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Judaism has always had a death penalty. The procedures and restrictions for capital punishment in ancient Israel were set forth in the great text of Jewish law and thought—the Talmud. [FN1] It is commonly said that rigorous proof and procedural requirements limited the actual number of executions. But Judaism still permitted, even required, that certain wrongdoers die for their crimes.

The United States today also has a death penalty. Proof and procedural requirements also are rigorous, though not as stringent as those created by the rabbis of the Talmud. The death penalty is controversial for us, as it was for them.

This article attempts to deepen the death penalty debate in America by introducing into that debate some of the themes raised by Talmudic sources. While the authors are not specialists in the field of Talmudic penology, we are confident that we have chosen representative perspectives from the Talmud to compare with modern views. Each of the themes we introduce here is obviously deserving of fuller treatment than we give it. Brief treatment is helpful, however, in seeing the death penalty itself illuminated by each light in turn. This article presupposes familiarity by the reader of the basic debates in modern American constitutional law and thus in a general way with the concepts of interpretivism and non-interpretivism.

II. THE TALMUDIC AND AMERICAN DEATH PENALTIES

The death penalty in America is familiar to most readers. In 1972, the United States Supreme Court struck down the death penalty as applied. [FN2] But in 1976, the Court upheld the death penalty as not violative in principle of the prohibition of cruel and unusual punishment in the Eighth Amendment to the United States Constitution. At the same time, the Court upheld the validity of particular death penalty statutes in Texas, [FN3] Florida, [FN4] and Georgia. [FN5] Since 1976, the Court has outlined specific procedures that must be incorporated in any death penalty statute, including a separate sentencing proceeding *35 after the conclusion of the trial on guilt. Today thirty-seven states and the federal government have death penalty statutes, under which more than 2,800 prisoners on death rows across the nation await execution.

The Talmudic death penalty is difficult to describe. The Talmud represents a compilation of discussions on various topics of Jewish law and learning that took place over hundreds of years in the academies of Babylonia and Palestine. When discussing a specific topic like the death penalty, the detailed discussions in the Talmud falsely suggest that the discussions corresponded to practice. The extent of correspondence is not known. The Talmud was not fully compiled until hundreds of years after the loss of Jewish political sovereignty in Israel. It is not clear how much of its pronouncements were ever enforced.

The Talmud describes two different types of executions. One, the formal/legal penalty, was imposed and carried out by a court of twenty-three. This system reflects the onerous procedural and evidentiary requirements for which the Talmudic death penalty is known.

A very few examples will suffice to demonstrate the difficulty of convicting a defendant in a capital case. [FN6] According to Gerald Bliedstein, "It has long been a truism that Jewish law is so weighted as to make execution a virtual impossibility." [FN7] In most trials, civil as well as criminal, a legal decision could not be reached on the evidence of only one witness. [FN8] But in capital cases, the two witnesses both must have seen the accused while he was committing the offense. [FN9] The witnesses also must have warned the accused of the punishment for the offense before he committed it, and the accused must have expressly acknowledged the penalty before proceeding. [FN10] There were in addition a number of procedural and standard-of-proof protections for the accused. [FN11] Perhaps the most dramatic was that if the twenty-three-member court voted unanimously for conviction upon hearing the evidence, the accused was acquitted; only if some members voted to acquit was a conviction permissible. [FN12]

Obviously, if these rules were followed, there would be almost no convictions in capital cases. And, indeed, a court that ordered an execution once *36 in seven years was condemned as "destructive." [FN13] Other voices in the tradition applied that epithet if a court condemned to death one person in seventy years. [FN14]

At the same time that this imposing legal structure operated, however, a parallel system or systems of execution...
also existed. The Sanhedrin retained the capacity to execute without recourse to legal formality in a time of emergency. The King maintained the same authority. In addition, if an obviously guilty criminal escaped condemnation in the formal system through operation of a procedural or evidentiary requirement, he was poisoned. [FN15]

III. LIMITS OF COMPARISON

The differences between Israel in the period before the redaction of the Talmud and America today are obviously great. Comparing them could not resolve issues besetting us. The most significant difference between ancient Israel and modern America is the level of violence. Even proponents of the death penalty in the Talmud appeared to accept the perspective noted above that a court that ordered an execution "once in seven years" is considered destructive. No American jurisdiction with a death penalty today could afford such a different approach. If we are to have a death penalty at all, with over 20,000 homicides a year, it must be a massively widespread penalty compared to that of Israel.

The rabbis of the Talmud could not have accepted the routinization of the death penalty necessitated by such large numbers. Illustrative of this reluctance is the surrender of capital case jurisdiction by the Sanhedrin over thirty years before Rome destroyed the Second Temple. [FN16] The Gemara accounts for this action with the seemingly peculiar explanation that the Sanhedrin, observing the number of murders increasing, decided that capital trials could "not properly be dealt with judicially" any longer. [FN17] The rabbis did have experience with temporary upsurges in violence and dealt with them by reducing procedural and evidentiary requirements for the death penalty [FN18]—something like what the Burger and Rehnquist Courts have done in the face of public anxiety in America about violent crime. But these departures were temporary. In contrast, the American condition of violent crime is not an emergency in the sense of being a temporary upsurge. A high level of violent crime is a permanent American condition. The Talmudic death penalty *37 was designed for only occasional use.

Aside from the enormous size of our crime problem, the American death penalty differs from that of the Talmud in that it is part of a secular criminal justice system. Americans like to think of themselves as religious—as descended from the Judeo-Christian tradition. We like to think of our public policy as embodying religious ideals. But the death penalty shows that at least in some contexts, a culture either has a religious perspective or it does not. An important part of the Talmudic death penalty—some say its overriding purpose—was to attain atonement for the condemned through a trial functioning as a religious service. [FN19] The Talmudic death penalty is unfathomable apart from atonement and ritual. [FN20]

The American death penalty does not have and cannot have, given the assumptions of our constitutional order, any focus on ritual and atonement. It would probably be reversible error for a jury even to consider that by condemning a defendant to death, they might be guaranteeing to him "a portion in the world to come." [FN21]

The secular nature of the American death penalty is not a function of judges imposing a radical separation of Church and State on an unwilling population— which is how some Americans look at the ban on prayer in the public schools, for example. Americans simply do not think about ritual and atonement in deciding the death penalty policy question. Retribution—restoring the balance in the moral order—does have a religious origin. And clearly, retribution is one of the goals served by the American death penalty. But retribution is now only a pale reflection of that religious origin. [FN22] Nor does retribution exhaust a religious viewpoint.

For these, and for other reasons, simply incorporating Talmudic practice in the American legal system would not be coherent or possible. Nor would it make sense to grant normative supremacy to the Talmud, per se. The two systems are different; the two societies are different.

*38 So, why compare them? The Talmud is a legal system that aspired to reflect God's purpose in the world. If such a system could confidently put men and women to death, then perhaps so can we. If, on the other hand, the rabbis of the Talmud agonized over execution, limited its reach, and sought to excuse where possible, perhaps we need to imitate their voices.
IV. THE ROLE OF THE JUDGE

Both the American legal tradition and the Talmudic tradition have had to deal with the conflict of obedience and innovation faced by a judge. As Robert Cover described in his book about the nineteenth century anti-slavery judges, Justice Accused, [FN23] the conflict can be particularly acute when a judge is dealing with a practice felt to be unjust, but which has perceived legal legitimacy.

One possible response to such conflicts in America is for the judge to declare the challenged practice unconstitutional. A major focus of American conservative legal theory is to argue that this response is not legitimate— that constitutional interpretation should not be based on morality. Instead it should be based on history or language or some other basis that is said to be more predictable and objective than morality. Justice Scalia recently echoed this criticism in dissenting from a decision banning prayer at public school graduation ceremonies: "Today's opinion shows more forcefully than volumes of argumentation why our Nation's protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people." [FN24]

In regard to a practice sanctioned by the revealed Word of God, as was the death penalty under the Talmud, the situation of the rabbis was far more constricted than is that of the American judge. Haim Cohn, Justice of the Supreme Court of Israel, describes that restriction as follows:

Like all theocratic law, the laws prescribing punishments and allocating them to various offenses are emanations of God's will, and their primary purpose is expiation, to turn away God's blazing anger. Not only are criminals and their crimes an abomination in the eyes of God and must for this reason alone be eliminated, but the very character of punishment as God's command leaves no alternative. [FN25]

Nevertheless, Justice Cohn describes a number of ways in which the rabbis did modify penal practice, from changing the modes of execution (while keeping the names the same as in the Bible) to the elimination of most talionic punishments. These reforms were accomplished by a complex reinterpretation of God's word, in light of deeply held rabbinic ideals— ideals, it was felt, that God would surely share. [FN26] Such radical reform took place outside the penal context as well. [FN27] As we shall see below, the confidence the rabbis had in God rendered reform more easily attainable than reform is in our positivist age, which skeptically views any talk of ideals and morality. That is, it was easier for the rabbis to depart from the Word of God than it is for American judges today to depart from the voice of the people. But, however easily reform could be accomplished, neither the American Judge nor the Talmudic Rabbi felt himself free simply to abolish the death penalty as an exercise of personal moral insight.

V. TALMUDIC VOICES ADDRESSING THE DEATH PENALTY

The Talmud does not explain why the law is as it is. One would look in vain for an explanation of why this rabbi or that rabbi favored or opposed the death penalty. In fact, it is not accurate to speak of opposition to the death penalty in the American sense. All of the rabbis were bound to some notion of the death penalty because the Bible— the Word of God— approved of it and demanded it. Nor does it make sense to speak of support for the death penalty in the American sense. No rabbi looked with anything but horror upon both violent crime and violent punishment.

Within those limits, however, there is among the rabbis more or less commitment to the death penalty. And there are snatches of comments that help to put these commitments in perspective.

A. Deterrence

The most famous exchange in the Talmud on the subject of the death penalty occurs in Makkoth:

A Sanhedrin that effects an execution once in seven years, is branded a destructive tribunal; R. Eliezer B. Azariah says: once in seventy years. R. Tarfon and R. Akiba say: Were we members of a Sanhedrin, no person would ever be put to death. [Thereupon] Rabban Simeon b. Gamaliel remarked, [yea] and they would also multiply shedders of blood in Israel! [FN28]

*40 The terseness of this exchange should not obscure its significance. The Talmud selects carefully. This
exchange demonstrates the well-known rabbinic reluctance to execute in the formal death penalty system. All four rabbis mentioned in the story appear to accept the one-in-seven-year frequency of the death penalty as an appropriate interval. R. Simeon B. Gamaliel does not appear to wish to speed up the existing system, nor to bring more wrongdoers to justice. And there were wrongdoers who avoided execution. The tone of the first part of the exchange suggests that there were other guilty parties apprehended during the seven years, but that for various reasons they were not executed.

R. Tarfon and R. Akiba reflect the most extreme rabbinic reluctance to execute. The Gemara explains how they would preclude the death penalty without denying its divine legitimacy. The rabbis would ask improbable and obscure questions of the witnesses—such as whether it were not possible that the victim had been suffering from some fatal disease, which actually killed him. A lack of certainty by the witnesses on any material point would bar formal execution.

R. Tarfon and R. Akiba are outside the rabbinic mainstream. The Gemara states that the "Rabbis," here apparently the mainstream rabbis not opposed to capital punishment, would not ask such searching questions, thus permitting the formal death penalty to be imposed more easily. This is an illustration of the disagreement among the rabbis in regard to the death penalty that Gerald Blidstein has noted was never resolved.

What can be said about the reasons R. Tarfon and R. Akiba opposed the death penalty? Nothing can be said with confidence. From the fragment above we know only that they were opposed to the death penalty for anyone. Elsewhere, R. Akiba is quoted as teaching, "Whoever spills blood destroys the image [of God]." [FN29] Presumably, this idea represents the foundation of R. Akiba's opposition to the death penalty.

If the reasons for rabbinic opposition are unclear, the source of support for the death penalty in this fragment is unambiguous—deterrence. For R. Gamaliel, the absence of the death penalty would lead to an increase in violent crime. There was a widespread Talmudic concern about the threat of breakdown in the social order. For example, when one left a city, one was to pray that he not be attacked on the way. [FN30] The existence of alternative systems of execution may possibly be explained by such fear.

Nevertheless, even given such fear, R. Gamaliel's view is difficult to understand. He does not dispute that the Sanhedrin should refrain from executing more than once every seven years. What kind of deterrence would be possible in such a setting? Of course a Talmudic exchange should not be *41 looked at as a conversation. R. Gamaliel was not necessarily responding to the first part of the paragraph; he may have been discussing the idea of abolition of the death penalty.

By arranging this exchange in its current form, the Talmudic redactor has suggested the following: that a broad rabbinic consensus existed favoring an infrequently invoked formal death penalty; that the same consensus preferred to overlook the informal capital practices probably in use at the same time; that a substantial rabbinic view held that the use of the formal death penalty should be reduced even further; and that two minority viewpoints confronted each other—one that would have abolished the death penalty altogether and another that would have strengthened it in the name of deterrence.

This Talmudic exchange has parallels to the America experience with death penalty debate. Americans against the death penalty generally would oppose the death penalty even if it were established as an effective deterrent of violent crime. So, too, presumably do R. Tarfon and R. Akiba.

The American proponent of the death penalty, however, argues today from a broader perspective than did R. Gamaliel. The American proponent does, of course, criticize abolitionists for undermining deterrence, as did R. Gamaliel. But, American death penalty proponents often also insist that the death penalty is a just and, in some contexts, the only just sanction.

R. Gamaliel's sole reliance on deterrence may stem from two sources. First, the rabbis were very concerned about deterrence and societal breakdown. They seem to have had more confidence in the unique effectiveness of, and need for, the death penalty than we have today. This is not too surprising since ancient Israel lacked large scale reliable institutions of incarceration.
Illustrative of the rabbinic fear of social breakdown, two stories are told in the Talmud about punishments imposed that were not legally justified. In the first, a man was stoned to death for riding on the Sabbath because at that time adherence to rabbinic religious pronouncements was weak. \[^{31}\] In the second, a husband was flogged for having sexual relations with his wife in public "because the times required [the flogging]." \[^{32}\]

There is, however, a more fundamental reason for R. Gamaliel's sole reliance on deterrence. A call for justice in favor of the death penalty would have conflicted with deeply held rabbinic attitudes toward the relationship of justice and mercy.

\*42 B. Justice and Mercy

The American death penalty debate is beset by the justice issue. American opponents of the death penalty do not, by and large, agree that murderers—or other wrongdoers—deserve to die. Nor is there a consensus in America about the standards of morality that would allow the death penalty question to be resolved. Proponents of the death penalty may have convinced a majority of voters that murderers deserve to die, but they cannot demonstrate this proposition by reasoning from generally accepted premises. The rabbis did not have this problem. The proper punishments for crime were set forth in God's Word. Even the abolitionist rabbis could hardly claim that the death penalty was conceptually illegitimate.

The death penalty debate in the Talmud, therefore, can be viewed as not so much about justice, as about mercy. Gerald Blidstein suggests that the death penalty debate in classic Jewish thought manifested contrasting Jewish understandings of the nature of mercy. One point of view equated justice and mercy, whereas the other point of view found in mercy the dynamic divine quality that controls and limits the demand for justice. \[^{33}\] Several classical Jewish sources regard the Biblical command to deliver the murderer to execution—"Thine eye shall not pity him" \[^{34}\]—as a warning against any reluctance to execute. \[^{35}\]

But this view—the harsh demand of the law for punishment—contrasts with a general rabbinic reluctance to invoke justice in punishment. This reluctance is illustrated in the following Talmudic story.

In the neighborhood of R. Joshua b. Levi there was a Sadducee who used to annoy him very much with [his interpretations of] texts. One day the Rabbi took a cock, placed it between the legs of his bed and watched it. He thought: When this moment arrives I shall curse him. When the moment arrived he was dozing. [On waking up] he said: We learn from this that it is not proper to act in such a way. It is written: And His tender mercies are over all His works. And it is further written: Neither is it good for the righteous to punish. \[^{36}\]

In the classic Jewish tradition, mercy occupies a central role. This helps explain why a proponent of the death penalty would argue from deterrence—for only in deterrence is harsh punishment merciful, merciful at least to potential innocent victims. Such a position could support the death penalty \*43 without denying the centrality of mercy. And, insofar as the tradition's existing limitations on the death penalty manifested mercy, R. Gamaliel does not criticize them.

A love of mercy and a dread of strict justice are common Talmudic themes. In the same discussion in which the story of R. Joshua b. Levi appears, the Talmud tells a beautiful tale about the prayer of God. The prayer God prays is that his mercy may overcome His anger.

R. Johanan says in the name of R. Jose: How do we know that the Holy One, blessed be He, says prayers? Because it says: Even them will I bring to My holy mountain and make them joyful in My house of prayer. It is not said, "their prayer," but "My prayer"; hence [you learn] that the Holy One, blessed be He, says prayers. What does he pray?—R. Zutra b. Tobi said in the name of Rab: "May it be My will that My mercy may suppress My anger, and that My mercy may prevail over My other attributes, so that I may deal with My children in the attribute of mercy and, on their behalf, stop short of the limit of strict justice." It was taught: R. Ishmael b. Elisha says: I once entered into the innermost part [of the Sanctuary] to offer incense and saw Akathriel Jah, the Lord of Hosts, seated upon a high and exalted throne. He said to me: Ishmael, My son, bless Me! I replied: May it be Thy will that Thy mercy may suppress Thy anger and Thy mercy may prevail over Thy other attributes, so that Thou mayest deal with Thy children according to the attribute of mercy and mayest, on their behalf, stop short of the limit of strict justice! And He nodded to me with his head. \[^{37}\]
Here the tradition displays its two minds. The anger of God is just and deserved. The wrongdoer should be punished harshly. But mercy is the highest attribute. It is invoked as even a “blessing” to God. R. Joshua links the mercy God would bestow on man to the mercy that the righteous should bestow on wrongdoers.

The Talmud also tells of God's suffering at the death of the wicked. The Mishnah teaches that the hanged body must be buried before nightfall, for he that is hanged is a reproach to God. In interpreting the phrase, "reproach to God," the Mishnah attributes to R. Meir the following description of God's suffering when even the wicked are punished:

R. Meir said, When a man undergoes suffering. [FN38] What does the Shechinah say (as it were)? "My head is in pain, My arm is *44 heavy." If this be so, and the Omnipresent is troubled because of the blood of the wicked that is shed, how much more [is He sorely troubled] at the blood of the righteous. [FN39]

The Soncino edition of the Talmud [FN40] comments concerning the phrase "The Name of Heaven is profaned," which refers to the effect of a publicly displayed hanged body: "Man's sin reflecting, in a manner of speaking, on God." [FN41]

The Gemara attributes to R. Meir a parable illustrating how the hanged man's death reflects on God:

R. Meir said: A parable was stated; To what is this matter comparable? To two twin brothers [who lived] in one city; one was appointed king, and the other took to highway robbery. At the king's command they hanged him. But all who saw him exclaimed, "The king is hanged!" Whereupon the king issued a command and he was taken down. [FN42]

Now, any tradition that teaches that Ted Bundy is God's twin brother takes very seriously the description of man as created in the "image of God." And, obviously, such a tradition would be deeply troubled by any execution. On the other hand, the Rabbis of the Talmud were also moved powerfully by the death of the crime victim. This is perhaps why murder is usually the example of a capital crime discussed in the Talmud though there are many other such crimes. And this is perhaps why the death penalty always remained the norm, even when it was rarely invoked.

C. Repentance and Atonement

There is a justification for mercy that goes beyond a dread of punishment. Mercy gives space for repentance by the wrongdoer. The ultimate goal of the Talmudic criminal justice system was not justice, but repentance. This can be seen in a story parallel to that of R. Levi, [FN43] but with the emphasis on repentance rather than on mercy:

Certain criminals lived in the vicinity of R. Meir and they subjected him to much harassment, and he prayed that they might die. His wife Beruria said to him: How do you justify such a *45 prayer? Is it because it is written: "Let sinners cease from the earth" (Ps. 104:35)? But the word as written means literally "sin," not "sinners." Moreover, consider the last part of the verse: "and let the wicked be no more." When sins will cease, the wicked will be no more. You should rather pray that they repent, and then the wicked will be no more. He prayed that they repent, and they repented. [FN44]

Now doubtless in part the point of this story is the effect of such prayer on R. Meir. In this the story is like that of R. Levi: the righteous should not punish.

But Beruria's comment goes further than that. She knows, where R. Meir has forgotten, that the purpose of law is repentance rather than proper and just judgment. The Jewish moral order is repaired not by punishment of the wrongdoer but by his repentance. Why did such a tradition not abolish the death penalty? The answer is, of course, that to an extent it did. And to an extent, given the Word of God, it felt it could not.

The continuation of the death penalty may also be explained by the problem of atonement. The Talmud clearly explained that God could forgive offenses against himself but could not forgive offenses against other persons. "Transgressions between man and God may be atoned on the Day of Atonement, but transgressions between man and man will not be atoned on the Day of Atonement until one has appeased his fellowman." [FN45]

Although there were many capital crimes, it is no accident that murder dominates in Talmudic discussion of the death penalty. In murder, appeasement is not possible. It is noteworthy in this regard that R. Levi and R. Meir are
the victims of crime who pray for the criminal's repentance. It may even be that the atonement brought about by the execution takes the place of appeasement of the murder victim in accomplishing acceptance of repentance. The Mishnah contains a full and obviously important treatment of atonement, including the following explanation of the need for confession at an execution: "Everyone that confesses has a portion in the world to come." [FN46] If the wrongdoer did not know how to make confession, he was instructed.

The need for atonement where repentance was not sufficient may be why the early tradition--The Bible [FN47]--insisted that of all punishment, the punishment of the murderer in particular must be carried out. The change in the tradition to a stance of some opposition to the death penalty may have reflected *46 a new and difficult insight—that even in murder, even without forgiveness by the victim, mercy and acceptance of repentance are possible without application of strict justice.

D. Innocence

Unlike the American death penalty debate, there is no indication that the chance of wrongly executing an innocent person affected Talmudic death penalty debate. All of the rabbis seem to have regarded such wrongful execution as totally unacceptable. The fanatic procedural and evidentiary hurdles employed in the Talmud's formal death penalty system can be understood as in part stemming from an abhorrence of convicting and executing—or even punishing in other ways—the innocent. The proof requirements assured that the accused was in fact the perpetrator. The required warning assured that the accused acted intentionally. Thus, although it is commonly and accurately said that these requirements prevented the execution of almost anyone, these requirements primarily prevented the execution of anyone who was innocent. The rabbinic determination to protect the innocent no doubt furthered the universal acceptance of these strict requirements.

The rabbinic determination to avoid punishment of the innocent could lead to extreme results, as the evidentiary rejection of circumstantial evidence and confessions illustrates. The Gemara describes the rejection of circumstantial evidence in the following well-known passage: "[The judge] says to them: Perhaps you saw him running after his fellow into a ruin, you pursued him, and found him sword in hand with blood dripping from it, while the murdered man was writhing [in agony]: If this is what you saw, you saw nothing." [FN48]

But despite all the precautions, and the rigid proof requirements, conviction or acquittal in a Talmudic capital case still depended on potentially fallible or even corrupt witnesses. The rabbis recognized that there could be no guaranty against the execution of an innocent person. The consciousness of this potentiality is demonstrated in a revealing Mishnah. The prescribed confessional prayer was "let my death be an atonement for my sins." After explaining how the condemned person was to be helped to confess his sin, the Mishnah adds: "R. Judah says, If he knew that he had been sentenced through false evidence he says 'let my death be an atonement for all my sins save this sin'."

This suggestion by R. Judah shows that despite the precautions, there were some accused who made a sufficiently plausible claim of innocence that a minority of rabbis felt a ritual amendment was needed. Even more to the *47 point, the tradition rejected R. Judah's amended confession on the ground that "everyone would speak in this fashion to show his innocence." [FN49] In the Philip Blackman edition of the Mishnah, the editor's comment to this passage points to the rabbinical fear that "judges and witnesses would be discredited and justice held in contempt" if the condemned went to their deaths officially proclaiming their innocence. [FN50] Some of the rabbis apparently did not believe the evidentiary and other requirements for conviction fully eliminated the possibility of executing the innocent.

In the American death penalty debate, innocence has played a different, indeed partisan, role. American opponents of the death penalty have attempted to show that the death penalty has and will lead to the executions of innocent persons. [FN52] The response from proponents of the death penalty has taken two different paths. On one hand, proponents argue that because of already existing procedural and evidentiary requirements, innocent persons are unlikely to receive the death penalty. This is the sort of response R. Gamaliel would have made, although, unlike a rabbinic court, the American criminal courts do not always have jurisdiction to handle claims of innocence after the trial is over. [FN53]
But the other response—what might be called the road response—is more demonstrative of the difference between Talmudic and American consciousness. American proponents of the death penalty often acknowledge the inevitability of error. They defend even the possibility of substantial numbers of erroneous executions. When we build a road, we know that a certain number of workers will die. Yet we continue to build roads. Thus it is with the death penalty. [FN54] In this response, more than in any other discussion, we can *48 see the rabbis' moral seriousness and compare it with our morally frivolous culture.

VI. AMERICAN AND JEWISH EXPERIENCE WITH THE ANTI-CRUELTY PRINCIPLE: THE SIXTH COMMANDMENT VERSUS THE EIGHTH AMENDMENT

One of the striking failures of the American legal community has been an inability to formulate and implement a coherent vision of the anti-cruelty principle. In contrast, classic Jewish law had a fairly stable sense of which sorts of punishment would be permitted and which would not be permitted.

Francine Klagsburn has noted that it was the value of human life that originally led to the biblical code providing for capital punishment. [FN55] The alternatives to the death penalty at the time—monetary compensation or substituted punishment—had the effect of exalting certain wrongdoers over others or devaluing certain victims compared to other victims. The biblical insistence on execution focused on the precious life the murderer had taken: "Your eye shall not pity him, but you shall purge the guilt of innocent blood from Israel, so that it may be well with you." [FN56]

The Talmud condemns all murder equally. Life history does not matter; neither do the circumstances of the crime; nor the survivors left behind. But if all life is precious, so that it does not really matter who killed or who was killed, then does not the same principle of the preciousness of life lead to abhorrence of the death penalty as well? This is the point made by Gerald Bildstein when he traces the root of the Hebrew word in the Sixth Commandment— r-z-ch- to the same root used to describe permitted killings in the Bible and judicially imposed executions in the Talmud. [FN57] Thus, according to Bildstein, the Sixth Commandment has been inaccurately translated as "You shall not murder" when the sense of the Hebrew phrase is "you shall not kill." Such a translation does not invalidate Biblical law, which demands execution in numerous contexts. But it does express the reluctance to execute that Bildstein considers a characteristic of Talmudic thought. As Moshe Sokol has put it, various sources in the Jewish tradition suggest that there is "some dimension of wrong" in even morally justified killing. [FN58]

There are a number of other sources also associated with rabbinic discomfort with the death penalty. Justice Haim Cohn identifies the Talmudic reform that led to changes in the methods of execution with the injunction *49 "love your neighbor as yourself," [FN59] which was interpreted to mean "devise an easy death for him." [FN60] J.H. Hertz suggests that Deut. 25:3, which limits flogging to forty blows lest "your brother should be dishonored before your eyes," identifies a general notion that "punishment must have a decidedly moral aim; viz. the improvement of the criminal." [FN61] And, of course, R. Meir's story appealing to the likeness of God in every man would also cause one to pause about the death penalty. [FN62]

These ideas do not state a single principle, but they do bear resemblances. And in all of them, every human life is uniquely important. From this bedrock, the rabbis set out to reform a number of aspects of the capital punishment system. The psychological assurance necessary to such action was "their belief in a merciful God who would surely approve of their abhorrence of cruel and inhuman punishments." [FN63]

But if we contrast rabbinic faith that reality favors mercy with modernity, we find skepticism and weariness instead of faith. American judicial decisions implementing fundamental rights are criticized today by many legal thinkers as an illegitimate substitution of rule by judge for rule by law or by majority. What makes such decisions illegitimate in this argument is that there is no unchanging moral foundation establishing fundamental rights; there is only "one's own moral view:"

[No] argument that is both coherent and respectable can be made supporting a Supreme Court that "chooses fundamental values" because a Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society. The man who understands the issues and nevertheless insists upon the righteousness of the Warren Court's performance ought also, if he is candid, to admit that he is prepared to sacrifice democratic process to his own moral views. He claims for the Supreme Court an institutionalized role as perpetrator.
of limited coups d'etat. [FN64]

This attack is traditionally made on so-called non-interpretivism, whereby the courts protect rights not present, in some sense, in the text of the Constitution. Conceivably, decisions implementing the anti-cruelty provision in the Eighth Amendment would not be subject to the same criticism. That text provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." [FN65]

One would imagine that the task of a society bound by this anti-cruelty principle would be to understand its application to everyday life. That is, one would ask what makes a particular punishment "cruel and unusual." In this way a culture would through time and precedent develop an understanding of what cruelty is and why it is forbidden.

This is what the rabbis of the Talmud did, in effect, with the Sixth Commandment and other norms expressive of the value of human life. They let those norms speak in a critique of existing practices. Thus did they effect reform.

But despite a clear text, many legal thinkers today do not want to reason about the meaning of human cruelty or any other norm. Instead, in parallel to the critique of non-interpretivism, they wish to subject the Eighth Amendment to some sort of "objective" analysis. Raoul Berger, for example, appeals to the original intention of the framers in interpreting the Eighth Amendment. [FN66] From the skeptical perspective, a court that interprets even specific language beyond clear history or demonstrable community values also is making rather than implementing value choices.

This jurisprudence of skepticism now dominates judicial decisions. The United States Supreme Court, even the more liberal Justices, appeal to objective indicia of a developing national consensus in interpreting the Eighth Amendment. In Thompson v. Oklahoma, [FN67] Justice Stevens reasoned from such objective criteria in concluding that the Eighth Amendment prohibits the execution of a 15-year-old: "[I]ndicators of contemporary standards of decency, [legislation, jury verdicts and so forth] [indicate that] the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community." [FN68] And if tomorrow that consensus should change, presumably 15-year-olds could again be executed.

What occurs in argument of this sort reflects, as Hadley Arkes has noted, the American legal tradition's current belief that reasoning about morality is impossible. [FN69] According to this skeptical view, we can never get to the truth of an issue such as whether the death penalty is cruel or not. All we are left with are our own opinions on the matter.

VII. CONCLUSION: THE MEANING OF AN EXECUTION

Professor Aaron Schreiber writes of the Talmudic criminal trial: "It may be that criminal trials in Jewish law were in essence a mode of divine service, or ritual, whose function was to attain atonement for the convict, and not necessarily to fathom the truth." [FN70]

Professor Schreiber captures here a core of Talmudic thought--man's need for atonement through ritual acts. The death penalty is a part of, and not separate from, this general attitude. An execution, though awesome, is not an act of hostility. It is a ritual opportunity for the condemned prisoner to attain atonement.

In contrast with the Talmud, what do we in America today believe we are doing when we execute a murderer? Not many Americans believe that the criminal is atoning for his crime through a ritual act. In execution, we may be deterring crime, satisfying the victim's family, saving money or even getting rid of the garbage. Not one of these is atonement. Each of these purposes is something done to the criminal, not for him and not with him. By doing to the criminal and not for him, we in America have severed the link of humanity with the criminal, a motivation that never occurred to the rabbis.

It might be said that the execution restores the moral balance destroyed by the murder and thus is an act of just retribution. And the most profound death penalty proponent would say that every member of society is a participant in the collective quest for justice--even the criminal about to be executed.
This attitude, if we felt it truly, could transform the American death penalty from today's bored bureaucratic function alternating with occasional sensational media event, to the highest shared ritual of which a secular society is capable. But then, we would have to take seriously what we do. Our process, to be worthy, would have to be thought about as seriously as was death penalty law in the Talmud.

Compare our trials with the Sanhedrin that left the Temple rounds when the rising murder rate rendered it impossible for the trials to be dealt with "properly." [FN1] Since the criminal trial was a ritual, for the glory of Heaven the trial had to be done properly and with proper intention. A ritual cannot be bureaucratized and remain a ritual.

We today would not give up the death penalty in the face of a rising murder rate. We would move to summary procedures, more courts, a weakening of procedural and evidentiary restrictions, a cutback in habeas corpus jurisdiction. In short, we would do what we have done.

The greatest horror in an American execution is that the taking of human life is done frivolously. The horror is that we feel no horror for what we do. In that absence we see the clearest contrast between American and Talmudic life.

[FN1]. Professor, Duquesne University School of Law. B.S.F.S., 1974, Georgetown; J.D., 1977, Yale.

[FNaa1]. Assistant Professor of Psychology, Duquesne University.

[FN1]. No introduction to the Talmud could be adequate, of course. These are the first words of the Reference Guide at the beginning of the Steinsaltz edition of the Talmud:

"The Talmud is the central pillar supporting the entire spiritual and intellectual edifice of Jewish life. The Talmud, in the broader sense of the term, is made up of two components: the Mishnah, which is the first written summary of the Oral Law, and the Gemara (called Talmud in the more restricted sense of the term), which is formally an explanation and commentary on the Mishnah.

THE TALMUD i (Rabbi Adin Steinsaltz ed., 1989).


[FN6]. These examples also apply in some cases which are not capital cases. The two witness rule applied in cases in which flogging or the death penalty was authorized and in certain civil cases. See AARON M. SCHREIBER, JEWISH LAW AND DECISION-MAKING 277, 357 (1979). Most of the rules described infra were also used in cases other than capital. See THE CODE OF MAIMONIDES, 14 Judges 32, ch. 5, § 4 [hereinafter MISHNEH TORAH].

[FN8]. See MISHNEH TORAH, supra note 6, at 32, ch. 5, § 1.

[FN9]. Id. at 89.

[FN10]. Id. at 34.

[FN11]. See, e.g., MISHNEH, Sanhedrin, ch. 4, § 1.

[FN12]. MISHNEH TORAH, supra note 6, at 28.

[FN13]. THE MISHNAH 403 (Herbert Danby trans., 1933). The word translated here as "destructive" is elsewhere defined as "tyrannical" (THE MISHNAH (Philip Blackman trans., 1954)) and "murderous" (FRANCINE KLAGSBURN, VOICES OF WISDOM 361 (1980)).

[FN14]. Id.

[FN15]. BABYLONIAN TALMUD, Sanhedrin 81b.

[FN16]. BABYLONIAN TALMUD, Sanhedrin 15a.

[FN17]. BABYLONIAN TALMUD, Abodah Zarah 8b.

[FN18]. See infra text accompanying notes 31-32.

[FN19]. SCHREIBER, supra note 6, at 277.

[FN20]. See infra text accompanying notes 44-46.

[FN21]. Cf. MISHNAH, Sanhedrin, ch. 6 § 2. The Pennsylvania Supreme Court has excluded religious references in death penalty cases twice in recent years. In Commonwealth v. Chambers, 599 A.2d 630 (Pa.1991), cert. denied, 112 S.Ct. 2290 (1992), the court reversed a sentence of death because the prosecutor urged the jury to follow God's law and return a sentence of death. Then, on authority of Chambers, an equally divided court upheld a sentence of death in Commonwealth v. Daniels, 612 A.2d 295 (Pa.1992), despite a trial court ruling that "religion" not be discussed by counsel during closing argument. Apparently, it is now error in Pennsylvania for anyone in a death penalty case to mention the Bible.

A California prosecutor actually did argue to a capital jury that imposing the death penalty could save a defendant's soul. The California Supreme Court held that such a suggestion was improper, although harmless error in the particular case. People v. Sandoval, 52 Cal.Rptr. 1307 (Ca.1992).

[FN22]. Cf. Beruria's discussion with her husband, R. Meir, infra. note 44. While both secular and religious viewpoints seek to restore the moral order, in a secular world this is done by infliction of pain, without hope or care
for the criminal's redemption. In Jewish thought, the moral order is restored by repentance.


[FN26]. Id.


[FN28]. MISHNEH, Makkoth, ch. 1, § 10.

[FN29]. TOSEFTA YEBUMOTH 8:4.

[FN30]. BABYLONIAN TALMUD, Berakoth 60a.

[FN31]. Attributed to Rashi in the SONCINO TALMUD 303 n. 8 (1935).

[FN32]. BABYLONIAN TALMUD, Sanhedrin 46a.

[FN33]. Blidstein, supra note 7, at 318-21.


[FN35]. Blidstein, supra note 7, at 318-19.

[FN36]. BABYLONIAN TALMUD, Berakoth 7a.

[FN37]. Id.

[FN38]. "Because of his sins" is added here in THE MISHNAH, supra note 13, at 265.

[FN39]. MISHNEH, Sanhedrin, ch. 6, § 5.

[FN40]. THE BABYLONIAN TALMUD (Rabbi Dr. Isidore Epstein ed., 1953).
[FN41]. Id. at 304 n. 8.

[FN42]. BABYLONIAN TALMUD, Sanhedrin 46b.

[FN43]. See supra note 33 and accompanying text.

[FN44]. BABYLONIAN TALMUD, Berakhot 10a.

[FN45]. MISHNA YOMA 8:9.

[FN46]. MISHNEH, Sanhedrin, ch. 6, § 2.

[FN47]. The Hebrew Bible was redacted into its canonical form several hundred years before the beginning of the compilation of the Mishnah. See generally HANS KUNG, JUDAISM 108, 132-38 (1992).

[FN48]. BABYLONIAN TALMUD, Sanhedrin 37b.

[FN49]. MISHNEH, Sanhedrin, ch. 6, § 2.

[FN50]. Id.


[FN53]. Some would say that such a lack of jurisdiction killed Roger Coleman. Cf. Coleman v. Thompson, 112 S.Ct. 1845 (1992) (Blackmun, J., dissenting) (denial of stay of execution). The United States Supreme Court has recently held that, at least absent extraordinary circumstances, innocence is not an independent ground for relief under federal habeas corpus, even in a death penalty case. Herrera v. Collins, 113 S.Ct. 2325 (1993).

[FN54]. Lest the reader think we exaggerate:

In capital cases, miscarriages of justice are more grave than in other cases. Nonetheless, some will occur, however much we try to avoid them, since courts are fallible. Innocents are killed in most human activities, not just in war. Truck traffic kills innocent pedestrians every year. Construction debris may kill innocent passersby; so may policing. We don't give up these activities because the advantages statistically outweigh foreseeable accidents. Miscarriages of justice are just as unintended, accidental and foreseeable. Here too the advantages—the morality and deterrent usefulness of the death penalty—outweigh the disadvantages. Execution would be disadvantageous only if miscarriages were so frequent as to cause the risk innocents run to be executed to rival that of murderers. Not even the most fanatic abolitionist contends that this is the case.

[FN55]. KLAGSBURN, supra note 13, at 358.


[FN57]. Blidstein, supra note 7, at 310-15.


[FN60]. Cohn, supra note 22, at 58.


[FN62]. See supra note 38 and accompanying text.

[FN63]. Cohn, supra note 25, at 72.

[FN64]. Robert Bork, Neutral Principles and Some First Amendment Problems, 47 IND.L.J. 1, 6 (1971).

[FN65]. U.S. Const. amend. VIII.


[FN68]. Id. at 832. Justice Stevens did attempt to make a judgment about the matter as well. Id. at 833-38.


[FN70]. Schreiber, supra note 6, at 278.

[FN71]. See supra notes 15-16 and accompanying text.

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PROCEEDINGS
OF
THE RABBINICAL ASSEMBLY

NINETY-SIXTH ANNUAL CONVENTION

The Concord Resort Hotel
Kiamesha Lake, New York

MAY 5 to MAY 9
NINETEEN HUNDRED NINETY SIX

VOLUME LVIII
Resolutions Adopted

RESOLUTION ON CAPITAL PUNISHMENT
WHEREAS the Torah teaches that all human beings are created in God's image;
    WHEREAS Jewish tradition upholds the sanctity of life;
    WHEREAS both in concept and practice rabbinic leaders in many different historical periods have found capital punishment repugnant;
    WHEREAS no evidence has been marshalled to indicate with any persuasiveness that capital punishment serves as a deterrent to crime;
    WHEREAS legal studies have shown that as many as 300 people in this century have been wrongly convicted of capital crimes;
    THEREFORE BE IT RESOLVED that The Rabbinical Assembly oppose the adoption of death penalty laws and urge their abolition in states that have already adopted them;
    That The Rabbinical Assembly urge the enactment of laws that mandate that some capital crimes be punishable by life imprisonment without parole;
    That The Rabbinical Assembly offer support and speak out on behalf of the victims of violent crime and their families;
    That The Rabbinical Assembly encourage its members to send this resolution to their appropriate elected officials.

RESOLUTION ON PRAYER IN PUBLIC SCHOOLS
WHEREAS organized prayer in public schools infringes on the constitutionally guaranteed separation of Church and State in the United States; and
    WHEREAS organized prayer in public schools debases distinctive religious expression, vital to maintaining particularistic religious beliefs; and
    WHEREAS a moment of silence for the purpose of silent prayer and silent meditation represents the introduction of school prayer in the public schools; and
    WHEREAS the institutionalization of prayer in a public school setting, spoken or silent, fosters a religious exercise that has a coercive effect on many students; and
RESOLUTION ON THE DEATH PENALTY

Adopted by the JCPA 2001 Plenum
Monday, February 26, 2001
Washington, D.C.

The Jewish Council for Public Affairs (JCPA) historically has stood in opposition to the death penalty and, in February 2000, joined the American Bar Association’s call for a death penalty moratorium until issues of fairness, impartiality, and the risk of error are resolved. That call was spurred by new information about the likelihood that wrongfully convicted individuals could be executed. The JCPA also urged the appointment of a commission to study the frequency with which death row inmates have later been found to be not guilty and the factors that contribute to wrongful convictions. At both the federal and state level, death penalty studies show racial bias and poverty continue to play a role in determining who is sentenced to death. Recent U.S. Justice Department findings, in a review that is ongoing, reveal both racial and geographic disparities in the administration of the federal death penalty. The study has found so far that just a handful of U.S. attorneys accounted for 40 percent of federal death penalty cases and that members of minority groups were represented disproportionately among those on federal death row.

Of 21 federal prisoners currently facing death sentences, 17 are members of racial/ethnic minorities. Today, more than half of those on death row nationwide, both state and federal, are people of color. Nearly half of those executed by states in the last two decades have been minorities. Further, studies documenting the role of poverty in death penalty disparities reveal a failure to provide adequate representation for indigent people accused of capital crimes and inadequate funding to enable those defending them to prepare proper defenses.

In light of these data, the JCPA reaffirms its call for a federal and statewide death penalty moratorium. Both supporters of the death penalty and opponents, such as the JCPA, are concerned about flaws in the system by which the government imposes sentences of death. We must not allow the understandable desire for punishment to overshadow the impartial pursuit of justice. The JCPA therefore, further resolves to:

- Urge that the study of factors that contribute to wrongful sentencing and convictions include racial disparities, disproportionality based on geographic location and income status of defendants, and adequacy of representation of capital defendants;

- Urge the federal and state governments to provide legal mechanisms whereby persons sentenced to death can challenge their convictions or sentences, despite the passage of time, on the basis of reliable scientific information, such as DNA testing, not available at the time of trial or post-conviction proceedings.
Call on the federal and state governments to provide for the collection and analysis of data to determine the extent, if any, to which disparate treatment of those sentenced to death is attributable to race or ethnicity and to act to eliminate disparities, where they exist;

Consistent with previous JCPA positions, call upon state legislatures in those states that do not impose a death penalty to reject calls for enactment of death penalty legislation;

Support recommendations of the American Bar Association, calling for the imposition of a moratorium on use of the death penalty by the federal government and all 50 states, to remain in force until policies and procedures can be implemented to ensure the fair and impartial administration of death penalty cases, and to minimize the risk that innocent people might be executed. These include:

1. Assurance that all those accused of capital crimes receive competent counsel at every step in the judicial process, with adequate funding for a fully investigated defense;
2. Measures to preserve, enhance, and streamline the authority and responsibility of federal and state courts to exercise independent judgment on the merits of constitutional claims in state post-conviction and federal habeas corpus proceedings;
3. Elimination of discrimination in capital sentencing on the basis of race of victim or defendant; and
4. Provisions that inhibit execution of mentally retarded people and those who were under the age of 18 at the time of their offenses.
OPPOSING CAPITAL PUNISHMENT

45th Council
November 1959
Miami Beach, FL

OPPOSING CAPITAL PUNISHMENT

We believe it to be the task of the Jew to bring our great spiritual and ethical heritage to bear upon the moral problems of contemporary society. One such problem, which challenges all who seek to apply God's will in the affairs of men, is the practice of capital punishment. We believe that in the light of modern scientific knowledge and concepts of humanity, the resort to our continuation of capital punishment either by a state or by the national government is no longer morally justifiable.

We believe there is no crime for which the taking of human life by society is justified, and that it is the obligation of society to evolve other methods in dealing with crime. We pledge ourselves to join with like-minded Americans in trying to prevent crime by removal of its causes, and to foster modern methods of rehabilitation of the wrongdoer in the spirit of the Jewish tradition of tshuva (repentance).

We believe, further, that the practice of capital punishment serves no practical purpose. Experience in several states and nations has demonstrated that capital punishment is not effective as a deterrent to crime. Moreover, we believe that this practice debases our entire penal system and brutalizes the human spirit.

We appeal to our congregants and to our co-religionists, and to all who cherish God's mercy and love, to join in efforts to eliminate this practice which lies as a stain upon civilization and our religious conscience.

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UNION FOR REFORM JUDAISM

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Resolution Adopted by the CCAR

Capital Punishment

Adopted by the CCAR at the 90th Annual Convention of
the Central Conference of American Rabbis
Phoenix, Arizona, March 26-29, 1979

In 1958 and again in 1960, the Central Conference of American Rabbis stated its opposition to all forms of capital punishment. We reaffirm that position now. Nothing which we have observed during the intervening years has shaken our convictions that:

a. Both in concept and in 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.

b. No evidence has been marshaled to indicate with any persuasiveness that capital punishment serves as a deterrent to crime.

c. We oppose capital punishment under all circumstances.

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For questions or comments about this site email the webmaster: webmaster@ccarnet.org
American Jewish Committee's Statement on Capital Punishment

Capital Punishment

While Jewish Biblical tradition mandates the imposition of capital punishment under certain rare circumstances, rabbinical interpretation of that tradition has required such procedural assurances with respect to the application of the death penalty that rabbinical interpretation, in effect, virtually prohibits it. Thus, AJC opposes capital punishment in general as cruel, unjust and incompatible with the dignity and self-respect of man.

The agency's belief that capital punishment "degrades and brutalizes the society which practices it" resulted in its joining an amicus brief in *Thompson v. Oklahoma* (1988), in which the Supreme Court held that the Eighth Amendment's prohibition against "cruel and unusual punishment" prohibits the execution of those who commit capital crimes while under the age of 16.

AJC has also filed briefs more recently in two landmark Supreme Court cases involving capital punishment: *Atkins v. Virginia* (2002), in which the Court held that the Eighth Amendment bars execution of persons with mental retardation, and *Roper v. Simmons* (2005), in which the Court ruled that executing individuals who were under the age of 18 at the time they committed a capital crime violates the Eighth Amendment. In both cases, AJC filed briefs together with a diverse coalition of religious communities, urging the court to consider the voices of religious and religiously affiliated institutions when assessing "evolving standards of decency," the standard for reviewing Eighth Amendment claims.
RACE AND THE U.S. CRIMINAL JUSTICE SYSTEM

65th General Assembly
December 1999
Orlando, Florida

RACE AND THE U.S. CRIMINAL JUSTICE SYSTEM

BACKGROUND
Preventing and punishing criminal conduct are among the primary obligations of government at all levels. But it is also the obligation of government to ensure that no one is unjustly accused, convicted, or punished. In Deuteronomy 16:20, the Torah commands us, (Tzedek, tzedek tirdof, "Justice, justice you shall pursue"), and the sages explained that the word (tzedek) is repeated not only for emphasis but to teach us that we must be just in our pursuit of justice, that our means must be as just as our ends. Similarly, the Rambam lists five transgressions for which people do not repent. One of them is mistakenly suspecting an innocent person of doing wrong. One will justify his suspicion by saying, "I haven't sinned. What did I do to harm that person?" He doesn't realize that he commits a sin by considering an innocent person a transgressor (Hilchot T'shuvah 4:3).

In this context, we express our support for America's law enforcement agencies and our concern that aberrations that undercut fairness and justice harm the credibility and efforts of those agencies and personnel even as they erode respect for law and justice in America more generally. Notwithstanding the ideals of our criminal justice system, there is growing evidence that race and poverty play a role in determining who gets arrested, who gets a fair trial, and how those convicted are sentenced. There is an increasing perception that we have two criminal justice systems, separate and unequal: one for affluent Whites and one for racial minorities and the poor. Foremost among the complaints are disparate application of the death penalty, police brutality, racial profiling, sentencing disparity, and disparate treatment of minorities by the juvenile justice system.

Death Penalty
In 1959, the Union of American Hebrew Congregations resolved to oppose the death penalty, a position supported by the former Synagogue Council of America representing Reform, Conservative, and Orthodox rabbis. While we continue to work for the abolition of the death penalty, we cannot ignore injustices in its application. Statistical evidence, including that compiled by the Death Penalty Information Center, shows that African-American men are disproportionately represented among those on death row and those who have been executed in the last twenty years. Although people of color are the victims in more than half of all homicides, a White victim case is over four times more likely to result in a death sentence than a comparable Black victim case. Some contend that these and other statistics showing disparities can be explained by nondiscriminatory factors, but there is strong evidence that race is a determining factor. Studies also document the role of poverty in death penalty disparities. Many jurisdictions fail to provide adequate representation for indigents accused of capital crimes and adequate funding for those defending them to properly prepare their defenses. The American Bar Association in 1997 called for a moratorium in executions until each jurisdiction adopts policies and procedures to ensure that death penalty cases are administered fairly and impartially, in accordance with due process. And to minimize the risk that innocent persons may be executed, implementing, among others, ABA policies to ensure competency of counsel in capital cases and striving to eliminate discrimination in capital sentencing on the basis of the race of either the victim or the defendant. There has been little response to the Bar Association's call.

Police Brutality
The use of force by police and law enforcement agencies has contributed to a widening rift in police/community relations. The brutalizing of Abner Louima while in police custody in New York and the police shooting of a West African immigrant, Amadou Diallo, in the vestibule of his New York apartment building have raised public awareness of a long-simmering concern. These events, as well as others across the country, sparked massive protests and opened a dialogue among city officials, minority leaders, and law enforcement agents.
Discriminatory Profiling

A major factor contributing to racial disparity in prosecution and punishment is the discriminatory profiling of minorities-based on race, ethnicity, and sexual preference-as criminal suspects and, especially, as drug traffickers. Profiling is used to determine whom to stop and search in the absence of the specific identification of a suspect in a particular crime. In a significant percentage of these traffic stops and searches, no traffic offenses are cited. In 1997, Judge Stephen Reinhardt of the 9th U.S. Circuit Court of Appeals wrote: "It is clear . . . that African-Americans are stopped by the police in disproportionate numbers." In Maryland, state police statistics showed that 73% of cars stopped and searched on I-95 between Baltimore and Delaware in a two-year period were driven by African-Americans, while only 14% of those driving on that stretch of road were Black. Police found absolutely nothing in 70% of those searches. The use of Racial profiling has now been admitted in New Jersey, and evidence of its use elsewhere is widespread.

Sentencing Disparity

While African-Americans constitute about 12% of the U.S. population and 13% of drug users, they make up 38% of persons arrested for drug offenses, 59% of those convicted of drug offenses, and 63% of those convicted of drug trafficking. African-Americans who are convicted of drug offenses are sentenced to prison at much higher rates and for longer terms than Whites convicted of the same offenses. The disparity in the treatment of users of crack and powder cocaine contributes to the disproportionate incarceration of minorities. In 1988, Congress distinguished crack cocaine from powder cocaine and other drugs by creating a mandatory minimum penalty for the simple possession of crack cocaine, the only such federal penalty for a first offense of simple possession of a controlled substance. Under this law, the possession of more than five grams of crack cocaine triggers a minimum sentence of five years in prison. On the other hand, the simple possession by a first-time offender of any quantity of any other illegal substances, including powder cocaine, is a misdemeanor punishable by a maximum of one year in prison. The impact of this disparity has fallen principally on African-Americans, who are predominant among crack cocaine defendants. Thus far, attempts at reforming these sentencing disparities have failed.

Other drug sentencing laws that mandate stiff prison sentences for first offenders, often without the possibility of parole, contribute to the disparate incarceration of minorities. Civil rights leaders, religious leaders, and many former supporters of mandatory minimum sentences have blamed these federal and state laws for devastating minority communities—in which one out of every four young Black men is in prison, on parole, or on probation. Many federal judges and law enforcement groups are also opposed to mandatory sentences for first offenders, appealing for new approaches to dealing with the drug problem.

Juvenile Justice

Despite legislation meant to stop the disproportionate confinement of juveniles who are members of minority groups, over the last ten years, a growing body of evidence shows that African-American youths between the ages of ten and seventeen are twice as likely to be arrested and seven times more likely to be placed in a detention facility than Caucasian youths. Analysis shows that this large discrepancy cannot be attributed simply to the fact that young people of different racial groups commit different types of crimes because the rates of confinement for African-American juveniles for every offense group are significantly higher. African-American juveniles are also disproportionately referred to adult criminal courts and treated as adults for purposes of trial and sentencing. Enforcement of the law does not require the use of numerical quotas or the arrest or release of any juvenile from custody based on race, but it does require that disproportionate minority confinement must be analyzed and addressed when it does exist. To date, the law has been largely unenforced.

THEREFORE, the Union of American Hebrew Congregations resolves to:

1. Reaffirm its strong and long-standing opposition to the death penalty;

2. Call upon all branches of government, at the federal and state levels, until such time as the death penalty is abolished, to:

   (A) Provide for the collection and analysis of data to determine the extent, if any, to which the disparate

http://urj.org/PrintItem/index.cfm?id=7203&type=Articles 6/15/2009
treatment of those sentenced to death is attributable to the race or ethnicity of the defendants or the victims and act to eliminate the disparities, where they exist.

(B) Reform the systems for the appointment of counsel for indigent defendants to ensure that all those accused of capital offenses are afforded competent counsel and that they have adequate funding to ensure that their defenses are fully investigated.

3. Speak out against incidents and patterns of police brutality and support action to improve police community relations, for example:

(A) Increasing outreach to and the recruitment of law enforcement officers from minority communities so that the police will look more like the communities they serve;

(B) Supporting programs that encourage police officers to develop close ties to the neighborhoods they serve; and

(C) Appealing to congressional leaders of both parties to follow through and immediately fund the provision of the Crime Control Act of 1994 that provides for the accurate collection of comprehensive national data on the use of excessive force by police. This would also include data on the number of people killed or injured by police shootings or other types of force; and

(D) Urging communities to create a mechanism for civilian oversight of law enforcement activity and, working with law enforcement agencies, to develop a set of community standards by which police actions would be judged.

4. Support legislation that prohibits discriminatory profiling and requires law enforcement agencies to provide accurate and timely data on such practices by law enforcement officials and to condemn law enforcement profiling;

5. Support legislation to repeal state and federal laws that require mandatory incarceration of first-time drug offenders, and to restore judicial discretion in sentencing first-time offenders;

6. Support legislation to end crack cocaine and powder cocaine sentencing disparities;

7. Call on government officials and especially juvenile correctional systems to treat juveniles at all phases of juvenile proceedings without regard to their race or ethnicity;

8. Call for the full enforcement of the existing federal mandate that disproportionate minority confinement of juveniles must be analyzed and addressed when found to exist and for the application of the penalties required by law against those systems that fail to fulfill the federal mandate; and

9. Call for a moratorium on the death penalty until all of the above matters are properly addressed...

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Capital Punishment – Again?

Stephen M. Passamanek

In January of 2005, the Pacific Association of Reform Rabbis invited me to lecture at their annual convention. The topic I chose was something like: a new look at capital punishment. In the course of my remarks I stated that I had tried to state my point of view before in a public forum of some kind, and that I had been unsuccessful. Some of the attendees spoke to me about sending the material to the CCAR Journal. Here is the substance of that presentation.

There are many excellent reasons to oppose capital punishment. That is never in doubt. The particular question examined here is whether or not Jewish tradition does, in fact, support an unequivocal rejection of capital punishment. Certainly liberal Judaism has adopted an anti-capital punishment stance virtually as a matter of faith, and it has, in part, supported this point of view with citations from rabbinic literature. Yet a contrary argument is made possible, if not actually necessary, by a more comprehensive reading of rabbinic literature.

No one questions that the Hebrew Bible has no qualms about the propriety and justice of capital punishment. It specifies death penalties for a number of offenses and it is the source of the somber message: “an eye for an eye...a life for a life.” Tannaitic halachah presents an equally somber message.

Rabbinic literature appears to afford some basis for rejection of capital punishment. Liberal rabbis for generations have directed their attention to M. Makot 1:10, where the “murderous Sanhedrin” is mentioned. To refresh the memory: an anonymous opinion declares that a Sanhedrin that imposes a capital penalty once in seven years is “murderous.” R. Elezzer b. Azariah declares that such
a penalty once in seventy years is enough to render a Sanhedrin "murderous." Then R. Tarfon and R. Akiba opine that if they had been on a Sanhedrin hearing a capital case, no one would ever have been put to death. R. Simeon b. Gamliel concludes the first chapter of Makkot with the trenchant observation that they—R. Tarfon and R. Akiba—increase (would have increased?) murderers among Jews, his point being that if no murderer had to forfeit his own life, what fear would potential murderers have had of punishment? None at all, so it seems. Clearly liberal Judaism has adopted the punishment view.

There are a few observations that may be made here. R. Tarfon and R. Akiba were giants in their generation, but it is hardly likely that they ever could have or would have sat on a court hearing a capital case. Both men were active long after the destruction of the Temple in 70 CE and obviously long after the Romans had stripped the Jews of jurisdiction in capital cases. In effect, both R. Tarfon and R. Akiba are indulging in a boast: "If I were there, I would never..." Even so, a capital case under classic rabbinic law (I shall refer to the rules on capital punishment specified in M. and T. Sanhedrin as the "classic law" or the "classic rules") was heard by a court of 23 judges. A guilty verdict required a majority of at least two: 12 to 11 was no good, but 13 to 10 was, and so was 15 to 8, etc. There is no guarantee that R. Tarfon and R. Akiba would have swayed sufficient votes (at least nine) to their side in deliberations. The pious boast of two rabbis, no matter how great and revered they might be, is hardly a firm foundation for a definitive point of view, particularly in light of R. Simeon b. Gamliel's response. It is much more useful to look at the classic rules themselves and see what was actually supposed—and the operative word is supposed—to happen in capital cases.

When we examine those classic rules, the prospect for an anti-capital punishment stance seems to be enhanced. One procedural or technical rule is heaped upon another until the possibility of a conviction on a capital charge becomes all but impossible. As has been indicated, the court must be composed of 23 ordained judges. There must be two eyewitnesses. The potential murderer (or rapist of a naarah morasah) must be warned that the act he is about to commit is a capital offense. He must specifically reject that warning, and assert that he will not desist. It is, of course, preposterous to imagine that a person bent on homicide (or rape) would break off his activity to respond to such a warning; why should he? At least there can be no question of the culprit's identity. But no response—no conviction! Further, the witnesses have to be standing in proximity to each other. Why do they not intervene and stop the potential homicide under the rule of rodef, which allows people to restrain a person bent on committing homicide even if they must use deadly force to do so? In any event, these rules could not possibly be employed to cover homicides committed in private or in darkness! The procedural bars as laid out in the talmudic texts render conviction a virtual impossibility. But that is surely not the end of the story.

The same materials that present the procedural hurdles that are all but impossible to clear also mention the kippah, a sort of a cell where a murderer who could not be convicted of offenses because, suggests the Gemara, the witnesses were not standing more or less together (thus Rav); or there was no warning given (thus Samuel); or the witnesses disagreed on minor points of the evidence, but agreed on the vital matters of evidence (thus R. Hisda in the name of Abimi). The accused was put in this cell and fed a diet that would in time cause his stomach to burst—and he would die from that condition, which in that era was untreatable. Even with the procedural hurdles, the murderer did not necessarily escape death, at least according to the strict rules, although we do not know how often the kippah was employed. No matter that it was not by means of one of the four specified modes of dispatching a person guilty of a capital offense; dead is, after all, dead. The rules concerning the kippah hardly suggest that the rabbinical courts really were uncomfortable with the death penalty, R. Akiba and R. Tarfon excepted of course.

As a matter of fact, rabbinic tradition does preserve recollections of the imposition of capital penalties. When we consider what was supposed to happen under the classic rules in those days, it is perhaps prudent to consider what might actually have happened as well. R. Eliezer b. Zadok recalls that as a young child he rode on his father's shoulders to see the daughter of a priest suffer death by burning. True enough, the Mishnah declares that the court that handed down the verdict was not learned and therefore the mode of execution was highly improper. Even so, there is no hint that the sentence of death itself was incorrect, unwarranted, or contrary to prevailing standards of morality.
Then there is the case of R. Simeon b. Shetah, who once saw a man pursue another into a ruined building, brandishing a knife, apparently intending to kill his quarry. By the time Simeon b. Shetah arrived on the scene, one man stood over the other, the former with a bloody knife, and the latter in the final convulsions of dying. Ben Shetah declared that without two witnesses (not to mention the absence of a warning) there could be no capital charge brought against the knife wielder. But the story takes a quick turn in the opposite direction. Simeon b. Shetah called down divine wrath upon the murderer, whereupon a snake bit that man and he died. The Gemara reacts to this vignette by asserting that even after the Sanhedrin no longer existed—certainly not the case in Shimon b. Shetah’s time—the law of the four modes of execution remained in force. The person deserving death by stoning would fall from a roof; the one deserving death by burning would be bitten by a poisonous snake; the one deserving of death by strangulation would suffer drowning or suffocation. The concept of capital punishment endured, at least in theory, as an aspect of divine justice, which would surely punish what the earthly court could no longer punish.

Simeon b. Shetah, who was observant of the rules of procedure when standing in the ruin, was the same Simeon b. Shetah who is alleged to have executed eighty witches on one day in Askelon. Whether or not the event actually happened is irrelevant; rabbinic tradition says it did—just as it mentions a “murderous” Sanhedrin, which may or may not ever have sat. This sort of mass trial and execution (one presumes there was a trial) is clearly prohibited under the classic rules. Simeon b. Shetah at the murder scene in the ruined building was clearly aware of the requirements of the law, so one would expect that he also knew the rules against multiple executions. The Gemara is at pains to demonstrate that he did in Askelon was, indeed, contrary to proper procedure—but perfectly licit as an emergency measure, as the context shows. But what he did is not itself a procedure to be followed in any future case. Simeon B. Shetah’s case is not a precedent, but the concept of the emergency measure is an ancient and enduring one in Jewish law. It is a basis for a whole different approach to capital punishment.

Although the medieval restatements of the law (to jump ahead for a moment) expressly declare that the classic rules are not in force and for various reasons cannot be put into operation, the alternate approach is just as clearly still on the books today and is potentially operable under the proper circumstances. It is precisely this alternate procedure that became the foundation for a branch of criminal jurisprudence in Jewish law. The view that Judaism eschewed capital punishment and holds it morally reprehensible does not take this alternate view into consideration nor mention the great rabbinic figures who have invoked it. But first things first.

The talmudic basis for this alternate view appears twice in the Babylonian Talmud. Both citations are the same, so only the first need be noted. In Yebamoth 90b we read “R. Eliezer b. Ya’akov said he had heard a tradition that a court may impose flogging and punishments that are not based on biblical law.” This is not for the purpose of transgressing Torah but rather to make a fence around it. There was an incident in the Greek period concerning a man who rode a horse on the Sabbath. They hauled him before a court and they stoned him to death—not because he was properly subject to such a punishment but because the times demanded it. There was an additional incident concerning a man who had intercourse with his wife under a fig tree [i.e., where they could be seen]. They hauled him before a court and they flogged him—not because he was properly subject to such a punishment but because the times demanded it.” The Gemara then points out that because these two cases were deemed a “protective measure” to safeguard the Torah, they are, as it were, unique cases in which a specific problem was considered, and are not decisions that may be used for analogies or for broadening the scope of laws in other ways.

These cases in time became the foundation for a tradition of jurisprudence during the Spanish period, when individual communities received royal charters that occasionally granted them the authority to adjudicate capital cases. Those communities were, in fact, responsible for the maintenance of public order. They were also well aware that a privilege granted may become a privilege withdrawn if they did not satisfactorily discharge their responsibilities. We shall look more closely at what they actually did in due course.

What of this R. Eliezer b Jacob? How reliable a traditionary is he? The talmudic record locates him as a tanna of the first century CE, and a man who had seen the Temple in Jerusalem and was familiar with it. Further, his teaching is described as kab v’tnaki, rather small in amount but clear (pure, or perhaps in context, reliable?). Later generations were inclined to adopt his views as the law. His haraitha assigns the incident of the Sabbath equestrian to the Greek
period. This is curious since the first century CE was a period of Roman domination, at times quite benign but eventually thoroughly brutal. Perhaps by the time the text was committed to writing, those early pre-destruction days were viewed as colored to a degree by the Greek Hellenistic culture that characterized the Near East during the late centuries BCE and into the first century CE. The point is really not important for the present inquiry.

In addition to this very clear statement of “emergency power” or “emergency jurisdiction,” the concept of rodef, the pursuer, is an important element in the development of the medieval halachah on capital punishment. The Talmud introduces us to the rodef: he (or she) is the person actively pursuing another for the purpose of killing (or raping) the pursued. People who observe the rodef in action are bidden to stop him (or her) before the offense can be committed. They are to use sufficient force to stop the person, even if that sufficient force turns out to be deadly force. The rodef, therefore, might die not for an offense that, though clearly contemplated, was not actually carried out. The death of the rodef is preemptive, both saving the life of the intended victim and maintaining the soul of the rodef unstained by grave sin.

Up to this point we have a straightforward rule allowing vigorous response against a murderous attack upon a person. The rule is, in fact, not substantially different from one common provision in a modern law enforcement use of force policy: an officer is to use no more force than is necessary to prevent a crime or take a suspect into custody; deadly force may be used only when the officer is in fear of his or her life or when the life of another person is in imminent danger. Simply put, this is a rule about the defense or protection of others.

The Babylonian Talmud extends this provision to sanction lethal force against an informer, a traitor, one who would expose Jews or Jewish property to danger by giving information to gentile authorities that they could then use against Jews or Jewish property. In one instance a Jew threatened to give the gentile authorities information about another Jew's straw. He did so in the presence of a rabbi who urged him not to do so. The man insisted he would inform, whereupon another rabbi in attendance jumped up and killed him. Another incident records that a rabbi had a person flogged for having intercourse with a non-Jewish woman. The man who received the flogging informed the gentile authorities of what that rabbi had done. The authorities investigated and the rabbi then accused the man of bestiality, a capital crime, and also so ingratiated himself with the investigators that he received a government appointment! When the flogging victim heard how the rabbi had lied and manipulated matters to his own advantage, he threatened to expose the rabbi and his lies to the authorities. The rabbi then killed him. Neither story shows off the tradition to good advantage; but be that as it may, they became in the medieval period the basis for extension of the capital penalty to informers, a class of persons clearly held in contempt and viewed with horror. Further, in both incidents we see a violent act by an individual without any legal process.

In the medieval period, the case of the informer was a matter for the rabbinical court or the communal authorities to consider and then decide the course of action. The death of the informer no longer seems to be an extreme reaction on the part of an individual. Jewish law came to view the informer as a rodef, and thus liable to suffer death. The death of the informer, however, was to occur before he had actually done what he threatened to do; he was not subject to a capital penalty after he had informed. Getting rid of the informer was a preventive and protective measure just like the dispatching of the rodef in pursuit of a victim.

There are a number of responsa from major Spanish rishonim in which capital punishment was a serious consideration. Whether or not the penalty was ever, in fact, inflicted is not important. Perhaps it was carried out by non-Jewish officers at the direction of the Jewish court. The important point here is that at no time did these first-rank authorities condemn capital punishment or avoid it as improper or repugnant to Jewish tradition. They could have done so; they did have some choice in the matter as we shall see. We shall take a brief look at some of these responsa.

R. Solomon b. Adret, the great Spanish authority of the late thirteenth and early fourteenth centuries, wrote a responsa that Joseph Karo features in his Beth Yosef commentary to Tur Hoshen Mishpat 2. He decides that if the selectmen (b'rurim, a lay court) believe the witnesses, they have the authority to impose a fine or corporal punishment as they see fit. This is a matter mikium haolam “of maintaining the world.” He writes that if one were to base every legal decision on the laws in the Torah (alone) and impose no punishment except what the Torah provides with respect to physical injuries and the like, the world would be destroyed! Under Torah law we would need (qualified) witnesses and (requisite) warning to be given! As
our sages of blessed memory wrote, “Jerusalem was destroyed because they based (their decisions on strict) Torah law.” Adret states further that this flexibility to impose fines and punishments is all the more necessary outside the land of Israel. He explains how both fines and even capital punishments are justified by citing the tradition about Simeon b. Shetah and the witches and the *baraitha* on exigent jurisdiction. He concludes these remarks with the caveat that the selectmen must take counsel among themselves and consider the matter very carefully indeed before they return such a serious verdict; and their intent must always be for the sake of Heaven.

Karo cites another responsum, this time in the name of the twelfth-century authority Nahmanides. This responsum clearly states that in such emergency cases the witnesses may be related to one another and hearsay is acceptable testimony; that is, the procedural requirements for presentation of testimony in the classic Torah rules do not apply in these cases. Finally, Karo in *Bedek Ha-bait* remarks that a judge may give a perfectly proper and correct decision yet be held to answer for it before God if he nevertheless raises subtle arguments to excuse the wrongdoer from condign punishment.

Next, let us take a quick look at two responsa from R. Asher b. Yehiel, the Rosh, Adret’s slightly younger contemporary and colleague. The community of Cordova asks R. Asher what they should do about a Jew who publicly blasphemed, even though he did so in Arabic, using a divine name that is similar to a Hebrew divine name. R. Asher first expresses his amazement that the Jews of Spain exercise capital jurisdiction under a dispensation of the government. As a matter of fact, he continues, this power has saved Jewish lives, since the Jewish court might not and need not impose a capital penalty in cases where non-Jewish law does require it! R. Asher declares that he has allowed the Spanish communities to “follow their custom,” i.e., to impose capital punishment, but he personally has never been in favor of it. He gives permission to the community to do as they see fit—in this case impose a capital sentence, though he personally would favor the punishment of amputation of the tongue so that this scoundrel could never blaspheme again. The *baraitha* of R. Eliezer also left the door open to severe corporal punishment.

The Rosh discusses the matter of the death penalty for informers against fellow Jews in another responsum in which he approves the sentence of death for the informer. He further rules that it is permissible to hire a gentile to do the actual killing, if a Jew does not carry out the sentence. The informer is viewed as a *rodef* whom it is permissible, even laudable, to kill before he can cause trouble. Evidence against the informer need not be taken in his presence since gentiles would protect him, so that if his presence were required, evidence could never be taken and no decision could be reached. The Rosh concludes his extremely hard-line decision with the procedural requirement that in this sort of capital case, it must be shown that the accused has on at least three occasions brought harm to a Jew or Jewish property. He closes with a reiteration of this basic point: they have done well to return the decision that he should be hanged.

Rabbi Asher may express amazement at the jurisdiction some Spanish communities enjoyed and he may himself have reservations about the death sentence, but he is quite willing to let the Spaniards follow their custom and to concur in the decision to impose capital sentence when he believes it fully warranted.

R. Judah b. Asher, who followed his father, the Rosh, in the rabbinate of Toledo, also followed his father in the matter of capital punishment. In the case of a homicidal attack upon a judge, he declares that a capital sentence could be imposed on the attacker, who had, in fact, fled, but he would prefer amputation of his hands as the proper punishment, since there were no witnesses to the actual murderous deed (N.B. this brutal punishment is suggested even though the evidence against the accused is very weak indeed.). This authority expresses gratitude to the king, who granted the Jews the authority to try capital cases. He reiterates the idea, which we have already noted, that Jews could be saved under Jewish law, when under non-Jewish law they might not escape capital punishment. He adds, however, the further view that the Jewish court can impose a capital penalty when the non-Jewish legal system would not, as in the case of informers whom the non-Jews would protect as a valued source of information. He also suggests that the curbing of wanton lawlessness, the purpose that the Talmud gives for exigent jurisdiction, is not limited to the prosecution of traitors to the Jewish community.

R. Isaac b. Sheshet, Rivash, the fourteenth- and early-fifteenth-century Spanish and North African authority, reviews two additional differences between classic capital jurisdiction and the capital jurisdiction in Jewish Spain in a series of six responsa. He notes that the capital jurisdiction exercised among Jews in Spain is (as we have
not at all in the mode of the classic Talmudic procedures for capital cases. The crown has granted this power as a special privilege. Rivash notes highly significant and far-reaching differences that are part of this special jurisdiction. First, the confession of the accused is perfectly admissible into evidence and the confession should be taken prior to the taking of other testimony. Under the classic rules no self-incrimination of any sort would be heard in a capital case. Second, the accused may have an advocate appointed to plead his case (a sort of attorney-in-fact), but that appointment need not be made prior to the hearing of the confession. There is a concern that otherwise the advocate might coach the accused in prevarication. In the particular case that gave rise to these various responsa, Isaac b. Sheshet denies the defendant bail; he was apparently held in jail pending trial. This author does not, however, explore matters discussed in the other responsa noted here: for instance, the far lower standard of evidence in these cases than under the classic rules. The court is certainly not the ordained court of 23; it is a court of three, no doubt in consultation with men of probity and power in the community.

At no time does this authority or any of the others noted here ever express any sense of moral concern that capital punishment may be wrong or improper or unconscionable in a Jewish community. Some opinion even views capital jurisdiction as a boon that allows the Jews to save their fellows when non-Jews might condemn them and that allows Jews to eliminate informers (and doubtless the occasional murderer among them). Rivash demonstrated that the accused was not, in fact, an informer under his definition of that offense and, therefore, not subject to a capital penalty. That argument, however, does not at all detract from his cogent discussion of the permissibility of capital punishment.

But what of the Jews in other lands where they were denied capital jurisdiction in their communities? There is no reason to believe that those communities never experienced serious crime. R. Israel b. Haim of Brünn, a fifteenth-century German authority, dealt with the question of what to do about two Jews who got into a drunken brawl with a third Jew and killed him. The victim had initiated the fight. One of the assailants disappeared; the other was filled with remorse when he sobered up. R. Israel states in his opinion that the drunkenness did not reduce the criminal responsibility. The remorseful man was sentenced to a regimen of public humiliation, prayer, fasting, and atonement. He was also to seek pardon from his victim’s widow and orphans, and arrange to support, or help to support, his victim’s heirs. He was to become active in all enterprises for the rescuing of imprisoned Jews and the saving of Jewish lives. R. Israel clearly demonstrates that the two assailants were murderers and subject to death decreed by a divine tribunal.

This rabbi did not have jurisdiction in capital matters. One may suppose that the people of the town in which the event occurred were somehow able to keep the killing quiet enough so the gentle authorities would not choose to take a hand in the affair, or simply that the gentiles did not care what Jews did to each other as long as taxes were paid on time and things did not get out of hand. The punishment he prescribes is long and difficult and we have no way of knowing if the condemned person actually performed the detailed regimen of fasting, prayer, good deeds, and public humiliation or any part of it. Even though the rabbi did not have the authority to impose a capital sentence, at no point does he express satisfaction with that situation or raise moral arguments against capital punishment that would help him to appreciate his lack of jurisdiction and be content with it. He makes no effort at all to rule out capital punishment, even if permissible, as somehow contrary to the highest ideals of Judaism.

All these authorities chose to take a very hard line in life-and-death matters. They were also completely aware of the classic rules that made capital punishment a nullity for all practical purposes. Certainly they knew of the traditional Jewish values of pursuing justice, treating the widow, orphan, and stranger with kindness, the enormous (but not absolute) value placed on saving lives. All that notwithstanding, then, their view of capital punishment ranged from a silence to toleration to wholehearted praise. Why did they choose this grim option when it was certainly possible to refrain from issuing death sentences even though they were empowered to issue them? We may safely assume that they were not cruel and brutal men. They were respected, pious, and learned leaders of their communities. For them, the welfare of that community, matters of public safety and public order, were doubtless always paramount in their minds. These Spanish rabbis knew very well that their communities possessed royal charters specifying rights and privileges and jurisdictions. They also knew that a charter or a privilege granted could also be a charter or a privilege revoked if the community did not uphold its part of the bargain, look after itself and maintain public order. It follows then that the effect of a decision in any partic-
ular case upon the total welfare of the community had to be taken into consideration. The rabbis were responsible for the physical well-being of their fellow Jews and they were accountable to their people and to Muslim or Christian governments. Pragmatism and necessity could easily trump leniency and any reluctance to impose capital sentences. They could not afford to be critics of the morality of their times. They did not enjoy a secure position from which they could point out the moral high ground. Their responsibility for the welfare of the community and the maintenance of the integrity of their authority in gentile eyes arguably demanded pragmatism; and they apparently did not choose to critique the morality of their day, which clearly allowed severe penalties, from the perspective of the classic Torah rules, in order to adopt anything akin to a modern and more enlightened posture in this matter. The person who is charged to act may have a different view of these matters than the person who is not so charged.

The question posed at the beginning of these remarks still stands: Granted that there are many excellent reasons to reject capital punishment in modern systems of criminal justice, can such a position be grounded in the Jewish tradition? At best, it cannot do so without a great deal of difficulty amounting to a denial of reality. The ancient and classical rabbinic rules on capital punishment are written in such a manner that a conviction is all but impossible under them. Nevertheless, rabbinic tradition records capital sentences that were carried out despite those rules. Those rules may, indeed, reflect a period in which the rabbinic court no longer exercised capital jurisdiction. The Romans took it away from them. They may have been formulated as a matter of pure theory, never really intended as an actual working system. They were studied and discussed as a matter of pious devotion to learning. The real system may have been, could well have been, the alternate reliance on exigent jurisdiction. That was a system that could work, could achieve a measure of justice, and could safeguard public order and public safety in the “real world.” That is, after all, what a system of criminal jurisprudence is supposed to do. Of course, the rights of the innocent must be protected, and the classic rules fulfilled that requirement to anyone’s satisfaction and then some. Yet when that element of protection in the system is developed virtually to the exclusion of everything else, the system cannot achieve any degree of justice or protect the public weal.

The reader may draw his or her own conclusions as to which approach to capital punishment reflects the reality of the Jewish tradition when Jews actually had jurisdiction in such matters and had the choice to punish with death or in some other severe fashion. Was capital punishment ever rejected on moral grounds when there was such a choice? True enough, the responsa state capital punishment may not be the best solution in a specific case, but does that really amount to a rejection of it? Do these ancient and medieval texts present the reality or do the classic rules of Sanhedrin that render capital punishment a nullity reflect reality despite the evidence that death penalties were occasionally imposed?

If one really wishes to maintain that Jewish tradition implicitly rejects capital punishment, then one really chooses to ignore a significant portion of traditional rabbinic literature. If modern and liberal people believe that capital punishment is morally repugnant and a relic of a more brutal time, there are excellent reasons to champion that idea, and a great deal of evidence to support it. The Jewish tradition, however, may not provide as sound a basis for such support as many people believe it does.

Notes

1. The websites of both the URJ and the CCAR devote space to the anti-capital punishment stance, and the Religious Action Center of the URJ eloquently makes the case against capital punishment in its material.
2. Exodus 21:23–25. In talmudic material see the catalog of capital offenses that appears in Sanhedrin, chapters 7, 9 and 11.
5. B. Sanhedrin 81b and M. Sanhedrin 8:7.
6. M. Sanhedrin 81b.
7. B. Sanhedrin 52a f.
8. B. Sanhedrin 37b.
9. Ibid.
10. B. Sanhedrin 46a.
11. See, e.g., Tur Hoshen Mishpat ch. 425 and especially ch. 2.
12. See also B. Sanhedrin 46a and B. Hagigah 2:78a.
14. The Encyclopedia Judaica vol. 6, 624, presents the few facts we have.
In his essay in a recent issue of this Journal, Philip Cohen considers the issue of methodology in bioethics: “by what method, or methods, do liberal Jews make decisions and come to opinions regarding newly emerging bioethical matters that are true to Judaism?” (p. 3). He challenges us to develop a uniquely “Reform” approach to decision-making on these questions, one that reflects our movement’s specific theological commitments. This is a goal that we all ought to share, and we owe Rabbi Cohen a vote of thanks for putting the subject on the agenda. This “response” is, therefore, not intended as a general critique of his article; indeed, I agree with much that he has to say. Rather, I want to focus upon his remarks concerning the role of halachah in the formulation of a Reform Jewish bioethics. Those remarks raise some fundamental issues that deserve a closer look.

There already exists a significant body of Reform Jewish writing on bioethics. I am referring to the literature of Reform responsa, specifically the tšhuvot of the CCAR’s Responsa Committee that address numerous issues that fall under this rubric. Rabbi Cohen is aware of this material, of course, but he sees it as mostly irrelevant to his project. He argues that since the responsa are essentially halachic documents, they are out of place in a movement that “has been post-halachic since its founding.” Reform Judaism, that is to say, does not speak the language of halachah and does not accept the governing assumptions of the halachic process. For this reason, a process of ethical decision-making “confined to halachic conclusions, or halachic methodology, is constitutionally the diametric opposite of the Reform self-understanding.” The responsa litera-
“Death, Thou Shalt Die”: Reform Judaism and Capital Punishment

Richard A. Block

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 tortureslaying 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.

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

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
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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. 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. 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. 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.

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.

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." 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." 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."

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. Moreover, the two witnesses were to be examined closely and separately, and should the slightest variation in their testimony exist, capital punishment could not be imposed by the
Some rabbis even held that the prospective criminal must be informed of the specific manner of execution the particular crime would entail. 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. Inasmuch as Jewish courts were deprived of their authority to impose capital punishment after the destruction of the Temple in 70 C.E., 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.

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.

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. Foremost among the crimes punishable by decapitation was murder. The practice of turning criminals over to civil authorities for execution continued into the Middle Ages.

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. 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." 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. . . .

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. 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. 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.™

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.™

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.” Even God’s prayer may not always be answered, but its guiding direction is clear.

NOTES

1CCAR Yearbook, vol. 89, p. 105.
2Mak. 1.10.
4Ibid.
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.
11Ibid., p. 21.
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 Berdnoro. 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.


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.

32 Ber. 7a.
Ethics And The Death Penalty

Rabbi Joshua Hammerman

Wednesday, September 28, 2011

Rabbi Joshua Hammerman

Jewish Week Online Columnist

Q – Was it right for the state of Georgia to execute Troy Anthony Davis?

A – The Davis case has once again put capital punishment on trial. No DNA evidence implicated him, no gun, no fingerprints and a bevy of recanting witnesses. I’d say that there is more than a remote possibility that an innocent man was killed. That being the case, it was, from the Jewish ethical perspective, the equivalent of state sponsored murder.

I only wish that the execution had been televised on all the networks to a national audience. Put it on at halftime of an NFL (National Finish-off-your-opponent-by-beating-his-brains-out League) game. Then perhaps Americans would wake up to their own bloodlust. Or perhaps they wouldn’t.

In the past decade, four states – New York, New Jersey, New Mexico, and Illinois – have abandoned the death penalty, leaving 34 states still with capital punishment. Maybe this case will help to tip the scales in my own state of Connecticut, where recent legislative votes have been very close.

The Torah mandates the death penalty for 36 offenses ranging from murder to kidnapping, adultery to incest, certain forms of rape, idolatrous worship and public incitement to apostasy, from disrespecting parents to desecrating the Sabbath. But the rabbinic sages effectively abolished the death penalty centuries later. Mishnah Sanhedrin 4:5 stresses the importance of presenting completely accurate testimony in capital cases, for any mistakes or falsehoods could result in the shedding of innocent blood. If any perjury were to cause an execution, "the blood of the accused and his unborn offspring stain the perjurer forever."

In Talmudic times, capital cases required a 23-judge court, while only three judges sat for non-capital cases. Two or more eyewitnesses were required to testify to the defendant's guilt, and their hands would, "be the first against him to put him to death" (Deuteronomy 17:6-7). In a capital case, a one-vote majority could acquit a defendant, but could not convict. Furthermore, if there was a mere one-vote majority or if any judge was undecided, additional judges were added in pairs until the majority ruled against conviction, or until one judge in favor of conviction was persuaded to err on the side of innocence (Mishnah Sanhedrin 5:5).

In practice, the death penalty became almost impossible to implement, though over the centuries there has been a diversity of opinion on the matter. Maimonides claims that murderers should not be executed if there was a question about how the trial was conducted. But if the trial was
conducted properly there is no restriction even if it means that one thousand murderers are executed in a single day. Rabbi Moshe Feinstein counters that the purpose of assigning the death penalty to so many crimes in the Torah is to educate people about the severity of the offenses, rather than to end the lives of the offenders. That practice has continued to this day in modern Israel, where not even terrorists with blood on their hands are executed. Only those convicted of crimes against humanity (i.e. Adolf Eichmann) have been executed.

In the U.S., the statistics are daunting:

Nationally, since 1973, 138 prisoners sentenced to death later have been exonerated.

The average time spent on death row by an exoneree is 9.8 years.

DNA has played a role in exonerating 17 death row prisoners. But in many death penalty cases, DNA testing proves impossible because of a lack of testable evidence.

Scientific evidence strongly suggests that Texas executed an innocent man, Cameron Willingham, in 2004. Compelling evidence in other cases suggests more innocent people have been executed.

Causes of wrongful conviction include: eyewitness misidentification, police coercion, perjury, prosecutorial misconduct, and inadequate representation.

Nationally, 50% of murder victims are white. In cases resulting in an execution, however, the murder victim is white 76% of the time. Studies in Connecticut, North Carolina, Maryland, and California found that one’s odds of receiving the death penalty increase significantly when the victim is white.

Because of additional resources and preparation required in death penalty cases, a separate sentencing phase, post-conviction appeals, and the added costs of death row facilities, studies consistently find the death penalty to be more costly than life without parole.

Since death sentences peaked in 1996, at 315, nationwide the number of death sentences has been declining. The number of death sentences in 2010, 114, was near the historic lows.

It’s time to put an end to this murderous circus.
Resolution Adopted by the CCAR

Capital Punishment

Adopted by the CCAR at the 90th Annual Convention of the Central Conference of American Rabbis Phoenix, Arizona, March 26-29, 1979

In 1958 and again in 1960, the Central Conference of American Rabbis stated its opposition to all forms of capital punishment. We reaffirm that position now. Nothing which we have observed during the intervening years has shaken our convictions that:

a. Both in concept and in 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.

b. No evidence has been marshaled to indicate with any persuasiveness that capital punishment serves as a deterrent to crime.

c. We oppose capital punishment under all circumstances.
Reconstructionist Rabbinical Association

RESOLUTION

DEATH PENALTY

2003

Whereas the Jewish scriptural tradition teaches that all human beings are created B’tezlem Elohim (in the image of God) and upholds the sanctity of all life;

Whereas both in concept and in practice, Jewish leaders throughout over the past 2000 plus years have refused, with rare exception, to punish criminals by depriving them of their lives;

And whereas current evidence and technological advances have shown that as many as three hundred people (disproportionately from minority and poor populations) have been wrongly convicted of capital crimes in America in the last century, which underscores the Jewish concern over capital punishment since all human systems of justice are inherently fallible and imperfect –

Therefore, we resolve that the Reconstructionist Rabbinical Association go on record opposing the death penalty under all circumstances, opposing the adoption of death penalty laws, and urging their abolition in states that already have adopted them.

Furthermore, recognizing the very real horrors inflicted on victims of violent crime by individual criminals, some of whom for reasons of circumstance or biology will never be able to safely interact in the public arena, the Reconstructionist Rabbinical Association urges the enactment of laws that mandate that some crimes be punishable by life imprisonment without parole.

In implementing the content of this resolution, the RRA agrees to

A) Forward copies of this statement, on RRA letterhead, to appropriate federal and state officials;
B) Join the National Coalition to Abolish the Death Penalty as a national affiliate organization (pending their approval);
C) Forward copies of this statement to our partner institutions and member communities in the Reconstructionist movement, urging the adoption of a similar stance in those settings as well; and
D) Recommend that our members and their communities become educated on this issue, expressing an opinion to elected officials where appropriate.

For background information, please go to: pewforum.org/deathpenalty/resources/reader/13.php3
ASSORTED BIBLICAL AND TALMUDIC CITATIONS REGARDING CAPITAL PUNISHMENT

1. Genesis 9:6 -- "Whoso sheddeth man's blood, by man shall his blood be shed, for in the image of G-d was man made."

2. Exodus 21:12-15 -- "He who fatally strikes a man shall be put to death. If he did not do it by design, but it came about by an act of God, I will assign you a place to which he can flee. When a man schemes against another and kills him treacherously, you shall take him from My very altar to be put to death. He who strikes his father or his mother shall be put to death."

3. Exodus 21:22-23 — "When men fight, and one of them pushes a pregnant woman and a miscarriage results, but no other damage ensues, the one responsible shall be fined according as the woman's husband may exact from him, the payment to be based on reckoning. But if other damage ensues, the penalty shall be life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise."

4. Leviticus 24:17-22 -- "And he that smiteth any man mortally shall surely be put to death. And he that smiteth a beast mortally shall make it good: life for life. And if a man maim his neighbor; as he hath done, so shall it be done to him: breach for breach, eye for eye, tooth for tooth; as he ath maimed a man, so shall it be rendered unto him. And he that killeth a beast shall make it good; and he that killeth a man shall be put to death. Ye shall have one manner of law, as well for the stranger, as for the home-born; for I am the Lord your G-d."

5. Numbers 35:11-33 -- Requires establishment of cities of refuge to which manslayers who commit unintentional killings can flee to escape retribution; requires two or more witnesses before anyone can be sentenced to death; requires that ransom not be accepted in exchange for punishment for murderer. Prohibits "pollution of the land" by allowing a killer, either manslayer or murderer, to dwell among the rest of society.

6. Deuteronomy 19:11-13 -- "But if any man hate his neighbor, and lie in wait for him, and rise up against him, and smite him mortally that he die, and he flee into one of these cities (of refuge); then the elders of his city shall send and fetch him thence, and deliver him into the hand of the avenger of blood, that he may die."

7. Deuteronomy 21:18-21 — "If a man have a stubborn and rebellious son, that will not hearken to the voice of his father, or the voice of his mother, and though they chasten him, will not hearken unto them, then shall his father and his mother lay hold on him, and bring him out unto the elders of his city, and unto the gate of his place, and they shall say unto the elders of his city: 'This our son is stubborn and rebellious, he doth not hearken to our voice, he is a
glutton and a drunkard. And all the men of his city shall stone him with stones, that he die; so shalt thou put away the evil from the midst of thee; and all Israel shall hear, and fear.

8. *Samuel II* 12:1-15 -- Nathan the Prophet came to King David after David had sent Uriah to the battlefront to be killed, so that David could take his wife, Bathsheba, for his own. And Nathan told David a story of a rich man who had a large flock and a poor man who had one lamb, and the rich man took the poor man's sole lamb to feed a traveler. Nathan asked David what he thought of this. David was greatly angered, and said that the rich man that had done this deserved to die. And Nathan told David that he, David, was like the rich man. But G-d loved David, and instead of killing him, cursed cursed him.

9. *Ezekiel* 18:27-28 -- "And if a wicked person turns back from the wickedness that he practiced and does what is just and right, such a person shall save his life. Because he took heed and turned back from all the transgressions that he committed, he shall live; he shall not die." *Ezekiel* 33:11 -- "It is not my desire that the wicked man shall die, but that the wicked turn from their evil ways and live."

10. *Mishnah Sanhedrin* 1:4 -- "Cases involving the death penalty are judged before twenty-three [judges]." *Mishnah Sanhedrin* 1:6 -- "Your verdict of acquittal may be on the vote of a majority of one, but your vote for guilt must be by a majority of two." *Mishnah Sanhedrin* 4:1 -- A long list of distinctions between property cases and capital cases where the procedural rules offer greater protection for the accused in capital cases. *Mishnah Sanhedrin* 4:2 -- Procedural protections continue. *Mishnah Sanhedrin* 5:1 ff. -- Deals with evidentiary rules in capital cases. *Mishnah Sanhedrin* 6:1 ff. -- Allows for presentation of new evidence after conviction to stay execution, even if it just the accused himself, as long as what he offers has substance.

11. *Mishnah Makkot* 1:10, one rabbi posited that any court which sentenced to death one man in seven years would be considered a bloodthirsty court. Rabbi Eleazar ben Azariah replied that the same would apply if even one man in seventy years were put to death. Ultimately, Rabbis Akiba and Tarfon indicated that had they sat in the Sanhedrin, no man would ever have been put to death. Rabban Simeon ben Gamaliel, expressing a minority view, disagreed on the basis that the death penalty could deter the killing of innocent people.

12. *Mishnah Berakhot* 10a. -- It is told that some robbers in the neighborhood of Rabbi Meir were causing him trouble. He prayed that they would die. Beruriah, his wife, said to him, 'How do you make such a prayer? Do not pray that the lives of the sinners cease, but rather that their sins should be no more. For if their sins cease there will be no more wicked men. Pray for them that they should repent.' He did so and they did repent.
June 13, 2000

UNION OF ORTHODOX JEWISH CONGREGATIONS ENDORSES DEATH PENALTY MORATORIUM

Today, the Union of Orthodox Jewish Congregations of America — the nation's largest Orthodox Jewish umbrella organization representing nearly 1,000 synagogues nationwide, announced its support for efforts to impose a nationwide moratorium on executions of death row inmates while a comprehensive review of how the death penalty is administered in America's courts is undertaken.

In explaining last night's decision by the Union's senior officers and directors, the organization's president, Mandell I. Ganchrow, and public policy director, Nathan Diament, issued the following statement: While traditional Judaism clearly contemplates and condones the death penalty as the ultimate sanction within a legitimate legal system, Judaism simultaneously insists that capital punishment be administered by a process that ensures accuracy as well as justice; our valuing of human life as infinite demands no less. In recent months, too many questions have been raised as to whether in America's courts the demand for accuracy is being met. These questions must be answered and appropriate corrective measures must be put in place before we can proceed with additional executions in this country. Thus, we support putting an execution moratorium in place and the creation of a commission to review America's death penalty procedures and any reforms needed to ensure that our justice system lives up to that name.

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Comments?

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RESOLUTION ON THE DEATH PENALTY

Adopted by the JCPA 2001 Plenum
Monday, February 26, 2001
Washington, D.C.

The Jewish Council for Public Affairs (JCPA) historically has stood in opposition to the death penalty and, in February 2000, joined the American Bar Association's call for a death penalty moratorium until issues of fairness, impartiality, and the risk of error are resolved. That call was spurred by new information about the likelihood that wrongfully convicted individuals could be executed. The JCPA also urged the appointment of a commission to study the frequency with which death row inmates have later been found to be not guilty and the factors that contribute to wrongful convictions. At both the federal and state level, death penalty studies show racial bias and poverty continue to play a role in determining who is sentenced to death. Recent U.S. Justice Department findings, in a review that is ongoing, reveal both racial and geographic disparities in the administration of the federal death penalty. The study has found so far that just a handful of U.S. attorneys accounted for 40 percent of federal death penalty cases and that members of minority groups were represented disproportionately among those on federal death row.

Of 21 federal prisoners currently facing death sentences, 17 are members of racial/ethnic minorities. Today, more than half of those on death row nationwide, both state and federal, are people of color. Nearly half of those executed by states in the last two decades have been minorities. Further, studies documenting the role of poverty in death penalty disparities reveal a failure to provide adequate representation for indigent people accused of capital crimes and inadequate funding to enable those defending them to prepare proper defenses.

In light of these data, the JCPA reaffirms its call for a federal and statewide death penalty moratorium. Both supporters of the death penalty and opponents, such as the JCPA, are concerned about flaws in the system by which the government imposes sentences of death. We must not allow the understandable desire for punishment to overshadow the impartial pursuit of justice. The JCPA therefore, further resolves to:

- Urge that the study of factors that contribute to wrongful sentencing and convictions include racial disparities, disproportionality based on geographic location and income status of defendants, and adequacy of representation of capital defendants;

- Urge the federal and state governments to provide legal mechanisms whereby persons sentenced to death can challenge their convictions or sentences, despite the passage of time, on the basis of reliable scientific information, such as DNA testing, not available at the time of trial or post-conviction proceedings.
Call on the federal and state governments to provide for the collection and analysis of data to determine the extent, if any, to which disparate treatment of those sentenced to death is attributable to race or ethnicity and to act to eliminate disparities, where they exist;

Consistent with previous JCPA positions, call upon state legislatures in those states that do not impose a death penalty to reject calls for enactment of death penalty legislation;

Support recommendations of the American Bar Association, calling for the imposition of a moratorium on use of the death penalty by the federal government and all 50 states, to remain in force until policies and procedures can be implemented to ensure the fair and impartial administration of death penalty cases, and to minimize the risk that innocent people might be executed. These include:

1. Assurance that all those accused of capital crimes receive competent counsel at every step in the judicial process, with adequate funding for a fully investigated defense;
2. Measures to preserve, enhance, and streamline the authority and responsibility of federal and state courts to exercise independent judgment on the merits of constitutional claims in state post-conviction and federal habeas corpus proceedings;
3. Elimination of discrimination in capital sentencing on the basis of race of victim or defendant; and
4. Provisions that inhibit execution of mentally retarded people and those who were under the age of 18 at the time of their offenses.
PARTICIPATING IN THE AMERICAN DEATH PENALTY

Jeremy Kalmanofsky


Question: May a Jew participate in capital criminal cases in the American legal system? May a Jew serve as judge in a capital trial? Or serve as prosecutor seeking the death penalty? May a Jew testify in a trial in which the defendant could be sentenced to execution? May a Jew serve on the jury which could sentence a defendant to death?

Response:

Jewish tradition is ambivalent regarding the death penalty. On one hand, Torah is replete with capital punishments. Maimonides lists 36 biblical violations carrying the death penalty, covering violent attacks like murder and kidnapping, as well as social, ritual and ethical evils like adultery, idolatry and contempt of court [MT Sanhedrin 15:10-13].

On the other hand, rabbinic tradition is generally averse to capital punishment. The Sages construed rules of evidence so strictly and stacked criminal procedure so strongly in favor of acquittal that the death penalty was almost never applied. Talmudic lore [b. Avodah Zarah 8b] records that 40 years before the Temple was destroyed, the Sanhedrin ceased to try capital cases, since society had collapsed into such chaos it would have had to impose too many death penalties. According to this view, there has been no official, judicial execution within the Torah legal system since the early 1st century CE.

There is yet a third side to the argument, however. Despite its general aversion to the death penalty, the Talmud [b. Sanhedrin 46a] recognized that desperate times can call for desperate measures, ruling that exigent circumstances sometimes required executions to maintain social order, to deter future crime and to punish the guilty, even for crimes that would not otherwise deserve death, even in cases that did not conform to proper rabbinic criminal procedure.

The classic Mishnah [Makkot 1:10] on capital punishment captures this ambivalence:
A Sanhedrin that executes once in seven years is called bloodthirsty. R. Elazar b. Azariah said: even once in 70 years. R. Akiba and R. Tarfon said: had we been in the Sanhedrin, none would ever have been put to death. Rabban Shimon ben Gamliel said: then these sages would have created more murderers in Israel.

In good rabbinic fashion, this mahloket remains unresolved. It seems that each side has a point, both Rabbi Akiva’s and Rabbi Tarfon’s inclination toward abolition and Rabban Shimon ben Gamliel’s claim for a deterrence effect.

More than 50 years ago, the CJLS affirmed its opposition to the death penalty, in this 1960 statement by Rabbi Ben Zion Bokser:

Only God has the right to take life. When the state allows itself to take life, it sets an example which the criminal distorts to his own ends. It proves to him that man may take into his own hands the disposition of another man’s life. The elimination of capital punishment would help to establish a climate in which life will be held sacred. The sense of the sanctity of life needs to be bolstered in our time, and it will be perhaps the greatest contribution toward deterring crime and violence. ... The abolition of capital punishment will be an important step forward in the direction of a more humane justice. It will free America from a black spot of barbarism which still disfigures the good name of our country.¹

We re-affirm that position today. We consider the contemporary death penalty a needlessly bloody measure, applied inconsistently and, all too often, wielded against those wrongfully convicted. We believe that in virtually all cases, even the worst murderers should be imprisoned rather than executed. We endorse the 1999 resolution of the Rabbinical Assembly that existing death penalty laws should be abolished and no new ones be enacted. Our religious community would contribute to American moral culture by opposing capital punishment in the name of our reverence for life. Moreover, we should express that view actively, for any who might protest a social wrong – even if their words are unlikely to be heeded – are nonetheless responsible if they fail to raise their voices [b. Shabbat 55a].

However, we are asked not only about an ideal penal system, but about the one we actually have in the United States (the only country with significant Jewish population

that applies capital punishment today). Given that the death penalty exists at the federal level and in 32 states, what should Jewish citizens do when called to play roles in capital cases? Should Jewish judges and prosecutors refuse to play their parts in what Justice Harry Blackmun called “the machinery of death?” Should Jewish citizens refuse to serve on juries that might send a person to execution? Should witnesses withhold testimony that might help send someone to death row? Or, alternatively, does Halakhah consider it within a government’s legitimate authority to execute criminals, though based on values we would argue that they should elect not to exercise that power? If this is the case, then Jewish citizens could take part in capital cases, albeit reluctantly or under protest. Certainly Jews are generally bound to obey the laws of the land, even those laws they oppose. Yet some laws may be so incompatible with our norms that Jews should refuse to follow them, by civil disobedience or conscientious objection. In which category does capital punishment belong? Is it beyond the bounds of what Judaism can tolerate? Or might it be bad policy, but not prima facie illegitimate?

Abolition in Theory

Perhaps the most famous teaching in all rabbinic literature [m. Sanhedrin 4:5] is that each human life is as valuable as the entire world, so killing a person is tantamount to destroying the world. That homily is presented as what judges should say to impress a healthy fear of heaven upon witnesses in capital cases, in which some human beings decide whether others will live or die. Judges, witnesses and counselors who participate in such an awesome procedure should never forget the catastrophic consequences of error or fraud.

This expresses the Sages’ well-attested tendency to view capital punishment with suspicion, as in the aforementioned m. Makkot 1:10. Halakhic criminal procedure and rules of evidence are “rigged extravagantly to bring about the acquittal of the accused,” wrote R. Aaron Kirschenbaum, “giving the defendant every possible advantage, and placing extremely stringent burdens of proof before conviction.”

A particularly interesting feature of these procedures is the ban on accepting circumstantial evidence against a defendant. Even if one witnessed an armed man chase another into an enclosed space, then later saw him, bloody sword in hand, standing above the corpse of the other man, dead of stab wounds, this would constitute inadmissible

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conjecture, not hard enough evidence for conviction [b. Sanhedrin 37b; Mekhilta d’Kaspa #20]. Maimonides explains why the ultimate penalty requires the strictest evidentiary standards:

The realm of the possible is very broad. Had the Torah permitted deciding capital cases based even on a conjecture so likely that it seems absolutely certain, like the example we mentioned [about the person chasing another with a sword], in the next case we would decide based on a conjecture just a little less likely, and in the next, a conjecture less likely still, until we would sometimes execute people based on nothing more than the judge’s imagination and opinion. Thus the Exalted One shut this door, and demanded that we not punish except when witnesses can testify without doubt or conjecture that they are absolutely certain the defendant did this deed. Inevitably, when we do not convict based even on very strong conjecture, we will sometimes acquit the guilty; while when we do convict by conjecture sometimes we will execute the innocent. But it would be better to acquit 1,000 criminals than to kill a single innocent. [Sefer HaMitzvot, Prohibition 290.]

To summarize: the Sages did not take the Bible’s predilection for capital punishment for granted. While not overturning its many death penalties, they construed criminal procedure so narrowly that they rendered biblical capital punishment all but theoretical. The Sages reported further that the Sanhedrin, by relocating, renounced its power to impose the death penalty in the early first century [MT Sanhedrin 13.11]. And so it has remained these two millennia.
Formal renunciation is only half the story, however. As elaborated pragmatically through history, Halakhah is more complicated. All societies must restrain and punish evil doers, as the Torah states nine times [Deuteronomy 13.6, for example]: “And you shall uproot the evil from among you.” A society that fails to punish criminals, even in the name of the humanity of its own rules, effectively encourages crime. Sanguine statements about preferring to release 1,000 murderers before one false conviction have an aggadic, exhortative whiff about them, and are no way to govern society. As Kirschenbaum wrote, those same humane rules biased toward acquittal effectively render formal halakhic criminal procedure “impractical” and “helpless” to address “social problems involving crime and punishment.”

In response, Halakhah mitigated the impracticality of its criminal law by adding a variety of fudge factors and emergency powers. For example, when proper testimony could not be obtained or warning was not administered, the Sages proposed locking suspected killers in tiny pits and causing their deaths by malnutrition [m. Sanhedrin 9.5, b. Sanhedrin 8:1b].

More relevant for our inquiry, and more frequently cited in the halakhic record, are emergency powers granted to rabbinic courts to impose penalties not warranted by standard procedures. The Talmud [b. Sanhedrin 46a] authorizes religious courts to flog and to execute malfeasors – “not to violate the Torah, but to make a fence around the Torah” - if they deemed the situation exigent enough; that is “if the hour demands it.” Indeed, Jewish courts throughout history cited this passage in asserting their own power to issue sometimes violent punishments. The Shulhan Arukh codifies this provision:

אכזב. כל מי הביא את מדיניות בנוו, אכזב שלם ששם פר続けて ובעיר, כי משך אחד מיית בינו מום, בר כל דין עונה,ープילא אכזב בסבר דוהט עותים. אכזב שלם, והביש אוחז על יד עוור, אכזב. וכל מדיניות ייח עשים שמות.

Any court, even judges who lack formal ordination from the Land of Israel, if they see the people wanton with sin, may judge the people and impose upon them any penalty, including death, financial penalties or any kind of punishment, even in the absence of clear testimony. And if [the offender] is mighty [and does not

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3 Ibid.
4 Habitual offenders of other crimes than homicide received the same treatment. This is the rabbinic “two strikes and you’re out” law. The Talmud’s explanation understands this indirect death penalty as a combination of starvation and force-feeding until the stomach bursts.
submit to the court’s authority], one may have non-Jews beat him. And may all
their actions be for the sake of Heaven [Hoshen Mishpat 2.1].

History attests that this power was not merely theoretical; in rare cases, Jewish courts
actually imposed the death penalty. Apparently, this power was found more commonly
in Spain, as R. Asher suggests: “In all countries I have heard of, none adjudicate capital
cases except here in Spain. When I emigrated here, I was astonished: How could they
adjudicate capital cases with no Sanhedrin? But they said they did so as delegates of the
King. Indeed, our judges often save those whom they judge, for much more blood would
have been spilled if they were judged by the Arabs [Responsa 17.8].”

In addition to granting such power to rabbinic courts, Jewish law adds a further fudge
factor, a secular rule of the king [called din malkhut or parallel terms] to impose order
when the strictures of criminal procedure proved too inflexible. The same Maimonides
who regards it a Torah prohibition to execute without unimpeachable eyewitnesses, also
rules in at least three places [MT, Melakhim 3.8-10, Sanhedrin 18.6 and Rotzeah 2.3-4] that
royal authority can impose the death penalty on criminals whom the Sanhedrin could not
convict:

כל המהרניםelsingא בראה בוררות, לא בראה אברות, אברות בני אלה, ולא שמעה שנדור
בשנה, י詳 למלך רשحت להזרהו לחם חיתו, נס עשתו זכרית

If one person kills another but without clear eyewitnesses, or without receiving
formal warning beforehand or with only one eyewitness, or a known enemy who

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5 The permission to employ non-Jewish police power to enforce a Beit Din’s ruling, derives from Rosh,
Response 6.27, and implies a basic acceptance of the legitimacy of that government and its violent force.
Menachem Elon refers to a number of responsa, mostly from Spain, attesting that “Jewish courts were even
given authority to administer the death penalty, especially against informers.” See also the responsum of R.
Jacob Baal HaTurim, Zikron Yehuda #75, which reports that R. Yosef ibn Megas executed an informant “at
Neila on Yom Kippur which fell on Shabbat!” This shocking time for such an execution would appear to be a
literary embellishment, borrowed from y. Hagiga 2.1, which describes Elisha b. Avuya as “riding my horse in
front of the Temple on a Yom Kippur which fell on Shabbat.” Louis Jacobs, Tree of Life [Oxford: Littman
Library, 2000], 132 n40 gives other sources for actual executions, including the Galician R. Reuven
Margaliot’s report in Margaliot haYam 1.91b n6 that “his father told him of an actual case where an informer
was drowned on Yom Kippur as late as the 19th century.” Perhaps this report borrows that same literary
embellishment.
7 His son, R. Jacob Baal HaTurim would make the same point in Responsa Zikron Yehudah #58: “Since the
day the Sanhedrin was exiled from the Hall of Hewn Stone, capital punishment ceased in Israel. It is
practiced today to rebuild the fences of this licentious generation. And Blessed is the One who gave such
wise counsel to the rulers of this land to authorize Israel to judge and to root out the evil doers. If it were
not for this, Israel could never exist in this land. Indeed many Jews saved by Jewish judges, would have been
killed by gentile judges.”
slays by accident, the king has authority to maintain order [lit.: to improve the world, *letaken olam*] by executing him, as the exigency of the moment demands [*Melakhim* 3.10].

In a remarkable statement, R. Shlomo ben Adret warns that hewing strictly to *halakhic* criminal law would itself cause social breakdown, which royal political power must avert:

*The Torah’s procedural rules apply only to the Sanhedrin. But as for the laws of the king, we pay no attention to all that. Royal law is determined exclusively by knowledge of the facts. And therefore one can be executed by royal law based on testimony by relatives or the accused’s confession, without any formal warning, and not by a court of 23 ... If one insists upon following Torah law, as in the process of the Sanhedrin, the world would become desolate, and the murderers and their henchmen would proliferate.*

Rashba carries forward R. Shimon ben Gamliel’s deterrence argument from *m. Makkot*, that immunity from capital punishment would embolden criminals and ultimately increase crime. As Rambam explains in one of the aforementioned passages, even if judges or kings do not employ the lethal means at their discretion, they still must punish criminals severely to maximize the deterrence effect:

> הררי של אהוב הממלך ולא היה חשש פורים להוטה PREF-middle יד节约 עם חספס declares events ממלכות בכל מיני הערה כי לאשתו על שאר היה חספס שלא היה הור_more declare events וממלכות מספר ולהור_ man of the hour ...

If the king does not execute them and the exigent hour does not demand the strongest response, the court must in all events beat them severely, near to death, and imprison them in harsh conditions for many years and make them suffer all kinds of pains. The court should do this in order to frighten and intimidate other wicked people, so that they not stumble by thinking to themselves: let me cause the death of my enemy, for I can do what this other person did, and likewise escape punishment. [*MT Rotzeah* 2.5]

For further reflection on the theory of king’s law, consult the rich presentation by R. Nissim Gerondi, *Derashot HaRan* #n. Ran argues that Torah law represents an ideal appropriate for a sacred community under divine providence. But it is no way to keep social order among real people, hewn from crooked timber. Some Torah laws, he wrote,

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Later quoted approvingly by R. Yosef Karo in *Beit Yosef, Hoshen Mishpat* 388 s.v. *v'katav haRosh*. The original responsum can be found in the 2005 edition of *New Responsa of Rashba, From Manuscript*, #345.
do not address political order at all. ... [These] are addressed to matters more sublime than perfection of society. Maintaining political order is why we appoint a king. In contrast, the judges of the Sanhedrin were appointed to judge the people according to the true and intrinsically just law, which causes the divine to cleave to us, regardless of whether the political order was perfected. In fact, some laws of the nations of the world actually produce a more effective political order than do the Torah's laws. But this is no shortcoming for us, for the king would correct any deficient political order.  

Ran's answer cannot be entirely satisfying. It lacks any obvious teeth for restraining royal despotism (beyond the exhortation that kings should restrain themselves by following the Torah). Moreover, Jews should analyze the Torah in consequentialist terms, asking whether it does in fact produce a moral, well ordered society.

Nonetheless, there is wisdom in Ran's approach, with its frank admission that, even in biblical times, halakhic purism was unrealistic for governing. Political questions do not always have halakhic answers, and we may be sorry when we try to extract such religious resolutions. Theocrats sometimes must defer to professional politicians, and permit them to guide society through their own imperfect methods. In Ran's argument we find a religious step toward a secularization of politics - a step all modern Jews should appreciate.

To summarize: while Halakhah is strongly averse to capital punishment as a matter of values, it also regards violent punishment, including execution, as a necessary response to serious crimes. While one hopes this provision would be almost never used, this feature of the halakhic record - endorsed by the Talmud, as well as all major medieval authorities and the Shulhan Arukh - forestalls any unequivocal conclusion that Jewish law forbids capital punishment.

Noachide Authority

In addition to Jewish authorities - either the religious courts of the greater and lesser Sanhedrin or the relatively secular royal power - we must consider the halakhic status of non-Jewish governments and their powers to inflict violence as a means of preserving social order. The prevailing view is that din malkhut is a fundamentally secular power,

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conferring rights and responsibilities to Jewish and non-Jewish authorities in parallel ways. "The duty to appoint a king is equivalent for Israel and other nations," wrote Ran, "for they all need stable political order."11

One could go further and say that Halakhah not only permits, it requires non-Jewish authorities to create legal systems that maintain social order and restrain crime. The Talmud [b. Sanhedrin 56a] considers the creation of dinim, a fair legal system, as one of the Noachide laws, applicable to all human societies. This is a most plausible rationale for the Halakhic principle of dina d’malkhuta dina, that secular law has legitimate standing in Jewish terms. Under this view, when gentile authorities employ police power to punish transgressors, they in fact fulfill the Noachide commandment that authorizes their government in the first place. Rashi, Rambam and Ramban all take this approach.12 Rashba makes this connection explicit between punishing criminals and the concept of dina demalkhuta:

If the government has the power to enforce laws in its locale, then its laws are law, for the principle is that the law of the land is law. Thus, it is the role of sovereign government to punish criminals like robbers, thieves and murderers, and its laws in such matters are law [Responsa 1.612].

What makes a gentile government a legitimate expression of dinim and not merely orderly brutality? Maimonides suggests a defining feature of any legitimate government is a commitment to procedural equal protection, treating subjects uniformly, not singling out individuals capriciously: “Whatever the king legislates must apply to all people, and not be aimed at a single individual alone” [MT Gezelah 5.14].13 The procedural requirement of equal protection and the prohibition against ad hominem punishment raise challenges to American capital punishment. Studies of the death penalty repeatedly

11 Derashot HaRan, p. 190. Ritba to b. Bava Metzia 83 (to be discussed further within) takes the same view. Notably, the responsum of Rashba, quoted above, addresses a case of cooperation between Jewish authorities and the Castilian king to execute a Jew who regularly cooperated with bandits.


13 This same point is elaborated by Ramban in his commentary to b. BB 55a that valid laws are those written in "the annals and the law books of the kings," while new and arbitrary decrees are thievery. Nachmanides attributes the idea to R. Yosef ibn Megas - Rambam’s father’s teacher, so perhaps he is Maimonides’ source as well - who distinguished between the authority or law of the kingdom [המשנתא דמלכותא ותא דמלכותא], and the thievery of the kingdom [המשנתא דמלכותא]."
conclude that extrinsic factors – like race and gender of the victim, race of the perpetrator, and locale in which the homicide occurred – so strongly influence which cases are selected for capital prosecution that the American death penalty is more inconsistent than uniform, more arbitrary than orderly. However it seems clear that Rambam’s demand is for formal legitimacy, in which laws must be addressed to the citizenry in general and not to individuals, and which must aim to improve the common weal, not to enrich the ruler. This does not demand that different juries, prosecutors and judges always arrive at the same conclusions and apply the law absolutely uniformly; indeed, it cannot demand this, once we grant that prosecutors juries and judges should have discretion to weigh mitigating or aggravating factors in each unique case. When a given person - let us say, Troy Davis, the Georgia man executed in September 2011, despite doubts about his guilt in a 1989 killing – is put to death under the American death penalty, it is not because a capricious law singled out Troy Davis for punishment. Rather, it is because he was convicted of violating a uniformly applicable law against murder, and because a given prosecutor operating within that legislation persuaded a given jury that this crime was aggravated enough to warrant the death penalty. Why other convicts in similar cases received lesser sentences or whether racial bias influenced the verdict and sentence are grave questions. Indeed, we believe they indicate why the American death penalty is such a bad policy. But inconsistency in application does not in principle vitiate laws imposing a death penalty for aggravated murder, or render these ostensibly uniform laws into capricious decrees.

How far does the legitimate police power of a Noachide government extend? As we saw, Shulhan Arukh HM 2.1 permits enlisting gentile police power to enforce decisions of Jewish courts. Other sources extend this to endorsing the non-Jewish governments’ own use of violent force, against even Jewish criminals. R. Menahem Meresburg, a 14th century German authority, endorses enlisting gentile police power to restrain a violent menace.

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14 A recent example is the October, 2011 study by Prof. John J. Donahue III of Stanford Law School, “Capital Punishment in Connecticut, 1973-2007: A Comprehensive Evaluation from 4686 Murders to One Execution,” available at http://works.bepress.com/john_donohue/87/. Donohue (p.4) finds no objective characteristics of the crime itself can explain the “arbitrary,” “capricious” application of capital punishment: “Once the system has operated through the enormous discretionary decisions of prosecutors and juries, there is no meaningful basis for distinguishing the very few who receive sentences of death from the many capital-eligible murderers who do not.” This, despite the Supreme Court’s ruling that “capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes,’ and whose extreme culpability makes them ‘the most deserving of execution.’” [Donohue quotes here from the 2005 decision in Roper v. Simmons]. That report was instrumental in Connecticut’s renunciation of the death penalty in April 2012.

15 This theme is developed by R. Zvi Hirsch Chajes in his essay “Din Melekh BelIsrael,” part of his work Torat Neviim [Zolkiev, 1836], 17d.
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even to the point of cutting off the thug's hands, if all other methods prove ineffective.\textsuperscript{16} R. Moshe Isserles quotes this source approvingly at \textit{Hoshen Mishpat} 388.7, where the rule is amplified by R. Shabtai HaKohen [\textit{Shakh}, at n.45].\textsuperscript{17}

Such punishment sounds positively medieval in its brutality. Modern students of Jewish law may feel an instinctive revulsion that sacred texts of a peace-loving religion would ever affirm such violence. We legitimately expect our sages to teach the Torah of loving-kindness, not the Torah of “beatings near to death,” of severing hands, of lethal force-feeding and even of executions. Perhaps some modern Jews feel such teachings shame the Torah that ought to display our “wisdom and discernment in the eyes of the nations.” And perhaps we modern interpreters should feel constrained to protest against the harshness of such rules.

At the same time, one must remember that classical \textit{Halakhah} addresses not only those symbolic and axiological realms we today think of as “religious,” like worship, ethics and personal status. Until modern times, Jewish law was also a political instrument for managing the crimes and conflicts that plague any human society. No society has ever undertaken that task without sometimes licensing violence to enforce its determinations of justice and social order. Presumably every member of a civilized society is pleased that magistrates are authorized to put criminals in shackles and haul them to prison, to confiscate ill-gotten property and to impose fines. Such actions are always violent toward those punished.\textsuperscript{18} Judaism, too, cannot rest content with offering irenic visions of a redeemed future, but must contend meaningfully with wrongdoing today. And this, I am afraid, will demand that Judaism offer teachings about the ethical use of violence in service of social order.

To that end, let us note the rhetorical flourish R. Yosef Karo adds to the assertion that judges may impose violent punishment [\textit{HM} 2.1, cited above]: “May all their actions be for the sake of Heaven.” Packed into this pithy wish is an implicit acknowledgment that people are apt to abuse the state’s police authority, resorting to unnecessary force, and inflicting more pain than is necessary, even against those who deserve punishment. R. Karo counters with the hope that those empowered to punish do so only with the best motives, reverently, in fear and trembling at the responsibility they bear. We offer the

\textsuperscript{16} This work, \textit{Nimmukei Menahem}, is found on the Bar-Ilan Responsa Project database under the category of \textit{Sifrei Minhag v’Halakha-Rishonim}. The electronic version there lacks pagination. This law appears s.v. \textit{Din mutar la’mukkeh likbol lagoyim}.

\textsuperscript{17} Cf. b. \textit{Sanhedrin} 58b for the Talmudic endorsement of cutting of the hands of violent attackers.

\textsuperscript{18} Robert Cover, “Violence and the Word,” 95 Yale Law Journal 1601 [1986]: “Judges deal pain and death... Most prisoners walk into prison, because they know they will be dragged or beaten into prison if they do not walk.”
same wish: state police power is necessary, yet dangerous. May the courts, the police officers and the voters all use their power for the sake of Heaven.

To sum up: Halakhah joins the rest of civilized society in demanding that governments control crime and, when necessary, punish criminals with violent force.

How much state violence remains legitimate? Perhaps Halakhah countenances certain kinds of “reasonable” state violence but not others, which we might deem “cruel and unusual?” Perhaps Halakhah could endorse, say, flogging but not execution. However, it may be impossible to find specific evidence from within rabbinic literature to warrant this conclusion. In fact, a number of examples condone the use of lethal force by legitimate non-Jewish governments.

Sages and Criminals

Three Talmudic stories, often cited regarding crime and punishment, provide the most relevant source material from Hazal on our question.

B. Bava Metzia 83b reports that R. Elazar ben R. Shimon worked as a policeman, arresting thieves whom the Romans would execute.19 R. Yehoshua ben Korha challenged R. Elazar for his line of work, asking “how long will you hand over God’s people to execution?” R. Elazar replies that he arrests those who are in fact guilty. “I am removing thorns from the vineyard,” he states. R. Yehoshua retorts that “the vineyard owner can remove his own thorns” – a rebuke we will analyze in a moment. The unit concludes by relating that R. Ishmael ben R. Yossi did the same police work. This time, Elijah the prophet delivers the rebuke, urging R. Ishmael to flee into exile rather than cooperate with the Romans.

Now, what did R. Yehoshua ben Korha mean in saying “the vineyard owner can remove his own thorns?” There are at least two possible explanations. He may mean, as Rashi understands ad loc., that one should await God’s own punishment for Jewish thieves rather than enacting human justice. Perhaps there is a pious, aggadic charm to the emuna shlema that God will get the wicked in the end; but this is a very poor public policy. Can anyone legitimately say that the response to crime is to sit still and wait for God to punish wrongdoers? Noachide governments must arrest criminals, and Jews may serve as police, contributing to this worthy endeavor for the social good, even when it might entail harsh punishment.

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19 In an older, parallel version, Pesikta d’R. Kahana 11.19, R. Eleazar performs the executions himself, not merely assists the ruling power.
Alternatively, as Meiri understands *ad loc.*, R. Yehoshua may mean that R. Elazar should let the Romans do their own dirty work, without the assistance of “sages, the pious or men of renown.” In principle, Meiri understands, Jews might serve the state’s police power, but this morally compromised role is unworthy of rabbis. Some might find this view inspiring, implying a kind of supererogatory conscientious objector status regarding capital punishment. Such a response might make sense under the rule of Roman Caesars, but it is unpersuasive in the American republic where we Jews are full citizens, duty-bound to uphold justice and law. It is not normatively or morally preferable to boycott the state’s efforts to stop crime, unless the state itself is fundamentally despotic, indeed worse than the crime it seeks to control.

Another tale [*b. Niddah* 61a] concerns R. Tarfon (who stated in the *Mishnah* that he never would have executed anyone) and some Galileans who were wanted for murder. R. Tarfon denies their request that he hide them from the government, because they may actually be guilty, as Rashi comments: “Perhaps you actually murdered, and then it would be forbidden to save you.” This story, like the previous, implies that Jews should not interfere negatively with the state’s police power, even when the state might impose execution.

Finally, there is a hypothetical case, followed later by an anecdote, where gentile soldiers demand that Jews turn over a wanted man for execution, or else they will punish the town collectively [*y. Terumot* 8.4, citing *t. Terumot* 7.20]. R. Yohanan rules that Jews should turn over the wanted man, regardless of his guilt or innocence, to avoid the threatened collective punishment. Resh Lakish rules that they should turn over the wanted man only if he is genuinely guilty of the crime he is charged with. In other words, Resh Lakish recognizes the legitimate right of a non-Jewish government to execute criminals. Rambam follows Resh Lakish in this dispute, ruling that one should never turn over an innocent sacrificial victim to save the community from collective punishment. But “if he is guilty and deserves the death penalty ... turn him over. But one should not teach people to do this *ab initio*” [*MT Yesodei HaTorah* 5.5].

*Mesirah*

Those tales all address the question of Jews cooperating with the prosecution of their fellow Jews. Indeed, much of the source material that informs our discussion regards the prohibition of *mesirah*, or “turning over” Jews and their property to gentile authorities. For much of Jewish history, our people stood in a wary, adversarial posture to gentile authorities. Unsurprisingly, then, classical *Halakhah* restricted – though, as we saw, did not ban – cooperation with non-Jewish courts and police power. Although this is no
longer the stance of American Jewish citizens, mesirah remains a relevant concept for the halakhic inquiry into capital trials. If Halakah permits cooperating with gentile authorities to restrain a fellow Jew’s wrongdoing, then presumably it permits the same toward any alleged criminals, the vast majority of whom – especially in capital cases – will be non-Jewish.

Mesirah has been thoroughly discussed elsewhere, and we need not detail the various views here.20 Suffice it to say that some authorities insist that the classical prohibition remains in force. They hold that in most cases – outside of immediate dangers to public safety – one should not expose Jews to gentile criminal justice by calling the police or testifying against them.

A more compelling position belongs to those who say that the original prohibition against informing was motivated by a fear that capricious governments would steal from Jews and persecute them. Such authorities were bandits, not governors, no matter what title they carried. Times have changed, however, and governments today – certainly that of the United States – are not essentially corrupt, do not punish arbitrarily and may be relied upon to follow their own rules fairly. Moreover, Jews are themselves religiously bound to follow the laws of the state, as noted. As such, normative Judaism grants to the state the power to enforce laws which citizens are bound to uphold. Therefore, nowadays, there is no prohibition against turning over a fellow Jew to the criminal justice system, except in the most lawless countries. This position is taken by R. Yehiel Michael Epstein [Arukh HaShulhan HM 388.7] and R. Eliezer Yehudah Waldenberg [Tzitz Eliezer 19.52], and others.21 American Jews may participate fully in criminal proceedings against their fellow Jews, regardless of how they may be punished as a result.

This would hold true in cases even of non-violent crime. But the question before us concerns capital cases, which, almost by definition, are homicide cases.22 When people
threaten public safety, *Halakhah* expects us to turn over even Jewish criminals to secular political authority, which may apply violent force. Rambam asserts this, specifically about *mosrim*, Jewish informers who abet bandits, and about wrongdoers generally:

> המעשרים בכל מקום שנהב שניים מתוTube המטיחים במותם מגן אולף חטא המטיחים להם חיטא והמחיקים הם נשמה. וקש פלטיא לציור ומלא חטא.

It is common in the cities of the west to execute habitual informers, to hand over the informers to gentile authorities for execution, beating and incarceration, befitting their wickedness. And regarding all who trouble the community, it is permissible to hand them over to the gentile authorities to beat them, incarcerate them and fine them...

This ruling is repeated by R. Yaakov b. Asher [*Tur* HM 388] who specifically adds that one should turn over “those who harass and trouble the public to the government [shilton].” Both R. Yosef Karo and R. Moshe Isserles repeat the ruling with additional detail at *HM* 388.12. Rama’s comment provides important guidance: “One engaged in counterfeiting and the like, where there is reason to fear that his actions would harm many people, one should warn him to desist. But if he does not heed the warning, one may turn him over and assert that there is no guilty party except him.” If we recognize a compelling interest in arresting Jewish counterfeiters, surely our norms recognize the need to arrest and punish murderers. Indeed, R. Moshe Tendler testified for the prosecution against a Jew in a 1979 murder case. (That was not a capital case; that killer, Philip Dreilich, remains in prison on a life sentence.)

Regarding Jewish punishment of *mosrim*, an interesting reference is found in R. Shimon Huberband’s essay from the Warsaw Ghetto archives known as “Oyneg Shabes,” *Kiddush HaShem: Jewish Religious and Cultural Life in Poland During the Holocaust*, ed. Jeffrey S. Gurock and Robert S. Hirt, trans. David E. Fishman [New York: Yeshiva University Press, 1987]. On Oyneg Shabes, see the amazing *Who Will Write Our History? Emmanuel Ringelblum, the Warsaw Ghetto and the Oyneg Shabes Archive* [Bloomington, IN: Indiana University Press, 2007]. R. Huberband [p. 136] cited a responsa (#138) of the 16th century R. Meir (Maraham) of Lublin that “in the days of R. Shachna of Lublin Jewish informers were drowned in the mikveh. But today [i.e. in the Ghetto] there aren’t enough mikvehs to suffice for all the Jewish informers.” In fact, this responsum records that R. Shachna merely put out their eyes and cut out their tongues, but does not discuss drowning. See also R. Shlomo Luria, *Yam Shel Shlomo*, *Yevamot* 10.20, who also favors executing informers.

Rama’s ruling comes again from the aforementioned *Nimmukei Menahem* of R. Menahem Meresberg.
What is Capital Punishment Supposed to Accomplish?

There are two main arguments for capital punishment.

There is, first, a deontological or duty-based explanation for executing the most terrible criminals. Under this approach, some crimes are so awful that a moral society must respond with the most severe condemnation possible: that the perpetrator had forfeited the right to live. This is Immanuel Kant’s position: “Whoever committed murder must die,” even if he was the last prisoner in a desert island society about to disband. In a contemporary application, consider the words of Justice John Paul Stevens, writing in another major death penalty case (Spaziano v. Florida, [1984]): capital punishment represents “an expression of the community’s outrage – its sense that an individual has lost his moral entitlement to live ... Capital punishment rests on not a legal but an ethical judgment – an assessment of the defendant’s ‘moral guilt.’”

This argument resonates with the biblical disposition toward capital punishment. At least in one famous verse, the Torah asserts that – given the infinite value of human life – the death penalty is the inevitable response to intentional homicide: “One who spills human blood, his own blood shall be spilled by human hands, for God created the human being in His image [Genesis 9.6].” The Bible scholar Moshe Greenberg argued that herein lies the uniqueness of biblical norms, in that the Torah treats murder not as a tortious crime but as a sin against God: “The guilt of the murderer is infinite because the murdered life is invaluable ... the effect of this view is, to be sure, paradoxical: because human life is invaluable, to take it entails the death penalty.” Maimonides intuits the same conclusion, when he writes:

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25 Philosophy of Law, in the section known as “The Public Right.”

26 Stevens later repudiated his support for capital punishment, and wrote in 2008 [Baze v. Rees] that the death penalty “the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.” See also his essay “On the Death Sentence,” New York Review of Books, Dec. 23, 2010.

The court is admonished not to accept a ransom from a murderer, even if he gave all the money in the world, even if the blood-avenger wanted to release the killer from the death penalty. For the life of the victim does not belong to the blood-avenger. It belongs to the Blessed Holy One. [MT Rotzeah 1.4]

Post-biblical Jewish tradition has generally not built law upon the deontological argument, however. Set aside the virtually sui generis case of Adolf Eichmann – to this day, the only person executed after a civilian trial in Israel, under a 1950 law specifically written for WW II-era murderers. Nazis set no precedent for ordinary criminals, although they might for terrorists and other mass murderers, like the Oklahoma City and 9/11 attackers. The Halakhic tradition’s well-attested ambivalence regarding capital punishment can be seen as an expression of concern not only for the infinite value of a victim’s life, but also for the value of a killer’s life as well. Rabbinic authorities have not been overeager to accept what Greenberg calls the “paradox” of each homicide entailing another as punishment. Even killers are still human beings, whose lives demand protection. While Halakhah considered capital punishment necessary at times, it generally did not justify execution by concluding that criminals forfeit all their human worth. Indeed, a famous midrash [b. Sanhedrin 46b] reminds us that even the crucified corpse of a notorious bandit – who thoroughly deserved his death sentence – is still “the twin brother of the King,” i.e., still bears the divine image.²⁸

Why, then, would certain crimes entail death? When the Torah imposes capital punishment, it often (nine times, all in Deuteronomy) explains the penalty by saying “you shall root out the evil from your midst.” On seven of those nine cases, Sifrei repeatedly comments “so that you root out evil doers from Israel.” This amounts to a consequentialist or outcomes-based argument for the death penalty. Under this approach, capital punishment is warranted because it helps do what all moral societies must: control crime, imposing the most severe punishments on the worst offenders, and deterring further crime by other potential criminals. This the argument R. Shimon b. Gamliel made in Mishnah Makkot: failing to employ capital punishment encourages crime. In America

one should interpret ancient Near Eastern texts. However, contemporary Halakhah is a different project than Bible scholarship, aiming to create Judaic meaning from within an interpretive tradition, rather than to analyze historical data. Whether or not Greenberg successfully rebutted Jackson in academic discourse, it is fair to say, I think, that his view accords with Genesis as Jews have read it.

²⁸ A dissenting view can be found in the commentary of R. David Kimchi [Provence, 12th century] to Genesis 9:6. Criminals are executed “because he has destroyed his own divine image the moment he violated his creator’s commandment. There is no divine image nor rationality to the sinner.”
today, this remains the most compelling claim for capital punishment, in the view of a number of political and legal authorities. If it is true that executing murderers in fact deters other murders, legal scholars Cass Sunstein and Adrian Vermeule argued in a 2006 article, it would be morally required to employ it. Even those who otherwise oppose executions on deontological grounds of preserving life, they claim, should recognize a “consequentialist override” to endorse a policy that would, after all, save many innocent lives.29

To summarize: the Judaic legitimacy of capital punishment depends precisely on the claims of deterrence and crime control. If in fact the American death penalty effectively helps control, punish and deter crime, then the consequentialist argument for the death penalty finds relatively easy justification in the Jewish legal tradition. On the other hand, if the death penalty produces no practical positive consequence for society, it really is pointless bloodshed that Jews should resist by conscientious objection to participation in capital trials.

**Does the American Death Penalty Deter?**

A *halakhic* analysis of the American death penalty calls for more than *halakhic* judgment. Jewish law should not be entirely self-referential, discussing only canonical texts; it should consult expert data so that its decisions meaningfully hook on to the world.30 We students of *Halakhah* should properly contribute our religious and ethical perspectives to this analysis, to clarify our obligations as Jews and as citizens. Still, we should also understand the limits of that discourse. If we think *Halakhah* should defer to military and diplomatic experts about Israel’s security, if we consult scientists and physicians on medical questions, then we should show a similar humility and respect for the secularized, democratic political process on this question.

And it must be said that capital punishment is a more complicated question than it might seem at first glance.

For one thing, we must reckon with the fact that the people in this American democracy consistently favor capital punishment. Although rates have support have declined in the last two decades, a decisive majority of around 63 percent still favors capital

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30 Remember that Rav acquired expertise about cattle blemishes through “field research,” by living among shepherds for 18 months, not by sitting in a *beit midrash*, examining authoritative texts [b. *Sanhedrin* 5b].
punishment. Why should public opinion matter? Capital punishment is a contested question of public morals and public policy. In democracies, we believe that hard questions like this are best decided by the people themselves. We Jewish citizens should argue for abolition. But that is not the same thing as saying that the people’s democratic choice is illegitimate.

Moreover, measuring deterrence is a most complicated matter. The question is not whether fear of capital punishment would deter crime; it is whether fear of death is a substantially greater deterrent than the threat of life in prison. The famous 1976 case of Gary Gilmore – the Utah career criminal who committed murder while on parole, then insisted on being executed rather than enduring a life sentence, becoming the first person executed after the Supreme Court permitted capital punishment anew, in Gregg – demonstrates that prison terms might actually be a more terrifying prospect to some criminals. Also, the death penalty might be more effective at deterring some crimes than others. Threat of death might restrain an armed robber from firing his weapon, for instance, but might not calm an enraged spouse who discovers an adulterous affair. Furthermore, it may be the case that many capital crimes are committed by severe sociopaths who are beyond the influence of any deterrent policy whatsoever. In all events, social science data and expert analysis are not univocal on these matters. Solid majorities of academic criminologists and legal scholars concur that capital punishment adds little differential deterrent effect beyond that exerted by life imprisonment alone. However, this view is not universal. A number of econometric studies have found substantial correlations between capital punishment and reductions in homicide rates, in one case suggesting that each execution correlates to the reduction of 18 homicides. While death penalty opponents have challenged the methodology of these studies, it is not reasonable for us non-experts to determine Halakhah by declaring one set of peer-reviewed studies by academically qualified researchers as valid, and rejecting another group of equally credentialed studies as invalid.

In fact, a number of leading scholars have concluded that empirical data on executions and deterrence is just too small and varies too widely year-to-year and by locale, and is responsive to too many other extrinsic factors to establish either the existence or absence

31 The Gallup Organization released a poll on January 9, 2013 finding 63 percent favored capital punishment (about the same as the finding of 61 percent in 2011, and 64 percent in 2010), down from a high of 80 percent in favor in 1994.
of a deterrent effect. For instance, opponents like to note that death penalty states may have higher homicide rates than non-death penalty states. But too many other factors influence those results, as can be seen in the following example. Among the member states of the OECD, only America and Japan practice capital punishment. In 2007, the United States had the group's second highest homicide rate, behind Mexico, which has no capital punishment. Japan had the lowest rate. Legal scholars on both sides of the argument agree that the data is preponderant but inconclusive, as in an op-ed article jointly written by Cass Sunstein (who has written in favor of capital punishment) and Justin Wolfers (who has written against).³⁴

This picture that emerges from the unresolved data on deterrence forestalls a univocal halakhic prohibition on the death penalty. Our values might prompt us to conclude that “there is no credible evidence that the death penalty deters crime,” as in a policy statement by the Progressive Jewish Alliance.³⁵ But such a view is “certainly an exaggeration,” in the view of legal scholar David Garland of NYU, a prominent death penalty expert: “The idea that the death penalty definitely works may be a myth – but this doesn’t mean that the opposite is true. Capital punishment is not, as its opponents argue, all costs and no benefits.”³⁶ Even if no one is ever executed, Garland noted, the threat of death can ease plea bargaining and induce cooperative testimony from conspirators. Garland argues that American capital punishment is part of a cultural, emotional and political discourse around death, but it is not effectively calibrated to control crime: “uncertainty, infrequency and delay undermine its deterrent effect.”³⁷ America sees more than 16,000 homicides annually, but now issues fewer than 100 new death sentences annually, and has never, in modern times, executed 100 persons in a year. Such numbers would comfortably reassure any rational killer that he will likely escape execution. Only if America’s death penalty were much more sweeping, swift and certain – if it were mandatory without exception, as in Singapore, or employed by the thousands, as in China – would its deterrent effect be maximized, Garland wrote.³⁸ But certainly Jewish citizens would not want this country to become such a brutal or “bloodthirsty court.”³⁹

³⁷David Garland, Peculiar Institution: America's Death Penalty in an Age of Abolition [Oxford, 2010], p. 385 n.4
³⁸“Five Myths about the Death Penalty.”
³⁹Garland writes: “Critics are right to argue that the classical criminal justice purposes are not well served by contemporary capital punishment. America’s capital punishment arrangements tend to undermine these purposes rather than advance them. ... Late modern capital punishment is, in fact, reasonably well adapted to the purposes that it serves, but deterrent crime control and retributive justice are not prominent among them.” Peculiar Institution, p.286.
To sum up: Gentile governments may use lethal force to deter criminals, although we think they almost always should not resort to such a drastic step, since evidence for deterrence is weak. However, if democratic governments do elect to use capital punishment, as the United States has, this is not prima facie an illegitimate choice that vitiates the policy’s halakhic standing.

Against Capital Punishment

As noted at the outset of this paper, we reaffirm the 1960 CJLS position and the 1999 Rabbinical Assembly resolution that the United States should forego executing criminals. As individuals and as a community, American Jewish citizens should advocate against capital punishment.

Most modern Jewish religious leaders have favored abolition. In Israel, when the young state convicted its first murderer, the two chief rabbis, R. Itzhak Herzog and R. Ben Zion Meir Hai Ouziel, urged the justice minister to nullify the death penalty, left over from the British Mandate; and it was in 1954. R. Aaron Soloveitchik also took this view in a letter to the Orthodox Union in the mid-1970s as that organization was weighing its stance: “It is irresponsible and unfair to submit a statement in favor of capital punishment in the name of Orthodox Jewry. In my humble opinion, from a halakhic point of view, every Jew should be opposed to capital punishment.” R. Moshe Feinstein took a similar view in a responsum he sent on Purim, 1981 to a sar hamedinah, apparently New York Gov. Hugh Carey [Iggerot Moshe HM 2:68].

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42 R. Feinstein also concludes that some exceptional crimes in exigent circumstances really do warrant the death penalty. The typical objections to capital punishment apply, he wrote, when the prohibition against murder has not been rendered meaningless. Rather the defendant murdered in a crime of passion or in some dispute over money or honor. But when one kills because the prohibition against murder is meaningless to him because of his exceptional cruelty, or when the number of murderers and evil doers has multiplied, they should apply the death penalty as an emergency matter to deter further murder, as a measure that would save the state. In other words, to R. Feinstein, the death penalty should not be imposed generally, but might be invoked in an emergency of widespread anarchy or to deal with an “exceptionally cruel” serial killer. This notably
The most obvious argument for abolition emerging from Jewish sources is that capital punishment all too hastily risks the irreversible horror of executing an innocent person. Killing even a criminal destroys a whole world. Imagine the worlds that would have been destroyed if 142 American death row prisoners had not been released since 1973 after their convictions were reversed.43

Another halakhic argument against the American death penalty is that while Jewish law permits authorities discretion to apply the death penalty in emergency cases, American law applies capital punishment as a general standard, not in response to the specific “needs of the hour.” Moreover, the American death penalty is always carried out years after the crime, following numerous court proceedings. After an average of 12 years on death row it is difficult to claim that someone must be executed “because the hour demands it.”

American death penalty policy deserves our condemnation in numerous other ways. We note the persistent patterns of racial discrimination, consistently poor defense counsel, and inconsistent approaches to appeal across jurisdictions in capital cases. These are three major reasons the American Bar Association since 1997 has favored a moratorium on executions. Moreover, the death penalty is tremendously expensive, with appeals and extra procedures costing between $2.5 million and $5 million per case, as opposed to less than $1 million per case resulting in life imprisonment. Florida alone has spent as much as $50 million on capital cases beyond what would have been the costs of trials seeking life imprisonment.44 Couldn’t that money have been better spent elsewhere on fighting crime?

Given these arguments, as well as the dubious prospect for a strong deterrence effect, we believe that ideally Jews should favor a policy preferring imprisonment to execution in virtually all cases.

But this is not equivalent to saying that even after the fact it is forbidden for Jews to participate in capital trials. In fact, Halakhah historically has recognized legitimate discretion for Jewish and gentile governments to execute murderers, and has authorized

resembles the policy Pope John Paul II took in his celebrated 1995 Evangelium Vitae: “the nature and extent of the punishment must be carefully evaluated and decided upon, and ought not go to the extreme of executing the offender except in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society. Today however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically non-existent.”

Jewish cooperation with the state’s lethal power. If that was true even when Jews lived under ancient and medieval despots, it is certainly true that Halakhah permits Jewish citizens of a law-abiding, democratic republic like the United States to do the same.

Should Jews Refuse to Participate?

Happily, the American death penalty is in decline. The number of new death sentences fell to 78 in 2012, compared with 224 in 2000, down from 315 in 1996, the highest number since Supreme Court reinstated capital punishment in Gregg v. Georgia, in 1976. Executions fell to 43 during 2012, from 85 in 2000, down from a high of 98 in 1999. Although 32 states still impose capital punishment, six states have abolished the death penalty since 2007, most recently Maryland, in May, 2013 (joining Connecticut, Illinois, New Jersey, New Mexico and New York), and a seventh, Oregon, issued a moratorium on executions in November, 2011. Following Jewish values, we are pleased to see this trend, and support its advance until the death penalty is abolished for all common crimes.

Given this advancing trend, it might be argued, the best course for a Jewish citizen is to refuse to participate in capital trials as judge, prosecutor or juror. Perhaps we should follow the late Supreme Court Justice Harry Blackmun, who recanted his earlier (1976 in Gregg) support for capital punishment (dissenting in Callins v. Collins, 1994), declaring he “would no longer tinker with the machinery of death ... [because] the death penalty experiment has failed.” Perhaps a Jewish boycott of the entire capital punishment process would nudge public opinion further toward abolition.

Such conscientious objection might seem at first glance to reflect a good moral intuition, and might seem appealing as a gesture of protest against a repugnant policy. But before coming to that conclusion, a few points bear consideration.

First, although we believe religious Jews should oppose the death penalty on moral and pragmatic grounds, at same time not everything moral by definition imposes a halakhic imperative or a prohibition. Based on all the foregoing, we do not find a halakhic prohibition on participating or a halakhic imperative to refuse to participate in capital cases as witnesses, jurors, prosecutors or judges.

Second, Jewish citizens of the United States are duty-bound to support the state’s fundamentally necessary efforts to restrain criminals and control crime. That duty does not lapse because we object to capital punishment. Do Jewish norms really demand that Jewish Texans, Floridians, Pennsylvanians or Californians (as examples of states with
active capital penalties) cede that civic obligation to their gentile neighbors whenever a murder is committed?

Conclusion: How Should Jews Participate in Capital Cases?

In fact, some moral and halakhic factors strengthen the argument for participating in death penalty trials as jurors and judges.

A leading capital defense attorney, Marshall Dayan, argues that it is "tremendously injurious" to defendants when those who object to the death penalty recuse themselves. Studies show that such "death qualified" juries – that is, jurors who have asserted during jury selection that they would be willing to impose death penalty – are more likely to convict even for lesser penalties than are juries taken from the general population. Death penalty opponents complain that prosecutors sometimes bluff their way to more congenial juries by saying (disingenuously) that they would seek capital punishment, thus sifting out the most conviction-averse jurors. How would it help vulnerable defendants for Jews, inspired by classical scruples and veneration for human life, to boycott the proceedings, further tilting the odds in favor of the prosecution? In this case, the conscientious refusal to participate in capital trials, which seemed at first glance to be a good moral instinct, turns out to risk harming American justice by leaving these cases only in the hands of those already committed to the death penalty. Instead, it might practically enhance criminal justice for morally scrupulous Jews to serve as judges, prosecutors, jurors and witnesses, to try to mitigate the problems that compromise American capital punishment. Such service would not prevent Jews from using other venues to advocate against the death penalty.

Let us consider each of these roles Jewish citizens might play in the criminal process.

Witnesses: This is the least morally freighted of the roles. A witness neither convicts nor acquits and assigns no penalty. A witness merely conveys to the court the information, for judges and jurors to evaluate. Even if that testimony proves decisive, it is not the witness

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45 These four states – all with significant Jewish populations – issued 51 of the 78 new death sentences in 2012. Together they account for most of the prisoners now on death row: 1,639 out of 3,108.

46 Private email communication, January 3, 2012.

47 An interesting application of this point comes from a 2006 California case in which death row inmate Fred Harlan Freeman petitioned for release, alleging that judge in his 1984 murder trial improperly advised the prosecutor to strike Jews as potential jurors because they would be opposed to the death penalty and biased for acquittal. The California Supreme Court denied Freeman's claim, and in March 2007 the Supreme Court declined to hear the case. My thanks to my friend and congregant Kate Janofsky for this reference.
who decided. If one has first-hand, accurate information about a crime, as a matter of public safety, one should speak to the police and testify in court, regardless of one's moral objection to whatever penalty may ensue. There is no halakhic basis to withhold information from investigators or testimony from court. In fact it would constitute a transgression to fail to give testimony in such a case. "One who is a witness, who sees or knows, but does not testify, will bear his guilt" [Leviticus 5.1]. Withholding testimony might help a violent criminal escape and expose others to future harm. Therefore, according to Maimonides [MT Rotzeah 1.14], withholding testimony violates one of the Torah's major ethical mandates: "Do not stand idly by the blood of your neighbor" [Leviticus 19.16].

**Jurors:** In one sense, whether death penalty opponents might refuse to serve on a capital jury is practically a moot question, since prosecutors usually try to identify those with anti-death penalty scruples and exclude them. Yet it can be practical and can accord with halakhic and ethical norms for death penalty opponents to sit on such juries. The Supreme Court has rendered several relevant rulings on this topic. In *Witherspoon v. Illinois* [1968], the court ruled that jurors cannot be removed for cause simply because they express general ethical or religious reservations about capital punishment. Later rulings in *Adams v. Texas* [1980] and *Lockhart v. Mcree* [1986] qualified this view, holding that jurors can be excused or excluded when their views are so strong that they would substantially impair them from performing the duties of the role. But as long as a person can perform a juror's duty within the law, such a person cannot be stricken for cause. 48

To determine whether they can follow the law, prospective jurors are typically asked something like: *Would you always vote for life without the possibility of parole over the death penalty, regardless of the circumstances of the case?* Even observant Jews who oppose the death penalty could answer that question in the negative. Let us remember that jury service is part of a citizen's general duty to fight crime in a society where "the law of the land is the law." Since, by any honest report, Halakhah recognizes that the death penalty is warranted in extreme cases, there is no halakhic reason why jurors should assert absolutely that they could never impose capital punishment. Observant Jewish jurors could promise to keep an open mind and vote for the death penalty if prosecutors could convince them execution was "the morally appropriate punishment," even if that applied only to a tiny class of cases.

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49 In the phrase of Marshall Dayan, private email communication, January 3, 2012.
Some might balk at this advice, considering it deceptive, if not an outright lie. I do not agree. In this case, I concur with a recent judgment of Chuck Klosterman, the New York Times Ethicist columnist, who took up this very problem. Prospective jurors should not misrepresent their views, Klosterman said, but should say honestly during jury vetting something like this: “I personally disagree with the state of Missouri’s position on capital punishment, but — if selected — I will perform my duty to the best of my abilities, within the framework of my own conscience.”

Judges and Prosecutors. The foregoing applies equally and more strongly to prosecutors and judges. Their work helps keep society safe, and so, in its way, is holy work. When the law requires a capital sentence, or when one’s superiors assign one to a capital case, a Jew may fulfill those tasks, albeit reluctantly.

Prosecutors have virtually unfettered discretion over when to seek the death penalty or long-term imprisonment. In many jurisdictions, judges are bound to follow juries’ sentencing determinations; in others, judges have discretion to modify those determinations. Jewish values argue that, in the vast majority of cases, except in the greatest exigencies, prosecutors and judges should choose imprisonment over execution. But even in cases where American law dictates a capital punishment, Jewish prosecutors and judges can fulfill their professional duties without transgressing the Torah and the decrees of our Sages.

Prison Guards and Medical Technicians. Presumably the number of Jewish staff working on death rows is negligible. Yet given all that has been said here, we must confront the possibility that a Jewish guard may have to strap a prisoner to a gurney, or a Jewish medical aide may be called upon to administer a lethal injection. Such a prospect is genuinely ugly, and we feel a reflex to say that this is no job for a nice Jewish boy or girl. But given everything we have said heretofore, there is no escaping the conclusion that when these employees of the state – like Rabbi Elazar ben Rabbi Shimon, as recorded by the Talmud and Midrash – carry out their duties, they are not murderers, but duly authorized public servants.

Of course, no one has to work in a prison. A person who cannot imagine ending another person’s life should seek another line of work. I can imagine that it would be extremely difficult for a prison employee to end the life of someone that he or she believed was

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52 Lethal injections account for 87 percent of the executions (1,175 of 1,350) in the US since 1976, and is the primary method of execution in every jurisdiction. (Thirteen states permit prisoners to choose an alternate method.)
genuinely innocent. In such a case, any prison employee – Jewish or gentile – might wish to petition to be excused from that assignment, without unduly interfering with the implementation of the sentence.

Nonetheless, judicial executions, carried out in accordance with criminal justice laws and proper trials, do not constitute murder, any more than a court-imposed fine constitutes theft. The judges, prosecutors, jurors and witnesses who play their roles in reaching and executing a capital sentence would not be halakhically guilty of causing an unjust homicide.

Ruling

We urge the American federal and state governments to renounce capital punishment except in the rarest cases. Religious Jews should advocate for that position as the superior moral stance and best public policy. But given the weight of precedent, it would be false to assert that Jewish law forbids capital punishment. Halakhah confers on secular governments the legitimate power to punish criminals to protect the innocent, including the right to impose death, when needed, God forbid.

Objection to the death penalty is not halakhic grounds to refuse to participate as judge, prosecutor, juror, police or witness in capital trials.