Report on Capital Punishment

In 1967 The Lutheran Church—Missouri Synod stated its position "that capital punishment is in accord with the Holy Scriptures and the Lutheran Confessions." Resolution 2-38 of the New York convention of the Synod reads as follows:

Whereas, Various church bodies have condemned capital punishment in recent years; and

Whereas, God's Word supports capital punishment (Gen. 9:6; Lev. 24:17; Ex. 21:12; Num. 35:21; Deut. 19:11; Rom. 13:4; Acts 25:11); and

Whereas, The Lutheran Confessions support capital punishment:

Therefore neither God nor the government is included in this commandment, yet their right to take human life is not abrogated. God has delegated His authority of punishing evil-doers to civil magistrates in place of parents; in early times, as we read in Moses, parents had to bring their own children to judgment and sentence them to death. Therefore what is forbidden here applies to private individuals, not to governments. *(Large Catechism I,* 180 to 181 [Tappert, p. 389])

therefore be it

Resolved, That The Lutheran Church—Missouri Synod declare that capital punishment is in accord with the Holy Scriptures and the Lutheran Confessions.

In 1973 the CTCR was asked to prepare and disseminate guidelines designed to assist the membership of Synod in making judgments regarding capital punishment. In response to this request the CTCR adopted the "Report on Capital Punishment," as prepared by its Social Concerns Committee. This report was published in the May 16, 1976, issue of *The Lutheran Witness.*

Since the issue of capital punishment continues to remain a topic of discussion and deliberation in many parts of our country today, the CTCR is again making its 1976 report available. The commission hopes that this document will be of assistance to the members of the Synod in their study of this issue.

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Introduction

Does government have both the right and the responsibility of taking the life of an individual found guilty of certain crimes? That is in essence the issue posed by any discussion of capital punishment.

Historical perspective

The Supreme Court Decision of 1972

In June 1972 the Supreme Court held that the imposition of the death penalty in three cases then before the court constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. At that time only two of the nine justices (Brennan and Marshall) felt that the death penalty for any and all crimes under any and all circumstances ought to be prohibited. Three justices (Douglas, Stewart, and White) agreed that the death penalty could not be applied in the cases then before the court, because the laws applying to the cases had been so seldomly, freakishly, and wantonly applied. The other four justices (Blackmun, Burger, Powell, and Rehnquist) held, essentially, that the Eighth and Fourteenth Amendments did not prohibit the imposition of the death penalty. The net effect of this decision was to return to the state legislatures the question of capital punishment for new guidelines covering the imposition of the death penalty.

This Supreme Court decision had the effect of preventing the execution of more than 600 persons who had been sentenced to death for capital crimes. In addition Congress and the legislatures of the more than 40 states with statutes allowing the death penalty were forced to debate the question and to enact legislation which would more accurately define offenses for and methods by which capital

punishment could be imposed. Since June 1972 most states of the union have enacted such legislation. Therefore the issue confronts our church anew as the question of capital punishment is being considered again at various levels of government.

Capital punishment is a church concern

Since capital punishment has moral dimensions, the church has the responsibility not only of discussing the matter but of reaching conclusions that conform to the expectations of the Biblical revelation entrusted to it for teaching and proclamation. Very properly, therefore, The Lutheran Church—Missouri Synod began its public debate on this item even before the Supreme Court had reached its decision. In 1967 the Synod, in convention assembled, declared "that capital punishment is in accord with the Holy Scriptures and the Lutheran Confessions" (1967 convention Resolution 2-38). Six years later a resolution was presented to the convention of the Synod which called for the preparation and dissemination of "guidelines designed to assist our membership" in making judgments regarding capital punishment in the public debate of this issue (1973 convention Resolution 9-14). This resolution, however, was not acted upon.

Subsequently, this resolution was referred to the Commission on Theology and Church Relations (CTCR) for study with a view to offering constructive guidelines. In response to that action the CTCR submits the following report as prepared by its Social Concerns Committee. The commission hopes that this statement, which addresses some of the ethical and societal concerns involved in this issue from the perspective of the Holy Scriptures and the Lutheran Confessions, will be helpful to the members of our church body in considering and discussing this vital question as part of their responsibilities both as Christian citizens and as members of an organization serving as an association before the law and, as such, providing a forum for dealing with matters of moral dimensions.

Theological perspective

The right and responsibility of government in Scripture

Lutherans have traditionally taught that the state may impose the death penalty. References to the Scriptures and the Lutheran Confessions have formed the bases for this position. Gen. 9:6 states: "Whoever sheds the blood of man, by man shall his blood be shed; for God made man in His own image." This general principle was, by revelation, written into Israel's civil laws: "And these things shall be a statute and ordinance to you throughout your generations in all your dwellings. If anyone kills a person, the murderer shall be put to death..." (Num. 35:29-30). These words on their surface require the application of the death sentence to any one guilty of murder. However, this passage must be seen as part of the civil law of Israel. It belongs to what Luther called "the judicial laws of Moses," which, as he pointed out, were binding only on the Jews. Later peoples were bound to observe the civil laws of their own nations *(Book of Concord,* Tappert, p. 223, fn. 9).

The authority of government is outlined in Rom. 13:1-5: "Let every person be subject to the governing authorities. For there is no authority except from God, and those that exist have been instituted by God. Therefore he who resists the authorities resists what God has appointed, and those who resist will incur judgment. For rulers are not a terror to good conduct, but to bad. Would you have no fear of him who is in authority? Then do what is good, and you will receive his approval, for he is God's servant for your good. But if you do wrong, be afraid, for he does not bear the sword in vain; he is the servant of God to execute his wrath on the wrongdoer. Therefore one must be subject, not only to avoid God's wrath but also for the sake of conscience."

This overall authority invested in government must be seen against the background of the possibility that such "powers that be" may, in given situations, turn into the kind of monstrous beasts described in Rev. 13:2 as fully wielding the power and authority of "the dragon" and so becoming satanic. Under these circumstances children of God have the responsibility to disobey such laws, decrees, and directives which violate God's law. In such situations the principle of Acts 5:29 applies: "We must obey God rather than

men." While these words do not speak directly to the question of the right of general revolt or rebellion against constituted authority, they do indicate the necessity for government also to work within the general framework of moral principle.

The Lutheran Confessions on capital punishment

This understanding is behind Luther's statement on the Fifth Commandment: "Therefore neither God nor the government is included in this commandment, yet their right to take human life is not abrogated. God has delegated his authority of punishing evildoers to civil magistrates..." (LC 1, 180). The Large Catechism says: "So you see that we are absolutely forbidden to speak evil of our neighbor. Exception is made, however, of civil magistrates, preachers, and parents, for we must interpret this commandment in such a way that evil shall not go unpunished. We have seen that the Fifth Commandment forbids us to injure anyone physically, and yet an exception is made of the hangman. By virtue of his office he does not do his neighbor good but only harm and evil, yet he does not sin against God's commandment because God of his own accord instituted that office**,** and as He warns in the Fifth Commandment, he has reserved to himself the right of punishment" (LC 1, 274). Furthermore, in the Apology of the Augsburg Confession we read, ". . . God wants this civil discipline to restrain the unspiritual, and to preserve it He has given laws, learning, teaching, governments, and penalties" (AP IV, 22).

The necessity of distinguishing God's two kingdoms

There are those who object to capital punishment. They hold, correctly, that capital punishment has at times been administered unjustly and unevenly to the detriment of the poor, minorities, and the uneducated. They argue that the authority of the state to take a human life is not to be interpreted as a *command* from God to employ the death penalty in the punishment of certain crimes. They invoke numerous Scriptural admonitions to Christian charity, compassion, and forgiveness. Furthermore, some apply to capital punishment the statement of Rom. 12:19: "Beloved, never avenge yourselves, but leave it to the wrath of God; for it is written, 'Vengeance is mine, I will repay, says the Lord.' " They claim that, even though capital punishment is a government function, the exercise of this right is, in fact, the application of distilled private vengeance and is, therefore, morally undesirable.

Inherent in this kind of argumentation is, at least in part, a failure to distinguish between God's kingdom of grace and His rule in power. In Lutheran theology this distinction goes under the title of the two-kingdom doctrine. In essence this teaching recognizes the fact that, according to the Scriptures, God deals with people in two different ways. On the one hand, every human being is God's creation and for that reason is expected to live under the rule of law established by governments in order to make community life possible. On the other hand, among persons in whom God reigns in His kingdom of grace, He works forgiveness and mercy through Word and Sacrament. Both the values and the methods of each of these *two* relationships differ from one another. A government, for example, has not been entrusted with the power to forgive sins; the church has. The church, by way of further illustration, does not "bear the sword" as government does.

It is of crucial significance in the discussion of a question like capital punishment to keep the distinction between the two kingdoms clearly in mind. This does not mean that the principles pertaining to each one of these work in a vacuum or in total separation from each other. Historically speaking, the concept of justice, for example, has been affected by the church's teaching and practice of mercy. That is to say, this basic Lutheran distinction does not propose to dichotomize life but to recognize a duality of relationships prevailing between God and human beings when they are both His creation and His children through faith in Jesus Christ.

A meaningful analogy might be that of a man who is at the same time a father and a policeman. His responsibilities, tasks, and relationships differ in the two instances; yet the work done in one area will often make its influence felt in the other. Such crossover effects, however, do not change the essential differences in the relationships created by and inherent in these two roles.

Christians may have legitimate differences of opinion

These theological considerations set forth must be kept in mind for purposes of evaluating the political side of the debate on the question of capital punishment. Much of the discussion at this level

in recent years has centered on the question of the need for capital punishment to protect society from criminals who cannot otherwise be controlled. Eighteenth century England had almost 300 crimes which were punishable by the death sentence. Capital punishment was brought from Europe to the American colonies. At one time death was mandatory for a substantial number of crimes, but that number has been materially reduced through the years. The kind of crimes punishable by death has decreased until at present approximately 20 remain. Most executions in the U.S. over the past 45 years have been for murder and rape. Executions at one time were public spectacles. Today the death penalty is imposed in private and in a much more humane manner.

Our nation has debated whether a society for which the dignity of the individual is of vital significance can, without a fundamental inconsistency, follow the practice of deliberately putting some of its citizens to death. As stated by T. Sellin in *The Death Penalty, A Report for the Model Penal Code Project of The American Law Institute 15 (1959):* "The struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement, or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of human behavior during the nineteenth and twentieth centuries."

This conflict has been primarily responsible for the substantial changes in our system of imposing punishment for crime. Such modifications do not of themselves constitute a disregard of the Biblical imperative in the matter of capital punishment. While at God's command the Old Testament civil law made the death penalty mandatory for numerous wrongs, only regarding the shedding of the blood of man is it explicitly stated—apart from the judicial law of Moses—that "by man shall his blood be shed" (Gen. 9:6). Whether treason, espionage, rape, or other grave evils are to be treated as capital crimes is a question which lies within the jurisdiction of any government to determine. It does so through its established instruments for drawing up proper legislation to deal with the issue at hand. Accordingly, individual Christians may hold and express points of view differing from each other in matters of this kind, always recalling that Rom. 13:5 invests government with the right to apply capital punishment also for crimes other than murder.

Christians obey even while seeking change

Since governments have been entrusted with the power of the sword and, for this reason, have the responsibility of adopting appropriate laws to meet the demands of order and justice as well as the general welfare, Christians are under obligation to honor and uphold the decisions of the "powers that be" on questions of this nature. At the same time they have both the right and the responsibility to use legitimate instruments available to them for the purpose of modifying and even rescinding legislation that is deficient or unjust.

Practical considerations

Does capital punishment deter crime?

The issue of deterrence is a strong point of contention between those who advocate abolition of the death penalty and those who advocate its retention. Abolitionists argue that statistical studies, based primarily on trends in states that have abolished the death penalty, support the view that it has proved to be no better a deterrent than life imprisonment. They say that these studies demonstrate that (1) when comparisons are made between contiguous states with similar populations and similar social, economic, and political conditions—some of these states lacking and some retaining capital punishment—homicide rates follow the same trend over a long period of time, regardless of the use or nonuse of capital punishment; (2) the abolition, introduction, or reintroduction of the death penalty is not accompanied by the effect on homicide rates that is postulated by the advocates of capital punishment; (3) even in communities where the deterrent effect should be greatest because the offender and his victim lived there and trial and execution were well-publicized, homicide rates are not affected by the execution; (4) the rate of policemen killed by criminals is no higher in abolition states than in comparable death penalty states.

In addition, at times studies and reports of prison officials indicate that imprisoned murderers are among the best behaved prisoners. While the statistical data to support these arguments are quite voluminous, they are not conclusive.

Retentionists argue that such statistical studies are defective. For the most part they take into consideration only homicides and not the other crimes which are punishable by death. There are no accurate figures on capital murders, that is, murders in the first degree which are premeditated. Certain homicides are misinterpreted as accidental deaths or suicides. Not all homicides are reported. They also argue that no one has been able to conduct a survey to determine how many times individuals may have contemplated the commission of a crime punishable by death and have abandoned such a course of action because of the deterrent effect of the punishment.

The Report of the Royal Commission on Capital Punishment, created by the government of Great Britain and operating from 1949 to 1953, stated in its final report: "*Prima facie* the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than any other form of punishment, and there is some evidence (though no convincing statistical evidence) that this is in fact so. But this effect does not operate universally or uniformly, and there are many offenders on whom it is limited and may often be negligible. It is accordingly important to view this question in a just perspective and not base a penal policy in relation to murder on exaggerated estimates of the uniquely deterrent force of the death penalty."

This report suggests further that legislative committees are uniquely well-equipped to make a thorough study of the deterrent effect of the death penalty in their respective jurisdictions so that appropriate legislation may be enacted.

Seldomly enforced laws become ineffective measures for controlling human conduct. Maximum deterrence is achieved through speedy trial with consistent punishment. Some argue that the death penalty, because of infrequent application is no longer an effective deterrent. The *Furman* decision of the United States Supreme Court, irrespective of legislative action by Congress and the state legislatures, has greatly restricted, if not terminated, the use of capital punishment.

On the other hand, others have pointed out that in modern society retribution need not always be the dominant objective of criminal law. Reformation and rehabilitation of offenders have, to some extent, become important goals of criminal justice. However, it should be added at once that such studies as the Goodell Report indicate that rehabilitation is not feasible for some segments of the criminal population.

Has capital punishment been imposed fairly?

It is generally agreed that the death penalty has more frequently been imposed on the lower economic strata of minorities, poor, and uneducated persons. Of 3,857 persons executed in the U.S. between 1930 and 1966, 2,065 or 53.5 percent were blacks. Abolitionists reason that this statistic proves discrimination in the assessment of the death penalty. However, sociological criminologists suggest that the disproportionate involvement of minorities in most crimes, particularly crimes against the person, are the result of a subculture of violence and the stresses and strains imposed on a minority group living in the slums of large cities.

Mr. Justice Powell stated in *Furman v. Georgia*, 408 U.S. 477, (1972): "The root causes of the higher incidence of criminal penalties on 'minorities' and the 'poor' will not be cured by abolishing the system of penalties. Nor, indeed, could any society have a viable system of criminal justice if sanctions were abolished or ameliorated because most of those who commit crimes happen to be underprivileged. The basic problem results not from the penalties imposed for criminal conduct but from social and economic factors that have plagued humanity since the beginning of recorded history, frustrating all efforts to create in any country at any time the perfect society in which there are no 'poor,' no 'minorities,' and no 'under privileged.' "

Justice Powell has suggested, moreover, that many crimes of violence are committed by professional criminals who willingly choose to prey upon society as an easy and remunerative way of life. Moreover, the terms "poor," "minorities," and "underprivileged" are relatively inexact. They often convey subjective connotations which vary widely.

Retentionists contend that statistics accumulated since 1930 do not reflect the dramatic changes which have resulted in desegregation and the selection of juries in relatively recent years. Persons of racial minorities are no longer as extensively excluded from jury service as

previously. Poll tax laws and other discriminatory statutes against the poor have been declared unconstitutional. Persons who do not believe in the death penalty no longer are automatically excluded from jury service. Substantial restrictions concerning the use of confessions and the right to counsel upon arrest have resulted in greater protection for minorities, especially in the case of the poor and the uneducated.

Conclusions

The following conclusions are offered as constructive guidelines for the discussion of the questions raised by the subject of capital punishment.

(1) Government has the authority to apply the death penalty.

The sacredness of human life, which results from God's having made man in His own image, is affirmed by God's pronouncements in Gen. 9:6: "Whoever sheds the blood of man, by man shall his blood be shed; for God made man in His own image" and in Ex. 20:13: "You shall not kill." Nevertheless, according to the Holy Scriptures and the Lutheran Confessions, government has the authority to apply the death penalty. In the New Testament it is clearly stated that God delegates His right of "vengeance" (Rom. 12:19) or retribution to government, even when it is not perfect, for it bears the sword to punish evildoers (Rom. 13:1-5). This is not personal, individual vengeance, some way of "getting even," but it is God's own authority for punishing those who have committed a crime. The term "sword" clearly indicates the capital dimensions of the punishment. The Lutheran Confessions recognize that government has the God-given right to exercise capital punishment. This right, however, cannot be regarded either in isolation or in the abstract. Neither can one overlook the circumstances in which it is applied.

(2) The authority of the government to apply the death penalty can be abused.

The power of the sword is an authority of great consequence. History bears ample testimony to its abuse—from the slaughter of the innocents in Bethlehem to the murders of Buchenwald and Belsen! It is a power to be used with restraint, tempered by principles of justice, equity, and in certain instances, of charity. The existence of cities of refuge in ancient Israel testifies to the need for making careful distinctions, for example, between accidental homicide and premeditated murder in a proper application of the law (cf. Num. 35:9-15).

(3) Government is not required to exercise its right to administer the death penalty.

As in the instance of other human institutions, it is at the point where government authority is exercised that personal differences and reservations play their proper role in creating a diversity of opinion. Neither the Scriptures nor the Lutheran Confessions state that the government *must* impose the death penalty in order to serve as the "minister of God" by punishing flagrant wrongdoing, including murder. Therefore Lutheran Christians may have their own reservations concerning the necessity of government exercising the right of capital punishment as it strives to carry out its responsibility to provide a quiet and peaceable life for society. Should government decide that justice and order, as well as the general welfare, would best be served by some other form of punishment, this would not necessarily constitute a denial of God's will for government or a surrender of its mandate.

(4) *Christians should exert a positive influence on the government's exercise of its responsibility of bearing the sword.*

Christians are to use their influence, to whatever degree it is possible, in urging governments either to retain, to reinstate, or to abolish the death penalty, on the insistence that any punishment be administered with utmost fairness.

All Christians, recognizing that government is God's servant for good, are encouraged—

(a) To develop a greater respect for human life, the rights of others, and for the laws of the land.

(b) To work for constant improvement in the system of criminal justice, namely, to define capital crime carefully and to apply justice more equitably and without undue delay, on the understanding that all such activities are to be undertaken within the context and under the impact of moral principle.

(c) To support the development of more effective methods of law enforcement.

(d) To contribute toward programs and systems of reformation and correction which are both humane and progressive.

(e) To search for more effective ways of dealing with persons who commit hostile acts against society, including the possibility of alternatives to incarceration.

(f) To work toward the correction of spiritual, educational, economic, and social problems which cause discrimination, disadvantage, and poverty and so contribute massively to crime.

(g) To love, to pray for, and to extend a ministry of Law and Gospel to both victims and perpetrators of crimes, because everyone needs the compassion and Christian witness of the children of God who want others to know what they know, feel what they feel, hope what they hope, and have what they have through Jesus Christ, their only Savior and Lord.

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