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THE DEATH PENALTY CASES: A PRELIMINARY COMMENT

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The next to last step down the long road to total abolition of capital punishment consists of a period during which the death penalty is retained as an official symbol but repealed in practice. When the proposed Revised Washington Criminal Code was published in 1970, this schizophrenic phase was already well under way, dating from at least 1967, the year of the last execution in this country.[1] The political message suggested by this state of affairs is that while the death penalty ought to be retained in the crime-prevention arsenal, it should be used only rarely. In attempting to legitimize disuse of the penalty by making it much more narrowly available than the current law has allowed,[2] the Proposed Code may be viewed as adopting this political view. The Proposed Code thus represents no departure from actual practice; rather, it represents a rationalization and codification of that practice.[3]

It is mildly ironic that Washington's preparations drastically to prune the hanging tree should be interrupted by the United States Supreme Court's pronouncement that the tree was already dead. For whatever else one may make of the per curiam decision and nine opinions rendered by the Court in *Furman v. Georgia*,[4] it is clear that five of the Justices believe at least that capital punishment, as presently administered, violates the eighth amendment prohibition against cruel and unusual punishment. The irony is strengthened by the possible

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1. REV. WASH. CRIM. CODE § 9A.32.025, Comment (Tent. Draft 1970) [hereinafter cited as R.W.C.C.].

2. Capital punishment is currently governed by WASH. REV. CODE § 9.48.030 (1959), which grants the jury discretion to impose the death penalty in cases of first degree murder. Section 9A.32.025 of the Proposed Code also grants to the jury discretionary power to impose the death penalty, but only under limited circumstances. *See* note entitled "Homicide" at p. 203 of this volume.

3. Governor Evans stated shortly after his election in 1964 that he favored abolishing the death penalty in Washington state. Governor Evans "termed the state's hangman rope as 'barbaric'...." Seattle Post-Intelligencer, Dec. 23, 1964, at 1, col. 4. No person has been executed in Washington since 1963. R.W.C.C. § 9A.32.025, Comment at 124.

4. 92 S. Ct. 2726 (1972). There were two companion cases decided by the Court in this opinion: Jackson v. Georgia, and Branch v. Texas.

constitutionality of capital punishment mandatorily imposed on all persons convicted of a particular offense, which suggests that the only constitutionally permissible direction for legislative "reform" of capital punishment may lie not in contracting its present scope, but in expanding it by withdrawing from judge and jury discretionary power not to impose the death penalty.

I. SOME COMMON GROUND

The Court's grant of certiorari in *Furman* was limited to the question whether the imposition and carrying out of the death penalty constitutes cruel and unusual punishment in violation of the eighth and fourteenth amendments.[5] The Court's per curiam reversal, in which Justices Douglas, Brennan, Stewart, White and Marshall concurred, holds simply that it does, "in these cases."[6] Each of the concurring Justices explains his vote in a separate opinion in which no other Justice joins. The Nixon-appointed dissenters are better organized: each joins the separate opinion of the others, except for Justice Blackmun's "somewhat personal" comments.[7]

Despite the divisions that separate the minority from the majority and the latter from one another, all of the Justices adhere, at least by necessary implication, to certain common principles. Chief among these are: (1) that the text of the Constitution and Bill of Rights does not preclude the Court's determination that the death penalty constitutes cruel and unusual punishment and, concommitantly, (2) that the cruel and unusual punishment clause prescribes a flexible, dynamic standard by which to review criminal punishments, a standard designed to reflect the changing moral perceptions of the society. Because these issues most directly implicate the Justices' views on the nature of the constitutional document and the Court's role as its ultimate interpreter, their breadth of agreement warrants further examination.

The textual issue arises from the references in the fifth amendment to capital punishment: (1) requiring a grand jury indictment for capital offenses; (2) forbidding government from twice putting a person "in jeopardy of life;" and (3) conditioning deprivation of life upon

5. 403 U.S. 952 (1971).
6. 92 S. Ct. at 2727 (per curiam).
7. *Id.* at 2812 (Blackmun, J., dissenting).

compliance with due process of law. If the meaning of the cruel and unusual punishment clause is governed by the framers' intent, Mr. Justice Black's conclusion in *McGautha v. California*[8] is virtually compelled: "The Eighth Amendment . . . cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted."[9]

No present member of the Court adheres to the view that because the framers "intended no absolute bar on the Government's authority to impose the death penalty,"[10] capital punishment is therefore forever exempt from nullification under the cruel and unusual punishment clause. Three of the dissenters explicitly, and Mr. Justice Rehnquist by necessary implication, endorse the view that the cruel and unusual punishment clause was "designed to be dynamic and to gain meaning through application to specific circumstances, many of which were not contemplated by [its] . . . authors."[11]

Of the dissenters, Mr. Justice Powell does the most fudging. He notes the three references to capital punishment in the fifth amendment and eventually concludes that, despite these references (and other considerations based on the principles of *stare decisis,* judicial self-restraint and separation of powers) "the most conclusive of objective demonstrations could warrant this Court in holding capital punishment *per se* unconstitutional."[12] But his route to this position may modify or at least obscure its apparently clear meaning. Mr. Justice Powell continues, "the Court is not free to read into the Constitution a meaning that is plainly at variance with its language,"[13] finding authority in that language only "to challenge the imposition of the death penalty in some barbaric manner or as a penalty wholly disproportionate to a particular criminal act."[14] That this narrower role of the cruel and unusual punishment clause may constitute Justice Powell's dominant position, despite his later concession that the clause *could* be[15] used to hold capital punishment *per se* unconstitutional, is sug-

8. 402 U.S. 183 (1971).
9. *Id.* at 226.
10. 92 S. Ct. at 2819 (Powell, J., dissenting).
11. *Id.* at 2819 (Powell, J., dissenting); *id.* at 2800 (Burger, C.J., dissenting); *id.* at 2814 (Blackmun, J., dissenting); *id.* at 2843 (Rehnquist, J., dissenting).
12. *Id.* at 2826 (Powell, J., dissenting).
13. *Id.* at 2819 (Powell, J., dissenting).
14. *Id.*
15. *See* note 12 *supra.*

gested by his statement that "the burden of seeking so sweeping a decision is almost insuperable."[16] In any event, the fact of Mr. Justice Powell's ambivalence is surely less important than the fact that he is the only Justice whose commitment to a dynamic view of the eighth amendment is in any way qualified, however ambiguously, by virtue of the "original intent" as expressed in the text of the Constitution.

The majority necessarily rejects a static view of the cruel and unusual punishment clause; Justices Douglas, White and Stewart by implication, and Justices Brennan and Marshall explicitly. Mr. Justice Marshall is content to rely upon *Trop v. Dulles*[17] and *Robinson v. California*[18] as establishing the dynamic character of the clause; Mr. Justice Brennan reasons from the text itself:[19]

> No one, of course, now contends that the reference in the Fifth Amendment to "jeopardy of . . . limb" provides perpetual constitutional sanction for such corporal punishments as branding and ear-cropping, which were common punishments when the Bill of Rights was adopted.

If textualism died with Mr. Justice Black, that other perennial of the Warren Court, federalism, may have survived the death of Mr. Justice Harlan. Unlike Black's text-thumping fundamentalism, which derived constitutional principles from the words of the Constitution, Justice Harlan inferred from the federal structure created by the framers a constitutional command that the states be allowed a degree of autonomy in their administration of criminal justice. For Harlan, that meant that state criminal processes should be judged by the more general prohibitions of the fourteenth amendment, and he was a constant dissenter against "incorporation" of the Bill of Rights standards as explicit limitations on state power.[20] Only vestiges of the federalist position appear in *Furman*. Mr. Justice Powell bows in that direction by reference to the "shattering effect" of the majority's views "on the root principles of . . . federalism . . . ."[21] He and his fellow dissenters,

16. 92 S. Ct. at 2826 (Powell, J., dissenting).
17. 356 U.S. 86 (1958).
18. 370 U.S. 660 (1962).
19. 92 S. Ct. at 2749 n. 28 (Brennan, J., concurring).
20. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 171-193 (1968) (Harlan, J., dissenting); *In re* Gault, 387 U.S. 1, 65-78, (1966) (Harlan, J., concurring).
21. 92 S. Ct. at 2818 (Powell, J., dissenting).
That the federalist position continues to play an occasionally decisive role in constitutional litigation is proved by the Court's decisions, earlier last Term, in Johnson

however, rely most heavily on a related but distinct structural proposition: separation of powers. Whereas "federalism" cautions or commands the Court to defer to the states, "separation of powers" demands judicial deference to the legislative or executive branches.

But for these vestigial remnants of the once powerful principles of federalism, to summarize, it is common ground for all the Justices that the eighth amendment is applicable to the states; that the text of the Constitution does not bar the conclusion that capital punishment is "cruel and unusual"; and that the clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[22]

The Court's unanimity that it *may* decide the issue is in marked contrast to its disagreement over what that decision should be, the principles on which it should be based, and the application of those principles to the cases before it—issues to which we now turn.

II. *McGAUTHA* WAS WRONG

Although no more than a quarter of the states have, at any one time, completely abolished capital punishment, all have responded to growing anti-capital punishment sentiment over the years by "reducing the number of capital crimes [and] replacing mandatory death sentences with jury discretion . . . ."[23] These same sentiments, admitted to the jury room by *Witherspoon v. Illinois*[24] have steadily reduced the number of death sentences actually imposed.[25] Execution of persons sentenced to death has been regularly defeated by the exercise of executive clemency and, increasingly, frustrated by dogged pursuit of judicial remedies:[26]

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v. Louisiana, 92 S. Ct. 1620 (1972) and Apodaca v. Oregon, 92 S. Ct. 1628 (1972). There the Court was split 4-4 on the question whether the sixth amendment permitted basing a criminal conviction on a less than unanimous jury verdict. Mr. Justice Powell's tie-breaking concurrence affirms the constitutionality of such verdicts in state trials on the ground that although "unanimity is one of the indispensable features of *federal* jury trials," (92 S. Ct. at 1637) "the Fourteenth Amendment [does not] require blind adherence by the States to all details of the federal Sixth Amendment standards." *Id.* at 1640.

22. Trop v. Dulles, 356 U.S. 86, 101 (1958).
23. 92 S. Ct. at 2778 (Marshall, J., concurring).
24. 391 U.S. 510 (1968).
25. 92 S. Ct. at 2748-57 (Brennan, J., concurring).
26. *Id.* at 2754 (Brennan, J., concurring).

> Even before the moratorium on executions began in 1967, executions totaled only 42 in 1961 and 47 in 1962 . . .; the number dwindled to 21 in 1963, to 15 in 1964, and to seven in 1965; in 1966, there was one execution, and in 1967, there were two.

Only an inference separates this record of infrequent use of the death penalty from unconstitutional, arbitrary use of the penalty. For the majority, "the conclusion is virtually inescapable that it is being inflicted arbitrarily:"[27]

> MR. JUSTICE DOUGLAS: "One searches our chronicles in vain for the execution of any member of the affluent strata of this society."[28]
>
> MR. JUSTICE BRENNAN: "Indeed, it smacks of little more than a lottery system."[29]
>
> MR. JUSTICE STEWART: "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual . . . . [T]he petitioners are among a capriciously selected random handful . . . ."[30]
>
> MR. JUSTICE WHITE: "[T]here is no meaningful basis for distinguishing the few cases in which [the death sentence] is imposed from the many cases in which it is not."[31]
>
> MR. JUSTICE MARSHALL: "[T]here is evidence of racial discrimination . . . . It is also evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society."[32]

For two of the majority, Justices Douglas and Stewart, the record of arbitrary infliction of the death penalty is alone a sufficient basis for its invalidation as "cruel and unusual." Mr. Justice Douglas finds the basic theme of "equal protection of the laws . . . implicit in the ban on 'cruel and unusual' punishments,"[33] and concludes that the power to discriminate, inherent in statutes authorizing discretionary imposition of the death penalty, renders them "unconstitutional in their operation."[34] Mr. Justice Stewart echoes this view in concluding that "The Eighth and Fourteenth Amendments cannot tolerate the infliction of a

27. *Id.*
28. *Id.* at 2733 (Douglas, J., concurring).
29. *Id.* at 2754 (Brennan, J., concurring).
30. *Id.* at 2762 (Stewart, J., concurring).
31. *Id.* at 2764 (White, J., concurring).
32. *Id.* at 2790-91 (Marshall, J., concurring).
33. *Id.* at 2735 (Douglas, J., concurring).
34. *Id.*

sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed."[35] Although the other majority Justices rest their votes on a variety of constitutional theories, they too rely on the great infrequency with which the death penalty is actually imposed.

The majority's reliance on what is in essence an equal protection theory creates difficulties, both for the *Furman* decision and for the future. I shall defer for now discussion of the future issue—the constitutionality of a "mandatory" death penalty. That issue arises because *Furman's* equal protection foundation renders it a decision not about the death penalty, *per se,* but about the process by which that penalty validly may be imposed. And because *Furman* is a process decision, it demands that *McGautha v. California,*[36] the Court's 1971 decision upholding the constitutionality of the death imposition process, be confronted.

McGautha sought, modestly enough, to require that juries empowered to impose or withhold the death penalty be given standards by which to exercise that power. The Court refused, holding that "In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the *untrammeled* discretion of the jury the power to pronounce life or death in capital cases is offensive to *anything* in the Constitution."[37] In *Furman,* however, it is precisely this "untrammeled" discretion and its consequences that are essential to the Court's decision that the death penalty, as presently administered, is "offensive" to the Constitution. If *Furman* is right, *McGautha* is wrong and should be overruled. But, far from overruling *McGautha,* Mr. Justice Douglas, in a dazzling move, turns it to his own advantage, while other concurring Justices either ignore *McGautha* or lamely distinguish it.[38]

Mr. Justice Douglas, who had joined Justice Brennan's dissent in *McGautha,* acknowledges "the tension between our decision today and *McGautha,*"[39] but instead of insisting that it be overruled or distinguished, he adopts the contrary precedent [*McGautha*] as "the seeds of the present cases."[40]

35. *Id.* at 2763 (Stewart, J., concurring).
36. 402 U.S. 183 (1971).
37. *Id.* at 207 (emphasis added).
38. 92 S. Ct. at 2762 (Stewart, J., concurring).
39. *Id.* at 2731 n. 11 (Douglas, J., concurring).
40. *Id.* at 2731 (Douglas, J., concurring).

Douglas might arguably have distinguished *McGautha* on the ground that it was a case that dealt solely with the absence of standards for imposition of the death penalty, whereas *Furman* called for a judgment on the overall consequences of a capital punishment scheme that included not only untrammeled jury discretion not to impose the penalty, but also untrammeled executive prerogative to set jury-imposed penalties aside, and, by operation of the elaborate process of judicial review demanded in capital cases, a predictably high rate of nullification among the residual cases.

Justice Douglas, however, rejects conventional methods for neutralizing contrary precedent and instead insists that the Court is "now imprisoned in the *McGautha* holding."[41] His commitment to *McGautha* is obviously tactical, if not sarcastic. He embraces its holding that unguided jury discretion is not unconstitutional in order to condemn the consequences of jury dispensation as "cruel and unusual punishment." On this view, *Furman* enjoys the paradoxical distinction of both denying *McGautha* (by condemning the process it upheld) and relying on it (by accepting *McGautha's* judgment that jury discretion is not itself unconstitutional).

III. CAUSA MORTIS

I take it to be a rule of logic that if the truth or falsity of a proposition is not provable, the side on which the burden of proof is placed cannot prevail, and a rule of politics that, in the same circumstance, the side with sufficient votes to allocate the burden of proof cannot lose. The Court's treatment of the deterrence issue exemplifies the operation of both of these rules. The deterrence issue, precisely if somewhat ponderously put, was this: does the cruel and unusual punishment clause comprehend the question of the relative efficacy of a particular punishment to achieve the objectives ascribed to its use? Precedent held only that a punishment that was excessive relative to the *offense* for which it was imposed might therefore be cruel and unusual.[42] The deterrent efficacy of the death penalty, however, questions not the disproportion between offense and punishment, but the disproportion

41. *Id.*
42. See the doctrinal summaries by Mr. Justice Marshall, 92 S. Ct. at 2768, and by Mr. Justice Powell, *id.* at 2819-2823.

between the punishment imposed and the law's objective (*e.g.*, deterrence) in imposing it.

Both the Chief Justice and Mr. Justice Powell contend that the latter inquiry is not within the purview of the eighth amendment.[43] Mr. Justice Powell states, "I find no support . . . for the view that this Court may invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology."

Justices Brennan, White and Marshall assume[44] or conclude[45] that the eighth amendment invalidates a punishment for which "there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted . . . ."[46] Because the other Justices neither address this question nor rely on its resolution, the doctrinal issue is temporarily stalemated. Were the "majority" view to prevail, however, Chief Justice Burger's view of the scope of such a doctrine is worth noting:[47]

> If it were proper to put the States to the test of demonstrating the deterrent value of capital punishment, we could just as well ask them to prove the need for life imprisonment or any other punishment.

Everyone concedes that there is no evidence that the death penalty is superior to life imprisonment as a deterrent.[48] At such an empirical impasse, placement of the burden of proof is obviously crucial. Not surprisingly, the "majority" Justices, by careful framing of the constitutional issue, allot the burden to the government. Mr. Justice Marshall's move is representative: "[T]he question to be considered is not simply whether capital punishment is a deterrent, but whether it is a better deterrent than life imprisonment."[49]

The dissenters are not taken in. The Chief Justice exposes the maneuver and asserts that burdening the punisher is "not descended from established constitutional principles, but . . . born of the urge to by-

43. *Id.* at 2834-35 (Powell, J., dissenting); *id.* at 2805 (Burger, C.J., dissenting).
44. *Id.* at 2764 (White, J., concurring).
45. *Id.* at 2746-47 (Brennan, J., concurring); *id.* at 2773-74 (Marshall, J., concurring).
46. *Id.* at 2747 (Brennan, J., concurring).
47. *Id.* at 2807 (Burger, C.J., dissenting).
48. *Id.* at 2806-07 (Burger, C.J., dissenting); *id.* at 2782 (Marshall, J., concurring); *id.* at 2758 (Brennan, J., concurring); *id.* at 2812 (Blackmun, J., dissenting); *id.* at 2836 (Powell, J., dissenting).
49. *Id.* at 2781 (Marshall, J., concurring). *See also* 92 S. Ct. at 2750 (Brennan, J., concurring).

pass an unresolved factual question."[50] Mr. Justice Powell would defer to the "presumptively rational" legislative judgment as to a penalty's efficacy or, reaching the question, place the burden on the petitioners.[51]

A variant position is taken by Mr. Justice White[52] and receded to by Mr. Justice Brennan:[53] that the death penalty as currently administered is so infrequently imposed as to rob it of any deterrent potential beyond that achievable by life imprisonment. Other commonly held goals of punishment fall victim to the same argument. If a seldom used death penalty cannot deter, neither can it adequately incapacitate particular offenders or satisfy "any existing general need for retribution."[54]

Disuse of the death penalty thus emerges as the dominant factual basis for the majority Justices' opinions. To Justices Douglas, Stewart and Brennan it evidences unconstitutional arbitrariness;[55] to Justices White and Brennan, as we have seen, disuse of the penalty disables it from exerting more than negligible deterrent, incapacitative or retributive effects.[56] And, as we shall see, infrequent use of the death penalty is also the cornerstone of the view shared by Justices Brennan and Marshall (and probably White)[57] that capital punishment is cruel and unusual because it "is morally unacceptable to the people of the United States at this time in their history."[58] On this view, capital punishment wasn't killed by the Court; it had already committed suicide.

IV. MORALITY AND CONSTITUTIONALITY

A cynical but not necessarily inaccurate view of the Court's treatment of issues of the magnitude of those presented by *Furman* involves demurring to the question whether the Justices decide such issues in accordance with "their own views of goodness, truth, and justice."[59] This stance enables one to cut through the "majority's" protestations of

50. *Id.* at 2807 (Burger, C.J., dissenting).
51. *Id.* at 2837 (Powell, J., dissenting).
52. *Id.* at 2763-64 (White, J., concurring).
53. *Id.* at 2758 (Brennan, J., concurring).
54. *Id.* at 2763 (White, J., concurring); *id.* at 2758-60 (Brennan, J., concurring).
55. *Id.* at 2735-36 (Douglas, J., concurring); *id.* at 2762-63 (Stewart, J., concurring); *id.* at 2754-55 (Brennan, J., concurring).
56. *Id.* at 2763-64 (White, J., concurring); *id.* at 2758-60 (Brennan, J., concurring).
57. *Id.* at 2764-65 (White, J., concurring).
58. *Id.* at 2788 (Marshall, J., concurring); *id.* at 2746 (Brennan, J., concurring).
59. *Id.* at 2843 (Rehnquist, J., dissenting).

"objectivity"[60] and the minority's accusations of "subjectivity"[61] as equally irrelevant, and to focus instead on the nature and variety of "nonsubjective" sources from which the Justices derive their moral views.

That the cruel and unusual punishment clause requires an assessment of the moral acceptability of a challenged penalty is a proposition accepted by the minority as well as the majority.[62] Because the moral and the doctrinal issues are identical in such cases, they provide a unique and illuminating view of the process by which the moral judgments that underlie important constitutional judgments are "externalized."

It is clear that if "official morality" is controlling, by no stretch of the data can capital punishment be found morally unacceptable. As Chief Justice Burger notes, "on four occasions in the last 11 years Congress has added to the list of federal crimes punishable by death."[63] Forty states and the District of Columbia retain the death penalty despite a long-standing abolitionist movement.[64] And twenty-five of twenty-six state appellate courts that have passed on the constitutionality of the death penalty during the past five years have upheld it. [65] Nor are public opinion polls of any use, for they show no clear majority for or against capital punishment.[66] Where, then, could the majority look for authoritative indicators of the death penalty's moral unacceptability? Justices Brennan and Marshall propound separate but fundamentally similar theories. For Brennan, "The acceptability of a severe punishment is measured not by its availability, for it might become so offensive to society as never to be inflicted, but by its use."[67] Noting the "successive restriction" of the death penalty—by statute, jury[68] and, in effect, the courts[69]—Brennan easily concludes that,

60. *See, e.g.,* the opinion of Mr. Justice Marshall, 92 S. Ct. at 2765.
61. *See, e.g.,* Mr. Justice Powell's dissenting opinion, 92 S. Ct. at 2824-25.
62. *Id.* at 2746 (Brennan, J., concurring); *id.* at 2824 (Powell, J., dissenting); *id.* at 2778 (Marshall, J., concurring).
63. *Id.* at 2801-02 (Burger, C.J., dissenting).
64. *See* Mr. Justice Marshall's historical sketch of the movement, 92 S. Ct. at 2775-78.
65. *Id.* at 2830 n. 37 (Powell, J., dissenting). These twenty-five appellate decisions were, of course, the sources offered by the minority as the legitimate expressions of public morality. California was the exception. *See* California v. Anderson, 6 Cal. 3d 288, 493 P.2d 880, *motion to stay judgment denied,* 405 U.S. 983 (1972).
66. 92 S. Ct. at 2802 (Burger, C.J., dissenting).
67. *Id.* at 2747 (Brennan, J., concurring).
68. *Id.* at 2764 (White, J., concurring).
69. *Id.* at 2757 (Brennan, J., concurring).

judged by "what society does with it,"[70] contemporary society has rejected the death penalty.[71]

Mr. Justice Marshall's theory barely serves to externalize the moral judgment, since it rests upon the presumed opinions of persons hypothetically endowed with Justice Marshall's views on capital punishment:[72]

> [T]he question . . . is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available.

A public informed that the death penalty is no more effective a deterrent than life imprisonment, that it is imposed discriminatorily, and that it "wreaks havoc with our entire criminal justice system"[73] would conclude, with Justice Marshall, that "the death penalty is immoral and therefore unconstitutional."[74]

The dissenting Justices condemn these views as undemocratic,[75] violative of the principle of separation of powers,[76] and lacking, needless to say, the proper "judicial restraint."[77] While none would deny the Court's ultimate authority to strike down a legislated penalty as cruel and unusual, all would erect a protective presumption to safeguard the legislative judgment:[78]

> [I]n a democracy, the legislative judgment is presumed to embody the basic standards of decency prevailing in the society. [It] . . . can only be negated by unambiguous and compelling evidence of legislative default.

In the end, however, the minority fails to persuade. If there was no precedent for finding the death penalty cruel and unusual, neither was there any forbidding that conclusion. And Justice Brennan's answer to the minority's structural arguments is surely sufficient: "Judicial

70. *Id.*
71. *Id.*
72. *Id.* at 2789 (Marshall, J., concurring).
73. *Id.* at 2790 (Marshall, J., concurring).
74. *Id.*
75. *Id.* at 2800-01 (Burger, C.J., dissenting); *id.* at 2818 (Powell, J., dissenting).
76. *Id.* at 2844 (Rehnquist, J., dissenting); *id.* at 2825-26 (Powell, J., dissenting).
77. *Id.* at 2816 (Blackmun, J., dissenting); *id.* at 2843-44 (Rehnquist, J., dissenting); *id.* at 2825 (Powell, J., dissenting).
78. *Id.* at 2801 (Burger, C.J., dissenting). *See also* Justice Powell's dissenting opinion, *id.* at 2826.

enforcement of the Clause . . . cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishments . . . ."[79]

Given the freedom, then, to judge the constitutionality of the death penalty, the determinative issue would seem to be the accuracy of the majority's description of the penalty in operation. For if it is true that capital punishment is imposed arbitrarily and discriminatorily, that it serves no legitimate deterrent or other function, and that its existence plagues the entire criminal justice system then it ought to be condemned as cruel and unusual. Only if this description of the realities of capital punishment is refuted, as the minority failed effectively to do, can one see the necessity for "judicial restraint" or the relevance of "separation of powers."

V. POST MORTEM

An issue for the future remains: would a death penalty mandatorily imposed upon conviction of a specified offense also be unconstitutional? Although only the opinions of Justices Brennan, Marshall and perhaps White[80] would go so far, a potential majority against mandatory capital punishment might also include: Mr. Justice Douglas, who expressly reserves the question;[81] and, from the *Furman* minority, Mr. Justice Blackmun, who considers the death penalty abhorrent and useless[82] and for whom its mandatory imposition would be "regressive" and "antique";[83] and Chief Justice Burger, who "could more easily be persuaded that mandatory sentences of death, without the intervening and ameliorating impact of lay jurors, are so arbitrary and doctrinaire that they violate the Constitution."[84]

Furman does not, of course, hold that statutorily-mandated capital punishment is constitutional. Nor does it reject any theory upon which a determination that such a punishment scheme is also unconsitutional might be based. Indeed, *Furman* suggests several such theories.

79. *Id.* at 2741 (Brennan, J., concurring).
80. *Id.* at 2764 (White, J., concurring).
81. *Id.* at 2736 (Douglas, J., concurring).
82. *Id.* at 2812 (Blackmun, J., dissenting).
83. *Id.* at 2816 (Blackmun, J., dissenting).
84. *Id.* at 2810 (Burger, C.J., dissenting).

A. Discriminatory Application.

As we have seen, unequal imposition of capital punishment is the empirical, if not the technical, foundation for the Court's ruling that permissive death penalty statutes are unconstitutional. As Mr. Justice Douglas notes, "such conceivably might [also] be the fate of a mandatory death penalty . . . ."[85] Even a mandatory statute would be unlikely to bar the prosecutor from exercising his traditional discretion to charge an offense carrying a lesser penalty. Nor would such a statute be likely to prohibit the intercession of executive clemency. And even the legislature is powerless to eliminate jury nullification of a mandatory penalty by returning unwarranted acquittals or, more likely, convictions for lesser offenses. If, by the operation of these or other processes, mandated death sentences were as randomly and suspiciously imposed as permissive death sentences had been, *Furman* itself would call for their invalidation.

B. Cruel and Unusual Punishment.

The eighth amendment provides at least two theoretical bases for the unconstitutionality of a mandatory death penalty. First, it is conventional doctrine that a penalty may be found to be cruel and unusual "because it is abhorrent to currently existing moral values."[86] Because the cruel and unusual punishment clause is conceded to be dynamic, no penalty, mandatory or otherwise, can escape constitutional assessment of its continuing "moral acceptability." A second theory around which a majority might form to strike down mandatory capital punishment questions not its acceptability but its efficacy. If to escape invalidation as cruel and unusual punishment the death penalty must be shown to be a superior instrument of deterrence, incapacitation or retribution, what reason is there to suppose that mandatory capital punishment will fare better than its discretionary predecessor? There is still no evidence that capital punishment deters or incapacitates more effectively than life imprisonment. And if retribution is a legitimate governmental objective[87] it is not apparent that life imprisonment is inadequate to slake the thirst for revenge.

85. *Id.* at 2735 (Douglas, J., concurring).
86. *Id.* at 2774 (Marshall, J., concurring).
87. *See* 92 S. Ct. at 2761 (Stewart, J., concurring).

My hunch is that *Furman* spells the complete end of capital punishment in this country, not because its logic requires it, but because the moral authority of the Court will command it, and because I think I hear a collective sigh of relief emanating from legislators who have more important business to attend to than the passage of necessarily narrow, probably futile and possibly unconstitutional death penalty statutes.