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40 Years after *Furman,* The U.S. Death Penalty is in Disarray

The Color of Law

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June 29 marks the fortieth anniversary of the landmark Supreme Court case *Furman v. Georgia*. In Furman, the high court abolished the death penalty on the grounds that it violated the Eighth Amendment prohibition on cruel and unusual punishment. The decision also barred the use of capital punishment for rape convictions.

"The fact that the State may seek retribution against those who have broken its laws does not mean that retribution may then become the State's sole end in punishing. Our jurisprudence has always accepted deterrence in general, deterrence of individual recidivism, isolation of dangerous persons, and rehabilitation as proper goals of punishment," wrote Justice Thurgood Marshall in his concurring opinion. "Retaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society."

Marshall also addressed the issue of inevitably executing the innocent. "No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed, but we can be certain that there were some," he noted.

"Whether there were many is an open question made difficult by the loss of those who were most knowledgeable about the crime for which they were convicted. Surely there will be more as long as capital punishment remains part of our penal law," Justice Marshall added.

Capital punishment was reinstated with *Gregg v. Georgia* in 1976, but at least for several years there were no executions in the U.S.

Forty years after *Furman,* problems still plague the death penalty, when in reality the problems never went away. And as long as there are executions, we'll continue to have a problem.

The writing is on the wall for those who offer to read it. Recently the Arkansas Supreme Court struck down the death penalty law in that state, finding it is unconstitutional for the department of correction to make policy by deciding execution procedures and what lethal injection drugs to use. Rather, it is the legislature's job to decide that, and in any case, Arkansas has not executed since 2005. Although the court did not find lethal injection or the death penalty itself unconstitutional in the 5-2 decision, state lawmakers would have to go back to the drawing board and write a new law. Actually, they should let it go and abandon the practice altogether.

In North Carolina, the state legislature passed a bill that would gut the Racial Justice Act. Signed into law by Governor Bev Perdue in 2009, the Racial Justice Act allowed death row convicts to challenge their sentences on the grounds that racial bias was a significant factor in their sentencing. The new scaling back of the law, if passed, would prohibit death row inmates from relying solely on statistics. This would effectively remove the "racial" and "justice" components of the original law, leaving exactly what conservatives and prosecutors wanted in the first place. And if the governor signs this regressive legislation, the Tarheel State will embrace its legacy of racial injustice, and demonstrate its failure to resist emulating its more backward neighbor to the South. Remember that when prosecutors keep blacks off juries due to racial motivations, both white defendants and defendants of color are harmed.

Meanwhile, in Texas, the state's Democratic Party passed a platform calling for abolition of the death penalty. And Hank Skinner - a Texas death row inmate who was granted a stay of execution in November in order to conduct a DNA test - has been given the green light to proceed with the testing. Skinner's exoneration came as a result of pleas from death row exonerees and abolition activists. The problem with DNA testing is that key evidence in the case is missing. How convenient.

And how typical of Texas, where a man named Cameron Todd Willingham was executed in 2004 for the arson murder of his three young daughters - even though no arson occurred. Another man, Carlos DeLuna, was put to death for a murder another man he resembled bragged about committing. Moreover, his innocence was proven posthumously by a Columbia law professor 23 years after the execution.

Texas is the place where an appellate judge wouldn't allow lawyers to file a last minute appeal in a death row case because 5pm was quitting time. Judge Sharon Keller closed the court, and the condemned man Michael Wayne Richard, was executed four hours later. Further, Kerry Max Cook, who spent years on death row and was released in a plea deal, was subjected to "egregious prosecutorial misconduct" according to an appeals court. Now trying to clear his name, Cook is accusing the prosecutor in his case of keeping the bloody murder weapon in his home as a souvenir. The DNA test was taken, and we await the results.

And finally, the SAFE California Act - a ballot initiative appearing on the November ballot - would abolish capital punishment and save the state $1 billion in five years. If the measure passes, it would eliminate one-quarter of the nation's death row.

They say if it ain't broke, don't fix it. Well, not only is the death penalty irretrievably broken, it is inherently broken. Four decades after the *Furman* decision, this is as clear as ever. Had the death penalty been a product, it would have been judged as shoddy, defective and unreliable. It would have been recalled and removed from the shelves long ago.

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