AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 8: The New Deal/Great Society Era—Criminal Justice/Punishments

Capital Punishment

Capital punishment took center stage during the New Deal/Great Society Era. Execution had always been controversial in the United States. A few prominent framers called for the abolition of the death penalty, Americans during the nineteenth century sharply reduced the number of crimes punishable by death, and a few states abolished capital punishment. Nevertheless, debates tended to be over policy. Abolitionists asserted that executions were inhumane or did not serve sufficient state purposes, but rarely claimed that capital punishment was "cruel and unusual" or inconsistent with state constitutional provisions.

The NAACP LDF's anti-capital punishment team during the 1940s and 1950s largely worked within this consensus. Civil rights attorneys became involved in capital punishment issues when they believed persons of color were being sentenced to death after unfair trials. They sought to overturn death sentences because the defendant had not had effective assistance of counsel or had been indicted by a racially biased grand jury. These attacks were often successful, but they did not undermine the constitutionality of the death penalty per se.

Liberals on the Supreme Court during the 1940s and 1950s did not raise constitutional questions about capital punishment. Justices on the Vinson and early Warren Courts did not believe themselves bound by 1791 practices. All the Justices in *Trop v. Dulles* (1958) agreed that the "[Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Nevertheless, all also initially agreed that capital punishment was consistent with "evolving standards of decency" in the United States. *State of Louisiana ex rel. Francis v. Resweber* (1947) illustrates the state of "cruel and unusual punishment" law during the mid-twentieth century. Louisiana's first effort to electrocute Willie Francis failed because a mechanical error resulted in an electric shock insufficient for death. A new death warrant was issued authorizing electrocution a week later. Five justices on the Supreme Court insisted that no constitutional problems existed with the second attempt at execution. Justice Stanley Reed's majority opinion declared:

> [t]he cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution.

Four justices dissented. Noting that Francis had suffered substantial pain and agony during the first attempt at electrocution, Justice Harold Burton wrote, "[t]he all-important consideration is that the execution shall be so instantaneous and substantially painless that the punishment shall be reduced, as nearly as possible, to no more than that of death itself." What is crucial for present purposes is that, in asserting that any further attempt to execute Willie Francis would be cruel and unusual, Burton and the other justices in the dissent assumed that no constitutional problems existed with the first attempt.

Rudolph v. Alabama (1963) dramatically changed the nature of constitutional attacks on capital punishment. Dissenting from the Supreme Court's decision not to hear that case, Justices Goldberg, Douglas and Brennan suggested that lawyers might make Eighth Amendment attacks on the death penalty per se, rather than point to constitutional violations peculiar to the particular defendant before

the Court. "I would grant certiorari in the case," Goldberg wrote, "to consider whether the Eighth and Fourteen Amendments to the United States Constitution permit the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life." Such groups as the NAACP LDF immediately took up and expanded this challenge. Rather than simply attack the constitutionality of executing persons for rape, civil rights lawyers began claiming that capital punishment was an unconstitutional sanction for all crimes.

The legal campaign against capital punishment enjoyed a major success in *Witherspoon v. Illinois* (1968). That case prohibited prosecutors from challenging for cause jurors who were morally opposed to capital punishment or indicated that they had moral qualms about capital punishment. Justice Stewart's majority opinion declared,

> a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict or 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.

Stewart then indicated that proper application of constitutional norms would result in juries extremely unlikely to impose capital punishment.

> A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it. Guided by neither rule nor standard, 'free to select or reject as it (sees) fit,' a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death. Yet, in a nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community. Culled of all who harbor doubts about the wisdom of capital punishment—of all who would be reluctant to pronounce the extreme penalty—such a jury can speak only for a distinct and dwindling minority.

The constitutional attack on capital punishment enjoyed even greater successes outside of the Supreme Court. Increased public opposition to capital punishment, increased unwillingness of juries to impose death sentences, increased unwillingness of prosecutors to seek death sentences and increased unwillingness of state courts to sustain death sentences resulted in a national moratorium on executions that began during the late 1960s.