

The Death Penalty and the Torah in 2019

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Rabbi Barry H. Block

This summer, United States Attorney General William Barr announced that “[t]he federal government will resume executions of death row inmates after a nearly two-decade hiatus.”ⁱ Heinous mass murderers have been sentenced to death but not executed, by a federal government that “has not executed anyone since 2003.”ⁱⁱ They include “Dylan Roof, the avowed white supremacist who gunned down nine African-American churchgoers in 2015, and Dzhokhar Tsarnaev, the Boston Marathon bomber.”ⁱⁱⁱ Nidal Hasan, “an Army major when he killed 13 people and wounded more than 30 others in a mass shooting at Fort Hood, Texas,” is among four convicts awaiting execution by the U.S. military.^{iv}

Meanwhile, across the country, opposition to the death penalty has grown. 21 states have abolished the death penalty, while governors in four additional states have halted executions with death penalty moratoriums.^v Opposing capital punishment, once a crusade of liberals, has now inspired some conservatives, too. In fact, just today, a group called Conservatives Concerned About the Death Penalty is kicking off its first-ever annual national meeting. “People affiliated with the group hold various views on why the death penalty should be abolished. For some...the taking of a life represents government overreach.” For others, fiscal conservatism is the motivation, given that “carrying out a capital sentence is often more expensive than life imprisonment.”^{vi}

Meanwhile, the Death Penalty Information Center reports a 2017 “Poll by researchers at the University of Arkansas found [that] 73% [of Arkansans] said they support the death penalty.”^{vii} Our state doesn’t have any executions scheduled currently, and has put no convicts to death since April, 2017, likely because of law suits and controversy about the drugs Arkansas uses in lethal injections, which allegedly cause horrific suffering.^{viii}

At this time of increasing controversy over the death penalty, paradoxically about to restart at the federal level even as several states have banned it, we would do well to look at what the Torah teaches about capital punishment.

Tonight, we read that the Torah prescribes the death penalty for a crime nowhere near the severity of the mass murders I listed.^{ix} In the same selection, though, the Torah begins to lay out the rigorous measure of guilt required for a Jewish court to put a criminal to death. Jewish law does not merely require that a capital defendant be found guilty beyond a reasonable doubt. Instead, Torah, amplified by the Rabbis of the Talmud and their successors, insists that a person be known to be guilty beyond any doubt whatsoever before being put to death. Yes, the Torah and the rabbis would permit other punishments with a less stringent standard. The death penalty, though, is different –irreversible, the taking of human life –requiring more evidence.

The words of Torah demand at least two eye-witnesses to a capital crime.^x The sages went much further in the Talmud: At least two witnesses must warn the perpetrator in advance, as in, “Don’t you know that what you’re about to do is punishable by death?” Then, they must both see the crime committed from exactly the same vantage point. For example, if two witnesses see the same murder from two different windows, but could not see one another, they do not count as the two witnesses needed to put a criminal to death.^{xi} In short, interpreting the Torah verses we read tonight, the rabbis made the death penalty virtually impossible from a practical standpoint.

What lies behind these teachings of the Torah and their amplification by our sages?

First, let us recognize that Judaism never repeals the death penalty. Some crimes are so despicable, and the evidence of the perpetrator’s guilt so clear, that the criminal has forfeited the right to continue living on Earth. We are taught, “Do not stand idly by while your neighbor bleeds.”^{xii} Were we to let the mass murderer get off with a punishment less than death, we may be said to harbor callous disregard for the lives criminally cut short.

But the victims’ lives are not the only ones we must understand to be sacred. The accused, too, is a human being created *b’tzelem Elohim*, in God’s image. The rabbis erected strict standards for carrying out capital punishment humanely,^{xiii} which is relevant to today’s discussion about gruesome lethal injections.

In recent years, DNA evidence has been brought to allege the innocence of prisoners on death row, and occasionally of those already put to death. During this period of enhanced focus on potential innocence of capital defendants, Arkansas

did not execute any convicts from 2005 until putting four to death in rapid succession in April, 2017.

The emergence of DNA evidence requires us to consider how the rabbis would write their rules today. The essence, of the rabbis' evidentiary requirement is certainty. Modern science has taught us to trust eyewitnesses' memories less than the rabbis did.^{xiv} Perhaps, were they writing today, the rabbis would require evidence obtained from DNA and/or cameras. There can be no doubt who planted the bombs at the Boston Marathon, for example. Or that Dylan Roof, caught on tape, murdered all those people in the Charleston church. Or that Nidal Hasan betrayed his nation, his medical profession, and his comrades-at-arms with his Texas mass murder.

We must confess that the rabbis would abhor a cherished aspect of the American legal system, namely that "guilty beyond a reasonable doubt" is the standard of guilt required, whether the penalty is death or a \$100 fine. Equating a financial penalty with the taking of human life degrades the very sanctity of human life that the death penalty is intended to protect.

This week's portion, *Parashat Shofetim*, begins with the famous injunction, *tzedek, tzedek tirdof*, "Justice, Justice shall you pursue." Even as we rightly demand justice for victims, so too must we assure that our society does not take additional innocent lives through legal execution. When considering the death penalty, our standard of justice must always be the very highest.

Amen.

ⁱ Katie Benner, "U.S. to Resume Capital Punishment for Federal Inmates on Death Row," *The New York Times*, July 25, 2019.

ⁱⁱ *Ibid.*

ⁱⁱⁱ *Ibid.*

^{iv} Kyle Rempier, "What death row executions may mean for these four soldiers at Leavenworth," *Army Times*, July 30, 2019

^v Olivia Paschal, "Momentum to abolish the death penalty picks up among conservatives," *Facing South: A Voice for a Changing South*, the online magazine of the Institute for Southern Studies, September 4, 2019.

^{vi} *Ibid.*

^{vii} Death Penalty Information Center, "State Polls and Studies," accessed September 6, 2019 at <https://deathpenaltyinfo.org/facts-and-research/public-opinion-polls/state-polls-and-studies>.

^{viii} John Moritz, "In trial over Arkansas' lethal-injection drugs, witnesses for state counter death-row inmates' experts," *Arkansas Democrat-Gazette*, April 30, 2019.

^{ix} Deuteronomy 17:2-5.

^x Deuteronomy 17:6.

^{xi} Makkot 6b.

^{xii} Leviticus 19:16.

^{xiii} Sanhedrin 45a.

^{xiv} Hal Arkowitz and Scott O. Lilienfeld, "Why Science Tells Us Not to Rely on Eyewitness Accounts," *Scientific American*, January 1, 2010.