

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 9: Liberalism Divided – Criminal Justice/Punishments/The Death Penalty

Winthrop Rockefeller, “Executive Clemency and the Death Penalty” (1971)¹

Americans temporarily abandoned the death penalty after 1967. In many states, anti-death penalty activists successfully obtained judicial stays, forbidding executions until courts resolved numerous constitutional attacks on capital punishment. Other governors refused to sign death warrants until the constitutional issues were resolved. Winthrop Rockefeller, the governor of Arkansas, went further. The Arkansas Constitution, as did the constitutions of most states, gave the governor the power to grant clemency to any convicted prisoner. That power can be used to grant a person a full pardon or reduce a criminal sentence. On December 29, 1970, Rockefeller officially commuted the death sentences of all persons on death row in Arkansas on the ground that the death penalty was cruel and unusual punishment.

Rockefeller, when justifying his action, insisted that executive clemency was a particularly appropriate means for constitutionally abandoning capital punishment. What reasons did he give for this conclusion? Are those reasons sound? Unlike members of the Supreme Court, Rockefeller was elected to office and he was known to oppose capital punishment. Nevertheless, might one argue that the power to make definitive constitutional decisions is better vested in a multiperson legislature than one person? Should a governor who believes persons have a constitutional right to use soft drugs pardon all persons convicted for that offense? Compare Rockefeller’s constitutional arguments to those made by justices opposed to capital punishment. How are they similar? In what ways do they differ?

Recent years had witnessed a growing current of public feeling against the death penalty. Most of this public reaction has manifested itself in the form of court cases. Different groups have backed condemned men in their efforts to have the courts declare the death penalty void on a number of legal theories. This almost exclusive reliance on the courts is unfortunate. It emphasizes lawyers and legal theory when the real question is one of people and morals. My experience in Arkansas demonstrates that *people* are ready to take the action necessary to abolish capital punishment. . . . Letters and telegrams from Arkansans supporting my action exceeded opposing letters three to one. Nationally and internationally the ratio of support was four to one. . . .

This positive reaction indicates that the case against capital punishment is supported by the people. The burden of abolishing it should not be left only to the Supreme Court. The actions of the legislative and executive branches can and should more readily reflect the public sentiment. Capital punishment has already been abolished or severely restricted by legislation in 14 states. Surely the public attitude will eventually be expressed with sufficient strength in the remaining state legislatures for them to change the law. But the legislative process takes time to catch up with the public sentiment, and meanwhile men and women wait on death row. The fate of these people can be altered by the use of a device that has been virtually ignored as a means of abolishing the death penalty – executive clemency.

Some would characterize executive clemency as little more than grace, to be bestowed by a governor on the basis of personal whim or caprice. This view is totally wrong. In a civilized society such

¹ Excerpt taken from Winthrop Rockefeller, “Executive Clemency and the Death Penalty,” *Catholic Law Review* 21 (1971): 94.

as ours, executive clemency provides the state with a final deliberative opportunity to reassess the moral and legal propriety of the awful penalty which it intends to inflict. . . .

The lack of understanding that surrounds the exercise of executive clemency unquestionably has influenced the thinking of many public officials, including some of those in whom the authority has been duly vested. I have talked with more than one governor who felt serious misgivings about exercising executive clemency in the case of the death penalty, the suggestion being that here somehow was an excessive use of authority, tantamount perhaps to a breach of the public trust. . . . That many governors of other states went out of their way to commend my broad exercise of executive clemency attests to their regard for its "uniqueness" and points out dramatically the need for a re-evaluation of its use and purpose."

From my conversations and correspondence with other governors, I am convinced that most if not all of them, while awaiting either legislative or judicial relief will continue the philosophy of the moratorium on the exercise of the death penalty which I instituted on taking office in 1967. I believe that the same repugnance to capital punishment exists in the hearts and minds of most private American citizens. Since Luis Monge died in Colorado's gas chamber in 1967, no prisoner has been put to death in the United States, and still no great outcry from the people has arisen. This provides a compelling indication of this public repugnance. The people are content with a de facto elimination of barbarism as a tool of American justice.

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It is incomprehensible that the "cruel and unusual" aspect of the death penalty in our system of dealing with capital offenders can be denied. One of the condemned men whose sentence was commuted had been on Arkansas's death row for 12 years, another had been there nine years, three others for eight years each. A third of these condemned men had spent a total of 45 years living . . . under the sentence of death. . . . When I became governor, the death row cells at Ticker Prison Farm were literally big iron boxes, measuring 9 x 9 1/2 feet—three sides solid metal and the fourth a wall of bars running from floor to ceiling. . . . Once a year, at Thanksgiving or Christmas, the warden let each man out of his cell long enough to trot up and down the "yard"—in reality nothing more than the corridor running the length of the cell row. These traditional exercise sessions never exceeded 15 minutes, and few were of that duration.

It is not an emotional statement to observe that this treatment of prisoners is cruel and unusual punishment. . . . Frightful as these conditions are . . . the unspeakable aspect is in each morning's awakening thought: Will somebody this day sign his name to a document officially setting the date of my death?" Day in and day out, this is the constant specter, merely changing form as the hours edge by until in the evening the question becomes, "Will it be tomorrow?"

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Historically, the exercise of executive clemency has provided a form of moral leadership that has brought about substantive changes in the law. In medieval English law, self-defense was not an acceptable plea to the charge of homicide. This had to be changed. After pardons in self-defense cases became established practice, the law itself incorporated the same logic.

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Executive clemency has served as a legitimate and effective instrument of change in the past. Looking at the monumental backlog of condemned humanity on the death rows of America today, I believe that executive clemency can lead to a great step forward in human progress. . . .

There is agreement within those disciplines whose concern is crime and punishment that capital punishment is not a deterrent to crime. Indeed, compelling arguments can be made that by its very existence capital punishment serves reverse purposes. In the case of the tormented individual who is looking for a vengeful society to accommodate his own death wish. . . .

... [M]any individuals now on death row—albeit guilty of crimes of violence—are demonstrably capable of rehabilitation. . . .

I believe that we must familiarize our elected officials with their responsibilities within executive clemency, encourage them to use it to prevent further deaths, and support them publicly when they thus

decide. This will be a difficult task, extraordinarily so if the Supreme Court ruling to come is not favorable.

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