

GOD’S JUSTICE AND OURS
Antonin Scalia

Before proceeding to discuss the morality of capital punishment, I want to make clear that my views on the subject have nothing to do with how I vote in capital cases that come before the Supreme Court. That statement would not be true if I subscribed to the conventional fallacy that the Constitution is a “living document” – that is, a text that means from age to age whatever the society (or perhaps the Court) thinks it ought to mean.

In recent years, that philosophy has been particularly well enshrined in our Eighth Amendment jurisprudence, our case law dealing with the prohibition of “cruel and unusual punishments.” Several of our opinions have said that what falls within this prohibition is not static, but changes from generation to generation, to comport with “the evolving standards of decency that mark the progress of a maturing society.” Applying that principle, the Court came close, in 1972, to abolishing the death penalty entirely. It ultimately did not do so, but it has imposed, under color of the Constitution, procedural and substantive limitations that did not exist when the Eighth Amendment was adopted—and some of which had not even been adopted by a majority of the states at the time they were judicially decreed. For example, the Court has prohibited the death penalty for all crimes except murder, and indeed even for what might be called run-of-the-mill murders, as opposed to those that are somehow characterized by a high degree of brutality or depravity. It has prohibited the mandatory imposition of the death penalty for any crime, insisting that in all cases the jury be permitted to consider all mitigating factors and to impose, if it wishes, a lesser sentence. And it has imposed an age limit at the time of the offense (it is currently seventeen) that is well above what existed at common law.

If I subscribed to the proposition that I am authorized (indeed, I suppose compelled) to intuit and impose our “maturing” society’s “evolving standards of decency,” this essay would be a preview of my next vote in a death penalty case. As it is, however, the Constitution that I interpret and apply is not living but dead—or, as I prefer to put it, enduring. It means today not what current society (much less the Court) thinks it ought to mean, but what it meant when it was adopted. For me, therefore, the constitutionality of the death penalty is not a difficult, soul-wrenching question. It was clearly permitted when the Eighth Amendment was adopted (not merely for murder, by the way, but for all felonies—including, for example, horse-thieving, as anyone can verify by watching a western movie). And so it is clearly permitted today. There is plenty of room within this system for “evolving standards of decency,” but the instrument of evolution (or, if you are more tolerant of the Court’s approach, the herald that evolution has occurred) is not the nine lawyers who sit on the Supreme Court of the United States, but the Congress of the United States and the legislatures of the fifty states, who may, within their own jurisdictions, restrict or abolish the death penalty as they wish.

But while my views on the morality of the death penalty have nothing to do with how I vote as a judge, they have a lot to do with whether I can or should be a judge at all. To put the point in the blunt terms employed by Justice Harold Blackmun towards the end of his career on the bench, when he announced that he would henceforth vote (as Justices William Brennan and Thurgood Marshall had previously done) to overturn all death sentences, when I sit on a Court that reviews and affirms capital convictions, I am part of “the machinery of death.” My vote, when joined with at least four others, is, in most cases, the last step that permits an execution to proceed. I could not take part in that process if I believed what was being done to be immoral.

Capital cases are much different from the other life-and-death issues that my Court sometimes faces: abortion, for example, or legalized suicide. There it is not the state (of which I am in a sense the last instrument) that is decreeing death, but rather private individuals whom the state has decided not to restrain. One may argue (as many do) that the society has a moral obligation to restrain. That moral obligation may

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weigh heavily upon the voter, and upon the legislator who enacts the laws; but a judge, I think, bears no moral guilt for the laws society has failed to enact. Thus, my difficulty with *Roe v. Wade* is a legal rather than a moral one: I do not believe (and, for two hundred years, no one believed) that the Constitution contains a right to abortion. And if a state were to permit abortion on demand, I would—and could in good conscience—vote against an attempt to invalidate that law for the same reason that I vote against the invalidation of laws that forbid abortion on demand: because the Constitution gives the federal government (and hence me) no power over the matter.

With the death penalty, on the other hand, I am part of the criminal-law machinery that imposes death – which extends from the indictment, to the jury conviction, to rejection of the last appeal. I am aware of the ethical principle that one can give “material cooperation” to the immoral act of another when the evil that would attend failure to cooperate is even greater (for example, helping a burglar tie up a householder where the alternative is that the burglar would kill the householder). I doubt whether that doctrine is even applicable to the trial judges and jurors who must themselves determine that the death sentence will be imposed. It seems to me these individuals are not merely engaged in “material cooperation” with someone else’s action, but are themselves decreeing death on behalf of the state.

The same is true of appellate judges in those states where they are charged with “reweighing” the mitigating and aggravating factors and determining *de novo* whether the death penalty should be imposed: they are themselves decreeing death. Where (as is the case in the federal system) the appellate judge merely determines that the sentence pronounced by the trial court is in accordance with law, perhaps the principle of material cooperation could be applied. But as I have said, that principle demands that the good deriving from the cooperation exceed the evil which is assisted. I find it hard to see how any appellate judge could find this condition to be met, unless he believes retaining his seat on the bench (rather than resigning) is somehow essential to preservation of the society—which is of course absurd. (As Charles de Gaulle is reputed to have remarked when his aides told him he could not resign as President of France because he was the indispensable man: “*Mon ami*, the cemeteries are full of indispensable men.”)

I pause here to emphasize the point that in my view the choice for the judge who believes the death penalty to be immoral is resignation, rather than simply ignoring duly enacted, constitutional laws and sabotaging death penalty cases. He has, after all, taken an oath to apply the laws and has been given no power to supplant them with rules of his own. Of course if he feels strongly enough he can go beyond mere resignation and lead a political campaign to abolish the death penalty—and if that fails, lead a revolution. But rewrite the laws he cannot do. This dilemma, of course, need not be confronted by a proponent of the “living Constitution,” who believes that it means what it ought to mean. If the death penalty is (in his view) immoral, then it is (hey, presto!) automatically unconstitutional, and he can continue to sit while nullifying a sanction that has been imposed, with no suggestion of its unconstitutionality, since the beginning of the Republic. (You can see why the “living Constitution” has such attraction for us judges.)

It is a matter of great consequence to me, therefore, whether the death penalty is morally acceptable. As a Roman Catholic – and being unable to jump out of my skin – I cannot discuss that issue without reference to Christian tradition and the Church’s Magisterium.

The death penalty is undoubtedly wrong unless one accords to the state a scope of moral action that goes beyond what is permitted to the individual. In my view, the major impetus behind modern aversion to the death penalty is the equation of private morality with governmental morality. This is a predictable (though I believe erroneous and regrettable) reaction to modern, democratic self-government.

Few doubted the morality of the death penalty in the age that believed in the divine right of kings. Or even in earlier times. St. Paul had this to say (I am quoting, as you might expect, the King James version):

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Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God. Whosoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation. For rulers are not a terror to good works, but to the evil. Wilt thou then not be afraid of the power? Do that which is good, and thou shalt have praise of the same: for he is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to execute wrath upon him that doeth evil. Wherefore ye must needs be subject, not only for wrath, but also for conscience sake. (Romans 13:1–5)

This is not the Old Testament, I emphasize, but St. Paul. One can understand his words as referring only to lawfully constituted authority, or even only to lawfully constituted authority that rules justly. But the *core* of his message is that government—however you want to limit that concept—derives its moral authority from God. It is the “minister of God” with powers to “revenge,” to “execute wrath,” including even wrath by the sword (which is unmistakably a reference to the death penalty). Paul of course did not believe that the *individual* possessed any such powers. Only a few lines before this passage, he wrote, “Dearly beloved, avenge not yourselves, but rather give place unto wrath: for it is written, Vengeance is mine; I will repay, saith the Lord.” And in this world the Lord repaid—did justice—through His minister, the state.

These passages from Romans represent the consensus of Western thought until very recent times. Not just of Christian or religious thought, but of secular thought regarding the powers of the state. That consensus has been upset, I think, by the emergence of democracy. It is easy to see the hand of the Almighty behind rulers whose forebears, in the dim mists of history, were supposedly anointed by God, or who at least obtained their thrones in awful and unpredictable battles whose outcome was determined by the Lord of Hosts, that is, the Lord of Armies. It is much more difficult to see the hand of God—or any higher moral authority—behind the fools and rogues (as the losers would have it) whom we ourselves elect to do our own will. How can their power to avenge—to vindicate the “public order”—be any greater than our own?

So it is no accident, I think, that the modern view that the death penalty is immoral is centered in the West. That has little to do with the fact that the West has a Christian tradition, and everything to do with the fact that the West is the home of democracy. Indeed, it seems to me that the more Christian a country is the *less* likely it is to regard the death penalty as immoral. Abolition has taken its firmest hold in post-Christian Europe, and has least support in the church-going United States. I attribute that to the fact that, for the believing Christian, death is no big deal. Intentionally killing an innocent person is a big deal: it is a grave sin, which causes one to lose his soul. But losing this life, in exchange for the next? The Christian attitude is reflected in the words Robert Bolt’s play has Thomas More saying to the headsman: “Friend, be not afraid of your office. You send me to God.” And when Cranmer asks whether he is sure of that, More replies, “He will not refuse one who is so blithe to go to Him.” For the nonbeliever, on the other hand, to deprive a man of his life is to end his existence. What a horrible act!

Besides being *less* likely to regard death as an utterly cataclysmic punishment, the Christian is also *more* likely to regard punishment in general as deserved. The doctrine of free will—the ability of man to resist temptations to evil, which God will not permit beyond man’s capacity to resist—is central to the Christian doctrine of salvation and damnation, heaven and hell. The post-Freudian secularist, on the other hand, is more inclined to think that people are what their history and circumstances have made them, and there is little sense in assigning blame.

Of course those who deny the authority of a government to exact vengeance are not entirely logical. Many crimes—for example, domestic murder in the heat of passion—are neither deterred by punishment meted out to others nor likely to be committed a second time by the same offender. Yet opponents of capital punishment do not object to sending such an offender to prison, perhaps for life. Because he *deserves* punishment. Because it is *just*.

The mistaken tendency to believe that a democratic government, being nothing more than the composite will of its individual citizens, has no more moral power or authority than they do as individuals has adverse effects in other areas as well. It fosters civil disobedience, for example, which proceeds on the assumption that what the individual citizen considers an unjust law—even if it does not compel *him* to act unjustly—need not be obeyed. St. Paul would not agree. “Ye must needs be subject,” he said, “not only for wrath, but also for conscience sake.” For conscience sake. The reaction of people of faith to this tendency of democracy to obscure the divine authority behind government should not be resignation to it, but the resolution to combat it as effectively as possible. We have done that in this country (and continental Europe has not) by preserving in our public life many visible reminders that—in the words of a Supreme Court opinion from the 1940s—“we are a religious people, whose institutions presuppose a Supreme Being.” These reminders include: “In God we trust” on our coins, “one nation, under God” in our Pledge of Allegiance, the opening of sessions of our legislatures with a prayer, the opening of sessions of my Court with “God save the United States and this Honorable Court,” annual Thanksgiving proclamations issued by our President at the direction of Congress, and constant invocations of divine support in the speeches of our political leaders, which often conclude, “God bless America.” All this, as I say, is most un-European, and helps explain why our people are more inclined to understand, as St. Paul did, that government carries the sword as “the minister of God,” to “execute wrath” upon the evildoer.

A brief story about the aftermath of September 11 nicely illustrates how different things are in secularized Europe. I was at a conference of European and American lawyers and jurists in Rome when the planes struck the twin towers. All in attendance were transfixed by the horror of the event, and listened with rapt attention to the President’s ensuing address to the nation. When the speech had concluded, one of the European conferees—a religious man—confided in me how jealous he was that the leader of my nation could conclude his address with the words “God bless the United States.” Such invocation of the deity, he assured me, was absolutely unthinkable in his country, with its Napoleonic tradition of extirpating religion from public life.

It will come as no surprise from what I have said that I do not agree with the encyclical *Evangelium Vitae* and the new Catholic catechism (or the very latest version of the new Catholic catechism), according to which the death penalty can only be imposed to protect rather than avenge, and that since it is (in most modern societies) not necessary for the former purpose, it is wrong. That, by the way, is how I read those documents—and not, as Avery Cardinal Dulles would read them, simply as an affirmation of two millennia of Christian teaching that retribution is a proper purpose (indeed, the principal purpose) of criminal punishment, but merely adding the “prudential judgment” that in modern circumstances condign retribution “rarely if ever” justifies death. (See “Catholicism & Capital Punishment,” *FT*, April 2001.) I cannot square that interpretation with the following passage from the encyclical:

It is clear that, for these [permissible purposes of penal justice] to be achieved, the nature and extent of the punishment must be carefully evaluated and decided upon, and ought not go to the extreme of executing the offender except in cases of absolute necessity: *in other words, when it would not be possible otherwise to defend society. Today, however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically nonexistent.* (Emphases deleted and added.)

It is true enough that the paragraph of the encyclical that precedes this passage acknowledges (in accord with traditional Catholic teaching) that “the primary purpose of the punishment which society inflicts is ‘to redress the disorder caused by the offense’” by “imposing on the offender an adequate punishment for the crime.” But it seems to me quite impossible to interpret the later passage’s phrase “when it would not be possible otherwise to defend society” as including “defense” through the redress of disorder achieved by adequate punishment. Not only does the word “defense” not readily lend itself to that strange interpre-

tation, but the immediately following explanation of why, in modern times, “defense” rarely if ever requires capital punishment *has no bearing whatever upon the adequacy of retribution*. In fact, one might say that it has an *inverse* bearing.

How in the world can modernity’s “steady improvements in the organization of the penal system” render the death penalty less condign for a particularly heinous crime? One might think that commitment to a really horrible penal system (Devil’s Island, for example) might be almost as bad as death. But nice clean cells with television sets, exercise rooms, meals designed by nutritionists, and conjugal visits? That would seem to render the death penalty more, rather than less, necessary. So also would the greatly increased capacity for evil—the greatly increased power to produce moral “disorder”—placed in individual hands by modern technology. Could St. Paul or St. Thomas even have envisioned a crime by an individual (as opposed to one by a ruler, such as Herod’s slaughter of the innocents) as enormous as that of Timothy McVeigh or of the men who destroyed three thousand innocents in the World Trade Center? If just retribution is a legitimate purpose (indeed, the principal legitimate purpose) of capital punishment, can one possibly say with a straight face that nowadays death would “rarely if ever” be appropriate?

So I take the encyclical and the latest, hot-off-the-presses version of the catechism (a supposed encapsulation of the “deposit” of faith and the Church’s teaching regarding a moral order that does not change) to mean that retribution is not a valid purpose of capital punishment. Unlike such other hard Catholic doctrines as the prohibition of birth control and of abortion, this is not a moral position that the Church has always—or indeed *ever before*—maintained. There have been Christian opponents of the death penalty, just as there have been Christian pacifists, but neither of those positions has ever been that of the Church. The current predominance of opposition to the death penalty is the legacy of Napoleon, Hegel, and Freud rather than St. Paul and St. Augustine. I mentioned earlier Thomas More, who has long been regarded in this country as the patron saint of lawyers, and who has recently been declared by the Vatican the patron saint of politicians (I am not sure that is a promotion). One of the charges leveled by that canonized saint’s detractors was that, as Lord Chancellor, he was too quick to impose the death penalty.

I am therefore happy to learn from the canonical experts I have consulted that the position set forth in *Evangelium Vitae* and in the latest version of the Catholic catechism does not purport to be binding teaching – that is, it need not be accepted by practicing Catholics, though they must give it thoughtful and respectful consideration. It would be remarkable to think otherwise—that a couple of paragraphs in an encyclical almost entirely devoted not to crime and punishment but to abortion and euthanasia was intended authoritatively to sweep aside (if one could) two thousand years of Christian teaching.

So I have given this new position thoughtful and careful consideration – and I disagree. That is not to say I favor the death penalty (I am judicially and judiciously neutral on that point); it is only to say that I do not find the death penalty immoral. I am happy to have reached that conclusion, because I like my job, and would rather not resign. And I am happy because I do not think it would be a good thing if American Catholics running for legislative office had to oppose the death penalty (most of them would not be elected); if American Catholics running for Governor had to promise commutation of all death sentences (most of them would never reach the Governor’s mansion); if American Catholics were ineligible to go on the bench in all jurisdictions imposing the death penalty; or if American Catholics were subject to recusal when called for jury duty in capital cases.

I find it ironic that the Church’s new (albeit nonbinding) position on the death penalty – which, if accepted, would have these *disastrous* consequences – is said to rest upon “prudential considerations.” Is it prudent, when one is not certain enough about the point to proclaim it in a binding manner (and with good reason, given the long and consistent Christian tradition to the contrary), to effectively urge the retirement of Catholics from public life in a country where the federal government and thirty-eight of the states (comprising about 85 percent of the population) believe the death penalty is sometimes just and appropri-

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ate? Is it prudent to imperil acceptance of the Church’s hard but traditional teachings on birth control and abortion and euthanasia (teachings that *have been* proclaimed in a binding manner, a distinction that the average Catholic layman is unlikely to grasp) by packaging them—under the wrapper “respect for life”—with another uncongenial doctrine *that everyone knows does not represent the traditional Christian view*? Perhaps, one is invited to conclude, all four of them are recently made-up. We need some new staffers at the Congregation of Prudence in the Vatican. At least the new doctrine should have been urged only upon secular Europe, where it is at home.