

"A JEWISH VIEW ON CAPITAL PUNISHMENT"

A Rabbi's Reaction to the Current Controversy

1. The issue of whether to retain or abolish Capital Punishment as one of the methods ~~with~~ of dealing with hardened criminals has recently been aired in the neighboring state of Conn. Most recently, the issue has become one of public controversy here in Springfield, and has been precipitated by the jury's verdict of C.P. in the tragic case of the double-killing last ~~summer~~ <sup>fall</sup>. However, the real issue is not ~~the~~ the justice of the jury's decision, which is clearly debatable and should not be publicly evaluated without complete knowledge of all the facts. The problem is a much greater one: the question of whether it is right, under any conditions, to inflict this most severe of all punishments.
2. The issue is understandably one which has caused great controversy. Life and death are weighty matters. Those who favor abolition of the extreme penalty maintain that mistakes are sometimes made by a jury; and one mistake is too many. There is sometimes serious question not only as to the proper identification of the killer, but as to the proper evaluation of his state of mind. Thus, in the recent case, there is the serious question of the sanity of the confessed criminal. They maintain, further, that C.P. accomplishes nothing for the criminal and little more for society. They believe that death is too cruel a punishment to be tolerated in our day and age.

Those who oppose them, and argue for the retention of our punitive system, are as firm in their opinion. Our laws do provide for careful weighing of evidence, they say. Death is one way to protect society against further acts against society by the criminal, and it serves as a warning and deterrent to other potential criminals. Furthermore, it is doubtful, they continue, whether life imprisonment is less cruel than death.

3. Now, to argue these matters endlessly may be virtuous, but the real answer on this critical problem of life and death cannot come from Man alone. It must ultimately be decided by reference to the Author of all life. And it is in the Torah, that G-d has revealed Himself. Well then, what do we find in the Torah? According to Judaism, is C.P. the right way to deal with renegades or not? Of course, it would be both ludicrous and presumptuous of me to say that I can speak authoritatively for Judaism on this immediate issue. Yet the Torah, as the "Tree of Life", certainly has attitudes and opinions on the matter, and it is to them that we shall refer for an answer - direction.

- \* 4. On the one hand, the Torah does mention a number of cases of specific sins that are to be punished with death. And in the rationale of its system of C.P., the Torah offers three distinct reasons.

- \* U'VIARTA HA'RAAH MI'KIRBECHA - uproot the evil in your midst - the ethical reason: to maintain a pure society
- \* LMAAN YISHMEU VE'YIREU VE'LO YEZIDUN ODE - to serve as a warning to potential lawbreakers - the social reason: to protect society
- \* KAPARAH - it is only by these extreme means that G-d will pardon the criminal and expiate his crime. This is the metaphysical reason - involves not society, but the individual.

Unless all three reasons are present, C.P. is impossible (note: thus MAAVIR KOL BANAV LE'MOLECH gets no C.P. because no KAPARAH). It is interesting to note that there is no motive here of vengeance, of personal revenge. That thought must be purged if civilization is to remain civilized.

5. And yet, conceding that the Torah decrees C.P. in some cases, and that/are there three very good reasons for it, I still feel sufficiently convinced of the Torah's abhorrence of C.P. to state that if I were asked to serve on a jury hearing a case which might involve C.P. that I would in all probability refuse to serve on grounds of not believing in C.P.

6. In general, the Torah looked askance at the extreme penalty even for those who richly <sup>de</sup>observed it. On this Shaabat Ha'gadol it is appropriate to mention the Midrash our Rabbis mention concerning the Exodus....MAASEI YADAI TOVE'IN BA'YAM V'ATEM OMRIM SHIRAH?.....  
The Egyptians well deserved the worst fate, and G-d was now administering it to them - and yet there fellow men have no right to feel triumph or happiness or even relief at a time of this sort.

7. It is G-d who gave life unto man. It is, therefore, only G-d who can take it. And the laws of our states, fine and noble as they may be, are the laws of men; they are not the laws of G-d.

8. Granted, you say, but after all does not the Torah speak of and recommend C.P.? How, then, can a devotee of Torah oppose it?

\* First, let us make it clear that by "Torah" we must mean not only the Written Law, Bible, but also Oral Law, the Tradition - i.e. Talmud. And as we shall later show, Talmud, representing the Oral Tradition, severely circumscribed the area of punishment by death, and in fact tended to its complete abolishment.

\*And even then it should pointed out that the number of cases of C.P. provided for in the Torah is small indeed. Whereas only 100 years ago, in such advanced countries as England and France, C.P. was mandatory in as many as 150-200 cases, the number of cases provided for in the Bible proper is 15, with 36 added by the Oral Law.

9. Historically, the death penalty fell into disuse, for all practical purposes, 40 years before the destruction of the Temple in 70 C.E. The Sanhedrin at that time decided that the number of capital crimes was of such great magnitude, that they would henceforth refrain from giving the death penalty. Notice this carefully: it was precisely BECAUSE the crime rate was increasing that the death penalty was abolished; in other words, C.P. was not serving its purpose of LEMAAN YISHMEU VEYIREU, it was not serving to prevent crime, and hence it was to be suspended completely. Only in extremely rare cases did the Sanhedrin return to its place in the Temple in the course of those 40 years in order to render a verdict of C.P., and even then it was an extra-legal decision (see Avodah Zarah 8b, Shab. 15a and Sanhedrin 14a and in Tossafot). \*When the Temple was destroyed, the imposing of the death penalty was legally impossible. Only while the Temple was established (see Maimonides, Sanh. 14, 11), while the influence of G-d was felt in the world, could men trust themselves with this extremely dangerous weapon. When that House of G-d went down, we were prohibited from indulging in C.P. \*\* And even before that, when the "lesser" Sanhedrins of 23 judges were qualified to render the extreme decision, even then a Beth Din which condemned a man to death as often as once in seven years - or according to others, once in 70 years - was regarded as "murderous"

10. The concern of Jewish Law for human life, its fear of a mistake and miscarriage of justice and general reluctance to execute the death penalty, are revealed in the elaborate and strict requirements and rules of evidence, in the mode of execution and in the deportment of the judges during the trial and during the execution.

\*The rules of evidence were such as to make C.P. virtually impossible.

\*No circumstantial evidence ever accepted in such cases.

\*Confession, even if willingly offered, was never accepted or considered

\*there had to be two, extremely reliable witnesses who witnessed the crime simultaneously

\*the testimony had to be such that, if they were lying, they could be encountered with opposing witnesses. If that happened, the witnesses who testified falsely were themselves liable to C.P. So that a witness in a capital case had to be completely convinced of the complete truthfulness and certitude of his testimony.

\*ignorance of the law is an excuse. Hence, the witnesses had to be present before the crime was done, had to warn the potential criminal of the gravity of his act and the severity of punishment, and the criminal had to answer, "I know, and nevertheless..."

\*Insanity was grounds for dismissing a case. It was to be dealt with carefully and given great weight

\*Furthermore, according to Malachah, and it is explicitly so in the Torah, the method of execution is different from common practice. In our society, judges and juries and witnesses are all respectable people who did not expose their sensitive souls to the horror of execution. That "dirty" work they leave to a paid executioner. Not so in Jewish Law. YAD HA'EIDIM TIHEYEH BO BA'RISHONAH - the witnesses themselves, those on whose testimony the whole case rests, they are the ones to do the executing - or to begin it, and after them the others - no paid executioners. A witness who was not absolutely, & beyond any kind of doubt, convinced of the facts, would not himself cast the first stone.

\*In addition, the concern of Judaism for life, its sympathy for the accused - even if guilty - and its serious approach to the questions of life and death, left its imprint on the rules for behavior of the participants in a capital trial. The 23 judges of the Jewish court, roughly equivalent to our 12 jurors, were not permitted to drink any wine or other hard drink during the course of the trial (not only when court was in session). They had to reduce their normal intake of food. Any kind of levity was absolutely forbidden. They were determining the mortal fate of a human being; how could they, then, even think of levity or frivolousness? I wonder what our ancient Jewish judges would say about a jury of 1955 which is locked up in a hotel nightclub after court-hours and are treated to a show and other entertainment, rather than having the gravity of the case constantly borne in on them.

\*We could go on and on, showing the ways of Judaism in such matters, the Rabbis' injunction to remember that the commandment VE'AHVTA LE'REIACHA KAMOCHA applies even to the guilty party being executed, and that therefore his body is not to be mutilated, and he is to be drugged so as not to experience pain. So many more examples could be given.

11. So that the tendency of our Rabbis was, clearly, so to circumscribe C.P. as to abolish it entirely. The great Sages R. Akiva and R. Tarphon, both of whom flourished after the loss of Judean independence, and so after the dissolution of the Sanhedrin and C.P., both said that had they belonged to the Sanhedrin and sat in on such cases, no man would ever have been executed. (Mak. 7a).

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\*Thus, by practically outlawing the extreme penalty, they <sup>indicated</sup> considered that, except for extremely rare circumstances, the Torah's death-penalties were to be considered as mostly ideal, that is that the Torah itself told us not to apply them to real conditions.

\*If so, you ask, what is the use of the Torah's words? Why did the Torah mention them?

\*First, because it provides for a method of evaluation of sin. It tells me which is the more serious of two crimes, and therefore imparts to me ethical knowledge - of what am I to be most beware in my life. It teaches me the values of life. Thus: human life is sacred; the Sabbath is sacred; morality is sacred; all those whose violation is punished, even only in theory, with C.P. ~~is-sa-~~ are sacred.

\*Second, the actual C.P. has been abandoned, the principle of C.P. has not. Thus, while a criminal cannot be executed by his fellow-men in a court of law, G-d, the Perfect Judge, will deal with him in His way, and the criminal will ultimately not escape his punishment (Ket. 30a).

\*So that the Torah must mention these penalties anyway, in order to teach us the relative seriousness of various sins, and to warn the criminal of G-d's punishment.

12. It is clear from all this, that C.P. should be clearly and forcefully outlawed. We do not use torture to warn potential criminals against crime, then why should we use death? Obviously, the extreme penalty as applied thru the centuries has not filled the bill of warning. Let us then be done with it. Human life is too sacred to entrust it to the legislation of mere mortals, the enforcement judgement of any 12 people who may still harbor doubts, and the enforcement by a paid executioner who does society's dirty-work for it.

13. The movement to abolish C.P. is one that is inspired by holiness - the great esteem in which human life should be held. I believe that abolition of C.P. will have a tremendous subtle educational effect. It will teach society and generations yet unborn that here on this continent, in an age stained with the blood of innocents and an era in which were perfected the most diabolical of instruments calculated to demolish masses of human beings, at this time and place 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 Life who alone has the right to take it back, and that, beginning modestly with concern for the miserable lives of a few outcasts 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.

14. Certainly, then, Capital Punishment should be outlawed. It is high time that America of 1955 caught up with Judea of the year 30...in fact, with Israel of the year 2,000 B.C.E. Let us make punishment more humane, more constructive and more civilized. Above all, in devotion to Justice, let us remember that Man was created in the Image of G-d.

*But - some exceptions - where genocide,  
organized ruthlessly, etc.*