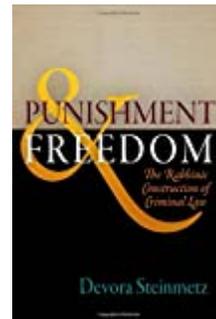




**Devora Steinmetz.** *Punishment and Freedom: The Rabbinic Construction of Criminal Law.* Philadelphia: University of Pennsylvania Press, 2008. xviii + 206 pp. \$55.00 (cloth), ISBN 978-0-8122-4068-9.



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**Published on** H-Judaic (February, 2009)

**Commissioned by** Jason Kalman (Hebrew Union College - Jewish Institute of Religion)

## Toward a Better Understanding of the Philosophy behind Jewish Criminal Law

Devora Steinmetz's ambitious *Punishment and Freedom* sets out to break significant new ground in the conceptual study of Jewish law through a detailed analysis of selected rabbinic material on capital punishment. Her methodological preface admirably limits the purview of her study to the Babylonian Talmud's *baraitot* and its Amoraic comments on *mishnayot* found predominantly throughout Sanhedrin and Makkot. She does this, she says, because "we are more likely to find a coherent construction of a given topic within a single text than within the range of rabbinic texts" (p. xii). Mostly, she abides by this limitation, with some excursions beyond the Bavli later in the book.

The preface defines the essential tension on which this study pivots: differentiation between a sinaitic approach to law, which relies on divine command that Steinmetz terms "positivist," and an alternate approach to law, which she names "natural law." Natural law, Steinmetz explains, is meant in its classical form: "seeing law as embedded in, and capable of being read off, nature" (p. xv). She casts such natural law as static—nature is as it is

forever and thus can never change—contrasting this with positivist sinaitic law, which, Steinmetz suggests, does have mechanisms for necessary legal change when the situation warrants.

These initial core definitions are not without problems. This typology represents an inversion of what one would usually define as characteristic of these two divergent legal approaches. Classical natural law is ultimately based on human perception of the natural world. That is to say, since we "read off" law from nature, the subjective act of *reading*, by necessity, has to color and shape the perceptions of law. Would not humanity's perceptual changes, influenced by culture, history, geography, and temporal factors, necessarily imply significant legal flexibility? Conversely, with respect to positivist sinaitic law, would not a set of divine commands not subject to revision or expiration necessarily imply an unchanging, eternal legal system with little room for adaptation to new circumstances? Steinmetz further complicates the picture by speaking of extralegal moral information and its potential impact on a positivist system, suggesting that

even a positivist system is altered by outside forces.

The following chapters cover significant and interesting examples from the Bavli and the Mishnah. Here, Steinmetz marshals evidence for these two opposing legal approaches. Her knowledge and presentation of the texts and relevant secondary literature is detailed and deep. She expands greatly on the designation of the various death penalties of the rabbis (*arba mitot beit din*), explicating the rabbis' concrete rationales for assigning particular penalties to each sort of murderer.

Strangulation (*heneq*), treated in chapter 1, is the sole means of capital punishment with no explicit basis in the Torah. It thus becomes both the default manner of death imposed by the *beit din*, and the single mode of capital punishment that reflects an entirely unconstrained rabbinic mindset. Moshe Halbertal and Yair Lorberbaum, for different reasons, suggest that when the Talmud calls *heneq* the "death that leaves no mark," it implies that it minimizes damage to the dignity of corpse, and thus to the image of God, by limiting physical damage (p. 3). Steinmetz argues against this position, suggesting that *heneq* is actually the human acting out of a divinely imposed death sentence—just as God leaves no mark in putting humans to death (through illness, old age, etc.), so too, should the rabbis when they utilize *heneq*. While Steinmetz acknowledges that *heneq* may have originated in a surrounding culture, for exegetical reasons or because it reduced the pain and suffering inherent in inflicting the death penalty, she postulates that it represents the rabbinic expression of a penalty for violation of sinaitic law.

The author then goes on to assemble a four-part chart of the *arba mitot beit din* according to statements in the Mishnah and Bavli that separate the death penalties based on burial of the offender, perceived severity of the offense, and the painfulness of the sentence:

*hereg seqila*

sword stoning

*heneq serefa*

strangulation burning

The penalties on the left are less severe, on the right more severe; those on the right are explicitly mandated by the Torah for particular violations, while those on the left are rabbinic enactments; and the left side represents how governmental officials eliminate their offenders, the bottom for Jewish courts (for murder by Jews and for vio-

lations of the Noahide laws by non-Jews), the top for Roman courts. In terms of the form of the punishment itself, the left side removes a life force (blood for *hereg*, air for *heneq*), while the right side kills by actually destroying the entire body. These factors, Steinmetz implies, all affect the rabbis' assignments of penalties to fit particular crimes.

In chapter 2, the author analyzes the Noahide laws and the punishments prescribed for their violation, as defined in Bavli Sanhedrin 56a-57a. She notes the *mahloket* on the particular punishments relating to violations of any Noahide laws, *heneq* (according to *Tanna deve Menashe*) and *hereg* (according to the Sages), and places the Noahide laws into the category of natural law. Since there is no *hatraah* (warning) required before the death penalty for a Noahide law violation, she reasons that these violations are not knowingly violative of a direct command from God. Instead, the act of violation is one that is dependent on the inherent criminality of the act itself.

This construction, while interesting, also faces some problems. Where, in fact, do the rabbis believe the Noahide laws actually originate? In the *baraita* in the Bavli on which Steinmetz bases her argument in this chapter, it suggests that passages in Genesis, Exodus, Leviticus, and Jeremiah are all sources for the Noahide laws. Even if we assume that a non-Jewish violator of these laws is not *metzueh* (commanded), in any traditional Jewish legal sense, by words of Torah, the source of these laws is deeply embedded in the ultimate positivist ur-text. Arguing that the Noahide laws should be categorized as natural law simply because there is no requirement for *hatraah* also fails the test of Occam's razor. The clear and present danger of warning non-Jews about their capital crimes, especially in the charged atmosphere of Roman Palestine where this *baraita* likely originated, surely seems a simpler explanation. In any case, the classification of laws sourced predominately from the Torah as somehow "non-sinaitic" demands greater clarity.

Chapters 3 and 4 then develop two specific examples that further explore the rabbis' conception of sinaitic law. First, through investigation of the substantive and procedural elements of penalties for brother-sister intercourse, prohibited for Jews yet permitted to Noahides, Steinmetz arrives at the conclusion that "the Rabbis' rules of criminal procedure and punishment express the Rabbis' understanding of the nature of law." There then follows an examination of the penalties for murder, a criminal act that violates natural law, but is still treated by the rabbis

from their “fundamentally positivist view of law” (p. 65). *Hatraah* again plays a role: a warning to the would-be murderer must result in his acknowledgment before his murderous act that he knows the penalty and does it with the penalty in mind. Without this warning and reply, the death penalty is not applicable to his crime. This shows “knowledge, choice and responsibility” on the part of the criminal (p. 66). “The person not only knows that there is a prohibition; he understands the circumstances of what he is about to do, and he knows that those circumstances fit the parameters of the prohibition” (pp. 66-67). While others see the idea of warning as a way to limit the applicability of capital punishment and thus reduce the number of deaths it would evoke, Steinmetz sees it as a prerequisite for operating in an essentially positivist system of capital punishment, as it acknowledges the terms of the legal compact before enforcing them.

Chapter 5 consists of an extended essay on the relationship between the legal worldviews of Paul and the rabbis. Steinmetz’s conclusion in this chapter hinges on Herbert Morris’s classic differentiation between shame and guilt as motivating concepts in a legal system. Morris’s “guilt morality” coheres well with the ideology behind the *sugya* in Makkot, focusing on the human capacity for restoration and atonement. In contrast, Morris’s idea of a “shame morality,” represents a different view of human nature more bound up with the ideas of Paul. “Rabbinic Judaism’s embracing of law—of *mitzva*, human action, as the path to life—is intertwined with the idea of human self-determination. Paul’s rejection of law is

embedded in a deterministic view of human nature” (p. 101).

In her final chapter, Steinmetz concludes that the rabbis were aware of other legal systems, but forsook other approaches to construct a legal philosophy based on a command—thus crafting a positivist, sinaitic system in which legal precedents were not to be read from nature, but from divine command itself. At the same time, she seems to argue the opposite, saying that “commands of the Torah, then, are not the ultimate *source* of law; they are the expressions of laws that have been embedded in the world since the beginning of time and that may have been observed *as laws* throughout pre-sinaitic history” (p. 108). In making this argument, she also strays from the narrow textual corpus she assigned herself in the start of the book, bolstering her case now with pericopae from Jubilees and Tanhuma, in addition to Bavli Makkot. Further, the conclusions about how the rabbis decided which legal system to employ appear, at times, to outpace the evidence presented.

All in all, the book makes for a worthwhile read. That is not to say that, due to the author’s lofty ambitions, there are not improvements that could be made. Nonetheless, it will surely provoke its reader to consider the legal philosophic stances that undergird rabbinic criminal law. The book certainly provides useful background on the particulars of rabbinic capital punishment as it is treated in the Bavli, a helpful bibliography of secondary literature, and much food for thought.

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**Citation:** Aaron Panken. Review of Steinmetz, Devora, *Punishment and Freedom: The Rabbinic Construction of Criminal Law*. H-Judaic, H-Net Reviews. February, 2009.

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