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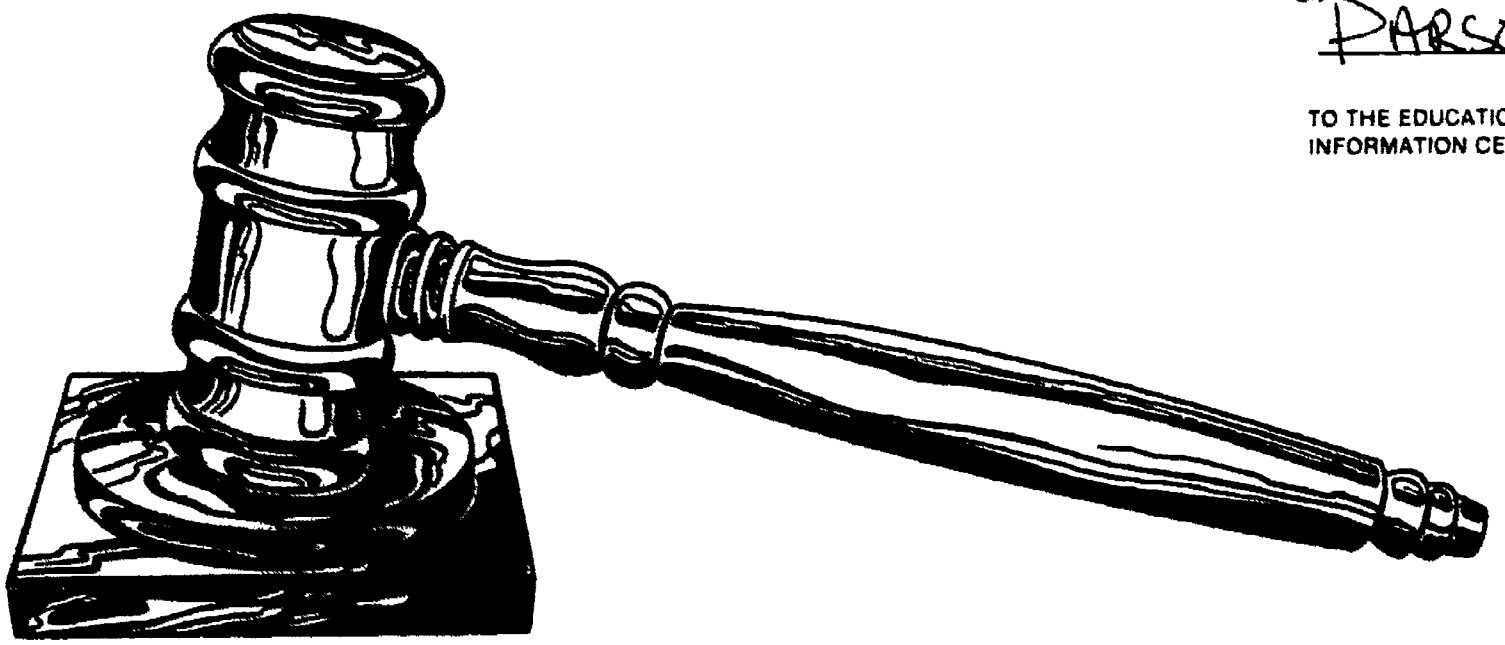
ABSTRACT

A series of four speeches on law-related topics comprise this volume. The text of each speech along with comments of invited respondents are included. The presentations include: "Justice and Sentencing" (Daniel Moylan); "Law: Obedience and Civil Disobedience" (Linda Irvin); "Liberty--The Right of Privacy" (Allan Powell); and "Punishment: The Death Sentence" (Tom Mappes). The appendix contains the program that outlines the seminar. (DB)

Challenges and Choices for the Law in the 21st Century



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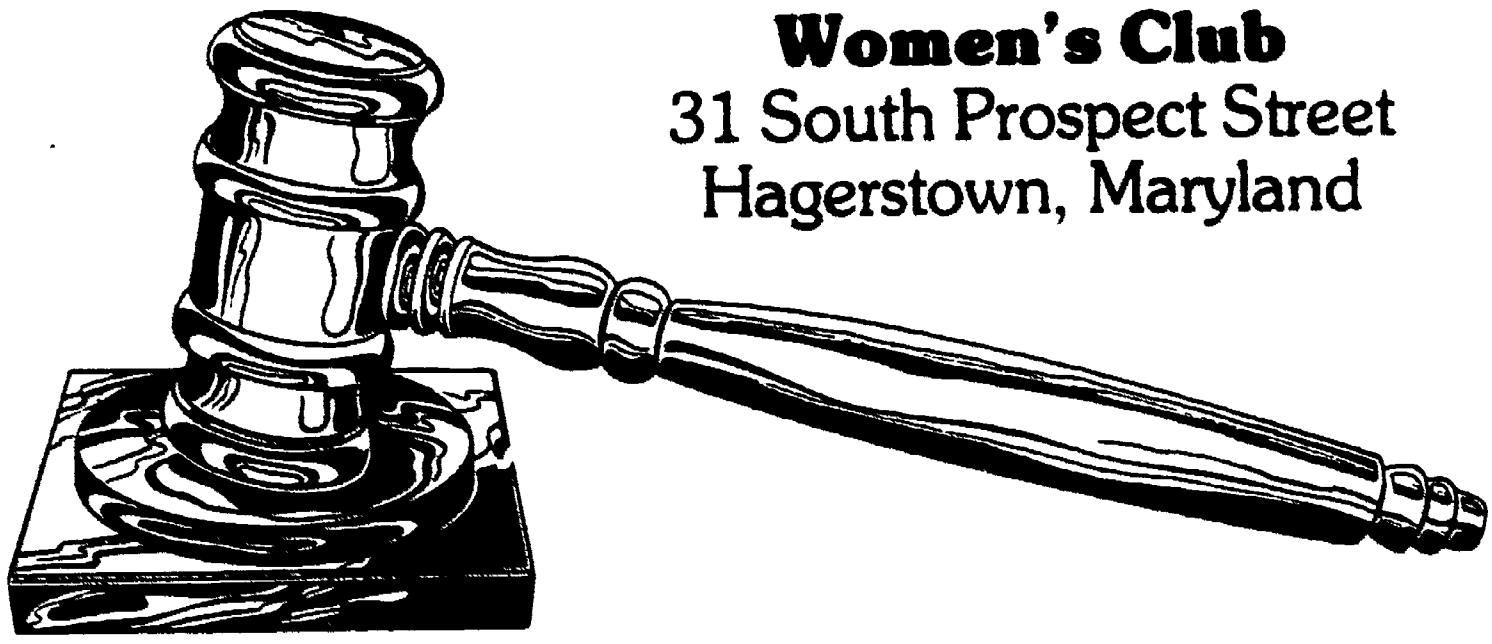
Challenges and Choices for the Law in the 21st Century

Fall 1990



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CHALLENGES AND CHOICES FOR THE LAW IN THE 21ST CENTURY

Hagerstown Junior College has maintained a continuing interest in bringing issues of a vital concern to residents within our service area. We appreciate the support of the Maryland Humanities Council in carrying out this mission.

We believe the addresses and the remarks made by the respondents ought to be shared with others who are interested in the topics discussed. Possibly the participants would enjoy some reactions to their point of view.

This was our first attempt at a cooperative venture with Frostburg State University. It is hoped that other such shared programs are in the future.

Allan Powell
Project Director

Michael Parsons
Dean of Instruction

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"JUSTICE AND SENTENCING"

Daniel Moylan
Judge

1. First in a series of four programs

2. Validate the programs, sponsors, and process

3. Applaud Hagerstown Junior College and Frostburg State University for providing a forum and time to talk about the important issues

4. My Thesis: This Topic

   On a par with the deficit as a major issue of the day

   Goes right to the heart

Able to govern and our faith (the public confidence) in our institutions of government

All three branches of government

1. Legislative
2. Executive
3. Judicial as well as

   Law enforcement;

   Legal system;

   Our corrective system; and

   Probation and parole systems

Q. Where are we at the present time? Where are we headed?

To understand our present situation and where we are going, we have to look back first, not forward.

"Those who don't know history, are doomed to repeat it."

Are things getting better? Are things getting worse?

Charles Dickens <u>In a Tale of Two Cities</u> captured the ambivalence and uncertainty that many feel today

"It was the best of times, it was the worst of times."

From the standpoint of the criminal justice system do you perceive things getting better or worse?

Introductory

Historical perspective

Rationale for sentencing

A. Vindication of society

B. Incapacitation

C. Deterrence

1. General

2. Special

Characteristics of system

Impersonal

Harsh

Brutal

Virtually no discretion (leniency)

Parties

The society

The defendant

Not the victim individually but as a member of society

The role of King or Queen (Emperor or Ruler)

The three-in-one (executive, legislative, judicial)

Concentration of POWER

Discretion: Clemency and pardon

Evolution of sentencing under the English Common Law

Jury trial replaced

Trial by combat

Trial by ordeal

Trial by abodial morsel

Judges imposed the sentence

Characteristic of system remained

Impersonal

Harsh

Brutal

Virtually no discretion (leniency)

Capital punishment

Justice in the colonies -- less harsh, BUT more of the same

By the time of the American Revolution

The winds of change are blowing

The Constitution -- establishes a republican form of government

Places limits on the absolute power of the ruler

Article I, Section 9 restricts suspension of the privilege of the writ of habeas corpus

Prohibits passage of bills of attainder ex post facto laws

Article II, Section 2 provides the President with the power to grant reprieves and pardons

Article III, Section 2 provides for trial by jury for "all crimes except in cases of impeachment" and directs that trials "shall be held in the state where the said crimes shall have been committed"

Article III, Section 3 narrowly defines what constitutes treason against the United States

Article IV, Section 2 provides for extradition of criminal defendants

Bill of Rights -- stress on criminal procedure of the twenty-three separate rights mentioned in the first eight amendments; thirteen relate to the treatment of criminal defendants

IV. No unreasonable searches and seizures
No warrant except upon probable cause
No general warrants (specific as to place and things)

V. Prosecution by Grand Jury Indictment for all infamous crimes
Double jeopardy
Compellable witness and self-incrimination

VI. Speedy and public trial
Right to notice
Fair and impartial jury
Confrontation of hostile witnesses
Compulsory process for obtaining witnesses
Assistance of counsel

VIII. Excessive bails and fines
Cruel and unusual punishments

General Prohibition: V. Amendment

". . . against deprivation of life, liberty, or property without due process of law"

Conferred rights upon U.S. citizens

Placed limitation upon the power of the central government

Not until a Civil War was fought and the adaption of the XIV Amendment that most of these same limitations were placed upon the State (and local) governments

System at the time of the Constitution 1789

Still impersonal, harsh, somewhat less brutal

But virtually no discretion (leniency)

Historical Perspective

Western sentencing traditions predate recorded history

When civilization's basic social structure was the TRIBE

Crime was considered **any** action by one of the tribe members which adversely affected the tribe's welfare

1790 B.C. sentencing theory of Hammurabian Code

Continued concept of tribal compensation

Fine

Lex talionis

Hebrew Mosaic

Medieval England

Compensatory fines

"Outlaws" -- forfeiture

Amputating body parts

Flogging

Enslavement

Death

Methods of capital punishment

Hangings were public

Less brutal -- more humane

Not until 18th and 19th century

Incarcerating an offender as a consequence of criminal conduct

Prison colonies -- Australia

Georgia

Penal Colonies

Criminal behavior with swift public condemnation

Harsh punishment

Maximize a sense of disgrace in the offender

Steve Zabetakis, Respondent
Professor, Hagerstown Junior College

to

Daniel Moylan, Speaker

Introductory remarks by Judge Moylan indicated that society in general appears little concerned about convicted persons' sentences. I agree and take the stand that many citizens are unfamiliar with the legal process and are not aware of all the complications associated with decisions regarding sentencing. Education is the key ingredient; however, it is very difficult to convince the general public that there is more to this issue then just "lock them up and throw the key away."

My response to the topic of Historical Perspective included the time frame in which law was divided into criminal (public wrong) and civil (private wrong). This idea was the first attempt to correct the blood feuds of the past allowing the government to represent the people for criminal violations. The Magna Carta was one of the first attempts to protect the people from tight-fisted rein of the kings of England and the forerunner of our Bill of Rights including that of Due Process (Fifth and Fourteenth Amendments).

My response to the comments regarding the U.S. Constitution centered around the Sixth Amendment in relationship to a person's right to face their accuser. Today, the issues have compounded themselves in criminal activity such as child abuse. The defendant under the Sixth Amendment right to confront witnesses vs the government's right to protect the child in the court room against any type of visual, etc. intimidation that may/would cause emotional, mental problems.

My response to the topic of today's reform movement focused on such matters as population, legal issues, and the type of sentence structure now in use pertaining to convicted/incarcerated individuals. In the last five to seven years the population in the correctional institutions has doubled and the old idea of ball and chain, lock-them-up attitude just does not work. Whether the general public likes it or not, these people must be treated as humans. A great number of court decisions from various levels, including the U.S. Supreme Court, has established the guidelines for this corrective action. Other institutions such as the American Civil Liberties Union are also acting as a watch dog over these legal issues and human treatment for the convicted.

Examples of the reform movement are indicated by the new sentence guidelines established as part of the Crime Control Act of 1984. This included a number of factors that are taken under consideration of the judiciary, i.e., supervised release rather than a parole board, calculations based on such factors as type of offense, prior criminal record, the offender's role in the criminal act, and their acceptance of responsibility for the act. Another example of reform can be observed in the State of Georgia where an array of options are available for the judges. These include Basic Probation, Community Services, Intensive Probation Supervision, Diversion Center, and Shock Incarceration.

In summary there is no instant fix nor can the band-aid approach continue to be used.

Robin Spaid, Respondent
Hagerstown Junior College

to

Daniel Moylan, Speaker

The historical perspective of justice and sentencing given by Judge Moylan was both interesting and informative. This raises several questions in my mind.

On sentencing, should judges by flexible or inflexible? Should we allow individual judges latitude in handing down sentences to address individual situations or should we be more rigid, imposing strict guidelines for crimes?

Balancing the rights of the defendant and protecting the public are two issues that are not mutually exclusive. How far do we go to protect the rights of individuals accused of crimes? What is the state's responsibility in protecting the public?

Do we as a society accept the easy way out by simply incarcerating the convicted? Is there any real rehabilitation of prisoners? Can we truly rehabilitate when what society has to offer the offender is less attractive than a life of crime?

How many of you in the audience vote? How many are under 18? None. If you are dissatisfied with our judicial system, your voice is your vote.

In a few years the ballot for Circuit Court judges will come up again. Judge Moylan will be on that ballot. This brings up the question of whether appointing or electing judges is still workable for today's society. Should we test judges, like we test lawyers, doctors, and teachers? Should we scrap life

appointments? If we elect judges, is it just a popularity contest like homecoming king and queen in high school?

What do we do with a jurist or jurists who commit indiscretions or crimes?

What about OBJECTIVITY? How do we handle a jurist who cannot make objective decisions?

It seems we are in deep trouble when it comes to justice and sentencing -- 46,004 more prisoners in a 5-year period. Why did the prison population double? Do we have more laws? Are we catching criminals or average citizens who commit indiscretions? Are the reporting systems more sophisticated now that we have computers? We are the data generation. Is there more "crime" or just a different definition of what a crime is? Has our view of crime changed?

What is wrong with our society that we have so many people locked up? That is the question of the day for all of you in the audience. It is not Judge Moylan's job to fix our society and make decisions as to how we might change things. It is not Steve Zabetakis' job or mine. It is your job as citizens and voters. This is your county, your state, and your country. You as a voter and a citizen have a responsibility to make changes in the system if it is not working. Thank you.

"LAW: OBEDIENCE AND CIVIL DISOBEDIENCE"

Linda Irvin
County Commissioner

Civil Disobedience -- what a benign sounding term. Yet students of history record clearly that just below the surface lies the stuff of which revolutions are made. The romantic versions of the Boston Tea Party report only the highest moral intent, but the rumblings of greater dissent were definitely part of the action.

This term immediately invokes references to Socrates, Jesus, Henry David Thoreau, Gandhi, and Martin Luther King, Jr. Each has his own methods and reasons for choosing to disobey and history credits each with a very different contribution. To project the usefulness for a behavior designed for critical effect into the future, one must first look at that history.

While Socrates' disobedience cannot be related to specific law, he was indicted, convicted, and sentenced to die for corrupting the morals of youth by teaching them to question intellectually the accepted religion of their time. His refusal to accept the host of Athenian gods was reason enough to be imprisoned and from his prison Socrates stood by his position ". . .whether in battle, or in a court of law, or in any other place, [one] must do what his city and his country order him; or he must change their view of what is just. . . ." It was either obey or dissuade the state, and his principles dictated he attempt the latter.

He felt that the unjustness of his impending death, and thus his martyrdom, would more quickly serve the ends of his god. It was upon belief in whom the great philosopher based his willingness to disobey the state where the two

conflicted. Much like Jesus, who flew in the face of conventional belief, Socrates was an itinerant teacher. These two were prosecuted and they accepted their punishment as appropriate to the importance of the messages they sought to convey.

Thoreau complained that support of injustice is wrong and thus he refused to pay his annual poll tax, for which he was jailed overnight; not quite the consequences his hero Socrates suffered. His focus or specific disagreement with the state in the late 1840s were two national evils, the American invasion of Mexico and Negro slavery.

Writing on Thoreau in his **Civil Disobedience: A Casebook**, Curtis Crawford offers the following discussion. "For moral excitement, Thoreau's language is hard to match. But carefully weighed, how substantial is it? 'Under a government which imprisons any unjustly, the true place for a just man is also a prison . . . the only house in a slave state in which a free man can abide with honor.' High, intoxicating ground, but consider: by the same logic, under a government which kills any unjustly, the true place for a just man is in the grave -- because injustice exists, it is better not to live."

Crawford's argument with Thoreau goes beyond the above-mentioned attempt to make his logic appear ludicrous. He states more clearly that "Men are rarely unanimous as to what should be done, nor do they always prefer to obey a group decision, whether they have approved it or not. Hence, it appears that a community could not exist without law (that is, the authority to bind those who disagree), that law could not exist without obedience, and that therefore men have a moral duty to obey the law."

Fifty years later comes Mohandas K. Gandhi, who served to inspire a worldwide following with his many successful non-violent, peaceful actions. His half-century of activities on behalf of countrymen in Africa and native India came from his assertions that only through God could a man know truth and that necessities must always take priority over luxuries.

He states under examination that each of his pledges "was bound to resist all those laws which he considered to be unjust and which were not of a criminal character, in order to bend the government to the will of the people."

One wonders how one of history's most pronounced circumstances where the lack of civil disobedience on the part of the German people in Hitler's Germany could have occurred concurrently with the life of Gandhi. We know, of course, that there were in fact many Germans who defied edicts of their rulers secretly.

It is probably the non-retaliation piece of Gandhi's Truthforce Treatise that most inspired the American civil rights movement which began less than 10 years after his death.

Gandhi wrote, "Victory is impossible until we are able to keep our temper under the gravest provocation. Calmness under fire is a soldier's indispensable quality. A non-co-operator is nothing if he cannot remain calm and unperturbed under a fierce fire of provocation.

"There should be no mistake. There is no civil disobedience possible until the crowds behave like disciplined soldiers. And we cannot resort to civil disobedience unless we can assure every Englishman that he is as safe in India as he is in his own home. It is not enough that we give assurance. Every

Englishman and Englishwoman must feel safe, not by reason of the bayonet at their disposal but by reason of our living creed of non-violence. That is the condition not only of success but our own ability to carry on the movement in its present form. There is no other way of conducting the campaign of non-co-operation."

As someone who grew up in the 1950s and 1960s, I cannot address this subject without specific reference to segregation/integration and to the Vietnam War.

My generation was a part of and witness to the entire saga beginning in 1955 of Whitney Young, Roy Wilkins, Martin Luther King, Jr., and Ralph Abernathy. Some of the resistance to that movement also took the form of civil disobedience. The headline that lamented the "Lost Class of 1959" was a reference to the fact that many white, southern children, scheduled to graduate in 1959, would need to go another year because their parents had pulled them out of newly integrated schools and too few accredited alternatives were available to take up the slack.

The sometimes quiet, sometimes boisterous -- even jubilant -- demonstrations and marches of the integration movement obviously were effective. The commitment of Martin Luther King's followers to have their "dream" through peaceful means certainly contrasted to the more-inclined-to-violence resisting and opposing view.

Not all the leaders of the black community supported the non-violent path, but success was more attributable to King's adaptation of Gandhi's teachings. That stoicism and determination made a greater mark on national policy than did the bidding of other memorable characters such as Malcolm X, Stokley Carmichael,

H. Rap Brown, Dick Gregory, Huey Newton, and Bobby Seale, who more than hinted that "turn the other cheek" was not their particular brand of dissent.

It was their competing for leadership roles and debate of moral versus criminal methodology that confused the issues, framed all involved in immoral reference, and began the loss of remarkable civil disobedience as a justifiable tool for philosophical and political dissent. Unfortunately, the violence that inevitably accompanied these men in their pursuits, riots, property destruction, and their own provoked assassinations, has had tremendous influence on the pendulum of racial justice and equality. President Kennedy died in 1963 with legislation concerning the movement stalled in congress. President Johnson was able to push passage soon after.

Even Malcolm X, often suspected of criminal activity, was given public respect following his death in 1965. And, surely King's assassin did not intend his 1968 bullets to shake loose from the Supreme Court its 1969 "at once" ruling.

However, it was the purer acts of civil disobedience to the Jim Crow laws, de facto segregation and de jure (separate but equal) statutes through boycotts, sit-downs, and marches which gave integration efforts their real momentum.

And finally, it was civil obedience, the power of the vote, which helped to give the blacks what they really needed. President Kennedy's narrow victory was partially attributable to black voters, but President Jimmy Carter's garnering 93% of the black vote was surely a major factor in his victory. Both of these administrations gave blacks significant gains in their fight to achieve equality.

Following and concurrent to all of this came the Vietnam War. In the late 1960s and early 1970s, marches and sit-downs had become the accepted way to express citizen unrest and dissatisfaction with government policy. The era of this unpopular and inexplicable conflict added draft-card burning, draft dodging (Canadian border flight), college and public building seizure and occupation. These widespread acts of civil disobedience, as primarily college students jumped on the bandwagon, were hinged on the belief that the U.S. government was waging an unwarranted and immoral war, committing American lives to a cause in which we had no interest nor right of intrusion.

Again, though, these demonstrations usually erupted into violence and with the senseless killings at Kent State University in Ohio, where students were shot by equally youthful and inexperienced National Guardsmen, came the clear reaction. U.S. public opinion had been swayed to not favor continuing the effort.

Very little high moral civil disobedience was evident during this period, but the violent deaths were real. The end came after the loss of 57,000 U.S. troops and the destruction of a president's political career. While the civil demonstrations surely had their impact, it was more the inevitable, subsequent violence that seemed to get results.

And, this violence has bred more violence, then fostered a disregard for the law and for the value of human lives. The strife of the opposing factions, the sense that opinions weren't heard nor heeded, may be partially responsible for the serious moral decay of the drug culture. The call of the day, "Turn on and tune off," still echoes loudly in the current disregard for controlled substance laws.

Because civil disobedience has bred so much violence in recent history and because it has been so overused, it is often ineffective and may soon be totally out of vogue. As in the case of the abortion controversy, where the opposing factions can nearly field equal numbers in any public demonstration, it goes virtually unnoticed. Only the clinic bombings, reviled as worse than the cause by even the avid abortion foes, receive note.

Flag burning has aroused some patriotic backlash, which has aroused some civil libertarian rhetoric about freedom of speech. However, most remarkable has been the general lackluster reaction, more indicative of a public boredom with civil disobedience demonstrated in the streets.

For some who matured amidst the speeches, marches, tirades, and final violence, there has been the choice to join the system, to observe it from within, to attack it from within, if necessary. Using the tools so handily provided by the framers of the system, to make it work by sometime subtle and sometimes radical change.

To be so very civilly obedient is actually a craft, a science, and an art all in itself, that those clever enough to weave the twists and versed enough in language nuance can effect swifter change than beating drums and marching feet. The movements of major civil disobedience referenced here each exceeded 10 years. Abraham Lincoln ended slavery after less than three years of bargaining with his peers.

More sophisticated methods, whether in the form of mediation or negotiation, should be sought to resolve dispute with policy. This is especially accessible in a society where free speech is accorded the masses. By reason of necessity,

the loftier endeavor would be to inspire a greater participation from the electorate.

Barring the development of a peace in all but the verbal and the ballot exercise, there is one form as yet untried in significant numbers. With the non-payment of taxes due looms the potential to strike a chill in the hottest political contest or social need.

Michael Parsons, Respondent
Dean of Instruction, Hagerstown Junior College

to

Linda Irvin, Speaker

Introduction

The first year of the decade bears a striking resemblance to Dickens' assessment of the era of the French Revolution. "It is the best of times; it is the worst of times." We are experiencing unprecedented technological change. Breakthroughs in medical and engineering sciences promise an improved quality of life. At the same time, social unrest runs rampant. We face a substance abuse crisis of grave proportions. Our government came perilously close to ceasing to function. The White House, a symbol of our national unity, is picketed daily by citizens disturbed over government policy on civil and individual rights.

Our colloquium could not take place at a better time. In less than a month there will be an election that will allow American citizens to voice their concerns within the context of civic responsibility. Will they? The primary election held a month ago does not bode well. In Washington County less than one-third of the eligible citizens chose to participate. The response mirrored the rest of the nation. So what? Some social commentators point to the data as an example of the essence of the American system -- the right of choice. I do not agree.

Our keynoter suggests correctly that the continuum of civil obedience-disobedience is based on the pragmatism of personal values and informed choice. However, nonparticipation demonstrates no awareness of values. Further, it too

often reflects lack of awareness and absence of choice. Professor Robert Woyach of Ohio State University observes that a chief failure of our political system during the past half-century has been its inability to encourage our citizens to participate in the development of a shared understanding of the common good.[1] Since the early sixties, political scientists have been endeavoring to develop a social environment which stresses the transformation of all political subjects into participating citizens. The process has been described as the development of a civic culture. The conceptual framework of my response is that without the development of a civic culture there is no rational basis for either civil obedience or disobedience.

The Social Context for Decision Making

One hundred forty-one years ago, Henry David Thoreau wrote, "I think that we should be [human] first, and subjects afterward. It is not desirable to cultivate a respect for the law, so much as for the right."[2] His position, upon initial examination, is easy to agree with. When analyzed, difficulties arise. What is "the right"? Who will determine its composition? How will the needs and expectations of those who disagree be safeguarded? The answers to these questions are the elements inherent in the development of a civic culture.

Current research in organizational sociology provides some useful insight into the process of developing a social context within which a civic culture may develop. An organization is a neutral entity; it cannot have values or promote ethics. The individuals who comprise the organization are the ones who determine its ethical and legal norms. M. Cash Mathews reiterates the classic research of March and Simon. "Propositions about organizations are statements

regarding human behavior." In her opinion civic culture "is based on the attitudes, beliefs, and values of the members of the organizations that comprise it."[3] What is the current state of values orientation in social organizations? James Waters, professor of management at York University, Ontario, Canada, provides an interesting perspective. He differentiates between personal integrity and social integrity. The former is behavior that is consistent with individual principles of goodness or rightness. The latter is "not simply consistency between [individual] actions and principles but [further] adherence to generally accepted principles or standards of goodness or rightness in [all] human conduct."[4] What is the current status of these concepts in our society?

In 1986-1987, Waters and Bird conducted a national study to ascertain the "moral dimension of organizational culture." Their findings are germane. Many individuals report a sense of isolation in organizations. "A key source of moral stress for individual(s) . . . is the general absence of institutionalized structures which accord a public character to moral concerns."[5] They discovered that discussions about ethical issues took place among individuals outside the organizational context but were close to being "nontopics" among groups within the organization. Their conclusion is important. "Because individuals do not feel able to discuss moral questions with peers and superiors, they often experience the stress of being morally on their own."[6] Is there a remedy for the absence of a values orientation in our society's organizational infrastructure?

Mathews suggests that the organizational groups to which one belongs are the most important source of reinforcement of individual behavior, often taking on an almost family-like relationship. She proposes, further, that only those

changes in behavior having their origins in human interaction have social relevance.[7] Therefore, rebuilding a values orientation must begin at the group level within organizations. Her suggestions include a two-pronged, long-term intervention approach. First, structural change within the organization needs to be initiated. Second, reinforcement at the group level needs to be undertaken which will promote "pro-social" behavior. The approach insures both establishment and maintenance of an ethical and "law-abiding" organizational culture. Further, structure modification provides a lasting rather than transitory intervention.[8] Unless the support remains, the return to individual isolation, stress, and eventual alienation is likely. The task is both extensive and significant. How can it be undertaken?

The Agent of Organization Renewal

In his assessment of the process of strengthening citizenship, Woyach is convinced that the most accurate perceptions of the public good will emerge from an environment in which discussion is encouraged and many points of view are recognized as legitimate and listened to carefully.[9] Is there a social institution that is uniquely suited to promoting open dialogue which is values based? I propose that the nation's higher education community is the logical one.

In the spring of 1989, Ohio Wesleyan University sponsored a symposium designed to investigate the processes needed to enhance the role of higher education in fostering the emergence of a civic culture. The principles that emerged are germane to our discussion. First, the institution "articulates moral order." There is no intent to generate or create morals, rather the expectation is to mediate, reconcile, and seek consensus. Second, the institution strives in a

conceptual way to integrate Waters' ideas of a personal and social integrity. Attention is given to a "life-long reflection on the relations between theory and practice in the world." The result is reinforcement of personal perspective and its integration into a larger social context. Finally, the higher education community acts as "an intellectual proving ground" for the models of moral development and societal reform that will make a civic culture possible.[10] Participants in the symposium were eloquent in their insight.

Benjamin Barber, Walt Whitman Professor of Political Science at Rutgers University, presented an individual perspective. Students of all ages "require the knowledge and skills . . . by which they might flourish as free citizens in communities of discourse and communities of action."[11] The result of his perspective will be twofold. First, isolation and moral stress will be reduced. Second, the ethic of personal values as the basis for informed choice will be reinforced.

John W. Cooper, senior research fellow at the Ethics and Public Policy Center in Washington, D.C., took a pragmatic position. If the higher education institution promotes "civic and civil discussion [leading to] a genuinely pluralistic society" then "the compartmentalization of social reality" will be counteracted.[12] The benefit for the civic culture will be the reduction in the number of decisions made in the absence of social integrity which result in harm being done to many citizens.

Finally, Suzanne Morse, director of programs for the Kettering Foundation, provides a useful synthesizing description of the institution. Colleges and universities must become "civic laboratories" with two purposes. They will attack the social problems found in a diverse society. Also, they will produce

a group of Americans who are thinking about problem solving in a civic way.[13] From these elements can a civic culture emerge.

Conclusion: Regular Folks Caught in the Maelstrom of Change

The topic civil obedience and disobedience is interesting. However, I will conclude by presenting a different focus. Our nation is embroiled in a maelstrom of social change. If we are to manage it so that the core values which gestated the American experiment in egalitarianism over 200 years ago will continue, action must be taken. The question is **not** civil obedience or disobedience, but rather can we engender a renaissance of civic involvement? Will our decisions, therefore, be values driven and based on informed choice? I am optimistic that the nation's higher education institution has the ability to create a civic culture in which the answers will be yes! I will close with two questions. If not now -- when? and If not us -- who?

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13. Suzanne Morse. "Response IV to Stanley" in ibid, p. 14.

Pat Stine, Respondent
Local Civic Leader

to

Linda Irvin, Speaker

I agree with most, but not all, of Commissioner Irvin's views on civil disobedience.

I am a law abiding person; respect the law in general and yet see the rare need for disciplined, structured, and shared resistance to injustices that law makers ignore. I see the need even though I fear civil disobedience because I also see the risks inherent in its use: when civil disobedience leads to violence it may ultimately result in anarchy, thereby not only destroying its rallying cause, but also threatening the system it seeks to correct. However, when the system of laws does not change rapidly enough or when it reflects indifference or ignorance to the general sense of fairness, civil disobedience can be an effective tool. But it is a weapon of last resort that loses its impact when it deteriorates into violence. Here I must stress that violence or force falls outside the definition and criteria for civil disobedience.

The social context of injustice changes as society changes. So that in addition to the need for discipline and mutual goal sharing, the success of civil disobedience depends upon an optimal time frame. For example, I would add to Commissioner Irvin's illustration of civil disobedience during the civil rights movement, that civil rights was an idea, an ideal, whose time had come. The movement required not only the activists (and I do not wish to diminish their role), but also the general feeling that had grown within the nation's conscience that slavery was abhorrent, that people who had been slaves had rights, that their rights and those of their descendants should be equal to the

rights of all others, and that the people whose rights were denied were victims who needed somehow to be compensated. These latent values did not develop over night; it took at least several generations. But without them the civil rights movement would not have had the impact it had. In other words, when the civil rights activists forced the nation to face the injustice, the American social conscience was ready and would no longer tolerate it. In fact the injustice of segregation became so repugnant that many citizens, both black and white who were not even actively involved in the movement, used it to excuse some of the violence that followed.

As conditions change, awareness of injustice will also change. Laws that are acceptable now may become intolerable in the future, depending upon the disparity they cause. It is the disparity that often awakens the conscience to efforts toward change. Society, even a democratic one, is not perfect; mistakes are made and we are not always ruled by reason and compassion. It is here that I differ with Commissioner Irvin because I believe that the system does not always correct itself from within. At times reform minded lawmakers can be outnumbered and overwhelmed by those who have a greater interest in the status quo. Therefore, although civil disobedience has been tarnished by overuse and by the subsequent violence that has come to be associated with it, I believe it is not obsolete and might provide an effective tool for reform in the 21st century, **provided it adheres to the tenets of peaceful protest.**

I have attempted to use my crystal ball to find examples where civil disobedience might be used in the future. Some hypothetical issues that occurred to me concern taxes, zoning laws, and the environment; certainly not a comprehensive list, but worth exploring for the sake of illustration:

1. Taxes

Americans have mostly paid their taxes and on time. But there is ever more grumbling and greater resentment as our standard of living wanes. More people disagree with how the government spends tax dollars. Added to this is the growing awareness of the insensitivity, incompetence, and undemocratic autonomy of the Internal Revenue Service. If Congress is unwilling to make the needed reforms, are we looking toward a time when large numbers of Americans refuse to pay up, even go to jail as a form of protest?

2. Zoning Laws

Many Americans have accepted restrictions on their rights as property owners. The laws have been enacted locally for the "common good." However, many zoning restrictions have been challenged in court. If there is a general sense of unfairness that neither the courts or local governments can resolve, will people decide to join hands and disobey these laws?

3. The Environment

Globally and nationally the future is clouded by grim reminders that our physical, natural world is being destroyed by the forces of greed. Will a new, universal environmental ethic cause more people to behave like the organization, Green Peace, to defy those forces?

Conclusion

When a law requires a person to do something he considers clearly immoral or extremely unjust, he may believe that civil disobedience is the only ethical course of action available to him.

Is a more just and ethical world a realistic goal for the 21st century? Can we also look forward to the end of apathy? I hope so. Thank you.

"LIBERTY - THE RIGHT OF PRIVACY"

Allan Powell
Professor, Hagerstown Junior College

Introduction

As we look ahead to the next decade and beyond as it relates to the right of privacy, there can be little doubt that it will be under attack. One has but to look at the various conceptions of what this term means and to the legal extensions of their application to realize that the right of privacy now rests on legal decisions which are not accepted by many and which would be overturned as the complexion of the Supreme Court changes.

At issue are the rights of the individual set over against the power of the state to set limits on private acts. This paper is intended to show the historical development of the notion of privacy and the arguments for and against these extensions as expressed in court decisions.

It is already clear from looking at minority opinions of earlier decisions and from trends set by the present Supreme Court Majority that definitions of privacy are unsettled. A look at these opinions will possibly give us a clue to what to expect in the next decade and beyond.

Importance of Privacy

It is a surprising fact that a right as important as privacy is omitted as a specific right in the Constitution. Privacy is particularly important in an open, free, pluralistic, and competitive society. It has long been recognized that it is hard to foster creativity and originality in an atmosphere lacking privacy. Friendships, trust, and love are impossible without privacy. Diverse life styles and personality traits as well as authentic self-expression can happen only if privacy exists.

The case for privacy has evolved over hundreds of years and is the result of combining philosophical, moral, legal, and constitutional ideas to fit specific situations. An early contributor, for example, is John Stuart Mill who in 1859 wrote,

> "The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used by physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted individually or collectively, in interfering with the liberty of action if any of their number is self protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant."[1]

Mill then proceeds to elaborate upon the implications of the foregoing assertion. The passage to be quoted is to be noted not only for its beauty but because of its influence. Mill says,

> "This then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness in the most comprehensive sense; liberty of thought and feelings; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological. The liberty of expressing and publishing opinions may seem to fall under a different

> principle, since it belongs to that part of the conduct of an individual which concerns other people; but being almost of as much importance as liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it. Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow; without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong."[2]

Another essay which has apparently had a strong influence on those who study the matter of privacy is one written in 1890 by Warren and Brandeis. After asserting that this essay is "recognized as perhaps the most influential law journal piece every published,"[3] Dionisopoulos and Ducat then say that Warren and Brandeis made great advances in the thinking about what is at stake when privacy is invaded. Accordingly,

> "Mental anguish and emotional distress might be relevant to fixing the amount of award, but that was not the nature of the wrong done. . . . The injury was the infringement of privacy itself -- the violation of that splendid isolation to which human beings were entitled. The invasion of privacy, constituted a tort in itself -- because it impaired the individuals sense of his own uniqueness, trammeled his independence, and assaulted his dignity."[4]

As Warren and Brandeis spell out the point, they write of "the right to one's personality." They also assert that,

> "The principle which protects personal productions, not against theft and physical appropriation, but against publication in any form is in reality not the principle of private property, but that of an inviolate personality."[5]

It is, of course, one thing to read of privacy in exalted statements by learned minds -- it is still another to give them constitutional status. As will be seen, this has been done by identifying privacy as inherent in certain articles of the Bill of Rights as well as other amendments -- especially the Fourteenth. The Ninth Amendment offers an obvious opening. It reads, "the enumeration in

the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." This has been interpreted to mean that while privacy, for example, is not specifically enumerated, it still should be as valid a right as any which are -- as for example, the prohibition against unreasonable search and seizure which protects privacy of place.

There is, however, still another hurdle to be crossed before the right of privacy is to be realized by the citizens of the various states. The Bill of Rights was inserted into the Constitution to protect citizens from federal encroachments on their liberties. What if states fail to deliver these same rights to their respective citizens or encroach on their liberties? Early Court decisions (e.g., Barron vs Baltimore, 1833) left this matter up to the states. However, in 1868, the Fourteenth Amendment was added to the Constitution. Article One reads, "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person within its jurisdiction the equal protection of the laws."

The Supreme Court now had an appropriate lever to prod states into the delivery of these rights -- if it had wanted to apply the lever. This did not happen until 1925. In Gitlow vs New York, the Court began the "nationalization" of the Bill of Rights -- that is, making the Bill of Rights applicable to the states as well as the federal government. The Court said,

> "We may and do assume that freedom of speech and of the press -- which are protected by the First Amendment from abridgement by Congress are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the states."[b]

In other words, it took 57 years for the Supreme Court to apply the protections of the Fourteenth Amendment to the states. Thus we see the long and arduous route the right of privacy had to take before it could come of age. Indeed, at this stage, it still had some distance to go. However, it can already be seen that some aspects of the notion of privacy have some age while others are recent appendages. Even at this early juncture of our study, it appears that the evolution of the concept of privacy parallels the complexity of our social evolution. An early assessment suggests that the Court moved at an exceedingly slow pace. As one scholar on the subject of privacy has observed,

> "Our nation's current preoccupation with privacy protection, however, is both unique and paradoxical: unique among the nations of the world in terms of the number of judicial decisions and legislation relating to personal privacy, and paradoxical because even though the Constitution does not guarantee a right of privacy, the Supreme Court in 1965, constitutionally denominated a right of privacy as a 'fundamentally personal right emanating from the totality of the Constitutional scheme under which we live'. Actually, the legal right of privacy, therefore, emerged as the product of incremental judicial decision making and the concept of privacy became a salient political issue in the United States."[7]

Having laid the groundwork indicating the evolutionary outline of the right of privacy, we are now in a position to trace the stages from an early conception of privacy inhering in place, to that of privacy inhering in relationships, to the most recent conception as inhering in the person.

It should be noticed that throughout this evolutionary account there is a constant tension between judges who look at the Constitution in a literalist fashion and want to hold the line against changes while other judges insist that our basic law must be flexible in order to meet new conditions and challenges. It is entirely possible that these two prospectives are more the result of temperamental predispositions than of legal training.

Privacy Inhering in Place

Early legal thinking was closely associated with the protection of property rights.

> "Much of the earliest theme underlying judicial decisions concerning privacy was the tendency to see the concept in spatial terms. Reliance upon the old aphorism, 'a man's home is his castle', repeatedly quoted by the courts, also symbolized preoccupation with the claim of privacy as a matter of property right."[8]

This is not to say that other important areas of privacy were neglected. American political and legal thought included some of the basic principles that had been borrowed from our earlier British heritage and developed in our colonial experience. As Alan Westin, a student of public law, puts it,

> "When the federal Constitution was drafted and the United States was launched as an independent government in the 1790s, American political thought rested on a series of assumptions -- drawn heavily from the philosophy of John Locke -- that defined the context for privacy in a republican political system. First was the concept of individualism, with its component ideas of the worth of each person, private religious judgement, private economic motives, and direct legal rights for individuals. Second was the principle of limited government, with its corollaries of legal restraints on executive authority, the rule of law, and the moral primacy of the private over public sphere of society. Third was the central importance of private property and its linkage with the individual's exercise of liberty; to protect these twin values, property owners required broad immunities from intrusion onto their premises and from interference with their use of personal possessions."[9]

Protecting privacy in terms of place is relatively simple in a society lacking advanced electronics technology. However, as technology advances, it is possible to invade privacy of place with these sophisticated devices. Westin lists the telephone, microphone, and dictograph recorder, as well as the advent of photography as the first major threats to privacy. It should be remembered, that these were only the beginning. He says,

> "Three technological developments of the late nineteenth century altered the balance between personal expression and third-party surveillance that had prevailed since antiquity."[10]

Westin then adds this revealing comment which sheds light upon how new technology forces a new interpretation of the notion of privacy.

> "Each in its own way, these three technological advances brought the capacity for invading privacy into the informal arenas of conversation and action. Law could no longer protect privacy of conversation and action. Law could no longer protect privacy of conversation and "free communion" solely by guarding the physical site from physical invasion or by guarding physical records from unreasonable seizure. The new developments demanded that American law define what rights of privacy were inherent in personal acts and conversations themselves."[11]

The new technology also brought new challenges to the Court regarding the varying state standards and the realization that they were inadequate to the task of protecting privacy. Westin asserts that the Court,

> ". . . had to find and demonstrate the need for national standards and remedies in the privacy field, since changes in police mores required the kind of national public attention available only through both federal and state actions."[12]

The inadequacies of a place-oriented, property right concept of privacy in an era of sophisticated eavesdropping equipment eventually produced a move toward a view of privacy inhering in the person. This move can be seen by the prophetic dissent of Brandeis in the Olmstead case in 1928. He says,

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure, and satisfactions of life are to be found in material things. They sought to protect Americans in their thoughts, their emotions, and their sensations. They conferred, as against the government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men."[13]

Brandeis was no longer just a bright, young lawyer. As a Justice of the Supreme Court, he was now in a position to make the ideals expressed in his famous essay bear fruit -- even though it was nearly 40 years later. He made a point which might well be kept in mind when we consider the Griswold and Wade cases. He says,

> ". . . the greatest dangers to liberty lurks in the insidious encroachment by men of zeal, well-meaning but without understanding."[14]

Could the Connecticut and Texas legislatures and the overzealous leaders of the Moral Majority possibly recognize themselves as cases in point?

Privacy Inhering in Relationships

> "Privacy may also inhere in a legally-protected relationship. Many of the relationships which we enter into and which are customarily regarded as private are so protected though mostly as a matter of statutory right. For example, one instance in which we confront the privacy of certain relationships is on the occasion when certain individuals might be called upon to testify at trial. Evidentiary rules on the books at the state level guard against the disclosure of confidential matters between husband and wife, doctor and patient, lawyer and client, parishioner and priest, and regarding trade secrets, the casting of one's vote, and so forth."[15]

This concept of privacy received a legal testing in 1965 as a result of a law passed in Connecticut. Included in the General Statutes of Connecticut were two sections which bear upon the intimate relationship of husband, wife, and physician. Section 52-32 charges,

> "Any person who uses any drug, medicinal article, or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days, nor more than one year, or be both fined and imprisoned."[16]

Section 54-196 provides,

> ". . . any person who assists, abets, counsels, causes, hires, or commands another to commit any offense may be prosecuted and punished as if he were the principle offender."[17]

Estelle Griswold, Executive Director of the Connecticut Planned Parenthood League, and Dr. Buxton, its Medical Director, were convicted for dispensing such information in violation of the law and fined $100.00. Eventually, on appeal, the case reached the Supreme Court and was voided by a 7-2 vote. Justice Douglas wrote the majority opinion and asserted that,

> "We deal with a right of privacy older than the Bill of Rights -- older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."[18]

Nor is this the end of the matter. Justice Goldberg, in a concurring opinion, uses the Ninth Amendment to further strengthen the case and "nationalize" its application in the process. He says,

> "This Court, in a series of decisions has held that the Fourteenth Amendment absorbs and applies to the States those specifics of the first eight amendments which express fundamental personal rights. The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights protected from government infringement, which exist alongside those fundamental rights specifically mentioned in the first eight Constitutional amendments. . . . The Ninth Amendment to the Constitution may be regarded by some as a recent discovery but since 1791 it has been a basic part of the Constitution which we are sworn to uphold."[19]

But we must return to the majority opinion penned by Justice Douglas because he bases his conclusions on a conception that needs further examination.

According to Douglas, the right of privacy is grounded upon "penumbras" which are "emanations" of specific guarantees in the Bill of Rights. The American

College Dictionary defines a penumbra (paene = almost + umbra = shade) as "the partial or imperfect shadow outside the complete shadow (umbra) of an opaque body, as a planet, where the light from the source of illumination is only partly cut off."

When this idea of a shaded area is connected to the idea of civil rights it may be translated to mean rights which are not directly in the light but which may be derived from or are extensions of other rights which are explicitly stated. Therefore, it may be concluded that Douglas believed that citizens had a right of privacy and that while not overtly stated in the Constitution, it could be properly implied without doing an injustice to the text of the Constitution.

Justice Douglas makes his case as follows,

> "Various guarantees create zones of privacy. The right of association contained in the penumbras of the First Amendment is one we have seen. The Third Amendment in its prohibition against the quartering of solders 'in any house' in time of peace without consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its self-incrimination clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment: The Ninth Amendment provides the enumeration in the Constitution of certain rights shall not be construed to deny or disparage other rights retained by people."[20]

It would appear, then, that in the absence of an explicit guarantee, the right of privacy stands or falls on acceptance of the Ninth Amendment and extensions of other amendments to the Constitution. It is not inappropriate to suggest that constitutional literalists will find this line of thought unacceptable. This also suggests their future approach to attack the right of privacy.

Privacy Inhering in Person

We have seen that the notion of privacy inhering in place had difficulties with the advent of modern technology. We also saw that a more modern view of privacy was initiated in the essay written by Warren and Brandeis. Legal scholars, Chase and Ducat give expression to this evolution by writing as follows,

> ". . . as contrasted with such a place-oriented conception of privacy, in which the constitutional right became heavily suffused with property interests, the more modern notion of the right to privacy has come increasingly to focus on privacy as a personal right."[21]

Privacy inhering in the person includes the right to be secure in one's own body and freedom from physical intrusion of it by others. It also includes invasion by the state through its police power to enforce certain notions of public propriety and morality to forbid the individual from using his or her body in some manner.

A landmark decision in 1973, involving these considerations was Roe vs Wade. A Texas law made it a criminal offense to abort a fetus except upon "medical advice for the purpose of saving the life of the mother." In a 7-2 decision, the Court voided the Texas law. Justice Blackmun, who wrote the majority opinion, had this to say,

> "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state actions, as we feel it is, or as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[22]

Blackmun, however, asserts that this does not mean that the right in question is absolute. It must be considered against important state interests related to the regulation of health, medical standards, and prenatal life.

Of special interest in the case in the concurring opinion of Justice Douglas. Reflecting and elaborating upon the ideals of John Stuart Mill and the Warren-Brandeis essay, Douglas writes,

> "The Ninth Amendment obviously does not create federally enforceable rights. It merely says, 'the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.' But a catalogue of these rights includes customary, traditional and time honored rights, amenities, privileges, and immunities that come within the sweep of the 'Blessings of Liberty' mentioned in the Preamble to the Constitution. Many of them, in my view, come within the meaning of the term liberty as used in the Fourteenth Amendment. First is the autonomous control over the development and expression of one's intellect, interests, tastes, and personality. . . . Second is freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children. . . . Third is the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf."[23]

Justice Douglas regarded the first category as absolute, permitting no exceptions. Categories two and three he regarded as subject to some control by the police power of the state. But, he adds the qualifiers that the state must have a compelling interest and that statutes affecting these areas must be narrowly and precisely drawn.

The ideals of Mill, Warren-Brandeis, and Douglas are still being advanced. Aryeh Neier, Executive Director of the American Civil Liberties Union says,

> "Privacy is the guarantor of individual moral autonomy, a basic value in a democratic system of government. . . . Privacy is violated whenever a person's moral autonomy or self-image are impinged upon. . . ."[24]

Conclusion and a Look to the Future

The future status of the right of privacy is certainly not clear. This is because new majorities on the Supreme Court have the power to redefine what is law. A new court might well take seriously the objections that have been raised to the extensions of the right of privacy which has been related in this paper. A summary of these objections will indicate the line of debate for the future.

An oft repeated objection is that the right of privacy as applied in Griswald and Wade was a "recently discovered" right which was crammed into the Constitution by a forced, liberal interpretation of that document. Typical of this line of thought is that expressed by the conservative columnist, George Will. He writes,

> "The truly conservative criticism of the 1973 ruling is not simply that it was incoherent in its attempt to find a right to abortion in the Constitution (a right supposedly inhering in a recently discovered right to 'privacy'). Rather, the basic conservative complaint is that the 1973 ruling used -- abused -- the Constitution as a pretext for nationalizing a question that traditional and correct construction of the Constitution has treated as a moral judgement to be settled by the political processes of the states."

If taken seriously, this kind of argument would remove all flexibility from the interpretation of the Constitution and freeze it in time and space. Application to new times and conditions would be impossible. Even the most entrenched conservative would not accept restraints which resulted in an immutable Constitution.

A second objection is also indicated in the Will statement. It is that the right of privacy is a matter to be regulated by the states. One wonders why an argument so clearly flawed has such popularity. If a right is indeed a right,

it should be an unquestioned right of every citizen. To admit that a state may tamper with any basic right is to undermine the status of that right. Rights which are up for grabs at the whim of a state legislature are no rights at all. This is not acceptable to any staunch supporter of civil rights.

Finally, there will be opposition to the right of privacy from those who believe that it is grounded on the Ninth Amendment which is too vague and too general. It has about the same status as the idea of penumbras put forth by Justice Douglas. These are regarded as legal will-o-the-wisps by those who insist upon literal specificity.

In the end, the challenge for the years ahead is to retain a right which came slowly and to keep this right from being eroded incrementally until it has lost all its force. Remember -- the right you lose will be your own.

Footnotes

1. John Stuart Mill, On Liberty (in) The Clash of Political Ideals, pp. 112-13.
2. ibid, p. 115.
3. Allan Dionisopoulos & Craig Ducat, The Right to Privacy, p. 20.
4. ibid, p. 20.
5. Don Pember, Privacy and the Press, p. 27.
6. Peter Woll and Robert Binstock, America's Political System, p. 469.
7. David O'Brien, Privacy, Law, and Public Policy, pp. 3-4.
8. Allan Dionisopoulos and Craig Ducat, The Right to Privacy, p. 31.
9. Alan Westin, Privacy and Freedom, p. 330.
10. ibid, p. 338.
11. ibid, p. 339.
12. ibid, p. 350.
13. Allan Dionisopoulos and Craig Ducat, The Right to Privacy, p. 39.
14. ibid, p. 39.
15. Allan Dionisopoulos and Craig Ducat, The Right to Privacy, p. 231.
16. Albert Saye, American Constitutional Law, p. 420.
17. ibid, p. 420.
18. ibid, p. 421.
19. Allan Dionisopoulos and Craig Ducat, The Right to Privacy, p. 235.
20. Joel Feinberg and Hyman Gross, Philosophy of Law, p. 287.
21. Harold Chase and Craig Ducat, Constitutional Interpretation, p. 1126.
22. Albert Saye, American Constitutional Law, p. 495.
23. Allan Dionisopoulos and Craig Ducat, The Right to Privacy, pp. 142-43.
24. Grant McClellan, The Right of Privacy, p. 30.

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Lew Metzner, Respondent
Attorney

to

Allan Powell, Speaker

Main Concepts:

I. General Law -- tort actions for unlawful invasion of privacy

II. Constitutional -- protects against unlawful government invasion

A. Constitution -- no explicit right -- Supreme Court has declared privacy is a fundamental right guaranteed by the Federal Constitution

Adopted by Congress -- Privacy Act of 1974

1. Section 2 (a)(4) Congressional finding that "the Right of Privacy is a personal and fundamental right protected by the Constitution of the United States"

B. Supreme Court has described this as "the right to be left alone"

III. Sources of Right to Privacy

A. Penumbra of various specific Constitutional Rights

1. First Amendment Right of Free Speech, Free Press, and Association
2. Third Amendment prohibition of peacetime quartering of soldiers in any house without consent
3. Fourth Amendment prohibition of searches and seizures
4 Fifth Amendment right against self incrimination
5. Ninth Amendment reservation to the people of rights not enumerated in the constitution

6. Fourteenth Amendment right of liberty in the due process clause

IV. Scope of Limitations of Rights

A. Only personal rights that are deemed fundamental or "implicit in the concept of ordered liberty"

1. Not concerned with place but protected intimate relationships

(a) Privacy of home

(b) Marriage, procreation, contraception, motherhood, family relationships, childhood rearing, and education

B. Right to Privacy not absolute (Roe vs Wade)

1. State regulation is allowed and appropriate

2. Any state regulation limiting these rights must have compelling state interests

3. Every government action interferes with privacy to some degree -- issue is, does it violate U.S. Constitution

C. When Rights of Privacy are restricted

1. Prostitution, sodomy, oral sex, same sex managers, filing of certificates of termination of pregnancy. Identification of prescription drug patients by doctors, sale and use of marijuana, involuntary commitment of mentally ill, public disclosure of finances of public officials or employees, political contributions, industrial espionage, dress and hair codes for public school students, screening applicants for bar, fingerprinted photos for license

D. Privacy upheld

1. Contraception, abortion, nudity at drive-in movies, and house-to-house peddling

Diana Silas, Respondent
Administrator, Hagerstown Reproductive Services

to

Allan Powell, Speaker

The perspective I'm going to offer is not the perspective of a college professor or a lawyer. I'm not the best person to speak broadly on the issue of a right to privacy. I am not versed in the technical aspects of the American legal system.

I will focus my remarks on one very specific right of privacy, the right to decide whether and when to bear children. I speak to you as a woman and as an administrator of a clinic that is philosophically pro-choice and that performs first trimester abortions.

I want to tell you what it means to women in this country to be able to make choices about unplanned pregnancies, pregnancies that regrettably are not a blessing, but are, instead a tragedy. I want to tell you what I've seen through these eyes in nine years at Hagerstown Reproductive Health Services and what it would mean if the freedom to choose were lost.

Over the course of these many years I've seen women of all ages, races, and social classes. I've seen teenagers and women with already grown children, single women, and women in faltering marriages. I've also seen women who are victims of rape and incest. Others have been victims of ignorance, immaturity, and neglect. I've seen women who have sought guidance from clergy and women who say they are morally or philosophically opposed to abortion. Some have even been members of so-called Right-to-Life groups.

The fact that it is possible for a woman who says she has opposed abortion to come to see it as a moral and reasonable choice is evidence of how complex peoples lives are and how intensely private are decisions about unwanted pregnancy.

Often, when people disagree each side makes dire predictions about what will happen should the opponent's policy prevail. With this issue, we don't need to do any guess-work. We know what happens when abortion is illegal. We know what happened before Justice Blackmun wrote that the right of privacy is broad enough to encompass a woman's right to decide to terminate her pregnancy.

Because it was illegal, there are only estimates. The estimates are staggering. Nearly 1,000,000 women every year placed themselves in the hands of concerned but inadequately trained friends or neighbors, or as is more often the case, in the hands of individuals whose only credentials were their willingness to take a chance and the desire to make a few fast dollars.

We know there were women who went to hospitals hemorrhaging and infected, after undergoing illegal abortions. We know women died.

In 1969, in New York City alone, 18 women, every single day, were admitted to hospitals with complications resulting from illegal abortions. Eighteen women, every day, in one city of this country: I say it again because I want to be sure you hear and understand the enormity of this.

These women were not criminals. They were also not women unknown or unimaginable to us. Women who chose abortion when it was illegal were school teachers, mothers, teenagers, women like us, women like those we know, women like our sisters and our mothers.

This discussion would not be complete if you could not hear from those women. I want to read you a few letters from women whose lives were touched by an illegal abortion.

"I am a retired nurse (R.N.). I cannot say that I am 100% for abortion, but I can say I am 100% pro-choice.

"No one who has ever been in a situation where it is unthinkable to bring a child into his world has any right to sit in judgement on another person and say 'you must have this child'! Fortunately, I have never been in this position myself, but I have seen what has happened to some of these desperate women who were forced to come to the hospital.

"One of these women was brought into the Emergency Room about 2:00 a.m. when I was a student nurse. She was as sick as you can possibly imagine -- temperature of 105 degrees, headache, nausea, vomiting, and extreme abdominal pain. After she had been checked, it was determined that she had had an abortion. This was 1948. The doctors told her they could not touch her, treat her in any way, until she told them who had performed the abortion, and actually left her alone in the room. She was frightened to death and told me she was sworn to secrecy. I was trying to make her a bit more comfortable, but the doctors ordered me out. When she said again a bit later that she could not tell, I was ordered to ready her for discharge. They knew and I knew too, that she would die if the delay in treatment continued and how would she ever get to another hospital as sick as she was? I pleaded with her to tell them, because outside of the room I had said 'Surely, you are not serious about not treating her!' and they said they could be held as responsible as whoever had performed the abortion.

"Finally, of course, she told them. They immediately did a D & E, a dilation and evacuation, and she survived, but would not have a few years earlier when we did not have Penicillin.

"I feel strongly that a women must have the right, with counseling, to decide what she must do."

Allentown, Pennsylvania

* * *

"I am a 64 year old widow with 2 children and 1 grandchild.

"I think it is a shame that there are people who are trying to make abortion illegal again.

"In 1931, when I was 10, a friend of my mother's had an abortion. She was married and had 2 children and couldn't afford any more. In order to have an abortion, her doctor had to declare her mentally

incompetent and she had to be committed to a mental hospital for a period of time. It was during her stay in the hospital (in N.Y.C.) that her doctor was legally able to perform her abortion. This was the only way she could get a safe, legal abortion. But it did cause emotional damage to her.

"I am pro-choice and believe all women should have the choice over whether they will bear a child or not. . . . No one other than each individual should be able to make the decision for them. Please help keep abortion safe and legal."

* * *

"Let me begin by saying and I have been married 38 years; I am the mother of 5 wanted and thoroughly loved children; the grandmother of 3; and the victim of a rapist and an illegal abortionist.

"In the mid-1950s I was very brutally raped, and this act resulted in pregnancy. At first suspicion that this might be the case, I went immediately to my doctor, told him what had happened, and pleaded for help. But, of course, he couldn't give it. To have performed an abortion would have meant chancing up to 20 years in prison, both for him and for me.

"Turned away by this reputable physician, I went to another that was considerably less reputable. This second doctor's sense of ethics left much to be desired -- his practice consisted primarily of pushing amphetamines; but even he felt that performing an abortion, no matter what the reason, was just too risky an undertaking."

The author of this letter goes on to tell us of an abortion performed under the most unthinkable circumstances, circumstances too long to detail here. She concludes with the following:

"The man who raped me left me for dead, and I very nearly was. The man who aborted me could not have cared less if I had died, and again, I very nearly did. But, a miss is as good as a mile, and I did make my 24th birthday, and despite all the horror -- physical, psychological, and financial -- I consider myself very lucky. I am still able to speak out. The real tragedy of those pre-1970 days of State and Church controlled wombs is those countless women who can only speak to you from the grave."

In conclusion, to those who disagree with me, I want to say: There are 40,000 children who die every day in this world. It is not enough to protect the unborn and leave the born to perish from indifference and neglect.

To those who agree with me, those who believe that Justice Blackmun was right when he wrote that the right of privacy encompasses a woman's right to make decisions about an unplanned pregnancy, I say: Don't take this right for granted. It is more vulnerable now than it has ever been. What you need to do is stand up; be counted. Communicate your views to those who represent you. Should those who purport to represent you fail to do so, show them your displeasure at the ballot box.

"PUNISHMENT: THE DEATH SENTENCE"

Tom Mappes
Frostburg State University

Introduction

Reference to "the problem of punishment" in general

Rejection of one "extreme" abolitionist line of thought

Arguments for the retention of the death penalty

A. An argument based on consideration of **retributive justice** -- the retributive rationale

B. Arguments based on consideration of **social utility**

1. The incapacitation rationale

2. The deterrence rationale

The case for abolition

Rejection of the three retentionist rationales

Reflections on "the burden of proof"

Conclusion

I am going to speak about the death penalty as an ethical issue. Only indirectly, if at all, will I be speaking about the death penalty as a constitutional issue. Clearly, the constitutionality of the death penalty continues to be a heated issue in our society, but in the past few years the Supreme Court seems to have settled into a more or less firm posture on the fundamental issue at stake here -- and I do not expect that we are going to see any change in the present posture of the Court in the near future, though we may well see a change in the somewhat distant future. In essence, the Court has decided that the death penalty is a constitutionally permissible punishment for the crime of murder. But we may well wonder, even if the death penalty is acceptable from a constitutional point of view, whether it is acceptable from an ethical point of view.

Retentionists -- those who favor the retention of the death penalty in our system of criminal justice -- say that the death penalty is an ethically acceptable practice. Abolitionists -- whose who want to abolish the death penalty -- maintain that it is not an ethically acceptable practice. For my part, I am neither a dedicated retentionist nor a dedicated abolitionist. I have been reading, thinking, and talking about the death penalty for a long time now, but I find -- somewhat to my own amazement -- that I have never been able to work up any stable conviction about the matter. This particular lack of conviction on my part stands in vivid contrast to the fairly stable convictions that I have been able to form with regard to many other issues that I am used to discussing in a class that I teach called Contemporary Ethical Problems. If you ask me, for example, what I think about the morality of abortion, I can tell you in no uncertain terms. It's not that I think that I can persuade you to think what I think about abortion, but at least I am

comfortable in my own mind about what I think is right. With the death penalty, it's different. I know all of the standard retentionist and abolitionist arguments, but I continue to sit on the fence. If someone told me that I have to get off the fence, I suspect -- for reasons that will perhaps become clear later -- that I would topple into abolitionist territory, but even this conviction feels very tentative to me.

I'm going to try to establish for you the lay of the land with respect to the range of arguments typically advanced by both retentionists and abolitionists. By and by, I will also share with you some of my own thoughts and reactions. But before I do any of this, I want to make you aware of a wider ethical problem. Our concern here today is with the ethics of the death penalty; we want to know if the death penalty -- a particular kind of punishment -- is ethically justified. The wider problem -- called by philosophers "the problem of punishment" -- asks this question: Is punishment in general ethically justified?

Over the years, and certainly in 20th century, philosophers have spilled a lot of ink on the problem of punishment. Most of them have concluded that punishment as an overall social practice is ethically justified. Indeed, however uneasy we might feel about inflicting harm on another person -- and punishment certainly entails inflicting harm on another person -- it is hard to visualize a complex society managing to survive without a firmly-entrenched penal system.

However, to say that philosophers generally agree that punishment is an ethically justified social practice is not to say that there are no dissenters from this view. Some have argued that society could be structured in ways that

would not demand commitment to a legal system of punishment as we know it. For example, might it not be that undesirable social behavior could be adequately kept in check by therapeutic treatment rather than by traditional kinds of punishment? Such a system would certainly have the advantage of being more humane, but surely it is implausible to believe that presently existing therapeutic techniques are anywhere near adequate to such a grand task. Perhaps future advances in behavioral and social science will render such an alternative more plausible. If so, it may one day be plausible to argue that the whole practice of punishment must be rejected on ethical grounds. But for now it is widely agreed that punishment, as an overall social practice, is ethically justified. What remains an open issue is whether or not the death penalty, as a distinctive kind of punishment, capital punishment, ought to continue to play a role in our legal system of punishment.

There is one extreme, and not widely embraced, abolitionist line of thought. It is based on the belief that the sanctity of human life demands absolute non-violence. On this view, it is thought that killing of any kind, for any reason, is always and everywhere morally wrong. No one has the right to take a human life, not in self-defense, not in war, not in any circumstance. Thus, since the death penalty obviously involves a kind of killing, it is a morally unacceptable form of punishment and must be abolished. This general view, which is associated with the Quakers and other pacifists, has struck most moral philosophers, including myself, as implausible. Can we really think that killing, when it is the only course that will save oneself from an unprovoked violent assault, is morally wrong? Can we really think, if circumstances were such that killing a mad man were the only possible way of stopping him for exploding a bomb in the midst of a kindergarten class, that such killing would

be morally wrong? The defender of absolute non-violence is sometimes inclined at this point to argue that violence will only breed violence, and there may indeed be much truth in this factual claim. Still, most do not believe that such a claim provides adequate support for the contention that **all** killing is morally wrong, and, if **some** killing is permissible from a moral point of view, perhaps the death penalty itself is ethically acceptable. What arguments can be made on its behalf?

Broadly speaking, arguments for the retention of the death penalty usually emphasize either (1) considerations of **retributive justice** or (2) considerations of **social utility**. Those who emphasize considerations of retributive justice develop their case along the following line: When the moral order is upset by the commission of some offense, it is only right -- it is a matter of simple justice -- that the disorder be rectified by punishment equal in intensity to the seriousness of the offense. This view is reflected in remarks such as: "The scales of justice demand retribution" and "the offender must pay for the crime." Along this line, the philosopher Immanuel Kant (1724-1804) is famous for his unequivocal defense of the **lex talionis** -- the law of retaliation, or as it is often expressed, "an eye for an eye." According to this principle, punishment is to be inflicted in a measure that will equalize or balance out the offense. And when the offense is murder, only capital punishment is sufficient to equalize it.

Although the demand for retribution continues to play a prominent role in the overall case for the death penalty, many retentionists (and obviously abolitionists as well) have come to feel quite uneasy with the notion of imposing the death penalty "because the wrongdoer **deserves** it." Perhaps this uneasiness can be traced, at least in part, to your growing awareness of the

way in which social conditions, such as ghetto living, seem to spawn criminal activity. If so, then it seems that we have arrived at a point of intersection with a venerable -- and vexing -- philosophical problem, the problem of "freedom and determinism." Pure retributive thinking seems to presuppose a radical sense of human freedom and its correlate, a radical sense of personal responsibility and accountability for one's actions. This is undoubtedly why retentionists who espouse a retributive rationale often insist that the death penalty does not constitute a denial of the wrongdoer's dignity and worth as a human being. On the contrary, they say, the death penalty reaffirms the dignity and worth of a convicted murderer -- by holding the person strictly responsible for the crime that has been committed and giving the person what he or she deserves. Of course, if someone is uneasy with the radical sense of human freedom that seems to underlie pure retributive thinking, he or she will surely be uneasy with the retributive rationale for retention of the death penalty. So let us turn our attention to the utilitarian side of the retentionist coin.

Since considerations of social utility are commonly advanced in defense of the practice of punishment in general, it is not surprising to find that they are also commonly advanced in defense of retaining the death penalty. Utilitarianism, as a distinct school or moral philosophy, locates the primary justification of punishment in its social utility. Utilitarians acknowledge that punishment consists in the infliction of evil on another person, but they hold that such evil is far outweighed by the future benefits that will accrue to society. Imprisonment, for example, might lead to such socially desirable effects as (1) **rehabilitation** of the criminal, (2) **incapacitation**, whereby society achieves at least temporary protection from the imprisoned criminal,

and (3) **deterrence** of other potential criminals. When utilitarian considerations are recruited in support of the retention of the death penalty, it is clear that rehabilitation of the criminal can play no part in the case. If you put someone in prison, it is at least logically possible, if not very likely, that he or she will be rehabilitated. But putting someone to death eradicates any possibility of rehabilitation. Thus, a utilitarian rationale for retention of the death penalty can only rely on considerations of incapacitation and deterrence.

Accordingly, some retentionists appeal to considerations of incapacitation and argue that the death penalty is the only effective way to protect society from a certain subset of convicted murderers -- namely, those who are at once violence-prone and irreformable. Life imprisonment, it is said, cannot assure society of the needed protection, because even if "life imprisonment" were really life imprisonment, that is, even if a sentence of life imprisonment excluded the possibility of parole, violence-prone and irreformable inmates would still pose an imminent threat to prison guards and fellow inmates. Furthermore, escape is always possible. Thus, the death penalty is the only truly effective way of achieving societal protection. In this spirit, consider the words of one retentionist (Jacques Barzun): "If a person of adult body has not been endowed with adequate controls against irrationally taking the life of another, that person must be judicially, painlessly, regretfully killed before that mindless body's horrible automation repeats."

Many retentionists think, however, that the strongest case for the death penalty can be made not on grounds of protecting society from already-convicted murderers but rather on grounds of deterring would-be murderers. Because of the intense fear that most people have of death, it is argued, the death

penalty functions as a uniquely effective deterrent. Although the threat of life imprisonment or even long-term imprisonment would surely be sufficient to deter many would-be murderers, the threat of execution would deter an even greater number. Thus the death penalty ought to be retained in our system of criminal justice because it is a more substantial deterrent than is life-imprisonment. Some years ago I heard a Bahamian official implicitly give voice to this view when he said, not in the way that a scholar would put the point but more with a common touch, "Nobody likes to hang people, but society will fall apart if you don't hang someone once in a while."

We have been looking at retentionist justifications of the death penalty. What now can be said of the abolitionist case against the death penalty? Most abolitionists do not care to argue the extreme position, already discussed, of absolute nonviolence, yet they often do want to commit themselves seriously to the idea of the sanctity of human life. They emphasize the inherent worth and dignity of each individual and insist that the taking of human life, while perhaps sometimes morally permissible, is a very serious matter and not to be permitted in the absence of weighty overriding reasons. At face value, they argue, the death penalty is cruel and inhumane; and since retentionists have failed to advance substantial reasons in its defense, it must be judged a morally unacceptable practice. Against retentionist arguments based on retribution as a demand of justice, abolitionists frequently argue that the so-called "demand of justice" is nothing but a mask for a barbarous vengeance. Against retentionist arguments based on considerations of social utility, they simply argue that other more humane punishments will serve equally well. We do not need the death penalty to incapacitate convicted murderers because life imprisonment can provide us with a sufficient measure of societal protection.

Also, since there is no reason to believe that the death penalty is a more effective deterrent than long-term imprisonment, retention cannot be justified on the basis of considerations of deterrence.

In addition to advancing arguments that directly counter retentionist claims, abolitionists typically incorporate two further arguments into their overall case against the death penalty. The first of these arguments can be stated as follows: It is impossible to guarantee that mistakes will not be made in the administration of punishment, but this factor is especially important in the case of the death penalty, because only capital punishment is irrevocable. Thus only the death penalty eradicates the possibility of compensating an innocent person who has wrongly been punished.

A second abolitionist argument focuses attention on patterns of discrimination in the administration of the death penalty. In our society -- and this has been very well documented -- blacks are more likely to receive the death penalty than whites, and the poor and uneducated are more likely to receive the death penalty than the affluent and educated. This social reality is reflected in a kind of joke that is sometimes told about the death penalty. "Do you know why they call the death penalty capital punishment? Because those without the capital get the punishment." Now, I think this is a funny little joke, but I do not think that discrimination in the administration of the death penalty is a laughing matter. I think there is a real worry about the death penalty on this score, and I will try to underline this worry by sharing with you a classroom story that I one time heard one of my colleagues tell. He was teaching a moral problems kind of course and had accustomed his class to the following discussion format. An issue would be identified and he would ask the class to split itself up in terms of initial attitudes toward the issue at

stake. For example, he might say, anyone who thinks that active euthanasia is always immoral, go to this side of the room, anyone who thinks that active euthanasia can sometimes be justified, go to the other side of room. If you are undecided, just stay in the middle until you hear something that helps you make up your mind. In the course of discussion, students would then change their physical location to reflect any significant change in their thinking. The class was being taught in the South and the makeup of the class was essentially 50/50 in terms of race -- 50% black and 50% white. When the teacher asked the class to arrange itself on the day that the death penalty was the subject of discussion -- retentionists go to one side of the room, abolitionists go the other side! -- all of the whites went to the retentionist side and all of the blacks went to the abolitionist side. Now, that's interesting, and I think it tells us something of importance about the death penalty in the society in which we live.

To this point, I have mostly tried to identify for you some of the most typical arguments made by both retentionists and abolitionists. To some extent I have already introduced some of my own thoughts and reactions but now I am going to share with you more explicitly my own thinking, though I am not claiming any kind of originality for what I am about to say. In particular, I would like to explain why I am unwilling to embrace any of the suggested rationales for retention of the death penalty. To begin with, I do not accept the retributive justification of retention. I do not accept it because it is dependent on a principle, the lex talionis, the principle of "an eye for an eye," that is itself notoriously problematic in the theory of punishment. Any kind of consistent overall commitment to this principle would produce a barbaric system of criminal justice. If justice demands that whatever a criminal does to a

victim, we should do in turn to the criminal, then it follows that we should rape rapists, torture torturers, and burn arsonists to death if their acts have been responsible for the death of others. But none of us could accept these implications, so the lex talionis is clearly an inadequate general principle of punishment. But if the lex talionis is an inadequate general principle of punishment, why should we rely on it in an effort to resolve the death penalty controversy? I guess in the end I only want to claim that the death penalty for murderers is not a demand of justice. It's not that I think the death penalty is an unjust punishment. It may well be compatible with justice in some cases, but I do not think the retentionist can establish the conclusion that it is required by justice.

With regard to the retentionist appeal to social utility, I consider the deterrence rationale to be much more formidable than the incapacitation rationale, so I have much more to say about the former than I do about the latter. About the incapacitation rationale, according to which the death penalty is necessary to protect society from those convicted murderers who are judged to be violence-prone and irreformable, I will say only this. How are we supposed to know which convicted murderers are irreformable? I guess it is fair to say about most convicted murderers that they are violence-prone, but on what grounds could we reach the conclusion that someone who is presently violence-prone is irreformable? Moreover, even if there are some cases in which it is fair to say that a convicted murderer is genuinely irreformable and thus would be a threat to society for as long as he or she remains alive, I fail to see why life imprisonment with no possibility of parole cannot provide sufficient societal protection.

I come now to the deterrence issue, in many ways the most important and the most interesting aspect of the debate about the morality of the death penalty. According to many retentionists, the fundamental justification for retaining the death penalty lies in the fact that the death penalty is a uniquely effective deterrent. But is this central factual claim really true? Does the death penalty really have more deterrent power than life-imprisonment or even long-term imprisonment? If I could convince myself that the death penalty were a uniquely effective deterrent, I would be a retentionist, but I suspect that the death penalty is not a uniquely effective deterrent. At any rate, I have to say that I don't know whether or not it is, and I don't think anybody else knows either. If my understanding of the social science on this matter is anywhere near the mark, we have to say that what evidence has been gathered is conflicting and ultimately inconclusive. Perhaps some of you can offer a different assessment of the social science findings, but for the moment I would like to consider what is left to say about the deterrence rationale once we acknowledge that empirical studies have failed to resolve the central factual question.

Many retentionists, willing to acknowledge that scientific findings are inconclusive, argue that we must rely on common sense. Since most people fear death much more than they fear life imprisonment, it just stands to reason, they say, that the death penalty is superior to life-imprisonment as a deterrent. But, if this is really what common sense is telling us, I think we have good reason to beware of its counsel. It does not follow from the mere fact that one penalty is more severe than another that the former will be a more substantive deterrent than the latter. Suppose, for example, that the penalty for a parking meter violation were set at one year in prison.

Obviously, we would reject such a penalty as overwhelmingly disproportionate to the seriousness of the crime, but just think about the example for a moment from the point of view of deterrence. Virtually everyone, I should think, would be successfully deterred from parking meter violations by the threat of a year in prison. Would we gain any additional deterrent impact by cranking the penalty up to two years in prison? My answer would be no. Even though two years in prison is a more severe penalty than one year, it seems likely to me that anyone who is capable of being deterred from parking meter violations will be equally well deterred by one year in prison as by two. Similarly, I suspect that anyone capable of being deterred from murder by the threat of the death penalty will also be deterred from murder by the threat of life imprisonment.

So let us say not only that scientific findings are inconclusive about the status of the death penalty as a deterrent but also that an appeal to common sense cannot provide a reasonable foundation for the belief that the death penalty is a uniquely effective deterrent. There is one last move than can be made by a retentionist dedicated to the deterrence rationale. The argument that is advanced here takes uncertainty -- our uncertainty whether or not the death penalty is a uniquely effective deterrent -- as its point of departure. If we retain the death penalty, the argument goes, we run the risk of needlessly eradicating the lives of convicted murderers; perhaps the death penalty is **not** a uniquely effective deterrent. On the other hand, if we abolish the death penalty, we run the risk of innocent people becoming future murder victims; perhaps the death penalty **is** a uniquely effective deterrent. Faced with such uncertainty, the argument concludes, it is our moral obligation to retain the death penalty. Whichever way we go, there is a risk to be run,

but it is better from a moral point of view to risk the lives of the guilty than to risk the lives of the innocent.

I think this argument would be compelling if it did not overlook one consideration of great importance. In claiming that retention risks the lives of the guilty whereas abolition risks the lives of the innocent, the argument overlooks the possibility that retention of the death penalty has what is sometimes called a "counter-deterrent effect." The idea here is that state-sponsored killing in the form of execution has a brutalizing effect on society, that it actually functions to weaken inhibitions on the part of the populace against killing. Thus, in the long run, there might well be more murders in a retentionist society than there would be in an abolitionist society.

Who has the burden of proof in the debate between abolitionists and retentionists on the deterrence issue? Abolitionists say that we should abolish the death penalty unless retentionists can prove that it is a uniquely effective deterrent. They say that retentionists have the burden of proof because the death penalty is such a severe punishment, because it is irrevocable, and because it continues to be administered in a discriminatory manner. Retentionists say that we should retain the death penalty unless abolitionists can prove that it is not a uniquely effective deterrent. They say that abolitionists have the burden of proof because, in a situation of uncertainty, it is better to risk guilty lives than innocent lives. But since I find no basis for excluding the possibility that the death penalty has a "counter-deterrent effect," I have to conclude that retention of the death penalty risks not only guilty lives but innocent lives as well. Thus I have to

reject the retentionist claim that abolitionists have the burden of proof in the debate on the deterrence issue.

I conclude with one final reflection. I said in the beginning that I was neither a dedicated abolitionist nor a dedicated retentionist, that I continue to sit on the fence on the issue of the morality of the death penalty. But I also said that if I have to get off the fence, I would probably wind up in abolitionist territory. It is because I think that retentionists have the burden of proof in the debate on the deterrence issue that I find myself leaning in an abolitionist direction. I guess, in a way, this means that I am an abolitionist. I'm just not a very impassioned one. I'm sort of a weak-kneed, mealy-mouthed, lily-livered abolitionist.

Some Suggested Readings

Bedau, Hugo Adam: "Capital Punishment." In Tom Regan, ed., Matters of Life and Death. 2nd ed. New York: Random House, 1986. Bedau, a prominent abolitionist, presents an expansive discussion of the morality of the death penalty. Part V of this long article is dedicated to a critical analysis and rejection of the view that considerations of retributive justice can provide an adequate justification for retention.

----, ed.: The Death Penalty in America. 3rd ed. New York: Oxford, 1982. This sourcebook provides a wealth of factual material relevant to the death penalty controversy. It also incorporates essays by both retentionists and abolitionists.

Berns, Walter: For Capital Punishment. New York: Basic Books, 1979. In this book, which provides a wide-ranging discussion of issues relevant to the death penalty controversy, Berns insists that capital punishment can be effectively defended on retributive grounds.

Black, Charles L., Jr.: Capital Punishment: The Inevitability of Caprice and Mistake. 2nd ed. New York: Norton, 1981. Black argues for abolition on the grounds that it is virtually impossible to eliminate arbitrariness and mistake from the numerous decisions that lead to the imposition of the death penalty.

Davis, Michael: "Death, Deterrence, and the Method of Common Sense." Social Theory and Practice. Vol. 7, Summer 1981, pp. 146-77. Davis argues that common sense is sufficient to establish the claim that death is the most

effective deterrent. For other reasons, however, he is unwilling to endorse retention of the death penalty.

Goldberg, Steven: "On Capital Punishment." Ethnics. Vol. 85, October 1974, pp. 67-74. Goldberg, ultimately sympathetic to retention of the death penalty, focuses on the difficulties involved in the factual question of whether or not the death penalty is a uniquely effective deterrent.

Murphy, Jeffrie G.: Punishment and Rehabilitation. 2nd ed. Belmont, CA: Wadsworth, 1985. This anthology provides a set of helpful readings on the philosophical aspects of punishment. Some explicit attention is paid to capital punishment.

Nathanson, Stephen: An Eye for an Eye? The Morality of Punishing by Death. Totawa, NJ: Rowman & Littlefield, 1987. Nathanson touches on all aspects of the death penalty controversy and constructs an overall case for abolition.

Reiman, Jeffrey H.: "Justice, Civilization, and the Death Penalty: Answering van den Haag." Philosophy and Public Affairs. Vol. 14, Spring 1985, pp. 115-48. Reiman argues that "abolition of the death penalty is part of the civilizing mission of modern states." In his view, although it is just to execute murderers, it is not unjust to forego execution and punish murderers with long-term imprisonment. Counterarguments by Ernest van den Haag can be found in the same issue -- "Refuting Reiman and Nathanson" (pp. 165-76).

Van den Haag, Ernst, and John P. Conrad: The Death Penalty: A Debate. New York: Plenum, 1983. Van den Haag (a retentionist) and Conrad (an abolitionist) touch on all aspects of the death penalty controversy as they

develop their respective cases and critically respond to each other's arguments.

Martha Cornwell, Respondent
Frostburg Sate University

to

Tom Mappes, Speaker

In my comments on Professor Mappes' remarks, I will assume as he does that punishment is ethically justified in modern society. It is my belief, however, that capital punishment is not.

I agree with several of the abolitionist arguments against the death penalty such as the possibility that innocent people may be put to death by mistake and that the evidence for a deterrent effect of the death penalty on future crime is inconclusive at best. I believe that Dr. Mappes raises an important point when he discusses discrimination in the application of the death penalty, and I believe that this evidence alone may be strong enough to warrant abolition.

A point which Professor Mappes raises and which I would like to address in more detail is that of vengeance disguised as a demand for justice. I believe that there is something to the argument that violence breeds violence and that violence has a brutalizing effect on our society.

No one can argue with the observation that our society has become more violent or at least more comfortable with public displays of violence in recent years. I fear that the recent interest in resuming executions in the United States is related in some way to the violence we are experiencing in general. It appears that perhaps in our society, the demand for retributive justice is actually an emotional issue involving violence, hatred, and vengeance, and as such is unacceptable ethically as justification for taking a life.

On a related point, I find it ironic that we as a society use the concept of retribution to justify using the death penalty as punishment for murder while at the same time decrying as barbarous the culture of Saddam Hussein when it applies the same concept under Islamic Law. I do not defend Hussein, but find this inconsistency a further argument for abolishing the death penalty in our society.

Finally, I would like to briefly discuss the interesting abolitionist argument put forward by Professor Robert Johnson of the American University in his recent book, Death Work. Johnson argues that the death penalty, as it is carried out in the United States, is intentionally dehumanizing torture, and is therefore an unethical and unacceptable way of dealing with criminals.

Johnson describes the need to dehumanize both the prisoner before his/her death and the team of executioners who carry out the execution. He argues that such dehumanization, which includes a lengthy stay on death row, is necessary so that the prisoner will be so stripped of any human reaction that he/she will go quietly, thereby relieving the executioners of guilt in executing a "human" person. The execution team loses its humanity by withdrawing into a bureaucratic cocoon from which they can successfully claim that no one of them actually did the deed and that they were all just "doing their jobs." Torture is a process of dehumanization, and Johnson makes his point that the death process is torture and as such should be abolished.

I would like to end with a quote from Joseph Conrad. Conrad states, "The state cannot convince that killing is wrong by killing." I believe that the evidence for abolition is compelling and I agree with Conrad that the death penalty should be abolished.

Steffanie Suchanek, Respondent
Frostburg Sate University

to

Tom Mappes, Speaker

When we remember that murder is a choice we need also remember that the murderer knows that he is risking his own life. But, just how risky are 200 to 1 odds.

At this point I would also like to mention the legal rights of the accused and also of the convicted. A person accused of murder has the legal right to a defense and must be convicted beyond a reasonable doubt. If convicted he then has the legal right to appeal.

This is just an aside -- but what about the rights of the victim and rights of those the victim has left behind? Do we consider their rights?

Back to the right to appeal. Appeal and more pleas for appeal. A convicted murderer can spend a life sentence on death row because he has his legal rights.

I know that my timing could be better but to look at the potential effects of the death penalty as a deterrent perhaps we ought to consider the Moslem nations. Their death penalties are swift and severe but their inter-societal murder rate is almost non-existent when compared to that of the United States.

The issue of incapacitation being as effective a deterrent as capital punishment: According to the national crime survey, the time a murderer sentenced to prison for life actually spends incarcerated is usually less than 20 years. In fact, with time off for good behavior, time off for time in, and

the present problems of overcrowding in the prisons, many sentenced to life are paroled in nine or ten years.

Rehabilitation: Rehabilitation theories really started gaining strength and support in the 1960s and 1970s and a great deal of time and money were spent in the implementation of such programs in the correctional system. But, expensive national research by Robert Martinson and his associates found that with very few exceptions, rehabilitation programs were without success.

According to the uniform crime report more than 20,000 Americans are murdered each year. That is more than 1 every 30 minutes. How long are the citizens of this country willing to tolerate such slaughter?

One of the main issues in the death penalty debate is deterrence. There have been those whose studies have shown that America's system of capital punishment works as a deterrent and there has been an equal number or more whose studies have shown that it does not work. The results of these studies are and have always been inconclusive.

When we declare the death penalty an ineffective deterrent, do we really have to look very far for a reason?

In the 1930s an average of 167 murderers per year received the death penalty. By the 1950s that number was down to 70 per year. In 1967 there were two executions. Between 1967 and 1977 there were no executions -- and the murder rate doubled.

In 1977 Gary Gilmore became the first person to again receive the death penalty.

Between 1977 and 1984 approximately 30 murderers were put to death. Since then approximately 1,500 murderers have been sentenced to death row.

Let us look at some figures here. The F.B.I.'s Uniform Crime Report states that there are approximately 20,000 murders in the United States per year.

The time frame from 1977 to 1990 is 13 years. We are talking about approximately 260,000 murders.

Since 1977 there have been somewhere between 50 and 60 executions and about 1,500 other sentenced to death. How could such a system of capital punishment possibly work as a deterrent? What are the odds of getting the death penalty? About 200 to 1.

Criminal law and the sanctions governing the violation of criminal law are public knowledge. The sanction in 38 states for first degree murder is death.

When a person chooses to commit a crime, any crime, even one punishable by the death penalty, we must remember that he is making a choice to violate criminal law.

First degree murder is a choice:

It is not an act of passion.

It is not an act of self defense.

It is not an act in the defense of others.

It is not an act of war.

It is an act of free will.

First degree murder is the premeditated, deliberate, willful killing of another with malice aforethought. When a person chooses to take the life of another he

does so with the knowledge that it is a criminal act and that it may very well cost him his own life. Yet he chooses to do it anyway.

In reference to the sanction: Capital punishment, we have heard the terms -- cruel and inhumane, infliction of evil, demand of justice, and barbarous vengeance. We also heard the term individual responsibility.

Some people believe that to hold an individual solely responsible for his action is a societal miscarriage of justice, I believe the term was radical retributionism. There isn't a person in this room who has knowledge of any society, anywhere, that at any time has treated all of its people equally. Does that mean that we, as members of an unequal society, must bear the responsibility when one member plans and then carries through with the murder of another?

Discrimination: Discrimination is a problem in and of itself. It is not exclusive to the death penalty but is to be found in every facet of American life. I do not deny that it is a problem and a very serious one, but to use it as an argument against capital punishment is an avoidance of the true source of the problem.

This presentation is a look at the death penalty as an ethical and moral issue. Ethics and moral, are based on the societal norms. In numerous national surveys of the American people, retentionism has been overwhelmingly supported. Eighty-five percent of those surveyed were in favor of the death penalty.

My final thoughts are on the death penalty as a preventative measure. The death penalty is the only true assurance that someone who has committed the crime of murder will not again kill.

In the words of Ernest van den Haag "Does the Sanctity of a Murderer's Life Outweigh the Lives of his Future Victims?"

APPENDIX

Our Thanks

Dr. Martha Cornwell	*Frostburg State University*
Dr. Peter Ward	*Frostburg State University*
Dr. Michael Parsons	*Hagerstown Junior College*
Professor Allan Powell	*Hagerstown Junior College* *Project Coordinator*

Also

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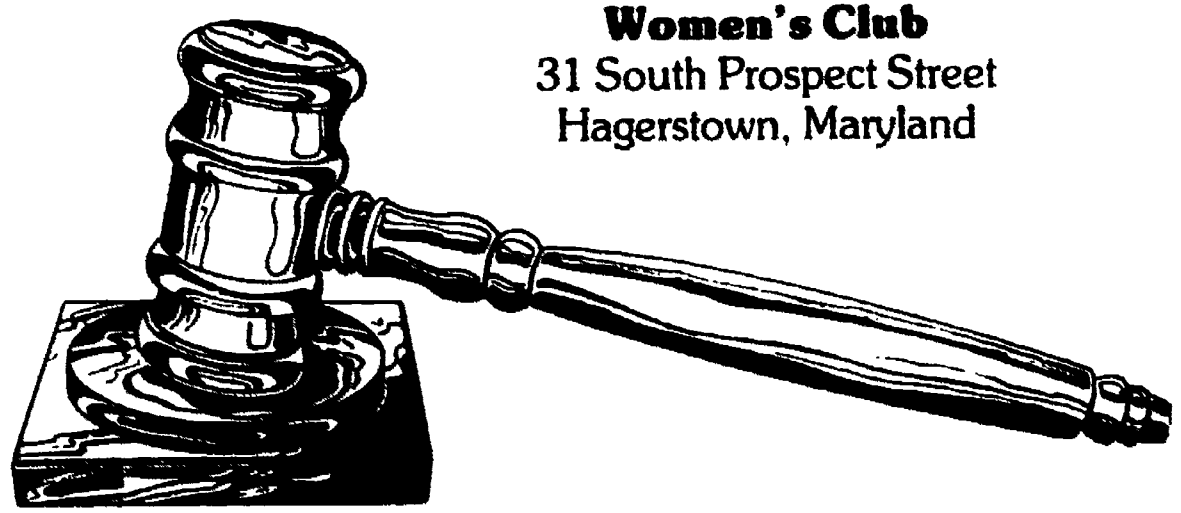

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Program

Tuesday, October 9 : 12:15 - 2:00 p.m.

Opening Welcome . . . . . Dr. Norman Shea
Hagerstown Junior College

Speaker . . . . . Judge Daniel Moylan

Topic . . . . . "Justice and Sentencing"

Moderator . . . . . Susan Haugh
State's Attorney's Office

Respondents . . . . . Professor Steve Zabetakis
Hagerstown Junior College

. . . . . Dr. Robin Spaid
Hagerstown Junior College

Audience Participation

Program

Tuesday, October 16 : 12:15 - 2:00 p.m.

Speaker . . . . . Professor Allan Powell
Hagerstown Junior College

Topic . . . . . "Liberty - The Right of Privacy"

Moderator . . . . . Ken Long
State's Attorney

Respondents . . . . . Lew Metzner
Attorney

. . . . . Diane Silas
Administrator, Hagerstown Reproductive Services

Audience Participation

Program

Thursday, October 11 : 12:15 - 2:00 p.m.

Speaker . . . . . Commissioner Linda Irvin

Topic . . . . . "Law: Obedience and Civil Disobedience"

Moderator . . . . . Professor Michael Harsh
Hagerstown Junior College

Respondents . . . . . Dr. Michael Parsons
Hagerstown Junior College

. . . . . Pat Stine
Local Civic Leader

Audience Participation

Program

Thursday, October 18 : 12:15 - 2:00 p.m.

Speaker . . . . . Dr. Tom Mappes
Frostburg State University

Topic . . . . . "Punishment: The Death Sentence"

Moderator . . . . . Dr. Carl Galligan
Hagerstown Junior College

Respondents . . . . . Dr. Martha Cornwell
Frostburg State University

. . . . . Steffanie Suchanek
Casa

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