Supplementary Material

Chapter 10: The Reagan Era—Criminal Justice/Punishments/The Death Penalty

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Callins v. Collins, 510 U.S. 1141 (1994)

Bruce Callins murdered Allen Huckleberry when Callins was robbing the patrons of Norma's Lounge, after Huckleberry did not hand over his wallet with sufficient speed. Callins was subsequently arrested, tried, convicted, and sentenced to death for capital murder. His conviction was sustained by the Texas Court of Criminal Appeals. Callins filed for a writ of habeas corpus, claiming that the trial court committed numerous constitutional errors. This suit was rejected by state courts in Texas, a federal district court, and the Court of Appeals for the Fifth Circuit. Callins appealed to the Supreme Court of the United States.

The Supreme Court by an 8–1 vote refused to hear Callins' appeal. Justice Blackmun's dissent from the denial of certiorari recanted his opinion in Furman v. Georgia *(1972). Blackmun claimed that twenty years of experience with capital punishment demonstrated that the death penalty could not be implemented consistently with constitutional safeguards. Justice Scalia's concurring opinion asserted that the problem with capital punishment in the United States was that the Supreme Court had imposed too many, not too few, safeguards. What specific problems did Blackmun believe haunt the capital sentencing process? Are these problems distinctive to capital punishment or endemic to any criminal justice system operated by human beings? Is death constitutionally different so that special procedures are needed to implement that sanction?* Callins *was decided as Blackmun was retiring from the Court. Did that influence his change of heart? Consider your opinions on capital punishment. What might cause you to change your opinion on the constitutionality of that sanction?*

The petition for a writ of certiorari is denied.

JUSTICE SCALIA, concurring.

Justice BLACKMUN dissents from the denial of certiorari in this case with a statement explaining why the death penalty "as currently administered" is contrary to the Constitution of the United States. That explanation often refers to "intellectual, moral and personal" perceptions, but never to the text and tradition of the Constitution. It is the latter rather than the former that ought to control. The Fifth Amendment provides that "[n]o person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, . . . without due process of law." This clearly permits the death penalty to be imposed, and establishes beyond doubt that the death penalty is not one of the "cruel and unusual punishments" prohibited by the Eighth Amendment.

As Justice BLACKMUN describes, however, over the years since 1972 this Court has attached to the imposition of the death penalty two quite incompatible sets of commands: The sentencer's discretion to impose death must be closely confined, see *Furman v. Georgia* (1972), but the sentencer's discretion not to impose death (to extend mercy) must be unlimited. . . . These commands were invented without benefit of any textual or historical support. . . .

Though Justice BLACKMUN joins those of us who have acknowledged the incompatibility of the Court's *Furman* and *Lockett v. Ohio* (1978. . . lines of jurisprudence, . . . he unfortunately draws the wrong conclusion from the acknowledgment. . . .

Convictions in opposition to the death penalty are often passionate and deeply held. That would be no excuse for reading them into a Constitution that does not contain them, even if they represented the

convictions of a majority of Americans. Much less is there any excuse for using that course to thrust a minority's views upon the people. Justice BLACKMUN begins his statement by describing with poignancy the death of a convicted murderer by lethal injection. He chooses, as the case in which to make that statement, one of the less brutal of the murders that regularly come before us—the murder of a man ripped by a bullet suddenly and unexpectedly, with no opportunity to prepare himself and his affairs, and left to bleed to death on the floor of a tavern. The death-by-injection which Justice BLACKMUN describes looks pretty desirable next to that. It looks even better next to some of the other cases currently before us which Justice BLACKMUN did not select as the vehicle for his announcement that the death penalty is always unconstitutional—for example, the case of the 11-year-old girl raped by four men and then killed by stuffing her panties down her throat. . . How enviable a quiet death by lethal injection compared with that! If the people conclude that such more brutal deaths may be deterred by capital punishment; indeed, if they merely conclude that justice requires such brutal deaths to be avenged by capital punishment; the creation of false, untextual, and unhistorical contradictions within "the Court's Eighth Amendment jurisprudence" should not prevent them.

JUSTICE BLACKMUN, dissenting.

On February 23, 1994, at approximately 1:00 a.m., Bruce Edwin Callins will be executed by the State of Texas. Intravenous tubes attached to his arms will carry the instrument of death, a toxic fluid designed specifically for the purpose of killing human beings. The witnesses, standing a few feet away, will behold Callins, no longer a defendant, an appellant, or a petitioner, but a man, strapped to a gurney, and seconds away from extinction.

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. . . Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, see *Furman v. Georgia* (1972), and, despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. . . . Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death can never be achieved without compromising an equally essential component of fundamental fairness—individualized sentencing.

It is tempting, when faced with conflicting constitutional commands, to sacrifice one for the other or to assume that an acceptable balance between them already has been struck. In the context of the death penalty, however, such jurisprudential maneuvers are wholly inappropriate. The death penalty must be imposed "fairly, and with reasonable consistency, or not at all."

To be fair, a capital sentencing scheme must treat each person convicted of a capital offense with that "degree of respect due the uniqueness of the individual." That means affording the sentencer the power and discretion to grant mercy in a particular case, and providing avenues for the consideration of any and all relevant mitigating evidence that would justify a sentence less than death. Reasonable consistency, on the other hand, requires that the death penalty be inflicted evenhandedly, in accordance with reason and objective standards, rather than by whim, caprice, or prejudice. Finally, because human error is inevitable, and because our criminal justice system is less than perfect, searching appellate review of death sentences and their underlying convictions is a prerequisite to a constitutional death penalty scheme.

On their face, these goals of individual fairness, reasonable consistency, and absence of error appear to be attainable: . . . Yet, in the death penalty area, this Court, in my view, has engaged in a futile effort to balance these constitutional demands, and now is retreating not only from the *Furman* promise of consistency and rationality, but from the requirement of individualized sentencing as well. Having virtually conceded that both fairness and rationality cannot be achieved in the administration of the death penalty, see *McCleskey v. Kemp* (1987), the Court has chosen to deregulate the entire enterprise, replacing, it would seem, substantive constitutional requirements with mere esthetics, and abdicating its statutorily and constitutionally imposed duty to provide meaningful judicial oversight to the administration of death by the States.

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants "deserve" to die?—cannot be answered in the affirmative. It is not simply that this Court has allowed vague aggravating circumstances to be employed, relevant mitigating evidence to be disregarded, and vital judicial review to be blocked. The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.

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There is little doubt now that *Furman*'s essential holding was correct. Although most of the public seems to desire, and the Constitution appears to permit, the penalty of death, it surely is beyond dispute that if the death penalty cannot be administered consistently and rationally, it may not be administered at all. . . .

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Unfortunately, all this experimentation and ingenuity yielded little of what Furman demanded. It soon became apparent that discretion could not be eliminated from capital sentencing without threatening the fundamental fairness due a defendant when life is at stake. Just as contemporary society was no longer tolerant of the random or discriminatory infliction of the penalty of death, see Furman, supra, evolving standards of decency required due consideration of the uniqueness of each individual defendant when imposing society's ultimate penalty.

This development in the American conscience would have presented no constitutional dilemma if fairness to the individual could be achieved without sacrificing the consistency and rationality promised in Furman. But over the past two decades, efforts to balance these competing constitutional commands have been to no avail. Experience has shown that the consistency and rationality promised in Furman are inversely related to the fairness owed the individual when considering a sentence of death. A step toward consistency is a step away from fairness.

There is a heightened need for fairness in the administration of death. . . . Because of the qualitative difference of the death penalty, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." . . .

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Yet, as several Members of the Court have recognized, there is real "tension" between the need for fairness to the individual and the consistency promised in *Furman*. On the one hand, discretion in capital sentencing must be "'controlled by clear and objective standards so as to produce non-discriminatory [and reasoned] application.'" On the other hand, the Constitution also requires that the sentencer be able to consider "any relevant mitigating evidence regarding the defendant's character or background, and the circumstances of the particular offense." The power to consider mitigating evidence that would warrant a sentence less than death is meaningless unless the sentencer has the discretion and authority to dispense mercy based on that evidence. Thus, the Constitution, by requiring a heightened degree of fairness to the individual, and also a greater degree of equality and rationality in the administration of death, demands sentencer discretion that is at once generously expanded and severely restricted.

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While one might hope that providing the sentencer with as much relevant mitigating evidence as possible will lead to more rational and consistent sentences, experience has taught otherwise. It seems that the decision whether a human being should live or die is so inherently subjective—rife with all of

life's understandings, experiences, prejudices, and passions—that it inevitably defies the rationality and consistency required by the Constitution.

The arbitrariness inherent in the sentencer's discretion to afford mercy is exacerbated by the problem of race. Even under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die. Perhaps it should not be surprising that the biases and prejudices that infect society generally would influence the determination of who is sentenced to death, even within the narrower pool of death-eligible defendants selected according to objective standards. . . .

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The fact that we may not be capable of devising procedural or substantive rules to prevent the more subtle and often unconscious forms of racism from creeping into the system does not justify the wholesale abandonment of the Furman promise. To the contrary, where a morally irrelevant—indeed, a repugnant—consideration plays a major role in the determination of who shall live and who shall die, it suggests that the continued enforcement of the death penalty in light of its clear and admitted defects is deserving of a "sober second thought." . . .

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[E]ven if the constitutional requirements of consistency and fairness are theoretically reconcilable in the context of capital punishment, it is clear that this Court is not prepared to meet the challenge. In apparent frustration over its inability to strike an appropriate balance between the *Furman* promise of consistency and the *Lockett* requirement of individualized sentencing, the Court has retreated from the field, allowing relevant mitigating evidence to be discarded, vague aggravating circumstances to be employed, and providing no indication that the problem of race in the administration of death will ever be addressed. . . . In my view, the proper course when faced with irreconcilable constitutional commands is not to ignore one or the other, nor to pretend that the dilemma does not exist, but to admit the futility of the effort to harmonize them. This means accepting the fact that the death penalty cannot be administered in accord with our Constitution.

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The Court's refusal last Term to afford Leonel Torres Herrera an evidentiary hearing, despite his colorable showing of actual innocence, demonstrates just how far afield the Court has strayed from its statutorily and constitutionally imposed obligations. See *Herrera v. Collins* (1993). In *Herrera*, only a bare majority of this Court could bring itself to state forthrightly that the execution of an actually innocent person violates the Eighth Amendment. This concession was made only in the course of erecting nearly insurmountable barriers to a defendant's ability to get a hearing on a claim of actual innocence. . . .

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Perhaps one day this Court will develop procedural rules or verbal formulas that actually will provide consistency, fairness, and reliability in a capital sentencing scheme. I am not optimistic that such a day will come. I am more optimistic, though, that this Court eventually will conclude that the effort to eliminate arbitrariness while preserving fairness "in the infliction of [death] is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether." I may not live to see that day, but I have faith that eventually it will arrive. The path the Court has chosen lessens us all. I dissent.