

## THE DEATH PENALTY: GOD'S TIMELESS STANDARD FOR THE NATIONS?

BRUCE W. BALLARD\*

How dare those who subscribe to the Bible attempt to force their morality on others! How often we hear this confused and tired saw. Yet there are ample reasons, both from Scripture and historical example, not to try to legislate every element of Biblical religion. As I know of none that deny this, it will not be argued here. On the other hand, it is quite clear in both OT and NT that God will judge every individual and nation. Those falling too far short of God's requirement may see their earthly lives brought to a sudden end either directly through supernatural means or through divinely mandated human agents. The goal here will be to determine how far the mandate extends to human agents today. While the question of the mandate is a perennial one for those subscribing to Biblical teaching, contemporary American social problems highlight the question for us in a distinctive way. But three initial qualifications are necessary.

First, while it is true that sin can attract divinely ordained corporeal death, the converse statement, that those who meet an early death must have been particularly wicked, is rejected in Scripture. Exemplars of faith (e.g. OT prophets, John the Baptist, Jesus, Stephen) and Christ's explicit teaching (Luke 13:1–5) show this. Second, the fact that divinely ordained capital punishment came upon those who committed certain offenses described below does not imply that other sins cannot attract such direct judgment (cf. Acts 5:1–10 on deceitful contribution, 1 Cor 11:27–30 on abuse of communion). Third, we cannot conclude that God will not forbear to directly destroy, in this life, those who commit the offenses that brought judgment in the cases discussed below.

In summary, then, the Biblically-informed argument here will be that: (a) there is a transhistorical transcultural standard of right to which God holds every individual and people; (b) sufficient violation of that standard merits the penalty of corporeal death; and, consequently, (c) the death penalty against such violation remains valid in contemporary societies. I will also sketch something of the nature of the standard as understood in Scripture, particularly from the OT. The topic is clearly of more than academic import. If the argument holds, then those who subscribe to the Bible ought to, in addition to evangelization and other works of charity and justice, pray and work that the standard may hold sway in their societies. To uphold the standard is to meet important requirements of divine justice and to help

\* Bruce W. Ballard is associate professor in the law, philosophy, and rhetoric department at Stephens College, Columbia, MO 65215.

forestall divine judgment upon a society. In some cases, this could involve pressing for particular legislation. Other, indirect benefits of promoting the standard will be discussed in the conclusion. The related question, whether or under what conditions one contemporary nation ought to destroy another based on the other's failure with respect to the standard, will not be taken up here.

In Biblical accounts, the death penalty is sometimes carried out directly by God and/or angels, as with the flood or the destruction of Sodom and Gomorrah. At other times, death is a penalty to be carried out by divinely appointed human agents such as Israel, or, as the OT occasionally reports, other nations. In Genesis we learn that every people has a divine mandate to carry out capital punishment for at least one particular crime.

What are the divine standards incumbent upon all humans, violations of which draw the death penalty? In the OT we learn about this matter through specific commandments to humanity as a whole and to Israel, through prophetic oracles, and through narratives of destruction with their accompanying explanations. Naturally we cannot treat every relevant passage here. The NT has a lot to say about the ultimate death penalty, damnation, less upon the topic at hand. The Gospels record little on the topic from Jesus, and some of what we have has been taken both to support and to undermine the death penalty. The book of Revelation does provide a list of sins attracting divine punishment, including corporeal death, as part of its prophetic oracle concerning the end times. And Paul supplies an important list of offenses in Romans 1 for which all are accountable through divinely imprinted natural law knowledge and which are "worthy of death."

#### I. PRE-MOSAIC DEATH PENALTY

To the complaint that the Law of Moses, and therefore the death penalty, pertained only to Israel, one might begin by pointing to pre-Mosaic teaching. Before the flood, we learn in Gen 6:11 that God will put humanity to death for its corruption and violence. In Gen 9:5–6, Noah and his family are told: "Surely I will require your lifeblood; from every beast I will require it. And from every man, from every man's brother I will require the life of man. Whoever sheds man's blood, by man his blood shall be shed, for in the image of God He made man" (NASB, here and throughout). Noah and his kin are addressed as representatives of all humanity, as can be seen by the use of the generic term "man" and by the reiterated command to be fruitful and multiply (v. 7). The rationale, "for in the image of God He made man," is a timeless one. It makes murder a kind of attack on God. The idea that the Noachic covenant was meant for the whole world throughout earthly time is also the traditional Jewish view.<sup>1</sup> Whereas God had been the agent of the death penalty in the

<sup>1</sup> Moshe Greenberg, *Studies in the Bible and Jewish Thought* (Philadelphia: Jewish Publication Society, 1995) 371. Here Greenberg also describes how much Jewish thought makes of the Noachic covenant. Noachic Laws are expounded in the Book of Jubilees and in the Talmud (where 7 such laws are listed). "Noachites" (Gentiles) are responsible before God to keep these commandments and can attain to the resurrection of the righteous if they do so, without having to convert to Judaism.

flood, this office is now explicitly extended to humans in relation to the crime of murder. The explicit extension of this mandate in the Noahic covenant might explain why Cain was not previously to be killed by other people for committing murder (Gen 4:15).

The ancient rabbis warned that one should not attempt to draw law (*halakha*) from narrative (*haggadah*). And this is a perilous business. On the other hand, Biblical narratives sometimes include an explicit rationale or can be interpreted by the use of explicit laws. Such is the case with the destruction of Sodom and Gomorrah. Though there have been attempts in recent years, usually tendentious and often tortured, to avoid at least one implication of this destruction, the Bible is clear enough about it. In Gen 18:20 we learn that the sin of Sodom and Gomorrah is exceedingly grave. What was that sin? Here, as elsewhere in the OT, societies that attract divine destruction tend to be rife with various sins. As early as Abraham, for example, God says that Israel will not take the land until the sin of the Amorites is “made complete” (Gen 15:16).

The sins of Sodom are enumerated in Ezek 16:49–50. There we learn that the citizens of Sodom were rich, arrogant, did nothing to help the poor and needy, and committed “abominations.” In Isa 3:9, the flagrancy of Sodom’s sin is noted. Jude 7 tells us that Sodom and Gomorrah had committed “gross immorality” in their sexual pursuits. Later Mosaic law (Lev 18:22) confirms that the homosexual act is an “abomination” and, in Lev 20:13, is listed as a capital crime. The attempted violence by the offenders at Sodom (Gen 19:9) is already implicitly condemned in the rationale for the flood judgment, and many times thereafter. When we come to look at the specific crimes meriting the death penalty in Mosaic Law, it will be clear that the judgment of Sodom and Gomorrah is actually overdetermined.

## II. MOSAIC DEATH PENALTY

How Christians should appropriate elements of the Law of Moses has been one of the most vexed questions in the history of Biblical interpretation. A traditional answer has begun by excluding the ceremonial law, since Christ has fulfilled what were essentially anticipatory practices. The civil Law of Moses is also often dropped, but for reasons that are more controversial. The moral law is taken to have enduring validity, either as exemplified in the specific commands and/or in the wider principles interpreters take to underlie them (e.g. commands to love God and neighbor, the Decalogue). Even if one adopts this threefold division (and there are alternative schemes), determining how certain laws ought to be categorized is notoriously difficult. The categories seem to overlap at times or require supplementing with additional categories. But the question here is not what elements of the law bind those who subscribe to the Bible, but which are binding upon all people. Interestingly, we can learn about this matter in the Mosaic Law itself.

Let us begin with two crucial passages that relate the requirement of the Mosaic Law to the wider world. Following a list of commands, largely concerning sexual sins, Lev 18:24–25 continues: “Do not defile yourselves [Israel]

by any of these things; for by all these the nations which I am casting out before you have become defiled. For the land has become defiled, therefore I have brought its punishment upon it, so the land has spewed out its inhabitants." What was the punishment God brought upon the pre-Israelite inhabitants of the land? They were to be utterly destroyed (cf. Exod 23:23; Deut 7:1–2; 9:3; 20:16–17; 31:3). Immediately following a similar list of sins and their penalties, Lev 20:22–23 reiterates the thought: "You [Israel] are therefore to keep all My statutes and all My ordinances and do them, so that the land to which I am bringing you will not spew you out [as it did the previous inhabitants]. Moreover, you shall not follow the customs of the nation which I will drive out before you, for they did all these things, and therefore I have abhorred them."

What are "all these things" the non-Israelite nations did which merited divine destruction, including the forfeiture of life? Drawing on Leviticus 18 and 20, and limiting ourselves to those specific crimes that also drew the death penalty in Israel, we have the following: (1) various types of incest; (2) adultery; (3) murder (specifically, child sacrifice); (4) homosexual acts; (5) bestiality; (6) cursing a parent; and (7) serving as a spiritist or medium. Interestingly, a number of these offenses were also outlawed among some of Israel's ancient Near Eastern neighbors, even taking the death penalty at times.<sup>2</sup>

Now we know that some of the above practices were also incorporated within the religions of the pre-Israelite inhabitants. Yet the laws of Leviticus do not make the crimes or penalty dependent upon their being a part of non-Israelite religions. Adultery was indeed committed by those who visited the temple prostitute of some Canaanite religions. But again, the fact that such a crime was actually made part of other religions just aggravates the offense. Finally, Leviticus mentions further crimes for which offenders might be "cut off," a designation that sometimes overlaps the humanly mandated death penalty but can also refer to forcible separation from Israel and/or a death penalty to be administered by God apart from human legal systems. Due to this variety, we will not consider offenses that carry the sole penalty of "being cut off."

Other crimes which drew capital punishment in Israel by divine command included: (8) striking or habitually rebelling against a parent; (9) reckless endangerment of others when it leads to their death; (10) working on the Sabbath; (11) prostitution by a priest's daughter; (12) blasphemy against the Name of God; (13) idolatry or encouraging others to worship other gods; (14) an engaged woman falsely claiming virginity before consummating her marriage; (15) kidnapping; (16) rejecting the judicial ruling of a priest; and (17) giving false witness in a capital case.<sup>3</sup> These crimes and their penalty are commanded in a number of passages throughout the Pentateuch, with a high concentration in Exodus 21–22 and Leviticus 20. Though some of these

<sup>2</sup> Cf. ANET 150–223; ANESTP 523–549.

<sup>3</sup> The full list of capital crimes in Israel, depending on how they are grouped, usually numbers between 16 and 20. For examples of various listings, see Lloyd R. Bailey, *Capital Punishment: What the Bible Says* (Nashville: Abingdon, 1987) 19–22 (this book is also an excellent treatment of the title subject altogether); *Theonomy: A Reformed Critique* (ed. William S. Barker and W. Robert Godfrey; Grand Rapids: Zondervan, 1990) 177, n. 6; "Crimes and Punishments," in *Encyclopaedia*

offenses and their penalty might well be taken as universal moral prescriptions, for the sake of argument here we will limit ourselves to penalties for offenses explicitly applied to the Gentiles as well.

### III. JUDGMENT OF DEATH IN PROPHETS

So far we have seen how the death penalty has been mandated to all for murder through the command to Noah, how the penalty was attracted to Sodom and Gomorrah, how the penalty was attracted by certain non-Israelite nations, and what was to draw the penalty in Israel. To these accounts we can add the offenses prophets decried as bringing about destruction, including forfeiture of mortal life, to particular non-Israelite nations. We find prophetic denouncements of this kind against Nineveh, Moab, Tyre, Ammon, Babylon, Assyria, Sidon, Edom, Damascus, Egypt, and Philistia, for example. The crimes denounced include a general wickedness (Jonah 1:2, 3:8); (1) violence and bloodshed (Jonah 3:8; Nah 3:1; Ezek 28:16; Amos 1:13); (2) idolatry (Nah 1:14; Jer 48:13, 35; 50:38; 51:47, 52; Dan 5:22–23); (3) oppressing and persecuting both Israel and other nations (Jer 51:24–25, 49); (4) arrogantly exalting a ruler or people to would-be divine status (Isa 16:6; Jer 48:26, 29, 49:4,16; 50:29; Ezek 28:2,6,9; 29:3,9; Dan 5:22–23); and (5) pride at beauty and riches (Isa 23:9; Jer 48:29; Ezek 27:3, 28:5).

Again it is not that divine judgment cannot be drawn for offenses not listed above, but that these are typical sources of that judgment within the prophetic oracles. And as with the pre-flood human population, Sodom and Gomorrah, and the pre-Israelite inhabitants of Canaan, those the prophets denounce for the penalty of destruction and death are engaged in a preponderance of sins.

To these prophetic denouncements we can add a NT parallel in John's prophecies from Revelation. There we learn that even after killing plagues have been unleashed on a rebellious humanity, those who survive them do not then repent of their (1) worship of demons; (2) idols; (3) murders; (4) sorceries; (5) immorality; or (6) thefts (9:20–21). Consequently, the plagues continue, bringing earthly death to offenders. Here too, it is important to note the preponderance of sins aspect. Theft and certain forms of immorality, for instance, *taken alone* were not capital crimes in either OT or NT.

### IV. JESUS ON THE DEATH PENALTY

Increasingly, contemporary Christians oppose the death penalty because they believe it contravenes the teaching of Jesus. Yet Jesus himself seems to continue holding to the death penalty, for at least one sin, in Matt 15:3–4: “And He [Jesus] answered and said to them, ‘Why do you yourselves transgress the commandment of God for the sake of your tradition? For God said, “honor your father and mother,” and “he who speaks evil of

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*of Religion and Ethics*, Vol. IV (ed. James Hastings; New York: Charles Scribner's Sons, 1925) 281; “Capital Punishment,” in *Oxford Dictionary of the Jewish Religion* (ed. R. J. Zwi Werblowsky and Geoffrey Wigoder; New York: Oxford University Press, 1997) 149.

father or mother is to be put to death.” We should recall that Jesus is talking to Pharisees and scribes who were failing to help their needy parents and justifying it through the use of a “religious” stratagem. On the other hand, they are fully refuted by citing the relevant command from the Decalogue alone. Why does Jesus add the penalty statement? To do so certainly underlines the gravity of his opponents’ wrongdoing. But, at least to this reader, it is hard to imagine him citing the penalty passage if he rejected capital punishment!

In the passages cited earlier, adultery clearly draws the death penalty both in Israel and the nations. But it is on this very offense that those who oppose the death penalty often stake their claim. Jesus seems to set aside the death penalty for this offense in the famous story of the woman caught in adultery (John 8:1–11). But this conclusion does not follow from the passage. As a number of writers on the subject have noted, the passage in question does not even appear in many of the earliest Greek manuscripts of the NT. And when it does appear, it does not always occur even in the same Gospel. But even granting canonical status to the story, we need to note that it is a test situation, not unlike the question concerning the payment of taxes, where the Pharisees are trying to trap Jesus.

What is the trap? A usual construction is that his opponents want to make Jesus run afoul of either Jewish law or Roman authority. If Jesus says that they should not stone the woman caught in adultery, he would seem to nullify the law of Moses, discrediting himself among Jews. If he says to go ahead and stone the woman, he violates the Roman administration of the period, which reserved capital punishment as a penalty it alone could carry out.<sup>4</sup> But even to ask for the death penalty from the Romans required a decision by the Sanhedrin, of which Jesus was not a member. So, a “yes” answer here would also run afoul of the Jewish authorities.

Does Jesus’ reply call for the abolition of the death penalty? Again, as noted above, if it did, it would amount to nullifying the Mosaic law and would thus fall into the trap. This would also create an apparent contradiction with his own explicit statement in Matt 5:17–19 and his evocation of the death penalty for the incorrigible son in Matt 15:3–4. By the behavior of the departing Pharisees, we gather that Jesus was not caught on either horn of the dilemma. In the invitation for the one “without sin” to cast the first stone, Jesus successfully appeals to the consciences of his opponents. Whether their sin is, for example, to usurp Sanhedrin and/or Roman prerogatives or to violate some other provision of the administration of the penalty

<sup>4</sup> We learn this from John 18:31. Ancient Jewish sources confirm the loss of this authority, cf. *b. Sabb.* 15a, 41a; *y. Sanh.* 18a. In *y. Sanh.* 18a, this right is described as being suspended some forty years before the fall of the Temple. In Alan Watson, *Ancient Law and Modern Understanding: At the Edges* (Athens: University of Georgia Press, 1998), the author chides many Christian Biblical interpreters for their lack of understanding concerning Talmudic and other ancient law sources. Yet his own interpretation of John 8 fails to give due weight to the explicit statement of *y. Sanh.* cited above. He also rejects John 18:31 as questionable without justification. Hence his own admittedly speculative solution, “for which I have not the slightest contextual support” (p. 46), is even less persuasive.

we do not have to determine. The rightness of the penalty *in principle* is not being discussed. And for Jesus to tell the woman he does not condemn her to death is perfectly in keeping with the facts that he was not an eyewitness, was not a Sanhedrin member, and was not a Roman magistrate.

Finally, when it comes to penalties, since it is Jesus who applies the penalty of eternal hell to so much as calling another person "fool" (Matt 5:22), to suggest that he, in principle, could not support the lesser penalty, capital punishment, is unwarranted.

Altogether then, our brief survey so far shows a striking continuity, literally beginning in Genesis and ending with Revelation, in the specific standards to which God holds all peoples and which draw corporeal death for violation. But on what basis are those who never heard the Law of Moses accountable for the death penalty?<sup>5</sup>

#### V. ACCOUNTABILITY TO DEATH PENALTY BY NATURAL LAW KNOWLEDGE

The Biblical answer is that everyone knows of God's existence and nature through observing the creation and God's moral requirements through the natural law of conscience. The well-known and clearest statement of this answer is given in Paul's letter to the Romans, chaps. 1 and 2. The natural revelation of God forms a sufficient basis upon which people will be held accountable for their acts (1:19–20, 2:12–16). Interestingly, Paul lists *particular offenses* which are known through conscience by all to violate "the ordinance of God" and merit death (1:32).

But does Rom 1:32 refer to capital punishment here or the ultimate death penalty, condemnation to hell, with God carrying out the judgment? In keeping with his connection between sin and eternal death in the chapters of Romans that follow, it could be argued that Paul refers here to eternal death. On the other hand, the list of offenses includes crimes which drew the penalty of earthly death under Mosaic law, both for individuals and nations as well, whether by supernatural or natural means. That Paul does not explicitly distinguish one sense of death here is not surprising given that both fall under God's ultimate standard of judgment. Other lists of sins Paul provides reiterate many of the offenses listed in Romans 1 (cf. 1 Cor 6:9, 1 Tim 1:9–10).

What are the particular offenses known through conscience to violate God's ordinance and warrant death? In addition to a more general condemnation of evil, Paul lists the following specific offenses in Rom 1:23–31: idolatry, homosexual acts, greed, envy or spite, murder, strife, deceit, malice, being a gossip, slandering, hating God, insolence, arrogance, disobedience to parents, lack of love, lack of mercy. Following our list from the OT, we find these capital crimes reiterated: idolatry, homosexual acts, murder, deceit (false witness in capital cases), malicious treatment (of Israel and other

<sup>5</sup> Of the OT, Moshe Greenberg remarks: "Throughout Biblical literature, the Gentiles are required to answer for breaking elementary moral laws, though nowhere is the ground for their responsibility set out" (*Studies* 373–374).

nations), acts of greed (in the sacking of Israel by neighbors, for instance), slander against God, the arrogance that exalts self or nation as divine and self-sufficient in wealth and power, mistreatment of parents, the lack of love and mercy shown in some of these acts and in ignoring the cry of the needy (one of Sodom's offenses). Again, Rev 9:20–21 provides a very similar refrain.

#### VI. LATER DISPUTES CONCERNING THE CONTENT OF THE NATURAL LAW

It might be objected at this point that a cross-cultural and transhistorical survey would not uncover a united humanity when it comes to the wrongness of offenses Paul tells us everyone naturally knows about, to say nothing of agreement about penalties. Of course, Paul also tells us, in Romans 1, that such natural moral knowledge can be suppressed in unrighteousness. As Aquinas was later to put it, the natural law can be suppressed through bad desires, bad habits, and bad company.<sup>6</sup> So we should not expect to find perfect unanimity.<sup>7</sup>

Calvin, though, does find a remarkable agreement among peoples on the moral law, together with a lack of general agreement on penalties, both of which he applauds.<sup>8</sup> Even a brief review of some ancient, medieval, and modern law codes confirms his overall impression concerning both the fact of wide agreement about what moral offenses should count as crimes and greater disparity concerning penalties.<sup>9</sup> As one contemporary Christian his-

<sup>6</sup> In *Summa Theologica* I–II, Q. 94, Art. 6.

<sup>7</sup> The common objection that law collections or codes need to be understood as wholes before comparisons are made between particular statutes is proper for certain purposes, but not here. Though individual codes do follow the form of larger religious and cultural traditions (or the idiosyncrasy of a particular ruler), natural law awareness of moral rights and wrongs seems to be of a content independent of such forms, and helps explain why such content recurs in such a variety of forms.

<sup>8</sup> John Calvin, *On God and Political Duty* (Indianapolis: Bobbs-Merrill, 1956) 65: "For they all [ancient non-Israelite nations] agree in denouncing punishment against those crimes which are condemned by the eternal law of God; such as murders, thefts, adulteries, false testimonies, though there is not a uniformity in the mode of punishment; and, indeed, this is neither necessary, nor even expedient." It is not "expedient" because severity of punishment ought to follow the needs of deterrence, as Calvin goes on to say. With respect to murder, however, Calvin seems to suggest in this same passage that it is the way capital punishment should be carried out that might rightly vary, not whether murder draws the death penalty as such. In fact, he mistakenly takes it that all societies agreed about that.

<sup>9</sup> *Encyclopaedia* 248–305 offers a very wide-ranging summary of crimes and punishments across religions and cultures, as does Israel Drapkin, *Crime and Punishment in the Ancient World* (Lexington: D. C. Heath & Co., 1989). A few interesting primary sources of ancient and medieval law are: *ANET* and *ANESTP* (as cited above, Babylonian, Assyrian, Hittite, Egyptian, and Syriac laws); Ronald F. Willetts, *The Law Code of Gortyn* (Berlin: de Gruyter, 1967; ancient Cretan laws); Kathleen Freeman, *The Murder of Herodes and other Trials from the Athenian Law Courts* (Indianapolis: Hackett, 1994; ancient Athenian laws); Aristotle, *The Constitution of Athens and related texts* (New York: Hafner, 1950; ancient Athenian laws); *The Civil Law*, Vols. 1–2 (trans. S. P. Scott; Cincinnati: Central Trust, 1932; ancient Roman laws); *Laws of Manu* (trans. Georg Buhler; New York: Dover, 1969; ancient Hindu laws); Tacitus, *The Agricola and the Germania* (New York: Penguin, 1970; ancient Germanic laws); *The Burgundian Code: Book of Constitutions or Law of Gundobad* (trans. Katherine Fischer Drew; Philadelphia: University of Pennsylvania Press, 1949; early medieval Germanic laws).



torian notes, modern social science provides direct support for natural law moral claims: “. . . anthropologists are able to show by empirical observation that . . . the last six of the Ten Commandments, which require respect for parents and prohibit killing, adultery, stealing, perjury and fraud, have some counterpart in every known culture.”<sup>10</sup> Hence, special revelation of OT laws is in some part *reiteration* of natural law knowledge, perhaps even largely so.<sup>11</sup>

The final question of our discussion, it will be recalled, is whether the crimes for which the death penalty is assigned in the OT ought to be so penalized today. I take it that the vast majority of contemporary European and American Christians<sup>12</sup> would answer this question negatively, with some exceptions in the case of murder. By continuing a theological tradition that reduced natural moral knowledge to some, if not all, of the Ten Commandments and an amorphous general “equity,” leaders in the Reformed tradition directly contradict Paul’s teaching as to the type of specific knowledge all have concerning wrongdoing. Given this reduction of the natural law, Calvin is consistent when he relativizes Israel’s penal laws to the peculiarities of the period.<sup>13</sup> How could the Gentiles be held accountable to God, even through the human agency of the state, for wrongs of which they are unaware? Indeed, even Christians need not keep to OT laws when they go beyond “equity.”

To be sure, Calvin does find many OT laws which express general equity, even some of the penal laws. The problem is that he is utterly subjective in his choice of which laws reflect equity, and how they do. Following a tradition that goes back at least as far as the first century,<sup>14</sup> Calvin sees the Decalogue as a summary of other, more specific, Mosaic laws. He reasonably classifies the prohibition against charging interest on loans as a species of theft. Yet he releases both Christian and non-Christian alike from this overall prohibition since “equity” no longer requires it!<sup>15</sup> And this, despite the fact that Jesus reiterates the usury prohibition in an *a fortiori* statement (Luke 6:35). Luther, who was even freer in his take on the applicability of OT laws under equity, goes the opposite direction and says that usury violates

<sup>10</sup> Harold J. Berman, *The Interaction of Law and Religion* (Nashville: Abingdon, 1974) 37.

<sup>11</sup> Cf. James Barr, “Biblical Law and the Question of Natural Theology,” in *The Law in the Bible and in its Environment* (ed. Timo Veijola; Helsinki: Finnish Exegetical Society, 1990) 1–22. In this chapter, Barr argues that quite a bit of OT specially revealed law is natural law confirmed.

<sup>12</sup> For a representative sample of arguments from the vast anti-death penalty literature by Christians, cf. Eric E. Hobbs and Walter C. Hobbs, “Contemporary capital punishment: biblical difficulties with the biblically permissible,” *Christian Scholar’s Review* XI/3 (1982) 250–262. As with other such writings, it explicitly rejects Scriptural teaching when it conflicts with contemporary practices or sensibilities and at other times flatly rejects Biblical teaching with no argument at all (p. 262).

<sup>13</sup> *On God* 66.

<sup>14</sup> Cf. Philo *Decal.* 19.154.

<sup>15</sup> Cf. W. Fred Graham, *The Constructive Revolutionary: John Calvin and His Socio-Economic Impact* (Atlanta: John Knox, 1978) 219. Here Graham quotes Calvin’s commentary on Matt 25:20, that “usury must be judged, not by any particular passage of scripture, but simply by the rules of equity.” That Calvin could conceive of loaning at interest as “equitable” I can only make sense of against the prevailing capitalism of Geneva at the time.

natural law,<sup>16</sup> indeed that usurers ought to be put on the rack and have their eyes pecked out by birds!

Two points are salient here. First, when Christians reduce the Scriptures' moral law to summary commands (like the Decalogue) plus an amorphous "equity," equity can be filled in with *anything*. The prevailing secular custom of the era is the likeliest candidate. This happened with usury.<sup>17</sup> It seems to be happening with divorce and remarriage today, even among evangelicals and other conservative Christians. So this approach wreaks havoc with Christian ethics intending to be Biblical. The instability of Calvin's approach in retaining certain Biblical laws under the aegis of "equity" is revealed by the way these laws were jettisoned by later Calvinists, also in the name of equity.<sup>18</sup> One of the most thorough attempts to make use of OT law for civil law, by the Puritans at Massachusetts Bay,<sup>19</sup> nevertheless departs from Moses' "judicials" in the name of equity. In that respect, Samuel Logan is correct when he distinguishes the Bay Colony view from contemporary theonomist views.<sup>20</sup> Second, since Scripture shows how much more specific natural law knowledge is in its correspondence with OT law, the havoc can be avoided both in Christian ethics and in the question of penal laws in secular states.

#### VII. A PARTIALLY THEONOMIC ALTERNATIVE PROPOSAL

As we have seen above, when natural law morality is reduced to the Decalogue or other summary laws plus "equity," at the expense of the mass of precepts found in the OT, subjectivity and inconsistency follow, indeed must follow, as theonomist Greg Bahnsen so clearly, pointedly, and repeat-

<sup>16</sup> Luther, "Trade and Usury," in *Luther's Works*, Vol. 45 (Philadelphia: Muhlenberg, 1962) 292: "Charging for a loan is contrary to natural law." Following a long tradition, Luther identifies the Golden Rule as part of the natural law and sees loaning for interest as a "mortal sin" contrary to it.

<sup>17</sup> For a wide-ranging Biblical and historical treatment of the question, see Bruce Ballard, "On the Sin of Usury: A Biblical Economic Ethic," in *Christian Scholar's Review*, XXIV/2 (December 1994) 210–228. For a detailed history of the diminution of the doctrine of usury in the church and society, see R. H. Tawney, *Religion and the Rise of Capitalism* (Gloucester: Peter Smith, 1962).

<sup>18</sup> Cf. W. Robert Godfrey, "Calvin and Theonomy," in *Theonomy: A Reformed Critique* 311: "Most modern Calvinists do not agree with Calvin today in those areas of formal agreement with the theonomists mentioned above [i.e. about retaining certain Biblical laws]. They see Calvin's conclusions as somewhat parochial and naïve. . . . Nevertheless, most modern Calvinists share Calvin's interpretive approach to the Scriptures." Indeed, they don't agree with each other either, again for the lack of a well-defined principle for engaging OT laws.

<sup>19</sup> In their *Laws and Liberties of Massachusetts* 1648. For a thorough study of the colonists' criminal law, see Bradley Chapin, *Criminal Justice in Colonial America, 1606–1660* (Athens: University of Georgia Press, 1983).

<sup>20</sup> That is, though there is a good deal of agreement between the conclusions concerning penal laws between the Puritans and theonomists, the principle by which they reach such conclusions is different. Cf. Samuel T. Logan, Jr., "New England Puritans and the State," in *Theonomy: A Reformed Critique* 383. But what Logan praises as the Puritans' "flexible" use of the Mosaic penal code is in fact the utter subjectivity they inherit with the concept of "equity."

edly shows.<sup>21</sup> Again, we have also seen, in the light of both Rom 1:23–32 and OT passages concerning the nations, that the reduction of natural law in this particular way is unnecessary.

On the other hand, there is still a gap here. If non-Israelite nations drew the death penalty in the form of divinely commanded destruction by human nations in war for a *preponderance* of sins, we cannot simply assume that each such sin draws the death penalty in isolation, either for a nation or an individual. Indeed, when we consult Paul's list of naturally known moral principles, we find elements which did not draw the death penalty in isolation in Israel. It would be very helpful if we could somehow connect the list of capital offenses in Israel with those that reflect natural law knowledge and bring destruction among the nations. Again, in addition to Paul's list, we also have the lists in Leviticus 18 and 20, together with prophetic oracles against the nations concerning sins leading to destruction, to help us get a take on the natural law. As we might have expected, these lists do not hold the nations accountable for violating the ceremonial laws of Israel, but for moral wrongdoing, albeit in more detail than the Ten Commandments.

But what of the penalties? Again it is Bahnsen who repeatedly draws our attention to the relevant passages: Deut 4:6–8 and Heb 2:2. In Deut 4:6, 8 we learn that Israel's neighbors will extol Israel, saying: "Surely this great nation is a wise and understanding people," because there is no other country "*that has such statutes and judgments as righteous as this whole law.*" Presumably a good deal of this admiration proceeds from a natural law recognition of good. In Heb 2:2 we learn, of OT law, that "every transgression and disobedience received its just penalty." Natural law recognition confirms this principle in the case of the murderer himself. For when we imagine the murderer complaining that the death penalty is "unfair," it comes across as empty. The same could be shown with other cases of the "eye for an eye" standard without great difficulty.

Again discussing murder and the death penalty, Moshe Greenberg very aptly points out that because murder is primarily an offense against God (as people are in God's image, Gen 9:6), "the kin of the slain person are not competent to say when that person has been paid for" [i.e. compensated with a lesser penalty or fine].<sup>22</sup>

We have already noted that offenses for which a non-Israelite people were to suffer destruction and death are often given in groups, showing a preponderance of sins within the relevant society. Although it might be possible to try and isolate further individual sins from these lists for which the death

<sup>21</sup> Cf. Greg L. Bahnsen in *Theonomy in Christian Ethics* (exp. ed.; Phillipsburg: Presbyterian and Reformed, 1984); *No Other Standard: Theonomy and its Critics* (Tyler: Institute for Christian Economics, 1991); and "The Theonomic Reformed Approach to Law and Gospel" in *Five Views on Law and Gospel* (ed. Bahnsen, Kaiser, Moo, Strickland, VanGemeren; Grand Rapids: Zondervan, 1996) 93–143.

<sup>22</sup> *Studies* 32.

penalty might be appropriate, here we will be conservative and stay with the overlapping identification proposed in the beginning.<sup>23</sup> That is, from the lists in Leviticus 18 and 20 which identify particular sins for which the nations are to be destroyed as Israel takes over the land, we will take over only those offenses which also took the death penalty in Israel when carried out by individuals. Using that procedure, we end up with the seven capital crimes of our original list. To these crimes we also add premeditated murder (including, but not limited to, child sacrifice) from Gen 9:6, with its clearly universal rationale, that people are created in the image of God. Interestingly, many non-Israelite societies have also recognized these offenses as wrongs, and a number have also assigned the death penalty for their violation.

The conclusion of the main argument, then, is this: The just penalty (cf. Heb 2:2) to be fairly administered by every human society for the types of incest specified in Leviticus 18 and 20, adultery, murder, child sacrifice, homosexual sex acts, bestiality, cursing a parent, and serving as a spiritist or medium is death. From Rom 13:3–4, we know that secular states have the authority to carry out God's righteous penalties, including capital punishment. We also know that a number of earlier societies adopted the death penalty for these types of crime, appealing directly to Leviticus as their warrant.<sup>24</sup> But as this course is an outrage to modern sensibilities, probably including most Christians, let me consider and respond to a few objections.

#### VIII. REPLY TO SOME OBJECTIONS

First of all, as Lloyd Bailey rightly points out, the "two or three witnesses" requirement found for capital crimes in the OT is in principle a much stronger requirement than a contemporary jury's "beyond a reasonable doubt," which can follow a purely circumstantial case.<sup>25</sup> Indeed, one would think very few indeed might face the death penalty were the OT standard of evidence required for conviction. Whether or not the two or three witnesses requirement is also to be carried forward into modern societies has not been shown here, of course. But the number of reversed convictions for murder in the U.S. over

<sup>23</sup> This is not to say that more of Bahnsen's theonomist case cannot be made, only that much of that case is unnecessary for the particular purpose of our discussion.

<sup>24</sup> Cf. John Laurence, *A History of Capital Punishment* (New York: Citadel, 1960) 16: A May 1, 1563 Swedish ordinance reads: "We decree that henceforth the following crimes shall not be punished by fine or imprisonment, to wit, blasphemy, . . . open adultery, incest, rape, sodomy and other similar crimes, for as much as Almighty God has Himself decreed, and nature and reason agree that those who commit such crimes should not escape death. Further, too, divers scourges such as plague and famine come to punish men for their sins to such an extent that it often happens that a whole country is devastated and suffers for the crime of one man. It is therefore necessary, in order to avoid the anger of God, that such Malefactors should not be spared." Much the same is reiterated in the Swedish Code of 1734. For similar provisions in German law, and a record of how they were carried out, cf. Richard van Dulmen, *Theatre of Horror: Crime and Punishment in Early Modern Germany* (Cambridge: Polity, 1990), esp. the appendix tables. For very similar provisions in early American law, again with records of how they were carried out, cf. *Criminal Justice*, esp. appendix tables.

<sup>25</sup> *Capital Punishment* 89.

the last decade or so, often based on new DNA tests, vividly demonstrates the horrific injustice resulting from the current standards and procedures.<sup>26</sup> Since 1976, in Illinois alone, over half of those on death row have been later freed as innocent, leading the ordinarily pro-death-penalty governor, George Ryan, to declare a moratorium on executions.<sup>27</sup>

On the other hand, purported witnesses could also deceive. Yet it is notoriously difficult, if not impossible, for lying witnesses to keep their testimony consistent under separate and detailed investigation. The importance of the thorough separate investigation is highlighted in the command to judges trying capital cases (Deut 19:18) and becomes the defining theme of the apocryphal book *Susanna*. And of course OT law also commanded the death penalty for false witnesses in a capital case, no doubt a powerful preventative by itself. So Bailey's point reaches to the heart of the matter.

Second, as Bailey also notes,<sup>28</sup> the effect of socio-economic status today on the chances of receiving justice from the criminal justice system in the United States is very great. Here, as all of us know, how much justice we receive is all too often dependent on how much we have to pay attorneys' fees.<sup>29</sup> The investigative procedure and the two witness requirement of the OT again sharply reduced, if not eliminated, that skewing effect. Bailey concludes that, if Christians are to continue to support the death penalty in the U.S., they ought to work for a fair use of the penalty.<sup>30</sup> Indeed, those who support the death penalty for Biblical reasons might well agree with Governor Ryan's position cited above, particularly in cases where two witnesses did not present evidence and the defending attorney inadequately examined them (an all-too-common occurrence with court-appointed counsel for an indigent accused).

Another frequent objection is that the OT penalties are maximum limits, that offenses for which they are given could receive lesser penalties. Appeal is made to the example of Exod 21:29–30, where the owner of an ox known to gore either receives the death penalty or whatever compensation is asked of him. But as Greenberg rightly notes, this ransom payment is only explicitly allowed for this kind of homicide, "a homicide not committed personally and

<sup>26</sup> We cannot forget the torment of those falsely sentenced to die either. Consider Ron Williamson who, in 1994, and after years of wrongful imprisonment, was told he would be executed within a month: "He was led back to a cell, screaming from that moment on, night and day, even after they moved him into another unit with double doors to muffle the noise. On Sept. 17, Williamson was shifted into the special cell for prisoners with less than a week to live. By then, the screaming had torn his throat to ribbons, but everyone knew his raspy, desperate litany: 'I did not rape or kill Debra Sue Carter! I am an innocent man!'" Last minute help from a public defender and later DNA tests arranged by the Innocence Project of the Cardozo Law School in New York made it possible for Williamson to be shown innocent and freed. Jim Dwyer, Peter Neufeld, and Barry Scheck, "When Justice Lets Us Down," *Newsweek* (February 14, 2000), <http://www.newsweek.com/nw-srv/printed/us/so/a16201-2000feb6.1>.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Capital Punishment* 89.

<sup>29</sup> There are cases in the U.S. where indigents accused of murder are allotted only \$2,000 for their whole defense. Even at the low rate of \$50/hour, that amounts to one week of a lawyer's time, to say nothing of other research costs.

<sup>30</sup> *Capital Punishment* 91.

with intent to harm.”<sup>31</sup> The objection also fails to make sense of commands to show “no pity” administering the death penalty to those who commit premeditated murder (Deut 19:13), to the pre-Israelite inhabitants of the land (Deut 7:16),<sup>32</sup> or in the use of the law of talion generally (Deut 19:21).

Others have claimed that the penalties reflect God’s indulgence toward the hardness of heart of the Israelites, that the penalties themselves are brutal. Jesus tells us that the allowance for divorce in Mosaic law was a concession to the Israelites’ hardness of heart (Mark 10:5), for instance. But we should note that the OT law of divorce regulated a practice which is itself counter to the intention of Genesis 1–2, to which Jesus appeals in his comments on divorce. And there is no general *command* to get divorced, a practice God “hates” (Mal 2:16). The regulation of slavery in OT law might show a similar allowance for hardness of heart (again to return to Genesis, people were created free). Yet God commands Israel, regarding the death penalty, to show “no pity,” as though to correct an Israelite disposition to lessen the penalties from the very outset. The supposed “brutality” of the laws is pretty hard to square with the obvious equity in the law of talion and the high praise of God’s law found in both OT and NT. As Greg Bahnsen also argues, the alternatives to Biblical penal law are themselves subjective, incoherent, and often not just non-Biblical, but counter-Biblical.<sup>33</sup>

Still others, including Christians, will argue that we ought to keep religion separate from the laws of the state, in order not to “force” one religious view on those who do not share it. But at least with reference to the offenses listed in our conclusion, the idea in Scripture seems to be that these wrongs are known through the natural law of conscience, that Israel’s laws are a model for other nations, and that the penalties therein are “just” in an unqualified sense. To pretend that the law is or can be “neutral” is also untrue. The law, for instance, is hardly neutral when it declares and protects a “right” to kill the unborn or partially-born and then criminalizes those who protest.<sup>34</sup> The general role of law as an educative and socializing force that contributes, positively or negatively, to the creation of a moral climate is also overlooked here. Just as children in public schools learn a practical

<sup>31</sup> *Studies* 30.

<sup>32</sup> So the charge of “ethnogenocide” Chismar and Rausch make against Israel would have to be made against God. Cf. Douglas E. Chismar and David A. Rausch, “Regarding Theonomy: An Essay of Concern,” *JETS* 27 (September 1984) 321. (I was forced to clarify my take on this article and on Bahnsen’s larger theonomy in a series of friendly critical discussions with Mike Burt.) The article in general presents a very weak critique of Bahnsen. The same must be said of many of the articles composing *Theonomy: A Reformed Critique*. Bahnsen nonetheless responds to Chismar, Rausch, and others in Bahnsen, *No Other Standard: Theonomy and Its Critics*.

<sup>33</sup> *Theonomy in Christian Ethics* (exp. ed.) 279–319.

<sup>34</sup> For an excellent treatment of the purported neutral pluralism in U.S. law and society, see Francis Canavan, *The Pluralist Game: Pluralism, Liberalism, and the Moral Conscience* (Lanham: Rowman & Littlefield, 1995). Cf. also Michael Sandel, *Democracy’s Discontent: America in Search of a Public Philosophy* (Cambridge: Harvard University Press, 1996) and Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame: University of Notre Dame Press, 1988), c. XVII in particular.

atheism by the absence of God throughout their studies, citizens can learn a similar lesson from the laws.

We ought also to remember that the Common Law we inherit is full of Christian influences, not at all “neutral.” As Christian historian Harold Berman notes, “much of the medieval canon law has been secularized and has passed over—often unnoticed—into the law of the state.”<sup>35</sup> Indeed, even basic aspects of our law owe a large debt to Christianity.<sup>36</sup> And many of the individual states practically established Christianity by their laws in the eighteenth and nineteenth centuries, requiring Christian belief for office, penalizing blasphemy, requiring public schools and universities to teach the Christian religion, etc.<sup>37</sup> Again, as Berman observes:

It is in the last two generations that the Enlightenment concept of law as something wholly instrumental, wholly invented, as contrasted with the pre-Enlightenment concept of law as something ordained, something partly invented but also partly given, has penetrated not only the ideology of the intellectuals but also the social consciousness of virtually all classes of the population.<sup>38</sup>

So what we are witnessing is more like a “de-biblicization” of the law.

One consequence of this secularization process is that Christianity appears more strange, and in some ways negative, to whatever common feeling and belief is conditioned by the law. The absence of the death penalty for crimes described above also makes it easier to disbelieve that God will ultimately punish unrepentant wrongdoers with a second death. It may even be part of the reason for some of the social problems overwhelming the U.S. now. As Bahnsen puts it: “It is not surprising that our most pressing criminal problems today (e.g., disdain for the integrity of life, for proper sexual relations. . .) are precisely the matters that are addressed with firmness and clarity in God’s law.”<sup>39</sup> Indeed, many of the capital crimes which brought divine judgment to the nations are now prevalent in the U.S.

Of the cited objections, only the two witnesses objection remains a serious one. It compels us to augment the conclusion of our overall Biblical argument. Again, that main conclusion is that the just penalty to be fairly administered by every human society for the types of incest specified in Leviticus 18 and 20, adultery, murder (including child sacrifice), homosexual sex acts, bestiality, cursing a parent, and serving as a spiritist or medium is death. Such a penalty so applied embodies the model of divine justice set forth in Scripture for all humanity. Yet because that standard is not being administered justly today in the U.S., we cannot recommend its wholesale adoption now.

<sup>35</sup> Harold J. Berman, *Faith and Order: The Reconciliation of Law and Religion* (Atlanta: Scholars, 1993) 45.

<sup>36</sup> *Ibid.* 44.

<sup>37</sup> *Ibid.* 211–213.

<sup>38</sup> *Ibid.* 215.

<sup>39</sup> *Five Views* 139.

So is our argument merely an academic exercise? Not at all. If the argument is correct, it follows that those who subscribe to Biblical teaching ought to support changes in law and procedure that would make for a fair administration of the just penalty. These would have to include higher standards which do not put the poor, minorities, and others at the high risk of injustice they now face. Although we have not provided an extended argument that the two or three examined witnesses requirement must be adopted universally for death penalty cases, it has at least a *prima facie* appeal for the Biblically oriented. The Biblically-oriented juror might well make use of this standard to determine what "reasonable doubt" should mean to him or her.

As for (re)instituting capital punishment for Biblical capital crimes besides murder, probably only a fairly sweeping (re)Christianization of the populace would ever bring that end in view. But even lesser legal penalties for these other offenses (where such penalties do not now exist), if fairly administered, could produce some of the benefits cited above. One need only consider the social effects of the widespread decriminalization of adultery, together with no-fault divorce, or the push by homosexual activists for the repeal of sodomy laws, in order to appreciate the importance of law as a contributor to the moral education and milieu of a culture. The significance of such laws has certainly not been lost on those who sought and now seek repeal. And, again, legal sanctions are a disincentive to behavior which attracts divine judgment upon a society. So, if the overall argument succeeds, the Biblically oriented have a better idea of what kinds of legal sanctions deserve their support and why.

#### IX. CODA: DIFFERENCE FROM THEONOMY

In closing, I want to distinguish the position taken in this paper from certain ancillary notions found in the work of Greg Bahnsen.<sup>40</sup> Bahnsen often states that civil rulers are not authorized to coerce or penalize where there is no explicit penalty or authorization to coerce in OT law. Hence, for instance, any modern state that redistributes tax income to programs for the poor is disobeying God.<sup>41</sup> Naturally Bahnsen still encourages Christians to voluntary charity to the poor. Yet, as Christopher Wright aptly observes, Israelite judges had a good deal of discretion.<sup>42</sup>

Deut 15:1–3 gives us a glimpse of such discretionary ruling and punishment: Once it is determined that "the wicked man deserves to be beaten," the judge is to order a flogging proportionate to the crime. Bahnsen rightly appeals to this passage for a statement about desert (a moral notion) in connection with punishments. However, flogging is nowhere given as an explicit

<sup>40</sup> I do not refer specifically to the writings of theonomists Gary North or Rousas Rushdoony here. Those writings lack the rigor and system of Bahnsen, and in too many other aspects seem inconsistent with Biblical Christianity to this reader.

<sup>41</sup> Cf. *Five Views* 129 n. 22.

<sup>42</sup> Christopher J. H. Wright, *Walking in the Ways of the Lord: The Ethical Authority of the Old Testament* (Downers Grove: InterVarsity, 1995) 104.



penalty within the Mosaic legislation itself. So we cannot say that offenses without specified penalties in that legislation can receive no penalty from the state.

From the foregoing we can also conclude that to suspend all of the economic restrictions but those against theft and fraud is unwarranted today. So those who have seen the imposition of a hyper-capitalist grid upon the Scriptures in theonomy are not without grounds.<sup>43</sup> To return to the usury prohibition, which theonomy drops, it would appear to fall within the explicit theft legislation and its twofold repayment penalty. And it was treated as such an economic crime by civil magistrates in medieval Europe, for example.<sup>44</sup> As Weinfeld also notes, even economic practices like debt remission and redistribution of land alleged to be peculiar to Israel were known both among Israel's neighbors and in other cultures,<sup>45</sup> providing some evidence that these concepts contain natural law dimensions. Even Bahnsen grants that states have to legislate and enforce traffic laws, for instance, because the Bible is not a textbook for the state. With this acknowledgement he opens the door, in principle, to an expansion of enforcements and penalties which could reach much wider and include economic redistribution.<sup>46</sup>

<sup>43</sup> Cf. *Walking* 106, and Timothy J. Keller, "Theonomy and the Poor: Some Reflections," in *Theonomy: A Reformed Critique*.

<sup>44</sup> Cf. R. H. Helmholz, "Usury and the Medieval English Church Courts," in *Speculum* 61/2 (1986) 364–380, where Helmholz also discusses secular court penalties for usury, p. 365.

<sup>45</sup> Cf. Moshe Weinfeld, "Sabbatical Year and Jubilee in the Pentateuchal Laws and their ancient Near Eastern Background," in *The Law in the Bible* 39–62.

<sup>46</sup> Sad to say, we shall hear no more from Greg Bahnsen on these matters. With his early death in 1995, the Christian community lost a brilliant and godly scholar.