

# *The Death Penalty: What's a Catholic to Think?*

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No doubt about it. The Church's teaching on capital punishment is confusing – and even bothersome – for many U.S. Catholics. To help dispel the “heat” and confusion, I turn to the death penalty symposium (2002) featured in the *National Catholic Register* and to the illuminating quality of some of its critical insights. The latter have implications not only for the intellectual formation of Catholics but also for shaping their practical judgments on the matter.

As I see it, having to decide about the morality of applying the death penalty is no longer an option for U.S. Catholics. Those residing in one of the 38 states that allow the death penalty will be faced with judging its practical appropriateness in their capacity as voters, jurors, prosecutors or judges. Those living in one of the 12 states that do not allow the death penalty will inevitably be called on to cast their vote for or against those predictable ballot initiatives aimed at reinstating the death penalty.

## **The Scalia Incident**

A review of the series of events and letters that pre-

ceded the publication of the *Register* symposium provides context for our discussion. On February 4, 2002, as part of a Jesuit Heritage Day function, Supreme Court Justice Antonin Scalia delivered a lecture to an audience of Georgetown University students. Following the presentation, one of them posed this question: How, as a Catholic judge, can you participate in the process of imposing the death penalty, when the Church says it's immoral to do so?

Scalia responded by rejecting the notion that immorality of the death penalty represents authentic Catholic doctrine. He argued that such a position – expressed by John Paul II in *Evangelium Vitae* (EV) – not only contradicts the traditional teaching of the Church on the issue, but also lacks the infallibility of an *ex cathedra* pronouncement. Consequently, Scalia admitted that, while the Church's ostensibly “new” position on the death penalty was worthy of his serious consideration, it did not command his assent. And, cutting to the quick of the student's question, Scalia explained he had *not* resigned from the Supreme

Court precisely because it was his studied conviction that Catholic doctrine did not forbid performance of his job, despite involving imposition of the death penalty.

### **The *Register* Editorial**

In its February 17-23, 2002 issue, the editor of the *Register* took exception to Scalia's Georgetown comments. First, to his insistence that any Church teaching that was non-*ex cathedra* deserved only "serious consideration," the editor countered with the notion that Catholics are also obligated to give their assent to statements like the one on the death penalty. Especially, the editor pointed out, when that teaching appears in an official document like the Catechism of the Catholic Church.

Second, the editor maintained that a scholarly debate, not a lecture to college students, is the proper place to discuss legitimate dissent on some doctrinal matters. Outside that scholarly venue, expressions of dissent could easily degenerate into "a powerful man persuading a crowd of people that the Church is wrong."

Third, in respect to alterations in the Church's position on capital punishment, the editor argued that Scalia failed to understand that the only thing that changed was the prudential judgment of *when*

the principle should be applied in modern democratic societies. The Church's essential teaching on the death penalty, however, is the same today as it was in the past.

### **Scalia's Letter of Reply to the Editor**

Scalia, responding to the *Register* editorial, contended that answering the Georgetown student's thoughtful question *was* an appropriate thing to do. It afforded him the opportunity to witness how seriously he (and by extension every Catholic student in the room) should take their faith and their membership in the Catholic Church. It gave him the chance to explain that, if what EV and the Catechism seemed to be saying about the death penalty was authentic then he, along with other sincere U.S. Catholic judges, prosecutors and jurors, should resign or recuse themselves. In short, Scalia believed it was his duty to resign, if he could not do his job without incurring sin.

The Justice further protested that the editor (not he) failed to understand John Paul's position in EV. Rather than teaching the death penalty is rarely, if ever, *required* (as the editor suggested), Scalia insisted that EV teaches the death penalty is rarely, if ever, *permissible*. Hence, in Scalia's estimation, the teaching of EV

contradicts the Church's universal doctrine.

Finally, Scalia rejected the *Register's* portrayal of him as someone who upholds the death penalty. "I do no such thing," he said. "I support the proposition that it is not sinful for a Catholic to support it, and indeed to participate in its imposition. Whether it *should* be imposed – whether such severe retribution is desirable – is a question I do not address. It is my job to help administer whatever response the American people give to that question, and I do not accept that performing my task (in *either* direction) is morally wrong."

### **The *Register* Symposium: What We Can Learn**

In its March 24-31, 2002 issue, the *National Catholic Register* published the "Death Penalty Symposium" featuring Scalia's letter to the editor (just summarized), together with critiques of the Justice's position penned by Fr. George Rutler (pastor of Church of Our Savior, New York City), Dr. Charles Rice (professor of law, Notre Dame University), and Avery Cardinal Dulles, S.J. To the many questions raised by the Scalia incident – Did John Paul II change the Church's traditional death penalty teaching? Does disagreement with the Pope's

position constitute dissent, with consequent separation from the Church? Did Scalia incur sin when he imposed the death penalty in a particular capital case? Do private citizens incur sin if they vote to make the death penalty legal in their state? – the Symposium provides compelling answers.

First, for two millennia the Church's classical position on capital punishment held that it could be morally licit for a State to impose the death penalty as an act of retributive justice. This teaching is rooted in Scripture (especially Gen 9:5-6 and Rom 13:1-4), confirmed by the teachings of various popes, bishops and the universal Magisterium, and consistently reiterated and developed in patristic writings, as well as in theological treatises spanning two millennia. Consequently, many argue (rightly in my estimation) that the Church's teaching on capital punishment is infallible by virtue of the ordinary Magisterium. And, in that sense, it is irreformable. As Cardinal Dulles points out, we need to keep in mind that, even should the teaching be reformable, it would hardly be reversed by "an incidental section in a long encyclical focused primarily on the defense of innocent human life." (A point, by the way, that Scalia also made.)

Hence, the assent that a Catholic owes the universal teaching of the Church on the morality of capital punishment is an assent of faith. Conversely, dissent from this standard – to deny that it would be moral in some cases for the State to impose the death penalty against aggressive criminals – would place a person outside the unity of believers and, as such, preclude the dissenting Catholic from receiving the Eucharist, the sign of the unity within the members of the Body of Christ.

Second, just like all the popes before him, John Paul II adhered to the standard teaching on the death penalty. What he wrote in EV (the summary of which appeared in the 1997 Catechism revisions on the issue) did not abrogate the Church’s classical position. Quite the opposite. In all of EV, for example, John Paul insisted on the inviolability of *innocent* human life, thus taking care to distinguish capital punishment from abortion, euthanasia and suicide. What John Paul did *not* say is also instructive. Nowhere in EV or in any of his other addresses did the former pontiff insist that every criminal has the right to live or that the State has no right to execute the guilty.

Now, you’re probably thinking, if John Paul’s position doesn’t signal a change in offi-

cial teaching, why is it so often billed as “new”? The answer involves recognition of the difference between the essential teaching on the death penalty which will *not* change and the application of that teaching which *is* subject to change according to time/culture-sensitive circumstances.

As we can see from the Scalia incident, much of the confusion regarding the kind of assent demanded of a Catholic toward the so-called novel position turns on the fact that John Paul’s prudential judgment regarding application of the death penalty was equated with the Church’s essential teaching. In July of 2004, then-Cardinal Ratzinger explained that Catholics of good will who disagreed with John Paul’s judgment about the prudent time to apply the death penalty (or to wage war) would not lose membership in the Church. Indeed, such Catholics could still receive Communion. Of course, Ratzinger would never have pronounced this way, if that about which Catholics were disagreeing was a matter of essential Church teaching.

Third, Dulles clearly and succinctly explains how we ought to understand the prudential decision-making that the Pope or any sincere Catholic ought to employ in judging the appropriate application of the death penalty. In a theo-

logical context, a prudential judgment refers to the “application of Catholic moral doctrine to concrete cases in which it is necessary to make a human estimate [the work of the virtue of prudence] of what is appropriate. Since Christian Revelation tells us nothing about the particulars of contemporary society, the pastors of the Church have to use their personal judgment as spiritual leaders.”

John Paul’s judgment – that the death penalty ought to be “rare, if not practically non-existent” – is based on his prudential “estimate” that, due to modern penal system reform, contemporary States have the non-lethal means to “effectively defend human lives against the unjust aggressor.” This current circumstance dictates that the death penalty is no longer the *only* way of defending the moral and physical order of modern democratic societies. Consequently, in the Pope’s judgment, 20<sup>th</sup> and 21<sup>st</sup> century Christians ought to prefer to realize the purposes of punishment – retribution, rehabilitation of the criminal, defense of society against the criminal, deterrence of other potential wrongdoers – through available bloodless or non-lethal means, e.g., life imprisonment without parole.

Fourth, the operative rationale behind John Paul’s

prudential judgment is that the death penalty is unnecessary, save for those rare cases where society could not protect itself from the criminal in any other way. Dulles enumerates seven other cogent reasons, reflective of today’s American democratic society, that also seem to count against capital punishment in the U.S. They include: the inequitable application of the death penalty due to prejudices of jurors and judges; the inability of poor and uneducated accused persons to secure adequate legal counsel; the possibility or even likelihood that innocent persons will be executed; sometimes the impossibility of identifying the subjective guilt of accused persons who are young or cognitively and/or psychologically impaired; the tendency for capital executions to feed the public’s sometimes inordinate desire for revenge; the failure of modern democratic states to recognize that to exact punishment through execution of the criminal is to carry out divine justice and, finally, the need to show respect for the value of life at a time when violations of innocent human life through abortion, euthanasia and other violent crimes are ubiquitous.

As U.S. Catholics, we need to be generally informed as to the appropriateness of applying the death penalty and then to be informed voters on the

issue whenever it comes up. To ground our Catholic judgment regarding the prudence of repealing or reintroducing the death penalty on a state level, we are obligated to reflect carefully both on what John Paul II concluded from a faith/natural law perspective and on the supportive case that Dulles and others have argued from a practical cultural viewpoint.

Fifth, for Catholics like Scalia who are in judicial positions, Dulles gives sound advice about resolving the difficulties that arise when the law they are bound to apply appears to be at odds with the contemporary prudential judgment of the Pope and bishops. In the first place, John Paul II's prudential judgment (in which Benedict XVI concurs) allows for the application of capital punishment in rare cases. Hence, an American judge could apply the American Constitution by imposing the death penalty in a particular case and still be in agreement with the current papal judgment.

Furthermore, Dulles argues that a judge who believed the death penalty ought never be applied and that this was

also what the Pope taught, could also impose the death penalty in certain cases "on the ground that, although the law was bad, its decision was nevertheless constitutional, legally correct, and not manifestly opposed to the moral law. One can legitimately implement a law that one regards as prudentially wrong."

Finally, although we need to be sensitive to the fact that many European and some American abolitionists are campaigning against the death penalty for the wrong reasons (e.g., the State is obligated to carry out the will of the people, not God's will; there is neither sin, crime nor guilt; persons cannot be held responsible for capital crimes because human freedom is a myth; temporal life, rather than a transition to an afterlife, is all there is), we should not be deterred from doing the right thing in respect to the application of the death penalty for the *right* reasons.

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