law in Tannaitic and Amoraic sources.<sup>248</sup>

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<sup>242</sup> *See id.*

<sup>243</sup> *See id.*

<sup>244</sup> *See id.*

<sup>245</sup> *See id.*

<sup>246</sup> The Bible requires a Jew who judges or evaluates the activity of another Jew to act in a just manner. *See* Leviticus 19, 15.

<sup>247</sup> The Sages interpreted this obligation in the Bible as follows: every Jew should evaluate the activity of his fellow Jew in a manner that is favorable, insofar as possible. *See* the statement of Rabbi Joshua ben Perachiah, in Mishnah Avot 1:6. *See also* Babylonian Talmud, Shabbat 127b.

<sup>248</sup> In medieval Jewish literature, the common interpretation concerning the desirable policy was that when an individual evaluates the activity of another individual, and

In capital punishment cases, the court has a special obligation to consider whether a favorable interpretation is possible in light of the circumstances of the case. This obligation is designed to prevent unjustified convictions and executions. The court should determine if a verdict in favor of the suspect is possible. In these cases, the court should allow the presentation of any legal claim of any person, or any evidence, acting in favor of the defendant, that could lead to the conclusion that the suspect did not commit the crime.<sup>249</sup> The Mishnah states:

After this (the cross-examination of the first witness in capital punishment cases), the second [witness] is admitted and [also] examined. If his testimonies correspond, they (the judges) open [the proceedings with arguments] in favor [of the accused]. If one of the witnesses says: “I have something to say in his favor”;

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there is uncertainty since it is not clear if he acted in the appropriate or inappropriate manner, he is obligated to be kind and merciful in his judgment of the activity of another human being, if the circumstances enable this interpretation. See Rashi on Shevuot 30a, s.v. *hevey dan et chaverkh lekhaif zekhut*; MAIMONIDES, COMMENTARY TO THE MISHNAH ch. Avot at 1, 6 (Joseph Kapach ed., Jerusalem 5725-1965), and a similar interpretation of the rule in the ancient texts of the Sages. RABBI MENACHEM BEN SHLOMO (HAMEIRI), CHIBUR HATESHUVAH 85-86 (Jerusalem, 5736-1976). With clear words, he determines the essence of the Jewish rules. He wrote that the interpretation of the obligation to judge other Jews in a just manner is as follows: “A man should always judge the actions of his fellow man in a favorable manner. When his actions can be interpreted in two opposing ways, and there is no clear-cut conclusion, and he could be pious a criminal, there is an obligation to adopt the favorable conclusion.” BEIT HABEHIRAH, SHEVUOT 30a (Jerusalem, 5721-1961), s.v. *af al pi sherov devarim*. He explains that this path of mercy leads to the true outcome. The favorable attitude is required when there are doubts, and there is no clear cut conclusion that a person committed a crime. See HIBBUR HATESHUVAH, MESHIV NEFESH art. 1, 4 at 90 (Jerusalem, 5736-1976).

<sup>249</sup> See Mishnah Sanhedrin 4:1; Mishneh Torah, Sanhedrin 11:2. In these texts the obligation of the court to judge in a favorable manner is applicable in capital punishment cases but not in disputes concerning monetary civil matters. These rules are not applicable in monetary civil matters since in monetary matters, a court rules concerning claims of two litigants, on both sides of the barricade. In monetary disputes, one party will feel that that decision was unjust when there was “mercy” that led to a “lenient” decision regarding the other party. However, in criminal cases, society is the “other party” that is accusing the suspect. Therefore, it is possible and necessary to implement mercy in criminal cases and adopt favorable outlook regarding the suspect, when this approach is possible.

or one of the rabbinic students<sup>250</sup> says: “I have an argument against him,” he is silenced. But if one of the rabbinic students says: “I have an argument in his favor,” he is brought up and seated with them, and does not descend from there all that day.<sup>251</sup> If there is substance to his argument, he is heard [and does not descend from there]. And even if he [the accused] himself says: “I can present an argument for my acquittal,” he is heard, provided that there is substance to his statement. If they find him not guilty, he is acquitted; if not, they postpone the verdict until the following day. They (the judges) pair off, practicing moderation in food and abstaining totally from wine the entire day, and they (each pair) discuss the case [the rest of the day and] throughout the night. Early the next morning, they assemble in court. He who favors acquittal states: “I declared him innocent [yesterday] and stand by my opinion.” While he who argued in favor of conviction states: “I declared him guilty and stand by my opinion.” One who [previously] argued for conviction may now argue for acquittal, but one who [previously] argued for acquittal, may not reverse himself and argue for conviction.<sup>252</sup>

As mentioned above, there are also many other rules in the Mishnah that are in favor of the accused in capital punishment cases.<sup>253</sup> According to one of these rules, civil monetary cases can be concluded on the same day, whether for acquittal or conviction.<sup>254</sup> However, capital punishment charges may be concluded on the same day for acquittal, but only on the next day for conviction.<sup>255</sup> In the Babylonian Talmud, Rabbi Kahana added:

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<sup>250</sup> See Mishnah Sanhedrin 4:3-4.

<sup>251</sup> Even if there is no substance to his argument. If he would be forced to descend, this would embarrass him and discourage finding arguments in favor of the defendant.

<sup>252</sup> Mishnah Sanhedrin 5:4-5; see also Tosefta Sanhedrin 9:2 (concerning the presentation of arguments in favor of the accused in capital punishment cases).

<sup>253</sup> See Mishnah Sanhedrin 4:1.

<sup>254</sup> See *id.*

<sup>255</sup> See *id.*

If the Sanhedrin unanimously find the accused guilty, he is acquitted. Why? Jewish law requires that the sentence in this case must be postponed until the next day, in order to allow the judges to think about the details of the case, and maybe they will conclude that the favorable outlook [of acquittal] is dominant.<sup>256</sup>

When the outlook that leads to acquittal is not presented in the panel of judges, it cannot be anticipated that on the next day, the necessary majority of judges, in a Jewish court that conducts proceedings in capital punishment matters, will arrive at the conclusion that the favorable outlook prevails, and that therefore, the accused should be acquitted. Additionally, at least one judge should present arguments in favor of the suspect. When the life of a person is in danger, if all the judges present their opinions only in the severe, convicting point of view, the conviction is not valid and capital punishment is not possible.<sup>257</sup> If all judges convict, the more favorable outlook does not give due weight in the process leading to the decision. In these circumstances, this panel of judges might be biased against the accused and will not be able to properly evaluate all the relevant factors in favor

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<sup>256</sup> Babylonian Talmud, Sanhedrin 17a; *see also* Rashi on Sanhedrin 17a, *s.v. keyvan degmireih* (“If the judges did not arrive at the favorable conclusion at the first day [after the end of the trial], they should wait and rule about this case on the next day, in order that during this delay they will find reasons to rule in favor of the accused.”); *see also* Rabbi Meir Halevi Abulafia, Commentary, *Yad Ramah al Masechet Sanhedrin*, pt. Saloniki at 17a (5558-1798), *s.v. amar Rav Kahanah* (“[I]f the judges could not rule in favor of the accused on the first day they should wait until the next day, so that maybe the next day one of those who wanted to convict will change his mind and adopt the point of view of those who wanted to rule in favor of the accused.”).

<sup>257</sup> Rabbi Yehudah Loew Ben Bezalel, known as the Maharal of Prague, explained that when all the judges in capital punishment cases can see only the point of view militating for conviction, their decision is invalid since there is an obligation to examine the favorable option, and it is not in order that all members of a court to adopt only the severe approach to convict. RABBI YEHUDAH LOEW BEN BEZALEL, *NETZACH YISRAEL* ch. 13 at 76-77 (Jerusalem, 5732-1972). Rabbi Eliyahu Desler explained that according to the Jewish view, investigation of whether the favorable option is possible in a particular case is essential for a court that attempts to reach the true conclusion. RABBI ELIYAHU DESLER, *MIKHTAV MIELIYAHU* 87-88 (Jerusalem, 5743-1983). Therefore, in the appropriate circumstances, the Lord intervenes and guides the Jewish judges to adopt the path of the merciful verdict, in favor of the accused in capital punishment cases, in order that their legal decision will be the “ultimate truth.” *Id.*

of the accused.<sup>258</sup> Therefore, in these circumstances, the court's decision to convict and pronounce a death sentence is invalid, and the ruling must be an acquittal.<sup>259</sup>

In addition, Jewish judges who hate or love a particular litigant are disqualified. Hatred causes an emotional "distance" from the litigant; as a result, the judge cannot consider all the aspects in his

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<sup>258</sup> See RABBI YEHUDAH LOEW BEN BEZALEL, BAER HAGOLAH, HABAER HASHENI 26-27 (Jerusalem, 5732-1972). Rabbi Kahana stated:

If the Sanhedrin unanimously find the accused guilty - he is acquitted'. Why? Since Jewish law requires that the sentence in this case be postponed until the next day, in order that the judges think the details of the case, and maybe they will conclude that the favorable outlook [of acquittal], prevails." . . . But, in these circumstances, these judges will not be able to find out what are the favorable aspects in the future. . . . The decision to acquit him will be a strange conclusion for them, after all the judges ruled he should be convicted. Therefore, in these circumstances, the decision should be an acquittal. . . . Judges are human beings and therefore there is a requirement that when they wish to convict, they should wait until the next day, in capital punishment cases where an execution by mistake is irreversible. . . . When judges see that one judge, or several judges, are in favor of the accused, they might change their minds, but when they see that all judges agree to convict, they feel this is the final decision and do not attempt, in the required manner, to investigate if there are relevant factors in favor of the accused. They do not devote the necessary intellectual effort and attempt to find out if there are these factors, in favor of the accused.

*Id.*

<sup>259</sup> See the explanation of Maimonides in Mishneh Torah, Sanhedrin 9:1:

When all the judges in the Sanhedrin begin with the conclusion that their judgment of a case involving capital punishment, should be that the accused is liable, he is acquitted. There must be at least one judge who seeks to acquit him and raises claims in the panel of judges on his behalf, and in these circumstances, he can be convicted, if the majority holds him liable. Only in these circumstances can he be executed.

*Id.* A similar explanation appears in Rabbi Menachem ben Shelomo Hameiri's fourteenth century commentary on the Talmud:

When all the judges in the Sanhedrin, in capital punishment cases, begin with the conclusion that the accused is liable, this does not lead to the imposition of the death penalty, since the law requires that in capital punishment cases the decision will be made on the next day if they did not decide to acquit on the first day, in order to enable the judges to think of reasons that may lead to a ruling in favor of the accused. But all the judges begin with the conclusion that the accused is liable, they will not be able to find in the future reasons in favor of the accused that can lead to acquittal. In these circumstances, the accused is not sentenced to death until there are judges who change their minds and rule in favor of the accused, although the majority of judges decided to convict him.

Beit Habehirah Sanhedrin 17a, s.v. *Sanhedrin shepatchu*.

favor.<sup>260</sup> Meanwhile, love causes a “friendly inclination” of emotional closeness with the litigant, and the judge might therefore grant unnecessary weight to aspects favoring the litigant.<sup>261</sup> Rabbi Papa stated:

A man should not act as judge either for one whom he loves or for one whom he hates; for no man can see all the elements that could lead to the determination of the guilt of whom he loves or all the favorable factors that could lead to the acquittal of one whom he hates.<sup>262</sup>

Maimonides defines the scope of “love” and “hatred” in this context:

A judge may not adjudicate the case of a friend. This applies even if the person is not a member of his wedding party or one of his more intimate companions.<sup>263</sup> Similarly, he may not adjudicate the case of one he hates. This applies even if the person is not his enemy and one whose misfortune he seeks.<sup>264</sup> Instead, the two litigants must be looked upon equally in the eyes and in the hearts of the judges. If the judge

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<sup>260</sup> See Rashi on Sanhedrin 29a, *s.v. chad ledayan*.

<sup>261</sup> See Babylonian Talmud, Sanhedrin 29a.

<sup>262</sup> Babylonian Talmud, Ketubot 105b.

<sup>263</sup> The definition of the scope of “love” in the writings of Maimonides is wider than the narrow scope in the example in the Mishnah Sanhedrin 3:5: “A friend or an enemy [is disqualified]. ‘A friend’ [means] one’s best man [during the period of his friend’s wedding].” Mishnah Sanhedrin 3:5; see Mishnah Bava Batra 9:4; see also Babylonian Talmud, Sanhedrin 29a (“By ‘friend’ one’s groomsman is meant. How long [is he regarded as a groomsman]? -Rabbi Abba stated, in Rabbi Jeremiah’s name: ‘The whole period of seven days of marriage feast.’ The Rabbis stated, in the name of Rav: ‘After the first day [he no longer is regarded as such].’)” The Tosaphists claimed that the basic law only disqualifies one’s groomsman and in other cases, included in the definition of “love” in Maimonides, the disqualification is only a stringency, beyond what is required by law. Tosaphot Ketubot, 105b, *s.v. Lo*.

<sup>264</sup> The scope of “hatred” in the writings of Maimonides is wider than the narrow scope in the example, concerning the disqualification of a witness as a result of hatred. Mishnah Sanhedrin 3:5. “‘An enemy’ [means] any man who is not on speaking terms with this person for three days.” *Id.*

does not know either of them and is not familiar with their deeds, this is the fairest judgment that could be.<sup>265</sup>

Some medieval Jewish scholars stressed that this rule is necessary in order to achieve the objective of Jewish rulings - *din emet la'amito*.<sup>266</sup> It ensures that the decision of a Jewish court or rabbi is not tainted as a result of bias. The court or rabbi should act in a completely neutral manner. Since absolute impartiality is essential to decision-making, Jewish judges and rabbis should not reach decisions as a result of their love or hatred of parties whose requests or actions are being evaluated by their decisions. Sometimes, a harsh or mild verdict is the result of strong negative or positive feelings toward an individual; however, this will be avoided when we ensure that a decision of a rabbi or Jewish court will not be tainted as a result of bias.<sup>267</sup>

The Sages also applied to capital punishment law the commandment in the Bible, "Love your fellow as yourself,"<sup>268</sup> which Rabbi Akiba defines as "a great rule of the Torah (biblical Jewish law)."<sup>269</sup> In light of this commandment, the ancient Sages wrote that a capital sentence must be executed in the least cruel and humiliating way, limiting the pain and indignity of the individual sentenced to the death penalty: "Choose him a fine death."<sup>270</sup> Therefore, capital punishment must not be administered in a prolonged manner; rather,

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<sup>265</sup> Mishneh Torah, Sanhedrin 23:6; *see also* RABBI YITZCHAK ABUHAV MENORAT HAMAOR ch.17 ("Love of Friends") (Vilnius 1883) Rabbi Abuhav stressed that one of the more important characteristics of love of friends is the activity of favorable judgment of what other human beings do. This behavior prevents unnecessary disputes between human beings and is the foundation of peaceful relationships between individuals. He stressed that there are several good outcomes of this behavior. One important result of this good behavior is love and unity between friends. *Id.* at 309-10.

<sup>266</sup> Rabbi Joseph Karo stresses that the attempt to reach the goal of *din emet la-amito* requires that the Jewish judge act with absolute impartiality. Rabbi Joseph Karo, Commentary, Beit Yosef, Hoshen Mishpat 1, *s.v. ve-zehu . . . kol ha-dan din emet le-amitto*.

<sup>267</sup> *See* 2 ELIAV SHOCHETMAN, SEDER HADIN BEBEYT HADIN HARABANI 574-76 (5771-2011) (concerning the rules in Jewish law that were enacted in order to prevent bias in legal proceedings in Jewish law).

<sup>268</sup> Leviticus 19, 18.

<sup>269</sup> *See* Genesis Rabba 24:7; Jerusalem Talmud, Nedarim 9:4; Babylonian Talmud, Shabbat 31a.

<sup>270</sup> *See* Babylonian Talmud, Pesahim 75a, Ketubot 37b, Sanhedrin 45a, Sanhedrin 52b; *see also* Rashi on Sanhedrin 45a, *s.v. mita yafa*.

the execution should be quick, in order to reduce the suffering of the executed human being as much as possible.<sup>271</sup>

Rabbi Tzvi Hirsch Chayut explained that the principle concerning “fine death” expresses a general rule in Jewish law of the ancient Sages. Jewish law will never impose an obligation or punishment that may result in severe and negative effects upon a Jewish individual. The rule “love your fellow as yourself” is applicable in the sphere of capital punishment to ensure that the death penalty should be a “fine death.” When the Sages had doubts as to the appropriateness of a punishment, they acted in light of this general rule. In turn, the Sages’ actions guided the Jewish court, in all aspects of its activity, to implement the lenient and less severe punishment. This is due to the general dominant goal of Jewish law: implementation of “compassion and mercy” in all the activities of Jews in the world.<sup>272</sup>

#### IV. CONCLUSION

According to many Jewish sources that present the point of view of influential rabbis and Jewish scholars, certain considerations that can lead to severe sentences – including the need to combat crime, deter potential criminals, and ensure that convicted criminals do not commit additional crimes – are only part of the wide range of important considerations in the Jewish legal system. These should include the significant weight accorded in a Jewish court to mitigating circumstances and the desire to adopt the path of mercy of the Lord. The ultimate truth in the legal system can be achieved only when the important perspective of a merciful approach exercised through compassion, which is implemented by the Creator of the World, is given its due consideration and leads the court to aspire to act beyond the strict letter of law.

Therefore, it is fitting that Jewish courts and rabbis, before making their decisions, should engage in an in-depth consideration of whether the harsh or the merciful outcomes is possible and desirable. This determination of what is the “ideal” in Jewish law (i.e., beyond the letter of law) is the legal policy that is necessary to undertake in the decisions of a Jewish court or in the halakhic decisions of a rabbi. In Judaism, mercy is not only the process of matching the sentence of

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<sup>271</sup> See Babylonian Talmud, Sanhedrin 45a.

<sup>272</sup> See ZVI HIRSCH CHAYUT, *MEVO HATALMUD* ch. 16 at 36 (Lemberg, 5688-1928).

an individual to the particular context of his or her act. The Jewish judge should take a deliberate approach, employing his intellect and emotions, on the path leading toward a merciful ruling, insofar as possible. He should analyze all the ramifications of his decisions and strike a suitable balance between different, and sometimes conflicting, relevant facts, outlooks and values, in order to reach the ultimate truth. This decision-making process is more appropriate and reflects greater moral integrity of the legal process and judgment than the current process in American law. The alternative process, involving a cold and distanced evaluation of facts and circumstances, lacks this necessary moral inspiration embraced by the Jewish law system. The guidelines for the Jewish judge are that he must exercise moderation in the legal process and focus on trying to prevent the suffering of innocent individuals. He should ensure that he is not denying the rights and defense of litigants, who should be granted proper rights and adequate legal defense, and is not punishing offenders in a strict, unjustified manner that is not necessary in light of all the relevant circumstances. This pattern of activity is clearly the embodiment of mercy in the legal system.

Acting in a lenient manner towards the offender, beyond the strict letter of the law, is indeed a challenge to the rule of law and leads, conceptually, to disorder and chaos. However, the appropriate combination of mercy and law, in cases where this integration is necessary and desirable, should lead to the desirable goal: a just and equitable legal process. According to the Jewish outlook, a court verdict that broadcasts a message of compassion, consideration, and conciliation may be essential for the existence of normal society more than a verdict which expresses an attitude of “let the law cut through the mountain.”<sup>273</sup> Mercy in courts and relationships between human beings are important. The outcome of the implementation of the merciful perspective is a good relationship among human beings. They live in harmony and peace in a world that can “survive.”<sup>274</sup> Therefore the Jewish judge is required to employ his ethics and conscience and seek to go beyond the laws and rules dictated by the strict letter of the law.

This focus in Jewish law and Jewish thought upon the desire to act in a merciful manner can be a source for comparison and

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<sup>273</sup> See *supra* note 106 and accompanying text (concerning this outlook).

<sup>274</sup> See *supra* note 125.

inspiration in criminal law in modern legal systems, such as the American legal system. It is relevant in many aspects of criminal law, including the nomination of judges and juries, legal policy regarding criminal judgment, and decisions issuing often very severe criminal punishment that involve capital punishment and three-strikes law convictions.