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# You May Kill, But You Must Promise Not to Use Discretion: *Furman v. Georgia*

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## YOU MAY KILL, BUT YOU MUST PROMISE NOT TO USE DISCRETION: *FURMAN v. GEORGIA*<sup>1</sup>

*Furman v. Georgia* was a case of immediate and dramatic impact. Fully six hundred prisoners on American death rows awaited its outcome, the decision promising to determine for each of them whether he should live or die.<sup>2</sup> The validity of hundreds of statutes, enacted by the Congress of the United States<sup>3</sup> and the legislatures of forty-one states,<sup>4</sup> was called into question when the United States Supreme Court decided to review the cases of three petitioners under sentence of death, the Court limiting its grants of certiorari to the following question: "Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?"<sup>5</sup>

Each of the three petitioners had been sentenced to death by a jury empowered to impose the death penalty or a lesser punishment for the

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1. 408 U.S. 238 (1972).

2. *Id.* at 316, 417.

3. Federal crimes punishable by death included treason, 18 U.S.C. § 2381 (1970); assassination of the President, Vice President, or those who stand elected to those positions, 18 U.S.C. § 1751 (1970); assassination of a member or member-elect of Congress, 18 U.S.C. § 351 (1970); espionage, 18 U.S.C. § 794 (1970); rape within the special federal maritime jurisdiction, 18 U.S.C. § 2031 (1970); causing death through destruction of aircraft or motor vehicles engaged in interstate commerce, 18 U.S.C. § 34 (1970); explosives offenses where death results, 18 U.S.C. § 844(d) and (f) (1970); aircraft piracy, 49 U.S.C. § 1472(i) (1970); train wrecking where death results, 18 U.S.C. § 1992 (1970); and capital punishment provisions in various articles of the Uniform Code of Military Justice, 10 U.S.C. §§ 885, 890, 894, 899, 901, 904, 906, 913, 918, and 920 (1970).

4. The only states lacking the death penalty are Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, Oregon, West Virginia, and Wisconsin. H. BEDEAU, *THE DEATH PENALTY IN AMERICA* (1967) (hereinafter cited as BEDEAU). The California Supreme Court declared the death penalty to violate this state's counterpart of the federal cruel and unusual punishments clause in *People v. Anderson*, 6 Cal. 3d 628, 100 Cal. Rptr. 152, 493 P.2d 880, *cert. denied*, 406 U.S. 958 (1972). See CAL. CONST. art. I, § 6. *Anderson* has since been nullified by referendum amendment of the California Constitution. See note 122 *infra*.

5. 403 U.S. 952 (1971). The Eighth Amendment provides in full: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Cruel and Unusual Punishments Clause of the Eighth Amendment has been held to apply to the several states by virtue of the Due Process Clause of the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660 (1962). See notes 31 and 92 *infra*.

same crime.<sup>6</sup> William Furman had been convicted of felony murder for the killing of a Georgia householder returning to his home, which Furman had entered to burglarize.<sup>7</sup> The victim was shot through a closed door when Furman accidentally tripped over a wire in his attempt to escape.<sup>8</sup> The two other petitioners had been convicted of rape. Lucious Jackson, an escaped convict at the time of his crime, entered a Georgia home and raped a woman while pressing a pair of scissors against her neck.<sup>9</sup> Elmer Branch raped and then threatened to kill a 65 year old Texas widow.<sup>10</sup> All three petitioners were black.<sup>11</sup> Each contested the validity of his sentence rather than his conviction.<sup>12</sup>

Each of the nine United States Supreme Court justices filed a separate opinion. Justices Brennan and Marshall concluded that the imposition of the death penalty was unconstitutional *per se* in that it constituted "cruel and unusual punishment" within the meaning of the Eighth Amendment.<sup>13</sup> Justice Douglas, finding the death penalty in these cases to be discriminatorily imposed, ruled that its execution would violate notions of equal protection implicit in the Eighth Amendment.<sup>14</sup> Justice Stewart, specifically exempting mandatory death penalties from his consideration, concluded death sentences imposed by juries with the power to impose a lesser punishment were violative of the Eighth Amendment.<sup>15</sup> Justice White, also explicitly declining to decide if the death penalty was cruel and unusual punishment *per se*,<sup>16</sup> found it indefensible when imposed so infrequently as to serve no purpose.<sup>17</sup> Chief Justice Burger, and Justices Blackmun, Powell, and Rehnquist each filed dissenting opinions, all but Justice Rehnquist professing personal objections to the institution of capital punishment, but holding the repeal of that penalty to be within the purview of the legislative branch alone.<sup>18</sup>

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6. 408 U.S. at 240.

7. *Furman v. State*, 167 S.E.2d 628 (Ga. 1969).

8. *Id.* at 629.

9. 408 U.S. at 252. See *Jackson v. State*, 171 S.E.2d 501 (Ga. 1969).

10. 408 U.S. at 253. See *Branch v. State*, 447 S.W.2d 932, 933 (Tex. Ct. Crim. App. 1969).

11. 408 U.S. at 252-53.

12. See text accompanying note 5 *supra*.

13. 408 U.S. at 305, 359-62.

14. *Id.* at 256-57.

15. *Id.* at 309-10.

16. *Id.* at 310-11.

17. *Id.* at 313-14.

18. *Id.* at 403-04, 410, 418, 468.

## I

## THE MAJORITY PERSPECTIVE

The opinion of Justice Brennan may serve as both a microcosm of the concurring opinions and a prism through which to view them, for each member of the majority decided *Furman* on one or more of four principles developed in Brennan's opinion.

Justice Brennan's approach to the Eighth Amendment rested heavily on *Trop v. Dulles*.<sup>19</sup> The plurality opinion of Chief Justice Warren in *Trop* held that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society"<sup>20</sup> and that the punishment of denationalization violated such standards.<sup>21</sup> Chief Justice Warren's view of the nature of the Cruel and Unusual Punishments Clause was that:

The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.<sup>22</sup>

Justice Brennan's debt to *Trop* may be seen by comparing Chief Justice Warren's language with Brennan's own formulation of the essence of the Eighth Amendment in *Furman*:

At bottom, then, the Cruel and Unusual Punishments 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.<sup>23</sup>

Justice Brennan's opinion is composed of the discussion and application of four principles "recognized in our cases and inherent in the Clause sufficient to permit a judicial determination whether a challenged punishment comports with human dignity."<sup>24</sup>

He summarized the four principles thus:

If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contem-

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19. 356 U.S. 86 (1958). The Court invalidated a provision of the Nationality Act of 1940, (8 U.S.C. § 1481(a)(8) (1970)) under which an American national was stripped of his American citizenship by reason of both his conviction by court-martial for desertion from the Armed Forces in time of war and dishonorable discharge for that conviction. *Id.* at 88.

20. *Id.* at 101.

21. *Id.*

22. *Id.* at 100.

23. 408 U.S. at 270.

24. *Id.*

porary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.<sup>25</sup>

These principles—unusual severity, arbitrariness, moral unacceptability, lack of necessity—were viewed by Justice Brennan as overlapping. The Justice's analysis of the Court's prior Eighth Amendment decisions<sup>26</sup> led him to the conclusion that a cruel and unusual punishment's affront to human dignity could not often be catalogued under any single principle.<sup>27</sup> Such punishments "seriously implicated" several principles which the Court had applied "in combination" by finding that previous punishments outraged human dignity. The four tests therefore were to be viewed as "interrelated, and in most cases it will be their convergence that will justify the conclusion that a punishment is 'cruel and unusual.' The test, then, will ordinarily be a cumulative one . . . ."<sup>28</sup>

#### A. Unusual Severity

The primary principle . . . is that a punishment must not by its severity be degrading to human dignity.<sup>29</sup>

Justice Brennan argued that a punishment may be so severe as to be degrading to human dignity if it entails mental or physical suffering.<sup>30</sup> The degree of pain, however, is not the essence of an unusually se-

25. *Id.* at 282. For a similar expression of these principles, see text accompanying note 174 *infra*.

26. 408 U.S. at 282.

27. *Id.* at 281.

28. *Id.* at 282. Justice Brennan's description of his test as "cumulative" is not to be understood as requiring that a challenged punishment fall within all four principles. Before it can be invalidated, it is rather to be viewed as a synergistic whole composed of interrelating and mutually reinforcing elements. An analogy might be drawn to the probative effect of evidence, where the totality of the elements often compels an inference unwarranted by any one of them individually.

29. *Id.* at 281.

30. *Id.* at 271-73. The Justice gave as an example of mental pain, the uncertainty and lack of identity experienced by one subjected to denationalization. See *Trop v. Dulles*, 356 U.S. 86, 110-11 (1958) (Brennan, J., concurring); see text accompanying notes 19-23 *supra*. Also cited to exemplify impermissibly severe mental suffering was the anguish of one who must undergo a second preparation for death, as in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) where, while rejecting the argument that subjecting the petitioner to another preparation for electrocution after a power failure had aborted the first attempt would be unconstitutionally cruel and unusual, the Court did indicate that the *deliberate* infliction of such mental anguish would not be permitted. *Id.* at 463-64.

vere punishment. Its "true significance [is that it treats] members of the human race as nonhumans, as objects to be toyed with and discarded [thus violating] the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity."<sup>31</sup>

Justice Brennan thought the death penalty met his description of an unusually severe punishment. The death penalty, he asserted, is unique among modern punishments because it alone involves the conscious infliction of physical pain.<sup>32</sup> It is unique in the degree of mental distress accompanying it.<sup>33</sup> Destroying a person's very existence is unique in its finality and enormity.<sup>34</sup> He concluded that the death penalty was therefore "uniquely degrading" to human dignity and would have rejected it on that basis alone were it not for its "longstanding usage and acceptance."<sup>35</sup> He, therefore, considered his second

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31. 408 U.S. at 272-73. Discarding a human being as an object was exemplified by a California statute punishing a narcotics addict for his affliction by criminalizing the status of addiction. The Court struck down that statute in *Robinson v. California*, 370 U.S. 660 (1962), because it "would doubtless be universally thought to be an infliction of cruel and unusual punishment." *Id.* at 666.

32. 408 U.S. at 288. The *Resweber* Court had indicated a willingness to accept the pain accompanying execution: "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." 329 U.S. at 464. See note 30 *supra*.

33. 408 U.S. at 288-89. See R. HAMMER, BETWEEN LIFE AND DEATH 222-35, 244-50, 269-72 (1969); Bluestone and McGahee, *Reaction to Extreme Stress: Impending Death by Execution*, 119 AMER. J. PSYCH. 393 (1962); Note, *Mental Suffering under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814 (1972). See generally the authorities collected by Justice Brennan, 408 U.S. at 288-89 n.36.

34. 408 U.S. at 289-90. Justice Brennan contrasted the awesome finality and enormity of execution to imprisonment, which does not deny the criminal "the right to have rights" such as access to the courts and freedom of religion. The executed criminal obviously has no such rights. This comparison does not reveal how locking a man in prison is consistent with the reverence for human dignity demanded by Justice Brennan. See, e.g., Note, *Sexual Assaults and Forced Homosexual Relationships in Prison: Cruel and Unusual Punishment*, 36 ALBANY L. REV. 428 (1972); Wagner and Cohen, *Attica: A Look at the Causes and the Future*, 7 CRIM. L. BULL. 817 (1971).

On the other hand, Justice Brennan does not need to demonstrate that imprisonment is thoroughly consistent with human dignity; instead he must merely indicate that he prefers the perhaps lesser denial of human dignity accompanying incarceration to the absolute rejection inherent in the death penalty.

35. 408 U.S. at 291. It is interesting to note that this argument is uniquely Justice Brennan's. No other Justice espoused it; none rebutted it.

Justice Brennan did not rely on this principle alone, but quickly coupled it with his second principle. This is the cumulative test referred to in note 28 and accompanying text *supra*. One cannot help but be curious why the death penalty's "longstanding usage and acceptance" should be a mitigating factor. Indeed this language would

principle, arbitrariness.

### B. Arbitrariness

[T]he State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others.<sup>36</sup>

Although for Justice Brennan it is but one element of a four part test,<sup>37</sup> arbitrariness is the pivotal issue in the *Furman* decision. It is an issue basic to the opinions of Justices Stewart,<sup>38</sup> White,<sup>39</sup> and Douglas,<sup>40</sup> each of whom would restrict the application of his views to sentencing procedures allowing arbitrary or discriminatory infliction of the death penalty.

Justice Brennan observed that during the years 1961 to 1970 juries had imposed an average of only 106 death sentences annually and that less than half of those were actually carried out.<sup>41</sup> The contrast between the decline in the number of executions<sup>42</sup> and the current increase in capital crimes<sup>43</sup> led to the conclusion that death, inflicted in but a "trivial number"<sup>44</sup> of cases, "is not the ordinary punishment for any crime."<sup>45</sup>

Many capital crimes are committed annually; few perpetrators are sentenced to death; still less are executed. Those sentenced to die are rarely responsible for the most serious crimes. For example, petitioner *Furman* was guilty of an "accidental" felony murder.<sup>46</sup> While

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appear to modify his first principle as follows: a punishment so severe as to be degrading to human dignity is cruel and unusual unless it has long been accepted. This recognition of the nation's acquiescence in the principle of capital punishment also qualifies the Justice's later insistence that the death penalty is morally unacceptable to American values. See notes 125-34 and accompanying text *infra*.

36. 408 U.S. at 274.

37. See notes 27-28 *supra* and accompanying text.

38. See notes 48, 72-73 *infra* and accompanying text.

39. See notes 49-50, 74 *infra* and accompanying text.

40. See note 71 *infra* and accompanying text.

41. 408 U.S. at 291, 292 nn.42-44.

42. "In the 1930's, executions averaged 167 per year; in the 1940's, the average was 128; in the 1950's, it was 72; and in the years 1960-62, it was 48. There have been a total of 46 executions since then, 36 of them in 1963-1964." *Id.* at 291 (footnote omitted).

43. *Id.* at 291. See also E. SCHUR, *OUR CRIMINAL SOCIETY* 27-28 (1969). (In 1967 the F.B.I. reported 12,093 instances of murder or non-negligent manslaughter, a rate of 6.1 per 100,000 of population).

44. 408 U.S. at 293.

45. *Id.* at 291.

46. See text accompanying notes 7-8 *supra*, note 55 *infra*; 408 U.S. at 294 n.48.

his transgression was certainly serious, it would be difficult to classify it among the hundred most vicious in any given year. It is questionable whether the criminal justice system operates with such precision and nicety as to accurately separate out for annual execution America's fifty most heinous criminals. Such a belief, improbable even on a priori level, is wholly rebutted by the facts in *Furman*. Justice Brennan believed that this situation raised an inference of arbitrary punishment—there could be no real distinction between the handful actually executed and many of the vast number imprisoned.

When a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied.

. . . .

. . . Indeed, it smacks of little more than a lottery system.<sup>47</sup> Justice Stewart expressed the same idea:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968 . . . petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.<sup>48</sup>

Although he also decided the case on the basis that the death penalty as applied to the petitioners no longer served any purpose,<sup>49</sup> Justice White observed that "the death penalty is exacted with great infrequency even for the most atrocious crimes . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."<sup>50</sup>

Chief Justice Burger advanced a contrary argument. He contended that the rare imposition of the death penalty was evidence of an increasing meticulousness on the part of juries<sup>51</sup> who, acting as "the conscience of the community,"<sup>52</sup> impose or refrain from imposing the death penalty, influenced by such factors as the motivation and brutality of the criminal, and the suffering of the victim.<sup>53</sup> The Chief Justice concluded that "to assume from the mere fact of relative infrequency that only a random assortment of pariahs are sentenced to

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47. 408 U.S. at 293.

48. *Id.* at 309-10 (footnotes omitted).

49. *Id.* at 311-13.

50. *Id.* at 313.

51. *Id.* at 388.

52. *Id.*, quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

53. 408 U.S. at 388.



death, is to cast grave doubt on the basic integrity of our jury system."<sup>54</sup>

The Chief Justice's argument, then, would seem to be that, with aberrant exceptions, the fifty or so felons executed each year are among the fifty or so *worst* felons. Such unbridled confidence in the prescience of juries appears misplaced; as pointed out by Justice Brennan: "If, for example, petitioner Furman or his crime illustrates the 'extreme,' then nearly all murderers and the murders are also 'extreme.'"<sup>55</sup>

Justices Brennan, Stewart and White saw the death penalty as senselessly, randomly imposed.<sup>56</sup> Concluding that no distinction could be made between criminals in capital cases sentenced to death and those sentenced to lesser punishments, they characterized the fact finder's decision as arbitrary.

Justice Douglas, however, saw a clear, though illegitimate, basis for making a distinction between those executed and those spared: the impermissible criteria of race and class.<sup>57</sup> He regarded the sentencing

54. *Id.* at 388-89.

55. *Id.* at 294 (footnote omitted). Furman, frightened by the return of the homeowner whose house he was robbing, *accidentally* shot and killed the householder through a closed door when Furman tripped over a wire in his attempt to escape. See notes 7-8 *supra* and accompanying text. Jackson and Branch had been convicted of rape. See notes 9-10 *supra* and accompanying text. Certainly Justice Brennan was correct in arguing that these three petitioners had not committed three of the most heinous crimes out of the thousands of capital crimes committed in any one year. He did not point out, however, that by denying juries the power to sentence the Furmans of the world to death, he would also deny them the discretion to so sentence the most vicious of offenders.

56. See notes 36-55 and accompanying text *supra*.

57. 408 U.S. at 249-52. Justice Douglas, by way of example, contrasted the fates of black and white defendants in Texas between 1924 and 1968. 88.4% of blacks sentenced to death were actually executed, but only 79.8% of whites. *Id.* at 250 n.15, citing BEDAU, *supra* note 4. In addition, he noted the opinions of former Warden Lawes of Sing Sing and former Attorney General Ramsey Clark to the effect that a poor defendant is far more likely to be sentenced to death than a rich one. *Id.* at 251.

Justice Douglas perhaps regarded the discriminatory impact of the death penalty as self evident and hence did not provide a great deal of supporting data. The statistics assembled by Justice Marshall, however, strongly indicate that Justice Douglas' assumptions were correct: 2,066 of the 3,859 persons executed since 1930 were black. *Id.* at 364.

But see the rebuttal of Justice Burger arguing that such racial discrimination was the case only in the "distant past." *Id.* at 390. Justice Powell also addressed himself to the argument that the death penalty is being applied in a discretionary manner.

Certainly the claim is justified that this criminal sanction falls more heavily on the relatively impoverished and underprivileged elements of society. The "have-nots" in every society always have been subject to greater pressure to commit crimes and to fewer constraints than their more affluent fellow citizens. This is, indeed, a tragic byproduct of social and economic deprivation, but it is not an argument of constitutional proportions under the Eighth or Fourteenth Amend-

process in capital cases as not merely arbitrary, but invidiously discriminatory. Since the Eighth Amendment was designed to be read "in light of the English proscription against selective and irregular use of penalties,"<sup>58</sup> Justice Douglas held:

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ment. The same discriminatory impact argument could be made with equal force and logic with respect to those sentenced to prison terms. The Due Process Clause admits of no distinction between the deprivation of "life" and the deprivation of "liberty." If discriminatory impact renders capital punishment cruel and unusual, it likewise renders invalid most of the prescribed penalties for crimes of violence. The root causes of the higher incidence of criminal penalties on "minorities and the poor" will not be cured by abolishing the system of penalties. Nor, indeed, could any society have a viable system of criminal justice if sanctions were abolished or ameliorated because most of those who commit crimes happen to be underprivileged. The basic problem results not from the penalties imposed for criminal conduct but from social and economic factors that have plagued humanity since the beginning of recorded history, frustrating all efforts to create in any country at any time the perfect society in which there are no "poor," no "minorities" and no "underprivileged." *Id.* at 447 (footnote omitted).

This is a misconception of the discriminatory impact argument. Justice Powell's statement is that the disadvantaged have a higher rate of criminality than the more affluent. But the discriminatory impact argument is that a black or poor murderer is more likely to be executed than a white or rich murderer—not that a poor man or a black is more likely to be a murderer. Chief Justice Burger understood this distinction: "[S]tatistics suggest, at least as a historical matter, that Negroes have been sentenced to death with greater frequency than whites in several States, particularly for the crime of interracial rape." *Id.* at 389 n.12.

58. *Id.* at 245. This is a reference to the origin of the phrase "cruel and unusual punishments" in the English Bill of Rights of 1689, from whence it came verbatim to the Eighth Amendment. Granucci, "*Nor Cruel and Unusual Punishments Inflicted!*" *The Original Meaning*, 57 CALIF. L. REV. 839 (1969). While Justice Douglas relied heavily on Mr. Granucci's article, that source does not lend support to the Justice's interpretation of the meaning of "cruel and unusual punishments" in the English Bill of Rights. Indeed, Mr. Granucci's thesis was that

[t]he English evidence shows that the cruel and unusual punishments clause of the Bill of Rights of 1689 was first, an objection to imposition of punishments . . . unauthorized by statute . . . and second, a reiteration of the English policy against disproportionate penalties. *Id.* at 860.

It would seem that Justice Douglas misread Granucci, upon whose article he based his conclusion that the English Bill of Rights was "concerned primarily with selective or irregular application of harsh penalties and that *its aim was to forbid arbitrary and discriminatory penalties of a severe nature.*" 408 U.S. at 242 (footnote omitted and emphasis added).

Chief Justice Burger sought to rebut Justice Douglas by showing that the latter's interpretation of the English Bill of Rights ignored history.

[T]he history of capital punishment in England dramatically reveals that no premium was placed on equal justice for all, either before or after the Bill of Rights in 1689. From the time of Richard I until 1826 the death penalty was authorized in England for treason and all felonies except larceny and mayhem, with the further exception that persons entitled to benefit of clergy were subject to no penalty or at most a very lenient penalty upon the commission of a felony. Benefit of clergy grew out of the exemption of the clergy from the jurisdiction of the lay courts. The exemption expanded to include assistants to clergymen, and by 1689, any male who could read. Although by 1689 numerous felonies had been deemed "nonclergyable," the disparity in punishments imposed on the educated and non-educated remained for most felonies until the early 18th century. *Id.* at 376-77 n.2.

[T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on "cruel and unusual punishments."<sup>59</sup>

This holding is a commingling of the Eighth Amendment with Section One of the Fourteenth Amendment.<sup>60</sup> While Justice Douglas argued that either the Due Process Clause or the Privileges and Immunities Clause of the Fourteenth Amendment banned cruel and unusual punishments,<sup>61</sup> he based his opinion upon the belief "that the basic theme of equal protection is implicit in 'cruel and unusual' punishments."<sup>62</sup>

Chief Justice Burger refused to legitimize the equal protection language of Justice Douglas, asserting that the latter avoided the true Eighth Amendment issues before the Court.<sup>63</sup> He contended that the Cruel and Unusual Punishments Clause bars certain state-imposed penalties, not the methods by which judges and juries act to cause the imposition of those penalties.

The Eighth Amendment was included in the Bill of Rights to assure that certain types of punishment would never be imposed, not to channelize the sentencing process. The approach of these concurring opinions has no antecedent in the Eighth Amendment cases. It is essentially and exclusively a procedural due process argument.<sup>64</sup>

There can be no doubt that the arbitrariness-discrimination argument looks not at the death penalty itself, but at a sentencing *process* which leaves the choice between death and a lesser punishment to the unguided discretion of jurors.<sup>65</sup> Perhaps the desire to dress this

59. 408 U.S. at 256-57.

60. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

61. 408 U.S. at 241.

62. *Id.* at 249. See note 58 *supra*.

63. 408 U.S. at 399. See note 5 *supra* and accompanying text.

64. 408 U.S. at 399.

65. This was specifically recognized in the opinions of the four members of the majority who addressed themselves to this issue:

Justice Brennan: "[O]ur procedures are not constructed to guard against the totally capricious selection of criminals for the punishment of death." *Id.* at 295.

Justice Douglas: "[W]e know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who . . . may be in a more protected position." *Id.* at 255.

Justice Stewart: "I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that per-

essentially Fourteenth Amendment issue in Eighth Amendment garb can be explained by the 1971 precedent of *McGautha v. California*,<sup>66</sup> wherein the Court had granted certiorari limited to the question:

Does California's practice of allowing capital trial juries absolute discretion, uncontrolled by standards or directions of any kind, to impose the death penalty upon a defendant convicted of the crime of murder violate the Due Process Clause of the Fourteenth Amendment.<sup>67</sup>

Justice Harlan, writing for a six man majority which included the Chief Justice and Justices Black, Stewart, White, and Blackmun, had answered the question in clear terms:

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.<sup>68</sup>

In spite of attempts to develop a definition of "cruel and unusual punishments" wide enough to embrace sentencing procedures<sup>69</sup> and thus to distinguish *McGautha*,<sup>70</sup> the fact remains that the opinions of

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mit this unique penalty to be so wantonly and so freakishly imposed." *Id.* at 310. Justice White: "[T]he policy of vesting sentencing authority primarily in juries—a decision largely motivated by the desire to mitigate the harshness of the law . . . 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." *Id.* at 313.

66. 402 U.S. 183 (1971).

67. 398 U.S. 936 (1970).

68. 402 U.S. at 207.

69. 408 U.S. at 275-77. Justice Brennan traced the genesis of a "cruel and unusual" analysis of sentencing procedures to the Court's treatment of the military use of firing squads where the Court concluded that since the death penalty was invoked "in the great majority of cases" where it was available, it could not be classified as "cruel and unusual." *Wilkerson v. Utah*, 99 U.S. 130, 133-34 (1878). He also recalled the Court's examination of the practices of other jurisdictions to see if the punishment of denationalization was "'something different from that which is generally done.'" 408 U.S. at 276, quoting *Trop v. Dulles*, 356 U.S. 86, 101 n.32 (1958). See notes 19-23 *supra* and accompanying text.

He interpreted these precedents as an indication of the Court's recognition that as the frequency of a punishment declines, the likelihood increases that its increasingly rare imposition is arbitrary. 408 U.S. at 276-77. In their original context, however, this method of comparison was used to determine if the punishment was unusual or if it violated "evolving standards of decency." Justice Brennan's fashioning of these cases into an anti-arbitrariness argument was a vital part of his effort to demonstrate that an arbitrarily imposed punishment is an "unusual" one within the meaning of the Eighth Amendment.

70. Justice Stewart maintained that

[i]n *McGautha v. California* . . . the Court dealt with claims under the Due Process and the Equal Protection Clauses of the Fourteenth Amendment. We expressly declined in that case to consider claims under the constitutional guarantee against cruel and unusual punishments. 408 U.S. at 310 n.12 (citation omitted).

three members of the *Furman* majority were restricted to the same procedures upheld in *McGautha*. Justice Douglas warned that mandatory death penalties would be unconstitutional if discriminatorily enforced, but specifically declined to consider whether they would be otherwise unconstitutional.<sup>71</sup> Justice Stewart, specifically exempting from his consideration four statutes providing for a mandatory death penalty,<sup>72</sup> chose not to judge the unconstitutionality "of capital punishment in the abstract" but only under the procedures by which the petitioners had been sentenced to death.<sup>73</sup> Justice White confined his consideration to the "narrower" consideration of discretionary punishments because

[t]he facial constitutionality of statutes requiring the imposition of the death penalty for first-degree murder, for more narrowly defined categories of murder, or for rape would present quite different issues . . . therefore, I do not at all intimate that the death penalty is unconstitutional *per se* or that there is no system of capital punishment that would comport with the Eighth Amendment.<sup>74</sup>

While the *Furman* grant of certiorari was expressed in Eighth Amendment terminology,<sup>75</sup> and the *McGautha* grant of certiorari confined itself to Fourteenth Amendment Due Process Clause questions,<sup>76</sup> it is difficult to recognize any other basis by which to distinguish the cases. *McGautha* permitted the discretionary imposition of the death penalty by juries.<sup>77</sup> *Furman* ended the practice.<sup>78</sup>

In spite of *Furman's* similarity, the Chief Justice may not have been wholly correct when he stated, "it would be disingenuous to suggest

71. "Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach." *Id.* at 257.

72. *Id.* at 307. 10 U.S.C. § 906 (1970) provides for execution of anyone acting as a spy in wartime. RHODE ISLAND GEN. LAWS ANN. § 11-23-2 requires the death penalty for murder by a life term prisoner. MASS. GEN. LAWS ANN. ch. 265, § 2 requires the death penalty for one convicted of murder in the commission of a forcible rape. OHIO REV. CODE ANN. tit. 29, §§ 2901.09, 2901.10 requires imposition of the death penalty for the assassination of the President of the United States, any person in line of succession to the Presidency, or the Governor or Lieutenant Governor of a State.

73. 408 U.S. at 308-09.

74. *Id.* at 310-11.

75. See note 5 *supra* and accompanying text.

76. See note 67 *supra* and accompanying text.

77. See note 68 *supra* and accompanying text.

78. While *Furman* is popularly believed to have declared the death penalty unconstitutional, only Justices Brennan and Marshall would have gone so far. See note 13 *supra* and accompanying text. Justices Douglas, Stewart, and White explicitly declined to rule on the constitutionality of the death penalty *per se*. See notes 71-74 *supra* and accompanying text.

that today's ruling has done anything less than overrule *McGautha* in the guise of an Eighth Amendment adjudication."<sup>79</sup> *McGautha* rejected a claim that jury instructions, incorporating standards to be applied in capital sentencing, were *required* by the Fourteenth Amendment not only because the formulation of such standards would be difficult and a potential magnet for multitudinous appeals in capital and non-capital cases, but also because it was felt that the formulation of standards would have little impact. On the other hand, read in the light of *McGautha*, *Furman* holds that with or without standards the *discretionary* imposition of the death penalty could not pass constitutional scrutiny. The votes of Justices Stewart and White were determinative of the result in each case and the interest of both Justices in the elimination of arbitrary sentencing without further burdening the Court may explain the results reached by each.<sup>80</sup>

Justices Brennan and Douglas, having dissented in *McGautha*,<sup>81</sup> did not shrink from renewed confrontation with it. Justice Douglas saw the Court as "imprisoned" in *McGautha* and felt that case contained the "seeds" of *Furman*.<sup>82</sup> Any "tension between our decision today and *McGautha*" was viewed as highlighting "the correctness of Justice Brennan's dissent in that case,"—a dissent which Justice Douglas had previously joined.<sup>83</sup> Justice Brennan noted that

our procedures in death cases . . . actually sanction an arbitrary selection. For this Court has held that juries may, as they do, make the decision whether to impose a death sentence wholly unguided by standards governing that decision. [*Citing McGautha.*] In other words,

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79. 408 U.S. at 400.

80. *McGautha* was decided by a 6-3 margin, *Furman* by a 5-4 vote. 402 U.S. at 184; 408 U.S. at 240. Neither Justice gave any rationale for his seemingly inconsistent voting.

If the *Furman* result is to be viewed as other than a rejection of *McGautha*, it must be upon the basis that neither case requires the states or the Court to devise intricate schemes and verbal formulae for guiding jurors in selecting an appropriate penalty in a capital case. Under *Furman* those states desirous of maintaining a death penalty have far greater freedom than an opposite result in *McGautha* would have produced.

Assuming that it was the intention of Justices White and Stewart to strike down a sentencing procedure they regarded as arbitrarily and freakishly imposed, *Furman* arguably accomplishes this result without doing away entirely with the death penalty and without burdening the courts with analyses of whether the penalty instructions of a given trial judge have met some arbitrary set of rules established by the Supreme Court. Had *McGautha* been decided as its dissenters had wished, the Court would most likely have been engulfed by petitions requesting clarification of whatever capital sentencing standards that opinion would have imposed.

81. 402 U.S. at 226, 248.

82. 408 U.S. at 248.

83. *Id.* n. 11.

our procedures are not constructed to guard against the totally capricious selection of criminals for the punishment of death.<sup>84</sup>

Justice White who had concurred in *McGautha*,<sup>85</sup> chose to ignore the *McGautha* rationale in *Furman*. Although he specifically voted in *Furman* to end the same procedures he had voted to uphold in *McGautha*,<sup>86</sup> he felt no compulsion to try to distinguish *McGautha* or even to comment on it. Perhaps Justice White felt that his addition of another factor brought his opinion out of *McGautha's* shadow:

[C]ommon sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted.<sup>87</sup>

This analysis—that a punishment is cruel and unusual if it is purposeless—is similar to another of Justice Brennan's four principles.

### C. *Lack of Necessity*

A punishment is excessive . . . if it is unnecessary: The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted . . . the punishment inflicted is unnecessary and therefore excessive.<sup>88</sup>

This principle, relied upon only by Justices Brennan and Marshall, was viewed by them as having its genesis in Justice Field's dissent

84. *Id.* at 294-95.

85. 402 U.S. at 184.

86. See text accompanying notes 67-68 and 74 *supra*.

87. 408 U.S. at 312. This is a novel approach. The death penalty is unconstitutionally cruel and unusual because it is imposed too infrequently. It would presumably follow that increased use of the death penalty would restore its constitutionality. One wonders if Justice White would have favored retention of an arbitrary but frequently imposed penalty. The Chief Justice observed that "[t]he implications of this approach are mildly ironical." *Id.* at 398. For another interpretation of Justice White's view, see note 80 *supra*.

88. *Id.* at 279. Justice Brennan's use of "severe" here should not to be confused with his first category of "unusual severity." See notes 29-35 *supra* and accompanying text. The Justice was concerned there with punishments so unspeakably harsh in their mental or physical impact as to be completely inconsistent with a regard for human dignity. Here the concept is that the punishment may not be any more severe than is necessary to accomplish its purpose. A greater punishment may not be employed when a lesser one would serve as well.

For example, if the purpose of the punishment is considered the prevention of recidivism, the death penalty is suspect under the unusual severity test because killing a man is utterly inconsistent with a due regard for his human dignity. It is impermissible under the lack of necessity test because the prevention of repeated offenses can be as well accomplished by life imprisonment as by execution.

in *O'Neil v. Vermont*,<sup>89</sup> in which the Court considered Vermont's imposition of a separate \$20 fine for each of 307 illegal whiskey sales.<sup>90</sup> Justice Field not only disagreed with the majority's holding that the Court lacked jurisdiction over the subject matter,<sup>91</sup> but also opined that the fines violated the Constitutional prohibition against cruel and unusual punishments. The Justice argued that:

The inhibition is directed . . . against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged. The whole inhibition is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted.<sup>92</sup>

Justices Brennan and Marshall further buttressed their position by drawing support from *Weems v. United States*.<sup>93</sup> The Court there had adopted Justice Field's *O'Neil* test to find a punishment of fifteen years at hard and painful labor in irons and forfeiture of civil and familial rights to be cruel and unusual, in that it was disproportionate to the crime of a falsifying a public document.<sup>94</sup> The Court catalogued more serious crimes that were less severely punished,<sup>95</sup> especially contrasting the severity of *Weems*' punishment to the relatively lenient sentence imposed for the far more serious crime of counterfeiting.<sup>96</sup> The contrast rendered *Weems*' sentence excessive and therefore cruel and unusual:

In other words, the highest punishment possible for a crime which may cause the loss of many thousand of dollars, and to prevent which the duty of the State should be as eager as to prevent the perversion of truth in a public document, is not greater than that which may be imposed for falsifying a single item of a public account. And this con-

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89. 144 U.S. 323 (1892).

90. *Id.* at 325-30.

91. *Id.* at 337. Justice Field argued that since the whiskey in question was imported from New York to Vermont, the transactions were within the definition of interstate commerce and hence subject to federal regulation. *Id.* at 347-49.

92. *Id.* at 339-40. Justice Field's basis for arguing that the Eighth Amendment should have been applied to the punishments imposed by one of the states is unclear. It is certain, however, that the Court has held the Eighth Amendment applicable to the states through the Fourteenth. *Robinson v. California*, 370 U.S. 660, 666-67 (1962). See note 31 *supra*.

93. 217 U.S. 349 (1910).

94. *Id.* at 362-65, 371.

95. Included were some degrees of homicide, inciting rebellion, misprision of treason, conspiracy to destroy the government by force, and recruiting soldiers in the United States to fight against the United States. *Id.* at 380.

96. "[I]t is provided that the forgery of or counterfeiting the obligations or securities of the United States or of the Philippine Islands shall be punished by a fine of not more than ten thousand pesos and by imprisonment of not more than fifteen years." *Id.* at 380-81.



trast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice. The State thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal.<sup>97</sup>

Justices Brennan and Marshall interpreted these cases to indicate, in Justice Brennan's words, that:

If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted . . . the punishment inflicted is unnecessary and therefore excessive. . . . Although the determination that a severe punishment is excessive may be grounded in a judgment that it is disproportionate to the crime, *the more significant basis is that the punishment serves no penal purpose more effectively than a less severe punishment.* This view of the principle was explicitly recognized by the Court in *Weems v. United States* . . . .<sup>98</sup>

This interpretation of the *Weems* doctrine is questionable. Justice Brennan's words indicate the transmutation of a test of excessiveness into one of lack of necessity. The excessiveness test, as developed in the *O'Neil* dissent and the *Weems* opinion, suggested a balancing test between the seriousness of the crime and the severity of the punishment. The argument adduced in those opinions was that the punishments of the multiplication of fines for whiskey sales and fifteen years at hard labor in chains for the offense of falsifying a government record were excessive in that they were disproportionately severe when compared to the crime for which they were imposed.<sup>99</sup> Justice Brennan's words indicate a different test, one which evaluates a punishment in view of its purpose rather than by a comparison to the seri-

97. *Id.* at 381. This is an example of the basis for Justice Brennan's "cumulative" test. See notes 27-29 *supra* and accompanying text. The *Weems* Court primarily objected to the punishment as unnecessary ("The purpose of punishment is fulfilled . . .") but there are also hints of arbitrariness and unusual severity in a punishment which is greater than the punishments imposed for lesser crimes.

98. 408 U.S. at 279-80 (emphasis added). See also Justice Marshall's similar statement of this view. *Id.* at 331-32.

99. See notes 88-96 *supra* and accompanying text. Had Justices Brennan and Marshall approached the death penalty under the traditional excessiveness test, they would have been forced to hold the death penalty disproportionately severe for the crimes of murder and rape. Such an argument was in fact urged upon the Court by petitioners Branch and Jackson, convicted of rape, and was discussed and rejected by Justice Powell. 408 U.S. at 456-61.

ousness of the crime. This new test of lack of necessity was seen by the *Furman* dissenters as a "gross distortion" of the excessiveness doctrine<sup>100</sup> and as a substitution of notions of "social utility" and "enlightened principles of penology" for the "intractable" standard of cruelty seen by the dissenters as the essence of the Eighth Amendment.<sup>101</sup>

Justices Brennan and Marshall brushed aside such objections to examine the lack of necessity of the death penalty to accomplish its purposes of retribution and deterrence.<sup>102</sup> The legitimacy of the purpose of retribution—the notion that, in Justice Brennan's words, "criminals are put to death because they deserve it"<sup>103</sup>—is, of course, a philosophical and moral question. Justice Brennan attempted to make it also a constitutional one by injecting it into his definition of lack of necessity:

As administered today . . . the punishment of death cannot be justified as a necessary means of exacting retribution from criminals. When

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100. 408 U.S. at 392.

101. *Id.* at 394.

102. Justice Marshall also examined the purposes of the prevention of recidivism, the encouragement of guilty pleas and confessions, eugenics, and the reduction of state expenditures.

The Justice argued that the death penalty is unnecessary to prevent recidivism because murderers do not tend to be recidivists. "For the most part, they are first offenders, and when released from prison they are known to become model citizens." *Id.* at 355. See SELLIN, *THE DEATH PENALTY, A REPORT FOR THE MODEL PENAL CODE PROJECT OF THE AMERICAN LAW INSTITUTE* 73-79 (Tent. Draft No. 9, 1959). Sellin gave as an example the 342 California male prisoners paroled between 1945-1954 after convictions for first degree murder. By June of 1956, only 37 of them had violated parole, a percentage of 10.8. The percentages for parolees in other categories during the period from 1946-1949 were: robbery, 20.8%, burglary, 25.6%, forgery, 30.2%, and automobile theft, 31.1%. *Id.* at 77. Justice Marshall also argued that jurors are never asked to consider the prevention of recidivism as a basis for imposing the death penalty. Even if they were, he added, the death penalty would still be excessive without a showing of the need to exterminate all capital offenders or a specific individual. 408 U.S. at 355.

The use of the death penalty to encourage guilty pleas and confessions was rejected as unconstitutionally infringing upon a defendant's right to a jury trial. Furthermore, such use is inconsistent with a view of the death penalty as a punishment. *Id.* at 356-57. "[T]he history of the world does not look kindly upon" eugenic goals which the Justice regards as "meritless." Certainly execution is unnecessary for such a goal, easily accomplished by sterilization, treatment, or imprisonment. *Id.*

Execution cannot be justified as being fiscally less costly than imprisonment. The comparatively low cost of execution is balanced by many factors, among which are the prolonged and therefore more expensive trials incident to capital cases, the costs of appeals and collateral attacks, and the verification of allegations of insanity. *Id.* at 357-58.

103. 408 U.S. at 304.

the overwhelming number of criminals who commit capital crimes go to prison, it cannot 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.<sup>104</sup>

Within the parameters of Justice Brennan's definition of "excessive," a punishment is cruel and unusual "if there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted." Yet, since most criminals who commit capital crimes go to prison, it was clear to the Justice that imprisonment serves whatever retributive purpose society requires.

While Justice Brennan impliedly approved of the retributive purpose of punishments,<sup>105</sup> Justice Marshall approached retribution less generously: "Punishment as retribution has been condemned by scholars for centuries, and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance."<sup>106</sup> Marshall's argument was that if "retribution alone" is a permissible goal of punishment, the ban on cruel and unusual punishments has no meaning, for the severity of a punishment would then be dependent upon the amount of public outrage prompted by the crime. Thus "a return to the rack and other tortures would be possible in a given case."<sup>107</sup>

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104. *Id.* at 304-05. Justice Brennan's personal dislike for "naked vengeance" was revealed in the next sentence of the quotation: "[O]ur society wishes to prevent crime; we have no desire to kill criminals simply to get even with them." *Id.* at 305.

105. *But see* note 104 *supra*.

106. *Id.* at 343. While retribution has been attacked for centuries, there is a long-standing and deeply held view to the contrary. *See* Vellenga, *Christianity and the Death Penalty*, in BEDEAU, *supra* note 4, at 123-30. The Reverend Vellenga quoted Genesis 9:4-6: "Whoever sheds the blood of man, by man shall his blood be shed; for God made man in his own image." BEDEAU, *supra* note 4, at 124. Also quoted was Numbers 35:30-34:

[Y]ou shall accept no ransom for the life of a murderer who is guilty of death; but he shall be put to death . . . . You shall not thus pollute the land in which you live; for blood pollutes the land, and no expiation can be made . . . except by the blood of him who shed it. BEDEAU at 125.

107. 408 U.S. at 345. Justice Marshall's qualification of his attack on retribution as an attack on "retribution *alone*" (emphasis added) prevented a conflict between his *Furman* opinion and his opinion in *Powell v. Texas*, 392 U.S. 514 (1968), where the Court distinguished a Texas statute forbidding public drunkenness from the California statute forbidding narcotics addiction struck down in *Robinson v. California*, 370 U.S. 660 (1962). *See* note 31 *supra*. The Justice had stated in *Powell* that "[t]his Court has never held that anything in the Constitution requires that penal sanctions be designed *solely* to achieve therapeutic or rehabilitative effects. . . ." 392 U.S. at 530 (emphasis added). Justice Marshall in *Furman* used the identical language. 408 U.S. at 352.

In addition to retribution, capital punishment is commonly justified as a deterrent to crime. The argument is usually based on the assumption that common knowledge and human experience demonstrate that a man is more frightened of death than of imprisonment and hence will be more deterred by the threat of execution than of imprisonment.<sup>108</sup>

Justice Brennan responded with a *reductio ad absurdum* approach. The theory that criminal conduct is deterred by the threat of the death penalty assumes a criminal who thinks rationally about his crimes—so rationally that he not only considers the risk of punishment, but distinguishes between punishments so precisely that he will be willing to risk life in prison but not death. The implausible assumption that such criminals exist is further weakened when one considers that the risk of death is remote,<sup>109</sup> and that of imprisonment considerably greater.<sup>110</sup>

Justice Marshall's argument was empirical. If the death penalty really is a deterrent, then murders should be less frequent in states which have retained the death penalty than in those which have abolished it, assuming socio-economic equality, and similar urban-rural population ratios.<sup>111</sup> The Justice's extensive documentation indicates that this proposition does not hold. In addition, neither abolition nor reintroduction of the death penalty within a given state has led to a significant change in that state's homicide rate.<sup>112</sup>

Considerable disagreement remains on the Court as to the burden of proof necessary to sustain the argument that the death penalty serves no deterrent purpose. Justice Brennan stated that "the available evi-

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108. 408 U.S. at 301, 347-48, 454-56. A typical statement of this view is Allen, *Capital Punishment: Your Protection and Mine* in BEDAU, *supra* note 4, at 135-36:

Capital Punishment Does Not Deter Crime?

If this be true, then why do criminals, even the braggadocian Chessman type, fear it most? Why does every criminal sentenced to death seek commutation to life imprisonment? Common sense alone, without the benefit of knowledge, wisdom, and experience, convinces that we are influenced to the greatest degree by that which we love, respect or fear to the greatest degree—and that we cling most tenaciously to our most valued possessions. Life is indisputably our greatest possession. Additionally, there is no definitive proof anywhere that the death penalty is not a deterrent. There are merely the gratuitous statements of wishful thinkers, some of whom, because of the responsible duties of their positions, ought not be making unprovable or misleading statements.

109. See notes 41-45 *supra* and accompanying text.

110. 408 U.S. at 301-02.

111. *Id.* at 349.

112. In three appendices to his opinion Justice Marshall contrasted abolitionist states with similar states that retained the death penalty. The crude homicide death rates per 100,000 people over the period from 1920-1955 showed no significant variance between similar abolitionist and retentionist states. *Id.* at 372-74.

dence uniformly indicates, *although it does not conclusively prove*<sup>113</sup> that death is not a superior deterrent. Justice Marshall felt that

[d]espite the fact that abolitionists have not proved non-deterrence beyond a reasonable doubt, they have succeeded in showing by clear and convincing evidence that capital punishment is not necessary as a deterrent to crime in our society. This is all that they must do. We would shirk our judicial responsibilities if we failed to accept the presently existing statistics and demanded more proof. It may be that we now possess all the proof that anyone could ever hope to assemble on the subject. But, even if further proof were to be forthcoming, I believe there is more than enough evidence presently available for a decision in this case.<sup>114</sup>

Justice Powell argued that such an approach conflicted with the Court's traditional view that legislative enactments in the area of fixing punishments are entitled to a presumption of validity.<sup>115</sup> Hence the burden of proof was upon the petitioners "to show that there exist no justifications for the legislative enactments challenged."<sup>116</sup> The Chief Justice argued that to shift the burden of proof to the states was but an "illusory solution." Such a shift in the burden of justification, he maintained, could just as easily and logically be placed on the states in the case of any punishment, thus requiring a state to be prepared to support, for example, the superior deterrent effect of a \$10 parking ticket over a \$5 parking ticket.<sup>117</sup>

But a reading of the language used by Justice Brennan and Marshall does not indicate any such shift of the burden of proof. Rather they speak of the *quantum* of proof involved and manifest a willingness to consider some amount of proof less than "beyond a reasonable doubt." Because a law is presumed valid does not necessarily mean that the presumption need be rebutted by more than a preponderance

113. *Id.* at 301 (emphasis added).

114. *Id.* at 353. It must be remembered that the nature of the test of lack of necessity required only that capital punishment be *no better* a deterrent than imprisonment. See notes 88-101 *supra* and accompanying text.

115. *Id.* at 451, 456. Justice Powell cited *Weems v. U.S.*, 217 U.S. 349, 379 (1910) as one example. The *Weems* court stated:

However, there is a certain subordination of the judiciary to the legislature. The function of the legislature is primary, its exercises fortified by presumptions of right and legality, and it is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety.

116. 408 U.S. at 456.

117. *Id.* at 396. Justice Marshall answered this objection by maintaining that the burden of demonstrating the excessiveness of the death penalty had taken 200 years to sustain and that therefore "[t]he burden placed on those challenging capital punishment could not have been greater." *Id.* at 360 n.141.

of the evidence. Justices Marshall and Brennan evidently believed petitioners had sustained the burden required of them. Whether or not it was sustained is an issue on which rational men might differ, but it is clear that the burden remained on the petitioners.

#### D. Moral Unacceptability

[S]evere punishment must not be unacceptable to contemporary society. Rejection by society . . . is a strong indication that a severe punishment does not comport with human dignity.<sup>118</sup>

This principle was not challenged by the dissenters. But Chief Justice Burger and Justices Powell and Blackmun, noting that the laws of forty states, the District of Columbia and the Federal Government continued to allow the death penalty,<sup>119</sup> insisted that the most accurate reflection of a society's attitudes toward a punishment was to be found in the laws it enacted.<sup>120</sup> Justices Blackmun and Powell also noted that many of these statutes had but recently been passed by resounding majorities,<sup>121</sup> and that in the last fourteen years the voters of three states had voted to restore or continue the death penalty.<sup>122</sup> A final argument was that juries, which presumably express "the conscience of the community"<sup>123</sup> continued to impose the death penalty at the rate of twice a week.<sup>124</sup>

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118. *Id.* at 277. The most recent previous expression of this test was in Chief Justice Warren's opinion in *Trop v. Dulles*, holding that the definition of a cruel and unusual punishment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," 356 U.S. at 101. See also text accompanying notes 19-23 *supra*.

119. See notes 3-4 *supra*.

120. 408 U.S. at 383-84, 411-13, 437-39.

121. The strong backing of statutes providing for capital penalties is clearly reflected in federal legislation. In 1961 Congress passed the aircraft piracy bill 92-0 in the Senate and by voice vote in the House. In 1965 Congress approved the presidential assassination statute by voice vote. The Omnibus Crime Control Act of 1970, providing the death penalty for congressional assassination, was approved 341-26 in the House and 59-0 in the Senate. 408 U.S. at 412-13, 437.

122. In Colorado 65% of the voters approved the death penalty in 1966. In 1968 the people of Massachusetts recommended retention of the death penalty. 64% of Illinois voters approved the penalty as recently as 1970. 408 U.S. 438-39. On November 7, 1972, the voters of California opted to amend this state's Constitution to restore those capital punishment provisions struck down by the California Supreme Court in *People v. Anderson*, 6 Cal. 3d 628, 100 Cal. Rptr. 152, 493 P.2d 880, *cert. denied*, 406 U.S. 958 (1972). See note 4 *supra*.

123. See note 52 *supra*.

124. 408 U.S. at 441. It is interesting to note that both Justice Powell in dissent and Justice Brennan for the majority cited the actions of juries to support their arguments. The former argued that the fact jurors impose the death penalty as often as twice a

While announcing his search for "objective indicators" by which to measure society's attitude toward the death penalty, Justice Brennan rejected these arguments grounded on voter approval because, "[t]he acceptability of a severe punishment is measured, not by its availability, for it might become so offensive to society as never to be inflicted, but by its use."<sup>125</sup> Society's debate over the morality of the death penalty<sup>126</sup> has caused progressive restriction of methods of execution,<sup>127</sup> rejection of public executions "as debasing and brutalizing to us all,"<sup>128</sup> and a drastic reduction of the number of crimes for which death may be imposed.<sup>129</sup> The Justice also saw society's concern over the death penalty reflected in the reluctance of governors and the appellate judiciary to actually let a condemned criminal be executed.<sup>130</sup> These "objective indicators" of society's attitudes led Justice Brennan to conclude that "today society will inflict death upon only a small sample of the eligible criminals. Rejection could hardly be more complete without becoming absolute."<sup>131</sup>

Justice Marshall's manner of ascertaining his fellow citizens' views of the death penalty was somewhat novel. He maintained that there was really no accurate means to determine what the people actually think.<sup>132</sup> Even if the present views of the American populace could be defined, however,

the question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available.<sup>133</sup>

Justice Marshall thus concluded that a majority of society would opt for his position if it could peruse the data he had amassed. He

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week shows that there is still considerable popular support for the death penalty. *Id.* The latter argued that the fact jurors impose the death penalty as seldom as they do indicates a nearly absolute rejection. *Id.* at 300.

125. *Id.* at 278-79.

126. Justice Brennan stated, "[t]he country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death." *Id.* at 296.

127. Hanging and shooting have given way to the "supposedly more humane methods" of electrocution and gassing. *Id.* at 296-97.

128. *Id.* at 297.

129. *Id.* Murder and rape have recently accounted for nearly 99% of all executions.

130. *Id.* at 299.

131. *Id.* at 300.

132. The community attitude "resembles a slithery shadow, since one can seldom learn, at all accurately, what the community, or a majority, actually feels." *Id.* at 361.

133. 408 U.S. at 362.

justified this view by asserting that

[j]udges have not lived lives isolated from a broad range of human experience. . . . They have learned to share with their fellow human beings common views of morality. If, after drawing on this experience and considering the vast range of people and views that they have encountered, judges conclude that these people would not knowingly tolerate a specific penalty in light of its costs, then this conclusion is entitled to weight.<sup>134</sup>

The "costs" of the death penalty, as compiled by the Justice, do have great persuasive weight. The death penalty is not a credible deterrent;<sup>135</sup> murderers are very rarely executed,<sup>136</sup> are often model prisoners, and are rarely recidivists;<sup>137</sup> the penalty is discriminatorily applied against blacks,<sup>138</sup> the poor, the ignorant, the underprivileged<sup>139</sup> and by sex;<sup>140</sup> innocent men are executed,<sup>141</sup> the death penalty distorts and

134. *Id.* at 369-70 n.163 (citation omitted). This startling method of analysis perhaps is owed to Goldberg and Dershowitz who, in analyzing the Court's opinion in *Robinson v. California* concluded that in *Robinson*

the Court reasoned that narcotics addiction [sic] is a disease like mental illness or leprosy, and that in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

The Court did not say that general public opinion actually did condemn the imposition of criminal penalties for narcotics addiction. Rather, it said that the public, if fully informed, would condemn it. In other words, the Court looked not to actual standards of decency prevailing in society, but to enlightened standards.

The *Robinson* approach to the evolving standards of decency is suggestive of the unconstitutionality of the death penalty. Were capital punishment, like criminal punishment of narcotic addiction, better understood, prevailing moral standards might well condemn it. Goldberg and Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1783 (1970) (footnotes omitted).

But Goldberg and Dershowitz merely suggested that the Court look "not to actual standards of decency prevailing in society, but to enlightened standards." Justice Marshall perhaps distorted this view by positing that these enlightened standards the Court has developed are the actual standards, on the theory that they are the norms the public would share if it but knew what the Court knows.

135. 408 U.S. at 362. See also notes 108-14 *supra* and accompanying text.

136. *Id.* at 362-63. See also notes 41-47 *supra* and accompanying text.

137. *Id.* at 363.

138. *Id.* at 364. Of 3,859 executed since 1930, 1,751 were white and 2,066 were black. Of the 455 executions for rape, 405 were blacks.

139. *Id.* at 365-66. Justice Marshall argued that the poor are less likely to be well defended. "Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape." *Id.* at 366.

140. *Id.* at 365. Only thirty-two women have been executed since 1930, compared to 3,827 men.

141. *Id.* at 367-68. As Justice Marshall remarked:

[N]o matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed but we can be certain that there were some. (footnote omitted.)



sensationalizes the entire criminal process.<sup>142</sup>

Excellent as these arguments may be, they are hardly a reliable indicator of people's thoughts on capital punishment. The opinions of judges are indeed "entitled to weight," but it is questionable whether judicial assumptions as to the probable opinions of an informed and enlightened American people should outweigh the easily verifiable actions of forty state legislatures, the Congress of the United States, and at least four recent popular referenda.<sup>143</sup> The considerations of Justice Marshall are sufficiently common that it is dubious to imply that they escaped the notice of the deliberative proceedings of the entire nation.

## II

### THE MINORITY PERSPECTIVE

Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds. That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated. For me, it violates childhood's training and life's experiences, and is not compatible with the philosophical convictions I have been able to develop. It is antagonistic to any sense of "reverence for life." Were I a legislator, I would vote against the death penalty for the policy reasons argued by counsel for the respective petitioners and expressed and adopted in the several opinions filed by the Justices who vote to reverse these convictions.<sup>144</sup>

These words, as eloquent and impassioned as any in the majority opinion, introduced the dissent of Justice Blackmun. Chief Justice Burger<sup>145</sup> and Justice Powell<sup>146</sup> joined in expressing a personal dislike for the death penalty. Yet all of the dissenters felt unable to translate their personal beliefs into a constitutional prohibition.

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142. *Id.* at 368. Former Justice Frankfurter expressed a similar view:

I am strongly against capital punishment . . . . When life is at hazard in a trial, it sensationalizes the whole thing almost unwittingly; the effect on juries, the Bar, the public, the Judiciary, I regard as very bad. I think scientifically the claim of deterrence is not worth much. Whatever proof there may be in my judgment does not outweigh the social loss due to the inherent sensationalism of a trial for life. F. FRANKFURTER, *OF LAW AND MEN* 81 (1956).

143. See notes 121-22 *supra*.

144. 408 U.S. at 405-06.

145. *Id.* at 375.

146. *Id.* at 465. While Justice Powell did not explicitly condemn the death penalty, he did decry "the failure of some legislative bodies to address the capital punishment issue with greater frankness or effectiveness." *Id.*

The cornerstone of the minority's reluctance to invalidate the death penalty was the doctrine of judicial restraint. The dissenters felt that, regardless of the strength of their views, they must manifest what Justice Powell described as "a proper recognition of the respective roles of the legislative and judicial branches" respecting crime and punishment:

The designation of punishments for crimes is a matter peculiarly within the sphere of the state and federal legislative bodies. When asked to encroach on the legislative prerogative we are well counseled to proceed with the utmost reticence. The review of legislative choices, in the performance of our duty to enforce the Constitution, has been characterized most appropriately by Mr. Justice Holmes as "the gravest and most delicate duty that this Court is called on to perform."<sup>147</sup>

It is easy to glibly brush aside such reticence as an excuse for inaction,<sup>148</sup> but the dissenters did not argue that a legislatively enacted punishment cannot be unconstitutional. Their point was simply that such enactments are presumed constitutional and that a strong showing of unconstitutionality must be made before that presumption may be overcome.<sup>149</sup> The dissenters thought the majority's views were difficult to square with the implicit constitutional acceptance of the death penalty in the Fifth Amendment<sup>150</sup> and a body of case law accepting the constitutional validity of capital punishment.<sup>151</sup>

Justice Powell argued that the Framers could not have intended the Eighth Amendment as a ban on the death penalty since the Fifth Amendment, enacted at the same time as the Eighth, guaranteed

those charged with crimes that the prosecution would have only a single opportunity to seek imposition of the death penalty and that the death penalty could not be exacted without due process and a grand jury

147. *Id.* at 431 (citation omitted).

148. Such an approach was taken by Justice White:

Judicial review, by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires. In this respect, Eighth Amendment cases come to us in no different posture. It seems conceded by all that the Amendment imposes some obligation on the judiciary to judge the constitutionality of punishments and that there are punishments that the Amendment would bar whether legislatively approved or not. *Id.* at 313-14.

149. See text accompanying note 147 *supra*.

150. The Fifth Amendment provides:

No person shall be held to answer for a *capital*, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of *life* or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of *life*, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. CONST. amend. V (emphasis added).

151. 408 U.S. at 377-78, 407-10, 421-28.

indictment.<sup>152</sup>

Therefore the Eighth Amendment's ban of cruel and unusual punishment was to be interpreted as forbidding some punishments, but not death.<sup>153</sup>

The dissenters recognized that the death penalty had also been established by a long line of cases endorsing or necessarily assuming its constitutional validity. *Wilkerson v. Utah*,<sup>154</sup> *In re Kemmler*,<sup>155</sup> and *Louisiana ex rel. Francis v. Resweber*,<sup>156</sup> which denied challenges to the *manner* or *mode* of inflicting the death penalty, must be read as upholding capital punishment, since it would be nonsense to hold that there is a constitutional manner of inflicting an unconstitutional punishment.<sup>157</sup>

152. *Id.* at 419.

153. Justices Brennan and Marshall did not disagree with this interpretation of the Framers' intent, although they emphasized the idea that the Clause had been inserted into the Bill of Rights as a judicial check on legislative power. See the remarks of Patrick Henry, quoted by Justice Brennan (*id.* at 259-60), and by Justice Marshall. *Id.* at 320-21. Such an approach gives little attention to the fact that the contents of Henry's remarks indicated that this check was to be used in the event the legislature should enact a punishment involving *torture*, rather than death alone.

Justice Brennan attached great significance to the remarks of Representative Livermore at the First Congress. Livermore objected to the proposed Eighth Amendment on the grounds that

it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? *Id.* at 262.

From the Congress' disregard of Livermore's protest, Justice Brennan concluded that the Framers were prepared to run the risk that common punishments such as death by hanging would one day be overruled. He did not mention that it is at least equally possible that the Congress thought these fears so unfounded as to not even deserve a reply.

154. 99 U.S. 130 (1878). In upholding the constitutionality of Utah's practice of vesting in the trial court the power to determine whether a murderer should be shot or hanged, the Court interpreted the Cruel and Unusual Punishments Clause to be primarily concerned with torture. *Id.* at 135-36.

155. 136 U.S. 436 (1890). In determining that electrocution was not cruel and unusual, since it was more "humane" than the methods of execution it replaced, the Court said:

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 there something inhuman and barbarous, something more than the mere extinguishment of life. *Id.* at 447.

156. 329 U.S. 459 (1947). See also note 30 *supra*. In *Resweber*, the Court upheld, as against Eighth Amendment attack, the subjection of a petitioner to death by electrocution after an earlier attempt to electrocute him had failed. Speaking for the Court, Justice Reed stated:

The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. *Id.* at 464.

157. 408 U.S. at 377-79, 407, 421-24. Justice Brennan's response to these cases

The thrust of the historical view upholding the constitutional validity of capital punishment is most forcefully presented in *Trop v. Dulles*:

At the outset, let us put to one side the death penalty as an index of the 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.<sup>158</sup>

The recent cases of *Witherspoon v. Illinois*<sup>159</sup> and *McGautha v. California*,<sup>160</sup> which evaluated certain procedural requirements in capital trials, had been “singularly academic exercises,” according to Justice Powell, if they were but prefatory to the invalidation of the death penalty.<sup>161</sup> The basic posture of the minority, then, was that the Constitution did oblige the Court to determine if a particular punishment was cruel and unusual, but that the determination must be made in the context of affirmative references to capital punishment in the Constitution, case law approving the death penalty, and the obligation of the judiciary to restrain itself from interference with the legislative power to determine punishments.

The members of the minority recognized only two tests by which a punishment could be found unconstitutionally cruel and unusual. They would strike down a punishment as excessive for a given crime.<sup>162</sup>

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was to view them as exemplifying the “‘historical’ interpretation” of the Eighth Amendment which he contrasted with his own interpretation of the Cruel and Unusual Punishments Clause as a “restraint upon legislatures.” *Id.* at 265-69.

158. 356 U.S. 86, 99 (1957).

159. 391 U.S. 510 (1968). The Court held that the practice of challenging jurors for cause because they objected to or stated doubts about the validity or propriety of the death penalty in capital trials deprived defendants of the impartial jury to which they were entitled under the Sixth Amendment.

160. 402 U.S. 183 (1971). The *Furman* dissenters argued that *McGautha* foreclosed a consideration of the *arbitrary* aspects of the death penalty. See notes 66-80 *supra* and accompanying text. They further urged that *Witherspoon* and *McGautha* foreclosed all consideration of the validity of the death penalty itself.

A consideration of the language of the two cases would at least call into doubt the assertion that the Court foresaw the continued inevitability of the death penalty. In *Witherspoon* Justice Stewart's majority opinion ended: “*Whatever 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.*” 391 U.S. at 523 (emphasis added). In *McGautha* Justice Harlan noted that “it may well be that criteria for jury sentencing discretion are superior means of dealing with capital cases *if the death penalty is to be retained at all.*” 402 U.S. at 220-21 (emphasis added).

161. 408 U.S. at 427 (footnote omitted).

162. See notes 99-100 *supra* and accompanying text.

None of the *Furman* petitioners argued that the death penalty was disproportionate to the crime of murder, and Justice Powell explicitly rejected the argument that it was excessively severe for rape.<sup>163</sup> The dissenters would also invalidate a punishment which has become morally unacceptable to the American people,<sup>164</sup> but they would not ignore the plain and evident fact that the American people have not rejected the death penalty.<sup>165</sup>

The essence of the minority position was that no constitutional basis existed for the members of the Court to impose their personal views regarding the propriety of the death penalty on the states. It portrayed the majority, in the words of Justice Rehnquist, as yielding to "the natural desire that beguiles judges along with other human beings into imposing their own views of goodness, truth, and justice upon others."<sup>166</sup> Justices Powell and Blackmun saw the Court as indulging its "personal preferences"<sup>167</sup> and "subjective standards of wise policy"<sup>168</sup> at the expense of the judicial role. It is no wonder that Justice Blackmun would argue that "[t]he Court has just decided that it is time to strike down the death penalty"<sup>169</sup> and that Justice Rehnquist would conclude that the decision was "not an act of judgment, but rather an act of will."<sup>170</sup>

### III

#### CONCLUSION

*Furman* did not end the death penalty in America. It merely ended a sentencing procedure by which juries were given an unguided, unrestricted discretion to impose the death penalty or a lesser offense for capital crimes.<sup>171</sup> It would seem therefore that a state law *requiring* the death penalty for appropriate crimes would be upheld.

One year previously, the Court upheld the procedures similar to those struck down in *Furman*; Justice Harlan's majority opinion in *McGautha v. California* praised the replacement of common law mandatory death penalties with jury discretion as a humanizing development

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163. 408 U.S. at 456-61.

164. See notes 118-24 *supra* and accompanying text.

165. *Id.*

166. 408 U.S. at 467.

167. *Id.* at 411.

168. *Id.* at 431.

169. *Id.* at 408.

170. *Id.* at 468.

171. See notes 37-40, 77-78 *supra* and accompanying text.

in the law.<sup>172</sup> *Furman* ends that development. If any state should wish to impose a death penalty for a crime, it must do so in a statute that requires juries to choose between death and acquittal. This is a most curious and grisly kind of progress.

Justices Brennan and Marshall alone voted to invalidate the death penalty per se.<sup>173</sup> Justice Brennan's opinion in particular afforded a reasonable theoretical basis by which to strike down the death penalty:

In sum, the punishment of death is inconsistent with all four principles: Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment. The function of these principles is to enable a Court to determine whether a punishment comports with human dignity. Death, quite simply, does not.<sup>174</sup>

Justice Brennan believed that his cumulative test allowed him to determine that the institution of the death penalty was inconsistent with human dignity. Whatever problems<sup>175</sup> or unanswered questions<sup>176</sup> this test presents, it does not leave Justice Brennan in an untenable position. The same cannot be said of the opinions of Justices Stewart and White, who preferred the more difficult task of distinguishing *Furman* from *McGautha*.

The members of the minority found themselves unable to translate their personal objections to the death penalty into law. It is to be regretted that not one of them addressed himself to the totality of Justice Brennan's tests. One wonders, for example, why Justice Blackmun, who so forcefully expressed his "distaste, antipathy, and, in-

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172. 402 U.S. at 199-201. *Furman's* effect may well be to hasten the end of capital punishment entirely. Juries faced with a mandatory death statute might opt for acquittal in many cases, thus encouraging a public reappraisal of the penalty in the terms announced by Justices Brennan and Marshall.

173. See note 13 *supra* and accompanying text.

174. 408 U.S. at 305.

175. See criticism of the tests of lack of necessity and moral unacceptability, notes 98-101 and 119-24, 134 *supra* and accompanying text.

176. Suppose, for example, that the Court were to be presented with a challenge to a mandatory death penalty, the imposition of which would not violate *Furman*. Presumably such a penalty would not be arbitrary, thus avoiding one element of Justice Brennan's four-part test. Would the three elements of unusual severity, lack of necessity, and moral unacceptability be sufficient to invalidate a mandatory death penalty?

Even a mandatory death penalty might be shown to be imposed in a discriminatory manner, thus presenting the equal protection issues raised by Justice Douglas.

deed, abhorrence" for the death penalty, did not at least respond directly to Justice Brennan's tests, even if only to reject them.

A society's conception of human nature will determine that society's system of law. Justice Brennan has insisted that it also determine our system of punishment. No man can define human dignity, yet its existence is one of our oldest and most deeply held beliefs. Justice Brennan has posited the intrinsic worth of every fragile human life, even that of the most heinous of criminals. In doing so he is faithful to a vision of man far more ancient than that underlying the constitutional doctrines before him:

. . . .

When I behold your heavens, the work of your fingers, the moon and the stars which you set in place—

What is man that you should be mindful of him; or the son of man that you should care for him?

You have made him little less than the angels, and crowned him with glory and honor.

You have given him rule over the works of your hands, putting all things under his feet:

All sheep and oxen, yes, and the beasts of the field,

The birds of the air, the fishes of the sea, and whatever swims the paths of the seas.<sup>177</sup>

. . . .

*George D. Crook*

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177. Psalm 8:4-9.