


1-1-2013

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## Recommended Citation

Ephraim Glatt, The Unanimous Verdict According to the Talmud: Ancient Law Providing Insight into Modern Legal Theory, 3 Pace Int'l L. Rev. Online Companion 316 (2013), <http://digitalcommons.pace.edu/pilronline/35/>.

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Volume 3, Number 10

Winter 2013

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**THE UNANIMOUS VERDICT  
ACCORDING TO THE TALMUD:  
ANCIENT LAW PROVIDING  
INSIGHT INTO MODERN LEGAL  
THEORY**

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## INTRODUCTION

Unanimous verdicts have long been the fascination of lawyers and academics. The history behind the unanimous verdict requirement, the benefits and detriments of such a requirement, and alternative methods are all vigorously debated. A foray into Jewish/Talmudic law<sup>1</sup> introduces a puzzling twist in

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<sup>1</sup> Before such a foray:

[a] brief historical review will familiarize the new reader of Jewish law with its history and development. The Pentateuch (the five books of Moses, the Torah) is the elemental document of Jewish law and, according to Jewish legal theory, was revealed to Moses at Mount Sinai. The Prophets and Writings, the other two parts of the Hebrew Bible, were written over the next 700 years, and the Jewish canon was closed around the year 200 before the Common Era ("B.C.E."). The close of the canon until year 250 of the Common Era ("C.E.") is referred to as the era of the Tannaim, the redactors of Jewish law, whose period closed with the editing of the Mishnah by Rabbi Judah the Patriarch. The next five centuries were the epoch in which scholars called Amoraim ("those who recount" Jewish law) and Savoraim ("those who ponder" Jewish law) wrote and edited the two Talmuds (Babylonian and Jerusalem). The Babylonian Talmud is of greater legal significance than the Jerusalem Talmud and is a more complete work.

The post-Talmudic era is conventionally divided into three periods: (1) the era of the Geonim, scholars who lived in Babylonia until the mid-eleventh century; (2) the era of the Rishonim (the early authorities), who lived in North Africa, Spain, Franco-Germany, and Egypt until the end of the fourteenth century; and (3) the period of the Aharonim (the latter authorities), which encompasses all scholars of Jewish law from the fifteenth century up to this era. From the period of the mid-fourteenth century until the early seventeenth century, Jewish law underwent a period of codification, which led to the acceptance of the law code format of Rabbi Joseph Karo, called the *Shulhan Arukh*, as the basis for modern Jewish law. The *Shulhan Arukh* (and the *Arba'ah Turim* of Rabbi Jacob ben Asher, which preceded it) divided Jewish law into four separate areas: *Orah Hayyim* is devoted to daily, Sabbath, and holiday laws; *Even HaEzer* addresses family law, including financial aspects; *Hoshen Mishpat* codifies financial law; and *Yoreh Deah* contains dietary laws as well as other miscellaneous legal matter. Many significant scholars - themselves as important as Rabbi Karo in status and authority - wrote annotations to his code which made the work and its surrounding comments the modern touchstone of Jewish law. The most recent complete edition of the *Shulhan Arukh* (Vilna, 1896) contains no less than 113 separate commentaries on the text of Rabbi Karo. In addition, hundreds of other volumes of commentary have been published as self-standing works, a process that continues to this very day. Besides the law codes and commentaries, for the last 1200 years, Jewish law authorities have addressed specific questions of Jewish law in written *responsa* (in question and answer form). Collections of such respon-

the unanimous verdict discussion. The Talmud rules that a unanimous verdict by the Sanhedrin (Jewish court) must be thrown out and the defendant must be exonerated! The alleged guilt of the defendant is immaterial and the killer walks away a free man. Such an illogical outcome seems strikingly out of place within the logical Talmud. Yet, a closer look at this law reveals that this quizzical result is actually quite rational. In fact, understanding the logic behind this surprising law sheds light on numerous aspects of modern legal theory. Part I of this paper will provide background information regarding the current academic discussion surrounding the unanimous verdict. Part II will discuss the startling Talmudic passage on the unanimous verdict. It will additionally focus on one explanation that radically reinterprets this passage. Part IIIA will introduce two schools of thought on the rationale behind the anti-unanimity rule. Part IIIB will highlight two areas of modern legal theory affected by such rationales.

## I. THE UNANIMOUS VERDICT IN AMERICAN LAW

### A. History of Unanimity

One of the earliest recorded unanimous jury verdicts was in Europe in the year 1367.<sup>2</sup> By the eighteenth century, unanimous verdicts were “an accepted feature of the common-law jury.”<sup>3</sup> Today, under American law, unanimous jury verdicts are required in federal felony trials<sup>4</sup> and in many state trials as well.<sup>5</sup> In 1972, in *Apodaca v. Oregon*, the United States Supreme Court posited four possible theories for the unanimity require-

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sa have been published, providing guidance not only to later authorities but also to the community at large. Finally, since the establishment of the State of Israel in 1948, the rabbinical courts of Israel have published their written opinions deciding cases on a variety of matters.

Michael J. Broyde, *The Foundations of Law: A Jewish Law View of World Law*, 54 *EMORY L.J.* 79, 80 n.3 (2005).

<sup>2</sup> Jeremy Osher, Note, *Jury Unanimity in California: Should It Stay or Should It Go?*, 29 *LOY. L.A. L. REV.* 1319, 1326 (1996).

<sup>3</sup> *Apodaca v. Oregon*, 406 U.S. 404, 407-08 (1972).

<sup>4</sup> FED. R. CRIM. P. 31(a).

<sup>5</sup> See Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 *U. MICH. J.L. REFORM* 569, 615 (2007); see also Emil J. Bove III, *Preserving the Value of Unanimous Criminal Jury Verdicts in Anti-Deadlock Instructions*, 97 *GEO. L.J.* 251 (2008).

ment.<sup>6</sup> The first theory was that the rule was “designed to compensate for lack of procedural safeguards ensuring that the defendant received a fair trial.”<sup>7</sup> The second theory was that the rule “developed from the practice of enforcement of the jury which was firmly established by the late 14th century.”<sup>8</sup> This simply “meant that a sufficient number were to be added to the panel until 12 were at last found to agree in the same conclusion.”<sup>9</sup> A third possibility was that “unanimity developed because early juries, unlike juries today, personally had knowledge of the facts of a case; the medieval mind assumed there could be only one correct view of the facts, and, if either all the jurors or only a minority thereof declared the facts erroneously, they might be punished for perjury.”<sup>10</sup> Lastly, “unanimity may have arisen out of the medieval concept of consent which carried with it the idea of unanimity.”<sup>11</sup>

Regardless of the exact reason behind the rise of the unanimous jury verdict system, “the unanimous jury has been so embedded in our legal history that no one would question its constitutional position.”<sup>12</sup> Unanimous conviction of the accused has largely remained “sacred and inviolate.”<sup>13</sup>

### *B. Benefits of Unanimity*

Supporters of the unanimous verdict often extol the many benefits of such a system. First, requiring every juror to agree on the verdict ensures that the minority opinion is heard, discussed, and analyzed until the entire group is adequately convinced of its flaws.<sup>14</sup>

Second, unanimous verdicts protect the integrity of our

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<sup>6</sup> *Apodaca*, 406 U.S. at 407 n.2.

<sup>7</sup> Osher, *supra* note 2, at 1326 n.37 (citing *Apodaca*, 406 U.S. at 407 n.2).

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

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* (quoting *Apocada*, 406 U.S. at 408).

<sup>11</sup> *Id.* (citing *Apodaca*, 406 U.S. at 407 n.2).

<sup>12</sup> *Johnson v. Louisiana*, 406 U.S. 356, 382 n.1 (1972) (Douglas, J., dissenting).

<sup>13</sup> Osher, *supra* note 2, at 1339 (quoting Bill Boyarsky, *Balky Trial Could Ignite Move to Radically Alter Jury System*, L.A. TIMES, Apr. 25, 1995, at A18).

<sup>14</sup> Jere Morehead, *A “Modest” Proposal for Jury Reform: The Elimination of Required Unanimous Jury Verdicts*, 46 KAN. L. REV. 933, 943 (1998).

legal system as they “represent the rational and reasoned judgment of all twelve jurors.”<sup>15</sup> When all of the jurors agree on an outcome, the public feels that the jurors “fully deliberated the case and that the resulting verdict is just.”<sup>16</sup> The rule removes the misconception that the “the government . . . abuse[s] its power and wrongly convict[s] people who aren’t guilty.”<sup>17</sup>

Lastly, proponents of the unanimous verdict requirement often cite the system’s impressive history when discussing its virtues.<sup>18</sup> The fact that the unanimous verdict is required by judiciaries in many countries and states surely points to its efficacy as well.

### *C. Detriments of Unanimity*

Although many discuss the numerous benefits of the unanimity requirement, some have criticized this rule. Arguing that “historical inertia should not prevent change,” these scholars have called for the abolishment of unanimity.<sup>19</sup> Ironically, England, the source of America’s unanimous verdict rule, no longer requires such unanimity.<sup>20</sup> Moreover, some critics note that the unanimous jury requirement may be nothing more than a historical accident.<sup>21</sup> Critics of the unanimous jury point to the large number of hung juries caused by such a requirement.<sup>22</sup> Additionally, hung juries are costly, inefficient, and they cause a backlog in the court docket.<sup>23</sup> Removing unanimity requirements would allow courts to preserve a large

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<sup>15</sup> Osher, *supra* note 2, at 1363.

<sup>16</sup> *Id.*; see Kim Taylor-Thompson, Majority Rule on Juries Would Increase Errors, S.F. CHRON., June 5, 1995, available at [http://articles.sfgate.com/1995-06-05/opinion/17809061\\_1\\_jury-splits-majority-rule-unanimity](http://articles.sfgate.com/1995-06-05/opinion/17809061_1_jury-splits-majority-rule-unanimity).

<sup>17</sup> Osher, *supra* note 2, at 1363 (quoting Steve Wilson, *Hung Juries Preferable to Those that Make Wrong Decision*, ARIZ. REPUBLIC, Sept. 27, 1995, at A2).

<sup>18</sup> *Id.* at 1340.

<sup>19</sup> *Id.*

<sup>20</sup> Bill Boyarsky, Unanimous Verdicts Also On Trial, L.A. TIMES, July 19, 1995, available at [http://articles.latimes.com/1995-07-19/news/mn25660\\_1\\_simpson-trial](http://articles.latimes.com/1995-07-19/news/mn25660_1_simpson-trial).

<sup>21</sup> *State v. Gann*, 463 P.2d 570, 573 (Or. 1969).

<sup>22</sup> Osher, *supra* note 2.

<sup>23</sup> *Id.*

amount of wasted resources.

Lastly, critics of unanimity highlight the concern that unanimous verdicts often lead to compromise convictions.<sup>24</sup> As jurors endeavor to decide the case, a stubborn juror can seriously delay reaching the verdict by holding out. Holding out often causes the other jurors to make some sort of compromise, perhaps lessening the conviction to a lower charge, in exchange for the holdout juror's guilty vote.<sup>25</sup> Such a compromise is viewed negatively by society as it does not represent an honest view of the facts and legal issues involved. Rather, it is a cheap bargain between disinterested parties.<sup>26</sup>

#### *D. Observation about Unanimity Scholarship*

Having discussed the pros and cons of requiring unanimous jury verdicts, one can offer an interesting observation. While critics have offered multiple reasons unanimity should not be required in jury verdicts, no critic has suggested that once a verdict is unanimous it should be disallowed, with the result of an acquittal. Since hung juries and compromise convictions may only be caused by requiring unanimity, presumably critics are in agreement that unanimity per se is not negative.

## II. UNANIMOUS VERDICT IN TALMUDIC LAW

### *A. Talmudic Passage*

In the midst of Tractate Sanhedrin,<sup>27</sup> the Talmudic section discussing the Jewish court system, an interesting law is stated:

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<sup>24</sup> See generally, JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 179 (1994).

<sup>25</sup> See *id.*

<sup>26</sup> *Id.*; see also Osher, *supra* note 2, at 1354.

<sup>27</sup> BABYLONIAN TALMUD, Tractate Sanhedrin 17a. All citations and author translations of the Babylonian Talmud in this paper will be from the Berman edition of the Vilna printing (1995), which will be cited as 'BABYLONIAN TALMUD,' followed by name of tractate, and page number. Citations and author translations of Talmudic commentaries, all of which are on file with the author, will be cited in the following manner: Author, Title of Work, Subtitle [if applicable] [,] Part or Page [,] (Edition, Year).

R[abbi] Kahana said: If the Sanhedrin [Jewish court] unanimously find [the accused] guilty, he is acquitted. Why? — Because we have learned by tradition that sentence must be postponed till the morrow in hope of finding new points in favor of the defense. But this cannot be anticipated in this case.<sup>28</sup>

The Talmud rules that a defendant who is unanimously found guilty may walk away free!<sup>29</sup> “Where the evidence of guilt appears indisputable, Jewish law frees the suspect.”<sup>30</sup> Yet, a case with weaker evidence, and thus containing a split amongst the justices, results in a conviction. Academics have noted this irrational outcome, declaring that this “paradox is quite compelling.”<sup>31</sup>

While the Talmud does offer some rationale for this confusing law, it is still difficult to understand. The Talmud explains that because the judges unanimously voted guilty, no new merits will be found to help the defendant. As such, the verdict is thrown out. Yet, such an explanation is troubling at best. While merits and defense arguments are important, perhaps none exist in the present case. Why is the defendant acquitted “on the basis of an apparent technicality?”<sup>32</sup>

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

<sup>29</sup> *Id.* Importantly, there is a dispute amongst Talmudic commentators concerning the application of this rule. Some feel that this anti-unanimity rule is limited to the highest appellate court, the Great Sanhedrin of 71 judges. See Meir Simcha of Dvinsk, *Ohr Sameach*, Laws of Sanhedrin 9:1 (Warsaw ed. 1926) (positing that Maimonides limits the anti-unanimity rule to the Great Sanhedrin to highlight that the defendant is completely exonerated, as opposed to a lower Sanhedrin, where it would simply be appealed). *But see* David Ibn Zimra, *RaDBaZ*, Laws of Sanhedrin 9:1 (Wagshal ed. 1984) (applying this law even to trial courts of 23 judges); *see* Meir Dan Plotsky, *Kli Chemdah*, *Devarim* 4 (Pietrikow ed., 1927); *see* Avraham Duber Cahana Shapiro, *Dvar Avraham*, Book 2 Ch. 34:3-4 (Warsaw ed., 1906). For the sake of the comparison to the modern jury, this article accepts the latter opinion.

<sup>30</sup> Irene Merker Rosenberg & Yale L. Rosenberg, *Guilt: Henry Friendly Meets the MaHaRaL of Prague*, 90 MICH. L. REV. 604, 619 (1991).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* Although this author has not found any commentator who explicitly understands the Talmudic passage this way, an argument can be made that the unanimity law is an example of formalism. While potentially illogical, it is simply a product of procedure and thus fits into the rubric of formalism. A fuller explanation of formalism is outside the scope of this article.



*B. A Radical Reaction to this Puzzling Law*

The brilliant Talmudic commentators are understandably troubled by this puzzling anti-unanimity law.<sup>33</sup> Accordingly, one Talmudic commentator radically reinterprets this passage by reviewing the simple meaning of the text. The Aramaic word use in this Talmudic passage is “potrin,” literally understood to mean “exonerated.” However, Meir Halevi Abulafia (RaMah), a medieval scholar, offers a different translation.<sup>34</sup> Noting that the word potrin is also sporadically used in Talmudic literature to mean “sent away,” the RaMah explains the Talmud in the following rational way: “If the Sanhedrin [Jewish court] unanimously find [the accused] guilty, he is ‘sent away,’ - killed immediately.”<sup>35</sup> Since a unanimous verdict shows that the defendant is definitely guilty, there is no need to delay the defendant’s execution. In other words, the RaMah understands the Talmud as a proponent of unanimous verdicts, not as an opponent to them. Avoiding any irrational interpretation, the RaMah conveniently regards our passage as a classical law supporting unanimous verdicts. Such an opinion fits nicely with modern American law.<sup>36</sup>

### III. FINDING RATIONALITY IN IRRATIONALITY

Notwithstanding the RaMah’s novel reinterpretation, the Talmud has surprisingly acquitted a unanimously convicted defendant. Can rationality be found within this troubling law? Two alternative approaches emerge among the great Talmudic commentators in understanding our passage. Through their

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<sup>33</sup> Although the term “anti-unanimity law” is imprecise, as it suggests that the Talmud did not allow unanimous verdicts at all, I use this term as shorthand for this puzzling Talmudic law only as to not break the flow of this article.

<sup>34</sup> See Meir Halevi Abulafia, *Yad RaMah*, Sanhedrin 17a (Shaulniki ed., 1798); see also Asher ben Yechiel, *Sanhedrin 17a* (Berman ed., 1995) (quoting this explanation in the name of the RaMah); Reuven Margolis, *Margalios HaYam*, Sanhedrin 17a (Mossad HaRav Kook ed., 1996). *But see* Ha’aros, *On Yad RaMah* (Mossad HaRav Kook ed., 1996) (arguing with this interpretation of the *Yad RaMah*).

<sup>35</sup> Abulafia, *Sanhedrin 17a* (Shaulniki ed., 1798); see also Baruch Halevi Epstein, *Torah Temimah*, *Mishpatim 23:2* (Romm ed., 1904) (bringing multiple examples of this usage throughout Talmudic literature).

<sup>36</sup> See *supra* text accompanying notes 14-20.

creative explanations, these commentators shed a great deal of light on modern legal thought and provide insight into certain tenets of the Jewish justice system. Part IIIA will list two very different approaches to finding rationality within the literal interpretation of this law. Part IIIB will then highlight some insights into modern legal philosophy resulting from each of these two interpretations.

### A. *Two Distinct Approaches*

#### 1. Judicial Collusion

##### a. *Explanation of Zvi Hirsh Chajes*

Although surprisingly bold, nineteenth century scholar Zvi Hirsh Chajes gives an easily understood answer.<sup>37</sup> While unanimous verdicts can be strong indicators of the defendant's guilt, Chajes takes the opposite approach. Connecting our law to the next few lines of the text of Talmud, Chajes notes that a judge on the Sanhedrin must be a brilliant thinker. In fact, the Talmud elaborates that before gaining entry onto the bench, a Sanhedrin judge must show that he is capable of providing a cogent, logical argument for an impossible factual scenario.<sup>38</sup> The judge must prove that a certain dead animal, ritually impure according to the explicit text of the Bible, is actually ritually pure according to Jewish law. Chajes proves from here that the responsibility of the Sanhedrin is to make the impossible argument.<sup>39</sup> Noting the juxtaposition of these two Talmudic statements, Chajes explains that when a Sanhedrin unanimously convicts a defendant, collusion must be suspected. Since a verdict is reached without any dissenting opinion, the judges on the Sanhedrin are not doing their job properly, as

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<sup>37</sup> Zvi Hirsh Chajes, MaHaratz Chiyus, Sanhedrin 17a (Berman ed., 1995).

<sup>38</sup> See BABYLONIAN TALMUD, Tractate Sanhedrin 17a.

<sup>39</sup> Chajes further bolsters this understanding by comparing the Sanhedrin to the modern court systems in France and Britain. Chajes, *supra* note 37. In these modern adversarial legal systems, a lawyer represents each side and arguments are made in favor of one's client, no matter how implausible. The goal is to protect and defend ones client to the fullest. So too, the Sanhedrin must analyze the facts and relevant laws to provide two sides of every story. *Id.*

they are not making the impossible arguments. As such, the Sanhedrin's unanimity is suspect and the verdict is dismissed.<sup>40</sup>

*b. Explanation of Judah Loew*

Judah Loew, a 16th century scholar, likewise interprets this Talmudic law within the context of a fear of judicial collusion. Loew goes even further than Chajes, providing a deeper rationale for the acquittal. According to Loew, the function of the Sanhedrin is to search for "evidence of innocence rather than guilt."<sup>41</sup> In other words, they "should not be so concerned about punishing those who have committed a wrong. The court should . . . stick to its business of finding merit in the defendant's cause."<sup>42</sup> While in some cases, evidence pointing to the defendant's guilt is so strong that, that the defendant must be found guilty, such a verdict "is simply incidental," or "so as not to pervert justice."<sup>43</sup> Thus, a Sanhedrin that unanimously finds the defendant guilty and has not properly entertained the possibility of his innocence is "simply not acting as a court."<sup>44</sup>

This idea of upholding the character of the court system explains a concern remaining even after Chajes and Loew's explanations. Collusion may be a real concern in a unanimous verdict. Still, the chance that exoneration may cause a guilty party to walk away unpunished is equally disturbing. However, Loew subtly addresses this concern, responding that:

[P]reserving the court's role as a righteous court that seeks to free the innocent is more important than the incidental fact of

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<sup>40</sup> *Id.*; see also YECHIEL MICHEL EPSTEIN, ARUCH HASHULCHAN [THE TABLE IS SET] 18:7 (Simcha Fishbane ed., 1992). As an aside, it is not surprising that Chajes offers this explanation. Although not necessarily disparaging every Sanhedrin, this approach does take the daring step of entertaining that the great Sanhedrin had the potential for collusion and dishonesty. This intellectually honest position fits well with Chajes, called by modern scholars a "Traditionalist and Maskil." See Bruria Hutner David, *The Dual Role of Rabbi Zvi Hirsch Chajes: Traditionalist and Maskil* (1971) (unpublished Ph.D dissertation, Columbia University), available at <http://www1.cs.columbia.edu/~spotter/david-chajes.pdf>.

<sup>41</sup> Rosenberg & Rosenberg, *supra* note 30, at 619 n.88.

<sup>42</sup> *Id.* at 621.

<sup>43</sup> *Id.* at 619.

<sup>44</sup> *Id.* at 621; see also NORMAN LAMM, *HAGADDA: THE ROYAL TABLE* 104 (Joel B. Wolowelsky ed., 2010).

the defendant's factual guilt. That we sometimes free guilty people is not significant. What is critical is preserving the character of the court.<sup>45</sup>

Loew's weighing of judicial priorities, perhaps not "unanimous" amongst legal authorities, at least further brings rationality to this complex law.

## 2. Punishment as Spiritual Cleansing

An alternative way to approach this strange Talmudic acquittal is by looking at the reasons behind punishment. While legal scholars, and thus consequently American jurisdictions, differ about the exact purpose of punishment, two main ideas are often discussed.<sup>46</sup> One position opines a utilitarian outlook, focusing on the general deterrence that results from punishment and viewing punishment in terms of the greater good of society.<sup>47</sup> A second position believes in retributive justice, that it is morally acceptable to bestow benefit on the aggrieved party by punishment of the wrongdoer.<sup>48</sup>

Jewish law is the subject of a similar debate.<sup>49</sup> Yet, an additional dimension, perhaps a subdivision of utilitarianism, is frequently involved. Many Talmudic commentators view punishment as a means to "cleanse" the defendant of his sins, enabling him to continue striving for moral perfection.<sup>50</sup> With this understanding of punishment as a means to forgiveness, the anti-unanimity requirement can be explained, albeit in two different ways.

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<sup>45</sup> Rosenberg & Rosenberg, *supra* note 30, at 622. *Contra* Epstein, *supra* note 34 (harshly dismissing this explanation).

<sup>46</sup> See Erik Luna, *The Practice of Restorative Justice: Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205 (2003); see also CYNDI BANKS, CRIMINAL JUSTICE ETHICS: THEORY AND PRACTICE 149 (2008).

<sup>47</sup> See Luna, *supra* note 46, at 208-17.

<sup>48</sup> See generally Adam Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009).

<sup>49</sup> See Meir Simcha of Dvinsk, Ohr Sameach, Laws of Murderers 6:12 (Warsaw ed., 1926); see also BABYLONIAN TALMUD, Tractate Makkos 2a & 9a; Yom Tov Asevilli, Ritva, Makkos 9a (Wagshal ed., 1987); Birchas Avraham, Tractate Makkos 2a & 9a (Jerusalem ed., 1993).

<sup>50</sup> See Meir Simcha of Dvinsk, *supra* note 49.

*a. Explanation of Menachem Mendel Schneerson*

Analogizing to another remarkable Talmudic law, Menachem Mendel Schneerson (d. 1994) clarifies our anti-unanimity law.<sup>51</sup> The Talmud states that two conspiring witnesses receive the same punishment that they were trying to wrongly impose on a suspect if two other witnesses testify that the conspiring witnesses are lying.<sup>52</sup> The two other witnesses know that the conspiring witnesses are lying because the conspiring witnesses were together with these other two witnesses at the time the crime occurred, and therefore the conspiring witnesses could not have witnessed the alleged crime. According to many commentators, however, the conspiring witnesses are not punished if the suspect that they were trying to frame was already punished.<sup>53</sup> Although conspiring witnesses are normally punished if they are caught before punishment is carried out on the framed individual, if they perform a worse evil by actually causing the framed defendant's punishment, they are exonerated! Yosef Karo, a 16th century scholar, provides rationale for this weird dichotomy based on his opinion of the purpose of punishment.<sup>54</sup> Since punishment is meant to help cleanse a defendant's soul, a defendant whose crimes are exceptionally egregious (i.e., cause an innocent individual to actually be punished) does not deserve to be punished. Rather, he must walk free, leaving his punishment in the hands of the Lord – a surely worse fate. Likewise, explains Schneerson, a defendant unanimously convicted is undeserving of punishment by the hands of mere mortals.<sup>55</sup> Instead, this heinous criminal must be judged by the Master Judge, the Lord himself. Thus, this perplexing Talmudic statement is actually quite rational.

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<sup>51</sup> See Chaya Shuchat, *Unanimous Verdict*, MEANINGFUL LIFE CENTER, [http://www.meaningfullife.com/torah/parsha/devarim/shoftim/Unanimous\\_Verdict.php#\\_edn10](http://www.meaningfullife.com/torah/parsha/devarim/shoftim/Unanimous_Verdict.php#_edn10) (last visited Oct. 22, 2012).

<sup>52</sup> BABYLONIAN TALMUD, Tractate Makkos 2b.

<sup>53</sup> In Aramaic this phenomenon is called “Ka’asher Zamam, v’Lo Ka’asher Asa.” See Shlomo Yitzhaki, Rashi, Makkos 2b (Berman ed., 1995); cf. Tosfos, Makkos 2b (Berman ed., 1995).

<sup>54</sup> See Yosef Karo, Kesef Mishnah, Laws of Testimony 20:2 (Wagshal ed., 1984).

<sup>55</sup> Shuchat, *supra* note 51.

*b. Explanation of Menachem Mendel Morgenstern*

Menachem Mendel Morgenstern (“Kotzker Rebbe”) also understands this unanimity problem based on the idea of punishment as a mode of forgiveness and spiritual cleansing, albeit from a different angle.<sup>56</sup> While Morgenstern agrees with Schneerson that the point of punishment is to cleanse a defendant’s soul, Morgenstern differs on how this cleansing occurs. He posits that the point of Sanhedrin is to help a person come to the internal realization that he committed a wrong and to truly regret his actions.<sup>57</sup> Usually, punishment is the ideal method to bring about this realization. However, when Sanhedrin unanimously convicts a defendant of egregious behavior, punishment is unnecessary. When the defendant sees that all the judges find him guilty, without even one judge finding merit in his actions, he will surely regret his actions, thus obviating the need for punishment. Although perhaps overly favorable in his assessment of the inherent goodness of human behavior,<sup>58</sup> Morgenstern’s explanation of our law is clearly rational.

*B. Application to Modern Legal Theory*

While there is intense scholarly debate about whether Jewish law can be compared to the modern legal system,<sup>59</sup> many articles and studies have been written detailing the similarities and contrasts of the two systems.<sup>60</sup> Thus, once the logic behind

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<sup>56</sup> Menachem Mendel Morgenstern, *Emes Mikotzk Titzmach* 62 (Netzach ed., 1961).

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

<sup>58</sup> See generally JOSEPH FOX, RABBI MENACHEM MENDEL OF KOTZK: A BIOGRAPHICAL STUDY OF THE CHASIDIC MASTER (1988), available at <http://itethics.tripod.com/kotzk.pdf>. Ironically, Morgenstern is known for his sharp-witted sayings and for his impatience for false piety. His interpretation of this Talmudic passage seems to be contrary of this outlook. *Id.*

<sup>59</sup> See Suzanne L. Stone, *In Pursuit of the Counter-Text; The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813 (1993).

<sup>60</sup> See *id.*; Chad Baruch, *A Critique of Reliance Upon Jewish Law to Support Capital Punishment in the United States*, 78 U. DET. MERCY L. REV. 41, 42 n.8 (2000) (quoting e.g., Steven Friedell, *The “Different Voice” in Jewish Law: Some Parallels to a Feminist Jurisprudence*, 67 IND. L. J. 915 (1992)); BERNARD MEISLIN, THE TEN COMMANDMENTS IN AMERICAN LAW, IN JEWISH LAW AND CURRENT LEGAL PROBLEMS 109 (Nahum Rakover, ed. 1984); Perry Dane,

a non-unanimous verdict requirement has been established, the law's relevance to modern legal theory can be analyzed. A closer look at the two divergent approaches explaining the rationality in the Talmud's anti-unanimity law reveals that certain well known ideas from the works of two popular legal theorists are intertwined in this Talmudic passage.

## 1. Max Weber

### *a. Four Types of Legal Systems*

A very influential sociologist of the late nineteenth century, Max Weber had a profound impact on legal theory through his studies of the history of economics and its complex relationship to legal development.<sup>61</sup> In *Economics and Society*, Weber's groundbreaking book on this subject, he details at length "how legal forms are shaped by economic and social forces and vice versa."<sup>62</sup> In doing so, Weber outlines a basic "typology of law based on different modes of legal thought," providing a vivid picture of the evolution of the law over time.<sup>63</sup>

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*Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191 (1987); John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237 (1987); Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65 (1987); Rosenberg & Rosenberg, *supra* note 30; Suzanne L. Stone, *Siniatic and Noahide Law: Legal Pluralism in Jewish Law*, 12 CARDOZO L. REV. 1157 (1991); Thomas L. Shaffer, *Jurisprudence in the Light of the Hebraic Faith*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 77 (1984); Bernard J. Meislin, *Jewish Law in American Tribunals*, 7 ISRAELI L. REV. 349 (1972); Dena S. Davis, *Method in Jewish Bioethics: An Overview*, 20 J. CONTEMP. L. 325 (1994); Joshua Fruchter, *Doctors on Trial: A Comparison of American and Jewish Legal Approaches to Medical Malpractice*, 19 AM. J.L. & MED. 453 (1993); Irene Merker Rosenberg & Yale L. Rosenberg, "Perhaps What Ye Say Is Based Only on Conjecture"—Circumstantial Evidence, Then and Now, 31 HOUS. L. REV. 1371 (1995); Gordon J. Beggs, *Proverbial Practice: Legal Ethics from Old Testament Wisdom*, 30 WAKE FOREST L. REV. 831 (1995); Shael Herman, *The "Equity of the Statute" and Ratio Scripta: Legislative Interpretation Among Legislative Agnostics and True Believers*, 69 TUL. L. REV. 535 (1994); Irene Merker Rosenberg & Yale L. Rosenberg, *Advice from Hillel and Shammai on How to Read Cases: Of Specificity, Retroactivity and New Rules*, 42 AM. J. COMP. L. 581 (1994).

<sup>61</sup> SHARYN L. ROACH ANLEU, LAW AND SOCIAL CHANGE 20-27 (2000), available at [http://books.google.com/books/about/Law\\_and\\_Social\\_Change.html?id=5Xk96podfLkC](http://books.google.com/books/about/Law_and_Social_Change.html?id=5Xk96podfLkC).

<sup>62</sup> *Id.* at 22.

<sup>63</sup> *Id.* at 23.

Weber's typology consists of four different categories of the law, each one leading into the next, resulting in a modern, formal and rational legal system.<sup>64</sup> The first category, which Weber calls "formal irrationality," is when judges "apply means that are beyond the control of reason."<sup>65</sup> The paradigm of "formal irrationality" is law based on prophecy or on an oracle.<sup>66</sup> Although this system relies on a formal, structured lawmaking body (i.e., prophet), its primitiveness is highlighted by the lack of logic inherent to any law.

The second category, "substantive irrationality," is when "decisions are influenced by concrete factors of the particular case evaluated in terms of ethical, emotional, or political values rather than general norms."<sup>67</sup> Weber cites to the *Kadi*, the Middle Eastern Islamic judge, as the prototype "substantive irrationality" lawmaker.<sup>68</sup> As the *Kadi* shied away from general rules, instead focusing on "particular merits of individual case," many decisions were based on emotional or political considerations.<sup>69</sup>

Weber's third category, called "substantive rationality," has best been described as a system "where legal decisions are made in reference to rules that reflect value commitments or ethical imperatives, for example a set of codified religious rules or a political ideology."<sup>70</sup> Some have classified the Talmud as an example of "substantive rationality," as the Talmud contains numerous laws stemming from a certain moral and ethical requirement.<sup>71</sup>

The most sophisticated legal system of "formal rationality," Weber's fourth category, consists of universally applied rules, laws and regulations.<sup>72</sup> This system is as "an orientation to the world which expresses itself by imposing order on reality in

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<sup>64</sup> Nancy L. Schwartz, *Max Weber's Philosophy*, 93 YALE L.J. 1386, 1387-88 (1984) (book review).

<sup>65</sup> ANLEU, *supra* note 61, at 23.

<sup>66</sup> *Id.* at 24.

<sup>67</sup> *Id.*; *see also* Schwartz, *supra* note 64, at 1388.

<sup>68</sup> ANLEU, *supra* note 61.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *See* Schwartz, *supra* note 64, at 1395.



strict numerical, calculable terms.”<sup>73</sup> Weber viewed contemporary Western law as the paradigm of this system.<sup>74</sup>

*b. Sanhedrin, Substantive Rationality and the Inquisitorial System*

The Sanhedrin, in many ways, operated as a typical “substantive rationality” system. One important characteristic of the Sanhedrin in which this is highlighted is its “inquisitorial” nature.<sup>75</sup> In the familiar, adversarial court system in America, the lawyers have the responsibility of establishing and clarifying the facts. By contrast, the role of a judge of the Sanhedrin was to be a “fact finder” as well as a judge. This added responsibility, common in many European countries today, is emblematic of a “substantive rationality” system.<sup>76</sup> As judges have greater scope for intervention, the inquisitorial system truly illuminates how “value commitments or ethical imperatives” can play a major role in decisions.<sup>77</sup>

*c. Sanhedrin, Substantive Rationality and Legal Guilt*

Substantive rationality is also found in the Sanhedrin by examining the concept of legal guilt. Legal scholars distinguish between two types of guilt: factual guilt and legal guilt.<sup>78</sup> Factual guilt is whether or not someone actually committed a crime. Legal guilt is whether or not enough evidence is provided to prove that someone actually committed the crime.<sup>79</sup> An important goal of a legal system built around legal guilt is to ensure that innocent people are never wrongly convicted of a crime, even if that means some more guilty people go free as a

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<sup>73</sup> KENNETH L. MORRISON, MARX, DURKHEIM, WEBER: FORMATIONS OF MODERN SOCIAL THOUGHT 356 (2006), available at <http://books.google.com/books?id=sya6fxO6zgC&q=357#v=onepage&q=strict%20numerical&f=false>.

<sup>74</sup> ANLEU, *supra* note 62, at 26.

<sup>75</sup> See *Accusatory and Inquisitorial Procedure*, JEWISHENCYCLOPEDIA, <http://www.jewishencyclopedia.com/articles/725-accusatory-and-inquisitorial-procedure> (last visited Oct. 22, 2012).

<sup>76</sup> ANLEU, *supra* note 61, at 24.

<sup>77</sup> *Id.*

<sup>78</sup> See Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1658 (2010).

<sup>79</sup> *Id.* at 1657.

consequence.<sup>80</sup>

Loew's statement about the Sanhedrin's goal to "free the innocent" being "more important than the incidental fact of the defendant's factual guilt" speaks to the essence of legal guilt.<sup>81</sup> According to Loew, an acquittal for a unanimous verdict due to potential collusion is necessary to ensure the integrity of the judicial system.<sup>82</sup> Public confidence in the judicial system is such an important ideal that a defendant who is likely guilty can walk free because of it: a key tenet of a legal guilt system. Thus, the Sanhedrin seemingly gave more weight to legal guilt than factual guilt.

Viewing the Sanhedrin in the legal guilt context fits very nicely with the Sanhedrin's "substantive rationality" component. Preserving the character of the court at the expense of not finding the defendant guilty of a crime that he likely committed typifies the "substantive rationality" idea of a "reference to a substantive goal" instead of an "application of abstract rules."<sup>83</sup> Requiring a dissenting opinion to ensure the credibility of the legal system at large imposes an extraneous ethical imperative not found in abstract rules. As such, Loew's explanation of this Talmudic passage is another sign of the "substantive rationality" inherent in the Sanhedrin.

#### *d. Formal Rationality and the Non-unanimous Verdict*

The theme of "substantive rationality" of the Sanhedrin is what makes the unanimity law so striking. A unanimity requirement for verdicts generally indicates "substantive rationality," as unanimity signifies "a collective subjective response to the facts as presented."<sup>84</sup> This "collective subjective response" stems from jurors' personal feelings or value judg-

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<sup>80</sup> See Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 143, 149 (2011).

<sup>81</sup> See Rosenberg & Rosenberg, *supra* note 30.

<sup>82</sup> See *id.*

<sup>83</sup> ANLEU, *supra* note 61, at 23-24; see also Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1227 n.164 (1989).

<sup>84</sup> ANLEU, *supra* note 61, at 26.

ments, rather than any formal decision making process.<sup>85</sup> For this reason, Weber viewed “substantive rationality” as more primitive than “formal rationality,” the beacon of the modern legal system.<sup>86</sup>

Quite possibly, the anti-unanimity Talmudic law is meant to combat this primitiveness. Chajes understood the anti-unanimity rule as protecting against judicial collusion, or perhaps, against this “collective subjective response.” By requiring the judges to provide at least one argument in defense of the accused, the Talmud was advocating for a more formal system of decision-making, unhindered by pure emotion.<sup>87</sup> To use Weber’s terminology, the anti-unanimity requirement was thus an injection of “formal rationality” into a highly “substantive rationality” system.

## 2. Ronald Dworkin

### *a. Judicial Discretion*

Ronald Dworkin, an influential modern legal philosopher, has written extensively on the role of judges as legal decision makers.<sup>88</sup> In Dworkin’s manifesto, *Taking Rights Seriously*, he discusses the interplay between the arbiter and the preservation of certain fundamental rights for the defendant.<sup>89</sup> Dworkin argues that “claims of right” should “trump” utilitarian arguments in matters of morality and politics. Cast as arguments of principle, in law, they cannot be defeated by arguments of social policy.<sup>90</sup> As such, Dworkin views a judge’s role

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<sup>85</sup> *Id.* at 27.

<sup>86</sup> *Id.* at 26.

<sup>87</sup> See BABYLONIAN TALMUD, Tractate Sanhedrin 17a. Chajes himself alludes to this phenomenon. Chajes, *supra* note 37. By comparing the Sanhedrin and its inquisitorial system to the modern public defenders of the French and British adversarial legal systems, Chajes shows how the anti-unanimity requirement bridges the gap between the two systems. Both systems are more focused on “formal rationality,” preferring that decisions are free of subjective, moral imperatives. While the adversarial system employs the public defender to prevent against the “collective subjective response,” the Sanhedrin utilizes the anti-unanimity requirement to ensure the same outcome. *Id.*

<sup>88</sup> See Rolf Sartorius, *Dworkin on Rights and Utilitarianism*, 1981 UTAH L. REV. 263, 263 (1981).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 264; see Paul Yowell, *A Critical Examination of Dworkin’s Theo-*

in assigning fault and punishment to the accused individual as an end unto itself, and not as a means to a larger social end.<sup>91</sup> Punishment is not to be used solely as a means of protection for society.<sup>92</sup>

*b. Dworkin and the Chassidic Outlook on Punishment*

Dworkin's view of punishment as an "end[]" and not as a "means" is reflective of the aforementioned approach of punishment as a spiritual cleanser. To interpret the startling anti-unanimity Talmudic law, Schneerson explains that this egregious defendant is undeserving of spiritual purification and is therefore freed.<sup>93</sup> Morgenstern goes to the opposite extreme, understanding that in a case of such egregious misconduct punishment is unnecessary, as this defendant will surely repent when he hears of his unanimous conviction.<sup>94</sup>

Yet, both interpretations are not bothered by the fact that a horrible murderer may be let loose, as protection of society is not a consideration when delivering punishment. Once the "ends" of punishment are received by the defendant, any goal of punishment as a "means" to protect society is meaningless. Dworkin's idea of utilitarian considerations being "trumped" by an individual right is the lesson of our startling anti-unanimity passage.

*c. Puzzling Scenario as Proof to Dworkin*

Further introspection into the perplexing Talmudic passage reveals a certain bizarre legal scenario.<sup>95</sup> Envision that twenty-two out of the twenty-three justices on the Sanhedrin have just voted that a defendant is guilty of murder. However, the twenty-third, and final, justice believes that the accused is innocent. How should this last justice vote? If he votes guilty,

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*ry of Rights*, 52 AM. J. JURIS 93, 95 (2007).

<sup>91</sup> STEPHEN GUEST, RONALD DWORKIN 65 (1991), available at <http://books.google.com/books?id=X1hkTzw41PoC>.

<sup>92</sup> *Id.*; see also Yowell, *supra* note 90, at 117.

<sup>93</sup> See *supra* text accompanying notes 52-55.

<sup>94</sup> See *supra* text accompanying notes 56-57.

<sup>95</sup> See Yosef Babad, *Minchas Chinuch*, Commandment 78 (Machon Jerusalem ed., 1988) (discussing this dilemma and leaving it unresolved); see also Dovid Tzvi Zahman, *Minchas Soles* 287 (Belgoraj ed., 1934).

against what he believes to be the truth, the defendant will be acquitted due to our anti-unanimity rule. However, if the justice votes what he earnestly believes, a vote of “innocent,” the defendant will be convicted and executed under a majority decision of twenty-three against one. A truly strange dilemma!

Chaim ibn Attar (“Ohr HaChaim”) solves this dilemma by understanding the Biblical verse commanding one to “follow the majority” as requiring the twenty-third justice to vote “innocent.”<sup>96</sup> Expounding on the goal of true justice, Chaim ibn Attar posits that a judge must not think of larger social policy considerations when deciding a case.<sup>97</sup> The judge is required to vote his belief on the case at hand, never looking at the effect of his vote. This is the meaning of the commandment to follow the majority – follow the majority even if you have another way to effectuate certain social policies.<sup>98</sup>

Chaim ibn Attar’s lesson, that every individual case must be judged as the “end” to itself and not as a “means” to a larger social policy goal, is virtually identical to Dworkin’s legal theory. Interestingly, Chaim ibn Attar, like Schneerson and Morgenstern, extrapolates such a concept from this fascinating anti-unanimity Talmudic passage.

#### IV. CONCLUSION

Unanimous verdicts have long been the subject of much scholarly literature. While a large part of scholarly discussion centers on whether a unanimity requirement for verdicts is beneficial or detrimental to the legal system, the Talmud has a novel approach. The Talmud’s view that unanimous verdicts result in an acquittal is, at first glance, very troubling. Yet, after analyzing multiple potential rationales for this confusing law, the anti-unanimity of the Talmud sheds light on two important legal theories. Highlighting Weber’s “formal rationality” and Dworkin’s “ends/means” theories, this Talmudic law can be very helpful to modern legal philosophers. Instead of an arcane, irrational rule, the anti-unanimity of the Sanhedrin is actually a brilliant lesson in legal theory.

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<sup>96</sup> Chaim ibn Attar, *Ohr Hachaim*, Mishpatim 23:2 (Petrekov ed., 1889).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*