

## Preface

Capital punishment has been and will remain a controversial method of enforcing criminal laws. Although the taking of a life always evokes moral concerns, something more than differing views of fairness in imposing punishment or conflicting predictions as to deterrent effects must account for the intensity of the arguments over the legitimacy of state-sanctioned executions. Fairness and utilitarian concerns might be raised with other punishments, but they are seldom presented with the same passion.

The use of the death penalty in the United States prompts enthusiastic support or equally adamant opposition because it is more than just another form of criminal punishment. The power to take life under authority of law represents the ultimate power a government may possess. The current debate surrounding capital punishment is best understood as a debate regarding the limits of governmental power: Does our modern conception of a democratic society permit the state to kill to achieve its objectives?

This symposium reflects the intertwined layers of law and politics that are inherent in the death penalty debate. The study of law requires analyzing problems through a complex prism, involving political theory, morality, and behavioral science. The death penalty permits — indeed requires — an exhaustive inquiry into each of these aspects of the law. With respect to this unique penalty, theory and practice collide at every turn.

When this symposium was organized in June 1984, nineteen persons had been executed since the Supreme Court ruled in 1976 in *Gregg v. Georgia*<sup>1</sup> that the death penalty is not a per se violation of the eighth amendment. In the year since, states have executed well over that number. Executions, once thought a relic of the past, have resumed in the United States. The accelerating execution rate and the over 1500 prisoners on death rows throughout the country mean that significant decisions concerning the death penalty must be made in the next few years. Although executions have a long history in this country, the death penalty has entered a new era in the mid-1980's. States with death penalty statutes and the courts that oversee their administration are confronting

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<sup>1</sup> 428 U.S. 153 (1976).

new problems and concerns — different from those that arose in legislating the punishment. Both judges and policymakers in the last half of this decade will face the enormous burden of translating the death penalty from an abstract expression of political will to a functioning system that incorporates evolving constitutional protections.

The symposium begins with general issues surrounding capital punishment and proceeds to more specific concerns. Section I contains articles discussing whether the death penalty constitutes a cruel and unusual punishment; whether executions advance the criminal justice system's goals; and whether capital punishment violates society's evolving sense of the morality of governmental actions. The articles in Section II address more specific problems, including the constitutional constraints on the selection of those who will receive death sentences. Finally, Section III contains empirical studies of the administration of the penalty.

The death penalty is a humbling topic for legal scholarship. It reminds us that problems in legal policy cannot be solved like mathematical equations. Discussion of modern constitutional doctrine is an inherently imprecise process replete with inexact conceptualizations and value conflicts that can be neither resolved nor ignored. But the legal scholar is required to do what she can to address and resolve the important questions of the age, however intractable they may be. That is the message and purpose of this effort.

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