The Death Penalty in America: Unjustified Violence?

By Michael Gottsegen

"Judges and officers shalt thou make thee in all they gates, which the Lord thy God giveth theee, tribe by tribe; and they shall judge the people with righteous judgment. Thou shalt not wrest judgment; thou shalt not respect persons; neither shalt thou take a gift; for a gift doth blind the eyes of the wise, and pervert the words of the righteous. Justice, justice shalt thou follow, that thou mayest live, and inherit the land which the Lord thy God giveth thee." (Deut 16:18-20)

"He that smiteth a man, so that he dieth, shall surely be put to death." (Deut 21:12)

What is the essential relation between violence and civilization? Is violence foundation or foe? In truth it is both. It is surely foe, for violence and the threat of violence undermine the social cooperation that is the basis of all that makes life worth living. As Hobbes observed, where violence threatens fear spreads and life cannot be anything but "solitary, poor, nasty, brutish and short." And yet, violence - and the threat of violence - is surely foundational as well. This is not only the case because most political and social orders have been birthed in acts of foundational and generative violence. It is also the case because the perpetuation of any social order depends upon its capacity to threaten and employ violence against those who would violently disturb this order. Violence then is Janus-faced so far as the social order is concerned. There is good violence and bad violence, licit violence and illicit violence, violence that sustains the social order and violence that would undermine it.

In modern society, we look to the police and the courts to protect us from violence. We, the people, have authorized the police and the judiciary to wield violence - good violence -- on our behalf. And through the instrument of jury trial we reserve unto ourselves the right to make the most fateful determinations of whether or not the violence of punishment is to be brought to bear upon any one of our fellow citizens.

Crime and punishment are both inherently violent. It is important, however, that violence mandated by the court appear to be violence of a completely different kind from the violence of crime. Only violence of a different kind can break free from the spiral of reciprocal violence. The first act of violence calls forth the second act of violence, judicial violence, but the latter must be of such a nature that it does not call forth a third act of violence in turn. For this reason judicial violence must appear to be utterly unlike the violence that called it forth. It must appear to be sacred violence, which is to say, legitimate violence, authorized violence. Indeed, judicial violence, like sacred violence, should not appear to be a species of violence at all.

Should it come about, however, that the distinction between judicially authorized violence and the "criminal" violence it opposes breaks down, a crisis may be in the offing. Should it appear to the public that the verdicts of the judiciary are as arbitrary as the acts of violence they aim to punish, the legitimacy of the criminal justice system, and of the social order it sustains, may be called into question.

In our legal system the power of judicial violence belongs to the jury. If we want to understand how judicial violence gets marked as the antithesis of criminal violence, we need look no further than here. A cardinal distinction is immediately apparent. In contrast to the spontaneous and passionate nature of the violence that called it into session, the jury trial is highly choreographed and thoroughly ritualized. The rules of civil and criminal procedure, as well as canons of evidence and procedures for appellate review regulate the proceedings, while the judge, who is there to insure that decorum prevails, sets the mood. Rules that are designed to prevent conflicts of interest and bias from entering into the process from the bench or on the part of the jury are also constitutive of the formal sanctity of the judicial proceeding. Together these rules define the norms of the process which, when followed, are intended to differentiate court-ordered sacred violence from profane criminal violence. In a democratic system, moreover, legitimate (and thus sacred) violence expresses the sovereignty of the people, whereas criminal violence expresses only an individual and arbitrary will. Sacred violence, then, will not only be reflective of due process. In the end its legitimacy and holiness owe to the fact that it has been ordered by the sovereign and, in the present context, this means by a jury of one's peers. In this highly formalized manner, violence is thus transmuted and transubstantiated from something that is by nature spontaneous, disordered, uncontrolled and (potentially) uncontainable, into something necessary, ordered, deliberate and contained. In short, it has been rendered sacred.

The formal and ritual quality of the proceedings is important for legitimating the outcome of the trial. These forms do possess a substantive purpose, however, which transcends mere formality. These forms - and the aura of gravitas they are intended to convey - are intended to transmute not only violence into something higher and finer, but also the agents of this violence, the jury itself, into something higher and finer than the motley crowd from whom the jury has been assembled. Jurors after all do not start off as jurists renowned for their impartiality but as men and women like the rest of us with particular biases and interests. The trial is supposed to be conducted in a manner, however, that will elevate the jurors above these individual biases and particular interests that they might become fit vessels of the power of sovereign violence with which the judicial proceeding invests them. It is the role of the presiding judge to insure that the trial is conducted on this high-minded level, that attorneys for the prosecution and defense do not descend below this plane of impartiality, fairness and disinterestedness, and that the trial's integrity is zealously protected.

Only a verdict that is arrived at in the proper manner can maintain the all-important distinction between licit and illicit violence. To avoid a tainted verdict, the purity of the process must be upheld. Nothing that might taint the jury or cause it to descend beneath the dignity of its task can be permitted to happen during the trial. Any taint, or even the appearance of taint, would mar the jury's sanctity and the sanctity of its verdict. As a matter of law the jury's verdict might stand, but as its integrity would be in doubt, its legitimacy would be nullified.

The fact that a given penalty has been mandated by a court of law with the power to do so, or that duly authorized government officials have carried out the sentence, does not suffice to differentiate fundamentally this "duly authorized" violence from illicit, criminal violence. If it appears that the process was corrupted or tainted in some way, or that in the end justice was not done, the fact that judge, jury, and jailer all acted in a nominally "legal and authorized" manner hardly matters. If the verdict appears to be the unjust product of ill will, bias or a lack of due process then the verdict cannot but undermine the all-important red line between crime and punishment. For this to happen even occasionally should be a cause for grave concern, but woe unto us if it should happen with any regularity. For where this distinction between crime and punishment is regularly, or systemically, undermined, the very foundations of the social order are at risk. A good society is only possible upon just foundations, but consistent bias or arbitrariness in the administration of justice hacks away at these foundations. Order may be preserved for a time even upon such weakened foundations but its legitimacy will be lacking. And in time a crisis of serious magnitude will surely arise for when the citizenry believes that the basic institutions of justice are without integrity and that the avowed difference between crime and punishment is just a sham, cynicism, apathy and lawlessness will take root and spread like a cancer upon the nation.

Could America be on the verge of such a crisis? Is there reason to think that the fundamental distinction between crime and punishment is currently at risk of being undermined? Is there reason to question the basic integrity and fairness of the judicial process? Is there reason to think that racial and class bias, legal incompetence and political calculation pervades and corrupts the administration of justice on such a scale as to undermine the legitimacy of the system as a whole? A flurry of recent stories about persons wrongfully convicted and sentenced to death suggests that we are indeed on the verge and that drastic steps must be taken at once if "equal justice" is to be more than a myth and the integrity of the justice system is to be restored.

The highest profile stories in recent months have been about "nth hour" DNA tests that have exculpated persons who had been scheduled for execution. Nationwide, in the past year 62 persons - 8 of whom were on death row - have had their convictions reversed on the basis of DNA evidence. Less dramatic, perhaps, but even more troubling in its implications, is a recent report from Columbia and New York University Law Schools on death penalty appeals that

studied more than 4,578 death penalty appeals from 1973 to 1995 and found that a state or federal court threw out the conviction or death sentence 68 percent of the time because of unreliable evidence or procedural defects. According to the report, only two of 38 death penalty states - Missouri and Virginia - got their capital cases right more than 50 percent of the time, while three-fifths had error rates of 70 percent or higher. In more than 80 percent of cases, it was determined that the defendant deserved a sentence less than death after the errors were cured. And in seven percent of the retrial cases, defendants were found innocent. Since 1973, according to the report, 87 prisoners have been freed from death row. The prisoners spent an average of 7.5 years on death row prior to being released.

It was in the face of such evidence of miscarriages of justice that Illinois' pro-death penalty Republican governor, George Ryan, declared a moratorium on executions in Illinois last January. Since 1977 more people on death row in Illinois had been exonerated (13) than executed (12). In its investigation of this troubling story, and of the situation on death row in Illinois more generally, the Chicago Tribune examined nearly 300 Illinois death-penalty cases and found that since 1977 33 death row inmates had been represented by trial attorneys who had since been disbarred or suspended and that half of the state's capital cases had been reversed for a new trial or sentencing hearing. The Tribune also reported that in 46 cases, prosecutors had used testimony from prisoner informants, which is widely understood to be the least reliable evidence in criminal cases.

One way of reading these statistics, of course, would be to argue that the exonerations of death row inmates - 87 since 1973 - proves that the system works, that the innocent will always prevail on appeal. If true, this would be heartening, but it is surely false. Most persons on death row do not have the resources to mount an appeal of their conviction or to fight the protracted legal battle that is required to achieve success. A recent federal study suggests that it costs an average of $250,000 to mount a decent capital defense, a figure that is far beyond the reach of most of the poor persons who are on trial for their lives. The study also reports that federal and state assistance for poor or indigent defendants has been decimated in recent years. In 1996, Congress cut funding for the nation's 20 death penalty resource centers, eliminating major resources for indigent defendants. Now, only about a dozen of the 38 states with the death penalty have state-organized public defender programs that handle capital cases. Only eight states have specialized death penalty units that serve all or part of the state.

The inference to be drawn is rather stark. Where the stakes are highest, the American system of justice fails to do justice. Nor does it seem that the system does any better where the stakes are lower. Study after study provides evidence of racial and economic disparities in conviction rates and in the severity of sentences handed down in non-death penalty cases. Apparently, in America

today, if you are poor, non-white and uneducated you are more likely to be convicted of the charges that have been brought against you, and are more likely to receive a longer or more severe sentence than if you are an educated, middle-class white with economic means. I am sure that most readers do not find this to be at all surprising. This too is telling for it suggests that most of us already know that there is something wrong with the American system of justice and are quite aware that it does not live up to its stated ideals and aspirations. That we who are neither poor nor uneducated nor without means do not experience the justice system as being in crisis does not mean that it is not objectively so. Rather it attests to our lack of social solidarity, to our lack of moral imagination, or to both. These too may be signs of a systemic crisis. That very few among us are filled with righteous indignation and moved to action by such systemic injustice - to demand, for example, that our elected leaders make the right to competent counsel a reality -- is a sign of the degree to which the American social compact has already unraveled in the face of this crisis.

When a "system of justice" operates in a manner that blurs the distinction between justice and injustice, the legitimacy of the system, and of the social order it sustains, are sure to be undermined. This legitimacy depends upon the creation and maintenance of a clear distinction between the judicially mandated violence that is punishment and criminal violence. If this distinction should erode, it is likely that violence pure and simple will become the order of the day. America has not yet descended into that dark pit, but if we would insure that it never does we must endeavor to insure that justice is within the reach of every American and that no American is ever executed for a crime he or she did not commit. As a first step we might demand from our presidential candidates that they support a nationwide moratorium on executions and that they tell us how they propose to insure that justice will never again be denied to any American because he lacked the economic wherewithal to pursue it. "Justice, justice shalt thou follow, that thou mayest live, and inherit the land which the Lord thy God giveth thee." (Deut 16:20)