

FOREWORD

The Death Penalty: A National Question

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This symposium assembles a number of important contributions concerning the penalty of death. The collection comes from authors all over the country; it appears in a law review of national circulation. Copies will ultimately be bound, and in that form will be in the permanent collection of every large law school library in the United States, and in many American law offices. All this seems only natural.

But does not the national character of this collection, in origin and destination, at least bring to mind the question whether, in dealing with the penalty of death, we ought not in all ways *practically* to treat it as a national problem? We do not do that now. It is an unspoken popular premise that, though we talk about it and think about it as citizens of the United States, the authority to decide whether the penalty of death is to go on being inflicted resides in the states one by one.

This decentralization, this shattering of a most solemn national question into little pieces, is lamentable. No factor that bears on the rightness of the death penalty is peculiar to any one state or to any group of states. The question of its cruelty — if indeed that be a question — stands the same everywhere. The question whether the political authority should hold and exercise power over human life and death is a general question of political morality, the right answer to which can hardly be thought to change when one crosses a state line. No one, I believe, thinks that the capriciousness attending the administration of the penalty varies from state to state; no one thinks mistakes are possible in Georgia but not in New Hampshire; no one thinks the penalty is a “deterrent” in Texas but not in Illinois.

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On the other hand, it is the *nation as such* that so stresses, on the stage of the world, its devotion to "human rights," and thus assumes responsibility for the handling of great human-rights problems such as this one. It is the *nation* that must answer, to the peoples of virtually all the countries with which we consider ourselves aligned, how it can be that the American people insist on maintaining in force a practice which these nations, our friends, have given up, just as they have given up the practice of using prolonged physical torture as a punishment.¹

Our failure to nationalize this question has, I think, a natural effect adverse to the development of a feeling of national responsibility in the premises. Executions in Georgia and Florida are becoming less and less visible in Connecticut, doubtless because the situation in Georgia is perceived by the people of Connecticut as something for which they are not responsible. The people of Georgia may look on intervention by Connecticut people as intervention by "outsiders," with all the negative feelings generated by that perception. It seems to me at least doubtful whether, if some 1500 people were now penned up ready to be killed, directly under the authority of the United States of America, the American people would stand for it. Such a mass slaughter — say thirty people a week for a year, without figuring in the sizeable monthly addition to the death-row population — would be nationally visible, in its entirety. We would all be responsible for all this killing; it would be the doing of the whole American people as one. So large a run of cases would make completely clear the capricious arbitrariness of the process by which, out of many thousands of murders, just these were judged to deserve the death penalty. And national sponsorship of the kind of bloodbath that now threatens would, I believe, provoke on the international scene, especially among our friends, a reaction we could not afford.

The capital punishment question is in all ways a huge question, deeply affecting our own perception of the nature of our society, as well

¹ The death penalty for civil crime has been abolished de jure, or has long ago fallen into disuse, in the vast majority of the member countries of the Council of Europe. In 1983, a new protocol to the European Convention on Human Rights was opened for signature, providing for the total abolition of the death penalty except as to war-connected crimes. Thirteen countries signed immediately. COUNCIL OF EUROPE, ACTIVITIES OF THE COUNCIL OF EUROPE IN THE FIELD OF HUMAN RIGHTS 2 (Feb. 1985). Of those not immediately signing, all except Turkey, and, doubtfully, Cyprus, are already in de jure or de facto compliance. The important thing is that this is a *serious human-rights subject* to virtually all of Europe outside the Soviet sphere of influence. Those who try to paint opposition to the death penalty as a mere eccentricity ought to look about them, and note the company in which they find themselves, world-wide.

as the picture of our society held by the world. It ought to be, it needs to be, a question dealt with on a national basis.

For a time, it looked as though the Supreme Court was well on its way to nationalizing this question. In *Furman v. Georgia*,² indeed, the Court was thought by many to have done this, by holding that the capriciousness and arbitrariness of the choice-for-death process was constitutionally unacceptable, whether because there could be no “due process of law” where there was no intelligible and controlling law, or because the rarity and randomness of the infliction of the penalty of death made it “unusual,” while the capriciousness of its infliction made it psychologically “cruel” to the person about to be done to death, who knew that many others, perhaps playing ball in the prison exercise yard, had done about the same thing he had done.

But the Court chose instead to approve, in *Gregg v. Georgia*,³ a set of new death penalty laws, incorporating so-named “guidelines” for the exercise of juries’ death-sentencing discretion. The Court told us, in advance, that these “guidelines” would work to eliminate what Justice Stewart, in *Furman v. Georgia*,⁴ had called the “freakish and wanton” administration of the penalty of death.

The trouble was, and is, that not even the Supreme Court can by fiat bring it about that something will work. I never did see how anybody could read these new statutes, particularly against the background of the wholly unchanged criminal justice system, and think that they would work to reduce, much less to eliminate, the freakishness and wantonness of the life-or-death decision. Time, and much expert observation, have shown beyond any doubt that they do not work. The situation — cosmetically embellished, if you think solemnity in easily penetrable false pretense to be an embellishment — is just the same as the one the Court faced and found intolerable in *Furman*. The death-row population looks pretty much the same as the one that had piled up by the time of *Furman* — almost entirely male, poor (with outsized representation of racial minorities and of people who have killed whites), often dim-witted, guilty of killings on the whole not rationally distinguishable from those committed by many, many others who somehow got out of the death-choice line.⁵

² 408 U.S. 238 (1972).

³ 428 U.S. 153 (1976).

⁴ 408 U.S. at 310 (Stewart, J., concurring).

⁵ In addition to such extremely important statistical work as that of David Baldus and William Bowers, with their respective associates, I have found particular interest in Ursula Bentele’s lawyer-like and yet readable analysis of the 85 cases reviewed by

But the Court, far from owning to its huge and hugely consequential mistake in *Gregg*, has declared victory and gone home. This has been accomplished in an extraordinary manner — by actually abbreviating and short-circuiting, in death cases, full national judicial consideration of questions of national law, not only by the Supreme Court itself, but by the lower federal courts.⁶ I am ashamed, as a citizen of the United States of America and as a lawyer, to have to say that some of this has been accompanied by impatient remarks about the attempts of counsel — often overworked and unpaid or underpaid — to press for full consideration of their condemned clients' cases. When I read some of this sorry stuff, I am reminded of the account (in Boswell's *Johnson*, I believe) of the woman who sold eels on an eighteenth-century London street. She was observed frying live eels in a deep pan. When the eels struggled to get out of the hot grease, she struck at them with a stick, crying angrily, "Down, wantons! Down!" Eels, it was evidently her view, should understand and accept with stoical grace their role in the order of things, and not make a lot of trouble about it.

Substantive law, it has been said, is secreted in the interstices of procedure. In the interstices of drumhead procedure, short-cut procedure, kangaroo-court procedure, is secreted the absence of law. That is the direction in which the present Supreme Court has in late years seemed to be moving the national law on the death penalty, a penalty whose every infliction ought to evoke the most deliberate and prayerful consideration at the highest reaches of judgment. Failure in such things, however disgraceful, we may hope to be temporary; after all, the Supreme Court for a long time denationalized — in the very teeth of its own earlier interpretations of the fourteenth amendment — the law of racial justice, cynically blessing abominations so odious that young people today can hardly be brought to believe they ever took place. But for just now the prospect for judicial nationalization of death-penalty law is bleak.

the Georgia Supreme Court in 1981, in which a death sentence might have been and in some of the cases was imposed. Any lawyer who reads this article can see what is happening, perhaps with more of reality-tone than arises from statistical work, valuable as the latter is. Bentele's article goes on to an excellent data-supported analysis of the actual workings of prosecutorial discretion and clemency in the same state. Bentele, *The Death Penalty in Georgia: Still Arbitrary*, 62 WASH. U.L.Q. 573 (1985). There is no reason to think there is anything special about Georgia.

⁶ This process is most ably described and evaluated in a Note soon to appear in the *Yale Law Journal* by Julia E. Boaz, Yale Law School, 1986: *Summary Processes and the Rule of Law: Expediting Death Penalty Cases in the Federal Courts*. I am herein indebted to Ms. Boaz's analysis.

Congress? Of course Congress has power to nationalize the law of the death penalty, by its general abolition. Congress could do this by exercise of its power under section five of the fourteenth amendment, either finding (as who could fail to find?) that capital punishment in practice effects racial discrimination, and so comes under the rule of *South Carolina v. Katzenbach*,⁷ or (perhaps most satisfyingly) finding that death penalty systems, throughout the country generally, operate in so capricious and arbitrary a manner as to deprive people of life "without due process of *law*," because there is nothing in our "due process of death" that has the quality of "law." There are other possible constitutional bases. But we all know that, politically, we are not going to get anything like this out of the Congress of these days.⁸

So, the Supreme Court is busily about denationalizing the law ruling this solemn national problem, and no great motion can in the near future be expected of Congress. What is to be done by those of us who regard this denationalization as possibly the most deplorable of recent legal developments?

Well, there is one thing left. Look about you. Here we are, in a distinguished national law review, talking it all over, in large perspective and in the finer grain. That's all that's left us just now. But it is a very great deal. It will continue. We will thereby be doing all we can to inform the country, and above all the Bar, concerning the real operation of this death-choice system. We have to hope that in the end this will be effective — that growing numbers of those who now want to continue operating this cruel and irrational death-choice machine will begin to be ashamed of themselves, as racists first began to be ashamed of themselves in the 1960's. If that happens, things will move.

Let us get on with it.

⁷ 383 U.S. 301 (1966).

⁸ It is perhaps not altogether hopeless that Congress might be moved to take lesser but important steps. Congress might, for example (using its power to regulate appellate procedures in the federal courts), mandate procedures in appeals concerning death sentences in such manner as at least to allot to the United States Courts of Appeals enough deliberative time to do their judicial duty.