

# *Christians and Capital Punishment*

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# *Christians and Capital Punishment*

## *I. Introduction*

This paper is the tangible result of an action taken by the Baptist General Convention of Texas in the form of a motion requesting that the Christian Life Commission study and report on the issue of capital punishment. Our *study* involved the extensive research upon which the paper is based and the deliberations of a capital punishment work group which met several times over the course of two years. One of these meetings involved a trip to the Texas execution chamber in Huntsville and extensive conversations with a number of prison administrators and chaplains.

A major part of our *report* is this paper. The scope and depth of the paper is commensurate with the complexity of the issue. Capital punishment does not yield to simplistic analysis at any level--biblical, historical, ethical, or practical. The sections which follow attempt to present the most salient aspects of the most important dimensions of the issue. We are indebted to many who have labored to do careful research on capital punishment and related issues, and the extent of our indebtedness is reflected in the footnotes which accompany the following text.

## *II. The Witness of Scripture*

### *Old Testament*

#### *Legal Texts*

The legal sections of the Old Testament (Torah) assign the death penalty for a multitude of offenses: for murder (Exod. 21:12-14); for owning an animal that kills people (Exod. 21:29); for kidnapping (Exod. 21:16; Deut. 24:7); for prophesying in the name of the other gods or prophesying falsely in the name of Yahweh (Deut. 18:20); for a stubborn son's disobedience to his mother or father or a child's cursing or striking a parent (Deut. 21:18-21; Exod. 21:15, 17; Lev. 20:9); for incest, adultery, bestiality, homosexual intercourse, rape, prostitution, and having sex during a woman's menstrual period (Exod. 22:19; Deut. 22:21, 24, 25; Lev. 20:10-16, 18; 21:9); for witchcraft and sorcery (Exod. 22:18; Lev. 20:27); for Sabbath-breaking (Exod. 31:14; Num. 15:32-36); for falsely testifying at a capital offense trial (Deut. 19:15-21); for making sacrifice to other gods (Exod. 22:20); for abusing widows and orphans (Exod. 22:22-24); for child sacrifice (Lev. 20:2); for enticing people to worship other gods (Deut. 13:6-11); for blasphemy (Lev. 24:13-16); and for a non-Levite who enters the sacred place (Num. 1:51; 3:10, 38; 18:7).<sup>1</sup>

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<sup>1</sup> Glen H. Stassen, "Biblical Teaching on Capital Punishment," in Glen H. Stassen, ed., *Capital Punishment: A Reader* (Cleveland, OH: Pilgrim Press, 1998), pp. 119-120. Dr. Stassen's work in this book, in Glen Stassen and David Gushee, "The Death Penalty and Preventive Initiatives," in *Kingdom*

The Old Testament provides relatively few accounts of actual executions. Leviticus 24:10-23 depicts the execution of a male who “blasphemed the Name in a curse” (Lev. 24:11) during the course of a fight. After being brought before Moses, “they took the blasphemer outside the camp, and stoned him to death” (Lev. 24:23). Numbers 15:32-36 describes the execution of an Israelite who was found “gathering sticks on the Sabbath day” (Num. 15:32). Like the blasphemer in the Leviticus passage, this transgressor of Sabbath law was taken outside the camp and stoned to death by the community. I Kings 21:1-16 tells the story of Naboth, the vineyard owner who refused to relinquish his ancestral property to King Ahab. Jezebel arranged for Naboth to be tried on charges of treason (not a capital offense in the above listing) and on the basis of false witnesses, Naboth was executed by stoning. II Chronicles 24:20-22 recounts the execution of the prophet Zechariah whose prophecies had angered King Joash. Like Naboth, Zechariah’s stoning was politically inspired and unrelated to the commission of any capital offense. Numbers 25 records the execution of Midianites and Israelites who have intermarried and worshipped the Midianite deity, “the Baal of Peor.”<sup>2</sup>

The paucity of execution accounts seems somewhat odd in light of manifold capital offenses prescribed by the Torah. Even in an *exemplary* society (which the prophets complain Israel was not), enforcing the long list of capital offenses would have resulted in significant numbers of offenders. Allowing for mitigating factors (e.g., not every execution would be recorded; repetitive accounts might be embarrassing to the community, etc.), it is at least curious that more executions are not recorded.<sup>3</sup>

Still more curious are the several prominent examples of perpetrators of capital offenses who are *not executed*. Cain, the father of all murderers, acting out of premeditated jealousy, kills his own brother. Found out, he cries,<sup>4</sup>

*I shall be a fugitive and a wanderer on the earth, and anyone who meets me may kill me. Then the LORD said to him, “Not so!” . . . And the LORD put a mark on Cain, so that no one who came upon him would kill him.* (Gen. 4:14-15)

With his own mark, Yahweh protects Cain from the clan<sup>5</sup> vengeance which Cain fully expected and from the penalty which the Torah would eventually prescribe.<sup>6</sup>

Moses is ridiculed by his kinsmen for killing an Egyptian who was beating a Hebrew slave, but instead of receiving the death penalty is chosen by God to deliver his people from slavery (Exod. 2:11ff.). David not only commits the capital offense of adultery with Bathsheba (even during the purification ritual following her menstrual period), but also orchestrates the death of her husband Uriah. Confronted by the prophet Nathan, David confesses and repents. Immediately, the prophet offers Yahweh’s pardon to this

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**Ethics** (Downers Grove, IL: InterVarsity Press, 2002), and on the capital punishment work group was extremely helpful and is reflected throughout this study.

<sup>2</sup> Ibid., pp. 120-121.

<sup>3</sup> Ibid., pp. 120-122.

<sup>4</sup> Ibid.

<sup>5</sup> Throughout Section I the term “clan” is used to name a social grouping defined mostly by kinship and tribal identity within ancient Hebrew culture.

<sup>6</sup> Ibid.

perpetrator of double capital offenses: “The Lord has put away your sin; you shall not die” (2 Sam. 11-12).<sup>7</sup>

Tamar admits she has committed adultery with her father-in-law--yet another capital offense. Not only is she allowed to live, but her adultery produces an ancestor of David and Jesus (Gen. 38; Matt. 1:3; Luke 3:33). Even though his wife Gomer repeatedly commits adultery, the prophet Hosea painstakingly forgives her and welcomes her back into their marriage covenant.<sup>8</sup>

Throughout the Old Testament the long list of capital offenses seems to co-exist in tension with community practice. Capital punishment is prescribed, but specific executions appear much less frequently in scripture than one might expect. Prominent and not-so-prominent capital offenders who clearly deserve execution according to Israel’s law are not executed. These exemptions evoke little or no commentary or explanation in the biblical text.<sup>9</sup>

Other legal considerations impinge upon this paradoxical tension. The *lex talionis*--the rule of revenge which stipulates a life for a life, an eye for an eye, and a tooth for a tooth (Exod. 21:24-26; Deut. 24:20)--appears at first glance to *require* vengeance, but instead actually *limits* it. Otherwise, angry family members might take seven or more lives for a life, as Lamech boasted (Gen. 4:23). The *lex talionis* reflects that clan revenge--the earliest mode of capital punishment--was part of Israel’s community practice, that this revenge had a tendency to spiral out of control, and that the community was intent to restrict clan vengeance within the limits of strict proportionality. The important point is that, contrary to common perception, the *lex talionis* was a legal tradition which embodied the community’s determination to *limit* and not to *require* revenge.<sup>10</sup>

The rule of limited revenge is supplemented by rules defining acceptable substitutions, so that by the time of Jesus most of these penalties (e.g., an eye for an eye) could be absolved through payments of money (although Num. 35:31 specifies that monetary ransom could not serve as an acceptable substitute in the case of murder). The provision for cities of refuge further limits vengeance, so that perpetrators of certain types of homicide, e.g., unintentional manslaughter (Exod. 21:12-13), could escape their avengers.<sup>11</sup>

The Mishnah--the record of authoritative rabbinic oral interpretation of the written law from about 200 B.C. to A.D. 200--makes death penalty determinations extremely difficult. According to rabbinic teaching, death penalty trials require twenty-three judges. Since capital offenses are seldom committed in public, the biblical requirement of at least two eye witnesses (Deut. 19:15) prevented many cases from being brought to trial. In addition, the testimony of near relatives, women, slaves, or people with a bad reputation is not admitted. If the judges find that a witness testified falsely with malicious intent, the witness gets the penalty that would have gone to the defendant, as Deuteronomy 19:15-21

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<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid., p. 122.

<sup>10</sup> Ibid., p. 121.

<sup>11</sup> John Howard Yoder, *The Christian and Capital Punishment* (Newton, Kansas: Faith and Life Press, 1961), p. 7.

prescribes. Old Testament scholar George Foot Moore concludes, “It is clear that with such a procedure conviction in capital cases was next to impossible, and that this was the intention of the framers of the rules is equally plain.”<sup>12</sup> The Mishnah describes a court which executes one man in seven years as “ruinous” or “destructive.” Rabbi Eliezar ben Azariah says, “Or one in even seventy years.” Rabbi Tarfon and Rabbi Akiba say, “Had we been in the Sanhedrin none would ever have been put to death.” Rabbi Simeon ben Gamaliel says, “[for the Sanhedrin to put someone to death] would have multiplied the shedders of blood in Israel.”<sup>13</sup> These rabbinic teachings are important, as they reflect the interpretations of Israel’s most significant legal scholars in the centuries which bracket the New Testament era.

In summary, Old Testament *legal texts* prescribe the death penalty for a long list of moral, sexual, and religious transgressions, but Israel’s *community practice* appears eventually to choose either not to enforce or to make it very difficult to enforce actual executions. Few executions are recorded in biblical texts, and prominent perpetrators of capital offenses are not executed. Related legal traditions (e.g., the *lex talionis* and cities of refuge) served to limit the practice of clan vengeance, the earliest mode of capital punishment.

Resolving the tension between legal prescription and community practice involves the recognition of *two critical convictions* simultaneously affirmed by the Old Testament. The first conviction is a profound seriousness about obeying God’s will. Since disobeying or disregarding the community’s covenants with God threatens the very existence of the community, disobedience is a deadly serious matter. The second conviction is a profound respect for the value of human life, created in the image of God (Gen. 1:26). Taken together, these two convictions seem to eventuate in a community practice such that executing people for capital offenses is avoided if there are viable, alternative ways to administer punishment. Thus, over time, executions appear to become less prominent in the life of Israel. The death penalty is almost never mentioned in the Prophets and the Writings, parts of the Old Testament written after the oldest law codes of the Pentateuch were formulated. The Mishnah--which reflects rabbinic teaching through the late Old Testament, intertestamental, and New Testament periods--frowns on the death penalty. Modern Israel has never practiced capital punishment, which fact is reflective of present-day Jewish understanding of biblical and rabbinic traditions.

### **Genesis 9:6**

For a number of reasons, Genesis 9:6 has played a central and historic role in justifying capital punishment. The verse is immediately contexted by divine post-flood addresses to Noah and his family:

<sup>1</sup>God blessed Noah and his sons, and said to them, “Be fruitful and multiply, and fill the earth. <sup>2</sup>The fear and dread of you shall rest on every animal of the earth, and on every bird of the air, on everything that creeps on the ground, and on all the fish of the sea; into your hand they are delivered. <sup>3</sup>Every moving thing that lives shall be food for you;

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<sup>12</sup> George Foot Moore, *Judaism in the First Centuries of the Christian Era* (New York: Schocken Books, 1971 edition), vol. 11, pp. 184-187. See also George Horowitz, *The Spirit of Jewish Law* (New York: Central Book Company, 1963), pp. 165-170, 176.

<sup>13</sup> Herbert Danby, trans., *The Mishnah* (London: Oxford University Press, 1933), 403; Makkoth, 1. 10.

and just as I gave you the green plants, I give you everything. <sup>4</sup>Only, you shall not eat flesh with its life, that is, its blood. <sup>5</sup>For your own lifeblood I will surely require a reckoning: from every animal I will require it and from human beings, each one for the blood of another, I will require a reckoning for human life.

<sup>6</sup>Whoever sheds the blood of a human,  
by a human shall that person's blood be shed;  
for in his own image  
God made humankind.

<sup>7</sup>And you, be fruitful and multiply, abound on the earth and multiply in it.  
(Gen. 9:1-7)

Martin Luther considered 9:6 to be the source of all civil law, granting to humans power over life and death and hence over everything else.<sup>14</sup> This verse has sometimes been read as a timeless demand by God for the execution of anyone who kills another person. Careful exegesis of the verse in context, however, discloses the problematic nature of simply inserting Genesis 9:6 into contemporary jurisprudence as a timeless moral imperative.

Because verse 6 constitutes one of the so-called “Noachic commandments” given in a biblical context which predates the Mosaic covenant with Israel, early Jewish teachers concluded that these commandments applied to all of humanity. The Book of Acts (15:20, 29; 21:25) and patristic sources seem to indicate that the Noachic commandments served as ethical norms for the early church.<sup>15</sup>

Verses 1-7 are part of God’s post-flood speech to Noah which begins at 8:21 with the promise never again to “destroy every living creature.” Verse 1 echoes the Edenic command in 1:28 (“Be fruitful and multiply”), but the rest of the passage makes it perfectly clear that this is no return to paradise. Humans will not simply “have dominion,” but will be the “fear and dread” of the entire animal kingdom. The post-flood world is the world we know, filled with violence and angst.<sup>16</sup>

Verse 3 grants to humans a new privilege, the right to kill animals for food. To this privilege verse 4 attaches the restriction, “Only, you shall not eat flesh with its life, that is, its blood.” Animal flesh may not be eaten with its “life,” denoted here and elsewhere as its blood (cf. Lev. 17:11, 14; Deut. 12:23). What might appear to be two distinct issues to modern readers--eating blood and shedding blood--are in Hebrew thinking closely related. Restrictions regarding blood remind Israel that all life belongs to God and must be respected as God’s own. Animals may be killed for food, but their life (blood) belongs to God.<sup>17</sup>

The underlying *assumption* is that the permission to kill animals carries with it the danger of blood-lust or wantonness. The underlying *conviction* is that only God can give life, and every life that is taken requires accountability to God. Verses 5 and 6 follow from this

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<sup>14</sup> Donald E. Gowan, *From Eden to Babel* (Grand Rapids, MI: Wm. B. Eerdmans Publishing Co., 1988), p. 103.

<sup>15</sup> Bruce Vawter, *On Genesis: A New Reading* (Garden City, NY: Doubleday and Co., 1977), p. 133.

<sup>16</sup> Gowan, *From Eden to Babel*, p. 102.

<sup>17</sup> *Ibid.*, pp. 102-103.

assumption and conviction. The brutality which God disallows toward animals cannot be separated from brutality toward humans. What is *conditionally allowed* with regard to animals is *unconditionally disallowed* with regard to humans. Verse 5 hammers home the theme of accountability to God for the taking of human life with the repetition of the phrase, “I will require a reckoning.”<sup>18</sup>

Verse 6 underscores the declaration of verse 5 in chiasmic (poetic) verse form. In the context of blessing of those saved from the flood, God categorically denies the brutality and violence which preceded the flood. The variations of interpretation of verse 6 are striking. Claus Westerman, one of the most well respected commentators on Genesis, summarizes the range of opinion:

*H. Gunkel suggests: “it could be an old legal saying.” J. Skinner: “possibly an ancient judicial formula which had become proverbial”; G. von Rad: “an extremely ancient sentence from sacral legal terminology.” B. Jacob on the contrary says: “It is not a formal legal pronouncement; [rather] a threat, a prophetic admonition.” S. McEvenue sees it quite differently: “The chiasmic form and rhyming quality lean . . . toward proverb style” . . . . He sees the clearest parallel in Mt 26:52: “. . . all who take the sword will perish by the sword.” . . . McEvenue comes to the conclusion that it has been demonstrated neither that the sentence 9:6a is very old, nor that it is a law. . . . The embarrassment remains that the interpreters vary between judicial formula, proverb and prophetic admonition.*<sup>19</sup>

Westerman’s own conclusion is that a simple, non-poetic legal statement (e.g., “thou shalt not kill”) has been shaped in the present context into a proverbial statement which serves as a divine warning against taking human life. The theological basis for this warning is that humans have been made in the *image of God*. Westerman argues that since God’s image exists in the unique relationship between God and humanity, murder is a direct attack on God’s right of dominion. “We have here the expression of a statement rather than a command: God will make demands for the many unexpiated crimes against humans as the image of God.” Interpretations that infer a transference of authority to punish from verse 6 (cf. Martin Luther above) impose a

*foreign, western understanding of authority. . . To call the “authorities” executors and representatives in this context is to make them a center of attention of which there is no trace in the text. The presupposition about what is said in v. 6 about the execution of the death penalty by humans is something else. Whoever executes it and whatever form it takes, the demand for life taken is a demand made by God.*<sup>20</sup>

A number of scholars emphasize the sacral character of Genesis 9:4-6, observing that these verses immediately follow the account of Yahweh’s positive response to Noah’s burnt offering:

*This means that we can never make the question of the death penalty [with regard to Genesis 9:6] a purely legal, nonreligious matter; it is a sacrificial act. The blood, i.e.,*

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<sup>18</sup> Claus Westerman, *Genesis 1-11: A Commentary* (Minneapolis, MN: Augsburg Publishing House, 1984), pp. 465-466.

<sup>19</sup> *Ibid.*, p. 467.

<sup>20</sup> *Ibid.*, p. 468.

*the life, of every man and beast belongs to God; to respect this divine ownership means, in the case of animals, that the blood shall not be consumed; for men it means that there shall be no killing. If there is killing, the offense is not simply a civil offense; it is also a ritual, religious evil, and it demands ceremonial compensation. If we must make the distinction at all between ceremonial and other considerations, it is not so much a legal or an ethical as a ceremonial requirement, that blood must be paid for with blood. If we would understand Genesis 9, we must think not of a moral order decreeing that one injury can be righted by another--there is nothing moral about that--but of a deeply religious reverence for life as sacred, belonging to God alone, so he who robs God by shedding his brother's blood forfeits his own blood in expiation.*<sup>21</sup>

Other scholars emphasize that the poetic structure of Genesis 9:6 evidences its proverbial character. So understood, this verse reflects the community's wisdom that people who shed the blood of others typically suffer the same fate. A number of commentators argue that Jesus so interpreted the verse in his rebuke of the disciple who drew the sword at Gethsemane:<sup>22</sup>

*Suddenly, one of those with Jesus put his hand on his sword, drew it, and struck the slave of the high priest, cutting off his ear. Then Jesus said to him, "Put your sword back into its place; for all who take the sword will perish by the sword."*  
(Matt. 26:51-52)

However Genesis 9:6 is construed (e.g., legal decree, prophetic warning, proverbial observation, sacral reflection), the issue of *application* remains. Genesis 9:6 provides general confirmation with regard to murder what we already know in more detail from Israel's legal texts with regard to multiple capital offenses: the covenant community, either by clan vengeance or formal legal procedure, is authorized to execute capital offenders. Israel's own struggle over time with the application of these legal texts to community practice has been amply documented.<sup>23</sup> Attempts to avoid this same struggle by treating verse 6 as a universal decree subvert sound hermeneutical principles. Its Noachic context notwithstanding, Genesis 9:6 is subject to all of the usual inquiries associated with applying the Bible to contemporary life. What is the context? What is the literary genre? Is this text a legal decree, a prophetic warning, a proverbial observation, or a sacral reflection? Does it embody several of the above? How does the prohibition against *taking* human life balance with the *demand* (legal, sacral, prophetic?) of

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<sup>21</sup> Yoder, *The Christian and Capital Punishment*, pp. 8-9; cf. Gowan, *From Eden to Babel*, p. 103; Walter Brueggemann, "Genesis," *Interpretation: A Bible Commentary for Teaching and Preaching* (Atlanta: John Knox Press, 1982), p. 83; Gordon J. Wenham, *Word Biblical Commentary, Vol. 1: Genesis 1-15* (Waco, TX: Word Books, 1987), p. 193; Gerhard von Rad, *Genesis: A Commentary* (Philadelphia: Westminster Press, 1972), pp. 130-132; Vawter, *On Genesis: A New Reading*, p. 132.

<sup>22</sup> Lewis Smedes, *Mere Morality: What God Expects from Ordinary People* (Grand Rapids, Mich.: Eerdmans, 1983), 119-121; Westermann, *Genesis 1-11: A Commentary*, pp. 463 ff; James J. Megivern, *The Death Penalty: An Historical and Theological Survey* (New York: Paulist, 1997), pp. 15-16; *The Interpreters Bible: Genesis*, (Nashville: Abingdon, 1952), p. 550; *The New Interpreters Bible: Genesis*, (Nashville: Abingdon, 1994), p. 399; Nahum M. Sarna, *The JPS Torah Commentary: Genesis* (Philadelphia: The Jewish Publication Society, 1989), p. 61.

<sup>23</sup> See Section I, pp. 1-3.

life for life? That is, how does the community's concern for *covenant fidelity and integrity* balance with the *sanctity of human life*?

Does the chiasmic structure of Genesis 9:6, with its precise correspondence of life for life ("whoever sheds . . . shall that person's blood be shed") *require* or *limit* the shedding of blood? That is, just as the *lex talionis* of Israel's legal traditions functioned to limit blood vengeance with its precise prescription of "life for life," does not Genesis 9:6 function much the same way in its post-flood context? As the violence which preceded and followed the flood testifies, vengeance *happens*. It hardly needs to be *commanded*. In every age normative human behavior follows the same pattern of violence, followed by counter-violence, followed by counter-counter-violence so that the resulting mass of violence accumulates in multiples which far exceed the original act of violence. As in the case of the *lex talionis*, the truly requisite command (if it is to be interpreted as a command) seems to be strict and precise proportionality. Finally, since the completely unqualified reference to homicide in Genesis 9:6 ("whoever sheds the blood of a human") seems to include *all* who take human life regardless of motive or circumstance (e.g., unintentional homicide, killing in war), how readily does this verse serve as a guide for contemporary jurisprudence? These questions and the foregoing exegetical reflections suggest that we should be wary of interpretations which find unconditional and timeless justification for the death penalty in this text.

## ***New Testament***

### ***The Gospels***

In some ways, New Testament teachings represent a continuation or further development of Old Testament and rabbinic traditions. The New Testament clearly reflects the twin Old Testament convictions regarding the critical importance of obedience and the value of human life. Jesus was certainly serious about obeying God:

*"Do not think that I have come to abolish the law or the prophets; I have come not to abolish but to fulfill. For truly I tell you, until heaven and earth pass away, not one letter, not one stroke of a letter, will pass from the law until all is accomplished. Therefore, whoever breaks one of the least of these commandments, and teaches others to do the same, will be called least in the kingdom of heaven; but whoever does them and teaches them will be called great in the kingdom of heaven. For I tell you, unless your righteousness exceeds that of the scribes and Pharisees, you will never enter the kingdom of heaven. (Matt. 5:17-20)*

He also emphasized the value of human life:

*Are not five sparrows sold for two pennies? Yet not one of them is forgotten in God's sight. But even the hairs of your head are all counted. Do not be afraid; you are of more value than many sparrows. (Luke 12:7)*

Jesus not only taught that we should not kill, but that we should quench festering anger with reconciling initiatives:

*You have heard that it was said to those of ancient times, "You shall not murder;" and "whoever murders shall be liable to judgment." But I say to you that if you are angry*

*with a brother or sister, you will be liable to judgment; and if you insult a brother or sister, you will be liable to the council; and if you say, "You fool," you will be liable to the hell of fire. So when you are offering your gift at the altar, if you remember that your brother or sister has something against you, leave your gift there before the altar and go; first be reconciled to your brother or sister, and then come and offer your gift.*  
(Matt. 5:21-24)

Building on the law of limited revenge, Jesus breaks new ground:

*You have heard that it was said, "An eye for an eye and a tooth for a tooth." But I say to you, do not resist an evil-doer. But if any one strikes you on the right cheek, turn the other also; and if any one wants to sue you and take your coat, give your cloak as well; and if any one forces you to go one mile, go also the second mile. Give to anyone who begs from you, and do not refuse anyone who wants to borrow from you."*  
(Matt. 5:38-42)

In this Sermon on the Mount setting, Jesus not only opposes limitless revenge, but also moves beyond the rule of limited revenge prescribed by the *lex talionis* to a third way, the way of *transforming initiatives*. Shunning the vicious cycles of even limited retaliation, Jesus calls us to creative confrontation and constructive community-building.

Jesus makes direct contact with the death penalty in the story of the woman caught in adultery:

*Early in the morning he came again to the temple. All the people came to him and he sat down and began to teach them. The scribes and the Pharisees brought a woman who had been caught in adultery; and making her stand before all of them, they said to him, "Teacher, this woman was caught in the very act of committing adultery. Now in the law Moses commanded us to stone such women. Now what do you say?" They said this to test him, so that they might have some charge to bring against him. Jesus bent down and wrote with his finger on the ground. When they kept on questioning him, he straightened up and said to them, "Let anyone among you who is without sin be the first to throw a stone at her." And once again he bent down and wrote on the ground. When they heard it, they went away, one by one, beginning with the elders; and Jesus was left alone with the woman standing before him. Jesus straightened up and said to her, "Woman, where are they? Has no one condemned you?" She said, "No one, sir." And Jesus said, "Neither do I condemn you. Go your way, and from now on do not sin again." (John 8:2-11)*

Johannine scholar Raymond E. Brown, praises the beauty of this story with "its succinct expression of the mercy of Jesus." Brown concludes, "The delicate balance between the justice of Jesus in not condoning the sin and his mercy in forgiving the sinner is one of the great gospel lessons."<sup>24</sup> Reflecting the Old Testament, the gospels teach us that disobedience may not be taken lightly, but mercy and the sacredness of human life require us to avoid killing criminals if there is a ethically serious alternative. Jesus releases the woman from the death penalty, but he admonishes her not to commit adultery again.

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<sup>24</sup> Raymond E. Brown, *The Gospel According to John* (Garden City, NY: Doubleday, 1966), vol. 1, pp. 336ff.

Lutheran bishop Lowell Erdahl says the accusers in the John 8 story “were convicted of their own sins and accepted the fact that there is no justification for the vengeful execution of one sinner by another. . . . The woman’s accusers knew enough about Jesus to expect that he might oppose her execution. We too are not surprised. . . . We would be shocked if Jesus had said, ‘Go ahead and kill this wretched sinner.’”<sup>25</sup>

### ***The Crucifixion of Jesus***

The other occasion when Jesus confronted the death penalty was when he himself was its victim. Crucifixion was a form of state terrorism administered to slaves and rebels who were tortured and killed in full public view to convince other slaves and potential rebels not to resist oppression.<sup>26</sup>

The Gospel accounts make it clear that Jesus was falsely accused and unjustly condemned (cf. John 18:38). In the words of one New Testament scholar, “He was falsely accused, unfairly tried, wrongly condemned, brutally tortured, and unjustly executed.”<sup>27</sup> Barabbas was actually guilty of insurrection, the crime with which Jesus was charged (Luke 23:19), and was freed in Jesus’ place. Despite the injustice of his execution, Jesus prayed from the cross, “Father, forgive them, for they know not what they are doing” (Luke 23:34). “They” needed forgiveness because the execution of Jesus was patently undeserved.

That God was able to use the cross for the redemption of humankind bears remarkable testimony to God’s redemptive faithfulness but in no way lessens the injustice of Jesus’ crucifixion. This is to say the Gospel accounts of Jesus’ death do not imply the legitimacy of capital punishment. It is in this context that the following account of the conversation between Jesus and Pilate must be understood:

*Now when Pilate heard this, he was more afraid than ever. He entered his headquarters again and asked Jesus, “Where are you from?” But Jesus gave him no answer. Pilate therefore said to him, “Do you refuse to speak to me? Do you not know that I have power to release you, and power to crucify you?” Jesus answered him, “You would have no power over me unless it had been given you from above; therefore the one who handed me over to you is guilty of a greater sin.” (John 19:8-11)*

Sharing Pilate’s misunderstanding of Jesus’ reply, some interpreters make the claim that this exchange tacitly legitimizes capital punishment. The theme of ironic misunderstanding runs throughout the Gospel of John. Words and phrases often mean one thing to the actors in the biblical drama and quite another thing to post-resurrection readers. When Jesus speaks of his “glorification,” for example, he consistently refers to his crucifixion, though his disciples seem never to understand this reference. The gap between meanings and understandings intensifies the dramatic impact of John’s narratives and dialogues. In this passage Jesus is speaking of God’s power to bring about the hour of redemption when he will die so that we may live. Pilate plays a role in this hour only because God allows him to do so. Pilate misunderstands, thinking the point of the

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<sup>25</sup> Lowell Erdahl, *Pro-Life/Pro-Peace* (Minneapolis: Augsburg Publishing House, 1986), p. 114.

<sup>26</sup> Martin Hengel, *Crucifixion in the Ancient World and the Folly of the Message of the Cross* (Philadelphia: Fortress, 1977).

<sup>27</sup> Christopher D. Marshall, *Crowned with Glory and Honor* (Telford, PA: Pandora Press, 2001), p. 91.

exchange is his power to command legions and kill people. Jesus' reply speaks to the issue of God's gift of redemption through the hour of his glorification/crucifixion. The power given to Pilate references Pilate's God-granted role in the drama, not his power to execute criminals. As Raymond Brown says, "No one can take Jesus' life from him; he alone has power to lay it down. However, now Jesus has voluntarily entered 'the hour' appointed by his Father (12:37) when he will lay down his life. In the context of 'the hour' therefore, the Father has permitted men to have power over Jesus' life."<sup>28</sup> The crucifixion narratives clearly affirm that the authorities acted unjustly in sentencing Jesus to death and neither directly nor indirectly underwrite capital punishment.

### **Other New Testament Passages**

Similar arguments are sometimes made regarding Acts 25:11, where Paul says,

*Now if I am in the wrong and have committed something for which I deserve to die, I am not trying to escape death; but if there is nothing to their charges against me, no one can turn me over to them. I appeal to the emperor.*

The context of this passage is Paul's appearance before the Roman procurator Porcius Festus following his trial before the Jewish council. When Festus proffers the option of standing trial before Jewish authorities in Jerusalem, Paul appeals on the basis of his Roman citizenship to appear before the emperor's tribunal. The context makes clear that the clause "now if I am in the wrong and have committed something for which I deserve to die" is purely subjunctive. Paul is neither admitting the possibility that he has committed a capital offense nor underwriting capital punishment. He *knows* that he has committed no crime, but appeals to Caesar because the Jewish establishment is intent on unjustly executing him.

The New Testament describes other instances of the death penalty being threatened or imposed, but nowhere does Jesus or his followers *advocate* the death penalty. In fact, every instance is presented as an injustice: the beheading of John the Baptist (Matt. 14:1-12); the crucifixion of Jesus (John 18:38; Luke 23:34); the stoning of Stephen (Acts 7); the stoning of other Christians (Matt. 21:35; 23:37; John 10:31ff.; Acts 14:5); the threatened death penalty for Paul (Acts 25:11, 25 and 26:31); the persecution of Christians in the Book of Revelation. Also, in the Letter to Philemon, Paul writes persuasively to save the life of the escaped slave, Onesimus, who under Roman law was liable to execution.<sup>29</sup>

### **Governmental Authority: Romans 13**

Some interpreters argue that the authority of the Roman government to impose capital punishment is specifically endorsed in Romans 13:1-7:

*Let every person be subject to the governing authorities. . . .for the authority does not bear the sword in vain. . . .For the same reason you also pay taxes, for the authorities are God's servants, busy with this very thing. Pay to all what is due them--taxes to*

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<sup>28</sup> Brown, *The Gospel According to John*, p. 893.

<sup>29</sup> Henlee Barnette, *Crucial Problems in Christian Perspective* (Philadelphia: Westminster Press, 1970), p. 129.

*whom taxes are due, revenue to whom revenue is due, respect to whom respect is due, honor to whom honor is due.*

Biblical scholarship has helped us to understand that Paul is urging his readers to pay Roman taxes and not to participate in a rebellion against the emperor Nero's new taxation policy. The Greek word in Romans 13:4 translated "sword" does not name the instrument used in capital punishment, but rather designates the symbol of authority carried by the police who accompanied tax collectors. Paul was urging Christians to make peace, pay Nero's new tax, and not rebel. He was not arguing *for* capital punishment. He was arguing *against* violence.<sup>30</sup>

This understanding fits the immediate and larger context of Romans. Paul says that because of God's reconciliation with humanity in the Christ event, God's children are called to be reconciled with each other. In chapter 12, readers are exhorted to love one another, to bless their enemies, never to seek vengeance, and to overcome evil with good. In chapter 14, he encourages Gentile Christians who do not observe dietary laws not to judge Jewish Christians who do. That Paul counsels the Roman church not to rebel against governmental authorities in 13:1-7 is consistent with the reconciliation theme which pervades Romans.

## **Conclusion**

### ***The Way of Jesus***

For Christians, Jesus is Lord of scripture, the very Word of God through whom all other revelatory words must be interpreted. As we have seen, the twin Old Testament themes of seriousness about obedience and reverence for life are incarnated in Jesus' life and teachings. The way that Jesus embodies these and other important Old Testament themes like righteousness, justice, and covenant fidelity in the context of his life, death, and resurrection constitutes the Way of Jesus (Acts 9:2; 18:25-26; 19:9, 23; 22:4; 24:14, 22) which Way calls and commands the life of every Christian. Through this Way, we discern the ways of God among us--past, present, and future:

*Thomas said to him, "Lord, we do not know where you are going. How can we know the way?" Jesus said to him, "I am the way, and the truth, and the life. No one comes to the Father except through me. If you know me, you will know my Father also. From now on you do know him and have seen him." (John 14:5-7)*

Following Jesus is the defining act of Christian discipleship:

*By this we may be sure that we are in him: whoever says, "I abide in him," ought to walk just as he walked. (I John 2:6)*

In the present context of discerning the witness of scripture regarding the death penalty, following Jesus appears to include moving beyond revenge to transforming and reconciling initiatives (Matt. 5:21-24); practicing neighbor love so expansively as to include love for our enemies (Matt. 5:43-48); valuing and embracing the disenfranchised, the despised,

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<sup>30</sup> Stassen, *Capital Punishment*, p. 126 referring to Johannes Friedrich, Wolfgang Pöhlmann, and Peter Stuhlmacher, "Zur historischen Situation und Intention von Röm 13, 1-7," *Zeitschrift für Theologie und Kirche* (1976), p. 131 ff.

and the forgotten (“the least of these”) (Matt. 25:31-46); sharing God’s love and hope with everyone, including those whose lives appear to be hopelessly lost and broken (Luke 15:1-34); and proclaiming God’s mercy and forgiveness for sinners even as we champion the cause of righteousness (John 8:2-11).

### ***Summary and Reflection***

To summarize:

- ❖ Old Testament legal texts prescribe the death penalty for a sizeable list of moral, sexual, and religious offenses.
- ❖ Over time, capital punishment appears to become less prominent in the life and faith of Israel.
- ❖ The tension between legal prescription and community practice reflects the creative balance between highly esteemed twin convictions: reverence for human life and seriousness about obedience.
- ❖ Jesus embodies these twin convictions throughout his life and teachings in his critical (e.g., “you have heard...but I say to you”) reinterpretation of covenant fidelity which constitutes the Way of Jesus.
- ❖ In his encounter with an imminent execution, Jesus synthesizes the twin convictions in a single pronouncement: “Neither do I condemn you. . . . do not sin again” (John 8:11).
- ❖ Prompted and carried out by religious and government authorities, Jesus’ own execution was clearly unjust.
- ❖ Other executions or threatened executions recorded in the New Testament are also unjust.
- ❖ Nowhere in the New Testament do Jesus and/or his followers advocate the death penalty. Arguments to this effect made on the basis of Romans 13 and John 14 are not convincing when carefully considered in context.

The foregoing discussion challenges the assumption that the Old Testament readily warrants or underwrites use of the death penalty in contemporary settings. How, for example, do we narrow the scope of capital punishment from the multiple capital offenses in Old Testament legal texts to capital murder and treason in American jurisprudence? On what basis do we limit capital punishment to certain kinds of homicides? How do we scripturally justify treason as a capital offense? What we do with the evidentiary requirements specified by the Torah? If the Old Testament is our guide regarding capital punishment, why are we not required to have two or three witnesses (cf. Deut. 19:15; 17:6) before pronouncing a death sentence? Why do we not impose the death penalty for witnesses who perjure themselves in capital cases (cf. Deut. 19:16-19)? Can our standard of “beyond reasonable doubt” in the context of an adversarial system which pits prosecution against defense really fulfill the Old Testament standard of *certainty* (“thorough inquiry, and the charge is proved to be true” Deut. 17:4)?

Moreover, this assumption fails to take into account the tension between Hebrew legal prescription and community practice and how this tension is reflected in the life, death, and resurrection of Jesus. Certainly, the commonly held notion that the Old Testament (depicted as the testament of law and judgment) teaches capital punishment and the New Testament (depicted as the testament of grace and forgiveness) resists capital punishment misses the mark. As the above study shows, the relationship between the testaments on this issue is more complementary than dialectical.

Finally, while the New Testament never directly deals with capital punishment as a social issue, it seems clear that the momentum of scripture moves away from the practice of capital punishment as *clan or societal vengeance*. Other arguments for the contemporary use of capital punishment can be made (e.g., public safety, deterrence, retribution, and/or deliverance for victims),<sup>31</sup> and these arguments can be and have been grounded in scripture by people of faith. In the end, every argument regarding capital punishment from scripture must answer the questions raised by scripture:

- ❖ How can we most faithfully reflect *both* of the twin convictions discussed above (i.e., reverence for human life and seriousness about obedience)?
- ❖ How can we most faithfully reflect the politics of Jesus (e.g., moving beyond revenge to transforming and reconciling initiatives, loving the enemy, embracing and advocating for the “the least of these,” reclaiming the lost, proclaiming God’s mercy and forgiveness for sinners, championing righteousness)?

### ***III. Historical Perspectives***

#### ***The Early Church***

As a marginalized and misunderstood minority within the Roman Empire, the early church was victimized by the death penalty. Christians refused to participate in the imperial cult (i.e., acknowledging Caesar as Lord and giving homage to traditional Roman deities) and were unjustly accused of seditious practices. Thousands were executed during both localized and widespread persecutions. The systematic, empire-wide persecutions which marked the reigns of Decius (249-251) and Diocletian (284-311) ravaged the church and are indelibly etched in Christian memory.<sup>32</sup>

The unjust executions of Jesus and his followers suggest that the early church would oppose the death penalty, but relevant texts are scarce. In two separate writings dated *circa* 211, Tertullian opposed Christian participation in the Roman army because soldiers were forced to take part in pagan sacrifices and because they were required to carry out executions. Origen (185-254) grants the right of the state to impose the death penalty but strongly opposes the direct involvement of Christians. Clement of Alexandria (150-211) was the first Christian writer to articulate theoretical grounds justifying capital punishment. In a composition written sometime after 202, Clement asserts that society’s use of capital punishment is like a doctor’s amputation of a diseased organ. He appeals to

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<sup>31</sup> See Section VI below.

<sup>32</sup> McGivern, *The Death Penalty*, pp. 19-20. Throughout this section, we are indebted to McGivern’s clear and comprehensive historical analysis.

no biblical or specifically Christian source, but rather to a utilitarian (i.e., the end justifies the means) argument: just as a doctor amputates a diseased organ if it threatens the body, evil individuals are executed if they threaten society.<sup>33</sup>

### **Constantinian Christianity**

After Constantine became the first pro-Christian emperor in 312, he and most of his successors employed imperial power in their attempt to establish Christianity as a unifying societal force. Lactantius, who lived through both the Diocletian persecution and Constantine's rise to power, typifies the church's transition from persecuted minority to established majority. When Christians were being executed for their faith, Lactantius opposed capital punishment on the basis of a strict interpretation of the fifth commandment:

*Nor is it right for a just man to charge someone with a capital crime. It does not matter whether you kill a man with the sword or with a word, since it is killing itself that is prohibited. And there is no exception to this command of God. Killing a human being, whom God willed to be inviolable, is always wrong.*<sup>34</sup>

After Constantine's victories, Lactantius came to regard the new emperor as "God's divinely appointed agent to restore justice and exact divine vengeance on the wicked." The more the newly established church grew in power and involvement in secular society, the more the church became entangled in capital punishment as the strategy of choice for dealing with heretics and nonconformists. James McGivern captures the historical moment:

*The century and a quarter from Constantine I to Theodosius II, when Christianity was adapting itself to its new role as the established religion of the Roman Empire, was a crucially formative time. The complex intertwining of Christian creed and Roman law definitively marked "Imperial Christianity" in manifold ways destined to last for centuries to come. This is the initial context for understanding the history of the use of capital punishment in Christendom. Ironically, the lethal combination of the Bible and Roman law provided surprisingly cruel penal codes, invariably viewed as directly willed by God. The entire repressive system of Roman law was brought to bear actively on the project of "Christianizing" the Empire when it was under challenge from external "barbarian" forces. During this period successive emperors passed at least sixty-six decrees against Christian heretics, and another twenty-five laws against paganism in all its forms. The violence of the age was extraordinary, and Christians were becoming more and more deeply involved in it, confronted with major decisions about how to respond appropriately when the instruments of power were placed in their hands.*<sup>35</sup>

A few voices of protest against violence are noteworthy. In 386, bishops Ambrose of Milan, Martin of Tours, and Siricus of Rome strongly denounced the executions of Priscillian and his companions for doctrinal differences at the hands of fellow Christians. After imperial troops executed hundreds of Thessalonian civilians in 390, Ambrose

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<sup>33</sup> Ibid., pp. 22-23.

<sup>34</sup> Ibid., p. 26 from Louis J. Swift, *The Early Fathers on War and Military Service* (Wilmington, DE: M. Glazier, 1983), pp. 62f.

<sup>35</sup> Ibid., pp. 27-28.

forced Emperor Theodosius to publicly repent and submit himself to church discipline. Ambrose also warned the clergy against participating in violence: "I do not think that a Christian . . . ought to save his own life by the death of another." Commenting on the parable of the wheat and the weeds, John Chrysostom (d. 407) argues that the householder's counsel to not to pull up the weeds lest "you would uproot the wheat along with them" (Matt. 13:29) means "it is not right to put a heretic to death . . . he [Jesus] does not forbid our checking heretics, . . . but [he does forbid] our killing and slaying them." Of more lasting influence, however, was Pope Leo's contrary reflection on Priscillian's execution less than two generations after Ambrose: "Both divine and human law would be subverted, if ever it should have been licit for such men to live with such doctrine."<sup>36</sup>

In 396, Augustine rejected the use of force against heretics, but twelve years later, after bitter battles with the Donatists, he changed his mind and welcomed Roman force to restore social order:

*I was formerly of the opinion that no one should be forced to the unity of Christ, that we should agitate with the word, fight with disputation, conquer by reason, lest we substitute feigned Catholics for avowed heretics. This opinion of mine was changed, not by the words of critics, but by the logic of events. My own town rose up to convict me. It had been entirely devoted to the Donatist party, but now was brought to Catholic unity by fear of the imperial laws.<sup>37</sup>*

Augustine always lived in the tension between the expedient use of force and the teachings of Jesus. In 412, when Donatist clerics had been arrested and convicted of murdering one Catholic priest and mutilating another, Augustine pleaded that the Donatists not be executed lest

*the sufferings of the servants of God . . . be sullied with the blood of their enemies. . . . If there were no other punishment . . . extreme necessity might require that such men be put to death, although, as far as we are concerned, if no lesser punishment were possible . . . we would prefer to let them go free, rather than avenge the martyrdom of our brothers by shedding their blood. But, now that there is another possible punishment by which the mildness of the Church can be made evident, and the violent excess of savage men be restrained, why do you not commute your sentence to a more prudent and more lenient one?<sup>38</sup>*

Against the backdrop of Augustine's pastoral pleas for restraint and mercy, the legal codes of the empire grew more violent and less tolerant. The Theodosian Code, a work of central importance to western jurisprudence, reached completion in 438. An accumulation of earlier Roman law plus later imperial legislation intended to Christianize the Empire, the code designated 120 capital offenses.<sup>39</sup> Over a century later, Emperor Justinian I used his own code, which combined the harshness of the Theodosian Code with even more specific Christian legitimation, to imprison, torture, and execute

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<sup>36</sup> Ibid, pp. 30-32, 35.

<sup>37</sup> Ibid., p. 36.

<sup>38</sup> Ibid., p. 44.

<sup>39</sup> Ibid., pp. 45-46.

heretics.<sup>40</sup> The Theodosian and Justinian Codes represent the logical outcome of Constantinian Christianity. The establishment of Christianity as the official religion of the Empire set in motion an explosive reaction between a simplistic reading of biblical law codes and Christianizing Roman law, and this combination proved lethal for thousands upon thousands whose beliefs and practices threatened imperial orthodoxy.<sup>41</sup>

### *The Middle Ages*

During the Middle Ages violence moved ever closer to the center of church life. In 785, a law prescribed death for eating meat during the Lenten season, for burning a cadaver pagan style instead of burial in a Christian cemetery, or going into hiding rather than presenting oneself for baptism.<sup>42</sup>

Pope Leo IX (1049-1054) not only approved of persecuting and executing heretics and pagans, but actually led papal forces into battle. Pope Gregory VII (1073-1085) extolled the virtues of Christian soldiers who fought the church's wars, thereby creating the mystique of the medieval Christian knight. Gregory invited the laymen of Europe to form the Knights of St. Peter, a militia bound to the pope and dedicated to the defense of the church. The death penalty was viewed as one of several violent measures authorized by God for the protection and advancement of Christendom.<sup>43</sup>

In 1095, Pope Urban II called for a holy war against Palestinian Muslims and so launched the first Crusade. In time, the Crusades were depicted as taking justifiable revenge for Christ's death on the cross, a final settling of accounts with, in the language of popular Christian polemic, "the godless Jews and Muslims." In a macabre reversal of the Gospel, one piece of popular literature portrays Jesus on the cross reassuring the good thief, "Know for certain that from over the seas will come a new race which will take revenge on the death of its father."<sup>44</sup>

Capital punishment was so culturally entrenched by the time of the high Middle Ages that Thomas Aquinas, the most astute commentator of his era, felt compelled to contradict John Chrysostom's interpretation of the parable of the wheat and the weeds: "If heretics be altogether uprooted by death, this is not contrary to our Lord's command, which is to be understood of a case when the weeds could not be pulled up without uprooting the wheat."<sup>45</sup> In other words, if the church can clearly identify heretics distinct from the rest of the community, it is appropriate to execute them. Elsewhere, Aquinas employs Clement of Alexandria's medical analogy:

*If, therefore, the well-being of the whole body demands the amputation of a limb, . . . the treatment to be commended is amputation. . . . Therefore, if any man is dangerous*

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<sup>40</sup> Ibid., pp. 48-49.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid., p. 47.

<sup>43</sup> Ibid., pp. 61-64.

<sup>44</sup> Ibid., pp. 64-68.

<sup>45</sup> Ibid., p. 117, quoting *Summa Theologiae*, II-II, q. 11, art. 3, ad tertium.

*to the community and is subverting it by some sin, the treatment to be commended is his execution in order to preserve the common good.*<sup>46</sup>

In the first case Thomas' presumption that capital punishment is part of the social order influences his interpretation of the parable. In the second case he defends capital punishment with a utilitarian argument. In neither case do the life and teaching of Jesus guide his analysis. That Thomas represents the zenith of scholastic theology indicates how married both church and state had become to violence as social strategy. Philosophically, theologically, and practically, capital punishment was standard practice--revealed by God and embedded in natural law.

The almost uninterrupted warfare during the Middle Ages and beyond was an important source of entanglement between Christians, violence, and capital punishment. Religious wars raged in Europe from 1559 to 1648, climaxing in the Thirty Years War, which killed one-third of Europe's population.<sup>47</sup> At the very center of ecclesial power, diminished regard for human life led to the acceptance of violence and bloodshed as ordinary conduct. Inquisition was the order of the day. Christian leaders were instrumental in assigning the death penalty to multiple thousands of Christian dissenters and other nonconformists, including John Hus and Joan of Arc.<sup>48</sup>

### ***The Reformation Era***

For all of the changes in the map of Christianity which were wrought by the theological revolutions of the sixteenth century, the Reformation offered little change regarding the nexus of church, state, and violence. Four of the five major streams of Reformation--Lutheran, Reformed, Anglican, and Catholic--remained committed in various ways to the union of church and state and the use of violence in the defense of Christendom. Martin Luther perfectly captures the prevailing presupposition:

*Let no one imagine that the world can be governed without the shedding of blood. The temporal sword should and must be red and bloodstained, for the world is wicked and bound to be so. Therefore the sword is God's rod and vengeance for it.*<sup>49</sup>

Luther theoretically opposed the execution of heretics, but in 1554 Lutheran leader Philip Melancthon enthusiastically endorsed the burning of Michael Servetus in Geneva under the watchful eye of John Calvin:

*The Church . . . owes you gratitude for the present as for the future. I entirely concur with your judgment. I maintain that your magistrates have acted rightly by condemning a blasphemer to death after a proper trial.*<sup>50</sup>

Against this presumption, the Anabaptists raised a dissenting voice. Before the Reformation, their views had been anticipated by the Waldensians, John Wyclif, and others who strongly objected to the use of violence and the death penalty as a violation of

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<sup>46</sup> Ibid., quoting *Summa Theologiae*, II-II, q. 64, art. 2.

<sup>47</sup> Ibid., pp. 179.

<sup>48</sup> Ibid., pp. 123-129.

<sup>49</sup> Ibid., p. 142 quoting Ewald M. Plass, ed., *What Luther Says: An Anthology* (St. Louis, MO: Concordia Publishing House, 1959), II:1156.

<sup>50</sup> Ibid., p. 147.

the Way of Jesus. Especially significant for Baptists is the unified witness of Conrad Grebel, Michael Sattler, Menno Simons, and other Anabaptist leaders. The Anabaptists were convinced that following Jesus (*nachfolge*) was absolutely fundamental to Christian discipleship, and that no state, societal, or ecclesial agenda could trump the clear and authoritative witness of Jesus' life and teaching in forming the conduct of every Christian. Because they were convinced that the Constantinian union of church and state had led both to their own persecution and to the church's long and deep involvement in violence, the Anabaptists strongly supported the separation of church and state.<sup>51</sup>

The fullest extant early Anabaptist objection to the death penalty was penned by Menno Simons, who observed that

*it would hardly become a true Christian ruler to shed blood. If the transgressor should truly repent before his God and be reborn of Him, he would then also be a chosen saint and child of God, a fellow partaker of grace, a spiritual member of the Lord's body, sprinkled with his precious blood and anointed with his Holy Spirit, a living grain of the Bread of Christ and an heir to eternal life; and for such a one to be hanged on the gallows, put on the wheel, placed on the stake, or in any manner be hurt in body or goods by another Christian, who is of one heart, spirit, and soul with him, would look somewhat strange and unbecoming in the light of the compassionate, merciful, kind nature, disposition, spirit, and example of Christ, the meek Lamb, which example he has commanded all his chosen children to follow.*<sup>52</sup>

Menno follows this best-case scenario of a repentant criminal with a worst-case scenario of an unrepentant criminal. Executing such a person, says Menno,

*would unmercifully rob him of the time of repentance of which, in case his life were spared, he might yet avail himself. It would be unmerciful to tyrannically offer his poor soul, which was purchased with such precious treasure, to the devil of hell under the unbearable judgment, punishment, and wrath of God, so that he would forever have to suffer and bear the tortures of unquenchable burning, the consuming fire, eternal pain, woe, and death. Never observing that the Son of man says: "Learn of me, I have given you an example. Follow me; I am not come to destroy souls but to save them."*<sup>53</sup>

In some ways, the sixteenth-century Anabaptists resembled the early church. Unfettered by the constraints of Roman law codes, societal presumption, and the defense of Christendom, the Anabaptists based their aversion to violence on Jesus himself. As a marginalized, misunderstood, and persecuted minority, their small numbers belied the power of their witness. And finally, their witness all too often took the form of martyrdom.

In seventeenth-century England, George Fox and the Quakers protested the severity of English jurisprudence and the widespread use of capital punishment. With over 150 capital offenses codified in English law, Fox lamented, "the most serious matter was the

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<sup>51</sup> Ibid., pp. 192-206.

<sup>52</sup> Ibid., p. 200 quoting *The Church, the State, and the Offender*, Church and Society Series #3 (Newton, KS: Faith and Life Press, 1963), p. 13.

<sup>53</sup> Ibid.

lack of proper proportion between the punishment and the gravity of the offense . . . The existing law . . . which struck down the thief who had filched only a small amount as well as the murderer, inevitably destroyed all sense of justice.”<sup>54</sup> In the witch craze of the seventeenth century, hundreds of thousands were executed across Europe and the New World.<sup>55</sup>

### *The Enlightenment*

These and other protests notwithstanding, the eighteenth century opened with capital punishment entrenched across Europe as a flourishing enterprise. Catholicism developed a death penalty liturgy in which pious fraternities systematically encouraged persons under death sentence to repent and cooperate fully in the religious ceremonies planned around their impending executions. In France, Spain, Italy, and parts of Germany, the fraternities organized liturgical processions--complete with altar boys, bells, and chanted litanies--which processed through towns and villages until they reached execution sites. Much of the liturgy had initially been developed to dramatize the fate of heretics, but later was adapted for other capital criminals with the focus of helping all those facing execution to die “with good dispositions.”<sup>56</sup>

In part because they depicted the wrath of God on sinful humanity, such public displays were never easy to control and often took on a carnival-like atmosphere. In Rome, the executions of star criminals were actually reserved for the carnival season. Turning these somber occasions into festivals represents not only gallows humor as coping mechanism but also a populace desensitized to violence. Across the European landscape, the ever-present scaffold symbolized the severity of both the rule of law and the judgment of God.<sup>57</sup>

Over centuries of close association, the death penalty and accompanying rituals thus became thoroughly grounded in religion. Its justification and even glorification in numerous theological texts made the case that capital punishment was an integral part of God’s eternal plan. If the rank and file were ever tempted to waver, they only needed to consult any number of bedrock authorities, both Catholic and Protestant. While the Anabaptists and others offered impressive minority protests to the majority opinion, questioning capital punishment bordered on heresy. After all, if the death penalty were not the revealed will of God, what other parts of the Christian faith would be subject to question as well?<sup>58</sup>

As the eighteenth century unfolded, Enlightenment thinkers, both secular and religious, challenged the undergirding assumptions of the capital punishment establishment. One of these assumptions was the church’s teaching regarding life after death. The gallows piety exemplified by the death penalty liturgy depicted above rested on the convictions (1) that the soul of the one whose bodily life was terminated by the executioner departed to a life beyond the grave and (2) that the quality of this after-life would be affected by

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<sup>54</sup> Ibid., p. 205 quoting Auguste Jorns, *The Quakers as Pioneers in Social Work* (Port Washington, NY: Kennikat Press, 1969), p. 166.

<sup>55</sup> Ibid., pp. 191.

<sup>56</sup> Ibid., pp. 211-212.

<sup>57</sup> Ibid., p. 212.

<sup>58</sup> Ibid.

the manner in which execution was endured. But if, as the secularists maintained, death were the end of human existence, not only the validity of these convictions but also the very meaning of the phrase “death penalty” would be fundamentally challenged.<sup>59</sup>

Throughout the last half of the century, a wide variety of other challenges issued from philosophers, ethicists, lawyers, historians, and theologians. In 1764, Cesare Beccaria’s ***On Crimes and Punishments*** protested capital punishment on utilitarian, philosophical, and humanitarian grounds:

*The punishment of death is pernicious to society from the example of barbarity it affords. If the passions, or the necessity of war, have taught men to shed the blood of their fellow creatures, the laws, which are intended to moderate the ferocity of mankind, should not increase it by examples of barbarity, the more horrible as the punishment is usually attended with formal pageantry. Is it not absurd that the laws, which detest and punish homicide, should, in order to prevent murder, publicly commit murder themselves?*<sup>60</sup>

Involved during the latter part of his life in three infamous capital cases in France, Voltaire assailed the legacy of capital punishment in Western Europe:

*Christian tribunals have condemned to death more than 100,000 so-called witches. If you add to these juridical massacres the infinitely higher number of immolated heretics, this part of the world will be seen as nothing other than a vast scaffold crowded with executioners and their victims, surrounded by judges and spectators.*<sup>61</sup>

Another Frenchman, Maximilien Robespierre, complained that the death penalty deadened the moral sensitivity of the citizenry:

*Listen to the voice of reason and justice! . . . The laws must always afford peoples the purest model. . . . If they shed human blood that they have the power to prevent and that they have no right to shed at all, . . . then they pervert in the citizens’ minds all idea of what is just and unjust. . . . Human dignity is rated of lesser worth when public authority sets little store on life. The idea of murder inspires far less terror when the law itself sets the example of it for all to see. Horror of crime diminishes when its only punishment is by another crime.*<sup>62</sup>

In England, legal scholar William Blackstone wrote, “Sanguinary laws are a bad symptom of the distemper of any state, or at least of its weak constitution.” Philosopher Jeremy Bentham complained that the death penalty was suffered only by the poor and that its finality made mistaken capital convictions intolerable.<sup>63</sup>

As the century closed, Kant and Hegel remained the major philosophical voices in support of the death penalty. Kant’s writings have actually been used by both sides of the

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<sup>59</sup> Ibid., p. 213.

<sup>60</sup> Ibid., pp. 218-219.

<sup>61</sup> Ibid., p. 220.

<sup>62</sup> Ibid., p. 223.

<sup>63</sup> Ibid., p. 229-230.

debate, with retentionists citing Kant's strict retributivism and abolitionists appealing to his categorical imperative against violating human dignity.<sup>64</sup>

### ***The Nineteenth Century***

Protests continued throughout the nineteenth century. In Ireland, famed criminal defense lawyer Daniel O'Connell opined in an 1832 address:

*There should not be in man the power of extinguishing human life, because the result was irreparable; because the injury that might be done could not be compensated, if the beings were not infallible who inflicted the punishment . . . and because, while we thought we were vindicating the law of society, we might be committing the greatest outrage that could be perpetrated on our fellow-creatures.*<sup>65</sup>

In France, Victor Hugo's *The Last Day of a Condemned Man*, *Claude Gueux*, and *Les Misérables* all voiced the author's protest against capital punishment.<sup>66</sup> In Spain, Catholic lawyer and theologian Manuel de Molina argued that the death penalty was "immoral, useless, incompatible with the principles of penal science," and not justifiable with reference to Jesus or to belief in the immortality of the soul.<sup>67</sup> In Germany, theologian Friederich Schleiermacher asserted,

*The purpose of the penal code is to assure obedience to the law, but this is meaningless when we execute the criminal. . . . Perhaps one might say that some crimes are so terrible that the criminal should never again enjoy life and that the death penalty is an act of mercy for him. But this is totally unchristian, for God's grace is greater than any human act.*<sup>68</sup>

As Europe and the New World marched into modernity, the collective impact of the Enlightenment and the emergence of the nation-state restricted the church's temporal power and direct involvement in executions so that the debate increasingly focused on the ethics of executing of criminals rather than heretics. In both Protestant and Catholic circles, the rhetoric of capital punishment supporters shifted away from the wrath of God toward enemies of the church to maintaining "traditional values" against the "breakdown of society" allegedly wrought by atheists, agnostics, and liberals. The difference in being for or against capital punishment was depicted as the difference between being on the angelic or demonic side of the great cosmic struggle for the soul of society.<sup>69</sup>

### ***The American Context***

European struggles over capital punishment were replayed in the American colonies. In the mid-1770's, all of the colonies had established severe criminal codes, with only Roger Williams' Rhode Island having codified less than ten capital offenses. Treason, murder, manslaughter, rape, robbery, burglary, arson, counterfeiting, theft, blasphemy, idolatry, adultery, sodomy, and bestiality were among the several crimes specified in colonial death

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<sup>64</sup> Ibid., p. 227.

<sup>65</sup> Ibid., p. 232.

<sup>66</sup> Ibid., pp. 238-239.

<sup>67</sup> Ibid., p. 243.

<sup>68</sup> Ibid., p. 244.

<sup>69</sup> Ibid., p. 256.

penalty statutes.<sup>70</sup> Even some of the Quaker judges in Pennsylvania imposed death sentences for convicted murderers.

In a sense, the death penalty in colonial America was the functional equivalent to the modern prison system. Because no prison system in the modern sense of the term *existed*, capital punishment commanded widespread support in part because it was believed to serve three important societal functions: deterrence, retribution, and penitence. Executions were highly public events commonly thought both to deter the most serious of crimes and to exact the retribution and expiation necessary to prevent the criminal's guilt from spreading to the entire community. The short-term incarcerations preceding executions afforded the opportunity for a steady stream of ministers to encourage capital offenders to repent while they still had the chance. At least in theory, the prison system came to provide a kind of secular approximation to these societal functions.<sup>71</sup>

The religious liberty clauses of the First Amendment to the U.S. Constitution disqualified heresy from consideration as a capital offense, but the debate over death sentencing for criminals raged on.<sup>72</sup> In 1787 at Benjamin Franklin's home in Philadelphia, prominent physician Benjamin Rush called for an end to capital punishment:

*Laws which inflict death for murder are, in my opinion, as unchristian as those which tolerate or justify revenge; for the obligations of Christianity upon individuals, to promote repentance, to forgive injuries, and to discharge the duties of universal benevolence, are equally binding upon states. The power over human life is the sole prerogative of Him who gave it. Human laws, therefore, rise in rebellion against this prerogative, when they transfer it to human hands.*

*(It was) the ignorance and cruelty of man, which by the misapplication of this text of scripture [Genesis 9:6], has so long and so often stained the religion of Jesus Christ with folly and revenge. . . . There is no opinion so absurd or impious that it may not be supported by solitary texts of scripture. To collect the sense of the Bible upon any subject we must be governed by its whole spirit and tenor.*<sup>73</sup>

In 1843, John Greenleaf Whittier's "The Human Sacrifice," laments the Christian clergy's involvement in executions as the "hangman's ghostly ally":

*Blessing with solemn text and word  
The gallows-drop and strangling cord;  
Lending the sacred Gospel's awe  
And sanction to the crime of Law. . .*<sup>74</sup>

Just two years later, Walt Whitman's essay "A Dialogue" protested the use of scripture to support capital punishment:

*When I read in the records of the past how Calvin burned Servetus at Geneva and*

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<sup>70</sup> Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2002), pp. 5-6.

<sup>71</sup> *Ibid.*, p. 23.

<sup>72</sup> McGivern, *The Death Penalty*, p. 301.

<sup>73</sup> *Ibid.*, p. 303.

<sup>74</sup> *Ibid.*, p. 306.

found his defense in the Bible; . . . I find the most barbarous cruelties and martyrdoms afflicted in the name of God and his Sacred Word, I shudder and grow sick with pity. . . But in these days when clergymen call for sanguinary punishments in the name of the Gospel, when . . . they throw themselves on the supposed necessity of hanging in order to gratify and satisfy Heaven . . . when they demand that our laws shall be pervaded by vindictiveness and violence, my soul is filled with amazement, indignation and horror. . . “O Bible!” say I, “what follies and monstrous barbarities are defended in thy name!”<sup>75</sup>

### **The Twentieth Century**

In the first half of the twentieth century, the carnage of two world wars had a profound effect on the European psyche. In France, Albert Camus’ essay “*Neither Victim Nor Executioners*” observed that the recent destruction of human life had “killed something within us” and that the only hope for a viable future would require the radical shift from a world “where murder is legitimate, and where human life is considered trifling” to one in which we collectively refused to “sanction murder” and to come to “a provisional agreement between men who want to be *neither victims nor executioners.*” Camus revealed that he had committed himself to a personal vow and challenged others to join him:

*I will never again be one of those . . . who compromise with murder. . . . All I ask is that, in the midst of a murderous world, we agree to reflect on murder and make a choice.*<sup>76</sup>

Karl Barth, who had courageously denounced both “the German war spirit” during the first war and the Third Reich during the second, addressed capital punishment in his **Church Dogmatics**:

*Now that Jesus Christ has been nailed to the cross for the sins of the world, how can we still use the thought of expiation to establish the death penalty? . . . Capital punishment will surely be the very last thing to enter our heads. . . . From the point of view of the Gospel, there is nothing to be said for its institution, and everything to be said against it. . . . Capital punishment must always be rejected and opposed as the legally established institution of a stable and peaceful state. . . . It can have no place in the ordinary life of the state . . . it cannot possibly be a regular institution.*<sup>77</sup>

In America, the notorious executions of Sacco and Vanzetti in 1927 raised serious justice issues concerning the influence of socio-economic class and ethnic minority status in the prosecution of capital cases. The 1936 conviction and execution of Bruno Richard Hauptmann for the kidnapping and murder of the Lindbergh baby raised further questions about the relationship between public pressure for quick convictions in high-profile capital cases and the incidence of mistaken prosecutions. In 1953, the executions of Julius and Ethel Rosenberg as Communist spies during the heyday of McCarthyism triggered protests from world-renown dignitaries including Albert Einstein and from thousands of American clergymen of all denominations. Just a few years later, Caryl

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<sup>75</sup> Ibid., pp. 307-308.

<sup>76</sup> Ibid., pp. 281-282.

<sup>77</sup> Ibid., p. 276 quoting Karl Barth, **Church Dogmatics** III/4 (New York: Charles Scribner, 1951), pp. 443-449.

Chessman's *Cell 2455 Death Row* focused more public attention on justice issues regarding capital punishment.<sup>78</sup>

In 1956, the Methodist Church officially called for the abolition of capital punishment. In quick succession, the United Church of Canada, the General Convention of the Episcopal Church, and the Unitarian/Universalist congregations issued similar statements. In 1968, the National Council of Churches of Christ, the largest ecumenical organization in the U.S., adopted a statement calling for the abolition of the death penalty in a unanimous vote representing 103 church bodies.<sup>79</sup>

During the course of the next twenty years, statements opposing the death penalty have been issued by the American Baptist Churches in the U.S.A., the American Friends Service Committee, the American Jewish Committee, the Bruderhof Communities, the Christian Church (Disciples of Christ), the Church of the Brethren, the Episcopal Church, the Evangelical Lutheran Church in America, the General Conference Mennonite Church, the Mennonite Central Committee, the Mennonite Church, the Moravian Church in America, the Orthodox Church in America, the Presbyterian Church (U.S.A.), the Reformed Church in America, the Reorganized Church of Jesus Christ of Latter Day Saints, the United Church of Christ, the United Methodist Church, and the United States Catholic Conference.<sup>80</sup>

In 1969, Pope Paul VI abolished a statute requiring the execution of anyone who attempted the assassination of the pope within Vatican City.<sup>81</sup> Following just such an attempt on his own life twelve years later in St. Peter's Square, Pope John Paul II issued statements reflecting on the death penalty, calling for forgiveness and valuing human life.<sup>82</sup> In 1995, John Paul issued his encyclical *Evangelium Vitae*, remarkable for its straightforward opposition to capital punishment. The encyclical elaborates on the relevance of the story of Cain and Able, noting that "God, who is always merciful even when he punishes, 'put a mark on Cain, lest any who came upon him should kill him' (Gen. 4:15)." The striking lesson drawn from the biblical story is that "not even a murderer loses his personal dignity, and God himself pledges to guarantee this." Despite the broad acceptance of capital punishment throughout Catholic history, the encyclical calls for radical change within the Catholic community, with the pope voicing his personal conviction that "we should count among the signs of hope . . . the growing public opposition to the death penalty." The encyclical insists that the punishment of criminals "ought not go to the extreme of executing the offender except in cases of absolute necessity: in other words, when it would be not possible otherwise to defend society." Such cases are described as "very rare, if not practically nonexistent."<sup>83</sup> The *Evangelium Vitae* thus moves toward very near to the position advocated by Karl Barth decades earlier: the death penalty as an ordinary feature of criminal jurisprudence is judged to be wrong

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<sup>78</sup> Ibid., pp. 318-322.

<sup>79</sup> Ibid., p. 322.

<sup>80</sup> For the complete statements, see *The Death Penalty: The Religious Community Calls for Abolition*, American Friends Service Committee, 1501 Cherry Street, Philadelphia, PA 19102.

<sup>81</sup> McGivern, *The Death Penalty*, p. 261.

<sup>82</sup> Ibid., p. 371.

<sup>83</sup> Ibid., p. 444.

and should not be retained in the modern state's penal system. In this view capital punishment should not be accepted as ordinary punishment because, by the encyclical's definition, it is not absolutely necessary in ordinary circumstances.<sup>84</sup>

#### **IV. Justice Issues**

Justice in the Bible is especially concerned with the margins of society, epitomized in the Old Testament as the poor, the orphan, the widow, and the sojourner. These categories are expanded in the New Testament to include women, children, prisoners, Gentiles and other social outcasts, and the mentally and physically afflicted. In the biblical sense, then, to ask about the justice of capital punishment is largely to ask how capital punishment has impacted the marginalized.

##### **Racial Minorities**

In the landmark case *Furman v. Georgia* (1972), the U.S. Supreme Court ruled five to four that as it was currently being administered, the death penalty violated the eighth and fourteenth amendments as a "cruel and unusual punishment" and was therefore unconstitutional. *Furman* was the first case in which the Court had ever heard arguments on the validity of the death penalty as such, and as the result, nine separate opinions were issued. *Furman* did not rule on the validity of capital punishment but only on the narrower question concerning its arbitrary application presented by the cases at hand. Just four years later, the Court upheld in *Gregg v. Georgia* the constitutionality of death penalty statutes along the lines of those in place in Georgia, Texas, and Florida, ruling the arbitrariness issue which had loomed so heavily in *Furman* "had dissipated considerably."<sup>85</sup>

Discrimination on the basis of race and economic status was one of the grounds on which the Supreme Court declared the death penalty to be unconstitutional in *Furman*. A number of the justices were concerned that factors that should be legally irrelevant to sentencing, like race and affluence, were in fact strongly associated with death penalty sentencing. Although the Court approved new death penalty laws in *Gregg*, the underlying rationale for striking down the death penalty in *Furman* remained unaffected. In *Gregg* the Court determined that the state of Georgia had crafted legislation that would make the arbitrary imposition of the death penalty much less likely. The quarter century which has elapsed since *Gregg*, however, has witnessed nothing to dispel the justice issues which the Court raised in *Furman*.<sup>86</sup>

Relative to their fraction of the total population, African-Americans have always comprised a disproportionately large proportion of persons on death row in the U.S. Over the past century, black offenders, as compared with white offenders, were relatively often executed for crimes less typically assigned the death penalty, such as rape and burglary. Ninety percent of the 455 men executed for rape between 1930 and 1976, for example, were black. A higher percentage of blacks than whites who were executed were juveniles,

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<sup>84</sup> Ibid., p. 445.

<sup>85</sup> Ibid., pp. 340-352.

<sup>86</sup> Stephen Nathanson, "Does It Matter If the Death Penalty Is Arbitrarily Administered?" *Philosophy and Public Affairs* 14 (Spring 1985) in Stassen, *Capital Punishment: A Reader*, pp. 88-89.

and blacks were more often executed without having their conviction reviewed by any higher court.<sup>87</sup>

Racism in sentencing is not a relic of the past. In a 1990 review of studies on racism and the death penalty, the General Accounting Office (GAO) reported: “Our synthesis of the 28 studies shows a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the *Furman* decision” and that “race of victim influence was found at all stages of the criminal justice system process.” In 82 percent of the studies reviewed by the GAO, race of victim was found to influence the likelihood of being charged with capital murder and/or receiving the death sentence. In a highly controlled, statistically sophisticated study of 2400 capital cases over a seven-year period in Georgia, defendants whose victims were white were four times more likely to receive a death sentence than those whose victims were black.<sup>88</sup>

These results cannot be explained away by non-racial factors (such as prior criminal record or type of crime) and lead to an incontrovertible conclusion. Even at the present time in U.S. trial courts, the killing of a white person is treated much more severely than the killing of a black person. Only 29 of the 168 persons executed between 1977 and 1992 had been convicted of the killing of a non-white, and only one of the 29 was white.<sup>89</sup>

A study of the inmates on death row in Kentucky found that *all* of the inmates had a white victim, despite over 1,000 African-Americans murdered in Kentucky since resumption of the death penalty.<sup>90</sup> A 1998 analysis of death penalty prosecutions in Philadelphia between 1983 and 1993 demonstrated that blacks were four times more likely to receive the death penalty than other defendants. The Philadelphia study showed that the combination of a black defendant with a non-black victim was the most likely to result in a death penalty judgment, regardless of other circumstances attending the case.<sup>91</sup>

In fact, studies of the relationship between race and the death penalty, with varying levels of thoroughness and sophistication, have now been conducted in every major death penalty state. Ninety-six percent of these reviews demonstrated patterns of race-of-victim and/or race-of-defendant discrimination.<sup>92</sup>

A complementary finding relates to the ethnic identity of decision makers in death penalty cases. Separate studies conducted by the Cornell Law Review and the St. Mary's University school of Law revealed that only one percent of the district attorneys in death penalty states is black. Another one percent is Hispanic, and the overwhelming remainder (97.5 percent) is white.<sup>93</sup> According to an analysis by the American Bar Association, this one-sided ethnic profile has led to several specific problems which tear

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<sup>87</sup> Hugo Adam Bedau, “The Case Against the Death Penalty,” Capital Punishment Project of the American Civil Liberties Union in Stassen, *Capital Punishment*, pp. 82-83.

<sup>88</sup> *Ibid.*, p. 83.

<sup>89</sup> *Ibid.*

<sup>90</sup> Glen Stassen and David Gushee, “The Death Penalty and Preventive Initiatives,” in *Kingdom Ethics* (Downers Grove, IL: InterVarsity Press, 2002), p. 13.

<sup>91</sup> Richard Dieter, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides* (Washington, D.C.: Death Penalty Information Center, 1998), p. 1.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*, p. 22.

at the integrity of the entire criminal justice process: “discrimination by prosecutors in choosing which cases to prosecute as capital murder cases; ineffective assistance of counsel in not objecting to systemic discrimination and pursuing discrimination claims; discriminatory use of peremptory challenges to obtain all-white or largely all white juries; racial insensitivity or outright racism of jurors, judges, prosecutors, law enforcement officials, and defense lawyers; and the lack of a reliable mechanism for defendants to raise claims of racial discrimination.”<sup>94</sup>

The gravity of the close connection between race and the death penalty becomes clear when compared to studies in other fields. Statistically, race is more likely to affect death sentencing than smoking affects the likelihood of dying from heart disease. While the latter evidence has produced significant legal and societal changes, racism continues to be a dominant factor in the administration of the death penalty.<sup>95</sup>

Despite these impressive demonstrations of pervasive patterns racial discrimination, the courts have been closed to discrimination-based challenges. In 1987, a highly divided Supreme Court ruled 5-4 in *McCleskey v. Kemp* that the defendant had to show that he was *personally* discriminated against in the course of the prosecution. Demonstrating a pattern of racial discrimination in Georgia over a long period of time was not deemed sufficient to prove bias. Taking their cue from *McCleskey*, the federal courts have not granted relief based on racial discrimination in *any* death penalty case. In their 1987 ruling, the Supreme Court invited legislative bodies to consider the adoption of legislation which would enable the “courts to grant relief to defendants based upon the type of evidence of systematic discrimination presented in *McCleskey*.”<sup>96</sup> Soon afterwards, the Racial Justice Act was introduced in Congress to provide this very legislative remedy. The Act passed the House of Representatives in 1990 and 1994 but was ultimately defeated on the theory that passage would eventually eliminate the death penalty. The American Bar Association, which had recommended the passage of the Racial Justice Act, has called for a moratorium on executions until the issue of racial injustice in capital punishment sentencing can be adequately addressed. Many local bar associations and over 100 other organizations have endorsed the call for a moratorium.<sup>97</sup>

### *The Poor*

The data for discrimination according to economic class are even more conclusive. A defendant’s poverty, lack of firm social standing in the community, and inadequate legal representation at trial or on appeal are all common factors among death-row populations. As Justice William O. Douglas noted in *Furman*, “One searches our chronicles in vain for the execution of any member of the affluent strata in this society.” In a book arguing for capital punishment, Walter Berns admits that no affluent person has ever been given the

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<sup>94</sup> “*Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States*,” American Bar Association Section of Individual Rights and Responsibilities, June 2001, p. 43.

<sup>95</sup> Richard Dieter, *The Death Penalty*, p. 22.

<sup>96</sup> “*Death without Justice*,” p. 43.

<sup>97</sup> Richard Dieter, *The Death Penalty*, p. 26.

death penalty in U.S. history.<sup>98</sup> Also, a recent study commissioned by the Nebraska legislature found that death sentences are four times more likely in cases in which the murder *victim* was wealthy than in comparable cases in which the victim was poor.<sup>99</sup>

One of the major reasons that capital punishment falls disproportionately on the poor is inadequate representation. Court-appointed defense attorneys often lack the knowledge, skill, experience, or inclination to handle capital cases. These attorneys may fail to call witnesses or to present important evidence which could either prove their clients' innocence or mitigate their sentences.<sup>100</sup> Most jurisdictions have been unwilling to establish the kind of legal services system necessary to ensure that defendants charged with capital offenses receive a competent defense. Many death penalty states have no working public defender programs, relying instead upon less comprehensive strategies for selecting and supporting defense counsel in capital cases. For example, some states simply assign lawyers at random from a general list, a method which inevitably identifies attorneys who lack the necessary qualifications and/or who regard their assignments as a burden. Other jurisdictions employ "contract" systems, which typically channel indigent defense business to the lowest bidder. Many states use public defender schemes which look in theory to be more promising, but prove in practice to be equally ineffective.<sup>101</sup>

### ***The Mentally Retarded***

Until the 2002 ruling by the Supreme Court in *Atkins v. Virginia*, the United States was the only country that executed the mentally retarded. Since 1976, at least thirty-five people with mental retardation had been executed. While the exact number of mentally retarded persons awaiting execution prior to *Atkins* is uncertain, the best estimates range from two to three hundred. Because of their mental retardation, these persons cannot understand fully what they did wrong, and many cannot comprehend the meaning of the phrase "death penalty."<sup>102</sup>

In 1989, the Supreme Court ruled in *Penry v. Lynaugh* that the execution of mentally retarded persons did not violate Eighth Amendment which prohibits cruel and unusual punishment. The *Penry* decision was handed down one month after the United Nations adopted a resolution calling for the elimination of capital punishment for the mentally retarded. In *Penry*, the Court applied the "evolving standards of decency" test and found that there was insufficient evidence in the form of state legislation to conclude that there was a "national consensus" against the execution of mentally retarded offenders. The Court noted that "a national consensus against the execution of the mentally retarded may someday emerge."<sup>103</sup>

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<sup>98</sup> Glen Stassen and David Gushee, *Kingdom Ethics*, p. 13.

<sup>99</sup> *The Death Penalty in 2001: Year End Report*, Death Penalty Information Center, December 2001, p. 6.

<sup>100</sup> *Moratorium on Executions: A Poverty Issue*, Arise Citizens' Policy Project, June 6, 2001.

<sup>101</sup> "Death without Justice," ABA, p. 71.

<sup>102</sup> "Death Penalty Developments in 2001," *Amnesty International*; and "The Death Penalty against Child Offenders," September, 2002, *Amnesty International*, [www.web.amnesty.org](http://www.web.amnesty.org).

<sup>103</sup> "The Death Penalty against Child Offenders," September, 2002, *Amnesty International*, [www.web.amnesty.org](http://www.web.amnesty.org).

Thirteen years later, the justices decided “someday” had arrived. The Supreme Court’s ruling in *Atkins* determined that the execution of the mentally retarded did in fact constitute a violation of the Eighth Amendment. The Court observed that a significant number of states had concluded that “death is not a suitable punishment for a mentally retarded criminal,” which observation

*provides powerful evidence that today society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition. Moreover, even in those states that allow the execution of mentally retarded offenders, the practice is uncommon. . . . The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.*<sup>104</sup>

The Court also reflected on the relationship between mental capacity and culpability:

*Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.*<sup>105</sup>

At the time of the *Atkins* decision, eighteen U.S. states, as well as the federal government, had enacted legislation prohibiting the use of the death penalty on defendants with mental retardation. Six states--North Carolina, Florida, Connecticut, South Dakota, Missouri and Arizona--had introduced such legislation. During the 2001 session of the Texas state legislature, a bill prohibiting the execution of the mentally retarded was passed by both the Senate and the House of Representatives, but vetoed by Governor Rick Perry.<sup>106</sup>

### **Juveniles**

On the same day in 1989 the Supreme Court decided *Penry v. Lynaugh*, the Court also decided *Stanford v. Kentucky*, ruling that the execution of persons convicted for crimes committed when they were sixteen or seventeen years old did not violate the Eighth Amendment. Once again, the Court determined that there was no “national consensus” against the execution of juvenile offenders, and once again, the majority opinion did so in the face of clear and contrary *international* consensus. In *Stanford*, the Court expressly rejected the relevance of international standards.

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<sup>104</sup> *Atkins v. Virginia*, syllabus.

<sup>105</sup> *Ibid.*

<sup>106</sup> “Mental Retardation and the Death Penalty,” Death Penalty Information Center, [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org).

In 1989, the International Covenant on Civil and Political Rights, which prohibited the execution of anyone for crimes committed under the age of eighteen, had been in force for over a decade. Five months after *Stanford*, the Convention on the Rights of the Child, which contained the same prohibition, was opened for signature. Within ten years, this international agreement had been signed by 191 nations, i.e., every nation on earth except the United States and Somalia. Beyond these and other international treaties on human rights, more than 110 countries whose laws still provide for the death penalty for at least some offences have laws specifically excluding the execution of child offenders or may be presumed to exclude such executions by being parties to one or more of the above treaties.<sup>107</sup>

At the time of the *Stanford* decision, eleven states and the federal government had legislated against the execution of persons for crimes committed under the age of eighteen. Since 1989, five more states have made such executions illegal. When these sixteen states are added to the thirteen states which do not have the death penalty, the resulting “national consensus” against the use of capital punishment against juvenile offenders is statistically larger than the “national consensus” which loomed so heavily in *Atkins* regarding the mentally retarded.<sup>108</sup> The *Atkins* decision noted that in addition to the opinions of state legislatures,

*several organizations with germane expertise have adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender. In addition, representatives of widely diverse religious communities in the United States, reflecting Christian, Jewish, Muslim, and Buddhist traditions, have filed an amicus curiae brief explaining that even though their views about the death penalty differ, they all share a conviction that the execution of persons with mental retardation cannot be morally justified.*<sup>109</sup>

The same situation exists regarding the execution of persons for offenses committed as juveniles. Numerous organizations have adopted official positions opposing the use of the death penalty for juvenile offenses, including the American Bar Association, the American Psychiatric Association, the American Academy of Child and Adolescent Psychiatry, the American Society for Adolescent Psychiatry, and the National Mental Health Association. Many religious judicatories at the state, national, and international levels have expressed opposition to the execution of juveniles, including the Texas Catholic Conference and Texas Impact in an *amicus* brief opposing the execution of Toronto Patterson in 2002 for a crime committed when he was seventeen years old.<sup>110</sup>

The *Atkins* decision also noted that only five mentally retarded persons had been executed since 1989 and that “the practice, therefore, has become truly unusual.” During the interval between the *Stanford* decision in 1989 and the *Atkins* decision in 2002, eighteen people were executed for crimes committed as juveniles. Nineteen of the twenty-one

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<sup>107</sup> “Facts and Figures on the Death Penalty,” *Amnesty International*, [www.web.amnesty.org](http://www.web.amnesty.org).

<sup>108</sup> “The Death Penalty against Child Offenders,” Abridged Version, September, 2002, *Amnesty International*, [www.web.amnesty.org](http://www.web.amnesty.org), pp. 1-8.

<sup>109</sup> *Ibid.*, p. 8.

<sup>110</sup> *Ibid.*, pp. 8-9.

(ninety percent) juvenile executions since *Gregg* have taken place in five states--Texas, Virginia, Georgia, Missouri, and Oklahoma. Thirteen of these twenty-one executions (sixty-two percent) have taken place in Texas. The conclusion can be plausibly drawn that, with the exception of these five states (most notably Texas), the execution of juvenile offenders "has become truly unusual."<sup>111</sup>

Furthermore, the Court's observations in *Atkins* regarding mentally retarded persons' diminished culpability seem applicable to juveniles, a point amply made by the dissenting justices in *Stanford*:

*The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult. Adolescents are more vulnerable, more impulsive, and less self-disciplined than adults, and are without the same capacity to control their conduct and to think in long-range terms. They are particularly impressionable and subject to peer pressure, and prone to experiment, risk-taking and bravado. They lack experience, perspective, and judgment. . . . Minors are treated differently from adults in our laws, which [treatment] reflects the simple truth derived from communal experience that juveniles as a class have not the level of maturation and responsibility that we presume in adults and consider desirable for full participation in the rights and duties of modern life.*<sup>112</sup>

Another point of comparison between the mentally retarded and juveniles concerns their relative ability to act in their own self interest. The *Atkins* opinion observed

*The risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty, is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.*<sup>113</sup>

Again, these same observations characterize juveniles. As a group, they are more likely than adults to make poor witnesses, to provide inadequate assistance to counsel, and to make false confessions. Such factors conspire to increase the likelihood of wrongful confessions.<sup>114</sup>

A small number of countries continue to execute child offenders. Seven countries since 1990 are known to have executed prisoners who were under eighteen years old at the time of the crime for which they were convicted--Democratic Republic of the Congo, Iran, Nigeria, Pakistan, Saudi Arabia, the United States, and Yemen. The U.S. has executed more juvenile offenders than any other country.<sup>115</sup>

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<sup>111</sup> *Ibid.*, pp. 10-11.

<sup>112</sup> *Ibid.*, p. 12.

<sup>113</sup> *Ibid.*, p. 17.

<sup>114</sup> *Ibid.*

<sup>115</sup> "Facts and Figures on the Death Penalty," *Amnesty International*, [www.web.amnesty.org](http://www.web.amnesty.org).

## *Mistaken Convictions*

In 1991, the Judiciary Committee of the U.S. Senate commissioned a study of death penalty cases to determine the frequency of errors serious enough to cause guilty judgments to be reversed. Conducted by the Columbia University School of Law and published in 2000, the study examined 4,578 state capital cases during the period 1973-1995. The first sentence of the study's executive summary foreshadows its startling findings: "There is a growing bipartisan consensus that flaws in America's death-penalty system have reached crisis proportions." The study determined that the overall rate of "prejudicial" error in capital cases is sixty-eight percent. That is, in nearly seven out of ten of the thousands of cases reviewed, the courts found serious, reversible error. Errors in capital trials are so numerous that even three judicial inspections produced no assurance that all errors were identified. After state courts threw out nearly half of the death sentences in the cases reviewed by the study, subsequent federal review found serious error in forty percent of the remaining cases.<sup>116</sup>

The most common errors, prompting the most reversals at the state post-conviction stage were (1) egregiously incompetent defense lawyers and (2) dishonest police and/or prosecutors. In the first instance, defense lawyers, who were mostly court-appointed, failed even to look for and demonstrably missed important evidence that the defendant was innocent or did not deserve the death penalty. The appendix has many examples of lawyers sleeping through trials or appearing drunk in court. In the second instance, unscrupulous police and/or prosecutors who had discovered exculpatory or mitigating evidence willfully suppressed this evidence from the jury.<sup>117</sup>

Eighty-two percent of those whose convictions were overturned at the state level were found to deserve less than death when errors were cured on retrial. Seven percent were found to be innocent of the capital crime. Only eleven percent of defendants whose capital convictions were reversed on state review were still found to deserve the death penalty.<sup>118</sup> The study revealed that unacceptable error rates persisted throughout the period from 1973-1995 and in every death penalty state. While some death penalty states had lower error rates than others, nine out of ten had error rates of fifty-two percent or higher, and six out of ten had error rates of seventy percent or higher.<sup>119</sup>

In 1999, Governor George Ryan imposed a moratorium on executions in Illinois following the release of twelve prisoners from death row after they were proved to be innocent. Significantly, the error rate for Illinois in capital cases is slightly lower than the national average of sixty-eight percent.<sup>120</sup> A panel appointed by Governor Ryan recently issued a lengthy report recommending sweeping changes in the state's capital punishment system.

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<sup>116</sup> James S. Liebman, Jeffrey Fagan, and Valerie West, "A Broken System: Error Rates in Capital Cases, 1973-1995," University of Columbia School of Law, Sept. 12, 2000, pp. i-ii.

<sup>117</sup> *Ibid.*, p. ii.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*, p. iii.

<sup>120</sup> *Ibid.*

Several other states have either passed a moratorium or begun comprehensive studies of death penalty jurisprudence.<sup>121</sup>

The Columbia study concluded that the capital trial process is so error-ridden as not only to be unfair, but irrational:

*Erroneously trying capital defendants the first time around, operating the multi-tiered inspection process needed to catch the mistakes, warehousing thousands under costly death row conditions in the meantime, and having to try two out of three cases again is irrational. . . . The error-detection system all this capital error requires is itself a huge expense--apparently millions of dollars per case. . . . If what were at issue here was the fabrication of toasters . . . or the processing of social security claims, or the pre-takeoff inspection of commercial aircraft or the conduct of any other private or public sector activity, neither the consuming and the taxpaying public, nor managers and investors would for a moment tolerate the error-rates and attendant costs that dozens of states and the nation as a whole have tolerated in their capital punishment system for decades. Any system with this much error and expense would be halted immediately, examined, and either reformed or scrapped.*<sup>122</sup>

## V. Capital Punishment in Texas

### Worldwide Context

Over half the countries in the world have now abolished the death penalty in law or practice. Seventy-six countries and territories have abolished the death penalty for all crimes, and fifteen countries have abolished the death penalty for all but exceptional crimes, e.g., certain crimes committed during war time.<sup>123</sup>

Another twenty countries can be considered abolitionist in practice; they retain the death penalty in law but have not carried out any executions for the past ten years or more. This means that a total of 111 countries have abolished the death penalty in law or practice.<sup>124</sup>

Eighty-four other countries retain and use the death penalty, but the number of countries which actually execute prisoners in any given year grows increasingly smaller. Once abolished, the death penalty is seldom reintroduced.<sup>125</sup>

The United States is the only western democracy which continues to use the death penalty; we stand with countries like China, Iran, Iraq, and Pakistan in its continued use. Since its reintroduction in the U.S. following the Gregg decision in 1976, capital punishment has been abolished in at least seventy countries--including Canada, Brazil, Romania, France, the Netherlands, and South Africa. Trailing only China and the

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<sup>121</sup> *Dallas Morning News*, April 16, 2002.

<sup>122</sup> Liebman, "A Broken System," pp. iii, 18-20.

<sup>123</sup> *The Death Penalty in 2002: Year End Report*, Death Penalty Information Center, pp. 7-8, [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org).

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

Democratic Republic of the Congo, the U.S. is third in total number of executions since 1998.<sup>126</sup>

### Overview

Since 1976, the state of Texas has executed 289 people, a figure which amounts to just over a third of all U.S. executions during the same period. Almost 70 percent of Texas' executions have taken place since 1995. In 2002, Texas performed 33 of the nation's 71 executions--nearly five times as many as Oklahoma, the next leading state, and double the Texas total for 2001. The last six executions of juvenile offenders in the United States occurred in Texas, the only state and one of the few jurisdictions in the world to carry out such executions during the past two years. Texas leads the nation in both the number of juvenile offenders on death row (29) and the number who have been executed (13). Approximately three-fourths of the juvenile offenders on Texas death row are minorities. Of the 453 people currently on death row in the Texas prison system, over two-thirds are minorities.<sup>127</sup>

Texas law allows defendants to be charged with capital murder for specific homicides: murder during the course of another violent crime such as rape or robbery; murder of a child less than six years of age; murder of two or more people; murder for hire or financial gain; and murder of certain classes of people such as police officers, judges, or district attorneys. The district attorney must decide whether or not to charge a defendant with capital murder.<sup>128</sup>

Capital murder trials in Texas have two phases. In the first phase guilt or innocence is determined, and in the second or penalty phase the jury is asked to determine if the defendant should receive a life sentence or the death penalty. A life sentence requires a person to serve a minimum of 40 years before parole can be considered.<sup>129</sup>

During the penalty phase, the jury is asked to determine if the defendant will be a continuing danger to society and whether there are sufficient mitigating circumstances (e.g., the defendant's character and background) to warrant a life sentence rather than the death penalty. If the jury decides that the defendant poses a continuing danger to society and there are not sufficient mitigating circumstances to warrant a life sentence, the defendant is sentenced to die.<sup>130</sup>

If a person is found guilty and sentenced to death, the case is automatically appealed to the Texas Court of Criminal Appeals. A death row inmate may also file a special appeal called a writ of *habeas corpus* in state or federal court. Most of the cases which are overturned are the second kind of appeal in federal court. Only rarely does the U.S. Supreme Court agree to hear an appeal from the Texas courts. In an effort during the mid-1990's to speed

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<sup>126</sup> Ibid.

<sup>127</sup> Texas Department of Criminal Justice, [www.tdcj.state.tx.us](http://www.tdcj.state.tx.us), and *The Death Penalty in 2002: Year End Report*, Death Penalty Information Center, pp. 1-2, [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org).

<sup>128</sup> "Balancing the Scales," *Calling for a Moratorium on Executions in Texas: A Study Guide* (Austin: Texas Moratorium Network, 2002), p. 9.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

up executions, laws were passed at both state and federal levels to limit the appeals of death row inmates.<sup>131</sup>

### ***Indigent Defense***

Because Texas does not have a statewide public defender system, the court normally appoints attorneys to represent indigent defendants. These attorneys are often inexperienced and usually poorly paid. Even when the courts appoint motivated and conscientious attorneys to represent indigent defendants, court-appointed attorneys usually do not receive adequate funding to conduct thorough investigations and to hire the experts necessary to ensure a good defense. Despite recent efforts to improve indigent defense by establishing minimum qualifications for court-appointed counsel in death penalty cases, some judges have been slow to enact the new standards and to pay attorneys adequately even when funding is available.<sup>132</sup>

Beyond its inherent limitations, the system of court-appointed attorneys has regularly been abused. Prosecutors have influenced the appointment of defense attorneys, and attorneys have often been appointed on the basis of factors other than merit (e.g., the attorney's ability to move cases quickly through the courts, need for income, political support for the judge). Attorneys have been appointed who had substance abuse problems, who slept at trial, who had conflicts of interest, and who had past disciplinary problems.<sup>133</sup>

The Fair Defense Act passed by the Texas Legislature in 2001 attempted to address these inadequacies and abuses by establishing appointment procedures, reasonable pay, and minimum standards for indigent defense counsel. The Act does not require a public defender system and still allows judges to appoint defense attorneys. Only time will tell whether or not the new law significantly improves legal defense for indigent capital defendants.<sup>134</sup>

### ***Prosecutorial and Police Misconduct***

Police officers and prosecutors are under enormous pressure to solve crimes and achieve convictions. As elected officials, prosecutors often feel the need to demonstrate to the electorate that they are tough on crime by seeking and winning death-penalty convictions. One tragic result of this pressured environment is prosecutorial and police misconduct.<sup>135</sup>

The Texas Code of Criminal Procedures clearly states that it is the primary duty of all prosecuting attorneys to see that justice is served and to seek the truth. As such, prosecutors may not intentionally avoid evidence that weakens their case, manufacture evidence, withhold exculpatory evidence from the defense, or knowingly present false testimony in the course of a trial. These safeguards offer vital protections against wrongful convictions, unfair sentences, and the execution of the innocent.<sup>136</sup>

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<sup>131</sup> Ibid.

<sup>132</sup> Ibid., p. 10.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid., p. 12.

<sup>136</sup> Ibid., pp. 12-13.

A number of practices in the Texas criminal justice system have been chronically abused so as to undermine these safeguards:<sup>137</sup>

- ❖ *The use of jailhouse informants.* Because of the tendency to fabricate testimony in exchange for favorable treatment for their own cases, the testimony of these informants is often unreliable. Texas law currently places no restrictions on the use of jailhouse informants by prosecutors.
- ❖ *Predictions of future dangerousness.* Paid psychiatric expert witnesses are routinely used by prosecutors to predict that defendants will pose a “future danger to society” in order to secure death sentences. A number of these witnesses have made such predictions without ever examining the defendant. Predictions of future dangerousness have been made against defendants who were later shown to be completely innocent. The American Psychiatric Association has stated that “Psychiatric testimony predicting future dangerousness distorts the fact finding process in capital cases.”
- ❖ *The use of scientific experts.* Convictions are often won on the basis of the testimony of scientific experts even though the credibility of such witnesses has often been called into question. For example, one pathologist submitted false reports on autopsies that he never conducted and offered conflicting testimony in different cases to convict the defendant. A serologist submitted false reports on blood tests that he never conducted. Studies have demonstrated the widespread use of hair comparison evidence and bite mark testimony, which forms of evidence have proved to be unreliable.<sup>138</sup>

One important study of post-Furman death penalty cases in Texas concludes:

*Several innocent men have been released from Texas' death row. These wrongful convictions usually stemmed from misconduct committed by prosecutors or police officers. In the overwhelming majority of these cases, the misconduct that sent these men to death row only came to light years after the trial had ended. Since official misconduct is by its nature hidden, it is always difficult to expose. Today, new procedures sharply limit a defendant's ability to secure review of his case in state and federal court, making it unlikely that the truth about the wrongful conviction of an innocent person will ever come to light.*<sup>139</sup>

### **Racial Discrimination**

Racial discrimination can enter the death penalty process in at least three ways:<sup>140</sup>

- ❖ *Racial discrimination in charging defendants.* Because prosecutors are invested with the authority to decide when to seek the death penalty, they alone determine which cases are tried as capital crimes. Statistics show the death penalty is sought more often

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<sup>137</sup> Ibid.

<sup>138</sup> *A State of Denial: Texas Justice and the Death Penalty, Executive Summary* (Austin, TX: Texas Defender Service, 2000), p. 3.

<sup>139</sup> Ibid., p. 4.

<sup>140</sup> “Balancing the Scales,” pp. 14-15.

when the victim is white. Studies have concluded that a Texan who commits the capital murder of a white person is five times more likely to be sentenced to death than a Texan who commits the capital murder of an African-American. Furthermore, with the rarest exceptions, whites in Texas do not receive death sentences for the capital murder of blacks.

- ❖ *Racial discrimination in jury selection.* A 1986 study published in the **Dallas Morning News** showed that African-Americans were three to four times less likely to serve as jurors in death penalty cases than whites or Hispanics. The corroborative weight of similar findings make it clear that non-whites are relative non-participants in the very process that disproportionately assesses punishment against them. In particular, African-Americans are the least likely to serve on capital juries, but the most likely to receive the death penalty.<sup>141</sup>
- ❖ *Racial discrimination in deciding “future dangerousness.”* Before the death penalty can be imposed, a jury must decide that a defendant will be a “future danger to society.” Studies have shown that all-white juries are more likely to perceive a black defendant than a white defendant as a future danger to society. Some prosecutors in Texas have used racial stereotypes to increase the likelihood that a minority defendant will be sentenced to death. Unfortunately, the Texas Court of Criminal Appeals has failed to correct this problem during the appeals process.<sup>142</sup>

While they comprise twelve percent of the population of Texas, African-Americans account for forty-two percent of the death row population. Racial discrimination is undoubtedly a contributing factor to this disproportional statistic.<sup>143</sup>

### ***Appeals Process***

Once found guilty and sentenced to death, defendants have two opportunities to appeal their case.<sup>144</sup>

- ❖ *State direct appeal.* This appeal to the Texas Court of Criminal Appeals (TCCA) is automatic and is limited to legal errors which occurred during the trial. If this appeal is denied, defendants may appeal directly to the U.S. Supreme Court.
- ❖ *Petition for a writ of habeas corpus.* This appeal allows the court to consider factual errors. For example, claims that a witness lied or that the prosecutor withheld evidence could be presented in a *habeas* petition. This appeal is presented first in the state appellate court and then in federal courts. If this appeal is denied, the defendant may appeal directly to the U.S. Supreme Court.

In an attempt to make the appeals process more efficient, a state law was passed in the mid-1990s requiring convicted individuals to pursue both their state direct and *habeas* appeals at the same time. This change severely limited the opportunity to discover additional evidence

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<sup>141</sup> **A State of Denial: Texas Justice and the Death Penalty**, Executive Summary (Austin, TX: Texas Defender Service, 2000), p. 4.

<sup>142</sup> “Balancing the Scales,” p. 14.

<sup>143</sup> *Ibid.*, pp. 14-15.

<sup>144</sup> *Ibid.*, p. 19-20.

to prove innocence and raise other points that would be helpful to the defense. It also had an adverse effect on the federal *habeas* appeal because new evidence cannot normally be raised in federal courts if not first preserved in the state courts. Laws have been adopted at the federal level that also severely limit what can be accomplished in the appeals process.<sup>145</sup>

The Texas Court of Criminal Appeals has adopted what is known as the “harmless errors doctrine.” Serious errors in lower courts are often considered as “harmless” in nature and thus never corrected by the TCCA. In addition, the TCCA has often been criticized for adopting the findings of prosecutors without question. The final result of the changes in the appeals process at both the state and federal levels is that valid claims of wrongful convictions and sentencing are often not heard in court.<sup>146</sup>

When the state took over appointing legal counsel at the appellate level in 1996, the problem of ineffective counsel was extended beyond the initial trial phase. The TCCA has appointed inexperienced lawyers over those with a reputation of advocating aggressively for their clients. Also, the state has consistently refused to appropriate adequate funding for both legal work and investigations. The TCCA has recently ruled that defendants were not entitled to effective legal counsel during state *habeas corpus* appeals, a remarkable decision which is indicative of the court’s history of ruling against death row defendants.<sup>147</sup>

An exhaustive study by the Texas Defender Service concluded that Texas death row inmates face a one-in-three chance of being executed without having their *habeas* appeals being investigated by a competent attorney and without having any claims of innocence or unfairness presented or heard. The study includes the following findings:<sup>148</sup>

- ❖ *In 42 percent of the appeals, post-conviction counsel appeared to have conducted no new investigation, and raised no extra-record claims, even though this is the only type of claim that can be considered for review in such a proceeding.*
- ❖ *In many cases, appointed attorneys merely repeated, sometimes word-for-word, claims which had already been rejected by the courts in a previous appeal--practically guaranteeing that there would be nothing for the courts to review in state or federal court.*
- ❖ *In approximately one-third of the cases reviewed, the post-conviction application was under 30 pages long. In 17 percent, the application was under 15 pages long. Such short applications can barely contain the requisite procedural formalities, let alone the legal arguments and factual assertions that are necessary to present a constitutional claim of error.*
- ❖ *In a number of cases where patently inadequate state habeas applications were filed, subsequent investigation has revealed significant constitutional errors--including an alcoholic trial attorney and a possible claim of innocence--that were not reflected in the habeas application, and would have remained undiscovered if they had continued on the normal track of Texas habeas appeals.*

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<sup>145</sup> Ibid.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid., p. 11.

<sup>148</sup> **A State of Denial: Texas Justice and the Death Penalty**, Executive Summary (Austin, TX: Texas Defender Service, 2000), pp. 5-6.

- ❖ *In 83.7 percent of the cases reviewed, the trial court's factual findings were identical or virtually identical to those filed by the prosecutor. In 93 percent of these cases, the Court of Criminal Appeals summarily adopted the trial court's "opinion." In all but the most unusual cases, the opinion then binds the federal court.*

### **Clemency Procedure**

Once the appeals process has been completed, the fate of the convicted individual moves from the judiciary to the executive branch of the state government. This step, known as the clemency procedure, is meant to serve as a safety net for individuals who are wrongly convicted or sentenced.<sup>149</sup>

Under the clemency procedure, a prisoner can ask the Board of Pardons and Paroles for a full pardon, a commutation to a life sentence or other maximum penalty, or a temporary reprieve from execution. The Board is required to consider various grounds for relief including clemency, the correction of judicial error, and the prevention of an unjust or wrongful execution. Without the Board's approval, the Governor cannot grant the prisoner more than a thirty-day stay of execution.<sup>150</sup>

Although the Board of Pardons and Paroles is meant to provide a final avenue of relief, in actual practice the Board's review is more form than substance. The quality of the Board's review is compromised by a number of factors:<sup>151</sup>

- ❖ Members of the Board are all political appointees and subject to the same political pressures as the Governor and elected judges.
- ❖ Comprised of eighteen people from across the state, the Board does not actually meet to discuss the cases. Members review cases individually and then fax or phone in their vote.
- ❖ The Board does not conduct hearings during which arguments of merit or evidentiary challenges could be presented. This absence of due process in the procedure for clemency review--the last possible stage to save the life of a wrongfully or unjustly convicted individual--limits the ability of the condemned individual to fully present a case for clemency.
- ❖ The Board keeps no records except for the final vote tally.

### **Mistaken Convictions**

The U.S. Supreme Court has denied *habeas* review of claims from Texas prisoners on death row with persuasive, newly discovered evidence of their innocence. Leonel Herrera presented affidavits and positive polygraph results from a variety of witnesses, including an eyewitness to the murder and a former Texas state judge, both of whom stated that someone else had committed the crime. The U.S. Supreme Court ruled, however, that

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<sup>149</sup> "Balancing the Scales," p. 21.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid.

Herrera was not entitled to a federal hearing on this evidence and his only recourse was the clemency process of Texas. He was executed on May 12, 1993.<sup>152</sup>

Herrera's case is not unique. That a number of innocent people have been sentenced to death in Texas is well-documented. Some were fortunate enough to be exonerated and released from prison before their execution date arrived. Their innocence was discovered, not because the system "worked," but because of the intervention of friends, filmmakers, activists, and others concerned about justice.<sup>153</sup>

One hopeful development in this context was the passage of a DNA testing bill during the 2001 session of the Texas legislature. The bill allows DNA testing to proceed if there is a "reasonable probability" that results favorable to a convicted defendant would have changed the outcome of the case. It is left up to the courts to decide whether these results actually warrant the defendant's release from prison. Despite the fact that the Texas DNA law is generally considered to be well crafted and a model for other states, the Texas Court of Criminal Appeals on a number of occasions appears to have circumvented the clear intent of the law. The court has adopted the position that what the legislature intended was to require a person to show that favorable results will prove his or her "actual innocence" before testing can proceed. This ruling stands even though the legislature considered and rejected the "actual innocence" standard in its debate over the bill and even though "actual innocence" often cannot be proven until after DNA analysis is completed. Exonerated Arizona death row inmate Ray Krone, for example, was able to prove his "actual innocence" only a year after his own DNA testing when a DNA profile obtained from the crime scene matched that of a convicted felon in another state.<sup>154</sup>

### ***Judicial Selection***

Criminal court judges in Texas are elected. Many trial judges are former district attorneys. In order to get elected and re-elected, judges must appear to the voting public as tough on crime and thus express their unqualified support for the death penalty. One judge who was elected to the Texas Court of Criminal Appeals ran for office on a single-issue platform supporting capital punishment and promising to increase the use of the "harmless errors doctrine" in the Court's consideration of capital cases.<sup>155</sup> Judges who question the fairness of the criminal justice system risk attacks by their election opponents as being "soft on crime." In contrast, federal judges are appointed by the President and confirmed by the Senate, a process generally viewed as a safety mechanism to insulate judges from undue political/electoral influence.<sup>156</sup>

### ***Life without Parole***

While a number of states have modified state sentencing laws to allow juries to assign a convicted defendant to life in prison without the possibility of parole, Texas juries do not have this option. During the punishment phase of a capital trial, juries must choose

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<sup>152</sup> Ibid., p. 22.

<sup>153</sup> Ibid.

<sup>154</sup> *Dallas Morning News*, September 27, 2002.

<sup>155</sup> See above, "Appeals Process."

<sup>156</sup> "Balancing the Scales," p. 23.

between the death penalty and life in prison. Under current law, a life sentence requires the convicted person to serve 40 years before parole can be considered.<sup>157</sup>

Many Texans have expressed support for life without parole as a sentencing option for juries. Proponents of this option argue that this sentence would protect society without the possibility of wrongful executions. During the 2001 legislative session, a bill was introduced to provide juries with this option. The bill was passed by the Senate, but was narrowly defeated in the House of Representatives.<sup>158</sup>

## ***VI. Traditional Justifications***

### ***Public Safety***

A traditional argument in favor of capital punishment is that society has the right and duty to protect itself from dangerous criminals. Just as we authorize the police to use deadly force in certain situations, so the argument goes, we authorize the criminal justice system to execute certain criminals. There are, of course, differences between state executions and the use of deadly force by the police to protect themselves and others from criminals acting violently. In the second instance, the police act in the face of an immediate threat, while in the first, the state executes criminals who are incarcerated on death row.

The public safety argument is understandable and straightforward. Certainly, the execution of inmates who are judged to present a continuing threat to society ends whatever threat they pose. It is also certain that society can be protected from dangerous criminals by other means, such as permanent incarceration.

### ***Deterrence***

Common sense might suggest that the death penalty must have a deterrent effect on some potential murderers who presumably calculate the penalty before committing the crime. Yet many controlled studies over decades have not demonstrated that the death penalty acts as a deterrent to murder or other crimes. One primary reason for the failure of deterrence is that there seems to be precious little “calculation” in the commission of most murders. Many murders are crimes of passion, facilitated by alcohol and/or other drugs.

A 1999 study focused on executions in Texas on the premise that since Texas leads the nation in executions, any real deterrent effect should be readily apparent. Careful statistical comparisons of execution patterns and murder rates between 1984 and 1997 revealed no evidence of deterrence on either murder or non-murder felony rates.<sup>159</sup> Similar studies in Oklahoma and California also found no evidence of a deterrence effect but did find discernible increases in homicide rates following each state’s resumption of

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<sup>157</sup> Ibid., p. 24.

<sup>158</sup> Ibid.

<sup>159</sup> John Sorenson, Robert Wrinkle, Victoria Brewer, and James Marquart, “Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas,” *Crime and Delinquency* 45 (1999): 481-493.

executions after a twenty-five year moratorium.<sup>160</sup> Another study focused on differences in homicide and violent crime rates in 293 pairs of counties around the country. The pairs were statistically matched and shared a contiguous border, but differed on the use/nonuse of capital punishment. The authors found no deterrent effect, but did find higher crime rates in the death penalty counties.<sup>161</sup> According to a recent FBI report, the South remains the region of the country with the highest murder rate. Since the reinstatement of the death penalty in 1976, the South has carried out 80 percent of the nation's executions. The region with the lowest murder rate, the Northeast, has carried out one percent of the executions.<sup>162</sup>

An extensive study by *The New York Times* showed that states without the death penalty have lower homicide rates than states with the death penalty. Ten of the twelve states without the death penalty have homicide rates below the national average, whereas half of the states with the death penalty have homicide rates above the national average. During the past twenty years, the aggregate homicide rate in states with the death penalty has been 48-101 percent higher than in states without the death penalty. Furthermore, matching death penalty states with similar non-death-penalty states (e.g., such as South Dakota with North Dakota, Virginia with West Virginia, and Connecticut and Rhode Island with Massachusetts) demonstrates higher homicide rates for death penalty states.<sup>163</sup>

Despite the continued concentration executions in the South, the FBI's annual report, *Crime in the United States*, indicated that again in 2001 the South had the highest murder rate of the four regions of the country. The South's rate of 6.7 murders per 100,000 people was the only regional rate above the national average. The Northeast, the region with by a large margin the fewest executions, had the lowest murder rate, 4.2. Texas, the country's leading execution state, experienced an increase in its homicide rate in 2001. States with the death penalty have consistently had a much higher murder rate than states without the death penalty and in the past eight years, the gap between these two groups has widened.<sup>164</sup>

So even beyond the absence of evidence for deterrence, the same evidence seems to point to an *imitative effect*, presumably by providing visible, government-sponsored killing in the name of justice. Other statistical observations are relevant: (1) Homicide rates increase in nations which are at war. (2) Returning veterans who have participated in war display a higher than average murder rate.<sup>165</sup>

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<sup>160</sup> William Bailey, "Deterrence, Brutalization, and the Death Penalty: Another Examination of Oklahoma's Return to Capital Punishment," *Criminology* (1998): 711-733; Ernie Thompson, "Effects of an Execution on Homicides in California," *Homicide Studies* (1999): 129-150.

<sup>161</sup> Keith Harris and Derral Cheatwood, *The Geography of Execution: The Capital Punishment Quagmire in America*, (Lanham, MD: Rowman and Littlefield Publishers, 1997), pp. 1ff.

<sup>162</sup> *Crime in the U.S. 2000*, FBI Uniform Crime Reports, October 2001; also Bureau of Justice Statistics.

<sup>163</sup> Bonner, Raymond, and Ford Fessenden, "States Without the Death Penalty Have Better Record on Homicide Rates," *New York Times*, Sept. 22, 2000, p. A1.

<sup>164</sup> *The Death Penalty in 2002: Year End Report*, Death Penalty Information Center, p. 2, [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org).

<sup>165</sup> Brian E. Forst, "The Deterrent Effect of Capital Punishment: A Cross-State Analysis of the 1960's," *Minnesota Law Review* (May 1977): 743 ff. See also William Bowers' research in Kenneth Haas and James

## Retribution

Surveys conducted during the decade following *Furman* and *Gregg* (1983-91) consistently indicated that a large majority of death penalty supporters would continue in their support even if the death penalty had no deterrent effect on the murder rate. Capital punishment was instead valued as societal retribution. Speaking in favor of the death penalty before a committee of the New Jersey Senate in 1982, a representative of the state attorney general's office made it clear that his support had little to do with deterrence:<sup>166</sup>

*I think there is a more basic reason to support the enactment of the death penalty. . . . For a generation now, we have been taught that the only valid purposes for punishing an offender are to seek his rehabilitation and to deter others from doing similar acts. . . . We have been taught that the idea of retribution, the idea of seeking a method of punishment to satisfy a community's needs to see an offender punished is a primitive notion that no longer has a place in our society. I suggest to you, from my own experience, and in my own judgment, that that notion is wrong. The idea that the punishment must fit the crime is something more than the idea that we have to find a way to isolate the offender and to try to rehabilitate him, the idea that somehow we ought to try to discourage others from committing crimes by imposing prison sentences and other forms of punishment. But, that is not enough. Somehow society needs to feel that when a criminal act has been committed, its interests have been vindicated.*<sup>167</sup>

This same point has been made repeatedly in a variety of contexts following the *Furman* decision: capital punishment is a moral imperative, regardless of whether it reduces the murder rate or that it cuts murderers off from the possibility of rehabilitation. Capital punishment thus has become a symbol for many Americans of something larger than the issue of capital punishment *per se*, i.e., the affirmation that criminals ought be held morally accountable for their crimes.<sup>168</sup>

When the New Jersey legislature was considering a bill to reinstate the death penalty, one senator reported that he had received hundreds of messages in support of capital punishment:

*Many of the letters relate personal experiences of assaults received while walking alone at night, coming home from a bus stop or just leaving their home to mail a letter. Almost all these letters ask the same questions: "Why don't our laws protect us? . . . What has happened to justice in our country?"*<sup>169</sup>

These citizen responses are telling because they bear witness to the symbolic role attached the death penalty in the aftermath of *Furman* and *Gregg*. While fear of crime was genuine and widespread, there was no *logical* reason to connect the issue of capital punishment to

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Inciardi, eds., **Challenging Capital Punishment: Legal and Social Science Approaches** (Beverly Hills, Calif: Sage Publishing, 1988), pp. 49-90; and Ted Gurr, **Why Do Men Rebel?** (New Haven, CT: Princeton University Press, 1970), *passim*.

<sup>166</sup> Stuart Banner, **The Death Penalty: An American History** (Cambridge, MA: Harvard University Press, 2002), p. 282.

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*, pp. 283-284.

the frequency of assaults and other common low-level crimes. Surely the execution of murderers could not reasonably be expected to prevent muggings. Yet it seems clear that support for capital punishment became connected with the resurgence of societal retribution, even though the legitimacy of retribution as social policy did not logically *require* capital punishment.<sup>170</sup>

This symbolism was amplified in electoral politics. Politicians quickly learned that opposing capital punishment invited the dreaded “soft on crime” label. This lesson made bipartisan impact as both Democrats and Republicans to varying degrees and in various ways embraced capital punishment as a retributive moral imperative. Elected officials sometimes pursued public policies that would allow them to claim support for the death penalty even in circumstances in which few criminals would ever actually be sentenced to death. By 1998, for example, federal criminal codes included no fewer than forty-six capital crimes, virtually all of which were variations of murder defined so narrowly and yet with so much overlap so as to suggest the motive of inflating the number of capital offenses.<sup>171</sup>

By the end of the twentieth century, the death penalty had become a symbol of law-abiding citizens’ holding criminals accountable for crimes which had little or nothing to do with the statutory provisions of capital punishment. This symbolic role helps to account for the emotive and political power of an issue which directly affected relatively few lives. The vast majority of Americans are neither murderers nor murder victims, but nearly everyone has been impacted by the fear of crime, and attitudes toward the death penalty have become intertwined with those fears.<sup>172</sup> While the resurgence of societal retribution is thus understandable, it is important in the present context to reiterate the point that criminals can be and are held accountable by means other than execution.

### ***Deliverance for Victims***

Another traditional justification for the death penalty is the assertion that executing murderers provides a means of deliverance for the survivors of murder victims. The crisis of victimization is truly comprehensive, triggering a myriad of feelings (anger, fear, vulnerability, guilt, blame, isolation, hopelessness, depression, anxiety) and evoking fundamental questions (who am I?, what do I believe?, whom can I trust?). Victims have many needs which can only be met by the victims themselves and the closest of family and friends. But some of their needs can only be met by the larger society, and specifically by the criminal justice system.<sup>173</sup>

One of those needs is to have what is sometimes referred to as an “experience of justice.” While vengeance or retribution is often assumed to be a part of this experience, a number of studies have suggested that the need for vengeance may actually be the result of justice denied. These studies suggest that the experience of justice includes (1) public assurance that what happened to the victim was both wrong and undeserved and that something is being done to prevent future offenses and (2) restitution from the offender. Restitution in

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<sup>170</sup> Ibid., p. 284.

<sup>171</sup> Ibid.

<sup>172</sup> Ibid.

<sup>173</sup> Howard Zehr, “Restoring Justice,” in Stassen, *Capital Punishment*, p. 24.

the form of compensation for losses and apologies are important statements of the offender's responsibility and thus are central to the victim's experience of justice.<sup>174</sup>

Unfortunately, the victim's need for justice is at best a minor aspect of American criminal jurisprudence. Victims play a central role if they are needed to serve as witnesses, but otherwise often feel left out of the process. As one researcher puts it,

*The legal process tends to ignore victims, then reinterprets their experience in foreign legal terms until it hardly sounds like their own. It steals their experience; it denies them the participation and meaning that is so crucial to recovery. What socially legitimate channels are left for their anger? What alternatives are there to fears and stereotypes about offenders? Who can be surprised that victims are so dissatisfied? . . . If one set out to design a system for provoking intrusive post-traumatic symptoms, one could not do better than a court of law.*<sup>175</sup>

Death-penalty cases and subsequent executions, which nearly always are prolonged for years through the legal system, only serve to amplify this trauma.

The same criminal justice system which fails to serve the needs of victims fails also to serve the needs of offenders. As the above discussion shows, capital punishment does not demonstrably deter crime. Nor does the system of punishment and imprisonment effectively serve to rehabilitate criminals. Nor does the present system hold offenders accountable, at least in the deepest sense of the term. Genuine accountability means taking responsibility for one's actions in terms both understanding real human consequences and taking concrete steps toward righting wrongs. Rapidly accelerating death row and prison populations promotes the *language* and *appearance* of accountability, but not the *reality* of accountability. Rather, justice as we know it says, "*Crime is breaking the rules. The state, not the individual, is the primary victim. Justice is establishing blame and giving out pain through a contest between the offender and the state.*"<sup>176</sup>

In the Sermon on the Mount (Matt. 5-7) and elsewhere, Jesus did not simply oppose evils such as killing, lying, and hating the enemy, but consistently emphasized transforming initiatives that offer deliverance from the vicious cycle of violence and alienation. In other words, he epitomized the two-fold scriptural emphasis (developed in Section I above) which both (1) values obedience and condemns sin and (2) reveres life.<sup>177</sup> Sin is understood not simply as rule breaking, but as the violation of the covenant relationship which humans are called to share with both God and one another. In these and other ways, the gospel suggests another sense of justice in which crime is viewed as a violation of people and relationships, and wrongs create obligations to make things right. This understanding of justice does include punishment, but is in essence *restorative* rather than *retributive*. In contrast to retributive justice, restorative justice says, "*Crime violates people. Violations always create obligations. Justice should involve victims, offenders, and the*

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<sup>174</sup> Ibid., p. 25.

<sup>175</sup> Ibid., p. 26.

<sup>176</sup> Ibid., pp. 26-28.

<sup>177</sup> Stassen, *Capital Punishment*, p. 128; see above "*I. The Witness of Scripture.*"

*community in a search to identify needs and obligations so that things can be made right as far as possible.*<sup>178</sup>

These two concepts of justice can be understood as the poles of a continuum which always contains elements of both poles. There are limits to how far society can move toward the restorative pole in specific cases. Some offenders need to be isolated from the larger society, and there is a place for punishment within a restorative context.<sup>179</sup>

It is also the case that programs around the world have demonstrated that societal justice can move toward the restorative pole. In many locations, victim-offender mediation programs work cooperatively with the traditional legal system to provide voluntary, mediated encounters between victims and offenders to work out restitution agreements. These encounters allow victims to meet many of their needs while holding offenders directly accountable. These and similar approaches have been highly successful in the context of property crimes and other lesser offenses, but are increasingly being applied with appropriate safeguards and modifications to major crimes including murder. It is not possible to make full restitution for the crime of murder, and people who have committed murder need to be kept from society, sometimes for life. Yet within the framework of public safety and traditional punishment, offenders can be held accountable in ways which take seriously survivors' or co-victims' needs.<sup>180</sup>

At one California prison, inmates voluntarily meet with victims to listen to needs, to understand responsibilities, and to work on fund-raising activities which provide restitution to victim assistance programs. A large Pennsylvania maximum-security prison has offered an intense twenty-week seminar program which helps them to better understand the human consequences of their crimes, to meet victims and survivors not related to their own case, and eventually to contact their own victims or co-victims. Many of the inmates are serving life sentences for murder. One of the conditions for participation is that involvement in the program will not be used in legal or parole proceedings. Victims who have chosen to meet with inmates in the program invariably describe the experience as being extremely helpful.<sup>181</sup>

These examples do not suggest that the goals of restorative justice are attainable in every case, but rather that restorative justice offers victims and offenders a better chance for healing and deliverance than conventional retribution. Studies indicate that initiatives like restorative justice are more helpful to the survivors of murder than the execution of offenders, which perpetuates the cycle of violence and ends the possibilities of restitution and restoration.<sup>182</sup>

Ross Byrd, son of James Byrd, Jr., an African American whose racially motivated 1998 dragging death in East Texas attracted national attention, is working to commute the death sentence of his father's murderer to a life sentence. Byrd initially supported the

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<sup>178</sup> Zehr, "Restoring Justice," p. 31.

<sup>179</sup> Ibid., p. 32.

<sup>180</sup> Ibid., pp. 32-33.

<sup>181</sup> Ibid., p. 33.

<sup>182</sup> Mary Sue Penn, "Leaven of Forgiveness: Murder Victims' Families Stand against the Death Penalty," in Stassen, *Capital Punishment*, pp. 9-13.

death sentence of John King, but recently joined a vigil at the Huntsville prison where King is awaiting his execution: “When I heard King had exhausted his appeals, I began thinking, ‘How can this help me or solve my pain?’ . . . I realized that it couldn’t.”<sup>183</sup>

## VII. Conclusion

Several conclusions are suggested by this study. First, Section I strongly argues that in the final analysis, biblical teaching does not support capital punishment as it is practiced in contemporary society. Well-intentioned people of faith have and will continue to underwrite capital punishment with scriptural authority. Section I has at least made a thoughtful case that deserves a thoughtful response by those who do not share its conclusions.

Second, the legacy of capital punishment as it has been practiced throughout the history of the western church is both tragic and instructive. It is tragic that the church became intractably enmeshed in a nexus of violence which was foreign to the high calling of Christian discipleship. It is instructive to realize both that the practice of capital punishment and protests against capital punishment are deeply woven into the fabric of every era of church (and western) history and that centuries-old debates anticipate and inform our own debates over this issue.

Third, the practice of capital punishment in our nation and state is an affront to biblical justice, both in terms of its impact on the marginalized in society and in terms of simple fairness. How can we perpetuate a system which is clearly so unfair and so broken?

This study and its conclusions suggest at least two recommendations for Texas. The first recommendation is to suspend executions until the injustices which attend our present system have been effectively addressed. In the interest of justice, other states have pursued this option. A second recommendation is to make life in prison without the possibility of parole a sentencing possibility for Texas juries. Most states have this sentencing option, and studies show that a majority of Americans support life without parole as an alternative to the death penalty, especially when sentencing options include accountability and restitution to victim families.<sup>184</sup>

People are often reluctant to give up the death penalty if there is no alternative that takes injustice seriously and does something about the murderous violence in society. As stated above, studies have shown that capital punishment does not reduce homicide rates and may actually increase them. These same studies show what *does* reduce homicides: e.g., catching and convicting murderers more promptly and efficiently; governmental example in opposing killing; a culture that opposes violence (versus television violence and ready access to guns); working to achieve justice for those who are denied rights and equality; funding drug rehabilitation programs.<sup>185</sup>

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<sup>183</sup> *The Death Penalty in 2002: Year End Report*, Death Penalty Information Center, p. 5, [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org), from *Houston Chronicle*, July 4, 2002.

<sup>184</sup> William J. Bowers and Benjamin D. Steiner, “The People Want an Alternative to the Death Penalty,” in Stassen, *Capital Punishment*, pp. 34f.

<sup>185</sup> *Ibid.*

It is significant that these actions closely resemble those advocated in scripture: engage in transforming initiatives away from violence (Rom. 12:17-21; Isa. 60:17b-20); invest in remedial justice and equal rights for the poor and outcasts (Isa. 61:1-4, 8-11; Jer. 22:1-5, 13-17); punish criminals justly (Exod. 23:6ff.; Isa. 5:22-23; Jer. 12:1); advocate for the welfare of neighborhoods (Jer. 29:4-9); persuade the government to work for peace rather than war (Jer. 4:19ff., 6:13ff., 22:3-17; Luke 19:41ff.).<sup>186</sup>

Many nations have remarkably fewer murders than the United States. As shown above, some cities and states have lower homicide rates than others. Comparative studies suggest the above actions are in fact effective in decreasing murder rates and constitute the most constructive focus for our emotions and energies.<sup>187</sup>

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<sup>186</sup> Ibid.

<sup>187</sup> Ibid.; and especially the carefully analyzed transnational and longitudinal statistical research of Dane Archer and Rosemary Gartner, *Violence and Crime in Cross-National Perspective* (New Haven, Conn.: Yale University Press, 1984), pp. 64ff., 86, 104, 115, 136ff., 159; Ted Gurr, *Why Do Men Rebel?*