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Sh'ma

Cases going to trial in the next months — including those of alleged terrorists — could impose death penalty sentences. Polls reveal that the majority of American Jews, much like the majority of the American population, support the death penalty, though the organized Jewish community supports a moratorium. Why the disconnect? Where will Jews — and our organizations — stand?

Legalized Murder

Abner J.Mikva

"Legalized murder" was how one of my associates characterized the death penalty during a successful appeal many years ago. I don't think the challenging phraseology had anything to do with our winning the appeal, but it does aptly describe the motivation for maintaining the death penalty in our punishment arsenal. Proponents of the death penalty at one time insisted that it acted as some kind of deterrent to crime. I would think that the events of September 11 and the suicide bombers in Israel make it clear that a fear of dying doesn't measure the behavior of many in our midst. It shouldn't be a surprise that persons most likely to break our most important societal rules are not responsive to the threat of death as a consequence of their bad acts.

The real reason for executing people is the oldest of reasons — revenge.

Sometimes the death penalty is advocated as a pragmatic way of "protecting" society from the "animals" that won't follow the rules. A killer may kill again. However, a sentence of life without the possibility of parole can be equally protective. While there have been occasions where persons receiving life sentences have had the sentence commuted, I know of none where the commutee killed again.

It cannot even be argued that it is cheaper to execute a killer than it is to keep him in prison for life. Even though prison care is expensive, it does not compare with the resources that we put into convicting, sustaining, and carrying out a death sentence.

We are one of the few Western countries that still utilize the death penalty. Almost all of Europe (including Russia) have either prohibited its use or declared a moratorium against its infliction. Most European countries will not extradite a person to a country, like ours, that still uses the death penalty. Partly out of shame for this fact, and partly because even in this country the death penalty is controversial, we try to be very careful about how it is imposed. We provide for numerous layers of review by lawyers and judges to make sure that we have the right person, that he doesn't fall in one of the exempt categories, that the means of carrying out the killing are humane, and that one of the many judge-made excuses for not executing the person do not exist.

Notwithstanding many efforts to tighten up the *habeas corpus* appeal rights, death sentences involve numerous appeals. Judges will pore over every piece of evidence and every event during the trial, frequently

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seizing on "technicalities" as the basis for reversal. I clerked for a "hanging" appellate judge, who seldom voted to overturn a death sentence, but who personally read every page of the then-handwritten records because he did not want to "pull the switch" (the electric chair was the device of choice in those days) unless he was absolutely certain that the prisoner was guilty and fairly tried. Some of the most far-reaching criminal law defenses arose out of such appellate concerns. *Miranda*, requiring arrested persons to be read theirrights, and *Escobedo*, precluding questioning without the presence of a lawyer — these and many other such precedents — arose in death penalty cases where the reviewing judges felt angst about the procedures used to pronounce the maximum penalty.

Judges will argue about what is an appropriate minimum age for execution. Is it 15, 16, or 17? If we really are protecting ourselves from animal behavior, why is that important? The quarrel of the day is over the mental capacity of the person to be executed; the exact IQ number is still in a state of flux. Again, if we are protecting ourselves, what difference does it make?

The way we execute people is another cause for controversy. We reformed our way from hanging to the electric chair, until that was determined to be too cruel and inhuman. (What an oxymoron: a gentle and humane execution!) I sat on one appeal where the defendant objected to the use of lethal injections: the inventive argument was made that the Food and Drug Administration should bar the use of the lethal drugs because they were created *only* for the purpose of killing people. The argument didn't last long, but it was a prime example of the ingenuity of lawyers.

The state of mind of the felons is considered most important as to whether they qualifiy for the death penalty. If the crimes were committed in the heat of passion, their lives may be spared. I would think that we would want to protect ourselves as much from the passionate as from the dispassionate.

The more that variations on the theme are scrutinized, the more obvious it is that the real reason for executing people is the oldest of reasons: revenge, anger at the felon, the somewhat flawed interpretation of the biblical "Eye for an eye, tooth for a tooth." But if that is the real reason for remaining outside the fold of all of the Western nations who have reformed away the death penalty, then why don't we acknowledge this thorn in our legal system by its appropriate name? We should admit that we engage in legalized murder.

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Defending Death Row Inmates

Stephen Greenwald

Mid-afternoon on Thursday, May 17, 2001 found me in a small visitors' room at Central Prison in Raleigh, North Carolina with my client Robert Bacon. Two armed prison guards sat with us.

I had represented Robert for six years in State and Federal courts trying to overturn the death sentence he received in 1993. But time was running out; Robert was to be executed in about ten hours, at 1:00 A.M. on May 18th. My co-counsel and I had exhausted all standard legal options and strategies. In the past week we had filed a claim in State court seeking to delay Robert's execution on somewhat novel and previously untested grounds. The claim had reached the North Carolina Supreme Court two days earlier, but, with the clock winding down, no decision had been announced. Robert seemed calm, at peace with whatever was to come. I was tense, nervous, and tired, unsure of what to say that would not seem banal or contrived. Then I was called out to the phone. It was my co-counsel, saying that the North Carolina Supreme Court had granted an indefinite stay of execution to consider our claim. I returned to the visitors' room with the news that Robert would not die that night, and, as we embraced, I felt a sense of pride and satisfaction that I was a lawyer, able to use whatever skills I had to save a life; a pride and satisfaction I had never experienced before. (Robert's sentence was commuted to life imprisonment by Governor Michael Easley in September 2001.)

But I have not described Robert's crime, nor told of his victim and the victim's family. Don't they