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CAPITAL PUNISHMENT AND THE CITIZENS OF OHIO

John Murphy*

My subject is "Capital Punishment and the Citizens of Ohio." I was asked to comment on the use of the death penalty in the state of Ohio, whether I think the death penalty is needed, and where the death penalty is headed in the future.

I believe that the death penalty is needed to fulfill two fundamental and proper objectives of criminal law. The first is deterrence and the second is retribution.

I. DETERRENCE

I agree with the U.S. Supreme Court's conclusion in *Gregg v. Georgia*,¹ decided in 1976, that explicitly found that the death penalty is neither cruel nor unusual punishment and therefore is not prohibited by the U.S. Constitution.² The Court in that case concluded that "the death penalty is undoubtedly a significant deterrent."³ I agree that the death penalty is a deterrent, and that if the death penalty were repealed for fear of wrongful application, barbarity, or for whatever reason, future victims of offenders who would otherwise have been deterred will pay the price. That is why the argument of wrongful application is so weak. Repeal of the death penalty would result in the wrongful deaths of many more innocent victims compared to those who would ever possibly face wrongful execution, and murder victims do not get due process.

But beware of the argument that the death penalty really is not a deterrent because it has been on the books for over 20 years and we still have a lot of murders. We can write anything on the books, but it will not deter once it becomes known that it will not be effectively enforced. Also, some argue that life without parole is sufficient. However, it does not have the same deterrent effect and it does not satisfy the objective of retribution. In addition, we can never be certain that life without parole will actually be enforced. What the legislature does today, it can undo tomorrow.

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¹ 428 U.S. 153 (1976).

² *Id.* at 168-169.

³ *Id.* at 185-186.

II. RETRIBUTION

In *Gregg v. Georgia*, the Supreme Court concluded that “[i]n part, capital punishment is an expression of society’s moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.”⁴ This rationale remains valid today and always will. Though some view capital punishment as barbaric, the fact is that citizens who obey the law need to see that our criminal justice system can and will deal effectively with those who do not, and that includes an element of retribution, or “just desserts.” This is a perfectly human and understandable need, and our criminal justice system must satisfy that need.

But in a democracy, the real measure of whether the death penalty is “needed” is whether there is public support for it. Notwithstanding the lamentations of opponents, public support remains strong. Obviously, the great majority of our citizens feels that the death penalty plays an important role in our society and in our criminal justice system. As long as that support continues, then the death penalty is needed.

III. ENFORCEMENT

To realize the benefits of deterrence and retribution, the death penalty, or any penalty, must be effectively enforced, and I believe that this is the chief failing of our criminal justice system today. In Ohio the penalty is enforced only in a halting, uncertain fashion. A seventeen plus year delay between the offense and the punishment undermines both the deterrent value and the retributive value of the death penalty. With this kind of delay we are close to having a penalty without a purpose. This delay must be addressed because it is doing great damage to our system of justice.

In my opinion, the main reason for delay in our death penalty litigation is that the party generally responsible for prosecuting the appeal, the defendant, has no incentive to do so. He does not want his appeal expedited. That is the last thing he wants, because he knows what awaits him at the end of the process; unless of course he is innocent, which in virtually every case, he is not.

Coupled with the delay in the appeals process is the mandatory review by the Ohio Supreme Court of every case in which the death penalty is imposed. Thus, the usual remedy for dragging one’s feet, dismissal of the

⁴ *Id.* at 183.

appeal for want of prosecution, is not available. The appeal cannot be dismissed - it must be reviewed. Until 1994, there was a mandatory review by both the courts of appeals and the Ohio Supreme Court. In that year, a constitutional amendment was passed removing the courts of appeals from this process.⁵ The reasoning for the amendment was that because the case will go to the Supreme Court anyway, we might as well eliminate the courts of appeals and go there directly.

This change should help, but in the end I believe the courts are going to have to step in, to a much greater extent than they do in normal cases, in order to expedite these appeals. This includes serious discipline of defense lawyers who deliberately delay or frustrate the process. Until that happens, the will of the people to see the death penalty effectively enforced will be denied.

IV. RELIABILITY OF THE SYSTEM

Since executions have resumed in Ohio, I think ordinary citizens have been reassured that the death penalty is focused on the right people and the right cases. With so-called national "studies" claiming widespread "misapplication" of the death penalty, as well as widespread prosecutorial misconduct and defense counsel incompetence, I think some real concerns were raised among ordinary citizens that maybe we here in Ohio might also have some of those same problems with the death penalty. Were these cases really about the worst offenders? Were these people really the ones who actually committed these crimes? Was our system really working or was it broken, as appeared to be the case in Illinois and other places, at least according to press reports? But amazing things happen when you start looking at real cases. And the real cases clearly show that the death penalty is focused on the right persons and the most heinous of offenses. It becomes clear pretty quickly that in Ohio, at least in this respect, our system is working. In almost all cases there really is no question that we have the right person. In fact, in testimony before the legislature in June, Justice Paul Pfeifer, not exactly a rabid supporter of the death penalty, acknowledged that identity is only rarely an issue and is hardly ever even raised.⁶

⁵ Ohio Const. art. IV, § 4.03.

⁶ *Justice Pfeifer Tells House Panel Proposed Review of Death Penalty Appropriate 20 Years After Enactment*, 72 *Gongwer News Serv.* (June 5, 2003).

V. MENTALLY RETARDED OFFENDERS

In *Atkins v. Virginia*,⁷ the U.S. Supreme Court held that the death penalty cannot, as a matter of constitutional law, be imposed on a mentally retarded offender.⁸

I see no justification whatsoever for this free pass for the mentally retarded. In the first place, there is the difficulty of determining who is and who is not mentally retarded. Secondly, there is a wide range of mental retardation, from slight to severe, yet all get the same free pass on the death penalty, no matter what they have done. Thirdly, and most important, the mental retardation may have had absolutely nothing to do with the offense or why it was committed.

Remember, these are cases in which it has been proved beyond a reasonable doubt that this defendant knew what he was doing and purposely acted to do it. We are not talking about someone who was unaware of what he was doing. It must be proved that the mentally retarded defendant did act purposely in order to convict. Consequently, mental retardation does not mean the person is incapable of forming the requisite intent.

Mental retardation is the only mitigating factor that gets a free pass. But virtually all aggravated murder defendants have mental issues of one kind or another. With rare exceptions, normal people do not commit aggravated murder. Yet another defendant, who may have far more compelling mitigating factors in his background, does not get the free pass, while retarded defendants do, even though the mental retardation may have played no role in the offense.

Should retardation be a mitigating factor? Yes - and it is. It should be considered along with all other mitigating factors on a case-by-case basis. But there should not be an absolute exclusion of the death penalty for these offenders when others, who did the same thing, are subject to the penalty. Incidentally, if mentally retarded defendants are "less culpable," why are they not held to lesser sentences for other crimes?

VI. THE FUTURE

In the future, I believe we will see less and less use of the death penalty. The main reason for this decline is the introduction into Ohio law

⁷ 536 U.S. 304 (2002).

⁸ *Id.* at 321.

of the sentence of life without parole. Prior to its adoption, the next lesser penalty was life with parole eligibility after thirty years. This is a substantial drop from the death penalty, and one that does not preclude a viable chance that the defendant, who in most cases is still fairly young, might get parole. But life without parole gives juries an option they are more comfortable with. Even though the life without parole sentence is of doubtful validity, as discussed above, juries tend to recommend this sentence rather than the death penalty, except in truly outrageous cases.

Legislation is now pending that would also apply the life without parole sentence to aggravated murder cases even where there is no death penalty specification. If enacted, this also will have the effect of reducing the number of death penalty sentences.

VII. CONCLUSION

Whatever one's view on the death penalty, all serious persons should be concerned about the effect that endless death penalty litigation and the various "studies" are having on public faith in our criminal justice system. I believe that faith is being eroded to the long term detriment of our judicial system and our society.