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RELIGIOUS ORGANIZATIONS AND THE DEATH PENALTY

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Over the past several years, many questions have been raised concerning the application and effectiveness of the death penalty. Ironically, the Catholic Church, a long-time supporter of the death penalty, has become one of the most vocal critics of the death penalty. In this Essay, Father Robert F. Drinan documents the Church's new-found opposition to the death penalty, and discusses the influence the Church will have on the future of the death penalty.

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A news report from Kabul, Afghanistan in the year 2000 symbolizes all the passions and irrationality involved in the use of the death penalty.¹ The *Taliban*, which controls 90 percent of Afghanistan, interpreted Islamic law to mean that the victim's family can execute the convicted killer. As a result, the brother of one of the victims cut the accused man's throat in a public execution.² This was done despite the pleas for clemency of 4,000 spectators in a Kabul sports stadium.³

One would like to think that this scene represents an event that is very rare and in decline everywhere. The fact is that in 1996 there were only 5,136 executions in the world. At least 4,367 of them occurred in China. The United States had forty-five executions in 1996 and seventy-four in 1997.⁴

Can the organized religions of the world persuade humanity to abolish the death penalty entirely? The answer is not clear, but most forms of Christianity, and especially the Catholic Church, are now opposed to the death penalty more than ever before in history.

One would think that the Catholic Church would have opposed the death penalty from the very beginning. After all, the execution of Jesus Christ was unjust in almost every detail. Historians have been writing for centuries that the trial of Christ was illegal, unfair, contrary to accepted standards, and hideously cruel. The false accusations, the legal irregularities, and the barbarity of the scourging and the crown of thorns have been pointed out for centuries.

But it should also be stated that Christ himself did not suggest that those who

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¹ See *Murderer Publically Executed in Afghanistan*, AGENCE FRANCE PRESSE, Jan. 20, 2000, at Int'l News; *Two Murderers Publically Executed in Afghanistan*, AGENCE FRANCE PRESSE, Jan. 6, 2000, at Int'l News.

² See *Two Murderers Publically Executed in Afghanistan*, *supra* note 1.

³ See *Murderer Publically Executed in Afghanistan*, *supra* note 1.

⁴ See Death Penalty Information Center, *Executions in the U.S. 1996*, at <http://www.deathpenaltyinfo.org> (last visited Sept. 28, 2000).

executed him should be punished. Indeed he proclaimed from the cross “forgive them Father for they know not what they do.”⁵ This teaching is consistent with Christ’s statement in Matthew 5:38, where he repudiated the ethics of retribution so essential to support of the death penalty.⁶ Christ said, “You have heard that it has been said ‘an eye for an eye and a tooth for a tooth’ but I say to you, do not resist an evil-doer. But if someone strikes you on the right cheek, turn the other also.”⁷ This approach was confirmed when Jesus stopped the legal execution of a woman taken in adultery. He said in John 8:7, “Let any one among you who is without sin be the first to throw a stone at her.”⁸

Why did not the Church, from the very beginning, conclude that the state should not have the power to execute a person because the use of that enormous power would in all probability be filled with abuse, as it was in the case of Christ? Indeed, there are few signs that such an opinion found much favor in the early ages of the Church. There were, however, some Christian pacifists in the early Church, such as Lactantius, who held that there can be *no* exception to the Fifth Commandment.

In the last generation or so, official Catholic teaching has become so opposed to the death penalty that many Catholics have become embarrassed at the bluntness and brutality of the centuries-old teaching of the Church that the death penalty is permissible for the most serious crimes.

The official catechism of the Catholic Church has made it increasingly clear that the death penalty is not allowed.⁹ There is such certainty on this point that Pope John Paul II has persistently asked governments not to use the death penalty.¹⁰ The Pope now regularly intervenes with a plea for commutation whenever a state schedules an execution.

The whole phenomenon of the Catholic Church taking a proactive role in preventing executions is so novel that there is some surprise and even a certain resentment by some Catholics. Governor Frank Keating of Oklahoma, a Catholic and a Republican who believes in capital punishment, rejected the recommendations of the Holy Father with the blunt words that “the Pope is wrong.”¹¹

The Catholic hierarchy has spoken regularly and vigorously denouncing abortion. While everyone recognizes that the bishops have the right to express their views, there has been some feeling that some bishops may be seeking to use ecclesiastical sanctions to accomplish a political objective.

But every observer of the rapidly-changing public attitude on the death penalty

⁵ *Luke 23:24.*

⁶ *Matthew 5:38-39.*

⁷ *Id.*

⁸ *John 8:7.*

⁹ *See POPE JOHN PAUL II, EVANGELIUM VITAE ¶ 56 (1995).*

¹⁰ *Id.* at ¶ 63.

¹¹ Paul English, *Pope Wrong, Keating Says*, THE DAILY OKLAHOMAN, Feb. 3, 1999, at 3.

has to concede that America's religious bodies may well have a critical, even a decisive, influence on the way in which the United States is now reacting to the use of the death penalty.

It should be pointed out, however, that some evangelical groups support the death penalty. In June 2000, Southern Baptists, representing some 10 million members, overwhelmingly supported the death penalty at their meeting in Florida.¹² The group said that the death penalty is a "legitimate form of punishment for those guilty of murder or treasonous acts that result in death."¹³ The resolution was grounded in biblical authority and not in any contemporary evidence.

The evolution in the way the Catholic Church looks at the death penalty has been chronicled in an excellent 641-page book by Dr. James J. Megivern, a professor at the University of North Carolina.¹⁴ Dr. Megivern tries to explore the reasons behind the amazing shift in the Catholic Church's view of the death penalty. But in the end, there is no totally convincing explanation of the change. A believer would have to conclude that it is the Holy Spirit leading the Church to revisit its long-held approval of the death penalty.

Somehow all the arguments used by St. Augustine, St. Thomas Aquinas, and many others in church history now seem unpersuasive. Indeed, some of the justifications employed throughout Catholic history seem inherently implausible. It may be that Pope John Paul II will add an apology for the Church's acceptance of the death penalty to the long list of dozens of acts by the Church for which the Pontiff has apologized.

The core of the Church's opposition to the death penalty is the reverence that everyone must have for human life in every one of its manifestations. The Church has insisted that human life is in a fetus, in the infirm and dying, and in the murderer, and that it cannot be destroyed under any circumstances. The book by Dr. Megivern brings this out. But the question keeps arising as to how the Church, always opposed to abortion and euthanasia, could have permitted or condoned the taking of the life by the state, of a person who committed murder.

The idea that the death penalty survived because it deters others from taking the lives of individuals has been for generations a part of the argument for the death penalty. But that argument cannot be demonstrated and is not accepted by any student of the vast literature about the death penalty. Louis Freeh, head of the FBI, and Attorney General Janet Reno have both conceded that there is no proof that capital punishment deters.

¹² See Steve Kloehn, *Baptists OK Limits on Women's Roles; Southern Sect Cites Bible as Authority*, CHI. TRIB., June 15, 2000, at 1; Gayle White, *Baptists OK Rules on Gays, Women*, ATL. J. & CONST., June 15, 2000, at 1E.

¹³ See White, *supra* note 12.

¹⁴ JAMES J. MEGIVERN, *THE DEATH PENALTY: AN HISTORICAL AND THEOLOGICAL SURVEY* (1997).

So what is the argument for the death penalty? Does its justification have to add up to vengeance? Or is there somehow a right grounded in the retributive benefits for the victim's family to kill the perpetrator?

Those who believe in the rights of victims have a solid argument. The federal government and some states do give compensation to the victims of serious crimes. Indeed, there are those who would urge an amendment to the U.S. Constitution so that the victims of crime can participate in the trials of those who allegedly injured their family. That, of course, would be a serious departure from the basic concepts of Anglo-American criminal jurisprudence.

The central idea in the opposition of the Holy See and the Catholic Bishops of America to the death penalty is reverence and respect for life. The dignity of everyone's life is a value higher than the state's desire to punish a malefactor. The state may incarcerate a person as an appropriate punishment—for life, if that is suitable—to protect other citizens. But it may not extinguish life unless it is necessary in the highly unlikely case that the instant death of a person is the only way to save the life of another innocent person.

The preciousness and exaltation of every human life is, of course, a long-held, centuries-old value of the common law and indeed of every legal system. The opponents of the death penalty now assert that the right to life takes precedence over the right of the state to terminate the life of an enemy of the state.

For the Catholic Church, the question is why the Church, with its centuries-old devotion to the exaltation of human life, has only recently extended that protection to those who commit capital offenses. For those with faith in the role of the Church, the change can be attributed to the Holy Spirit that educates and inspires every Christian. Those who do not have this faith have to look upon the Catholic Church as a vast worldwide organization with over one billion adherents that has shifted its position on the death penalty. The Catholic Church is now in agreement with Amnesty International, the American Civil Liberties Union, and a wide variety of humanist and religious organizations.¹⁵

The Catholic Church is also in a growing alliance with mainline Protestant churches, but not with the many Evangelical churches that read the Old and New Testaments to permit capital punishment. Most Jewish religious organizations are opposed to the death penalty, although some Orthodox Jews would claim that the Bible allows the ultimate penalty, even though it was rarely used during the days of the Old Testament.

The opponents of capital punishment can also claim that the death penalty

¹⁵ For information on the efforts of Amnesty International and the American Civil Liberties Union against the death penalty, see Amnesty International, *Website Against the Death Penalty*, at <http://www.web.amnesty.org> (last visited Sept. 28, 2000); American Civil Liberties Union, *ACLU Death Penalty Campaign*, at <http://www.aclu.org/deathpenalty> (last visited Sept. 28, 2000).

violates customary international law.¹⁶ That proposition is not certain because basic documents such as the Charter of the United Nations and the Universal Declaration of Human Rights, along with the many U.N. covenants on human rights, do not expressly outlaw the death penalty. However, the vast majority of nations, especially in Europe and Latin America, have a de jure or de facto ban on the death penalty.¹⁷

Many opponents of the death penalty find their reasons to be self-evident. Religious leaders can point to the sanctity of all life, while non-religious opponents point to the inherent injustices built into the system. The inequities are known to all. They involve discrimination against persons of color built into the system of selecting and trying those who are charged with capital offenses. Discrimination against persons of color has been notorious: of the 3,979 persons executed between 1930 and 1989, 2,115 were African-American. The scholarship of Professors Hugo Bedau and Michael Radelet concludes that there were 416 miscarriages of justice in the area of the death penalty from 1900 to 1990.¹⁸ Above all, the difficulty with the death penalty is the process by which only 300 are chosen for the death penalty out of those who commit 23,000 homicides each year in America.

The fact that the death penalty does not deter is demonstrated by the fact that Florida and Texas, which lead the nation in the number of executions,¹⁹ have far more murders than states like Michigan or Minnesota, which do not have the death penalty. There are, of course, many variables involved, but academic and sociological studies seem to conclude that deterrence is not provable.

There are some persons within the Catholic Church who want the bishops to mobilize opposition to the death penalty. Can a Catholic public official who opposes abortion simultaneously be in favor of the death penalty? In Massachusetts, which is about fifty-five percent Catholic, the reinstatement of the death penalty almost happened in recent times.²⁰ The advocacy of its elimination led by Catholic organizations in Massachusetts was rejected by many public officials who feel that sentiment favors the death penalty.

The opponents of the death penalty are hesitant to employ their central argument that there is sanctity and dignity in all human life. As a result, they utilize

¹⁶ See Richard C. Dieter, *International Perspectives on the Death Penalty: A Costly Isolation for the U.S.* (1999), at <http://www.deathpenaltyinfo.org/internationalreport.html> (last visited Sept. 28, 2000).

¹⁷ See *id.*

¹⁸ See MICHAEL L. RADELET ET AL., *IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES* (1992).

¹⁹ Since 1976, Texas has held 232 executions, while Florida has conducted 49 (as of Sept. 27, 2000). Death Penalty Information Center, *Number of Executions by State Since 1976*, at <http://www.deathpenaltyinfo.org/dpicerg.html> (last visited Sept. 28, 2000).

²⁰ See Frank Phillips, *Poll: Mass Voters Support Death Penalty Law*, BOSTON GLOBE, Sept. 23, 1990, at 33.

several of the strong arguments against the death penalty that do not require their audience to concede that the death penalty is always beyond the jurisdiction of the government.

Persons of this mind help to formulate the concept of a moratorium on the death penalty. It worked in February 1997, when the American Bar Association proposed a moratorium on the death penalty until or unless there is basic due process for those charged with capital offenses.²¹ Those who proposed the moratorium did not expect that the House of Delegates of the American Bar Association, generally a conservative body, would vote to 280 to 119 in favor of a moratorium.²²

The proponents of the moratorium might tell you, if they were candid, that a moratorium would result in the de facto abolition of the death penalty. In other words, there is no way by which the death penalty, as presently administered, could fulfill the requirements of due process and equal protection guaranteed by the Constitution.

The White House in effect declared a moratorium when, in July 2000, it postponed the first federal execution scheduled for August 5, 2000.²³ One possible way to end executions for the 3,600 on death row is for states to declare a moratorium. That would mean that every case would be re-studied by competent counsel. In at least fifty percent of the cases that have been so examined, some type of prosecutorial misconduct, incompetent defense counsel, or racial discrimination has been found.

A moratorium might not be a glorious ending to a system of prosecution of the most disadvantaged persons in America. But it would give a signal to state and federal prosecutors that if they charge an offender with a capital offense, they must have flawless evidence if they want their case to survive to the end.

Religious groups in American history have always been in crusades. They, along with others, initiated the abolitionist movement. Some of the churches helped to bring about suffrage for women. And church-related groups fought for the passage of the Civil Rights Act. Many religious bodies urged the end of the Vietnam War.

Over the past generation, a coalition of faith-based organizations in Washington have been a powerful force for peace, justice, and equality. This coalition has unanimously opposed the death penalty. Despite that opposition, however, Congress in the 1980s enacted laws that provide up to fifty new grounds for the death penalty. Congress followed public opinion, which in the 1980s and even

²¹ See Sandra Torrey, *ABA Endorses Moratorium on Capital Punishment*, WASH. POST, Feb. 4, 1997, at A4.

²² See *id.*

²³ See Charles Babington & Bill Miller, *Clinton Halts Execution Until Federal Clemency Policy Is Set*, WASH. POST, July 8, 2000, at A2.

today supports the death penalty by percentages in the sixties and in the seventies.²⁴

Can religious bodies therefore change public opinion on the death penalty? Church-related groups are theoretically less influential today than they were in previous generations. There are, after all, 100 million Americans with no affiliation with any religious body. Furthermore, politicians tend to support the recommendation of faith-based organizations only when it brings popular and political support to the public officials.

It is not clear that religious groups are always successful in changing public opinion on law in the United States. Beginning in 1980, the Moral Majority, the Christian Coalition, and other like-minded groups aggressively demanded that prayer be returned to the public school and that abortion be re-criminalized. They have not succeeded in these efforts.

It can be argued that the religious organizations that now oppose capital punishment are not against the solid and settled Supreme Court decisions that the Religious Right faced. The case against the death penalty advanced by church-related bodies arguably has the support of laws favoring abolition of the death penalty in most nations of the developed world.

But the desire for justice against those who engage in violence is deep and broad. The execution of Timothy McVeigh seems plausible to many people, indeed to most people.²⁵ The argument that violence should beget more violence has a certain kind of logic.

One of the most helpful recent books on the death penalty is *Executing Justice—The Moral Meaning of the Death Penalty*, by Lloyd Steffen.²⁶ The author, a professor of religious studies at Lehigh University, assesses all of the profound issues involved with the death penalty and concludes, as Albert Camus did in his book *Reflections on the Guillotine*, that any society that sanctions the death penalty is foundationally unjust.

Beginning early in the year 2000, strong signs appeared in the United States that the beginning of the end of capital punishment may be at hand. But the widespread fear and hatred of violence will impede a moratorium on the death penalty, much less its abolition. Religious groups are not likely to desist from their efforts to persuade the United States to rethink its position on taking life for a life. The late Cardinal Joseph Bernardin summed up the core argument in these words: "Capital punishment feeds the cycle of violence instead of staying it."

²⁴ According to a new Gallop Poll, sixty-six percent of Americans support the death penalty, which is the lowest level of support since 1981. See Death Penalty Information Center, *Public Opinion About the Death Penalty*, at <http://www.deathpenaltyinfo.org/po.html> (last visited Sept. 28, 2000).

²⁵ See Editorial, *No Mercy for McVeigh*, S.F. CHRON., June 14, 1997, at A22.

²⁶ LLOYD H. STEFFEN, *EXECUTING JUSTICE: THE MORAL MEANING OF THE DEATH PENALTY* (1998).