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A Catholic Lawyer's View of the Death Penalty Symposium: Thoughts on Death Penalty Issues 25 Years after Furman v. Georgia.

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A CATHOLIC LAWYER'S VIEW OF THE DEATH PENALTY

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I. INTRODUCTION

I'm in a bit of a pickle. I am supposed to speak to you as a Catholic about my views of the death penalty. Unfortunately, after listening to Rabbi Levine and hearing about all the great safeguards in Jewish law, I am sort of considering conversion. Still, I will try to stick to the script.

Just two quick caveats: One is that, although I am the Capital Defender of New York State, what follow are my idiosyncratic meanderings and not the views of New York State. Oddly enough, the Empire State has not adopted an official view of Catholic teaching and thus has not pronounced, for instance, on whether Saint Augustine's juridical versus his pastoral views of the death penalty should prevail.

The second caveat is that it is always difficult to talk about religion and the death penalty. This point has been driven home to me very strongly since I have gone back to New York. There we have a prominent district attorney who holds the death penalty morally indefensible but who has nonetheless repeatedly sought death sentences since September 1995 (when the new capital statute took effect). Complicating matters further, this official makes no secret of his Roman Catholicism. Amidst these paradoxes, a local columnist challenged him with the Catechism's demand that, whenever possible, criminals be punished through "bloodless means." The District Attorney's responded by insisting that lethal injection was bloodless. (I felt obliged to underscore that this prosecutor had not been the beneficiary of a Jesuit education).

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As a Roman Catholic, my opposition to the death penalty really boils down to three basic propositions: (1) that human beings are fallible; (2) that racism is mortally sinful; and (3) that human life is sacred. Now, these are not exclusively Catholic understandings or beliefs, but I do think they have a special resonance in the Catholic tradition.

II. HUMAN BEINGS ARE FALLIBLE

In the nineteenth century, when there was less ecumenical etiquette, there was a mainline Protestant church which published a pamphlet contending that Catholicism really was not a Christian religion at all; rather, it was a "religion of human nature, congenial and delightful to fallen man." Frankly, there is some truth in that. There is.

When I was in Alabama, my Baptist friends struck me as having a more black and white view of things. One was saved or was not saved; born again, or not born again. You were either a shoe-in for heaven or bound for hell.

Catholics see a lot more gray. We believe that the line between good and evil does not run between individuals but, rather, through the human heart. Error, misunderstanding, and sinfulness are never surprises for us. I think that is one of the reasons why we have great spiritual writers like Ignatius and Thomas Merton and why we have great fiction writers like Flannery O'Connor, Graham Green and Mary Gordon. In any event, we understand the fallibility and frailty of the individual.

We also have, or darn well should have, a very strong understanding about institutional fallibility. Because, after all, as Roman Catholics, we believe that Christ entrusted His Word to us in a special way; we believe the institutional church has endured and evolved through history as a special repository of faith. Right? We believe ours is the truest expression of Christ's message; not the perfect expression; not that we do not have a lot to learn from other faiths; but the truest expression. Yet look at our Church's history. We have had geopolitical misadventures in the form of the Crusades, reigns of terror in the form of inquisitions, and blasphemous commercialization of our doctrines in the form of indulgence sales. There is not a lot of room for a Catholic to kid him- or herself about the fallibility of institutions. Therefore, if you bring Catholic understanding—if you bring Catholic sensibility—to the death penalty, it sort of hits you in the face just how faulty things are on a systemic level.

I will tell you I was pleasantly surprised at hearing some of the dialogue in here today about the state of the right to counsel in Texas because I had a very different impression. I thought this was a state where a judge said, "You have a right to counsel, you don't have a right to a counsel who is awake." I thought that was this state. Am I mistaken?

But let me not pick just on Texas. I mean, I will tell you that in my five and a half years in the Deep South, the quality of representation was such that, well who here has a dog? Anybody?

Let me tell you something, if your dog took a bite out of the kid next door and they wanted to put your dog to sleep, you would not settle for the quality of representation that typifies capital trials in the Death Belt. Trial lawyers with whom I worked in Alabama were fine talented men and women; good people. But, they were consistently undertrained, under-equipped and, most crucially, underpaid. They were effectively prevented from doing the kind of job they wanted to on their capital cases.

The kicker—what really kills me—is the hypocrisy on this point. We are at a time in our history when Conservatives have prevailed with their economic common sense. They have helped us all see that, in many respects, capitalism works, and it works because it recognizes the need for incentive, for profit. The Conservatives have helped us see that, indeed, you get what you pay for. Yet somehow, for some Right-Wingers there is a magical leap of faith when it comes to capital defense. Suddenly, the laws of the market are suspended when the defense of poor people lives at stake. Legislators and judges pretend that under-compensated counsel will routinely let their practices wither and see their mortgages foreclosed so that sufficient time and resources can be brought to bear on behalf of an accused murder. That is a lot of nonsense, unmistakable evidence of human fallibility. We see the fallibility on a systemic level, but much more tragically, we see it on a case-by-case basis.

This is the tip of the iceberg: Between 1863 and 1962 there have been over seventy soundly documented cases of wrongful capital and potentially capital convictions. Over twenty wrongful executions between 1905 and 1974 have been similarly documented, and this is a conservative estimate.

Of course, it is very important to emphasize that it is not just a problem of a terrible, backwards frontier Texas or of a reckless, racist South. It is an American problem with capital justice. In Illinois, for every person who has been executed they have had to let someone else off the row because of compelling evidence of innocence. In New York, we hold the record for the greatest instances of wrongful executions. The record is eight. We hold that record.

Nationally, since 1973, 6,000 people have been put on death row. According to the Death Penalty Information Center, sixty-nine have had to be released in the wake of evidence pointing to innocence. That is a one percent error rate. It is very useful to take this out of the paradigm where the lives in jeopardy are predominantly poor people and minorities, and to put it in a different paradigm.

So let me ask you something. If you designed an airplane and you went to the FAA and you said to the FAA, "I want you to license this. Oh, but by the way on every hundredth landing somebody almost gets killed," what would happen? If you went to the FDA and said, "I have a drug, it has no demonstrable benefits, it has a completely unpredictable reaction on at least twelve percent of the population, and one percent of the time it causes near lethal side effects," what would happen? If you went to the Federal Election Commission — O.K. — Forget that one.

Come on, this is outrageous. Let me tell you, when I was young, I thought that Christ's injunction, you know, "judge not lest ye be judged," was really saying: "Be nice." Now, the older I get the more I realize he was saying, "Hey, you're not very good at judging. If you don't have to do it, don't do it." Our Lord was being prudent, not just charitable.

III. THE MORTAL SINFULNESS OF RACISM

The Catholic record on race is a mixed one. Not only is it mixed, it is often misunderstood and misrepresented. Sometimes we give the Church too much credit, sometimes too little.

Let me give you an example, briefly, of too little credit. For many years as a good liberal Catholic I accepted the conventional wisdom that the Vatican, during the second world war, callously turned its back on the European Jewish communities targeted by Hitler for slaughter. After over ten years of research and writing on this, I think that is nonsense. Nonsense.

On the other hand, there comes to mind an instance when the Church has been given too much credit. The American Catholic Bishops were out ahead of the United States Supreme Court in denouncing desegregated education; they were out ahead of *Brown*.¹ Once desegregation got under way, furthermore, some Bishops, like the one in New Orleans, used excommunication against recalcitrant desegregationists. As a result of these actions by the institutional Church, the non-Catholic American public assumed that the Catholic laity in America were great prophets for racial justice. But it was not true; it was nonsense. Polling showed otherwise. And the reception of desegregation by busing in Boston finished off any remaining doubt. No offense Father Drinan.

So the Catholic record on race is mixed, but the teaching is certainly not. I mean there is no Church that has a theological aspiration as broad as that of the Roman Catholic Church. The word "catholic" means universal, and the Catholic Church is the most racially and ethnically diverse institution in the history of the world. If you bring those sensibilities and

1. *Brown v. Board of Education*, 347 U.S. 483 (1954).

bring those lights to the death penalty, there is no missing that on every death row, *every death row* in this country, the statistics are out-of-whack. On every death row, minorities are grossly over-represented, given general population patterns.

Of course, it is not just the defendant's race that counts; it is also the race of the victim that heavily determines who ends up on the row. When I was in Alabama, over eighty-four percent of the folks on the row—and I suspect this is still true—were there for killing white people. Yet in the overwhelming majority of cases, homicide victims in Alabama are black people. This indicates which lives we value, and which lives we do not value.

Furthermore, even though it is absolutely important to understand that it is African-Americans who still bear the brunt of capital injustice in this country, it is also important to realize that it has not just been African-Americans. And it is much, much, more important to realize that it has not just been in the South where this injustice has occurred. If you go through a list of the folks who were executed in New York over the years, it is amazing, because you can sort of see phases. During one period in this century, for instance, there was a run on executing Italians and then other immigrants. In Nineteenth Century New York City, of course, it was folks with names like mine who were going to the gallows. Today we have the bell curve and other lame camouflage for racism. Back then, too, they made excuses for racial disparities.

There was a newspaper editor. I am sure many of you have heard of him, Horace Greeley. He openly opposed the death penalty. Nonetheless, he felt the need to make excuses for why the Irish were going to the hangman in disproportionate numbers. He claimed that, the Irish simply drank themselves into homicidal rages and numerous hangings was the natural consequence. If we refuse to see the forest for the trees in today's death rows, we are doomed to attempt the same kind of excuse making in 1998.

Now, just as racism is embedded in the history of the death penalty in this country, I think everybody who has practiced in the capital area knows that it is inherent in the dynamics of the individual capital case. It is inherent in the process after a person is convicted of capital murder, there is a penalty phase in which the jury decides whether the defendant will be imprisoned forever or executed. And, as often as not, winning a life verdict in the penalty phase means getting the jury to say: "There but for the grace of God go I." The Defense's aim is not to have the sentencing jury excuse the crime or deem what the defendant has done to be explained away. The aim is, though, to forge some empathic link which can be a conduit for mercy. And whether it is the human condition or the American condition, it is nonetheless a fact that barriers of race and bar-

riers of class prevent empathetic connections. Even Justice Scalia acknowledged that racism, racial prejudice—even in Texas—is simply inherent in the capital justice system in this country: “[T]he unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions, and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable.”²

IV. HUMAN LIFE IS SACRED

Lastly, human life is sacred. I think for a Catholic this means two things. The first thing it means is that you may not rope off some parts of humanity and selectivity deny them human rights. That is the first thing. Of course, the Church itself has committed this sin at times. At its best, though, the Church has given witness to the universality of human rights and sacredness of all human life: the Eighth Century with the establishment of foundling hospitals as alternatives to infanticide, in the Fifteenth Century when Pias II condemned the particularly brutal Portuguese slave trade, and in this country, today, here in America, both with respect to the death penalty and also with respect to the issue of abortion.

It would be difficult to ignore the degree to which the Church has compromised its own credibility on abortion due to sexism in the Church and its refusal to confront it. And reasonable minds can differ about how exactly pro-life ethics should translate into the law. Nonetheless, you have to give credit to the Church for keeping alive an ethical dimension on the abortion issue, for making people realize that it cannot simply be written off as a matter of turning the clock back on an unwanted pregnancy.

I suggest that this witness is all the more important in our culture and in our market-driven world where there is such pressure to measure human beings by only their utility. It is so important for the Church to take the view, with respect to the death penalty and with respect to the medical ethics, which says there is something beyond usefulness to be considered when we look at human beings. It is so important in a day when workers are only secure so long as they are optimally profitable.

It is so important in a day when there is so much talk of the right to assisted suicide. I agree with the fellow who said that assisted suicide is like assisted masturbation; once its assisted, you are talking about something else. There is so much talk about the right to assisted suicide, and so little talk about the right to medical care.

2. Memorandum to the Conference from Justice Antonin Scalia in No. 84-6811—McClesky v. Kemp, of Jan. 6, 1987. McClesky v. Kemp File, THURGOOD MARSHALL PAPERS, The Library of Congress, Washington, D.C.

It is so important in this society for the Church to be giving witness. Who here is blessed with a daughter? It is so important for the Church to be giving witness to innate human dignity, at a time when our culture, for all its feminist pretensions, constantly bombards young women with the message that, "You're only as good as you are attractive. You are only as good as you are a source of pleasure. You are only as good as you are pretty."

The idea that the value of human beings derives simply from their usefulness, their economic value or their pleasure-giving promise is horrific, and the Church absolutely deserves credit for giving witness to a different view, one that emphasizes the inherent nonutilitarian dignity of the human person.

The sacredness of human life secondly means that it is not only the life of the executed that is sacred but also the life of the executioners. Catholicism is the Twentieth Century caretaker of the Natural Law tradition, and that tradition emphasizes that the greatest impact of immoral acts is not on the actee but on the actor. So what we do as moral actors shapes us, humanizes or dehumanizes us. And you cannot miss the degree to which the exercise of the death penalty on a human being warps and numbs people—just looking at it on a human scale.

I see time is running out, but just a quick story: A little while back, I had to go up to Rochester, New York, in order to defend a very fine lawyer in our office, Tom Dunn, who had received a written reprimand for being unprofessional. His sin? His sin was that in arguing for additional time to make motions, he said, "Your Honor, respectfully we deserve the extra two weeks. After all, the prosecutor is trying to kill my client."

Well, he said the "K" word. Apparently in Rochester they are going to execute without killing. That's great. But you can see it there, you can see the numbing and the warping because we do not want to face what we are really up to.

On a societal level, you see the numbing and warping in the refusal of some states to bar the execution of retarded inmates. You see it in the fact that we have an attorney general in Washington who morally opposes the death penalty, yet has done a pretty good job of overcoming those reservations with the prosecution of over 80 federal death cases.

You see it in the fact that the man presently in the White House is there in large part, because during the primaries he went back and presided over the execution of a brain damaged capital inmate in Arkansas. You see it in the fact that we still, in many jurisdictions, use an electric chair despite the fact in recent history there have been eight instances of malfunction. You see it in the fact that in Florida some son of a gun doctor was paid to get on the witness stand and testify that when the

mask of a man being electrocuted caught on fire and set his face aflame, it was painless!

So you see again and again how the death penalty in society numbs us and warps us. The death penalty is, in my view, a moral toxin in our ethical and spiritual ecology. That is what it is.

V. CONCLUSION

I will close by saying that as we think about the death penalty, we should realize that we are thinking about much larger issues. We are really talking about whether we are going to potentially be the first successful multiracial democracy in the history of the world. That is one of the things at stake. We are also talking about whether our courts are going to be viewed as theaters of spectacle or temples of justice and healing.

Finally, we are talking about whether human beings are going to be commodities or creatures of God with inherent dignity and importance. Those are the things we must think about.

To those of you here who are Catholic, I urge you to think about this issue with a Catholic mind, pray about it with a Catholic heart, and speak about it with a Catholic voice.