

A Sermon for Kol Nidrei Evening, Rabbi Peter J. Rubinstein Yom Kippur 5760

[All **bolded** text appears in the original transcript.]

The calm of this new year has already been shattered by the massacre at Wedgewood Baptist Church in Ft. Worth, Texas. Violence continues. Our prayers and our tears are with those families that have lost their children this week.

Kol Nidrei assembles us for self-examination, to be aware of ourselves, the civilization we are building, and the world we have inherited. It is time to give serious thought to what we have wrought. We begin with a piece of history. On April 10, 1937, while robbing a restaurant on the Lower East Side, six men killed Police Detective Michael J. Foley. After being arrested, one of them, apparently to conceal his own personal involvement, accused a seventh man, Isidore Zimmerman, of having supplied the group with weapons. All seven of the gang were found guilty. Five were executed in the electric chair. One died of natural causes. Two hours before Zimmerman was scheduled to be electrocuted, his death sentence was commuted to life in prison.

Zimmerman spent the next 24 years in New York state penitentiaries. In 1962, finding that a prosecutor in the D.A.'s office had deliberately perjured testimony and had suppressed evidence that might have proven Zimmerman's innocence, an appeals court overturned his conviction. Twenty one years later the State Court of Claims awarded Zimmerman \$1,000,000 for his ordeal.

Zimmerman died four months later, having spent 24 of his 66 years in prison for a crime the state finally admitted he had no part in. This example is one among others where judicial miscarriage had horrifying outcomes.

Today we traditionally spend time thinking about sin and its consequences, examining judgment and redemption, reward and punishment. This evening we will recite a lengthy litany of sins. Acknowledging that God is our judge and jury we plead to be sealed in the book of life. We may deserve reprimand for some sins, even punishment for others.

Our Torah recognizes that there are three motivations for punishment. First, to help a person learn proper behavior. Second, to protect ourselves and the community by deterring further crime. Third, to take revenge.

Our first encounter with punishment often begins in childhood. We, as parents, punish children in order to teach them right from wrong. We accentuate the importance of sharing, decency, working hard, living effectively with other people. At some time every parent introduces a child to punishment: we send them to their room, we withhold allowance, we ground them for a month, often saying, "I am doing this for you."

The value of punishment emerges in our tradition. B'tai Din. Jewish courts of law intended to teach proper conduct to a Jew who had transgressed. At its best, punitive measures help us understand that we have done wrong, that we have the ability and must be given the opportunity to rectify our mistakes.

When the offense has more serious consequences for the individual and society, the punishment focuses on deterrence and retribution. The community assumes the

responsibility to protect itself from further offenses. We take criminals off the street, especially for repeated crimes.

Punishment needs to fit the crime, and we expect that punishment will also deter crime. We impose fines and incarcerate in our judicial system because we believe that if the law-breaker hurts enough, they will not again break the law.

Our Jewish legal system has similar goals: that is to punish in order to teach, to improve, to deter, to extract retribution. What concerns me most is when we try to use revenge as an appropriate punishment for wrongdoing.

Albert Camus described the reflex we all have: "Whoever has done me harm must suffer harm; whoever has put out my eye must lose an eye; and whoever has killed must die. This is an emotion...a particularly violent one..."

The Talmud describes this desire to take revenge as if one is carrying a serpent, that is, it can attack you without warning. Another Talmudic passage encourages us to turn aside from revenge with the promise that if we do not retaliate with vengeance, our transgressions will be passed over.

Our tradition recognized the vicarious, costly desire to hurt the ones by whom we feel injured. Our tradition turns us aside from indulging the instinct for revenge.

We Jews, however, are part of an American culture that honors vengeance especially in its choice to impose the death penalty.

The execution chambers in our country are increasingly busy. For example, tomorrow on Yom Kippur Day, Marvellous Keene will be executed in Ohio. Ricky Wayne Smith will be executed the day after in Texas and on Friday there will be three executions, one in Texas, one in Florida, and one in Delaware. The population on death row has exploded to some 3,500 inmates. Only China, Iran and Saudi Arabia, nations with judicial systems we hardly emulate, execute more prisoners than we do. America is a world leader in imposing the death penalty for juvenile convictions. We in the United States have also executed 34 men with mental retardation, individuals who could not read the statements they signed. For example, James Roach from South Carolina had an IQ below 70. He had Huntington's Disease, which causes the brain to deteriorate....

Our state of New York has, for years, refused the death penalty and only recently passed death penalty legislation. We inch precariously closer to reactivating the death chamber. **The death penalty is a prime example of the most vicious demonstration of revenge. It is time to acknowledge what we are doing by supporting it, either by agreement or inaction.** By supporting it we put innocent people to death. Examples are uncovered too often. ...

A *New York Times* editorial comments, "The exonerations are not a sign that the system works. The innocence of many death row prisoners is discovered only because outsiders went to great time and expense to investigate when the courts could not." The Innocence Project at Cardozo School of Law is an example of such perseverance. They helped to free seven death row inmates. Also, as part of a class project, Northwestern University journalism students found the evidence that exonerated three men on death row in Illinois. Only sheer luck saved the life of Walter McMillan, who was released from Alabama's death row after having spent six years there on the basis of perjured

testimony and withheld evidence. After listening to a tape recording of a key witness against McMillan, a volunteer lawyer flipped the tape to see if there was anything on the other side. Only then did he hear the same witness complain that he was pressured to frame McMillan.

A system that requires college students to provide justice as a class project cannot be called functional. A system that holds the balance of a man's life in the flipping of a tape cannot be called reasonable. How many innocent people may yet be put to death on our behalf, because there was no one to champion their cause? The death penalty will kill innocent men and women. Further, the death penalty is not an effective deterrent. ...

Criminologists, police chiefs and sheriffs, people who are bullish on the law, don't believe that it is a significant deterrent. In fact, some studies find that homicides may actually increase immediately after a well-publicized execution, and murder rates have plunged in places in this country and around the world where there is no death penalty. The death penalty is also unfair and unjust. It is discriminatory.

When Supreme Court Justice Harry Blackmun spoke at Central Synagogue in 1993, he confided that he was certain that more than a few innocent people have been executed in this country. Justice Blackmun had shamelessly supported the death penalty. But in 1994, he officially went on record reversing himself. In a dissent, he wrote: "From this day forward, I no longer shall tinker with the machinery of death...I feel morally and intellectually obligated to simply concede that the death penalty experiment has failed. It is virtually self-evident to me now, that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies."

Blackmun knew that capital punishment was racially discriminatory, inconsistently applied, and fraught with constitutional danger. The skin color of the victim and the perpetrator, financial resources, the location of the trial, the judge, the expertise of lawyers are all capricious matters that determine whether the accused will live or die.

In addition to executing innocent people, the death penalty's ineffectiveness as a deterrent, and its being discriminatory, constitutional requirements also make capital cases exorbitantly expensive. Tabak shows, for example, that in North Carolina, death penalty cases cost at least two million dollars more per execution than life without parole. Another study in Florida shows that the cost of a capital case is three million dollars more expensive than a case carrying a sentence of life without parole.

For us Jews, capital punishment is antithetical to the principles of our faith.

The eye for an eye argument used vociferously by death penalty proponents does not fit with what we believe. Certainly the Torah and subsequent texts contain long lists of capital offenses and are explicit in the matter of the death penalty. But remember that among the crimes punished by death were working on the Sabbath, adultery, blasphemy, cursing a parent or being an extremely unruly child. Dare I say that few of us here would survive a literal application of Torah law.

Before we use the eye for an eye argument to support the modern-day death penalty, we need to be especially cautious. By the time we emerged as a religious community, our rabbinic authorities used textual devices to prevent the death penalty. The rabbis

reinterpreted the Torah using God's aversion to murder as a basic principle. And they referred to Torah texts which explicitly prohibited capital punishment.

The *lex talionis* statute of an eye for an eye was reinterpreted to mean the worth of an eye for an eye. We have no recorded history of putting out eyes, amputating hands, or knocking out teeth. Criminals needed to pay for wrongdoing, but not with the mutilation of their bodies or with their lives. Financial fines were imposed, isolation, and even putting into *cherem* (excommunication), exile from the community was used. But the eye for an eye legislation remained conceptual and used only in its interpreted form. "You shall not murder," one of our Commandments, contradicted the call for punishment by death.

Our forebears believed that only God had the right to take life.

The most famous example of the rabbinic reluctance to impose a death sentence is in the Mishnah. 'A Sanhedrin that effects an execution once in seven years is branded a destructive tribunal'; Rabbi Eliezer B. Azariah says: 'once in 70 years.' Rabbi Tarfon and Rabbi Akiba say: 'Were we members of a Sanhedrin, no person would ever be put to death.' For most of our history, the argument was theoretical. We lived under foreign powers. We lacked the authority to execute until the creation of the modern state of Israel. Israel imposes the death penalty for treason and war crimes only. An example is the execution of Adolf Eichmann.

Eichmann was executed December 1961 for "crimes against the Jewish people" and for "causing the killing of millions of Jews". Despite the murderous onslaughts of terrorists throughout Israel's history as a state, Eichmann is still the only one to have been executed in Israel even though hundreds of defenseless Israelis have been murdered by heinous terrorist thugs. Eichmann's execution does not make a case for capital punishment. If we executed only those who have killed defenseless millions, there would be far less debate about this matter.

I believe we must abolish the death penalty. We, as Jews, should not become murderers. Execution is not simply death. Capital punishment is premeditated and calculated murder. For there to be an equivalency between the death penalty and murder, execution would, in Camus' words, have to "punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him, and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life."

I cannot even imagine what it is like to send 2,000 volts through three electrodes attached to the head by a tightly fitting cap and strapped to the ankles. I dare not imagine the gassing of a human being or hanging or the loud sound of lungs being emptied of air by lethal injection before the poison stops the heart. I do not want the state to do this on my behalf. Taking a person's life by plan, by calculation, and in cold blood, is murder.

Capital punishment is an ignoble, irrevocable act of revenge.

When Samuel Pizar, one of the youngest survivors of the Nazi death camps, wrote his memoirs, he recounted an occasion in which he responded to a fellow student's practical joke with punches and rage. Then he caught himself. He was mortified. "Fool," he said to himself. "What have you done?...Have those Nazis succeeded after all? You

have got to learn some self-control. You have got to lock up the hoodlum in you and throw away the key..."

I worry about what I would do if any person harmed those whom I love. No doubt, I would want an attacker to feel pain. And let it be that murderers spend their entire lives in prison, facing the reality of their broken lives. We are responsible for how we punish. We are responsible for what we do. We can punish to educate and improve and to redeem. We can punish to deter, to exact retribution, to protect. We cannot punish out of revenge. It makes us murderers. It diminishes us. It begets violence. Revenge turns us into thugs. We have no right, no reason, to take life.

So tonight we stand before God. We consider the most difficult, most troubling matters in our lives. For some of us, it is the moment we strip away masks and reveal ourselves in the starkness of this night's meaning. We have sinned. We have done wrong. We have caused pain. God cannot forgive our sins unless we have firm resolve for what we mean to accomplish. God asks of us to give life, not to take life. God pleads with us to heal each other, and not to harm each other. God needs us to build this world, not destroy this world. These are the missions before us. May we be worthy of God's trust in our goodness, the tool God gave us to help complete this creation. May we have strength for it all. Amen.

[This sermon appears in Sermons, Homilies, & Reflections on the Death Penalty, published by the Religious Organizing Against the Death Penalty Project. Please note that some of the statistics cited in this sermon are now out of date.]