

ANNUAL FALL MCGINLEY LECTURE



Capital Punishment:

**Changes in Jewish, Christian, and
Muslim Attitudes**

The Reverend Patrick J. Ryan, S.J.

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Fordham University's McGinley Chair in Religion and Society was established in 1988 to attract distinguished scholars interested in the interaction of religion with the legal, political and cultural forces in our pluralistic American society.

The chair is a tribute to the Reverend Laurence J. McGinley, S.J., who first attained distinction as a professor of theology and served as president of Fordham University from 1949 to 1963. In 1979, he was appointed president emeritus, a position he held until his death on August 15, 1992. Father McGinley's educational vision and dedication to New York City led to the creation of the Lincoln Center campus, and he was a founding director of Lincoln Center for the Performing Arts.

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TUESDAY, NOVEMBER 13, 2018 | LINCOLN CENTER CAMPUS

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Capital Punishment:

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I recently discovered that Sister Helen Prejean and I have something in common: we are both pre-war models, coming to birth just before World War II broke out in Europe. Sister Helen, famous for her advocacy for the abolition of capital punishment, has much more expertise than I on capital punishment, the subject of my lecture this evening. Furthermore, since I set the topic for this fall's lecture, Pope Francis has decided to revise the official *Catechism of the Catholic Church* on capital punishment, declaring it inadmissible in all circumstances. In this Pope Francis has followed a tendency that started with the teaching of Pope Saint John Paul II and continued in the teaching of Pope Benedict XVI. Pope Francis has recently ordered changes in Number 2267 in the *Catechism* so that it states quite

explicitly that “the death penalty is inadmissible because it is an attack on the inviolability and dignity of the person.”¹

Given this papal teaching, should I now sit down? I think not. The usual acerbic critics of Pope Francis in conservative media outlets, secular and religious, continue to speak out for retention of the death penalty.² This evening I want to make my small contribution to the work of Sister Helen Prejean and the teaching of Pope Francis by examining capital punishment in a comparative perspective—Jewish, Christian, and Muslim—and especially the ways that Jewish, Christian, and Muslim opinions are changing on this subject. Sister Helen is one of the reasons they are changing.

Sister Helen has accompanied many people on death row, some of them to their execution; I have only accompanied one such prisoner on death row, and very briefly, but I still think of him. The Jesuits in the North-West Africa Province of the Society of Jesus are charged with the pastoral care of a parish in Benin City, a state capital in southern Nigeria. Sometimes, while visiting Benin City, I celebrated Mass and heard confessions in one of the two prisons in that city. I preferred the sun-baked walled compound of the older jail to the gloomy cement fortress of the newer one. Part of the process of the Sunday liturgy involved offering the possibility for private confessions as well as celebrating Mass for a congregation of about a hundred. Some prisoners, however, were not allowed to attend Mass, but you could bring them communion after it. The excluded prisoners were the men and women locked up in the C.C. block. C.C. indicated that they had been tried and condemned to death by hanging; they awaited their fate in the Condemned Cells.

On one particular hot and sunny Sunday morning, as I was bringing communion to the male Condemned Cells, one of the inmates asked me to hear his confession before he took communion. It was broiling hot under the corrugated tin roof and the prisoner had doffed his uniform and was completely naked. No facility was provided for confessions and I

had to stick my ear up to the bars and listen to him whispering in my ear. I cannot tell you what he said to me, but I can tell you he was certainly the only naked person to whom I ever gave communion. I thought then and think now of King Lear's raving to Poor Tom on the storm-whipped heath:

Is man no more than this? Consider him well. Thou owest the worm no silk, the beast no hide, the sheep no wool, the cat no perfume . . . Thou art the thing itself: unaccommodated man is no more but such a poor, bare, forked animal as thou art.³

Until the day I die, I will never forget that "unaccommodated man" on a hot Sunday morning in Benin City shortly before his execution.

CAPITAL PUNISHMENT IN THE JEWISH TRADITION

In the tradition of ancient Israel the Book of Genesis suggests a possibility for punishing the crime of murder other than through capital punishment. In the narrative of the first murder, Cain's killing of his brother, Abel, the LORD takes judgment on the crime into his own hands. Cain is punished with exile, an exile even more dramatic than that imposed on Adam and Eve for their desire to be like gods, knowing everything. For this sin they had been driven out of the garden to a place east of Eden. Hard as it was to till the soil and bear children in that locale, Adam and Eve still had a place to dwell. Cain's crime, however, resulted in a banishment even worse than that of his parents. "You are cursed from the ground, which has opened its mouth to receive your brother's blood," the LORD declares. "When you till the ground, it will no longer yield to you its strength; you will be a fugitive and wanderer on the earth" (Gen 4:11-12). Cain, protected by a mark from the very fate he had imposed on Abel, has to go even further into exile than did his parents: "Cain went away from the presence of the LORD, and settled in the land of Nod, east of Eden" (Gen 4:16). Nod, a Hebrew word for wandering, is no place for a man whose vocation had been the very localized profession of farming.⁴

The mysterious mark of Cain, left undefined in the text of Genesis, is imaginatively described in Jewish commentary in the first centuries of the Common Era as either the orb of the sun, a leprous spot, a dog, or a horn. This mark points out the criminal but also protects him in his wandering until the flood in Noah's time wipes out everyone and everything but Noah's family and the other living inhabitants of the Ark. The same commentary also suggests that Cain is not put to death for killing his brother because "he had none from whom to learn" how wicked was such a crime.⁵ That wickedness, however, continues in Cain's lineage. A sixth-generation descendant, Lamech, went well beyond his fratricidal ancestor in wreaking violence: "I have killed a man for wounding me, a young man for striking me. If Cain is avenged sevenfold, truly Lamech seventy-sevenfold" (Gen 4:23b-24).

In the aftermath of the Flood, retaliation for mortal offenses is strictly limited; the violence wreaked by Cain and, even worse, the vengeful behavior of Lamech, are repudiated. In the covenant made with Noah, God says: "Whoever sheds the blood of a human, by a human shall that person's blood be shed: for in his own image God made humankind" (Gen 9:6). Rabbi Akiva, the prince of scholars in the late first-century and early second-century Common Era, declared that "he who sheds blood is regarded as though he had impaired [God's] likeness." Recall that the first chapter of Genesis narrates how God intended to "make humankind in our image, according to our likeness" (Gen 1:26). An attack on the human likeness of God—the only image of God possible for adherents to the faith of Israel—is construed in some sense as an attack on God.

Within the Book of Exodus, the law of retaliation parallels this Genesis motif, limiting retribution for crime. One particular crime cited centers on harm inflicted on a pregnant woman, harm that results in the loss of the infant in her womb. The husband of the wife demands financial reparation, after asking for a judgment by a magistrate. But if greater harm ensues from the crime—for instance, the death of the pregnant woman herself—the punishment is strictly proportionate: "If any harm follows, then you shall give life for life, eye for eye, tooth for tooth, hand

for hand, foot for foot, burn for burn, wound for wound, stripe for stripe” (Ex 21:23-25). By a curious irony, this verse of the Hebrew Bible, so frequently cited in defense of capital punishment, actually limits what the eighth amendment of the American Constitution calls “cruel and unusual punishment,” and what warmongers in many ages and climes have called massive retaliation. Furthermore, this law of retaliation was not interpreted literally in ancient Israel but was understood metaphorically, designating monetary compensation to be paid to a victim by a perpetrator.⁶ This is an important point that needs to be kept in mind throughout this lecture.

During the centuries when ancient Israel was more or less self-ruling and parts of the Hebrew Bible were still being composed, various forms of capital punishment could be enacted: stoning was the most common form of capital punishment, a type of execution that involves the whole community as the executioners. Burning and hanging were also known, but were rarer, or only supplemental to stoning. In the Roman era, however, the authority to execute criminals had been taken away from the Sanhedrin, the highest judicial body of the Jews, at least four decades before the destruction of the Temple in 70 CE.

In the period when the Babylonian Talmud was being composed, the first five centuries of the Common Era, Jewish legal scholars still considered the theoretical possibility of such executions at some future post-colonial or post-diaspora time and place. There may have been executions of criminals in the Jewish community in Spain in the Muslim era of that country,⁷ but the Babylonian Talmud discussions of executions, like its discussions of Temple sacrifices, seem to have been purely theoretical.⁸ In the *Mishnah Makkot*, a second- or third-century CE treatment of punishment for crimes, weighty authorities from an earlier era are cited as opposing capital punishment: “A Sanhedrin that would execute somebody once in seven years would be considered destructive.” Rabbi Eleazar ben Azariah says: ‘Once in seventy years.’ Rabbi Tarfon and Rabbi Akiva said: ‘If we were on the Sanhedrin, nobody would have been

executed.”⁹ Rabbi Akiva, Rabbi Tarfon and Rabbi Eleazar ben Azariah are regarded as leading scholars and contemporaries of the late first and early second centuries CE.

Until the founding of the State of Israel, Jewish communities in diaspora generally had no right to execute anyone. The founders of the modern State of Israel were generally rather secular in their attitude toward the tradition of ancient Israel, but courts in Israel since 1948 have been strongly influenced by the interpretation of the legal passages of the Hebrew Bible and the Babylonian Talmud. With two notable exceptions, the death penalty has not been enacted for criminals in the past seven decades of modern Israel. But those two exceptions raise major questions.

At the end of the 1947-48 struggle between the nascent State of Israel and its Arab neighbors, Meir Tobianski, an Israeli army officer accused of informing British and Jordanian operatives in Jerusalem of the location of places in Jerusalem where Israeli arms manufacturers were working, was taken into custody. Tobianski was subjected to a drumhead military trial, one conducted without a lawyer for the accused or the right to appeal; ten days later he was executed by a firing squad. Within a year the Israeli government had to rehabilitate Tobianski posthumously and re-inter him on Mount Herzl as a war hero. The members of the first Israeli government, headed by Prime Minister David Ben-Gurion, had always opposed capital punishment and found themselves severely embarrassed by Israel's military execution of Tobianski. Robert Sherrill, an American journalist and provocateur over many years, published a book in 1970 on military justice in the United States, the title of which applies throughout the world: *Military Justice is to Justice as Military Music is to Music*. That truism seems to have prevailed in the era of modern Israel's beginnings.

There has been only one civilian court case trial followed by an execution in the history of the State of Israel, the famous trial of the German-Austrian-Argentinian war criminal Adolf Eichmann. Following the precedent set by the Nuremberg trials of Nazi war criminals (1945-49)

conducted under the auspices of the victorious allies at the end of World War II, the Israeli government arranged for the kidnapping of Adolf Eichmann from Argentina in 1960, his trial in Jerusalem in 1961, and his execution in 1962. Some prominent Israelis decried the execution at the time, most notably the philosopher Martin Buber.¹⁰

In recent years, a conservative political party that is a junior party in the present thirty-fourth government of Israel, *Yisrael Beiteinu* (Israel is our Home), has asked the Knesset to consider whether Israeli law should be changed to permit application of the death penalty to individuals convicted of committing murder during a terrorist attack. The Knesset has uniformly refused to make that change. In theory, Israeli military tribunals already have the legal authority to impose the death penalty, if the judges are unanimous in convicting the malefactor. In practice, however, no Israeli military tribunal has ordered the imposition of the death penalty; instead, those convicted of murder receive lengthy prison sentences. As an eminent Israeli legal scholar, the late Menachem Elon (d. 2013), has written, even the military courts have had to admit that the principles enunciated by Jewish legal sages two millennia ago still cry out for serious consideration: “A Sanhedrin that would execute somebody once in seven years would be considered destructive.’ Rabbi Eleazar ben Azariah says: ‘Once in seventy years.’ Rabbi Tarfon and Rabbi Akiva said: ‘If we were on the Sanhedrin, nobody would have been executed.’”¹¹

CAPITAL PUNISHMENT IN THE CHRISTIAN TRADITION

The New Testament has no need to repeat the story of Cain and Abel, but it makes references to it, usually by way of example. Thus, in Matthew’s and Luke’s versions of a diatribe of Jesus aimed at the Pharisees, Jesus refers to “all the righteous blood shed on earth, from the blood of righteous Abel to the blood of Zechariah” (Mt 23:25; see also Lk 11:51). Outside the Gospels there are other references to Cain and Abel as examples of brotherly relations gone sour. Thus, the First Epistle of John, urging mutual love in the sometimes contentious community of the

Beloved Disciple, exhorts the members of that community not “to be like Cain who was from the evil one and murdered his brother” (1 John 3:12). This characterization of Cain apparently reflects some extra-canonical Jewish writings suggesting that Cain was not a true son of both Adam and Eve but the offspring of Eve and the serpent.¹² Cain, Balaam, and Korah are associated with each other as arch-villains in the Epistle of Jude (Jude 11). The anonymous Epistle to the Hebrews evokes the memory of Cain and Abel twice. It lists Abel as the first hero in its encomium on people of faith: “By faith Abel offered to God a more acceptable sacrifice than Cain’s. Through this he received approbation as righteous, God himself giving approval to his gifts; he died, but through his faith he still speaks” (Heb 11:4). Shortly afterward the same Epistle describes Jesus as the mediator of the new covenant by the shedding of his blood on the cross, “the sprinkled blood that speaks a better word than the blood of Abel” (Heb 12:23). In the Genesis account of Cain’s murder of Abel, the LORD says to Cain that “your brother’s blood is crying out to me from the ground” (Gen 4:10). In the Epistle to the Hebrews this motif is transformed, referring to the blood of the crucified Jesus spilt at Calvary as a positive and sanctifying force.

Jesus was put to death under the orders of the Roman prefect of Judaea, Pontius Pilate, subjected to the worst possible public execution, one reserved for non-citizens: crucifixion. John’s Gospel hints that Pilate may not have wanted to impose so drastic a sentence, but felt pressured to do so lest he lose favor in Rome: “If you release this man, you are no friend of the emperor. Everyone who claims to be a king sets himself against the emperor.” (John 19:12). According to Luke’s Gospel, Jesus forgave his executioners: “Father, forgive them, for they do not know what they are doing” (Lk 23:34). Was that forgiveness extended only to the actual soldiers carrying out their duty? Matthew’s Gospel enshrines in the Sermon on the Mount the teaching of Jesus that transforms the law of retaliation enunciated in the Torah: “You have heard that it was said, ‘An eye for an eye and a tooth for a tooth.’ But I say to you, do not resist an

evildoer. But if anyone strikes you on the right cheek, turn the other also” (Mt 5:38-39).¹³

This ideal of forgiveness, modeled on the behavior of Jesus, did not prevent other authors in the New Testament from finding value in the governmental use of coercion in establishing order and justice, even to the point of executing major malefactors. In what seems to be a later interpolation into the Epistle to the Romans,¹⁴ the author sees value in the coercive powers of the state, including capital punishment. “Let every person be subject to the governing authorities; for there is no authority except from God, and those authorities that exist have been instituted by God. . . . But if you do what is wrong, you should be afraid, for the authority does not bear the sword in vain! It is the servant of God to execute wrath on the wrongdoer” (Rom 13:1, 4). If this passage had been written by Paul before his arrival in Rome—and it does not fit very well into its literary context—Paul might have had second thoughts about executions after arriving in the imperial capital. Ancient tradition asserts that Paul was beheaded in Rome, the usual form of capital punishment for Roman citizens.

In the pre-Constantinian era, Christians generally opposed capital punishment since they saw it as the sword quite literally held over their heads by agents of the Roman Empire. That stance changed somewhat in the fourth century. Christianity became a tolerated religion after the Edict of Milan issued in 313 by the western and eastern co-emperors, Constantine and Licinius. By the end of the same century Christianity had progressed from being a tolerated religious cult to becoming the official one. The emperor Theodosius (r. 379-395) went beyond the Edict of Milan and established orthodox Christianity as the official religion of the declining empire. It was around this time that some Christians, at least, called on the civil authorities to enact punishment on someone accused of heresy. Thus the Emperor Maximus, at the behest of some bishops in Spain, saw to the execution in Trier in the year 385 of the heretical bishop of Avila, Priscillian. Priscillian, an autodidact with Gnostic and perhaps

even Manichean ideas, combined with an inordinate interest in the occult, was probably a heretic. The intervention of the secular arm in his execution was an innovation resisted by many who were unsympathetic to Priscillian's theological views. Thus, Saint Martin of Tours (316-397) and Saint Ambrose of Milan (337-397), without denying the heretical status of Priscillian, protested his trial and execution by the imperial government.¹⁵

Saint Augustine opposed the execution of heretics as criminals, with the possible exception of the marauding Circumcellions whose murderous thuggery in North Africa apparently derived from their rigoristic Donatist theology. But even in this instance, Augustine pleaded with the civil authorities not to execute Circumcellions who had killed Catholic clergy.¹⁶ Augustine, however, did think that the state could legitimately execute criminals for certain reasons. He connected this permissibility of capital punishment with the permissibility of just war. "The one to whom authority is delegated, and who is only the sword in the hand of the person who employs it, is not personally responsible for the death that delegate administers. Likewise, those who wage war in obedience to the divine command or in conformity with (God's) laws, represent in their persons public justice or the wisdom of government. In this role they have executed wicked people; such executioners have by no means broken the commandment, 'You shall not kill.'"¹⁷ Thomas Aquinas, writing in the thirteenth century, argues for the legitimacy of capital punishment on the grounds of the common good of society. He compares such capital punishment to the amputation of an infected limb in the hopes of stopping the further spread of infection. "If, for the health of the whole human body, it proves necessary to cut away one or another part because it is rotting and infecting the other parts [of the body], it will be both laudably and profitably cut off. Now every individual person is, in comparison with the whole community, like a part to the whole. Therefore if someone is dangerous and infectious to the community, because of some sin that person commits, it is praiseworthy and profitable that the person be killed to safeguard the common good."¹⁸

There is something chillingly modern in Augustine's description of an executioner as one who is "only the sword in the hand of the person who employs it," or Aquinas' allusion to "someone [who] is dangerous and infectious to the community." Depersonalizing the person, both of these descriptions conjure up the utter lack of morals in the human automatons who were the agents of terror unleashed by Robespierre, Hitler, Stalin, and Pol Pot. Monsters of obedience, however, have not characterized every time and place. People often feared taking the role of hangman in times past. For the hanging of Blessed Dominic Collins, the Irish Jesuit brother executed for being a Catholic and a Jesuit in 1602 in his hometown of Youghal in County Cork, a fisherman who happened to be passing by at the time was forced to do the job. He heartily begged forgiveness from Blessed Dominic and was heartily assured of that forgiveness.¹⁹

In those parts of the United States where capital punishment is still effected by electrocution or by lethal injection, the families of murder victims are sometimes invited to witness the death through one-way glass, enabling them to see the execution but not be seen while watching it. Disguising capital punishment as a medical procedure, with the criminal offender strapped to a gurney and injected like a patient prepared for an operation, diminishes all who participate in this dreadful practice on whatever side of the one-way window they are found. The person of the executioner and the person of the one executed are completely blotted out.

In the Campo de' Fiori in Rome stands one of the most striking monuments in that city, a brooding statue of Giordano Bruno. Bruno was burned at the stake in the Campo de' Fiori on February 17, 1600. A Dominican friar who had once questioned some of the theological and philosophical orthodoxies of the Catholic tradition, Bruno fell into trouble in Italy with various courts of Inquisition in a suspicious era in the Catholic Church. Fleeing to Calvinist Geneva, he found the Calvinist reformers no more tolerant than Catholics. France, and especially Paris, proved more congenial, but a stay in Oxford brought him into conflict

on cosmological issues with anti-Copernicans. Later stays in Germany brought him into controversy with Lutheran clergy, who excommunicated him. Having worn out the welcome mat in much of northern Europe, Bruno returned to Italy, where the Inquisition in Venice caught up with him in 1592. Stressing his work in the areas of cosmology rather than theology while he was on trial in Venice, Bruno suddenly found himself extradited to Rome to face the Roman Inquisition in 1593. His trial for heresy dragged on for years. He was finally convicted and handed over to “the secular arm” for execution in 1600, as described above.

Bruno was no doubt an intellectual loner, an oddball, someone too interested in the occult and probably a heretic on some issues; but he was also a genius. Joan of Arc was also a loner and an oddball, a transvestite considered by some ecclesiastics to be a witch. A Church tribunal had condemned her to be burned at the stake in 1431. A little less than five centuries later she was canonized by Pope Benedict XV. Both saints and sinners have been put to death over many centuries for what in those times were considered valid reasons. It is better by far to judge not lest you be judged (Mt 7:1), as Jesus warns us, and especially when judgment leads to capital punishment. Reversing capital punishment at a later time is never possible. To use some West African pidgin English—the most expressive language I know—it is better to “Lef’ am for God.” Leave it up to God.

CAPITAL PUNISHMENT IN THE MUSLIM TRADITION

The story of Cain and Abel is also told in the Qur’an in a late passage revealed when Muhammad found himself arbitrator and judge of an embattled and sometimes contentious community in Medina. There are interesting variations in this passage on the theme of fratricidal murder and its punishment. “Tell them the truth of the story of the two sons of Adam, how they each offered a sacrifice. It was accepted from one of them but not accepted from the other.” The stage is set without any mention of the two brothers’ names or their respective professions as farmers and

pastoralists. Their main roles in the Qur'an are as agents of sacrifice, one whose sacrifice was accepted by God and one whose sacrifice was not. The brother whose sacrifice was not accepted blames not God but his sibling for this outcome: "I will kill you." The other sibling responds with an implied critique of the one whose sacrifice has not been accepted: "God only accepts [sacrifice] from the God-fearing." He follows this subtle accusation up with a pledge of his own non-violence, no matter what misdeed his brother may intend. Unlike the biblical Abel, his Quranic equivalent senses what is coming. "Even if you stretch out your hand towards me to kill me, I will not stretch out my hand against you to kill you. As for me, I fear God, the Lord of the worlds" (Qur'an 5:27-29). After murdering his brother, the perpetrator feels a surge of repentance rise within him, and he extends to his brother's corpse the dignity of burial, a virtuous deed he learns from a bird: "Then God sent a crow to scratch on the earth to show him how to cover the corpse of his brother. He said, 'O woe is me! Can I not be like this crow and cover up my brother's body?'" The Qur'an is kinder to the memory of the murderous brother than the Bible; it ends its brief account by saying that the murderer who learned from the crow "became one of those who repent" (Qur'an 5:31).

Immediately following this condensed version of the story of Adam's two sons, the Qur'an enunciates a two-sided moral principle of great ethical import, one well known among Jews. "For that reason [Cain's murder and repentance] We [God] wrote it down for the Children of Israel that whoever kills a human being—apart from [someone one who has killed another] human being or [someone who has committed] an abomination on earth—it will be as if that person had killed all of humanity. And whoever saves the life [of another human being], it will be as if [that person] had saved the life of all of humanity" (Qur'an 5:32). This two-sided rule does indeed reflect or at least parallel a famous passage in a Mishnah text cited in the Tractate Sanhedrin of the Talmud. "All mankind was created from a single ancestor to teach us that whoever takes a single life[,] it is as though he destroyed a whole world, and

whoever sustains a single life[,] it is as though he sustained a whole world.”²⁰ The exceptive clause in that general rule in the Qur’an, allowing capital punishment for a murderer or the harder-to-define committer of “an abomination on earth,” stands in uncomfortable dialectic with the Quranic narrative of Cain’s repentance.

The law of retaliation enunciated in the Book of Exodus also has its parallel in the Qur’an and more than once, especially in two late Quranic passages. These passages were revealed to Muhammad during the years of his rule in Yathrib, later renamed *Madinat al-nabi* (“the Prophet’s town”), an oasis 210 miles north of Mecca. Muhammad’s situation had changed dramatically from the years when he was a persecuted Prophet in his hometown. In Medina he was charged not only with receiving revelation but also with grave civic responsibilities for a very mixed community. The Medinan Arabs, some (but not all) of them recently converted Muslims, had invited Muhammad in as mediator between the clan factions of their oasis. Also included in this mixed community were Jews native to that oasis and Meccan Muslim refugees who had left Mecca before or after the Prophet. That context is very important for understanding these portions of the Qur’an.

In the *Surat al-baqara*, a very early Medinan revelation, the Quranic revelation addresses itself to an audience that seems to have been familiar not only with the Hebrew Bible’s law of retaliation (Ex 21: 23-25), but possibly with the New Testament’s mitigation of that law²¹ (Mt 5: 38-39): “O you who keep faith! Retaliation has been prescribed for you concerning those who have been killed: freeman for freeman, slave for slave, woman for woman. But when one is forgiven for [such a crime] by his brother, the consequence should entail the usual recompense [given] in kindness. That is a mitigation from your Lord and a mercy. But anyone who commits an act of aggression after that will receive painful punishment” (Qur’an 2:178).²² As mentioned in the treatment of the law of retaliation in the Hebrew Bible, monetary or equivalent material compensation is usually prescribed for such violations. Even in the pre-Islamic Arab

tradition such compensation was called *diyah*, often rendered as bloodwit in English. The Anglo-Saxon tradition called such a payment *wergild*, money paid or property given to the relatives of a murder or accident victim as compensation for the loss of the victim's life. Such *diyah* or *wergild* provides a way to prevent a blood feud. The very next verse in the same passage of the Qur'an suggests that such peaceful retaliation can be life-giving: "There is [the possibility of] life for you in [such] retaliation, O men of intelligence. Perhaps you will then become God-fearing" (Qur'an 2:179). A later Medinan passage of the Qur'an—in fact, among the very last revelations received by Muhammad—reiterates the law of retaliation, but gives even more prominence to the possibility of charitable remission by bloodwit: "Whoever charitably surrenders [retaliation]—for [that person] it will serve as an expiation [of sins]" (Qur'an 5:45).

Much attention is paid in the West to violence wreaked by Muslims in revenge for wrongs and injustices perpetrated against Muslims in many times and places; there is no denying that such retribution has been exacted repeatedly, especially in recent times. It has often come down not only to the execution of captured military personnel but also, in some notorious cases, to the execution of journalists, humanitarian aid workers, and non-combatant religious men and women, Muslim and non-Muslim. Few Western critics of Islam, and sometimes, I fear, few militant Muslims seem to be aware of the ancient tradition of *diyah*, the pre-Islamic and Islamic compensatory payment of reparations for past injuries.

In modern times, however, several notable Muslim thinkers have spoken out against capital punishment. First in this rank I would count the Sudanese Muslim teacher Mahmud Muhammad TaHa, who distinguished a Meccan and a Medinan message of Islam. The Meccan message of Islam Muhammad received from God between 610 and 622 when he had no political role; the Meccan passages of the Qur'an do not legislate criminal penalties, much less capital punishment. The Medinan message of Islam Muhammad received during the last decade of his life when he was governing a fractious community in Medina. TaHa maintains that many

Medinan passages in the Qur'an, and especially passages about *hudud*, the punishments prescribed for serious crimes, need to be understood in their historical setting. For TaHa they do not represent the most basic message of Islam first received in Mecca. Only the Meccan message, TaHa insists, continues to be of enduring religious importance.²³

Not every Muslim would accept TaHa's distinction between Meccan and Medinan messages of Islam. In any case, TaHa was an extraordinarily virtuous man, well ahead of his time; sadly, he was executed in 1985 for his opposition to the enforcement of Shari'ah law in the last years of the dictatorial Nimeiri regime in Sudan. His Sudanese-American disciple, Professor Abdullahi Ahmed An-Na'im of Emory University, continues the campaign of TaHa for a more humane regime of punishment for crime in the Islamic world. "My trust in God," An-Na'im writes, "leads me to believe that current efforts to implement the public law of Shari'ah will fail because they are harmful to the best interests of Islam and the Muslims."²⁴

In July 2015 Penal Reform International, a London-based NGO dedicated to progressive abolition of the death penalty throughout the world, issued a major study document entitled *Shari'ah Law and the Death Penalty*, subtitled with a pertinent question: "Would abolition of the death penalty be unfaithful to the message of Islam?" The study document, principally authored by Muslim scholars, makes telling historical and theoretical arguments for repealing the laws mandating the death penalty in many modern Muslim-majority countries. Let me quote the document briefly: "It would therefore not be unfaithful to the tenets of Islam if a Muslim state were to participate in efforts that seek to prohibit or restrict the application of the death penalty."²⁵

I myself witnessed in the early 2000s the sham application of Islamic criminal law in twelve of Nigeria's northern states, the work of criminal politicians, and especially state governors, who at the same time used their unchecked powers to deplete state treasuries. Meanwhile, these state governors and their state assemblies appointed half-baked Shari'ah

court judges who ordered the amputation of the hands of sheep-stealers and other petty thieves. Two times attempts were made to have women accused of adultery put to death, but astute Nigerian women lawyers came to the legal rescue of these poor women.²⁶

There are Muslims all over the world today who are organizing to abolish capital punishment. The most famous of these Muslims is the youngest ever recipient of the Nobel Peace Prize, Malala Yousafzai. Now 21 years of age, she was nearly killed by one of the Taliban who attacked her in 2012 while she and her parents were campaigning for girls' education in Pakistan's Swat Valley. In 2013, speaking before the General Assembly of the United Nations on her sixteenth birthday, this victim of violence expressed a distinctly Muslim commitment to non-violence, abjuring all hatred of the militant member of the Taliban who tried to kill her in 2012. "I do not even hate the Talib who shot me," she said. "Even if there is a gun in my hand and he stands in front of me, I would not shoot him. This is the compassion that I have learnt from Muhammad, the prophet of mercy, Jesus Christ, and the Lord Buddha. This is the legacy of change that I have inherited from Martin Luther King, Nelson Mandela, and Muhammad Ali Jinnah. This is the philosophy of non-violence that I have learnt from Gandhiji, Bacha Khan, and Mother Teresa." Muslim women like Malala Yousafzai and the lawyers who defended those women dragged before Nigerian Shari'ah courts threatening capital punishment give me hope for the future.

CONCLUSION

Let me return to the revision to the *Catechism of the Catholic Church* ordered by Pope Francis. Following teaching proclaimed by recent popes, Cardinal Ladaria, Prefect of the Congregation for the Doctrine of the Faith, outlines on the present Pope's behalf the reasons why capital punishment is deemed morally inadmissible in modern times. Thus Ladaria quotes the 1995 encyclical of John Paul II *Evangelium vitae* to this effect: "Modern society in fact has the means of effectively suppressing crime by rendering criminals harmless without denying them the chance

to reform.”²⁷ Pope *emeritus* Benedict XVI, writing in response to a Synod on Africa, a continent too tolerant of capital punishment as a deterrent to criminal behavior, exhorted its readers to call “the attention of society’s leaders to the need to make every effort to eliminate the death penalty.”²⁸ Pope Francis, as quoted or paraphrased by Cardinal Ladaria, develops his predecessors’ thought further. “‘Today capital punishment is unacceptable, however serious the condemned [person’s] crime may have been.’ The death penalty, regardless of the means of execution, ‘entails cruel, inhumane, and degrading treatment.’ Furthermore, it is to be rejected ‘due to the defective selectivity of the criminal justice system and in the face of judicial error.’”²⁹

My heroine and age-mate, Sister Helen Prejean, was delighted with the revision Pope Francis made to the *Catechism*. “The huge thing,” she said to Kevin Clarke, a writer for *America*, the Jesuit journal of opinion, “is the recognition by the church of ‘the inviolable dignity even of guilty people who have done terrible crimes.’ The *Catechism* had often stated the dignity of innocent life, and people who are pro-life Catholics stand for the dignity of all life. But where it pushed today, right into the heart of the Gospel, is [to say that] even those who have done terrible crimes have an inviolable dignity. And part of that dignity is not to be strapped down and rendered defenseless and killed by an intentional act. That’s what changed in this. No exceptions.”³⁰

Let me conclude with a few personal, family reasons I have for opposing capital punishment. As I have mentioned in an earlier McGinley lecture, my father, Paddy Ryan (Lacken), actively participated after 1919 in the Irish struggle for independence. No sooner had the unsatisfactory results of the Anglo-Irish Peace Treaty been announced in December 1921 than civil war broke out between pro-Treaty and anti-Treaty Irish people, those willing to accept Ireland’s status as a Free State within the British Commonwealth with some trappings of independence, and those unwilling to accept such half-measures. During that civil war my father was arrested and detained by pro-Treaty forces. Destined for jail and

execution in nearby Limerick, he was mistakenly sent to a much larger prison camp, Harepark in the Curragh of Kildare. Peadar O'Donnell, a socialist activist within Irish Republican ranks, narrates in his civil war diary how my father managed to escape his fate in 1923. "Paddy Ryan (Lacken) had been transferred here by accident from Limerick. The mistake was discovered in Limerick when the sentence of execution against him came to be carried out. An order was sent to Harepark to hand him over to an escort, but he could not be located, for he had been by now thoroughly disguised and three thousand men there refused to answer names or receive letters or do anything that might assist in the search. Ryan was thus on the run in jail and kept on the run until danger of execution was past."³¹ Oral tradition in the family says that my father, less than 25 years of age at the time, shaved off his hair and grew a mustache, even using actor's makeup to disguise himself. I am glad he did escape capital punishment in the Curragh of Kildare in 1923.

I would not be here tonight, had he not.

NOTES

- 1 Pope Francis quoted in Luis F. Cardinal Ladaria, S.J., “Letter to the Bishops Regarding the New Revision of Number 2267 of the Catechism of the Catholic Church on the Death Penalty,” *Bolletino della Sala Stampa*, August 2, 2018, paragraph 6. Henceforth this document will be cited as Ladaria, with the paragraph number noted.
- 2 For a religious criticism of Pope Francis on the death penalty, see Steven A. Long, “Magisterial Irresponsibility,” *First Things* (October 2018) available online at www.firstthings.com. From a similar perspective, before the change mandated by Pope Francis, see Edward Feser and Joseph Bessette, *By Man Shall His Blood Be Shed: A Catholic Defense of the Death Penalty* (San Francisco: Ignatius Press, 2017).
- 3 *King Lear*, Act 3, Scene 4.
- 4 See Richard Clifford, “Genesis,” *The New Jerome Biblical Commentary* (Englewood Cliffs, NJ: Prentice Hall, 1990), 13a. Henceforth this reference work is cited as *NJBC*.
- 5 *Midrash Rabbah: Genesis*, tr. H. Freedman (London: The Soncino Press), 1:191.
- 6 See Richard J. Clifford, S.J., “Exodus,” *NJBC*, 53b.
- 7 Haim Hermann Cohn, “Capital Punishment: In the Bible; In Talmudic Law,” *Encyclopaedia Judaica*, 2nd ed. 4:445-47 (Detroit: Macmillan Reference USA, 2007). Henceforth this reference work is cited as *EJ 2*, with the volume and pages following.
- 8 Louis Isaac Rabinowitz, “Capital Punishment: In Practice in the Talmud,” *EJ 2*, 4:447.
- 9 *Mishnah Makkot* 1.10, available online at www.sefaria.org. Such opinions critical of capital punishment seem to have been formulated in opposition to the opinion of Rabban Simeon ben Gamaliel, a scholar who died at the hands of the Zealots around the time of the Roman destruction of the Temple. Rabban Simeon had declared that such leniency with capital punishment would multiply murderers in Israel.
- 10 The United Nations International Criminal Court, founded in 2002, was created precisely to provide a legal way to press charges against murderers in places like Congo, the former Yugoslavia, Rwanda, and Liberia, especially when perpetrators of mass murder seemed to escape any retribution within those deeply divided countries.
- 11 Menachem Elon, “Capital Punishment: In the State of Israel,” *EJ 2*, 4:448.
- 12 See Oded Yisraeli, “Cain as the Scion of Satan: The Evolution of a Gnostic Myth in the Zohar,” *Harvard Theological Review* 109: 1 (2016), 56-74.
- 13 In John’s Gospel, however, Jesus asks why a guard in the household of Annas strikes him: “If I have spoken wrongly, testify to the wrong. But if I have spoken rightly, why do you strike me?” (Jn 18:23).
- 14 See Laurence L. Welborn, *Paul’s Summons to Messianic Life: Political Theology and the Coming Awakening* (New York: Columbia University Press, 2015), 70. (Jn 18:23).
- 15 See Henry Chadwick, *Priscillian of Avila: The Occult and the Charismatic in the Early Church* (Oxford: Clarendon, 1976), 130.

- 16 See Augustine, Letter 133, available online at www.newadvent.org/fathers/1102133. Also see *Letter 134* available in *Letters of Saint Augustine: Selected and Translated*, ed. Mary H. Allies (London: Burns and Oates, 1890), 138-39.
- 17 *The City of God*, I, 21. My translation from the Latin.
- 18 *Summa Theologica*, IIa-IIae, q. 64, art. 2. My translation from the Latin.
- 19 See letter of Richard Harries (19 January 1603) sent from the Irish seminary in Lisbon to Father James Archer, S.J., in the Roman Archives of the Society of Jesus, Mss. Castell., 33, f. 94; see also M. Gonçalves da Costa, ed. *Fontes inéditas Portuguesas para a história de Irlanda* (Braga, 1981), 409.
- 20 As quoted in *The Talmud: Selected Writings*, tr. Ben-Zion Bokser (New York: Paulist Press, 1989), 207.
- 21 See Gabriel Said Reynolds, *The Qur'an and the Bible: Text and Commentary* (New Haven and London: Yale University Press, 2018), 81.
- 22 All translations from the Qur'an are my own.
- 23 *The Second Message of Islam*, tr. Abdullahi Ahmed an-Na'im (Syracuse: Syracuse University Press, 1987), 125-26.
- 24 Abdullahi Ahmed An-Na'im, *Towards an Islamic Reformation* (Syracuse, NY: Syracuse University Press, 1996), 187. 25 Hodgson I:330.
- 25 Penal Reform International, *Shari'ah Law and the Death Penalty* (July 2015), 34. Available online at www.penalreform.org/resource/Shari'ah-law-and-the-death-penalty
- 26 See Patrick J. Ryan, S.J., "Ready to Cast the First Stone", *America* 187 (25 November 2002).
- 27 *Evangelium vitae*, no. 27, published in *Acta Apostolicae Sedis* 87 (1995), 432.
- 28 Postsynodal Apostolic Exhortation *Africae munus* (19 November 2011), no. 83, published in *Acta Apostolicae Sedis* 104 (2012), 276.
- 29 Ladaria, paragraph 6. Single quotation marks surround words or phrases from Pope Francis in Ladaria's letter.
- 30 Kevin Clarke, "Sister Helen Prejean's 'happy day' as Pope Francis revises teaching on death penalty," in www.americamagazine.org (03 August 2018).
- 31 Peadar O'Donnell, *The Gates Flew Open* (1932; rpt: Cork: Mercier Press, 2013), 185.

Jewish Response to the 2018 Fall McGinley Lecture

Pierre M. Gentin, J.D.

I'd like to thank Judge William Kuntz and Sister Anne-Marie Kirmse for their kind introductions. It is a great privilege for me to join Professor Ebru Turan in responding to tonight's McGinley Lecture delivered by my friend, Father Patrick Ryan.

In discussing capital punishment from a Jewish standpoint, I begin with the foundation of moral and legal authority in Judaism: the Torah. In Jewish tradition, *Matan Torah*, God's revelation at Mount Sinai, has two equal components. First, there is the *Torah she b'ktav*, the Written Torah. This is the text of the first five books of the Hebrew Bible, the "Five Books of Moses." The Written Torah begins with the familiar stories of Creation and the Flood from which Noah is saved. It is during the lifetime of Noah—a time period *before* the Jewish people enter the biblical narrative—that God conveys the *sheva mitzvot bnei Noach*, the Seven Laws of Noah that are incumbent on all of humanity. Among those laws are the prohibition against murder and the requirement that societies establish a fair and honest justice system. Judaism holds that "the righteous of all nations have a share in the world to come" but Jewish tradition leaves the particulars of how non-Jewish societies should

observe the Seven Laws of Noah to the wisdom of God-fearing non-Jewish people.

The Written Torah then turns to the life of Abraham, the first Jew. From the 12th chapter of *Sefer Bereishit*, the Book of Genesis, and onward, the Torah's narrative traces how the Jewish family becomes the Jewish people. The Torah's laws guide how Jews are to live out their mission as a *mamlechet kohanim v'goy kadosh*, "a kingdom of priests and a holy nation." Judaism views the vast majority of laws in the Torah as incumbent only upon Jews, including the Torah's laws relating to capital punishment.

The second component of the revelation at Sinai is the *Torah she b'al pe*, the Oral Torah which, in Jewish tradition, was imparted by God alongside the Written Torah. While the Written Torah's stories and principles are typically expressed succinctly, in a powerful phrase or a significant word or letter, the Oral Torah provides extensive commentary and detail in order for Jews to understand the lessons of the Torah, and to observe the Torah's six hundred and thirteen commandments in practice.

During the long period of Jewish sovereignty in the Land of Israel before the Common Era, the Oral Torah remained just that—an unwritten tradition of intellectual and emotional engagement with the Torah's text, passed on from generation to generation for over a thousand years—until Israel became part of the Roman Empire. It was then, in the first centuries of the Common Era, that the Romans crushed Jewish national and religious life, destroying the Temple in Jerusalem and stamping out the last holdouts of Jewish resistance, from Gamla in the Golan Heights, to Masada in the Jordan River valley. Jewish leaders of the day recognized that the nation would soon be exiled and dispersed. One of those leaders, Rabbi Yochanan ben Zakkai, was spirited out of the besieged city of Jerusalem in a coffin so that he could meet with the Roman general Vespasian. Conceding defeat, Ben Zakkai asked Vespasian: *Tein li Yavne v'chachameha*. "Leave me the city of Yavne, and its scholars." It was at Yavne, and other centers of Jewish life that remained after the destruction,

that scholars—chief among them Rabbi Yehuda HaNasi, Judah the Prince—committed the *Torah she b'al pe*, the Oral Torah, to writing in a text called the Mishna. Over the following centuries, the Mishna was itself extensively developed in Israel and in Babylonia, in a vast document called the Talmud.

And yet, even after the Oral Torah's substantive content was embodied in the sixty-three tractates of the Talmud, it never lost its organic, deliberative energy, "the force that through the green fuse drives the flower," in the words of Dylan Thomas. The Talmud's interpretive methodologies, passion for argument, its homiletic boldness has given rise, over the past 1,500 years, to the entire intellectual edifice of rabbinic Judaism. To this day, the spirit of the Oral Torah animates rabbis as they derive new insights from the Torah and continue to develop the *Halacha*, Jewish law, to address the questions and needs of each new generation.

With that background on the Torah, what is Judaism's view of capital punishment? Very early on in the Written Torah, we read of Cain's pre-meditated murder of his younger brother Abel, a tragedy born of jealousy and anger. After seven generations, Cain is himself killed, in fulfillment of God's decree. A just punishment for murder, the Torah tells us, is death although God—not humanity—convicts Cain and imposes the sentence.

The Torah's first direct prohibition of murder comes in Chapter 9 of *Sefer Bereishit*, the Book of Genesis, when God tells Noah: "Whoever sheds the blood of man, by man shall his blood be shed, for God made man in His own image." The Torah reiterates—murder is punishable by death—but now human beings can impose the sentence. Murder is not just a crime against the victim and an act that sabotages societal harmony. For the Torah, it's much more: since every human being is created *b'tzelem Elokim*, in God's image, the murder of a human being is an attack on God as well.

When it comes to Jewish society, the *Torah she b'ktav*, the Written Torah, is clear that provided important safeguards are met, a Jewish court can impose the death penalty. Capital offenses in the Torah include

what might be characterized as crimes against God, such as idol worship, cursing God, and violating the Sabbath, which is one of the Ten Commandments. Infractions relating to sexual morality, including incest, adultery, and bestiality, are also capital offenses, as are murder, kidnapping, and giving false testimony in a capital case.

What principles is the Written Torah emphasizing? Accountability for our actions. Reverence for human life as a societal priority. The holiness to which people must aspire in their conduct. And that there are acts so egregious and destructive that capital punishment *is* a just and measured response. But it's the Oral Torah—in particular, the Talmudic tractate Sanhedrin—that fleshes out these principles with essential detail and commentary.

For example, while the Written Torah indicates that a Jewish court can impose the death penalty, it is the Oral Torah, the Talmud, that explains that this cannot be an ordinary tribunal but must be a Sanhedrin, a court of no fewer than 23 judges. The Talmud adds that all evidentiary inferences are to be drawn in favor of the accused. In a seemingly counterintuitive ruling—and yet one emblematic of Judaism's misgivings about the death penalty—if the Sanhedrin's judges unanimously imposed a death sentence, the accused was set free on the theory that if not a single judge could side with the accused, that court must be unsound. While the Written Torah requires the testimony of two competent witnesses in a capital case, it's the Talmud that explains that those witnesses must have first clearly warned the offender that he was about to commit a capital offense, and clearly heard the accused reply that he knew and understood, but was proceeding with the crime anyway.

In practice, the Oral Torah's explication of the Written Torah's principles makes it all but impossible to carry out the death penalty in Jewish law. Father Ryan earlier referenced the sages of the Mishna who criticized any Sanhedrin that would impose the death penalty. Historians indicate that while capital punishment did take place in ancient Israel, it was rare and had likely ceased entirely when the Temple in Jerusalem—where the

Sanhedrin held its court sessions—was destroyed by the Romans in the First Century.

Since the destruction of Jewish life in the Land of Israel—nearly 2,000 years ago—Jews have lived in what we call the *Galut*, or the Exile. Students of Jewish history know well that with some notable exceptions—including the American Jewish experience—these two millennia have been characterized by devastating persecution and suffering, especially in Europe. Scholars have traced the development of the iconic Western view of the Jew as the archetypal “Other,” a demonic nation guilty of deicide, a subhuman race undeserving of the most basic human rights. Entrenched societal anti-Semitism in Europe frequently gave way to violence: to the exile or murder of individual Jews and families, the expulsion and massacre of whole Jewish communities, confinement in ghettos, forced conversions, pogroms, the Crusades and Inquisition, Tsarist and Communist persecution, and of course, the Holocaust—less than 75 years ago—in which two out of every three European Jews were murdered.

The *Galut* experience has left Jews with an acute awareness of how easily the powerful can put people to death. While the persecutors of Jews have often faced little or no accountability for their murders, up to and including genocide, history is replete with examples of Jews being condemned to death and executed—in meaningful numbers—for the capital crime of being Jewish. Jews know intuitively that the lynch mob mentality can manifest itself in courtrooms, religious tribunals, or other mechanisms of the state. It’s fascinating that while American Jews are so divided today on issues of religion, politics, and public policy, there is a remarkable degree of consensus in opposition to capital punishment, a fact that I attribute—not to a common understanding of Jewish tradition—but rather to the internalized Jewish experience of the past 2,000 years.

And what about the State of Israel, where for 70 years, Jews have exercised political sovereignty? As Father Ryan noted, during Israel’s 1948 War of Independence, a Jewish soldier, Meir Tobianski, was wrongly accused

of espionage and executed by a military court. In response, the newly established country suspended all death sentences pending discussion of whether to adopt the capital punishment that had been in effect, under British law, during the Palestine Mandate. In 1954, Israel's parliament eliminated the death penalty from Israeli law except for crimes against humanity and certain crimes during wartime. Although modern Israeli law is not based on *halacha*, Jewish religious law, the Torah's discomfort with the death penalty has plainly been influential.

To date, Israel's courts have executed only one individual: Adolph Eichmann, commandant of the extermination camp Auschwitz-Birkenau, where an estimated one million Jews were murdered between 1940 and 1945. Eichmann's execution in 1962 was opposed by prominent Jews including philosopher Martin Buber, and Levi Eshkol, who would become Prime Minister of Israel the following year.

As one of the few Middle Eastern countries without the death penalty, Israel's stance is, as Father Ryan pointed out, not without its critics, particularly given Israel's complex security challenges. In 2011, for example, Israel released over 1,000 prisoners in exchange for one Israeli soldier held by the militant group Hamas which publicly stated that the prisoners released had been responsible for the deaths of 569 Israelis. To date, however, the Israeli parliament has continued to reject the death penalty, even for murder cases where there is no doubt as to motive or action.

I'll conclude with what seems to me a straightforward question: If the Torah spends so much time discussing capital punishment, and if Jewish history shows that even mass murderers have gone unpunished, why are Jews so profoundly uncomfortable with the death penalty? I believe the answer lies in the deepest impulses of the Torah and Jewish tradition: the consciousness that every *living* human being has the unique potential to bring the *Shechina*, God's immanence, into this world, through their actions. Judaism trembles at the thought that this potential could be extinguished, regardless of how justified capital punishment may be. The

Torah recounts that as the Jewish people prepare to enter the Land of Israel, God instructs them: “I call heaven and earth to be witnesses that I have placed before you life and death, blessing and curse—*uvacharta bachayim*—and so, choose life.”

Thank you.

Muslim Response to the Fall 2018 McGinley Lecture

Ebru Turan, Ph.D.

I thank Father Patrick Ryan for this beautifully written, deeply moving, and insightful lecture. In his examination of capital punishment in a comparative perspective across Jewish, Christian, and Muslim traditions, Father Ryan highlighted the emphasis given in each tradition to human dignity, preservation of life, and forgiveness. He praised the growing movement worldwide to abolish the death penalty and expressed his hope for a future in which capital punishment will be completely eliminated, and the inviolability of human dignity universally acknowledged. As a Muslim woman who grew up in secular Turkey and as a historian working on pre-modern Islamic history, Father Ryan's lecture touched many personal chords in my heart and mind. However, as you will hear more about it in my response, as much as I wish to agree with Father Ryan and share his optimism, I cannot. The global resurgence and

radicalization of Islam which glorifies death and destruction in the name of religion diminishes my hope for a peaceful future based on respect, toleration, and reconciliation. I wonder, both as a Muslim and as an Islamic scholar, when or if the Islamic tradition will ever be able to overcome this sick and sickening fanatical extremism, afflicted with an insatiable bloodlust, and reinvent itself both socially and spiritually to help create a world living in peace and harmony.

The first part of my presentation aims to give a brief overview of Islamic criminal law, that is the criminal law administered in accordance with the divine law in Islam, also known as Shari'ah. This is essential in understanding which crimes were traditionally associated in Islam with capital punishment, and which procedures were required to implement them. In the second section, I will focus on the reintroduction of capital punishment into penal codes in Muslim majority countries under the growing pressure of political Islam since the later decades of the twentieth century. I argue that this trend is the fundamental issue that underlies the acts of *jihadi* violence, perpetrated against those who have allegedly insulted and blasphemed Islam in recent years.

CAPITAL PUNISHMENT IN SHARI'AH

Broadly, crimes are treated in Shari'ah in two categories: offenses committed against God and those against man. The former are called *hudud*, which can be translated in English as boundaries, and refer to those offenses that violate the boundaries set by Allah. The *hudud* crimes and their punishments are specified by the Qur'an and in some instances by the Sunnah of the Prophet, documented in the recorded sayings of Prophet Muhammad, called Hadith. The offenses incurring

hudud punishments are adultery or *zina*, which means unlawful sexual intercourse, unfounded accusations of adultery, consuming intoxicants, highway robbery and some forms of theft. According to some jurists, apostasy and blasphemy are also included in *hudud* crimes. This is a topic to which I will return later in my presentation.

Capital punishment figures prominently in the category of *hudud* crimes. The punishments prescribed for *hudud* range from beheading and crucifixion to publicly stoning to death and amputation of hands. However, the evidentiary standards for these punishments are set often impossibly high in Shari'ah. Therefore, they were implemented only very sparingly and very rarely in Islamic history.

As an example, let's take a look at the case of adultery or *zina*. Based on the Hadith of Prophet Muhammad, all schools of Islamic jurisprudence are in agreement that *zina* is to be punished by stoning if the offender is a free, adult, and married Muslim. But what kind of specific evidence is needed to legally carry out the *hudud* punishment? Firstly, a Muslim must confess to *zina* four separate times. But if the confessor retracts his words before or during the punishment, the punishment cannot be carried out and he/she is released. Secondly, four adult males who are held to be righteous and known to be pious Muslims must testify that they all simultaneously observed the couple engaged in unlawful sexual intercourse without any doubt or ambiguity. This implies that for the punishment to be executed, they must be able to say that they saw with their own eyes the private parts of those involved in the unlawful act meet. Thirdly, if the four witnesses take back their testimony before the punishment is carried out, then the punishment cannot proceed and the witnesses must be prosecuted for the crime of false accusation. Since these requirements are virtually impossible to be fulfilled, aside from a few rare and isolated instances, there is nearly no historical record of stoning for *zina* being implemented in the Islamic lands.

Furthermore, drawing on the prophetic traditions, Muslim jurists have stipulated that *hudud* punishments should be avoided by the slightest

doubt or ambiguity with respect to the evidence. Therefore, it would not be wrong to state, as Jonathan Brown has remarked, “the harsher *hudud* punishments were meant to deter and to convey the gravity of offenses against God, rather than to be carried out.”¹

Capital punishment in Islam also appears as a type of punishment mandated by *qisas* crimes, which constitute the second category of crimes in Shari’ah and refer to those committed against man. *Qisas* is the Islamic legal principle of “eye for an eye.” In the Qur’an and the Hadith, the punishment for crimes contained in this category is set as exact retribution or compensation. For example, in the case of intentional or unintentional murder, Shari’ah gives the murder victim’s nearest relative two options: they can either use their right to take the life of the killer or accept a monetary compensation or the blood money, called *diyyah* in Arabic. As Father Ryan has also demonstrated, although the principle of *qisas* is stipulated by the Qur’an, the Qur’an strongly urges that one should accept *diyyah* or blood money and not demand the execution of the killer. Several verses in the Qur’an underline the importance of showing clemency and forgiveness for the believers in cases of *qisas*, articulated most forcefully in Surah 2:178 and Surah 5:45, both cited by Father Ryan in his lecture.

In practice, however, since very early on in Islamic history, criminal cases were usually handled by secular courts administered by the rulers. The laws and procedures used in these courts were based however only loosely, if at all, on Shari’ah. For example, the high evidentiary standards demanded for the implementation of *hudud* punishments were often disregarded or abandoned in sentencing at secular courts.

MODERN DEVELOPMENTS AND THE RISE OF ISLAMIC MOVEMENTS

During the nineteenth century, Shari’ah based criminal laws were widely replaced by statutes inspired by European models nearly everywhere in the Islamic world, except for some particularly conservative regions,

such as the Kingdom of Saudi Arabia. Starting with the later decades of the 20th century, however, we see the trend turning in the opposite direction in Muslim majority countries. Under the growing influence of Islamic revivalism, Islamist movements began to agitate for the full implementation of Shari'ah, especially of the *hudud* punishments, including the death penalty. The reinstatement of *hudud* laws has had a particular symbolic importance for these groups because of the Quranic mandate for such crimes. Under the pressure of Islamization, starting from the 1970s on, *hudud* punishments have been incorporated into the legal codes in some Muslim majority countries. As a result, the harsh *hudud* punishments, which had been used only very rarely or not at all in the past, have come to be applied more frequently and more widely. Furthermore, as pointed out by Father Ryan based on his experience in Nigeria, the administrators of the re-Islamicized criminal law often disregarded the stringent restrictions of Shari'ah, traditionally observed at their application.

A good case in point is the enactment of the Hudud Ordinances in Pakistan in 1979, which replaced parts of the British era Pakistan Penal Code. Promulgated by the then military ruler of Pakistan, Zia ul-Hakk, as part of the Islamization program in the country, the new Hudud Law was meant to bring Pakistani law into conformity with the prescriptions of Shari'ah. As a result, new criminal offenses such as adultery, fornication, consumption of alcohol, and theft were added to the law, along with the new punishments of whipping, amputation, and stoning to death. The provisions concerning adultery or *zina* were particularly controversial. Critics pointed out that there were hundreds of incidents where a woman subjected to rape or even gang rape, was eventually accused of *zina* and punished by imprisonment. After much criticism and public agitation, parts of the law were revised in 2006 by the Women's Protection Bill.

APOSTASY AND BLASPHEMY LAWS IN ISLAM, PAST AND PRESENT

In the last part of my response, I would like to focus on another controversial crime included in the *hudud* prescriptions: apostasy and blasphemy. Islamic jurists have defined apostasy as an act of leaving Islam to become an atheist or to convert to another religion. Blasphemy means using impious and derogatory remarks or engaging in such acts concerning Allah, the Qur'an, and the Prophet Muhammad. The Qur'an admonishes both apostasy and blasphemy but does not specify any worldly punishments for either. Some of the hadiths however suggest that various punishments, including death, should be imposed on the offenders. As mentioned earlier, traditionally there was no consensus among Islamic jurists whether apostasy and blasphemy was punishable by death. During the last decades, however, like other *hudud* punishments, apostasy and blasphemy laws have begun to be carried out more frequently as a result of Islamist agitation. In some Muslim majority countries, some politicians and radical groups have taken advantage of these laws in order to promote their Islamist agendas and to silence, coerce, and intimidate the leftists, liberals, Muslim intellectuals opposing radicalization, and religious minorities and their leaders. There are also cases in which blasphemy laws were invoked to instigate incidents of mob violence and assassinations of prominent figures.

The most well-known blasphemy incident which attracted a huge media attention is the one that involves the British author Salman Rushdie and his book, *The Satanic Verses*, published in 1988 and inspired in part by the life of Muhammad. As soon as the book came out, it sparked immediate controversy, with some saying that the book contained derogatory allusions to the Prophet. The book was banned in many Muslim countries and public rallies were held, during which copies of the book were burned. On 14 February 1989, Ayatollah Khomeini, the leader of the Iranian Revolution in 1979 and then the supreme leader of Iran, issued a *fatwa*, a legal opinion, calling *The Satanic Verses* blasphemous against Islam

and ordering Rushdie's execution as punishment. A bounty was offered for Rushie's assassination. Khomeini's *fatwa* provoked further violence. Several people associated with translating or publishing the book were attacked, severely injured, and even killed. Rushie himself had to go into hiding and was forced to live under police protection for several years.

The incident of Salman Rushdie was followed by other violent attacks in recent years, all carried out by Islamist terrorists purportedly in response to blasphemous depictions of Islam and Muhammad. They are far too many and far too heartbreaking to enumerate here in full, but it is hard not to remember the terrorist attack in January 2015 on the office of the French satirical magazine *Charlie Hebdo*. Undertaken by two Al-Qaida militants, the attack resulted in the killing of twelve people and the wounding of eleven. The allegedly blasphemous jokes the newspaper published about Prophet Muhammad were used as justification for the terrorist act.

These terrorist attacks committed in the name of protecting Islam have led to criticisms across the world of the apostasy and blasphemy laws in Islam. The critics have rightfully pointed out that they grossly violate freedom of religion, conscience and thought and other basic human rights as enunciated in the United Nations Charter. To conclude, in my view, as far as Islam is concerned, the question of death penalty is an issue that goes beyond concerns about protecting human dignity, establishing justice, and abolishing capital punishment. The crimes for which death penalty is mandated in Islam raise fundamental questions with respect to the compatibility of Islam with modern norms and universal values without which we cannot envision a peaceful global community living together in harmony, respect, and understanding. In other words, it is a matter that directly strikes at the heart of the future of Islam as a religion, system of values, and political force.

¹Jonathan A. C, Brown, *Misquoting Muhammad: The Challenge and Choices of Interpreting the Prophet's Legacy* (London: Oneworld, 2014), 180–181.

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