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AMERICA AND THE DEATH PENALTY:
A CASE STUDY OF THREE DIVERSE GROUPS

By

RICHARD KEVIN MOORE
B.A., OLD DOMINION UNIVERSITY, 1991

THESIS

Submitted in partial fulfillment of the requirements
for the degree of Master of Arts in Public Policy

Robertson School of Government

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1998

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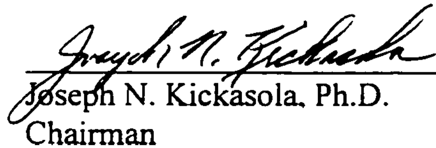

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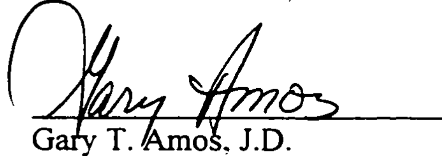

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ABSTRACT

This study first traces the history of the use of capital punishment in America since its inception. In this, it will show how the anti-death penalty lobby has perpetually worked since the founding of the country to eliminate the death penalty as a punishment for capital crimes. This anti-death penalty lobby has had limited success, but on their goal to completely abolish its use they have not yet succeeded.

The study then turns to reviewing three very diverse groups and their opposition to the use of the death penalty as a form of punishment. These groups are The American Civil Liberties Union, The American Bar Association, and the Catholic Church. The first two of these groups have already publicly announced their opposition to the use of capital punishment and the third group is on the verge of doing so.

Finally, the study turns to an analysis of the death penalty as it relates to the concept of the political covenant that all humans have with God and his fellow man. Just what exactly is a covenant and, just what exactly are the ramifications of breaking a covenant with God are discussed. Along with this, Noah's covenant with God and its meaning on all following generations is presented as the answer to the question that persists throughout this document: God does sanction the use of the death penalty by the state for the crime of murder.

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AMERICA AND THE DEATH PENALTY:
A CASE STUDY OF THREE DIVERSE GROUPS

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INTRODUCTION

On April 19, 1995, a cold blooded killer drove up to the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, and left his rented Ryder truck parked outside. But this was not just another rental truck: this truck was loaded with a 4,800-pound fertilizer-and-fuel-oil bomb. This bomb was to eventually detonate and kill 168 people and injure more than 500. In the weeks and months that followed, the United States Federal Bureau of Investigation (FBI), with the assistance of nearly all the federal law enforcement officers in the country, began putting the clues together and searched for the cold-blooded killer(s).

On August 11, 1995, United States Attorney General, Janet Reno announced that three individuals had been arrested for the crime, two of whom were Timothy McVeigh, a twenty-seven year-old former United States Army member with an outstanding service record, and his ex-army buddy, forty year-old Terry Nichols. Both men were charged with conspiring to use and with using a weapon of mass destruction, destruction of federal property and eight counts of killing federal law enforcement officers who worked in the building.

The eleven-count indictment against McVeigh and Nichols detailed a scheme to accumulate bomb components and detonate the bomb. According to the FBI, in September and October of 1994, the two gentleman using false names, bought two tons

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of ammonium nitrate fertilizer and concealed it in a storage unit in Kansas. The two as well stole other explosives from another storage locker in Kansas and then concealed them in Arizona. Finally, after accumulating all the supplies and resources needed to produce the bomb, the two men put the bomb together. After it was completed McVeigh drove the bomb to the Murrah Federal building, where it was eventually detonated.

The third person mentioned in Attorney General Reno press conference, was another former Army buddy of McVeigh and Nichols, namely Michael Fortier. Fortier, a 26 year-old friend of the two accused killers, was charged with knowing of the plan, but concealing it from the investigation. Fortier, for his part, immediately pleaded guilty to the offense, and agreed to testify on behalf of the government against McVeigh and Nichols for a lesser charge.

Both McVeigh and Nichols would plead not guilty to their charges and their cases would go to trial. Both men would have faced the ultimate penalty for their crimes, the death penalty, if they were found guilty. McVeigh was eventually found guilty of the offenses and was sentenced to be executed. Nichols, for his part, was also found guilty, but the jury decided not give him the death penalty, because he was not at the scene of the crime when the bomb was planted.

With the trial and sentencing of McVeigh, to be executed at the hands of the state, the issue of the use of the death penalty has once again come to the forefront of American justice. For its part, the use of capital punishment in America has been under fire from the beginning. Over the years, the parameters of its use have changed, but its use has

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been steady for nearly all our country's great life. But not all of society agrees with its use, and because of this a large number of states have outlawed its use.

As of the end of 1992, Alaska, District of Columbia, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin had outlawed its use, while the thirty-six remaining states still have laws that allow for its use. In August of 1995, the State of New York changed its mind again and has reinstated its use. In the remaining thirty-six states that still use the death penalty, from 1976 to June 1997 there were 391 executions, which makes for an average of about thirty prisoners executed annually.[1]

With each of these 391 executions there has been a battle within the hearts and minds of Americans. Many in America believe that the use of the death penalty is wrong and should be outlawed. The rationale for this passion comes from a wide variety of reasoning. One argument is that its use has a negative effect on society, because it lowers the value of human lives, while others argue against the use of the death penalty because they feel it is not a real deterrence to criminals and that it just is not cost effective.

Opponents of the death penalty also point out that the use of capital punishment devalues human life, while a disproportionate amount of minorities and those with mental illness are being put to death. Opponents also argue that the chance that an innocent person could be put to death is just too high for our country to even consider its use. The argument against capital punishment even goes as far as the church and the Bible. Some

[1] Religious Tolerance, *Capital Punishment: The Death Penalty* [Online]; available from http://www.religioustolerance.org/execute.html#whaot; Internet; accessed 5 January 1998.

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Christians feel that they are no longer bound by the legal codes of the Hebrew Scriptures that require the use of the death penalty.

On the other side of the argument. proponents of capital punishment continue to lobby for it use based on its deterrent value and its cost effectiveness. Vengeance is also discussed as a reason for it continued use. because it is felt that with the death of the murderer. it will satisfy the need for justice. Finally, the proponents for the death penalty can also be found in America's churches. Many Christians feel that the Bible requires the use of capital punishment for a wide variety of crimes.

For this study of the death penalty, I have found three very intriguing groups that have taken the death penalty debate to new and fascinating levels. These three groups are: The American Civil Liberties Union (ACLU), The American Bar Association (ABA) and the Catholic Church. The first two members of this group have come out against the use of capital punishment. while the third is on the verge of doing so.

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II

A BRIEF HISTORY OF THE USE OF CAPITAL PUNISHMENT IN AMERICA

"The supreme penalty exacted as punishment for murder and other capital crimes."
Black's Law Dictionary

Early History

For all intents and purposes, the first record of the existence of the death penalty can be found in the estimated year 5000 BC, when God made his covenant with Noah.[2] With the advent of the Noahic Covenant, the Bible states in Genesis 9:6: "Whoever sheds man's blood, by man his blood shall be shed, for in the image of God he made man." The context of this passage is when God made his covenant with Noah and his descendants. The question then becomes, did capital punishment exist before Noah? There is no clear evidence that it did or did not exist before Noah, but it is easy to speculate that some form of vengeance existed before the Noahic Covenant. Other than the Bible, the earliest written history of the death penalty can be found in the great code of laws drawn up by the Babylonian Hammurabi in about 2000 BC.[3]

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[2] William H. Baker, On Capital Punishment (Chicago, IL: Moody Press, 1985), 4.

[3] Elinor Lander Horwitz, Capital Punishment, U.S.A. (New York, NY: JBLippincott Company, 1973), 13.

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Throughout the death penalty's existence, one truth has stood clear. This truth lies in the right of the state to defend itself and its citizens against those men and women who refuse to obey the law. As for America, in its relatively young history, there have been men and women put to death for close to one hundred different crimes. These crimes range from murder, rape, robbery, arson and witchcraft, to treason and espionage. Ultimately, though, as Black's Law Dictionary describes the death penalty, it is the "supreme penalty exacted as punishment for murder and other capital crimes."[4]

Early on in America's history, the colonist deemed that the death penalty was a justifiable sentence for certain capital offenses. These early Americans gained these feelings and knowledge from their religion and the teachings they received in the English common law. On average the number of capital crimes that existed in each colony was about twelve, but this number and the actual capital offenses varied from colony to colony. Most of the colonist that were executed, were executed for the crimes of murder, treason, counterfeiting, horse theft, arson, robbery, rape, sodomy, and exciting slaves to rebellion.[5]

At the end of the eighteenth century the laws for the use of capital punishment began to change in America. After the Revolutionary War, many of the states' court systems began to throw out parts of the English common law and develop new laws that they felt were more appropriate for the new country. These new laws were more liberal

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[4] Henry Campbell Black, Black's Law Dictionary (St. Paul, MN: West Publishing CO., 1990), 400.

[5] Horwitz, 33.

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in context and began to ultimately undermine the old views of the use of the death penalty.

With the push for reform and abolition at the end of the eighteenth century, the nineteenth century was soon to become the century when large numbers of Americans began to demand the abolition of capital punishment. This theme was to run throughout the nineteenth century and into the twentieth century as well. During these time periods the laws relating to the death penalty began to weaken and such things as non-public executions and the right of a jury to give life imprisonment instead of death came into effect. The laws got so weak in some states that they either outlawed its use all together or only used the death penalty on subjects who were convicted for first-degree murder.

Why this change of heart in America? When one looks at the history of the death penalty, one comes to a quick realization that since its conception, its use has been under fire. This principle holds true for the United States as well. There have been numerous men and women throughout the ages who have fought for the abolition of the death penalty, but few have had the influence on early American opinion like George Fox, Cesare Beccaria, and Dr. Benjamin Rush did.

George Fox, the founder of the Quaker religion, was the first real vocal opponent of the death penalty. While at Derby prison in 1650-51, he saw men being put to death for crimes such as petty theft. Fox was appalled at what he was seeing, and began to crusade for reform in England. Through his position as the founder of the Quaker religion, Fox began teaching to his followers that the use of the death penalty was wrong.

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Fox as well through his position in the church was able to influence Quaker thought and doctrine against the use of capital punishment that still exists today.[6]

Other prominent men spoke before and after Fox, such as Voltaire, Rousseau, Marx, Hume, and Franklin against the use of the death penalty, but an Italian jurist named Cesare Beccaria was the first real influential opponent of the death penalty to come after Fox.

At the end of the eighteenth century, Cesare Beccaria wrote a book entitled, On Crimes and Punishment, in which he called the use of capital punishment an absurdity. For his argument, Beccaria stated: how could a state that despises and punishes those who commit homicide then commit murder themselves in order to deter its citizens from taking these actions themselves in the future. Beccaria believed that the threat of life imprisonment presented the only genuine deterrent to crime. He viewed executions simply as public spectacles in which the state committed murder while never instilling fear in its citizens as it was hoped it would.[7]

The first major influential abolitionist in the United States was Dr. Benjamin Rush. Rush, a Quaker physician, and a signer of the Declaration of Independence, wrote and read a paper on the death penalty to a gathering of intellectuals at the house of Benjamin Franklin. Rush, in this paper, condemned the use of capital punishment on humanitarian grounds. Rush believed, like Beccaria, that it was inconsistent for the state

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[6] Ibid., 48.

[7] Cesare Beccaria, "On Crime and Punishment," in An Essay on Crimes and Punishments, trans. E.D. Ingraham (Stanford, CA: Academic Reprints, 1952), 98.

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to kill a man for the crime of murder. Instead of the death penalty. Rush pushed for prison reform. In doing this Rush hoped that capital offenders could be kept from hurting the general public while attempts at reform were tried on the criminals.[8]

Dr. Rush. for his work. is considered the father of penal reform in the United States. and thanks to his work through his Philadelphia Society for Alleviating the Miseries of Public Prisons. the Walnut Jail opened in Philadelphia in 1790. With the opening of this jail. it marked the beginning of the penitentiary system in the United States.[9] Following in Rush's religious beliefs. the penitentiary system is based on the idea that the prisoner does his penance in his cell. in the hopes of repaying his or her victim and society for their sins. Furthermore. Rush's actions have encouraged and supported other anti-death penalty organizations around the country.

Following Dr. Rush. the abolitionist movement began to gather steam and numbers. Finally in 1846 the State of Michigan became the first English-speaking jurisdiction in the world to eliminate the death penalty from its books. Slowly other states began to join Michigan. These included Rhode Island in 1852 and Wisconsin by 1853. But during the 1850s and 1860s. and the push for civil rights after the civil war. the movement began to steadily lose its sense of urgency.

With the end of the civil war, the reformers who were concentrating on this issue of the death penalty began to be diverted to the causes of civil rights. The issue didn't die out all together though. Mandatory death sentences had all but ceased to exist in most of

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[8]Horwitz. 48.

[9] Ibid, 48.

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the states. and the State of Maine joined with the other states and abolished the use of capital punishment all together. As for the federal government. after long debate in the Congress. they reduced its list of capital offenses to three: murder. treason. and rape. But even for the federal government these crimes did not require a mandatory death sentence.

As the nineteenth century came to an end. many in the abolition movement continued to fight for the complete abolition of the death penalty. but the going was hard. But during this time new and inventive ways were being created to help ease the perceived cruelty of the execution. In 1893. a convicted ax murder named William Kemmler became the first man to die in the electric chair. The desire for more humane executions also held over to the twentieth century when in 1924. in Carson City. Nevada. the gas chamber was first used. Finally in 1936 the last unrestricted public execution in the United States took place.

As the twentieth century rolled on. more states began to abolish the use of the death penalty and the amount of executions began to steadily drop. From 1930-39 an average of 167 persons were executed a year. From 1940-49 that number was to drop to 128 per year. Between the years of 1950-59 the number dropped to seventy-one. The year 1962 saw forty-seven persons executed and twenty-one followed the next year. In 1965 there were only seven. and in 1966 there was only one. and 1967 saw just two before the Supreme Court stepped in.[10]

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[10] Ibid., 62.

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The Supreme Court and Capital Punishment

As the 1960s rolled in, the fight for the abolition of the death penalty left the state house and entered the court house. Before this time, it was never imagined that the courts would ever consider a case whose main argument was that the use of capital punishment was unconstitutional. For over a century, the courts had read the Bill of Rights to say that it was not their right to interfere with the laws and practices of the individual states when it came to the issue of capital punishment. But the times had changed, and the courts had now become the major battleground for the abolition movement to push for the abolition of its use.

Nowhere in the Constitution does it say that the use of the death penalty is unconstitutional. In looking at the founding fathers and their original intent with the Constitution and the Bill of Rights, there was next to no debate on the issue of capital punishment. The only debate on record was right before the Eighth Amendment was ratified. The Eighth Amendment is the amendment which outlaws the use of cruel and unusual punishment. During the original debate on the Eighth Amendment, it came to light that in the future the use of this Amendment would be used to try to outlaw the use of capital punishment. Because of this it was urged by some, that the Amendment not be passed for the fear of just that.[11]

Starting in 1963, the fears of some the founders started to come to fruition. In October 1963, three members of the Supreme Court, led by Justice Arthur J. Goldburg, wrote a dissenting opinion in Rudolph v. Alabama. In this opinion, Justice Goldburg,

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[11] Weems v. United States, 217 U.S. 349 (1910).

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called for the court to consider the use of capital punishment as unconstitutional on the grounds that its use on a rapist could be in violation of the rapist's constitutional rights.[12] With this dissenting opinion, it signaled to the abolition movement that more than one member of the court may be against the use of the death penalty and that their arguments could eventually be heard at the Supreme Court level.

So what are the Constitutional issues that the abolition movement could use to fight the use of the death penalty in the courts? The answer to this question lies in five areas: one, any attempt to deprive a person of his or her life would involve a violation of that person's Fifth and Fourteenth Amendment rights to due process of law. Second, it is next to impossible, according to the abolitionist, to seat an impartial jury in a capital case. Because of this, it violates the defendant's Sixth Amendment rights.

Thirdly, the use of the death penalty is considered by many as cruel and unusual punishment, and because of this, these folks believe its use violates the Eighth Amendment. Fourthly, the death penalty is considered to violate certain rights retained by the people as discussed in the Ninth Amendment. Finally, it is believed that if anyone is put to death, it has violated their equal protection of the laws as discussed in the Fourteenth Amendment.

The battle lines had been drawn, and such groups as the American Civil Liberties Union (ACLU), and the NAACP Legal Defense and Educational Fund (LDF) were ready for the fight. The first real test for capital punishment and the courts came in August 1967 with the cases of Adderly v. Wainwright and Hill v. Nelson. In these cases,

[12] Rudolph v. Alabama, 375 U.S. 889 (1963).

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injunctions were given staying all executions so that the lower federal courts could decide whether the death penalty violated the Constitution.[13]

The next test for the use of capital punishment came in 1972 with Furman v. Georgia. In Furman, the Supreme Court ruled that the State's procedural rules had become so flawed that the use of the death penalty had become arbitrary. In this case all nine of the justices filed their own separate opinions, taking over 230 pages to express their views.[14] In these pages the complexity of the court's problems and the depth of the disagreement among its members came to light.

In their decisions, all of the justices were attempting to find a solution to the State's procedural problems, and five justices ruled that capital punishment was unconstitutional. Justices Brennan and Marshall ruled that the death penalty was unconstitutional because it was, *per se*, cruel and unusual punishment. Three other justices concurred with Brennan and Marshall, but on the narrower grounds that the sentencing procedures that were currently in use were constitutionally defective.[15]

Justices Burger, Blackmun, Powell and Rehnquist did not agree with the five other justices and took a more traditional stance on the use of the death penalty. These justices used four different arguments to defend their support of the death penalty. First, the justices noted that there was a long tradition of capital punishment in America and

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[13] Hugo Adam Bedau, The Courts, the Constitution, and Capital Punishment (Lexington, MA: D.C. Heath and Company, 1977), 13.

[14] Furman v. Georgia, 408 U.S. 249 (1972).

[15] Ibid.

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The court did uphold other state statutes requiring certain considerations of special aggravating and mitigating circumstances in capital punishment sentences. With these decisions in Profitt v. Florida, Gregg v. Georgia, and Jurek v. Texas, the Supreme Court opened the door which they had closed in the Furman case in 1972 for the use of the death penalty once again.

In Profitt v. Florida, the court ruled that Florida's new law which was modeled after the Model Penal Code was constitutional, with two exceptions. The first exception was that the court was not bound to uphold the judgment of the jury when it imposes the sentence of imprisonment. Secondly, the Florida statue was not allowed to permit jury decisions by majority vote.[20]

In Gregg v. Georgia, the court upheld the state statute which requires that the jury in all capital punishment cases must find at least one of the ten aggravating circumstances specified in the statute.[21] This new law in construction significantly overlapped the Model Penal Code except that the Georgia statute did not specify mitigating factors. To overcome this, the state statute permits the sentencer to consider any relevant mitigating circumstances that could cause the sentencer not to impose the death sentence.[22]

In Jurek v. Texas, the court upheld the Texas statute which defined capital murder as the intentional killing in five situations. These consisted of killing a law enforcement

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[20] Profitt v. Florida, 428 U.S. 242 (1976).

[21] Gregg v. Georgia, 428 U.S. 153 (1976).

[22] Richard G. Singer & Martin R. Gardner, Crimes and Punishment: Cases, Materials, and Readings in Criminal Law (United States: Matthew Bender & Company, 1996), 470.

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officer or fireman. murder committed in the course of specified felonies. murder for hire. murder committed in an escape or attempted escape from prison. and the murder of a prison employee or inmate. With the conviction of capital murder under these five circumstances. the murder would be given a separate hearing, in which a jury is instructed in regard to the crime and of their options. Then after considering their options the jury could then impose the death penalty with an unanimous vote.[23]

Since the five 1976 decisions. the courts have ruled on numerous other death penalty cases. These cases have ranged from the execution of juvenile killers to suspicions that certain state statutes are racially biased. and because of this these states should be required to suspend all executions. Through all these battles. the courts have continued to rule that the new sentencing guidelines. which were laid down by the states in the aftermath of the Furman case. meet and/or exceed the demands of the court. Through it all. the Supreme Court has ruled that the use of capital punishment is constitutional.

[23] Jurek v. Texas. 428 U.S. 262 (1976).

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III

THE AMERICAN CIVIL LIBERTIES UNION AND THEIR FIGHT AGAINST THE USE OF THE DEATH PENALTY

"Human dignity is a philosophical construct, not a constitutional one; offenses to human dignity take place everyday without triggering a constitutional debate. Moreover it is a slippery argument to maintain that the death penalty is an affront to human dignity."
William Donohue

Introduction

In America's jails today there are more than 3,000 inmates waiting for execution.[24] In just about every one of these cases the American Civil Liberties Union (ACLU) will get involved on behalf of the condemned prisoner. The American Civil Liberties Union spends enormous amounts of time and resources defending death-row inmates. With their extensive resources the ACLU's Death Penalty Project has been able to create a system where it may take up to six to ten years for a deàth sentence to be completed. During these six to ten years a condemned prisoner's case may be heard by as many as forty State and Federal Judges.[25] The ACLU devotion to protecting the life of

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[24] American Civil Liberties Union, *Death Penalty* [Online]; available from http://www.aclu.org/issues/death/isdp.html; Internet; accessed 15 March 1997.

[25] Daniel J. Popeo, Not OUR America...The ACLU Exposed! (Washington DC: Washington Legal Foundation, 1989), 110.

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convicted murderers has gotten to the point where. the ACLU will fight against the executions of inmates who don't even want their assistance.

This zeal to save the lives of convicted murders has not always existed within the ACLU. Nonetheless. the idea exists today. and must be taken seriously. There are two battleground ploys used by the ACLU when they defend condemned prisoners. These ploys are to fight on legal and on moral grounds for the abolition of capital punishment.

Non-Opposition

The ACLU has not always been against the death penalty. As a matter of fact. the ACLU's Board of Directors in the 1950s found no civil-liberties problem with the scheduled execution of Ethel and Julius Rosenburg for conspiracy to commit espionage.[26] As a matter of fact. one of the men the ACLU sees as an early role model. John Stuart Mill. once went in front of Parliament to fight against the abolition of the death penalty. Mill did state that his position on the issue went to the extreme of liberal opinion.[27]

Change of Heart

This non-opposition to capital punishment changed on April 4. 1965. The events leading up to this change can be found in two distinct events that occurred in 1963. In October 1963. three justices of the Supreme Court voted in a dissenting opinion that the court should hear the case Rudolph v. Alabama. In Rudolph. three justices lead by Arthur

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[26] William A. Donohue. Twilight of Liberty: The Legacy of the ACLU (New Brunswick NJ: Transaction Publishers. 1994), 289.

[27] William A. Donohue, The Politics of the American Civil Liberties Union (New Brunswick NJ: Transaction Books, 1985), 266.

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J. Goldburg, who wrote the dissenting opinion, stated that the argument that the imposition of the death penalty on a subject who committed rape but did not take the life of the victim could be unconstitutional.[28] This new stance by some of the members of the court signaled to the ACLU that there was a home for their arguments in the Supreme Court.

The second event in 1963 that led to the ACLU's change of heart came when the Board of Directors of the ACLU asked Norman Dorsen to write a memorandum on the pros and cons of capital punishment. Mr. Dorsen took this assignment and concluded that the ACLU should take the position against the death penalty. Dorsen stated that capital punishment damaged an individual's liberty and dehumanizes the societies which choose to use it.[29] Dorsen came to the conclusions knowing full well that the Supreme Court had ruled in earlier cases that the punishment of death was not cruel and unusual within the meaning of the words of the Constitution.

Dorsen in his Memorandum also submitted the following recommendations for action by the ACLU:

> The Due Process Committee and, subsequently, the National Board of Directors, should issue a policy statement against capital punishment.
>
> This policy statement should be implemented:
>
> a. Through determined efforts to secure the legislative repeal of laws authorizing the death penalty or to limit the class of crimes for which the death penalty is imposed.

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[28]Bedau, 12.

[29] Norman Dourness, Frontiers of Civil Liberties (New York, NY: Pantheon Books, 1968), 277.

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b. Through appropriate legal assistance to defendants accused. or in particular. convicted of a capital offense and sentenced to death. This legal assistance could be patterned on efforts of the New York Committee to Abolish Capital Punishment. which raises on behalf of all persons sentenced to death any substantial constitutional issue that could save the convicted person from execution.[30]

On April 4. 1965. the ACLU adopted Policy #239 which finally called for the abolition of the death penalty. With Policy #239 the ACLU now took an official stance against capital punishment. Using Dorsen's recommendations and the new ray of hope gained from the Supreme Court in Rudolph v. Alabama. the ACLU introduced its new policy on capital punishment with these words: "capital punishment is so inconsistent with the underlying values of a democratic system that the imposition of the death penalty for any crime is a denial of civil liberties."[31]

Two Ways to Fight the Issue

On legal grounds the ACLU says that the use of capital punishment is a violation of an individual's:

- Eighth Amendment rights.
- Fourteenth Amendment rights.

On the moral ground the ACLU takes the position that:

- The death penalty is morally bankrupt and that alternative sentencing should occur.
- The death penalty strips a man of his human dignity.
- Innocent persons might be put to death.

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[30] Ibid., 277.

[31] Bedau, 12.

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- Minorities are being sentenced to death in larger percentages, so capital punishment must be discriminatory.
- Modern civilized societies cannot use the concept of an eye for an eye when it comes to punishment of criminals.

The ACLU believes that the use of capital punishment is a violation of the Eighth and Fourteenth Amendment. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted."[32] As it relates to the Eighth Amendment the ACLU believes that the death penalty is cruel and unusual punishment.

The ACLU has had a hard time using the Eighth Amendment argument. The Supreme Court, has never ruled that capital punishment is cruel and unusual punishment. In every case where this defense has been used the courts have ruled that capital punishment is not cruel or unusual under the guidelines set down by the Constitution, even though some of the justices have hinted that it might be. Because of these rulings, the ACLU favors a contemporary and more liberal reading of the Constitution.

The second legal issue used by the ACLU is to say that capital punishment is a violation of the Fourteenth Amendment. The Fourteenth Amendment states: "...nor shall any State deprive any person of life, liberty, and property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws."[33] The ACLU is trying to convince the courts that the death penalty is not being administered properly.

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[32] The National Legal Foundation, Foundations of Freedom: The Constitution & Bill of Rights (Virginia Beach, VA: The National Legal Foundation, 1985).

[33] Ibid.

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The ACLU maintains that capital punishment shouldn't exist because innocent persons might be put to death by mistake, or because African Americans, are proportionally punished more through executions than other racial groups. Because of this the ACLU promotes the idea that these individuals are not receiving equal protection under the law.

When presenting analysis on these two Constitutional legal arguments, the ACLU is ignoring one other important Amendment, the Fifth Amendment, which states that persons will not : "be deprived of life, liberty, or property, without due process of law."[34] The Fifth Amendment strictly bars the taking of life, through capital punishment, without the due process of law. This quite obviously shows that the founding fathers of this country allowed for the death penalty, as long as a system of due process existed.

The ACLU's Eighth Amendment argument is not logical under a strict reading of the Constitution. Under this strict reading, the same men who wrote and passed the Fifth Amendment, also wrote and passed the Eighth Amendment. The Eighth Amendment was placed in the Constitution to protect against cruel and unusual punishment. As was discussed in Chapter 1, the founding fathers did not want this amendment used against the use of capital punishment. In debate over the amendment, the founding fathers almost didn't implement this amendment for that very reason.

The cruel and unusual punishment clause in the Constitution clearly relates to sentences for criminals which just do not fit the crime. The Constitution obviously placed within itself a set of checks and balances. These checks and balances serve to

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[34] Ibid.

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protect the citizens of the country and ultimately allow the use of capital punishment, as long as a system of due process is employed.

Capital punishment was found to be unconstitutional by the Supreme Court in 1972, in Furman v. Georgia, where the court ruled that all existing statutes allowing for the use of the death penalty were a violation of the Constitution.[35] What the court ruled in this decision was that the states were not using capital punishment in a consistent manner, and because of this they were in violation of the Constitution. The Supreme Court, essentially, told the states that they would have to set up firmer guidelines for the use of the death penalty.

In 1976, the states did just that, and the death penalty was reinstated by the Supreme Court. Justice Stewart, in his opinion written for the case Gregg v. Georgia, held that capital punishment for the crime of murder was not always a violation of Eighth and Fourteenth Amendments. He went on to say that the use of the death penalty as retribution and deterrence were allowed by legislatures when deciding whether capital punishment should be allowed within their states. Justice Stewart, also, stated that the State of Georgia had met all the previous objections that the court had about procedure.[36] The death penalty was then reinstated.

Another tactic used by the ACLU in fighting capital punishment, is to argue against it on moral grounds. The ACLU believes the concept of the death penalty is morally bankrupt, and that alternative sentencing such as incapacitation, as they call it,

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[35] Furman v. Georgia, 408 U.S. 153 (1976).

[36] Gregg v. Georgia, 428 U.S. 153 (1976).

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should be used instead.[37] The problem with this argument is that the ACLU has already come out against long prison sentences.

In 1978. the ACLU introduced its policy on criminal sentencing. This policy. stated that imprisonment was harsh. frequently counter-productive. and costly. The policy also opposed the idea that incarceration should be used as a deterrence to crime. Also mentioned was the fact that the union was opposed to mandatory sentencing, because it did not allow for non-incarceration options. When it comes to almost all crimes. the ACLU states that probation should be authorized by the legislature in every case. Exceptions to this principle are not favored. and any exception. if made. should be limited to the most serious offenses. such as murder and treason.[38]

It is quite obvious that the ACLU has a problem with their own alternative to the death penalty. The ACLU. in its briefing paper on the death penalty. states that murderers should be incapacitated. by lengthy prison terms. including life. This seems legitimate to someone who opposes capital punishment. but then it ignores the ACLU's own beliefs about incarceration. The ACLU is saying that it is willing to compromise on criminal sentencing guidelines in cases of murder and treason. but even if they are willing to compromise. is this best for the country?

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[37] American Civil Liberties Union. *ACLU Briefing Paper: The Death Penalty,* [Online]; available from Internet http://www.aclu.org/library/pbp8.html; accessed 15 March 1997.

[38] William A. Donohue, The Politics of the American Civil Liberties Union (New Brunswick NJ: Transaction Books, 1985), 264.

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Another moral argument proposed by the ACLU is to say that capital punishment strips a man of his human dignity. When using this argument, the ACLU will refer back to the Constitution and the Eighth Amendment. William Donohue in his book Twilight to Liberty, addresses this argument very well. Mr. Donohue states:

> Human dignity is a philosophical construct, not a constitutional one: offenses to human dignity take place everyday without triggering a constitutional debate. Moreover it is a slippery argument to maintain that the death penalty is an affront to human dignity.[39]

The question the ACLU has failed to ask itself is, what about the human dignity of the victim and his or her family?

What has to be the ACLU's most logical moral argument for the abolition of the death penalty, is the possibility of an innocent person being put to death. For its proof, the ACLU uses a study published in the Stanford Law Review. In this study it was discovered that 350 capital convictions in this century were eventually overturned, because the suspect was later found to be innocent. Of those 350 cases, twenty-five were executed, while the rest spent numerous amounts of years in jail. The study goes on to say that fifty-five of the 350 cases occurred in the 1970s, and another twenty between 1980 and 1985.[40] It must also be noted that studies by other ACLU members on the same topic have come back with much lower numbers than these latest statistics.

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[39] William A. Donohue, Twilight of Liberty: The Legacy of the ACLU (New Brunswick NJ: Transaction Publishing, 1994), 291.

[40] American Civil Liberties Union, *ACLU Briefing Paper: The Death Penalty*, [Online]; available from http://www.aclu.org/library/pbp8.html; Internet; accessed 15 March 1997.

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The central point of the ACLU's argument must be addressed, though. If one innocent person is executed, that is one too many. It is unfortunately true that innocent persons have been put to death in the past. This occurrence has happened so few times, though, that it has not led the country to abolish capital punishment. As a matter of fact, due to the work of the ACLU, it is virtually impossible for an innocent person to be put to death. As mentioned earlier, it takes up to six to ten years for a death sentence to be completed. During these six to ten years, the condemned prisoner's case will he heard by as many as forty state and federal judges.

The ACLU also argues that civilized societies cannot use the concept of an eye for an eye. This argument is meant to refute those religious groups which believe that the use of capital punishment is ordained by God, in the Bible. When push comes to shove on this argument, the ACLU has shown that it does not like to fight on these grounds. To put it plainly, the ACLU does not want to start and fight a holy war. The ACLU is more content on trying to turn the words of Deuteronomy 19:21 around on itself: "Thus you shall not show pity: life for life, eye for eye, tooth for tooth, hand for hand, foot for foot." Statements like these can be found in their internet homepage: "The penalty for rape cannot be rape, or for arson, the burning down of the arsonist's house. We should not, punish the murder with death."[41]

In the ACLU's statements in regards to the biblical principle of an eye for an eye, it becomes clear that they do not understand what the Bible is saying. At first glance, the Bible can appear to be confusing when it comes to the death penalty. In the Ten

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[41] Ibid.

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Commandments it states that thou shall not kill. However if you look further into the Bible, you will find verses such as Exodus 21:12: "anyone who strikes a man and kills him shall surely be put to death." Another similar verse in the Bible is Exodus 21:14, which states: "but if a man schemes and kills another man deliberately, take him away from my altar and put him to death." Reading these verses and many others like them, it becomes clear that God has in fact prescribed the use of the death penalty. It must also be noted that God has distinguished between the killing that the convicted killer has done, and the clear public right that society has to punish those wrongdoers via the death penalty.

Another moral and, to an large extent, social way the ACLU fights the use of capital punishment, is to say that discrimination plays a large part in who is actually sentenced to death. To back up this statement, the ACLU uses a study done in 1990 by the Government Accounting Office (GAO), and two other studies from New Jersey and California.

In the GAO report, it states that it found a constant pattern of evidence indicating racial disparities in charging, sentencing, and imposing the death penalty.[42] The New Jersey report states that it found that the prosecutors went for the death penalty in fifty percent of the cases where blacks killed whites, but when whites killed blacks, prosecutors only went for the death penalty twenty-eight percent of time. The California

[42] Ibid.

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report stated that 6 percent of those convicted of killing whites got the death penalty while only 3 percent convicted of killing blacks got sentenced to death.[43]

These numbers presented by the ACLU seem compelling, but in reality they are a moot point. The reason for this is that this exact argument was used in the Furman v. Georgia in 1972. In Furman, the ACLU was able to win its case because the court ruled that there was in fact a problem with discrimination in death penalty sentencing in our states' courts system. In 1976, the Supreme Court reversed its decision in Furman when it ruled that the states had changed and met the demands laided down by the court in Furman. Because of this the death penalty was reinstated.

Discussion

There is one moral question that the ACLU refuses to discuss, though. This question is in regard to its own moral bankruptcy when it comes to the crime of murder. In 1988, the ACLU took-up the case of a 15 year-old, death-row inmate, William Wayne Thompson. Mr. Henry Schwarzchild, an attorney for the ACLU, and a member of the union's Capital Punishment Project wrote a brief on behalf of Mr. Thompson which stated that juveniles do not have the same mental or moral capacities as adults. Because juveniles have less-developed capacities, juveniles should be released from any possibility of receiving a death sentence.

If juveniles don't have the same mental capacities to understand the moral dilemmas that go along with murder, than how could that same juvenile have the mental capacity to understand abortion? For the ACLU this seems to be a moot question. The

[43] Ibid.

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union and most of its members have no problem with a juvenile mother's ability to understand abortion. But the ACLU was smart enough to see that the courts could connect the mental incapability question and use it against them in their attempts to secure abortion on demand for any women no matter what their age.

The ACLU had a dilemma on their hands. Do they defend the right of the juvenile mother to execute her child in the womb, or do they defend the life of the juvenile murderer? The ACLU had to make a decision. As a matter of fact, the ACLU never let Mr. Schwarzchild file his brief. Janet Benshoof, the head of the ACLU's Reproductive Freedom Project, would not allow it.

The ACLU could not have known what would happen if Mr. Schwarzchild's brief was filed and he won his argument. But the ACLU was smart enough to realize that if the court ruled that a juvenile is incapable of understanding what murder really means, then how could a juvenile understand the moral issues that come along with abortion. The ACLU had to have known as well that many in America, including some of the judges whom they would have to stand in front of, would understand the corollary between the two arguments.

The ACLU knew it had a problem and they were not about to let Schwarzchild's brief get out. Benshoof was to later say: "Schwarzchild argues that teens have the incapacity to make moral, even rational decisions. In order to oppose restrictions on abortion, he forces me to favor the hanging of teenagers."[44] Schwarzchild on the other

[44] William A. Donhue, Twilight of Liberty: The Legacy of the ACLU (New Brunswick NJ: Transaction Publishers, 1994), 292.

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hand saw it differently. Schwarzchild stated: "Benshoof's logic forces me to say that in order to oppose restrictions on abortion. I have to favor hanging 15 year-old girls."[45]

The ACLU in its stance with Benshoof is ultimately saying that it is willing to sacrifice its principles in the area of the death penalty and the life of a juvenile death-row inmate. so that they can continue to fight for the rights of teenage girls to get abortions on demand. The ACLU is picking their fights here. just as the other side would when confronted with this same decision. just reversed. In doing this. though. the ACLU appears to be making is own moral arguments out to be trivial. The ACLU has to address this moral dilemma: do they promote abortion on demand for juveniles or do they defend that a person under the age of eighteen is just incapable of understanding their actions at their age. Well which is it going to be?

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[45] Ibid., 292.

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IV

THE AMERICAN BAR ASSOCIATION AND THEIR FIGHT FOR THE EQUITABLE USE OF THE DEATH PENALTY

Introduction

On February 3, 1997, The House of Delegates for The American Bar Association (ABA) approved a resolution calling upon all jurisdictions that impose capital punishment to not carry out the sentence until the jurisdictions implement policies and procedures that are consistent with ABA policies on the issue. The ABA also goes on to say that its policies and procedures were produced with the intent to ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and that they minimize the risk that an innocent person may be executed.[46]

What are the ABA policies and procedures on the death penalty? The answer to this can be broken down into four areas of examination. First is the appointment of, and proper performance of, defense council in all death penalty cases. Second is the preserving, enhancing and streamlining of state and federal courts' authority and responsibilities to exercise independent judgment on the merits of constitutional claims in state post-conviction and federal habeas corpus proceedings. Three is the attempt to eliminate discrimination in death penalty sentencing and, finally, preventing the

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[46] The American Bar Association, *Media Relations*,[Online]; available from http://www.abanet.org/media/feb97/death.html; Internet; accessed 2 February 1998.

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execution of mentally retarded persons and persons under the age of eighteen at the time of the offense.

Guidelines for Appointment and Performance of Council

The first area of examination is that of the appointment of, and performance of, council in death penalty cases. The ABA adopted their guidelines for appropriate council in February, 1989, when its House of Delegates passed a resolution on the issue. The reasoning for this was simple. The ABA felt that certain defendants were not being appointed experienced and sufficiently skilled council. To combat this problem, the ABA proposed these guidelines as a framework for the selection of attorneys.

The first guideline is that two qualified trial attorneys should be assigned to each death penalty case. These attorneys should be chosen by a appointing authority which should be found in the public defender office or from an assigned council program. In some cases where it is not feasible to have these appointing authorities, a special appointments committee consisting of no fewer that five qualified attorneys can and should appoint council. [47]

Secondly, council should only be chosen after the appointing authority reviews the attorney's background, experience, and training. Once an attorney has passed this review, lead council can be assigned to the man or woman who is a member of the bar, has at least five years of litigation experience in the criminal defense field, and has at least nine prior experiences as lead council in jury trials that were tried to completion. In

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[47] American Bar Association, Guidelines for the Appointment and Performance of Council in Death Penalty Cases (American Bar Association, February, 1989), 41-45.

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these nine jury trials. at least three of these cases would have to be murder trials. and one would have to be a death penalty case. If an attorney could not be found with these qualifications. council could then be assigned to an attorney who had the nine jury trials under their belt. but not as lead council in a murder trial.[48]

The ABA also feels that trial co-council should be assigned to all death penalty cases. In order to become trial co-council the attorney has to be a member of the bar. and have at least three years of litigation experience in criminal defense. Co-council would also have to have been lead or co-council in at least one case were the death penalty was imposed. This attorney would also have to have at least some prior experience at the appeals of felonies. In these appeals. co-council would have to have been lead council in the appeal of three felony convictions in federal and or state court. Of these appeals one would have to be for a conviction of murder. Alternatively. co-council could have experience in the last three years as lead council in the appeal of no fewer than six felony convictions. two of which would have to be murder convictions.[49]

There are other mandatory qualifications for lead and co-council. and a whole new list of qualifications for appellate co-council and post conviction council assignment which I will not discuss. But in general these are the basic qualifications for lead and co-council. What is interesting about the ABA's basic guidelines for appointment of council is that they by virtue of their own self-written bylaws always leave the appointing

[48] Ibid.. 49-53.

[49] Ibid.. 49-53.

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authority the opportunity to designate someone who does not meet their minimum standards.

After council is designated by the appointing authority. the guidelines go on to discuss numerous other issues in the defense strategy of the council. These include workload. supporting services. trial. monitoring and compensation. Monitoring, what does the ABA mean by monitoring? In their guideline the ABA says that the appointing authority should monitor the performance of the assigned attorney to see if he or she is doing their job. So what if the appointing authority feels that council is not doing his job? In these cases the ABA gives the appointing authority the right to first remove the attorney from appointment of all future death penalty cases. and then if necessary the appointing authority may remove the attorney from the current case. In defense of the appointing authority. the ABA says that if they are doing their job right. it should not interfere with the case.[50]

In the area of compensation the ABA feels that the lawyers and the expert legal consultants should be paid fairly. So just what is fair to the ABA? In February 1988 the ABA's House of Delegates passed a recommendation that gives just that answer. In the 1988 recommendation the ABA urged each federal district and circuit court. along with each federal circuit judicial council to approve a plan that provided for:

- Compensation of all appointed councils and their expert legal consultants in every federal habeas corpus death penalty case. This money is to be paid no matter if the attorney prepared the petition. or if the council worked on the earlier case for free.
- The appointed attorney's rate should be $75 per hour.

[50] Ibid.. 69-71.

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- That federal district judges have the right to recommend waivers of the case compensation maximum of $750 an hour for attorneys fees and $1000 an hour for investigative, expert and other services. This can only be done, though, with the approval of the appropriate circuit judge.

- Passing procedures so that council can receive payment of fees and expenses before long protracted and complex cases are completed.[51]

In studying the ABA's guidelines for appointment and performance of council in death penalty cases, it becomes clear that if the guidelines are approved by the courts that the ABA would have unlimited power, control over the attorney's assigned to the case. With the ABA's current bureaucracy and central control, it also becomes clear that it would be very easy to see where corruption could creep into the system if the wrong individuals were on the appointing authority.

Speeding Up the Process

The second recommendation listed in the ABA's House of Delegates Recommendations of February 3, 1997, was for the preserving, enhancing, and streamlining of the state and federal courts' authority and responsibility to exercise independent judgment on the merits of constitutional claims in state post-conviction and federal habeas corpus proceedings. Just what exactly does that mean? To find these answers you have to go to the recommendations adopted in August 1982 by the ABA.

In its August 1982 recommendations, the ABA first resolved that procedures should be implemented in all state and federal courts to speed up the appeals process so that they have to be completed between the entry of the judgment of conviction by the

[51] American Bar Association, *Press Release*, [Online]; available from http://www.abanet.org/irr/feb88.html; Internet; accessed 2 February 1998.

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state court and resolution of the federal habeas corpus proceeding. If this were to be done, it would in fact speed up the appeals process and would eventually lead to quicker judgments on whether an individual would die at the hands of the state.

The ABA says the best way to speed this process up is to:

- Speed-up the direct state Appellate process so that immediate preparation of court transcripts and court schedules orders for the filing of briefs by attorneys.
- Accelerate any state post-conviction remedy necessary for exhaustion state remedies under Picard v. Connor, 404 U.S. 270 (1971).
- If individual state laws allow its use, a unified review process should be implemented in which the direct appeal of the conviction is held in a state of suspension while issues not adequately raised by the record of the lower court are examined.
- The immediate submission by the state to the federal courts of all state documents and or copies of such documents including the transcripts of the trial and briefs filed by both parties in the state appellate courts.
- That strict time requirements for filing of memoranda in the federal habeas corpus proceeding be implemented.
- That the final settlement by the habeas corpus court of the petition for habeas corpus relief be quick.[52]

The ABA, secondly, resolved that good competent council for both state and federal proceedings should be hired immediately for the defendant. The ABA says this should be done quickly so that it would enable the federal courts to rule fairly and promptly on the merits of the habeas corpus petition. In this the appointed council should be qualified and trained for the job. The defendant's attorney should also be able to make frequent contact with his client, while a system of both monitoring of the assigned and

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[52] American Bar Association, *Press Release*. [Online]; available from http://www.aba.net.org/irr/aug82.html; Internet; accessed 2 February 1998.

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retained council is kept to insure that the attorneys are competent to do the job. Along with this. these attorneys should be properly paid.[53]

Thirdly. the ABA resolved that they support the establishment of a set of high standards for the competency of council. In doing this the ABA is hoping to guarantee the accused council that is consistent in all cases in all jurisdictions. In order to do this the ABA. as discussed earlier in this chapter. feels that a strict hiring process. that is done by a appointing authority. will have to be followed. If the process is followed and appropriate council is assigned to the case. then the case could still be challenged in the courts on the Sixth Amendment for inadequate representation.[54]

Race, Mental Health and Age

The third recommendation that the ABA called for in February, 1997. was for the attempt to eliminate discrimination in capital sentencing on the basis of race of either the victim or the defendant. The ABA for its part doesn't write much on this issue. and in what they have publicly stated they say that they support all efforts to eliminate racial discrimination in death penalty sentencing.

Finally. the February. 1997. recommendations calls for the prevention of all executions of mentally retarded persons and persons under the age of eighteen at the time of the crime. The ABA has written extensively on both of these subjects. but they have

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[53] Ibid.

[54] Ibid.

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not come out with any clear statements or stances on the issue other than asking for legislative changes.

As it relates to the mental retardation question, as mentioned earlier, the ABA has written extensively on the rights of the mentally disabled, in the hope of making sure that these individuals get a fair trial. The only problem for the ABA and any other groups that have taken a stance against the execution of the mentally disabled, is who is actually going to make the decision that a person is mentally retarded? There are existing rules in the court system today that call for guilt or innocence based on the reason of insanity, and at this point that seems to be the best tool that the courts have in this area. The ABA and the courts have to be very careful to clarify clearly just what their wishes are in this area, because it can become very easy to see how this issue could lead to corruption.

In relation to the question of whether a child younger than eighteen when he or she committed the crime should be put to death, the ABA feels that they should not be executed. For their part, they once again urge the state and federal legislatures to amend their juvenile and criminal codes. The ABA also encourages that these bodies amend their codes so that if a juvenile is transferred to be tried as an adult, then that child cannot receive the death penalty.[55]

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[55] American Bar Association, Annual Report of the American Bar Association, Including Proceedings of the One Hundred Sixth Annual Meeting Held at Atlanta, Georgia August 2-3, 1983 (Chicago, IL: American Bar Association, 1986), 991.

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Discussion

In examining the ABA reasoning for asking all jurisdictions currently using the death penalty to stop using it. I found some very good arguments. as well as some very suspect arguments. No one on either side of the issue would disagree with the ABA's wish to speed up the appeals process. In America today it can take six to ten years to complete the appeals process. Because of this fact. it makes it clear to everyone involved. including the death row inmate. that the process is just too long and complicated for its own good. The ABA is right when it asks for the appeals process to be sped up.

The ABA has also stated that they support any initiative that strives to eliminate discrimination in capital sentencing on the basis of the race of either the victim or the defendant. This is once again a commendable statement. but the ABA gives very little discussion on the topic. other than to say that federal and state legislators should pass legislation that strives to eliminate discrimination. In forethought. this is a wise choice by the ABA. in that this very issue was taken up by the supreme court in the 1972 case of Furman v. Georgia. The ABA is right in striving to eliminate discrimination in capital sentencing but even wiser to stay out of the politically charged battles that this stance could bring.

On the negative side. I found that if the ABA were to have their guidelines for appointment and performance of council completely approved by the courts. it would lead to giving a multitude of power to a very few people. This power core can and would be found in the group that the ABA calls the appointing authority. The ABA sets down strict guidelines on who can be in the appointing authority, but more importantly the

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ABA sets down stricter guidelines on who this group can assign as council and co-council in death penalty cases.

It is expected, and most people in America would agree, the accused deserves to have the best council he or she can get. But with the system the ABA has set up, it becomes plainly obvious that only a few lawyers will ever get the right to try these cases. Fewer still will ever get the necessary experience as co-council. Because of these obvious facts the ABA is setting itself up for problems in the future because of its own policies. Just who exactly will be qualified to defend these cases in the future?

As it relates to the issue of preventing the execution of the mentally retarded and those criminals who commit their crimes before the age of eighteen, the ABA has to be more specific in its stance. With the trial of the mentally retarded we have to guarantee that the defendant is in fact mentally retarded, and as it is now, no absolutely fool proof system exists to clarify this point. This very fact could lead to corruption.

With the ABA's wish to abolish the execution of juveniles, the ABA is taking a wrong stance. The ABA is giving a blanket response to an issue that is not black and white. In every case involving the death penalty, the court should consider all the mitigating circumstances. If a serial killer is seventeen years old and completely understands what he or she was doing, then that juvenile should be treated as an adult. There is no mystery age when a child becomes an adult, and that must always be remembered.

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V

THE CATHOLIC CHURCH: ON THE VERGE OF OUTLAWING THE USE OF THE DEATH PENALTY

"I do not know whether a murderer is more likely to repent and make a good end on the gallows a few weeks after the trial or in the prison infirmary thirty years later."
C.S. Lewis

Introduction

From the beginning there has been a battle within the Catholic Church on whether the Church should support the use of capital punishment or not. In the Catechism of the Catholic Church, it states that the death penalty is sanctioned by the Church in certain situations.

> Preserving the common good of society requires rendering the aggressor unable to inflict harm. For this reason the traditional teaching of the Church has acknowledged as well-founded the right and duty of a legitimate public authority to punish malefactors by means of penalties commensurate with the gravity of the crime, not excluding, in cases of extreme gravity, the death penalty. (2266)[56]

The Catechism also states that human life is sacred for the simple reason that from the beginning it is God who gives life and ultimately it is God who takes it away.

> Human life is sacred because from the beginning it involves the creative action of God and it remains for ever in a special relationship with the creator, who is the

[56] See section 2266 of the 1994 Catholic Catechism, Libreria Editrice Vaticana, Catechism of the Catholic Church (Liguori, Italy: Liguori Publications, 1994), 546.

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sole end. God alone is the Lord of life from its beginning until its end: no one can under any circumstances can claim for himself the right directly to destroy an innocent human being. (2258)[57]

The question then becomes what should be the church's responsibility and response to the use of the death penalty? It seems clear from the Catechism that the church's response should be to support the use of capital punishment, as long as it is done justly and all efforts are made to guarantee that an innocent man or woman is not put to death. As for the duties of the Catholic Church, it also appears clear from the teachings of the church that it is their duty to work for the conversion of those lost souls in the world, including the death row inmate.

Recently, popes and some of the bishops in the United States, have started to campaign against the use of the death penalty. It seems clear that these individuals are not denying the compatibility of capital punishment with Catholic teaching, but instead have just begun to argue against its use for a variety of personal reasons. Before examining their arguments for the abolition of the death penalty, it would first be helpful to discus the church's early history on this debate.

Early History

The first real testimony against the use of the death penalty by the Latin Fathers can be found in the Montanist works of Tertullian. Tertullian writing sometime between 197 and 207 composed De Idololatria. In this, Tertullian states in chapter seventeen that even if the servant of God appeals to the power of the state, he should not pronounce

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[57] See section 2258 of the 1994 Catholic Catechism, Libreria Editrice Vaticana, Catechism of the Catholic Church (Ligouri, Italy: Liguori Publications, 1994), 544.

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capital sentences. Following up on Tertullian. Lactantius writing about 305 to 323. wrote Divinae Institutiones. In this Lactantius states that when God prohibited murder. this also refers to the men who administer the death penalty.[58] Lantantius's position was clear: a man could not even charge or be charged with a capital offense.

After Tertullian and Lantantius others began to write on the subject. Felix in his work Octavius V, written around 225. states that it is wrong for the church to assist in the killing of man. or even to listen to an account of it. In the Canons of Hippolytus II. 16. Hippolytus in a more ancient Egyptian tradition states that whoever holds the power of the sword. and the judge who proceeds over capital cases. should renounce their office or be excluded from the catechism.[59]

In the same vein. The Council of Elvira in 305 ordered that all the duumvirate magistrates should not enter a church during their years of office. even though they were not required to pronounce capital sentences.[60] The church had a problem here as to how it could support the right of the state to execute the hardened criminal. but deny to those who enforce the law the rights and privileges of the church.

Ambrose. a former imperial officer. saw this and in or about the year 385 wrote to the Magistrate Studius about just this issue. In this letter Ambrose stated that Romans 13 recognizes the state's power to take life. but he also goes on to say that we should imitate Christ in his forgiveness of the adulteress. In Ambrose's mind he could not find a

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[58] Franz Bockle and Jacques Pohier. The Death Penalty and Torture (New York, NY: Seabury Press. 1979), 46.

[59] Ibid., 47.

[60] Ibid., 47.

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solution to the church's dilemma. Augustine was to follow Ambrose in his writings in his De Libero Arbitrio. In this Augustine stated that the death penalty is a commandment of God. However Augustine was to go on to say in the Epistle LIV to Macedonius that Christian moderation should be able to have a say.[61] Augustine understood that the use of the death penalty was just, as long as it is used justly and in moderation.

Clearly, many in the early church had a problem with the use of the death penalty, even though it was church doctrine that it could be used. These abolitionists were to get a great ally with the reign of Pope Nicholas I. Nicholas, believed that the church had to give up its support of the death penalty and stick to the business of the salvation of souls. Pope Nicholas used the Apostle Paul as his example in teaching his beliefs. Nicholas also pointed out that the Apostle Paul in the beginning of his life was a persecutor of men, but upon his conversion he gave up his ideas on the death penalty and stuck to the business of savings souls. Because of this, Nicholas believed that all men had to give up the practice of executing the criminal in every possible circumstance and concentrate on saving the soul of the sinner.[62]

After Pope Nicholas, church doctrine concentrated on the issue of conversion of the criminal. The church began to profess that all capital crimes were just sins and that the soul of the convicted criminal was more important than their crimes. In a sense the conversion of criminal became more important than the justice of punishing the criminal.

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[61] Ibid., 47.

[62] Ibid., 47-48.

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Because of this. the church began to promote the idea that the death penalty was not to be used.

This aversion to the use of the death penalty was to change. In the twelfth century the church put out the Decretals. In this the church stated that the state did in fact have the right to administer the death penalty. but the church did not and was not to get involved in the practice. The church did reserve for itself the right to watch over the courts in order to see that law was being administered fairly and justly.[63]

This stance on the death penalty was to remain until the thirteenth century when Pope Innocent III. in 1208. declared that it was permissible to exercise the use of capital punishment. but with the proviso that the reprisal should not be taken out of hatred but in the spirit of wisdom.[64] Innocent's teachings were to become the leading thought of the day. but almost sixty years later a man was to come along and solidify the church's position on the use of the death penalty. This man was Thomas Aquinas.

St. Thomas Aquinas

Thomas Aquinas. the son of a count. was born in 1224 in the family castle at Roccasecca. in central Italy. At the age of 5. Aquinas was sent by his parents to live in the Benedictine monastery at Monte Cassino were his uncle had been a monk. Aquinas. was to eventually leave the monastery and enroll at the University of Naples. While there

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[63] Ibid., 48.

[64] Ibid., 48.

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he came in contact with many within the Dominican order, and against the wishes of his parents, he joined their order in 1244.[65]

Upon joining the Dominican order, Aquinas went to Cologne and Paris and studied with Albertus Magnus. From 1252 to 1259 Aquinas taught at the Dominican Stadium Generale in Paris. While there, he obtained the title of Master of Theology in 1256. Then in 1259 Aquinas became attached to the papal court and stayed until 1269. After leaving the papal court, Aquinas was assigned to Naples where he led the Dominican Stadium Generale. Then in 1274 while going north to attend the Council of Lyon he got sick and died. On April 11, 1567, the church honored Aquinas by declaring him a Doctor of the Church.[66]

During Aquinas's life he wrote extensively, but his most famous and greatest work was the Summa Theologiae. The Summa took six years (1267 to 1273) to write, and Aquinas never got to finish the work. Aquinas had ceased writing on the Summa on December 6, 1273, in order to leave for the Council of Lyons, but unfortunately he died on the way.[67] The Summa is a massive work that deals with most of the ideas and teachings of the church, including those on the use of the death penalty.

In Section 2a2ae, 64 of the Summa, Aquinas took up the issue of homicide. In Section 64.2 Aquinas analyzed the question of whether it is a sin to kill a sinner. Aquinas

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[65] Ralph McInery, "Aquinas, Saint Thomas," in Academic American Encyclopedia, 1997 ed.

[66] William M. Walton, "Aquinas, St. Thomas," in Collier's Encyclopedia, 1989 ed.

[67] Ibid.

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stated that he could understand how it would seem to be illegal to kill sinners: God forbids man to kill, and anything forbidden by God is a sin. Aquinas also stated that human justice is modeled after and on divine justice. Because of this, God does allow the sinner time to repent. As Ezekiel 18:23 says, God does not enjoy the death of the sinner.[68]

On the other hand, in Psalm 101:8 it states: "[E]very morning I will destroy all the wicked of the land, so as to cut off from the city of the Lord all those who do iniquity." Using this verse and others like it, Aquinas comes to the conclusion that all individuals are a part of the whole, just as every part of a person's body is part of the whole. Understanding this, Aquinas deduced that just as a doctor removes a gangrenous limb from the body in order to protect the whole of the body, the use of the death penalty against an individual who is a threat to the whole of society is a proper action for the welfare of all.[69] Using this analogy, Aquinas shows that the use of the death penalty is good for the whole of society, not just a tool for vengeance.

Following up on Section 64.2, Aquinas in Section 64.3 goes into the issue of whether a private individual can kill a man, or is this right only to be held by the state. To this, Aquinas states that since it is legal to kill the sinner if it is for the good of the whole society, then only those who are charged with the duty of caring for the whole of society have the right to execute the sinner. Just as the doctor in the earlier analogy had

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[68] See section 2a2ae.64.2 "Homicide" of the Black Friars edition, St. Thomas Aquinas, <u>Summa Theologiae, Volume 38</u> (New York NY: McGraw-Hill, 1975), 21-25.

[69] Ibid., 21-25.

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the duty of eliminating the gangrenous limb. those entrusted with the care of the whole community. and not private persons. should have the right to execute the criminal. [70]

Aquinas went on in the Summa to address other issues in relation to death and killing that the church had been struggling with. On the issue of whether a cleric can kill a criminal. Aquinas in Section 64.4 comes to the conclusion that even though spiritual power is greater than temporal power. and more like God's power. it is not legitimate for clerics to kill. On the issue of suicide. Aquinas in section 64.5 states that in all circumstances it is wrong. Aquinas also states this about the killing of the innocent. But Aquinas did state that a man could kill in self defense. [71]

Aquinas's writings to this day are considered to be sound doctrine by many in the Catholic Church. There are also many outside of the Catholic Church as well who use Aquinas for their reasoning on the issue. Many feel that the use of the death penalty is wrong. but using Aquinas's reasoning, its use is the only way that society can protect itself when seriously threatened. Because of this. many within and without the Catholic Church have joined Aquinas in his support of the death penalty.

Modern Times

As the Catholic Church enters the twenty-first century, the debate over the use and abolition of the death penalty is still active among many of its members. It is commonly believed that these individuals are not denying the compatibility of capital punishment

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[70] See section 2a2ae. 64.3 "Homicide" of the Black Friars edition, St. Thomas Aquinas. Summa Theologiae. Volume 38 (New York. NY: McGraw-Hill, 1975), 25-29.

[71] Ibid., 29-47.

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with the teachings of the Catholic Church. but instead for their own reasons they have taken a stand against its use.

The list of opponents of capital punishment include Cardinal Joseph Bernardin and his fellow Roman Catholic bishops of Illinois. On February 17. 1996. Cardinal Bernardin and all the bishops in the 1.069 Catholic parishes in the State of Illinois. read and posted a statement against the use of capital punishment.[72] Joining along with the priests of Illinois. the Catholic bishops of Texas on October 18. 1997. put out a similar statement which condemned the use of the death penalty for any reason.[73]

In these statements. the priests are giving a multitude of reasons for why the death penalty should be abolished. These reasons include that capital punishment is not a deterrent to crime. that its use could lead to the execution of an innocent person. that it could prevent the possible conversion of a criminal. that it is used more commonly on blacks and persons of low income status. and that it leads to the further erosion of respect for life in society.

On the other side of the argument. there are many within the church who still support the use of capital punishment. These individuals argue that the use of the death penalty does in fact deter the criminal from committing crimes. This is done by executing the criminal. which makes the criminal incapable of committing any further

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[72] Paul Galloway, "State's Catholic Bishops Reassert Opposition to the Death Penalty," Chicago Tribune, 17 February 1996, sec. news.

[73] Death Penalty Information. *Death Penalty*, [Online]; available from http://www.soci.niu.edu/~critcrim/dp/other/text-bish.txt; Internet: Accessed 2 February 1998.

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acts of violence. They also argue that the state would have to abolish all the laws, if it wanted to make sure that no innocent person is ever convicted of a crime.

Catholic capital punishment advocates also say that a criminal is more likely to repent of his or her sins when faced with their own mortality, rather than life in prison. They also state that in fact many crimes are committed by blacks and persons of low economic status, and frequently these crimes are committed against persons of the same race and economic class. As for respect for life, catholic pro-death penalty advocates believe that capital punishment in fact might improve respect for life if those who commit acts of violence are swiftly executed.

More importantly to the priest of America who are crusading against the use of the death penalty, their cause has and is picking up support from some very important persons within the church. On April 11, 1963, Pope John XXIII released his Pacem in Terris. In this document Pope John discusses the inalienable rights of the human person. Pope John makes it clear that all men are equal in the eyes of God and, as such, all men are to be treated fairly and justly. Pope John also makes it clear that all men are guaranteed by God that their lives are sacred in the eyes of God.[74] Pope John did not say that the use of capital punishment was a sin, but many in the modern church are continuing and will continue to use his writing as reasoning against the use of the death penalty.

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[74] American University, *Pope John XXIII*, [Online]; available from http://listserv.american.edu/catholic/church/papal/john.xxiii/j23pacem.txt; Internet; accessed 15 February 1998.

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More recently the priests have picked up a more vocal ally in their fight. Pope John Paul II. John Paul published a book in 1994. entitled Crossing the Threshold of Hope. In a chapter entitled "The Defense of Every Life." John Paul starts out discussing the issue of abortion. but by the end he takes this stance on all issues of life:

> For man. the right to life is the fundamental right. And yet. a part of contemporary culture has wanted to deny that right. turning it into an "uncomfortable" right, one that has to be defended. But there is no other right that so closely affects the very existence of the person! The right to life means the right to be born and then continue to live until one's natural end: "as long as I live. I have the right to live."[75]

On March 25. 1995. John Paul II also published the Evangelium Vitae. The gospel of life is at the center of this document that deals very specifically with the topics of abortion and euthanasia. The death penalty is also mentioned in this document and John Paul makes his most definitive statement to date on this issue. In section 56.1 John Paul begins his comments on the issue:

> This is the context in which to place the problem of the death penalty. On this matter there is a growing tendency. both in the church and in civil society. to demand that it be applied in a very limited way or even that it be abolished completely. The problem must be viewed in the context of a system of penal justice ever more in line with human dignity and thus. in the end. with God's plan for man and society. The primary purpose of the punishment which society inflicts is "to redress the disorder caused by the offense." Public authority must redress the violation of personal and social rights by imposing on the offender an adequate punishment for the crime. as a condition for the offender to regain the exercise of his or her freedom.[76]

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[75] John Paul II. Crossing the Threshold of Hope (New York. NY: Alfred A. Knopf, Inc., 1994), 204-211

[76] Michael J. Miller, The Encyclicals of John Paul II (Huntington. IN: Our Sunday Visitor Publishing Division, 1996), 844.

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The most controversial section of the Evangelium Vitae. in reference to the death penalty. comes in John Paul's statements in section 56.2:

> It is clear that for the purposes to be achieved. the nature and extent of the punishment must be carefully evaluated and decided upon. and ought not go to the extreme of executing the offender except in cases of absolute necessity: in other words when it would not be possible otherwise to defend society. Today. however. as a result of steady improvements in the organization of the penal system. such cases are very rare. if not practically nonexistent.[77]

John Paul. in his statements in sections 56.1 and 56.2. makes it clear that he is against the use of capital punishment in all cases except those where no other possible means can be used to defend society. He goes on to say that with today's modern penal system he feels that the need for the use of the death penalty is almost non-existent anymore. This statement by John Paul is clearly the closest that a modern Pope has ever come to calling for the complete abolition of the death penalty.

John Paul reiterates these beliefs again in section 56.3:

> In any event. the principle set forth in the new Catechism of the Catholic Church remains valid: "If bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons. public authority must limit itself to such means. because they better correspond to the concrete conditions of the common good and are more in conformity to the dignity of the human person."[78]

John Paul had made his decision on what he feels should be the church's position on the use of the death penalty. With this statement. though, it has lead many in the Catholic Church to call for changes in catholic doctrine. One vocal ally for this change in

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[77] Ibid.

[78] Ibid., 845.

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church doctrine is Cardinal Joseph Ratzinger. Ratzinger argues that the Pope's position on capital punishment clearly represents a palpable development of doctrine.

John J. Conley on the other hand refutes Cardinal Ratzinger and his call for change. Conley, clearly points out in his review of John Paul's Evangelium Vitae entitled Narrative, Act, Structure: John Paul II's Method of Moral Analysis that: "The encyclical itself, however, provides scant treatment of how the church moved from clear support for capital punishment to prudential opposition to it in the space of several decades."[79]

So what should be the Catholic Church's responsibility and response to the issue of the death penalty? It is obvious that the Catechism, and the teachings of many of the great Catholic scholars, say that the use of the death penalty is a just and responsible practice, as long as it is done in a just and fair manner for the good of all society. Along with this, these pro-capital punishment scholars are asserting that its use has to come after taking all precautions that an innocent person is not put to death.

It is also clear in the teachings of the Catechism, and in the teachings of many of the great Catholic scholars, that there is a clear continuity within Catholic Church doctrine on the sanctity of life. In this stance, taken in both the death penalty and abortion sections of the Catechism, it is made clear that the sanctity of life of both the living and the unborn are priorities of the church. This position of protecting the life of the innocent is not an inconsistent doctrine when it comes to the death penalty.

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[79] John J. Conley, "*Narrative, Act, Structure: John Paul II's Method of Moral Analysis.*" In Choosing Life: A Dialogue on "Evangelium Vitae (Washington, DC: Georgetown University Press, 1997), 17.

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But on the other hand, the teachings of the previous scholars are recently being clouded by statements and stances made by the bishops of the United States and the writings of Pope John XXXIII and Pope John Paul II. Pope John XXXIII's writings reflect a new emphasis in the Catholic Church on the notion of the inalienable rights of the human person. With this new understanding of just what inalienable rights are, many in the church are starting to use this argument to justify their anti-death penalty beliefs. To add to this, Pope John Paul II in his book Crossing the Threshold of Hope has come out and made a clear statement, without using the words death penalty or capital punishment, that he is against the use of the death penalty all together.

So what is the answer to the question? The answer is that at this point there is no answer. It is obvious that many within the Catholic church are against the death penalty. But the church as of today has not taken any official stance. What is known is that America needs to pay close attention to the Catholic Church and its statements in the coming years on this issue. This debate is surely going to continue to rage within the church.

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VI

THE DOCTRINE OF MAN AND HIS POLITICAL COVENANT WITH GOD AND HIS FELLOW MAN

"The earth ... is defiled under the inhabitants thereof; because they have transgressed the laws, changed the ordinance, broken the everlasting covenant."
Isaiah 24:5

Introduction

In the last four chapters the reader has been presented a short history of the use of capital punishment in America. along with a short discussion of the beliefs of three groups which have either come out against its use or are on the verge of doing so. For each of these three groups their reasoning for opposing the use of the death penalty have been one of emotion on an issue that. at heart. no one really wants to think about. Nonetheless. the need for the death penalty does exist. but. more importantly. it is an area where emotion cannot and should not dictate its use.

What exactly then is the answer to the abolitionist moral dilemma of how the state can punish the murderer with his own death? The answer lies in the teaching by God and his covenant he cut with Noah after the flood. God in Genesis 9:6 ordered that whosoever sheds man's blood their life will be taken by the hands of man. God does not enjoy the death of the sinner. but he does love justice. God has clearly mandated the use of the death penalty and God's decisions are not based on emotion.

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What is a Covenant

What exactly is a covenant, and do we today have to follow the rules of the covenant cut by Noah after the flood? Many in today's society do not understand just what exactly a covenant is, and for the most part, most don't understand what the ramifications of making, or more importantly, breaking a covenant with God really means. As for the question of whether today's society is obligated to uphold Noah's covenant with God, the answer is clearly yes.

What exactly is a covenant? Daniel Elazar, in his book Covenant & Polity in Biblical Israel, states that:

> A covenant is a morally informed agreement or pact based upon voluntary consent, established by mutual oaths or promises, involving or witnessed by some transcendent higher authority, between peoples or parties having independent status, equal in connection with the purposes of the pact, that provides for joint action or obligation to achieve defined ends (limited or comprehensive) under conditions of mutual respect, which protect the individual integrities of all the parties to it.[80]

Elazar's definition of a covenant is very good, and when one breaks it down into its components one finds that a covenant has three distinct components. First, a covenant is a bond. Secondly, a covenant is a bond for life and, finally, a covenant is a binding agreement on all generations, unless otherwise stated in the beginning that it is not.

The first point, and without a doubt the most important aspect, of any covenant is that a covenant is a bond. When an individual, or a country, makes a covenant with another individual or country, that party is making a bond between himself and the other

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[80] Daniel J. Elazar, Covenant & Polity in Biblical Israel: Volume I of the Covenant Tradition in Politics (New Brunswick, NJ: Transaction Publishers, 1995), 22-23.

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party. In making the bond, the two independent parties are linking themselves together, in order to meet the specific needs of either one or both parties in the agreement. This bond or covenant is to bind together the two parties, until the agreement is either completed in duration, or broken by one of the parties. But at the heart of any covenant is the aspect of the bond that two links two independent parties together as one.

A covenant does not have to be between two men or countries only. It can, more importantly, be between God and man. Covenants have been cut throughout history between God and man. These include Noah (Gen.6:18), Abraham (Gen.15:18), Israel (Exod.24:8), and David (Ps.89:3).

The second area of a covenant is that the bond is for life. A covenant, unless clearly stated in the beginning, is a covenant for life. When God enters into a covenant with man, he never enters into it on an informal basis. For his part God expects that man will uphold his end of the bargain, as he will his. If man decides of his own free will to break the covenant, then he must be prepared to pay the ultimate penalty. The covenant breaker must be ready to pay with his life.

Finally, a covenant is binding contract for all generations. If it is not clearly stated in the agreement that there is a time frame on the completion of the bond, then the covenant is perpetual. Throughout history, men and countries have made legal agreements binding them together for a common goal. In these agreements, there has almost always been a time frame or goal, that once met, frees the parties from the covenant. But with covenants between God and man, there has not always been time

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frames laded down in the beginning. Because of this, these covenants are binding on all generations. A good example of this is God's covenant with Noah.

Noah's Covenant

Now that the reader has a basic understanding of just what a covenant is, then it becomes clear that people today are still bond by the tenants of Noah's covenant with God. What exactly was Noah's covenant with God? The first mention of Noah's covenant with God can be found in Genesis 6:18. After giving Noah specific instructions on how to build the ark, God tells Noah that he is going to make an covenant with Noah and spare him and his family's life. Noah, seeing the importance of God's wishes, follows the orders of God and builds the ark. The flood does eventually come, and Noah and his family, as God promised, is spared from death.

After forty days and forty nights of floating in the ark, God allowed the flood waters to recede. Once on dry land, Noah built an altar to the Lord, and God responded to this gift by promising Noah and his descendants that he would never again curse the ground on account of man again (Genesis 8:21). God then goes on to bless Noah and his sons by giving them the dominion mandate. Be fruitful and multiply, and fill the earth (Gen. 9:1). God, as well gives man authority over all the living things of the earth. Along with this, God goes on to say in Genesis 9:6 that to murder one of your fellow man is unexceptable, and whoever sheds man's blood, by man his blood shall be shed, for in the image of God man is made. To consummate the covenant with Noah, God gave Noah and his descendants the rainbow as a sign of his commitment to keep his bond (Genesis 9:17).

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The Noahic Covenant and the Death Penalty

God instructed Noah and his sons to be fruitful and multiply after the flood. God as well made a commitment to Noah that he would preserve the life of man after the flood. This commitment to spare man becomes plainly apparent in the provisions that God laid out in Genesis 9:3-6:

> Every moving thing that is alive shall be food for you: I give all to you as I gave the green plant. Only you shall not eat flesh with its life, that is, its blood. And surely, I will require your lifeblood; from the beast I will require it. And from every man, from every man's brother I will require the life of man. Whoever sheds the man's blood, by man his blood shall be shed, for in the image of God he made man.

In Genesis 9:6 God makes his simplest and clearest statement of the Bible on what God expects of man, when any man or beast kills another man: "Whoever sheds man's blood, by man his blood shall be shed, for in the image of God he made man." God has made it clear that all life is to be considered sacred. But human life is considered to be more sacred than others. This becomes very apparent when one realizes that God requires the lives of both man and beast to be taken, if they take the life of another man.

Such is God's reasoning for the sanctioning of the use of the death penalty, for the crime of murder goes far deeper than just the fact that man is made in God's own image. This reason alone should be enough for man to follow Gods commands, but God had a deeper reason for his sanctioning of capital punishment. The preservation of the human race seems to be the larger theme of the covenant.

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First. God gives the dominion mandate to Noah and his sons to be fruitful and multiply. Along with this. God promises Noah that he will never curse the earth again. God. then goes on to give all of the earth to Noah and his descendants to rule. This included all of the plants and animals. which man could eat. as long as the meat is cooked to the point where all the blood is gone. Finally. God gives Noah and his descendants the divine mandate to execute all human killers. man or beast. In doing this God is giving Noah and his descendants the ultimate way of preserving man from all murderous beings.

This was a change for man. Earlier in the Bible. God reserved the right to judge and eliminate the murderer himself. In the story of Cain and Abel. God spared Cain's life after he had killed his brother Abel. God did curse Cain for his crime but he did not put him to death (Gen.4:1-12). God. in sparing Cain's life. makes it abundantly clear that no one at that time had the right to take Cain's life. except God (Gen.4:15). In changing his command which gave man the authority to judge and execute the murderer, God had given Noah and his descendants a new authority, and a new way to preserve the human race.

In giving man the authority to execute the murderer, God as well laid down the framework for the creation of the first forms of government. God did not draft specific directions for an elaborate new form of government. but God did give the power of the sword to man. In effect, God created the temporary power of the state as his instrument in an attempt to control evil and the sinner. For the first time, the power of the sword was placed in the hands of man, which if controlled properly, would become the ultimate

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deterrent to all evildoers. As the Bible states in Romans 6:23. "The wages of sin is death."

Discussion

Now that it is clear that God has in fact given man a divine mandate. namely that all murderers are to be executed at the hands of his fellow-man. Then what does this mean in regard to the arguments put up against the use of capital punishment by the three groups discussed earlier? The ACLU. ABA. and the Catholic Church all state that the death penalty should be outlawed for various different reasons. These reasons vary from the death penalty being a violation of the murderer's Eighth and Fourteenth Amendment rights. to the reason that its use is racially biased. and finally to the reason that modern societies cannot use the principle of an eye for an eye in the punishment of the criminal. But what all these arguments fail to see is that God loves justice and mandates the death of the murderer.

God. does not enjoy in the death of the sinner. but he does delight in justice. As Dr. Joseph Kickasola put it in his October 11. 1997 article in the Virginian-Pilot newspaper:

> In my view. the Bible clearly teaches that God's reasoning on capital punishment is that it is a "moral" necessity, a civil duty, because it is simple justice and it actually undergrids "respect" for the dignity of human life. because man is made in the image of God.[81]

Man is made in the image of God but God's son, Jesus Christ, was the only man to walk the earth who never sinned. Because of this, God graciously presented his son on

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[81] Joseph N. Kickasola. "Capital Punishment and the Bible," Virginian-Pilot, 11 October 1997, sec. B8.

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the cross as a sacrifice for man and his sins. The death of Jesus Christ in a sense became the only way man could find atonement form his sins and get right with God. This atonement as given by God has as well become the basis of the Christian faith and civil justice.

> Because of the centrality of atonement in the Christian faith its meanings is as varied as theological systems are diverse. However, all views hold in common that the end of atonement is the reconciliation of God and man. Properly understood, atonement establishes the ground of "justice" for reconciliation between an offended party and the offender. Similarly, civil justice should establish the ground of justice for reconciliation of victim and the offender and the restoration of both.[82]

God in sacrificing his son demonstrated his love of justice. Jesus Christ's death was necessary as the only means for man to receive salvation and atonement from his sins and get right with God. The death of the murderer by the hands of man is the only way that man can demonstrate obedience and justice to God while teaching justice as well.

> God was "just" and demonstrated "justice" by upholding the principle that "the wages of sin is death" (Romans 6:23), and he was also the "one who justifies," by demonstrating his love in providing Christ as the substitutionary victim for the required death of all those who have sinned but now believe on him. Capital punishment is demonstrated justice, and justification is demonstrated love. Capital punishment is so moral that it is the very basis of God's action in the necessary physical death of Christ.[83]

God loves justice. In fact, throughout the Bible, the Lord makes it clear that he cherishes his children promoting justice. Psalm 89:14, "Righteousness and justice are the foundation of thy throne." Proverbs 28:5, "Evil Men do not understand justice, but those

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[82] Jeffery C. Tuomala, "Christ's Atonement as the Model for Civil Justice," The American Journal of Jurisprudence 38 (1993) : 222.

[83] Kickasola, ibid.

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who seek the Lord understand all things." Micah 6:8. "He has told you. O man. what is good: and what does the lord require of you. but to do justice. to love kindness. and walk humbly with your God."

In Ezekiel 33:13 the Bible clearly states: "Say to them. as I live declares the Lord God. I take no pleasure in the death of the wicked. but rather that the wicked turn from his way and live. Turn back. turn back from your evil ways!" God does not delight in the death of the murderer but. on the contrary, he is distressed in his death. But God has made it clear that justice is to be done and that restitution must be paid to God and man for the murder of another human being.

The execution of the murderer is sad in its needfulness. but its need does exist. As long as man continues to sin, and commit the crime of murder. the need for the use of the death penalty will continue. The arguments stating that it is wrong for the state to kill another man for his crimes are mostly based on emotional responses to something that most men see as a horror. But that is just it: most men see the murder of another human being as a appalling event. but what does society do with those who see otherwise? Should it incarcerate them for the rest of their lives, try to reform them. and then let them go. or do we execute them for their crimes?

God, who is far wiser than all of man, has made the answer to this question clear: we as children of God, governed under his covenant with Noah in Genesis are to punish the killers of man through their own death at the hands of man. This is to be done because, first, we are made in the image of God, and only he has the right to terminate the life of the innocent and, secondly, to preserve the human race.

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God cannot and will not simply ignore sin. Because of this God requires that the death of the murderer must come at the hands of man. God does not delight in the death of the sinner but, on the contrary, he is distressed at the need and death of any sinner. God does delight in justice, though, and all that it encompasses. Because of this the use of the death penalty in the United States must continue if God is to continue to grant his blessings on us.

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VITA

Richard Kevin Moore was born October 18, 1969 in Newport News, Virginia and grew up in Poquoson, Virginia. He attended Poquoson High School and graduated in 1987. Mr. Moore then attended Old Dominion University in Norfolk, Virginia, where he majored in History and minored in International Studies, graduating in 1991. Upon completing his studies at ODU, Mr. Moore took a job as a security guard and body guard at the Christian Broadcasting Network. While employed at CBN, he was to become an Auxiliary Police Officer in December 1992, with the Poquoson Police Department, Poquoson, Virginia. Mr. Moore also graduated from the Hampton Roads Regional Academy of Criminal Justice in March 1993. In December 1993, Mr. Moore was to move to Smithfield, Virginia, to become a full time Police Officer with the Smithfield Police Department. In January 1998, he was to accept a promotion to the position of Sergeant with the police department.

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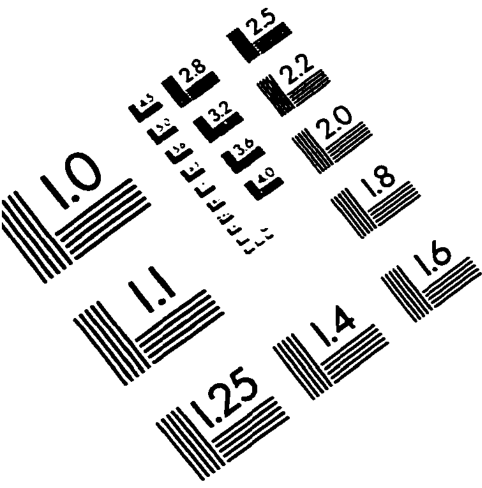
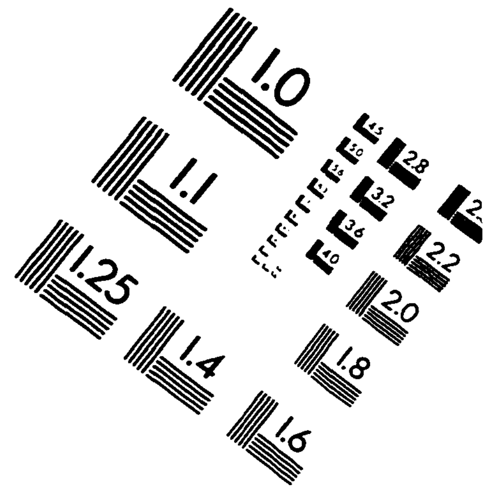
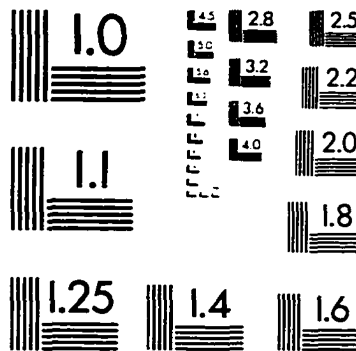
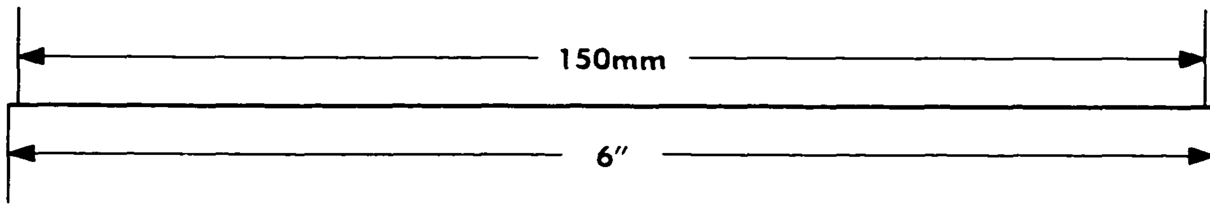

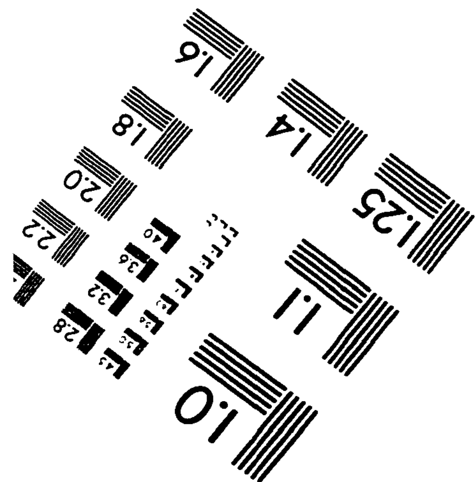

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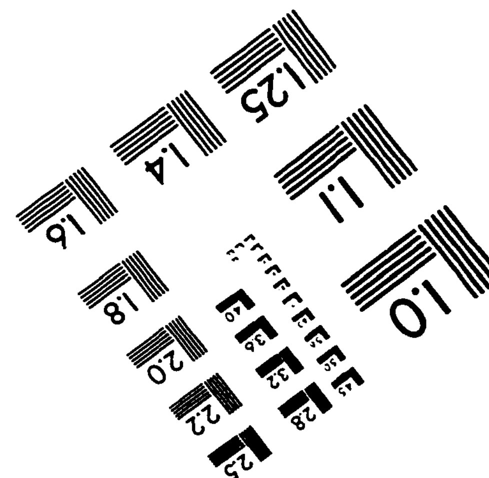

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