



Life and Death in our Hands: Who, When, and How Do we Execute Justice?

Parashat Pinhas, Numbers 25:10 - 30:1 | by Mark Greenspan

“Crime and Punishment,” by Rabbi Abigail Sosland, (pp. 458- 475) in *The Observant Life*

Introduction

Judaism is not a pacifist religion. There are circumstances under which war is not only permitted but obligatory and Judaism contains a system of judicial punishment for serious crimes including capital punishment. The tractates of *Sanhedrin* and *Makkot* offer a detailed system for trying and punishing criminals. Yet as Abigail Sosland points out Judaism was exceedingly cautious in invoking the death penalty. She writes: “The rabbis...preserved the tradition of seeking a ‘workable balance’ between justice and mercy. On the one hand they developed a judicial system that provided severe penalties for certain types of criminal acts...On the other hand, the rabbis also introduced into the legal system a number of brakes designed to favor the accused in a capital trial.” This is not to suggest that the death penalty wasn’t practiced in the Middle Ages; even when they did not have the authority to try such cases the rabbis found ways to turn certain criminals over to the majority courts for punishment.

In our Torah portion today we find a glaring challenge to Judaism’s judicial system. At the end of last week’s *parashah* anarchy breaks out in the Israel camp; Phineas steps forward and impales an Israelite prince and a Midianite princess as they engage in sex in the entrance to the Tent of Meeting. There is no trial or judicial proceedings prior to Phineas’ act. His actions place him somewhere between a zealot and a vigilante. Granted the act of Zimri and Cozbi was truly heinous and sacrilegious but did that give Phineas the right to take the law into his own hands? Our Torah portion begins by informing us that God made a *b’rit shalom*, a pact of friendship, with Phineas; he and his descendants would be God’s priests forever because “He took impassioned action for his God.” Given the nuanced discussion of the death penalty in Jewish literature and the caution with which the sages invoked this practice (if ever) how do we reconcile Phineas with Jewish attitudes toward capital punishment?

The Torah Connection

One of the Israelites brought a Midianite woman over to his companions in the sight of Moses and the whole Israelite community who were weeping at the entrance of the Tent of Meeting. When Phineas son of Eleazar son of Aaron the priest saw this, he left the assembly and, taking a spear in his hand followed the Israelite into the chamber and stabbed both of them, the Israelite and the woman, through the belly. Then the plague against the Israelites was checked.

- Numbers: 25:6-9

The Lord spoke to Moses saying: Phineas son of Eleazar son of Aaron the priest has turned My wrath from the Israelites by displaying among them his passion for me, so that I did not wipe out the Israelite people in my passion. Say, therefore, I grant him My pact of friendship.

- Numbers 25:10-12

- a. **Based on the division of *parshiot*, the story of the Moabite women and Phineas’ zealous act appears to be divided into two parts. In Parashat Balak we read of Phineas’ shocking act (Numbers 25:1-9) and in Parashat Pinhas we learn that Phineas was rewarded for his passion for God (Numbers 25:10-15). How do you account for this division of the story?**

- b. Do you think this division presents Phineas in a more positive or a more negative light?

Through the belly: *The rabbis were uncomfortable with Phineas' act. He set a dangerous precedent by taking the law into his own hands and slaying a man impulsively, in disregard of the law. Some argued that Moses and the other leaders would have excommunicated him were it not for the divine declaring that Phineas had acted on God's behalf (vv. 12-13). Regarding this, a recent commentator remarks: (B. Epstein, Torah Temimah) Who can tell whether the perpetrator is not really prompted by some selfish motive, maintaining that he is doing it for the sake of God, when he has actually committed murder? That is why the sages wished to excommunicate Phineas, had not the holy one testified that his zeal for God was genuine.*

- Jacob Milgrom, *The Jewish Publication Society*, Torah Commentary Numbers

- a. What is the problem with vigilante justice? Why were the sages somewhat ambivalent about Phineas' actions? Is vigilante justice justified if it is for good of the whole community?
- b. If someone had the chance to kill Hitler at the beginning of the World War II would his actions have been justified? Why or why not?

Mishnah: *The following must be saved from sinning even at the cost of their lives: one who pursues his neighbor to slay him or after a male or a betrothed maiden (to sexually abuse them). But one, who pursues an animal (to sexually abuse it) or to desecrate the Sabbath, or to commit idolatry, must not be saved at the cost of his life.*

Gemara: *Our Rabbis taught: whence do we know that he who pursues after his neighbor to slay him must be saved [from sin] at the cost of his own life? From the verse, (Leviticus 19:16) "You shall not stand by the blood of thy neighbor."*

- BT, Sanhedrin 73b

Rabbi Hisda said: If the zealot comes to take counsel [whether to punish the transgressors enumerated in the Mishnah], we do not instruct him to do so...What is more, had Zimri forsaken his mistress and Pinchas slain him, Phineas would have been executed on his account; and had Zimri turned upon Pinchas and slain him, he would not have been executed, since Pinchas was a pursuer [seeking to take his life].

- BT, Sanhedrin 82a

- a. A **rodef** is defined as is one who is "pursuing" another to murder him or her. According to Jewish law, such a person must be killed by any bystander after being warned to stop and refusing. The tradition puts it this way – you are saving the one who pursued and saving the pursuer by keeping him from sinning.
- b. Yigal Amir claimed that he killed Yitzchak Rabin because he was a **rodef** who endangered the destiny of the Jewish people by returning land to the Palestinians. What are the limits that should be placed on designating a person as a pursuer?
- c. According to the Talmud who was the **rodef** in the story of Pinchas?

A Sanhedrin which has a man put to death once in seven years is designated as destructive. Rabbi Eleazer ben Azariah says: Even once in seventy years. Rabbi Tarfon and Rabbi Akiva say: Were we members of the Sanhedrin, no person would ever have been put to death. Rabbi Simeon ben Gamaliel retorted, It seems that would rather have increased the shedders of blood in Israel.

- M. Makkot 1:10

a. Who do you agree with in the Mishnah above: Rabbis Akiva and Tarfon or Rabbi Simeon ben Gamaliel? Which one better fits our society today?

The Talmud ruled out the admissibility of circumstantial evidence in cases which involved capital crime. Two witnesses were required to testify that they saw the action with their own eyes. A man could not be found guilty of a capital crime through his own confession or through the testimony of immediate members of his family. The rabbis demanded a condition of cool premeditation in the act of crime before they would sanction the death penalty; the specific test on which they insisted was that the criminal be warned prior to the crime, and that the criminal indicate by responding to the warning, that he is fully aware of his deed, but that he is determined to go through with it. In effect, this did away with the application of the death penalty. The rabbis were aware of this, and they declared openly that they found capital punishment repugnant to them... There is another reason which argues for the abolition of capital punishment. It is the fact of human fallibility. Too often we learn of people who were convicted of crimes and only later are new facts uncovered by which their innocence is established. The doors of the jail can be opened, in such cases we can partially undo the injustice. But the dead cannot be brought back to life again. We regard all forms of capital punishment as barbaric and obsolete.

- Ben Zion Bokser, *Statement on capital punishment, 1960. Proceedings of the Committee on Jewish Law and Standards 1927-1970*

a. You receive a summons calling you to be on a jury. The case you are chosen for is a case in which the defendant could be found to be given the death penalty. How might your Jewish values influence your participation in such a case? To what extent should Judaism play a role in decision making?

Reflections

This is not the only place in the Torah in which the legal and narrative perspectives of the Torah appear to contradict one another. In the story of the Moabite women Phineas' justice is swift, without precedent, and carried out without any type of societal or judicial consensus. Phineas takes the law into his own hands and saves the people of Israel from disaster. But what gives him the right to pass judgment on Zimri and Cozbi? It is only after the fact that we learn that Phineas was rewarded by God for saving the nation from apostasy. As mentioned above Phineas is both a vigilante and a zealot – something that left the sages feeling doubtful and ambivalent.

Maybe that is why this biblical narrative was divided between these two *parshiot*. The story of Phineas stands by itself; the rabbis wanted to keep it as far removed from Phineas' 'Pact of Friendship' as they possibly could. In fact in the Midrash the sages depicted the people of Israel preparing to punish Phineas for his vigilante justice. In the nick of time God speaks up in his defense and tells the people that as extreme as his actions may have been they were necessary to save the nation from destruction. There are times when it may be necessary to take the law into one's own hands but that does not mean that such acts are ideal or preferable.

We find a very different picture of Jewish justice in the legal material of the Talmud and the codes. While there are times when a person must act to stop a *rodef*, a pursuer, it can become confusing to decide who the pursuer is and who is the pursued. Besides the *Torah Temimah* writes how can we know that our actions are truly in the interest of justice and not motivated by a personal agenda?

Jewish law goes out of its way to make sure beyond all doubt that one who is convicted of a capital crime is guilty. Abigail Sosland speaks of the complexities of Jewish law in this matter; the court in such cases is larger, there is ample opportunity for the members of the court to change their decision in the interest of the

defendant, and the rights of the defendant are carefully protected. Yet at the end of the day how can we be sure that we have decided correctly?

For the better part of two millennia these were not issues that troubled Jewish courts. Living as a minority in a larger non-Jewish society Jews did not have the power or the authority to decide such matters as life and death in capital cases. When the issue did arise in Jewish society it was just as easy to turn the defendant over to the gentile courts.

But what happens in a Jewish society that is still struggling to define itself? Israeli courts are not bound by Jewish law but the issues of Jewish law and values clearly play a role in the way Jewish judges and attorneys think or should think about such issues. Is there a Jewish method of incarceration? When if ever is the death penalty an appropriate form of punishment in Jewish society?

What is a capital case beyond the most obvious ones? It is easy for us to understand the expression *dina d'malkhuta dina* (the law of the land is the law) but what should it mean in a society that has a majority of Jews as well as significant religious and ethnic minorities? As American citizens we too struggle with Jewish law while living in a western democratic state governed by a different set of laws. Is the law of the land still the law for us if the procedures and laws contradict our most fundamental values?

Adapted from Torah Table Talk by Mark Greenspan