

## The Prize of the Poor

Steven King Ainsworth

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The epitome of power is the right to kill, to kill under the colour of law. “The decisive means of politics is violence” (Genovese, 1972, p. 25), and capital punishment is the graphic use of that violence.

At the close of 1997, the United States had executed 431 human beings in the Modern Era (1976 - present) of capital punishment. If the rate of executions continue unabated, as they did in 1997, the United States will execute its 500<sup>th</sup> human being before the close of 1998. The argument over whether Texas should execute Karla Faye Tucker, who would be only the second woman executed in the Modern Era, and the first woman executed in Texas since 1863, is simply the latest controversy. Karla Faye Tucker was denied clemency and executed by Texas on February 3, 1998.

The debate over the viability of death as punishment has continued since the time of Hammurabi (1792 - 1750 B.C.) who first codified capital punishment in the ancient laws of the Amorites. Sectarian and secular rulers freely employed capital punishment to control and punish those they ruled throughout history. The Spanish Conquistadores following in the wake of Columbus, as well as the early English settlers, brought capital punishment to America and used it frequently, under the guise of God’s will. The Ruling Council of Jamestown probably hung the first white man (1609) on the eastern seaboard just months after landing on the American shore.

The death penalty was the punishment of choice for a myriad of crimes: adultery, sodomy, theft, murder, rape, witchcraft, assault, robbery, infanticide and others, in colonial America. Even religious dissenters [Quakers] were subject to death by the authorities of Massachusetts Bay Colony (Friedman, 1993, p. 42). These early Christian colonies seemed to rely on the Old Testament scriptures as their authority to kill, in ignorance of Christ’s law of mercy proclaimed in the Sermon on the Mount. Favourite passages from Genesis (9:6), Leviticus (24:17), Exodus (21:23-25) and Deuteronomy (19:19-21) were often heralded as the Biblical right to kill. [Similar arguments rage on today as the ‘Christians’ of America struggle to justify their support for capital punishment]. At the same time the ‘Benefit of Clergy’ often saved a condemned person from execution (Schwarz, p. 128; Friedman, p. 43). Early 17<sup>th</sup> century records indicate that the Puritans of Massachusetts enacted death penalty statutes based on the Mosiac (Old Testament) model for “blasphemy, bestiality,

conspiracy, rebellion, cursing a parent and ravishing a maid,” (Rantoul, 1836). Capital punishment was freely applied to control slaves in early Virginia; special courts [segregated] of oyer and terminer (Tate, p. 93-96) were set up to deal with crimes committed by slaves, including capital crimes. There is even evidence that an attempt to speed up executions, such as the recent *Anti-Terrorism and Effective Death Penalty Act of 1996* has a legal forbearer in *The 1692 Act for more Speedy Prosecution of Slaves Committing Capital Crimes* (Hening, p. 102-103; Billings, 1981, p. 577). Capital punishment has long been the prize of the poor and minority in America (Ainsworth, 1997).

The American record for mass execution was carried out by military tribunal on December 26, 1862, at the behest of Abraham Lincoln who ordered the hanging of 39 Lakotas Souix at Mankato, Minnesota (Fingle, 1992, p. 347-351). The use of capital punishment to put down dissent (or rebellion) has a long history in America. It was utilized in controlling and ending a rebellion of poor whites and slaves in 1676 known as ‘Bacon’s Rebellion’ (Zinn, 1992, p. 90-94), and again in 1786 to quell ‘Shay’s Rebellion’ (Zinn, 1992, p. 167). Throughout pre-Civil War America, capital punishment was employed to control the poor white, Indian and slave populations, culminating in the hanging of the abolitionist John Brown in 1859 (Sutler, p. 6-9).

Throughout the period between 1609 and the Civil War (1861-65), the use of capital punishment as a criminal sanction became limited to fewer and fewer crimes, although it was still in force and mostly the province of the poor, ill-educated and racial minority. It was never abolished despite the early abolition efforts of people such as Dr. Benjamin Rush (1745-1813), who published the first proposal to abolish capital punishment in 1787 (O’Sullivan, p. 104-105). Rush following in the footsteps of Beccaria (Wormer, 1949, p. 225) advised the Founding Fathers that “the power over human life is the sole prerogative of Him who gave it. Human laws, therefore, rise in rebellion against this prerogative, when they transfer to human hands” (Rush, 1787). This early movement to abolish capital punishment did have some effect in the United States by the mid-19<sup>th</sup> century. A hundred years after Beccaria’s *Treatise* (Beccaria, 1764) against the death penalty, the movement for abolition had borne fruit, capital punishment was abolished in Michigan (1847), Rhode Island (1852), and Wisconsin (1853).

The Civil War quashed this early effort, but matters, at least from an accused citizen’s perspective, did improve after the Civil War, through the

expanded rights granted U.S. citizens of the several states by the Civil War Amendments (1868) to our Constitution, and subsequent Federal Court decisions (Bedau, 1997, p. 183) which at least gave some civil rights protection to those being tried for capital crimes, or so it appeared.

Although the Fourteenth Amendment required the States to abide by the Fifth Amendment's due process provision and guaranteed equal protection of the laws, both of these requirements "slippery-open ended concepts" (Friedman, 1993, p. 298) and their application may be questionable in at least two capital cases [and many more] of the early 20<sup>th</sup> century; Nicola Sacco and Bartholomew Vanzetti (executed in 1927) (Zinn, 1992, 367), and the legal machinations surrounding the Ethel and Julius Rosenberg's trial, appeal and execution in 1953 ( Zinn, 1992, p. 424-428).

The Eighth Amendment's provision forbidding cruel and unusual punishment also came into play in the litigation war waged against capital punishment. Public sentiment for "limbing" [as in the 'Life and Limb provision of the Fifth Amendment] waned early on (Schwarz, p. 145), and the last vestige of this particular cruel and unusual punishment (castration) survived into the late antebellum period (Genovese, 1972, p. 34). It has since been replaced in the modern era by chemical means. However, since the Civil War, hanging, firing squad, electrocution, and lethal gas were all employed as methods of execution, and all were challenged to no avail (Bedau, 1997, p. 183). These methods were joined by lethal injection in the modern era and all five methods have been used in the present decade, all of which have been held to be constitutional by the U.S. Supreme Court, although some questions are still unanswered as to lethal gas.

The horrors of World War II seemed to bring a new sense to the populace concerning the value of human life, and in the post-World War II era public sentiment seemed to turn from its former bloodthirst. The new prosperity and educational opportunities in the 1950's and 1960's, as well as a strong civil rights movement, brought a new sensitivity to race and individual rights into the debate concerning criminal justice and capital punishment. Consequently, the pendulum of punishment swung from the brutality and harshness of the pre-World War II era to a more humane system of rehabilitation after the war.

This movement may have reached its zenith with the *Furman* (*Furman v. Georgia*, 1972, p. 238) decision in 1972. Racism, oppression of the poor, due process, equal justice, cruel and unusual punishment and

public sentiment were all addressed in the *Furman* decision opinion(s). Justice Brennan's opinion in *Furman* brought a new test to determine what was cruel and unusual punishment as forbidden by the Eighth Amendment. The principles of Brennan's test were cumulative:

... if a punishment is unusually severe, if there is a strong possibility that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the clause ... (Bedau, 1997, p. 190).

The *Furman* court had found a way to conquer the troublesome 'and' in the clause. While judicial homicide certainly was not unusual in the U.S., no one can argue that killing a viable human being is not cruel!. The new test in Brennan's opinion found that all of its principles were being violated by Georgia's statutes [and by inference by all jurisdictions then employing capital punishment] in their application of capital punishment.

The immediate effect of *Furman* was to abrogate the power to kill of the state and federal governments. The *Furman* relief was short lived. While it and the debate leading up to it forestalled any actual executions from taking place for a decade (1967-1977), the immediate response in the following months by various legislative bodies soon circumvented the holdings in *Furman* and new and improved (umph!) death penalty statutes were enacted. *Furman* came up short, as it did not rule out the possibility of there being a constitutionally protected right to kill that could be employed by the powers that be.

Supposedly, these new statutes were in response to a new public vigour for the death penalty, possibly as a backlash to the 1960's liberalism, reaction to the urban riots of the era, the political assassinations and world-wide publicity surrounding the Manson Murders of 1969. Who knows? The public perception of crime (Hall, 1996, p. 545), as distorted by politicians clamouring for a reinstatement of their political means of violence, and the fear fanned by the media prohibited the nation from taking a breath and giving capital punishment a closer look. Crime statistics indicate the murder rate per 100,000 was 9.4 in 1973, rose to a high of 10.2 in 1980, and was 9.2 in 1992, a total

fluctuation of 0.8 percent. One might question the public's perception of its need to kill its fellow citizens.

*Furman* also had some impact on the number of crimes that are punishable by death. While the issue is not completely settled, I do not believe any has been put to death in the modern era (1976 - present) for a crime in which some sort of homicide was not involved. In the wake of *Furman*, the court ruled death was "grossly disproportionate and excessive" (*Coker v. Georgia*, 1977) for the crime of rape. There are statutes in some jurisdictions providing capital punishment for non-homicide crimes that have yet to be challenged and California gubernatorial candidate, Al Checchi, was advocating the death penalty for serial rapists and child molesters in his 1997-98 television campaign ads. It remains to be seen what the Rehnquist Court or a subsequent court will do with this issue.

The *Gregg* decision [428 U.S. 153] in 1976, reinstated capital punishment in the U.S. by approving the procedural changes in their capital crime statutes. Georgia had, in the eyes of a majority (7-2) of the Supreme Court, met constitutional muster and could once again kill under the colour of law. Ostensibly, these new procedures met the evolving standards of decency within U.S. society.

Other states and the federal government joined Georgia in pushing the trundle to the killing ground. However, a companion case to *Gregg* eliminated mandatory death sentences (*Woodson v. North Carolina*), and the *Gregg* court opted to recognize that "one of the most important functions any jury can perform ... a selection [between life in prison and death in a capital case] is to maintain a link between contemporary community values and the penal system" (Bedau, 1997, p. 199), and this became the new norm in death penalty cases. The jury either actually chooses the punishment or recommends it. I might note here that while in California the trial judge can reduce a jury verdict of death to life without parole (LWOP), he/she cannot elevate a LWOP verdict to death. This is not the case in some jurisdictions where the jury recommends a sentence. In several of the southeastern states, a recommendation of life by a jury has been elevated by the trial judge to death, a procedure the Rehnquist Court has ruled constitutional. To me, this is a sinister use of power and a slap to the jury system!

The new and improved *Gregg* procedures actually gave capital defendants more issues to appeal and acted in part to lengthen the appeal process. Both *Furman* and *Gregg* did away with most general challenges

to capital punishment, and the majority of challenges today are limited to individual case issues. In my opinion, only the words have changed from pre-*Furman* to post-*Gregg* and in actual application of the death penalty, it remains the province of the minority and the prize of the poor.

Neither *Furman* nor *Gregg* addressed the issue of who is charged with a capital offense. This diabolical choice is made by a county prosecutor in most jurisdictions, an elected official, who may pick and choose those accused for capital prosecution. A choice that may be, and often is, based on his/her political aspirations and bias.

Capital crimes are so political that winning becomes far more important for the average District Attorney, we are not talking about being competitive, we're talking about winning at all costs. Deliberately deceiving the Court, withholding favourable evidence, arguing things they know are not true, harassing defence witnesses, concealing deals they make with their witnesses, winning means a death sentence ... (Le Boeuf, 1998, p. 58).

The ability of the defendant to defend himself/herself, the race, gender or wealth and position of the victim, the county locale, and the race of the defendant more often decide who is capitally prosecuted than the nature of the offence. This seems contradictory to the tenet that *the obligation of the prosecution is to accomplish justice, not just get a conviction*.

The last post-*Gregg* attempt to address the race issue that has been inherent in the use of capital punishment from the beginning, was dealt with by the Rehnquist Court surreptitiously. They chose to ignore the fact that the petitioner *McClesky* (*McClesky v. Kemp*, 1987) had shown "a discrepancy that appears to correlate with race" (Friedman, 1993, p. 319) in Georgia's application of sentencing, but he (*McClesky*) failed to prove that race had any bearing on his own trial, conviction and condemnation (*McClesky* was black and the victim was white). Had the Court recognized the racism in *McClesky*, it's ruling would have seriously impaired the power to judicially kill in the U.S., if not eliminating capital punishment entirely.

Ironically, Justice Blackmun, who participated in all three cases [*Furman*, *Gregg* and *McClesky*], voting in the minority in *Furman*, and with the majority in *Gregg* and *McClesky*, as well as Justice Powell who took part in the latter two cases, voting in the majority in both, had, after

twenty plus years on the high bench, changed their minds about the constitutionality of capital punishment. Blackmun, just before retiring, declared capital punishment a failure, unconstitutional, and that he “would no longer tinker with the machinery of death” (*Callins v. Collins*, 1996). In a biography of Powell, after his retirement, he said that the only vote he regretted and would change if he could was his vote in *McClesky* in 1987, a case decided by a 5-4 majority. Changes of mind and heart certainly did not aid the 431 human beings executed from 1977 through 1997.

While Justice Brennan points out in *Furman* that an executed person has “lost their right to have rights” (Bedau, 1997, p. 191), and Bedau makes reference to the “Universal Declaration of Human Rights” (1948) (*ibid*, p. 191), in which the right to life is recognized as the most basic human right of all, the United States has consistently ignored the fact, that all rights stem from the right to life. As long as it exercises its power to commit judicial homicide, all human rights in the United States are hollow and at risk.

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