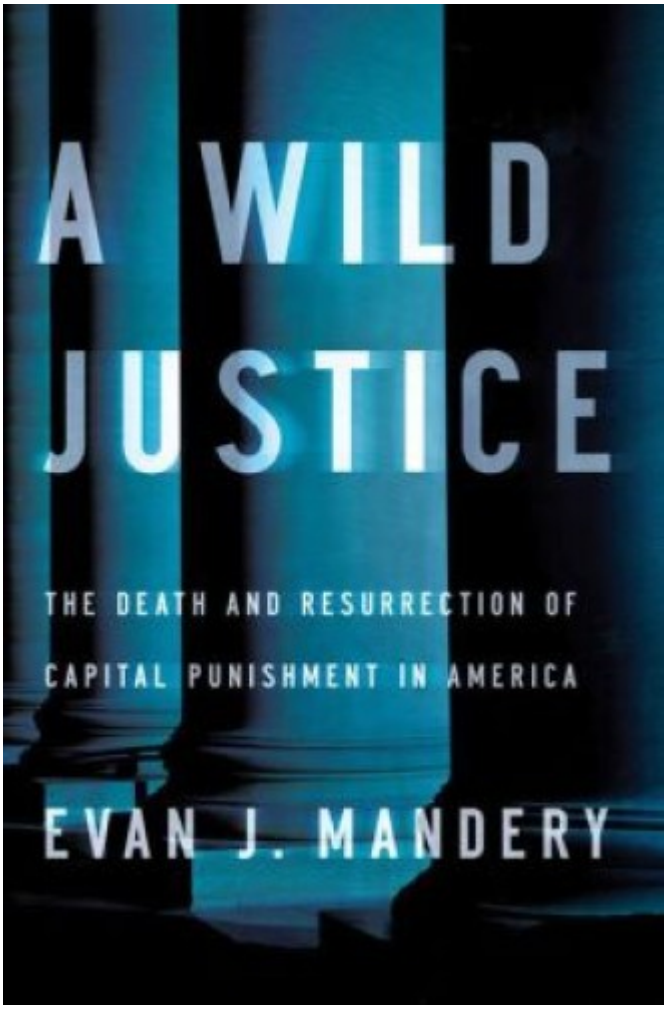
The executioner’s return

by Thomas C. Berg in the January 8, 2014 issue

In Review



A Wild Justice

By Evan J. Mandery
Norton

The United States stands alone among Western democracies in retaining the death penalty. In 2012 the states executed 43 persons and sentenced another 77 to death. But from time to time unexpected individuals and institutions flirt with its abolition.

At a 2000 conference in Williamsburg, Virginia, I heard Pat Robertson issue a much-publicized call for a moratorium on capital punishment. He did not mobilize many of his evangelical followers on the issue.

In 1972 the U.S. Supreme Court, to the shock of many, struck down all of the nation's death penalty laws, undoing the sentences of more than 600 death-row prisoners on the grounds that as administered the laws allowed "cruel and unusual punishment" in violation of the Eighth Amendment. But the decision, *Furman v. Georgia*, merely flirted with abolition. The justices' reasoning left ample room for states to enact new capital punishment laws, and many did so. In 1976 the court upheld many of those laws in *Gregg v. Georgia*. Since capital punishment resumed in 1977, more than 1,300 persons have been executed.

Criminal justice professor Evan Mandery tells the story of the *Furman* and *Gregg* decisions and the legal campaign against the death penalty waged by the NAACP Legal Defense and Educational Fund, the civil rights group that won *Brown v. Board of Education*. The LDF, led by brilliant attorney Anthony Amsterdam, faced a steep uphill battle in getting the *Furman* ruling abolishing capital sentences: capital punishment is referred to or assumed three times in the text of the Constitution, and it has support in decades of tradition. But by the late 1960s juries were imposing the death penalty less and less frequently. When they did, it was with no statutory guidance concerning the appropriate cases for death, and there appeared to be major racial disparities in the results.

Amsterdam argued that irreversibly punishing a few arbitrarily chosen defendants was "cruel and unusual." The chain of objections was powerful, but each link had a weakness. If the problem was in singling out only a few defendants, could the states cure it by executing more? Was arbitrariness an inevitable product of the discretion that must exist in any humane criminal justice system?

When the cases reached the Supreme Court, two liberal justices, William Brennan and Thurgood Marshall, voted to invalidate the death penalty broadly on the grounds that it violates human dignity by treating the defendant's life as disposable. William Douglas joined on the grounds that the penalty fell disproportionately on minorities and the poor. But reaching a five-person majority required the votes of the moderate Potter Stewart and the pragmatic but unpredictable Byron White. Mandery concludes that Stewart also had been willing to rule broadly but tempered his position in a deal with White.

In any event, both men wrote opinions invalidating the death penalty not per se, but in its administration. Stewart said that the infrequency and arbitrariness of capital sentences made them “wanton” and “freakish,” cruel and unusual “in the same way that being struck by lightning is.” White said that their infrequency kept them from being a “credible deterrent” or serving any other purpose of punishment.

The Stewart-White rationales effectively invited the states to pass new statutes providing for death sentences in certain situations. The states immediately accepted. By the time new cases reached the court in 1976, 35 states had statutes allowing the death penalty, and the death-row population again hit 600. The premise of the LDF’s strategy—that once courts eliminated the death penalty, Americans would not want it back—was refuted, Mandery says, by “emphatically expressed” preference. The court had changed as well: Ford appointee John Paul Stevens had replaced the aged and ailing Douglas.

Stewart, White and Stevens produced the controlling opinions in the key 1976 decisions, which upheld state statutes guiding the jury’s discretion on factors to consider (*Gregg*) but invalidated state statutes making a death sentence mandatory in any category of cases (*Woodson v. North Carolina*). Attempts to mediate the two goals of considering defendants individually while treating them equally could only be imperfect, for, as Mandery puts it, different persons’ situations “cannot be both unique and equal.” Fatefully, the court approved the statute from Texas, the state that became by far the national leader in executions: 423 from 1977 to 2008, versus 611 in all other states combined.

The book’s focus on 1970s litigation is both its greatest strength and limitation. To understand the moral, theological, historical and sociological issues concerning capital punishment in the Western world, including the United States, one should consult the work of theologian James Megivern or legal scholar Stuart Banner.

However, Mandery’s focus makes possible a richly detailed, page-turning narrative of the LDF’s legal strategy, the court’s dynamics and rulings and the public’s reaction. He deftly sketches the backgrounds and legal philosophies of key justices, including their relevant religious beliefs. Notably, he suggests that Brennan’s invocation of “human dignity” was influenced less by his Catholicism—he was not a robust believer by this time—than by the social justice orientation of close Jewish friends.

The focus on the court makes this an excellent case study of the possibilities and limits of constitutional litigation as a vehicle for social reform. Mandery contends that the LDF came within one vote of getting capital punishment eliminated on broad moral and constitutional grounds. But instead they got the *Furman* ruling, which failed to stick. Almost immediately public approval for the death penalty, which had steadily declined for years to below 50 percent, shot up to 57 percent by December 1972 and 66 percent by 1974.

Mandery argues that backlash against *Furman* and contemporaneous decisions on busing and abortion rights together mobilized hostility toward the court. The surge in death penalty support, he argues, cannot be explained by increases in crime, which had been occurring for several years before 1972, longer than the normal lag time for public response. So why did abortion rights survive while the death penalty ruling did not? Mandery says that the divided opinions deprived *Furman* of "intellectual coherence." (But many scholars, including some with pro-choice views, found *Roe*'s reasoning incoherent too.)

More convincingly, Mandery notes that the key justices in *Furman* virtually invited the states to satisfy their objections. In turn, the court's approval of new statutes encouraged the public to think that the death penalty's problems had been fixed even though arbitrariness and racial disparities persisted. As Mandery notes, this exemplifies how courts sometimes legitimate laws in the very act of scrutinizing them. Such legitimation plays a valuable role in a constitutional democracy, but not if the court's decisions fail to cure the problems with the laws in question.

The book also presents a case study on strategic and ethical choices in reform movements. LDF lawyers sometimes faced tensions between arguments that would best advance their client's case and those that would best advance the general goal of death penalty abolition. They also faced a choice between emphasizing broad or incremental objections to the death penalty. The former were less likely to succeed: in the 1976 oral arguments, Mandery recounts, Amsterdam stunned Justice Lewis Powell by answering that death sentences would be unconstitutional even for those who planned the Holocaust. On the other hand, the narrower objections could be satisfied by the states.

Mandery's story mostly stops in 1976, but of course much has happened since. The irreversibility of capital punishment and the possibility of erroneous convictions—relatively minor factors in the 1970s debate—became central issues

with the development of DNA identification techniques. Though the same techniques also shored up the death penalty because they could be used at trial to head off mistaken convictions, in the last decade six states have abolished capital punishment. It’s unlikely, but not out of the question, that this trend will move the court to try again to invalidate the death penalty nationwide. The court has recently relied on state trends to support more limited rulings forbidding death sentences for minors and people with cognitive disabilities.

The weekend after the 1976 decisions—after “the undoing of his greatest victory,” Mandery writes—Amsterdam returned to work. He began writing a manual for lawyers challenging future death sentences: the “Last-Aid Kit,” as it became known, in recognition of the long haul ahead.