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## Go, Witness, and Speak

*William R. Montross Jr.*

WITH THE OVERWHELMINGLY DISPROPORTIONATE NUMBER OF BLACK MEN on death row, some argue that today's death penalty executions in the United States are the equivalent of legalized lynching. Others may charge this equivalence as hyperbole, but the numbers betray a system of racialized injustice that people of good will ought to reject today as did like-willed people of the churches, synagogues, and community organizations of the years leading up to the civil rights movement and beyond. This essay exposes the factors of race and poverty that lead to determinations of the guilt or innocence and the likelihood of a death or life sentence to those convicted of capital crimes.

### Introduction

Welcome to Atlanta, the city that once was a cradle of the civil rights movement. This year marks the fortieth anniversary of the assassination of Dr. Martin Luther King Jr. (January 15, 1929–April 4, 1968). From the Atlanta Hilton walk down Auburn Street and you will come upon Ebenezer Baptist Church, the same Ebenezer Baptist Church to which Dr. King always returned after honors and applause or to seek temporary sanctuary from curses and beatings. It was his home. It was a church. It was a house of worship that had met head-on the greatest injustices of that time.

Welcome to Atlanta, the city that today serves as the jewel of the “Death Belt.” Sweep westward from Florida and the Carolinas—through Georgia, Alabama, Mississippi, and Louisiana—to Texas and you have passed through the states that execute more people than anywhere else in the country. Since the United States Supreme Court again legalized judicial executions in 1976, close to 90 percent of the executions in this country have occurred inside the Death Belt. Surprised? It was in the Death Belt that more lynchings occurred than anywhere else in the nation, where vigilante groups strung ropes around the necks

of young black men and hanged them. And surrounding the limp bodies, some additionally desecrated by being burned beyond recognition, stood the crows: men looking proud, women in bonnets, and children flashing large smiles for the cameras. Many say that today's executions are nothing more than legalized lynchings. I agree.

During the 1950s, '60s, and '70s it was plain to see the horrific effects of the racism and poverty that surrounded us no matter where we lived in the United States. During the years of the civil rights movement the most indelible images of the relationships between blacks and whites were pictures of snarling police dogs as they struggled to reach the protestors, their leashes straining in the hands of white police officers; signs on so many buildings that made clear that blacks were not welcome; and television footage of rocks and bottles and fire hoses directed toward people of all races and creeds who marched for racial justice. It was the years of the "war against poverty," when we saw starving children in the richest country in the world, when ghettos existed beneath the shadows of skyscrapers, and when frustration and anger spilled out in the form of riots and looting in our nations' cities.

It was during these most difficult times that not only Christians but many Americans sought leadership from within the Christian churches. And the churches responded. At the head of almost every march for justice (indeed, at the very head of the civil rights movement itself) were the churches. It was the churches—their pastors and members—who were attacked by dogs, who were thrown in jails, who were stoned and threatened with their very lives. Churches were bombed, burned to the ground, and riddled with gunfire. But the racists and the Ku Klux Klan and Bull Connor and his men were wrong—the churches were not buildings, they were people, and the people stayed and continued to lead. Jews and Catholics and Protestants all united in the demand for social justice—black churches and white churches, southern churches and northern churches; all leading the call for justice.<sup>1</sup>

Blacks and whites can now sit together on buses, drink from the same water fountains, and sleep in the same hotels. The images once seen on television and in magazines—pictures of beatings and police dogs and little children bravely walking through mobs just to go to school—have been relegated by most Americans to the history books. In the forty years that have passed since Dr. King was killed, the legal vestiges of segregation are gone. But the system those laws nurtured and established, the system of discrimination built upon race and class, persists.

Each of us knows that racism and poverty have not disappeared; they continue to permeate our society to its core, corrupt our institutions, and ravage our communities. Today we need the churches to be again the voice for those without a voice, to stand next to the person no one else will stand next to, to

demand that human worth be based not on the color of one's skin or the contents of one's wallet. And nowhere is that voice needed more than in our criminal justice system.

### **Race, Poverty, and the American Criminal Justice System**

Far too much of what we as a society know about the American criminal justice system we learn from the local news in sound bites that grossly fail to express the everyday realities experienced by people who are poor and people of color. We are told in near-hysterical terms that we are surrounded by crime, surrounded by "people" who have no respect for our values, our properties, our lives. When one of those "people" is caught, he or she is branded as the "perpetrator" or "perp" and often paraded in front of the television cameras. Often that person is a black man or someone whom the newscaster calls an "illegal." And we are encouraged to feel afraid of them.

Ask some American citizens for their opinion of the criminal justice system and you will hear outrage: outrage at the perceived leniency of the criminal justice system; outrage at the justice system's failure to "protect" us; outrage at "all the rights defendants get" at the expense of victims; outrage at the glorification of process over the search for truth.

This rage is powerful, but it is also blind and misdirected. For most poor people and people of color the criminal justice system is not some abstraction or source of entertainment (witness, for example, television shows such as "CSI," "Law and Order," "Court TV," and "Frontline," and novels and movies too numerous to list). For them, the criminal justice system is a constant and oppressive force in their lives. Particularly in the South, the criminal justice system dominates the lived experience of the poor and people of color. And sadly, despite the passage of the Civil Rights Act in 1964, not much has changed in the past four decades. Rev. Joseph Lowery, a giant of the civil rights movement and someone who walked shoulder-to-shoulder with Dr. King, recently said, "If one were to ask me what aspect of life in the United States has been the least impacted by the movement for social justice, my answer would be the criminal justice system. The criminal justice system in 2007 is too much like the criminal justice system of 1907."<sup>2</sup>

Reverend Lowery is right. In the criminal justice system the two factors that most determine what happens to you if suspected of a crime—whether you are arrested, whether you are convicted, what your sentence will be, and whether you are executed—are your race and your class. In fact only four years after the 1976 reintroduction of the death penalty in the United States, the U.S. Conference of Catholic Bishops saw this pattern clearly:

But we must also reckon with a legal system which, while it does provide counsel for indigent defendants, permits those who are well off to obtain the resources and the talent to present their case in as convincing a light as possible. The legal system and the criminal justice system both work in a society which bears in its psychological, social, and economic patterns the marks of racism. These marks remain long after the demolition of segregation as a legal institution. The end result of all this is a situation in which those condemned to die are nearly always poor and are disproportionately black.<sup>3</sup>

As grossly overrepresented as African Americans are in this country's prisons and on its death row, African Americans are equally underrepresented in any role other than "criminal defendant" in this country's courts. According to Amnesty International, Alabama's African American population was 26 percent of the state's total in 2001. In that year, 2001, Alabama did not have a single elected black district attorney out of 40 such officials; only 4 percent of its criminal court judges were black, and there were no African American judges on either the state Supreme Court or the Court of Criminal Appeals.<sup>4</sup> Matters have not changed in the past seven years: While there are more district attorneys than seven years ago, now 42, only 1 of these 42 elected district attorneys is black,<sup>5</sup> and there are still no black judges on any of Alabama's appellate courts. Alabama is not alone among the states in this disproportion. Of Georgia's 188 Superior Court judges, the judges who preside over capital trials, only 15 are black.<sup>6</sup> In South Carolina, of the 52 circuit judges—the judges who preside over the death penalty trials—only 7 are black.<sup>7</sup> Texas has 414 district court judges, only 13 are black.<sup>8</sup> Of all the states that have the death penalty, 98 percent of the chief district attorneys in those states are white, 1 percent are black.<sup>9</sup>

If African American men are not sitting behind the judicial bench or draped with the power of the prosecutor, where are they? Bob Herbert, a nationally syndicated columnist for the *New York Times*, has argued that there is a whole generation of African American men, whether in urban and industrialized northern cities or rural, southern towns, who feel that the next few years hold for them only one of two things: death or prison.<sup>10</sup> These are feelings that betray an incredible powerlessness and hopelessness, and these feelings are justified. Young black men in America today lack both educational and employment opportunities. Young black men have a better chance of going to prison than college: a 2002 Justice Policy Institute report found that there were approximately 791,600 African American men in prison and only 603,000 in higher education.<sup>11</sup> The United States makes up 5 percent of the world's population, but we incarcerate close to 25 percent of our country's population.<sup>12</sup> African Americans make up 12 percent of our country's population and account for 48 percent of all inmates in state and federal prisons or local jails.<sup>13</sup> One out of three young black men in this country is currently in prison or jail, or on pro-

bation or parole.<sup>14</sup> The prospects for change are dim, especially when the same young black men, years later, come out of prison not only with no employment prospects and no educational prospects but also with no right to vote, no right to serve as jurors, and no right to hold public employment.<sup>15</sup> This country's solution to a generation's hopelessness has not been to provide education, training, or good jobs. Instead it has been to build more prisons, put more people in these prisons, and offer poor people the jobs of "prison guards" as a bright and fulfilling career.

The invidious role race plays in our criminal justice system becomes more stark when we consider the system's ultimate sanction: death. Both statistical and anecdotal evidence confirms that black defendants are far more likely to receive the death penalty than are white defendants. In 96 percent of the states where there have been reviews or studies examining race and the application of the death penalty, patterns of discrimination are found.<sup>16</sup>

But most striking are the disparities seen when the defendant's sentence is compared to the victim's race. After reviewing more than 2,500 homicide cases in Georgia and accounting for more than 230 nonracial variables, David Baldus found that a capital defendant, irrespective of race, is 4.3 times more likely to be sentenced to death for killing a white person than for killing a black person.<sup>17</sup> Georgia is not an aberration. Kill a white person rather than a black person in Florida and a defendant is 480 percent more likely to be sentenced to death; in Illinois, 400 percent; in Oklahoma, 430 percent; in North Carolina, 440 percent; and in Mississippi, 550 percent.<sup>18</sup> In Alabama only 6 percent of all murders involve a black defendant killing a white victim. However, more than 60 percent of black defendants on Alabama's death row have been sentenced for killing a white victim.<sup>19</sup> In Alabama 65 percent of all murders involve black victims, but more than 80 percent of the condemned awaiting executions in Alabama were convicted of killing a white victim.<sup>20</sup> Let me make the numbers simple: Since 1976, 15 white defendants have been executed for killing black victims; 223 black defendants have been executed for killing white victims.<sup>21</sup> More than any other factor in the Death Belt, it is the race of the victim that determines whether the defendant will be executed.<sup>22</sup> If you kill a white person, you will likely be executed. If you kill a black person, you likely will not.

In 2006 Stanford University released an incredibly disturbing study.<sup>23</sup> Titled "Looking Deathworthy" and published in the social science journal *Psychological Science*, the study found that in those cases where black defendants were convicted of killing white victims (those cases where the defendant is already far more likely to receive a sentence of death) the more stereotypically "black" a defendant looked (defined in the study as black individuals with broad noses, thick lips, and dark skin) the more likely the black defendant was to receive the death penalty. Jurors were "influenced not simply by the knowledge that the

defendant [was] Black, but also by the extent to which the defendant appears stereotypically Black.<sup>74</sup> Not only are you likely to be executed if you kill a white person, but the "blacker" you look, the even more likely you are to be executed.

If race is the number one invidious factor in our American criminal justice system, then class is a very close second. The majority of people arrested and processed through the criminal justice system are poor. The United States Supreme Court in *Powell v. Alabama* held that an indigent defendant accused of capital murder was entitled to a court-appointed attorney to defend him or her.<sup>75</sup> But if that court-appointed attorney is to mean anything for the defendant, then that attorney must have the resources to represent the client, must stand independent of the executive and judiciary branches of government, and must be skilled and dedicated.

However, the states routinely provide poor people, especially indigent capital defendants, counsel who are shamefully ill-funded, who depend on the very judges before whom they appear for their next paying appointments, and who lack the skills (and too often the commitment, passion, and dedication) necessary to effectively represent their clients. What types of attorneys are representing poor people charged with capital crimes? Some of them are simply incompetent, literally "walking violations" of the Sixth Amendment. There are some attorneys representing capital defendants who not only have never tried a capital murder case before but also have never even tried a drunk-driving case. There are some attorneys representing capital defendants who hate their clients, are racists, and are themselves suffering from drug and alcohol problems. On the other hand, there are attorneys who are passionate and committed and who fight but who are undercut at every turn by a lack of resources and structural support.

In Alabama there is no state public defender system, no dedicated capital defender office that represents poor people accused of capital crimes. Instead the local court appoints attorneys from the local community to handle these complex and difficult cases. Today, in 2008 in Alabama, attorneys appointed by the court to handle capital cases will be paid \$60 an hour for their in-court time, \$40 an hour out-of-court. Compare this to large law firms whose first-year associates bill out at \$200 an hour, partners at \$400 to \$500 an hour. Nevertheless, this paltry sum is a big improvement over what court-appointed counsel used to receive in Alabama. Before 1999 capital attorneys in Alabama were compensated at the rate of \$40 and \$20 an hour for in-court and out-of-court time, respectively. Court-appointed attorneys in Alabama were not only grossly undercompensated but the total amount they could charge the State for their time was also capped by law. In Alabama in 1999 an attorney trying a capital case could not claim more than \$1,000 in compensation for in-court time or more than \$1,000 for out-of-court time: a \$2,000 total for a capital case! In 1999 capital attorneys in Alabama received a raise: \$50 an hour for in-court time, \$30

an hour for out-of-court time. But their payment for all out-of-court work, such as investigating, preparing the case, locating witnesses, remained capped at \$1,000.<sup>76</sup> Now there is no "sanctuary cap" on out-of-court work; instead the judge determines what hours are "reasonably expended out of court in preparation of the case," quite the financial incentive not to anger the judge with meritorious motions, demands for experts, and trials that take more than a few days.

On July 26, 2007, Darrell Grayson was executed by the State of Alabama. Mr. Grayson was represented at his trial by an attorney who received \$40 an hour for his in-court time and \$20 an hour for his out-of-court time. This attorney petitioned the trial court to give him money to hire an investigator and experts so that he could represent Mr. Grayson as effectively as the Supreme Court has required. The trial court gave him the total sum of \$500. Yet the prosecution in this highly publicized capital case enjoyed the support of three prosecutors, backed by multiple law enforcement agencies and expert witnesses. Mr. Grayson's trial attorney himself testified to the role that the defendant's poverty and the system's inequities played in this execution: "Without more than \$500, there was only one choice, and that [was] to go to the bank and to finance this litigation, myself, and I was just financially unable to do that. It would have cost probably in excess of thirty to forty thousand dollars, and I just could not justify taking those funds from my practice, or my family at that time."<sup>77</sup>

After Mr. Grayson was convicted and sentenced to death, and after his conviction and death sentence were upheld by the courts on direct appeal, my office, the Southern Center for Human Rights, became involved in his case at the "post-conviction proceedings" stage. It is in this stage that issues such as the effectiveness of trial counsel are litigated for the first time. These are important issues, critical issues, issues that have resulted in dozens of death sentences being reversed in the past ten years.

However, in Alabama a man sitting on death row has no right to an attorney at this stage. As far as Alabama is concerned, you had your trial (and your trial attorney at state expense) and your direct appeal (and your appellate attorney at state expense) and that is all you are entitled to have. So death row inmates are left to fend for themselves. We try to represent as many of these people as possible (Alabama's death row includes four women and two hundred men). But even today there are, I believe, twelve men on Alabama's death row who do not have attorneys.

Yet the difference in the facts of the capital cases does not explain why one defendant receives a death sentence and another defendant does not. All capital cases have horrible facts. The cases are by their very definition gruesome and tragic. But not every capital case ends in a death sentence. Terry Nichols, who along with Timothy McVeigh, blew up a federal building in Oklahoma City killing 168 people and wounding more than 850 people, was spared the

death penalty not once but twice by two different juries. Eric Rudolph detonated a bomb at the 1996 Olympic Games, in Atlanta. He also bombed abortion clinics throughout the country. He killed 2 and injured and maimed hundreds.<sup>28</sup> He did not receive a death sentence. Gary Ridgway, known to most as the "Green River Killer," murdered at least 48 women in the Seattle area. He did not receive a death sentence. Why did these individuals, who committed some of the most highly publicized and egregious acts of murder in this country's history, not receive death sentences? Because Nichols, Rudolph, and Ridgway, all high-profile cases, all had good defense attorneys; the majority of anonymous poor people and people of color do not.

There is a crisis in our criminal justice system that affects millions of lives, not just the lives of those convicted and their families but all our lives: When even one person is denied justice, all are vulnerable to the next injustice. It is a system corrupted by racism. It is a system where justice must be bought and paid for. To change this system will not be easy. As Dr. King made clear in his "Letter from Birmingham Jail," "History is the long and tragic story of the fact that privileged groups seldom give up their privileges voluntarily. Individuals may see the moral light and voluntarily give up their unjust posture; but, as Reinhold Niebuhr has reminded us, groups tend to be more immoral than individuals. We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed."<sup>29</sup> But as hard as those in power struggle and fight to maintain this system, we must struggle and fight even harder to bring justice to the forefront. Who will lead us in this struggle? Those who have led us before: the churches.

### Churches as Agents of Social Change

Throughout American history the churches have shown us the way. The churches led the abolitionist movement.<sup>30</sup> The churches led antislavery movements.<sup>31</sup> The churches fed the starving immigrants fleeing oppression in their own homelands.<sup>32</sup> And, of course, the churches drove the civil rights movement. From Dexter Avenue Baptist Church in Montgomery, Alabama, to Riverside Church in New York City, churches served as the infrastructure and incubators of the American civil rights movement in the 1950s and 1960s. The launch pads for demonstrations in southern cities, churches black and white served as shelter for the Freedom Riders, the sites of Freedom Summer orientation sessions, and as the inspiration that led countless citizens to press against the tyranny of segregation and to demand justice in the eyes of the law. These churches were the backbone upon which the movement was built, and the churches' leaders, both those who became nationally heralded and those who remained only locally cherished, served God and the human community by

stepping forward to lead when a movement needed leaders. Southern churches provided the leadership, physical sites, and inspiration that channeled the push for desegregation into the notice of the national media and onto the national agenda. Northern churches contributed financial resources and political clout to a growing movement. I turn my focus now on the churches and the civil rights movement for two reasons: to remind you who are leaders in your churches how powerful your voice once was, and to inspire you to find that voice again.

#### *Southern Churches: The Infrastructure of the Movement*

The incredible successes of the civil rights movement would have been inconceivable without the participation of the churches and church leaders. African American churches harbored the Southern civil rights movement from the very rise of segregation during Jim Crow (1877–1960s). Individual pastors utilized their human, financial, political, and cultural resources to battle local injustices. After the end of World War II challenges to the segregated system of the South flashed up with more and more frequency. And as the National Association for the Advancement of Colored People (NAACP) fought a slow battle in the courts, individual church leaders began a systematic fight against segregation, neighborhood by neighborhood. Throughout the 1950s and 1960s these same leaders mobilized their churches in three critical areas: leadership, physical and symbolic spaces, and spiritual inspiration.

#### *Leadership*

By working individually and forming political action collectives, African American ministers served as beacons of the struggle against segregation and Jim Crow laws. Individual visionaries like Fred Shuttlesworth of Bethel Baptist in Birmingham worked tirelessly in their own churches to nurture the growing movement. Having lived through the bombing of his parsonage because of those activities, Reverend Shuttlesworth went on to safeguard the Freedom Riders after their beating at the bus station in Birmingham.<sup>33</sup> Similarly, local church leaders spoke out from pulpits across the South in support of the civil rights movement. Theologians, too, put their bodies on the line in support of desegregation, for example, by shocking white congregations in Mississippi with their attempts to integrate church services.<sup>34</sup>

While the strength of individual leaders played a crucial role in the movement, coalitions of church leaders became the engines of change. Shuttlesworth himself founded in 1956 the Alabama Christian Movement for Human Rights, comprised of concerned ministers.<sup>35</sup> Their work in Alabama and throughout the South would be vital to the success of mass demonstrations and the eventual passage of the Civil Rights Act. Another well-known group of church leaders, the

Southern Christian Leadership Conference (SCLC) founded by Dr. King in 1957, played an indispensable role in bringing the movement to the national stage; the SCLC remains in existence today.

The work of individual ministers and groups like the SCLC inspired church leaders nationally. Groups such as the National Council of Churches began to look for ways to become involved in what was in the beginning primarily a southern movement. In a historic gathering, the 1963 Chicago Conference on Race and Religion brought together almost 1,000 religious leaders and prominent theologians from almost every denomination across America. The Chicago Conference agenda was to discuss segregation, religion, and potential next steps for the religious leaders present, which included the most prominent rabbi in Chicago and a large delegation of Catholic bishops.<sup>36</sup> The lasting legacy of this gathering was primarily symbolic, but a bright and shining symbol it was: Historical religious divides and acrimones would not prevent people of conscience and spirit from across the nation from speaking out against that which was wrong. Dr. King's call to arms to the religious leaders there, delivered during his address as one of the keynote speakers, exemplified the style of leadership of so many southern ministers during the movement: "One must not only preach a sermon with his voice . . . he must preach it with his life."<sup>37</sup>

#### *Sites and Symbols*

When we think of the civil rights movement, we think of churches: Sixteenth Street Baptist, Ebenezer Baptist, Dexter Avenue Baptist. By involving their congregations in the movement, church leaders gave not only leadership but also critical physical spaces in which African Americans could gather to plan and implement mass demonstrations. Often integrated in a way public spaces never could be in the 1950s and 1960s, church rectories, sanctuaries, and meeting rooms literally incubated the movement. The first mass meeting of the sit-in movement was held at the First Baptist Church of Nashville, Tennessee, in 1960 and churches served as the hub from which mass demonstrations moved into city parks and streets from Selma, Alabama, to the northern movement.<sup>38</sup> More than that, these physical spaces became symbolic of nonviolent tactics and allowed for theatrical public displays of support from, for example, a delegation of rabbis with members from places as far apart as Memphis and Nova Scotia who traveled to Birmingham in 1963, striding into a mass meeting at the Sixth Avenue Baptist Church to proclaim their support for the movement.<sup>39</sup>

#### *Inspiration*

Beyond symbols of the movement for the national media and other on-lookers, southern African American churches and church leaders provided the inspiration for the thousands of individuals who marched and worked for desegregation. The cultural capital wielded by churches, both in the 1950s and 1960s

and today, should never be underestimated.<sup>40</sup> Powerful religious institutions and leaders can lend legitimacy, a sense of overarching justice, and a broad and receptive audience to any social movement. The power that civil rights movement participants felt from the theology of freedom and fellowship being preached throughout the South propelled many individuals to acts of bravery: facing down police dogs, walking through teargas, marching against armed police officers, and standing back up after being knocked down by fire hoses. The churches instilled confidence in the righteousness of the cause.

#### *Northern Churches: Involved on a National Level and on the Ground*

The civil rights movement was not a movement of southern churches only. No shortage of heroes, some also martyred, came from the northern churches as well. Jonathan Daniels, an Episcopalian seminary student in Cambridge, Massachusetts, is one example. In March of 1965 Daniels came to Alabama, integrated the local Episcopalian Church, protested white-only stores, and was locked up in the dead of summer in southern jails with no air conditioning or plumbing. In August of 1965, after being freed from jail in the small town of Fort Deposit, Alabama, he and other protestors were met on the side of the road by a shotgun-toting highway employee. The man leveled his gun to shoot a seventeen-year-old child among them. Daniels pushed the child out of the way and took the whole of the blast. He was killed. His murderer was tried by an all-white jury of twelve honest men and acquitted. The killer said Daniels threatened him with a knife. But his murder galvanized the Episcopalian Church, who thereafter placed civil rights on the map as a goal to be pursued by the whole church.

Of course, the southern African American religious leaders guided the arc of the movement, but coalitions of northern churches worked both within denominational lines and across them to contribute to the movement's success. One federation of religious leaders, the National Council of Churches (NCC) headquartered in New York City, would become an important political force supporting the southern movement.

The NCC consisted of mostly white mainline northern Protestant Churches.<sup>41</sup> What the northern churches had, and many of the southern churches did not, was money and lawyers. The NCC sent its staff attorney, Jack Pratt, to Mississippi to represent incarcerated civil rights workers who were unable to hire local lawyers.<sup>42</sup> Along with Mr. Pratt NCC also sent \$10,000 in bail money to help release fifty-seven activists being held in two hell-holes—Parchman Penitentiary (known affectionately by those who came to rely on its work-gang/slave labor as "Parchman Farm") and Leflore County Work Farm. When Pratt arrived at the Leflore County Work Farm, he was met by shotgun-bearing deputies amid barking dogs and a fleet of squad cars. The prisoners, forty in all at Leflore, were men and women of all races and ages,



including two women older than seventy. When released, one of those women, originally suspicious of the young Yankee lawyer, turned to the other activists and proclaimed: "Praise God! The church has come and set us free!"<sup>43</sup>

### *The Moral Voice of the Church*

What the churches meant to the civil rights movement was so much more than leaders, and symbols, and inspiration: it was the churches' moral voice—that what was happening in this country was wrong, morally wrong—that allowed the civil rights movement to succeed to the extent it did. Those churches turned that moral voice against the criminal justice system that in the South was the means to enforce segregation. Loitering statutes, trespass statutes, and debtor statutes were used consistently to pick up black men and ship them off to the prison work gangs. The criminal justice system was the primary means of overtly racist social control.

When the protestors were arrested, they were arrested for violating the same trespass and loitering statutes that had been used against blacks for decades. But now there was a moral voice, the voice of the churches that said "No!" The churches said "No, these people are not criminals." The churches stood, in many instances for the first time, on the side of the criminal defendant. And in doing so these churches dramatically reoriented the national dialogue on the civil rights movement. No longer were "criminals" being arrested for sit-ins at local lunch counters; now these were church-going people who were arrested: ministers and pastors and rabbis and priests and students—citizens exercising their moral rights to stand against unjust laws.

How powerful was this voice! It spoke to the world. In the face of injustice, it said "No More." In the face of power, it said "We Will Not Follow." In the face of hatred and anger and prejudice, it responded with a voice of love. And it was one voice (granted, a voice that was spoken in different accents and draws and dialects), a voice of consistency and truth. This voice is the moral power and authority of the church.

From the old television films, from the photos, and likely from the experience of some members of the SCF, think back: who do you see at the front of the civil rights movement? You see the churches. You see black pastors and white priests and Jewish rabbis walking hand in hand, arm in arm, down the street facing racism and hatred and violence as one body.

### **Theologians**

Can we say with the woman freed from Leflore prison, "Praise God! The church has come and set us free!"? We need the church again to set us free.

We put black men in prison at an unprecedented rate, threatening to incarcerate a whole generation; we need the churches to speak. We execute people—1,099 since 1976—and thousands more wait their turn; we need the churches to speak. Our criminal justice system has institutionalized racism; we need the churches to speak. Massive social injustice has not disappeared; we need the churches to speak.

What do I mean when I say we need the churches to speak? How can the church go about challenging the criminal justice system? And specifically, what can you, as theologians and ethicists, do? You can be moral witnesses. In the words of the Jewish ethicist Avishai Margalit, the moral witness "makes an effort to observe and report on suffering arising from evil conduct. He may take risks in doing so, but he has a moral purpose: to expose the evil done by a regime that tries to cover up its immoral deeds. A moral witness acts with a sense of hope: that there is, or will be, a moral community for which his or her testimony matters."<sup>44</sup> To be a moral witness you must first, *go*; second, *witness*; third, *write and speak and report*.

First, *Go!* In the civil rights movement, the churches went to where racism was manifest. Blacks could not sit at a lunch counter; the churches sat there. Blacks could not vote in Selma; the churches went there. Where ought the churches to be now? You need to *go* to the courts. You need to *go* to the prisons. You need to *go* to the executions. And *go* again, and again, and again.

Let me tell you what I have seen in Georgia. In the southwestern, rural part of the state, around the towns of Nashville, and Americus, and Blakely, the churches went to the courts.<sup>45</sup> And what they saw disgusted them. People pleading out to jail terms without an attorney representing them; black men shuffling into court, all shackled together, and shuffling back out; an attorney, when there was an attorney, with two hundred case files, and not knowing the name of any of his clients—"meet 'em and plead 'em." And the churches started to act: They went to the newspapers, to their local representatives, to other churches. Legislative hearings were called; the churches went to the hearings and they described what they had seen, what had disgusted them, what needed to be changed. They did not go in vain. After years of struggle, Georgia created a functional public defender system. So *go* to the courtrooms where so-called justice is dispensed, *go* to the prisons, and *go* take a tour of your local jail.

Second, *witness!* Here is the scene outside a prison at a recent execution: The prison locks everything down; nothing goes in and nothing comes out. Then two groups start to form on the prison grass, hundreds of yards away from the actual execution. You see a small, little group. They hold some candles, they are four or five protestors, and most of them know the condemned personally. Then there is the other group. The other group is always larger. And they are waiting to cheer, to holler, and to yell when the word that death has been applied finally seeps out through the walls. They stay around and jeer at the

hearse that removes the body. I am not the only one who has seen this spectacle: Pat Robertson, outside the Carla Faye Tucker execution in Texas, described the scene: "Outside the prison, it was like a Roman circus. There was blood-thirstiness out there, they were cursing and cheering and chanting for her to be executed."<sup>46</sup> The churches need to be there, to witness against the execution and for the dignity of human life.

Third, *write and speak out!* In 1980 the American Roman Catholic Bishops spoke out collectively against the death penalty.<sup>47</sup> That was more than twenty-five years ago. In 1993 Sister Helen Prejean wrote *Dead Man Walking*, a book that reached millions. That was fifteen years ago.<sup>48</sup> In 2004 Stanley Hauerwas wrote about Christian churches and the death penalty.<sup>49</sup> That was nearly five years ago. The Roman Catholic Bishops, Sister Prejean, Professor Hauerwas, and others continue to speak, but we need more and we need it now. Because too often the voices being heard today professing to be the "Catholic" or "Christian" voices are the wrong voices.

Antonin Scalia is a sitting United States Supreme Court Justice. And he professes to be a practicing Catholic. Recently he addressed "the morality of capital punishment" at the Pew Forum on Religion and Public Life at the University of Chicago Divinity School.<sup>50</sup> His jurisprudence is known as "strict constructionalist." His own words best describe his manner of constitutional interpretation: "The Constitution that I interpret and apply is not living but dead—or, as I prefer it, enduring. It means today not what current society . . . thinks it ought to mean, but what it meant when it was adopted. For me, therefore, the constitutionality of the death penalty is not a difficult, soul-wrenching question. It was clearly permitted when the Eighth Amendment was adopted. . . . And so it is clearly permitted today."<sup>51</sup> The Eighth Amendment was adopted in 1791. Scalia's vision of Christianity is as dead as his vision of the Constitution.

Many ask, "How can you be a Christian and support the death penalty?" The bishops and Pope John Paul II said that the death penalty cannot be supported by Catholic Christians. What does Justice Scalia say to this? Scalia says: "I am . . . happy to learn from canonical experts I have consulted that [this] position . . . does not purport to be binding teaching. . . . I am happy to have reached that conclusion, because I like my job, and would rather not resign."<sup>52</sup> He says that the Church's position on the death penalty is an "uncongenial doctrine that every-one knows does not represent the traditional Christian view. . . . We need some new staffers at the . . . Vatican. At least the new doctrine should have been urged only upon secular Europe, where it is at home."<sup>53</sup> How is it that certain politicians who take pro-choice positions are threatened with excommunication, and this man has never been challenged or refused on his pro-death penalty position?

Why do you need to go, to witness, and to write and speak out? Because when you do these things, you bring light to this certain darkness. Racism does

not like light. Discrimination does not like light. Jean Porter recently called attention to the need to expose what is hidden in the darkness in "Due Process and the Rule of Law: A Moral/Theological Challenge," where she criticizes Catholic theologians for their failure to "identify the disregard of due process and the rule of law as a distinctively moral issue."<sup>54</sup> What is due process? Due process is transparency not only as defined by Jean Porter but by our legal system as well.<sup>55</sup>

So let's talk about killing people: What do you know about how the state kills people; how transparent are the procedures for execution? You probably know about the problems of electrocution—people catching on fire, flames erupting from their heads.<sup>56</sup> Most states switched to lethal injection, a method considered by all the so-called experts to be the "humane" way to kill human beings—no worries about people catching on fire, no worries about the stench of burning human flesh causing people to vomit at executions, just a needle poke and the condemned falls asleep.

But the whole process of lethal injection has been kept secret; the lack of transparency is scandalous. What drugs were used?—secret. How the drugs were administered?—secret. Who actually administered the drugs?—secret. Everything about how the state goes about killing human beings is kept secret from the public. And not just the public, this information is also kept secret even from other governmental organizations. It is kept secret at the execution itself (the curtains are kept closed until the last minute so no one sees the struggle to find a vein in the condemned's arm or the needles popping out). And it is kept secret after the execution; even the dead man's autopsy records are marked "CONFIDENTIAL" and "SECRET" and are not released to anyone.

But who has been present at every execution for years, holding the hand of the condemned and praying on their knees for the eternal salvation of the soul? The prison chaplains were. But never did the chaplains, in any state, come forward with the horrors of what was happening; never did the chaplains disclose the botched executions and horrific deaths that they had witnessed. You can be there—you get access when we do not, and with that access is a responsibility to speak out in the face of evil. Jean Porter challenges the theologians and churches to demand transparency, to demand process, to demand legitimacy and justice.

If you do that, you will bring change. I cannot, I am just an anti-death penalty attorney. I grew up in New York; I have yet to master my Southern accent; I am not liked. Consider how the State of Alabama attests to me as troublemaker in one of its briefs: an "out-of-state activist attorney . . . who will do just about anything to frustrate the State of Alabama's enforcement of its laws."<sup>57</sup> This view of me is not only from the attorney general for the State of Alabama; the overwhelming majority of people in Alabama see me this way too. No one will ever say, "Praise God, the young Yankee lawyer has come and set us free." But it has been said, and will be said again, "Praise God, the church

has come and set us free." It is you—leaders of the churches—who have a different authority: You are not seeking to frustrate, you are seeking to save. Where lawyers are trained that there are no "right answers," you were trained and taught and now teach others that there are right answers, that there are right choices and wrong choices, that there are good and bad. Lawyers are trained to write and speak in legalese; you are trained to write and speak so that everyone, from the highest reaches of power to the lowest, understands you. Where I represent murderers, you represent God. You have the power to make change for the good. You have the moral voice.

Not long ago in the South, black would not be sitting next to white, Jew next to Christian, Catholic next to Protestant—look at how far the churches have taken us in forty years. It is good to be in Atlanta today. It is good to be with the SCE today. We are together. We are united. We are a moral community. But there is still a road to travel; the road is hard and long. But where you go, others will follow. What you witness, others will believe. And when you speak, the world will hear.

## Notes

1. Theophilus Eugene "Bull" Connor "was an ardent segregationist who served for twenty-two years as commissioner of public safety in Birmingham, Alabama. Using his administrative authority over the police and fire departments, Connor worked to ensure that Birmingham remained, as Dr. Martin Luther King Jr. described it, the most segregated city in America." In 1963, the violent response of Connor and his police force to demonstrations in Birmingham propelled the civil rights movement into the national spotlight." Clayborne Carson et al., *The Martin Luther King, Jr. Encyclopedia* (Greenwood Press, 2008), [www.stanford.edu/group/king/about\\_lang/encyclopedia/connor\\_bull.htm](http://www.stanford.edu/group/king/about_lang/encyclopedia/connor_bull.htm).
2. Joseph Lowery, "Champions of the Public Good," *The Champion* 31, no. 6 (July 2007): 51–52, at 51.
3. U.S. Conference of Catholic Bishops, *Statement on Capital Punishment*, Washington, DC: USCCB, 1980, [www.usccb.org/stwp/national/criminal/death/usccb80.shtml](http://www.usccb.org/stwp/national/criminal/death/usccb80.shtml).
4. Amnesty International, "United States of America: Death by Discrimination—The Continuing Role of Race in Capital Cases" (April 2003), [www.amnesty.org/en/library/info/AMR51/046/2003](http://www.amnesty.org/en/library/info/AMR51/046/2003).
5. Equal Justice Initiative, "Racial Bias," <http://eji.org/eji/deathpenalty/racialbias>.
6. American Bar Association, [www.abanet.org/jindind/diversity/states/georgia.xls](http://www.abanet.org/jindind/diversity/states/georgia.xls).
7. American Bar Association, [www.abanet.org/jindind/diversity/states/south\\_carolina.xls](http://www.abanet.org/jindind/diversity/states/south_carolina.xls).
8. American Bar Association, [www.abanet.org/jindind/diversity/states/texas.xls](http://www.abanet.org/jindind/diversity/states/texas.xls).
9. Death Penalty Information Center, "Facts about the Death Penalty," [www.deathpenaltyinfo.org/FactsSheet.pdf](http://www.deathpenaltyinfo.org/FactsSheet.pdf).
10. "Drive through some of the black neighborhoods in cities and towns across America and you will see an emerging catastrophe—levels of [African American] male joblessness that mock the very idea of stable viable communities. This slow death of the hopes, pride, and

well-being of huge numbers of African Americans is going unnoticed by most other Americans and by political leaders of both parties." Bob Herbert, "An Emerging Catastrophe," *The New York Times* July 19, 2004, A17.

11. Justice Policy Institute, "Cellblocks or Classrooms?: The Funding of Higher Education and Corrections and Its Impact on African American Men" (2002), [www.justicepolicy.org/images/upload/02-09\\_REP\\_CellblocksClassrooms\\_BB-AC.pdf](http://www.justicepolicy.org/images/upload/02-09_REP_CellblocksClassrooms_BB-AC.pdf).
12. James Yveini, "U.S. Has Most Prisoners in the World Due to Tough Laws," Reuters (December 9, 2006), [www.reuters.com/article/topNews/idUSN0944913420061209](http://www.reuters.com/article/topNews/idUSN0944913420061209).
13. Amnesty International, "United States of America: Death by Discrimination—The Continuing Role of Race in Capital Cases."
14. Equal Justice Initiative, <http://eji.org/eji/raceandpoverty/sentencingbias>.
15. "With respect to disenfranchisement, in Alabama and Florida one-third of all African American men, most of them ex-offenders, have lost their right to vote." S. David Mitchell, "Undermining Individual and Collective Citizenship: The Impact of Exclusion Laws on the African-American Community," *Fordham Urban Law Journal* 34 (2007): 833–66, at 860.
16. Death Penalty Information Center, "Facts about the Death Penalty," [www.deathpenaltyinfo.org/FactsSheet.pdf](http://www.deathpenaltyinfo.org/FactsSheet.pdf).
17. United States General Accounting Office, Death Penalty Sentencing, February 1990.
18. Richard C. Dieter, "The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides?" Death Penalty Information Center (June 1998), [www.deathpenaltyinfo.org/article.php?cid=45&did=539#National%20Patterns%20of%20Race%20Discrimination](http://www.deathpenaltyinfo.org/article.php?cid=45&did=539#National%20Patterns%20of%20Race%20Discrimination).
19. Equal Justice Initiative, "Racial Bias," <http://eji.org/eji/deathpenalty/racialbias>.
20. *Ibid.*
21. Death Penalty Information Center, [www.deathpenaltyinfo.org/article.php?cid=5&did=184](http://www.deathpenaltyinfo.org/article.php?cid=5&did=184).
22. "In 82% of the studies [reviewed], race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found more likely to be sentenced to death than those who murdered blacks." United States General Accounting Office, Death Penalty Sentencing, February 1990.
23. Jennifer L. Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns, and Sheri Lynn Johnson, "Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes," *Psychological Science* 17:5 (2006): 383–86.
24. *Ibid.*, 385.
25. *Powell v. Alabama*, 287 U.S. 45 (1932).
26. Alabama Code §15-12-21 (1975).
27. Deposition of Richard Bell, *Gryson v. State*, No. CV-86-193 (Circuit Court, Shelby County, AL, Oct. 10, 1991), 24–25.
28. United States Department of Justice, "Eric Rudolph Charged in Centennial Olympic Park Bombing," October 14, 1998, [www.usdoj.gov/opa/pr/1998/October/47cmm.htm](http://www.usdoj.gov/opa/pr/1998/October/47cmm.htm).
29. Martin Luther King Jr., "Letter from Birmingham Jail" in *The Essential Writings and Speeches of Martin Luther King, Jr.*, James M. Washington, ed. (San Francisco: Harper-Collins, 1991), 292.
30. Gilbert Hobbs Barnes, *The Key: Slavery Impulse, 1830–1844* (Harbinger, 1964).
31. Dr. Martin Luther King Jr., *Beyond Vietnam—A Time to Break Silence*, in *The Essential Writings and Speeches of Martin Luther King, Jr.*, James M. Washington, ed. (San Francisco:

- HarperCollins, 1991), 231-44; Thomas W. Ogletree, *The World Calling: The Church's Witness in Politics and Society* (Louisville, KY: Westminster John Knox Press, 2004), 97-121.
32. Episcopal Church, *Neighbors: Studies in Immigration from the Sandpoint of the Episcopal Church* (New York: Domestic and Foreign Ministry Society, 1919) 29-36, <http://pds.lib.harvard.edu/pds/view/3423343>.
33. Taylor Branch, *Parting the Waters: America in the King Years, 1954-63* (New York: Simon & Schuster, 1988), 422.
34. Taylor Branch, *Pillar of Fire: America in the King Years, 1963-65* (New York: Simon & Schuster, 1998), 270-71.
35. Branch, *Parting the Waters*, 187-88.
36. Branch, *Pillar of Fire*, 21-32.
37. *Ibid.*, 30.
38. Branch, *Parting the Waters*, 274.
39. *Ibid.*, 785.
40. David L. Chappell, *A Stone of Hope: Prophetic Religion and the Death of Jim Crow* (Chapel Hill: University of North Carolina Press, 2004), 5-7.
41. Branch, *Pillar of Fire*, 104-5; see also James F. Findlay Jr., *Chorish People in the Struggle: The National Council of Churches and the Black Freedom Movement, 1950-1970* (New York: Oxford University Press, 1993), 6.
42. Findlay, *Chorish People*, 79; see also, Branch, *Pillar of Fire*, 128-29.
43. Findlay, *Chorish People*, 79-80.
44. Avishai Margalit, "A Moral Witness to the 'Intricate Machine,'" *The New York Review of Books* 54, no. 19 (2007), 34.
45. See e.g., James Bell, "Correcting the System of Unequal Justice," in *The Covenant with Black America* (Chicago: The Smiley Group, Inc./Third World Press, 2006), 57-58.
46. Dr. Pat Robertson, Transcript, William & Mary Speech, "On the Role of Religion and the Death Penalty," April 2000, <http://www.deathpenaltyinfo.org/PRobertsonWMSpeech.pdf>.
47. U.S. Conference of Catholic Bishops, Statement on Capital Punishment, Washington, DC: USCCB, 1980, [www.usccb.org/sdwp/national/criminal/death/usccb80.shtml](http://www.usccb.org/sdwp/national/criminal/death/usccb80.shtml).
48. Helen Prejean, CSJ, *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States* (New York: Random House, 1993).
49. Stanley Hauerwas, *Performing the Parity* (London: SPCK Publishing, 2004).
50. Antonia Scalia, "God's Justice and Ours," adapted from remarks given at a conference sponsored by the Pew Forum on Religion and Public Life at the University of Chicago (2002), <http://www.prodeathpenalty.com/scalia.htm>.
51. *Ibid.*
52. *Ibid.*
53. *Ibid.*, emphasis in original.
54. Jean Porter, "Due Process and the Rule of Law: Moral/Theological Challenges," in *Catholic Theological Ethics in the World Church*, James F. Keenan, ed. (New York: Continuum, 2007), 147-51, at 149.
55. Anglo-American law has long reflected "the principle that justice cannot survive behind walls of silence." *Shepard v. Maxwell*, 384 U.S. 333, 349 (1966).
56. See *Prevezano v. Moore*, 744 So.2d 413, 422-42 (Fla. 1999) (Shaw, J., dissenting); describing executions of Tifeno ("smoke and foot-long flames spurring from his head"), Medina ("smoke and flames spurring from the head piece"), and Davis ("Trior to and during the electrocution, blood flowed freely from Davis' nose, ran over the mouth-strap, and spilled onto his chest, forming a pool the size of a dinner plate on his white shirt").
57. State of Alabama's Response to Petitioner Perkins's Motions Challenging Dr. Glen King's Psychological Evaluation, *Perkins v. State*, No. CC-92-478,60 (February 27, 2006), 14-15.