

injury, more or less imminent danger, greater or lesser assurance of outcome."<sup>50</sup>

The manualist moral theology which still informs magisterial documents relegates circumstances to a secondary role: they cannot redefine the "object" of the action itself. For the casuist, as for the lawyer and the physician, the particular circumstances make the case. Even for Aquinas "circumstances may also, however, change the very nature of the moral act . . . these particular circumstances [may] involve something so contrary to reason that they become an essential feature of the act."<sup>51</sup> Except for the primary precepts of the natural law (e.g. to know the truth, to live in society) all moral laws admit of exceptions. "Intrinsically evil acts," the staple of recent magisterial teaching of sexual and procreative ethics, are not found until the late seventeenth century, when casuistry declined into more rigid systems.<sup>52</sup>

What does this mean for the present state of moral philosophy and theology? "By ignoring the insights of the casuists and rejecting their use of moral discernment for a more principled but grossly simplistic approach to moral issues, we do humanity a disservice that has produced bitter fruit."<sup>53</sup> The Catholic tradition would be better served by admitting the alternatives which it contains. The lack of reception given by many to the magisterium's moral teachings should not be too quickly dismissed as stemming from bad will or the pernicious effects of liberal, democratic culture. A modest recognition that the Holy Spirit does not absolve the Church from the limits of human practical reflection and that norm-centered ethics is not canonical might make the Church's moral guidance more intelligible in the future.

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#### CAPITAL PUNISHMENT

In major metropolitan areas, it is now customary for the late evening news to begin with a review of the day's murders. This serves as a factual counterpart to the innumerable fictional murders of prime-time entertainment. Crime and the ineffectiveness of our society's response to it have been an important theme in many recent elections. The liberal climate that once led many people to expect that the ten-

<sup>50</sup> Ibid. 253–54. See James Gaffney's perceptive review in which he raises the question whether casuistry can work on "macro-ethical" questions where paradigmatic social arrangements are called into question or have yet to be discovered (*Commonweal* 67/14 [1990] 468).

<sup>51</sup> Jonsen and Toulmin 134.

<sup>52</sup> Ibid. 186, 262.

<sup>53</sup> Ibid. 342.

year moratorium on executions that obtained in the U.S. from 1967 to 1977 might lead to abolition, either by a definitive Supreme Court decision holding that the death penalty was unconstitutional or by public forbearance, now seems irretrievably remote. While the U.S. Catholic Conference's administrative board in its election-year statement on political responsibility reaffirmed its continuing opposition to the death penalty,<sup>1</sup> all three major candidates in the recent election made clear their support for the death penalty. It is only in an atypical jurisdiction such as the District of Columbia that the death penalty fails to find widespread public support. In a November 1992 referendum mandated by Congress, the citizens of the District refused to authorize the imposition of the death penalty. But such victories for opponents of capital punishment are rare.

### *Teaching of the Philippine Bishops*

We should notice, however, that the debate over capital punishment is not confined to very violent societies such as the U.S. and South Africa. It has surfaced recently in the Philippines where President Fidel Ramos has made the reinstatement of capital punishment part of his anti-crime program. This requires a change in the 1986 Constitution, which abolished the death penalty, a change which was opposed by the Catholic Bishops' Conference of the Philippines in a statement issued on 24 July 1992. This statement, which strongly reflects the influence of the 1980 statement of the U.S. Catholic bishops,<sup>2</sup> provides a useful starting point for seeing how this issue is now approached in Catholic teaching. Because of the long history of church acceptance of the death penalty and because of the explicit scriptural authorization of the death penalty, it is not possible for the Philippine bishops to argue that the death penalty is inherently and necessarily a violation of the biblical commandment against killing or that it is an intolerable violation of human rights. Rather, they have to offer a more complex argument which is more prudential than demonstrative but which illuminates connections between capital punishment and other contemporary concerns of the Church. Their line of argument falls into three parts: (1) a critical assessment of arguments for the death penalty, (2) a setting forth of objections to the death penalty, and (3) the recommendation of alternative ways to bring crime under control.

<sup>1</sup> U.S. Catholic Conference Administrative Board, "Political Responsibility: Revitalizing American Democracy," *Origins* 21 (1991) 313-23, at 319.

<sup>2</sup> U.S. Catholic Conference, "Statement on Capital Punishment," *Origins* 10 (1980) 373-77.

### Criticism of Death-Penalty Arguments

The Philippine bishops begin by affirming that "the abolition of the death penalty by the 1986 Constitution was a very big step towards a practical recognition of the dignity of every human being created to the image and likeness of God and of the value of human life from its conception to its natural end."<sup>3</sup> Three aspects of this preliminary judgment are noteworthy. First, it is about means, not ends ("a very big step"). Second, it is about practice and what makes values effective. Third, it is about values that the Catholic community regards as morally urgent and supremely important (human dignity and the value of human life). The first two points remind us that the bishops are dealing here in the realm of policy and prudential judgments. In fact, one of the Philippine politicians who opposes the bishops' stand, Senator Ernesto Herrera, observes that both sides agree that life is sacred and must be protected and that "we differ only in our approaches."<sup>4</sup> But it is the third point that accounts for the insistence with which those who call for the abolition of capital punishment pursue their cause.

The bishops, along with most observers, believe that the actual deterrent effect of capital punishment as a practice has not been established. Their response to the essentially retributivist claim that capital punishment contributes intrinsically to the restoration of the order of justice is to insist that what society needs is "a humane and Christian approach to punishment."<sup>5</sup> The last point may well be true; but here it amounts to begging the question. The bishops do better in rejecting the standard analogy comparing the criminal to a diseased organ, an analogy which goes back at least to Thomas Aquinas. Against such a comparison they object that the "human being has a value in himself/herself and is the goal and purpose of society in a way that a limb or organ is not the goal or purpose of the human body."<sup>6</sup> One can discuss capital punishment as a means to protect certain values, but one ought not to make the life of the individual person a means.

### Objections to the Death Penalty

Two of the objections that the bishops make to the death penalty are familiar and obvious, namely, the possibility of error in applying it and the congruence between abolition and the teaching of Jesus on God's

<sup>3</sup> Catholic Bishops' Conference of the Philippines, "Restoring the Death Penalty: 'A Backward Step,'" *Catholic International* 3 (1992) 886–88, at 886.

<sup>4</sup> *Ibid.* 887.

<sup>5</sup> *Ibid.* 886.

<sup>6</sup> *Ibid.* 886. The analogy can be found in *Summa theologiae* 2-2, q. 64, a. 2.

mercy. But two of the other objections are more theologically provocative. The bishops maintain that "the imposition of the death penalty will have a bias against the poor" and that therefore it is not compatible with the Church's preferential option for the poor.<sup>7</sup> Given the great differences in access to quality legal advocacy in most societies, including both the Philippines and the U.S., one can normally expect that the recipient of punishment will be a poor person who does not have the financial resources or the educational background or the social sophistication to mount an effective defense against capital charges. There are also, we should note, a certain number of highly publicized cases where prominent or affluent people are on trial and where prosecutors and other officials make strenuous efforts to ensure that there is no appearance of favoritism or softness in the way they are treated. Proponents of the death penalty would be correct in observing that most of the victims of violent crime are themselves poor, and they would also be correct in arguing that, if capital punishment is right, then the way to correct inequitable application of the penalty is to apply greater severity to the affluent or well-connected. This reply may have some merit in the abstract, but in most societies we are more likely to get equivalent treatment of rich and poor defendants if criminal penalties do not include capital punishment. It is also important for the legitimacy of the criminal justice system that justice be seen to be done; patterns which support the inference that one class or ethnic group fares better under the system undermine its legitimacy.

The other theologically significant consideration that the Philippine bishops offer is their claim that supporting the abolition of capital punishment is a better way of defending their stand for life. Their language here suggests that the connection between their views on capital punishment and on such life issues as abortion and euthanasia is not one of logical inference and is more a matter of affinity, of public perception, and of tactics. The proposal to connect Catholic positions on capital punishment, disarmament, war, aid to the poor, abortion, and euthanasia is the substance of the "seamless garment" approach to life issues championed by Cardinal Bernardin of Chicago and by many U.S. bishops.<sup>8</sup> This approach has recognized that the Church finds allies and supporters in different parts of the political spectrum for

<sup>7</sup> Ibid. 887.

<sup>8</sup> The most prominent presentation of the "seamless garment" approach was the Gannon Lecture given by Cardinal Joseph Bernardin at Fordham University in December 1983 and published in *Origins* 13 (1983) 491–95. A perceptive account of the political uses and limitations of this approach can be found in Timothy A. Byrnes, "How 'Seamless' a Garment? The Catholic Bishops and the Politics of Abortion," *Journal of Church and State* 33 (1991) 17–35.

different parts of its program for the defense of life; and it has attempted to make a pedagogical and persuasive effort to urge people to develop a broader understanding of what kinds of social and legal measures are needed to protect human life in our time.

But such an approach which attempts to group a range of seemingly disparate issues under one rubric suffers from two inherent limitations. The first is that the connection between norm and practice varies across the range of issues so that church teaching endorses no abortions, lower levels of nuclear and conventional weapons, no executions, some possible uses of military force, and some withholding of life-sustaining measures. This variability does not show that the Church's positions on the defense of life are mutually inconsistent; rather, they show that other values are being taken seriously and that they require a more complex set of prescriptions than if one focused on life to the exclusion of other values. The other limitation is that since the separate issues are connected by the common thread of their reference to life and not by the chains of inference and deduction, they remain distinguishable and separable. The person who affirms the absolute prohibition of abortion and refuses to accept the recent rejection of capital punishment by most conferences of bishops and by the most recent popes is not guilty of logical inconsistency.

#### Alternative Recommendations

On the more positive side, the Philippine bishops make a set of recommendations for alternatives to the death penalty that are to a large extent, I believe, applicable to U.S. society as well. These include: a comprehensive attack on poverty; reform of the criminal-justice system; reform of the penal system; dealing with such causes of crime as gangs, drugs, and gambling; cleansing of the police and the military; a lessening of the atmosphere of violence; and enforcement of the ban on wearing guns in public places.<sup>9</sup> Since every execution comes at the final stage of a history of personal conflict, destructive behavior, police and judicial processes, society needs to review on a continuing basis how it can alter the various stages in this history so that it does not end with yet another person being violently expelled from the human community and from life in this world. The murders and capital crimes which occur in a society are both the work of the individuals who commit them and who must be prevented from repeating them and an expression of the values and conflicts that are prevalent in society at large.

In sum, then, what the Philippine bishops give us in their recent statement is a compact statement of a tripartite case against the death

<sup>9</sup> "Restoring the Death Penalty" 887-88.

penalty: objecting to reasons for it, stating reasons for abolition, and proposing alternatives that do not involve the taking of yet another human life. This is similar in structure to the 1980 statement of the U.S. bishops on the same topic; and it is in fact what is needed when a social practice is to be assessed which affects a number of distinct values and whose moral acceptability or unacceptability is not to be settled simply by the invocation of a single value. What this sort of argument yields is a reflective assessment of a practice and its connections with a range of values. It is less clear and less decisive as an assessment of particular actions. As I will argue later, it may even be true that a particular criminal (e.g. Ted Bundy) is justly executed but that capital punishment itself is a generally bad practice which ought to be terminated.

### *Societal Considerations*

The connection between capital punishment and the values of society at large is central to the argument of a provocative essay by Mark Tushnet, a professor of law at Georgetown University, who observes that "society's position on the existence and use of the death penalty both expresses and constitutes the kind of society it is."<sup>10</sup> Tushnet draws a contrast between a remark made by Jürgen Habermas on the inappropriateness of the death penalty in Germany after the Nazi period and his own reading of the current moral condition of American society. He says:

Abolition of capital punishment, I suggest, would amount to a similar denial of the actual condition of society in the United States. That is, it falsifies the experience of that society to claim that it has gotten beyond the retributive urges that most easily justify the practice of capital punishment.<sup>11</sup>

Abolition of capital punishment in Tushnet's view would be like eliminating a symptom rather than a disease; it would encourage a "misplaced self-satisfaction" and might have distorting effects on other social institutions. This last claim is not easy to specify or to substantiate. Tushnet's view also has the disturbing implication that on this matter the U.S. lags behind Germany. This may well be a crudely progressivist simplification of Tushnet's view, which is probably closer to a claim that Germany has by painful historical experience learned the indispensability of extreme caution in the taking of human life.

<sup>10</sup> Mark Tushnet, "Reflections on Capital Punishment: One Side of an Uncompleted Discussion," *Journal of Law and Religion* 7 (1989) 21–31, at 24.

<sup>11</sup> *Ibid.*

Where Tushnet's view seems to me to be particularly illuminating is on the rise and subsidence of the movement to abolish capital punishment. He observes: "Law is an effort to move from the world as it is—committed to social violence—to a different world. Abolition could then be seen as a bridge that, by prefiguring a world that had abandoned its commitment to social violence, might lead us there."<sup>12</sup> The distance from where we are as a society to what kind of society we would be without capital punishment and without the attitudes toward capital punishment that legitimate it would on this understanding simply have been too great to sustain. The moratorium that began in 1967 and the expectations aroused by the Supreme Court's 1972 decision requiring the revision of the existing death-penalty statutes confronted the separate states and the country as a whole with a choice of either reaffirming the death penalty or of moving to a new attitude to violence. Most of the states (36 out of 50) decided to keep the death penalty in a modified and constitutionally acceptable form. The bridge to a new order of society, in this area at least, collapsed. The conclusion that Tushnet draws from this episode is that we ought not to press for the abolition of the death penalty, but that we can criticize the method by which it is applied so that arbitrariness is diminished. He writes: "One can reject abolitionism as a denial of the society's commitment to social violence and simultaneously object to the manner in which the death penalty is administered."<sup>13</sup>

In Tushnet's view there is no real social base for abolition. As he puts the matter, "support for abolition does not emerge from a social group with an alternative vision of the world."<sup>14</sup> This is a formulation that needs some clarification or amplification; for it seems to me that abolitionists do have some vision of a nonviolent, nonvindictive form of society; but it also seems to me doubtful that they are effectively identified with one or more coherent interest groups (such as religious or ethnic groups, professional or trade associations, regional groups) that are constituted independently of the capital-punishment issue. The constituency for abolition, with the exception of African-Americans and some church groups, is simply an ad hoc coalition of moral conviction.

One way of reading Tushnet's position is to take it as an announcement that abolition is not a politically appealing cause and does not generate sufficient public support. This is true, but it does not seem to require more than the ability to read opinion polls or the election

<sup>12</sup> *Ibid.* 26.

<sup>13</sup> *Ibid.* 27.

<sup>14</sup> *Ibid.* 30.

returns. But it can also be taken as making a more controversial and interesting point, namely, that abolition is a case whose time has not yet come, a cause that has not yet "ripened." Abolition is the right thing to do, but society is not yet ready to accept this, and so it is best not to press the matter now; indeed, it may even be wrong to do so. This is a complex judgment that combines a moral position with a reading of social and political history. It may seem to belong to the realm of politics rather than jurisprudence or ethics. But we should notice that it expresses an attitude that we should only adopt toward a practice which has both positive and negative aspects and whose continuation for an interim we can contemplate with some equanimity. To grasp the point here, it may be helpful to reflect how we would react to a parallel treatment of slavery. Tushnet's piece does not resolve the underlying ethical issues about capital punishment, but it does direct our attention to important and difficult questions about the legitimacy of violence in our culture and about the anomalous position of the U.S. as the main practitioner of capital punishment among advanced industrial societies even while it is a country which tolerates notably higher murder rates, especially in its cities, than any nation of even remotely comparable economic and educational levels.

### *Special Problems for the Medical Profession*

That this paradoxical situation should produce serious normative tensions is only to be expected. These tensions are felt with special force in the medical profession and other professions charged with treating condemned prisoners as patients and clients. Two issues have become especially heated in recent discussions. The first is whether patients who are found to be mentally disturbed and therefore incompetent to be executed, can rightly be treated by psychiatrists so that they can be restored to competence and then executed. The second is whether it is right for health care professionals to participate in conducting an execution. The first problem arises within our legal system because the U.S. Supreme Court held in *Ford v. Wainwright* (1986) that mentally incompetent persons could not be executed. Here we should remember that the issue is not mental incompetence at the time the crime was committed (which should be considered in arriving at a verdict and an appropriate sentence), but incompetence at the time of execution (a condition which is not an unlikely outcome as a result of years of confinement on Death Row). The problem of executing the formerly incompetent is more pressing today because of two trends recently noted by David Katz: (1) the increasing number of death sen-



tences, and (2) the development of more successful medications that would restore a prisoner's competency.<sup>15</sup>

A scenario in which a patient is forced to ingest medications that restore him or her to competence, is then pronounced ready for execution, and is then executed raises a troubling comparison and conflicts with a venerable tradition. The comparison that comes to mind in this century is with doctors who have collaborated with the secret police and the military in regimes that relied on repressive terror and who in some cases regulated torture so that it would not prove fatal or who revived prisoners for subsequent torture or execution.<sup>16</sup> The physician's intervention in such a scenario may serve the short-term interest of the prisoner in survival, but it is clearly not intended to serve the long-term benefit of the prisoner. While such a comparison is a useful reminder of the terrible things that power can ask medicine to do, it is not very helpful in understanding capital punishment within the open and democratic society of the U.S. with its abundance of procedural safeguards and affirmations of the rights of prisoners and citizens even though these safeguards are not fully reliable within the criminal-justice system.

The conflict with tradition, however, is more troubling, since what is at stake here is the first principle of the Hippocratic Oath, "First, do no harm." Successful treatment will in fact lead to the death of the prisoner even if this is not the intention of the physician. As Donald Wallace observes, this produces a Catch-22 situation: "To be sane means death, crazy means life, and a therapist is expected to take treatment seriously."<sup>17</sup> Wallace concurs with the view that prisoners in such a situation should have their death sentences commuted. Wallace bases this conclusion clearly on the healing objective of the health professions when he writes:

For the state to provide legally required health measures to its imprisoned inmate who is incompetent to be executed, without violating the healing ethic of the mental health professions, the death sentence will have to be commuted. This will allow for treatment that will not lead to the execution of the death row inmate deemed incompetent for execution.<sup>18</sup>

<sup>15</sup> David L. Katz "Penry v. Louisiana: Medical Ethics on Death Row—Is Judicial Intervention Warranted?" *Georgetown Journal of Legal Ethics* 4 (1991) 707–28, at 712.

<sup>16</sup> Ibid. 716.

<sup>17</sup> Donald Wallace, "The Need to Commute the Death Sentence," *International Journal of Law and Psychiatry* 15 (1992) 317–37, at 325.

<sup>18</sup> Ibid. 331.

Wallace claims that treatment is carried on in such cases for the interest of the state and not for the best interest of the patient, and that "mental health professionals . . . are placed in the position of being the causal link between life and death."<sup>19</sup>

This last point is too simple; we might ask whether a physician would be right to refuse to treat a patient suffering from cancer or a similar illness if the physician knew that the patient would still be liable to execution on recovery. For purposes of ethical and legal analysis, it is of course possible to distinguish the physician's work in restoring the patient to competence or health and the action of the state in executing the prisoner. The questions are whether the proximity and the causal connection between the physician's task of restoring the prisoner to competence and the state's project of executing the prisoner are in fact so close that the second project makes the first ethically unacceptable, and whether the close combination of these two projects puts the physician or mental-health professional in an untenable situation. For those who already believe that capital punishment in general is wrong, both of these questions have to be answered in the affirmative. Similar answers have to be given by a physician who comes to believe that it is wrong to execute this prisoner. One situation in which treatment may be ethically acceptable occurs when the patient makes it clear that he wants to be treated.<sup>20</sup> Bonnie argues that in such a case a paternalistic refusal to treat by the physician is inappropriate. That leaves us with those cases where the physician believes that the death penalty is justifiable and that this prisoner should be executed and with those cases where the physician is unsure about one or both of these propositions. My own view is that where the physician believes both these propositions it is inappropriate for him or her to undertake treatment of the prisoner because the physician will be limited in acting for the prisoner's good as this is normally conceived, and that where the physician is in doubt about both these propositions he or she lacks the intellectual clarity needed before one proceeds to action in vital and difficult matters. I would not, however, agree with David Katz, who claims that a physician who successfully treated a condemned prisoner would be extremely culpable because of providing "the causative link" resulting in the patient's death. Such a view seems to me to ignore the fact that the primary responsibility for the condemned person's death rests with the state; it also overlooks the possibility that a physician honestly convinced of the moral justifiabil-

<sup>19</sup> Ibid. 317.

<sup>20</sup> Richard Bonnie, "Medical Ethics and the Death Penalty," *Hastings Center Report* 20 (1990) 12-18, at 16.

ity of capital punishment would be subjectively innocent and hence not culpable.

But precisely because capital punishment is a life-and-death matter, the medical profession is not able to separate itself completely from it. In 1986 there was a strong affirmation from the Council on Legal and Judicial Affairs of the American Medical Association to the effect that "A physician, as a member of a profession dedicated to preserving life where there is hope of doing so, should not be a participant in a legally authorized execution."<sup>21</sup> This provides a basis for the medical profession's refusal to countenance direct participation by physicians in the process of execution by lethal injection. This procedure was devised in order to find a method of execution that would be more reliable and less painful than the electric chair and so less subject to constitutional objection on the grounds of being "cruel and unusual punishment" and thus forbidden by the Eighth Amendment. Texas originally required that a physician supervise the procurement of appropriate drugs, insert the intravenous apparatus into a suitable vein, and certify the death of the prisoner. Professional resistance quickly eliminated the first two requirements; the third has long been held to be a permissible use of professional knowledge and not an impermissible involvement in the causal chain leading to the prisoner's death. Both Bonnie and Katz also hold that it is permissible for a physician or mental-health professional to offer an evaluation of the competence of the condemned. Bonnie regards the professional who performs this sort of evaluation as providing information to decision makers and not as participating in the execution. He writes with some sympathy for those professionals who take a status of conscientious abstention from capital cases, but he also points to the unsatisfactory consequences of depriving the criminal-justice system of mental-health expertise. He underlines the emotional burden carried by all who manage our system of capital punishment and refers to "our profound ambivalence toward the death penalty."<sup>22</sup>

The society whose attitudes to the death penalty Tushnet addresses is not united; it is actually divided into conflicting professional and popular groups. It does not seem possible to resolve the moral dilemmas of mental-health professionals in the criminal-justice setting by appealing to the popular consensus in support of capital punishment, the deliberations of a presumably impartial jury, the force of the law, the numerous procedural protections it provides, and the normative

<sup>21</sup> American Medical Association, Council on Legal and Judicial Affairs, Statement on Capital Punishment, cited in Katz 714.

<sup>22</sup> Bonnie 18.

warrants in our culture that uphold the rightness of capital punishment. One conclusion that could be drawn from this is that capital punishment is unworkable if it is in insoluble conflict with the professional ethos of a group whose involvement in the process is necessary. Another, less satisfactory conclusion would be that the continued conflict simply shows the incorrigible elitism and lack of realism of an isolated professional group. But I would argue that the lack of realism is found more on the side of the public consensus in support of capital punishment.

### *A Deterrent to Violent Crime*

The public is rightly concerned about the rise in crime, especially violent crime. The FBI Uniform Crime Reports for 1990 recorded over 1.8 million crimes of violence, of which 23,440 were cases of murder and nonnegligent manslaughter. This is up from 1.25 million crimes of violence in 1983, of which 19,310 were murders.<sup>23</sup> This rise, it should be observed, occurred precisely during a time when capital punishment was being more widely used. Against these figures we should set the fact that there have been only 18,000 official executions recorded in the entire history of the U.S., of which 180 have occurred since the reinstitution of the death penalty in 1977. Capital punishment resolves only a minute fraction of the crime problem that so troubles our society. Secondly, defense of capital punishment rests to a large extent on confusing two issues: whether a given individual has been justly executed, and whether capital punishment is a justifiable practice. In a case such as the trial and execution of Ted Bundy, the defender of capital punishment can point to many considerations that justify the execution of such a heinous killer, who is at the same time an intelligent and persuasive individual. This seems to establish the rightness of capital punishment in at least some cases. But it mistakes the actual problem of administering capital punishment when most of the condemned are neither so chillingly psychopathic nor so photogenic as Mr. Bundy, when in fact the great majority of them are black, poor, and emotionally disturbed, and when many of them are mentally retarded and ill equipped to understand their situation.

A case that illustrates the unsatisfactoriness of the way the death penalty is currently understood and applied in the U.S. is the Penry case. Johnny Paul Penry was convicted of rape and murder committed in 1979. Rebecca Dick-Hurwitz summarizes his capabilities thus:

<sup>23</sup> Federal Bureau of Investigation, Uniform Crime Reports, 1990, cited in *World Almanac 1992* (New York: Pharos, 1991) 954.

Johnny Paul Penry was twenty-two years old at the time of his crime and had an IQ measured through the years as between 50 and 63. His social maturity has been assessed as equivalent to that of a nine or ten year old child. He had always exhibited erratic behavior, had never finished first grade and had labored for a year trying to learn how to print his name.<sup>24</sup>

The U.S. Supreme Court held that the execution of the mentally retarded did not in itself violate the Eighth Amendment's prohibition of cruel and unusual punishment, though they did decide that in the Penry case insufficient attention had been giving to mental retardation as a mitigating circumstance. As Dick-Hurwitz pointedly observes:

It is beyond dispute that the mentally retarded face profound difficulties when dealing with the criminal justice system. Many of these problems have the potential for catastrophic consequences. *Penry* is a case in point. This unreliability should be a matter of grave concern to the Supreme Court, particularly with regard to the imposition of the death sentence. In light of past decisions, the Court should make every effort to see that this "extreme sanction, suitable to the most extreme of crimes" is reserved only for the most culpable of criminals. Mentally retarded defendants such as Johnny Paul Penry simply do not fit this description.<sup>25</sup>

The abiding difficulty here is that even if a future Supreme Court decision were to rule out capital punishment of the gravely retarded, the death penalty will still be imposed on a certain number of people who have only a marginal capacity for deliberation and for moral agency. It is neither likely nor desirable that capital punishment will ever rise to the level of frequency where it becomes American society's standard response to murder or where it becomes a reasonably reliable deterrent. Rather, it serves as an intermittent and ominous response by a society that tolerates the careless and extensive distribution of guns and the deterioration of basic living conditions for the poor, while it declines to invest in improving educational and correctional institutions and makes the unrealistic depiction of extensive and brutal violence a central part of its entertainment and its imaginative life. It is simply not credible for such a society to present its reliance on capital punishment as a sign of its deep and passionate commitment to justice.

The conclusion reached in an ecumenical statement by the Christian religious leaders of Arizona, including Bishop O'Brien of Phoenix,

<sup>24</sup> Rebecca Dick-Hurwitz, "*Penry v. Lynaugh*: The Supreme Court Deals a Fatal Blow to Mentally Retarded Capital Defendants," *University of Pittsburgh Law Review* 51 (1990) 699-725, at 700.

<sup>25</sup> *Ibid.* 725. The quotation is from the Supreme Court's decision in *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).

seems both right and reasonable: "The death penalty cannot be justified as a legitimate tool of society's justice system."<sup>26</sup>

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#### THE EMBRYO AND THE FETUS: NEW MORAL CONTEXTS

The ambiguous status of unborn human life contributes to the interminability of the debate about the morality of abortion. New medical research and therapies are implying questions about the value and protectability of life in its earliest stages,<sup>1</sup> to which in vitro fertilization now gives more access. This essay will address especially the interplay of scientific information about embryonic development with philosophical interpretations of personhood. The ultimate question is whether full moral status in the human community ("personhood") can be tied to a physiological indicator or developmental line.

Some ancient authors (Augustine, Aquinas) favored a theory of delayed ensoulment or "animation," on the premise that a human soul could be infused by God only when the body had reached an adequate level of development. The modern Church, drawing on improved scientific data about genetics, fertilization, and embryology, has tended to view human life as personal from "conception," on the assumption that at fertilization a new genetic code is created which establishes individuality and controls all further growth. Current controversy really has two centers. The first is essentially *empirical and descriptive*. It focuses on the question whether the best information available supports the view that individuality and the integrated function of the new organism are established at fertilization. The second is *philosophical and normative*. It raises questions about how to interpret the data: What aspects of human existence does the term "person" denote? What are the minimum criteria of being a person? What is the relevance to present moral standing of the potential to actualize personal characteristics? And are the Thomistic categories form and matter still useful in conceptualizing the relation of soul to body?

<sup>26</sup> Arizona Ecumenical Leaders, "The Retaliatory Violence of Capital Punishment," *Origins* 21 (1992) 517–18, at 517.

<sup>1</sup> Scientists now usually use the term "preembryo" for the first fourteen days, reserving "embryo" for the conceptus after implantation. Richard A. McCormick, S.J., deflects accusations that the term is designed simply to remove the zygote from the sphere of condemnations of embryo research by citing the intentions of scientists to designate by its use a stage of development clearly demarcated on its far end by the formation of the embryo proper ("Who or What is the Preembryo?" *Kennedy Institute of Ethics Journal* 1 [1991] 1).