Notre Dame Journal of Law, Ethics & Public Policy

Volume 16
Issue 1 *Symposium on Violence in America*

Article 2

1-1-2012

Categorical Pardon: On the Argument for Abolishing Capital Punishment

J. Budziszewski

CATEGORICAL PARDON: ON THE ARGUMENT FOR ABOLISHING CAPITAL PUNISHMENT

J. BUDZISZEWSKI*

INTRODUCTION

Justice is giving to each what is due to him: Praise to the doers of good, harm to the doers of wrong. So fundamental is the duty of public authority to requite good and evil that natural law philosophers make it the paramount function of the state, and the New Testament declares that the role is delegated to magistrates by God Himself. "Be subject for the Lord's sake to every human institution," says St. Peter, "whether it be to the emperor as supreme, or to governors as sent by him to punish those who do wrong and to praise those who do right."[1] St. Paul agrees:

> For rulers are not a terror to good conduct, but to bad. Would you have no fear of him who is in authority? Then do what is good, and you will receive his approval, for he is God's servant for your good. But if you do wrong, be afraid, for he does not bear the sword in vain; he is the servant of God to execute His wrath on the wrongdoer. Therefore one must be subject, not only to avoid God's wrath but also for the sake of conscience.[2]

So weighty is the duty of justice that it raises the question whether mercy is permissible at all. By definition, mercy is pun-

---

* J. Budziszewski, Ph.D is an associate professor of Government and Philosophy at the University of Texas at Austin. He is the author of several books including, THE RESURRECTION OF NATURE: POLITICAL THEORY AND THE HUMAN CHARACTER (1986), THE NEAREST COAST OF DARKNESS: A VINDICATION OF THE POLITICS OF VIRTUES (1988), TRUE TOLERANCE: LIBERALISM AND THE NECESSITY OF JUDGEMENT (1992), WRITTEN ON THE HEART: THE CASE FOR NATURAL LAW (1997), and THE REVENGE OF CONSCIENCE: POLITICS AND THE FALL OF MAN (1999). His forthcoming book is THE BEGINNING OF WISDOM available this Fall from Spence Publishing. This manuscript was originally presented at the Conference "A Call to Reckoning: Religion and the Death Penalty," University of Chicago Divinity School, January 24, 2002, sponsored by Pew Forums on Religion and Public Life.

1. *1 Peter* 2:13–14 (RSV).

2. *Romans* 13:3–5 (RSV).

ishing the criminal less than he deserves,[3] and it seems no more clear at first why not going far enough is better than going too far. We say that both cowardice and rashness miss the mark of courage, and that both stinginess and prodigality miss the mark of generosity; why do we not say that both mercy and harshness miss the mark of justice? Making matters yet more difficult, the argument to abolish capital punishment is an argument to *categorically* extend clemency to *all* those who deserve death for their crimes—for to abolish capital punishment is to give *all* of them less than they deserve.

For clarity, I will focus mainly on the crime of murder, the deliberate taking of innocent human life. The reason for this focus is that the question of mercy arises only on the assumption that some crime does deserve death. Suffice it to say that at least death deserves death, for nothing less is sufficient to convey the gravity of the deed. Scripture agrees: "Whoever sheds the blood of man, by man shall his blood be shed, for God made man in his own image."[4] Someone may object that the murderer too is made in God's image, and so he is. But this does not lighten the horror of his deed. On the contrary, it heightens it, because it makes him a morally accountable being. Moreover, if even simple murder warrants death, how much more does multiple and compounded murder warrant it? Some criminals seem to deserve death more than once. If we are considering not taking their lives at all, the motive cannot be justice. It must be mercy.

The questions we must address are therefore three: (1) Is it ever permissible for public authority to give the wrongdoer less than he deserves? (2) If it is permissible, then when is it permissible? (3) Is it permissible to grant such mercy categorically?

I. Is It Ever Permissible for Public Authority to Give the Wrongdoer Less Than He Deserves?

Society is justly ordered when each person receives what is due to him. Crime disturbs this just order, for the criminal takes from people their lives, peace, liberties, and worldly goods in order to give himself undeserved benefits. Deserved punishment restores this just order, making the wrongdoer pay a price equivalent to the harm he has done. This is retribution, not to be confused with revenge, which is guided by a different motive. In retribution, the spur is the virtue of indignation, which answers injury

3. "Compassionate treatment, as of criminal offenders or of those in distress; esp., imprisonment, rather than death, imposed as punishment for capital murder." Black's Law Dictionary 1001 (7th ed. 1999).

4. *Genesis* 9:5–6 (RSV).

with injury for public good. In revenge, the spur is the passion of resentment, which answers malice with malice for emotional satisfaction. We are not concerned here with revenge.

Retribution is the primary purpose of just punishment *as such*.[5] The reasons for saying so are threefold. First, just punishment is not something which might or might not requite evil; requital is simply what it is. Second, without just punishment evil cannot be requited. Third, just punishment requires no warrant beyond requiting evil, for the restoration of justice is good in itself. True, just punishment may bring about other good effects. In particular, it might rehabilitate the criminal, protect society from him, or deter crime in general. Although these might be additional motives for just punishment, they are secondary. In the first place, punishment might not achieve them. In the second place, they can sometimes be partly achieved apart from punishment. Third and most important, they cannot justify punishment by themselves. In other words, we *may not do more* to the criminal than he deserves—not even if more would be needed to rehabilitate him, make him harmless, or discourage others from imitation. For example, if a man punches another man in the nose, we may not keep him in a mental institution forever just because he has not yet become kind in spirit, kill him because we cannot be sure that he will never punch again, or torture him because nothing less would deter other would-be punchers. For these reasons, rehabilitation, protection, and deterrence have a lesser status in punishment than retribution. They are secondary.

Now the argument against capital punishment works like this: True, the murderer deserves death, but under certain circumstances, retribution might interfere with other purposes of punishment. It might prematurely put an end to his rehabilitation, it might undermine deterrence by inciting wicked men to greater evils, and it might not be necessary for the safety of others. Therefore, it would be better not to kill him, but to protect society by other means—perhaps to lock him up forever. The difficulty with this argument is that it seems to regard the secondary purposes of punishment as sufficient to overturn its primary purpose. If rehabilitation, protection, and deterrence cannot justify doing more than what retribution demands, then how can they justify doing less?

If this were the end of the story, then clemency would be impossible. The correct response to every appeal for mercy

5. Retribution is defined as "[s]omething justly deserved; repayment; reward." BLACK'S LAW DICTIONARY 1318 (7th ed. 1999).

would be: By all means kill the criminal, because death is what he deserves. If you fear that death will prematurely put an end to his rehabilitation, then work harder to rehabilitate him before his death. If you fear that his execution will incite wicked men to yet greater evils, then find other ways to damp their vicious energy. Do not demand that justice be abrogated for the sake of your fears.

Now I do not consider this the end of the story, and I do believe that mercy and justice can be reconciled. First, let me first consider a false ending to the story which makes their reconciliation seem simpler than it is. This false ending comes from the utilitarian philosophy which has come to permeate our society and legal culture.

To the question, "Is it ever permissible to show mercy?" the utilitarian answers "Yes," but it is a misleading "Yes" because he does not understand what is being asked. A utilitarian says that the only reason to have laws at all is to stop things that make people feel pain and start things that make them feel pleasure. Requiting wrong just because it is wrong will make no sense to him because he does not believe in intrinsic wrong; if someone chides him, "Never do evil that good may result," he is confused, because *what results* is the only measure of evil that he has. He cannot distinguish retribution from revenge, viewing it merely as an emotional venting which makes people feel better. Not that he objects to it on that account, for in his view, feeling good is all that matters. Over time, though, rehabilitation, protection, and deterrence make people feel better, too, so the only question is what combination of punishment and remission of punishment makes people feel the best. Therefore, the utilitarian might very well do less to the criminal than he deserves—but for the same reason that he might do more to him than he deserves: He does not grasp the concept of "deserves."

To the question, "Is it ever permissible to show mercy?" I also answer "Yes," but for a different reason. The faith I hold recognizes the dilemma which utilitarians ignore. Justice is inexorable; evil must be punished. This would seem to make mercy impossible; yet, there is mercy. As the Psalmist says, "Great is thy mercy, O LORD; give me life according to thy justice."[6] Somehow the irreconcilables meet and kiss.

How can this be? There are two parts to the riddle, one on God's side, the other on man's.

On the divine side, the reconciliation of justice with mercy lies in the Cross. God does not balance mercy and justice; he

6. *Psalms* 119:156 (RSV).

accomplishes both to the full. The reason He can remit punishment to human beings who repent and turn to Him is that Christ, the Lamb of God, has taken the punishment in their place. His death and resurrection become their death and resurrection, because He identifies with them through sacrifice and they identify with Him through faith; the Judge Himself steps forward to pay their debt. Divine mercy, then, means two things. One is the divine atonement which makes God's forgiveness possible. The other is the divine patience with which He waits for us to ask for it.

Yet whom God loves, He disciplines. For our good, not even divine forgiveness means that the consequences of sin *in this life* are fully remitted. Among these consequences is punishment by human magistrates, who act as God's agents whether they know it or not. The sentences of human magistrates cannot be, and are not meant to be, a final requital of unrepented evil; that awaits the great day when Christ returns to judge the quick and the dead. But they foreshadow that final justice so that something of the retributive purpose is preserved. In the meantime they promote restraint, repentance, and amendment of life. Human magistrates turn out to be not plenary but partial delegates, and not only of God's wrath but of His patience.

All this puts the primary and secondary purposes of punishment more nearly on a level than they would be otherwise—not for God, but for man. Although human magistrates are forbidden to let crimes go unrequited, they do not carry the impossible burden of requiting them to the last degree. For temporal purposes, the retributive purpose of punishment can be moderated by the other three purposes after all. The only purpose which cannot be moderated is the purpose of *symbolizing* that perfect retribution which magistrates themselves do not achieve, for human punishment is a sign of wrath to come.

II. If It Is Permissible, Then When Is It Permissible?

If criminals in general can sometimes be punished less than they deserve, then perhaps capital criminals can sometimes be punished less than they deserve. The desideratum is when the purposes of punishment can be satisfied better by bloodless means than by bloody ones, so let us consider the four purposes one by one.

Rehabilitation refers to the reconciliation of the criminal with man and God. It may seem at first that capital punishment can never aid in rehabilitation, because when the string of life is cut, the process of rehabilitation is cut off too. But this is overstated.

One part of rehabilitation is cut off, for certainly a dead man is not readmitted to society. But what do the opponents of capital punishment propose as an alternative? For serious crimes and dangerous criminals, they propose life imprisonment, but a man in jail for life does not return to society either. The real question is not what the prospect of death does to a man's prospect of readmission to society, but what it does to his prospect of change of heart. Here the picture is quite different. "Depend upon it, Sir," said Samuel Johnson, "when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully."[7] Indeed there may be many criminals for whom nothing else concentrates the mind enough. By contrast, an offender who is confined in jail for life, with no society but that of other criminals, is more likely to be hardened than reformed. We are forced to conclude that in some cases, the death penalty may contribute to rehabilitation rather than hindering it.

Protection refers to the defense of society from the criminal. It may seem at first that although capital punishment might once have been necessary for protection, modern improvements in the penal system make it possible to shield the innocent without killing. Such indeed is the argument of Pope John Paul II,[8] who is worthy of great respect. What the Pope seems to have in mind is that today we can sentence a criminal to life imprisonment with the reasonable certainty that he will not be able to escape. I agree that this is a deeply significant change that may ultimately reduce the weight of the safety question in cases where clemency has been proposed. However, I do not agree that it has reduced its weight already. Today, the risk is not so much that dangerous and justly judged criminals will escape from prison, as that we will let them out; it has been long since a "life sentence" meant that the prisoner would stay in prison for the rest of his natural life.

There are several reasons for the erosion of life sentencing, and they tend to compound each other. High crime rates have so swelled the number of inmates that officials find it difficult to feed and house all of them; the pressure to set some free is hard to resist. At the same time, our society finds it increasingly difficult to take right and wrong seriously. Not only does our lax moral attitude contribute further to the high rate of crime, but it generates further pressure to let criminals out of prison. When

7. JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON (entry dated Sept. 19, 1777).

8. John Paul II, *Encyclical Letter Evangelium Vitae, available at* http://www.Vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-i_enc_25031995_evangelium-vitae_en.html (Mar. 25, 1995).

we do let them out, they are usually more dangerous than when they entered, because of the tips they have learned, the contacts they have made, and the attitudes they have developed among other criminals. The argument is sometimes made that abolishing capital punishment would foster the virtue of compassion. Conceivably, this is so, but in the present moral climate, it is more likely to foster that counterfeit compassion, which thinks no wrong is very wrong. Should this happen, society would be even more at risk than now.

Suppose the unlikely; suppose that somehow we did nerve ourselves to keep all capital criminals in prison for the duration of their natural lives. Even then, the protective purpose of punishment would not be fully satisfied. True, a man behind bars no longer endangers society in general. But he endangers other inmates, and he certainly endangers prison staff. Surely they, too, deserve consideration. We are forced to conclude that even today, with our modern penal systems, safety is still an issue. Safety must not trump desert; the risk of future harm cannot justify doing *more* to the criminal than he deserves. But in many cases it should keep us from doing less.

Deterrence refers to the discouragement of crime in general.[9] This is where some opponents of capital punishment claim their strongest ground, for the statistical evidence for the deterrent effect of capital punishment is inconsistent and inconclusive. Avery Cardinal Dulles suggests a further dilemma.[10] Although grotesque and torturous methods of execution seem most likely to deter, they are incompatible with human dignity. Conversely, those methods of execution which are compatible with human dignity seem unlikely to deter. So for the means of capital punishment which could actually be used, we probably could not count on a deterrent effect.

For those who view deterrence as the primary purpose of punishment, the uncertainty of capital punishment as a deterrent provides the best argument against it. For those who view its primary purpose as retribution, however, this uncertainty makes little difference; the mere fact that a deserved punishment does not deter makes it no less richly deserved. But is it possible that high rates of capital punishment would actually undermine deterrence, inciting wicked and resentful men to greater evils?

9. "[D]eterrence, [t]he act or process of discouraging certain behavior, particularly by fear; esp. as a goal of criminal law, the prevention of criminal behavior by fear of punishment." BLACK'S LAW DICTIONARY 460 (7th ed. 1999).

10. Speech of Avery Cardinal Dulles, S.J., Catholicism & Capital Punishment (Oct. 17, 2000), *in* 112 FIRST THINGS 30 (2001), *available at* http://www.firstthings.com/ftissues/ft0104/articles/dulles.html.

We know that *banning* a favorite vice can have this effect; the prohibition of alcohol, for example, can give drunkenness a certain glamour. But the crimes we class as capital must be prohibited in any case. If there were evidence that punishing them *by execution* rather than by bloodless means incited them, that would certainly be an argument for using the bloodless means. To my knowledge, however, no such evidence has turned up. It seems, then, that the data on deterrence neither strengthen nor weaken the case for capital punishment.

Retribution. We saw earlier that although human punishment does not bear the full burden of requiting good and evil, it *must* hold up requital as an ideal; it must point beyond itself, to that perfect justice of which it is merely a token. Cardinal Dulles agrees but sees a problem:

> For the symbolism to be authentic, the society must believe in the existence of a transcendent order of justice, which the State has an obligation to protect. This has been true in the past, but in our day the State is generally viewed simply as an instrument of the will of the governed. In this modern perspective, the death penalty expresses not the divine judgment on objective evil but rather the collective anger of the group. The retributive goal of punishment is misconstrued as a self–assertive act of vengeance.[11]

The cynicism which Cardinal Dulles describes is a real and grave difficulty. Our rulers no longer believe in those divine decrees of which human decrees are but a hint or shadow, and neither does a large and growing part of the population. More and more, our intellectuals agree with the famous statement of Oliver Wendell Holmes that "truth is the majority vote of that nation that could lick all others."[12] But what is the import of these facts? They do not make it *less* important for our courts to appeal to justice; they make it *more.* There is a difference between saying that the ideology people hold no longer gives adequate expression to the law which St. Paul says is "written on their hearts,"[13] and saying that it is not in fact written on their hearts. Even now, people retain a dim idea of desert; the sentence "A deserves B for doing C" has not simply become meaningless to them. The Roman judges of the first century were no less cynical than the American judges of the twenty-first. Tiberius

11. Dulles, *supra* note 10, at 6.

12. Oliver Wendell Holmes, *Natural Law,* 62 HARV. L. REV. 40, 40 (1918). Though the author says he is stating a sentiment of his youth, he states it to endorse it.

13. *Romans* 2:14–15.

Caesar would have been quite comfortable with Holmes' maxim; Pontius Pilate washed his hands of justice, using the question, "What is truth?" not to begin the interview with his prisoner, but to end it. The apostles knew all these things, yet St. Paul calls the magistrate the servant of God to execute His wrath on the wrongdoer.

I do not know whether our society can be brought back to believe in a transcendent order of justice, but of this I am certain: If we do not act as though we believe in it, then no one will believe in it. If, just because no one believes in it, we must act as though we do not believe in it either, then we speak as do men without hope. We must not stop singing just because our listeners hear so poorly. We must sing more clearly to help them hear.

The question to ask about the retributive purpose of capital punishment is this: Is it possible for punishment to signify the gravity of crimes that deserve death if they are *never* visited with execution? This seems unlikely. Consider the deviant who tortures small children to death for his pleasure, or the idealogue who meditates the demise of innocent thousands for the sake of greater terror. *Genesis* says murderers deserve death *because* life is precious; man is made in the image of God. How convincing is our reverence for life if its mockers are suffered to live?

III. Is It Permissible to Grant Such Mercy Categorically? The Argument So Far

To summarize the argument up to this point, the death penalty fares differently under each of the four purposes of punishment.

1. The prospect of execution may contribute, in a way in which no other punishment can, to one aspect of rehabilitation, the criminal's change of heart. It cannot contribute to the other, his readmission to society, but neither can the alternative, life in prison.
2. Despite modern developments in penology, capital punishment is still often necessary for the protection of society. The problem is not that dangerous men may escape from prison, but that we cannot bring ourselves to keep them in. In some ways, imprisonment itself may increase their danger to others, both before their release and afterward.
3. There is no conclusive evidence that capital punishment deters crime in general. Neither is there evidence that it incites it, and a deterrent effect is not necessary to justify deserved punishment.

4. In order for the system of justice to signify the gravity of crimes which merit death, it is probably not necessary that they always be punished with death. Yet it hardly seems possible to signify their gravity if they never are.

Clemency remains a moral possibility in particular cases. Where death is deserved, it might nevertheless be replaced by life imprisonment for those criminals who are least dangerous, who are likeliest to repent, and whose guilt is least compounded (so far as we can tell)—provided that the punishment is not so weak in comparison to the crime that the symbolism of divine retribution is impaired. Yet the propriety of clemency in particular cases is not a warrant for its categorical extension to *all* capital criminals, regardless of their danger to society, heedless of their hardness of heart, irrespective of the heinousness of their deeds.

Let us consider what might be said against this provisional conclusion.

IV. Objections

The judicious Cardinal Dulles, to whom my discussion is already indebted, finds less to commend capital punishment than I do. Yet even he does not think that a review of the purposes of punishment is sufficient *in itself* to justify abolishing the ultimate penalty.[14] The crux of his published argument is found not there, but in four other common objections to the penalty of death: (1) sometimes innocent people are sentenced to death; (2) capital punishment whets the lust for revenge rather than satisfying the zeal for true justice; moreover; (3) it cheapens the value of life; and (4) it contradicts Christ's teaching to forgive. The Cardinal calls the first objection "relatively strong," to the second and third he concedes "some probable force," and the fourth he considers "relatively weak."[15] Yet he concludes that "taken together, the four may suffice to tip the scale against the death penalty." Let us revisit these four objections.

Erroneous convictions. Courts sometimes mistakenly condemn the innocent. Although erroneous conviction is possible in any case, its severity increases with the severity and irreversibility of the penalty. It would seem that the proper remedy is to require a higher procedural standard in capital than in ordinary cases, and to root out the sources of corruption in the system of justice. Indeed, the Cardinal acknowledges the point, approving the suggestion that capital punishment would be justified if the trial

14. Dulles, *supra* note 10, at 33.
15. *Id.* at 34.

were held in an honest court and the accused were found guilty "beyond all shadow of doubt."[16] His point is that this criterion cannot be satisfied, for despite all precautions, errors sometimes occur.

The difficulty with the argument lies in the notion of guilt "beyond all shadow of doubt." When we say this, do we mean beyond shadow of any sort of doubt, or do we mean beyond shadow of reasonable doubt? In law, the latter standard rules, and surely this is as it ought to be. Anything *might* be doubted, but it does not follow that doubt is always justified by the facts in evidence. The murderer might have told the grocer, doctor, and cabdriver what he was going to do; he might have been videotaped doing it by a newsman, a passerby, and an automatic security camera; he might have boasted about it afterward to a coworker, bartender, and next-door neighbor; and he might have confessed, in the presence of his lawyer, to the arresting officer, the investigating officers, and the court. Yet, perhaps someone on the jury has been reading the *Meditation* of René Descartes and is troubled by the possibility that the sensible world is only an illusion caused by an evil demon or by the nature of minds.[17] If it is, he reasons, then none of the witnesses can be trusted. For that matter, neither can the accused; he may have only dreamed the whole murder. True, Descartes concludes that the world is not an illusion after all. But the juryman votes for acquittal anyway, reflecting that philosophers sometimes err.

Now the way that the juryman reasons about philosophers is very much like how Cardinal Dulles reasons about juries. The Cardinal holds that because even honest courts can err, we must not trust any verdict, irrespective of the weight of evidence which supports it.[18] But a doubt which cannot be affected by any possible evidence is not a reasonable ground for letting a convict off the hook.

The lust for revenge. Of course it is true that the death penalty might whet the appetite for revenge. It is hard to see, though, why this should be more true of the death penalty than of "locking them up for life." Indeed it is hard to see why it should be more true of punishment than of the other aspects of criminal justice. Seeing policemen on the streets, hearing the testimony of witnesses in court, hearing the judge's solemn charge to the jury—all of these things might whet the appetite for revenge, and

16. *Id.*

17. *See generally* RENÉ DESCARTES, MEDITATION ON FIRST PHILOSOPHY, V, 8 (1641)

18. Dulles, *supra* note 10, at 34.

no doubt they often do. Should we then abolish policemen, testimony, and solemn charges? Moreover, not only can the love of justice be twisted to wrong, but every good impulse can be twisted to wrong: love of country, love of family, compassion for those who suffer. The first may be distorted into fanaticism, the second into jingoism, the third into sentimentality. Even the love of God can be perverted, and when it is, it is a terrible thing indeed. Yet, the fact that something right can be perverted does not stop it from being right.

The cheapening of life. This concern is closely associated with Joseph Cardinal Bernardin. As Cardinal Dulles paraphrases it, "By giving the impression that human beings sometimes have the right to kill, [capital punishment] fosters a casual attitude toward evils such as abortion, suicide, and euthanasia."[19] Not even Cardinal Dulles considers this argument strong. In particular, he observes that many earnest opponents of these other deeds are earnest supporters of capital punishment, for they realize that the rights of the guilty and innocent are not the same. The Cardinal is quite right, and we can pair his observation with another. Many fervent *supporters* of these other deeds are also fervent *opponents* of capital punishment. The phenomenon is as common as it is strange. Perhaps it is a form of compensation; conscience demands its pay. Having approved the private execution of the weak and blameless, one now seeks absolution by denouncing the official execution of the strong and ruthless. Whether or not this explains it, two things at least are plain. First, it is *psychologically* possible to hold either of the following combinations of positions: It is wrong to kill the innocent but may be right to kill the guilty, and it is wrong to kill the guilty but may be right to kill the innocent. Second, the *normal moral reason* for upholding capital punishment is reverence for life itself. Indeed this is the reason why Scripture and Christian tradition uphold it, a fact which suggests that if anything, it is the *abolition* of capital punishment which threatens to cheapen life.

Christ's teaching on forgiveness. It is true that Jesus taught to love those who hate us, forgive those who wrong us, and abstain from hypocritical comparisons between ourselves and those who offend us.[20] These things we should do, however difficult they may be. But let us remember that the same Lord and God who commands His people to pardon their debtors also gave them the *Torah,* which commands magistrates to call them to account.

19. *Id.*

20. *See Matthew* 5:43–48; 6:12–15; 18:21–35; 7:1–5 (RSV).

Cardinal Dulles speaks rightly when he says that "personal pardon does not absolve offenders from their obligations in justice."[21] Indeed, he considers this fourth objection "relatively weak" and "complex at best."[22] My only objection to these words is that they are too polite, for the supposition that personal forgiveness implies a requirement for universal amnesty is not merely weak, but absurd. Taken seriously, it would destroy all public authority, for if punishment *as such* is incompatible with forgiveness, then why stop with capital punishment? Must we not abolish prisons, fines, and even reprimands as well?

I have heard it asked by fellow Christians, "How dare we play God? How dare we wrest into our own hands the divine prerogative of life and death?" It is a good question. My answer is that we dare not. We dare not wrest into our own hands *any* of the divine prerogatives of justice—whether the deprivation of life, of liberty, or of property. It is a dreadful matter to kill a man, but it is also dreadful to lock him in a hole, away from wife, children, parents, friends, and all that he held dear in life. It is a fearsome matter to imprison a man, but it is also fearsome to use fines and impoundments to confiscate his worldly goods, treasure which he may have accumulated by honest labor and counted on for the succor of his family and support during his declining years. No, we dare not wrest into our hands any powers over our fellow men. But if God *puts* such powers into the hands of those who hold public authority—what then? Does this not alter the picture? How dare we jerk our hands away, hide them behind our backs, refuse the charge? For the teaching of Scripture is just as clear about public justice as it is about personal forgiveness, and the teaching of Christ is that "Scripture cannot be broken."[23] The magistrate is "sent," whether he knows it or not; he is "the servant of God to execute His wrath on the wrongdoer."[24] Yes, we have seen that he is a servant of God's patience, too, but the one charge does not cancel the other. However tempered with mercy, public authority remains an augur or a portent of the wrath which will one day fall upon the unrepentant.

The story has another side as well. To remit deserved punishment too easily is a miscarriage not only of justice but of mercy. When a heart is very hard, it may sometimes be the case that deserved punishment is the only knock strong enough to break the husk and spill out the seeds of repentance. God Him-

21. Dulles, *supra* note 10, at 34.
22. *Id.*
23. *John* 10:35 (RSV).
24. *Romans* 13:3–5 (RSV).

self is said to use this method: Those whom He loves, He chastens, even perhaps with the prospect of death. If we are to imitate His love, then we must sometimes imitate His chastening too.

CONCLUSION

Our brief review of the objections to capital punishment has left the interim conclusion unshaken.

1. In considering whether to grant clemency, the proper question is not whether juries ever err, but whether we have reasonable ground to think that *this* jury has erred in fact.
2. Any deserved punishment, indeed any element of justice, might whet the impulse for revenge. But when a good impulse is perverted, we should fight not the impulse but its perversion; and so with the impulse for justice.
3. Scripture and Christian tradition uphold capital punishment not in contempt for life but in reverence for it. It is *because* man is made in God's image that Torah decrees that whoever sheds the blood of man, by man shall his blood be shed.
4. Christ did teach personal forgiveness, but he never challenged the need for public justice. Official pardon rightly has conditions which personal forgiveness does not. Not only is punishment compatible with love, it is sometimes demanded by it as the only medicine strong enough to do the offender good.

Classically, the Church has held that the state has the authority to inflict capital punishment. It has also classically held that in certain cases a deserved punishment of death may be remitted, but the grounds for possible clemency are particular, not universal. I believe that categorical remission of the penalty for all who deserve death contradicts revealed teaching on the duty of the magistrate and has no warrant in Christian tradition. It would weaken three of the four purposes of punishment, confuse the good counsels of compassion, and bring about more harm than good.

Some say that because there is a risk of error in both directions, we should prefer to err on the side of mercy. I agree. We should indeed prefer to err on the side of mercy, in individual cases. But to err *categorically* is no longer to make a mistake. It is to abdicate from judgment, and forsake our bounden duty.