

Dr. James S. Spiegel, Christian Ethics, Session 15, Capital Punishment

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This is Dr. James Spiegel in his teaching on Christian ethics. This is session 15 on Capital Punishment.

Okay, the next issue we're going to discuss is the death penalty and capital Punishment. we will begin by looking at some legal cases that are important in the history of capital punishment in the United States and then address the moral question.

Is the death penalty ever a justifiable form of punishment? So, in 1972, the legal case *Furman v. Georgia* ruled that the death penalty, as it was then administered, was unconstitutional in a case of cruel and unusual punishment. At that time, the modes of capital punishment were electrocution, the electric chair, the gas chamber, hanging, and the firing squad. This was before lethal injection.

Interestingly, it was a 5-4 majority decision on the Supreme Court, but none of the main arguments that were used or affirmed by any of these five judges really overlapped with one another. So, there were five different majority opinions written in defense of this decision, but they all agreed that the death penalty was unconstitutional because, in any of these modes of application, it was cruel and unusual punishment. Well, that prohibition of the death penalty lasted just four years.

In 1976, there was another Supreme Court decision, *Gregg v. Georgia*, where the court ruled that the death penalty is not necessarily unconstitutional for a number of reasons. One, it may accord with standards of decency, it may serve as a deterrent, and it's not arbitrarily applied. So, it's just that brief hiatus in the history of American law with regard to permission or allowance of the death penalty.

Though since, you know, there have been and there are many states in our country where the death penalty is not applied, but it's left to the states. In *McCleskey v. Kemp* in 1987, the court ruled that the death penalty is not unconstitutional despite the fact that killers of whites are much more likely to be executed than killers of blacks. This is an argument, as we'll see, that's often made in favor of eliminating the death penalty.

Here are some statistics with regard to US executions since *Gregg v. Georgia* from 1976 until 2019. Of those executed, 56% were white, 34% were black, and 9% Hispanic. The victims of these crimes, 76% were white, 15% black, and 7% Hispanic.

Among those executed, only 16 were female. It's helpful to begin our discussion here regarding capital punishment by framing this within a general understanding of what punishment is generally. The philosophers Olin and Berry have given what I would call the best definition of punishment, the general definition of punishment that I've seen.

They define punishment generally as pain or harm inflicted by a rightful authority on a person who has been judged guilty of violating a law or rule. So, if this is a good general definition of punishment, then it needs to apply in all contexts where we talk about punishment, whether it's punishing someone for some sort of felony or a misdemeanor or something like violating a traffic law or violating a rule within an institution or punishment within a context of a family. So, we use the word punishment, and we apply punishment in all these different contexts and all these different levels of society.

Is this understanding of punishment applicable in all these cases? I think it is. It is pain or harm inflicted by a rightful authority on a person who's been judged guilty of violating a law or rule. Next, we can ask what is the best or appropriate general theory of punishment in terms of its purpose. Again, this can apply to punishment at all levels as well, as can all of these theories of punishment.

The deterrentist says that punishment is given to deter wrongful behavior by both behavior by the particular offender in a given case, someone who's being punished, and others who might be tempted to commit the same sort of crime or wrongful action. So deterrentism says that punishment is about deterring or discouraging bad behavior. The reformativist or the rehabilitationist says that punishment is intended to rehabilitate the offender to make them a productive, law-abiding member of society.

And finally, there's retributivism, which is the view that punishment is given because the offender deserves it primarily. It's a fair and just response that respects the autonomy of the offender as well as the value of the victim. So those are three general orientations on punishment, and I don't think you have to affirm one at the exclusion of the others.

Typically, thinkers on this issue will tend to emphasize one over and above the others, but one can be a retributist, for example, and maintain that the main purpose of punishment is to give the punishment what it deserves. Punishment is a just and fair response to the crime, which also has a deterrent effect as a kind of positive side effect or secondary function, and that may also serve to reform the wrongdoer or criminal. Moral traditions, moral theories, and their general approaches to capital punishment, just to highlight some of those.

The utilitarian will either justify or condemn capital punishment or punishment per se or generally based on the benefits or harms that this might bring to society. The utilitarian will favor, therefore, considerations of deterrence as well as rehabilitation when it comes to punishment. When it comes to capital punishment, rehabilitation is certainly out of the question, but deterrence may figure prominently in the utilitarian's support of the death penalty if they happen to support it.

In Kantian ethics, capital punishment tends to be justified on the basis of personal autonomy, the idea that the death penalty actually respects the will of the offender. Many Kantians will argue that way, which is also in keeping with the way the philosopher Hegel defended capital punishment, that basically, you have someone who's chosen to take another life, and in doing so, they are also choosing to die themselves. They're basically proclaiming to the legal authorities, take my life.

I've killed this person. Kill me as well. That's what the person is choosing by killing. So, that would be more of a Kantian approach, which would favor the death penalty.

When it comes to natural law and moral theology, in this tradition, there will be a justification or a condemnation of capital punishment based on considerations of the sanctity of life, especially. And there's disagreement within this tradition, within the Judeo-Christian tradition, over whether the death penalty today, capital punishment today in our society, should be used. So, let's look at arguments pro and con, and I've set this up in such a way that a major proponent of the death penalty and a major critic of the death penalty are essentially debating with their arguments, even though the articles from which I've drawn their arguments don't really engage one another.

I've set it up in such a way that it makes it look like a dialogue because they deal with all the same arguments. A major critic of capital punishment is Hugo Badal, who highlights the problem of unequal distribution that many others have highlighted. The injustice in the fact that killers of white people are more likely to receive the death penalty than killers of minorities.

And it seems to be statistically significant. So, shouldn't that prompt us away from capital punishment because it's so unequally applied? If we're going to have an unjust situation in terms of application when applying the death penalty, then we shouldn't have it at all. A major proponent of the death penalty is Ernest Van Dam Haag.

His response to this argument is that unequal application of the death penalty doesn't mean that capital punishment per se is unjust. It just shows that we need to apply this more carefully with greater attentiveness to how killers of whites may be treated as opposed to killers of minorities. Another argument that Badal makes appeals to this problem of miscarriages of justice because some innocent people are put to death.

And we know this because there have been many, many people who've been on death row that have later been exonerated. Were it not for the years and years and years of intervening appeals, which staved off their final execution, they would have been put to death before their innocence was discovered. So, no doubt, there have been many people who have been innocent, wrongly convicted, who were put to death.

And that is a tragedy that needs to be avoided in any case. So he says we need to end the death penalty because if you do the math based on all of the cases of exoneration and discovery of wrongful conviction, the best estimation is that about four times per year, an innocent person is convicted of murder. And again, in many cases, or at least in some cases, we can be confident they end up on death row and ultimately being put to death.

Van Den Haag's reply to this is there are many human activities where innocent people die, but we don't stop those activities because of that. We just understand that's just an unfortunate consequence of, say, high-speed transportation. There are thousands, several thousands of deaths every year on American roads and highways.

But I have yet to hear anyone make the case that we shouldn't be driving in cars or that we should, even that we should lower the speed limit on highways significantly. I never hear that argument. Or people who work on construction sites.

There are such people who work in high-rise situations or in otherwise dangerous situations with construction who die hundreds or thousands of serious injuries every year. And many people die every year in these contexts, but we don't outlaw that. We don't say, well, let's not have tall buildings.

That would save a lot of lives. But we say, well, that just kind of goes with the territory. I mean, it sounds heartless, but we want our tall buildings.

We want to maximize real estate space, and we want to be able to drive fast and everything else. So, yeah, every year, three, four, five thousand people are going to die in car accidents. It's too bad.

Again, it can seem kind of heartless, but that's kind of the, that's the exchange we've made for the sake of freedom and convenience. So, in this context, okay, suppose a few people do get killed. Innocent people die from year to year because of wrongful convictions.

Then you've got others who are sitting in prison who don't necessarily pay the death penalty, but we know there are a lot of innocent people in prison. But what are you going to do? Stop imprisoning people? End the criminal justice system? You say, well,

like with construction and transportation, it's unfortunate, but, you know, that's just a sad consequence of all these different aspects of a civil society. So that's an interesting argument in response.

Another argument that Bedau makes is one that appeals to the idea that the death penalty, capital punishment, is not as much of a deterrent as it might seem. A lot of people make the argument that with the death penalty in place, people are going to be less likely to commit capital crimes. But where is the conclusive statistical evidence that capital punishment is a better deterrent than life imprisonment? So, it isn't the death penalty versus no penalty at all.

Clearly, it's a better deterrent than no penalty at all for severe crimes. The question is whether capital punishment is a better deterrent than, say, life in prison without parole. And that has not been demonstrated.

Van Den Haag's reply appeals to basic facts about human psychology. He says experience shows the greater the threat and penalty, the more it deters. But he would press the point that, you know, that's really, to respond like this is to kind of deal with the deterrentist on their own terms, which we don't have to.

We don't need to show that capital punishment is a greater deterrent than life in prison because the main argument in favor of capital punishment is not deterrence or any other good consequence. It's about justice. A person who takes another person's life must pay with their own life. The punishment must equal the crime. So that's Van Den Haag's response to that argument.

Finally, Bedau makes an argument based on this utilitarian concern of cost.

Applying the death penalty is a huge financial burden, at least in our society, where we have due process under the law. And you have appeal after appeal after appeal, and many of these cases have made it all the way up to the Supreme Court. But even short of that, the appeals process, with each appeal taking, say, a year or so to process, these appeals can go on for a decade or more.

In fact, it's routine for people on death row for it to take ten or more years before they're finally executed. And this is a huge financial burden on the criminal justice system. So why not save society, our government, and a lot of money and just make life in prison without parole the ultimate punishment? Then we relieve ourselves of this huge financial burden while at the same time, we eliminate the worry about innocent people being killed.

Van Den Haag responds to that by saying that, again, we need to keep in view the alternative and the cost of keeping someone in prison for 20, 30, 40, 50 years and feeding and housing them in a prison. That is not cheap, whereas at least when a

person is executed, all those costs are saved. So, who knows, it might turn out to be a wash or pretty comparable in terms of overall costs between life imprisonment and the death penalty.

So, there are a number of philosophical arguments, very common philosophical arguments, and pros and cons regarding capital punishment. Now, let's turn to some biblical arguments for and against. In favor of capital punishment, the argument is made that the Old Testament prescribes the death penalty, such as in Genesis 9, 6, where God says, Whoever sheds human blood by humans shall their blood be shed, for in the image of God has God made mankind.

So, the idea is it's because people are made in the image of God that the death penalty is appropriate. A response to this, though, is that that's an inconsistent use of Old Testament law since there are a number of other crimes that warranted the death penalty in the Old Testament as well, like rape, kidnapping, incest, and many other forms of behavior that today we would not even consider making the death penalty apply to. So why are we selectively applying capital punishment to murder when we're not to all these other things if we want to be so biblical about it? Also, we don't live in a theocracy today as ancient Israel did.

Another argument in favor of capital punishment appeals to an important New Testament passage, specifically in Romans 13, where the Apostle Paul approvingly cites an instrument of death, the sword. Here's a portion of that passage, verses 4 and 5 in Romans 13, where Paul says that the one in authority is God's servant for your good, but if you do wrong, be afraid, for rulers do not bear the sword for no reason. They are God's servants, agents of wrath, to bring punishment on the wrongdoer.

Therefore, it's necessary to submit to the authorities, not only because of possible punishment but also as a matter of conscience. So, he cites specifically the sword in this context. What is the sword? You don't spank people with the sword.

You don't whip their wrists. You kill with the sword. It's an instrument of death.

So many will regard this particular passage as implicitly an endorsement of the death penalty. In response, many argue that, point out rightly, that the context of this verse is not capital crimes, but rather taxes and obeying rulers. He's using this as an illustration of why we need to submit to the governing authorities.

Paul's not primarily interested here, or maybe he's not even interested at all, in the debate over the death penalty. So, that is a standard reply to this argument. In terms of arguments against capital punishment from a biblical standpoint, one line of reasoning appeals to the biblical emphasis on mercy, which we see in multiple places throughout the scriptures.

Jesus says, blessed are the merciful, for they will be shown mercy in Matthew 5. And in John 8, in this fascinating story about Jesus and this woman who's been caught in the act of adultery, Jesus seems to refuse to apply the Old Testament law to her case. You recall that this woman is brought before Jesus, who's been caught in the act of adultery. The Pharisees are saying, what do you say, teacher? The law says kill her.

What's your judgment? He's writing in the dirt. He doesn't answer at first. They repeat the question.

Finally, he stands up, and he addresses them. Ultimately, he makes the statement that he among you who is without sin, let him cast the first stone. And one by one, from the oldest to the youngest, they dropped their stones and walked away.

It's a powerful story there, clearly an act of mercy. And then he speaks to the woman. He says, where have your condemners gone? There's no one left to condemn you.

And then he says, neither do I condemn you. Now go and leave your life of sin. He doesn't take her off the hook entirely.

It's a pretty strong charge to repent. And you know this must have had a profound effect on her. He's shown mercy to her, but he has told her you need to repent and leave your life of sin.

Powerful story. But notably, he does not instruct or approve of these religious leaders of their stoning her, even though they wanted to. So what do we say in response to that? Many will reply by noting that that does not preclude capital punishment.

It doesn't show that Jesus was against the death penalty. In this case, arguing or suggesting that Jesus did not abide by the Old Testament law is just mistaken. Because if they were to apply the Old Testament law in that case, the woman's partner in moral crime had to be present here.

Where is he? As Bob Dylan once said, you can't make love all by yourself. She had to have a partner in this moral crime. The fact that he was not there with her, to be judged by her, showed that they were already deviating from the Old Testament standard.

So, his letting her go was not just a clear violation or abrogation of Old Testament law. So that's an interesting discussion. This is complicated by the fact that that passage in John 8 is not in the most reliable biblical manuscripts.

And so, I know there are pastors who will not even preach out of that passage for that reason. It certainly fits with what we know about Jesus, the portrait we get of him in the gospel materials. It's just the kind of thing that he would do.

But the fact that the most reliable manuscripts do not contain it gives certain scholars and pastors a little bit of pause. There is a little bit of pause as to how much to rely on that, particularly as applied to an issue like this one. Moving on, another anti-capital punishment argument in scripture appeals to the idea that the Mosaic standards would outlaw today's application of the death penalty, at least in many cases.

As the Old Testament law was stipulated, or as it addressed this issue of the death penalty, two or more witnesses were required, and eyewitnesses had to help perform the execution. I was supposed to be the first to throw the stones, to initiate stoning the person to death. And in our current contemporary applications of the death penalty in this country, that is not required.

You don't have to have two or more eyewitnesses. In some cases, you do, like in James Holmes' case. He's the Batman movie killer who murdered a dozen or so people in a theater several years ago.

A lot of people saw that. So, if he were sentenced to death, that particular requirement would be fulfilled. But there were a lot of cases and a lot of people sitting on death row around the country where nobody saw them do it.

It's just overwhelming evidence of other kinds. And we certainly don't require that eyewitnesses help to pull levers or press buttons to initiate lethal injection or anything like that. The genius, the practical genius of this Old Testament requirement about eyewitnesses helping to perform the execution is that if they are lying, then in this process, they become guilty, not just indirectly, but directly, of murdering, killing an innocent person.

Not to mention the fact that it would be harder to stick to your false story, knowing that you're actually going to have to have a hand in killing this person, in response to this argument, the point is often made that these are procedural matters that don't have to do with the justice of capital punishment per se. The principle of life for a life, lex talionis, is something that transcends times and cultures.

There were certain procedural requirements in the Old Testament with regard to demanding two or more witnesses and witnesses contributing to the actual process of killing the guilty person. But that's just procedure. The main thing is that this is or can be, in many cases, a just punishment for a crime.

Moreover, it's often pointed out that the requirement of two or more witnesses has to do with certainty. It's an epistemological guarantee that it is known without any doubt that this person is guilty because we have these two witnesses. Perhaps today, with genetic testing, we can establish that with finality, with as much certainty as an eyewitness.

We know eyewitnesses can be misled or confused. Maybe genetic testing, in some cases, is even more certain and provides even more confidence in the guilt of a particular individual. Eyewitness testimony might be used in some cases.

So, there's that response. So, there we go. That's a review of major arguments, philosophical and theological, both for and against the death penalty.

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