

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):

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 interpretation, 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 appropriate? 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.

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JUSTICE

# Hunting 'The Fugitive'

An ancient blood sample may settle the Sheppard murder—and finally finger a fabled suspect

BY MARC PEYSER  
AND GREGORY BEALS

IT WAS THE KIND OF CASE HOLLYWOOD can't get enough of. The way Dr. Sam Sheppard told the story, at about 4 a.m. on July 4, 1954, he heard his pregnant wife, Marilyn, yell "Sam!" from upstairs in their house in suburban Cleveland. Sheppard, 30, who had been dozing on the first floor, ran to her room and was knocked out from behind. When he came to, he chased a tall, "bushy-haired" intruder through the basement to the Lake Erie beach. Another struggle; another Sheppard knockout. When he woke up this time, the intruder was gone. Sheppard staggered inside, but Marilyn was dead, bludgeoned 35 times. The doctor was arrested and convicted after he couldn't explain why the alleged intruder left no fingerprints or any sign of forced entry. Twelve years later a 28-year-old lawyer named F. Lee Bailey convinced the Supreme Court that biased press coverage had prejudiced the jury. In the retrial, a forensics expert testified that there was blood in the house that didn't belong to either Sheppard, and the doctor was set free. The case became the basis for "The Fugitive" TV series and the movie. Until O.J., it was called "The Crime of the Century."

And like the Simpson case, the Sheppard story won't go away. Sheppard's son, also named Sam, has co-written a book alleging that his father was innocent—something many still doubt. But young Sam's new "Mockery of Justice" does more than just defend the elder Sheppard, who died in 1970. With coauthor Cynthia Cooper, he thinks he's tracked down the supposed "bushy-haired" man (he became the "one-armed man" in Hollywood): Richard Eberling, the family's window washer. Now 66, Eberling is serving life in prison for altering a wealthy widow's will to make himself

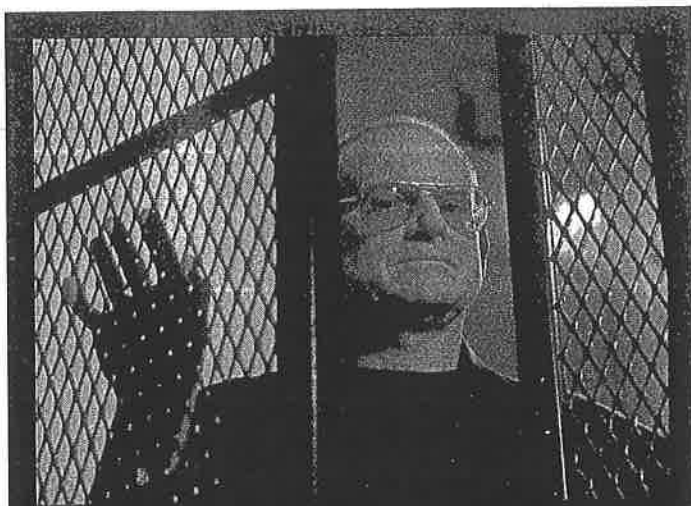
the beneficiary—then killing her in 1984. Though Cooper, who interviewed Eberling, did not ask him if he murdered Mrs. Sheppard (she says she was afraid of alienating him as a source), the authors amassed enough circumstantial information to per-

now. During 40 hours of interviews with Cooper, he was startlingly knowledgeable about the Sheppard house on the night of the murder, down to the fact that blood didn't splatter on Marilyn's pink satin slippers because they were under her bed. While compiling the book, Cooper obtained a police report, dated July 23, 1954, that says police made a casting of a chisel-like mark found on a basement door. The report wasn't turned over to Dr. Sheppard's attorneys, who never could refute charges that no one forced their way into the house. To the son, it's a key finding. "I think it's nearly over," says Sheppard, who was a 7-year-old sleeping down the hall when his mother was murdered. Raised

by an uncle and then sent to a military school, he's now an unemployed dental hygienist, a Buddhist and an anti-death-penalty activist.

The telltale clue may be a drop of blood preserved on wood removed from the Sheppards' basement floor. Sheppard wants its DNA compared with Eberling's. Forensic experts don't know if 41-year-old blood will prove fit to be tested. But if the blood samples match, Eberling has an explanation. He says he cut his finger working at the Sheppards' two days before the murder. He told that story in 1959, after police arrested him for stealing from his clients. Among the things found at his house was Marilyn's diamond ring. (Eberling said he lifted it from her sister-in-law, who got it after the murder—a sign of obsession with the case.)

Rings, blood, chisels—none of them means that Eberling killed Marilyn Sheppard, or that her husband didn't. The book points out that Eberling is a tall, bald man who wore "bushy" toupees, and witnesses testified they saw a "bushy-haired" man near the Sheppard home on the morning after the murder. But wouldn't Dr. Sheppard have recognized his own window washer? Maybe not. The authors also recount Eberling's troubled childhood (he was abandoned at birth), his criminal record and his knowing jailhouse hints about the case. Young Sheppard, now 48, believes that the blood will implicate Eberling. "Eberling's a pretty tortured individual," Sheppard told NEWSWEEK. "We can see how he wants to be relieved of this distress." Sheppard could just as well be talking about himself.



**Blood ties:** Sam the son, today (above); Dr. Sheppard and Bailey lobby for a retrial in 1965 (right); Eberling's 1959 mug shot



POLICE DEPARTMENT  
ROCKY RIVER OHIO



suade prosecutors to ask for a sample of Eberling's blood for DNA testing, which they will do this week. "I don't think Sheppard was a good suspect," says Carmen Marino, first assistant prosecutor in Cuyahoga County, Ohio. "I don't believe he killed his wife."

Eberling passed a lie-detector test in 1959, but his own words may snare him

