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HISTORY REPEATS ITSELF: THE POST-*FURMAN* RETURN TO ARBITRARINESS IN CAPITAL PUNISHMENT

*“[T]he burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society.”*¹

—Justice Thurgood Marshall, concurring in *Furman v. Georgia*, 1972

*“A disproportionate number of capital murder defendants are black, and [a] disproportionate number of capital murder defendants are people who are accused of killing a white victim. And close to 100 percent of capital murder defendants are indigent. At some level, everyone in America already knows this.”*²

—David R. Dow, capital defense attorney, 2002

INTRODUCTION

The 1972 landmark ruling in *Furman v. Georgia* appeared to be the end of the arbitrary imposition of the death penalty in the United States.³ Almost everyone around the country, including the Justices who decided *Furman*, believed the decision permanently invalidated America’s death penalty.⁴ Though each of the five Justices voting in the *Furman* majority authored individual opinions with differing reasoning, each relied on the arbitrary imposition of the death penalty in concluding the punishment was unconstitutional under the Cruel and Unusual Punishments Clause of the Eighth Amendment.⁵ The Justices in the majority had little Eighth Amendment precedent to rely upon in declaring

1. *Furman v. Georgia*, 408 U.S. 238, 365–66 (1972) (Marshall, J., concurring).

2. David R. Dow, *How the Death Penalty Really Works*, in MACHINERY OF DEATH: THE REALITY OF AMERICA’S DEATH PENALTY REGIME 11, 20 (David R. Dow & Mark Dow eds., 2002).

3. See 408 U.S. at 239–40 (per curiam).

4. See Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 45 (2007).

5. See *Gregg v. Georgia*, 428 U.S. 153, 206 (1976); Lain, *supra* note 4, at 14.

the death penalty unconstitutional,⁶ but *Furman* came to be known for condemning the arbitrary imposition of the penalty.⁷ The Court's concern that the unique punishment of death not be imposed in an "arbitrary and capricious manner"⁸ seemed to indicate the Constitution would not tolerate a system where the penalty was "so wantonly and so freakishly imposed."⁹

Likely as a result of the fractured and unprecedented ruling in *Furman*, the decision did not permanently end the death penalty in the United States.¹⁰ Four years after its decision in *Furman*, in *Gregg v. Georgia*, the Supreme Court upheld the constitutionality of Georgia's new death penalty statute, believing it eliminated the possibility of arbitrariness.¹¹ The Court held the new statute negated the jury's ability to wantonly and freakishly impose a death sentence, allaying the concerns that prompted its decision in *Furman*.¹² With the Court's new commitment to standards in sentencing,¹³ arbitrariness in capital punishment appeared, at least to some, to be a thing of the past.

History, however, appears to be repeating itself. Arbitrariness continues to plague capital sentencing throughout the country and a review of the current status of the death penalty reveals many of the same factors that lead to *Furman* are again present. As a result, the Court may soon face a *Furman*-like challenge to the death penalty. Fortunately, significant Eighth Amendment precedent has developed since *Furman* which will allow the Court to approach the challenge in a more structured and reasoned way. When the challenge arises the Court should again declare the death penalty unconstitutional, but this time in a unified opinion declaring the death penalty unconstitutional per se, negating the possibility of history repeating itself yet again.

6. See Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1777-78 (1970); Lain, *supra* note 4, at 9-10.

7. See *Gregg*, 428 U.S. at 206.

8. *Id.* at 188.

9. *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring).

10. A look back reveals the *Furman* decision actually mobilized death penalty supporters and resulted in increased support for and use of the death penalty in years to come. See DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION* 287 (2010); Lain, *supra* note 4, at 46-47.

11. 428 U.S. at 206; see also *infra* note 99.

12. *Gregg*, 428 U.S. at 206-07.

13. See *id.* at 206 (noting Georgia's new sentencing procedures "focus[ed] the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant").

Part I of this comment provides a brief review of *Furman* and the circumstances leading to the decision. Part II discusses the factors indicating current arbitrariness and other recurring factors surrounding the American death penalty. Part III examines the development of the Cruel and Unusual Punishments Clause since *Furman*. Finally, Part IV discusses how the Supreme Court should apply its contemporary Eighth Amendment doctrine to the current circumstances surrounding the imposition of the death penalty.

I. THE *FURMAN* DECISION: REASONING AND SURROUNDING CIRCUMSTANCES

The *Furman* decision shocked the country,¹⁴ especially in light of the Court's ruling just one year earlier in *McGuatha v. California*, which upheld discretionary and standardless decision-making in the imposition of the death penalty.¹⁵ The *Furman* decision was not the product of a long line of precedent slowly chipping away at the institution of capital punishment; rather it resulted from the social and political movements at the time.¹⁶ At the time, Eighth Amendment doctrine and the Court's own precedent clearly supported the constitutionality of the death penalty,¹⁷ but the circumstances surrounding its imposition con-

14. See MICHAEL A. FOLEY, *ARBITRARY AND CAPRICIOUS* 62 (2003). Justice Brennan himself did not expect the Court's decision in *Furman*. Prior to leaving for summer vacation after the Court granted certiorari in *Furman* and its companion cases, he "directed [his] law clerks to begin research for what [he] fully expected would be [the] lone dissent." William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 322 (1986).

15. See 402 U.S. 183, 207 (1971) ("[I]t [is] quite impossible to say 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.").

16. See Lain, *supra* note 4, at 8–9; see also James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 COLUM. L. REV. 1, 26 (2007) (noting "[t]he Court had to break new legal ground to conclude that the constitutionality of the death penalty could turn on something other than the attributes of death as punishment and murder as a crime, such as racial patterns, . . . or the fairness of the procedures used to mete out the sanction").

17. See *McGuatha*, 402 U.S. at 221; HUGO ADAM BEDAU, *THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT* 35 (1977).

vinced five of the Justices the death penalty needed to be declared unconstitutional.¹⁸

A. *Eighth Amendment Precedent at the Time of Furman*

At the time of *Furman*, the Court's interpretation of the Cruel and Unusual Punishments Clause provided little support for the Justices' determination that the death penalty was cruel and unusual under the Clause's meaning.¹⁹ In separate opinions, Justices Brennan and Marshall reviewed the history of the Clause, agreeing it derived from the English Bill of Rights, but noting the Framers provided little interpretation of its meaning.²⁰ In the more than 150 years between the ratification of the American Bill of Rights and *Furman*, the Court only decided ten cases providing any interpretation of the Clause.²¹ These cases provided little interpretation of the Amendment and noted the difficulty in defining the provision with exactness.²² Only three times before *Furman* did the Court declare a punishment unconstitutional under the Eighth Amendment, none of which were a death penalty case.²³

Not until 1958 did the Court provide the first, and lasting, tool for interpreting the Clause.²⁴ In *Trop v. Dulles*, the Court held the

18. See Lain, *supra* note 4, at 18.

19. See STUART BANNER, THE DEATH PENALTY 233–34 (2002). In *Boykin v. Alabama*, the Court confronted a claim that a punishment of death for robbery was cruel and unusual, but ultimately decided the case on other grounds, providing no interpretation of the Eighth Amendment with regard to the death penalty. See 395 U.S. 238, 243–44 (1969) (reversing a death sentence after finding the record in the case was insufficient to prove the defendant had a full understanding of the constitutional rights he waived through a guilty plea).

20. See *Furman v. Georgia*, 408 U.S. 238, 258, 274 & n.16 (1972) (Brennan, J., concurring); *id.* at 316–18 (Marshall, J., concurring).

21. See *Powell v. Texas*, 392 U.S. 514, 533 (1968); *Robinson v. California*, 370 U.S. 660, 667 (1962); *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947); *Badders v. United States*, 240 U.S. 391, 394 (1916); *Weems v. United States*, 217 U.S. 349, 375–76, 381 (1910); *Howard v. Fleming*, 191 U.S. 126, 136 (1903); *O'Neil v. Vermont*, 144 U.S. 323, 331–32 (1892); *In re Kemmler*, 136 U.S. 436, 445–46 (1890); *Wilkerson v. Utah*, 99 U.S. 130, 135–36 (1878).

22. See *Furman*, 408 U.S. at 258 (Brennan, J., concurring); *Wilkerson*, 99 U.S. at 135–36.

23. See *Robinson*, 370 U.S. at 667 (holding criminal punishment for addiction to narcotics violated the Eighth Amendment); *Trop*, 356 U.S. at 103 (holding expatriation as punishment violated the Eighth Amendment per se); *Weems*, 217 U.S. at 358, 381 (1910) (holding fifteen years of hard labor in ankle chains and loss of other civil rights for falsification of a public record violated the Eighth Amendment).

24. See *Furman*, 408 U.S. at 327 (Marshall, J., concurring).

Amendment must be interpreted as drawing “its meaning from the evolving standards of decency that mark the progress of a maturing society.”²⁵ The Court determined the Eighth Amendment was not a static clause, but one with inherent flexibility, which must continually be reexamined “in the light of contemporary human knowledge.”²⁶ Until *Furman*, the Court only struck down a penalty under the Amendment when it found virtually unanimous or universal condemnation of the punishment.²⁷

Thus, the Justices confronted *Furman* armed only with precedent interpreting the Cruel and Unusual Punishments Clause as one that changes over time with the evolving standards of decency of a maturing society. The Clause never invalidated the death penalty prior to *Furman*.²⁸ In fact, only one year before, the Court upheld the death penalty in *McGuatha*, presuming its constitutionality under the Eighth Amendment.²⁹ Though the Court interpreted the Eighth Amendment as evolving, the doctrine did not seem to allow for such a drastic evolution of the standards of decency.³⁰ With the recent approval of the death penalty, the Court’s traditional legal analysis did not provide support for the Justices’ decision in *Furman*.³¹

B. *The Court’s Stated Reasoning*

Though the then-current interpretation of the Eighth Amendment did not clearly support their decision, five of the nine Justices declared the death penalty unconstitutional under the Cruel

25. 356 U.S. at 101.

26. *Furman*, 408 U.S. at 327 (Marshall, J., concurring) (quoting *Robinson*, 370 U.S. at 666); *id.* at 328 (noting Chief Justice Frankfurter’s emphasis on the “flexibility inherent in the words ‘cruel and unusual’” in *Trop*).

27. See *Robinson*, 370 U.S. at 666; *Trop*, 356 U.S. at 102; *Weems*, 217 U.S. at 366–67.

28. *Furman*, 408 U.S. at 380 (Burger, C.J., dissenting) (“In the 181 years since the enactment of the Eighth Amendment, not a single decision of this Court has cast the slightest shadow of a doubt on the constitutionality of capital punishment.”).

29. See *McGuatha v. California*, 402 U.S. 183, 310 n.74 (1971) (Brennan, J., dissenting). *McGuatha* was decided on due process grounds, leaving the question of whether the death penalty violated the Eighth Amendment open. See *id.* at 196 (majority opinion); Liebman, *supra* note 16, at 23.

30. See *Furman*, 408 U.S. at 409–10 (1972) (Blackmun, J., dissenting) (“I certainly subscribe to the position, that the Cruel and Unusual Punishments Clause may acquire meaning as public opinion becomes enlightened by a humane justice . . . My problem . . . is the suddenness of the Court’s perception of progress in the human attitude since decisions of only a short while ago.” (internal quotation marks omitted)).

31. Lain, *supra* note 4, at 11.

and Unusual Punishments Clause.³² The five concurring Justices could not agree on unified reasoning for the determination and wrote individual opinions; however, the common thread through each of the Justices' opinions was their concern with the arbitrary imposition of the death penalty.³³

Justices Brennan and Marshall found the death penalty per se unconstitutional based in part on its arbitrary imposition.³⁴ Justice Brennan found arbitrariness "virtually inescapable" in a punishment inflicted in a "trivial number of cases in which it is legally available."³⁵ He noted a steady decline in the infliction of the punishment, evidenced by the decline in executions and sentences from the 1930s to 1972.³⁶ He concluded there was a strong inference the punishment was not being "regularly and fairly applied" when it was inflicted no more than fifty times per year in a country of over 200 million people.³⁷ Based on arbitrariness and other justifications, Justice Brennan concluded the death penalty was unconstitutional in all circumstances.³⁸ He concluded, "Rather than kill an arbitrary handful of criminals each year, the States will confine them in prison."³⁹

Justice Marshall's main rationale was that capital punishment was excessive and therefore violated the Eighth Amendment.⁴⁰ However, even if the punishment was not excessive, he would have found it unconstitutional because it was morally unacceptable to the people of the United States.⁴¹ Though there were not clear indicators the people of the country found the punishment morally unacceptable, Justice Marshall determined the people would find it unacceptable if they knew more about the imposi-

32. *Furman*, 408 U.S. at 256–57 (Douglas, J. concurring); *id.* at 305 (Brennan, J., concurring); *id.* at 310 (Stewart, J., concurring); *id.* at 314 (White, J., concurring); *id.* at 370 (Marshall, J., concurring).

33. See *Gregg v. Georgia*, 428 U.S. 153, 206 (1976); Lain, *supra* note 4, at 14.

34. *Furman*, 408 U.S. at 293 (Brennan, J., concurring); *id.* at 364, 369 (Marshall, J., concurring).

35. *Id.* at 293 (Brennan, J., concurring).

36. *Id.* at 291–93.

37. *Id.* at 293.

38. *Id.* at 305. In addition to finding the penalty unconstitutionally arbitrary, Justice Brennan found the penalty was unusually severe and thus degrading to human dignity, *id.* at 291, unacceptable to contemporary society, *id.* at 300, and excessive and unnecessary for the protection of society. *Id.* at 304.

39. *Id.*

40. *Id.* at 359 (Marshall, J., concurring).

41. *Id.* at 360.

tion of the penalty.⁴² One of the reasons he believed the average citizen would find capital punishment unacceptable was its discriminatory imposition.⁴³ Justice Marshall found discriminatory imposition based on evidence that “Negroes were executed far more often than whites in proportion to their percentage of the population,”⁴⁴ that the penalty was employed against men and not women,⁴⁵ and that the “burden of capital punishment falls upon the poor, the ignorant, and the under privileged members of society.”⁴⁶ Accordingly, he concluded the death penalty violated the Eighth Amendment under all circumstances.⁴⁷

Justices Douglas, Stewart, and White each concluded capital punishment only violated the Eighth Amendment under the then-current statutes.⁴⁸ Each of these Justices also based their decision on the arbitrary imposition of the death penalty.⁴⁹ Justice Douglas noted the death penalty was applied “sparsely, selectively, and spottily to unpopular groups,” specifically African Americans, the poor, and the ill-educated.⁵⁰ He determined an important part of the Eighth Amendment was equality and concluded the death penalty was unconstitutionally cruel and unusual under the then-

42. *Id.* at 362–63, 369.

43. *Id.* at 363–64. In addition, Justice Marshall believed evidence that innocent people were executed and that the punishment “wreak[ed] havoc” on the entire criminal justice system would lead people to believe the death penalty was morally unacceptable. *Id.*

44. *Id.* at 364 (noting 3859 people were executed between 1930 and 1972, of which 1751 were white and 2066 were African American).

45. *Id.* at 365.

46. *Id.* at 365–66.

47. *See id.* at 370.

48. *Id.* at 256–57 (Douglas, J., concurring) (“[T]hese discretionary statutes are unconstitutional in their operation.”); *id.* at 310 (Stewart, J., concurring) (“[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”); *id.* at 314 (White, J., concurring) (“In my judgment what was done in these cases violated the Eighth Amendment.”). In *Furman*, the Justices reviewed the Georgia and Texas death penalty statutes in three companion cases. William Henry Furman was sentenced to death under Georgia’s statute for the murder of a householder while attempting to enter the home at night. *See id.* at 252 (Douglas, J., concurring). Lucious Jackson, Jr., a black male, was sentenced to death under Georgia’s statute for the rape of a white woman. *See id.* Elmer Branch, also a black male, was sentenced to death under Texas’s statute for the rape of a sixty-five year old white woman. *See id.* at 253.

49. *See id.* at 256 (Douglas, J., concurring); *id.* at 309–10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring).

50. *See id.* at 256 (Douglas, J., concurring). Few cases prosecuting a person of means or social position resulted in execution. Defendants able to employ expert legal counsel were “almost certain to avoid death penalties.” Sara R. Ehrmann, *For Whom the Chair Waits*, in *CAPITAL PUNISHMENT* 187, 205 (James A. McCafferty ed., 1972).

current statutes.⁵¹ Justice Stewart made the oft-cited statement that the few death sentences actually imposed were “cruel and unusual in the same way that being struck by lightning is cruel and unusual,”⁵² and concluded the “Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death . . . so wantonly and so freakishly imposed.”⁵³ Finally, Justice White reasoned the death penalty was arbitrary because of the infrequency of its imposition, even for the most atrocious crimes, and found no meaningful basis for distinguishing between the cases resulting in execution and those which did not.⁵⁴ In response to this arbitrariness, Justice White concluded the death penalty statutes before the Court in *Furman* violated the Eighth Amendment.⁵⁵

Overall, the Justices found significant arbitrariness in the capital punishment system and stretched existing Eighth Amendment doctrine to invalidate the death penalty statutes throughout the country.⁵⁶ The arbitrary infliction noted by the Justices, however, does not provide a complete picture of the institution of capital punishment in America leading up to *Furman*.⁵⁷ Other trends throughout the country certainly provided the catalyst for the Court’s decision.

C. *The Status of Capital Punishment Leading up to Furman*

Numerous indicators signaled the decline of the death penalty’s use and popularity at the time of *Furman*. The Justices discussed some of these indicators specifically, but others certainly played a role by creating a social and political climate seemingly ripe for the decision.⁵⁸

51. See *Furman*, 408 U.S. at 256–57 (Douglas, J., concurring).

52. *Id.* at 309 (Stewart, J., concurring).

53. *Id.* at 310.

54. *Id.* at 313 (White, J., concurring).

55. See *id.* at 314.

56. See Lain, *supra* note 4, at 11.

57. See *id.* at 18–19.

58. See generally Lain, *supra* note 4 (discussing the Court’s reliance on social and political movements of the time in rendering the *Furman* decision).

1. Decline in Executions and Sentences

The decline in executions and sentences signaled more than arbitrary imposition. The nation showed its discomfort with the penalty by using it reluctantly and sparingly. The number of executions dropped sharply in the years leading up to *Furman*.⁵⁹ Justice Brennan noted that the country averaged 167 executions per year in the 1930s, and that the average dropped to 128 per year in the 1940s and to 72 per year in the 1950s.⁶⁰ The 1960s showed a further decrease in the use of the punishment with an average of 48 per year from 1960–1962.⁶¹ The remainder of the 1960s and early 1970s saw an even steeper decline in executions with 21 in 1963, 15 in 1964, 7 in 1965, 1 in 1966, 2 in 1967, and no executions between 1968 and the *Furman* decision in 1972.⁶²

The number of sentences imposed in capital cases also declined significantly in the years leading up to *Furman*. Though the population and number of capital crimes committed increased greatly, capital sentencing became a rarity in the forty years leading up to *Furman*.⁶³ From 1935 to 1942, an average of 142 defendants received death sentences each year.⁶⁴ That number dropped to 106 per year in the 1960s,⁶⁵ revealing juries returned death sentences only about ten to twenty percent of the time when death was statutorily available.⁶⁶ Additionally, commutations and other reprieves spared over half of those sentenced to death in the 1960s.

59. *See Furman*, 408 U.S. at 291 (Brennan, J., concurring).

60. *Id.*

61. *Id.*

62. *See id.* at 291 n.40. The decrease in executions likely resulted in part because of intense challenges to the constitutionality of the penalty by the National Association for the Advancement of Colored People and the American Civil Liberties Union in the late 1960s, the 1960s criminal procedure revolution allowing death row inmates new opportunities to litigate prior to execution, and the decreased number of sentences imposed by juries in capital cases. *See Lain, supra* note 4, at 20–21.

63. *See Furman*, 408 U.S. at 292–93 (Brennan, J., concurring).

64. *Lain, supra* note 4, at 21 (citing *BANNER, supra* note 19, at 244).

65. *Furman*, 408 U.S. at 291–92 (Brennan, J., concurring). Though the average number of death sentences decreased, the decline in death sentencing was not perfectly linear. The average of 106 resulted from 140 sentences in 1961, 103 in 1962, 93 in 1963, 106 in 1964, 86 in 1965, 118 in 1966, 85 in 1967, 102 in 1968, 97 in 1969, and 127 in 1970. *Id.* at 292 n.41 (citations omitted).

66. *See id.* at 291–92. The number is especially surprising because death qualified juries were not prohibited until 1968. *See Witherspoon v. Illinois*, 391 U.S. 510, 523 (1968) (holding the imposition of a death sentence by a jury where veniremen were excluded for cause simply because they voiced general objections to the death penalty was constitutionally impermissible).

Only one out of every four death sentences actually resulted in execution.⁶⁷ The decrease in sentences and executions clearly showed the reluctance of the American people to impose the death penalty despite the statutory availability of the sentence. This is especially noteworthy because the decrease occurred in spite of the general belief that the rate of violent crime had increased during the same period.⁶⁸

2. National Trend Toward Abolition

Though not specifically noted by the Justices, the national trend toward abolition likely played a role in setting the stage for the *Furman* decision. Several state legislatures abolished the death penalty in the decades leading up to *Furman*.⁶⁹ Six states and territories categorically abolished the death penalty between 1957 and 1972—the Alaska and Hawaii territories in 1957,⁷⁰ West Virginia⁷¹ and Iowa in 1965,⁷² New Mexico in 1969,⁷³ and California, by judicial decision, in 1972.⁷⁴ At the same time, several states severely limited the crimes for which the penalty was available, resulting in limited abolition in those states.⁷⁵ Even in the states retaining the death penalty, a trend toward discretionary statutes and limiting the crimes eligible for the penalty emerged.⁷⁶ The movement toward abolition in the mid-twentieth century is especially noteworthy because no states made legislative moves toward abolition in the forty years leading up to the late 1950s.⁷⁷

67. See *Furman*, 408 U.S. at 292 n.46 (Brennan, J., concurring).

68. See MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 52 (1973).

69. See *id.* at 51–52; Lain, *supra* note 4, at 22.

70. MELTSNER, *supra* note 68, at 51.

71. BANNER, *supra* note 19, at 244.

72. *Id.*; MELTSNER, *supra* note 68, at 51–52.

73. GARLAND, *supra* note 10, at 120.

74. *People v. Anderson*, 493 P.2d 880, 899 (Cal. 1972) (concluding capital punishment was “impermissibly cruel” and its authorization was unconstitutional).

75. GARLAND, *supra* note 10, at 120. New York and Vermont in 1965 and New Jersey in 1972 passed laws abolishing the death penalty for all murders except those of on-duty police and prison officials and those committed by an inmate serving a life sentence. *Id.*

76. Lain, *supra* note 4, at 23–24. The movement toward abolition was incomplete as one state, Delaware, abolished the death penalty in 1958 only to reinstate the penalty again in 1961, and many states elected to retain their death penalty even when facing abolitionist legislation. See GARLAND, *supra* note 10, at 120; Lain, *supra* note 4, at 24–25.

77. WILLIAM J. BOWERS, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA*, 1864–

In addition to state abolition, political and public opposition to the death penalty created pressure to abolish the death penalty throughout the country. Numerous political groups publicly opposed the death penalty in the 1960s.⁷⁸ In 1965, the Department of Justice announced its opposition to the death penalty;⁷⁹ and in 1967, the National Crime Commission described the administration of the death penalty as intolerable and recommended its abolition absent substantial reform.⁸⁰ In 1968, in an unprecedented move, the Johnson Administration specifically asked Congress to abolish the penalty.⁸¹ Also during the late 1950s and early 1960s, state governors pushed for abolition.⁸² The North Carolina governor made many public comments against the death penalty,⁸³ and the Ohio governor campaigned against the penalty, going so far as to hire convicted murderers in order to demonstrate the possibility of rehabilitation.⁸⁴

Many nongovernmental organizations also took a public stand against the death penalty as well. Several of the nation's prominent newspapers, including the *New York Times*, *Washington Post*, *Los Angeles Times*, and *Philadelphia Inquirer*, voiced opposition, as did organizations such as the American Judicature Society, the American Correctional Association, and the National Council on Crime and Delinquency.⁸⁵ By the end of the 1960s, most major Protestant denominations and the American Jewish

1982, at 10 (Ne. Univ. Press 1984) (1974); *see also* BANNER, *supra* note 19, at 223.

78. *See* Lain, *supra* note 4, at 33–34.

79. BANNER, *supra* note 19, at 241.

80. PRESIDENT'S COMM'N ON LAW ENFORCEMENT & THE ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (1967) (citing the penalty's infrequent imposition, decline in application, unclear deterrent effect, undesirable impact on the administration of justice, and discriminatory patterns in imposition as necessitating significant reform or abandonment of the punishment).

81. *To Abolish the Death Penalty: Hearing on S.1760 Before the S. Comm. on the Judiciary*, 90th Cong. (1968) [hereinafter *Death Penalty Hearing*], as reprinted in CAPITAL PUNISHMENT, *supra* note 50, at 180 (statement of Attorney Gen. Ramsey Clark). In 1971, President Johnson's Committee on Reform of the Federal Laws also called for abolition of the federal death penalty. *Id.*

82. BANNER, *supra* note 19, at 240–41.

83. *Id.* (noting that North Carolina Governor Terry Sanford made so many statements against the death penalty that the state's condemned prisoners made a point to mention it in their clemency petitions). The North Carolina governor's opposition to the punishment is especially informative as one would expect strong support for the punishment in the southern state. *See* Lain, *supra* note 4, at 34.

84. BANNER, *supra* note 19, at 240.

85. Lain, *supra* note 4, at 32 (citations omitted).

community officially opposed the death penalty.⁸⁶ Many of these organizations made their opposition known to the Court in the eleven amicus briefs filed in *Furman*, supporting the Justices' ultimate decision.⁸⁷

Public opinion polls also showed declining national support for the death penalty. In 1953, sixty-eight percent of the public supported the death penalty, but support fell to less than half by 1965.⁸⁸ A 1966 Gallup poll showed death penalty abolitionists outnumbered supporters.⁸⁹ Overall, support for the death penalty fell between twenty to thirty percent in just over a decade, the steepest decline since Gallup began polling on the death penalty in the 1930s.⁹⁰ The political and public opinion of the death penalty seemed to show the Court that the nation opposed the death penalty despite the fact that forty-one states and the federal government had capital punishment statutes on the books.⁹¹

3. International Abolition and Pressure

The mid-twentieth century saw a major movement toward abolition internationally as well. By the end of the decade, the United States became an outlier by retaining the death penalty.⁹² The United States traditionally had milder penal codes than any in Europe, but that began to change in the mid-twentieth century.⁹³ Most west European countries abolished capital punishment in the years immediately following World War II or in the 1960s and 1970s.⁹⁴ By 1968, more than seventy nations, including almost all of western Europe, formally rejected capital punishment.⁹⁵ The pressure on the United States mounted when international groups and individuals began protesting individual executions. In

86. See Brief Amici Curiae of the Synagogue Council of America et al. at 4–5, *Furman v. Georgia*, 408 U.S. 238 (1972) (No. 69-6003); BANNER, *supra* note 19, at 241.

87. See MELTSNER, *supra* note 68, at 254–57; Lain, *supra* note 4, at 32. The Court received only one amicus brief in favor of the constitutionality of the death penalty, which came from the State of Indiana. MELTSNER, *supra* note 68, at 254.

88. Lain, *supra* note 4, at 32–33.

89. *Id.* at 33; see also BANNER, *supra* note 19, at 240.

90. Lain, *supra* note 4, at 32–33.

91. See *Furman*, 408 U.S. at 340–41 (Marshall, J., concurring).

92. See BANNER, *supra* note 19, at 242.

93. *Id.* at 243.

94. GARLAND, *supra* note 10, at 112.

95. *Death Penalty Hearing*, *supra* note 81, at 177; see also GARLAND, *supra* note 10, at 111–12.

addition, the racial overtones of the system resulted in international scorn, creating a problem for foreign relations.⁹⁶ Some countries, after abolishing capital punishment themselves, appealed to the United Nations in an effort to put pressure on the United States to do the same.⁹⁷

International pressures, combined with the national movement toward abolition and the decreased imposition of the death penalty, certainly affected the Court's decision in *Furman*. These circumstances pushed the Court to make the decision that would theoretically end the arbitrary imposition of the death penalty in the United States for good. History, however, reveals a different story. In response to *Furman*, the pro-death penalty movement grew stronger and many states reinstated the penalty.⁹⁸ The Court held the new statute presented in *Gregg* did not violate the Constitution because it provided safeguards against "arbitrariness and caprice."⁹⁹ The next section discusses how the Court-approved, guiding statutes did not curb the arbitrariness of the death penalty. The imposition of the death penalty has again become arbitrary and many of the same social and political pressures present at the time of *Furman* are present in the country today.

II. HISTORY REPEATS: THE CURRENT STATUS OF THE AMERICAN DEATH PENALTY

Many of the factors influencing the Justices' decision in *Furman* are present in the current imposition of the American death penalty. These factors and several new arbitrariness concerns indicate capital punishment is imposed as arbitrarily now as before *Furman*. Many of the socio-political factors not explicitly relied on in *Furman*, but undoubtedly catalyzing the decision, are again present, creating a climate ripe for a *Furman*-like challenge to the death penalty today.

96. See BANNER, *supra* note 19, at 243–44. President Eisenhower delayed an execution until after a trip to Latin America for fear of the hostility he would encounter during his trip if an execution were to take place. *Id.* at 243.

97. *Id.*

98. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 207 (1976); see also Lain, *supra* note 4, at 47.

99. *Gregg*, 428 U.S. at 196–98. The Court reasoned the new statute would direct the jury's attention to "the particularized nature of the crime and the particularized characteristics of the individual defendant," ensuring a jury could no longer "wantonly and freakishly" impose death sentences. *Id.* at 206–07.

A. *Arbitrariness Is Still Present in Capital Punishment*

In 1976, the Supreme Court upheld Georgia's new death penalty statute in *Gregg*, believing the statute created sentencing procedures that would eliminate the arbitrary and capricious imposition of death sentences.¹⁰⁰ The Court found the statute eliminated arbitrariness and focused the jury's attention on "the particularized nature of the crime and the particularized characteristics of the individual defendant."¹⁰¹ The statute did so, according to the Court, by narrowing the class of murderer eligible for the death penalty, requiring the jury to find at least one statutory aggravating factor beyond a reasonable doubt, allowing jurors to consider mitigating factors, and providing an automatic appeal.¹⁰² The Court did not overrule *Furman* in *Gregg*, but determined the death penalty could be administered in a nonarbitrary fashion under the new statute.¹⁰³ A review of the current state of the death penalty, however, reveals the death penalty is imposed at least as arbitrarily as it was when *Furman* was decided in 1972.

1. Low and Decreasing Execution Rates and Sentencing

Execution rates increased after the reinstatement of the death penalty in 1976 until the end of the twentieth century, when the number of executions began decreasing again.¹⁰⁴ The increase in executions culminated in 1999 and 2000, with ninety-eight and eighty-five executions in those years, respectively.¹⁰⁵ Since then, the number of executions throughout the country decreased to thirty-seven in 2008, fifty-two in 2009, and only forty-six in 2010.¹⁰⁶ These numbers are especially significant in light of Jus-

100. *Id.*

101. *Id.* at 206.

102. *Id.* at 196–98. In addition to arbitrariness recurring in American capital sentencing, many states since *Gregg* have expanded their death penalty statutes to make more offenders eligible for the punishment. See, e.g., John H. Blume et al., *When Lightning Strikes Back: South Carolina's Return to the Unconstitutional, Standardless Capital Sentencing Regime of the Pre-Furman Era*, 4 CHARLESTON L. REV. 479, 483 (2010) (noting the return to discretionary statutes has contributed to the return to arbitrariness in capital sentencing after *Gregg*).

103. *Gregg*, 428 U.S. at 206–07.

104. See TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, 2009—STATISTICAL TABLES 1 fig.2, 15 tbl.13 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cp09st.pdf>.

105. *Id.* at 15 tbl.13.

106. *Id.*; DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2010: YEAR END REPORT 1

tice Brennan's conclusion that a strong inference of arbitrariness results from the infliction of the death penalty less than fifty times in a country of over 200 million people.¹⁰⁷ Since Justice Brennan drew his conclusions, the population has risen to over 300 million people,¹⁰⁸ yet the number of executions remains less than fifty per year.¹⁰⁹ Accordingly, the low imposition rates raise the same inference of arbitrary imposition today as they did in 1972, if not an even stronger one.

The number of death sentences imposed by judges and juries has decreased significantly from the height of their imposition in the 1990s.¹¹⁰ When adjusted for the increase in national population since 1972, the number of death sentences imposed is roughly parallel to the frequency with which the sentences were handed down leading up to *Furman*.¹¹¹ Just as Justice Brennan noted in *Furman*, the average number of death sentences imposed per year has decreased significantly in recent years.¹¹² The average number of sentences per year in the 1980s was 259¹¹³ and 287 in the 1990s.¹¹⁴ The first decade of this century saw a significant decrease to an average of 145 sentences per year.¹¹⁵ The past

(2010) <http://www.deathpenaltyinfo.org/documents/2010YearEnd-Final.pdf> [hereinafter YEAR END REPORT].

107. *Furman v. Georgia*, 408 U.S. 238, 293 (1972) (Brennan, J., concurring).

108. U.S. CENSUS BUREAU, <http://www.census.gov> (last visited Apr. 15, 2011).

109. YEAR END REPORT, *supra* note 106, at 1.

110. See *Death Sentences in the United States from 1977 by State and by Year*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008> (last visited Apr. 15, 2011) [hereinafter *Death Sentences by Year*].

111. David McCord, *Lightning Still Strikes: Evidence from the Popular Press that Death Sentencing Continues to be Unconstitutionally Arbitrary More than Three Decades After Furman*, 71 BROOK. L. REV. 797, 806–07 (2005). The study reviewed the four years leading up to *Furman* and the years 2000–2004 and found the rate per 100,000 population was 0.051 leading up to *Furman* and 0.053 in the beginning of the century. *Id.* The study is now several years old, but the number of sentences has decreased since keeping the study's conclusions relevant in 2011. See YEAR END REPORT, *supra* note 106, at 1–4; *Death Sentences by Year*, *supra* note 110.

112. *Furman*, 408 U.S. at 291–92 (1972) (Brennan, J., concurring); *Death Sentences by Year*, *supra* note 110.

113. Specifically, the 1980s saw the following numbers of death sentences—1980: 173; 1981: 223; 1982: 267; 1983: 251; 1984: 286; 1985: 261; 1986: 300; 1987: 287; 1988: 289; 1989: 256. See *Death Sentences by Year*, *supra* note 110.

114. The 1990s saw the following numbers of death sentences—1990: 251; 1991: 268; 1992: 287; 1993: 287; 1994: 313; 1995: 313; 1996: 315; 1997: 268; 1998: 294; 1999: 277. *Id.*

115. The 2000s saw the following numbers of death sentences—2000: 224; 2001: 159; 2002: 166; 2003: 152; 2004: 140; 2005: 139; 2006: 123; 2007: 120; 2008: 119; 2009: 112. *Id.*

five years show a further downward trend in the number of sentences with an average of only 118 per year.¹¹⁶

2. Race, Gender, and Status

Another major concern and indicator of arbitrariness in 1972 was the death penalty's disproportionate imposition on African Americans, men, and poor, ill-educated defendants.¹¹⁷ Racial disparity continues to plague the death penalty's imposition, indicating a return to arbitrariness. The majority of studies show the race of the victim or defendant is likely to influence charging decisions and ultimately who receives the death penalty.¹¹⁸ As of 2009, over forty-three percent of all executions since *Furman* were carried out on minorities.¹¹⁹ The death penalty is still predominantly imposed on men and the ill-educated. At year-end 2009, over ninety-eight percent of condemned death row inmates were males and only nine percent had more than a twelfth grade education.¹²⁰ The discriminatory imposition of the death penalty since *Furman* is clear. These disparities reveal decisionmakers arbitrarily decide who receives the death penalty based on factors other than the particularized nature of the crime, as required by *Gregg*.¹²¹

116. The last five years have seen the following numbers of death sentences—2006: 123; 2007: 120; 2008: 119; 2009: 112; 2010: 114. *Id.* (providing data for the years 2006–2009); YEAR END REPORT, *supra* note 106 (providing data for 2010).

117. See *Furman*, 408 U.S. at 249–50 (Douglas, J., concurring) (“The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.”(internal citations omitted)); *id.* at 365–66 (Marshall, J., concurring) (“There is also overwhelming evidence that the death penalty is employed against men and not women It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society.”).

118. See, e.g., Sheri Lynn Johnson, *Race and Capital Punishment*, in BEYOND REPAIR? AMERICA'S DEATH PENALTY 121, 129–30 (Stephen P. Garvey ed., 2003).

119. See SNELL, *supra* note 104, at 15 tbl.13. The true depth of research and studies on race and the death penalty is beyond the scope of this comment. For further reading see G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425 (2010), and David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1658–59 & n.61 (1998).

120. SNELL, *supra* note 104, at 9 tbl.5.

121. See *Gregg v. Georgia*, 428 U.S. 153, 206 (1976) (requiring determination based on the particularized nature of the crime and the particularized characteristics of the individual defendant).

3. Geographic Disparity

Though not relied on in *Furman*, the geographic disparity in the penalty's present imposition also indicates arbitrariness. Almost half the jurisdictions in the United States conducted no executions over the last ten years.¹²² In 2010, only twelve states carried out any executions.¹²³ In the jurisdictions carrying out executions, the majority of executions fell within a small number of states. Since *Gregg*, three states—Texas, Virginia, and Oklahoma—conducted more than half of all the executions in the United States.¹²⁴ Indeed, from 2004 to 2009, all executions were carried out in only ten percent of the counties throughout the country.¹²⁵ The murders in those counties were no more heinous than in other parts of the country, but prosecutors in those counties sought the death penalty more often, leading one commentator to refer to the counties collectively as the “Death Belt.”¹²⁶ These statistics indicate the imposition of the death penalty depends more on the location of the crime than the “particularized nature of the crime and the particularized characteristics of the individual defendant” as required by *Gregg*.¹²⁷

4. The Worst of the Worst

Finally, the capital punishment system in America exhibits arbitrariness by failing to choose the “worst of the worst” for its imposition. A study of all sentences for death eligible offenses in 2004 concluded the system overincludes defendants who are not the “worst of the worst” and does not include a robust number of those who would be considered the “worst of the worst.”¹²⁸ The

122. *Almost Half of U.S. Jurisdictions Have Had No Executions in 10 Years*, DEATH PENALTY INFO. CENTER (Jan. 5, 2011), <http://www.deathpenaltyinfo.org/almost-half-us-jurisdictions-have-had-no-executions-10-years> (noting there have been no executions in at least ten years for twenty-six of fifty-three United States jurisdictions—including the fifty states, the District of Columbia, the federal government, and the military).

123. YEAR END REPORT, *supra* note 106, at 2.

124. FRANK R. BAUMGARTNER & RICHARD J. RICHARDSON, UNIV. OF N.C. AT CHAPEL HILL, *THE GEOGRAPHY OF THE DEATH PENALTY 2* (2010), <http://www.unc.edu/~fbaum/Innocence/NC/Baumgartner-geography-of-capital-punishment-oct-17-2010.pdf>.

125. Robert Smith, *Arbitrary as Ever: Only 10% of Counties in the Country Have Imposed a Death Sentence in the Last 6 Years*, SECOND CLASS JUSTICE (Oct. 29, 2010), <http://www.secondclassjustice.com/?p=116>.

126. *See id.*

127. *Gregg v. Georgia*, 428 U.S. 153, 206 (1976).

128. McCord, *supra* note 111, at 864. Though no system exists for collecting data on all

study determined that “159 murderers who did *not* receive death sentences were more depraved than about the bottom one-third who *did*” receive the penalty, a group totaling forty-three murderers.¹²⁹ In reviewing these sentences, the study concluded the system “does not assure merit-based reasons” for choosing between the defendants receiving death sentences and those spared death.¹³⁰ This finding of meritless determination is reminiscent of Justice White’s concern in *Furman* that there was no meaningful basis for distinguishing between the cases which resulted in death and those that did not.¹³¹

Anecdotal evidence also reveals the system fails to select the “worst of the worst.” Terry Nichols, convicted of killing 161 people, and serial killers Charles Cullen and Richard White, were spared death sentences.¹³² Yet Cory Maye, whose bedroom was suddenly raided by the police, causing him to fire one shot and hit one of the police officers—just missing the bulletproof vest—was sentenced to death by a jury.¹³³ Failing to select the “worst of the worst” indicates the punishment’s arbitrary imposition rather than consideration of the particularized facts of the crime.¹³⁴

In an effort to ensure the “worst of the worst” receive death sentences, many jurisdictions encourage jurors to consider the danger a defendant will pose to society in the future by including future dangerousness as an aggravating factor.¹³⁵ Research shows,

death-eligible murders in the United States, the author of this study compiled a database of all death-eligible offenses in the country during 2004, relying primarily on news reports appearing in searchable online databases. *Id.* at 825–26.

129. *Id.* at 864. The author determined depravity by assigning “depravity points” to each offense based on the aggravation of the offenses (i.e., the method of murder, number of murders, type of victim, motive for killing, and disposal of the body). *Id.* at 833–40. Mitigating factors were not taken into account in the depravity calculation because the effect of mitigation is difficult to quantify and has unpredictable effects on any given case. *Id.* at 840–43.

130. *Id.* at 864.

131. *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring).

132. McCord, *supra* note 111, at 864. Nichols was spared a death sentence by a jury determination. *Id.* (citations omitted). Cullen and White were spared death sentences by the prosecutors in their cases because they agreed to identify their victims or the location of their remains. *Id.* (citations omitted).

133. *Id.* (citations omitted).

134. See *Gregg v. Georgia*, 428 U.S. 153, 206 (1976).

135. See, e.g., OR. REV. STAT. § 163.150(1)(b)(B) (2009) (requiring a determination of future dangerousness by jurors to impose a death sentence); TEX. CRIM. PROC. CODE ANN. art. 37.071, § 2(b)–(c) (West 2006) (same); see also Daniel A. Krauss et al., *Limited Expertise and Experts: Problems with the Continued Use of Future Dangerousness in Capital Sentencing*, in MENTAL DISORDER AND CRIMINAL LAW 135, 138–39 (Robert F. Schopp et al.

however, that juror and psychologist predictions of future dangerousness are rarely correct.¹³⁶ One study concluded jurors making a prediction of future violence were wrong ninety-seven percent of the time, showing only “chance-level” performance of capital juries in predicting future dangerousness.¹³⁷ Experts and psychologists presented to the jury by the prosecution do not fare any better. A recent study of defendants predicted by experts at their trials to be a future danger to society showed that none of the inmates “committed another homicide during their . . . incarceration” and “only 5.2% of [the] inmates . . . had committed a serious assaultive act requiring more than first aid.”¹³⁸ The American Psychological Association (“APA”) agrees that psychiatrists cannot predict long-term future dangerousness, stating that such predictions, even under the best of conditions, are wrong in two

eds., 2009). In a case decided the same day as *Gregg*, the Court held the then-new Texas statute requiring jurors to predict the future dangerousness of the defendant was constitutional. The Court recognized it is not easy to predict the future, but decided that difficulty did not mean the prediction could not be made. *Jurek v. Texas*, 428 U.S. 262, 274–75 (1976), *overruled in part by* *Abdai-Kabir v. Quarterman*, 550 U.S. 233, 250 n.12 (2007). I use the term “future dangerousness” to encompass all aggravating factors alleging a defendant’s future danger to society.

136. See Mark D. Cunningham et al., *Capital Jury Decision-Making: The Limitations of Predictions of Future Violence*, 15 PSYCHOL. PUB. POL’Y & L. 223, 223 (2009) (reporting on a 2009 study reviewing the prison disciplinary records of seventy-two federal capital defendants for whom juries made a determination concerning the likelihood the defendant would commit future criminal acts of violence); John F. Edens et al., *Predictions of Future Dangerousness in Capital Murder Trials: Is It Time to “Disinvent the Wheel?”*, 29 LAW & HUM. BEHAV. 55, 61–62 (2005) (reporting on a 2005 study reviewing the postconviction institutional behavior of 155 Texas capital inmates where experts had testified for the state predicting their future dangerousness). The unreliability of these predictions alone should be enough to prohibit jurors from considering future dangerousness as an aggravating factor in death penalty decisionmaking. The Court has repeatedly emphasized that, because of the exceptional and irrevocable nature of the death penalty, “extraordinary measures” are required by the Eighth Amendment to ensure the reliability of decisions regarding both guilt and punishment in a capital trial. *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O’Connor, J., concurring); see also *Beck v. Alabama*, 447 U.S. 625, 637–38 (1980); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Gardner v. Florida*, 430 U.S. 349, 357–58 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

137. Cunningham, *supra* note 136, at 240, 246. The results of this study are consistent with other studies on the accuracy of juror predictions of future violence. See, e.g., James W. Marquart et al., *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 LAW & SOC’Y REV. 449, 462–64 (1989) (comparing predictions of future dangerousness to “gazing in a crystal ball”).

138. Edens, *supra* note 136, at 62–63. The study sample included forty-eight former death row inmates (whose sentences were reduced post-capital sentencing), forty-two current death row inmates, and sixty-five executed death row inmates. *Id.* at 62 tbl.1. Conditions on Texas’s death row were largely “similar to that of general population, including routine, unshackled interactions with staff and other inmates . . . and the ability to hold work-eligible status” until November of 1998. *Id.* at 62.

out of every three cases.¹³⁹ As a result, the APA encouraged the Supreme Court to prohibit psychiatrists from offering their predictions of future dangerousness at capital trials.¹⁴⁰ Though considering future dangerousness appears to provide a standard for ensuring the “worst of the worst” are sentenced to death, the inaccuracies of juror and expert predictions actually result in defendants who pose no danger to society receiving sentences of death.¹⁴¹

Arbitrariness clearly exists in the imposition of the death penalty today. The low number of executions and sentences, indications of discriminatory imposition, geographic disparity, and failure to impose the sentence on the “worst of the worst” imply significant arbitrariness. Compared with the decades leading up to *Furman*, the current capital punishment system in America appears to be at least as arbitrary as when the Court declared it unconstitutional in *Furman*. The repeated arbitrariness, however, is not the only recurring condition in America’s death penalty—social and political pressures for abolition are also present today.

B. *Recurring Social and Political Pressure*

Social and political pressures toward abolition seemed to provide a catalyst for the Justices’ decision in *Furman*.¹⁴² Many of these same pressures are present in the current American capital punishment.

139. Brief Amicus Curiae for the American Psychiatric Ass’n at 9, *Barefoot v. Estelle*, 463 U.S. 880 (1983) (No. 82-6080).

140. *Id.* at 8. The Court dismissed the APA’s concerns, stating “the suggestion that no psychiatrist’s testimony may be presented with respect to the defendant’s future dangerousness is somewhat like asking [the Court] to disinvent the wheel.” *Estelle*, 463 U.S. at 896.

141. The errors in predicting future dangerousness are especially concerning because research shows future dangerousness plays a part in almost all jury determinations to impose a death sentence. Between 1995 and 2006, “future violence was alleged as a non-statutory aggravating factor in [77]% of the federal capital prosecutions” and a “death [sentence] occurred in over 80% of the federal cases where the jury found that future prison violence was likely.” Cunningham, *supra* note 136, at 225, 244. A 2001 study in South Carolina found that even when prosecutors have not raised the issue of future dangerousness, it is present in the jury’s determination all the same. John H. Blume et al., *Future Dangerousness in Capital Cases: Always “At Issue”*, 86 CORNELL L. REV. 397, 397–98 (2001). Even when prosecutors did not raise future dangerousness, nearly seventy percent of the jurors said “keeping the defendant from ever killing again” was fairly or very important to their decision. *Id.* at 407.

142. See discussion accompanying *supra* notes 58–99.

1. National Trend Toward Abolition

A trend toward abolition is once again present, as indicated by state actions abolishing the death penalty and public opinion polls. In recent years, several states abolished the death penalty or prevented its reinstatement, just as in the fifteen years leading to *Furman*.¹⁴³ In 2004, the New York Court of Appeals declared the state's death penalty statute unconstitutional,¹⁴⁴ and the New York legislature voted in 2005 not to revise the statute in order to reinstate the penalty.¹⁴⁵ Also in 2005, twenty-one years after the State's Supreme Judicial Court struck down a constitutional amendment allowing the penalty, Massachusetts legislators defeated a bill to bring back the death penalty.¹⁴⁶ The New Jersey legislature enacted a moratorium on the death penalty in 2006,¹⁴⁷ and the legislature formally repealed the state's death penalty statute in 2007.¹⁴⁸ In 2009, New Mexico abolished the death pe-

143. See *supra* notes 69–77 and accompanying text.

144. See *People v. LaValle*, 817 N.E.2d 341, 359 (N.Y. 2004) (declaring New York's death penalty statute facially unconstitutional because the court considered the jury deadlock instruction coercive). In 2007 the New York Court of Appeals overturned the death sentence of John Taylor, New York's last death row inmate, despite the fact that the judge in Taylor's case changed the jury instruction. *People v. Taylor*, 878 N.E.2d 969, 978 & n.12 (N.Y. 2007). The court held *LaValle* controlled the case, resulting in a determination that Taylor's sentence occurred under a facially unconstitutional statute. See *id.* at 984.

145. Michael Powell, *In N.Y., Lawmakers Vote Not to Reinstate Capital Punishment: Accidental Execution of the Innocent Cited*, WASH. POST, Apr. 13, 2005, at A3.

146. Scott Helman, *Death Penalty Bill Fails in House*, BOS. GLOBE, Nov. 16, 2005, at B1.

147. Act of Jan. 12, 2006, ch. 321, 2005 N.J. Laws 2165–68 (creating the New Jersey Death Penalty Study Commission to review the state's administration of the death penalty and imposing a moratorium on the death penalty until at least sixty days after the commission's report); see also Scott E. Sundby, *The Death Penalty's Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor*, 84 TEX. L. REV. 1929, 1930 & n.5 (2006). The New Jersey Death Penalty Study Commission completed its study and ultimately recommended New Jersey abolish the death penalty and replace it with life imprisonment without the possibility of parole, to be served in a maximum security facility. N.J. DEATH PENALTY STUDY COMM'N, NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT 1 (2007).

148. Act of July 5, 1983, ch. 245, 1983 N.J. Laws 1093–98, *repealed by* Act of Dec. 17, 2007, ch. 204, 2007 N.J. Laws 1427–34; see also Jeremy W. Peters, *Corzine Signs Bill Ending Executions, Then Commutes Sentences of 8*, N.Y. TIMES, Dec. 18, 2007, at B3. The abolition by the New Jersey legislature is especially significant because it was the first state legislature to do so in the forty years following the reinstatement of the death penalty in 1976. Keith B. Richburg, *N.J. Approves Abolition of Death Penalty; Corzine to Sign*, WASH. POST, Dec. 14, 2007, at A3. The same was true of the states abolishing the death penalty leading up to *Furman*, where forty years without any legislative abolition preceded the movement. See *supra* note 77 and accompanying text.

nalty for all crimes.¹⁴⁹ Illinois' road to abolition further exemplifies the growing concern with the administration of the death penalty. In 2003, Illinois Governor George H. Ryan commuted the sentences of all 167 death row inmates in Illinois prior to leaving office.¹⁵⁰ After the commutation, Illinois' death penalty statute remained on the books, but the state legislature ultimately repealed it in early 2011,¹⁵¹ continuing the trend toward abolition throughout the country.¹⁵²

Public opinion polls also reveal declining support for the death penalty in America. A 2005 Gallup poll revealed support for the death penalty dropped from a high of eighty percent in September 1994 to only sixty-four percent in October 2005.¹⁵³ When asking whether a person is for or against the death penalty, the Gallup poll showed support remained around sixty-four percent in October 2010.¹⁵⁴ However, a more important question—not asked prior to *Furman*, in fact not asked until 1985—is whether the better

149. Act of Mar. 30, 1979, ch. 150, 1979 N.M. Laws 522–29, *repealed by* Act of Mar. 18, 2009, ch. 11, 2009 N.M. Laws 133–41. The New Mexico repeal does not apply retroactively—it applies only to crimes committed after July 1, 2009. 2009 N.M. Laws at 141. Therefore, two men remain on death row in the state. YEAR END REPORT, *supra* note 106.

150. Michael L. Radelet & Hugo Adam Bedau, *The Execution of the Innocent, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT* 325, 337 (James R. Acker et al. eds., 2d ed. 2003). In 2000, Governor Ryan learned of evidence that thirteen death row inmates in Illinois were innocent. *Id.* In response, he appointed a commission to study the state's death penalty. *Id.* The commission found “widespread race-of-victim and regional biases” in the state's death penalty and recommended eighty-five reforms in the way the state handled capital cases. *Id.* In response to the commission's recommendations, Governor Ryan commuted the sentences of all the state's death row inmates to life imprisonment. *Id.* Governor Quinn signed the abolition bill, concluding “it is impossible to create a perfect system.” John Schwartz & Emma G. Fitzsimmons, *Illinois Governor Signs Capital Punishment Ban*, N.Y. TIMES, Mar. 10, 2011, at A18.

151. Act of Mar. 9, 2011, ch. 725, 2010 Ill. Legis. Serv. 96-1543 (West) (effective July 1, 2011).

152. Connecticut appears poised to become the next state to abolish its death penalty. On April 12, 2011, the state's judiciary committee approved a bill to repeal the death penalty. S. 1035, 2011 Gen. Assemb., Jan. Sess. (Conn. 2011). At the time of this publication, the bill's supporters are optimistic the bill will become law. Mary E. O'Leary, *Connecticut House Panel Votes to Repeal Death Penalty*, NEW HAVEN REG., Apr. 12, 2011. Current Governor Dannel P. Malloy has already committed to signing the repeal bill if it reaches his desk. Daniela Altimari, *Repeal of Death Penalty Clears Key Legislative Committee*, HARTFORD COURANT, Apr. 13, 2011, http://articles.courant.com/2011-04-12/community/hc-death-penalty-041320110412_1_death-penalty-repeal-bill-innocent-person. The full legislature passed a similar bill in 2009, which was then vetoed by former Governor M. Jodi Rell. *Id.*

153. Lydia Saad, *Support for Death Penalty Steady at 64%*, GALLUP (Dec. 8, 2005), <http://www.gallup.com/poll/20350fsupport-death-penalty-steady-less.aspx>.

154. *Death Penalty*, GALLUP, <http://www.gallup.com/poll/1606/Death-Penalty.aspx> (last visited Apr. 15, 2011).

penalty for murder is the death penalty or life imprisonment without the possibility of parole.¹⁵⁵ When asked that question, support for the death penalty declined to less than half, with only forty-nine percent of people believing the death penalty was a better punishment in October 2010.¹⁵⁶ Support for the death penalty is not quite as low as at the time of *Furman*; however, declining support since the mid-1990s is clearly apparent, just as in the years leading up to *Furman*.¹⁵⁷

Taken together with the decrease in executions and death sentences, and the states' trend toward abolition, the public opinion polls reveal the country's growing discomfort with capital punishment. The national climate of abolition and disapproval is similar to the climate the Justices encountered at the time of *Furman*, creating a climate ripe for another *Furman*-like challenge.

2. International Abolition

International pressures encouraging the repeal of the American death penalty are even greater than at the time of *Furman*.¹⁵⁸ Prior to *Furman*, roughly seventy countries throughout the world abolished the death penalty.¹⁵⁹ As of December 2010, ninety-six countries—more than two-thirds of those around the world—have abolished capital punishment for all crimes by law,¹⁶⁰ and 139 countries have substantially abolished the penalty by practice.¹⁶¹ Executions around the world have decreased as well. In 2009, only nineteen countries actually carried out executions, the lowest

155. *See id.*

156. *Id.*

157. *See id.*

158. *See supra* Subpart I.C.3.

159. Lain, *supra* note 4, at 26.

160. *Figures on the Death Penalty*, AMNESTY INT'L, <http://www.amnesty.org/en/death-penalty/numbers> (last visited Apr. 15, 2011).

161. AMNESTY INT'L, DEATH SENTENCES AND EXECUTIONS: 2010, at 3 (2010) [hereinafter AMNESTY REPORT 2010], available at <http://www.amnesty.org/en/library/asset/ACT50/001/2011/en/ea1b6b25-a62a-4074-927d-ba51e88df2e9/act500012011en.pdf>. Since *Furman*, a number of countries that retained the death penalty for extraordinary crimes, but never invoked the penalty, have abolished the penalty for all crimes. GARLAND, *supra* note 10, at 112 (Portugal in 1976, Denmark in 1978, Luxembourg and Norway in 1979, the Netherlands in 1982, Ireland in 1990, Italy in 1994, Spain in 1995, Belgium in 1996, and the United Kingdom in 1998).

number ever recorded.¹⁶² That number increased only slightly to twenty-three in 2010.¹⁶³ The United States carried out the fifth greatest number of executions in 2010, behind only China, Iran, North Korea, and Yemen.¹⁶⁴ The United States remains an outlier in continuing to retain and use the death penalty.

The most significant international pressure surrounding the death penalty today comes through the United Nations General Assembly. A 2007 resolution called for a moratorium on the death penalty throughout the world. The resolution was reaffirmed in 2008 and again in 2010, with increasing support each time.¹⁶⁵ These pressures from the United Nations have made the death penalty an international political issue and created a movement toward global abolition.¹⁶⁶ One commentator noted the death penalty in the West is approaching its “absolute antithesis: what was once an unproblematic institution, universally embraced, is fast becoming a violation of human rights, universally prohibited.”¹⁶⁷

The domestic and international movements for the abolition of the death penalty create the ideal climate for a *Furman*-like challenge. Such a challenge would require that the Justices render a decision under many of the same conditions existing in 1972. Today, however, the Court would be armed with more precedent to apply in its analysis and ultimate determination.

III. EVOLUTION OF CRUEL AND UNUSUAL PUNISHMENTS CLAUSE JURISPRUDENCE

At the time the Court decided *Furman*, the Cruel and Unusual Punishments Clause remained relatively undeveloped by the Court.¹⁶⁸ Since then, the Court has decided numerous Eighth Amendment cases creating significant precedent to rely on in de-

162. AMNESTY REPORT 2010, *supra* note 161, at 5.

163. *Id.*

164. *Id.* at 41.

165. See G.A. Res. 62/149, ¶ 5–6, U.N. Doc. A/RES/62/149 (Dec. 18, 2007); Thomas Hubert, *UN Resolution: The Abolitionist Front Grows Stronger Again*, WORLD COALITION AGAINST THE DEATH PENALTY (Dec. 22, 2010), <http://www.worldcoalition.org/modules/smartsection/item.php?itemid=469>.

166. See GARLAND, *supra* note 10, at 113.

167. *Id.* at 113–14.

168. See discussion *supra* Part I.A.; see also Lain, *supra* note 4, at 11 (discussing the unprincipled decisionmaking undertaken by the Court in *Furman*).

ciding the constitutionality of the death penalty.¹⁶⁹ This contemporary Eighth Amendment doctrine would allow the Court to make a better-reasoned decision, supported by its precedent, should a *Furman*-like challenge arise again.

The core of the Court's Eighth Amendment consideration remains "the evolving standards of decency that mark the progress of a maturing society,"¹⁷⁰ which "change as the basic mores of society change."¹⁷¹ In addition to the concept of evolving standards of decency, "[t]he concept of proportionality [has become] central to the Eighth Amendment."¹⁷² A punishment does not need to be challenged as "inherently barbaric," but only as "disproportionate to the crime" in order to fall under the Eighth Amendment's prohibition against cruel and unusual punishment.¹⁷³ Therefore, when reviewing a general challenge to a death sentence, rather than the method of execution, the Court uses a proportionality inquiry which incorporates the evolving standards of decency.¹⁷⁴

The Court reviews challenges to the proportionality of sentences under the Eighth Amendment in two categories.¹⁷⁵ The first category includes challenges to term-of-years sentences given the circumstances of a particular case and defendant.¹⁷⁶ The

169. See, e.g., *Graham v. Florida*, 560 U.S. ___, ___, 130 S. Ct. 2011, 2034 (2010) (holding juvenile life without parole sentences for nonhomicide crimes violate the Eighth Amendment); *Kennedy v. Louisiana*, 554 U.S. 407, 418 (2008) (holding the death penalty for rape of a child where death was not intended and did not result violates the Eighth Amendment); *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding the execution of juveniles—individuals under eighteen years of age at the time of their crime—violates the Eighth Amendment); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding the execution of the mentally retarded violates the Eighth Amendment).

170. See *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (internal quotation marks omitted)).

171. *Kennedy*, 554 U.S. at 419 (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (internal quotation marks omitted)).

172. *Graham*, 560 U.S. at ___, 130 S. Ct. at 2021.

173. *Id.*

174. Compare *Baze v. Rees*, 553 U.S. 35, 48–49, 52 (2008) (reviewing the method of execution and requiring only a finding that the method does not involve torture or a lingering death and that there is no feasible, readily implemented alternative method which significantly reduces the risk of harm in order to be permitted by the Eighth Amendment), with *Kennedy*, 554 U.S. at 419 (reviewing a challenge to the death penalty for all persons committing rape of a child where death was not intended and did not result and requiring the penalty to be proportionate to the crime in order to be permitted by the Eighth Amendment).

175. *Graham*, 560 U.S. at ___, 130 S. Ct. at 2021.

176. *Id.* In reviewing a term-of-years sentence, the Court begins by comparing the gravity of the offense and the severity of the sentence. *Id.* at ___, 130 S. Ct. at 2022 (citing *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring)). In the rare

second category involves categorical challenges to sentences which compare the nature of the offense and the characteristics of the category of offender.¹⁷⁷ The Court uses its categorical analysis for challenges to sentences with regard to a particular type of person, such as juveniles¹⁷⁸ or the mentally retarded,¹⁷⁹ as well as for challenges to sentences for a particular type of crime for all defendants, such as nonhomicide crimes¹⁸⁰ and rape.¹⁸¹ A *Furman*-like case, challenging the death penalty's constitutionality as applied to all defendants, would be similar to the cases the Court has reviewed under the categorical challenge standard and would therefore be reviewed in the same manner.

In reviewing categorical challenges, the Court first looks to whether there is a national consensus against the penalty by considering the objective indicia of society's standards.¹⁸² The Court reviews the history of the penalty for the crime, current state statutes and proposed enactments, and the frequency of the penalty's imposition.¹⁸³ Historically, the Court found a national consensus against a penalty when more than half of the states prohibited the punishment by legislation.¹⁸⁴ Until this year, the Court's inquiry into a national consensus would end if a majority of the states permitted a punishment.¹⁸⁵ However, in *Graham v. Florida*, the Court held a national consensus against a penalty

case where that threshold comparison leads to an inference of gross disproportionality, the Court will then compare the defendant's sentence to those received by others in the same jurisdiction and those imposed for the same crime in other jurisdictions. *Id.* (citing *Harmelin*, 501 U.S. at 1005). When the "comparative analysis 'validate[s] an initial judgment that [the] sentence is grossly disproportionate,' the sentence is cruel and unusual." *Id.* (quoting *Harmelin*, 501 U.S. at 1005 (alterations in original)).

177. *Id.*

178. See *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005).

179. See *Atkins v. Virginia*, 536 U.S. 304, 306 (2002).

180. See *Graham*, 560 U.S. at ___, 130 S. Ct. at 2011; *Enmund v. Florida*, 458 U.S. 782, 786 & n.2 (1982).

181. See *Kennedy v. Louisiana*, 554 U.S. 407, 412 (2008).

182. See *Roper*, 543 U.S. at 567–68.

183. See *Kennedy*, 554 U.S. at 434.

184. See *id.* at 426 (finding a national consensus against the death penalty for child rape where only six jurisdictions authorized the penalty); *Roper*, 543 U.S. at 564 (finding a national consensus against executing juveniles where thirty states prohibited the punishment); *Atkins*, 536 U.S. at 313–15 (finding a national consensus against executing the mentally retarded when over twenty states and the federal government prohibited such punishment); *Enmund*, 458 U.S. at 789 (citations omitted) (finding a national consensus against the death penalty for participation in a robbery when only eight jurisdictions authorized the imposition of the sentence).

185. See *Graham*, 560 U.S. at ___, 130 S. Ct. at 2049 (Thomas, J., dissenting).

could be found even where a majority of the states permitted a punishment.¹⁸⁶

In *Graham*, despite the fact that thirty-seven jurisdictions permitted life without parole sentences for juvenile nonhomicide offenders, the Court found “a national consensus [had] developed against [the penalty].”¹⁸⁷ Rather than stopping its inquiry where a majority of jurisdictions permitted the penalty, the Court looked to the actual sentencing practices throughout the country.¹⁸⁸ Finding only 123 juveniles serving life without parole sentences throughout the country, seventy-seven of which were imposed in Florida, and that only eleven jurisdictions had actually imposed such a penalty, the Court determined the sentencing practice was exceedingly rare and therefore revealed a national consensus against the punishment.¹⁸⁹ *Graham* sets the precedent for actual sentencing practices’ ability to trump the consideration of state legislation when determining whether a national consensus against the practice exists.¹⁹⁰

A national consensus against a punishment is not in itself determinative;¹⁹¹ therefore, after finding a national consensus against a penalty, the Court exercises its independent judgment to determine whether the punishment violates the Constitution.¹⁹² The Court’s independent judgment analysis consists of three considerations. First, the Court reviews the culpability of the category

186. *Id.* at ___, 130 S. Ct. at 2023–26 (majority opinion).

187. *Id.* at ___, 130 S. Ct. at 2026. *Graham v. Florida* may signal significant change in Eighth Amendment jurisprudence. The decision marked the first time the Court applied a categorical challenge analysis to a noncapital sentence, *id.* at ___, 130 S. Ct. at 2046 (Thomas, J., dissenting), and the first time actual sentencing practices trumped state legislation in determining a national consensus. *Id.* at ___, 130 S. Ct. at 2049. The effect the *Graham* decision will have on Eighth Amendment capital sentence challenges will only become clear as the Court decides future cases.

188. *Id.* at ___, 130 S. Ct. at 2024 (majority opinion).

189. *Id.* at ___, 130 S. Ct. at 2024–26.

190. The Court has not relied on this new precedent since its decision in 2010, so it remains to be seen whether the Court will continue to use actual sentencing to overcome a majority of states retaining a punishment, however, the stage is clearly set for the Court to do so. *See id.* The dissent in *Graham* strongly condemned the Court’s reliance on actual sentencing practices noting it was “nothing short of stunning” that the Court was “undaunted” by the lack of a consensus against the penalty. *Id.* at ___, 130 S. Ct. at 2049 (Thomas, J., dissenting).

191. *Id.* at ___, 130 S. Ct. at 2026 (majority opinion) (citing *Kennedy v. Louisiana*, 554 U.S. 407, 434 (2008)).

192. *Id.* at ___, 130 S. Ct. at 2022 (citing *Roper v. Simmons*, 543 U.S. 551, 572 (2005)).

ry of defendants in light of the crimes committed.¹⁹³ Second, the Court considers the severity of the punishment, consistently holding that the death penalty is the most severe punishment permitted by law.¹⁹⁴ The third consideration is whether the penological justifications support the imposition of the penalty.¹⁹⁵ Where a sentence lacks legitimate penological justification, the sentence is “by its nature disproportionate to the offense.”¹⁹⁶ Accordingly, the Court determines whether retribution, deterrence, incapacitation, or rehabilitation provide penological justification for the imposition of the sentence.¹⁹⁷

Finally, though not specifically included as a consideration in its independent judgment, the Court also reviews international acceptance or rejection of a penalty.¹⁹⁸ International opinion is not dispositive, but the Court also notes it is not irrelevant.¹⁹⁹ In *Roper v. Simmons*, the Court noted international opinion is not controlling and that the Court retains the task of interpreting the Eighth Amendment, but also noted that laws of other nations have been instructive for the interpretation of the Cruel and Unusual Punishments Clause since its decision in *Trop*.²⁰⁰ Conse-

193. *Id.* at ___, 130 S. Ct. at 2026 (citing *Roper*, 543 U.S. at 568).

194. *Id.* at ___, 130 S. Ct. at 2027 (citations omitted).

195. *Id.* at ___, 130 S. Ct. at 2028 (citations omitted).

196. *Id.*

197. *Id.* at ___, 130 S. Ct. at 2028–30. The review of penological justifications in determining the constitutionality of a sentence is a clear change from Eighth Amendment jurisprudence at the time of *Furman*. Dissenting in *Furman*, Chief Justice Burger noted that seeking to attack a sentence on the grounds of legitimate penal aims sought to give a dimension to the Eighth Amendment the Court had never pursued. *Furman v. Georgia*, 408 U.S. 238, 391 (1972) (Burger, C.J., dissenting).

198. See, e.g., *Graham*, 560 U.S. at ___, 130 S. Ct. at 2033–34 (noting the United States was the only country that actually imposed juvenile life without parole sentences for non-homicide offenders); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (recognizing that within the world community, the death penalty for crimes committed by the mentally retarded was overwhelmingly disapproved); *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (“Civilized nations of the world [were] in virtual unanimity that statelessness is not to be imposed as punishment for [a] crime.”). Reliance on international opinion is not without controversy in the Court. In *Roper*, Justice Scalia decried the Court’s reliance on international opinion, stating the Court relies on international opinion, inconsistently and its “attempt to downplay the significance of its extensive discussion of foreign law is unconvincing. ‘Acknowledgment’ of foreign approval has no place in the legal opinion of this Court unless it is part of the basis for the Court’s judgment—which is surely what it parades as today.” 543 U.S. at 628 (Scalia, J., dissenting).

199. *Graham*, 560 U.S. at ___, 130 S. Ct. at 2033 (quoting *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982)).

200. *Roper*, 543 U.S. at 575; see also *Trop*, 356 U.S. at 102–03.

quently, the Court uses international opinion to confirm its own independent judgment that a penalty is cruel and unusual.²⁰¹

In the nearly forty years since the Court decided *Furman* without clear guiding precedent, Eighth Amendment jurisprudence has developed significantly and now provides guidance for determining whether a punishment violates the Cruel and Unusual Punishments Clause. The decisions since *Furman* provide the Court with a clear structure for an Eighth Amendment analysis which considers and accounts for all of the factors that led to its decision in *Furman* and are present again today. Such reasoned consideration should allow the Court to create a lasting rule that the death penalty is unconstitutional as disproportionate for any defendant and against society's evolving standards of decency.

IV. CRITICAL FACTORS IN A *FURMAN*-LIKE CHALLENGE TODAY

Consistent with its now-indoctrinated Eighth Amendment categorical challenge analysis, the Court could render a more unified—and therefore more persuasive—opinion in a *Furman*-like challenge today.²⁰² The Court should use the analysis to determine that the death penalty in America violates the Constitution per se. The arbitrary imposition of the death penalty should no longer be the only cognizable reason for the Justices' decision, but should be woven throughout the Court's analysis of the categorical challenge.

A. *National Consensus*

In the first step of its analysis, the Court should determine there is a national consensus against the death penalty. Current-

201. *Graham*, 560 U.S. at ___, 130 S. Ct. at 2034 (“The Court has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world’s nations that a particular sentencing practice is inconsistent with [the] basic principles of decency demonstrates that the Court’s rationale has respected reasoning to support it.”).

202. Bringing a *Furman*-like challenge to the Supreme Court will require properly raising and challenging the system in a lower court proceeding. McCord, *supra* note 111, at 866–67 (discussing the potential difficulties in raising a *Furman*-like challenge, and recommending that such a challenge be brought in a state with significant arbitrariness and judges skeptical of the punishment).

ly, thirty-four states and the federal government authorize the death penalty.²⁰³ However, this is less than the number of jurisdictions which authorized the punishment at the time of *Furman*,²⁰⁴ and a trend toward abolition can be seen in state legislatures and courts repealing their death penalty statutes.²⁰⁵ The Court's inquiry need not stop at a finding that more than half the jurisdictions authorize the penalty: the *Graham* decision allows the Court to review actual capital sentencing practices to determine whether there is a national consensus against the penalty.²⁰⁶ In recent years, the number of sentences and executions has decreased significantly,²⁰⁷ revealing juror, prosecutor, and judicial unwillingness to impose sentences of death despite their statutory availability. Like the sentences in *Graham*,²⁰⁸ the final imposition of death sentences, executions, is confined to a small number of jurisdictions.²⁰⁹ Only twelve states carried out executions in 2010,²¹⁰ a similar number to the eleven jurisdictions that actually imposed juvenile life sentences noted by the *Graham* Court.²¹¹ Current imposition of a death sentence is therefore "exceedingly rare," making it "fair to say that a national consensus has developed against it."²¹² In finding a national consensus against the penalty, the Court should continue its analysis using its independent judgment to determine the constitutionality of the penalty.

203. See SNELL, *supra* note 104, at 2 (noting thirty-six states and the federal government authorized the death penalty at the end of 2009). New York and Illinois were removed from the Bureau of Justice Statistics number as New York does not have a constitutional death penalty statute, *see supra* notes 144–45 and accompanying text, and the Illinois legislature repealed its death penalty statute this year. *See supra* notes 151–53 and accompanying text.

204. *Furman v. Georgia*, 408 U.S. 238, 341 (1972) (Marshall, J., concurring) (noting forty-one states, the District of Columbia, and federal jurisdictions authorized the death penalty for at least one crime).

205. *See supra* notes 144–52 and accompanying text.

206. *See supra* notes 186–90 and accompanying text.

207. *See* discussion accompanying *supra* notes 110–21.

208. *Graham v. Florida*, 560 U.S. ___, ___, 130 S. Ct. 2011, 2024 (2010). Comparing execution rates to the rate of sentencing in *Graham* is appropriate because executions reveal the actual imposition rather than the possible imposition of the sentence. Because so few sentences actually result in execution, using execution rates is particularly appropriate.

209. *See* YEAR END REPORT, *supra* note 106, at 2.

210. *Id.*

211. *Graham*, 560 U.S. at ___, 130 S. Ct. at 2024.

212. *Id.* at ___, 130 S. Ct. at 2026 (citing *Atkins v. Virginia*, 536 U.S. 304, 316 (2002)).

B. *Independent Judgment*

In reviewing its first consideration of independent judgment, the culpability of offenders, arbitrariness of the penalty should play a large role. Culpability is directly tied to the severity of the crime.²¹³ The Court finds homicide offenders categorically more culpable than nonhomicide offenders;²¹⁴ however, the arbitrariness present in capital sentencing indicates that the most culpable offenders are consistently not the ones chosen for execution. The evidence reveals the penalty is not reserved for the “worst of the worst.”²¹⁵ Though all capital offenders have committed homicide crimes, a range of depravity still exists in those crimes, leading to differing levels of culpability within that class of offenders.²¹⁶ Because the death penalty is the most severe punishment, it should be reserved for only the most culpable offenders.²¹⁷ This is simply not the case in the contemporary system, where often the worst offenders are spared, yet less depraved and less culpable offenders are chosen for execution. Arbitrariness should therefore sway the culpability consideration in favor of declaring the penalty unconstitutional.

The second consideration, the severity of the punishment, will not be affected by arbitrariness, but also favors a ruling of unconstitutionality because the Court consistently notes the death penalty is the most severe penalty permitted by law.²¹⁸ Being the most severe punishment, the culpability and penological justifications must be strongly in favor of the punishment in order for the Court to declare it constitutional.

The arbitrariness of the penalty should affect the Court’s analysis of the third consideration, penological justifications for the penalty, specifically its consideration of retribution, deterrence, and incapacitation. The Court considers retribution a legitimate reason to punish,²¹⁹ but the arbitrary imposition of the penalty should negate the retributive justification because such justification is sufficient only when it correlates to the culpability of the

213. *See id.* at ___, 130 S. Ct. at 2027.

214. *Id.*

215. *See* discussion *supra* Subpart II.A.4.

216. *See supra* note 129.

217. *See Atkins*, 536 U.S. at 319.

218. *Graham*, 560 U.S. at ___, 130 S. Ct. at 2027.

219. *Id.* at ___, 130 S. Ct. at 2028.

defendant.²²⁰ Studies show juries, judges, and prosecutors do not select the “worst of the worst” for the final imposition of the death penalty.²²¹ Just as it did at the time of *Furman*, the low level of infliction of the penalty makes it “highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for [the] punishment.”²²² In a system that arbitrarily chooses who receives the death penalty, for reasons not based on the culpability of the defendant, retribution cannot provide sufficient justification for the penalty.

The Court should also strongly consider the arbitrary imposition of the penalty when reviewing deterrence as a justification. The Court has consistently been suspect of the deterrent effect of a punishment rarely imposed.²²³ As Justice Brennan reasoned in *Furman*, “A rational person contemplating a murder . . . is confronted, not with the certainty of a speedy death, but with the slightest possibility that he will be executed in the distant future.”²²⁴ The same is true today. The imposition of a penalty dependent on the race of the defendant or victim, the defendant’s gender or education level, or the location of the crime, cannot logically create a deterrent effect. Additionally, numerous recent studies cast significant doubt on whether the death penalty acts as a deterrent at all.²²⁵ Accordingly, the rarely imposed death penalty cannot reasonably serve as a deterrent justifying such a severe punishment.

The arbitrary imposition of the penalty should also be considered when reviewing incapacitation as a justification for capital punishment. Incapacitation is considered an important goal of the penological system to protect society from future harm by the defendant.²²⁶ The justification should not be considered sufficient, however, where the system arbitrarily imposes the most severe punishment without a reliable determination of which defendants actually pose a future danger to society. Jurors and expert wit-

220. *See id.* (citations omitted).

221. *See* discussion *supra* Subpart II.A.4.

222. *Furman v. Georgia*, 408 U.S. 238, 294 (1972) (Brennan, J., concurring).

223. *See Graham*, 560 U.S. at ___, 130 S. Ct. at 2028–29.

224. *Furman*, 408 U.S. at 302.

225. *Discussion of Recent Deterrence Studies*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/discussion-recent-deterrence-studies> (last visited Apr. 15, 2011).

226. *See Graham*, 560 U.S. at ___, 130 S. Ct. at 2029.

nesses fail a significant majority of the time to accurately predict whether a capital offender poses a future danger to society.²²⁷ Decisionmakers, therefore, may appear concerned with incapacitation in their determination, but their unreliable predictions result in incapacitating individuals who pose no future threat. This, along with the availability of an alternative punishment of life without parole in most every state,²²⁸ shows incapacitation can be accomplished with a lesser punishment than death and therefore cannot provide justification for the most severe penalty.

Rehabilitation should not be affected by arbitrariness, but should not provide justification for the death penalty either. The *Graham* Court noted life imprisonment without parole “forfeits altogether the rehabilitative [goal].”²²⁹ In the same way life without parole sentences do not allow for rehabilitation, a sentence of death also forfeits rehabilitation as the defendant in both instances remains incarcerated until death. Accordingly, rehabilitation cannot provide justification for the death penalty.

Taken together, none of the legitimate penological justifications should be considered sufficient to support the imposition of the most severe punishment. Because the death penalty is the most severe punishment and the most culpable defendants are not selected for its imposition, the Court’s independent judgment should contribute to the conclusion that the death penalty is unconstitutionally cruel and unusual under the Eighth Amendment.

C. *International Opinion*

As a final consideration, the Court should also note the United States remains an outlier among developed nations in continuing its use of the death penalty. The international trend toward abolition is more significant than at the time of *Furman*²³⁰ and similar to the trends discussed by the Court in its recent Eighth Amendment cases.²³¹ Similar to the trend discussed in *Graham*,²³² cur-

227. See discussion *supra* Subpart II.A.4.

228. See *Life Without Parole*, DEATH PENALTY INFO. CENTER, <http://www/deathpenaltyinfo.org/life-without-parole> (last visited Apr. 15, 2011) (noting that every state except Alaska has some form of life without parole) .

229. *Graham*, 560 U.S. at ___, 130 S. Ct. at 2029–30.

230. See discussion *supra* Subparts I.C.3., II.B.2.

231. See discussion accompanying *supra* notes 198–201.

232. *Graham*, 560 U.S. at ___, 130 S. Ct. at 2033–34 (noting only eleven nations autho-

rently the United States is one of the few countries continuing to impose the death penalty despite United Nations encouragement of its abolition.²³³ International disapproval of capital punishment should confirm the Court's independent judgment that the death penalty violates the Cruel and Unusual Punishments Clause of the Eighth Amendment.

CONCLUSION

Furman shocked the nation, but failed to provide an end to arbitrary imposition of the death penalty in the United States. History has repeated itself. The capital punishment system in America is as arbitrary as it was leading up to *Furman*. The system and cultural climate of the country appear ripe for a *Furman*-like constitutional challenge to capital punishment for all offenders. The good news is that the Court now has an arsenal of precedent to write a powerful opinion declaring the death penalty unconstitutional once and for all, sparing the lives of thousands awaiting their potential death throughout the country and the arbitrary few who would be sentenced to death in the future.

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rized life without parole sentences for juvenile offenders and the United Nations Convention on the Rights of the Child prohibited such punishment).

233. See discussion *supra* Subpart II.B.2.

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