DEATH PENALTY IN AMERICA: YESTERDAY, TODAY, AND TOMORROW

Hugo Adam Bedau

Those of us who oppose the death penalty for any crime under any conditions, and especially oppose it under the conditions that prevail in the United States today, need to remind ourselves from time to time how we are faring in this struggle. It is easy to become discouraged over our apparent impotence in lifting this scourge from our civilization. So, in an effort to obtain a balanced assessment of where we are and of what may lie ahead, let us look back briefly over the path we have travelled during the past forty years.

In the late 1940s, only six states were completely without the death penalty. Today, abolition states number over a dozen.

Four decades ago, persons could be and were sentenced to death and executed not only for murder but for rape, or armed robbery, or burglary, or kidnapping. Indeed dozens of crimes were punishable by death. Today, the death penalty is virtually limited to the crime of first-degree murder.

Forty years ago, death was the mandatory punishment for many crimes in many jurisdictions. Today, the death penalty is nowhere a mandatory punishment for any crime, not even for murder by a lifeterm prisoner.

In the late 1940's, any prospective juror in a capital case who voiced hesitance or opposition to the death penalty would be summarily dismissed. Today, little has changed, except when a patient and ingenious defense counsel managed to get such a prospective juror to concede that, yes, under some hypothetical conditions he or she might favor execution after all.

Hugo Adam Bedau is Austin B. Fletcher Professor of Philosophy and Director, Center for the Study of Decision Making, Tufts University. An expert on capital punishment, he is the author of *Death is Different* and *The Courts, the Constitution and Capital Punishment*.

Forty years ago, the trial courts that did have sentencing discretion were free to exercise it uncontrolled by any pretence of fairness. Today, judges and jurors must at least profess to have well-grounded reasons for a death sentence rather than a prison sentence.

Then, persons were sentenced to death and executed without assurance of review by the highest state appellate court, much less of any review of constitutional issues by a federal court. Today, review of every death sentence by the relevant state courts is required by law and further review in the federal courts is a virtual certainty.

Four decades, the Supreme Court had expressed no views on the constitutionality of the death penalty. Today, the Court has upheld the principle that capital punishment is not *per se* a "cruel and unusual punishment" and does not *per se* violate the requirements of "due process of law" and "equal protection of the laws." However, the court has also rejected on constitutional grounds mandatory death sentences and death sentences for nonhomicidal crimes against the person, and it has overturned many death sentences and statutory capital provisions on other, less sweeping, grounds as well.

In the late 1940's, on any given day, there were about a hundred or so prisoners waiting under death sentence (no exact count was kept). Rarely did anyone stay on death row for more than six months or so. Today, there are about two thousand, many of whom have been under death sentence for years.

Forty years ago, it was not uncommon for a governor to commute a death sentence--if it was imposed under a mandatory death statute, or imposed on someone other than the "triggerman," or on a juvenile, or a woman. Today, and for the past decade, commutations of death sentences have virtually disappeared. Trial-court populism, we might say, rules on the death rows of American today.

Four decades ago, executions were carried out by hanging, the electric chair, and--still a relative novelty--the gas

chamber. Now, in the latest phase of the continuing effort to make executions "more humane," the preferred method has become lethal injection: relatively painless, clean, reliable, and quick--at least, when compared with the neck-breaking, high-voltage frying and asphyxiation of an earlier day.

Then, two or three executions were carried out each week in any of three dozen states stretching from Massachusetts to California. Now, about that many occur each month, and they have been confined to less than a dozen states, most of them in the South.

Four decades ago, the death penalty for rape was in effect reserved for black men who assaulted white women. Today, among those executed for murder since 1979, the race of victim is still decisive: In nearly 90% of the executions during the past decade, the offender's victim was white.

Then, it was anyone's guess whether the death penalty was a better deterrent than imprisonment. Now, after three decades of ever more sophisticated research, the evidence is clear: Either we can infer nothing from the data (perhaps because executions have become so rare relative to the volume of murder) or the two penalties are about equally (in)effective as deterrents.

Forty years ago, the nation's major political parties ignored the death penalty. Today, the national Republican Party has a standing platform plank favoring the death penalty and our current President and his two immediate Republican predecessors have repeatedly given support to capital punishment and criticized the Supreme Court's anti-death penalty decisions.

Four decades ago, the death penalty in all its variety and frequency was supported by the American public about two to one. Today, the public supports what is left of the death penalty about three to one--but takes little notice of the dozens executed, the hundreds under death sentence, and the thousands of convicted murderers never sentenced to death at all. As David Bruck has well noted, support for capital punishment in this country may now be a mile wide--but it is only an inch deep.

What should we make of this scorecard? As I evaluate it, I see us entering the last innings of the struggle, with the anti-death penalty forces well out in front. This is not to say that complete victory is at hand, or that we can hope (much less confidently predict, as some of us did in the early 1970s) that we would never see another execution in this century. On the contrary, as the death penalty decreases in importance as an instrument of crime control it becomes more important for its defenders as a symbol of law and order. (This has never been more evident than during the eight years of Ronald Reagan's presidency.) Oddly, the less there is of it the more difficult it seems to uproot it once and for all.

Cheering though the progress over the past four decades may be, we must not forget for one moment the enormous number of men and women (nearly two dozen) currently under death sentence. This vast population of the condemned--unprecedented in American or European history--casts a dark cloud over any sunny forecasts for the immediate future. Likewise, if we compare ourselves with Western Europe, where virtually every country has now abolished the death penalty (except under special conditions, as in wartime) and where Council of Europe legislation effectively outlaws the death penalty, our unrelenting death sentencing and especially our resumption of executions in the past decade looks startlingly uncivilized and atavistic. The closer we come to putting the death penalty behind us, once and for all, the more troubling is its lingering grip.

Yet local victories occur, too, and they should encourage us. In 1986, an initiative drive in Michigan to authorize the death penalty for murder--abolished since 1847!--was defeated. Governor Tony Anaya in New Mexico commuted all five of his state's death sentences. In 1987, the Kansas legislature rejected efforts to reintroduce the death penalty there. In Indiana, Maryland, Nebraska, and North Carolina, the scope of capital punishment laws were narrowed. The National Coalition Against the Death Penalty, organized in 1976 by Henry Schwarz-

schild of the American Civil Liberties Union, is far stronger and more representative than was its predecessor, the American League to Abolish Capital Punishment (founded in 1925 and disbanded in 1972).

Of all the themes in recent decades that stand out in the nation's struggle over the death penalty, three are interrelated and crucial: the involvement of the Supreme Court in deciding whether executions may proceed, the Court-imposed moratorium on executions that lasted for a decade (1967-77), and constitutional assault on the death penalty as an outgrowth of the civil rights movement of the 1960s. The story has been told in detail by Michael Meltsner in his superb account, *Cruel and Unusual: The Supreme Court and Capital Punishment* (1973). With the Court's ruling in April 1987 in *McCleskey v. Kemp*, however, all observers agree that a watershed was reached, so much so that the dominant legal (if not the popular) criticism of the death penalty may now have to undergo radical transformation.

The story really begins in 1968, when lower federal courts upheld an Arkansas statute that gave the jury sentencing discretion in the punishment of rape. Conclusive evidence by the standards of that day was put before the courts, showing that throughout the South, no male--white or black--had been sentenced to death for the rape of a black female, and that the vast majority of death sentences for rape went to blacks convicted of raping whites. The defendant in this case, Maxwell, was black and his victim white. His counsel on appeal was the NAACP Legal Defense and Educational Fund of New York.

The federal courts, District and Circuit, however, rejected the argument. Their ground was that Maxwell's attorneys failed to show that he, personally, had been a victim of racial discrimination. Mere statistical analysis tending to show that any death sentence for rape was a result of the racial status of the offender and victim simply did not suffice--or so the courts declared. (Two years later the Supreme Court side-stepped the

issue by overturning Maxwell's death sentence on other grounds.) As Meltsner explained in his book, this was a signal defeat for the Legal Defense Fund, which gambled that the federal courts could not ignore this kind of argument and the social science research on which it was based. Thus, this first effort to mount a flank attack on the death penalty, by stressing its racially discriminatory effects as actually administered, failed.

In the two decades since that time, the federal courts have struggled with the problems of persisting *de facto* racial discrimination. One of the achievements of the civil rights movement was the recognition by the courts that *de facto* segregation and discrimination in housing, employment, and education needed remedial action, and that the courts had a vital role in crafting the remedies. The death penalty, however, when attacked on essentially the same grounds, has managed to turn back one challenge after another. Thus, a decade after *Maxwell*, when the Supreme Court finally did hold the death penalty for rape unconstitutional (*Coker v. Georgia*), the majority opinion of the Court ostensibly ignored the telling evidence of the racist administration of the death penalty for rape. Instead, the Court argued that death was "disproportionate"--as no doubt it is--for the crime of rape and therefore on this ground alone was an unconstitutional "cruel and unusual punishment."

In the recent case of *McCleskey v. Kemp*, the death penalty for murder--the only capital crime that matters anymore--survived an even more impressive attack on its racist character. This time, the social science evidence was more extensive and had been subjected to far more sophisticated analysis than in *Maxwell*. Once again, LDF attorneys were able to show the powerful predictive character of race of victim in determining sentencing outcome in a capital case. Once again, however, the Court argued that there was no constitutionally objectionable bias in sentencing McCleskey to death, even though he was black and his victim

white, because McCleskey had failed to prove (indeed, he did not even try to prove) that he, personally, was the object of intentional racial discrimination.

The dissenters, led by Justice Brennan, exposed the jurisprudential failures in the Court's reasoning. It may be hoped that in due course these dissents will guide the Supreme Court in a better direction. That time, however, will not be soon. There is no likelihood that in another case a few years hence, further evidence of a similar sort could persuade the Rehnquist Court to reverse itself. With the ruling in *McCleskey*, the hopes of two decades have come to an end. Trying to abolish the death penalty by a flank attack on the unconstitutionality of its racist administration now seems no longer plausible. Instead, a new and different strategy of constitutional--or political--assault on executions will have to be created.

Of course, it may be that in the present climate of opinion no abolitionist strategy can make much headway. Since the 1972 ruling against the death penalty by the Court in *Furman v. Georgia*, which required states to redraft their death penalty statutes wholesale, public opinion in favor of the death penalty (at least for murder) has steadily grown to where it now stands at an all-time high. In the Deep South, where most executions have occurred before as well as since *Furman*, the margin of public support for the death penalty may be as high as 8 to 1. No one should be surprised that the current Court, strengthened in its conservative outlook by three appointees of President Reagan, does nothing drastic to dismantle capital punishment.

For most of us who oppose the death penalty, however, trying to get it abolished explicitly and primarily on racial grounds has not and never could be our central concern. To see why, it may be helpful to consider the force of another familiar and similar argument, to the effect that the death penalty ought to be abolished because of the risk it always creates that the

innocent will be irretrievably punished. No doubt that risk exists.[1] Its magnitude is not decisive for most of us, however, because we oppose the death penalty not just for the innocent but especially for the guilty. Even if the death penalty never fell on the innocent, we would still oppose it. Hence the fact that it does, occasionally, perpetrate the gravest injustice of all cannot be our prime reason for opposing it. The same is true where race is concerned: Even if the death penalty were administered with scrupulous fairness to black and white, male and female, young and old, we would still oppose it.

Seen in this light, our problem now is whether our judicial and political institutions can be made sensitive to the issue on such abstract grounds, or whether the only way to end the death penalty is this country is by linking it ever more firmly with arbitrary, racially discriminatory, and erroneous administration. It may well be that during the 1960s and 1970s, the best chance to rid the nation of capital punishment was by federal judicial ruling on constitutional grounds, and that the best way to secure such a ruling was by stressing the racial discrimination in its administration. We will never know, because no other kind of argument was really mounted against capital punishment. Even the attempt to establish that the death penalty was *per se* in violation of the constitutional prohibition against "cruel and unusual punishments," which failed in 1976 (*Gregg v. Georgia*), stressed the defects in its administration rather than its inherent deficiencies as seen from the moral point of view. Many of us still believe that the death penalty in this country is and has been for decades a "cruel and unusual punishment."[2] Why the Supreme Court should think so, too, however, has not been argued except in a manner that relied on the all-too-evident deficiencies in the fair administration of such punishments. Perhaps it is not too late for argument along different lines to succeed where previous arguments have (so far) failed. At least, philosophers if not lawyers and social activists may well wonder.

Be that as it may, future historians of our constitutional jurisprudence will look back on the ruling in *McCleskey* and judge it to be another of the Supreme Court's great failures--along with *Dred Scott, Plessey, Korematsu,* and *Hirabyashi*. It took the Civil War to establish the simple proposition that a black human being in this country was something more than another man's chattel. A civil rights movement was needed to extend neglected and misinterpreted constitutional guarantees across state lines and into institutions, private as well as public. Grudging and belated reassessment of the true situation in 1941 now convinces even the Department of Justice under Attorney-General Meese that the "relocation" of Japanese-Americans was not only unnecessary and shameful, but also unconstitutional.

In time, repudiation of the death penalty by responsible government officials, both on and off the courts, will also come throughout this country, as it has in Europe. Meanwhile, it falls to the rest of us who oppose it to expose this ancient practice for the failure and folly that it is.

ENDNOTES

1. See H. A. Bedau and Michael L. Radelet, "Miscarriages of Justice in Potentially Capital Cases." *Stanford Law Review*, 40 (November 1987), pp. 21-179.

2. For further discussion, see H. A. Bedau, *Death is Different: Studies in the Morality, Law, and Politics of Capital Punishment*. Boston, Northeastern University Press, 1987, especially pp. 92-128.