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THE ROLE OF ORGANIZED RELIGIONS IN CHANGING DEATH PENALTY DEBATES

Michael L. Radelet*

In his Article, Professor Michael L. Radelet describes a global decline in the use of the death penalty, the United Nation's progressively stronger stance against executions, and a growing opposition to capital punishment in the United States. This decrease is attributed to both empirical studies casting doubt on the death penalty's efficacy in promoting its stated underlying goals, and to the increasingly vocal stance of religious leaders morally opposed to capital punishment. Nevertheless, the decline in other justifications for capital punishment has been met with increasing reliance on retribution as the primary argument in its support. Professor Radelet argues that retribution's moral, rather than empirical, base makes it an issue largely within the purview of religious denominations, the traditional source of a community's moral authority. Professor Radelet predicts that religious leaders' increasing opposition to the flawed administration of the death penalty, rather than their lesser support for the abstract concept of capital punishment, will tip the balance toward its abolition in America.

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I. WORLDWIDE TRENDS TOWARD DEATH PENALTY ABOLITION

The symposium on which this Article is based met in Williamsburg, Virginia, just a few miles from Jamestown, where in 1608 a man named George Kendall became the first person to be executed on American shores.¹ At that symposium, I argued that there is an accelerating trend toward worldwide abolition of the death penalty. America's executioners have not written their final obituaries, but this area of central Virginia is certainly a fitting place to meet and reflect on historical and recent trends in attitudes toward and the use of the death penalty, and the past and future role of organized religions in leading or fueling these changes. Dare we suggest that we have come almost full circle?

Worldwide, the death penalty is increasingly confined to a smaller and smaller number of countries. Amnesty International reports that in 1999 only thirty-one

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¹ See Francis X. Clines, *The Grim List of Those Put to Death*, N.Y. TIMES, Nov. 18, 1992, at A16 (explaining that it is possible that others were executed before Kendall, but his is the earliest execution for which documentation exists today).

countries hosted one or more executions, whereas 108 countries had abolished the death penalty either totally or in practice.² Even within those thirty-one countries, the executions are concentrated in only a handful: “[eighty-five] percent of all known executions in 1999 were carried out in China, Iran, Saudi Arabia, the Democratic Republic of the Congo, and the [United States].”³ These others are not countries that most Americans look to for human rights leadership.

More and more countries are signing international treaties that abolish or restrict the death penalty.⁴ The United Nations is also taking a progressively stronger stand against the death penalty. In 1999, for the third year in a row, the Geneva-based U.N. Commission on Human Rights passed a resolution calling for a moratorium on death sentencing.⁵ The resolution was co-sponsored by seventy-two states (compared to forty-seven in 1997).⁶ Although the total abolition of the death penalty is its ultimate goal, the resolution encourages a strategy of “progressively restrict[ing] the offenses for which the death penalty can be imposed.”⁷ Toward this end, the 1999 resolution reaffirms an international ban on executions of those under eighteen, those who are pregnant, and those who are suffering from mental illness.⁸ The resolution also calls for non-death penalty nations to refuse to extradite suspects to countries that continue to use executions as a form of punishment.⁹

Movement away from the death penalty can also be found within the United States. In the past year, some American political leaders have shown a willingness to rethink their support for the death penalty. In May 1999, the Nebraska legislature voted to call for a moratorium on executions.¹⁰ After a gubernatorial veto, the legislature—by a unanimous vote—overrode the veto on that part of the

² See AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 22 (2000). Counted among these 108 countries are thirteen that have abolished the death penalty “for all but exceptional crimes, such as war crimes.” *Id.*

³ *Id.*

⁴ See, e.g., WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW (2d ed. 1997) (describing the international progression away from use of the death penalty).

⁵ See E.S.C. Res. 61, U.N. ESCOR, 55th Sess., U.N. Doc. E/CN.4/RES/1999/61 (1999).

⁶ See AMNESTY INTERNATIONAL, REP. ACT 50/04/00, THE DEATH PENALTY WORLDWIDE: DEVELOPMENTS IN 1999, at 15 (Apr. 2000), available at <http://www.web.amnesty.org/ai.nsf/index/ACT500042000>; AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 16 (1999) (citing U.N. Commission on Human Rights Resolution 8, E.S.C. Res. 8, U.N. ESCOR, 54th Sess., U.N. Doc. E/CN.4/Res/1998/8 (1998)).

⁷ *U.N. Panel Votes for Ban on Death Penalty*, N.Y. TIMES, Apr. 29, 1999, at A4.

⁸ See E.S.C. Res. 61, *supra* note 5.

⁹ See *id.*

¹⁰ See Robynn Tysver, *Execution Suspension Approved: Senators Hand Johanns Life and Death Decision*, OMAHA WORLD-HERALD, May 20, 1999, at 1.

bill that allocated \$160,000 to study whether death sentences in Nebraska are being applied systematically.¹¹ In January 2000 in Illinois, Governor George Ryan imposed an immediate moratorium on executions, in large part because thirteen inmates had been released from that state's death row since 1977 because of evidence of innocence.¹² Going one step further, both chambers of the New Hampshire legislature passed a motion calling for the abolition of the death penalty in that state.¹³ Local governments in cities such as Atlanta, Baltimore, Buffalo, Detroit, Philadelphia, Pittsburgh, Rochester, and San Francisco have also called for moratoria on executions.¹⁴

Not coincidentally, public support for the death penalty in the United States has dropped precipitously during the last half-dozen years. In a national opinion poll released in February 2000, Gallup found that overall support for the death penalty stood at 66%, which is down from a peak of 80% in 1994 and is the lowest level of support in nineteen years.¹⁵ More importantly for the vast majority of death penalty states that offer an alternative of life without parole,¹⁶ national support for the death penalty, given this option, stands at only 52%.¹⁷ Statewide polls in California,¹⁸ Texas,¹⁹ Florida,²⁰ the states with America's largest death rows,²¹ have found

¹¹ See Robynn Tysver, *Death Penalty Study OK'd*, OMAHA WORLD-HERALD, May 28, 1999, at 1. This study is being conducted by University of Iowa Law Professor David Baldus.

¹² See Ken Armstrong & Steve Mills, *Ryan Suspends Death Penalty*, CHI. TRIB., Jan. 31, 2000, at 1.

¹³ See John Kifner, *A State Votes to End Its Death Penalty*, N.Y. TIMES, May 19, 2000, at A16. This legislation was later vetoed by Governor Jeanne Shaheen. See *New Hampshire Veto Saves Death Penalty*, N.Y. TIMES, May 20, 2000, at A16.

¹⁴ For an updated and comprehensive list of local governments and other organizations that have called for a moratorium on executions, see The Quixote Center, *Over 1000 Groups Joining the Call For A Moratorium On Executions*, at http://www.quixote.org/ej/ej_tally_of_moratorium_signers_by_st.html (last visited Sept. 13, 2000).

¹⁵ See Gallup Organization, *Support for Death Penalty Drops to Lowest Level in Nineteen Years*, at <http://www.gallup.com/poll/releases/pr000224.asp> (last visited Sept. 13, 2000).

¹⁶ Of the thirty-eight states that authorize the death penalty, thirty-three also authorize life without parole. For a list of these states, see Death Penalty Information Center, *Life Without Parole*, at <http://www.deathpenaltyinfo.org/lwop.html> (last visited Sept. 13, 2000).

¹⁷ See Gallup Organization, *supra* note 15.

¹⁸ A June 2000 Field Poll in California found that death penalty support had dropped to 63%, from a high of 83% in 1986. The poll also found that 73% of the respondents favored a moratorium on executions while the fairness of the death penalty is studied. See Greg Lucas, *Death Penalty Doubts in California*, S.F. CHRON., June 22, 2000, at A1.

¹⁹ A poll taken in May and June 2000 found that 73% of Texans supported capital punishment, down from peaks of 86% in 1988 and 1994. See Kathy Walt & John W. Gonzalez, *Despite Doubts, Most Texans in Poll Support Death Penalty*, HOUS. CHRON., June 22, 2000, at A17. This support actually rose slightly since 1998, when, in the wake of the execution of Karla Faye Tucker, the death penalty garnered a 68% approval rating. See

similar, and in some cases even greater, movement away from death penalty support. An NBC/*Wall Street Journal* poll taken in July 2000 found that 63% of the American public favored an immediate moratorium on executions.²²

II. CHANGES IN DEATH PENALTY DEBATES

In recent years we have also seen major changes in the way the death penalty is justified in civic and political discourse. These arguments have changed, in part, because of major impact by scores of social scientific research projects that have addressed various issues surrounding the capital punishment controversy, and in part because of the increasing stand against capital punishment taken by major religious organizations.²³ In 1976, when the U.S. Supreme Court put its stamp of approval on the death penalty in *Gregg v. Georgia*,²⁴ the leading argument voiced by those who supported the death penalty was deterrence.²⁵ A second leading argument in favor of the death penalty was that executing prisoners was less expensive than long imprisonment.²⁶ Third, people believed that without the death penalty, murderers sentenced to prison terms would threaten the safety of fellow prisoners, prisoner visitors, and prison staff.²⁷ In 1976, little or no concern was

Kathy Walt, *Death Penalty's Support Plunges to 30-Year Low*, HOUS. CHRON., Mar. 15, 1998, at A1.

²⁰ A 1998 Florida poll revealed 63% support for the death penalty, but "[j]ust 50% of those polled would support the death penalty if life without parole were a certainty. Another 44% would favor banning the death penalty under those circumstances, with 6% undecided." See Michael Griffin, *Voters Approve of Death Penalty; The Support Would Be Weaker if Florida Voters Were Certain that Killers Would Be Locked Up Forever, A Poll Found*, ORLANDO SENTINEL, Apr. 23, 1998, at D1. In Florida there are only two possible sentences for those convicted of first degree murder: death and life without parole.

²¹ For data on the numbers of prisoners awaiting execution in each state, see NAACP Legal Defense and Education Fund, *Death Row USA: Summary of State Prisoners On Death Row*, available in Death Penalty Information Center, at <http://www.deathpenaltyinfo.org/DRUSA-StateSumm.html> (last visited Sept. 13, 2000).

²² See Pollingreport.com, *Crime*, at <http://pollingreport.com/crime.htm#Death> (last modified Aug. 8, 2000).

²³ Perhaps the most extensive recent discussion of the historical role of organized religions in death penalty debates is JAMES J. MEGIVERN, *THE DEATH PENALTY: AN HISTORICAL AND THEOLOGICAL SURVEY* (1997).

²⁴ 428 U.S. 153 (1976).

²⁵ See, e.g., Anthony G. Amsterdam, *Capital Punishment*, in *THE DEATH PENALTY IN AMERICA* 346, 356 (Hugo A. Bedau ed., 3d ed. 1982) ("In 1975, the first purportedly scientific study ever to find that capital punishment *did* deter homicides was published.").

²⁶ See, e.g., Barry Nakell, *The Cost of the Death Penalty*, in *THE DEATH PENALTY IN AMERICA*, *supra* note 25, at 241 ("Many people mistakenly believe that it is less costly to execute a murderer than to keep him in prison for life.").

²⁷ See Wolfson, *infra* note 33, at 160.

voiced that there might be continued racial bias in the administration of revised death penalty statutes passed in the preceding four years, or the possibility that innocent people would be among those sent to our execution chambers. With some notable exceptions and despite verbal opposition, communities of faith were uninvolved in death penalty debates.²⁸

In sharp contrast to the picture of twenty-five years ago, in the February 2000 Gallup Poll, only 8% of those who supported the death penalty justified their position on deterrence grounds.²⁹ This decline in support for the deterrence argument is one example of how social science research has had an impact on policy debates. Scores of projects have examined the deterrence issue,³⁰ and a 1996 survey of America's top criminologists found that some 85% of the experts agreed that the empirical research on deterrence has shown that the death penalty never has been, is not, and never could be superior to long prison sentences as a deterrent to criminal violence.³¹

In the February 2000 Gallup Poll, only 4% of those who supported the death penalty did so because they believed that execution was the only way to prevent the murderer from repeating her or his crime.³² This position, too, has been challenged by recent empirical research that has found that the odds of repeat murder in prison are quite low, and that people convicted of homicide tend to make better adjustments to prison (and, if released, exhibit lower rates of recidivism) than other convicted felons.³³ The best research on this issue has been done by James Marquart and Jonathan Sorensen, sociologists at Sam Houston State University, who tracked down 558 of the 630 people on death row when all death sentences in the U.S. were invalidated by the Supreme Court in 1972.³⁴ Contrary to the

²⁸ See, e.g., VOICES AGAINST THE DEATH PENALTY: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT 1787-1975, at iv (Philip English Mackey ed., 1976) ("most Jewish and Protestant and some Catholic religious organizations [are] on record against the death penalty").

²⁹ See Gallup Organization, *supra* note 15.

³⁰ For recent reviews of this body of scholarship, see ROGER HOOD, THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE 180 (rev. ed. 1996); Ruth D. Peterson & William C. Bailey, *Is Capital Punishment an Effective Deterrent for Murder? An Examination of Social Science Research*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 157 (James R. Acker et al. eds., 1998).

³¹ See Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY 1, 2 (1996).

³² See Gallup Organization, *supra* note 15.

³³ See Hugo Adam Bedau, *Deterrence: Problems, Doctrines, and Evidence*, in THE DEATH PENALTY IN AMERICA, *supra* note 25, at 93, 100; Wendy Phillips Wolfson, *The Deterrent Effect of the Death Penalty Upon Prison Murder*, in THE DEATH PENALTY IN AMERICA, *supra* note 25, at 159; John M. Stanton, *Murderers on Parole*, 15 CRIME & DELINQ. 149 (1969).

³⁴ See James W. Marquart & Jonathan R. Sorensen, *A National Study of the Furman-*

predictions of those who advocate the death penalty on the grounds of incapacitation, Marquart and Sorensen found that among those 558 whose death sentences were commuted in 1972, seven went on to kill again.³⁵ This figure is almost identical to the number of death row prisoners on death row at the time of *Furman*³⁶ who were later found to be innocent (five).³⁷ Interpreted another way, these data indicate that one hundred death row inmates would have to be executed to incapacitate the one person who statistically might be expected to repeat.

A fourth shift in the way the death penalty is argued is that today, more and more Americans are recognizing the inevitability of caprice and bias in the administration of the death penalty,³⁸ as well as the inevitability of occasionally executing the innocent.³⁹ Numerous studies have found that in recent years, those who kill whites are between three and four times more likely to be sentenced to death than those who kill blacks, other things being equal.⁴⁰ And, after the exoneration of a death row inmate in my hometown of Gainesville earlier this spring,⁴¹ there have now been eighty-seven people released from death row since 1970 because of doubts about their guilt.⁴²

Commuted Inmates: Assessing the Threat to Society from Capital Offenders, 23 LOY. L.A. L. REV. 5 (1989).

³⁵ See *id.* at 26 (“551 prisoners, or 98%, did not kill either in prison or in the free community.”).

³⁶ *Furman v. Georgia*, 408 U.S. 238 (1972) (holding the death penalty, as applied, unconstitutional).

³⁷ See Michael L. Radelet & James W. Marquart, *Assessing Nondangerousness During Death Penalty Phases of Capital Trials*, 54 ALB. L. REV. 845, 857 (1990).

³⁸ See GEN. ACCOUNTING OFFICE, REP. GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990). More recent studies include David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998); Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLA. L. REV. 1 (1991).

³⁹ See MICHAEL L. RADELET, HUGO ADAM BEDAU & CONSTANCE E. PUTNAM, IN SPITE OF INNOCENCE (1992); Michael L. Radelet, William S. Lofquist & Hugo Adam Bedau, *Prisoners Released from Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 T.M. COOLEY L. REV. 907 (1996).

⁴⁰ See, e.g., Death Penalty Information Center, *Race of Defendants Executed Since 1976*, at <http://www.deathpenaltyinfo.org/dpicrace.html> (last updated with execution on Sept. 27, 2000) (listing the races of both victims and defendants). In the July 2000 NBC/*Wall Street Journal* poll, *supra* note 22, respondents were asked “From what you know, do you think that the death penalty is or is not applied fairly?” The same proportion of respondents—42%—said it was and was not applied fairly.

⁴¹ See Sydney P. Freedberg, *Ex-Death Row Inmate Gets Walking Papers*, ST. PETERSBURG TIMES, Mar. 17, 2000, at 1A.

⁴² For a list of these cases, see Death Penalty Information Center, *Innocence: Freed from Death Row*, at <http://www.deathpenaltyinfo.org/dpic/innocentlist.html> (last visited Sept. 13, 2000). Sixty-eight of these cases are described in depth in Michael L. Radelet et

Finally, a fifth important way that death penalty arguments have changed in the past twenty-five years is that fewer and fewer religious leaders voice a pro-death penalty position. Regardless of one's stand on the issue, we can all agree that the vast majority of the so-called "moral leadership" in the U.S. has taken a strong stand against the death penalty. Leaders of Catholic, most Protestant (with the notable exception of the most fundamentalist denominations), and Jewish denominations are strongly opposed to the death penalty, and most formal religious organizations in the U.S. have endorsed statements in favor of abolition.⁴³ To be sure, this message is not well-communicated and is ignored or rejected by many members of these denominations. Nonetheless, in the words of Father Robert Drinan (a Jesuit priest and former member of Congress), "[t]he amazing convergence of opinion on the death penalty among America's religious organizations is probably stronger, deeper, and broader than the consensus on any other topic in the religious community in America."⁴⁴

Increasingly, the leading (and often sole) justification for the death penalty rests on retributive grounds, which is more a moral and less an empirical argument. Indeed, in the February 2000 Gallup Poll, 46% focused on the "eye for an eye" rationale, saying that the "death [penalty] is the only punishment that fit[] the crime."⁴⁵ Another 5% said that the prisoner "deserved" it, and 3% said that death was the biblical remedy.⁴⁶ With 22% of those who supported the death penalty giving no reason,⁴⁷ clearly the retribution argument is the foundation on which today's capital punishment support is built.⁴⁸

III. SOME LIMITS TO THE RETRIBUTIVE ARGUMENT

Those who oppose the death penalty can be optimistic that in the near future, retributive justifications for the death penalty will lose some of their appeal. I say this for three general reasons.

First, there is evidence that the general public recognizes some limits to

al., *supra* note 39, at 923-62.

⁴³ For a collection of statements of major religions on the death penalty, see AMERICAN FRIENDS SERVICE COMMITTEE, *THE DEATH PENALTY: THE RELIGIOUS COMMUNITY CALLS FOR ABOLITION* (1998).

⁴⁴ ROBERT DRINAN, *THE FRACTURED DREAM: AMERICA'S DIVISIVE MORAL CHOICES* 107 (1991).

⁴⁵ Gallup Organization, *supra* note 15.

⁴⁶ *See id.*

⁴⁷ *See id.*

⁴⁸ For articulation of this point of view, see WALTER BERNS, *FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY* (1979); Ernest van den Haag, *Justice, Deterrence, and the Death Penalty*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT* 139 (James R. Acker et al. eds., 1998).

retributive punishments. A 1991 Gallup Poll asked respondents which method of execution they preferred. After all, if one were *really* retributive, and if people like Ted Bundy or Oklahoma City bomber Timothy McVeigh *really* got what they “deserved,” the preferred method might be slow boiling or public crucifixion. Yet, 66% of the respondents favored lethal injection, an increase of ten points from six years earlier.⁴⁹ Support for lethal injection has risen even further since then.⁵⁰ This preference likely reflects, at least in part, the popular belief that electric chairs, gas chambers, and nooses are too gruesome. In contrast, the popular wisdom is that lethal injection is ostensibly less barbaric. Paradoxically, we may want retribution, but our stomachs turn when prisoners catch fire in our electric chairs. In short, retributive thirst has its limits.

A second fault with retributive justifications for capital punishment is seen by examining the effects of the death penalty on families of homicide victims. The retributive benefits of the death penalty are often portrayed as something that families of homicide victims need: death penalty opponents are frequently asked, “How would you feel if your closest loved one was murdered?”⁵¹ Those who oppose capital punishment can reasonably respond by showing that the death penalty offers much less to families of homicide victims than it first appears. For example, we know that each execution costs millions more than a sentence of long imprisonment.⁵² By diverting vast resources into death penalty cases—which, after all, are only about 2% of all homicides—the state has fewer resources for families of non-capital homicide victims and for more effective assistance for families of all homicide victims. One could also argue that the death penalty hurts families of homicide victims in cases in which the killer is *not* sentenced to death, since the prison sentence risks making them feel like their loved one’s death was not “worth” the life of the killer. Or, one could argue that the death penalty serves to keep the case open for many years before the execution actually occurs, often through re-sentencing or retrials, continually preventing the wounds of the family of the victim from healing. It is also true, I hasten to add, that the scholarly community has devoted precious little attention to families of homicide victims.⁵³ Indeed, I am

⁴⁹ See Alex Gallup & Frank Newport, *Death Penalty Support Remains Strong*, GALLUP POLL MONTHLY, June 1991, at 40, 42.

⁵⁰ See, e.g., Griffin, *supra* note 20; Alan Judd, *Electric Chair Is Out of Favor*, SARASOTA HERALD-TRIB., Feb. 18, 1998, at 1B (both articles describing this trend).

⁵¹ This question was asked of candidate Michael Dukakis during the 1988 presidential race, and many observers felt that Dukakis answered it poorly. See JACK GERMOND & JULES WITCOVER, *WHOSE BROAD STRIPES AND BRIGHT STARS? THE TRIVIAL PURSUIT OF THE PRESIDENCY 5* (1989).

⁵² See Richard C. Dieter, *Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty*, in *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 401 (Hugo Adam Bedau ed., 1997).

⁵³ For an exception, see Margaret Vandiver, *The Impact of the Death Penalty on the*

aware of no research specifically studying the short-term and long-term effects of the execution of a killer on the family of the homicide victim, or, for that matter, on the family of the executed inmate.

A third reason to believe that the days of the retributive justifications for the death penalty have peaked stems from the moral basis of retribution.⁵⁴ Retribution is not an empirical issue; there are no mathematical formulae available that can tell us precisely (or even roughly) how much of a given punishment a murderer—or any other offender—“deserves.” In the end, the calculation of how much punishment a criminal “deserves” becomes more a moral and less a criminological issue. As communities of faith learn more about the death penalty, they are coming to the consensus mentioned above about the moral limits of retributive justice.⁵⁵ And there are at least three reasons to expect the greater involvement of people of faith in the death penalty question in the next decade.

As communities of faith ponder the notion of “just desserts,” they will need to confront the distinction between individual versus collective responsibility. To calculate one’s “just dessert,” one must first measure individual responsibility. The death penalty is a punishment based on absolute and total individual responsibility—the problem is solely the evil within the offender, and executing the offender will totally eliminate the evil. On the other hand, high rates of criminal violence can be seen in part as a collective responsibility, decreasing the retributive justification for punishment.

People of faith are in general agreement that a life of morality is a life of sharing. Those with more resources are expected to share them with people who have fewer. When we look at the biographies of those sentenced to death, we see an amazing convergence of life stories. We see poverty, neglect, physical abuse, emotional abuse, sexual abuse.⁵⁶ We see people who were born with two strikes against them because they were born with fetal alcohol syndrome.⁵⁷ If we had what most would consider to be a “Christian” or “godly” world, our communities would be doing a much better job than they are doing to care for these damaged children.

When we do not, some of those children grow up to engage in criminal violence. To be sure, they are personally responsible for their crimes. But our larger communities must also share some of the blame. Children we neglect today are the prisoners we execute tomorrow. We bury our mistakes. To say we have a

Families of Homicide Victims and of Condemned Prisoners, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT, supra note 48, at 477-505.

⁵⁴ For an elaboration of the moral basis of retribution, see LLOYD STEFFEN, *EXECUTING JUSTICE: THE MORAL MEANING OF THE DEATH PENALTY* 69-88 (1998).

⁵⁵ See *supra* text accompanying note 43.

⁵⁶ See, e.g., Brooke A. Masters, *Lawyer and Killer Build a Bond on Virginia Death Row*, WASH. POST, Aug. 20, 2000, at A1 (presenting these issues in one example).

⁵⁷ See, e.g., Jennifer Frey, *A Death in Two Nations*, WASH. POST., Oct. 28, 1999, at C1 (documenting one such case).

responsibility to the poor and the neglected is to say that we also have some responsibility for the criminal violence that puts people on death row. To deny this is a failure to take responsibility for our own sins.

More support for the idea that future years will see a growing involvement of communities of faith in death penalty debates comes from biblical sources. While the New Testament is usually seen as a message of mercy and forgiveness,⁵⁸ there are some who find passages in the Old Testament that lead them to support the death penalty in the United States today.⁵⁹ Again, like with the deterrence argument, here I suggest that we defer to the experts. American Jewish leaders, who we assume know the Old Testament pretty well, also stand opposed to the death penalty.⁶⁰ To what country would we send people who might want to learn more about the Old Testament? Israel, of course. And Israel, a highly-educated country, is a country with strong interests in deterring criminal violence, especially highly premeditated criminal violence. Yet, despite some possible deterrent appeal, the death penalty in Israel is available only for crimes against humanity.⁶¹ Only two people have ever been sentenced to death by the state of Israel.⁶² One of them, John Demjanjuk, a retired Cleveland auto worker who was sentenced to death in 1988 because it was thought that he was the infamous "Ivan the Terrible" who ran the gas chambers at Treblinka death camp in Poland, was released in 1993 when evidence indicated he was a victim of mistaken identity.⁶³ Even Yigal Amir, convicted of the November 1995 assassination of Prime Minister Yitzhak Rabin, was not eligible for the death penalty under Israeli law.⁶⁴

None of the Ten Commandments come with asterisks. For example, there is no asterisk after the rule "Thou Shalt Not Commit Adultery," saying that adultery is okay if you are really attracted to your anticipated paramour. Similarly, there is no asterisk after the commandment "Thou Shalt Not Kill" that says it is okay to kill if

⁵⁸ See Glen H. Stassen, *Biblical Teaching On Capital Punishment*, in CAPITAL PUNISHMENT: A READER 119, 125 (Glen H. Stassen ed., 1998).

⁵⁹ See, e.g., SOUTHERN BAPTIST CONVENTION RES. 5, *infra* note 68 ("Whereas God authorized capital punishment for murder . . . validating its legitimacy in human society." (citing *Genesis* 9:6)).

⁶⁰ See American Jewish Comm., *Statement on Capital Punishment*, in THE DEATH PENALTY: THE RELIGIOUS COMMUNITY CALLS FOR ABOLITION, *supra* note 43, at 7.

⁶¹ See Gloria M. Weisman, *Israel*, in BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, WORLD FACT BOOK OF CRIMINAL JUSTICE SYSTEMS (1996), available at <http://www.opj.usdoj.gov.bjs/pub/ascii/wfbcjjsr.txt> (last visited Oct. 6, 2000).

⁶² See Andrew David Wolfberg, Comment, *Israel v. (John) Demjanjuk; Wachmann Demjanjuk Allowed to go Free*, 17 LOY. L.A. INT'L & COMP. L.J. 445, 448 (1995).

⁶³ See generally YORAM SHEFTEL, DEFENDING IVAN THE TERRIBLE: THE CONSPIRACY TO CONVICT JOHN DEMJANJUK (Haim Watzman trans., Regnery Publ'g 1996); Wolfberg, *supra* note 62 (both describing these events).

⁶⁴ See Joel Greenberg, *Rabin's Killer is Given a Life Sentence in Israel*, N.Y. TIMES, Mar. 28, 1996, at A1.

you hate the person or if you think the person deserves it. Some might say that killing in self-defense is an exception, but in reality, those who kill in self-defense are not the ones making the decision that someone is going to die. Those who kill in self-defense have a primary intent of preventing a killing, not of taking a life.

IV. MORALITY AS A SOCIAL SCIENCE QUESTION

Despite the above arguments, a small minority of American religious leaders remain firm in their support for capital punishment. Elsewhere in this volume, Dr. Pat Robertson has pointed to some parts of both the Old and New Testaments that he and others interpret as giving justification for executions.⁶⁵ Dr. Robertson also points to some important flaws in the way that capital punishment is being implemented; flaws that led him to call for a moratorium on the death penalty when these remarks were first presented at William and Mary Law School in April 2000.⁶⁶ Shortly thereafter, another conservative religious leader, Reverend Jerry Falwell, not only publicly disagreed with Robertson, but added that he thought the appeals process should be speeded up so that more inmates could be executed and their deaths could happen more quickly after trial than is now the case.⁶⁷ Three months later, the annual meeting of the Southern Baptist Convention (representing some 15.9 million members) overwhelmingly passed a resolution on the death penalty—their first statement ever on the issue—supporting “fair and equitable use of capital punishment by civil magistrates as a legitimate form of punishment for those guilty of murder or treasonous acts that result in death.”⁶⁸

⁶⁵ See Pat Robertson, *Transcript of Speech on Religion's Role in the Death Penalty*, 9 Wm. & Mary Bill Rts. J. 215 (2000).

⁶⁶ See Dave Schleck, *Robertson Stuns Crowd By Favoring Moratorium*, DAILY PRESS (Williamsburg, Va.), Apr. 8, 2000, at A1.

⁶⁷ See Frank Green, *Falwell Opposes Moratorium; He, Robertson Differ on Executions*, RICH. TIMES-DISPATCH, Apr. 11, 2000, at B4.

⁶⁸ SOUTHERN BAPTIST CONVENTION RES. 5 (2000), available at <http://www.sbcannualmeeting.org/sbc00/res.asp?ID=1295130452&page=0&num=10> (last visited Sept. 13, 2000). The complete text of the resolution reads:

WHEREAS, The Bible teaches that every human life has sacred value (*Genesis* 1:27) and forbids the taking of innocent human life (*Exodus* 20:13); and

WHEREAS, God has vested in the civil magistrate the responsibility of protecting the innocent and punishing the guilty (*Romans* 13:1-3); and

WHEREAS, We recognize that fallen human nature has made impossible a perfect judicial system; and

WHEREAS, God authorized capital punishment for murder after the Noahic Flood, validating its legitimacy in human society (*Genesis* 9:6); and

WHEREAS, God forbids personal revenge (*Romans* 12:19) and has established capital punishment as a just and appropriate means by which the civil magistrate may punish those guilty of crimes (*Romans* 13:4); and

This disagreement leads to my final point. Even if the Bible justifies the death penalty *in theory*, that gives us no answer about whether the death penalty is justified *as applied* in the United States today. There have been scores of high-quality research projects that have found that who is sentenced to death is much more than a function of the heinousness of the offense or the incorrigibility of the offender: race of victim and defendant matters, as does gender, social class, and attachment to the community.⁶⁹ Quality of attorney matters.⁷⁰ There is also a high degree of arbitrariness, not explained by legal factors or demographics,⁷¹ that results in death sentences for many of the less deserving and life sentences for many of the most culpable. Conservative journalist George Will reminds us that “[c]apital

WHEREAS, God requires proof of guilt before any punishment is administered (*Deuteronomy* 19:15-19); and

WHEREAS, God's instructions require a civil magistrate to judge all people equally under the law, regardless of class or status (*Leviticus* 19:15; *Deuteronomy* 1:17); and

WHEREAS, All people, including those guilty of capital crimes, are created in the image of God and should be treated with dignity (*Genesis* 1:27).

Therefore, be it RESOLVED, That the messengers to the Southern Baptist Convention, meeting in Orlando, Florida, June 13-14, 2000, support the fair and equitable use of capital punishment by civil magistrates as a legitimate form of punishment for those guilty of murder or treasonous acts that result in death; and

Be it further RESOLVED, That we urge that capital punishment be administered only when the pursuit of truth and justice result in clear and overwhelming evidence of guilt; and

Be it further RESOLVED, That because of our deep reverence for human life, our profound respect for the rights of individuals, and our respect for the law, we call for vigilance, justice, and equity in the criminal justice system, and equity in the capital justice system; and

Be it further RESOLVED, That we urge that capital punishment be applied as justly and as fairly as possible without undue delay, without reference to the race, class, or status of the guilty; and

Be it further RESOLVED, That we call on civil magistrates to use humane means in administering capital punishment; and

Be it finally RESOLVED, That we commit ourselves to love, to pray for, and to minister the gospel to victims and perpetrators of crimes, realizing that only in Christ is there forgiveness of sin, reconciliation, emotional and spiritual healing, and the gift of eternal life.

⁶⁹ See, e.g., DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990) (presenting statistical data reinforcing this argument).

⁷⁰ See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, in *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* (1997), *supra* note 52, at 275-309.

⁷¹ See, e.g., Andrea Shapiro, *Unequal Before the Law: Men, Women, and the Death Penalty*, 8 AM. U. J. GENDER SOC. POL'Y & L. 427, 470 (2000) (“The imposition of the death penalty is always arbitrary and capricious.”).

punishment, like the rest of the criminal justice system, is a government program, so skepticism is in order.⁷² The record is clear: we are making god-like decisions without god-like skills.

Today's religious leaders who support the death penalty have virtually ignored the wide array of moral problems that plague the administration of the death penalty. They seem to support what we might call a "Disneyland Death Penalty," where the punishment is imposed with equity, proportionality, and perfection.⁷³ Many of those who stand opposed to the death penalty would undoubtedly change their views if this "Disneyland Death Penalty" actually existed. But it does not. As Justice Marshall argued in the *Furman* decision,⁷⁴ the more people know about the death penalty, the more likely they are to oppose it.⁷⁵

This same point was made in a slightly different way by renowned criminologist Marvin Wolfgang. In a paper published shortly before his death, Wolfgang reminded us that simply because someone might "deserve" to die in the abstract, that does not mean that death is a punishment required by any consistent philosophy of punishment.⁷⁶ Given well-documented injustices in the application of the death penalty, Wolfgang raises the issue of whether such a penalty can be applied in the name of "justice." For Wolfgang, the question becomes not "Who deserves to die," but instead, "Who deserves to kill?"⁷⁷

CONCLUSION

I have argued that in recent years the number one argument in favor of the death penalty has become retribution. Unlike issues of cost, deterrence, and future dangerousness, retribution is not an issue that is empirical. That is, while we can gather data to see if the death penalty is more expensive than long imprisonment, or to see if the threat or use of the death penalty lowers homicide rates better than the threat or use of long imprisonment, we cannot gather data to prove, one way or another, how much of a given punishment (or benefit) any prisoner (or non-prisoner) "deserves." How much we all deserve, instead, is a cultural determination greatly influenced by prevailing standards of morality.

And since retribution rests on more of a moral base than on an empirical one,

⁷² See George F. Will, *Innocent on Death Row*, WASH. POST, Apr. 23, 2000, at A23.

⁷³ As Charles Black has put it: "[I]t doesn't really make any difference at all what I think about the abstract rightness of capital punishment. There exists no abstract capital punishment." CHARLES L. BLACK, JR., *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* 166 (2d ed. 1981).

⁷⁴ *Furman v. Georgia*, 408 U.S. 238, 363 (1972).

⁷⁵ See *id.* at 368.

⁷⁶ See Marvin E. Wolfgang, *We Do Not Deserve to Kill*, 13 T.M. COOLEY L. REV. 977 (1996).

⁷⁷ See *id.* at 990 (quoting Sister Helen Prejean).

it is fundamentally a question that religious denominations need to address. The future of the death penalty in the United States will be greatly influenced by how religious leaders and organizations deal with this issue.

There is great potential for growth in religious opposition to the death penalty. After all, it was not until 1999 that the Pope, on a visit to St. Louis, made it clear that the Catholic Church opposes the death penalty in all circumstances,⁷⁸ and we can expect that it will take a few years for his message to filter down to the pews. As more religious leaders add their voices to this call for abolition, especially our sisters and brothers from more fundamentalist denominations, the end of the death penalty could come quite quickly.

⁷⁸ See Alessandra Stanley, *Pope, in St. Louis Mass, Urges U.S. Catholics to Oppose Death Penalty*, N.Y. TIMES, Jan. 28, 1999, at A16.