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IN THIS ISSUE

PATAKI, JOHNSON, & THE SECOND CENTURY SAGES

by Rabbi Jeffrey H. Miller[1]

When Angel Diaz hanged himself in his jail cell, he beat the state of New York in the race to carry out the newly enacted death penalty statute. Diaz stood accused of killing Police Officer Gillespie, but he can no longer be tried by an earthly court for that crime. While Angel Diaz will not be the first man executed by the state under the capital offense law, his cowardly act of self destruction accomplished the same goal. Instead of an executioner's lethal syringe, Diaz's life was taken by his own belt. Still, in hanging himself, Angel Diaz executed the will of the people.

According to a recent Gallop poll, the vast majority of American's support the death penalty in the belief that it provides a deterrent to crime. Whether is does or not is debatable. Regardless, it is a well known fact that a dead murderer can murder no more. Of course, such sound logic does not consider the fact that a dead convict, mistakenly convicted of a capital offense, can likewise appeal no more.

The overwhelming popular support of capital punishment did not prevent the American Bar Association from asking for a nationwide moratorium on the death penalty. The ABA resolution denouncing capital punishment was passed by a margin of more than two to one. Interestingly, the polled citizenry support the death penalty by an even more overwhelming margin of four to one. Clearly, the general population and the legal profession do not see eye to eye. The statistics indicate that Americans by and large favor an "eye for an eye," while the ABA seems to prefer confinement for killing.

Since Diaz was the first potential capital case in New York, it was also the first potential challenge to the newly enacted statute. His death ended the specific case but the jurisdictional dispute that arose between Gov. Pataki and Bronx D.A. Johnson remains, and both men appear eager to have the court rule on their respective positions. The court should in fact make a determination since the Diaz-Gillespie case presents the first serious and potential test of New York's newly enacted death penalty statute.[2] Undoubtedly other capital cases will follow.

Public discussion on capital punishment is hardly new, but the passionate debate is no longer theoretical. Every reasonable official would agree that Gillespie's killer should have been appropriately punished. Yet good and decent elected public officials often disagree as to what the fair, efficient, legal, and moral response should be to an act of brutal violence.

In the context of New York's death penalty law, the determination of the punishment must precede even the (more fundamental) issue of the suspect's trial and possible conviction. The D.A.'s

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[1] Rabbi Miller is a third-year law student at St. John's University School of Law and also serves as a full-time Rabbi at the Marathon Jewish Community Center in Douglaston, New York.

[2] Editor's Note: While we were going to press, the Appellate Division First Department in fact issued its ruling on the controversy between Governor Pataki and D.A. Johnson on the jurisdictional issue. The decision is reported at page 13.

decision to decline to seek the death penalty is irrevocable. Given the fact intensive nature of capital cases, it was no accident that the state legislature gave the D.A. such broad discretion.

Nevertheless, the Governor also has broad discretion, including the ability to remove a local D.A. in favor of the State's Attorney General. The New York Times reported that Gov. Pataki wanted Bronx D.A. Johnson to "tell [him] in advance whether he was going to decide against the death penalty" (3/26/96). Pataki, aware of Johnson's general opposition to the death penalty, was apparently concerned Officer Gillespie's killer would not face the death penalty. In addition, Pataki feared that Johnson's refusal to seek the death penalty in this case could seriously jeopardize the entire death penalty statute on constitutional grounds. As the governor stated: "We cannot have different standards and different laws in different parts of this state." (NYT 3/22/96). The Pataki administration suggested publicly that the courts would conclude that the new law was not being applied proportionally, and would necessarily find that it violated the Equal Protection Clause of the Fourteenth Amendment.

I remain amazed that Pataki and Johnson are reenacting a debate that occurred in the late antiquities, among the second century Jewish sages of Palestine. The incident is recorded in the Babylonian Talmud, and it reinforces the famous words of King Solomon: "What was will [once again] be' for there is nothing new under the sun" (Ecclesiates 1:9).

The Bible explicitly mandates capital punishment for certain crimes. Still, the authoritative rabbinic codes were not so eager to embrace it. The *Talmud*, Tractate Makot 7a, declared that a *Sanhedrin* (Rabbinical Tribunal) that executes once every seven years - others say once every seventy years - is considered a "destroyer." The passage was not meant to be the legal yardstick by which the courts judged the application of the death penalty. Rather, the text was meant to convey to the reader - Rabbis, judges, and lay persons alike, that the general principle that capital punishment should only be dispensed in only the rarest of situations.

Following the introductory statement of principle permitting but severely limited the use of the death penalty, Rabbis Tarfon and Akiba declared: "Had we been members of the Sanhedrin [at the time the death penalty was still being dispensed], no one would ever have been executed." The Talmudic section closes with the retort by Rabbi Shimon ben Gamliel: "They [R. Tarfon and R. Akiba] would be responsible for shedding additional blood!"

According to some Talmudic commentaries, notably Rashi, capital punishment has a deterrent affect. Rabbi Akiva and Rabbi Tarfon were willing to remove that deterrent by declaring their unequivocal opposition to capital punishment; they would therefore bear some of the responsibility for the next round of capital crimes. Since these sages would have been responsible for removing the fear of punishment from the populace, they would likewise be morally culpable for the ensuing acts of violence.

The scholars of the Babylonian academies who reviewed this text a hundred or so years later were equally puzzled. In language remarkably similar to that recently invoked, they asked how two great scholars such as Rabbis Akiba and Tarfon could declare their opposition to a valid Biblical law, especially before a particular case arose and the specific facts were known.

They offered a face saving resolution. They concluded that Rabbis Akiba and Tarfon would have asked detailed and difficult questions of the witnesses in order to invalidate their testimony. Did

the witnesses see the criminal act itself, or merely its aftermath? Was the evidence absolutely perfect, or could some defect be found in it that would necessitate a punishment other than death? Seen this way, Rabbis Akiba and Tarfon would have accepted the abstract notion that certain crimes deserve capital punishment; they just would have been hard pressed to implement it in any given case. The rabbis of the *Sanhedrin*, like today's D.A.s, were responsible for justice, not just convictions.

The later scholars believed that a law on the books, even one that was never actually utilized because the particular circumstances were not quite right, could still have the necessary deterrent effect. In fact, many otherwise inapplicable laws were "retained", recorded, and reviewed by the sages of the *Talmud* because of their educational value.

Examples abound of preachers and politicians gaining mileage by painting contemporary events with an ancient paintbrush. The theologian tries to sway the outcome of a modern debate by structuring the argument on biblical ethos, and the listener achieves a degree of comfort in knowing that today's message was also known to, debated among, and resolved by our greatest religious thinkers. Still, yesterday's scholars were hardly monolithic in thought, and there was considerable acrimonious disagreements on legal and ethical issues, even back then. It is possible, therefore, for today's bearers of opposing viewpoints to each claim authenticity by citing the classical texts.

EDITOR'S NOTE REGARDING LAST ISSUE'S ARTICLE ON APPELLATE PROCEDURES FOR DEATH PENALTY CASES.

Due to a printing error the sub-captions were omitted from page 6 of last month's issue. The appropriate captions which should be included before each relevant paragraph are:

Notice to Attorney General
Statistical Data
Duties of the Court of Appeals
Conclusion