

CLOSING THOUGHTS

## Two Final Lessons the U.S. Could Learn from Jewish Criminal Law

Zooming out from the specifics of policing and incarceration, there are two other overall lessons the U.S. could learn from a study of halacha. One is about a qualitative distinction between categories of crimes, and the other is about the public nature of punishment.

The Mishnah, in tractate Sanhedrin, lays out the two types of criminal cases and how they are to be judged. *Dinei nefashot*, capital cases, are heard and decided by a court of 23. The 36 crimes that are punishable by death essentially boil down to the three categories of most egregious violations, those that “do violence to the divine presence in some way...[they] represent both crimes against God and threats to the civic and moral fiber of Jewish society.”<sup>502</sup> They are murder, idol worship, and sexual impropriety as defined by the Torah.

**All other crimes**—including property damage, assault, and rape<sup>503</sup>—are *dinei mamonot*, “monetary legal matters.” They are judged by a court of three and punished by a combination of fines and lashes—never incarceration and never the death penalty.

In other words, in the Jewish view, most crimes are matters that can be ironed out in society in such a way that the harmed individual(s) can be made whole again and the one who did the harm can be held accountable, do *teshuvah*, and go on with his/her life. In only an extreme few cases does a crime pose such a threat to society that the one who committed it must be removed permanently.

The U.S. has what, at first glance, appears to be a similar system, with different courts and rules of procedure for criminal and civil cases. The Jewish division, however, does not map at all onto the American one—*dinei mamonot* are not solely “civil” suits; they are the vast majority of ways one person can harm another.

If a court of 23 has convicted someone of a capital crime and the death sentence is to be carried out, it is done quite publicly, and that is the second lesson. The American legal system likes to hide punishment where possible. Prisons are often located in rural areas, so that the people held there effectively “disappear” from life. Moreover, the problems those people represent—homelessness, addiction, domestic violence, mental illness, and so on—disappear, making it easier for society to ignore them.<sup>504</sup> Executions are carried out at midnight, in the depths of a prison, so that few people will be around to be “disturbed” by them. But if society is going to execute one of its members, shouldn’t we be disturbed?

Under the halachic system, an execution is carried out in a public place, in the middle of the day, some distance from the courthouse. A town caller goes before the condemned crying out his/her name and the nature of the crime, so that anyone who might have exculpatory evidence can bring it forward at the last minute. The witnesses themselves, and in some cases the entire community, carry out the execution. (See *Mishnah Sanhedrin* 6:1, 4) It is a public act, done with the full knowledge of the community, and not something that can be hidden away so that most people can ignore it.

This is not primarily an argument about the death penalty but about understanding the severity of crimes and of punishment. American criminal law easily allows—indeed, sometimes mandates—that crimes be upgraded based on their circumstances. For instance, if a person dies during the commission of another crime, that becomes “felony murder”—even if the death is totally accidental. Similarly, a nonviolent illegal drug transaction becomes classified as a violent crime, with additional penalties, if a gun was present, even if it was never used or even brandished.<sup>505</sup> *Halacha* reminds us that the punishments we mete out are real, with serious, lifelong (or life-ending) consequences; we cannot simply weasel our way, collectively, out of being responsible for them.

502 Jacobs, Jill. *There Shall Be No Needy: Pursuing Social Justice Through Jewish Law and Tradition*. p. 194-195.

503 See *Mishnah Sanhedrin* 1:1. Our modern sensibilities are repelled by the idea of treating a rape as mainly a matter of damage to the woman’s marriageability—i.e., to the father’s property—and today we might want to draw the distinction between the two categories somewhat differently. Nonetheless, the fundamental point about the distinction between *dinei nefashot* and *dinei mamonot*—and the relationship each bears to society—remains important.

504 See Schenwar, *Locked Down, Locked Out*, p. 3.

505 <http://famm.org/projects/federal/us-congress/gun-mandatory-minimum-sentences/>