

*Nathan J. Diament*

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## JUDAISM AND THE DEATH PENALTY; OF TWO MINDS BUT ONE HEART

### I. FIRST PRINCIPLES

If one can be certain of anything in a discussion of Judaism's views regarding capital punishment, especially those held in a public forum, it is that the following statement in the *Mishna* (*Makkot* 1:10) will be quoted:

A Sanhedrin that executed [more than] one person in a week is called a "murderous" [court]. Rabbi Elazar ben Azarya states: "[More than] one person in 70 years [would be denoted a murderous court]." Rabbi Tarfon and Rabbi Akiva state: "If we had been members of the Sanhedrin, no defendant would ever have been executed."

While this passage properly finds its way into all discussions of the Torah's approach to the death penalty, other Mishnaic statements of equal authority with different perspectives seem to be often overlooked. In fact, the very *Mishna* quoted above gives the last word to R. Shimon ben Gamliel, who responds that had they indeed ensured that the death penalty would never be carried out, R. Tarfon and R. Akiva "would have been increasing the murderers in Israel."

In the complete Mishnaic citation we see our tradition grappling with the core question that confronts every society which contemplates utilizing capital punishment as a component of its criminal justice system—how can a society protect human lives with an institution that itself takes human life?

To answer this question, we must turn to another *Mishna*. *Sanhedrin* 4:5 states:

Man was created single [in the person of Adam], to teach you that anyone who eliminates one person in Israel, the Torah considers it as though an entire world has been eliminated; and anyone that sustains

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one person is Israel, the Torah considers it as though an entire world has been sustained. . . . And [man was created single], to proclaim the greatness of the Holy One; a person can mint many coins with one mold, and they will all be identical in appearance; and the King of Kings . . . made all of mankind from the mold of Adam the first, and no one person is identical to the other. Thus, each individual person must say “for me was the world created.”

Among the Torah’s seminal and timeless gifts to the world—a world that has seen societies that have endorsed everything from ancient child sacrifices to false gods to modern campaigns of ethnic cleansing—is this teaching of the infinite value of each human life.

What is most striking, however, about this critical *Mishna* is the context in which the lesson is presented. These noble words are in answer to the *Mishna*’s question of *ketsad me’aymin et ha-edim*—how does the court instill awe and fear into witnesses in capital cases so that they will testify truthfully? The very passage that proclaims our recognition of the value of each life is presented and utilized in the capital case!

Moreover, instilling fear into witnesses is but one of the many procedural safeguards required in capital cases. Other well known safeguards include requirements for two simultaneous witnesses to the crime who were not only viewing the perpetrator but also saw each other and had time to properly warn the perpetrator of the nature of his crime and punishment prior to his committing the act.

Judaism, it seems, is of two minds about capital punishment. But we can discover where the heart of our tradition lies in one more halakha.

While the Torah prescribes a strict regime of procedural safeguards before one of the four biblically authorized methods of capital punishment may be imposed, the rabbis recognized that there would be cases in which it was known beyond doubt that a particular person had committed a murder, but one of the biblically required procedural elements was absent. What then? Would a murderer roam free? No. As stated in *Mishna Sanhedrin* (9:5), the perpetrator would be placed in jail and, essentially, be put to death by malnutrition.

The key to our understanding can be found in Maimonides’ codification (*Rotse’ah* 4:9) of this ruling:

This procedure [of confinement and death by malnutrition] is not done to perpetrators of other capital crimes [procedural requirements are lacking] . . . because even though there are sins more severe than mur-

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der, they do not cause the destruction of the world's stability and order in the manner of murder; even [the cardinal sins of] idolatry, incest and violating *Shabbat* are not equal to murder. For these sins are between man and God, but murder is a sin against fellow man and anyone who commits this transgression is completely evil and all the good deeds of his entire lifetime cannot outweigh this sin nor rescue him from judgment. . . .

Murder is not only a sin against the victim and his or her Creator. Murder, in the Jewish view, is a sin against society, for it tears at the foundation stone upon which an orderly, productive, and moral society must be built—the dignity and equal worth of each of its members.

The foregoing discussion, as is often the case, is one in which the halakhic system does not offer a one-sided view of an issue, but reflects the Divine nature of God's creation in incorporating and balancing multiple and competing values that are inherent to any human challenge. While recognizing there might be multiple means to fulfill a single goal, in its heart, Judaism is devoted to championing each human life as unique and sacred.

## II. MODERN PERSPECTIVES

The challenge here, as with many other issues of this sort, for Orthodox Jews committed to the principle that the Torah's teachings are timeless and relevant to all societies in which we find ourselves, is determining how we might realize these ideals, and perhaps advocate for them in our milieu, the Diaspora of the United States.

An interesting point of departure for considering this question is a letter obtained by an officer of the Orthodox Union from R. Ahron Soloveichik in the mid-1970s, at a time when apparently the OU was considering what position to voice in a domestic debate regarding capital punishment.<sup>1</sup> R. Soloveichik wrote:

[I]t 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 Halachik point of view, every Jew should be opposed to capital punishment. It is true . . . that the Torah recognizes capital punishment. However, the Torah delegates the authority to mete out capital punishment only to Sanhedrin, not to anyone else. Even Sanhedrin are [sic] not able to mete out capital punishment if there is no Beis Hamikdash.

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*B'zman she'yesh kohen makriv, yesh nefashot, b'zman she'ayn kohen makriv, ayn nefashot.* Even capital punishment among *B'nei Noach* cannot be meted out when there is no *kohen makriv*.

The letter continued to state:

If a Sanhedrin carried out one execution in seven years it is characterized as a murderous Sanhedrin. Rabbi Akiva and Rabbi Tarfon say that if they had been in Sanhedrin, no person would have ever been executed. . . .

There are several responses to R. Soloveichik's strong declaration. First, R. Soloveichik gives no weight to R. Shimon ben Gamliel's "last word" and instead takes his hashkafic cues from the "once-in-seven years" pronouncement. But there is a more fundamental means of respectfully disagreeing with R. Soloveichik's reasoning. The *pesukim* from which the principle of *bizman she-yesh kohen makriv* is derived is clearly speaking to the functioning of the *Jewish* court system and *its* use of the death penalty.

If there arise a matter too hard for you in judgment, between blood and blood [*dam le-dam*], between plea and plea [*din le-din*], and between stroke and stroke [*nega la-nega*], even matters of controversy within your gates; then you shall arise, and go unto the place which the Lord your God shall choose. And you shall come unto the priests the Levites, and unto the judge that shall be in those days; and you shall inquire; and they shall declare unto you the sentence of judgment (*Devarim* 17:8-9).

The Torah's linkage of issues of *dam*, *din*, and *nega* for determination by arbiters sitting in "The Place" and connected to *kohanim* can only be understood as relevant to the Jewish legal system. These components are not relevant to the administration of a justice system by a non-Jewish state, one of the basic *sheva mitsvot benei Noah* every society is required to undertake.

This *peshat*, although not explicitly stated, is harmonious with a 1981 responsum of R. Moshe Feinstein.<sup>2</sup> Asked by an unidentified (American?) government official, denoted by R. Moshe as "*sar ha-medina*," for the Jewish view on capital punishment, R. Moshe concisely but comprehensively summarizes the procedural and substantive elements of the Torah's capital system. In the synopsis, R. Moshe does not reference the *Mishna* regarding the "murderous Sanhedrin" at all. He does cite the principle of not hearing capital cases without the *Bet*

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*Hamikdash* standing, but clearly indicates its relevance is only to Jewish courts:

It is not possible to adjudicate capital cases except when the *Bet Hamikdash* is standing and the Sanhedrin of 71 sits in the *lishkat hagazit*, and that is why we have not adjudicated capital cases even in countries wherein there was permission from the sovereign for *the Jews to adjudicate for themselves* under Torah law.

In consonance with the *peshat* from *Devarim*, R. Moshe clearly restricts the limitation upon capital punishment of a functioning *Mikdash* to the adjudication of such cases by the Jewish community operating a halakhic legal system.

To further emphasize this point, R. Moshe goes on to state in the responsum that “all of this”—all the principles he summarizes in the responsum including the requirement of two witnesses, *hatra’a*, a standing *Mikdash*—only applies

. . .when the prohibition against murder has not been rendered null; but for someone who murders people because for him the prohibition against murder has become meaningless, and similarly when the number of murderers has become many [due to the prohibition becoming ignored], we apply [capital punishment] in order to deter murder for to do this is to save society.

One could opt to interpret this final point to allow for Jewish communities to impose capital punishment when murder is rampant, but one need not go this far. Clearly, R. Moshe is speaking to a general society, one in which the inquiring *sar ha-medina* serves, to allow capital punishment when murder is common.

Nevertheless, concluding that the *peshat* of the *pesukim* and relevant halakhic sources permit us to support the utilization of capital punishment in the general society in which we live need not compel us to blindly support the manner in which capital punishment is implemented. In fact, we can contribute to society at large by advocating that some of the basic principles contained in Judaism’s capital punishment system ought to inform, if not be incorporated into, general society’s system. To wit: the many safeguards halakha demands in a capital case—two uncontroverted witnesses, mental capacity and knowledge aforethought by the perpetrator, intense investigation and cross examination, etc.,—clearly argue that, whether by using these specific safeguards or

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others, a capital justice system must have processes that yield a high level of certitude that a person sentenced to death is in fact guilty of the crime and deserving of the punishment.

### III. CONTEMPORARY RELEVANCE

In the context of the United States, serious questions have been raised in recent years as to the accuracy and fairness of this nation's capital punishment systems.<sup>3</sup> Perhaps best known is a U.S. Department of Justice study released in 2000 that found substantial disparities in federal death sentences.<sup>4</sup> Additionally, for many years there have been persistent questions as to whether racial bias plays a role in the capital punishment system inasmuch as a majority of death row defendants over the years has been comprised of racial minorities.<sup>5</sup>

Clearly, one cannot defend a capital system that might have such shortcomings on the basis of halakha's general acceptance of capital punishment. But one need not demand that capital punishment be abolished either. Indeed, in light of the fact that we, tragically, live in a society wherein heinous murders regular occur, one may suggest that abolishing capital punishment altogether would be at odds with the wisdom of *Yahadut*.

What would be most appropriate, in light of the serious questions raised and halakha's clear demand for a capital punishment system that is administered with fairness and accuracy, would be for Orthodox Jews and their spokesmen to advocate for a moratorium on all capital punishment pending the implementation of appropriate reforms.

### IV. CONCLUSION

This brief essay has outlined the dimensions of our tradition's discussion of the processes, utility, and values associated with a capital punishment system that are highly relevant to the contemporary debates over these very issues. As is often the case, the Torah does not offer a one-sided view of an issue, but reflects the Divine nature of God's creation in incorporating and balancing the competing values that are inherent to any human challenge. While recognizing there might be multiple means to fulfill a single goal, in its heart, Judaism seeks to achieve the single goal—fostering a world in which each human life is protected as unique and sacred.

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### NOTES

1. Letter to David Luchins on file with the Orthodox Union.
2. *Iggerot Moshe, Hoshen Mishpat* II, pp. 293-294.
3. One must be mindful that the United States does not have a single, unified criminal justice system. In addition to the federal government, each of the fifty states and the District of Columbia has its own criminal code and procedures. Most criminal prosecutions, including murder prosecutions, are brought under state laws before state courts. A majority of states have provisions for capital punishment as part of their criminal justice code, but, beyond minimal requirements set by the U.S. Supreme Court, there is considerable variance among the states with regard to parameters under which, and the frequency with which, capital cases will be brought.
4. Survey of the Federal Death Penalty System, accessible at:  
<http://www.usdoj.gov/dag/pubdoc/dpsurvey.html>
5. The Supreme Court addressed issue in the case of *McClesky v. Kemp*, 481 U.S. 279 (1987).