

# FORWARD

## When the Written Word And Reality Diverge

*But if harm should occur, then you are to give life in place of life — eye in place of eye, tooth in place of tooth, hand in place of hand, foot in place of foot, burnt-scar in place of burnt-scar, wound in place of wound, bruise in place of bruise.*

— Exodus 21:24-25

By ALEX KOZINSKI

**T**his passage from the week's Torah portion epitomizes for many, especially non-Jews, the harsh justice of the Old Testament. While primarily concerned with civil law, the portion also mandates the death penalty for a variety of transgressions, from

### THE PORTION

EXODUS 21:1-24:18

murder and idolatry to cursing one's parents.

Those familiar with Jewish law and tradition know that the written word and the reality diverged. There are no recorded instances of eye gouging, flesh searing or public amputation. Nor was anyone executed for being a rebellious son, as prescribed in Deuteronomy. If such things ever happened, Jewish law evolved so as to make them unthinkable.

Capital punishment in particular came into great disfavor. While the Torah prescribed death for many transgressions, executions were exceedingly rare. In a famous passage from the Mishna, Rabbi Elazar ben Azariah described a Sanhedrin that imposed the death penalty every 70 years as "bloodthirsty."

How does one reconcile the written word — the word of God, after all — and the actual practice? The answer can be summarized in a single word: interpretation. The rabbis entrusted with the administration of the law found creative ways to adapt the Torah's harsh words to evolving mores and sensibilities. The requirement of an eye for an eye was interpreted as calling for the payment of the value of an eye. And capital punishment

could not be imposed at all unless two witnesses testified that they had seen the crime being committed and warned the perpetrator of the consequences. In addition, they had to have heard him say, not only that he understood, but also that he was committing the crime in order to suffer the punishment. As Nathan Lewin explains in an amicus curiae brief recently filed in the United States Supreme Court, the rabbis also took great pains to ensure that the methods of execution prescribed by the Torah were carried out humanely and without mutilation.

There were, even in those days, the strict constructionists who insisted that the biblical text should be applied without regard to oral tradition or rabbinical interpretation. These were the Sadducees, whose views were rejected. Instead, Judaism

### The death penalty for the sin of cursing one's parents?

embraced the notion that law has no meaning in the abstract, that the written word must be interpreted and shaped to reflect evolving standards of justice and decency. And it was the judges of that day, the rabbis, who were entrusted with the delicate task of tempering a code full of thundering commandments and stern prohibitions into a humane, almost gentle, body of common law. At that time, and in the centuries since, we have called this wisdom.

Today we call it judicial activism.

*Judge Kozinski, a federal judge in California, considers himself a Sadducee on matters of constitutional law.*