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REFLECTIONS ON OPPOSING THE PENALTY OF DEATH*

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For about five years now, I have been going up and down the land, in print sometimes but mostly not in print, trying to persuade my fellow citizens that the penalty of death ought to be abolished. For most of that time, I have mainly stressed a single thesis. In this talk I want, first, to try to place that thesis, a little more definitely than I have done before, in relation to other lines of thought about the death penalty, and then to say a very little about certain other reflections of mine on the theme, without quite as definite a relation to what has become, one might say, my principal specialty as a part of the opposition to this practice.

I mean this to be a self-contained talk, because it would be both vain and unrealistic to assume that everybody here has read my previous writings on this subject. I shall therefore state, as briefly as I can, what I have been trying to say in the main body of that work.

Whatever may have been the case in the past, the death penalty for a long time has been and definitely promises to continue being administered by a system that is characterized by a large amount of arbitrariness and mistake-proneness. Those who are to die have been chosen by a process which, at every critical stage, proceeds on no clearly articulated or understandable criteria. This starts with the stage of charging and pleading; the decision of the prosecutor as to what to charge and as to whether to offer a plea-bargain is not only unfettered and unreviewable but also without any clear and authoritative standards for the exercise of discretion. The luck of the draw in the jury is what I have called it, the luck of the draw. In a great majority of cases, the jury is instructed upon and may find "guilty" upon a lesser included offense, rather than on the charge

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that makes the defendant eligible for death; there is no review of this decision, and even instruction from the bench upon the difference between first and second degree murder, on premeditation, on the provocation that justifies or compels a manslaughter finding, and so on, is necessarily vague, for the law itself is vague. The "insanity defense," allowed in every state but in no state given a really intelligible definition, is a wild joker in the deck. At the separate sentencing stage, the state statutes, most of them recently put in place, contain other wild jokers which make unfaultable and unreviewable a decision for death or against death at this point. The decision for or against clemency is designedly standardless. The net effect is that virtually full discretion exists, taking the system as a whole, to select or not to select the particular defendant, out of the very many who might have been eligible, for suffering the supreme agony. Such a system, it seems to me, is not good enough for making this choice.

Now I am going to do what might seem a most arrogant thing, though I believe that on reflection you will not find it so. I am going to ask that tentatively, and for this short time only, we assume that the foregoing is a correct description of the system by which eligibility for death is established and acted upon. I make this quite temporary draft upon your patience and kindness because my aim in this talk is not to reargue this thesis but rather to place it in relation to other thoughts and questions about the penalty of death.

I must only add, by way of proemium, that my remarks will be somewhat personal, because they originate, in greatest part, as reactions to various questions I have met throughout the country, and as quite personal thoughts of my own — mostly, I must confess, while jogging my daily five miles, an ordeal that may prolong life as far as cardiac problems are concerned, but that soon would kill with boredom if one did not think furiously and continuously over a wide range of subjects.

Now the first thing I have noticed, as I have gone about preaching the thesis I have just stated, is that many persons in my audiences seem to have been making an order-of-magnitude mistake as to what it was that was being asserted. Often, a questioner seems under the impression that what I have said is that there are certain small though definite defects in our choice-for-death system, certain problems around its edges, whereas what I have been saying is that it is riddled up and down, through and through, with major vaguenesses and indeterminacies, and with major possibilities of error, where there is a standard clear enough for the concept of "error" to

be meaningful. This is a matter of mere misunderstanding, perhaps connected with an inability to believe that things can really be all that awry as to so terrible a matter, regardless of what we know of human fallibility and of original sin.

More serious is a questioning along lines which may be exemplified by the query, "But what would be your position if the system of choosing persons for death were perfect?" I have reflected much on the implications of this question, and I will now explore some of these: this will in fact be the main organizing principle of my talk here.

First of all, for candor ought to come first, is my literal answer: "I would be against the penalty of death no matter how perfected the system for administering it might be." I have given this answer on many occasions. Let me first admit how personal such an opinion is, and then add how personal must be all opinions of this sort, upon which, in their sum, our moral life rests. I will make my point by telling you a true story.

Last November, in Washington, I found myself in the company of fourteen philosophers. I am not myself philosophically learned, and as they had at me I sometimes felt that their number — fourteen — was not accidental, but constituted a jury, with the two alternates now customary; once, when I had to leave the room, I returned in some fear of the verdict. Seriously, however, they pressed me very hard for a cogent demonstration, a proof in moral philosophy, of the wrongness of the punishment of death. Of course I had none; it will not do, for example, to refer to the harrowing pages of Camus and Koestler, where the degrading horror of the practice is made real to the mind, for the philosophers could, and did, simply say, "But how do you prove *that* wrong?" But I finally had a very simple inspiration. I said to them, "Pick anything you choose, of which *you* disapprove — the boiling in oil of some murderers in Tudor or Stuart England, the penalty of hanging, drawing and quartering, the *amende honorable* inflicted on the attempter upon Louis XV's life, the burnings at the stake performed by both sides in the religious wartime of the sixteenth century, crucifixion as practiced by the Romans. There must be something in all this that you are prepared to call wrong. Now pick that thing, and construct for me a proof in moral philosophy that it *is* wrong. Then I will know what such a demonstration looks like, and I will see whether I can construct one to show that the infliction of death by judgment of law is wrong."

Of course the subject was forthwith changed; no such demonstra-

tion was any more possible in their mouths than in mine, and yet not one of them would have hesitated to condemn most or all of the practices I referred to.

I think that, if philosophy were a more rigorous discipline, it would long ago have been proved, to everybody's satisfaction, that no such demonstration is possible, in the end, of a moral judgment. Those who, like me, oppose the penalty of death altogether, are simply making the judgment that it is too much, too cruel, too degrading to the offender and to society. We cannot prove this, but neither can the opponent of bone-breaking as a prelude to crucifixion prove his case. The two opinions stand upon exactly the same logical or scientific footing. Our part of the world, the western Christian part,[1] has by and large decided that torture is just too much, no matter what the offense. Four hundred years ago that decision had not been made. No new rational arguments have been devised in the meanwhile, coercing the mind to the judgment that torture is too much, whatever the offense may have been. The change from the sixteenth century's opinion on torture to the twentieth century's opinion on torture is not at all like the change from the sixteenth century's belief as to the age of the earth to the twentieth century's belief on the same subject. The torture change is a shift of the moral emotions, of conscience — not of the intellect.

Now if we look over the history of the whole world during the last century, we perceive in progress, I think, a similar world-wide shift with regard to the death penalty. Like all historical currents, this one may change. Those of us who are opposing the death penalty in America are engaged in attempting to persuade others that we should join rather than oppose this shift in moral feeling. But on the principal and final issue itself — the inherent and intrinsic wrongness of the death penalty — neither we nor our adversaries can, strictly speaking, adduce rational arguments. The most we can do is to expose the penalty to view, in all its compound horror as we perceive it, and invite others, informed by this view, to agree. Koestler and Camus, chiefly among many others, have done this, performing (as one reviewer of my own book put it) the "emotional act" of exhibiting the penalty as it is and as it is felt by those who suffer it.

In my own case, I have elected not to do this over again. It has seemed to me that I, as a lawyer, could make a different contribu-

1. This expression was inadvertent. Japan amongst other countries not answering this description has abolished the penalty.

tion — the exhibiting to view of the multiple arbitrarinesses of the process by which people have been and are being chosen to suffer this agony. And the charge I seem to be encountering here and there — and I use the word "seem" because it is a charge never clearly spelled out — is that there is some kind of inconsistency in my being, at once, a convinced opponent of the death penalty however administered, and also an advocate of the view that the processes by which we select those who die are riddled with arbitrariness and mistake-proneness.

I can see one grain of truth in this charge — or, rather, one sense in which it might be true. It might be said that one who is resolutely opposed to the death penalty, however administered, is not the best judge of the adequacy of the procedure by which it is administered. That is perhaps right, but not responsive to the actual state of the argument. I am not merely registering my own judgment on the nature of the death-penalty system. I have been describing that system by drawing attention to its publicly knowable characteristics, inviting the judgment of readers and hearers — without, of course, concealing my own judgment. Every assertion I make is subject to easy disaffirmance if it be false. So far as I am aware, no serious attempt has been made to perform this disaffirmance. But even if everything I have asserted is true, nobody else's judgment can be coerced to the final act of rejection. In the end of ends, final judgment here cannot be rational, though it can be informed by reason — or, more humbly, by knowledge of the facts — at all stages short of finality. One must at last judge whether such a system as we have will decently do for selecting whom to kill by law.

Beyond this point, I cannot see how my own opposition to the death penalty as a thing in itself can taint or touch my contention that, even if you believe in the penalty as a thing in itself, you ought to consider whether the process by which it is administered is not so flawed as to make morally necessary its abandonment. I think of a conversation. Someone says "I am opposed to the penalty of death. It is too horrible a thing for all of us to do to any of us." Someone answers, "Well, I don't agree." The first speaker then says, "I won't try to argue you out of that view, for it is in the end unarguable, but won't you consider whether even someone, who — like you — does not disapprove of the death penalty in the abstract, can approve of the system by which people are actually chosen to die? Let me tell you a little about that system." I confess I absolutely fail to understand how the person who says this — and this is what I have been saying — is even close to inconsistency.

But let me now enter another area into which I am led by this question. I will open this branch of my remarks by going back to my fourteen philosophers. They were most interested — and, as philosophers, they must be — in the abstract question of the rightness of the death penalty. The discussion, for a time, proceeded on this level. At this level, such terms as "those who deserve to die," or "the relation of man to the state," were freely used. At one point, I made the only intervention a lawyer could make, by saying, "Ladies and gentlemen, it is no doubt well that philosophers never cease from pondering the great abstract questions of the universe, from the nature of being on down. But if you want to discuss the *political* question facing the United States today, you cannot use such a term as 'those who deserve to die' without an interlinear gloss, or a footnote, *every time* you use the term, explaining that by 'those who deserve to die' you mean 'those who are found to deserve to die by the criminal justice system as it stands and as it operates.' This is a ponderous gloss, and may tend to interrupt the flow of discourse and dull its elegance, but these disadvantages are as nothing when compared with the disadvantage of failing to keep steadily present in mind the fact that all we are now discussing and can discuss is the question whether those persons shall be killed who are chosen for death by our system as it stands."

I will say that, from this encounter and others, it seems to me that one of the chief troubles, if not the chief trouble, with most philosophizing about law is that it fails to be utterly permeated, as all useful thought about law must be permeated, by consciousness and concrete knowledge of *process*. I venture to hope, though not quite to predict, that a whole new school of the philosophy of law may one day arise based centrally upon the operational or processual approach. After all, it is entirely possible to state verbally a hypothetical case in which two events in far-separated galaxies occur simultaneously. Modern physics tells us, I think, that such a case would contain a meaningless term — "simultaneity" — because no operations or observations can be planned or executed which would make it possible to use this term in a meaningful way. I would be glad to see a philosophy of legal "fact" which was based upon there being, strictly speaking, no such thing as "fact," but only testimony, and procedures for settling upon a verbal account which will be *regarded* as stating, authoritatively, the "facts" of a case. I would like to see what could be done with a philosophy of the law of contracts which started from the rather obvious truth that, where experienced and learned persons can disagree on the meaning of words, those words

have no single meaning, but only the demonstrated potentiality of carrying two or more meanings — a potentiality that may be acted upon, but cannot be altered by, the processes of legal "interpretation." "Law" is not norms-plus-process but process wherein norms play such part as they can in the process given. But let me bring this thought back to my main theme here.

On that theme, then: The question I have just put — the question whether it is right to kill such people as are chosen by our system as it stands — is not a peripheral or side-question. It is not a needless complication of a simple question, or a needlessly confusing combination of two separate questions. It is the *only* question that actually confronts us. We are not presently confronted, as a political society, with the question whether something called "the state" has some abstract right to kill "those who deserve to die." We are confronted by the single unitary question posed by reality: "Shall we kill those who are chosen to be killed by our legal process as it stands?" My own work has been principally devoted to trying to throw more light on one aspect of that single unitary question — that part of it which invites inquiry as to the nature of the system as it stands. Strictly, for this purpose, it doesn't really make any difference at all what I think about the abstract rightness of capital punishment. There exists no abstract capital punishment.

Of course, it might be said that the single unitary question that now confronts us might change its aspect very quickly, by drastic improvements in the systems for choosing those who are to die. But the present systems, out in the states, are the best the states have been able to come up with in the years since the *Furman* case against a far longer background of thought and experience. Their defects, in process and in concepts that work themselves out only in process, are deeply rooted in the law of decades and even of centuries past. There is not, realistically, the smallest chance of major improvement, *transforming* improvement, in any time soon to come. And even if there were, we are confronted right now with the question of sending to death row or not sending to death row, killing or not killing, persons already chosen or in the process of being chosen by the systems as they stand. Not even the most optimistic looker-forward can avoid or evade this question.

Yet I am now myself in what I might loosely call a philosophic vein, and I cannot restrain myself from talking to you about the deepest of the thoughts that have come to me from being asked, perhaps five hundred times, "Would you favor the death penalty if it were administered by a perfect system?" My own philosophic

depths, which are, I am afraid, rather shallow as philosophic depths go, have finally been stirred to produce the counter-question, "What can this person mean by a 'perfect system'?" And here, again, the dominant theme must be the *processual* theme. It is impossible to stress this too strongly, or too often.

I can sketch imaginatively, though in the pale tones of utter political impossibility, some aspects of the system which could be brought to something that might be called perfection, as human perfection goes. For example — and I know what a ludicrous example it is, in the world we actually live in — it is imaginable that every capital defendant might be furnished by the state, at every stage, with the best counsel money can buy, and with completely adequate funds for investigation, for expert witnesses, and for everything else that you or I would hock our souls to get if we had anyone dear to us standing accused of a capital offense. Since we would all do this, presumably we consider it advantageous to have and to use these resources. By clearest consequence, we must consider it disadvantageous not to have them. When I got off the plane recently in a Western state, some people were falling all over me to let me know that there were three men currently in the death house there without any lawyers at all to prepare their federal appeal papers — and time was running. Thinking of that situation, and many others like it, I almost laugh at what I am about to say. But I can at least imagine that a civilized state might decide that, before leading a person into a small room to be killed, it should afford the best, and not the grudgingly conceded bedrock minimum, of resources for making a defense. If that were to be done, the system would be, in that one aspect alone, perfected.

Even as to this kind of perfectability, I wonder why anybody wants to raise the question now. I have always been patient on these occasions, but I find it difficult to treat this question as anything but diversionary. You raise the terrible question, "Shall we kill poor people who have been furnished minimal legal representation and next to no other resources for preparing a defense?" and the reply is "What would you say if the state furnished each capital defendant with means actually sufficient for putting up the best possible defense?" Is it possible that the questioner is not seeking, consciously or unconsciously, to direct the attention — his own attention, perhaps — away from one aspect of the terrible, and terribly real, issue that actually confronts him, and me, and all of us?

On many other questions of perfectibility, or even of susceptibility of improvement, I am not so sure I can even imagine what the

questioner means, or supply a meaning for him. Here, again, attention to processual issues brings some clarity.

Let us take the simplest plane — that of fact. What does it mean to speak of a "perfect" system in this regard? That predication has no operational meaning unless a better, more reliable system is used to check factual determinations, but what is the guarantee that this system itself possesses infallibility, or any given degree of rightness? (Of course such a system is merely imaginary.)

But this is rather abstract. Let's take a middling-complicated question of mixed physical and psychological fact, coupled with a normative judgment: "Did the defendant kill the victim because of a reasonable belief that his own life was threatened?" Now no improvement in the legal system is ever going to enable the fact-finding tribunal to witness personally even the external events under examination. Whether the deceased pulled a knife, or looked as if he were going to pull a knife, is all a matter of inference from testimony, very often the testimony of the defendant, and in other cases almost always the testimony, given much later, of witnesses to a rapidly moving, exciting course of events. Whether the defendant believed the victim had a knife is a question of psychological fact, but of great difficulty of investigation. Whether the belief was "reasonable" is a matter of *ad hoc* evaluation by a jury. How can all this be changed?

A level deeper, we come to the pure question of mental state, and its evaluation. I put the matter in that general way because I am aware that some now favor the doing away with the so-called "insanity defense." But I cannot imagine that any moral society could look on mental state as totally irrelevant to the question whether death was deserved as a penalty. Yet I cannot imagine, either, how the techniques for dealing with this, with which our legal culture has without success struggled for so long, could be refined so as to eliminate arbitrariness and mistake from judgment.

In Brooklyn recently, a white policeman shot and killed, apparently without provocation, a black youth of 15. The defense, supported by medical testimony, was that the policeman had suffered a sudden psychological seizure or episode. The jury acquitted. I do not impugn their judgment; it may well have been right. But what I ask you to consider is what the chances would be of a black youth, who without provocation shot and killed a policeman, and proferred the same defense. Wherever the verbal line is drawn, and under whatever name, between those states of mind which qualify for death and those which do not, arbitrariness and mistake will con-

tinue to rule.

Sometimes I think the question, "What would you do if the death-choice system were perfected?" is like the question, "What would you do if 40% of the people in the United States learned to speak pretty good Japanese by next New Year's Day?" — a question that states an hypothesis not physically impossible, not even psychologically impossible case by case, but absolutely impossible from the social and political point of view. But sometimes I think the question is more like, "What would you do if an amoeba were taught to play the piano?" I dare say the question concerns a mixture of both these things — the politically and socially impossible, and the rigorously impossible even to the imagination.

Let me turn to the very closely connected question — the question of the actual existence of mistake in death cases. It must be conceded, that there are very few instances of established mistake in cases where execution has occurred. But I think, that on reflection you may agree with me that this is, literally, quite meaningless — and I choose that word carefully. Such reflection must, again, attend to *processual* issues.

First, and perhaps most important, there are in our legal system no procedures or tribunals or jurisdictions for "establishing" that someone should not, under law, have suffered death. When one says that there are few "established" cases of this wrong, what is he talking about? Many people think a mistake was made in the famous *Rosenberg* case. But where do they file the papers, for an official declaration? The mere publication of new evidence, or of new views about the evidence, "establishes" nothing. This is to be strongly contrasted with the situation as to imprisonment, where there is always a real party in interest to move for a new trial; there are exceedingly weighty difficulties about such a motion, but it is at least a possibility.

Secondly, there is a lack of the energizing effect of there being something tangible that can be accomplished by demonstrating mistake. A person in prison wants out. His family and friends want him out. How many resources can be devoted to mere name-clearing, by the relatives and friends of those men whom I just mentioned, who could hardly get lawyers to prepare their federal papers, while they were still alive?

But the difficulty is vastly deeper. For our society is totally committed to executing, not all who have committed homicide, but only some, selected in accordance with certain procedures and certain criteria. If these procedures err, if these criteria are incorrectly ap-

plied, then "mistake" *as to execution* has occurred. And the trouble is that, through virtually their entire range, these subsidiary criteria, the ones actually set up for the death choice, are either exceedingly difficult of establishment, so that a jury's verdict, even if based on a guess, can hardly be definitely faulted, or are too lacking in meaning for the concept of "mistake" to apply.

Let me go back to the defense of "reasonable belief that one's life is endangered." Only a belief in direct divine guidance of the jury could lead anyone to think that the verdict on this is always right. But try to imagine how one would, after execution, go about faulting that verdict.

Or, to revert to a deeper level, all states, including Texas, are committed to not executing persons as to whom there exists some mitigating mental or psychic condition, usually referred to as the "insanity defense." Let's go back to the case of the policeman who shot the 15-year-old boy. His insanity defense was submitted to the jury, and they bought it. But if they hadn't, and if he had been executed — as would be possible in some states — how would one go about *establishing* that this was a mistake? Of course there is no way; this is so clear that your first reaction might be to think the question silly. If that is what you think, I think it is because the "insanity defense" typically poses a question, which is not in fact understood by either the judge or the jury. Of course one cannot at a later time establish "mistake" as to the answer to this question, when that answer has resulted in the killing by law of the defendant. Neither can one establish the correctness of the answer.

Some states are committed to refraining from executing people convicted under the felony-murder doctrine, where the defendant's participation in the felony was "relatively minor." Some states are committed to considering the defendant's "age" or "youth." These questions are typical of the question so vague that no answer can be established as wrong, or right. Of course "mistake" cannot be established as to the answers to such questions, and could not be established even if a tribunal existed charged with that responsibility. But what does that tell us as to the nature of the question?

Or take, for a final example, your famous Texas "Question 2," asked of the jury at the punishment hearing. The jury must determine, "beyond a reasonable doubt" that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society . . . ."

I have examined this question from many sides in previous writings. What I am saying now is that, if there is any seriousness in law

or life, Texas has quite seriously committed herself *not* to kill persons as to whom this question ought to be answered "no." An execution in such a case is a mistaken execution. But try to imagine how one would go about establishing, after the execution, that a mistake had been made — or had not been made.

I think the upshot of all this is that, in greatest part, the concept of "establishment of mistaken execution" simply evaporates. No tribunals, no procedures, no tangible energizing motivation, and no sufficient concepts exist for performing this act of "establishment." This again is a point at which abstraction from process is fatal to understanding, or to meaningful conclusions.

I have spoken at length, and only touched a few points of interest to me — and I hope to you. The room is endless for reflection on this penalty. Those who, like me, oppose it can ask no more than that you reflect upon it; this reflection on your part is in the end our only chance of victory.

I will say only one more thing. One tries, after many years of living, to look back and make some sense of one's life, or of major parts of one's life. As I have looked back on my work in law, I have asked myself: "What does it all add up to? What unity is there in it?"

I haven't the answer to all of it yet, and doubtless never will. But I do see the connection, I think, between my work in combatting racism and my work in fighting against the penalty of death. And this connection is at a level far deeper than would be suggested by the mere fact that a largely disproportionate number of black people are and have been on death row, as disturbing and shameful as that fact is.

I have carried around in my heart, since I read it, Albert Camus' saying that the infliction of capital punishment violates the only genuine human community — the community in the face of death. And I have never forgotten James Baldwin's being sorrowfully amazed that it could be, in the face of the death that waits for all of us, the last going down of the sun, that some people could treat other people so shamefully, because of the colors of their skins. To me, the truth behind these sayings is one. The penalty of death, and the cruel injustice of racism, violate our bedrock community — the community of all people, all of whom must face death together. And I suppose that is the deepest root of my own motives in these central parts of my own work in law. Or very near to the deepest.