THE DEATH PENALTY AND THE
UNITED STATES SUPREME COURT
DURING THE 1970'S

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The United States Supreme Court has recently dealt with many issues of great social concern. Among these have been: busing, abortion, civil rights and the death penalty. Like the others, the death penalty is an issue that is very complex. The Court, in early cases, shied away from making any sweeping decisions on the constitutionality of the death penalty. If the Court did mention the death penalty, it was only in dictum. But during the 1970's, the Court has dealt with the death penalty quite extensively. Several cases have been argued and ruled upon and several more are pending. These cases bear close examination. First, however, an examination of the Court's position before the 1970's is warranted.

Death as a penalty for crime has been in use by societies since ancient times. As far back as the recorded history of the ancient Egyptians, the infliction of death has been an acceptable practice. Death has been used as a deterrent and as retribution by almost every society and culture that has existed. Over the years, the methods of execution and the crimes for which death was meted out have decreased. The death penalty, which was at one time used for such crimes as counterfiting and heresy, has been reduced as a punishment for only horrendous crimes such as murder, rape, or kidnap and in some instances, treason. Today, many countries have abolished the use of the death penalty and in nations where it is still a statutory punishment, its
The death penalty is used very infrequently. The infrequent use of the death penalty has caused the question to come before the United States Supreme Court as to whether or not the death penalty is a cruel and unusual punishment as prohibited by the 8th amendment to the Constitution of the United States and made applicable to the States thru the 14th amendment.

The United States Supreme Court has implied that the death penalty was constitutional thru cases when it held that a particular method of execution did not violate the eighth amendment. There are several cases that the Court heard on method of execution of various types: Shooting-Wilkersen v. Utah, 99 US 130 (1878); Hanging-Ex parte Medley, 134 US 160, 10 S. Ct. 384, 33 L. Ed. 835 (1889); Electrocution-McElvaine v. Brush, 142 US 155, 12 S. Ct. 156, 35 L. Ed. 971 (1891); In re Kemmler, 136 US 436, 10 S. Ct. 930, 34 L. Ed.
971 (1890); Storth v. Mass., 183 US 138, 22 S. Ct. 72, 46 L. Ed. 120 (1901); People v. Caughey, 246 US 880, 74 S. Ct. 120, 98 L. Ed. 387. These early cases showed the reluctance of the Court to deal with the death penalty as a violation of the cruel and unusual punishment because they did deal only with a particular method of execution, not the actual infliction of the penalty.

The Court dealt with the death penalty in dictum in several cases that dealt with other aspects of the cruel and unusual clause. In Weems v. United States, 217 US 349, 30 S. Ct. 544 (1910), there was discussion of the death penalty in the majority opinion delivered by Mr. Justice McKenna. In that instance, the Court was of the opinion that death did not violate the 8th amendment because it had been an acceptable practice of society. They held that since the Court had not overturned the death penalty, it was constitutional. In Trop v. Dulles, 356 US 86, 189 S. Ct. 590 (1959), a case in which petitioner had lost his citizenship because he had been convicted by the military tribunal of desertion. The case was brought forth on the grounds of cruel and unusual punishment. In the majority opinion delivered by the Chief Justice Warren, the Court said at 507:

At the outset let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment both on moral grounds and in terms of accomplishing the purposes of punishment-and they are forceful-the death penalty has been employed throughout history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.
It was this basic feeling of the Court which kept them from dealing with the death penalty because they felt that they had no reason to. Soon, however, cases would come before the Court which would deal with the death penalty as a cruel and unusual punishment. These cases would set the trend for a re-examination of the meaning of cruel and unusual in a light that was different from that of the historic conception of the meaning as brought forth in Weems.

The 1960's and '70's were a time when the Court dealt with many issues concerning civil and criminal rights. The Court became an arena for minorities who had little political power to fight for their rights and to fight legislation which they felt was discriminatory toward them. The Court became somewhat liberal in its interpretations of state and national legislation. The rights of blacks, women, criminals; issues of busing, abortion, pollution and other cases of this nature were argued before the Court. It is in this context that the Court really began dealing with the infliction of the death penalty under the eighth amendment.

In 1971, the Court heard the case of McGautha v. California, 402 US 183, 91 S. Ct. 1454. In this case, the petitioner was convicted of first degree murder in California and sentenced to death. The penalty was left up to the jury's discretion and punishment was determined in a separate procedure following the trial. The petitioner contended that the jury's total discretion as to sentence imposed was a violation of the 8th and 14th amendments' bans on cruel and
unusual punishments. This was the first case that the Court had dealt with which expanded the interpretation (or rather, tried to expand) of the cruel and unusual ban to include the discretionary and capricious manner in which juries were allowed to impose the death penalty without any type of guideline.

In this instance, the Court upheld the constitutionality of this type of sentencing procedure on the basis that it was beyond the limits of the Court to try and set up standards by which the death penalty could be imposed and that it was basically a legislative function to do so. The Court went into a brief history of the death penalty and its use but did not rule on the use of death per se, only upon the jury procedure as used to sentence McCautha. In the majority opinion delivered by Mr. Justice Harlan, the Court held at 1466:

Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal in language which can be fairly understood and applied by the sentencing authority appear to be tasks which are beyond present human ability.

The Court clearly stated that it felt that there was no way to eliminate the discretionary nature of sentencing procedures were somthing that the Court would do nothing about and which were also not unconstitutional. Again Justice Harlan in McCautha at 1467:

In light of history and experience, and the present limitations of human knowledge we find it quite impossible to say that committing to the untrammeled
discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.

Justices Douglas, Brennan, and Marshall dissented on the grounds that not allowing McGautha to testify or have his character taken into account during the sentencing procedure was violative of the due process.

Although it seemed as though this case and the holding of the Court in it would end for a time the argument against death penalties as discretionary, the same year that McGautha was decided, the landmark case of Furman v. Georgia was certiorari.

Furman v. Georgia (Jackson, Georgia Branch v. Texas) 408 US 238, 92 S. Ct. 2726 (1972), was the second case that the Court examined as to the constitutionality of discretionary sentencing procedures. This was basically the same type of question that had been dealt with in the McGautha case. Indeed, as will be pointed out later, the dissent in Furman could not understand why the Court would again deal with this question of discretion and come up with a different ruling in less than one year.

Furman was convicted of murder while Branch and Jackson were convicted of rape. All three were sentenced to death under statutes which allowed total discretion on the part of the jury as to whether or not the death penalty would be imposed. There was another important characteristic of all three of these men which had a bearing on the case. All three were black. This brought the element of discrimination
into the case as well as discretion. The outcome of the case could be viewed as another of the Court's rulings in the area of civil rights.

None of the concurring Justices joined in the opinions of the others. Each Justice in the majority filed his own opinion and approached the question before the Court in a different manner. The opinions were very interesting and bear some looking at.

Justice Douglas' opinion states that the statutes which allow untrammeled jury discretion aids in the practice of discrimination. In Furman at 2734-2735 he states:

In a nation committed to equal protection of the laws there is no permissible "caste" aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.

He then goes into a discussion of the "cruel and unusual" clause of the eighth amendment as he feels that it applies in this instance. Furman at 2735:

The high service rendered by the "cruel and unusual" punishment clause of the eighth amendment is to require legislatures to write penal laws that are even-handed, non-selective, and non-arbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively and spottily to unpopular groups.

He goes on to say that statutes which allow jury discretion are "pregnant with discrimination," and therefore, violative of the equal protection implicit in the cruel and unusual
ban of the eighth amendment. Douglas does make sure to point out that he believes that the death penalty per se is unconstitutional. He states in Furman at 2736:

Any law which is non-discriminatory on its face may be applied in such a way as to violate the Equal Protection clause of the Fourteenth Amendment. Such conceivably might be the fate of a mandatory death penalty, where equal or lesser sentences were imposed on the elite, a harsher one on the minorities or members of the lower castes. Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach.

Justice Douglas, therefore, based his argument on the discriminatory/discretionary sentencing procedures as applied to the petitioners.

Justice Brennan went in a different direction. He viewed the death penalty as too arbitrarily used. He stated in Furman at 2754:

When the punishment of death is inflicted in a number of the cases in which it is, legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system.

Brennan then questions the use of the death penalty in any instance. He felt that:

The progressive decline in and the current rarity of the infliction of death demonstrate that our society seriously questions the appropriateness of this punishment today. When an unusually severe punishment is authorized for wide-scale application but not because of society refusal, inflicted save in a few instances, the inference is compelling that there is a deep-seated reluctance to inflict it. Indeed, the likelihood is great that the punishment is tolerated only because of its disuse. At the very least, I must conclude that contemporary society views this punishment with substantial doubt. (Furman at 2757)
Brennan viewed the death penalty as unconstitutional per se because of its disuse; it had become an unusual punishment and death was certainly cruel. This was almost a moral stance relying little on even fabricated legalistic arguments, but still reaching the conclusion that the death penalty was unconstitutional.

Justice Steward also concluded that these discretionary statutes were too arbitrary and therefore unconstitutional. He states in Furman at 2762:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners, are among the capriciously selected random handful upon whom the sentence of death has in fact been imposed.

At 2763:

I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so warrantly and freakishly imposed.

Justice White approached the question in the sense that it was no longer a meaningful retribution or deterrent to crime. In Furman at 2764:

The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment that it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment. It is my view that it would, for its imposition would then be the pointless and needless extinction of life with only marginal contributions
to any discernable social or public purpose. A penalty with such negatable returns to the state would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment. It is also my opinion that this point has been reached with respect to capital punishment as it is presently administered under the statutes involved in this case.

Justice Marshall gave a prolonged opinion regarding capital punishment which included histories, statistics, and charts. His conclusion was in Furman at 2793:

Assuming knowledge of all of the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice. For this reason alone, capital punishment cannot stand.

It can be seen through all of the above opinions that the Justices had several methods of arriving at the same conclusion. The dissent in Furman noted this and was very skeptical of the decision. Each dissenting Justice also filed his own opinion although they did join in each other's opinions. Chief Justice Burger stated in Furman at 2811-12:

The five opinions in support of the judgements differ in many respects, but they share a willingness to make sweeping factual assertions, unsupported by empirical data concerning the manner of imposition and effectiveness of capital punishment in this country. Legislatures will have the opportunity to make a more penetrating study of these claims with the familiar and effective tools available to them as they are not to us.

Burger also made comment concerning the decision as being influenced by pressure from outside the Court. At 2812:

The highest judicial duty is to recognize the limits on judicial power and to permit the democratic process to deal with matters falling outside of those limits. The "hydraulic pressures" that
Holmes spoke of as being generated by cases of great import have propelled the Court to go beyond its limits of judicial power, while fortunately leaving some room for legislative judgment.

The other dissenting Justices carried forth the same feelings in their opinions that the Court had gone beyond its judicial function into a legislative one. However, the power of the Court to make such decisions had been ruled upon by the Court itself.

In Weems v. United States, the Court held that it had the right to rule on legislation which it might find to be unconstitutional. In Weems, at 553-554, Justice McKenna said:

We disclaim the right to assert a judgment against that of the legislature of the expediency of the laws nor the right to oppose the judicial power to the legislative power to define crimes and fix their punishment unless that power encounters in its exercise a constitutional prohibition. In such a case, not our discretion but our legal duty, strictly defined and imperative in its direction is involved. There the legislative power is brought to the judgment of a power superior to it for the instant.

In United States v. Carolene Products Co., 304 US 144, 58 S. Ct. 778 (1938), the Court held that it had the power to examine legislation as to its constitutionality as that was a proper exercise of judicial power. The Weems and Carolene arguments would seem to justify the decision in Furman as a proper exercise of judicial review, and that it did not overstep its bounds.

However, in Weems, the Court also held at 554 that:
There is a certain subordination of the judiciary to the legislature. The function of the legislature is primarily, its exercise, fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by a judicial conception of its wisdom or property. They have not limitations, we repeat, but constitutional ones, and what those are the judiciary must judge. We have expressed these elementary truths to avoid the misreprehension that we do not recognize to the fullest the wide range of power that the legislature possesses to adopt penal laws to conditions as they may exist, and punish crimes of men according to their forms and frequency.

This, along with the decisions of Trop and McGuatha, would seem to negate the power of the Court to reach its decision in Furman and, instead, these would appear to bolster the dissent in Furman. However, Furman did stand and many state legislatures were forced to rewrite their death statutes to come into line with Furman.

The decision in Furman seemed to impose certain requirements as to the imposition of the death penalty. These included requiring the penalty-fixer to consider the aggravating circumstances of a particular crime, the mitigating circumstances surrounding the crime and the accused, a broader form of appeal and elimination of the discretionary nature of such statutes. After states had rewritten their statutes, test cases were brought before the Court to determine whether or not the states had enacted legislation that would stand in the light of Furman.

Gregg v. Georgia, 96 S. Ct. 2909, Jurek v. Texas, 96 S. Ct. 2950, and Proffit v. Florida, 96 S. Ct. 2960, all 1976 cases, were upheld by the Court as constitutional.
Each state had enacted legislation which called for the penalty-fixer to take into account the aggravating and mitigating circumstances of a crime and the convicted before the sentence of death could be imposed. Each state had statutory guidelines which had to be met and all called for automatic appeal to consider whether or not the sentences had been properly imposed. Justices Brennan and Marshall dissented in these cases because of their opinions in *Furman* which called for total abolition of the death penalty.

*Woodson v. North Carolina*, 96 S. Ct. 2978, and *Roberts v. Louisiana*, 96 S. Ct. 3001, both 1976 cases, were overturned by the Court. Both states in this instance had enacted mandatory death penalties for persons convicted of certain crimes. This was thought to eliminate the arbitrariness of the death penalty, but the Court held that a mandatory death statute was unconstitutional because it did not take into account the aggravating and mitigating circumstances before imposing the death penalty. In both cases, the dissent felt that this was wrong because the Court in *Furman* had wanted to eliminate discretion and these mandatory sentences did.

The Court has further expounded upon the sentencing procedures in *Gardner v. Florida*, 96 S. Ct. 1197 (1976). In this case, the trial court judge, relying in part on a pre-sentence investigation that he had ordered and portions of which were not disclosed or requested by counsel for either party, overruled the sentencing jury's imposition of life imprisonment, and imposed death because he felt that
this was a denial of due process because the petitioner had no opportunity to deny or explain the information contained in the investigation. The most interesting aspect of the case was that Justices Brennan and Marshall dissented because of their contentions that the death penalty per se was unconstitutional. This is consistent with their opinions in other death penalty cases.

The United States Supreme Court has in recent times become an arena for minorities who have little "political clout" as Justice Douglas pointed out in Furman. In this arena, black civil rights, busing, abortion, etc., would seem to be more social and moral issues rather than constitutional ones. The Court had seemingly taken the side of the "underdogs" of society, and has made decisions which protect these underdogs. This may seem morally right, but to do so in the guise of constitutionality is somewhat perplexing.

The Court has done something else that is somewhat disturbing: it has taken the sentencing powers of state legislatures and curtailed them. In another of the Court's strivings for uniformity, it has diminished the rights of states to be self-determining. These new death penalty cases (Furman, Gregg, Jurek, etc.) show that state legislatures will never really know if their legislation is valid without a test case before the Court. This will undoubtably lead to a great influx of cases to the Court which will overburden
it. Since no clear-cut decision on the death penalty was ever given, the Court, in its ambiguity, has left itself open for such cases.

The Court has done what it has done many times in the past: it has sought an end and it has achieved it. Enough Justices were against the death penalty so that the Court could, in a manner, strike it down and then figure out how to explain why it did so. The decision in Furman was not at all consistent with earlier Court decisions on the death penalty.

The Court has once again put itself in the position of "champion" and thus, exceeded the true exercise of its judicial function in this writer's opinion. Perhaps someday in the near future the Court will realize that variety in the part of state legislature is the spice that makes the United States such an interesting place to live. If one does not like the laws of one state, one is free to move to a state whose laws accommodate one's personal philosophy. After all, people are not all the same, so why should every state be.

Since 1972, the death penalty has been imposed in a case.
FOOTNOTES


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