

Progress and Punishment

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1. by *Shalom Carmy* January 2019



Modern spokesmen for traditional Judaism have consistently expressed reservations about capital punishment. While the biblical texts seem to provide many opportunities for the death penalty, the normative Talmudic interpretations in effect make these punishments inapplicable. For example, the bar of evidence in capital cases is set so high that conviction becomes exceedingly difficult. In the early second century, the formidable Rabbi Akiva and his peer Rabbi Tarfon famously declared that had they been members of the Sanhedrin when it exercised its full judicial powers, they would have exploited the evidentiary loopholes to prevent all executions. Establishment voices in their time rejoined that such maneuvering would have increased the rate of homicide. Yet in the dialogue of the generations, it was the lenient Akiva-Tarfon voice that resonated loudest.

This presumption against the death penalty was the default attitude I absorbed in school and at home. When the newborn state of Israel, eager to be progressive, decided to do without capital punishment, the Israeli rabbinate supported the move with enthusiasm. Thus I was taught to cultivate a measure of skepticism about the reliability of human evidence in matters of life and death, and to entrust absolute justice to the omniscience of God. In addition, I probably absorbed the conviction that frequent capital or even corporal punishment, however justified, contributed to a violent, unhealthy society.

Halakhic Judaism is likewise associated with disapproval for imprisonment, including debtor's prison. Here the common rationale is that prison, by and large, is a flawed punitive response by society and that it does not promote repentance or rehabilitation. Calling prisons penitentiaries does nothing to change this reality. The proper execution of punishment is prompt, unambiguous, and limited in scope, which means no ongoing stigma

after its termination. Where detention is endorsed in medieval Jewish jurisprudence, historians and legalists are inclined to explain it as an accommodation to surrounding non-Jewish standards: Jews were allowed a degree of self-government only to the extent that they visibly succeeded in imposing order among themselves, and this order was defined in accord with Gentile norms. In the modern state, too, imprisonment is accepted as a necessary evil, a concession to contemporary conditions that deviates from the ideal Torah criminology.

When I read about Pope Francis's dogmatic opposition to capital punishment, both these points came to mind. One central element in his thinking is the conviction that transgressors do not forfeit their right to life, even when they violate the greatest moral prohibitions, such as that against murder. A subsidiary theme in the pope's thinking seems to be the conviction that modern methods of detention are more humane and effective than punitive systems of the past. Therefore our modern system is superior to traditional systems that include the death penalty. In effect, one may conclude, the pope seems to be in sympathy with the popular Jewish aversion to the implementation of capital punishment by governing authorities. His comments on the value of prison, however, treat it more optimistically than the Jewish approach I sketched above.

One of my last conversations with the great recently deceased scholar Yaakov Elman questioned our assumptions about the common Jewish attitude. Perhaps, ventured Elman, the biblical and Talmudic dicta about capital punishment and more particularly prison do not express an ideal jurisprudence. Instead, these classical opinions reflect practical constraints that are not relevant today. Specifically, he speculated, a subsistence society lacked sufficient resources to support a system of prolonged punishment. Extended imprisonment is impractical when the cost of running prisons is prohibitive. Therefore, when confronted by severe crime, their alternatives were either the death penalty (or a less drastic form of corporal punishment inflicted all at once) or the "liberal" view of Rabbis Akiva and Tarfon that accepted the death penalty in principle, though not in practice. He went on to observe that modern society has the wherewithal and manpower to maintain prisons. With these reflections, Elman seemed to have brought an interpretation of Jewish sources closer to the new Catholic position.

Elman's perspective on criminal punishment is novel, at least in Jewish circles. That neither bolsters nor undermines its plausibility. But it did cause me to raise with my friend a further question. Did he regard our current methods of detention to be superior to the earlier approaches that did not accept prison as the primary mode of punishment? One does not have to be a specialist in the area to know that many thoughtful scholars and intellectuals, whether they identify as liberals or conservatives, do not believe in the efficacy or fairness of our criminal justice system.

Not long ago the conservative William Stuntz of Harvard deplored present realities in *The Collapse of American Criminal Justice*, where he spelled out the most salient criticisms. As he

saw it, recent generations have seen a move away from local policing. The older approach allowed police and the community to know each other. They could form reasonable judgments about crime and public safety based on local realities. Now, by contrast, we have an assembly-line model of adjudication. Little attention can be spared for an individualized analysis of deviant behavior and its social context. As a result, prosecutors, who are detached from the particular communities they serve, exercise a great deal of leeway. Given the large volume of criminal arraignments, plea-bargaining rather than discretionary judgment dominates the justice system.

Stuntz focuses on the process of conviction and sentencing, but the situation he describes has created a huge prison population. Is this massive system of incarceration superior to what went before? Stuntz was especially unhappy about unfairness of the present system to poorer and racially stigmatized segments of society. Setting aside his concern about discrimination, one may ask whether large-scale imprisonment promotes lifelong criminal identity rather than rehabilitation, and whether it enables rather than discourages recidivism. It has been argued that our gigantic network of prisons with its enormous number of guards and other functionaries is not, to put it mildly, a very humane way to govern the criminal population, and may in fact incubate criminal inclinations.

Perhaps Pope Francis lauds modern ideas about detention because American practice is not his model. James Q. Whitman of Yale Law School argues in his book *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* that the United States is marked by the distinctive severity of its penitential system. French and German punishments are milder: Prison sentences are rarer and shorter. Whitman believes that American harshness reflects our more egalitarian outlook. Aristocratic Europe traditionally distinguished between the upper-class offender, whose status earned him respect and was thus punished in distinctive ways, and the plebeian criminal treated with contempt. With the waning of hierarchy in Europe, the lower-class criminal now benefits from the dignity previously denied him. He is punished in accord with the magnanimity once accorded to the noble transgressor. In America, by contrast, the fundamental notion that nobody is special means that upper-class criminals are no better than the multitudes. Everyone who runs afoul of the law is treated harshly. The American lawman and public alike enjoy "throwing the book" at the elite offender precisely because it reinforces a democratic sense of equality before the law.

Questions of just punishment and law enforcement can appear distant from our everyday moral and spiritual challenges. Few of us work in the criminal justice system, so we have no direct responsibility for formulating or imposing punishments. In New York, where I live, street crime is nothing like it was in my youth. What is done to those who collide with the law takes place largely out of sight. Hence we tend to relegate moral questions about crime and punishment to the realm of social policy rather than ethics and religion.

These circumstances should not short-circuit moral reflection. In our society, concern about criminal justice is surely part of our religious outlook on the public square. In the eyes of God, we are all potential noblemen, however much we may dishonor the image of God we bear. For that reason, the judgment of Rabbis Akiva and Tarfon about punishment, especially capital punishment, remains authoritative, however much our practice must take into account contemporary social realities. We cannot afford to be complacent about our present arrangements. We should challenge ourselves to think about whether and how criminal justice can be made consistent with the classical religious goal of repentance and amendment of life.

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