

“Death, Thou Shalt Die”: Reform Judaism and Capital Punishment

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ON MARCH 12, 1982, William Bonin was sentenced to death by a California court for what the sentencing judge described as “the intense, sadistic and unbelievably cruel” homosexual torture-slaying of ten boys and young men.

Does Jewish tradition consider Bonin’s sentence repugnant?

According to a 1979 CCAR resolution, it does. At the Phoenix convention, the Conference reaffirmed its 1958 and 1960 resolutions and stated “its opposition to all forms of capital punishment . . . under all circumstances.” The resolution expresses the “[un]shaken . . . conviction” that:

Both in concept and practice, Jewish tradition found capital punishment repugnant, despite Biblical sanctions for it. For the past 2,000 years, with the rarest of exceptions, Jewish courts have refused to punish criminals by depriving them of their lives.¹

The UAHC General Assembly of 1959 passed a similar resolution.

Like many of my colleagues, I have preached against capital punishment on a number of occasions. My congregants have been almost uniformly tolerant, but in nearly uniform disagreement. As a congregant, I was often on the receiving end of similar preachments. My rabbi was unalterably opposed to capital punishment and so, he assured our congregation, was Jewish tradition. In support of that assurance, he often quoted the Talmud:

A Sanhedrin that puts one man to death in a week [of years] is called “destructive.” R. Eleazer 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.²

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The intellectual force of the quotation is obvious. Its emotional argument is more subtle: If one believes that the death penalty may be justly imposed in appropriate cases, he is not merely in opposition to Jewish tradition, but is “destructive” or, as my rabbi translated the pertinent word, “murderous.”

It was not until years later when I, then a rabbinical student, began preparing my first sermon against capital punishment, that I discovered the missing “B-part” of mishna Makot 1.10, which my rabbi had neglected to quote:

Rabban Simeon b. Gamaliel says: They [who would have prevented the imposition of capital punishment] would have multiplied [the number] of shedders of blood in Israel.

Jewish tradition, it appeared, had more to say on the subject of capital punishment than I had been led to believe. There was, at the very least, a difference of opinion about capital punishment to be found in the Mishna, and a debate of strikingly contemporary character. Mishna Mak. 1.10 reflects an acute and possibly unresolvable conflict in values, a conflict between respect for the sanctity of every human life, even the life of a criminal, and respect for the right of society to protect itself and its innocent citizens.

One would never know such a conflict exists within Jewish tradition from the CCAR resolution. This is, in a way, understandable. Admitting a conflict in the tradition would have weakened the polemic and would have conceded Jewish legitimacy to those who disagreed with the resolution. Still, to have admitted the conflict would have been the intellectually honest course of action. The resolution’s failure to follow that course provided additional evidence for the observation of our colleague, Julius Kravetz:

... [T]hose who have been moved by what they regarded as nobler and more humane sentiments have also not been inhibited by scruples of academic fastidiousness in their own exploitation of the tradition.³

Kravetz went on to call the expurgated citation of Mak. 1.10 “perhaps the most scandalous example of such deliberately induced tunnel vision.”⁴

As a cursory reading of the full mishna suggests, Jewish post-biblical tradition does not speak with one voice on capital punishment. Firstly, there are many lengthy, detailed talmudic

discussions of the various methods of carrying out the death penalty and the crimes for which it is to be imposed. Large portions of Tractate Sanhedrin are devoted to these matters. Indeed, at points the tractate becomes a virtual executioner's manual.⁵ It is clear from these discussions that, contrary to the assertion of the CCAR resolution, the rabbis did not reject the Bible's jurisprudential values.

Secondly, the Talmud recognizes that one important objective of criminal law is to protect innocent people, and the assertion is made that the needs of society can justify the imposition of capital punishment.⁶ This is so even when capital punishment is not warranted by the Torah, as long as it is imposed in order "to safeguard" the Torah.⁷ In other words, Rabban Simeon b. Gamaliel was in good rabbinic company in believing that capital punishment protects society by deterring crime.

Thirdly, the rabbis considered death to be the just and appropriate punishment for certain crimes, for instance, when capital punishment effectuates the principle of *mida keneged mida*.⁸

Fourthly, the rabbis believed that death imposed as punishment expiated the crime and that, therefore, it was not only in the interest of society, but in the interest of the criminal as well.⁹

We may disagree with one or more of these views, but we deceive ourselves and others if we claim that post-biblical Jewish tradition repudiates capital punishment "in concept." Rather, as De Sola Pool wrote, "It [is] beyond doubt that the Rabbis approved of the theory of capital punishment."¹⁰

Does Judaism, nonetheless, find capital punishment repugnant "in practice," as the 1979 CCAR resolution claims? While not going so far, De Sola Pool stated that "the Rabbis did not favor capital punishment in practice."¹¹ 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."¹²

These conclusions rely upon the well-known talmudic restrictions on the imposition of capital punishment, chief among them *hatra-a*, or "warning." In order for a Jewish court to order a person's execution, the person must have been warned, prior to the crime and in the presence of two witnesses, that he was liable to be executed by order of the court should he commit the crime.¹³ Moreover, the two witnesses were to be examined closely¹⁴ and separately,¹⁵ and should the slightest variation in their testimony exist, capital punishment could not be imposed by the

court.¹⁶ Some rabbis even held that the prospective criminal must be informed of the specific manner of execution the particular crime would entail.¹⁷ Thus, it has been argued by De Sola Pool and Blidstein, among others, that the rabbis gave “theoretical” allegiance to the biblical prescriptions of capital punishment while, at the same time erecting such imposing “practical” barriers to capital punishment as to make it virtually impossible to carry out. So goes the conventional wisdom.

Is this argument correct? Do the various restrictions imposed by the rabbis show that they opposed capital punishment “in practice?”

I believe not, for a number of reasons. For one thing, there is scant evidence to indicate that these restrictions were ever put into practice in a functioning Jewish criminal justice system.¹⁸ Inasmuch as Jewish courts were deprived of their authority to impose capital punishment after the destruction of the Temple in 70 C.E.,¹⁹ the talmudic restrictions on capital punishment must be regarded as theoretical rather than practical.

Secondly, the restrictions were not universally applicable. For instance, a student (*chaver*) could be executed for a capital crime without *hatra-a*. Because the sole purpose of the *hatra-a* requirement was to be certain that the crime was committed willfully, this requirement was unnecessary when, as in the case of a student, knowledge of the law could be presumed.²⁰

A third reason not to take the restrictions literally is the existence of mishnaic evidence of a procedure for putting to death someone guilty of a capital crime, even when *hatra-a* had not occurred or the witnesses’ testimony was not entirely consistent, as long as the court was certain of the person’s guilt.²¹

Fourthly, the Talmud informs us that after the Temple was destroyed and Jewish courts lost the power to impose capital punishment, criminals liable to be decapitated were turned over to the Gentile government, i.e., the Roman authorities, for execution.²² Foremost among the crimes punishable by decapitation was murder.²³ The practice of turning criminals over to civil authorities for execution continued into the Middle Ages.²⁴

Finally, and most importantly, capital punishment was carried out by Jewish authorities both before 70 C.E. and, when it was possible (whether strictly legally or not), after 70 C.E. as well.²⁵ De Sola Pool discussed a number of such instances, and Blidstein admitted that “in practice the Rabbinic authorities found the abolition of capital punishment inherent in Jewish law im-

possible to maintain.”²⁶ Justice Haim H. Cohn of the Supreme Court of Israel summarized as follows:

Though in strict law the competence to inflict capital punishment ceased with the destruction of the Temple, Jewish courts continued, wherever they had the power (e.g., in Muslim Spain), 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. . . .²⁷

Sources that record historical instances of capital punishment being imposed are considerably more probative of how the rabbis viewed capital punishment “in practice” than any theoretical discussion.

It seems clear that, just as the rabbis approved of capital punishment “in concept,” they utilized capital punishment “in practice” when they considered it necessary. Talmudic discussions of *hatra-a* have no more to do with the *practice* of capital punishment than the lengthy, and likewise largely theoretical, discussions of the manner in which capital punishment is to be carried out. De Sola Pool and Blidstein were correct in identifying a fundamental dichotomy between two bodies of talmudic material on capital punishment, one body in favor and one opposed. Their mistake lay in labeling the material in favor of capital punishment as “theoretical” or “conceptual” and in calling the material in opposition to it “practical.” Jewish tradition does not favor capital punishment in theory while opposing it in practice. The tradition is at war with itself. It embodies the tension between two compelling theoretical positions and two competing sets of values.

There are, tradition tells us, crimes heinous enough to warrant death as the just and appropriate punishment. Society needs and deserves the full protection of criminal sanctions, including capital punishment. Yes, tradition answers itself, but, every person bears the divine image, and society cannot be too careful when it seeks to take a life.

In the final analysis, these two antithetical bodies of talmudic material reflect the classic tension between *midat hadin* and *midat harachamim*, the attributes of justice and mercy. They represent a painstaking attempt to elaborate, in the most minute detail possible, these two aspects of the divine essence. The massive, painfully explicit accounts of how, when, where, why, and

upon whom capital punishment is to be imposed amount to a rabbinic relief map of that region of God's consciousness that our tradition knows as "the attribute of justice." Strict justice demands the death of the sinner for any of a range of crimes against mankind and God. The comparably elaborate discussions of restrictions on capital punishment are a rabbinic atlas of "the attribute of mercy." Mercy demands that human weakness be acknowledged and that a second chance be given.

These two bodies of material stand in tension, just as the attributes of justice and mercy are portrayed by the tradition as coexisting in constant opposition within the divine personality.²⁸ We mistake the nature of the talmudic enterprise if we assume that the rabbis' primary concern was practical Halacha. It was not. Their primary concern was to penetrate and replicate God's mind through the study and exposition of "Torah," in its most comprehensive sense. Ultimately, the talmudic discussions of capital punishment are part of the messianic enterprise. The halachot were to be expounded and studied for the reward inherent in so doing, but they were not to be effectuated until the messianic era, at which time they may well become superfluous.²⁹ In the meanwhile, impotent to put their views into practice, the rabbis were free to soar in the upper reaches of thought. Spared, in large part, the painful necessity of exercising full criminal judicial authority in the world of here and now, they were free to legislate for a world that had never been, but might yet come to be.

Where does this leave the modern Jew, honestly seeking the guidance of Jewish tradition in this matter of life and death? It leaves each of us to struggle with the competing values and the ambivalent feelings we find within ourselves and within Jewish tradition itself.

One thing is clear. By misrepresenting Jewish tradition in the interest of making a case, the Conference resolution forfeits whatever moral force it might otherwise claim. As we have seen, the tradition struggles with capital punishment, but it does not reject it as "repugnant" either "in concept" or "in practice." Jewish courts have not "refused" to impose capital punishment for the last 2,000 years; they have normally been powerless to impose it, and when they had such power, they exercised it. There is no way to tell how "rare" such instances may have been, but the fact, if it is a fact, that Jewish courts have but rarely imposed capital punishment does not argue for or against its imposition *per se*.

Can anything conclusive be said? That depends on one's goal. If one seeks to establish the one and only Jewishly valid, logically irrefutable position on capital punishment, the answer is no. If, however, one seeks a coherent, Jewishly authentic position for oneself, the answer is yes. Such a position can emerge from a personal confrontation with Jewish tradition, as one draws upon that part of the tradition that resonates most intensely 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—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.³⁰

Capital punishment may be just, but it cannot be administered in a just, fair, and uniform manner. Our legal system is the finest mankind 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.³¹

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 justice."³² Even God's prayer may not always be answered, but its guiding direction is clear.

NOTES

¹*CCAR Yearbook*, vol. 89, p. 105.

²Mak. 1.10.

³Julius Kravetz, "Some Cautionary Remarks," *CCAR Journal*, vol. XV, no. 1 (January, 1968), p. 75.

⁴*Ibid.*

⁵See, e.g., Sanh. 49b, *et seq.*

⁶Sanh. 8.5; Sanh. 46a; Yev. 90b.

⁷Sanh. 46a; Yev. 90b.

⁸See, e.g., Sota 1.7; Sanh. 4.5.

⁹Tos. Sanh. 9.5; Sanh. 9.5.

¹⁰D. De Sola Pool, *Capital Punishment Among the Jews* (New York: Bloch Publishing Co., 1916), p. 20.

¹¹*Ibid.*, p. 21.

¹²Gerald J. Blidstein, "Capital Punishment—The Classic Jewish Discussion," *Judaism*, vol. 14, no. 2 (Spring, 1965), p. 164.

¹³Sanh. 8b, 9b, *inter alia*:

¹⁴Sanh. 32b.

¹⁵Sanh. 29a.

¹⁶Sanh. 40b.

¹⁷Sanh. 8b; Mak. 16a.

¹⁸But see, Sanh. 41a, where a tradition is recorded that "it once happened that Ben Zakkai cross-examined as to the stalks of figs." The meaning of this statement and the identity of the Ben Zakkai named there is unclear, though the gemara concludes that it refers to Rabban Johanan b. Zakkai before he was ordained. Though the baraita suggests that witnesses were closely examined to ascertain the credibility and consistency of their testimony, it does not necessarily demonstrate that *hatra-a* was ever required in actual practice. Moreover, even if such questioning were to have led to inconsistencies sufficient to prevent capital punishment by one of the four prescribed methods, an alternate

means of putting the criminal to death was apparently available, and the same baraita is cited as an appropriate instance for the use of such an alternative (see Sanh. 81b).

¹⁹Sanh. 37b; Sota 8b; Ket. 30a. See also NT, John 18:31, and Josephus, *The Jewish Wars* VI, ii, 4.

²⁰Sanh. 8b, 41a, 72b.

²¹See Sanh. 9.5 and rabbinic commentaries, including Rashi and Bertinoro. According to Kravetz, "the most severe punishments were imposed on evidence that did not meet the strict requirements of Torah law, evidence obtained from solitary witnesses, from relatives of the suspect, by means of hearsay, from circumstantial facts, and from the mouth of the suspect himself" (*supra*, note 3, p. 81). This may only pertain, however, to the post-talmudic period. See Jacob M. Ginsberg, *Mishpatim LeYisra-el*, Jerusalem, 1956, pp. 22–26, 91–95. In summarizing the Jewish practice following the close of the Talmud, Ginsberg wrote: "From all of these decisions and incidents we have seen that in every period the important rabbinic authorities of Israel, men of repute, imposed capital punishment on Jewish criminals if they considered the matter imperative to deter wrongdoers" (*ibid.*, p. 26).

²²Sanh. 37b; Sota 8b; Ket. 30a.

²³Sanh. 7:3.

²⁴De Sola Pool, *supra*, note 10, pp. 47–50; Blidstein, *supra*, note 12, pp. 170–171, note 23; Haim H. Cohn, "Capital Punishment," *Encyclopedia Judaica* 5:144 (Jerusalem: Keter, 1972). See also note 21, *supra*.

²⁵Sanh. 6.4, 7.2; Tos. Sanh. 9.5, 9.11, 10.11; Sanh. 46a; 52b; Git. 57a; Kid. 80a; Ber. 58a.

²⁶Blidstein, *supra*, note 12, p. 170, n. 23.

²⁷Cohn, *supra*, note 24, p. 144. Cohn adds:

In order not to give the appearance of exercising sanhedrical jurisdiction, they would also 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. (*Ibid.*, citations omitted)

²⁸See, e.g., Ber. 7a.

²⁹There is a divergence of opinion in Jewish tradition as to whether the coming of the Messiah will herald a new and perfected world in which there will be no sin and, thus, no need for punishment, or whether the world will be like the present world except for the absence of foreign domination of Israel, in which case all of the Halacha saved for use in the messianic era would presumably be effectuated. See Sanh. 97a ff.

³⁰Does capital punishment deter crime? Though the CCAR has said no, many believe otherwise. In my view, the evidence is inconclusive. Studies purporting to show that abolition of capital punishment does not lead to increased crime are highly speculative. There are simply too many determinants of criminal behavior to rely on such "findings." On the other hand, to prove that capital punishment deters crime we would need a swift, sure, and effective system of capital punishment, something that does not exist and cannot be created. We would then have to prove how many crimes were *not* committed that would have been committed if capital punishment were not practiced.

Common sense and human experience suggest that some crimes, such as crimes of passion, definitely would not be deterred by capital punishment, whereas others, such as certain crimes involving premeditation, might be. At the same time, capital punishment could actually stimulate crimes in situations where the criminal's conscious or subconscious motive is self-destruction or when someone with homicidal tendencies is stimulated to kill by the violent feelings a legal execution can arouse.

Because it is impossible to prove whether capital punishment would deter crime overall, even some thoughtful proponents of capital punishment admit the inconclusiveness of the deterrence debate and base their arguments on other grounds. See, e.g., Walter Berns, *For Capital Punishment*, Basic Books, New York, 1979.

Deterrence is not, therefore, the only issue. As we saw, the rabbis supported capital punishment not merely because of its believed deterrent effect, but because they considered it just in certain cases. Many people, Berns among them, still believe this to be true. In a recent survey of attorneys of the California Bar, although only 58.2 percent agreed that "the death penalty is a deterrent to violent crime," 69.3 percent agreed that "the death penalty should be maintained as a punishment for serious crimes" (*California Lawyer*, March, 1982, p. 24). Of course, what one person considers just punishment, another may call retribution. Still, the issues of deterrence and justice are not identical, and they should be kept separate unless one wishes to assert that capital punishment can only be "just" if it proves to be a deterrent.

³¹For an excellent discussion of the anti-capital-punishment position by an eminent constitutional scholar, see Charles L. Black, *Capital Punishment: The Inevitability of Caprice and Mistake*, Norton, 1974.

³²Ber. 7a.