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POINT

THE DEATH PENALTY AND THE DECLINE OF LIBERALISM

JOHN R. MACARTHUR*

I mean no disrespect to The John Marshall Law School, nor to anyone attending this symposium, nor to the memory of Chief Justice Marshall — especially to his legacy of judicial review as framed in *Marbury v. Madison*¹ — when I say that I am here to pick up the check.² Since I am, besides my sister, very likely the largest single private contributor to the anti-death penalty campaign in America (which it is not terribly expensive to be), I sincerely hope that you will indulge me for a few minutes. I would like to talk about money, liberalism and why I would take the time to write a speech with the aim of scrounging money for what many of you assume, perhaps correctly, is a totally lost cause. After six or so years of blank stares, awkward silences, pitying looks and polite but chilly nods when I bring up the subject of the death penalty, I am actually quite grateful, honorarium or not, to have what I hope is an interested audience of people with the means

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1. 5 U.S. (1 Cranch) 137 (1803). The author recalls first learning about *Marbury* from John Dwight Ingram, who is now a professor with the John Marshall faculty, while Mr. MacArthur was in high school.

2. The author notes that the honorariums he receives for speaking out against the death penalty are transferred to the nearly empty coffers of the Death Penalty Information Center ("DPIC"). The author founded DPIC, an institute that purports to inform people about some of the more unfortunate aspects of capital punishment.

and the intelligence either to argue back, or actually to do something about America's scandalous execution racket.

In fact, in the six years since I founded the Death Penalty Information Center ("DPIC"), only one person has taken the bait and seriously challenged my abolitionist orthodoxies: the esteemed jurist and former mayor of New York City, Edward Koch. Mr. Koch insisted to me that the Baldus study on racially discriminatory application of the death penalty was simply wrong.³ I will not attempt a summary of his argument; I suspect he had not read Justice Powell's majority opinion in *McCleskey v. Kemp*,⁴ which accepted the Baldus study but upheld McCleskey's death sentence anyway.⁵ Maybe Mr. Koch had read the opinion but did not care what it said. Suffice to say that his defense of punishment by execution was as vociferous as it was unusual.

My point is that the death penalty is so politically secure today that its promoters rarely see the need to defend it. I hope I will not disappoint anyone with my lack of legal erudition: I assumed that, with all the experts speaking at this *Death Penalty Symposium*, you would not need me to recite any case law or to quote any famous judges. Of course I can recite a few of my own unsophisticated reasons why one might oppose capital punishment. Innocence is my personal favorite: it bothers me to know that in an imperfect system of justice, persons innocent of any crime, including murder, are inevitably and irreversibly being executed. This is particularly alarming in times such as these when certain Supreme Court Justices, and even the President of the United States, seem hostile to the very concept of judicial review. I am alluding, of course, to the narrowing in the scope of habeas

3. See *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), *aff'd*, 481 U.S. 279 (1987) (discussing the Baldus study). "The Baldus study analyzed the imposition of [the death] sentence in homicide cases to determine the level of disparities attributable to race in the rate of the imposition of the death sentence." *Id.* at 887.

4. 481 U.S. 279 (1987).

5. *Id.* at 313. Justice Powell, writing for the Court in *McCleskey*, was reluctant to explicitly endorse the Baldus study:

Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious. In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.

Id. However, Circuit Judge Roney, writing for the Eleventh Circuit, was less equivocal in his acceptance of Baldus: "We assume without deciding that the Baldus study is sufficient to show what it purports to reveal[, that there is a racial imbalance,] as to the application of the Georgia death penalty." 753 F.2d at 895.

corpus by the Supreme Court⁶ and its further gutting by the new Clinton anti-terrorist law.⁷ Substitute legal thuggery for extra-legal terrorism and you have an even less perfect system of justice. Is it not bad enough to spent twenty years in jail for a crime you did not commit?

Then, speaking of money, I am offended by the notion that people of means may more easily avoid the death penalty. If you murder someone and you happen to have the money to hire a good lawyer, you generally do not get the death penalty. In fact, prosecutors rarely ask for the death penalty when confronting high-powered and high-paid lawyers, because they figure it is not worth the trouble. The O.J. Simpson case will serve as an example.⁸

If you kill somebody and you are poor, your chances of getting the death penalty increase substantially.⁹ You might get a good public defender in New York or Chicago, or you might not. However, in Alabama you might get a lawyer who has never handled a capital case, or who decided to stay out drinking all night before your arraignment or the first day of your trial. Yet even with the best public defenders, it is still a question of money. Without money, there are no psychologists to explain the mitigating circumstances of your parents' insanity; no crack investigators to run down the witness who saw you somewhere else at the time of the crime, but who suddenly made himself scarce because he does not like talking to cops.

Then there is the race issue. I know Mayor Koch disagrees, but even putting Baldus¹⁰ aside, to me it is just common sense that black people who kill whites stand a far greater likelihood of execution than whites who kill blacks or whites who kill whites. I think all we have to do is look around to understand that, financially and politically, whites still run the country, and more specifically the legal profession. However, that by itself would not explain the predilection of prosecutors and judges for executing black people in disproportionately large numbers. Again, it is just

6. See, e.g., *Felker v. Turpin*, 116 S. Ct. 2333, 2338 (1996) (holding that suspension of writ of habeas corpus under provisions of Antiterrorism and Effective Death Penalty Act did not violate Constitution's Suspension Clause); *Oxford v. Bowersox*, 86 F.3d 127, 128 (8th Cir. 1996), *cert. dismissed*, 116 S. Ct. 2581 (1996) (holding that under Antiterrorism and Effective Death Penalty Act of 1996, a third habeas petition filed was abuse of writ).

7. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (to be codified in scattered sections of 28 U.S.C.).

8. See, e.g., James Ridgeway, *Slaughterhouse Justice. Race, Poverty, and Politics: Essential Ingredients for a Death Penalty Conviction*, VILLAGE VOICE, Oct. 11, 1994, at 23 (discussing O.J. Simpson's wealth advantage and the plight of the typical death-row inmate).

9. See, e.g., *id.* (discussing the exorbitant costs of specialized defense attorneys and experts).

10. See *supra* note 3 discussing the Baldus survey.

common sense that prosecuting and executing black people is still very popular with a lot of voters, in the North as well as the South.

Just ask President Clinton, who made such a public point of seeing through the Arkansas death sentence on the brain-damaged murderer, Rickie Ray Rector,¹¹ during the 1992 presidential campaign. Rickie Ray Rector, although he did have three alliterative names, was not descended from the founders of a gunpowder and chemicals conglomerate like John Eleuthere du Pont, who has been declared mentally incompetent to stand trial in Pennsylvania for murder.¹² There are those, perhaps liberals, who would argue that Rickie Ray Rector was mentally incompetent to face execution. Reportedly, he had forgotten his own name by the time they took him to the death chamber.¹³

Which brings me to another of my favorite reasons for opposing the death penalty: prosecutors and judges all too often ride capital punishment to big headlines and exciting political careers. I suppose you do what you have to do to get ahead, but getting ahead on someone's corpse, no matter how rotten, strikes me as uncivilized. And getting ahead on the back of a poor black corpse, as opposed to a rich white one, seems downright disgusting, not to mention unjust. This is not to say that many prosecutors, including a former one who also addressed the *Death Penalty Symposium*,¹⁴ William Kunkle of John Wayne Gacy fame,¹⁵ do not sin-

11. *Rector v. Clinton*, 823 S.W.2d 829 (Ark. 1992). In spite of Rector's "organic deficits" causing him difficulty in participating "in a collaborative, cooperative effort with an attorney," and although "Rector would 'not be able to recognize or understand facts which might be related to his case or which might make his punishment unjust or unlawful,'" the Arkansas Supreme Court denied Rector's final appeal. *Id.* at 831. Arkansas executed Rector by lethal injection January 24, 1992. *Clinton Back Home for Execution*, COURIER-JOURNAL, Jan. 25, 1992, at 6A.

12. Since the *Death Penalty Symposium* at which Mr. MacArthur spoke, the Pennsylvania Supreme Court has determined that John du Pont shall be presumed competent to stand trial unless and until he "demonstrat[es] his incompetence to stand trial by a preponderance of the evidence." 681 A.2d 1328, 1330 (Pa. 1996). Du Pont's trial began January 27, 1997. Stevenson Swanson, *Wife Testifies How du Pont Shot Her Husband*, CHI. TRIB., Jan. 28, 1997, § 1, at 7. (eds.)

13. Rector "howled and barked like a dog"; "[t]here were Indians, he thought, in the corner of his cell, who [sic] he was busy hunting"; "serpents slithering across his bunk, alligators and chickens set loose by the guards"; "he kept his dessert . . . to eat it after the execution"; and believed that "[i]f you eat grass, lethal injection won't kill you." Christopher Olgiati, *The White House Via Death Row*, GUARDIAN, Oct. 12, 1993, at 18.

14. Mr. Kunkle participated in the morning roundtable discussion at the Death Penalty symposium held at The John Marshall Law School on October 17-18, 1996.

15. William Kunkle, as Assistant State's Attorney, prosecuted John Wayne Gacy in 1980. Illinois executed Gacy by lethal injection on May 10, 1994, after the U.S. Supreme Court, 114 S. Ct. 1667 (1994) and the Court of Appeals for the Seventh Circuit, 24 F.3d 887 (7th Cir. 1994), denied his final appeals for

cerely believe in the appropriateness of the death penalty, even for white people.¹⁶ It is just that other prosecutors see it merely as a cheaper and more effective advertising campaign.

As you may know, DPIC surveyed law enforcement officials a while back and found that cops put things like brighter street lights and gun control ahead of the death penalty as their preferred methods of crime prevention. Nobody knows better than a police officer that most killings are of the moment, not pre-meditated and in the case of Rickie Ray Rector, probably not even post-meditated. The death penalty is not something a killer is generally thinking about when he or she kills. However, I am not so charitable to the police view of things and while I applauded the results of our survey, I would have added another choice to the list—smarter, better-paid police and prosecutors.

As a young reporter for the *Chicago Sun-Times* back in 1980, I had quite a bit to do with exposing the incompetence of the Chicago police department and the Cook County State's Attorney's office, of which Mr. Kunkle was then a member, in their handling of John Gacy, when finally, after something like twenty-five murders, he appeared on their radar screens as a suspect. I will not relate this in detail, but the crux of my story, later amplified by Mike Royko,¹⁷ was that police could easily have caught Gacy much earlier—at the very least five murders earlier.¹⁸ You may recall that the vastly smaller but vastly more enterprising Des Plaines police department ultimately arrested and charged Gacy. I told the story of one of Gacy's lucky victims, a young man whom Gacy merely raped and tortured, but whose story the authorities chose ultimately to ignore at the time,¹⁹ although Mr. Kunkle was delighted to use him as a star witness in the trial.

After the trial, the witness' usefulness was another matter. Because this star witness told certain details of his problems with the police to me and because the story reflected poorly on the state's attorney's office as well, Mr. Kunkle and others suddenly found their star witness to be a political liability and thus severely lacking in credibility. This is parenthetical to my point that Gacy, possibly because of his political connections, the color of his skin and the indifference of the police toward violence with a homosexual angle, got special treatment that another killer, less sophisticated or black, would never have gotten. Affirmative action, if you will, for a prime murder suspect. Nonetheless, after all this favor-

stay of execution.

16. Gacy, as one may recall, was white, prosperous and a Democratic precinct captain with various political ties. See, e.g., Edward Lifson, *Countdown—Two Days to John Wayne Gacy's Execution* (National Public Radio broadcast, May 8, 1994) available in LEXIS, News Library, ARCNWS File.

17. Mike Royko, *A Word for Justice*, CHI. SUN TIMES, Nov. 2, 1980, at 2.

18. *Id.*

19. *Id.*

itism, Illinois still convicted and executed Gacy, making him the great white hope of the death penalty lobby.

Why, as a matter of principle, should the government have executed Gacy when Jeffrey Dahmer, another high-volume sex killer, was not?²⁰ In an episode eerily similar to the one I described in my *Sun-Times* story, the Milwaukee police chose to ignore the plight of one of Dahmer's victims, literally returning the young man, discovered naked on the street, to Dahmer's tenderly homosexual mercies.²¹ Gacy, like Dahmer, was insane. I will never forget Gacy at his sentencing hearing at the Cook County Criminal Court, dressed in a lime green suit, winking and smiling at the jury, judge and press gallery. Gacy, like Dahmer, was white and could afford a decent lawyer. However, Gacy was convicted on the Illinois side of the state line, where there is a death penalty, and Dahmer was convicted on the Wisconsin side of the line, where there is no death penalty. Dahmer lived, until his fellow inmates took the law into their own hands.²² Gacy died at the hands of the state.²³

Jesse Jackson's new book, *Legal Lynching*,²⁴ reminds us that Justice Blackmun famously recanted his dissent in *Furman v. Georgia*²⁵ as follows;

There is little doubt now that *Furman's* essential holding was correct. Although most of the public seems to desire, and the Constitution appears to permit, the penalty of death, it surely is beyond dispute that if the death penalty cannot be administered consistently and rationally, it may not be administered at all.²⁶

The Gacy execution was, I think, irrational and inconsistent when compared with the treatment of Dahmer. Hardly anyone, I suspect, shed any tears for Gacy when he died, but I do not see how his crimes were any worse than Dahmer's. I am tempted to

20. Jeffrey Dahmer was convicted in Milwaukee, Wisconsin, a state without a death penalty statute, of 15 murders, and he was sentenced to 15 consecutive life sentences. Rebecca Carr & Maureen O'Donnell, *Clash of Emotions for Dahmer Victims' Families and Dahmer Chronology*, CHI. SUN TIMES, Nov. 29, 1994, at 6.

21. The national media lambasted the Milwaukee police for their reprehensible mishandling of this event. See *E.g.*, Carr and O'Donnell, *supra*, note 20, at 6; Alex Prud'homme, *The Little Flat of Horrors*, TIME, Aug. 5, 1991, at 26 (discussing the murder of 14 year-old Konrak Sinthansomphome, and Dahmer's imprisonment three years earlier for fondling 13 year-old Saysamone Sinthansomphome, Konrak's older brother).

22. Fellow inmates beat Dahmer to death on November 28, 1994. See Carr & O'Donnell, *supra* note 20 (discussing Dahmer's murder).

23. Olgiati, *supra* note 13.

24. JESSE JACKSON, LEGAL LYNCHING 88 (1996).

25. 408 U.S. 238 (1972).

26. Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

conclude that the execution of Gacy was the result of a kind of reverse discrimination, perhaps to prove that white people are not above the law, or at least that blacks are not beneath it. I suspect that the Gacy execution was a decision every bit as politically motivated as that of a racist Texas judge who railroads a black man to the death gurney. Gacy was an embarrassment to the Cook County law enforcement establishment: how did the well-connected, former Democratic precinct captain get away with it for so long? The State of Wisconsin, and the city of Milwaukee, evidently feel no such political pressure, and Wisconsin still has not enacted a death penalty. If the comparison of Illinois' treatment of Gacy to Wisconsin's treatment of Dahmer does not reveal inconsistencies and irrationalities, then I suppose that I have a different understanding of the words 'inconsistent' and 'irrational.'

Nonetheless, I promised to say something about the death penalty and the decline of liberalism and why I am scrounging for money. The title of this work really should have been *The Death Penalty and the Failure of Liberals*, because I have to confess that my quarrel these days is more with my formerly liberal allies and friends than it is with the death lobby. At least the proponents of the death penalty, like Mr. Kunkle, know where they stand: even the anti-abortion types who favor the death penalty have a somewhat coherent point of view. The liberals' position, as best I can surmise, is to re-elect President Clinton and worry about everything else, including justice, later. They may simply have no position. Everywhere I look among the usual suspects in my world, including the lawyers with fundraising clout, I find an exasperated silence or a kind of smiling indifference. Perhaps they are smiling at my naiveté about politics and fundraising. Perhaps they secretly favor the death penalty. Perhaps they are tired of arguing. Perhaps they knew a murder victim. I really do not know.

Why, for example, does the Lawyers' Committee for Human Rights not include the U.S. death penalty on its docket, even tangentially? Not, I imagine, because my friends Norman Dorsen and Michael Posner support capital punishment. It is more likely that they know such a move would cause problems with Reebok, or one of their other major donors. Opposing or questioning the death penalty is perceived to be a political death; it is too controversial even for a human rights organization.

What was Abner Mikva,²⁷ one of the very few politicians I have admired, and a former congressman for whom I wore out a great deal of shoe leather when I was growing up in Winnetka, doing as counsel to the President, instead of sitting on the Supreme Court? This to me is absurd. Some poorly informed people

27. Abner Mikva, an Illinois Democrat, served five terms in the U.S. House of Representatives.

have said that Jimmy Carter was spineless, but Carter fought to put Mikva on the D.C. Court of Appeals over the powerful objections of the National Rifle Association (NRA).²⁸ Clinton, by contrast, accepted Mikva's resignation as chief judge and converted him into a political functionary.²⁹ I think the rationale put out at the time was that Mikva, who is now sixty-nine years of age, was too old, and that Clinton wanted to put a younger person on the bench who would have a longer-term impact. That is nonsense. Clinton's people no doubt studied the Mikva fight of 1980 and decided it was not worth expending any political capital against the National Rifle Association. Maybe Mikva was just too liberal for Clinton. He certainly might have embarrassed the President on death penalty cases.

In an interview published in the September issue of *The Progressive*, Stephen Reinhardt, a judge on the Ninth Circuit and a Carter appointee, states flatly that "[t]here are no liberals being placed on the courts by Bill Clinton."³⁰ Furthermore, he says, "Bill Clinton seems to consider the courts unimportant. To him, judicial nominations are things to be traded for political advantage. They're of no significance to him. I don't think he's biased against liberals. He just thinks they will cause him political trouble, so he won't appoint any."³¹ I agree with Nat Hentoff that Reinhardt is excessively generous.³² Hentoff says, "[w]hen it comes to court appointments, it's like everything else with Clinton—he has no principles whatsoever."³³ However, I would go further and argue that Clinton is the most reactionary Democrat to occupy the White House since Woodrow Wilson and that he is temperamentally suited to colluding with the Republicans on court nominations.

Whatever Clinton's motives are, they are no excuse for traditional liberals to abandon the death penalty as an issue. We on the abolitionist side are losing, less because of public opinion, or because of the moral force of the counterargument, than because of a failure of nerve by the liberal community. As another DPIC poll discovered, public support for the death penalty drops to forty-one percent when genuine life without parole is offered as the alternative. The President loves polls, so why does he not come out aggressively for life without parole instead of inventing new federal death penalty statutes? Where are the principled liberals who

28. See, e.g., Walter Isaacson, *Magnum Force Lobby; the NRA is the Toughest Gun in Town*, TIME, Apr. 20, 1981, at 22 (discussing the NRA's immense lobby efforts against Mikva, among others).

29. See, e.g., Irv Kupcinet, *Kup's Column*, CHI. SUN TIMES, Aug. 12, 1994, at 40 (discussing concern over Mikva's decision to leave the bench).

30. John Nichols, *The Clinton Courts: Liberals Need Not Apply*, 60 PROGRESSIVE 25 (1996).

31. *Id.*

32. *Id.*

33. *Id.*

should be asking these questions of Clinton? They are all running around looking for patronage jobs and talking about how horrible the alternative is.

I have lately come around to my friend Vince Passaro's notion that the only way to shock liberals, or anyone else, into considering the possible injustices of the death penalty, is to execute an animal simultaneously with every execution of a human being, preferably just outside the penitentiary walls. The method of execution would always be the same as the one used inside the humans' prison: lethal injection, special pet-sized electric chair, firing squad, etc. Of course we would only execute bad animals, killers and biters and such. The well-funded animals' rights movement would instantly and vociferously protest the animal executions and call the police. The resulting media attention would catapult the death penalty onto the front pages of the nation's newspapers and the evening news broadcasts. The terrible injustice of accidentally killing one innocent dog would be trumpeted everywhere as a sign of the barbarity of our times. This would again free liberals to make the old arguments of reason against cruel and unusual punishment. I guarantee that DPIC would have a public relations field day. We might even win the argument.

I resort to the absurd because I can no longer resort to liberals. And, I might add, the spectacle of Bob Dole's attacks on President Clinton for his allegedly liberal policies is just as much an absurdity as my animal execution scenario. I do not know about Chicago anymore, but in New York, where I now live, true liberals have gone the way of the passenger pigeon.

There is today a perverted version of liberalism afoot that is really just a disguise for heartlessness. By heartlessness I mean the lack of both courage and compassion. A little bit of liberal heart appeared around the time of the terrible Clinton/Republican welfare bill,³⁴ a few people recognized it as another salvo in the ongoing American war against poor children.³⁵ However, principled people like Abner Mikva and Peter Edelman end up resigning from the administration and shuffle off into obscurity. Peter Edelman is another liberal whom Clinton found too politically dangerous to appoint to the federal bench: Edelman had the temerity to object to what Clinton is actually doing to the poor. If innocent poor children become the targets of society's rage, what chance has an innocent person on death row, or for that matter, a guilty one?

Liberals, to whom the task of making the hard arguments for progress has traditionally fallen, have simply failed to meet their responsibilities. I came here for the check because there is so little

34. S. Con. Res. 57, 105th Cong. (1996) (enacted).

35. See, e.g., 142 Cong. Rec. H4662-4753 (daily ed. May 9, 1996) (statements of Reps. Jackson, Lazio, and Velasquez.)

liberal money available for what the DPIC is doing. Foundations will not touch the death penalty with a ten-foot pole, though there is a lot of liberal money available for human rights abroad, where the death penalty is nearly extinct. Again, I suspect this is because of political pragmatism as well as a change of heart. We in the anti-death penalty camp are, however, painfully aware of the absence of liberal support manifest in the silence of our colleagues. To me, this absence is far more troubling than any amount of hectoring by the pro-death penalty camp. At least I can see the opposition, and as a liberal, I am by definition up for any argument. I cannot even see my allies.