

Commentary: Further Points for Dialogue on the Death Penalty, the Church, and Our Profession

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The invitation to dialogue on the subject of the death penalty is both important for our time and challenging in what it calls forth from us. It forces us to recognize both the fundamental privacy of individual intention and the potential breadth of its reach. It can deepen our sense of responsibility for what happens to others on our account, even in the apparent absence of intention. The astonishing power of the spoken word should be harnessed by cooperative dialogue to focus its consequences more sharply on the demands of justice. We need dialogue to attend faithfully to our deepest obligations and longings.

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Practitioners of medicine experience their discipline sometimes as science and sometimes as art. As science, it encompasses a knowledge base that would be incomplete without addressing religion. Not only do patients refer to influences from religion in the accounts they bring to physicians, but also they often seek help first from religious clergy for problems that subsequently may come to medical attention.¹ In addition, there are diverse and powerful influences from religion on patients' health status, for better and for worse. The influence of religion is favorable to patients' health when it serves to provide community support and comfort and to instill hope. The story can be quite different when patients' religious beliefs induce them to refuse medication or other prescribed treatment. The health-promoting power of religion is strengthened when scholars present sound, relevant information about religious culture and beliefs for physicians to ponder. Thus, an inviting presentation like that of Michael Norko² is likely to achieve its goal of promoting mutually helpful dialogue for both medical and religious purposes.

The reality of medicine as art is especially powerful for both patient and practitioner when they are deal-

ing with the prospect of death. Sherwin Nuland³ has shown how the physician is forced to experience directly the fascination that human nature finds with death, while medical culture tends to keep it at the greatest possible distance. His wide-ranging references to religious influences give witness to a crucial fact: the near presence of a patient's death can lead the physician to a defining dialogue with religion in a variety of helpful ways. I am accustomed to witnessing such dialogue as reflected in the deliberations of Catholic hospitals' ethics committees. In this light, Norko is correct in making the suggestion that Seneca set up a misguided course for the early development of Catholic doctrine on the death penalty.² The flaw in likening execution to removal by amputation of a diseased part is that it may be used to support euthanasia. It potentially lowers the barrier for the physician to prescribe morphine as a treatment for pain while intending to hasten the patient's death.

Keeping Hands Off

The question of intention is critical, since we are living in an age of expanding attention to euthanasia and physician-assisted suicide. The claim of an ability to discern intentions is not one to be casually made.⁴ This reality is brilliantly portrayed in the case of Ananias and Sapphira, cited by Norko from St. Augustine. St. Peter had only to question each of them to name their crimes, accurately discerning

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their intentions. Upon hearing his accusation that they intended to lie to God, each of them promptly fell dead.² It seems in keeping with this precedent that, as Norko points out, neither clergy nor judges are ever in any way permitted to become personally involved in carrying out executions.

Now in the case of Ananias and Sapphira, it is easy enough to hypothesize psychological mechanisms for their dying without being physically touched. Despite this, their execution remains unique in human history, since the punishment took place immediately upon the pronouncement of the criminals' guilt without anyone's laying hands on them.

Robert Cover⁵ has demonstrated in considerable depth the social significance of the requirement for a complex functioning social structure to execute the sentences of judges without their personal participation. He notes that when for any reason this structure is missing or breaks down, the conscientious judge must proceed in a most cautious and circumspect manner. To illustrate, he cites an example from post-war Berlin. Without the implied consent of a constitutive people expressed by all the various actors playing their assigned roles, the judge's word has no force. Because their sentences involve the perpetration of legally sanctioned violence on those who have been convicted, Cover holds that judges who would act fairly must be constantly attentive. Clearly, the same should be said of psychiatric experts in the courtroom, regardless of their contingent and personal opinions regarding the death penalty.

Sister Helen Prejean⁶ carries the application of this hands-off principle a step further. She acknowledges that a valid theoretical case might be made (by someone else, of course, including church officials). She then makes a persuasive case that any theoretical justification for the death penalty is overwhelmed by the factual history of the malfunctioning of all the known systems for its execution. Her account is lengthy and disturbing, giving it considerable probative force.⁶ In the end, she finds no reason to expect the emergence of a state competent to administer the process of execution fairly.

A Further Morality Narrative

There is a moral argument that should give serious pause to supporters of capital punishment. It is from Dostoevsky as he speaks through the lips of a monk in *The Brothers Karamazov*:

Remember especially that you cannot be the judge of anyone. For there can be no judge of a criminal on earth until the judge knows that he, too, is a criminal, exactly the same as the one who stands before him, and that he is perhaps most guilty of all for the crime of the one standing before him. When he understands this, then he will be able to be a judge [Ref. 7, pp 320–321].

How is this possible?

See, here you have passed by a small child, passed by in anger, with a foul word, with a wrathful soul. You perhaps did not notice the child, but he saw you, and your unsightly and impious image has remained in his defenseless heart. You did not know it, but you may thereby have planted a bad seed in him, and it may grow, and all because you did not restrain yourself before the child, because you did not nurture in yourself a heedful, active love [Ref. 7, p 319].

So, continues Dostoevsky, the judge would do well to reflect as follows:

However mad that may seem, it is true. For if I myself were righteous, perhaps there would be no criminal standing before me now [Ref. 7, p 321].

Serious words indeed for the judge about to render a heavy sentence, but there are words even sharper and more explicit for the expert who is about to apply psychiatric expertise to legal questions bearing on the penalty of death. Speaking at the final plenary session of a conference marking the 50th anniversary of the Nuremberg trials, Jay Katz⁸ reminded us that much of the classic corpus of pathology as a genuine science was garnered from those at the bottom of society who were often treated with little or no regard for their human rights or dignity. He submitted that, along with the scientific learning, a pattern of some disregard for the rights of human beings as patients and as research subjects was transmitted. To demonstrate the current cogency of his assertion, Katz makes reference to a 1941 *American Journal of Psychiatry* article recommending that “hopelessly unfit children—nature’s mistakes—should be killed and the less unfit [sterilized] so that thereafter civilization will pass on and on in beauty.”⁸

In their defense it must be pointed out that neither judges nor physicians can escape reflecting the cultures that shape them. This recognition seems to drive Cover's analysis in several ways and it finds resonance elsewhere. James Gilligan⁹ speaks with a particularly persuasive voice regarding the violence of society, especially in the United States. He calls it an epidemic as he points to its roots in poverty and the various ways that members of society lawfully mistreat one another, especially in penal settings. Through a wide range of interactions, Gilligan as-

serts a collective responsibility for much of the violence epidemic. He also offers corrective suggestions, some of which require or involve dialogue.¹⁰ For his part Norko himself speaks of his “haunting knowledge” of a homeless man dying anonymously in broad daylight, even as he and hundreds of other professionals passed him by.¹¹ If we too are haunted, it is probably by a shared awareness of our minor and doubtless unwitting inattentions that played their parts in such a death.

Conclusion

It should be acknowledged that at times the performance of the Roman Catholic Church, as Norko recites, has fallen well short of what most would consider ideal. Often, it seems, the worst instances of moral failure by the Church have coincided with her most stressful periods politically. One can find examples among the crusades as well as in the heavy number of executions referenced by Norko that were linked sometimes to an excess of the Church’s secular power and at other times to its decline. His suggestion is correct that many recent signs of the Church’s current maturing in her understanding of her own history offer points for constructive dialogue, and his examples are useful for that purpose.

Another point for dialogue can be found in the area of how death itself is to be understood. Each major religion is in part identified with its position on how one ought to die, whether it is by execution or not. For Christians in general, the goal of life is union with God, and its importance can and should bring together in dialogue the entire range of Christianity from all walks of life.¹² The hope of every human being for a good death constitutes the ultimate drive to engage in attentive dialogue.

Finally, it has to be acknowledged that unfortunately the Church’s position on capital punishment is opposite the opinion shared by some two-thirds of Roman Catholics in the United States.¹³ This stretches the positive value of diversity too far and presents a serious problem, since an unreflective, personally held dissent is fraught with moral and social hazards.¹⁴ Here lies the most urgent need for honest dialogue.

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