A Text Abstract of

Death Penalty

Decision

The following is an abstract of the 47-page text of the California Supreme Court's majority opinion abolishing the death penalty. For brevity and readability, The Examiner has eliminted footnotes, legal citations and considerable history, particularly that involving previous legal arguments.

A jury found Robert Page Anderson guilty of first degree murder, the attempted murder of three men, and first degree robbery, and fixed the penalty at death for the murder. The judgment was affirmed.

Thereafter the remittitur was recalled and the judgment was reversed insofar as it related to the death penalty.

A second trial was had on the issue of the penalty for the murder, and the jury again imposed the death penalty. A motion for a new trial was denied, and this appeal is now before us automatically.

Defendant contends that error was committed in selecting the jury, that certain evidence was improperly admitted, that the prosecutor was guilty of prejudicial misconduct, and that the death penalty constitutes both cruel and unusual punishment and, as such, contravenes the Eight Amendment to the United States Constitution and Article I, Section 6, of the Constitution of California.

We have concluded that capital punishment is both cruel and unusual as those terms are defined under Article I, Section 6, of the California Constitution, and that therefore death may not be exacted as punishment for crime in this state.

Because we have determined that the California Constitution does not permit the continued application of capital punishment, we need not consider whether capital punishment may also be prosecuted by the Eighth Amendment to the United States Constitution.

Before undertaking to examine the constitutionality of capital punishment in light of contemporary standards, it is instructive to note that Article I, Section 6, of the California Constitution, unlike the Eighth Amendment to the United States Constitution, prohibits the infliction of cruel or unusual punishment.

Thus, the California Constitution prohibits imposition of the death penalty if, judged by contemporary standards, it is either cruel or has become an unusual punishment.

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Having determined that under the California Constitution capital punishment is prohibited if it is either cruel or an unusual punishment, and that no constitutional impediment exists to restrain our examination of the death penalty in light of contemporary standards, we must also define the role of the courts in giving effect to the cruel or unusual punishments clause of Article I, Section 6.

Our duty to confront and resolve constitutional questions, regardless of their difficulty or magnitude, is at the very core of our judicial responsibility. It is a mandate of the most imperative nature.

Called upon to decide whether the death penalty constitutes cruel or unusual punishment under the Constitution of this state, we face not merely a crucial and vexing issue but an awesome problem involving the lives of 104 persons under sentence of death in California, some for as long as 8 years.

There can be no final disposition of the judicial pro-

ceedings in these cases unless and until this court has decided the state constitution question, a question which cannot be avoided by deferring to any other court or to any other branch of government.

The cruel or unusual punishment clause of the California Constitution, like other provisions of the Declaration of Rights, operates to restrain legislative and executive action and to protect fundamental individual and minority rights against encroachment by the majority.

It is the function of the court to examine legislative acts in light of such constitutional mandates to ensure that the promise of the Declaration of Rights is a reality to the individual.

Were it otherwise, the Legislature would ever be the sole judge of the permissible means and extent of punishment and Article I, Section 6, of the Constitution would be superfluous.

Although we have often considered challenges to the constitutionality of capital punishment, we have heretofore approached the question in the Eighth Amendment context of "cruel and unusual" punishment, using that term interchangeably with the "cruel or unusual" language of Article I, Section 6, of the California Constitution, and have never independently tested the death penalty against the disjunctive requirements of the latter.

As a consequence of this emphasis on the Eighth Amendment approach the majority of our prior opinions have focused on justifications for continuation of the death penalty which were then believed to exempt it from the federal constitutional prohibition of cruel and unusual punishment without regard to whether it was cruel.

This disregard of the cruelty question is understandable when it is realized that at the time Article I, Section 6, was drafted in 1849, and when it was readopted in 1879, capital punishment was not considered so cruel as to warrant proscription, and was a widely accepted customary punishment in the fledging state.

Hanging had been a popular form of vigilante justice, and even after the new state instituted a judicial and penal system, public executions continued.

Thus, at the time of our earliest decisions upholding capital punishment, a substantial proportion of California's residents had witnessed executions.

It was not a remote or abstract concept, and the question as to whether capital punishment might violate standards of decency then accepted or shock the conscience of the people of that time did not often arise.

When it did, the question woud be summarily disposed of by a court which then understandably assumed that capital punishment was not so cruel as to be proscribed by the state or federal Constitutions.

Since the cruelty of capital punishment was not then a substantial issue, any doubts as to the constitutionality of the death penalty were resolved by resorting to its continuing and usual acceptance. The emphasis of our prior opinions was thus placed on the common or usual rather than the "cruel" aspect of the punishment.

The majority of challenges to the death penalty in this state have been rejected either without further exploration of the cruel or unusual punishment question, or by finding justification for continuance of capital punishment.

When justifications offered in support of continuance of the death penalty were more recently challenged, we continued to uphold it on the ground that it had long been practiced and its application upheld, without, however, independently reexaming the question of the cruelty of the punishment in the reality of present day conditions.

Thus our approach heretofore has paralleled that of the United States Supreme Court in rejecting challenges brought under the Eighth Amendment in finding justification for capital punishment and upholding it if it is not disproportionate to the offense.

Now, however, as the California constitutional history demonstrates, we must probe the issue on the basis of the disjunctive cruel or unusual punishment.

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Well over a century has now passed since the day when vigilante justice and public hangings made executions an accepted practice of California life.

". . . and that therefore death may not be exacted as punishment for crime in this state"

We cannot today assume, as it was assumed in early opinions of this court, that capital punishment is not so cruel as to offend contemporary standards of decency.

Appellant has asked that we not only reexamine the validity of the prior bases upon which the death penalty has been upheld, but that we independently examine its cruelty applying contemporary standards.

We have done so and have concluded that capital punishment is "cruel" as that term is understood in its constitutional sense.

We have also, at the instance of both appellant and respondent, reexamined the bases upon which capital punishment has been upheld heretofore.

We have concluded that the death penalty cannot be justified as furthering any of the accepted purposes of punishment. Moreover, we have concluded that it can no longer escape characterization as an "unusual" punishment.

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Respondent contends that a punishment is constitutionally proscribed only if it is both unnecessarily cruel and is unusual.

We have already concluded, however, that the California Constitution prohibits either cruel or unusual punish-

ments, and have indicated that we believe capital punishment to be cruel in the constitutional sense.

We have not had occasion heretofore to consider whether a cruel punishment can avoid the proscription of Article I. Section 6, upon a showing that it is "necessary." Before examining the validity of that proposition, we shall set forth

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our reasons for concluding that capital punishment is cruel in the constitutional sense.

It merits emphasis that in assessing the cruelty of capital punishment we are not concerned only with the "mere extinguishment of life," which the United States Supreme Court has suggested does not violate the Eighth Amendment or with a particular method of execution but with the total impact of capital punishment, from the pronouncement of the judgment of death through the execution itself, both on the individual and on the society which sanctions its use.

We do not interpret the constitutional prohibition of cruel or unusual punishments either as a license for the indefinite continuance of all punishments known to the common law or practiced at the time California attained statehood, nor as a proscription of innovative types of punishment whose purpose is the rehabilitation or reformation of criminal offenders.

Historical analysis suggests that the framers intended to outlaw both cruel punishments and punishments of excessive severity for ordinary offenses. They used the term cruel in its ordinary meaning — causing physicl pain or mental anguish of an inhumane or torturous nature.

The framers of the California Constitution sought to restrict their fellow Californians' zeal for devising novel and torturous punishments.

We are mindful, too, that Article I, Section 6, like the Eighth Amendment, is not a static documet.

Judgments of the nineteenth century as to what constitutes cruelty cannot bind us in considering this question any more than eighteenth century concepts limit application of the Eighth Amendment.

The United States Supreme Court recognized that the Eighth Amendment might be interpreted progressively when it said that:

"The clause of the Constitution in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice."

Were the standards of another age the constitutional measure of "cruelty" today, whipping, branding, pillorying, severing or nailing ears, and boring of the tongue, all of which were once practiced as forms of punishment in this country, might escape constitutional proscription, but none today would argue that they are not "cruel" punishments.

Thus, although respondent argues that the standard of cruelty today is no different from what it was when Article I, Section 6, was adopted, our responsibility demands that we must construe that provision in accordance with contemporary standards.

Respondent also contends, however, that capital punishment does not offend contemporary standards of decency.

The People find evidence that it does not do so in public opinion polls, in the willingness of juries to impose the death penalty, and in the statutes of the 41 states which contain provisions for the punishment of death.

Public acceptance of capital punishment is a relevant but not controlling factor in assessing whether it is consonant with contemporary standards of decency.

But public acceptance cannot be measured by the existence of death penalty statutes or by the fact that some juries impose death on criminal defendants.

Nor are public opinion polls about a process which is far removed from the experience of those responding helpful in determining whether capital punishment would be acceptable to an informed public were it even-handedly applied to a substantial proportion of the persons potentially subject to execution.

Although death penalty statutes do remain on the books of many jurisdictions, and public opinion polls show opinion to be divided as to capital punshiment as an abstract proposition, the infrequency of its actual application suggests that among those persons called upon to actually impose or carry out the death penalty it is being repudiated with ever increasing frequency.

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What our society does in actuality belies what it says with regard to its acceptance of capital punishment.

Between 1930 and 1968, a total of 3859 persons were executed in the United States as punishment for crimes ranging from murder to burglary and aggravated assault.

The steady decrease in the number of executions from a high of 199 in 1935 to 2 in 1967, in spite of a growing population and notwithstanding the statutory sanction of the death penalty, persuasively demonstrates that capital punishment is unacceptable to society today.

The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out.

Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.

The brutalizing psychological effects of impending execution are a relevant consideration in our assessment of the cruelty of capital punishment.

The dignity of man, the individual and the society as a whole, is today demeaned by our continued practice of capital punishment. Judged by contemporary standards of decency, capital punishment is impermissibly cruel.

It is being increasingly rejected by society and is now

almost wholly repudiated by those most familiar with its processes.

Measured by the "evolving standards of decency that mark the progress of a maturing society," capital punishment is, therefore, cruel within the meaning of Article I, Section 6, of the California Constitution.

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In seeking to justify continuance of capital punishment, the People argue that it furthers three of the four acknowledged purposes of punishment.

Respondent concedes that death is in no way rehabilitative, but contends that capital punishment may be legitimately imposed in retribution for serious offenses, that it serves to isolate the offender, and that the existence of the death penalty acts as a deterrent to crime.

None of these purposes is shown to justify so onerous a penalty as death.

Although vengeance or retribution has been acknowledged as a permissible purpose of punishment under the Eighth Amendment, we do not sanction punishment solely for retribution in California.

Admittedly, isolation of the offender from society is a proper and often necessary goal of punishment and death does effectively serve that purpose. But in no sense can capital punishment be justified as "necessary" to isolate the offender from society.

Respondent contends that the existence of the death penalty may deter some persons from committing capital offenses.

Nonetheless, as respondent concedes, many homicides in particular are not deterrable and as to the remainder capital punishment can have a significant deterrent effect only if the punishment is swiftly and certainly exacted.

We have already demonstrated that the punishment is not swift. Moreover, it is far from certain.

Notwithstanding the discretion given to judges and juries to impose either death or life imprisonment for first degree murder, it is estimated that in California 80 percent of those persons convicted receive a sentence of life imprisonment.

Of the 20 percent upon whom a sentence of death is imposed, commutation of sentence, reversal of the judgment, and other factors further reduce the number of defendants actually executed to the point where, far from being a certain penalty with acknowledged deterrent effect, capital punishment today is rarely imposed or implemented.

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We have already noted that the death sentence is rarely imposed in California today and that it is even more rarely carried out. But even adopting the broader test of widespread acceptance among civilized peoples, capital punishment can no longer withstand constitutional proscription.

If any doubt remained as to its cruelty, however, we could no longer uphold capital punishment on the ground that it is commonly accepted, for the repudiation of the death penalty in this country is reflected in a world-wide trend towards abolition.

Although world-wide acceptance of capital punishment at the turn of the century may then have warranted resolving doubts as to its cruelty in favor of its constitutionality, the current has now reversed.

It is now, literally, an unuscal punishment among civilized nations.

CONCLUSION

We have concluded that capital punishment is impermissibly cruel. It degrades and dehumanizes all who participate in its processes.

It is unnecessary to any legitimate goal of the state and is incompatible with the dignity of man and the judicial process.

Our conclusion that the death penalty may no longer be exacted in California is not grounded in sympathy for those who would commit crimes of violence, but in concern for the society that diminishes itself whenever it takes the life of one of its members.

Lord Chancellor Gardiner reminded the House of Lords, debating abolition of capital punishment in England:

"When we abolished the punishment for treason that you should be hanged, and then cut down while still alive, and then disembowelled while still alive, and then quartered, we did not abolish that punishment because we sympathized with traitors, but because we took the view that it was a punishment no longer consistent with our self respect."

The judgment, insofar as it provides for the penalty of death, is modified to provide a punishment of life imprisonment and as so modified is affirmed in all other respects.