Most Deserving of Death?

An Analysis of the Supreme Court's Death Penalty Jurisprudence

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MOST DESERVING OF DEATH?

The role of capital punishment in America has been criticised by those for and against the death penalty, by the judiciary, academics, the media and by prison personnel. This book demonstrates that it is the inconsistent and often incoherent jurisprudence of the United States Supreme Court which accounts for a system so lacking in public confidence. Using case studies, Kenneth Williams examines issues such as jury selection, ineffective assistance of counsel, the role of race and claims of innocence which affect the Court's decisions and how these decisions are played out in the lower courts, often an inmate's last recourse before execution. Discussing international treaties and their lack of impact on capital punishment in America, this book has international appeal and makes an important contribution to legal scholarship. It also provides a unique understanding of the dynamics of an alarmingly problematic system and will be valuable to those interested in human rights and criminal justice.

List of Tables

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Contents

Introduction

The death penalty continues to be one of the most divisive issues in the United States. Past disputes, such as slavery and racial segregation, have been largely resolved. Yet, the debate over capital punishment persists. Proponents and opponents of capital punishment disagree over whether it is just, whether it deters, whether it is racist, and just about every other issue associated with the death penalty. Even the Bible is inconclusive on the question of capital punishment; both sides regularly cite its passages in making their cases. Both sides, however, seem to have reached a consensus about one thing: the system is broken.

Opponents have argued for years that the arbitrariness and unfairness of the death penalty alone are reasons why it should be abolished. They have been joined in their criticisms more recently by proponents of the death penalty. New Mexico Governor Bill Richardson, a supporter of capital punishment, decided to sign a bill repealing the death penalty in his state. According to Richardson, he did so because he came to the conclusion that "regardless of my personal opinion about the death penalty, I do not have confidence in the criminal justice system as it currently operates to be the final arbiter when it comes to who lives and who dies for their crimes."[1] Another proponent, Governor Pat Quinn of Illinois, signed into law his state's repeal of capital punishment. During most of Justice Harry Blackmun's tenure on the United States Supreme Court, he consistently voted to uphold the death penalty because he believed that "on their face, [the] goals of fairness, reasonable consistency, and absence of error appear to be attainable."[2] Prior to leaving the Court, however, Justice Blackmun announced that he felt "morally and intellectually obligated simply to concede that the death penalty experiment has failed."[3] Justice Blackmun found that despite efforts to make the system work, the death penalty "remains fraught with arbitrariness, discrimination and caprice, and mistake"[4] and that "the basic question – does the system accurately and consistently determine which defendants 'deserve' to die cannot be answered in the affirmative."[5] Former Illinois Governor George Ryan, also a supporter of capital punishment, commuted the death sentences of every death row inmate

1 Governor Bill Richardson Signs Repeal of the Death Penalty, available at http://www.deathpenaltyinfo.org/documents/richardonstatement.pdf.

2 *Callins v. Collins*, 510 U.S. 1141, 1144 (1994) (Bluckmun, J., dissenting).

3 *Id.* at 1145.

4 *Id.* at 1144.

5 *Id.* at 1145.

while he was governor and also imposed a moratorium on executions.[6] He did so as a result of the fact that his state had wrongly convicted and sentenced to death more inmates than it had executed.[7] Conservative activist Richard Viguerie believes that his fellow conservatives should oppose capital punishment because "conservatives have every reason to believe that the death penalty system is no different from any politicized, costly, inefficient, bureaucratic, government run operation, which we conservatives know are rife with injustice."[8] Other prominent conservatives, such as George Will and Pat Robertson, have also been critical of the system. Because of the flaws in the administration of the death penalty – the mistakes that can lead to the execution of innocent people – George Will has concluded that "the ultimate punishment makes reason ... ultimately turn away."[9] Pat Robertson indicated that he favored a moratorium on executions because "we cannot have a culture that discriminates against African-Americans and the poor, and that's what's happening."[10]

The American criminal justice system is acknowledged as a model for criminal procedure worldwide. The death penalty, however, is one of the system's biggest flaws. How did we end up with a system that both supporters and opponents of the death penalty would agree has become dysfunctional? It is the thesis of this book that the United States Supreme Court, through its inconsistent and often incoherent jurisprudence, bears primary responsibility. This may seem to be an unfair accusation in light of the fact that the Court has spent an enormous amount of time on the death penalty over the past four decades. The Court began to regulate the death penalty in 1972 with its decision in *Furman v. Georgia.* Although the Court later upheld the death penalty against constitutional attack in its 1976 *Gregg v. Georgia* decision, the Court signaled that it would continue to regulate the process. Thus began the modern era of attempting to identify those offenders "most deserving of death."[11]

In its endeavor to limit the death penalty to the worst offenders, the Court began by limiting the crimes punishable by death. The Court immediately outlawed the death penalty for rapists and in doing so signaled that it would allow only murderers to be executed.[12] The Court later indicated that even someone who rapes a child does not deserve to die.[13] The Court also limited the class of individuals who can

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6 See R. Warden, *Illinois Death Penalty Reform*, 95 J. Crim. L. & Criminology 381, 382, and n. 6 (2005).

7 *Id.*

8 R. Viguerie, When Governments Kill, available at http://www.sojo.net/index.cfm?action=magazine.article&issue=soj0907&article=whengovernments-kill.

9 G. Will, The Ultimate Punishment, available at http://townhall.com/columnists/GeorgeWill/2003/10/30/the_ultimate_punishment.

10 Transcript William & Mary Speech on the Role of Religion and the Death Penalty, available at http://www.deathpenaltyinfo.org/PRobertsonWMSpeech.pdf.

11 See *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

12 See *Coker v. Georgia*, 433 U.S. 584 (1977).

13 See *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008).

be executed. The Court has held that the deterrent and retributive functions of the death penalty are not properly served by the execution of juveniles,[14] individuals who are mentally retarded,[15] and those who become insane as a result of their long, solitary confinement.[16] Because "death is different" the Court has also adopted procedures unique to capital cases. For instance, defendants in capital cases are allowed to seek mercy from the sentencer and, as a result, have the right to present "as a mitigating factor, any aspect of a defendant's character or record or any circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[17]

The purpose of this book is not to make the case for or against abolition. Rather, the book is written to provide the reader with a better understanding of the death penalty: when it is sought, why it is sought, and to understand some of the problems that have been encountered in carrying it out. A further goal of the book is to outline and critique the Supreme Court's role in the system: how it has alleviated some problems but exacerbated others. The foremost goal of the book is to determine whether the Supreme Court has achieved its goal of reserving the death penalty for the worse offenders – those who are "most deserving of death."

14 See *Roper v. Simmons*, 543 U.S. 551 (2005).
15 See *Atkins v. Virginia*, 536 U.S. 304 (2002).
16 See *Ford v. Wainwright*, 477 U.S. 399 (1986).
17 *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

Chapter 1
History of Capital Punishment in the United States

History of Capital Punishment

Societies have used death to punish criminals for their transgressions since the fifth century BC. The first formal death penalty laws were established in the eighteenth century BC, when the Code of King Hammurabi of Babylon codified the death penalty for 25 different crimes. Murder was the primary offense that subjected an individual to the death penalty but there were many others. Individuals were also sentenced to death for marrying a Jew, not confessing to a crime, treason, uttering blasphemy, cursing a parent, publishing libels and insulting songs, and making disturbances in the city at night. Executions were carried out by burning at the stake, hanging, beheading, boiling in oil, crucifying, drawing, quartering and disemboweling, and decapitation.

English common law recognized eight capital crimes: treason, petty treason (the killing of a husband by a wife), murder, larceny, robbery, burglary, rape, and arson. However, the number of capital crimes in Britain increased dramatically between the seventeenth and nineteenth centuries. By 1820, there were more than 200 capital crimes in Britain. In addition to the common law capital crimes, individuals could also be executed for many property crimes, such as theft of a pocket handkerchief, and forgery. The late nineteenth century saw a marked decline in crimes punishable by death, due largely to the refusal of British jurors to convict if the offense was not serious. After 1863, murder was the primary offense for which people were executed until England abolished the death penalty in 1965.

English settlers brought the common law, including the death penalty, with them when they came to America. The first recorded American execution occurred in 1608. Captain George Kendall was executed in the Jamestown colony of Virginia for being a spy for Spain. Death penalty laws varied considerably among the colonies. Massachusetts' capital crimes derived from the Bible: idolatry, witchcraft, blasphemy, murder, manslaughter, poisoning, bestiality, sodomy, adultery, man stealing, false witness in a capital trial, and rebellion. In contrast, Pennsylvania and South Jersey were settled by Quakers and they limited the death penalty to murder and treason. As the population of the colonies began to grow, they expanded the number of capital crimes as a means of maintaining public order.

The writing of Italian jurist Cesare Beccaria and others influenced the death penalty in the United States. Beccaria believed that the state had no justification

for taking human life, that the death penalty was a barbarity, and that it did not deter crime. These writings led to the creation of an abolitionist movement and significant reforms. For instance, Thomas Jefferson introduced legislation that would make only murder and treason capital crimes. Dr Benjamin Rush, a signatory of the Declaration of Independence, was also influenced and as a result launched the first movement to abolish capital punishment in the United States. He did not believe the death penalty to be a deterrent and that it actually increased criminal conduct. The most significant reform was the division of murder into degrees. This led some states to limit the death penalty to first degree murder. Another significant reform was providing juries with sentencing discretion. Southern states were first in enacting this reform, in all likelihood so that all-white jurors would have discretion to be lenient in sentencing white defendants.

The framers of the Constitution and the Bill of Rights did not prohibit capital punishment in 1791. In fact, many of the provisions seemed to endorse it. The Fifth Amendment provides that "no person shall be held to answer for a *capital*, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."[1] The Fifth Amendment further provides that no person can be "subject for the same offence to be twice put in jeopardy of *life*," and that no one can be "deprived of *life*" without due process of law. The only provision of the Bill of Rights that could arguably be interpreted as prohibiting capital punishment is the Eighth Amendment, which outlaws "cruel and unusual punishments."[2] However, such a reading would be inconsistent with the other provisions of the Bill of Rights which seem to clearly authorize capital punishment. Furthermore, capital punishment was widely practiced when the Constitution and Bill of Rights were written, and the fact that the framers did not specifically condemn capital punishment was not an oversight. The Eighth Amendment was understood at the time to prohibit some of the more egregious forms of executions such as burning at the stake and crucifixion. Following the Civil War, Congress enacted the Fourteenth Amendment in order to protect the newly freed slaves. This Congress was obviously aware of the fact that slaves were frequently executed. The Fourteenth Amendment, however, does not prohibit capital punishment, and in fact seems to endorse its continued use. Like the Fifth Amendment, the Fourteenth Amendment prohibits the states from depriving "any person of *life*, liberty, or property without due process of law."[3]

Capital punishment has always been more widely used in the south. Before the Civil War, it was used as a means of controlling the slave population. Many southern states explicitly punished a slave with death for committing certain offenses, while whites who committed the same offense were not punished nearly as harshly. Virginia, for instance, required the death penalty for any slave convicted of a crime punishable by three or more years' imprisonment for whites. In Georgia, the death penalty was required for a slave convicted of raping a white woman,

1 U.S. Const. amend. V.
2 U.S. Const. amend. VIII.
3 U.S. Const. amend. XIV.

whereas a white man convicted of raping a white female could be sentenced to prison for as little as two years. After the Civil War, the death penalty continued to be used to control black Americans. Blacks were not allowed to participate in the criminal justice system, except as defendants. As a result, blacks were often sentenced to death following perfunctory trials. Lynchings were also an extralegal means of keeping black people "in their place." State officials often participated in these lynchings, or at least turned a blind eye to them.

Supreme Court Regulation before 1972

There have been 14,489 legal executions in the United States between 1608 and 1972. Despite the fact that the death penalty was widely practiced and disproportionately employed against blacks, the Supreme Court provided very limited oversight over the administration of the death penalty prior to 1972. On occasion, the Court overturned death sentences due to some procedural irregularity during the defendant's trial.[4] However, the Court made only two broad pronouncements regarding capital punishment prior to 1972. In *Powell v. Alabama*,[5] the defendants were young African American men described by the court as "ignorant and illiterate" and they had been charged with raping two white women.[6] The community was so hostile towards the defendants that the state militia had to be called in to assist in guarding them. The trial judge appointed all the members of the bar for the purpose of arraigning the defendants. No specific attorney was named to represent them until the very morning of trial. As a result, no investigation of the facts occurred. Not surprisingly, the defendants were convicted and sentenced to death. The Court held "that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him."[7] The Court also held that the appointment of counsel must be made well before trial so that counsel would have the opportunity to investigate and prepare for trial. Thus, in 1932, the Court held that counsel had to be appointed for every indigent defendant facing the death penalty.[8]

4 The Court reversed convictions based on prosecutorial misconduct, see, e.g., *Alcorta v. Texas*, 355 U.S. 28 (1957); coerced confessions, see, e.g., *Brown v. Mississippi*, 297 U.S. 278 (1936); and ambiguous jury instructions, see *Andres v. United States*, 333 U.S. 740 (1948).

5 287 U.S. 45 (1932).

6 *Id.* at 71.

7 *Id.*

8 The right of defendants charged with non-capital crimes to counsel was not established until 31 years later in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

The Supreme Court's only other broad pronouncement addressed jury selection in capital cases. An Illinois state statute provided that: "In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same."[9] This statute allowed prosecutors to remove any juror who "might hesitate to return a verdict inflicting [death]."[10] In *Witherspoon v. Illinois*, after the judge said "let's get these conscientious objectors out of the way, without wasting any time on them,"[11] 47 potential jurors were successfully challenged for cause based on their attitudes toward the death penalty. Only five of the 47 explicitly indicated that they would not vote for the death penalty under any circumstance. Potential jurors who may have been opposed to capital punishment but who nonetheless might be willing to impose such a penalty were automatically eliminated. Thus, Witherspoon's jury was composed solely of individuals who supported capital punishment. The Supreme Court held that "a jury composed exclusively of such people cannot speak for the community"[12] given the fact that a large percentage of the community opposes the death penalty. The Court went on to state that:

> a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death. Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.[13]

The Court was confronted with two systemic challenges to the death penalty prior to 1972, both of which it rejected. The first was a series of challenges to the methods by which executions were carried out. In *Wilkerson v. Utah*,[14] after the defendant was convicted of murder and sentenced to death, the trial judge ordered that he be shot to death. The Supreme Court held that because soldiers convicted of desertion or other capital military offenses were frequently shot, this manner of execution was not cruel and unusual punishment. *In Re Kemmler*[15] involved a challenge to New York's practice of imposing death by electrocution. The Supreme Court declared that although the death penalty per se was not cruel, punishments

9 *Witherspoon v. Illinois*, 391 U.S. 510, 513 (1968).

10 *Id.*

11 *Id.* at 514.

12 *Id.* at 520.

13 *Id.* at 522. This decision was later modified in *Wainwright v. Witt*, 469 U.S. 412 (1985). The Court held that potential jurors with conscientious or religious scruples against the death penalty could be excluded if their views substantially impair their ability to perform as jurors.

14 99 U.S. 130, 135 (1879).

15 136 U.S. 436 (1890).

are cruel when they involve torture or a lingering death. However, the Court deferred to the New York state courts in their interpretation that electrocution was the most humane form of execution and that it produced an instantaneous and painless death. A newspaper account described Kemmler's subsequent execution as follows:

> After the first convulsion there was not the slightest movement of Kemmler's body ... Then the eyes that had been momentarily turned from Kemmler's body returned to it and gazed with horror on what they saw. The men rose from their chairs impulsively and groaned at the agony they felt. "Great God! He is alive!" someone said: "Turn on the current," said another ... Again came that click as before, and again the body of the unconscious wretch in the chair became as rigid as one of bronze. It was awful, and the witnesses were so horrified by the ghastly sight that they could not take their eyes off it. The dynamo did not seem to run smoothly. The current could be heard sharply snapping. Blood began to appear on the face of the wretch in the chair. It stood on the face like sweat ... An awful odor began to permeate the death chamber, and then, as though to cap the climax of this fearful sight, it was seen that the hair under and around the electrode on the head and the flesh under and around the electrode at the base of the spine was singeing. The stench was unbearable.[16]

Finally, the Supreme Court rejected Willie Francis's request that Louisiana not be allowed to attempt to electrocute him again after the first attempt failed. Francis was sentenced to death after being convicted of murder.[17] On the day of his scheduled execution, he was placed in the electric chair. The executioner threw the switch but Francis did not die. Francis was returned to his cell. The state sought and obtained a new death warrant. Francis claimed that it would be cruel and unusual punishment for the state to attempt to electrocute him again. Specifically he argued that the first attempt obviously did not produce instantaneous death and the second constitutes lingering punishment. The Supreme Court held that the state could attempt to execute Francis again since there was no purpose on its part to inflict unnecessary pain. The dissent felt that the lack of intent on the state's part was immaterial. The dissenters believed that repeated application of electrical currents into the body fails to produce a painless death.

The second systemic challenge was to the unfettered discretion that states gave to jurors in deciding whether a person should live or die. In *McGautha v. California*,[18] the Court considered challenges to both California and Ohio laws in which "the decision whether the defendant should live or die was left to the

16 D. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 Wm & Mary L. Rev. 551, 600 n. 322 (1994).

17 *Louisiana Ex Rel. Francis v. Resweber*, 329 U.S. 459 (1947).

18 402 U.S. 183 (1971).

absolute discretion of the jury."[19] In both states there were no standards to guide or limit the jurors' discretion. The defendants claimed that this was lawless and violated due process. In support of their claim that the lack of standards produced arbitrary decisions, they asserted that the death penalty is imposed on far fewer than half the defendants found guilty of capital crimes. The Supreme Court held that there was nothing wrong with the states' failure to limit the jury's discretion: "The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel."[20] The flaw in the Court's rationale was that while the jury may consider factors suggested by the evidence and by defense counsel, we know from history that the likelihood they would consider other factors such as race was great.

The Supreme Court did decide two cases that did not directly involve capital punishment but that set the stage for future successful challenges to certain aspects of the death penalty. In *Weems v. United States*,[21] the Supreme Court found a sentence of 15 years' imprisonment at hard labor plus a lifetime disqualification from many civil rights to be too harsh for falsifying a minor government record. Thus, the Court for the first time established the proposition that a sentence that is so disproportionate to the crime can violate the Eighth Amendment. This rationale was subsequently used by the Court in holding that the death penalty could not be imposed for the crime of rape. In *Trop v. Dulles*,[22] the Court held that the Eighth Amendment would not be confined to its original meaning. According to the Court, "the words of the Amendment are not precise" and "their scope is not static."[23] "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." This evolving standard of decency analysis caused a later Court to conclude that society had come to condemn the death penalty for juveniles and the mentally retarded.

Furman v. Georgia and the Aftermath

In *McGautha,* the Court gave states complete discretion in administering the death penalty. However, only a year later the Court completely changed course. In *Furman v. Georgia*,[24] the Court struck down every death penalty statute in the county. In its 233-page opinion, five justices agreed that the manner in which the death penalty was administered violated the prohibition on cruel and unusual

19 *Id.* at 185.
20 *Id.* at 207–8.
21 217 U.S. 349 (1910).
22 356 U.S. 86 (1958).
23 *Id.* at 100–101.
24 408 U.S. 238 (1972).