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Capital Punishment: Judaism

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Capital Punishment: Judaism

Abstract

The Bible specifies capital punishment for a wide range of crimes against both God and man. Distinct and paradoxical political realia, however, circumscribe its interpretation and implementation in postbiblical Judaism. Capital jurisdiction is a test case of political autonomy, and in the postbiblical era, full Jewish political autonomy has been limited to the Second Temple era and the State of Israel. In Second Temple Judaism, executions fell primarily under the jurisdiction (or discretion) of the sovereign, such as Alexander Jannaeus or Herod. Any ties understood to have existed between executions and biblical strictures are unclear.

Keywords

Capital Punishment, Judaism

Disciplines

Criminal Procedure | Jewish Studies | Religion | Religion Law

own image God made humankind.” The warrant is God’s creating human beings in the divine image rather than a specific political arrangement, say, theocracy. The background is also the sixth commandment, “You shall not kill” (Exod 20:13), even when interpreted in terms of murder and not killing. Punishment for idolatry has different warrant than shedding blood and is not dependent on the state or the sixth commandment. In Matt 15:4, Jesus teaches that “whoever speaks evil of father or mother must surely die.” Yet there is no specification of the means of punishment, and Jesus, even facing crucifixion, never resorts to force. Within the Gospels there is an emphasis on forgiveness, although the state’s power of capital punishment is not denied. Apostle Paul continues the theme. A leader holding legitimate authority, indeed authority from God, “does not bear the sword in vain! It is the servant of God to execute wrath on the wrongdoer” (Rom 13:4). Thus, the Bible contains various warrants for capital punishment (divine command, the human as the image of God, the right of a legitimate state, etc.) which assert the seriousness of the violation of the sixth commandment and the sovereignty of God.

Besides diversity in the Bible, Christians have drawn on different theological and ethical ideas in order to consider the legitimacy of capital punishment. Two basic patterns of thinking are dominant, East and West. Many understand Jesus’ teaching presented in the Sermon on the Mount (Matt 5–7) to require the rejection of violence and the demand of pacifism. The argument is twofold: the prohibition in the sixth commandment is absolute and without exception, and, further, the example of Jesus’ action is normative for Christian life. The Christian community is to be a community of peace emblematic of the reign of God. Menno Simons and the subsequent Peace Church tradition, for instance, assert that Christians should not take vows or bear arms because Jesus did not. Capital punishment is contrary to the Gospel, and its use among Christian too easily makes the church an agent of the state. While the state is a legitimate social form, it is not needed among Christians. In recent times some Orthodox leaders focus on the centrality of forgiveness as reasons against capital punishment. Other thinkers have noted that capital punishment is often used against the poor. Christian commitment to the poor should alert one to abuses of state power.

The other dominant line of thinking draws on different biblical, theological, and ethical warrants. From Augustine to Martin Luther and John Calvin as well as the long-tradition of just war thinking and also Orthodox thinkers many arguments have been made for the right use of lethal force, including capital punishment. The crucial claim, variously conceived, is that Christians exist within the

“earthly city” (Augustine), under two governments – church and state – (Calvin), in two kingdoms (Luther), or in the “symphonic” relation of church and state (Orthodox). Recent Christian realists continue the insight. Christians cannot escape the vicissitudes of social and historical life, and the ambiguities of history and society mean that in certain situations of self defense, preservation and restoration of civil peace, and the protection of the weak and innocent, justice may require the use of lethal force. The work of justice, including retributive justice, can be merciful. Augustine argued that punishment keeps the sinner from further sin and endangering their souls, a position that historically took a fateful turn in the execution of heretics. Yet the idea is that justice must approximate Christian love, and, further, Christian commitments to forgiveness cannot compromise the demands of justice. Mindful of the ambiguity and possible abuse of political power, in this pattern of thought God is held sovereign over all things, and there are goods which systems of justice must protect.

Divergent biblical warrants on capital punishment and the dominant strands of thinking intersect with different conceptions of the purpose of punishment. If punishment is to reform the wrongdoer, then capital punishment terminates that possibility and is morally illicit. Conversely, if punishment is to restrain wickedness, restore peace after its violation, punish the sinner, or manifest the wrath of God, then capital punishment might be justified. Each account of punishment is found among Christians, and they cohere with the biblical warrants and the theological ethical arguments noted.

There is no unified Christian position on capital punishment and this fact flows from diversity within the Bible, different conceptions of the relation of the church to historical and socio-political realities, and, finally, disputes about the purpose of punishment. Despite contrasting judgments, the impact of the Christian tradition over time has been to mitigate excessive expressions of retributive justice with the message of mercy and forgiveness.

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William Schweiker

II. Judaism

The Bible specifies capital punishment for a wide range of crimes against both God and man. Distinct and paradoxical political realities, however, circumscribe its interpretation and implementation in postbiblical Judaism. Capital jurisdiction is a test case of political autonomy, and in the postbiblical

era, full Jewish political autonomy has been limited to the Second Temple era and the State of Israel. In Second Temple Judaism, executions fell primarily under the jurisdiction (or discretion) of the sovereign, such as Alexander Jannaeus or Herod. Any ties understood to have existed between executions and biblical strictures are unclear.

Only in the rabbinic period (2nd–5th cents. CE), when Jews had no capital jurisdiction, do we find extensive treatment of the topic in biblical terms.

The trajectories of the rabbinic discussion are twofold:

(1) The rabbis give vivid detail to the schematic biblical picture of capital punishment, discussing: which crimes merit death; the composition of the court; collection of evidence; interrogation of witnesses; conduct of judges throughout the trial; the precise modes of execution; and even the proper mourning by the family of the executed. According to rabbinic law, a person accused of a capital offense must be tried before a court of 23 judges (*mSan* 1:4) and accused by two sanctioned witnesses, who in the course of proving guilt with epistemological certainty, must also prove that the accused was warned of the precise consequences of the crime and had acknowledged the warning prior to the crime (*mSan* 5:1–4; *bSan* 8b, 40b). If condemned, the crime merits one of four punishments: stoning, burning, beheading, or strangling (*mSan* 6–7). Of these, only stoning and burning have clear biblical antecedents. The biblical authority of the other two are driven by hermeneutical, jurisprudential, and theological principles, and are in places clearly influenced by the Roman milieu in which they were articulated.

(2) *Mishnah Makkot* 1:10 reads:

A sanhedrin that executes once in seven years, is called murderous. R. Eliezer b. Azariah says: once in seventy years. R. Tarfon and R. Aqiva say: If we were members of a sanhedrin, no person would ever be put to death. Rabban Simeon ben Gamaliel remarked: They would also multiply murderers in Israel.

This *Mishnah* holds contradictory views in tension, namely the belief that the evils of capital punishment outweigh its legality and the belief that capital punishment prevents even more bloodshed. The rabbis thus weave a second strain of biblical interpretation throughout their explication of the process, one that radically questions and functionally rejects human authority over capital punishment either on the basis of its inherent wrongness or on the basis of the flawed nature of the human tribunal and the fear of error. Exaggerated standards of proof make conviction all but impossible. Even the odd descriptions of how to kill the condemned encode moral imperatives, such as the need to minimize human suffering (cf. Lev 19:18 “love your neighbor as yourself”) and to preserve dignity. The body, as the image of God, should remain unblemished, and the executioner, whose actions should

imitate the way God himself kills (*mSan* 4:5; *bSan* 45a, 52b; *MekY Neziqin* 5). The rabbis interlace the discussion of capital punishment with implicit and explicit explorations of morality, anthropology, theology, epistemology, jurisprudence, and, to a lesser extent, politics.

Medieval commentators within the rabbinic tradition mostly reiterate these traditional positions. Maimonides states: “It is better and more satisfactory to acquit a thousand guilty persons than to put a single innocent man to death” (*Sefer ha-Mitsvot*, negative commandments 290). However, in contrast to the classical rabbis, in the Middle Ages, some Jewish communities, e.g., in Muslim Spain, had capital authority and used it, albeit in a sporadic and limited way. Given both the absence of a sanhedrin and the broader talmudic abrogation, however, execution struck some as illegitimate, and there seem to have been attempts to avoid directly transgressing rabbinic law, for example, executing the condemned by extrarabbinic modes or out of deference to custom (Assaf: no. 28). A tradition tied to the talmudic discussion of the Noahide laws builds a conceptual edifice permitting execution on less stringent evidentiary standards so as to serve the demands of ruling a community. Some sources argue for exemption from the demands of certainty that restrained the rabbinic court, placing the interests of the community over those of strict justice (e.g., Isaac bar Sheshet, *Responsa Ribash* 234, 251 [late 14th cent.]); cited in Nagar vs. State of Israel [1980] (in Elon 1999: 202); *bSan* 57b; Maimonides, *MishT*, *Sefer Shoftim*, *Hilkhot Melakhim* 9:14).

In modern Israel, after initial debate, capital punishment was rejected on the basis of humanitarian arguments built on rabbinic grounds. It is permitted only in cases of treason, genocide, and crimes against the Jewish people. Note that in Israel, licit execution happens by shooting or hanging, neither of which is a rabbinic mode. The Nazi war criminal Adolph Eichmann was the only person ever executed in Israel; he was hanged in 1962.

Orthodox Judaism holds that since capital punishment is mandated by God, execution is not in itself repugnant. However, the lack of a truly pious court renders it impossible to administer. The other branches of Judaism draw on similar sources and ideas but more directly confront execution as itself problematic. However, debate remains open, and each side can claim talmudic and biblical proof-texts.

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III. Islam

Capital punishment in Islamic discourse is mainly associated with crimes or transgressions committed by man against the will of God (crimes against fellow humans are called *ta'zīr*). The Qur'ān informs the reader/listener about the *ḥudūd Allāh*, “God’s boundaries.” This phrase occurs 12 times in the Qur'ān, for example, “These are God’s boundaries, do not approach them” (S 2:187), and “These are God’s boundaries, do not transgress them. Whoever does transgress God’s boundaries, those are the wrongdoers” (S 2:229). These two examples indicate that *ḥudūd Allāh* are a warning to prevent people from committing crimes. Some theologians hold that it is better to be disciplined and repent in this life than to end up in hell. From this point of view, it is clear that *ḥudūd* (sg. *ḥadd*) is part and parcel of the Qur'ānic reward and punishment stories. Those believers who remain within the boundaries shall be rewarded in the afterlife, while sinners will be tormented in hell.

As R. Kimber (2001) points out, there is a similarity between the Qur'ānic *ḥudūd* and the biblical *ḥuqqīm/ḥuqqōt* (boundaries, statutes of God; cf. Lev 18:4–5, 26; 19:19, 37; 26:3, 15; Num 30:17; Deut 5:1; 6:1, 24; 26:16–7; Exod 18:16). Both the Qur'ān and the HB/OT mainly discuss these concepts in relation to marital or family relations. Even though there are many similarities, there are also important differences between Islamic and Judaic jurisprudence (cf. Kimber 2001).

The application of *ḥudūd Allāh* is dependent on theological interpretations of the Shari'a, which, it is clear, have varied over time and depend on local contexts. However, this concept is generally associated with adultery, fornication, theft, highway robbery, use of intoxicants and apostasy, all crimes that should be punished with corporal punishment (in the form of flogging, stoning and amputations). The strictest punishments are applied in Saudi Arabia and Iran, but elsewhere in the modern Muslim world they have fallen largely into disuse (Pearl 1995: 1). Islamists in countries such as Pakistan, Sudan and Nigeria have nonetheless lately campaigned for the re-introduction and application of the *ḥudūd* punishments.

The main difference between the so-called *ḥudūd* crimes and other felonies is the important fact that the sin is committed against God and not against humankind. Consequently, the strictness of the judgments and the severity of the penalties im-

posed are based on the fact that it is the “right of God” (*ḥaqq Allāh*) to chastize those who transgress his boundaries/limits (Carra de Vaux: 116).

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IV. Literature

In “As I please” (Nov. 1944), Orwell wisely retracts his comment that no one “ever writes of an execution *with approval*.” The God of Gen 9 actually requires capital punishment because, if man is made in God’s image, murder is blasphemous. Inconsistently, rather than killing David for murdering Uriah, God condemns David and Bathsheba’s child (2 Sam 12). However, although the Torah prescribes death for sins ranging from homosexuality (Lev 20) to Sabbath-breaking (Exod 31) and rape (Deut 22), talmudic “barriers” ensure that it is rarely imposed (Rosenberg: 1169); the Jews tell Pilate that it is unlawful for them to execute anyone (John 18). While Paul concedes the state’s right to execute citizens (Rom 13), Jesus prevents the Pharisees from stoning an adulterous woman (John 8).

Condemned Christians often imitate Christ’s example of patient courage: St. Stephen (Acts 6–8) and St. Cecilia in Chaucer’s “Second Nun’s Tale” (ca. 1390) face death with rousing speeches; Thomas More’s letter to his daughter (1535) hopes that “we may merrily meet in heaven”; and in Marvell’s “Horatian Ode” (1650), Charles I lays his head on the scaffold “as upon a Bed.” Both Villon in “Ballade des Pendus” (ca. 1450) and Cawdor in Shakespeare’s *Macbeth* (1606) express repentance. In contrast, Tichborne’s “Elegy” (1586) voices a youth’s despair at what Orwell’s “A Hanging” (1931) calls “The unspeakable wrongness ... of cutting a life short ... in full tide.”

The trope of Christian acceptance leads some novelists to mute execution’s horror: Dickens’s sentimental account of Carton’s death in *A Tale of Two Cities* (1859); Melville’s “Billy Budd” (1891), where the “angelic” hero does not twitch when hanged; the reprieve of the infanticide Hetty in George Eliot’s *Adam Bede* (1859). Without a victim’s acceptance, capital punishment is doubly appalling: the murderer in Hugo’s *Le dernier jour d’un condamné* (1829) crying inwardly that it is “impossible” that he will not receive mercy; Fagin’s last terrified, unrepentant night in Dickens’s *Oliver Twist* (1838). However, the *observer’s* acceptance in Wordsworth’s “Sonnets on the Punishment of Death” (1839) seems pietistic; in Boswell’s *Life of Samuel Johnson* (1791), Johnson offers Dodds spiritual comfort rather than questioning so harsh a penalty for forgery. Boswell’s own obsession with hangings is a