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## The Furman Case: What Life is Left in the Death Penalty?

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## RECENT DEVELOPMENTS

### The Furman Case: What Life Is Left in the Death Penalty?

On June 29, 1972, the United States Supreme Court announced a dramatic, far-reaching, and highly controversial decision in the case of *Furman v. Georgia*,<sup>1</sup> which declared the current application of capital punishment to be a violation of the eighth amendment prohibition against "cruel and unusual punishments."<sup>2</sup> The immediate impact of the decision was to strike down virtually all provisions in the state and federal statutes which allow the imposition of the death penalty<sup>3</sup> and to spare the lives of 631 convicted criminals then awaiting execution.<sup>4</sup>

However, the decision was by no means clear as to the viability of capital punishment in American criminal law. In a manner befitting the serious and controversial nature of the topic, all nine justices filed separate opinions totaling 232 pages, and only reached a consensus by a bare 5-4 majority. A composite of the five majority opinions yields one point of agreement: the death penalty as currently imposed at the discretion of juries is a cruel and unusual punishment for a variety of reasons. Left unresolved are the questions whether capital punishment is per se unconstitutional or whether the present system could be cured to preserve the death penalty.

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1. 408 U.S. 238 (1972). The Court actually consolidated three cases for consideration: *Furman v. Georgia*, 225 Ga. 253, 167 S.E.2d 628 (1969) (petitioner convicted of murder and sentenced to death under GA. CODE ANN. § 26-1005 (Supp. 1971) ); *Jackson v. Georgia*, 225 Ga. 790, 171 S.E.2d 501 (1969) (petitioner convicted of rape and sentenced to death pursuant to GA. CODE ANN. § 26-1302 (Supp. 1971) ); and *Branch v. Texas*, 447 S.W.2d 932 (Tex. Ct. Crim. App. 1969) (petitioner convicted of rape and sentenced to death under TEX. PENAL CODE, art. 1189 (1961) ).

2. The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

3. Because the decision reaches only those laws making the death penalty a discretionary choice for juries, four statutes imposing mandatory death penalties are unaffected: 10 U.S.C. § 906 (1959) (spying for the enemy in wartime), MASS. GEN. LAWS ANN., ch. 265 § 2 (1970) (murder during the commission of a forcible rape), OHIO REV. CODE ANN. §§ 8901.09-10 (1954) (assassin of a President of the United States or the Governor of a State), and R.I. GEN. LAWS ANN. § 11-23-2 (1957) (life term prisoner who commits murder in prison).

4. TIME, *Death Rattles*, November 20, 1972, at 74.

The purpose of this article is to attempt to clarify the positions taken and the reasoning employed by the various justices, with an eye to the future resolution of the unanswered questions.

### Background

The Court's decision in *Furman* culminates years of intense debate and speculation over the constitutionality of the death penalty; speculation strong enough to bring about a moratorium on criminal executions during the last five years while several defendants maneuvered to get their cases before the Supreme Court to test various constitutional arguments.<sup>5</sup> Prior to *Furman*, the Supreme Court had never directly ruled upon the constitutionality of the death penalty under the eighth amendment,<sup>6</sup> although some passing references have been made to the issue in earlier cases. In fact, the Court has measured criminal punishments against the cruel and unusual punishment clause on only ten occasions,<sup>7</sup> while finding only three to be violations.<sup>8</sup> It must be noted, however, that not until 1962 did the Court definitely determine that the eighth amendment was applicable to the States through the fourteenth amendment.<sup>9</sup>

The Court's first confrontation with the clause came in *Wilkerson v. Utah*<sup>10</sup> in 1878, where the Court concluded that publicly shooting a convicted murderer did not inflict unnecessary pain and, therefore, the method of execution was not cruel.<sup>11</sup> Twelve years later, in the case of *In re Kemmler*,<sup>12</sup> the

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5. In *Furman*, Justice Powell points out in dissent:

Petitioners concede, as they must, that little weight can be given to lack of executions in recent years. A *de facto* moratorium has existed for five years now while cases challenging the procedures for implementing the capital sentence have been re-examined by this Court. *McGautha v. California*, 402 U.S. 183 (1971); *Witherspoon v. Illinois*, 391 U.S. 510 (1968). The infrequency of executions during the years before the moratorium became fully effective may be attributable in part to decisions of this Court giving expanded scope to the criminal procedural protections of the Bill of Rights, especially under the Fourth and Fifth Amendments. *E.g. Miranda v. Arizona*, 384 U.S. 436 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961).

408 U.S. at 435 n.18.

6. *See, e.g., Boykin v. Alabama*, 395 U.S. 238 (1969). The Court heard arguments on the issue, but decided the case on other grounds.

7. For a complete list of cases *see* Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1777 n.17 [hereinafter referred to as Goldberg].

8. *Robinson v. California*, 370 U.S. 660 (1962) (criminal punishment for the status of narcotics addiction); *Trop v. Dulles*, 356 U.S. 86 (1958) (criminal penalty of expatriation per se unconstitutional); and *Weems v. United States*, 217 U.S. 349 (1910) (fifteen years hard labor in chains plus other civil penalties for falsifying a public record.).

9. *Robinson v. California*, 370 U.S. 660 (1962).

10. 99 U.S. 130 (1878).

11. *Id.* at 136. The Court raised the eighth amendment issue on its own. In dic-

Court refused to hold that electrocution, then a novel form of execution, was cruel and unusual punishment under the constitution of the State of New York. In denying an application for a writ of error, the Court determined from the evidence that electrocution was an instantaneous and painless mode of execution,<sup>13</sup> therefore not "cruel" in the intended meaning of the constitutional term.<sup>14</sup>

*Weems v. United States*<sup>15</sup> marked the first time the Court struck down a sentence under the cruel and unusual punishment clause. The Court vacated a judgment which sentenced a defendant, convicted of falsifying a public record, to 15 years at hard labor, the permanent loss of civil liberties, and a fine. Expanding the concept of "unnecessary cruelty" drawn from *Wilkinson* and *Kemmler*, the Court held the sentence "excessive."<sup>16</sup> *Weems* marked a turning point in the Court's view of its role in construing "cruel and unusual" punishments. The principle of "excessiveness" was applied both to the proportionality between crime and punishment and to the severity of the penalty necessary to achieve the proper purpose of punishment.<sup>17</sup>

In *Louisiana ex rel Francis v. Resweber*<sup>18</sup> the Court upheld the Louisiana Supreme Court's denial of writs filed on behalf of a defendant whose electrocution was prevented by a mechanical failure. By a 5-4 vote the Court rejected arguments that a subsequent electrocution would be an emotional torture and contrary to the due process clause of the fourteenth amendment.<sup>19</sup>

tum the Court defined "cruel and unusual punishments" as tortures and "all others in the same line of unnecessary cruelty." *Id.*

In his dissenting opinion in *Furman*, Chief Justice Burger objected to the majority's lifting the terms "unnecessary cruelty" and "excessiveness" out of context from *Wilkinson* and *Weems*. He contended the original meaning of such terms was limited to the particular punishment's relation to the crime, and were not meant to imply authority for the Court's evaluation of the efficacy of a punishment in relation to the achievement of penal aims. 408 U.S. at 392.

12. 136 U.S. 436 (1890).

13. *Id.* at 441-44.

14. *Id.* at 447. "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies something inhuman and barbarous, something more than the mere extinguishment of life." *Id.*

15. 217 U.S. 349 (1910).

16. *Id.* at 362-67. See also Goldberg, *supra* note 7, at 1795.

17. 408 U.S. at 280 (Brennan opinion). "Mr. Justice Field apparently based his conclusion (in *Weems*) upon an intuitive sense that the punishment was disproportionate to the criminal's moral guilt, although he also observed that 'the punishment was greatly beyond anything required by any humane law for the offenses.'" *Id.* n.24.

18. 329 U.S. 459 (1947).

19. *Id.* at 464. The Court determined that the method of execution was not inherently cruel, and incidental mental suffering was not within the protection of the amendment.

In *Trop v. Dulles*<sup>20</sup> the Court reversed a sentence of expatriation imposed upon a convicted deserter by a military general court-martial.<sup>21</sup> Picking up the developmental approach where it left off in *Weems*, the Court stated the cruel and unusual punishment clause was not a static feature of the Constitution but "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>22</sup> The Court held such alienation of the deserter did not qualify as "civilized treatment guaranteed by the Eighth Amendment."<sup>23</sup> In a concurring opinion Mr. Justice Brennan expressed his belief that the penalty was extremely harsh and bore questionable relation to the recognized legitimate penal objectives of deterrence, social isolation and rehabilitation.<sup>24</sup> In dicta, however, the Court indicated that capital punishment, per se, could not be found cruel given its historical acceptance.<sup>25</sup>

More recently, the Court, in *Robinson v. California*,<sup>26</sup> struck down a 90-day jail sentence for violation of a California statute making it a crime to "be addicted to the use of narcotics." The Court had little trouble finding the punishment "excessive" in light of the fact that they viewed drug addiction as more an illness than a crime.<sup>27</sup> However, in 1968, in *Powell v. Texas*,<sup>28</sup> the Court upheld a \$20 fine levied against a defendant charged with public drunkenness. A 5-4 majority refused to extend the *Robinson* principle because it found insufficient evidence to equate alcoholism and drug addiction, and because the punishment was not based solely upon the defendant's physical status.

Two other recent cases are important. In *Witherspoon v. Illinois*<sup>29</sup> and

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20. 356 U.S. 86 (1958).

21. Four Justices in *Trop* agreed that loss of citizenship constituted "cruel and unusual punishment." Mr. Justice Brennan swung the case in favor of the petitioner but by concluding that Congress lacked the legislative power to authorize such deprivations by statute.

22. 356 U.S. at 101. See also *Weems v. United States*, 217 U.S. 349, 378 (1910) (constitutional protection expands as "public opinion becomes enlightened by human justice.")

23. 356 U.S. at 99.

24. *Id.* at 110-14.

25. "Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty. But it is equally plain that the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination." *Id.* at 99.

26. 370 U.S. 660 (1962).

27. *Id.* at 666.

28. 392 U.S. 514 (1968).

29. 391 U.S. 510 (1968).

*McGautha v. California*<sup>30</sup> the Court considered arguments that the rejection of prospective jurors who opposed the death penalty in capital cases<sup>31</sup> and the lack of standards to guide juries in the infliction of death penalties violated the due process clause of the fourteenth amendment. After much consideration, the Court found in both cases that complete and unfettered jury discretion was not only a responsible, but a necessary element in maintaining a "link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society'."<sup>32</sup>

The most significant development occurred in early 1972 when the California Supreme Court, in *People v. Anderson*,<sup>33</sup> declared the state's death penalty to be in violation of the state's constitutional proscription against "cruel or unusual punishment".<sup>34</sup> The defendant was sentenced to die following conviction for first degree murder.<sup>35</sup> In a dramatic reversal the California high court rejected the presumption of the death penalty's validity through historical acceptance and declared it now so offensive to contemporary standards of decency as to be cruel and unusual.<sup>36</sup> The court stated contemporary standards are to be measured by the will of informed citizens, not by public opinion polls.<sup>37</sup> In the court's opinion the fact that jurors called upon to impose the death penalty were increasingly reluctant to

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30. 402 U.S. 183 (1971).

31. The *Witherspoon* Court held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. at 522.

32. 391 U.S. at 519 n.15: "In light of history, experience and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution." 402 U.S. at 207.

33. 6 Cal. 3d 628, 100 Cal. Rptr. 152, 493 P.2d 880 (1972).

34. CAL. CONST. art. I, § 6 provides in pertinent part: "Excessive bail shall not be required, nor excessive fines imposed; nor shall cruel or unusual punishments be inflicted." (Emphasis added)

Commentators have pointed out that the disjunctive wording in the California constitution is of no significant difference from that of the United States Constitution. In any case, the California court held capital punishment to be both cruel and unusual, though expressly declining to consider the issue in light of the eighth amendment because *Furman* was before the United States Supreme Court at the time. See Comment, *Cruel or Unusual Punishment: The Death Penalty*, 6 SUFFOLK U.L. REV. 1045, 1047-48 (1972) [hereinafter cited as Suffolk Comment].

35. The defendant was granted a new trial on the punishment issue in light of the U.S. Supreme Court's ruling in *Witherspoon* that jurors could not be excluded on the basis of general or conscientious objections to capital punishment. A second jury again imposed the death penalty. 6 Cal. 3d at 633, 100 Cal. Rptr. at 154-55, 493 P.2d at 883.

36. 6 Cal. 3d at 656, 100 Cal. Rptr. at 171, 493 P.2d at 899.

37. 6 Cal. 3d at 649, 100 Cal. Rptr. at 166, 493 P.2d at 893-94. See also Suffolk Comment, *supra* note 34, at 1047.

utilize capital punishment indicated strong social disfavor.<sup>38</sup>

*Furman v. Georgia*

It was in the context of the above-mentioned prior decisions that the Supreme Court reviewed the death sentences imposed by Georgia juries upon Furman<sup>39</sup> and Jackson,<sup>40</sup> as well as that imposed by a Texas jury upon Branch.<sup>41</sup> To understand the basis for the majority's coalition it is necessary to examine separately the reasoning used by the individual Justices.

Justices Brennan and Marshall devoted considerable space to historical interpretations of the language of the eighth amendment<sup>42</sup> and to the history of the death penalty in Anglo-American law.<sup>43</sup> Both Justices concluded that the death penalty, despite its long historical acceptance, could become cruel and unusual if contrary to contemporary moral standards; that no prior case law had directly held capital punishment compatible with the eighth amendment; that, in any case, the nature of the eighth amendment obligated the judiciary to review certain legislative penalties in the light of their most objective interpretation of contemporary moral standards; and that, in fact, capital punishment per se violated present day standards.

Mr. Justice Brennan determined that the fundamental purpose behind the cruel and unusual punishment clause was the preservation of human dignity.<sup>44</sup> He distilled four principles out of prior eighth amendment cases by which to test any punishment: degradation to human dignity, arbitrary imposition, offensiveness to contemporary moral standards, and excessiveness in relation to the crime or penal purpose. He found, in light of his understanding of contemporary society, that capital punishment violated all four principles.

Brennan reasoned that the enormity and severity of the death penalty by its irrevocable nature was uniquely degrading to human dignity and a denial

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38. *Id.* "The steady decrease in the number of executions . . . 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." *Id.*

39. William Furman was convicted of murder for fatally shooting the occupant of a house who discovered Furman breaking into his home early one morning.

40. Lucious Jackson was convicted of forcibly raping his victim while holding a pair of scissors to her throat during the course of a robbery.

41. Elmer Branch was convicted of forcibly raping a 65 year old woman in her home, without the use of a weapon but with physical force and intimidating threats.

42. See 408 U.S. at 260-69 (Brennan opinion); *id.* at 316-33 (Marshall opinion).

43. *Id.* at 333-42 (Marshall opinion).

44. "At bottom, then, the . . . Clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is 'cruel and unusual,' therefore, if it does not comport with human dignity." *Id.* at 270.

by society of the individual's existence as a member of the human community.<sup>45</sup> He also concluded that the death penalty has been arbitrarily inflicted<sup>46</sup> and offered statistics to show the great reduction in the number of death sentences imposed and the rare incidence of those convicted of capital crimes actually being executed over the last four decades.<sup>47</sup> He believed that the statistics raised a presumption of arbitrariness which was not overcome by the claim that capital punishment is used "selectively," since no rational basis was offered for distinguishing between those capital offenders who live and those who die. To the contrary, he claimed, the meaning of *McGautha* was that juries are to be "wholly unguided by standards governing that decision."<sup>48</sup>

Drawing upon the extensive analysis of the death penalty's history written by Mr. Justice Marshall,<sup>49</sup> Brennan contended "[t]he progressive decline in, and the current rarity of, the infliction of death demonstrate that our society seriously questions the appropriateness of this punishment today."<sup>50</sup>

Finally, Brennan concluded, the death penalty is excessive because it has been proven unnecessary or ineffective in furthering legitimate penal aims. Again citing Marshall's statistics,<sup>51</sup> Brennan found no conclusive evidence that the death penalty is any more effective a deterrent to crime than life imprisonment, although admittedly a more severe punishment. Nor, Brennan

45. 408 U.S. at 289. Brennan likens capital punishment to expatriation which was struck down in *Trop* as "a form of punishment more primitive than torture . . .," in that it was "the loss of the right to have rights." 356 U.S. at 101-02.

46. Although little attention has been given to the term "unusual" by itself, some courts have alluded to it as a concept closely related to "arbitrariness." See Goldberg, *supra* note 7, at 1791, "The Court in *Francis* did make reference to the "[p]rohibition against the wanton infliction of pain . . . which suggests that the proscription of unusual punishment extends to wanton as well as arbitrary imposition of severe penalties."

47. Data cited from National Prisoner Statistics No. 46, Capital Punishment 1930-70. 408 U.S. at 291-93 and accompanying footnotes.

48. *Id.* at 295.

49. Justice Marshall's analysis brought to light the succession of popular movements in America since colonial times and their various degrees of success in abolishing capital punishment. The result is that nine states presently have outlawed the death penalty and all of the others have greatly reduced the number of crimes punishable by death over the years to a few of the most serious.

50. 408 U.S. at 299.

51. Justice Marshall's figures, for the most part, were taken from T. SELLIN, THE DEATH PENALTY, A REPORT FOR THE MODEL PENAL CODE PROJECT OF THE AMERICAN LAW INSTITUTE (A.L.I.) 5 (1959).

Sellin's statistics indicate no correlation between the murder rate and the presence or absence of capital punishment, that the abolition or reintroduction of capital punishment has no effect on homicide rates, nor is a greater deterrent effect apparent even in those communities where executions are carried out. 408 U.S. at 348-51. On the other hand, Marshall cites some evidence to the effect that the use of the death penalty may even encourage certain psychologically disturbed persons to commit capital crimes. *Id.* at 351 n.113.



found, even assuming retribution to be a legitimate penal purpose,<sup>52</sup> can the argument stand that those who commit the most heinous crimes deserve to die. The scarcity of statutes imposing mandatory death sentences indicated to him that legislatures have not found it necessary that any criminal must die, no matter how despicable his crime.<sup>53</sup>

In the light of these four principles Brennan declared the death penalty "cruel and unusual" and no longer justified. Mr. Justice Marshall joined him in advocating the total abolition of capital punishment and, although his opinion in effect covers much of the same ground as did Brennan's, Marshall addressed himself to several other issues.

Marshall was conscious of the fact that judicial restraint cautioned him against striking down such a long-standing practice as capital punishment and invading the legislative realm to do so. With regard to prior case law he stated, "There is no holding directly in point, and the very nature of the eighth amendment would dictate that unless a very recent decision existed, *stare decisis* would bow to changing values, and the question of the constitutionality of capital punishment at any given moment in history would remain open."<sup>54</sup> And after examining the history of popular movements to abolish or limit the use of the death penalty, he justified his invasion of legislative prerogative by stating:

"[i]t is not improper at this point to take judicial notice of the fact that for more than 200 years men have labored to demonstrate that capital punishment serves no purpose that life imprisonment could not serve equally well. And they have done so with great success. Little, if any, evidence has been adduced to the contrary. The point has now been reached at which deference to the legislatures is tantamount to abdication of our judicial roles as factfinders, judges, and ultimate arbiters of the Constitution. We know that at some point the presumption of constitutionality accorded legislative acts gives way to a realistic assessment of those acts. This point comes when there is sufficient evidence available so that judges can determine, not whether the legislature acted wisely, but whether it had any rational basis whatsoever for acting."<sup>55</sup>

Marshall found the evidence overwhelming that capital punishment is "excessive" and in violation of the eighth amendment.

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52. Justice Brennan did not believe "naked vengeance" to be a legitimate penal purpose. "As the history of the punishment of death in this country shows, our society wishes to prevent crime; we have no desire to kill criminals simply to get even with them." *Id.* at 305.

53. *Id.* at 304, "When the overwhelming number of criminals who commit capital crimes go to prison, it can not be concluded that death serves the purpose of retribution more effectively than imprisonment. The asserted public belief that murderers and rapists deserve to die is flatly inconsistent with the execution of a random few."

54. *Id.* at 330.

55. *Id.* at 359.

In addition to finding current sentencing practices to be arbitrary, Marshall found reason to believe they had proved discriminatory, an issue which was the core of Justice Douglas' concurring opinion. Judging by the disproportionate numbers of Negroes that have been executed as compared with their percentage in the general population and in the crime rate,<sup>56</sup> Marshall was led to believe that the *McGautha* rationale constituted "an open invitation to discrimination."<sup>57</sup>

Aside from dispelling the myth that the death penalty is a more effective deterrent than life imprisonment, Marshall produced evidence that murderers, the primary class of capital offenders, have proven to have a much lower incidence of recidivism than other criminals,<sup>58</sup> and that legislatures have demonstrated recidivism is not of such major concern to make the death penalty mandatory or to make it a consideration for juries in choosing which criminals to sentence to death.

Marshall agreed with Brennan that the compatibility of capital punishment with contemporary moral standards is not properly reflected by public opinion polls. He concluded only that if the average citizen were confronted with the evidence before the Court, he would surely agree the death penalty is not only unwise, but immoral and unconstitutional.<sup>59</sup>

Justices Douglas, White and Stewart concurred in striking down the death penalty, but they restricted themselves to a much narrower issue. They found it inappropriate to reach the ultimate question of whether capital punishment per se is unconstitutional. Instead they confined their arguments to the death penalty as it was applied in the three cases before them, namely at the juries' discretion.

56. See *Id.* at 364 and accompanying footnotes for statistics. In dissent, Justice Powell discounted the value of the older statistics regarding racial discrimination since "the segregation of our society in decades past, which contributed substantially to the severity of punishment for interracial crimes, is now no longer prevalent in this country. Likewise, the day is past when juries do not represent the minority group elements of the community." *Id.* at 450.

57. *Id.* at 365. "It is also evident that the burden of capital punishment falls upon the poor, the ignorant and the underprivileged members of the society . . . who are least able to voice their complaints against capital punishment." *Id.* at 365-66.

Justice Marshall contended the death penalty has been retained largely due to public ignorance or apathy as to its actual effect. *Id.* at 365-66, 369.

To the contrary, Justice Powell finds it quite natural that the death penalty falls heaviest upon the "have-nots" of society as do almost all criminal punishments. But he holds this to be the result of socio-economic factors which cannot be elevated to eighth amendment proportions. *Id.* at 447.

58. Statistics tend to show murderers are extremely unlikely to commit other crimes either in prison or upon release. For the most part they are first offenders, and when released from prison they are known to become model citizens. *Id.* at 355. See also B. ESHELMAN and F. RILEY, *DEATH ROW CHAPLAIN* 224 (1962).

59. 408 U.S. at 363.

Justice Douglas admitted the difficulty in declaring such a long-standing penalty suddenly "cruel". However, he read the history of the cruel and unusual punishment clause to reflect a strong "equal protection" consideration;<sup>60</sup> not only to prevent unnecessarily cruel penalties but also to prevent the selective or irregular application of penalties, especially directed against minority groups. For this reason Douglas believed the mere evaluation of the language of a statutory punishment was insufficient; "[w]hat may be said of the validity of the law on the books and what may be done with the law on its application do or may lead to quite different conclusions."<sup>61</sup> Declaring jury discretion to be the constitutional defect in the current use of capital punishment, he blamed the *McGautha* decision. "We are now imprisoned in the *McGautha* holding. Indeed the seeds of the present cases are in *McGautha*. Juries (or judges, as the case may be) have practically untrammelled discretion to let an accused live or insist that he die."<sup>62</sup>

Douglas found that vulnerable minorities have most often been the target for capital punishment in the past and that today the penalty is still selectively applied to unpopular minorities, as well as to the ignorant and the poor, who do not or can not retain qualified legal counsel.<sup>63</sup> "The high service rendered by the 'cruel and unusual' punishment clause . . . is to require legislature to write penal laws that are even-handed, nonselective, and non-arbitrary and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups."<sup>64</sup> Douglas concluded that the present capital punishment statutes based on jury discretion are "pregnant with discrimination" and must fall.

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60. *Id.* at 249. Justice Douglas finds "the principle of equal protection implicit" in the language of the English Bill of Rights which spawned the Eighth Amendment. *Id.* at 240. See also Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839, 845-46 (1969).

In dissent, Chief Justice Burger objected to Justice Douglas' raising essentially an equal protection argument when the grant of certiorari in this case was limited to the eighth amendment issue distinct from any equal protection claim. "Evidence of a discriminatory pattern of enforcement does not imply that any use of a particular punishment is so morally repugnant as to violate the eighth amendment." *Id.* at 390 n.12.

61. *Id.* at 242.

62. *Id.* at 248. Justice Douglas reiterated his dissent in *McGautha*, and questioned why the same evidence of arbitrary and discriminatory sentencing relied on by the majority in the present case was not sufficient to strike down jury discretion under the due process attack in *McGautha*. *Id.* n.11.

63. 408 U.S. at 250. Justice Douglas cited Koeninger, *Capital Punishment in Texas, 1927-1968*, 15 CRIM. & DELIN. 132, 141 (1969) (study concludes that the poor, the young and the ignorant bear a disproportionate share of the death sentences in Texas), and BEDAU, *THE DEATH PENALTY IN AMERICA* 474 (1967 rev. ed.) (a disproportionate number of blacks sentenced and executed.) *Contra*, see Justice Powell's rebuttal noted in footnotes 56 and 57.

64. 408 U.S. at 256.

Justices Stewart and White likewise considered only the constitutionality of discretionarily imposed death sentences. Both concluded, in short opinions, that such a sentencing system had resulted in at least such arbitrary and infrequent use of the death penalty as to violate the proscription against cruel and unusual punishments.

Justice Stewart noted that the discretionary application of capital punishment was an admission by legislatures that it was not a necessary punishment, though far more "cruel" than the alternative of life imprisonment. Although willing to admit retribution is a valid consideration of social justice, he found that the infrequency of infliction renders death an "unusual punishment and, further, that those selected to die constitute a "capriciously selected random handful". He concluded that the eighth amendment cannot tolerate so unique a penalty "to be so wantonly and so freakishly imposed".<sup>65</sup>

Justice White agreed, finding the death penalty so rare as to have lost any deterrent value it might once have had. He, too, believed such an infrequently applied punishment is of doubtful use in satisfying any general need of justice. He did not view the decision as an imposition upon legislatures; but rather an evaluation of legislative policy which had placed discretionary power in the hands of juries.<sup>66</sup> "[T]hat policy of vesting sentencing authority primarily in juries—a decision largely motivated by the desire to mitigate the harshness of the law and to bring community judgment to bear on the sentence as well as guilt or innocence—has so effectively achieved its aims that capital punishment within the confines of the statutes now before us has for all practical purposes run its course."<sup>67</sup>

### *Dissent*

Although the four dissenting Justices raise various rebuttals to the arguments of the majority,<sup>68</sup> they are all united in the belief that if capital punishment is to be eliminated at this late stage, it can only be done by popular sentiment expressed by the public through their legislative representatives.

In addition to questioning the majority interpretation of the eighth amendment language,<sup>69</sup> Chief Justice Burger disagreed that there were obvious indications of public rejection of capital punishment. He pointed out that

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65. *Id.* at 310.

66. *Id.* at 314.

67. *Id.* at 313.

68. Chief Justice Burger and Justices Blackmun, Powell and Rehnquist filed dissenting opinions.

69. Chief Justice Burger reprimanded Justices White and Stewart for using essentially a due process argument, in lieu of eighth amendment considerations for which

new capital crimes have been sanctioned in recent years,<sup>70</sup> that polls certainly do not show strong public demand to eliminate capital punishment,<sup>71</sup> nor are death sentences meted out so rarely as the majority indicates.<sup>72</sup> Further, he contended, judges are incompetent to measure something so elusive as a "shift in public values" if it did occur, while the legislatures were designed for that purpose.<sup>73</sup> Although troubled by the majority's reasoning, the Chief Justice admitted that he is "not altogether displeased that legislative bodies have been given the opportunity, and indeed the unavoidable responsibility, to make a thorough re-evaluation of the entire subject of capital punishment."<sup>74</sup>

In a more personal opinion, Mr. Justice Blackmun began with a statement of his own abhorrence for capital punishment but refused to let that dictate what he believed to be his judicial duty. He chided the majority for taking "the easy choice" morally in striking down the death penalty when in fact such a decision should be based only on legislative rather than judicial reasoning.<sup>75</sup> His reading of prior case law lead him only to the conclusion that the courts, the legislatures and the people have long accepted capital punishment and he saw no significant movement or shift in values that would suddenly make the death penalty offensive to contemporary moral standards.<sup>76</sup> He indicated that the majority was swayed by the California Court's decision in *Anderson*, when in fact that case should have no bearing on this Court's decision.

Blackmun pointed to recent overwhelming votes in Congress which established new capital crimes and indicated that the majority was unjustified in considering itself more in touch with contemporary moral standards than

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certiorari was granted in this case. Burger contended there is no empirical evidence to indicate that juries are not exercising their good faith responsibility in choosing between life and death according to community values. To allege otherwise, he believed, was to cast grave doubt upon the integrity of the jury system. *Id.* at 389 n.12.

In any case, Burger maintained the consideration of such due process arguments are foreclosed by the recent *McGautha* decision which the majority is attempting to circumvent or indirectly overrule. *Id.* at 398-40.

70. In the last eleven years Congress has declared four new offenses as capital crimes by overwhelming votes. *Id.* at 385 and accompanying footnote.

71. *Id.* at 385-86 n.9.

72. There is some evidence to indicate that 15-20% of those convicted of murder are sentenced to death. *Id.* at 386 n.11.

73. *Id.* at 383.

74. *Id.* at 403. Chief Justice Burger hoped that new legislative consideration of the death penalty will generate more conclusive evidence of its application and effect than that relied upon by the majority in this case. *Id.* at 405.

At the same time Burger and Justice Blackmun shared concern that the majority ruling will only encourage the return of mandatory death statutes.

75. *Id.* at 410.

76. *Id.* at 408.

those elected representatives.<sup>77</sup> Like Burger, Blackmun personally approved the result but believed the Court far overstepped its authority to reach it.

Justice Powell registered strong objection to the majority's abandonment of case-by-case evaluation of eighth amendment punishments in favor of such a sweeping elimination of virtually all death penalties.<sup>78</sup> He, too, offered evidence of public opinion polls and legislative votes which, he believed, clearly indicated a desire to retain the death penalty in some states.<sup>79</sup> Powell contended that any attempt to estimate social standards, given all the conflicting evidence, was pure speculation and certainly not the function of the Court.<sup>80</sup> In a closing plea for judicial restraint Powell stated:

I know of no case in which greater gravity and delicacy have attached to the duty (of judicial restraint) that this Court is called on to perform whenever legislation—state or federal—is challenged on constitutional grounds. It seems to me that the sweeping judicial action taken today reflects a basic lack of faith and confidence in the democratic process. Many may regret, as I do, the failure of some legislative bodies to address the capital punishment issue with greater frankness or effectiveness. Many might decry their failure either to abolish the penalty entirely or selectively, or to establish standards for its enforcement. But impatience with the slowness, and even the unresponsiveness, of legislatures is no justification for judicial intrusion upon their historic powers.<sup>81</sup>

Justice Rehnquist cast his vote with the dissents of Justices Blackmun and Powell, and added his own admonition of the majority for what he believed was an unwarranted invasion of the legislative domain. Although the very nature of the constitutional system of checks and balances gives the judiciary the last word in interpreting and applying constitutional principles, he reminded the majority, such power carries with it the implied obligation that the judiciary exercise self-restraint. He cautioned that such self-restraint is particularly critical in instances where duly enacted legislation is challenged and added that “[t]he task of judging constitutional cases . . . must surely be approached with the deepest humility and genuine deference to legislative judgment.”

Rehnquist believed such deference was appropriate in an issue such as capital punishment where judges are strongly moved by their own personal convictions:

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77. *Id.* at 413.

78. *Id.* at 433-34.

79. *Id.* at 437-39.

80. *Id.* at 443-44.

81. *Id.* at 464-65.

Rigorous attention to the limits of the Court's authority is likewise enjoined because of the natural desire that beguiles judges along with other human beings into imposing their own views of goodness, truth, and justice upon others. . . . The most expansive reading of the leading constitutional cases does not remotely suggest that this Court has been granted a roving commission . . . to strike down laws that are based upon notions of policy or morality suddenly found unacceptable by a majority of this Court.<sup>82</sup>

In addition, Justice Rehnquist criticized the majority decision as another serious encroachment by the federal courts, under the banner of fourteenth amendment rights, upon the constitutional rights of the States to govern themselves. He viewed capital punishment statutes as laws duly enacted by elected legislators in legitimate attempts to deal with serious crimes in their states, and as such deserved to stand even against the claims of individuals under the due process and equal protection clauses.<sup>83</sup>

### Conclusion

The *Furman* decision had the immediate effect of sparing the lives of over six hundred capital offenders awaiting execution and virtually suspending the imposition of new death sentences pending future legislation. But the case left unanswered the ultimate question of the constitutionality of capital punishment per se. It must be reiterated that the only common ground among the majority opinions is that the discretionary imposition of death sentences by juries had resulted in such infrequent and uneven use as to constitute cruel and unusual punishment to those upon whom it was inflicted. The decision does not affect the handful of statutes imposing mandatory death sentences,<sup>84</sup> nor does it preclude the possibility that the more widely used discretionary system could be cured of its constitutional defects.

Since the *Furman* decision was announced there has been a flurry of activity on state and federal levels to reinstate capital punishment to whatever degree possible.<sup>85</sup> Some supporters advocate a return to the broader use of mandatory death sentences for the most serious crimes, arguing that this approach would avoid the possibility of uneven or discriminatory use con-

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82. *Id.* at 467.

83. *Id.* at 470, citing Black, J., in *Oregon v. Mitchell*, 400 U.S. 112, 126 (1970).

84. See statutes cited note 3 *supra* as exceptions.

85. On November 7, 1972, the voters of California passed a referendum by a two-to-one margin calling for reinstatement of the death penalty in the form of an amendment to the state constitution in light of the *Anderson* decision. The procedure amounts only to a formal registration of public sentiment and is not itself binding legislation.

A current survey of state legislatures showed that of the 47 legislatures presently in session, nine had abolished the death penalty (all prior to the *Furman* decision), but 31 of the remaining 38 states had legislation pending to reinstate capital punishment and Florida had already restored the penalty.

demned in *Furman*. However, as the Court recognized both in *Furman* and *McGautha*, the move away from mandatory death penalties in recent history to allowing juries the discretion to choose between life and death came about as a result of juries refusing to convict defendants, regardless of guilt, whom they felt did not deserve to die.<sup>86</sup> A return, then, to mandatory sentences could thwart the fundamental purposes of criminal justice by forcing sympathetic juries to let capital offenders go completely unpunished. Such use of capital punishment would further contribute to an uneven pattern of convictions and executions because it would serve to increase pressure on prosecutors to reduce charges in order to secure convictions and on governors to commute unpopular sentences.

On the other hand, any attempt to reform the discretionary infliction of death sentences by providing standards to "guide" juries in their choice of sentences also poses problems. As Chief Justice Burger pointed out, past attempts to draw up standards that would be both acceptable to lawmakers and meaningful to lay jurors have been failures.<sup>87</sup>

One proposal under consideration by the staff of the Department of Justice would provide a two-stage trial system with a "mandatory" characteristic. In federal cases the jury would first determine the guilt or innocence of the defendant charged with a capital offense. A guilty verdict would require a subsequent proceeding where the jury would hear evidence of mitigating and aggravating circumstances before passing sentence. An instruction would then be given the jurors that they are required to impose the death penalty if they find certain factors present, such as "a willful disregard for human life" by the defendant. However, there is little reason to believe that the discretion given the jury under such a system, even with "guides," would produce a less arbitrary pattern of death sentences than the "unguided" system struck down in *Furman*. Generally-worded guides would probably encompass the kind of considerations jurors weigh in their own minds anyway when confronted with the life or death choice.<sup>88</sup>

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86. See 408 U.S. at 339 (Marshall opinion) and 402 (Burger dissent, citing the Court's review in *McGautha*).

87. *Id.* at 387. In dissent, Chief Justice Burger wrote, "Unless the Court in *McGautha* misjudged the experience of history, there is little reason to believe that sentencing standards in any form will substantially alter the discretionary character of the prevailing system of sentencing in capital cases." *Id.* at 401. See also, *McGautha* for the Court's review of the practical difficulties in framing manageable jury instructions for capital punishment. 402 U.S. 183, 197-208 (1971).

88. At a press conference held in Washington, D.C., on January 4, 1973, Attorney General Richard Kleindienst announced his own support for reinstatement of mandatory death sentences in cases involving "cold blooded and premeditated" acts of violence (*e.g.*, the killing of a prison guard by a life term prisoner, the killing of a policeman, the assassination of a public official, skyjacking and the bombing of a public building). However, the department's staff is expected to recommend to Congress the



The Florida legislature made a more innovative attempt to correct the constitutional defects cited in *Furman*. With the passage of a law on December 1, 1972,<sup>89</sup> the state installed a two-stage trial system for capital crimes, but the jury's duty in the second stage is only to recommend punishment. The final decision rests in the sole discretion of the judge, who is required to file a written report stating the factors involved in his choice of a life or death sentence. The object of the reports is to create what will amount to a body of sentencing case law which hopefully will produce some consistency in the use of the death penalty and to provide a record for the state supreme court to review in an automatic appeal of any death sentence.<sup>90</sup> If capital punishment survives at all, it seems likely that this type of approach would be the most attractive alternative.

While legislative activity to reinstate capital punishment remains in the formative stages, several developments can be expected. First, future imposition of death sentences, whether under a mandatory or a discretionary system, will spawn new appeals to the Supreme Court. Adversaries of capital punishment will push for a conclusive ruling against the death penalty per se, or, at the very least, try to upset each of its various forms. Second, despite reenactment and use of capital punishment statutes, the moratorium on executions can be expected to remain in effect until a clearer resolution of the penalty's constitutionality is provided by the Court.

It is difficult to predict in which direction the Court will move in subsequent considerations of the death penalty.<sup>91</sup> The limited decision in *Furman* was achieved by the barest of majorities. At the same time, the *Furman* majority must be conscious of the fact that their reading of the "evolving standards of decency which mark the progress" of our matured society appears to be curiously at odds with the opinions of a large and vocal segment of the population and their elected representatives. The majority opinions leave themselves open to the dissenters' oft repeated charges that

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enactment of the more discretionary two-stage trial system. *The Washington Post*, January 6, 1973, § A, at 6, col. 7.

89. 1 F.S.A. Sess. Laws 1972, ch. 72-724. The bill was passed by the Florida House by a vote of 116-2 and by the Florida Senate by 36-1. It arose as a compromise when the legislators became deadlocked over the manner of sentencing.

90. The Florida law is also unique in that seldom if ever in the past have judges been required to justify the severity of a sentence which was within their discretion to impose. It will be interesting, if this legislation survives constitutional challenge, to see if this concept remains limited to capital crimes or is expanded into a more general principle in criminal sentencing.

91. Only Justices Brennan and Marshall are on record as advocating the total abolition of the death penalty. Justices Douglas, White and Stewart expressly reserved judgment on that issue. Although dissenting in the case, Chief Justice Burger indicated that he might find that mandatory death sentences "without the intervening and ameliorating impact of lay jurors, are so arbitrary and doctrinaire that they violate the Constitution." 408 U.S. at 402.