

# ATKINS V. VIRGINIA: LESSONS FROM SUBSTANCE AND PROCEDURE IN THE CONSTITUTIONAL REGULATION OF CAPITAL PUNISHMENT

Carol S. Steiker\* and Jordan M. Steiker\*\*

In its first two decades regulating capital punishment in the modern era, the U.S. Supreme Court focused primarily on procedure rather than substance.<sup>1</sup> The broad attack on the death penalty in the 1960s and early 1970s had both substantive and procedural dimensions.<sup>2</sup> Death penalty opponents claimed that the punishment itself was excessively cruel and inconsistent with evolving standards of decency. They also argued that state death penalty systems lacked basic procedural safeguards to ensure that the punishment, if retained, would be applied in a consistent, nondiscriminatory manner. In response to these claims, the Court insisted that states rewrite their statutes to guide sentencer discretion<sup>3</sup> while also preserving some meaningful consideration of mitigating evidence.<sup>4</sup> Additionally, the Court adopted rules intended to limit unfair or discriminatory selection of

---

\* Howard J. and Katherine W. Aibel Professor of Law, Harvard Law School.

\*\* Cooper K. Ragan Regents Professor of Law, University of Texas School of Law. We thank Meghan Shapiro for her helpful research assistance. We also thank Andrea Lyon and the editors of the DePaul Law Review for helpful comments and for organizing this thought-provoking symposium.

1. See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV L. REV. 355, 402-03 (1995).

2. MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 60-72 (1973) (describing death penalty opponents' strategy leading up to *Furman v. Georgia*, 408 U.S. 238 (1972), as a plan to attack the death penalty on procedural grounds with hopes of gaining ground on a substantive assault against the death penalty).

3. See *Proffitt v. Florida*, 428 U.S. 242, 253 (1976) ("Under Florida's capital-sentencing procedures, in sum, trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life."). In *Gregg v. Georgia*, the Court stated the following:

[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance . . . [I]t is possible to construct capital-sentencing systems capable of meeting *Furman's* constitutional concerns.

428 U.S. 153, 195 (1976) (citing *Furman*, 408 U.S. 238).

4. See *Woodson v. North Carolina*, 428 U.S. 280 (1976) (invalidating a mandatory death penalty statute on grounds that it foreclosed individualized consideration of the offender and offense).