



# Punishing Evildoers with the Sword: Further Discussion?

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**I**N THE SUMMER OF 1991, THE COMMISSION FOR CHURCH IN SOCIETY OF THE Evangelical Lutheran Church in America placed two policy statements before its national assembly. Both dealt with issues of life and death. The one—the more controversial—was a statement on abortion; the other, a statement on capital punishment. While the former was hotly debated and sent back for revision, the latter was passed by a large majority with only minor revision. With the very qualified authority of a social statement, the church spoke.

Of course, this is not the first time, and it may not be the last. Capital punishment has been highly controversial in Lutheran churches in the past three decades, and the resultant theological statements and reports serve to chronicle the controversy. As all the statements note, Lutherans have historically supported the death penalty; indeed, it has been a basic part of their understanding of the power and authority of the state. In recent years, the former Lutheran Church in America was the first to break with tradition. As part of the growing opposition to the death penalty in the 1950s and '60s, it adopted a statement in 1966 opposing the death penalty, and it has remained firm in that position ever since. In 1972, the former American Lutheran Church adopted a statement that simply presented both sides of the issue and called for further study.<sup>1</sup> Last to enter the fray was the Lutheran Church–Missouri Synod. Although that body has consistently supported the death

<sup>1</sup>Both statements along with that of the LCMS can be found in J. Gordon Melton, *The Church Speaks On: Capital Punishment* (Detroit: Gale Research, 1989).

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penalty, the report it adopted in 1976 laid out all sides of the issue, much as the ALC statement had done, leaving individual members free to support or oppose the death penalty provided the position they took was consistent with a basic theological framework.

Unable to resolve the issue, in 1984 the ALC put it to its member churches, first through a discussion document presenting both sides and then through a churchwide referendum.<sup>2</sup> The referendum proved inconclusive and the church decided to adopt only what emerged as the clear message from its members: the need to reduce crime and reform the criminal justice system. The issue remained controversial in the ALC until the time of the ELCA merger in 1988. And it was this that required the ELCA to speak. Thus, though the synods have spoken, it has not been with a common voice. The only conclusion they all share is the call for further discussion.

But conclusions are not everything, especially in theological reflection on issues of this sort. In the case of the death penalty, the disagreements between and within the synods exist against a background of common theological principle, and this common ground makes the evaluation of the ELCA statement – and other statements – easier than one might think. When measured against its predecessors, the 1991 statement is in most respects the weakest and least satisfying, so much so that it encourages us to raise some broader questions about the direction further discussion should take and the church's role in it.

## I. THE SOCIAL CONTEXT

Perhaps the best way to approach the social statement – and the other Lutheran statements – is to locate it in the on-going debate in our society about capital punishment. For it is the dynamics of this discussion, not any new theological or biblical insights, that are the driving force of the discussion among Lutherans.<sup>3</sup>

During the 1950s and '60s, the argument against the death penalty was clearly in the ascendancy. Typically, abolitionists appealed to three rather different considerations. The first was the apparent absence of any demonstrable deterrent value of capital punishment. The underlying assumption was that punishment is justified by its social consequences – in this case, deterrence. On this assumption, the argument about capital punishment became largely a matter of social science: Is there any evidence that capital punishment has a uniquely deterrent value over, say, life imprisonment? The classic study was published in 1959 by Theodore Sellin<sup>4</sup> and its finding, soon regarded by many as a dogma of social science, was that it did not. The evidence seemed to be clear and incontrovertible: the compari-

<sup>2</sup>See Eric Jorstad, "Church Conflict Over Capital Punishment," *The Christian Century*, 3 July 1985, 639-640.

<sup>3</sup>An excellent, brief summary of this history is to be found in Franklin E. Zimring and Gordon Hawkins, *Capital Punishment and the American Agenda* (New York: Cambridge University, 1986). The Lutheran statements make this dependence clear; reading them in light of this history makes it even clearer.

<sup>4</sup>Theodore Sellin, *The Death Penalty* (Philadelphia: The American Law Institute, 1959).

son of states with capital punishment statutes to those without as well as the comparison of states before and after they abolished capital punishment produced nothing to suggest the correlations indicative of deterrence.

A second appeal was to the sanctity of human life. Religious and secular opponents of the death penalty alike argued that human life was sacred and ought not to be taken, especially if no demonstrable good to society is achieved by it. What is more, the death penalty, it was claimed, sends the message that human life is “cheap” and it thereby contributes to a social climate in which human life is not treated with due respect. But more than this, the sanctity of life served as a strong and deeply motivating force for the abolitionist cause, even when there was no direct appeal to it.

The third appeal was to the desirability of rehabilitation. Punishment, it was often claimed, should serve to restore the offender. And unless one was willing to claim that this life is a preparation for the next – a position especially unpopular in the ‘60s, even among Christians – it seemed obvious that death forecloses on any and every opportunity for rehabilitation.

As different as these appeals may be, they tended to be mutually reinforcing and were embodied not just in public opinion and discourse but in the judiciary as well.

It would also seem that they were not without their effect on public behavior. Several states repealed their capital punishment statutes, and executions declined steadily nationwide through the ‘50s and ‘60s. Juries were more reluctant to sentence criminals to death. And when they did, governors often commuted the sentences or, as was more frequently the case, higher courts reversed them. By 1967, executions had ceased completely.

However, the changes in the practice of the death penalty in the 1960s were not just the reflection of public opinion, they were also the result of a concerted effort by the civil-rights community. The effect of this was not only to focus opposition to the death penalty, it was also to inject new issues into the discussion.

Historically, the practice of capital punishment has been most strongly established in the southern states. Earlier in this century, several crimes, including rape, burglary, and armed robbery, were capital offenses. It was widely known that blacks were more frequently executed than whites, especially for the crime of rape, and that the death penalty had been a common and effective tool of racial discrimination. Studies documenting this discrimination began to appear in 1940 and accumulated through the 1960s. What they showed was that the race of the criminal and the victim were significant variables in capital sentences and executions. Whatever else one may say about the death penalty, there was mounting evidence that it was being administered in a racially biased and therefore unjust manner.

The issue and the statistics made their way to the Supreme Court several times. In 1972, however, in *Furman v. Georgia*, a majority of the justices found the evidence of discrimination compelling and ruled that, in the cases under consideration, capital punishment constituted cruel and unusual punishment because it was “so wantonly and freakishly imposed.” As a result of the court’s ruling, all

existing capital punishment statutes were put in question and a moratorium was placed on the execution of some 600 prisoners on death row. However, the epochal pronouncements of the opponents of capital punishment proved premature: the court did not rule that capital punishment per se was unconstitutional, as many hoped it would and thought it had. Therefore, states—some 35 as well as the federal government—responded to the decision almost immediately by drafting new capital punishment statutes that they believed would receive the court's approval. In 1976, in *Gregg v. Georgia*, the court gave its blessing to a revised capital punishment law and established some basic safeguards to minimize the chance of discrimination and caprice. As a result, the new capital punishment laws remained in effect, and executions resumed, beginning with Gary Gilmore in 1977.

Meanwhile, the philosophical background of the debate began to shift dramatically.

The deterrence theory of punishment was widely rejected, at least in its classical form. The philosophical principle that punishment is justified because of its deterrent value seemed indefensible: it is clearly immoral, many argued, to inflict suffering on a human being simply to prevent crime. What is more, the debate about the deterrent value of capital punishment was thrown open again. The absence of a correlation between capital punishment laws and the incidence of murder, which had been long noted, is indeed subject to other interpretations. It may well reflect a variety of other variables such as the actual execution rate, the certainty of apprehension, etc. In 1975 an economist named Isaac Ehrlich<sup>5</sup> challenged Sellin's conclusions along these lines. Using a sophisticated, multi-variable regression analysis to compare the murder rates in states with capital punishment to those without, Ehrlich concluded that every execution resulted in the saving of approximately eight lives. His work has since provoked extensive debate that has not decisively vindicated either side. Suffice it to say that one can no longer claim with any assurance that capital punishment does not have a unique deterrent value. On the other hand, though, one cannot claim with much authority that it does.

For whatever reasons, the sanctity-of-life principle seems to have all but disappeared from the debate. Extensive discussion of the application of it to a variety of life and death issues has led to a deeper realization that it is a far more complex concept than it seems on first inspection. Consequently, it has become far less central to the discussion of life and death issues, capital punishment included—though its motivating force continues.

The therapeutic notion of punishment went the way of deterrence. On the one hand, it has not been able to withstand the very formidable philosophical criticism directed against it. Therapy, it is clear, is a rather different notion than punishment. There are also deep and vexing questions about the morality of

<sup>5</sup>Isaac Ehrlich, "The Deterrent Effect of Capital Punishment: A Question of Life and Death," *American Economic Review* 65 (1975) 397-417.

subjecting someone to coercive harsh treatment in the service of some ideal of normalcy. What is more, the whole therapeutic ideal has been the object of serious empirical criticism. There seems to be little evidence that we have effective means of rehabilitation; from what little we do know, incarceration—the mainstay of our criminal justice system—has negligible therapeutic value at best.

Parallel to these developments, and to some extent driving them, have been some alarming changes in American society. Beginning in the mid-'60s, the crime rate in the United States began a steady and dramatic increase. The most troubling increases have come in violent crimes, especially murder. Although the early 1980s and now the mid-'90s have seen a slight decline, a high level of violent crime is likely to be with us for some time.

In response to escalating crime rates and the changing philosophical milieu, the discussion of crime and punishment as well as the administration of our criminal justice system has turned more to the notion of justice. That crime deserves punishment is now a first principle of the discussion, and the determination of appropriate punishment is now more likely to turn on questions of justice than of deterrence or rehabilitation. Though the prevailing theories of punishment are by no means a simple return to *lex taliones*, they are centrally concerned with the notions of justice and just deserts. Retributivism is now back in fashion.<sup>6</sup>

With this change has come a fundamental change in the capital punishment debate. More and more, the debate centers on the question of just deserts. Arguments against the death penalty have lost their obviousness, and though one still finds challenging arguments from abolitionists, they are less common. Most grant that in many cases death is deserved. What is now more commonly argued is that death lacks one of the essential features of punishment and therefore ought not to be included among society's options in dealing punitively with wrongdoing.<sup>7</sup> At any rate, though respectable abolitionist arguments are still offered, there is some truth to the claim that the case against capital punishment formulated in the '50s and '60s has collapsed.<sup>8</sup>

## II. THE STATEMENT IN CONTEXT

It is against this background that we should first consider the 1991 ELCA statement.

One of the basic points it makes repeatedly is that the death penalty “fails to make society better or safer” or “makes no provable impact on the breeding

<sup>6</sup>It is little short of remarkable the way that retribution, over the past decade or so, has emerged from the darkness of the least defensible doctrine of penal theory into the light as the most defensible among penologists, philosophers, and members of the Supreme Court.” (Hugo Bedau, *Death Is Different* [Boston: Northeastern University, 1987] 60).

<sup>7</sup>A popular but effective presentation of this objection is to be found in Margaret A. Falls, “Against the Death Penalty: A Christian Stance in a Secular World,” *The Christian Century*, 10 December 1986, 1118-1119.

<sup>8</sup>So argues Earnst van den Haag in “The Collapse of the Case Against Capital Punishment,” *National Review*, 31 March 1978.

grounds of violent crime.”<sup>9</sup> These seem to be references to the deterrence debate, and the point is that the evidence for any uniquely deterrent effect of the death penalty is inconclusive. But if this is what is intended, the claim is rather too sweeping. Punishments make society safer not only through deterrence but also through incapacitation. Surely there are *some* murderers who would not have murdered again if they had been executed. Clearly, execution is uniquely incapacitating, especially when we recall that a life sentence is rarely if ever without the opportunity for parole.<sup>10</sup>

But this is a mere quibble compared with what follows. Having taken a cautious attitude toward the evidence about deterrence, caution is then thrown to the wind; for we are told,

Executions harm society by mirroring and reinforcing existing injustice. The death penalty distracts us from our work toward a just society. It deforms our response to violence at the individual, familial, institutional, and systematic levels. It perpetuates cycles of violence. (16.24-27)

Is there evidence for the alleged ill-effects of capital punishment? There have been some studies that suggest that capital punishment may actually incite acts of violence.<sup>11</sup> Unfortunately, however, they too have failed to win universal acceptance. But even if these studies were conclusive, they prove less than is asserted. What evidence is there that capital punishment “distracts us from our work toward a just society,” that it “deforms our response to violence,” that it “perpetuates cycles of violence”? A more measured conclusion would be that as the evidence for deterrence is inconclusive, so is the evidence for the ill-effects of capital punishment.

But so far we have ignored what may be the most important effect of capital punishment: a degree of justice that would not exist in society without it. What place does the ELCA statement give to justice as a justification for capital punishment?

Although the statement claims (in bold type) that “It is because of this church’s commitment to justice that we oppose the death penalty” (16.29), the claim is largely unsubstantiated. Making matters even more confusing, there are essentially two different notions of justice at play in the statement.

On the one hand, there is some reference to garden variety justice — justice as fairness or just deserts. Using this notion, the claim advanced is that the death penalty is unjust.

Despite attempts to provide legal safeguards, the death penalty has not been,

<sup>9</sup>*The Death Penalty* (Chicago: Commission on Church in Society, Evangelical Lutheran Church in America, 1991). Hereafter, numbers in parenthesis are page and line numbers contained in the draft presented to the assembly. The version finally adopted lacks the reference structure found in the draft.

<sup>10</sup>The additions to the statement made by the assembly suggest a greater concern with incapacitation than we find in the original version.

<sup>11</sup>So argue William Bowers and Glen Pierce, “Deterrence or Brutalization: What is the Effect of Executions?” *Crimes and Delinquency* 26 (1980) 453-484. This study is cited in the ELCA statement. An earlier note in the statement observes that the evidence in support of the brutalization hypothesis is “conflicting.”

and cannot be made fair. The race of the victim plays a role in who is sentenced to death and who is sentenced to life imprisonment, as do the gender, race, mental capacity, age, and affluence of the accused. The system cannot be made perfect, for biases, prejudices, and chance affect who we charge with a capital crime, what verdict we reach, and whether appeals will be successful. (16.36-40)

What the authors of the statement have in mind is probably the argument that the Supreme Court found persuasive in *Furman v. Georgia*. This is probably what lies behind the claim that capital punishment mirrors existing injustice. (Though, if we assume that women have historically been the victims of the injustice of men, an inverse relationship holds in the case of capital punishment.)

However, what the high court was not ready to affirm, the statement asserts boldly: "the death penalty has not been, and *cannot* be made fair" (emphasis added). What is absent, however, is any reason to share this conclusion. Why would it be impossible to have capital punishment laws administered in a non-discriminatory way? What is wrong with the court's reasoning in *Gregg* and why are the post-*Gregg* safeguards inadequate? Though there are respectable arguments abroad that post-*Gregg* capital punishment laws are still discriminatory,<sup>12</sup> there is no reference whatsoever to them in the statement and no reason given to believe that, even if yet unattained, a reasonable degree of fairness and consistency is impossible.

Probing the statement more closely, there are three things that we might reasonably construe as support for this conclusion. However, none of them has much merit.

At one point we are told that "the system cannot be made perfect." Granted. Buy why must the criminal justice system work perfectly in order for capital punishment to be fair? And why is this in any way a unique objection to capital punishment? Why does the statement assume that bias, prejudice, and chance are not factors in all criminal proceedings? If perfect justice is required to claim that the death penalty is just, why is it not equally a requirement of any just punishment? And if it is, what we have is not an objection to capital punishment so much as an objection to any system of justice administered by mere mortals. As is often the case with arguments against capital punishment, requirements are introduced that, if applied consistently, argue against the entire criminal justice system.

Another possibility we glean from the statement is the familiar objection that, since human beings are fallible, we cannot ensure that the innocent will not be wrongly executed. The execution of the innocent is obviously a matter of grave injustice, but so are other cases of wrongful punishment of the innocent. What is the special problem of capital punishment? The statement clarifies: "Death is a different punishment from any other; the execution of an innocent person is a mistake we cannot correct" (16.42-44). The assumption here is that we can correct other miscarriages of justice. But obviously we cannot. Suppose a person is

<sup>12</sup>For example, Charles Black, *Capital Punishment: The Inevitability of Caprice and Mistake*, 2nd ed. (New York: Norton, 1981).

wrongly convicted of robbery. Can we give back to him the five years he has spent in prison? Can we somehow make up for the fact that, say, he could not experience the first five years of his daughter's life? Can we extend his life by five years? How then can we correct the mistake? The difference between this and capital punishment is one of degree, not one of kind.<sup>13</sup> Consequently, what is the special problem of injustice in the mistaken execution of the innocent?

The third possibility we are offered results in a worse version of the same argument. "Violent crime is, in part, a reminder of human failure to ensure justice for all members of society" (16.20). The suggestion here is that those who commit violent crime are not responsible—or at least not fully responsible—for their actions. Society must share some of the blame. Why? Violent crime is in part caused by social inequality. The assertion is itself suspect. Although it is commonly believed by some—fewer now than previously—that crime is the result of poverty, the causes of crime are more complex and more elusive. The highest correlation is not with poverty but with being raised in a single-parent family. What are we to make of that? Regardless, we again ask why any of this is relevant to capital punishment. Rather, is it not applicable to all punishments? And what are we to conclude if it is? That all crimes must be punished less severely because criminals are not fully responsible for them?

But even if we can make our way around all of these problems, we must note one final and fatal overgeneralization. Do we not know of murderers who are not the victims of social injustice? Surely we do the economically disadvantaged a great injustice by assuming that they are the only ones in our society who commit murder!

Suffice it to say that those who support the death penalty for the unspectacular reason that in some cases it is deserved will find little in the ELCA statement to persuade them otherwise. Those who oppose the death penalty because they believe it unjust, however, should be cautioned. The best they are offered is reason to believe that the death penalty is currently administered in a discriminatory way—that it is *contingently* unjust. What is lacking is anything that argues convincingly that it is inherently unjust. Assessed in light of traditional Lutheran arguments, that omission is, I think, fatal.

The only hope for something more comes when we move to the second definition of justice used in the statement. Justice, it is claimed, is restorative. The warrant for this is theological. Since Jesus dealt with violent crime in a restorative way, the church should respond to violent crime in like manner. But without a blush, we move from Jesus and the church to the state. The justice with which the state is entrusted is also restorative. "Executions," it is objected, "do not restore broken society" (16.8). The challenge for the state, we are told, is to find ways of incapacitating capital criminals in a way that "holds open the possibility of conversion and restoration" (16.11-12). Begged here are two crucial questions, both theologi-

<sup>13</sup>This is argued more extensively by Michael Davis in "Is the Death Penalty Irrevocable?" *Social Theory and Practice* 10/2 (1984) 143-156.



cal. Is retributive justice foreign to the divine nature? Is God forever and ever restorative? At the very least, a community that weekly confesses that we deserve “thy temporal and eternal punishment” has some explaining to do. Equally questionable is how easily we pass from the nature of divine justice to the proper function of the state. What basis do we have for saying that the justice administered by the state is necessarily restorative? What has happened to that central Lutheran teaching about the two kingdoms?<sup>14</sup> Is there no difference of principle between the response of the state to violent crime and that of the church? Leaving aside theological considerations, I suspect that as we massage the notion of restorative justice, it soon begins to look like what used to be called the therapeutic view of punishment.

What, finally, are we to conclude? Is the death penalty unjust?

What we are given in the ELCA statement falls woefully short of a convincing case. What the authors fail to acknowledge is that there is a strong *prima facie* argument that some murderers deserve to die. To convince the thoughtful reader otherwise is going to take far more and far better than what we are given. If we ask how the authors of the statement could have missed this, they give us an interesting but puzzling clue. We are told that “the ongoing controversy surrounding the death penalty shows the weakness of its justification” (16.31). The suggestion here is that a careful reading of the death penalty debate would make it evident that the death penalty is without much rational support. If asserted in the ‘50s or ‘60s, the claim is plausible. But made in the ‘90s, it is a puzzling statement oblivious of the current death penalty debate in our society. If we look at both opinion polls and opinion makers, there is a sense in which any opponent of the death penalty must realize that the burden of proof has shifted, and that any successful argument against the death penalty cannot be as off-handed as the statement often appears to be.

### III. THE LUTHERAN CONTEXT

While the argument of the statement is illuminated by its social context, the more important – and telling – comparison is with the tradition of Lutheran statements on capital punishment.

The theological statements produced by the different synods during the ‘60s and ‘70s are remarkably similar in their basic structure – so similar, in fact, that it is somewhat puzzling that they are used to support different conclusions.

The essential issue of assessing capital punishment from a traditional Lutheran point of view is actually rather simple: “Does government have both the right and the responsibility of taking the life of an individual found guilty of certain crimes?”<sup>15</sup> Drawing on both biblical sources and traditional Lutheran theol-

<sup>14</sup>It is of crucial significance in the discussion of a question like capital punishment to keep the distinction between the two kingdoms clearly in mind.” So states LCMS (Melton, *The Church Speaks*, 115), but their advice has gone largely unheeded in the official statements of the other synods.

<sup>15</sup>LCMS, “Report on Capital Punishment,” in Melton, *The Church Speaks*, 113.

ogy, all sides begin from the same premise: the state has the right to take life in discharging its divine mandate. But not all rights should be exercised. So the crucial question is this: Is capital punishment necessary for the fulfillment of the state's basic duties which are "to preserve public order, to foster justice, and to deter evildoing"?<sup>16</sup> If capital punishment can be shown to contribute significantly to any of these purposes, it is then not only the right but also the duty of the state to take life.

Curiously, none of the earlier Lutheran statements actually argues that capital punishment is necessary to the essential functions of the state. Consequently, none of them actually advocates capital punishment. Even Missouri, though supportive of capital punishment, does not advocate it in its theological statement and indeed leaves this as an issue on which Lutherans may in good conscience disagree.

The series of statements from the LCA involve a curious and long-standing non sequitur. Though they are explicitly opposed to capital punishment, they offer little justification for their opposition. The 1966 LCA statement, much like the ELCA statement, asserts that "at present" the death penalty is administered unfairly. However, if it is only current conditions that render the death penalty unjust, in the absence of further explanation we could just as equally argue that we need to eliminate the discriminatory way in which the death penalty is currently administered—a position arguably in keeping with the larger mandate to improve the criminal justice system. In other words, why is abolition to be preferred over reform?

But this is not the only non sequitur. As noted, the 1966 statement asserts that "at present" capital punishment "is a clear misuse of [the state's] mandate."<sup>17</sup> But what follows are three reasons for this, two of which refer to aspects of capital punishment that are in no way dependent on circumstances and are thus never going to change. The two reasons in question are familiar points: capital punishment does nothing to restore the offender and the mistaken execution of the innocent cannot be reversed. But if the two factors cited are not likely to change, what then is the point? Is it that capital punishment is simply wrong *at present*? Or is it that capital punishment is *inherently* wrong? If the state cannot execute wrongdoers without ensuring that no errors are made, what becomes of its right to bear the sword? Worse still, what becomes of that same right if the state is obliged in all cases to restore the offender? What we begin to suspect is that the affirmation of traditional Lutheran teaching on the right of the state to take life is simply window dressing.

The direction suggested here is taken further by the ELCA statement of 1991 with the result that the theological confusion is even greater. Absent in the original was the theological framework found in previous Lutheran statements. Although phrases of a more traditional ring were added, they do not really change the fact

<sup>16</sup>ALC, "Statement on Capital Punishment" (1972), in Melton, *The Church Speaks*, 107.

<sup>17</sup>Melton, *The Church Speaks*, 106.

that the argument nowhere depends on them and is indeed inconsistent with them. We are told, for example, that the state may (or must?) take life “when failure to do so constitutes a clear danger to society.” But the possibility is never explored seriously, nor does it seem to square with the insistence that justice must be restorative. What is worse, new theological themes are suggested without being fully developed. Worse still, there is no clear and consistent understanding of the function of the state, and much that seems inconsistent with traditional Lutheran teaching. What we find, then, are the pieces of an argument that is never clearly made and fragments of a position that is never fully stated.

Where, then, have we come in this ongoing discussion? Perhaps the statement has brought peace of a sort to one of the Lutheran synods – at least for now. But at what price? The statement fails to provide a clear theological framework within which to discuss the issue; still less does it present a compelling case for or against the death penalty. What then has been accomplished? Is there any sense in which the issue has been resolved or progress made on it? I think the answer to both questions is clearly, no. For this reason, it is wise to look again at where we are in this discussion and where we should go.

The place to begin is with a realization that the capital punishment issue is not likely to go away soon, regardless of the position Lutherans take on it. Violent crime rates remain high; society feels threatened; a sizable majority of voters supports capital punishment; states continue to support and enact capital punishment statutes;<sup>18</sup> the number of executions increases yearly. Indeed, if the revolution of habeas corpus appeals begun by the Bush administration is brought to conclusion by the current Congress, we should expect that the time between conviction and execution will continue to diminish.

In this situation, what is the role of the church? The statement calls for further discussion of capital punishment. Is this really wise, and if it is, how will we recognize progress when it is made?

The earlier statements from the Lutheran churches articulate a common theological understanding of the state, its functions and its rights. Top marks go to Missouri because its statement is the most thorough, consistent, and balanced. Working within this general theological framework, progress would come in the form of an argument that capital punishment is or is not necessary to the functions of the state. And an argument could be made in relation to any one, or a combination, of them. If one is unable or unwilling to make such arguments, we need to accept freely the conclusion that this is a matter on which Christians may disagree in good conscience and leave it at that.

However, we may wish to go beyond this, not to legislate dogma, but to help Christians seriously concerned about their social responsibility. In other words, pastoral rather than dogmatic concerns may lead us to attempt more. But if this is so, the church would be wise in its public statements to eschew the more credal

<sup>18</sup>Most recently the city of Washington, DC, passed a referendum in favor of capital punishment, prompted in part by the slaying of an aide to Alabama Senator Richard Shelby.

style of assertion and adopt a more straightforwardly and consistently argumentative style. Christians truly in need of guidance on this issue would be better served by this than by the more typical style of synodical statements and reports, especially since many of these, the recent ELCA one in particular, claim that one of their purposes is to foster further discussion. What better way to do this than by advancing an argument that may be understood and supported or refuted? In doing this, positions may and should be advanced without any hint of ecclesiastical authority. In fact, all synods should think very carefully about the common practice of stating that an issue is one on which Christian consciences are free and then adopting an official statement that takes sides.

Those who wish the church to speak or to counsel, however, may want it to do so in a new way. If so, it is necessary to modify the traditional theological framework or replace it with something else. While there are several possibilities here,<sup>19</sup> the one requirement is that what is proposed is at least as clear as what one seeks to replace or supersede. To leave the theological context in disarray or to settle for an incoherent compromise is to fail at the most basic level. And this is perhaps what is most fundamentally wrong with the ELCA statement.

But the church's concern may be neither dogmatic nor pastoral, but "social," i.e., with the effect of the issue on society. If this is the case, it is well worth asking how much of the church's attention the issue deserves. Recall that we don't know a great deal about the social consequences of capital punishment. If we are concerned solely with the loss of those executed, we should remember that more people die from almost any cause other than execution. Consequently, there are any number of issues to which the church could profitably turn her attention that would result in a far greater saving of human life. One important reason capital punishment is worth our attention is that it forces us to clarify our thinking about the respect due human life, the nature of crime, the justification of punishment, and the function of the state. If the discussion of capital punishment can further these ends and hence clarify and sharpen the church's witness, it is valuable. If not, we may be better off to say simply that this is an issue that the light of revelation does not sufficiently illuminate and get on with the many other important and clearer issues in the life of our society and our churches.<sup>20</sup> ⊕

<sup>19</sup>In many ways the clearest and most attractive alternative — one very much in keeping with the direction taken in the 1991 statement — is that of the Anabaptist tradition. See John Howard Yoder, *The Christian and Capital Punishment* (Newton, Kansas: Faith and Life, 1961); "The Death Penalty: A Christian Perspective," originally published in *The Interpreter* (1979) and anthologized in Hugo A. Bedau, ed., *The Death Penalty in America*, 3rd ed. (New York: Oxford University, 1982) 370-375; and (with H. Wayne House) *The Death Penalty Debate* (Dallas: Word, 1991) 105-179, 197-208. A promising beginning on an alternative position is made by Oliver O'Donovan in *Measure for Measure: Justice in Punishment and the Sentence of Death* (Bramcote, Nottinghamshire: Grove Books, 1977) 21-22.

<sup>20</sup>I wish to thank the Earhart Foundation for a summer grant that supported the research reflected in this essay.