

Chapter 4



PUNISHMENT

Its Method and Purpose

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All legal systems need a way of enforcing court decisions; punishment represents one of those means. It may be provided to exact or to circumvent vengeance, to rehabilitate, educate, enforce social norms, maintain class distinctions, exercise power, or for a variety of other reasons. Jewish law also used different methods of enforcement. The reasoning behind them may be clearly stated or implicit.

Effectiveness demanded a system of readily understood punishments and penalties governed by a rationale readily understood by the offender, the injured party, the surviving family, and the broader society. Various periods of Jewish history have seen the judiciary take different paths. The punishments provided rarely indicated the intent of those who imposed it and there was no extended debate of what punishment sought to accomplish. Occasional hints may point to some general theories of punishment. We shall investigate what punishments were used as well

Notes for this section begin on page 60.

as those avoided. In other words, not only the paths taken, but the road eschewed. Punishment for social or religious violations have changed several times since the biblical period, but not necessarily in the direction which we ascribe to it. This paper will present only a skeletal outline with some tentative conclusions.¹ The subject is immense and so this essay can only begin to explore it.

Judaism since Biblical times has defined itself through a system of *mitzvot*—commandments. These are not suggestions, but divine demands on human conduct. They were worded very clearly, with "You shall" or "you shall not," as in the Decalogue and elsewhere,² dealt with specific situations as in many laws of Exodus and Leviticus. They might begin "If a person . . .," and then conclude with a penalty which may simply be a fine or go as far as demanding death,³ or they might be presented as actual cases.

As the commandments were to be taken seriously, a system of timely penalties and punishments accompanied them. Some punishments were mentioned in the Decalogue, but far fewer than we might have expected and their nature did not make them socially useful. How would the average rogue react to the penalties provided by the Decalogue—"I will not hold him guiltless" or "visit the sins of the fathers upon the children for the third and fourth generation" or "will prolong their days in the land which the Lord your God will give you?" These specifics were not translatable into daily life unless the individual was truly religious. Furthermore no penalties were attached to the most common breaches of family and social morality mentioned by the Decalogue—murder, robbery, and adultery. Punishments were, however, provided later in the Torah.

What was the goal of the Torah's legal system? Exodus declared that Israel was to become "a kingdom of priests, a holy people" and that was reiterated in Deuteronomy as well as later. The thought was shared throughout the long biblical period.⁴ In other words a special status of sanctity was to be achieved by the entire people. Whatever else holiness might mean, it certainly demanded the elimination of sin, as well as personal and social misconduct. The lofty goal was left undefined, but sins toward God and human beings were delineated and enumerated. The Torah, as a religious document, treated religious and ritual wrong-doings alongside crimes against individuals and society.

As the Torah is a religious document, not a national legal code, it would have been appropriate to leave punishments to God.

Divine punishment could be meted out in the form of diseases, accidents, farming or business misfortunes, and might be delivered in this or succeeding generations. The entire natural and human world could be seen as enforcing agencies. Punishment could also be postponed to the next world with powerful descriptions of the site of such punishment, as vivid as Dante's Hell. Judaism sometimes took the first path and interpreted disasters of a personal nature as punishment for specific acts⁵ or national disasters as divine punishment for wrong doing of the entire people. Such an interpretation was frequently invoked⁶ and continued to be used as an explanation for great national disasters such as the destruction of the Temple, the expulsion from Spain, and the Holocaust.⁷ These explanations usually served best in a hortatory setting.

The religious goal was the creation of a "holy nation." Social goals also emerge from the legislation and its provisions for punishment. Let us begin with the most serious offenses, murder and manslaughter, which although rare, arouse strong emotions, we will then turn to other crimes.

The biblical legislation sought to prevent human vengeance and to channel matters into the hands of the law. Murder was differentiated from accidental killing and so were the punishments. The cities of refuge provided a safe haven for the innocent,⁸ although we know nothing about the way in which they functioned, and they were not replicated in any form in later Jewish history. Murder was severely punished through the death penalty, which was carried out by the courts or by the relatives of the victim, so Cain in Genesis was free to be killed by anyone who felt that the blood of Abel needed to be avenged.⁹ This citation came from an era in which the court system was not sufficiently strong to carry out penalties and this method of justice was condemned.¹⁰ Blasphemy also carried the death penalty, as did misappropriation of divine property (i.e. something declared *herem*).¹¹ The death penalty was invoked for many crimes, though not for crimes against property as in many non-Jewish jurisdictions until the nineteenth century.¹² Executions were carried out through various means with stoning used most frequently, followed by fire. Hanging was not a method of execution although a corpse might have been hung in order to shame the individual or to warn others.¹³

The death penalty could be invoked against an entire community if it was involved in apostasy;¹⁴ the city was then totally

destroyed. We may be astonished by the constant use of the death penalty; justice was severe.

With the suspected adulteress (*sotah*), the trial by ordeal was as frightening, as the punishment could be death, at the husband's discretion.¹⁵ In this case, we also have a public spectacle of a highly dramatic nature, as we learn especially from the tractate by that name in the Babylonian Talmud, which detailed the proceedings before the court.

Young women about to enter marriage were especially vulnerable to charges of non-virginity, so the punishment for a false accusation was severe and consisted of a fine of one hundred shekels, whipping, and the inability to ever divorce his wife. The same penalty was provided for someone who raped a girl who was not betrothed; if she was, the penalty was death,¹⁶ strange to our ears indeed.

A system of precise retribution, aside from vengeance for murder, discussed earlier, was provided by the statements "An eye for an eye" which demanded monetary compensation through the courts.¹⁷ A slave was given freedom if seriously injured by his master.¹⁸ These laws protected the perpetrator from personal vengeance and allowed the facts to be investigated. A harsh punishment, however, was decreed for a woman who sought to assist her husband during a fight by seizing the genitals of his opponent; her hand is cut off.¹⁹

Whipping was frequently invoked, although mentioned specifically only once, it seems to have been taken for granted as it was mentioned without a specific offense, but as a general punishment. It was considered disciplinary in nature. It seems to have been frequently used to discipline slaves.²⁰

Some punishments were intended to make crime expensive, so the system of high fines in addition to restitution were invoked and should have made the potential thief think twice about his actions (seven fold or five fold for an ox, four fold for a sheep).²¹ Even an innocent purchaser, who presumably did not investigate the source of his purchase sufficiently, paid a two fold penalty.²² Theft voluntarily acknowledged brought restitution and the addition of a fifth of the value, plus a guilt offering.²³ Many laws dealt with the protection of property, although we should note that the notion of personal possession was limited by the laws of the Sabbatical Year and the Jubilee.²⁴ The latter was theoretical, but the Book of Jubilees testified to a desire to follow it.

Imprisonment was used only for holding a suspect until trial, for political reasons, or to enforce a judicial decision. It was not generally used as a method of punishment.²⁵ Confiscation was mentioned only at the end of the biblical period.²⁶

The laws sought to protect the weak and demanded a fair judicial system which treated all persons regardless of status alike. This included the non-Israelite stranger and the slave.²⁷

There are, of course, instances when no human punishment is possible as the commandment deals with a matter of conscience alone, such as the tenth commandment. Who knows when "You shall not covet" has been violated? We must leave this to God and the human conscience.

The Bible was not the product of systematic thinkers. We, therefore, have no theoretical statements about the function of punishment whether carried out by divine mandate or through human agency. We must deduce what we can from isolated statements and various hints.

The human court carried out a divine mandate, so the punishment was seen as ultimately coming from God to help to produce a "holy nation." Punishment played a social role as it generally was public; the people participated or were required to participate, so that the communal nature of this final stage of a trial was likely to have an impressive religious effect and may have been planned as a deterrent as well. The court's intervention took punishment out of the realm of personal vengeance and replaced it with communal action. It was also a display of royal, priestly, or communal power and protected that power and its system of courts. For the individual, the prospect of public humiliation before the entire community played a significant role.

The Mishnah and the Two Talmuds

The Mishnah and the two Talmuds vastly expanded the range of law. Many of the areas covered must have existed earlier because a society could hardly have functioned with the skeletal system of the Torah, but we possess no record of that coverage. The Mishnah and the Jerusalem and Babylonian Talmuds present detailed discussions, actual cases, and academic analyses of problems. Often it is difficult to distinguish among them. Matters which were no longer actual, as those connected with the Temple

and its ritual as well as the "King's Law" were debated.²⁸ A series of hermeneutical rules, interpreting and expanding the original biblical material were carefully developed.²⁹ These rules tied the "oral law" to the earlier "written law" and provided a justification for the expansion. The judiciary was fleshed out and various levels of courts which may also have existed earlier, but were not described in the Bible, were mentioned.

Punishments for crimes were also changed, and in some instances, expanded or reinterpreted. Whipping, for example, was seen as a merciful act, as any trespass against a divine commandment actually deserved the death penalty.³⁰ An entire mishnaic tractate bore the name "Lashes," although it also contained discussions of other material. The number of lashes was diminished to thirty-nine to avoid a possible mistake and then could be further reduced for medical reasons or to spare the honor of the person to be punished.³¹ On the other hand, if the individual died during the administration of the whip, no one was blamed. Its administration was also described in detail; three judges had to be present during its administration.³² The specific crimes for which whipping was the penalty were detailed; they included all offenses for which *karet* was the biblical penalty as well as all violations of a negative commandment which entailed some action, so tale-bearing, prohibited in Leviticus 19:14, would not lead to whipping. On the other hand taking the name of God in vain was so punished.³³ This form of punishment was also extended to provide communal discipline, so those who made impossible vows were flogged as were individuals who had intercourse in public, or a man and a woman who secluded themselves.³⁴ The limit of thirty-nine lashes only existed for offenses against negative commandments, there was no limit for positive commandments. Therefore, if the command to build a sukkah was met by refusal, the individual could be whipped, as could a debtor.³⁵ We shall see this form of punishment vastly expanded as a disciplinary measure in later times.

Confiscation, hardly mentioned in the Bible, was extended and meant that the courts could punish far beyond the fines provided by the Scripture this was used particularly to punish repeating offenders, as a means of restoring law and order,³⁶ or to provide what common sense demanded, but for which no other precedent existed, such as the sale of an infant's property for the seller's own benefit or invalidating a marriage which had been

legally executed.³⁷ It was also used to justify Hillel's *prosbul*, in other words to justify a quasi-legislative act of social reform.³⁸ The system of fines was expanded to cover numerous situations; they were often fixed by law so that equity was assured. There was some disagreement whether fines earlier imposed only by a *bet din* could be continued, but there was consensus on the power of the court to fine for any matter not covered by biblical law.³⁹

The death penalty and the methods of execution were discussed in detail. Four methods of execution were used: stoning, burning, strangulation, and decapitation.⁴⁰ Each of these methods of execution was arranged in such a way that the convicted individual's physical appearance would not change. The thought behind this was that of making the execution resemble a normal death as much as possible with the body of the criminal left un mutilated.⁴¹ This was considered an extension of the commandment to love your neighbor as yourself and assured a humane death.⁴² These two considerations continue the biblical thought of having the court act as an agent of the Divine and following that pattern as much as possible.

Stoning, the penalty for eighteen Biblically mentioned crimes, was changed so that the criminal was pushed from a height onto stones, rather than having stones thrown at him. The general public was also effectively excluded and only the witnesses took part.⁴³ Burning, for adultery and incest, was preceded by strangulation.⁴⁴ Decapitation, prescribed principally for murder, followed the Roman practice.⁴⁵ Strangulation was used for all crimes in which no other death penalty was specified; it was considered the most humane method of execution.⁴⁶ Safeguards against wrongful execution were carefully put into place.⁴⁷ Following stoning the corpse could be hanged for public display until nightfall if the crime was blasphemy or idolatry.⁴⁸ As these executions were painful, a drug potion including frankincense was given to them.⁴⁹

Although theoretically the death penalty was not to be extended beyond the instances mentioned in the Torah, in practice this was not so.⁵⁰ Some efforts were made to limit the use of the death penalty. It seems that during portions of the late mishnaic period it disappeared entirely or was so infrequent that it no longer played a role, so one authority stated that a court which gave the death sentence once in seven years was a bad court, while Eliezer b. Azaria increased that to once in seventy years. R. Tarfon and R. Akiba would not impose the death penalty at all.

The talmudic discussion suggested that the penalty be avoided by asking questions of the witnesses till some confusion arose.⁵¹

These brief statements against the death penalty, as well as others which sought to void it in the case of the rebellious son, do not change the basic tenor of the talmudic discussion. The death penalty remained part of the legal system and could be used when jurisdiction was provided.

The use of imprisonment was expanded and we learn of separate prisons for Jews and non-Jews.⁵² It continued to be used to hold suspects for trial and convicted criminals until their punishment. It was also used to force individuals to obey the will of the court.⁵³ Furthermore, it was used to sentence a murderer who could not be convicted for technical reasons and for repeat offenders who were not discouraged by whipping. Such prisoners could be fed bread and bad water or barley water, which would lead to their death.⁵⁴

The effort of this literature to clearly delineate the rights and prerogatives of various courts collapsed when the original system of ordination upon which all of this was based vanished. This occurred in the third or fourth century.⁵⁵ The literature took it for granted that the authority of the court remained intact despite the lack of ordination. Theoretically, the death penalty was no longer possible, but it continued to be used.

As we look at the Babylonian and Jerusalem Talmud from the point of view of punishment and punitive theory, we see that both added an enormous amount of detail which we have made no attempt to present here. For every biblical law there are dozens of cases, exceptions, peripheral elements, objections both real and theoretical. In addition, the crimes covered were increased as the Biblical laws were too skeletal and because the civilization or the country in which the people now lived had changed. New social and economic conditions had to be met. The basic types of punishment remained the same. Capital punishment may have diminished, but that is far from certain, and it was not eliminated.

Fines were a method of punishment expanded by the Talmud; they went beyond compensation for damage actually suffered. In most cases the amount of the fine was fixed by law and meant that a system was created.⁵⁶ Fines could be imposed for many crimes and a very long list existed. Even when the legal right to impose a fine was weak, it could be upheld through custom and the need of the time.⁵⁷

The laws of robbery and theft followed the biblical statements closely; the discussions presented considerable detail as well as actual cases, but made few basic changes.⁵⁸

The ban (*herem*) was changed from its biblical connotation of complete destruction or dedication to God; in the Bible it was not a method of punishment except through a threat made by Ezra.⁵⁹ The Mishnah introduced the *nidui* which was a lesser form of the *herem*, but saw it as punishment through isolation; the biblical basis for this was found in the Book of Numbers.⁶⁰ It was used to punish both scholars and laymen during the Tanaïtic period.⁶¹ *Nidui* seems usually to have been for a period of thirty days which might be extended for an additional term. If compliance was not achieved, then *herem* could be pronounced and it was effective until lifted by the court. A shorter period of imposed isolation was the *nezifah* with a duration of only seven days.⁶² The forms of isolation differed in their severity, i.e. whether study or business was permitted, and whether there were restrictions on washing, clothing, public greeting, participation in public worship or *mezuman*, as well as funerary dishonor.⁶³ A long series of offenses could be punished by *nidui*.⁶⁴

In the vast talmudic literature we will not find much theoretical discussion of punishment or the development of penal theory. The various penalties were to punish for crimes, to serve as deterrents to prospective criminals, and to maintain social order. The range of application had widened considerably beyond that of the biblical period, but that may be more apparent than real, for our knowledge of biblical punishment is very limited.

In contrast to the Bible, there was discussion among the authorities about the punishment used and the manner of its execution. Authorities who disagreed and provided other penalties were cited, even if not with approval. We, therefore, see a diversity of courts emerge in these centuries.

Post-Talmudic Halakhic Authority

At the conclusion of the talmudic period, the court system of the previous age survived in the Gaonate which continued to exercise considerable authority in the Near East and the southern Mediterranean basin during the early Islamic period of the Umayyad (661-750) and Abbasid (750-1100) caliphates. When the Abbasid

Empire disintegrated, local authorities in various lands assumed judicial authority as they had earlier in Southern and Central Europe. As local rulers were generally quite willing to permit internal autonomy to the Jewish communities, the system of courts and their sentences followed the talmudic pattern with amplification as needed.

As the earlier talmudic law had frequently gone beyond the "written law" with only a slender scriptural connection, so the post-talmudic courts found ways to expand the "oral law" when the need arose. Often steps taken as temporary measures became permanent. The Tanaim had already made a modification by allowing the selection of lay judges by the litigants; the Amoraim went further, so that a single "expert" could adjudicate. Now decision in monetary matters would be made by judges who did not possess the ancient ordination which ceased in the fourth century.

Whipping and the death penalty were theoretically limited, but continued.⁶⁵ A new series of punishments was imposed through *takkanot* (communal decrees), often intended only as temporary, but they usually became permanent. Legislation established by a city or provincial assembly of scholars as well as individual decisions of local rabbis were to be obeyed because "of the needs of the time" and this could and did lead to a long list of penalties.⁶⁶

These changes also influenced punishments which often were dictated by the need to protect the community. The ancient requirements as modified in the rabbinic literature made it very difficult to convict anyone as the laws of evidence often required specific warnings or precise corroboration; they did, however, truly protect the individual. Much of this was part of a general medieval need for solidarity in the face of a hostile world and the emphasis on the society rather than the individual.

On the other hand, some types of punishment disappeared entirely, for example the ordeal of the *sotah*, was not mentioned again. Even trial by ordeal was quite common among neighboring cultures in the medieval period, it was not found among Jews.

The death penalty which continued during the talmudic period, despite occasional objections, was fully enforced, except in the Gaonic period and it was used for new situations, for example on informers who were a danger to the entire community; the struggle against them was considered a war to be waged without mercy. The ordinary murderer was also executed

as earlier. Executions were by strangulation or drowning, and also sometimes held secretly.⁶⁷

The justification for its use was the removal of evil from the community. Others saw it as a way of frightening potential criminals. Often the right to execute had to be authorized by the local ruler or the king. There is no way of knowing how frequently the death penalty was used. Our sources deal primarily with the best known scholars; they refer to this sentence as nothing unusual. We should remember that the medieval period was much more violent than our times in urban areas and on the roads, as contemporary non-Jewish sources attest.

Added to the list of punishments was maiming, which was unknown in biblical or talmudic times. It was used in both Spain and Poland for a variety of crimes, a habitual Polish thief had both ears cut off. As one respondent indicated, this was more feared than death, as it was a reminder to the world of criminal acts for the rest of the individual's life.⁶⁸

Prisons were used in the Middle Ages in all lands except France and Germany. In Spain imprisonment occurred only for serious crimes such as murder. We even have an inquiry about the need for a *mezuzah* for a prison. House arrest with a guard posted outside the house was also used, especially in Spain.⁶⁹

A method of punishment influenced by the surrounding society was the placement of offenders into iron stocks before the entrance of main synagogue as in Lvov and other Polish cities, a procedure known to us through the *pinkasim* (communal records) of the cities.⁷⁰ Another unusual penalty was branding the letter *tav* for prostitution, theft, and/or informing as reported from Spain, Prague, and Cracow.⁷¹ Equally shaming was the shaving of all hair and the beard; this was not known in Gaonic times, but was later used in all lands.⁷²

Whipping was the most frequent physical punishment. Maimonides provided a long and detailed list of crimes for which whipping was the punishment; twenty-one were crimes against communal morality in which the Torah stipulated *karet*, a divine punishment of unknown meaning, but not death; eighteen dealt with priestly wrongs and matters connected with sacrifices; 168 covered everything from slander and perjury to dietary and sumptuary laws. This was a much more thorough list than presented by anyone earlier.⁷³ The medieval punishment of lashes was not governed by the earlier rules which limited it to forty,

and the Mishnah diminished to thirty-nine; whippings went far beyond that. It could be part of a system of penance and lead to consecutive whippings.⁷⁴ Sometimes it was used as a means of execution. This bodily punishment also led to public shame and so was quite effective.⁷⁵

Whipping and fines were not limited to crimes against individuals, but were also used to punish infringements of a religious nature. In other words, punishment was a tool used to uphold communal morality in a broad sense. Violation of the Sabbath and inappropriate behavior on holidays was punished. In some places individuals could be whipped publicly for a minor infringement such as lighting a fire or a candle after Shabbat had officially begun, or for the more the major offense of not attending public services to provide a *minyán*. In this way a minimum set of religious observances was enforced.⁷⁶

The least problematic form of punishment were fines, and we find them frequently in the responsa literature used for situations not mentioned earlier. Some were quite serious as (accepting stolen goods) and others trivial, as (bringing a dog to synagogue).⁷⁷ Unlike previous ages, fines were generally not paid to the injured party, but to the communal treasury and used for a charitable cause. In some instances, the injured party could stipulate the recipient charity.⁷⁸ When jurisdiction was provided by the gentile government. It was often stipulated that a portion of all fines collected would be paid into its treasury.

The *herem* in its various forms was used in the medieval period not only as punishment, but as a threat of punishment. For example, and so it was attached to the decree attributed to R. Gershom which prohibited polygamy. The conditions of the *herem* were made more severe, so that it affected the entire family; the wife and children were excluded from synagogue and school. Circumcision and burial would not be performed. The individual and his family were treated as if they did not exist. Within the closed Jewish communities, this was a severe and effective punishment.⁷⁹

This form of punishment ceased to be effective by the nineteenth century when it was used too freely in the struggle between *mitnagdim* and Hassidim as well as the battle between Orthodoxy and the Reform movement. When used nowadays by the extreme Orthodox, it is more a sign of their anger than an effective tool. The collapse of a united community meant it was

no longer useful even when properly applied. The same was true of penance which ceased to be mentioned in the responsa literature. The communal base for such actions diminished further and further.

Forms of penance as a path to reconciliation with God had their roots in the Bible with its system of guilt and atonement offerings as well as fasting. They were stipulated, but not legally enforced as this was an area between God and the individual. They could be used as a form of punishment. The Talmud developed them, but not in the direction of a court directed punishment as was the case in the Middle Ages. Whipping, shaving of the head and beard, and fasting along with financial restitution was imposed.⁸⁰

Aside from the traditional uses of punishment of earlier periods to control criminal behavior, the medieval authorities utilized it as a way of enforcing communal discipline. As the world around them was often hostile, strict discipline was necessary to hold the community together. The threat of punishment should therefore be seen as preventive or educational. The methods used reflected the general standards of the times, so new and cruel methods, not previously found, were introduced. There were limits beyond which the punishment could not go for the possibility of simply leaving the Jewish community always existed. So a balance between reinforcing communal discipline and forcing a member out of the community had to be found.⁸¹ No general theories of punishment were developed and none of the medieval philosophers treated this area.

Conclusions

As we look over the punishments used through the centuries, we see that a number of different goals were sought: (a) The execution of the Divine will; (b) the establishment of a "holy people" with high ideals which would lead to the Messianic Age; (c) the removal of evil from the midst of the people; (d) the elimination of personal vengeance; (e) the prevention of evil through a fear of punishment; (f) the re-education of the criminal; (g) the maintenance of limited autonomy in the face of gentile power; (h) the preservation of the community and its integrity and (i) the elimination of dissidence.

Although each of these forms of punishment used were primarily applied to the individual found guilty, in the medieval period they were applied to the family through various forms of the ban. Many questioned this broader application of punishment and its effect; however, the practical consideration of its effectiveness in difficult times led to its intermittent use.

The considerations here mentioned were used as justification for punishment throughout our long history. They vary from the ideal to the highly utilitarian; as one looks at the literature and the authorities who mention these justifications, we see that the nature of the times and the nature of the personalities played a major role in determining which rationale was emphasized. The talmudic authorities and their later medieval successors rarely present us with any discussion of a theory of punishment or with a listing of alternative rationales. In fact in most instances when a rationale has been given at all, it was incidental to the punishment. Only when asked whether the sentence would have an adverse affect on the community or the individual was a rationale presented at all. Those who made the decisions were more interested in the task of practical leadership for their community than in a theory of criminology. Those who wrote codes wished to present a concise synopsis of the vast fields of the halakhah and, with the exception of Maimonides, added little theoretical material to their volumes. The great debates about the nature and purpose of punishment at human hands existed only in rudimentary forms.

The biblical efforts were intended to remove punishment from the hands of the individual through a system of courts and this succeeded. The courts and the law which accompanied them took care of all disputes. Both were firmly established; the power and authority of the halakhah, became firmly rooted, so that anarchy never reigned even in the worst of times. This was relatively easy in periods of independence or when a high degree of autonomy was given to the Jewish community and, to a lesser degree, in ages when submission to the will of the courts was voluntary. The punishments, of course, had to be tailored to the conditions which prevailed.

Human punishment through courts dampened the desire for vengeance. We see this especially with the treatment of murder and physical injury. Equally important, it leveled the ground between the powerful and well-connected and the ordinary human being. Justice, ultimately, in the hands of God, could be

found in the courts and was meted out according to the crime and the facts, not personal status. Humaneness in the nature of the punishment was a goal sought as well. In the Bible we see it through leaving many punishments in the hands of God, by the establishment of the cities of refuge, a system of fines, etc. The trend toward a more humane system was accelerated in the rabbinic period when we find the death penalty, so frequently invoked in the Bible, much more limited. Execution occurred mainly for murder and was performed in a less painful manner and with the general population effectively excluded. Efforts were also made to limit whipping and to take the physical condition of the individual sentenced into account. Often fines could be substituted for physical punishment.

The medieval period accepted the rabbinic modifications in the Mishnah and the Talmud, but often moved in the direction of severity in accordance with the perceived needs of the times. The jurisdiction to impose punishments was extended as necessary and at times the methods used by the surrounding society were used. They were not sufficiently frequent to arouse objection or discussion. Although thousands of responsa deal with every facet of human life, only a fraction of them mention punishments. It is, therefore, difficult to assess the frequency of the imposition of any punishment.

As we follow the pattern of punishment through the ages, we must be keenly aware that change occurred readily and frequently. It went far beyond using the methods of the surrounding world. Judaism displayed a constant resilience and ability to make radical changes when it was necessary. The clearest example is the creation of a new system of judges and courts after rabbinic ordination had disappeared. This was done in keeping with the spirit of tradition, but existed entirely outside its parameters.

Studies of punishment in Jewish law, as so in so many other areas need to be carried out in depth with evidence from the legal literature augmented by other sources, both Jewish and gentile. Such studies will carry their share of surprises as, perhaps, this study.

Notes

1. A very extensive bibliography, especially of the Hebrew literature has been provided by Nahum Rakover, *Otzar Hamishpat*, Vol. 1 (Jerusalem: 1975), pp. 271-302; Vol. 2 (Jerusalem: 1992), pp. 263-301. Many publications are not readily accessible. The bibliography could be annotated to note essays which are traditional and non-historic in their approach, those which are apologetic, those which seek to apply the tradition to modern Israel, etc.
2. Ex. 20; Deut. 5, Lev. 18, 19, Deut. 22
3. Ex. 21 and 22, Lev. 5, etc.
4. Ex. 19.5; Deut. 7.6, 14.2, 21; 26,19; 28.9; Is. 62.12; Dan. 8.24; 12.7
5. For taking divine property—1 Sam 15.1-33, divine anger is incurred; cursing God punished by God, Lev 24.15; sexual relations with a brother's wife leads to childlessness, Ex 20.21; various sexual offenses will be divinely punished, Ex 20.17ff.; homosexuality Lev 20.13; a series of curses for a wide variety of offenses sexual, familial, and social, Deut 27.15-26.
6. When booty declared as *herem* was taken, the entire people were punished through defeat, Josh 6.17; 7.1-12; apostasy on the part of the people was punished by a plague, Nu 25.1-9; As a general threat, Lev 18.25; for idolatry, Lev 26.14ff; as part of a general exhortation, Deut 8.19f; 11.1ff; 28ff.
7. Major sections of each of the prophetic books threatened the destruction because of Israel's sins or mourn for the Temple as does the *Book of Lamentations*. The Talmud frequently blamed the destruction on the sins of the people; see Kaufman Kohler, *Jewish Theology* (New York: 1927), pp. 342 ff.; in recent times various groups of Hassidim, including R. Teitelbaum, have seen the Holocaust as punishment for the sins of the people of Israel.
8. Ex 21.13; Nu 35.25-34; Josh 20.7, 8.
9. Gen 4.11-14; also in later legislation in Ex 21.14; Nu 35.20, 21; Deut 19.11; II Sam 14.7; II Sam 21.5-9.
10. Lev 19.18; Deut 24.16.
11. Lev 24.14 ff; I Kings 21.13; Josh 7.25.
12. Sabbath violation, Ex 31.14-15; 35.2; incitement to apostasy, Deut 13.2-12; presenting a child to Moloch, Lev 20.2-3; sacrifice to another deity, Deut 17.2-7; sorcery, Ex 22.17; cursing parents, Ex 20.9; adultery, Ex 20.10; homosexuality, Lev 20.13; incest, Ex 20. 11 ff; bestiality, Ex 20.15; rape of a betrothed girl, Deut 22.25; adultery, Gen 38.24; Lev 20.10; Deut 22.22; kidnapping, Ex 21.16; cursing the king, 1 K 21.10-16; 2 K 9.26; striking or cursing parents, Ex 21.15 and 17; not guarding a known goring ox, Ex 21.28 ff; Lev 20.9; false witness in a capital case, Deut 19.19; disregard of the court, Deut 17.8-13.
13. Ex 21.20, 16; Deut 8.5; 21.22-23; 25.2; Prov 19.18; 23.13; 29.17. In the Bible whipping was used as punishment when no other penalty was specifically mentioned, Deut 25.1, 2; 40 lashes was the maximum amount. Later exegesis disagreed about the limitations of this type of punishment, Mak 2b; Ibn Ezra to Deut 25.1, 2, etc.
14. Deut 13.13-18.
15. Nu 5.11-3; Prov 6.32-35 though some scholars like M. Greenberg in "Some Postulates of Biblical Criminal Law," *Yehezkel Kaufmann Jubilee Volume*, pp. 15 ff., felt that execution was mandatory.
16. Deut 22.13ff and 28.

17. Ex 21.24-25; 24.19; later Jewish law clearly indicated that monetary compensation was to be provided rather than literal retribution and the Biblical wording itself may already indicate that this was the path taken (B. Jacob, *Auge um Auge, Eine Untersuchung zum alten und Neuen Testament*, Berlin, 1929).
18. Ex 21.26, 27.
19. Deut 25.11, 12.
20. Deut 22.18; 25.1-3.
21. Prov 6.30f; Ex 21.37.
22. Ex 22.8.
23. Lev 5.24.
24. Lev 25; Deut 15.
25. Lev 24.12; Nu 15.34; 1 Kings 22.27; 2 Chron 16.10; Jer 37.15, 38.4-14; Ezra 7.25.
26. Ezra 7.26, 10.8.
27. Lev 19.15; 34-36; Deut 16.18ff; 24.17.
28. Much material scattered throughout the Talmud dealt with the Temple rituals. The initial discussions (Deut 17.14-20; Joshua 1.18; 1 Samuel 1; 1 Kings 21) were expanded and detailed (San 5a; 49a; 52a, etc.).
29. Summaries of this material appear in H.L. Strack and G. Stemberger, *Introduction to the Talmud and Midrash* (Minneapolis: 1992); Z. H. Chajes, *The Student's Guide through the Talmud* (New York: 1960); H. Albeck, *Mavo Lamishnah* (Jerusalem: 1959); M. Elon, *Hamishpat Ha-Ivri* (Jerusalem: 1973).
30. San 10a and Rashi.
31. Mak 3.10f; San 10aff.
32. Mak 22 b.
33. Tem 3a. In those instances when two punishments were prescribed for the same crime, whipping gave way to monetary fines and reparation (Mak 1.2, 4b; Ket 32a, etc.).
34. J Suk. 55b; Yev 90b; Kid 81a.
35. Ket 86a.
36. MK 16a; Git 36b; Yev 89b; for repeat offenders (Baba Kama 96b)
37. Git 40b; 59a. The court retroactively seized the ring with which an abducted girl had been formally married and so invalidated her marriage (Yev 90b, 110a). There were similar uses of this power with wills (J Kid 159d; Ket 39a).
38. Git 36a ff
39. Yeb. 118 b; Git 44 a; B.K. 91 a; M.K. 16 a; fixed fines M. B.K. 8.6; M. Ket. 3.7; on the power of the courts see Asher b. Yehiel, *Responsa* 101.1; *Shulhan Arukh, Hoshen Mishpat*, 1.5.
40. M. San. 8.1ff.
41. San 52 a.
42. San 45a, 52 a.
43. M San 6.4; 45a. This may have followed the precedent of 2 Chr 25.12 or been done in imitation of Greek custom.
44. M San 7.2; 52a; we have no record of this form of execution being used, but we do learn of a priest's daughter burned for adultery and of this practice condemned when used by Hama ben Tobia (San 52a).
45. San 52a.
46. San 52b; 84b; 89a.
47. M San 6.1 ff.
48. M San 6.4, though there was some discussion about applying this to women.

49. San 43 a; Matt 27.34; Mark 15.23.
50. San 82 b; Ker 5 a.
51. Makkot 7a.
52. Pes 91a; Yoma 11a; J Pes 36a; Moed Katan 81c.
53. Moed Katan 16a.
54. 81 b-82 a.
55. J. Newman, *Semikhah* (Manchester, England: 1950), cited a number of opinions. It was the common consensus that ordination ceased after R. Hillel Hanasi (320-370), while H. J. Bornstein claimed that it continued until the time of Maimonides (1135-1205). Newman, himself, felt that it ended with David b. Azaria in 1062.
56. M. Ket 3.7; B K 8.6, though larger fines could be imposed by the court (Baba Kama 96 b).
57. J. Pes 30d.
58. M. Jung, *The Jewish Law of Theft* (New York: 1929); M. Elon, *Hamishpat Ha-ivri* (Jerusalem: 1973).
59. Ezra 10.8. Earlier it had referred to consecration to God (Lev 27.28; Nu 18.14, etc.), in conquest (Nu 21.2,3) as punishment (Ex 22.19; Deut 13.16), or as part of a vow (Jud 11.30).
60. Nu 12.14, though that punishment was limited to seven days.
61. Against scholars for unwillingness to comply with the majority decision (BM 59b); for various lay offenses (Kid 72a, Shab 130a, Pes 53a).
62. Moed Katan 16 a.
63. Mod Katan 15 a b; B M 59b, etc.
64. Ber 19a; they were later listed by Maimonides (*Yad, Hil. Talmud Torah* 6 and in the *Shulhan Arukh, Yoreh Deah* 334. The offenses are not related in any way.
65. M..San 3.1; San 5a; R.H. 25b. The death penalty could only be exercised by a court of 23 during the time when the court of 71 sat in the Chamber of Hewn Stone, which ceased before 70 C.E.
66. Asher ben Yehiel klal 101.1; Judah b. Asher, *Responsa* (*Zikhron Yehudah*, Jerusalem 1967) # 79 The courts were no longer a *bet din*, but the elders of the city. The justification was necessity, i.e. the problems of the hour, the need to create order out of chaos, the prevention of the wicked reigning supreme, the protection of the community, (Asher ben Yehiel, *Klal* 17.1, 6; Solomon b. Aderet, *Responsa*, 4.185; 5.238; and others. In addition there was the preventive measure of keeping Jewish affairs in the hands of the Jewish minority and out of the general courts, which would lead to the end of Jewish semi-autonomy, (Asher ben Yehiel, *Klal* 17.8) or to courts in which justice could not be guaranteed (*Yam shel Shelomo, Perek* 8. 7 quoting a Sephardic responsum). There was a special need to act against informers, so this was possible even on Yom Kippur which fell on shabbat (Asher ben Yehiel *Responsa* 107.6; Adret, *Responsa*, 1.80).

All of these common sense arguments were used and a new judiciary was created. It based itself on the older legal system and its penalties even though at times clearly recognizing that the justification was precarious.

As the fundamental nature of the judiciary had changed other changes followed with equally little justification from the past. As we look at the earlier courts and their medieval successors we will note many distinctions. The laws of evidence have been greatly relaxed and punishments changed. It

was no longer necessary to have two absolutely certain witnesses, something already true for certain matters in Talmudic times. Often a single witness sufficed or women were permitted to testify. Centuries later there was still astonishment at minor and major changes. Isaac b. Sheshet (1326 Valencia -1408 Algiers) was astonished that witnesses were sworn, contrary to rabbinic law (Kid 43b—Tosfos), which changed the nature of testimony. Furthermore women, specifically excluded (Kid 73b) from being witnesses were regularly included; a decision of Rabenu Tam, *Responsa* 179, Meir of Rothenburg, *Responsa*, 4.185. Evidence which in earlier times would have been considered hearsay was also admitted depending on the nature of the crime and the general circumstances (*Yam shel Shelomo* 8.7).

67. *Shaarei Zedek*, 4.7.38; *Or Zarua* 1.112; Assaf cited a large number of authorities who decreed the death penalty, especially in Spain; they included Moses Maimonides; Joseph Ibn Migash, Solomon b. Adret. S. Simcha Assaf, *Op. Cit.*, pp. 19 ff.
68. S. Assaf, *Otzar Hageonim*, pp. 21ff.
69. *Ibid.*, pp. 25ff.
70. *Ibid.*, p. 27.
71. *Ibid.*, pp. 92, 121, 155, 313
72. *Ibid.*, pp. 24, 59, 89, 93.
73. *Yad Hil. San* 17ff.
74. Whipping Monday, Thursday and the following Monday for a false oath, Jacob Judah Weil, *Responsa* # 123; R. Isaac of Narbonne ordered a daily whipping, morning and evening, for a year in addition to fasting as penitence for manslaughter while under the influence of alcohol, Abraham b. Isaac of Narbonne, *Responsa* # 41.
75. S. Assaf, *Otzar Hageonim.*, pp. 23ff.
76. *Yad Hil. San.* 19 and numerous responsa.
77. S. Assaf, *Op. Cit.*, 95, 127, 133, 137, 141; fines were also imposed for not accepting the authority of the rabbis. Asher, *Responsa* 21.8 or using a non-Jewish court to settle a dispute *Mordecai B. K.* 195.
78. *Yam shel Shelomo B.K.* 8.49; *Shulhan Arukh, Yoreh Deah* 256.1; Asher ben Yehiel, *Responsa* 13.4; 21.8.
79. *Shulhan Arukh, Yoreh Deah* 334; the hardship which this imposed on the family was opposed by some rabbis: Asher b. Yehiel, *Responsa* 43.9; Isaac b. Sheshet, *Responsa* 173; Solomon Adret, *Responsa* 5.238; *Yam shel Shelomo B.K.* 10.13.
80. A system of penance was discussed by Eliezer b. Judah of Worms, *Rokeah* 2; a selection of authorities from various centuries, who prescribed penance in their responsa, include Abraham b. Isaac of Narbonne, *Responsa* # 41; Jacob b. Judah Weil, *Responsa* # 123; Moses Isserles, *Responsa* # 37; Moses Sofer, *Responsa Hatam Sofer, Orah Hayyim* # 166; a long list of such responsa may be found in Isaac Lampronti, *Pahad Yitzhok*, Vol. 10, pp. 175ff.
81. Radbaz, *Responsa*, # 187; Bacharach, *Responsa* # 141; Morpurgo, *Responsa, Yoreh Deah* # 48.