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THE DEATH PENALTY AFTER FURMAN

Carol S. Vance*

Introduction

Anyone interested in the death penalty, be he historian or student, lawyer or layman, advocate or antagonist, should read the Furman v. Georgia decision. Nine justices in nine separate opinions painstakingly and articulately delivered their views with a sense of history and deliberate thoroughness seldom found in a single case.

The purpose of this article will not be to belabor these opinions or try to create holy writ from inferences or impressions of the utterances of the court. Instead, it shall be my purpose to discuss the practical problems and alternatives that face the vast majority of this country's citizens who want a death penalty for certain crimes.

With this in mind, I will explore:

1) Where are we? A brief summary of the position of the court at this time.
2) Is there a remedy? What type of legislation could be promulgated which might be upheld from a constitutional standpoint?
3) Is the death penalty worth the effort?

I. Where Are We?

Probably no topic within the purview of our criminal justice system has been debated and discussed with the fervor of the death penalty.

With an anxious intensity, judges, lawyers, police, and the American people agonizingly awaited a decade for legal clarification as the United States Supreme Court seemingly avoided the issue at every opportunity. By the time the question was answered, if it was, in the historic Furman v. Georgia opinion, over 600 death row inmates had experienced a cruel and unusual wait for a definite answer. The United States Supreme Court faced a dilemma of extreme social consequences. It is one thing for Americans to want a death penalty for heinous crimes, but another to face the inevitable result of over 600 executions within a short period of time.

Still the decision shocked the conscience of many Americans. Even death penalty antagonists could not comprehend how one opinion could overrule the duly enacted statutes of some 41 states. Not only were the statutes of the individual states overruled, but also legislation by the Congress of the United States. The aircraft piracy statute was enacted by the United States Senate by a vote

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* District Attorney of Harris County, Texas, and President of the National District Attorneys Association.
1 408 U.S. 238 (1972).
of 92-0, with the eight absent Senators stating they would have made the vote unanimous. Thus we witnessed a classic example of a 5-4 decision that over-turned the legislative processes and nearly two centuries of American jurisprudence.

But this is our system. Any five justices can legislate with unhampered power. In this instance they did, and the death penalty as we knew it, is no more. The four dissenting justices articulately answered the majority opinions with a clarity and logic that leave little else to be added. Perhaps Mr. Justice Burger, who personally found the death penalty repugnant, best summed up the historical viewpoint when he quoted Mr. Chief Justice Warren:

... 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 our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.\(^3\)

and the legal viewpoint by quoting Mr. Justice Black, who not very long ago in *McGautha v. California*\(^4\) said:

The Eighth Amendment forbids “cruel and unusual punishments.” In my view, these words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted. It is inconceivable to me that the framers intended to end capital punishment by the Amendment.\(^5\)

From a reading of the dissents, I believe we can assume four justices would uphold any death penalty legislation consistent with decisions prior to *Furman*. So the first and simple conclusion is that any future legislation must be acceptable to at least one of the five justices of majority opinion.

At the risk of oversimplification, it is probably safe to conclude that Justices Douglas, Brennan, and Marshall would not consider any death penalty statute constitutional under any circumstances. Their general conclusion is the death penalty is a cruel and unusual punishment and violates the eighth and fourteenth amendments.

Therefore, our attention must turn to the opinions of Justices Stewart and White, who may have left the door open for death penalty legislation along very restricted lines. Both of their opinions are short and must be considered separately and in depth.

Justice Stewart makes it clear at the outset that he finds “it unnecessary to reach the ultimate question,” i.e., whether the death penalty per se is unconstitutional by reason of its being a cruel and unusual punishment. He finds it cruel and unusual because of the wanton and freakish way it had been imposed in cases before the Court and because of the wide discretion left by the legis-

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\(^3\) Trop v. Dulles, 356 U.S. 86, 99 (1958), quoted 408 U.S. at 381.


lature to the jury without any statutory guidelines. Specifically, Justice Stewart said:

[T]hese sentences . . . are "cruel" in the sense that they excessively go beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary. *Weems v. United States*, 217 U.S. 349. In the second place, it is equally clear that these sentences are "unusual" in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare. But I do not rest my conclusion upon these two propositions alone.

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

Therefore, it is difficult to determine what Justice Stewart's conclusion would be if he answered the ultimate question. If we assume Justice Stewart would uphold the death penalty, we must also conclude that he would only uphold legislation containing very specific guidelines as to when the death penalty would be imposed. Any statute that would permit a jury or a judge to give one murderer a prison sentence and another (under the same circumstances) the death penalty would probably not meet Justice Stewart's rationale.

Justice White leaves the door open wider. I think it reasonable to assume he would uphold certain types of death penalty legislation when he states:

In joining the Court's judgments, therefore, I do not at all intimate that the death penalty is unconstitutional *per se* or that there is no system of capital punishment that would comport with the Eighth Amendment. That question, ably argued by several of my Brethren, is not presented by these cases and need not be decided.

However, we must recognize the fact Justice White is not positively committed to upholding any death penalty statute.

Somewhat similar to Justice Stewart's position Justice White expresses concern over three points as he writes:

(1) the legislature authorizes the imposition of the death penalty for murder or rape; (2) the legislature does not itself mandate the penalty in any particular class or kind of case (that is, legislative will is not frustrated if the penalty is never imposed) but delegates to judges or juries the decisions as to those cases, if any, in which the penalty will be utilized; and (3) judges and juries have ordered the death penalty with such infrequency that the odds are now very much against imposition and execution of the penalty with respect to any convicted murderer or rapist. It is in this context that we must consider whether the execution of these petitioners would violate the Eighth Amendment.

6 408 U.S. at 306-10.
7 Id. at 309-10.
8 Id. at 310-11.
9 Id. at 311.
Justice White also put great emphasis on the fact the death penalty was seldom enforced. He said:

But common sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted.\(^\text{10}\)

It should be noted that nearly every point Justice White and his brothers on the Court made with respect to the infrequent enforcement of the death penalty could likewise be made with respect to life imprisonment or any long prison terms. The records will adequately reflect that relatively few persons charged with first-degree murder, robbery by firearms, rape or any traditional death penalty offense end up with life imprisonment or its equivalent. However, Justice White concluded:

... I cannot avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice. ...

The death penalty is exacted with great infrequency even for the most atrocious crimes and ... there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not. The short of it is that the policy of vesting sentencing authority primarily in juries—a decision largely motivated by the desire to mitigate the harshness of the law and to bring a community judgment to bear on the sentence as well as guilt or innocence—has so effectively achieved its aims that capital punishment within the confines of the statutes now before us has for all practical purposes run its course.\(^\text{11}\)

Giving authority to the jury to determine the death penalty may void a statute in Justice White's opinion as he said:

In this respect, I add only that the past and present legislative judgment with respect to the death penalty loses much of its force when viewed in light of the recurring practice of delegating sentencing authority to the jury and the fact that a jury, in its own discretion and without violating its trust or any statutory policy, may refuse to impose the death penalty no matter what the circumstances of the crime. Legislative "policy" is thus necessarily defined not by what is legislatively authorized but by what juries and judges do in exercising the discretion so regularly conferred upon them. In my judgment what was done in these cases violated the Eighth Amendment.\(^\text{12}\)

Where are we? No definite conclusion can be drawn, but one can surmise that new legislation must take away discretion from the punishing authority—particularly if it is the jury.

\(^{10}\) Id. at 312.
\(^{11}\) Id. at 313.
\(^{12}\) Id. at 314.
II. Is There a Remedy?

Yes, there is one certain remedy. This is by way of constitutional amendment, which would require proposition by two-thirds of both Houses and ratification by the legislatures of three-fourths or at least 38 states. This is conceivable in that forty-one states have the death penalty at present, and as violent crimes soar, there seems to be a ground swell for the death penalty in certain instances. Even such a constitutional amendment must be drawn with care. Keep in mind the Constitution as presently written implies acceptance of the death penalty in the fifth amendment, an amendment that is very much in force. My suggestion for wording would be:

The discretionary use, by jury, judge, or other sentencing authority of the death penalty by hanging, electrocution, gas chamber, or other humane device, is not a cruel or unusual punishment and is not a violation of any right under this Constitution.

This would be simple. The intent is clear. Yet it must be kept in mind that death sentences could always be set aside because of the way they were administered notwithstanding the above amendment.

As a practical matter, such an amendment is, at best, several years away. Ratification by thirty-eight states’ legislative bodies on such a controversial and emotional issue doesn’t come overnight. And there are probably a few death penalty states, where the issue is sufficiently close, in which new legislation in this direction would be difficult to enact.

In the interim, our concern must focus on possible statutes that might meet the test of Furman v. Georgia.

There are several approaches that could be suggested. In fact, Florida took the lead by passing a statute just a few short weeks after the motion for rehearing was overruled in the Furman case.

In the Florida bill, a person convicted of a capital felony may receive death after a special sentencing procedure. Capital felonies are only applicable to murder "when perpetrated from a premeditated design" or an unlawful killing "in the perpetration of or in the attempt to perpetrate any" arson, rape, robbery, burglary, kidnapping, aircraft piracy, handling a bomb, or distributing of heroin where that act proves "to be the proximate cause of the death of another." Rape of a child under the age of eleven is also defined as a capital felony.13

Once a person is convicted of a capital felony either by a jury, a judge, or plea of guilty, the court must conduct a separate sentencing proceeding to decide between death or life in prison. This proceeding is conducted by the trial judge and the trial jury (or a specially empaneled jury if there was no trial jury). After studying all mitigating and aggravating circumstances listed below, a majority of the jury renders an advisory sentence. This advisory sentence of the jury may be reached without unanimity. Notwithstanding this recommendation, the court will then enter a sentence. If the sentence is death, it must be

accompanied by a written explanation of why the aggravating circumstances were sufficient and the mitigating circumstances insufficient. A death sentence is subject to automatic review by the Florida Supreme Court within 60 days.\textsuperscript{14} The aggravating and mitigating circumstances are as follows:

**Aggravating circumstances**—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment;

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person;

(c) The defendant knowingly created a great risk of death to many persons;

(d) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnaping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb;

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(f) The capital felony was committed for pecuniary gain;

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;

(h) The capital felony was especially heinous, atrocious or cruel.

**Mitigating circumstances**—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity;

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(c) The victim was a participant in the defendant's conduct or consented to the act;

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(e) The defendant acted under extreme duress or under the substantial domination of another person;

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(g) The age of the defendant at the time of the crime.\textsuperscript{15}

Finally there is a safety valve provision stating that if the death penalty should be declared unconstitutional, capital felonies would be punished by life imprisonment.

This Bill would hopefully satisfy the objections of some of the Justices. The death penalty is certainly to be used only in the most extreme circumstances. However, when these circumstances have been fulfilled by a certain crime, there is a carefully prescribed procedure to deal with the criminal as his deed demands. There is little room left for discrimination against an individual since capital felonies and their attendant aggravating or mitigating circumstances are carefully spelled out. The sentencing procedure is perhaps the best that can

\textsuperscript{14} Id. § 941.141.

\textsuperscript{15} Id.
be devised to make sentences uniform and to establish a standard for justice.

In the Texas Penal Code Revision (sponsored by the State Bar of Texas), which will be introduced in the current (1973) legislative session, the proposal is drafted as follows:

[Section 12.31]
An individual adjudged guilty of a capital felony shall be punished by death, unless the jury after deliberation on punishment recommends leniency, in which event punishment shall be by confinement in the Texas Department of Corrections for life.

[Section 19.03—Capital Murder:]
(a) A person commits an offense if he commits murder as defined under Section 19.02 (a) (1) and:
(1) the murder is done in the commission of or attempt to commit or the flight from the commission of or attempt to commit any degree of robbery, kidnapping, forcible rape, or forcible sexual abuse; or
(2) the murder is done for hire or promise of payment by another; or
(3) the murder is done in the commission or in the flight from an escape or attempted escape from a penal institution; or
(4) the person murdered is a guard or individual working in connection with the operation of a penal institution and the actor is incarcerated in such penal institution; or
(5) the person murdered is a peace officer acting in the lawful discharge of official duty, and the actor knew or had been informed that the person murdered was a peace officer; or
(6) the actor has been previously convicted of intentional or voluntary murder; or
(7) the murder is done with deliberate premeditation; or
(8) the murder is done with extreme atrocity or cruelty or under circumstances which show exceptional depravity on the part of the actor.

(b) An offense under this section is a capital felony.

(c)Prospective jurors in offenses charged under this section shall be informed that a sentence of life or death is mandatory upon a conviction of capital murder and no person shall be qualified to serve as a juror unless he shall state under oath that the mandatory penalty for capital murder will not affect his deliberations on any issue of fact.

(d) Where the jury does not find beyond a reasonable doubt that one of the circumstances or conditions enumerated under subsections (a) (1)–(8) occurred or existed in connection with a murder, the actor may nevertheless be convicted of murder as defined in Section 19.02 or any other lesser included offense.16

Although the majority of the Texas Penal Code Revision Committee believes the statute is restrictive enough to meet either Justice White's or Stewart's test, the weakness is obvious. Will any discretion left to a jury (or judge) be valid? The statute does not specify certain findings of fact that would cause everyone so adjudicated within one of the above categories to be treated alike—that is, receive the death penalty. One section subject to criticism is number eight, the "depraved or extreme cruelty" section. All other sections are extremely

specific and call for an objective standard. Conceivably one jury could determine extreme cruelty existed in one case and a separate jury could find that a co-defendant, who did the same acts in the same case, did not act with extreme cruelty. In other words, extreme cruelty is whatever the jury believes it. But at least it gives less discretion to a jury because most of us would probably agree on whether a particular set of facts demonstrated depravity or extreme cruelty.

For those of us who believe in the death penalty, there is a great need for a catchall section to cover the truly depraved cases. Otherwise Richard Speck, who killed eight nurses, would not come within the other more specific sections. Adolf Eichmann would not be included or the recent New Orleans sniper(s). And yet these are the extremely aggravated cases in which virtually all Americans would concur the maximum penalty, whatever it may be, should be inflicted.

There is no practical way to define the possible atrocities that can be as diverse as the depraved mind can devise. Perhaps the Supreme Court in its wisdom would recognize that if there is a need for any death penalty, it is in these instances, and that the proposed Texas definition does provide sufficient guidelines to meet the test.

The big objection to the Texas proposal is that a jury can render a life-or-death verdict for any of the capital crimes. In my opinion, this must be changed to satisfy either Justice White or Justice Stewart.

III. Is the Death Penalty Worth the Trouble?

The question is not, should there be a death penalty. The vast majority of Americans have answered that question through their elected representatives in forty states and a United States Senate that unanimously enacted an air piracy statute just a few months ago. The people speaking through referendums such as the one in California where over two to one (67.5 to 32.5%) voted in favor of the death penalty, also want the death penalty.

The more subtle and realistic question is: Is the death penalty worth the trouble in light of the many obstacles not the least of which is the *Furman v. Georgia* opinion?

Before I go into my reasons, let me clear up one matter where I believe the majority of the Supreme Court is off base. Many opponents of capital punishment tender the same fallacious reasoning. They assume that since so few receive the death penalty, this is a form of discrimination. Nothing could be further from the truth. If we were to extend this line of reasoning, the very same argument could be made against a natural life sentence, life imprisonment, or any long term of years.

The average sentence for murder in my jurisdiction, Harris County (a country of approximately 2 million persons), is somewhere in the neighborhood of 12 years. Of the homicides the last full year of the death penalty, 1971, there were 277 cases tried for murder with malice (first-degree murder); 154 were convicted, and there were three death penalties and nine life sentences. Nearly
every word written in Furman v. Georgia would be equally applicable for the nine who received life imprisonment.

Why do so few cases receive the most stringent penalties? In my jurisdiction, out of 100% of the homicides committed, 10% will not be arrested, 25% will not be indicted, and another 10% will be dismissed on insufficient evidence or acquitted after trial. Of the 45% who are tried for murder and convicted, the conviction will be for a lesser offense than first-degree murder about half the time. In this weeding-out process some guilty men will not receive the punishment due them. Yet no one would seriously contend that because many guilty parties get off, all should be acquitted in order to insure equal justice.

Actually there is a fairly universal consensus on which cases should receive the harshest penalties. Consider the following murder cases for example. Some 70% of the killings are between persons who knew each other. Nearly all of these occur in a state of passion over such things as a 50 cents pool bet, dancing with the wrong person, or even more likely a domestic quarrel. These crimes are extremely serious, but any jury would laugh at the prosecutor seeking the death penalty in a typical crime of passion situation. It is only in the bizarre murder, the killing for hire or during another serious crime, and a few other isolated instances that the people of this country want to see the death penalty applied. And these crimes are a small percentage of the overall murders. The prosecutors of Texas (as well as any judge or defense attorney) can listen to a set of facts and tell you whether it is a death penalty case. A recent survey of the Texas District and County Attorneys Association revealed that in the past five years there were only 87 cases where the district attorneys sought the death penalty. In 37 of these instances (over 40%) juries rendered a death penalty verdict.

The truth of the matter is that there should be very few death penalty sentences. Only a very few cases warrant this extreme measure. It takes two essential ingredients to obtain a death penalty: (1) overwhelming proof of the defendant's guilt and (2) an extremely aggravated fact situation. What is so surprising is Justice White's and Justice Stewart's conclusion that there is something highly improper in so few people receiving the death penalty.

If there is any injustice in those cases deserving the death penalty, it is that some defendants escape with life imprisonment or a term of years due to superior defense counsel or an unusually sympathetic jury. But by anyone's standards this is less of an injustice than the murderer who goes free because he is never arrested or his case is dismissed due to a missing witness, the Miranda decision, or a motion to suppress.

There is no question that an unusually talented defense counsel with relatively unlimited resources can sharply reduce the odds of a defendant's receiving the death penalty. Although this may be a valid argument against the death penalty, it should equally apply to any defendant who receives life, or for that matter is even convicted, if the defendant did not have the very best lawyer in the state representing him.

If then, the death penalty is to be meted out very sparingly, why is it worth the trouble? Although rehabilitation and punishment are generally considered
reasonable purposes of imprisonment, some patterns of criminal conduct indicate that the criminal is hopeless. Why should we take a chance with a murderer, whose past history indicates is likely to kill again?

In a sense, the criminal is taking his own life when he commits a capital crime. Society is responsible for the safety and security of its members. Therefore, it has the right to remove a person who threatens this safety and security.

But perhaps the most important argument for capital punishment is that it is a deterrent. There are some people who fear nothing but death itself, and to place society's innocent in the hands of these uncontrollables without hope of fair recompense would be to play the fool. In law enforcement, idealism untempered with realism is sheer folly.

The death penalty deterred an escapee from a Texas prison. The inmate abducted a woman, stole her car and headed west. When asked why he didn't kill this person who told police his direction of travel that led to his capture, the inmate, already under a life sentence, said he didn't want to ride "Old Sparky." I have talked to robbers, who said the only reason they didn't kill the only eye witness was the threat of the electric chair.

Even England, upon allegedly abolishing the death penalty, kept it for second-offender murders, for killing a prison guard and for killing a policeman. Wasn't this hypocritical? Apparently they believed it a deterrent for the killer of the guard or the policeman, or at least the second time around.

And if Charles Manson and his companions were executed tomorrow, might not some future defendant think twice before shooting, beating and stabbing seven innocent victims a total of 1,691 times to satisfy a lustful and depraved desire? What about the next airline bomber? Future victims need all the protection society can give them.

There is no way to measure or predict how many murderers are deterred by the death penalty. Since the moratorium on the death penalty which lasted about ten years, crimes of violence have drastically increased. In my opinion, a death penalty, even sparingly used, would cut down on certain types of murders such as premeditated murder and killings during robberies.

One last thing worthy of mention is that in certain cases society expects justice or retribution. If we were to ignore the retribution aspect and concentrate solely on rehabilitation, murderers would receive the lowest sentences as a group because they are the least likely as a group to repeat. Once caught, Adolf Eichmann would probably be one of the better risks. There are some cases that call for the death penalty. Even Justice Stewart in his opinion said:

On that score I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve" then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.17

17 408 U.S. at 308.
We must recognize that retribution is an ingredient of justice—particularly where a human life is unlawfully taken. Otherwise, we would not impose any penalty for the typical fit of passion killer who does not need to be rehabilitated and who is the least likely to be deterred by any punishment.

I do think the death penalty is worth the effort. In the interest of justice as well as public safety, I hope most of the states enact appropriate statutes. In this regard, legislation similar to Florida’s should be preferred. It allows participation by the jury, but the judge makes the final decision. The Florida statute sets up exacting guidelines where the death penalty is applicable—including statutory mitigating and aggravating factors. Lastly, it provides for sentencing review by the state’s supreme court and thus a system for statewide uniformity.