

A Traditional Jewish View on Capital Punishment

1. We are here gathered tonight because of a common purpose: the exercise of our democratic rights in seeking to secure the abolition of the death-penalty in this Commonwealth. I believe that the origin of our commonly shared opinion and the goal of our activities, our starting point and end point, are the same. We all begin with a deep and ineffable reverence for human life, and we aim at the legal abolition of capital punishment, which outrages this sense of reverence for Life. But the route we take from the starting point to the end point, from origin to goal, differs with each of us, and affects the quality, temper and mood of our opinions. Jew, Christian and agnostic, scientist and lawyer, each develops his opinion differently. I think, therefore, that we are acting wisely in giving expression to the different, individual and unique ways in which many of us arrive at the same conclusion, the necessity of abolishing the death penalty.

2. I speak as an Orthodox Jewish Rabbi. To me human life has infinitely more than sentimental or social value. It has the very highest religious value, for Man was created in the Image of G-d. When, therefore, we discuss the disposition of human life, we involve ourselves directly in our relations with the Creator. And if the problem of Capital Punishment is of such great religious import, my judgement on it must be derived from the classical sources of the Jewish Tradition.

Allow me to make several brief prefatory remarks on the nature of these sources. Jewish Law, which includes Jewish religion, philosophy, theology, morals and ethics, has two origins; they are the two avenues of the Divine revelation to Man. More well-known is the Written Law, which is Scripture. The Bible, or Written Law, is, to our way of thinking, the exact record of G-d's revelation to Moses. It contains a good part of the civilized culture of the ages that preceded it (the "Noahide Laws") with certain changes and additions effected by Divine inspiration. It contains the historical material



with which most of us are acquainted, ~~and~~ special chapters of Law dealing with the Temple ritual (which ~~were~~ committed to writing on the day the Tabernacle was built), ~~and the~~ a series of portions which Moses received at different times under this Divine inspiration, the Book of Deuteronomy which Moses delivered to the Israelites before his death, and, centrally of course, the Ten Commandments which all the world, according to Tradition, heard, and which Moses brought with him from atop Mt. Sinai. This Written Law, however, is not the ~~sum~~ total of all the prophecy of Moses. Furthermore, many passages of the Bible are inexplicable as they are, and still others make veiled references to commandments that Moses had received orally. To complement the Written Law we have the Oral Law, that body of laws and teachings and explanations which has been transmitted orally from father to son, from teacher to disciple until it was committed to writing in the great body of Jewish Law known as the Talmud. The Oral Law is, chronologically, older than Scripture. It elaborates upon the terse verses of Scripture and advances the authoritative explanations of the many difficult passages in it. Frequently, the interpretations of the Oral Law in no way seem inherent in the Biblical text itself. But that does not matter - to the believer - for the Written Law alone is of no value without the complementary Oral Law which began with the revelation of G-d to Abraham and all the righteous of all generations and came to its climax in the oral laws granted to Moses in his 40-day sojourn on Sinai. It is primarily the study of that Oral Law which has been the preoccupation of Jewish scholarship throughout the ages and which most authoritatively represents the real picture of Jewish thought.

So that in our talk this evening, when we will refer to the Bible, or to Scripture, or to the Torah, we mean the Written Law. And when we refer to the Talmud or Tradition, we mean the Oral Law. And while both have equal validity to the religious Jew, it is the Oral Law which gives the final and decisive interpretation of the <sup>W</sup>ritten Law, and not the other way around.



3. Well now, what of Capital Punishment in the classical Jewish sources we have mentioned?

To be sure, Scripture does provide for the death penalty in a variety of cases. Homicide, incest and idolatry are some of the crimes punishable by death according to the Bible. The total number of such cases is 15 directly mentioned in the Bible proper, with 36 added by the Oral interpretation of allusions to such punishment in the Bible itself. That makes a total of 51 cases of crime punishable by the extreme penalty.

Lest there be some here tonight who think that number rather high, let me remind you that only 160 years ago, in such advanced and civilized countries as England and France, the death penalty was mandatory in as many as 150-200 cases. That is 3 to 4 times as many as those provided for by the Bible several thousands of years earlier! If anything, therefore, the Written Law, while making provision for such punishment, tends to restrict its use rather than expand it.

4. Historically, the death penalty in Judaism fell into disuse in the year 30 CE, or 40 years before the destruction of the Second Temple in the year 70 CE. The destruction of the Temple in itself made the meting out of capital punishment illegal in Jewish life. Only while the Temple flourished (Maimonides, Sanh. 14, 11), while the influence of God could be clearly perceived in the world, was it legally possible for men to trust themselves with this dangerous weapon. With the destruction of the Temple, it became even theoretically impossible.

However, as we mentioned, even 40 years prior to that sad event was Capital Punishment, for all practical purposes, scrapped. The Sanhedrin - the Supreme Court of Jewish Law - which alone had the power to impose this terrible penalty, consciously exiled itself from its official place of convention in the Temple in order to automatically disqualify itself from imposing the extreme penalty. So that 1,925 years ago the Sages of Judea already found capital punishment so offensive, so reprehensible and obnoxious that they utilized legally approved means for circumventing the Written Law (requiring the penalty), thus bringing the Law to its full moral fruition.



5. But let us concentrate for a moment on the theme of Capital Punishment in the Bible itself. Investigation bears out four reasons for the inflicting of this extreme penalty.
- a- the demands of Justice....."a soul for a soul" ( )
  - b- the ethical reason: the maintenance of a pure society...."thou shalt uproot the evil in thy midst" ( )
  - c- the social or pedagogic reason: the warning to potential lawbreakers....  
"so that the people may hear and see and sin no longer" ( )
  - d- the metaphysical reason: as an expiation of a grave sin. This reason involves the individual alone, unrelated to society.

Here, then, are four reasons for Capital Punishment which no group such as this can lightly dismiss. And yet, they serve as starting points for this Jewish opinion against the death penalty!

First, let us note that in the reasons given, not one is a matter of vengeance. It plays absolutely no role in the <sup>rationale of penal</sup> ~~the/Biblical/system of~~.

Second, the Oral Law gave a strict interpretation to these four reasons so that the reasons themselves served as deterrents and as restrictives. Thus, it seems that the Oral Tradition required all four reasons to be operative in any one case of capital ~~trial~~ in order for the penalty to be administered. If even one was not applicable, the death penalty was not given.

Two examples:

- a-Metaphysical : "ma'avir kol banav la'molech" was acquitted. Maharsha (Sanhedrin, quoting Smag) gives as reason: crime too great to be expiated by death penalty.
- b-Social-pedagogic : Case mentioned above where the Sanhedrin voluntarily exiled itself from Temple in year 30 CE in order to disqualify itself. Only in extremely rare cases did they return to give a capital verdict, and even then was an extra-legal decision. But the reason the Sanhedrin gave for this self-disqualification is of interest: ~~Ma'she'nisrabu~~ ha'rot'schin....crime-rate up.....i.e. experience had proven that, under those specific conditions, social-pedagogic reason non-operative.



Therefore a capital verdict would not be fulfilling all its requirements, hence abolished it. THIS IS diagonally opposite to the reasoning employed by those of our contemporaries who favor retaining C.P. Those <sup>&</sup>ages, had they lived today, would have pointed to the many/well-publicized instances of C.P. and then the fact that it does not really help.

6. Let us give some more instances of the attitude of the ~~Oral~~ Law towards C.P.

I leave it to you, my audience, to make most of the comparisons with current accepted procedure.

a-No circumstantial evidence. Only two (min.) extremely reliable witnesses who witnessed the act simultaneously and hold up under extreme cross-examination

b-Confession, even when willingly offered, inadmissible, completely out

c-Eidus she'i ata yachol le'hazimah...the witnesses thus had to know that if contradicted they themselves liable to same punishment.

d- Ignorance of the Law is an excuse - any Law. Has'ra'ah...included warning also of penalty, criminal had to answer: "I know, and nevertheless..."

e-The insane and minors not liable to the penalty. Can't go into all details, but suffice to say that Talmud much more lenient than modern law in definition of insanity for legal purposes ("..between right and wrong").

f- Capital case judged not by Jury of laymen, but by court of 23 Musmachim - ordained and experienced judges. Some of the qualifications: wisdom in religion, in secular culture, some knowledge of medicine, math etc, especially great facility languages, piety, the over-aged, sterile and childless eliminated (achzarius), reputation, despise money, general demeanor, a judicial "sense", a sentiment for the "underdog"...

g-Judges - no heavy eating, no intoxicating liquors, absolutely no levity.....

compare to Chapin Jury watching floor-show with certain famous actress entertaining....

h- Yad ha'eidim tihyeh bo ba'rishonah..if not sure, witnesses would retract.....

no paid executioners do society's dirty work



7. The tendency of the Oral Law in restricting the area of C.P. as legislated in the Written Law is clear enough. And this tendency found its greatest expression in two Talmudic statements, one a record of popular opinion and the other a statement by two of the greatest figures in the history of the Jewish Tradition.

- a- in this first statement, the Talmud records that a Court of Law which rendered the extreme verdict as ~~often~~ much as once in seven (7) years achieved a reputation as a "murderous court". According to other Talmudic sources this unflattering appellation was given to courts which rendered the verdict even as infrequently as once in seventy (70) years. The nature of the stigma reveals the extent to which Capital Punishment had been in disuse amongst Jews for generations and generations.
- b- A statement by R. Akiva and R. Tarphon, two of the towering personalities of the Talmudic era and its chief legislators, who lived immediately after the Destruction of the Temple, when C.P. was legally impossible. They stated that had they lived at the time of the Temple, when this penalty was theoretically possible, and had they been members of the Sanhedrin NO MAN EVER WOULD HAVE BEEN SENTENCED TO DEATH.

8. Clearly, what we have here is a case of the Law stating a principle and allowing succeeding generations of legal authorities <sup>either</sup> to apply the principle in full or, by utilizing legally accepted methods, to restrict the principle in practice. We have seen how Jewish Law has, accepting the PRINCIPLE of capital punishment, tended to abolish it in PRACTICE. The weight of Jewish Tradition is decidedly against the use of the extreme penalty. So that if I were asked for a clear and unequivocal statement of opinion on the matter, I would say that IN PRINCIPLE I can understand and approve of C.P. But IN PRACTICE I believe it to be reprehensible, dangerous and unquestionably evil. The Biblical principles of Justice, of an ethically pure society, of social pedagogy and metaphysical expiation are all goals towards which we must strive. But death is not one of the methods of reaching those ideals. This, to my mind, is the judgement of Jewish Tradition. This is how Jewish thought, accepting the two-fold source of Revelation of G-d, the written and the oral, interpreted the Will of G-d. And it is a Will for Life, not death.



9. I know that this "in-principle" affirmation of the justice of Capital Punishment, and the "in-practice" opposition to its use as a penal tool of the state, may seem paradoxical to some, especially when we stress that there is no "conflict" between the Written and Oral Laws, which is unthinkable, but rather a definition of the one by the other. Yet the Bible itself - without recourse to any oral tradition - mentions specific cases where ideally, "in-principle", the death penalty should be administered, but where provision is made, "in-practice", for some substitute penalty. Let me read to you three verses in Exodus, chapter 21, verses 28-30.....The English translation is weak here because of the beginning of verse 30 which reads "if there be laid on him a ransom", which follows the usual translation of IM, but which here should be translated as the same way KI or ASHER, as an introductory, but not conditional, preposition. Thus criminal neglect of one's property which is a proven public menace and which results in the death of an innocent party is, "in-principle", a case of homicide punishable by death. But "in-practice", the accused can be fined instead. The medieval Spanish commentator, Ibn Ezra, compares this law to that of "an eye for an eye", so roundly misinterpreted by most people. This latter has always been accepted, by Jews, as an "in-principle" juridical ideal. i.e. he who caused the loss of an eye is deserving of losing his own, and "in-practice" must pay for the value of an eye.

Thus, the Bible itself contains explicit or near-explicit cases where a harsh penalty, required by the strict demands of Justice, is curbed in practice because of a variety of reasons, not the least of which is, I assume, a deep reverence for human life.

I might add in passing that this sort of dichotomy forms the basis of the Jewish rationale of animal sacrifice as once practiced in the Temple. Here is a ritual which the ancient primitive world accepted as a magical attempt at propitiating angry gods. In Judaism, however, according to its most brilliant interpreters, the sacrifice was an acknowledgement by the person bringing the offering, that "in-principle" he deserves the fate of this poor animal, but that "in-practice" he is being given another opportunity to repent and rectify what needs rectification.



At this point some of you may wonder: if we are to regard the Biblical approval of Capital Punishment as only ideal, what was the necessity of its inclusion in the first place? Let us answer ~~these~~ questions very briefly and leaving the details to your imagination. First, a statement of ideals clarifies for us ~~the~~ our spiritual values. Thus, if homicide is, Biblically, punishable by death, and stealing by a big fine, then, although in practice we have no C.P., I have learnt the severity of homicide, <sup>as compared with stealing</sup> In my personal scale of values I learn that homicide, incest, idolatry and the like are major crimes. I need not remind you that in this manner the Bible has had extensive tho perhaps not sufficient influence on all Western thought. And second, as the Talmud itself states (Ketubot 30a), tho the practice of C.P. has been abandoned, the principle has not. Thus, while a human agency - such as a court of law - cannot enforce this extreme penalty, we who believe in the justice of G-d believe that He, in His omniscience and His omnipotence, will pursue the guilty one and mete out to him his just deserts. Man can never hope to completely do justice. G-d, Who is perfect, He <sup>does</sup> can achieve the ideal.

10. What we have tried to show in this discussion is that the Traditional Jew can accept C.P. as an ideal juridical abstraction, "in-principle", but that he rejects it categorically as an actual, practical penological instrument. In this opinion he reflects both the fundamental dedication to Justice, and the basic appreciation of human life, that are at the very center of Jewish life and thought.

When I conclude, therefrom, that the death penalty should be abolished in this Commonwealth, I do not mean to imply that Jewish Law should become the Law of Massachusetts. Certainly not. But I do mean that the general moral principles, the very principle of morality, which predominate and express the spirit of Jewish Law, that this should be embodied in legislation by this commonwealth to outlaw, once and for all, the extreme penalty which so often serves as an instrument of revenge rather than as a mode of justice or pedagogy or ethical action. If our civil law will adopt these moral attitudes, it will be richer in moral value, stronger in ethical fabric and nobler in spiritual content. And you need not share my theology to share that moral conviction.



And not only the possibility of mistakes should encourage us in our task. But the very idea of consciously <sup>& deliberately</sup> taking life should be repugnant to us. Some criminals might deserve it, but we dare not arrogate to ourselves the right to administer that kind of punishment. G-d Who gave life can and may take it back. And the laws of any state are the laws of men, not the laws of G-d. Which of us would be willing to pull the switch in an electrocution or otherwise execute a man? By delegating this gory task to a professional executioner we are merely acting like ostriches. The task is being done, and we share full responsibility, whether we witness the execution or not.

12. The movement to abolish capital punishment is one that is inspired by holiness, not by weakness; by a firm spirituality and humaneness, not by a syrupy sentimentalism. It is based upon a great esteem for human life. It recognizes that just as torture was once recognized as an instrument of justice, and as indispensable, and yet has been abolished as barbarian and savage, so must the death penalty be abolished as a relic of an age long gone by.



I believe that the abolition of capital punishment will have a subtle but extensive educational effect. It will teach society and generations yet unborn that here on this continent and this Commonwealth, in an age stained with the blood of innocents and in an era in which were perfected the most diabolical of instruments calculated to demolish masses of human beings, at this time and place of wanton disregard of humane values, a reaction arose against this deprecation of the Divine Image in Man, and men and women of good will assembled to reaffirm their faith in the Creator of all men. Life who alone has the right to take it back, and that, beginning modestly with concern for the miserable lives of a few outcasts, a few rejects of society, initiated a new feeling of reverence in the presence of Life, the most precious creation of G-d Almighty. This new respect for human life cannot fail to leave its imprint on our young. It will be a noble, valuable lesson in human dignity.

13. Certainly then, capital punishment should be outlawed. It is high time that America of 1955 caught up with Judea of the year 30; indeed, with the Children of Israel of the year 1,500 BCE.

Let us make punishment more humane, more constructive, more civilized. Above all, let us always remember that not only Man with a capital M ~~was created~~, but that all men, small, individual men, every single man - was created in the Image of G-d.

If that is the purpose to which you have dedicated yourselves, it is a noble purpose. You have come to support that Image of G-d. May He, in turn, support you, give you success in your great undertakings; G-d bless you.

*for N. Lamm*