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The Christian Executioner: Reconciling "An Eye for an Eye" with "Turn the Other Cheek"

God quit you in his mercy! Hear your sentence. . . .

Touching our person seek we no revenge;

But we our kingdom's safety must so tender, whose ruin you have sought, that to her laws we do deliver you. Get you therefore hence, poor miserable wretches, to your death: The taste whereof, God his mercy give you patience to endure, and true repentance of all your dear offences! Bear them hence.

King Henry V, WILLIAM SHAKESPEARE,
KING HENRY V act 2, sc. 2.

I am going face to face with Jesus now. I love all of you very much. I will see you all when you get there. I will wait for you.

Karla Faye Tucker, convicted
axe murderess, executed
February 3, 1998

I. INTRODUCTION

The February 1998 execution of convicted murderess Karla Faye Tucker sparked a tempest of discussion, among both the religious and the more secularly minded, regarding the relationship of mercy and justice within the criminal justice system. What made the Texas execution so dramatic was the fact that the "pickax killer" was a born-again Christian.¹ While Ms. Tucker herself seemed content with her fate, stating that, "If [God] brings me home February 3rd, it's because in his wisdom, and his sovereignty, he knew that through that something greater is going to be accomplished,"² many other Christians were not so certain. Christian conservative Jerry Falwell stated that, "[a]s far as I'm concerned, I think there has to be room for selective mercy, or there's no hope for anyone."³ Similarly, the

1. See Michael Graczyk, *Tucker 'Face to Face with Jesus*, ARIZ. REP., Feb. 4, 1998, at A1.

2. *Id.*

3. E.R. Shipp, *Texas Execution was Repulsive, Not Just the Cheering, Either*, SALT LAKE TRIB., Feb. 11, 1998, at A9.

Reverend Pat Robertson declared that “mercy trumps justice.”⁴ Texas Governor George W. Bush considered these and other pleas before denying Tucker’s request for a pardon. “Like many touched by this case,” he announced, “I have sought guidance through prayer. I have concluded judgment about the heart and soul of an individual on death row are best left to a higher authority.”⁵

Whether the Tucker case will have lasting impact on the death penalty debate remains to be seen. What is clear, however, is that Christian principles and biblical notions of justice and mercy are at least factors in the ongoing debate over capital punishment. For lawyers, this has a number of possible applications. First, would-be policy makers, whether Christian or otherwise, should understand the religious arguments advanced either for or against the death penalty. According to one commentator, ninety-five percent of Americans profess belief in God and seventy percent are members of a church or synagogue.⁶ Consequently, it is not uncommon for legislators to consider religious arguments in their policy discussions.⁷ Unfortunately, much of the information regarding religion and political issues that is available to policy makers is created more as political rhetoric than as honest theological discourse.⁸ Thus, legislators who genuinely wish to reflect their constituents’ religious concerns may be misled by propaganda misstating what “Jews” or “Christians” believe. Additionally, policy makers may be concerned with their own personal moral and spiritual views. It is not uncommon to hear sincere religious adherents say, “well, you can make a good biblical argument on either side of the issue,” and thus dismiss the Bible as a source for guiding their decision at all. This paper does not argue that the Bible should be a guide to legislative decisions. It does, however, suggest that policy makers who try to abide by biblical instruction in their daily lives may also use the scriptures as a guide to forming their own personal opinions about the morality of capital punishment.

In addition to legislators, other attorneys may be confronted with the morality of the death penalty. Criminal judges and prosecutors must decide whether they can, in good conscience, participate in capital cases. This paper will briefly address the decisions faced by individuals regarding whether or not they should recuse themselves from a capital case. For the religious individual, this question becomes particularly acute. They must not only decide whether they are able to set aside their personal beliefs in order to render an impartial decision or to zealously prosecute a capital case, but they must also decide whether they should do so. The Apostle Peter, the Christian patriarch, declared that he “must obey God rather than men.”⁹ For the Christian judge, for example, that might mean recusing oneself from a

4. E.J. Dionne, *Karla Tucker's Legacy*, 125 COMMONWEAL, Feb. 27, 1998, at 9 (Feb. 27, 1998).

5. Graczyk, *supra* note 1, at A1.

6. See Michael J. Perry, *Religious Arguments in Public Politic Debate*, 29 LOY. L. REV. 1421, 1421 (1996).

7. See *infra* notes 24-28 and accompanying text (discussing state legislators’ debates over whether to enact an anti-capital punishment statute).

8. See *id.*

9. Acts 5:29.

capital case if he or she believed that God was opposed to capital punishment, even if the individual really could set aside his or her personal beliefs and impose the sanction.

With consequences this practical, it is essential that any practitioner considering recusal or avoiding the prosecution of a death penalty case should do so because he or she truly has an informed conviction about the matter and not simply because they have heard rhetoric about what the Bible or their religion does or does not say about capital punishment. Unfortunately, there are many pithy statements regarding what the Bible says about capital punishment, but very little true biblical exegesis is available to legal practitioners not well practiced in theological study.

Modernly, it is becoming increasingly accepted that the teachings of Jesus did away with Old Testament provisions for capital punishment.¹⁰ In fact, Christians, once considered mainly pro-capital punishment as a group, are joining the abolitionist ranks in growing numbers. On the eve of three scheduled executions in Florida in March of 1998, about "200 people attended an interfaith service at First Presbyterian Church" to voice their opposition to the death penalty.¹¹ From the Pope¹² to select Christian musicians,¹³ many Christians now implicitly, and sometimes explicitly, advance the argument that Christ's message of love and forgiveness supersedes Old Testament notions of obedience and justice. This notion

10. The Karla Faye Tucker case generated many platitudes regarding Christianity's supposed opposition to the death penalty, but with little textual or historical support for such notions. See, e.g., Afi-Odelia E. Scruggs, *Mixed Feelings on Tucker Execution*, THE PLAIN DEALER (CLEVELAND), Feb. 6, 1998, at 1B ("Plus, as a Christian, I hold fast to notions of redemption, grace and, most importantly, forgiveness.").

11. See Judy Gross, *Florida Steps Up Executions*, 34 NAT'L CATH. REP., April 3, 1998, at 22.

12. During his October 8, 1995 speech in Baltimore, Pope John Paul II declared that Democracy serves what is true and right when it safeguards the dignity of every human person, when it respects inviolable and inalienable human rights, when it makes the common good the end and criterion regulating all public and social life. . . I say to you again, America, in light of your own tradition: love life, cherish life, defend life, from conception to natural death.

Sister Monica Kostielney, *Understanding Justice with Clarity, Civility, and Compassion: Reflections on Selected Biblical Passages and Catholic Church Teachings on the Death Penalty*, 13 T.M. COOLEY L. REV. 967, 975 (1996). In his 1995 encyclical letter entitled the "Gospel of Life," the current Pope expressed his general opposition to the death penalty more directly, stating,

It is clear that for the purposes to be achieved, the nature and extent of the punishment must be carefully evaluated and decided upon. It ought not go to the extreme of executing the offender except in cases of absolute necessity. In other words, when it would not be possible to otherwise defend society.

Id.

At least one commentator has noted that, "the evolution of this strong Catholic opposition to the death penalty has coincided with the pontificate of Pope John Paul II." See Symposium, *The Death Penalty: A Philosophical and Theological Perspective*, 30 J. MARSHALL L. REV. 463, 491 (1997).

13. See, e.g., SUSAN ASHTON, *Beyond Justice to Mercy, on So Far* (Sparrow Records 1995) ("We can reach beyond justice to mercy.").

assumes center stage in many Christian arguments to abolish the death penalty in America. Rather than expressing an outright rejection of the Old Testament and its principles of “life for life, eye for eye,”¹⁴ however, most contemporary “Christian abolitionists”¹⁵ stress general principles of Christ’s mercy, particularly as demonstrated by his encounter with the woman caught in adultery,¹⁶ and avoid detailed biblical exegesis.¹⁷ Modern critics of the death penalty not writing from a Christian perspective frequently refer to New Testament notions of love and forgiveness as arguments for abolition as blithely as proponents of the death penalty claim a biblical mandate to take life for life.¹⁸ A remarkable example of the increasing acceptance of conclusory statements that Christian principles demand abolition of the death penalty appears in an article analyzing the views of Thomas Aquinas, the man credited with writing the classic Christian defense of capital punishment.¹⁹ After arguing at length that most of Aquinas’ logical and political arguments for capital punishment do not apply to modern America, the writer concludes:

However, there remains one difficulty—the religious argument. Part of Aquinas’ defense of capital punishment rests upon his conviction that God has ordained execution as the penalty for a number of offenses. If an up-to-date Aquinas were to retain the same conviction, there would be a problem. However, there is no reason to suppose that on the theological level his position would remain inflexible, and that

14. See, e.g., *Exodus* 21:23 (“[T]hen you shall take life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe.”).

15. See Sister Helen Prejean, *Capital Punishment: The Humanistic and Moral Issues*, 27 ST. MARY’S L. J. 1, 21 (1995)

If people learn the truth and we are able to educate, we can generate the second Abolitionist movement in the United States. The first one abolished slavery. . . . The death penalty will also be abolished. . . . I hope you will join the people in the United States who are part of the second Abolitionist movement.

Id.

16. The story of the woman caught in adultery is related in *John* 8:1-11 and is discussed in *infra* notes 95-109.

17. See, e.g., Kostielney, *supra* note 12, at 968 (“My purpose is not to present a biblical exegesis, but to promote sound moral policy on this issue by looking at the three sources of our position, which are the Old Testament, the New Testament and current church teaching.”); see also Prejean, *supra* note 15 at 9-10 (condemning “selective quoting of the Bible” with the observation that the Bible proscribes death as the penalty for adultery and scoffing that imposition of such a law would “decimate our population”); see also Daniel A. Rudolph, *The Misguided Reliance in American Jurisprudence on Jewish Law to Support the Moral Legitimacy of Capital Punishment*, 33 AM. CRIM. L. REV. 437, 462 (1996) (arguing that because ancient Israel never rigorously enforced the death penalty provisions of the Torah, “[a]ny attempts to apply the principles of the Torah to the American legal system are incoherent and unjustified.”).

18. See, e.g. Symposium, *Symposium on the Death Penalty*, 23 HOFSTRA L. REV. 627, 637 (1995) (claiming philosophical support for abolition in the asserted fact that the United States is alone among “leading practitioners of the death penalty [which] could be called a predominately Christian country”).

19. See Brian Calvert, *Aquinas on Punishment and the Death Penalty*, 37 AM. J. JURIS. 259 (1992).

it would be impossible to persuade him that his reading of biblical texts should be revised. One contemporary moral theologian confidently assures us that there is absolutely no warrant in the New Testament for seeing any endorsement of the death penalty. . . .²⁰

Just what new theology-changing information is now available to modern day Aquinases? The answer is none. Unlike papal teachings and official church positions,²¹ the biblical text has not changed much in the seven hundred plus years since the original Aquinas' death.

The purpose of this paper is not to defend the death penalty in America, or even to analyze or support the political and philosophical arguments advanced by great Christian thinkers such as Aquinas in favor of capital punishment. Rather, this paper seeks simply to provide practitioners concerned with the Christian, biblical perspective on capital punishment with a clear presentation and analysis of the relevant biblical passages on the topic, including both the Old Testament and the New Testament teachings of Christ and the Apostle Paul. More pointedly, this paper asks whether Jesus' teachings of forgiveness and non-retaliation may be reconciled with Moses' insistence on severe punishment for wrongdoing.

To answer that, Part I of this comment explores the biblical arguments commonly advanced by Christians both for and against the death penalty. Part II considers situations in which the lawyer may be called upon to consider religious and biblical arguments for and against the death penalty. Part III begins the scriptural overview of what the Bible really does teach about capital punishment by considering Old Testament passages facially in support of capital punishment. Modern scholarly arguments that these Old Testament scriptures when carefully analyzed, particularly in light of the actual practices of ancient Israel, do not, in fact, support modern application of the death penalty are discounted for the purposes of this paper. As stated above, this paper is not concerned with whether the Bible supports the death penalty as applied in America, but only with whether God's law, as allegedly revealed to Moses, suggests that a nation should implement capital punishment if feasible and if any such endorsement remains after the coming of Christ and his teachings on mercy and forgiveness. Part IV addresses those teachings of Jesus which abolitionists claim supersede any Old Testament proscriptions of the death penalty. Before analyzing the Christian abolitionist arguments in depth, it is briefly noted that Christ himself never claimed to do away with the law of Moses, but rather came to fulfill it. It is the premise of this paper that the Bible is entirely consistent with itself and that the Old Testament is indeed

20. *Id.* at 281 (citing 1 Germain Grisez, *The Way of the Lord Jesus*, vol. 1, 221, 228, n.10 (1983)).

21. *See generally* Kostielney, *supra* note 12, at 968-75 (tracing the history of Catholic teachings and beliefs regarding capital punishment).

“profitable for teaching, for reproof, for correction, and for training in righteousness. . . .”²² Upon this premise, this paper addresses those New Testament passages which allegedly abolish the segments of the Mosaic law proscribing capital punishment. In doing so, the paper relies heavily upon the biblical exegesis of some of Christianity’s greatest theologians. In Part V, New Testament passages and concepts cited in favor of capital punishment are discussed. First, Paul’s endorsement of civil authority in his letter to the Romans is cited as support for state enforced punishment. Second, the implications regarding capital punishment of the necessity of Christ’s own death on the cross are posited as a divine recognition of capital punishment. This paper concludes that, when read as a unified whole, the Bible in both Old and New Testaments very clearly expresses approval of capital punishment by a God who never changes.²³ Once again, this is not to suggest that Christians in America must support capital punishment as it currently is applied. Rather, this discussion is simply intended to help the practitioner concerned with following biblical principals in his or her practice or with understanding the Christian view on capital punishment discern what the Scriptures, when viewed as a whole, really teach regarding capital punishment. Thus, this Comment should help those individuals make both policy decisions and personal decisions concerning recusal and prosecution of capital cases.

II. WHY LEGAL PRACTITIONERS MAY CARE ABOUT WHAT THE BIBLE SAYS

A. *Policy Makers Consider Moral and Religious Concerns*

Religious notions sometimes enter into a legislative body’s deliberations. Historically, this was mostly true. In 1846, for example, Michigan was the first state to statutorily abolish the death penalty within its borders.²⁴ Much of the Select Committee on the Abolishment of Capital Punishment’s debate centered upon biblical arguments for and against the sanction.²⁵ Lest any think that that concern was unique to the 1840’s, religious arguments entered the discussion in 1993 when Wisconsin’s legislature considered various grounds for the adoption of capital punishment.²⁶ As the legislature approached its vote on the issue, certain Christian groups began to actively protest the death penalty. The Interfaith Committee on Social and Economic Justice in Madison stated:

22. 2 Timothy 3:16b.

23. See James 1:17 (“Every good endowment and every perfect gift is from above, coming down from the Father of lights with whom there is no variation or shadow due to change.”).

24. See Eugene G. Wanger, *Historical Reflections on Michigan’s Abolition of the Death Penalty*, 13 T.M. COOLEY L. REV. 755, 755 (1996).

25. See *id.* at 762 and n. 11.

26. See E. Michael McCann, *Opposing Capital Punishment: A Prosecutor’s Perspective*, 79 MARQ. L. REV. 649, 650, 702-03 (1996).

In spite of common assumption to the contrary, "an eye for an eye and a tooth for a tooth," does not give justification for the imposing of the penalty of death. Jesus explicitly repudiated the *lex talionis* (Matthew 5:38-39) and the Talmud denies its literal meaning, replacing it with financial indemnities.²⁷

How much credence policy makers gave to such statements is impossible to tell. It is reasonable to expect, however, that at least some legislators were concerned with the biblical position on capital punishment and considered such statements with interest. Even policy makers who are not personally religious may very well attempt to legislate in a way consistent with what they perceive to be the prevailing beliefs of their constituents. Additionally, those who are religious may sincerely wish to follow the dictates of their faith, but be uncertain of how to do so. As mentioned above, many believe that sound biblical arguments can be made on either side of the death penalty debate, and thus throw out the proverbial baby with the bath. Some may not be familiar with various theological positions on the death penalty, and may easily mistake the statement of one interfaith counsel's abolitionist position as representative of what Christians generally believe or they may even accept such a group's characterization of the biblical position on capital punishment as authoritative, without exploring the issue themselves. This is particularly possible when the legislator is not personally devout but attempts to gauge the attitudes of sectarian constituents. While we cannot expect our legislators to act as theologians, those who do consider religious arguments in their decision making process should, at the very least, consider true and accurate representations of what the Bible teaches and what many Christians believe. Legislators who choose to consider religion in their decision-making process should be certain that it is indeed religion that they are considering and not simply conclusory platitudes about supposedly Christian beliefs advanced by a group with an agenda, whether that agenda be for or against capital punishment.²⁸

27. *Id.* at 702.

28. Some commentators go a step further to suggest that Christian legislators should affirmatively rely upon the Bible in their decision making process. In their article advancing a "Lawyer's Bible," J. Nelson Happy and Samuel Pyeatt Menefee cited an impressive tradition, in both Britain and America, of judges and policy makers relying heavily upon the Bible when rendering judgments and answering policy questions. See J. Nelson Happy and Samuel Pyeatt Menefee, *Genesis!: Scriptural Citation and the Lawyer's Bible Project*, 9 REGENT U. L. REV. 89, 95-136 (1997). The authors contend that "only in recent have the law and the Bible been artificially separated." *Id.* at 139.

B. Criminal Judges and Prosecutors Must Decide Whether They Can in Good Conscience, Participate in the Sentencing Process of Capital Cases

In Florida, one criminal judge dramatically highlighted the struggle that some practitioners face regarding whether they can participate in capital sentencing by writing a series of letters to the public in the local newspaper. In one such letter he declared, “[b]ecause God has given me a new life in Jesus Christ, I choose not to condone our use of capital punishment.”²⁹ The Florida judge’s problem is not unique. While there is much scholarly debate concerning the role that a judge’s personal morality should play in rendering judgments,³⁰ the prevailing opinion seems to be that a judge should not sit on a capital case if he is morally resolved not to impose the death penalty upon any individual.³¹ This requirement implied by the laws governing recusal standards may be likened to the concept of “death-qualified juries,” a concept which most states have adopted that prevents staunch death penalty opponents from serving as jurors on capital cases.³² While the Supreme Court has announced that dismissing all jurors with “conscientious scruples against capital punishment” is too broad a disqualification and would really lead to juries who were “death prone,”³³ case law supports dismissing jurors who cannot honestly consider capital punishment as an option.³⁴ It seems natural to apply a similar standard to judges.³⁵ For judges, however, the decision is left largely to their own scruples; no attorney is going to exercise a peremptory challenge against a judge.³⁶ That means that judges must decide whether they should recuse themselves from a case. Judges who feel strongly that they are bound only to follow the law of the land, and who do not feel bound by any higher duty than precedent, may choose to set aside any moral reservations about a practice that they may have and remain on the case. In his confirmation hearings, Justice Breyer stated that the only time when a judge’s subjective belief should enter his decision making process is if he feels that he “cannot follow what [he] believe[s] the law to be because of [his] subjective

29. Talbot D’Alemberte, *Searching for the Limits of Judicial Free Speech*, 61 TUL. L. REV. 611, 639 n.154 (1987).

30. See Richard B. Saphire, *Religion and Recusal*, 81 MARQ. L. REV. 351, 351 (1998) (stating that scholars have adopted a wide range of positions on the proper relationship between a judge’s personal religious convictions and his policy making decisions).

31. See *id.* at 354-55 (summarizing the different standards for recusal, including the requirement that a judge disqualify himself when he has a “personal bias concerning a party”).

32. See John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 336 (1998).

33. See *id.* (citing *Witherspoon v. Illinois*, 391 U.S. 510 (1968)).

34. See *id.* at 338-39.

35. See *id.*

36. See *id.* at 350.

belief,” in which case that judge should recuse himself from the case.³⁷ Other judges, such as former Supreme Court Justice Blackmun, suggest that morality can factor into a judge’s decision-making process.³⁸ Whether a judge chooses to allow personal morality to enter into his decision making process or whether he decides that his sense of personal morality dictates that he recuse himself, a judge must act upon his sense of morality in some way. Even the judge who attempts to set aside his personal feelings on a subject must decide that to do so does not violate any higher authority to which he might need give answer. As mentioned above, for the Christian who believes that ultimately one must obey the laws of God rather than the laws of man, the latter question becomes particularly troublesome. If, for instance, Christianity really does teach that capital punishment is morally wrong, it would be very difficult for the devout practitioner to willfully ignore that principle and impose capital punishment anyway. The same, of course, can be said for the criminal prosecutor who has nagging doubts about the inherent morality of capital punishment. While recusal does not take on the same dimensions for the prosecutor, it would be difficult for the prosecutor who questions the moral validity of capital punishment to zealously prosecute a capital case and argue for imposition of the death penalty. However, before either judges or prosecutors do recuse themselves from a case, and before a judge allows his personal conviction against capital punishment to influence his rulings, it is essential that he or she do so based upon firm convictions and not merely nagging suspicions about the morality of capital punishment. With all of the conclusory statements purporting to articulate the Christian viewpoint on the issue available to students of capital punishment,³⁹ it would be easy for the Christian practitioner to assume that his or her religion forbids wholehearted support of capital punishment. Whether that is indeed the case should be determined not from reading political statements issued by church counsels but by carefully considering the biblical teachings on capital punishment when viewed as a whole.

37. Ori Lev, *Personal Morality and Judicial Decision-Making in the Death Penalty Context*, 11 J.L. & RELIGION 637, 640-41 (1994-95) (citation omitted).

38. *See id.* at 654 (stating that Justice Blackmun’s “acceptance of the role of personal morality finally led [him] to announce in *Callins v. Collins* that he believes the death penalty is unconstitutional”).

39. *See supra* notes 11 through 21 and accompanying text.

III. OLD TESTAMENT SUPPORT OF CAPITAL PUNISHMENT CRITIQUED

A. *The Scriptural Injunctions*

1. “For your lifeblood I will surely require a reckoning; of every beast I will require it and of man; of every man’s brother I will require the life of man. Whoever sheds the blood of man, by man shall his blood be shed.”⁴⁰

After the great flood, God blessed Noah and his sons and gave them this and other instruction on the nature of God’s world and expectations. First, it should be noted that it is *God* who requires a reckoning for the lifeblood, not merely man and man’s laws.⁴¹ Secondly, the Hebrew verb translated “sheds man’s blood” “denotes not to commit homicide, but to kill from premeditation or malice.”⁴² Thirdly, the meaning of the phrase “by man” preceding “shall his blood be shed” has been debated by commentators, some of whom, in opposition to capital punishment, suggest that the phrase is better translated, “whoso [sic] sheddeth man’s blood among men, his blood shall be shed.”⁴³ Translated thus, the passage contains a warning and not a command.⁴⁴ Commentators Jamieson, Fausset, and Brown discount this argument, asserting that, “all the best versions render it [by whom]; and the most eminent scholars consider it as used here to denote the *agent by whom* the blood is shed, the authority to take the life of the murderer is given by God to those, . . . who possess the character of public recognized magistrates.”⁴⁵

The most striking portion of the passage is God’s *reason* for the injunction: man is made in the image of God. The import of that assertion cannot be understated for it lends universality to what might otherwise arguably be considered a localized command for the pre-Mosaic offspring of Noah.⁴⁶ Perhaps one 1920s country preacher stated it best:

“For in the image of God made he man.” Is that reason any less true today than it was

40. *Genesis* 9:5-6

41. See REV. ROBERT JAMIESON *et al.* 1 A COMMENTARY: CRITICAL, EXPERIMENTAL AND PRACTICAL ON THE OLD AND NEW TESTAMENTS 105 (1948) (cross-referencing to *Psalms* 9:12, which states, “For he who avenges blood is mindful of them; he does not forget the cry of the afflicted”).

42. See *id.*

43. See *id.* at 106.

44. See *id.*; see also Symposium, *supra* note 18, at 637 (James Lund, co-director of the Office of Ministry of Peace and Justice, asserting that a “Catholic reading of *Genesis* 9 is different. It’s not a pretext, in our view, to justify capital punishment. But it’s a sad commentary and a reality as a result of human sin.”).

45. Jamieson, *supra* note 41, at 106.

46. See *generally id.* (asserting the universality of the command).

when first uttered? Most assuredly it is not. In other words, is it not just as true now as it ever has been that man is created "in the image of God"? Most assuredly it is. Hence, the very same identical reason which God himself assigned for the law on capital punishment exists today with all the force it had when he first assigned it . . . Hence, according to God's own specific declaration, as long as it is a fact that man is in the divine image, that long will this law on capital punishment be in force.⁴⁷

While it is not man's place to question the wisdom of God's reasons and edicts,⁴⁸ one may wonder why God would choose to protect the sanctity of life by sanctioning the taking of life. This paper is not concerned with analysis of the deterrent effect of the death penalty or with whether it truly serves the common good⁴⁹, concerns which could help explain God's reasons to us, but only with determining what God's edicts and principles are regarding capital punishment, whatever His reasons. It does seem appropriate, however, to offer at least one common, and to this writer, satisfying, rationale for God's choice:

[T]he true mark of civilization is the extent to which a society upholds the rights of its members, especially the right to life. There is only one appropriate penalty for the willful, unprovoked violation of that right. By imposing this penalty on those who dare to break the most basic rule of existence, we affirm the dignity of every other individual.⁵⁰

47. See M.C. KURFEES, *THE LAW OF GOD ON CAPITAL PUNISHMENT* 10 (1927).

48. See *Job* 38:1-3 ("Then the LORD answered Job out of the whirlwind: 'Who is this that darkens counsel by words without knowledge? Gird up your loins like a man, I will question you, and you shall declare to me.'"); *Isaiah* 55:8-9 ("For my thoughts are not your thoughts, neither are your ways my ways, says the LORD. For as the heavens are higher than the earth, so are my ways higher than your ways and my thoughts than your thoughts.").

49. For a concise and balanced discussion of those topics see *THE DEATH PENALTY: OPPOSING VIEWPOINTS* (Carol Wekesser ed., 2nd ed. 1991).

50. Jacob Sullum, *The Death Penalty is Just*, in *THE DEATH PENALTY: OPPOSING VIEWPOINTS*, *supra* note 49, at 57, 60; see also Thomas J. Walsh, *On the Abolition of Man: A Discussion of the Moral and Legal Issues Surrounding the Death Penalty*, 44 *CLEV. ST. L. REV.* 23, 33 (1996) ("However, the one universal truth, which appears in most religious and philosophical doctrines, and which seems to give rise to all discussion surrounding morality and the death penalty, is that human life is to be valued."). Sullum's position is not new. In 1868, John Stuart Mill spoke before the British Parliament in favor of retention of capital punishment. See TOM SORELL, *MORAL THEORY AND CAPITAL PUNISHMENT* 81 (1987). He argued: [T]o deter by suffering from inflicting suffering is not only possible, but the very purpose of penal justice. Does fining a criminal show want of respect for property, or imprisoning him, for personal freedom? Just as unreasonable is it to think that to take the life of a man who has taken that of another is to show want of respect for human life. We show most emphatically our regard for it, by the adoption of the rule that he who violates that right in another forfeits it in himself, and that while no other crime that he can commit deprives him of his right to live, this shall. *Id.* at 91 (quoting Hansard *PARLIAMENTARY DEBATES*, (3d series, 21 April 1868) reprinted in *APPLIED ETHICS* 102 (Singer ed., 1986)).

2. Mosaic Law, "You shall give. . . life for life, eye for eye. . ."51

When mustering biblical support in favor of the death penalty, the general public perhaps most often cites the familiar "eye for an eye" injunction.⁵² When combined with the numerous crimes for which the Mosaic law proscribed death⁵³, it is very clear that at the very least, God endorsed (and indeed proscribed) ancient Israel's provisions for capital punishment. Before addressing in a later section the notion that Christ's message of love and forgiveness superseded the Mosaic commands and laws, it is absolutely pivotal to define the nature of the laws that are allegedly incompatible with Christ's philosophy. Many of those who claim incompatibility of the Old and New Testaments and the laws contained therein and, therefore, the superiority of the New, forget that Jesus Christ was and is "the image of the invisible God,"⁵⁴ the same God who delivered the law through Moses to the Israelites.⁵⁵ The alleged incompatibility arises from the belief that the Mosaic law promoted retribution and vengeance, attitudes unequivocally prohibited by Christ's Sermon on the Mount:

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 one who is evil. But if any one strikes you on the right cheek, turn to him the other also; and if any one would sue you and take your coat, let him have your cloak as well

You have heard that it was said, "You shall love your neighbor and hate your enemy." But I say to you, Love your enemies and pray for those who persecute you, so that you may be sons of your Father who is in heaven⁵⁶

So that you may be sons of *who*? Jesus? No. Love your enemies so that you may be sons of your *Father who is in heaven*. So that you may please Him who gave you the law in the first place. The religious leaders of Jesus' day had perverted God's law in a way contrary to the Old Testament itself. Not only did Mosaic law contain no allowance for hatred of one's enemy, but its provisions to love one's neighbor⁵⁷

51. *Exodus* 21:23.

52. See Donald L. Beschle, *What's Guilt (or Deterrence) Got to Do with It? : The Death Penalty, Ritual, and Mimetic Violence*, 38 WM. & MARY L. REV. 487, 507-08 (1997).

53. See, e.g., *Exodus* 22:20 (idolatry); *Deuteronomy* 13:1-5 (false prophecy); *Leviticus* 24:13 (blasphemy); *Numbers* 35:32 (accepting payment for the life of a homicide guilty by capital offense); *Numbers* 15:32-36 (breaking the Sabbath); *Exodus* 22:18 (witchcraft); *Deuteronomy* 21:18-21 (incorrigible child); *Deuteronomy* 22:25-26 (rape); *Deuteronomy* 22:23-24 (sexual intercourse between an engaged woman and a man other than her fiancé); *Leviticus* 20:10-11 (adultery); *Exodus* 22:19 (bestiality); *Leviticus* 20:11-20, 30 (incest).

54. *Colossians* 1:15a.

55. See *Exodus* 21:1.

56. *Matthew* 5:38-45.

57. See, e.g., *Leviticus* 19:17-18.

should have been interpreted in just the manner that Christ, in His parable of the Good Samaritan, told them it should.⁵⁸

Thus, Jesus corrected not the law, but the Pharisees' interpretation of the law. Aquinas, referring to Augustine, noted that "those precepts of Our Lord are not contrary to the precepts of the Old Law With regard to the hatred of one's enemies, [Christ] dispelled the false interpretation of the Pharisees"⁵⁹ In believing that "an eye for an eye" sanctioned personal vengeance, the Jews' fundamental flaw in interpretation was that they mistook a *civil* principle for a *moral* one.⁶⁰ At its core, the law was given to aid the magistrate in determining just punishments.⁶¹ Interestingly, one Christian critic of the death penalty used this fact to argue that the Old Testament, while certainly not opposed to capital punishment, does not require it.⁶² The critic argued that the Law of Talion (an eye for an eye) was necessary in a lawless society to control vengeful tendencies.⁶³ "Far from advocating revenge," she argued, "the Law of the Talion was a first step in limiting [vengeful] impulse[s]."⁶⁴

More accurately perhaps, the Law of the Talion was a more formal step in Israel's history of curbing personal vengeance. Predating the Mosaic penal code, many ancient societies in the early stages of development, including Israel, practiced "blood revenge."⁶⁵ This practice allowed the nearest of kin to the murder victim to serve as the "avenger of blood," killing the murderer.⁶⁶ While at first blush this practice appears to be a form of personal vengeance, it was not. The practice existed where a civil authority was not in place to enact punishment.⁶⁷ Such practice operated to prevent tribal warfare and family feuds by dictating that "retaliation was not to extend beyond the offender."⁶⁸ The Old Testament Scriptures emphasize the principle that "the fathers shall not be put to death for the children, nor shall the

58. See *Luke* 10:25-37; see also *Proverbs* 20:22 ("Do not say, 'I will repay evil for evil'; wait for the LORD and he will help you."); *Proverbs* 24:17 ("Do not rejoice when your enemy falls, and let not your heart be glad when he stumbles . . ."); *Proverbs* 24:29 ("Do not say, 'I will do to him as he has done to me; I will repay the man back for what he has done.'").

59. THOMAS ACQUINAS, 8 THE SUMMA THEOLOGICA at Q. 107, Art. 2, at 298 (Fathers of the English Dominican Province trans., Burns Oates & Washbourne 3d ed. 1942).

60. See Jamieson, *supra* note 41 at 366; see also Symposium, *supra* note 18, at 637 (Richard Land, president-treasurer of the Southern Baptist Convention's Christian Life Commission, asserting that, "[I]n classical Protestant theology, [the] distinction [between vengeance and retribution] has always been maintained.").

61. See *id.*

62. See Kostielney, *supra* note 12, at 969-70.

63. See *id.* at 969.

64. *Id.*

65. See MERRILL F. UNGER, UNGER'S BIBLE DICTIONARY 149 (1969).

66. See *id.*

67. See *id.*

68. See *id.*

children be put to death for the fathers; every man shall be put to death for his own sin.”⁶⁹ The reasoning behind this principle was not to encourage personal vengeance but to ensure that murder did not turn into a blood feud.⁷⁰ Regardless of when this practice was supplanted completely with a formal civil system, it is clear that Judaic law and custom placed restrictions on personal vengeance.⁷¹ The fact that during the early history of Israel a family member of the victim executed the murderer, rather than an executioner hired by the state, does not detract from the fundamental principles inherent in the Old Testament that personal vengeance must never go unchecked.⁷²

Understanding that the Old Testament scriptures endorsed blood vengeance and the principle of “an eye for an eye” only as civil rather than moral principles, makes it clear that any straw man arguments that Christian principles of love and forgiveness of one’s neighbor *necessarily* supplant Old Testament principles of personal retribution and vengeance must fail.

B. The Scriptural Objections

1. Exodus 20:13 “You shall not kill.”

“Hey, wait a minute,” some students of the Ten Commandments might object,

69. *Deuteronomy* 24:16; *see also* *2 Kings* 14:6; *see also* *2 Chronicles* 25:4.

70. *See* *DICTIONARY OF THE BIBLE* 80 (James Hastings, ed.) (Frederick Grant & H.H. Rowley, eds. rev. ed. 1963). It is uncertain for how long this practice continued in Israel, but remnants existed after the giving of the Mosaic Law. *See* *UNGER’S BIBLE DICTIONARY* 149 (1969). The most notable allusion to this practice is in the account of the brief civil war between King David and his son Absalom. *See generally* *2 Samuel* 13:15 - 18:33 (recounting the story of the rebellion between David and Absalom). In this story, the King’s son, Absalom, murdered his half-brother who had raped Tamar, Absalom’s sister. *See id.* Absalom fled from his father the king, knowing that his offense, though perhaps understandable, deserved punishment. Joab, one of the King’s most trusted subjects, sent a woman to persuade David to allow Absalom to return to the land, unpunished. *See id.* Basically, the woman entreated David to forego the practice of blood vengeance, telling him a sad, albeit fictional, story of her son’s killing of her other son. *See id.* She plead for mercy for the murdering son, telling the King that her family sought to kill him, entreating him, “let the king invoke the Lord his God, that the avenger of blood slay no more, and my son be not destroyed.” *2 Samuel* 14:11. After the King granted her request, the woman likened Absalom to her own son and so convinced David to ignore the custom of blood vengeance and the Mosaic Law. *See 2 Samuel* 13:15-18:33. One commentator characterized David’s decision as more despotic than like a constitutional king of Israel, stating that “the feelings of a father triumphed over the duty of the king, who, as the supreme magistrate, was bound to execute impartial justice on every murderer.” Jamieson, *supra* note 41, at vol. 2, p. 250. Sadly, Absalom exploited the King’s kindness. This ultimately led to an insurrection against David, and Absalom attempted to proclaim himself king. *See 2 Samuel* 13:15-18:33. The story implies that, at least until the time of David, blood vengeance may have actually been used as a means of enforcing civil justice. *2 Chronicles* 19:10 indicates that during the reign of King Jehoshaphat the practice of the avenger of blood was permanently replaced with a court at Jerusalem to hear cases “concerning bloodshed, law or commandment, statutes or ordinances.” *See* *UNGER, supra* note 65, at 149.

71. *See supra* notes 63-66 and accompanying text.

72. *See id.*

"how can you say that the Bible supports the death penalty when it says 'don't kill'?" The aforementioned country preacher answers this excellently:

The claim sometimes made that capital punishment for murder is forbidden by the sixth commandment of the decalogue, which says 'Thou shalt not kill,' is easily met by the fact that such a claim makes God squarely contradict himself. Assuredly he would not give specific directions in a number of places in his word to put men to death for certain crimes, and then in the decalogue, forbid it to be done.⁷³

Commentators support his reasoning and offer solid textual support for the claim that God has not given inconsistent commandments. There are at least seven words used in the Hebrew Bible that all, in some sense, mean to kill.⁷⁴ The Hebrew verb translated as kill in the sixth commandment means to "slay with premeditation and malice."⁷⁵ To interpret the word to exclude all kinds of killing would not only invalidate capital punishment, but also slaughter of an enemy in defensive war, an action clearly accepted by God in the Old Testament Scriptures.⁷⁶ Interpreting the sixth commandment to forbid one form of killing, but not necessarily all kinds, is also consistent with the basic principle implicit in later Mosaic passages which proscribe different punishments for different types of killing.⁷⁷ For example, just one chapter after the decalogue, in *Exodus 21:12-13*, the law differentiates between types of killing:

Whoever strikes a man so that he dies shall be put to death. But if he does not lie in wait for him . . . then I will appoint for you a place to which he may flee. But if a man willfully attacks another to kill him treacherously, you shall take him from my altar, that he may die.

Of course, this selection highlights not only God's differentiation between types of killing, but his schizophrenia if the sixth commandment is interpreted to absolutely forbid all types of killing.⁷⁸

73. Curfews, *supra* note 47, at 16.

74. *See id.*

75. Jamieson, *supra* note 41, at 360.

76. *See id.*

77. *See id.*

78. Aquinas makes another interesting argument reconciling the sixth commandment with the rest of the Mosaic law:

The slaying of a man is forbidden in the decalogue, in so far as it bears the character of something undue: for in this sense the precept contains the very essence of justice. Human law cannot make it lawful for a man to be slain unduly. But it is not undue for evil-doers or foes of the common weal to be slain: hence this is not contrary to the precept of the decalogue; and such a killing is no murder as forbidden by that precept, as Augustine observes (*De Lib. Arb.* i. 4.)—In like manner when a man's property is taken from him, if it be due that he should lose

2. Genesis 4:13-15

And Cain said unto the LORD, "My punishment is greater than I can bear. Behold, thou hast driven me out this day from the face of the earth; and from thy face shall I be hidden; and I shall be a fugitive and a vagabond in the earth, and it shall come to pass, that everyone that findeth me shall slay me." And the LORD said unto him, "Therefore whosoever slayeth Cain, vengeance shall be taken on him sevenfold." And the LORD set a mark upon Cain, lest any finding him should kill him.

Cain murdered his brother, Abel.⁷⁹ Rather than receive the death penalty, God gave him a protective mark, lest anyone should try to kill him.⁸⁰ It has been correctly stated that, immediately after the Creation story has established the sacredness of human life, God demonstrates his extreme displeasure towards Cain for disregarding the sanctity of his brother's life.⁸¹ Abolitionists, however, point excitedly to the fact that God does not here require life for life.⁸² Rather than extracting a general principle from the story, one commentator has suggested that this story merely creates an exception to the death penalty for intra-familial murders.⁸³

Constructing a rather odd exception is not necessary to avoid an anti-death penalty interpretation of the story. Rather, it must quite simply be noted that the Cain and Abel incident occurred *before* God instituted formal governing structures and *before* He issued the basic tenet to Noah that whoever sheds man's blood, by man's hand shall his blood be shed.⁸⁴ In fact, the entire story is a marvelous illustration of the fact that God has never endorsed personal vengeance and retribution. First, God himself served as judge. This was necessary because the government was still patriarchal and the case of homicide unprecedented.⁸⁵ Cain's father, Adam, was unlikely to execute true justice on the accused and had no commands to guide him in his decision.⁸⁶ Therefore, God himself had to determine the sentence.

Most interesting are Cain's own words, "everyone that finds me shall slay me."⁸⁷ Implied in this, assert Jamieson, Fausset, and Brown, is that the sentence,

it, this is not theft or robbery as forbidden by the decalogue.

Aquinas, *supra* note 59, at Q. 100, Art. 8, p. 135. In *Summa Contra Gentiles*, Aquinas considers calls resorting to the sixth commandment to argue against the death penalty quite simply "frivolous." See Michael Pakaluk, *Christians Can Morally Support the Death Penalty*, *THE DEATH PENALTY: OPPOSING VIEWPOINTS*, *supra* note 49, at 67, 70.

79. See *Genesis* 4:8.

80. See *Genesis* 4:15.

81. See Kostielney, *supra* note 12 at 968-69.

82. See *id.*

83. See THORSTEN SELLIN, *THE PENALTY OF DEATH* 10 (1980).

84. See *supra* notes 40-49 and accompanying text.

85. See Jamieson, *supra* note 41, at 72.

86. See *id.*

87. *Genesis* 4:16.

“according to the murderer’s own sense of justice, should have been one of death.”⁸⁸ God, however, instead sentenced him to a life of perpetual exile: “Cain would live, it is yielded to him, but only for a curse.”⁸⁹ It has been posited that:

The fact is, that his preservation in the special circumstances, as a monument of the Divine displeasure would, in the early state of mankind, tend to stamp a deeper brand of horror on the crime of murder than the shedding of Cain’s blood would have done; and in the secret remorse of which he must have been the prey, as well as in the consciousness of moral degradation and infamy amongst men, life would be felt often to be an intolerable curse.⁹⁰

There are two main points to be drawn from this. First, in his capacity as judge, God knew the most fitting punishment for Cain at that patriarchal time. Later, when He gave man judicial laws by which to govern themselves, He did not invest the judges with the same discretion that He himself enjoyed. Rather, God offered generally applicable laws with penalties to fit the nature of the crime, not the individual circumstance. Second, in giving Cain a protective mark and promising vengeance upon any man who took Cain’s life, God implicitly condemned personal retribution or vengeance outside of the penal system.⁹¹ God had acted as judge; therefore, only God could issue a sentence. Adam could not avenge the death of his son, even if he wanted to do so. Nor could anybody else except the authority, in this case God, who had the power to sentence him. Turn the other cheek and “vengeance is mine,”⁹² it seems, have very early roots.

The New Testament offers an interesting story to compare with that of God’s judgment upon Cain. In Acts 5, an early believer, Anani’as, sold a piece of property and secretly kept back some of the proceeds from the first Christian community.⁹³ Peter became aware of this and accused Anani’as of lying to God; immediately, Anani’as fell down dead.⁹⁴ Here, then, is another case of God Himself executing judgment apart from the governmental penal system. In this case, however, God does impose the “death penalty,” if one may call it that. As in the Cain story, God’s judgment was designed to send a special message in an unprecedented situation at a crucial period in history. God’s design here of course had its desired effect: “And

88. Jamieson, *supra* note 41, at 72.

89. *Id.* (citing Bishop Hall).

90. *Id.*

91. See Jamieson, *supra* note 41, at 72 (“[A]nyone who should dare to avenge the life of Abel, by taking the life of Cain, would be considered guilty of a more aggravated murder, and condemned to a far severer punishment than that unhappy fratricide.”).

92. *Romans* 12:19.

93. See *Acts* 5:1-2.

94. See *Acts* 5:3-5.

great fear came upon all who heard of it.”⁹⁵ While this passage should not be used to suggest a course of action for human judges, it serves as a counter example to God’s choice not to sentence Cain to death for mankind’s highest good.

C. *The Historical Objection—Jewish Practice*

A very good case can be made that, in practice, the Jews carried out very few executions.⁹⁶ The rabbis, it is asserted, avoided carrying out the Mosaic commandments proscribing death by interpreting them to require numerous procedural safeguards and circumstances.⁹⁷ In fact, the Bible itself required some of these safeguards. *Numbers 35:30*, for example, states that “no person shall be put to death on the testimony of one witness.” This requirement was very difficult to meet because most crimes warranting death were committed in private.⁹⁸ While these arguments and passages may certainly be helpful in analyzing the moral legitimacy of the manner in which executions are handled in modern America, commentators are incorrect when they assert that actual Jewish practice diminishes the moral legitimacy of capital punishment in the abstract. When, in 1954, the Israeli Knesset abolished the death penalty in most cases, it was perhaps mindful of a speech made before it four years earlier in which Zorah Mannhaftig argued that,

it is said in the Torah that man was created in the image of God, and only by command of God can his life be taken away from him. *Our laws are not the command of God* and therefore we have no right to take from a human his life, which is a gift of God.⁹⁹

Once we begin to doubt the authority of the Scriptures, to believe that the laws given to us by God are no longer applicable or never really came from him, then there is of course room for considerations of Jewish practice and rabbinical interpretation. When, however, we are engaged in the pursuit of determining just what God’s law is on the subject, such considerations are extraneous and possibly diverting.

IV. NEW TESTAMENT PASSAGES ALLEGEDLY OPPOSED TO CAPITAL PUNISHMENT ADDRESSED

Jesus was very clear that his teachings were not intended to negate the Old Testament scriptures. In the same Sermon on the Mount in which he enjoined his followers to turn the other cheek rather than seek retribution, he affirmed the Old

95. *Acts 5:5b*.

96. See generally Daniel A. Rudolph, Note, *The Misguided Reliance in American Jurisprudence on Jewish Law to Support the Moral Legitimacy of Capital Punishment*, 33 AM. CRIM. L. REV. 437 (1996) (arguing that capital punishment was almost nonexistent in ancient Israel).

97. See *id.* at 445.

98. See *id.* at 457 (citation omitted).

99. Sellin, *supra* note 83, at 15.

Law. In fact, he prefaced his remarks regarding the correct use and interpretation of the Old Law, thus:

Think not that I have come to abolish the law and the prophets; I have come not to abolish them but to fulfil them. For truly, I say to you, till heaven and earth pass away, not an iota, not a dot, will pass from the law until all is accomplished. Whoever then relaxes one of the least of these commandments and teaches men so, shall be called least in the kingdom of heaven; but he who teaches them and who does them shall be called great in the kingdom of heaven.¹⁰⁰

In addressing whether the Old Law was from God, Aquinas notes that Christ himself affirmed the Old Law in several places.¹⁰¹ While this paper has no intention of discussing dispensationalism (we will leave that to the great theologians), we briefly note that many theologians have concluded that Christ did not relax anything other than the ceremonial proscriptions of the Old Testament law in any way. Aquinas, for example, asserted that even Christ's seemingly lenient view of the requirements of the Sabbath was simply "an interpretation rather than a dispensation."¹⁰² Aquinas further asserted that the New Law of Christ's teachings did not void any part of the Old Law except its ceremonial precepts which were "fulfilled when those things were accomplished which they foreshadowed."¹⁰³ Proceeding upon Aquinas' premise that Christ did not come to do away with the Old Testament laws, let us proceed to examine his teachings that are allegedly contrary to the Old Law.

A. *John 8:1-11*

Early in the morning he came again to the temple; all the people came to him, and he sat down and taught them. The scribes and the Pharisees brought a woman who had been caught in adultery, and placing her in the midst they said to him, "Teacher, this woman has been caught in the act of adultery. Now in the law Moses commanded us to stone such. What do you say about her?" This they said to test him, that they might have some charge to bring against him. Jesus bent down and wrote with his finger on the ground. And as they continued to ask him, he stood up and said to them, "Let him who is without sin among you be the first to throw a stone at her." And once more he bent down and wrote with his finger on the ground. But

100. *Matthew* 5:17-19.

101. See Aquinas, *supra* note 59, at Q. 98, Art. 2, p. 88 (citing *Luke* 24:44; *John* 5:46).

102. See *id.* at Q. 100, Art. 8, p. 136.

103. *Id.* at Q. 107, Art. 2, p. 297.

when they heard it, they went away, one by one, beginning with the eldest, and Jesus was left alone with the woman standing before him. Jesus looked up and said to her, "Woman, where are they? Has no one condemned you?" She said, "No one, Lord." And Jesus said, "neither do I condemn you; go, and sin no more."¹⁰⁴

Critics claiming that the New Testament abolished Mosaic proscriptions of capital punishment almost invariably rely upon the story of the woman caught in adultery to support their argument.¹⁰⁵ Careful analysis of the passage reveals that their reliance is misplaced.

First, as the passage notes, the Pharisees came so that they might trap him. On the one hand, if he told them to release her, he would be advocating ignoring the Mosaic law and the Jews would have an express charge against him. As Martin Luther noted, to challenge the authority of Moses would be "rebellion and interference with the rule of Moses, who was the mouthpiece of God."¹⁰⁶ But if he told them to go ahead and stone her, the Pharisees had two points on which they could condemn him. On the political level, they could have reported him to Pilate, as claiming for himself the power of capital punishment, which the Romans had taken away from the Jews.¹⁰⁷ On this human plane, Jesus the man quite simply, being not a magistrate and not having witnesses before him to examine,¹⁰⁸ did not have the authority to condemn her.¹⁰⁹ During his short time on earth, Jesus was not concerned with establishing an earthly kingdom. Jesus was concerned with a heavenly kingdom and simply chose not to deal with certain matters or assert authority over them. On this point, John Calvin reasoned that those who deduce from Jesus' refusal to condemn the woman that adultery should not be punished by death, "must, on the same reasoning, admit that inheritances should not be divided, since Christ refused to arbitrate between two brothers."¹¹⁰ Christ himself made it very clear that his first mission to earth was limited. In *Luke 4:18-19*, Christ, reading from the book of Isaiah described his mission thus:

The Spirit of the Lord is upon me, because he has anointed me to preach good news to the poor. He has sent me to release the captives and recovering of sight to the blind, to set at liberty those who are oppressed, to proclaim the acceptable year of the Lord.

104. John 8:1-11.

105. See, e.g. Kostielney, *supra* note 12, at 970-71 ("Consistent with so many gospel accounts, Jesus refuses to condemn the woman. He chooses to be merciful and challenges her to 'go, and sin no more.'"); Sellin, *supra* note 83, at 15-16 (relying heavily upon the story of the woman caught in adultery to support his conclusion that, "It seems evident from what we learn about Jesus from the Gospels that he was opposed to the use of capital punishment.").

106. MARTIN LUTHER, 23 LUTHER'S WORKS 310 (Jaroslav Pelikan, ed., 1959).

107. See ADAM CLARKE 5 CLARKE'S COMMENTARY 575 (n.d.).

108. See *Leviticus 17:6* (requiring at least two or three witnesses to stone the adulterers).

109. See CLARKE, *supra* note 107, at 576.

110. JOHN CALVIN, 4 CALVIN'S COMMENTARIES 209 (T.H.L. Parker trans., David W. Torrance & Thomas F. Torrance eds., 1959).

Interestingly, Christ does *not* quote the second half of *Isaiah 61:2*, the verse he read, which continues, "to proclaim the acceptable year of the LORD, *and the day of vengeance of our God.*"¹¹¹ That must presumably come later.

On the theological plane, the Pharisees' question was designed to trap Jesus into backpedaling on his teachings of forgiveness and mercy. Martin Luther explored this point in detail, beginning with Christ's words, "Come unto Me, all who labor and are heavy-laden with sin, and I will give you rest."¹¹² And here indeed, Christ did "give her rest." Yet Jesus' message of forgiveness here was a *spiritual* message, not an object lesson in his alleged distaste for capital punishment. As Luther stressed, Christ highlighted the difference between the earthly kingdoms and his spiritual kingdom. By requiring only he who is without sin to cast the first stone, Christ reduced all men to sinners.¹¹³ But then Christ, in his capacity as spiritual savior of the world, absolved her of her sin.¹¹⁴ Commentator J. Vernon McGee, after recognizing that Jesus was in no way reversing the Mosaic system, reminded his readers that the Jesus who refused to condemn the woman was the

[o]ne who is the son of the virgin, who Himself was under a cloud all of His life, [was] going to the cross to pay the penalty for even the sin of this woman. He did not come into the world to condemn the world. He did not come to judge this woman. He came into the world to be a Savior!¹¹⁵

This of course was and is something that no earthly magistrate could accomplish. At best, a judge may suspend a sentence. That is nothing like absolving sins. To argue that Christ's spiritual act negated preordained temporal acts by men is nonsensical.

Further, some might argue that Jesus' suggestion that only "he who is without sin" may cast stones means that no human being is in the position to judge another or to pronounce sentence upon them. This conclusion contains two major fallacies. First, the Greek word translated "without sin" is only used once in the entire New Testament¹¹⁶ and its precise translation is therefore difficult to determine. The term has generally been translated to mean something along the lines of the same kind of sin, which in this case would be adultery.¹¹⁷ Translated thus, the phrase serves to

111. *Isaiah 61:2* (emphasis added).

112. LUTHER, *supra* note 106, at 310-11 (quoting *Matthew 11:28*).

113. *See id.* at 316.

114. *See id.*

115. VERNON MCGEE, 4 THRU THE BIBLE WITH J. J. VERNON MCGEE 416 (1983).

116. *See* W.E. VINE, THE EXPANDED VINE'S: EXPOSITORY DICTIONARY OF NEW TESTAMENT WORDS (John R. Kohlenberger III ed., 1984) 1046.

117. *See* CLARKE, *supra* note 107, at 576; Jamieson, *supra* note 40, at 400 (asserting that the term does not mean "'sinless altogether,' nor yet 'guiltless of a literal breach of the Seventh Commandment;' but probably, 'He whose conscience acquits him of *any such sin.*'").

highlight the hypocrisy of the woman's accusers.¹¹⁸ Secondly, the conclusion would lead logically to absurd results. John Calvin expressed this beautifully:

[W]hoever accuses another should impose on himself a law of innocence. . . . In this way, however, He seems to be removing justice from the world, so that none will dare to say that he punishes crimes. Is there one single judge who is not conscious of something wrong in himself? . . . So He seems to be driving . . . all judges from their bench.¹¹⁹

If imposing punishment for adultery requires sinlessness, there is no logical reason to make an exception for imposition of fines for parking tickets or community service for littering. To plead thus to a judge in municipal court, however, would be humorous. Calvin resolved the apparent tension between Christ's requirements and the obvious need for a penal system thus:

I reply, this is not an absolute and simple prohibition, in which Christ forbids sinners to do their duty in correcting the sins of others. But by this word, He only reproves hypocrites, who gently flatter themselves and their own vices, but are excessively severe and even savage judges of others. None, then, must let his own sins stop him from correcting the sins of others and even punishing them when necessary, so long as he hates, both in himself and in others, what is to be condemned. . . . In this way we shall wage war on sins without hating men.¹²⁰

Thus, as the commentators make clear, *John* 8:1-11 must be read through spiritual glasses and in its historical context. Deducing from the passage that Christ was against capital punishment, or even that he was commenting upon proper governmental systems in any way, is a critical leap that the text simply does not allow.

B. General Christian Principles of Mercy and Forgiveness

To read the arguments of some Christian abolitionists, one would think that Jesus had spent eternity appalled by his Father's harsh rules for humanity and, when given a chance to break the heavenly confines and come to earth, he immediately began to criticize the cruelty of his co-Trinity-member's edicts. As we have already noted, Jesus did nothing of the sort.¹²¹ Allegations that he did, however, are so prevalent that they require further response.¹²² Granted, one might say, you can pick apart individual passages and concluded that Christ wasn't really talking about civil

118. With charming verbosity, Jamieson, Fausset, and Brown noted that, "a sanctimonious hypocrisy is not unfrequently found among unprincipled professors of religion." Jamieson, *supra* note 41 at 401.

119. CALVIN, *supra* note 109, at 207.

120. *Id.* at 207-08.

121. See *supra* notes 91-94 and accompanying text.

122. See, e.g., Kostielney, *supra* note 12 at 970-71 (asserting that Christ's consistent concern for individuals and his anxiousness to forgive "cannot go unnoticed and must clearly check the impulse toward condemnation that is at the root of capital punishment"); Prejean, *supra* note 15, at 9 (arguing that the death penalty opposes the "heart of what Jesus was about. . . compassion and humanity").

government. But certainly you cannot deny that Christ's overarching message was one of love and grace. True. Nor would one wish to deny the charity of Christ's teachings. To conclude, however, as some have done that Christ's "praise for charity"¹²³ proves his opposition to capital punishment requires faulty premises.

First, even ignoring the Christian belief that Jesus was with the Father since before the foundation of the world,¹²⁴ Christians should recognize that the God of Moses, the great "I am," was also about love and mercy. King David, who knew only the Old Testament scriptures and had never heard the name of Jesus, sang praises to the LORD, declaring, "O give thanks to the LORD, for he is good; for his steadfast love endures forever!"¹²⁵ The New Testament affirms this, that "God is love."¹²⁶ How those who think that Christianity somehow corrected the harshness of God misrepresent his eternal character! And what a great disservice we do to His Word by negating so much of it with a lazy-minded acceptance that God and Jesus may have said two different things. God grant us a heart like David's that cries, "Thou art good and doest good; teach me thy statutes!"¹²⁷ Once we recognize God's unchanging, eternal love and the goodness of His law, it is difficult to see how the fact that Christ preached love negates the commands of the same God of which Christ spoke, "the word which you hear is not mine, but the Father's who sent me."¹²⁸

Second, when considering Christian tenants, one must be careful to differentiate between the temporal and the spiritual. Christian abolitionists, for instance, argue that man's capacity for repentance and Christ's focus upon the one lost "sheep" render capital punishment's "defeatist" principles anti-Christian.¹²⁹ Jesus' focus, however, was upon *souls*; not human lives. When asked about the seeming injustice of a world where the innocent sometimes suffer evil, Jesus responded by giving his questioners another example of a bad thing happening to good people: "[Consider] those eighteen upon whom the tower in Siloam fell and killed them, do you think that they were worse offenders than all the others who dwelt in Jerusalem? I tell you, No; but unless you repent you will all likewise perish."¹³⁰ Jesus did not think it was necessary to even address the problem of suffering in our earthly bodies, but rather stressed the importance of personal repentance. Similarly, Christ, upon the cross between two thieves, said nothing about their physical death, but instead

123. SORELL, *supra* note 50, at 57-58.

124. *See John* 1:1-14.

125. *Psalms* 106:1.

126. *1 John* 4:8.

127. *Psalms* 119:68. The entire 119th Psalm is a wonderful reminder of the excellence of God's law.

128. *John* 14:24.

129. *See SORELL, supra* note 50, at 124; *see Kostielney, supra* note 12, at 971.

130. *Luke* 13:4-5.

focused upon their spiritual renewal in paradise.¹³¹ Because a man's physical death is necessary for his spiritual life in eternity,¹³² acknowledging that some individuals must die for their earthly crimes is not, in the grand spiritual scheme with which Christ is concerned, defeatist at all. It should be the fervent prayer of Christians that every person on death row will come to a saving knowledge of Christ as savior and turn from their sins in repentance. Just as God himself desires that every man be saved,¹³³ so too should we. The question simply becomes "saved from what?": physical death, or an eternity outside the presence of God. Christ's concern is clearly the latter.

The contention that Christ's command to be forgiving counsels against capital punishment, carried to its logical conclusion, would result in complete abolition of the penal system. Martin Luther King Jr. claimed that "Capital punishment is society's final statement that we will not forgive."¹³⁴ The obvious question is whether fines for drunk driving, or life imprisonment for multiple rapes, or any other penal sanction is also a statement of refusal to forgive. Yet abolitionists of the death penalty do not assert that that is the case. The following section addresses Paul's instructions in *Romans* to submit to governing authorities. Whether or not one concludes that the section endorses capital punishment, one must admit that it does sanction at least some government, as does Christ himself.¹³⁵ Recognizing that one of the major functions of government is to enforce penal laws, it is difficult to imagine that Christ and Paul were wholly opposed to the penal system.¹³⁶

131. See 23:40-43.

132. See 1 *Corinthians* 15:42-50.

133. See 1 *Timothy* 2:3-4.

134. See John Dear, *Christians Cannot Morally Support the Death Penalty*, in 79.

135. See *Matthew* 22:15-22.

136. Finally, one rather obscure argument in favor of abolition relies upon Jesus' parable in *Matthew* 13 of the wheat and the weeds. See *Matthew* 13:24-32. The argument runs that, because Jesus forbade the uprooting of weeds (the wicked), "lest in gathering the weeds you root up the wheat along with them," in *Matthew* 13:29, capital punishment is forbidden. See Calvert, *supra* note 19, at 268. Aquinas responded to this objection by stating that the parable only forbids killing the wicked when they "cannot be slain without the good being killed with them." Aquinas, *supra* note 59, vol. 10, at 198. While Aquinas' argument is perhaps satisfying if the passage is referring to civil punishment in any way, a more obvious answer to the abolitionist contention is simply that Jesus is talking about a spiritual truth, not an earthly edict. This parable appears in a series of parables discussing the nature of the kingdom of God. Whether the weeds in the field represent false doctrine or human beings, the final verse of the passage makes it almost impossible to interpret the parable as having any bearing at all upon the issue of capital punishment. Jesus stated, "Let both grow together until the harvest; and at harvest time I will tell the reapers, Gather the weeds first and bind them in bundles to be burned, but gather the wheat into my barn." *Matthew* 13:30. Anyone who attempts to make that verse fit into a discourse on capital punishment, at the very best sounds ridiculous and at the very worst sounds cruel. Highlighted therein are the fallacies inherent in converting spiritual teachings into edicts for earthly government.

V. NEW TESTAMENT SUPPORT FOR CAPITAL PUNISHMENT

A. *Romans 13:1-4*

Let every person be subject to the governing authorities. For there is no authority except from God, and those that exist have been instituted by God. Therefore he who resists the authorities resists what God has appointed, and those who resist will incur judgment. For rulers are not a terror to good conduct, but to bad. Would you have no fear of him who is in authority? Then do what is good, and you will receive his approval, for he is God's servant for your good. But if you do wrong, be afraid, for he does not bear the sword in vain; he is the servant of God to execute his wrath on the wrongdoer.

This passage clearly supports civil government as ordained by God. Proponents of capital punishment also assert that "the sword" legitimizes the death penalty. Commentator Adam Clarke supports this conclusion, stating that the magistrate's power is "delegated to him for the defense and encouragement of the good, and the punishment of the wicked; and he has authority to punish capitally, when the law so requires; this the term sword leads us to infer."¹³⁷ Calvin reached the same conclusion, stating that, "Paul explicitly declares that magistrates are armed with the sword not just for empty show, but in order to smite evil doers."¹³⁸ Calvin further noted that:

If by arming the magistrate the Lord has also committed to him the use of the sword, then whenever he punishes the guilty by death, he is obeying God's commands by exercising His vengeance. Those, therefore, who consider that it is wrong to shed the blood of the guilty are contending against God.¹³⁹

Not all commentators, however, agree that the word "sword" is a direct reference to capital punishment. Christian abolitionist Sister Monica Kostielney, after conceding that even Catholic theologian Thomas Aquinas used the passage to justify capital punishment, noted that the Jerome Biblical Commentary defines the sword as "a symbol of penal authority, of the power legitimately possessed by the state to coerce recalcitrant citizens in an effort to maintain order."¹⁴⁰ If one accepts that all scripture is inspired by God (and it would be silly to concern ourselves with what

137. CLARKE, *supra* note 107, vol. 6, at 146.

138. CALVIN, *supra* note 110, vol. 8, at 282-83.

139. *Id.* at 283.

140. Kostielney, *supra* note 12, at 973 (citation omitted).

one Saul of Tarsus had to say about the death penalty and civil government if we do not), one must wonder at the inspired usage of the word “sword.” Surely, if God wished to condemn capital punishment, which would require revocation of his earlier laws, He would not only do so expressly, which we find nowhere in scripture, but He would certainly not allow a phrase to stand that evokes such strong images of civil authority to wield the sword. God is not a God of confusion.¹⁴¹ This argument is particularly persuasive because it is one of the only places in the New Testament specifically speaking of civil government. If God intended to alter his penal law, it seems very strange that in one of the few places where He mentions governmental authority, He says nothing of the change and use language indicating endorsement of physical punishment.

B. Christ’s Death for Our Sins

The “Jerusalem Way,” Christ’s long, tortured walk to the cross on which he was to die, is the world’s most abhorred walk down “death row.” In fact, Christ’s entire life on earth was a kind of death row experience, for he came knowing he was to be executed at the hands of sinners.¹⁴² Yet Christ did not condemn his accusers, nor did he shrink from the cross; rather, the Son of God “humbled himself and became obedient unto death, even death on a cross.”¹⁴³ Christ’s sacrifice, however, was just that: a sacrifice. It was not merely an unfortunate miscarriage of justice, not an example of an imperfect penal system executing an innocent. Christ’s death was the execution of God’s plan for the redemption of mankind, a plan preordained before the foundations of the world.¹⁴⁴ Christ’s death was necessary to “secur[e] an eternal redemption,” and it is “through the blood of Christ, who through the eternal Spirit offered himself without blemish to God,” that we may be purified to “serve the living God.”¹⁴⁵ The fact that Christ’s blood was required to save us from the law of sin and death and give us eternal life, presupposes, according to Aquinas, “that death is a fitting punishment for those who are guilty.”¹⁴⁶ God’s perfect justice demanded the sacrifice of Christ. God’s perfect love offered it. God’s justice did not allow Him to merely forgive our sins and usher us into His presence despite our sin-stained natures. Justice demands something more, the mercy of Christ notwithstanding. Hence the cross. While it feels presumptuous to reduce such an awesome spiritual truth to a workable worldly principle, we might draw from it the idea that Christian ideals of love and mercy in no way relax the demands of justice. God did not erase the spiritual death penalty from his volume of eternal laws. Instead, God, as judge, took off his judge’s robe and donned the tunic of a carpenter to pay the penalty He Himself demanded. *That* was true “Christ-like” love and mercy.

141. *1 Corinthians* 14:33 (“For God is not a God of confusion but of peace.”).

142. See *Revelation* 13:8 (speaking of the Lamb slain from the foundation of the world).

143. *Philippians* 2:8.

144. See *Revelation* 13:8.

145. *Hebrews* 9:12, 14.

146. See Pakaluk, *supra* note 78, at 69.

VI. CONCLUSION

From our examination of Old Testament texts, one finds consistent support for the principle of "life for life," when the sentence is imposed not by personal vengeance but according to biblical proscriptions. The Mosaic law could not be much more clear. Thus, when we turn our focus to the New Testament and the teachings of Jesus, the burden of proof is upon those who assert that the principles of the Old Law requiring capital punishment for certain crimes are no longer in effect. Analysis of the few Scriptures used by Christian abolitionists to support their contention that Christian principles of forgiveness and mercy should replace reliance upon the civil laws ordained by God reveals that their reliance is misplaced.

The spiritual principles expressed by Christ in those passages do not address civil government and in no way suggest that Christ came to relax the Old Law. Not only did Christ himself specifically say that he did not come to abolish the Old Law, but his very death reveals the great extent of God's mercy to satisfy the demands of God's perfect justice. Paul's treatment of obedience to one's earthly authorities and his affirmance of the power of the magistrate's sword ostensibly supports capital punishment and certainly does nothing to suggest that Christ's coming condemned it in some way. While this does not necessarily demand that the death penalty be implemented today with renewed enthusiasm, it does show that Christian abolitionists have failed to meet their burden of proof in claiming God's disapproval of capital punishment. Not only *may* Christians support capital punishment while remaining true to Christ's high calling to love and mercy, the Bible perhaps suggests that they *must*.

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