

Guilty Beyond Doubt: The Torah's Standard

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Today, in a Texas military courtroom, Maj. Nidal Hassan, an Army psychiatrist turned extremist Muslim terrorist, is on trial for his life. Nobody disputes that Hassan murdered thirteen people, and wounded dozens, at Fort Hood, where Army men and women were preparing to deploy to the Middle East. Countless eye-witnesses saw Hassan commit mass murder, facts the defendant does not dispute. Were Hassan to be put to death for his crimes, his execution would be the American military's first in over sixty years.

Tonight, we read that the Torah prescribes the death penalty for a crime nowhere near the severity of Hassan's. In the same selection, though, the Torah begins to lay out the rigorous measure of guilt required for a Jewish court to put a criminal to death. Jewish law does not merely require that a capital defendant be found guilty beyond a reasonable doubt. Instead, Torah, amplified by the Rabbis of the Talmud and their successors, insists that a person be known to be guilty beyond any doubt whatsoever before he or she may be put to death. Yes, the Torah and the rabbis would permit other punishments with a less stringent standard. The death penalty, though, is different – irreversible, the taking of human life – requiring more evidence.

The words of Torah demand at least two eye-witnesses to a capital crime. Explicitly, we are told that the testimony of one witness is insufficient to put a defendant to death. Implicitly, we are instructed that circumstantial evidence does not prove a capital crime, and the rabbis later make that

explicit as well. Indeed, Torah informs us that the witnesses must be so certain that they are charged with casting the first stone to put the condemned person to death.

The rabbis later made these standards even more difficult to meet. For example, they taught that, even with as many as 100 eye witnesses, if only one of those witnesses offered conflicting testimony, even in the smallest detail, the accused could not be put to death. The rabbis opined that a court that would execute a single criminal in a seventy year period should be considered “blood-thirsty.”

What lies behind the teachings of the Torah and its amplification by our sages?

First, let us recognize that Judaism never repeals the death penalty. Some crimes are so despicable, and the evidence of the perpetrator’s guilt so clear, that the criminal has forfeited the right to continue living on Earth. We are taught, “Do not stand idly by while your neighbor bleeds.” Were we to let the mass murderer get off with a punishment less than death, we may be said to harbor callous disregard for the lives criminally cut short.

But the victims’ lives are not the only ones we must understand to be sacred. The accused, too, is a human soul whose life is of inestimable value. The rabbis’ strict standards for carrying out capital punishment may be seen as careful protection of human life.

The military is not the only entity that has carried out the death penalty only sparingly in recent decades. The United States Federal Government has executed but one criminal in the modern era:

Timothy McVeigh, the Oklahoma City bomber, whose callous act of terrorism took scores of lives, many of them innocent children in the Federal Building's day care.

The State of Israel, too, has practiced restraint. But one criminal has been put to death in the 65 year history of the Jewish State: Adolph Eichmann, the architect and chief executioner of Hitler's "Final Solution."

Some states have not been at all reluctant to carry out the death penalty. Chief among them, to my shame, has been my native Texas. Texas has executed over 500 men and women since the early 1980s, a period during which Arkansas has put to death 27.

In most recent years, DNA evidence has been brought to allege the innocence of prisoners on death row, and occasionally of those already put to death. I hasten to note that, during this period of enhanced focus on potential innocence of capital defendants, Arkansas has not executed a single convict since 2005, at a time when the death machine continues unabated in neighboring Texas.

The emergence of DNA evidence requires us to consider how the rabbis would write their rules today. The *ikar*, the essence, of the rabbis' evidentiary requirement is certainty. Modern science has taught us to trust human memories, including eyewitnesses, less than the rabbis did. Perhaps, were they writing today, the rabbis would require evidence obtained from DNA and/or cameras. There can be no doubt who planted the bombs at the Boston Marathon, for example.

The sages would want to examine the claim that the death penalty deters murder. If it did, the rabbis might revisit their reluctance to execute. If putting criminals to death were proven to save innocent lives, the rabbis would likely support doing so, since the purpose of capital punishment in their eyes was to venerate the sanctity of life. However, the evidence does not seem to bear out such a claim. States that liberally apply the death penalty do not have lower murder rates than states where capital punishment is illegal.

To be sure, the rabbis would label a state blood-thirsty if its death machine so active that it refuses to consider evidence of innocence arising after trial, as is the case in Texas. All citizens of such a state have blood on their hands, and are obligated to advocate fiercely for more careful administration of capital punishment.

The rabbis would abhor an entire aspect of the American legal system, namely that “guilty beyond a reasonable doubt” is the standard of guilt required whether the penalty is death or a \$100 fine. Equating a financial penalty with the taking of human life degrades the very sanctity of human life that the death penalty is intended to protect.

The case of Nidal Hassan seems to be exactly the kind of case for which the rabbis left capital punishment on the books. His apparent callous disregard for human life, and his conviction that he alone could best determine who should live and who should die, coupled with the indisputable evidence of his guilt, make Nidal Hassan, like Adolph Eichmann and Timothy McVeigh before him, the moral exception to a principled reluctance to carry out the death penalty.

This week's portion, *Parashat Shofetim*, begins with the famous injunction, *tzedek, tzedek tirdof*, "Justice, Justice shall you pursue." Even as we rightly demand justice for victims, so too may we assure that we as a society do not take additional innocent lives. Let our standard of justice ever be the very highest.

Amen.