

# Capital Punishment and the Eighth Amendment: *Furman* and *Gregg* in Retrospect\*

Franklin E. Zimring\*\* and Gordon Hawkins\*\*\*

*This Article, part of a book in progress, examines the opinions of the majority Justices in Furman v. Georgia as a case for declaring the execution of murderers cruel and unusual punishment under the eighth amendment to the United States Constitution. The authors argue that the majority Justices in Furman did not address the critical questions of timing and legitimacy of judicial abolition. The plurality opinion in Gregg v. Georgia compounded the problem by failing to put predictable public opinion and legislative reactions in proper perspective. The result is a capital punishment policy, in part the Court's creation, as problematic as the systems voided in Furman.*

## INTRODUCTION

When a constitutional court becomes a significant force in the destiny of an issue, those seeking comprehensive historical explanations of that question must take legal doctrine seriously. In the case of capital punishment, the central doctrinal conflict of the 1970's was also the most important development in the public career of the death penalty. The debate concerned the eighth amendment ban on cruel and unusual punishment in relation to the practice of executions. The issue became the

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\*\*Professor of Law and Director of the Earl Warren Legal Institute, University of California at Berkeley; Fellow, Center for Studies in Criminal Justice, University of Chicago Law School.

\*\*\*Visiting Fellow, Earl Warren Legal Institute, University of California at Berkeley; Fellow, Center for Studies in Criminal Justice, University of Chicago Law School.

focus of national attention only in the 1970's and has remained such. The significance of the eighth amendment issue requires a sustained analysis of this debate. That is our task in these pages.

In addressing this conflict, we offer a discussion of the eighth amendment that falls short of a systematic jurisprudential analysis or a fully articulated theory of constitutional interpretation. We do not speculate about how the Founders or the Framers might hypothetically have construed the eighth amendment in the circumstances of today. Nor do we deal with the "fine tuning" of cases dealing with the mandatory death penalty for killing a police officer<sup>1</sup> or the subsidiary questions generated by permitting the death penalty after *Gregg v. Georgia*.<sup>2</sup>

The heart of the matter lies in *Furman v. Georgia*,<sup>3</sup> *Gregg v. Georgia*,<sup>4</sup> and the quartet of cases (*Proffitt v. Florida*,<sup>5</sup> *Jurek v. Texas*,<sup>6</sup> *Woodson v. North Carolina*,<sup>7</sup> and *Roberts v. Louisiana*<sup>8</sup>) in which the argument that the imposition of the death penalty under any circumstances is cruel and unusual punishment in violation of the eighth and fourteenth amendments was rejected. *Furman* and *Gregg* are the two crucial episodes in the history of capital punishment in this country in this century. We limit our analysis to the essential questions in these two cases. We argue that *Furman*, rightly construed, provided a basis for extending the prohibition of capital punishment to the civil crime of murder in its frequently recurring forms, but that the confusions of *Furman* were an important barrier to justifying the correct result in *Gregg*.

In *Furman* the Supreme Court held that "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."<sup>9</sup> In *Gregg* the plurality opinion specifically addressed "the basic contention that the punishment of death for the crime of murder is, under all circumstances, 'cruel and unusual' in violation of the Eighth and Four-

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<sup>1</sup> *Roberts v. Louisiana*, 431 U.S. 633 (1977) (mandatory death sentence unconstitutional).

<sup>2</sup> See, e.g., *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (mitigation evidence); *Godfrey v. Georgia*, 446 U.S. 420 (1980) (limits on statutory aggravating circumstances); *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty for rape unconstitutional).

<sup>3</sup> 408 U.S. 238 (1972).

<sup>4</sup> 428 U.S. 153 (1976).

<sup>5</sup> 428 U.S. 242 (1976).

<sup>6</sup> 428 U.S. 262 (1976).

<sup>7</sup> 428 U.S. 280 (1976).

<sup>8</sup> 428 U.S. 325 (1976).

<sup>9</sup> 408 U.S. at 239-40 (per curiam).

teenth Amendments of the Constitution" and held that "the punishment of death does not invariably violate the Constitution."<sup>10</sup>

In *Furman* each of the nine Justices filed a separate opinion, and "the Court majority was fractured five separate ways."<sup>11</sup> As Justice Powell put it, in dissenting, "[t]he reasons for that judgment are stated in five separate opinions, expressing as many separate rationales."<sup>12</sup>

In his dissenting opinion in *Furman* Chief Justice Burger spoke of "the uncertain language of the Eighth Amendment"; of its being "less than self-defining"; and of its "enigmatic character."<sup>13</sup> He also said that "[t]he widely divergent views of the Amendment expressed in today's opinions reveal the haze that surrounds this constitutional command."<sup>14</sup> Certainly, those who hoped that the Court would dispel the haze and provide "new or useful tools which might be used to help the unenlightened to see why the death penalty is cruel and unusual punishment"<sup>15</sup> have found *Furman* disappointing.

### I. A SINGULAR OPINION

At the same time there is one opinion which brings out more clearly than any other the crucial issues in the case. It is the opinion of one of the four dissenting Justices: that of Justice Harry A. Blackmun.<sup>16</sup> It is a singular opinion in the literal sense because all the other dissenting opinions were joined by all the other dissenters, but no other Justice concurred with Justice Blackmun's opinion. It is also singular in the clarity with which it reveals a view of the Supreme Court's role in administering the prohibition against cruel and unusual punishment that ultimately dominated and determined the Court's later decision in *Gregg*.

The opinion begins with a passage that deserves quotation in full:

Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds. That distaste is

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<sup>10</sup> 428 U.S. at 168-69.

<sup>11</sup> Bedau, *Is the Death Penalty "Cruel and Unusual" Punishment?*, in *THE DEATH PENALTY IN AMERICA* 249 (H. Bedau 3d ed. 1982) [hereafter Bedau, *Cruel and Unusual*].

<sup>12</sup> 408 U.S. at 414 (Powell, J., dissenting).

<sup>13</sup> *Id.* at 375-76 (Burger, C.J., dissenting).

<sup>14</sup> *Id.* at 376.

<sup>15</sup> Polsby, *The Death of Capital Punishment?* *Furman v. Georgia*, 1972 SUP. CT. REV. 1, 3.

<sup>16</sup> 408 U.S. at 405 (Blackmun, J., dissenting).

buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated. For me, it violates childhood's training and life's experiences, and is not compatible with the philosophical convictions I have been able to develop. It is antagonistic to any sense of "reverence for life." Were I a legislator, I would vote against the death penalty for the policy reasons argued by counsel for the respective petitioners and expressed and adopted in the several opinions filed by the Justices who vote to reverse these judgments.<sup>17</sup>

Justice Blackmun went on to cite a number of cases, from 1879 to 1963 in which it was "either the flat or implicit holding of a unanimous Court" that "capital punishment was . . . not unconstitutional *per se* under the Eighth Amendment."<sup>18</sup> He then said:

Suddenly, however, the course of decision is now the opposite way, with the Court evidently persuaded that somehow the passage of time has taken us to a place of greater maturity and outlook. The argument, plausible and high-sounding as it may be, is not persuasive, for it is only one year since *McGautha*, only eight and one-half years since *Rudolph*, 14 years since *Trop*, and 25 years since *Francis*, and we have been presented with nothing that demonstrates a significant movement of any kind in these brief periods. The Court has just decided that it is time to strike down the death penalty. There would have been as much reason to do this when any of the cited cases were decided. But the Court refrained from that action on each of those occasions.

The Court has recognized, and I certainly subscribe to the proposition, that the Cruel and Unusual Punishment Clause "may acquire meaning as public opinion becomes enlightened by a humane justice." . . . And Mr. Chief Justice Warren, for a plurality of the Court, referred to "the evolving standards of decency that mark the progress of a maturing society."

My problem, however, as I have indicated, is the suddenness of the Court's perception of progress in the human attitude since decisions of only a short while ago.<sup>19</sup>

As a technical matter, the Court had never before faced or decided whether death was cruel and unusual punishment.<sup>20</sup> But the nature of

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<sup>17</sup> *Id.* at 405-06.

<sup>18</sup> *Id.* at 407.

<sup>19</sup> *Id.* at 408-10.

<sup>20</sup> In each of the cases cited by Justice Blackmun, the Court was either not confronted with a general cruel and unusual punishment challenge to the death penalty, or it refused to decide the issue. In *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), the Supreme Court held that the preparation for and mental anguish involved with an execution after an unsuccessful first attempt did not violate the eighth amendment's prohibition. The Court, in dicta, in *Trop v. Dulles*, 365 U.S. 86, 99 (1958), did state that the death penalty was constitutional. However, the issue before the Court was whether depriving one of their citizenship for desertion from military service was cruel and unusual punishment. The third case that Justice Blackmun cited, *Rudolph v.*

Justice Blackmun's "problem" is in fact a crucial issue here. In effect, Justice Blackmun posed three questions that should have been addressed by the majority Justices in *Furman*. The first is: Why should the death penalty be regarded as cruel and unusual punishment? The second is: What evidence is there to support the claim that "the passage of time" has produced the relevant kind of evolutionary development in standards of decency, from which the eighth amendment "must draw its meaning?" The third is simply as of 1972 as an historical moment: Why is *now* the time to strike down the death penalty?

Justice Blackmun's questions are answerable, and they are critical to the determination of the death penalty issue. However, they were not well answered in the five opinions that uneasily coalesced to form the *Furman* majority. At the time this was regrettable; four years later it could have proved decisive.

## II. THE MAJORITY OPINIONS

Justice Brennan's doctrinal analysis came closest to responding to Blackmun's concerns. He made the point that "the Framers' concern was directed specifically at the exercise of legislative power. They included in the Bill of Rights a prohibition upon 'cruel and unusual punishments' precisely because the legislature would otherwise have had the unfettered power to prescribe punishments for crimes."<sup>21</sup> "Judicial enforcement of the Clause," he added, "cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishments for crimes. That is precisely the reason the Clause appears in the Bill of Rights."<sup>22</sup>

He also pointed out that "[t]he Cruel and Unusual Punishments Clause, like the other great clauses of the Constitution, is not susceptible of precise definition."<sup>23</sup> He referred to the statement of Chief Justice Warren writing the plurality opinion in *Trop v. Dulles*<sup>24</sup> that "the clause 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society'"; and that "[t]he basic

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Alabama, 375 U.S. 889 (1963), was simply the denial of certiorari to a convicted rapist sentenced to death. Finally, in *McGautha v. California*, 402 U.S. 183 (1971), although the Court decided a number of death penalty issues, it did not decide specifically whether the punishment was cruel and unusual.

<sup>21</sup> 408 U.S. at 263 (Brennan, J., concurring).

<sup>22</sup> *Id.* at 268.

<sup>23</sup> *Id.* at 258.

<sup>24</sup> 356 U.S. 86 (1958) (stripping of nationality for desertion from armed forces violated prohibition against cruel and unusual punishment) (plurality opinion).

concept underlying the [Clause] is nothing less than the dignity of man. While the State has the power to punish, the [Clause] stands to assure that this power be exercised within the limits of civilized standards."<sup>25</sup>

Justice Brennan then suggested four principles "recognized in our cases and inherent in the Clause sufficient to permit a judicial determination whether a challenged punishment comports with human dignity."<sup>26</sup> The first principle is that "a punishment must not be so severe as to be degrading to the dignity of human beings"; the second, "that the State must not arbitrarily inflict a severe punishment"; the third "that a severe punishment must not be unacceptable to contemporary society"; and the fourth "that a severe punishment must not be excessive."<sup>27</sup>

He concluded that:

[T]he punishment of death is inconsistent with all four principles: Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment.<sup>28</sup>

Justice Brennan's opinion is lucidly and vigorously argued and is soundly based in its conception of the eighth amendment "as posing a core question of values."<sup>29</sup> It draws attention to matters that are directly relevant to answering that core question. The attempt to make explicit by a process of analysis "the principles recognized in our cases and inherent in the Clause" is well conceived and, although inevitably vulnerable to criticism at some points, well executed. But in the end it fails.

It fails because it does not address two of the key questions posed in Justice Blackmun's opinion. Justice Blackmun said:

The several concurring opinions acknowledge, as they must, that until today capital punishment was accepted and assumed as not unconstitutional *per se* under the Eighth or the Fourteenth Amendment . . . Suddenly, however, the course of decision is now the opposite way, with the Court evidently persuaded that somehow the passage of time has taken us to a place of greater maturity and outlook . . . [W]e have been presented

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<sup>25</sup> 408 U.S. at 269-70 (quoting *Trop*, 356 U.S. 86, 100-01 (1958)) (brackets in original).

<sup>26</sup> *Id.* at 270.

<sup>27</sup> *Id.* at 271-79.

<sup>28</sup> *Id.* at 305.

<sup>29</sup> Polsby, *supra* note 15, at 10.

with nothing that demonstrates a significant movement of any kind  
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And there is certainly nothing in Justice Brennan's opinion to explain this abrupt leap, this sudden mutation, in the evolution of standards of decency.

Justice Blackmun also indicated that if he were a legislator he "would vote against the death penalty for the policy reasons argued by counsel for the respective petitioners and expressed and adopted in the several opinions filed by the Justices who vote to reverse these judgments."<sup>31</sup> It was for the legislators, he said, to abolish the death penalty: "these elected representatives of the people — [are] far more conscious of the temper of the times, of the maturing of society, and of the contemporary demands for man's dignity, than are we who sit cloistered in this Court."<sup>32</sup> And there is nothing in Justice Brennan's opinion to say why on this issue the Court should reject the voice of the people as expressed by their elected representatives.

Indeed he appeared to accept Blackmun's view that the voice of the people should prevail. One of the principles which Brennan sees as "inherent in the Clause is that a severe punishment must not be unacceptable to contemporary society"<sup>33</sup>; and he maintained that "this punishment has been almost totally rejected by contemporary society . . . . [R]ejection could hardly be more complete without becoming absolute."<sup>34</sup> He based this contention on the fact that "death sentences are rarely imposed and death is even more rarely inflicted."<sup>35</sup>

And he said "[i]t is, of course 'We, the People' who are responsible for the rarity both of the imposition and the carrying out of this punishment."<sup>36</sup> Yet this argument not only does nothing to meet Blackmun's point but is also vulnerable to the objection that a valid inference from the infrequency of the imposition of a penalty would be, not that society has rejected the penalty, but "that it wishes to reserve its use to a small number of cases."<sup>37</sup> As Chief Justice Burger put it: "if selective imposition evidences a rejection of capital punishment in those cases where it is not imposed, it surely evidences a correlative affirmation of

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<sup>30</sup> 408 U.S. at 407-08 (Blackmun, J., dissenting).

<sup>31</sup> *Id.* at 406.

<sup>32</sup> *Id.* at 413.

<sup>33</sup> *Id.* at 277 (Brennan, J., concurring).

<sup>34</sup> *Id.* at 295, 300.

<sup>35</sup> *Id.* at 299.

<sup>36</sup> *Id.*

<sup>37</sup> Polsby, *supra* note 15, at 20.

the penalty in those cases where it is imposed."<sup>38</sup>

The only other member of the Court who concluded that the eighth amendment prohibits capital punishment for all crimes and under all circumstances was Justice Marshall. His opinion is similar to Justice Brennan's in that he saw the crucial question at issue as being the normative one: whether the death penalty accorded with "evolving standards of decency that mark the progress of a maturing society."<sup>39</sup> He too enunciated four principles, which he saw as implied in the previous judgments of the Court, for determining that a punishment might be deemed cruel and unusual. He conceded that two of these principles (that punishments which amount to torture are prohibited and that punishments previously unknown as penalties for a given offense may be unconstitutional) were not relevant to a decision in *Furman*.<sup>40</sup>

Justice Marshall's argument rested on his other two principles: that a penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose, or because "it is abhorrent to currently existing moral values."<sup>41</sup> His conclusion was that "capital punishment serves no purpose that life imprisonment could not serve equally well" and therefore that "there is no basis for concluding that capital punishment is not excessive"; and in addition that "even if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history."<sup>42</sup>

Justice Marshall's argument is well articulated and well documented. It includes the legislative history of the eighth amendment, a brief history of capital punishment in the United States, and an analysis of the available evidence regarding the deterrent efficacy of the death penalty. Yet when it comes to the second and third questions posed by Justice Blackmun his opinion is no more responsive than Justice Brennan's.

He acknowledged that the Court, or individual Justices, have previously expressed opinions that the death penalty is constitutional or that indicate an acceptance sub silentio of capital punishment as constitutionally permissible. He maintained that the last case to imply that capital punishment was still permissible was *Trop v. Dulles*<sup>43</sup> and said:

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<sup>38</sup> 408 U.S. at 390 (Burger, C.J., dissenting).

<sup>39</sup> *Id.* at 329 (Marshall, J., concurring) (quoting *Trop*, 356 U.S. 86, 101 (1958)).

<sup>40</sup> *Id.* at 333.

<sup>41</sup> *Id.* at 330-32.

<sup>42</sup> *Id.* at 359-60.

<sup>43</sup> 356 U.S. 86 (1958).



Not only was the implication purely dictum, but it was also made in the context of a flexible analysis that recognized that as public opinion changed, the validity of the penalty would have to be re-examined. *Trop v. Dulles* is nearly 15 years old now, and 15 years change many minds about many things.<sup>44</sup>

He went on to say, correctly, that "there is no holding directly in point, and the very nature of the Eighth Amendment would dictate that unless a very recent decision existed, *stare decisis* would bow to changing values, and the question of the constitutionality of capital punishment at a given moment in history would remain open."<sup>45</sup> But this does nothing to answer Justice Blackmun's objection that "we have been presented with nothing that demonstrates a significant movement of any kind" in the "14 years since *Trop*."<sup>46</sup> In other words it does not (and Justice Marshall does not anywhere else in his opinion) indicate why at that particular "given moment in history" the Court should find capital punishment violative of the eighth amendment.

Justice Marshall does address "the argument that since the legislature is the voice of the people, its retention of capital punishment must represent the will of the people."<sup>47</sup> That argument he said was "undercut" by "[t]he fact that the constitutionality of capital punishment turns on the opinion of an informed citizenry."<sup>48</sup> He maintained that, if properly informed, "the great mass of citizens would conclude . . . that the death penalty is immoral and therefore unconstitutional."<sup>49</sup>

He did, however, acknowledge some doubt about this, saying that while the information presently available "would almost surely convince the average citizen that the death penalty was unwise, a problem arises as to whether it would convince him that the penalty was morally reprehensible."<sup>50</sup> What cannot be doubted is that an insecure, unfulfilled conditional proposition, unsupported by evidence, about the possible opinion of an informed electorate fails to meet Justice Blackmun's objection to what he saw as the usurpation of the authority of the legislative branch by the judiciary.

The arguments of Justices Douglas, Stewart, and White avoid both "the core normative question with which Justice Brennan and

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<sup>44</sup> 408 U.S. at 329 n.37.

<sup>45</sup> *Id.* at 330.

<sup>46</sup> *Id.* at 408.

<sup>47</sup> *Id.* at 361 n.145.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 363.

<sup>50</sup> *Id.*

Marshall attempted to grapple"<sup>51</sup> and also what the Chief Justice called "the ultimate issue presented in these cases . . . , the basic constitutional question."<sup>52</sup> All three Justices view the eighth amendment in terms that Daniel Polsby has aptly described as depriving it of "a dimension which is latent in almost all of the previous cases, particularly in the *Weems* case and in the Warren opinion in *Trop* — as an independently potent moral force which is at the disposal of the least dangerous branch of government and which may be used to make the most dangerous branch a little less so."<sup>53</sup> The emphasis in all three opinions is on defects in the sentencing system or sentencing practices which they saw as not complying with the eighth amendment rather than on the death penalty itself.

Justice Douglas avoided altogether the question whether the death penalty per se is a cruel or unusual punishment. Indeed what he said applies to imprisonment just as much as to the death penalty:

[I]t is "cruel and unusual" to apply the death penalty — *or any other penalty* — selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board.<sup>54</sup>

In another key passage Justice Douglas said:

It would seem to be incontestable that the death penalty inflicted on one defendant is "unusual" if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.<sup>55</sup>

The essence of his opinion is that because the death penalty statutes were "pregnant with discrimination" and the procedures involved in the imposition of the death penalty were discriminatory, they were not "compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."<sup>56</sup> Thus, his opinion does not reach the questions raised by Justice Blackmun.

Nor with one exception, do those of Justices Stewart and White whose "swing votes" were crucial in *Furman* since, as the Chief Justice said, both "stop short of reaching the ultimate question."<sup>57</sup> Justice Stewart acknowledged the uniqueness of the death penalty "in its abso-

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<sup>51</sup> Polsby, *supra* note 15, at 26.

<sup>52</sup> 408 U.S. at 403 (Burger, C.J., dissenting).

<sup>53</sup> Polsby, *supra* note 15, at 25.

<sup>54</sup> 408 U.S. at 245 (Douglas, J., concurring) (emphasis added).

<sup>55</sup> *Id.* at 242.

<sup>56</sup> *Id.* at 257.

<sup>57</sup> *Id.* at 396-97 (Burger, C.J., dissenting).

lute renunciation of all that is embodied in our concept of humanity" and acknowledged also that the case for concluding that the infliction of the death penalty is constitutionally impermissible in all circumstances under the eighth and fourteenth amendments "is a strong one."<sup>58</sup>

We shall refer to these statements again in the context of the plurality opinion and judgment of the Court that Justice Stewart announced in *Gregg*. In *Furman*, however, he did not develop these thoughts because he saw it as "unnecessary" to "decide whether capital punishment is unconstitutional for all crimes and under all circumstances."<sup>59</sup> He concluded that the petitioners' sentences should be set aside not because the punishment was impermissibly cruel but because "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed."<sup>60</sup>

Similarly, Justice White decided that the questions whether the death penalty was unconstitutional *per se*, or whether there was any system of capital punishment that would comport with the eighth amendment were not presented in *Furman* and did not need to be decided. He said, however, that "the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."<sup>61</sup> He concluded that the arbitrariness and irrationality of what juries and judges did in exercising their discretion rendered the imposition of the death penalty "as it is presently administered under the statutes involved in these cases," violative of the eighth amendment.<sup>62</sup>

Unlike Justices Douglas and Stewart he did say something directly relevant to one of Justice Blackmun's queries. Justice Blackmun asked in effect why *now* was the appropriate time to strike down the death penalty. Although Justice White said "I do not at all intimate that the death penalty is unconstitutional *per se*," he came close to answering that question in the following passage:<sup>63</sup>

I begin with what I consider a near truism: that the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system. . . . *At the moment that it ceases realistically to further*

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<sup>58</sup> *Id.* at 306 (Stewart, J., concurring).

<sup>59</sup> *Id.* at 306-07.

<sup>60</sup> *Id.* at 310.

<sup>61</sup> *Id.* at 313 (White, J., concurring).

<sup>62</sup> *Id.* at 312-13.

<sup>63</sup> *Id.* at 310-11.

*these purposes, . . . the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment. It is my view that it would, for its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. . . . It is also my judgment that this point has been reached with respect to capital punishment as it is presently administered . . . . I cannot avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.*<sup>64</sup>

### III. THE MISSING LINKS

It cannot be said that the majority Justices failed altogether to confront the crucial issues raised by Mr. Justice Blackmun. By collating and consolidating selected passages from all their opinions it might be possible to construct a synthetic opinion that would approximate an adequate response to his challenge. One might begin with Justice Blackmun's own opinion and his declaration of distaste, antipathy, and abhorrence for the death penalty "with all its aspects of physical distress and fear" and its antagonism to any sense "of 'reverence for life.'"<sup>65</sup> But Justice Blackmun was well aware of, and sensitive to, the nature of the death penalty. He stated firmly that if he were a legislator he would do all he could "to sponsor and to vote for legislation abolishing the death penalty."<sup>66</sup> The problem, as he defined it, was "the suddenness of the Court's perception of progress in the human attitude since decisions of only a short while ago."<sup>67</sup>

What was the nature of that problem? In order to understand it we have to ask in what sense was the Court's judgment in *Furman* sudden? In the context of the decline of the death penalty in the rest of the Western world and of America's participation, and indeed primary role, in that development, it is impossible to regard the Court's decision that it was "time to strike down the death penalty" as anything more than the culmination of a long-term movement in the Western societies "down the road toward human decency" (to use Justice Blackmun's own words).<sup>68</sup> It was a movement that had begun *in America* one hundred and twenty-five years earlier<sup>69</sup> and that had continued consistently

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<sup>64</sup> *Id.* at 311-13 (emphasis added).

<sup>65</sup> *Id.* at 405-06 (Blackmun, J., dissenting).

<sup>66</sup> *Id.* at 410.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> In 1846 the Territory of Michigan voted to abolish capital punishment for all crimes except treason, effective March 1, 1847, thus becoming the first jurisdiction in

until by 1972 there had not been an execution in America in the previous five years.<sup>70</sup>

In other words, the relevant "passage of time" to which Justice Blackmun's attention should have been directed was not the "brief periods" since *McGautha v. California*,<sup>71</sup> *Rudolph v. Alabama*,<sup>72</sup> *Trop v. Dulles*,<sup>73</sup> and *Louisiana ex rel. Francis v. Resweber*<sup>74</sup> but the whole period over which the long-term trend away from execution developed. In that context the "significant movement" he sought is plainly manifest over the twentieth century. In that context to say that "the passage of time has taken us to a place of greater maturity and outlook" is not a matter of "plausible and high-sounding argument," but simply a matter of historical fact.

In the historical perspective there is no way in which *Furman* can be seen as some kind of precipitate rush to judgment. Justice Blackmun said "[t]here would have been as much reason to do this when any of the cited cases [*McGautha*, *Rudolph*, *Trop*, and *Francis*] were decided. But the Court refrained from that action on each of these occasions."<sup>75</sup> Indeed there *was* as much reason when the earlier cases were decided. Philip Kurland, whose verdict was that "[i]n the *Furman v. Georgia* decision the inevitable came to pass," also said: "The essential surprise is that it came to pass when it did. Earlier cases had afforded the majority of Justices the same opportunities to justify the conclusion they reached . . . ."<sup>76</sup> The Court's "perception of progress in the human attitude" may have been "sudden" in some sense, but it could also be regarded as belated.

Two other aspects of Justice Blackmun's opinion deserve attention. After referring to "voting facts with respect to" recent federal death penalty legislation — the 1961 aircraft piracy statute,<sup>77</sup> the 1965 presi-

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the English-speaking world to do so. W. BOWERS, EXECUTIONS IN AMERICA 6 (1974).

<sup>70</sup> Although 199 prisoners were executed in 1935, in the post-Second World War era this number diminished remarkably, and in 1962, 10 years before *Furman*, 47 executions occurred. In 1967, the last year of executions before the *Furman* decision, only two prisoners were executed. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 1981, at 14 Table 1 (1982) [hereafter CAPITAL PUNISHMENT 1981].

<sup>71</sup> 402 U.S. 183 (1971).

<sup>72</sup> 375 U.S. 889 (1963) (denial of certiorari).

<sup>73</sup> 356 U.S. 86 (1958).

<sup>74</sup> 329 U.S. 459 (1947).

<sup>75</sup> 408 U.S. at 408-09 (Blackmun, J., dissenting).

<sup>76</sup> Kurland, 1971 Term: *The Year of the Stewart-White Court*, 1972 SUP. CT. REV. 181, 297.

<sup>77</sup> Pub. L. No. 87-197, 75 Stat. 466 (codified at then 49 U.S.C. § 1472(i)).

dential assassination statute,<sup>78</sup> and the 1970 Omnibus Crime Control Act<sup>79</sup> — he said:

It is impossible for me to believe that the many lawyer-members of the House and Senate — including, I might add, outstanding leaders and prominent candidates for higher office — were callously unaware and insensitive of constitutional overtones in legislation of this type. The answer, of course, is that in 1961, in 1965, and in 1970 these elected representatives of the people — far more conscious of the temper of the times, of the maturing of society, and of the contemporary demands for man's dignity, than are we who sit cloistered on this Court — took it as settled that the death penalty then, as it always had been, was not in itself unconstitutional. Some of those Members of Congress, I suspect, will be surprised at this Court's giant stride today.<sup>80</sup>

In the first place, the context of death penalty legislation is crucial to comprehending its meaning as political and symbolic action. What Justice Blackmun, "cloistered on this Court," seems to have missed — and what "the many lawyer-members of the House and Senate" undoubtedly had been well aware of, and sensitive to — is the almost purely symbolic significance of death penalty legislation at the Federal level where a virtual moratorium on executions prevailed.

Over the years in which the legislation mentioned was enacted, out of a federal prison population averaging 22,430<sup>81</sup> the number of prisoners on death row never rose above two.<sup>82</sup> Moreover, despite the multitude of federal crimes for which the death penalty was available only one prisoner was executed in that period.<sup>83</sup> The only execution took place in 1963 prior to the passage of two of the pieces of legislation mentioned. There have been none since that time, and at the time of writing there have been no prisoners on death row for the past eight years.

What is also puzzling about this passage is that it reflects a conception of the cruel and unusual punishment prohibition so restrictive that it makes the clause almost disappear. For if public opinion as interpreted by the "elected representatives of the people" determines the

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<sup>78</sup> Pub. L. No. 89-141, § 1, 79 Stat. 580, 580 (codified at 18 U.S.C. § 1751 (1982)).

<sup>79</sup> Pub. L. No. 91-644, tit. IV, § 15, 84 Stat. 1880, 1891 (codified at 18 U.S.C. § 351 (1982)).

<sup>80</sup> 408 U.S. at 413.

<sup>81</sup> U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1973, at 349 Table 6.17 (1973).

<sup>82</sup> U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT (yearly bulletins from 1961 to 1970).

<sup>83</sup> CAPITAL PUNISHMENT 1981, *supra* note 70, at 17 Table 5 (last federal execution occurred in 1963).

range of punishments available, it is difficult to understand what function remains for a prohibition on cruel and unusual punishment to perform, or what could constitute a violation of the eighth amendment, in this context. What is the significance of a curb on majority and legislative will which cannot be employed to check or restrain that will?

If on the other hand "one role of the Constitution is to help the nation to become 'more civilized,'" <sup>84</sup> it is clear that public opinion must be accorded a different and necessarily subsidiary position. In relation to the abolition of the death penalty in the Western world it always has been. The abolition of capital punishment never takes place with evident public support. Majorities on the order of two-thirds of the population support the continuation of the death penalty at the point of abolition.<sup>85</sup> Then they disappear.<sup>86</sup> The role of a constitutional court operating within the eighth amendment is to facilitate that transition.

The history of the abandonment of capital punishment demonstrates the need for a "lead from the front." With rare exceptions, leadership from the front in American political life is a function of a constitutional court. If public opinion is accorded a subsidiary role, then the judicial function is to make difficult decisions as to what leadership from the front may mean in relation to punishment policy and eventual public acceptance. In making those decisions the Court cannot be guided solely by the will of the people. As Justice Blackmun rightly said: "I do not sit on these cases, however, as a legislator, responsive, at least in part, to the will of constituents."<sup>87</sup>

In *Furman* the Court's attention was drawn to the decline in the use of the death penalty in the rest of the civilized world. Chief Justice Burger giving the leading opinion in dissent referred to "[t]he worldwide trend toward limiting the use of capital punishment, a phenomenon to which we have been urged to give great weight," but said that it

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<sup>84</sup> Kurland, *supra* note 76, at 296.

<sup>85</sup> See, e.g., 1 THE GALLUP INTERNATIONAL PUBLIC OPINION POLLS, GREAT BRITAIN, 1937-1975, at 774 (G. Gallup ed. 1976) (1964 poll revealed that only 21% of those asked believed that the death penalty should be abolished) [hereafter GALLUP INTERNATIONAL POLLS]; Erskine, *The Polls: Capital Punishment*, 34 PUB. OPINION Q. 300 (1970).

<sup>86</sup> The most complete documentation of this tendency is found in Germany where two to one opposition to abolition of capital punishment at the time it was accomplished became two to one support for abolition in just over two decades. See THE GERMANS: PUBLIC OPINION POLLS, 1947-1966, at 150 (E. Noelle & E. Neuman eds., G. Finan trans. 1967) [hereafter GERMAN POLLS, 1947-1966]; THE GERMANS: PUBLIC OPINION POLLS, 1967-1980, at 171 (E. Noelle-Neuman ed. 1981) [hereafter GERMAN POLLS, 1967-1980].

<sup>87</sup> *Furman*, 408 U.S. at 410 (Blackmun, J., dissenting).

"hardly points the way to a judicial solution in this country under a written Constitution."<sup>88</sup> "Our constitutional inquiry," he said, must be "confined to the meaning and applicability of the uncertain language of the Eighth Amendment."<sup>89</sup>

The Chief Justice's rubric might suggest that the Court should confine itself to a purely semantic analysis designed to determine the denotation of the phrase "cruel and unusual punishments." But even semanticists are concerned with the development of, and changes in, the meanings of speech forms. Furthermore, they do not confine their attention to parochial or regional usage or to a fixed point in time.

In this connection it is interesting to read Raoul Berger's account of the history of the "Cruel and Unusual Punishments" Clause.<sup>90</sup> Berger contests what he calls "the spurious doctrine that the clause, borrowed from the Bill of Rights of 1689, prohibits excessiveness in punishment."<sup>91</sup>

One thing is clear beyond peradventure: the "cruel and unusual punishments" clause left death penalties untouched. Writing seventy years after the appearance of the clause in the 1689 Bill of Rights, Blackstone said of "deliberate and wilful murder, a crime at which human nature starts," that it is "punished almost universally throughout the world with death," striking testimony by the great commentator that the death penalty was not affected by the clause.<sup>92</sup>

It is however also striking evidence that Blackstone did not regard contemporary policy and practice in countries other than his own as irrelevant in considering the death penalty.<sup>93</sup> Is it conceivable that the Supreme Court would have considered it irrelevant if the position in 1972 had been, as it was in Blackstone's day, that deliberate and wilful murder was punished almost universally throughout the world with death?

The experience of Western democracies with the issue of capital punishment is relevant to the concerns raised by Justice Blackmun. Detailed knowledge of the processes leading to abolition in other countries would certainly have provided a better context for the Court's deliberations in *Furman* and might have dispelled Justice Blackmun's unease.

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<sup>88</sup> *Id.* at 404 (Burger, C.J., dissenting).

<sup>89</sup> *Id.* at 375.

<sup>90</sup> R. BERGER, *DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE* (1982).

<sup>91</sup> *Id.* at 29-30.

<sup>92</sup> *Id.* at 43 (quoting W. BLACKSTONE, *COMMENTARIES* \*194).

<sup>93</sup> See, e.g., 4 W. BLACKSTONE, *COMMENTARIES* \*10 (considering effect of capital punishment in Russia); *id.* \*194 (Mosaic law).



Our research, to be reported in a forthcoming book, reveals several common developments:

1. An almost universal trend in Western democracies, culminating in the 1960's and 1970's, toward formal abolition of capital punishment for civil crimes.

2. The existence of strong popular opposition to abolition, as measured by public opinion polls. Majorities of two-thirds opposed to abolition were associated with abolition in Great Britain in the 1960's,<sup>94</sup> Canada in the 1970's,<sup>95</sup> and West Germany in the late 1940's.<sup>96</sup> In West Germany, the turn around in public opinion took two decades, but solid majorities opposed to executions did emerge and withstood a sustained period of terrorist activities in the 1970's.<sup>97</sup>

3. In many cases, laws providing for the death penalty persisted long after the practice of execution was halted. Statutes with capital penalties co-existed with de facto abolition in many European countries, on occasion for nearly a century.<sup>98</sup> The federal statutes of concern to Justice Blackmun were thus exercises in symbolism that were in no way inconsistent with a national trend toward abolition.

4. Once the penalty was abolished, and despite popular opinion, no Western democracy has reintroduced executions for a sustained period. Except for a time after World War II in many of the countries subject to occupation and attack, and in a brief period in New Zealand, the abolition of capital punishment has not led to further execution. And in Europe and New Zealand, reintroduction was followed by reabolition.<sup>99</sup> The long term trend toward abolition in the West appears, in retrospect, inevitable.

In this light, the performance of the majority in *Furman* appears typical of the significant moves toward abolition in Western nations. The court's leadership of public opinion was no more dramatic than that of the executive branch and parliament in many other nations.

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<sup>94</sup> See GALLUP INTERNATIONAL POLLS, *supra* note 85, at 774, 1462 (prior to 1966 suspension of the death penalty, only 21% of those polled favored abolition; in 1966, 76% favored reintroduction).

<sup>95</sup> D. CHANDLER, CAPITAL PUNISHMENT IN CANADA 53 (1976).

<sup>96</sup> See GERMAN POLLS, 1947-1966, *supra* note 86, at 150 (in 1948, 74% favored retention of the death penalty).

<sup>97</sup> See GERMANS POLLS, 1967-1980, *supra* note 86, at 171 (in 1980, 55% opposed the death penalty, while only 26% favored it).

<sup>98</sup> See AMNESTY INTERNATIONAL, THE DEATH PENALTY 108 (1979) (last execution for a civil crime in Belgium was in 1918); *id.* at 117 (last execution in Greece was in 1972).

<sup>99</sup> See ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT 340 app. 6 (1953).

Even the non-ultimate issue decided in *Furman*, the death penalty "as administered," resembles the incremental approaches, including suspension of executions and de facto abolition, in other countries. And the constitutional court that ventured the decision in *Furman* was the branch of federal government in the United States historically relied upon to initiate such changes.

One consequence of regarding *Furman v. Georgia* as a typical step toward abolition of capital punishment is to center attention on *Gregg v. Georgia*<sup>100</sup> as an historical discontinuity. From a long term perspective, the Supreme Court of the United States did not produce two surprises in the 1970's, but only one. And serious study of the origins, reasoning, and context of *Gregg v. Georgia* becomes even more necessary.

#### IV. FROM *Furman* TO *Gregg*

To many observers, after *Furman* "the death penalty in the United States seemed to be past history."<sup>101</sup> *Furman* was interpreted as having "said that capital punishment had been abolished in America."<sup>102</sup> "In its ruling in *Furman*," wrote Hugo Bedau, "the Court in effect abolished the death penalty throughout the nation."<sup>103</sup> Somewhat more circumspectly, Anthony Amsterdam, who had represented *Furman*, and was the principal architect of the moratorium strategy,<sup>104</sup> said "[e]ven if some kind of mandatory legislation were passed, by the time this could happen and a new round of legislation go through the courts, nine or ten years would have elapsed without any execution in this country. It's almost inconceivable that executions could be resumed under those circumstances."<sup>105</sup>

On July 2, 1976, when the Supreme Court announced its decision in *Gregg v. Georgia* it became clear that executions would indeed be resumed. On January 17, 1977, with Gary Gilmore's death before a firing squad in Utah "nearly ten years without any executions came to a

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<sup>100</sup> 428 U.S. 153 (1976).

<sup>101</sup> B. WOLFE, PILEUP ON DEATH ROW 411 (1973).

<sup>102</sup> L. STEVENS, DEATH PENALTY: THE CASE OF LIFE VS. DEATH IN THE UNITED STATES 139 (1978).

<sup>103</sup> H. BEDAU, THE COURTS, THE CONSTITUTION AND CAPITAL PUNISHMENT xiii (1977).

<sup>104</sup> See M. MELTSNER, CRUEL AND UNUSUAL, THE SUPREME COURT AND CAPITAL PUNISHMENT 109 (1973); B. WOLFE, *supra* note 101, at 411.

<sup>105</sup> B. WOLFE, *supra* note 101, at 411.

violent end.”<sup>106</sup> Just as Justice Blackmun asked in *Furman* what had happened in the brief periods since *McGautha*, *Rudolph*, *Trop*, and *Francis* to justify the Court’s striking down the death penalty in *Furman*, it is pertinent to ask what had happened in the four years between *Furman* and *Gregg* to bring about, what appeared to many to be, an outright reversal of opinion.

One account of the transition from *Furman* to *Gregg* that has been suggested is phrased in nakedly political terms. A commentator has argued that the dissenters in *Furman*, “all Nixon-administration appointees and led by Chief Justice Warren E. Burger, were a solid bloc in defense of the death penalty.”<sup>107</sup> On this view the retirement of Justice Douglas and his replacement by Justice Stevens, who was appointed by President Ford, ensured that there was no longer a majority on the bench with the kind of judicial philosophy which produced the *Furman* decision. But the idea that patterns of constitutional decisionmaking are determined by the unvarying policy positions of members of the Court and that changes in those patterns are thus simply a function of changes in the personnel of the Court is not supported, but rather contradicted, by the available evidence.<sup>108</sup> Furthermore, in *Gregg* it was the “swing votes” of Justices Stewart and White, who were with the majority in *Furman*, which created a solid majority. The central opinion was written by Justice Stewart and supported by Justice White. A bloc of three Justices, Stewart, Powell, and Stevens, apparently with Justice Stewart as the leader, were the only Justices to vote with the majority in all five death penalty opinions issued that day.

Another interpretation of the change in relation to the central issue of the death penalty is that in *Gregg* the Court simply reversed the spirit if not the substance of *Furman*. At least one of the Justices — Justice Blackmun — appeared to have seen it in that way. He did not write an opinion in the case nor did he join in the opinion of others in the majority, though he did concur in the result. In *Gregg* he wrote: “I concur in the judgment. See *Furman v. Georgia*, 408 U.S. 238, 405-414 (1972) (Blackmun, J., dissenting), and *id.*, at 375 (Burger, C.J., dissenting); *id.*, at 414 (Powell, J., dissenting); *id.*, at 465 (Rehnquist, J., dissenting).”<sup>109</sup> What is striking here is that Justice Blackmun’s references with approval are confined to the four *Furman* dissents, implicitly disapproving the majority reasoning in *Gregg*. And he said the

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<sup>106</sup> H. BEDAU, *supra* note 103, at xiii-xiv.

<sup>107</sup> Bedau, *Cruel and Unusual*, *supra* note 11, at 249.

<sup>108</sup> R. SCIGLIANO, *THE SUPREME COURT AND THE PRESIDENCY 125-60* (1971).

<sup>109</sup> 428 U.S. at 227 (Blackmun, J., concurring).

same thing in a slightly abbreviated form when concurring in *Proffitt*<sup>110</sup> and *Jurek*,<sup>111</sup> and also dissenting in *Woodson*.<sup>112</sup>

To understand the transition from *Furman* to *Gregg* it is necessary to examine the plurality opinion and judgment of the Court announced by Justice Stewart and joined by Justice Powell and Justice Stevens. For it is there, and in particular in the passages dealing with the petitioners' argument that the sentence of death for the crime of murder was a per se violation of the eighth and fourteenth amendments to the Constitution, that the determining factors are to be found.

The petitioners in *Gregg* argued, as the petitioners in *Furman* had, that standards of decency had evolved to the point where capital punishment could no longer be tolerated. They argued in effect that the evolutionary process had come to an end and that standards of decency required that the eighth amendment be construed as prohibiting capital punishment. In *Gregg* the Court acknowledged that "an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment."<sup>113</sup> The plurality opinion goes on to say: "this assessment does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction."<sup>114</sup>

The decisive passages in the opinion dealing with this question run as follows:

The petitioners in the capital cases before the Court today renew the "standards of decency" argument, but developments during the four years since *Furman* have undercut substantially the assumptions upon which their argument rested. Despite the continuing debate, dating back to the 19th century, over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction.

The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*. The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person. And the Congress of the United States, in 1974, enacted a statute providing the death penalty for aircraft piracy that results in death . . . [A]ll of the post-*Furman* statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people.

In the only statewide referendum occurring since *Furman* and brought to our attention, the people of California adopted a constitutional amend-

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<sup>110</sup> 428 U.S. 242, 261 (1976) (Blackmun, J., concurring).

<sup>111</sup> 428 U.S. 262, 279 (1976) (Blackmun, J., concurring).

<sup>112</sup> 428 U.S. 280, 307-08 (1976) (Blackmun, J., dissenting).

<sup>113</sup> 428 U.S. at 173.

<sup>114</sup> *Id.*

ment that authorized capital punishment, in effect negating a prior ruling by the Supreme Court of California in *People v. Anderson* . . . , that the death penalty violated the California Constitution.<sup>115</sup>

The opinion continues:

The jury also is a significant and reliable objective index of contemporary values because it is so directly involved . . . . The Court has said that "one of the most important functions any jury can perform in making . . . a selection [between life imprisonment and death for a defendant convicted in a capital case] is to maintain a link between contemporary community values and the penal system." . . . [T]he actions of juries in many States since *Furman* are fully compatible with the legislative judgments, reflected in the new statutes, as to the continued utility and necessity of capital punishment in appropriate cases. At the close of 1974 at least 254 persons had been sentenced to death since *Furman*, and by the end of March 1976, more than 460 persons were subject to death sentences.<sup>116</sup>

In *Gregg* a second opinion, with which the Chief Justice and Justice Rehnquist also concurring in the judgment joined, was written by Justice White. Justice White concluded his opinion by saying "[f]or the reasons stated in dissent in *Roberts v. Louisiana*, . . . neither can I agree that the petitioner's other basic argument that the death penalty, however imposed and for whatever crime, is cruel and unusual punishment."<sup>117</sup> The following passage from Justice White's dissenting opinion in *Roberts v. Louisiana* is relevant here:

In *Furman*, it was concluded by at least two Justices that the death penalty had become unacceptable to the great majority of the people of this country and for that reason, alone or combined with other reasons, was invalid under the Eighth Amendment, which must be construed and applied to reflect the evolving moral standards of the country. . . . That argument, whether or not accurate at that time, when measured by the manner in which the death penalty was being administered under the then-prevailing statutory schemes, is no longer descriptive of the country's attitude. Since the judgment in *Furman*, Congress and 35 state legislatures re-enacted the death penalty for one or more crimes. All of these States authorize the death penalty for murder of one kind or another. With these profound developments in mind, I cannot say that capital punishment has been rejected by or is offensive to the prevailing attitudes and moral presuppositions in the United States or that it is always an excessively cruel or severe punishment or always a disproportionate punishment for any crime for which it might be imposed. These grounds for invalidating the death penalty are foreclosed by recent events, which this Court must accept as demonstrating that capital punishment is acceptable to the contemporary community as just punishment for at least some intentional

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<sup>115</sup> *Id.* at 179-81.

<sup>116</sup> *Id.* at 181-82 (brackets in original).

<sup>117</sup> *Id.* at 226 (White, J., concurring).

killings.

It is apparent also that Congress and 35 state legislatures are of the view that capital punishment better serves the ends of criminal justice than would life imprisonment and that it is therefore not excessive in the sense that it serves no legitimate legislative or social ends.<sup>118</sup>

The significance of these passages from the opinions written by Justice Stewart and Justice White is that they reveal what it was that had happened in the interim between *Furman* and *Gregg* to change the minds of the two Justices who cast the crucial "swing votes" in *Furman*. Justice Stewart had said in *Furman* that the case advanced by Justices Brennan and Marshall for concluding that the infliction of the death penalty was constitutionally impermissible in all circumstances under the eighth and fourteenth amendments was "a strong one."<sup>119</sup> Justice White had said that the death penalty was exacted with such a "degree of infrequency" that it had ceased "realistically" to further "any discernible social or public purposes," and that it was therefore "patently excessive and cruel and unusual punishment violative of the eighth amendment."<sup>120</sup>

What had happened to debilitate the strong case advanced by Justices Brennan and Marshall? What had happened to restore viability to a penalty that had, in Justice White's words, "for all practical purposes run its course?"<sup>121</sup> Two phenomena appear to have strongly influenced Justices Stewart and White: the impact of *Furman* on public opinion and the legislative response to *Furman*.

Consider first the matter of public opinion. Both Justices refer to the fact that California, subsequent to the invalidation of the death penalty in that state on constitutional grounds in *People v. Anderson*<sup>122</sup> by the California Supreme Court, adopted a constitutional amendment that authorized capital punishment. Both refer to a 1968 referendum on the death penalty in Massachusetts in which a majority voted to retain the death penalty. Both also refer to public opinion polls on capital punishment including (in the case of Justice Stewart) a December 1972 Gallup poll which indicated that fifty-seven percent of the people favored the death penalty and a June 1973 Harris survey which showed support of fifty-nine percent.<sup>123</sup>

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<sup>118</sup> 428 U.S. 325, 351-53 (1976).

<sup>119</sup> 408 U.S. at 306 (Stewart, J., concurring).

<sup>120</sup> *Id.* at 311-12 (White, J., concurring).

<sup>121</sup> *Id.* at 313.

<sup>122</sup> 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied*, 406 U.S. 958 (1972).

<sup>123</sup> *Roberts*, 428 U.S. at 352 n.5 (White, J., dissenting); *Gregg*, 428 U.S. at 181

It is notable that Justice White mentions, in regard to public opinion polls on capital punishment that "their validity and reliability have been strongly criticized."<sup>124</sup> Yet, as we have pointed out earlier, in this context the universal experience is that public opinion invariably favors the death penalty and in relation to abolition is invariably led, not followed.<sup>125</sup> If America waits until the death penalty has "become unacceptable to the great majority of the people," or "has been rejected by or is offensive to the prevailing attitudes" in the community, before abandoning the death penalty then it may never abandon it. Moreover, the Court did not discuss the possibility that the post-*Furman* poll results represented no more than a predictable reaction to *Furman*.

The jury may in some circumstances be "a significant and reliable objective index of contemporary values" but it is also an equivocal one in this connection. In the first place we have no reliable data on jury decisions before and after *Furman* because we do not know the relative frequency with which jurors were asked by prosecutors to make the death penalty decision under pre-*Furman* and post-*Furman* statutes. Estimating the propensity of juries toward death penalties without those key figures is trying to construct a fraction without a denominator.

Second, using jurors in death penalty cases as an index of contemporary values is misleading because prospective jurors with strong scruples against the death penalty are systematically eliminated from capital trials.<sup>126</sup> Third, the number of jury death verdicts as a fraction of death eligible cases is small. The total of death sentences is less than ten percent of robbery homicide convictions and that is disregarding all other death eligible convictions. Again we do not know how much of this to attribute to jury behavior because the denominator of death sentence requests is unavailable. However, from the standpoint of concern about a penalty that strikes like lightning, the relative infrequency of death sentences after *Furman* remains salient.

Fourth, to regard the post-*Furman* jury death sentences as an index of the attitudes of jurors seems dubious. Jurors for the most part see their legal and civic duty as a matter of following instructions. *Furman* and the statutes it spawned changes those instructions in ways that

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n.25.<sup>124</sup> *Roberts*, 428 U.S. at 352 n.5 (White, J., dissenting).<sup>125</sup> See *supra* text accompanying notes 85-86.<sup>126</sup> *Witherspoon v. Illinois*, 391 U.S. 510 (1968); see also Fitzgerald & Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31 (1984).

should increase jury death verdicts quite independently of juror attitudes. The new "discretionary" statutes such as Georgia's contained much more directive language than pre-*Furman* laws. So that in imposing death sentences juries may have simply been trying to follow what were perceived as orders; orders moreover that were devised by legislatures as a response to *Furman*.

Finally, the number of death sentences reported in the Stewart opinion in *Gregg* included those imposed under post-*Furman* mandatory legislation. Eighteen states adopted mandatory death penalty statutes after *Furman* that completely removed the jury's discretion.<sup>127</sup> In fact it was for that reason struck down on the same day *Gregg* was decided!<sup>128</sup>

As to the legislative extravaganza of new death penalty statutes that followed *Furman*, it is reminiscent of the "pouring panic of capital statutes" which was a feature of the history of the criminal law in eighteenth-century England.<sup>129</sup> Whatever the social psychology of that development may have been, the post-*Furman* reaction in America would probably be best characterized as a typical frustration-aggression response. Like parallel incidents in school prayer and pornography, legislative backlash was entirely to be expected by anyone familiar with the history of judicial invalidation in this country.<sup>130</sup>

In short, it is impossible to regard any of these "objective indicia" as

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<sup>127</sup> MODEL PENAL CODE § 210.6 n.145 (1980).

<sup>128</sup> *Roberts*, 428 U.S. 325 (1976); *Woodson*, 428 U.S. 280 (1976).

<sup>129</sup> L. FOX, *THE ENGLISH PRISON AND BORSTAL SYSTEMS* 22 (1952); see also L. RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW FROM 1750*, at 3 (1948).

<sup>130</sup> In the early 1960's the Supreme Court decided several controversial decisions involving the constitutionality of religious prayer in public schools. In *Engel v. Vitale*, 370 U.S. 421 (1962), the Court held that the use of a prayer composed by the New York Board of Regents violated the first amendment's requirement of separation of church and state. The next year, the Court declared that religious use of the Lord's prayer and Bible reading was also unconstitutional.

The public outcry to the Supreme Court's decisions was "deafening." F. FRIENDLY & M. ELLIOTT, *THE CONSTITUTION: THAT DELICATE BALANCE* 125 (1984). Within hours of the decisions, politicians, newspapers, and religious leaders condemned the Court. See, e.g., Kurland, *The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . ."*, in *CHURCH AND STATE: THE SUPREME COURT AND THE FIRST AMENDMENT* 1, 3 (P. Kurland ed. 1975). Political leaders called for constitutional amendments to overturn the Court's rulings; 49 such amendments were introduced in Congress. See K. DOLBEARE & P. HAMMOND, *THE SCHOOL PRAYER DECISIONS: FROM COURT POLICY TO LOCAL PRACTICE* 27 (1971). Although the initial compliance with the Court's rulings was mixed, see, e.g., *id.* at 30, eventually many of those who decried the decisions have applauded them, see Kurland, *supra*, at 33. And, of course, no constitutional amendments were enacted and no impeachment proceedings against the Justices were instituted.



providing a simple veridical reflection of "the public attitude toward a given sanction." Yet the Court in *Gregg* appeared to have accepted them as such without question or qualification and to have regarded them as decisive on the question of evolving standards of decency. This is disturbing because in considering the constitutional validity of a penalty described by Justice Stewart as unique "in its absolute renunciation of all that is embodied in our concept of humanity"<sup>131</sup> such matters should not go unquestioned but be subjected to rigorous scrutiny.

One window into the complex and crucial issue of capital punishment and public opinion is to ask the question: What would have happened if the Court had ruled the other way in 1976? We think the answer is: not all that much. Earlier we have drawn a parallel between the capital punishment and school prayer decisions.<sup>132</sup> There can be no doubt that a 1976 reaffirmation of the end of the death penalty in the United States might have evoked direct mail campaigns, proposals in Congress for constitutional amendment, and fervent calls for the impeachment of standing judges. That is the American way. But the dust would probably have settled. School prayer amendments do not pass. Neither, we suspect would the Capital Punishment Amendment of 1976, or 1986 have passed. A ten-year hiatus in execution in the United States, stretched to twenty years, would probably in retrospect have seemed inevitable. In those circumstances, *Furman* and not *Gregg* would have been viewed as a landmark case.

The structure of political democracy in America is such that the Supreme Court plays "a vital role in the preservation of the American democratic system."<sup>133</sup> It is vital in the sense that if the Court does not act then, in many cases, no action will be taken. It may be true that wide-scale implementation of the Court's ban on legally imposed school segregation in *Brown v. Board of Education*<sup>134</sup> in 1954 "was accomplished only after the political branches afforded coercive support in the Civil Rights Act of 1964."<sup>135</sup> But if the Court had not spoken as it did, there would have been nothing for Congress to support.

"Today, just ten years later," wrote Dallin Oaks in 1974, "the controversy seems as if it had come from another century. With the passage of the Civil Rights Act we not only changed our law, but we also

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<sup>131</sup> *Furman*, 408 U.S. at 306 (Stewart, J., concurring).

<sup>132</sup> See *supra* note 130 and accompanying text.

<sup>133</sup> J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 10 (1980).

<sup>134</sup> 347 U.S. 483 (1954).

<sup>135</sup> J. CHOPER, *supra* note 133, at 92.

changed our minds. Today the proposition adopted in that legislation is well accepted from coast to coast and from north to south."<sup>136</sup> Yet, it should not be forgotten that the crucial initiative came twenty years earlier from the Justices who in Alexander Hamilton's words "had courage and magnanimity enough to serve [the people] at the peril of their displeasure."<sup>137</sup> If the Supreme Court had adopted in relation to the death penalty as unwaivering an approach as it did in *Brown*, that controversy too might now seem as if it had come from another century and there would be no 1500 prisoners on death row.

## V. THE FUTURE OF THE EIGHTH AMENDMENT

There are some basic questions regarding the doctrinal future of *Furman* and *Gregg* that deserve serious attention. The first question is whether *Furman* in spirit and in substance is still good law. Apparently Justice Blackmun regards *Gregg* as having reversed *Furman*. But again he appears to stand alone; the other eight Justices think that the two cases can comfortably coexist. The second and related question is whether there is any doctrinal space remaining after *Gregg* for an assault on capital punishment, either per se or as currently administered, as cruel and unusual punishment in violation of the eighth amendment of the Constitution.

We shall not here discuss in detail two obvious ways in which the Court could strike down death penalties. *Gregg v. Georgia* could be reversed by a Court majority confessing the error of its ways, but that is unlikely. Somewhat more likely, since the eighth amendment has not been regarded as a static concept but as deriving its meaning from evolving standards of decency over time, is that a future Court majority could conclude that standards of decency had evolved since 1976 in such a manner as to change the classification of the penalty of death. That is a more probable eventuality but not to be expected in this decade, and possibly not even in this century.

What we shall explore here is whether the statutory systems and capital-sentencing procedures approved in principal in *Gregg* (and in *Proffitt* and *Jurek*) could be struck down in practice under the authority of *Furman*. In order to do this it is necessary to narrow down somewhat Justice Stewart's statement of the issue, involving the death pen-

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<sup>136</sup> Oaks, *The Popular Myth of the Victimless Crime*, in *THE PURSUIT OF CRIMINAL JUSTICE: ESSAYS FROM THE CHICAGO CENTER* 223 (G. Hawkins & F. Zimring eds. 1984).

<sup>137</sup> *THE FEDERALIST* No. 71, at 207 (A. Hamilton) (R. Fairfield ed. 1981).

alty as a punishment for murder "under any circumstances,"<sup>138</sup> to whether the punishment of death for the civil crime of murder in its frequently recurrent forms is constitutionally permitted. That is in fact the only question that can be decided in terms of the *Furman* opinions. There are no Presidential assassins or persons found guilty of treason amongst the pool of 1500 on death row. Moreover, hypothetical cases cannot be faced with the same experience and moral authority as can those that make up the quotidian grist of felony homicides. Since 1977 the precipitating causes of all but a handful of the executions have been homicides committed in the course of other forcible felonies.

There have been in the last decade an annual average of more than 20,000 criminal homicides in America.<sup>139</sup> An estimated current annual rate of twenty to thirty executions per year represents less than 0.2 percent of the homicide rate. In the year 1979 when John Spinklink was executed for robbery homicide at Rainsford Prison in Florida there were about 2200 robbery homicides known to the police and more than 3400 felony killings.<sup>140</sup>

We estimate that over half of these events resulted in one or more arrests and most of these occurred in states that make such crimes eligible for capital punishment.<sup>141</sup> Spinklink's execution was thus less than a one in one thousand proposition. To escalate the odds to one in one hundred for robbery killings would require a national increase in the frequency of execution even if no other form of criminal killing were so punished. Increasing the chances to ten in one hundred on a national basis would result in more executions in the United States every year for robbery killing alone than occurred in any year during the twentieth century. We leave it to the reader to perform the calculations of necessary executions required for more evenhanded justice.

What is the significance of ratios of this order in the light, of Justice Stewart's and Justice White's opinions in *Furman*?

The relevant passage in Justice Stewart's opinion is as follows:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon

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<sup>138</sup> *Proffitt v. Florida*, 428 U.S. 242, 247 (1976).

<sup>139</sup> U.S. DEP'T OF JUSTICE, FBI, UNIFORM CRIME REPORTS; CRIME IN THE UNITED STATES (1974-1983).

<sup>140</sup> U.S. DEP'T OF JUSTICE, FBI, UNIFORM CRIME REPORTS; CRIME IN THE UNITED STATES 1979, at 12 (from Table).

<sup>141</sup> See Zimring & Zuehl, *Determinants of Injury and Death in Urban Robbery*, 15 J. LEGAL STUD. (1986) (forthcoming).

whom the sentence of death has in fact been imposed . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.<sup>142</sup>

Justice White, as noted above, also emphasized the "degree of infrequency" with which the death penalty was imposed: "judges and juries have ordered the death penalty with such infrequency that the odds are now very much against imposition and execution of the penalty with respect to any convicted murderer . . . ."<sup>143</sup> Indeed, he said that its imposition was so infrequent that it constituted "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes."<sup>144</sup>

In the light of these statements an inescapable question presents itself. To what extent do the new statutory schemes and procedures for the imposition of the death penalty, adopted since *Furman*, satisfy the constitutional deficiencies identified in that case by Justices Stewart and White? Justice Stewart referred to the testimony before Congress of United States Attorney General Clark that only a "small and capricious selection of offenders have been put to death. Most persons convicted of the same crimes have been imprisoned."<sup>145</sup> Does the record since *Gregg* reveal a significant change in respect to the selection of offenders for the death penalty?

One key issue is whether the state review processes lauded by Justice Stewart in *Gregg*<sup>146</sup> and *Proffitt*<sup>147</sup> effectively police the distribution of death sentences and executions. The Court's opinions in the leading cases in this area indicate a belief that appellate review ensures uniformity, fairness, and consistency in capital sentencing.

A study by Professor George E. Dix of the University of Texas directly addresses this matter, evaluating the empirical data and analyzing many of the appellate opinions in capital homicide cases in those states.<sup>148</sup> For each state Professor Dix asked to what extent the state appellate court has invalidated death penalties, has provided a basis for encouraging proper and consistent sentencing, and has resolved procedural problems.

He found that the Georgia and Texas courts have held death

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<sup>142</sup> *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring).

<sup>143</sup> *Id.* at 311 (White, J., concurring).

<sup>144</sup> *Id.* at 312.

<sup>145</sup> *Id.* at 310 n.12 (Stewart, J., concurring).

<sup>146</sup> 428 U.S. at 204-06.

<sup>147</sup> 428 U.S. at 250-53, 258-59.

<sup>148</sup> Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97 (1979).

sentences invalid in only two and one percent respectively of the cases reviewed; and that although the Florida court had reduced death sentences in twenty-three percent of the cases reviewed, in all but one of those cases the trial judge had ignored a jury recommendation of leniency.<sup>149</sup> He found that in none of the states had the appellate review process resulted in appellate opinions that provided "an effective basis for the encouragement of proper and consistent sentencing."<sup>150</sup> And he found that "the state appellate tribunals have been inconsistent in their approach to procedural problems that relate to the consistency and appropriateness of the application of the death sentence."<sup>151</sup> He concluded his study as follows:

I suspect, however, that the failure of appellate review reflects the impossibility of the underlying task. The expectation of effective appellate review assumes that objective and rational decisions can be made concerning which killers should live and which should die. The appellants, however, have all committed atrocious crimes. Given the enormity of their crimes, the task of identifying specific characteristics that society may use to determine whether a particular appellant should be executed may be impossible . . . .

If objective standards are impossible to achieve, uniformity within a system of individualized discretion may be an illusory goal. The life-death decision in homicide cases seems to be the area in which such uniformity would be most difficult to achieve. If so, the July 1976 Supreme Court decisions mandate pursuit of an impossible goal. The failure of appellate review of death penalties, therefore, may reflect less upon the appellate process than upon the nature of the objective.<sup>152</sup>

There is nothing in Professor Dix's study to suggest that "the problems of the horizontal inequity or the disutility"<sup>153</sup> of the death penalty identified by Justices Stewart and White have been resolved. The number of people sentenced to death has increased substantially since *Furman* to a rate of well over two hundred per year but the percentage executed has been reduced to less than two percent of the death row population.<sup>154</sup> The new death penalty schemes have resulted in a situation which seems indistinguishable from that in which, in the years before *Furman*, the system permitted "this unique penalty to be so wantonly and so freakishly imposed."<sup>155</sup>

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<sup>149</sup> *Id.* at 159.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 160.

<sup>152</sup> *Id.* at 160-61.

<sup>153</sup> Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 388.

<sup>154</sup> Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 917, 919 (1982).

<sup>155</sup> *Furman*, 408 U.S. at 310 (Stewart, J., concurring).

The only alternative to a capital punishment system that searches fruitlessly for a formula to choose the one in one thousand killings or one in a hundred robbery murders that merits death is an obscene affirmative action program whereby the states execute many more prisoners than would otherwise be the case in order to generate an impression of evenhandedness to satisfy the United States Supreme Court. This scenario is not fantastic, nor even unlikely. Already, Florida has responded to critics who noted the great majority of its death row inmates were convicted of killing whites with a campaign to increase death sentences for killings with nonwhite victims.<sup>156</sup> Already, we have observed the sharp increases in death sentences associated with the reaction to *Furman v. Georgia* in the South that persisted when *Gregg v. Georgia* returned power to the states to execute.<sup>157</sup> Now, the agencies of state government might understandably conclude that the only way to make executions less freakish in distribution would be to broaden the practice of execution substantially, inflicting more cruelty to satisfy the Court that it was not unusual in its administration.

What might an appropriate eighth amendment analysis of this course of events conclude? The question has never been faced in prior cases, but we think this form of affirmative action displays a pattern of gratuitousness beyond the imagination of the *Furman* majority Justices. Executing people to shore up the legitimacy of executing other people is a violation of Kant's injunction against the use of citizens "merely as a means" in a most offensive manner. That the Court itself may have set these forces in motion should intensify the scrutiny with which these developments are regarded.

This last point has broader application. There is, in 1985, no method of neutralizing the role of the Supreme Court in the execution policy of years to come. A failure to aggressively intervene in the near future will allow the states to maintain levels of execution that have been significantly altered by the previous conduct of the Court. And stopping executions would be only one form of judicial activism in an area where the Court, inevitably, has no truly passive stance to choose. Importantly the United States Supreme Court will, in future death penalty cases, be reviewing its own creation.

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<sup>156</sup> Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981).

<sup>157</sup> See W. BOWERS, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA 1864-1982*, at 172 (1984) (from 1974-1978, average of 187 prisoners added to death row annually).