David M. Oshinsky

Capital Punishment on Trial

Furman v. Georgia and the Death Penalty in Modern America

DAVID M. OSHINSKY

Capital Punishment on Trial

Furman v. Georgia and the Death Penalty in Modern America

UNIVERSITY PRESS OF KANSAS

Published by the University Press of Kansas (Lawrence, Kansas 66045), which was organized by the Kansas Board of Regents and is operated and funded by Emporia State University, Fort Hays State University, Kansas State University, Pittsburg State University, the University of Kansas, and Wichita State University

Library of Congress Cataloging-in-Publication Data

Oshinsky, David M., 1944–
Capital punishment on trial : Furman v. Georgia and the death penalty in modern America / David M. Oshinsky.
p. cm. – (Landmark law cases & American society)
Includes bibliographical references and index.
ISBN 978-0-7006-1710-4 (cloth : alk. paper)
ISBN 978-0-7006-1711-1 (pbk. : alk. paper)
1. Capital punishment--United States. I. Title.
KF9227.C2O83 2010
345.73'0773--dc22
2010001936

British Library Cataloguing-in-Publication Data is available.

Printed in the United States of America

10 9 8 7 6 5 4 3 2 1

The paper used in this publication is recycled and contains 30 percent postconsumer waste. It is acid free and meets the minimum requirements of the American National Standard for Permanence of Paper for Printed Library Materials Z39.48-1992.

Capital Punishment on Trial

LANDMARK LAW CASES

&

AMERICAN SOCIETY

Peter Charles Hoffer
N. E. H. Hull
Series Editors

RECENT TITLES IN THE SERIES:

Murder in Mississippi, Howard Ball
Sexual Harassment and the Law, Augustus B. Cochran III
The DeShaney Case, Lynne Curry
Brown v. Board of Education, Robert M. Cottrol, Raymond T. Diamond, and Leland B. Ware
The Battle over School Prayer, Bruce J. Dierenfield
Nazi Saboteurs on Trial, Louis Fisher
Little Rock on Trial: Cooper v. Aaron *and School Desegregation*, Tony A. Freyer
One Man Out: Curt Flood versus Baseball, Robert M. Goldman
The Great New York Conspiracy of 1741, Peter Charles Hoffer
The Treason Trials of Aaron Burr, Peter Charles Hoffer
Griswold v. Connecticut, John W. Johnson
M'Culloch v. Maryland: *Securing a Nation*, Mark R. Killenbeck
The Slaughterhouse Cases, Abridged Edition, Ronald M. Labbé and Jonathan Lurie
Mapp v. Ohio, Carolyn N. Long
Dred Scott *and the Politics of Slavery*, Earl M. Maltz
The Snail Darter Case, Kenneth M. Murchison
Animal Sacrifice and Religious Freedom, David M. O'Brien
The Michigan Affirmative Action Cases, Barbara A. Perry
The Sodomy Cases: Bowers v. Hardwick *and* Lawrence v. Texas, David A. J. Richards
The Insular Cases *and the Emergence of American Empire*, Bartholomew H. Sparrow
San Antonio v. Rodriguez *and the Pursuit of Equal Education*, Paul Sracic
The Confederacy on Trial, Mark A. Weitz
The Times and Trials of Anne Hutchinson, Michael P. Winship
The Miracle *Case: Film Censorship and the Supreme Court*, Laura Wittern-Keller and Raymond J. Haberski, Jr.
The Zoning of America: Euclid v. Ambler, Michael Allan Wolf
The Battle for the Black Ballot, Charles L. Zelden

For a complete list of titles in the series go to www.kansaspress.ku.edu

For my friend Jack S. Blanton: his decency, dignity,
and generosity are a model for us all.

In the American system of federalism, criminal law, including punishment for crimes, is traditionally a matter of state legislative and judicial action. The result has been a messy pattern of law enforcement and criminal litigation. In no area of law is this more confusing or poignant than in capital punishment. For not only is capital punishment the harshest penalty that the state can impose, it is irreversible.

One would like to see rationality in the justification for this punishment and fairness in its imposition, but often the very opposite prevails. For example, in some states, until recently, rape was a capital offense. In others, it was not. More bewildering still were the multiple ways in which state legislatures and courts decided which defendants would suffer death for their crimes and which would not.

Adding a sinister complication was the clear pattern of regional and racial prejudice in the distribution of executions. If the victim of the offense was black, judges rarely ordered the defendant executed. If the victim was white, particularly when the defendant was black, the death penalty was far more certain. That this pattern was most pronounced in the southern and southwestern states of the old confederacy raised the logical presumption of racial animus in the law.

None of this was unknown to the justices of the U.S. Supreme Court who heard *Furman v. Georgia* or to scholars, jurists, and journalists who have included the case in their studies of capital punishment. In it, an African American man's allegedly accidental killing of a householder during a burglary in Georgia led the High Court to demand states think harder about their capital laws. The result, however, was a jumble of inconsistencies. Some states decided to drop the death penalty entirely. Others pursued it with renewed vigor.

Pulitzer Prize–winning historian David Oshinsky brings to this tale a remarkable gift for empathy and an eye for the telling anecdote. In his sure-handed account, the confused and complex legal issues surrounding capital punishment are made clear. As Oshinsky convincingly demonstrates, the key questions did not end with *Furman*. Indeed, they continue to perplex the Court. In a coda to the case, he revisits the ongoing question of the execution of defendants whose

insanity, youth, and mental deficiency impair their ability to understand the nature of their acts and the relation between the punishment and the crime. Oshinsky's own views are not hidden from the caring reader, but his account is a model of neutral and nuanced legal history.

ACKNOWLEDGMENTS

I begin by thanking Peter Hoffer, who suggested that I do the *Furman* case and its wider implications for this series. His enthusiasm for this manuscript and his careful eye as a reader and critic are deeply appreciated. At the University Press of Kansas, Mike Briggs, a man of extraordinary talent, showed me far more patience than I deserved. I cannot thank him enough for his good sense and professionalism in this endeavor. Larisa Martin moved the manuscript through production with great skill and efficiency. I must acknowledge my friend Scot Powe, a distinguished constitutional historian at the University of Texas School of Law, for his invaluable advice on legal issues and for his eagle eye in vetting the manuscript. And I owe a debt to the members of the New York University Legal History Colloquium, especially Bill Nelson, Dan Hulsebosch, and Richard Bernstein, who helped shape my thinking at an early stage in this project.

I also would like to acknowledge the vital assistance of the Blanton family and the Jacob K. Javits Foundation. I am honored to be associated with both. And finally, a truly special thanks to my wife, Jane Oshinsky, my loving partner, toughest critic, and closest friend.

Capital Punishment on Trial

CONTENTS

CHAPTER 1

"I Didn't Intend to Kill Nobody"

It began with a burglary gone sour. In the early morning hours of August 11, 1967, William Micke, a twenty-nine-year-old Coast Guard machinist, was awakened by a thumping noise in the hallway of his Savannah, Georgia, home. The sound was familiar; his stepson, Jimmy, was known to wander in his sleep. As Micke headed down the hallway, calling out Jimmy's name, he spotted the silhouette of a man kneeling in the kitchen. Micke rushed at the intruder – and a cracking sound pierced the air. Alarmed, his wife, Lanell, herded the children into her bedroom and frantically phoned the police. When a squad car arrived a few minutes later, William Micke lay dead on the floor, a single bullet lodged in his chest.

William Henry Furman had never met the man he just killed. A sixth-grade dropout, functionally illiterate, and prone to epileptic seizures, Furman, twenty-four, had been in and out of trouble most of his life. Convicted four times for the crime of burglary, he was currently on parole. That fateful evening, he had been drinking at a local club, Ruby's Two Spot, before deciding to rob a house. All he wanted, he said later, was "to pick up a radio or two." Furman, an African American, had traveled by foot to an all-white neighborhood; he chose the Micke house, a modest structure, because it seemed an easy touch. The evening was wet, and Furman had left a perfect set of tracks leading directly to his uncle's home, where he was found hiding under the front porch, a .22 caliber pistol in his pocket. At the police station, Furman gave an oral statement admitting that he had broken into the Micke home and fired a single shot into the darkness before running away. He seemed stunned to learn that the homeowner was dead.

Furman was charged with felony murder, a capital crime in which the intent to kill does not have to be proved. Examples might be a victim who dies during a sexual assault, a store clerk who is shot to death

during an armed robbery, or a child who suffocates in a kidnapping attempt. Since Furman could not afford a lawyer, the court provided one. Such attorneys often lack the resources, incentive, and expertise to mount even a modest legal defense. Furman was fortunate; his lawyer, Bobby Mayfield, would fight tenaciously to save his life.

Mayfield, one of a handful of black attorneys in Savannah, was deeply involved in the civil rights movement then gripping that city and the larger South. Defending a man like Furman, he believed, was more important, in terms of social justice, than the more lucrative cases that kept his small law firm afloat. Mayfield strongly opposed the death penalty, viewing it as a punishment reserved for society's outcasts, especially poor blacks. But what, exactly, could be done? Furman had admitted to breaking and entering, and the gun in his pocket had been shown to be the one used in the shooting. This was a textbook case of felony murder, compounded by the fact that Furman, a career criminal, was out on parole.

Worse still was the racial dynamic. "It was black on white. A black man killed a white man," Mayfield recalled. "That did it. A white judge, a white jury—they wouldn't need to know anything else when they heard black on white. The black man was done for."

This was no exaggeration. At the time of Furman's arrest, blacks constituted 27 percent of Georgia's population, but more than 80 percent of its death row inmates. In the previous three decades, 340 of the 421 convicts executed in Georgia were African American. Furthermore, unlike a case in which a black killed another black, an African American convicted of interracial murder faced the virtual certainty of a death sentence. No local prosecutor would dare to plea bargain such a crime, and no judge seemed likely to accept one.

Mayfield responded with a flurry of pretrial motions. One called for a psychiatric examination of his client. Insanity defenses are rarely used because they almost never work. Studies have shown a success rate of two per every thousand felony cases. The three doctors selected by the state to examine Furman found him to have a "mental deficiency, mild to moderate," but agreed that he understood right from wrong and was capable of cooperating in his own defense. Mayfield demanded the right to examine the prosecution's files; claimed that his paltry fee of $150 for defending Furman made it impossible to wage an effective defense; charged that his client had not been fully

informed of his right to remain silent or to have an attorney present when questioned by the police; and cited the racial imbalance of the grand jury that had indicted Furman for felony murder (all twenty-three members were white). Each motion was denied, as Mayfield had expected. He was carefully planting the seeds for an appeal.

The trial took less than a day. That included the selection of a jury comprised of eleven whites and one black. A series of witnesses testified briefly for the prosecution: the detectives summoned to the Micke home, the officers who had captured Furman, and Lanell Micke, whose life had been shattered by her husband's violent death. (For years afterward, in several cities, she would place desperate phone calls to the police claiming an intruder was breaking down her door.) Mayfield called no witnesses. He feared an obvious backlash if the jury heard too much about Furman's criminal past, and he wasn't about to allow the prosecution to cross-examine his easily flustered client.

At Mayfield's request, the judge did permit Furman to make an "unsworn statement" to the jury. In a barely audible voice, Furman offered a version of events quite different from the one he supposedly gave to the police following his capture. He now claimed that his gun had discharged accidentally when he tripped on an electrical wire and fell backward trying to get away. "I didn't intend to kill nobody," he said. "I didn't know nothing about no murder until they arrested me, and when the gun went off I was down on the floor and I got up and ran. That's all [there is] to it."

The Furman case mirrored the sort of problems that plagued death penalty trials throughout the nation. Some states defined felony murder as a capital offense; others did not. Some states used a single trial to determine guilt or innocence and – if necessary – the punishment as well. Other states used a two-phase model, which allowed the defendant to provide the kind of mitigating factors in the penalty phase – a drug or alcohol addiction, a mental deficiency, a history of family violence – that could be held against him in the guilt or innocence phase. Some states provided for the mandatory review of each death sentence by the State Supreme Court to insure fairness and uniformity; others did not. Some states offered modest guidance to the jury regarding the life-and-death decision they were about to make. Not so in Georgia. The judge in Furman's case simply listed three sentencing options: the jury could find the defendant guilty, which would

send him to Georgia's electric chair; it could find him guilty but recommend mercy, which would mean a life sentence with the possibility for parole; or it could find him not guilty.

The jurors understood that Furman's description of the shooting, even if true, fell within the liberal parameters of felony murder. But their discomfort was clear. Following a half hour of deliberation, the foreman sent a note to the judge asking whether it would be possible for the court—not the jury—to mete out Furman's punishment if he were found guilty. The judge said no: that determination belonged to the jury alone. He did repeat, however, that while murder in Georgia must be committed with "malice aforethought," meaning the intention to do harm, such malice could be implied or indirect, as when a robber carried a deadly weapon that he might have to use. An hour later, the jurors returned a verdict of guilty with no recommendation for mercy. The judge set a date—November 8, 1968—for the defendant to "be put to death by electrocution in the manner provided by law."

The sentence of death imposed upon William Henry Furman and thousands more has had a long and troubled history in the United States and the American colonies that preceded it. Though the record is sparse, the first person to be executed on these shores appears to have been Captain James Kendall, a prominent counselor and militiaman of the Jamestown, Virginia, settlement, in 1608. Supposedly, Kendall was hanged for "heinous conduct," thought to be treason. He very likely was a spy in the service of Spain, placed in Virginia to report on British attempts to colonize the New World. Recently, archaeologists digging near the walls of Jamestown discovered a body tucked inside a coffin, believed to be Kendall's, riddled with musket fire. Either by hanging from a tree branch or at the hands of a primitive firing squad, George Kendall began the time line of capital punishment that lasts to this day.

In colonial times, the death penalty was rarely criticized and widely used. England's criminal code, the harshest in Europe in the seventeenth and eighteenth centuries, listed literally hundreds of capital crimes. Most involved specific local offenses, such as cutting down a tree in one county or stealing a rabbit in another. Tens of thousands

were executed in England for murder, for arson, and especially for property crimes. The American colonial assemblies modified these so-called "bloody codes" to suit their local needs. In Massachusetts, where religion had played a key role in settlement, crimes like blasphemy, witchcraft, sodomy, adultery, and incest became capital offenses, though juries sometimes hesitated to convict. In Virginia, where religion was less compelling and slavery prevailed, the death penalty emphasized property crimes along with a separate code for slaves. In Pennsylvania, where Quaker sentiment against capital punishment was strong, the legislature made murder alone a capital crime until England intervened to add additional offenses.

As scholars have noted, the death penalty's legitimacy rested on three well-defined principles: deterrence, penitence, retribution. A serious crime demanded a serious rebuke. The punishment must be a lesson to the larger community—"an Example and Warning," in the words of one colonial newspaper, "to prevent others from those Courses that lead to so fatal and ignominious a Conclusion." It must strike fear into the hearts of future criminals while holding the present one responsible for his crime. How could society better express its revulsion against the most serious breaches of behavior than by taking the life of the offender? And how else could the offender better prepare for his justly deserved death than by repenting publicly for his sins? Capital punishment "fulfilled the moral expectations of colonial Americans most of the time," wrote the historian Louis Masur, "and that was enough to make it the standard penalty for all serious crimes. Hardly anyone suggested that it be used more sparingly, much less that it be abandoned."

The popularity of capital punishment had another explanation as well: the absence of penitentiaries. Lacking a prison system, authorities saw few alternatives in dealing with murderers, armed robbers, arsonists, forgers, horse thieves, and moral deviants. For a petty theft, the offender might be whipped on his bare back or branded on the face with the letter "T." For a crime of mayhem, such as drunkenness or fighting, the culprit might pay a fine or stand in the stocks for several hours. But the options were limited. To preserve the moral and social order, the death penalty was essential.

The success of capital punishment demanded not only numerous executions, but also public ones, locally staged, and liberally attended.

Thus a hanging in Boston or Richmond, or in a farm field in rural Delaware or North Carolina, was a massive spectacle in colonial times drawing the largest crowds, by far, of any public event. Held within days or weeks of the trial itself, the execution took on deeply ritualistic qualities, serving as both a warning to the assembled throng about the consequences of wrongdoing and a powerful display of civic and religious authority. A typical execution in that era might include the prisoner riding atop his coffin in the wagon leading to the gallows, the reading of his death warrant, hymns sung by a church choir, a short sermon about the human potential for evil, a few words from the prisoner himself warning others not to follow his path, and, finally, the drop of the trap door that "launched the condemned into eternity."

By the mid-1700s, scattered voices of protest were heard. The work of Enlightenment philosophers, widely circulated in the colonies, contained a critique of criminal justice that included the death penalty. From France, Charles Louis de Montesquieu argued for the proportionality of punishment; a just society must be ruled by reason, not by terror, he wrote in *The Spirit of Laws* (1748). One did not treat a murderer the same way one treated a thief. From Italy, Cesare Beccaria expanded this line of thinking. Effective punishment must be prompt, proportional, and certain, he explained in his *Essay on Crimes and Punishments* (1764). "The evil it inflicts has only to exceed the advantage derivable from the crime. . . . All beyond this is superfluous and for that reason tyrannical." Beccaria meant the death penalty, in particular. "It seems to me absurd that the laws, which are an expression of the public will, which detest and punish homicide, should themselves commit it," he said, "and that to deter citizens from murder they order a public one."

The American Revolution added legitimacy to these ideas. The British, after all, had threatened to hang the rebellious colonial leaders, making the death penalty seem every bit as tyrannical as Beccaria had described. Though most Americans still endorsed the practice – George Washington, for example, saw it as an essential disciplinary measure – some envisioned a society with a carefully limited death penalty, or none at all, a list that included Benjamin Franklin, Thomas Jefferson, and Benjamin Rush, the country's most distinguished physician. "Capital punishments are the offspring of monarchical governments," Rush declared. "Kings believe that they