

12 June, 1974

Mr. John E. Cosgrove, Director  
Division ~~of~~ Urban Affairs  
United States Catholic Conference  
1312 Massachusetts Avenue, N. W.  
Washington, D.C. 20005

Dear Mr. Cosgrove:

Thank you for your memorandum of May 30. I have only been home a few days and this is my first chance to get to work on the capital punishment document. I have only glanced through the folder of material. I think that by working quickly, I should have a copy ready to send you by about July 7. If you send your home address, I will send it there special delivery and registered. It will be a fair copy, and you will be able to make the required copies directly from it. (If there is not someone at home all the time, either give me another address where it will reach you without delay, or I will simply register it to your office address.)

As I say, I have not had time yet to read the material, but will begin studying it at once. Meanwhile, I send the following tentative ideas about the outline of the document, which I project between the 3,000 and 6,000 word limits you indicate. The material content of the outline is what I am after; don't worry about the style and vocabulary. I will not use technical terms without absolute necessity.

The document should begin with an indication of the situation which calls for comment: the state of the present debate, division of opinion, and so on. This will be brief. Then a statement as to why it befits the Bishops to speak on the matter: concern for life and social justice, as well as the fact that a traditional Christian view (that capital punishment is divinely commanded) might be at stake.

Next, the treatment to come is clearly divided into two parts. The first part will concern the question: "Might it be the case that capital punishment is intrinsically wrong? Or, on the other hand, is it clearly the case that capital punishment is clearly divinely mandated?" The second part will concern a quite distinct question: "If one assumes that capital punishment is neither always evil nor definitely commanded by God, then what conditions would justify its use? Are these conditions likely to be fulfilled in the U.S. today?"

The treatment of the first question, although it seems rather theoretical, is extremely important for the Bishops in their role as teachers of Catholic morality, as guardians of the Christian tradition. I do not think that the Catholic Bishops of the U.S. can come out flatly against the seeming tradition to condemn capital punishment. The extent and the force of the received view must be pointed out.

But once the extent and the force of the received view is pointed out, and once the Bishops make clear that on the theoretical issue they are only going to offer some tentative suggestions, not an authoritative teaching, the document should go on to indicate reasons for thinking that a development in moral teaching on the justifiability of capital punishment might be possible. The injunction is Old Testament; the New Testament seems to indicate a somewhat different approach. The New Testament itself makes clear that its teaching in some ways sets a higher standard than the Old--e.g., in respect to divorce. Moreover, institutions sanctioned in the Old Testament and taken for granted in the New, such as slavery, are now (*Gaudium et spes*) rejected flatly. (It is worth noting that Popes were teaching against the spoliation and enslavement of the native peoples of the Americas during the period of the Conquistadores; their teaching was "interpreted" by many theologians and ignored by many of the people to whom it was directed.)

Christians make a clearer distinction between moral and legal guilt than was made in the O.T. Moral guilt is not for man's judgment. The inherent value of human life is not altered by the status or condition--even the condition of legal guiltiness of the person whose life is at stake. At the same time, the defense of innocent life and the maintenance of social order--which were the values for the protection of which capital punishment was intended--remain valid. But do these valid purposes justify the taking of a human life, even of one who is legally guilty of killing another?

Perhaps there is room for a development ~~of~~ Christian teaching in this area. If there is, the development would be in the direction of excluding capital punishment out of respect for human life as such. This development need not exclude killing an attacker when necessary for the immediate defense of oneself or an innocent third party. Perhaps much capital punishment in the past really was thought of as an extension of self-defense.

The development, the Bishops should point out in one of the most important sections of the document--the development if it is to come about is not merely a matter of joining a secular humanist consensus, not merely a matter of going along with the times. It is a possibility coherent with increasing sensitivity to human life to which the Bishops have been very much sensitized by the abortion issue. They speak to this issue with the same right, the same authority, and the same interests as they have spoken to the abortion issue. Moreover, if a development occurs such that we are going to regard capital punishment wrong, it will not be because we value less the lives of victims, but because we see more clearly the solidarity of human life, even of our lives and the lives of innocent victims with the lives of criminals. Development here would not be a lessening of respect for a human good, but a more refined and sensitive respect. Therefore, no one should suppose that if development is possible here, all of Catholic moral teaching is subject to change. Abortion, for instance, will always be wrong, and a purported "development" which would reverse twenty centuries of Christian moral judgment against such killing of the unborn would not be a refinement through increased sensitivity to the human value of life. Another point: if Christians have been mistaken in regarding capital punishment as permissible, some lives have been (materially) wrongfully taken, but no one has been told that it was a mortal sin to refuse to engage in capital punishment. In fact, clerics have been forbidden to take direct part in the practice. Thus, a development here would not condemn our fathers in faith. The Church is taught from age to age by the Spirit, but in every age has what is necessary to lead the faithful in the way of salvation; this requirement would not be violated by development in the teaching on capital punishment.

This brings us to the second part of the paper. The Bishops have neither asserted that capital punishment is intrinsically wrong nor have they denied that. They have indicated how development might occur toward regarding capital punishment as wrong, and how such development would be in line with the Catholic tradition, not just an arbitrary change. But they modestly back away from taking a firm stand on a matter which has not been adequately considered by the Bishops of the entire Catholic world, including the Pope.

So, from here on, with respect to the practical issue which gave rise document in the first place, they must operate on a supposition, a supposition which is not firmly asserted wither, but is taken as a working basis inasmuch as the weight of the apparent tradition is for it: that capital punishment sometimes is justified, but only under conditions. If one takes this assumption, what is one to say of the practical issue confronting us?

In the first place, traditional moralists have tended to say capital punishment would be unjustified if it was not really necessary and effective, and if due process of law was not followed. This brings us into the concrete problems of effectiveness and fairness. Much has been written about these problems. It is hard to evaluate the evidence available. But probably the preponderance is against thinking capital punishment really necessary or even a very effective method of stopping crime. In some ways, indeed, there is a temptation to express one's emotional concern with serious crime in capital punishment of an occasional criminal, when more effective means of inhibiting crime are neglected. Capital punishment might serve as a kind of social aspirin for the underlying difficulties.

Also, there are really serious questions about fairness, certainly of capital punishment as it has been exercised in the recent past in the U.S. If it is reinstated in some restricted cases, perhaps more careful attention can be paid to fairness. Yet it is far from clear that those who commit the most brutal and cold-blooded crimes against human life ever will be subjected to capital punishment. Somehow it is ironic that the U.S. Supreme Court is clearer and firmer in justifying (legally) abortion than in rejecting capital punishment for persons whose attacks on life are less blatant, less massive, less a matter of "sufficient reflection and full consent."

Anyway, the outcome of the second part should be, I think, to lean rather strongly against reinstating capital punishment in the U.S. Greater efforts to prevent crime are necessary. Also, larger numbers of the truly dangerous must, perhaps, be kept in permanent custody in decent prisons--the idea being legitimate and effective protection of society.

A last thought. While a person lives in confinement, there is time for conversion if he be guilty. If innocent, there is a chance for his innocence to come to light. It is fitting for Christians, who follow Him who was Himself an innocent victim of capital punishment, to bear this in mind.

That's about it, and I will look forward to comments before I actually write the thing. If you wish to speed matters, you could call me at home in the evening--306-586-8628--and I could record your remarks off the phone. If you have anything to send, please send to my home address special delivery: 219 Habkirk Drive; Regina, Saskatchewan, Canada, S4S - 2X5.

Sincerely,





# CAMPION COLLEGE

UNIVERSITY OF SASKATCHEWAN  
REGINA CAMPUS  
POSTAL CODE S4S 0A2

REGINA, CANADA. S4S 0A2

10 July, 1974

Mr. John Cosgrove  
Division for Urban Affairs  
U. S. Catholic Conference  
1312 Massachusetts Avenue, N.W.  
Washington, D.C. 20003

Dear Mr. Cosgrove:

I finished the enclosed draft last night and will have it in registered airmail by noon today. The mail has been slow; I hope you get it by the 15th. I expect that you will wish to obtain Bishop Unterkoefler's approval before sending the draft to members of the full Committee, so I am sending him a copy of everything in this envelope, including this letter, by the same way at the same time to facilitate matters. I am sending under separate cover and by slower mail the materials you sent me.

If you need to send the thing out to get it reproduced, I had very good luck with Reprographics, which is in downtown D.C., for fast and excellent offsetting. They probably could do it in one day, on both sides of the sheets, adjusting margins on the reverse. I put it on long pages to save the number of reproductions while still leaving good margins to work with.

I have numbered the paragraphs to facilitate cross-referencing, if that is desired, but mostly to help the Committee refer to places when they discuss or comment on the thing. I suggest that you call the numbering to attention of members (and to anyone else to whom it is sent for comment) and ask that they make their notes with reference to the numbered paragraphs.

As I mentioned to you, I am absolutely tied up the rest of the summer and into the fall, so there is no possibility of my re-drafting or doing any more work on the project. There is a possible exception, however. If the Committee discusses the document at a meeting, they might wish I were there to answer questions. If Bishop Unterkoefler wishes, I would be glad to do this by long-distance telephone; you can get a speaker set up in the room, arrange with me when, approximately, it will be, and I can receive, record the questions or objections, and a little later call back with the answers, and carry on a discussion with members of the Committee. I would be glad to do this as a contribution to the cause.

If I had had more time, I would have sent out this draft to a number of people for comments, and then re-drafted the thing. I am sending a list of the names and addresses of persons to whom I personally would have sent it for comments. If you wish, you might send it to them, telling them that I would have liked to send it to them and could not, so you would like their comments. I will give you a run-down on who these people are.

Finnis is an Oxford professor of philosophy of law; he is a lawyer and knows Catholic teaching on things like punishment. Fr. Ford I expect you know, but you might not realize he has degrees in law as well as theology.

Charlie Rice is a constitutional lawyer. He would be pro-capital punishment. Horan is a good lawyer and a right-to-lifer. I think he is against. Fr. Smith is a young moral theologian. Bill May has done work in philosophy and in moral; he is experienced in editing, and might make suggestions from that point of view.

Fr. Lawler is in philosophy, but also has a good base in theology. He would be against capital punishment, I think. Fr. McSorley has been in the anti-war movement and is familiar with the Church's social teaching. Fr. Campion wrote an article on the death penalty for the New Catholic Encyclopedia; he is against. I called up Fr. Campion--whom I don't know personally--and asked him for references to the Church Fathers whom he mentions as against capital punishment in his article; I did not receive anything from him yet, but will send it on if I do. You might prod him; the document would be improved if this could be included.

Rabbi Novak is a Conservative--not Orthodox--rabbi, who has worked on moral-legal issues such as suicide and abortion, and who takes positions very close to Catholic ones. He knows Scripture too. Prof. Ramsey is a good Protestant moralist. Joe Boyle is a former student of mine who is a very tight logician; he would pick up any logical faults in the arguments. Bill Ball is a lawyer who has had experience with Catholic Conference affairs. Fr. Canavan used to be an America editor; he has worked on various legal-moral issues involving theology, philosophy, and constitutional law. Prof. Rosenblum is a Jewish lawyer and right-to-lifer.

I also am enclosing two pages of notes, keyed to the footnote numbers, listing research things which need to be completed or watched. Some of these I cannot do because the things are not available here and there is no time to get them; others are matters which have to be done by direct contact, and you are likely to get answers easily from your office by indicating what you want the answers for. I don't think any of these things should be too much trouble; all are very important.

The document turns out to be much longer than we expected. There are two reasons for this. The first is that the problem is more complex than one who is not into it would realize--more so than I realized--and also that a number of things essential for dealing with it do not already exist--so far as I could find--and thus had to be worked out from the ground up.

To explain--and also outline the thing at the same time.

The existing situation and its historical background is complicated. One needs to understand it to see why the Supreme Court ruled as it did. The issue involves overtones of racial discrimination, which must be brought out in the facts, but which should not be overemphasized. The first section lays things out.

Next, central to what the Bishops can contribute is an articulation of the Catholic (Augustinian-Thomistic) view of punishment. I did not think it would be necessary to write this from scratch, because I thought there would be a good statement of it in some modern Church document, but did not find anything which would do. Getting the right theory of punishment from a theological point of view is vital; in the background we have essential issues about divine punishment.

Next, the arguments generally offered against capital punishment are bad, and some of them are not only doctrinally subversive but practically dangerous.

In many cases, Christian bodies endorsing the abolition position have endorsed these arguments. The practical debate is just about over, but these theoretical issues are important. So I decided to deal rather carefully with the main arguments against use of the death penalty, and to show what is wrong with them. I do not consider all the arguments, only the ones which are of theological or philosophical importance, or ones which are so current that they cannot be ignored.

To be fair about it, the bad arguments for justifying the death penalty must come in. Some of the worst of these are found in people like Aquinas, but I do not say that.

The crux of the problem as a theological one--and as a problem for Bishops as teachers--is that we seem to have a tradition favoring capital punishment and it seems to be wrong. I had expected to find some solid articles on the Scripture in journals, and on the theological tradition, but have not found any. But this may just be a matter of lack of research facilities here. Anyhow, I just did the job to the extent necessary for the purpose.

Finally, it is vital to explain what alternative you are proposing if you favor getting rid of capital punishment. Usually what you find is some version of "get rid of the causes of crime and treat the poor, sick bastards." This is a dangerous oversimplification. So I try to work out in the last section a parallel thing, but in harmony with Catholic teaching on human free will and social justice.

Another reason why the draft is long is that I attempted to figure out what Bishops holding each position--and I assume there are some--would want to say, and to get as much of it into the document as possible. This was done not by papering over differences and fudging, but by working out a synthesis which is based on principles all the Bishops should agree on. At the same time, there are enough facts and reasons given in the document to provide grounds--I hope--on which the Bishops can assent to the synthesis worked out.

Running through this whole controversy is alleged racial bias and reaction to it. I decided not to bring this to the forefront, but not to hide it either. I let the facts bring it out, try to deal with it reasonably, but give it only about the level of attention the Supreme Court opinions do, or a bit less.

What I decided to bring to the forefront is the relation of capital punishment and abortion as life issues. They are intrinsically related. I suspect that one of the reasons for the Bishops making a statement on the death penalty at this late stage in the game is the prompting of those who say they should to be consistent with their anti-abortion stand. Many of those who talk like this are more or less pro-abortion types, oddly enough.

There is another feature, which has to do with audience. The sort of Catholics who are likely to listen to and learn from the Bishops are likely to be pro-capital punishment people, and anti-abortion. It is vital to help these people see the difference between the situations and how development on capital punishment does not mean everything is going down the drain. At the same time, there will be people who will read this with somewhat more sympathy than they do the Bishops' statements on abortion, and it is important to take the opportunity to try to instruct these people.

I think there is a temptation for religious leaders to talk like politicians, saying diverse things to their diverse audiences, and not completely integrating a position. This is very understandable and also a disaster. Our Bishops, especially, should try to integrate a position which will bring people in the Church closer together, rather than simply leaving each segment of the audience nourish its own biases. That is why this draft is in some ways very conservative and in others would be regarded with horror by extreme conservatives.

I have adopted a rather straightforward style in the document. Some of the Bishops might feel uncomfortable with this. But I think it is important to say what you have to say clearly and as frankly as possible. Nobody respects glossing and punch-pulling. If the substance of the message is still there, a smart person can see it, and objects doubly to the fact that it is glossed and--as he sees it--dishonestly softened. If the substance of the message gets lost, then the reason for saying anything vanishes.

This is especially important in a document like this, where the position proper must be considerably nuanced. If the statements which are made are softened down as well, the whole thing will strike a reader as a lot of mush.

I was not impressed with the quality of material I found on this, and especially the quality of material by religious leaders. I have tried to give the thing an intellectual tone and sophistication which is appropriate to the Bishops. One wants quality in a document like this, not oversimplification. In doing this, you might say I have priced the thing out of the intellectual market of most ordinary members of the Church. That is true, but it isn't too difficult for most priests and teachers, or for adult study groups and the like. I figured that if it was as intelligible as the average encyclical, that should do. So I am not assuming that every Catholic paper will carry it for the home audience.

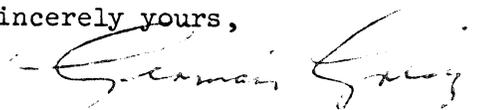
It would be good to have a good summary prepared for release at the time the document is approved, if it is anything like this one. Russell Shaw could do it. I'd say about 700-1,000 words.

If the Committee arrives at a draft agreeable to it fairly soon, I suggest that consideration be given to sending that draft--clearly labeled as such--to a variety of people asking for comments. These would include leaders of other religious bodies which have taken a stand, Congressmen and legislators on both sides of the issue, editors of Catholic media, any foreign Bishops who have taken stands on the issue. Asking for comments for people like this before the thing is finalized and taking their comments into account is likely to improve the quality of the final document, to get interest and attention and sympathy from the people whose help is asked, and to get a better PR impact for the final product when it is released. Even editors are likely to keep quiet if they are sent the thing and told their comments are wanted, but the document itself alone should be published, whenever it comes out.

Also, if the Committee agrees on a draft it can work with, I strongly urge it be got out to all the Bishops well before the November meeting. I think that if they have time, the whole body of Bishops can considerably improve a document; this was shown even in a very tight situation in 1968 when they put out Human Life in Our Day, with a final version much better than the draft they started with.

With this, I leave the project. Good luck.

Sincerely yours,



Additional research which should be done--by footnote numbers

1. It would be best to check Blackstone's Commentaries; the Library of Congress Law Division has the early editions; to see what he has on the number of crimes and so forth. If the text needs adjustment, it should be altered to fit Blackstone, and if it does not, he should be made first reference.

4. The Vatican had, but did not use, the death penalty in its state law; Paul VI abolished it, but I do not have any reference. Probably can be obtained through Apostolic Delegate; then the sentence should be inserted in the text saying he abolished it, it not having been used since \_\_\_\_\_ (or "ever" as the case may be) and the proper reference inserted in the footnote.

5. In this note I am just asserting that the British and Canadians have not used the death penalty since their restrictive statutes were passed; I know this only by word of mouth. Confirmation and reference to some official document of recent date probably can be obtained from the two embassies' information officers. The references should be inserted in the note.

18. It would be best to replace Calm in favor of official statistics if they are available; suggest checking with Calm for an official reference of some sort. Also, at the beginning of the paragraph preceding the one to which this note is attached, I say "about 700" because I lack a figure; this probably can be obtained in National Prisoner Statistics, for the following year or so.

22 and 25. These notes are not very good, because they rely on conflicting news reports; the AP dispatch date should be inserted and the Regina, Canada date-line removed; information on brief in N. Carolina probably can be obtained easily directly from the NAACP lawyers, who will be only too happy to have the Bishops' support in any degree at all. Some

Additional Research which should be done--by footnote numbers

22 and 25 continued. sort of official references to the brief would probably be best here. Someone then should keep up with the case, so that the last draft has current information and it is indicated as of what date the document speaks. I do not think it likely that there is going to be any decision on this case before the end of the year; the news stories seem to indicate it has not even been accepted yet. If it is, it might be argued in the fall and decided early in 1975, at the soonest--thus if the Bishops get out the statement this year, the subject will still be live.

28. The reference to the Society of Friends document is old; I am sure they would be glad to supply a recent reference if you ask, or they will supply a bundle of copies of statements, which can then be filled in.

30. Each Bishop must be asked to let you know what has been done in his State Conference, diocesan offices, priests' Senate, etc., so that this note can be complete. It is important that nothing any Bishop wants in here should be left out.

31. I only have at hand the slip opinions in these cases; a lawyer should replace my citations with the right ones from U.S. and S.Ct. Also, I do not have references for Bob Byrn's case; it should be inserted.

49. The Augustine reference should be completed with a reference to a standard Latin edition of his letters--I don't have it here.

59. I have seen various references to Church Fathers--such as Athenagoras, Lactantius, Tertullian, Origen--without specific citations, which indicate that they opposed all killing. I can't find where they do; I called Donald Campion and asked for his references but haven't received them. It would help considerably if someone would find these references, if they exist, and draft a paragraph highlighting this material and a note providing full citations to the texts. Be sure they exclude all death penalty.