

CAPITAL PUNISHMENT: THE CASE FOR JUSTICE

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Justice is giving to each what is due to him. So fundamental is the duty of public authority to requite good and evil in deeds that natural law philosophers consider it the paramount function of the state, and the New Testament declares that the role is delegated to magistrates by God Himself. “Be subject for the Lord’s sake to every human institution,” says St. Peter, “whether it be to the emperor as supreme, or to governors as sent by him to punish those who do wrong and to praise those who do right.” (1 Peter 2: 13-14) St. Paul agrees:

For rulers are not a terror to good conduct, but to bad. Would you have no fear of him who is in authority? Then do what is good, and you will receive his approval, for he is God’s servant for your good. But if you do wrong, be afraid, for he does not bear the sword in vain; he is the servant of God to execute His wrath on the wrongdoer. Therefore one must be subject, not only to avoid God’s wrath but also for the sake of conscience. (Romans 13:3-5)

So weighty is the duty of justice that it raises the question whether mercy is permissible at all. By definition, mercy is punishing the criminal less than he deserves, and it seems no more clear at first why not going far enough is better than going too far. We say that both cowardice and rashness miss the mark of courage, and that both stinginess and prodigality miss the mark of generosity; why do we not say that both mercy and harshness miss the mark of justice? Making matters yet more difficult, the argument to abolish capital punishment is an argument to *categorically* extend clemency to *all* those whose crimes are of the sort that would be requitable by death.

I ask: Is there warrant for such categorical extension of clemency? Let us focus mainly on the crime of murder, the deliberate taking of innocent human life. The reason for this focus is that the question of mercy arises only on the assumption that some crime does deserve death. It would seem that at least death deserves death, that nothing less is sufficient to answer the gravity of the deed. As scripture says: “Whoever sheds the blood of man, by man shall his blood be shed, for God made man in his own image.” (Genesis 9: 5-6) Someone may object that the murderer, too, is made in God’s image, and so he is. But this does not lighten the horror of his deed. On the contrary, it heightens it, because it makes him a morally accountable being. Moreover, if even simple murder warrants death, how much more does multiple and compounded murder warrant it. Some criminals seem to deserve death many times over. If we are considering not taking their lives at all, the motive cannot be justice. It must be mercy.

The questions we must address are therefore three: Is it ever permissible for public authority to give the wrongdoer less than he deserves? If it is permissible, then when is it permissible? Is it permissible to grant such mercy categorically?

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Society is justly ordered when each person receives what is due to him. Crime disturbs this just order, for the criminal takes from people their lives, peace, liberties, and worldly goods in order to give himself undeserved benefits. Deserved punishment protects society *morally* by restoring this just order, making the wrongdoer pay a price equivalent to the harm he has done. This is retribution, not to be confused with revenge, which is guided by a different motive. In retribution the spur is the virtue of indignation, which answers injury with injury for public good. In revenge the spur is the passion of resentment, which answers malice with malice for private satisfaction. We are not concerned here with revenge.

Retribution is the primary purpose of just punishment *as such*. The reasons for saying so are threefold. First, just punishment is not something which might or might not requite evil; requital is simply what it is. Second, without just punishment evil cannot be requited. Third, just punishment requires no warrant beyond requiting evil, for the restoration of justice is good in itself. True, just punishment may bring about other good effects. In particular, it might rehabilitate the criminal, *physically* protect society, or deter crime in general. Although these might be additional motives for just punishment, they are secondary. In the first place, punishment might not achieve them. In the second place, they can sometimes be partly achieved apart from punishment. Third and most important, they cannot justify punishment by themselves. In other words, we *may not do more* to the criminal than he deserves—not even if more would be needed to rehabilitate him, make him harmless, or discourage others from imitation. For example, if a man punches another man in the nose, we may not keep him in a mental institution forever just because he has not yet become kind in spirit, kill him because we cannot be sure that he will never punch again, or torture him because nothing less would deter other would-be punchers. For these reasons, rehabilitation, protection, and deterrence have a lesser status in punishment than retribution: they are secondary.

The argument against capital punishment runs as follows: True, the purpose of retribution is served by the murderer's death, but under certain circumstances retribution might interfere with other purposes of punishment: it might prematurely put an end to his rehabilitation; it might undermine deterrence (say, by so angering his compatriots that they, too, commit evils); and it might not be necessary for the physical safety of others. Therefore, it would be better not to kill him, but to protect society by other means—perhaps by locking him up forever. The difficulty with this argument is that it seems to regard the secondary purposes of punishment as sufficient to overturn its primary purpose. Rehabilitation, protection, and deterrence cannot justify doing more than what retribution demands; how can they justify doing less?

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Fortunately, this is not the end of the story; mercy and justice can, in fact, be reconciled. Let me first consider a false ending to the story that makes their reconciliation seem simpler than it is. This false ending comes from the utilitarian philosophy that has come to permeate our society and legal culture.

To the question, “Is it ever permissible to show mercy?” the utilitarian answers Yes, but in a misleading way because he does not understand what is being asked. A utilitarian says that the only reason to have laws at all is to stop things that make people feel pain and start things that make them feel pleasure. Requiring wrong just because it is wrong will make no sense to him because he does not believe in intrinsic wrong; if someone chides him, “Never do evil that good may result,” he is confused, because *what results* is the only measure of evil that he has. He cannot distinguish retribution from revenge, viewing all punishment merely as an emotional venting which makes people feel better. Not that he objects to it on that account, for in his view, feeling good is all that matters. Over time, though, rehabilitation, protection, and deterrence can make people feel better, too, so the only question is what combination of punishment and remission of punishment makes people feel the best. Therefore, the utilitarian might very well do less to the criminal than he deserves—but for the same reason the utilitarian might do more to the criminal than he deserves, for the utilitarian does not grasp the concept of desert.

To the question “Is it ever permissible to show mercy?” I also answer Yes, but for a different reason. The faith I hold recognizes the dilemma that utilitarians ignore. Justice is inexorable; evil must be punished. This would seem to make mercy impossible; yet there is mercy. As the Psalmist says, “Great is thy mercy, O Lord; give me life according to thy justice.” (Psalms 119:156) Somehow the irreconcilables meet and kiss.

How can this be? There are two parts to the riddle, one on God’s side, the other on man’s. On the divine side, the reconciliation of justice with mercy lies in the Cross. God does not balance mercy and justice; He accomplishes both to the full. The reason He can remit punishment to human beings who repent and turn to Him is that Christ, the Lamb of God, has taken the punishment in their place. His death and resurrection become their death and resurrection, because He identifies with them through sacrifice and they identify with him through faith; the judge himself steps forward to pay their debt. Divine mercy, then, means two things. One is the divine atonement which makes God’s forgiveness possible. The other is the divine patience with which He waits for us to ask for His forgiveness.

Yet whom God loves, He disciplines. For our good, not even divine forgiveness means that the consequences of sin *in this life* are fully remitted. Among these consequences is punishment by human magistrates, who act as God’s agents whether they know it or not. The sentences of human magistrates cannot be, and are not meant to be, a final requital of unrepented evil; that awaits the great day when Christ returns to judge the quick and the dead. But they foreshadow that final justice, so that something of

the retributive purpose is preserved. In the meantime they promote restraint, repentance, and amendment of life. Human magistrates turn out to be not plenary but partial delegates, and not only of God's wrath but also of His patience.

All this puts the primary and secondary purposes of punishment more nearly on a level than they would be otherwise — not for God, but for man. Although human magistrates are forbidden to let crimes go unrequited, they do not carry the impossible burden of requiting them to the last degree. For temporal purposes, the retributive purpose of punishment can be moderated by its other three purposes after all. The only purpose which cannot be moderated is the purpose of *symbolizing* that perfect retribution which magistrates themselves do not achieve, for human punishment is a sign of wrath to come.

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If criminals in general can sometimes be punished less than they deserve, then perhaps capital criminals can sometimes be punished less than they deserve. The desideratum is when the purposes of punishment can be satisfied better by bloodless means than by bloody ones, so let us consider the four purposes one by one.

Rehabilitation refers to the reconciliation of the criminal with man and God. It may seem at first that capital punishment can never aid in rehabilitation, because when the string of life is cut the process of rehabilitation is cut off, too. But this is overstated. One part of rehabilitation is cut off, for certainly a dead man is not readmitted to society. But what do the opponents of capital punishment propose as an alternative? For serious crimes and dangerous criminals, they propose life imprisonment, but a man in jail for life does not return to society either. The real question is not what the prospect of death does to a man's prospect of readmission to society, but what it does to his prospect of change of heart. Here the picture is quite different. "Depend upon it, Sir," said Samuel Johnson, "when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully." Indeed there may be many criminals for whom nothing else concentrates the mind enough. By contrast, an offender who is confined in jail for life with no society but that of other criminals is probably more likely to be hardened than reformed. We are forced to conclude that in some cases, the death penalty may contribute to rehabilitation rather than hindering it.

Protection refers to the defense of society from the criminal. The restoration of just order is by its very nature a moral protection of society, but there is much to be said even if we consider only physical protection. Some people suggest that although capital punishment might once have been necessary for protection, modern improvements in the penal system make it possible to shield the innocent without killing the guilty. Such indeed is the argument of Pope John Paul II in *Evangelium Vitae*, although he states the conclusion in less categorical terms. It is the more categorical form of the conclusion to which I object. What the Pope suggests is that today we may be able to sentence a criminal to life imprisonment with the reasonable certainty that he will not be able to escape. I agree that this is a deeply significant change which may ultimately reduce the

weight of the safety question in cases where clemency has been proposed. However, I do not agree that it has reduced its weight already. Today the risk is not so much that dangerous and justly judged criminals will escape from prison; the risk is that we will let them out. It has been long since a “life sentence” meant that the prisoner would stay in prison for the rest of his natural life.

There are several reasons for the erosion of life sentencing, and they tend to compound each other. High crime rates have so swelled the number of inmates that officials find it difficult to feed and house all of them; the pressure to set some free is hard to resist. At the same time, American society finds it increasingly difficult to take right and wrong seriously. Not only does our lax moral attitude contribute further to the high rate of crime, but it generates further pressure to let criminals out of prison. When we do let them out, they are usually more dangerous than when they entered, because of the tips they have learned, the contacts they have made, and the attitudes they have developed among other criminals. The argument is sometimes made that abolishing capital punishment would foster the virtue of compassion. Conceivably this is so, but in the present moral climate it is more likely to foster that counterfeit compassion which thinks no wrong is very wrong. Should this happen, then society would be even more at risk than it is now.

Suppose the unlikely; suppose that somehow we did keep all capital criminals in prison for the duration of their natural lives. Even then the protective purpose of punishment would not be fully satisfied. True, a man behind bars no longer endangers society in general. But he endangers other inmates, and he certainly endangers prison staff. Surely they, too, deserve consideration. We are forced to conclude that even today, with our modern penal systems, safety is still an issue. Safety must not trump desert; the risk of future harm to society cannot justify doing *more* to the criminal than he deserves. But in some cases it should keep us from doing less.

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Deterrence refers to the discouragement of crime in general. This is where some opponents of capital punishment claim their strongest ground, for the statistical evidence for the deterrent effect of capital punishment is inconsistent and inconclusive. Avery Cardinal Dulles has suggested a further dilemma. (Catholicism & Capital Punishment,” FT, April 2001). Although grotesque and torturous methods of execution seem most likely to deter, they are incompatible with human dignity. Conversely, those methods of execution which are compatible with human dignity seem unlikely to deter. So for the means of capital punishment which could actually be used, we probably could not count on a deterrent effect.

For those who view deterrence as the primary purpose of punishment, the uncertainty of capital punishment as a deterrent provides the fatal argument against it. For those who view its primary purpose as retribution, however, this uncertainty makes little difference; the mere fact that a deserved punishment does not deter makes it no less richly deserved. But is it possible that high rates of capital punishment would actually

undermine deterrence, inciting wicked and resentful men to greater evils? We know that banning a favorite vice can have this effect; the prohibition of alcohol, for example, can give drunkenness a certain glamour. But the crimes we class as capital must be prohibited in any case. If there were evidence that punishing them *by execution* rather than by bloodless means incited them, that would certainly be an argument for using the bloodless means. To my knowledge, however, no such evidence has turned up. It seems then that the data on deterrence neither strengthen nor weaken the case for capital punishment.

Retribution. We saw earlier that although human punishment does not bear the full burden of requiting good and evil, it must hold up requital as an ideal; it must point beyond itself, to that perfect justice of which it is merely a token. Cardinal Dulles agrees, but sees a problem:

For the symbolism to be authentic, the society must believe in the existence of a transcendent order of justice, which the state has an obligation to protect. This has been true in the past, but in our day the state is generally viewed simply as an instrument of the will of the governed. In this modern perspective, the death penalty expresses not the divine judgment on objective evil but rather the collective anger of the group. The retributive goal of punishment is misconstrued as a self-assertive act of vengeance.

The cynicism which Cardinal Dulles describes is a real and grave difficulty. In general, our ruling class no longer believe in those divine decrees of which human decrees are but a hint or shadow, and neither does a large and growing part of the population. More and more our intellectuals agree with the famous statement of Oliver Wendell Holmes that “truth is the majority vote of that nation that could lick all others.”

But what is the import of these facts? They do not make it *less* important for our courts to appeal to justice; they make it *more* important. There is a difference between saying that the ideology people hold no longer gives adequate expression to the law which St. Paul says is “written on their hearts” (Romans 2:14-15), and saying that it is not in fact written on their hearts. Even now, people retain a dim idea of desert; the idea “A deserves B for doing C” has not simply become meaningless to them. The Roman judges of the first century were no less cynical than the American judges of the twenty-first. Tiberius Caesar would have been quite comfortable with Holmes’ maxim; Pontius Pilate washed his hands of justice, using the question “What is truth?” not to begin the interview with his prisoner, but to end it. The apostles knew all these things, yet St. Paul calls the magistrate the servant of God to execute divine wrath on the wrongdoer.

I do not know whether our society can be brought back to believe in a transcendent order of justice, but of this I am certain: if we who recognize this standard do not act as though we believe in it, then no one will be brought by us to believe in it.

The question to ask about the retributive purpose of capital punishment is this: Is it possible for punishment to signify the gravity of crimes which deserve death if their perpetrators are never visited with execution? This seems unlikely. Consider the deviant

who tortures small children to death for his pleasure, or the ideologue who meditates the demise of innocent thousands for the sake of greater terror. Genesis says murderers deserve death *because* life is precious; man is made in the image of God. How convincing is our reverence for life if its mockers are suffered to live?

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Let us consider what objections might be made against our argument to this point. The judicious Cardinal Dulles, to whom my discussion is already indebted, finds less to commend capital punishment than I do. Yet even he does not think that a review of the purposes of punishment is sufficient *in itself* to justify abolishing the ultimate penalty. The crux of his published argument is found not there, but in four other common objections to the penalty of death. (1) Sometimes innocent people are sentenced to death. (2) Capital punishment whets the lust for revenge rather than satisfying the zeal for true justice. Moreover, (3) it cheapens the value of life, and (4) it contradicts Christ's teaching to forgive. The Cardinal calls the first objection "relatively strong," to the second and third he concedes "some probable force," and the fourth he considers "relatively weak." Yet he concludes that "taken together, the four may suffice to tip the scale against the death penalty." Let us revisit these four objections.

Erroneous convictions. Courts sometimes do mistakenly condemn the innocent. Although erroneous conviction is possible in any case, its gravity increases with the severity and irreversibility of the penalty. It would seem that the proper remedy is to require a higher procedural standard in capital cases than in ordinary cases, and to root out the sources of corruption in the system of justice. Indeed, the Cardinal acknowledges the point, approving the suggestion that capital punishment would be justified if the trial were held in an honest court and the accused were found guilty "beyond all shadow of doubt." His point is that this criterion cannot be satisfied, for despite all precautions, errors do sometimes occur.

The difficulty with the argument lies in the notion of guilt "beyond all shadow of doubt." When we say this, do we mean beyond shadow of any sort of doubt, or do we mean beyond shadow of reasonable doubt? In law, the latter standard rules, and surely this is as it ought to be. Anything *might* be doubted, but it does not follow that doubt is always justified by the facts in evidence. The murderer might have told the grocer, doctor, and cabdriver what he was going to do; he might have been videotaped doing it by a newsman, a passerby, and an automatic security camera; he might have boasted about it afterward to a co-worker, bartender, and next-door neighbor; and he might have confessed, in the presence of his lawyer, to the arresting officer, the investigating officers, and the court. Yet perhaps someone on the jury has been reading the *Meditations* of René Descartes, and is troubled by the possibility that the sensible world is only an illusion caused by an evil demon or by the nature of minds. If it is, the juror reasons, then none of the witnesses can be trusted. For that matter, neither can the accused; he may have only dreamed the whole murder. True, Descartes concludes that the world is not an illusion after all. But the juryman votes for acquittal anyway, reflecting that philosophers sometimes err.

Now the way that the jurymen reason about philosophers is very much like how Cardinal Dulles reasons about juries. The Cardinal holds that because even honest courts can err, we must not trust any verdict, irrespective of the weight of evidence which supports it. But a doubt which cannot be affected by any possible evidence is not a reasonable ground for letting a convict off the hook.

The lust for revenge. Of course it is true that the death penalty might whet the appetite for revenge. It is hard to see, though, why this should be more true of the death penalty than of “locking them up for life.” Indeed it is hard to see why it should be more true of punishment than of the other aspects of criminal justice. Seeing policemen on the streets, hearing the testimony of witnesses in court, hearing the judge’s solemn charge to the jury—all of these things might whet the appetite for revenge, and no doubt they often do. Should we then abolish policemen, testimony, and solemn charges? Moreover, not only can the love of justice be twisted toward the wrong, but every good impulse can be twisted toward the wrong: love of country, love of family, compassion for those who suffer. The first may be distorted into jingoism, the second into nepotism, the third into sentimentality. Even the love of God can be perverted, and when it is, it is a terrible thing indeed. Yet the fact that something right can be perverted does not stop it from being right.

The cheapening of life. Cardinal Dulles paraphrases the standard argument this way: “By giving the impression that human beings sometimes have the right to kill, [capital punishment] fosters a casual attitude toward evils such as abortion, suicide, and euthanasia.” The Cardinal does not consider this argument strong. In particular, he observes that many earnest opponents of these other deeds are earnest supporters of capital punishment, for they realize that the rights of the guilty and innocent are not the same. He is quite right, and we can pair his observation with another. Many fervent *supporters* of these other deeds are also fervent *opponents* of capital punishment. The phenomenon is as common as it is strange. Perhaps it is a form of compensation, as conscience demands its pay: having approved the private execution of the weak and blameless, one now seeks absolution by denouncing the official execution of the strong and ruthless. Whether or not this explains it, two things at least are plain. First, it is *psychologically* possible to hold either of the following combinations of positions: that it is wrong to kill the innocent but may be right to kill the guilty, and that it is wrong to kill the guilty but may be right to kill the innocent. Second, the *normal moral reason* for upholding capital punishment is reverence for life itself. Indeed, this is the reason why Scripture and Christian tradition uphold it, a fact which suggests that if anything, it is the abolition of capital punishment which threatens to cheapen life.

Christ’s teaching on forgiveness. It is true that Jesus taught us to love those who hate us, forgive those who wrong us, and abstain from hypocritical comparisons between ourselves and those who offend us. These things we should do, however difficult they may be. But let us remember that the same Lord and God who commands His people to pardon their debtors also gave them Torah, which commands magistrates to call them to account. Cardinal Dulles speaks rightly when he says that “personal pardon does not

absolve offenders from their obligations in justice.” Indeed, he considers this fourth objection “relatively weak” and “complex at best.” My only objection to these words is that they are too polite, for the supposition that personal forgiveness implies a requirement for universal amnesty is not merely weak, but mistaken. Taken seriously, it would destroy all public authority, for if punishment *as such* is incompatible with forgiveness, then why stop with capital punishment? Must we not abolish prisons, fines, and even reprimands as well?

I have heard it asked by fellow Christians, “How dare we play God? How dare we wrest into our own hands the divine prerogative of life and death?” It is a good question. My answer is that we dare not. We dare not wrest into our own hands *any* of the divine prerogatives of justice, whether the deprivation of life, of liberty, or of property. It is a dreadful matter to kill a man, but it is also dreadful to lock him in a hole, away from wife, children, parents, friends, and all that he held dear in life. It is a fearsome matter to imprison a man, but it is also fearsome to use fines and impoundments to confiscate his worldly goods, which he may have accumulated by honest labor and is counting on for the succor of his family and the support of his declining years. No, we dare not wrest into our hands any powers over our fellow men. But if God *puts* such powers into the hands of those who hold public authority—what then? Does this not alter the picture? How dare we jerk our hands away, hide them behind our backs, refuse the charge? For the teaching of Scripture and Christian tradition are just as clear about public justice as it is about personal forgiveness, and the teaching of Christ is that “Scripture cannot be broken.” (John 10:35) The magistrate is “sent,” whether he knows it or not; he is “the servant of God to execute His wrath on the wrongdoer.” Yes, we have seen that he is a servant of God’s patience, too, but the one charge does not cancel the other. However tempered with mercy, public authority remains an augur or a portent of the wrath which will one day fall upon the unrepentant.

The story has another side as well. To remit deserved punishment too easily is a miscarriage not only of justice but also of mercy. When a heart is very hard, it may sometimes be the case that deserved punishment is the only knock strong enough to break the husk and spill out the seeds of repentance. God Himself is said to use this method: those whom He loves, He chastens, even perhaps with the prospect of death. If we are to imitate His love, then we must sometimes imitate His chastening, too.

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Our brief review of the objections to capital punishment has led us to the following conclusion. First, in considering whether to grant clemency, the proper question is not whether juries ever err, but whether we have reasonable ground to think that *this particular* jury has erred in fact. Second, any deserved punishment, indeed any element of justice, might whet the impulse for revenge. But when a good impulse is perverted, we should fight not the impulse but its perversion; and so with the impulse for justice. Third, Scripture and Christian tradition uphold capital punishment not in contempt for life but in reverence for it. It is *because* man is made in God’s image that Torah decrees that whoever sheds the blood of man, by man shall his blood be shed.

Fourth, Christ did teach personal forgiveness, but he never challenged the need for public justice. Official pardon rightly has conditions which personal forgiveness does not. Not only is punishment compatible with love, it is sometimes demanded by it as the only medicine strong enough to do the offender good.

Classically, Christian teaching has held that the state has the authority to inflict capital punishment. It has also classically held that in certain cases a deserved punishment of death may be remitted, but that the grounds for possible clemency are particular, not universal. Categorical remission of the penalty for all whose crimes deserve death contradicts revealed teaching on the duty of the magistrate and has no warrant in Christian tradition. It would weaken three of the four purposes of punishment, would confuse the good counsels of compassion, and would bring about more harm than good. What then of *Evangelium Vitae*? I accept the conclusion of John Paul II that “today,” cases in which the death penalty is still necessary are “very rare, if not practically nonexistent.” However, we must resist the tendency to exaggerate his conclusion by reading these six words as the single word “nonexistent.”

Some say that because there is a risk of error in both directions, we should prefer to err on the side of mercy. I agree. We should indeed prefer to err on the side of mercy, in individual cases. But to err *categorically* is not simply to make a mistake. It is to abdicate from judgment and forsake our bounden duty.