

Justice, Justice: The Death Penalty for the Pittsburgh Mass Murderer

Shabbat Shof'tim 5783

August 17, 2023

Rabbi Barry H. Block

Josh Shapiro took office as Pennsylvania's governor in January. At the time of the heinous murder of eleven Jewish worshipers at Pittsburgh's Tree of Life Synagogue, Shapiro was the state's attorney general. In the aftermath, at a time when the plan was to prosecute the murderer under Pennsylvania law, Shapiro proclaimed that the murderer deserved the death penalty. More recently, though, two things changed. One: After he took office as governor, Shapiro announced that he no longer supported capital punishment, and he called on the legislature to abolish it. And two: The murderer was prosecuted in federal court, under the laws of the United States rather than those of Pennsylvania. After the jury convicted the murderer and determined that he should be executed, Shapiro's statement did not mention the death penalty. He said: "Our justice system did its job and found the murderer responsible for the deadliest act of antisemitism in American history guilty."ⁱ

One could easily dismiss Governor Shapiro as a flip-flopper. I suspect, though, that, while Shapiro has staked out a clear position on the Pennsylvania death penalty, he is ambivalent about its application in this horrific case. Governor Shapiro is Jewish, which seems relevant to any discussion related to the Tree of Life massacre. Perhaps Shapiro's Jewishness is also linked to his shifting position on the death penalty generally and his reluctance to endorse the death penalty even in this most heinous case. Shapiro is hardly the first Jewish leader to express ambivalence about the death penalty.

Torah prescribes death as the punishment for a plethora of offenses—not only heinous crimes such as murder and rape, but also transgressions that we may consider religious matters, from idolatry to working on Shabbat. Our rabbinic sages could not abolish any of the Torah's laws, but they made capital punishment very difficult to execute. Maimonides taught, "It is better and more satisfactory to acquit a thousand guilty persons than to put a single innocent one to death."ⁱⁱ

Despite designating death as the penalty for many crimes, the Torah does not make that result easy. In this week's Torah portion we read, "A person shall be put to death only on the testimony of two or more witnesses; no one shall be put to death on the testimony of a single witness."ⁱⁱⁱ The Talmud makes that requirement even more stringent. Much more stringent. Prior to the crime, the witnesses must have first warned the wrongdoer that they will be liable for the death penalty if they carry out the offense.^{iv}

A famous Talmudic passage disallows circumstantial evidence to an extent that seems extreme. Rabbi Shimon imagines seeing an evildoer running after a victim, sword in hand. Then, the pursuer and his prey run into a place where the rabbi's view is obscured. The apparent murderer later emerges with the sword, dripping in blood. The rabbi then finds the victim in death throes, gushing blood. But the rabbi did not **see** the stabbing. In this case, he says, he is not eligible to testify that he has witnessed a murder justifying the death penalty.^v

In the case of the Pittsburgh massacre, one may ask whether the rabbis of the Talmud would have been satisfied to exact the death penalty. Nobody had time to warn the murderer before he pulled the trigger. Moreover, while there is no doubt that the convicted killer was indeed the murderer, and he has confessed, I am not certain that at least two of the surviving witnesses report having seen him pull the trigger. The sages were dealing with daggers, not semiautomatic rifles.

Still, multiple witnesses—worshippers who survived, including some who were wounded, the rabbi, and police officers who responded to the scene gave eye-witness testimony. SWAT operator Stephen Mescan gave a lengthy account of his direct confrontation with the murderer. Officer Michael Smigda “said that he briefly made eye contact with the gunman after arriving at the Tree of Life synagogue,” and he identified him in court. SWAT operator Clint Thimons recounted words the murderer exchanged with him as he was arrested. “Thimons testified that when asked why he carried out the rampage, [the murderer] responded that ‘he had had enough.’ The officer said [that the murderer], in a matter-of-fact conversational tone, claimed Jews were killing children and ‘all Jews had to die.’”^{vi} Officer Daniel Mead testified that, “as he approached the door, he saw [the murderer] pointing a weapon at him.” Audrey Glickman, “a member of the Tree of Life Congregation...,” told of her significant other, Joe Charny, who died before the trial, but had told her that “he had stood face to face with [the murderer and his] long gun—a man with blue eyes. She testified that he had looked the gunman in the eye and saw the barrel of the gun.”^{vii}

In a famous passage, the rabbis of the Talmud say that a court “that executes a transgressor once in seven years is characterized as a destructive tribunal. Rabbi Elazar ben Azarya says, ‘once in seventy years.’”^{viii} Arkansas and several similar states qualify as “destructive” by this standard. The death penalty is carried out so routinely, even capriciously, not to with mention racial disparities,^{ix} that such states may be said to pay insufficient reverence to human life. They are destructive.

Respecting the Pittsburgh case, we must ask if the federal courts are “destructive.” The federal government has carried out the death penalty a total of sixteen times since the Supreme Court reinstated the death penalty in 1988 after it

had been held unconstitutional in 1972. Thirteen of those sixteen executions, though, occurred in one six-month period, July 2020 to January 2021.^x Except for the last six months of President Trump’s administration, the federal courts may not be called “destructive,” especially when we think of some of the people executed—Timothy McVeigh, the Oklahoma City bomber, for example. There must be a balance. After all, the same passage that condemns a court that decrees the death penalty too often as destructive goes on to say the same about a Sanhedrin that would never execute a murderer.^{xi}

Judaism stands ambivalent, much like Governor Shapiro. Not at all eager to carry out the death penalty. Insistent on being certain that a person who is executed is guilty beyond any doubt, not merely beyond a reasonable doubt, certainly the case with the Tree of Life murderer.

You have perhaps noticed that I do not mention the murderer’s name. He has forfeited the right to that dignity, even as he may have forfeited his right to breathe the same air from which his victims once drew life.

By contrast, the names of those pious Jews whose lives he so viciously ended must always be remembered. Let their names be our loving benediction tonight:

Joyce Fienberg. Richard Gottfried. Rose Malinger. Jerry Rabinowitz. Cecil Rosenthal. David Rosenthal. Bernice Simon. Sylvan Simon. Daniel Stein. Melvin Wax. Irving Younger.

May their memories always live, as a blessing.

Amen.

ⁱ Jacob Kornbluh, “The Pittsburgh synagogue shooter got the death penalty. Pennsylvania’s Jewish governor is mum on the sentence.,” *The Forward*, August 3, 2023, <https://forward.com/fast-forward/556371/pittsburgh-synagogue-shooter-death-penalty-pennsylvania-jewish-governor-josh-shapiro/>.

ⁱⁱ Maimonides, *Sefer ha-Mitzvot*, Comment on Negative Commandment 290.

ⁱⁱⁱ Deuteronomy 17:6.

^{iv} Babylonian Talmud, *Makkot* 6b.

^v Babylonian Talmud, *Sanhedrin* 37b.

^{vi} Sabrina Souza and Ray Sanchez, “‘I did this myself’: Officers describe confrontation with Pittsburgh synagogue mass shooting defendant,” *CNN*, June 2, 2023.

^{vii} Bob Mayo, “Tree of Life shooting survivors testify to danger, tragedy they encountered,” *WTAE*, June 1, 2023, <https://www.wtae.com/article/pittsburgh-synagogue-shooting-trial/44064357>.

^{viii} Babylonian Talmud, *Makkot* 7a.

^{ix} “Race and the Death Penalty,” *ACLU*, February 26, 2023, <https://www.aclu.org/documents/race-and-death-penalty#:~:text=The%20color%20of%20a%20defendant,of%20those%20currently%20awaiting%20execution>.

^x The Federal Death Penalty, *Death Penalty Information Center*, <https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty>.

^{xi} Babylonian Talmud, *Makkot* 7a.