



## The Death Penalty Dilemma

On February 24 of this year, two masked men walked into the *bodega* which Andre Gonzalez operated in a poor section of Manhattan. They demanded money, and when Gonzalez resisted one of the robbers killed him with a shotgun blast to the chest. The robber in turn was killed by Gonzalez's son with a licensed .38-caliber pistol kept in the store for protection. The other robber fled.

Gonzalez' fate is not unusual in New York City. What is unusual is the true justice achieved by the son's justified killing of his father's murderer. If the murderer's confederate is caught and convicted, however, he will not pay with his life, thanks to Governor Mario Cuomo's repeated rejection of efforts to restore capital punishment in that state.

### Pace of Executions

The pace of executions in this country has fluctuated in recent decades, mostly in response to shifting rulings by the Supreme Court. During the 1950s, executions averaged about 50 a year, but they slowed in the late 1950s and came to a stop so that no executions occurred between 1967 and 1977. Executions resumed sporadically and since 1984 have averaged roughly 20 a year.

Thirty-six states now authorize the death penalty, typically for murder. Federal law provides for the death penalty in various cases within federal jurisdiction, including: first-degree murder; murder while a member of the armed forces; retaliatory murder of a member of the immediate family of law enforcement officials; murder of a member of Congress, an important executive official, or a Supreme Court justice; destruction of aircraft, motor vehicles, or related facilities resulting in death; destruction of government property resulting in death; mailing of injurious articles with the intent to kill or resulting in death; assassination or kidnapping resulting in the death of the president or vice president; willful wrecking of a train resulting in death; bank robbery-related murder or kidnapping; treason; murder of federal judges and officers; espionage; death resulting from aircraft hijacking; and witness tampering where death results. In 1988, Congress also authorized the death penalty for certain drug offenses, but no one has yet been executed under those provisions. Various proposals introduced in Congress in 1993 would extend the death penalty to almost 50 additional crimes where death results, including murders committed by prisoners in federal correctional institutions, drive-by shootings, and kidnappings which result in the death of any person.

The framers of the Constitution clearly did not intend to outlaw the death penalty on either the state or federal level. The Bill of Rights, which originally applied only to the federal government until its provisions were erroneously applied to the states in this century, explicitly validated that penalty in its Fifth Amendment provisions that "no person shall be held to answer for a capital or other infamous crime" except by action of a grand jury, and that "no person shall be deprived of life, liberty, or property, without due process of law." (Emphasis added.)

However, the prospect of expanded federal capital crimes ought to give pause to those who generally favor the death penalty. The Constitution gives the federal government no general criminal jurisdiction. In recent decades, unfortunately, federal law has intruded into large areas of state responsibility through expansive interpretations of congressional power to regulate interstate commerce and to oversee the activities of recipients of federal subsidies. Expansion of federal capital crimes would compound this abuse.

### Saving Innocent Life



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In light of the increased public support for the death penalty, at state and federal levels, it is useful to consider some basic justifications for that penalty. "It is incontrovertible," as Bernard Lande Cohen put it more than two decades ago, "that a killer who has been executed is forever inhibited from doing it again." But does the death penalty deter other would-be murderers? Significant statistical evidence would appear to support the firm conclusion of common sense and experience that the death penalty probably deters at least some premeditated homicides. Since it probably does deter, the death penalty probably saves the innocent lives of potential future victims who would be killed but for the deterrent effect of that penalty.

Nor is it unjust to execute a murderer. When the would-be murderer comes at his victim, the victim can rightfully kill him if necessary to save his own life since the murderer by his aggression has forfeited his right to life. Having forfeited his right to live for purposes of immediate self-defense, it is not unreasonable for the murderer to be held to forfeit his life to save the lives of future victims of other would-be murderers.

St. Thomas Aquinas argued that the common good requires that some men be removed from the community by execution:

The life of certain pestiferous men is an impediment to the common good which is the concord of human society.... Therefore, certain men must be removed by death from the society of men....

Therefore, the ruler of a state executes pestiferous men justly and sinlessly in order that the peace of the state may not be disrupted.

### **God's Authority**

Another justification for capital punishment is retribution, which some opponents of capital punishment confuse with vengeance. As a sound principle of natural law and common sense, the punishment should fit the crime. If someone had been convicted of the assassination of President Kennedy and the judge had sentenced him only to five years in prison, the nation would have been properly outraged. For such a crime, as for the murder of Andre Gonzalez, only the death penalty would serve to correct the balance of justice. Retribution involves the rightful use of that penalty to restore that balance and thereby to promote the common good. Murder should be stigmatized as the crime of crimes. To punish it by imprisonment — a penalty qualitatively no different from that inflicted for embezzlement — is to devalue innocent life. Seen in this light, the death penalty promotes respect for innocent life.

The state's moral authority to impose the death penalty, as with the moral authority to kill in a just war, ultimately rests on the fact that the state derives its authority from God who is the Lord of life.

However, one can legitimately argue on prudential grounds that the death penalty ought not to be imposed in a particular society at a particular time. Perhaps the most telling prudential argument is that delays and excessive technicalities introduced into the criminal justice system by Supreme Court rulings have caused the death penalty to be a poor man's punishment inflicted on those, often members of racial minorities, who lack the means to engage highly competent attorneys at the trial state of the proceedings. Ultimately, the solution to this problem is to restore a greater measure of realism to the criminal process so that the issue of guilt or innocence will not be obscured. Too often, criminal trials bear out the truth of Justice Benjamin Cardozo's observation that "the criminal is to go free because the constable has blundered."

Opponents also argue that the death penalty involves the risk of the mistaken execution of an innocent person. A 1985 study claimed that 343 people had been wrongly convicted of capital offenses in the



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United States during the 20th century. Twenty-five of these were actually executed, including cases in which innocence is debatable, such as Nicola Sacco and Bartolomeo Vanzetti, Bruno R. Hauptwarus (the convicted kidnapper of the Lindbergh baby), and Soviet spies Ethel and Julius Rosenberg.

The risk of erroneous conviction is inherent in any criminal case. The irrevocability of the death penalty casts a heavier burden of justification on its supporters. And it argues for enhanced procedural safeguards in capital cases.

However, it is unsound to argue categorically that the risk of convicting the innocent should automatically rule out the death penalty. The abolition of that penalty puts at risk the lives of other prison inmates who might be murdered by prisoners who otherwise would have been executed. Abolition of the death penalty would also put at risk innocent members of the general populace who might be murdered by persons who should have been executed or by murderers who would have been deterred by the prospect of the death penalty.

### **A Right to Life Issue**

Capital punishment is obviously a “right to life” issue. But it is often oversimplified. One could legitimately argue against both abortion and, on prudential grounds, capital punishment. But the two cases are not the same since the unborn child is innocent and the convicted murderer is not. One could therefore also legitimately argue against abortion and in favor of capital punishment. The liberal position today, however, is to oppose the killing of convicted criminals but to approve the killing of innocent children in the womb. It is a symptom of debased humanism to protest a murderer’s deserved punishment while acquiescing in the killing of innocent children through abortion.

All human life is precious because we are all created in the image and likeness of God. But God also gave us free wills and made us by nature social beings with the inclination to live in community and with the moral duty to act in accord with the common good of that community. It is fair to say that one pressing need of the human community, in the United States as elsewhere, is to restore respect for innocent life and to protect innocent members of the community against aggressors, whether abortionists or more conventional killers.

In this context, the imposition of capital punishment can be seen as a means to restore respect for innocent life. The prudent use of the death penalty can emphasize, as no other penalty can, that malefactors are responsible for their own actions and that the deliberate, willful taking of innocent life is the most abhorrent of all crimes precisely because the right to life is the most precious of all rights.

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