

RABBI HILLEL'S SERMON FROM
ROSH HASHANA 2ND DAY, 5772
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CAPITAL PUNISHMENT

Our theme for this High Holy Day season is “How do **you** covenant?” We talked yesterday about how we often disagree about what the covenant wants from us in living our lives in God’s world. What we haven’t talked about is how we figure out what the covenant wants from us. Obviously, since we almost always disagree, it isn’t an exact science. But even though the results sometimes differ, there are traditional tools for figuring this out.

The important point here is that this is the covenantal process at work. Along with a shared history and a shared future, this process is what ties us to the generations of Jews who came before us, to our fellow Jews around the world today who are going through this same process, and to the generations who will come after us who will do the same, but only if we maintain for them the tools of the covenant.

Those tools are the written sources of our tradition, beginning with the Torah. The Chumash, the collection of five books handed down from Moses to us, is the bedrock of all that has, and will, come after.

But it doesn’t end there. It has been suggested that we are not a Biblical religion, even though the Torah is so important to us; it would be more accurate to say that we are a Talmudic religion, because our tradition requires that we look at what that monumental compendium of rabbinic debate says about any given issue.

It shouldn’t stop there, either. Many generations of rabbis and scholars have left to us their interpretations of the Talmudic discussions. It would make no sense for us to start from scratch on every issue, without benefiting from their work.

And the process goes on today. Orthodox rabbis and scholars continue to study and debate issues of halacha, Jewish law. Both the Conservative and Reform movements have panels of rabbis and scholars who debate issues that come up in modern American Judaism.

In most cases, the Conservative panel leaves the ultimate decision up to the rabbi of each community to decide, within the framework of the Conservative interpretation, what works best in his or her community. In **all** cases, the Reform committee leaves it up to the individual Jew to decide for him or herself, although the expectation is that each one would use the committee’s discussions and recommendations as a starting point.

As we can see, the covenant not only ties us to God and to all other Jews in the world today; it also ties us to four thousand years of Jewish heritage, tradition and scholarship. When we decide how to deal with an issue that confronts us in the 21st century, the covenant calls on us to do so in light of that ancient tradition. That doesn’t mean we have to follow the old interpretations if they no longer make sense. But it does mean that we have to respect them, and struggle with them, and understand why we are deviating from them, if that is indeed what we do in the end.

I have often said that Judaism has something to say about everything. Someone once challenged me on that, and asked if Judaism had something to say about nuclear physics. My answer was: not about the math, but most certainly about the results of the work of a nuclear physicist: how, or even if, those results – such as nuclear weapons - should it be used.

I wonder if the person who presented me with that challenge may have thought that a religion, such as Judaism, will only deal with questions about God. But to the Jewish tradition, **everything** involves God, and how God wants us to live in this world that God has loaned to us.

There is an issue currently before us as members of the American public, and it may be helpful to see how that issue is treated by our Jewish tradition.

Last week, a long-standing debate in this country about capital punishment was re-energized when the state of Georgia executed a man by the name of Troy Davis. Davis, who was black, had been convicted of the murder of a police officer, who was white.

It wasn't just the fact of the execution that raised the volume of the debate. The state of Texas had executed a man earlier in the same day, but that execution did not raise the same sort of outcry. The Texas execution was of Lawrence Russel Brewer, a white man, who had been convicted of chaining a Black man to his truck and dragging him to his death.

There were at least two parallels in the two cases: both were in Southern states, and both involved race.

The big difference between the two cases is that in the Texas case, there was no question of guilt; whereas in the Georgia case, Davis insisted to the end that he was innocent. "So what," we might think, "that's what they all say." Well, no, they don't all say that; but if it was only the defendant saying he was innocent, there would be no issue.

The reason for the outcry was that the trial of Troy Davis raised many troubling questions. Among other problems, there was no physical evidence linking Davis to the crime; and seven of the nine witnesses against him later recanted their testimony.

All of that **still** does not prove that Davis was innocent. But it could have suggested that a reasonable doubt may have existed at the time of his death as to whether or not he was guilty. Reasonable doubt is the standard by which a jury determines guilt or innocence, and at the trial of an accused murderer, all it takes is one juror out of twelve having a reasonable doubt to eliminate the possibility that an innocent man may be executed.

Unfortunately for Davis, once the case goes to the appeals process, the burden shifts to the convicted defendant to prove that there was a mistake of law at the trial. The safeguard of reasonable doubt no longer applies in the appellate system, although perhaps it should. But it still played a role in the court of public opinion, and that was the reason for the outcry over the execution of Troy Davis.

There are many people who believe that the state should not be executing **anyone**, irrespective of guilt. But the presence of doubt in the Troy Davis case only added to the public questioning of his execution.

I recently read the latest book by novelist John Grisham, called *The Confession*. The basic premise of the story – the horror of a possible execution of an innocent person – could have been taken from the Davis case. The book is about a black man who is about to be executed in Texas for the abduction, rape and murder of a white teenage girl. There was absolutely no evidence against the condemned man, and the body of the girl was never found; the entire case is based on a coerced confession and false testimony from witnesses. The day after the man is executed, another man leads a lawyer to the body of the girl, proving that he, not the executed man, was the real killer. The basic premise – the possibility of executing an innocent man – could have been taken from the Davis case.

That has to be the most troubling aspects of the death penalty: the chance that we, the people, through the state, may put to death someone who is innocent of the crime they are being executed for.

In recent years, seventeen people on death row have been proven innocent of the crime for which they were sentenced, by use of DNA evidence, which was not available when they were convicted. And 112 other capital defendants have been exonerated on the basis of other evidence.

Fifteen states in the United States, including Maine, have abolished the death penalty, and others are considering it.

Many other nations of the world have abolished capital punishment officially, and some others have gone so long without executing anyone that they have repealed it in practical terms.

The State of Israel nominally has a death penalty, but it is limited to treason, terrorism, crimes against humanity, and crimes against the Jewish people. Capital punishment was abolished for other crimes in 1954.

Since Israel's founding in 1948, there have been only one execution: that of Adolf Eichmann, the Nazi official who was the architect of the death camps during the holocaust.

All of this is very interesting, but what do the guiding sources of our Jewish tradition say about the death penalty?

Some religious opponents of capital punishment begin by pointing to the Ten Commandments, which in many English translations say: "Thou shalt not kill." These opponents say that this should apply to the state as well as to individuals. The problem with that argument, of course, is that the common English translation is wrong. The original Hebrew is: *Lo tirtzach*, which clearly means "Do not murder." If it said "do not kill," the Hebrew would have been *lo taharog*.

The difference between killing and murder is not just one of semantics. Killing is a fact: a life - in our discussion, a human life - is ended. Murder is a legal conclusion that some killings are unlawful. Some killings, such as in self-defense, are considered lawful.

As I learned many years ago in law school, making laws is an exercise in drawing lines. Two hundred years ago in England, you could be executed by hanging for stealing a loaf of bread.

Now, the line on capital punishment has moved so far that, as noted, fifteen states and many countries don't impose the death penalty at all; and some that do impose it, do so only in certain particularly heinous cases, such as the murder of a police officer, or what are called crimes against humanity, which are seen as an attack on society as a whole.

So an appeal to the common translation of the Ten Commandments would not have helped Troy Davis, assuming that his conviction was proper in the first place.

What else in the Torah might help us with this issue? In the first recorded case of homicide, Cain's killing of his brother Abel, capital punishment was not imposed. Our tradition bases that on the fact that Cain had never seen death, and so he could not know the possible fatal consequence of his violent attack on his brother. Not much help there - in the 21st century, we all know that death is a fact of life.

In God's covenant with Noah after the flood, we are told that "Whoever sheds the blood of man, by man shall his blood be shed; for in his image did God make man." This verse was used by the Rabbis of the tradition as a basis for including in the Noachide covenant a commandment for human society to set up judicial systems, rather than leave punishment to revenge by individuals. But this verse would also appear to be a direct divine sanction for capital punishment.

The Torah prescribes a death penalty thirty-six times for violation of certain commandments, including murder, kidnapping, adultery, blasphemy, even working on Shabbat, or striking or cursing your father or mother. The Torah even specifies different methods of execution for different crimes.

Again, this sounds like a clear approval of the death penalty, at least in principle.

But as we move on in our study of Covenantal sources to the Talmud, we find that the rabbis of our tradition were not comfortable with a court having the power to impose the death penalty, and they built up procedural roadblocks against its imposition.

They reminded themselves and us a number of times that even an accused criminal is created in the divine image, and we human beings must be absolutely certain of guilt before executing someone. **This** is the issue that terrifies the rabbis of our tradition: the chance that an innocent person may be executed. And the tradition placed massive roadblocks in the way of the death penalty, to assure that it wouldn't happen.

The Torah itself, in Deuteronomy, requires that the death penalty be imposed only on the testimony of at least two eye-witnesses. And in order to be certain that those eye-witnesses take their testimony very seriously, the Torah commands that they be the ones to carry out the execution, if the defendant is convicted on their testimony. For obvious reasons, close relatives of both the victim and the accused cannot be among the witnesses whose testimony is taken by the court.

The Talmud takes that even further: in a capital case, again as a safety check, the testimony of the witnesses must fully corroborate each other. And it isn't even enough that the testimonies about the act itself match; the witnesses must also establish that the defendant was warned before the act that committing the crime could result in the death penalty, and the defendant must calmly indicate that he is aware of that, but chooses to commit the act anyway. The rabbis were looking to prove cool premeditation on the part of defendant, before imposing the ultimate penalty.

But wait, there's more. The court would appoint special investigating judges, some to look for evidence of guilt, and others to look for evidence of innocence. These investigators would then report their findings to the rest of the court.

In perhaps the most unusual court rule, if the judges all voted unanimously to convict, then the defendant was not executed; there was a concern that, on a court of at least 23 judges, if not one judge voted for acquittal, then perhaps there hadn't been enough of an effort to find exculpatory evidence.

And on days when the Sanhedrin, the supreme Jewish court in Jerusalem, would vote on capital cases, all of its members were required to fast, to emphasize the seriousness of what they were doing.

Some rabbis of the Talmud so disliked capital punishment that they said that a Sanhedrin that condemned someone to death once in seven years would be considered a bloodthirsty court; other rabbis said a court that condemned someone to death even once in **seventy** years was a bloodthirsty court! This was not a unanimous opinion: the Talmud does quote another rabbi as saying that such an attitude would have increased the number of murderers in Israel! But this last rabbi was clearly in the minority.

What effect has all this had in modern American Judaism? I am not aware of a single Jewish religious organization that has not taken a position in opposition to the death penalty. The Reform Movement has been on record since 1959 as opposed. The Conservative Movement

issued an opinion in 1960 saying “we regard all forms of capital punishment as barbaric and obsolete.”

Orthodox opinions, not surprisingly, follow the above-cited procedural blocks against imposition of capital punishment from the Torah and Talmud. They generally state that, since the Torah provides for capital punishment in so many cases, it isn't immoral in and of itself – but that the cases in which it could be safely and properly imposed or so rare as to be, for all intents and purposes, non-existent.

The great medieval Rabbi, the Rambam, expressed everyone's primary concern: the risk that an innocent person will be executed. He wrote that, if someone is wrongfully imprisoned, we can always open the jailhouse door; but if someone is wrongfully executed, there is no reversing death. Better to acquit a thousand guilty persons, the Rambam taught, than to put a single innocent one to death.

In the American debate over the death penalty, arguments are sometimes offered about whether or not capital punishment is a deterrent to violent crime. Studies of this argument have shown this argument to be incorrect: some states **with** the death penalty have higher violent crime rates than some states without it.

An argument is also sometimes made that it is less expensive to execute a violent criminal than to incarcerate him for the rest of his life. Studies have also shown **this** argument to be incorrect: for example, California finds that it costs \$90,000 more per inmate per year to confine someone to death row than to a maximum security prison for life without parole.

But in the Jewish discussion, these issues would simply have little to no importance when compared with the concern over the possible ending of an innocent life.

As it happens, the United States Supreme Court has agreed. In the 1970s the court imposed a moratorium on all capital cases in the country, primarily because of how the issue of race affected the fairness of imposition of the death penalty. Three years later, the Court allowed executions to resume while the courts and legislatures continue to try to find ways of assuring that an innocent person will not be executed.

But given the statistics I quoted earlier about how many people on death row have been exonerated, some observers don't believe that such assurance is possible. The great concern of the Jewish tradition, that an innocent person might be executed, remains a primary issue, for me, and for many others, both in the Jewish world and beyond.

Again, we don't necessarily have to agree, on this or any other issue.

But I submit to you that if we are taking our covenantal obligations seriously, we should be looking to our sources and our traditions, on this and other issues, to benefit from the thinking and discussions and struggles of those who have gone before us.

How do **you** covenant? I hope one way is that you learn from 4,000 years of Jews struggling to understand what it means to live in God's world, in covenant with God and the rest of humanity.

In this new year just begun, may we all continue to struggle with the many issues that face us, mindful that such struggle is the very meaning and essence of what it means to be in covenant.

May we all be inscribed in the Book of Life for a year of learning and growing, as well as for a year of health, happiness, and – above all – peace.

Shana Tova.