

Capital Punishment in Jewish Law II

Mishna Sanhedrin 6:1

When **the trial has ended** in a guilty verdict and the condemned has been sentenced to be stoned, **he is taken out to be stoned. The place of stoning was outside the court** and a little beyond it, **as it is stated** with regard to a blasphemer: **“Take out him who has cursed** to outside the camp, and let all that heard him lay their hands upon his head, and let all the congregation stone him” (Leviticus 24:14). **One man stands at the entrance to the court, with cloths in his hand, and another man sits on a horse at a distance from him but where he can still see him.** If **one** of the judges **says: I can teach** a reason to **acquit him, the other**, i.e., the man with the cloths, **waves the cloths** as a signal to the man on the horse, **and the horse races** off after the court agents who are leading the condemned man to his execution, **and he stops them**, and they wait until the court determines whether or not the argument has substance. **And even if he**, the condemned man himself, **says: I can teach** a reason to **acquit myself, he is returned** to the courthouse, **even four or five times, provided that there is substance to his words.** If, after the condemned man is returned to the courthouse, the judges **find** a reason to **acquit him, they** acquit him and **release him** immediately. **But if they do not** find a reason to acquit him, **he goes out to be stoned. And a crier goes out before him** and publicly proclaims: **So-and-so, son of so-and-so, is going out to be stoned because he committed such and such a transgression. And so-and-so and so-and-so are his witnesses. Anyone who knows** of a reason to **acquit him should come forward and teach it on his behalf.**

Maimonides Sefer Hamitzvot Negative Commandment 290

In the realm of the possible, some possibilities are extremely probable, some are extremely unlikely, and then there's the full broad gamut of possibilities that fall somewhere between these two extremes. If the Torah were to allow the courts to punish an individual in an instance where the probability of guilt is almost definite (similar to the above example), then the courts would also come to punish in cases in which the guilt is less and less probable, until they would execute defendants based on flimsy estimation according to the judge's imagination....

If we do not inflict punishment, even when the offense is most probable, the worst that could happen is that someone who is really guilty will be found innocent. But if punishment was implemented based on circumstantial evidence, it is possible that someday an innocent person would be executed. And it is preferable that a thousand guilty people be set free than to execute one innocent person.

משנה סנהדרין ו:א

נגמר הדין, מוציאים אותו לסקלו. בית הסקילה הנה חוץ לבית דין, שנאמר (ויקרא כד) הוצא את המקלל. אהד עומד על פתח בית דין והסודרין בידו, ואדם אהד רוכב הסוס רחוק ממנו כדי שיהא רואהו. אומר אהד יש לי ללמד עליו זכות, הנה מניף בסודרין והסוס רץ ומעמידו. ואפלו הוא אומר יש לי ללמד על עצמי זכות, מחזירין אותו אפלו ארבעה וחמשה פעמים, ובלבד שיש ממש בדבריו. מצאו לו זכות, פטרוהו, ואם לאו, יוצא לסקל. וכרוז יוצא לפניו, איש פלוני בן פלוני יוצא לסקל על שבער עברה פלונית, ופלוני ופלוני עדיו, כל מי שידע לו זכות יבא וילמד עליו:

רמב"ם ספר המצוות לא תעשה רצ

לפי שהדברים האפשריים יש מהם שאפשרותם קרובה מאד, ומהם שאפשרותם רחוקה מאד, ומהם בינוניים בין אלו, וה"אפשר" רחב מאד. ואילו הרשתה תורה לקיים עונשים באפשר הקרוב מאד, אשר כמעט קרוב למחייב המציאות כדוגמת מה שהזכרנו - כי אז היו מקיימים את העונשים במה שהוא יותר רחוק מזה ובמה שהוא עוד יותר רחוק, עד שיקיימו את העונשים וימיתו בני אדם בעוול באומדן קל לפי דמיון השופט...

ואם לא נקיים את העונשים באומדן החזק מאד - הרי לא יוכל לקרות יותר משנפטר את החוטא; אבל אם נקיים את העונשים באומדן ובדימוי אפשר שביום מן הימים נהרוג נקי - ויותר טוב ויותר רצוי לפטור אלף חוטאים, מלהרג נקי אחד ביום מן הימים.

Mishna Sanhedrin 6:5

Rabbi Meir said: The phrase “for he that is hung is a curse [*kilelat*] of God” should be understood as follows: **When a man suffers** in the wake of his sin, **what expression does the Divine Presence use? I am distressed [*kallani*] about My head, I am distressed about My arm**, meaning, I, too, suffer when the wicked are punished. From here it is derived: **If God suffers** such distress **over the blood of the wicked that is spilled**, even though they justly deserved their punishment, it can be inferred *a fortiori* that He suffers distress **over the blood of the righteous. And the Sages said not only this**, that an executed transgressor must be buried on the same day that he is killed, **but** they said that **anyone who leaves his deceased relative overnight** without burying him **transgresses a prohibition**. But if **he left the deceased overnight for the sake of the deceased’s honor**, e.g., **to bring a coffin or shrouds** for his burial, **he does not transgress** the prohibition against leaving him unburied overnight.

אמר רבי מאיר, בשעה שאדם מצטער, שכונה מה הלשון אומרת כבכול, קלני מראשי, קלני מזרועי. אם פן המקום מצטער על דמם של רשעים שנשפד, קל וחמר על דמם של צדיקים. ולא זו בלבד, אלא כל המליו את מתו, עובר בלא תעשה. הלינו לכבודו להביא לו ארון ותקרבים, אינו עובר עליו.

Sanhedrin 8b

And the matter is in accordance with **this tanna**, whose statement follows: **As it is taught** in a *baraita*: With regard to **all the others**, those who are **liable for** the various **death penalties** stated **in the Torah** other than the inciter to idol worship, the court **executes them only when** the following elements are present: **The congregation**, represented by the court; **and witnesses**; **and forewarning** just before the defendant commits the transgression. **And** the court does not execute him **unless** the witnesses had **informed** the defendant **that he is liable** to receive **the death penalty from the court. Rabbi Yehuda says:** The defendant is not executed **unless** the witnesses had **informed** the defendant **by which** form of the **death penalty he is** to be killed.

סנהדרין ח:

דתניא ושאר כל חייבי מיתות שבתורה אין ממיתין אותם אלא בעדה ועדים והתראה ועד שיודיעוהו שהוא חייב מיתה בבית דין ר' יהודה אומר עד שיודיעוהו באיזה מיתה הוא נהרג

Sanhedrin 40b

The Sages taught in a *baraita*: In a trial for murder, the court asks the witness: **Do you recognize** the accused? **Did he kill a gentile? Did he kill a Jew? Did you forewarn him? Did he accept the forewarning on himself**, i.e., acknowledge the warning? **Did he release himself to death**, i.e., acknowledge that he is aware that the court imposes capital punishment for murder? **Did he kill within** the time required **for speaking** a short phrase, as if not, he could claim he forgot the warning?

סנהדרין מ:

תנו רבנן מכירים אתם אותו נכרי הרג ישראל הרג התריתם בו קיבל עליו התראה התיר עצמו למיתה המית בתוך כדי דיבור

Sanhedrin 41a

And it is taught in a *baraita*: **Forty years before the destruction of the Second Temple, the Sanhedrin was exiled** from the Chamber of Hewn Stone **and sat in the store** near the Temple Mount. **And Rabbi Yitzhak bar Avudimi says:** The intent of the statement concerning the relocation of the Sanhedrin is **to say ...that** the Sanhedrin **no longer judged** cases of **capital law**. Once the Sanhedrin left the Chamber of Hewn Stone, the court’s power to judge capital cases was nullified.

סנהדרין מא:

ותניא ארבעים שנה קודם חורבן הבית גלתה סנהדרי וישבה לה בחנות ואמר ר' יצחק בר אבודימי לומר שלא דנו דיני קנסות דיני קנסות ס"ד אלא שלא דנו דיני נפשות

While galut rendered Judaism's central institutions inoperable, one of halakhah's most astonishing features is that—at least some of the time—it has spoken as if it governs a broad array of public institutions. Perhaps the most famous example is the talmudic discussion regarding the law of capital punishment. **On the surface, little in the Mishnah's treatment of capital punishment reveals that by the time these texts were disseminated, these laws were no longer operative.** Five of tractate Sanhedrin's eleven chapters are devoted to these laws—three to the underlying offenses, and two to the penal procedures themselves. And yet, in the rabbis' own recounting, the Sanhedrin—the High Court that sat in Jerusalem—ceded its capital jurisdiction forty years prior to the Temple's destruction in 70 CE (b.Sanhedrin 41a; b.Shabbat 15a; b.Avodah Zarah 8b), well before the Mishnah's publication. **Further, by all accounts no such institution functioned after the fall of Jerusalem and the full assumption of Roman rule, and the Mishnah itself describes considerable hesitancy over administering capital punishment. Despite the practical irrelevance of capital punishment, however, the Mishnah, and later the Talmud, developed an elaborate procedure detailing how it would be—or should be—administered. Further, when discussing the topic, the Mishnah does not speak of an idealized past, but rather in declarative tones of the governing present. .. But even if we assume that the Mishnah speaks of an era when the Sanhedrin enjoyed the full panoply of its powers, executing a criminal under talmudic law would still be all but impossible. Though many specific elements contribute to the legal nullification of talmudic capital punishment, none is more striking than the process by which the criminal had to consent verbally to his judicial execution, known as hatra'ah (literally, warning).**

Ibid P. 8

This book will argue that halakhah is not only a body of regulations, but a way, a path of thinking, being, and knowing. Over the course of several chapters, we will see how the rabbis use concepts forged in the regulatory framework to do the work other societies assign to philosophy, political theory, theology, and ethics, and even to art, drama, and literature.

Ibid. p. 72

What is beauty? What is truth? What is the best political ordering? The Talmud anchors such macro questions in the context of a specific mitzvah and its obligations. Thus, the issue of how many judges should sit on a panel is approached by considering whether the role of a court is to secure social peace or to determine legal truth (b.Sanhedrin 6b-7a). ... Which books are deemed part of the Bible is assessed through a discussion of which books are rescued from a building burning on Shabbat, or which scrolls transmit ritual impurity. ...What we now call the life/work balance is negotiated in the Talmud by weighing a worker's contractual obligations towards his employer versus his religious obligations of daily prayer (b.Berakhot 16a). In brief, what the Greeks pursued through reflective and speculative philosophy, the rabbis read into, out of, and through halakhah.

Sanhedrin 7:2

The mitzva of those who are burned, i.e., the process of execution by burning, is carried out in the following manner: The executioners **submerge** the condemned one **in dung up to his knees** so he cannot move, **and they place a rough scarf within a soft one**, so his throat will not be wounded, **and wrap** these scarves **around his neck**. **This one**, i.e., one of the witnesses, **pulls** the scarf **toward himself**, **and that one**, the other witness, **pulls it toward himself**, **until** the condemned one is forced to **open his mouth**, as he is choking. **And another person then lights the wick and throws it into his mouth, and it goes down into his intestines and burns his intestines** and he dies. **Rabbi Yehuda says: But if this one** who is condemned to death by burning **accidentally died at their hands** by strangulation, **they have not fulfilled the mitzva of execution by burning** for this person. **Rather**, the process is carried out in the following manner: One **opens the mouth of** the condemned person **with prongs, against his will**, and one **lights the wick and throws it into his mouth, and it goes down into his intestines and burns his intestines** and he dies. **Rabbi Elazar ben Tzadok said: An incident occurred with regard to a certain priest's daughter who committed adultery, and they wrapped her in bundles of branches and burned her**, contrary to the process described in the mishna. The Sages **said to him**: That court did not act properly; they did so **because the court at that time was not proficient** in *halakha*.

Sanhedrin 45a

Rav Nahman says that Rabba bar Avuh says: The verse states: "You shall love your neighbor as yourself" (Leviticus 19:18), teaching that even with regard to a condemned prisoner, **select a good**, i.e., a compassionate, **death for him**.... One Sage, i.e., the Rabbis, **holds: Minimizing one's degradation is better for him than seeing to his physical comfort**, i.e., than minimizing his physical pain. Therefore, the Rabbis view the more compassionate death as one without degradation, even if wearing clothes will increase the pain of the one being executed, as the clothes will absorb the blow and prolong his death. **And one Sage, Rabbi Yehuda, holds that one's physical comfort is better for him than minimizing his degradation**, and therefore the one being executed prefers to be stoned unclothed, without any chance of the clothing prolonging his death, even though this increases his degradation.

Devora Steinmetz, Punishment and Freedom: The Rabbinic Construction of Rabbinic Law, p. 17

[T]he would-be violator of the Torah's command must both accept upon himself the *hatraa* (warning) and give himself over to death. The Gemara asks what the source is of this second requirement... The source that is offered is the phrase *yumat hammet* (Deut. 17:6); translated literally, this means "the dead shall be caused to die." ... It is not, then, the court that imposes death on the criminal. The criminal comes to court already "dead" because by knowingly and willfully violating God's command he has relinquished his right to life... The *hatraa* and the acceptance of *hatraa* elevate the crime to nothing less than a violation of God's command and a handing oneself over to death.

Ibid p. 19

[T]he Rabbis see sinaitic law as they understand it - as a system of law this is grounded wholly in divine command - as a key marker of Jewish distinctiveness.

משנה סנהדרין ז:ב

מצות הנשרפין, היו משקעין אותו בזבל עד ארפבותיו ונותנין סודר קשה לתוך הרפה וכורף על צנארו. זה מושף אצלו וזה מושף אצלו עד שפותח את פיו, ומדליק את הפתילה וזורקה לתוך פיו ויורדת לתוך מעיו וחומרת את בני מעיו. רבי יהודה אומר, אף הוא אם מת בידם לא היו מקנמין בו מצות שרפה, אלא פותחין את פיו בצבת שלא בטובתו ומדליק את הפתילה וזורקה לתוך פיו ויורדת לתוך מעיו וחומרת את בני מעיו. אמר רבי אליעזר בן צדוק, מעשה בבת כהן אחת שזנתה, והקיפיה חבילי זמורות ושרפה. אמרו לו, מפני שלא הנה בית דין של אותה שעה בקי:

סנהדרין מה.

אמר רב נחמן אמר רבה בר אבוא אמר קרא (ויקרא יט, יח) ואהבת לרעך כמוך ברור לו מיתה יפה...

והכא בהא קמיפלגי מר סבר בזיוני דאיניש עדיפא ליה טפי מניחא דגופיה ומר סבר ניחא דגופיה עדיף מבזיוני.

Sanhedrin 56a

The Sages taught in a *baraita*: The descendants of Noah, i.e., all of humanity, were commanded to observe seven mitzvot: The mitzva of establishing courts of judgment; and the prohibition against blessing, i.e., cursing, the name of God; and the prohibition of idol worship; and the prohibition against forbidden sexual relations; and the prohibition of bloodshed; and the prohibition of robbery; and the prohibition against eating a limb from a living animal. ...

The Gemara asks: **From where are these matters, the Noahide mitzvot, derived?**

Rabbi Yohanan says: It is from that which the verse states: **“And the Lord God commanded Adam, saying: Of every tree of the garden you may freely eat; but from the tree of the knowledge of good and evil, you shall not eat from it, for on the day that you eat from it, you shall die”** (Genesis 2:16–17). The verse is interpreted homiletically as follows: With regard to the term **“and...commanded,” these are the courts of judgment...**

“the Lord,” this alludes to blessing the name of God; ...

“God,” this alludes to idol worship...

“The man,” this alludes to bloodshed; and so it states: “One who sheds the blood of man, by man his blood shall be shed” (Genesis 9:6).

“saying,” this alludes to forbidden sexual relations; and so it states: “Saying, if a man sends his wife, and she goes from him and becomes another man’s...”

“Of every tree of the garden” alludes to the fact that one may partake only of items that are permitted to him, as they belong to him, and he may not partake of stolen items. “You may freely eat” alludes to the fact that one may eat fruit, but not a limb from a living animal.

Sanhedrin 56b

As the school of Menashe taught: The descendants of Noah were commanded to observe seven mitzvot: The prohibitions of idol worship, and forbidden sexual relations, and blood-shed, and robbery, and eating a limb from a living animal, and castration, and diverse kinds.

The prohibitions of **idol worship and forbidden sexual relations** are stated, as it is written: **“And the earth was corrupt before God”** (Genesis 6:11), presumably referring to a transgression, **and the school of Rabbi Yishmael taught: Anywhere that the term corruption is stated, it is referring to nothing other than a matter of licentiousness and idol worship. ...**

According to the school of Menashe, the prohibition of **bloodshed** for the descendants of Noah is stated separately in the Torah, as it is written: **“One who sheds the blood of man, by man his blood shall be shed”** (Genesis 9:6).

The prohibition of **robbery** is stated, according to the school of Menashe, as it is written: **“Every moving thing that is alive shall be for food for you; like the green herbs I have given you all”** (Genesis 9:3). **And Rabbi Levi says: Like the green herbs that sprout all over by themselves and are ownerless, and not like the vegetation of a garden, which belongs to the garden’s owner alone. ...**

The prohibition against eating **a limb from a living animal** is stated in the Torah, as it is written: **“Only flesh with its life, which is its blood, you shall not eat”** (Genesis 9:4), i.e., it is prohibited to eat flesh while the animal that it comes from is still alive....

The prohibition of **castration** that applies to the descendants of Noah is stated, as it is written: **“And you be fruitful and multiply, swarm in the earth and multiply in it”** (Genesis 9:7), indicating that nothing may be done to prevent reproduction. **And the other *tanna'im* hold that this verse is written merely as a blessing, not as a mitzva.**

The prohibition of **diverse kinds** that applies to the descendants of Noah is stated, as it is written: **“Of the fowl after their kind and of the cattle after their kind, of every creeping thing of the ground after its kind”** (Genesis 6:20), indicating that each species must be kept separate, and that crossbreeding is prohibited.

תנו רבנן שבע מצות נצטוו בני נח דינין וברכת השם ע"ז גילוי עריות ושפיכות דמים וגזל ואבר מן החי...מנהגי מילי אמר ר' יוחנן דאמר קרא (בראשית ב, טז) ויצו ה' אלהים על האדם לאמר מכל עץ הגן אכול תאכל ויצו אלו הדינין וכן הוא אומר (בראשית יח, ט) כי ידעתיו למען אשר יצוה את בניו וגו' ה' זו ברכת השם וכן הוא אומר (ויקרא כד, טז) ונוקב שם ה' מות יומת אלהים זו עבודת כוכבים וכן הוא אומר (שמות כ, ב) לא יהיה לך אלהים אחרים על האדם זו שפיכות דמים וכן הוא אומר (בראשית ט, ו) שופך דם האדם וגו' לאמר זו גילוי עריות וכן הוא אומר (ירמיהו ג, א) לאמר הן ישלח איש את אשתו והלכה מאתו והיתה לאיש אחר מכל עץ הגן ולא גזל אכל תאכל ולא אבר מן החי.

סנהדרין נב.

דתנא דבי מנשה שבע מצות נצטוו בני נח ע"ז וגילוי עריות ושפיכות דמים גזל ואבר מן החי סירוס וכלאים...תנא דבי מנשה אי דריש ויצו אפילו הנך נמי אי לא דריש ויצו הני מנא ליה לעולם לא דריש ויצו הני כל חזא וחזא באפי נפשיה כתיבא ע"ז וגילוי עריות דכתיב (בראשית ו, יא) ותשחת הארץ לפני האלהים ותנא דבי רבי ישמעאל בכל מקום שנא' השחתה אינו אלא דבר ערוה ועבודת כוכבים דבר ערוה שנא' (בראשית ו, יב) כי השחית כל בשר את דרכו עבודת כוכבים דכתיב (דברים ד, טז) פן תשחיתון ועשיתם וגו'...שפיכות דמים דכתיב (בראשית ט, ו) שופך דם האדם וגו' ואידך קטליהו הוא דקמגלי גזל דכתיב (בראשית ט, ג) כירק עשב נתתי לכם את כל וא"ר לוי כירק עשב ולא כירק גנה ואידך ההוא למישרי בשר הוא דאתא...סירוס דכתיב (בראשית ט, ז) שרצו בארץ ורבו בה ואידך לברכה בעלמא כלאים דכתיב (בראשית ו, כ) מהעוף למינהו ואידך ההוא לצותא בעלמא

While the Sages' list of Noachide laws, then, is grounded in legislation and linked to the establishment of a judicial system, Tanna Deve Menashe's list does not include the obligation to set up a judicial system, and the laws on this list do not have their source in commands. ... [T]he source of the prohibitions added by Tanna deve menacha...[are] in verses that stress the good of procreation and of sustaining the kinds of creatures that God created. ... for Tanna deve Menashe, prohibited acts are those acts that run counter to the way the world was created.

Ibid 31-32

Tanna deve Menashe is similar to natural law in its classical form. According to the classical view of natural law, the world is created and operates according to certain principles ... And the content of law is derivable from observation of the world as it is. ... castration is unlawful because it violates the principles of reproduction inherent in the world as it was created and as it must operate. ... These acts are unlawful not because they are prohibited by a command but because they violate the world order. ... [In the sages' view] the content of law consists of basic prohibitions that are designed to ensure the functioning of human society. But these are not laws in the sense of normative principles within the natural order; they are commands within human society.... The content of the laws is limited to that which is seen as necessary for social life to function... Thus, the very first law, according to this conception, is the commandment of *dinin*.

Ibid p. 34

The lack of hatraa as a component of Noachide criminal procedure demonstrates the criminality of behavior for a Noachide has nothing to do with intent to violate a command; it has to do only with the nature of the act that the person has done. For a Noachide, the act is criminal in itself, while for those commanded at Sinai, the act is only criminal to the extent that the person knowingly and willfully violates the command.