

INTRODUCTION

As of the end of 2018, thirty-four states and the federal government authorized the use of capital punishment for certain types of murder (e.g., first-degree murder), and in the case of the federal government, also for treason.¹ In 2018, there were 2,628 prisoners on death row, and 25 total executions.² There can be little doubt that innocent people have been executed, even if it is difficult to determine how many. The Innocence Project, an organization that uses DNA evidence to exonerate prisoners, reports that since 1989 there have been 375 prisoners exonerated through DNA evidence, 21 of whom were on death row.³ A statistical study sponsored by the National Academy of Sciences estimates that at least 4.1% of those on death row were falsely convicted.⁴ Thus, answering the question of whether the death penalty is morally acceptable, and if so, under what safeguards, is imperative. Both those advocating for capital punishment, and those against it, claim support from the Bible. The position argued here is that the Bible unequivocally permits capital punishment for certain crimes, but any conviction where the accused does not have the benefit of effective assistance of counsel, as required by the Sixth Amendment to the United States Constitution, is unlawful. Any execution based on an unlawful conviction is murder.

SUPPORT FOR CAPITAL PUNISHMENT

Christians that support capital punishment often appeal to the Mosaic Law, under which a

¹ United States Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Capital Punishment, 2018 – Statistical Tables*, by Tracy L. Snell, NCJ 254786, September 2020.

² *Ibid.*

³ “DNA Exonerations in the United States,” The Innocence Project, accessed April 24, 2021, <https://innocenceproject.org/dna-exonerations-in-the-united-states/>.

⁴ Samuel R. Gross, Barbara O’Brien, Chen Hu, and Edward H. Kennedy, “Rate of false conviction of criminal defendants who are sentenced to death,” *Proceedings of the National Academy of Sciences* 111, no. 20 (May 2014): 7230.

number of infractions were capital offenses, including striking or cursing a parent or breaking the sabbath.⁵ An obvious response is that the Mosaic Law never applied to any nation except Israel and no longer applies as a covenant to Christians today.⁶ But to some degree that objection misses the point. If capital punishment were immoral—if it were sinful—then God would never have imposed it. That God included capital punishment within the Law is a relevant data point, but because few would argue that the same offenses should be capital offenses today in the United States, we need to explore whether there is Biblical support outside of the Mosaic Law.

The three most relevant passages that are not part of the Mosaic Law are Genesis 9:5-6, Romans 13:1-7, and 1 Peter 2:13-15.⁷ We read in Genesis 9:6 (KJV): “Whoso sheddeth man’s blood, by man shall his blood be shed: for in the image of God made he man.” Barrett Duke correctly concludes that this verse is a clear mandate for capital punishment:

Though some have opposed capital punishment for ideological and practical reasons, it is important to note that God mandated its use. This divine mandate occurs first immediately after the Noahic flood. God instructed Noah and his sons, “Whoever sheds man’s blood, by man his blood shall be shed” (Gen. 9:6 NASB). Human beings are created in the image of God (Gen. 9:6), and thus all human life is sacred, justifying a penalty as severe as death for murder.⁸

We read in Romans 13:4 (NET) that human government “is God’s servant for your well-being. But be afraid if you do wrong because government does not bear the sword for nothing. It is God’s servant to administer punishment on the person who does wrong.” As Duke explains, “since the *machaira* (sword) typically describes an instrument of death in the NT, and certainly in Romans

⁵ J. K. Grider and G. L. Knapp, “Punish,” ed. Geoffrey W. Bromiley, *The International Standard Bible Encyclopedia, Revised* (Wm. B. Eerdmans, 1979–1988), 1052–1053.

⁶ Wayne Grudem, *Christian Ethics: An Introduction to Biblical Moral Reasoning* (Wheaton, IL: Crossway, 2018), 346-347.

⁷ *Ibid.*, 506-509.

⁸ Barrett Jr. Duke, “Capital Punishment,” ed. Chad Brand et al., *Holman Illustrated Bible Dictionary* (Nashville, TN: Holman Bible Publishers, 2003), 265.

(cf. Rom. 8:35–36), it is evident that the state’s authority to administer justice includes capital punishment.”⁹ Finally, Peter wrote that human government is ordained by God “to punish wrongdoers.”¹⁰ As Grudem explains, “[t]he expression translated ‘to punish’ in verse 14...includes the same word that Paul uses for ‘vengeance’ that belongs to God (Rom. 12:19)” and thus human government has the role of imposing “retribution for wrongdoing.”¹¹ As Holmes asserts, based on the Law and Romans 13, “[w]e cannot argue biblically against all capital punishment *on principle*.”¹²

Death penalty advocates further argue the following public policy grounds for their position: (1) “capital punishment expresses an appropriate demand for justice”; (2) deterrence against future crimes; (3) it is less costly to execute a criminal than provide for a life sentence; and (4) there is nothing cruel or disproportionate about the death penalty.¹³ While these may be legitimate policy reasons, they are irrelevant to the ethical question. As Nelson and Anderson caution, “A Christian’s belief about capital punishment should be based on what the Bible teaches, not on a pragmatic assessment of whether capital punishment works.”¹⁴

OPPOSITION TO CAPITAL PUNISHMENT

Christians against capital punishment offer several objections. First, they respond to the three key proof texts for capital punishment. Regarding Genesis 9:5-6, they argue that the passage

⁹ Barrett Jr. Duke, 265.

¹⁰ 1 Pet. 2:14 (NET).

¹¹ Wayne Grudem, *Christian Ethics*, 509.

¹² Arthur F. Holmes, *Ethics: Approaching Moral Decisions*, ed. C. Stephen Evans, Second Edition., Contours of Christian Philosophy (Downers Grove, IL: IVP Academic, 2007), 101.

¹³ Scott B. Rae, *Moral Choices: An Introduction To Ethics*, Third Edition. (Grand Rapids, MI: Zondervan, 2009), 254–259.

¹⁴ Thomas Nelson and J. Kerby Anderson, *Moral Dilemmas* (Nashville: Thomas Nelson, 1997), 94.

is proverbial rather than a command, and thus only warns us against killing lest we be killed.¹⁵ But the passage does not warn that someone else (e.g., the victim’s family) may seek revenge. Instead, God is pictured as the avenger, saying to the murderer, “I will require the life of man.”¹⁶ To passages like 1 Peter 2 and Romans 13, they respond that we should instead follow the commands of Jesus.¹⁷ This argument sacrifices inerrancy in order to prop up an objection to the death penalty. If they are correct, then we should cast away nearly all of the Bible.

In addition, Christians against capital punishment rely on Exodus 20:13, Matthew 5:38-39, 22:39, 26:52, and John 8:2-11.¹⁸ The prohibition against murder in Exodus 20:13, however, “refers to the unlawful taking of a human life, not to all taking of human life.”¹⁹ If this objection were sound, God would not elsewhere in the Mosaic Law dictate the death penalty for various violations of it. Jesus’ teaching in Matthew 5:38-39 addresses individual retaliation, much like Romans 12:19, and not government action.²⁰ Reliance on Matthew 22:39 (“You shall love your neighbor as yourself”) as a prohibition on the death penalty is also misplaced because Jesus based his teaching directly on Leviticus 19:18, yet other passages in Leviticus impose the death penalty (e.g., Leviticus 20:2, 10).²¹ Matthew 26:52 has nothing to do with the death penalty, but instead presents Jesus’ instruction to Peter that he not use force to prevent Jesus’ arrest. Finally, while John 8:2-11 involves a capital offense under the Law—namely adultery—Jesus did not abrogate the death penalty but instead lawfully acquitted the defendant because there were not two witnesses to

¹⁵ Wayne Grudem, *Christian Ethics*, 513.

¹⁶ Gen. 9:5 (KJV).

¹⁷ *Ibid.*, 516.

¹⁸ *Ibid.*, 513-516.

¹⁹ *Ibid.*, 513.

²⁰ *Ibid.*, 514.

²¹ *Ibid.*

support a conviction against her under the Mosaic Law.

Other objections include that (1) the death penalty does not deter crime; (2) innocent people may get executed; (3) government sponsored violence leads to more violence in society; (4) it is unfairly administered as to the poor and minorities; and (5) the death penalty has a history of abuse and cruelty.²² These are largely policy arguments, but we should not dismiss them too lightly. As Scott Rae explains: “The majority of convicted murderers who receive death sentences are minority men, particularly blacks and Hispanics, who come from the lower socioeconomic classes. Rarely do whites or middle- or upper-class individuals receive the death penalty, and even more rarely are women executed.”²³ John and Paul Feinberg reach similar conclusions.²⁴ While Thomas Nelson and Kerby Anderson observe that “much of the evidence for discrimination is circumstantial,” they concede “discrimination does take place...not only on the basis of race but also on the basis of wealth.”²⁵ Advocates of the death penalty may reject the premise that innocent people have been executed in recent history, as Grudem does, and point out that even if innocent people were executed, that is an indictment of the justice system, not the principle of capital punishment.²⁶ However, we must consider whether capital convictions—which indisputably are statistically discriminatory based on race and wealth—are always lawful.

LEGALITY OF CONVICTIONS

John and Paul Feinberg have well stated the overarching principle that should guide any analysis of capital punishment: “We begin by reaffirming that justice is the issue at stake in capital

²² Ibid., 518.

²³ Scott B. Rae, *Moral Choices*, 263–264.

²⁴ John S. Feinberg and Paul D. Feinberg, *Ethics for a Brave New World* (Wheaton, IL: Crossway Books, 1993), 132.

²⁵ Thomas Nelson and J. Kerby Anderson, *Moral Dilemmas*, 95.

²⁶ Wayne Grudem, *Christian Ethics*, 520.

punishment.”²⁷ Where a prisoner is executed as a result of lawlessness in the trial process, there is no justice. As Supreme Court Justice Sandra Day O’Connor stated in a speech delivered in 2001, “‘serious questions are being raised about whether the death penalty is being fairly administered in this country,’ noting that six death row inmates were exonerated in the year 2000, bringing the total to ninety since 1973.”²⁸ Critically, she added: “If statistics are any indication, the system may well be allowing some innocent defendants to be executed. Perhaps it is time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used.”²⁹ Similarly, Supreme Court Justice Harry Blackmun wrote: “My 24 years of overseeing the imposition of the death penalty from this Court have left me in grave doubt...whether the constitutional requirement of competent legal counsel for capital defendants is being fulfilled.”³⁰

As already pointed out, Exodus 20:13 prohibits “murder”—the unlawful taking of a life. The Sixth Amendment to the United States Constitution mandates that “[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence.” The United States Supreme Court observed over 50 years ago that “[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel.”³¹ This legal mandate, however, was substantially weakened “[i]n *Strickland [v. Washington]*, [when] the [Supreme] Court held that, in order to have his conviction reversed on Sixth Amendment grounds, a defendant

²⁷ John S. Feinberg and Paul D. Feinberg, *Ethics*, 145.

²⁸ Victoria Ashley, “Death Penalty Redux: Justice Sandra Day O’Connor’s Role on the Rehnquist Court and the Future of the Death Penalty in America,” *Baylor Law Review* 54 (Spring 2002): 407-408.

²⁹ *Ibid.*, 408.

³⁰ *McFarland v. Scott*, 512 U.S. 1256, 1264 (1994) (Blackmun, J., dissenting from denial of certiorari).

³¹ *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)

must show that his counsel's performance was not effective, viewed as of the time of counsel's conduct, and that the errors committed were prejudicial to the defendant."³² Because it difficult to impossible to prove that effective assistance of would have changed the outcome of a case, the Sixth Amendment now "require[s] little more than a warm body with a law degree standing next to the defendant."³³ One commentator concludes that "[p]ervasive inadequate representation by counsel has rendered practically meaningless a critical constitutional safeguard of individual liberty....[and] *Strickland v. Washington* has in important ways exacerbated these problems."³⁴

A large part of the problem is the old adage that you get what you pay for. The fee schedules for appointed criminal defense counsel in Texas counties illustrate the problem of extraordinarily low funding.³⁵ Many counties pay \$100 per hour (e.g., Dallas County, Washington County), and some pay less, which based on this author's 20 years of legal experience is about 10 to 30% of the hourly rate one would pay for competent civil counsel in the same courts. A recent study, focused on the appointment of counsel in Harris County, Texas, empirically demonstrates that "when courts appoint private attorneys to represent indigent defendants for a fee, as is done in hundreds of jurisdictions across the United States....[it] create[s] an 'incentive gap' that financially motivates defense attorneys to maximize their caseloads but minimize their efforts."³⁶ The legal bar widely recognizes that indigent criminal defendants charged with capital offenses are

³² Richard Klein, "The Constitutionalization of Ineffective Assistance of Counsel," *Maryland Law Review* 58 (1999): 1445-1446.

³³ *Ibid.*, 1446.

³⁴ Sanjay K. Chhablani, "Chronically Stricken: A Continuing Legacy of Ineffective Assistance of Counsel," *Saint Louis University Public Law Review* 28, no. 2 (2009): 395.

³⁵ Texas Indigent Defense Commission, "Indigent Defense Data for Texas," accessed April 27, 2021, <http://tidc.tamu.edu/public.net/Reports/FeeDocuments.aspx#D>.

³⁶ Neel U. Sukhatme and Jay Jenkins, "Pay to Play? Campaign Finance and the Incentive Gap in the Sixth Amendment's Right to Counsel," *Duke Law Journal* 70 (2021): 775.

frequently deprived of the legally required effective assistance of counsel, and because of *Strickland* there is little recourse to fix it on appeal. The ultimate result is unlawful convictions and tainted executions.

CONCLUSION

A conviction, without the legally required effective assistance of counsel, that results in the imposition of the death penalty, is unconstitutional and unlawful. As a consequence, the resulting execution is murder in violation of Exodus 20:13. As Christians, we should understand the immorality of capital punishment resulting from an unlawful trial. Jesus willingly died to provide a substitutionary atonement, but we recognize that his trial before the Jewish and Roman authorities was unlawful. A Biblical view on murder and justice, and Christ's command to love others, should motivate us to advocate for reform in the United States, and especially in the systems for appointing and paying counsel for indigent defendants, so that when the death penalty is carried out, it is done so lawfully after a trial where the accused was effectively represented so that the needed safeguards are in place to prevent executions of innocent people.

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