

# Does Judaism Condone Capital Punishment?

## By Rabbi Dan Polish

While the Torah supports the death penalty in principle, it places formidable obstacles to its implementation -- and the Talmud nearly drove the executioner to extinction.

### **Does Judaism condone capital punishment?**

Supporters of the death penalty often cite the Bible to bolster their position. "Ye shall take no ransom for the life of a murderer...he shall surely be put to death" (Numbers 35:31). Indeed, the Torah specifies a full litany of offenses for which a person may be put to death, including murder, idolatry, blasphemy, adultery, violating the Sabbath, wizardry, and rebelling against one's parents. The punishments for each transgression are noted as well--stoning, burning, and slaying by the sword.

But the recording of these laws in Scripture may give a false impression about the actual practice of capital punishment in ancient Israel. While the Torah supports the death penalty in principle, it places formidable obstacles to its implementation. HUC-JIR Bible Professor Dr. David Sperling has observed that the well-known *lex talionis* (law of retaliation), "Thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe" (Exodus 21:23-25), may appear to endorse capital punishment, but it is actually a formula for restricting the punishment to be meted out. "In contrast to the Code of Hammurabi [an earlier legal code well known in the ancient Near East]," Professor Sperling writes, "biblical law limits the death penalty to the murderer--a family member cannot be executed in his/her place" (Exodus 21). Moreover, the defendant may not be put to death unless two (or in some cases three) eyewitnesses testify against him or her. Each witness must be so certain of his testimony that he personally would be willing to carry out the execution. Deuteronomy 19:13-21 asserts that a false witness is subject to the same punishment as the defendant--including, presumably, death.

The Torah also distinguishes between a premeditated murder and unintentional killing. In the case of an unintentional slaying, the killer is permitted to take refuge in one of six cities on the other side of the Jordan River (Numbers 35:9-15, Deuteronomy 4:41-43, Joshua 20). The pattern of not inflicting the ultimate punishment is established early in the Bible. After Cain kills his brother Abel in a fit of rage, God does not demand Cain's life in retribution; instead, Cain is set free to wander the earth. The mark God places on Cain's forehead is not a sign of punishment, as is commonly assumed, but one of protection; it served as a kind of mobile "city of refuge," warding off anyone seeking to avenge the wrong Cain had committed.

### **Interpretations in the Rabbinic Age**

The rabbis who compiled the Talmud in the first centuries of the Common Era interpreted and expanded upon the biblical laws governing capital punishment. They too stipulated transgressions deserving of death, among them idolatry, bestiality, blasphemy, illicit sex, violating the Sabbath, witchcraft, and adultery in certain circumstances. Then, in meticulous detail, they linked each crime with its corresponding method of execution (stoning, burning, strangulation, or slaying by the sword).

Grisly punishments all--but it is highly doubtful that the rabbis ever actually imposed the death penalty. After a long, elaborate discussion of the class of capital crime befitting

the stubborn and rebellious son and a description of how the execution was to be carried out, the Talmud states: "It never happened and it never will happen." The passage then explains that the entire matter is presented purely for study: "That you may study [the Torah for its own sake] and receive reward" (Sanhedrin 71A). In other words, the discussion of capital punishment in the Talmud seems to exist only in the realm of theoretical speculation, just as -- after the destruction of the Temple in Jerusalem -- all the laws of sacrifice were retained and studied long after the sacrifices ceased to be offered.

### **The Trial**

Capital cases were heard by a court of twenty-three judges (Sanhedrin 2A) and, in some cases, seventy-one judges (Sanhedrin 2A, 15A, & 16A), all of the highest character. "Anyone fit to try capital cases could also try monetary cases," the rabbis stated, "but a person fit to try a monetary case may still be unfit to try a capital case" (Nida 49B).

According to Rabbi Judah, a person whose disposition is cruel should be excluded from sitting in judgment in such cases (Sanhedrin 36B). Not only should a person's own record be pure and righteous, but his ancestry had to be free of blemish before he could sit on this court (Sanhedrin 36B). The judges sat on three rising semicircular tiers, as in an amphitheater, in order to see one another, and all murder cases were tried in the light of day; in these ways, everything could be open and aboveboard. Two judge's clerks stood before them, one to the right and the other to the left, and wrote down the arguments of those who would acquit and those who would condemn; both clerks were necessary as a precaution against any mistake. Rabbi Judah said that there were three such clerks: one to record arguments for acquittal, a second to record arguments for conviction, and a third to record arguments for both acquittal and conviction. Witnesses stood in front of these tiers of judges.

The stringent demands on witnesses in capital cases rendered almost impossible the likelihood that a defendant would be convicted. To ensure that a witness's testimony was not based on conjecture (e.g. circumstantial evidence), hearsay, simple rumor, or the observations of another witness, the court would "fill the witness with fear." Witnesses were asked to establish the day and hour of the crime and explain the circumstances surrounding it (Sanhedrin 2B). They were then warned that they would be subject to rigorous questioning and relentless cross-examination and held personally responsible should the accused be falsely condemned. Bearing false witness in a capital case was in itself a crime punishable by death (Sanhedrin 9B, 32B, 86A, & 89A).

A witness in a capital case had to have seen the entire crime as it was being committed; circumstantial evidence was inadmissible. For example, Rabbi Simeon Ben Shatach witnessed the following incident: "I saw a man chasing another man 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 testify against him, because he did not see the actual crime (Sanhedrin 37B).

Not only did witnesses have to see the crime take place, they had to have warned the perpetrator prior to the act that he was about to commit a capital offense. According to Rabbi Judah, a warner even had to inform the perpetrator of the type of execution prescribed for his crime (Sanhedrin 8B). The perpetrator was then obliged to have verbally acknowledged this warning by saying something like, "I know I am warned not to do this;" to have admitted his liability to death by adding something like, "even though I shall be punished by such-and-such manner, yet I want to go ahead and commit this crime;" and to have committed the murder within the time needed to make such an

utterance (Makkot 6A). The great eleventh-century commentator Rashi explains this last restriction by suggesting that if a murder was delayed longer than the time necessary to make an utterance, the plea might be accepted that the perpetrator had forgotten the warning altogether. Furthermore, two or three witnesses had to have similarly interacted with the accused. And on the unlikely chance that such witnesses could be found, the Court could convict the accused only if guilt could be proven beyond a reasonable doubt.

According to the Talmud, "A doubt in capital charges should always be for the benefit of the accused" (Baba Batra 50B, Sanhedrin 79A). In reaching a verdict, a judge was free to argue in favor of the accused, but not against him. A judge who had argued initially for condemnation could subsequently argue for acquittal, but one who had argued for acquittal could not argue later for condemnation. Acquittal in capital cases required a majority of one vote, condemnation a majority of two. A verdict could be reversed for acquittal if errors were revealed, but no new evidence was allowed which would reverse a decision from acquittal to condemnation.

### **Staying the Execution**

Following a guilty verdict, provisions were made to stay the execution. A herald was dispatched to announce something like: "So-and-so, son of so-and-so, is going forth to be stoned because he committed such-and-such offense, and so-and-so are his witnesses. If anyone has anything to say in his favor, let him come forward and state it."

If someone offered to make a statement in favor of the condemned man, a retrial followed.

A person was stationed at the door of the court holding a signaling flag, while a horseman stood at the ready within sight of the signaller. If one of the judges said he had something further to state in favor of the condemned, the signaller waved his flag, sending the horseman to postpone the execution. Indeed, even if the condemned said he had something further to plead in his own favor, the court was obliged to reconvene (Sanhedrin 42B).

Rabbinic attitudes concerning the death penalty are also reflected in statements such as "a Sanhedrin that effects an execution once in seven years is branded a destructive tribunal." Rabbi Elizer Ben Azariah said, "Once in seventy years." Rabbis Tarfon and Akiba said, "If we were members of a Sanhedrin, nobody would ever be put to death." In that same Gemarra, however, Rabbi Simeon Ben Gamaliel dissented: "If we never condemned anyone to death, we might be considered guilty of promoting violence and bloodshed.... [We] could also multiply shedders of blood in Israel" (all Makkot 7A). Forty years before the fall of Jerusalem in 70 C.E., the rabbis abolished capital punishment altogether (Soncino Talmud, Sanhedrin page 161, footnote 10). Rather than applying the four methods of execution themselves, they ruled that punishment should be carried out by divine agencies (Sanhedrin 37B, Ketubot 30A, & 30B). In other words, a punishment so awesome as the taking of a person's life should not be entrusted to fallible human beings, but only to God.

This ruling does not mean the rabbis dispensed with punishment altogether. On the contrary, they expressed no compunction about decreeing corporal punishment--harsh physical suffering. If the rabbis/judges were convinced of a defendant's guilt in a capital

case, but the high standard of evidence did not permit execution, he would be sentenced to prison on a ration of bread and water.

The thrust of Jewish tradition and the historical positions of the Reform Movement impel us to oppose capital punishment in principle and in practice. A person wrongfully flogged for robbery can heal. A person improperly imprisoned for murder can be exonerated and set free. But someone put to death for a crime he/she did not commit can never be redeemed. If we are true to our faith and our tradition, we must respond to the imperative of its teachings and do everything we can to keep our society from committing the ultimate of injustices: the wrongful execution of an innocent person.

*[This article was written by Rabbi Daniel Polish, HUC-JIR class of 1968, who is the Director of the Joint Commission on Social Action of Reform Judaism and is a co-author with Rabbis Daniel Syme and Bernard Zlotowitz of Drugs, Sex and Integrity (UAHC Press). Reprinted by permission of Reform Judaism magazine, published by the Union of American Hebrew Congregations. Summer, 2002. Copyright 2002, Union of American Hebrew Congregations.]*