

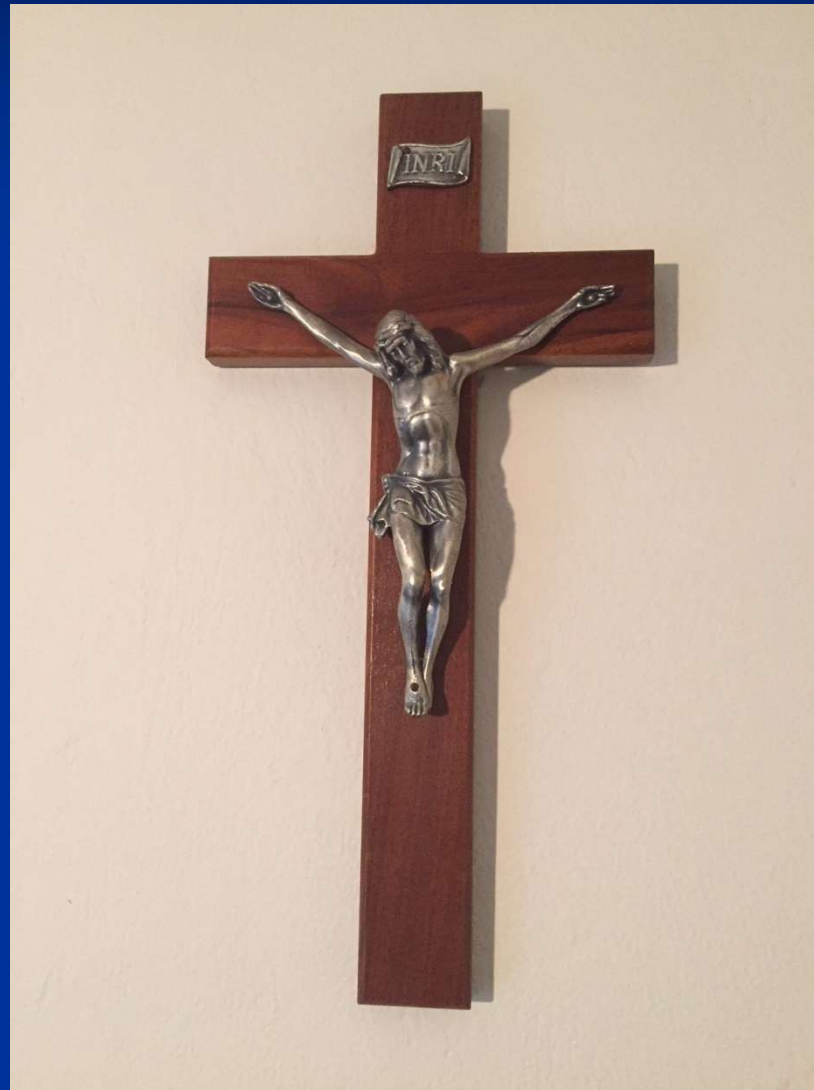
A REFLECTION ON THE DEATH PENALTY

*The Catholic Church's Evolving Teaching on
Capital Punishment*

My Role in Speaking

- I am a retired attorney. Since I am neither ordained nor a theologian, I speak solely as a layperson.
- Disclosure: I am a member of Ohioans to Stop Executions.
- I do not represent my past employer.
- My views are not those of the U.S. Department of Justice; I am fully retired.

Meditation



Prayer Before a Crucifix

- Look down upon me, O good and gentle Jesus, while before Your face I humbly kneel and, with burning soul, pray that You fix deep in my heart lively sentiments of faith, hope and charity; true contrition for my sins, and a firm purpose of amendment. While I contemplate, with great love and tender pity, Your five most precious wounds, pondering over them the words which David, Your prophet said of You my Jesus: “They have pierced My hands and My feet; they have numbered all my bones.”

Camus: Reflection on the Guillotine

- “The unbeliever cannot keep from thinking that men who have set at the center of their faith the staggering victim of a judicial error ought to at least hesitate before committing legal murder.”

The Company We Keep

- Nearly all developed Western nations have abolished the death penalty.
- Our colleagues, a representative list:
- Afghanistan, Bosnia, Bulgaria, Red China, Iran, Iraq, North Korea, Libya, Pakistan, Russia and other former USSR states, Saudi Arabia, Somalia, Syria and Vietnam.

Not an Academic Subject

- 27 States still have the death penalty.
- Catholics as judges, prosecutors, wardens and guards.
- Capital punishment could affect YOU. If you are a registered voter, you could be summonsed for jury duty in a capital trial.
- The ultimate question: is the death penalty congruent with the Gospel of Jesus Christ, crucified?

Current State of Constitutional Law

- Capital punishment is unequivocally constitutional, the Supreme Court has held.
- Due Process Clause: life, liberty, property.
- Death Penalty accepted practice when Founding Fathers wrote the 5th and 8th Amendments.
- We should not rely on judicial activism to reverse present state of constitutional law.
- We must convince the populace: legislation.

Furman v. Georgia (1972)

- Halted executions, by 5-4 vote.
- But only 2 Justices, both deceased, thought capital punishment was per se unconstitutional.
- 3 Justices thought it unconstitutional only as applied: juries acting in arbitrary and discriminatory fashion with no guidance.
- 4 Justices approved capital punishment as then applied.

The Fix: Gregg v. Georgia (1976)

- Two phase capital trial: guilt and punishment
- In penalty phase, jury's discretion guided.
- Jury must unanimously find one or more statutory aggravating factors.
- Jury must consider any mitigating evidence the defendant wishes to present.
- Jury must unanimously agree that aggravating factor(s) outweigh mitigating factor(s).

Related Constitutional Rules

- Woodson v. North Carolina: no mandatory death penalty.
- Coker v. Georgia: must be a murder. No death penalty for rape, even if victim a minor. Kennedy v. Louisiana.
- Graham v. Florida: no death penalty for minors.
- Witherspoon v. Illinois: death qualification of jurors. Extremely unfavorable to defendants.
- McCleskey v. Kemp: social science data showing systemic racial discrimination insufficient; defendant must show discrimination by his own jury.

The Early Church

- Christians as victims of capital punishment: persecutions under Nero, Trajean, Septimus Severus, Decius and Diocletian (as late as 310 A.D.)
- Conversion of Constantine (312 A.D.) and the Edict of Milan (313 A.D.): Christianity is permitted.
- Emperor Theodosius (380 A.D.): Christianity as State religion. Roman legal usages enter Church.

The Medieval Church

- Church tolerates, if not encourages, death penalty to deal with heretics.
- Church did not execute heretics; turned over to the State.
- Consult Megivern's exhaustive [The Death Penalty: An Historical and Theological Survey](#)
- Roman Catechism of 1566: State has right to execute criminals; no meaningful justification or discussion. Historical formulation for the next 400 years.

Historical Formulation: Internal Tension

- Church recognized right of State to execute heinous criminals.
- But Church urged the State to do so rarely, if ever. Some Bishops took this position until the 1990's.
- But when Bishops said State should rarely execute criminals, they were expressing a moral claim, not a mere social policy preference or prudential judgment.
- But if capital punishment is, in principle, permissible, what is the moral basis behind pleas not to use it?

Historical Formulation vs. Necessity Standard

- Other Church exceptions to Fifth Commandment based on strict necessity.
- Self-defense
- Defense of a third party
- Just War Theory: Principle of Last Resort (soldier facing armed combatant).
- Historical Formulation fails strict necessity test.

The 1992 Catechism of the Catholic Church

- Original 1992 Catechism continued to reflect the historical formulation and the internal tension.
- Paragraph 2266: “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 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.”

1992 Catechism (con't)

- Paragraph 2267: “If bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons, public authorities should limit itself to such means because they better correspond to the concrete conditions of the common good and are more in conformity with the dignity of the human person.”

Enter Pope St. John Paul II

- The critical clarification in Evangelium Vitae: the inviolability of human life is re-affirmed.
- “The nature and extent of 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.” (Emphasis supplied)

Evangelium Vitae (con't)

- “Today, however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically non-existent.” (Emphasis supplied)
- But, if the conditions under which capital punishment could be morally licit are “practically non-existent,” should not the death penalty be categorically condemned?
- The 1992 Catechism was amended in light of Pope John Paul’s teaching; the new language is found in revised paragraph 2267.

1997 Revised Paragraph 2267

- “Assuming that the guilty party’s identity and responsibility have been fully determined, the traditional teaching of the Church does not exclude recourse to the death penalty, if this is the only possible way of effectively defending human lives against the unjust aggressor.”
(emphasis supplied)

1997 Revision (con't)

- “If, however, non-lethal means are sufficient to defend and protect people’s safety from the aggressor, authority will limit itself to such means, as these are more in keeping with the concrete conditions of the common good and more in conformity with the dignity of the human person.” (emphasis supplied)

1997 Revision (con't)

- “Today, in fact, as a consequence of the possibilities which the state has for effectively preventing crime, by rendering one who has committed an offense incapable of doing harm...the cases in which the execution of the offender is an absolute necessity are very rare, if not practically non-existent.” (emphasis supplied)

Pope Francis, October 2017

- Pope Francis on 10/11/17 articulated a more absolute moral reason for prohibiting capital punishment based upon the inviolability and sacredness of human life. No apparent “necessity” exception.
- Death penalty is “contrary to the Gospel”
- “No man, not even a murderer, loses his personal dignity.”

Pope Francis 10/17 (con't)

- “It is necessary therefore to restate that, however grave the crime that may be committed, the death penalty is inadmissible because it attacks the inviolability and the dignity of the person.”
- “...the dignity of human life from the first instant of conception to natural death has always found in the church its coherent and authoritative voice.”

2018 Amendment to Catechism

- It is a very small step from “very rare, if not practically non-existent” to “not at all.”
- Pope Francis took that step in August 2018 when paragraph 2267 of the Catechism was again amended.
- Noted that the Church previously approved of capital punishment in extreme circumstances, but today the dignity of human life and incarceration alternatives mandate prohibition.

2018 Amendment (con't)

- Present text: “Consequently, the church teaches, in the light of the Gospel, that the death penalty is inadmissible because it is an attack on the inviolability and dignity of he person and she works with determination for its abolition worldwide....”
- As capital punishment is per se impermissible, the Church will work to abolish it worldwide.

Pope Francis: *Fratelli Tutti*

- “St. John Paul II stated clearly and firmly that the death penalty is inadequate from a moral standpoint and no longer necessary from that of penal justice. There can be no stepping back from this position. Today we state clearly that the death penalty is inadmissible and the Church is firmly committed to calling for its abolition worldwide.” (Emphasis supplied)

Objection: Literal Interpretation of the Old Testament

- Exodus 21:12—“Whoever strikes a man a mortal blow must be put to death.”
- Exodus 21:23—the famous “eye for an eye”
- Sayings in the Old Testament about death penalty were a limitation on prior practice.
- Old Testament, while inspired by God, is pre-Christian and not God’s complete revelation, which occurs only in the person of Christ.

Problem Old Testament Passages for the Literalists

- Exodus 21:29—if an ox with bad history gores someone, the owner shall be executed
- Exodus 21:16—kidnapers shall be executed
- Exodus 21:17 & Leviticus 20:9—one who curses his parents shall be executed
- Exodus 2:17—sorceresses shall be executed
- Exodus 20:10 & Leviticus 20:16—persons committing bestiality shall be executed

The Ultimate Problem Old Testament Passages

- Leviticus 20:10 & Deuteronomy 2:22-24: persons committing adultery shall be put to death.
- What might the New Testament have to suggest about the subject?
- In the New Testament, Jesus never expressly prohibited the death penalty.
- But did Jesus ever prescribe violence as the proper human response to a problem?

Unjust Convictions

- Since 1976 nationwide, 200 men sentenced to death were later exonerated.
- In Ohio since 1981, 11 men sentenced to death were exonerated.
- Since 1981, Ohio has executed 56 inmates. With 11 exonerations, that is 1 in 6 cases where Ohio got it wrong, an error rate of 15%.
- Where sentence is death, that error rate is intolerable.

Deterrence and Plea Bargaining

- Capital punishment does not deter: Gary Mohr
- Death penalty is not needed for plea bargaining in first degree murder cases
- Neighboring State of Michigan has not had the death penalty since 1846, which is 179 years.
- Yet, Michigan's prosecutors have been able to prosecute their first degree murder dockets without death penalty as bargaining leverage.

The Issue of Racial Discrimination

- The Baldus study: replicated many times.
- Controlling for all other factors, in Georgia, one who murders a white person is 4.3 times more likely to receive the death penalty than one who murders a black person.
- In Ohio, ABA found 3.8 ratio (2014 Task Force Report)(last time Ohio studied the issue).
- GAO report: correlation between race of victim and death penalty is “remarkably consistent.”

The Theological Problem with Race of the Victim Data

- As Pope John Paul II re-affirmed in Evangelium Vitae, all persons are of equal, infinite value in God's eyes.
- But our society says white life is more valuable than minority life because, on a systemic basis, we impose greater punishment where white life is taken.
- How can the notion that white life is more valuable than minority life be squared with the fundamental principle that all human beings are of equal, infinite value before God? Or with the secular principle of equality before the law?

Discrimination: Geography

- 10 Ohio counties with 48% of our population file 79.5% of capital prosecutions.
- Cuyahoga, Franklin, Hamilton, Lucas, and Summit Counties: over 60% of all cases
- Since 1981, 6 Ohio counties have never charged a capital case; 34 of 88 counties have charged 5 or less such cases.
- Whether offender receives death sentence depends upon geography?

Cost

- If all one cares about is money, in every state where a study has been conducted, it is cheaper to incarcerate a prisoner for life than to execute him. In Ohio, it is a cost factor of 3.
- 70% the costs are trial costs, not appeals. Also, increased costs of operating death row.
- Additional trial costs are borne whether the offender is sentenced to death or not.

Costs, continued

- In Ohio, it takes 10 times as much money to try a capital murder cases vs. a non-capital murder case.
- Yet, in Ohio, juries return non-death sentences in 9 of 10 cases. Also true of Summit County.
What private business could consistently spend 10 times the money to obtain the desired result 10% of the time?
- Capital punishment makes no economic sense.

Conclusion

- In forming conscience on the death penalty, please return to the Prayer Before a Crucifix.
- FAITH
- HOPE
- CHARITY

- Ohioans to Stop Executions, www.otse.org

Contact Elected Officials

- The Governor's Office, Riffe Center, 30th Floor, 77 South High Street, Columbus, Ohio 43215-6117
- Your State Senator, Senate Building, 1 Capitol Square, ___ Floor, Columbus, Ohio 43215
- Your State Representative, 77 South High St., ___ Floor, Columbus, Ohio 43215
- Or email them at address given on websites