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Dedicated in loving memory of
 Harav Yosef Grossman zt"l

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DECLARATIVE SENTENCES: EXPLORING THE EXECUTIVE FUNCTION

Why punish wrongdoing?

Adapted from the writings of Dayan Yitzhak Grossman

One of the fundamental issues raised by the fatal police shooting of Rayshard Brooks (as well as by the recent federal execution, the first in seventeen years) is the legitimacy and purpose of the use of violence by the state against criminals. In this article we consider the question of punishment (as opposed to self-defense). Punishment can be justified, in various circumstances, as retribution, deterrence, rehabilitation, or incapacitation; we consider various Torah perspectives on the matter, and particularly the tension between the pure ideal of justice and the pragmatic needs of society.

This tension is acutely articulated by the Mishnah, which records a dispute over the ideal frequency of the imposition of capital punishment: the *tana kama* maintains that a Sanhedrin that carries out an execution as frequently as once in seven years is considered destructive (*chavlanis*); R' Elazar ben Azariah says once in seventy years. R' Tarfon and R' Akiva say that had they been there, no one would ever

have been executed, to which R' Shimon ben Gamliel retorts that such an approach "increases murderers in Israel."¹ The Rambam rules in accordance with the *tana kama*. He explains that this is an exhortation to be deliberate and not rush to judgment, but the court may carry out executions as often as daily if that is how things turn out.²

THE DEATH PENALTY: "POUR ENCOURAGER LES AUTRES"

R' Moshe Feinstein, in a letter addressed to a senior government official, declares that the Torah's rationale for the death penalty is not hatred of sinners, nor a concern for societal order, since the latter is Hashem's responsibility, not ours, per the Talmudic maxim "Let the Owner of the vineyard come and eradicate

¹ Makos 7a.

² Hilchos Sanhedrin 14:10.

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Excerpted and adapted from a shiur by
 Dayan Yosef Greenwald

PARSHAS DEVARIM

BROTHER IN LAW

...And you shall judge righteousness between a man and his brother and his opponent.

(Devarim 1:16)

The only mitzva in this week's *parsha* is to appoint judges to Bais Din. Bais Din adjudicates *dinei mamonos*, which doesn't encompass all monetary cases, only those with a claimant and a defendant. This assertion can be supported from several sources, including:

- The halachos of *ribbis* (interest) appear, strangely, in the Yoreh Deiah section of Shulchan Aruch, rather than in Choshen Mishpat, where other *dinei mamonos* (money matters) are found. The reason is that Choshen Mishpat is about disputes between individuals, and *ribbis* is forbidden even if both parties are amenable to it. Therefore it belongs in Yoreh Deiah with other matters of prohibited activity (*issur v'heter*).
- The Ran (Chulin 96) says that a single witness is accepted in identifying the owner of a lost object. Although *dinei mamonos* usually requires two witnesses, this is not a case of *hotza'as*

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Early Adopters

Q To make "early Shabbos," when must one daven and eat?

A There is a dispute between R' Yehuda and the *Chachamim* (Brachos 26a) whether *shkiah* (sunset) or *plag hamincha* (1.25 variable hours before the end of the day) is the deadline for mincha and the earliest time for ma'ariv. The halacha is that one may choose either *shitah* and even switch back and forth from week to week. (This is only regarding Erev Shabbos; on weekdays, one must follow one *shitah* consistently.)

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His thorns.³ The true reason for the penalty, R' Moshe explains, is rooted in the expressive theory of punishment: "so that people should know the severity of these prohibitions and not violate them."⁴

It is difficult to reconcile this stance with the position of R' Shimon ben Gamliel that avoiding ever actually imposing the death penalty will result in the proliferation of murderers, which Rashi and the Tiferes Yisrael explain will be the result of murderers not fearing judicial punishment. Perhaps R' Moshe understands that the expressive power of the death penalty does not derive merely from its theoretical existence but requires its implementation.

In any event, other sources directly contradict R' Moshe's perspective. The Chinuch writes that the rationale for the death penalty for murder is "evident to everyone...were it not for the fear of justice, men would kill each other."⁵ The Rambam makes the fundamental assumption that the Torah's rationale for punishment in general is to deter sin through fear, a principle that he uses to explain the varying severity of punishment for different classes of sins:

Only fear of a severe punishment restrains us from actions for which there exists a great temptation, either because we have a great desire for these actions, or we are accustomed to them, or we feel unhappy without them...

From such acts (that can be done "secretly," "unseen," and "unnoticed") we are deterred only by the fear of a great and terrible punishment.⁶

A hybrid view is espoused by the Ran: The Torah's formal system of criminal law embodies "true, righteous judgment" but provides insufficient deterrence to prevent the proliferation of murderers and the complete breakdown of the structure of society. Such deterrence is the province of a king—who may

mete out punishment beyond the limits that constrain the judicial system, as necessary for the good of the kingdom.⁷

EXTRALEGAL PUNISHMENT

The Talmud itself already acknowledges that the Torah's formal system of criminal justice is not always sufficient to deter sin and crime. It records a case where a Rabbinic violation of Shabbos was punished by execution "not because he was deserving of this, but because the hour required it," and it asserts the principle that the court may administer lashes and punish even when not provided for by Torah law.⁸

Similarly, the Mishnah rules that a defendant known to the court to be guilty of murder who stands to be exonerated because the testimony against him fails to meet the halacha's rigorous procedural safeguards, should nevertheless be killed via indirect means.⁹

The Rambam adds that even when "the hour does not require it," there is nevertheless a universal obligation incumbent upon courts to severely beat murderers, nearly to death; to incarcerate them for many years in harsh and oppressive conditions; and to inflict all sorts of pain upon them, all in order to frighten and terrorize other villains who might be tempted to murder.¹⁰

These two Talmudic passages were invoked by various *Rishonim* as a basis for the punishment, including execution, of criminals by the local Jewish communal authorities, despite the explicit Talmudic rule that capital punishment is no longer practiced, and the absence, in many cases, of the halacha's normal procedural requirements.¹¹ Such punishments could be quite harsh: In one case, R' Yehuda ben HaRosh issued a detailed ruling in which he recommended, depending upon the reliability of the testimony of various witnesses against the defendant, either execution, the cutting off of both hands, the cutting off of the right hand, the cutting off of the left hand, or exile.¹²

3 Bava Metzia 83b. R' Moshe's inference from this principle that it is not society's job to deter crime appears debatable, since (as we discussed in n. 11 of last week's article), the context there is cooperation with a draconian non-Jewish criminal justice system, whose punishments were far stricter than those of the Torah and rules of procedure far looser.

4 Shu"t Igros Moshe C.M. cheilek 2 siman 68.

5 Sefer Hachinuch mitzvah 47.

6 The Guide for the Perplexed, Part III Chapter XLI (translation of Michael Friedländer). Cf. Shu"t Noda Bihuda mahadura kama O.C. siman 35 s.v. ella she'omer ani, which asserts that the purpose of the death penalty is "in order that man will fear transgressing."

7 Derashos HaRan Perek 11.

8 Yevamos 90b; Hilchos Rotzeiach 2:4.

9 Sanhedrin 81b; Hilchos Rotzeiach 4:8.

10 Ibid. 2:5.

11 Shu"t HaRosh klal 17 siman 8; Shu"t Rivash siman 234 s.v. aval atah.

12 Shu"t Zichron Yehuda siman 58, and cf. siman 79.

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mamon (extracting money); rather, the finder is holding onto an object to fulfill the mitzvah of returning it. R'

Akiva Eiger questions this from the Gemara (Bava Metzia 26b) that states that if one person testifies that a lost object belongs to Shimon, but both Shimon and Levi claim it (and offer identifying *simanim*), the witness is not believed. Perhaps the answer is that

in this case, the factor of "between a man and his brother" is present, since two people are arguing about who owns the item, and that is in the realm of Bais Din alone. Therefore, two witnesses are required.



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RAV AVRAHAM YESHAYA COHEN

Therefore, one who wants to make early Shabbos, i.e., daven ma'ariv before *shkiah*, must follow R' Yehuda's view and daven mincha before *plag*, because to daven both mincha and ma'ariv between *plag* and *shkiah* would be contradictory (*tarti d'sasri*).

Neiros Shabbos may not be lit before *plag hamincha*, so a woman who typically lights around the time her husband goes to shul must be careful, when making early Shabbos, to light only after *plag*. It is questionable whether she may still do *melacha* once the kehilla (community) or her husband accepts Shabbos in shul (by saying *bo'i v'shalom*), so she should light before that happens.

One does not fulfill the *mitzvah d'Oreisa* of *krias shema* before *tzais hakochavim*, when it is certainly night, so one must repeat the entire *shema* after that point. This is not a stringency—as in the case of one who davens ma'ariv when it's questionable whether *tzais hakochavim* has occurred—but an absolute obligation.

There is a dispute whether, in this case, one may begin a meal within half an hour of the time of *krias shema* without having yet fulfilled the mitzvah. The Mishnah Berurah (267:6) rules that one should be strict about this but need not protest someone who isn't. If possible, therefore, one should be careful to begin the meal no later than several minutes before *shkiah*.

There is a dispute whether one can fulfill the mitzvah of eating the Shabbos meal before *tzais hakochavim*. The Mishnah Berurah (267:5) says it is therefore proper to eat a *kezayis*-sized portion of challah at night.

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