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Joseph L. Hoffmann
Indiana University School of Law, hoffma@indiana.edu

Justice Dando and the "Conservative" Argument for Abolition

JOSEPH L. HOFFMANN*

The 1996 Jerome Hall Lecture, *Toward the Abolition of the Death Penalty*,[1] is an outstanding contribution to the worldwide capital punishment debate by a most remarkable man. In his lecture, Justice Shigemitsu Dando, who is truly a leader of the post-war generation of Japanese legal scholars and jurists, draws upon numerous sources in law, psychology, philosophy, and theology to bolster his argument that capital punishment is an affront to human dignity and must therefore be abolished. Justice Dando also relies on his own deeply personal experiences, as a member of Japan's judiciary, to support his thesis. Without question, Justice Dando's lecture will cause all those who were fortunate enough to hear it, or who will now read it in the *Indiana Law Journal*—Japanese and Americans, lawyers and non-lawyers, abolitionists and retentionists alike—to think about the death penalty in new and different ways. It is a moving and powerful moral statement.

As for myself, in listening to and later thinking about Justice Dando's lecture, I was most fascinated by two particular aspects of the lecture: one that may reveal a fundamental difference between present-day Japan and the United States, and another that underscores the great extent to which our two nations can nevertheless learn from each other in a universal moral dialogue.

The first aspect concerns the recent development of the abolitionist movement in Japan and the United States. In his lecture, Justice Dando describes in detail the way in which the United Nations, speaking for the world community, has contributed to the abolitionist movement in Japan. As he notes, the steady progression from the generalized *Universal Declaration of Human Rights*,[2] to the more specific, but largely toothless, *International Covenant on Civil and Political Rights*,[3] to the new *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty* ("*Second Optional Protocol*"),[4] has brought increasing pressure on the Japanese Government to turn away from capital punishment despite the fact that, as yet, neither Japan nor the United States has ratified the *Second Optional Protocol*. Justice Dando certainly seems to regard these international law trends as the most promising path toward his ultimate goal of Japanese abolition.

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* Professor of Law and Associate Dean for Academic Affairs, Indiana University School of Law—Bloomington. Professor Hoffmann was a Fulbright Professor at the University of Tokyo Faculty of Law in 1994-95, and he will return there as a Visiting Foreign Professor in 1997. Professor Hoffmann is also the Director of the Indiana University School of Law's Pacific Rim Partnerships Program.

1. Shigemitsu Dando, *Toward the Abolition of the Death Penalty*, 72 IND. L.J. 7 (1996).

2. G.A. Res. 217(III)A, U.N. Doc. A/810, at 71 (1948).

3. G.A. Res. 2200(XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 53, U.N. Doc. A/6316 (1966).

4. G.A. Res. 44/128 U.N. GAOR, 44th Sess., Supp. No. 49, at 206, U.N. Doc. A/44/824 (1989).

In the United States, on the other hand, the United Nations and its various statements on capital punishment have been of only passing interest to those whose views count the most in the American death penalty debate—for example, judges, political leaders, and the public at large. Although Justices Brennan and Marshall, our most prominent recent abolitionist jurists, regularly cited international law in their death penalty opinions,[5] few other judges seem to be influenced, even a little bit, by such authorities. In the political arena, one rarely hears any discussion about the views of the world community (except for the occasional, and obviously mistaken, comment that the United States is "the only modern industrialized democracy that still retains the death penalty"). As for the public, the average "person on the street" in America is about as unlikely to care about the United Nations' position on the death penalty as he or she is to ask the Secretary-General for advice on whom to elect to their local city council, or on how high their local property taxes should be.

What explains this dramatic difference in perspective? Perhaps it has something to do with America's history of aloof, if not downright arrogant, independence in international affairs (although, until very recently, Japan also had a somewhat similar history of independence). Perhaps it is a reflection of the self-centeredness of most Americans with respect to the rest of the world, a general tendency also seen in America's stubborn refusal to adopt the metric system, and in the fact that so few Americans (other than those whose first language is not English) ever learn to speak any language other than English.

But perhaps the difference is even more directly attributable to the fact that, in the United States, matters of crime and punishment—like other so-called "health, safety, and welfare" issues—have always been viewed as belonging to the states, rather than to the federal government. Thus, as recently as last year, the United States Supreme Court struck down a federal criminal statute on the ground that the behavior regulated, gun possession near a school, was outside the reach of the federal government and could only be prohibited by the states.[6] This decision must have seemed incomprehensible to most foreign observers, but it was easy for most Americans to understand, even if they did not agree with the practical impact of invalidating the statute. If, as even most lay Americans intuitively seem to grasp, decisions about crime and punishment are generally reserved for state, as opposed to federal, action, then how can it possibly be that such decisions can be usurped by an authority even more remote and foreign, such as the international community, speaking through the United Nations? In short, the peculiar American concept of federalism, still surprisingly robust and resilient after more than 200 years, may predispose Americans to think of capital punishment as a subject that is local rather than national or international in scope.

But even if Justice Dando's reliance on international law authorities does not carry much weight for most Americans, another, more important aspect of his lecture should be seen as a potentially major contribution to the ongoing American debate on capital punishment.

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5. *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361, 389-91 (1989) (Brennan, J., dissenting).
6. United States v. Lopez, 115 S. Ct. 1624 (1995).

The first time I heard Justice Dando's lecture, I found myself doing an intellectual double take. In the last part of his lecture, where he raises the "human dignity" argument against capital punishment, Justice Dando expresses an extremely forceful view in support of free will and personal autonomy. He cites with approval the statement of Georg Stürup that "most of our actions are voluntary,"[7] and rejects the determinism of B.F. Skinner as "the denial of the autonomous man" and thus "inconsistent with human dignity."[8]

At first blush, passages like these seemed incongruous to me. After all, in the United States, the battle lines on capital punishment are drawn in such a way that abolitionists almost always seek to *diminish* the defendant's free will, and thus the defendant's responsibility for his murderous acts. These persons, usually—though not always—characterized as "liberals," argue, either in general or in the context of specific capital cases, that the defendant was not solely responsible for his crime because he was abused as a child, or was allowed to slip into a destructive cycle of drug or alcohol addiction, or in countless other ways was failed by the larger society.[9] Even in non-capital cases, the overwhelming tendency is for such "liberals" to seek to minimize the defendant's moral responsibility, sometimes by asserting seemingly specious excuses for criminal behavior.[10] Retentionists, on the other hand, almost always assert that the death penalty can be morally justified on the basis of the defendant's desert—that is, they argue that the defendant is (or should be held to be) *largely responsible* for the terrible harm his acts have caused. These persons, usually—though not always—characterized as "conservatives," note that not all persons who suffer similar deprivations turn to a life of crime, and thus that the defendant must carry the blame for his chosen course of conduct. This is but a specific application of the general tendency among such "conservatives" to reject most excuses in favor of a strict application of the penal laws.

Upon further reflection, though, I began to realize that Justice Dando's version of the "human dignity" argument is an interesting one that is rarely, if ever, heard in the American debate on capital punishment, and is one that deserves to be taken most seriously. In his "human dignity" argument, Justice Dando starts from what most Americans would call a "conservative" premise—that all persons possess a strong, undeniable freedom of will, which their past circumstances cannot override, and which makes them largely responsible for the acts they commit. In America, this usually leads directly to a claim that the defendant should be *held* responsible for his acts, and should therefore receive the death penalty. But Justice Dando, in effect, challenges so-called "conservatives" to follow their premise all the way to what he sees as its ultimate, albeit startling, conclusion: if, as the premise asserts, no person is a captive of his past (hereditary, environmental, or otherwise), then even the person who commits a

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7. GEORG K. STÜRUP, TREATING THE "UNTREATABLE" at vii (1968).

8. Dando, *supra* note 1, at 19.

9. *See generally* William S. Geimer, *Law and Reality in the Capital Penalty Trial*, 18 N.Y.U. REV. L. & SOC. CHANGE 273, 294 (1990-91).

10. *See generally* ALAN M. DERSHOWITZ, THE ABUSE EXCUSE (1994) (surveying recent examples of reliance by defendants on defense of diminished responsibility due to past abuse or mistreatment).

capital crime is not a captive of his own (murderous) past, and always retains the "infinite possibility"[11] of changing his personality and becoming a worthy individual, deserving of life, even if in prison.

This is the key to what I call, in my title, Justice Dando's "conservative" argument for abolition. According to Justice Dando, those who believe strongly in free will and personal moral responsibility should have the courage of their convictions, and should recognize that such a belief stands in direct opposition to any claim that a death row defendant is an "animal" who is beyond redemption or rehabilitation. This is a powerful argument, with empirical support, at least in an anecdotal sense; Justice Dando's own personal experiences, with the unnamed Japanese murderer who reformed himself after meeting Father Candeau,[12] obviously contributed to his deep faith in the inherent potential of all human beings to improve themselves.

Importantly, Justice Dando distinguishes between the individual's capacity for self-improvement and the outmoded notion of rehabilitation that dominated American penal policy at numerous times in the last century. Consistent with the "conservative" viewpoint, Justice Dando agrees with Georg Stürup that "[w]e should not attempt to 'cure' any criminal; he has to develop his own way and remain himself."[13] Society's trust, in other words, should be placed *not* in the experts (such as psychologists or criminologists) who have, in the past, been called upon to help "rehabilitate" the criminal, but rather in the inherent potential of the criminal himself, as a human being with the capacity for self-determination. Again, Justice Dando's argument here relies on something akin to faith, but it is a kind of faith that flows logically from the aforementioned "conservative" premise about free will. Of course, we cannot say with any degree of confidence that any particular criminal *will* change and become a better person, if we do not execute him. However, if we believe strongly enough in free will, then, according to Justice Dando, we should always be willing to hold open the possibility of self-improvement, and should therefore resist the temptation to take the defendant's life.

I believe that Justice Dando's argument represents exactly the kind of insightful, universally applicable moral reasoning that could help invigorate the ongoing American debate about capital punishment. Speaking for myself, Justice Dando's lecture—and especially his argument from "human dignity"—has challenged me to rethink my own long-standing views about capital punishment, and has left me feeling much less certain about whether the death penalty can ever, under any circumstances, be morally justified.

No matter how the American people, or the Japanese people, eventually resolve the question of capital punishment, it can safely be said that Justice Dando has left his distinctive mark in yet another area of the law. I am most grateful that he chose to travel all the way from Tokyo to Bloomington, Indiana, to give us the benefit of his insights.

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11. Dando, *supra* note 1, at 18.
12. *Id.* at 16.
13. STÜRUP, *supra* note 7, at 15.