

Chapter 5



CAPITAL PUNISHMENT

Rabbi Richard A. Block

The question is as old as human history and as fresh as today's headlines: May those who violate society's most fundamental norms be put to death? Timothy McVeigh is the convict *du jour* and for the purpose of assaying an answer to that question, his case is as good as any and perhaps better than most. After all, if McVeigh's crime does not warrant the death penalty, what does? But let us recall, as we begin, that McVeigh's execution, if it occurs, may be ten or more years away and the US death row population presently exceeds 3,200 persons, 41 percent of them black. Seventy-nine people were executed in the United States in 1996 and each year approximately 300 more are sentenced to death.¹ By the time America's official killing machine spews forth Timothy McVeigh's corpse, more than a thousand men and women are likely to precede him and several thousand more will be waiting in line.

If my position is not already evident, let me state it explicitly: I oppose capital punishment on Jewish and social grounds that I will outline later, but I did not arrive at this position easily nor do

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I regard it as inevitable. If I have contributed anything to the discussion of capital punishment and Jewish tradition within the Reform Movement, it has been to challenge the conventional wisdom and demonstrate that in Jewish tradition as a whole, not just the Torah, support for the death penalty is an authentic, Jewishly tenable position. Indeed, it is arguably the normative one.

The official position of the Reform Movement opposing capital punishment has been stated numerous times, including a 1959 UAHC General Assembly resolution and CCAR resolutions in 1958, 1960 and 1979. The latter states its opposition to all forms of capital punishment ... under all circumstances" and expresses the "[un]shaken ... conviction" that "[b]oth in concept and practice, Jewish tradition found capital punishment repugnant, despite Biblical sanctions for it."² As I hope to demonstrate, notwithstanding my own position, this statement is plainly wrong.

The Torah prescribes capital punishment for a wide variety of offenses, from murder and kidnapping to adultery, Shabbat violation, and abuse of parents. Its enactments in this regard are so extensive and well known as not to require citation. Modern rabbinic exhortations against capital punishment, while acknowledging the Torah's position, generally rely upon a famous mishnah in Tractate *Makkot*: "A Sanhedrin that puts one man to death in a week [of years] is called 'destructive.' R. Eleazar b. Azariah says: Or one in even seventy years. R. Tarphon and R. Akiba say: Had we been in the Sanhedrin none would ever have been put to death."³

Note well, however, that while Rabbis Tarphon and Akiba may be said to oppose capital punishment, Rabbi Eleazar does not rule it out entirely. Moreover, the anonymous mishnah, which presents the authoritative position, holds that the death penalty should be imposed infrequently, not never. Since this is a view that even thoughtful supporters of capital punishment may share, reliance on this text as the mainstay of the argument for abolition is misplaced.

A more serious flaw is the common failure to cite the remainder of the mishnah, in which we learn, "Rabban Simeon b. Gamaliel says, 'They [who would not impose the death penalty] would multiply shedders of blood in Israel.' " Our colleague, Julius Kravetz z'l, described the "edited" citation of *Makkot* 1:10 as a "scandalous example of ... deliberately induced tunnel vision,"⁴ and observed, "[T]hose who have been moved by what they regarded as nobler and more humane sentiments ... have

not been inhibited by the scruples of academic fastidiousness in their ... exploitation of the tradition.⁵

Far from proving the case against capital punishment, the text demonstrates that Jewish post-biblical tradition contains a range of views, which are mirrored in today's policy debates. It reflects a fundamental tension between a reverence for human life so profound that it embraces even the most despicable criminal and society's right to take all measures necessary to protect its citizens and insure its own survival.

If additional evidence be needed that the Jewish post-biblical tradition does not find capital punishment conceptually "repugnant" it is plentiful. Tractate Sanhedrin, in significant part, is a virtual executioner's manual.⁶ It sets out and describes, *ad nauseum*, the four methods of execution considered legal in Jewish capital cases: stoning, burning, decapitation and strangulation.⁷ For Maimonides, each of these is a distinct *mitzvah*; hence they collectively constitute four of the 613 commandments.⁸ Of the four, strangulation was preferred by the rabbis because it was the one that did least injury to the body. The person would be sunk to the knees in mud and then strangled with a hard cloth wrapped in a soft one which was twisted around his neck and pulled in opposite directions until he suffocated.⁹

Talmudic sources explicitly affirm that the needs of society can justify the death penalty¹⁰ even when the Torah does not classify the crime as a capital offense, so long as the punishment is required "to safeguard" the Torah.¹¹ Death is held to be the just and appropriate punishment for numerous crimes and to effectuate the principle of *midah keneged midah* when a life has been taken.¹² We also find talmudic support for the notion that capital punishment was preventative.¹³ Since capital punishment was held to expiate the crime, it was also said to be in the interest of both society and the defendant.¹⁴ Ultimately, capital punishment was understood to represent just retribution. As the Mishnah states, "And lest you say, 'Why should we be guilty of the blood of this man?' was it not already said, 'When the wicked perish there is rejoicing.'"¹⁵ We may or may not share these views, but they clearly support the Torah's jurisprudence and demonstrate that, as De Sola Pool concluded, "It [is] beyond doubt that the Rabbis approved of the theory of capital punishment."¹⁶

May we yet say that the CCAR resolution was half right, that Jewish tradition rejects capital punishment in practice? Or, as

Gerald Blidstein concluded, that "Jewish law abolished capital punishment in fact not by denying its conceptual moral validity but rather by allowing it *only* this conceptual validity?" I had this view in mind earlier when I referred to the "conventional wisdom." This claim builds on a host of talmudic rules of evidence and criminal procedure, chief among them *hatra'ah*, the requirement that a person be warned, just prior to the crime and in the presence of two witnesses, that he is liable to be executed should he commit the act,¹⁷ which warning must be acknowledged immediately and unequivocally.¹⁸ Some authorities went so far as to insist that the warning include the manner of execution.¹⁹ At trial, the witnesses were to be examined closely²⁰ and separately.²¹ Inconsistencies in their testimony, even about matters immaterial to the crime itself, barred the imposition of the death penalty.²²

Do these rules prove that the rabbis supported capital punishment in theory, but abolished it in practice? I believe that they do not, for several reasons. Firstly, their effect is not to eliminate capital punishment, but to restrict it to cases where there is clear, convincing, and uncontradicted evidence of guilt, criminal intent, and premeditation. Moreover, the rules were not enforced inflexibly. Thus, for example, scholars could be executed without *hatra'ah*. Since "warning is only a means of deciding whether one has committed the crime willfully or not,"²³ it was unnecessary when willfulness could be inferred from a defendant's presumed knowledge of the law. Jewish tradition also allows *batei din* to impose extraordinary punishment and disregard normal evidentiary and procedural rules as an emergency measure.²⁴

Secondly, Jewish courts lost their authority to impose capital punishment after the destruction of the Temple in 70 C.E.,²⁵ and, even presuming that these restrictions predated that event, there is scant evidence that they were ever employed in a functioning Jewish criminal justice system. In addition, as we shall see, when Jews regained that authority in later times and other places, they imposed capital punishment notwithstanding these seemingly insurmountable barriers. Thus, like the talmudic descriptions of execution methodology, the Talmud's stringent procedural and evidentiary rules are to be regarded as largely theoretical, not as evidence of actual practice.

Thirdly, recognizing the detrimental effect on justice and social welfare that might occur if imposing capital punishment

became impossible, Jewish tradition provides an extra-judicial avenue to rectify the matter. Thus, wholly apart from the Jewish court system, tradition confers on the monarch the authority to administer what Maimonides calls *din ha-malkhut*, i.e., "the sovereign's justice."²⁶ Unlike a *bet din*, a Jewish monarch is empowered to act for the benefit of society by executing criminals even when the crime is not a capital offense under biblical law.²⁷ In addition, the monarch is not bound by the strict laws of evidence to which the Jewish court is subject. Thus, for example, the monarch can impose the death penalty on the basis of one witness or a confession.²⁸ Whether circumstantial evidence is a sufficient basis for capital punishment as an exercise of sovereign justice is not clear,²⁹ but even without clear proof or warning, "the king has authority to execute [a criminal] and to perfect the world in accordance with what the hour requires."³⁰ As Rabbi David Bleich observes, "Jewish law provides ... in effect ... two separate systems of justice and two parallel judiciaries."³¹

Ultimately, the best evidence of Jewish legal practice is derived not from legislation, but from history. The Mishnah indicates that persons charged with capital offenses were sometimes executed, even if *hatra'ah* had not occurred or there were evidentiary problems, so long as the court was certain of guilt.³² The Talmud also informs us that after Jewish courts lost the authority to impose capital punishments, murderers were turned over to civil authorities for execution,³³ a practice that continued into the Middle Ages.³⁴

Finally, capital punishment was carried out by Jewish authorities, both before and after 70 C.D.E., when it was possible, whether strictly in accordance with the law or not.³⁵ To cite but a few examples, the Talmud recounts a man being stoned to death "in the Greek period" for riding a horse on Shabbat.³⁶ In another instance, a woman and a young man whom she had raised from infancy were brought to a *bet din* and stoned to death for incest.³⁷ The case is all the more noteworthy for the fact that there was no proof that he was her son, the sentence being imposed after presuming that fact because "he clinged to her."³⁸ Simeon ben Shetah, who declined to impose the death penalty in one case involving overwhelming circumstantial evidence,³⁹ is said, nonetheless, to have hanged eighty women in Ashkelon,⁴⁰ and in 240 C.E., Origen declares in a letter that the Jewish patriarch in Palestine exercised the power to impose and carry out capital punishment.⁴¹

In the post-talmudic era, too, Jewish courts were sometimes empowered to impose the death penalty. (Asher ben Jehiel, also known as Rosh) attests to the practice in 14th century Spain,⁴² and himself imposed it on an informer.⁴³ Maimonides declares that killing informers or handing them over to non-Jews to be killed was a regular occurrence "in the cities of the West."⁴⁴ Jews were also granted the power to impose capital punishment in North Africa⁴⁵ and 17th century Lithuania.⁴⁶

One scholar summarized as follows, "From all of these decisions and incidents we have seen that in every period the important rabbinic authorities of Israel, men of renown, imposed capital punishment on Jewish criminals if they considered the matter imperative to deter wrongdoers."⁴⁷ Another, Justice Haim H. Cohn of the Supreme Court of Israel, put it this way,

Though in strict law the competence to inflict capital punishment ceased with the destruction of the Temple, Jewish courts continued, whenever they had the power ... to pass and execute death sentences ... not even necessarily for capital offenses as defined in the law, but also for offenses considered in the circumstances prevailing at the time, as particularly dangerous or obnoxious ... In order not to give the appearance of exercising sanhedrical jurisdiction, they would ... normally refrain from using any of the four legal modes of execution; but isolated instances are found of stoning, slaying and strangling, along with such newly devised or imitated modes of execution as starvation in a subterranean pit, drowning, bleeding or delivery into the hands of official executioners. In most cases, however the manner in which the death sentences were to be executed was probably left to the persons who were authorized or assigned by the court to carry them out.⁴⁸

Clearly, just as the rabbis approved of capital punishment in theory, they utilized it in practice, though seemingly rarely and with reluctance. While the Talmud indeed contains two antithetical bodies of material on capital punishment, it is a mistake to view one as theoretical and the other as practical. Rather, they are both largely theoretical and reflect the classic tension between *midat hadin* and *midat harakhamim*. The Talmud's gory and detailed accounts of execution methods amount to a rabbinic relief map of "the attribute of justice." Strict justice demands the death of the sinner for serious crimes against people and God. Talmudic restrictions on capital punishment constitute a rabbinic atlas of "the attribute of mercy." Mercy pleads for a concession to human weakness and an opportunity to do *teshuvah*.

All of this, however, has little if any bearing on the McVeigh case, from the standpoint of Jewish tradition. Like the vast majority of American criminal defendants, *barukh haShem*, McVeigh is a non-Jewish defendant in a gentile court. What does Jewish tradition teach about such a situation?

In this regard, the seven commandments of *b'nai Noach* come into play. The Noahide code prohibits murder, theft and sexual immorality and requires that established violators of the code may be, or in the view of some, must be punished by imposing the death penalty.⁴⁹ Jewish law provides that in gentile courts the testimony of a single eyewitness suffices for conviction and execution, but the admissibility of confessions is a matter of dispute.⁵⁰ It is unclear whether capital punishment may be imposed on the basis of circumstantial evidence.⁵¹ Rabbi David Bleich cites a statement by Rambam in *Guide the Perplexed*⁵² that a gentile sovereign may do so and reasons as follows: Since gentile courts are empowered to enforce the provisions of the Noahide code and possess delegated authority to impose "the sovereign's justice," it can be strongly argued that such courts *may* impose capital punishment on the basis of circumstantial evidence, as in the case of Timothy McVeigh.

Where does this leave the committed Jew who seeks to ground his or her position on capital punishment in Jewish tradition? In the final analysis, Jewish tradition is ambivalent about capital punishment and the claim that there is only one coherent, Jewish authentic position on the subject strikes me as intellectually dishonest and morally flawed. As I observed in 1983, in an article in *The Journal of Reform Judaism*:⁵³ "Such a position can emerge [only] from a personal confrontation with Jewish tradition, as one draws upon the part of the tradition that resonates most intense within oneself."

For me, the most resonant aspect of the tradition is its reluctance to take a human life, even a life that "deserves" to be taken, its reluctance to become a killer in response to a killing. Society certainly has the right—ought indeed, it has the obligation—to protect itself by punishing criminals, but it ought not kill criminals on the unproved and unprovable supposition that capital punishment saves lives by deterring crime.

Capital punishment may be just, but it cannot be administered in a just, fair and uniform manner. Our legal system is the finest humanity has ever known, but it is far from perfect. Its

chief fuel is money, and its chief flaw is that only the affluent defendant can be sure of receiving an adequate defense. The history of capital punishment in western civilization in general, and in this country in particular, demonstrates that the poor, members of racial and ethnic minorities, and the physically ugly are disproportionately likely to be executed for capital crimes. As a well-known American attorney once put it, "I've never seen a rich man go to the chair."

Moreover, cases in which innocent people have been wrongly convicted of capital crimes are disturbingly common. Even when there is eyewitness identification or a confession, the identification sometimes turns out to have been incorrect or the confession is revealed to have been coerced or falsified. Once a person has been executed, the injustice cannot be undone. The risk of executing innocent people cannot be eliminated so long as capital punishment is practiced. The essence of the problem is captured well in the title of a 1974 book by the eminent constitutional scholar, Charles L. Black: *Capital Punishment: The Inevitability of Caprice and Mistake*.⁵⁴

In addition, society should not resort to capital punishment if there are less drastic means of achieving the public policy goals of criminal law. One means of deterring crime and protecting innocent people would be to devote adequate resources to law enforcement. We do not know whether capital punishment deters crime, but we do know that crime decreases as the certainty of punishment increases, whatever the punishment may be. A second means of deterring crime and protecting the innocent would be to impose a genuine life sentence. A person who commits a truly heinous crime can be locked up, safely away from society, for life, without possibility of parole. Society does not need to kill killers in order to protect itself.

These reasons for opposing capital punishment are not uniquely Jewish, but they emerge from a tradition that values both justice and mercy and strives to accommodate both demands. They emerge from a tradition keenly aware that human life could not exist in a world of strict justice, but that human society could not exist in a world of pure mercy. They emerge from a tradition that teaches us that God prays. What is God's prayer? "May My attribute of mercy overcome My attribute of anger."⁵⁵ Even God's prayer may not always be answered, but its guiding direction is clear.

Notes

1. *Time* 149, 24 (June 19, 1997): 34-35.
2. *CCAR Yearbook* 89: 105.
3. *M.Mak.* 1:10.
4. Julius Kravetz, "Some Cautionary Remarks," *CCAR Journal* 15, 1 (January, 1968): 75; see Passamanek, *supra*, p. 16.
5. *Ibid.*
6. See, e.g., *San.* 49b, *et seq.*
7. *M. San.* 7:1.
8. J. David Bleich, *Contemporary Halachic Problems* II, p. 350.
9. *M.San.* 7:3.
10. *M.San.* 8:5; *San.* 46a; *Yeb.* 90b.
11. *San.* 46a; *Yeb.* 90b.
12. See, e.g., *M.Sota* 1:7 and *M.San.* 4:5.
13. As in the instance of the defiant and rebellious son, *M.San.* 8:5; *San.* 72a; *Sifre Deut.* xxi, 18-21. This example is to be regarded as theoretical, since the rabbis also insisted that there never was nor would there ever be a son who warranted this punishment. Nonetheless, if one speaks of the rabbis' conceptual understanding of capital punishment, the text has direct bearing.
14. *M.San.* 9:5 and *Tos.San.* 9:5. The latter recounts a case of a person taken out for stoning for an unspecified offense and indicates that "those executed by a *bet din* have a share of the world to come because they are confessed of all their sins."
15. *M.San.* 4:5, quoting *Prov.* 11:10.
16. D. De Sola Pool, *Capital Punishment Among the Jews* (New York, 1916), p. 20.
17. *San.* 8b, 9b, *inter alia*.
18. *San.* 40b.
19. *San* 8b, *Mak.* 16a.
20. *San.* 32b.
21. *San.* 29a.
22. *San.* 40b.
23. *San.* 8b.
24. Bleich, p. 353, note 12; Rambam, *Hilkhhot Rotzeah* 2:4, *Hilkhhot Mamrim* 2:4.
25. *San.* 37b; *Sota* 8b; *Ket.* 30a. See also, NT, John 18:31. Josephus, *The Jewish Wars* 6, ii, 4 and Bleich, p. 343.
26. Rambam, *Hilkhhot Rotzeah* 2:4 and *Hilkhhot Sanhedrin* 8:6. See also, Bleich, pp. 350-56.
27. Bleich, p. 351. notes 10 and 11.
28. Rambam, *Hilkhhot Sanhedrin* 18:6.
29. Bleich, p. 355. and note 16.
30. Rambam, *Hilkhhot Melakhim* 3:10, *Hilkhhot Rotzeah* 2:4.
31. Bleich, p. 350. In effect, the Jewish sovereign may be said to enforce the Noahide code against his or her subjects when the restrictions of the Sinaitic code are too stringent. See the discussion of the Noahide code at p.7, *infra*.
32. *San.* 9:5 and rabbinic commentaries, including Rashi and Bertinoro. See also Kravetz, note 3, page 81.

33. San. 37b; Sota 8b; Ket. 30a. The texts indicate that such defendants were turned over for decapitation, the form of execution prescribed for murder. San.9: 1; Mechilta to Exodus 21:12.
34. De Sola Pool, *supra*, note 10, pp. 47-50; Blidstein, *supra*, note 12, pp.170-71; Haim H. Cohn, "Capital Punishment," *Encyclopedia Judaica* 5:144 (Jerusalem, 1972).
35. San. 6:4, 7:2; Tos.San. 9:5, 9:11; San. 46a, 52b; Git. 57a; Kid. 80a; Ber.58a.
36. San. 46a; J. Chag. 2:14, 78a.
37. Kid. 80a.
38. Ibid.
39. San. 37b.
40. M.San. 6:4.
41. Ep.ad.African. Par.14. Juster, I.C.,p. 151, note 2. Cited by De Sola Pool, *supra* 41-42.
42. *Teshuvot ha-Rosh*, k'lal 17, no. 8.
43. *Teshuvot ha-Rosh*, k'lal 16, no. 1.
44. *Yad. Hikhot Hobel u'Mazik* 8:2.
45. De Sola Pool, *supra* pp. 48-50.
46. "Lithuania," *The Jewish Encyclopedia*, vol. 8 (New York, 1904), p. 129.
47. Jacob M. Ginsberg, *Mishpatim LeYisrael* (Jerusalem, 1956), p. 26.
48. Haim H. Cohn. "Capital Punishment," *Encyclopedia Judaica*, vol. 5 (Jerusalem, 1972), p. 144.
49. Rambam holds that capital punishment is mandatory. Others understand the gentile courts to have discretionary authority in this regard. See Bleich, pp. 344-347.
50. Ibid.
51. Ibid.
52. Book 3, chapter 40; Bleich, pp. 365-66.
53. "Death, Thou Shalt Die: Reform Judaism and Capital Punishment," *Journal of Reform Judaism*, Spring (1983): 1-10.
54. Norton, 1974.
55. Ber. 7a.