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Does the Death Penalty Still Matter: Reflections of a Death Row Lawyer

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My own life as a lawyer coincides quite exactly with the modern era of capital punishment in the United States. I started law school less than two months after the United States Supreme Court had seemingly swept the whole problem into the dust-bin of history with its decision in Furman v. Georgia. But on July 2, 1976, less than two months after I'd started work as a fledgling public defender in Columbia, South Carolina, the Supreme Court validated the death penalty's return in Gregg v. Georgia.

Still, in those earliest years after Gregg, it didn't seem likely that the death penalty was really back to stay. At least, it didn't seem likely to me. After all, all the other Western democracies had already abolished it, or were about to. And our own country soon proved itself much quicker to pass death penalty laws, and send people to death row, than to actually execute anyone. The death penalty seemed an anachronism, a vestigial institution, a throwback to a pre- Warren Court era of segregated drinking fountains and third-degree police interrogations.

Surely a hard shove by a few determined defenders would cause the whole death penalty apparatus to shudder to a halt forever.

Or at least that's how my own thinking went back in the winter of 1980, when I read a local newspaper story about the re-sentencing of two men, half-brothers, who'd killed a gas station owner during a bungled, drug-addled robbery two and a half years earlier, just a month or so after South Carolina's post-Gregg death penalty statute took effect. Their original death sentences had been reversed by the South Carolina Supreme Court on grounds

1. This talk is a follow-up to "Does the Death Penalty Matter?" given 12 years ago as the 1990 Ralph E. Shikes Lecture at Harvard Law School. 1 RECONSTRUCTION No. 3, 1991.

that their lawyer had neither objected to at trial nor raised on appeal (this back in the long-ago days when some state courts, including South Carolina's, did not enforce procedural defaults when life hung in the balance). So every lawyer in the state who read the advance sheets knew that these men had inadequate representation. And yet the same unqualified lawyer showed up for the re-sentencing trial, and stood by as they were both sentenced to death for the second, and last time. (Not quite knowing what to do about all this, South Carolina would temporize for the next 17 years before finally executing both men in 1998). Even though the trial judge would later testify that the lawyer's performance was grossly substandard and his attitude "cavalier," it was no one's job to make sure that the defendants had decent representation, so no one did.

The next step seemed obvious enough to me. Even though I'd never actually defended a capital case myself, I knew I could do better than the travesty I'd just read about, and what's more, surely it wouldn't be too hard to recruit experienced lawyers to fill the gap. So I signed on as a part-time contract attorney with a newly-created state appellate defender's office, handling two, then six, and eventually ten capital appeals at a time, taking on death penalty trials at then-statutory going rate of $10 per hour, and assuming a self-appointed role as South Carolina's "expert" on capital defense.

The intervening years have been taken up with the clutter of the defender's craft. The cases fill up the days and years, and there are only a few chances to stop and think about what it means, whether I've really done any good.

Not that anyone should else care, but it matters to me in a practical way, because after a couple of decades of this, I have to decide more and more often whether I should recommend to law students that they should follow the same path that I have, and spend their professional (and a good part of their personal) lives working to save a few already-devastated people, and battling a death penalty system that has so far proven pretty resistant to all of the efforts against it.

To be honest, the purely legal achievements of lawyers like me have been pretty paltry. I did not yet realize this when I started defending death penalty cases in 1980, but you can't miss it now: despite the arcane complexity of modern death penalty law in the

United States, the Supreme Court has largely abandoned the actual regulation of the death penalty, which is today imposed about as infrequently and sporadically as before Furman. In 1980, it was possible to suppose–and I did–that the Supreme Court really intended

- to require that state courts carefully instruct juries so as to control the process by which they sentenced people to death;
- to ensure that capital juries faithfully reflected a cross-section of public attitudes,
- to require that states review the actual operation of their death selection systems so as to guarantee even-handedness,
- to ensure that death sentences would not be carried out in the face of unexplained racial disparities, and
- to mandate that absolutely no effort would spared, and no procedural roadblock permitted, whenever any case presented a risk of executing an innocent person.

But each of these objectives proved much harder to attain that anyone had expected, and one by one, in case after case, the Supreme Court gave up on all of them. When juries revealed that they did not understand the judge's sentencing instructions, the Supreme Court made it harder – indeed, almost impossible – for criminal defendants to win new trials on the basis of confusing instructions. When states refused to require that their own supreme courts monitor the pattern of death sentences to guarantee some measure of consistency, the Supreme Court declared such statewide review wasn't necessary anyway. When social scientists showed that juries were stacked in favor of the prosecution whenever (as happens in every capital trial) opponents of capital punishment were barred from service, the Court simply redefined jury impartiality so as to leave the death penalty system operating as before. And when painstaking research seemed to show the skin color of the murder victim counted for more in the life-or-death decision- making of the Georgia courts than most of the statutory guidelines enacted by Georgia's legislature, the Court announced that the system it had upheld (on faith) in Gregg could not be impugned by mere evidence of its actual operation. Having underestimated the political resilience of the death penalty after Furman, the Supreme Court has consistently stepped out of the way whenever a death row inmate's claim would undo a lot of

death sentences, or significantly complicate the states' efforts to secure and carry out more.

And it's not just the Supreme Court. Consider this case.

More than 21 years ago, in January, 1981, a man named Howard Neal murdered his half- brother during an argument, and then raped and murdered both his brother's 13-year-old daughter and her friend. He was arrested, and he confessed. A simple enough case: if a state has the death penalty (and Mississippi did, and does), what possible reason could there be not to execute him?

Howard's Neal jury agreed and sentenced him to death, although not before hearing the testimony of his mother, and of a psychologist hired by Neal's court-appointed lawyer who'd seen him one time, three days before his trial. His mother told the jury that Neal could not learn as a child; that she was unable to find anyone to adopt him (as she had with her other ten children), and that "the welfare" sent him to a state school to teach him a trade. The psychologist testified that he had an IQ score of 54, which put him in the low end of "mild" mental retardation, and that he exhibited slowness, poor impulse control, irritability, psycho-sexual confusion, and the mental ability of an eight-year-old.

Some years later, after the Mississippi Supreme Court had already upheld his death sentence, Neal came to be represented by a lawyer who runs a small (and since defunded) defender office for Mississippi death row inmates. With a few letters and phone calls, the lawyer uncovered a lot more information about Howard Neal than had his original trial lawyers. His sister, his mother, and a social worker who knew his family all revealed that during Neal's childhood, his father was an abusive alcoholic who had concentrated his violence against Howard.His sister recalled that when his mother sent him off to a school for the retarded at the age of 10, "he was like a throwed away child. It was like he didn't have parents." Workers at the state-run school recalled him as a "good worker" and a "likeable kid," although a psychological report (that also placed his IQ in the mid-50s) mentions his running away and problems controlling his behavior. At age 16 he was transferred to a state mental institution where, according to a former staff psychologist, he was warehoused for several years without education, training or recreation, together with 150 mentally incompetent criminal defendants. This institution released him at age 18, but his mother sent him away again because she was afraid

of losing her welfare benefits. Soon afterwards he was arrested for assault in Oklahoma, and went to jail. There, a prison psychologist remembered him:

Howard was completely defenseless in prison. He was raped, mocked and abused by other inmates. The treatment of Howard by other inmates was so horrible, I have difficulty discussing it. They would do whatever they wanted with him. For example, one time thirty or forty inmates forced him under a table in the yard. One by one they forced him to commit sodomy on them and then spit the semen in a bucket. Howard was frequently abused and there were other incidents of brutality inflicted on him.

The psychologist helped get Social Security benefits for Neal after his release, and Neal's case manager recalled his worry about what would happen to Neal when he got out and went home to Mississippi, since there was no one there to look after him.

Although the jury that sentenced him to death knew none of this, the Mississippi Supreme Court refused to order a re-sentencing after the evidence finally came to light. It ruled that by presenting the testimony of Neal's mother and the last-minute psychological evaluation (by a doctor who knew nothing of Neal's background, nor even what crimes he was to be sentenced for), his court-appointed trial lawyers had done all the constitution requires.

This was not supposed to be the end of the matter, because Howard Neal still had the right to petition the federal courts to set aside his death sentence. His new lawyer did so, and after a few more years, all 15 judges of the United States Court of Appeals for the Fifth Circuit, sitting in New Orleans, reconsidered his case.

When they did, in a ruling announced just four weeks ago, all 15 agreed that the Mississippi courts had been wrong about the adequacy of his defense. Contrary to the Mississippi Supreme Court, the federal court concluded that the jury would likely not have sentenced Neal to death had they known of his traumatic childhood at the hands of an alcoholic and abusive father, of the" bleak, depressing, and hopeless life" that followed his mother's abandonment of him to state mental institutions, of his helplessness before the brutality inflicted on him in prison, of the corroborating evidence of his lifelong mental afflictions, and of the concern felt for him by the handful of people who had befriended him. And since all of this evidence could easily have been presented

had his trial lawyers simply done their job, the court of appeals found that Mississippi had violated his federal constitutional right to counsel.

But the court rejected his appeal anyway.

The reason was that under an amendment to the federal habeas corpus statute enacted by Congress 15 years after Howard Neal's crime, federal courts can no longer grant relief simply by determining that a state court conviction or death sentence violated the prisoner's rights under the constitution. The federal court must also find that the state court acted "unreasonably" when it rejected the prisoner's claim. And because the federal appeals court could not say that Mississippi was not just wrong but also "unreasonable" in finding that the jury had heard enough to pass muster, Howard Neal's death sentence stood. The vote on this, too, was 15 to 0.

This tale contains most of what there is to say about the institution of the death penalty in America at the start of the 21st century. I don't mean that every death row inmate's case is like Howard Neal's. But many are, and for some that aren't, the biggest difference is that the prisoner's guilt is nowhere near so certain. What is typical about the legal saga of Howard Neal is that whether he lives or dies, in the end, will have depended less on what he did than on the lawyer he was given to defend him. Had his volunteer appellate lawyer represented him at his trial instead, it's very likely–almost certain, in my experience–that the jury, knowing the whole story of how horrendously he'd been hurt before he had hurt anyone else, would have sentenced him to life imprisonment rather than to death. The trial lawyer he did get performed lackadaisically, but "adequately" – adequately, that is, to keep the courts from finding anything wrong.

And Howard Neal's case also reveals what the death penalty has done to the law. The federal habeas corpus statute that his current lawyer tried to invoke on his behalf was passed by the Reconstruction Congress in 1867: it is one of a handful of federal statutes whose real legislative history is to be found at Shiloh and Gettysburg. Congress enacted federal habeas corpus for state prisoners to ensure that when a state sentences someone to prison or death, it must do so in accordance with his fundamental rights as an American citizen–to be determined, if necessary, by a life-tenured federal judge who cannot be voted out of office for

unpopular rulings (as was the one Mississippi Supreme Court justice, James L. Robertson, who voted to grant Howard Neal's ineffective-assistance claim).[2]

How the federal courts actually used their habeas jurisdiction has varied widely since 1867. But for 129 years, Congress did nothing to alter that basic grant of jurisdiction. Until 1996, that is. Then, just in time for the first anniversary of the Oklahoma City Bombing, and responding to political pressure to "speed up" executions, Congress re-wrote the habeas statute to forbid federal judges from vacating a state criminal judgment "merely" because it violated the federal constitutional rights of an American citizen. Henceforth, this power could be exercised only when the state court's ruling was not just wrong but off the charts. The rest of the time, "state's rights" are supposed to trump individual rights. And that was the end of Howard Neal's appeal.

Let's understand the magnitude of what has happened here. Federal habeas corpus review was part of our national heritage as Americans. While it lasted, it meant–it made real, when it mattered most– that we are all Americans first, and only Mississippians or Minnesotans after that. It endured for well over a century, and when the death penalty was restored in 1976, federal habeas review was one of the reasons for confidence that this incomparably severe punishment would remain subject to a strict national standard of due process. But habeas corpus did not survive its encounter with the death penalty.

Of course this is not exactly accessible to the public. If and when Howard Neal is executed, the TV news won't explain the court-stripping legislation that was needed to get him to the executioner's gurney. If the case attracts any attention at all, we'll likely hear that it was reviewed 11 different times by 48 or 63 or 99 judges, and some politician will be complaining that no sentence should take 21 years to carry out.

And it's more likely that most people will hear no explanation at all, since executions like this are hardly news any more. Indeed, until quite recently, the executions that captured public attention

2. Stephen B. Bright, *Judges and the Politics of Death: Deciding Between the Bill of Rights And the next Election in Capital Cases*, 75 BOSTON U. L. REV. 759, 763–4 (1995).

were those involving the most outrageous crimes–Ted Bundy, John Wayne Gacy, Timothy McVeigh. Of course, the fact that the death penalty system sometimes succeeds in executing the very people it was intended for is not much of a validation of its overall operation, any more than an airline whose planes usually crash will regain our confidence when we hear that two or three of its planes have actually landed safely. But the airline analogy is not quite apt, because we all identify ourselves or our loved ones as at risk from an unsafe airline, while over the last 26 years of death penalty deregulation, very few of us have worried that anyone we knew or cared about might be unfairly sentenced to death.

So here we are: it's 26 years after Gregg v. Georgia, we have a cumbersome death-selection system of mind-numbing procedural complexity, but no assurance of justice.

What next?

In some ways, the outlook is not encouraging. In recent years, we've seen executions of Americans for crimes they committed when they were 17 and even 16 years old– a practice that even China has abolished, and that can be found almost nowhere else in the world. To be newsworthy, an execution nowadays has to offer the thrill of novelty, and that's getting harder and harder to generate. After all, the news media has already reported on:

- the first double execution,
- the first triple execution,
- the first execution in defiance of a ruling of the World Court,
- the first execution of an amputee,
- the first execution that required the state to rush the prisoner from a hospital emergency room after a nearly-successful suicide attempt,
- the first (and second and third) execution of a prisoner whose guilt remained in doubt, and
- the first execution of an articulate, attractive, and obviously-rehabilitated woman.

In the vast televised entertainment that the American death penalty has become, these will not be easy acts to follow.

We've also begun to see the re-structuring of death sentencing as communal therapy. Beginning with the Supreme Court's mild declaration in Payne v. Tennessee that the constitution does not forbid prosecutors from affording sentencing juries "a brief glimpse of the life that the murderer chose to extinguish," capital

sentencing hearings throughout the country are increasingly characterized by emotionally overpowering presentations of the grief and anguish of murder victims' surviving family members. As the once-clear line between memorial service and criminal trial erodes, we now read that federal prosecutors are auditioning hundreds of September 11 survivors in New York, Washington, and elsewhere, planning to select from this vast supply of trauma the thirty witnesses most likely to convert the anticipated sentencing of a relatively minor al Qaeda co-conspirator into an almost unimaginable national pageant of grief and outrage. After this–and what judge will want to stand in its way? – there may not much left of the notion of "undue prejudice" in capital sentencing hearings.

But despite all this, there has been a turning.

It may have begun at an extraordinary meeting at Northwestern University in Chicago, in November, 1997, when some 30 former death row inmates, all of them eventually proven innocent and freed, stood together on a lecture hall stage and announced, one by one, that "if the state of Florida (or Texas, or Illinois) had had its way, I'd be dead today." More exonerations followed, some of them resulting, undeniably, only from last-minute flukes, until a conservative Republican governor of Illinois called a moratorium on executions in his state that remains in effect today. Death penalty moratorium resolutions proliferated around the country; the New Hampshire legislature actually voted to abolish the death penalty (though the governor vetoed the bill), national polling figures showed a marked drop in death penalty support, and during the 2000 Presidential campaign, for the first time ever, a candidate found himself running away from rather than bragging about his record of carrying out executions. All the while, violent crime rates have dropped, and the existence of a new and harsh alternative to the death penalty–life without parole–has become available (though not yet fully appreciated by the public) in almost every state. Not even the horrific crimes committed against the United States on September 11, 2001 appear to have reversed the modest erosion of support for capital punishment: a national poll two weeks ago showed the same two-thirds support (down from nearly 80 percent six years ago) as was true in March of 2001.

Terrorist murders seem to represent the "easy case" for the death penalty. But here too, experience may soon teach us why England and Israel–two countries that have endured much more sustained terrorist attacks than we have over the past 25 years–have consistently rejected the death penalty as a response. The melodrama of death sentencing and execution is a windfall, not a threat, to political terrorists. In Al Qaeda, we have adversaries who have already accepted death and seek martyrdom: in this setting, the deterrent logic of the death penalty gets stood on its head. Meanwhile, the only discernible impact of our determination to execute those responsible for September 11–that is, the ones who failed to execute themselves–is on our Western European allies, who find themselves increasingly unnerved and embarrassed by our use of capital punishment at a time when we simply must have their co-operation and support.

In this connection, it's striking how isolated the United States has become. No Western democracy besides ours still uses capital punishment. A clear and rapidly growing majority of the world's countries has now abolished it: besides here, it survives primarily in China, the Muslim world, and the former European colonies of Africa and the Caribbean. Meanwhile, swimming against the tide, the United States is turning itself into the world's anti-terrorist executioner, as we regularly indict foreign nationals for capital crimes committed against Americans overseas (the recent indictment by a New Jersey federal court of a Pakistani terrorist accused of murdering Wall Street Journal reporter Daniel Pearl may prove to be only one of many such efforts to export the US federal death penalty, or, more correctly, to import its targets).

Insisting that such acts of illegal warfare against American civilians be treated as if they were domestic capital crimes will likely give rise to a whole new set of unintended consequences. It will be hard for the domestic death penalty system to continue pursuing the pathetic likes of Howard Neal while settling for life in the cases of Al Qaeda terrorists. But if we let our need for consistency to push our domestic death penalty onto a world stage–that is, if we let the death penalty exert an expansionist will of its own–we risk compromising much more important national goals that really are matters of life and death.

For this reason, September 11 may not help to revive the American death penalty. On the contrary, our new sense of

vulnerability and global interdependence may over time prove the pathway by which the worldwide movement against the death penalty enters American calculations and consciousness.[3]

Before 9/11, Americans were not much inclined to worry if every one of our closest allies thought we had lost our minds over the death penalty: now we ignore our allies at our peril. At the same time, the enormity of the September 11 attacks makes it more essential that we identify and do what works, as opposed to what expresses our feelings, or helps us find "closure." Awakening from our expressive self-indulgence, Americans may become more willing to acknowledge–as did the British and the Israelis before us–the death penalty's impracticality as an anti-terrorist weapon. And once we give up on executing the killers of Al Qaeda, a psychic barrier will have been breached: we will have acknowledged that there can be–there will have to be–justice without killing.

That said, the death penalty has become embedded in our political and legal systems, and it'll be with us for years to come. So I come back to the question I started with: for a law student or a young lawyer just beginning to practice, is this is effort worth it?

Today no one in his or her right mind would start out as I did 22 years ago, sure that the death penalty would soon disappear in the face of a little resistance. A young lawyer today who chooses this line of work will have to do so in a more humble spirit. And not just because the likelihood of dramatic, historic legal victories is so small. But also because this is work, when it's done right, that requires a lawyer to enter worlds of pain, horror and grief, and to do so with an open heart. Working against the death penalty in this country is a matter of one case at a time; it's a career on the burn ward. Most clients are saved from death row not by dramatic closing arguments in the courtroom, but by painstaking investigation, and then by the nuanced diplomacy of plea negotiation. That's the process by which a victim's family lets go of the false hope that a killing can help bring healing, while the defendant surrenders all hope that he will ever leave prison for another chance at life. There's nothing but heartbreak all around,

3. This, in fact, is what has already occurred in the former Soviet bloc countries of Eastern Europe, most of which have moved to abolish the death penalty as a price of admission to the European community.

and the defense lawyer works against the clock, like a surgeon in the years before anesthesia, to help bring about the least awful result.

This is not what most lawyers think of as "impact" litigation. We learned from the experience of the 1970s that lawyers will not be the ones who abolish the death penalty: that will have to come, in fits and starts, from the political system, led by public figures with a little courage and a willingness to engage this great issue. That said, it will be lawyers, working for our clients, who prepare the way.

For each of the now 100 death row inmates who have been found innocent after being condemned to death in the years since Furman, there was first a lawyer who suspended disbelief, who listened, who wondered whether there might still be another side to this story. And so too for the many hundreds more who, since 1972, have been condemned to die, only to re-establish in court their right to live. Every story of error or injustice that fuels the growing public debate was written by a lawyer who was willing to look past the ghastly facts of a murder, and to try to understand everything.

I don't mean to suggest that our profession's record since 1972 has been a proud one. On the contrary: we've delivered poor people's justice, and all in all, it's been a disgrace. For every lawyer like the one who finally tracked down Howard Neal's life story, there have been many more like Howard Neal's original trial attorneys, lawyers with too little experience, too little time, too little money, too little help, and too little motivation. The result has been predictable: a pileup of malpractice cases, as though podiatrists had been drafted to do most of the last 26 years' worth of brain surgery.

As a profession, we have the obligation to ensure that every defendant facing death receives expert legal representation, at the trial level rather than when it's usually too late, somewhere down the line. Our failure to require this is the greatest single source of arbitrariness and error in the modern death penalty system. We've been temporizing and delaying ever since 1932, when in Powell v. Alabama, the first of the Scottsboro cases, the Supreme Court reversed the death sentences imposed on three black men who'd been had been the beneficiaries of a pro forma appointment of the "the whole county bar" a few days before their trials. Powell v.

Alabama was decided before the Supreme Court started requiring death row inmates to prove that competent counsel would really have made all that much of a difference: as Professor Geimer has shown, had the Supreme Court's present day ineffective-assistance doctrine been in effect in 1932, the winner in Powell would probably have been the Attorney General of Alabama. So Powell is no museum piece: it's still a call to action, even today.

Explaining the right to counsel – effective counsel, not pro forma counsel, but one who takes responsibility for the client's fate–Justice Sutherland wrote then, "By 'the law of the land' is intended 'a law which hears before it condemns.'"

"Which hears before it condemns."

Those simple words contain an article of democratic faith, which is that each person has a story to be told, for which no stereotype of class or race or criminological theory affords an adequate substitute. Even when the confession and the gruesome crime scene photos have been introduced in evidence, the law still has to hear before it condemns. The lawyer's job, in a capital case, is to cause this to occur. In the end, it is a patriotic task, because in carrying it out the lawyer insists that in the United States, no person–not even an accused or convicted murderer–can be understood as a thing rather than as a human being. Regardless of the facts or the outcome in any given case, it is important for our country that this be done.

So yes, I think the death penalty does still matter. It obviously matters to the thousands of people most directly affected – the condemned, their families, and the families of murder victims whom the death penalty system puts through so much added grief for so little good reason. But it also matters to the rest of us. Because it corrupts the rule of law, and puts our system of individual rights under more strain than it has proven capable of withstanding.

And because the death penalty matters, it also matters that capable, bright, energetic young lawyers be willing to work against it. You cannot get rich doing this work, but you can discover and use every talent you have. You can protect and comfort families in worse trouble than any of us can imagine. You can make sure that society does not kill its own citizens blindly, that we do not condemn without having first truly heard. And even when you fail,

as you will, you can make known that which is wrong, and has to change.