



3-7-2010

The Moral and Spiritual Challenge of Capital Punishment

Lloyd Steffen

Follow this and additional works at: <http://digitalcommons.sacredheart.edu/shureview>

Recommended Citation

Steffen, Lloyd (1999) "The Moral and Spiritual Challenge of Capital Punishment," *Sacred Heart University Review*: Vol. 19: Iss. 1, Article 2.

Available at: <http://digitalcommons.sacredheart.edu/shureview/vol19/iss1/2>

This Article is brought to you for free and open access by the Sacred Heart University Press Publications at DigitalCommons@SHU. It has been accepted for inclusion in Sacred Heart University Review by an authorized administrator of DigitalCommons@SHU. For more information, please contact ferribyp@sacredheart.edu.

LLOYD STEFFEN

*The Moral and Spiritual Challenge
of Capital Punishment*

In January 1998, Karla Faye Tucker became the second woman in thirty-one years to be legally executed in the United States. Only a few weeks ago in Jasper, Texas, a white man, John William King, 24, was sentenced to death for the brutal and racially-motivated murder of James Byrd, a black man. On Christmas day, 1998, Pope John Paul II called for an end to the death penalty, reiterating that call on January 27, 1999 before a crowd of 100,000 at the Trans World Dome in St. Louis, Missouri: "I renew the appeal I made most recently at Christmas for a consensus to end the death penalty, which is both cruel and unnecessary. Modern society," he went on, "has the means of protecting itself, without definitively denying criminals the chance to reform."

All three of these stories were widely reported. All three stories pertained to the practice of state-sponsored execution in the United States. All three stories could provoke some deep questions about the moral meaning of the death penalty, but I ask, did any of these three actually do so? My perception is that most Americans believed the John William King death sentence was a just desert for a horrendous crime; that Karla Faye Tucker's execution, though more problematic, was just if the central issue were her actual crime and not how she reformed; that the Pope's remarks expressed religious ideals that are not binding in secular America and which are even marginal for many American Roman Catholics, many of whom are ambivalent about capital punishment.

In coming to speak with you about the moral and religious meaning of the death penalty, I want to present what I think are the critical moral questions involved in each of these three stories. I seek to demonstrate how we can investigate this topic as a moral

Lloyd Steffen is University Chaplain and Professor of Religion Studies at Lehigh University. This talk was delivered at Sacred Heart University on March 15, 1999, as the annual Bishop Walter W. Curtis Lecture.

issue worthy of our time and effort; and because the death penalty is a symbol and much of the energy for death penalty support derives from religious sources and sanctions, I will attend briefly to the role religious belief can play in providing moral warrants for execution practice.

Moral Issues

Since moral truth is never finally a question of majority preference, the first thing we must do is avoid appeal to popular sentiment and polling data as a simple determiner of moral meaning. Having said that, let me remind you that thirty years ago opinion polls showed Americans equally divided over the death penalty. That is no longer the case. Support for capital punishment nationally runs at around 72%, and there are some counties in Texas, the state that executes most regularly, where support is over 90%.¹ What has led to this high level of support for capital punishment?

Is it that execution has caused a decrease in murder rates so that a common good for all of society is advanced? States that have the death penalty continue to have murder rates twice the rate of those that have abolished it.

Is it that keeping murderers alive for decades is an extravagantly expensive and execution provides a necessary economy and cheaper alternative to incarceration when tax dollars are scarce? Execution continues to cost from five to six times what a forty-year life sentence would cost. The state of Indiana recently released an estimate that it could save five million dollars a year if it rid itself of the death penalty, savings, incidentally, that might be put into support for the work of law enforcement officials.²

Is it because the death penalty is one way America can continue to show solidarity with other societies who share our deepest political aspirations and cultural values? Every Western democracy except the United States has abolished the death penalty, and countries that continue to use it – China, Iran, Iraq – are regularly cited for human rights violations. One of the first things South Africa did when apartheid ended was abolish the harshest instrument of white rule that was used primarily against blacks, the death penalty.

The death penalty is not an object of fierce and spirited debate in American society today: it is an accepted practice. If the above reasons,

THE CHALLENGE OF CAPITAL PUNISHMENT

17

which are reasonable reasons for lending the practice support, fail to justify the practice, why is it so widely accepted? There are two reasons I will offer.

The first is that many Americans do not trust the criminal justice system to dispense justice and thus protect innocent citizens from crime. The average time served for committing a criminal homicide is less than that spent on drug dealing offenses and the average murderer is released after only 6½ years.³ In light of that reality, execution begins to look like a "final solution" that assures that an offender who threatens society will never do so again.

I understand this, but I would remind you that murder is the least repeated felony crime. Only about 1½% of those who commit America's 22-23,000 murders per year are sentenced to death. The claim that our criminal justice system fails to deliver justice is no argument for justifying the direct, deliberate, and intentional killing of an individual human person by the state, since a flawed criminal justice system should be expected to be flawed in capital cases as well. Supporting execution as a way to compensate for the inadequacies of a criminal justice system constitutes, in Wittgenstein's language, a "category mistake." Failure of a criminal justice system to deliver justice and protect the innocent, while a worthy topic for debate and political involvement, is not an argument for overturning what morality ordinarily presumes cannot be justified and therefore condemns: the direct and intentional killing of a member of our moral community.

The second reason why I think so many people support the death penalty is this: it is justice — simple justice, proportional justice, a just retribution imposing the most serious penalty on the most serious crime.

What moral assumptions allow us to conclude that the death penalty is simple justice? I will grant that on first glance it looks that way, but information and understanding of America's death penalty system may go far toward dispelling that initial impression; and I really do believe that because Americans in general do not understand capital punishment and how it works, we are as citizens oblivious to its moral challenge. But there is a moral challenge, and I want to present a case for thinking about that challenge. I will begin by rehearsing briefly some of the arguments for capital punishment and show what would undo them as strong arguments; then I want to try a different

way of thinking about capital punishment, and ask if you think this is a better way to think about the subject, a better theory than the others. I shall outline a theory of what I call "just execution," and it is in that discussion that we can revisit those three stories with which we began — the Karla Faye Tucker execution, the King sentencing, and the recent papal pronouncements.

Religious Sanction

What are typical defenses of capital punishment? Since lots of people are guided in their moral thinking by religion, we should at least mention religious ethics and its attendant moral theory — divine command. Divine command is the theory that provides philosophical support for acting from religious motives. The foundational question of ethics is this: Why do you do what you do? In divine command theory, the answer, which is powerful and in some versions philosophically defensible, is this: because God told me to.

So here is a first reason to support capital punishment: God commands it; God even seems to like it. In Western religion, in fact, of the 613 commandments that comprise the teaching of law in the Hebrew Bible, 36 of those laws approve of execution for certain offenses. Before blithely accepting this justification, remember some of the offenses for which you could be killed besides murder: cursing your parents, striking your parents (Exodus 21:15); trespassing on sacred areas (Exodus 19:12); profaning the Sabbath (Numbers 15:32; would our weekend football and basketball games constitute such a profanation?); adultery, blasphemy, false prophecy (who would risk going into meteorology, even with Doppler radar?), and negligence (if, after being warned that your ox is dangerous, it gores someone to death, you are to die: think about how many automobile industry executives would be executed for not getting a recall notice out soon enough to prevent a death by mechanical fault).

These scriptural references do not represent Jewish teaching, for the religion of Judaism has strong traditions of opposition to capital punishment, and in Christianity, the Gospels tell of Jesus interfering to prevent a legal execution over adultery; of Jesus repudiating the ancient rule of "an eye for an eye"; and Jesus asking God to forgive his executioners, since Jesus obviously thought it was not in his power to

do so and the offense of execution was ultimately against God.

Many Christians today support capital punishment, but my argument is that this is because Christian theology has transformed the cross from a brutal instrument of Roman terror and political oppression into a sublimated good. Christian theology affirms that the cross was by divine action rendered the instrument for the atoning work of the Christ by whose blood God is reconciled to humanity. The cross as symbol directs our attention not so much to death as to life and salvation: it became the admittedly harsh but nonetheless necessary instrument that effects salvation – yours, mine, that of the whole cosmos. With so many positive and life-affirming associations attached to it, the cross has been rendered in our theological thinking as a very good thing. A certain reasonable ambivalence thus attaches to the cross as instrument of state terror, and given that the cross is transformed into a positive instrument of divine atonement and acceptable sacrifice, it is no wonder that Christians are not immediately repulsed at the thought of execution. I continue to imagine, I might add, that the Jesus whom we are told buckled under the weight of his cross, did not go to his death secretly joyful that he was about to effect a cosmic reconciliation between a sinful humanity and a God whose justice couldn't be reached any other way than by the sacrifice of innocent blood.⁴

My immediate point is that religion is a primary sanction for the death penalty. "Thou shalt not kill" means you should not kill unless the killing can be justified, and any killing that God approves is automatically justified – including for profaning the Sabbath or cursing your parents. Upon examination it is not so clear what God's will is in the matter of execution: the one time God directly deals with a murderer and dispenses justice personally – the Genesis story of Cain – God refuses to demand of the murderer life for life. What God's will is on state- or community-authorized execution is an interpretive issue that undergoes revision in Judaism and Christianity over time. Although I cannot claim to know for certain God's final view on the appropriateness of the death penalty, I do find it significant that the Jesus presented in the Gospels is presented as one who explicitly repudiated "eye for an eye" thinking, who nowhere endorses the right of the state to execute, and who himself was condemned by the state – the Roman state – to death for the crime of sedition.

Deterrence

But there are other arguments: deterrence, for example. Execution protects society by setting on crime so high a price that the thought of being put to death deters you, that is, it prevents you from committing the crime. A major proponent of this theory, John Stuart Mill, a nineteenth-century English philosopher, thought that the foundation of deterrence was *psychological arousal*. In other words, the thought of death must be so terrible against the background of normal life that it presents a horrendous prospect that would psychologically arouse a susceptible and tempted individual to refrain from murder.

Deterrence has problems as an argument, since there is no evidence that those who commit murder in a moment of passion give any thought to consequences; and those who commit more sinister, premeditated murder are convinced they'll never get caught. But the problem I want to pose is this: How in a society like ours do we provoke psychological arousal and a sense of horror sufficient to prevent a murder? Is execution really so fearful? Does arousal come from thinking about the execution, which is now not a boiling in oil or a hanging followed by being drawn in four directions by horses and dismembered, then having one's intestines shoveled out of your body for you to see before dying as molten lead is poured into your abdominal cavity? That medieval execution method might even work a little today against the backdrop of the latest slasher film or tonight's top news story in Philadelphia, which is likely to be a murder. But routine violence and commonplace murder have desensitized us — have they not? — robbing us of the capacity for the arousal deterrence requires?

Consider that murder is not only familiar in our environment: it's the centerpiece of our entertainment. The average child growing up in America will by the age of 18 witness in the media 16,000 murders and over 200,000 acts of violence.⁵ Against that background of violence, how do you generate sufficient psychological arousal to create horror at the thought of execution? How do you generate a deterrence effect based on horror when we execute people in secret, and then do so by giving them an IV? Is an IV so scary that it would deter a murderer? Is

the thought of drifting off to permanent sleep by an IV so horrible a prospect that it makes us shudder just thinking about it, so much so that we know for certain that we would not kill another human being for fear of facing such a terrible death?

Just Retribution

Deterrence is often heard and still appealed to, but there is no evidence of a deterrent effect, which would be a plausible justification for capital punishment. How about another argument: just retribution? For committing a murder, the killer must die. Why? Because, as the Enlightenment philosopher Immanuel Kant said, by killing another, you forfeit your own life on a principle of simple proportionate justice. Justice requires the execution. What harm you visit on another should, as a fair and just response, be visited on you as proportionate punishment: it's the Golden Rule. Kant went so far as to say that by entering into society and its system of justice administration, while you wouldn't will your own execution, you, as a citizen possessed of the right to be treated with respect and protected from interference, implicitly consent to the forfeiture of your own life as just punishment for the crime of willfully taking the life of another.

This may sound like a defensible reason, and, as I say, I think this is one of the reasons people commonly advance to justify the death penalty. But there are some problems. Kant believed that murderers must die because justice demands it and that every murder is morally equivalent to every other murder — so that equal and proportionate justice requires on principle that every murderer be put to death. There are, as I said, 22,000 murders in America every year, and we put on death row about 300 people, or about 1½%. Kant's theory would have us dispense death to 22,000 individuals a year, for if you take a life you lose your life.

Americans may want more executions, but would we tolerate 22,000 a year? We would have to resort to king-size multiple-use poisoning gurneys and retire electric chairs and build electric couches. I am willing to assert, in a hopeful and optimistic frame of mind, that an around-the-clock, day-in-day-out killing operation that piled up 22,000 corpses a year for a crime where currently the average sentence is 6½ years would offend Americans' aesthetic, if not moral,

sensibilities.

But that is not even the biggest problem. The one thing Kant never seemed to have considered is that the system of justice administration would execute an innocent person. Kant's moral philosophy could not justify the execution of an innocent person, and he went out of his way to argue *against* the kind of moral thinking that would allow the death of an innocent person as an acceptable loss. A wrongful killing would be impossible to justify, for in Kant's philosophy, to engage in *any* behavior required that the rule or maxim governing that behavior be made akin to a universal law. By consenting to the proposition that "Executions must proceed even if they occasionally kill an innocent," you would have to agree that the innocent person – even if it were only one – could be you, or your mom or dad, or another loved one. You would have to consent to that – it would have to be *any* innocent person, any individual from the class of innocent persons; and you, if you support the acceptable loss theory, could not distinguish one innocent from another. You would have to consent not only to your own wrongful execution, but that of those you love.

Kant himself would not agree to this on principle, for on his theory it would be contradictory to say that killing the innocent is unjust, which it is (and all reasonable persons know it to be), but that execution can be morally justified even when it is unjust. Unjust killings, because they cannot be justified, are morally prohibited. "But there are not unjust execution killings because we do not execute innocent persons," you say. You are wrong to say that. Hugo Adam Bedau, Michael Radelet, and Constance Putnam in their book, *In Spite of Innocence*, identify 400 wrongful capital convictions this century, with 23 of those wrongful capital convictions actually leading to executions.⁶

Since the moratorium on executions was lifted in 1976 and executions resumed under the Constitution, about 80 individuals who have been convicted of murder and put on death row to await execution have been released from prison on a finding of innocence and wrongful conviction. That statistic reveals why we have an appeals process. Our criminal justice system, for all of its perceived flaws has one outstanding virtue: it was constructed by individuals who understood that it would make mistakes, and the mistake that most

needs avoiding is a mistake around execution. Such a mistake cannot be righted: it's an irrevocable mistake. If polls in the wake of the first O.J. Simpson trial are a reliable guide, most people believe that the criminal justice system makes mistakes. It is thus curious why this suspicion of a criminal justice system, widely regarded to be error-prone, does not seem to translate into suspicion about the dispensing of justice in capital cases. Many Americans, the same ones who feel victimized by unfairness in their parking tickets or traffic violations, blithely accept that no such unfairness arises in capital cases. How can the variable of human fallibility, so prevalent in disputes over parking tickets, not attach to murder cases?

Weighed against the empirical reality of those wrongfully convicted and later released from death row upon findings of innocence is the counterpoint to a view given its clearest expression by Mary Sue Terry, Attorney General of Virginia from 1986-94, who said in replying to an appeal to introduce new evidence from a prisoner sentenced to death: "Evidence of innocence is irrelevant."

The justice administration system makes mistakes. They may be rare or not so rare, but Kant only needs *one* execution of an innocent in practice to create havoc for his theory. If confronted with the American system of justice administration, I believe Immanuel Kant, who articulated the theory that justice requires that killers be killed, and who articulated the simple retributive justice argument that holds sway for many if not most supporters of the death penalty today, would not – and could not logically – support execution as practiced in America today.

Just Execution

Let us turn away from these old arguments and try something new. Consider this question: Should the state have the right to kill its own citizens? Yes or no. Those who say no may be pacifists or speaking out of a religiously-based absolutism, and I have no persuasive argument to penetrate the absolutism barrier. So let us take the non-absolutist option, which yields a positive response to the question. But then this question comes as a rapid follow-up: Should the right of the state to kill its own citizens be restricted? "O yes," you say, "We do not want the state to claim some power where it can just dispense death capriciously and at a whim. That would be to approve of Hitler's Nazi

regime, or Pol Pot or Idi Amin – pick your murderous tyrant." So then the answer is that the right of a state to kill its citizens is a restricted right, the kind of right exercised by police officers when they use lethal force to defend themselves or to protect innocent citizens in threatening situations. The state clearly has the right reasonably in such situations as that, but police cannot just kill people deemed undesirable. Killing by the state must be restricted to self-defense or to protect others.

If we are in agreement up to this point let me proceed to ask about capital punishment. Does the state have a right to kill citizens through capital punishment? You may say yes, but I want to say, ``Not so fast." A police officer who kills in self-defense does so in the immediacy of the threat. The officer cannot wait until the offender is captured, rendered defenseless, then walk into the offender's cell and kill the unarmed, incapacitated offender claiming self-defense.

Self-defense may be a just reason to use deadly force, but the situation just described hardly warrants a claim of self-defense. Yet that is the situation facing the capital offender who has been captured, imprisoned, and rendered non-threatening. The threat is not immediate, so that the use of lethal force on grounds of self-defense is no longer appropriate. What if you kill to protect others? Again, if the offender is removed from society and incapacitated so that no threat is posed, then society is protected. It would be wrong for a police officer to use lethal force on an incapacitated offender for the reason that by so doing, society at large was being protected. The threat is gone.

What I mean to suggest by these statements is that we do grant the state power to use lethal force, and yes, the state may kill its citizens: but it is a highly restricted right and if truth be told, we seem to honor what I would call a *moral presumption* or general rule – a reasonable rule – that ordinarily the state ought not to kill its own citizens. Even police authorized to use deadly force ought not do so frequently or without grave cause, such as self-defense. On this logic, I want to say that the foundation for rethinking the moral challenge of capital punishment must reside in a common agreement that you and I share, namely, that whatever our differences on capital punishment, you and I should be able to agree that the state ought not to kill its citizens. We agree on this rule, though I acknowledge, as you should, that that rule or presumption is not absolute. It admits of exceptions, and the

question is, "Is capital punishment an allowable exception to our rule?"

A theory of what I call "just execution" is a moral theory that says that the state ought not, ordinarily, kill its own citizens. By logical extension, if the state ought ordinarily not kill its citizens, then neither should it, ordinarily, execute them. A moral presumption against the use of the state's execution power attaches to the idea that the state ought not ordinarily kill its citizens, so that we can say without controversy, even in a society that allows capital punishment, that the moral presumption at stake in capital punishment is against the use of the death penalty. If we use this punishment at all, we want to use it rarely, maybe for only the worst of the worst crimes: we don't want to use it for jaywalking or traffic violations or robbery or even rape or assault. We want to restrict it to murder – this is a rather recent development historically – and the fact that only 300 out of 22,000 murders a year get to death row indicates just how much we want to restrict its use. This restricted use of the death penalty is concrete evidence of a societal belief that ordinarily we ought not to execute persons, even murderers. It is clear from the American practice of execution that observing the presumption against the use of capital punishment is what accounts for the fact that we subject only a few and then special cases of offenders to capital punishment.

Which cases? This is where things get interesting. In light of the moral presumption against capital punishment, a theory of just execution would specify conditions that would have to be satisfied if the presumption against execution were to be justifiably lifted, and every time a criminal offender is sentenced to death, we presumably do that. We say: "Here is a case where it is just to impose a death sentence: here is a situation in which we can morally justify lifting the presumption against the use of the death penalty."

That is the theory. The theory is one thing, the practice another. Let me lay out nine conditions that I think would have to be met in practice if we are to impose a death sentence justly:

1. The punishment must be authorized by competent authority.
2. There must be a just cause for using it, a grave cause, like self-defense.

3. The motivation for using it must be justice and not vengeance.
4. It must be imposed fairly, without discrimination.
5. The punishment itself must not be cruel, for respect for persons prohibits torture.
6. The punishment must not subvert the very value (life) that it is supposed to be protecting and promoting.
7. It must be a last resort: no other punishment could possibly deliver justice adequately short of execution.
8. The end being sought must restore the equilibrium of justice upset by the offender's crime: the end must be the restoration of peace.
9. The punishment must not yield an effect out of proportion to the end being sought: it should be proportionately, the worst punishment for the worst crime.⁸

If all of these conditions are met, as presumably they are when we sentence persons to death and execute them, the execution, on this theory, may be deemed just. The American legal system, in my view, has appealed to such a moral theory in developing execution policy, making executions infrequent and not even a regular punishment for murder. When a death penalty is pursued in a particular case, it is done so with the sense that the above criteria have been satisfied. The law restricts use of the death penalty, requires fairness and non-discrimination in imposition, and establishes various conditions that must be satisfied in the interests of promoting justice and evaluating the moral meaning of execution practice.

That is the theory. It is a theory of "just execution" that can be used to test any particular execution, even the whole system of execution. It is a reasonable theory, and it conforms to a system of natural law moral thinking originating in Cicero and transmitted to Western culture through the Roman Catholic moral tradition, where it has been used to frame a theory of, say, a just war. (In "just war" theory, several conditions are laid out that if met would overturn the just war presumption that we ordinarily ought not to use force to settle conflicts.)

Our American practice of capital punishment does not meet the

requirements of the just execution moral theory. For if the conditions are not met — all of them, all nine — then an execution cannot claim moral justification. Although some of the criteria can easily be met in individual cases, all nine are not ever met in the current practice of execution.

Fair imposition, for instance, is continually violated. It is violated on racial, gender, and class grounds. A disproportionate number of persons sent to death row are black and male, and the racial issue shows up not so much by looking at the color of death row inmates, but by looking at the race of victims. A person who kills a white person in the state of Maryland is 11 times more likely to get a death sentence than if the victim is black. Why? I suggest racism. The message in that statistic, which has correlates across the country and reveals a similar attitude toward execution that was found in South Africa, is this: killing whites is the crime that overwhelmingly increases the likelihood of a death sentence. The General Accounting Office has said that in 82% of cases, race of victim was found to influence who would be charged with capital murder and eventually receive the death penalty.⁹

If we as American citizens were educated about how the death penalty is imposed, we would realize that the truly startling thing about the conviction of John William King in Texas is that he was a white person sentenced to death for killing a black person. That fact was reported in the news as the second time this had happened in Texas, but unfortunately it did not lead to a wider discussion about the true locale of racial discrimination in death sentencing: that race of victim is the deciding factor and the King conviction is noteworthy because it is a blatant exception to the rule concerning who receives a death sentence. Executing a white person for killing a black person is an anomaly in our practice of execution, and despite the fact that this was reported, we seem to be focused on the just desert delivered to one filled-with-hate and easy-to despise individual, as if that one case can be our paradigm of justice. How can we say conclude from one situation that justice is imposed in capital cases in a non-discriminatory fashion when the death penalty is a societal practice that requires that we look at the practice as it is imposed across the society? If you do that, you will find, as did the General Accounting Office, that racial considerations affect the entire process of arrest, indictment, prosecution, jury selection, trial, sentencing, and appeal. The King

conviction ought to have opened up a wider conversation about the way in which race affects the death sentencing process, but unfortunately we let go the fact that this was the second time this has happened in Texas history and settled our consciences with the belief that impartial justice was delivered. If we look at the King sentencing against the historical and social backdrop of execution practice in Texas, King is a clear anomaly, so much so that as much as I fear saying this, King seems positioned to make a case logically – not legally – that since Texas does not execute those who kill black persons, he is a victim of racial discrimination in sentencing practices. This terrible irony brings home the reality of racial discrimination in America's execution practices.

But discrimination affects not only race. About 90% of capital defendants are indigent, so poor that they cannot afford counsel. They thus receive court appointed attorneys, who often are not prepared to engage capital law, which is a highly specialized area of criminal law. There is a class discrimination surrounding the death penalty, and some notable murder cases involving wealthy persons – O.J. Simpson and the Dupont trial in Philadelphia – testify to the role that well-financed legal defense teams play in keeping capital punishment away from clients.

And gender is an issue. Of the 532 executions since 1976, only three of them have involved women. It was a big story when Texas proceeded to execute Karla Faye Tucker, a woman who was articulate in interviews, had nice hair and capped teeth, a born-again Christian who even married the prison chaplain. What made this Texas execution noteworthy was the fact that Karla Faye Tucker was a woman, and that is an issue because women are so rarely executed. Even in Texas there was serious division over this one. Karla Faye Tucker did not seem threatening. This attractive woman who had been forced into prostitution as a teenager by her mother found prison the best environment she had ever known. And in that environment, she flourished and reformed and died truly different from the drug-crazed murderer who buried a hatchet in the skull of one of her victims. The fact is that many of those on death row have stories like Karla Faye Tucker, and many are born-again Christians, as she was. The special factor in this case was sex – and execution is a gender specific practice, a "male thing," if you will, that discriminates along gender lines.

THE CHALLENGE OF CAPITAL PUNISHMENT

29

Since 1976, at least 12,000 women in this country have been convicted of killing their children, with only 3 or 4 of them sentenced to death, so the problem is not a lack of women candidates for execution. The point rather is that in a sexist society, it is possible that women are not viewed as being fully autonomous moral agents who can be held fully accountable for their murders. I only want to point out the fact of discrimination: actually, women do not fare well in the criminal justice system when the crimes are not capital. But where the death penalty is concerned, there is a sex discrimination affecting the execution practice, and that is what the Karla Faye Tucker execution exhibited: the second woman in thirty-seven years out of the more than 500 executions that had taken place in those years. A theory of "just execution" would not allow discrimination on any of these grounds — race, class, or gender. That one criterion — just imposition — prohibits discrimination and would halt a system of execution infected with discrimination.

But I mentioned nine criterion, not just one; and these others fail as well.

In an adversarial system of law, prosecutors will often appeal to emotion and thus to vengeance to gain a death sentence. Executions rarely bring peace to those who have lost loved ones, and not every surviving victim of capital crime wants another death. Executions continue to be botched, thus cruel. The fact that execution perpetuates the cycle of violence, leading fools to cheer on an execution rather than soberly accept the loss of a life as tragic, even when it is a murderer's life, gravitates against the criterion that execution honors life and does not subvert the value of life.

Furthermore, let me reiterate that capital punishment cannot be said to be proportional, if by that we mean that we mete out the most serious punishment for the most serious crime. We execute for murder, but the average murderer in the United States not only avoids the death penalty but serves, as I said, only 6½ years in prison. Drug offenders on average serve longer sentences. Those facts should force the conclusion that our most serious crime is not murder but drug offense, and that conclusion can be drawn logically by looking at how we put into practice what we value.

What all of these things mean is that the American execution practice is out of sync with what a theory of just execution would

demand; and the one criterion that seems to me never to be met is "last resort." If a criminal is removed from society and rendered non-threatening, and the public is made safe and secure, we thus have an alternative to execution. This is precisely the point that Pope John Paul II has been making. In making this point he is not making a vague appeal to religious ideals but to a criterion of just execution theory. He is pointing out that a just execution theory will set a standard for justice, then saying that our execution practice does not satisfy the last resort criterion. He is thereby pointing to a general moral failure in the system of state-sponsored execution. The Pope is also offering the view that there are alternatives to execution that will protect society – criminal perpetrators can be incapacitated by incarceration – so that execution is not, in fact, a last resort. I would point out that not only is last resort challenged by the incarceration alternative mentioned by the Pope, but American law has evolved recently to prevent jurors from thinking about incarceration as a reasonable option to execution. In Pennsylvania, life imprisonment means life without parole in every instance where life imprisonment is imposed, and that can be a terrible and harsh fate. The Supreme Court, however, has said that states that have such a policy do not need to inform jurors that a life sentence would keep the offender away permanently, a bizarre decision that seems designed to keep the capital punishment system going by means of keeping jurors uninformed of their sentencing options. Removing options or misleading people into thinking they do not have options whereby legitimate societal safety concerns can be fairly evaluated violates the spirit of just execution theory, for the theory is all about making informed choices in a context of freedom. It was only in such a context of freedom that the Pope could evaluate the execution practice and determine that the incarceration option suffices to incapacitate violent offenders, provide for the public safety, and thus challenge the execution practice itself on the basis of the "last resort" criterion of just execution theory.

Conclusion

I came here to say that the death penalty poses a moral challenge. The moral challenge of the death penalty concerns the central question: Can the killing that occurs when a person is executed by the

state be rendered just, that is, can it be deemed a morally justified killing? You cannot answer that question without finding out about how we actually put a theory of just execution into practice, and the American practice of execution does not meet the test of the theory.

You and I should be able to agree that the best moral defense of execution killing or any kind of killing is self-defense or defense of the innocent. But the death penalty is not self-defense, and this is the heart of the Pope's moral objection to the death penalty. State-sponsored execution is a deliberate and cold-blooded killing of a defenseless and powerless individual, who, indeed, may be a terrible human being. The argument might then go, "Well, then, it protects society." If the average murderer is incarcerated for only 6½ years, the legitimate fear of violent criminals being released to kill again is aroused, and it is reasonable even for capital punishment opponents to say that those who threaten the public safety must be contained. But making sure that our criminal justice system delivers justice and incapacitates those who threaten the public safety provokes issues that ought to issue in a debate about the effectiveness of our criminal justice system. The fact that murderers may spend less time in prison than drug offenders is not itself a moral justification for execution killing.

The problem is that we never seem to get around to talking about the criminal justice system because public officials have learned that all they have to do to respond to the crime problem and indicate that they are "hard on crime" is to say "I support the death penalty" and thus dispense with ideas about what they would do to combat crime and strengthen the environment where all of us want to be secure in our persons. When I hear public officials responsible for some aspect of our justice administration system start talking about the importance and necessity of capital punishment in the state's arsenal of crime-fighting tools, I assume that they have no ideas, no plan, nothing. Capital punishment is code, and in its worst symbolic connotations, it is a code that appeals to our fear of those who in this society present themselves before the majority as the stranger — the poor and the racial minority.

Execution is not a major cause of death in America, but it is a major symbol. The question is, of what? It is offered as a symbol of justice, but I am convinced that a study of the death penalty will reveal that that is illusion. It is a symbol of power, an ultimate God-like power

that human beings should be reluctant to grasp lest they act in pretense as if they were God. The death penalty does not conform to the requirements of justice and fairness, and the death penalty minus justice equals power. Exercising this ultimate power – this power to take life – in pursuit of a perfect justice that is not only irrevocable but which mistakenly obliterates the body in punishing the moral personality oversteps its bounds, offends justice, models a use of violence for solving societal problems, and, theologically, announces the death of God.

I conclude by reminding you that spirituality is what you do with your freedom, so that using your freedom to learn about capital punishment is the spiritual challenge that faces you. You will become a more informed citizen by so doing. And if you learn about how execution policy is put into practice and carried out in your name and with your consent, you may become a more morally reflective and critical citizen, more apt to raise a moral questions about an issue that many will tell you is not really a moral issue at all. ``Of course the death penalty is justified, morally justified." In that ``of course" is the moral challenge that faces you.

Notes

¹See Bruce Tomaso, ``Texas' Deadly Ritual," *Dallas Morning News*, October 1, 1995.

²See <http://www.vadp.org/info.htm>, a site maintained by Virginia Death Penalty Information.

³See my book, *Executing Justice: The Moral Meaning of the Death Penalty* (Cleveland: Pilgrim Press, 1998), pp. 133-37.

⁴For more on this line of theological interpretation, see *Executing Justice*, pp. 142-69, especially the section on ``The Guilty Jesus."

⁵See Carol Ann Campbell, ``A TV Guide for Kids," *The Record*, September 15, 1996, A1.

⁶Hugo Adam Bedau, Michael Radelet, and Constance Putnam, *In Spite of Innocence* (Boston: Northeastern University Press, 1992).

⁷Reported at <http://www.vadp.org/quotes.htm>.

⁸For a full discussion and critique of these criteria, see *Executing Justice*, pp. 88-141.

⁹For citations to these and other racially related statistics, see my section on

THE CHALLENGE OF CAPITAL PUNISHMENT

33

“Race” in *Executing Justice*, pp. 122-24.