

FEDERALISM AND THE DEATH PENALTY

*Evan J. Mandery**

The Supreme Court's commitment to federalism is nowhere stronger than in the jurisprudence of the death penalty, but the traditional justifications for state rights ring hollow in this context.

It is axiomatic in the jurisprudence of the death penalty that it is left to the states to determine, within bounds of the U.S. Constitution, the contours of sentencing procedures.¹ The Court articulated this premise in *Gregg v. Georgia*² and has committed to it a host of times since.³ It has led the Court to uphold a wide range of procedural choices by the states. State legislatures have free reign to choose what factors should count as death qualifying, or state legislatures should establish a scheme that does not rely upon aggravating factors at all.⁴ The state may include a proportionality review if it sees fit,⁵ or it can assign the ultimate responsibility for the sentencing decision to the judge or the jury.⁶

The traditional and most commonly offered policy justification of federalism is that it fosters innovation by state governments. Justice Brandeis wrote in 1932: "It is one of the happy incidents of

* Assistant Professor, John Jay College of Criminal Justice. J.D., Harvard Law School, 1992; A.B., Harvard College, 1989.

¹ See, e.g., *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990) ("Within the constitutional limits defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished.")

² See 428 U.S. 153, 195 (1976) (stating that the court has "embarked upon this general exposition to make clear that it is possible to construct capital-sentencing systems capable of meeting *Furman's* constitutional concerns"). Under *Furman* the death penalty should not be imposed arbitrarily through the use of carefully drafted sentencing statutes. *Id.* See also, *Furman v. Georgia*, 408 U.S. 238 (1972).

³ See *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) (noting that there can be "no perfect procedure for deciding in which cases governmental authority should be used to impose death"); see also *Spaziano v. Florida*, 468 U.S. 447, 464 (1984) ("As the Court . . . has made clear, we are unwilling to say that there is any one right way for a State to set up its capital sentencing scheme."); see also *Blystone*, 494 U.S. at 319 ("Within the constitutional limits defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished.")

⁴ See *Jurek v. Texas*, 428 U.S. 262, 270 (1976).

⁵ See *Pulley v. Harris*, 465 U.S. 37, 43-45 (1984).

⁶ See *Proffitt v. Florida*, 428 U.S. 242, 251-52 (1976).

the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”⁷ This famous defense of states as “laboratories of democracy” has been quoted in more than three dozen Supreme Court cases.⁸ It may offer a sound justification to explain the history of social and economic development in the United States, but its good sense is less obvious in the context of the death penalty.

The essential ingredient of a constitutional death-sentencing scheme is that it incorporate some mechanism for identifying the worst offenders. Most states accomplish this by enumerating a set of death-qualifying aggravating factors.⁹ Federalism dictates that the states decide for themselves which factors should count as aggravating, and the Supreme Court has been deferential to their choices.¹⁰ In practice, though, states have decided upon aggravating factors that are sometimes in tension with one another. For example, in several states it is an aggravating factor to torture the victim.¹¹ On the other hand, in Florida, among other states, it is an aggravating factor if the murder is “committed in a cold, calculated, and premeditated manner without any pretense or moral or legal justification.”¹² States like these are drawing different conclusions between the manner in which a murder is committed and the culpability of the offender. Some states say that quick, cold-blooded

⁷ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

⁸ See Michael S. Greve, *Laboratories of Democracy: Anatomy of a Metaphor*, FEDERALIST OUTLOOK May, 2001, available at <http://www.aei.org/fo/fo12889/htm> (last visited Jan. 19, 2003).

⁹ See *Zant v. Stephens*, 462 U.S. 862, 877 (1983) (articulating that aggravating factors must “genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder”).

¹⁰ See *supra* notes 3–6 and accompanying text.

¹¹ See James R. Acker and C.S. Lanier, “Parsing This Lexicon of Death”: *Aggravating Factors in Capital Sentencing Statutes*, 30 CRIM. L. BUL. 107, 124–27 (1994) (explaining the difficulty in defining “heinous, atrocious or cruel” in the context of murder, and discussing some states’ use of “torture” as a means to identify particularly horrible murders).

¹² FLA. STAT. ANN. §921.141(i) (West 2001). The United States Supreme Court also rejected an argument that the aggravating circumstance of “utter disregard for human life” was unconstitutionally vague based upon a similar interpretation. *Arave v. Creech*, 507 U.S. 463, 479 (1993). The Idaho Supreme Court applied a limiting instruction that required a showing of “the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer.” *Id.* at 468 (quoting *State v. Osborn*, 631 P.2d 187, 201 (Idaho 1981)). The United States Supreme Court upheld the narrowing construction noting that although “pitiless” alone may not sufficiently narrow the factor, the term “cold-blooded” did provide sufficient narrowing. *Arave*, 507 U.S. at 475–76. The Court reasoned that “cold-blooded” means “emotionless” and that some first-degree murderers do exhibit feelings, such as anger; therefore, the aggravating factor was sufficiently narrow. See *id.* at 476.

murderers are, on the whole, more culpable than other murderers; other states say the opposite. The problem is this: Only one answer can be right. In the name of federalism, the Supreme Court tolerates the execution of certain murderers who are not necessarily among the most culpable.

It seems fairly easy to anticipate the response to this claim: Divergent, inherently contradictory outcomes always result in a federalist system. It must be that work-for-welfare is either good policy or not. Some states have it, others do not, but this hardly gives anyone pause about federalism. The reason it does not is that we understand that there may be no single policy that is the right answer for all the states. Workfare may work well in some places, require modifications in others, and may not work at all in others. The genius of federalism is that it allows the states to figure out for themselves which states are which.

Death-sentencing however, is not like workfare. Aggravating factors are not policy choices to be tinkered with to make the machinery of death function in the optimal manner—they are blanket moral assessments about the relative culpability of groups of offenders. In the workfare example, it is possible to imagine that all of the states are getting it right—that each state is figuring out what is best for itself. Yet it cannot be that both Florida, in executing cold-blooded murderers, and New Jersey, in executing torturers, are both getting it right. They are at opposite ends of a moral continuum; one must be worse than the other.

A defender of federalism could say this is no different than what we see every day with abortion. Some states allow second trimester abortions—abortions performed between the twelfth and twenty-fourth weeks of gestation—and other states prohibit them.¹³ These are moral choices—both cannot be right—yet few would say that federalism should be sacrificed for the sake of consistency. It is better to recognize, as the Supreme Court has, that right and wrong is not knowable in some cases, and we should therefore tolerate a diversity of answers to moral questions of this kind.

This may be the only possible answer, but it is an unsettling one in the context of death-sentencing. Look where it leaves us: All that is required of a valid death-sentencing scheme is internal

¹³ Compare, e.g., N.Y. PENAL LAW §§ 125.00, 125.05(3)(b) (McKinney 1998) (permitting abortions any time within the first twenty-four weeks of gestation) with KY. REV. STAT. ANN. §311.760(1) (Banks-Baldwin 2002) (allowing abortions only if performed during the first trimester of pregnancy).

consistency. Each state is free to choose for itself whether it wants to count as aggravating whether the murder was particularly quick or slow, whether the victim was very young or very old, whether it was committed for money or for no reason at all. All of these are valid aggravating factors because, out of respect for federalism and concern that moral questions of this sort are unanswerable the Court does not examine the content of the aggravating factor. It suffices that it divides the universe of murderers and has some bearing on culpability, one way or the other.

The result of all this is the certainty of arbitrariness in death-sentencing when the system is examined on a national level. The Supreme Court placed value on aggravating factors as a mechanism for “genuinely narrowing” the class of death-eligible murderers.¹⁴ Some aggravating factors may be useful in reducing arbitrariness within a particular state. But if a particular factor death-qualifies a defendant in one state, and the opposite of that factor death-qualifies someone in another, then we know that systemic arbitrariness has not been eliminated.

What could possibly be said in defense of federalism when the issue is procedural reforms that are believed to reduce the risk of error in capital cases? Among many other reforms, the Ryan Commission in Illinois recommends a host of new procedures for qualifying counsel in capital cases, and new instructions on identification procedures—all seen as generating more reliable verdicts.¹⁵ It can’t be said, as with aggravating factors, that the answer to this question is ultimately unknowable—better attorneys either reduce mistaken convictions or they do not. But no other state would be compelled to include such a reform, even if it were proved over the course of time to reduce error.

This might just be a necessary byproduct of our nation’s peculiar history. It might be, as with abortion, that the question is moral and ultimately unanswerable. Some states will have it, others will not, and that is all there is to it. But that answer seems more responsive to the concern that some states have capital punishment

¹⁴ *Zant*, 462 U.S. at 877.

¹⁵ See Marshall J. Hartman, *Taking the Next Step on Death Penalty Reform*, 148 CHI. DAILY L. BULL. 8 (May 2, 2002), available at WL 5/2/02 CHIDLB 8 (discussing the Ryan Commission’s conclusions regarding the state of the criminal justice system in Illinois); see also Daniel C. Vock, *Courts, Lawmakers Left with Next Move*, 149 CHI. DAILY L. BULL. 1 (Jan. 13, 2003) available at WL 1/13/03 CHIDLB 1 (debating what the impact of outgoing Governor Ryan’s decision to commute all death sentences in the state, as well as the actual release of three prisoners, will be on the Ryan Commission’s efforts to reform the capital punishment system in Illinois).

2003]

Death Penalty

813

and other states do not. The issue here is different. The Supreme Court has established that the premise that state-sponsored executions are only constitutional if they are the product of a sentencing scheme that separates out the most culpable defendants in a systematic and non-arbitrary manner. After establishing that premise, the Court divorces itself of any obligation to examine the various systems for internal or cross-state consistency. If it did engage in that practice in any meaningful way, the Court would find a national scheme riddled with philosophical and pragmatic inconsistencies. As the Court itself has said, “[W]e are unwilling to say that there is any one right way for a State to set up its capital sentencing scheme.”¹⁶ And that seems precisely the point.

¹⁶ *Spaziano*, 468 U.S. at 464.