

## The Failures of Regulation

AS DEATH PENALTY SUPPORTERS and opponents battled in the courts during the 1960s and early 1970s, increased regulation of the death penalty was no one's goal. Justice Goldberg's 1963 call to action sprang from his belief that the death penalty ought to be abolished. The litigators at the LDF likewise hoped that small victories in the U.S. Supreme Court would soon be followed by outright judicial abolition. Supporters of the death penalty regarded its administration as an issue for the states. They were skeptical that the Court had much to teach the states about improving capital practices. Thus, when the Court rejected abolition in its 1976 decisions while elaborating a set of Eighth Amendment constraints, it embarked on a course that seemed to please no one: retention of the death penalty with top-down regulation of capital practices by the American judiciary.

Now, forty years later, supporters and opponents of the death penalty remain united in their dislike of the status quo of retention and regulation. Supporters of the death penalty believe that the Court's efforts have burdened the administration of capital punishment with an overly complex, absurdly arcane, and minutely detailed body of constitutional law that, to borrow the words of the great American jurist Learned Hand from a slightly different context, "obstructs,