

Who will live, and who will die. A few days before Rosh Hashanah, the state of Texas executed a 7th person this year, the 16th person executed in the United States in 2019.

Robert Sparks killed his wife and her two sons and raped her two daughters. At first glance, he is a textbook death penalty case, a thoroughly despicable human being. He confessed to his ex-girlfriend right after he did it. He later called the police and confessed, saying that his wife was trying to poison him. Who will live, and who will die. Didn't Robert Sparks deserve to die? Robert Sparks is borderline intellectually disabled, with an IQ of 75, although the state would not provide the funds for a full neuropsychology exam to confirm whether or not he was disabled under the law and thus ineligible for the death penalty. During the penalty phase of the trial, a pro-death penalty bailiff wore a homemade tie depicting a syringe and sat in full view of the jury. Did Robert Sparks deserve to die?

Three times on Rosh Hashanah and Yom Kippur, we read the Unetaneh Tokef prayer containing the paragraph beginning, "Who will live, who will die ...". The force behind those words is that our fates lay in the hands of God. God controls who will live, who will die, who by fire, and who by water. But what about 'who by lethal injection?' Is that in the hands of human justice or Divine Justice?

My friend and colleague Rabbi Jonathan Perlman, the rabbi of one of the congregations worshipping in the Tree of Life congregation in Pittsburgh, wrote the following to the US attorney in charge of prosecuting the man who killed 11 people in the synagogue on a Shabbat morning last October:

"Our religious tradition ... vigorously oppose[s] the death penalty. "I would like the Pittsburgh killer to be incarcerated for the rest of his life without parole.

"He should meditate on whether taking action on some white separatist fantasy against the Jewish people was really worth it. Let him live with it forever. I am mainly interested in not letting this thug cause my community any further pain.

"We are still attending to our wounds, both physical and emotional, and I don't want to see them opened any more.

"A drawn out and difficult death penalty trial would be a disaster with witnesses and attorneys dredging up horrifying drama and giving this killer media attention he does not deserve."

Those who oppose the death penalty might point to Unetaneh Tokef, suggesting that our fates should be left in the hands of God rather than the State, as well as a statement in the Talmud that a court which imposes one death penalty in 70 years is bloodthirsty, as proof that human beings should never impose the death penalty. Rather, the fate of people like Robert Sparks or the Pittsburgh shooter should be to spend the rest of their life in prison without any possibility of parole, leaving it to God to choose their time of death.

It is well documented in our justice system that people of color receive heavier sentences than white offenders for equivalent crimes, that men receive longer sentences than women. Our justice system does not impose punishments equally and some argue that because of this, we don't have the moral authority to impose a death penalty.

I have a great deal of sympathy for Rabbi Perlman's words and experience. He knows his community well, and knows how much a trial would delay justice and closure. He would much rather that the US attorney offer a plea bargain of life without parole in exchange for a guilty plea and no trial. It would be ease the suffering of his congregation.

However, I disagree with his assertion that Jewish tradition unequivocally opposes the death penalty. Even the citation he offers, calling a court imposing the death penalty bloodthirsty, is countered by another Talmudic voice suggesting that a court which never imposes the death penalty increases the number of murders.

Our prison system is design to punish, not to rehabilitate. And from the evidence, no punishment, whether life in prison or the death penalty, has proven to be an effective deterrent for other potential murderers. But at least the death penalty prevents the murderer from killing again, whereas life in prison, even life without the possibility of parole, leaves open the possibility of the murderer taking another life in prison.

If it is true that we don't have the moral authority to impose a death sentence because of the inequalities of our justice system, then what is the basis for our moral authority to take away freedoms by imposing prison sentences? A life can never be returned for a mistakenly imposed death penalty, but neither can the years spent in prison be returned to the person wrongly convicted.

As a secular society, we have the moral authority to take away property, freedom, or lives because we have given the government, which has an obligation to protect our basic freedoms, the power to enforce a limited set of laws. From a religious point of view, our tradition teaches that God gave the world a set of laws known as the Noahide laws which we believe are fundamental laws of a civil society, one of which is to establish a system of courts. And that gives us the moral authority to impose fines, jail or prison sentences, or even a death sentence as long as the system proves that the individual convicted is guilty of the crime.

Participating in the judicial system, whether as an attorney, a judge, a prosecutor or a defender, a bailiff or a court reporter, or as a member of a jury, is in fact a mitzvah, a serious mitzvah. Each one of us, given that chance, has the heavy responsibility to use the opportunity to make sure that the scales of justice are evenly and fairly balanced. It's not a time to joke around and wear funny ties advertising the death penalty.

We construct a Jewish ethical system based on biblical and other early Jewish rabbinic sources. Biblical support for the death penalty is based on the notion that human life is sacred and the deliberate taking of life demands an equal payment. Justice, in our tradition demands accountability, repayment commensurate with the crime. Teshuvah requires an acknowledgement of the crime and acceptance of an appropriate punishment.

Based on post-Biblical Jewish sources, for a death penalty to be ethical, the basic criteria is absolute certainty that the offender had full mental capacity to know that the action was wrong; that the offender knew at the time of the crime that it was a death penalty offense and did it anyway; and that we are absolutely certain, beyond a shadow of a doubt, that this person is the offender.

Because of this, I object to the state killing someone found guilty only beyond a reasonable doubt, because as long as there is doubt, there is a possibility of error; and as long as that possibility exists, the state should not impose a non-rescindable punishment. If there is any shadow of doubt, the next best option is life in prison without possibility of parole. But if there is no doubt, and the other conditions are fulfilled, then the death penalty is ethical.

In addition, on Monday, the Supreme Court agreed to hear two cases prompted by state laws which abolish the insanity defense. Four states have such laws, which bars the defense that a mental illness prevented defendants from understanding that their actions were wrong.

Depending on the outcome of this case, a Jewish ethical system will have an additional problem supporting the death penalty.

If I were to imagine being on the jury in a capital case, I would need to be clear that I could vote to convict with the normal standard of evidence, but my Jewish ethical system would only allow me to vote for a death penalty if I was convinced of guilt beyond any doubt by a person with the mental capacity to understand what he or she was doing.

One more thing – in the rabbinic description of the death penalty, the set of judges who imposed the capital sentence carried out the punishment. So I play this mental game: I pretend that the members of the jury would be required to carry out the execution, and that I was on the jury in the case of the Tree of Life synagogue shooter, convinced that he was guilty and mentally competent beyond any doubt. So I imagine I am one of 12 jurors sitting in front of 12 buttons. After the medical professional places the IV's in the offender and hooks them to the series of drugs intended to kill, each of us 12 jurors must press the button to initiate the process. If even one juror refuses to press the button, there will be no lethal injection. I ask myself – could I press the button and live with myself? Could I press the button and sleep at night? Could I look somebody in the eye and press the button? Or would I rather vote for life without parole?

I am fascinated with the idea of such a system because it drives home the serious nature of the death penalty and that anyone voting for death is directly responsible for that death. Such a system is, of course, impractical. What would happen if a juror died or moved away? What happens if, 10 or 15 years later after the appeals are exhausted, if the jurors simply don't show up on the appointed day? So my final question is, given that conditions are not ideal, does that mean that I cannot ever support the death penalty?

In the end, I can't let go of my sense of justice, that sometimes the proper response to deliberately taking a life is to take the life of the murderer. But the enormous moral weight of authorizing the taking of a life, even a guilty life, pulls at my conscience. Who will live and who will die is a hard enough concept to grasp when it asks me to be responsible for my own life. I don't know if I can handle being responsible for someone else's fate. So it boils down to the question, do we want to be the kind of people who participate in state sanctioned killing or the kind of people who spare the life of an unrepentant murderer? And my conclusion is that Judaism supports the death penalty and also supports opposition to the death penalty. We ask God to balance justice and mercy on Yom Kippur. So if we can hold uncomfortable support of the death penalty and reluctant opposition to it in our mind at the same time, then we are precisely at that place of fear and trembling which embodies the Days of Awe. So embrace that fear and trembling, and for the rest of the holiday, imagine yourself on trial and pleading for your life. Who will live and who will die, who will be at peace and who will be troubled, who will be tranquil and who will be tormented, who will be brought down and who will be raised up. And remember, the power and freedom to affect your destiny, to nudge it every so slightly in a positive direction, is in your hands.

May your name be written and your fate sealed for good.