A COMPARATIVE STUDY OF THE JEWISH AND THE UNITED STATES CONSTITUTIONAL LAW OF CAPITAL PUNISHMENT

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> The Jewish view on the death penalty is that it should exist but it should never be used . . . . [I]t is Governor Pataki's job to ensure order. But he must remember that as a leader he must exhibit attributes of both the father and the mother. Governor Pataki is a nice man. But if he acts on the death penalty, he will be the leader of a bloody government.[1]

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1. Rabbi Aaron Soloveichik, *The One-Hundred Smartest New-Yorkers*, N.Y. MAG., Jan. 30, 1995, at 52.

I. INTRODUCTION

From 1966 to 1972, despite permissive capital punishment statutes in most states, only three men were executed in the United States.[2] An objective observer would have cited this trend as a forecast of the gradual abandonment of this ultimate punishment.[3] However, in 1972 the Supreme Court gave its full attention to the impact of the United States Constitution upon the imposition of capital punishment. In *Furman v. Georgia*,[4] the Supreme Court held that the Constitution barred capital punishment as it was applied by the states at that time.

While some people heralded this seminal event as the death blow to capital punishment, ironically, *Furman* was a harbinger of the punishment's re-emergence. The wholly divergent opinions within *Furman* forced the members of the Supreme Court into a fractious battle over the nature of a constitutional system of capital punishment. This battle eventually led the Supreme Court to consciously erect a constitutional system that encouraged frequent death sentences and their implementation. Consequently, over 300 executions have occurred since 1977;[5] fifty-six executions in 1995.[6]

In contrast, the Jewish experience with capital punishment has been markedly different. The Bible specifies mandatory execution for a substantial number of crimes.[7] Despite this compulsion, executions were exceedingly rare in the Jewish law.[8] This occurred due to the Sanhedrin's, the highest Jewish court, disparaging attitude toward capital punishment.[9]

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2. HUGO A. BEDEAU, THE DEATH PENALTY IN AMERICA 23, 25 (3d ed. 1982).

3. *See, e.g.*, Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1789-94 (1970) (citing present unusualness of death penalty as marker for its unconstitutionality); Amicus Curiae Brief for the NAACP Legal Defense Fund at 42-47, Boykin v. Alabama, 395 U.S. 238 (1969) (noting increasing public distaste for and judicial decline of capital punishment as premise for its abandonment). *See also* Rudolph v. Alabama, 375 U.S. 889 (1963) (Goldberg, Douglas, and Brennan, J. dissenting from denial of certiorari) (stating that certiorari should be granted to decide whether current popular trends may in certain circumstances render death penalty unconstitutional).

4. Furman v. Georgia, 408 U.S. 238 (1972).

5. As of January 7, 1996, the exact number of executions is 313. *See, Executions on the Rise; Capricious Penalty: With More People on Death Row, More Chances of Error*, BALTIMORE SUN, Jan. 7, 1996, at 2E.

6. *Id.*

7. *See infra* p. 3.

8. *See infra* pp. 17-18.

9. *See infra* pp. 14-17.

The Sanhedrin consciously erected a procedural system that prevented the issuance and realization of death sentences.[10]

This essay explores the reasons for these two divergent outcomes through a comparative study of the judicial development of the Jewish and United States constitutional law of capital punishment.[11] It contrasts the Jewish system of capital punishment with the United States judicial experience. Through this judicial exploration the *why* and *how* of capital punishment's sparing employment in the Jewish law and judicially encouraged use in the United States is examined.[12]

This essay begins with a survey of the textual foundations of capital punishment both in the Jewish law and the United States Constitution. The basic texts of the Jewish law and the Constitution are examined for their treatment, or lack thereof, of capital punishment. They are then scrutinized for any potential mitigatory effect on the imposition, structure, and use of capital punishment.

Having established the foundational law, this essay continues by tracing the actual judicial development of capital punishment law in both systems. A comparison is conducted of the interpretation applied to the basic texts by the highest judicial court of each system. The essay concludes by contrasting the two wholly divergent judicial interpretational experiences to divine root causes of the present structure of, and judicial attitude towards, capital punishment in the United States.

II. TEXTUAL FOUNDATIONS FOR CAPITAL PUNISHMENT

In Jewish law, the Biblical legality of capital punishment is a certainty. The text of the Bible states that the death penalty can be imposed for thirty-six different crimes.[13] While the imposition of death is

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10. *See generally* Israel J. Kazis, *Judaism and the Death Penalty*, CONTEMPORARY JEWISH ETHICS, 326 (1979).

11. This essay is limited only to the judicial experiences with capital punishment. Therefore, this paper does not examine capital punishment as distributed non-statutorily by the Jewish King, the so-called *King's Justice*. For an exploration of this aspect of Jewish law, see Bleich, *Capital Punishment in the Noachide Code*, *in* CONTEMPORARY HALAKHIC PROBLEMS (1981).

12. This essay is not pervasive in scope. Rather, it touches upon the structure and key tenets of both systems in order to discern bedrock developmental principles. For further comparative discussion of these two systems, see Bruce Ledewitz, *Reflections on the Talmudic and American Death Penalty*, 6 FLA. J.L. & PUB. POL'Y 33 (1993). For a more comprehensive survey of the modern Supreme Court experience with capital punishment see WELSH S. WHITE, THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT (1987).

13. *See* SAMUEL MENDELSOHN, CRIMINAL JURISPRUDENCE OF THE JEWS 45 (1991). The Jewish law provided for four methods of capital punishment: stoning; burning; decapitation; and strangulation. Stoning was considered the most severe form of execution, strangulation the

discretionary for some crimes, in the majority of instances it is mandatory if guilt is found.[14]

In contrast, the United States Constitution is opaque on the legal status of capital punishment. There is neither an explicit bar nor an expression of its permissible use within the document. However, there are strong inferences that its use is permissible. The opening sentence of the Fifth Amendment provides that "[n]o person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury. . . ."[15] The Double Jeopardy clause of this amendment prohibits being "[t]wice put into jeopardy of life. . . ."[16] Finally, the Due Process Clause commands due process of law before an accused can "[b]e deprived of life."[17]

Under the federal system constructed by the Constitution, what is not delegated to the federal government or barred from the states is left to the states.[18] It would thus appear, with no affirmative bar in the Constitution or implication to the opposite, that capital punishment and the form of its implementation would be discretionary to the states. However, only through deductive reading can any gloss be placed upon the Constitution's position on capital punishment. This raises the specter that the self-acknowledged judicial interpreter of the Constitution, the Supreme

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weakest. Eighteen crimes were punishable by stoning: 1) incest with one's own mother; 2) with his step-mother; 3) with his daughter-in-law; 4) with a betrothed virgin (rape); 5) pederasty; 6) bestiality, practiced by a man; 7) the same practice by a women; 8) blasphemy; 9) idolatry; 10) sacrificing one's own children to Moloch; 11) instigating individuals to embrace idolatry; 12) instigating communities to do the like; 13) pythonism; 14) necromancy; 15) magic; 16) violating the Sabbath; 17) cursing a parent; 18) violation of a filial duty. Ten Crimes were punishable by burning: 1) adultery of a priest's daughter; 2) incest with one's own daughter; 3) with one's own daughter's daughter; 4) with one's own son's daughter; 5) with one's own step-daughter; 6) with one's own step-daughter's daughter; 7) with one's own step-son's daughter 8) with one's own mother-in-law; 9) with her mother; 10) with one's own father in-law's mother. Two crimes were punishable by decapitation: 1) murder; 2) communal apostasy from Judaism to idolatry. Six crimes were punishable by strangulation: 1) adultery; 2) bruising a parent; 3) kidnapping; 4) maladministration; 5) false prophecy; 6) prophesying in the name of heathen deities.

14. *See generally Maimonides* 15:10-13.

15. U.S. CONST. amend. V.

16. *Id.*

17. *Id.*

18. U.S. CONST. amend. X. The contours and history of the Court's Tenth Amendment doctrine is traced in New York v. United States, 505 U.S. 144 (1992). *See also* Perez v. United States, 402 U.S. 146 (1971) (explaining that the Tenth Amendment analysis requires inquiry into whether Constitution authorizes federal action); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (stating the Tenth Amendment prevents federal action invasive of powers of the states).

Court,[19] could through reference to other passages, find the document prohibitive or regulative of capital punishment.

III. POTENTIAL SOURCES OF MITIGATION IN THE JEWISH AND CONSTITUTIONAL TEXT

In an initial blind encounter with the primary texts, the case for capital punishment is clear in the Biblical code and seemingly permissible in the Constitution. However, this judgment is based solely upon the presence or absence of explicit statements within the texts concerning capital punishment. It does not examine what bearing other sections of the Bible, Jewish oral law, or the United States Constitution might have upon the question of capital punishment.

A. The Jewish law

In the Bible, the main passage with tangential application to the efficacy of capital punishment concerns the moral righteousness of mercy: "And whether the mother is a cow or a ewe, you shall not kill both her and the young in one day."[20]

The validity of mercy over punishment and primacy of forgiveness also finds expression in the Midrash, the Jewish oral law, "The priests forgave [Saul for his role at the slaughter at Nob], but the Gibeonites did not forgive him, and therefore God rejected them."[21]

Beyond the realm of death the theme of mercy espoused in the Midrash was also employed to show the righteousness of mercy upon the undeserving. This was seen in the actions of Rabbi Joshua b. Levi:

> In the neighborhood of Rabbi Joshua b. Levi there lived a Sadducee who used to trouble him greatly with [his interpretations of] texts. One day the rabbi . . . thought . . . 'I shall curse him.' When the moment arrived, Rabbi Joshua was dozing [On awakening] he said. I see from

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19. Cooper v. Aaron, 358 U.S. 1, 18 (1958) (stating "it is emphatically the province and duty of the judicial department to say what the law is").

20. *Leviticus* 22:28 (Midrash on Psalms). In subsequent commentaries this passage has been used to illustrate misplaced mercy. The Midrash states: "Bar Kapara said, 'Doeg is called the edomite because he forbade Saul to shed the blood of Agag.' For Doeg said, 'it is written in the torah, Ye shall not kill it and its young on the same day: yet you are about to kill young and old, children and women in one day'." Midrash on Psalms (to ps. 52), I, p. 479.

21. *Shmot Rabbah* 30:12. Other passages of the Jewish law address the role of mercy generally. The Babylonian Talmud states: "[I] saw Akathriel Jah, the Lord of Hosts, seated upon a high and exalted throne. He said to me: Ishmael, My son, Bless Me! I replied: May it be Thy will that Thy mercy may suppress Thy anger and thy mercy prevail over Thy other attributes." *Babylonian Talmud, Sanhedrin* 46b.

> this that my intention was improper. For it is written and his mercies are over all his works, and it is further written. Neither is it good for the righteous to punish.[22]

Distilled from what has been detailed thus far, the case for the widespread employment of capital punishment in the Jewish law is still certain. There is a strain of mercy that is present; a strain that is explicitly applicable to those convicted of capital crimes. It could permit a moral judgment concerning the validity and frequency of capital punishment. However, capital punishment, as has been noted, is in the Jewish law, a mandatory event. Thus, it is yet to be seen what the quality of mercy can directly do to forestall capital punishment in mandatory circumstances.

B. The Constitutional Law

In the United States Constitution, the passages potentially relevant to capital punishment have similar qualities to those just delineated in the Jewish law. Both permit moral judgments with the potential to regulate capital punishment and, in the case of the Constitution, to even venture so far as to prohibit its use. However, the Constitution, while containing language that potentially can go further than the Jewish law, does not include the positive moral aspect of the Jewish law. Rather, in the Constitution the relevant tangential clauses are at their basis morally neutral. They can be employed to place a moral imprint upon capital punishment, but the nature of that judgment, unlike the Jewish law, is never detailed.

1. Substantive Due Process

The first relevant passage within the Constitution is the Due Process clause of the Fifth Amendment. This clause states that "[n]o person shall be . . . deprived of life, liberty or property . . . without due process of law."[23]

A quick skim through this passage would cause one to assume that the clause's statement that *life* can be taken so long as Due Process is adhered to, would negate any potential mitigation upon capital punishment. However, this initial glance, while correct, would ignore the Supreme Court's interpretation of this clause. If this interpretation is explored, the status and use of capital punishment is debatable.

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22. *Berakoth* 7a.

23. U.S. CONST. amend. V.

The Supreme Court has held that the Due Process clause embodies a being which the Court has termed substantive due process.[24] Substantive due process has been held by the Court to bar government interference with practices which are fundamental traditions in our society unless a compelling reason exists.[25] This prohibition has been expressed by the Court as a protection of those acts essential to a concept of ordered liberty.[26] It has also been expressed as a negative commandment which prevents the government from engaging in conduct "shocking to the conscience."[27]

The Court, though, while stating that once an act is found to be fundamental or necessary to ordered liberty and thus protected from interference by substantive due process, has never definitively stated how such a practice is determined to be fundamental or implicit to ordered liberty. However, a survey of cases where the Court has found a practice to be protected or government conduct to be shocking, exposes a pattern in the Court's analysis. The Court has largely employed substantive due process to protect traditions essential to the home and family and to bar particularly brutal actions by the government.[28]

Despite the uses which substantive due process has protected, it has never contained or included an explicit moral element. Rather, substantive due process has been defined and provides content through the subjective perceptions of the Court. The Court, through the employment

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24. The Due Process Clause also contains a species known as procedural due process. However, as capital punishment is largely the domain of the states any procedural structure under the Due Process Clause would have to be imposed through substantive due process. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1 (1964). This exposition can therefore be confined to that concept.

25. *See* Poe v. Ullman, 367 U.S. 497, 541 (1967) (Harlan, J., dissenting from denial of certiorari).

26. *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937).

27. Rochin v. California, 342 U.S. 165 (1952). *See also* Kinsella v. United States, 361 U.S. 234, 246 (1960) (explaining that the government violates due process when it acts without fundamental fairness because it is shocking to the sense of justice).

28. *See inter alia* Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that marriage is fundamental); Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942) (holding that procreation is a fundamental right); Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972) (holding that contraception is fundamental); Moore v. East Cleveland, 431 U.S. 494 (1977) (holding that family is fundamental tradition). *See generally* Griswold v. Connecticut, 381 U.S. 479, 481-86 (1965); Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798); United States v. Carolene Products, 304 U.S. 144, 152-53 n.4 (1939); Washington v. Harper, 494 U.S. 210, 221 (1990) (explaining that due process prevents government from arbitrarily medicating individuals); Poe v. Ullman, 367 U.S. 497, 543 (1967) (Harlan, J., dissenting from denial of certiorari) (explaining that due process forbids government from purposelessly restraining individuals); Rochin v. California, 342 U.S. 165 (1952). *See also* Kinsella v. United States, 361 U.S. 234, 246 (1960) (holding that government violates due process when it acts without fundamental fairness, shocking to the sense of justice).

of the tests above, has used the ideological composition of its own membership to determine the scope and composition of substantive due process.[29] Thus, a moral element is encompassed within the opinions of the individual Justices, but that element has no explicit exposition as in the Jewish law of mercy.

2. The Eighth Amendment

The second relevant text is the Eighth Amendment, which bars cruel and unusual punishment.[30] The Eighth Amendment was initially erected to prohibit torture and other barbarous punishment.[31] However, over time the Supreme Court has interpreted the amendment to espouse "broad and idealistic concepts of dignity, civilized standards, humanity, and decency."[32] As such, the Court has come to view the amendment as a flexible text which bars punishment conflicting "with the evolving standards of decency that mark the progress of maturing society."[33]

The determination of a societal standard of decency has been a source of controversy in the Court. The Court has at times stated that the decision that a punishment is in conflict with standards of decency is to be taken with reference to both national and international standards. International standards are apparently the international conventions and the practices of other nations.[34] The determination of what national standards are has been a source of controversy and is difficult to pinpoint. However, the Court at various times has drawn reference, with fluctuating weight given, from their own perceptions,[35] the populace's attitudes,[36] the state legislatures,[37] and the practices of juries.[38] It is rather needless to

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29. The exact content and scope of substantive due process has been the source of heated debate. Compare the concurring opinions of Justices White, Harlan, and Goldberg with the dissenting opinion of Justices Black and Stewart. Griswold v. Connecticut, 381 U.S. 479 (1965).

30. U.S. CONST. amend. VIII.

31. Wilkerson v. Utah, 99 U.S. 130, 136 (1878).

32. Estelle v. Gamble, 429 U.S. 97, 102 (1976).

33. Tropp v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion); Coker v. Georgia, 433 U.S. 584, 593 (1977) (plurality opinion) (explaining that the international consensus against death penalty for rape weighs against validity of punishment); Roberts v. Louisiana, 428 U.S. 325, 333-34 (1976) (holding that mandatory death sentences invalid because society rejects identical punishments for every convicted felon).

34. *See Coker*, 433 U.S. at 592 (citing international standards to find the death penalty for rape barred by the Eighth Amendment).

35. *See* Gregg v. Georgia, 428 U.S. 153, 174 (1976).

36. *See Coker*, 433 U.S. at 592.

37. *See* Stanford v. Kentucky, 492 U.S. 361, 374 (1989).

38. *See* Woodson v. North Carolina, 428 U.S. 280, 295-96 (1976).

point out that as in the case of substantive due process, none of these bench-marks, except a count of state legislatures, embodies a moral element that can be defined without reference to the subjective perceptions of the Justices of the Court.

3. Conclusion

Thus, the case for prohibition or regulation of capital punishment in the constitutional scheme is a morally neutral one. There are passages which could potentially bar or regulate the process. However, these passages, unlike the Jewish law on mercy, have no explicit moral force. Rather, they are neutral and depend on subjective indicia for their moral composition. Thus, any potential effect of these passages upon capital punishment would depend upon the Justices' subjective definitions and assessments of these guideposts.

IV. THE PROCEDURAL ASPECTS OF CAPITAL PUNISHMENT

A. The Jewish law

From the brief overview conducted above, one would conjecture that capital punishment would be a common event under Jewish law. This is not the case. Executions in ancient Israel were a rarity. This was due to the procedures which the Jewish law and Sanhedrin required for the implementation of death. The Sanhedrin's interpretation of the scriptures and their methods made for a body of procedure that was so "weighted as to make execution a virtual impossibility."[39]

At the outset, the Bible required a set number of witnesses in a capital case. Numbers 35:30 states: "Who so killeth any person, the murderer shall be put to death by the mouth of witnesses: but one witness shall not testify against any person to cause him to die."[40]

This passage is repeated without a capital context in Deuteronomy 19:15: "[a] case can be valid only on the testimony of two witnesses or more."[41]

The Biblical requirement of two witnesses is a strict one. However, in their implementation of these passages, the Sanhedrin construed them to require further procedural structure. Thus, these passages were read broadly and employed to eliminate the use of

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39. Gerald J. Blidstein, *Capital Punishment - The Classic Jewish Discussion*, *in* CONTEMPORARY JEWISH ETHICS 310, 317 (Menachem Marc Kellner ed., 1979).

40. *See Numbers* 35:30. *See also Deuteronomy* 17:6.

41. *See Tosephta Sanhedrin* 11:1.

circumstantial evidence to convict an accused. The Gemara states: "[The judge] says to them; perhaps you saw them running after his fellow into a ruin, you pursued him, and found him sword in hand with blood dripping from it, while the murdered man was writhing: If this is what ye saw, ye saw nothing."[42]

The Sanhedrin also interpreted the necessity of two witnesses to exclude the testimony of the murderer himself. Thus, a murderer's own confession, no matter the probity, was inadmissible in a capital crime. This was a strictly guarded rule and all statements which could arguably imply guilt were construed not to.[43]

The testimony of these witnesses was also required to be uncontroverted as to any fact. If there was any discrepancy between their testimony it was excluded. The Sanhedrin employed this rule to effectively exclude the testimony of witnesses who would testify to the defendant's guilt.[44] They separately interrogated the witnesses, and then questioned them concerning the most minute details of the crime. If they contradicted each other as to any fact whatsoever, their testimony was excluded. The pervasiveness and intensity of the Sanhedrin's questioning was illustrated by Rabbi Yochanan Ben Zakkai who interrogated witnesses about the number of figs growing on the tree underneath which the crime was committed.[45]

The Sanhedrin also required the defendant be forewarned. Only if the defendant had been made *ante facto* aware of the consequences of his crime by two witnesses could he be sentenced to die.[46] The accused must also have acknowledged this penalty before proceeding.[47] This requirement was applicable only to cases where capital punishment, not imprisonment, was at issue.[48]

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42. *Babylonian Talmud, Sanhedrin* 37b.

43. *See generally* AARON KIRSCHENBAUM, SELF-INCRIMINATION IN JEWISH LAW 36-37 (1970).

44. *Talmud* 81b.

45. *Sanhedrin* 41a. *See also Talmud Bavli Makkot* 7a (stating that Rabbi Johanan and Rabbi Elezar would prevent witnesses from testifying by questioning them about intimate details such as "Did you take note whether the victim was suffering from some fatal affection or was he perfectly healthy?" Rabbi Ashi elaborated on this by stating that should the reply be perfectly healthy, they might further be embarrassed by asking, maybe the sword only severed an internal lesion).

46. *The Code of Maimonedes*, 14 Judges 34, ch. 12, §1, 2.

47. *Id.*

48. *Id.*

The accused was also required to be convicted by a qualified lower court of twenty-three.[49] If, upon hearing the evidence, all twenty-three of these men voted to convict the accused, he was acquitted. The accused could only be convicted if some of the members voted to acquit.[50]

The Sanhedrin also did not recognize capital punishment for felony murder. Thus, an accessory was not subject to the death penalty.[51] The individual sentenced to die had to be the one who directly caused the death.[52]

Finally, when none of these procedures could stop the implementation of capital punishment, there was an escape clause in Jewish law. The lower courts, composed of twenty-three judges, could implement capital punishment only if the Great Sanhedrin met within the precincts of the Temple.[53] Some forty years before the destruction of the Second Temple the Great Sanhedrin moved their deliberations from the Temple to prevent the use of capital punishment.[54]

Thus, capital punishment under the Jewish law was a rare event. The exact frequency is the subject of speculation, but there have been suggestions in the commentaries that executions in excess of one instance every seven years or even one execution every seventy years were viewed as unacceptable.[55] However, whatever the raw numbers were, and they are unknown,[56] the Jewish procedural laws on the implementation of capital punishment and their interpretation and use made executions a very rare thing indeed. This is undisputed.

B. The Constitutional Law

Despite the obvious potential for widespread employment of capital punishment in the Jewish law, procedural requirements made this punishment a rarity. In contrast, the United States constitutional experience with capital punishment has been almost an exact opposite of the Jewish experience. Since the 1970s, the Supreme Court has structured

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49. In order to judge a capital case, a judge was required to be a recipient of semikhah. *See* Bleich, *supra* note 11, at 342 n.2.

50. *The Code of Maimonedes*, 14 Judges 28.

51. An accessory could, however, be tried under non-capital procedures and imprisoned. *Sanhedrin* 24:26. However, if an accessory was tried under capital strictures he was adjudged innocent and released. *Sanhedrin* 18:8.

52. *Sanhedrin* 78b.

53. *Hilkhot Sanhedrin* 14:11.

54. *Gemara Sanhedrin* 41a.

55. *Talmud Bavli Makkot* 7a.

56. *Id.*

its constitutional jurisprudence of capital punishment to lessen procedural structures and reduce judicial appellate supervision, thereby causing both death sentences and their implementation to be a more frequent event.

The first modern-day, relevant Supreme Court encounter with capital punishment occurred in *McGautha v. California*.[57] The question at issue was whether the due process clause prohibited the standardless death sentencing of an individual.[58] However, behind this narrow question was the broader one of the constitutionality of the death penalty. This was, therefore, an opportunity for the Court, through the due process clause, to regulate or abolish capital punishment. This, the Court declined to do. In *Mcgautha*, the Court, per Justice Harlan, rejected the notion the due process clause required any regulation of, or bar upon, the implementation of capital punishment.[59]

Despite its holding in *McGautha*, only two years later, the Court took up the related question of whether the Eighth Amendment had any bearing upon capital punishment. The case was *Furman v. Georgia*,[60] and the Court badly splintered. Two Justices wrote that the Eighth Amendment barred the death penalty in all circumstances.[61] Four Justices held that the Eighth Amendment had no effect on the procedures or existence of capital punishment.[62] Thus, the Supreme Court's decision concerning this question was governed by the remaining three justices, Douglas, Stewart, and White, who each wrote their own individual opinions.[63] The opinion of Douglas is unimportant, for he retired the next year and his viewpoint did not influence future Court decisions on capital punishment.[64] However, the opinions of Stewart and White are of supreme importance for they marked the two divergent ideologies that would shape the development of the Supreme Court's jurisprudence on the requirements of a constitutional system of capital punishment. In *Furman,* Justice White

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57. McGautha v. California, 402 U.S. 183 (1971).

58. *Id.* at 185.

59. *Id.* at 204.

60. Furman v. Georgia, 408 U.S. 238 (1972).

61. *Id.* at 314 (Marshall, J., concurring); *id.* at 257 (Brennan, J., concurring).

62. *Id.* at 375 (Burger, C.J., dissenting); *id.* at 405 (Blackmun, J., dissenting); *id.* at 414 (Powell, J., dissenting); *Furman*, 408 U.S. at 465 (Rehnquist, J., dissenting).

63. *Id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring); *id.* at 240 (Douglas, J., concurring).

64. Douglas' opinion, which was based upon a system-wide Eighth Amendment equal protection rationale was explicitly rejected by the Court in *McCleskey v. Kemp*, 481 U.S. 279 (1987). *Furman*, 408 U.S. at 240 (Douglas, J., concurring). It has, however, seen fits of resurgence in the preceding years. *See* Callins v. Collins, 510 U.S. 1141 (1994) (Blackmun, J., dissenting from denial of certiorari).

wrote: "But when imposition of the penalty reaches a certain degree of infrequency . . . [it] would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment . . . [capital punishment] is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice."[65] In contrast, Justice Stewart wrote:

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . [T]he petitioner's are among a capriciously selected random handful . . . 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 freakishly imposed.[66]

Thus, Justice White held that the death penalty, as imposed at the time, was given so infrequently as to be violative of the Eighth Amendment. In contrast, Justice Stewart, who did not join Justice White's opinion, found that the death penalty was violative of the Eighth Amendment because it was distributed with no rational basis as to who was sentenced to death. In future opinions, this view would translate into a position that strict procedures be drawn to ensure that only a core group of people, the worst killers, got the death penalty.

Drawing any singular holding out of *Furman* is almost an impossibility. However, the Court has done so by consistently stating that *Furman* held the death penalty, as implemented pre-1972, was violative of the Eighth Amendment because it was imposed "arbitrarily and capriciously."[67] Though, while the Court has spelled out a holding in *Furman*, the Justices have clashed on the composition of state legislative statutes necessary to conduct this punishment under the *Furman* decision. The source of this clash has been the divergent views of Justice White and Justice Stewart and their attempts to implement different constitutional requirements in a system of death.[68]

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65. *Furman*, 408 U.S. at 311-13.

66. *Id.* at 309-10 (Stewart, J., concurring).

67. *See, e.g.*, *Callins*, 510 U.S. at 1148 (Blackmun, J., dissenting from denial of certiorari) (stating "Furman demanded that the sentencer's discretion be directed and limited . . . to minimize the risk of arbitrary and capricious sentences. . . ."); Walton v. Arizona, 497 U.S. 639, 657-59 (1990) (Scalia, J., concurring in part); Zant v. Stephens, 462 U.S. 862, 875 (1983).

68. *Compare* Godfrey v. Georgia, 446 U.S. 420, 427-30 (1980) (Stewart, Powell, and Stevens, JJ., plurality opinion) *and* Gregg v. Georgia, 428 U.S. 153 (1976) (Stewart, Powell, and Stevens, JJ., plurality opinion) *with Godfrey*, 446 U.S. at 444-57 (White, J., dissenting) *and* Lockett v. Ohio, 438 U.S. 586 (1978) (White, J., concurring in part, dissenting in part). *See generally* Jim

This conflict began four years later when the Court considered the validity of a quintet of capital statutes enacted post-*Furman*.[69] These five opinions, which inter alia held that the Eighth Amendment did not bar capital punishment in all circumstances, constituted a victory by Justice Stewart over Justice White. Justice Stewart partially succeeded in his goal of limiting the death penalty to only a select few, mandatory death sentences were held unconstitutional in two of the opinions.[70]

In the other three opinions, the Court approved the sentencing schemes of Georgia, Texas, and Florida.[71] The most important opinion in this latter trio is *Gregg v. Georgia*, which provided approval of the Georgia sentencing scheme.[72] In *Gregg*, Justice Stewart spelled out his vision of a constitutional death penalty system. He repeatedly referred to the capital statute contained in the Model Penal Code (MPC).[73] He praised the guidance given a jury through this statute - that aggravators and mitigators are provided and the jury is furnished concrete instructions on how to consider these.[74] Justice Stewart also expressed his satisfaction with the bifurcation of the trial both in the MPC and the Georgia statute.[75] Finally, Justice Stewart extolled the virtues of proportionality and strict appellate review.[76] The Stewart model was therefore laid out: a strict set of procedures at both the trial and appellate level for the imposition of capital punishment, and a limitation on the applicability of capital punishment to only a select few - designed to ensure that only the most deserving, the worst killers, receive the death penalty.

The next major decision in the Supreme Court's capital jurisprudence was *Coker v. Georgia*.[77] This was another victory for the Stewart viewpoint. In *Coker*, a plurality held that the death penalty for the crime of rape of an adult was violative of the Eighth Amendment.[78] Thus,

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Liebman and Adam Haven-Weiss, Fatal Distortion: Judicial Oversight of the Death Penalty 1972-1992 (unpublished).

69. Gregg v. Georgia, 428 U.S. 153 (1976); Profitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

70. *Woodson*, 428 U.S. at 280; *Roberts*, 428 U.S. at 325.

71. *Gregg*, 428 U.S. at 153; *Profitt*, 428 U.S. at 242; *Jurek*, 428 U.S. at 262.

72. *Gregg*, 428 U.S. at 153 (Stewart, Powell, and Stevens, JJ., plurality opinion).

73. MODEL PENAL CODE § 210.6 (1962).

74. *Gregg*, 428 U.S. at 153.

75. *Id.* at 195.

76. *Id.* at 198, 206.

77. Coker v. Georgia, 433 U.S. 584 (1977).

78. *Id.*

Coker restricted the death penalty, with only certain *hedges*, to murder.[79] This was another step in Justice Stewart's goal of limiting the death penalty to only the most deserving.

Despite these initial victories, a capital system commensurate to Justice Stewart's vision was not created. The Supreme Court rejected the Stewart view and adopted the capital ideology of Justice White. Justice White's system, spelled out in *Furman*, required that a constitutional capital punishment system distribute and implement death sentences with frequency so as to avoid arbitrary imposition.[80] This necessitated a constitutional system which encouraged both death sentences and their execution. The Court, under the leadership of Justice White, took four paths to accomplish this goal.

First, the Supreme Court focused on the unique aspect of the capital trial - the penalty phase. From 1978 to 1993 the Court, again under the ideological leadership of Justice White, succeeded in stripping the capital sentencing trial of almost any constitutional requirement of procedure.[81] The Court, under Justice White's lead, successively held: a jury is free to consider any piece of evidence of aggravating circumstances during the trial's guilt phase;[82] weighing state non-statutory aggravators can be employed in the consideration of imposing death;[83] mitigating evidence can be virtually ignored;[84] a judge could overrule a jury's verdict of life for death;[85] and finally, the definition of aggravators could be broadly construed into meaninglessness.[86] This diminishment of procedural criteria only made it easier for prosecutors to procure a death sentence.

The Court's second line of cases expanded the number of individuals who could receive a death sentence. The Court drew a broad category of those co-conspirators who could be sentenced to death.[87] The

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79. *Coker* did leave open the possibility of a death sentence for rape of a child. *Id.* at 597.

80. *See supra* note 65 and accompanying text.

81. *See generally* Liebman & Haven-Weiss, *supra* note 68; Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305. *See also* Callins v. Collins, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting from denial of certiorari).

82. Zant v. Stephens, 462 U.S. 862 (1983).

83. Barclay v. Florida, 463 U.S. 939 (1983) (plurality opinion).

84. Johnson v. Texas, 509 U.S. 350 (1993) (holding that a state does not have to provide full effect to potentially mitigating evidence).

85. Spaziano v. Florida, 468 U.S. 447 (1984).

86. Walton v. Arizona, 497 U.S. 639, 648 (1990); Lewis v. Jeffers, 497 U.S. 764 (1990) (applying a lenient standard for constitutional review of the construction of aggravators); Arave v. Creech, 507 U.S. 137, 147 (1994).

87. Tison v. Arizona, 481 U.S. 137, 147 (1987) (adopting reckless indifference to human life to satisfy culpability requirements for death penalty of co-conspirators).

Court held that youths as young as sixteen years of age, and possibly even fifteen years of age, could be executed,[88] and the mentally retarded could also be executed.[89]

These two lines of decisions, however, were not the sole marks of the Court's deregulation of capital punishment. Justice White's ideology of widespread capital punishment, to fulfill the view espoused in *Furman*, mandated that not only the number of death sentences increase, but that the number of executions increase. Justice White's ideology required that, inter alia, the hands of the judiciary, particularly the federal one, be confined in their ability to overturn death convictions. This mandate resulted in two lines of decisions.

The first string of cases repudiated any constitutional requirement that state appellate review in capital cases was to be a searching inspection.[90] The Court successively held: proportionality review of capital sentences was not constitutionally mandated;[91] a state appellate court has the discretion to reweigh the evidence if an error was made at a capital sentencing trial;[92] the Constitution did not require a system wide appellate analysis for racism in the implementation of capital punishment;[93] the constitutional standard for appellate analysis of ineffective assistance of counsel for those facing capital punishment was a low one;[94] and that the Constitution set an incredibly high standard for appellate analysis of a wrongful death-sentence.[95]

The second line of decisions was a circumscription of the lower federal court's ability to overturn state convictions on habeas corpus.[96] To accomplish this task the Court set up a system of draconian procedural

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88. Stanford v Kentucky, 492 U.S. 361 (1989).

89. Penry v. Lynaugh, 492 U.S. 302 (1989).

90. *See generally* Weisberg, *supra* note 81.

91. Pulley v. Harris, 465 U.S. 37 (1984).

92. Clemons v. Mississippi, 494 U.S. 738 (1990).

93. McCleskey v. Kemp, 481 U.S. 279 (1987).

94. Strickland v. Washington, 466 U.S. 668 (1984).

95. Herrera v. Collins, 506 U.S. 390, 429 (1993) (White J., concurring) (stating that a persuasive showing of innocence would find relief under the Constitution).

96. For a fuller chronicle of this event see Testimony of George Kendall, NAACP Legal Defense Fund, House Judiciary, Habeas Corpus Reform (Oct. 22, 1993). *See also* Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557 (1994); Michele M. Jochner, *'Til Habeas Do Us Part: Recent Supreme Court Habeas Corpus Rulings*, 81 ILL. B.J. 250 (1993); Lisa S. Spickler, Brecht v. Abramson, *Another Step Toward Evisceration of Habeas*, 27 U. RICH. L. REV. 546 (1993); James S. Liebman, *More Than "Slightly Retro" the Rehnquist Court's Rout of Habeas Corpus Jurisdiction in* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 537 (1990).

default rules.[97] The Court, inter alia placed strict standards for successor petitions and abuse of the writ analysis,[98] implemented a harsh rule of retroactivity which denied habeas petitioners the benefits of new rules,[99] applied the standard of *Kotteakos* to state habeas corpus petitions,[100] enacted strict procedures for default upon non-presentment of all claims in state habeas,[101] and denied that effective assistance of counsel was required for habeas petitioners.[102]

A picture is therefore painted of a Court which willingly erected a system to increase the number and speed up the implementation of death sentences. However, this conclusion is not a deduction. Beyond Justice White's explicit statement in *Furman*, over the past ten years various members of the Court have admitted that much of the reasoning behind their decision making has been to increase the number of executions.[103] Justice Scalia last year, complained during an oral argument that the Texas Resource Center, the organization which handles all Texas death row appeals, was too dilatory in their filings and consequently there were not a sufficient number of executions.[104] Justice Kennedy, in a Georgia speech ruminated on how he hated death penalty attorneys and their repeated attempts to slow down executions.[105]

The end result of these attitudes and the resultant case law has been a sharp rise in the number of death sentences and executions. At the time of *Furman*, there had been no executions for the previous five

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97. These rules are so harsh that today the typical result is that even if a constitutional error is found on habeas, relief is usually barred due to procedural strictures. *See* Callins v. Collins, 510 U.S. 1141, 1158 (1994) (Blackmun, J., dissenting from denial of certiorari) (noting this fact).

98. Wainwright v. Sykes, 433 U.S. 72 (1977) (Adopting a cause and prejudice standard for successor petitions); McCleskey v. Zant, 499 U.S. 467 (1991) (adopting a cause and prejudice standard for abuse of the writ).

99. Teague v. Lane, 489 U.S. 288 (1989). *See also* Stringer v. Black, 503 U.S. 222 (1992) (adopting a low threshold for ascertainment of new rules).

100. Brecht v. Abramson, 507 U.S. 619 (1993).

101. Rose v. Lundy, 455 U.S. 509 (1982).

102. Coleman v. Thompson, 501 U.S. 722 (1991).

103. Furman v. Georgia, 408 U.S. 238, 311-13 (1972) (White, J. concurring).

104. *See* Linda Greenhouse, *Court Confronting Results of Limiting Death Row Appeals*, N.Y. TIMES, Mar. 30, 1994, at A1.

105. *See also* Coleman v. Balkcom, 451 U.S. 949 (1981) (Rehnquist, J., dissenting from denial of certiorari) (stating that the pace and number of executions is too slow); Schiro v. Indiana, 493 U.S. 910 (1989) (Stevens, J., respectfully concurring to denial of certiorari) (stating that the pace of executions are too slow); Autry v. McKaskley, 465 U.S. 1085 (1984) (Marshall, J., dissenting from denial of certiorari) (stating that the Court, in its haste to speed up executions, is not devoting sufficient time to the merits of death row habeas petitions); *Fast Track for Executions*, WASH. POST, Sept. 25, 1989, at A14 (detailing Justice Rehnquist's formation of a committee to speed up and increase the number of executions).

years.[106] And before that, there had been a serious downward trend in the rates of execution.[107] Last year there were fifty-six executions.[108] There have been over 313 executions since the death of Gary Gilmore.[109] There are now over 3000 individuals on death row throughout the nation.[110] These are compelling statistics, and their numbers are on the rise.[111]

V. THE HOW AND THE WHY

A. Introduction

So why did this happen? At the beginning of this paper the conjecture would have been that the use of capital punishment would be widespread in the Jewish law. The Constitution, in contrast, had little or nothing to say concerning its use. However, as delineated, the two systems have enacted procedures designed to produce very different results. In the case of the Jewish law, it is the rarity of execution. In the constitutional experience, it has been a conscious effort by the Court to increase the number of executions. So again, why did this happen?

B. The Jewish Law

In Jewish law there is a juxtaposition between moral value and law. In the Jewish law the religion is the law. A moral force in the religion and populace will be given, and indeed must be given, explicit effect in the law by the Sanhedrin. In Jewish law there are two moral forces which could plausibly be responsible for the Sanhedrin's aversion to structuring their capital system to forestall executions. The first of these was discussed above, the Biblical requirement of mercy.

The second possible basis is the value the Jewish religion has placed upon individual life. In Judaism, the person is viewed as created in God's image. This is true regardless of the position of the killed. The fact he might be a sinner is apparently of no consequence. This viewpoint was stated expressly by Rabbi Meir, a student of Rabbi Akiba who states that the sight of an executed criminal hanging from a tree in Deuteronomy

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106. BEDEAU, *supra* note 2, at 23, 25.

107. *Id.* (For the years of 1960-67, the number of executions were 56, 42, 47, 21, 15, 7, 1, 2, respectively).

108. *Executions on the Rise; Capricious Penalty: With More People on Death Row, More Chances of Error*, BALTIMORE SUN, Jan., 7, 1996, at 2E.

109. As of January 1, 1996, the exact number of executions is 313. *Id.*

110. *Id.*

111. *Id.*

21:22-3, provokes the thought that "the King [or as Kellner phrases it G-d] himself is hung."[112]

This respect for the individual is reinforced through the Biblical language on killing. In the Bible there are no words that distinguish between, of kill, criminal homicide, justifiable homicide, and execution. They are all described through the same word; Kill (razach). This usage is also reflected in the language of the Rabbinate. Passages in the Jerusalem Talmud and the Mekhilta employ the same typology as the Biblical language. Thus, the language of ancient Israel made no distinction between types of killings. No matter their posture, justified or criminal, they are all described by the same word with the equal moral imprint, kill.[113]

This moral conviction and perception expressed itself through a call for respect of the person and a sparing use of capital punishment. The Mishnah states that a Sanhedrin which implements the death penalty once every seven years is a violent court. Rabbi Eleazer B. Azariah says this is true of a court which passes such a sentence once in seventy years. And finally, Rabbi Tarfon and Rabbi Akiba say, "Were we in the Sanhedrin [during that period when it possessed capital jurisdiction], no man would ever have been killed."[114]

While these statements were made after the Sanhedrin had lost capital jurisdiction, they are an illumination of the perceptions of that time.[115] They express the moral force that the Jewish law gave to the value of life during the period of the Sanhedrin's existence. The existence of this sanctity was borne out by the requirement that the judges fast on the day of execution.

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112. Blidstein, *supra* note 39.

113. *Id.*

114. *Mishnah, Makkoth* 7a.

115. Another example of the Talmudic respect for life is illustrated in the treatment which these scholars gave to the four methods of capital punishment mandated by the Bible. Justice Haim H. Cohn, *The Penology of the Talmud*, 5 ISR. L. REV. 53 (1970), thoroughly details how the Talmudic scholars reinterpreted the Biblical texts so that these punishments became less brutal. Thus, stoning was transformed from death by public stoning into the a procedure where the convicted was thrown off a two story high stoning house. *Mishnah Sanhedrin* 6:4. Even more remarkably, burning became death by strangulation. *B Sanhedrin* 52a. And strangulation by hanging was rejected for a more secretive death of two men pulling ties around the convict's neck until he suffocated. *M. Sanhedrin VII* 3. These lengths which the Talmudic scholars obviously went to, to lessen the violence of these punishments, is a sure signal of their abhorrence of capital punishment itself. *See* Moshe Sokol, *Some Tensions in the Jewish Attitude Toward the Taking of Jewish Life*, 7 JEW. L. ANN. 97, 102 (1988) (noting the "dimension of wrong" in even justified killing).

Thus, the Jewish value of life and mercy is a plausible explanation for the strict procedures erected around capital punishment. These procedures were designed to limit its use and give expression to this moral concern, and they succeeded. Executions were a rarity in ancient Israel. This was due to the merger of morality and religion in the Jewish law. These were directly incorporated into the law, for in Judaism the religion (moral values) is law. Thus, the explicit religious values of life and mercy were easily required to be considered in the erection of procedures concerning the use of capital punishment. The result has just been delineated, a set of procedures designed to employ capital punishment as infrequently as possible.

C. The Constitutional Law

In contrast, the Supreme Court has never imposed a moral imprimatur upon its constitutional regulation of capital punishment. This is due to a number of factors, but primarily because of the Justices' perception of the nature of the Court's role in the constitutional scheme. In *Furman*, the Supreme Court, in its development of the constitutional procedure of capital punishment, became concerned solely with the content of the text, its interpretation and its holding in *Furman*. The Justices never addressed whether what they were doing was en toto moral. This resulted in a conscious effort by the Court to increase the number of executions in order to fulfill a judicial theory.

In the constitutional scheme, the role of the judiciary has been the subject of vicious ideological debate. The differing viewpoints can be rendered into simplistic shorthand as a battle between judicial conservatives and judicial activists. The judicial conservatives, led most recently by Justice Scalia, believe the Court's constitutional role is a limited one. The Court should confine itself to strict interpretation of the constitutional text, with reference to the traditions at the time of ratification. The Court should also defer to the legislative will.[116] In contrast, the judicial activists believe a judge should take on a socially progressive mantra. They believe a judge should view the Constitution as

116. *See* ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (Free Press 1990); Michael Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justice's Black and Scalia*, 74 B.U. L. REV. 25 (1994); Christopher L. Eisgruber, *Justice and the Text: Rethinking the Constitutional Relation Between Principle and Prudence*, 43 DUKE L.J. 1 (1993).

an evolving document to be interpreted broadly and independent of the legislative will.[117]

The strength of the judicial activists has declined in the last few decades as the Court has grown more conservative.[118] The effect of this development, and an example of the conservative viewpoint's influence upon capital punishment, was illustrated in a statement by Justice Scalia last year. This was a response to Justice Blackmun's dissent in *Callins v. Collins*,[119] asserting capital punishment in its present form was unconstitutional. Justice Scalia wrote:

> That explanation [Blackmun's assertion that capital punishment is unconstitutional] often refers to 'intellectual, moral and personal' perceptions, but never to the text and tradition of the Constitution. It is the latter rather than the former that ought to control. The Fifth Amendment provides that '[n]o person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life . . . without due process of law.' This clearly permits the death penalty to be imposed, and establishes beyond doubt that the death penalty is not one of the 'cruel and unusual punishments' prohibited by the Eighth Amendment.[120]

Thus, at the outset, the judicial conservatives have found that the text cannot function as an absolute bar on the implementation of capital punishment. However, the conservative viewpoint and the aggressiveness of its proponents has not only succeeded in keeping the constitutionality of the death penalty a closed question, it has also functioned as the main guide in the Supreme Court's dismantling of the procedural requirements for death. This result is largely a product of the conservative's view of our federalist system. They believe that in most instances, particularly when a moral judgment is made, the Court should defer to the will of the

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117. *See* John Ely, *Another Such Victory, Constitutional Theory and Practice in a World Where Courts are No Different Than Legislatures*, 77 VA. L. REV. 833 (1991).

118. For complete scholarly treatment of the conservative tide, see DAVID SAVAGE, TURNING RIGHT: THE MAKING OF THE SUPREME COURT (Wiley 1990); Herman Schwartz, *Trends in the Rehnquist Court*, 22 U. TOL. L. REV. 559 (1991); Mary Daly, *Affirmative Action, Equal Access and the Supreme Court's 1988 Term: The Rehnquist Court Takes a Sharp Turn to the Right*, 18 HOFSTRA L. REV. 1057 (1990).

119. Callins v. Collins, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting from denial of certiorari).

120. *Id.* at 1141 (Scalia, J., concurring in denial of certiorari).

legislature.[121] Thus, as the conservative wing of the Court strengthened, the Court has come to view its role in capital punishment as subservient to the states. Any moral context to this penalty should therefore be considered in the legislature, not the Supreme Court.

The rise of this conservative viewpoint and the transformation it has engendered is aptly illustrated in the development over the last twenty years of the Court's Eighth Amendment jurisprudence, the most important clause in the constitutional regulation of capital punishment. In *Gregg v. Georgia*,[122] Justice Stewart, a sometime judicial activist, wrote of the Court's role in Eighth Amendment jurisprudence: "It seems conceded by all that the amendment imposes some obligations on the judiciary to judge the constitutionality of punishment and that there are punishments that the amendment would bar whether legislatively approved or not."[123]

However, this view, which permitted the Court to place their own moral gloss on the Eighth Amendment, quickly fell victim to a conservative tide. Only a few years later, in *Coker v. Georgia*,[124] the Court rejected its subjective role. The Court, per Justice White, instead advocated a more objective indicia for the development of the Eighth Amendment, "Judgment should not be . . . [the] views of individual justices, [in an Eighth Amendment analysis] attention should be given to the public attitudes . . . legislative attitudes, and the response of juries."[125]

Thus, the opinions of the individual members of the Court were dropped for more objective measurements of the popular will. However, this new test still contained some opportunity for the Court to impose a moral judgment. The composition of public attitudes is always uncertain. A judge's choice of the indicia to measure this feeling could reflect his own morality.

However, in *Stanford v. Kentucky*[126] the Court dispelled this possibility by further limiting the elements contained in an Eighth Amendment assessment. The role of juries and public attitude was rejected. Instead, the Court adopted an Eighth Amendment analysis which focused almost solely upon the legislature. As Justice Scalia wrote:

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121. For a comment by a conservative idealogue on the illegitimacy of moral opinions by Justices of the Supreme Court see *Herrera v. Collins*, 506 U.S. 390, 427 (1993) (Scalia J., concurring).

122. Gregg v. Georgia, 428 U.S. 153 (1976).

123. *Id.* at 174.

124. Coker v. Georgia, 433 U.S. 584 (1977).

125. *Id.* at 591.

126. Stanford v. Kentucky, 492 U.S. 361 (1989).

> [P]etitioners seek to demonstrate [the public attitude] through other indicia, including public opinion polls, the views of interest groups and the positions adopted by various Professional associations. We decline the invitation to rest constitutional law on such uncertain foundations. A revised national consensus . . . must appear in the operative acts (laws and application of laws) that the people have approved.[127]

Thus, the rise of the judicial conservatives has resulted in a rejection of a judge's role in an Eighth Amendment analysis.[128] The Court has reformed its Eighth Amendment jurisprudence so that any moral judgment has been shifted completely to the state legislatures. They are the ones who will decide what is moral and what is not.[129]

The broader consequence of this event has been an almost across-the-board rejection by the Court of any system-wide moral role in their Eighth amendment decision-making process.[130] This has led the Court to take an amoral view of capital punishment. This the Court has admitted numerous times.[131] However, the Court has taken this fact and gone even further. They have decided that the en toto morality of capital punishment

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127. *Id.* at 377.

128. This abdication of judicial capability for system wide moral analysis within the Eighth Amendment has coincided with the Court's virtual rejection of any notion of proportionality for individual sentences within that same Amendment. In *Harmelin v. Michigan*, 501 U.S. 957 (1991), the Court held that a life sentence for the possession of 680 grams of cocaine was not violative of the Eighth Amendment. Thus, the Court has essentially rejected for itself any moral role in any Eighth Amendment analysis whatsoever; instead preferring to leave such responsibilities to the legislatures. *See* Lisa Tatulli, *Casenote* Harmelin v. Michigan, 2 SETON HALL CONST. L.J. 409 (1991); Kelly A. Patch, Harmelin v. Michigan: *Is Proportionate Sentencing Merely Legislative Grace?*, 1992 WIS. L. REV. 1697 (1992).

129. For a fuller treatment of this development *see* Note, Wilkins v. Missouri: *The Court Searches for A Consensus to the Cruel and Unusual Question*, 35 ST. LOUIS U.L.J. 125 (1990); Jane Radin, *The Jurisprudence of Death; Evolving Standards for the Cruel and Unusual Punishment Clause*, 126 U. PA. L. REV. 989 (1978).

130. The Court still retains the ability to make direct moral judgments on an individual basis through the traditional *shocking to the conscience* test embedded in the Due Process Clause. However, recent cases have exposed a reluctance by the Court to invalidate a capital sentence upon even this narrow, individual basis. *See, e.g.*, Romano v. Oklahoma, 512 U.S. 1 (1994) (stating death sentence given where prosecutor in closing argument referred to previous death sentence later overturned did not lessen responsibility of jury so as to violate due process).

131. *See* Furman v. Georgia, 408 U.S. 286, 375 (1972) (Burger, C.J., dissenting); Walton v. Arizona, 497 U.S. 639, 656 (1990) (Scalia, J., concurring in part and concurring in the judgment).

is now the domain of the legislature, the morality of how it is implemented and its frequency, will also be left to that body.[132]

The states have wholeheartedly, at least in concept, embraced frequency and a procedural laxness in the implementation of capital punishment. Therefore, the Court, under the guidance of Justice White's *Furman* opinion and the conservative notion of the Court's role, has consciously set out to increase the number of executions as a means to implement the will of the state legislatures. Viewed through a broader perspective, it began because the Eighth Amendment at its core is morally neutral. It is for the Court to give it a moral context. However, the Court, after initial steps in the other direction, abandoned a subjective role for itself in this assessment and instead, transformed an Eighth Amendment judgment into a counting game of the state legislatures. In doing this, the Court absolved themselves of any duty to morally assess the development of procedures for the death penalty.[133] Thus, without a moral context, the Court has concentrated solely on fulfilling Justice White's *Furman* opinion and the perceived legislative will. However, the Court has never asked itself whether what it was doing was moral.[134] This has led to the development of a system that, encourages the execution of individuals.

VI. CONCLUSION

This essay has eschewed a moral position on the validity of the death penalty. Instead, it has sought to find the basic factors that influenced the development of these system's apparatus of capital punishment through a comparison of two very different legal systems. Thus, it is the inescapable conclusion that the role of morality is the key difference in the development of the capital punishment systems of the Jewish law and the Constitution. A subtext and root cause of this difference is the structural role which is provided for in the text to the Supreme Court and to the Sanhedrin.

In the Jewish law, the existence of moral guides which the Sanhedrin could follow in the development of a system of capital

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132. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 446 (1993) (Blackmun, J., dissenting) (stating that "this Court is eager to do away with any restriction on the States' power to execute whomever and however they please").

133. The best example of this is *Herrera*, 506 U.S. at 390, where the Court equivocated on whether the Cohstitution, particularly the Eighth Amendment, protected the innocent from execution.

134. The development of the death penalty system and how it has allowed all of the actors, including the legislature, to absolve themselves of moral culpability is covered in Jack Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908 (1982). *See also* Stephen Garvey, *Politicizing Who Dies*, 101 YALE L.J. 187 (1991).

punishment were explicit. Furthermore, as a religious source these guides had to be considered and followed in the implementation of the death penalty. Thus, the Sanhedrin employed the Jewish viewpoint on life and mercy to develop a strict procedural system for the distribution of capital punishment. This was readily accomplished because of the structural posture of the Sanhedrin. The Sanhedrin was both the judicial and legislative branch within the Jewish law. Thus, without hesitation, the Sanhedrin could implement their interpretation of the composition of the scriptures. They could also, through this intersection of law and morals, examine the system-wide morality of capital punishment.

In contrast, the Supreme Court was a victim of its own position in the constitutional scheme. The clauses through which it could have mitigated the effect of capital punishment were clearly present. However, these clauses themselves were morally neutral in tone. They had to be given content and inner definition by the Supreme Court. However, the Supreme Court is only one of a number of players in the federal scheme. Their exact role in the interpretation and implementation of the laws is a continuing debate. The ideological viewpoint of a majority of the Court on this debate led it to eventually define the Eighth Amendment as an assessment of factors beyond the control of its subjective perceptions.

Thus, the Court destroyed its own capability to examine on a system-wide basis, the moral outcome of an Eighth Amendment analysis. However, this is the clause which the Court chose to regulate the death penalty.[135] In this moral vacuum, the effect of Justice White's *Furman* opinion was a wholly rational act which jibed with conservative notions embodied within the Court's Eighth Amendment jurisprudence. As a result, the Court consciously set out to increase the number of executions.

135. The Court was largely denied utilization of the Due Process Clause. *McGautha* had ruled that this clause had no bearing on the processes employed in the distribution of capital punishment.