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Capital Punishment and the American Agenda

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CAPITAL PUNISHMENT AND THE AMERICAN AGENDA. By *Franklin E. Zimring* and *Gordon Hawkins*. New York: Cambridge University Press. 1986. Pp. xviii, 192. \$22.95.

In the preface to *Capital Punishment and the American Agenda*, the authors¹ announce that they write from the perspective of advocates for abolition of capital punishment in the United States. Unlike more typical literature on this topic,² however, their primary focus is not on the relative merits, or lack thereof, of the death penalty.³ Instead, they argue that abolition is the inevitable by-product of civilization's evolving respect for human rights, and that the present state of American law is an aberration in this long-term trend. They contend that the United States has developed to the point where execution should be barred by the eighth amendment's prohibition of cruel and unusual punishment.⁴ But they also provide a theory to explain why capital punishment exists in the United States today, and they make predictions regarding the long-term viability of the institution. The result is a lucid book that provides interesting and worthwhile reading for the layman as well as the legal scholar.

The book is divided into two main sections. In part 1, the authors chart the evolution of the abolition of capital punishment in Western democratic societies, exploring factors that account for the status of the United States as the only Western industrialized nation still executing criminals (p. 3). In part 2, Zimring and Hawkins survey social and political factors that they expect will determine capital punishment's future in America.

Among nonexecuting nations of the world, abolition may be *de jure* or *de facto*. *De facto* abolitionist countries may reserve the death penalty for specific wartime offenses, or they may make it legally available even in time of peace. In either case, national policies and prac-

1. Franklin E. Zimring is a Professor of Law and the Director of the Earl Warren Legal Institute at the University of California, Berkeley. Gordon Hawkins is a Senior Fellow of the Earl Warren Legal Institute, and was formerly the Director of the Sydney University Institute of Criminology.

2. See generally H. BEDAU, *DEATH IS DIFFERENT* (1987) (a collection of essays arguing against the morality and utility of capital punishment, as well as an examination of relevant political factors); C. BLACK, *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* (1974); Gibbs & Erickson, *Capital Punishment and the Deterrence Doctrine*, in *CAPITAL PUNISHMENT IN THE UNITED STATES* 299 (1976); White, *The Role of Social Sciences in Determining the Constitutionality of Capital Punishment*, in *CAPITAL PUNISHMENT IN THE UNITED STATES* 3 (1976).

3. For example, discussion of the often central topic of deterrence is relegated to the appendix.

4. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

tices in these countries⁵ have precluded executions for at least a decade (p. 5).

In contrast to abolitionist states, those nations (other than the United States) actively executing criminals are described as "politically repressive" (p. 6). Citing South Africa, Latin America, the People's Republic of China, the Soviet Union, and many Middle Eastern countries as examples, the authors contend that there is a demonstrable negative correlation between proexecution policy and governmental respect for human rights (pp. 6-8).

The Western democracies' movements toward abolition have been independent and uncoordinated, yet recurrent themes form a pattern. Typically, a period of decline in the rate of executions is followed by a long period of abeyance prior to official abolition. At some point between abeyance and official abolition, the threat of the death penalty ceases to have any meaning.⁶ When the government does take the step of official abolition, its action invariably runs counter to popular opinion (p. 12). But as the availability of the death penalty fades from the public's memory, the next most severe punishment (life imprisonment) takes on the symbolic importance previously accorded capital punishment (p. 162).

The United States has long been a leader in the advancement of human rights, and abolition of the death penalty took place in some U.S. states years before the first instance of abolition in Europe.⁷ By 1972, when the Supreme Court decided *Furman v. Georgia*,⁸ the United States as a whole was at or beyond the point in the evolution of civilized society at which abolition typically becomes appropriate (p. 26). Executions had declined each year over the three decades following 1935, and had ceased altogether since 1967 (p. 26). These trends were then reinforced by the *Furman* Court, which "ruled that the death penalty was 'cruel and unusual' punishment because it had been used in an arbitrary and discriminatory fashion" (p. 34; footnote omitted). According to the pattern described by Zimring and Hawkins, public opposition to the *Furman* decision should not have been surprising, since such opposition has occurred in other democracies

5. Total abolitionist nations include Austria, Finland, Iceland, Portugal, Sweden, and West Germany. Countries with death penalties only for specific wartime offenses include Canada, Denmark, France, Italy, the Netherlands, New Zealand, Norway, Spain, and Switzerland. *De facto* abolitionist countries include Belgium, Cyprus, Greece, Ireland, Israel, and the United Kingdom. Pp. 5-6.

6. Pp. 8-10. The authors ascribe the public's favorable view of capital punishment to deep-seated appreciation of the ritualistic, symbolic value of the death penalty. Pp. 10-15.

7. The Territory of Michigan abolished capital punishment in 1846, the states of Rhode Island and Wisconsin in 1852 and 1853, respectively. The first European country to strike down the death penalty was Portugal in 1867. Pp. 28-29.

8. 408 U.S. 238 (1972). The *Furman* Court held that "the imposition and carrying out of the death penalty in [the cases at bar] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." 408 U.S. at 239-40.

where the death penalty has been struck down (p. 12). Yet four years later, in *Gregg v. Georgia*,⁹ the Court acceded to the apparent will of the people and upheld death penalty laws that had been purged of the defects decisive in *Furman*.¹⁰

The authors argue that *Gregg* was wrongly decided and contend that the confusions of *Furman*¹¹ were a substantial barrier to achieving a "historically and doctrinally correct result in *Gregg*" (p. 51). The *Furman* Court declined to address the issue of whether the death penalty was *per se* violative of the eighth amendment (p. 57). But the authors point to language in Justice Blackmun's *Furman* dissent which, if properly addressed by the majority, would have led to a different result in *Gregg* (p. 51).

In *Furman*, Justice Blackmun cited a number of cases from 1879 to 1963, from which he inferred holdings that the death penalty was not *per se* cruel and unusual punishment (p. 52). Then he stated: "The Court has recognized . . . that the Cruel and Unusual Punishments Clause 'may acquire meaning as public opinion becomes enlightened by a humane justice.' . . . My problem . . . is the *suddenness* of the Court's perception of progress in the human attitude since decisions of only a short while ago."¹² Zimring and Hawkins contend that "[d]etailed knowledge of the processes leading to abolition in other countries would certainly have provided a better context for the Court's deliberations in *Furman* and might have dispelled Justice Blackmun's unease" (p. 63). Viewed with a long-term, evolutionary perspective, the change in attitude would not have appeared "sudden."

While the authors cite the concurring *Furman* opinions of Justices Brennan and Marshall as advancing strong supporting arguments for the holding in that case,¹³ they believe that the lack of a cohesive response to Justice Blackmun's concerns led to the decision in *Gregg* (pp. 63-64). The *Gregg* petitioners argued, to no avail, that standards of decency had evolved to proscribe capital punishment. That Court's assessment of contemporary values was flawed by the same short-term

9. 428 U.S. 153 (1976). The *Gregg* Court held that capital punishment does not "invariably violate" the eighth amendment. 428 U.S. at 169.

10. The holding in *Furman* was limited to the fact-specific cases considered, with executions under those facts being deemed cruel and unusual punishment. Many state legislatures then set about passing new death penalty laws that corrected the flaws evident in the laws addressed in *Furman*. P. 41.

11. The *Furman* Court filed nine separate opinions, four of which were in dissent. "The reasons for that judgment are stated in five separate opinions, expressing as many separate rationales." 408 U.S. at 414 (Powell, J., dissenting). The court stopped short of declaring that all capital punishment was unconstitutional.

12. 408 U.S. at 409-10 (Blackmun, J., dissenting) (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)) (emphasis added).

13. The authors contend that by collating and consolidating selected passages from all the majority justices' opinions in *Furman* it is possible to synthesize an opinion that adequately responds to Justice Blackmun's challenge. P. 58.

analysis undertaken in *Furman*, because the *Gregg* plurality looked primarily to popular opinion and political reaction after *Furman* (pp. 65-67). The authors urge, *inter alia*, that insufficient time had passed for capital punishment to lose the symbolic importance reflected in public opinion (p. 67). The political reaction, which inspired previously executing states to pass *Furman*-proof death penalty statutes, was analogous to states' reactions to other decisions in which their control over symbolic issues was perceived as having been usurped.

[T]here are a number of symbolic issues on which state legislatures annually and deliberately test the patience of the constitutional courts, including school prayer, pornography, and abortion. . . .

The public outcry against [the Supreme Court decisions] was "deafening." . . . Political leaders throughout the country called for constitutional amendments to overturn the Court's rulings Initial compliance with the rulings was mixed, but eventually many of those who decried the decisions have since applauded them [pp. 44-45]

The *Gregg* Court thus seemingly succumbed to the type of pressures it had characteristically resisted in cases of the same nature.

In the second part of the book, Zimring and Hawkins explain state governments' hesitance to abolish capital punishment as indicative of a political phenomenon particularly acute in the United States. In democracies abolishing the death penalty, government officials "led from the front," going against the grain of public opinion in order to shape that opinion into one reflecting a higher standard of humanity (p. 22). In the United States, however, elected officials are considered too accountable to the electorate to take such bold action. The public has a greater affection for the death penalty as a law than for actual executions, but the structure of our justice system is such that the government cannot act upon this aversion to actual killings. Instead, each participant in the system can avoid both personal responsibility for an execution¹⁴ and a confrontation with public opinion (pp. 95-105).

The authors also examine the regional disparity in execution policies, noting the South's responsibility for an unseemly majority of all executions in the United States (p. 128). Considering present backlogs on death row and potential trends in execution policy, the authors describe a number of scenarios by which decisionmakers will be confronted with a choice between an assembly line pace of executions and some furtherance of the trend toward abolition.¹⁵ Finally, the authors survey the various mechanisms by which abolition may be brought

14. The prosecutor may ask for the death penalty knowing that it is up to the jury to decide whether to award it. The jury may award the death penalty knowing that its decision will be reviewed by the courts. Judges know that the Governor may grant clemency. The Governor, not wanting to appear "soft" on crime, may decline clemency, citing a deference to the decisions of the legislature, prosecutor, jury, and courts, all of whom have determined that the particular convict should die. Pp. 98-102.

15. Pp. 130-37. This discussion is found in chapter 5, appropriately entitled "A Game of Chicken."

about in the long term, and conclude that United States Supreme Court action is the most likely candidate.

[T]here is no doubt that the end will come. Although both the public mood and the ideology of governments fluctuate dramatically in relatively short periods of time, in the history of the Western world those fluctuations occur within a larger continuous movement of developing social and political trends.

....

. . . Historical trends will produce the pressure for abolition and the national Supreme Court seems the path of lowest resistance to achieving that objective. [p. 158]

The authors find that, the *Gregg* decision notwithstanding, *Furman* can provide a basis for striking down death penalty laws.¹⁶ Empirical analysis of contemporary executions leads the authors to conclude that the death penalty as currently administered is cruel and unusual punishment within the meaning of the eighth amendment. They follow Justice Stewart's concurring opinion in *Furman*, in which he stated that the death sentences in that case were "cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."¹⁷ Pointing to the extremely low percentage of death sentences meted out for capital crimes, and to society's inability to define persuasively the criteria that should make particular crimes capital offenses, the authors contend that being executed in the United States is, in fact, like being struck by lightning (pp. 70-91). Despite their empirical findings, the authors realistically do not expect decisive action to be taken in the near future (p. 157).

Zimring and Hawkins present a persuasive argument for a refocusing of the discourse on capital punishment. The asserted negative correlation between respect for human rights and willingness to execute certainly seems plausible, and the stark contrast between the human rights policies of executing and nonexecuting countries does make the United States' execution policy appear anomalous. The authors employ the human rights thesis to support their assertions regarding the contemporary meaning of cruel and unusual punishment. However, their logic would have more force if they had examined more thoroughly potential alternative explanations for the "clear disjunction between executing and nonexecuting states" (p. 6). They posit that "[i]t is no coincidence that the list of actively executing countries matches that of politically repressive countries" (p. 6). This key contention is

16. The authors find that only one of the nine justices in *Gregg*, Justice Blackmun, regarded *Gregg* as having overruled *Furman*. P. 69. See notes 8-9 *supra*.

17. *Furman v. Georgia*, 408 U.S. 238, 309-10 (Stewart, J., concurring).

then followed by a mere two-page summary of the sins of ten nations that execute criminals. Considering the fundamental role that the asserted relationship plays in the authors' thesis, the topic is worthy of further and more detailed examination.

Capital Punishment and the American Agenda provides a rational analysis of the current state of capital punishment in the United States, one which does not invite emotional dispute at each turn. The reader need not be a devout abolitionist to concur with many of the authors' conclusions regarding the influence of public opinion on execution policy, the role played by political accountability, and the potential scenarios for the future. The authors' assertions about the development of the meaning of the eighth amendment reflect a pointedly nonoriginalist perspective of constitutional interpretation, yet the predictions about the long-term future of capital punishment are more pragmatic than argumentative. The book is thought-provoking, and may cast a new light on previous arguments concerning the propriety of the death penalty.

— *John Pierce Stimson*