

Blood on the Door: Judaism and Capital Punishment
Parashat Bo; January 10, 2003

My friends, I believe that the time has come to take another look at capital punishment. Not only in our country. But in our conscience. And our tradition. At a time when courts are allowing fewer and fewer questions to be asked, what questions should Jews be asking, about the proper pursuit of justice, and the demands of dignity? At a time when the state of Texas, commenting on the case of George McFarland, sentenced to death in 1992 after his own attorney slept and snored through most of the four-day trial, wrote that “The Constitution says that everyone is entitled to an attorney... The Constitution does not say that the lawyer has to be awake.” At a time when judges and politicians alike run for office *bragging* about how quick they will be to throw the switch or pull the plug, is it not our time to remember that in the midst of the storm of rage and the fire of hate, God was not in the thunder. And God was not in the fire. But in the small, murmuring sound, the still, small voice.

It is time to raise the voice of doubt, about a system more bent on vengeance than justice. To raise a moral qualm about system at once bloody, and broken.

The most verbal proponents of capital punishment turn to the Bible, to our Torah itself as the basis for their argument. Most of us know that the Torah is hardly hesitant to call for the death penalty. Burning and hanging and, later, crucifixion were the methods used by non-Jews, but stoning was the preferred

form of execution in the Biblical period, an instinctive, violent expression of popular wrath in which the entire populace was said to have participated. Strangling and slaying by the sword were introduced as additional methods of execution at a later time. And capital punishment was prescribed not only for murder, but for many other acts as well: witchcraft, idolatry, astrology, adultery, homosexuality-- even violating the Sabbath, or disobeying one's parents, was said to have led to a brutal and bloody end.

Now, for many centuries, these laws have been used as cudgel in an ongoing Christian polemic against Judaism. Many Christians looked at what they call the Old Testament, and came to the conclusion that the God of the Old Testament was harsh and vindictive, demanding and bloody, as opposed to the love they felt in the New Testament; a more forgiving faith, and a less bloody one. And as they made this contrast between the Old Testament and the New, so too did they contrast our faith with theirs. So Christians long described Judaism itself as harsh and vindictive.

But this view misinterprets history. And it misses an important point. For... just as the early Christians were coming to understand that the Torah had overapplied the death penalty, so, too, at the *very same time*, the rabbis of the early Talmudic period were coming to *the exact same conclusion*. They are the ones who remembered that the Torah *also* taught that every human being is made

in the image of God. They are the ones who wrote that human life is of inestimable value, that whoever destroys one human life, it is as if he or she had destroyed an entire world. And while of course that would apply to a murderer... the early rabbis are the ones who applied it... to the executioner as well.

And so the rabbis at the time of the Talmud did something extraordinary. They talked about those words of the Torah that told us about the death penalty. They debated how to apply them. They "interpreted" the laws. And in doing so, they made it *almost impossible* to carry out capital punishment.

How so? Well, first of all, cases involving capital punishment had to be tried by a court of twenty-three judges. A judge could argue for conviction, and then later change his argument -- but could not argue for acquittal and then change. In civil cases, the opinion of the senior judges was expressed first, but in capital cases the junior judges spoke first, to prevent them from being influenced by their elders. In civil cases unanimity was a goal; in capital cases all the judges could vote to acquit, but if the verdict to convict was unanimous, the case was thrown out because if no one could be found to argue for the accused, the court was automatically considered biased.

There is more. Conviction could only come with the testimony of two eye-witnesses, who could not be related to either party by blood or by marriage.

Circumstantial evidence was not allowed. The Talmud gives the following example: "I saw a man chasing another into a ruin. I ran after him and saw a sword in his hand dripping with the other's blood, and the murdered man in his death agony." But the witness did not see the circumstances in which the sword was inserted into the victim's body. Maybe the victim ran into the sword himself?

Witnesses were interviewed separately about the exact time, place and persons involved in the crime. If any discrepancy was found, the accused was acquitted. Rabbi Yochanan ben Zakkai even attempted once to disqualify a witness by questioning him about the stems of the figs growing on the tree underneath which the crime was committed. In order to prevent conspiracy and coordination of testimony, witnesses were warned that if they were found to have testified falsely they would be subject to the same penalty.

Double jeopardy was prohibited, even in light of new evidence. And, astoundingly, witnesses were asked whether they had *warned* the accused, *immediately prior to the crime being committed*, if he or she knew that the penalty for what he or she was about to do was death. Such a verbal warning was required for conviction!

A Christian authority on Jewish law, George Foot Moore, wrote "It is clear that with such a procedure conviction in capital cases was next to impossible, and that this was the intention of the framers of the rules was equally plain."

The Talmud records Rabbi Tarfon and Rabbi Akiva as saying that had they been members of the Sanhedrin during the era when it ruled on capital cases (something the Romans reserved for themselves when these two rabbis lived), no one would ever have been executed. And yet such a sentiment was not unanimous. The Talmud also records Rabbi Simeon ben Gamliel replying to his two colleagues that they, too, would have multiplied the spillers of blood in Israel.

Perhaps, maybe, someday, one of these courts might have enforced the death penalty. But none of these rabbis -- even Simeon -- would have been proud of it.

Why did the ancient rabbis not just admit what they were doing, be honest about it, and abolish the death penalty? For several reasons. First, they could not do so. These words were, after all, the word of God. They could not explicitly change the Torah.

But I am not sure that they would have done so even if they felt that they could. Several years ago, someone shared with me a judicial opinion written by a former Chief Justice of the Pennsylvania Supreme Court, the father of the woman who was President of the synagogue in Erie while I served there, and, yes, another Republican. His name was Samuel Roberts. Justice Roberts felt that society needs to set some standards, to send a message that for some acts, your very life

is forfeit. He believed that the death penalty needed to be on the books. But as to enforcing it, carrying it out, well, that was something else.

Essentially, what Judge Roberts felt... is what the ancient rabbis did. For the sake of the statement, and as the literal meaning of Torah, they left it on the books. And at the same time, they made it impossible to carry out.

Our nation is one of the very few remaining Western democracies to regularly carry out the death penalty -- and our crime rate -- our murder rate -- remains the highest in the Western world. Even a nation challenged with political violence and terror such as Israel has the death penalty on its books only for genocide and treason in time of warfare.

In Israel, it *has* to be this way; there has to be an incentive for a terrorist holding a bus full of children hostage to give up. If he has nothing to lose, the lives of those children are in even *more* danger than if he *knows* that, *whatever* happens, he has a way out. He can surrender... and survive.

But even without the threat of terrorism, the death penalty in Israel would be *extremely* rare, carried out with a caution that puts this country to shame. Remember the release of Demjanjuk?

Compare that with the commercials and the campaigns and the calls to hang 'em all from the highest tree.

Something is wrong with our system. Something is wrong with the way we value life. The death penalty is an unreliable deterrent. It is applied in an immoral and unjust way, carried out on the backs of the poor and on minorities in far greater proportion than the percentage of violent crimes committed by those groups. And, as the Governor of Illinois has lately learned, it is a flawed and fallible tool.

Against a wave of anger we say: on matters of life, one mistake is too many. Against a hunger for revenge we say: Justice, justice, shall you pursue that you may live.

My friends, you can still want the penalty on the books, you can believe in it for genocide and treason, maybe even for domestic terrorism, and cry at what we have become. It is time to make our passion small, to hear more clearly the call of God. It is time to teach values, not vengeance. It is time to say: may the killing end. Shabbat Shalom.