THE DEATH PENALTY: AN ISSUE FOR MORAL DELIBERATION

A Guide for Discussion
in the Congregation

DEPARTMENT FOR STUDIES
COMMISSION FOR CHURCH IN SOCIETY

THE DEATH PENALTY: AN ISSUE FOR MORAL DELIBERATION

A. *Purpose*

1. The purpose of this study is to provide members of the Evangelical Lutheran Church in America a means to assess the current state of the death penalty debate, and to provide comments and recommendations on a social practice statement on the issue.

2. This study guide is a revised edition of a guide prepared in 1985 by the Reverend Eric Jorstad for the American Lutheran Church. Originally called "The Capital Punishment Debate," the study guide proved useful to congregations grappling with this volatile issue. Revised in light of developments since 1985, it is best suited for group study and discussion in four sessions.

3. "The Death Penalty: An Issue for Moral Deliberation" presupposes that Christians can reasonably disagree over the death penalty. It is not a blueprint for arriving at "The" Christian answer. Rather, it offers an invitation to moral deliberation. Christians dare to consider difficult issues, knowing they remain one in the Spirit.

B. *Method*

1. We begin by talking together about what we each bring *to* this study. Are we predisposed one way or another? Unsure but wanting to learn more? We will then take a look - in our first session - at the common ground held by both sides.

2. Our second session considers arguments in favor of the death penalty. Our third session presents arguments against the death penalty. Both sessions provide the opportunity for discussion.

3. Our fourth session presents the first draft of an Evangelical Lutheran Church in America social practice statement on the death penalty. Based on statements of the Lutheran Church in America and the American Lutheran Church, and representing the conclusions of a churchwide task force, the draft opposes the death penalty. Having discussed the issue, your group will be asked to evaluate the draft and to send in responses.

4. Those involved in the death penalty study, be they members of the task force or churchwide staff, have committed themselves to taking your responses seriously and to considering them in a final drafting process.

SESSION ONE

PART ONE: Where We Start

These questions are provided as a way to get acquainted and find out where we are each coming from as we begin this study. If group size permits, take the time for each person to have an opportunity to respond. The questions are open-ended and personal, so there is no "right" or "wrong" answer.

A. *Positions*

As you begin this study, are you predisposed one way or another? Do you favor the death penalty for certain crimes? What kinds of crimes? Are you opposed to the death penalty? For any kind of crime? What is your main reason for supporting or opposing the death penalty? Or, are you unsure of your position now, looking to learn more?

B. *Experiences*

Are there experiences in your life or those whom you love which predispose you to believe one way or another about the death penalty? Have you had any involvement with the criminal justice system? Are there any lawyers ill your group? judges? prison guards or officials? prison visitors? social workers? police officers? Does your professional experience incline you one way or another regarding the death penalty?

PART TWO: Common Ground

Having gotten an initial sense of your group's commitments, identified some resource people, and aired expectations, you can now explore the common ground held by both sides in the death penalty debate. The format from now on will be discursive sections, to be read prior to the session, followed by questions for discussion.

A. *History of the Death Penalty in the United States*

1. The death penalty has been in practice since colonial times. In the colonies, as in England, there were dozens of capital offenses, from theft to murder. In the Massachusetts Bay Colony, Puritan clergy preached an "execution sermon" before a hanging to reinforce the moral lesson that crime will be punished. When the U.S. Constitution was written, the legitimacy of the death penalty was assumed.

2. In 1846, Michigan became the first state to abolish the death penalty. Fifteen more states abolished it by World War One; eight of these states reinstated it after the war. The last *public* execution was held in 1936 in Kentucky. During the twentieth century the great majority of executions have been for murder or rape; a few have been for kidnapping, armed robbery, burglary, and aggravated assault. From 1900, the number of executions increased through the 1930s -- 199 in 1935 being the high point, with over 1500 in that decade. The number dropped off in the 1940s and declined steeply in the 1950s and 1960s, to zero by 1968. More than half of all executions during this period were of people of color. Thirty-two executions were of women.

3. Largely as an outgrowth of the Civil Rights Movement, the NAACP Legal Defense and Education Fund, with others, effected a de facto national moratorium on the death penalty. Public opinion polls in the 1960s registered clear opposition to the death penalty. In 1972, the U.S. Supreme Court, in Furman vs. Georgia, ruled that the death penalty as then administered was "cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments" to the

U.S. Constitution. Every Death Row in the nation was cleared at a stroke, and it looked as if the death penalty was abolished.

4. But within months of the Furman decision new death penalty statutes, designed to meet the requirements of the Supreme Court, appeared in several states. And in a series of decisions in 1976, the Supreme Court ruled that the penalty of death is not as such unconstitutional, provided its imposition meets clear objective standards.

5. In 1990, thirty-eight states, the U.S. Government and the U. S. military have death penalty statutes. Since the reinstitution of the death penalty in 1976, more than 120 executions have taken place (nearly half of them of people of color.) Over ninety percent of U.S. executions have been in Texas, Florida, Louisiana, Georgia, Virginia, North Carolina, Alabama, Mississippi and South Carolina. 2400 inmates currently live on death row.

6. The number of executions has been steadily rising since the 1976 Supreme Court decisions, and most observers agree that number is likely to continue to rise. More and more prisoners are approaching the end of their appeals process. Common ground ends at this point, however, as there are varying predictions regarding what the future holds.

B. *The Demand for Accountability*

1. Violence and murder are as ancient as the human family. Since Cain slew Abel, the blood of countless victims has cried out to the Lord. Our hearts, too, cry out, because we believe life is a sacred gift. The whole human community grieves with the family and friends of the violated one -- the victim. Violent crime has a powerful, corrosive effect on society. When the bonds of trust between persons are broken the assumptions which allow us to live our lives in security and peace also break down. We fear our neighbor, instead of loving our neighbor. We especially fear the stranger.

2. Something must be done to make things right. Those who violate life must be held accountable, and the human community demands that justice be done. We feel sadness when people suffer, and anger when they suffer unjustly. Sadness and anger are appropriate responses from people who care deeply about the lives of their partners in human community.

3. Murder is not a merely modern phenomenon, but recent homicide statistics have been a cause for alarm. In 1963 the homicide rate was 4.5 per 100,000 population. From then it swiftly rose, to 7.8 per 100,000 by 1970, and to 11.0 per 100,000 by 1980. The rate for other serious crimes rose just as or even more swiftly during this time. There is no way to quantify it, but levels of fear and anger have risen precipitously as well in the last twenty years.

4. Common ground for the death penalty debate includes this increase in crime and fear of crime. Nobody wants to see this much crime. Nobody wants to live with such fear. The question then becomes: what can we do about it? Sessions two and three will present different answers to this question.

C. *Conceding Barbarization*

1. In trials for a violent crime, our courts have refused to admit into evidence pictures or oral descriptions which are revolting to human decency. The courts recognize that relying on such "evidence" could cause conclusions to be reached more on the basis of emotion than of logic.

2. The same principle can limit our discussion of the death penalty. Opponents of the death penalty could paint vivid and horrible pictures of the scene of the execution, repelling to our sense of humanity. But with at least equal force could proponents of the death penalty describe the brutal atrocities perpetrated upon innocent victims by those who commit murders and rapes. We need to know what is going on. But neither a lurid description of the execution scene nor a lurid description of the criminal homicide scene is a sound basis for making a decision. Both sides can concede that we are dealing with barbarous events that nobody wants to see happen, and that stomach-turning emotional appeals on either side won't help us make a reasonable decision on how to reduce the incidence of such appalling scenes.

D. *Inconclusiveness of Deterrence Statistics*

1. One of the chief points of debate about the death penalty is whether or not it is an effective deterrent to criminal homicide. Both sides will present their arguments below. But there is one point of common ground; in the words of the U.S. Supreme Court: "Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate. The results simply have been inconclusive." (Gregg vs. Georgia, 1976). There is no statistical "proof" about deterrence one way or another.

2. In 1978, the National Academy of Sciences published a report by its Panel on Research on Deterrent and Incapacitative Effects. This report reinforces the conclusion of the Supreme Court. Its research leads the panel "to conclude that the available studies provide no useful evidence on the deterrent effect of the death penalty."[1]

3. The report goes on that this state of inconclusive statistical evidence is not likely to change.

> *[T]he strong value content associated with decisions regarding the death penalty and the high risk associated with errors of commission make it likely that any policy use of scientific evidence in this area will impose extremely severe standards of proof; non-experimental research, to which the study of the deterrent effects of the death penalty is limited, almost certainly will be unable to meet those standards of proof. Thus, the panel considers that research on the deterrent effects of capital sanctions is not likely to provide results that will or should have much influence on policy makers.*

4. In effect, the panel says, we will have to make our decision concerning the death penalty on some, other basis than the evidence of "hard science, for such evidence is here inadequate and inconclusive. Different sides of the issue will make different interpretations of this statistical inconclusiveness, but the fact of it is common ground for all concerned.

Questions for Discussion

1. What is the history of laws in your state regarding the death penalty? Who has been executed for what, and when? What is the current status?

2. Has the experience in your community reflected the national rise in crime rates over the last twenty years? Why or why not? Have you sensed any corresponding rise in fear and anger? What ways have you responded (i.e., supporting longer sentences, neighborhood watch, moving away, political involvement, more locks, etc.)?

3. Do you agree with the courts that vivid descriptions of heinous events should not be allowed in our deliberations? What role does news reporting by the media play in public attitudes toward violent crime? What role should it play?

4. Are you willing to accept what has been laid out in this section as common ground, or do you have questions at this point? Record your questions and come back with them during the fourth session.

SESSION TWO

"For The Death Penalty"

Until the late eighteenth century, the legitimacy and effectiveness of the death penalty went virtually unquestioned. Church leaders and theologians as well as politicians and philosophers assumed and supported the use of the death penalty in the course of ordinary criminal justice. In the nineteenth century some of the most vocal defenders of the death penalty were Christian clergy.[2] Today the most sustained advocacy of the death penalty comes from those with official responsibility for law enforcement--ranging from those who must apprehend and control persons charged/convicted of capital crimes, to those who draft death penalty legislation, to district attorneys who prosecute capital cases, to scholars and essayists.

In this session we first take up the biblical and theological arguments supporting the death penalty, then consider some philosophical criminal justice issues.

PART ONE: Biblical and Theological Perspectives

A. *Old Testament*

1. The Mosaic Law clearly and unequivocally prescribes death as the penalty for murder and numerous other offenses. This is put plainly in Numbers 35:30-31:

> *If any one kills a person, the murderer shall be put to death on the evidence of witnesses; but no person shall be put to death on the testimony of a single witness. Moreover you shall accept no ransom for the life of a murderer, who is subject to the death penalty; a murder must be put to death.*

(See also Exodus 21:12-32; 22:18-24; Leviticus 24:16-22; 20:9-16,27; Deuteronomy 13:1-18, 17:27; 21:18-21; 22:13-29.) The well-known lex talionis, or "law of retaliation," can be found in Exodus 21:23b-25:

> *...you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe.*

2. In the pre-Mosaic law given by Noah, the people are told that one who kills another person shall be killed, because people are created in God's image. Thus, the death penalty is required for murder and is given explicit theological basis. (See Gen. 9:6.)

3. Human life is sacred, created by God in God's own image; whoever takes human life must be held accountable and forfeit his or her life.

4. These Old Testament passages support the use of death as a penalty for certain crimes.

B. *New Testament*

1. The New Testament does not explicitly advocate or renounce the use of the death penalty, though certain passages point one way or the other. One passage that has often been cited to support the death penalty is taken from Romans 13:

> *Let every person be subject to the governing authorities. For there is no authority except from God, and those authorities that exist have been instituted by God ... [I]f you do what is wrong,*

> *you should be afraid, for the authority does not bear the sword in vain! It is the servant of God to execute wrath on the wrongdoer. (vs. 1, 4b)*

2. God cares about justice and holds those who do wrong accountable. The government is God's agent in carrying out justice. There are different ways to interpret this passage, but a long history in the church has used it to support the death penalty.

C. *Luther and the Augsburg Confession*

1. Luther supported the use of the death penalty in the criminal justice system of his day--a system with many fewer procedural safeguards than our system today. Luther notes that although the Fifth Commandment says, "You shall not kill,"

> *neither God nor the government is included in this commandment [and] their right to take human life is not abrogated. God has delegated His authority of punishing evil doers to civil magistrates.*

2. The commandment really means, "You shall not murder"; and it is the business of government to see that those who do murder are punished for it.

3. The Augsburg Confession does not name the death penalty as such. However Article 16 accepts the right of Christians

> *to serve as princes or judges, render decisions and pass sentences according to imperial and other existing laws, punish evil-doers with the sword, engage in just wars, serve as soldiers....*

4. The Lutheran theological tradition has generally accepted and affirmed the right of the state to impose the death penalty.

D. *Sanctity of Life*

1. Human life is made in the image of God and is holy and precious to God. Taking a human life is a grave offense which violates the sanctity of life. Anti-death penalty arguments sometimes make this an issue against the death penalty, that the death penalty violates the sanctity of life. But two points suggest otherwise.

2. First is the belief that the death penalty for murder is a way of heightening the value of life by exacting such a severe penalty for taking a life. The way to defend innocent life is to take the life of those who take innocent life. Society thus clearly expresses its moral outrage against murder.

3. Second, if the death penalty does deter some would-be murderers from taking life (as we will consider shortly), then the value of human life is not lessened but heightened and protected by the use of the death penalty. As the death penalty discourages murder, it encourages respect for tIle sanctity of life.

PART TWO: The Death Penalty Makes Society Safer

A. *General Deterrence*

1. Even though the statistical evidence regarding deterrence is inconclusive, there are still reasons to believe that the death penalty does make society safer. The key statistic, after all, would be not how

many people did commit murder, but how many did not, and why not. To understand this we must consider the inherent logic of the deterrence argument and the testimony of those who work most closely with violent crime -- law enforcement officials -- who overwhelmingly advocate the death penalty to help protect society.

2. There is an inherent rationality to the deterrent power of the threat of death. Although many murders are the result of passion and hence "undeterrable" by criminal sanctions, a large number are the result of premeditation. The severity of possible punishment must enter into consideration in the latter cases. A person will be hesitant to undertake an action which might result in the loss of his or her life. The fear of death has deterred thousands of people from flying, from smoking, from overeating, and so on. It seems common sense that some persons would take appropriate precautions against the possibility of being executed by refraining from committing or putting themselves in the situation where they might commit a capital crime.

3. This logic is supported by the great weight of experience of law enforcement officials. The Sheriff of Los Angeles County testified before the California Senate Committee on the Judiciary:

> *I can tell you that the overwhelming majority of people in law enforcement -- the ones who are dealing with these criminals, the ones who are seeing them not as statistics but real live human beings, and who are studying their human behavior -- are overwhelmingly convinced that the death penalty is a deterrent.*[3]

4. For example, the District Attorney of Philadelphia stated in testimony before the U.S. Senate:

> *We have the frequent occurrence in the criminal courts of Philadelphia where professional burglars have expressed themselves on the point of not carrying a weapon on a burglary because of their concern there may be a scuffle, there may be a dispute, the weapon may be used and death result, and they may face the possibility of the death penalty.*[4]

B. *Incapacitation*

1. The death penalty, Thomas Jefferson 'wrote, is the "last melancholy resource against those whose existence is become inconsistent with the safety of their fellow citizen."[5] There is no means to better incapacitate criminals who have already murdered and will remain potentially dangerous to society for the rest of their lives than the death penalty. Imprisonment offers those people the chance to escape, or the possibility, in some cases, of release on parole by mistake. There is a very small number of very lethal people whose existence continually threatens the rest of society. They must be permanently incapacitated.

2. The great fear, of course, associated with such irrevocable incapacitation is that of executing an innocent person. Given fallible human nature, this fear can never be entirely eliminated. The best we can do is pay scrupulous attention to the due process of law. The careful procedural safeguards for criminal defendants mandated by the U.S. Supreme Court in recent years try to protect against the possibility of mistake as much as is humanly possible. Each person must decide whether this risk is justified by the benefits of the death penalty, including protection from dangerous potential repeat offenders.

C. *Special Cases*

1. There are three special cases whose particular circumstances warrant consideration:

(a) Murder by a prisoner already serving a life sentence. If society had no leverage of being able to threaten further punishment, the lifer could act with impunity and be more of a danger to guards, inmates and others.

(b) Murder of a police officer, judge, governor, president or lawmaker, while that person is carrying out official duties or because of the office he or she holds. Assuming special responsibility and danger for the common good deserves special protection and honor.

(c) Treason. Treason is the ultimate offense against the nation, jeopardizing the security of all its citizens. The potential traitor may not be deterred by the threat of imprisonment, for he or she believes that when the nation is "liberated" by the enemy the imprisonment will be over.

2. Some states have abolished the death penalty for any crime except (a) or (b) above; some nations likewise for any crime but treason.

PART THREE: The Death Penalty Makes Society Better

A. *Retribution*

1. There are generally considered to be four goals in criminal sentencing: deterrence, incapacitation, rehabilitation, and retribution. The first two have been considered in Part Two above; we now turn to retribution.

2. Retribution is distinct from revenge. Revenge is a private matter, a wish to "get even" with a person one feels has injured one, whether or not what that person did was legal. Retribution, on the other hand, is a legally threatened punishment for an act prohibited by law, threatened before the act is committed and limited by law. It is through retribution that society expresses its outrage toward those who break its laws and thus undermine the bonds of community and trust. Retribution expresses the fact that criminals have not only inflicted harm upon individuals but have also weakened the foundations of civil society. Retribution holds criminals accountable for what they have done.

3. Many believe that the moral outrage of the community at the taking of innocent human life can only and best be expressed through imposing the death penalty. The U.S. Senate Committee on the Judiciary has written:

> *Murder does not simply differ in magnitude from extortion or burglary or property destruction offenses; it differs in kind. Its punishment ought to also differ in kind. It must acknowledge the inviolability and dignity of innocent human life. It must, in short, be proportionate. The Committee has concluded that, in the relatively narrow range of circumstances outlined in this bill, the penalty of death satisfies that standard.*[6]

4. Or, as Prof. Ernest an den Haag argues against long imprisonment for murder, "Should we really treat murder as an aggravated form of pickpocketing?"[7]

5. The U.S. Supreme Court has considered the role of retribution in criminal justice. The Justices caution that a people who feel the government is excessively ineffective may take the law into their own hands.

> *In part, the death penalty is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.*
>
> *"The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a free society governed by law...." (Gregg, quoting Furmann)*

Thus the death penalty has an important place not only in making society safer but also in making society *better* as a community of free men and women who care enough to be outraged at those who take innocent human life and hold them accountable for their actions.

B. *Law as Educative*

1. Retribution, we can see, is more than punishing criminals for their illegal actions. Law is not only retrospective, focusing on what persons have just done. Law is also prospective, looking ahead by expressing and forming who we are as a people. Law is educative. When making laws, we should ask questions like: what kinds of habits will this law encourage? How will it affect my grandchildren? Will this law help make us more or less like the people we want to become?

2. The educative power of law is heightened in questions of life and death. This must give us pause to think carefully about what lessons we teach our children in our decision regarding the death penalty. The abolitionist side will make its case on these questions in the next session. Here the retentionist side rests with these words from Prof. Walter Berns:

> *We think that some criminals must be made to pay for their crimes with their lives, and we think that we, the survivors of the world they violated, may legitimately extract that payment because we, too, are their victims. By punishing them we demonstrate that there are laws that bind men across generations that we are not simply isolated individuals, each pursuing his selfish interests.*
>
> *The death penalty serves to remind us of the majesty of the moral order that is embodied in our law, and of the terrible consequences of its breach.*[8]

Questions for Discussion

1. Do those in your group who support the death penalty find the arguments in this section accurately present their own beliefs? Would you add or subtract anything from what is said?

2. Gandhi once said, "If we really enforced 'an eye for an eye and a tooth for a tooth' there would be a great number of sightless, toothless people." Yet the *lex talionis* also codifies a commitment to proportionality of punishment. If you don't want to take "a hand for a hand" literally, why should you take "a life for a life" literally?

3. Compare Genesis 4:8-16 with Genesis 9:6. Can you reconcile the seeming difference concerning the death penalty? Or do these two passages reflect competing understandings of the death penalty even in the Old Testament?

4. How do you interpret the Fifth Commandment, "You shall not kill?" Do you believe the government has the right to take life? If so, under what kinds of circumstances?

5. Both sides in the the death penalty debate appeal to the sanctity of life to support their position - -that the death penalty violates this sanctity; that only the death penalty can express our abhorrence at murderers who violate this sanctity. Which argument is more persuasive to you?

6. Do you think there is an inherent logic in the deterrent power of the threat of death? Or is that a fallacy, because no one who commits murder ever intends to get caught to face any penalty? Is it the likelihood of apprehension or the severity of the punishment which acts as the deterrent?

7. Can you live with the possibility of executing an innocent person? Why, or why not?

8. Do you believe that retribution is a legitimate goal of criminal sentencing? Is the death penalty really required to adequately carry out retribution or might there be other penalties which sufficiently express society's moral outrage and do hold the offender accountable?

9. What lesson do you think the death penalty teaches your children?

SESSION THREE

"Against The Death Penalty"

1. Christian clergy may have been outspoken advocates of the death penalty in earlier centuries, but in our own it is Christian and Jewish organizations which have been at the forefront of the effort to abolish the death penalty.[9]

2. In this session we first consider some biblical and theological arguments against the practice of the death penalty. We then take a look at the human experience of the death penalty -- not in "lurid detail," but describing how it affects all the people involved in the process. We then turn to the philosophical and criminal justice arguments.

PART ONE: Biblical and Theological Perspectives

Christians thinking about the death penalty should distinguish between proclamation of the Gospel and recommendation of specific public policies. We enter the public realm with humility, in the spirit of "Come, let us reason together" (Isaiah 1:18a), with all people. We need carefully and thoughtfully to consider the evidence, the experience and the arguments. But as Christians we must examine the biblical record and clearly lift up the Word of the Good News.

A. *Concerning Old Testament Code and Practice*

1. We need to say three things about the death penalty in the Old Testament.

2. The *lex talionis*, or "law of retaliation" ("You shall give life for life, eye for eye," etc. Exodus 2:23-24; Deuteronomy 19:21; Leviticus 24:20), is more a limit upon than a requirement for vengeance. It was an attempt to make the retaliation or restitution appropriate to the offense, in a time when vengeance and "blood revenge" were far out of proportion to the offense (cf. Genesis 4:23-24).

3. The Old Testament code prescribes the death penalty for many offenses we would consider vastly disproportionate: striking or cursing one's father or mother, rebellion of teenagers, a woman unchaste at her wedding, adultery, and oppression of strangers, widows, or orphans (Exodus 21:1532; 22:21-24; Deuteronomy 21:18-21; 22:13-22). How could someone appeal to the Old Testament code as a support for using the death penalty on murders while rejecting that same code when it prescribes the same penalty for adulterers, rebellious teenagers, and so on? There is clearly no way to use the Old Testament code as a proof-text to support use of the death penalty today.

4. Not only the historical conditions but also the broader Hebrew themes of "rightness" (*tsedeq*) and "justice" (*mishpat, shalom*) give perspective to the "law of retaliation." These themes emphasize right relationships within community, where unjust distribution of wealth and unjust exercise of power are just as significant as individual crimes of violence (cf. Amos 3-6). The use of the death penalty in fact steadily decreased in Jewish history and is abolished in the Israeli criminal justice system today.[10]

B. *Jesus and the Death Penalty*

1. Jesus puts the death penalty in a radically different context than the severity of the crime and its proportional punishment. He says that, according to the divine judgment, each of us deserves death -- and that, by God's grace, forgiveness and a new, transformed life are offered to all. In the Sermon on the Mount, Jesus says:

> *"You have heard that it was said to those of ancient times, "You shall not murder"; and "whoever murders shall be liable to judgment." But I say to you that if you are angry with a brother or sister, you will be liable to judgment; and if you insult a brother or sister you shall be liable to the council; and if you say, 'You fool!' you will be liable to the hell of fire." (Matthew 5:21-22)*

None of us can escape such a judgment. Jesus raises the stakes, changing the context from acts of crime and their corresponding punishment to the human condition of brokenness and sin and the need for healing and forgiveness.

2. Jesus specifically related this universality of sin and need for grace to the death penalty when confronted by the impending stoning of the woman caught in adultery. When the scribes and the Pharisees quoted the Mosaic code to him and asked what he thought should be done, he said, "Let anyone among you who is without sin be the first to throw a stone at her" (John 8:2-11). Jesus did not condone her act (v. 11), but he created a sense of identification between the potential executioners and the one to be executed. He challenged his hearers to think about the notion of who "deserves" the death penalty.

3. Sin is the universal human condition; so grace through Christ is God's offer to us all. God's grace reaches out to the extremes--even to Paul, complicit in Stephen's and others' murders (Acts 8:1; 9:1-2); even to the thief on the cross beside Jesus (Luke 23:40-43); even to Jesus' own executioners, as he said, "Father, forgive them, for they do not know what they are doing." (Luke 23:24)

4. The cross of Christ is where the cycle of violence ends, where the ultimate penalty has already been paid, making forgiveness and transformation possible. This is God's free gift, to be received by faith.

5. As Christians we should not and cannot try to legislate the Gospel or take it as a direct model for the criminal justice system. Forgiveness is a gift of faith. Crime should still be punished. Yet Jesus' relationship to the death penalty leads us to three conclusions in considering use of the death penalty today:

   (a) that the Good News of God's transforming grace extends to all people, including the condemned on Death Rows, so that we oppose, their dehumanization or characterization as "animals" who are somehow less than human;

   (b) that public attitudes and rituals of execution as a form of social satisfaction--as if the executed one bears and so removes the sins of the community--is a blasphemons and barbarous human sacrifice;

   (c) that our Christian discipleship calls us to proclaim the *breaking* of the cycle of violence in the cross and resurrection of Christ in precisely this violent, fearful, and angry world.

C. *The Lutheran Theological Tradition*

1. The Lutheran theological tradition has generally accepted the right of the state to take life when required to fulfill the purposes of good government. This need not be in dispute here, although some Christians would deny that the state has the right. The relevant section of the Augsburg Confession has been quoted in the previous session. Article 16 accepts the right of Christians to serve in government, including the judicial system and law enforcement. According to this article, the government clearly has the right to take life under certain circumstances, for example, when engaged in a "just war." To affirm that the state can take life in some circumstances does not mean,

however, that it is required to use the death penalty. Our basic question, then, is whether using the state's power to execute fulfills the ends of good government in the United States today.

2. Government is God's servant to preserve order and promote justice (I Peter 2:13-17; Romans 13: 17). In Romans 13:1-7, it is accorded the power of "the sword" to accomplish these purposes. In interpreting this passage, let us remember three things:

   (a) The "sword" was the symbol of Roman judicial authority, not the instrument used for executions. The Greek word for "sword" here (*machaira*) is specifically not the word for execution. This passage is not discussing the death penalty but the grounds for Christian respect for rule of law.

   (b) When a government tries to act as if it were God, instead of accountable to God as God's servant, it can become horribly destructive of justice and order (cf. Revelation 13).

   (c) In a democracy such as our own, where the people *are* in a significant sense the government, it is the duty of Christians to participate in determining what authorities shall do. Inevitably, this obligation involves us all directly in the death penalty process.

3. In the rest of this session we will be examining the experience, the evidence, and the arguments to determine whether the death penalty is necessary or useful to fulfill the purposes of good government in the United States today. The death penalty was practiced for many years but has recently been abolished in Scandinavia and the Federal Repuyblic of Germany (largely Lutheran countries), the rest of Western Europe, Canada, Mexico, Nicaragua and Namibia. The following materials suggest it is time to abolish the death penalty here.

PART TWO: The Human Experience of The Death Penalty

Execution is a form of violent death. But the penalty of death begins long before the actual execution and includes many more persons than the offender. It is part of a *cycle of violence* which also includes the victim's family, the offender's family, the executioner, the prison warden and guards, and finally, all of us. The death penalty is more than a violent *act*. It is a violent *process* that involves us all because it is carried out in our name. And no one who is involved in the process can walk away unaffected.

A. *The Victims' Families*

The family and friends of a murder victim often report that they feel victimized twice: once by the murder itself, and again by the vagaries of the criminal justice system.[11] Victims' loved ones need to be assured that what happened to them is unfair and tragic. They need people who will listen to their feelings without judging, blaming, or stigmatizing them. They need a chance to grieve, restitution for burdens caused by the offense, an opportunity to participate in their own case, and freedom from the fear of further violence. But these needs are often overlooked in the rising tide of vengeance institutionalized in a capital case. The victim's family becomes a public spectacle in the publicity and ritual surrounding a capital trial. They are later dragged repeatedly through the experience -- even years later -- at times of appeals, required by due process, and, finally, at the execution. The death penalty process often freezes the victim's family at the single point of anger, leaving them with a bitter and hate-filled legacy rather than contributing to real healing.

B. *The Offenders' Families*

The family of the offender is also victimized by the death penalty process and execution. Many murder victims' families develop a special empathy for the family of the death penalty victim. As one such woman said, "The ultimate effect of the loss is the same."[12] It is an important question whether or not society is being "made right" by inflicting such grief and sorrow on yet another family, adding to the cycle of violence and the trail of victims.

C. *Death Row*

The death penalty cannot be separated from the human experience of those sentenced to die. To avoid abstraction we need to see it in its human dimension. An anthropologist has described the experience of a person sentenced to die as "a ritual death of his/her entire being as a human."[13] Prison guards who see Death Row inmates approaching sometimes say, "Dead man coming!" Death Row inmates in Ohio once had to wear uniforms with a red patch over their heart. That symbolizes the whole experience: isolation, constant harassment (psychological and sometimes physical), living as one marked for violent death."[14] It is, in a word dehumanization. As a minister who visits regularly on Death Row in Georgia describes it, "Death Row defines human beings as animals--as non-persons. As we prepare to take their lives, we create the institution of Death Row to take their humanity as well."[15] Under such conditions it is little surprise that some inmates will choose execution as a release from the experience of Death Row. One former Death Row inmate said, "You go crazy there!"[16]

D. *Wardens, Guards, Executioners*

The list of wardens who have spoken out against the death penalty is impressive.[17] It is easy to understand why--they oversee the actual executions, which are a nasty business. They fear botched execution attempts, commutations which arrive too late, and killing a person later found innocent, all of which do happen. As has been noted above (p. 3), every execution is a barbarous event involving fellow human beings. More people are drawn into the cycle of violence.

E. *Society*

The death penalty affects all of us. The practice of executions legitimizes the use of violence to solve problems, adding to the cycle of violence in our society. We have already ended the use of torture. and maiming as criminal penalties, because we have judged that they make society something we do not want it to be. It is time to consider how the death penalty affects our society. There are four key goals in the criminal sentencing process: deterrence, retribution, rehabilitation, and incapacitation. These are the social goals of criminal justice. We need to consider the use of death as a criminal penalty in relation to these goals.

PART THREE: The Death Penalty Does Not Make Society Better or Safer

A. *Deterrence or Stimulus?*

1. The theory of deterrence holds that punishing one offender can prevent others from committing similar crimes for fear of similar punishment. The threat of punishment is to inspire reverence for the rule of law and make society safer. The question is: does the threat of execution actually deter people from killing? If so, does it deter better than other forms of punishment?

2. Many studies have examined the relationship between murder and the death penalty. We have acknowledged as common ground that the statistical evidence is inconclusive. But there is a good deal of evidence which suggests that the death penalty does not uniquely deter murder. Neighboring states with and without the death penalty, single states which abolish or reinstate it over a period

of time, the experience of Canada before and after abolition of the death penalty in 1976-- all show that there are as many (or slightly more) criminal homicides when the death penalty is the practice.

3. There is no proof that the death penalty reduces the number of murders. Several facts suggest that the death penalty actually stimulates more murders. For example, after the 1979 execution of John Spenkelink in Florida with its great amount of publicity, the homicide rate during the next months there rose. Further the state's with the highest use of the death sentence also have the highest number of murders (Florida, Texas, California, Georgia, and others). There is also the not uncommon event of a suicidal homicide--someone who murders to receive the glorified attention of a capital trial and the chance to "die like a man." Rather than protecting society from violence, the death penalty may raise, not lower, the level of violence in society. One study has concluded that death as a penalty has the effect, not of deterrence, but of "brutalizing" society and intensifying the climate of violence."[18]

4. The death penalty does not break the cycle of violence but perpetuates and expands it. Studies have shown that it is the certainty of being caught and punished, not the severity of the punishment, which acts as the deterrent.

B. *Incapacitation and Rehabilitation*

1. Some argue that by executing a murderer, at least we ensure that person will never kill again. This is true. There are dangerously lethal individuals who must be incapacitated for a long time, even the rest of their lives. It is the government duty to protect society from such persons. We need to ensure incapacitation for the most dangerous offenders. But long-term imprisonment can accomplish this as well as execution.

2. Studies show that convicted murders are unlikely to commit violent crimes again. Prison wardens note that murderers are among the easiest people to handle in prison. Rehabilitation of convicted murderers cannot be prescribed, but its possibility should be available, and for this there must be no death penalty. Persistently dangerous people do need to be securely incapacitated; states without the death penalty have found adequate ways to manage this.

C. *Cost Effectiveness*

It is not true that the death penalty saves money. To safeguard against error (in over half of capital cases, either sentence or conviction will be overturned due to lower court error), the trial, mandatory appeals, elective appeals, isolated Death Row and execution costs are substantial. One study by the New York Public Defenders Association estimated the cost of a capital case to be $1.8 million (compared to $602,000 for forty years in prison). A criminal justice system without the death penalty would cost less than our present one with it.[19]

D. *Arbitrary and Discriminatory Retribution*

1. Fairness is at the heart of the idea of judicial retribution: giving murderers their just desserts. Does the practice of the death penalty serve to carry out fairness?

2. A lawyer has said, "If you have ten convicted murderers and pick three names out of a hat, then eliminate one because he is white and one because the murder victim is not white, we cannot say that the remaining murderer, who is executed, has gotten his just desserts."[20] This is the data in

our system of administering the death penalty, where people are not being executed for their crimes, but on a "crooked lottery."[21]

3. The system is, first of all, *arbitrary* in selecting offenders for execution. Many of those on Death Rows are not those convicted of committing the worst crimes. The process by which a handful of people are selected for execution out of the thousands convicted of murder often turns as much on chance as on guilt. Accomplices in the same crime often receive very different sentences -- one death, the other prison (for example, Charlie Brooks and Willie Lauder in Texas, 1979).

4. The system is, secondly, *discriminatory*. In state after state, research shows that a defendant's chances of being sentenced to death increase dramatically if the victim is white, while murderers of African-Americans are almost always spared. Research also shows that while 40% of all homicides are committed by women, only one percent of Death Row inmates are women.[22] The death penalty not only discriminates on the basis of the race of the victim and the gender of the offender, but also on the basis of economic status. A former governor of Ohio said, "During my experience as governor, I found that the men on Death Row had one thing in common: they were penniless that they had no money was a principal factor in their being condemned to death.".[23] It is not the guilty as a group whom we execute, but largely the guilty poor male whose victim is white.

E. *Incorrectability*

1. The problems of arbitrariness and discrimination, and hence judicial fairness, may be intractable because of the great fear of executing an innocent person. This is an incorrectable mistake, unlike every other mistake that could be made in the criminal justice system. Death is a unique penalty.

2. The dilemma is this: to the extent that society tries to be careful and fair in administering the death penalty, it will inflict it so rarely as to render it almost meaningless as a tool of criminal justice. But if society tries to correct this problem by inflicting death more frequently it guarantees that more errors will be made and more innocent persons executed.

3. The same lawyer quoted above has said, "So long as we're careful to make as few errors as possible, we're also going to let most of the ones who 'deserve' the death penalty slip through the net too, and the ones who are left to die will be executed not because of what they did, but because they were the wrong color, or because they killed someone popular or powerful, or because they couldn't afford a competent lawyer, or because they just weren't lucky."[24]

4. The death penalty fails to meet the goals of justice and fairness it is meant to uphold. It clearly does not make society better or safer; it may be doing the opposite. The death penalty is not necessary to achieve any of the four goals of criminal sentencing. Its effect is, rather, contrary to the social goals of criminal justice. It intensifies the cycle of violence. The lesson that the death penalty as practiced in the United States teaches our children is that it's okay to kill someone if you think you have a good enough reason. The law is indeed educative. Why do we kill people who kill people to teach that killing people is wrong?

Questions for Discussion

1. Do those in your group who oppose the death penalty find the arguments in this section accurately present their own beliefs? Would you add or subtract anything from what is said?

2. Why do you think so many Christian churches and leaders have become opposed to the death penalty in recent decades?

3. How do you interpret the various Old Testament laws about the death penalty? If you pick one but not another, how did you come to choose? Do you use the same principle for interpreting other Old Testament passages?

4. What message does the Christian Gospel bring to our criminal justice system, specifically the death penalty? As noted, Jesus had some specific things to say about the criminal justice system of his day. What do you think he would say today? Does this Gospel have any consequences for our involvement with public policy in this area?

5. What has been your experience with the death penalty process? What is your reaction upon hearing of an execution? of a stay of execution? Take some time as a group to listen and understand each person who is sharing.

6. To your perception, does the death penalty intensify the cycle of violence in this country? Or is it an important step in reducing violence, sending a message that violence will not be tolerated?

7. Data show there is a "Death Belt" in this nation (roughly equivalent to the "Bible Belt") where the rates of murders and executions are noticeably higher. Do you think the death penalty might stimulate more murders? Or is this data misleading, that there may well have been even more murders were it not for the death penalty in action?

8. Because a criminal penalty such as death has been applied in an arbitrary and discriminatory way, does that make the penalty itself wrong? Shouldn't the penalty simply be more evenly applied? Or do you think that the long history of the death penalty's arbitrary and discriminatory application in this country is enough to justify its abolition?

9. Are you willing to pay more to have a criminal justice system with the death penalty? Or should we "speed up" the process to try to save money?

10. Talk again this week about what lessons you think the death penalty teaches your children.

SESSION FOUR

"Where Do We Go From Here?"

Having found common ground and considered (and questioned) different positions, we now try to reach consensus.

The Evangelical Lutheran Church in America hopes for a broad base of participation in the development of its social statements. As members of the Evangelical Lutheran Church in America, your participation is valued.

Take some time as a group to discuss the first draft of the social practice statement on the death penalty.

Please put your responses in writing and send them to:

The Death Penalty Study
Commission for Church in Society
8765 West Higgins Road
Chicago, Illinois 60631-4140

ENDNOTES

1. Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates, ed. by Alfred Blumstein, Jacqueline Cohen and Daniel Nagin (Panel on Research on Deterrent and Incapacitative Effects, National Academy of Sciences), Washington, 1978, p.9.

2. The Death Penalty in America, 3rd ed. by Hugo Adam Bedau, New York, 1982, p. 305.

3. California State Legislature, Senate Committee on the Judiciary, 1960; quoted by Establishing Constitutional Procedures for the Imposition of Capital Punishment: Report of the Committee on the Judiciary, United States Senate ... to Accompany S.114, 96th Congress. 7th Session, Report No. 96-554, January 17, 1980; found in The Death Penalty in America, p. 312.

4. Quoted by Establishing Constitutional Procedures ...; found in The Death Penalty in America, p. 313.

5. Quoted by John P. Conrad, in John P. Conrad and Ernest Van den Haag, The Death Penalty -- A Debate, New York, 1983, p. 47.

6. Establishing Constitutional Procedures ...; found in The Death Penalty in America, p. 316.

7. The Death Penalty -- A Debate, p. 370.

8. The Death Penalty in America, pp. 334, 339. See also: Berns, For Capital Punishment: Crime and the Morality of the Death Penalty, New York, 1979.

9. A compilation of recent statements on the death penalty by religious organizations is: Capital Punishment: What the Religious Community Says, available from the National Interreligious Task Force on Criminal Justice, 475 Riverside Drive, New York, New York 10027.

10. The death penalty remains a possible sentence for those convicted of genocide.

11. This is reported, for example, by Marie Deans, founder of Murder Victim's Families for Alternatives to the Death Penalty, as at the 1984 American Lutheran Church Consultation on Capital Punishment, held at Minneapolis.

12. Marie Deans, the American Lutheran Church Consultation.

13. Colin Turnbull, quoted by Murphy Davis, "A Stand for Life," Catholic Worker, 50(1983)5.

14. As recounted by Death Row inmates, prison chaplains, and Death Row visitors at the American Lutheran Church Consultation.

15. "A Stand for Life."

16. As recounted at the American Lutheran Church Consultation.

17. See the occasional papers of the Institute for Southern Studies, Box 531, Durham, North Carolina 27702.

18. The Death Penalty in America, pp. 95-185.

19. Capital Losses: The Price of the Death Penalty for New York State (New York State Defenders Association, Report to the New York State Senate Finance Committee), New York, 1982.

20. David Bruck, the American Lutheran Church Consultation.

21. Idem, "Condemned to Death: the Capital Punishment Lottery," The New Republic, December 12, 1983.

22. Statistics can be found in: The Death Penalty in America, pp. 39-64. In 1989 the NAACP Legal Defense and Educational Fund listed 25 women among the then 2210 Death Row inmates (1.13%). Since the reinstitution of the death penalty in 1976, one woman has been executed.

23. Quoted by an occasional paper of the Institute for Southern Studies, "Public Officials Speak."

24. David Bruck, "Rationalizations for Death Penalty Are Often Inaccurate," The Greenville (South Carolina) Piedmont, September 18, 1983.

This study guide has been authorized for distribution, discussion and comment by the Studies sub-committee of the Board of the Commission for Church in Society of the Evangelical Lutheran Church in America as part of the deliberative process leading to the ELCA's social practice statement on the death penalty.

Copyright © 1990 Evangelical Lutheran Church in America
Produced by the Department for Studies, Commission for Church in Society.
Permission is granted to reproduce this document as needed providing copies are for local use only and that each copy displays the copyright notice printed above.

67-1204