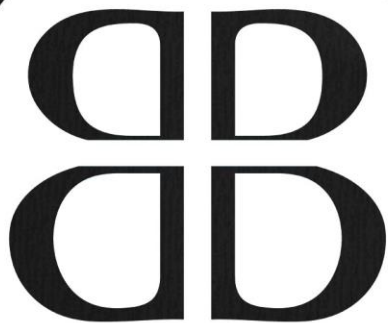


Is The Death Penalty Just?

by PHILLIP KAYSER, Ph.D.



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Phillip Kayser, Ph.D.

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INTRODUCTION

Why the need for Biblical justice?

America is fast losing its sense of justice. In some jurisdictions, rapists routinely get out on parole only to rape again. The average time that a murderer spends in prison before being released is 8.5 years. In Florida, a forty-eight year old man has served only a few months in prison despite being convicted of raping a thirteen-year-old girl with muscular dystrophy. 90% of all criminal cases do not go to court because the criminal pleads guilty to a lesser charge. John DiIulio, Jr. (professor at Princeton University) says,

The justice system is a revolving door for convicted predatory street criminals, the vast majority of whom enter the system by plea-bargaining, exit it before serving even half of their time in confinement and make a cruel joke out of the terms of their 'community-based supervision.' ... Within three years of sentencing, while still on probation, nearly half of all probationers are placed behind bars for a new crime or abscond.¹

On the other hand, prison itself would be considered grossly unbiblical. Prisons have become places in which criminals mentor each other on their criminal skills. But they are also places of unnecessary suffering.² Clearly our system of corrections is not working. But by what standard should it be fixed?

What is the legitimate punishment for a crime? Should it be left to the discretion of the state? Then what would stop a tyrannical state from once again imposing the death penalty for petty theft as was repeatedly practiced in England?³ On the other hand, what would hinder the state

¹ Anne Morrison Piehl and John J. DiIulio, "Does Prison Pay? Revisited," *The Brookings Review*, Winter 1995, p. 22

² The high incidence of violence, homosexual gang rape, and other forms of physical and psychological abuse make America's penitentiary system cruel and unusual punishment. Both civil agencies and private advocacy groups have documented this. See *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons*, (Washington, D.C.: Vera Institute of Justice, 2006). This government authorized report gives 126 pages of sobering statistics on how evil and twisted the prison system is. Prison is certainly an unbiblical concept.

³ The Hon. Justice Adams, Supreme Court of New South Wales, documents the history of punishment in England and shows that it was anything but Christian. As late as 1826 in

from simply fining a murderer \$100? Would that not be a gross injustice? Without an objective standard of justice from God, how can we discern justice? Indeed, unless there is a law by which the law of the state can be judged, how can any state be accused of tyranny? It is the contention of this book that the Bible alone can define what punishments are tyrannical, overly permissive, or just.

Was Saudi Arabia unjust in beheading men for smuggling drugs? The Bible would say, yes. Is it unjust to cut off the hand of a thief as is prescribed in the Koran?⁴ The Bible would say, yes. In America people are placed into jail for years for thefts that could have been paid off by means of Biblical restitution in much less time. With the biblical penalty, the criminal is rehabilitated and the victim is compensated.

It is easy to see how the Biblical penalties designed to be restorative would be a wonderful alternative to present penalties. But some people have questioned whether the Biblical death penalty should be implemented. It is acknowledged that the penalty for murder is not restorative. But it is the contention of this booklet that the (maximum) penalty of death for every other crime was designed to restore sinners to repentance. It is to the issue of the death penalty that this exploratory research booklet is devoted. A later booklet will (Lord willing) outline the benefits and wisdom of the other penalties listed in the Bible.

Scripture indicates that murder defiles a land and brings God's judgment, unless the murderer is executed. This is not merely an academic question. This is a question of great significance. Numbers 35:29-34 says,

Now these things shall be a statute of judgment to you throughout your generations in all your dwellings. Whoever kills a person, the murderer shall be put to death on the testimony of witnesses; but one witness is not sufficient testimony against a person for the death penalty. Moreover you shall take no ransom for the life of a murderer who is guilty of death, but he shall surely be put to death. And you shall take no ransom for him who has fled to his city of refuge, that he may return to dwell in the land before the death of the

England the mandatory sentence for hundreds of crimes (and for every felony) was death. In 1800 a ten-year-old boy was sentenced to death for stealing notes in the post office. In 1814 a fourteen-year-old boy was hanged in Newport for stealing. In 1833 a nine-year-old boy was given the death penalty for stealing two pence worth of ink.

⁴ Surah 5:38 says, "As for the thief, both male and female, cut off their hands. It is the reward of their own deeds, an exemplary punishment from Allah."

priest. So you shall not pollute the land where you are; for blood defiles the land, and no atonement can be made for the land, for the blood that is shed on it, except by the blood of him who shed it. Therefore do not defile the land which you inhabit, in the midst of which I dwell; for I the LORD dwell among the children of Israel.

If we want the Lord's blessing on our nation, we must take the issue of the death penalty seriously. Though the Bible provides some flexibility on the maximum and minimum penalties for other crimes, Numbers 35 insists that there can be no ransom for a murderer: "he shall surely be put to death." If we ignore the parameters that the Bible gives for civil penalties there will be no objective standard that can protect any of us from tyranny. The Bible alone must determine the parameters for the punishment of crimes. Without an objective and infallible standard we are subject to the whims of a tyrannical state.

The Misuse Of Biblical Civil Law

But it is possible to be tyrannical and sub-Christian even if we agree that Biblical criminal law is just. 1 Timothy 1 says about the Old Testament civil law that "the law is good if one uses it lawfully" (v. 8). That statement implies that the civil law would not be good if it was used unlawfully. And indeed, the principles of this booklet can be used in wrong ways if they are not interpreted within the whole context of the Bible.

Citizens may not use these laws for hateful or vengeful activity

One unlawful way of using Biblical civil law would be to allow it to inform the attitudes and actions of *citizens* against criminals. Jesus was rebuking this error in Matthew 5:38-42. Just because the state may use a *lex talionis* principle against a criminal does not give citizens the right to do so. The Pharisees justified revenge based on the verse "an eye for an eye and a tooth for a tooth," but Jesus rightly pointed out that private citizens may never use that principle to resist evil (v. 39). Instead, we are called to go the extra mile (vv. 39-42) and to love our enemies (vv. 43-48). Jesus was interpreting the Old Testament as it was intended to be understood, and if the Pharisees had read the Old Testament civil laws in context, they would have realized that. For example, Leviticus 18 commands the state to punish crime, but Leviticus 19 commands the average citizen, "You shall not take vengeance, nor bear a grudge against the children of your people, but you shall love your neighbor as yourself"

(Lev. 19:18). Vengeance is the mandate of the state jurisdiction and love is the mandate of the individual, family, and church jurisdictions. This is the same contrast that we see between Romans 12 and Romans 13. Romans 12 commands us to “repay no one evil for evil” (v. 17), but to “live peaceably with all men” (v. 18), to feed our enemies (v. 20) and to overcome evil with good deeds (v. 21). In contrast, the state is commanded to “execute wrath on him who practices evil” (v. 4). So the first unlawful use of the civil law is to let it inform our private attitudes and actions towards criminals. We must not hate criminals or act with bitterness, vengeance, or wrath against them.

The state may not use these laws in a non-libertarian way

But it is also possible for the *state* to be unlawful in its use of Biblical law. If these civil powers were trusted to big government, enormous abuse could happen. Instead, Biblical civil law should be interpreted within the philosophy of Biblical libertarianism. R. J. Rushdoony once said,

Few things are more commonly misunderstood than the nature and meaning of theocracy. It is commonly assumed to be a dictatorial rule by self-appointed men who claim to rule for God. In reality, theocracy in Biblical law is the closest thing to a radical libertarianism that can be had.⁵

To get a perspective of how libertarian Biblical civics really is, consider the following points. First, the Bible did not allow for an income tax, property tax, inheritance tax, sales tax, or business tax. The very lack of massive tax revenues that are necessary to run a big state automatically argues for a libertarian approach to government.⁶ Second, Biblical law made no provision for a standing army, police, or prisons. Everything about Biblical civics argues against a police state and argues for a Biblical libertarian state. God intended crimes to be punishable only as citizen-victims brought charges⁷ and provided two or three witness

⁵ R. J. Rushdoony, *Chalcedon Position Paper #15*.

⁶ On the Biblical information related to taxation, see Dr. Robert E. Fugate, *Toward a Theology of Taxation* (Omaha, NE: Thy Word is Truth Publishers, 2007)

⁷ This was one of the reasons why the prostitutes 1 Kings 3 were not harassed by the state – no victim had brought charges. This was one of the things that made the Pharisees such hypocrites in John 8:1-12 when they brought the adulteress for prosecution. First, Jesus was not a magistrate, so they should not have brought her to Him. Second, there was no victim who was bringing charges. For other points of hypocrisy, see my exposition under

who were willing to bear the cost of false testimony.⁸ Biblical civics was antithetical to police surveillance, entrapment, sting operations, interrogation of suspects or other forms of coerced testimony. For an ungodly, intrusive state to use civil law as a club would be an unlawful use of the law because it ignores the limits that God has placed upon all civil governmental jurisdiction. The third thing that necessitates a libertarian approach to civics is that the Bible gives a very limited set of sins that are crimes. For example, though polygamy is a sin, it is not treated as a crime in Scripture. I define a crime as a sin that has a Biblical civil penalty explicitly connected to it. With this definition, the state has a very limited role indeed. Fourth, as is argued in this book, with the exception of God's mandate of death for the crime of murder, the Bible's intent for all civil penalties was restorative in nature, and capital punishment was rarely applied to any crime other than murder.

The state must not see civil law as inflexible

A third way that the state might use the civil law unlawfully is to misinterpret and over-apply those laws inflexibly. In this book I critique the theonomic interpretation of the ambiguous Hebrew phrase *מֹט יִצְמַח* (*möt yumat*). Theonomists have tended to treat it as a *mandate* for the death penalty. I argue that this is impossible, since God Himself authorized lesser penalties (and even no penalties) of people who had committed such crimes. While I agree with theonomists that it is impossible to be faithful to the Bible and ignore the justness of every penalty that God gave (Heb. 2:2; etc), I strongly believe that (with the exception of the penalty for murder) God built flexibility into the law in order to make it restorative.

Failing to see civil law as restorative

The fourth way we can misuse the civil law is to fail to use it restoratively. As will be argued in the book, God's civic laws drove people to the Gospel and to restoration. In a subsequent book I hope to show how restitution and other penalties actually gave a criminal a chance to make something of himself and to learn good habits for

Objection 2.

⁸ See Appendix A for details. False witnesses were severely dealt with (Deut. 19:18-21; Prov. 19:5; 21:28), so there had to be a pretty solid case before a victim would take someone to court. And though circumstantial evidence could supplement, it could never substitute for the minimum of two personal witnesses (Deut. 19:15).

success. But the same is true of the death penalty for all crimes except for murder. God's purpose was to turn a criminal from his wicked way that he might live (Ezek. 18:23,32). This booklet will wrestle with the restorative implications of the civil law.

We must not rob victim's of their rights

The last way that we can use the civil law unlawfully is to rob victims of their rights. If victims have no say-so on forgiveness, restitution, or other alternatives to the death penalty, then a major reason for the law – to protect life and property – is misaligned.⁹ Just as one example, if the state put Hosea's wife to death for her adultery despite Hosea's desires to forgive her, then state interests would have trumped Hosea's individual interests. By giving Hosea victim's rights to have a say in what happened, God was providing certain libertarian ideas.

When these five caveats (love your neighbour, a libertarian state, flexibility in penology, the restorative nature of the law, and victim's rights) are kept in mind, it makes sense that capital punishment was rarely imposed in the Old Testament. Thus the capital crime of murder stands out from the others as unusual, though all the penalties are treated as being God-given and just.

The position of this book may ruffle many feathers and garner many objections. It will be controversial with those who do not believe in Biblical civics, and it will also be controversial with traditionalists who believe that the Old Testament mandated the death penalty for all "capital" crimes. In the spirit of love and learning we present the following responses to common objections; always striving to have Scripture be our standard. If we have erred we welcome your correction.

⁹ One notable exception is Gary North, *Victim's Rights: The Biblical View of Justice* (Tyler, TX: ICR, 1990).

OBJECTIONS ANSWERED

Objection 1 – “If we accept the Old Testament penalty for murder, then we need to accept the death penalty for adultery, homosexuality, bestiality, blasphemy and all the rest.”

The implication is, no one would agree to the death penalty for those infractions, therefore we can't accept it for any crime. I hope you can recognize that as the logical fallacy of emotional appeal. But because this often persuades people, let's start with the Scriptures which people have used to defend the death penalty apart from the Mosaic economy.

Death Penalty Not Limited to the Mosaic Covenant

It is clear that the death penalty was not limited to the Mosaic economy. Genesis 4:14-15 shows not only that Cain recognized he deserved the death penalty, but also that Cain's contemporaries had a sense of this justice. This may have been by special revelation, or it may have been an innate understanding like that in Romans 1:32. All we know is that he recognized that the death penalty is a natural consequence of murder. In Genesis 9:5 God says of the death penalty, “I require it.” Both of those occasions are long before the Mosaic Law came into being, and there is nothing that has annulled the Noahic covenant. It continues in force as long as the rainbow, seasons and time exist since it is “an everlasting covenant.”

Thus, in the New Testament we find Paul acknowledging the legitimacy of the death penalty in Acts 25:11 saying,

For if I am an offender or have committed anything worthy of death, I do not object to dying; but if there is nothing in these things of which these men accuse me, no one can deliver me to them. I appeal to Caesar.

He is not about to accept an unjust death penalty without a fight, but he acknowledges that there are crimes “worthy of death,” and if he had committed one of those crimes, he would not object to the death penalty. The phrase, “worthy of death” was a technical phrase for the death penalty taken from Deuteronomy 21:22. Everywhere it is used in the New Testament it refers to capital punishment. For example, in Acts 23:29 Paul is tried, and the magistrate declares that Paul “had nothing

charged against him worthy of death or chains.” Other examples are Acts 25:25; 26:31. So Paul acknowledges that there are crimes where the death penalty is legitimate.

Romans 13 also supports the concept of a death penalty. Paul says that for a magistrate to fail to use the sword against its criminal citizens is considered “vain” by the Lord (Rom. 13:4). What else but a use of the sword would make you “afraid of the authority” (v. 3) and make the “minister of God’s vengeance” (v. 4) “a terror” to evil doers (v. 3)? The command is “But if you do evil, be afraid; for he does not bear the sword in vain; for he is God’s minister, an avenger to execute wrath on him who practices evil.” (v. 4).

Death Penalty Applies to More than Murder

Most scholars would not quibble over the examples I have cited, but some would insist that the death penalty only applies to murder, and it is based on Genesis 9 rather than on the Mosaic economy. Because both the Old and New Testament connect the death penalty to more than murder, I want to demonstrate that while every variety of penalty in the Old Testament continues to be considered just by the New Testament, that (with the exception of murder) the death penalty was not a mandated penalty, and that it was actually intended to be restorative and to produce repentance in the criminal, not death. I will also demonstrate that under “victims rights,” the victim could ask for a lesser penalty on crimes wrought against him/her. I will also demonstrate that there was some judicial discretion with most capital crimes. For example, the judge might take into consideration whether this was a repeat offense and whether there was repentance in determining whether to give the maximum penalty or to give a lesser penalty. Therefore, with the exception of murder (where death was always required), death was a maximum penalty, not a mandated penalty. Nevertheless, when rightly administered those maximum penalties were just.

Old Testament is Just

In Deuteronomy 4:5-8 God describes His statutes and judgments as wisdom in the sight of the nations (v. 6) and as being the most righteous statutes and judgments of any nation (v. 8). Israel’s law code stands as a model law code for other nations. The New Testament echoes that sentiment when it says that in the Old Covenant “every transgression and disobedience received its just penalty” (Heb. 2:2). If those laws were “wise,” (as Deuteronomy 4 says they are) why would we want to discard

them for something that is less than wise? Any movement away from wisdom is foolishness. If Israel's law code was more righteous than any other nation's law code (as Deuteronomy 4 says it was), why would we opt for anything else? Any moving away from Israel's law code would make our law code less righteous. If the civil penalties were in each case a "just penalty," (as Hebrews 2:2 affirms) how can we improve on justice? Any deviation from "justice" is to that extent advocating injustice. Romans 7:12 declares that God's law reflects God's holiness, God's justice and God's goodness. Those are the three sides of the law. God's law is just because God is just. To say that there is a change in justice is to say that there is a change in God.

Abiding in New Testament

Whereas Hebrews 2:2 gives a blanket endorsement of all Old Testament penology as justice, the rest of the New Testament gives specifics. It teaches that certain homosexuals are "worthy of death" (Rom. 1:32).¹⁰ It teaches that juvenile delinquents who abuse their parents can in certain circumstances "be put to death" (Mt. 15:3-9) and that rejection of this provision was to "transgress the commandment of God because of your tradition" (v. 3). This is the most unpopular of the Old Testament penalties, yet Christ gives a blanket endorsement of the death penalty for this crime in Matthew 15:3-9:

Why do you transgress the commandment of God because of your tradition? For God commanded, saying, 'Honor your father and your mother'; and 'He who curses father and mother, let him be put to death.' [In the Old Testament context we are talking about juvenile delinquents.] But you say, 'Whoever says to his father or mother, "Whatever profit you might have received from me has been dedicated to the temple" is released from honoring his father and mother.' Thus you have made the commandment of God of no effect by your tradition. Hypocrites! Well did Isaiah prophesy about you, saying: "These people draw near to Me with their mouth, and honor Me with their lips, but their heart is far from Me. And in vain they worship Me, teaching as doctrines the commandments of men.

Would the church of today receive the same scathing denunciation because we do not want the state to enforce this law? In America we

¹⁰ Keep in mind the caveats in the introduction of a victim pressing charges, a libertarian state, etc., for this and other capital offenses.

have juvenile delinquents who threaten their parents, abuse their parents and keep their parents in constant fear. There should be some provision where this could be stopped. Keep in mind that in the Old Testament the *parents* couldn't put their children to death, only the state could. On the other hand, the *state* couldn't put them to death unless the parents testified against them. And there are many other checks and balances in Biblical jurisprudence that are outlined in Appendix A. But Christ gives no indication that this commandment has been annulled. Instead, he reproves those who would seek to annul it.

The New Testament allows the death penalty for adultery in certain circumstances (Mt. 1:19; Jn. 8:4-11- see the exposition of this passage under objection #2.). In Matthew 5:17-19 Christ said,

Do not think that I came to destroy the Law or the Prophets. I did not come to destroy but to fulfill. For assuredly, I say to you, till heaven and earth pass away, one jot or one tittle will by no means pass from the law till all is fulfilled. Whoever therefore breaks one of the least of these commandments, and teaches men so, shall be called least in the kingdom of heaven; but whoever does and teaches them, he shall be called great in the kingdom of heaven.

1 Timothy 1:9-10 upholds civil laws related to kidnapping, perjury, blasphemy, murder and other crimes. Paul says,

But we know that the law is good if one uses it lawfully, knowing this: that the law is not made for a righteous person, but for the lawless and insubordinate, for the ungodly and for sinners, for the unholy and profane, for murderers of fathers and murderers of mothers, for manslayers, for fornicators, for sodomites, for kidnappers, for liars, for perjurers, and if there is any other thing that is contrary to sound doctrine.

The two Old Testament kidnapping laws that were cited in this passage by Paul were civil laws (Exodus 21:16; Deut. 24:7). This passage also distinguishes the crime of matricide and patricide from ordinary murder just as the Old Testament does. And the heinous crime of matricide and patricide (and any abuse leading to it) is likewise spelled out only in a civil statute (Ex. 21:15). The same could be said of perjury, which is a civil statute for court procedure. In discussing these civil statutes, Paul affirms three things:

First, it is lawful to use these civil statutes today. "But we know that the law is good if one uses it lawfully" Clearly it is possible to use these

laws just mentioned in a lawful way. There is an abiding value to all of God's civil statutes.

Second, these laws were intended for criminals, not for the righteous. "Knowing this: that the law is not made for a righteous person, but for the lawless and insubordinate...etc." The fact that believers were not in view strengthens my thesis that Paul is talking about the justice side of the law, sometimes called the civil law. Romans 7:12 shows three sides to the moral law: "Therefore the law is holy, and the commandment holy and just and good."

1) The holiness dimension of God's law is the standard of right and wrong. Both the righteous and unbelievers find this facet of God's law coming to bear on their lives. So this could not be in view.

2) The goodness side of the law deals with the benefits to law-keeping, such as "that your life may be long on the land" - a benefit that believers do partake of (for example, in Eph. 6:1-3).

3) The justice side of God's moral law is called by Reformers the "first use of the law." It is the civil restraining use. It is the retribution that comes to those who violate the commandments. Only criminals need fear this side of the law, because this was designed for criminals.

So keep in mind that the law Paul is talking about was not made for the righteous, but for criminals.

Third, we must guard against unlawfully using such statutes. "But we know that the law is good if one uses it lawfully" (v. 8). It appears that to Paul, it is lawful to use the Old Testament law against murderers, homosexuals, kidnappers, etc. even in New Testament times. But what would be an unlawful use of the law? The context indicates that it was the Judaizers who were unlawfully using the law, and Paul cites himself as a man who unlawfully used the law when he persecuted Christians. Certainly Paul's sins involved the application of Old Testament civil penalties against Christians. Paul does not blame the law for this persecution, but rather himself. All civil law can be abused.

A further illustration of Jewish misuse of civil law can be seen in the Sermon on the Mount. The Pharisees sought to use the principle of *lex talionis* for personal revenge, and Christ indicated that the civil law was not intended for private citizens to implement. It is not lawful for private citizens to execute vengeance on homosexuals or thieves. Paul makes the same point in Romans. In Romans 12 he in effect tells us to turn the

other cheek and not to take vengeance into our own hands. Quoting an Old Testament verse Paul says of God, “‘Vengeance is mine, I will ‘repay,’ says the Lord.” But that introduces chapter 13 that shows one of God’s means of bringing His vengeance—the magistrate is God’s minister, executing vengeance on those who practice evil. The point is that it is unlawful for private citizens to use civil law against each other. Likewise it is unlawful for governments to use civil law against good as Paul had done. Romans 13 is clear that magistrates are to be a terror to evil, not to good. For further misuses of civil law, see the introduction.

When one combines these insights together with the fact that some of these laws only appear as a civil statute (i.e., with a penalty attached) in the Old Testament, a strong case can be made that 1 Timothy 1 is upholding the civil penalties of all the Old Testament laws for today.

In Acts Paul illustrates the abiding place of the Old Testament blasphemy and apostasy laws when rightly applied. Let me give some background. The Jews charged him with blasphemy in Acts 23. Claudius Lysias wrote to Felix saying, I found out that he was accused concerning questions of their law, but had nothing charged against him worthy of death. It was Jewish law that was being used against Paul, and he was innocent of violating Jewish law. In chapter 24 he is again accused of leading Jews into apostasy and of defiling the temple. When defending himself before Felix, it is clear that it is Jewish law he is defending himself about. In chapter 26 when defending himself before Agrippa, Paul praises Agrippa for being expert in all customs and questions that have to do with the Jews. He defends himself again against the charge of blasphemy. In Acts 25 the issue again is apostasy and blasphemy. In verse 19 the magistrate writes that the Jews

had some questions against him about their own religion and about one, Jesus, who had died, whom Paul affirmed to be alive, and because I was uncertain of such questions, I asked whether he was willing to go to Jerusalem and there be judged concerning these matters.

In this context of subverting the nation through blasphemy and proselytizing into apostasy, Paul says in Acts 25:7-11,

To the Jews I have done no wrong, as you very well know. For if I am an offender, or have committed anything worthy of death, I do not object to dying; but if there is nothing in these things of which

these men accuse me, no one can deliver me to them. I appeal to Caesar.

Paul would not submit to the death penalty without a fight if it was being imposed falsely. But he said that if he was guilty as charged, or had done anything else worthy of death, he would not object to dying. Clearly Paul sees an attempt to subvert a nation into apostasy as one among several crimes worthy of death.

Up to this point we have seen that the New Testament specifically upholds Old Testament laws against blasphemy (Acts 25:7-11; 1 Tim. 1:9), homosexuality (Rom. 1:32; 1 Tim. 1:10), parental abuse (Mt. 15:3-9) and adultery (Mt. 1:19; Jn. 8:4-11; 1 Tim. 1:10). 1 Timothy 1 adds kidnapping, perjury, murder and other crimes, and Hebrews covers all the bases by saying, “every transgression and disobedience received its just penalty” (Heb. 2:2). The New Testament is not silent on this subject.

Law on Men’s Hearts

But God has even implanted in man’s heart a civil sense of justice and equity that is upset when governments bring injustice. Romans 1-2 describe the innate knowledge of God and of law that all men have. The more successful men are at suppressing this knowledge of the law, the more depraved the society becomes. The last half of Romans 1 indicates that when homosexuality becomes characterized by the complex web of sin in the last few verses, and when it becomes public (they “not only do the same but approve of those who practice them”), they are worthy of death.¹¹

But notice how Paul ties this in with his overarching theme of natural knowledge. It is not just the *sinfulness* of homosexuality that is known, but also the *justice* of the death penalty for homosexuality. In verse 32 Paul says, “Who knowing the righteous judgment of God, that those who practice such things are worthy of death, not only do the same but also approve of those who practice them.” The reason men have an innate sense of justice is because God’s law reflects not only His holiness but also His justice and goodness (Rom. 7:12). Romans 13 says that magistrates are subject to all three. They must know what is sin and

¹¹ Of course, being “worthy of death” is different than being able to be prosecuted successfully in court, which requires the victim to press charges, witnesses, cross examination, etc. Again, keep in mind the caveats in the introduction.

what is good, and they must apply justice in condemning the one and protecting the other. All of that, Romans 1-2 says is in man's heart.¹²

One illustration of this innate knowledge of the justice of capital punishment is the bandit on the cross. He said that Christ did not deserve the death penalty. How did he know that? How did he have that sense of justice? The bandit went on to say, "we receive the due reward for our deeds" (Lk. 23:41). He was recognizing the legitimacy of the death penalty for an incorrigible criminal, something that Deuteronomy 17:12 addresses.

Therefore, not only does the written code of the Old Testament continue to be binding, but the sense of the justice of God's civil laws is also written on men's hearts. Certainly men suppress that knowledge. But God continues to place it on men's hearts. In my booklet on natural law I suggest ways that we can take advantage of this as we seek to move countries toward a Biblical standard.

Binding Beyond National Israel

It is also clear that as originally given, the civil laws of Israel were not intended for Israel alone. Sometimes people will say that the civil law of Israel was never imposed on pagans, and therefore it was unique to Israel and has no bearing on nations today. But this is simply not true.

First, long before Israel came into existence, there are instances of capital punishment. Cain recognized that he deserved the death penalty for murder (Gen. 4:14). In answer to objection 7 we will see why he was not executed - no witnesses, no government, and absence of other provisions that the law mandates. Jacob recognized that the rape of an unbetrothed virgin did not deserve the death penalty, and especially not the death of an entire city (Gen. 34). On the other hand, Judah understood the distinction between adultery and premarital sex and he said that adultery did deserve the death penalty (Genesis 38:24). Interestingly, he planned to implement a specialized burning of the dead body that God later instituted for the case of the adultery of a priest's daughter (see Lev. 21:9). He was a hypocrite in doing so, but he knew what the law said. He also implicitly recognized that this was a maximum penalty and could be an option. And we will be looking at that point later. Genesis 19 shows that the angels knew homosexuality

¹² See the author's book, *Natural Law: An Adequate Basis for Liberty and Justice?* available at www.biblicalblueprints.org

(at least as it was flagrantly flaunted in Sodom) was worthy of death. When one considers the scanty material we have on any subject in those chapters, it is amazing to see this much material on judicial laws. How did they know? Hebrews tells us that God “at various times and in different ways spoke in time past to the fathers” (Heb. 1:1). They had the same laws we do, but they received them through various revelational methods.

Second, in later Biblical history we have even clearer testimony. God held gentile kings accountable to these civil laws. In Amos we find God rebuking Gaza and Tyre for slave trading (1:6f), Tyre for breaking treaties (1:9f), Ammon for expansionism and unwarranted brutality to women (1:13f), and Moab for improper handling of a captured Edomite king’s body (2:1ff). These were all violations of God’s civil law governing the magistrate. When Belshazzar failed to give God the glory in Daniel 5 he was “weighed in the scales and found deficient.” God judged nations by how they kept His law.

There is no evidence whatsoever that civil law was restricted to Israel. In connection with personal and civil law God said, "There shall be one standard for you; it shall be for the stranger as well as the native, for I am the Lord your God" (Lev. 24:22 see context). Thus Daniel sought to bring God's law to bear upon Babylon (Dan. 4, especially verses 1,25-27,37) and was so effective that when Artaxerxes decreed the return of Jews from the captivity he commanded Ezra to appoint judges and magistrates over all the nations from the River Euphrates to the Mediterranean. In chapter 7 he stipulated that these non-Israelite civil servants must know the laws of God and teach those who were ignorant of them (v. 25). This authority extended to penalties all the way from fines to capital punishment (v. 26) and covered everything that God had commanded (v. 23) according “to the law of your God which is in your hand.” (v. 14). Clearly God’s law had relevance to pagan nations.

Psalm 2 is a Messianic Psalm that Acts applies to the New Covenant, yet this Psalm clearly speaks of judgments on nations that do not submit to His rule. Isaiah 42:1-4 predicts that nations in the New Covenant would submit to His laws. And that is what God had intended from the beginning. God intended other nations to envy and emulate Israel's civil laws (Deut. 4:6-8). Indeed, God spewed the nations out of Canaan precisely because they did not keep such laws, and God warned Israel that the same would happen to them as happened to the pagans if they deviated from the laws (Lev. 18:24-30; cf. Deut. 4:5-8; 12:29-32).

Certainly David tried to convince other kings of the law; Psalm 119:46 says, “I will speak of Your testimonies also before kings, and will not be ashamed.” That’s an interesting phrase: “will not be ashamed.” There is the temptation to be ashamed of God’s law simply because it runs counter to common wisdom. But God calls us to take every thought into captivity to the obedience of Christ. Solomon stated, "righteousness exalts a nation, but sin is a disgrace to any people" (Prov. 14:34). If Hebrews 2:2 says that every single civil statute was a just law, why would we want to value pagan law more than God's law? Why would we want to trade justice for injustice, whatever our philosophical reasons? No, it is better in my opinion to affirm that magistrates continue to be subject to Biblical statutes and judgments.

Various Categories of Capital Crimes

However, one helpful distinction needs to be made: There were three categories of capital crimes.

First, there were crimes where both the victim and the courts could use discretion in applying clemency or forgiveness. For an example of this we will look at Exodus 21:28-32.

Second, there were crimes where judicial discretion was removed from the courts by the phrase “surely he shall die.” We will discuss the meaning of that phrase in a moment.

Third, there was the crime of pre-meditated murder where neither the victim nor the courts were allowed to show any leniency, and all lower penalties were removed. What distinguishes this crime from the others are such phrases as “no person...shall be redeemed” (Lev. 27:29), “you shall take no ransom for the life of a murderer” (Numb. 35:29-34) and “take him from my altar that he may die” (Ex. 21:14). This last phrase is especially significant, since it refers to a person pleading for mercy. In the case of Adonijah, Solomon granted mercy for a capital crime (1 Kings 1:51-53), but in obedience to Exodus 21:4 Solomon refused to grant mercy to the premeditated murder of Joab, even though Joab too clung to the altar for mercy (1 Kings 2:28-29). Ezekiel 3, 18, and 33 all speak of justice relenting on capital crimes when there is genuine repentance. We will look at those passages in a moment. But we need to deal with a problem first. There is a phrase connected with capital crimes that seems to mandate the death penalty in any and every situation.

“Surely He Shall Die” and Lesser Penalties

Greg Bahnsen has pointed out that all of these capital crimes have the phrase attached, “surely he shall die.” This seems to be an absolute mandate for the death penalty. The interpretation I will be suggesting is quite different from that normally given by theonomists. I agree with the theonomic position that all civil penalties in the Old Testament continue to apply today. There is no objective basis for ethics without that position.

However, I believe that both theonomists and anti-theonomists have misinterpreted a key phrase in the Old Testament. That is the ambiguous Hebrew phrase מוֹת יוֹמָת (*mōt yumat*). In our English Bibles it is usually translated, “he shall surely be put to death.” I freely grant that this intensive use of the infinitive absolute is a very common Hebrew usage. If it is the correct translation, then it may be intensifying the fact that a person deserves the death penalty, but we will see later that it cannot be a command void of exceptions since the Scripture explicitly gives lesser penalties to at least some of the crimes that have this phrase attached.

Other interpretations are possible. Another sense of the infinitive absolute is to see *mōt* as a helping verb, and this is reflected in some literal translations like Wigrams - “dying he shall be caused to die.” The hophal form of the verb is used in *yumat*, which is a passive causative. If this translation is correct, the meaning may be, when capital punishment is pressed for in court (i.e. “in dying”) the judge has no judicial discretion to lower the penalty (“he shall be caused to die”). You could paraphrase it, “If death is pressed, then he must die.” This form of the infinitive absolute could have another translation which would reverse the actors, and it would be “to die, he shall be caused to die.” In other words, in order to be put to death, all that is required is for someone to successfully press charges (“he shall be caused to die.”). A third use of the infinitive absolute, though not common, is to see *mōt* as an imperative.¹³ This would mean, “Put to death [the one who] will be caused to die.” In other words, when someone such as an avenger of blood or a victim causes such a person to be put to death, the courts may not intervene, but must put him to death. So the phrase could be pointing to a mandate, could be demonstrating judicial discretion, or could be emphasizing victim’s rights.

¹³See for example *zachon* in Ex. 13:3

I will not pretend to be able to resolve the translation of this difficult phrase. I will leave that to the Hebrew experts. The point I am making however is that the phrase alone, as ambiguous as it is, cannot determine the issue. If I can demonstrate *that crimes that have this technical phrase attached to them allow for lower penalties*, then *I have proved that it takes more than this phrase to establish a rigid mandatory death penalty in every case*. And it is my contention that murder is the only crime where capital punishment is mandated in all circumstances, and it is because God adds to that phrase that mercy cannot be shown, even if he claims mercy from the altar (Ex. 21:13) or flees to the city of refuge (Numb. 35) or offers to pay a ransom (Numb. 35), or seeks to redeem his life (Lev. 27:29). Over and over God blocks any attempt to impose a lesser penalty on murder, but He does not do so for the other crimes.

I believe this position protects the central thesis of theonomists while also answering the concerns that non-theonomists have raised as to how God's law would apply after Pentecost. Westminster Seminary put together a symposium entitled, *Theonomy: A Reformed Critique*. One argument was raised that I think theonomists ought to take seriously, and that was Tremper Longman's suggestion that capital punishment was a maximum penalty. Let me quote from Bahnsen's response from his excellent chapter on penology. Bahnsen says,

In his article Longman ... examines the flexibility which was inherent within the Old Testament itself regarding the penal sanctions. This is his main point. However, this insight does not constitute a critique or even a mild conflict with the theonomic position at all. As long as we are dealing with flexibility revealed within the law itself, we are dealing with the interpretation of the law and not the question of its continuing validity....

Longman suggests that perhaps the *ius talionis* was "not mandating in every case" the penalty of death, but rather teaching the maximum penalty permitted (p. 52). I am open to that possibility in some (but not all) cases where the Mosaic law mentions the death penalty, provided it is supported with sound reasoning and competent exegesis. That has yet to be done, though...

The assumed premise, that only in the case of premeditated murder was the death penalty absolutely required (no ransom or substitute penalty being allowed), is not biblically accurate. "You shall not allow a sorceress to live" (Ex. 22:18) specifically forbids any

punishment short of death. The next verse, “whosoever lies with an animal shall surely be put to death” (22:19), uses an idiomatic Hebrew expression which communicates the certainty of that which was required - “dying he shall die” = “shall surely die.”¹⁴

In the next pages I will accept Bahnsen’s challenge and try to demonstrate the flexibility that Tremper Longman suspected was there. I will marshal passages of Scripture that show clemency on eight, and possibly nine capital crimes, each of which allows for a lesser penalty under certain circumstances, and usually only upon the sincere repentance of the offender. However, as I have already pointed out, if I can prove Biblical clemency for even one of the capital crimes that has the Hebrew phrase *möt yumat* attached to it, there is no compelling reason to believe that the phrase itself mandates the death penalty without exception. And I believe my last example of adultery is a watertight case.

Again, let me point out that we are not arguing for relativity here. We are arguing for Biblically sanctioned judicial discretion within Biblical guidelines. If we do not have a complete basis for Biblical penology in Scripture, then we have no basis for a just system of ethics. Apart from the Bible it is impossible to develop a universal ethic. So let us proceed.

Lashing

First, let me demonstrate from non-capital crimes that the concept of degrees of punishment for a single category of crime is a valid principle. Typically God would give the maximum penalty and then give some discretion as to whether the maximum would be applied, depending upon the severity of the crime. Let me give some Biblical examples of what I mean by victim discretion and judicial discretion, and I will start with a non-capital crime: When it came to punishment by beating God said that there could be no more than 40 lashes given at any one time. He didn’t mandate that every time a person was beaten with a rod or a whip that he had to have 40 lashes. For example, Deuteronomy 25:1-3 says,

When men have a dispute, they are to take it to court and the judges will decide the case, acquitting the innocent and condemning the guilty. If the guilty man deserves to be beaten, the judge shall make him lie down and have him flogged in his presence with the number

¹⁴Gary North, ed., *Theonomy: An Informed Response* (Tyler, TX: Institute For Christian Economics, 1991), pp. 113-114.

of lashes his crime deserves, but he must never give him more than forty lashes. If he is flogged more than that, your brother will be degraded in your eyes.

Notice that phrase, “the number of lashes his crime deserves, but he must never give him more than forty.” Clearly judicial discretion is allowed. Though a lower number of lashes were allowed to be administered, specific gradations are not spelled out. It simply gives a maximum. A judge does not just judge the act. He also judges the extenuating circumstances. One such extenuating circumstance allowable in Scripture is determining whether the crime was done with knowledge or without knowledge, whether it was done willfully or through neglect. Luke 12 gives the general principle:

And that servant who knew his master’s will, and did not prepare himself to do according to his will, shall be beaten with many stripes. But he who did not know, yet committed things worthy of stripes, shall be beaten with few. For everyone to whom much is given, from him much will be required; and to whom much has been committed, of him they will ask the more.

Proverbs indicates that people respond differently to beatings. Proverbs 17:10 indicates that some are so petulant and stubborn that they may need to be beaten over and over, whereas a wise man may only need to be warned the first time. That verse indicates that he may get off without a beating.

Non-Premeditated Manslaughter

Exodus 21:28-32 is another example, this time in the area of non-premeditated manslaughter through carelessness. The passage says,

If an ox gores a man or a woman to death, then the ox shall surely be stoned, and its flesh shall not be eaten; but the owner of the ox shall be acquitted. But if the ox tended to thrust with its horn in times past, and it has been made known to his owner, and he has not kept it confined, so that it has killed a man or a woman, the ox shall be stoned and its owner also shall be put to death. If there is imposed on him a sum of money, then he shall pay to redeem his life, whatever is imposed on him. Whether it has gored a son or gored a daughter, according to this judgment it shall be done to him. If the ox gores a manservant or a maidservant, he shall give their master thirty shekels of silver, and the ox shall be stoned.

Here was a case where God gave victims the right to impose a ransom if they so desired, and God gives a guideline of a minimum ransom in the case of a slave, but gives discretion for those who were freeborn. So Scripture gives minimums and maximums, and gives guidelines to help us evaluate discretionary judgments in between.

Repentance, Clemency, and Incurability

One important passage on penology is Ezekiel 18. This passage indicates that before a death penalty can be lowered, there must be genuine repentance on the part of the criminal. And later we will look at three illustrations in 1 Kings 1-2 that can help us to evaluate whether there was genuine repentance. Scripture doesn't just leave the issue of clemency for repentance up in the air.

Before we look at Ezekiel 18, let's look at two passages that form the background. Deuteronomy 24:16 says, The fathers shall not be put to death for their children, nor shall the children be put to death for their fathers; a person shall be put to death for his own sin. This was Israel's standing law and it ran completely contrary to the *Herem* principle of warfare. The Canaanite war was not the way Israel was to normally engage in war or for that matter to execute apostates. The reason man, woman and child was wiped out in Canaan was because God had already judged these people and from His court gave the capital judgment. God can see the capital crimes even in their hearts. Human courts don't have that privilege. So in the *Herem* principle in which children and parents were wiped out, Israel did not try the criminals; God did. But during the normal course of history, Israel was to avoid killing anyone that had not gone through proper judicial procedure. 2 Kings 14:6 says of Amaziah,

But the children of the murderers he did not execute, according to what is written in the Book of the Law of Moses, in which the LORD commanded, saying, "The fathers shall not be put to death for the children, nor shall the children be put to death for the fathers; but a person shall be put to death for his own sin."

Those are the two Scriptures that form the background for Ezekiel's discussion of penology. The post-Conquest norm for all capital crimes was expressed in Ezekiel 18 and this chapter is a clarification of who is worthy of death. Verses 4-9 say that an upright man shall live. Verses 10-13 say that his unrighteous son shall die. Verses 14-17 say that his righteous grandson shall live. Verse 18 says that his grandson's exemplary life does not exempt the father from capital punishment.

Verse 20 summarizes the argument saying, "The soul who sins shall die. The son shall not bear the guilt of the father, nor the father bear the guilt of the son."

The crimes that are listed in this chapter are idolatry (vs. 6,11-13,15), sexual sins (vv. 6,15), oppression of poor (v. 7,12,16), robbery (v. 7,12,16), usury (v. 8,13,17) and other unspecified crimes (vv. 9,12-13,17,etc.). He does not list murder as one of the crimes, because murder can have no clemency, ransom or lesser penalty than death. Ezekiel is only dealing with the way in which the capital penalty can be used as a restorative provision. You might have noticed that some of the crimes listed were not capital crimes. But it needs to be kept in mind that incorrigibility can make any crime a capital crime. Scripture says "the man who acts presumptuously and will not heed... the judge, that man shall die" (Deuteronomy 17:12). This Scripture gives judicial discretion to a judge for how to handle incorrigibility or repeat offenders. Such a judge has the option of eventually inflicting capital punishment. This is what Ezekiel is talking about – criminals who refuse to repent. So all the crimes listed were considered (in certain circumstances) to warrant the death penalty.

Notice also that the technical phrase for capital punishment, *môt yumat*, is used in verse 13:

Shall he then live? He shall not live! If he has done any of these abominations, He shall surely die (*môt yumat*); His blood shall be upon him.

Yet in verse 21 God says,

But if a wicked man turns from all his sins which he has committed, keeps all My statutes, and does what is lawful and right, he shall surely live; he shall not die.

Notice that the phrase "he shall surely die," is not absolute. If an idolater repents and becomes a believer, he shall surely live. If a man who has committed high treason shows genuine repentance, he shall surely live. There can be clemency for capital crimes. Later in this booklet we will look at some examples where the judge wanted to execute a criminal, but because of repentance felt compelled to commute the sentence on condition that certain restrictions be observed.

It might be objected that God is talking about eternal death and eternal life. But God says that a righteous man who commits these sins will die, and if he later repents he will live. And a wicked man can be justified,

and later condemned. He is not advocating salvation by works and losing salvation. Instead, God is answering Israel's charge that He has not been fair in His dealings with them. He quotes the civil statute from Deuteronomy 24:16, goes on to show that this is a reflection of His justice, and then goes on to say that His dealings with Israel have not deviated from that civil statute. The God who tells judges to judge righteously will not break His own rules. Judges can confidently imitate God's justice. And throughout this passage God is contrasting His perfect standard of justice with their injustice. For example, in verse 19 God complains, "Yet you say, 'Why should the son not bear the guilt of the father?'" and God answers, "Because the son has done what is lawful and right." They had a faulty sense of justice in their courts because they were looking to the pagan nations around them who all judged children along with the parents. "Why should the son not bear the guilt of the father," they say. That was the common concept of justice in all of the nations. But God wants courts to look to *His* justice, not to man's. And these Jews had a faulty sense of justice when it came to God's judgments in history.

In verse 25 Israel complains, "The way of the LORD is not fair." God replies, "Hear now, O house of Israel, is it not My way which is fair, and your ways which are not fair?" And He repeats the accusation that Israel's ways were not fair in verse 29. He was condemning their tyrannical use of the capital penalty. Thus we see that Ezekiel 18 clearly ties God's justice together with the court justice mandated in Deuteronomy 24:16. These were principles God wanted Israel to follow. This chapter is a case where the phrase *môt yumat* is attached to several capital crimes, yet when genuine repentance is found, there is a commuting of the death sentence.

The passage in Numbers 35 that we started with not only gives the death penalty for murder, but specifies that in the case of pre-meditated murder there could be no ransom from death, and in the case of accidental death, there could be no ransom from the city of refuge. This passage (along with Exodus 21:13 and Lev. 27:29) implies that the practice of commuting other capital crimes was common. Otherwise, why the need to mention the prohibition on ransom? If the phrase *môt yumat* conveyed such certainty, there would be no need. It is significant that the prohibitions from ransom do not occur with any other crime.

False Witness

An example where ransom was allowed is in the case of a false witness. Deuteronomy 19:16-20 makes it clear that a false witness receives the penalty that the pretended crime would have deserved. Deuteronomy 22:18-19 gives an example of one who falsely accuses his wife of adultery in court. Adultery was punishable by death according to Leviticus 20:10. The question then comes, *Why was this man beaten, fined and forbidden to ever divorce his wife in the future? Why wasn't he put to death?* Deuteronomy 19:16-20 makes clear that at least in some similar situations, the man could have been put to death. Apparently the father saw fit to keep him as a son-in-law rather than pressing for the highest penalty allowed under Deuteronomy 19:16-20.

Sabbath Breaking

God wisely gave Sabbath breaking as a capital crime in Exodus 30:12-17. Since God gave the law, we must believe it is a good and a just law. Sabbath breaking destroys a culture, and God treats it very seriously. Yet Nehemiah 13 makes it clear that capital punishment need not be applied in every case of Sabbath breaking. Indeed, we know from the Scripture that this would rarely be applied. It was a maximum penalty. So we see Nehemiah going through a series of escalating confrontations. In chapter 10 Nehemiah teaches them, then warns Sabbath breakers, then closes the gates on them, then threatens to lay hands on them.

Other Capital Crimes

Capital punishment was not invariable for Sabbath breaking, harlotry and other issues in David's day. Treason was a capital crime, yet when Adonijah clung to the altar in repentance and begged for mercy Solomon granted it saying,

“If he proves himself a worthy man, not one hair of him shall fall to the earth; but if wickedness is found in him, he shall die.” So King Solomon sent them to bring him down from the altar. And he came and fell down before King Solomon; and Solomon said to him, “Go to your house.” (1 Kings 1:52-53)

Solomon was not so easy on Joab. Joab tried the same trick, and Solomon in obedience to Exodus 21:14 said,

“Strike him down and bury him, that you may take away from me and from the house of my father the innocent blood which Joab shed. So the LORD will return his blood on his head, because he struck

down two men more righteous and better than he..." (1 Kings 2:31-32).

Again, when Adonijah, whose death sentence was commuted, persisted in his treason, he too was executed (1 Kings 1:13-25). Shimei was another example of Biblical clemency for capital crime, with restrictions applied, and when those restrictions were broken, he was executed (1 Kings 2:36-46).

Therefore when Ezekiel 18 says that repentance brings a commuting of the death sentence, we are not talking about a person who repeatedly says "I'm sorry" and then goes on to commit the same crime. God's purpose in clemency is to provide a means whereby genuine reconstruction of life can happen. God says, "'Do I have pleasure at all that the wicked should die?' says the LORD God, 'and not that he should turn from his ways and live?'" (Ezek. 18:23) The reason there were so many capital crimes in the Old Testament was not only to inspire fear in criminals, and to cut off wickedness from the land; it was also to give opportunities for criminals to seriously consider salvation and reformation of life. Ironically, capital crimes were restorative in many instances.

Yet Solomon shows that his court never coddled criminals. He enforced restitution, he put restrictions on the person's life and when those were not kept, he followed through on the execution.

As Ezekiel 3:19 says,

"Yet if you warn the wicked, and he does not turn from his wickedness, nor from his wicked way, he shall die in his iniquity."

Likewise, Ezekiel 33:14 says,

"Again, when I say to the wicked, 'You shall surely die,' [another occurrence of *möt yumat.*] if he turns from his sin and does what is lawful and right, if the wicked restores the pledge, gives back what he has stolen, and walks in the statutes of life without committing iniquity, he shall surely live; he shall not die...Yet the children of your people say, 'The way of the LORD is not fair.' But it is their way which is not fair!"

Can you see the beauty of God's system? God's law was tough, but even with capital crimes it was designed to be restorative. God's justice mandates that after the initial warnings on a capital crime, there is no

mercy if the person persists in his crimes. Solomon was exercising these principles of justice given in Ezekiel.

Blasphemy, False Witness, Kidnapping

We could demonstrate the same flexibility for blasphemy (Lev. 24:10-16), being a false witness for a capital offense (Deut. 22:13-21) and kidnapping (Judges 21:20-24) each of which was a capital crime (Lev. 24:13-16; Deut. 19:16-21; Ex. 21:16).

Adultery

However, perhaps the most significant illustration of this leeway in the law is the case of adultery. Leviticus 20:10 is one of several passages calling for the death penalty on adultery using that phrase, *möt yumat*. It says, “The man who commits adultery with another man’s wife, he who commits adultery with his neighbor’s wife, the adulterer and the adulteress, shall surely be put to death.”

The phrase *möt yumat* is clearly tied to adultery, yet Scripture makes clear that the victim of the adultery is not required to prosecute, and if he or she does prosecute, he or she is not required to ask for the maximum penalty. Matthew 1:19 draws attention to Joseph’s uprightness when he chooses not to prosecute to the fullest extent of the law - “Then Joseph her husband, *being a just man*, and not wanting to make her a public example, was minded to put her away secretly.” He chose not to impose the death penalty upon her (making her a “public example”), but the text makes it clear that this quiet divorce was consistent with Biblical justice. It says, “being a just man” he did this.

Indeed, if this interpretation of the crime of adultery is not taken, then it is impossible to understand the many passages that allow sexual sins as grounds for divorce. (How can there be a divorce if the penalty of death always had to be applied?!) Isaiah 50:1 says, “Thus says Jehovah: ‘Where is the bill of divorce of your mother whom I have put away?’” Jeremiah 3:8 says, “Israel committed adultery, I put her away and gave her a bill of divorce.” Christ made clear that adultery was grounds for divorce in Matt. 5:31-32. If you could prove adultery in court to sue for divorce, you could certainly use the same grounds for capital punishment. You couldn’t just divorce people because you thought they had committed adultery. Deuteronomy 22:17-19 makes that clear. The case had to be proven beyond a shadow of a doubt in court. In Ezra 10, Ezra tried each case of improper marriage on its own merit. He didn’t

make everyone with a non-Israelite wife divorce her. That would be unlawful according to Deuteronomy 21 and other passages. Paul is applying the Old Testament when he tells believers not to leave unbelievers who are willing to dwell with them. And if you read the chapter carefully you will see that Ezra didn't do it. Each couple had a court case examination, and Ezra said, "Let it be done according to the law."

Only those cases that deserved capital punishment would have allowed for a divorce in Ezra 10. Those could have included idolatry, sorcery and other crimes. And most of those pagans would have been involved in capital crimes. Yet Ezra makes them sue for a divorce even though he was quite capable of implementing capital punishment upon those crimes. Both he and Nehemiah chose not to, and the books of Ezra and Nehemiah make it quite clear that it was consistent with Biblical justice. Next time you criticize Nehemiah for cursing those who were married to idolaters and yanking out their hair in clumps, and forcing them to vow to give up their wives, consider the fact that Nehemiah was actually showing great restraint and clemency. He could have given the death penalty. The forced divorces in Ezra and Nehemiah just don't fit into the theology that most Christians advocate. The alternatives were death or divorce. Romans 7 says, "Or do you not know, brethren (for I speak to those who know the law)" and then he goes on to say that nothing but death can annul a marriage. Every crime for which the death penalty applied is legitimate grounds for divorce, and certainly if there is no repentance, Ezra and Nehemiah say it is a mandate for divorce.

Likewise, unless this interpretation is taken, it is impossible to understand Solomon's treatment of the two harlots as evidence of the justice of God. 1 Kings 3 shows that everyone knew they were harlots, and yet verse 28 gives that story as exhibit A "that the wisdom of God was in him to administer justice." Obviously justice did not mandate the death penalty for those harlots. Likewise, unless this interpretation is taken, the book of Hosea does not make sense. Hosea took his wife back to himself after she committed adultery and in doing that stands as a model of forgiveness. Hosea demonstrates that a victim does not have to press for justice. Though a court must give justice if a prosecution is brought, a victim can forgive.

Thus there is no tension between Biblical law and the Great Commission. For example, in a society that was being converted, homosexuals could continue to be converted as they were in the church

of Corinth. Even after a society implemented Biblical law and made homosexuality a crime, execution would be rare for the reasons mentioned in the introduction and because of the protections of criminals in civic law. (See Appendix A for specifics.) The civil government could not round them up. Only those who were prosecuted by citizen-victims¹⁵ could be punished, and the punishment could take a number of forms, analogous to the flexibility in dealing with adultery – which ranged all the way from forgiveness, to divorce, to death. Even if my thesis for flexibility in the law is not correct and Bahnsen’s more literal viewpoint were adopted, there still would not be very many executions given the caveats in the introduction. Bahnsen’s view might drive homosexuals into the closet, but the state could not touch them there. The second view, which gives judicial discretion, might bring a few speedy executions of non-repentant criminals, and others would think twice before despising God’s law. But if my view is true, execution would be even more rare, and both the restorative side of the law and the protection of abused victims would be highlighted. More study of the meaning of the ambiguous Hebrew phrase מוֹת יִבְמַת (*mōt yumat*) needs to be done before a definitive answer could be given, but hopefully this exploratory monograph can get the ball rolling on such study. In any case, I hope I have at least demonstrated that Christians should *advocate* the full implementation of all God’s civil penalties in every age. It seems to me that both the Old and the New Testaments call for this.

Summary

We need to remember that adultery is a serious crime that *is* “worthy of death.” God says so (Lev. 20:10; 21:9; Deut. 22:21-24; Jn. 8:4-11; 1 Tim. 1:10). The same is true of each of these other laws we have been discussing. (See Appendix B page 54 for a complete listing of capital crimes.) God’s laws were never too harsh or too lenient, but were given “according to his fault” (Deut. 25:2) and “every transgression and disobedience received a just reward” (Heb. 2:2). If a person transgresses a capital crime, then it matters not what society thinks; God thinks that he or she is “worthy of death.”

¹⁵ Some people characterize this as a victimless crime since homosexuals cannot get married. But there are plenty of circumstances (homosexual rape, homosexual incest, homosexual death threats against politicians, etc.) where victims might be motivated to bring charges.

So far we have been showing how theonomists need to recognize the flexibility that exists within God's law. Now I want to backtrack and insist that our flexibility cannot go beyond the law. Deuteronomy describes apostates who lead others astray, and since there was no repentance mentioned in this chapter, God says, you shall not consent to him or listen to him, nor shall your eye pity him, nor shall you spare him, or conceal him; but you shall surely kill him (Deut. 13:8-9). The only pity allowed is what God's law mandates. The only clemency allowed is based upon conditions that Scripture itself lays down. We cannot do like some have done in *Theonomy, A Reformed Critique*, and use flexibility in penology as an excuse to jettison Biblical penology. Clemency is justice only if all the Biblical conditions are met. And it should be *justice* we are interested in for the civil sphere. Deuteronomy 19:21 says, "Your eye shall not pity; but life shall be for life, eye for eye, tooth for tooth, hand for hand, foot for foot." Deuteronomy 25:2 says that a person should be beaten "according to his guilt, with a certain number of blows." I can't emphasize enough that we have been talking about flexibility *within* the law, not a forsaking of the law of God. Every Old Testament statute continues on the books, and without those statutes, we could not have a consistent ethical standard.

In conclusion, let me reiterate the objection and summarize why it is not valid. The first objection states, "If we accept the Old Testament penalty for murder, then we need to accept the death penalty for adultery, homosexuality, bestiality, blasphemy and other issues." We have seen that this is without merit on six grounds: First, the objection is the logical fallacy of emotional appeal. Second, the death penalty for murder can be defended without appealing to the Mosaic Law. Third, God Himself has given the law and has attached it to other crimes. To argue against applying the death penalty to Biblical crimes is to question God's wisdom and justice, to denigrate His Word and to leave us without any objective standard by which we can oppose tyranny. Fourth, the New Testament continues to uphold the death penalty for all the Old Testament crimes for which it was given, recognizing of course all the caveats that have been given. Fifth, many objectors fail to realize that the death penalty was restorative for all crimes except premeditated murder. Sixth, I believe I have clearly shown that God Himself authorized lower penalties (and even no penalties) on all crimes except for murder, and therefore, capital punishment for murder is indeed uniquely stated among Biblical crimes. Once the flexibility within the law is understood, the

true genius of restorative punishments can be appreciated. And once the caveats of the introduction are understood, it makes clear that rarely did capital punishment have to be applied to crimes other than murder.

Objection 2 - "In John 8:3-11 Christ removes the death penalty."

The second objection that people bring against the death penalty is that Jesus abolished it in John 8:3-11. They point out that the woman was guilty of a capital crime, that Christ would only let a sinless person give the penalty (v. 7), and that Christ Himself was not willing to condemn her (v. 11). This alleged overturning of the Old Testament is proof in their minds that the death penalty is contrary to a Christian ethic. Others have modified the argument and have said that this does not do away with the death penalty for murder, but that it simply does away with the death penalty for adultery. Thus John Murray and R. J. Rushdoony both claim that divorce is the only redress for the crime of adultery. Greg Bahnsen disagrees, and I believe he argues against this conclusion convincingly. To see this, let's look at the passage in context:

John 8:3-11: ³Then the scribes and Pharisees brought to Him a woman caught in adultery. And when they had set her in the midst, ⁴they said to Him, "Teacher, this woman was caught in adultery, in the very act. ⁵Now Moses, in the law, commanded us that such should be stoned. But what do You say?" ⁶This they said, testing Him, that they might have *something* of which to accuse Him. But Jesus stooped down and wrote on the ground with *His* finger, as though He did not hear. ⁷So when they continued asking Him, He raised Himself up and said to them, "He who is without sin among you, let him throw a stone at her first." ⁸And again He stooped down and wrote on the ground. ⁹Then those who heard *it*, being convicted by *their* conscience, went out one by one, beginning with the oldest *even* to the last. And Jesus was left alone, and the woman standing in the midst. ¹⁰When Jesus had raised Himself up and saw no one but the woman, He said to her, "Woman, where are those accusers of yours? Has no one condemned you?" ¹¹She said, "No one, Lord." And Jesus said to her, "Neither do I condemn you; go and sin no more." ¹²Then Jesus spoke to them again, saying, "I am the light of the world. He who follows Me shall not walk in darkness, but have the light of life."

It is my contention that Christ was requiring these civil leaders to be without the specific sin being discussed (adultery), not that they be totally sinless before they could judge. If Christ was saying that they had to be free from *all* sin before they could cast the first stone, this would place John 8 into contradiction with Romans 13:4 which calls *sinful* Rome to exercise the sword for justice. What would give the civil government the right to bring *any* judgment when *every* magistrate is a sinner? Such an interpretation would lead to anarchy. Yet Paul makes clear that the government does not bear the sword in vain.

So what is Christ saying? It is unlikely that the Pharisees would have been stumped if Jesus were overturning the law. Indeed, they would have had every reason to call Him a heretic, start a riot and stone Him. Yet Christ's statement so thoroughly discredited them that they are left speechless. This is inconceivable if Jesus was simply telling these magistrates that they could not judge anyone without being sinless. There must have been an Old Testament law that Jesus was appealing to or His argument would not have been compelling. I believe that Christ was appealing to several laws that they had ignored.

First, if they had any case at all, Deuteronomy 22:22-24 mandated that the adulterer be charged together with the adulteress. It appears that they had not brought the adulterer. But if they had a case, one of the men in His presence must have been guilty of the sin of adultery. Starting with that first assumption, Jesus says, "He who is without sin among you, let him throw a stone at her first."

Second, the Pharisees had ignored the law which required a witness to not be guilty of the same sin he was accusing another of. In context it is clear that Christ had the sin of adultery in mind, not every sin. The only sin they were discussing was adultery. When Jesus tells her, "go and sin no more," it is clear that He is telling her to quit her sin of adultery. The law did not demand that a plaintiff be perfectly sinless. Nor did it demand that the witnesses or judges be perfectly sinless. But the law did demand that an accusation could not be brought by one who was guilty of the same crime (Hos. 4:14; see rabbinic interpretations of Numb. 5:30-31; Deut. 19:15). Indeed, in the time of Christ vigorous discussions had been going on regarding the meaning of Numbers 5:30-31. The view of Johanan ben Zaccai and other notable rabbis was that it was only "if the man is clear of sin, then the woman shall bear her sin."¹⁶ It may very well

¹⁶ See Siphre on Numbers 5:31. For an analysis of this, see D. DAUBE, *Appeasement or*

be the case that Jesus was siding with powerful rabbis in their interpretation of this passage. But certainly the Bible itself rebuked the hypocrisy of those who wanted to punish women for adultery but were not willing to punish the men (see Hos. 4:14). Biblical justice did not give the adulterer permission to throw the stone. So in effect, Jesus was giving the same argument that Paul did in Romans 2.

Therefore you are inexcusable, O man, whoever you are who judge, for in whatever you judge another you condemn yourself; for you who judge practice the same things (Rom. 2:1).

You who say, “Do not commit adultery,” do you commit adultery? (vs. 22).

This interpretation makes sense when the other laws applicable to this case are understood. Deuteronomy 22:22-24 mandates that if a charge is brought against the woman, it also has to be brought against the man. When Christ says, “let the one who has not sinned throw a stone at her first,” He is making a backhanded slap at the Pharisees. He is implying that if they have any Biblical case at all, then one of them (and He uses the male gender) must be the adulterer and should be subject to stoning as well. By Biblical law, one of those Pharisees should be the guilty male. This was an embarrassing oversight in their case against Jesus.

But furthermore, Christ implied that since He was not a civil magistrate, the ball was in their park. The Pharisees were civil magistrates as part of the Jerusalem Sanhedrin. Christ insisted that if they wanted to proceed with the stoning, then they had to follow Biblical procedure: “let the one who has not sinned throw a stone at her first,” Deuteronomy 17:7 mandates that a *witness* cast the first stone, and since He was not a witness, He throws it into their lap.

But there is more. Christ gives a command to those who meet the Biblical qualifications as witnesses - He says, “cast¹⁷ the first stone” (John 8:7). The Greek is an imperative, a command. The magistrate

Resistance (Berkeley 1987), p. 30. If this was the case, Christ may have been writing in the dust. However, Christ was certainly upholding the meaning of other Old Testament passages. Hosea 4:14 says, “I will not punish your daughters when they turn to prostitution, nor your daughters-in-law when they commit adultery, because the men themselves consort with harlots and sacrifice with shrine prostitutes.” It is also possible to translate Deuteronomy 19:15 as requiring this of a witness.

¹⁷Βαλετω is the third person singular, second aorist, active, imperative form of “to throw.” It is clearly a command that Christ is giving.

does not have judicial discretion for lessening the penalty, though the victim does (see below).

This leaves the Pharisees in a dilemma. If they follow through on their demand for capital punishment, they will get in trouble with Rome (Rome forbade capital punishment in Israel) or they will have to either stone the man in their midst who committed adultery with the woman or admit that they had shown partiality by letting him go.

However, if they fail to follow through on their demand for capital punishment, they will be admitting either that they were not truly witnesses (admitting to lying) or that they were adulterers themselves (not without sin).

Any direction they went they were caught. As false witnesses they could be subject to the same penalty the woman was subject to (see Deut. 19:18-21). If they denied that they were false witnesses, one of them would have to be stoned as an adulterer (Lev. 20:10; 21:9; Deut. 22:21-24). But if they followed through on stoning the woman in order to save face, Rome might give them the capital penalty for violating Roman law. They would also have the difficulty of having to stone the adulterous man. They could thus have been “convicted by their conscience” on several counts. The easiest thing for them to do was to admit that they were hypocrites.

Thus Christ is clearly enforcing the demands of the Old Testament with respect to adultery. Christ recognized that adultery was worthy of death. But three chapters earlier He affirmed that it was not the only penalty for adultery. In Matthew 5:32 Christ allowed divorce as an alternative to death. In doing so He was simply upholding Biblical law on divorce. But interestingly, Jesus also illustrates the whole thesis of this book when he does not condemn her as a private citizen. He does not excuse her sin. He says, “Go and sin no more.” However, he shows love and compassion to her. This is the only role that we as citizens can take with repentant sinners. God’s call to us is to love such a woman (Romans 12) and it illustrates the difficulty of applying the death penalty in a libertarian state (Romans 13).

Objection 3 – “The death penalty does not deter criminals.”

The third objection is that the death penalty doesn’t work. In answer we can say two things: 1) if God mandates the death penalty for murder,

then we should do it whether we can see that it works or not. 2) God says that it does work. The death penalty is in part designed to be a deterrent.

So all Israel shall hear and fear, and not again do such wickedness as this among you. (Deut 13:11)

And all the people shall hear and fear, and no longer act presumptuously. (Deut 17:13)

then you shall do to him as he thought to have done to his brother; so you shall put away the evil from among you. And those who remain shall hear and fear, and hereafter they shall not again commit such evil among you. (Deut 19:19-20)

Then all the men of his city shall stone him to death with stones; so you shall put away the evil from among you, and all Israel shall hear and fear. (Deut 21:21)

I will grant that in America the death penalty has not been much of a deterrent. But that is true primarily because of four reasons:

First, there is presently no speedy trial as guaranteed by our Constitution¹⁸ and provided in Scripture. Ezra 7:26 says, “Whoever will not observe the law of your God and the law of the king, let judgment be executed *speedily* on him, whether it be death, or banishment, or confiscation of goods, or imprisonment.” The examples of execution in the Bible occur immediately after the sentence has been announced. Execution was supposed to be speedy, but in our culture there are so many delays and appeals that it is extremely rare to find a person executed. That is not a very frightful prospect to a murderer.

A second problem is that the execution is no longer public, but secret. In the Bible, capital punishment helped to deter crime because it had to be carried out at the “gates” of the city where all of the people were required to witness it (Numb. 15:35-36; Deut. 13:9; 17:5,7,13; Acts 7:58). In the Declaration of Independence of the 13 Colonies from England, public execution was seen as a protection of justice that was taken away by the King when he took prisoners to England. When executions are public, the justice system is much more accountable to make sure that justice is done. Otherwise they face the wrath of those who witness the injustice.

¹⁸See Bill of Rights, Article VI.

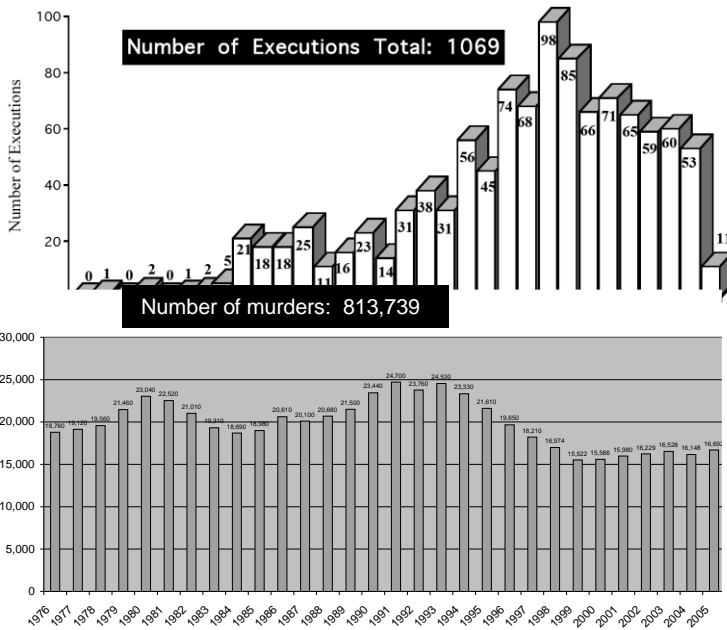
Third, capital punishment is rarely gruesome any longer, and rarely fits the horribleness of the crime. If it were, it would inspire fear in the hearts of many (if not all). There is little fear in an injection that causes you to painlessly drift off to sleep. However, the Bible does limit the gruesomeness of capital punishment. Deuteronomy 21:23 says that a body was not to remain hanging overnight. There was not to be a morbid delight in death even if it was legal. Samples of Old Testament methods of capital punishment that struck fear into the hearts of criminals were:

- hanging (2 Sam. 21:6-9; Josh. 8:29; 10:26,27; Deut. 21:22-23)
- stoning (Ex. 19:13; Lev. 20:27; Josh. 7:25; etc.)
- arrow (Ex. 19:13)
- spear or sword (Deut. 19:6,12; 2 Sam. 1:15; 1 Kings 2:25,34,46; Rom. 13:4)
- being thrown off a cliff or dashed on rocks (2 Ch. 25:12; Ps 2:9)

Fourth, the percentage of convicted murderers who are actually executed is extremely small. The intervention of judges who were not on the case slows down the process even though such intervention has nothing to do with the merits of the case. Many times the death penalty is overturned on ridiculous technicalities. Scripture condemns such interference in Deut. 17:11 and 13:8. The death penalty is almost never enforced in the United States. For example, from the time that the death penalty was once again legal in America (1977) to February of 2007 there have been only 1137 executions. Yet the same period of time has had well over half a million murders. There have been ever increasing numbers of murders with very few death penalties inflicted. The first chart (below) shows the number of executions by year. The second chart shows the number of murders. With these kinds of statistics, no murderer will find the death penalty a deterrent to his crime.

The death penalty certainly has reduced crime in those countries where it is swiftly enforced. The Bible says that capital punishment does deter: “you shall put away the evil person from among you. And those who remain shall hear and fear, and hereafter they shall not again commit such evil among you.” (Deut. 19:19-20; compare Deut. 17:12,13; 21:21; etc.)

But even if it did not deter others, it certainly deters the murderer from murdering again. He will no longer pollute the land with the blood of his victims (Numb. 35:33). Our concern should be about his future possible victims.



Objection 4 – “We ought to be concerned about the salvation of his soul, and the death penalty puts an end to that possibility.”

Causing a habitual murderer to face death may be the only thing that brings him to his senses and makes him face eternity seriously. Many people have been converted on death row. And regarding the other capital crimes, we have seen how they are actually used by God as a restorative measure.

Ironically this objection could actually be used to *promote* the death penalty. Think of the thousands of victims who will never have a chance to hear the Gospel if these murderers are not killed. The execution of one murderer may save many lives. But of course this is an *ad hominem* argument and we do not base our theology on pragmatism.

Scripture is our final court of appeal, not pragmatic arguments. And Scripture specifically says that a murderer should not be spared even if he pleads the atonement by clinging to God’s altar (Ex. 21:14; cf. 1 Kings 2:28-34). In other words, this passage insists that the issue of salvation (“My altar”) cannot interfere with an execution. It is possible

to be more merciful than God, not because we are more righteous, but because we are sinners who fail to appreciate how abominable these crimes are to God. So God warns us, “Your eye shall not pity him, but you shall put away the guilt of innocent blood from Israel, that it may go well with you... Your eye shall not pity; but life shall be for life...” (Deut. 19:21).

Objection 5 – “The poor are convicted and the wealthy escape.”

This is a difficult objection to evaluate since the definition of poor changes with the studies. But it is helpful to realize that on any definition of poor that I have read, there are proportionately more murders among the poor than among the wealthy. If there is indeed injustice being perpetrated on the basis of wealth, the solution is not to do away with justice by abolishing the death penalty. The solution is to apply the death penalty to every murderer.

A variation on this argument is that minorities are disproportionately executed compared to whites in America. This too is an abuse of statistics. The death row population in January of 2005 was 46% white, 42% Black, 10% Latino, 1% Native American and 1% Asian. Granted, this ratio is disproportionate to the population. But the murder rate is also disproportionately higher among blacks than among whites.

But even if it could be demonstrated that the disproportionate number of executions in any one socio-economic group is due to discrimination, the remedy is not to abolish the death penalty, but to make sure that all murderers are put to death. We should remedy the system to reflect Biblical justice that mandates,

You shall do no injustice in judgment. You shall not be partial to the poor, nor honor the person of the mighty. But in righteousness you shall judge your neighbor. (Lev. 19:15; cf. Deut. 1:17; 10:17; Ps. 82:2)

You shall not be afraid of any man’s presence, for the judgment is God’s. (Deut. 1:17)

Objection 6 – “David wasn’t executed for his murder of Uriah.”

The sixth argument is that David wasn’t executed for his murder of Uriah. David certainly recognized that he was worthy of death (2 Sam.

12:5), as did Nathan the prophet who predicted that he would avoid the death penalty (2 Sam. 12:13).

Biblical law gave several protections to the accused.¹⁹

- 1) There had to be two or three witnesses.
- 2) The witnesses had to bring the charges before a court case could proceed.
- 3) The witnesses could not be guilty of the crime themselves (Deut. 19:15a). In this case, both witnesses (Bathsheba and Joab) were implicated. They didn't want to be stoned, so it is unlikely that they would come forth as witnesses.
- 4) The accused had the legal right to remain silent.
- 5) A person was innocent until legally proven guilty (only Israel had this law!)
- 6) A thorough investigation of the case would occur only after citizens brought the case to court (they did not have a police state!).
- 7) The king has the authority to grant a pardon (1 Kings 3:5-15). Though it is usually assumed that he would grant it for others, it is possible (though unlikely) that he misused this privilege for himself.

Therefore, on several counts it would have been impossible to convict David. Cases where people got off free of capital punishment do not in any way logically prove that they should have gotten free.²⁰

Objection 7 – “Cain was not executed.”

The seventh objection is that Cain was not executed, and God Himself protected Cain (Gen. 4:15). However, it is important to note that Cain recognized that he deserved to die (Gen. 4:14).

Furthermore, this passage is perfectly consistent with the details of the Mosaic laws that were written much later. Note for example the laws listed under the previous point. Also note the later prohibition of *ex post facto law*. *Ex post facto law* is the tyrannical use of newly framed laws to convict people retroactively for violating the law before the law was

¹⁹ See Appendix A for Scripture proofs and for more examples.

²⁰ Notice that in my arguments on commuting some capital crimes, I only use Scriptures where God clearly authorized a lower penalty (or no penalty – as in the case of Hosea's adulterous wife).

passed. In America, this law was written into the Constitution in Article I, section 9, though it has been violated with increasing frequency. Many nations pass *ex post facto* laws that are impossible to defend against. In the case of Cain, since God was the only witness, court law could not be followed. God of course could have slain him, but God is here establishing law for *human* courts. And the significant law that is being highlighted is that there can be no *ex post facto* laws established by men to later attempt to execute Cain.

Objection 8 – “The New Testament commands us to love our enemies (Matt. 5:44), to not take ‘an eye for an eye and a tooth for a tooth’ (Matt. 5:38) and to not avenge ourselves since vengeance belongs to the Lord (Rom. 12:19).”

The eighth objection says that Christ overturned the Old Testament law by commanding us to love our enemies (Mt. 5:44), by no longer allowing the *lex talionis* law of “an eye for an eye and a tooth for a tooth” (Mt. 5:38) and by commanding us not to avenge ourselves since vengeance belongs only to the Lord (Rom. 12:19). However, if we were to apply such passages and reasoning to the state, it would rule out prisons, fines, or any other penalties too. That doesn’t just rule out the death penalty.

The truth of the matter is that these Scriptures were given to prevent private citizens from taking vengeance into their own hands. Romans 13 commands the state to give justice, while Romans 12 commands private citizens and churches to love. Leviticus 18 commands the state to punish criminals while Leviticus 19 commands private citizens to not take vengeance or bear a grudge but to love (v. 18). Both sides of the equation must be held.

It is helpful to realize that in the Sermon on the Mount Christ opposes the *oral* law of the scribes and Pharisees (“you have heard it *said*”). He was not opposing the *written* law (“It is *written*.”). With regard to the *lex talionis* law, Christ was opposing the Pharisee’s private use of that law, not the state’s legitimate use of it. A reading of the Talmud indicates that the Pharisees used a law given to judges (“an eye for an eye and a tooth for a tooth”) and applied it to citizens, thus justifying murder, robbery and other attempts to get even. It was a gross misinterpretation of the Old Testament, and the Sermon on the Mount gives the true interpretation of the Old Testament.

The quotation Christ gives in Matthew 5:43 (“You have heard that it was said, ‘You shall love your neighbor and hate your enemy’”) cannot be found in the Old Testament. But it can be found in the Pharisaical oral traditions. Indeed, the Old Testament commanded believers to love their enemies, to give cold water to them, to help them with an ox in a ditch, etc. (Ex. 23:4-5; Lev. 19:18,34; 2 Kings 6:22; 2 Chron. 28:9-15; Psalm 7:4; Psalm 35:13,14; etc.). Proverbs 25:21-22 says, “If your enemy is hungry, give him bread to eat; and if he is thirsty, give him water to drink; for so you will heap coals of fire on his head, and the LORD will reward you.” Romans 12:19 is telling us to obey the Old Testament when it says, “Beloved, do not avenge yourselves, but rather give place to wrath; for it is written, ‘Vengeance is Mine, I will repay,’ says the Lord.” He was quoting Deuteronomy 22, a chapter which also commands, “Set your hearts on all the words which I testify among you today, which you shall command your children to be careful to observe - all the words of this law” (v. 46).

In context God is indicating that civil government is the way He brings vengeance. Thus Romans 12 is God’s command for private citizens (no vengeance) and Romans 13 is God’s command to government (“to execute wrath on him who practices evil.”). The love and forgiveness of Romans 12 cannot be applied to civil government without destroying the government’s ability to exercise justice. Likewise, the vengeance of Romans 13 cannot be applied to private citizens without creating anarchy. Paul insists in 1 Timothy 1:8 that “the law is good if one uses it lawfully.” What Christ and Paul were countering was the unlawful use of the law.

Objection 9 - “What if an innocent man is executed?”

It must be admitted that perfect justice is impossible on earth. But God gave far more protections in its legal procedure to protect against just such possibilities than even modern American courts have. As a result, many criminals got off the hook in the Old Testament. David was one of them. However, that is not the problem in today’s “civilized countries.” Even murderers like Sirhan Sirhan, whose act was seen by a dozen witnesses, are not executed.

Gordon Clark has shown how pragmatic arguments can be turned different ways. He says,

Do you prefer 10,000 murders to save one innocent man rather than one tragedy to save 5000 lives? But of course this type of argument

is superficial and irrelevant. God gave the right of capital punishment to human governments. He intended it to be used wisely and justly, but he intended it to be used. Abolition of the death penalty presupposes the falsity of Christian principles.²¹

Objection 10 – “Prison is more humane than capital punishment.”

This can be questioned. There have been many who would rather have had capital punishment than to suffer the homosexual rape and other forms of abuse that they have experienced in prison.²²

On the other hand we might argue that prison may be more humane to the criminal, but why should we be inhumane to society and humane to a criminal? Society is forced to pay for his stay, risk the lives of guards, risk possible escape, let such criminals teach their wicked lifestyles to other inmates and make them worse, all in the name of being humane.

Scripture forbids the harboring of murderers, even if they are being harbored “in confinement” (Deut. 19:12-13). There can be no ransom or lesser penalty than death (Numb. 35:19-21,30-34) for murder or for unrepentant capital crimes.

Objection 11 – “Those who advocate capital punishment are not consistently pro-life.”

Many people say that to be consistently pro-life we must be against the death penalty. However, God is pro-life yet He advocated the death penalty. I am willing to be as consistent as God’s Word is.

It is truly pro-life to protect possible future victims against attack. What could be more pro-life than to protect the lives of citizens by removing the aggressor (Numb. 35)? What could be more pro-life than deterring other people from becoming murderers (Deut. 19:20; 17:12,13; 21:21)? What could be more pro-life than having the state pass laws

²¹ Clark, *Essays on Ethics and Politics* (Jefferson: Trinity Foundation, 1992), p. 11.

²² As stated earlier, the high incidence of violence, homosexual gang rape, and other forms of physical and psychological abuse make America’s penitentiary system cruel and unusual punishment. Both civil agencies and private advocacy groups have documented this. See *Confronting Confinement: A Report of the Commission on Safety and Abuse in America’s Prisons*, (Washington, D.C.: Vera Institute of Justice, 2006). This government authorized report gives 126 pages of sobering statistics on how evil and twisted the prison system is. Prison is certainly an unbiblical concept

establishing a certain date²³ after which all doctors who continue to perform abortions will be executed? Certainly a handful of doctors might be killed (pro-death for killers), but think of the millions of little lives that would be saved! (Pro-life for those who are innocent.) Yes, I am pro-life.

Objection 12 – “There are other legitimate forms of justice than those given in Scripture.”

Objection 12 claims that there are other legitimate forms of justice than those given in Scripture. The question is, “How do you define justice?” The call for “justice” is thrown around by everyone. Liberals, conservatives and every brand in between want justice, but they have radically different definitions of justice. Augustine said, “Without justice, what are states but great bands of robbers?” But it is clear that until we can define justice, it is a meaningless word. An Ayatollah can cut off the hand of a hungry man for stealing. That is not justice according to the Bible. England went even further by hanging people for stealing a loaf of bread. Scripture would condemn that also. The Bible advocates restitution in the case of theft. England and the Ayatollah had two competing views of “justice.” Ancient Babylon gave the death penalty for serving bad beer. What a travesty of justice! Yet who is to say that this is injustice if the state is the definition? The Bible alone is a protection against undue laxity and undue severity because the Bible alone gives God’s evaluation of what is just.

Objection 13 – “This would lead to a blood bath if we were to implement that law today because almost our entire nation is implicated in capital crimes.”

This objection is a mixture of pragmatism (we can’t do it) and emotional appeal (it would lead to a blood bath). But neither argument changes God’s definition of justice. Difficulty in implementing Biblical law does not make non-Biblical penology just. But even on Bahnsen’s strictest interpretation of the death penalties, the results would not be as

²³I say after a certain date because *ex post facto* laws are immoral according to the Bible and there could be no executions for past abortions. This is why many Christians who were revolted by Germany’s atrocities still opposed the *ex post facto* laws of the Allies. There were enough German laws that could have convicted them. You don’t invent laws to try to convict.

dire as people often predict. For example, while many homosexuals would be executed on Bahnsen's interpretation, it would not be nearly as many as critics try to imply, because homosexuals would likely keep silent about their lifestyle, and the state would not be authorized by the Bible to engage in sting operations, surveillance, investigation, police bullying, anonymous tips, or any other means of trying to ferret them out. The state would leave them alone and give them all the civil rights that anyone else has. Biblical civics only punishes publically provable acts that are pressed by citizen/victims. Biblical law would recognize as a matter of justice that even if his interpretation could be enforced today, homosexuals could not be prosecuted for something that was done before the law was enacted (*ex post facto* law is forbidden in Scripture).

But on our interpretation, executions would be even more rare. Furthermore, this law should not be taken out of the whole context of Leviticus which requires due process of law. There must be a minimum of two eyewitnesses who would themselves be prosecuted if their witness turned out to be false. Numerous other protections for homosexuals are listed in Appendix A.

Whether or not the law is applicable today we must see it as being a righteous law or we would defame the character of God who gave it. Hebrews 2:2 says that every transgression and disobedience of the law in the Old Testament received a just recompense. We should not call unjust what God has called just. All the laws He gave were said to be the most righteous laws on earth (Deut. 4:6-8).

In our present pagan societies we don't have a majority of Christians in the nation and it would probably take a Christian consensus before such laws could be implemented in a Biblical way. But there must still be a standard toward which a society could aspire should our nation ever become Christianized.

CONCLUSION

Let me summarize this whole topic with two verses from Deuteronomy 32:

Set your hearts on all the words which I testify among you today, which you shall command your children to be careful to observe - all the words of this law. For it is not a futile thing for you, because it is your life, and by this word you shall prolong your days in the land... (vv. 46-47).

God's law was given for our good. If we want life, we must not jettison the law. If we want our country to prolong its days as a nation, we must cleanse the land of its blood defilement. According to God, "blood defiles the land, and no atonement can be made for the land, for the blood that is shed on it, except by the blood of him who shed it" (Numb. 35:33). If we ignore the abominations that are being committed in our land, the land will vomit us out now just as surely as it vomited out the Canaanites and threatened to vomit out the Jews (see Leviticus 18). The issue of penology is a critical issue for the future security of our nation.

APPENDIX A

Checks & Balances in God’s Legal System that Protected the Accused

Some have objected to the death penalty because they do not recognize the checks and balances that were required by God’s law. I want to demonstrate in this appendix that the Old Testament gave more protection to both criminals and victims than our present court system does.

It might be objected: “then why was Christ, a perfectly innocent man, condemned to death. Surely the death of Christ is a great argument against the death penalty.” However, it should be recognized that the Sanhedrin deliberately broke fifteen laws that would have protected Christ’s rights. The problem was not with the laws, but with the kangaroo court. On every level, the trial and execution of Christ was obviously unjust and illegal.

Court laws violated at Christ’s trials

1. The scribes, Pharisees and Herodians repeatedly tried to find Christ guilty of a crime by entrapment (Mark 3:2; 12:13; Luke 6:7; 11:54; 20:26; etc.). Entrapment was something known in ancient times (1 Sam. 28:9), but shunned by the righteous (1 Kings 3:16-28). In the last passage, Solomon must have suspected that these two women were harlots. He could have trapped both into confessing to their capital crime of adultery, yet he did not. Instead he allowed them a hearing and was considered just by God in doing so (“justice” - v. 28). Certainly Scripture condemned the entrapment of Christ (Daniel 6; Jer. 5:26; Ps. 141:9-10).
2. The arrest was arbitrary without any formal accusation (Mt. 21:46). The law required a formal accusation before any inquiry could be started (Deut 17:4; see Dan. 6:4; Hos. 2:2; Jer. 37:13; Acts 23:29-30; 25:16,27; 1Tim. 5:19). God Himself models this by saying, “‘I will yet bring charges against you,’ says the LORD” (Jer. 2:9; see Hos. 4:1; 12:2).
3. Indeed, throughout the trial there was a lack of any definite charge since the leaders “sought false testimony” against Him even after the trial began (Mt. 26:59; Mark 14:55). It thus resembled a witch-hunt,

or perhaps even a lynching, something condemned in Scripture (Ex. 23:2, 7). Scripture required a formal accusation before a trial could begin (Numb. 35:12 says that the “accused...stands trial”; Job 31:35 says, “let my accuser put his indictment in writing.”

4. The Sanhedrin interrogated the accused whereas the accused always had the right to remain silent. (Implied in Num. 35:30; Deut. 17:6; 19:15 and affirmed by Christ’s silence in Mark 15:3-5; Matt. 27:14). When they tried to extract a testimony from Jesus He refused, saying, “Why do you ask Me? Ask those who have heard Me what I said to them.” (John 18:21). When He was slapped for refusing, He stood up for His right to remain silent in verse 25. The implication in the Old Testament was that the prosecution had the responsibility of bringing witnesses and that the accused did not.
5. Christ’s first trial was held at night and away from the public eye (John 18:13-14, 19-24). They later had a day trial to legalize what was already decided. But all trials needed to be public (in the “gates of the city”) and during the day (Deut. 16:18; 17:5; cf. historical precedent in Exodus 18:13). This was to prevent secret trials and executions such as the Star Chamber of England engaged in.
6. The arrest was made in secret, the charges were made in secret and the trial was held in secret in Caiaphas’s house. Christ rebukes them for this flagrant violation of the law in Luke 22:53 and in John 18:20-21. Numerous Scriptures speak against such secrecy (Ex. 18:13; Deut 16:18; 21:19; 22:15; 1 Kings 7:7; Imp. Jer. 36:10, 12-13).
7. Jesus was mocked and beaten prior to trial (Lk. 22:63-65). This is a violation of the civil court principle of being innocent until proven guilty - something unique to the Bible in ancient societies. (Deut. 25:1-2; Is. 43:9; Imp. Deut. 17:6; Acts 23:3). Also, there was to be no torture to extract confessions. The court could ask for a voluntary confession (see Josh 7:19), but could not coerce it.
8. There were no witnesses to begin the proceedings. Rather they had to look for witnesses after the fact (Mt. 26:59-63; Mark 14:53-59). According to Biblical law, the witnesses were supposed to 1) bring the case to court, 2) be part of the prosecution, and 3) be involved in the execution if it was a capital crime. (Ex. 23:1-9; Num 35:20; Deut. 17:4-7). If witnesses cannot prove the charge, then judgment has to be left to God (Numb. 5:12-31). This was so clear a reading of

Biblical law that any Jew reading the Gospels would have been shocked at the tyranny.

9. There is no evidence that the false witnesses (Mt. 26:60; Mark 14:56,57) were charged for perjury as mandated by God's law (Deut. 19:18-21; Prov. 19:5, 9; 21:28). Yet it was clear to the court that their testimony conflicted and was false (Mark 14:56).
10. Long before Christ's arrest, at an official meeting of the court, Christ was condemned to death without any of the court proceedings being present, and the purpose of this condemnation was fear of the reaction of the Romans (John 11:47-50). Expediency ruled the day rather than justice, and there was an undue influence of the government upon the decision. (Num. 35:12, 24-25; Deut. 17:2, 4). Nicodemus rightly asked, "Does our law judge a man before it hears him and knows what he is doing?" (John 7:51) He knew that they were violating the civil law.
11. A man previously sentenced to death was not to be scourged (Imp. Deut. 17:5-7), yet Christ was mistreated in this way before and after the trial.
12. He was convicted of blasphemy, but when the trial was brought to Pilate, the charge was changed (Luke 23:2). Therefore Christ was crucified for a different charge than the Sanhedrin had condemned him for. (Imp. Deut. 16:19-20)
13. According to the Sanhedrin law, the sentence of death could not be passed on the same day the trial occurred. (This can be questioned Biblically, but it was clear that they were not following their own laws.)
14. According to Sanhedrin law, evidence must be from two informers or from the deposition of the injured party – not from a government official. (Whether this is Biblical or not can be questioned.)
15. A witness could not also be the judge. The judge must recuse himself. Yet all of these people who had prejudiced themselves against Christ prior to the trial (see John 7:51), did not recuse themselves.

From the material presented so far it is clear that the fault was not with the law. The law gave numerous protections to the accused. The fault was with a kangaroo court that was intent on lynching Jesus. Even with the best laws in place, a corrupt government is still capable of ignoring its laws and producing injustice. Nevertheless, the law does slow down

tyranny, and these judicial procedures are something that we ought to hold dear. Very few countries had such laws before America was founded. We should strive to restore such checks and balances.

More Checks and Balances in God's Law

16. The trial was to be public or "in the gates" (Deut. 16:18; 17:5; cf. Deut. 21:19; 22:15; 25:7; Amos 5:12,15; Zech. 8:16). The court is to be neither secretive nor interventionist, but rather to receive appeals from the grass roots. In this case the crime "is found" by citizens (17:2) and "it is told" to the court (17:4). Lawsuit must initiate from the people and the trial must be a public trial (cf. Deut. 21:19; 22:15; 25:7). This provision prevents the civil government from turning the court into an intimidation machine. Everything about this description speaks against secret trials away from the eyes of the public.
17. There must be thorough investigation (Deut. 17:4). It was not enough to have witnesses. There must be corroboration of the witnesses (17:1-7; 19:15-21). Circumstantial evidence was not enough. So important was a carefully followed record of procedure that even 500 years before the time of Moses, thorough investigation was recorded in writing as a matter of course (Job. 31:35)!
18. The case had to be established with a minimum of two witnesses, and in some situations, three (Deut. 19:15). Perhaps the provision for the optional three witnesses was judicial discretion when there was doubt.
19. The accused had the right to face his accusers and question them (Job 40:2; Psalm 50:21; Isa. 50:8). There was to be cross examination of the testimony of the witnesses (Prov. 18:17; Deut. 19:18)
20. Witnesses were required of the prosecution but not the accused (Deut. 19:15). To require witnesses would violate the right to remain silent. Only the accuser was forced to testify.
21. The privilege of making self-defense was always accorded the accused (Deut. 1:16-17; 17:9; John 7:51)
22. There was to be no coerced testimony (even Achan whom God had already tried and convicted was only asked to give a voluntary confession in Josh. 7:9-26). The teaching that a person is innocent until proven guilty is only found in Biblical religion. No torture or other methods to extort confessions was allowed. Thus Paul rightly

protested when he was treated as guilty until proven innocent (Acts 16:37) and the trial of Christ (as much of a Kangaroo court as it was!) was stymied in their attempt to prove Christ guilty. This however does not mean that a person cannot be condemned when he testifies to his own guilt. See for example 2Sam. 1:16 - For David had said to him, "Your blood be on your own head. Your own mouth testified against you when you said, 'I killed the LORD's anointed.'"

23. Contempt of court was forbidden and was treated very seriously. When the sentence of the court was ignored with a high hand the maximum penalty could be raised to the death penalty (Deut. 17:11-13; cf. Ex. 22:28; Acts 23:5).
24. A right to a speedy trial was guaranteed (Ezra 7:26; Eccl. 8:11; Imp. Mt. 5:25)
25. No trial was to be held on the Sabbath (though Numb. 15:32-36 indicates that arrests could be made on the Sabbath).
26. The witness was to take an oath before testifying (Ex. 22:10,11). In early America the testimony of an atheist was not allowed since he could not take an oath.
27. The sentence was to be carried out without interference (such as interference from a parole board) (Deut. 17:11). The only exceptions to this principle related to appeals to a higher court (Deut. 1:15-17; 2 Chron. 19:10; 2 Kings 8:1-6; Acts 25:11-12,21,25; 28:19; 1 Kings 3:1-28), pardons by a king (2 Sam. 14:16; Prov. 25:10) and legal interference by the elders when the government was engaging in tyranny or had violated its constitutional powers (Numb. 35:25; 1 Sam. 14:45; 2 Kings 6:32; Jer. 26:17-24). Also when a lower official proved himself to be incompetent or unjust, the king or a review board of elders could remove him from office (Eccl. 5:8; 2 Chron. 34:33; 1 Kings 2:27; 2 Kings 23:5).
28. There was a distinction between church courts and civil courts and thus there were "elders of the priests" and "elders of the people" (Jer. 19:1; cf. 2Kings 19:2).
29. Within the civil courts there were five basic levels of court jurisdiction, and only the first two levels seem to be regularly employed in proceedings on criminal law, domestic relations, estate law, contract law or tort law: (Thus the courts were not tied up with endless appeals.)

- a. *Elders of the town or city* that dealt with contracts, family issues, protection of patriarchal interests, and local disputes (Deut. 19:12, 21:3,6,19; 22:15; 25:9; Ruth 4:1-12; etc.). They were also on occasion involved in investigating charges brought against a person from another jurisdiction before handing him over (Deut. 19:12 in context with Numbers 35:12,24-25). They also worked hand in hand with judges on occasion (Deut. 21:2). Rushdoony comments:

“...the elders of the city whose functions are seen in the law in reference to five types of law: (1) blood redemption, (Deut. 19:12); (2) the expiation of murder by an unknown culprit (Deut. 21:3); (3) the judgment of incorrigible delinquents and criminals (Deut. 21:19); (4) cases of defamation of virgins (Deut. 22:15); and (5) protection of the family and its local, patriarchal interests. The law in each case requires discernment and judgment but does not permit discretion. The elders of the city thus constitute an extension of family government, protection and defense. Clearly, a very different conception of the city is in evidence here. In the bible, the community is a collection of families with a common faith, and its basic government is one which concerns itself with family life.” (*Law and Society*, p. 657)

- b. *Appointed judges* (another form of eldership) which dealt with extraordinary contractual issues (Ex. 21:6), tort law (Ex. 21:6,22; 22:8,9; etc.), capital offenses (Ex. 21:22-23; Numb. 25:5; etc.) and any criminal matters and disputes that couldn't be resolved at the local level (Ex. 21:22; 22:8-9; Deut. 16:18-20; 19:17-18; 25:1-3; 2 Chron. 19:5-10; etc.). Notice that there could be appeal to these appointed judges from the judgments of the city courts: “Whatever case *comes to you from* your brethren who dwell in their cities, whether of bloodshed or offenses against law or commandment, against statutes or ordinances...” (2 Chron. 19:10). Rushdoony comments:

“The judges constitute still another form of eldership. The judges and their courts act in connection with disputes (Deut. 19:17-18; 25:1-3). Matters beyond the jurisdiction or solution of the elders of the city are referred to the judges, who sit with a priest, who provides judgment, not on the case at hand, but on the laws of God pertinent to the case (Deut.

17:8-11). These elective judges (Deut. 16:18-20) have a certain amount of investigative power in the court with respect to the testimony of witnesses (Deut. 19:16-19). In the case of an unknown murderer, the judges acted in concert with the elders of the city (Deut. 21:1ff) and the elders of the country (Deut. 21:2)." (*Law and Society*, pp. 657)

- c. *Elders of tribes* (Deut. 31:28; 2 Sam. 19:11; 1 Kings 8:1; 12:16; 2 Kings 23:1; 2 Chron. 10:16). These elders primarily represented the tribal interest against the national interest, but they were also a part of the appeals process (Deut. 1:15)
- d. "*Elders of the people*" or elders of the country whose functions were much broader than judicial (Numb. 11:16; 1 Kings 8:1; 20:7,8; 1 Sam. 3:17; 2 Sam. 5:3; 17:14-15; 2 Kings 6:32; Jer. 26:17-24; etc.). These elders were also a check and balance against ungodly tyranny from a central government. Jeremiah's life was rescued because of the interference of such men (Jer. 26:17-24). Issues of national interest would come before this Sanhedrin. Rushdoony comments:

"...the elders of the people or the elders of the country. These elders constituted the general government and made up the national assembly, later known as the Sanhedrin, a council of seventy plus the governor, king, or, under the Romans, the high priest acting as a governor. Their creation is cited in Numbers 11:16; their powers included the declaration of war (1 Kings 20:7,8), negotiations by lesser councils with other tribes of Israel (1 Sam. 3:17), and the like. They ratified and made possible a king's rule (2 Sam. 5:3), and were the ruling body (2 Sam. 17:14-15). We find these elders working with Elisha against the king (2 Kings 6:32), and, later, interfering in the trial of Jeremiah (Jer. 26:17-24). Thus, the office retained great power even in the times of the monarchy.

"The functions of the elders of the people were (1) to represent the people in the covenant and in the proclamation and government of the law of God (Ex. 19:7; 24:1,9; Deut. 27:1; 29:9; 31:9; Josh. 8:33; 24:1; 2 Kings 23:1). They were to see to it that God's law governed the land and the people. (2) The elders of the people appointed a leader, governor, or king (1 Sam. 8:4; Judges 11:5-11). (3) These elders declared war (Josh. 8:10; 2 Sam. 17:4-15; 1 Kings 20:7). (4) They

conducted political negotiations and made pacts and agreements (Ex. 3:16,18; 4:29; Numbers 16:25; 2 Sam. 3:17; 5:3). (5) They performed some sacred ceremonies, as in the Passover (Ex. 12:21), communion (Ex. 18:12), and in witnessing sacrifices (Lev. 9:1). (6) They acted in times of national crisis as an aid and consenting witness to God's prophet (Ex. 17:5-6), in seeking God's mercy through repentance (Josh. 7:6; 1 Chron. 21:16). It was the elders of the people or of Israel who met in the city square next to the city gate (Deut. 21:19; 22:15; 25:7; Ruth 4:1ff; Lam. 5:14). Their deliberations were thereby to be open to both God and man." (*Law and Society*, pp. 657-658) [In my judgment, none of the references in the second to last sentence relate to the elders of the country, but as the texts themselves say, to "the elders of the city." Nevertheless, the general jurisdictional categories Rushdoony has given appear to be correct. The elders of the people often sat in the gate with the king. pk]

- e. *Elders who advised the king* (2 Sam. 12:17; 1 Kings 12:6,13; 2 Chron. 10:6,13). Since the king acted as judge on occasion and was involved in pardons, these advisors could have a significant influence. Technically however, they were not a court.
30. Sting operations and other diligent searches for evidence can only be engaged in after a citizen has brought charges (Deut 13:12-14; 19:15-21; Jer. 5:26; implied in lack of it with the harlots in 1 Kings 3, etc.).
31. Perjury was punished with the same punishment that law would have demanded of the accused had his accusation been true (Deut. 19:18-21).
32. A witness could not refuse to testify at a criminal trial if called to do so. Lev. 5:1, "If a person sins because he does not speak up when he hears a public charge to testify regarding something he has seen or learned about, he will be held responsible."
33. Where execution was necessary it was to be public (Deut. 17:5,13).
34. "The hands of the witnesses shall be the first against him to put him to death, and afterward the hands of all the people." (Deut. 17:7; cf. Acts 7:58 where even this protection doesn't guarantee justice)

35. There were times when a person had a right to trial by jury or in some fashion be represented “before the congregation in judgment” (Numb. 35:12,24,25; Josh. 20:6; cf. 1Sam. 14:45?).
36. Bribery of judges was strictly forbidden and a judge’s receiving of a bribe was strictly forbidden (Exodus 23:8; Deut. 16:18-20; 27:25; 1 Sam. 8:3; Psalm 15:5; Prov. 17:23; 29:4; Isaiah 1:23; 5:23; Amos 5:12; Mich. 3:11; 7:3).
37. Restitution. If a person makes restitution on his own initiative, it was 120% whether to God (Lev. 5:14-19) or to man (Lev. 6:1-7).
38. If the injured party could not be found then the restitution went to the church (Numb. 5:8).
39. If confession occurred during trial (i.e., he pleads guilty) there is a 200% fine (Ex. 22:9).
40. If the guilty party perjures himself by pleading not guilty, then there is an additional 20% fine (Lev. 5:1-13; 6:6).
41. Further gradation of penalties occurred depending on nature of crime and successful retrials etc. up to seven fold. This strongly motivated criminals to plead guilty rather than abusing the court system. The sooner they confessed, the lower the penalty.
42. There was a double penalty of 400% or 2 x 200% for falsely accusing someone of theft (Deut. 19:16-19). Thus Zaccheus promised to pay back four fold.

These and other provisions show that the Bible was not interested in a tyrannical use of the death penalty. Instead, the Bible gave so many protections for the accused that the chances of being falsely condemned to death were greatly reduced. Just consider all of the “murder cases” in America that would have been dismissed from court because all that was available was “circumstantial evidence” rather than the required “two or three witnesses” needed for a death sentence. God’s laws are indeed wise and just.

APPENDIX B

A Listing of the Capital Crimes

The Bible lists 17 crimes that could (in certain circumstances) call for capital punishment. All of these maximum penalties were given to provide incentive to a criminal “that he should turn from his ways and live” (Ezek. 18:23,32; 33:11; see discussion in the main body of this booklet for details). For this and several other reasons mentioned in this booklet, it was rare that the death penalty was applied for every crime. When the law was used lawfully (see exposition of 1 Timothy 1:8f and the caveats mentioned in the introduction), even the New Testament says that each penalty was “a just penalty” (Heb. 2:2; etc).

Crimes where there could be “no ransom” (Numb 35:31-32), no judicial discretion, and no victim’s discretion for a lower penalty.

1. Premeditated murder (Gen. 9:5; Ex. 21:12-14; Numb. 35:16-33; Lev. 24:17; Deut. 19:11-13; 21:1-19).

Premeditated murder was the only crime where a lesser penalty or a “ransom” could not be provided.²⁴ God mandated death in all cases (Numb. 35:31-32). The call for the death of a murderer can be found in Gen. 9:5f; Ex. 21:12-14; Numbers 35:16-21,30-33; Lev. 24:17; Deut. 19:11-13; 21:1-9. It is important to realize that abortion was considered a crime worthy of death since it was the murder of a baby (Ex. 21:22-25).

Involuntary manslaughter (where there could be a lesser penalty)

2. Involuntary manslaughter and gross negligence that resulted in someone’s death (Ex. 21:28-30; Deut. 19:5; Numb. 35)

Involuntary manslaughter could result in a death penalty, depending on the circumstances. For example, if there had been gross negligence resulting in human death, and this had occurred before, there could be the death penalty (Ex. 21:28-30). A drunk driver who has been a repeat violator, and who later kills a person in an accident could be subject to

²⁴ See Jacob Milgrom, *The JPS Commentary: Numbers* (Philadelphia: Jewish Publication Society, 1990), pp. 295,510. Walter Kaiser, *Toward Old Testament Ethics* (Grand Rapids: Zondervan, 1983), p. 92; Umberto Cassuto, *A Commentary on the Book of Exodus* (Jerusalem: Magnes, 1967), p. 277.

the death penalty. Some of these cases would require judicial discretion, but the penalty of death could be just. Likewise, if a person killed another through carelessness, but without intention, the avenger of blood could seek his life (Numb. 35). Yet if the man appealed to the courts, they could impose lesser restrictions upon him (Numb. 35:22-28). If the man violated his parole, he could be subject to death once again (vv. 26-28). Thus, manslaughter, while not always calling for the death penalty can justly receive the death penalty as a maximum.

Capital crimes for which there could be lesser penalties, a “ransom,” divorce, or no penalty – i.e., forgiveness.

I would refer the reader to the main body of the book to demonstrate that capital punishment was a maximum, not a mandated penalty on all capital crimes except for murder. These crimes were considered so serious by God that if there was no repentance, death was a just penalty. But even then, Scripture did not always apply the death penalty to these crimes. Only with murder does God specify “you shall take no ransom for the life of a murderer” (Numb. 35:31,32). Proverbs 13:8 indicates that “the ransom of a man’s life is his riches.” This contrast between Numbers 35 (“no ransom”) and Proverbs 13:8 (riches can redeem a life) implies there are capital crimes that could be successfully avoided by way of a ransom. This conclusion is strengthened by the numerous Scriptures speaking of “ransom” as a concept, plus the Scriptures I cited earlier where God’s justice allowed a lesser penalty for certain capital crimes, and even Scriptures that called for forgiveness (such as Hosea). It should be emphasized that these crimes are so heinous that they deserve death in God’s eyes. Yet God is more interested in repentance and restoration than he is in the death of the sinner (Ezek. 13:22; 18:19-32). In the case of sexual sins, people who kept these things to themselves could not be prosecuted because it would require two or three witnesses (depending on judicial discretion), the pressing of charges by a victim-citizen, the exclusion of government from spying, sting operations, etc., and other checks and balances. All of this would make proof of the crime difficult.

3. Kidnapping was a capital crime (Ex. 21:16; Deut. 24:7; 1 Tim. 1:10). However, it would often be of great benefit to a kidnapped person to seek monetary restitution rather than the death penalty.
4. Rape of an engaged or married woman (Deut. 22:23-27).

5. Adultery or prostitution (Lev. 20:10; 21:9; Deut. 22:21-24; Jn. 8:4-11; 1 Tim. 1:10)
6. Incest (Lev. 20:11-14; 18:6-19,29)
7. Striking one's parents and/or parental abuse (Ex. 21:15,17; Lev. 20:9; Dt. 21:18-21; Mt. 15:3ff; Mk 7:10; Prov. 20:20)
8. Homosexuality (Lev. 18:22; 20:13; Rom. 1:32; 1 Tim. 1:10).
9. Bestiality (Ex. 22:19; Lev. 20:15f)

Crimes that undermine the Christian constitution of a nation.

10. Blasphemy and cursing God publicly (Ex. 22:28; Lev. 24:10-16,23; Acts 25:7-11; 1 Tim. 1:9) is an attack on God, the source of a nation's law.
11. Sorcery and witchcraft (Ex. 22:18; Lev. 20:27) was an attack on Israel's Lawgiver.
12. Breaking the Sabbath (Ex. 31:14; 35:2; Numb. 15:32-36)²⁵ was a symbolic attack on the covenant God made with Israel (Ex. 31:16; Ezek. 20:12-25), akin to burning the flag and denouncing Israel's constitution.
13. Incitement of a city or state into apostasy and abandoning the Biblical order (Deut. 13:1-19; 17:2-7; 18:20), was considered to be a form of treason.
14. Offering human sacrifice (Lev. 20:2-5). Of course, this is a form of murder, so would likely come under that category.
15. Publicly sacrificing to other gods (Ex. 22:20).

Crimes against the state

16. Perjury (Deut. 19:16-20; 1 Tim. 1:10) is treated seriously because it not only jeopardized the social order, but it jeopardized the innocent victim.
17. Incurability, repeated criminal behavior or persistent contempt of courts or civil law (Deut. 17:12-13; Heb. 10:28).

²⁵ Some say the New Testament removes this from the list of punishable crimes. For example, Colossians 2:16 says, "let no man judge you in...sabbaths." (See also Romans 14). However, it is more likely that those passages remove the penalty for Jewish Sabbaths. In any case, if it can be demonstrated that the New Testament changes an Old Testament law, then we submit to God's wisdom.

Resources Available from the Publisher

- Cummings, Tim. *Ministerial Training: The Bible's Normative Pattern*.
- Davis, Andrew. *Written on Your Heart: An Approach to Extended Memorization of Scripture*.
- Elliot, Michael (Ed.). *Bible Acrostic: An Aid to Memorizing the Content of Every Chapter of the Bible*.
- Kayser, Phillip. *Biblical Romance: What Does the Bible Say About Courtship & Betrothal?*
- Kayser, Phillip. *The Canon of Scripture, Volume 1: Biblical Presuppositions*.
- Kayser, Phillip. *Church Membership: Is It Biblical?*
- Kayser, Phillip. *December 25 Jewish Style: The Ancient Jewish Celebration Anticipating the Birth of Christ*.
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IS THE DEATH PENALTY JUST?

Phillip Kayser, Ph.D.

The history of the Church in the modern era is the story of Christians (laypeople and theologians alike) molding the Bible to the ideas of the times. It is the position of this book that God's Holy Word alone determine the parameters for the punishment of crimes and those parameters often provide for some flexibility. It is with humility that we apply the Bible to jurisprudence and the punishment of criminals.

Founder and President of Biblical Blueprints, **Phillip Kayser** has degrees in education, theology, and philosophy. Ordained in 1987, he currently serves as Senior Pastor of Dominion Covenant Church, a conservative Presbyterian (CPC) church in Omaha, Nebraska. He also serves as Professor of Ethics at Whitefield Theological Seminary and President of the Providential History Festival. He and his wife Kathy have 5 children and 9 grandchildren.



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