PARTICIPATING IN THE AMERICAN DEATH PENALTY

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Question: May a Jew participate in capital criminal cases in the American legal system? May a Jew serve as judge in a capital trial? Or serve as prosecutor seeking the death penalty? May a Jew testify in a trial in which the defendant could be sentenced to execution? May a Jew serve on the jury which could sentence a defendant to death?

Response:

Jewish tradition is ambivalent regarding the death penalty. On one hand, Torah is replete with capital punishments. Maimonides lists 36 biblical violations carrying the death penalty, covering violent attacks like murder and kidnapping, as well as social, ritual and ethical evils like adultery, idolatry and contempt of court [*MT Sanhedrin* 15:10-13].

On the other hand, rabbinic tradition is generally averse to capital punishment. The Sages construed rules of evidence so strictly and stacked criminal procedure so strongly in favor of acquittal that the death penalty was almost never applied. Talmudic lore [*b. Avodah Zarah* 8b] records that 40 years before the Temple was destroyed, the Sanhedrin ceased to try capital cases, since society had collapsed into such chaos it would have had to impose too many death penalties. According to this view, there has been no official, judicial execution within the Torah legal system since the early 1st century CE.

There is yet a third side to the argument, however. Despite its general aversion to the death penalty, the Talmud [*b. Sanhedrin* 46a] recognized that desperate times can call for desperate measures, ruling that exigent circumstances sometimes required executions to maintain social order, to deter future crime and to punish the guilty, even for crimes that would not otherwise deserve death, even in cases that did not conform to proper rabbinic criminal procedure.

The classic Mishnah [*Makkot* 1:10] on capital punishment captures this ambivalence:

סנהדרין ההורגת אחד בשבוע נקראת חובלנית. רבי אלעזר בן עזריה אומר אחד לשבעים שנה. רבי טרפון ורבי עקיבא אומרים אילו היינו בסנהדרין לא נהרג אדם מעולם. רבן שמעון בן גמליאל אומר אף הן מרבין שופכי דמים בישראל.

> A Sanhedrin that executes once in seven years is called bloodthirsty. R. Elazar b. Azariah said: even once in 70 years. R. Akiba and R. Tarfon said: had we been in the Sanhedrin, none would ever have been put to death. Rabban Shimon ben Gamaliel said: then these sages would have created more murderers in Israel.

In good rabbinic fashion, this *maḥloket* remains unresolved. It seems that each side has a point, both Rabbi Akiva's and Rabbi Tarfon's inclination toward abolition and Rabban Shimon ben Gamliel's claim for a deterrence effect.

More than 50 years ago, the CJLS affirmed its opposition to the death penalty, in this 1960 statement by Rabbi Ben Zion Bokser:

> Only God has the right to take life. When the state allows itself to take life, it sets an example which the criminal distorts to his own ends. It proves to him that man may take into his own hands the disposition of another man's life. The elimination of capital punishment would help to establish a climate in which life will be held sacred. The sense of the sanctity of life needs to be bolstered in our time, and it will be perhaps the greatest contribution toward deterring crime and violence. … The abolition of capital punishment will be an important step forward in the direction of a more humane justice. It will free America from a black spot of barbarism which still disfigures the good name of our country.[1]

We re-affirm that position today. We consider the contemporary death penalty a needlessly bloody measure, applied inconsistently and, all too often, wielded against those wrongfully convicted. We believe that in virtually all cases, even the worst murderers should be imprisoned rather than executed. We endorse the 1999 resolution of the Rabbinical Assembly that existing death penalty laws should be abolished and no new ones be enacted. Our religious community would contribute to American moral culture by opposing capital punishment in the name of our reverence for life. Moreover, we should express that view actively, for any who might protest a social wrong – even if their words are unlikely to be heeded – are nonetheless responsible if they fail to raise their voices [*b. Shabbat* 55a].

However, we are asked not only about an ideal penal system, but about the one we actually have in the United States (the only country with significant Jewish population

[1] *Proceedings of CJLS, 1927-1970*, 3: 1537-8.

that applies capital punishment today). Given that the death penalty exists at the federal level and in 32 states, what should Jewish citizens do when called to play roles in capital cases? Should Jewish judges and prosecutors refuse to play their parts in what Justice Harry Blackmun called "the machinery of death?" Should Jewish citizens refuse to serve on juries that might send a person to execution? Should witnesses withhold testimony that might help send someone to death row? Or, alternatively, does Halakhah consider it within a government's legitimate authority to execute criminals, though based on values we would argue that they should elect not to exercise that power? If this is the case, then Jewish citizens could take part in capital cases, albeit reluctantly or under protest. Certainly Jews are generally bound to obey the laws of the land, even those laws they oppose. Yet some laws may be so incompatible with our norms that Jews should refuse to follow them, by civil disobedience or conscientious objection. In which category does capital punishment belong? Is it beyond the bounds of what Judaism can tolerate? Or might it be bad policy, but not *prima facie* illegitimate?

Abolition in Theory

Perhaps the most famous teaching in all rabbinic literature [*m. Sanhedrin* 4:5] is that each human life is as valuable as the entire world, so killing a person is tantamount to destroying the world. That homily is presented as what judges should say to impress a healthy fear of heaven upon witnesses in capital cases, in which some human beings decide whether others will live or die. Judges, witnesses and counselors who participate in such an awesome procedure should never forget the catastrophic consequences of error or fraud.

This expresses the Sages' well-attested tendency to view capital punishment with suspicion, as in the aforementioned *m. Makkot* 1:10. Halakhic criminal procedure and rules of evidence are "rigged extravagantly to bring about the acquittal of the accused," wrote R. Aaron Kirschenbaum, "giving the defendant every possible advantage, and placing extremely stringent burdens of proof before conviction."[2]

A particularly interesting feature of these procedures is the ban on accepting circumstantial evidence against a defendant. Even if one witnessed an armed man chase another into an enclosed space, then later saw him, bloody sword in hand, standing above the corpse of the other man, dead of stab wounds, this would constitute inadmissible

[2] "The Role of Punishment in Jewish Criminal Law: A Chapter in Rabbinic Penological Thought," Jewish Law Annual 9 (1991), p. 123-5. The rules cited here can be found throughout the Mishnah and Gemara to tractate Sanhedrin, chapters 4 and 5.

conjecture, not hard enough evidence for conviction [*b. Sanhedrin* 37b; *Mekhilta d'Kaspa* #20]. Maimonides explains why the ultimate penalty requires the strictest evidentiary standards:

> ולאפשר רוחב גדול מאד. ואילו התירה התורה לחתוך דיני נפשות באפשר הקרוב מאד שאפשר שיהיה קרוב מן המחוייב המציאות כגון זה שהמשלנו היינו חותכים הגדר במה שהוא רחוק מזה מעט ובמה שהוא יותר רחוק גם כן עד שיחתכו הגדרים וימיתו האנשים פעמים במעט אומד לפי דמיון הדיין ומחשבתו. ולכן סגר יתעלה את הפתח הזה ואמר שלא ייחתך גדר העונש אלא כשיהיו העדים מעידים שהם ידעו בודאי שזה עשה המעשה ההוא באמת בלא ספק ובלא דמיון כלל. וכאשר לא נחתוך הגדרים בדמיון החזק מאד הנה תכלית מה שיהיה שנפטור החוטא וכאשר חתכנו הגדרים בדמיון ובאומד הנה פעמים נהרוג נקי יום אחד. ולזכות אלף חוטאים יותר טוב ונכסף מהרוג זכאי אחד יום אחד.
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> The realm of the possible is very broad. Had the Torah permitted deciding capital cases based even on a conjecture so likely that it seems absolutely certain, like the example we mentioned [about the person chasing another with a sword], in the next case we would decide based on a conjecture just a little less likely, and in the next, a conjecture less likely still, until we would sometimes execute people based on nothing more than the judge's imagination and opinion. Thus the Exalted One shut this door, and demanded that we not punish except when witnesses can testify without doubt or conjecture that they are absolutely certain the defendant did this deed. Inevitably, when we do not convict based even on very strong conjecture, we will sometimes acquit the guilty; while when we do convict by conjecture sometimes we will execute the innocent. But it would be better to acquit 1,000 criminals than to kill a single innocent. [*Sefer HaMitzvot*, Prohibition 290.]

To summarize: the Sages did not take the Bible's predilection for capital punishment for granted. While not overturning its many death penalties, they construed criminal procedure so narrowly that they rendered biblical capital punishment all but theoretical. The Sages reported further that the Sanhedrin, by relocating, renounced its power to impose the death penalty in the early first century [*MT Sanhedrin* 13.11]. And so it has remained these two millennia.

<u>Accommodation in Practice</u>

Formal renunciation is only half the story, however. As elaborated pragmatically through history, Halakhah is more complicated. All societies must restrain and punish evil doers, as the Torah states nine times [Deuteronomy 13.6, for example]: "And you shall uproot the evil from among you." A society that fails to punish criminals, even in the name of the humanity of its own rules, effectively encourages crime. Sanguine statements about preferring to release 1,000 murderers before one false conviction have an aggadic, exhortative whiff about them, and are no way to govern society. As Kirschenbaum wrote, those same humane rules biased toward acquittal effectively render formal halakhic criminal procedure "impractical" and "helpless" to address "social problems involving crime and punishment."[3]

In response, Halakhah mitigated the impracticality of its criminal law by adding a variety of fudge factors and emergency powers. For example, when proper testimony could not be obtained or warning was not administered, the Sages proposed locking suspected killers in tiny pits and causing their deaths by malnutrition [*m. Sanhedrin* 9.5, *b. Sanhedrin* 81b].[4]

More relevant for our inquiry, and more frequently cited in the halakhic record, are emergency powers granted to rabbinic courts to impose penalties not warranted by standard procedures. The Talmud [*b. Sanhedrin* 46a] authorizes religious courts to flog and to execute malfeasors – "not to violate the Torah, but to make a fence around the Torah" - if they deemed the situation exigent enough; that is "if the hour demands it." Indeed, Jewish courts throughout history cited this passage in asserting their own power to issue sometimes violent punishments. The Shulhan Arukh codifies this provision:

כל בית דין, אפילו אינם סמוכים בא"י, אם רואים שהעם פרוצים בעבירות, היו דנין בין מיתה בין ממון, בין כל דיני עונש, ואפילו אין בדבר עדות גמורה. ואם הוא אלם, חובטים אותו על ידי עובדי כוכבים. וכל מעשיהם יהיו לשם שמים.

> Any court, even judges who lack formal ordination from the Land of Israel, if they see the people wanton with sin, may judge the people and impose upon them any penalty, including death, financial penalties or any kind of punishment, even in the absence of clear testimony. And if [the offender] is mighty [and does not

[3] Ibid.

[4] Habitual offenders of other crimes than homicide received the same treatment. This is the rabbinic "two strikes and you're out" law. The Talmud's explanation understands this indirect death penalty as a combination of starvation and force-feeding until the stomach bursts.

> submit to the court's authority], one may have non-Jews beat him. And may all their actions be for the sake of Heaven [*Hoshen Mishpat* 2.1].[5]

History attests that this power was not merely theoretical; in rare cases, Jewish courts actually imposed the death penalty.[6] Apparently, this power was found more commonly in Spain, as R. Asher suggests: "In all countries I have heard of, none adjudicate capital cases except here in Spain. When I emigrated here, I was astonished: How could they adjudicate capital cases with no Sanhedrin? But they said they did so as delegates of the King. Indeed, our judges often save those whom they judge, for much more blood would have been spilled if they were judged by the Arabs [*Responsa* 17.8]."[7]

In addition to granting such power to rabbinic courts, Jewish law adds a further fudge factor, a secular rule of the king [called *din malkhut* or parallel terms] to impose order when the strictures of criminal procedure proved too inflexible. The same Maimonides who regards it a Torah prohibition to execute without unimpeachable eyewitnesses, also rules in at least three places [*MT, Melakhim* 3.8-10, *Sanhedrin* 18.6 and *Rotzeah* 2.3-4] that royal authority can impose the death penalty on criminals whom the Sanhedrin could not convict:

> כל ההורג נפשות שלא בריאה ברורה, או בלא התראה, אפילו בעד אחד, או שונא שהרג בשגגה, יש למלך רשות להרגו ולתקן העולם כפי מה שהשעה צריכה

> If one person kills another but without clear eyewitnesses, or without receiving formal warning beforehand or with only one eyewitness, or a known enemy who

[5] The permission to employ non-Jewish police power to enforce a *Beit Din*'s ruling, derives from Rosh, *Responsa* 6.27, and implies a basic acceptance of the legitimacy of that government and its violent force.

[6] In *Jewish Law: History, Sources and Principles* [Philadelphia: Jewish Publication Society, 1994]. 1.11 n25 Menachem Elon refers to a number of responsa, mostly from Spain, attesting that "Jewish courts were even given authority to administer the death penalty, especially against informers." See also the responsum of R. Jacob Baal HaTurim, *Zikhron Yehuda* #75, which reports that R. Yosef ibn Megas executed an informant "at Neila on Yom Kippur which fell on Shabbat!" This shocking time for such an execution would appear to be a literary embellishment, borrowed from *y. Hagiga* 2.1, which describes Elisha b. Avuya as "riding my horse in front of the Temple on a Yom Kippur which fell on Shabbat." Louis Jacobs, *Tree of Life* [Oxford: Littman Library, 2000], 132 n40 gives other sources for actual executions, including the Galician R. Reuven Margaliot's report in *Margaliot haYam* 1.91b n6 that "his father told him of an actual case where an informer was drowned on Yom Kippur as late as the 19th century." Perhaps this report borrows that same literary embellishment.

[7] His son, R. Jacob Baal HaTurim would make the same point in *Responsa Zikhron Yehudah* #58: "Since the day the Sanhedrin was exiled from the Hall of Hewn Stone, capital punishment ceased in Israel. It is practiced today to rebuild the fences of this licentious generation. And Blessed is the One who gave such wise counsel to the rulers of this land to authorize Israel to judge and to root out the evil doers. If it were not for this, Israel could never exist in this land. Indeed many Jews saved by Jewish judges, would have been killed by gentile judges."

> slays by accident, the king has authority to maintain order [*lit*.: to improve the world, *letaken olam*] by executing him, as the exigency of the moment demands [*Melakhim* 3.10].

In a remarkable statement, R. Shlomo ben Adret warns that hewing strictly to *halakhic* criminal law would itself cause social breakdown, which royal political power must avert:

> The Torah's procedural rules apply only to the Sanhedrin. But as for the laws of the king, we pay no attention to all that. Royal law is determined exclusively by knowledge of the facts. And therefore one can be executed by royal law based on testimony by relatives or the accused's confession, without any formal warning, and not by a court of 23 … If one insists upon following Torah law, as in the process of the Sanhedrin, the world would become desolate, and the murderers and their henchmen would proliferate.[8]

Rashba carries forward R. Shimon ben Gamliel's deterrence argument from *m. Makkot*, that immunity from capital punishment would embolden criminals and ultimately increase crime. As Rambam explains in one of the aforementioned passages, even if judges or kings do not employ the lethal means at their discretion, they still must punish criminals severely to maximize the deterrence effect:

> הרי שלא הרגם המלך ולא היתה השעה צריכה לחזק הדבר הרי בית דין חייבין מכל מקום להכותם מכה רבה הקרובה למיתה ולאסור אותן במצור ובמצוק שנים רבות ולצערן בכל מיני צער כדי להפחיד ולאיים על שאר הרשעים שלא יהיה להם הדבר לפוקה ולמכשול לבב ויאמר הריני מסבב להרוג אויבי כדרך שעשה פלוני ואפטר.

> If the king does not execute them and the exigent hour does not demand the strongest response, the court must in all events beat them severely, near to death, and imprison them in harsh conditions for many years and make them suffer all kinds of pains. The court should do this in order to frighten and intimidate other wicked people, so that they not stumble by thinking to themselves: let me cause the death of my enemy, for I can do what this other person did, and likewise escape punishment. [*MT Rotzeah* 2.5]

For further reflection on the theory of king's law, consult the rich presentation by R. Nissim Gerondi, *Derashot HaRan* #11. Ran argues that Torah law represents an ideal appropriate for a sacred community under divine providence. But it is no way to keep social order among real people, hewn from crooked timber. Some Torah laws, he wrote,

[8] Later quoted approvingly by R. Yosef Karo in *Beit Yosef, Hoshen Mishpat* 388 *s.v. v'katav haRosh.* The original responsum can be found in the 2005 edition of *New Responsa of Rashba, From Manuscript,* #345.

> do not address political order at all. … [These] are addressed to matters more sublime than perfection of society. Maintaining political order is why we appoint a king. In contrast, the judges of the Sanhedrin were appointed to judge the people according to the true and intrinsically just law, which causes the divine to cleave to us, regardless of whether the political order was perfected. In fact, some laws of the nations of the world actually produce a more effective political order than do the Torah's laws. But this is no shortcoming for us, for the king would correct any deficient political order.[9]

Ran's answer cannot be entirely satisfying.[10] It lacks any obvious teeth for restraining royal despotism (beyond the exhortation that kings should restrain themselves by following the Torah). Moreover, Jews *should* analyze the Torah in consequentialist terms, asking whether it does in fact produce a moral, well ordered society.

Nonetheless, there is wisdom in Ran's approach, with its frank admission that, even in biblical times, *halakhic* purism was unrealistic for governing. Political questions do not always have *halakhic* answers, and we may be sorry when we try to extract such religious resolutions. Theocrats sometimes must defer to professional politicians, and permit them to guide society through their own imperfect methods. In Ran's argument we find a religious step toward a secularization of politics – a step all modern Jews should appreciate.

To summarize: while *Halakhah* is strongly averse to capital punishment as a matter of values, it also regards violent punishment, including execution, as a necessary response to serious crimes. While one hopes this provision would be almost never used, this feature of the *halakhic* record – endorsed by the Talmud, as well as all major medieval authorities and the *Shulhan Arukh* – forestalls any unequivocal conclusion that Jewish law forbids capital punishment.

Noachide Authority

In addition to Jewish authorities – either the religious courts of the greater and lesser Sanhedrin or the relatively secular royal power – we must consider the *halakhic* status of non-Jewish governments and their powers to inflict violence as a means of preserving social order. The prevailing view is that *din malkhut* is a fundamentally secular power,

[9] *Derashot HaRan* (Jerusalem: Makhon Yerushalayim, 1977), ed. L. Feldman, pp. 191.
[10] Cf. the critique by the first Ashkenazi chief rabbi of the state, R. Itzhak HaLevi Herzog, *BeTzomet HaTorah ve'HaMedinah*, (Jerusalem: Tzomet, 1991) pp. 3-9; reproduced and translated in *The Jewish Political Tradition Vol. 1: Authority*, eds. Michael Walzer, et al, (New Haven: Yale, 2000), pp. 471-476.

conferring rights and responsibilities to Jewish and non-Jewish authorities in parallel ways. "The duty to appoint a king is equivalent for Israel and other nations," wrote Ran, "for they all need stable political order."[11]

One could go further and say that Halakhah not only *permits*, it *requires* non-Jewish authorities to create legal systems that maintain social order and restrain crime. The Talmud [*b. Sanhedrin* 56a] considers the creation of *dinim,* a fair legal system, as one of the Noachide laws, applicable to all human societies. This is a most plausible rationale for the Halakhic principle of *dina d'malkhuta dina*, that secular law has legitimate standing in Jewish terms. Under this view, when gentile authorities employ police power to punish transgressors, they in fact fulfill the Noachide commandment that authorizes their government in the first place. Rashi, Rambam and Ramban all take this approach.[12] Rashba makes this connection explicit between punishing criminals and the concept of *dina demalkhuta*:

אם השלטון הזה יש בו כח לעשות חקים בעירו דינו דין דקיימא לן דינא דמלוכתא דינא. ומי שמענשין המקלקלים כגון הגזלנים והגנבים והרצחנים וכיוצא בזה ממשפטי המלוכה והאדנות הוא זה ודינן בכל אלו וכיוצא באלו דין.

> If the government has the power to enforce laws in its locale, then its laws are law, for the principle is that the law of the land is law. Thus, it is the role of sovereign government to punish criminals like robbers, thieves and murderers, and its laws in such matters are law [*Responsa* 1.612].

What makes a gentile government a legitimate expression of *dinim* and not merely orderly brutality? Maimonides suggests a defining feature of any legitimate government is a commitment to procedural equal protection, treating subjects uniformly, not singling out individuals capriciously: "Whatever the king legislates must apply to all people, and not be aimed at a single individual alone" [*MT Gezelah* 5.14].[13] The procedural requirement of equal protection and the prohibition against *ad hominem* punishment raise challenges to American capital punishment. Studies of the death penalty repeatedly

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[11] *Derashot HaRan*, p. 190. Ritba to *b.* Bava Metzia 83 (to be discussed further within) takes the same view. Notably, the responsum of Rashba, quoted above, addresses a case of cooperation between Jewish authorities and the Castilian king to execute a Jew who regularly cooperated with bandits.

[12] Rashi: *b.* Gittin 9b s.v. *hutz mi-gittei nashim*; Maimonides: *MT Melakhim* 9.14; Nachmanides: Torah commentary to Genesis 34.13.

[13] This same point is elaborated by Ramban in his commentary to *b.* BB 55a that valid laws are those written in "the annals and the law books of the kings," while new and arbitrary decrees are thievery. Nachmanides attributes the idea to R. Yosef ibn Megas - Rambam's father's teacher, so perhaps he is Maimonides' source as well - who distinguished between the *authority* or *law of the kingdom* [הורמנותא דמלכותא ודינא דמלכותא], and the *thievery of the kingdom* [חמסנותא דמלכותא]."

conclude that extrinsic factors – like race and gender of the victim, race of the perpetrator, and locale in which the homicide occurred – so strongly influence which cases are selected for capital prosecution that the American death penalty is more inconsistent than uniform, more arbitrary than orderly.[14] However it seems clear that Rambam's demand is for formal legitimacy, in which laws must be *addressed* to the citizenry in general and not to individuals, and which must aim to improve the common weal, not to enrich the ruler.[15] This does not demand that different juries, prosecutors and judges always arrive at the same conclusions and apply the law absolutely uniformly; indeed, it cannot demand this, once we grant that prosecutors juries and judges should have discretion to weigh mitigating or aggravating factors in each unique case. When a given person - let us say, Troy Davis, the Georgia man executed in September 2011, despite doubts about his guilt in a 1989 killing – is put to death under the American death penalty, it is not because a capricious law singled out Troy Davis for punishment. Rather, it is because he was convicted of violating a uniformly applicable law against murder, and because a given prosecutor operating within that legislation persuaded a given jury that this crime was aggravated enough to warrant the death penalty. Why other convicts in similar cases received lesser sentences or whether racial bias influenced the verdict and sentence are grave questions. Indeed, we believe they indicate why the American death penalty is such a bad policy. But inconsistency in application does not in principle vitiate laws imposing a death penalty for aggravated murder, or render these ostensibly uniform laws into capricious decrees.

How far does the legitimate police power of a Noachide government extend? As we saw, *Shulhan Arukh HM* 2.1 permits enlisting gentile police power to enforce decisions of Jewish courts. Other sources extend this to endorsing the non-Jewish governments' own use of violent force, against even Jewish criminals. R. Menahem Meresburg, a 14th century German authority, endorses enlisting gentile police power to restrain a violent menace,

[14] A recent example is the October, 2011 study by Prof. John J. Donahue III of Stanford Law School, "Capital Punishment in Connecticut, 1973-2007: A Comprehensive Evaluation from 4686 Murders to One Execution," available at http://works.bepress.com/john_donohue/87/. Donohue (p.4) finds no objective characteristics of the crime itself can explain the "arbitrary," "capricious" application of capital punishment: "Once the system has operated through the enormous discretionary decisions of prosecutors and juries, there is no meaningful basis for distinguishing the very few who receive sentences of death from the many capital-eligible murderers who do not." This, despite the Supreme Court's ruling that "capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes,' and whose extreme culpability makes them 'the most deserving of execution.'" [Donahue quotes here from the 2005 decision in *Roper v. Simmons*]. That report was instrumental in Connecticut's renunciation of the death penalty in April 2012.

[15] This theme is developed by R. Zvi Hirsch Chajes in his essay "*Din Melekh BeIsrael*," part of his work *Torat Neviim* [Zolkiev, 1836], 17d.

even to the point of cutting off the thug's hands, if all other methods prove ineffective.[16] R. Moshe Isserles quotes this source approvingly at *Hoshen Mishpat* 388.7, where the rule is amplified by R. Shabtai HaKohen [*Shakh,* at n.45].[17]

Such punishment sounds positively medieval in its brutality. Modern students of Jewish law may feel an instinctive revulsion that sacred texts of a peace-loving religion would ever affirm such violence. We legitimately expect our sages to teach the Torah of loving-kindness, not the Torah of "beatings near to death," of severing hands, of lethal force-feeding and even of executions. Perhaps some modern Jews feel such teachings shame the Torah that ought to display our "wisdom and discernment in the eyes of the nations." And perhaps we modern interpreters should feel constrained to protest against the harshness of such rules.

At the same time, one must remember that classical *Halakhah* addresses not only those symbolic and axiological realms we today think of as "religious," like worship, ethics and personal status. Until modern times, Jewish law was also a political instrument for managing the crimes and conflicts that plague any human society. No society has ever undertaken that task without sometimes licensing violence to enforce its determinations of justice and social order. Presumably every member of a civilized society is pleased that magistrates are authorized to put criminals in shackles and haul them to prison, to confiscate ill-gotten property and to impose fines. Such actions are always violent toward those punished.[18] Judaism, too, cannot rest content with offering irenic visions of a redeemed future, but must contend meaningfully with wrongdoing today. And this, I am afraid, will demand that Judaism offer teachings about the ethical use of violence in service of social order.

To that end, let us note the rhetorical flourish R. Yosef Karo adds to the assertion that judges may impose violent punishment [*HM* 2.1, cited above]: "May all their actions be for the sake of Heaven." Packed into this pithy wish is an implicit acknowledgment that people are apt to abuse the state's police authority, resorting to unnecessary force, and inflicting more pain than is necessary, even against those who deserve punishment. R. Karo counters with the hope that those empowered to punish do so only with the best motives, reverently, in fear and trembling at the responsibility they bear. We offer the

[16] This work, *Nimmukei Menahem*, is found on the Bar-Ilan Responsa Project database under the category of *Sifrei Minhag v'Halakha-Rishonim*. The electronic version there lacks pagination. This law appears *s.v. Din mutar la'mukkeh likbol lagoyim.*

[17] Cf. *b. Sanhedrin* 58b for the Talmudic endorsement of cutting of the hands of violent attackers.

[18] Robert Cover, "Violence and the Word," 95 Yale Law Journal 1601 [1986]: "Judges deal pain and death… Most prisoners walk into prison, because they know they will be dragged or beaten into prison if they do not walk."

same wish: state police power is necessary, yet dangerous. May the courts, the police officers and the voters all use their power for the sake of Heaven.

To sum up: *Halakhah* joins the rest of civilized society in demanding that governments control crime and, when necessary, punish criminals with violent force.

How much state violence remains legitimate? Perhaps *Halakhah* countenances certain kinds of "reasonable" state violence but not others, which we might deem "cruel and unusual?" Perhaps *Halakhah* could endorse, say, flogging but not execution. However, it may be impossible to find specific evidence from within rabbinic literature to warrant this conclusion. In fact, a number of examples condone the use of lethal force by legitimate non-Jewish governments.

Sages and Criminals

Three Talmudic stories, often cited regarding crime and punishment, provide the most relevant source material from *Hazal* on our question.

B. Bava Metzia 83b reports that R. Elazar ben R. Shimon worked as a policeman, arresting thieves whom the Romans would execute.[19] R. Yehoshua ben Korha challenged R. Elazar for his line of work, asking "how long will you hand over God's people to execution?" R. Elazar replies that he arrests those who are in fact guilty. "I am removing thorns from the vineyard," he states. R. Yehoshua retorts that "the vineyard owner can remove his own thorns" – a rebuke we will analyze in a moment. The unit concludes by relating that R. Ishmael ben R. Yossi did the same police work. This time, Elijah the prophet delivers the rebuke, urging R. Ishmael to flee into exile rather than cooperate with the Romans.

Now, what did R. Yehoshua ben Korha mean in saying "the vineyard owner can remove his own thorns?" There are at least two possible explanations. He may mean, as Rashi understands *ad loc.*, that one should await God's own punishment for Jewish thieves rather than enacting human justice. Perhaps there is a pious, *aggadic* charm to the *emuna shlema* that God will get the wicked in the end; but this is a very poor public policy. Can anyone legitimately say that the response to crime is to sit still and wait for God to punish wrongdoers? Noachide governments must arrest criminals, and Jews may serve as police, contributing to this worthy endeavor for the social good, even when it might entail harsh punishment.

[19] In an older, parallel version, *Pesikta d'R. Kahana* 11.19, R. Eleazar performs the executions himself, not merely assists the ruling power.

Alternatively, as Meiri understands *ad loc.*, R. Yehoshua may mean that R. Elazar should let the Romans do their own dirty work, without the assistance of "sages, the pious or men of renown." In principle, Meiri understands, Jews might serve the state's police power, but this morally compromised role is unworthy of rabbis. Some might find this view inspiring, implying a kind of supererogatory conscientious objector status regarding capital punishment. Such a response might make sense under the rule of Roman Caesars, but it is unpersuasive in the American republic where we Jews are full citizens, duty-bound to uphold justice and law. It is not normatively or morally preferable to boycott the state's efforts to stop crime, unless the state itself is fundamentally despotic, indeed worse than the crime it seeks to control.

Another tale [*b. Niddah* 61a] concerns R. Tarfon (who stated in the *Mishnah* that he never would have executed anyone) and some Galileans who were wanted for murder. R. Tarfon denies their request that he hide them from the government, because they may actually be guilty, as Rashi comments: "Perhaps you actually murdered, and then it would be forbidden to save you." This story, like the previous, implies that Jews should not interfere negatively with the state's police power, even when the state might impose execution.

Finally, there is a hypothetical case, followed later by an anecdote, where gentile soldiers demand that Jews turn over a wanted man for execution, or else they will punish the town collectively [*y. Terumot* 8.4, citing *t. Terumot* 7.20]. R. Yohanan rules that Jews should turn over the wanted man, regardless of his guilt or innocence, to avoid the threatened collective punishment. Resh Lakish rules that they should turn over the wanted man only if he is genuinely guilty of the crime he is charged with. In other words, Resh Lakish recognizes the legitimate right of a non-Jewish government to execute criminals. Rambam follows Resh Lakish in this dispute, ruling that one should never turn over an innocent sacrificial victim to save the community from collective punishment. But "if he is guilty and deserves the death penalty … turn him over. But one should not teach people to do this *ab initio*" [*MT Yesodei HaTorah* 5.5].

Mesirah

Those tales all address the question of Jews cooperating with the prosecution of their fellow Jews. Indeed, much of the source material that informs our discussion regards the prohibition of *mesirah*, or "turning over" Jews and their property to gentile authorities. For much of Jewish history, our people stood in a wary, adversarial posture to gentile authorities. Unsurprisingly, then, classical *Halakhah* restricted – though, as we saw, did not ban – cooperation with non-Jewish courts and police power. Although this is no

longer the stance of American Jewish citizens, *mesirah* remains a relevant concept for the *halakhic* inquiry into capital trials. If *Halakhah* permits cooperating with gentile authorities to restrain a fellow Jew's wrongdoing, then presumably it permits the same toward any alleged criminals, the vast majority of whom – especially in capital cases – will be non-Jewish.

Mesirah has been thoroughly discussed elsewhere, and we need not detail the various views here.[20] Suffice it to say that some authorities insist that the classical prohibition remains in force. They hold that in most cases – outside of immediate dangers to public safety – one should not expose Jews to gentile criminal justice by calling the police or testifying against them.

A more compelling position belongs to those who say that the original prohibition against informing was motivated by a fear that capricious governments would steal from Jews and persecute them. Such authorities were bandits, not governors, no matter what title they carried. Times have changed, however, and governments today – certainly that of the United States – are not essentially corrupt, do not punish arbitrarily and may be relied upon to follow their own rules fairly. Moreover, Jews are themselves religiously bound to follow the laws of the state, as noted. As such, normative Judaism grants to the state the power to enforce laws which citizens are bound to uphold. Therefore, nowadays, there is no prohibition against turning over a fellow Jew to the criminal justice system, except in the most lawless countries. This position is taken by R. Yehiel Michael Epstein [*Arukh HaShulhan HM* 388.7] and R. Eliezer Yehudah Waldenberg [*Tzitz Eliezer* 19.52], and others.[21] American Jews may participate fully in criminal proceedings against their fellow Jews, regardless of how they may be punished as a result.

This would hold true in cases even of non-violent crime. But the question before us concerns capital cases, which, almost by definition, are homicide cases.[22] When people

[20] Surveys of this material can be found in Elliot Dorff's 1995 responsum on family violence, which can be found both on the CJLS website [cited as *Hoshen Mishpat* 424.1995] and in the volume CJLS *Responsa 1991-2000*, eds. Kassel Abelson and David Fine, pp. 798-9. See also Michael Broyde, *The Pursuit of Justice and Jewish Law: Halakhic Perspectives on the Legal Profession*, 2nd ed. [New York: Yashar Books, 2007], pp. 79-115 and J. David Bleich, *Contemporary Halakhic Problems, Volume 4* [New York: Ktav/Yeshiva University, 1995], 62-91. These chapters include abundant references to classical and modern rabbinic writings.

[21] Broyde takes this position as well, *Pursuit of Justice,* p. 108. He also relates a number of incidents where *Haredi gedolim* endorse cooperating with gentile police power against Jewish criminals. See his anecdotes concerning R. Yaakov Kamentzky (pp. 80-81 n.5), R. Yosef Shalom Elyashiv (p.93) and R. Shlomo Zalman Auerbach (pp.93-94 n47).

[22] Federal law also provides for the death penalty in cases of treason, espionage and large-scale drug trafficking, and a number of states and the US military code include provisions for capital punishment for a small number of other crimes, like aggravated kidnapping and terrorism. However, since capital punishment was re-introduced in 1976, no one has been executed in the U.S. for anything other than

threaten public safety, *Halakhah* expects us to turn over even Jewish criminals to secular political authority, which may apply violent force. Rambam asserts this, specifically about *mosrim*, Jewish informers who abet bandits, and about wrongdoers generally:

> ומעשים בכל זמן בערי המערב להרוג המוסרים שהוחזקו למסור ממון ישראל ולמסור את המוסרים ביד הגוים להרגם ולהכותם ולאסרם כפי רשעם. וכן כל המיצר לציבור ומצער אותן מותר למסרו ביד גוים להכותו ולאסרו ולקנסו.

> It is common in the cities of the west to execute habitual informers, to hand over the informers to gentile authorities for execution, beating and incarceration, befitting their wickedness. And regarding all who trouble the community, it is permissible to hand them over to the gentile authorities to beat them, incarcerate them and fine them… [*MT Hovel* 8.11]

This ruling is repeated by R. Yaakov b. Asher [*Tur HM* 388] who specifically adds that one should turn over "those who harass and trouble the public to the government [*shilton*]." Both R. Yosef Karo and R. Moshe Isserles repeat the ruling with additional detail at *HM* 388.12.[23] Rama's comment provides important guidance: "One engaged in counterfeiting and the like, where there is reason to fear that his actions would harm many people, one should warn him to desist. But if he does not heed the warning, one may turn him over and assert that there is no guilty party except him."[24] If we recognize a compelling interest in arresting Jewish counterfeiters, surely our norms recognize the need to arrest and punish murderers. Indeed, R. Moshe Tendler testified for the prosecution against a Jew in a 1979 murder case. (That was not a capital case; that killer, Philip Dreilich, remains in prison on a life sentence.)

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homicide. Louisiana issued two death penalty sentences for child rape, but executed neither man before a 2008 Supreme Court ruling, *Kennedy v. Louisiana*, ruled the death penalty unconstitutional in non-fatal cases of child rape. Those sentences were changed to life imprisonment.

[23] Regarding Jewish punishment of *mosrim*, an interesting reference is found in R. Shimon Huberband's essay from the Warsaw Ghetto archives known as "Oyneg Shabes," *Kiddush HaShem: Jewish Religious and Cultural Life in Poland During the Holocaust* , ed. Jeffrey S. Gurock and Robert S. Hirt, trans. David E. Fishman [New York: Yeshiva University Press, 1987]. On Oyneg Shabes, see the amazing *Who Will Write Our History? Emmanuel Ringelblum, the Warsaw Ghetto and the Oyneg Shabes Archive* [Bloomington, IN: Indiana University Press, 2007]. R. Huberband [p. 136] cited a responsum (#138) of the 16th century R. Meir (Maraham) of Lublin that "in the days of R. Shachna of Lublin Jewish informers were drowned in the *mikveh*. But today [i.e. in the Ghetto] there aren't enough *mikvehs* to suffice for all the Jewish informers." In fact, this responsum records that R. Shachna merely put out their eyes and cut out their tongues, but does not discuss drowning. See also R. Shlomo Luria, *Yam Shel Shlomo, Yevamot* 10.20, who also favors executing informers.

[24] Rama's ruling comes again from the aforementioned *Nimmukei Menahem* of R. Menahem Meresberg.

What is Capital Punishment Supposed to Accomplish?

There are two main arguments for capital punishment.

There is, first, a *deontological* or duty-based explanation for executing the most terrible criminals. Under this approach, some crimes are so awful that a moral society must respond with the most severe condemnation possible: that the perpetrator had forfeited the right to live. This is Immanuel Kant's position: "Whoever committed murder must die," even if he was the last prisoner in a desert island society about to disband.[25] In a contemporary application, consider the words of Justice John Paul Stevens, writing in another major death penalty case (*Spaziano v. Florida*, [1984]): capital punishment represents "an expression of the community's outrage – its sense that an individual has lost his moral entitlement to live … Capital punishment rests on not a legal but an ethical judgment – an assessment of the defendant's 'moral guilt.'"[26]

This argument resonates with the biblical disposition toward capital punishment. At least in one famous verse, the Torah asserts that – given the infinite value of human life – the death penalty is the inevitable response to intentional homicide: "One who spills human blood, his own blood shall be spilled by human hands, for God created the human being in His image [Genesis 9.6]." The Bible scholar Moshe Greenberg argued that herein lies the uniqueness of biblical norms, in that the Torah treats murder not as a tortious crime but as a sin against God: "The guilt of the murderer is infinite because the murdered life is invaluable … the effect of this view is, to be sure, paradoxical: because human life is invaluable, to take it entails the death penalty."[27] Maimonides intuits the same conclusion, when he writes:

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[25] *Philosophy of Law*, in the section known as "The Public Right."

[26] Stevens later repudiated his support for capital punishment, and wrote in 2008 [*Baze v. Rees*] that the death penalty "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes." See also his essay "On the Death Sentence," *New York Review of Books,* Dec. 23, 2010.

[27] Moshe Greenberg, "Some Postulates in Biblical Criminal Law," in *Studies in the Bible and Jewish Thought*, [Philadelphia: Jewish Publication Society, 1995 (originally, 1960)] 32. Bernard Jackson, "Reflections on Biblical Criminal Law," in his *Essays on Jewish and Comparative Law* [Leiden: Brill, 1975], 25-63, challenged both the conclusions and interpretive methods of Greenberg and those who followed him. Greenberg replied with "More Reflections on Biblical Criminal Law," *Studies in the Bible* [*Scripta Hierosolymitana*, 31:1-17, 1986]. Among Jackson's claims [pp. 46-7] relevant for our inquiry is that Genesis 9.6 is best understood as threatening divine punishment, not at all a demand for execution at human hands. Moreover, he and other scholars hold that there are other plausibly relevant factors that may explain biblical rules of capital punishment besides an assertion of the infinite value of life, including doctrines of the land "pollution" by spilled blood. Moreover, different biblical texts may not entirely agree about the inevitable consequence of capital punishment in different sorts of homicides. (See Pamela Barmash, *Homicide in the Biblical World*, [Cambridge: 2005.])I am in no position to judge whether Greenberg's critics are correct with respect to how

ומוזהרין בית דין שלא ליקח כופר מן הרוצח ואפילו נתן כל ממון שבעולם ואפילו רצה גואל הדם לפטרו שאין נפשו של זה הנהרג קנין גואל הדם אלא קנין הקדוש ברוך הוא.

> The court is admonished not to accept a ransom from a murderer, even if he gave all the money in the world, even if the blood-avenger wanted to release the killer from the death penalty. For the life of the victim does not belong to the blood-avenger. It belongs to the Blessed Holy One. [*MT Rotzeah* 1.4]

Post-biblical Jewish tradition has generally not built law upon the deontological argument, however. Set aside the virtually *sui generis* case of Adolf Eichmann – to this day, the only person executed after a civilian trial in Israel, under a 1950 law specifically written for WW II-era murderers. Nazis set no precedent for ordinary criminals, although they might for terrorists and other mass murderers, like the Oklahoma City and 9/11 attackers. The *Halakhic* tradition's well-attested ambivalence regarding capital punishment can be seen as an expression of concern not only for the infinite value of a victim's life, but also for the value of a killer's life as well. Rabbinic authorities have not been overeager to accept what Greenberg calls the "paradox" of each homicide entailing another as punishment. Even killers are still human beings, whose lives demand protection. While *Halakhah* considered capital punishment necessary at times, it generally did not justify execution by concluding that criminals forfeit all their human worth. Indeed, a famous midrash [*b. Sanhedrin* 46b] reminds us that even the crucified corpse of a notorious bandit – who thoroughly deserved his death sentence – is still "the twin brother of the King," i.e., still bears the divine image.[28]

Why, then, would certain crimes entail death? When the Torah imposes capital punishment, it often (nine times, all in Deuteronomy) explains the penalty by saying "you shallroot out the evil from your midst." On seven of those nine cases, *Sifrei* repeatedly comments "so that you root out evil *doers* from Israel." This amounts to a *consequentialist* or outcomes-based argument for the death penalty. Under this approach, capital punishment is warranted because it helps do what all moral societies must: control crime, imposing the most severe punishments on the worst offenders, and deterring further crime by other potential criminals. This the argument R. Shimon b. Gamliel made in *Mishnah Makkot*: failing to employ capital punishment encourages crime. In America

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one should interpret ancient Near Eastern texts. However, contemporary *Halakhah* is a different project than Bible scholarship, aiming to create Judaic meaning from within an interpretive tradition, rather than to analyze historical data. Whether or not Greenberg successfully rebutted Jackson in academic discourse, it is fair to say, I think, that his view accords with Genesis as Jews have read it.

[28] A dissenting view can be found in the commentary of R. David Kimchi [Provence, 12th century] to Genesis 9:6. Criminals are executed "because he has destroyed his own divine image the moment he violated his creator's commandment. There is no divine image nor rationality to the sinner."

today, this remains the most compelling claim for capital punishment, in the view of a number of political and legal authorities. If it is true that executing murderers in fact deters other murders, legal scholars Cass Sunstein and Adrian Vermeule argued in a 2006 article, it would be morally required to employ it. Even those who otherwise oppose executions on deontological grounds of preserving life, they claim, should recognize a "consequentialist override" to endorse a policy that would, after all, save many innocent lives.[29]

To summarize: the Judaic legitimacy of capital punishment depends precisely on the claims of deterrence and crime control. If in fact the American death penalty effectively helps control, punish and deter crime, then the consequentialist argument for the death penalty finds relatively easy justification in the Jewish legal tradition. On the other hand, if the death penalty produces no practical positive consequence for society, it really is pointless bloodshed that Jews should resist by conscientious objection to participation in capital trials.

Does the American Death Penalty Deter?

A *halakhic* analysis of the American death penalty calls for more than *halakhic* judgment. Jewish law should not be entirely self-referential, discussing only canonical texts; it should consult expert data so that its decisions meaningfully hook on to the world.[30] We students of *Halakhah* should properly contribute our religious and ethical perspectives to this analysis, to clarify our obligations as Jews and as citizens. Still, we should also understand the limits of that discourse. If we think *Halakhah* should defer to military and diplomatic experts about Israel's security, if we consult scientists and physicians on medical questions, then we should show a similar humility and respect for the secularized, democratic political process on this question.

And it must be said that capital punishment is a more complicated question than it might seem at first glance.

For one thing, we must reckon with the fact that the people in this American democracy consistently favor capital punishment. Although rates have support have declined in the last two decades, a decisive majority of around 63 percent still favors capital

[29] "Is Capital Punishment Morally Required? Acts, Omissions and Life-Life Tradeoffs," 58 Stanford Law Review 703-748.
[30] Remember that Rav acquired expertise about cattle blemishes through "field research," by living among shepherds for 18 months, not by sitting in a *beit midrash*, examining authoritative texts [*b. Sanhedrin* 5b].

punishment.[31] Why should public opinion matter? Capital punishment is a contested question of public morals and public policy. In democracies, we believe that hard questions like this are best decided by the people themselves. We Jewish citizens should argue for abolition. But that is not the same thing as saying that the people's democratic choice is illegitimate.

Moreover, measuring deterrence is a most complicated matter. The question is not whether fear of capital punishment would deter crime; it is whether fear of death is a substantially greater deterrent than the threat of life in prison. The famous 1976 case of Gary Gilmore – the Utah career criminal who committed murder while on parole, then insisted on being executed rather than enduring a life sentence, becoming the first person executed after the Supreme Court permitted capital punishment anew, in *Gregg* – demonstrates that prison terms might actually be a more terrifying prospect to some criminals. Also, the death penalty might be more effective at deterring some crimes than others. Threat of death might restrain an armed robber from firing his weapon, for instance, but might not calm an enraged spouse who discovers an adulterous affair. Furthermore, it may be the case that many capital crimes are committed by severe sociopaths who are beyond the influence of any deterrent policy whatsoever. In all events, social science data and expert analysis are not univocal on these matters. Solid majorities of academic criminologists and legal scholars concur that capital punishment adds little differential deterrent effect beyond that exerted by life imprisonment alone.[32] However, this view is not universal. A number of econometric studies have found substantial correlations between capital punishment and reductions in homicide rates, in one case suggesting that each execution correlates to the reduction of 18 homicides.[33] While death penalty opponents have challenged the methodology of these studies, it is not reasonable for us non-experts to determine *Halakhah* by declaring one set of peer-reviewed studies by academically qualified researchers as valid, and rejecting another group of equally credentialed studies as invalid.

In fact, a number of leading scholars have concluded that empirical data on executions and deterrence is just too small and varies too widely year-to-year and by locale, and is responsive to too many other extrinsic factors to establish either the existence or absence

[31] The Gallup Organization released a poll on January 9, 2013 finding 63 percent favored capital punishment (about the same as the finding of 61 percent in 2011, and 64 percent in 2010), down from a high of 80 percent in favor in 1994.
[32] "Do Executions Lower Homicide Rates? The Views of Leading Criminologists," M. Radelet and T. LaCock, *Journal of Criminal Law and Criminology* [2009] 99:489.
[33] "Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data," H. Dezhbaksh et al, *5 American Law and Economics Review* 344 [2003].

of a deterrent effect. For instance, opponents like to note that death penalty states may have higher homicide rates than non-death penalty states. But too many other factors influence those results, as can be seen in the following example. Among the member states of the OECD, only America and Japan practice capital punishment. In 2007, the United States had the group's second highest homicide rate, behind Mexico, which has no capital punishment. Japan had the lowest rate. Legal scholars on both sides of the argument agree that the data is preponderant but inconclusive, as in an op-ed article jointly written by Cass Sunstein (who has written in favor of capital punishment) and Justin Wolfers (who has written against).[34]

This picture that emerges from the unresolved data on deterrence forestalls a univocal *halakhic* prohibition on the death penalty. Our values might prompt us to conclude that "there is no credible evidence that the death penalty deters crime," as in a policy statement by the Progressive Jewish Alliance.[35] But such a view is "certainly an exaggeration," in the view of legal scholar David Garland of NYU, a prominent death penalty expert: "The idea that the death penalty definitely works may be a myth – but this doesn't mean that the opposite is true. Capital punishment is not, as its opponents argue, all costs and no benefits."[36] Even if no one is ever executed, Garland noted, the threat of death can ease plea bargaining and induce cooperative testimony from conspirators. Garland argues that American capital punishment is part of a cultural, emotional and political discourse around death, but it is not effectively calibrated to control crime: "uncertainty, infrequency and delay undermine its deterrent effect."[37] America sees more than 16,000 homicides annually, but now issues fewer than 100 new death sentences annually, and has never, in modern times, executed 100 persons in a year. Such numbers would comfortably reassure any rational killer that he will likely escape execution. Only if America's death penalty were much more sweeping, swift and certain – if it were mandatory without exception, as in Singapore, or employed by the thousands, as in China – would its deterrent effect be maximized, Garland wrote.[38] But certainly Jewish citizens would not want this country to become such a brutal or "bloodthirsty court."[39]

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[34] "A Death Penalty Mystery," Cass R. Sunstein and Justin Wolfers, *Washington Post,* June 30, 2008.
[35] Cited in *Jewish Choices, Jewish Voices: Social Justice*, eds., Elliot N. Dorff and Danya Ruttenberg, p. 116.
[36] "Five Myths about the Death Penalty," Washington Post, July 18, 2010.
[37] David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition*[Oxford, 2010], p. 385 n.4
[38] "Five Myths about the Death Penalty."
[39] Garland writes: "Critics are right to argue that the classical criminal justice purposes are not well served by contemporary capital punishment. America's capital punishment arrangements tend to undermine these purposes rather than advance them. … Late modern capital punishment is, in fact, reasonably well adapted to the purposes that it serves, but deterrent crime control and retributive justice are not prominent among them." *Peculiar Institution*, p.286.

To sum up: Gentile governments *may* use lethal force to deter criminals, although we think they almost always *should* not resort to such a drastic step, since evidence for deterrence is weak. However, if democratic governments do elect to use capital punishment, as the United States has, this is not *prima facie* an illegitimate choice that vitiates the policy's *halakhic* standing.

Against Capital Punishment

As noted at the outset of this paper, we reaffirm the 1960 CJLS position and the 1999 Rabbinical Assembly resolution that the United States should forego executing criminals. As individuals and as a community, American Jewish citizens should advocate against capital punishment.

Most modern Jewish religious leaders have favored abolition. In Israel, when the young state convicted its first murderer, the two chief rabbis, R. Itzhak Herzog and R. Ben Zion Meir Hai Ouziel, urged the justice minister to nullify the death penalty, left over from the British Mandate; and it was in 1954.[40] R. Aaron Soloveitchik also took this view in a letter to the Orthodox Union in the mid-1970s as that organization was weighing its stance: "It 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 *halakhic* point of view, every Jew should be opposed to capital punishment."[41] R. Moshe Feinstein took a similar view in a responsum he sent on Purim, 1981 to a *sar hamedinah,* apparently New York Gov. Hugh Carey [*Iggerot Moshe HM* 2:68].[42]

[40] Justice Haim H. Cohn, "Capital Punishment," *Encyclopedia Judaica* 5:145.

[41] Cited in Nathan J. Diament, "Judaism and the Death Penalty: Of Two Minds but One Heart," *Tradition* 38:1, Spring, 2004, pp.76-82. As an interesting historical note, R. Aaron Levin of Rzeszow, who served in the interwar Polish *sjem* as a representative of Agudat Israel was a leading advocate for abolition of the death penalty at that time, according to J.D. Bleich, "the Death Penalty in Noachide Law," in the R. J.D. Soloveitchik Jubilee Volume [New York: Yeshiva University, 1984] vol. 1, p. 208 n.31.

[42] R. Feinstein also concludes that some exceptional crimes in exigent circumstances really do warrant the death penalty. The typical objections to capital punishment apply, he wrote,

> … when the prohibition against murder has not been rendered meaningless [כשלא הופקר איסור הרציחה]. Rather the defendant murdered in a crime of passion or in some dispute over money or honor. But when one kills because the prohibition against murder is meaningless to him because of his exceptional cruelty, or when the number of murderers and evil doers has multiplied, they should apply the death penalty as an emergency matter to deter further murder, as a measure that would save the state [הצלת המדינה].

In other words, to R. Feinstein, the death penalty should not be imposed generally, but might be invoked in an emergency of widespread anarchy or to deal with an "exceptionally cruel" serial killer. This notably

The most obvious argument for abolition emerging from Jewish sources is that capital punishment all too hastily risks the irreversible horror of executing an innocent person. Killing even a criminal destroys a whole world. Imagine the worlds that would have been destroyed if 142 American death row prisoners had not been released since 1973 after their convictions were reversed.[43]

Another *halakhic* argument against the American death penalty is that while Jewish law permits authorities discretion to apply the death penalty in emergency cases, American law applies capital punishment as a general standard, not in response to the specific "needs of the hour." Moreover, the American death penalty is always carried out years after the crime, following numerous court proceedings. After an average of 12 years on death row it is difficult to claim that someone must be executed "because the hour demands it."

American death penalty policy deserves our condemnation in numerous other ways. We note the persistent patterns of racial discrimination, consistently poor defense counsel, and inconsistent approaches to appeal across jurisdictions in capital cases. These are three major reasons the American Bar Association since 1997 has favored a moratorium on executions. Moreover, the death penalty is tremendously expensive, with appeals and extra procedures costing between $2.5 million and $5 million per case, as opposed to less than $1 million per case resulting in life imprisonment. Florida alone has spent as much as $50 million on capital cases beyond what would have been the costs of trials seeking life imprisonment.[44] Couldn't that money have been better spent elsewhere on fighting crime?

Given these arguments, as well as the dubious prospect for a strong deterrence effect, we believe that ideally Jews should favor a policy preferring imprisonment to execution in virtually all cases.

But this is not equivalent to saying that even after the fact it is forbidden for Jews to participate in capital trials. In fact, *Halakhah* historically has recognized legitimate discretion for Jewish and gentile governments to execute murderers, and has authorized

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resembles the policy Pope John Paul II took in his celebrated 1995 *Evangelium Vitae:* "the nature and extent of the punishment must be carefully evaluated and decided upon, and ought not go to the extreme of executing the offender except in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society. Today however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically non-existent."

[43] The most recent are Damon Thibodeaux of Louisiana, released September 28, 2012, and Seth Penalver of Florida, acquitted December 21, 2012. Death Penalty Information Center http://www.deathpenaltyinfo.org.

[44] "Capital Punishment: Deterrent Effects and Capital Costs," Prof. Jeffery Fagan of Columbia University, posted at http://www.law.columbia.edu/law_school/communications/reports/summer06/capitalpunish.

Jewish cooperation with the state's lethal power. If that was true even when Jews lived under ancient and medieval despots, it is certainly true that *Halakhah* permits Jewish citizens of a law-abiding, democratic republic like the United States to do the same.

Should Jews Refuse to Participate?

Happily, the American death penalty is in decline. The number of new death sentences fell to 78 in 2012, compared with 224 in 2000, down from 315 in 1996, the highest number since Supreme Court reinstated capital punishment in *Gregg v. Georgia*, in 1976. Executions fell to 43 during 2012, from 85 in 2000, down from a high of 98 in 1999. Although 32 states still impose capital punishment, six states have abolished the death penalty since 2007, most recently Maryland, in May, 2013 (joining Connecticut, Illinois, New Jersey, New Mexico and New York), and a seventh, Oregon, issued a moratorium on executions in November, 2011. Following Jewish values, we are pleased to see this trend, and support its advance until the death penalty is abolished for all common crimes.

Given this advancing trend, it might be argued, the best course for a Jewish citizen is to refuse to participate in capital trials as judge, prosecutor or juror. Perhaps we should follow the late Supreme Court Justice Harry Blackmun, who recanted his earlier (1976 in *Gregg*) support for capital punishment (dissenting in *Callins v. Collins,* 1994), declaring he "would no longer tinker with the machinery of death … [because] the death penalty experiment has failed." Perhaps a Jewish boycott of the entire capital punishment process would nudge public opinion further toward abolition.

Such conscientious objection might seem at first glance to reflect a good moral intuition, and might seem appealing as a gesture of protest against a repugnant policy. But before coming to that conclusion, a few points bear consideration.

First, although we believe religious Jews should oppose the death penalty on moral and pragmatic grounds, at same time not everything moral by definition imposes a *halakhic* imperative or a prohibition. Based on all the foregoing, we do not find a *halakhic* prohibition on participating or a *halakhic* imperative to refuse to participate in capital cases as witnesses, jurors, prosecutors or judges.

Second, Jewish citizens of the United States are duty-bound to support the state's fundamentally necessary efforts to restrain criminals and control crime. That duty does not lapse because we object to capital punishment. Do Jewish norms really demand that Jewish Texans, Floridians, Pennsylvanians or Californians (as examples of states with

active capital penalties)[45] cede that civic obligation to their gentile neighbors whenever a murder is committed?

Conclusion: How Should Jews Participate in Capital Cases?

In fact, some moral and *halakhic* factors strengthen the argument for participating in death penalty trials as jurors and judges.

A leading capital defense attorney, Marshall Dayan, argues that it is "tremendously injurious" to defendants when those who object to the death penalty recuse themselves.[46] Studies show that such "death qualified" juries – that is, jurors who have asserted during jury selection that they would be willing to impose death penalty – are more likely to convict even for lesser penalties than are juries taken from the general population. Death penalty opponents complain that prosecutors sometimes bluff their way to more congenial juries by saying (disingenuously) that they would seek capital punishment, thus sifting out the most conviction-averse jurors. How would it help vulnerable defendants for Jews, inspired by classical scruples and veneration for human life, to boycott the proceedings, further tilting the odds in favor of the prosecution? In this case, the conscientious refusal to participate in capital trials, which seemed at first glance to be a good moral instinct, turns out to risk harming American justice by leaving these cases only in the hands of those already committed to the death penalty. Instead, it might practically enhance criminal justice for morally scrupulous Jews to serve as judges, prosecutors, jurors and witnesses, to try to mitigate the problems that compromise American capital punishment.[47] Such service would not prevent Jews from using other venues to advocate against the death penalty.

Let us consider each of these roles Jewish citizens might play in the criminal process.

Witnesses: This is the least morally freighted of the roles. A witness neither convicts nor acquits and assigns no penalty. A witness merely conveys to the court the information, for judges and jurors to evaluate. Even if that testimony proves decisive, it is not the witness

[45] These four states – all with significant Jewish populations – issued 51 of the 78 new death sentences in 2012. Together they account for most of the prisoners now on death row: 1,639 out of 3,108.
[46] Private email communication, January 3, 2012.
[47] An interesting application of this point comes from a 2006 California case in which death row inmate Fred Harlan Freeman petitioned for release, alleging that judge in his 1984 murder trial improperly advised the prosecutor to strike Jews as potential jurors because they would be opposed to the death penalty and biased for acquittal. The California Supreme Court denied Freeman's claim, and in March 2007 the Supreme Court declined to hear the case. My thanks to my friend and congregant Kate Janofsky for this reference.

who decided. If one has first-hand, accurate information about a crime, as a matter of public safety, one should speak to the police and testify in court, regardless of one's moral objection to whatever penalty may ensue. There is no *halakhic* basis to withhold information from investigators or testimony from court. In fact it would constitute a transgression to fail to give testimony in such a case. "One who is a witness, who sees or knows, but does not testify, will bear his guilt" [Leviticus 5.1]. Withholding testimony might help a violent criminal escape and expose others to future harm. Therefore, according to Maimonides [*MT Rotzeah* 1.14], withholding testimony violates one of the Torah's major ethical mandates: "Do not stand idly by the blood of your neighbor" [Leviticus 19.16].

Jurors: In one sense, whether death penalty opponents might refuse to serve on a capital jury is practically a moot question, since prosecutors usually try to identify those with anti-death penalty scruples and exclude them. Yet it can be practical and can accord with *halakhic* and ethical norms for death penalty opponents to sit on such juries. The Supreme Court has rendered several relevant rulings on this topic. In *Witherspoon v. Illinois* [1968], the court ruled that jurors cannot be removed for cause simply because they express general ethical or religious reservations about capital punishment. Later rulings in *Adams v. Texas* [1980] and *Lockhart v. Mcree* [1986] qualified this view, holding that jurors can be excused or excluded when their views are so strong that they would substantially impair them from performing the duties of the role. But as long as a person can perform a juror's duty within the law, such a person cannot be stricken for cause.[48]

To determine whether they can follow the law, prospective jurors are typically asked something like: *Would you always vote for life without the possibility of parole over the death penalty, regardless of the circumstances of the case?* Even observant Jews who oppose the death penalty could answer that question in the negative. Let us remember that jury service is part of a citizen's general duty to fight crime in a society where "the law of the land is the law." Since, by any honest report, *Halakhah* recognizes that the death penalty is warranted in extreme cases, there is no *halakhic* reason why jurors should assert absolutely that they could never impose capital punishment. Observant Jewish jurors could promise to keep an open mind and vote for the death penalty if prosecutors could convince them execution was "the morally appropriate punishment,"[49] even if that applied only to a tiny class of cases.

[48] *Deathquest: Introduction to the Theory and Practice of Capital Punishment*, 4th edition, Robert Bohn, [Waltham, MA: Anderson, 2012]81-2.
[49] In the phrase of Marshall Dayan, private email communication, January 3, 2012.

Some might balk at this advice, considering it deceptive, if not an outright lie. I do not agree. In this case, I concur with a recent judgment of Chuck Klosterman, the New York Times *Ethicist* columnist, who took up this very problem. Prospective jurors should not misrepresent their views, Klosterman said, but should say honestly during jury vetting something like this: "I personally disagree with the state of Missouri's position on capital punishment, but — if selected — I will perform my duty to the best of my abilities, within the framework of my own conscience."[50]

Judges and Prosecutors. The foregoing applies equally and more strongly to prosecutors and judges. Their work helps keep society safe, and so, in its way, is holy work. When the law requires a capital sentence, or when one's superiors assign one to a capital case, a Jew may fulfill those tasks, albeit reluctantly.

Prosecutors have virtually unfettered discretion over when to seek the death penalty or long-term imprisonment.[51] In many jurisdictions, judges are bound to follow juries' sentencing determinations; in others, judges have discretion to modify those determinations. Jewish values argue that, in the vast majority of cases, except in the greatest exigencies, prosecutors and judges should choose imprisonment over execution. But even in cases where American law dictates a capital punishment, Jewish prosecutors and judges can fulfill their professional duties without transgressing the Torah and the decrees of our Sages.

Prison Guards and Medical Technicians. Presumably the number of Jewish staff working on death rows is negligible. Yet given all that has been said here, we must confront the possibility that a Jewish guard may have to strap a prisoner to a gurney, or a Jewish medical aide may be called upon to administer a lethal injection.[52] Such a prospect is genuinely ugly, and we feel a reflex to say that this is no job for a nice Jewish boy or girl. But given everything we have said heretofore, there is no escaping the conclusion that when these employees of the state – like Rabbi Elazar ben Rabbi Shimon, as recorded by the Talmud and Midrash – carry out their duties, they are not murderers, but duly authorized public servants.

Of course, no one has to work in a prison. A person who cannot imagine ending another person's life should seek another line of work. I can imagine that it would be extremely difficult for a prison employee to end the life of someone that he or she believed was

[50] *New York Times Magazine,* June 16, 2013 http://www.nytimes.com/2013/06/16/magazine/can-a-juror-ever-fudge-the-truth.html?ref=theethicist&_r=0

[51] John A. Horowitz, "Prosecutorial Discretion and the Death Penalty," 65 *Fordham L. Review* 2571 (1997).

[52] Lethal injections account for 87 percent of the executions [1,175 of 1,350] in the US since 1976, and is the primary method of execution in every jurisdiction. (Thirteen states permit prisoners to choose an alternate method.)

genuinely innocent. In such a case, any prison employee – Jewish or gentile – might wish to petition to be excused from that assignment, without unduly interfering with the implementation of the sentence.

Nonetheless, judicial executions, carried out in accordance with criminal justice laws and proper trials, do not constitute murder, any more than a court-imposed fine constitutes theft. The judges, prosecutors, jurors and witnesses who play their roles in reaching and executing a capital sentence would not be *halakhically* guilty of causing an unjust homicide.

Ruling

We urge the American federal and state governments to renounce capital punishment except in the rarest cases. Religious Jews should advocate for that position as the superior moral stance and best public policy. But given the weight of precedent, it would be false to assert that Jewish law forbids capital punishment. *Halakhah* confers on secular governments the legitimate power to punish criminals to protect the innocent, including the right to impose death, when needed, God forbid.

Objection to the death penalty is not *halakhic* grounds to refuse to participate as judge, prosecutor, juror, police or witness in capital trials.