THE DEATH PENALTY--SHOULD IT BE ABOLISHED?

An Examination of the Issue by the National Conference of Catholic Bishops

(First Draft; 7 July, 1974; by Germain Grisez, Ph. D.)

State of the Question

1. When the United States gained its independence, the death penalty was called for by the criminal codes of all European nations and of their colonies. English law under King Goerge III made more than one hundred crimes punishable by death. These were not only major crimes such as treason and murder, but also minor offenses such as picking pockets.[1]

2. In 1776, a movement to limit or abolish the death penalty already was under ~~weigh~~ way. This movement had been initiated both by Christians and by humanists. Goerge Fox, founder of the Society of Friends (Quakers), already preached against the death penalty in the mid-seventeenth century. Cesare Beccaria published his philosophical work on crime and punishment, Dei delitti e delle pene, in 1764. In this work, Beccaria rejected the death penalty as inhumane. In 1786 Tuscany and in 1787 Austria abolished the death penalty.[2]

3. The law of the American colonies never used the death penalty as extensively as did the law of England. William Penn's "Great Act" of 1682 restricted the penalty of death in his colony to murder and treason. In the eighteenth century, however, partly because of pressure from the English Crown, Pennsylvania, and the American colonies generally, punished with death such crimes as treason, murder, piracy, arson, rape, robbery, burglary, and sodomy.

4. After Independence, Pennsylvania was one of the first States in which a significant movement against the death penalty developed. In 1794 Pennsylvania ended the death penalty except for "first degree" murder; in this law, the familiar American distinction between "degrees" of murder was made for the first time.[3]

5. The movement for abolition or restriction of the death penalty has continued throughout the world and in the United States to the present day. Many times in various jurisdictions the death penalty has been reinstated after having been abolished or extended after having been restricted. Such reversals of policy have resulted from various factors--for example, changes in regime, the existence of a state of war or its aftermath,

and reactions of public opinion to particularly horrible crimes. Still, the long-term trend has been toward abolition or restriction. Often the death penalty has been abolished a second time after having been first abolished and then reinstated.

6. By 1962, about twenty nations, mostly in Europe and Latin America, had abolished the death penalty, while other nations never used it or narrowly restricted its use.[4] For all practical purposes, the United Kingdom eliminated the death penalty in 1965, and Canada has suspended use of the death penalty by statute since 1968.[5]

7. By 1968, nine of the United States had completely abolished the death penalty: West Virginia (1965), Iowa (1965, previously 1872-1878), Oregon (1964, previously 1914-1920), Michigan (1963, since 1847 except for treason), Alaska (1957), Hawaii (1957), Minnesota (1911), Maine (1887, previously 1876-1883), and Wisconsin (1853).[6] In 1972 the California State Supreme Court declared the death penalty incompatible with the cruel-or-unusual-punishment clause of that State's Constitution,[7] thus making California the tenth State not using the death penalty. Five States had severely limited use of the death penalty by 1971: Rhode Island (1852), North Dakota (1915), New York (1965), Vermont (1965), and New Mexico (1969); these States allowed the death penalty in unusual cases such as those in which a prisoner or one already convicted of murder committed murder. However, in practice these five States seem to have abolished the death penalty; Rhode Island and North Dakota had not executed anyone at least since 1930, and as of January 1, 1971, none of these five States had anyone under sentence of death.[8]

8. The Federal Government and the other States retained the death penalty as a possible punishment for a variety of crimes; the last death sentences were executed in 1967. Most often, murder, kidnapping, treason, and rape were crimes punishable by death. However, almost all capital cases involved either murder or rape, and in these cases the laws in all jurisdictions allowed discretion in imposing the death sentence to the judge or--more often--to the jury.[9]

9. Since 1930, 3,859 persons have been executed in the United States--that is, in the States using the death penalty, in the District of Columbia, and in the Federal Civilian Jurisdiction. Of those executed,

1,751 were white, 2,066 were black. Executions for murder numbered 3,334; of these, 1,664 were of whites and 1,630 were of blacks. Executions for rape, mostly in southern States, numbered 455; of these, 48 were of whites and 405 were of blacks. There were only 70 executions for other crimes. Only 32 persons executed were female.[10]

10. The executions were not spread evenly over the period under consideration. In the 1930s, executions averaged 167 per year; in the 1940s, 128; in the 1950s, 72. In the 1960s, executions tapered off annually as follows: 56, 42, 47, 21, 15, 7, 1, and 2.[11] The tapering off of executions during the 1960s can be accounted for in part by the fact that the U. S. Supreme Court was then expanding procedural protections in criminal process under the Bill of Rights; thus some executions were postponed during extended litigation. Since 1967 there have been no executions due to a de facto moratorium while lower courts and officials waited for the outcome of challenges to the constitutionality of the death penalty in the U. S. Supreme Court and in the high courts of various States.[12]

11. However, the drop in executions during the 1960s cannot be attributed solely to delays in executions. On January 1, 1961, 219 persons awaited execution; by December 31, 1970, the number had increased by only 389 to 608. During this period, 135 persons were executed; 1,177 persons were condemned to death. If the population of death row had been kept from increasing during the decade by a steady rate of executions, only 52 executions per year would have been carried out--a significant drop from the 72 per year of the 1950s and a continuation of the declining trend since 1930. One might wonder what happened to the 653 persons who were under condemnation during this decade but who were neither executed nor still awaiting execution at the end of the decade. The answer is that their sentences were commuted by executive action; or they were transferred to mental institutions; or they died naturally or by suicide; or they were removed from death row by court actions commuting their sentences, granting them new trials, dismissing the indictments under which they had been tried, or reversing their convictions.[13]

12. Thus, during the 1961-1970 decade, 653 persons who had been sentenced to death were removed from death row otherwise than by execution, while only 524 persons were either executed or added to the group awaiting

execution. This fact points to an interesting conclusion: Even if a person were sentenced to death, the odds were better than even that he would not be executed. Moreover, only a fraction of those convicted of crimes for which the death penalty could be imposed were sentenced to death. Most, probably 75-85 percent or more, were given a lesser penalty by the exercise of the discretion which laws allowed to the jury or to the judge.[14] This situation existed at a time when juries in cases in which the death penalty could be imposed generally were selected in such a way that persons who were opposed in principle to the death penalty were excused from serving.[15]

13. Furthermore, many persons who violated laws carrying the death penalty were dealt with by prosecutors in such a way that these criminals never ran the risk of being sentenced to death. Often prosecutors accept a plea of guilty to a lesser charge rather than seek conviction for the more serious crime of which someone is actually guilty. Some statutes had built-in provisions which allowed a criminal to avoid risking the death penalty if he waived trial by jury or agreed not to plead not-guilty. The U. S. Supreme Court struck down a provision of the Federal Kidnapping Act along these lines in 1968; under orders from the U. S. Supreme Court, the New Jersey Supreme Court nullified a similar provision of the New Jersey homicide statute in 1972.[16]

14. Thus, even if a person were caught by the police in a situation in which there was evidence sufficient to convict him of committing a crime for which the death penalty could be imposed, there was only a marginal possibility that he would ever be executed. Of course, many crimes are never reported to police and many crimes which are reported to police are never resolved by conviction. For example, from 1919 to 1963, there were 982 gangland-style murders in Chicago; for these crimes, only 19 persons were convicted and none was executed.[17]

15. By the beginning of 1972, about 700 persons were awaiting execution in the United States. Twenty-one men were removed from death row in Trenton when the New Jersey Supreme Court, as noted above, nullified the death-penalty provision of the State homicide statute; this decision was announced January 17, 1972. On the 18th of February, 105 men and women at San Quentin were removed from death row when the California State

Supreme Court declared the death penalty incompatible with the State Constitution.

16. On June 29, 1972, the U. S. Supreme Court implicitly reversed sentences to death which had been imposed on the remaining 631 persons who were awaiting execution on that date in 31 States and the District of Columbia. Of these, 547 had been convicted of murder, 80 of rape, 4 of armed robbery; 351 were black, 267 white, 13 of other races.[18] In its decision--Furman v. Georgia[19]--the U. S. Supreme Court reviewed the decisions of the high courts of Georgia and Texas in three of these cases. The question at issue was whether the imposition and execution of the death penalty in these cases constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution. The decision, by a 5-4 majority, was that in these cases the imposition and execution of the death penalty do constitute cruel and unusual punishment. The Court immediately applied this precedent to other death-penalty cases on its docket, reversing the decisions of lower courts to the extent that they had allowed death sentences to stand.[20]

17. This decision of the U. S. Supreme Court, although clear as to its immediate effect, was not clear as to its long-range implications. The five justices forming the majority wrote independent opinions. Three--Mr. Justice Douglas, Mr. Justice Brennan, and Mr. Justice Marshall--were or seemed ready to abolish the death penalty altogether. But two others--Mr. Justice White and Mr. Justice Stewart--took a more nuanced position. They noted that the convictions had occurred under statutes which permitted the judge and/or jury discretion in imposing the death penalty, and that very few persons convicted under these statutes were being condemned to death. Under these conditions. they held, the imposition and execution of the death penalty on a few persons do constitute cruel and unusual punishment.

18. Mr. Justice White explained his position by arguing that "the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." Mr. Justice Stewart argued that existing statutes "permit this unique penalty to be so wantonly and freakishly imposed" that they are incompatible

in this respect with the provisions of the Constitution forbidding cruel and unusual punishment. "These death sentences," he observed, "are cruel and unusual in the same way that being struck by lightning is cruel and unusual."[21]

19. In short, the decision in Furman v. Georgia left the door ajar to new statutes which might attempt to impose the death penalty in a more rational--or, at least, more regular--manner than hitherto. By June, 1974, twenty-eight States had reinstated the death penalty for at least some crimes.[22] Some of these States enacted new statutes which would make the death penalty mandatory for all persons convicted of the crimes for which it would be imposed; others provided for a two-stage trial, a first stage in which a person might be found guilty and a second stage in which the death penalty could be imposed only after a decision to do so was made in accord with specified criteria.[23] On March 12, 1974, the Senate of the United States passed by a vote of 54-33 a bill which would reinstate the death penalty for murder and serious crimes resulting in someone's death, and for such national-security offenses as treason and espionage. The Senate bill, which was officially supported by Attorney General Elliot Richardson, provides for a two-stage trial, with definite guidelines to be followed by the judge and jury at the sentencing stage. This procedure is intended by the bill's sponsors to make the application of the death penalty fair in individual cases, uniform across the nation in all federal cases, and as rational as any legal process can and should be.[24]

20. North Carolina is one of the States which has reinstated the death penalty. The sentences of four men convicted under the North Carolina statute are being appealed to the U. S. Supreme Court by lawyers acting for the Legal Defense and Education Fund of the National Association for the Advancement of Colored People. Their petition seeks review of the cases in question as a further test of the compatibility of the death penalty with the United States Constitution.[25] Obviously the U. S. Supreme Court must sooner or later decide to extend its decision in Furman to abolish the death penalty in America or to refine the Furman decision to define the conditions under which the death penalty will be imposed and executed.

21. The actions of the U. S. Senate and of the State legislatures in reinstating--or attempting to reinstate--the death penalty indicate that there is widespread public support for this course. Public opinion polls of Americans over the age of eighteen both before and after the U. S. Supreme Court decision showed a substantial majority in favor of retaining the death penalty for the crime of murder. Before the Furman decision, in March, 1972, 50 percent favored retention, 41 percent opposed it, and 9 percent were undecided. After the decision, in November, 1972, 57 percent favored retention, 32 percent opposed it, and 11 percent were undecided. In the latter poll, the only sub-group which opposed retention of the death penalty was non-whites; in this sub-group, 29 percent favored retention of the death penalty for murder, 53 percent opposed it, and 18 percent were undecided.[26]

22. Public opinion is not altogether irrelevant to the issue whether the death penalty is compatible with the U. S. Constitution. One relevant factor in determining whether a punishment is cruel and unusual or not, is whether it offends the consciences of upright persons or not.[27] However, conscience in the true sense is expressed less accurately in unreflective statements of a person's opinion--which is likely to vary with reports of crime--than it is in reasoned judgments based on profoundly held convictions about moral principles. Thus, more significant than polls are position papers of various churches and religious bodies. For example, the General Board of the National Council of Churches of Christ in the U.S.A. adopted a policy statement by a vote of 103-0 on September 13, 1968, urging abolition of the death penalty.[28] The 33rd biennial convention of the National Conference of Catholic Women passed a resolution in October, 1966, urging members of the Council to work for abolition of the death penalty.[29] In recent years, several State Catholic Conferences and diocesan offices have taken a position against use of the death penalty.[30]

The Purpose of the Present Statement

23. Until now, however, we Catholic Bishops of the United States have not been of one mind on this issue. Some of us have regarded the death penalty as wrong in principle; some of us have doubted the wisdom and justice of its continued use in the United States today; but some of us have considered the imposition and execution of the death penalty, at least in

certain special types of case, to be a just and necessary exercise of the authority of our Federal and State governments, which are responsible for the protection of innocent persons and for the national security. For this reason, we did not deal with the death penalty in the formal statement of the United States Catholic Conference, The Reform of Correctional Institutions in the 1970s, which we approved a year ago. Instead, we postponed the subject of capital punishment for more profound study and for a separate statement suited to the complexity and importance of the subject.

24. At present, we still do not agree with respect to all the issues involved in the complex problem of the death penalty. Nevertheless, we do agree on many relevant points and we can draw some conclusions. Our conclusions, which are conditional to the extent that they depend upon matters of fact about which we do not claim to be expert, point to elimination of the death penalty from American criminal law.

25. We offer our reflections to Catholics of the United States for their guidance in forming their consciences on this issue. We also offer our reflections to all our fellow citizens, in a spirit of civil conversation; we hope that the effort we have made to reach consensus among ourselves will contribute to the effort we believe the American people as a whole should make to reach consensus on this issue.

26. Ideally, constitutional issues in a democratic society should be settled neither by political pressures arising from uninformed public opinion nor by imposition of the private judgment of members of the highest court as public policy, but by rational reflection upon the demands of fundamental principles of justice as these principles apply to developing states of affairs. Such reflection should occur throughout the national community joined together in civil conversation and committed to reach consensus on matters of principle. Such reflection should be creative, because insight into justice can deepen and the concrete requirements of justice can change as facts change and as society develops. But such reflection also must be faithful to the values of human life, personal dignity, ordered liberty, and equal justice, because these values are the chief goods for the sake of which we the people of the United States stand together in national unity. The alternative to reflection is the imposition by the more powerful part of the society upon the weaker part of an

opinion which remains partisan and hence divisive. This course is never desirable when the basic principles of community are at stake, as they frequently are in constitutional issues.

27. Many times in recent years we Catholic Bishops of the United States have rejected as unjust the legalization of the killing of unborn infants. We reject the legalization of such killing because abortion violates human life and its legalization violates the equal justice--due process of law and equal protection of the laws--due to unborn persons. Of course, most of those who favor abortion deny that the unborn are persons, and the U. S. Supreme Court has decided that their opinion shall prevail as the law of the land.[31] We believe that in a free and pluralistic society the burden of proof lies on those whose policy would restrict the circle of legal personhood; the Court assumed the opposite without ever actually considering where the burden of proof should lie. We believe that the U. S. Supreme Court's denial of legal personhood to the unborn constitutes the establishment of a religion in the sense prohibited by the First Amendment of the United States Constitution. The religion established is one shared by some conventional religious believers and by some whose religion--in the Constitution's sense of "religion"--is secular humanism. This religion has as one of its peculiar dogmas the proposition that human beings become persons at the magical moment of birth--or, at least, do not become persons before that moment. Our stand on abortion has been condemned by some who are imposing their religious beliefs on the unborn as an attempt to impose our religious beliefs on the consciences of our fellow citizens. But we have never intended to impose our teaching on the conscience of anyone who does not share our Catholic faith and accept our authority on that basis. We have only tried to appeal to the consciences of all Americans in the matter of abortion. Our intent in the present matter is precisely the same. We point this fact out in this context because we expect that many of those who have questioned the legitimacy of our effort in the matter of abortion will have no difficulty in accepting the legitimacy of our effort in the present matter.

28. In the matter of abortion, we Catholic Bishops do intend to teach our brothers and sisters in Christ who recognize our authority to teach in his name.[32] Similarly, much of what we say in the present matter merely

recapitulates and applies traditional Catholic moral teaching. The teaching authority we have from Christ is not limited to strictly religious matters, as Pope Pius XII pointed out, but extends to "the whole matter of the natural law, its foundation, its interpretation, its application, so far as their moral aspects extend." The keeping of the natural law--that is, abiding by fundamental moral principles--is essential to salvation, His Holiness explained, which is the purpose of the Catholic Church. He concluded:

> Therefore, when it is a question of instructions and propositions which the properly constituted shepherds (i.e., the Roman Pontiff for the whole Church and the Bishops for the faithful entrusted to them) publish on matters within the natural law, the faithful must not invoke the saying (which is wont to be employed with respect to opinions of individuals): "The strength of the authority is no more than the strength of the arguments."[33]

Hence, in so far as we give moral instruction to Catholics, we propose the Church's teaching so that they may form their consciences in accord with it; we do not propose mere personal opinions which would deserve no more consideration than the arguments we could articulate in support of them. At the same time, we wish to make clear the qualifications on the assertions we make here. For this reason, we state our conclusions in a conditional form, leaving to individuals the judgments of fact which are necessary to apply the moral norms we articulate.

Retribution Essential to Punishment

29. Much of the discussion of the death penalty has been impeded by confused notions of punishment. Retribution often is listed among the "purposes" of punishment, together with protection of society, deterrence of potential criminals, and rehabilitation of offenders. However, "retribution" usually is taken to mean the infliction of pointless suffering in a spirit of revenge against a criminal. Genuine retribution, which is essential to punishment, is usually ignored.

30. For example, in his concurring opinion in Furman v. Georgia, Mr. Justice Brennan says that retribution "means that criminals are put to death because they deserve it." But criminals would deserve death, he argues, only if "for capital crimes death alone comports with society's notion of proper punishment." He concludes that the death penalty is

thus excluded, since "we have no desire to kill criminals simply to get even with them."[34] Mr. Justice Stewart, in his concurring opinion in the same case, admits retribution as a permissible ingredient in punishment. However, he describes retribution as an instinct which must be channeled for the sake of social stability to avoid vigilante justice and lynch-law.[35] This description obviously assumes that retribution is revenge. Mr. Justice Powell, in his dissenting opinion in the same case, also accepts retribution, which he takes to involve an emphatic social denunciation of wrongdoing, an expression of revulsion necessary to maintain respect for the law, and a satisfaction of a public demand aroused by the offensive, shocking, or outrageous character of a crime.[36]

31. Such views of retribution assume that the urge for revenge is a psychological fact, that this urge must be satisfied somehow or other, and that the justification for satisfying it legally is that the alternative would be a socially less desirable outlet for this urge.

32. If retribution were correctly understood in this way, retribution would have no legitimate place in criminal law. It would be merely one more non-rational fact which prudent lawmakers would have to take into account. But if retribution is removed entirely from the concept of punishment, the protective, deterrent, and rehabilative purposes of punishment are inadequate to ground a clear distinction between the punishment of wrongdoers on the one hand and, on the other, the training of children or the treatment of psychologically disturbed persons.

33. A true political society is based upon a common commitment of persons living in a certain land to unite themselves together, to establish a fair system of cooperation, to ensure peace among themselves, to protect themselves against threats from outside, to promote common interests, and to limit and control their own government until they pass it on to the next generation. The Preamble to the United States Constitution formulates this common commitment as follows: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

34. Just laws direct the actions of members of the society and of guests in it so that these actions do fulfill and do not frustrate the purposes to which the common commitment has been made. Criminal laws demand what is required and forbid what must be excluded in the action of everyone, regardless of his personal choices and commitments, if the purposes which ground the society are to be fulfilled, not frustrated. One who commits a crime freely chooses to act in a way which violates the fair system of cooperation essential to the equilibrium--that is, to the health and vigor--of the body politic. A criminal, by his act, implicitly breaks faith with other members of the society; he violates his own commitment to its purposes (or, if an alien, violates the conditions under which he has been permitted to live as a guest in the community).

35. Thus the criminal act differs from the immature behavior of children or the deranged behavior of sick persons. Children and sick persons do not break faith with the community. Their behavior is not fully free and responsible action. While the incompetence of children and sick persons to function as responsible members of the society must be taken into account and dealt with in a realistic and reasonable manner, their immature or deranged behavior does not alter their status in the society, does not break faith with the community, and does not disrupt that fair system of cooperation which is the goal of any society which seeks to "establish Justice."

36. The criminal, by the very fact that he commits a crime, takes unfair advantage. Although it is not his end in view--unless he happens to be not merely a criminal but also an anarchist--he disturbs the equilibrium of the body politic. This disturbance threatens the society. Criminal action usually does specific damage as well--murder deprives an innocent person of his life, robbery of his property, and so on. But the primary wrongfulness of a criminal action is not the damage done to particular individuals; the primary wrongfulness of a criminal action is the criminal's voluntary self-indulgence of his own desires and interests in violation of the order of justice. For this reason, unsuccessful attempts to commit crimes are themselves rightly counted as crimes; one who wishes to commit a crime already has broken faith with the community and taken unfair advantage of every law-abiding member of it.

37. Once a person has committed a crime, society as a whole has a legitimate interest in reestablishing the order of justice which has been violated. The disturbed equilibrium must be restored. Because this is a common interest, it must be satisfied by lawful procedures which are carried out in the name of the community as a whole. Thus the criminal must be tried and convicted by a suitable process ordained by law; he must be dealt with by a system of criminal justice which functions with the authority of the community.

38. The criminal enjoys many goods for which he is at least partially dependent upon the existence and the functioning of the political society in which he lives. Without political society, none of us could survive, none of us could be free to do as we please, none of us could pursue our spiritual destiny in accord with our faith. In other words, were it not for the fair system of cooperation which criminal law protects, life, liberty, and the pursuit of happiness would be possible for no one.

39. Thus, it is fair that the criminal, who has taken advantage of others, should be deprived of some good which he might otherwise enjoy. The criminal's voluntary alteration of his own status in the society is met by society's alteration of its disposition toward him. The criminal must be dealt with in a way which will restore the balance of fairness which his crime has disturbed. He must suffer a disadvantage proportionate to the unfair advantage he has gained. Sometimes the criminal sees the fairness of the deprivation imposed upon him; he gives himself up of his own accord and consents to his own punishment. But whether the criminal is willing to be punished or not, the punishment means that he loses some good to which he would otherwise be entitled. Since everyone naturally desires his own good, this loss is against the criminal's desire. His self-indulgence in committing crime is balanced by a negation of his self, willing or not, in being punished.

40. In this sense, the criminal in being punished <u>suffers</u> a penalty. The suffering in question need not be physical pain nor mental anguish. In committing crime, the criminal has taken advantage of law-abiding persons. He has taken more than his share of the freedom to do as one pleases. Punishment puts the criminal in his place. The shares of freedom to do as one pleases are equalized. Law-abiding persons can look back over their

lives and say to themselves that in virtue of the adjustments which punishments have brought about they have not lost out to criminals. Strict observance of the law is difficult for everyone at times, but violation of the law also has its costs. This fact not only makes it easy to be law-abiding by providing the psychological incentive of deterrence to one who is tempted to commit a crime, but also makes it reasonable to be law-abiding, because the system of cooperation which works for the common good also prevents any member of the society from gaining an unfair advantage.

41. Even if a criminal has repented his crime and is most unlikely to commit a crime again, society is not unfair if it exacts punishment. The criminal gains unfair advantage at the very moment he willingly breaks faith with the community. Punishment restores the balance of fairness and reintegrates the criminal into the society by making his whole overreaching and undergoing--the crime together with the punishment--come under the fair system of cooperation.

42. However, fairness is not the sole good to which members of a political society are dedicated by their common commitment. They also seek mutual protection, the promotion of the general welfare, and so on. For this reason, just criminal law can allow for mercy to the criminal. If the wider good of society and of the criminal himself will not be served by the full execution of a fair punishment, then society rightly forgoes the punishment. However, justice itself is a good and the punishment of criminals contributes directly to it. Thus, if there is no reason why a just punishment should not be executed, fairness requires that it should be. The murderer who repents his crime and who is an exemplary prisoner should not be released from prison after a few weeks or months--assuming that he committed the murder by his own free and responsible choice.

43. This situation must be contrasted with that of a sick person whose homicidal act is a piece of deranged behavior which he did not choose freely and for which he is not morally responsible. No punishment is justified for such a person. If the evidence is that his sickness is cured and that he will not kill again, it would be unfair to deprive such a person of any good to which he would have been entitled had he not

killed another. Crime deserves punishment, which vindicates justice and seeks to restore the guilty person to community by eliciting repentance. Sickness deserves treatment which benefits the sick person and protects others from his deranged behavior; if successful, such treatment restores the sick person to community by making him capable of functioning once more as a fully competent member of it.

44. We are well aware that the distinction between criminality and illness, between crime and deranged behavior, between punishment and treatment is difficult to apply in practice. Those whose behavior violates the law often act with less than full freedom; they have some criminal responsibility, but mitigated responsibility in virtue of their inability to appreciate fully and to consent whole-heartedly to the evil which they do. The mitigated responsibility of adolescents for their not-fully-mature behavior also complicates matters. Yet although the distinction between criminal acts on the one hand and, on the other, the deranged behavior of sick persons and the immature behavior of children is not easy to apply, this distinction is essential to criminal justice.

45. To treat the person who is guilty of crime as if he were only sick or only immature is to deny his personal dignity. One guilty of crime has freely chosen to act contrary to the common good, to break faith with other members of the society. To be punished in expiation of the offense is to be treated as a free and responsible person who is capable of repentance, of rededication, of renewed trust. The criminal who sees the justice of the punishment imposed upon him, who repents, and who rededicates himself to the goods which ground the community has done his part in restoring himself to the status of a full and trusted member of society.

46. There must be proportionality between crime and punishment. This proportionality is not found in making the evil of the punishment equal to the evil of the crime. Indeed, in as much as the greatest evil of crime is its moral evil, no punishment can be equal in evil to it. The crime is unjust; the punishment must be just. Nor is the proportionality between crime and punishment found in making the criminal undergo as much evil, suffer as much deprivation, as he has made others suffer in committing his crime. The proportionality between crime and punishment is found only in the balance of fairness which is disrupted by crime and restored by

punishment. Criminals cannot always be detected, convicted, and punished. Yet on the whole and in the long run, to abide by the law must not be to sacrifice one's own freedom to do as one pleases for the benefit of those who would take unfair advantage of the society and of the opportunities it offers. Crime must not pay because it is unfair that crime should pay. If crime does not pay, this fact also will be a deterrent to potential criminals.

47. But not every deterrent is reasonable. Children and sick persons might be deterred from doing certain things by being threatened with torture. But such a threat and its execution would in no sense be a punishment. Criminals might be deterred by being threatened with very severe suffering for very slight crimes, but such a deterrent would not vindicate justice. It would violate justice and it would not be a true punishment.

48. The urge to avenge oneself and to purge society of the hostility and anxiety aroused by the acts of criminals and by the behavior of persons who behave like criminals without criminal responsibility--this urge for revenge does not discriminate between those who are responsible and those who are not. Justice must discriminate here. The retribution which is essential to just punishment is the restoration of the balance of fairness. The score is evened; the criminal gets what he deserves. Unfair advantage taken is balanced by fair disadvantage suffered. The law-abiding should be satisfied, not because their hostility is placated and their anxiety relieved, but because their desire for justice is fulfilled. One of the goals for which the community exists--justice--is not only protected but to some extent realized whenever a criminal is subjected to a fair punishment.

49. The suffering of punishment is an evil to the criminal. But it need not be evil to inflict punishment. For the evil which the criminal suffers need not be the purpose of the one who inflicts punishment and will not be his purpose if he acts justly. His primary purpose is just retribution, the reestablishment of equilibrium in the system of fair cooperation among all members of the society. This purpose is achieved in the very act of inflicting punishment and in the very process of the criminal's undergoing punishment, whether he repent or not.

50. Still, as we have pointed out, fairness is not the only good to be considered in criminal justice. Crime damages the common good. The criminal should compensate this damage. The deprivation which he suffers should be designed in such a way that it contributes to the purposes of society. This contribution also helps to restore justice. Punishment can contribute to the common good in a number of ways. One of these is to protect society against additional criminal acts of unrepentant criminals; another is to deter potential criminals.

51. Punishment also can be designed in a way which requires the criminal to work fruitfully for the common good, perhaps especially for the benefit of innocent victims of crime, while being deprived of some of the benefits to which he would normally be entitled in virtue of such work. The process of criminal justice might work better if more punishments were designed in this way, for the public at large and criminals themselves could easily see the justice of such punishments.

52. The rehabilitation of the criminal also is an important objective of a sound penal system. But rehabilitation of a criminal is not the curing of a sick person or the education of an immature person. A criminal is rehabilitated only if he repents. Thus a punishment is more likely to be efficacious in rehabilitating a true criminal if it is more likely to help him to see the unfairness of his crime, the justice of the punishment, his need for conversion, and the desirability in itself of a new and whole-hearted commitment to the purposes which ground the fair system of cooperation which his crime violated. To treat a true criminal as if he were sick and/or immature is to omit the retributive element essential to punishment. Punishment which is truly such, fair retribution, is more likely to be efficacious in the rehabilitation of true criminals than is an inappropriate attempt at treatment and/or education, which is likely to help the criminal to rationalize his crime and to convince himself that he is not really responsible for the evil of which he nevertheless remains guilty.

53. The teaching on punishment we state here is not our own invention. Pope Pius XII pointed out that many modern theories of criminal punishment omit the element of retribution or expiation of the crime. He

questioned whether such theories can make sense of punishment, and argued that they cannot:

> The essence of the culpable act is the free opposition to a law recognized as binding. It is the rupture and deliberate violation of just order. Once done, it is impossible to recall. Nevertheless, in so far as it is possible to make satisfaction for the order violated, that should be done. For this is a fundamental exigency of justice, whose role in morality is to maintain the existing equilibrium, if it is just, and to restore the balance, when upset. It demands that by punishment the person responsible be forcibly brought to order. And the fulfillment of this demand proclaims the absolute supremacy of good over evil; right triumphs sovereignly over wrong.[37]

St. Thomas Aquinas explained punishment in a similar way.[38] Interestingly, some contemporary legal theorists have recently begun rediscovering this understanding of punishment, which in modern times has been eclipsed by the predominant utilitarian and positivistic philosophies of law.[39]

Unsound Arguments against Use of the Death Penalty

54. The preceding clarification of punishment illuminates inadequacies in many of the arguments frequently proposed on both sides of the argument about the justifiability of the death penalty. We consider first a number of common arguments against the death penalty, and say why we regard these arguments as unsound. Some opponents of the death penalty claim its use is always wrong; others maintain only that it is unjust to continue its use today. We consider first the arguments of those who regard use of the death penalty as intrinsically evil.

55. Some think that use of the death penalty is intrinsically evil because it destroys the criminal rather than rehabilitates him. The assumption is that every penalty must aim at rehabilitation of the offender as its primary purpose. In the language of Canon Law, this theory is that all punishment must be medicinal, not vindicative.

56. But, as we have explained, retribution is of the essence of punishment. A medicinal punishment is imposed justly only if there is need to reestablish the order of justice, because a punishable wrong has been done. Otherwise, no punishment at all may be imposed. A vindicative penalty need not be vindictive; justice is vindicated even if the criminal is not benefitted provided that fairness and not revenge is sought. At

times justice and the protection of society require punishments which do not benefit the persons punished. Thus the death penalty cannot be ruled out in principle simply because it does not benefit the criminal himself.

57. The position we take here is not incompatible with our position in last year's statement: The Reform of Correctional Institutions in the 1970s. There we set down as a fundamental purpose: "to insure protection for all the civil rights of confined offenders in an atmosphere of human compassion conducive to reconciliation and rehabilitation." We were concerned with persons in prison; such persons are punished by the very fact that they are in prison. As has been said well, a criminal is sent to prison as punishment; he is not sent there for punishment other than that specified in the law and in his sentence. When imprisonment itself is punishment enough--and assuming that the prisoner is eventually to be released as most prisoners in fact will be--the purpose of the prison system in dealing with prisoners should be to treat them fairly and to treat them in a manner conducive to their restoration to full, faithful, and trusted cooperation in society.

58. Many who argue that the death penalty is unjustifiable in principle point to the fact that criminals who are executed often are persons who are mentally unstable or of low intelligence or from wretched social situations; if none of these conditions is verified, then it is suggested that many criminals act while in a fit of passion or under excessive provocation. Rather than execute criminals, it is argued, society must study the "causes" of crime and find ways to remedy these "causes."

59. To the extent that persons whose behavior does not conform to the law act with mitigated responsibility, they should not be subjected to the most severe punishment. No doubt, some who kill are not criminals, and the guilt of many criminals is mitigated by factors beyond their control. But the cause of true crime is the free choice of the criminal to pursue his own desires and interests in an unfair way. Murder can be lucrative, and the prevalence of abortion today makes clear that the willingness of human beings to kill fellow human beings is not so uncommon or abnormal that the murderer must always be a victim of forces beyond his control or an agent whose criminal responsibility is very limited.

60. Some who argue that the death penalty is never justified and who suggest that every criminal is a helpless victim of circumstance, appeal to Christian sensibility by saying: "There, but for the grace of God, go I." The saying is correct; we are all sinners, and no one would be innocent of serious crime were it not for the grace of God. Yet God's grace does not remove man's freedom; even with the grace of God, one can refuse to serve. Moreover, the grace of God is not denied to any sinner. The criminal is not a victim of some whim on God's part. Awareness that but for the grace of God we too would be criminals should stimulate our gratitude to God. But such awareness should not make us condone criminality. All human goodness is the fruit of God's grace; human wickedness is the worm of man's own free malice which spoils this fruit.

61. Some who reject the retributive element of punishment go so far as to deny the very legitimacy of social order and of the authority which guides and sustains it. Of course, authority can be abused; laws in force sometimes are unjust. Many Saints died rather than obey unjust laws which demanded that they act contrary to the higher demands of fidelity to God's love and the law of Christ. Yet human society as such is good; genuine human law expresses the requirements of justice. The anarchist is in the odd position of saying that those who impose and execute criminal punishments act unjustly because there is no such thing as justice!

62. If those holding authority sometimes abuse it by acting unjustly, this very fact demonstrates that there is an order of justice to be preserved, that a fair system for preserving it must be followed, and that such a system is not of itself unjust.

> Let everyone obey the authorities that are over him, for there is no authority except from God, and all authority that exists is established by God. As a consequence, the man who opposes authority rebels against the ordinance of God; those who resist thus shall draw condemnation down upon themselves. Rulers cause no fear when a man does what is right but only when his conduct is evil. Do you wish to be free from the fear of authority? Do what is right and you will gain its approval, for the ruler is God's servant to work for your good. Only if you do wrong ought you to be afraid. It is not without purpose that the ruler carries the sword; he is God's servant, to inflict his avenging wrath upon the wrongdoer (Rm. 13.1-4).

As Pope John XXIII explained, St. Paul does not mean that every ruler is legitimate and every act of government just. What he means is that the social order and the authority which maintains it are as such part of God's providential design for human life, and that the just requirements of public authority are duties which bind the Christian's conscience.[40]

63. Some who consider the death penalty unjustifiable propose a more specific argument. They grant that punishment can be justified even if it does the criminal himself no good, that some who behave wrongly do so freely and thus are true criminals, and that the social order and the authority which maintains it are legitimate. But they point out that some penalties--for example, those which involve torture--offend the dignity of the person; they claim that the death penalty belongs in this class, since execution exterminates the criminal as if he were a pest.

64. Certainly, if the death penalty is used without discriminating between true criminals and those who misbehave with little or no criminal responsibility, its use offends human dignity. However, if the penalty is reserved only for true criminals, its use respects the human dignity of the wrongdoer. He is considered a responsible person who has freely broken faith with the community. The extermination of vermin does not proceed on such an assumption. Moreover, the analogy with penalties involving tortue is not cogent. Torture makes one suffer in his sentient nature, which man shares with other animals; the undergoing of pain is not a specifically human evil, although it does tend to block the properly human functions of reflection and choice. The death penalty takes away <u>human life</u>, which is a specifically human good, from a person who can consider his own life and death objectively so that death for him is a privation, not anihilation.

65. Still, it is objected, if the criminal somehow survives his own death, the death penalty must be rejected precisely because it takes away his chance to repent. Christians especially, this argument goes on, should be ready to spare the criminal in the hope that his soul might be saved.

66. This argument is sound to the extent that it demands that the criminal be warned of his impending punishment and given an opportunity to examine his conscience and make his peace with God. However, conversion need not take a long time. Rehabilitation for the person who is sick or

who has acted with diminished responsibility can be a long process. But the true criminal has sinned by his own free choice. A person who commits crimes with full responsibility is perhaps more likely to repent and make his peace with God if, informed of the day and the hour, he faces his own imminent death. The execution of the death penalty in Christian societies always took this fact into consideration; the condemned man was not denied means of spiritual reconciliation.

67. Another argument for holding the death penalty unjustifiable in principle is that human judgment is fallible. Mistakes in identification, false confessions, prejudice by a judge and/or jury, errors in legal process, and perjured testimony can lead to conviction of the innocent. If such a convict is sentenced to death and the sentence is executed, the error is irrevocable.

68. The premises are sound. But does it follow that use of the death penalty is unjustifiable? A person who is erroneously punished in any way suffers a deprivation which can never be fully compensated. A man wrongfully imprisoned for several years cannot regain those years. The effect of error in the execution of a death sentence upon an innocent person differs in degree, not in kind. All merely human processes are fallible. There is reason for great caution, not only when imposing the death penalty but when imposing any punishment. But if human beings are to live and live together, then--fallible as we are--responsibility must be taken. A Christian takes responsibility with all prudence, in a spirit of justice, and with confidence that an innocent person who suffers because of human fallibility will receive at God's hand the exact reward which his innocence deserves.

69. Another argument proposed by some is that the death penalty is unjustifiable because it is too severe. A person who is murdered, so it is said, suffers only briefly, but a condemned man must face the inevitability of death for a long time, perhaps even for years. A person who is murdered frequently does not even realize what is happening to him. A person who is sentenced to death is subjected to awful anguish as the machinery of the law grinds on inexorably. This argument usually is pressed by those who do not take into account the spiritual value of a warning of one's impending death.

70. The argument fails because it does not take seriously enough the value which belongs to human life as such. The life of a victim of murder and the sanctity of the body of a victim of rape are valuable in themselves. Of course, the quality of a person's experience--including a criminal's experience--also is important. The legal process should not be unduly prolonged. But it is a mistake to compare the length of time during which the victim of crime suffers with the length of time during which the criminal suffers, as if the extent of experienced suffering were all that mattered. The victim suffers an objective loss and this loss is the more grievous because it is objectively unjust.

71. Still, it is urged, if human life as such is sacred, the life of the criminal also has an intrinsic value. As a pamphlet published by the American Civil Liberties Union states: "Executions in prison gave the unmistakable message to all society that life ceases to be sacred when it is thought useful to take it. . . ."[41] It is ironic that this argument should be published by an organization which also holds that the innocent life of an unborn child ceases to be sacred when it is thought useful to take it. Be that as it may, the argument has its merit. The life of the criminal does have its value, and no one can take away the criminal's right to life.

72. But the imposition and execution of the death penalty need not be regarded as a denial of the criminal's right to life. If the penalty is just, the criminal himself has negated his own right to life by his own free act; no one has taken that right from him. The penalty of death, when it is reserved for murder and other extremely serious crimes, affirms the sanctity of the lives of the innocent and the importance of other goods which serious crimes violate.

73. But, it is argued, if one holds that abortion is wrong because human life is sacred, then one is somehow inconsistent if one approves use of the death penalty. If the value of human life does not depend upon a person's condition, his status, or his opportunities, then the value of life should not be held to depend upon a person's moral character. Human life is human life, and it has the same value no matter whose life it is, just as truth is truth, and it has the same value regardless of the moral character of the person who defends it.

74. The unalterability of the values of life and of truth is not in question. Yet it is not obvious that this unalterable value demands that those who reject abortion also reject the death penalty. According to the Judeo-Christian tradition, God is the Lord of life. The killing of the innocent is sinful because God forbids it. But the tradition also seems to tell us that the killing of the criminal is not sinful because it is authorized by God. This received position is based on passages of Sacred Scripture, such as:

> If anyone sheds the blood of man, by man shall his blood be shed;
> For in the image of God has man been made (Gn. 9.6).

When the life of man made in God's image is unjustly taken, then the Lordship of God is violated; but when the retribution of death authorized by God is justly exacted, then the Lordship of God is acknowledged. If anyone wishes to claim against this received position that a different view agrees with Christian faith, then he must show how the received teaching on the justifiability of the death penalty can develop. We consider the possibility of showing this in a later section.

75. Some, of course, reject the received Judeo-Christian moral evaluation of the death penalty--they reject whatever does not please them in traditional moral teaching--as outdated and no longer relevant. Setting aside Sacred Scripture and tradition, they call for a new morality more consonant with the "enlightened opinion" of contemporary man. Of course, we reject this view. Christian moral teaching, just as Christian doctrine, is open to refinement and legitimate development. The Spirit continues to teach the Church to understand what God once and for all revealed in Christ. However, the received moral teaching of the Church is not to be renounced. To replace it systematically with contemporary secular public opinion, which is largely formed apart from the light of faith, is to renounce it.

76. Indeed, Christians by now ought to recognize the need for caution in adopting any new morality. Human wisdom and God's wisdom sometimes coincide, but very often human wisdom is folly to God, while a judgment made according to the mind of Christ is sheer stupidity to unbelieving men. After all, not very long ago human wisdom urged that the killing and spoliation of the native peoples of the Americas was justified; more

recently human wisdom urged that the purification of the Aryan race by the genocide of the Jewish people was justified; at that time, human wisdom also urged that the destruction of entire urban areas with their civilian populations was justified.[42] Today, human wisdom urges that the mass killing of unborn infants is justified; human wisdom is beginning to urge that infanticide and euthanasia are justified. A judgment made according to the mind of Christ, we believe, condemns all of these practices as violations of God's commandment: "You shall not kill" (Ex. 20.13; Dt. 5.17).

77. Some maintain that the retribution which justice requires can never demand so serious a deprivation as the loss of life itself. This loss takes away every right, ends every opportunity.

78. We deny that serious crimes do not deserve death. The eternal death of hell certainly is worse than the bodily death of a criminal who is executed. Yet God will condemn unrepentant serious sinners to hell. The question, then, is not whether death is too severe a penalty for those guilty of grave injustices. The question is: Is it right for man to impose and execute this penalty, or is this penalty one which should be reserved to God alone, despite the seeming authorization He has given mankind to use it to vindicate justice, especially the justice violated when innocent life is willfully taken?

79. Some argue that while the death penalty might have been justified in the past, it is no longer justified today. This position has merit. However, many of the arguments offered in support of this position seem to us unsound.

80. Some suppose that because the U. S. Supreme Court has concluded that the death penalty is cruel and unusual punishment, it is now wrong. This supposition overlooks the unclarity of the Court's position, as explained above. More important, this supposition confuses the question of rightness with the question of legality. Under the United States Constitution, there is no appeal from a decision of the U. S. Supreme Court; hence, as long as that decision stands, it is the law of the land. However, what is legal is not necessarily right. The Court's decision on abortion is an example. Since the present question is whether the death penalty should be reinstated or wholly abolished, what the Supreme Court has decided is not determinative; to treat the earlier decision as

determinative is to beg the question.

81. Moreover, even if most people who know the facts about the death penalty feel that its use is wrong, this situation does not settle the issue. Perhaps there are psychological reasons why it is easier to sympathize with criminals than it is to realize the importance of reestablishing the order of justice which is disturbed by crime. Moreover, informed judgment depends upon something more than knowledge of facts; it also requires insight into principles, and such insight is often lacking in debates about constitutional issues in our society. Inasmuch as a sound understanding of punishment has been absent from the debate about the death penalty, acquaintance with the facts of the matter together with natural human sympathy is not likely to lead the general public to a sound judgment on the issue.

82. Some point to the difference in the use of the death penalty in different jurisdictions and suggest that this difference alone shows continued use of the death penalty to be wrong. Why, for example, should a person who commits a crime in Chicago be executed while he would not have been executed for the same crime had he committed it in Milwaukee? The difference, however, does not show use of the death penalty to be unjust. The jurisdictions which have abolished it could be the ones in the wrong. Or, perhaps, both the use of the death penalty and forebearance to use it are justifiable, even under very similar, if not precisely identical, conditions.

83. The opinions of the Justices concurring in Furman v. Georgia stressed the point that the death penalty has not been dealt out fairly. As we have seen, this consideration was decisive for Mr. Justice White and Mr. Justice Stewart, whose judgments were necessary to make up the majority.

84. If racial or other unjust discrimination has determined the imposition of the death penalty, then the nullification of any sentence arising from such discrimination certainly is in order. But this leaves open the question whether the death penalty can be used fairly. We know that persons who are black, poor, uneducated, or of low social status are at a disadvantage whenever they confront the law. Such persons are unfairly treated at many points in the process of criminal law enforcement, not only in respect to the death penalty, but also in respect to other penalties,

to arrest, to prosecution, to treatment in prison, to possibilities of pardon and parole, and so on. The remedy obviously cannot be to eliminate law enforcement altogether.

85. If, as some argue, the chief inequity suffered by many disadvantaged persons accused of crimes is the quality of the legal assistance available to them, perhaps what is needed is that the offices of public defenders have the same sort of staff as the offices of public prosecutors, that the lawyers for both sides be provided with equal facilities and paid equal salaries, and that defenders be supplied with all the information and evidence discovered by police investigations at the same time and on the same basis as prosecutors are given these materials. If the defense and the prosecution were evenly matched, the axiom that anyone is to be regarded as innocent until he has been proved guilty beyond a reasonable doubt could have a real sense. As it now is, an innocent defendant who cannot afford the quality and quantity of legal assistance necessary to protect him in an uneven contest with police and prosecutors is at an unfair disadvantage.

86. The improvement of the position of the defendant in criminal cases by providing every defendant with legal facilities for his defense comparable to the state's facilities for his prosecution might render unnecessary certain of the procedural safeguards and some of the opportunities for appeal which have developed in the present system. Some of these undoubtedly are necessary for justice, but the prolonged delays associated not only with the death penalty but with criminal legal processes generally might be greatly reduced.

87. Another objection to the death penalty is that its availability gives prosecutors an unfair advantage in plea bargaining. Often a prosecutor elicits a plea of guilty to a lesser, but still serious, crime from a person who could be charged with a crime carrying a death penalty. Sometimes, it is asserted, innocent persons in a weak position were forced to plead guilty to avoid the risk of death.

88. As we mentioned above, systems which authorized different penalties depending upon the defendant's plea have been curbed by a U. S. Supreme Court decision. The practice of plea-bargaining deserves careful scrutiny in all its aspects. Perhaps the practice as such, not the

penalties involved, is what is wrong. Again, a more even matching of prosecution and defense and a more equal availability to both sides of the investigative facilities of the police might speed the settlement of many cases without resort to plea-bargaining. It is worth note in passing that as long as prosecutors exercise discretion as they do at present, no law imposing a "mandatory" death penalty will eliminate discretion in the matter of the use of the penalty.

89. A final point often made against use of the death penalty is that it blocks reformation of the system of criminal justice, and that the special distinctions and devices required in criminal process because of the death penalty distort the whole process of criminal justice. This argument would be important if it were correct. However, what seems to underlie the argument is the fact that the use of the death penalty compels the law to keep the distinction between crime on the one hand and, on the other, deranged and/or immature behavior. The reform in the system of criminal justice which seems to be assumed desirable in the argument would be a "reform" which would altogether eliminate the distinction between punishment and treatment.

90. Clearly, if use of the death penalty is not justified in itself, its use will not be justified merely because it blocks such a dangerous project. However, if the death penalty is abolished, its abolition must not make way for this sort of transformation in the process of criminal justice. In fact, law-makers should be alert to defend the so-called "distortions" which the existence of the death penalty has imposed upon criminal law, to the extent that it has helped maintain the difference between crime and deranged behavior, between punishment and treatment.

91. Confusion here will result in the breakdown of justice, because true criminals will be treated as if they were free of responsibility; they will be provided with rationalizations of their criminal conduct which they will be all too ready to accept. Confusion here also might--and probably will--result in the violation of the rights of truly sick or immature persons who behave without criminal responsibility in ways not acceptable to society. In other words, there is a danger that the sick and the immature will be punished, perhaps indefinitely, while the guilty are treated and--since they are more likely to be able to act shrewdly in their own

interests--released to proceed with their wrongdoing. If this state of affairs already obtains to some extent, it ought to be changed, not extended.

Unsound Arguments in Justification of the Death Penalty

92. Some argue that since crime rates are rising, the death penalty is necessary and is justified by this fact alone. This argument is unsound. Evil may not be done that good might come of it. The end does not justify the means. If use of the death penalty is not justifiable in itself, then its usefulness in deterring crime cannot justify it.

93. Moreover, opponents of the death penalty point out that few of the crimes which rightly concern law-abiding citizens are punishable by death. They also point out that the use of the death penalty against a few dozen persons convicted of murder or rape each year can do nothing to deter robbery, assault, and other crimes of violence. They claim--and even many who defend use of the death penalty agree--that it has not been shown that the use of the death penalty has any greater effect than alternative penalties would have in deterring the very crimes for which the death penalty has usually been imposed. Whether or not the death penalty is reserved even for those who murder police officers and prison guards, as many persons think it should be, is said to make no demonstrable difference in the rate of such murders.[43]

94. Nor is capital punishment shown justifiable by the fact that it has been accepted for a very long time and has been approved by many virtuous persons. The same situation existed two centuries ago with respect to slavery.

95. Some have argued that society may use the death penalty to save the body politic just as an individual may amputate a diseased member or organ to preserve his organic body. But this analogy is not sound, for the principle of totality which is applicable to the organic unity of individual persons is not applicable to the social unity of a political community, any more than it is to the functional unity of a pregnant woman and her unborn child. If the principle of totality were applied to society, the authority responsible for society would rightly destroy defective persons whether or not they were responsible for their condition and behavior, subordinating them wholly to the good of society, just as an individual

destroys a diseased member or organ for the good of the whole body without considering the effects upon the particular part.[44]

96. Another argument is that the death penalty is justified because those who are subjected to it have by their own inhuman deeds given up the status and dignity of human personhood. This argument confuses the criminal's nullification of his role in society, which is implicit in his betrayal of the community, with nullification of the personhood which grounds his natural rights, which are prior to human society itself. Personhood cannot be given up, even by an individual's own wish, since personhood is essential to man.

97. A person can cut himself off from a society and he can attempt to cut himself off from all human community, but he cannot cut himself off from his own nature. A man can develop and fulfill but he cannot nullify his humanity. Although one can act in a way which violates one's own dignity, one cannot lose one's essential dignity. The image of God is stained and concealed by sin, yet the image of God remains in sinful man. Otherwise, he could not be saved. Thus the criminal does not give up the status and dignity of his personhood. The argument that some human individuals--ones not yet born or ones convicted of serious crimes--are not persons appeals to those who wish to justify killing members of either group, but the argument is no more sound in the one case than in the other.

98. Another argument used to justify the death penalty is that this punishment actually is less severe than a long prison term, and that a long term in prison is the only alternative punishment available for some guilty of serious crimes. This argument is not very plausible. Very few persons sentenced to death resist commutation of their sentences to life in prison--although some persons have done so. Perhaps the wretched conditions prevalent in prisons were partly responsible for such choices; these conditions have been improved but clearly still need to be improved.

99. But more important is the point that even if imprisonment is in some sense a more severe penalty than death for certain persons, the justifiability of the death penalty cannot be based entirely upon considerations of its severity. The precise question at issue is whether it is right to <u>kill</u> criminals as a punishment. A brief period of torture might be a less severe punishment than a long term in prison, but that fact

would not justify substituting the former for the latter, even at the request of the convict himself.

100. An argument which appeals to many people is that the death penalty at least is justified for those who commit premeditated murder, since only the penalty of death balances the wickedness of killing. This argument sometimes appeals to the saying: An eye for an eye and a tooth for a tooth. We discuss this saying, which is found in Sacred Scripture, in the next section.

101. If the execution of the death penalty could bring the innocent victim of a murderer back to life, then it certainly would be plausible to argue that such a penalty is essential to restore the balance of justice. But use of the death penalty does not undo what harm the crime has caused, and, as we explained above, the retribution essential to punishment is that the criminal suffer a privation proportionate to the unfair advantage he has taken in violating the order of justice; just punishment does not repay the harm done by the criminal with equal harm to him. That the death penalty is necessary to restore the equilibrium of justice is the primary claim of this particular argument for the justifiability of the death penalty. One who attempts murder might do no harm at all; he certainly deserves severe punishment, but no one is arguing that he deserves the death penalty. The moral difference in malice between an attempted and a successful murder is nil. The criminal takes precisely the same unfair advantage whether his attempt succeeds or not.

102. Some believe that the death penalty is justifiable because it is not only permitted by divine law, but commanded by it. For this they cite certain passages of the Old Testament, which we shall consider shortly. As we shall see, the Christian tradition in general has been that public authority is not obliged to use the death penalty, although it is allowed to use it.

Scripture, Tradition, and the Possibility of Development

103. The first point to notice in a theological consideration of the justifiability of use of the death penalty is that "You shall not kill" (Ex. 20.13; Dt. 5.17) was not understood originally to exclude the death penalty. The law of ancient Israel mandated or authorized the death penalty for a variety of crimes.

104. Crimes punishable by death included sacrificing to or worshipping an alien god (Ex. 22.19; Nm. 25.1-5; Dt. 17.2-7), and specifically offering an offspring to Molech (Lv. 20.2); leading others to worship alien gods (Dt. 13.2-18); being an unauthorized or false prophet (Dt. 18.20), a sorceress (Ex. 22.17), a medium or fortuneteller (Lv. 20.27), or a client of a medium or fortuneteller (Lv. 20.6); committing blasphemy (Lv. 24.14-16); and profaning the Sabbath (Ex. 31.14, 35.2; Nm. 15.32-36).

105. Murder was punishable by death (Ex. 21.12-14; Lv. 24.17; Nm. 35. 16-21; Dt. 19.11-13). Premeditated murder was distinguished from other homicide (Ex. 21.12-14; Nm. 35.9-28; Dt. 19.11-13). Striking a slave with a rod was punishable--whether by death or otherwise is not clear--only if the slave died within a day (Ex. 21.20). A blow to a pregnant woman which caused a miscarriage and subsequent death was punishable by death (Ex. 21.22-23). An owner of an ox which habitually gored people could be punished by death if the owner had been warned and if the ox again gored someone other than a slave resulting in the injured person's death; however, the death penalty was not mandatory in this case (Ex. 21.28-32). It was murder to beat a burglar to death during daylight, but not at night (Ex. 22.1-2).

106. A person bearing false witness in a capital case was to be punished with death (Dt. 19.21) and so were persons who disobeyed judicial decisions in certain types of cases (Dt. 17.12). Also subject to the death penalty was the kidnapping of an Israelite in order to enslave him (Dt. 24.7) or, perhaps, the same crime whether the victim was an Israelite or not (Ex. 21.16).

107. Other crimes punishable by death were bestiality (Ex. 22.18; Lv. 20.15-16), male homosexuality (Lv. 20.13), various incestuous relationships (Lv. 20.11,12,14,17,19), and adultery involving a married woman (Lv. 20.10; Dt. 22.22). Both parties to these crimes, including the animal in cases of bestiality, were subject to the death penalty.

108. A man who raped a betrothed girl could be punished by death (Dt. 22.23-27), and so could the victim of such a rape if it occurred in the city and she was not heard to cry out for help (Dt. 22.23-24). A bride who was accused by her husband of not being a virgin and who could not provide evidence that she was a virgin might be punished by death

(Dt. 22.20-21). Both parties to intercourse during a woman's menstrual period were to be "outlawed" or "cut off from their people" (Lv. 20.18).[45]

109. The death penalty also was prescribed for striking a parent (Ex. 21.15) or cursing a parent (Ex. 21.17; Lv. 20.9). A stubborn and rebellious son, if incorrigible, could be denounced by his mother and father to the elders of the city, and punished by being stoned to death by the people of the town (Dt. 21.18-21).

110. Many of these crimes are held to be serious sins in the New Testament and Christian tradition. However, the moral quality of such acts is not our present concern. The question is: Should we consider the prescription of the death penalty for such crimes in the law of ancient Israel to express a divine teaching that use of the death penalty is morally right?

111. The law of ancient Israel had sterner legislation regarding deliberate homicide than did other ancient near-Eastern codes.[46] Blood was considered to be the seat of life, and life--even including animal life--was held sacred because of its close relationship to God, the Lord of life (Gn. 9.4-6; Lv. 17.11-12; Dt. 12.23-27).[47] The shedding of innocent blood was held to pollute the land; purification could be achieved only by blood expiation (Nm. 35.33).[48] If the murderer were not detected, the elders and priests from a nearby town were to purge the guilt of innocent blood by the ritual killing of a heifer (Dt. 21.1-9).

112. The extent of reverence for life explains the prohibition of eating the blood of animals, a prohibition which was still accepted by the early Christians (Acts 15.29). This reverence for life and blood also possibly explains the severe penalty attached to sexual intercourse during a woman's menstrual period (Lv. 20.18). Most important, the sense of the sanctity of life probably explains why the death penalty not only was authorized but made mandatory in cases of murder (Ex. 21.12-14; Nm. 35.31-33; Dt. 19.11-13). It is not clear that the death penalty was mandatory in other cases in which it was authorized, except for those offenses having a specifically religious character (Ex. 31.14; Lv. 20.2-5, 24.14-16; Dt. 13.7-18, 17.2-7) and the bearing of false witness in a capital case (Dt. 19.21), which obviously is tantamount to murder.

113. Christian tradition has not maintained that mandatory death penalties are morally obligatory. St. Augustine, for example, argued that it is just for public officials to condemn wrongdoers, but that it also is right for good people to intercede with officials on behalf of wrongdoers, seeking mercy for them if they repent and promise to amend their ways. Augustine argued his case by appealing to the teaching of Our Lord about love of enemies, forgiveness of trespasses, and the universality of sinfulness. Augustine appealed in his argument to Jesus' example in the case of the woman taken in adultery (Jn. 8.3-11). Jesus did not condone the sin nor deny that it deserved the penalty, but he prevented the carrying out of the judgment.[49]

114. Because the Israelites based their reverence for life upon its sacredness and held that God is Lord of all life, they did not consider the prohibition of killing applicable only to members of the tribes of Israel (Gn. 9.5-6; cf. Lv. 17.8-16, 24.16-22). However, discrimination was not absent, for example, from the prohibition of kidnapping in Deuteronomy. Moreover, the punishment of murder was executed by the murdered individual's kinsman, the avenger of blood (gō'ēl); the law regulated, but did not abolish, this existing system of private revenge (Nm. 35.9-34).[50] Under this system, an alien in Israel who committed murder certainly would be executed for the crime; nothing is said, however, about who should execute the murderer of an alien living in or passing through Israel.

115. The provisions with regard to homicide distinguished between premeditated murder and other cases of homicide. The gō'ēl previously had the right to execute a killer, even if the homicide was an accident. The law regulated, but did not altogether eliminate, this right. To escape vengeance, the individual who caused death accidentally was required to flee to a city of sanctuary and to remain there for some time; if the gō'ēl apprehended the killer at large, the execution could be carried out (Nm. 35.9-34; Dt. 19.4-10). Christian morality clearly would not sanction the execution of a person who caused another's death by sheer accident.[51]

116. The lex talionis (rule of proportionate compensation) was included in the law of ancient Israel:

> "Whoever takes the life of any human being shall be put to death; whoever takes the life of an animal shall make

> restitution of another animal. A life for a life! Anyone who inflicts an injury on his neighbor shall receive the same in return. Limb for limb, eye for eye, tooth for tooth! The same injury that a man gives another shall be inflicted on him in return. Whoever slays an animal shall make restitution, but whoever slays a man shall be put to death" (Lv. 24.17-21; cf. Ex. 21.23-25; Dt. 19.21).

This rule was common in ancient, near-Eastern codes; it was intended to regulate uncontrolled private revenge by applying a limit of proportionality to it.[52] The notion of compensation appropriate to commutative justice between private individuals is presupposed by this rule; this supposition is evidenced by the conjunction of cases involving restitution for killing of an animal with cases involving retribution for the injuring or killing of a human being.

117. Those who appeal to the rule of proportionate compensation to justify use of the death penalty ignore the full scope of this rule. No one is arguing that mutilation would be the appropriate punishment for a person who has maliciously injured another. Moreover, Our Lord proposed a different rule, "'Offer no resistance to injury'" (Mt. 5.39), to replace the "'commandment, "An eye for an eye, a tooth for a tooth"'" (Mt. 5.38). It has often been pointed out that St. Paul (Rm. 12.17 - 13.7) restates this very teaching of Jesus and follows it immediately with the justification of public authority we quoted above in which Paul includes the assertion: "It is not without purpose that the ruler carries the sword; he is God's servant, to inflict his avenging wrath upon the wrongdoer" (Rm. 13.4).

118. However, while this passage certainly asserts the legitimacy of public authority and its penal function, it need not be taken as asserting the legitimacy of use of the death penalty, despite reference to the sword; the sword is mentioned here as a symbol of the general authority of legitimate rulers.[53] Moreover, even if Jesus' teaching with respect to the rule of proportionate compensation is taken as applying only to private persons, not to public officials, it seems reasonable to think that Jesus' teaching would be relevant to the ancient law with respect to the death penalty for murder, since that penalty, although subject to legal regulation, <u>was executed by a private person</u>.

119. The legal processes provided for in Israel's law limited the imposition of the death penalty. A person who killed another and who escaped to a city of sanctuary could not be executed without a trial (Nm. 35.22-25); children were not wholly at the mercy of the head of the family but were protected by the requirement that the elders of the town hear the parental complaint (Dt. 21.18-21). However, executions could take place without any trial in the case of deliberate murder (Nm. 35.19). The cases narrated in the New Testament of the woman taken in adultery (Jn. 8.3-11), of the martyrdom of St. Stephen (Acts 6.8-7.60), and of Jesus' trial by the Sanhedrin (Mt. 26.57-68; Mk. 14.53-65; Lk. 22.52-71), suggest that in practice the legal processes fell short of the standards we could approve.

120. The law of ancient Israel generally assumed that an individual could be punished only for crimes for which he was personally responsible: "Fathers shall not be put to death for their children, nor children for their fathers; only for his own guilt shall a man be put to death" (Dt. 24.16). However, animals were sometimes treated as if they were responsible (Ex. 21.28-32; Lv. 20.15). A person guilty of accidental homicide could be legally executed (Nm. 35.26-28,32). And a family or a city as a whole could be destroyed under the penalty of the ban (herem), for certain serious religious crimes (Ex. 22.19-20; Lv. 20.2-5; Dt. 13.13-18; Jos. 7.10-26). Family solidarity in guilt seems to have been altogether eliminated only in post-exilic times.[54]

121. Legal process called for witnesses and excluded execution if there was only a single witness (Dt. 17.2-7, 19.15-21); this requirement held in cases of homicide which came to trial (Nm. 35.30). However, in the case of the unfortunate betrothed girl who was raped in town and not heard to cry out, the presumption was that she was guilty of consent (Dt. 22.23-24), just as the presumption was against a bride accused by her husband of not having been a virgin (Dt. 22.20-21).

122. Slaves had some rights; they were not wholly at the mercy of their masters. However, the institution of slavery is assumed in specific, discriminatory provisions of the law (Ex. 21.20-21,32). If all life was sacred, some lives were more likely to be avenged than others.

123. The authority of the head of a family was limited. The mother was given status equal in some respects to the father in as much as the

penalties imposed for striking and cursing parents applied to offenses against either parent, and both had a role in denouncing an incorrigible son. However, the use of the death penalty in such cases hardly seems justifiable, even given the restrictions imposed by the law.

124. The ancient law of Israel discriminated against women less than some other law codes. However, the provisions with respect to adultery and rape were much harsher for women than for men (Dt. 22.13-29). The institution of polygamy--and in post-exilic times of divorce (rejected by Jesus)--was a basis for this difference in the application of the death penalty to men and women.[55]

125. Many legal codes have imposed the death penalty much more freely than did the ancient law of Israel. Crimes involving property were not thus punished by death in Israel; the death penalty for pick-pockets was a modern development. Still, Christians could hardly approve a death penalty for many of the crimes thus punished in accord with the law. In particular, Christians always have taken the position that ecclesiastical authority should not use the death penalty; clerics or potential clerics directly involved in the imposition or execution of a secular death penalty, regarded as legitimate in itself, are nevertheless considered unfit to receive or to exercise Holy Orders.[56]

126. Vatican Council II, in its teaching on religious liberty, clearly precludes the use of secular penalties to enforce religious conformity:

> If, in view of peculiar circumstances obtaining among certain peoples, special legal recognition is given in the constitutional order of society to one religious body, it is at the same time imperative that the right of all citizens and religious bodies to religious freedom should be recognized and made effective in practice.
>
> Finally, government is to see to it that the equality of citizens before the law, which is itself an element of the common welfare, is never violated for religious reasons whether openly or covertly. Nor is there to be discrimination among citizens.
>
> It follows that a wrong is done when government imposes upon its people, by force or fear or other means, the profession or repudiation of any religion, or when it hinders men from joining or leaving a religious body.[57]

From this it follows that there can be no general moral justification for

the use of the death penalty by secular society in specifically religious offenses. If its use for such offenses in the law of ancient Israel was justified, it seems that the justification could only have been that ancient Israel was a very special society, subject in this respect to a special code of positive divine law.

127. Clearly, Christian moral judgment on the rightness of using the death penalty cannot be based directly and simply on Sacred Scripture.[58] The law of ancient Israel has had to be modified by Christians in very many respects, not to conform to humanistic philosophy and modern secular practices but to harmonize with specifically Christian beliefs and traditional Christian practices.

128. Moreover, in working against the legalization of abortion, Catholics and other religious believers cooperating in the struggle on behalf of innocent life have been forced to meditate upon and to ground their action in the sanctity of human life as such, since in debating with non-believers, they could not appeal to the teaching of faith that the killing of the innocent infringes upon the dominion of God, the Lord of life. In this fight, also, some who have participated by articulating jurisprudential arguments have been compelled to reconsider the proper role of law in respect to human life; they have tended to conclude that public authority has an unqualified duty to protect human life but has no right to destroy it. Thus in thinking and working to defend innocent life against legalized injustice, these persons have come to a more intense appreciation of the value of human life as such and they have also focused their attention upon the requirements of justice in criminal law.

129. The result is that in recent years certain Catholic thinkers who have shown their fidelity to the Church's teaching office and their dedication to the values of human life and just law have argued that the use of the death penalty is a morally unjustifiable attack upon human life. They deny to political society any special dominion over human life and they maintain that the good of just punishment cannot justify the means of killing a person. The testimony of these Catholics is significant. It cannot be dismissed as the reflection of secular opinion; these are persons accustomed to thinking with the Church and to acting in accord with their faith. They have taken a position against the legalization of abortion--a

position often unpopular among their acquaintances and associates--and have acted on this position with an energy borne of Christian commitment. Their reflective articulation of the fruit of this experience must be considered with respect.

130. The fact that the ancient law of Israel with respect to use of the death penalty already had to be modified considerably to harmonize with Christian beliefs and practices together with the fact that contemporary reflection rooted in specifically Christian belief and action has begun calling the received position on the justifiability of the death penalty into question lends some initial plausibility to the proposal that the received position might be mistaken. Perhaps the more ancient books of Sacred Scripture show that the use of the death penalty was authorized by God only in the sense that they show that other practices common in those days but now believed immoral by Christians were authorized by God. In other words, perhaps God merely permitted use of the death penalty as he permitted polygamy and slavery, until the deepening of faith and a growing sense of human personal dignity nurtured by faith would lead to replacement of these practices by alternatives consonant with the natural law and with the new law of Christ. The law of Christ does not replace natural law, but fulfills and elevates it by assuming it into union with the grace of the Holy Spirit, who teaches and guides Christians from within.

131. If God only permitted use of the death penalty, then it must be said that the belief that its use is morally justified is not strictly speaking part of Catholic tradition. Statements in the New Testament and in traditional teaching which can be taken to exclude the justifiability of the death penalty would have to be interpreted without the limitations and qualifications hitherto commonly introduced to permit justification of it, while elements of the New Testament and definitive Christian teaching which seem to justify use of the death penalty would have to be interpreted as only tolerating it. The question is: Is such a reinterpretation possible without infringing upon anything essential to Catholic faith?

132. This question cannot be answered without a very careful--intensive and extensive--study of all the teaching of the Church relevant to the morality of using the death penalty. Unfortunately, no such study has been made. Most Doctors of the Church and sound Catholic theologians who

have written on the subject seem to have defended the morality of using the death penalty.[59] However, the teaching office of the Church itself seems to have had little to say directly bearing upon the issue. Statements of Popes often have touched on the use of the death penalty; they have assumed it to be morally justified, accepting the received position without expressly considering whether that position is essential to Catholic teaching or not.

133. The single important exception seems to be a declaration of faith prescribed by Innocent III in 1210 for some who had accepted Waldensian heresies. This profession includes among points to be accepted: "We assert concerning the secular power that it can carry out the death penalty (iudicium sanguinis) without mortal sin, so long as it proceeds in imposing the penalty not from hatred but from judgment, not carelessly but prudently."[60] Only after very careful study could anyone judge with confidence whether the prescribing of this assertion was a definitive act of the Church's teaching authority.

134. One thing is certain. A matter of this kind cannot be settled solely by an examination of Sacred Scripture, with the help of contemporary scholarship, and reflection upon contemporary Catholic convictions. Whether or not the Catholic Church is irrevocably committed to the position that the use of the death penalty is morally justifiable--and to other positions included in her received moral teaching--can be determined only if the teaching of the Church through the ages is taken fully into account. Moreover, the judgment of the kind of assent due to any teaching received in the Church is not the function of individual conscience or private opinion based on theological scholarship. The teaching of the Church binds the consciences of Catholics and is the criterion against which theological opinions must be measured. Thus, the judgment of the kind of assent due to any received teaching must be made by the teaching office of the Church.

135. In this situation, we are not prepared to assert either that the use of the death penalty is morally wrong in principle or that it is certainly justified. The issue needs further study. As Catholic Bishops we are not prepared to insist upon the received position as one which every Catholic must accept with religious assent. But neither are we prepared to endorse a position opposite to the one which until now at least has been

taken for granted by the teaching office of the Church. We are not prepared to contradict most of the Doctors of the Church and sound Catholic theologians who have studied the question of the justifiability of the use of the death penalty.

136. If there is to be a development of Catholic teaching in the direction of excluding the moral justifiability of the death penalty, that development must not occur in virtue of acceptance of any of the unsound arguments against the death penalty which we considered and rejected above. Moreover, the development must not be allowed to lessen horror of the evil of serious crime nor to lessen appreciation for the lives and other goods lost by the victims of crime.

137. The rejection of the death penalty as immoral would not exclude as immoral the killing of a person or a group of persons engaged in an unprovoked attack when such killing is necessary for the immediate defense of any innocent person or persons. Defensive killing, whether authorized by public authority or not, whether defensive of oneself or of another person, if immediately defensive and necessary for defense, can be justified as indirect.[61] At least certain forms of strictly defensive warfare can reasonably be regarded as exercises of the right of self-defense against unprovoked attack.

138. The development--assuming it possible--of Catholic teaching to exclude the death penalty would occur partly in virtue of a more intense appreciation of the value of human life as such, a clearer recognition of the indivisible unity of human bodily life and human personal dignity, and a more refined grasp of the manner in which fundamental personal values render morally unacceptable any act which would directly attack them. Such a development would by no means indicate that other received Catholic teachings with respect to the value of human life might also be reversed.

139. For example, there is no room for the opinion that the direct killing of the innocent, such as direct abortion, can ever be justified. Twenty centuries of very clear and very firm Christian moral teaching condemn such killing of the innocent as the matter of grave sin. The contradictory opinion accepted by some today is altogether incompatible with Christian faith and morality. The acceptance of direct abortion cannot reflect a refinement of moral sensitivity to the value of life; the

rejection of the death penalty might possibly reflect such a refinement.

140. Moreover, inasmuch as Christians always have believed that the direct killing of the innocent is the matter of grave sin, anyone who knowingly and freely violated the precept forbidding it has always imperiled his own salvation. Our ancestors in faith throughout the centuries have lived their Christian lives in the light of this standard of conduct.

141. The Church is taught from age to age by the Spirit more perfectly to understand what God has revealed once and for all in Christ, but in every age the authorized teachers in the Church are sufficiently guided by the Spirit, so that they are able to instruct the entire People of God in all that they must believe and practice to follow Christ's way of salvation. If the official teaching of the Church could erroneously condemn as matter of grave sin some form of behavior which was actually morally acceptable, the Church's teaching office would be an obstacle rather than a help to salvation. But the Church's teaching office was established by Jesus himself, when he commissioned the Apostles to go and teach all nations (Mt. 28.18-20). Thus, the very clear and very firm position which the Church's teaching office has taken always and everywhere condemning the direct killing of the innocent as matter of grave sin cannot have been erroneous.

142. The firm belief of the Catholic Church that the direct killing of the innocent cannot be justified must be credited to the light of the Holy Spirit. This belief is the same today as it was yesterday, and it will remain the same tomorrow and always, for Jesus Christ does not change and his Spirit, sent forth to the Apostles on the first Pentecost, remains with the Church forever.

143. A development--assuming it possible--with respect to the moral justifiability of the use of the death penalty would be a different matter altogether. Here it would have to be said that the official teaching of the Church allowed the faithful to believe this manner of acting right and that it is now seen to be wrong. If such were the case, the Holy Spirit, enlightening the Church gradually, would have permitted Christians of earlier ages to do in good faith something objectively wrong, but the teaching office of the Church would not have led anyone mistakenly to suppose sinful something objectively justifiable.

144. Thus, a development with respect to the moral justifiability of the use of the death penalty would not imply that the teachers in the Church failed in times past in their mission of leading the faithful along Christ's way of salvation. The situation would be similar to the development of Christian moral teaching with respect to slavery. The fact that such development has occurred does not imply that modern Christians are morally superior to our ancestors in faith. The Spirit gives different gifts to Christians of each age, so that they might use the special opportunities of each age to redeem it (cf. Eph. 5.16).

Conclusions and Recommendations

145. As we have stated, we are not prepared to say that the received position that the death penalty is morally justifiable is a position every Catholic must accept with a religious assent of soul. In other words, we concede the theoretical possibility that the use of the death penalty is in principle morally unjustifiable and that Catholic teaching might eventually develop in such a way as to make clear that this is the case. This conclusion of the preceding argument, although modest, is not without practical importance.

146. Conceding the theoretical possibility that use of the death penalty might be morally unjustifiable, we cannot approve the reinstatement of the death penalty in the United States unless we are morally certain that if the use of the death penalty is not intrinsically evil, its use in the United States at this present time is obligatory. If there is no cogent argument that there is a strict obligation to use the death penalty, then it should not be reinstated.

147. If the very imposition of punishment achieved directly and in itself no important human good, then the imposing of a punishment would be an evil done for the sake of the ulterior goods to which it might lead--such as the protection of society and the deterrence of potential criminals. However, as we have explained, the imposing of punishment is not merely a means to an ulterior end. The evil suffered by one who is punished is good for society, not as satisfying a desire for vengeance, but as promoting the good of justice: unfair advantage taken is balanced by fair disadvantage suffered.

148. Must the death penalty be imposed for the sake of justice itself? In other words, does the retributive aspect which is essential to any just punishment ever demand that a criminal suffer death as the only deprivation proportionate to the unfair advantage he has taken in committing a crime?

149. It is clear that the more grievous and harmful to social order a crime is, the more the commission of that crime expresses a willingness on the part of the criminal to take unfair advantage. Thus, when the retributive aspect of punishment alone is considered, a greater disadvantage is justly imposed as punishment for a more grievous and harmful crime, and a lesser disadvantage is just punishment for a less serious offense. A criminal code which would punish equally severely and most severely a variety of crimes ranging from petty theft to first-degree murder obviously would be unjust.

150. What is not clear is that the restoration of the order of justice essential to punishment demands that the deprivation of life itself be imposed as human punishment for any crime.

151. As we explained above, it is not sound to argue that only the penalty of death is adequate in cases of murder because it alone balances the wickedness of killing. Just punishment is not a matter of repaying evil with evil; the rule of proportionate compensation appropriate to commutative justice between private parties is not suited to the determination of criminal penalties imposed by public authority.

152. As we also explained above, a person who attempts murder takes the same unfair advantage as one who succeeds. It is this unfair advantage which the punishment, as retribution, must balance. But no one is arguing that every attempt at murder should be punished with death.

153. What is more, the extent to which Christian teaching and practice has sanctioned the commutation of sentences and the pardoning of criminals condemned to death suggests that justice does not absolutely demand the death penalty for any crime. The abolition of the death penalty in several of the United States and in many foreign nations has been opposed by few Catholics or other Christians as gravely unjust, but abolition would be gravely unjust if the order of justice essential to punishment demanded that the death penalty be imposed for the most serious crimes.

154. Moreover, while the good of society might dictate that a less severe punishment be imposed than fairness alone would indicate, no other factor can justify the imposition as punishment of any deprivation more severe than that indicated by strict fairness.

155. Still, it might be argued that although fairness does not absolutely demand use of the death penalty, fairness calls for use of this penalty but other considerations might justify not using it. Such considerations might include the need to promote an attitude of greater respect for human life and the value of encouraging all members of society to accept public authority as their kindly friend.

156. If fairness does not demand use of the death penalty--that is, if the retributive aspect of punishment does not imply a strict obligation to use the death penalty--then there can be no obligation to use it unless it is absolutely necessary for some other purpose of punishment, such as deterrence of potential criminals. However, as we stated in considering unsound arguments against the justifiability of using the death penalty, many who oppose use of it argue that its use does not deter potential criminals more effectively than would less severe penalties. Some proponents of the use of the death penalty admit that there is no solid evidence that it is a more effective deterrent than imprisonment.

157. We do not judge the merits of the arguments concerning the facts. We know of no solid evidence that the death penalty is necessary to protect society or to deter potential criminals, but we do not assert that there can be no such evidence. Therefore, our conclusion is conditional.

158. <u>If the use of the death penalty is not shown to be absolutely necessary to protect society and to deter potential criminals, then the reinstatement of this penalty in the United States today is morally unjustified.</u>[62] This does not mean that if the death penalty were shown to be necessary, then its use certainly would be justified. It could still be the case that the use of the death penalty is in principle unjustifiable.

159. One of the arguments which seemed cogent to some members of the United States Supreme Court in <u>Furman v. Georgia</u> was that the death penalty has not been used fairly. The contention is that it has been imposed

arbitrarily and on the basis of unacceptable grounds of discrimination. Since the Court's decision, many opposed to the death penalty have argued that its use cannot be rendered fair, because the public in general and those in particular responsible for conducting the process of criminal justice--including members of juries--will never accept a rational and non-discriminatory use of the death penalty.

160. Again, we do not judge the merits of the argument with respect to the facts. However, we assert a conditional conclusion: <u>If the death penalty cannot be imposed and executed fairly, then it must be abolished</u>. Again, this conclusion does not mean that if the death penalty can be administered fairly, its use is justified.

161. Someone might object to our conclusions that by the criteria we are using, the application of penalties in general would be unjustifiable. No particular penalty, they would argue, can be conclusively shown to be absolutely necessary and no criminal process can be carried out with perfect fairness.

162. If the premises of this objection are true, still the conclusion does not follow. Use of the death penalty must meet special criteria, because there is at least a theoretical possibility that its use is unjustifiable in principle. In the case of other penalties--such as a moderate fine or a reasonable term of imprisonment under decent conditions--use of the punishment is justified if it is proportionate to the crime, provided that the imposition of the penalty will <u>probably</u> be conducive to the common good and provided that the criminal process be carried out as fairly as possible, considering that it is carried out by fallible and imperfect men.

163. If the death penalty is abolished, the distinction between deranged and immature behavior on the one hand and criminal acts on the other must be maintained. Punishment and treatment must not be confused. A true reform in the processes of criminal justice will not eliminate this distinction, but rather will take it more carefully and more systematically into account. Justice demands that a serious attempt be made to determine whether a person who has behaved in violation of the law acted deliberately and freely--with full criminal responsibility--with substantially mitigated responsibility, or with no responsibility at all.

164. Those convicted of crimes and found to have acted with full criminal responsibility should be sentenced to a punishment with a certain minimum not subject to commutation proportioned to the seriousness of the crime. Even a repentant criminal ought to be punished severely for a grave crime if he committed it with full criminal responsibility. This does not necessarily mean that the most serious crimes deserve indefinite punishment. However, the question of terms of imprisonment is too complex to consider here.

165. Those who have behaved in violation of criminal law but without criminal responsibility should be treated and cared for in a manner which will benefit them; they should be guarded and confined only to the extent necessary for their own protection and the safety of others. Those who have violated criminal law with substantially diminished responsibility should be subjected to some punishment; however, society should treat such persons with compassion and should seek their reformation and rehabilitation.

166. Some who defend use of the death penalty argue that even if abolition of it does not have any demonstrable effect upon the rate of crimes punishable by death, still a society's refusal to use this penalty might lead to deterioration of cultural attitudes generally with respect to the sanctity of life and of the body. Assaults, for example, might increase. Perhaps even a higher rate of accidents causing personal injury would occur.

167. This argument is weak and highly speculative, but it does suggest something important. Whether or not the death penalty is abolished, our legal system should communicate more effectively than it now does the sanctity of innocent life and the inviolability of the human body.

168. One way to communicate these values would be to accept the personhood of the unborn and to give their lives the protection they deserve. Another way would be to punish more severely than at present attempted murder and other crimes which put the lives of innocent persons in serious danger. Moreover, forcible rape and other sexual assaults must be energetically investigated and prosecuted, with all possible consideration for the innocent victims of such crimes.

169. If it is impossible to determine beyond reasonable doubt that a person doing violence against another will not behave in a similar way again, then he must not be set free, even if he behaved with little or no criminal responsibility.

170. Complaints of violence against persons should be resolved whenever possible by effective investigation; when crimes have been committed, those responsible should be uniformly indicted and prosecuted. A reasonable answer to legitimate public concern about violent crime would be the prosecution and conviction of more criminals.

171. Moreover, if the processes of criminal justice also are expedited, the prospect of speedy and sure punishment is more likely to deter potential criminals than is the threat of a very severe punishment--such as the death penalty--which is unlikely to be regularly imposed and speedily executed.

172. Every effort must be made to eliminate the unfairness and discrimination which is alleged to have existed in the use of the death penalty. Unfairness and discrimination can be detected at various points in the whole process of criminal justice. We suggested above that steps should be taken to assure that offices of public defenders be evenly matched with offices of public prosecutors, and that the evidence and information gathered by police be made available to defending attorneys at the same time and on the same basis as to prosecuting attorneys.

173. For many people, the availability of the death penalty, even if it is seldom used, is a symbol of the majesty of the law. We believe that the majesty of the law can be better expressed in other ways. We do not oppose symbols, but we prefer symbols which help to accomplish what they signify.

174. The majesty of the law primarily consists in the reasonableness of its process and the impartiality of its application.

175. The impartiality of the law would be shown more effectively if all actions which substantially violate the fair system of cooperation which is essential to society were regarded as crimes and punished in proportion to their seriousness. Certain kinds of unjust acts are likely to be chosen by persons who are poor and lacking in social power; these are actions such as robbery which often involve violence against the

persons of others and which are aimed at immediate material advantage. It is not unjust that such acts be held criminal, even though very few wealthy and influential persons are likely to choose to commit them.

176. However, other kinds of unjust acts are likely to be chosen by persons who are well to do and who enjoy high social status. A few specific examples of such acts are fraudulent advertizing, abuse of public office, negligence in fulfilling professional responsibilities, tax evasion, refusal to honor guarantees, and publication of libelous statements. Many such unjust acts indulged in by wealthy and influential persons are not now mentioned in any criminal code. Many unjust acts, despite the fact that they violate the fair system of cooperation essential to society just as seriously and obviously as do any acts now regarded as crimes, are consigned to civil law or to administrative regulation.

177. Clearly, a system of law is not impartial when it regards as crimes and controls at public expense the offenses which the poor and weak are likely to commit but regards as matters for civil law or administrative regulation and controls at the expense of those wronged--or hardly controls at all--the offenses which the wealthy and influential are likely to commit. We believe that nothing would better express the majesty of the law than greater impartiality in regarding as crimes the unjust acts of all classes of citizens.

178. Criminal processes also could be conducted in a more rational manner. Respect of status and sympathy for certain types of criminals too often mitigates the judgment which would be dictated by purely rational considerations. For example, when well to do and influential persons are found guilty of crimes, they often are dealt with very gently by the processes of criminal justice. Such persons, if convicted of a crime, often suffer a loss of reputation and status which is a very serious matter for them and for their families. Hence there is a tendency to say that the conviction itself is sufficient punishment.

179. The justice of this view is questionable. A poor and weak person has very little to lose; if he loses his liberty by being sent to prison, he loses the greater part of the goods he enjoys. A wealthy and powerful person has a great deal to lose, but even after the loss of reputation and status, he remains free to enjoy many of the goods he previously

had. Just punishment should not measure the extent of loss to the criminal, but should rather balance with a proportionate disadvantage the advantage he gained by taking more than his fair share of freedom to do as one pleases.

180. It is not clear that loss of status and reputation suffered by a wealthy and influential person convicted of a crime ought to be taken into account in assessing a fair punishment. This practice seems to presuppose that a member of society having greater social and economic advantages deserves them. The assumption is questionable. Greater social and economic advantages often reflect nothing more than greater natural gifts and a happy accident of birth. Sometimes these advantages have been achieved through unjust actions which are crimes or which should be regarded as crimes. In the latter case, just punishment certainly must deprive a criminal of something more than what he has gained by his unjust acts.

181. Persons tempted to commit crimes of violence are unlikely to respect a system of criminal law which has no better symbol of its majesty than its ability to put criminals to death. They would more likely respect a system of criminal law which expressed its majesty by greater impartiality and reasonableness.

182. We believe that an improved system of criminal justice--one fair and speedy in its processes and ready to punish as crimes all actions which substantially violate the fair order of cooperation essential to society--would do much toward achieving the objectives sought both by the proponents and by the opponents of the use of the death penalty.

183. Such a system would contribute to the objectives sought by opponents of the use of the death penalty by making the system of criminal justice more conducive to social justice and to the common good. At the same time, it would contribute to the objectives sought by proponents of the use of the death penalty by helping reduce crime. It would do this by removing the occasions of many crimes committed with mitigated responsibility by poor and weak persons.

184. We do not believe that true crime is caused by social factors beyond a person's control. Nevertheless, we do believe that if violent crimes, including murder, are more common in the lower socio-economic

strata of our society, this state of affairs is not to be explained by assuming an uneven distribution between different segments of society of moral uprightness and wickedness.

185. Occasions for committing crimes of violence are presented to poor and weak persons by their very disadvantaged status. In a more just society, persons now poor and weak would have fewer temptations to commit crimes of violence, because they would more fairly share in the gifts with which the good God has endowed this land and in the fruits with which we trust his providence will continue to reward our cooperative effort to establish justice, to insure domestic tranquility, and to promote the general welfare.

1. Hugo A. Bedau, "General Introduction," in Hugo A. Bedau, ed., The Death Penalty in America (Chicago: 1964), pp. 1-7. Picking pockets ceased to be a capital crime in 1810 (p. 7). Because of the difficulty in determining whether offenses are to be counted as of one or of diverse types, it is hard to know how many crimes were punishable by death around 1776 in England, but there were a great many. See Arthur Koestler, Reflections on Hanging (London: 1956), pp. 13-27, and the works he cites.

2. United Nations, Department of Economic and Social Affairs, Capital Punishment (New York: 1962), pp. 28-32, considers the abolition movement. See also Marc Ancel, "The Problem of the Death Penalty," in Thorsten Sellin, ed., Capital Punishment (New York, Evanston, and London: 1967), pp. 4-6. These studies show how the abolition movement developed and underwent various reverses; in many cases, a jurisdiction which once abolished the death penalty currently uses it, having reinstated it.

3. Bedau, op. cit., pp. 5-8; Hugo A. Bedau, "General Introduction," in James A. McCafferty, ed., Capital Punishment (Chicago and New York: 1972), pp. 27-29.

4. United Nations, op. cit., pp. 7-8; Clarence H. Patrick, "The Status of Capital Punishment: a World Perspective," Journal of Criminal Law, Criminology, and Police Science, 56 (1965), pp. 397-411.

5. The United States Supreme Court ruled on the death penalty in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972). Justices Douglas, Brennan, Stewart, White and Marshall formed the majority and wrote separate concurring opinions; Mr. Chief Justice Burger and Justices Blackmun, Rehnquist and Powell dissented and subscribed to one another's dissenting opinions. References hereafter to this case will be by the name of the member of the Court, followed by the page numbers in the U.S. and S.Ct. reports. Burger, 404, 2811, and Powell, 438, 2828, provide references to the Canadian and British statutes. The British statute was at first temporary and was made permanent in 1969; the death penalty is retained for treason, piracy, and dockyards arson. Canada's statute is not yet permanent; the death penalty is retained for treason, piracy, and murder of a police or corrections officer. However, neither government has carried out an execution since their restrictive laws were passed.

6. Marshall, 372, 2794.

7. People v. Anderson, 6 Cal. 3d 628, 493 P. 2d 880, 100 Cal.Rptr. 152 (1972); cert. den., 406 U.S. 958, 92 S.Ct. 2060 (1972). See New York Times, Feb. 18, 1972, p. 1.

8. Brennan, 298, 2757.

9. Bedau, "Offenses Punishable by Death," in Bedau, ed., op. cit., pp. 39-52.

10. Marshall, 364-365, 2790-2791, refers to National Prisoner Statistics, No. 45, Capital Punishment: 1930-1968, pp. 7 and 28.

11. Brennan, 291-293, 2753-2754, refers to National Prisoner Statistics, No. 46, Capital Punishment: 1930-1970, p. 8.

12. Powell, 434, 2826-2827.

13. Brennan, 291-293, 2753-2754, refers to the work mentioned in note 11 above, pp. 9 and 14; National Prisoner Statistics, No. 42, Executions: 1930-1967, p. 13; to the work mentioned in note 10 above, p. 12.

14. Burger, 386, 2802-2803; Powell, 435, 2827. At oral argument, counsel for petitioner estimated the ratio as 12-13:1.

15. Only after the last execution was this procedure ruled out by a U.S. Supreme Court decision: Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968).

16. U.S. v. Jackson, 390 U.S. 570 (1968); Funicello v. New Jersey, 403 U.S. 948 (1971); State v. Funicello, 60 N.J. 60, 286 A.2d 55 (1972).

17. Thorsten Sellin, "The Inevitable End of Capital Punishment," in Sellin, ed., op. cit., pp. 250-251.

18. Calm Inc., Newsletter, 6 (Oct., 1972), p. 4.

19. The reference and manner of referring to this case herein are stated at the beginning of note 5 above.

20. The first case disposed of by reference to Furman was Stewart v. Massachusetts, 408 U.S. 845, 92 S.Ct. 2845 (1972); over 100 other cases were disposed of in the same way.

21. White, 313, 2764; Stewart, 309, 2762. Some of the language of these opinions could be interpreted as excluding the death penalty altogether, but if this was the intent of the two Justices, it is incomprehensible why the majority did not join in a single opinion, thus saving the States and Congress the effort of trying to discover under what conditions legislation imposing the death penalty might meet the Court's standards.

22. George Moneyhun, "Back-in-favor death penalty under seige," Christian Science Monitor (Midwest Edition), June 17, 1974, p. 1; W. Dale Nelson, "Over 100 wait on death row," an Associated Press Dispatch, published in The Leader-Post, Regina, Canada, July 6, 1974, p. 13.

23. Committee on the Judiciary, U. S. Senate, "To Establish Rational Criteria for the Imposition of Capital Punishment," Report No. 93-721, March 1, 1974, p. 23, summarizes information from 15 States which had adopted new laws; 15 others responding to inquiries had not.

24. Ibid., pp. 4-21, 52-60; New York Times, March 13, 1974, p. 1.

25. See reports cited in note 22 above; Moneyhun states that the cases of four men are being appealed, Nelson that the cases of five men are being appealed. The latter also states that North Carolina and South Carolina maintained the death penalty by court rulings stating that Furman merely invalidated provisions of existing statutes permitting jury discretion; one man has been sentenced to death in South Carolina and 42 in North Carolina, since the Furman decision.

26. These data are from a Gallup Poll, reported in New York Times, November 23, 1972, p. 18. The Senate Judiciary Committee Report cited in note 23 above includes (p. 14) a summary of Gallup Poll results since 1953, which indicates that opposition to the death penalty was in the plurality in the mid-60s, but it came back to favor. The summary also includes results of three Harris Survey polls--"Do you believe in capital punishment (death penalty) or are you opposed to it?"--as follows: 1969, 48 percent favored, 38 percent opposed, 13 percent undecided; 1970, 47 percent favored, 42 percent opposed, 11 percent undecided; 1973, 59 percent favored, 31 percent opposed, 10 percent undecided.

27. Marshall, 369, 2793; Burger, 385, 2801-2802; Powell, 433-443. The last, who considers the contention that prevailing standards of human decency require abolition of the death penalty at greatest length, finally asserts that even if true, this contention would be only peripheral. Perhaps it is significant that none of the Justices mentions statements of churches and other religious bodies as indices of public conscience.

28. National Council of Churches of Christ in the U.S.A., "Abolition of the Death Penalty," adopted by the General Board, 103 for, 0 against, 0 abstentions, September 13, 1968. The statement expresses unqualified opposition to the death penalty, and says that in taking this position the National Council is in substantial agreement with many of its members already on record against the death penalty. A list of reasons for opposition is given, the first of which is: "The belief in the worth of human life and the dignity of human personality as gifts of God." Statements of various religious bodies opposing capital punishment are gathered by Society of Friends, Conference on Crime and the Treatment of Offenders, Continuation Committee, What Do the Churches Say about Capital Punishment? (Philadelphia: 1961).

29. Thomas G. Dailey, S.T.D., "A Matter of Life and Death," Word, NCCW, April, 1967, p. 5.

30. Indiana Catholic Conference, January, 1972; Michigan Catholic Conference, Focus Newsletter, April 26, 1973; Pennsylvania Catholic Conference; Senate of Priests, Archdiocese of St. Paul and Minneapolis, April 18, 1974; Office of Social Ministry of the Catholic Diocese of Richmond, "Capital Punishment in Virginia: a Position Paper"; the National Catholic Conference for Interracial Justice and the National Coalation of American Nuns filed an amicus curiae brief in Aikens v. California, No. 68-5027, which was argued with Furman but dismissed (406 U.S. 813, 92 S.Ct. 1931) after the California State Supreme Court decision cited in note 7 above settled that case.

31. Roe v. Wade, U.S. S.Ct. No. 70-18 (1973); Doe v. Bolton, U.S. S.Ct. No. 70-40 (1973). See Dennis J. Horan, John D. Gorby, and Thomas W. Hilgers, M.D., "Abortion and the Supreme Court: Death Becomes a Way of Life," in Abortion and Social Justice, Thomas W. Hilgers, M.D. and Dennis J. Horan, J.D., eds. (New York: 1972), pp. 301-328. Professor Robert Byrn of Fordham University Law School unsuccessfully attempted to obtain consideration from the U.S. Supreme Court of the claims of unborn infants of whom he had been appointed legal guardian, although the unborn have been accepted as parties to suits involving practically every other right they might have. The Court's preference for regarding the issue as one between women desiring abortions and state officials seeking to enforce

laws forbidding abortion rather than as one between unborn infants and persons wishing to kill them evidenced bias and prejudiced the issue. Horan, Gorby, and Hilgers point out (pp. 317-318) the failure of the Court to face the issue; they also show that the Court erroneously treats the question of the beginning of life as if there were some doubt about it--which there is not. The Court held in Roe v. Wade (Slip opinion, p. 44): "We need not resolve the difficult question when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." The Court then proceeded to hold that the State of Texas was wrong in attempting to protect the lives of the unborn with its abortion statute because, the Court held, its legitimate interest in protecting the "potentiality of human life" did not become "compelling" until "viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb" (Slip opinion, pp. 47-48). However, even then the Court excludes (p. 48) States from forbidding abortion if the mother's life or health is at stake; thus, in fact, the Court takes live birth as the first possible moment at which the right to life obtains. How does the Court move from its modest refusal to speculate about when life begins to its definite conclusion a few pages later? By stating various positions on the issue about which it refuses to speculate, the first of which is: "There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics. [note omitted] It appears to be the predominant, though not the unanimous attitude of the Jewish faith. [note omitted] It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained; organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family [note omitted]" (Slip opinion, pp. 44-45). In other words, if anyone favors abortion, the supposition is that such a person denies that life begins before live birth, and the Court, favoring abortion, established the position of those with whom it agreed and therefore struck down the statutes of Texas and other States which had attempted

to protect the unborn. The Court also dates viability at 28 or 24 weeks and defines viability as the potentiality to live outside the mother's womb, "albeit with artificial aid" (Slip Opinion, p. 45). A study in New York City, however (Carl L. Erhardt, et al., "Influence of Weight and Gestation on Perinatal and Neonatal Mortality by Ethnic Group," American Journal of Public Health, 54 [1964], pp. 1841-1855), showed that although deaths within the first twenty-eight days following live births were more frequent with shortened lengths of gestation, 45 percent of white and 58 percent of non-white babies born during the 26-27 weeks survived the first 28 days, at least, and more than 20 percent of those born alive under 20 weeks survived at least the first 28 days after live birth. But these infants were not aborted on purpose. The Court, by its decision in Roe v. Wade, has established that similar infants may be removed by surgery from their mother's wombs, for no reason other than the choice of the woman (perhaps made reluctantly and under great pressure); having been removed, they are born alive; by the Fourteenth Amendment they are citizens of the United States, and therefore are also persons--until the Court decides that such citizens are not persons because they lack the possibility of "meaningful life"; but they die and are disposed of with the rest of the tissue which is removed in surgery. Yet, sometimes, they are not permitted or encouraged to die at once, but are kept alive for some time, so that the vital functioning of these individuals, about whose life the Court did not feel competent to speculate, can be studied, and various substances useful for treating others extracted. Of course, it would be wrong to let them go to waste.

32. We considered questions related to the teaching office of Bishops in our collective pastoral, The Church in Our Day, approved November, 1967 (Washington, D.C.: 1968), pp. 61-73; we have made many statements concerning abortion, for example that in our collective pastoral, Human Life in Our Day, November 15, 1968, pp. 27-28.

33. Pius XII, "Teaching Authority of the Church," The Catholic Mind, 53 (1955), pp. 315-316; AAS 46 (1954) 671-672.

34. Brennan, 303-305, 2759-2760.

35. Stewart, 307-309, 2761-2762.

36. Powell, 452-454, 2835-2836.

37. Pius XII, "International Penal Law," The Catholic Mind, 52 (1954), p. 117; AAS 45 (1953) 742-743. Also see Pius XII, "Crime and Punishment," The Catholic Mind, 53 (1955), pp. 364-384; AAS 47 (1955) 60-85.

38. St. Thomas Aquinas, Summa theologiae, 1-2, question 87; see also parallel passages in his other works.

39. See John Finnis, "The Restoration of Retribution," Analysis, 32 (1972), pp. 131-135; Franklin E. Zimring and Gordon J. Hawkins, Deterrence: the Legal Threat in Crime Control (Chicago and London: 1973), pp. 32-35, and the works cited by them which show that theories of punishment somewhat similar to that which we articulate are well known among those concerned with the theory of punishment.

40. John XXIII, "Pacem in terris, Part II," The Pope Speaks, 9 (1964), pp. 22-29; AAS 54 (1963) 269-279.

41. Hugo A. Bedau, The Case against the Death Penalty, a pamphlet published by the American Civil Liberties Union (New York: January, 1973), p. 2. The same organization's statement, "Policy Statement of the American Civil Liberties Union on State Laws Prohibiting Abortion," was issued March 25, 1968; it marked a turning-point for the pro-abortion movement by outlining the position that the anti-abortion statutes were unconstitutional which the U.S. Supreme Court subsequently adopted and enacted into law.

42. This practice is condemned by Vatican II: "Any act of war aimed indiscriminately at the destruction of entire cities or of extensive areas along with their population is a crime against God and man himself. It merits unequivocal and unhesitating condemnation" (Gaudium et spes, 80; The Documents of Vatican II, Walter M. Abbott, S.J., ed., p. 294). The theological justification of the Council's condemnation already was articulated by an American theologian while World War II was still in progress: John C. Ford, S.J., "The Morality of Obliteration Bombing," Theological Studies, 5 (1944), pp. 261-309.

43. The question of the deterrent effect of the death penalty is considered in several of the opinions in Furman. Marshall, 345-355, 2780-2785, provides an extensive and useful survey of the literature; Burger, 395-396, 2807, says the debate is a "stalemate" or an "unresolved factual question."

Powell, 446, 2841, note 63, quotes the Report of the President's Commission on Law Enforcement and the Administration of Justice, The Challenge of Crime in a Free Society (1967), stating that it is "impossible to say with certainty whether capital punishment significantly reduces the incidence of heinous crimes"; Justice Powell, who had been a member of this Commission, still agreed with the views expressed by it. Many of the important studies are gathered in Bedau, ed., op. cit., pp. 258-332, and in Sellin, ed., op. cit., pp. 135-186. A thorough study of the deterrent question not mentioned in literature already cited is Ezzat Abdel Fattah, A Study of the Deterrent Effect of Capital Punishment with Special Reference to the Canadian Situation, Research Centre Report 2, Department of the Solicitor General (Ottawa: 1972). The U.S. Senate Judiciary Committee Report cited in note 23 above was favorable to the bill retaining the death penalty; it considered the question of deterrence and concluded with respect to the evidence: "In short, the available data on this question is [sic] at best inconclusive" (p. 9). But the Report proceeds to argue from intuition and the experience of persons concerned with law and its enforcement that the death penalty is a necessary deterrent (pp. 9-11); Senator Philip Hart, in an Appendix to the Committee Report, rebutted this argument (pp. 46-50). Zimring and Hawkins, in their work cited in note 39 above, pp. 23-35, consider the type of arguments used by the Senate Committee (not specifically with respect to the death penalty, but in general to the problem of determining the deterrent effect of criminal penalties of various sorts) and show why such arguments tend to be fallacious. Thus, it seems that while one might suppose, before attempting to prove the point, that the death penalty would very likely be a much more effective deterrent than any alternative punishment would be, still the supposition has not been shown correct. Perhaps the situation is somewhat like that of the dangers of smoking cigarettes; the fact that one might die if one behaves in a certain way does not stop one from behaving in that way if the prospect of death is remote and unlikely. The chances of being executed for a crime punishable by death were so low--even for a person committing such a crime in the 1950s--that the prospect of death did not become close and lively. We do not suggest, however, that death and other penalties do not deter; we all know by experience that they do.

44. See Pius XI, "Casti connubii," AAS 22 (1930) 564; Pius XII, "Iis interfuerunt Conventui primo internationali Histopathologia Systematis nervorum, 13, IX, 1952," AAS 44 (1952) 784-788.

45. The Vulgate reads "interficientur ambo de medio populi sui"; the older Catholic exegetes who relied on the Vulgate assumed that this meant a death penalty, but they adopted the common theological position that such intercourse at least was not a mortal sin, and concluded that this law was a divine positive law. See, for example, Cornelius a Lapide, Commentaria in Scripturam Sacram, t. 2, In Pentateuchum Mosis (Paris: 1866), p. 131, with references to Thomas Sanchez and other theologians.

46. References to commentary in The Jerome Biblical Commentary, Raymond E. Brown, S.S., Joseph A. Fitzmyer, S.J., and Roland E. Murphy, O.Carm., eds. (Englewood Cliffs, N.J.: 1968), will be made herein by giving the particular author's name, followed by JBC, followed by the number of the chapter and section separated by a colon, as in the work itself. John E. Huesman, S.J., JBC, 3:56.

47. Eugene H. Maly, JBC, 2:43.

48. Frederick L. Moriarty, S.J., JBC, 5:60.

49. St. Augustine, Letters, vol. 3, trans. Sr. Wilfrid Parsons, S.N.D. (New York: 1953), pp. 281-303, letter 153.

50. Moriarty, JBC, 5:60; Joseph Blenkinsopp, JBC, 6:46.

51. One example given (Dt. 19:4-10) of the non-premeditated homicide in question is a case in which an ax-head, being used to cut down a tree, flies off the handle, strikes and kills someone.

52. Huesman, JBC, 3:57; Roland J. Faley, T.O.R., JBC, 4:49; Blenkinsopp, JBC, 6:47.

53. Joseph A. Fitzmyer, S.J., JBC, 52:123. Pius XII, while he insists on the legitimacy of vindicative punishment imposed by public authority, states ("Crime and Punishment," The Catholic Mind, 53 [1955], p. 381; AAS 47 [1955] 81): ". . .the words of the sources and of the living teaching power do not refer to the specific content of the individual juridical prescriptions or rules of action (cf. particularly, Rm. 13.4), but rather to the essential foundation itself of penal power and of its immanent finality." Nowhere in this discourse nor in the one he gave the previous year on penal law, cited in note 37 above--does Pope Pius mention

the death penalty; in the passage quoted here, he seems to insist upon the relevance of Rm. 13.4 to his point precisely by not treating the passage as authorization of the death penalty. This fact is understandable, for Pope Pius in this 1955 address was speaking to Italian jurists. Italy had abolished the death penalty in 1889, reintroduced it in 1928, again abolished it in 1944 (United Nations, work cited in note 2 above, p. 31).

54. Huesman, JBC, 3:60; Faley, JBC, 4:40.

55. See E. Schillebeeckx, O.P., Marriage: Human Reality and Saving Mystery, trans. N. D. Smith (New York: 1965), pp. 89-94, 142-155. The Council of Trent specifically condemned polygamy (Denz. 972; D.S. 1802).

56. CIC c.984.6-7; these two irregularities are called "ex defectu lenitatis"; St. Thomas Aquinas, Summa theologiae, 2-2, question 64, article 4, argues that clerics should not serve as executioners since they are ordained to serve in the commemoration of the passion of Christ, who did not strike back, and since the service of the New Law, which does not prescribe penalties of mutilation and death, is their assigned work.

57. Dignitatis humanae, 6; The Documents of Vatican II, Abbott, ed., p. 685.

58. Christians should not suppose, however, that the Jews of the Current Era carry out or have carried out the ancient law without development; procedural requirements made the legal imposition of a death penalty more and more difficult until it became almost impossible; see "Capital Punishment," Encyclopaedia Judaica, vol. 5 (Jerusalem: 1971), 142-147.

59. Examples are St. Augustine, City of God, I, 21; XIX, 6; St. Thomas Aquinas, Summa theologiae, 2-2, question 64, article 2; Summa contra gentiles, III, 146; Collegii Salmanticensis, Cursus theologiae moralis, vol. 3 (Venice: 1728), tr. 3, cap. 2, pp. 157-158. Augustine thinks the judge would show greater refinement if he shrank from involvement (XIX, 6, at the end). Thomas obviously has real opponents who argue from New Testament texts; these might be, or they might only include, some who held heretical views; Thomas does not say who they are. The Salamancans mention only one Doctor who holds an unusual position--Scotus, I, dist. 15, q. 3, sec. 2, who treats all the Old Testament legislation on the death penalty as if it were divine positive law. Scotus' position has the effect of restricting the death penalty to the crimes mentioned in the

Old Testament for which it was prescribed. These did not include offenses against property.

60. "De potestate saeculari asserimus, quod sine peccato mortali potest iudicium sanguinis exercere, dummodo ad inferendam vindictam non odio, sed iudicio, non incaute, sed consulte procedat" (Denz. 425, D.S. 795). In 1520 Leo X condemned a proposition of Martin Luther, "33. Haereticos comburi est contra voluntatem Spiritus" (Denz. 773, D.S. 1483). However, the alternative censures on the set of propositions included some very weak ones; also, though Leo's condemnation certainly implies the justifiability of the death penalty in a specific instance, the teaching of Vatican II, cited in note 57 above, excludes it in just that instance. Historical study might reveal that the force of the proposition prescribed by Innocent was no greater than Leo's condemnation of Luther's proposition, and that the content of the former amounted to that of the latter. Recent Popes mention the death penalty when condemning abortion or insisting on the limits of political authority over the person (see the places cited in note 44 above as examples), but these mentions only assume the justifiability of the death penalty, while insisting upon what is unquestioned: the inviolability of the innocent and the inapplicability of arguments justifying punishment to them, whether those arguments are ever sound or not.

61. St. Thomas Aquinas, Summa theologiae, 2-2, question 64, article 7; the theory is developed by Germain G. Grisez, "Toward a Consistent Natural-Law Ethics of Killing," The American Journal of Jurisprudence, 15 (1970), pp. 64-96.

62. Sound Catholic moralists have required that the death penalty be used only when necessary and when there is no adequate alternative; see, for example, Henry Davis, S.J., Moral and Pastoral Theology, vol. 2 (London: 1943), p. 151. Granted that theoretically the use of the death penalty might be unjustifiable in principle, the necessity must be strict, the evidence of it beyond reasonable doubt, and the burden of proof on the proponents of its use. The materials to which reference is made in note 43 above do not, in our judgment, show strict necessity beyond reasonable doubt, but we leave the study of the evidence and the factual judgment to each, merely indicating the moral norm to be applied.