

## Incarceration, Part Two: Is There a Jewish Approach to Criminal Sentencing Reform?

The Freehof Blog, November 13, 2015

In our last [post](#), we examined a statement that appeared on a Reform Jewish website. The statement declared that "Jewish values" support current efforts to do away with the mandatory criminal sentencing regime in the United States, in particular the heavy sentences handed down to non-violent drug offenders. We argued that, aside from the merits of the proposed reform, the "values" that the statement cited (the verse Deuteronomy 16:20 - "Justice, justice you shall pursue") amount to little more than a nebulous slogan and that any substantive support that does exist in Jewish tradition is most likely to be found in the *halakhah*, the texts and sources of Jewish law.

All right - so who's going to volunteer to conduct a study of the vast corpus of the halakhic literature in search of that support? (Moral of the story: be careful when you criticize!) It would be a daunting task... which is why we are fortunate that much of the work has already been done. We're referring to Professor Aharon Kirschenbaum,[1] whose massive (1026 pages) and magisterial study *Jewish Penology* surveys the structure and development of the Jewish laws of punishment (*dinei onshin*) from Biblical times to the present day.[2]

Especially relevant for us is Kirschenbaum's discussion of *torat ha'anishah*, the theoretical rationale behind the institution of punishment in Jewish law (pp. 704-739). There, he classifies the various punishments imposed by the Torah, the Rabbis, and by later Jewish communities[3] according to the purposes they are intended to serve: vengeance (נקם), retribution (תגמול), the purging of evil from the community (ביעור הרע), atonement (כפרה), and deterrence (הרתעה).

This last category applies directly to our subject. After all, the harsh mandatory sentences imposed upon nonviolent drug offenders were enacted largely for the purpose of deterring potential lawbreakers. And deterrence is certainly a "Jewish value." As Kirschenbaum notes, It finds its justification throughout our traditional literature: "Thus all Israel will hear (of the punishment) and be afraid, and such evil things will not be done again in your midst" (Deuteronomy 13:12); "People would commit murder were it not for the fear of the law's punishment" (*Sefer HaHinukh, mitzvah* no. 47); "Were the transgressor to escape punishment, one who intends to commit a sin would not be deterred" (Maimonides, *Guide of the Perplexed* 3:35). It's hard to argue against such sentiments, given that they are so firmly grounded in what we take as common sense: what *would* deter lawbreakers if not the likelihood of punishment?

But suppose for a moment that, in a particular instance, common sense turned out to be erroneous, that the prescribed penalties were found *not* to deter potential criminals. Or suppose it were found that the harsh sentences meted out to non-violent offenders actually backfire, that they tend to increase the likelihood that the offenders will persist in criminal behavior upon their release from prison? In such a case, those taking a progressive halakhic approach toward the study of our sources[4] might logically conclude that the penalty has *in this instance* lost its justification and therefore ought to be modified or repealed.

We can find support for this conclusion in a famous *mishnah*:

סנהדרין ההורגת אחד בשבוע נקראת חובלנית. רבי אלעזר בן עזריה אומר: אחד לשבעים שנה

רבי טרפון ורבי עקיבא אומרים: אילו היינו בסנהדרין לא נהרג אדם מעולם

רבן שמעון בן גמליאל אומר: אף הן מרבין שופכי דמים בישראל

A Sanhedrin that executes one offender in seven years is called "destructive." Rabbi Elazar b. Azaryah says: (A Sanhedrin that executes) one in seventy years (is called "destructive").

Rabbi Tarfon and Rabbi Akiva say: "Had we been members of the Sanhedrin, no one ever would have been executed." [5]

Rabban Shimeon b. Gamliel says: "Yes, and they would have increased the number of murderers in Israel!"

In this dispute, Rabban Shimeon b. Gamliel represents the common sense view of punishment as described above: the prospect of execution intimidates potential murderers, so that Rabbi Akiva and Rabbi Tarfon, by doing away with the capital punishment as a practical matter, would have denied the legal system that powerful deterrent. [6] How then would Rabbi Tarfon and Rabbi Akiva have responded to such an incendiary charge? The *mishnah* doesn't say, but can't we safely presume that they, too, were guided by common sense? Can't we say that their devotion to protecting innocent lives was as deep as that of Rabban Shimeon and that neither of them wanted to "increase the number of murderers in Israel"? If so, it's at least plausible that they would have defended their position on the grounds that, in their view, the death penalty is not in fact a deterrent to murder. Therefore, because it does not serve its intended purpose, that awesome and awful sentence should be administered sparingly, if at all.

There is much more to be said, of course, about the subject of capital punishment in Jewish law. But for the moment let me suggest that, in a progressive halakhic reading, this Mishnaic dispute offers a Jewish paradigm for thinking about mandatory minimum sentencing. To the extent that sentencing laws serve the purpose for which they are intended - that is, to deter crime - then we would be led toward the conclusion of Rabban Shimeon b. Gamliel that to remove the punishment would simply encourage lawbreakers. Conversely, if we can demonstrate that there is no clear connection between harsh sentences for drug offenders and reduction in crime, then we would tend to side with the approach of Rabbi Akiva and Rabbi Tarfon: we would work either to eliminate these draconian penalties or to modify them substantially.

The point is that a "Jewish" approach - which is to say a *halakhic* approach - to sentencing policies ought to be *data-driven*, based upon an evaluation of the available facts: do mandatory severe sentences for non-violent offenses actually achieve the legitimate goal of deterrence (הרתעה)? Any number of studies would seem to indicate that harsher prison sentences do not deter crime and might even increase the likelihood of recidivism. To the extent that these findings are persuasive, [7] we have the makings of a powerful *Jewish* argument for reform in

sentencing rules, an argument based not upon high-sounding "values" but upon the texts and sources of the Jewish legal tradition.

We don't claim that the foregoing represents a thorough and exhaustive treatment of the subject. And I certainly do not wish to compare it to Professor Kirschenbaum's impressive achievement. But it just may provide an example of how progressive halakhic thinking can help us derive text-based Jewish approaches to contemporary controversies.

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[1] A well-known and widely-published scholar in the field of *mishpat ivri* (Jewish law). See especially his *Equity in Jewish Law* (Hoboken, NJ: Ktav/Yeshiva, 1991).

[2] ירושלים: מאגנס, 2013). בית דין מכין ועונשין: הענישה הפלילית בעם ישראל- תורתה ותולדותיה)

[3] This indicates Kirschenbaum's essential distinction (pp. 42-43) between "Jewish law in theory" (המשפט העברי הקלסי-הרמנויטי), based in the classic Jewish texts, interpreted by the standard Rabbinic procedures, and codified in the major "restatements" of the *halakhah*, and "Jewish law in practice" (המשפט העברי הפרגמטי-יישומי), that is, the law "in action" as discovered in the post-Talmudic responsa, court cases, and communal enactments.

[4] Put briefly, progressive *halakhah* attempts to avoid the mechanical and formalistic interpretation of halakhic texts, which applies rules regardless of their consequences. Rather, if a law is based upon a stated rationale, we ought to take that rationale seriously and interpret the law in accordance with it.

[5] See Bartenura *ad loc.*, based upon *B. Makot 7a*: they would have set the standard of evidence so high as to render execution impossible to carry out in practice.

[6] See Rashi, *B. Makot 7a, s. v. af.*

[7] I'm not trying to weasel out of a firm conclusion here. The problem is that, alongside the studies that question the connection between severity in sentencing and reduction in crime, a cursory web search will pull up studies that point to the opposite result. For what it's worth, my impression is that the studies in this latter group are dwarfed in number by those in the former. Obviously, to determine just which set of studies is more correct requires social science research skills far beyond my own professional competence.