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The Reincarnation of the Death Penalty: Is It Possible?

Yale Kamisar
University of Michigan Law School, ykamisar@umich.edu

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Fifty years ago Clarence Darrow, probably the greatest criminal defense lawyer in American history and a leading opponent of capital punishment, observed:

> The question of capital punishment has been the subject of endless discussion and will probably never be settled so long as men believe in punishment. Some states have abolished and then reinstated it; some have enjoyed capital punishment for long periods of time and finally prohibited the use of it. The reasons why it cannot be settled are plain. There is first of all no agreement as to the objects of punishment. Next there is no way to determine the results of punishment. If the object is assumed, it is a matter of conjecture as to what will be most likely to bring the result. If it can be shown that any form of punishment would bring the immediate result, it would be impossible to show its indirect result although indirect results are as certain as direct ones. Even if all of this could be clearly proven, the world would be no nearer the solution. Questions of this sort, or perhaps of any sort, are not settled by reason; they are settled by prejudices and sentiments or by emotion. When they are settled they do not stay settled, for the emotions change as new stimuli are applied to the machine.

At the time Darrow made these observations – a few years after the first World War – four abolitionist states had just reinstituted capital punishment and the abolition movement had lost its momentum in other states. But the movement did achieve one lasting success – the almost complete elimination of *mandatory* capital punishments. The result of this humanitarian effort, however, was to make the imposition of the death penalty exceedingly rare, haphazard and capricious – and lead to the Supreme Court's June, 1972 decision in *Furman v. Georgia* where the five holdovers from the Warren Court [Brennan, Douglas, Marshall, Stewart, and White] ruled, over the bitter dissents of the four Nixon appointees [Burger, Blackman, Powell, and Rehnquist] that the current discretionary, random, arbitrary administration of the death penalty constitutes "cruel and unusual" punishment in violation of the Eighth and Fourteenth Amendments.

At the time he made it, Darrow's prediction that the question of capital punishment "will probably never be settled" appeared well-founded. That it would someday be settled by the Supreme Court of the United States seemed inconceivable. The high Court had already sanctioned death by shooting and by electrocution. Indeed, 25 years later, in the infamous *Resweber* case, where Louisiana had botched its first attempt to execute a prisoner, it allowed the state to strap the man in the electric chair a second time and throw the switch again. Thus sustaining what the dissenting Justices called the horror of "death by installments." And in the 1950s it twice legitimated the execution of men whose sanity was in doubt, leaving the question of sanity to the private

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judgement of a governor and a warden. Thus, even the Justices who voted to strike down the death penalty in June, 1972, conceded, as they had to, that the Court had long assumed that death was a constitutionally permissible punishment.

How, then, explain the June decision? Although each member of the majority wrote a separate opinion, the salient and pervasive factor was the sharp decline in the infliction of capital punishment. The decline began in the 1940s, but accelerated dramatically in the 1960s [several years *before* the appellate court policy of issuing stays in death cases began]. Executions had averaged 128 per year in the 1940s and 72 per year in the following decade, but dropped to 21 in 1963, 15 in 1964, a mere seven in 1965, and just one in 1966. Since 1965 there have been only ten executions – a figure smaller than the *monthly* average during the 1930-50 period – and in the last five years there have been no executions at all.

The reduction of the infliction of the death penalty to a trickle of cases aggravated and made more visible the arbitrariness of the process. Justice Brennan compared it to "a lottery system"; Justice Stewart to "being struck by lightning." And the Justice whose vote to strike down the death penalty last month most surprised Court watchers, Justice White, could perceive "no meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not."

As Professor Michael Meltsner of the Columbia Law School pointed out, Justice White, generally regarded as the most conservative Warren Court holdover, indicated that he had been "radicalized" by his reading of the records and general closeness to the problem. For, in a rare "personal touch," he based his conclusion that capital punishment has been arbitrarily inflicted "on 10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases in which death is the authorized penalty."

The sharp decline in and the present virtual nonexistence of the infliction of capital punishment also enabled the majority to make short shrift of the contention that death is a necessary punishment because it deters the commission of certain crimes more effectively than could any term of imprisonment. There was no need to appraise this argument in the abstract because, as Justice Brennan noted, "proponents of this argument necessarily admit that its validity depends upon the existence of a system in which the punishment of death is invariably and swiftly imposed," but under our current system "the risk of death is remote and improbable." Similarly, Justice White observed that deterrence is not served "where the death penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others."

The almost complete discontinuance of capital punishment in the past decade was also considered strong evidence that the punishment has been largely rejected by contemporary society. True, conceded Justice Brennan, many legislatures (some 40) authorize the

death penalty and opinion polls and referendum votes indicate that substantial segments of the public continue to support it, at least in the abstract, but "the objective indicator of society's view of an unusually severe punishment is what society does with it" and society's rejection of the punishment "could hardly be more complete without becoming absolute."

But the almost complete disuse of capital punishment probably influenced the Court to a much greater degree than is apparent even from reading the opinions. Members of the Court have repeatedly pointed out that a law may be ineffective, unenforceable, unwise, or even downright silly but still not in violation of the U.S. Constitution. The average man, however, rarely draws such distinctions. Because a decision "legitimating" capital punishment would be interpreted by many as "approving" it, the result would undoubtedly have been a stifling of the current movement for reform in nonjudicial forums and the lending of the Court's prestige to those forces favoring the continuation of the death penalty. In short, as former Justice Arthur Goldberg and Professor Alan Dershowitz of Harvard maintained in an influential article published on the eve of the capital punishment case, to give the imprimatur of legitimacy to the now broadly challenged death penalty "would defeat the very reason behind judicial restraint – encouragement of decision by the other branches of government."

Moreover, more was at stake than the fate of the three petitioners directly involved in the cases. Hanging in the balance were the lives of almost 600 condemned men and women who had been piling up in "death row" for years and years. I strongly share the view of Harvard criminologist Lloyd Ohlin that "the people administering the death penalty desperately wanted the Court to get them 'off the hook' and were transmitting clear signals to this effect"; a "legitimation" of the punishment after a slowdown and then "moratorium" on its use "might produce a 'bloodbath' of horrible proportions and brutalizing effect."

How, in the face of a massive bloodletting, could four members of the Court vote to uphold the death penalty? Recalling his days as a law clerk to Chief Justice Earl Warren in the late 1950s and the care and intensity with which he and his fellow clerks studied the "death cases" – the files "marked with a big pink sticker" – Professor Jesse Choper of the University of California (Berkeley) commented: "It is much easier to talk about 'judicial self-restraint' and 'deferrence to the legislative judgment,' as did the dissenters last month, when you *know* you *don't* have the votes to send 500 or 600 people to death."

Although all the constitutional and criminal law experts interviewed personally rejoiced at the Court's result, they gave it a mixed reception as a matter of constitutional pronouncement. Professor Christopher Stone of the University of Southern California Law Center noted that the decision would be perceived by the public not as a "legal" but a "moral judgment," one which citizens and legislators feel well qualified to make for themselves; and that unlike legislative malapportionment, for example, "there was no built-in lock against the public working out this problem for itself."

But Professor Meltsner, one of the lawyers for petitioners in the death cases, maintained that you "cannot expect political resistance to an evil which is not presented to the public as something which really occurs"; "the Justices were much closer to the problem than the average citizen and they were well aware that in reality there were no alternatives to judicial action. The Court, at least a majority, fully understood that it was literally 'a court of last resort.' "

Imprisonment, pointed out Professor Sanford Kadish of the University of California (Berkeley), "although obviously less awesome than the punishment of death, is nevertheless a devastating experience. Yet the decision who escapes with a fine or suspended sentence or probation or who goes to prison (and for how long) is probably made as 'wantonly' and as 'freakishly' [using Justice Stewart's words] as the imposition of the death penalty. Should we, therefore, move in the direction of mandatory prison terms?"

Professor Kadish also found it "ironic," if not "bizarre," that if the death penalty could still be constitutionally administered at all, it would have to be done "without the individualized discrimination which one would have thought to be the requirement of a sensitive, civilized society." Both Kadish and Columbia Law School's Richard Uviller thought it somewhat "grotesque" that if a *much higher percentage* of "eligible" criminals had been executed the death penalty might have withstood constitutional challenge.

All of the professors interviewed (as did even the dissenters in the death case) agreed with the general propositions advanced by the majority that the "cruel and unusual" punishment clause could not be confined to those punishments thought excessively cruel and barbarous at the time of the adoption of the Eighth Amendment, that the clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" and may acquire new meaning "as public opinion becomes enlightened by a humane justice."

But a number of the experts were troubled, as were the dissenters, by the suddenness of the majority's perception of great changes in public attitudes and standards of decency since decisions of only a few years ago; since for example, 1958, when Chief Justice Warren, speaking for four members of the Court, observed by way of dictum: "The death penalty has been employed throughout our history, and in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."

Most legislatures still authorize death as the punishment for certain crimes and new federal death penalty legislation dealing with assassination and aircraft piracy has been overwhelmingly adopted. Juries and judges continue to impose the death penalty and according to polls and referenda, large segments of the public continue to support it. How, in the face of all this, could members of the majority conclude that "this punishment has been almost totally rejected by contemporary society" (Justice Brennan), that "it is morally unacceptable" to the American people "at this time in their history" (Justice Marshall)?

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In this regard, one section of Justice Marshall's opinion caught heavy fire. He reasoned that if the average American *knew more about* capital punishment (for example that it is no more effective a deterrent than life imprisonment, that it is imposed discriminatorily against certain identifiable classes of people, that it may actually stimulate criminal activity, that it wreaks havoc with our entire criminal justice system) *then* that Americans would find it "shocking to his conscience and sense of justice."

Kadish's response was typical of the reaction of several professors: "This is the classic ploy of any philosopher-king; we know what's best for you; if you knew what we know you would agree with us. Justice Marshall's approach represents a kind of elitism in moral judgment not easily reconcilable with the egalitarian tendencies manifested in other decisions of the Court." But Kadish's colleague, Jesse Choper, disagreed: "The Justices have always been accused of being philosopher-kings, but that's what judicial appraisals of constitutionality are all about." He thought Justice Marshall had made a "valiant effort" to deal with the extraordinarily difficult question of public opinion – and, "what's more, I think he's right. Just imagine the widespread revulsion if the public had to witness executions!"

The late Herbert Packer of Stanford Law School sides with Choper: "The Supreme Court *is* an elitist institution. I hope it always will be." But I think there is much force in the retort of U.C.L.A. Law School's Gary Schwartz: "The Court is entitled to disregard public opinion when it interprets certain counter-majoritarian provisions of the Constitution such as the command of the First Amendment that 'Congress shall make no law respecting an establishment of religion . . . or abridging the freedom of speech,' but public standards of decency and morality are inherent in the 'cruel and unusual' punishment clause. The Court, therefore, cannot disregard public opinion in this instance – or 'reconstruct' it in the speculative fashion Justice Marshall did."

Despite the foregoing, the decision in the death penalty cases, frankly, came as quite a surprise to me and, so far as I can tell, to most students of the Court. A main reason was that only a year earlier, in *McGautha v. California*, the late Justice Harlan – speaking for a majority which *included* Justices Stewart and White – had emphatically rejected the contention that permitting a jury to impose or withhold the death penalty as it sees fit without any guidelines or standards violates due process. "In light of history, experience, and the present limitations of human knowledge," declared the *McGautha* Court, "we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution. The states are entitled to assume that [even without any governing standards] jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision. . . ."

If, as seems to be the case, the justices, especially Justices Stewart and White, were reluctant to enter into the long-standing and hotly contested capital punishment debate, yet equally hesitant to "legitimate" the punishment, the preferable way to proceed would seem to have been to continue to chip away at the procedural administration of the death penalty, that is to say, to have required in *McGautha* that the states develop and articulate criteria under which convicted capital felons should be chosen to live and die – not to launch a more frontal assault, as the Court did this June. A holding, last year in *McGautha*, that capital case juries must be instructed as to when the death penalty should be imposed would have spared the hundreds awaiting execution, yet afforded the state legislatures much greater leeway to rethink capital punishment than they were given by the June 1972, decision.

Moreover, if, after requiring that legislatures articulate standards for application of the death penalty, it had turned out that the arbitrary and haphazard, if not discriminatory, imposition of capital punishment still continued – as it probably would have – *then* the Court would have been in a better position to do what it did this June.

Why didn't Justices Stewart and White take the route offered by *McGautha* rather than the broader avenue presented in the more recent case? Perhaps because in June they were free of a powerful force which had operated on them the previous year – the restraining influence of that great "judge's judge" – Harlan. Perhaps because Justices Stewart and White did not themselves know until the "moment of decision" last June that they *would* vote to strike down the death penalty. They knew that *McGautha* was not the "last act," that a decision to affirm the convictions in that case would not "pull the switch" – the "cruel and unusual" punishment issue was waiting in the wings. But the curtain was about to fall. And perhaps, after struggling for years to avoid meeting the issue head-on, when they finally had to do so Justices Stewart and White simply could not bring themselves to uphold the punishment – even if they had to go off on grounds which seem quite inconsistent with their previous position in *McGautha*. As Professor Choper said of the Stewart-White switch, "this is a study for psychiatrists as well as for lawyers."

How much leeway do the legislatures now have? What, if anything, is left of the death penalty?

The pivotal opinions of Stewart and White plainly leave open the question whether any system of capital punishment, as opposed to the currently arbitrarily, capriciously administered one, may be reconciled with the Constitution. A third member of the majority, Justice Douglas, also explicitly leaves for another day the question whether a mandatory death penalty would survive challenge. And, despite reports to the contrary by the mass media and assertions to the contrary by dissenting members of the Court, I do not read the opinions of even the remaining two justices, Brennan and Marshall, as concluding that the Constitution bars capital punishment for all crimes and under all circumstances.

Justice Brennan does have some very unkind things to say about the death penalty (calling it, for example, "a

denial of the executed person's humanity" and "uniquely degrading to human dignity"), but in light of the fact that it is "a punishment of longstanding usage and acceptance in this country" he "hesitates" to strike it down on that ground alone, but instead enters into a long discussion of its "arbitrary" infliction. True, Brennan is unimpressed as a *general matter* with the argument that death is a more effective deterrent than life imprisonment, in large part because a person contemplating a murder or rape is confronted with but "the slightest possibility that he will be executed in the distant future." But what would he say, for example, about a narrow statutory provision like Rhode Island's, which makes murder by a life term prisoner punishable by a mandatory death sentence?

Finally, among the factors Justice Marshall considers "critical to an informed judgment on the morality of the death penalty" are "that convicted murderers are rarely executed"; "that no attempt is made in the sentencing process to ferret out likely recidivists for execution"; and that punishment "is imposed discriminatorily against certain indentifiable class of people."

In short, there is ample room in the opinions for sustaining narrowly defined crimes, carrying mandatory death penalties, certainly the slaying of a prison guard by a lifer, perhaps even the murder of a police officer, generally; or presidential assassination or air piracy. But the Court did not have to come to grips with mandatory death sentences. If and when it has to face up to that question, can it bring itself to "legitimate" a law which mandates the punishment of death without regard for possible mitigating circumstances or anything in the offender's background?

After all, the world wide movement against capital punishment is much more pronounced against mandatory death penalties than discretionary ones and, as the Court has pointed out on occasions, as far back as the 18th Century there was legislative "rebellion against the common law rule imposing a mandatory death sentence on all convicted murderers." Moreover, the constitutionality of mandatory death sentences may not reach the high Court for another four or five years and by that time there will not have been a single execution for a full decade – "an incredibly powerful force," points out Professor Meltsner, "operating on any Justice who is conscientious and uncertain."

On the other hand not only is there room within the four corners of the majority opinions for mandatory death sentences, perhaps even discretionary ones for special fact situations, but the four newest members of the Court dissented with such intensity that one cannot overlook the possibility that the case itself may be overruled in the near future. After all, why should the dissenters honor a shaky, cloudy, and bitterly protested new precedent when, as they are deeply convinced, the majority itself overruled or disregarded precedent to arrive at the result it desired?

In short the death penalty is badly battered, and almost dead – but not so dead that the next Nixon appointee cannot breathe some life back into it.

***Yale Kamisar** is a professor at the University of Michigan School of Law. This article is reprinted from that school's* Law Notes.