Let the States Decide

The Eighth Amendment to the Constitution forbids "cruel and unusual punishments." In capital punishment cases, Supreme Court Justices William Brennan and Thurgood Marshall, the surviving relics of the Earl Warren Court, routinely declare that "the death penalty is in all circumstances cruel and unusual punishment forbidden" by the Eighth Amendment. Their position, however, is in direct conflict with the express terms of the Fifth Amendment, which three times explicitly recognizes that penalty:

> No person shall be held to answer for a *capital* or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury … nor shall any person be subject for the same offence to be twice put *in jeopardy of life or limb* … nor *be deprived of life*, liberty, or property, without due process of law. [Emphasis added.]

No rational judge could read the Eighth Amendment to bar as "cruel and unusual" the death penalty specifically recognized in the fifth, unless that judge considered himself free from any duty to follow the clear meaning of the text of the Constitution. Nevertheless, for the past 15 years the status of the death penalty was clouded by Supreme Court interpretations. This year, however, the Court removed much of the uncertainty and went a long way toward reestablishing that penalty as a legitimate option for the states.

In 1972, in *Furman v. Georgia*, the Supreme Court held the death penalty laws of all the states and federal government unconstitutional as a violation of the Eighth Amendment's prohibition on "cruel and unusual punishments." The Court did not hold that the death penalty was inherently unconstitutional; rather, the statues were struck down because of the arbitrary and discriminatory manner in which, in the Court's view, the penalty was applied. After *Furman* many states conformed their laws to that decision, and, in *Gregg v. Georgia* in 1976, the Court upheld such laws, in which guilt or innocence is determined in a separate proceeding from the determination of the sentence. Except for murders committed during aircraft hijackings, however, there is no federal death penalty.

Since executions were resumed by the states in 1977, the Supreme Court has removed several procedural obstacles to its imposition. Two of the most significant cases were decided by 5-4 votes in April of this year. In *Tison v. Arizona*, Ricky and Raymond Tison helped their father, Gary Tison, escape from prison. In the escape they kidnapped John Lyons, his wife, Donnella, their two-year-old son, and their 15-year-old niece. Gary Tison shotgunned the entire Lyons family to death as his sons watched without attempting to interfere. The sons were sentenced to death and the Supreme Court upheld the sentences. Although the sons did not intend to kill, they were armed and "could have foreseen that lethal force might be used, particularly since [they] knew that [their] father's previous escape attempt had resulted in murder.… [They] participated fully in the kidnapping and robbery and watched the killing after which [they] chose to aid those whom [they] had placed in the position to kill rather than their victims." Their "reckless or extreme indifference to human life" made them subject to death for the murders that occurred during the commission of the escape and kidnapping even though they had no direct intent to kill.

On the following day, in *McCleskey v. Kemp*, the Court held that evidence that in Georgia killers of whites, especially black killers, are far more likely to be executed than are killers of blacks, did not show unconstitutional discrimination against a black man sentenced to death for killing a white policeman during a robbery. McCleskey could prove neither that the Georgia legislature enacted capital punishment with a racially discriminatory purpose nor that "the decision-makers in *his* case acted with

discriminatory purpose." [Emphasis in original.] Mere statistical disparity in sentencing does not prove a constitutional violation.

The *Tison* and *McCleskey* cases resolved procedural uncertainties that have delayed numerous executions. Other issues still must be decided by the Court, including the constitutionality of executing persons who were under 18 years of age when they committed the crime. But the *McCleskey* case is especially significant because it laid to rest the statistical argument on racial discrimination that has been a staple of death penalty appeals for decades.

George C. Smith, director of litigation of the Washington Legal Foundation noted: "The vast majority of actual executions in the post-*Furman* era have involved white convicts." To the extent that statistics show that killers of whites are more likely to be sentenced to death than are killers of blacks, Smith claims that "any apparent disparity is explained by the fact that whites are disproportionately the victims of the kinds of aggravated murders which alone qualify for the death penalty. Felony murders — those committed in the course of a rape or robbery — are the chief crimes eligible for capital punishment under the post-*Furman* statutes. The available data demonstrate that whites constitute between 77 percent and 89 percent of rape and robbery victims. It follows inescapably that whites would represent a comparable percentage of murder victims killed during a rape or robbery."

The Supreme Court in *McCleskey* noted: "McCleskey's arguments are best presented to the legislative bodies. It is not the responsibility — or indeed even the right — of this Court to determine the appropriate punishment for particular crimes.... Capital punishment is now the law in more than two thirds of our States. It is the ultimate duty of courts to determine on a case-by-case basis whether these laws are applied consistently with the Constitution."

Tison and *McCleskey* do not decide whether the death penalty is good or bad. Rather, in accord with the intent of the framers, they recognize that the policy choice is up to the state legislatures rather than the unelected judiciary.