LAW AND CONTEMPORARY PROBLEMS

Volume 61 Autumn 1998 Number 4

# FOREWORD

JAMES E. COLEMAN, JR.*

*When we abolished the punishment for treason that you should be hanged, and then cut down while still alive, and then disemboweled while still alive, and then quartered, we did not abolish that punishment because we sympathised with traitors, but because we took the view that it was a punishment no longer consistent with our own self-respect.*

Lord Chancellor Gardiner[1]

On February 3, 1997, the American Bar Association ("ABA") called for a moratorium on the death penalty pending elimination of serious flaws in its administration.[2] The ABA identified four principal concerns underlying its extraordinary action: first, the lack of standards in most states for the appointment of competent counsel to represent capital defendants at trial and in post-conviction proceedings; second, the erosion of adequate and independent state post-conviction and federal habeas corpus review, and the resulting risk that innocent people will be executed; third, the failure of jurisdictions with capital punishment to take meaningful steps to eliminate racial discrimination in the administration of the death penalty; and, fourth, the refusal of the United States Supreme Court and several states to bar the death penalty for persons who are mentally retarded or for juveniles under the age of eighteen.

---

Copyright © 1998 by Law and Contemporary Problems

This foreword is also available at http://www.law.duke.edu/journals/61LCPForewordColeman.

* Professor of Law, Duke University.

At the time of the American Bar Association's adoption of the resolution calling for a moratorium on the death penalty, the author was the vice-chair of the Association's Section of Individual Rights and Responsibilities, the principal sponsor of the resolution; he is currently chair-elect of the Section.

1. 268 PARL. DEB., H.L. (5th ser.) 703 (1965).

2. The resolution and accompanying report are reproduced in the appendix to this volume. *See* American Bar Ass'n, Resolution of the House of Delegates (Feb. 1997); American Bar Ass'n, Report No. 107 (1997), *reprinted in Appendix*, 61 LAW & CONTEMP. PROBS. 219 (Autumn 1998).

In calling for a moratorium, however, the ABA did not take a position on whether the death penalty should be abolished. Rather, it expressed—on behalf of its 400,000 members, most of whom had no direct experience with capital punishment and many of whom supported it—the belief that serious defects in the administration of the death penalty had persisted to the point of crisis and that professional responsibility required the ABA to take some meaningful action that effectively and immediately brought this crisis to the attention of the American people.[3]

The ABA death penalty moratorium resolution was only the most recent in a long line of ABA policies and efforts to ensure the fair and impartial administration of the death penalty. Beginning in 1979, the ABA adopted a series of policies aimed at ensuring the appointment of competent counsel in capital cases, including promulgating in 1989 the ABA "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases."[4]

The ABA also has been a leader in the effort to preserve effective and independent state post-conviction and federal habeas corpus review of capital sentences, prompted in part by concern for protecting persons wrongfully convicted of capital murder.[5] And the ABA has called for the elimination of racial discrimination in the imposition of the death penalty, both on the basis of the race of the defendant and the race of the victim.[6]

The ABA also categorically opposed imposition of the death penalty in two circumstances. In 1983, the Association opposed the death penalty for juveniles under the age of eighteen.[7] In 1987, the Association opposed the death penalty for mentally retarded offenders.[8]

Beyond adopting policies,[9] the ABA has taken steps to ensure the fair and impartial administration of the death penalty. Through its sections, committees, and *ad hoc* task forces, for example, the ABA has sought to educate its members and the public about how the death penalty is administered and how it could be administered fairly. In addition, through its Death Penalty Post-Conviction Center, the ABA has been a leader in the recruitment and training

---

3. The ABA Section of Individual Rights and Responsibilities has published its recent assessment of the impact of the moratorium resolution. *See* SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES, AMERICAN BAR ASS'N, REFOCUSING THE DEATH PENALTY DISCUSSION IN AMERICA: IMPACT OF THE AMERICAN BAR ASSOCIATION CALL FOR A MORATORIUM ON EXECUTIONS (Sept. 1998). Several well-publicized cases in Illinois of innocent people being released from death row, see, for example, Pam Belluck, *Convict Freed After 16 Years on Death Row; State Is Examining New Evidence in 10th Case of Apparent Error*, N.Y. TIMES, Feb. 6, 1999, at A6, prompted renewed calls for a moratorium on the death penalty in February and March 1999.

4. *See* American Bar Ass'n, Resolution of the House of Delegates (Feb. 1989); *see also* American Bar Ass'n, Resolutions of the House of Delegates (Feb. 1979, Feb. 1988, Feb. 1990, and Aug. 1996).

5. *See* American Bar Ass'n, Resolutions of the House of Delegates (Feb. 1982 and Feb. 1990).

6. *See* American Bar Ass'n, Resolutions of the House of Delegates (Aug. 1988 and Aug. 1991).

7. *See* American Bar Ass'n, Resolution of the House of Delegates (Aug. 1983).

8. *See* American Bar Ass'n, Resolution of the House of Delegates (Feb. 1989).

9. Once the ABA adopts a policy, it becomes the basis for the Association's legislative efforts in the United States Congress or for the ABA's participation as *amicus curiae* in individual cases, primarily before the United States Supreme Court.

of volunteer lawyers to represent death row inmates in post-conviction proceedings.[10]

Despite this history of sustained action, the ABA has had only very limited success in bringing about meaningful change in the areas of its principal concerns. Indeed, often led by the United States Supreme Court, the country has been moving in the opposite direction. For example, the Supreme Court has approved the death penalty for juveniles over the age of fifteen and for mentally retarded offenders.[11] It intentionally or effectively has limited the availability of state post-conviction and federal habeas corpus review.[12] It has made it virtually impossible in post-conviction proceedings to raise a constitutional challenge to the competence of counsel in capital cases.[13] And, in 1987, the Court upheld the death penalty against a challenge that it discriminated on the basis of the race of the victim, concluding that the apparent risk of such discrimination did not rise to the level of constitutional concern.[14]

In 1996, two other significant developments occurred that figured prominently in the ABA's adoption of the Moratorium Resolution. First, Congress ended federal funding for Post-Conviction Defender Organizations, which not only provided post-conviction representation in capital cases, but also recruited, trained, and supported volunteer lawyers in such cases.[15] The ABA played a prominent role in the establishment of these organizations and actively opposed their defunding.

Second, Congress enacted the Anti-Terrorism and Effective Death Penalty Act of 1996, which makes it significantly more difficult for capital defendants to obtain independent federal habeas corpus review of their convictions and sentences.[16] The Act establishes deadlines for filing habeas petitions, places limits on federal evidentiary hearings in habeas cases, sets timetables for action by federal courts, limits the availability of appellate review, makes it extremely difficult to obtain review of even meritorious claims in successive or successor

---

10. The ABA Section of Individual Rights and Responsibilities originally founded the Center as the Death Penalty Representation Project. The Center is now housed in the ABA Section of Litigation, one of the co-sponsors of the moratorium resolution. In addition to recruiting and training volunteer lawyers, the Center also develops legal materials for use by its volunteers.

11. *See* Stanford v. Kentucky, 492 U.S. 361 (1989); Penry v. Lynaugh, 492 U.S. 302 (1989). Although the Supreme Court has concluded that the death penalty for the mentally retarded and for juveniles over the age of 15 is constitutional, the ABA continues to oppose capital punishment in those circumstances, perhaps because it is inconsistent with our self-respect, if not with our current standard of decency.

12. *See, e.g.*, Teague v. Lane, 489 U.S. 288 (1989).

13. *See* Strickland v. Washington, 466 U.S. 668 (1984).

14. *See* McCleskey v. Kemp, 481 U.S. 279 (1987). The decision in *McCleskey* was by a 5-4 vote. Former Justice Lewis F. Powell, who wrote the majority opinion, later identified it as the one vote he would change if he had the chance. *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR., at 451-52 (1994). Although Justice Powell was a former President of the ABA, the supporters of the moratorium resolution did not ask him to support the resolution, out of deference to his membership on the Court.

15. *See* Pub. L. No. 104-134, 110 Stat. 1321, 1321-34 (1996).

16. *See* Pub. L. No. 104-132, §§ 101-108, 110 Stat. 1214, 1217-26 (codified at 28 U.S.C. §§ 2244-2266 (Supp. II 1996)).

petitions, and purports to bar federal courts from correcting certain erroneous constitutional rulings by state courts. The ABA had fought vigorously against such restrictions.

The ABA finally concluded that these developments, together with other disturbing trends in the administration of the death penalty, had precipitated a crisis. Its response was to call for a moratorium until the crisis could be abated through serious reform. At the ABA's annual meeting in August 1996, Supreme Court Justice John Paul Stevens had asked in a speech why the country continued to take the "appalling risk" of implementing the death penalty in face of the documented high rate of errors in its imposition and the diminishing safeguards against even potentially fatal errors.[17] That question led twenty of the twenty-four living past presidents of the ABA to conclude in a "Dear Colleague" letter they signed in support of the Resolution that "[l]eaders of the profession committed to the rule of law must object to taking such risks when there is no way to reverse a mistake."[18]

The genesis of this special issue arose from my belief that the ABA's death penalty moratorium resolution had the potential to refocus the public discussion of the death penalty, by including in the debate respected leaders of the American Bar who previously had been silent and whose views could not be dismissed lightly. By adopting the resolution, those leaders went on record as concluding that the death penalty as currently administered was a national injustice, to the point that it should be suspended until its flaws were corrected.

To take advantage of the exposure the ABA thus has given to the administration of the death penalty, I invited several of the country's leading scholars of the death penalty to address the concerns upon which the ABA based its resolution, including the significance of the resolution itself as an act of the legal profession. In my letter, I expressed the hope that "the special issue [would be] a reliable and dispassionate source of information to fuel the important debate generated by the ABA Resolution. I believe an issue centered around the ABA Resolution will receive wide circulation, and will be a significant contribution to our understanding of these difficult issues."

The response to my invitation was overwhelmingly enthusiastic; even scholars unable to contribute to the issue encouraged me to proceed. I think my vision for this issue has been realized. I believe the following articles are a significant contribution to the refocused and energized national debate generated by the ABA resolution, and more importantly, to our understanding of the issues that prompted the resolution.

---

17. Speech by Associate Justice John Paul Stevens to Annual Meeting of the ABA (Aug. 1996) (on file with author).

18. Letter to Colleagues from twenty former ABA Presidents (Feb. 1, 1997) (on file with author) (expressing and requesting support for Report No. 107 (1997)).