"CAIN ROSE UP AGAINST HIS BROTHER ABEL AND KILLED HIM": MURDER OR MANSLAUGHTER?

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I. INTRODUCTION

The world’s first case of man slaying man,¹ and, indeed, the earliest recorded crime,² is dealt with in a series of terse verses in Genesis, the first of the five Books of the Torah,³ the Jewish Bible:

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³ In our citations to Jewish law materials, we have used English translations whenever possible, verifying their accuracy by comparing them with the original sources. In some cases, however, this means that the same word will be transliterated differently by various translators. For example, the Hebrew letter equivalents of “s” and “t” are sometimes used interchangeably. With respect to Hebrew and Aramaic sources that have not been translated into English, we of course vouch for the accuracy of the translations.


² It is the first crime unless, of course, one counts Adam’s and Eve’s disobedience to God when they ate the forbidden fruit (Genesis 3:1-19).

³ The term “Torah” comes from the Hebrew root meaning “to instruct.” In Orthodox Jewish legal discourse the Torah was received at Sinai, written by Moses at God’s command. See, e.g., Deuteronomy 31:24 (Moses “[wrote] the words of this Torah onto a book”); accord, Maimonides, Mishneh Torah, The Book of Knowledge 1b (Moses Hyamson trans., 1981). Modern biblical scholarship, especially by Christian and non-Orthodox Jewish scholars, conjectures that there were several stages of transmission, both oral and written, of the material finally recorded in the Old Testament. E.g., Bernhard W. Anderson, Understanding the
1. Now the man had known his wife Eve, and she conceived and bore Cain, saying, "I have acquired a man with [the Lord]."

2. And additionally she bore his brother Abel. Abel became a shepherd, and Cain became a tiller of the ground.

3. After a period of time, Cain brought an offering to [the Lord] of the fruit of the ground;

4. and as for Abel, he also brought of the firstlings of his flock and from their choicest. [The Lord] turned to Abel and to his offering,

5. but to Cain and his offering He did not turn. This annoyed Cain exceedingly, and his countenance fell.

6. And [the Lord] said to Cain, "Why are you annoyed, and why has your countenance fallen?

7. Surely, if you improve yourself, you will be forgiven. But if you do not improve yourself, sin rests at the door. Its desire is toward you, yet you can conquer it."

8. Cain spoke with his brother Abel. And it happened when they were in the field, that Cain rose up against his brother Abel and killed him.

9. [The Lord] said to Cain, "Where is Abel your brother?" And he said, "I do not know. Am I my brother's keeper?"

10. Then He said, "What have you done? The blood of your brother cries out to Me from the ground!

11. Therefore, you are cursed more than the ground, which opened wide its mouth to receive your brother's blood from your hand.


Although generally it refers to the first five books of the Bible, "Torah" is also used in a far broader sense, encompassing not only the "Prophets" and "Writings" segments of the Old Testament, but also the entirety of Jewish religious learning, including, inter alia, the Talmud, post-talmudic legislation and codes, medieval commentaries, midrashic literature and responsa. In this article, however, we will use the word "Torah" in its limited sense, referring to the first five books of the Old Testament.
12. When you work the ground, it shall no longer yield its strength to you. You shall become a vagrant and a wanderer on earth."

13. Cain said to [the Lord], "Is my iniquity too great to be borne?

14. Behold, You have banished me this day from the face of the earth—can I be hidden from Your presence? I must become a vagrant and a wanderer on earth; whoever meets me will kill me!"

15. [The Lord] said to him, "Therefore, whoever slays Cain, before seven generations have passed he will be punished." And [the Lord] placed a mark upon Cain, so that none that meet him might kill him.

16. Cain left the presence of [the Lord] and settled in the land of Nod, east of Eden.4

Most authorities view Cain's act as murder.5 For example, fast forward fifty-seven centuries, and consider the case of Will Borrer,7 charged with the

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4 The Chumash, Genesis 4:1-16, at 19-23 (Nosson Scherman ed. 1993). Unless otherwise noted, quotations of the Torah in this article will be from this edition. "Chumash," the Hebrew word meaning "five," is a synonym for the Torah, as is Pentateuch, its Greek counterpart. The Torah, in its original form, has neither punctuation nor vowels, both of which can alter meanings drastically. The translations of the Bible, initially into Aramaic and Greek and thereafter into numerous languages including English, often resolve rather than preserve ambiguities, thereby favoring one interpretation over another. This means that different English translations will sometimes produce differing interpretations of the text. See, e.g., infra notes 160-67 and accompanying text, discussing the meaning of the "sevenfold punishment" described in Genesis 4:15, as applying either to Cain or to the person who kills him.

5 See, e.g., David W. Amram, Leading Cases in the Bible 34 (1905) ("The record of the first murder case is found in the fourth chapter of Genesis"); Dershowitz, supra note 3, at 48-59 ("Chapter 2. Cain Murders—and Walks"); David Max Eichhorn, Cain: Son of the Serpent 62 (2d ed. 1985) ("Cain decided to murder Abel"); Alexander Franklin, Seven Miracle Plays 23-37 (1963) (including one such medieval play entitled "Cain and Abel," that depicts Cain as a premeditated murderer whose sacrificial tithe is solely the result of his religious brother's persistent urging, and is given grudgingly, even shortchanging God; when Cain's sacrifice is rejected, Abel says it is not his fault, and Cain attacks him with a bone, saying "So may this cheek bone burst thy brain, That life and thee shall part in twain... So lie down there and take thy rest. And thus I rid me of a pest"); Ricardo J. Quinones, The Changes of Cain 3 (1991) (observing that "[t]he dramatic elements of the [Cain and Abel] story are powerful... the first murder").

6 See, e.g., Elliot N. Dorff & Arthur Rosett, A Living Tree—the Roots and Growth of Jewish Law 6 (1988), noting that "[t]he Jewish tradition has its own system for numbering years from the date of the creation of the world, under which the first half of 1987
murder of his neighbor, to whom he had previously complained about the victim’s cattle getting into his field. According to the prosecution, defendant went into the field where the victim was plowing, laid in wait, and then shot him. Borrer claimed self-defense, and he was convicted of manslaughter and sentenced to two years imprisonment.

On appeal, Borrer raised numerous points of error, including the prosecutor’s allegedly inflammatory remarks to the jury that the case reminded him of the first “assassination,” referring specifically to Cain and Abel. The court rejected defendant’s argument, reasoning that “the state’s evidence, if believed, would indicate that the homicide was an assassination,” whereas the jury rejected that version of the events by finding Borrer guilty only of manslaughter and assessing the lowest possible punishment. Consequently, said the court, it was not likely that there was any impropriety in the remarks.

Improper or not, the prosecutor’s argument and the events in Borrer do resonate with the biblical account. And, as we shall see, just as the jury in that case believed the defendant was guilty only of manslaughter and not murder, there is a basis for viewing Cain’s act in a similar way.

falls in the year 5747.” To be sure, the Cain and Abel story has mythical dimensions (see, e.g., QUINONES, supra note 5, at 3: “Out of the vast repertoire of Western myth, one myth stands apart for the extraordinary longevity and variousness of its appeal. This is the Cain-Abel story . . . one of the defining myths of our culture.”). It is, however, the traditional Jewish version of which we write, and that tradition dates the crime as indicated in the text accompanying this footnote. Even within the Jewish tradition, it should be noted, Cain and Abel have been depicted as archetypes. See infra notes 92-97 and accompanying text.

8 See id. at 1004.
9 Id.
10 See id.
11 There is a split as to whether prosecutorial reliance on biblical verses, such as “eye for eye,” is reversible error in capital cases. Compare State v. Rouse, 451 S.E.2d 543, 562 (N.C. 1994) (affirming death penalty even though the prosecutor had told the jury that “eye for eye” was an appropriate basis for imposing capital punishment), and State v. Shum, 866 S.W.2d 447, 464-65 (Mo. 1993) (en banc) (affirming first degree murder conviction and finding that prosecutor’s reliance on “eye for eye” during closing argument was not plain error), with People v. Sandoval, 841 P.2d 862, 883-84 (Cal. 1992) (prohibiting either district attorney or defense counsel from relying on Biblical authority in arguments to jury), and Commonwealth v. Chambers, 599 A.2d 630, 644 (Pa. 1991) (reversing death penalty and warning prosecutors that using Biblical authority to get a death sentence is per se reversible error).
Pursuing this anachronistic exercise a bit further, let us consider the case of People v. Cain, first according to contemporary American law, and then under Jewish law. At least at first glance, one is struck by a jarring discrepancy: In the biblical account, Cain’s punishment was exile, a seemingly lenient sanction if the crime was in fact cold-blooded murder. If modern American law were applied, could such a slayer expect better or worse? Would he fare as well as Borrer did? Of course, the result would turn largely on the underlying facts and circumstances, which we have not yet explored, but a lot would also depend on the jurisdiction in which Cain was brought to trial.

Murder in the common law jurisdictions is typically defined as a malicious, unlawful killing that requires either proof of intent to kill or to do grievous bodily harm or proof of a depraved heart. In such states, to establish murder in the first degree, there is usually a requirement of deliberation or premeditation, or of both elements, which are generally defined as cool reflection for some period of time. Without these mental states, the killing constitutes murder in the second degree. As we shall see, depending on which version

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12 See infra notes 147-70 and accompanying text, discussing the nature of the sanction.
13 Professor Dershowitz is somewhat exercised by this ostensible divine leniency, especially in comparison to the punishment meted out to Adam and Eve as a result of their fateful encounter with the serpent and the fruit of the tree of good and evil. DERSHOWITZ, supra note 3, at 50.
14 See WAYNE R. LAFAVE, CRIMINAL LAW § 7.1, at 653-55 (3d ed. 2000). Most states also classify killings during the commission of serious felonies as murder. Id. at 653.
15 See id. § 7.7, at 692-96; see also United States v. Chagra, 638 F. Supp. 1389, 1399 (W.D. Tex. 1986) (defining deliberation as requiring “a cool mind that is capable of reflection” and premeditation as requiring reflection “at least for a short period of time” before the killing), aff’d, 807 F.2d 398 (5th Cir. 1986).
16 See LAFAVE, supra note 14, § 7.7, at 693; see, e.g., People v. Anderson, 447 P.2d 942, 948 (Cal. 1968) (observing that “the legislative classification of murder into two degrees would be meaningless if ‘deliberation’ and ‘premeditation’ were construed as requiring no more reflection than may be involved in the mere formation of a specific intent to kill”); accord State v. Solomon, 421 N.E.2d 139 (Ohio 1981); but see, e.g., Commonwealth v. Carrol, 194 A.2d 911, 916 (Pa. 1963) (quoting an earlier case that “‘no time is too short for a wicked man to frame in his mind the scheme of murder’ ”); Young v. State, 428 So. 2d 155, 158 (Ala. Crim. App. 1982) (noting that “[p]remeditation and deliberation may be formed while the killer is ‘pressing the trigger that fired the fatal shot.’ ”) (citation omitted).
17 See LAFAVE, supra note 14, § 7.7, at 692-96.
of the Cain saga the jury finds to be credible, there is a basis for a finding of either first or second degree murder.\textsuperscript{18}

Under the Model Penal Code, on the other hand, murder requires proof of either purpose or knowledge,\textsuperscript{19} or a very high degree of recklessness, "manifesting extreme indifference to the value of human life."\textsuperscript{20} Under the Code, there are no degrees of homicide.\textsuperscript{21} Diminished culpability is evaluated through the extreme emotional disturbance doctrine, proof of which reduces murder to manslaughter.\textsuperscript{22}

Turning from murder to manslaughter, the common law states define the latter as an intentional killing "without malice aforethought,"\textsuperscript{23} in the heat of passion.\textsuperscript{24} The requisite provocation must be reasonable or adequate and is usually very strictly defined, e.g., being assaulted or seeing a spouse in flagrante, and not having time to cool off. It is judged by an objective standard.\textsuperscript{25} Some common law states have more expansive definitions of provocation,\textsuperscript{26} but even in these states it is often difficult to get to the jury on

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\textsuperscript{18} See infra notes 147-56 and accompanying text.

\textsuperscript{19} See MODEL PENAL CODE, § 210.2(1), 120 (1985), stating that "criminal homicide constitutes murder when: (a) it is committed purposely or knowingly." In § 2.02(2)(a), the Code defines "purposely" as follows:

A person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; . . . .

In turn,

[a] person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

\textsuperscript{20} Id. § 2.02(2)(b).

\textsuperscript{21} See id. at § 210.2(1)(b), at 120.

\textsuperscript{22} See infra notes 23-34 and accompanying text.

\textsuperscript{23} LAFAVE, supra note 14, § 7.9, at 703.

\textsuperscript{24} See id. § 7.10, at 703-17.

\textsuperscript{25} See Girouard v. State, 583 A.2d 718, 722 (Md. 1991) (reaffirming common law rule that words alone are insufficient for a manslaughter instruction); State v. Shane, 590 N.E.2d 272, 278 (Ohio 1992) (same).

\textsuperscript{26} See Commonwealth v. Berry, 336 A.2d 262, 264-65 (Pa. 1975) (permitting manslaughter instruction if any circumstances, including words, would provoke a reasonable person to lose self-control); Maher v. People, 81 Am. Dec. 781 (Mich. 1862) (holding that what constitutes reasonable provocation is usually a matter for the jury rather than the court).
the issue. Furthermore, some jurisdictions require the victim rather than a third party to be the provoker. Thus if one views God rather than Abel as the provocateur, in such jurisdictions Cain might be convicted of murder even if he acted in the heat of passion.

To establish manslaughter under the Model Penal Code, the defendant must have acted recklessly or "under extreme mental or emotional disturbance for which there is a reasonable explanation or excuse." The test is more subjective than the common law counterpart of heat of passion; unlike the latter, there is no per se requirement that the provocation be legally adequate, although there are objective elements to it. Thus, the "reasonableness" of the "explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." As a result, Code jurisdictions make it far easier to secure jury consideration of manslaughter. There need not even be real external provocation; rather, it can stem from the defendant's psyche. For example, in one case, the wrongdoer was afraid of his brother and killed him, even though there was no basis in fact for his fear. Accordingly, the Model Penal Code would give Cain a realistic

28 See Lopez v. State, 716 S.W.2d 127, 129 (Tex. Crim. App. 1986) (upholding murder conviction of defendant who in a rage killed a third party, based on penal code provision stating that "sudden passion" means passion directly caused by and arising out of provocation by the individual killed.)
29 See infra note 114 and accompanying text exploring God's possible role as provocateur.
30 See MODEL PENAL CODE, § 210.3(1), at 120 (1985). The recklessness required for manslaughter is less egregious than that mandated for murder, which necessitates proof of "extreme indifference to the value of human life." Id. § 210.2(1)(b) In § 2.02(2)(c), the Code defines "recklessly" in these terms:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

31 Id. § 210.3(1)(b).
32 Id. The drafters' comments make clear that there is a wholly subjective requirement regarding whether the defendant did in fact act under extreme emotional disturbance, whereas the "reasonableness" requirement is objective. MODEL PENAL CODE AND COMMENTARIES, Part II, § 210.3, at 49-50 (1980).
33 See State v. Elliot, 411 A.2d 3 (Conn. 1979). There is a split of opinion on the underlying rationale for provocation, that is, whether it is a quasi-justification or a quasi-excuse, and the alternative one chooses can alter the result. For
possibility of getting to the jury on a manslaughter charge. It is not, however, a slam dunk. Even in Code states, courts will sometimes refuse manslaughter instructions, finding the provocation to be inadequate.\textsuperscript{34} In addition, even if Cain received jury consideration for manslaughter, there is no guarantee that the jurors would accept his mitigation claim.

Taking this millennium-hopping comparison a few steps backward, we learn that the Jewish law of homicide affords an interesting contrast, as well as an uncertain result, in the case of Cain. To be guilty of murder in the rabbinic courts, one must kill intentionally and with premeditation. For example, according to Exodus 21:14, one who "act[s] intentionally against his fellow to kill him with guile" is guilty of a capital crime,\textsuperscript{35} whose punishment example, if provocation is considered a semi-justification, some states take the position that if the killer accidentally slays someone other than the provoker, there is no defense. \textit{E.g.}, Lopez v. State, 716 S.W.2d 127 (Tex. Crim. App. 1986). If semi-excuse is the rationale, one focuses on the defendant's state of mind rather than the culpability of the victim. In the latter circumstances, the killer cannot be deterred, and his rage is more understandable. \textit{See} Joshua Dressler, \textit{Rethinking Heat of Passion: A Defense in Search of a Rationale}, 73 J. CRIM. L. \\& CRIMINOLOGY 421, 456-58 (1982) (arguing that the justification rationale is in tension with society's belief in the value of human life).


\textsuperscript{35} Jewish law, however, contains an array of procedural, substantive and evidentiary safeguards that render conviction exceedingly difficult. \textit{See}, e.g., Irene Merker Rosenberg \\& Yale L. Rosenberg, \textit{In the Beginning: The Talmudic Rule Against Self-Incrimination}, 63 N.Y.U. L. REV. 955 (1988) (discussing the absolute prohibition against use of confessions in criminal cases); Irene Merker Rosenberg et al., \textit{Murder by Gruma: Causation in Homicide Cases Under Jewish Law}, 80 B.U. L. REV. 1017 (2000) [hereinafter Causation in Homicide Cases Under Jewish Law] (analyzing the hyperstringent talmudic causation requirements); Irene Merker Rosenberg \\& Yale L. Rosenberg, "Perhaps What Ye Say is Based Only on Conjecture"—\textit{Circumstantial Evidence, Then and Now}, 31 HOUS. L. REV. 1371 (1995) (explaining the absolute prohibition against the use of circumstantial evidence). Indeed, one such procedural safeguard is that the witnesses must warn the suspect that the conduct in question is prohibited and punished by death, THE BABYLONIAN TALMUD, Sanhedrin 80b (I. Epstein ed., 1960) [hereinafter B. TALMUD], a notice requirement designed to deter the defendant, but which, in a homicide case, establishes the wrongdoer's premeditation if it fails to accomplish the desired objective.

Not all of these barriers, however, apply to non-Jews. Cain was not Jewish—the first Jew was Abraham—and, in any event, the Torah had not yet been given to man. Even the Noachide laws, which are applicable to all human beings and which include a prohibition against murder, B. TALMUD, \textit{supra}, Sanhedrin 56a-56b, may not have been imposed in Cain's era. \textit{See} 4 ENCYCLOPEDIA TALMUDICA 362 (Shlomo J. Zevin ed., 1992) (noting disagreement among
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is death by beheading. On the other hand, Exodus 21:13 states that one who kills but who “ha[s] not lain in ambush” for his victim is subject only to banishment in a city of refuge. This exile, which echoes Cain’s sentence, saves the wrongdoer from the blood avenger, and living with the priestly Levites in a city of refuge permits him to contemplate his sin and refine his character. Similarly, in Numbers 35:20-23, the verses suggest that one is guilty of murder only if he lies in wait, that is, in “ambush.” If, however, he kills another “with suddenness, without enmity,” he is not culpable for murder and is instead consigned to a city of refuge. The barebones Genesis account does not provide sufficient information to establish whether Cain lay in wait and was consequently a murderer, or whether the killing was even intentional.

Be that as it may, safety from the blood avenger in a city of refuge is available only to one who is guilty of an “inadvertent” killing, which is roughly a synonym for negligent homicide. There is also a category of talmudic sages “regarding the number of precepts given to Adam. All agree, however, that after the Flood Noah’s descendants were commanded all seven precepts”). Presumably, however, the prohibition against murder was one of the laws given to Adam. Indeed, it is a malum in se offense, and ignorance of the law is not a defence in such circumstances. DERSHOWITZ, supra note 3, at 53. There is, however, a Midrash stating that God mitigated Cain’s punishment on notice grounds, i.e., no one had told him of the seriousness of his crime. See infra notes 146, 156 and accompanying texts; but see OTZER HA-MIDRASHIM, Leviticus 5:1, at 222 (Eisenstein ed. undated) (asserting that Cain loved possessions and did not study Torah, whereas Abel did study and that the sign placed on Cain after the killing was either boils or leprosy, as a penalty for his failure to learn Torah; the underlying assumption appears to be that long before Sinai some form of the Torah was available, and there was an obligation to learn it).

See THE MISHNAH, Sanhedrin 9:1, at 395 (Herbert Danby trans., 1933) [hereinafter MISHNAH], reprinted in B. TALMUD, supra note 35, Sanhedrin 76b.


37 See THE PENTATEUCH—THE HIRSCH COMMENTARY, Numbers 35:34, at 647 (Ephraim Oritz ed. & Gertrude Hirschler trans., 1986) [hereinafter HIRSCH COMMENTARY ON THE TORAH].

38 See Numbers 35:20.

39 See id. at 35:22.

40 See id. at 35:22-28; Deuteronomy 4:41-43, 19:2-10.

41 See infra notes 130-38 and accompanying text (giving various and conflicting accounts of the killing).

42 See THE CODE OF MAIMONIDES, Book 11: The Book of Torts, Murder and the Preservation of Life 5:1, at 209 (Hyman Klein trans., 1954) [hereinafter THE CODE OF MAIMONIDES] (noting that “[i]f one slays inadvertently, he must go into exile from the district where he has slain to a city of refuge”).

43 See ARTSCROLL SERIES, TALMUD BAVLI, Makkos, Introduction to ch. 2, p. 1 (Hersh Goldwurm & Nosson Scherman eds., 1990) [hereinafter ARTSCROLL TALMUD] (defining “inadvertent killing” as one “which results from some measure of negligence, but not gross negligence. This is the type of unintentional killing for which the Torah decrees . . . exile”).
killings known as “close to intentional,” describing a reckless or perhaps even grossly negligent homicide or an intentional slaying without premeditation. Such killings are not punished in the human courts but are left either to the blood avenger or to God, being too serious for exile to a city of refuge, but not quite evil enough for infliction of capital punishment by the human court. Cain’s act might fit within this category as well, depending on the manner in which he killed Abel.

The net effect is that, under either American or Jewish law, determining whether Cain might be guilty of something less than intentional, premeditated murder will turn on a careful examination of the “facts” of the case. At this point, however, it must be conceded that the evidence is fairly stale. How, then, do we ascertain the facts?

From a Jewish perspective, assessing the Cain-Abel conflict and ascertaining Cain’s level of culpability involve more than scrutinizing the skeletal language of the Torah text and then applying the law to these “facts.” In Judaism, the words of the Torah itself are of course the natural starting point, but they are merely the beginning of the exegetical process. Understanding can be achieved only after examination of a far more extensive corpus, including the Talmud, a redaction of the oral law of Judaism, consisting of the Mishnah and the Gemara; the Midrash Aggadah, rabbinic interpretations of Torah verses that include moral and ethical teachings disguised as stories, parables, riddles, legends and the like, that often appear contradictory to one another; medieval commentaries by such luminaries as Rashi, the Ramban, and the like.
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III. THE NOT SO PLAIN MEANING
OF THE TORAH TEXT

Starting with the verses in Genesis themselves, initially the key word in the biblical narrative seems to be the verb describing Cain’s sin of taking his brother’s life. The Hebrew word used in the original text is a form of the root “harag,” whose translation is generally “kill.” The Hebrew root for murder, on the other hand, is usually “ratsach,” the act prohibited and the term used in the Decalogue. By using the verb “harag” in this context, is the Bible suggesting that Cain did not commit an intentional premeditated murder, as most people seem to think, but is guilty only of some lesser form of homicide?

As it turns out, relying on the “harag-ratsach” distinction is not that helpful in determining the degree of homicide committed by Cain. Although “ratsach”

believed to be the eternal, relevant, and fundamentally religious significance of the biblical text.”

50 It should be noted that, although the Talmud, Midrash Aggadah, and medieval and modern commentaries are discrete categories, the midrashic literature is incorporated throughout the Talmud, and it is likewise cited, quoted and relied on by the commentators.


52 See JASTROW, supra note 51, at 1493 (translating “ratsach” as “to slay, murder”); AVINOAM, supra note 51, at 359 (giving the translation as “to murder, slay, kill”); CLARK, supra note 51, at 248 (translating “ratsach” solely as “murder”).

means murder when used in the noun form, when used as a verb, both Hebrew terms, “harag” and “ratsach” can denote either killing or murder. For instance, in Exodus 21:14, the Torah uses a form of the verb “harag” in describing the punishment inflicted on one who “act[s] intentionally against his fellow to kill him with guile,” a clear instance of intentional, premeditated murder. Conversely, in Deuteronomy 4:42, Scripture employs “ratsach” to denote a form of negligent homicide.

Since the key verb describing the slaying turns out to be inconclusive in ascertaining the moral level of Cain’s crime, perhaps the threshold question should be, “What’s in a name?” The names “Cain” and “Abel” may provide a clue to their respective characters. Indeed, it is often the case in Scripture that names disclose significant information about the person. The root of Cain is “kinyan”—acquire. Abel is derived from the word for vanity—“hevel.” One can view these meanings in various ways, one of which is that Cain wanted to acquire material possessions, and Abel sought

54 See JASTROW, supra note 51, at 1493 (defining the noun form as “murderer, assassin”).
55 See THE TORAH: A MODERN COMMENTARY, supra note 53, at 1357 (observing that while in English there is a distinction between ‘kill’ (which may be authorized by the state or be accidental) and ‘murder’ (which is unauthorized and malicious), the Hebrew ‘ratsach’ cannot be clearly distinguished from the more frequent ‘harag.’ However, the commandment deals obviously with homicide, and hints those supporting pacifism or the abolition of capital punishment cannot justifiably base themselves on this word but must look to other reasons.).
56 See discussion at supra note 35 and accompanying text.
57 Deuteronomy 4:42 refers to one who “killed his fellow without knowledge, but was not an enemy of his from yesterday and before yesterday.” See COMMENTARY OF THE RASHBAM, 1 Mikraot Gedolot Ha-Maor, Exodus 20:13, at 468 (Aaron Samet & Daniel Biton eds., 1990) (contending that “ratsach” is used in Deuteronomy 4:42 merely for stylistic reasons).
58 For example, Rashi states that Cain’s descendant, Tubal-Cain, who, according to one set of Midrashim, was responsible for Cain’s death (see infra note 165 and accompanying text), was so named, because “he improved the work of Cain. ‘Tubal’ is an expression based on ‘tavleen’ (spices). He seasoned and improved the work of Cain in making implements of war for murderers.” 1 THE PENTATEUCH AND RASHI’S COMMENTARY, Genesis 4:22, at 45 (Abraham Ben Isaiaah & Benjamin Sharfman trans., 1949) [hereinafter THE PENTATEUCH AND RASHI’S COMMENTARY].
59 See RAMBAN COMMENTARY ON THE TORAH, supra note 1, Genesis 4:1, at 87: Now she [Eve] called one son by a name indicating ‘acquisition,’ and the second one she called Abel, denoting ‘vanity’ because man’s acquisition is likened to vanity. But she did not wish to say so explicitly. Therefore, no reason is written for the name of the second son. The secret received by tradition concerning Abel is very profound.
prestige, a form of vanity. In this view, neither brother is an apostle of virtue. In fact, one modern commentator argues that Adam’s children symbolize “the twisted path of corrupting the essence of creation,” and their names show it. Cain loves material possessions, and Abel, who is at an arguably somewhat higher level, disdains work because it is vain. Thus, Cain’s acquisitive nature may afford a basis for inferring a motive for premeditated murder, namely, a desire to take his brother’s share of the wealth. On the other hand, the symbolism of Cain’s name may be benign and in fact praiseworthy, for Eve declares that she “acquired a man (Cain) with God,” which Rashi, the famed eleventh century French exegesis interpret to mean with God’s help, viewing God as a partner in the process of procreation.

The biblical text provides other subtle clues concerning the nature of the brothers’ characters, which may in turn bear on Cain’s level of culpability. Consider their respective professions. Cain chose to be a tiller of the soil, and Abel became a shepherd. The Sforno, a sixteenth century Italian exegesis and physician, says that the latter was a more skilled occupation than the former, arguably borne out by the emergence of leaders of the Jewish people from the ranks of shepherds, to wit, Jacob, Moses, and David. Moreover, shepherding allows one to contemplate spiritual matters and build the

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60 See Yehuda Nachshoni, Studies in the Weekly Parasha—Bereshis 17 (Shmuel Himelstein trans., 1988). See also Louis Ginzberg, The Legends of the Jews 107 (Henrietta Szold trans., 1909) (noting that “Eve bore her second son, whom she named Hebel, because, she said, he was born but to die.”). Another Midrash tells of Eve’s dream in which she “… had seen the blood of Abel flow into the mouth of Cain, who drank it with avidity, though his brother entreated him not to take all.” Id.

61 Nachshoni, supra note 60, at 17.

62 See 8 Midrash Rabbah, supra note 1, Ecclesiastes 6:3, at 159 (asserting that Cain, “… was not satisfied with [what he possessed of] the world’s good things”); Pirkei D’Rabbi Eliezer, ch. 23, at 70 (M.H. Horwitz ed., 1973) (accusing Cain of murdering his brother in order to take possession of his property).

63 Genesis 4:1. According to one Midrash, however, Cain is the evil offspring of Eve and the serpent. 1 Ginzberg, supra note 60, at 105.

64 See The Pentateuch and Rashi’s Commentary, supra note 58, Genesis 4:1, at 37. Rashi favors the plain meaning of biblical passages throughout his exegesis of the Torah. See, e.g., id., Genesis 3:24, at 37. He gives aggadic interpretations as well when he feels that they are necessary for a fuller understanding of the text. See, e.g., id., Genesis 1:1, at 1.

65 See Genesis 4:2.

66 See 1 Sforno, Commentary on the Torah, Genesis 4:2, at 34 (Raphael Pelcovitz trans., 1987). See Eichhorn, supra note 5, at 36 (referring to Moses and David as exemplars and asserting that “Abel displayed wisdom and strength of character when he decided to become a shepherd rather than a farmer”).
character of mercy, because shepherds are isolated and must care for and nurture living creatures. This is supported by the text, which mentions Cain's occupation after his brother's, even though Cain is the elder. On the other hand, the Malbim, a nineteenth century Russian exegesist, argues that farming was the preferred occupation reserved for the first born, whereas shepherds were viewed with disfavor, so it was perfectly respectable for Cain to engage in agriculture.

It is also possible, however, that Abel actually wanted to become a shepherd rather than a farmer because God had cursed the earth after Adam and Eve had sinned. Following this line of reasoning, Cain nonetheless opted for farming perhaps because he was stubborn or because he believed the curse against the earth applied only to his father, Adam. One difficulty with farming is that it requires hard work, leaving little time for spiritual matters. Cain may also have become obsessed with tilling the land and deluded himself that his wealth came from his own efforts rather than God's will. Such an interpretation fits with God's punishment that Cain would no longer be able to farm successfully and indeed that he would become a wanderer on the earth, rendering him entirely unable to farm. In this view, Cain's character, usually irrelevant in assessing criminal liability, was not of the highest order. He was arrogant and spiritually blunted, devoting himself to physical labor for

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67 See SFORNO, supra note 66, Genesis 4:2, at 34; cf. MEYER SIMCHA, MESHECH CHACHMAH 5 (Abraham Abraham ed., 1972) (asserting animals were preferred sacrifices because of the effort required in raising them).
68 See SFORNO, supra note 66, Genesis 4:2, at 34.
69 See 1 MALBIM COMMENTARY ON THE TORAH, Genesis 4:2, at 299-300 (Zvi Faier trans., 1982).
70 See THE PENTATEUCH AND RASHI'S COMMENTARY, supra note 58, Genesis 1:11, at 7-8 (noting that during Creation God had commanded the earth to put forth "fruit tree bearing fruit," but the earth merely produced "tree bearing fruit." According to Rashi, God's command was intended to make the trees themselves taste like fruit. Therefore, "when Adam was cursed because of his sin, it [the earth] too was remembered [punished] because of its sin and was cursed.").
71 See HIRSCH COMMENTARY ON THE TORAH, supra note 38, Genesis 4:2, at 22 ("Agriculture calls primarily for the use of all man's physical energies.... The tiller of the ground is dragged down more and more to the level of the soil he cultivates.").
72 See id.
73 See 9 MIDRASH RABBAH, supra note 1, Esther 6:3, at 74 (asserting that the biblical statement that Cain was a tiller of the earth implied "... that he was predestined for banishment.").
74 See Genesis 4:12; see also 1 MIDRASH RABBAH, supra note 1, Genesis 22:10, at 190 (discussing various interpretations of God's curse with respect to farming).
75 This is, of course, true unless defendant places his or her character in issue. See, e.g., FED. R. EVID. 404(a)(1).
material gain. For whatever reason, a Midrash concludes that Cain was one of "[t]hree [who] had a passion for agriculture, and no good was found in them."\(^7\)

Proceeding to the details of the plot line, even a cursory inspection of the Torah text reveals that it is laden with ambiguity. For example, one is struck by the phrase, "Cain rose up against his brother Abel."\(^7\) Since he "rose up," does this mean that Cain was literally (or figuratively) underneath Abel, and, if so, why was Cain down? Was he crouching down in the field, lying in wait? Or lying prostrate, because Abel had knocked him down? Or lying placidly asleep? Or is the language simply metaphorical? The text does not explain. The oral law, however, suggests that Abel, who was the stronger of the two, pinned Cain down during a quarrel,\(^7\) whereupon Cain pleaded with his brother to let him go, arguing that if Abel killed him, Adam and Eve would be distressed and would know who the killer was,\(^7\) there being no other humans in the world.\(^8\) Consequently, Abel, in pity, released Cain,\(^8\) who then "rose up" against his brother.\(^8\) Such a scenario of assault could support either manslaughter or murder: on the one hand, Cain’s play on Abel’s sympathy, together with the subsequent killing, may indicate premeditation. Alternatively, however, although this is not the sense of the Midrash, assuming Cain

\(^{76}\) 1 MIDRASH RABBAH, supra note 1, Genesis 36:3, at 289. The other two agricultural miscreants specified in the Midrash were Noah and Uzziah.

\(^{77}\) Genesis 4:8.

\(^{78}\) The Torah itself makes no explicit reference to a quarrel, stating only that Cain “spoke” with Abel, after which they were in a field, and Cain “rose up” and killed his brother. Genesis 4:8. A number of Midrashim, however, assume that a quarrel preceded the slaying. See, e.g., 3 MIDRASH RABBAH, supra note 1, Exodus 30:17, at 366 (footnote omitted) (“Nothing good or peaceful ever results from strife. It was only after a quarrel that Cain smote his brother.”).

\(^{79}\) See 1 MIDRASH RABBAH, supra note 1, Genesis 22:8, at 187.

\(^{80}\) The midrashic literature, however, states that Eve gave birth to a girl together with Cain and to either one or two girls at the time of Abel’s birth. 1 MIDRASH RABBAH, supra note 1, Genesis 22:2, at 180; id. 22:3 & n.5, at 181; id. 22:7, at 187; 2 MIDRASH RABBAH, supra note 1, Genesis 61:4, at 543. See also B. TALMUD, supra note 35, Yebamoth 62a (discussing the duty to propagate and relying on an extra word in the Genesis text to denote that each brother was born together with a sister); id., Sanhedrin 58b (suggesting that Adam did not marry his daughter so that Cain would be able to do so). According to another Midrash, the brothers were allowed to marry their sisters notwithstanding the prohibition against incest, Leviticus 18:9, because of the need to populate the world. PIRKEI D’RABBI ELIEZER, supra note 62, at 69.

\(^{81}\) See MIDRASH ZUTA, Shir HaShirim 7:10 (Buber ed. undated) (describing God’s warning to Abel not to have compassion on Cain, “this evil one,” meaning that he should kill Cain; but, continues the Midrash, Abel rejected the divine advice).

\(^{82}\) See 1 MIDRASH RABBAH, supra note 1, Genesis 22:8, at 187. According to another Midrash, God admonishes Cain for killing his brother even though Abel had compassion on Cain when the latter was beneath him. 1 MIDRASH TANCHUMA, supra note 1, Breishis 9, at 18.
considered the release only a temporary respite from his brother's wrath, the killing even may be viewed as an instance of justifiable self-defense if Cain was not the aggressor—or at least imperfect self-defense, which permits one who is an aggressor and therefore cannot claim perfect self-defense to be found guilty of manslaughter rather than murder.\textsuperscript{83}

Also fraught with ambiguity is the phrase, "and it happened in the field."\textsuperscript{84} "Happened" could suggest a sudden encounter without premeditation or planning. Or it could mean simply that the event took place in the field. While the Torah states that Cain initiated a conversation with Abel, it does not even specify whether the brothers actually argued,\textsuperscript{85} although, if contemporary case law involving fratricide affords any guidance, these are usually not carefully conceived, cold blooded, dispassionate murders, and the sentences imposed often reflect that reality.\textsuperscript{86} Assuming, as is likely, that the brothers

\begin{footnotes}
\item[83] See LAFAVE, supra note 14, \S 7.11(a), at 718. Under the Model Penal Code, imperfect self-defense is viewed as a problem of reckless manslaughter or negligent homicide, depending on whether the actor's belief was reckless or negligent. MODEL PENAL CODE, cmt. to \S 210.3, at 51 (1985).
\item[84] Genesis 4:8. Others translate the verb as "came to pass" (e.g., THE PENTATEUCH AND HAFSORAH, supra note 53, Genesis 4:8, at 14), although the Hebrew verb literally means "was".
\item[85] See Genesis 4:8 ("Cain spoke with his brother Abel"); cf. MIDRASH ZUTA, supra note 81, Shir HaShirim 7 (labeling Cain a man of "evil speech").
\item[86] See, e.g., Commonwealth v. Puksar, 740 A.2d 219, 222-23 (Pa. 1999) (affirming murder convictions, as well as death sentence for slaying of sister-in-law and life imprisonment for killing of brother, with whom defendant had recently fought over transaction involving model trains; court noted that the brother's "... body was found surrounded by scattered boxes of model trains"), cert. denied, 531 U.S. 829 (2000); Miller v. State, 939 S.W.2d 681, 684 (Tex. App. 1996) (noting, "... dysfunctional family relationships which culminated in ... fratricide," in which defendant killed his brother because victim turned off television and told him to leave the house; defendant was sentenced to life imprisonment); Commonwealth v. Jones, 640 A.2d 914, 915 (Pa. Super. 1994) (upholding sentence of 18-60 months for voluntary manslaughter, where defendant stabbed his half-brother "during the course of a heated argument"; jury acquitted defendant on murder charge); State v. Gonsalves, 553 A.2d 1073, 1074 (R.I. 1989) (stating that defendant was convicted of manslaughter for killing his brother, and that they were "... embroiled in a bitter argument"); Gilchrist v. State, 409 S.W.2d 329, 330 (Ark. 1966) (affirming murder two conviction and 21-year sentence, based on slaying committed after a "ruckus" between defendant and his brother; original charge was murder in the first degree); State v. Parker, 403 S.W.2d 623, 624 (Mo. 1966) (upholding manslaughter conviction and ten-year sentence for fratricide in the course of an argument; defendant originally charged with murder two); Hackman v. State, 148 So. 2d 253, 254 (Ala. Ct. App. 1962) (affirming murder two conviction for fratricide on an indictment for murder in the first degree); State v. Ward, 86 S.E.2d 275 (N.C. 1955) (reversing conviction on other grounds, in a case involving slaying of brother during a fight, where defendant was originally charged with murder in the second degree); Jureczki v. State, 211 S.W.2d 231, 232 (Tex. Crim. App. 1948) (upholding conviction
\end{footnotes}
did argue, it is likewise unclear whether Cain argued with Abel only immediately preceding the killing, or whether there had been harsh words previously. In other words, was there time for cooling off, making the heat of passion defense problematic, at least in the strict common law jurisdictions? Additionally, of what significance is it that the killing occurred in the field, which was in Cain's dominion? Did Abel enter there on his own, or did Cain lure him to this locale so that he could kill his brother in the absence of witnesses? Did Cain bare his heart to his brother, "sharing his deep hurt" with him, as the Sforno suggests, or did he pick a fight with Abel, as Rashi says, in order to have an excuse to kill his sibling, or did the argument suddenly flare up? What did they argue about?

In short, one may scrutinize the Torah's Cain-and-Abel saga long and hard without arriving at any firm conclusion concerning the degree of Cain's blameworthiness. Perhaps the answer lies in an analysis of the talmudic, medieval and modern commentators, whose contributions we now consider.

of murder without malice and five-year sentence, where defendant killed his brother during the course of a fight).

See also Dressler, supra note 33, at 421 n.4 (suggesting that, since Cain and Abel were apparently embroiled in a familial dispute in which jealousy may have been a factor, the killing might be considered manslaughter, committed in the heat of passion or as a result of extreme emotional disturbance).

87 See, e.g., State v. Copling, 741 A.2d 624 (N.J. App. Div. 1999) (ruling that 2 1/2 hour delay between provoking incident and killing was sufficient cooling off period, and that consequently no manslaughter instruction was required); State v. Follin, 947 P.2d 8 (Kan. 1997) (finding that 1 1/2 hour delay was enough cooling time and justified trial court's refusal to give manslaughter instruction); State v. Robinson, 185 S.W.2d 636 (Mo. 1945) (affirming murder conviction, and holding that combination of 30-40 minute interim between fight and killing, and defendant's cool demeanor, was sufficient basis to deny manslaughter instruction); but see People v. Brooks, 230 Cal. Rptr. 86 (Cal. App. 1986) (reversing murder conviction for failure to instruct jury on manslaughter even though 2 hours had elapsed, relying on earlier decision ruling that even with 20 hour lapse defendant had acted in heat of passion).

88 See Deuteronomy 22:23-27 (distinguishing cases of rape in the field and in the city. If the rape occurred in the city, where there were people who could hear if the victim, a betrothed woman, called for help, both the man and the woman are culpable, whereas, in the case of a rape in the field, the woman is excused, because it is assumed that she called for help, and there was no one to hear her). See also, Sforno, supra note 66, Genesis 4:8, at 36 n.8 (stating that although Cain was prepared to "harm" Abel, he was not "... so callous and cruel as to do so in the presence of his parents!").

89 Sforno, supra note 66, Genesis 4:8, at 36 n.8.

90 The Pentateuch and Rashi's Commentary, supra note 58, Genesis 4:8, at 39.
IV. THE TORAH TEXT AS SEEN BY THE MIDRASH AND THE COMMENTATORS

Somewhat surprisingly, and perhaps stemming from the ambiguities of the Genesis account, a number of the commentaries give explanations of the argument that are independent of the sacrifice episode that figures centrally in the scriptural text. A midrashic source asserts that Cain and Abel were archetypes rather than mere individuals, and that they were arguing about that which people usually fight, namely, land (wealth), religion, and sex.9

The Midrash gives three explanations of these universal bones of contention that lead to bloodshed. The first is that Cain and Abel decided to divide the world.93 Cain took the land, and Abel, the personalty. Cain said, "The land you stand on is mine," directing Abel to "fly [off the ground]," and his brother responded, "What you are wearing is mine," ordering Cain to take his apparel off.94 In the course of the fight that ensued, Cain killed Abel. The second version is that the brothers divided the land and the personalty, but each one wanted the future Temple to be built on his share.95 Finally, one sage opined that the brothers were fighting about sexual access to their mother Eve. Alternatively, the sexual quarrel concerned one of the twin sisters born along

91 Attesting to the view of law as a "seamless web," 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW 1 (2d ed. 1909), the previous section of this Article examining the ambiguities of the Torah text, necessarily refers to the positions of some of the authorities cited and discussed in this section, which deals more directly with the Midrash and the biblical commentaries. The short of the matter is that it is a central tenet of Jewish law and learning that the written Torah cannot be understood in a vacuum. Cf. THE MISHNAH, 2(a) Seder Nezikin, Sanhedrin, front cover flap (ArtScroll Mishnah Series, Matis Roberts trans., 1987) ("When Moses descended from Sinai, he held the Tablets in his hands and the Oral Law in his mind. The words of the Law would be contained in the Written Torah, but their meaning and application would be transmitted from teacher to student in an eternal chain of generations."); Michael Wyschogrod, Was the Oral Law Given at Sinai?, MOMENT MAGAZINE, 12 (April 1991) ("It might even be argued that the oral law is more central to Judaism than the written. Christianity, after all, also reveres the Bible as the word of God. What it does not do is accept the oral Torah.").

92 See NEHAMA LEIBOWITZ, STUDIES IN BERESHIT (Genesis) 39 (4th rev. ed. undated) (categorizing the midrashic explanations of the brothers' quarrel in this manner).

93 See 1 MIDRASH RABBAH, supra note 1, Genesis 22:7, at 187. The Midrash does not specify which brother initiated the plan.

94 Id. In a variant Midrash concerning the property, Cain tries to take credit for Abel's sacrifice, arguing that, since he was the eldest, he should receive a double portion, and that portion should include the land on which Abel offered his sacrifice. 1 MIDRASH TANCHUMA, supra note 1, Breishis 9, at 17.

95 See 1 MIDRASH RABBAH, supra note 1, Genesis 22:7, at 187.
with Abel. The interests of these midrashic commentators transcend the particular individuals involved; instead, they are seeking to ascertain a universal truth and are thus unhampered by the literal text.

In a variant Midrash dealing with the brothers’ division of the world, Cain’s blameworthiness is highlighted, and he is given a motive that accords with premeditated murder, namely, that he “was impatient to possess the whole world.” Furthermore, the Midrash says that after dividing the property, “Cain thought of a plan to remove Abel from this world.” Cain then ran after his brother, shouting, “ ‘Get away from my property,’ until he finally rose up against him and slew him.” This Midrash concludes by referring to Cain, “whose eye was so evil against his brother.”

The biblical text itself, however, says nothing of a division of the world, suggesting instead that the cause of the dispute was God’s evaluation of the brothers’ respective offerings. Abel gave of “the firstlings of his flock and from their choicest,” whereas Cain gave only “the fruit of the ground.” God accepted Abel’s sacrifice for two reasons: it was the best of the flock, and

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96 See id. Another Midrash adds that Cain was jealous of Abel and hated him because, inter alia, the latter’s sister was more beautiful than his, and Cain desired her. Pirkei D’Rabbi Eliezer, supra note 62, ch. 23, at 70; see also supra note 80 (dealing with the two brothers’ female siblings).

97 See Leibowitz, supra note 92, at 39.

98 3 Midrash Rabbah, supra note 1, Exodus 31:17, at 399; see also Eichhorn, supra note 5, at 62.

99 3 Midrash Rabbah, supra note 1, Exodus 31:17, at 399.

100 Id.

101 Id. at 399–400.

102 At the same time, the midrashic explanation concerning the brothers’ division of the world is consistent with the biblical account of their respective sacrifices, for “Cain brought of the fruits of the ground—his immovable property, and Abel brought the firstborn of his sheep—his movable property.” Id. at 399 n.4.

103 Cf. 4 Midrash Rabbah, supra note 1, Leviticus 27:5, at 348 (discussing the assertion that God “demands satisfaction for the blood of the pursued at the hands of the pursuers,” and giving as proof thereof that, “Abel in fact was pursued by Cain,” and therefore God chose Abel’s offering). See also 8 Midrash Rabbah, supra note 1, Ecclesiastes 3:15, at 99.

104 See Pirkei D’Rabbi Eliezer, supra note 62, ch. 23, at 69 (noting Abel’s sheep were not only the fattest of his flock, but also unshorn, meaning that he received no benefit from these animals, giving them fully to God).
it came from his flock, whereas Cain brought only "of the fruit of the ground" rather than choice fruit that he had worked to produce, that is, Cain made no real sacrifice in the offering he submitted to God.\textsuperscript{105} Or, as the Midrash puts it, Cain brought, "of the inferior crops," and was consequently, "like a bad tenant who eats the first ripe figs but honours the king with the late figs."\textsuperscript{106}

Abel, however, was not responsible for God's action, so why would Cain direct his wrath toward his brother rather than the real culprit? It is of course conceivable that Abel gave of his choicest to upstage Cain, the usually favored elder son.\textsuperscript{107} Yet given Abel's temporal closeness to the Creation, it is more likely that he gave a superior sacrifice out of a genuine love of God and recognition that everything belongs to God, Who deserves thanks for creation. Moreover, if Abel did have such faith and love, presumably he believed that God could plumb his secret thoughts and, if his motives were improper, God would accordingly reject his sacrifice as He did Cain's.\textsuperscript{108}

On the other hand, aside from simply being consumed by jealousy, Cain may have concluded that Abel's sacrifice, which came after his elder brother's, was offered to curry favor with the Master of the Universe.\textsuperscript{109} Thus, Cain may have held Abel responsible for God's rejection of his sacrifice and for God's rebuke. Had Abel not offered his best sheep, God would not have been able to distinguish between the two, at least by virtue of their deeds. Cain cannot

\textsuperscript{105} See supra note 103 (describing the inferior nature of Cain's sacrifice).

\textsuperscript{106} 1 MIDRASH RABBAN, supra note 1, Genesis 22:5, at 182 & n.5 (noting that the early figs were "a special delicacy").

\textsuperscript{107} See Deuteronomy 21:15-17 (giving first born son a double portion). See also RABAN Commentary on the Torah, supra note 1, Genesis 4:7, at 88 (interpreting this verse, in which God advises Cain that if he improves, he will be forgiven, as meaning, "'If you will mend your ways you will have your rightful superiority in se'eith (dignity) over your brother since you are the firstborn.'").


\textsuperscript{108} Cf. Isaiah 1:11-17 (expressing God's disdain for insincere sacrifices, and instead urging the people to "[I]earn to do good, seek justice, vindicate the victim, render justice to the orphan, take up the grievance of the widow") (id., 1:17); to the same effect, see id., 58:3-12; 1 Samuel 15:22; Micah 6:6-8.

\textsuperscript{109} See EICHHORN, supra note 5, at 41-42 (referring to Cain's comment to Abel that the latter "went out and got all [his] animals together to make sure that [he] would not be outdone by [Cain and Adam].''). See also id. at 46 (where Cain perceives Abel's behavior as a "... deliberate plot to supplant him as God's favorite.").
tangle with God, but his brother is a different matter. If Cain gets rid of Abel, God would, according to this perception of Cain’s view, have no choice other than to accept his offering.

When God rejected that offering, Cain became exceedingly angry,\(^\text{110}\) “and his countenance fell,”\(^\text{111}\) denoting shame.\(^\text{112}\) God then admonished Cain, asking him why he was reacting in this manner, and telling him that he could repent and rule over his evil inclination; that is, Cain could exercise his free will and achieve spiritual elevation.\(^\text{113}\) Perhaps this revelation was a shock to Cain, since he might have believed that, inasmuch as an omniscient and omnipotent God had created the world and human beings, it was He Who determined all events.\(^\text{114}\) Now, however, after God’s lecture, Cain understood that he had a responsibility to improve his character.

Cain nonetheless rejected God’s admonition to look at his own motives and deeds and repent. Instead, his reaction was in the opposite direction—grossly

\(^{110}\) The Hebrew term used is "vayihar," which "is derived from harah, to bum..."; thus, the biblical verse might mean that Cain was “burnt up, i.e., blackened." 1 MIDRASH RABBAH, supra note 1, Genesis 22:6, at 184 n.5. One might also argue that Cain’s “blackened” face was a sign of deep shame, or reflected a combination of shame and anger. Cf. Thomas Scheff & Suzanne Retzinger, Shame, Anger and the Social Bond: A Theory of Sexual Offenders and Treatment, 3 ELECTRONIC J. SOC. 1, 8 (1997) (“propos[ing] a theory of shame/rage loops leading to verbal or physical violence,” and noting that such “[s]hame/anger loops may also be the emotional basis for institutionalized conflict between individuals and between groups, as in duels, feuds, vendettas, and wars.”).

\(^{111}\) Genesis 4:4.

\(^{112}\) See RAMBAN COMMENTARY ON THE TORAH, supra note 1, Genesis 4:7, at 88 (observing that “he who is ashamed presses his face downward”). See also Scheff & Retzinger, supra note 110 (discussing the connection between shame and anger).

\(^{113}\) See Genesis 4:7; see also RAMBAN COMMENTARY ON THE TORAH, supra note 1, Genesis 4:7, at 89:

[Y]our sin longs to cleave to you at all times. Nevertheless thou mayest rule over it if you so desire, for you may mend your ways and remove it from upon you. Thus He taught him [Cain] concerning repentance, that it lies within his power to return anytime he desires and He will forgive him.

\(^{114}\) See 1 MIDRASH RABBAH, supra note 1, Genesis 22:9, at 189, in which Rabbi Simeon bar Yohai gives the following parable: “Think of two athletes wrestling before the king; had the king wished, he could have separated them. But he did not so desire, and one overcame the other and killed him, ...” See also id., Genesis 30:8, at 236 (asserting that “Cain was predestined to exile.”).

Indeed, invoking this perspective and quoting the above Midrash, Professor Dershowitz suggests that God mitigated Cain’s punishment because the latter was provoked, not by Abel, but by the Master of the Universe Himself. See DERSHOWITZ, supra note 3, at 52 (“If God’s action and inaction provoked Cain into killing Abel, then it becomes understandable why God would mitigate Cain’s punishment. Provocation has traditionally been recognized as a mitigating consideration, though the victim is generally the provocateur.”).
compounding his original misconduct by taking the life of his brother. Thus, Cain missed the opportunity that God had given man to conquer sin. Just as Adam and Eve had sinned against God, Cain now sinned against both his fellow man and God. Indeed, the Torah and the commentaries emphasize the gravity of that sin. When God tells Cain that the "blood" of his brother called out to Him from the ground, the Hebrew word for blood ("dom") is pluralized ("dimei"). Why? According to the Midrash, the point of the pluralization is to establish that Cain killed not only Abel, but also his descendants, "the blood of his posterity." The medieval commentators on this episode give various explanations of the occurrence. Rashi opts for murder as the "plain meaning" of the biblical text, asserting simply that Cain began an argument as a pretext to kill Abel. Yet this explanation does not render Cain completely unsympathetic. If he were a cold-blooded killer, what need would he have for a prefatory pretextual argument? Even in this view there is something in Cain's character that requires him to stir himself up to hot bloodedness before he can kill. The Ramban, a thirteenth century Spanish exegesis, kabalist and poet, reaches the same ultimate conclusion of murder, albeit by a somewhat more circuitous path. He opines that the biblical words, "and Cain spoke to Abel his brother," are connected to "it came to pass, when they were in the field," and on that basis he concludes that Cain invited Abel to the field and then "secretly

115 See LEIBOWITZ, supra note 92, at 40-42.
116 See Genesis 4:10.
117 See MISHNAH, supra note 36, Sanhedrin 4:5, at 388, reprinted in B. TALMUD, supra note 35, Sanhedrin 37a; accord, 1 MIDRASH RABBHA, supra note 1, Genesis 22:9, at 289. The Mishnah's alternative explanation is that the plural denotes that Abel's blood was widely scattered. See also infra notes 134-38 and accompanying text.
118 It should be noted that for Judaism, the Middle Ages begin earlier and end slightly later than Western historical chronology: "From the viewpoint of Jewish history, the Middle Ages may be defined as the period stretching from the early Moslem-Arab conquests in 632 CE, to the spiritual crisis experienced by Jewry during the second half of the seventeenth century . . . ." HAIM H. BEN-SASSON, THE MIDDLE AGES, IN A HISTORY OF THE JEWISH PEOPLE 385 (Haim H. Ben-Sasson ed., 1976).
119 See THE PENTATEUCH AND RASHI'S COMMENTARY, supra note 58, Genesis 4:8, at 39 (alluding to other aggadic interpretations, but contending that his "is the plain meaning of the passage."). As we shall see, however, Rashi's position is not so simple. See infra notes 152-53 and accompanying text.
120 According to another Midrash, however, Cain's jealousy and hatred, stemming from God's rejection of his sacrifice and Cain's desire for Abel's beautiful sister, as well as Abel's property, led Cain to declare, "I will kill Abel, my brother"—clearly indicating premeditation. See PIRKEI D'RABBI ELIEZER, supra note 62, ch. 23, at 69-70.
killed him.”

He also considers the possibility that Cain’s intent in killing Abel was to build the world up through himself rather than Abel, which was unlikely absent the killing, since it was Abel’s sacrifice that had been accepted.

The Sforno also effectively opts for murder one, making an interesting textual argument based on the Hebrew word for “rose up.” He states that there was no prior argument between the two brothers, because, in another passage in the Torah, the same verb was used in a case where the aggressor ambushed his victim without any warning. As such, Cain would be viewed as a murderer lying in wait for his brother.

Others are not quite as hard on Cain. According to Ibn Ezra, a twelfth century Spanish exegesist, grammarian, astronomer and physician, Cain told Abel what God had said to him and blamed Abel for God’s chastisement and admonitions. This interpretation suggests that, rather than lying in wait for his brother, Cain engaged Abel in conversation and became progressively more enraged in the course of the exchange, which ultimately led to the slaying—arguably a basis for a mitigation claim.

Even more sympathetically, the Malbim states that Cain killed Abel because he misunderstood God’s admonition that, “sin crouches at his door within,” but that he could overcome it. According to this authority, Cain thought that God was telling him Abel was a sinner and would try to lure him, Cain, into wrongdoing. The killing therefore was, in a sense, justified in Cain’s eyes as a case of spiritual self-defense.

Another factual issue, also bearing on the nature of Cain’s crime, is the manner in which he slayed his brother, and how he knew how to do so. As
to the method of killing, the Midrash suggests either a staff, that is, a weapon that inflicts a bruise, or a stone,30 which is a more formidable weapon. On the question of knowledge, one Midrash reports that Cain told God that he did not know that hitting Abel with a rock would kill him, but God immediately pronounced sentence on Cain, thus indicating divine understanding that his argument was specious.131 Another Midrash says that Cain might have deduced how to kill his brother by observing his father slaying animals for sacrifices.132 Presumably when the rabbinic authors of this Midrash referred to animal sacrifices, they intended the traditional method, which would require a clean slitting of the throat.33 On the other hand, a Mishnah states that Abel’s blood “was cast over the trees and stones,”134 perhaps indicating a less than precise multiple wounding, and Rashi says further that in fact Cain inflicted many wounds on Abel because he did not know which spot would be fatal.135 A single, clean incision would be more suggestive of murder, whereas the flailing approach is ambiguous. If the multiple wounds are solely the result of ignorance, that, too, is consistent with murder. Indeed, a Midrash states that, not knowing which part of the anatomy was susceptible to a mortal wound, Cain inflicted many injuries on his brother’s body, until he reached the neck and succeeded in killing Abel.136 On yet another hand, such wounds might also be the product of a frenzied emotional state that would not meet the standard for a cool, premeditated killing.137 As one contemporary commenta-

adolescence. Compounding the uncertainty is 1 MIDRASH RABBAH, supra note 1, Genesis 22:4, at 182 (stating that “all agree that Abel was not in the world more than fifty days.”) (footnote omitted). But see EICHORN, supra note 5, at 29 (noting that “[a]ll the children were also born as full-grown adults.”).

130 See 1 MIDRASH RABBAH, supra note 1, Genesis 22:8, at 188.
131 See 1 MIDRASH TANCHUMA, supra note 1, Breishis 9, at 18. But see infra notes 147-56 and accompanying text, discussing the relative leniency of the divine punishment.
132 See id.
133 See MISNAH, supra note 36, Hullin 1:2-4, at 513-14, reprinted in B. TALMUD, supra note 35, Hullin 15b, 18a, 19b.
134 MISNAH, supra note 36, Sanhedrin 4:5, at 388, reprinted in B. TALMUD, supra note 35, Sanhedrin 37a.
135 See THE PENTATEUCH AND RASHI’S COMMENTARY, supra note 58, Genesis 4:10, at 40 (relying on B. TALMUD, supra note 35, Sanhedrin 37b).
136 See 1 MIDRASH TANCHUMA, supra note 1, Breishis 9, at 18.
137 See People v. Anderson, 447 P.2d 942 (Cal. 1968) (reducing a charge of murder one to murder two, where the defendant had inflicted more than sixty wounds all over the victim’s body). But see DERSHOWITZ, supra note 3, at 53 (arguing Cain inflicted multiple wounds to make sure Abel died).
tor puts it, Cain was “filled with blind fury and hate, ... chok[ing], kick[ing] [and] bit[ing]” his brother’s body.138

Arguably cutting in the other direction and suggesting a more culpable slaying is Cain’s encounter with God after the killing. God asks, “Where is your brother,” obviously knowing what had happened but giving Cain an opportunity to confess and repent, just as He had done with Adam and Eve.139 Cain lies to God, saying “I know not; am I my brother’s keeper?”140 As Rashi states, Cain “acted as if he could deceive the mind of the Most High.”141 Or, as a Midrash metaphorically puts it, God knocked on Cain’s “flask ... only to find it a chamber pot.”142 Again, however, although attempting a cover-up in response to divine interrogation may indicate that Cain was not the sharpest tool in the shed, it does not necessarily suggest murder rather than manslaughter. After all, the latter is also a very serious crime and, given our protagonist’s apparent propensity to lie, might also warrant a cover-up on his part.

Be that as it may, Cain’s flippant rejoinder reveals a serious character flaw that is highlighted in the midrashic literature, in which Cain expresses no contrition. Instead, he gives excuse after excuse for the slaying, and conveniently forgets God’s recent lecture to him on the subject of free will.143 He likens God to a derelict watchman who apprehends the thief only after the theft and is met with the defense that it is the thief’s job to steal and the

138 Eichhorn, supra note 5, at 67.
140 1 Midrash Rabbah, supra note 1, Genesis 22:9, at 188:
[Cain’s question] may be compared to a prefect who was walking in the middle of the road, and found a man slain and another standing over him. ‘Who killed him?’ he demanded. ‘I will ask you [that question] instead of your asking me,’ rejoined the other. ‘You have answered nothing,’ he retorted (footnote omitted). Again, it is like the case of a man who entered a garden, and gathered mulberries and ate them. The owner of the garden pursued him, demanding, ‘What are you holding?’ ‘Nothing,’ was the reply. ‘But surely your hands are stained [with the juice]!’

On the other hand, Professor Leibowitx views Cain’s response as an “attempt to deaden the voice of his conscience [which] was in vain”). See also Leibowitz, supra note 92, at 48.
141 The Pentateuch and Rashi’s Commentary, supra note 58, Genesis 4:9, at 39. See also Pirkei D’Rabbi Eliezer, supra note 62, ch. 23, at 70 (noting Cain thought he could deceive God by burying his brother in the earth). There is another Midrash, however, stating that Adam and Eve did not know what to do with Abel’s body until they saw a raven burying his mate. See THE BOOK OF LEGENDS 24 (Hayim N. Bialik & Yehoshua H. Ravnitzky eds., 1992).
142 1 Midrash Rabbah, supra note 1, Genesis 19:11, at 156. Even more graphically, see 6 Midrash Rabbah, supra note 1, Numbers 20:6, at 791, which refers to Cain as a “vessel full of urine,” because he tried to deceive God rather than immediately confessing.
143 Genesis 4:7.
watchman's to prevent theft, therefore the latter is to blame, not the thief. Alternatively, Cain admits the killing but criticizes God for having given him the evil inclination. Shifting to God's omnipotence, Cain again asserts divine blame, this time based on God's role as guardian over all the world, Who nonetheless allows Abel to be killed. Never at a loss for excuses, he says to God, with even more awesome temerity, "It is Your fault, for if You had accepted my sacrifice, I would not have been jealous." Finally, Cain asks rhetorically, "Did I know if I hit Abel with a rock that it would kill him?"

Following Cain's disingenuous disclaimer of responsibility for his brother's welfare, God metes out punishment— inability or diminished ability to till the soil, banishment and wandering the earth. Banishment suggests manslaughter rather than murder. As already noted, under Jewish law, the punishment for intentional premeditated murder is death by beheading. The sentence for inadvertent, that is, negligent killings, however, is exile to a city of refuge. That fact is not conclusive, because, while banishment fits nicely with consignment to a different location, wandering the earth does not. Indeed, Rashi's commentaries seem to reflect this uncertainty. Even though he apparently regards Cain's slaying as murder, Rashi also comments on Genesis 4:16, which says that Cain "settled in the land of Nod, east of Eden." Rashi notes that that locale was a shelter for negligent killers, and observes that the cities of refuge set up by Moses were in the east, thus at least inferentially lending support to the notion that Cain's act was something other than premeditated murder.

144 See 1 MIDRASH TANCHUMA, supra note 1, Breishis 9, at 18; see also 1 GINZBERG, supra note 60, at 110.
145 See 1 GINZBERG, supra note 60, at 110.
146 1 MIDRASH TANCHUMA, supra note 1, Breishis 9, at 18; 1 GINZBERG, supra note 60, at 110. See also EICHORNS, supra note 5, at 74: "For all You know, I never intended to kill him. I just meant to give him a sound thrashing."
147 See Genesis 4:12.
148 See supra notes 37-41 and accompanying text, discussing exile and cities of refuge under Jewish law.
149 See supra notes 35-36 and accompanying text.
150 See supra notes 43-44 and accompanying text. Banishment to a city of refuge may not really be a punishment, since it protects the killer from the blood avenger.
151 In fact, if a person convicted of negligent homicide wanders outside the city of refuge, he is liable to death at the hand of the blood avenger. THE CODE OF MAIMONIDES, supra note 43, Murder and Preservation of Life 5:9, at 211.
152 See supra note 119 and accompanying text.
153 THE PENTATEUCH AND RASHI'S COMMENTARY, supra note 58, Genesis 4:16, at 42. See also 1 MIDRASH RABBAH, supra note 1, Genesis 21:9, at 178 ("In every case the east affords an asylum.").
It is also conceivable that, although Cain’s act was murder, his punishment could “not be as the judgment of other murderers,” and was consequently mitigated to reflect Cain’s lesser moral blameworthiness, just as modern statutes give a wide range of punishments for various degrees of homicide. As the Midrash explains, he “had none from whom to learn [the enormity of his crime], but henceforth, All who slay shall be slain.”

Upon hearing of his relatively lenient sanction, Cain continues to parry with God, protesting that “whoever meets me will kill me,” and arguing that, far from leniency, this is a death sentence. But rather than viewing Cain as an ingrate, the Ramban interprets the slayer’s statements collectively as evidence of genuine contrition and recognition of God’s omnipotence, stating:

154 1 MIDRASH RABBAH, supra note 1, Genesis 22:12, at 191.

155 Under contemporary American law, there is a range of sanctions for murder. See, e.g., CAL. PENAL CODE § 190(a), (b) (Deering 2000) (imposing sanctions of death, life imprisonment without possibility of parole, or 25 years to life imprisonment for murder in the first degree, and sanctions of fifteen years to life imprisonment for murder in the second degree); OHIO REV. CODE ANN. §§ 2903.01, 2903.02, 2929.02(a) (Anderson 2000) (providing sentence of death or life imprisonment and a fine of up to $25,000 for aggravated murder, and imposing sentence of fifteen years to life imprisonment and a fine of up to $25,000 for murder); TEXAS PENAL CODE ANN. §§ 12.31, 12.32, 19.03, 19.04 (West 2000) (making capital murder punishable by death or life imprisonment, and murder punishable by life imprisonment or a term of 5-to-99 years and a fine of up to $10,000).

156 1 MIDRASH RABBAH, supra note 1, Genesis 22:12, at 191 (footnote omitted).

Professor Dershowitz takes issue with the Midrash’s reasoning, based, inter alia, on (1) murder’s status as a malum in se offense; (2) Cain’s understanding of death through his experience with animals and his brother's sacrifices thereof; and (3) his cover-up denial to God. DERSHOWITZ, supra note 3, at 53-54. Professor Dershowitz concludes that “God was not doing a very good job deterring crime... He was allowing humans to get away with murder!” Id. at 58.

As noted earlier, however, at least under Jewish law, only deliberate, premeditated murder subjected the slayer to capital punishment. See supra notes 35-36 and accompanying text. Moreover, numerous procedural safeguards such as the two-eyewitness rule rendered conviction difficult. Id. Consequently, under Jewish law, Cain could not have been convicted in a human court, but was of course subject to punishment at the hands of God. As we note hereafter, that Cain “got away with murder” is far from clear. See infra notes 163-67 and accompanying text, which discusses the deferral and ultimate imposition of a death penalty on Cain.

157 Genesis 4:14. According to Rashi, Cain was concerned that animals would kill him, for the only other humans were his parents, of whom he was not afraid. THE PENTATEUCH AND RASHI’S COMMENTARY, supra note 58, Genesis 4:14, at 42.

158 See RAMBAN COMMENTARY ON THE TORAH, supra note 1, Genesis 4:13, at 91. But see THE PENTATEUCH AND RASHI’S COMMENTARY, supra note 58, Genesis 4:13, at 40 (relying on a Midrash in interpreting the verse, “My punishment is greater than I can bear,” as a question rather than a confession). The question, according to Rashi, is, “You (God) bear the worlds above and below and my iniquity can you not bear?” Depending on Cain’s intonation, the question can be viewed as arrogant or simply inquisitive. Rashi says it is asked in “wonder-
The correct plain interpretation is that it is a confession.... The sense of this is that Cain said before G-d: ‘Behold, my sin is great, and You have punished me exceedingly, but guard me that I should not be punished more than You have decreed upon me for by being a fugitive and wanderer and unable to build myself a house and fences at any place, the beasts will kill me for your shadow has departed from me.’ Thus Cain confessed that man is impotent to save himself by his own strength but only by the watchfulness of the Supreme One upon him.159

According to one translation, God’s rejoinder to Cain’s concerns is in the nature of a threatening reassurance; He announces that “whosoever slays Cain, vengeance shall be taken on him sevenfold,”160 referring to Cain’s future killer.161 Although one may consider the proposed punishment of Cain’s potential assailant to be wildly disproportionate,162 the passage may also be viewed as directed not only to the assailant, but also to Cain, as a figurative declaration of divine comfort, designed to assure Cain that no one will dare to kill him.

An alternative translation of God’s “sevenfold” declaration suggests instead that the divine sanction against Cain went beyond a curse on his labor, together with banishment and consignment to wandering. The latter version has God responding to Cain’s “dead man walking” concerns by saying that it is only

159 Ramban Commentary on the Torah, supra note 1, Genesis 4:13, at 91 (footnote omitted). See also infra note 174 (discussing conflicting rabbinic views of atonement).

160 See, e.g., The Pentateuch and Haftorahs, supra note 53, Genesis 4:15, at 15 (using the translation quoted in the text).

161 See Ramban Commentary on the Torah, supra note 1, Genesis 4:23, at 95 (stating that the meaning of the passage is, according to its real sense, that G-d said: ‘Therefore, whosoever slayeth Cain will have vengeance taken on him sevenfold, for I will punish his slayer seven times for his sin, since I have promised Cain that he will not be slain in view of his fear of Me and his confession before Me.’).

162 This is essentially the position taken by Professor Dershowitz, who asserts “Yet another unjust threat of disproportionate punishment!” He concedes, however, that potential wrongdoers have been duly warned and that sevenfold may be difficult to calculate “in the context of killing another.” Dershowitz, supra note 3, at 51.

Cf. David Daube, Judas, 82 Cal. L. Rev. 95, 102 (1994) (noting that “[t]o this day, an educated Western public just cannot brook Asian irrationalism”). See, for example, Cain utterly damned for a monstrous deed in Genesis 4:11-12 and fully re-elevated in Genesis 4:15-18.
after seven generations that Cain will be slain.\textsuperscript{163} This translation is based on an interpretation of the passage by Rashi,\textsuperscript{164} who refers to a Midrash positing that Cain was killed unintentionally by his descendant, Lamech,\textsuperscript{165} a nice, albeit dilated, "measure for measure" touch—Cain killed his brother and was in turn killed by his several-greats grandson.\textsuperscript{166} Thus, according to the Rashi

\textsuperscript{163} See THE CHUMASH, supra note 4, Commentary to Genesis 4:15, at 21: Our rendering follows Rashi who interprets this as 'an abbreviated verse with an implied clause: \textit{Whoever slays Cain will be punished} (this phrase is unstated, but understood). As for Cain himself, only \textit{after seven generations will I execute My vengeance upon him}, when Lemech, one of his descendants, will arise and slay him.'

\textsuperscript{164} THE PENTATEUCH AND RASHI’S COMMENTARY, supra note 58, Genesis 4:15, at 41.

\textsuperscript{165} Id., Genesis 4:23, at 45. Rashi's account of this slaying is as follows: [For Lamech was blind and Tubal-cain [Lamech’s son] led him, and he [Tubal-cain] saw Cain who appeared to him like an animal. He [therefore] said to his father to draw the bow, and he killed him. As soon as he [Lamech] learned that it was Cain his grandfather, he struck one hand against the other (in remorse), and struck his son (accidentally) between them and killed him. Lamech thereafter argued to his wives, who had, according to a Midrash, separated from him sexually, that since the punishment of Cain, who had "killed intentionally," was deferred for seven generations, he, who had killed inadvertently, should have his sanction deferred for many times seven generations. Id., Genesis 4:24, at 46-47.

According to the Ramban, Lamech assured his wives that God would not punish him because he "did not slay a man by wounds, nor a child by bruises, as did Cain, ... ." RAMBAN COMMENTARY ON THE TORAH, supra note 1, Genesis 4:23, at 96. In response to his wives' concerns that he would be punished for teaching his son Tubal-cain to make swords and other instruments of war, see supra note 58, Lamech argued that "death caused by wounds and bruises [the method used by Cain to kill Abel] is a worse death than by the sword."

\textsuperscript{166} The concept known as "measure for measure," or, in Hebrew, "mida k’neged mida," essentially provides that, as you have done, so will it then be done to you. According to the Midrash, Cain was killed by Lamech, his descendant, seven generations later, but the slaying was not intentional. See supra note 165, describing Cain’s death and Lamech’s characterization of the killing as inadvertent. Thus, arguably, although not perfectly congruent, just as Cain killed Abel intentionally, but perhaps without premeditation, and was not punishable in the human court (see supra note 45 and accompanying text) he, too, was killed by a blood relative without premeditation, although concededly unintentionally. Since such killings cannot be punished by the court, God Himself imposes the appropriate sanction. For example, Exodus 21:13 provides, "And if a man not lie in wait, but God cause it to come to hand; then I will appoint thee a place whither he may flee." The Gemara gives the following explanation of this verse:

For what is Scripture here speaking about? About two men, one of whom killed a person with premeditation and the other killed inadvertently, and in neither case were there witnesses to the deed who could testify about it. Consequently, the former was not put to death and latter was not forced into banishment to a city of refuge. . . . Now God brings them together at the same inn. He who killed with premeditation happens to sit beneath a ladder,
exegesis, “sevenfold” refers to the amount of time God wishes to wait before exacting final payment for Cain’s crime.\textsuperscript{167}

On the other hand, this deferral, which enabled Cain to marry and procreate,\textsuperscript{168} suggests divine leniency. By the same token, however, Cain did not die of old age or natural causes.\textsuperscript{169} God shortened his life, which may be viewed as a punishment in addition to exile and wandering the earth. The same is true even if one accepts the alternative midrashic view that God suspended judgment on Cain “until the Flood came and swept him away.”\textsuperscript{170}

Yet another midrashic account is somewhat sympathetic, suggesting that God was half lenient in response to Cain’s half repentance. Commenting on the colloquy between the two protagonists, the Midrash presents an anguished defendant, who responds plaintively to the divine inquiry, “Where is Abel thy brother”: ‘Sovereign of the Universe,’ replied he, ‘Abel and I brought Thee a gift; Abel’s Thou didst accept, while me Thou didst turn away with aching heart.’\textsuperscript{171}

Then, moving from defense to offense, Cain continues: ‘Seekest Thou him from me? Surely he is to be sought from none but Thee, for Thou keepest and the other who killed inadvertently ascends the ladder and falls when descending it, upon the man who killed with premeditation, and kills him. Witnesses now being present they testify against him, so compelling him to be banished to one of the cities of refuge. The result is that he who killed inadvertently is actually banished and he who killed with premeditation actually suffers death.

\textbf{B. TALMUD, supra note 35, Makkoth 10b; THE PENTATEUCH AND RASHI’S COMMENTARY, supra note 58, Exodus 21:13, at 235-36.}

\textsuperscript{167} See THE PENTATEUCH AND RASHI’S COMMENTARY, supra note 58, Genesis 4:15, at 41; see also id., Genesis 4:19, at 43 (interpreting the text about Lamech to establish that, by having offspring, Lamech had raised “a seventh generation” before he killed Cain).

\textsuperscript{168} See 3 MIDRASH RABBAH, supra note 1, Exodus 31:17, at 400 (noting that Cain “begat a hundred children”); see also 8 MIDRASH RABBAH, supra note 1, Ecclesiastes 6:3, at 159.

\textsuperscript{169} See RAMBAN COMMENTARY ON THE TORAH, supra note 1, Genesis 4:17, at 93, saying of Cain that “his hoary head did not go down to the grave in peace, rather he saw his destruction and all his seed with him” (footnotes omitted). \textit{But cf.} 3 MIDRASH RABBAH, supra note 1, Exodus 31:17, at 400 \& n.4 (stating that “Cain lived as long as Adam—So that the days of his years are many—for he outlived his father by seven hundred and twenty-six years.”). \textit{But see} 1 MIDRASH RABBAH, supra note 1, Genesis 23:4, at 195, in which Lamech and his two wives go to Adam for advice on whether they should continue to procreate, which means that Adam was alive at the time Lamech killed Cain.

\textsuperscript{170} 1 MIDRASH RABBAH, supra note 1, Genesis 32:5, at 252. \textit{See also} RAMBAN COMMENTARY ON THE TORAH, supra note 1, Genesis 4:17, at 93 (noting Cain’s death in the flood after living “many years.”).

\textsuperscript{171} 2 MIDRASH RABBAH, supra note 1, Genesis 97, at 903.
watch over all creatures.'

Clearly unpersuaded, God curses Cain, whose rejoinder was nothing if not persistent, noting that in the future God would forgive "sixty myriads" of the Jewish people for multiple sins committed in the desert following the exodus from Egypt. The divine reaction is simply extraordinary. Abruptly shifting ground, God says: "If I do not forgive Cain, I will shut the door in the face of all penitents." Consequently God forgave him half; yet because his repentance was incomplete, He did not forgive him all his sins."

God considered Cain's repentance incomplete because he played the lawyer, demanding his right to a pardon, rather than appearing as a supplicant seeking mercy.

In still another example of the conflicting views of Cain's character, commenting on his response to God and his attitude after the killing, one Midrash gives Cain's acknowledgment that his sin was more severe than Adam's, whereas another has the wrongdoer protesting his punishment as too stringent, when he says, "My sin is too great to bear." Again, when God

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172 Id.
173 See id. (citing Numbers 14:18-20).
174 Id. at 903-04 (footnote omitted).

Another Midrash presents the conflicting views of two rabbis regarding atonement. One takes the position that repentance brings half atonement, and prayer, complete atonement, while the other takes the directly opposite position. Conjecturing on the source of the former's belief that repentance effects half atonement, the Midrash cites the case of Cain, concerning whom, "half of the decree was withheld" when he repented. Asking how it is known that Cain repented, the Midrash relies on Cain's poignant statement, "[m]ine iniquity is too great to be forgiven." The Midrash thereafter explains that God first cursed Cain, condemning him to be a fugitive and a wanderer, and then relented by allowing him to dwell in the land of Nod, which means wandering. Thus, he remained a wanderer but was not a fugitive. The Ramban says that the meaning of the biblical verse "is that Cain did not traverse the entire world, but he dwelt in that land, perpetually wandering therein and not resting at all in any one place thereof, and so it was forever called 'the land of Nod (wandering)' after him." RAMBAN COMMENTARY ON THE TORAH, supra note 1, Genesis 4:16, at 92; see also IBN EZRA COMMENTARY ON THE TORAH (Mehokkai Yehuda), Genesis 4:12, at 84-85 (undated) (noting that Cain was both in exile (in "Nod") and wandering therein); COMMENTARY OF RABBI KRINSKI ON IBN EZRA,Genesis 4:12, at 85 (pointing out that Cain's original punishment included exile (Hebrew, "Nod") and wandering (Hebrew, "nah"), but he received only the penalty of exile, relying on Genesis 4:16, referring only to "Nod").

176 1 MIDRASH RABBAH, supra note 1, Genesis 22:12, at 191; but see 2 MIDRASH RABBAH, supra note 1, Genesis 75:9, at 695 (suggesting that Esau drew support for his evil plot to slay his brother Jacob from God's treatment of Cain, by reasoning that "Cain slew his brother, yet
places a protective mark on Cain in response to his lament that he will be
killed while wandering the earth, the midrashic rabbis argue about the nature
of the sign. One suggests that it was a special glow, like an “orb of the sun,”
prompting the rejoinder that Cain was a “wretch” who received leprosy rather
than sunshine to distinguish him. Another says he was given a dog, which
is viewed as a contemptible animal. A pair of rabbis debates whether Cain
was made a divine example to murderers or to penitents. Seizing on the
verse that Cain then “left the presence” of God, the Midrash asks rhetori-
cally how this is possible, since God is everywhere, with two rabbis asserting
that he went out as a divine deceiver and another responding that he departed
“rejoicing” and that: Adam met him and asked him, ‘How did your case go?’
‘I repented and am reconciled,’ replied he. Thereupon Adam began beating
his face, crying, ‘So great is the power of repentance, and I did not know!”
Thus, viewed in their totality, the midrashic assessments of the extent of
Cain’s blameworthiness and punishment can fairly be characterized as
consistently inconsistent or at least ambivalent—a not uncommon feature of
the midrashic literature.

V. CONCLUSION

What is one to make of these inherently conflicting midrashic accounts
with respect to Cain’s culpability and character? The rabbinic sages are
unfazed by such seeming contradictions and in fact welcome them. As we
have stated elsewhere, “the Torah is read on four levels, has seventy meanings,
and is like a rock, which, when struck, splits into many pieces, and while it

God did nothing to him.”). Another Midrash has Esau drawing the lesson that “Cain was a fool,
for he killed his brother during his father’s lifetime, not knowing that his father would be fruitful
and multiply. I will not do so, . . .” 4 MIDRASH RABBAH, supra note 1, Leviticus 27:11, at 356;
see also 9 MIDRASH RABBAH, supra note 1, Esther 7:23, at 101.

177 Genesis 4:13.
178 See id. at 14-15.
179 See 1 MIDRASH RABBAH, supra note 1, Genesis 22:12, at 191. Rashi asserts that the sign
was a letter from God’s Holy Name placed on Cain’s forehead. THE PENTATEUCH AND RASHI’S
COMMENTARY, supra note 58, Genesis 4:15, at 41.
180 See 1 MIDRASH RABBAH, supra note 1, Genesis 22:12, at 191.
181 See RAMBAN COMMENTARY ON THE TORAH, supra note 1, Genesis 4:13, at 92.
182 See id.
183 Genesis 4:16. The Ramban says this means that Cain would never again stand before
God. RAMBAN COMMENTARY ON THE TORAH, supra note 1, Genesis 4:16, at 92.
184 1 MIDRASH RABBAH, supra note 1, Genesis 22:13, at 191-92.
185 See supra note 49 and accompanying text, discussing this feature.
may yield a plethora of conflicting opinions, all are, at least in a mystical sense, correct, constituting the words of the living God.”

Thus, even if the sages “present a number of differing views on the same subject, they all contain a certain aspect of the truth. Although they may be contradictory on the surface, they all hold true in a certain sense.”

Variegated perceptions of the truth are indeed part and parcel of the human condition. The Torah, and the book of Genesis in particular, is on one level a collection of stories, and that is probably because “we are more persuasive when we tell stories,” and indeed narratives have become an accepted albeit controversial aspect of legal scholarship. How people understand a particular story depends in turn on their own collections of stories that make up their memories. So when people hear stories, even new ones, as listeners, they hear them as old stories—one of their stories.

Thus, on the one hand, Cain may be an evil, greedy, premeditated, unrepentant, cold-blooded murderer, or, on the other, an anguished, shamed, less favored child, whose anger explodes in a frenzied attack on his brother that may not even have been an intentional killing, and is, in any event, one that he deeply regrets. To the extent persons have stories of their own—stories of sibling rivalry or of their role in the family or of their relationship to God or other authority figures—that will in large part determine their understanding of the story of Cain and Abel. As is their wont, the Torah, the Talmud, the aggadic literature, and the numerous commentaries, leave the matter in delicious equipoise. And, as

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187 I WEISSMAN, supra note 49, at ix.


189 E.g., compare ROBIN WEST, NARRATIVE, AUTHORITY AND LAW (1993) (endorsing narratives as a means of understanding the experiences of traditionally excluded classes), with Jane B. Baron, Resistance to Stories, 67 S. CAL. L. REV. 255, 280-85 (1994) (advising caution in the use of stories for purposes of legal analysis). Cf. Cover, supra note 107, at 4: “No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture.” (footnotes omitted). See also Sally Frank, Eve Was Right To Eat the “Apple”: The Importance of Narrative in the Art of Lawyering, 8 YALE J.L. & FEMINISM 79, 118 (1996) (arguing that “[w]ithout an examination of how people tell and understand stories, lawyers may be missing opportunities to convince others of their clients’ positions,” and that, “[b]y showing that Eve can be defended plausibly by a creative lawyer, I have shown that lawyers can develop defenses for even their most vilified clients.”).

190 See SCHANK, supra note 188, at 58.
is the case elsewhere in Judaism, the journey may be more important than the destination.¹⁹¹

¹⁹¹ Cf., e.g., Irene M. Rosenberg & Yale L. Rosenberg, In the Beginning: The Talmudic Rule Against Self-Incrimination, 63 N.Y.U. L. REV. 955, 969-70 (1988) ("[I]t is the debates themselves, rather than the rules propounded, that are the glory of the Talmud"); LOUIS JACOBS, THE TALMUDIC ARGUMENT 1 (1984) ("The Babylonian Talmud consists almost entirely of arguments having as their aim the elucidation of the law, ruling, religious teaching or ethical idea. . . . The whole constitutes reasoning processes which . . . have contributed more to the shaping of the Jewish mind than any other factor.").