

The Concept of Super Due Process in Application of the Death Penalty

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Since the decision that mandatory death laws in capital punishment cases were unconstitutional, the United States Supreme Court has imposed numerous constraints in an attempt to prevent arbitrary use of the death penalty. The underlying implementation of these constraints has led to the development of a super due process for capital punishment cases in an attempt to ensure the proper administration of death sentences (Zimring, 2003). The intent of this super due process is to provide: strict guidelines to ensure that aggravating and mitigating evidence is considered in a death sentence; and an automatic appeal process that also includes a proportionality review (Bohn, 2011).

Constitutional Rights and Due Process of Law

The basic concept of due process is rooted in English law which expanded upon the primary tenant of the Magna Carta (Orth, 2003). Although the due process concept was not initially included in the United States Constitution, the Fifth Amendment and Fourteenth Amendment were subsequently added to provide that a person may not be deprived of life, liberty or property without due process of law. An important consideration with due process is that the concept has applicability to both property rights and personal rights. However, in a discussion of capital punishment, the due process argument is associated with the applicability of the Constitutional Amendment for the protection of basic rights of human liberty (Amar, 2000). Other Amendments provide the procedures and processes that are designed to ensure fairness in the criminal justice system by providing an accused individual with: freedom from self-incrimination and double jeopardy through the Fifth Amendment; a right to a fair trial with counsel by an impartial jury through the Sixth Amendment; and freedom from cruel and unusual punishment through the Eighth Amendment (Fuller, 2010).

Fifth Amendment. Perhaps the most widely known aspect of the Fifth Amendment is associated with the *Miranda v. Arizona* (384 U.S. 436, 1966) decision that prevents a forced or involuntary confession and provides that counsel be present during questioning by police. An additional aspect of the Fifth Amendment is the double jeopardy clause which guarantees that a defendant will not: be subjected to a second prosecution after a conviction; or receive multiple punishments for the same offense (Bohm, 2011). With regard to capital punishment, the Fifth Amendment provides some degree of credence that the Founding Fathers supported the death penalty by inferring that circumstances could exist in which a person may be denied their life if the safeguards associated with the due process of law were implemented (Martinez, Richardson & Hornsby, 2002). An alternative view was rendered by the U.S. 2nd Circuit Court of Appeals in 2002 which identified that the death penalty prevents an individual from being able to prove their innocence and creates an unacceptable risk that an innocent individual would be executed in violation of the Fifth Amendment right to due process of law (U.S. v. Quinones 313 F.3d 49, 2002). Although this decision was subsequently overturned based on precedents established by the United States Supreme Court, the original ruling underscores not only the ongoing controversy of capital punishment but the dissenting views within the judicial system.

Sixth Amendment. The first aspect of the Sixth Amendment that is of significance to the requirements for due process is associated with the right to counsel. Before 1932 the right to counsel was deemed applicable to those cases in which an individual desired and could afford to hire an attorney to represent them in court. This perception was changed beginning with the decision in *Powell v. Alabama* (287 U.S. 45, 1932) to clarify that this 6th Amendment clause requires that an accused individual should be represented in court even if it requires a court-appointed attorney at the expense of the public. An additional aspect of the right to counsel is

associated with the effectiveness of an attorney in criminal proceedings. Although a complicated issue to address, ineffective counsel during a trial can provide a basis for the violation of a Sixth Amendment right of an accused individual (Veasey & Guglielmo, 2012). The Court first addressed questions regarding the effectiveness of counsel in *McMann v. Richardson* (397 U.S. 759, 768-71, 1970). However, it was the case of *Strickland v. Washington* (466 U.S. 668, 1984) that the Court provided a process to determine whether the effectiveness of counsel had a detrimental effect on the outcome of criminal trials and capital punishment sentencing processes.

The second aspect of the Sixth Amendment that is of significance to the requirement for due process is associated with the right that a jury and not a judge determine the appropriateness of a death penalty in capital cases (Holder, 1997). In *Ring v. Arizona* (536 U.S. 584, 2002) a jury decision of life in prison was later changed by a state judge to a death sentence. The subsequent decision by the U.S. Supreme Court was that the Sixth Amendment right of a defendant to receive a jury trial in a capital case was violated when the state judge changed the sentence from life in prison to death (Bohm, 2011). However, laws which allow a judge to impose life in prison without the possibility of parole instead of a jury decision of the death penalty has, to date, not been deemed unconstitutional (Bohm, 2011).

Eighth Amendment. The debate over the Eighth Amendment right of an individual to be free from cruel and unusual punishment is perhaps the most controversial topic for discussion concerning capital punishment. Accordingly, more than two hundred years after the Bill of Rights was adopted, the Court is still in search of a coherent approach to address the issue of capital punishment (Bessler, 2012). In *Furman v. Georgia* (408 U.S. 238, 1972) decision, the Court identified that imposition of the death penalty constituted cruel and unusual punishment in violation of the Eighth Amendment (Bohm, 2011). While this decision resulted in an end to

capital punishment in the United States, the moratorium only lasted for a few years until states revised their capital punishment laws and procedures to conform to the new Court identified standards. As determined by the Court in *Coker v. Georgia* (433 U.S. 584, 1977), punishment is not generally deemed to be cruel and unusual unless it is grossly disproportionate to the crime that was committed by the accused. After the Coker decision, cases involving the method of execution were not challenged on Constitutional grounds until *Baze v. Rees* (553 U.S. 35, 2008). The challenge in this case was that the use of lethal injection in fulfilling a death sentence imposed a cruel and unusual punishment in violation of the Eighth Amendment. However, the Court decided that lethal injection was not considered to be a cruel and unusual punishment and, therefore, did not violate the Constitution. (Bohm, 2011). In this and other subsequent decisions, the Court provided clarification that cruel and unusual punishment involved instances of a tortuous or lingering death (Bohm, 2011). Nevertheless, the question of whether the death penalty constitutes cruel and unusual punishment remains at the forefront of the debate regarding the imposition of capital punishment.

Fourteenth Amendment. The Fourteenth Amendment provides the basic tenants of citizenship in the United States and was an important aspect of incorporating the Confederacy back into the United States after the Civil War (Epps, 2006). Of equal importance is that the Fourteenth Amendment applied the requirements of due process and equal protection upon the states by specifically enforcing the Bill of Rights on the states. However, it would be well into the middle of the twentieth century before the Court would begin to rule upon issues requiring that key portions of the Bill of Rights be applied to the states (Bohn, 2011). Accordingly, the fundamental belief regarding the Fourteenth Amendment is that primary intent is to protect all rights of an individual.

Super Due Process and the Death Penalty

Beginning with the decision in *Furman v. Georgia* (408 U.S. 238, 1972) the Supreme Court has developed a system of super due processes that impose additional safeguards with the intent of protecting the rights of death-eligible defendants (Sarat, 2001). While the Court recognized the need for higher standards of due process to ensure a higher standard of reliability, according to Bohn (2011) there is ample evidence which identifies that the super due process has not reduced the potential for miscarriages of justice considering the number of death row exonerations and wrongful executions. This does not, however, mean that the Court was wrong in attempting to ensure that capital punishment is administered in a manner that is designed to reduce arbitrary and discriminatory practices in the application of a death sentence. Challenges to the Eighth Amendment have been addressed to prohibit cruel punishment of excessively painful or brutal executions and provide restrictions on the arbitrary nature of unusual punishment (Bohn, 2011). The Court has also cited the Fifth Amendment in decisions pertaining to the concept of cruel and unusual punishment by stating that the Constitution does not implicitly prevent the use of capital punishment (Bohn, 2011). Further, in addressing the Fifth Amendment right to life and liberty, the Court has supported the notion that it is not a constitutional violation to deprive an individual of their life through the imposition of a death sentence as long as the principles of due process are correctly followed (Bohn, 2011). There is little doubt that the actions of the Court to address constitutional challenges have at least minimized the arbitrary and discriminatory practices to protect the rights of death-eligible defendants. However, the greater quest in capital punishment cases should be the need for absolute certainty in the application of a death sentence rather than heightened standards in the form of super due process rights.

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