

Capital Punishment, Covenant Justice and the Cross of Christ: The Death Penalty in the Life and Death of Jesus

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Abstract: This paper aims to contribute to a distinctively Christian view of capital punishment within a peace church perspective. The present essay builds from the previous work of Mennonite-Anabaptist writers on this question—John Howard Yoder, Christopher Marshall, Gardner Hanks and Millard Lind. It offers a two-part argument concerning capital punishment, based on the teaching of Jesus in the Gospel of John and the message of the cross in the epistles of Paul.

In the past decade three Mennonite-Anabaptist writers have contributed significantly to the debate concerning Christian conviction and capital punishment: Christopher Marshall, *Beyond Retribution* (2001);¹ Gardner Hanks, *Capital Punishment and the Bible* (2002);² and Millard Lind, *The Sound of Sheer Silence and the Killing State* (2004).³ These books follow the earlier work of John Howard Yoder, *The Christian and Capital Punishment* (1961) and *The Death Penalty Debate* (1991, with H. Wayne House).⁴ Each of these writers argues that a biblically-based perspective concerning violence, justice and the cross cuts against Christian support for the death penalty. From that platform, this essay seeks to develop these views in several new directions.⁵

Within a peace church perspective, Jesus' life and teaching, as well as his death and resurrection, are not only revelatory of God but also normative for the church. The two dimensions of a distinctively Christian view of capital punishment within a peace church perspective

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1. Christopher D. Marshall, *Beyond Retribution: A New Testament Vision for Justice, Crime, and Punishment* (Grand Rapids, Mich.: Eerdmans Publishing, 2001).

2. Gardner C. Hanks, *Capital Punishment and the Bible* (Scottsdale, Pa.: Herald Press, 2002).

3. Millard Lind, *The Sound of Sheer Silence: The Death Penalty and the Bible* (Telford, Pa.: Cascadia Publishing, 2004).

4. John Howard Yoder, *The Christian and Capital Punishment* (Newton, Kan.: Faith and Life Press, 1961); and H. Wayne House and John Howard Yoder, *The Death Penalty Debate* (Dallas: Word Publishing, 1991).

5. The present work picks up and carries forward some of the ideas proposed in my reviews of the Hanks and Lind books, *MQR* 76 (Oct. 2002), 451-453; and 80 (Apr. 2006), 276-278, respectively.

will thus be shaped primarily by the teaching and cross of Jesus Christ. Accordingly, the argument that follows unfolds along two lines: that Jesus' teaching in the Gospel of John amounts effectively to a permanent moratorium on the human practice of capital punishment in fulfillment of the substance of covenant law; and that Paul's gospel announces the good news that God has put a final end to the death penalty through the cross of Christ.

CAPITAL PUNISHMENT AND COVENANT JUSTICE IN THE TEACHING OF JESUS: A DEATH PENALTY MORATORIUM

In the Gospel of John we find the only instance where Jesus addresses directly the question of the death penalty, the story of "the woman caught in adultery" (Jn. 8:2-11).⁶ This story, as will become clear, depicts Jesus acting to fulfill God's covenant justice—justice that brings good news for the poor, justice that transcends retribution for the sake of redemption.

Preliminary Objections

Several potential preliminary objections might be anticipated. First, some may want to object that the authority or veracity of this text is questionable because it is not found in the earliest manuscripts of the New Testament and is found at various places in later manuscripts.⁷ Bruce Metzger, a leading New Testament textual scholar, argued that, such variations notwithstanding, this story "has all the earmarks of historical veracity."⁸ In any case, that this text has been handed down as part of the accepted canon of Holy Scripture, and has been commented on as Holy Scripture since the Patristic period,⁹ is sufficient, in my view, to establish its authority for the church. Second, some may want to object that the story concerns lynching, not capital punishment—Jesus intervenes to stop an illegal procedure, to thwart mob justice. The details of the story, however, appear consistent both with the Torah and with the legal custom of rabbinical Judaism at the time. Hanks persuasively

6. Verse citations in this section refer to that text. All Bible citations from N.R.S.V., unless noted otherwise.

7. Cf. Lloyd R. Bailey, *Capital Punishment: What the Bible Says* (Nashville, Tenn.: Abingdon Press, 1987), 69.

8. Bruce M. Metzger, *A Textual Commentary on the Greek New Testament*, 2nd ed. (Stuttgart: German Bible Society, 1994), 188.

9. See Joel C. Elowsky, *Ancient Christian Commentary on Scripture: New Testament IVA, John 1-10* (Downers Grove, Ill.: InterVarsity Press, 2006), 272-278.

argues that the evidence shows that "Jesus' intervention stopped a legal execution fully sanctioned by the Jewish authorities."¹⁰

Third, some may want to object that this case is presented to Jesus as a trap. Because Jesus' reply is intended to avoid the horns of a dilemma, the objection goes, we cannot read any "moral" from the story because, again, capital punishment is not the issue. Thus argues H. Wayne House, professor of biblical and theological studies and professor of law: "The real issue placed before Jesus was not a guilty woman but a baited trap. . . . Capital punishment never became an issue for Jesus."¹¹ It does not follow from the fact that Jesus' answer is aimed at avoiding a dilemma, however, that it is therefore lacking authority concerning ethical practice. The question of the imperial tax is also put to Jesus in the temple as a trap (Mk. 12:13-17), but Jesus' reply—"Give to the emperor the things that are the emperor's, and to God the things that are God's"—has served to legitimate the "two kingdom" model in Protestant ethics.

Fourth, some may object that the inference of ethical principles from biblical narratives is dubious and inappropriate. Whether a trap or not, we should not read any "moral" from this story precisely because it is a story. Thus argues Lloyd Bailey, a Methodist Hebrew Bible scholar: "One should not deduce *halakah* (ethical guidelines) from *haggadah* (scriptural narrative). Rather, ethical guidelines are to be sought in formal teachings, whose purpose is instruction in ethical behavior."¹² There is a reasonable caution to observe here. To draw a "moral" from a story assumes knowing whose words and deeds in the story are meant to be exemplary; and even if we agree on the exemplar, the scope of applicability of that "moral" may be ambiguous. In this story, the exemplar is indisputably Jesus. Regarding the scope of the "moral" of Jesus' teaching, we propose to read this story in a way that inverts the question. Instead of "What ethical principle are we to infer from Jesus' teaching?" we ask "How does Jesus' teaching fulfill covenant justice?"

10. Hanks, *Capital Punishment and the Bible*, 154.; cf. 148. J. Duncan M. Derrett, *Law in the New Testament* (London: Darton, Longman & Todd, 1970), 166-168, takes the view that this was to be a lynching. His view is premised on the assumption that, because around 30 A.D. the Roman provincial authority stripped Jewish courts of jurisdiction in capital crimes, there was no Jewish court to try her case. Whether that edict was already in effect at the time of this incident is debatable, however. Even if so, it would appear that after this edict was in effect the Roman authority was willing to look the other way while Jewish courts tried capital cases and carried out public executions, as in the case of Stephen (Acts 7). In the case of Jesus himself, moreover, at which time the edict seems to have been in effect, it is the Jewish leaders, not the Roman governor, that insisted upon this capital case being handled in a Roman court. Pilate expressly wished for the Jewish council to judge Jesus according to Jewish law—and, evidently, would not have objected had they executed him themselves (Jn. 18:31).

11. House, "In Favor of the Death Penalty," *The Death Penalty Debate*, 63-65.

12. Bailey, *Capital Punishment*, 70.

Rather than reading this story as promulgating a new teaching and so establishing a new point of departure on the question, we read it as fulfilling “the law and the prophets.” This story shows us a living parable of covenant justice. Now, although Jesus puts covenant justice into practice here, it does not follow that his ruling in this case teaches us nothing new concerning the law. This story has the same triadic structure as the “antitheses” in the Sermon on the Mount—(a) statement; (b) prohibition; (c) imperative:¹³ (a) You have heard that it is written, “An adulterer shall be put to death;” (b) But I say unto you, “Only one without sin may execute the death penalty;” (c) Go, and sin no more. Jesus’ ruling points beyond the letter to the true meaning of the law, just as do his teachings in the Sermon on the Mount.

Examining the Text

Let us, then, proceed to examine the text by drawing out various aspects of the story. It would seem that the case is being brought to Jesus on appeal. The woman has evidently already been tried and convicted in a council of elders. Certain scribes and Pharisees, apparently members of the council that has tried her case, bring the case and the woman before Jesus for his interpretation and ruling concerning her sentence (Jn. 8:3-5). The council has likely already sentenced her to death, and they want to see if he will uphold the council’s sentence of death according to the law of Moses. Their appeal to Jesus thus concerns whether this case meets the requirements of the law for a death sentence.¹⁴ Although done with ulterior motive, their action might have been following a legal course. The Torah and rabbinical tradition provided precedents and procedures for appeals to a recognized judicial authority in difficult or questionable cases (cf. Ex. 18:13-26; Deut. 1:17; 17:8-13).¹⁵ By taking this case to Jesus, the scribes and Pharisees effectively recognize Jesus as having juridical authority to decide such cases, whether in fact he had such authority *ex officio* or not.¹⁶ Should Jesus rule against them but they ignore his ruling

13. See Glen H. Stassen, *Just Peacemaking: Transforming Initiatives for Justice and Peace* (Louisville, Ky.: Westminster/John Knox, 1992), 33-51.

14. Because the question posed is framed by “in the law Moses commanded us to stone...,” some commentators have suggested that the question concerned not whether she should be executed but only the *manner* of execution, whether by stoning or some other method, which would depend legally on whether she was married or not. Derrett, *Law in the New Testament*, 168-169, is convinced that the appropriate manner of execution was not in doubt in this case, and Jesus’ reply supports that view.

15. Regarding legal process in rabbinical tradition, see Hanks, *Capital Punishment and the Bible*, 78ff.

16. Concerning this question of Jesus’ authority, see Derrett, *Law in the New Testament*, 158-160. Whatever Jesus’ actual authority for the actors in the story, regarding Jesus’ authority for us, Derrett comments aptly: “Christians . . . will see him in a guise of more

and stone her anyway, their actions would expose their evil intentions and so convict themselves as lawbreakers instead of Jesus.

There is one basic statute that guides the judges of Israel: "You shall not render an unjust judgment; you shall not be partial to the poor or defer to the great: with justice you shall judge your neighbor" (Lev. 19:15; cf. Deut. 16:18-20). Jesus' chief responsibility as a judge of Israel is to render judgment that treats the parties equally. And, as we will see, that is precisely what Jesus does in this case.

Yet, in his situational role as appellate judge, Jesus does not so much as even review the woman's case. He does not challenge her conviction or question her sentence on evidential, procedural or substantive grounds—and thus looks past the key issues of our own contemporary debate on the death penalty. Concerning evidential matters, Jesus does not rule on whether the facts are sufficient to prove her guilt "beyond a reasonable doubt" or whether new exculpatory evidence might be discovered. Indeed, Jesus does not express any interest in the factual evidence—and thus effectively stipulates the truth of the prosecution's case, that she "was caught in the very act of committing adultery" (Jn. 8:4).

Concerning procedural issues, Jesus' ruling does not address whether irregularities have occurred in the prosecution. He does not rule on whether she has received a fair trial, or whether her legal rights have been respected, or whether she has received "due process of law" or "equal protection under law." There were legal provisions for making such a challenge.

Regarding due process, the law required the testimony of at least two eyewitnesses for a death sentence (Num. 35:30; Deut. 17:6; 19:15), but Jesus does not even inquire regarding who were the witnesses, much less cross-examine them. Had he done so and found their testimony inconsistent, exposing them as false witnesses, they themselves would have been subject to a death sentence (Deut. 19:16-19).¹⁷ The law required further that "the hands of the witnesses shall be the first raised against the person to execute the death penalty. . ." (Deut. 17:7). Elmer Martins, a Mennonite Brethren Old Testament scholar, thus argues that Jesus releases the woman because the two required witnesses, who must "cast the first stone," were not present, so that the execution could not

than a *iurisprudens*: for them he acted not merely as a referee, but as a legislator" (160).

17. An example is found in the story of Susanna, ch. 13 of the Greek version of Daniel. After Susanna has been falsely accused, wrongly convicted and condemned to death, Daniel intervenes to expose the false witnesses, who are themselves then put to death. Andrew T. Lincoln, *The Gospel According to Saint John* (London: Continuum, 2005), 534-536, offers an interesting comparative analysis of the two stories.

proceed legally.¹⁸ This seems implausible, for two reasons. First, it would imply that the scribes and Pharisees, while attempting to trip up Jesus on one point of law, were themselves carelessly tripping over another point of law. We would then conclude that the scribes and Pharisees, rather than being experts in the law, were actually mere bunglers, which seems unlikely. Second, it would leave us with more questions than when we started: if Jesus' ground for dismissing the case were that obvious, then why such a cryptic response (writing in the dirt), and why speak to the sins of the accusers rather than the number of witnesses?

Regarding equal protection, the law charges both man and woman with the same crime and sentences them to the same death (Lev. 20:10; Deut. 22:22). That only the woman has been charged, tried, convicted and sentenced for adultery indicates that the law is not being applied equally. Jesus might have justified releasing her on the ground of inequitable treatment under law, but he did not do so.

Concerning substantive grounds, Jesus' ruling does not address whether a death sentence would be an appropriate outcome for this case, whether death is a disproportionate (or "cruel and unusual") punishment for the crime. As the scribes and Pharisees point out (Jn. 8:5), the law prescribes a penalty of death for adultery (Lev. 20:10; Deut. 22:22-24); and Jesus raises no question about whether that penalty is appropriate for this sin. Nor does Jesus rule that due to "mitigating factors" the court should show mercy and commute her sentence. This was a legal option at Jesus' disposal. God had given the prophet Ezekiel an amendment to the law—those who show repentance by their actions, even if the law prescribe a death sentence for their crimes, should have their lives spared (Ezek. 18:21-32; 33:14-15). In the end Jesus does warn the woman to repent (Jn. 8:11), but he releases her from judgment *before* she has done anything to show repentance. Jesus' ruling is not based on the mitigating factor of the sinner's repentance.

Jesus' ruling on the question put to him—"Should she be executed or not?"—suggests, therefore, that he agrees that legal justice has indeed been satisfied in this woman's case—and would be satisfied if she were put to death. A ruling challenging her conviction or sentence on strictly legal grounds would have been the obvious way for Jesus to avoid the trap laid for him. But Jesus does not pursue that safer option. We thus concur with Marshall that "it is with full cognizance of the legal justifiability of capital punishment in this specific case that Jesus refuses

18. Elmer A. Martens, "Capital Punishment and the Christian," in *On Capital Punishment* (Winnipeg, Man.: Kindred Press, 1987), 23.

to condone the woman's execution."¹⁹ Jesus evidently agrees that the woman is guilty as charged and deserving of death under law. But it is precisely this "under law" that is the key to understanding the "moral" of Jesus' ruling. For Jesus, the real question concerning the justice of the death penalty lies deeper than "the rule of law." The justice of God, which Jesus represents, is irreducible to satisfaction of law.

Interpreting Jesus' Ruling

With this in mind, then, let us interpret Jesus' ruling: "Let anyone among you who is without sin be the first to throw a stone at her" (Jn. 8:7). Here Jesus is implicitly invoking the requirement of the Law that the ones to initiate an execution be the witnesses against the accused (Deut. 17:7). Unless the witnesses cast the first stone, the execution cannot proceed legally. Jesus rules that only one without sin may execute a death sentence.

Now, who is "the one without sin"? According to the scriptural witness, Jesus himself is "without sin" (cf. 2 Cor. 5:21; Heb. 4:15). So, a possible interpretation of "the one without sin" is that Jesus refers to himself. Jesus would thus be saying that, among those present, only he has authority to initiate the execution of a death sentence—which he elects not to do, refusing to endorse a legal death sentence.²⁰ While plausible, I'm not convinced of this view. First, had the audience understood Jesus to be claiming sinless perfection for himself, and in that way claiming equality with God, one would expect *that* to have become the central point of controversy, as did happen on other occasions in John's Gospel (e.g., Jn. 5:17-18; 8:58-59; 10:30-31, 38-39). Indeed, had Jesus been claiming his equality with God, he would have handed the scribes and Pharisees grounds for a charge of blasphemy against him and so given cause for stoning *himself* instead of her. Second, casting the first stone was the exclusive legal privilege and duty of the eyewitnesses, and Jesus himself was not a witness to the adulterous act. According to the law, while Jesus could have participated in the stoning with the assembly once the first stones had been thrown by the witnesses, he could not claim the right to throw the first stone. Had he been claiming the right to initiate her execution, he would have been showing himself to be a lawbreaker, and again fallen into the very trap set for him. So, self-reference seems unlikely here.

19. Marshall, *Beyond Retribution*, 232.

20. Cf. John H. Redekop, "An Analysis of Capital Punishment," in *On Capital Punishment*, 6-7; Marshall, *Beyond Retribution*, 233; and Lincoln, *The Gospel According to Saint John*, 533.

We suggest looking elsewhere in the Gospels to find a clue for how we might interpret this saying. Nowhere in the Gospels do we find Jesus claiming sinless perfection for himself, at least not directly.²¹ But on another occasion, we do find Jesus pointing explicitly to God alone as having moral perfection (Mk. 10:17-18). While this does not undermine the orthodox doctrine that Jesus was both God incarnate and in fact sinless, it does suggest that Jesus' audience likely did not understand him to be saying as much in this circumstance. The audience likely hears this saying of Jesus in the same way, as reminding them of the twin affirmations of their shared faith tradition: that all humans, even members of the covenant community, are sinners (Ps. 14:3; 53:3; Isa. 64:6) and, hence, that there is only One without sin—namely, God, as Job's friends had rightly (if self-righteously!) reminded him (Job 4:17; 25:4).

Jesus' ruling thus effectively raises the legal standard for executing a death penalty to a humanly impossible level: legally justified killing demands complete blamelessness or sinless perfection, which belongs to God alone. Prior to executing a legal judgment of death on the life of another, one's own life must first withstand God's absolute judgment, which no mortal's life can do. Jesus' ruling recalls the psalmist: "If you, O LORD, should mark iniquities, Lord, who could stand?" (Ps. 130:3); "Do not enter into judgment against your servant, for no one living is righteous before you" (Ps. 143:2). Jesus' ruling implies that only God may execute a death sentence, reminding those who would take life, even with legal justification, that sovereignty over life belongs exclusively to God. Jesus' ruling thus effectively shifts the question from the case at hand to a question that applies in every capital case: the question is not whether the woman *should* be executed (i.e., whether her actions deserve condemnation), but whether she *can* be executed (i.e., whether mere mortals qualify to condemn).

Thus interpreted, Jesus' ruling both culminates the canonical development of biblical law as well as exceeds its prophetic and rabbinical interpretation. The biblical law assesses the death penalty for some twenty-five crimes.²² At the same time, biblical law implements several measures restricting of the death penalty to protect the lives of the innocent: those who cause death unintentionally can flee to cities of refuge (Num. 35:9-15; Deut. 19:1-13); children cannot be put to death for their parents' sins, and vice-versa (Deut. 24:16); no one can be put to death on the testimony of a single witness (Num. 35:30; Deut. 17:6;

21. Marshall, *Beyond Retribution*, 233, cites Jn. 8:21, 24 and 46 in support of interpreting Jesus' saying at Jn. 8:7 as claiming himself to be perfectly sinless; but these texts do not say as much, although one might read such an interpretation into them.

22. For a listing and discussion, see Hanks, *Capital Punishment and the Bible*, 53-65.

19:15); giving false witness in a capital trial incurs a penalty of death (Deut. 19:16-19); and only the witnesses can initiate an execution (Deut. 17:7). The prophets amend the law so that repentant sinners are spared the death penalty (Ezek. 18, 33). In the Mishnah, the Jewish rabbinical authorities sought to balance the Torah's profound respect for the value of human life and the Torah's clear instruction that certain crimes were to be punished by death.²³ They did so by retaining the death penalty in principle but restricting it in practice even further than did the Torah, establishing stringent criteria and instituting elaborate procedures that erected barriers to the legal execution of a death penalty.²⁴ The death penalty is never abolished in Jewish law, but rather is so qualified "as to make execution a virtual impossibility," as Gerald Blidstein, a professor of Jewish law, comments: "Jewish law abolished capital punishment in fact not by denying its conceptual moral validity but rather by allowing it only this conceptual validity."²⁵

Likewise, Jesus himself does not abolish the death penalty outright in his teaching, perhaps because it expresses God's ultimate judgment upon sin. He nonetheless puts the death penalty unconditionally beyond human reach. While retaining the death penalty in principle, Jesus' ruling extends the legal requirement that no execution can proceed unless initiated by the witnesses, imposing a condition that no witness can satisfy in practice. Jesus' ruling effectively reduces the number of legally permissible executions to exactly zero and thus constitutes a *permanent moratorium* on the human practice of capital punishment.

Objections to This Interpretation

Now, some might argue that this interpretation has taken Jesus' ruling in this case too far. Three such possible objections should be considered. One might argue that Jesus did not intend to make execution of a death sentence legally impossible, but rather to ensure only that all wickedness is excluded from the prosecution of capital cases.²⁶ Jesus' ruling should be interpreted more narrowly to mean that anyone who is guilty of a capital crime, or that anyone who is guilty of the specific capital crime being tried, is henceforth excluded from giving testimony, rendering a

23. On the value of human life in biblical law, see Moshe Greenberg, "Some Postulates of Biblical Criminal Law" (1960), in *Studies in the Bible and Law* (Philadelphia: Jewish Publication Society, 1995), 25-41.

24. Cf. Hanks, *Capital Punishment and the Bible*, 82-83; cf. 78-85; and David Novak, *Jewish Social Ethics* (New York: Oxford University Press, 1992), 163ff.

25. Gerald L. Blidstein, "Capital Punishment: The Classic Jewish Discussion," in Glen H. Stassen, ed., *Capital Punishment: A Reader* (Cleveland: Pilgrim Press, 1998), 107-118, 113. Cf. Novak, *Jewish Social Ethics*, 174ff.

26. Cf. Derrett, *Law in the New Testament*, 175ff.

verdict or pronouncing sentence in a capital case. Such a narrowly-tailored ruling would thus require greater care in selecting witnesses, jurors and judges, not a moratorium on death sentences. This objection, however, reads too much into what Jesus actually says. He does not say, "Let the one who has committed no sin deserving of death cast the first stone," or "Let the one who has never committed adultery cast the first stone," or "Let the one who has committed no sin in this case cast the first stone." He says, "Let the one who is without sin cast the first stone." The Greek expression *ho anamartētos* means, literally, "the one not having sinned." "Without sin" – period. To narrow the interpretation of Jesus' ruling, we must *add* to Jesus' words to make them say *less* than what he actually says.

Another still might argue that Jesus' ruling applies only to cases of adultery and does not necessarily cover other kinds of capital crimes. Judge Jesus may grant mercy in an adultery case, but it by no means follows that he would even entertain a mercy plea in a murder case.²⁷ Such an objection, it seems to me, misses the point that Jesus' ruling concerns neither the gravity of the crime nor the proportionality of the punishment, but rather only whether mortals/sinners are fit to execute a death sentence. As such, Jesus' ruling applies to *all* crimes we might judge deserving of the death penalty.

And yet another might argue that if our interpretation of Jesus' ruling were accepted, it would mean a moratorium on not only executions, but any judgment or punishment whatsoever. There could be no guilty verdicts, much less any prison sentences, fines, reparations or even requirements of community service. Thus, Bailey: "What would be the consequence if, in every case, the jurors were told, 'Let him [or her] who is without sin. . .?' . . . The result would be that no one could condemn anyone for anything! Thus the argument, when pursued to its logical conclusion, leads to an absurdity."²⁸ By assuming implicitly that there is no relevant distinction between the kind of case considered here and all other kinds of cases, this argument falls prey to the classic "slippery slope" fallacy. The way Bailey has framed the argument illustrates the point. Bailey elides the latter part of Jesus' ruling, which concerns specifically the execution of a death sentence. Ignoring the distinction between capital and noncapital cases, the argument slides over the distinction between lethal and nonlethal punishment, between judgment that *kills* and judgment that does not. This distinction matters dearly to the covenant law. For covenant law reflects the biblical value of human life especially in how it handles capital cases. Jesus' ruling places a

27. Cf. Bailey, *Capital Punishment*, 71-72.

28. *Ibid.*, 73.

moratorium only on judgment that kills, leaving humans free and responsible to judge wrongdoing in a way that redeems offenders and restores community (cf. Mt. 18:15-20; Gal. 6:1).²⁹ Jesus himself practices such redemptive-restorative justice in this case. He judges the woman's actions as sin, but releases her with a judicial warning to turn from sin that leads to death and walk the way of righteousness that leads to life, according to both the law (Deut. 30:15-20) and the prophets (Ezek. 18:21-23, 30-32).

The Basis of Jesus' Ruling in Covenant Law

As important as it is to see *that* Jesus makes a judicial ruling with far-reaching implications for the human institution of legal justice, it is at least as important that we understand *why* he does so in this concrete situation. As we have seen, the Torah, prophets and rabbis took great care to protect the innocent from wrongful conviction and execution and to preserve the life of guilty ones who repented of their sins. But here, Jesus raises the legal standard for the death penalty to a humanly impossible threshold neither for the sake of the innocent nor on behalf of the repentant. Why, then, does he do it? The covenant provides the answer: Jesus intervenes to save the life of one who is created "in the image of God," who is "poor and needy," who is weak and vulnerable, who stands defenseless and helpless before the rulers and authorities. In doing so, Jesus acts on behalf of the God "who made heaven and earth, the sea, and all that is in them; who keeps faith forever; who executes justice for the oppressed" (Ps. 146:6b-7a).

Clearly, this woman is being exploited, and those who accuse her and would condemn her are abusing their authority. It takes two to commit adultery—if *she* has been caught in the act, then so has *he*. And, as observed above, the law subjects both to penalty of death. In fact, the law puts the emphasis on the man's actions before the woman's (cf. Deut. 22:22; Lev. 20:10). But the scribes and Pharisees bring only the woman to Jesus for judgment. His life is not on the line, only hers. Evidently, the scribes and Pharisees have seized opportunity in this adultery case to pursue their plan to trap Jesus into convicting himself of lawlessness or blasphemy. Or, perhaps, they have conspired to catch her committing adultery for that same end.³⁰ Either way, she is merely an expendable

29. Marshall, *Beyond Retribution*, 131-140, considers the potential for "restorative punishment" in a communal approach to criminal justice. See also Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice*, 3rd ed. (Scottsdale, Pa.: Herald Press, 2005).

30. Derrett, *Law in the New Testament*, 160-163, points out that it is unlikely that the adulterous act was discovered by chance by random passersby—adultery is usually committed out of public view, in close quarters, behind secured doors. Rules of testimony would have required the witnesses to have seen the act itself in progress and have agreed

pawn in their evil ploy. In their eyes, her life has no more value than the success or failure of their scheme. Indeed, their scheme is premised upon the willingness to trade her life in exchange for “the goods” on Jesus. William Barclay comments: “They were not looking on this woman as a person at all; there were looking on her only as a thing, an instrument whereby they could formulate a charge against Jesus. They were using her, as a man might use a tool for their own purposes.”³¹

The very notion that a human life should be reducible to an instrumental value, to a means of exchange, is repugnant to the Torah. As the Jewish Bible scholar Moshe Greenberg observes, “the bedrock of the biblical evaluation” of humankind is that the human being “is no tool, no instrument, no means.”³² And the belief that a human being cannot be measured by any utilitarian standard, Marshall writes, is rooted in creation:

As the height of God’s creative activity, human beings ought never to be considered mere instruments for some ‘higher’ end. Each person is an end in himself or herself. And the reason for this lies in the *manner* of human creation, for humans alone are created in the image of God.³³

Exploiting one created in God’s image as a mere means to an end is the penultimate sin against God’s law, following only the sin of failing to acknowledge and worship God alone as God. Indeed, the one sin is akin to the other: if we refuse to reverence God as God, we will not respect the life of one created in God’s image; and if we refuse to respect the life of one created in God’s image, we will not reverence the One in whose image she is created. We thus see that ethics is rooted in worship: proper respect for one created in God’s image is premised upon proper fear of

on the details. That the woman was seen “in the very act of committing adultery” thus suggests that the witnesses might have been “lying in wait” – which would suggest further a conspiracy, perhaps initiated by her suspicious husband.

31. William Barclay, *The Gospel of John* (Philadelphia: Westminster Press, 1975), 2:5.

32. Moshe Greenberg, “The Biblical Grounding of Human Value,” in *The Samuel Friedland Lectures, 1960-1966* (New York: Jewish Theological Society of America, 1966), 39-52, 47. Greenberg shows how the value of human life underlies biblical law and is reflected in the creation story.

33. Christopher D. Marshall, *Crowned with Honor and Glory: Human Rights in the Biblical Tradition* (Telford, Pa.: Pandora Press U.S., 2001), 55, original emphasis. Cf. Greenberg, “The Biblical Grounding of Human Value,” and Aharon W. Zoera, *In the Image of God: A Christian Response to Capital Punishment* (Lanham, Md.: University Press of America, 2000), 13-15. I would add this qualification: God alone exists as an “end in himself,” strictly speaking; for God alone is uncreated; God alone *is* good in a final sense (Mk. 10:18). As creatures of the Creator, we are created not for the sake of ourselves, but ultimately for the glory of the Creator. Nonetheless, that humans alone among all creatures are created “in the image” of the Creator invests the individual human being with a transcendent value or incomparable worth (“dignity”) relative to all other created things.

the One in whose image she is created; and right action toward others is premised upon right worship toward God.³⁴

It is, of course, the poorest and weakest members of the community who are most vulnerable to exploitation by the selfish schemes of others and the unjust structures of society. Now as then, the legal system of capital punishment seizes upon the poorest and weakest members of the community for the death penalty; hence the saying, “those without the capital get the punishment.”³⁵ Hence also the many statutes in covenant law to protect the rights and provide for the needs of widows, orphans, debtors and immigrants in the community. The scribes and Pharisees, who are experts in the law and bring this case to Jesus with the ostensible purpose of upholding the law, are in fact violating the law at its very heart. For them to succeed in their scheme would be to deface God’s image, to dishonor God, and so bring down the whole edifice of “the law and the prophets.” Jesus thus acts in this concrete situation in order to uphold the creation-rooted biblical principle that underlies covenant justice: because humankind is created in God’s image, neither the poorest nor the weakest nor even the most sinful member of the human community is to be made an instrument for merely human ends.³⁶

She is a woman, moreover. This obvious fact frames the legal charge and moral stance of the scribes and Pharisees—“. . . *this woman* was caught in the very act of committing adultery. Now in the law Moses commanded us to stone *such women*. . .” (Jn. 8:4-5)—and thus, in a way, frames the whole situation. According to legal custom, her testimony carries no weight. She cannot even speak for herself, much less protest her innocence. Only a man—her husband, say, or a brother or a son of legal age—has the right to act in her defense; but no man has come forth on her behalf. She stands alone before judgment without defense. Jesus stands in as her defense, advocating on her behalf before humans and God, defending the accused and shaming the accusers, in order to save

34. This line of thought derives from the early-fourth-century Christian writer Lactantius—see his *Divine Institutes*, Book VI, chaps. 10-11, in Philipp Schaff, *Ante-Nicene Fathers*, vol. 7.

35. In the U.S., the death penalty is given disproportionately to the poor (those unable to hire a lawyer), the under-educated, the mentally disabled, and African-American defendants convicted of killing white victims. See Hugo Adam Bedau, *The Death Penalty in America: Current Controversies* (New York: Oxford University Press, 1997), 249-309; and Gardner C. Hanks, *Against the Death Penalty: Christian and Secular Arguments against Capital Punishment* (Scottsdale, Pa.: Herald Press, 1997), 95-110.

36. Such thinking might well be extended to the question of abortion. See Richard B. Hays, *The Moral Vision of the New Testament: Community, Cross, New Creation; A Contemporary Introduction to New Testament Ethics* (San Francisco: HarperSanFrancisco, 1996), 444-461.

the life of the defenseless from condemnation. Jesus thus upholds the tradition of “the law and the prophets” that measures the overall justice of the covenant community by the welfare of its least—poorest and weakest—members. By his advocacy, Jesus effectively speaks God’s answer to the prayer of the accused on behalf of this woman:

But you, O LORD my Lord, act on my behalf for your name’s sake. . . . For I am poor and needy. . . . I am an object of scorn to my accusers. . . . My accusers will be clothed with dishonor; may they be wrapped in their own shame as a mantle. With my mouth I will give great thanks to the LORD; I will praise him in the midst of the throng. For he stands at the right hand of the needy, to save them from those who would condemn them to death (Ps. 109:21-31).

Jesus pursues the covenant justice that defends the dignity and saves the life of the weak and vulnerable, regardless of moral merit, irrespective of legal rights. The ethic of Jesus is thus far more radical than the “consistent ethic of life” or “completely pro-life stance” promoted by both Catholic and evangelical Christians. The late Joseph Cardinal Bernardin and Ron Sider have sought to build an ethical stance that addresses life-threatening issues—for example, abortion, euthanasia, poverty, health care, environmental destruction and nuclear war—on a consistent basis.³⁷ I certainly agree that Christians should maintain a consistent stance concerning interconnected life-ethical issues.³⁸ Yet I find their ethic lacking in a certain crucial respect.

The basis of their consistent ethic is a principle upon which all Christians and most reasonable persons, it would seem, could agree—“the principle which prohibits the directly intended taking of innocent human life.”³⁹ Yet, by adding the qualifier “innocent,” this principle hedges the value of human life and so restricts moral concern to only lives that pass an “innocence” test. The principle thus “prohibits direct attacks on unborn life in the womb, direct attacks on civilians in warfare, and the direct killing of patients in nursing homes,”⁴⁰ but is noticeably silent concerning the direct killing of inmates in the execution chamber. Bernardin himself emphasized this point: “The principle which protects *innocent* life distinguishes the unborn child from the convicted

37. Joseph Cardinal Bernardin, *Consistent Ethic of Life* (Kansas City, Mo.: Sheed & Ward, 1988); and Ronald J. Sider, *Completely Pro-Life: Building a Consistent Stance on Abortion, the Family, Nuclear Weapons, the Poor* (Downers Grove, Ill.: InterVarsity Press, 1987).

38. Darrin W. Snyder Belousek, “Toward a Consistent Ethic of Life in the Peace Tradition Perspective: A Critical-Constructive Response to the MC USA Statement on Abortion,” *MQR* 79 (Oct. 2005), 439-480.

39. Bernardin, *Consistent Ethic*, 8, 16 and 23; Sider, *Completely Pro-Life*, 30-31.

40. Bernardin, *Consistent Ethic*, 16.

murderer.”⁴¹ Given this principle, therefore, a “consistent ethic of life” or “completely pro-life stance” would seem fully compatible with the death penalty fairly administered. Bernardin did address the question of the death penalty, but on grounds other than the principle that prohibits taking innocent life—for example, God’s demonstration of love to us, Jesus’ ethic of forgiveness, the Gospel call to reconciliation and the social cycle of violence.⁴² This suggests that Bernardin recognized that one cannot articulate a consistent ethic completely compatible with the Gospel of Jesus Christ on the basis of this principle alone. A “consistent ethic of life” founded on the principle of the inviolability of *innocent* life *only* turns out to be less than “completely pro-life” after all.

The ethic of Jesus adds no moral qualification to the value of human life created in the image of God and thus consistently defends all human life, even those who fail the “innocence” test. Jesus advocates on behalf of the life of the woman who is brought before him for judgment, not because she qualifies as “innocent,” nor because she “deserves” it, but solely because she *needs* it—because no less than any other person created in the image of God, she is a sinner who needs saving help. Jesus’ advocacy is thus simply an act of divine grace. The grace of Jesus releases her from judgment under law, thus opening the way for her repentance from a life of sin: “Neither do I condemn you. Go your way, and from now on do not sin again” (Jn. 8:11). She is restored to the covenant community in order to live the way of righteousness that God desires.

Jesus’ ruling makes possible not only the woman’s repentance, but also that of her accusers and would-be executioners. Jesus has reminded them that they are no less blameworthy under God’s judgment than she; they, too, need to repent from their evil deeds. But after exposing them to public shame as they have exposed her, Jesus again stoops down to write on the ground, giving them the same opportunity as her, to “go and sin no more.” And, wisely, they take Jesus’ offer of grace: “When they heard it, they went away, one by one, beginning with the elders” (Jn. 8:8-9).⁴³ Jesus’ advocacy on behalf of the defendant, therefore, does not in the least compromise his impartiality as judge; for he judges equally the sins of the defendant and the sins of her accusers.

41. *Ibid.*, original emphasis.

42. Bernardin, *Consistent Ethic*, 59-65. Sider, *Completely Pro-Life*, also includes capital punishment as part of a “comprehensive vision” (196), but does not spell out the rationale for including it along with abortion and other “pro-life” issues.

43. Cf. Gail R. O’Day, *The Gospel of John*, in *The New Interpreter’s Bible* (Nashville: Abingdon Press, 1995), 9:630.

Jesus' gracious action on behalf of this woman and those who would condemn her fulfills the covenant justice that God desires, as attested by the prophets. God's justice desires for the sinner not death by retribution, but rather life by repentance that restores the sinner to righteous living (Ezek. 18:23): "Have I any pleasure in the death of the wicked, says the Lord GOD, and not rather that they should turn from their ways and live?" The justice of God is neither satisfied by the death of the wicked nor compromised by mercy upon the repentant. For it is precisely God's desire for turning from sin to righteousness, leading from death to life, that expresses the heart of God's covenant law. Thus God pronounces judgment upon his covenant people:

Therefore I will judge you, O house of Israel, all of you according to your ways, says the Lord GOD. Repent and turn from all your transgressions; otherwise iniquity will be your ruin. . . . Why will you die, O house of Israel? For I have no pleasure in the death of anyone, says the Lord GOD. Turn, then, and live. (Ezek. 18:30-32)

"Turn, then, and live." Or, as Jesus says, "Go and sin no more." As God judges Israel, so Jesus judges this woman. By his words and deeds, Jesus points the way of repentance and offers the gift of redemption, thus fulfilling the intention of God's covenant justice.

Jesus' ruling on behalf of this woman does covenant justice in three ways: by upholding the value of human life created in the image of God, which underlies covenant law; by advocating for one who is "poor and needy," who stands defenseless and needing protection; and by opening the way for repentance from sin, redemption of sinners and restoration of community. Insofar as Jesus judges on God's behalf in this case, his words and deeds at John 8:2-11 present us with a model of God's own justice-doing, which is not a punitive justice that seeks retribution to satisfy the demands of law. Indeed, in this case, the demand of the law is *not* fulfilled, retribution is *not* satisfied, punishment is *not* executed—and yet God's covenant justice is done. God's covenant justice, therefore, does not necessarily—and thus does not essentially—have to do with legal demands and retributive punishment, but rather is *redemptive-restorative* justice.

CAPITAL PUNISHMENT AND THE CROSS OF CHRIST: THE DEATH PENALTY CRUCIFIED

We come now to the connection between Jesus' death on the cross and the death penalty. There is, of course, an intimate relationship between them, witnessed by the Nicene Creed: "For our sake he was crucified under Pontius Pilate." Jesus died "for us" by the legal execution of a death sentence under Roman authority. Yet, what are the implications?

What does Jesus' death by execution entail for the death penalty itself? Surprisingly, such questions seem not to have been much asked by Christian theologians during most of the church's two millennia, perhaps not at all until the twentieth century. In his masterful and comprehensive survey of the history of Christian thinking concerning the death penalty, the Catholic scholar James Megivern cites only one major theologian dealing with this question, the Reformed theologian Karl Barth.⁴⁴

The teaching of Jesus, we have argued, leads to a twofold conclusion: a permanent moratorium on the human practice of capital punishment, because no human being is worthy to execute the death penalty—such privilege belongs solely to divine prerogative. This prompts the questions: Does God continue to uphold the death penalty? And does the Gospel have anything more to say on the matter? The message of the cross leads to the conclusion that God has brought the death penalty to a final end through the cross of Christ—indeed, that God has put the death penalty itself to death upon the cross. Through the cross of Christ, the death penalty has lost divine sanction because it has lost its very life by the action of God. We shall develop this view in two parts, each of which addresses a particular rationale for the death penalty: first is the rationale of expiation; second is the rationale of retribution. The cross of Christ, we shall argue, nullifies the death penalty on both counts.

The Expiatory Rationale: Jesus' Death Removes Sin "Once for All"

One rationale for capital punishment throughout the centuries has been that the death penalty serves as an expiation of the murderer's sin. The expiatory rationale continues to some extent in Jewish, Lutheran and Catholic thought.⁴⁵ Within Catholic thought, Pope Pius XII stated (1952), "It is reserved to the public power to deprive the condemned of the good of life in expiation of his crime after he has already disposed himself of the right to life."⁴⁶ In his 1995 encyclical *The Gospel of Life*, Pope John Paul II argued for a severe limitation of the death penalty—it can be justified only "in cases of absolute necessity . . . when it would not be possible otherwise to defend society" (no. 56). The *Catechism of the Catholic Church*, in its section on capital punishment, nonetheless maintains expiation as a secondary rationale for the death penalty:

44. James J. Megivern, *The Death Penalty: An Historical and Theological Survey* (Mahwah, N.J.: Paulist Press, 1997), 275-277.

45. Megivern, *The Death Penalty*, 272, 280, 283 and 430; Novak, *Jewish Social Ethics*, 174-178.

46. Quoted in Megivern, *The Death Penalty*, 280.

Legitimate public authority has the right and duty to inflict penalties commensurate with the gravity of the crime. The primary scope of the penalty is to redress the disorder caused by the offense. When his punishment is voluntarily accepted by the offender, it takes on the value of expiation. (no. 2262)

Within covenant law, as evident in the Torah, capital punishment did serve an expiatory function—that is, as a cleansing, purging or “wiping away” of sin and its consequences. This expiatory rationale is found at the end of Numbers and throughout Deuteronomy. In Numbers, the idea is that bloodshed pollutes the land and destroys its fertility (cf. Gen. 4:10-12), such that maintenance of the holy land requires removal of the murder-induced pollution. The only means of making expiation for the land to cleanse it from blood-pollution was the death of the murderer:

Moreover you shall accept no ransom for the life of a murderer who is subject to the death penalty; a murderer must be put to death. . . . You shall not pollute the land in which you live; for blood pollutes the land, and no expiation (*kipper*) can be made for the land, for the blood that is shed in it, except by the blood of the one who shed it. (Num. 35:31, 33)

The use of cultic language (*kipper*) suggests that applying the death penalty to a murderer was intended as a ritual expiation. In Deuteronomy, the idea is that evildoing sows contamination among the people, such that the maintenance of covenantal integrity requires purging the evildoer from the community. Repeatedly, we hear the law append the following motivation to a command to execute the death penalty upon a person guilty of this or that evil deed: “So you shall purge the evil from your midst” (Deut. 13:1-11; 17:2-7, 12; 19:11-13, 18-19; 21:1-9, 18-21). The Hebrew word “purge” (*bāar*, Piel) signifies something burned or consumed by fire. Although not specifically cultic language, the connotation of expiation can be seen here. A biblical rationale for capital punishment, therefore, would be to expiate the sin of bloodshed or other serious evildoing for the sake of protecting the integrity of the covenant community and the fertility of the holy land.⁴⁷

The argument can thus be made that the atoning death of Jesus removes the expiatory rationale for the death penalty. The New Testament depicts Jesus’ death as vicarious (“for us”) and sacrificial in manifold ways, including as sin offering (Heb. 7:27; 9:23-26; 10:3-18) and as atoning sacrifice for sins (Rom. 3:25; Heb. 2:17; 1 Jn. 2:2; 4:10).⁴⁸ The

47. Cf. J. Greenberg, “Crimes and Punishments,” *The Interpreter’s Dictionary of the Bible* (New York: Abingdon Press, 1962), 1:733-744; and Raymond Westbrook, “Punishments and Crimes,” *The Anchor Bible Dictionary* (New York: Doubleday, 1992), 5:546-556.

48. John Driver, *Understanding the Atonement for the Mission of the Church* (Scottsdale, Pa.:

writer of Hebrews testifies that Jesus' death is the final sacrifice and ultimate expiation for sin: Jesus has come in the flesh "to make a sacrifice of atonement (*hilaskesthai*) for the sins of the people" (Heb. 2:17); "he has appeared once for all at the end of the age to remove sin by the sacrifice of himself" (Heb. 9:26); "Christ . . . offered for all time a single sacrifice for sins" (Heb. 10:12). And John witnesses that Jesus' death atones for the sins of all humanity: "he is the atoning sacrifice (*hilasmos*) . . . for the sins of the whole world" (1 Jn. 2:2; cf. Jn. 1:29).⁴⁹ Insofar as the cross of Christ serves as an all-sufficient ("once for all") sacrificial expiation of sin that is of cosmic scope ("for the whole world"), Jesus' vicarious death removes expiation as a rationale for capital punishment for all crimes and "for all time."

Barth had put forth this argument in the form of a rhetorical question: "Now that Jesus Christ has been nailed to the cross for the sins of the world, how can we still use the thought of *expiation* to establish the death penalty?"⁵⁰ Yoder elaborates:

It is the clear witness of the New Testament, especially the Epistle to the Hebrews, that the ceremonial requirements of the Old Testament find their fulfillment and their end in the high-priestly sacrifice of Christ. "Once for all" is the triumphant claim of the Epistle. Henceforth no more bloodshed is needed to testify to the sacredness of life, and no more sacrifices are called for to expiate a man's usurping of the power to kill. With the cross of Christ the moral and ceremonial basis of capital punishment is wiped away.⁵¹

Marshall summarizes this argument, drawing out the theological implications concerning the expiatory rationale for capital punishment after the cross:

The atoning value of all Old Testament practices is thus fulfilled and superseded by the death of Christ. This means that the language of atonement cannot be used to defend capital punishment in the Christian era. By doing so, [one] ends up in a theological quagmire in which God requires dual atonement for murderers, once by their own death and once by Christ's . . . arguments which construe the offender's death as expiating his or

Herald Press, 1986), 129-162.

49. The Greek verb *hilaskomai* ("make atonement" or "expiate"), from which is derived the related noun *hilasmos* ("atoning sacrifice"), is used (in the form *exhilaskomai*) in the Septuagint to translate the Hebrew *kipper* and thus is explicitly cultic language.

50. Karl Barth, *Church Dogmatics* III/4, quoted in Megivern, *The Death Penalty*, 276, original emphasis.

51. John Howard Yoder, *The Christian and Capital Punishment*, 8-9.

her objective guilt before God must be rejected as inconsistent with New Testament teaching on atonement.⁵²

As Marshall himself concedes, this argument is limited in scope—it does not undermine punishment per se, nor does it address all biblical rationale for capital punishment (more concerning the latter in the next section).

The conclusion of this argument is limited in one further respect. Marshall states that using expiation as a rationale for the death penalty after the cross of Christ would lead us into “a theological quagmire in which God requires dual atonement for murderers, once by their own death and once by Christ’s.” This assumes, however, that the death of Christ atones for the sins of all humanity, an assumption with which we agree and which we have inferred from John’s testimony (1 Jn. 2:2; cf. Jn. 1:29; 3:16). But one might challenge this argument by taking a strict Calvinist view that Jesus’ vicarious death does not benefit all humanity: Jesus died “for us” but not for everyone, “the people” for whom he has made “a sacrifice of atonement” being restricted to “the elect” predestined by God for salvation. From the Calvinist perspective of a “limited atonement,” then, one could continue to maintain the validity of the expiatory rationale for the death penalty: Jesus’ death makes expiation for the sins of “the elect,” but others still need to make expiation for their own sins by their own deaths.

The Retributive Rationale: God’s Justice Nails Retribution to the Cross

The above argument does not undermine entirely the biblical case for capital punishment also because the need for expiation is not the only biblical rationale for the death penalty. Although atoning sacrifice provides a way for the pollution of sin to be “wiped away,” one might think that the law itself still needs to be satisfied, that justice must be “paid its due” for sin by the death of the sinner. This is the retributive rationale for capital punishment.

In the modern era, the retributive rationale has found no greater exponent than the Enlightenment thinker and German Pietist, Immanuel Kant:

But whoever has committed murder must *die*. There is, in this case, no juridical substitute or surrogate, that can be given or taken for the satisfaction of justice. There is no *likeness* or proportion between life, however painful, and death; and therefore there is no equality

52. Marshall, *Beyond Retribution*, 222.

between the crime of murder and the retaliation of it but what is judicially accomplished by the execution of the criminal.⁵³

In order to right a wrong, from the retributivist perspective, justice requires “retaliation,” a punishment that “pays back” the wrongdoer in due proportion to the wrong done. In the case of murder, as Kant argues, the only judicial sentence that achieves an adequate “retaliation” or due proportion between crime and punishment is the death penalty – life for life (or death for death).

Kant’s logic of retribution is premised on the *lex talionis*, the ancient principle of law that justice is satisfied by a “likeness” between crime and punishment. Such retributive rationale premised upon the *lex talionis* is found within two major sections of biblical law, the Covenant Code (Ex. 20-23) and the Holiness Code (Lev. 17-26). In Exodus 21:12-32, one finds a sub-section of laws concerning homicide and other potentially capital crimes. This legislation lays out a casuistry to distinguish cases for the sake of assigning degrees of culpability and assessing a fitting penalty. In cases of intentionally-caused injury and death, the penalty is assessed according to the *lex talionis* (Ex. 21:23-25). This section of the Covenant Code thus provides a retributive rationale for the death penalty. This retributive rationale is repeated in the Holiness Code, where the *lex talionis* assigns appropriate penalties in cases of murder or injury:

Anyone who kills a human being shall be put to death. Anyone who kills an animal shall make restitution for it, life for life. Anyone who maims another shall suffer the same injury in return: fracture for fracture, eye for eye, tooth for tooth; the injury inflicted is the injury to be suffered. One who kills an animal shall make restitution for it; but one who kills a human being shall be put to death. (Lev. 24:17-21)

There is nothing obviously cultic about this legislation; the rationale behind the death penalty here is evidently legal, an equality or proportionality between transgression and penalty: life for life. This same legal principle appears again at Deuteronomy 19:15-21, a section of laws concerning trial procedure in which the *lex talionis* sanctions penalties against witnesses. Those who falsely accuse another of wrongdoing in a court trial are to be punished with the penalty that the accused would have received if convicted. The false witness is treated as

53. Immanuel Kant, *The Philosophy of Law*, excerpted in *Philosophical Perspectives on Punishment*, ed. Gertrude Ezorsky (Albany, N.Y.: State University of New York Press, 1972), 105, original emphasis. For an extended treatment of Kant’s retributivism, see Lloyd Steffen, *Executing Justice: The Moral Meaning of the Death Penalty* (Cleveland: Pilgrim Press, 1998), 69-87.

an evildoer attempting to inflict an unjust punishment upon the accused, which punishment is then inflicted back in kind (*hon tropon*) upon the accuser as due penalty for his wrongdoing (Deut. 19:19). The *lex talionis* measures out the appropriate retribution against the evildoer: "life for life, eye for eye, tooth for tooth, hand for hand, foot for foot" (Deut. 19:21). In a capital case, the penalty would be death, of course; in effect, therefore, the *lex talionis* here sanctions the death penalty as retribution against false witnesses in a capital trial.

Biblical law thus sanctions a retributive rationale for capital punishment, which remains the primary rationale for popular support of the death penalty in contemporary America.⁵⁴ A comprehensive Christian view concerning the death penalty must thus address directly the retributive rationale for capital punishment.

What follows is an argument that the cross of Christ not only removes any expiatory rationale for the death penalty, but also nullifies any retributive rationale.⁵⁵ A brief review of the biblical trajectory of the *lex talionis*, following the work of Millard Lind, prepares the way for this argument.⁵⁶ Lind traces the practice of retribution as it is introduced and reassessed within covenant law, from Moses in receiving the law at Mount Sinai (Torah) to Elijah in his theophany at Mount Horeb (prophets) to Jesus in his Sermon on the Mount (Gospel). Overall, this journey "across three mountaintops" manifests a shift from law as retribution to law as covenant love. Lind's path of thinking can be extended to a fourth mountaintop, the hill of the cross.

We begin with Lamech, who boasts, "I have killed a man for wounding me," and pledges seventy-sevenfold vengeance against anyone else who would do him injury (Gen. 4:23-24). Lamech's way of excessive retribution and escalating violence becomes the way of fallen humanity, exemplified in the stories of Dinah, Samson and David (cf. Gen. 34; Judg. 13-16; 1 Sam. 25).⁵⁷ Against this cycle of violence and

54. See Phoebe C. Ellsworth and Samuel R. Gross, "Hardening of the Attitudes: Americans' Views on the Death Penalty," in Bedau, *The Death Penalty in America*, 90-115.

55. The reader might wonder here concerning deterrence as a rationale for the death penalty. One does find a deterrent aspect to the biblical rationale for capital punishment in Deuteronomy: "Then all Israel shall hear and be afraid, and never again do any such wickedness" (Deut. 13:11; cf. 17:13; 19:20; 21:21). Two comments: First, the deterrent rationale appears always paired with and following, and so would evidently be subordinate to, the expiatory rationale ("purge the evil"). Second, the biblical grounding of covenant law in the value of human life created in the image of God would seem to entail that deterrence cannot be a *sufficient* (i.e., stand-alone) reason for capital punishment. For to take the life of one person who has committed a crime *solely* in order to deter another from committing a crime would be to convert human life into an instrumental value, a mere means to an end, which is repugnant to the Torah.

56. Lind, *Sound of Sheer Silence and the Killing State*.

57. Concerning the Samson story, see my essay "Tragic zeal: The spiral of violence,

vengeance, and amid a clan culture of blood feuds, the *lex talionis* in biblical law functions to *limit* the retaliatory violence characteristic of human relations (Ex. 21:23-24).⁵⁸ As such, the *lex talionis* does not represent God's perfect intention for the covenant community, but rather reflects the sinful reality of the human situation. The *lex talionis* places a twofold limit on retribution: first, life can be taken only in exchange for *life*, never for personal injury or property damage; second, only *one* life can be taken for a life. The *lex talionis* functions in covenant law not to sanction retribution as an absolute principle, but to extinguish the entrenched practices of human vengeance.

The Torah and prophets limit retribution further by qualifying the *lex talionis*.

1. The Torah limits the *lex talionis* from the beginning to only cases of intentional murder (Ex. 21:12-14), and subsequent legislation established "cities of refuge" to which those who cause death without intent may flee to escape the "avenger of blood" (Num. 35:9-15; Deut. 19:1-7). So, not only can life be taken only for life, and only one life for a life, but only if life had been taken with intent to kill.
2. Moses, the first prophet of Israel, qualifies the *lex talionis* further with the requirement of individual responsibility: "only for their own crimes may persons be put to death" (Deut. 24:16). So, not only can life be taken only for life, and only one life for a life, but the life of only the guilty party, and then only if the guilty party killed with intent.
3. Moses adds a further qualification, requiring at least two eyewitnesses in order for the *lex talionis* to be imposed: "no one shall be put to death on the testimony of a single witness" (Num. 35:30; cf. Deut. 17:6; 19:15). So, not only can life be taken only for life, and only one life for a life, but the life of only the guilty party, and then only if the guilty party killed with intent, but then only if there were at least two witnesses.
4. The prophet Ezekiel qualifies the *lex talionis* even further with the proviso that, if the criminal repents of his crimes and amends his ways, then his life should be spared (Ezek. 18:21-24; cf. 33:10-11). So, not only can life be taken only for life, and only one life for a life,

vengeance, and death," *The Mennonite*, Sept. 7, 2004, 16-17.

58. On the historical and cultural background of biblical law and the function of the *lex talionis*, see Hanks, *Capital Punishment and the Bible*, 25-85, and Marshall, *Beyond Retribution*, 215ff.

and the life of only the guilty party, but then only if the guilty party killed with intent, and then only if there were at least two witnesses, but even then only if the guilty party is *unrepentant*.

The Torah and prophets thus deliberately and repeatedly hedge the *lex talionis* with qualifications that limit retribution and leave room for redemption.

Jesus, the final prophet and authoritative teacher of the law, completes this trajectory and so fulfills the intent of "the law and the prophets" (Mt. 5:17). He rejects outright the *lex talionis* as specifying the right response of the covenant community to an evildoer in its midst: "You have heard that it was said, 'An eye for an eye and a tooth for a tooth.' But I say to you, Do not resist an evildoer (*tō ponērō*) . . ." (Mt. 5:38-42). As the Mennonite New Testament scholar Dorothy Jean Weaver has argued, the Old Testament background for Jesus' citation of the *lex talionis* is Deuteronomy 19:15-21, where the *lex talionis* underwrites the community's religious and moral obligation to "purge the evildoer (*ton ponēron*)" from its midst.⁵⁹ This canonical context carries two implications relevant for our purposes: first, Jesus' rejection of the *lex talionis* refers to the legal practice of the covenant community (i.e., not interpersonal relations); and, second, that context links the talionic formula directly to sanction of capital punishment (as we observed above). The upshot for us here is that Jesus rejects the *lex talionis* precisely insofar as it gives sanction to the death penalty as the necessary and justified means of dealing with evildoers by the covenant community. Weaver comments:

The impact of this negative command can hardly be overestimated. With the words "do not resist," Jesus disallows both the principle of *hon tropon*, "punishment in kind," and the *lex talionis*, the "law of retaliation" which embodies that principle. In so doing, he invalidates the most ancient and fundamental standard that individuals and societies have for dealing with "the one who is evil."⁶⁰

At the cross of Christ we witness the consummation of this development: the transcendence of God's covenant justice beyond the law of retribution and yet the vindication of God's covenant justice in the redemption of sinners. Paul's message of the cross proclaims this good news in astonishing terms in Colossians 2:13-15, a text whose significance concerning the death penalty has been hitherto

59. Dorothy Jean Weaver, "Transforming Nonresistance: From *Lex Talionis* to 'Do Not Resist the Evil One,'" in Willard M. Swartley, *The Love of Enemy and Nonretaliation in the New Testament* (Louisville: Westminster John Knox Press, 1992), 32-71.

60. Weaver, "Transforming Nonresistance," 54.

underappreciated (as far as I am aware).⁶¹ Ernest Martin's analysis and layout of this text helps us see its features in relief:

- 13 a. when **you** were dead in your transgressions
and the uncircumcision of your flesh,
 - b. HE MADE **YOU** ALIVE TOGETHER WITH HIM,
 - c. having forgiven **us** all our transgressions,
- 14 a. having cancelled out **the certificate of debt**
consisting of decrees against us and which was hostile to us,
 - b. HE HAS TAKEN **IT** OUT OF THE WAY,
 - c. having nailed **it** to the cross.
- 15 a. When he had disarmed **the rulers and authorities**,
 - b. HE MADE A PUBLIC DISPLAY OF **THEM**,
 - c. having triumphed over **them** through him.⁶²

Notice carefully what Paul has written. First, the subject of the verbs here would seem to be God-self (at least in vv. 13-14, perhaps Christ in v. 15). God has acted with a threefold redemption: to deal graciously (*charidzomai*) with us concerning our transgressions and to give us life; to obliterate, expunge or wipe away (*exaleiphō*) our sin record (or cancel our legal debt) and remove (*airō*) the legal decree against us; and to defeat, disarm and humiliate "the rulers and authorities" that crucified Christ. Second, the recipient of God's redeeming activity is "us," we who were "dead in our transgressions" but who now have received God's grace. God acts to forgive us our transgressions, save us from death and raise us to life "with Christ." Third, God acts to redeem us by means of Christ and the cross. The final phrase *en autō* in verse 15c can be translated either "through him [viz., Christ]" (N.A.S.B.) or "in it [viz., the cross]" (N.R.S.V.). Both make sense here: God acts for the sake of our redemption from sin and death through Christ in the cross. But notice that Paul nowhere says that God acts in any way *upon* or *against* Jesus: God acts *through* Christ *in* the cross.

Fourth, the pronoun "it" in both verse 14b ("this" N.R.S.V.) and verse 14c refers back to the entire preceding phrase in verse 14a, "the record that stood against us with its legal demands" (N.R.S.V.) or "the

61. Our analysis and interpretation of this text does not attempt to consider it in relation to the epistle as a whole. To some extent, as is unavoidable in such discussions, we take this text "out of context."

62. Ernest D. Martin, *Colossians, Philemon*: Believers Church Bible Commentary (Scottsdale, Pa.: Herald Press, 1993), 113, original emphasis. Martin follows the N.A.S.B.

certificate of debt consisting of decrees against us" (N.A.S.B.). This "certificate" (*cheirographon*) is the legal record of our transgressions (or the accounting sheet of our debts) that is kept in the heavenly books.⁶³ The "legal demands" (*dogmata*) that attach to this record, one may plausibly interpret, refer to the decrees of the commandments in the law of Moses. In Ephesians, Paul uses the same term to refer to "the law of commandments in decrees" (*ton nomon tōn entolōn en dogmasin*) that is abolished or nullified in Christ through the cross (Eph. 2:15-16, N.E.T.).⁶⁴ There, the "law" (*nomos*) divides Gentiles from Jews (cf. Eph. 2:14)—and, hence, the *dogmata* would seem to concern the law of Moses. One might thus infer that the *dogmata* in Colossians 2:14 also concern the law of Moses. In Colossians, then, these *dogmata* can be interpreted as representing the condemnatory decrees of the law—that is, the law insofar as it sanctions penalties for transgressions (levied, say, according to the *lex talionis*). In this sense, we would be "dead in our transgressions" because we stood condemned under the law on account of the legal record and penalty against us. Biblical scholar Jerry Sumney gives another interpretation: *dogma* represents here an official decree of condemnation or a judicial order of execution—a death sentence—and not a legal demand.⁶⁵ Both interpretations, however, come to the same point: God has acted *both* to render of no account our record of sin *and* to render null and void our condemnation on account of sin (whether by legal penalty or judicial order); for God has expunged our sin record, taking it away with the sentence of death attached to it, and has nailed *both* to the cross. We are thus released from both sin and condemnation.⁶⁶

Fifth, note carefully what Paul does *not* say here. Paul does not say that God has canceled the "certificate of debt" charged against our account because Christ has paid our debt to God in his blood by his

63. Jerry L. Sumney, *Colossians: A Commentary* (Louisville: Westminster John Knox Press, 2008), 144. The only other (deutero-)canonical use of this Greek word is in Tobit (5:3; 9:5), where it refers to a bond of financial obligation.

64. On the possible relation between these two texts, see Thomas R. Yoder Neufeld, *Ephesians*, Believers Church Bible Commentary (Scottsdale, Pa.: Herald Press, 2002), 117-118.

65. Cf. Sumney, *Colossians*, 144-145.

66. Paul's idea here parallels that of Rom. 8:1-3, where Paul writes that God acting in Christ has both "set [us] free from the law of sin and of death" and "condemned sin." This "law of sin and of death" is evidently the law that condemns us on account of our sin (cf. v. 1)—or, possibly also, the law that death is the end result (*telos*) of sin, the final consequence of life lived "according to the flesh" (cf. Rom. 6:16, 21; 7:5; 8:5-6). Paul argues thus: we are no longer under the "condemnation" (*katakrima*) of law (v. 1) because we have been liberated from the condemnatory law by the Spirit in Christ (v. 2); and we have been liberated from this law by the Spirit on account of what God has done in Christ the incarnate Son "concerning sin" (*peri hamartias*): God has "condemned sin" (*katekrinen tēn hamartian*) in the flesh"—i.e., God has passed a sentence of death upon sin itself (v. 3).

death on the cross.⁶⁷ Rather, Paul says, God has “obliterated” or “expunged” or “wiped away” (*exaleiphō*) our account of sin from the heavenly book of record. What Paul says God does at the cross on our behalf is precisely what David had petitioned God to do on his behalf: “according to your abundant mercy, blot out (LXX *exaleipson*) my transgressions” (Ps. 51:1; cf. 51:9). It is also what the prophet Isaiah had testified that God does on behalf of Israel: “I, I am He, who blots out (LXX *exaleiphōn*) your transgressions for my own sake” (Isa. 43:25). And it is what Peter proclaims that God will do on behalf of all who repent: “Repent therefore, and turn to God so that your sins may be wiped out (*exaleiphthēnai*)” (Acts 3:19). We thus have here, not debt cancellation by a transaction between God and a third party (namely, Christ), but rather debt cancellation by a sovereign act of divine mercy.⁶⁸

Nor does Paul say that God has forgiven us our transgressions because, having removed our transgressions from us (cf. 2 Cor. 5:19), he has reckoned them against Christ instead. Rather, Paul says, God has taken away our transgressions and nailed them to the cross. Nor does Paul say that God spares us from the death penalty by putting Jesus to death in our place as penalty for our sins. Rather, Paul says, what God puts to death at the cross is our sin and the law that demands (or the judgment that decrees) death as the penalty (or sentence) for sin.⁶⁹ Marianne Meye Thompson, a New Testament scholar, comments aptly on this text:

It is striking that this verse [v. 14] does not say that Christ was nailed to the cross, but rather that the “bond of indebtedness” was put to death. . . . Similarly, there is here no explicit reference to a penalty due to sin that Christ bore for sinful humanity on the cross. Rather, in an unusual and fresh image, Paul speaks of the accusing record itself being destroyed on the cross.⁷⁰

67. This view is found in, e.g., F. F. Bruce, *The Epistles to the Colossians, to Philemon, and to the Ephesians* (Grand Rapids, Mich.: Eerdmans Publishing, 1984), 109, and C.F.D. Moule, *The Epistles of Paul the Apostle to the Colossians and to Philemon: An Introduction and Commentary* (Cambridge: Cambridge University Press, 1968), 98.

68. I thus disagree with Ben Witherington III, *The Letters to Philemon, the Colossians, and the Ephesians: A Socio-rhetorical Commentary on the Captivity Epistles* (Grand Rapids, Mich.: Eerdmans Publishing, 2007), who reads Paul as saying here that God has cancelled our “certificate of debt” because “Jesus paid it all” (158). His interpretation must read “payment” into the text; for Paul does not use any language of payment here, only forgiveness (*charidzomai*) and cancellation (*exaleiphō*).

69. Similarly, at Rom. 8:1-3, Paul does not say that we are released from the law’s condemnation on account of sin because God has condemned Christ instead of us, but rather because God has condemned sin itself.

70. Marianne Meye Thompson, *Colossians and Philemon: A Two Horizons Commentary* (Grand Rapids, Mich.: Eerdmans Publishing, 2005), 58.

Paul's language in this text, therefore, does not say, explicitly or implicitly, that God has satisfied the requirement of retribution, that God has fulfilled the legal demand (or judicial sentence) of death for sin. In fact, Paul writes here, quite the opposite is the case. God has acted through Christ in the cross to do away with legal records and to nullify such legal requirements (or judicial decrees). The legal demand (or judicial sentence) of death against us has *not* been fulfilled, but removed; the requirement (or judgment) of retribution for sin has *not* been satisfied, but crucified. And yet, as he emphasizes elsewhere, Paul is convinced that God, in redeeming humanity from sin through the atoning death of Christ, has done justice in faithfulness to the covenant (Rom. 3:21-26). How, though, can God *both* redeem humanity from sin *and* do justice in faithfulness to the covenant if retribution is not satisfied? This is possible, Paul says there, because the covenant justice of God that redeems sinners is the expression of God's own grace—sinners are put right ("justified") by God through the cross of Christ, not according to the law of retribution ("just deserts"), but rather as a divine gift (Rom. 3:24).⁷¹ While the cross fulfills the purpose of "the law" in that it manifests the covenant righteousness (justice) of God through the faithfulness of Christ (Rom. 3:21-22), it nonetheless does so in a way that transcends the law of retribution.

Through the cross of Christ, we see *the death penalty crucified*—and, yet, God's justice vindicated in covenant faithfulness. We thus observe a remarkable consistency between the teaching of Jesus and the cross of Christ: as with the judgment of Jesus in the case of the woman, the cross of Christ reveals the covenant justice of God beyond retribution for the sake of redemption. Whereas Jesus' teaching puts the death penalty out of practice, God's redemption in Christ nails the death penalty to the cross. God nails to the cross *both* the legal record of our sins *and* the legal demand (or judicial order) that condemns us to death on account of our sins. Instead of satisfying the legal demand (or judicial order) of retributive justice, God works redemption through Christ by nailing the law of retribution (or judicial order) itself to the cross. Whereas "the rulers and authorities" had crucified Jesus, *God crucifies the death penalty, "nailing it to the cross."* At the cross, God does execute the death penalty—not upon Christ, but upon itself! By God's faithful action of saving justice through the cross of Jesus Christ, the death penalty is thus finally dead, once and for all.⁷²

71. Charles B. Cousar, *A Theology of the Cross: The Death of Jesus in the Pauline Letters* (Minneapolis: Fortress Press, 1990), 46.

72. What about Genesis 9:6 ("Whoever sheds the blood of a human, by a human shall that person's blood be shed")? As one could resort to a Calvinist view to avoid the universal implication of the atoning value of Jesus' death, so also one could resort to a

dispensationalist view to avoid the universal implication here. From a dispensationalist view, the cross of Christ has value only with respect to the covenant with Moses. Insofar as the covenant with Noah still stands, and inasmuch as the Noachide law both applies to all humankind (Gen. 9:9-10) and evidently sanctions the death penalty (Gen. 9:6), one could thus appeal to the Noachide covenant to support the universal validity and continuing legitimacy of capital punishment. Marshall, *Beyond Retribution*, 216-217, however, argues that the covenant with Noah does come under the cross of Christ—and hence that the Noachide law needs to be interpreted in light of New Testament teaching. See also Perry B. Yoder, “The Noachide Covenant and Christian Mission,” in *Beautiful Upon the Mountains: Biblical Essays on Mission, Peace, and the Reign of God*, Mary H. Schertz and Ivan Friesen, eds. (Elkhart, Ind.: Institute of Mennonite Studies, 2003), 3-16.