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The Death Penalty: Where Are We Now?

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THE DEATH PENALTY: WHERE ARE WE NOW?

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When an international network hating America and the West sends suicide bombers to kill our innocent civilians by the thousands, confident that dying along with their victims lands them in heaven, death-as-deterrence and death-as-deserved takes on new meaning. Conventional wisdom tells us that post September 11th nothing shall ever be the same. But we must avoid the *post hoc*: Where we are *after* 9/11 is not necessarily where we are *because of* that day.

The new millennium began on January 31, 2000, when conservative Republican Governor George Ryan declared a moratorium in Illinois, after a journalism class at Northwestern uncovered the innocence of Anthony Porter, a man about to be put to death. Executing Carla Fay Tucker in 1998 had given the Nation the willies, arousing a storm of protest at killing a beautiful woman who had found Christ. Undermined by the Columbia study which showed that 68% of death penalties were reversed for serious error, spurred on by media which played up the occasional horror story of a sleeping lawyer and cast serious doubt on the guilt of some convicted murderers condemned to die, support for the death penalty dropped.

As its blood price for membership in the economic club, Europe kept on demanding all members abolish capital punishment. Still in the U.S. death rows swelled, and a fairly steady pace of executions climbed and hovered at nearly eighty a year—while Texas Governor George W. Bush, whose state led the nation in executions, was elected forty-third President of the United States.

That year, in *Apprendi*, a bitterly divided U.S. Supreme Court held that New Jersey could not make the defendant's racially based motive a "sentencing factor" that increased the punishment for assault, to be decided only by a judge's best guess.[1] The Court 5-4 explicitly held that any fact which can increase the maximum possible punishment must be specified in an indictment, and proved *to a jury beyond a reasonable*

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1. Apprendi v. New Jersey, 530 U.S. 466 (2000).

doubt. Acknowledging that several state legislatures gave judges ultimate authority to decide life or death, the Justices left the special world of death penalty jurisprudence for another day.

By 2001, the movement for a moratorium had grown, as the Philadelphia City Council and other municipalities passed resolutions urging their state legislatures to put a halt to the death penalty until it could be reviewed and revised. Maryland joined Illinois and halted all executions, pending further study and reform. It felt like the late 1960s again, in the years before *Furman*,[2] as doubts spread about whether those who were being executed deserved it or were even guilty. Then Timothy McVeigh was executed with the support of more than 80% of the American people—among them many who generally opposed capital punishment but were willing to make an exception for this mass murdering terrorist who had callously characterized the deaths of nineteen children in day care as "collateral damage". Waiting for the public outrage to fade with the next problematic execution, abolitionists now prepared to employ a new moral benchmark against which other condemned killers would be measured: "Not as bad as McVeigh."

Then September 11.

It seemed strange as we fought the war in Afghanistan against Al Qaeda and the Taliban—religiously fanatic mass murderers targeting not only our civilians but our entire civilization—that the instant we captured those who would incinerate us by chemical waste or waste this nation by pandemic, some of us seemed more concerned with their civil liberties than our own survival. Others insisted on our moral and legal right to kill them. Now that the Taliban are gone and Al Qaeda dispersed but potentially more dangerous, now that we have cleared out the ruins of the World Trade Center and returned to regular government, where are we in the aftermath?

In June, 2002, twice within one week, the U.S. Supreme Court handed down major decisions restricting the death penalty. In *Atkins,* over a bitter dissent, the majority categorically forbade states from executing the mentally retarded but left it up to the states to determine who in fact was retarded. With a measured IQ of fifty-nine, Atkins, the condemned killer, had been classified as "mildly retarded": His account of the robbery murder, however, was sustained and coherent, although the jury rejected it. He gave his recipe for chicken, could make change, knew that "Kennedy" had recently died in a plane crash

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

and was the "son of JFK, President" of the United States. When asked about *pi*, he replied "3.15", and used "*deja vu*" and "orchestra" correctly in conversation.[3]

It was a moral question, ultimately: "Those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes," Justice Stevens wrote for the majority. "Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct."[4]

How to determine the culpability necessary before we put a person to death? Unless they were willing to assert transcendent moral facts, the Justices could only consult the "evolving standards of decency of a maturing society." All agreed that legislatures reflected these "evolving standards" through their changing penal codes. Counting up thirty states or so that did not execute the retarded, the *Atkins* majority found a consensus against it sufficient to render the punishment cruel and unusual under the 8th Amendment. By a different method of counting, thirty states imposed their harshest punishment (death or life with no parole) with *no* exemption for the mentally retarded. Jury verdicts, too, constituted a primary indication of society's standards, all Justices agreed. Juries rarely voted for death for the mentally retarded. But almost never is not never, and the death penalty itself was to be reserved only for the worst of the worst. United in the belief that public standards evolve and inform the 8th Amendment, when seeking to assess the temperament more than the temperature of this nation, the Court continued to split in *Atkins* over whether public opinion polls, briefs of religious and professional organizations, and those of European nations should count in determining the consensus necessary to make death unconstitutional under the 8th Amendment.

Although public opinion does inform the meaning of "cruel and unusual", independently of popular sentiment the Court was really deciding the larger moral question of whether those with diminished mental capacity could be fully evil and deserve to die. Can a killer be insane and wicked, sick and evil, young and evil, delusional yet responsible enough to die? Andrea Yates, with a history of mental illness,

3. Atkins v. Virginia, 122 S.Ct. 2242 (2002).
4. *Atkins*, 122 S.Ct. at 2244.

drowned her five children in a bathtub to send them to heaven. The jury found her guilty of multiple murder, but spared her life.

In some states, however, judges and not juries decided whether to condemn a person to die. Three days after it prohibited executing the mentally retarded in *Atkins*, the U.S. Supreme Court in *Ring v. Arizona* answered the question they had left hanging in *Apprendi*. Death was no exception: *All* facts that elevated any punishment beyond its statutory maximum must be proven to a *jury beyond a reasonable doubt*.[5] On the other hand death *was* different: With every other crime, within limits imposed by the legislature, the judge decided on the sentence. But as the Court decided, the Constitution required that only a jury could sentence a convicted murderer to death. Was every capital defendant's right to a jury sentence so fundamental that *Ring* was retroactive? The question was pressing but left unanswered. If the Constitution flatly forbade a judge from having the final say of death and that prohibition were retroactive, then hundreds of the condemned on death rows in several states would have their death sentences vacated. Among them in Florida, Danny Rolling, the Gainesville Ninja killer who stalked, raped, tortured and stabbed to death five undergraduates, posing their dead bodies pornographically, taking nipples with him in a baggie, leaving behind a head on a mantel. Ten years later on Florida's Death Row at Starke, I stood there watching Rolling in his cell twelve feet away, tranquil, glasses propped on the bridge of his nose, lying back in bed, totally engrossed in a good book. I remembered his tortured and dismembered victims, brutally slaughtered in their young prime, and the families they left behind. And I seethed, growling from a place deep inside, "Damn you, why aren't you dead?"

If *Ring* were fully retroactive, however, then arguably every person who had been sentenced to death by a judge, even upon the jury's unanimous but non-binding recommendation, would be entitled to a resentencing. Danny Rolling might well be released from Death Row.

For several years, federal judges in Pennsylvania had individually overturned the last twenty state death sentences to come before them, often on hypertechnical grounds. Then New York federal Judge Rakoff took it a step further by becoming the first federal judge in the U.S. to announce the entire federal death penalty unconstitutional. Inevitably, an innocent person would be executed, the judge insisted, and on balance the death penalty would not save innocent lives. True, two major

5. Ring v. Arizona, 122 S. Ct. 2428 (2002).

recent studies (one from Emory, the other from the University of Colorado) had shown that capital punishment *did* have a significantly greater deterrent effect. But those studies, already underplayed by a largely abolitionist press and thus mostly kept from public consciousness, were not even mentioned by Rakoff nor by U.S. Supreme Court Justice Breyer in *Ring* the week before when he summarily omitted them from his list, simply insisting that "studies of deterrence are at most inconclusive."[6] Besides, for abolitionists, no less than for retributivist advocates of a death penalty as sometimes deserved, deterrence was not the issue.

Post September 11th, however, abolitionists dared not try to convince the public that no crime was so heinous, no perpetrator so wicked as to ever deserve execution. Instead, their focus of attack was process and the real, if remote, possibility of executing a factually innocent person. "Cutting off the opportunity for exoneration," Judge Rakoff boldly declared, was "tantamount to foreseeable, state-sponsored murder of innocent human beings."[7] Most observers correctly predicted that the district court's pseudo-analytic Constitutional usurpation to be quickly reversed on appeal, but committed abolitionists continued to champion the standard "state-sponsored murder" hyperbole. Aided by leading media outlets like the *New York Times* downplaying contrary voices, selectively reporting, relentlessly slanting and shamelessly spinning death penalty news, the abolitionist bench and organized bar continued their relentless attack.

Recognizing they had no chance of abolishing it wholesale in the states, local bar associations followed the A.B.A.'s call for a moratorium on executions, organizing conferences stacked with death penalty opponents. The City Council of New York was preparing to replace Philadelphia as the leading municipality to adopt a resolution calling for a state and national moratorium, purporting to study it while preparing to destroy the punishment by staying it. Meanwhile, back in Illinois, Governor Ryan, about to leave office under a cloud of corruption and publicly flirting with a wholesale commutation, ordered a review of every capital sentence, opening a public wound through which the families of the victims bled, as they were forced to plead again for the death of the condemned who had murdered and in some cases tortured their loved ones.

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6. *Ring*, 122 S. Ct. at 2446.

7. United States v. Quinones, 205 F.Supp. 2d 256, 268 (S.D.N.Y. 2002).

The first anniversary of September 11 saw the fight against terror continuing, as the horror and searing pain faded into a settled anger and deep-seated anguish that terrorists with weapons of mass destruction might murder millions. Repeatedly warned by their own government that more attacks were inevitable, a jittery nation, a generation unaccustomed to feeling insecure, had entered more fully a post September 11th world. The U.S. was detaining but not indicting ranking Al Qaeda except for Moussaoui. Bin Laden was dead or safe. With only a small spike in measured public support for capital punishment, in this new "normal" state of heightened anxiety and resolve, in spite of the organized abolitionist drumbeat, under-represented in the media and the academy, administrations—state and federal—continued to administer flawed death penalty schemes, marginally improved. Within weeks after *Atkins* and *Ring*, legislatures in Delaware and Colorado met in special session and amended their death penalty statutes; other affected states prepared to follow suit. The abolitionists pressed on at all levels, more and more effectively. All that seemed to stand between them and success was the sentiment of solid majorities of the American people in most states, and they were steadily chipping away at that mass.

As the Supreme Court's 2002 fall term opened, speculation mounted. The Court had reversed themselves twice within a week—in *Atkins* and *Ring*—restricting both the class of who could deserve to die, and the process by which the decision was made. Substantively, by subtracting mentally retarded killers, the Court had continued to shrink the class of death-eligibles: No one insane, or under sixteen at the time of the crime, or mentally retarded could be put to death. For only the fourth or fifth time since 1976 and the modern era, the court imposed substantive limits on *what* could count as the worst of the worst. Some of us pitched this to the media as merely a refinement, animated by the Court's attempt to reserve the penalty only for the worst of the worst. Others suggested hopefully or fearfully, it might be a next step toward outright national abolition.

In any event, the right of a state to execute murderers who killed before they turned eighteen seemed next up. In August, three Justices publicly dissented from a denial of *certiorari*, chastising the majority for allowing Texas to have condemned a person to death for a murder committed when he was seventeen.[8] It took four votes to grant *cert.*,

8. Patterson v. Texas, 2002 WL 1986618.

and when the term opened and the Court made public its list of questions to be answered, death for juveniles was not among them. For now, the Court's latest pronouncement stood: A state may determine that a seventeen-year-old deserves to die.

Three Justices dissenting where it took four, became four justices dissenting from a denial of *habeas* when it took five, again declaring it "shameful" to put to death a person who killed when less than eighteen.[9] They were but one vote shy of finding a national consensus, buttressed by world public opinion. Momentum was clearly shifting, and the Court seemed on the brink of constitutionally shrinking the class of death-eligibles yet again, declaring a national consensus against executing youthful murderers.

Then the Sniper struck.

From Baltimore to Richmond, as ten innocents were randomly shot dead from afar, cities were gripped with fear. Once captured, the older Sniper, a gulf war veteran converted to Islam, stirred hatred and fear that Al Qaeda could duplicate this form of terror. Federal and state prosecutors from different jurisdictions competed to try the snipers, but only Virginia, not Maryland or the feds could seek death for the younger, seventeen-year-old, John Malvo. Virginia could prosecute both of them capitally, as multiple murderers and for their murders with the "intent to intimidate the civilian population at large," its recently enacted aggravator.

September 11th had to influence how we feel about responsibility. Are Middle Eastern Muslim terrorists mentally ill if their culture seduces and coerces them to become martyrs? How about inner-city U.S. teenagers seduced and coerced to kill by older leaders in their own drug culture? Or a seventeen-year-old assassin dominated by his older partner? Suppose the younger had dominated? It happens on the streets. One thing was clear, now that the issue was squarely and concretely before the American People, the abolitionist claim of a national consensus against ever executing a seventeen-year-old was instantly exploded.

September 11th then, does impose its own lens. The case of Richard Reid—Al Qaeda-trained shoe bomber, who, but for the timely intercession of alert passengers and crew, would have blown up a planefull of people—and the "twentieth hijacker", Moussaoui, forces us to ask whether the death penalty must be reserved only for those who

9. *In re* Stanford, 2002 WL 984217.

have provably caused death. Proponents search for a vocabulary to explain how the loss of one innocent murder victim could be infinitely great, yet mass murder be worse. They search for a language acceptable to the courts, the media, and academic society, in which they could articulate, and justify acting on their rage.

Post-September 11th, the focus on deterrence fades even faster—when their own deaths are alluring, suicide bombers (although not necessarily those who direct them) seem undeterrable. New, more sophisticated studies reveal increasingly (but for terrorism), the death penalty's *greater* general deterrent effect. Still the overwhelmingly abolitionist media readily cooperate in ignoring deterrence, except for an occasional barb that the death penalty won't stop a suicide bomber.

In deciding whether to condemn terrorist murderers to death, we are forced to reevaluate the Model Penal Code's standard mitigator: The killer believed the killing to be morally justified. Is responsibility diminished by the zealot's pleasure in going to heaven for destroying the West? Is evil real? Can one not only *act* badly, but also *be* bad and be executed for it? Can sixteen- or seventeen-year-olds ever deserve to die? Or do we categorically exempt whole classes—the retarded, the young, the religious fanatics? Old wine in new bottles.

The U.S.A. today moves toward abolition, or reform. The days of sleeping or drunk capital defenders are past. Competent, well-funded counsel, state-funded DNA testing, and other reforms should produce only factually guilty death-eligibles. But that just moves the question back to its core: Among the culpable, who deserves to die, and why?

Is death different? As punishment, as harm? Early in 2002, Robert Courtney, the multimillionaire pharmacist—from greed and with a most depraved indifference to human life—diluted chemotherapy treatments to cancer patients, thereby subjecting scores of trusting victims to certain, lingering, painful suffering and possible death. He was allowed to plead guilty and was sentenced only to a long prison term. Retributivist advocates of the death penalty know this was grotesquely unjust. We have only begun to wrestle with it: "Death is different" must evolve, as through cloning and gene manipulation, man becomes "another manmade thing". In 2002, euthanasia was legalized in the Netherlands: Increasingly we have the right to take our own life, and the capacity to make, extend, and suspend the lives of others. On the new horizon, life and death change their meaning.

2003 began with a jolt. At the end of his term, with friends and associates already under indictment for selling commercial drivers' li-

censes to unqualified drivers, one of whom crashed and killed six children, while $190,000 of that bribery money went into his campaign for Governor, mired in scandal and maladministration with a federal investigation closing in on him, Governor George Ryan found himself serenaded by the abolitionists who assured the Politician that greatness could still be achieved (not to mention big bucks on the lecture circuit). Having forced the victims' families to publicly air their pain again, to beg again for the Justice they had long since been assured—that the killer of their loved one should die—with adulation pouring in from world leaders, to the adoring cheers of adoring abolitionists, the Governor emptied Illinois' death row. Having promised a real case-by-case review, the Governor instead blanketly commuted all 163 death sentences.

Above and beyond its cruelty and callousness, it was a morally indiscriminate act.

Among the returning veterans of death row who would now be allowed to live in prison, no longer specially condemned, were Fedell Caffey and Jacqueline Williams. Although she already had three children, the couple decided they wanted a baby. So they stabbed to death Debra Evans in her apartment, cut her fetus from her body, and then murdered her ten-year-old daughter, Samantha. Next they abducted then murdered her eight-year-old son, Joshua, beneficently leaving alive the seventeen-month-old who could not be a witness against them.

Also among the spared whose return was wildly cheered, Latasha Pulliam had lured six-year-old Shenosha Richard with a bag of potato chips and a promise to take her to the movies. Instead she took the child to her boyfriend and they tortured her: He anally penetrated the little girl with a shoe polish applicator. Pulliam vaginally assaulted the child with a hammer. Then they used the same hammer to crush her skull, beat and strangled her, and dumped her in a garbage can. Pulliam had a measured IQ of sixty-nine.

The Executive power does and should include prerogative, the right to go outside the rules in the special case for the good of the whole. Executive power includes conscience as a corrective on strict legal justice, as an instrument of mercy. The power to spare should only be used collectively and indiscriminately for an entire group for reasons of state, to quiet serious unrest, or correct serious injustice. Unquestionably the Governor's blanket commutation was legally binding. Much less clear was whether life without parole could be substi-

tuted for those who had been condemned to die when that penalty did not yet exist. If not, these killers would have had restored to them not only their normal lives in prison, but also their hope of eventual release.

Worst of all and most ironic, the Governor's morally indiscriminate blanket pardon directly violated the spirit of the Commission the Governor himself had established, whose recommendations he had unsuccessfully urged upon the legislature. In common, the Illinois Commission, the Constitution Project, the Columbia (Liebman) Study and we retributivists all insist that the worst of the worst can and should be distinguished: Not all murderers are alike. The Illinois Commission had suggested ways to narrow the class of death-eligibles. The Governor had a golden opportunity to actually apply these criteria, case by case to ask whether each individual convicted murderer should be death-eligible. He might have determined that many, perhaps most condemned killers could be removed from death row justly. He could have made a giant stride for the death penalty dialogue by making refined moral distinctions in the name of the Commission he himself had established. He could have shown how a more morally refined system would work in practice. He could have actually reserved the death penalty for the worst of the worst. Instead, he showed the same blindness shown by so many abolitionists and vengeful advocates: They too would treat all murderers indiscriminately.

This is a critical moment for the Nation. As angry and hurt as we are, as disgusted as we retributivist advocates feel toward abolitionists for their moral insensitivity, more and more common ground reveals itself. No one who knows it likes the capital punishment regime, as-is. Capital crimes are too haphazardly defined; capital punishment is too haphazardly administered. Increasingly we agree that if the death penalty is used at all, it ought to be reserved for the worst of the worst who, beyond factual and moral doubt, deserve to die.

Who *does* deserve to die and why? Can legislatures articulate morally refined categories in advance? Can prosecutors and juries—applying reason *and* informed emotion, apply those categories fairly and consistently? Can abolitionists and advocates stop the rhetoric—contesting and striving to best each other in debate—and instead engage in dialectic, minds cooperatively engaged at getting at the truth?

This is the time. This is the moment that presses us to reconsider and reform.