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The Death Penalty in America: Yesterday and Today*

Hugo Adam Bedau**

Where does our society now stand on the matter of abolishing capital punishment? To answer that question, I propose to contrast our current situation with the recent past, and to take as my baseline the late 1950s, when I first became concerned about the death penalty. To tally the relevant facts, let us start by identifying those developments that have tended to entrench the death penalty in our society.

Thirty years ago the American public was almost evenly divided over the death penalty, according to survey research of that day, with perhaps fifteen percent of the public undecided.¹ Today, public support for the death penalty has increased to about three or four to one, with barely ten percent undecided.² It may be, as some have remarked, that current national support for the death penalty is indeed a mile wide, but only an inch deep, and that given an effective alternative punishment, a majority of Americans would be willing to end executions.³ Yet popular support for the death penalty today is widespread and occasionally reaches strident proportions, as the circus atmosphere surrounding the execution of Ted Bundy in Florida in January 1989 illustrates.⁴ This apparently overwhelming public support for the death penalty is no doubt the greatest single obstacle at the present time to total nationwide abolition.

Three decades ago the nation's major political parties ignored

* This essay is a revised version of the keynote address delivered at the 1989 annual meeting of the National Coalition Against the Death Penalty, Nashville, Tennessee, November 10, 1989. Portions appear in an earlier paper, Bedau, *The Death Penalty in America: Yesterday, Today, and Tomorrow*, 45 *THE ILIFF REVIEW* 43 (Spring 1988), as well as in a forthcoming paper, Bedau, *Reflections on Psychiatry and the Death Penalty*, in *THE MOSAIC OF CONTEMPORARY PSYCHIATRY IN PERSPECTIVE* (eds. Kales, Pierce, & Greenblatt). I am grateful to Constance E. Putnam for her comments and suggestions on this version.

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1. Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 *STANFORD L. REV.* 1245 (1974).

2. Zeisel & Gallup, *Death Penalty Sentiment in the United States*, 5 *J. QUANTITATIVE CRIMINOLOGY* 285 (1989).

3. Bowers, *The Death Penalty's Shaky Support*, *N.Y. Times*, May 29, 1990, 21.

4. Paredes & Purdum, 'Bye-Bye Ted . . .' *Community Response in Florida to the Execution of Ted Bundy*, 6 *ANTHROPOLOGY TODAY* 9 (April 1990).

the death penalty; the issue played no visible role in electoral politics. Today, the national Republican Party has a standing platform plank favoring the death penalty, and four Republican presidents have used the "bully pulpit" of the White House to cultivate public support for executions.⁵ Two of them, Richard Nixon and Ronald Reagan, went even further. They openly criticized Supreme Court decisions that introduced some measure of justice into the law on capital punishment.⁶ During 1988, the world witnessed an unprecedented spectacle as our presidential election campaigns were polarized around this issue.⁷

Thirty years ago, any prospective juror in a capital case who voiced opposition to the death penalty was summarily dismissed "for cause" by the trial judge. Today, despite the *Witherspoon* ruling in 1968,⁸ little has changed. Every prosecutor in a capital case begins the trial knowing he or she has a death-scrupled jury, and knowing that such juries are more willing to convict on a given body of evidence than a jury chosen at random, a true jury of the defendant's (and the victim's) peers in the community.⁹

In the late 1950s, it was not uncommon for a governor to commute a death sentence, especially if it had been imposed under a mandatory death statute, or on someone other than the "trigger-man," or on a juvenile or a woman, or for other reasons of mercy.¹⁰ Today, commutation of the death sentence has virtually ceased.¹¹ The reasons for this change are not fully understood, but substantial public support for the death penalty and the unwillingness of governors to commit what they view as political suicide are no doubt the principal factors.¹² The result is a curious and unbalanced struggle: The populist trial court tries to wrestle the offender into the execution chamber; the elitist appellate court is on the lookout for the

5. See Lacayo, *The Politics of Life and Death*, TIME, April 2, 1990, at 18; Culver, *State Politics and the Death Penalty: From Furman to McCleskey*, 12 J. CRIME & JUSTICE 1 (1989); H. BEDAU, DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT 149-54 (1987).

6. *Id.*

7. Wicker, *The Garbage Man*, N.Y. Times, Oct. 21, 1988, at A35; Barnicle, *A Curse Upon This Year*, Boston Globe, Nov. 3, 1988, at 31.

8. *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

9. Taylor, *The Constitution, Capital Punishment, and 'Death Qualified' Juries*, N.Y. Times, May 11, 1986, at E22; Ellsworth, *Juries on Trial*, 19 PSYCHOLOGY TODAY 44 (July 1985).

10. Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136 (1964).

11. U.S. DEPT. JUSTICE, BUREAU OF CRIMINAL STATISTICS, CAPITAL PUNISHMENT 1989, 10 (1990), lists 43 commutations between 1977 and 1986 and none in 1987-89.

12. Bedau, *The Decline of Executive Clemency in Capital Cases*, 17 N.Y.U. REV. L. & SOC. CHANGE 255 (1991).

grosser fouls; and the chief executive stands passively to one side.

Three decades ago the racial impact of the death penalty was a troubling matter, but it was neither carefully studied nor widely lamented—hardly surprising in a day when the white threat to lynch blacks was still quite real and Jim Crow governed the relations between the races. For the past twenty years, we have known that the death penalty for rape was virtually reserved for black males found guilty of raping white females.¹³ We also know that among those executed for murder, the race of the victim is still decisive. In nearly ninety percent of the executions during the past decade, the offender's victim was white.¹⁴ In no instance has a white offender been executed for the murder of a nonwhite victim.¹⁵ In 1987, the Supreme Court acknowledged in *McCleskey*¹⁶ that the racial pattern of capital indictments, sentences, and executions cannot plausibly be explained except by assuming some form of bias against offenders whose victims are white.¹⁷ Even so, the Court could find no constitutional ground for overturning the death sentences that were the product of such systemic bias.

More than a decade ago in *Gregg*¹⁸ and related cases,¹⁹ the Supreme Court rejected the argument that the death penalty in principle is a "cruel and unusual punishment." The Court had earlier upheld the death penalty in *McGautha*²⁰ against the criticism that it was in violation of "equal protection of the laws." Not only has the Court held that the death penalty is not per se unconstitutional, the current Court has apparently brought to a halt all efforts to introduce procedural reforms in capital cases. Such reforms during the 1970s were the product of the belief shared by most members of the Burger Court that "death"—that is, the punishment of death—"is

13. Wolfgang & Reidel, *Race, Judicial Discretion, and the Death Penalty*, 407 THE ANNALS 119 (May 1973).

14. NAACP LEGAL DEFENSE AND EDUCATION FUND, DEATH ROW, U.S.A., at 5 (Jan. 21, 1991).

15. *Id.*, citing no executions of a white offender guilty of murdering a nonwhite victim. Throughout American history, there are only 30 recorded cases of a white executed for a capital crime against a black. Radelet, *Exceptions to the Rule? Execution of Whites for Crimes Against Blacks*, 17 SOUTHERN COALITION REPORT 5, 6 (Summer 1990). *But see White Dies for Killing Black, For the First Time in Decades*, N.Y. Times, Sept. 7, 1991, at 1:1.

16. *McCleskey v. Kemp*, 481 U.S. 279 (1986).

17. *Id.* at 287, 312 (Powell, J.), 321-22 (Brennan, J., dissenting), 345 (Blackmun, J., dissenting). For the evidence put before the Court on behalf of appellant, see D. BALDUS, G. WOODWORTH, & C. PULASKI, EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990).

18. *Gregg v. Georgia*, 428 U.S. 153 (1976).

19. *Proffitt v. Florida*, 428 U.S. 242 (1970); *Jurek v. Texas*, 428 U.S. 262 (1976).

20. *McGautha v. California*, 402 U.S. 183 (1971).

different,"²¹ and so of course more stringent procedures are required when someone is sentenced to death. Today, however the conservative majority of the Rehnquist Court would roll back these reforms.²² They have been under steady criticism by the Chief Justice himself,²³ who (to the best of my knowledge) has not voted to overturn any capital sentence or any capital statute since he joined the Supreme Court bench in 1972. Furthermore, in the 1988 term of the Court, the majority declared that there was no constitutional barrier to the execution of the mentally retarded²⁴ or of juveniles who committed a capital crime under the age of 18.²⁵ I trust that the time will come when the nation looks back on these decisions with the same dismay that it regards the *Dred Scott*²⁶ decision of 1857 and the *Korematsu* decision of 1944.²⁷

In earlier decades, legislatures would respond to public outcry over "the crime of the hour" by increasing the severity of the punishment from imprisonment to death. In the 1930s, this happened with the crime of kidnapping;²⁸ in the 1960s the crime was aircraft hijacking;²⁹ today, the crime is drug-related homicide. During the most recent presidential campaign, Congress passed by an overwhelming vote the Anti-Drug Abuse Act of 1988.³⁰ One of its provisions treats as a federal crime any homicide that occurs during drug-related activities.³¹ The provision also authorizes the trial court to sentence to

21. *Gregg*, 428 U.S. at 188 (Stewart, J.); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (O'Connor, J., concurring); but see *Woodson v. North Carolina*, 428 U.S. 280, 322 (1976) (Rehnquist, J., dissenting).

22. Kaplan, *Killing the Rights of the Condemned*, N.Y. Times, June 27, at A29, 1990; Greenhouse, *The Courts Cut Off Another Exit from Death Row*, N.Y. Times, Mar. 11, 1990, at E5; Editorial, *No Need for the Execution Express*, N.Y. Times, Oct. 3, 1989, at A22; Amsterdam, *In Favorem Mortis: The Supreme Court and Capital Punishment*, 14 HUM. RTS. 14 (Winter 1987).

23. Greenhouse, *Chief Justice is Off Cue as the Curtain is Lifted*, N.Y. Times, Mar. 16, 1990, at A22; Editorial, *Death Penalty Fumble*, Boston Globe, Oct. 10, 1989, at 10; Greenhouse, *Judges Challenge Rehnquist Action on Death Penalty*, N.Y. Times, Oct. 6, 1989, at 1.

24. *Penry v. Lynaugh*, 492 U.S. 302 (1989); for discussion, see Bruck, *Sentencing the Mentally Retarded to Death—an Eighth Amendment Analysis*, 41 ARK. L. REV. 725 (1988).

25. *Stanford v. Kentucky*, 492 U.S. 361 (1989); see generally, V. STREIB, *THE DEATH PENALTY FOR JUVENILES* (1987).

26. *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1956); Bedau, *Someday McCleskey Will be Death Penalty's Dred Scott*, Los Angeles Times, May 1, 1987, at II:5.

27. *Korematsu v. United States*, 323 U.S. 214 (1944).

28. See generally E. ALIX, *RANSOM KIDNAPPING IN THE UNITED STATES, 1874-1974* (1978).

29. 49 U.S.C. §§ 1472-73; 18 U.S.C. §§ 32-34. The Antihijacking Act of 1974 authorized a mandatory death penalty. See generally Evans, *Aircraft Hijacking: What is Being Done?* 67 AMER. J. INT. L. 641 (1973).

30. Anti-Drug Abuse Act of 1988, Title VII, § 7001; see excerpts in 44 CRIM. L. REP. 3001, 3016-19 (Nov. 2, 1988).

31. Anti-Drug Abuse Act of 1988, Title VII, § 7001.

death anyone so convicted.³² This law effectively introduces capital punishment into every jurisdiction in the nation, whether abolitionist under its own laws or not; the law in effect threatens for the first time to nationalize the death penalty.³³

Finally, on this side of the debate, we must look squarely at the worst development of all. In the last 1950s, on any given day, there were about 200 prisoners awaiting execution.³⁴ Rarely did anyone remain on death row for more than a year or two. Today, in two dozen American prisons there are well over two thousand condemned convicts, many of whom have been under a death sentence for a decade.³⁵ Apart from the Hitler and Stalin eras in Europe, this is the greatest concentration of prisoners on the altar of Moloch in the modern history of western civilization.

Now let us turn to the other side of the debate. The set of developments over the past three decades favoring abolition are many and diverse. Three decades ago, only six states were completely without the death penalty.³⁶ Delaware's decision to abolish executions in 1958 was the first in many years where a state legislature voted to end executions.³⁷ Today, abolition jurisdictions number a baker's dozen.³⁸

Thirty years ago persons could be and were sentenced to death and executed not only for murder but also for rape; indeed, ten percent of all executions were for that crime.³⁹ From time to time executions also occurred for armed robbery, burglary, and kidnapping.⁴⁰ The most famous execution of the 1950s—Julius and Ethel Rosenberg in New York,⁴¹ and of the 1960s—Caryl Chessman in

32. *Id.*

33. *U.S. to Seek Death Penalty in a Drug Slaying*, N.Y. Times, May 12, 1990, at 10, col. 1; Zimring, *Drug Death Penalty: A Federal Tantrum*, N.Y. Times, Sept. 16, 1988, at A35, col. 5.

34. See U.S. DEPT. JUSTICE, NATIONAL PRISONER STATISTICS, CAPITAL PUNISHMENT, annually, for the years 1951-60.

35. U.S. DEPT. JUSTICE, *supra* note 11, at 1, listing 2,250 persons under death sentence at the end of 1989. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, *supra* note 14, lists 2,412 persons on death row as of Jan. 21, 1991.

36. Savitz, *Capital Crimes as Defined in American Statutory Law*, 46 J. CRIM. L., CRIMINOLOGY & P.S. 355 (1955).

37. Bennett, *A Historic Move: Delaware Abolishes Capital Punishment*, 44 A.B.A. J. 1053 (1958).

38. U.S. DEPT. JUSTICE, *supra* note 11, at 1, citing twelve states and District of Columbia.

39. U.S. DEPT. JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 1982, 14 (1984), lists 3,865 persons executed since 1930, of whom 455 were men convicted of rape.

40. *Id.*

41. See, e.g., J. SHARLITT, *FATAL ERROR: THE MISCARRIAGE OF JUSTICE THAT SEALED THE ROSENBERG'S FATE* 196 (1989). The Rosenbergs were executed for the crime of conspiracy to spy for a foreign nation, under the Espionage Act of 1917, P.L. 24, 65th Congress.

California,⁴² were for nonhomicidal crimes. Dozens of different offenses were punishable by death;⁴³ my favorite was the death penalty in Georgia for kicking over a tombstone ("desecrating a grave," in the sober language of the statute).⁴⁴ Today, using the death penalty to punish crime has survived Supreme Court scrutiny only when the crime is some form of homicide.⁴⁵

In 1959, death was the mandatory punishment for at least one crime in many capital jurisdictions.⁴⁶ Today, the death penalty is not a mandatory punishment for any crime.⁴⁷

Thirty years ago, the trial courts that did have sentencing discretion in capital cases were free to exercise that discretion unfettered by any pretence of fairness. The law did not even attempt to curb arbitrariness or discrimination in the choice of sentence for a capital crime.⁴⁸ Today, judges and jurors must at least profess to have well-grounded reasons for a death sentence rather than a prison sentence, based on evidence presented during the post-conviction, pre-sentencing phase of the trial.⁴⁹ Furthermore, the trial jury is entitled to hear anything of a mitigating nature that might serve as a reasonable ground for a prison sentence rather than a death sentence, and defense counsel is free to present a complete personality profile on the defendant to the sentencing court.⁵⁰

Three decades ago persons were sentenced to death and executed without assurance of review by the highest state appellate court, much less review in the federal courts of constitutional issues. Today, review of every death sentence by the relevant state court is required by law in most jurisdictions and further review in the federal courts is a virtual certainty.⁵¹ These reviews are significant if one judges by their effects. More than half of all death sentences in

42. M. MACHLIN & W. WOODFIELD, *NINTH LIFE* 160 (1961). Chessman was executed for violation of California's "Little Lindbergh" kidnapping statute.

43. See generally Savitz, *supra* note 36.

44. CODE OF GA. ANN. § 26-8117 (repealed 1963).

45. U.S. DEPT. JUSTICE, *supra* note 11, at 4, citing current capital statutes by jurisdiction.

46. Savitz, *supra* note 36, at 360, 363.

47. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Sumner v. Shuman*, 483 U.S. 66 (1987).

48. *Furman v. Georgia*, 408 U.S. 238 (1972).

49. See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1970); *Jurek v. Texas*, 428 U.S. 262 (1976).

50. *Lockett v. Ohio*, 438 U.S. 586 (1978).

51. U.S. DEPT. JUSTICE, *supra* note 11, at 5, noting that 34 of the 36 States with capital punishment statutes in 1989 provide for an automatic review of all death sentences; Goodpaster, *Judicial Review of Death Sentences*, 74 J. CRIM. L. & CRIMINOLOGY 786, 791-94 (1983), noting that mandatory state appellate review has not yet been declared mandatory under the federal constitution.

recent years meted out by trial courts have been reversed on appeal in state or federal courts.⁵²

In the late 1950s, the Supreme Court had expressed no views on the constitutionality of the death penalty.⁵³ Since that time, the Court has rejected on constitutional grounds mandatory death sentences⁵⁴ and death sentences for nonhomicidal crimes such as rape⁵⁵ and kidnapping.⁵⁶

Three decades ago, two or three executions were carried out each week in any of three dozen states across the nation.⁵⁷ During the 1980s, very few executions occurred each *month*, and they were confined to a dozen jurisdictions.⁵⁸ The only places where death sentence prisoners have been regularly executed are in the deep South.⁵⁹

In 1959, executions were carried out by hanging, shooting, electrocuting, or asphyxiating the prisoner.⁶⁰ These methods are still in use, but in the latest phase of the continuing search for the ideal form of execution, legislatures increasingly favor death by lethal injection.⁶¹ This procedure is relatively painless, clean, reliable, and quick,⁶² at least when compared with neck-breaking, high-voltage frying, choking by gas, or the trauma of multiple bullet wounds. Lethal injection illustrates Schwarzschild's Paradox, named after Henry Schwarzschild,⁶³ who first formulated it: Some methods of carrying out the death penalty are worse than others, but none is better than any.

In the late 1950s, social scientists, lawyers, and humanists in

52. Greenhouse, *Judicial Panel Urges Limit on Appeals by Death Row Inmates*, N.Y. Times, Sept. 22, 1989, at B20, col. 3. Many of these reversals are owing to incompetence of defense counsel; see Coyle, Strasser, & Lavelle, *Fatal Defense: Trial and Error in the Nation's Death Belt*, Nat'l L.J., June 11, 1990, at 30.

53. Cf. *Rudolph v. Alabama*, 375 U.S. 889 (1963), cert. denied (Goldberg, Douglas, Brennan, JJ., dissenting); Bedau, *The Courts, the Constitution, and Capital Punishment*, 1968 UTAH L. REV. 201 (1968).

54. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

55. *Coker v. Georgia*, 433 U.S. 584 (1977).

56. *Eberheart v. Georgia*, 433 U.S. 917 (1977) (per curiam decision).

57. U.S. DEPT. OF JUSTICE, *supra* note 34.

58. *Id.* at 10, reporting 56 executions from 1980 through 1989, and at 9, reporting 13 jurisdictions carrying out executions since 1977.

59. *Id.*

60. U.S. DEPT. OF JUSTICE, NATIONAL PRISONERS STATISTICS, EXECUTIONS 1959, Table 3 (1960).

61. Christian, *Execution by Lethal Injection*, 15 CRIM. L. BULL. 69 (1979).

62. See Los Angeles Times, Dec. 14, 1988, at I:27, col. 3.

63. In July 1976, Henry Schwarzschild was appointed the director of the Capital Punishment Project of the American Civil Liberties Union, and organized the National Coalition Against the Death Penalty. See *Sentencing in Capital Cases, Hearing before the Subcommittee on Criminal Justice, Committee on the Judiciary*, H.R., 95th Congress, 2nd session, at 23 (1978) (testimony of Henry Schwarzschild).

this country rarely studied the death penalty, and even more rarely published the results of their investigations and reflections.⁶⁴ Ignorance about the actual status, effects, and functions of the death penalty in the United States was widespread. Today, two or three articles on one or another aspect of the death penalty appear in professional journals every month, and a book or two on the subject is published every year.⁶⁵ With a whole library of current materials to consult, there is no excuse for anyone not to be fully informed about our lawful lethal practices.

Three decades ago, pioneering research had just been published that cast doubt on the special deterrent effect of the death penalty.⁶⁶ Now, after a decade of increasingly sophisticated inquiry, the results are reasonably clear. Either we can infer nothing from the data on the question because the statistical methods are too crude given the infrequency of executions and the importance of unquantifiable variables,⁶⁷ or we can conclude that the two penalties—death vs. long-term imprisonment—are about equally (in)effective as deterrents.⁶⁸

Finally, in 1959, only one frail voice was raised against the death penalty nationwide; it issued from the American League to Abolish Capital Punishment, founded in the 1920s.⁶⁹ But by the mid-1960s, the American Civil Liberties Union⁷⁰ and the NAACP Legal Defense and Educational Fund⁷¹ had joined the cause. In the 1970s, Amnesty International focused the efforts of its worldwide or-

64. *But see* MURDER AND THE DEATH PENALTY, 284 THE ANNALS 1 (Nov. 1952) (ed. Sellin), containing 19 articles devoted to research on the death penalty.

65. M. RADELET & M. VANDIVER, CAPITAL PUNISHMENT IN AMERICA: AN ANNOTATED BIBLIOGRAPHY (1988).

66. T. SELLIN, THE DEATH PENALTY 19-63 (1959); *see also supra* note 67.

67. A. BLUMSTEIN, J. COHEN, & D. NAGIN, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 8-9, 336-60 (1978); Fox & Radelet, *Persistent Flaws in Econometric Studies of the Deterrent Effect of the Death Penalty*, 23 LOY. L.A. L. REV. 29 (1989).

68. Peterson & Bailey, *Murder and Capital Punishment in the United States*, in CRIMINAL LAW IN ACTION 435 (ed. Chambliss) (2nd ed., 1984); Lempert, *The Effect of Executions on Homicides: A New Look in an Old Light*, 29 CRIME & DELINQ. 88 (1983). Some even argue that the evidence supports the hypothesis that executions provoke more homicides than they deter. *See* Bowers, *The Effects of Executions is Brutalization, Not Deterrence*, in CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES 49 (eds. Haas & Inciardi, 1988).

69. LEAGUE FOR THE ABOLITION OF CAPITAL PUNISHMENT, 43 MEDICO-LEGAL J. 66 (1926); D. MACKEY, VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT, 1787-1975, xxxviii (1976).

70. M. MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 55 (1973).

71. *Id.* at 54, 73, 106. However, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND ANNUAL REPORT 1989-1990, 16 (1991), reports that "For more than three decades, LDF has been engaged in a protracted struggle to abolish the death penalty"

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ganization to attack the problem.⁷² Today, the National Coalition Against the Death Penalty supports a fully staffed office in Washington, D.C., national and regional conferences, and the participation of more than sixty multi-issue organizations concerned with civil liberties, human rights, and legal aid.⁷³

It is apparent that awareness of and opposition to the death penalty is growing. But rather than dwelling on that point, I want to offer a few cautionary observations suggested by the foregoing survey.

First, it admittedly appears that the reforms enacted during the past two decades have brought greater fairness into a death sentence system hitherto shot through with arbitrary and discriminatory use of authority. To that extent, however, these reforms rationalize every death sentence and every execution; they have made what remains of capital punishment in the United States more, not less, acceptable. This is but the latest irony in the whole history of the struggle against the death penalty in this nation, a history that began two centuries ago in Pennsylvania when the reach of the death penalty was first limited by the distinction between first- and second-degree murder.⁷⁴

Second, defense of the death penalty publicly, jurisprudentially, and philosophically has become increasingly and openly grounded on retributive feelings and principles. By retribution I do not mean that potent combination of anger, fear, and frustration that in fact seems to characterize the prevailing national desire to "get tough with crime." This retaliatory syndrome should be kept distinct from retribution. Retaliation knows no limits imposed by respect for justice, whereas legitimate retributive punishment does acknowledge a constraint of that sort.⁷⁵

The chief consequences of resting the defense of the death penalty on retribution is that it makes criticism of executions on grounds of justice, or reason, or experience, increasingly difficult. In the days when many different crimes were punishable by death, the simple retributive maxim, "A Life for a Life," obviously was insufficient. Something more was needed to defend the death penalty for rape,

72. See AMNESTY INTERNATIONAL, *THE DEATH PENALTY: AMNESTY INTERNATIONAL REPORT* (1979).

73. A list of the member organizations of the National Coalition, as of July 1978 (two years after its founding) appears in *Sentencing in Capital Cases*, *supra* note 66, at 30-31 (testimony of Henry Schwarzschild).

74. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759 (1949).

75. B. NOZICK, *PHILOSOPHICAL EXPLANATIONS* 363-70 (1981).

armed robbery, espionage, and the like. So defense of executions rested primarily on claims of special deterrence and incapacitation; these purposes, not retribution, provided the necessary rationale. Today, however, deterrence and incapacitation seem less important than they used to be.⁷⁶ Instead, the laws and prevailing attitudes rest on the appeal to "just deserts," and as Mother Wit long ago taught us, the murderer deserves to die, period. As a result, argument over the death penalty has become correspondingly more complex and abstract.⁷⁷

Finally, the current system of capital punishment entrenches our national obsession with killing people. It teaches the lesson that some may kill others willfully, deliberately, and with premeditation as long as they are the right people doing it for the right reasons in the right manner. The fact that such killings are not necessary, that there is a well-established alternative method of punishment—long-term imprisonment—now used throughout Europe and in many American jurisdiction for over a century, does not matter. Defenders of the death penalty insist that the killings they favor are justified, desirable, legal, authorized—and therefore *are* "necessary." Besides, we are told, those who are condemned to die by the death penalty are less than human. Their conduct and their histories prove that they are not like us, and they have done unspeakable things for which there is no forgiveness or repentance; they deserve our righteous indignation. Any refusal on our part to put them to death is proof of our own failure of nerve. Thus do we extend the reign of Thanatos, the god of death.

Writing some years ago, Dr. Louis Gold, a psychiatrist, observed that in his experience, discussion of capital punishment inevitably provoked "a great deal of blind and highly personalized affect . . . , identification and projection, repressed hostility and aggression, rejection, passivity and guilty."⁷⁸ My remarks verge on illustrating Dr. Gold's observation. Even a philosopher cannot pretend to suppress indefinitely all affect on this subject.

I digress, and I must return to my main theme. This year in the United States, there will be 20,000 or more criminal homicides.⁷⁹ At

76. Dionne, *Capital Punishment Gains Favor as Public Seeks Retribution*, Washington Post, May 17, 1990, at A22; von Hirsch, *Recent Trends in American Criminal Sentencing Theory*, 42 MD. L. REV. 6 (1983).

77. Bedau, *How to Argue About the Death Penalty*, in *FACING THE DEATH PENALTY: ESSAYS ON A CRUEL AND UNUSUAL PUNISHMENT* 178 (ed. Radelet) (1989).

78. Gold, *A Psychiatric Review of Capital Punishment*, 6 J. FORENSIC SCIENCES 465 (1961).

79. U.S. DEPT. JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL

most, half of these crimes will result in a conviction of murder or manslaughter.⁸⁰ Of the 10,000 or so persons convicted, a small number, perhaps about 300, will be sentenced to death.⁸¹ Of these few, an unknown number will eventually be executed sometime during the decade. This year perhaps two or three a month will enter the execution chamber.⁸² With more than twenty thousand murders, there will be less than fifty executions.

These facts strongly suggest that we abolitionists have virtually won our struggle no matter what the courts decree or public opinion declares. Perhaps it is only a question of time before advocates of judicially authorized executions throw in the towel. I am sure these figures prove beyond question that it is no longer possible to defend the death penalty in our society either on retributive, utilitarian, or any other rationale.

Nevertheless, I suggest that the position of many abolitionists deviates from the typical and prevailing position of most Americans on several important questions of morality. This difference is crucially relevant to the likelihood of any early success of our efforts in the future. I do not suggest merely that the public opinion polls show how overwhelmingly abolitionists would be outvoted. Rather, I suggest two things.

First, abolitionists take an *absolute* position (categorically opposing all executions) at a time when our society is afloat on a sea of moral relativity in which there are few if any absolute prohibitions at all. Second, we fight against one kind of homicide—the kind done by the state as punishment—while tolerating many other forms of homicide. No wonder we appear deviant and even inconsistent to our opponents! Bear with me for a few moments as I explore these ideas.

The bulk of the American public agrees with us that hardly any criminals really deserve the death penalty. Thanks to the dispersal of judicial power among the prosecution, trial judges, and appellate courts, only 250 or so persons were sentenced to death annually in the 1980s out of a possible 10,000 or so convicted annually of criminal homicide. What most of our fellow Americans do not understand is why we oppose *all* executions, even of the worst offenders, and

JUSTICE STATISTICS—1989, 365 (1990).

80. *Id.* at 365, reporting an estimated 20,610 crimes of "murder and nonnegligent manslaughter" during 1986, and at 508, reporting an estimated 9,854 felony convictions in state courts for murder during 1986.

81. Estimate based on annual average of persons received under death sentence during 1980-1989. See U.S. DEPT. OF JUSTICE, *supra* note 11, at 10.

82. *Id.* See also Bedau, *The Death Penalty and the Risk of Execution Today*, LIFE-LINES, 2 (January-March 1991).

especially of recidivist murderers. We know, of course, that the 250 out of the 10,000 who are sentenced to death are the losers in a crude and arbitrary lottery, and that they go to their deaths not because they are the worst among the bad, and thus the most deserving, but for a variety of other reasons that make a mockery of the rule of law and equal justice for all.⁸³ Even so, if all arbitrariness was magically ended tomorrow, and only the 250 or whatever number of the very worst, most dangerous, least manageable or reformable murderers were sentenced to death, we would *still* oppose their execution. However much our opponents may respect us for our sincere convictions, they are bewildered by our moral absolutism.

And the truth is, most of us do not take a position of moral absolutism on all other questions of killing human beings. We do not universally oppose all abortions. We do not unequivocally condemn all killings in self-defense or in the aid of helpless third parties. We do not universally oppose all use of lethal force by the police. We do not absolutely condemn all mercy killings and all suicides. We do not denounce as immoral the conduct of a death sentence convict who refuses any further legal assistance to fight his death sentence and who, to that extent, "volunteers" to die.⁸⁴

We must each speak for ourselves, but as I contemplate my own answers to these questions and the profile of my attitude toward the value of human life, I confess that I cannot take any easy refuge behind such bulwarks as the sanctity of human life or the absolute right to life. These principles are simultaneously too rigid and too vague to do justice to my reflective convictions on matters of human life and death. And I suspect I am not the only one who opposes the death penalty in a setting of relative approval, toleration, or permission regarding some of these other kinds of human killings.

In admitting the above, I do not believe that I am guilty of any moral inconsistency. I do not think that logic requires anyone who is absolutely opposed to the death penalty to oppose as well all abortions, suicides, mercy killings, lethal force, and so on. In fact it is quite easy to defend hostility toward capital punishment and toleration toward other kinds of homicide in certain circumstances. All one must do is notice the distinctive things about the kind of killing that

83. Tabak & Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOY. L.A. L. REV. 59, 62 (1989); Berger, *Rolling the Dice to Decide Who Dies*, N.Y. STATE BAR J. 32 (Oct. 1988); Weisberg, *Deregulating Death*, 8 SUPREME COURT REV. 305 (1983); Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 27 (1980).

84. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853 (1987); Bedau, *The Right to Die by Firing Squad*, HASTINGS CENTER REPORT, 5 (Feb. 1977).

DEATH PENALTY IN AMERICA

capital punishment always involves:

1. When the state kills a prisoner, no one else's life, limb, or liberty is therewith preserved, saved, or restored nor is anyone's death or harm prevented.

2. When the state kills a prisoner, it kills a human being whose abilities, moral development, and capacities for autonomous conduct are not significantly different from those of all other prisoners and most other persons.

3. When the state kills a prisoner, an alternative was available—incarceration, isolation, temporary sedation—that would effectively reduce the risk of harm to others.

4. When the state kills a prisoner, it does not care what the prisoner desires or prefers or what the likely future life of that prisoner would have been if he had not been killed.

No homicide except capital punishment presents these four features. All other types of homicide lack one or more, and that is enough to make capital punishment homicide different from other homicides in morally relevant respects. But it is far from clear that these differences make it reasonable to oppose *all* cases of capital punishment and only some or most of the other types of homicide.

Why then do abolitionists oppose the death penalty in all cases? Is it in fact reasonable to do so? I cannot answer for anyone but myself, and I am not entirely sure even now, after more than thirty years, that I can do so adequately. But let me try.

First, I shrink from the whole idea of killing anyone, especially without the fully rational consent and knowledge of the one who is to die, and I oppose hiring or in any way supporting others to do a job I am morally unwilling to do myself. I do not believe that I could kill any prisoner (or, if I had done so, believe that I was fully justified) and I do not want to hire anyone else to do it for me.

Second, the reasons that public officials and the general public give for their support of any execution, or for capital punishment in general, seem to me to spread across a spectrum both ends of which are marked by ignorance, inconsistency, and insincerity.

Third, killing by the government of one of its own citizens as punishment symbolizes for me everything that is wrong about coercion, power, bureaucratic institutions, and lawful authority. The death penalty system has its chief effects not on crime but on the criminal justice system. There its effects are two. The death penalty

increases costs⁸⁵ by way of tax dollars, judicial time and effort, and human stress. The death penalty also decreases understanding of and accommodation to the facts of modern life.

Beyond these effects lies the symbolic significance of capital punishment, and this for me is a crucial consideration. This symbolic significance explains the role of capital punishment in the public forum and the grip it continues to have on our imagination. The three reasons mentioned above which explain my own opposition to the death penalty are evidence of the symbolic significance this form of punishment has for me.

Let me end by drawing attention to a wise comment of sixty years ago that has relevance to the death penalty, even though it was offered originally in a completely different context. As Sigmund Freud reached the conclusion of his sobering little book, *Civilization and Its Discontents*, he observed that "the question is how to dislodge the greatest obstacle to civilization, the constitutional tendency in men to aggressions against one another"⁸⁶ Who can disagree? But if we do agree with Freud, then surely our opposition to the death penalty must be seen as part of the progressive effort to civilize the aggressive tendencies in our society, thus vindicating our unremitting efforts to see the death penalty abolished once and for all. Capital punishment, as a foremost example of the dysfunctional use of violence and of the ritualization of the tendency toward aggression in one of its most seductive forms, the expression of righteous indignation, deserves our condemnation and all the resistance we can muster.

85. Spangenberg & Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations*, 23 LOY. L.A. L. REV. 45 (1989).

86. S. FREUD, CIVILIZATION AND ITS DISCONTENTS 101 (1900); cf. Reik, *Freud's View on Capital Punishment*, in T. REIK, THE COMPULSION TO CONFESS: ON THE PSYCHOANALYSIS OF CRIME AND PUNISHMENT 471-74 (1972).