

Capital Punishment— The State of the Art

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It was a dreary Louisiana morning in 1946. The month was May. The event—an electrocution of a seventeen-year-old black youth. On the basis of circumstantial evidence, Willie Francis had been convicted of murdering a highly respected druggist from St. Martinville, Louisiana.

A portable electric chair connected to the generator of an outside van was brought into Willie Francis' jail cell. The hair was removed from the youth's body, the liquid conductor applied, and the wires attached. "Captain" Foster (the enterprising executioner and owner of both the mobile van and electric chair) pulled the switch. As Francis began to dance, the odor of burnt flesh filled the room. Several of the onlookers suppressed the urge to vomit, one without success.

After the first thirty seconds it should have been over. It was, therefore, quite curious that Willie Francis was still capable of delirious ranting after the switch was released. The obvious solution was to repeat the procedure. Again and again the switch was pulled; Willie refused to die. After two full minutes the State of Louisiana decided to give up—temporarily.

The case of Willie Francis was characterized by all sorts of irregularities in legal procedure. Francis' original defense counsel never bothered to appeal the verdict, even after the death sentence was handed down by the court. Although the local community was enraged at the death of the druggist and newspapers and radio continued to incite the citizens, the same defense attorney never requested a change of trial location. Finally, incredibly, no written transcript of the actual trial was ever made. Since appeals are usually based upon specific references to the trial (as documented by the official transcript), Francis' new appellate attorney was working under an insurmountable handicap.

Six months after the first execution attempt, and just after the U.S. Supreme Court hinted to Francis' attorney that they might grant an appeal if he went through proper channels,¹ the State of Louisiana demonstrated its persistence. The onlookers gathered

once again in the same jail cell. The same portable chair was brought in (recently overhauled and repaired) and the switch was pulled. This time Willie Francis' death dance was real. Within thirty seconds it was over.

Death With Dignity

It can be seen that there were many valid reasons for arguing against carrying out Willie Francis' execution yet a second time. However, by its very refusal to become involved, the Supreme Court gave tacit approval to the events that conspired to take Willie's life. With what justification then did the Court decide to put an end to the death penalty in the 1972 landmark case of *Furman v. Georgia*?

Unlike most Supreme Court decisions, wherein one of the nine justices writes the majority opinion and another justice is designated to write the dissenting or minority view, the *Furman* case had such a profound impact on the Court that each of the nine justices felt the need to explain his vote. Consequently, we are left with nine separate opinions, five of which give disparate reasons for outlawing capital punishment, while the remaining four take varying opposing views.²

In the official majority opinion, Justice Brennan gave the underlying rationale of the Court when he stated:

A punishment is cruel and unusual . . . if it does not comport with human dignity . . . In *Louisiana ex rel. Francis v. Resweber* (1947), for example, the unsuccessful electrocution, although it caused mental anguish and physical pain, was the result of an unforeseeable accident. Had the failure been intentional, however, the punishment would have been, like torture, degrading and indecent as to amount to a refusal to accord the criminal human status. . . . The State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others.

The test, then, for determining what is cruel and unusual rested upon whether the State intentionally meted out severe punishments to some individuals found guilty of having committed certain crimes, and *not* meted out the same punishment to others found guilty of the very same crimes.

¹The Court advised Willie Francis' attorney to enter the appeal through the U.S. Circuit Court and then appeal to the highest court if the primary appeal was rejected. In this way, the U.S. Supreme Court would know that every legal remedy below its level had been exhausted.

²Those voting to prohibit further administration of the death penalty were Justices Brennan, Stewart, White, Marshall, and Douglas. Those voting to retain the death penalty were Chief Justice Burger, and Justices Blackmun, Powell, and Rehnquist.

3. THE JUDICIAL SYSTEM

“A Lottery System”

Having thus explained their rationale for deciding under what circumstances capital punishment would be unjust, each of the five justices in the majority also felt obliged to document his case. Accordingly, Justice Brennan wrote:

. . . executions totaled only 42 in 1961, and 47 in 1962, an average of less than one per week; the number dwindled to 21 in 1963, to 15 in 1964, and to seven in 1965; in 1966 there was one execution, and in 1967 there were two.

He then added:

When a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly or fairly applied. . . . Indeed, it smacks of little more than a lottery system.

In like manner, Justice Potter Stewart wrote:

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 . . . the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.

Finally, Justice Thurgood Marshall, the only black on the Court, stated:

A total of 3,859 persons have been executed since 1930, of which 1,751 were White and 2,066 were Negro. . . . It is immediately apparent that Negroes were executed far more often than Whites in proportion to their percentage of the population. There is also overwhelming evidence that the death penalty is employed against men and not women. Only 32 women have been executed since 1930, while 3,827 men have met a similar fate. It is difficult to understand why women received such favored treatment since the purposes allegedly served by capital punishment seemingly are equally applicable to both sexes.

The Meaning of the Decision

In retrospect, it is clear that the five justices who voted to end capital punishment did so in regard to the way it was then being administered. While Chief Justice Burger was in the minority, he used his dissent as a vehicle to explain to the states that (1) the death penalty was not being prohibited permanently, and (2) that the death penalty might be restored if “legislative bodies . . . seek to bring their laws into compliance with the Court’s ruling by more narrowly defining the crimes for which the penalty is to be imposed.”

In short, the Chief Justice was telling the country that capital punishment might be restored in the years to follow if the state legislatures would rewrite the sections of their penal codes dealing with this subject. Since the Furman decision approximately two-thirds of the states have readopted the death penalty. In each instance, the penal code is quite specific in detailing exactly which few crimes will merit the ultimate punishment.

The kinds of crimes for which the death penalty has been readopted range from murder of a peace or corrections officer (New York), murder by a life prisoner (New York), first degree

murder during the commission of a felony (North Carolina), all premeditated murder (Idaho), aircraft piracy (Mississippi), carnal knowledge of a female below the age of twelve by a person eighteen or older (Mississippi), kidnapping resulting in the victim’s death (Montana) and perjury in a capital case resulting in the death of an innocent person (Nebraska).

Recent Decisions: The First Round

On July 2, 1976 the Supreme Court held in each of two separate cases that capital punishment was unconstitutional in states which made execution automatic for any specified crime(s) (*Woodson v. North Carolina*, *Roberts v. Louisiana*). The Court’s reasoning was that such laws were actually arbitrary because the judge or jury had no discretion over the outcome. Arbitrary use of the death penalty was precisely what the Court had outlawed in the Furman decision. In effect, these two recent decisions struck down the mandatory death penalties enacted in ten states since 1972.

Recent Decisions: The Second Round

On July 2, 1976 the Supreme Court handed down a second judgment by combining three more cases involving the death penalty (*Gregg v. Georgia*, *Proffitt v. Florida*, *Jurek v. Texas*). In these cases the Court upheld “two-part procedure” laws. In the first stage only the question of innocence or guilt would be decided. If the jury found the defendant guilty, the second stage would concern itself exclusively with appropriate sentencing. In this stage, the death penalty might or might not be handed down. This would depend on whether extenuating circumstances were found to exist. The judge or jury now had some discretion. The death penalty was not to be automatic or “arbitrary.”

Where We Now Stand

At first glance it might seem that the Supreme Court has sharply reversed itself on the issue of capital punishment. In fact, just the opposite is true. The Court’s recent decisions are actually in line with the reasoning behind the 1972 Furman case. In the first round of recent cases, the Court continued to outlaw arbitrary imposition of the death penalty. In the second round of cases, the Court tested and then upheld imposition of capital punishment in those states where the judge or jury was able to exercise discretion with intelligence and decency. This was felt to be possible if the verdict was separated from the sentence.

It is now up to the rest of the states to deliberate following the example set by Georgia, Florida, and Texas. These three states have proved that constitutional revision of state penal codes on the subject of capital punishment is indeed a very real possibility. The questions of the deterrent value of capital punishment and its moral efficacy will continue to be debated.