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Introduction

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THE DEATH PENALTY IN NEW YORK: PAST, PRESENT . . . FUTURE?, EDWARD V. SPARER PUBLIC INTEREST LAW FORUM, BROOKLYN LAW SCHOOL, MARCH 9, 1995

INTRODUCTION

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In the fall of 1994, as Governor George Pataki's election made it highly probable that New York State would soon join the thirty-seven American states that authorize capital punishment, the students and faculty at Brooklyn Law School thought it worthwhile to examine this most controversial aspect of the criminal justice system. The editors of the *Journal of Law and Policy* joined with the Edward V. Sparer Public Interest Law Fellowship committee to plan a forum entitled *The Death Penalty in New York: Past, Present . . . Future?* The forum could not have been more timely: it was scheduled for March 9, 1995, which, as it turned out, was just two days after the new legislation was signed into law by Governor Pataki.

A few weeks before the Sparer forum, I had been sitting in the new courtroom built in the Braamfontein section of Johannesburg especially for the new Constitutional Court of South Africa. I was listening to the very first case being heard by that court,[1] a case

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[1] State v. Makwanyane and Mchunu, Case No. CCT/3/94, argued February 15-17, 1995 (available in Internet from the Uniform Resource Locator:

that challenged the death sentences imposed on two men under a South African statute very much like the laws in the thirty-eight American states, now including New York, that retain capital punishment. During the course of the two and one-half days of argument, the beleaguered attorney general seeking to uphold the statute got an unexpected boost from a faxed front page *New York Times* article announcing tentative agreement on a death penalty bill. It appeared that in order for South Africa to achieve the abolition that President Nelson Mandela and his new government wanted, it had to explain away the United States, and now the state of New York—presented as examples of how some democratic, civilized societies do still engage in the practice of killing their citizens. As a New Yorker, I felt ashamed and quite saddened. Indeed, a professor with whom I was acquainted, who argued as amicus for the defendants, pointed in my direction, saying: "It's your fault!" And in a way it was.

The articles that follow discuss the return of capital punishment to New York from various perspectives. First, for a generation of lawyers and academics who have not had to confront this issue, a look back at what New York did when it *was* executing its citizens seemed appropriate. As you will see from the piece by Michael Lumer and Nancy Tenney, New York was among the leaders in the practice of capital punishment, both in numbers of people it put to death and in the methods of execution. The article includes, in its Appendix, a chart listing all the 695 executions carried out under state authority in New York between 1890 and 1963. Available here for the first time, the article presents statistics on the race of the defendant and the race of the victim. Although conclusions must remain tentative at this early stage of research, the racial data in combination with the names of the defendants provide a fascinating and disturbing glimpse into the world of the different racial and ethnic groups targeted for the death penalty in New York's history. This information should prove a valuable resource for future research on the application of the death penalty in New York.

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http://pc72.law.wits.ac.za/judgements/deathsn.html).

Second, two speakers at the forum, whose remarks were transcribed and edited for publication here, discussed specific aspects of the implementation of capital punishment: the role of the medical profession and the problems facing defense attorneys. David Rothman's comments focus on the phenomenon of the medicalization of the death penalty in this country. In the United States, alone among countries that use capital punishment, we seem to feel the need to devise ever more "humane" ways of deliberately killing our fellow human beings. That was the main justification for use of the electric chair over hanging in the late nineteenth century. Now, in the late twentieth century, the overwhelmingly popular method of execution has become lethal injection, again because of its asserted "painlessness." One wonders if, without this seemingly almost benign means of killing, legislatures and courts would continue to be as eager to maintain capital punishment. The problem with this modern way of death, however, is that, to be done right, it requires doctors to participate in killing, doctors who swear to a Hippocratic Oath that promises "First, do no harm." Professor Rothman's contribution discusses the medical profession's role, and its resistance to that participation, in state-administered killings.

Russell Neufeld, who began working on capital cases while he was a student at Brooklyn Law School, looks at the capital prosecutions to be brought under the new statute from the perspective of an attorney with the Legal Aid Society whose responsibilities will include defending some of those cases. He warns that the burden on the defense bar will be great: while the prosecution has 120 days to make its decision about whether to pursue a death sentence for any given defendant, the defense must treat each potentially capital case as a death case, and from the beginning gather the mitigating evidence that might be crucial if indeed the defendant is indicted for and convicted of capital murder. Moreover, since the right to counsel extends only to the first state postconviction proceeding, New York could face a situation like that in California, where over 100 people on death row are without counsel. The problem of the unrepresented is exacerbated further when death row inmates become mentally incompetent—by no means an unusual situation.

Finally, Professors Eve Cary and Mary Falk examine the possible challenges to the new death penalty statute under the New York State Constitution. The authors urge lawyers and academics not to be constrained by the traditional interpretation of the Eighth Amendment to the United States Constitution when looking at the new state statute. Rather, they suggest a fresh look at first principles in evaluating potential attacks on New York's death penalty law. They also provide some background on the "New Federalism" movement, and analyze the approaches that might be taken by the judges of the New York Court of Appeals when presented with arguments based on the New York State Constitution. They then suggest several promising challenges and call for further research, both traditional and empirical, in pursuit of additional ways to prevent New York from again becoming a leader among states that kill their citizens.

The featured speaker at the forum was Bryan Stevenson, Director of the Alabama Capital Representation Resource Center in Montgomery, Alabama.[2] He mesmerized the audience with his personal reflections on eleven years of experience working on behalf of death row inmates in Alabama, experience punctuated again and again with discrimination based on race.[3] For example, in preparing to make a challenge to the way jury rolls were formed, he was shown, as late as 1991, two books of marriage registries, one marked "White," the other "Colored." The judge hearing the challenge failed to see these as suggestive of racial discrimination. In another case, Stevenson was forced to conduct hearings in a courtroom guarded by a German shepherd dog to discourage Black members of the community from attending. Nor, as he noted, is race bias limited to the South—of the thirty-eight cases of alleged drug kingpins for whom the United States Attorney General approved seeking a death sentence under the recently enacted

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[2] This center is one of the 20 such law centers across the country that were recently cut off from funding by Congress. *See* Lis Wiehl, *A Program for Death-Row Appeals Is Facing Elimination*, N.Y. TIMES, Aug. 11, 1995, at B16.

[3] For a transcription of remarks by Bryan Stevenson on the same subject, see *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 FORDHAM URB. L.J. 239, 252-60 (1994).

federal capital statute,[4] eighty-eight percent were Black or Hispanic.

Yet the courts have been unwilling to grant relief for even the most obvious discrimination based on race. The United States Supreme Court was presented with overwhelming and unrefuted evidence of racial discrimination in the administration of capital punishment, discrimination such that one who killed a White victim was eleven times more likely to be sentenced to death than one who killed a Black victim, and a Black defendant who killed a White victim was twenty-two times more likely to be sentenced to death than a White defendant who killed a Black victim. Bryan Stevenson, a man who had spent the last hours of life with condemned men and watched them die, had never done anything as painful as reading the opinion in *McCleskey v. Kemp*,[5] in which Justice Lewis Powell, speaking for a five to four majority, acknowledged the presence of racial discrimination, but concluded that it was *inevitable*, and therefore beyond redress by the Court. Unlike the 1954 decision in *Brown v. Board of Education*,[6] a decision that had permitted Mr. Stevenson to attend integrated schools, the 1987 Supreme Court was willing to accept discrimination based on race in what was literally a matter of life and death.

Particularly in light of Bryan Stevenson's powerful indictment of the continuing role played by race in the imposition of the death penalty in the United States, it seemed to me supremely ironic that the advent of capital punishment in New York, after a period of more than thirty years without it, coincided with the movement towards declaring it unconstitutional in South Africa. As I have hypothesized elsewhere,[7] racial discrimination had a significant, if not indeed decisive, impact on the retention of capital punishment in both the United States and South Africa, countries that otherwise would be expected to have followed the trend in other Western democracies of abolishing this extreme penalty.

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[4] 21 U.S.C. § 848(e)(1) (1988).

[5] 481 U.S. 279 (1987).

[6] 347 U.S. 483 (1954).

[7] *See* Ursula Bentele, *Race and Capital Punishment in the United States and South Africa*, 19 BROOK. J. INT'L L. 235 (1993).

In June 1995, South Africa, a country rightly condemned as a pariah among nations only five years ago, decided that official killing of its citizens would be uncivilized and not in keeping with the spirit of the new democratic society. The recent unanimous judgment of the South African Constitutional Court concluded that the death penalty violated the provision of the new constitution prohibiting cruel, inhuman or degrading punishment.[8] The court took great care to acknowledge that South Africa was beset with an extraordinarily high rate of violent crime (higher even than New York's), yet it rejected the rationales offered by the attorney general for using capital punishment in response to that crime. The court found, as has been universally recognized, that the death penalty cannot be shown to be a better deterrent than long prison terms. The court also rejected the other main rationale for capital punishment, that of retribution: "The state does not need to engage in the cold and calculated killing of murderers in order to express moral outrage at their conduct. A very long prison sentence is also a way of expressing outrage and visiting retribution upon the criminal."[9]

Two quotations from concurring opinions seem worth the attention of judges about to face the issue of the death penalty in New York. On the effect of the use of capital punishment, Justice Sydney Kentridge observed, "in general in civilised democratic societies the imposition of the death penalty has been found to be unacceptably cruel, inhuman and degrading, not only to those subjected to it but also to the society which inflicts it."[10] And on the state's role in safeguarding the right to life of all its people, Justice Didcott noted:

> South Africa has experienced too much savagery. The wanton killing must stop before it makes a mockery of the civilized, humane and compassionate society to which the nation aspires and has constitutionally pledged itself. And

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[8] REPUBLIC OF S. AFR. CONST. ch. 3, § 11(2).

[9] State v. Makwanyane and Mchunu, Case No. CCT/3/94, judgment of the Constitutional Court rendered June 6, 1995, at para. 129 (Chaskalson, P.) (available in Internet from the Uniform Resource Locator: http://pc72.law.wits.ac.za/judgements/deathsn.html).

[10] *Id.* at ¶ 199 (Kentridge, J., concurring).

> the state must set the example by demonstrating the priceless value it places on the lives of all its subjects, even the worst.[11]

Thus, South Africa has aligned itself with the vast majority of democratic countries that have abandoned the death penalty for murder. Might our courts be persuaded that, in the absence of any showing that the death penalty deters, the New York Constitution prohibits the state from deliberately taking the life of its citizens, even the lowest?

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[11] *Id.* at ¶ 190 (Didcott, J., concurring).