Supplementary Material

Chapter 9: Liberalism Divided—Criminal Justice/Punishments/The Death Penalty

Capital Punishment in Massachusetts (1977–1980)

The vast majority of state supreme courts in the wake of Furman *sustained state statues imposing capital punishment. Massachusetts was a notable exception. The supreme court of that state repeatedly declared unconstitutional state death penalty measures. As you read the opinions below, consider what explained the difference between Massachusetts and the judicial majorities on both the Supreme Court and other state tribunals. To what extent did the different wording of constitutional provisions matter? The Massachusetts Constitution forbids "cruel* ***or*** *unusual punishments." Most constitutions forbid "cruel* ***and*** *unusual punishments." Might past precedents in Massachusetts be more anti–capital punishment than federal precedents or the precedents in other states? Are the opinions below best explained by underlying values, that justices in Massachusetts were more opposed to capital punishment than justices in other states and on the federal bench? What might explain that difference?*

Opinion of the Justices, *372 Mass. 912 (1977)*

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[A]rt. 26 of the Declaration of Rights "No magistrate or court of law, shall . . . inflict cruel or unusual punishments" forbids the imposition of a death penalty in this Commonwealth in the absence of a showing on the part of the Commonwealth that the availability of that penalty contributes more to the achievement of a legitimate State purpose for example, the purpose of deterring criminal conduct than the availability in like cases of the penalty of life imprisonment. Existing studies of the entire subject have provided no such demonstration regarding any of the situations of murder that would be covered by the proposed legislation, nor has the Legislature made findings resulting from investigation that might furnish the demonstration. Accordingly, House No. 3373 would violate article

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The reasoning under article 26 [is] that deprivation of life is a dread, ultimate sanction unique, standing apart from other exactions by the State. Unless the State could demonstrate in reason that this extreme penalty performed some legitimate State function more effectively than life imprisonment, execution of a sentence of death constituted a pointless infliction of excessive punishment and hence was "cruel" or "unusual" within the meaning of article 26. The opinions in *Commonweal v. O'Neal II* (MA 1975) [a case declaring a previous version of the Massachusetts death penalty law unconstitutional] canvassed each basis on which it could be claimed that capital punishment excelled over life imprisonment in the respect mentioned. The basis having most surface appeal was that a prospect of suffering death had stronger deterrent effect on potential murderers than a prospect of being sentenced to imprisonment for life. But a careful examination in *O'Neal II* of the serious studies of the entire subject, including the reports of two Massachusetts legislative commissions, disclosed that the deterrence basis, like the others that might be asserted, had not been established by satisfactory empirical proof or by acceptable a priori reasoning.

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Whether the bill would be held to conform to the Constitution of the United States we need not consider, as that question is not put in the Order. Rather, the Order poses the question whether the bill would violate the Declaration of Rights of the Commonwealth.

We believe it would. The bill sets up a machinery and standards by means of which the trier would attempt to decide whether individual defendants guilty of murder in the first degree should or should not be sentenced to death. But this entire procedure appears directed as was the statute in the Gregg case to meeting the Furman objection; it does not meet the O'Neal objection, namely, that capital punishment is "cruel" or "unusual" in the absence of a demonstration of its peculiar efficacy in comparison with other punishment.

The view expressed to this point is joined in by the Justices subscribing to this answer to the House. We add that individual Justices question the validity of House No. 3373 on additional grounds: (1) that capital punishment is in itself so brutal to the object and so dehumanizing of others that it constitutes "cruel" or "unusual" punishment within article 26; (2) that, in practice, the process culminating in a sentence of death under the bill would have elements of untrammeled discretion very likely to work in discriminatory fashion against racial minorities and the poor.

FRANCIS J. QUIRICO and ROBERT BRAUCHER.

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[W]e are of the opinion that "for purposes of this analysis art. 26 of the Massachusetts Declaration of Rights imposes a standard no more restrictive than that expressed in the prohibition of 'cruel and unusual' punishment in the Eighth Amendment." . . . In particular, we would follow the view in which seven of the nine Justices of the Supreme Court of the United States concurred, that the sentence of death for the crime of murder does not of itself constitute "cruel and unusual" punishment. . . .

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With respect, we would suggest that if the present will of the people is that capital punishment should not be permitted in some or all cases of murder in the first degree, procedures for amendment of the State Constitution which are relatively speedy, but still require time for reasonable reflection, are available to accomplish that end. Instead, the O'Neal decision and the present advisory opinion have accomplished a judicial amendment to our Constitution shifting to the people the burden of taking the steps necessary to make it mean what it has been understood to say at all times since 1780.

We do not join the debate on the question of comparative deterrence as between the death penalty and life imprisonment except to agree that the results "simply have been inconclusive." The majority depart violently from our traditional scrutiny of legislative determinations regarding punishment. . . . They convert a disputed factual question, on which reasonable men differ, into an absolute bar to legislation, placing the burden of proof on the Legislature. The departure does a disservice to our high function under the Constitution. We have no special competence in assessing complex statistical arguments over incremental deterrence, and we should not make constitutional rights depend on shifting evaluations of empirical data. The responsibility for evaluating all such data rests with the Legislature and not with this court.

District Attorney for Suffolk District v. Watson, *381 Mass. 648 (1980)*

HENNESSEY, CHIEF JUSTICE.

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. . . We conclude furthermore that c. 488 of the Acts of 1979 [the death penalty provision] contravenes the prohibition against cruel or unusual punishment contained in art. 26 of the Declaration of Rights on each of two grounds: (1) the death penalty is unacceptably cruel under contemporary standards of decency, and (2) the death penalty is administered with unconstitutional arbitrariness and discrimination.

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The history of the death penalty in the Supreme Judicial Court of Massachusetts consists basically of two matters. In the first of these, *Commonwealth v. O'Neal*, . . . (MA 1975) (*O'Neal II*), a majority of this court held that a mandatory death penalty for rape-murder constituted cruel or unusual punishment in violation of art. 26 of the Declaration of Rights of the Massachusetts Constitution. *In Opinions of the Justices*, . . . (1977), . . . five Justices of this court [declared] . . . "that art. 26 of the Declaration of Rights—'No magistrate or court of law, shall . . . inflict cruel or unusual punishments'—forbids the imposition of a death penalty in this Commonwealth in the absence of a showing on the part of the Commonwealth that the availability of that penalty contributes more to the achievement of a legitimate State purpose—for example, the purpose of deterring criminal conduct—than the availability in like cases of the penalty of life imprisonment."

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I. THE DEATH PENALTY IS OFFENSIVE TO CONTEMPORARY STANDARDS OF DECENCY.

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. . . "Certainly at the time of its adoption, art. 26 was not intended to prohibit capital punishment. Capital punishment was common both before and after its adoption. However, art. 26, like the Eighth Amendment, 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' . . . Therefore, if the death penalty is indeed unacceptable under contemporary moral standards, it is tantamount to those punishments barred since the adoption of art. 26, and it is our responsibility to declare it invalid.

It is true that there is no unanimity of public opinion either favoring or opposing the death penalty. But public opinion, while relevant, is not conclusive in assessing whether the death penalty is consonant with contemporary standards of decency. . . . Moreover, we think that what our society does in actuality is a much more compelling indicator of the acceptability of the death penalty than the responses citizens may give upon questioning. . . . From the beginning of 1948 until the end of 1972 (the *Furman v. Georgia* case was decided in 1972) no person was executed in this Commonwealth. The death sentences of forty-three persons were commuted or reduced by executive action. . . . The complete absence of executions in the Commonwealth through these many years indicates that in the opinion of those several Governors and others who bore the responsibility for administering the death penalty provisions and who had the most immediate appreciation of the death sentence, it was unacceptable.

In its finality, the death penalty may cruelly frustrate justice. Death is the one punishment from which there can be no relief in light of later developments in the law or the evidence. . . . While this court has the power to correct constitutional or other errors retroactively by ordering new trials for capital defendants whose appeals are pending or who have been fortunate enough to obtain stays of execution or commutations, it cannot, of course, raise the dead. . . .

The cruelty of the death penalty similarly inheres in its unparalleled effect on all the rights of the person condemned. . . . An individual in prison does not lose 'the right to have rights.' . . .

Finally, and perhaps most conclusive, the death penalty is unacceptable under contemporary standards of decency in its unique and inherent capacity to inflict pain. The mental agony is, simply and beyond question, a horror. . . . In addition, we know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death.

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II. THE DEATH PENALTY IS ARBITRARILY INFLICTED.

It is inevitable that the death penalty will be applied arbitrarily. Also, experience has shown that the death penalty will fall discriminatorily upon minorities, particularly blacks. For these reasons the death penalty is unconstitutionally cruel under art. 26 of the Declaration of Rights. . . .

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We think that arbitrariness in sentencing will continue even under the discipline of a post-*Furman* statute like the one before us. . . .

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Furman and subsequent cases do not address the discretionary powers exercised at other points in the criminal justice process. Power to decide rests not only in juries but in police officers, prosecutors, defense counsel, and trial judges. In the totality of the process, most life or death decisions will be made by these officials, unguided and uncurbed by statutory standards. In any given case, decisions may rest upon such considerations as the level of public outcry.

Furman stands indifferent to the exercise of the prosecutor's "untrammeled discretion." For reasons which may be valid in the context of his duties, but which do not assist evenhandedness, the prosecutor in a homicide case may forgo a first degree murder indictment and seek an indictment for second degree murder or a lesser charge. . . .

The death penalty has been described by many commentators not only as arbitrary and capricious but also as discriminatory. . . .

Examination of death sentences imposed in Florida, Georgia, and Texas under post-*Furman* statutes upheld by the Supreme Court in 1976 indicates that very little has changed as to arbitrariness and discrimination. The criminal homicide data from the date of the post-Furman statutes through 1977 indicate the following: In Florida, of 286 blacks who had killed whites, forty-eight (16.8%) were sentenced to death; of 111 whites who killed blacks, none were sentenced to death. In Georgia, of 258 blacks who killed whites, thirty-seven (14.3%) were sentenced to death; of seventy-one whites who killed blacks, two (2.8%) were sentenced to death. In Texas, of 344 blacks who killed whites, twenty-seven (7.8%) were sentenced to death; of 143 whites who killed blacks, none were sentenced to death.

From the foregoing discussion, it follows that we accept the wisdom of *Furman*, that arbitrary and capricious infliction of the death penalty is unconstitutional. However, we add that such arbitrariness and discrimination, which inevitably persist even under a statute which meets the demands of Furman, offend art. 26 of the Massachusetts Declaration of Rights.

A judgment shall enter in the county court declaring that c. 488 of the Acts of 1979 is unconstitutional under art. 26 of the Declaration of Rights of the Constitution of Massachusetts.

LIACOS, JUSTICE (concurring).

. . . [I]t is also likely that the Constitution of this Commonwealth may have a separate and distinct meaning which is to be interpreted and enforced by this court. . . . This court has not decided whether the phrase "cruel and unusual" and the phrase "cruel or unusual" have the same or a distinct meaning. . . . I would . . . state that art. 26 stands on its own footing [and] . . . hold that a punishment may not be inflicted if it be either "cruel" or "unusual."

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QUIRICO, JUSTICE (dissenting).

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We start with the proposition that the Legislature has "full power and authority . . . to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, . . . either with penalties or without, so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same. . . ." . . . It is thus with restraint that we exercise our power of review to determine whether the punishment before us exceeds the constitutional limitations imposed by the Eighth Amendment and by art. 26" (citations omitted).

In determining the constitutionality of a statute, this court ordinarily assumes that the Legislature has acted on the basis of facts which have a rational bearing on the subject matter of the legislation, and which support the validity of the statute. . .

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In my opinion, it cannot be said that the statute under consideration "cannot be supported upon any rational basis of fact that reasonably can be conceived to sustain it." It should therefore follow, under that rule, that "the court has no power to strike it down as violative of the Constitution." I believe that the same result would follow if we were limited in our decision to a consideration of those facts expressly found by the Legislature.

It should surprise no one that the factual conclusions reached by the Legislature are not universally accepted. The Legislature's powers are not limited to action in areas where there is unanimity of opinion as to the need for action and the nature of the action required. There are few subjects which have been so widely debated for so long as has been the case with capital punishment. There are perhaps few subjects on which opinions are so polarized, and the basis for which is found in personal viewpoints without satisfactory factual proof to support them. We thus have a typical case for the application of the rule that "(w)here the reasonableness of the legislative finding or the factual basis of the legislative finding is fairly debatable the legislative determination must be sustained. . . .

If this court is to determine the constitutionality of the death penalty in light of contemporary moral standards, I believe it must, at a minimum, award great deference to the legislative judgment implicit in the passage of the statute that contemporary moral standards support the punishment in certain circumstances. The fact that we interpret art. 26 rather than another provision of our Constitution should not affect the functions and responsibilities of the co-equal branches of government so as to justify an otherwise unwarranted and improper intrusion by the judiciary into the legislative domain. . . .

It is, of course, well established that art. 26 of the Declaration of Rights places a restraint upon the exercise of legislative power and an obligation on the court to judge the constitutionality of legislative determinations regarding punishment. . . . However, I am of the view that "for purposes of this analysis art. 26 of the Massachusetts Declaration of Rights imposes a standard no more restrictive than that expressed in the prohibition of 'cruel and unusual' punishment in the Eighth Amendment." . . . I do not believe that the court places any particular reliance on the slight difference between the words making reference to "cruel or unusual" punishment in art. 26 of the Declaration of Rights, and the words making reference to "cruel and unusual" punishment in the Eighth Amendment to the United States Constitution in interpreting art. 26 as proscribing the death penalty (emphasis supplied). We are, of course, free to interpret our own Constitution differently from the manner in which the United States Supreme Court interprets basically the same language in the United States Constitution. However, the total absence of any sound reason for the difference in interpretation gives cause to question the decision in this case. There is no historical reason to suppose that these words, first adopted as a part of the Massachusetts Constitution in 1780 and then adopted as part of the First through Tenth Amendments to the United States Constitution in 1790, were intended to have different meanings in substantially similar societal settings, both of which clearly recognized and sanctioned capital punishment for certain crimes. There is no other apparent reason why the nearly identical State and Federal constitutional provisions should not dictate identical results. . . .

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In part two of its decision the court properly suggests that c. 488 would meet Federal constitutional requirements. Nevertheless, the court concludes that c. 488—or any other statute providing for capital punishment—is unconstitutional under the Massachusetts Constitution. Part two of the decision holds the death penalty to be unconstitutional because it is arbitrarily inflicted, and because it falls discriminatorily upon minorities. To support this holding, the court takes judicial notice of the existence of racial prejudice in some persons in this Commonwealth. Even recognizing the existence of such prejudice, however, I am not prepared to accept a statistical showing from Florida, Georgia, Texas and Ohio as evidence of the extent of such discrimination in Massachusetts. There are no comparable statistics or other evidence before the court which suggests that the death penalty has been discriminatorily imposed in this Commonwealth. In the absence of such a record, I do not concede that sentencing under c. 488 would inevitably be arbitrary and discriminatory.

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In summary, the issue before the Justices of this court, as I see it, is not whether any Justice favors or opposes capital punishment as a matter of Commonwealth policy. Nor is the issue whether any Justice

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would favor or oppose capital punishment if he were called to vote thereon as a member of the general public or as a member of the Legislature. Rather, the issue before us, as I see it, is whether the Legislature has the power, under the Constitution of the Commonwealth, to enact a statute mandating capital punishment for certain types of murder in the first degree, and more specifically whether it has the power to enact St. 1979, c. 488, the statute under consideration, which authorizes the imposition of the death penalty for murder in the first degree committed in particular, specified circumstances. A vote on the subject of capital punishment by a member of the general public or by a member of the Legislature requires a consideration of broad questions of public policy. A vote on the same subject as it comes before the court in this case involves consideration of the much more limited constitutional question of the power of the Legislature to determine what the public policy of the Commonwealth should be on this subject. I conclude that the Legislature has the power to make that decision under the provisions of the Constitution of this Commonwealth, and I reach that conclusion without regard to any personal views which I may have on the "expediency, wisdom or necessity" of capital punishment.

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