

Feature Article: DE205

## SENTIMENT AS SOCIAL JUSTICE: THE ETHICS OF CAPITAL PUNISHMENT

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### SYNOPSIS

Historically, the church has affirmed the right of the civil magistrate in matters of capital justice. Contemporary culture, in contrast, is permeated with arguments against capital punishment. Even among those professing Christian faith, there is widespread opposition to the death penalty. As a trend, the ever-increasing role of the media in manipulating public sentiment in the face of pressing ethical debates promises not to subside. While we may grant that the Christian community is divided over this issue and while we take no delight in its clarification, the church — in keeping with its earthly mandate — is to instruct the state in matters of justice.

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The highly publicized 1992 executions of Robert Alton Harris (California) and Roger Keith Coleman (Virginia), for better or worse, injected a new level of urgency into the debate over capital punishment. In both cases the extent to which the American public was treated to a numbing display of sentimentality by media pundits was nothing short of breathtaking. A more recent case involving a disabled murderer, Charles Sylvester Stamper, further fueled the death penalty debate on a national level. Stamper, who killed three people in a restaurant robbery, became the first person in a wheelchair to be put to death since the *Gregg v. Georgia* Supreme Court ruling in 1976 that reinstated capital punishment.

Debates about capital punishment usually play to the emotions. Contemporary Western culture is saturated with arguments that call for its abolition. These arguments take various forms — for example, purported Eighth Amendment immunity, the fallibility of the criminal justice system, “excessive” governmental power, the insufficiency of revenge as a motive, a purported lack of statistically verifiable deterrence, the possibility of executing an innocent person, a purported racial imbalance in executions, and among some Christians, the annulment of Mosaic Law.

In addition, the media play an ever-expanding role in shaping the contours of ethical discourse. Film and television exert an inordinate influence on our perception of reality. Television alone packs an enormous psychological punch. In reporting on capital punishment cases, TV will not engage the public with a reasoned exchange of viewpoints; rather, it uses powerful visual stimuli to impart the impression that executions are repugnant and morally reprehensible. In the end, debates over the death penalty are more a spectator sport than a quest for truth and justice.

Post-enlightened culture has grown increasingly intolerant of meting out criminal punishment that smacks of being “cruel” or “barbaric.” (This was not the case, however, in 1791 when both the Eighth and Fourteenth Amendments were enacted. Since the death penalty was not “unusual” in the late eighteenth

century, the Eighth Amendment cannot have been intended to apply to capital punishment per se.) This loathing, strangely, is often in the context of increasingly barbaric criminal acts themselves. Not infrequently this moral confusion manifests itself in a pretext of compassion, in much the same way that abortion advocates who decry graphic films such as *The Silent Scream* attempt to obscure moral culpability and redefine the notion of victimhood. Meanwhile, society is stripped of its most fundamental right — protection from violent criminal acts.

Protection, for example, from the likes of “Little Man” James. Released in late 1991 on a mere \$1,000 bail for four counts of assault with intent to kill, James was cruising with several friends on the outskirts of Washington, D.C. when he announced he “felt like killing someone.”<sup>1</sup> Rolling down his window, James fired a shot into the passenger side of the adjacent vehicle. The blast from point-blank range instantly crushed the skull and snuffed out the life of a 36-year-old mother.

Or take child abuser Westley Allan Dodd (Washington State), who after being caught told authorities, “I will kill and rape again and enjoy every minute of it.” Dodd had raped and fatally stabbed two brothers, ages 10 and 11, in a park in September of 1989. A month later he abducted a four-year-old boy from a school playground, molested and tortured him, then hanged him. When his death sentence was handed down in court, Dodd did not hide the pleasure with which he committed the crimes. “I liked molesting children and did what I had to do to avoid jail so I could continue molesting,” he told the state Supreme Court in 1991. “I think I got more of a high out of killing than molesting.”<sup>2</sup>

What is particularly excruciating for families of murder victims is that many convicted killers are found to be out on parole following previous violent crimes. The November 1993 kidnap-murder of a 12-year-old girl in Northern California is a case in point. The slayer, Richard Allen Davis, had two previous kidnap charges to his record before abducting Polly Klaas from a slumber party at her home and driving her to her strangulation-death 40 miles away.<sup>3</sup> Even as recent as May, 1994, 16 years after John Wayne Gacy was convicted of no fewer than 33 murders, it remained uncertain whether justice would be served. The day before Gacy’s scheduled execution, his lawyers dredged up every conceivable excuse for a stay of execution.<sup>4</sup>

## OBSTRUCTING JUSTICE

Curiously, more concern by the pundits is given to the (potential) abuse of political power by fallible civil servants than to ensuring that people like the 36-year-old mother from Washington can drive safely on the beltway. In truth, genuine abuse of the system is illustrated by the fact that while judges engage in moral vanity, the death sentences of premeditated murderers — when not revoked — are delayed for years due to legal technicalities. Legal experts, who by citing a lack of available statistics contend that capital punishment has not constituted a measurable deterrent, have strangely overlooked the obvious — namely, that at the very least it deters murderers by guaranteeing no possibility of parole or escape, hence precluding new crimes committed by repeat murderers.

What in *fact* has watered down the death penalty deterrent is the manner in which much-publicized cases such as those of Harris and Coleman have dragged on over the years, thereby reflecting a wholly *inconsistent* approach to criminal justice. Absent of moral standards, the courts and the criminal justice system languish under the whims of activist judges and the psychotherapeutic elite, at the utter expense of bona fide social justice.

The extent to which death penalty abolitionists have rendered justice impossible is graphically illustrated by one social critic. Estimating about 265,000 murders in the U.S. from 1976 (the year of the *Gregg v. Georgia* decision) until 1990, William F. Buckley, Jr., calculated that within this 14-year period there was one execution for every 2,137 murders committed across the nation. This reticence to do justly has resulted in the longest judicial foreplay in history.<sup>5</sup>

The Harris episode is particularly instructive. After 13 years of procedural roadblock, California was finally able to execute Harris, who, lacking a car for a bank robbery in 1978, kidnapped two 16-year-old

boys sitting in an automobile eating hamburgers, drove them to a deserted canyon, and shot one. The other ran, screamed for help, and tried to hide, but Harris pursued and killed him as well. Harris appealed to the California Supreme Court, which under the guidance of Chief Justice Rose Bird overturned 68 death sentences before she was voted out of office in 1986. (Harris's conviction was one of four that Bird let stand.) As Robert Bork pointed out, Harris's case alone received nine separate reviews.<sup>6</sup>

On the day before Harris's scheduled execution, his lawyers filed one state habeas petition, one federal habeas petition, and one federal court action claiming that execution in the gas chamber was cruel and unusual punishment under the Eighth Amendment. Mercifully, the Supreme Court put an end to the excruciating volley of last-minute attempts at stay of execution, noting that Harris had filed a total of four prior federal habeas petitions and five state petitions, yet was unable to explain why he never before raised the cruel-and-unusual-punishment claim. The Harris case perfectly illustrates the wisdom of the preacher, uttered nearly three millennia ago: "When the sentence for a crime is not quickly carried out, the hearts of the people are filled with schemes to do wrong" (Eccles. 8:11).<sup>7</sup>

### PLAYING THE NUMBERS GAME

In an April 24, 1992 column in *The Washington Post*, Charles Krauthammer voiced a prevalent argument against the death penalty — the lack of available statistics to verify deterrence. He wrote: "If capital punishment could be demonstrated to deter murder, I might be persuaded...But there is no convincing evidence that the death penalty deters."

The problem with the argument based on "convincing" statistics is that no person who is *in principle* opposed to capital punishment will be sufficiently convinced by *any* statistics that are suggestive of changing trends in criminal justice. This was graphically illustrated some years ago at a symposium on criminal justice held at Arizona State University. Two distinguished abolitionists, Professors Hugo Bedau of Tufts University and Charles Black of Yale Law School, were asked whether they could be persuaded to change their convictions if in fact statistics brought *conclusive proof* that the death penalty was serving as a strong deterrent. Both replied that this would not change their views. Asked if they would remain abolitionists even if homicides in this nation ballooned to a dizzying 1,000 percent, they responded in the affirmative.<sup>8</sup>

The truth is that an abolitionist will remain an abolitionist based on passionate *ideological commitments*. Statistics will not change any bias that is rooted in deep-seated convictions. Above and beyond any statistical verification, abolitionists choose to ignore the obvious implication of the death penalty — namely, that it eliminates the possibility of the convict repeating his capital offense. This consideration is fully aside from the \$600,000 cost of imprisoning a convict for life.<sup>9</sup>

It is remarkable how insistent abolitionists can be in denying the likelihood that punishment can deter criminals. Sadly, this often occurs at the expense of time-tested wisdom and common sense. Perhaps the most comprehensive analysis of the criminal mindset was done some years back by Drs. Samuel Yochelson and Stanton Samenow in their landmark work, *The Criminal Personality*. This study was based on 16 years of observing 255 criminal patients at St. Elizabeth's Hospital in Washington, D.C. Yochelson, a respected neuropsychiatrist who died in 1976, started the Program for the Investigation of Criminal Behavior in 1961. He was joined by psychologist Samenow in 1970. The two researchers' conclusions proved to be controversial: criminals were found neither to be victims of society's problems nor of "character disorders"; they acted with deliberation and were in control of their behavior.<sup>10</sup>

The authors also concluded that the fear of death was very strong, persistent, and pervasive in the criminal's life. Some crimes, it was observed, were ruled out because of these fears. It is indeed ironic that abolitionists claim the burden of proof for the efficacy of capital punishment as a deterrent rests on the shoulders of its advocates. Most human beings, after all, are inclined to avoid situations or circumstances that are likely to produce unpleasant, painful, or fatal results.

Does the fear of death deter? Hoodlums in Washington, D.C. and other cities around the nation know the

answer. Given the growing dilemma of witness intimidation in murder cases, law enforcement authorities note that the refusal of witnesses to testify, for fear of being eliminated themselves, is making it difficult to prosecute murder suspects. "It's undoubtedly one of the biggest problems we face," concedes the chief of the U.S. attorney's office in the nation's capital.<sup>11</sup>

If capital punishment does not serve to deter the potential murderer, the abolitionist will thus need to acknowledge the grim reality that *neither will any other form of punishment*. (Thus, *any* punishment is arbitrary.) If, for the sake of argument, capital punishment is implemented under the mistaken notion that it deters, the lives of convicted murderers are lost. If, on the other hand, capital punishment is abolished due to the mistaken belief that it does *not* deter, then innocent lives — indeed, *many* lives both within and without the prison system — are lost.

### OUTRAGEOUS ATROCITY OR MORAL IMPERATIVE?

Murder constitutes the initiation of lethal force against an innocent person; it is also the ultimate despising of divine authority. The murderer thereby forfeits *his* right to live by violating, with an intent to kill, the victim.

When in the defense of an innocent victim or preservation of moral order the authorities execute a premeditated murderer, no inalienable right is being violated. The moral rationale lying behind the life-for-life mandate is rooted in the efficacy of the Noahic covenant in Genesis 9. This imperative is directed at man *as man* and thus is *universal* in scope. Accordingly, deliberately killing a human being created in the image of God is tantamount to killing God in effigy.<sup>12</sup>

The ethical directive in Genesis 9 of a life-for-life policy exacted "by man" for premeditated murderers is validated in the New Testament by explicit statements from the apostle Paul with regard to the civil authorities. These authorities, irrespective of their inherent fallibility or moral character, exercise authority derived from God and are under obligation to extend protection to society at large from violent criminals. This they do by means of the deterrent ("Would you fear..?") of the magistrate's "sword," the *jus gladii*.

Government, if it is performing a legitimate role in society, restrains by force those who are a violent and criminal threat to society. The implication of the Romans 13 text is that by failing to apply the sword as punishment the authorities "praise" evil and negate what is good. The death penalty is not an *initiation* of force as is murder; rather it is a *response* to force — a supremely calculated and necessary one. And whereas *private* vengeance is proscribed by the apostle in Romans 12, a legitimization of the state's administration of the death penalty for a murderer follows in the immediate context. (Rarely is this literary context taken into consideration.)

Christian opponents of the death penalty frequently cite the lifting of the Mosaic code (which sanctioned the death penalty) as evidence of the nonbinding nature of *all* Pentateuchal legislation (including Genesis 9). The affirmation of a life-for-life policy with regard to premeditated murderers in Genesis 9, however, *predates* the Mosaic code and commands *universal* respect for the sanctity of human life; it is not limited to theocratic Israel.

While not all manslaughter required the death penalty — indeed, safeguards against abuse of the system were meticulously built into the Mosaic code — the Hebrew Scriptures nonetheless assume the moral accountability, in the present life, of the offender. The argument by ethicists that the New Testament abrogates the legal standard set forth in the Old Testament has little to commend it. Nowhere do we find an annulment of capital punishment for premeditated murder. To the contrary, the New Testament affirms that the civil authorities play a crucial role in maintaining social order in a moral universe. The social injunctions of law remain universally normative for a stable society.

Because a holy God cannot reside in a polluted land without judging its inhabitants, Israel as a nation was to take pains to ensure the purity of the land by dealing with bloodguilt when it occurred. Inasmuch as blood pollutes the land (cf. Deut. 19 and 21), its consequences are most serious. If a man was killed, it

was the duty of the nearest male relative to avenge that death.

Mosaic Law made very clear distinctions between premeditated murder and accidental manslaughter (for which the cities of refuge were mercifully provided).<sup>13</sup> It should be noted that this proscription applied not only to native Israelites but to foreigners and sojourners as well. Even wholly secularized legal authorities in modern culture acknowledge the difference between involuntary manslaughter and premeditated murder. Thus they demonstrate more discernment than some Christians who in their theological shallowness glibly observe that the Mosaic code has been “abolished,” without considering the abiding moral regulation.

People should start reflecting on the sanctity of life *before* a murder is committed and not *after*. The clear goal of capital sanctions is the *preservation* of human life. This sanction, it should be repeated, transcends theocratic Israel.

### ETHICS FROM BELOW

Opponents of the death penalty are quick to cite the potential for executing an innocent person. The fact that potential for error exists in the criminal justice system is undeniable. Yet no domain of our legal system is predicated on a zero-percent chance of error; the system is indeed fallible. This is not to say, however, that the system is not workable. Fallible people work nevertheless for just results. Sadly, it is rare that abolitionists confront “the other side of the story.” Fifteen years, 30 years, or life in prison inevitably afford the murderer the possibility of escape, pardon, or parole, and more tragically, the chance to kill again — whether inside or outside the prison. Abolitionists appear unwilling to concede that innocent deaths resulting from released or paroled criminals are *far more* frequent — and *tragic* — than the rare instance of an innocent convict dying. If the risk that an innocent person will die is present with or without the death penalty, why not devise the system in favor of society and not the convict?

Another difficulty with the abolitionist argument of erroneous execution is the degree to which the media inevitably discount or obscure forensic evidence against a convict — evidence of which the general public has little or no knowledge. Consequently, a shift occurs in death penalty cases from adducing and evaluating forensic evidence to the exploiting of public sentimentality.

Compassion, when it is anchored in objective morality, is redemptive and restorative in nature. Historically, this has meant that compassion has been (necessarily) directed toward the *victims* of crime. “Compassion” that is directed toward the violent criminal, at the expense of the truly oppressed victim, is a moral-legal miscarriage (Isa. 10:1-4). For those, both inside and outside of the criminal justice system, whose sense of compassion is not guided by universally normative notions of good and evil, innocence or guilt, it is often the murderer who — fully aside from corroborated evidence — is regarded as the “victim.”

Carried to an extreme in this century, “compassion” for certain “poor” (e.g., Stalin and the Communists), abetted by “compassionate progressives” in the West, resulted in the murder of about 10 million “rich” in the gulags. Ethically speaking, when compassion supplants morality and truth as the highest value, the results are horrific. One political historian estimates that roughly 170 million lives worldwide have been deliberately sacrificed in this century alone because of political-ideological (i.e., nonmilitary) reasons<sup>14</sup> — in the name of compassion, to be sure. As former Attorney General Ramsey Clark once noted, one person’s terrorist is another person’s freedom-fighter. When the notions of objective “good and evil” fall into disuse, moral judgments can be no more than personal opinions.

### A CIVIL SOCIETY

Does the death penalty for premeditated murder constitute an “uncivilized” or “barbaric” response by society to crime, as many abolitionists fervently maintain? The answer depends fundamentally on how a society perceives the moral difference between crime and punishment. Those who contend that capital punishment is barbaric are incapable of morally distinguishing between punishment and criminal acts

themselves. To abandon the criteria of righteous and just punishment, as C. S. Lewis pointed out, is to abandon *all* criteria for punishment.<sup>15</sup> Thus, punishing the *innocent* can be justified, since it has nothing at all to do with desert. Moreover, in a moral vacuum, retribution and restoration are indistinguishable from revenge.

Contrarily, a view of life that acknowledges proportionality for crimes is not predicated on “barbarity” (a description that many abolitionists have curiously chosen not to use regarding abortion), but rather on life’s inherently *sacred* character. To be punished — however severely — because we in fact should have known better is to be treated as human beings, endowed with dignity and moral agency. A society unwilling to impose the penalty of death upon those who murder in cold blood is a society that has deserted its responsibility to uphold the unique value of human life.

In the context of a moral universe, premeditated murder is unique in terms of significance and severity of consequence. By biblical standards, it is *the* one crime for which there exists no possible ransom or restitution (Num. 35). It is precisely the acknowledgment of the reality of “good and evil,” as well as moral accountability in the *present* world,<sup>16</sup> that allows the Judeo-Christian framework of law to infuse the criminal justice system with moral guidelines of an enduring nature. The biblical teaching on punishment derives from a world view in which the absolute moral good of the Creator and the moral depravity of human beings cohere. While just punishment is scandalous to the secular mind, it is central to the biblical mindset. A foreshadow of divine judgment, punishment is the necessary restoration of morality and social justice.

Rendering life for life in the case of premeditated murder is not to be carried out in the context of personal vengeance. Social justice requires — indeed *demand*s — uniform standards of sentencing. Certainly “due process of law,” “equal protection under the law,” and “equal justice for all” are meant to avoid the morally repugnant effects of unequal justice. However, a truly “civilized” society indeed will distinguish between mercy and justice. Civil authorities make a mockery of justice by considering the life of an offender of more value than the life of an innocent victim who did not have the luxury of even choosing life incarceration. A sense of “justice” that expresses undue sentiment toward the murderer, hailing him as a type of champion of “victims’ rights,” is a perversion of true justice and a travesty of monumental proportions.

### SEEKING A STANDARD

Contrary to modern practice in most jurisdictions, punishment for a crime and restitution for the victim are interrelated concepts. In the case of premeditated murder, compensation is not available as an alternative; thus it should carry a mandatory death sentence, in recognition of the sacred character of human life.

Arguments that seek to undermine the authority or binding force of the universal moral imperative found in Genesis 9 — an imperative that is assumed throughout the whole of biblical revelation — have little to commend them. Responsible involvement in this debate by the Christian community must proceed from a sober “consensus” reading of relevant biblical data — a reading that, on the balance, favors retention of the death penalty.

Contrary to modern abolitionist arguments, the inherent morality of the death penalty does not stand or fall on the fallibility of judges, jurors, and lawyers, or the government’s ability to administer justice “fairly.” Neither is it predicated on the use or abuse of Eighth Amendment provisions, the possibility of mistaken executions, or vengeance for the aggrieved. All these factors, powerful and volatile as they are in informing debate over capital punishment, are insufficient in explaining a *moral standard* of justice by which to measure and respond to violent criminal acts. Most notably, all are susceptible to excessive human manipulation. A framework for criminal justice can in fact administer justice only to the extent that a *consistent*, unchanging canon of justice is adhered to and advanced. The failings of the system lie not in the fallibility of the instruments who execute justice, but rather in our failure to acknowledge and implement an abiding moral standard.

Left in the hands of moral philosophers who exalt sentiment over substance, society's framework for criminal justice becomes devoid of moral accountability and inevitably turns on those who are to benefit from its protection. In its place is the triumph of the "Little Man." Well-meaning Christians only add to the ethical confusion surrounding the debate by calling for abolition to the death penalty in the name of some "higher" Christian ethic.<sup>17</sup> To suggest that the ultimate human crime should not be met with the ultimate punishment at the hands of the civil authorities is not "compassion" as some would have it; rather, it is moral prostitution of the highest order. If a person cannot be made to answer for a capital crime, then everything in the world is arbitrary and nothing is certain.

Reducing matters of morality to private elitism, public opinion, or mushy religious sentiment will only obscure the pressing issues of our culture. How contemporary American society in the future will view the moral difference between crime and punishment depends to a great extent on the church's involvement in ongoing cultural debate — and on the influence of CNN. Stay tuned.<sup>18</sup>

## NOTES

1. Michael York, "James Found Guilty of Freeway Murder," *Washington Post*, 4 June 1992, B1.
2. AP News, "Dodd's 'Conversion' Revives Eternal Tiff on Redemption," *The Washington Times*, 9 January 1993, C4.
3. Jerry Seper, "System Fails to Stop Repeat Offenders," *The Washington Times*, 15 December 1993, A7.
4. At his trial, Gacy's lawyer pled insanity; however, Gacy himself later rejected that plea. More recently, he claimed outright innocence.
5. W. F. Buckley, Jr., "The War against Capital Punishment," *National Review*, 25 June 1990, 62.
6. Robert H. Bork, "An Outbreak of Judicial Civil Disobedience," *Wall Street Journal*, 29 April 1992, A22.
7. The Preacher demonstrates basic insight into human nature. The certainty and swiftness with which punishment is meted out — coupled with proportionality — constitute the proper measure of justice. Thus seen, the U.S. system would require a major overhaul in order to meet fundamental criminal justice criteria.
8. E. van den Haag, *Is Capital Punishment Just?* (Washington, D.C.: Ethics and Public Policy Center, 1978), 403.
9. A 1991 Bureau of Prisons report calculated the average annual "operating" cost of housing someone in a federal prison at about \$20,000. This figure excludes the costs of land, buildings, and facilities themselves.
10. The conclusions of Yochelson and Samenow departed radically from conventional behavioral thinking. At the time they were published, they drew responses ranging from high praise from those concerned with the bankruptcy of corrections to knee-jerk criticism from those whose "humanitarian" model was being devastated.
11. P. Duggan, "Witness Imprisoned by Fear; Man Goes to Jail Rather than Risk Testifying at Murder Trial," *The Washington Post*, 18 December 1993, A1.
12. Walter Kaiser, Jr., *Toward Old Testament Ethics* (Grand Rapids: Zondervan, 1983), 167.
13. It should be noted that the cities were intended to serve as an asylum for the involuntary manslayer, not the premeditated murderer. The congregation of Israel would have adjudicated with well defined criteria by which to distinguish between the two. In the case of the former, deliverance out of the hand of the avenger was facilitated, whereas in the latter the accused was to be put to death.
14. Zbigniew Brzezinski, "New World, New Disorder," *Crisis*, May 1993, 40.
15. Lewis's critique of "humanitarian" punishment, published in *God in the Dock* (Eerdmans, 1970, 287-94), originally appeared in the *Australian Quarterly Review* in 1949. The reason for this was simple, as he wrote to T. S. Eliot out of frustration: he could get no hearing for it in England. See also S. B. Babbage, "C. S. Lewis and the Humanitarian Theory of Punishment," *The Christian Lawyer*, 4 (1973): 4-10.
16. In his crucifixion narrative, Luke is careful to note just deserts. The one thief responds in defense of Jesus: "We are receiving the due reward for our deeds, but this man has done nothing wrong" (Luke 23:41). Legal sanctions exist for non-Christians and Christians alike, ranging from speeding to strangulation. Salvific redemption in no way eradicates the consequences of our actions, whether they are pre- or post-conversion.
17. Frequently misunderstood by Christians is the "eye-for-an-eye" (Exod. 21:24) maxim to which Jesus alluded (Matt. 5:38). As understood in Jesus' day, it meant restitution, not retaliation. If one blinds another's eye, one compensates the victim — in money — for the value of the eye. The Talmud says repeatedly, "Eye for eye means pecuniary compensation," and Jewish courts apparently never read physical punishment into the *lex talionis*.
18. A more thorough discussion of the ethics of capital punishment can be found in J. D. Charles, "Outrageous Atrocity or Moral Imperative: The Ethics of Capital Punishment," *Studies in Christian Ethics*, 6,2 (1993): 1-14.