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THE DEATH PENALTY AND DISCRETION: IMPLICATIONS OF THE FURMAN DECISION FOR CRIMINAL JUSTICE

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INTRODUCTION

Whether the death penalty should remain as a penalty available in American criminal law continues to be a subject of controversy among social scientists, lawyers, the judiciary and the public. While the traditional areas of debate over whether the death penalty is a deterrent and whether it is imposed in a discriminatory manner continue to be important issues, the recent Supreme Court decision (Furman v Georgia, 1972) and subsequent legislation has introduced another dimension: the nature and use of discretion.

Current litigation on the death penalty (Fowler v North Carolina, 1974) is directed toward a resolution of issues raised by Furman. However, it is our contention that the results of such efforts will raise a range of policy questions regarding how discretion can be exercised not only in other parts of the criminal justice process, but for non-death penalty offenses as well. The purpose of this paper is to examine the Furman decision and subsequent legislation and show that the questions raised about discretionary decisions are questions that are equally applicable to processing all criminal offenses.

FURMAN V. GEORGIA

In June 1972, the Supreme Court, by a five-to-four decision, ruled that "the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eight and Fourteenth Amendments" (U.S. Reports, 1972:238). The three petitioners referred to in the decision are black; one had been convicted of a felony murder, while the other two had been convicted of rape.[1]

Because the concurring and dissenting justices filed separate opinions, and none joined in the opinion of any other, the scope and consequences of the Furman decision are not completely clear. However, the opinions of the concurring Justices suggest that the death penalty constitutes cruel and unusual punishment because it is imposed infrequently and under no clear standards. Justice Brennan, for example, concluded that procedures have not been "constructed to guard against the totally capricious selection of criminals for the punishment of death" (U.S. Reports, 1972:295). Justice White indicated that the death penalty is imposed so infrequently that "the threat of execution is too attenuated to be of substantial service to criminal justice" (U.S. Reports, 1972:313). Focusing on the lack of clear standards, Justice Stewart simply concluded "that the Eight and Fourteenth Amendments cannot

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[1]The convictions and sentences were affirmed, Furman v. State, 225 Ga. 253, 167 S. E. 2d 628 (1969); Jackson v. State, 225 Ga. 790, 171 S.E. 2d 501 (1969); Branch v. State, 447 S.W. 2d 932 (Tex. Ct. Crim. App. 1969).

tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be wantonly and so freakishly imposed" (U.S. Reports, 1972:310).

Justices Marshall and Douglas indicated that the lack of clear standards in jury sentencing may provide opportunities for the discriminatory imposition of the death penalty. Giving juries "untrammeled discretion" to impose a sentence of death, Justice Marshall concluded, was "an open invitation to discrimination" (U.S. Reports, 1972:365). Commenting on the opportunities for discrimination against minorities, the poor and powerless, Justice Douglas states "thus, these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishment" (U.S. Reports, 1972:256,257).

In addition to invalidating all the death penalty statutes that left sentencing to the unfettered discretion of the judge or jury, the Furman decision led to the reversal of 631 death sentences (Davis, 1974). In the three years since the Furman decision, 34 state legislatures have enacted new statutes authorizing the death penalty.

SUBSEQUENT LEGISLATION: "MANDATORY" AND "GUIDED DISCRETION" STATUTES

Although the Supreme Court apparently found standardless judge or jury discretion in imposing the death penalty constitutionally impermissible, it left open the question of what form of the death penalty, if any, was constitutionally acceptable. The lack of clarity in the Furman decision is reflected in the thrity-four new statutes which purport to meet the constraints imposed by the Supreme Court decision; none of the new statutes is identical, although differences among some of them are negligible (Salkin, 1974).

The new death penalty legislation has resulted in statutes that can be divided into two broad categories; "mandatory" and "guided discretion". "Mandatory" statutes prescribe the imposition of a death sentence upon conviction for certain usually narrowly defined crimes. Idaho, for example, provides that every person found guilty of first degree murder shall suffer death. First degree murder is defined as all premeditated murder, murder of an on-duty law officer, or murder by a person already convicted of first or second degree murder (Legal Defense Fund, 1973).

It is not clear if current statutes reviving mandatory death penalty sentencing, which was abandoned by nearly all the states in the nineteenth and early twentieth centuries will meet constitutional objections. Historically, the abandonment of mandatory sentencing occurred because it was believed to produce "jury nullification"--a refusal or lessened readiness by juries to convict (Bowers, 1974). Such a possibility remains with new mandatory statutes, leading Chief Justice Burger to comment in dissent: "Real change could clearly be brought about if legislatures provided mandatory death sentences in such a way as to deny juries the opportunity to bring in a verdict on a lesser charge. Under such a system, the death penalty could only be avoided by a verdict of acquittal. If this is the only alternative that legislatures can safely pursue under today's ruling, I would have preferred that the Court opt for abolition" (U.S. Reports, 1972:401).

Consideration like the above may have led legislatures to enact statutes which attempt to guide discretion by providing a list of aggravating and sometimes mitigating circumstances to be used by the court in deciding whether the death sentence is to be imposed. Except for the offenses of treason and aircraft hijacking for which a mandatory death penalty is imposed, the Georgia death penalty statute belongs among the "guided discretion" statutes. It specifies that for the offenses of rape, murder, armed robbery and kidnapping, the death sentence may be imposed by the trial judge or jury only if the sentencer finds at least one aggravating circumstance (Salkin, 1974).

Using a bifurcated trial to decide separately the issues of guilt and sentence, the statute specifies that at the pre-sentence hearing "the judge shall consider or include in his instructions to the jury to consider, any mitigating or aggravating circumstances otherwise authorized by law and any of the following aggravating circumstances which may be supported by the evidence" (Salkin, 1974:17-18). For offenders convicted of rape, murder, armed robbery or kidnapping, a partial list of aggravating circumstances include a prior record of a capital felony, a substantial history of serious assaultive criminal convictions, the murder of a judicial officer, district attorney, solicitor, peace officer, corrections employee or fireman during the course of their occupational duties, and the commission of rape, murder, armed robbery or kidnapping in the course of committing another felony (Salkin, 1974).

It is somewhat difficult to understand how this statute is equitably administered. While aggravating circumstances are listed, no mitigating circumstances are provided. Further, even if the jury finds aggravating circumstances, it is not compelled to make a "recommendation of death" (Legal Defense Fund, 1973).

THE FURMAN DECISION AND SENTENCING

The most important observation drawn from the material is that interpretations of the Furman decision do not center on discrimination against a particular group; rather, the objection is to a sentencing procedure. The basic objection is to a standardless discretionary sentencing decision, characterized as having arbitrary and discriminatory results.

It would appear that there are important similarities between the discretionary sentencing decisions objected to in Furman and the discretionary sentencing decisions currently in use to impose a variety of criminal sanctions. For death penalty and non-death penalty cases the discretion of the sentencing agent is only broadly constrained by statute or not at all. Reviews of the research literature on the sentencing emphasize the variability among judges and variability of sentences for similar offenses (Adler and Riedel, 1968; Riedel and Adler, 1969; Green, 1961). Many of the studies reviewed also indicated arbitrariness and discrimination in sentencing.

In objecting to what he regards as nearly unbounded discretion, Frankel (1972) has indicated that there is relatively little agreement among sentencers as to what the relevant criteria for sentencing are or should be. There are, he suggests, "curbstone notions" such as seriousness of the offense or prior record which are meant to serve as guidelines, but the unequal sentences for similar offenses and offenders suggests little consensus about these guidelines.

If there are similar concerns about the exercise of sentencing discretion for death penalty and non-death penalty cases, it is reasonable to suppose that the outcome of litigation with regard to the death penalty will have an impact on policy and possibly the direction of litigation regarding sentencing discretion for other offenses. In concluding his comments about sentencing and the Furman decision, Frankel states:

> I repeat my intention to resist speculation in the field of constitutional law. Reluctantly turning from the capital punishment decision, I merely register the view that the central point about whimsical and unequal sentencing is in principle germane in non-capital cases. This could mean one day that the Supreme Court might deem itself constrained finally to move more broadly, on constitutional grounds, against the kinds of "wanton and freakish" disparities I (and so many others) have deplored (Frankel, 1972:104).

"MANDATORY" AND "GUIDED DISCRETION" AND CRIMINAL JUSTICE

As important as the Furman decision may be in a possible reevaluation of sentencing discretion, its major impact may be a consequence of subsequent legislation of mandatory and guided discretion death penalty statutes. In that context, death penalty statutes raise questions about the exercise of discretion throughout the criminal justice process.

As noted earlier, the legislation of mandatory and guided discretion statutes represented an effort to remove the arbitrariness and discrimination which were constitutionally objectionable. However, the criminal justice process from arrest to final disposition involves a series of interdependent decisions; variations in decisions about the number and type of offenders at one point constrains and limits the number of choices available for decisions at other points. Eliminating or reducing discretion at the sentencing stage can simply serve to shift the locus of discretion to other decision points, where it produces either arbitrary or discriminatory results.

There is relatively little evidence available to indicate what effect mandatory death sentences have on pre-sentence and post-sentence decisions. Comparing the processing of capital cases during a period of mandatory sentencing and a period of discretionary sentencing, Bedau (1964, 1965) found that mandatory sentences in Oregon and New Jersey are associated with lower conviction rates and higher rates of commutation. Similarly, Riedel (1973) found in Pennsylvania that mandatory sentences were more frequently commuted than discretionary sentences. In addition, the results indicated that under mandatory sentences, more black and black felony offenders were executed (Riedel, 1973). As for the guided discretion statutes, they are without precedent and we know nothing about their operation.

Black (1974) also concludes that eliminating or reducing discretion at the sentencing stage shifts the locus of discretion to stages which are at least as mistake prone and "saturated" with standardless discretion as pre-Furman sentencing practices. Beginning with decisions to charge, a clearly discretionary and largely unbounded decision, the prosecuting attorney may decide the offense in question does not warrant the mandatory death penalty

and charge a lesser offense. For example, if a mandatory death penalty is imposed for "recklessly" causing the death of a law enforcement officer, would it require an elaborate hypothetical argument to show that the killing, not by intention, but "recklessly", might occur in a way that it would be absurd, as well as cruel, to execute the "reckless" offender? It would seem inevitable, Black (1974) suggests, that prosecutors use some common sense in charging. "Common sense", laudable though it may be in an individual case, is subject to no rule of law, but is exercised arbitrarily.

At the conclusion of the charging process, the next step is frequently a plea bargaining session between the prosecutor, the defendant and the defendant's lawyer. At this stage, the defendant is given a choice to plead guilty to a lesser charge in exchange for not insisting on a trial. Such prosecutorial discretion is not subject to any statable rule but is a critical official choice which can lead to the defendant being tried and convicted for an offense carrying a mandatory death penalty.

Black (1974) also examines other discretionary decisions: the decision as to the degree of guilt, the decision on sentencing and the decision on clemency. Because of mandatory sentences, critical decisions as to who will be selected for execution are made at pre-sentence and post-sentence stages where discretion is unbounded, mistake prone, and standardless (Black, 1974).

What the preceding suggests is that mandatory sentencing makes it impossible to consider the consequences of death penalty sentencing from the viewpoint of one type of decision; discretion is important as a system property involving the interdependence of discretionary decisions. If mandatory sentencing leads to arbitrariness and discrimination then litigation resulting in more equitable death penalty sentencing must involve changes in the pattern of discretionary decision making at pre-sentence and post-sentence stages. Where the latter occurs, it is reasonable to suppose that it could have a marked effect on the way discretionary decisions can be made about non-capital cases.

The contention that changes in pre-sentence and post-sentence discretion in processing death penalty offenses is further supported by the critical view currently taken of discretion. The report of the American Friends Service Committee (1971) could find no positive function for discretion in criminal justice and recommended that it be eliminated or greatly reduced. Numerous studies of police discretion (Skolnick, 1966; Reiss, 1971; Wilson, 1972), prosecutorial discretion (Grosman, 1969; Newman, 1966), and clemency (Wolfgang, Kelley, Nolde, 1962) have found that discretionary decisions follow no statable rule of law and are frequently arbitrary and discriminatory. Packer (1968:290) noted:

> The basic trouble with discretion is simply that it is lawless, in the literal sense of that term. If police and prosecutors find themselves free (or compelled) to pick or choose among known or knowable instances of criminal conduct, they are making a judgement which in a society based on law should be made only by those to whom the making of law is entrusted. For the rough approximation of community values that emerges from the legislative process there is substituted the personal and often idiosyncratic values of the law enforcer.

CONCLUSIONS

This analysis of the implications of the Furman decision criminal justice leads to two alternatives. Supposing that subsequent litigation on the death penalty leaves the current interpretation of the Furman decision largely unchanged: standardless discretion exercised in imposing the death penalty is constitutionally impermissible. Minimally, this result should stimulate a consideration of guidelines regarding sentencing discretion in non-capital cases. If what is at issue is the criteria by which sentencing decisions are made, death penalty and non-death penalty cases are subject to the same criticisms.

Alternatively, suppose that litigation leads to changes in death penalty sentencing in a way which reduces, constrains or eliminates pre-sentence and post-sentence discretion. Given the present climate of skepticism about the uses of discretion, it is difficult to understand how such a result in death penalty litigation would not provide a basis for challenging present implicit and subjective approaches to sentence and post-sentence discretion for non-capital offenses. Either alternative in the area of death penalty litigation provides a basis for demanding far reaching changes in discretionary decision making in criminal justice.

Of course, one way to avoid the consequences of either alternative is to consider the death penalty a "unique" sanction in that it is irreversible. Under that assumption, abolition may be the appropriate decision because the machinery of the state for condemning and executing men may be so fallible that whatever procedures are instituted for avoiding mistakes, they are altogether insufficient.

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