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Ohio Northern University Law Review

The Twenty-Third Annual Law Review Symposium The Ultimate Penalty: A Multifarious Look at Capital Punishment

Keynote Address

Still Unfair, Still Arbitrary—But Do We Care?

SAMUEL R. GROSS*

Welcome. It is a pleasure to see everybody at this bright and cheery hour of the morning. My assignment is to try to give an overview of the status of the death penalty in America at the beginning of the twenty-first century. I will try to put that in the context of how the death penalty was viewed thirty years ago, or more, and maybe that will tell us something about how the death penalty will be viewed thirty or forty years from now.

We will start at 1965, thirty-five years ago. In 1965, the death penalty was not much on people's minds. In 1965, if you believe the Gallup polls that were available, 45% of Americans favored the death penalty, and 33% opposed it. Seven executions took place that year. The following year, 1966, support was down to 42%, and 47% opposed the death penalty. This was the one point in American history when the national polls showed more people opposing the death penalty than favoring it. One execution took place in 1966.

Fast-forward to 1999, last year. Nowadays, public opinion polls are taken much more frequently, and most show that over 70% of Americans support the death penalty. In 1999, ninety-eight people were executed in this country. So far this year, 2000, twenty-five people have been executed, a rate of about two executions per week. The death penalty is once again not news. Although you do see it in the newspaper, the death penalty has almost become an ordinary background fact, but this is a very different death penalty than we

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had at the beginning of the process, in 1965. I want to talk about what happened in between, how we got from that prehistory of the “modern” death penalty to the futuristic death penalty that we have now in the year 2000.

Until the early 1960s, as far as American courts were concerned, the death penalty was just another punishment. Judges realized, of course, that it was a more extreme punishment than any other, but its use had not been challenged on any systematic grounds—and by the 1960s it was not widely used. As I mentioned, the national execution rate had gone down to only a few per year.

Around 1965, the death penalty was a common high school and junior high school debate topic. There were strong and interesting arguments to be made on both sides. There was a reasonably even division of opinion in the country, with a lot of people on both sides, and the topic did not evoke strong passions. It was not an issue on which political fortunes were made or lost, not an issue that people talked about a lot or berated other people about, and it was not an issue that excited a great deal of attention in the media. Most Americans probably did not care much about the death penalty in 1965.

In 1965, the legal status of the death penalty in the United States was essentially the same as the status of the death penalty in other Western democracies. In Canada and in most of Western Europe the death penalty was available as a punishment for murder, at least in theory; but it was rarely used. Public opinion, there as here, loosely supported the death penalty, but it did not excite much debate. I suspect that in 1965, most educated people in Europe, Canada and America, if asked, would have said: “Yes, I guess we have a death penalty, but it will probably go out of existence.” In the decades that followed, in Canada and in every country in Europe, the death penalty was in fact abolished, *de facto* or *de jure*. Here in America, of course, that did not happen. I will get back to that difference later.

The modern era in the American death penalty began in the early 1960s, when the NAACP Legal Defense and Education Fund (the “Legal Defense Fund”) took on the issue.¹ The Legal Defense Fund initially became concerned about the death penalty because of increasingly strong evidence that it was being used in a racially discriminatory manner in the South. This discrimination was clearest in those cases in which the death penalty was used for rape. By 1965, a major study of the use of the death penalty for rape offenders, by Professor Marvin Wolfgang and others, was just getting underway. This study—now a classic in the field—eventually proved what most people had suspected: that the death penalty for rape was essentially

1. See MICHAEL MELTZNER, *CRUEL AND UNUSUAL, THE SUPREME COURT AND CAPITAL PUNISHMENT* 3-19 (1974).

reserved for black men who were convicted of raping white women in southern states. The initial attacks on the death penalty focused on that issue.

By 1965, the Legal Defense Fund strategy had broadened to an attack on the death penalty as such. It evolved into a plan to force a moratorium on the use of the death penalty. It worked. The last execution in this period was in 1967; and there were none from 1968 until 1977. The idea was that this moratorium would force the Supreme Court to confront basic questions about the constitutionality of the death penalty. It was a successful strategy, at first. The Supreme Court was forced to confront the constitutionality of the death penalty.

The basic argument against the death penalty was that it violates the Cruel and Unusual Punishments Clause of the Eighth Amendment. I do not pretend that this is news to you. I just want to remind you of how odd an argument this was when the Legal Defense Fund started out with it in 1965, at a time when the death penalty had never seriously been challenged on constitutional grounds.

The death penalty is explicitly recognized in the Constitution. The Fifth Amendment, for example, provides that “[n]o person shall be held to answer for a *capital*, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of *life*, liberty, or property, without due process of law”² There is no doubt that in 1789, or for that matter in 1868, when the Fourteenth Amendment was ratified, the death penalty was widely used and universally understood to be a legally acceptable punishment. To say that the death penalty violates these provisions of the Constitution required saying that the Constitution now prohibits things that the drafters of the Bill of Rights and the Fourteenth Amendment clearly did not intend those amendments to prohibit. How did they make that argument?

In 1958, in a case called *Trop v. Dulles*, Chief Justice Warren wrote, “[t]he [Eighth] Amendment [prohibition of cruel and unusual punishments] must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”³ In other words, the content of this prohibition, and the nature of the punishments that are prohibited by it, must change with time. The assumption underlying this description is that society will increasingly prohibit punishments that were permitted in earlier, more barbaric times. This is a necessary interpretation of the Cruel and Unusual Punishments provision of the Eighth Amendment. There is no way around it, and no Supreme Court Justice since, including conservative originalists such as Justice Scalia, has challenged it. Why?

2. U.S. CONST. amend. V (emphasis added).

3. 356 U.S. 86, 101 (plurality opinion).

The reason is that in 1789, when the Eighth Amendment was enacted, many punishments were permitted that we would never consider tolerating today. Flogging and ear cropping were just two forms of mutilation and torture that were commonly available in 1789. Nobody would say that they are constitutional now. As a result, the Court has accepted the idea that the Eighth Amendment has to be reinterpreted periodically to fit with contemporary standards of decency and due process.

How does this standard apply to the death penalty? Specifically, if the definition of a cruel and unusual punishment is a punishment that contemporary society rejects, how can one argue that the *Supreme Court* should prohibit it? After all, this is a democracy. If contemporary American society rejects capital punishment, then contemporary society will prohibit it by legislative action. We elect our legislators and executive officers, and they decide what types of punishment are no longer permitted—just as legislatures prohibited flogging and ear cropping in the nineteenth century, without intervention from the Supreme Court.

Any argument that the death penalty violates the cruel and unusual punishments clause of the Eighth Amendment had to address the claim that this was an issue that should be left to the elected branches of government. The Legal Defense Fund dealt with this problem by focusing on the reality of the death penalty in America at that time. They argued that because the death penalty had become so uncommon, because it was such a marginal issue, because it affected so few people—and powerless, isolated people at that—it was the sort of issue on which legislatures could not be expected to effectively reflect contemporary values. There was no constituency that demanded that the government attend to this problem. An occasional person would be executed at the end of a long and convoluted legal process, for a crime that was no different than—or perhaps not as bad as—crimes for which many other people were not executed. Most voters might disapprove of this result if they knew about it, but they rarely noticed, so the issue could never command legislative attention. The death penalty was so unpredictable and uncommon that it never made it onto anybody's legislative agenda.

The Legal Defense Fund also argued that if the public understood how the process works, it would disapprove of the process as it in fact operated. But because the death penalty was so rare, it had simply dropped from public view.

This was a plausible argument when it was first advanced in the late 1960s and early 1970s. The Legal Defense Fund carried this argument to the Supreme Court decision in 1972, in the seminal case on which the

constitutional jurisprudence of the death penalty in America rests, *Furman v. Georgia*.⁴

Of the many issues that the Court had before it in *Furman*, the central one was this: Was the death penalty, as of that time, acceptable to late-twentieth century American society? The Court reached no decision on that issue in 1972. What the Court did instead—in an extremely confusing 5 to 4 decision—was hold that the death penalty, as it operated at that time, was unconstitutionally “arbitrary” because it singled out a few randomly selected individuals for execution from a much larger group who was spared that fate. Some of the Justices in the majority were also troubled by the apparent discrimination in the use of the death penalty against blacks and other minorities, and against poor people. As a result, all death penalty statutes in effect in 1972 were declared unconstitutional, and all death penalty sentences were vacated. The net effect of *Furman* was that the Supreme Court cleared all death rows in America, continued the moratorium on executions that was then in effect, and created a lengthy hiatus in the use of the death penalty.

At that time, in the 1960s and early 1970s, moratoria on capital punishment were fairly common in Western countries. In other countries, however, they were imposed by legislatures or government ministers rather than by judges. Also—outside the United States—a moratorium was always a stepping stone to abolition. This happened in Great Britain where capital punishment was abolished in 1969, and it happened in Canada, where it was abolished in 1976. In several countries abolition came despite continued public support for the death penalty.⁵ In Great Britain, for example, support for the death penalty actually increased for an extended period after abolition, and then eventually decreased, some twenty years later. Today, a majority of Britons would probably still say that they would like to have the death penalty restored, although they do not expect it to happen. I also do not think that they much care.

The pattern in the United States has obviously been very different. After the *Furman* decision by the Supreme Court in 1972, support for the death penalty increased. It went from 53% in 1972, to 60% in 1976, when the Supreme Court revisited the issue. More important, by 1976 thirty-five states had enacted new statutes restoring the death penalty, with procedural modifications that were intended to reduce the “arbitrariness” that had led to the invalidation of all death penalty statutes in effect in 1972. These events severely undermined the claim that the death penalty was a barbaric relic that was left behind because it was too unimportant to make it onto the political

4. 408 U.S. 238 (1972).

5. See Samuel R. Gross, *The Romance of Revenge: Capital Punishment in America*, 13 *STUD. L. POL. AND SOC'Y* 71, 89–90 (1993).

agenda. Not surprisingly, when the constitutionality of the death penalty came back to the Supreme Court in *Gregg v. Georgia*,⁶ the Court said that capital punishment is acceptable to contemporary American society. The Court also held that the new modified death penalty statutes promised to address the “arbitrariness” that led to the invalidation of earlier capital sentencing schemes in *Furman*. In sum, the Court in *Gregg* gave its constitutional stamp of approval to several new death penalty laws, and ushered in the “modern” period in capital punishment in America.

According to the Supreme Court in *Gregg*, the strongest evidence that society endorsed capital punishment was the large number of state legislatures that had restored the penalty after *Furman*. Why did this happen? Why the resurgence of support for the death penalty after it was temporarily invalidated in 1972? Professors Frank Zimring and Gordon Hawkins⁷ have argued that this was a reaction to the Court’s decision—that in many states people felt aggrieved and angry because the Court had taken away their beloved death penalty. Thus, in response, even larger numbers came out to support it. There is much to this explanation, but there are other explanations as well.

First, crime in the United States was increasing dramatically. The Court, I think, did not quite appreciate the significance of this trend in 1972. From the mid 1960s to the late 1970s, the homicide rate in the United States more than doubled, and the violent crime rate nearly tripled. As everybody who lived through that period knows, the rising crime rates caused big changes in people’s lifestyles. They also generated a major public reaction against what was seen to be an increasingly dangerous situation. Increased support for the death penalty was part of that reaction.

Second, the criminal justice system in America has always been much more political than in other Western democracies. Initially, and still most importantly, it is political at the local level. As you all know, we have elected prosecutors and elected sheriffs in almost every county in the United States. We have elected police chiefs in many cities, and where they are not elected they are usually appointed by other elected local officials. We also have elected trial court and appellate court judges in almost all states—judges who apply the law while looking over their shoulders and worrying how their rulings will play out at the ballot box. This is a uniquely American phenomenon. Europeans think that an elected judiciary is not merely weird, but barbaric.

Because all of these criminal justice officials must get elected to office, and because many of them—conspicuously prosecutors—use their experience

6. 428 U.S. 153 (1976).

7. FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA (1986).

in the criminal justice system to run for higher office, criminal justice has always been an electoral issue at the local and state levels in the United States. In the late 1960s, crime became an electoral issue at the national level as well. Eventually, in the late 1980s, the death penalty became a central part of the national politics of crime.

Let me give you a couple of examples: In 1984, Walter Mondale was defeated by President Ronald Reagan. Does anyone here know what Walter Mondale's position on the death penalty was? It did not surface in the campaign. In fact, he was opposed to it. Mondale is from Minnesota, which has not had the death penalty since 1911, but I doubt if one voter in a hundred knew this in 1984. Jimmy Carter was not opposed to capital punishment—after all, he was the governor of Georgia—but he was only in favor of it for a narrow, restricted set of cases. That never surfaced either when he ran for president, in 1976 and 1980. On the other hand, in 1988, when Michael Dukakis ran for president against George Bush, the fact that he opposed the death penalty was a central element of the campaign against him, and was very destructive. Of course, in 1992, when Bill Clinton ran for president against George Bush, he made a point of interrupting his campaign to go back to Arkansas to preside over the execution of a brain-damaged prisoner. It worked; he was elected. In the process, a new political fact was cemented in place: any major-party candidate for president of the United States for the foreseeable future must swear allegiance to the death penalty.

The same change has occurred at the state level. Jerry Brown, who is now the mayor of Oakland, was elected Governor of California in 1974, and in 1978. He was always opposed to the death penalty, and this was a well-known public position. Nonetheless, he was re-elected in 1978 on the same ballot in which Californians voted overwhelmingly for a pro-death penalty initiative. The issue had little impact on his campaign. That could never happen now. Nowadays, candidates for governor of California compete to show that they are more in favor of the death penalty than their opponents.

For the moment, political debate about the death penalty in America is over. Everybody is on one side. There are still opponents of the death penalty in public office, but they avoid the issue. The governor of my own state, Michigan—John Engler—is opposed to the death penalty. But he never talks about it in public because it might hurt him politically. Fortunately, there is no death penalty in Michigan, and—so far—it has not become a major political issue.

What about the issue that the Supreme Court did deal with in *Furman* in 1972, the question of how the death penalty was administered? The Court decided in *Furman* that as the penalty was imposed at that time, it was so arbitrary and potentially discriminatory that it was unconstitutional. When the Court got the issue back in *Gregg* in 1976, it upheld several new death penalty statutes that attempted to provide guidance to juries in deciding whether or not

to send defendants to their death. The Court held that these new death penalty laws had the potential to cure the arbitrariness in the use of the death penalty that led to the decision in *Furman*.

For the first several years after the *Gregg* decision in 1976, the Supreme Court, in my opinion, tried contentiously to apply its decisions in *Gregg* and in *Furman*, and make the death penalty operate in a predictable, even-handed, non-discriminatory way. It tried to come up with a system in which the death penalty could be imposed without randomly choosing some people for execution over others, or discriminating on the basis of race or some other impermissible basis. It didn't work. Because of the new procedural requirements, the increased attention to death penalty cases, and the more careful review of death penalty cases by all courts (and federal courts in particular)—there were almost no executions. In 1976, there were none; in 1977, there was one; in 1978, none; in 1979, two; in 1980, none; in 1981, one; and in 1982, two. Over a period of seven years, we had fewer than one execution per year in the entire country. And yet, the death penalty occupied a very large portion of the Supreme Court's time and generated dozens if not hundreds of cases in the federal courts.

This all changed in 1983, when the Supreme Court started a process of dismantling the procedural protections that were supposed to make the death penalty operate in a non-discriminatory, non-arbitrary manner. I will not take time to go over the details because it is a complicated story, and has been often told.⁸ Suffice it to say that in a series of decisions the Court held that most of the procedural requirements that it seemed to impose on capital punishment in 1972 and 1976 were not in fact required. In addition, the Court started to speed up the review of death penalty cases, in particular by cutting back on their review in federal courts by way of federal habeas corpus. The total process of dismantling took years, and eventually Congress got in on the act. But the change in 1983 was immediate. In 1983 itself—half of which followed the end of the Supreme Court term—there were five executions. In 1984, there were twenty-one. The process sped up again in the early 1990s, and has continued to accelerate through last year, when we had nearly 100 executions last year.

The low point in the dismantling of the constitutional protections that govern capital punishment came in 1987, in the case of *McKleskey v. Kemp*.⁹ Until then, the challenges to the death penalty were all in the following form: The *procedure* that was used by the State of Texas (or Ohio, or Illinois) to sentence this defendant to death was unconstitutional because it did not live up to the requirements of *Furman* and *Gregg*. These were attacks on

8. See, e.g., Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305.

9. 482 U.S. 920 (1987).

procedures as such. Starting in 1983, the Court kept saying, in effect: "That's not what we meant. You're reading too much into *Furman* and *Gregg*. Those procedures we mentioned are not really necessary. It is not as difficult to meet the constitutional requirements as you supposed."

In *McKleskey*, the challenge was different; it was a challenge to the *outcomes* of the system of capital sentencing. The Supreme Court was presented with compelling evidence that into the 1980s the death penalty in the State of Georgia operated in a manner that discriminated on the basis of race. The strongest finding was that defendants convicted for killing white victims were far more likely to be sentenced to death than defendants convicted of killing black victims. The Court said: Let's assume that this is all true; even so, it's not unconstitutional. That type of racial disparity in the application of the death penalty is just something we have to put up with.

Many people consider *McCleskey* one of the most disturbing cases in the history of the Supreme Court. And it is profoundly disturbing that twenty-four years after *Brown v. Board of Education*,¹⁰ the Supreme Court could say that unequal application of the death penalty based on race is tolerable. And yet, this is probably a position that most Americans would agree with. Public opinion polls show that most people in this country believe that the death penalty is used in a manner that discriminates on the basis of race and wealth, and that they support it nonetheless.

So where are we now? Skipping many, many details, it looks like the death penalty is once again in a stable state. Once again it is not subject to serious challenge, and once again it is not exactly news. But it is also certainly not the same as it was thirty-five years ago.

From a legal standpoint, the death penalty is now on the Supreme Court's agenda, apparently permanently. The Justices deal with a fairly steady diet of death penalty cases. That has consequences down the line, as the lower federal courts and the state courts are required to consider death penalty cases with greater care than anybody would have imagined in the early 1960s.

The death penalty is a much bigger industry than it was thirty-five years ago. There are more death penalty prosecutions, and there are far more executions than there were in the 1960s. Overall, legal defense in capital cases is much better, although it is extremely uneven. Many defendants fall through the cracks. There are terrible, notorious cases of defense attorneys who come to court drunk, sleep through capital trials, never talk to their clients before trial, or never call any witnesses. This happens on a regular basis, and it is shocking and shameful. On the other side, however, the high end of capital defense work, at trial and on appeal, is much higher than it was in the early 1960s. These cases generate a steady stream of very well-

10. 347 U.S. 483 (1954).

developed, well-presented, and well-argued challenges to the administration of the death penalty. The net result is that judicial review of capital cases is, on the whole, considerably more exacting now than it was in the early 1960s.

By contrast, executive review for clemency has almost entirely disappeared in capital cases in America. Before 1965, many people who were sentenced to death were not executed, not because their sentences were reversed by a court, but because they were commuted by governors. Now, most governors believe that granting commutations is politically risky, and they rarely do it.

But has the death penalty really become a fixed, stable institution in American life? That's how it looks, and yet in the last few years cracks have begun to appear.

First, I want to get back to Europe. As I mentioned, the death penalty has now been abolished everywhere in Europe. But the difference goes deeper than that. In this country, to the extent that there is any debate about the death penalty, it focuses on its application in one context or another: Does a particular defendant deserve the death penalty? Is it cost-effective punishment? Can we use it fairly? Is it subject to racial discrimination? Are innocent people condemned to die? These issues are discussed in Europe as well, but the basic point of view of most European judges and lawyers is much simpler. As they see it, the death penalty—like torture—is a violation of fundamental human rights. Just as it is the policy of the United States to oppose violations of human rights in other countries, it is the policy of several European countries, conspicuously Great Britain, to oppose the imposition of the death penalty as a violation of human rights. A central aspect of this policy is constant pressure to get the United States to abandon capital punishment. Since we are Americans, we think we know better. We are not much interested in world opinion, or in the views of even our closest allies. But that could change.

Second, since 1976, some eighty-five people who were sentenced to death have been released from death row because it has been proven that they were innocent—that they did not commit the murders for which they were condemned. This is a shocking number. In other countries, when something like this happens once—when a single individual who was convicted of murder is determined to be innocent and released—it causes an uproar. As often as not, a commission is appointed to investigate why this one person was erroneously convicted and sentenced to life imprisonment. Here, year after year, dozens of people who have been sentenced to death are released because of proven miscarriages of justice—and we shrug. Finally, however, in the last two years, the magnitude of this horror seems to be sinking in.

Third, in 1997, the American Bar Association (ABA) House of Delegates called for a moratorium on the use of the death penalty. The ABA did not call for the abolition of capital punishment but for its suspension. They did so for

several reasons: because of the continuing problem of ineffective capital defense counsel, which plagues many death penalty cases; because the Congress and Supreme Court have so limited access to the federal courts that they no longer serve the necessary function of ensuring the fairness of capital punishment; because of continuing racial discrimination in the use of the death penalty; because of the particular uses of the death penalty that are considered to be a separate human rights violation by almost every other country in the world—the execution of juveniles for crimes committed before the age of eighteen, and the execution of mentally ill defendants; because of the general need to insure fairness and due process in the procedures by which the death penalty is imposed; and because of the obvious need for additional safeguards to minimize risk of executing innocent defendants. The ABA is not exactly a radical organization. It is a striking fact that this centrist organization, representing a large cross section of the American bar, has taken such a position.

That same year, the Nebraska legislature voted for a moratorium on the death penalty. The governor vetoed the bill, but as a result there is a *de facto* moratorium on the death penalty in Nebraska while the issue is being studied. This year, the governor of Illinois imposed a moratorium on the use of the death penalty in that state because of the large number of innocent defendants who have been released from death row in Illinois—thirteen since the death penalty was restored in 1976, in a state in which twelve capital defendants have been executed.

Finally, there is some recent evidence that support for the death penalty may be decreasing. From the early 1980s through the late 1990s, it was always in the range of 70% to 75%. In the best recent poll from 1998, the General Social Survey by the National Opinion Research Center in Chicago, support was down to 68%. On several polls this year it comes in around 66%. This is still a high level support for the death penalty, but these polls could indicate that support has peaked and may have begun to drop off.

And what next? Obviously, I do not have an answer. On the one hand, capital punishment is now an established fact in American life. On the other hand, new problems and new opposition are emerging. Perhaps the death penalty will survive for decades—problems, opposition and all. Or perhaps support will begin to erode, and sometime in the near future the landscape will change again.