
Constitutional Law - The Remains of the Death Penalty: *Furman v. Georgia*

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CONSTITUTIONAL LAW—THE REMAINS OF THE DEATH PENALTY: FURMAN v. GEORGIA

INTRODUCTION

In the last 100 years many courts have dealt with aspects of the death penalty, but the constitutionality of that punishment had never been decided by the Supreme Court. In *Furman v. Georgia*,¹ the Court for the first time held the death penalty unconstitutional in cases where discretionary jury sentencing procedures resulted in an arbitrary and infrequent meting out of the penalty.

Due to the specific facts of the three cases ruled upon,² the scope of the decision remains somewhat uncertain; however, a trend toward a broad interpretation of *Furman* is revealed by an examination of its five majority opinions in light of Supreme Court orders in subsequent death penalty cases.

Each justice in the majority decided the issue presented on one of three constitutional theories: (1) the imposition of the death penalty *per se* is a violation of the eighth amendment "cruel and unusual punishments" clause; (2) the imposition of the death penalty is a violation of the fourteenth amendment "equal protection" clause; and (3) the arbitrary and infrequent meting out of the death penalty is a violation of the eighth amendment "cruel and unusual punishments" clause as incorporated into the fourteenth amendment.

Justices Brennan and Marshall espouse the theory that the death pen-

1. 225 Ga. 253, 167 S.E.2d 628 (1969), *cert. granted* 403 U.S. 952 (1971), 408 U.S. 238 (1972); *together with* Jackson v. Georgia, 225 Ga. 790, 171 S.E.2d 501 (1969); Branch v. Texas, 447 S.W.2d 932 (Tex. Ct. Crim. App. 1969).

2. Furman, a black, was surprised by his victim while burglarizing his house. Attempting to escape, he accidentally tripped over a wire, causing his pistol to fire through the door of the house. He was convicted of murder and sentenced to death by the jury.

Jackson, a black, entered his victim's home, held a pair of scissors against her neck, demanded money, and raped her. While there were no long-term traumatic effects on the victim, she was bruised and abraded in the struggle, but not hospitalized. He was convicted of rape and sentenced to death by the jury.

Branch, a black, entered the home of a 65 year old white widow while she slept, and raped her, holding his arm against her throat. The record was barren of any medical or psychiatric evidence showing injury to her as a result of this attack. He was convicted of rape and sentenced to death by the jury.

alty *per se* is violative of the eighth amendment prohibition because it is a punishment totally repugnant to the dignity of man. Justice Brennan, developing four cumulative tests to be satisfied before a punishment can be held violative of the eighth amendment, proves that the death penalty "does not comport with human dignity." Justice Marshall, on the other hand, unqualifiedly rejects the death penalty as unconstitutional for both legal and moral reasons, finding the death penalty "no longer consistent with our self-respect."

Contending that the eighth amendment prohibits discriminatory infliction of severe punishments, Justice Douglas finds that discretionary capital statutes are discriminatory in their operation and therefore violate the fourteenth amendment "equal protection" clause. Finally, Justices Stewart and White would strike down the death penalty only in murder and rape cases where it is infrequently and arbitrarily inflicted. In subsequent capital cases though, the Court has extended the holding in *Furman* to other crimes, indicating a more liberal approach to the issue.

The first application of *Furman* was in *Moore v. Illinois*,³ in which the petitioner had been convicted of murder and sentenced to death by a jury exercising complete discretion. The Court unanimously held that the imposition of the death penalty under statutes such as those of Illinois is violative of the Eighth and Fourteenth Amendments The sentence of death may not now be imposed." Thus the death penalty clearly has been abolished for murderers and rapists sentenced to death by a jury having discretionary power over life and death.

In *Stewart v. Massachusetts*,⁴ the second application of *Furman*, the Court overturned a sentence of death imposed by a discretionary jury for the murder of a policeman. Immediately thereafter, citing *Stewart* for authority, the Court further extended its ruling in *Furman* and overturned the death sentences in 125 memorandum orders, where the offenses included first degree murder, murder of a policeman, murder by an escaped convict, conspiracy to murder, robbery by firearms, rape where the victim sustained no harm, rape where the victim did sustain injury, and kidnapping where the victim was raped.⁵

The ultimate disposition of the death penalty, however, rests on the resolution of three constitutional issues: (1) whether the death penalty by constitutional definition is a cruel and unusual punishment; (2) whether discretionary sentencing procedures can be utilized in any capital

3. 408 U.S. 786 (1972).

4. 408 U.S. 845 (1972).

5. 408 U.S. 901 (1972).

sentencing procedures; and (3) whether a mandatory death penalty is constitutionally permissible. This comment will explore each of these issues in terms of its historical precedent, the opinions in *Furman*, and subsequent developments, and will demonstrate that adequate grounds remain for sustaining the death penalty in at least some instances.

THE DEATH PENALTY AS "CRUEL AND UNUSUAL PUNISHMENT"

Supreme Court decisions which have given rise to a judicial definition of "cruel and unusual punishments" are divided into two categories: those which ruled on the constitutionality of a given punishment, and those which ruled on the constitutionality of a method of carrying out the death penalty. This distinction is important because even though the constitutionality of capital punishment had not been tested prior to *Furman*, several challenges to methods of execution have been heard by the Court. Clearly, those decisions applying the eighth amendment to invalidate a punishment itself are binding as to the judicial definition of that amendment, but decisions dealing with forms of execution are of interest only because of the discussion of the death penalty in dicta.⁶

In the first cases addressed to the meaning of the eighth amendment, the Court routinely applied the historical definition of the clause and prohibited only punishments of torture and gruesome depravity. The first indication that the eighth amendment might acquire any other meaning was Justice Field's dissent in *O'Neil v. Vermont*.⁷ There he stated that the proposed punishment of confinement to hard labor for 54 years for 307 separate violations of a Vermont liquor act should be overturned since the eighth amendment extended not only to torturous and barbaric punishments, but to "all punishments which by their excessive length or severity are greatly disproportionate to the offenses charged"⁸

The Court in *Weems v. United States*,⁹ subsequently adopted Justice Field's definition of the eighth amendment and, for the first time, invalidated a legislatively-enacted punishment.¹⁰ Holding that the punishment

6. In *Wilkerson v. Utah*, 99 U.S. 130 (1878), a challenge to execution by shooting failed; the Court stated that "punishments of torture . . . and all others of unnecessary cruelty" are prohibited by the eighth amendment; the Court also implied that shooting as a means of execution was constitutional because of its widespread acceptance and use at that time. See also *In re Kemmler*, 136 U.S. 436 (1890) (electrocution); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (Douglas, J., dissenting) (second electrocution after failure of first attempt).

7. 144 U.S. 323 (1892).

8. *Id.* at 339-40.

9. 217 U.S. 349 (1910).

10. The Philippine punishment, *cadena temporal*, required that the convict be

of twenty years at "hard and painful labor" for a relatively slight offense¹¹ violated the eighth amendment, the Court concluded that the eighth amendment "may acquire meaning as public opinion becomes enlightened by a humane justice"¹² and that "punishment for crime should be graduated and proportioned to the offense."¹³

The Court further expanded the tests formulated in *Weems* in *Trop v. Dulles*,¹⁴ where the petitioner, a native-born American, lost his citizenship as a consequence of his conviction by court-martial for wartime desertion. Chief Justice Warren, joined by Justices Douglas, Black and Whittaker, with Justice Brennan concurring, held that denationalization of the petitioner violated the eighth amendment:

[U]se of denationalization as a punishment is barred by the Eighth Amendment. There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development.¹⁵

The importance of *Trop*, however, lies not in its invalidating denationalization as a punishment in these circumstances, but in its definition of the eighth amendment: "[T]he words of the Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."¹⁶ Recognizing the state's power to punish the individual offender, the Court noted that the eighth amendment assures that "this power be exercised within the limits of civilized standards."¹⁷

Although *Trop* affirmed the constitutionality of the death penalty in dicta,¹⁸ the "evolving standards of decency" test formulated by Chief

imprisoned for twenty years with no assistance whatsoever from outside the institution. During this period the convict labored for the benefit of the state while wearing a chain attached at the ankle and wrists. Accessory penalties were also imposed including civil interdiction, absolute disqualification for public office, and lifetime surveillance.

Originally a provision of the Spanish Penal Code, the punishment was subsequently adopted by the Philippines before they became a territory of the United States.

11. Petitioner was convicted of falsifying government documents.

12. *Weems v. United States*, 217 U.S. 349, 378 (1910).

13. *Id.* at 367. *Cf.* *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U.S. 407 (1921); *Badders v. United States*, 240 U.S. 391 (1916).

14. 356 U.S. 86 (1958).

15. *Id.* at 101.

16. *Id.* at 100-101.

17. *Id.*

18. "At the outset, let us put to one side the death penalty as an index of the

Justice Warren proved to be instrumental in later attacks on the death penalty. This test can be distinguished from the "public opinion" test of *Weems* since, in *Trop*, the terms of the test are met by judicial determination rather than by ascertaining public attitudes toward a particular punishment.

Further groundwork for a challenge to capital punishment was laid in *Robinson v. California*,¹⁹ where the Court expressly held for the first time that the eighth amendment applied to the states through the incorporation doctrine of the fourteenth amendment. The petitioner had been sentenced to 90 days imprisonment for the crime of being a narcotics addict, and the Court overturned the conviction on the basis that one cannot be punished for an act over which he has no control.²⁰

The first clear sign that the Supreme Court would eventually review the death penalty itself came in *Rudolph v. Alabama*.²¹ There Justice Goldberg, joined by Justices Douglas and Brennan, dissenting from the denial of *certiorari*, urged that a hearing be granted to "consider whether the eighth and fourteenth amendments . . . permit the imposition of the death penalty on a convicted rapist who has neither taken nor endangered life."²²

Thus, by 1972 the Court had formulated four tests to define "cruel and unusual punishments": (1) torturous and barbaric treatment; (2) pun-

constitutional limit on punishment. 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.

19. 370 U.S. 660 (1962).

20. Justice Stewart stated for the Court that a state law which imprisons a person for narcotics addiction, "even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment. To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.* at 667.

21. 375 U.S. 889 (1963) (*cert. denied*).

22. *Id.* Justice Goldberg indicated a number of issues which he deemed worthy of consideration: "Is the taking of human life to protect a value other than human life consistent with the constitutional proscription against 'punishments which by their excessive . . . severity are greatly disproportioned to the offenses charged?' Can the permissible aims of punishment (*e.g.*, deterrence, isolation, rehabilitation) be achieved as effectively by punishing rape less severely than by death . . .?" *Id.* at 891.

ishment which in public opinion is too harsh; (3) punishment which is disproportioned to the crime; and (4) punishment which offends the "evolving standards of decency that mark the progress of a maturing society." Formulated by a Court that had heretofore invalidated only non-capital punishments, these tests are patently insufficient to strike down the death penalty. It remained for the Court in *Furman* to embellish these definitions of the eighth amendment in order to bring the death penalty within its purview. Only two members of the Court, however, based their decisions directly on a definition of "cruel and unusual punishments." Thus the primary importance of their statements lies in the fact that one of these tests may be adopted by the Court in the future, and may consequently be applicable to punishments other than the death penalty.

Justice Marshall, one of the two members of the Court who defined "cruel and unusual punishments," formulates two alternative tests for evaluating the constitutionality of a challenged punishment. These two tests are drawn from an examination of the case law on the eighth amendment and when applied to the death penalty reveal that it is "a punishment no longer consistent with our self-respect."²³

The first test holds that an excessive or unnecessary punishment violates the "cruel and unusual punishments" clause of the eighth amendment. This test is developed by examining three of the reasons that punishments have been found to be cruel and unusual. Punishments violate the Constitution if they are (1) inherently cruel, such as the rack and thumbscrew;²⁴ (2) unusual;²⁵ and (3) excessive and do not serve any valid legislative purpose.²⁶ Common to all three of these categories is the element of excessiveness. Justice Marshall concludes that since excessive punishments are historically barred,²⁷ an excessive punishment today is barred.

Applying this test to the death penalty, Justice Marshall finds that the death penalty is excessive since life imprisonment serves the legislative purposes of punishment²⁸ as well as the death penalty. In the event that

23. 408 U.S. at 315.

24. See *O'Neil v. Vermont*, 144 U.S. 323, 339 (1892) (Field, J., dissenting).

25. Cf. *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U.S. 407, 435 (1921) (Brandeis, J., dissenting).

26. *Weems v. United States*, 217 U.S. 349 (1910).

27. E.g., *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947); *Weems v. United States*, 217 U.S. 349, 381 (1910); *O'Neil v. Vermont*, 144 U.S. 323, 339-340 (1892) (Field, J., dissenting); *Wilkerson v. Utah*, 99 U.S. 130, 134 (1878).

28. Justice Marshall assigns as the six purposes of punishment: retribution, deterrence, prevention of recidivism, encouragement of guilty pleas and confessions,

a lesser punishment serves society as well as a greater one, it is excessive punishment to impose the greater. The death penalty, therefore, violates the eighth amendment.

Notwithstanding the first test, Justice Marshall formulates an alternative test which evaluates a punishment in the light of "currently existing moral values."²⁹ Since a punishment that was abhorrent to the public at the time of the adoption of the constitution is proscribed by the eighth amendment, a punishment which becomes unacceptable to public opinion is also prohibited.³⁰ Analyzing the death penalty according to this test, he finds that the average citizen would be revolted if he knew of the discriminatory, unfair and expensive process by which the death penalty is meted out.³¹ The death penalty, therefore, would violate the second test because public sentiment would abhor it.

Justice Brennan also finds that the death penalty is a cruel and unusual punishment. Adopting from *Trop* the premise that "a punishment is 'cruel and unusual'. . . if it does not comport with human dignity,"³² he formulates a four-part definition of "cruel and unusual punishments": (1) "a punishment [may] not be so severe as to be degrading to the dignity of human beings;"³³ (2) a severe punishment must not be inflicted arbitrarily;³⁴ (3) "a severe punishment must not be unacceptable to con-

economy, and eugenics. *United States v. Jackson*, 390 U.S. 570 (1968); *Trop v. Dulles*, 356 U.S. 86, 111 (1958); *Weems v. United States*, 217 U.S. 349, 381 (1910). See generally Bedau, *Deterrence and the Death Penalty: A Reconsideration*, 61 J. CRIM. L.C. & P.S. 539, 542 (1970); Caldwell, *Why is the Death Penalty Retained?*, 284 ANNALS AM. ACAD. POL. & SOC. SCI. 48 (1952); Sellin, *Capital Punishment*, 25 FED. PROB., No. 3, 3 (Sept. 1961) (1967 ed.); SELLIN, THE DEATH PENALTY, A REPORT FOR THE MODEL PENAL CODE PROJECT OF THE AMERICAN LAW INSTITUTE 5, 34 (1959); Comment, *The Death Penalty Cases*, 56 CALIF. L. REV. 1268, 1275-1302 (1968); REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-1953, at 486-491 (1953); DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, UNITED NATIONS, CAPITAL PUNISHMENT pt. II, at 123 (1968).

29. 408 U.S. at 333.

30. *Id.* at 332.

31. *Id.* at 362-64.

32. *Id.* at 270.

33. *Id.* A punishment is "degrading to the dignity of human beings" if it involves physical pain, severe mental suffering or dehumanization. See *People v. Anderson*, 6 Cal. 3d 628, 649, 493 P.2d 880, 894, 100 Cal. Rptr. 152, 166 (1972); *Trop v. Dulles*, 356 U.S. 86, 102 (1958); *Soleshee v. Balkcom*, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947); *Weems v. United States*, 217 U.S. 349, 366 (1910). See also *Hearings on S. 1760 before a Subcomm. of the Senate Judiciary Committee*, 60th CONG., 2d Sess., at 19-21 (1970); REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, at 246-73 (1953).

34. 408 U.S. at 274. Justice Brennan places emphasis on the adjective "unusual" rather than "cruel" as an indicia of arbitrariness in the infliction of severe punish-

temporary society;"³⁵ and (4) "a severe punishment must not be excessive."³⁶

A *caveat* is attached to this four-part test. Observing that since 1789 only three punishments have been found to violate the eighth amendment prohibition,³⁷ Justice Brennan theorizes that each punishment, while degrading to human dignity, was not fatally offensive under any particular principle, but rather, that "[t]hese 'cruel and unusual punishments' seriously implicated several of the principles . . . in combination. . . ."³⁸ Thus, his test is cumulative; each of the four principles must be violated in order for a challenged punishment to be adjudged inconsistent with human dignity.

Although Justices Brennan and Marshall both reach the conclusion that the death penalty is a cruel and unusual punishment, the tests developed by each vary in several respects. Both Justices rely on the same body of prior cases in arriving at a definition of "cruel and unusual punish-

ments, and feels that the imposition of the death penalty "smacks of little more than a lottery system." *Trop v. Dulles*, 356 U.S. 86, 100, n.32 (1958); *Weems v. United States*, 217 U.S. 349, 369-70 (1910); *Wilkerson v. Utah*, 99 U.S. 130, 134-35 (1878). 106 capital sentences have been imposed annually from 1961 to 1970, and there have been 46 executions since 1962, 36 of them in 1963-1964. The last execution in the United States took place in 1967. NATIONAL PRISONER STATISTICS No. 46, CAPITAL PUNISHMENT 1930-1970, at 4, 9 (August, 1971).

35. 408 U.S. at 277. Discarding the subjective evaluations of public opinion of earlier determinations, Justice Brennan applies an objective standard: "The acceptability of a severe punishment is measured . . . by its use." *Id.* at 279. Compare *Robinson v. California*, 370 U.S. 660, 666 (1962); *Trop v. Dulles*, 356 U.S. 86, 111-12 (1958); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 473 (1947) (Burton, J., dissenting); *Weems v. United States*, 217 U.S. 349 (1910); *O'Neil v. Vermont*, 144 U.S. 323, 340 (1892) (Field, J., dissenting); *Wilkerson v. Utah*, 99 U.S. 130 (1878).

36. 408 U.S. at 279. An "excessive" punishment is defined as one which (1) involves the pointless infliction of suffering; (2) is disproportioned to the specific crimes involved; or (3) serves no penal purpose more effectively than would a less severe punishment. *Id.* at 279-80. See *Robinson v. California*, 370 U.S. 660, 666-67 (1962); *Trop v. Dulles*, 356 U.S. 86, 111-12 (1958); *Weems v. United States*, 217 U.S. 349, 381 (1910); *O'Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting).

Justice Brennan proposes a realistic alternative to capital punishment: "[I]f a criminal convicted of a capital crime poses a danger to society, effective administration of the state's pardon and parole laws can delay or deny his release from prison, and techniques of isolation can eliminate or minimize the danger while he remains confined." 408 U.S. at 300-01.

37. Twelve to twenty years in chains at hard and painful labor, *Weems v. United States*, 217 U.S. 349 (1910); denationalization, *Trop v. Dulles*, 356 U.S. 86 (1958); imprisonment for narcotics addiction, *Robinson v. California*, 370 U.S. 660 (1962).

38. 408 U.S. at 282.

ments," but Justice Marshall accepts statements made by dissenting Justices in past cases,³⁹ as well as the majority holdings, in arriving at a flexible set of variables to work with. Justice Brennan, on the other hand, adopts rules of law only from cases in which a challenged punishment has successfully been ruled unconstitutional,⁴⁰ and thus approaches the task of formulating a modern definition of the eighth amendment more conservatively.

The structure of the tests evolved by each also demonstrates Justice Marshall's more liberal definition of "cruel and unusual punishments." By proposing two alternative definitions, only one of which contains the concept of arbitrariness, the "excessive" test can be used to strike down a punishment which is not discriminatorily or arbitrarily imposed. Justice Brennan's four-part test, however, must be met fully, so that if a challenged punishment is not discriminatorily imposed, it will not be ruled unconstitutional.

Noting these differences, it would appear that Justice Marshall's definition of "cruel and unusual punishments" as those which are either "excessive" or "abhorrent to currently existing moral values" would be more readily adopted by the Court in future litigation. However, the shortcoming of his argument is that while he adopts from *Trop* the basic premise that the eighth amendment is defined according to the "evolving standards of decency that mark the progress of a maturing society," he continues to measure those "evolving standards" by the tests of cases up to 60 years old. His rhetoric is persuasive because of the mass of evidence that he marshalls, rather than because his perceptions of the innate cruelty of capital punishment are so compelling. As a guide for future courts, his test is just as unmanageable as are those of the past, and it will never be any easier to measure the sentiments of a "maturing society" from the bench than it is now.

Justice Brennan's four-part definition of "cruel and unusual punishments" is not likely to be adopted by a court either, for it too is a mere compilation of all prior holdings on the eighth amendment, and is equally

39. In addition to relying on the definitions of the eighth amendment enunciated in *Robinson*, *Trop* and *Weems*, in which challenged punishments were successfully defeated, Justice Marshall incorporates the statements of dissenting Justices in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. at 464; *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 225 U.S. at 435; *O'Neil v. Vermont*, 144 U.S. at 339; *In re Kemmler*, 136 U.S. at 447; and *Wilkerson v. Utah*, 99 U.S. at 134.

40. Justice Brennan uses eighth amendment cases more conservatively, basing his definition of "cruel and unusual punishments" on those punishments which are historically barred plus the standards developed by the Court in *Weems* and *Trop*.

unmanageable, since it is also premised on the "maturing society" concept of *Trop*. In addition, he has made his definition more restrictive than any previously applied. While each element of his definition was the basis for invalidating a punishment in a prior case, by making the four elements cumulative he is in effect implying that if the facts of *Weems* came before the Court now, the petitioner's appeal would fail if arbitrariness were not claimed, even though in that case that issue was not originally presented. In attempting to expand the definition of the eighth amendment, he has created a test so rigorous that its application would rule unconstitutional only the most outrageous punishment. Rather than create a liberalized vehicle for invalidating punishments which are inconsistent with present moral standards, Justice Brennan has placed a barricade in the path of implementation of humanitarian values.

As long as the indefinite and vague statements of *Trop* dominate eighth amendment litigation it is quite likely that the members of the Court will continue to shy away from a direct confrontation with its meaning. Instead they will seek other means to invalidate unacceptable punishments, as did three members of the majority in *Furman* who chose to discuss the procedural aspects of capital punishment rather than the definition of the eighth amendment.

THE DEATH PENALTY AS DISCRETIONARY

The second major issue which will affect the future availability of the death penalty is that of the discretionary death penalty. In fact, as long as the Court does not declare capital punishment *per se* a cruel and unusual punishment, the jury's discretion in sentencing a defendant to imprisonment or death is the sole basis for prohibition of the death penalty. Of the three avenues of attack on the death penalty,⁴¹ procedural attacks on capital punishment have produced the most interesting and paradoxical results.⁴²

The first substantial attack on discretionary jury sentencing was in *Witherspoon v. Illinois*,⁴³ where the Court held that a death sentence was invalid

if the jury that imposed or recommended it was chosen by excluding veniremen for

41. The three avenues of attack on the death penalty have been (1) by interpretation of "cruel and unusual punishments," (2) by challenging methods of execution, and (3) by testing the capital sentencing procedures.

42. See *e.g.*, *Williams v. Georgia*, 349 U.S. 375 (1955); *Andres v. United States*, 333 U.S. 740 (1948).

43. 391 U.S. 510 (1968). See generally H. KALVEN AND H. ZEISEL, *THE AMERICAN JURY* (1966).

cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.⁴⁴

Recognizing that the rate of imposition of the death penalty should reflect "the evolving standards of decency that mark the progress of a maturing society,"⁴⁵ Justice Stewart concluded in his opinion for the Court:

[W]hatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution. The State of Illinois has stacked the deck against the petitioner. To execute this death sentence would be to deprive him of his life without due process of law.⁴⁶

The effect of this decision was to make it impossible for prosecutors to block a *de facto* abolition of the death penalty which would surely develop if a large enough majority of the population developed reservations about capital punishment.

The second case bearing on the issue of jury discretion in capital sentencing is *McGautha v. California*,⁴⁷ which challenged standardless discretionary jury sentencing in capital cases, together with *Crampton v. Ohio*, which challenged the single-verdict death sentence. The petitioners' common claim in these cases was that to leave a jury wholly at large in choosing between the death penalty and life imprisonment was "fundamentally lawless" and accordingly violative of due process. Rejecting the challenge to standardless jury sentencing, Justice Harlan stated:

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 the Constitution. The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision. . . .⁴⁸

On the issue of the single-verdict death sentence, Justice Harlan admitted that bifurcated trials could well be superior methods of capital sentencing, but that "[t]he Federal Constitution . . . does not guarantee trial procedures that are the best of all worlds."⁴⁹

44. 391 U.S. at 522.

45. *Id.* at 519, n.15. "Guided by neither rule nor standard, . . . a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death. Yet, in a nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community. Culled of all who harbor doubts about the wisdom of capital punishment—of all who would be reluctant to pronounce the extreme penalty—such a jury can speak only for a distinct and dwindling minority." *Id.* at 519-20.

46. *Id.* at 523.

47. 402 U.S. 183 (1971).

48. *Id.* at 207-08.

49. *Id.* at 221.

The apparent effect of *McGautha* was to close the door on further challenges to the death penalty, since its most vulnerable aspect—standardless discretionary jury sentencing—had been emphatically affirmed as constitutional. However, when *McGautha* is read in conjunction with *Witherspoon*, an interesting theory, which we shall term *jury input*, is indicated. By *Witherspoon*, the rate of imposition of the death penalty is forced to reflect the weight of public opinion, and the selection of members of the jury may in no way be based on each individual's beliefs regarding the death penalty. And by *McGautha*, the decision of the jury may be reached without sentencing standards, regardless of how arbitrary, discriminatory, or capricious that result may be. The Supreme Court has given a properly-selected jury the absolute right to sentence each individual defendant free of any considerations, save their own conscience, within statutory limitations. Thus the jury has the constitutional right to sentence without standards and in one trial as few as 1% of all convicted capital criminals to death. No other decision could have been made in *McGautha*, however, because the imposition of mandatory sentencing standards and/or bifurcated trials in capital cases could lead to the same restrictions on noncapital criminal proceedings, placing an unreasonable burden on the entire criminal process.

McGautha did not represent the last ruling on the issue of the arbitrarily imposed death penalty since the Court chose to distinguish the jury sentencing procedure from its result, which we shall term the *jury output*. In *Furman v. Georgia*, the common statement of the five majority Justices was that the arbitrary and discriminatory result of discretionary jury sentencing in capital cases is a violation of the eighth amendment as incorporated into the fourteenth amendment by the "due process" clause.

Justice Brennan incorporated arbitrariness into his four-part test for "cruel and unusual punishments," stating that the current rate of imposition of the death penalty "smacks of little more than a lottery system,"⁵⁰ and Justice Marshall identifies the discriminatory and arbitrary imposition of the death penalty as one of his bases for ruling against it.⁵¹

Justice Stewart characterizes the death sentence when it is imposed at the discretion of the jury or the judge as "cruel and unusual in the same way that being struck by lightning is cruel and unusual," not necessarily because death sentences may be meted out on the basis of race,⁵² but because there is a "capriciously selected random handful upon whom

50. 408 U.S. at 293.

51. *Id.* at 364-66.

52. See concurring opinion of Justice Douglas, *Id.* at 249-51; concurring opinion of Justice Marshall, *Id.* at 366 n.155.

the sentence of death has in fact been imposed.”⁵³ Although Justice Stewart was a member of the majority court that in *McGautha* held it not violative of the fourteenth amendment for a jury to impose the discretionary death penalty without sentencing standards, he here distinguishes this case as turning on the interpretation of the eighth amendment in conjunction with the fourteenth amendment. Defining “cruel” as “excessive” and “unusual” as “infrequently imposed,” he concludes that in the absence of a mandatory death penalty,⁵⁴ the imposition of the death sentence in murder and rape cases is prohibited by the eighth amendment.⁵⁵

Justice White identifies the presence of discretionary death sentencing as the reason for infrequently imposing capital punishment,⁵⁶ which infrequency has resulted in its present unconstitutional arbitrariness. Relying only on the evidence presented by the other Justices in the majority to support his argument, Justice White reasons that the death penalty is infrequently used; that when used infrequently, the death penalty ceases to be “a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system;” and that the imposition of the death penalty which has ceased realistically to further recognized penological purposes is a “patently excessive and cruel and unusual punishment violative of the eighth amendment.”⁵⁷

Justice Douglas determines that the imposition and execution of the death penalty constitutes cruel and unusual punishment within the meaning of the eighth amendment as incorporated into the fourteenth amendment because it violates the “equal protection” clause.⁵⁸ Without decid-

53. 408 U.S. at 309-10.

54. See e.g., 10 U.S.C. § 906 (1964) (mandatory death penalty for conviction as a spy for the enemy in time of war); 3 R.I. GEN. LAWS ANN. § 11-23-2 (1956) (mandatory death penalty for a life term prisoner who commits murder); OHIO REV. CODE §§ 2901.09 and 2901.10 (1953) (mandatory death penalty for the assassin of the President of the United States or Governor of a state); MASS. GEN. LAWS ch. 265, § 2 (1956) (mandatory death penalty for conviction of murder in the commission of forcible rape).

55. “I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.” 408 U.S. at 310.

56. “[P]ast and present legislative judgment with respect to the death penalty loses much of its force when viewed in light of the . . . fact that a jury, in its own discretion and without violating its trust or any statutory policy, may refuse to impose the death penalty no matter what the circumstances of the crime.” *Id.* at 314.

57. *Id.* at 312.

58. The proposal of the fourteenth amendment maintained that “the privileges or immunities of the citizens of the United States” included protection against “cruel and unusual punishments”: “Contrary to the express letter of your constitution, ‘cruel and unusual punishments’ have been inflicted under State Laws within this Union upon citizens . . . against which the Government of the United States had

ing whether the death penalty is "cruel" *per se*, Justice Douglas contends that the eighth amendment prohibits the discriminatory application of severe punishments.⁵⁹

Looking to history, Justice Douglas hypothesizes that the framers of the Bill of Rights intended that it be "cruel and unusual" to apply a penalty selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board.⁶⁰

He relies on a variety of current sources to support the notion that it is, in fact, the minority groups who receive the death sentence,⁶¹ and concludes that the discretionary capital statutes are discriminatory in their operation, therefore violating the "equal protection" clause.

Interestingly enough, Justice Douglas is the only member of the *Furman* majority who would today overrule *McGautha*, stating that "[w]hat the legislature may not do for all classes uniformly and systematically, a judge or jury may not do for a class that prejudice sets apart from the community."⁶²

provided no remedy and could provide none." Cong. Globe, May 10, 1966, at 2542.

That the requirements of due process ban cruel and unusual punishments is now firmly established. *Robinson v. California*, 370 U.S. 660, 667 (1962); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463, 473-74 (1947); *Weems v. United States*, 217 U.S. 349, 378-82 (1910).

59. "[T]he death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices." 408 U.S. at 242.

60. *Id.* at 245. Justice Douglas claims that the prohibition in the English Bill of Rights of 1689 against "cruel and unusual punishments," from which the language of the eighth amendment was taken, was designed to forbid arbitrary and discriminatory penalties of a severe nature. See Granucci, "Nor Cruel and Unusual Punishments Inflicted": *The Original Meaning*, 57 CALIF. L. REV. 839, 845-46 (1969).

Justice Douglas admits that while "the debates of the First Congress on the Bill of Rights throw little light on its intended meaning. . . . [T]he words, at least when read in light of the English proscription against selective and irregular use of penalties, suggest that it is 'cruel and unusual' to apply the death penalty—or any other penalty—selectively to minorities." 408 U.S. at 244-45. See *Noval v. Beto*, 453 F.2d 661, 673-79; *cf. In re Medley*, 134 U.S. 160; *Brooks v. Florida*, 389 U.S. 413.

61. Koeninger, *Capital Punishment in Texas, 1927-1968*, 15 CR. AND DEL. 132, 141 (1969); CLARK, *CRIME IN AMERICA* 335 (1970); LAWES, *LIFE AND DEATH IN SING SING* 155-60 (1928); THE PRESIDENT'S COMMISSION OF LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY*, at 143 (1967); Testimony of Ernest van den Haag before the Committee of the Judiciary, United States House of Representatives, on H.R. 8414 and H.R. 3243.

62. 408 U.S. at 249. Justice Douglas offers as a possible solution to the dis-

Since *McGautha* affirmed the jury's independence in reaching their decision, the Court in *Furman* was faced with remedying a situation which occurred because of the unfair results emanating from unstructured secrecy. Thus, these two cases illustrate the distinction the Court made between the input to the jury and the output from the jury.

The question of the permissibility of jury sentencing standards was answered in *McGautha* to the extent that it is constitutional not to have standards. This response by the Court, however, does not preclude the future imposition of some jury sentencing standards designed to guide the jury in evaluating the criminal and the type or amount of punishment necessary to satisfy society. Thus, at this point in time the input to the jury is free of all restraints and their decision may be rational or emotional, fair or unfair, retributive or rehabilitative.

Examining the result of discretionary jury sentencing in *Furman*, the Court found that the number of criminals eligible to receive the death sentence and those actually receiving it was greatly disproportionate. In effect, the juries were randomly handing out death sentences and the deterrent effect of such enforcement was negligible. The Court, therefore, struck down the death penalty in cases where the results of this unguided jury proved to be arbitrarily and infrequently imposed on random criminals. The effect of jury sentencing was thus circumvented at the output stage in order to protect the rights of those being sentenced without disturbing the nature of the jury procedure.

The distinction between jury input and jury output is useful in analyzing future problems relating to sentencing procedures because it is possible for the court to establish jury standards to guide their imposition of a death penalty which might mitigate the discriminatory results of totally discretionary sentencing.

THE DEATH PENALTY AS MANDATORY

The third issue which bears on capital punishment is the constitutionality of a mandatory death penalty. Since many of the justices in *Furman* refer to the mandatory death sentence as an alternative to the discretionary death sentence, consideration of this type of sentence is realistic and integral to an examination of the status of the death penalty.

Historically, the mandatory death penalty was almost totally abolished

criminally imposed and execution of the death penalty laws that are "even-handed, nonselective, and nonarbitrary" on their face and in application. *Id.* at 256. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

between 1830 and 1900. This result was precipitated by the phenomenon of jury nullification; that is, juries failed to convict because they believed the punishment to be disproportionate to the offense. The resulting acquittal of many criminals caused the legislature to introduce procedures which gave the judge and jury discretionary power to sentence the defendant to imprisonment or death and the problems of the mandatory death penalty dropped into the background.⁶³ The Court's action in *Furman*, however, again raises the issue of the mandatory death penalty inasmuch as it seemingly solves the problems of a discriminatory discretionary sentencing procedure.

There are several difficulties, however, with the mandatory death penalty as a form of punishment. First, a discriminatory result could obtain under mandatory sentencing statutes. Where the prosecutor brings only the capital charge in the indictment, the jury is free to refuse to convict regardless of the facts of the case or their reasoning. In a climate marked by an increasing disapproval of capital punishment,⁶⁴ the existence of a mandatory death penalty would result in an unrealistic rate of acquittals in capital cases, and the argument that the death penalty is not being meted out in an evenhanded fashion would still be applicable.

Second, where the prosecutor brings an indictment containing lesser included offenses as well as a capital charge, a jury refusing to impose the death penalty will convict of a lesser offense, which will also have the effect of perpetuating the discriminatory imposition of capital punishment.

Note also that in light of *Witherspoon*, a "hanging jury" cannot be selected, and thus, the rate of imposition of the death penalty will continue to reflect the current moral attitude toward that punishment.

Justice Burger, agreeing that these problems exist with reference to implementation of a mandatory death penalty, considers that it would be regressive. Juries would infrequently convict defendants of crimes carrying a mandatory death penalty because of its mandatory nature.⁶⁵ This result would not be a re-enactment of the discretionary jury, however, because

63. See *McGautha v. California*, 402 U.S. 183, 199 (1971).

64. See *Witherspoon v. Illinois*, 391 U.S. 510, 526 (1968); *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, cert. denied 406 U.S. 813 (1972); BEDAU, *THE DEATH PENALTY IN AMERICA* 231-41 (1967); Goldberg and Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1783 (1970); But see Erskine, *The Polls: Capital Punishment*, 34 PUBLIC OPINION QUARTERLY 290 (1970).

65. 408 U.S. at 401.

conviction of one crime with a discretionary choice of penalties can be distinguished from conviction of one of two or more crimes with distinct penalties.

The third problem concerns the realities of imposing a mandatory death penalty. Assuming that the death penalty were not held a direct violation of the "cruel and unusual punishments" clause, a mandatory death penalty which was imposed and carried out swiftly, certainly and uniformly, and satisfied the requirements of due process, could be upheld as constitutional. Realistically, however, the mandatory penalty would be more likely upheld for such infrequently committed crimes as aircraft piracy, assassination of an elected official, or treason than for the more ordinary and frequently committed capital crimes for which the discretionary death penalty has been expressly overturned. Thus, in cases of great public outrage imposition of the mandatory death penalty would serve to effectuate the penal purposes of retribution and deterrence.

In *Furman* Justices Stewart and White view the possibility of a mandatory death penalty as constitutionally permissible, but their positions as "swing" Justices make predicting the future of this punishment difficult. Justice Douglas, while not expressly commenting on the mandatory death penalty, does imply that any death penalty that would be applied uniformly, without violating "equal protection," would be constitutional.

The dissent in *Furman* warns that the majority decision will cause a rash of legislative action to enact laws which will comply with the vague guidelines of the opinion. Essentially the fear of the dissent is that new laws will revive the old mandatory death penalty and produce a situation that is more unpleasant than the discretionary jury system. Certainly these fears are well founded and new legislation advocating such a penalty could only be viewed as regressive.

The mandatory death penalty is thus a feasible replacement for discretionary jury sentencing procedures because it fulfills the requirements of due process and equal protection. Enactment of such statutes is quite possible, but highly unlikely for most of the commonly committed crimes. This result, however, could be quite different if the legislatures translated public rage into a need for retribution and deterrence for such crimes as aircraft piracy, assassination of an elected official, or treason. Implementation of a mandatory death penalty in those situations is not too far removed from reality. A change in the composition of the Court could also produce a more conservative majority, and a new review of both the discretionary and mandatory death penalty is entirely possible and the imposition of a mandatory death penalty more likely.

CONCLUSION

The death penalty has survived the attacks made on it in *Furman* and the subsequent cases. The reasons for its survival are not readily apparent, but the results of the attack are quite clear. First, the death penalty has not been classified as a cruel and unusual punishment *per se*. Since the Court has not adopted the tests and views of Justices Brennan or Marshall, the death penalty has not been struck down on the basis of a judicial definition of the eighth amendment "cruel and unusual punishments" clause. Second, the death penalty has not been abolished in every case and for every crime. The reluctance of the Court to strike the punishment down for some of the more uncommon crimes indicates that possible exceptions might be made. Further, once the problem of discretionary and arbitrary jury output is remedied, possibly through jury sentencing standards, the death penalty may be reinstated by a more conservative Court. And third, imposition of a mandatory death penalty is questionable. Although this type of punishment complies with the fourteenth amendment requirements set out in *Furman*, strong opposition to a regressive punishment may overcome a conservative drive to reinstate it.⁶⁶

The death penalty, therefore, remains in spite of *Furman* because the Court has not attacked the substantive penalty but only the procedural aspects of its imposition. Future decisions will most likely follow these procedural attacks on the punishment because of the Court's continuing reluctance to fix and adopt a workable definition of "cruel and unusual punishments."

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66. See *Winston v. United States*, 172 U.S. 303 (1899); cf. *Colton v. Utah*, 130 U.S. 83 (1889); see also *Andres v. United States*, 333 U.S. 740, 753 (1948) (Frankfurter, J., concurring).