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## *Furman* Fundamentals

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## FURMAN FUNDAMENTALS

Corinna Barrett Lain\*

For the first time in a long time, the Supreme Court's most important death penalty decisions all have gone the defendant's way. Is the Court's newfound willingness to protect capital defendants just a reflection of the times, or could it have come even without public support for those protections? At first glance, history allows for optimism. *Furman v. Georgia*, the 1972 landmark decision that invalidated the death penalty, provides a seemingly perfect example of the Court's ability and inclination to protect capital defendants when no one else will. *Furman* looks countermajoritarian, scholars have claimed it was countermajoritarian, and even the Justices saw themselves as playing a heroic, countermajoritarian role in the case. But the lessons of *Furman* are not what they seem. Rather than proving the Supreme Court's ability to withstand majoritarian influences, *Furman* teaches the opposite—that even in its more countermajoritarian moments, the Court never strays far from dominant public opinion, tending instead to reflect the social and political movements of its time. This Article examines the historical context of *Furman v. Georgia* and its 1976 counterpart, *Gregg v. Georgia*, to showcase a fundamental flaw in the Supreme Court's role as protector of minority rights: its inherently limited inclination and ability to render countermajoritarian change. In theory, the Court protects unpopular minorities, but in practice it is unlikely to do so unless a substantial (and growing) segment of society supports that protection. Even then, *Furman* reminds us that the Court's "help" may do more harm than good. If the past truly is a prologue, *Furman* portends that the Court's current interest in scrutinizing the death penalty will not last forever. Like the fair-weather friend, the Court's protection will likely be there in good times but gone when needed the most.

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## INTRODUCTION

The past few years have seen a dramatic turn in the jurisprudence of death. After two decades of “deregulating” the death penalty,<sup>1</sup> the Supreme Court is once again closely scrutinizing the administration of capital punishment in the United States. Since 2002 alone, the Court has categorically exempted mentally retarded and juvenile offenders from the death penalty,<sup>2</sup> invalidated death eligibility determinations made by judges as opposed to juries,<sup>3</sup> and insisted upon more than de minimis legal representation in capital cases.<sup>4</sup> Each move is a major milestone.

By and large, commentators have applauded the Court’s newfound willingness to protect capital defendants.<sup>5</sup> Yet at a time of widespread

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1. See generally Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305 (1983) (analyzing the 1982 term’s capital punishment decisions as an announcement from the Supreme Court that it was “going out of the business of telling the states how to administer the death penalty”); Kenneth Williams, *Deregulation of the Death Penalty*, 40 SANTA CLARA L. REV. 677 (2000) (arguing that the Supreme Court has effectively deregulated the death penalty by closing avenues of appellate review and refusing to restrict the manner in which states administer it).

2. See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (invalidating the death penalty for juvenile offenders); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (invalidating the death penalty for mentally retarded offenders).

3. See *Ring v. Arizona*, 536 U.S. 584, 589 (2002).

4. See *Rompilla v. Beard*, 545 U.S. 374, 377 (2005) (finding ineffective assistance of counsel where attorney failed to conduct reasonable investigation to find and introduce mitigating evidence); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (same).

5. See, e.g., Editorial, *Executing Kids: The High Court Curbs Cruelty*, MINN. STAR TRIB., Mar. 4, 2005, at 20A (praising Supreme Court’s decision in *Simmons* for recognizing the vulnerability of juveniles); Clay Robison, Editorial, *Justices Took High Road in Juvenile Death Penalty Case*, HOUSTON CHRON., Mar. 6, 2005, at 3 (applauding *Simmons* as morally correct); Bruce Shapiro, *Rethinking the Death Penalty*, THE NATION, July 22, 2002, at 14, 17–18 (describing *Atkins* as an “easy” decision and noting that other recent decisions remove “atrocious capital trial lawyering” and

public doubts about the death penalty and bipartisan support for death penalty reform,<sup>6</sup> perhaps we should be only so impressed. Death penalty safeguards are popular now, but one day the worm will turn yet again. Politicians will stop advocating moratoriums and return to campaigning on the number of executions they presided over in their previous term.<sup>7</sup> When support for reform wanes, will the Court still be inclined to closely scrutinize the imposition of death?

To some extent, we can expect the Supreme Court's death penalty jurisprudence to reflect prevailing sentiment because doctrine ostensibly demands it. The chief constitutional constraint on the death penalty is the Eighth Amendment's "cruel and unusual punishments" clause,<sup>8</sup> which the Court has interpreted to turn on the nation's "evolving standards of decency."<sup>9</sup> In practice, that means the Court will tend to look for and follow national trends when recognizing constitutional protection in this area as a matter of doctrinal design.<sup>10</sup> But there must be more to it than

address "public perceptions of unfairness" in the imposition of death). *But see* Carol S. Steiker, *Things Fall Apart, but the Center Holds: The Supreme Court and the Death Penalty*, 77 N.Y.U. L. REV. 1475, 1487–88 (2002) (arguing that decisions like *Atkins* remove the most offensive applications of the death penalty, depriving the abolitionists of their "poster children" for reform).

6. *See* Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1, 21–97 (2002) (discussing reasons for, and evidence of, public doubts about the death penalty and support among even conservatives for death penalty reform); Ronald J. Tabak, *Finality Without Fairness: Why We Are Moving Towards Moratoria on Executions, and the Potential Abolition of Capital Punishment*, 33 CONN. L. REV. 733 (2001) (same).

7. *Compare, e.g.*, Kirchmeier, *supra* note 6, at 43–47 (discussing moratorium imposed by Illinois Governor George Ryan and similar efforts by other politicians) and Tabak, *supra* note 6, at 739–45 (same) with Craig Haney, *Riding the Punishment Wave: On the Origins of Our Evolving Standards of Decency*, 9 HASTINGS WOMEN'S L.J. 27, 41–43 (1998) (describing gubernatorial elections in Texas as turning on "promises about who can kill the most Texans" and relaying other incidents in political campaigns) and Glenn L. Pierce & Michael L. Radelet, *The Role and Consequences of the Death Penalty in American Politics*, 18 N.Y.U. REV. L. & SOC. CHANGE 711, 721 (1990–91) (describing the 1990 Florida gubernatorial campaign where an incumbent bragged about the number of death warrants he had signed and discussing the death penalty's prominence in other political campaigns).

8. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

9. *See* *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (explaining that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society"); *accord* *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (using "evolving standards of decency" framework to exempt juvenile offenders from the death penalty); *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002) (using same to exempt mentally retarded offenders).

10. *See* *Simmons*, 543 U.S. at 560–64, 578 (finding a national consensus against use of death penalty with regard to juvenile offenders); *Atkins*, 536 U.S. at 316 (finding same for mentally retarded offenders); *see also* *Stanford v. Kentucky*, 492 U.S. 361, 370–71 (1989) (finding

that. Not all of the Court's recent restrictions on the death penalty have invoked the Eighth Amendment<sup>11</sup> and besides, one need not know Eighth Amendment doctrine to question the Court's willingness to intervene in less hospitable times. Supreme Court Justices are a part of contemporary society, and thus naturally influenced by the same societal forces that shape the rest of the country's views.<sup>12</sup> As a result, the Court is unlikely to take positions that depart significantly from prevailing sentiment, no matter what its doctrine says.<sup>13</sup> To be clear, this is not to suggest that the Court always takes majoritarian positions (though often it does).<sup>14</sup> The point is that the Court rarely takes a stance *strongly contrary* to those positions, so its protection is like the help of a fair-weather friend—dependable in good times, but gone when needed the most.

Given the Eighth Amendment's reliance on "evolving standards of decency," the death penalty context might seem ill-suited for demonstrating the Supreme Court's inherently limited inclination for

insufficient evidence of a national consensus regarding execution of juvenile offenders); *Penry v. Lynaugh*, 492 U.S. 302, 334–35 (1989) (rejecting claim that the death penalty for mentally retarded offenders violates the Eighth Amendment for same reason).

11. See, e.g., *Rompilla v. Beard*, 545 U.S. 374, 377 (2005) (considering Sixth Amendment ineffective assistance of counsel claim); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (same); *Ring v. Arizona*, 536 U.S. 584, 588–89 (2002) (considering challenge under Sixth Amendment right to jury).

12. Former Chief Justice William Rehnquist recognized this very point when he wrote, "But these same judges go home at night and read the newspapers or watch the evening news on television; they talk to their family and friends about current events. . . . Judges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs." William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 768 (1986).

13. I have made this point in the criminal procedure context as well. See generally Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361 (2004); see also BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 168 (1921) ("The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by."); Michael J. Klarman, *Rethinking the History of American Freedom*, 42 WM. & MARY L. REV. 265, 278 (2000) (reviewing ERIC FONER, *THE STORY OF AMERICAN FREEDOM* (1998)) ("Judges are part of contemporary culture and thus are exceedingly unlikely to interpret the Constitution in ways that depart dramatically from contemporary public opinion.").

14. By majoritarian positions, I mean positions consistent with dominant public opinion, however defined or identified. Justice Kennedy recently recognized the Court's propensity to decide cases consistent with public sentiment, stating, "In the long term, the court is not antimajoritarian—it's majoritarian." See Jason DeParle, *In Battle to Pick Next Justice, Right Says Avoid a Kennedy*, N.Y. TIMES, June 27, 2005, at A1. Empirical evidence proves him right. See THOMAS R. MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* 79–81 (1989) (concluding that the Supreme Court is as majoritarian as the executive and legislative branches, consistent with other research in field).

countermajoritarian decision-making. Yet the closer one looks, the less that is true—and no case illustrates the point better than *Furman v. Georgia*,<sup>15</sup> the most famous death penalty decision in Supreme Court history.<sup>16</sup> Decided in 1972, *Furman* ruled that the death penalty violated the Eighth Amendment’s “cruel and unusual punishments” clause, abolishing (at least for a time) capital punishment in the United States.<sup>17</sup>

For the purposes of the present discussion, *Furman* is uniquely instructive in two respects. First, *Furman* does not present the same doctrinal difficulties that the Court’s later Eighth Amendment death penalty cases do. Although “evolving standards of decency” played a role in the decision, *Furman*’s holding did not rest on those grounds.<sup>18</sup> Thus, if the Supreme Court was following socio-political trends in its *Furman* decision, it was not because doctrine required that result.

Second, and more importantly, *Furman* appears at first blush to be a perfect example of the Supreme Court’s ability and inclination to play the proverbial “countermajoritarian hero.”<sup>19</sup> We tend to think of *Brown v. Board of Education*<sup>20</sup> as the iconic moment of judicial heroism, the quintessential example of the Court’s willingness to protect unpopular minorities from the vagaries of majority will.<sup>21</sup> But *Brown* protected innocent schoolchildren. It was *Furman* that saved the lives of over 600 convicted capital murderers and rapists<sup>22</sup>—the most unpopular,

15. 408 U.S. 238 (1972).

16. See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 362 (1995) (“Whatever crude gauge one employs—be it the size and placement of the headlines in the *New York Times* or the number of citations by other courts and commentators—*Furman* easily wins as the landmark Supreme Court decision regarding capital punishment.”).

17. *Furman*, 408 U.S. at 239–40. The Court reinstated the death penalty in *Gregg v. Georgia*, 428 U.S. 153, 187 (1976), discussed *infra* at Part II.B.

18. See *infra* text accompanying notes 79–83.

19. I credit Michael Klarman for coining the term. See Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 493 (1997) (“[J]udges do not act as ‘countermajoritarian heroes’ or ‘villains.’”); Michael J. Klarman, *What’s So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 192 (1998) (“Only one who thinks about judicial review ahistorically and acontextually could subscribe to the romantic vision of the Court as countermajoritarian hero.”).

20. 347 U.S. 483 (1954).

21. See Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 7 (1996) (noting that *Brown* “represents a paradigmatic example of the Supreme Court intervening to protect an oppressed minority from majoritarian overreaching”).

22. At the time *Furman* was decided, there were 631 men and two women on death row. MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 292–93 (1973); James R. Acker, Robert M. Bohm & Charles S. Lanier, *Introduction to AMERICA’S*

politically powerless individuals in America.<sup>23</sup> In *Furman*, the Supreme Court invalidated the death penalty statutes of thirty-nine states and the federal government, a move that had to have taken courage in the conservative, “law and order” times of 1972.<sup>24</sup> Even the Justices in *Furman* saw themselves as playing a heroic, countermajoritarian role.<sup>25</sup> Indeed, the Justices’ concern that the death penalty was being selectively applied—“feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority”<sup>26</sup>—figured prominently in their decision to override, rather than respect, the countervailing position of the states on this issue.<sup>27</sup> In short, if any decision showcases the Supreme Court

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EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT AND FUTURE OF THE ULTIMATE PENAL SANCTION 5, 5–6 (James R. Acker et al. eds., 2003); see also *infra* text accompanying note 124 (noting that in the 1960s, ninety-nine percent of all executions were for two offenses—murder and rape).

23. See Williams, *supra* note 1, at 722 (describing death row inmates as “the most despised group in America, a constituency without any political representation, and completely unable to fend for themselves in the political process”); Editorial, *The Ultimate Question*, THE NATION, May 17, 1971, at 610 (“Cases in which the death penalty can be imposed are cases which arouse fears, hatred, ethnic animosities and social prejudices.”).

24. Forty states had death penalty statutes of some variety in 1972, but Rhode Island’s capital statute was spared because it was a mandatory, rather than discretionary, death penalty provision. See *Furman v. Georgia*, 408 U.S. 238, 417 n.2 (Powell, J., dissenting). Rhode Island’s capital statute was invalidated as a result of the Court’s 1976 decision in *Woodson v. North Carolina*, 428 U.S. 280 (1976). See *infra* text accompanying notes 315–21 (discussing *Woodson*); *infra* Part I.C.6 (discussing “law and order” mood of 1972).

25. See *Furman*, 408 U.S. at 268–69 (Brennan, J., concurring) (“The right to be free of cruel and unusual punishments, like the other guarantees of the Bill of Rights, ‘may not be submitted to vote; [it] depend[s] on the outcome of no elections.’ ‘The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.’” (internal citations omitted)); *id.* at 345 (Marshall, J., concurring) (“But the Eighth Amendment is our insulation from our baser selves.”); see also LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE 72 (1992) (noting that NAACP briefs in *Furman* stressed just one view of the Court’s institutional function: that of protector of minority interests).

26. *Furman*, 408 U.S. at 255 (Douglas, J., concurring).

27. See, e.g., *id.* at 249–50 (Douglas, J., concurring) (“‘The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.’” (internal citation omitted)); *id.* at 365–66 (Marshall, J., concurring) (“It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society. It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment.”); *id.* at 310 (Stewart, J., concurring) (“[I]f any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.”); *id.* at 294 (Brennan, J., concurring) (“No one has yet suggested a rational basis that could differentiate . . . the few who die from the many who go to prison.”). Justice White’s statements in

protecting unpopular minorities in the face of strong majoritarian opposition, it is *Furman v. Georgia*.

But the lessons of *Furman* are not what they seem. Rather than proving the Supreme Court's ability to withstand majoritarian influences, *Furman* teaches the opposite—that even in its more countermajoritarian moments, the Court never strays far from dominant public opinion, tending instead to reflect the social and political movements of its time. In *Furman*, the Supreme Court did take a countermajoritarian position, but the circumstances in which it did so say more about the Court's limited inclination for countermajoritarian decision-making than the contrary. When the Court decided *Furman*, public support for the death penalty was only fifty percent,<sup>28</sup> and opposition to the practice had been mounting for over a decade.<sup>29</sup> To many contemporary observers, the abolition of capital punishment was just a matter of time.<sup>30</sup> Against that backdrop, it is difficult to conclude that *Furman* was countermajoritarian in any strong sense of the word; the Court only saw fit to play a countermajoritarian role once it *almost* no longer was. Like several other seemingly countermajoritarian decisions, the Court in *Furman* decided an issue that split the nation roughly in half, adopting a *slightly* minority position with momentum on its side.<sup>31</sup>

In fairness, not all of *Furman*'s lessons can be gleaned from a discussion of the decision itself. To understand *Furman*, one must also understand the backlash it engendered and the ruling that came in the wake of that backlash, *Gregg v. Georgia*.<sup>32</sup> Decided just four years after *Furman*, *Gregg* reinstated the death penalty<sup>33</sup> and made its own point

conference made the same point. There he reportedly stated, "The nut of the case is that only a small proportion are put to death, and I can't believe that they are picked out on the basis of killing those who should be killed. I can't believe that it is meted out fairly." See THE SUPREME COURT IN CONFERENCE (1940–1985), at 617 (Del Dickson ed., 2001).

28. See *infra* text accompanying note 205.

29. See *infra* Parts I.C.5–6 (discussing rising public, political, and judicial opposition to the death penalty).

30. See *infra* text accompanying notes 234–38.

31. See Klarman, *supra* note 21, at 8 (discussing *Brown v. Board of Education*, 347 U.S. 483 (1954)); Lain, *supra* note 13, at 1420–27 (discussing *Miranda v. Arizona*, 384 U.S. 486 (1966)); EPSTEIN & KOBYLKA, *supra* note 25, at 136–54 (discussing *Roe v. Wade*, 410 U.S. 113 (1973)); see also Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 486 n.396 (2005) (citing public opinion poll data from 1974 showing that forty-seven percent of Americans supported *Roe*, while forty-four percent opposed it).

32. 428 U.S. 153 (1976).

33. *Id.* at 169 ("We now hold that the punishment of death does not invariably violate the



about the Court's willingness to act in a heroic, countermajoritarian fashion. In *Furman*, the Supreme Court *seemed* like the countermajoritarian savior but was not; in *Gregg*, the Court *could* have been the countermajoritarian savior but was not. In different ways, both decisions showcase the inherently limited nature of the Court's inclination to protect.

In the discussion that follows, I argue that *Furman*, *Gregg*, and the events that transpired between them highlight a fundamental flaw in the Supreme Court's role as protector of minority rights—its limited inclination and ability to render countermajoritarian change. Part I establishes *Furman* as a decision profoundly affected by the social and political movements of its time. Part II considers the backlash that *Furman* generated and the Court's response to that backlash in *Gregg*, arguing that *Gregg* likewise illustrates the pervasive effect of extralegal context on judicial decision-making. Part III extrapolates two lessons from the inherently majoritarian influence of context in *Furman* and *Gregg*, arguing first, that the Court's inclination for countermajoritarian decision-making is extremely limited and second, that to the extent the Justices issue even *slightly* countermajoritarian rulings, they risk retarding the very cause they are trying to promote. If the past truly is a prologue, *Furman* portends that the Court will be an unlikely source of protection when capital defendants need it most. We ought to recognize that fact and rethink our reliance on the Court to protect these and other unpopular minorities from the tyrannical potential of majority rule.

## I. RETHINKING *FURMAN*

Rethinking *Furman* as a decision that reflected, rather than rejected, the majoritarian influences of its time requires consideration of the decision's legal, as well as extralegal, context. Consideration of *Furman*'s legal context is necessary because we lawyers tend to think judicial decisions are primarily a product of the rule of law.<sup>34</sup> Presumably, the law matters, which is why law professors teach the law and law students study the law. Thus, in order to see *Furman* for what it was—a product of the social and political movements of its time—one must first recognize what *Furman* was not: a product of purely (or even

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Constitution.”).

34. See Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1273–74 (2004). This starting assumption is not shared by all lawyers, nor is it shared by many outside the field of law. See *id.*

mainly) principled decision-making. And to do that, it is first instructive to view the doctrinal landscape of the Eighth Amendment’s “cruel and unusual punishments” clause as it stood before *Furman*. As discussed below, *Furman* made little sense based on previously established Eighth Amendment doctrine and traditional sources of legal analysis, but was perfectly understandable in light of the social and political movements of its time.

### A. Eighth Amendment Doctrine Before *Furman*

Before *Furman* was decided in 1972, the Eighth Amendment’s “cruel and unusual punishments” clause was largely a dead letter in constitutional law. During the first 175 years of its existence, the clause provided the basis for decision in just six Supreme Court cases and produced just three guiding principles.<sup>35</sup> The first two were substantive prohibitions: a punishment could not “involve torture or a lingering death,”<sup>36</sup> nor could it be grossly disproportionate to the crime.<sup>37</sup> The third was a principle designed to guide interpretation of the clause itself. In 1910, the Supreme Court in *Weems v. United States*<sup>38</sup> declared that the meaning of the “cruel and unusual punishments” clause was “capable

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35. See *infra* notes 36–37. The first of those cases was not decided until 1878, almost a century after the Bill of Rights was ratified. See *id.*

36. In *re* Kemmler, 136 U.S. 436, 447 (1890) (upholding death by electrocution); *accord* Wilkerson v. Utah, 99 U.S. 130, 136–37 (1878) (upholding death by public shooting). The Court’s later decision in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), would prove that even the “lingering death” prohibition had leeway. In *Francis*, officials botched the defendant’s electrocution and wanted to try again. During the initial attempt, the defendant’s body had reacted so violently to the shock it was receiving that the electric chair, which had not been anchored to the floor, gave way. A majority of the Court upheld what the dissenters called “death by installments.” *Id.* at 474 (Burton, J., dissenting). According to the majority, even a lingering death was tolerable so long as the state did not mean for it to be. *Id.* at 464. After *Francis*, the Court’s point was clear—while the “cruel and unusual punishments” clause spoke to the method of imposing death, it did not have much to say. For the story of *Francis*, see MELTSNER, *supra* note 22, at 177–78.

37. See *Weems v. United States*, 217 U.S. 349, 367 (1910) (“[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense.”). The Court articulated and applied the proportionality principle in three cases prior to *Furman*. See, e.g., *id.* (holding that twelve-year sentence of *cadena temporal*—forced labor while chained at the ankles and wrists—is “cruel and unusual” punishment for the crime of forging a public document); *Robinson v. California*, 370 U.S. 660, 667 (1962) (holding that imprisonment for narcotics addiction is “cruel and unusual” punishment, explaining that “[e]ven one day in prison would be cruel and unusual punishment for the ‘crime’ of having a common cold”); *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (holding that expatriation is “cruel and unusual” punishment for a soldier’s wartime desertion for a day).

38. 217 U.S. 349 (1910).

of wider application than the mischief which gave it birth” and would “acquire meaning as public opinion becomes enlightened by a humane justice.”<sup>39</sup> Echoing that sentiment in 1958, the Court in *Trop v. Dulles*<sup>40</sup> interpreted the clause in accordance with “evolving standards of decency that mark the progress of a maturing society.”<sup>41</sup> Penned by Chief Justice Warren, those words would become the touchstone of modern Eighth Amendment interpretation, spawning an entire body of constitutional constraints on the imposition of death.<sup>42</sup>

Concededly, the dynamic nature of the “cruel and unusual punishments” clause left plenty of room for the Supreme Court to read new protections into the Eighth Amendment. Before 1972, however, that potential had yet to be realized. As Hugo Bedau observed in 1968, “not a single death penalty statute, not a single statutorily imposed mode of execution, not a single attempted execution has ever been held by any court to be ‘cruel and unusual punishment’ under any state or federal constitution.”<sup>43</sup> Then came *Furman*.

*Furman v. Georgia* stands alone in American death penalty jurisprudence not only because of what the Court held—“the imposition and carrying out of the death penalty . . . constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments”<sup>44</sup>—but also because of *how* the Court held it. The decision itself was announced in a terse, one paragraph *per curiam* opinion that was not at all remarkable.<sup>45</sup> The remarkable part is what came next: nine separate opinions (five concurring and four dissenting) totaling 233 pages of official reports, earning *Furman* the dubious distinction of being the

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39. *Id.* at 373, 378. It was this declaration, in fact, that justified the Court’s recognition of the proportionality principle in the first place. *See id.* at 367.

40. 356 U.S. 86 (1958).

41. *Id.* at 101.

42. *See supra* notes 9–10 and accompanying text.

43. HUGO ADAM BEDAU, *THE COURTS, THE CONSTITUTION AND CAPITAL PUNISHMENT* 35 (1977). Granted, the Eighth Amendment’s “cruel and unusual punishments” clause had only been incorporated into the Fourteenth Amendment’s due process protections since 1962. *See Robinson v. California*, 370 U.S. 660, 667 (1962) (implicitly incorporating the clause). This may explain the paucity of cases decided under the clause prior to *Furman* and, if one sees *Furman* as an early “misstep” due to the Court’s inexperience with the clause, it may even help explain the decision’s weak doctrinal basis. None of this detracts from the point of Parts I.A and I.B—that the Justices decided *Furman* as they did because they wanted to, not because they had to or even had the doctrinal room to do so.

44. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972).

45. The paragraph identified the petitioners, posed the question, answered it in one sentence, and reversed and remanded the cases. *See id.*

longest decision in Supreme Court history.<sup>46</sup> Because none of *Furman*'s concurring Justices joined in any other concurring Justice's opinion, identifying *Furman*'s doctrinal basis is itself no small feat.<sup>47</sup> As Norman Finkel has aptly noted, "*Furman* has the feel of an anthology desperately in need of an editor."<sup>48</sup> Still, whatever was driving the result in *Furman*, it was almost certainly *not* principled decision-making despite the Eighth Amendment's relatively blank slate.

*B. Furman as a Product of (Un)Principled Decision-Making*

For those patient (and awake) long enough to read *Furman* from start to finish, the true wonder of its dichotomy becomes readily apparent. On the one hand, *Furman* is utterly convincing as a moral, philosophical, and penological proposition. On the other, its dearth of doctrinal support is equally palpable. Even with the Eighth Amendment's expansive potential, it is difficult to conclude that principled decision-making played a role in *Furman*. Indeed, one cannot help but wonder if the Justices' inability to agree on a doctrinal basis for their ruling was due to the fact that one simply did not exist. In virtually every conceivable way, traditional sources of legal analysis pointed away from—rather than toward—the result in *Furman*.

First, neither the text nor the original understanding of the Constitution supported *Furman*'s ruling. The Fifth Amendment, adopted the same day as the Eighth Amendment in 1791, provides protection for those accused of a "capital" crime, limiting the number of times they may be put in "jeopardy of life" and preventing deprivations of "life, liberty, or property . . . without due process of law."<sup>49</sup> The Constitution's text clearly assumes the death penalty's legitimacy, and the Framers did as well. At the time the Eighth Amendment was adopted, the death

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46. See NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW 172 (1995) (recognizing *Furman* as "the lengthiest opinion ever written in the history of the Supreme Court"); Steiker & Steiker, *supra* note 16, at 362 (same).

47. HUGO ADAM BEDAU, THE DEATH PENALTY IN AMERICA 249 (3d ed. 1982) ("Because the Court majority was fractured five separate ways, however, it was no small exercise in interpretation to determine on precisely which issues the Justices agreed."); Steiker & Steiker, *supra* note 16, at 362 ("The opinions presented a staggering array of arguments for and against the constitutionality of the death penalty and offered little means, aside from shrewd political prediction, of determining which arguments would dominate in the decision of any future cases."); Weisberg, *supra* note 1, at 317 ("[T]here really is no doctrinal holding in *Furman*").

48. FINKEL, *supra* note 46, at 172.

49. U.S. CONST. amend. V.

penalty was mandatory for most felonies and prevalent in every state.<sup>50</sup> Executions were common; even twelve-year-old children were not immune.<sup>51</sup> Indeed, the same First Congress that drafted and debated the Eighth Amendment also passed the nation's first death penalty law.<sup>52</sup> Whatever the Framers thought the "cruel and unusual punishments" clause prohibited, the death penalty itself was not on the list.

To be fair, *Furman's* difficulties with the text and original understanding of the Constitution are hardly insurmountable. True fans of originalism would have to concede considerable doubt as to whether even the Framers knew what the phrase "cruel and unusual punishments" meant at the time they adopted it.<sup>53</sup> Besides, after *Weems* interpreted the clause in a dynamic manner in 1910,<sup>54</sup> what the Framers thought (or did not think) hardly could be considered decisive. The whole point of "evolving standards of decency" was that the Eighth Amendment's meaning could change; what the clause allowed in the 1790s it might not allow in the 1970s.<sup>55</sup> After all, the Framers also

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50. See *Furman*, 408 U.S. at 335–41 (Marshall, J., concurring) (detailing the history of capital punishment in the United States).

51. See Victor L. Streib, *Emerging Issues in Juvenile Death Penalty Law*, 26 OHIO N.U. L. REV. 725, 728 (2000) (discussing execution of twelve-year-old Hannah Ocuish in 1786, as well as other juvenile offender executions).

52. See *Furman*, 408 U.S. at 420 (Powell, J., dissenting). The nation's first federal death penalty law can be found in the First Crimes Act of 1790. See 1 Cong. ch. 9, 1 Stat. 112 (providing death penalty for murder, treason, sodomy, among other felony offenses).

53. According to accounts of the First Congress, a number of legislators objected to the "cruel and unusual punishments" clause based on its vague language. Samuel Livermore of New Hampshire appears to have captured the sentiment best when he remarked, "The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary." 1 ANNALS OF CONGRESS 754 (1789). See also *Furman*, 408 U.S. at 258–64 (Brennan, J., concurring) (elaborating lack of evidence regarding the Framers' intent in incorporating the "cruel and unusual punishments" clause in the Bill of Rights). To the extent the prohibition against "cruel and unusual punishments" had an original understanding, it was thought to prevent particularly barbaric punishments—an interpretation based on English law that several scholars have shown to be mistaken. See Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119, 121 (2004) (arguing that the English version of the clause was meant to prohibit excessive, rather than torturous, punishments but that the Framers interpreted it incorrectly); Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CAL. L. REV. 839, 843–44 (1969) (arguing that the English version of the clause was meant to prohibit discrimination in punishments but that the Framers interpreted it incorrectly).

54. See *supra* text accompanying notes 38–39.

55. The phraseology is adapted from an NAACP memo created in preparation for *Furman*, which noted that the Eighth Amendment "may condemn in 1971 what it permitted in 1791." EPSTEIN & KOBYLKA, *supra* note 25, at 73 (reproducing memo).

thought ear-cropping was perfectly acceptable, but no one would have considered that practice constitutional when *Furman* was decided in 1972.<sup>56</sup> In short, the text and original understanding of the Constitution may not have made *Furman*'s holding lawless (though the dissenters thought so)<sup>57</sup>—but that is not the point. The point is that neither of these interpretive sources would have led the Justices in *Furman* to rule as they did.

Similarly, nothing in the Supreme Court's prior Eighth Amendment decisions suggested that the death penalty itself could violate the "cruel and unusual punishments" clause. To the contrary, almost every one of the Court's few decisions interpreting the clause before 1972 acknowledged the death penalty's legitimacy in some form or fashion. In 1890, for example, the Court explained:

Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life.<sup>58</sup>

Likewise, virtually all of the Court's other pre-*Furman* Eighth Amendment decisions contain statements—some by the Court, some by individual Justices—assuming or asserting as a matter of settled law the death penalty's constitutionality.<sup>59</sup> Of course, the comments in these decisions were technically dicta; the Justices had never before squarely confronted the issue. But Chief Justice Burger was undoubtedly correct when he wrote in his *Furman* dissent, "In the 181 years since the enactment of the Eighth Amendment, not a single decision of this Court

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56. See *Furman*, 408 U.S. at 384 (Burger, C.J., dissenting) (conceding point).

57. See, e.g., *id.* at 414 (Blackmun, J., dissenting) (noting that the Court's decision is "difficult to accept or to justify as a matter of history, of law, or of constitutional pronouncement"); *id.* at 417 (Powell, J., dissenting) (lamenting that "[t]he Court rejects as not decisive the clearest evidence that the Framers of the Constitution and the authors of the Fourteenth Amendment believed that those documents posed no barrier to the death penalty").

58. *In re Kemmler*, 136 U.S. 436, 447 (1890).

59. See *Furman*, 408 U.S. at 421–28 (Powell, J., dissenting) ("On virtually every occasion that any opinion has touched on the question of the constitutionality of the death penalty, it has been asserted affirmatively, or tacitly assumed, that the Constitution does not prohibit the penalty."); *id.* at 407–08 (Blackmun, J., dissenting) (discussing cases and making same point); *id.* at 329 (Marshall, J., concurring) (conceding that a "fair reading" of the Court's prior death penalty cases "would certainly indicate an acceptance *sub silentio* of capital punishment as constitutionally permissible").

has cast the slightest shadow of a doubt on the constitutionality of capital punishment.”<sup>60</sup>

That said, the largest hurdle for the Justices in *Furman*’s majority was not prior dicta, but the Court’s decision just fourteen months earlier in *McGautha v. California*.<sup>61</sup> In *McGautha*, the Supreme Court considered and rejected the claim that standardless discretion in the imposition of death violated due process.<sup>62</sup> According to the Court, juries did not need standards to guide capital sentencing determinations and in any event, standards would do little to protect against the arbitrary imposition of death that formed the gist of the defendant’s complaint.<sup>63</sup> After extolling the virtues of a jury’s ability to afford mercy whenever it saw fit, the Court in *McGautha* concluded:

In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.<sup>64</sup>

Guided discretion statutes might be a better way of approaching capital jury trials, the Court conceded, but they were not constitutionally required.<sup>65</sup>

For the majority in *Furman*, *McGautha* was a problem because the one point on which all of the concurring Justices agreed—and the one point that *Furman* would come to represent—was that the arbitrary imposition of death was constitutionally impermissible.<sup>66</sup> The facts of *Furman* (as well as its companion cases)<sup>67</sup> were perfect for making the

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60. *Id.* at 380 (Burger, C.J., dissenting).

61. 402 U.S. 183 (1971).

62. *See id.* at 207.

63. *See id.*; *see also infra* text accompanying note 334 (quoting *McGautha*).

64. 402 U.S. at 207.

65. *See id.* at 221 (conceding that standards in capital sentencing may be “superior” means of administering the death penalty, while noting that the Constitution “does not guarantee trial procedures that are the best of all worlds”).

66. *See Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (“Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.”); EPSTEIN & KOBYLKA, *supra* note 25, at 78 (“[T]he five Justices agreed on one major point of jurisprudence: that those states using capital punishment do so in an arbitrary manner.” (citing WILLIAM J. BOWERS, *LEGAL HOMICIDE* 174 (Northeastern Univ. Press 1984))).

67. Both of *Furman*’s companion cases were rapes of white women by black defendants where the victim did not otherwise suffer serious injuries. For a discussion of the facts of those cases, see MELTSNER, *supra* note 22, at 246–48. In fairness, a third companion case, which presented the

point. William Henry Furman was a black man of limited intelligence who shot and killed a white man, arguably by accident, as he was fleeing a burglary of the man's home.<sup>68</sup> Yes, he had killed someone, but what distinguished Furman from the countless other killers who had not received the death penalty? For Justice Stewart, it was the fact that there was *no* distinction that rendered the death penalty constitutionally impermissible; Furman was simply one of a "capriciously selected random handful" upon whom death was "wantonly" and "freakishly" imposed.<sup>69</sup> For Justice White, the death penalty's infrequent and arbitrary imposition rendered it completely ineffective as a deterrent, so the states no longer had a legitimate reason to put people to death.<sup>70</sup> For Justice Douglas, the imposition of death was not only arbitrary and capricious, but discriminatory as well, preying on "only those in the lower strata, only those who are members of an unpopular minority or the poor and despised."<sup>71</sup> For the two remaining members of *Furman's* majority—Justices Brennan and Marshall—the infrequent, arbitrary, and/or discriminatory imposition of death was just one of several reasons that capital punishment was "cruel and unusual" per se.<sup>72</sup> In short, each of the Justices in *Furman's* majority based his decision at least in part on the arbitrary results of a capital punishment system that the Court had just upheld against the claim that it produced arbitrary results.

Granted, the constitutional questions considered in *McGautha* and *Furman* were different, but not much. In both, the petitioners argued that unbridled discretion made it impossible to rationally distinguish between

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Court with a brutal rape-murder, was remanded before *Furman* was decided when the California Supreme Court in *People v. Anderson*, 493 P.2d 880 (Cal.), *cert. denied*, 406 U.S. 958 (1972), invalidated the death penalty under its state constitution. See MELTSNER, *supra* note 22, at 247 (discussing facts of *People v. Aikens*, 450 P.2d 258 (Cal. 1969), *cert. dismissed*, *Aikens v. California*, 406 U.S. 813 (1972)); *infra* text accompanying note 232 (discussing remand of *Aikens* in light of *Anderson*).

68. See MELTSNER, *supra* note 22, at 247–48.

69. *Furman v. Georgia*, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring).

70. See *id.* at 313 (White, J., concurring) ("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.").

71. *Id.* at 247 n.10 (Douglas, J., concurring).

72. See *id.* at 281–306 (Brennan, J., concurring) (invalidating the death penalty because it is unusually severe, inflicted arbitrarily, substantially rejected by contemporary society, and unable to serve any penal purpose more effectively than some less severe punishment); *id.* at 342–71 (Marshall, J., concurring) (invalidating the death penalty because it is an excessive and unnecessary penalty, because informed public opinion would reject it, and because it is used in a discriminatory manner).



those who would live and those who would die.<sup>73</sup> The real difference was that in *Furman* the argument worked. This was particularly ironic because at its core, the arbitrariness that *Furman* denounced was a procedural problem. It was a problem with how the death penalty was applied, rather than with the penalty itself, and thus better suited for the due process challenge made and rejected in *McGautha*.<sup>74</sup> Acutely aware of the inconsistency, the Justices in *Furman*'s majority dealt with *McGautha* as well as they could—rejecting it, distinguishing it, even ignoring it altogether.<sup>75</sup> They had understood what *McGautha* meant for future challenges to the death penalty at the time it was decided. In fact, *McGautha* was thought to have so decisively settled the death penalty's constitutionality that Justice Douglas initially drafted a dissent to the Court's grant of certiorari in *Furman*, claiming it was "cruel and unusual" for the Court to give false hope to death row inmates only to announce "in draconian fashion that the death penalty passes muster."<sup>76</sup> He later withdrew it, but others who would form *Furman*'s majority initially thought the same thing—having just held that the Constitution

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73. Compare *McGautha v. California*, 402 U.S. 183, 204 (1971) (rejecting *McGautha*'s complaint that the statutes at issue "failed to provide a rational basis for distinguishing" those who would live from those who would die) with *Furman*, 408 U.S. at 313 (White, J., concurring) ("[T]here is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."); *id.* at 294 (Brennan, J., concurring) ("No one has yet suggested a rational basis that could differentiate . . . the few who die from the many who go to prison.").

74. See *Furman*, 408 U.S. at 398–99 (Burger, C.J., dissenting) ("The decisive grievance of the opinions—not translated into Eighth Amendment terms—is that the present system of discretionary sentencing in capital cases has failed to produce evenhanded justice; the problem is not that too few have been sentenced to die, but that the selection process has followed no rational pattern. . . . The approach of these concurring opinions has no antecedent in the Eighth Amendment cases. It is essentially and exclusively a procedural due process argument."). Justice Douglas's concurrence implicitly recognized the point. See *id.* at 256–57 (Douglas, J., concurring) ("[T]hese discretionary statutes are . . . pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments.").

75. Justices Douglas, Marshall, and Brennan had dissented in *McGautha*, and stayed with that position in *Furman*. See *McGautha*, 402 U.S. at 248, (Brennan, J., dissenting, joined by Douglas, J. and Marshall, J.); *Furman*, 408 U.S. at 248 n.11 (Douglas, J., concurring) (arguing the "correctness of Mr. Justice Brennan's dissent" in *McGautha*). For Justices Stewart and White, who had voted with the majority in *McGautha*, the task was not that simple. Justice Stewart distinguished *McGautha* in a footnote as a case arising under the Due Process and Equal Protection Clauses, see *id.* at 310 n.12, while Justice White ignored *McGautha* altogether. See *id.* at 310–14; see also *id.* at 427 n.11 (Powell, J., dissenting) (chiding Justice Stewart for attempting to "dispose[] of *McGautha* in a footnote" and Justice White for making "no attempt to distinguish *McGautha*'s clear holding").

76. See MARK V. TUSHNET, *MAKING CONSTITUTIONAL LAW* 150 (Oxford Univ. Press 1997) (discussing and quoting draft dissent).

did not require standards in the imposition of death, the Court was unlikely to then strike the death penalty because there were no standards.<sup>77</sup> The ink on *McGautha* was barely dry when certiorari in *Furman* was granted two months later.<sup>78</sup> It was simply unthinkable that the Court would turn its back on a case of such recent vintage, until it did.

Arguably, the concept of “evolving standards of decency” provided a way around *McGautha*,<sup>79</sup> but not even this doctrinal basis can explain the Court’s decision in *Furman*. Only Justices Brennan and Marshall relied on “evolving standards of decency” to support their ruling; as previously noted, the other three Justices in *Furman*’s majority relied exclusively on some variation of the arbitrary manner in which death was inflicted.<sup>80</sup> Even then, Justice Marshall did not contend that the nation’s standards of decency had actually evolved to a point where capital punishment was considered socially unacceptable. His conclusion, soon to be dubbed the “Marshall Hypothesis,”<sup>81</sup> was that the death penalty *would* be socially unacceptable if only Americans knew more about it.<sup>82</sup> That left only Justice Brennan claiming that the death

77. Like Justice Douglas, Justice Brennan assumed the Court would uphold the death penalty in *Furman*, and had prepared a draft dissent before oral arguments in the case. *Id.* By the morning of oral arguments in *Furman*, Justice Marshall had done the same. William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 322 (1986–87). Apparently, the whole point of granting certiorari in *Furman* was to “once and for all . . . make it clear to the nation that the death penalty and all its aspects pass constitutional muster.” See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 257–58 (Harvard Univ. Press 2002) (quoting Justice Black); see also Brennan, *supra*, at 322 (discussing Justice Black’s role in the decision to grant certiorari in *Furman*); MELTSNER, *supra* note 22, at 287 (arguing that *McGautha* ensured *Furman*’s result “would rank among the greatest surprises in American legal history”).

78. *McGautha* was decided May 3, 1971. See *McGautha*, 402 U.S. at 183. Certiorari in *Furman* was granted June 28, 1971. See *Furman v. Georgia*, 403 U.S. 952 (1971).

79. Before *Furman*, “evolving standards of decency” was an interpretive principle, not a substantive constraint. As Chief Justice Burger recognized in his *Furman* dissent, the Court had never before held that a punishment could be “cruel and unusual” because it was out of step with societal values. See *Furman*, 408 U.S. at 383 (Burger, C.J., dissenting). See also *supra* Part I.A (discussing Eighth Amendment doctrine before *Furman*).

80. See *supra* text accompanying notes 69–75.

81. See Austin Sarat & Neil Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, in *CAPITAL PUNISHMENT IN THE UNITED STATES* 190, 190–207 (Hugo Adam Bedau & Chester M. Pierce eds., 1975) (reporting substantial empirical support for the Marshall Hypothesis).

82. See *Furman*, 408 U.S. at 369 (Marshall, J., concurring) (“Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice.”).

penalty had in fact been rejected by contemporary society and for him, “evolving standards” was just one of four reasons that the death penalty was unconstitutional *per se*.<sup>83</sup> In short, “evolving standards of decency” cannot explain *Furman*’s result because by and large, the Justices did not use it.

In retrospect, it is not difficult to understand why *Furman*’s holding did not rely more heavily on “evolving standards of decency” despite the end run it provided around *McGautha*. In 1972, forty states had death penalty statutes,<sup>84</sup> juries were still imposing death sentences (at least on occasion),<sup>85</sup> and death penalty supporters *slightly* outnumbered its opponents.<sup>86</sup> Given those considerations, it was virtually impossible to conclude that capital punishment had become morally repugnant to the nation as a whole, notwithstanding Justice Brennan’s eloquent opinion to the contrary. This is not to deny that the death penalty was extremely controversial at the time—nor is it to deny the direction in which the nation’s standards appeared to be evolving.<sup>87</sup> But to claim in 1972 that the nation had soundly rejected capital punishment was more than a little difficult—it was utterly unconvincing.

In the end, then, this much is clear: *Furman* was a decision the Justices *wanted* to make, not one they had to make (or even had doctrinal room to make). The Justices in *Furman*’s majority invalidated the death penalty because they were convinced it was the right thing to do, and if traditional sources of legal analysis did not support that result—well, they would simply have to give way. The question is *why* the Justices wanted to strike the death penalty in *Furman* (and better yet, why they wanted to in *Furman* but not in *McGautha*).

Although it is impossible to know exactly why the Justices in *Furman*’s majority ruled as they did and no single explanation is completely satisfactory on its own, the role of extralegal context in the decision was clearly significant. The Justices in *Furman* made a policy choice, pure and simple, and it is more than mere coincidence that they did so in a socio-political context extremely conducive to that choice. Only by understanding the socio-political context in which *Furman* was decided can we begin to understand why the Justices would have

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83. See *supra* note 72.

84. See *supra* note 24.

85. See *infra* text accompanying notes 100–04 (discussing sentencing patterns in 1960s).

86. See *infra* text accompanying note 205.

87. See *infra* Part I.C (discussing socio-political context of *Furman*).

thought invalidating the death penalty was the right thing to do *despite* doctrine, rather than because of it.

### C. Furman as a Product of Broader Socio-Political Trends

*Furman*'s socio-political context began long before 1972. Although it was not until the late 1950s that abolition sentiment started to gain momentum, the country had begun to distance itself from the death penalty even before then.<sup>88</sup> By the mid-1960s, the nation appeared to be moving towards abolition of its own accord. As discussed below, executions were dwindling, state legislatures were abolishing the death penalty, a world-wide abolition movement was underway, and domestic egalitarianism was feeding a similar movement at home. Even as the country turned increasingly conservative on criminal justice issues, political and judicial opposition to the death penalty mounted. The result was a socio-political context uniquely conducive to the Court's 1972 landmark ruling.

#### 1. Use of the Death Penalty

One of the earliest (and clearest) indications of the nation's growing discomfort with capital punishment was an increasing reluctance to actually use it. In the 1930s, the average number of executions per year was 167; in the 1940s, the average was 128.<sup>89</sup> By the 1950s, that figure had dropped to 72.<sup>90</sup> In 1962, there were only 47 executions, and the numbers plummeted from there—1963 had 21 executions, 1964 had 15, 1965 had 7, 1966 had one, 1967 had two, and from 1968 until the death penalty was reinstated in 1976, there were *none*.<sup>91</sup>

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88. See *infra* Parts I.C.1 (discussing decline in executions as early as the 1930s) and I.C.2 (discussing state legislative trend towards abolition beginning in the late 1950s).

89. See Walter C. Reckless, *The Use of the Death Penalty: A Factual Statement*, in CAPITAL PUNISHMENT 38, 51 (James A. McCafferty ed., 1974) (charting executions from 1930 through 1970).

90. *Id.*

91. *Id.*; see also PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY: A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 143 (U.S. Gov't Printing Office 1967) [hereinafter NAT'L CRIME COMM'N REPORT] ("The most salient characteristic of capital punishment is that it is infrequently applied."); Reckless, *The Use of the Death Penalty: A Factual Statement*, in CAPITAL PUNISHMENT, *supra* note 89, at 51; EPSTEIN & KOBYLKA, *supra* note 25, at 59 (recognizing 1968 as "the first year in American history in which no executions occurred").

Granted, the fact that executions had ground to a halt by the late 1960s was attributable to a litigation-induced de facto moratorium in place while the Supreme Court waded through various constitutional challenges to the death penalty.<sup>92</sup> But the National Association for the Advancement of Colored People (NAACP), which led those challenges, did not begin to systematically attack the death penalty's constitutionality until 1967.<sup>93</sup> Before then, its efforts had focused on defending blacks in Southern rape cases, where racial discrimination in the imposition of death was most apparent.<sup>94</sup> Even the American Civil Liberties Union (ACLU), which partnered in the NAACP's 1967 massive litigation campaign,<sup>95</sup> did not take a stand against the death penalty until 1965.<sup>96</sup> Before then, its official position was that capital punishment did not present a civil liberties issue.<sup>97</sup> Thus, while the NAACP and ACLU deserve the credit (or blame) for stopping executions entirely, these so-called "moral elites" entered the fray too late to have played a significant role in the death penalty's dwindling use.<sup>98</sup>

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92. For fascinating accounts of the evolution and execution of the NAACP's litigation-based "moratorium strategy," see MELTSNER, *supra* note 22, at 106–67. See also EPSTEIN & KOBYLKA, *supra* note 25, at 48–61 (discussing moratorium strategy and aptly describing it as "litigation laced with psychological warfare"); *infra* note 313 (discussing "pileup on death row").

93. See EPSTEIN & KOBYLKA, *supra* note 25, at 53 (discussing NAACP's decision "to change their strategy dramatically in 1967"); MELTSNER, *supra* note 22, at 108–10 (discussing 1967 Ford Foundation grant to NAACP that made moratorium strategy possible). The NAACP achieved its moratorium by distributing "Last Aid Kits"—packets of virtually every motion, pleading, or other document a lawyer might need to postpone an execution—to hundreds of capital defense attorneys nationwide. For a discussion of the Last Aid Kits and their contents, see CAPITAL PUNISHMENT IN THE UNITED STATES 130–32 (Bryan Vila & Cynthia Morris, eds., Greenwood Press 1997).

94. See EPSTEIN & KOBYLKA, *supra* note 25, at 48–53 (discussing evolution of NAACP's focus beyond southern racism in interracial rape cases); MELTSNER, *supra* note 22, at 106–07 (same). The NAACP collected data on rape cases that occurred between 1945 and 1965 in twelve Southern states. That data revealed that of 119 defendants sentenced to death during those years, 110 were black. After examining twenty-nine variables, the NAACP study concluded that "[i]n less than one time in a thousand could these associations have occurred by the operation of chance factors alone." EPSTEIN & KOBYLKA, *supra* note 25, at 50–51.

95. See EPSTEIN & KOBYLKA, *supra* note 25, at 54–58 (discussing ACLU contributions to NAACP litigation strategy).

96. CAPITAL PUNISHMENT IN THE UNITED STATES, *supra* note 93, at 125–27 (reproducing ACLU-issued statement against the death penalty in 1965).

97. See MELTSNER, *supra* note 22, at 55 (discussing ACLU's 1965 stand against the death penalty).

98. See HUGO ADAM BEDAU, DEATH IS DIFFERENT 134–45 (Northeastern Univ. Press 1987) (considering and rejecting claim that decline in death penalty's use was imposed by "moral elites" like the NAACP and ACLU).

A number of factors likely contributed to the fall in executions prior to 1967. The 1960s criminal procedure revolution almost certainly played a part—if nothing else, its launch in 1961 gave death row inmates new opportunities to litigate just to stay alive.<sup>99</sup> But not even the 1960s criminal procedure revolution can account for the dramatic decline in executions over the previous thirty years. Before (and during) the 1960s, executions fell at least in part because juries were less inclined to impose death sentences and other institutional actors were less inclined to carry them out. From 1935–1942, courts imposed an average of 142 death sentences per year;<sup>100</sup> by the 1960s, that number had dropped to 106<sup>101</sup> despite a significant rise in population and capital crimes committed during that interval.<sup>102</sup> In practice, juries in the 1960s were returning death sentences only around ten-to-twenty percent of the time they were asked to do so,<sup>103</sup> a remarkably low figure considering the fact that death-qualified “hanging juries” were not prohibited until 1968.<sup>104</sup>

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99. The term “criminal procedure revolution” refers to a series of rulings by the Warren Court in the 1960s that recognized new constitutional rights in the criminal procedure context. See Lain, *supra* note 13, at 1363–64. The Supreme Court’s 1961 decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), which applied the Fourth Amendment’s exclusionary rule to the states, is widely credited with launching the revolution. See Lain, *supra* note 13, at 1373. The Supreme Court ultimately held that *Mapp* was not retroactive, *Linkletter v. Walker*, 381 U.S. 618, 640 (1965), rendering it unavailable to defendants whose conviction was already final as of 1961—but even death row inmates who would ultimately fail in their exclusionary rule claim were still able to litigate it (and thus postpone their executions) in the meantime.

100. BANNER, *supra* note 77, at 244.

101. See *Furman v. Georgia*, 408 U.S. 238, 291–92 & n.41 (1972) (Brennan, J., concurring) (listing number of death sentences imposed from 1961 to 1970 and averaging those figures).

102. *Id.* at 291. From 1936–1937, the number of murders and non-negligent manslaughters was 7894. See FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES, FIRST QUARTERLY BULLETIN, 1937, at 211 (1937). In 1960, by comparison, that number was 9136. FED. BUREAU OF INVESTIGATION U.S. DEP’T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES—1960, at 33 (1961). In the last half of the 1960s, the number of murders and non-negligent manslaughters skyrocketed. In 1966, that number was 10,920; in 1967, it was 12,090; in 1968, it was 13,650; in 1969, it was 14,590; and in 1970, it was 15,810. See FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES—1970, at 65 (1971).

103. Exact figures are not available, and estimates vary. The NAACP estimated that only around one in every twelve-to-thirteen capital trials resulted in a death sentence. See MELTSNER, *supra* note 22, at 273. *Furman*’s dissenting justices estimated that figure at closer to twenty percent, see, e.g., *Furman*, 408 U.S. at 435 n.19 (Powell, J., dissenting), and the Court in *Gregg* estimated it at “less than twenty percent.” *Gregg v. Georgia*, 428 U.S. 153, 182 n.26 (1976).

104. See *Witherspoon v. Illinois*, 391 U.S. 510, 523 (1968) (holding that excluding veniremen for cause because they voice general objections to the death penalty creates a “hanging jury” and is constitutionally impermissible). The Supreme Court subsequently “softened” *Witherspoon* in *Lockhart v. McCree*, 476 U.S. 162, 183–84 (1986) (upholding “death qualification” of jurors so

Commutations and other reprieves removed over half the individuals entering death row in the 1960s, and of those that remained, only around one in five was actually executed.<sup>105</sup> As the National Crime Commission recognized in its 1967 Report, those responsible for the administration of capital punishment were losing the will to carry it out.<sup>106</sup>

## 2. *State Trends in Death Penalty Legislation*

State legislative trends likewise evidenced a shift away from the death penalty. In fact, those trends may well be another reason for the long-term decline in the death penalty's use.<sup>107</sup> The most visible legislative movement was towards abolition. In 1957, the territories of Alaska and Hawaii abolished the death penalty.<sup>108</sup> Oregon followed suit in 1964,<sup>109</sup> kicking off a flurry of abolition activity in the states. In 1965, two states—West Virginia and Iowa—abolished the death penalty completely while another two—New York and Vermont—abolished it for all but extraordinary crimes such as murder by a life prisoner.<sup>110</sup> New Mexico similarly chose limited abolition in 1969,<sup>111</sup> becoming the fourteenth state to formally or informally end capital punishment within

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long as it removes only those jurors whose opposition to the death penalty is so strong that it would substantially impair the performance of their deliberative duties).

105. See *Furman*, 408 U.S. at 292 n.46 (Brennan, J., concurring); see also NAT'L CRIME COMM'N REPORT, *supra* note 91, at 143 ("Only 67 persons were sentenced to death by the courts in 1965, a decline of 31 from the previous year, and 62 prisoners were reprieved from their death sentences."); *Signs of an End to "Death Row"*, U.S. NEWS & WORLD REP., May 31, 1971, at 37–38 (noting increasing reluctance to use the death penalty in recent years and high number of commutations).

106. NAT'L CRIME COMM'N REPORT, *supra* note 91, at 143 ("[A]ll available data indicate that judges, juries, and governors are becoming increasingly reluctant to impose, or authorize the carrying out of a death sentence."); see also McCafferty, *Attack on the Death Penalty*, in CAPITAL PUNISHMENT, *supra* note 89, at 225, 226–27 (noting growing opposition to death penalty among governors, state attorneys general, correctional administrators, and wardens); *Signs of an End to "Death Row"*, *supra* note 105, at 38 (noting increasing reluctance to use the death penalty in recent years and high number of commutations).

107. But the point is less obvious than it looks. States tended to abolish the death penalty only after it had already dwindled away in practice, so it is not entirely clear that legislative abolition would have had much effect on the death penalty's use. See BANNER, *supra* note 77, at 244–45 (arguing that state legislative activity did not contribute to decline in death penalty's use).

108. Reckless, *supra* note 89, at 50.

109. BEDAU, *supra* note 43, at 4–5.

110. BEDAU, *supra* note 43, at 4–5.

111. FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 31 (1986).

its borders.<sup>112</sup> Before the late 1950s, no state had made that legislative move in forty years.<sup>113</sup>

Admittedly, the trend towards abolition was inconsistent. One state, Delaware, reinstated the death penalty in 1961 after abolishing it in 1958.<sup>114</sup> And for every state that rejected the death penalty during this time, many more elected to keep it. In 1965, twenty states considered proposals to abolish capital punishment; the vast majority failed miserably.<sup>115</sup> But the fact that half the death penalty states were at least thinking about abolition was itself significant. Before the 1960s, those proposals were not even on the table.<sup>116</sup> Moreover, it was hardly surprising to see state legislatures lag behind juries and other institutional actors in gradually rejecting capital punishment. As is often the case with penal prohibitions, support for officially discarding death penalty statutes tended not to materialize until well after those statutes already had been discarded in practice.<sup>117</sup>

Even die-hard death penalty states gradually underwent two legislative changes restricting its use. One was the move from mandatory to discretionary death penalty provisions. In colonial days, a lack of facilities and manpower for long-term incarceration required punishments that could be carried out swiftly—fines, mutilations, and for serious felonies, death.<sup>118</sup> Over time, juries maneuvered around the

112. BANNER, *supra* note 77, at 244.

113. WILLIAM J. BOWERS, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864–1982*, at 9–10 (Northeastern Univ. Press 1984) (1974).

114. BEDAU, *supra* note 43, at 59.

115. See BEDAU, *supra* note 43, at 64 (estimating that three-fourths of all legislative attempts to repeal the death penalty have failed); HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA* 232 (Anchor Books 1967) (1964) (noting same and that “the vote in most instances wasn’t even close”); see also BANNER, *supra* note 77, at 244 (noting that twenty state legislatures were considering bills to abolish capital punishment in 1965, and discussing some instances in which the bills came close to being passed).

116. See BEDAU, *supra* note 43, at 64 (“In no other decade of American history have there been such referenda on this issue.”).

117. See Sol Rubin, *The Supreme Court, Cruel and Unusual Punishment, and the Death Penalty*, in *CAPITAL PUNISHMENT*, *supra* note 89, at 245, 258 (“The laws for the burning of witches were repealed only some time after the burning of witches had stopped.”); *supra* note 107. In conference after *Furman*, Justice Powell implicitly recognized the point, noting that “juries have begun to move ahead of the legislatures” and that “our legislative guardians have abdicated their responsibilities, hoping that this Court would take the problem off of their backs.” *THE SUPREME COURT IN CONFERENCE (1940–1985)*, *supra* note 27, at 618–19.

118. See *Furman v. Georgia*, 408 U.S. 238, 335 (1972) (Marshall, J., concurring) (“With county jails inadequate and insecure, the criminal population seemed best controlled by death, mutilation, and fines.”) (quoting Filler, *Movements to Abolish the Death Penalty in the United States*, 284



law's harshness by refusing to convict those they wanted to spare, and the law responded by formally recognizing the discretion in capital sentencing that jurors were already exercising in practice.<sup>119</sup> By the turn of the twentieth century, twenty states had moved from mandatory to discretionary death penalty statutes.<sup>120</sup> By 1950, that number had nearly doubled.<sup>121</sup> By the 1960s, mandatory death penalty provisions were virtually nonexistent; a few were still on the books for rare, narrowly defined crimes but they sat largely in desuetude, forgotten relics of a bygone era.<sup>122</sup> Concomitant with this trend, state legislatures also gradually reduced the list of offenses punishable by death. Once available for burglary, sodomy, arson and other serious felonies,<sup>123</sup> capital punishment in the twentieth century became increasingly narrowly prescribed. Between 1930 and 1967, when the moratorium began, ninety-nine percent of all executions were for just two offenses, murder and rape, with murder alone accounting for eighty-seven percent.<sup>124</sup>

Granted, the death penalty was still firmly entrenched at the state level when *Furman* was decided. In 1972, forty states had at least one death penalty statute on the books.<sup>125</sup> As a measure of support for capital punishment, however, that number was deceptive. Five of the forty states had death penalty statutes so limited that they were almost never applicable, and another six had death penalty statutes that were generally applicable but almost never put to use.<sup>126</sup> Of the remaining twenty-nine

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ANNALS AM. ACAD. POL. & SOC. SCI. 124 (1952))).

119. See *McGautha v. California*, 402 U.S. 183, 198–99 (1971) (discussing jury nullification of mandatory death penalty laws).

120. See BOWERS, *supra* note 113, at 10.

121. See *id.* at 10–11.

122. See *Woodson v. North Carolina*, 428 U.S. 153, 292 n.25 (1976) (discussing the “handful of obscure statutes” imposing a mandatory death penalty before *Furman*, such as causing a trainwreck resulting in death and perjury resulting in the execution of an innocent person, while noting that none of these statutes appeared to be in active use).

123. See BEDAU, *supra* note 47, at 6 (listing capital offenses in colonial times as including murder, treason, piracy, arson, rape, robbery, burglary, and sodomy).

124. *Furman v. Georgia*, 408 U.S. 238, 297 (1972) (Brennan, J., concurring).

125. *Id.* at 417 (Powell, J., dissenting). That number had been forty-one until 1971, when the California Supreme Court held that the death penalty violated its state constitution’s “cruel or unusual punishments” clause. For a discussion of that development, see *infra* text accompanying notes 228–33.

126. See *Furman*, 408 U.S. at 298 n.53 (Brennan, J., concurring) (listing five states that had virtually abolished the death penalty legislatively and six others that had more general death penalty statutes but made virtually no use of them, averaging about one execution every ten years).

states, few were embracing capital punishment; death penalty laws were on the books, but with one regional exception—the South—they were rarely invoked in practice.<sup>127</sup>

Only in the South, where the death penalty was “as firmly entrenched as grits for breakfast,”<sup>128</sup> did capital punishment continue to flourish in the 1960s. Then, as now, Southern states led the nation in death penalty statutes and a willingness to use them.<sup>129</sup> From 1935 to 1969, Southern states conducted more executions than all other regions of the United States combined; in the 1950s and 1960s, they accounted for nearly two-thirds of all executions.<sup>130</sup> Explanations for the so-called Southern “death belt” are varied, but the most prominent is capital punishment’s unique legacy there as a tool of racial control.<sup>131</sup> In the antebellum South, “black codes” explicitly allocated the death penalty along racial lines, typically providing that black defendants could be put to death for any crime that could result in three or more years of imprisonment if committed by a white.<sup>132</sup> Over time, these codes were replaced by the

127. See *infra* text accompanying note 136.

128. HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 21 (Oxford Univ. Press 1997).

129. See AUSTIN SARAT & CHRISTIAN BOULANGER, *THE CULTURAL LIVES OF CAPITAL PUNISHMENT* 98–99 (Stanford Univ. Press 2005) (comparing Southern death penalty statutes and reforms to those of rest of nation); ZIMRING & HAWKINS, *supra* note 111, at 30–32 (discussing unique prevalence of the death penalty in the South in the 1950s and 1960s); *id.* at x (noting same post-*Furman*); see also BEDAU, *supra* note 128, at 21 (“As of May 1996, two-thirds of all executions since *Furman* have been carried out in just five southern states: Texas, Florida, Virginia, Louisiana, and Georgia.”).

130. See ZIMRING & HAWKINS, *supra* note 111, at 30–32; (discussing and charting Southern dominance in executions); see also *id.* at 89 (concluding that the most powerful predictor of the death penalty is geography). Ironically, public support for the death penalty is lowest in the South. See *infra* note 304 (discussing phenomenon).

131. See BEDAU, *supra* note 128, at 23 (describing “conventional explanation” for Southern “death belt” as relating to racist attitudes and use of death penalty as a form of social, political, and legal control over blacks); Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97, 122–26 (2002) (considering various explanations for Southern exceptionalism regarding the death penalty, including “the most obvious” explanation of race, noting, “[the] long-standing and close association of capital punishment with the formal and informal social control of blacks in the South may contribute to Southern unwillingness to part with the death penalty”).

132. See BEDAU, *supra* note 128, at 23 (describing conventional explanation that the death penalty in the South is “nothing but the survival in a socially acceptable form of the old Black Codes and the lynch law enforced by the Klu Klux Klan”); EPSTEIN & KOBYLKA, *supra* note 25, at 333 n.31 (noting that antebellum Southern states had codes “that explicitly discriminated against blacks by making some types of conduct punishable by death only if the defendant was black, or the victim was white, or both” (quoting Samuel R. Gross & Robert Mauro, *Patterns of Death*, 37 STAN. L. REV. 27 (1989))); SARAT & BOULANGER, *supra* note 129, at 98–99 (discussing various black codes).

informal (but just as effective) practice of mob lynching until private violence gradually gave way to capital trials.<sup>133</sup> Despite the progress, blacks continued to be the primary recipients of capital punishment in the South. In Southern rape cases, for example, they accounted for over ninety percent of all executions.<sup>134</sup>

Even in the South, however, support for the death penalty had begun to soften in the decades preceding *Furman*. Between 1940 and 1960, Southern executions fell by fifty percent, eclipsing the more gradual descent then underway in the rest of the nation.<sup>135</sup> In fact, the long-term decline in executions nationwide was largely attributable to a marked decline of executions in the South.<sup>136</sup>

In sum, state legislatures were slowly but surely moving away from the death penalty, restricting its use and in a few (but growing) number of instances, abandoning it altogether. Although forty states still had death penalty statutes in 1972, few states were routinely using them outside the South. Only in the South did the death penalty continue to thrive, although in the decades prior to *Furman* even this geographical region experienced a significant drop in the executioner's work.

### 3. *International Norms*

Just as the death penalty isolated the South from the rest of the nation, it also isolated the nation from the rest of the world. The 1960s saw a global movement towards the abolition of capital punishment; between 1960 and 1970, the number of countries abolishing the death penalty more than doubled.<sup>137</sup> By 1968, more than seventy nations had formally rejected capital punishment, including almost all of Western Europe.<sup>138</sup>

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133. For insightful discussions of the relationship between lynching and capital trials, see FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 89–118 (Oxford Univ. Press 2003) and Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000).

134. See *supra* note 94 (noting that of 119 defendants executed in the South for rape between 1945 and 1965, 110 were black).

135. See ZIMRING & HAWKINS, *supra* note 111, at 32.

136. See ZIMRING & HAWKINS, *supra* note 111, at 32.

137. Viktor Mayer-Schonberger, *Crossing the River of No Return: International Restrictions on the Death Penalty and the Execution of Charles Coleman*, 43 OKLA. L. REV. 677, 678 (1990).

138. See *Negating the Absolute*, TIME, July 12, 1968, at 17 (noting that seventy-three foreign countries had already abolished the death penalty); see also Paul L. Montgomery, *Campaign Against Capital Punishment Has Gained in West in the Last 200 Years*, N.Y. TIMES, June 30, 1972, at 14 (“In Western Europe, only France and Spain retain the death penalty, and France is in the midst of a concerted campaign for abolition.”).

Countries most like the United States had either abolished the death penalty by that time or at least begun the process. Great Britain temporarily suspended the death penalty in 1965, abandoning it permanently in 1969.<sup>139</sup> Canada imposed a five-year moratorium in 1967, the same year that Australia saw its last execution.<sup>140</sup> New Zealand had abolished the death penalty back in 1961.<sup>141</sup> By the late 1960s, the United States had become an outlier among Western democracies in retaining the death penalty.<sup>142</sup> Abolition was a world-wide phenomenon, and as *Time* Magazine observed in 1968, America was lagging behind.<sup>143</sup>

With the death penalty losing support abroad, executions in the United States became increasingly problematic as a matter of foreign relations. In 1958, for example, the case of Jimmy Wilson, a Southern black man sentenced to death for robbing a white woman of \$1.95, provoked intense international criticism.<sup>144</sup> Headlines in Prague read “This Is America,” while papers in Great Britain, Venezuela, Yugoslavia, and Ghana decried what Jamaican news referred to as a “macabre anachronism.”<sup>145</sup> Alabama Governor James Folsom received some 3000 letters of protest on the case; he ultimately commuted Wilson’s sentence after the Secretary of State complained about adverse foreign publicity.<sup>146</sup> Even death penalty cases without racial undertones resulted in international scorn.<sup>147</sup> Of course, none of this was the press

139. BANNER, *supra* note 77, at 242.

140. See BANNER, *supra* note 77, at 242; *The Death Penalty: A World Survey*, U.S. NEWS & WORLD REP., May 31, 1971, at 38.

141. EPSTEIN & KOBYLKA, *supra* note 25, at 39; *The Death Penalty: A World Survey*, *supra* note 140, at 38.

142. See BANNER, *supra* note 77, at 242 (discussing movement among various Western democracies to abolish the death penalty in the 1960s); Franklin E. Zimring & Gordon Hawkins, *Capital Punishment and the Eighth Amendment: Furman and Gregg in Retrospect*, 18 U.C. DAVIS L. REV. 927, 943 (1984–1985) (noting the “almost universal trend in Western democracies” toward abolition in the 1960s and 1970s).

143. See *Negating the Absolute*, *supra* note 138, at 17 (“In failing to abolish the death penalty nationwide, the United States lags behind 73 foreign countries as well as 13 of its own states, which have abolished the death sentence.”).

144. See BANNER, *supra* note 77, at 243.

145. See BANNER, *supra* note 77, at 243–44.

146. See BANNER, *supra* note 77, at 243–44.

147. One example is the 1960 execution of Caryl Chessman, who wrote several best-selling books during his eleven-year stay on death row. Bowing to international pressure, President Eisenhower actually had Chessman’s execution postponed until after his trip to Latin America because he feared the protests that would result. See BANNER, *supra* note 77, at 243; (discussing

that the United States wanted in the cold war that followed World War II. Having just fought (and won) a world war against fascism, the last thing the country needed was to lose the moral high ground with its seemingly indiscriminate—or worse yet, racially discriminate—use of the death penalty. Cases like that of Jimmy Wilson were a blemish on the nation's self-aggrandized image of equality and justice at a time when its reputation internationally had never been more important.<sup>148</sup> Even so, the nation's movement away from the death penalty in the late 1950s and 1960s had as much to do with events at home as it did with those in the world at large.

#### 4. *Domestic Norms*

If the late 1950s and 1960s in the United States had one overriding theme, it was egalitarianism. Equality, particularly before the law, was the very point of the civil rights movement and it pervaded the social, political, and legal reforms that marked the nation's war on poverty as well.<sup>149</sup> By the mid-1960s, *de jure* equality for racial minorities and the poor was well underway and had widespread support.<sup>150</sup> Anything less was considered grossly unfair.<sup>151</sup> Against this backdrop, it is little wonder that abolition sentiment in the late 1950s and 1960s gathered substantial momentum. Once the country's concern for equality changed the way it approached access to education and the voting booth, it was only natural to think about equality in other contexts as well—and none was more important than when the stakes were life or death.<sup>152</sup> To many,

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international outrage and State Department's request to postpone execution); MELTSNER, *supra* note 22, at 20 (noting national and international controversy surrounding Caryl Chessman's execution); CAPITAL PUNISHMENT IN THE UNITED STATES, *supra* note 93, at 109 (crediting execution of best-selling author Caryl Chessman for bringing the issue of capital punishment to center stage).

148. See generally MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 3–6 (2000).

149. See JAN GORECKI, *CAPITAL PUNISHMENT: CRIMINAL LAW AND SOCIAL EVOLUTION* 90 (1983) (describing “egalitarianism, and especially equality before the law” as the “pervasive social and legal concern” of the time and a major theme of the Warren Court's decisions); Lain, *supra* note 13, at 1385–1420 (discussing civil rights movement and war on poverty, and the influence of those movements on the Warren Court's 1960s criminal procedure decisions).

150. See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965).

151. See Lain, *supra* at note 13, at 1395–98 (discussing egalitarian values of 1960s).

152. See BANNER, *supra* note 77, at 247 (crediting the civil rights movement for heightening awareness of race discrimination in capital punishment); CAPITAL PUNISHMENT IN THE UNITED STATES, *supra* note 93, at 109 (same); SAMUEL WALKER, *POPULAR JUSTICE* 250–51 (1980) (same); Lain, *supra* note 13, at 1388–89 (“Once loosed, the idea of equality is not easily cabined.” (quoting

the death penalty represented the ultimate expression of race and class discrimination.<sup>153</sup> At a time when the nation was rejecting state-sponsored discrimination, the abolition of capital punishment appeared to be a logical, if not necessary, step in harmonizing American practice with its reinvigorated egalitarian ideals.<sup>154</sup>

The link between 1960s egalitarianism and the abolition movement was most apparent in the public debate over capital punishment. Although the death penalty was controversial for a number of reasons,<sup>155</sup> its disproportionate impact on underprivileged members of society, particularly racial minorities and the poor, was chief among them.<sup>156</sup> As one commentator explained:

We have always picked quite arbitrarily a tiny handful of people among those convicted of murder to be executed, not those who have committed the most heinous, the most revolting, the most destructive murders, but always the poor, the black, the friendless, the life's losers, those without competent, private attorneys, the illiterate, those despised or ignored by the community for reasons having nothing to do with their crime. . . . The penalty of death is imposed almost entirely upon members of what the distinguished social psychologist Kenneth B. Clark has referred to as "the lower status elements of American society."<sup>157</sup>

The sentiment was a common one. Contemporary newspaper and magazine articles talked about racial and economic discrimination in the

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Archibold Cox) (internal citation omitted)).

153. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 205 (1979) (describing Justice Marshall's view that the death penalty was "the most conspicuous example of the unfairness in the criminal justice system" and "the ultimate form of racial discrimination").

154. See ZIMRING & HAWKINS, *supra* note 111, at 165 ("In the end, by discarding capital punishment, American society will be catching up with itself.").

155. See MELTSNER, *supra* note 22, at 57 (noting that one observer has counted sixty-five arguments for the death penalty, and eighty-seven arguments against it); *Pros, Cons of an End to Death Penalty*, U.S. NEWS & WORLD REP., Jan. 31, 1972, at 56; James Q. Wilson, *The Death Penalty: Is It Useful? Is It Just? Or Is It Only Cruel?* N.Y. TIMES, Oct. 28, 1973, at 27 (discussing major arguments for and against the death penalty).

156. Montgomery, *supra* note 138, at 14 ("Debates on the death penalty generally center on two points: whether it prevents crime, and whether it falls with equal weight on the rich and the poor.").

157. Henry Schwarzschild, *In Opposition to Death Penalty Legislation*, in *THE DEATH PENALTY IN AMERICA*, *supra* note 47, at 364, 366–67. Although this particular statement was made post-*Furman*, see *id.* at 364, the sentiment expressed was common in the 1960s. See *infra* notes 158–60 and accompanying text.

imposition of death,<sup>158</sup> as did law reviews and other elite publications.<sup>159</sup> The National Crime Commission's 1967 report likewise focused on the issue, recommending that capital punishment be abandoned if it could not be administered in a nondiscriminatory fashion.<sup>160</sup> The argument was hardly new. In the 1920s, Clarence Darrow had advocated the abolition of capital punishment because it was imposed upon "the poor, the ignorant, the friendless."<sup>161</sup> What *was* new was the nation's inclination to listen.

Of all the socio-political conditions favoring *Furman's* result, the country's renewed commitment to egalitarian ideals had the most direct impact. First, it was almost entirely responsible for the litigation that culminated in *Furman*. The NAACP and ACLU only challenged the death penalty because they thought it was being discriminatorily applied.<sup>162</sup> Second, it played a significant role in the amicus briefs

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158. See, e.g., *Clark Calls for End of Death Penalty*, N.Y. TIMES, July 3, 1968, at 1 (quoting Attorney General Ramsey Clark as stating "it is the poor, the weak, the ignorant, the hated who are executed" in his request to Congress to abolish the death penalty); *Death Row: A New Kind of Suspense*, NEWSWEEK, Jan. 11, 1971, at 23–24 (noting that "[t]o be sure, disproportionate numbers of blacks are arrested for capital crimes[,] [b]ut that does not sufficiently explain the inordinately high percentage of Negroes on death row"); *Death Row Survives*, N.Y. TIMES, May 6, 1971, at 42 ("The death penalty is, in practice, inflicted only on the black, the brown and the poor."); *Negating the Absolute*, *supra* note 138, at 17 (noting that the "great majority of those awaiting execution are Negroes" and that "[f]ew well-to-do prisoners are ever executed"); *The Ultimate Question*, *supra* note 23, at 610 (noting that only "abject, unknown, friendless, poor, rejected specimens of the human race" are sentenced to death and that "the character of the condemned constitutes one of the best arguments for abolition").

159. See, e.g., Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1792 (1969–1970) (discussing discriminatory aspects of the death penalty and quoting other commentators recognizing same); Sarah R. Ehrmann, *For Whom the Chair Waits*, FED. PROBATION Q. 14 (Mar. 1962), reprinted in CAPITAL PUNISHMENT, *supra* note 89, at 205–06 ("It is difficult to find cases where persons of means or social position have been executed. . . . Likewise, most of the defendants sentenced to die and those executed are from minority racial groups, especially Negroes.").

160. See NAT'L CRIME COMM'N REPORT, *supra* note 91, at 143 (noting that "[t]he death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups" and recommending that it be abandoned if states cannot administer it in "an evenhanded and nondiscriminatory manner").

161. See BEDAU, *supra* note 43, at 71 (quoting Clarence Darrow, co-founder of the American League to Abolish Capital Punishment).

162. See BANNER, *supra* note 77, at 250–51 (noting that the NAACP "existed to help black people" and "was interested in capital punishment primarily because of the racial disparities in capital sentencing"); MELTSNER, *supra* note 22, at 15 (noting that the NAACP initially became involved in Southern rape cases because doing so provided an opportunity to advance its general interest in eliminating racial discrimination in the criminal law); *id.* at 55 (noting that the ACLU's involvement came in 1965 when the organization authorized its lawyers to enter death penalty cases provided there was evidence in those cases suggesting that the death penalty had been imposed on

supporting *Furman*.<sup>163</sup> Typical of those briefs was a statement by former prison officials, who rhetorically asked, “What is it that distinguishes those who have been condemned to die from those who are permitted to live?”<sup>164</sup> The answer was blunt: “poverty, ignorance, and out of all statistical proportion, race.”<sup>165</sup> Finally, egalitarian concerns propelled the Court’s decision in the case. Three of the five Justices in *Furman*’s majority—Justices Douglas, Marshall, and Stewart—explicitly acknowledged or based their ruling on the racially discriminatory manner in which the death penalty was being imposed,<sup>166</sup> while the remaining two members of *Furman*’s majority—Justices Brennan and White—at least thought it was being inequitably applied.<sup>167</sup> Even *Furman*’s companion cases, both of which involved Southern black defendants accused of raping white victims, were perfectly suited for making the point.<sup>168</sup> In short, it is no coincidence that *Furman* invalidated the death penalty for the same reasons it was being denounced in the public discourse. Egalitarian themes drove the 1960s criminal procedure revolution,<sup>169</sup> so it only made sense that they would influence the way the Court saw the death penalty as well.

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the basis of race or class); *see also supra* notes 93–94 (discussing evolution of NAACP’s focus beyond southern racism in interracial rape cases).

163. *See* BURT HENSON & ROSS R. OLNEY, *FURMAN V. GEORGIA: THE DEATH PENALTY AND THE CONSTITUTION* 58–61 (1996); MELTSNER, *supra* note 22, at 255–57; LEONARD A. STEVENS, *DEATH PENALTY: THE CASE OF LIFE VS. DEATH IN THE UNITED STATES* 112–21 (1978).

164. HENSON & OLNEY, *supra* note 163, at 58.

165. HENSON & OLNEY, *supra* note 163, at 58–59.

166. *See* THE SUPREME COURT IN CONFERENCE 2001, *supra* note 27, at 616–19 (quoting passages from concurring opinions).

167. In his concurring opinion, Justice Brennan wrote, “No one has yet suggested a rational basis that could differentiate . . . the few who die from the many who go to prison.” *Furman v. Georgia*, 408 U.S. 238, 294 (1972) (Brennan, J., concurring). Justice White made the same point in conference, stating, “The nut of the case is that only a small proportion are put to death, and I can’t believe that they are picked out on the basis of killing those who should be killed. I can’t believe that it is meted out fairly.” THE SUPREME COURT IN CONFERENCE 2001, *supra* note 27, at 617.

168. *See supra* note 67.

169. *See* Lain, *supra* note 13, at 1368–1418. As others have recognized, *Furman* can easily be seen as just an extension of the criminal procedure revolution, which was likewise aimed at removing discretion—and the potential for discrimination that came with it—in law enforcement practices. *See* BANNER, *supra* note 77, at 265 (viewing *Furman* as the “high-water mark” of a general trend towards standardizing criminal procedure, comparing it to *Miranda v. Arizona*, 384 U.S. 436 (1966)).



### 5. *Public and Political Opposition to the Death Penalty*

As one might expect, capital punishment in the late 1950s and 1960s was a particularly salient issue. High school students across the nation discussed it, debated it, and wrote about it.<sup>170</sup> State governors received more letters about it than they could answer.<sup>171</sup> In an unprecedented fashion, individuals and organizations alike took a stand on the death penalty—and more often than not, that stand was against it. The nation's most prominent newspapers—the *New York Times*, *Washington Post*, *Los Angeles Times*, and *Philadelphia Inquirer*, among others—all voiced opposition to capital punishment during this time,<sup>172</sup> as did elite organizations like the American Judicature Society, the American Correctional Association, and the National Council on Crime and Delinquency.<sup>173</sup> By the close of the 1960s, most major Protestant denominations officially opposed the death penalty as well, including the Methodist, Lutheran, Episcopal, and Presbyterian Churches.<sup>174</sup> Perhaps most indicative of the death penalty's decline in institutional backing was the dearth of *amicus* support it received in *Furman*. Of the dozen *amici* to file briefs in *Furman*, only one—the State of Indiana—defended capital punishment; every other *amicus* urged the Supreme Court to abolish it.<sup>175</sup>

Public opinion poll data likewise evidenced a drop in death penalty support. In 1953, sixty-eight percent of the public supported capital

170. See BANNER, *supra* note 77, at 241–42 (discussing prominence of capital punishment as a civic issue in the 1960s).

171. See BANNER, *supra* note 77, at 241–42.

172. See BEDAU, *supra* note 98, at 144.

173. See BEDAU, *supra* note 43, at 60 (noting that opposition to the death penalty “became the national policy of a number of secular nationwide organizations with professional or political stature”); *Thou Shalt Not Kill*, JUDICATURE 227, reprinted in CAPITAL PUNISHMENT, *supra* note 89, at 185; Victor H. Evjen, *Let's Abolish Capital Punishment*, in CAPITAL PUNISHMENT, *supra* note 89, at 218, 219; *Abolition of Death Penalty is Urged by Urban League*, N.Y. TIMES, Mar. 4, 1969, at 19.

174. See BANNER, *supra* note 77, at 241; BEDAU, *supra* note 43, at 4.

175. See *supra* note 163 (discussing *amicus* support for abolition in *Furman*). Of course, the fact that the death penalty had virtually no *amicus* support in *Furman* could also be a reflection of the fact that organizations supporting the practice did not think it necessary to file a brief, but this is unlikely for two reasons. First, there were few organizations that still supported the death penalty in 1972; as discussed in the text, both private and governmental organizations generally opposed the death penalty during this time. See *supra* text accompanying notes 172–74 and *infra* text accompanying notes 182–86. Second, with death penalty support at a low fifty percent, political and judicial resistance to the practice, and concern among death penalty supporters that the Court would strike down the death penalty, there was clearly an incentive to organize and defend capital punishment. See *infra* text accompanying notes 205, 213–37.

punishment; by 1965, less than half of those surveyed did so.<sup>176</sup> That year, Gallup reported support for the death penalty at forty-five percent and opposition to it at forty-three percent.<sup>177</sup> Harris poll results for 1965 were even more striking, reporting death penalty support at just thirty-eight percent and opposition to it at forty-seven percent.<sup>178</sup> In 1966, Gallup similarly reported death penalty abolitionists outnumbering its supporters—that year only forty-two percent of those surveyed supported capital punishment, while forty-seven percent opposed it.<sup>179</sup> In short, support for the death penalty fell between twenty-five and thirty percentage points in a little over a decade—the steepest decline since polling on the issue began in the 1930s.<sup>180</sup> Given these figures, the Supreme Court appeared to be exactly right when in 1968 it referred to death penalty supporters as “a distinct and dwindling minority.”<sup>181</sup>

Like bees to honey, the death penalty’s falling popularity attracted political opposition to the practice as well. In 1965, the Department of Justice announced its opposition to the death penalty<sup>182</sup> and in 1968, the Johnson Administration asked Congress to abolish it.<sup>183</sup> The request was a historic first.<sup>184</sup> In 1967, the National Crime Commission likewise took

176. GEORGE H. GALLUP, 2 THE GALLUP POLL: PUBLIC OPINION 1935–1971, at 1187 (1972); GEORGE H. GALLUP, 3 THE GALLUP POLL: PUBLIC OPINION 1935–1971, at 1659 (1972).

177. GALLUP, 3 THE GALLUP POLL: PUBLIC OPINION 1935–1971, *supra* note 176, at 1922. That year, twelve percent of those polled were undecided. *Id.*

178. See Humphrey Taylor, *Support for Death Penalty Down Sharply Since Last Year, But Still 64% to 25% in Favor*, THE HARRIS POLL #41, Aug. 2, 2000, available at [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=101](http://www.harrisinteractive.com/harris_poll/index.asp?PID=101). Fifteen percent of those asked were undecided. *Id.*

179. GALLUP, 3 THE GALLUP POLL: PUBLIC OPINION 1935–1971, *supra* note 176, at 2016. Eleven percent of those asked were undecided. *Id.*

180. In 1937, support for the death penalty registered at sixty-five percent. GEORGE H. GALLUP, 1 THE GALLUP POLL: PUBLIC OPINION 1935–1971, at 85 (1972).

181. *Witherspoon v. Illinois*, 391 U.S. 510, 520 (1968) (holding that excluding veniremen for cause because they voice general objections to the death penalty violates the Sixth Amendment right to an impartial jury drawn from a cross-section of the community); see also *supra* note 104 and accompanying text (discussing *Witherspoon* decision).

182. See EPSTEIN & KOBYLKA, *supra* note 25, at 334 n.39 (quoting Attorney General Ramsey Clark’s 1965 letter to Congress stating “[w]e favor abolition of the death penalty,” and noting the stance was an abrupt change from his position when President John F. Kennedy was assassinated two years earlier).

183. In a statement before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee, Attorney General Ramsey Clark stated, “Executions cheapen life. We must cherish life. . . . The death penalty should be abolished.” Ramsey Clark, *To Abolish the Death Penalty*, reprinted in CAPITAL PUNISHMENT, *supra* note 89, at 176, 177, 180.

184. EPSTEIN & KOBYLKA, *supra* note 25, at 58–59.

a stance sharply critical of the death penalty, describing its administration as “intolerable” and recommending abolition absent substantial reform.<sup>185</sup> At the state level as well, politicians became increasingly willing to speak out against the death penalty. In North Carolina, where one would expect to see strong political support for capital punishment, the governor made so many public comments against the death penalty that clemency petitions routinely referenced them.<sup>186</sup> In Ohio, the governor even hired convicted murderers to prove that rehabilitation was possible.<sup>187</sup> Whether following public opinion or leading it, politicians in the 1960s were beginning to reach the same conclusion *Furman* would in 1972.

#### 6. “Law and Order” Crosswinds

Admittedly, the political context in which *Furman* was decided had cooled considerably since the mid-1960s, when abolitionist momentum peaked.<sup>188</sup> Events in the last three years of the decade would turn the country sharply conservative and earn the “turbulent 1960s” its name. Urban riots,<sup>189</sup> campus unrest,<sup>190</sup> political violence,<sup>191</sup> and a spate of prominent assassinations and multiple murders<sup>192</sup> gripped the nation in

185. See NAT’L CRIME COMM’N REPORT, *supra* note 91, at 143 (“Some members of the Commission favor the abolition of capital punishment, while other members favor its retention. . . . All members of the Commission agree that the present situation in the administration of the death penalty in many states is intolerable. . . . When a state finds that it cannot administer the penalty in such a [fair and expeditious] manner, or that the death penalty is being imposed but not carried into effect, the penalty should be abandoned.”); see also BEDAU, *supra* note 98, at 144 (describing National Crime Commission Report as taking a position “virtually in favor” of abolition).

186. BANNER, *supra* note 77, at 240–41. Similarly, in Arkansas, the governor’s outspoken criticism of the death penalty resulted in the state’s execution chamber being converted into a hospital. See Richard Hammer, *The Case That Could End Capital Punishment*, N.Y. TIMES, Oct. 12, 1969, at SM46.

187. BANNER, *supra* note 77, at 240–41.

188. See *supra* notes 108–16 and 176–80 and accompanying text (discussing state legislative trends and public opinion poll data, respectively).

189. See Lain, *supra* note 13, at 1428–29, 1447–58 (discussing urban riots in mid- to late-1960s, in particular those of the “long, hot summer” of 1967).

190. See MELTSNER, *supra* note 22, at 212 (discussing violence at Kent State University); Lain, *supra* note 13, at 1448 (discussing violence at Columbia University).

191. MELTSNER, *supra* note 22, at 211 (referencing violence at the 1968 Democratic Convention).

192. See CAPITAL PUNISHMENT IN THE UNITED STATES, *supra* note 93, at 112 (discussing extensive publicity associated with trial and conviction of Albert DeSalvo—a.k.a. the “Boston Strangler”—in January 1967, and of Richard Speck in April 1967 for murdering eight student

the late 1960s, as did skyrocketing crime rates.<sup>193</sup> By 1968, crime dominated the public consciousness and political landscape.<sup>194</sup> That year, Richard Nixon won the presidency on a “law and order” campaign,<sup>195</sup> while Congress enacted the most extensive anti-crime legislation in history.<sup>196</sup> Not surprisingly, the Johnson Administration’s bill to abolish the death penalty never made it out of committee.<sup>197</sup> Over the next three years, Congress would enact two new death penalty statutes instead.<sup>198</sup> Times were tough for those trying to save convicted capital murderers—*any* stance that could be considered “soft on crime” was a relatively unpopular stance in 1972.<sup>199</sup>

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nurses in Chicago); Lain, *supra* note 13, at 1447–48 (discussing assassinations of Martin Luther King and Robert F. Kennedy in context of other violence in 1968); *Death Sentences for Manson Clan, But—*, U.S. NEWS & WORLD REP., Apr. 12, 1971, at 26 (discussing Manson murders in 1969 and death sentences for its perpetrators in 1971).

193. See Lain, *supra* note 13, at 1427–28, 1447–48 (discussing crime rates in the late 1960s and their salience among American public).

194. Events in 1971 would continue that trend, leading Vice President Spiro Agnew to lament “the whole damn zoo” of “deserters, malcontents, radicals, incendiaries, the civil and uncivil disobedients.” See MELTSNER, *supra* note 22, at 212–13 (discussing string of bombings in spring 1970, campus violence at Kent State and Jackson State, and Vice President Agnew). For an excellent discussion of crime and its effect on the American psyche in the late 1960s, see generally MICHAEL W. FLAMM, *LAW & ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S* (2005).

195. EPSTEIN & KOBYLKA, *supra* note 25, at 60; Lain, *supra* note 13, at 1424–25.

196. David J. Bodenhamer, *Reversing the Revolution: Rights of the Accused in a Conservative Age*, in *THE BILL OF RIGHTS IN MODERN AMERICA AFTER 200 YEARS*, at 101, 112 (David J. Bodenhamer and James W. Ely, Jr. eds., 1993).

197. See *Furman v. Georgia*, 408 U.S. 238, 427 (1972) (Powell, J., dissenting).

198. Four federal death-penalty statutes were enacted in the decade before *Furman*, punishing air piracy that resulted in death (1961), assassination of the president (1965), transporting illegal explosives that resulted in death (1970), and assassination of a member of Congress (1971). See *id.*, 408 U.S. at 385 (Burger, J., dissenting) (citing the four death penalty statutes enacted in decade prior to *Furman*); *id.* at 412–13 (Blackmun, J., dissenting) (discussing in detail federal death penalty legislation enacted in the 1960s and 1970s, along with lopsided votes enacting them); see also *infra* note 221 (discussing largely symbolic significance of federal legislation).

199. See BEDAU, *supra* note 43, at 69 (noting that pressure for “law and order” tends to make opposition to the death penalty an unpopular stance for politicians); BEDAU, *supra* note 98, at 166 (describing the public mood as “hostile in the 1970s to any policies that appeared to be ‘soft’ on criminals”); STEVENS, *supra* note 163, at 108 (noting that “days were difficult for anyone trying to save the lives of some of the most brutal felons in the nation” and that the “drift of the times . . . was clearly moving against those who felt that capital punishment was inappropriate for an America of the 1970s”); Daniel D. Polsby, *The Death of Capital Punishment? Furman v. Georgia*, 1972 SUP. CT. REV. 1, 2–3 (1972) (noting that “the past few years have scarcely provided a tranquil environment for the nurture of new and more polished ideals of reverence for human life”).

Even so, the country's support for crime control measures in the late 1960s and early 1970s had curiously little effect on support for capital punishment. Death penalty support jumped just once in the late 1960s and early 1970s before *Furman* was decided—and that was in 1967.<sup>200</sup> After its historic low in 1966,<sup>201</sup> death penalty support surged twelve points the following year to fifty-four percent, most likely due to extensive publicity surrounding the convictions of Albert DeSalvo (a.k.a. “the Boston Strangler”) and Richard Speck (murderer of eight student nurses in Chicago) just before polling began.<sup>202</sup> From there, however, it once again began a slow but perceptible descent. Gallup reported death penalty support at fifty-one percent in 1969 and forty-nine percent in 1971, while *Furman* was pending.<sup>203</sup> The Harris Poll listed death penalty support as consistently just under fifty percent during this time.<sup>204</sup> In March 1972, three months before *Furman* was decided, Gallup reported public support for the death penalty at an even fifty percent, with forty-one percent of the public opposed to the practice and nine percent undecided.<sup>205</sup> Given the “law and order” tenor of the times,<sup>206</sup> these figures were truly remarkable. In 1968, the American public identified crime as the nation's top domestic problem, and an overwhelming eighty-one percent of those asked believed that law enforcement in the country had “broken down.”<sup>207</sup> Yet despite the

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200. See David W. Moore, *Americans Firmly Support Death Penalty*, GALLUP POLL MONTHLY, June 1995, at 25.

201. See *supra* note 179 and accompanying text.

202. See CAPITAL PUNISHMENT IN THE UNITED STATES, *supra* note 93, at 112 (discussing timing of DeSalvo and Speck convictions in relation to Gallup's 1967 polling on the death penalty); Moore, *supra* note 200, at 25 (reporting death penalty support in 1967). One might speculate that the riotous “long, hot summer” of 1967 also contributed to the spike, but the 1967 poll was given in June and the heaviest rioting that year did not occur until July. See Lain, *supra* note 13, at 1428–29.

203. See Moore, *supra* note 200, at 25. In 1969, forty percent of those asked said they opposed the death penalty, and nine percent were undecided. *Id.* In 1971, forty percent again said they opposed the death penalty, with eleven percent answering that they were undecided. *Id.*; see also ZIMRING & HAWKINS, *supra* note 111, at 39 (noting that opposition to capital punishment dropped in 1967, but that the trend was quickly reversed and opposition remained high until 1972, when *Furman* was decided).

204. Harris reported death penalty support at forty-eight percent in 1969, and forty-seven percent in 1970. Taylor, *supra* note 178.

205. GEORGE H. GALLUP, 1 THE GALLUP POLL: PUBLIC OPINION 1972–1977, at 20 (1978).

206. See Lain, *supra* note 13, at 1427–29 (discussing nation's turn to “law and order” in 1967); *supra* notes 189–99 and accompanying text (same).

207. See GALLUP, 3 THE GALLUP POLL: PUBLIC OPINION 1935–1971, *supra* note 176, at 2107 (reporting results of 1968 poll indicating that crime and lawlessness were mentioned almost twice as often as any other local problem); *Poll Finds Crime Top Fear at Home*, N.Y. TIMES, Feb. 28, 1968,

nation's punitive attitude, the public could barely muster fifty percent support for capital punishment in the late 1960s and early 1970s. The difference between death penalty supporters and opponents was only nine percentage points at the time *Furman* was decided and if the previous four years were any indication, support for the practice was unlikely to make a strong rebound.

From a modern perspective, the public's weak support for the death penalty but strong support for "law and order" prior to *Furman* is perplexing. Today, support for the death penalty is considered a symbol of strong support for law enforcement in general.<sup>208</sup> In the late 1960s and early 1970s, however, this did not appear to be the case. Even before the Supreme Court articulated the concept in *Furman*,<sup>209</sup> Americans seemed to think death was different. As a result, it was possible to maintain "law and order" credentials and oppose the death penalty, too. Abolitionists clarified that opposition to the death penalty was not about protecting criminals—it was about putting them to death, an act they found morally bankrupt for a number of different reasons.<sup>210</sup> In the minds of many, the

at 29 (reporting that "[c]rime and lawlessness are viewed by the public as the top domestic problem facing the nation for the first time since the beginning of scientific polling in the mid-thirties, according to the latest Gallup Poll"); *Public Opinion Online*, Accession No. 0174711, Question No. 012 (Harris Survey, Aug. 24, 1968), available at <https://web.lexis-nexis.com/universe> (follow "Reference" hyperlink; follow "Polls and Survey" hyperlink; enter "crime" into "Keyword" box, enter "0174711" into "Roper Accession Number" box, and select "All Available Dates" from the "Date" drop down menu) (reporting that eighty-one percent of pollsters agreed with the statement that law and order had "broken down"). For a discussion of incidents contributing to this belief, see *supra* text accompanying notes 189–93.

208. See Robert M. Bohm, *American Death Penalty Attitudes: A Critical Examination of Recent Evidence*, 14 CRIM. JUST. AND BEHAV. 380, 393 (1987) (noting that politicians often promote the death penalty as a symbol of law enforcement in general, and that empirical evidence suggests that this strategy works); Steiker, *supra* note 131, at 113–14 (noting that the death penalty is a potent symbol in the politics of "law and order" and that support for capital punishment translates to voters as support for tough crime control generally).

209. See *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) ("The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."); *id.* at 286–87 (Brennan, J., concurring) ("There has been no national debate about punishment, in general or by imprisonment, comparable to the debate about the punishment of death. . . . Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity.").

210. For example, the former Director of Corrections in California said, "I am not a stranger to violence or to violent men. . . . It is my conviction, from the vantage point of my experience, that vengeance and retribution carried to the point of taking human life in this deliberate fashion is beneath the dignity of a modern democratic government." *Voting Their Fears*, THE NATION, Dec. 4, 1972, at 548. Similarly, the British Chancellor stated, "We did not abolish [capital] punishment

death penalty went beyond calls for “law and order.” It was, in a word, *different*.

Perhaps because death truly was seen as different, political support for capital punishment also remained low during this time. President Nixon supported the death penalty, but he did not campaign on the issue in 1968;<sup>211</sup> the death penalty was much too controversial for that. Nor did the Nixon Administration file an amicus brief while *Furman* was pending, despite the obvious constitutional implications of the decision at the federal level.<sup>212</sup> Indeed, the 1972 Republican Party platform was conspicuously silent on the death penalty issue, while the Democratic Party platform that year favored abolishing it.<sup>213</sup>

Similarly, “law and order” politics did not prevent political opposition to the death penalty from mounting into the early 1970s. In December 1970, the lame-duck Governor of Arkansas made history when he commuted the death sentences of all fifteen people then on death row, encouraging other state governors to “hasten the elimination of barbarism as a tool of American justice.”<sup>214</sup> In January 1971, Pennsylvania’s outgoing Attorney General ordered the state’s electric chair to be dismantled, calling the death penalty a “disgusting indecency” and the electric chair a “cruel instrument of public vengeance.”<sup>215</sup> The state’s new Governor pledged that there would be no executions while he was chief executive and had the execution room converted into a psychologist’s office.<sup>216</sup> The same month, the National

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because we sympathized with traitors, but because we took the view that it was a punishment no longer consistent with our self-respect.” *The Death Penalty: Cruel and Unusual?*, TIME, Jan. 24, 1972, at 55.

211. Nixon refrained from commenting on the issue, although his new Attorney General had stated that Nixon was “not opposed to capital punishment.” EPSTEIN & KOBYLKA, *supra* note 25, at 61.

212. EPSTEIN & KOBYLKA, *supra* note 25, at 97 (noting that the federal government had stayed out of *Furman*). The Nixon Administration *did* file an amicus brief in *McGautha*, see MELTSNER, *supra* note 22, at 230–31, so perhaps it simply thought one unnecessary. See *supra* text accompanying notes 76–77 (discussing expectation among the Justices that *Furman* would affirm death sentences).

213. See DONALD BRUCE JOHNSON & KIRK H. PORTER, NATIONAL PARTY PLATFORMS 1840–1972, at 809 (1973); Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court’s Criminal Justice Jurisprudence*, 94 GEO. L.J. 1385, 1402 (2006).

214. MELTSNER, *supra* note 22, at 235–36; see also James A. McCafferty, *Introduction to CAPITAL PUNISHMENT*, *supra* note 89, at 1, 1 (discussing incident).

215. MELTSNER, *supra* note 22, at 236–37.

216. See MELTSNER, *supra* note 22, at 237.

Commission on the Reform of Federal Criminal Laws issued a comprehensive report that recommended abolishing the death penalty at the federal level,<sup>217</sup> making front-page headlines and receiving substantial editorial support.<sup>218</sup> Finally, in May 1971, just before certiorari in *Furman* was granted,<sup>219</sup> Congress again began considering well-backed legislation to halt executions. In the wake of *McGautha*, the Chairman of the House Judiciary Committee had introduced a bill proposing a two-year moratorium on executions designed to give Congress and the states breathing room to decide whether to revise their death penalty statutes or abandon them altogether.<sup>220</sup> The bill was still pending when *Furman* was decided but its outlook (at least in the House) was thought to be good.<sup>221</sup>

By the early 1970s, even the judiciary had become more willing to rule against the death penalty. In December 1970, the Fourth Circuit became the first court in the country to hold that the death penalty itself could violate the Eighth Amendment's "cruel and unusual punishments" clause.<sup>222</sup> By its own terms, the Fourth Circuit's ruling was extremely limited, applying only in rape cases where the victim was otherwise not seriously physically harmed.<sup>223</sup> But it was a breakthrough nonetheless.

217. See NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, FINAL REPORT TO THE PRESIDENT AND CONGRESS 312 (1971); see also MELTSNER, *supra* note 22, at 236 (discussing Commission's 1971 Report).

218. See BEDAU, *supra* note 43, at 63; EPSTEIN & KOBYLKA, *supra* note 25, at 68.

219. The Supreme Court granted certiorari in *Furman* on June 28, 1971. *Furman v. Georgia*, 408 U.S. 952, 952 (1971).

220. MELTSNER, *supra* note 22, at 245; Charles L. Black, Jr., *The Crisis in Capital Punishment*, 31 MD. L. REV. 289, 307 (1971). Sponsors of the bill gave two reasons to support the measure, citing evidence that the death penalty was being discriminatorily applied against minorities and the poor, and "a growing basis" to conclude that executions constituted "cruel and unusual punishment." *Bill to Seek Stay of Executions*, N.Y. TIMES, May 15, 1971, at 14.

221. See *Bill to Seek Stay of Executions*, *supra* note 220, at 14. One might question this prediction given the fact that Congress had just passed two death-penalty statutes the year before. See *supra* note 198. But it is difficult to know how much weight to give those statutes. Both were in response to highly salient political events—Bobby Kennedy's assassination in one case, a courthouse bombing where Black Panther H. Rap Brown was supposed to stand trial in the other—and had little more than symbolic significance. Despite a wide array of death penalty statutes at the federal level, only one federal prisoner was executed after the 1950s, and the number of federal inmates on death row during this time never exceeded two. See Zimring & Hawkins, *supra* note 142, at 940 (noting that "out of a federal prison population averaging 22,430 the number of prisoners on death row never rose above two" (internal citation omitted)); MELTSNER, *supra* note 22, at 212 (discussing courthouse bombing incident and legislative response).

222. *Ralph v. Warden*, 438 F.2d 786, 793 (4th Cir. 1970); see also EPSTEIN & KOBYLKA, *supra* note 25, at 68; MELTSNER, *supra* note 22, at 231–33.

223. See *Ralph*, 438 F.2d at 793 (expressly limiting holding to cases where the victim's life is not



The following year, the New Jersey Supreme Court invalidated the state's death penalty statute because it impermissibly encouraged guilty pleas to avoid death,<sup>224</sup> and the Alabama Court of Appeals issued a short-lived ruling that amounted to a blanket commutation.<sup>225</sup> Because Alabama's death penalty statute identified the location for executions as Kilby Prison and because Kilby Prison had been demolished, the Court of Appeals ruled that no pending death sentences could be carried out—nor could they ever be, since any legislative attempt to cure the problem would constitute an *ex post facto* law.<sup>226</sup> The decision was quickly overturned by the Alabama Supreme Court,<sup>227</sup> but two decades earlier that sort of resistance to the death penalty (especially in the South) would have been unfathomable in the first place.

That said, the abolitionists' most significant legal victory before *Furman* was the California Supreme Court's decision in *People v. Anderson*,<sup>228</sup> which invalidated the death penalty in California because it violated the state constitution's "cruel or unusual punishments" clause.<sup>229</sup> Announced in February 1972, just one month after oral arguments in *Furman*, *Anderson* was a tremendous boost to the abolition movement. At the time, California had the largest death row population in the country,<sup>230</sup> and the California Supreme Court was considered the most well-respected and innovative state judicial body.<sup>231</sup> *Anderson* carried considerable weight in the legal community, helped in part by the

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endangered). The Fourth Circuit rested its holding on the proportionality principle long recognized in the Eighth Amendment. *See id.*; *supra* text accompanying note 37.

224. *See State v. Funicello*, 286 A.2d 55, 58–59 (N.J. 1972); MELTSNER, *supra* note 22, at 279–80.

225. *See Brown v. State*, 264 So. 2d 529 (Ala. App.), *rev'd*, 264 So. 2d 549 (Ala. 1971); MELTSNER, *supra* note 22, at 237.

226. *See Brown*, 264 So. 2d at 538; MELTSNER, *supra* note 22, at 237.

227. *See Brown*, 264 So. 2d at 549.

228. 493 P.2d 880 (Cal.), *cert. denied*, 406 U.S. 958 (1972).

229. *Id.* at 883 (emphasis added); *see also* CAL. CONST. art. I, § 6; MELTSNER, *supra* note 22, at 281–85. Ironically, *Anderson* also reversed recent precedent; the Court had just rejected the same claim made by the same capital defendant in 1968. *See In re Anderson*, 447 P.2d 117, 128–30 (Cal. 1968) (rejecting challenges to death penalty under federal and state constitutions); *id.* at 155 (Tobriner, J., dissenting) (concluding that death penalty is unconstitutional because it is "capricious, discriminatory, and guess-infected").

230. EPSTEIN & KOBYLKA, *supra* note 25, at 77. California's death row population was 107 at the time, and included notorious murderers Charles Manson and Sirhan-Sirhan. *Id.*

231. *See* EPSTEIN & KOBYLKA, *supra* note 25, at 77; MELTSNER, *supra* note 22, at 284–85. As Anthony Amsterdam, who argued *Furman* for the NAACP, explained at the time, "The California Supreme Court is to the courts what UCLA is to basketball." *Id.* at 266.

fact that it was an “easy” six-to-one decision and written by Chief Justice Wright, a conservative Governor Reagan appointee.<sup>232</sup> For the petitioners in *Furman*, it could not have been better timed. *Anderson* was the final piece of the puzzle that formed *Furman*’s socio-political backdrop, capping the most powerful abolition movement the nation had ever seen.<sup>233</sup>

Looking back, then, the nation’s conservatism in the years before *Furman* may have slowed the abolition movement’s momentum, but it did not halt or reverse it. Public support for the death penalty continued to hover at just fifty percent in the years immediately preceding *Furman*, while political and judicial support for abolition slowly mounted. In short, the nation may have been in a “law and order” moment, but it was still in the midst of an abolition *movement*.

### 7. *The Impact of Socio-Political Context in Furman*

Given the socio-political forces discussed at length above, it should come as no surprise that in the years before *Furman*, many contemporary observers believed the abolition of capital punishment was just a matter of time.<sup>234</sup> *Time* magazine twice wrote about “The Dying

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232. See MELTSNER, *supra* note 22, at 281–85 (discussing reasons for decision’s influence); *A Decision that May Reach Far Beyond California*, N.Y. TIMES, Feb. 20, 1972, at E3 (discussing same and speculating that the U.S. Supreme Court may find its reasoning persuasive). Because of *Anderson*, the most brutal of the cases under consideration in *Furman*—*People v. Aikens*, 450 P.2d 258 (Cal. 1969), *cert. granted*, 403 U.S. 952 (1971), *cert. dismissed*, 406 U.S. 813 (1972)—was removed from consideration, much to the delight of the NAACP and the dismay of Chief Justice Burger. See MELTSNER, *supra* note 22, at 246–48 (discussing facts of *Aikens*); EPSTEIN & KOBYLKA, *supra* note 25, at 340 n.89 (noting the NAACP’s “collective sigh of relief” when *Aikens* was remanded); WOODWARD & ARMSTRONG, *supra* note 153, at 212 (discussing Chief Justice Burger’s reaction to *Anderson*).

233. See Rubin, *supra* note 117, at 256 (“The death penalty is being subjected to the most powerful attack it has ever had in this country.”).

234. See BEDAU, *supra* note 43, at 98–99 (discussing book published shortly before *Furman* that depicted capital punishment as a “dying and indefensible penal institution”); GORECKI, *supra* note 149, at 93 (noting belief at the time of *Furman* that total abolition was just around the corner); Evjen, *supra* note 173, at 218 (observing that “the death penalty seems to be on its way out”); Samuel R. Gross & Phoebe C. Ellsworth, *Second Thoughts: Americans’ Views on the Death Penalty at the Turn of the Century* 15, in BEYOND REPAIR?: AMERICA’S DEATH PENALTY 7, 7–57 (S.P. Garvey, ed., 2003) (noting that the death penalty in the early 1970s “was unusual, it was controversial, and many people believed that America had evolved to a stage where it would soon be abolished”); Joseph L. Hoffmann, *Narrowing Habeas Corpus*, in THE REHNQUIST LEGACY 156, 161 (2006) (“Many observers believed that the end was near for the American death penalty.”); *What Shall We Do About Capital Punishment?*, ESQUIRE, Oct. 1968, at 193 (quoting criminal trial lawyer as professing his firm belief that the death penalty would be abolished in the next ten years).

Death Penalty” in 1967,<sup>235</sup> and *U.S. News & World Report* (among others) reported increasing abolitionist sentiment as late as 1971.<sup>236</sup> While *Furman* was pending, supporters of capital punishment lamented the “mounting zeal for abolition” and the likelihood of its success.<sup>237</sup> Even the 1972 *Supreme Court Review* gave the decision little more than a figurative yawn, writing that in *Furman*, “the inevitable came to pass.”<sup>238</sup>

To be clear, this is not to say that *Furman*’s result was predetermined or even predictable; it was neither.<sup>239</sup> Given the Court’s decision in *McGautha*,<sup>240</sup> one can certainly imagine the Justices going the other way. But they did not, and socio-political context provides one explanation why. For swing Justices Stewart and White, who frequently dissented in the Warren Court’s criminal procedure decisions,<sup>241</sup> the

235. See *The Dying Death Penalty*, TIME, Feb. 17, 1967, at 50; *Killing the Death Penalty*, TIME, July 7, 1967, at 47 (“By inches, the death penalty is dying in the U.S.”).

236. See *Death Sentence for Manson Clan, But—*, supra note 192, at 26 (“Sentiment to abolish the death penalty altogether appears to be growing throughout the United States.”); *Signs of an End to ‘Death Row,’* supra note 105, at 37 (“Now a nationwide drive to do away with the death penalty is gaining momentum.”); see also BEDAU, supra note 47, at 236 (“The general public shows a steadily growing trend to doubt the death penalty and to favor abolishing it.”); *No Work for the Hangman*, THE NATION, Jan. 27, 1969, at 101–02 (noting growing opposition to the death penalty despite public concern over crime). But see *Death Row: A New Kind of Suspense*, supra note 158, at 24 (noting that “certainly the law-and-order surge of the last several years has weakened the abolitionist’s cause”).

237. Donald A. Zoll, *A Wistful Goodbye to Capital Punishment*, 23 NAT’L REV. 1351, 1354 (Dec. 3, 1971).

238. Philip Kurland, *1971 Term: The Year of the Stewart-White Court*, 1972 SUP. CT. REV. 181, 297 (1972).

239. See *Bad News for the 648 on Death Row*, N.Y. TIMES, May 9, 1971, at E8 (noting that defense lawyers have little optimism about the Supreme Court’s position on whether death penalty is “cruel and unusual” based on its recent record); *Closing Death Row*, TIME, July 10, 1972, at 37 (noting that the Supreme Court “was expected to uphold the death penalty” in *Furman* but instead produced a surprise); *The Death Penalty: Cruel and Unusual?*, supra note 210, at 55 (reporting that “educated guessers” predict that the Supreme Court will uphold the death penalty); *Mixed Reviews*, THE NEW REPUBLIC, July 15, 1972, at 7 (describing the Supreme Court’s ruling in *Furman* as “one of the biggest surprises in its history” due to the votes of Justices Stewart and White).

240. See supra notes 61–78 and accompanying text; *Fatal Decision*, TIME, May 17, 1971, at 64 (noting lack of optimism among abolitionists in *Furman* given the Court’s decision in *McGautha* the previous year).

241. See BANNER, supra note 77, at 260–62 (noting that Justice White “had dissented at virtually every opportunity in the Warren Court’s famous cases expanding the constitutional rights of criminal defendants”); EPSTEIN & KOBYLKA, supra note 25, at 71 (describing Justice White as “clearly a vote on which the conservative wing of the Court could count”); MELTSNER, supra note 22, at 157 (describing Justice Stewart as “something of an enigma when it came to capital punishment,” noting that he had dissented frequently in the Warren Court’s criminal procedure

country's seemingly inexorable movement towards abolition played a pivotal role in the case. Justice Stewart, who found the death penalty issue excruciatingly difficult,<sup>242</sup> voted to reverse in *Furman* partly because he thought a vote to affirm would just delay abolition.<sup>243</sup> Justice White's comments after oral argument suggested he felt the same way,<sup>244</sup> and his observation in *Furman* that the death penalty "has for all practical purposes run its course" figured prominently in the deterrence-based rationale for his ruling.<sup>245</sup>

In more subtle ways, too, the socio-political context in which *Furman* was decided had an effect on the outcome of the case. As previously discussed, the Justices in *Furman*'s majority ruled the way they did because they thought abolishing the death penalty was the right thing to do at the time.<sup>246</sup> It is no accident that almost half the American public—and particularly highly educated elites—felt the same way.<sup>247</sup> By 1972, even the Court's conservatives thought the death penalty was wrong on the merits. Three of *Furman*'s four dissenters—including Chief Justice Burger—made a point of stating their personal distaste for the death penalty<sup>248</sup> and Justice Blackmun, a conservative Nixon appointee, came

decisions but had also written the majority opinion in *Witherspoon v. Illinois*, 391 U.S. 510, 523 (1968). *Witherspoon* is discussed *supra* note 104.

242. Justice Stewart changed his mind three times on the death penalty issue—and almost changed it again. See *infra* note 399 (discussing Justice Stewart's comments in a late 1976 case that he might well change his mind about the death penalty's constitutionality); see also BARRY NAKELL & KENNETH A. HARDY, *THE ARBITRARINESS OF THE DEATH PENALTY* 44 (Temple Univ. Press 1987) ("Tracing these decisions obviously follows a course of personal agonizing over a major ethical issue and over the extent of judicial responsibility for deciding it. Justice Stewart struggled with inconsistencies in his search for a satisfying resolution of a conscientious conflict.").

243. In conference, Justice Stewart reportedly stated, "If we hold it constitutional in 1972, it would only delay its abolition." See *THE SUPREME COURT IN CONFERENCE (1940–1985)*, *supra* note 27, at 617.

244. In conference, Justice White reportedly stated, "We should not legalize the death penalty at this time in our history. I reverse in all of these cases." See *THE SUPREME COURT IN CONFERENCE (1940–1985)*, *supra* note 27, at 618.

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

246. See *supra* Part I.B.

247. See *supra* note 205 and accompanying text (noting abolition sentiment at forty-one percent in March 1972); *supra* note 173 and accompanying text (discussing opposition to capital punishment voiced by elite organizations in the 1960s).

248. See *Furman*, 408 U.S. at 375 (Burger, C.J., dissenting) ("If we were possessed of legislative power, I would either join with Mr. Justice Brennan and Mr. Justice Marshall or, at the very least, restrict the use of capital punishment to a small category of the most heinous crimes."); *id.* at 405 (Blackmun, J., dissenting) ("I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty. . . ."); *id.* at 465 (Powell, J., dissenting) ("Many may regret, as I do, the failure of some legislative bodies to address the capital punishment issue with greater

close to voting to reverse in the case.<sup>249</sup> Only Justice Rehnquist supported capital punishment as a matter of policy and law.<sup>250</sup> In short, *Furman* was a decision subtly and not-so-subtly affected by the social and political currents of the era in which it was decided. About the only way to make sense of *Furman* is to view the decision as a product of its time.

This is not to say that *Furman* was *solely* a product of its time, for context does not fully explain the Court's contrary decision in *McGautha* eleven months earlier. Aside from the California Supreme Court's decision in *Anderson*, which came after *McGautha* but before *Furman*, the socio-political context of the two decisions was about the same. Justice Blackmun believed *Anderson* influenced *Furman*'s result,<sup>251</sup> and he may well have been right—but if not, something besides context had to have caused the change. Whatever it was, it could not have been the Court's composition; two Justices retired between *McGautha* and *Furman*,<sup>252</sup> but *Furman*'s majority consisted of *McGautha*'s three dissenters and Justices Stewart and White, who switched sides.<sup>253</sup> As others have suggested, superior advocacy probably played a role in the switch.<sup>254</sup> Anthony Amsterdam, who argued *Furman* for the NAACP, was legendary for his exceptional advocacy skills.<sup>255</sup> In

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frankness or effectiveness.”).

249. In conference, Justice Blackmun reportedly stated, “I am inclined to affirm shakily. I am not at rest. I might join a reversal opinion, but not now.” See THE SUPREME COURT IN CONFERENCE (1940–1985), *supra* note 27, at 618.

250. In conference, Justice Rehnquist reportedly stated, “As a legislator, I would keep it. I am not torn by the problem and affirm.” See THE SUPREME COURT IN CONFERENCE (1940–1985), *supra* note 27, at 619. Then-Justice Rehnquist's stance was not surprising. See EPSTEIN & KOBYLKA, *supra* note 25, at 16 (discussing Rehnquist's ultra-conservative background).

251. See *Furman*, 408 U.S. at 411 (Blackmun, J., dissenting) (“The Court, in my view, is somewhat propelled towards its result by the interim decision of the California Supreme Court, with one justice dissenting, that the death penalty is violative of that State's constitution.”). See *supra* notes 228–32 and accompanying text (discussing *Anderson* decision).

252. See MELTSNER, *supra* note 22, at 257–65 (discussing the resignations of Justices Black and Harlan in September 1971, and their replacement by Justices Powell and Rehnquist).

253. Compare *McGautha v. California*, 402 U.S. 183, 236 (Justices Brennan, Douglas, and Marshall, dissenting) with *Furman*, 408 U.S. at 240–375 (Justices Brennan, Douglas, Marshall, Stewart, and White, concurring).

254. See EPSTEIN & KOBYLKA, *supra* note 25, at 79 (concluding that the NAACP's involvement, particularly that of Amsterdam, “appear[s] to have played a leading role in convincing White and Stewart, the ‘pivotal’ block, to vote to strike”).

255. See EPSTEIN & KOBYLKA, *supra* note 25, at 49–50 (noting that stories about Amsterdam's keen legal skills are of “mythical proportions” and relating incidents to support that conclusion); EDWARD LAZARUS, CLOSED CHAMBERS 90 (1998) (describing Amsterdam as “the finest lawyer of

fact, Justice White would later claim that Amsterdam's argument in *Furman* was among the best he had ever heard.<sup>256</sup> Even this explanation, however, is not fully persuasive. Amsterdam did not argue *McGautha*,<sup>257</sup> but he did argue several other death penalty cases before the Court during this time and was largely unsuccessful in those, despite the extremely favorable factual context in which the claims were presented.<sup>258</sup>

In the end, then, no single explanation can fully account for *Furman*'s result. Perhaps the most that can be said is that the decision was a product of numerous social and political forces, although other influences were probably also in play. Of this much one can be certain: the Justices in *Furman*'s majority did not have doctrine on their side, but they believed their decision was the right one and there was good reason to believe history would see it that way too. Virtually every socio-political indicator pointed towards the Court's decision in *Furman*—that is, until those indicators changed.

## II. REVIVING DEATH

When the Supreme Court decided *Furman* in June 1972, almost everyone—including the Justices themselves<sup>259</sup>—believed that America had seen its last execution.<sup>260</sup> The Court had not invalidated the death

his generation" and relaying seemingly incredible "legal fish stories" supporting the conclusion).

256. WOODWARD & ARMSTRONG, *supra* note 153, at 209.

257. See MELTSNER, *supra* note 22, at 229 (noting that the NAACP filed an amicus brief in *McGautha*, but was not directly involved in the case).

258. The best example is *Boykin v. Alabama*, where Amsterdam argued that the death penalty for robbery (at least in the absence of aggravating circumstances) violated the Eighth Amendment. See *Boykin v. Alabama*, 395 U.S. 238, 240–41 (1969); MELTSNER, *supra* note 22, at 168–85 (discussing *Boykin*'s ultimate resolution on guilty plea grounds and concluding that "the failure of the Court to reach the cruel and unusual punishment issue when a state sought to impose the death penalty on a robber—the most disproportionate use of capital punishment it was likely to face—was a sad omen").

259. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring) (noting that the death penalty "has for all practical purposes run its course"); THE SUPREME COURT IN CONFERENCE (1940–1985), *supra* note 27, at 619 (recording Justice Stewart's personal belief that after *Furman*, the death penalty "was finished" in America); WOODWARD & ARMSTRONG, *supra* note 153, at 219 (noting Chief Justice Burger's private prediction that "[t]here will never be another execution in this country"). Former Justices, too, thought *Furman* had abolished the death penalty for good. See Arthur J. Goldberg, *The Death Penalty and the Supreme Court*, 15 ARIZ. L. REV. 355, 366–67 (1973) (discussing initial reaction to *Furman*).

260. See EPSTEIN & KOBYLKA, *supra* note 25, at 80–81 (noting the widespread belief after *Furman* that there would never be another execution in America, quoting contemporary sources);

penalty per se, but that certainly appeared to be the effect of its ruling. *McGautha* had already rejected the notion that standards could reduce arbitrariness in the imposition of death and the only other option, mandatory death penalties, seemed truly barbaric.<sup>261</sup> Even if the states enacted new death penalty statutes, it would take years for them to work their way through the legal system and it was highly unlikely that executions would resume after a decade-long hiatus.<sup>262</sup> But the worm was about to turn. In the wake of *Furman*, death penalty supporters mobilized, resulting in one of the most dramatic backlashes the nation had ever seen.<sup>263</sup> In response, the Court backed down, proving once again the limited nature of its inclination to protect.

### A. *The Furman Backlash*

At first, the country's reaction to *Furman* was mixed. Abolitionists praised the ruling, as did some politicians and law enforcement officers.<sup>264</sup> President Nixon had a measured response; like others, he did not seem to know what the Justices' ruling meant.<sup>265</sup> Elsewhere, intense

ZIMRING & HAWKINS, *supra* note 111, at 26 (same); *The Death Penalty Revived*, TIME, July 12, 1976, at 35 (noting that at the time, *Furman* "sounded to many like a constitutional ban on executions"); *Death Rattles*, TIME, Nov. 20, 1972, at 73 ("Most people assumed that the death penalty died last June when the U.S. Supreme Court, by a 5-4 vote in *Furman v. Georgia*, declared capital punishment unconstitutional."); *An End to "Death Row"? What Supreme Court Ruled*, U.S. NEWS & WORLD REP., July 10, 1972, at 25, 27 (quoting prosecutor as saying *Furman* "resolves the issue once and for all").

261. See *supra* text accompanying notes 61-78 (discussing *McGautha*) and 118-122 (discussing the demise of mandatory death penalties); *infra* text accompanying notes 326-35 (discussing *McGautha* and mandatory death penalties).

262. See Zimring & Hawkins, *supra* note 142, at 944 (quoting Anthony Amsterdam).

263. See BANNER, *supra* note 77, at 267 (noting that *Furman* "touched off the biggest flurry of capital punishment legislation the nation had ever seen"); BEDAU, *supra* note 98, at 149 (observing that "the death penalty was defended on a national scale in an unprecedented fashion"); EPSTEIN & KOBYLKA, *supra* note 25, at 83-90 (discussing in detail the "tremendous backlash" that *Furman* inspired and noting that "virtually every political indicator pointed to massive disdain" for the decision); Jonathan Simon, *Why Do You Think They Call It CAPITAL Punishment? Reading the Killing State*, 36 LAW & SOC. REV. 783, 795 (2002) ("Few other decisions of the Supreme Court have ever received a more rapid legislative response.").

264. See *An End to "Death Row"? What Supreme Court Ruled*, *supra* note 260, at 27 (reporting that "[a]cross the U.S., reaction to the ruling was mixed" and giving examples); Martin Arnold, *Parole in Capital Offenses Less Likely, Officials Say*, N.Y. TIMES, June 30, 1972, at 1 (discussing divided reaction to *Furman* among law enforcement officials and politicians); *The Court on the Death Penalty*, NEWSWEEK, July 10, 1972, at 20 (noting mixed reaction to *Furman* among politicians).

265. See *An End to "Death Row"? What Supreme Court Ruled*, *supra* note 260, at 27 (noting uncertainty surrounding meaning of decision); *Transcript of President Nixon's News Conference*

pockets of resistance immediately surfaced. In Georgia, the Lieutenant Governor called *Furman* “[a] license for anarchy, rape, murder,” while in Alabama, the Lieutenant Governor claimed that the Supreme Court “had lost contact with the real world.”<sup>266</sup> The *New York Daily News* called for passing “old time” mandatory death penalty laws to see “what the Supreme Court does about that.”<sup>267</sup> Within a day of the decision, legislators in five states had announced their intent to enact new death penalty legislation and seventeen congressmen had joined in sponsoring a constitutional amendment to reinstate the death penalty.<sup>268</sup> Several months later, in November 1972, resistance to *Furman* gained momentum when California voters amended their state constitution to negate *Anderson* by a 2:1 margin.<sup>269</sup> In December 1972, it gained momentum again when the National Association of Attorneys General voted 32:1 to adopt a resolution asking Congress and the states to enact new death penalty statutes that would pass constitutional muster.<sup>270</sup>

By January 1973, the tide had clearly turned against the Supreme Court’s decision in *Furman*. One state—Florida—had already reenacted its death penalty statute,<sup>271</sup> and others were certain to follow. In the 1973

*Emphasizing Foreign Affairs*, N.Y. TIMES, June 30, 1972, at 2 (answering questions on *Furman*).

266. See MELTSNER, *supra* note 22, at 290–91; *An End to “Death Row”? What Supreme Court Ruled*, *supra* note 260, at 27.

267. MELTSNER, *supra* note 22, at 291 (quoting paper).

268. See Richard Phalon, *Death Penalty Urged in 5 States; Some Legislators Are Uncertain*, N.Y. TIMES, July 1, 1972, at 10 (discussing intent to restore the death penalty among some state and national legislators).

269. See *Moves to Restore the Death Penalty*, U.S. NEWS & WORLD REP., Dec. 4, 1972, at 60 (reporting vote as 5.38 million to 2.59 million); see also BEDAU, *supra* note 98, at 169 (describing California referendum as an important political event); EPSTEIN & KOBYLKA, *supra* note 25, at 85; *Voting Their Fears*, *supra* note 210, at 548 (same); Tom Wicker, *Death Again in California*, N.Y. TIMES, Nov. 12, 1972, at E11 (noting that California’s action may set off a flurry of activity in other states to restore the death penalty). Governor Reagan had characterized *Anderson* as a “lethal blow” to the state’s right to protect its citizens against violent crime and threatened to appeal the decision to the United States Supreme Court—clearly a political ploy since *Anderson* was a decision based solely on state law. See MELTSNER, *supra* note 22, at 284–85; see also *supra* notes 228–32 and accompanying text (discussing *Anderson*).

270. See MELTSNER, *supra* note 22, at 308 (discussing development); *Rebirth of Death?*, NEWSWEEK, Dec. 18, 1972, at 23 (discussing development as part of “a quickening effort to bring the death penalty back to life”).

271. Florida’s governor called the state legislature into a special session to enact new death penalty legislation, which it did in just four days. See EPSTEIN & KOBYLKA, *supra* note 25, at 85–86 (discussing Florida’s restoration of the death penalty post-*Furman*); John H. Culver, *State Politics and the Death Penalty: From Furman to McClesky*, 12 J. CRIME & JUST. 1, 9 (1989) (same); Simon, *supra* note 263, at 798 (same).



legislative session, bills to restore the death penalty were submitted in three-fourths of the former death-penalty states *plus* Michigan, which had not had capital punishment for 127 years.<sup>272</sup> By March, President Nixon was blasting the “soft-headed judges” who had invalidated the death penalty, asking Congress to reenact federal death penalty legislation.<sup>273</sup> Other politicians joined the charge, having discovered that the surest way to draw applause in a speech was to call for return of the death penalty.<sup>274</sup> Reflecting the nation’s sea-change in attitude, state legislatures passed new death penalty statutes with unprecedented speed and determination.<sup>275</sup> By May 1973, thirteen states had new death penalty statutes, including New Mexico, which had abolished the death penalty on its own in 1969.<sup>276</sup> By *Furman*’s one-year anniversary, twenty states had restored the death penalty<sup>277</sup>—and by 1976, that number had grown to thirty-five.<sup>278</sup>

Concomitant with this trend was a tremendous surge in death sentences. After a slow start in 1973, death sentences hit a three-decade high of 149 in 1974.<sup>279</sup> In 1975, a whopping 298 death sentences were imposed—at the time, the highest year-end figure ever recorded.<sup>280</sup> Of course, none of these sentences could be carried out until the Supreme Court once again ruled on the death penalty’s constitutionality, but that

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272. See MELTSNER, *supra* note 22, at 308. Michigan’s attempt at restoring capital punishment failed. See *Death Penalty Has Been Restored by 13 States*, N.Y. TIMES, May 10, 1973, at 18 (listing states that restored death penalty in 1973 legislative session).

273. See *Strong Medicine Indeed*, N.Y. TIMES, Mar. 18, 1973, at 205 (describing the particulars of the Nixon Administration’s proposed legislation); Warren Weaver, Jr., *Gives Drug Plan*, N.Y. TIMES, Mar. 11, 1973, at 1 (quoting President Nixon and discussing his efforts to restore the federal death penalty).

274. See Jerry M. Flint, *States on Move*, N.Y. TIMES, Mar. 11, 1973, at 1 (discussing “thunderous applause” in political speeches upon mention of restoration of the death penalty).

275. See *The Death Penalty Gets a Big Push*, U.S. NEWS & WORLD REP., Mar. 26, 1973, at 70; *supra* notes 268–72 and accompanying text.

276. See *Death Penalty Has Been Restored by 13 States*, *supra* note 272, at 18; *supra* text accompanying note 111.

277. See BEDAU, *supra* note 47, at 93. By *Furman*’s second anniversary, twenty-eight states had reenacted death penalty statutes. See *id.*

278. See *Gregg v. Georgia*, 428 U.S. 153, 179–80 (1976) (discussing and listing new death penalty statutes).

279. See BANNER, *supra* note 77, at 270 (discussing death sentences in 1973, 1974, and 1975).

280. See BANNER, *supra* note 77, at 270. Of course, this figure included sentences imposed under mandatory death penalty statutes, which significantly skewed death-sentencing patterns. See THE SUPREME COURT IN CONFERENCE (1940–1985), *supra* note 27, at 620 n.384 (noting that death sentences imposed in North Carolina jumped 500% after the state enacted a mandatory death penalty statute).

is not the point.<sup>281</sup> The point is that for the first time in years, imposing death was something juries were suddenly ready and willing to do.

The nation's renewed support for the death penalty was apparent in the public opinion poll data collected during this time as well. As previously noted, public support for the death penalty was an even fifty percent when *Furman* was decided, with forty-one percent of those asked supporting abolition and nine percent undecided.<sup>282</sup> In November 1972, just months after *Furman*, death penalty support was at fifty-seven percent, with thirty-two percent of the public opposed to the practice and eleven percent undecided.<sup>283</sup> In short, the difference between death penalty supporters and opponents went from nine percentage points before *Furman* to twenty-five points after it—and that margin would only increase over the next several years.<sup>284</sup> By 1976, sixty-six percent of those asked favored the death penalty, marking the highest level of death penalty support in nearly twenty-five years.<sup>285</sup> Not surprisingly, both Republican presidential candidate Gerald Ford and his Democratic rival, Jimmy Carter, supported the death penalty in the 1976 election.<sup>286</sup> As Gallup reported that year, “large majorities in every socio-economic group—with the single exception[] of non-whites—favor death for convicted murderers.”<sup>287</sup>

In fairness, the nation's renewed support for capital punishment also may have reflected rising violent crime rates between 1972 and 1976, as others have alleged.<sup>288</sup> But several considerations cast doubt on this

281. This is not to say that uncertainty as to whether the sentences would be carried out was irrelevant. See Tom Goldstein, *Capital Punishment: Confusion Reigns as Law Is in Limbo*, N.Y. TIMES, Dec. 10, 1976, at 35 (arguing that jurors know their verdict is not final); Joseph Onek, Letter to the Editor, *Capital Punishment*, N.Y. TIMES, Aug. 1, 1976, at 132 (arguing that jurors who imposed capital punishment probably did not believe death sentence would ever be carried out).

282. See *supra* text accompanying note 205.

283. See Moore, *supra* note 200, at 24.

284. See *infra* note 285.

285. Moore, *supra* note 200, at 24. That year, only twenty-six percent of those asked said that they opposed the death penalty, while eight percent were undecided. *Id.* Harris Poll results in 1976 were virtually identical, recording sixty-seven percent support for the death penalty, twenty-five percent opposition to it, and eight percent undecided on the issue. See Taylor, *supra* note 178.

286. EPSTEIN & KOBYLKA, *supra* note 25, at 112 (discussing positions of presidential candidates Carter and Ford).

287. See CAPITAL PUNISHMENT IN THE UNITED STATES, *supra* note 93, at 160 (reproducing 1967 Gallup report).

288. See, e.g., Joseph H. Rankin, *Changing Attitudes Toward Capital Punishment*, 58 SOC. FORCES 194, 204 (1979) (explaining increased support for capital punishment from 1972–1976 as a function of higher violent crime rates). I credit Ron Wright for impressing upon me the possible

hypothesis. First, crime rates had risen before *Furman* as well, with little to no effect on death penalty support.<sup>289</sup> Second, the crime rate actually dropped in 1976, while support for the death penalty skyrocketed.<sup>290</sup> Finally, crime had begun to occupy the public consciousness as early as 1966, when pollsters named it the nation's second most important domestic problem and President Johnson issued a special message to Congress on the topic.<sup>291</sup> That same year, however, marked the lowest level of death penalty support in recorded history, with death penalty opponents outnumbering its supporters.<sup>292</sup> For these reasons, it is unlikely that crime rates were driving the rebound in death penalty support in the wake of *Furman*. Given *Furman*'s high profile among politicians and the popular press, the main reason for the surge in death penalty support—particularly between March and November 1972—was almost certainly negative public reaction to the decision itself.<sup>293</sup>

A number of factors likely contributed to the backlash that *Furman* inspired, and the fractured nature of the Court's decision was surely one of them. Part of the problem was that no one knew just what the Justices had held, allowing states already so inclined to test the Court's resolve.<sup>294</sup> Also problematic was the fact that the decision was too

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validity of this argument.

289. See *supra* Part I.C.6 (discussing crime in the late 1960s and early 1970s, the "law and order" mood of the nation, and death penalty support during that time).

290. See Rankin, *supra* note 288, at 208 n.4 (conceding point, but arguing that public opinion lags behind crime rates).

291. See Lain, *supra* note 13, at 1417 (discussing crime rate in 1966 as compared to earlier years in the 1960s and the rising salience of crime that year as a political issue).

292. See *supra* note 179 and accompanying text.

293. See BANNER, *supra* note 77, at 268 (noting that even if crime rates would have caused support for the death penalty to rise anyway, *Furman* influenced the speed—if not direction—of change); Robert M. Bohm, *American Death Penalty Opinion: Past, Present, and Future in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT*, *supra* note 22, at 29 (discussing 1972 public opinion polls and concluding that "[a]lthough other factors may have had an effect, it appears that significant public discontent with the *Furman* decision was decisive"); Steiker, *supra* note 131, at 108 ("[I]t seems likely that the Supreme Court's decision in *Furman* itself played a bigger role in bolstering public support for capital punishment, at least as reflected in polling data, than did rising homicide rates.").

294. This point was recognized by the popular press. See, e.g., *Capital Punishment: It's Being Revived in Many States*, U.S. NEWS & WORLD REP., Mar. 4, 1974, at 46 (attributing resurgence of dispute over death penalty's legality to dispute about the meaning of the Supreme Court's ruling in *Furman*); *Death Rattles*, *supra* note 260, at 72 (attributing California's efforts to restore the death penalty to ambiguity in *Furman*); *Moves to Restore the Death Penalty*, *supra* note 269, at 60 ("Behind all this [legislative] activity is an area of legal confusion created by [*Furman*]."). As Learned Hand once explained, "Disunity cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends. People become aware that the answer to the

splintered to carry much moral force or legitimacy.<sup>295</sup> *Furman* looked nakedly political, pitting five Warren Court holdovers against four Nixon appointees, and it had no jointly expressed rationale for the ruling. Absent even a plurality consensus, the Justices in *Furman* appeared to be speaking more as individuals (because they were) than as *The Supreme Court*, raising the question of why individuals—particularly non-elected ones—should be telling the states what to do about a matter that traditionally had been their sole prerogative.<sup>296</sup> Perhaps not even unanimity would have prevented resistance to *Furman*; it did not seem to make a difference in *Brown*.<sup>297</sup> But having the Court's full authority and prestige behind a decision of that magnitude could not have hurt. *Furman*'s lack of leadership and clear moral guidance rendered it vulnerable to attack from the start.<sup>298</sup>

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controversy is uncertain, even to those best qualified, and they feel free, unless especially docile, to ignore it. . . ." *The Divided Court*, N.Y. TIMES, July 1, 1972, at 21.

295. See LAZARUS, *supra* note 255, at 109–10 (arguing that “[f]or five Justices to issue one of the most far-reaching constitutional rulings in the Court’s history without even agreeing among themselves on a legal rationale betrayed the very rule of law they claimed to be upholding” and contrasting *Furman* with *Brown*); MELTSNER, *supra* note 22, at 303 (recognizing that *Furman*'s moral force was diluted by five separate opinions); Steiker, *supra* note 131, at 129 (speculating that “[i]f the Supreme Court had managed to speak more clearly, emphatically, and unanimously” in *Furman*, abolition may have been permanent); Steiker & Steiker, *supra* note 16, at 407 (noting that “the *Furman* Court was badly splintered, in terms of both votes and rationales; it did not speak with the same clear tone of moral authority sounded in the unanimous *Brown* opinion”); Welsh S. White, *Patterns in Capital Punishment*, 75 CAL. L. REV. 2165, 2174–75 (1987) (reviewing GORDON HAWKINS & FRANKLIN ZIMRING, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA (1877)) (discussing *Furman*'s inherent weaknesses and concluding that it “seemed to invite a backlash—the Court was fragmented, the moral basis for its decision was unclear, and the states were not precluded from enacting new death penalty statutes”).

296. See ZIMRING, *supra* note 133, at 69 (“There were no special federal restrictions on capital punishment in the United States for the first 150 years of constitutional government. Each state decided whether to have a death penalty, the crimes for which a death penalty might be imposed, and the range of special procedures (if any) that would be provided when a defendant faced the death penalty.”); Simon, *supra* note 263, at 794–95 (“Murder, like most other serious crimes, is primarily a state matter. . . . Likewise, the death penalty, as a response to murder, provided a traditional form of state authority with little real competition at the federal level.”).

297. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). For an excellent discussion of the massive resistance to *Brown*, see MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 385–442 (2004).

298. Contemporary observers recognized *Furman*'s vulnerability. See Lesley Oelsner, *Banned—But For How Long?* N.Y. TIMES, July 2, 1972, at E1 (quoting Professor Yale Kamisar as observing, “[w]henver you’ve got five opinions, you’ve got a very vulnerable precedent”); Polsby, *supra* note 199, at 40 (noting that *Furman*'s five separate opinions “seemed almost deliberately calculated to make this judgment of dubious value as a precedent”); see also *supra* note 295 (comparing solidarity lacking in *Furman* to that present in *Brown*).

Another factor contributing to the backlash that *Furman* engendered was Chief Justice Burger's dissenting opinion, which stressed just how weak the ruling truly was. As Chief Justice Burger pointed out, only two of *Furman*'s concurring Justices—Justices Brennan and Marshall—held that capital punishment was unconstitutional per se; the others were unwilling to go that far.<sup>299</sup> In Chief Justice Burger's mind, this gave states "the opportunity, and indeed unavoidable responsibility" to reconsider their death penalty statutes and, if desired, to redraft those statutes to conform with *Furman*'s ruling.<sup>300</sup> He then proceeded to tell them *how*.<sup>301</sup> Although couched in terms of compliance, Chief Justice Burger's highly publicized dissent was as much an instigation of defiance—which is exactly how the legislative response to *Furman* was depicted in the popular press.<sup>302</sup> At the very least, the dissent was an invitation for death penalty supporters to reassert their position, virtually assuring that attempts to reinstate capital punishment would follow.

That said, the most intriguing question is whether *Furman*'s backlash shows that the decision was countermajoritarian on the merits, as others have claimed.<sup>303</sup> This account best explains the intense backlash against *Furman* in the South, which had a strong preference for capital punishment and led the drive to enact the new death penalty statutes.<sup>304</sup>

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299. *Furman v. Georgia*, 408 U.S. 238, 375 (1972) (Burger, C.J., dissenting).

300. *Id.* at 403–04 (Burger, C.J., dissenting).

301. *See id.* at 400–04 (Burger, C.J., dissenting) (noting that "if state legislatures and the Congress wish to maintain the availability of capital punishment, significant statutory changes will have to be made" and discussing how states might pass death penalty laws in compliance with the Court's ruling).

302. *See The Death Penalty Gets a Big Push*, *supra* note 275, at 70 (detailing legislation "designed to overturn the Supreme Court's ruling" in *Furman*); *Strong Medicine Indeed*, *supra* note 273, at 205 (reporting that "[t]he Nixon legislation will attempt to circumvent Supreme Court opposition to the death penalty"); Tom Wicker, *The Question of Death*, N.Y. TIMES, Mar. 14, 1975, at 39 (reporting that thirty-one states have moved "to circumvent the *Furman* decision and retain capital punishment"); *see also* Phalon, *supra* note 268, at 10 (discussing legislative attempts to restore the death penalty and crediting Chief Justice Burger's dissent for encouraging them); *States on Move*, *supra* note 274 (same).

303. *See* EPSTEIN & KOBYLKA, *supra* note 25, at 129–32 (noting that public opinion, state legislation, and the national administration were against the decision in *Furman* and resulted in a backlash); Steiker & Steiker, *supra* note 16, at 407–10 (discussing *Furman* backlash as a result of the Court misreading popular sentiment); *see also supra* note 199 and accompanying text (noting relative unpopularity of any stance that could be considered "soft on crime" in 1972).

304. *See* Steiker & Steiker, *supra* note 16, at 406 (noting that the most vocal and indignant opposition to *Furman* came from Southern politicians and that Southern states led efforts to reenact death penalty statutes); *supra* notes 128–36 and accompanying text (discussing prominence of the death penalty in the South). Ironically, public support for the death penalty typically has been lowest in the South, most likely a reflection of the region's large minority population and the reticence of

Outside the South, however, the countermajoritarian theory is less persuasive. Admittedly, the nation did not like *Furman*'s ruling, but the problem could not have been that the Justices took a policy position significantly at odds with prevailing sentiment—Part I of this Article makes that much painstakingly clear.<sup>305</sup> Abolition sentiment was still mounting as late as 1971,<sup>306</sup> so why the hostile reaction to *Furman*?

The most plausible explanation is not that the Justices in *Furman* misread the tide of public opinion, but rather that they unwittingly *turned it*, just as contemporary observers thought.<sup>307</sup> *Furman* inspired a sense of righteous indignation among death penalty supporters, hardening their resolve while providing an occasion for them to join together and speak out. In short, instead of settling the death penalty debate, *Furman* reinvigorated those who were losing it, stimulating political countermobilization and a resurgence of death penalty support.<sup>308</sup> Much of this was helped by the fact that capital punishment was a matter traditionally considered to be a state prerogative.<sup>309</sup> For

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that population to support capital punishment. See Robert M. Bohm, *American Death Penalty Opinion, 1936–1986: A Critical Examination of Gallup Polls*, in *THE DEATH PENALTY IN AMERICA: CURRENT RESEARCH* 113, 119–21, 127–29 (Robert M. Bohm ed., 1991) (discussing support for the death penalty by race and region).

305. See *supra* Part I.C.

306. See *supra* text accompanying notes 235–37.

307. The *New York Times* made the point best, reporting:

[I]n a curious way, [*Furman*] has had the opposite effect of what many who favor abolishing the death penalty had hoped. . . . For decades, the death penalty was slowly withering away as judges and juries exercised ever more discretion in reaching their verdicts in capital cases. This withering away pleased abolitionists, though of course they wished it would proceed even faster. And as executions became less common, they seemed to become more arbitrary. The result, it was supposed, would be a Court-imposed end to all executions under any circumstances. Instead, we have a rush of new laws that may well rescue, by making more predictable, the use of capital punishment.

Wilson, *supra* note 155, at 27. Others also recognized the point. See *Death Row Returns*, *THE NATION*, Oct. 15, 1973, at 356 (noting that “[f]or two decades up to June 29, 1972, the movement to abolish capital punishment seemed to be making slow but steady progress” and that the effect of *Furman* was “retrogression” of death penalty support); *Dusting Off ‘Old Sparky’*, *NEWSWEEK*, Nov. 29, 1976, at 35 (noting that “[j]ust a decade ago, capital punishment in the U.S. seemed on the way to extinction” and that *Furman* was “the high-water mark” of the abolition movement, with momentum now going the opposite way).

308. See DAVID R. DOW, *EXECUTED ON A TECHNICALITY* xvii (2005) (“The Court [in *Furman*] did not complete a process; it instigated one.”); ZIMRING, *supra* note 133, at 82 (noting swift reenactment of death penalty statutes without protracted debate as evidence that states were reacting to *Furman* rather than public opinion *per se*). For excellent discussions of the backlash phenomenon in general, see Michael McCann, *How the Supreme Court Matters in American Politics: New Institutional Perspectives*, in *THE SUPREME COURT IN AMERICAN POLITICS* 63, 71–77 (Howard Gillman & Cornell Clayton eds., 1999); Friedman, *supra* note 34, at 1291–93.

309. See *supra* note 296 and accompanying text.

death penalty supporters, there were two reasons to complain about *Furman*: the merits of the ruling and the propriety of federal intervention itself. Interestingly, the brunt of *Furman*'s criticism focused on the latter. As others have recognized, hostility towards the decision was couched mainly in terms of undue federal interference and usurped state authority.<sup>310</sup> Upon reflection, this makes perfect sense. States' rights provided an easy rallying cry for those who disagreed with the Court's ruling, especially when compared to defending the death penalty on the merits (at least at first).<sup>311</sup> Moreover, the Supreme Court had just spent the last decade forcing its will upon the states in areas traditionally considered to be state affairs,<sup>312</sup> and *Furman* decided one of the most important and controversial state issues of the previous decade. Given the choice, it is little wonder that death penalty supporters attacked *Furman* primarily on federalism grounds.

In sum, it is difficult to see the country's resurgence of death penalty support in the wake of *Furman* as anything other than a reaction to—and rejection of—the Court's ruling itself. Given *Furman*'s fractured, fragile ruling, Chief Justice Burger's goading dissent, and the intensely personal, divisive nature of the issue involved, it is no surprise that the decision fared as poorly as it did. Yet just as important as making sense

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310. See WENDY KAMINER, *IT'S ALL THE RAGE: CRIME AND CULTURE* 137 (1995) (noting that *Furman* was "met with considerable outrage about judicial activism and federal court interference"); ZIMRING & HAWKINS, *supra* note 111, at 41–45, 68 (describing hostility to *Furman* as "a state response to a federal slight" rather than a statement about the public attitudes on the death penalty itself); Kirchmeier, *supra* note 6, at 18; (attributing backlash to the fact that *Furman* "fueled popular resentment of the federal government imposing its will on the states"); Simon, *supra* note 263, at 796 (noting that "[t]he backlash against the Supreme Court after *Furman* became, by its own logic, a rally for state power in a very specific sense.").

311. As previously mentioned, even the Court's conservatives in *Furman* disliked the death penalty on the merits. See *supra* notes 248–49 and accompanying text. Even Southern politicians, who clearly favored the death penalty on the merits, couched their criticism of *Furman* in terms of states' rights. See, e.g., *The Court on the Death Penalty*, *supra* note 264, at 20 (quoting Mississippi Senator James Eastland as accusing the Supreme Court of "again legislating and destroying our system of government"). See generally Erwin Chemerinsky, Foreword: *The Vanishing Constitution*, 103 HARV. L. REV. 43, 62 (1989–90) ("Moreover, it is often easier to criticize a decision as usurping democracy than it is to debate the substantive desirability of the ruling. If nothing else, it permits appeal to a commonly shared ideal of democratic rule, whereas arguments on substantive grounds highlight disagreements over values.").

312. See Steiker, *supra* note 131, at 129 (noting that the Supreme Court's legitimacy had been weakened by prior decisions in civil rights and criminal procedure areas); see also ELIZA STEELWATER, *THE HANGMAN'S KNOT: LYNCHING, LEGAL EXECUTION, AND AMERICA'S STRUGGLE WITH THE DEATH PENALTY* 223 (Westview Press 2003) (noting that the civil rights era was marked by federal intervention and resentment of that intervention).

of *Furman*'s backlash is making sense of what the Supreme Court did next.

B. *Gregg v. Georgia, Another Product of Its Time*

By 1976, years of unexecuted death sentences had created a second "pileup on death row."<sup>313</sup> Once again, the backlog pressed the Supreme Court to decide the death penalty's constitutionality, which it did in the 1976 companion cases of *Gregg v. Georgia*<sup>314</sup> and *Woodson v. North Carolina*.<sup>315</sup> Like *Furman*,<sup>316</sup> *Gregg* and *Woodson* were consolidated cases. *Gregg* considered three guided discretion statutes<sup>317</sup> and *Woodson* considered two mandatory death penalty statutes.<sup>318</sup> As before, the decisions were deeply splintered.<sup>319</sup> In two three-Justice plurality opinions, the Court upheld the guided discretion statutes,<sup>320</sup> while striking those that made the death penalty mandatory for select crimes.<sup>321</sup>

313. The whole point of the NAACP's moratorium strategy was to create a "pileup on death row," threatening a bloodbath in the event executions resumed. See BEDAU, *supra* note 43, at 84; MELTSNER, *supra* note 22, at 107; EPSTEIN & KOBYLKA, *supra* note 25, at 52–60 (discussing moratorium strategy and calling it "litigation laced with psychological warfare"). In 1976, when *Gregg* was decided, there were more than 460 people on death row. ZIMRING & HAWKINS, *supra* note 111, at 41.

314. 428 U.S. 153 (1976).

315. 428 U.S. 280 (1976).

316. See *supra* notes 67 and 168 and accompanying text (discussing *Furman*'s companion cases).

317. Guided discretion statutes are statutes that provide some sort of criteria to guide the jury's discretion in determining whether to impose death in a capital case. See *supra* notes 62–65 and accompanying text (discussing *McGautha*'s consideration of claim that guided discretion statutes were constitutionally required).

318. See EPSTEIN & KOBYLKA, *supra* note 25, at 101 (charting provisions of statutes at issue and facts of all five cases).

319. Altogether, the five consolidated cases produced twenty-four separate opinions. See Lesley Oelsner, *Decision is 7 to 2; Punishment is Ruled Acceptable, at Least in Murder Cases*, N.Y. TIMES, July 3, 1976, at 7. Justices Brennan and Marshall voted to reverse in all five cases, Justices Burger, Blackmun, Rehnquist and White voted to affirm in all five, and Justices Powell, Stewart and Stevens voted to affirm in the guided discretion death penalty statute cases but reverse on the mandatory ones. See EPSTEIN & KOBYLKA, *supra* note 25, at 111–14 (discussing and charting voting coalitions in *Gregg* and *Woodson*); WOODWARD & ARMSTRONG, *supra* note 153, at 434–37 (discussing same).

320. *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (holding that *Furman*'s concerns may be met by "a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance").

321. *Woodson v. North Carolina*, 428 U.S. 280, 292–93 & n.25 (1976) (invalidating mandatory death penalty statutes as inconsistent with evolving standards of decency, but explicitly not considering mandatory death penalty statutes for murder by a life-term prisoner).



Like *Furman*, *Gregg* is difficult to see as a product of principled decision-making, but easy to understand as a product of its time.

According to the Justices in *Gregg*, the guided discretion death penalty statutes at issue did not fall within *Furman*'s prohibition for two reasons. First, the nation's "evolving standards of decency" supported those statutes, which as a factual proposition was certainly true in 1976.<sup>322</sup> But "evolving standards of decency" was not the reason *Furman* had invalidated the death penalty in the first place.<sup>323</sup> Thus, relying on it to bring the death penalty back was a complete non sequitur.<sup>324</sup> The "evolving standards" doctrine did justify *Woodson*'s result,<sup>325</sup> but mandatory death penalties were so obviously antiquated that no one seriously believed they would pass constitutional muster.<sup>326</sup> By 1976, the notion of a mandatory death penalty for certain crimes, regardless of the circumstances, struck most Americans as fundamentally wrong<sup>327</sup>—and to the Justices, the notion that the death

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322. See *Gregg*, 428 U.S. at 179 ("[I]t is now evident that a large proportion of American society continues to regard [the death penalty] as an appropriate and necessary criminal sanction."); *supra* Part II.A (discussing backlash to *Furman*).

323. See *supra* text accompanying notes 80–83.

324. *Gregg*'s plurality opinion attempted to make "evolving standards of decency" relevant by stating that the petitioners had renewed the argument, see *Gregg*, 428 U.S. at 179, but it is difficult to imagine Anthony Amsterdam, who argued *Furman*, pushing that argument in 1976. Indeed, thirty-five pages of petitioners' thirty-six page brief were addressed to the arbitrariness with which the death penalty continued to be administered (as one would expect) and the last page argued that the death penalty was an excessive punishment. See Brief of Petitioner, *Gregg v. Georgia*, 428 U.S. 153 (1976) (No. 74-6257), 1976 WL 178713; EPSTEIN & KOBYLKA, *supra* note 25, at 103 (noting that attorneys in *Gregg* tried to avoid "evolving standards" approach as much as possible).

325. See *Woodson*, 428 U.S. at 301 (invalidating mandatory death penalties for being inconsistent with evolving standards of decency, and noting that "one of the most significant developments in our society's treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense"); *supra* text accompanying notes 118–22 (discussing demise of mandatory death penalty statutes). Ironically, *Woodson* also invalidated mandatory death penalties because in practice they did not remove the unbridled discretion that *Furman* found constitutionally objectionable. See *infra* note 349 and accompanying text.

326. See EPSTEIN & KOBYLKA, *supra* note 25, at 342 n.17 (noting that law reviews were "virtually unanimous" in their prediction that the Court would strike the antiquated mandatory death penalty laws); BEDAU, *supra* note 98, at 166–67 (noting no surprise that the Court struck mandatory death penalties in *Woodson* because they "flew directly in the face of an unswerving historical development" towards discretion in the imposition of death).

327. See Neil Vidmar & Phoebe Ellsworth, *Public Opinion and the Death Penalty*, in CAPITAL PUNISHMENT IN THE UNITED STATES, *supra* note 93, at 127, 129 (discussing Harris survey in which no more than forty-one percent of those asked favored a mandatory death sentence for any given crime); see also EPSTEIN & KOBYLKA, *supra* note 25, at 84 (noting that Congress rejected a mandatory death penalty after *Furman* as "inhumane"). Not even Solicitor General Robert Bork

penalty had to be more cruel to be less unusual was equally abhorrent.<sup>328</sup> The states had passed mandatory death penalty statutes only because they thought they had to in order to get around *Furman*.<sup>329</sup> With *Gregg* providing an alternative avenue of relief, *Woodson*'s result was almost a given.<sup>330</sup> In short, "evolving standards of decency" was reason enough to strike the mandatory death penalty statutes, but it did little to legitimate the guided discretion ones. For that, the Justices would have to revisit the core of *Furman*'s complaint—discretion itself.

*Gregg*'s second reason for upholding guided discretion statutes was that they eliminated the arbitrariness in capital sentencing that *Furman* had found constitutionally objectionable.<sup>331</sup> Once again, *McGautha v. California* appeared to dictate a different result.<sup>332</sup> In *McGautha*, the Supreme Court had rejected the claim that standards were constitutionally required in capital sentencing determinations, in part because the Court thought they were unnecessary and in part because it thought they would not work.<sup>333</sup> Using the Model Penal Code's proposed

supported the mandatory death penalties at issue in *Woodson*. Warren Weaver, Jr., *Federal Law Official Will Argue Before Court on Death Penalty*, N.Y. TIMES, Mar. 9, 1975, at 38 (discussing Department of Justice's position).

328. See *Furman v. Georgia*, 408 U.S. 238, 401 (1972) (Burger, C.J., dissenting) (noting that if mandatory death penalties are the only option after *Furman*, he would prefer that the Court impose total abolition); THE SUPREME COURT IN CONFERENCE (1940–1985), *supra* note 27, at 621 (reporting Justice Stevens in conference after *Woodson* as saying, "[t]o have created a monster like North Carolina, which increases the incidence of the penalty, is abhorrent"); Zimring & Hawkins, *supra* note 142, at 956 (noting that the states "might understandably conclude that the only way to make executions less freakish in distribution" is to increase them, "inflicting more cruelty to satisfy the Court that it was not unusual"). North Carolina's mandatory death penalty statute had produced 122 death sentences; the states with the next highest were Florida, with seventy-three death sentences, California with fifty-seven, Louisiana with forty-seven, and Texas with forty-two. See *34 States and U.S. Have Capital Punishment Laws*, N.Y. TIMES, July 3, 1976, at 7.

329. See *Woodson*, 428 U.S. at 298 ("[I]t seems evident that the post-*Furman* enactments reflect attempts by the States to retain the death penalty in a form consistent with the Constitution, rather than a renewed societal acceptance of mandatory death sentencing."); *The Death Penalty Revived*, *supra* note 260, at 35 (noting that *Gregg* struck mandatory death penalties, "the very thing that the court seemed to be asking for in 1972"); *Death Rattles*, *supra* note 260, at 73 ("So far, most of the effort to reinstate the death penalty has concentrated on eliminating 'arbitrariness' by making death mandatory for certain crimes.").

330. Despite the widely-held belief that mandatory death penalty statutes would not pass constitutional muster, they almost did. See WOODWARD & ARMSTRONG, *supra* note 153, at 434–36 (discussing initial vote to affirm even mandatory death penalties).

331. See *Gregg v. Georgia*, 428 U.S. 153, 206–07 (1976) ("No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines.").

332. 402 U.S. 183 (1971).

333. See *McGautha*, 402 U.S. at 204–08; *supra* text accompanying notes 61–65 (discussing *McGautha*).

guided discretion statute as an example, the Court in *McGautha* explained:

It is apparent that such criteria do not purport to provide more than the most minimal control over the sentencing authority's exercise of discretion. They do not purport to give an exhaustive list of the relevant considerations or the way in which they may be affected by the presence or absence of other circumstances. They do not even undertake to exclude constitutionally impermissible considerations. And, of course, they provide no protection against the jury determined to decide on whimsy or caprice.<sup>334</sup>

The Court in *Gregg* acknowledged *McGautha* only by the vague reference, "some have suggested that standards to guide a capital jury's sentencing deliberations are impossible to formulate,"<sup>335</sup> and indeed "some" had—namely, four of the plurality justices in *Gregg*.<sup>336</sup>

The Supreme Court's decision in *Gregg* was even more inexplicable in light of the particulars of Georgia's guided discretion statute. Georgia's statute authorized the death penalty upon a finding of any one of ten statutorily-identified aggravating circumstances, including murder involving "depravity of mind" or "aggravated battery to the victim"<sup>337</sup>—circumstances that describe most, if not all, murders.<sup>338</sup> Compounding

334. *McGautha*, 402 U.S. at 207; *accord id.* at 208 ("For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever really be complete. The infinite variety of cases and facets to each case would make general standards either meaningless 'boiler-plate' or a statement of the obvious that no jury would need.").

335. *Gregg*, 428 U.S. at 193.

336. Justices White, Stewart, Burger and Blackmun all supported the result in *Gregg*, and had also signed on to the majority opinion in *McGautha*. See THE SUPREME COURT IN CONFERENCE (1940–1985), *supra* note 27, at 614–16 (discussing votes in *McGautha*); MELTSNER, *supra* note 22, at 241–42 (same); *supra* note 319 (discussing votes in *Gregg*). The Justices in *Gregg* even used the Model Penal Code to make the opposite point. See *Gregg*, 428 U.S. at 193–94 (using guided discretion statute in Model Penal Code to refute suggestion that standards in capital sentencing are impossible to formulate).

337. See *Gregg*, 428 U.S. at 162–66, 196–99 (reproducing and discussing statute).

338. See Stephen R. McAllister, *The Problem of Implementing a Constitutional System of Capital Punishment*, 43 KAN. L. REV. 1039, 1051–57 (1995) (discussing statutes under consideration in *Gregg* and concluding that "the 1976 cases themselves raise serious questions about the strength of the Court's commitment to the guided discretion principle"); Jordan M. Steiker, *The Limits of Legal Language: Decisionmaking in Capital Cases*, 94 MICH. L. REV. 2590, 2608–09 (1995–96) (arguing that such phrases "describe the circumstances surrounding most murders"); Weisberg, *supra* note 1, at 321 (concluding that *Gregg* does "little more than confirm that the Court may permit almost any scheme except the kind that *Woodson* expressly forbids"); see also Carol S. Steiker & Jordan M. Steiker, *Judicial Developments in Capital Punishment Law*, in AMERICA'S EXPERIMENT WITH

the problem was the fact that Georgia's statute provided no guidance whatsoever as to how juries were to make the capital sentencing decision once a defendant was determined to be death-eligible.<sup>339</sup> In *Gregg*, the Court held that the "isolated decision of a jury to afford mercy" (as opposed to its decision to impose death) did not require standards.<sup>340</sup> Given these provisions, John Hart Ely had it exactly right when he said of Georgia's statute, "in less serious circumstances this would be amusing."<sup>341</sup> Before guided discretion statutes and after, juries had enormous liberty to impose death for capital crimes whenever they wanted—something *Furman* had said they could not do.<sup>342</sup>

The Supreme Court in *Gregg* was not oblivious to the deficiencies in the new guided discretion statutes. As previously noted, most of the Justices in *Gregg*'s plurality also had been in *McGautha*'s majority, so they already had gone on record against the feasibility of those provisions.<sup>343</sup> Even if they had not, it was common knowledge by 1976 that discretion and discrimination in the imposition of death remained. The popular press reported it,<sup>344</sup> the law reviews discussed it,<sup>345</sup> and the

CAPITAL PUNISHMENT, *supra* note 22, at 47, 65 (noting that death eligibility remains remarkably broad today, citing a recent Supreme Court decision upholding a death penalty statute that listed murder in "utter disregard for human life" as a sufficiently limiting aggravating factor).

339. See *Gregg*, 428 U.S. at 162–66 (reproducing and discussing statute); Steiker & Steiker, *supra* note 16, at 391–92 (arguing "[i]f standardless discretion is problematic because it gives those with a mind to discriminate the opportunity to discriminate, unconstrained consideration of any kind of mitigating evidence is problematic precisely for the same reason" and quoting as correct the NAACP's claim that "'Kill him if you want' and 'Kill him, but you may spare him if you want' mean the same thing in any man's language").

340. *Gregg*, 428 U.S. at 203.

341. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 175 (1980).

342. See *supra* notes 69–72 and accompanying text (discussing core holding of *Furman*); *Furman v. Georgia*, 408 U.S. 238, 253 (1972) (Douglas, J., concurring) (lamenting "uncontrolled discretion of judges or juries" in capital sentencing); *id.* at 313 (White, J., concurring) ("[T]here is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."); *id.* at 294 (Brennan, J., concurring) ("No one has yet suggested a rational basis that could differentiate . . . the few who die from the many who go to prison."). Over time, empirical evidence would confirm common sense—virtually every defendant sentenced to death in Georgia prior to *Furman* would have been considered death-eligible under Georgia's newly-drafted guided discretion statute as well. See Steiker, *supra* note 338, at 2609.

343. See *supra* note 336 (discussing Justices' votes in *McGautha* and *Gregg*). Justices Powell and Stevens, who had joined the Court since *McGautha*, recognized the box the Justices were in; in fact, Justice Powell thought that between *McGautha* and *Furman*, the Court had little choice but to invalidate the statutes in *Gregg*. See WOODWARD & ARMSTRONG, *supra* note 153, at 431–32.

344. See, e.g., Wicker, *supra* note 302, at 39 (arguing that the "unassailable record shows capital punishment to be racially discriminatory" even under the new statutes and providing statistics to back up claim); see also, e.g., *Death Penalty for Nonwhites Found More Likely Now Than*

empirical evidence confirmed it.<sup>346</sup> Even state governors—including Georgia’s Jimmy Carter—publicly doubted the constitutionality of the death penalty bills they were signing.<sup>347</sup> All things considered, the NAACP made at least as strong a showing of arbitrariness in *Gregg* as it had in *Furman*<sup>348</sup>—and this time, the law was on its side. The Justices

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*Previously*, N.Y. TIMES, Apr. 4, 1976, at 42 (discussing study finding that new state laws have not succeeded in reducing discrimination in death-penalty administration); Mary Ellen Gale, *How Fair Is Our Justice, How Fitting Is Execution?* N.Y. TIMES, Jan. 5, 1975, at BR1 (praising book that concludes that even under the new statutes, “a few people are selected, without adequately shown or structured reason for their being selected, to die”); *In Spite of All the Talk of Restoring the Death Penalty*, U.S. NEWS & WORLD REP., Apr. 14, 1975, at 52 (discussing claim that new death penalty statutes do not satisfy objections in *Furman*); Michael Meltsner, *Cruel and Unusual Punishment*, N.Y. TIMES, Oct. 11, 1974, at 39 (arguing that “[d]iscretion has not been eliminated, it has merely become less visible” and that the new laws, using Georgia’s guided discretion statute as an example, worked much like the old ones); Oelsner, *supra* note 298, at 58 (discussing claim that new laws do not curb discretion and discrimination in death penalty’s administration); Warren Weaver, Jr., *Penalty of Death Attacked in Book*, N.Y. TIMES, Nov. 24, 1974, at 46 (discussing leading constitutional authority’s view that statutes in Georgia, Texas, and other states provide no more than a “smokescreen” for “the same old unbridled jury discretion”); Warren Weaver, *Ruling Expected on Death Penalty*, N.Y. TIMES, Oct. 21, 1974, at 68 (noting argument that arbitrary infliction of the death penalty “has been carefully preserved” and that in Georgia, only seventeen men have received the death penalty out of 900 rapes, 800 murders, and 6000 cases of armed robbery).

345. See, e.g., Honorable James R. Browning, *The New Death Penalty Statutes: Perpetuating a Costly Myth*, 9 GONZ. L. REV. 651 (1973–74); see also EPSTEIN & KOBYLKA, *supra* note 25, at 102 (noting consensus among law reviews that if Justices in *Furman* hold to their opinions, new statutes will not pass constitutional muster). Perhaps the most famous of these academic works was a book by Yale Law Professor Charles Black, *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* (1975). See *CAPITAL PUNISHMENT IN THE UNITED STATES*, *supra* note 93, at 153 (discussing book and quoting its conclusion that the new death penalty statutes “do not effectively restrict the discretion of juries by any real standards” and “never will”); EPSTEIN & KOBYLKA, *supra* note 25, at 342 n.12 (mentioning prominence of book).

346. See *CAPITAL PUNISHMENT IN THE UNITED STATES*, *supra* note 93, at 151 (discussing and quoting 1973 study concluding that “racial variables are systematically and consistently related to the imposition of the death penalty”); EPSTEIN & KOBYLKA, *supra* note 25, at 94 (discussing and quoting 1976 study concluding that “there is no evidence to suggest that post-*Furman* statutes have been successful in reducing the discretion which leads to a disproportionate number of nonwhite offenders being sentenced to death”); *Death Penalty for Nonwhites Found More Likely Now Than Previously*, *supra* note 344, at 42 (same).

347. See EPSTEIN & KOBYLKA, *supra* note 25, at 86–87 (noting doubts about Florida’s new death penalty statute among governor’s committee and Governor Jimmy Carter’s doubts about new death penalty law he signed into effect); Flint, *supra* note 274, at 55 (reporting Jimmy Carter’s pledge to sign death penalty bill despite questions about its constitutionality); see also *Death Penalty Bill Signed*, N.Y. TIMES, June 21, 1973, at 36 (quoting Louisiana Governor’s statement that he had “serious reservations” about whether the U.S. Supreme Court would uphold the death-penalty bill he had just signed); *Rebirth of Death?* *supra* note 270, at 24 (noting that Florida’s new death penalty statute “is of such shaky construction that some of its own backers doubt it will stand up in court”).

348. See EPSTEIN & KOBYLKA, *supra* note 25 at 131–32 (noting that the NAACP “made at least

were savvy enough to recognize that even mandatory death penalty statutes did little to curb discretion in the imposition of death.<sup>349</sup> It is hard to believe they did not know that guided discretion statutes (particularly those at issue in *Gregg*) suffered from the same constitutional infirmities.<sup>350</sup>

In short, *Gregg* may not have formally overruled *Furman*, but it clearly turned its back on *Furman*'s ideals and constitutional command. *Gregg*'s plurality opinion read like *Furman*'s dissents, and even cited them from time to time.<sup>351</sup> Something had changed; the question (again) was what. The Court's composition provides a partial, though ultimately unsatisfactory, answer. Between *Furman* and *Gregg*, the Court's most liberal member—Justice Douglas—retired and was replaced by Justice

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as plausible a showing of arbitrariness in [the new statutes'] application and enforcement in 1976 as they did in 1972" and that "what a majority saw as troubling in *Furman* remained present in *Gregg*").

349. See *Woodson v. North Carolina*, 428 U.S. 280, 302–03 (1976) (noting that "mandatory statutes enacted in response to *Furman* have simply papered over the problem of unguided and unchecked jury discretion," exacerbating it by "resting the penalty determination on the particular jury's willingness to act lawlessly").

350. Justice Rehnquist pointed out the inconsistency in his *Woodson* dissent, but the barb went unanswered. See *id.* at 315 (J. Rehnquist, dissenting) ("To conclude that the North Carolina system is bad because juror nullification may permit jury discretion while concluding that the Georgia and Florida systems are sound because they *require* this same discretion, is, as the plurality opinion demonstrates, inexplicable."). The plurality's distinction in *Gregg* was even more bizarre given its decision to uphold the Texas statute in one of *Gregg*'s companion cases, *Jurek v. Texas*, 428 U.S. 262 (1976). In *Jurek*, the Justices upheld a hybrid discretionary-mandatory death penalty statute that channeled jury discretion by asking three questions—focusing on intent and future dangerousness—but required imposition of the death penalty if the jury answered the questions in the affirmative. See *id.* at 269 (reproducing Texas statute); see also Lesley Oelsner, *Decision is 7 to 2*, N.Y. TIMES, July 3, 1976, at 1 (discussing Court's ruling on hybrid Texas statute).

351. Compare *Gregg v. Georgia*, 428 U.S. 153, 168 (1976) (noting multiple occasions that the Court has assumed or asserted the death penalty's constitutionality in the past), *and id.* at 174–76 (noting responsibility of Court to not act as legislature, citing *Furman* dissents), *and id.* at 176–78 (noting long history of public acceptance of death penalty in United States), *and id.* at 181–82 (characterizing rarity of sentences as result of juries being more discriminating in imposing death sentences), with *Furman*, 408 U.S. at 428 (Powell, J., dissenting) (noting multiple occasions that Court has assumed or asserted the death penalty's constitutionality in the past), *and id.* at 431 (Powell, J., dissenting) (noting importance of judicial restraint and deference to legislative prerogative), *and id.* at 385–86 (Burger, C.J., dissenting) (discussing indicators of public acceptance of the death penalty in the United States), *and id.* at 388 (Burger, C.J., dissenting) (viewing selectivity of juries in imposing death as "a refinement on, rather than repudiation of" the death penalty). Justice Blackmun's one sentence concurrence made the point explicitly. See *Gregg*, 428 U.S. at 227 (stating "I concur in the judgment" and citing four *Furman* dissents); see also ZIMRING & HAWKINS, *supra* note 111, at 64 (describing *Gregg* as "an apparently outright reversal of opinion" from *Furman*).

Stevens, a moderately conservative Ford appointee.<sup>352</sup> But the Court's membership cannot be the only explanation for the change, for the vote in *Gregg* was not five-four, but seven-two.<sup>353</sup> Once again, Justices Stewart and White switched sides.<sup>354</sup> Justice Stewart, who wrote the plurality opinion in *Gregg*, reportedly felt betrayed by the abolitionists in *Furman*.<sup>355</sup> They had led him to believe that the death penalty was dying anyway and that an abolitionist ruling would just help it along, which had not been the case.<sup>356</sup> Justice White, who authored a rival, three-Justice concurrence in *Gregg*, also thought that the nation's renewed commitment to the death penalty justified a different result. In *Furman*, Justice White had reasoned that states were not imposing the death penalty enough to justify its deterrent use.<sup>357</sup> Now they were. Given the states' renewed commitment to the death penalty, Justice White no longer cared about arbitrariness in the imposition of death; as he callously acknowledged, "Mistakes will be made and discriminations will occur which will be difficult to explain."<sup>358</sup> For both Justices, then, broader socio-political context once again played a role in the case.

As in *Furman*, legal advocacy probably also influenced *Gregg*'s result, albeit in a different way. The federal government had stayed out of the litigation in *Furman*, but in *Gregg* it filed a lengthy amicus brief

352. The Supreme Court initially agreed to consider the constitutionality of mandatory death penalties in 1975, although it split four-four on the issue when Justice Douglas was hospitalized and missed the conference vote. It decided to reconsider mandatory death penalties the next year, along with guided discretion statutes, once Justice Douglas's replacement had joined the bench. See EPSTEIN & KOBYLKA, *supra* note 25, at 98–99; WOODWARD & ARMSTRONG, *supra* note 153, at 369; see also EPSTEIN & KOBYLKA, *supra* note 25, at 17 (discussing departure of Justice Douglas, "the court's most stalwart liberal," and his replacement by more moderate Justice Stevens).

353. Indeed, if the decision had been five-four, it may have gone the other way. See EPSTEIN & KOBYLKA, *supra* note 25, at 128–29 (arguing that if the abolitionists had been able to retain the votes of Justices Stewart and White, they may well have gotten the vote of Justice Stevens as well). But see NAKELL & HARDY, *supra* note 242, at 29 ("Justice Douglas could have changed the count from seven-to-two to six-to-three but not the outcome. His departure from the Court, therefore, was not decisive.").

354. In the aftermath of *Gregg*, Justice Stewart almost switched again. See *Death and Confusion at the Court*, TIME, Dec. 13, 1976, at 85 (discussing case involving irregularity in Florida death penalty procedure and Justice Stewart's angry comment during oral argument that "perhaps as many as three members of the court" could "change their minds" about constitutionality of Florida statute).

355. See WOODWARD & ARMSTRONG, *supra* note 153, at 432–33.

356. See WOODWARD & ARMSTRONG, *supra* note 153, at 432–33.

357. See *supra* note 70 and accompanying text (discussing Justice White's deterrence-based rationale in *Furman*).

358. *Gregg v. Georgia*, 428 U.S. 153, 226 (1976) (White, J., concurring).

asking the Court to overrule *Furman* and sent Solicitor General Robert Bork to argue on its behalf.<sup>359</sup> Like Amsterdam, Bork was a worthy adversary in the courtroom, but more important was the fact that the government's position carried great weight.<sup>360</sup> On such a highly controversial issue, it is hard to imagine the Justices not at least giving serious consideration to the position of the nation's chief executive.<sup>361</sup> Indeed, aside from its refusal to formally overrule *Furman*, the Justices in *Gregg* did just as Bork had asked, upholding the guided discretion statutes while striking those that made the death penalty mandatory.<sup>362</sup>

That said, the pressure the Court felt in *Gregg* almost surely had more to do with the larger, exceedingly hostile socio-political climate of 1976 than the Solicitor General's position. The Justices were clearly moved by the backlash against *Furman*; they said so explicitly in an "evolving standards of decency" analysis that was largely irrelevant to the legal issues at hand.<sup>363</sup> Remaining true to the principles of *Furman* would have been risky. The states already had threatened a constitutional amendment to restore the death penalty and by 1976, they were perilously close to having the numbers to pull it off.<sup>364</sup> Even a failed attempt to override the Court would have been a severe blow to its institutional authority.<sup>365</sup> In the face of a strong challenge to that

359. See Lesley Oelsner, *High Court is Urged by Bork to Restore Capital Punishment*, N.Y. TIMES, Apr. 1, 1976, at 1; see also BANNER, *supra* note 77, at 270–71 (comparing federal government's involvement in *Gregg* and absence in *Furman*); EPSTEIN & KOBYLKA, *supra* note 25 at 97 (same).

360. See EPSTEIN & KOBYLKA, *supra* note 25, at 97–98 (discussing the Solicitor General's unique influence with the U.S. Supreme Court); LAZARUS, *supra* note 255, at 230–31 (same); Neal Devins, *Explaining Grutter v. Bollinger*, 152 U. PA. L. REV. 347, 355 (2003–04) (noting the Solicitor General's average success rate of seventy percent).

361. See EPSTEIN & KOBYLKA, *supra* note 25, at 305 (concluding that it was "not surprising that the Court buckled and reversed its legal position" in *Furman* given pressure from the executive branch via the Solicitor General, but that Bork's efforts alone cannot explain the result in *Gregg*); MARSHALL, *supra* note 14, at 83 (summarizing research findings that the Supreme Court is "very likely to defer to federal policy makers, regardless of whether the federal law was itself consistent with the polls").

362. See *supra* note 327 and text accompanying note 359 (noting the Solicitor General's position on mandatory and guided discretion statutes).

363. See *supra* notes 322–24 and accompanying text.

364. See *supra* text accompanying notes 268, 278 (noting initial attempt to pass constitutional amendment to override *Furman* and subsequent reenactment of death penalty laws by thirty-five states).

365. See BEDAU, *supra* note 98, at 169 (noting that new death penalty legislation "confront[ed] the Court with a potentially severe challenge to its political authority" and that the Court "might well have reasoned that it was better to invoke the principle of judicial restraint than to invite



authority, the Court in *Gregg* did what the Court usually does when met with intense resistance—retreat.<sup>366</sup> Commentators have seen *Gregg* for what it was, a “judicial surrender to the perceived wishes of the public.”<sup>367</sup> The Supreme Court was under tremendous pressure in *Gregg*, and it is hard to imagine the Justices not succumbing to that pressure. Like *Furman*, *Gregg* was a decision difficult to understand as a product of principled decision-making, but easy to understand as a product of its time.

### III. THE INHERENTLY MAJORITARIAN INFLUENCE OF EXTRALEGAL CONTEXT

Ironically, in both *Furman* and *Gregg*, the litigant with the law on its side lost. In *Furman*, nearly every shred of constitutional law available weighed against the NAACP, but it won anyway. In *Gregg*, the abolitionists finally had doctrine on their side, but they still suffered defeat. In both cases, broader socio-political context played an integral role in the result. Extralegal context helps to explain why the Justices in *Furman* thought invalidating the death penalty was the right thing to do in 1972, and why in 1976 the Justices thought differently in *Gregg*. But extralegal context does more than just explain the results in these cases. As *Furman* and *Gregg* illustrate, the majoritarian influence of extralegal

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nationwide attempts to amend the federal constitution”).

366. Over two decades ago, Jan Gorecki provided a political explanation of this phenomenon, writing:

[I]n the long run, when opposed by clear and strong sentiment of the majority, the Court has no choice but to eventually concede. Its power, and especially the implementation of its decisions, depends on the other branches of the government, which, in turn, depend more directly on the electorate; hence, the Court’s power might be impaired if the Justices went too far too long in opposing the will of the nation on an important issue.

GORECKI, *supra* note 149, at 111; see James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 B.Y.U. L. REV. 1037, 1136 n.425 (1993) (“Judges who stray [from popular sentiment] face reversals if they sit on lower courts, derision on and off the bench, declining influence over future cases caused by lack of respect and cooperation, and even impeachment in extreme situations.”).

367. ZIMRING & HAWKINS, *supra* note 111, at xi. See, e.g., BEDAU, *supra* note 98, at 169 (“The appeal to judicial restraint thus became the fig leaf with which the Court endeavored to hide.”); Louis D. Bilionis, *Eighth Amendment Meanings From the ABA’s Moratorium Resolution*, 61 LAW & CONTEMP. PROBS. 29, 37 (1998) (noting “the heavy legislative backlash against *Furman* and the Court’s substantial acquiescence to that backlash in the 1976 decisions); Steiker, *supra* note 131, at 129 (noting Court’s willingness to “retrench on the issue of capital punishment in response to the outpouring of rage that *Furman* had generated”); Weisberg, *supra* note 1, at 322 (noting classical view that *Gregg* “amounts to little more than judicial sighs of relief over how Georgia has allowed the Court to escape gracefully from the responsibility it posed for itself in *Furman*”).

context limits the Court's *inclination* and *ability* to render countermajoritarian change.

A. *The Supreme Court's Limited Inclination to Render Countermajoritarian Change*

*Furman* and *Gregg* both demonstrate how extralegal context limits the Supreme Court's inclination for countermajoritarian decision-making, but they do so in different ways. *Furman* shows that even in its more countermajoritarian moments, the Court tends to move with the social and political currents of its time. On a superficial level, *Furman* was one of the Supreme Court's more countermajoritarian moments—it invalidated the death penalty statutes of thirty-nine states and the federal government, it saved the lives of over 600 condemned capital murderers and rapists, and it did so in the conservative, “law and order” times of 1972.<sup>368</sup> Scholars have viewed *Furman* as a countermajoritarian decision,<sup>369</sup> and the Justices involved viewed it that way too.<sup>370</sup> Indeed,

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368. See *supra* notes 19–24 and Part I.C.6 and accompanying text (discussing countermajoritarian aspects of *Furman* and “law and order” times of 1972, respectively).

369. See EPSTEIN & KOBYLKA, *supra* note 25, at 130–31 (discussing “unrelentingly hostile” context of *Furman*, and noting that “it is critical to note that the [NAACP’s] accomplishment came in spite of a generally unfavorable political environment”); MELTSNER, *supra* note 22, at 316 (noting that the Court in *Furman* “acted to limit the human capacity for destructiveness against the strong tide of the urge to punish”); Pilsby, *supra* note 199, at 3 (characterizing *Furman* as “remarkable considering the sanguinary temper of the time[s],” which “have scarcely provided a tranquil environment for the nurture of new and more polished ideals of reverence for human life”); *supra* note 199 and accompanying text (noting relative unpopularity of any stance that could be considered “soft on crime” in 1972). Given the “law and order” tenor of the times, even the NAACP expected to lose. See STEVENS, *supra* note 163, at 138–39.

370. See *supra* notes 25–27 and accompanying text. The closing lines of Justice Marshall’s *Furman* concurrence provide a striking example. Justice Marshall quite clearly thought of the case as one in which the Court’s bravery and willingness to act in a countermajoritarian fashion would be celebrated in the future, stating:

At a time in our history when the streets of the Nation’s cities inspire fear and despair, rather than pride and hope, it is difficult to maintain objectivity and concern for our fellow citizens. But, the measure of a country’s greatness is its ability to retain compassion in time of crisis. No nation in the recorded history of man has a greater tradition of revering justice and fair treatment for all its citizens in times of turmoil, confusion, and tension than ours. This is a country which stands tallest in troubled times, a country that clings to fundamental principles, cherishes its constitutional heritage, and rejects simple solutions that compromise the values that lie at the roots of our democratic system. In striking down capital punishment, this Court does not malign our system of government. On the contrary, it pays homage to it. Only in a free society could right triumph in difficult times, and could civilization record its magnificent advancement. In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute. We achieve “a major milestone in the long road up from barbarism” and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment.

the whole point of the Court's intervention in *Furman* was to protect the forlorn and forgotten few.<sup>371</sup>

Yet even *Furman* is more accurately understood as a decision that moved with, rather than against, the social and political currents of its time. When the Supreme Court decided *Furman*, the nation was in the midst of the strongest abolition movement it had ever seen.<sup>372</sup> Executions had ground to a halt, death sentences had become increasingly rare, and outside the South, the states themselves had begun to move towards abolition, mirroring a world-wide trend.<sup>373</sup> Even the nation's "law and order" mood in the late 1960s and early 1970s did little to dampen abolition sentiment. Public support for the death penalty was only fifty percent when *Furman* was decided, and political support for the practice was weak.<sup>374</sup> Thus, while the Supreme Court technically *did* take a countermajoritarian position in *Furman*, the circumstances in which it was willing to do so were extremely limited. The abolitionists held a minority position in 1972, but only slightly so—and they appeared to have momentum on their side.<sup>375</sup> Like *Brown v. Board of Education*,<sup>376</sup> *Roe v. Wade*,<sup>377</sup> and other seemingly heroic, countermajoritarian decisions, the Court in *Furman* decided an issue that split the nation roughly in half, protecting minority rights only in the context of substantial (and increasing) public support for that position.<sup>378</sup>

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*Furman v. Georgia*, 408 U.S. 238, 371 (1972) (Marshall, J., concurring).

371. The difference between the concurring Justices in *Furman* and their dissenting brethren was not over the merits of the death penalty, but rather whether the Court should override the states on a matter that traditionally had been a state prerogative. See *supra* notes 248–50 and accompanying text (noting that even the dissenters disliked the death penalty on the merits); *supra* note 351 (quoting passages from *Furman* dissenters regarding importance of judicial deference to state legislative decisions). The Court's role as protector of minority interests was the justification for overriding, rather than respecting, the states' position on this issue. See *supra* notes 25–27 and accompanying text (making point and quoting passages from concurring Justices' opinions).

372. See *supra* note 233 and accompanying text.

373. See *supra* Parts I.C.1–3 (discussing dwindling use of the death penalty and state and international trends toward abolition).

374. See *supra* Parts I.C.4–5 (discussing public opinion poll data and political opposition to the death penalty).

375. See *supra* text accompanying notes 234–38 (discussing increasing abolitionist sentiment in late 1960s and early 1970s prior to *Furman*).

376. 347 U.S. 483 (1954).

377. 410 U.S. 113 (1973).

378. See David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decision-making in the Post-New Deal Period*, 47 J. POL. 652, 655 (1985) (examining five cases in which the Supreme Court protected minority rights, including *Brown* and *Roe*, and concluding that the "Supreme Court's vindication of minority rights occurred in the context of increasing public support—and in

As Michael Klarman has persuasively argued, this is about as countermajoritarian as the Supreme Court gets.<sup>379</sup>

Given the true nature of *Furman*, one of the most intriguing aspects of the case is that the Justices saw themselves as playing a heroic, countermajoritarian role in the decision. This dichotomy is perhaps best exemplified by Justice Brennan's *Furman* concurrence. Justice Brennan viewed *Furman* as a countermajoritarian decision and justified it as such, explaining:

The right to be free of cruel and unusual punishments, like other guarantees of the Bill of Rights, "may not be submitted to vote; (it) depend(s) on the outcome of no elections." "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."<sup>380</sup>

At the same time, Justice Brennan was the one Justice who concluded that the death penalty was unconstitutional in part because it had been soundly rejected by contemporary society.<sup>381</sup> These views are not necessarily inconsistent,<sup>382</sup> but they highlight an inconsistency of sorts—the Justices in *Furman* only saw fit to play a countermajoritarian role once it *almost* no longer was.

Granted, *Furman* was somewhat belated. One would think that a Court susceptible to majoritarian influences would have struck the death penalty in the mid-1960s, when abolitionist fervor peaked.<sup>383</sup> Yet even *Furman*'s timing makes sense upon further reflection. The NAACP did

some cases even majority public support—for the policy position enunciated by the Court"); *id.* at 662 (noting that the Court's protection of minorities was supported by at least the trend of public opinion); see also MELTSNER, *supra* note 22, at 26 ("The power of the courts is great when accommodating the newly accepted or refuting the outworn . . .").

379. See Klarman, *supra* note 21, at 6 (arguing that the Supreme Court's decisions either impose a strong national consensus on relatively isolated outliers or resolve a genuinely divisive issue that splits the nation in half, neither of which are truly countermajoritarian acts).

380. *Furman v. Georgia*, 408 U.S. 238, 268–69 (1972) (Brennan, J., concurring) (internal citation omitted) (quoting *Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)). Justice Brennan went on to say that without the capacity to provide countermajoritarian protection, "the cruel and unusual punishments clause would become . . . little more than good advice." *Id.* at 269.

381. See *id.* at 291–300 (Brennan, J., concurring).

382. It may well be the case that legislative enactments do not accurately represent contemporary sentiment, and Justice Brennan's concurring opinion suggested this was his view. See *id.*

383. See *supra* Part I.C.5 (discussing nation's shift to "law and order" mood in the late 1960s and early 1970s); *supra* note 188 and accompanying text (noting the mid-1960s as peak of abolitionist sentiment).

not launch its massive litigation campaign against the death penalty until 1967<sup>384</sup>—and it was not until 1968 that the first significant opportunities to curb the death penalty came before the Supreme Court.<sup>385</sup> Before then, the Court may (or may not) have had a chance to decide the death penalty's constitutionality,<sup>386</sup> but it had little incentive to do so. In the mid-1960s, the Justices were plenty busy spending their political capital on other highly controversial decisions and dealing with massive resistance to *Brown*.<sup>387</sup> Because the legal challenges that culminated in *Furman* were themselves the result of the abolition movement,<sup>388</sup> it only makes sense that *Furman* followed, as much as it coincided with, the tide of abolition sentiment.

Moreover, the socio-political context of 1972 was at least more conducive to *Furman* than the late 1960s, when the first major death penalty challenges came before the Court. In 1968, crime was the nation's top domestic problem, and the Court was on the heels of a twelve-point spike in death penalty support.<sup>389</sup> It is hard to imagine the Justices issuing a *Furman*-type ruling in that sort of environment, particularly at the height of election year "law and order" politics. In 1972, by contrast, support for the death penalty had stabilized at fifty percent,<sup>390</sup> and only ten percent of the public considered crime to be the nation's most important domestic problem.<sup>391</sup> Again, the point is not that

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384. See *supra* notes 93 and accompanying text.

385. See, e.g., *Witherspoon v. Illinois*, 391 U.S. 510, 523 (1968) (holding that excluding veniremen for cause because they voice general objections to the death penalty creates a "hanging jury" and is constitutionally impermissible).

386. In 1963, Justice Goldberg wrote a dissent from denial of certiorari, raising the possibility that the death penalty could be considered cruel and unusual for rape because of the racial disparities in its imposition, but he raised that issue sua sponte; the defendant had challenged only the voluntariness of his confession. Chief Justice Warren reportedly told Justice Goldberg that "in view of the numerous attacks on the Court . . . it would be best to let the matter sleep for awhile." See EPSTEIN & KOBYLKA, *supra* note 25, at 42–44, 332 (discussing Justice Goldberg's dissent from denial of certiorari in *Rudolph v. Alabama*, its timing in relation to the backlash against *Brown*, and its role in getting the NAACP to start contemplating litigation); MELTSNER, *supra* note 22, at 33–34 (noting that even the Justices who thought the death penalty was constitutional did not like it, and thus did not want to give it express judicial approval).

387. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 978 (1964); see also *supra* note 297 (noting massive resistance to *Brown*).

388. See BEDAU, *supra* note 98, at 134–35 (discussing role of moral elites in abolition campaign and concluding that they are themselves a reflection of "deeper societal forces" moving in same direction).

389. See *supra* notes 201–02, 207 and accompanying text.

390. See *supra* notes 203–05 and accompanying text.

391. GEORGE H. GALLUP, 1 THE GALLUP POLL: PUBLIC OPINION 1972–1977, at 48 (1978).

*Furman* was inevitable, or even necessarily predictable, in 1972.<sup>392</sup> The point is that from a historical perspective, *Furman*'s timing made sense.<sup>393</sup>

Even then, *Furman* was a decision the Justices would rather not have had to make. In the past, the Court had ducked major death penalty rulings where it could.<sup>394</sup> And in the rulings it did issue, the Court tended to take a passive-aggressive approach to the death penalty, encumbering its application almost in hopes that the practice would die out on its own.<sup>395</sup> Indeed, the Court only agreed to decide the Eighth Amendment

392. See *supra* note 239 and accompanying text.

393. *Furman* made sense in other ways too. Behavioral social science studies have identified an extremely limited number of circumstances in which the Supreme Court has issued bold policy rulings. See MCCANN, *supra* note 308, at 69–76 (discussing circumstances). Remarkably, *Furman* exemplifies each one. The Justices in *Furman* expressed the values of a previously entrenched lawmaking majority against a newly ascendant one, typical behavior of the Court during a period of “critical realignment” in political regimes. See *id.* at 69 (discussing moments of “critical realignment” in national politics); *700 Await Court's Verdict*, N.Y. TIMES, Jan. 23, 1972, at E2 (“Former Attorney General Ramsey Clark, who opposed capital punishment, has been succeeded by John N. Mitchell, who approves it . . .”). The Justices in *Furman* also decided an issue that other prominent political actors—in this case, President Nixon—found too decisive and politically costly to address. See MCCANN, *supra* note 308, at 70 (discussing “displacement of conflict” theory); *supra* notes 211–13 and accompanying text (noting that President Nixon did not campaign on the death penalty or submit an amicus brief in *Furman*, and that the death penalty issue was conspicuously absent on the 1972 Republican platform). One can even view the Justices in *Furman* as suppressing an outlier practice that had become increasingly at odds with prevailing national (and in this case, international) norms. See MCCANN, *supra* note 308, at 69 (discussing the U.S. Supreme Court's role in enforcing dominant national norms on resistant state and local officials); *supra* notes 127–30 (discussing Southern exceptionalism on the death penalty). Suppressing regional outliers is what the Warren Court did best. See LUCAS A. POWE, JR., THE WARREN COURT IN AMERICAN POLITICS 490 (2000) (noting that “the dominant motif of the Warren Court is an assault on the South as a unique legal and cultural region”).

394. See, e.g., *Boykin v. Alabama*, 395 U.S. 238, 243–44 (1969) (sidestepping death penalty challenge while reversing conviction and death sentence on the basis of defendant's failure to understand the nature and consequences of guilty plea); *Delay on the Death Penalty*, TIME, June 15, 1970, at 60 (noting that the Supreme Court had thus far declined to rule on the death penalty's constitutionality and that recently the Court had “avoided even the questions it had earlier agreed to answer”); see also *supra* note 258 (discussing *Boykin* decision).

395. See, e.g., *Witherspoon v. Illinois*, 391 U.S. 510, 530 (1968) (holding constitutionally impermissible the exclusion of veniremen for cause merely because they voice general objections to the death penalty); *id.* at 532 (J. Black, dissenting) (“If this court is to hold capital punishment unconstitutional, it should do so forthrightly, not by making it impossible for the states to get juries that will enforce the death penalty.”); Elmer Gertz, *The Primitive Relic*, THE NATION, Jan. 11, 1971, at 48, 49 (citing *Witherspoon* decision in support of the view that the Court wants to make imposing the death penalty difficult without expressly invalidating it). The Texas Attorney General opined that *Witherspoon* “effectively does away with the death penalty in all States. It would be a very, very remote case where anyone would get death.” *An End to All Death Sentences?* U.S. NEWS & WORLD REP., June 17, 1968, at 15.

question in 1972 because governors across the country refused to conduct executions until it did.<sup>396</sup> With the entire nation holding its breath for the Supreme Court to decide “the ultimate question,” the Justices had little choice but to resolve the issue.<sup>397</sup> It was not a chore they relished. Like the public, the Justices were deeply conflicted over the death penalty and that conflict showed. It showed in *Furman*’s fractured opinions, it showed in the decision’s narrow, tentative holding,<sup>398</sup> and it showed in the oscillating positions of Justices Stewart and White, who provided the pivotal (and inconsistent) swing votes in *McGautha*, *Furman* and *Gregg*.<sup>399</sup> In short, despite rising abolition

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396. See *Bad News for the 648 on Death Row*, *supra* note 239, at E8 (noting that governors have thus far held off on executions, resulting in “strong pressures on the Court to finally decide if capital punishment is, indeed, ‘cruel and unusual’ punishment”); *Death Row Survives*, *supra* note 158, at 42 (arguing that until the U.S. Supreme Court decides whether the death penalty is cruel and unusual, “no state should act against the prisoners now on death row”); *The Question of Life or Death*, NEWSWEEK, May 17, 1971, at 30; *Signs of an End to “Death Row,”* *supra* note 105, at 37 (quoting various state governors as announcing that they will not resume executions until the Supreme Court decide whether the death penalty is “cruel and unusual”); *States Expected to Delay Any Action on Executions*, N.Y. TIMES, May 4, 1971, at 1 (reporting that “legal authorities expressed a reluctance to act until the Court rules on what they see as the central issue—the constitutionality of capital punishment itself”).

397. *The Ultimate Question*, *supra* note 23; see *supra* note 396. The fact that the Justices would have to rule against the death penalty to avoid a bloodbath also played a role in the decision. Justice Stewart believed that it was unacceptable for over 600 people to die based on one vote and therefore decided *ex ante* that if there were four other votes to reverse in *Furman*, he would provide the fifth. See WOODWARD & ARMSTRONG, *supra* note 153, at 209; see also *id.* at 207 (noting that Justice Black had predicted that the Court would eventually invalidate the death penalty, though he believed it was constitutional, just because the Court would not want “that much blood on its hands”). Admittedly, the same pressure did not sway the Court in *Gregg*, although it did cause Justice Powell to ponder the possibility of a mass amnesty in the case. See *id.* at 432; *supra* note 313 (noting over 460 people on death row in 1976).

398. Only two of the Justices in *Furman*’s majority gave the abolitionists what they wanted; the other three took smaller steps, refusing to strike the penalty but agreeing to strike its application, which few found acceptable in 1972. See *supra* notes 158–60 (discussing complaints of racial discrimination in the imposition of death); GORECKI, *supra* note 149, at 10–11 (characterizing *Furman* as a narrow, compromised decision that did not resolve the validity of capital punishment but did save the lives of those on death row). This may be another reason why the Justices did not use “evolving standards” to justify their ruling; it justified nothing short of complete abolition, and therefore went further than three of *Furman*’s five Justices wanted to go. See WOODWARD & ARMSTRONG, *supra* note 153, at 215–16 (discussing desire of Justices Stewart and White to reverse without striking the death penalty altogether).

399. *Supra* notes 253 and 354 and accompanying text (noting Justices Stewart and White’s change of position between *McGautha* and *Furman*, and *Furman* and *Gregg*, respectively). In the aftermath of the *Gregg* rulings, Justice Stewart and his plurality almost changed their minds again. See *Florida and Texas Cases Ensnarl Court’s Rulings on Death Penalty*, N.Y. TIMES, Dec. 1, 1976, at 24. In a follow-up appeal regarding the Florida statute upheld in *Gregg*, Justice Stewart reportedly became angry at the state’s poor procedural protections, snapping: “This Court upheld

sentiment at the time, *Furman* was a decision the Justices were *barely* able to make. *Furman* is anything but the bold, countermajoritarian decision it appears at first blush. Rather than proving the Supreme Court's willingness to withstand majoritarian influences, *Furman* teaches the opposite—that even when facing a weak, arguably nonexistent majority, the Court has little inclination to act in a countermajoritarian fashion.

That said, any doubts about the Supreme Court's limited inclination for countermajoritarian decision-making in *Furman* were surely removed four years later in *Gregg*. Faced with a genuinely hostile socio-political context, the Court in *Gregg* turned its back on *Furman*, reiterating *Furman*'s lesson even as it rejected its constitutional command. In theory, the Supreme Court could have stood its ground. Discrimination and arbitrariness in the imposition of death were wrong in 1972—and in 1976, they were still wrong. In reality, however, the Justices were under too much pressure to do anything other than retreat. Thirty-five states had reenacted death penalty statutes, public opinion favored the punishment two-to-one, and the nation's chief executive was asking the Court to overrule its 1972 decision.<sup>400</sup> *Gregg v. Georgia* clearly provided the Supreme Court an opportunity to play countermajoritarian hero. It chose not to, validating Robert McCloskey's observation over a decade earlier: "it is hard to find a single historical instance when the Court has stood firm for very long against a really clear wave of public demand."<sup>401</sup> Like the drum major who looks back only to see that the band has turned, the Supreme Court breaks path in the face of strong opposition only to reassert its leadership position in front of whatever direction the nation happens to be facing. The Court is willing to lead the country, but only where it is poised to go.

In sum, *Furman* and *Gregg* both illustrate the Supreme Court's limited inclination for countermajoritarian decision-making, but they do so in different ways. In *Furman*, the ruling was countermajoritarian on a superficial level, but supported by strong majoritarian undercurrents that

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the Florida statute on the representation of the State of Florida and decisions by its supreme court that this was open and above the board proceeding. And this case gets here and it's apparent that it isn't." *See id.* He reportedly continued by threatening, "perhaps as many as three members of the Court" could "change their minds" based on the facts presented in the case. *See id.*; Leslie Oelsner, *Supreme Court and Death Penalty: Uncertainty Heightened by New Rulings*, N.Y. TIMES, Dec. 6, 1976, at 22 (reporting problems with Florida practice and relaying comments).

400. *See supra* Part II.A (discussing backlash to *Furman*).

401. ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 224 (1960).



gave the Justices the room and inclination to rule as they did. In *Gregg*, the Justices had none of that room or inclination, providing yet another reminder of why the judiciary remains “the least dangerous branch.”<sup>402</sup> Whether reflecting socio-political climate or reacting to it, both *Furman* and *Gregg* illustrate the Supreme Court’s limited *inclination* for countermajoritarian change.

*B. The Supreme Court’s Limited Ability to Render Countermajoritarian Change*

*Furman v. Georgia* also illustrates the Supreme Court’s limited *ability* to effectuate countermajoritarian change. The Court can be an agent of change, but when it does more than validate an existing consensus, it risks halting—even reversing—change that is already in progress.<sup>403</sup> As *Furman* illustrates, that risk is especially high when the Court is splintered, and when it is ruling on an issue that the public cares about and is accustomed to deciding for itself. Before *Furman*, the nation appeared to be moving towards abolition on its own; in fact, the abolition of capital punishment was widely considered to be just a matter of time.<sup>404</sup> That changed when the Supreme Court intervened, inspiring one of the most dramatic backlashes the nation had ever seen.<sup>405</sup> Ironically, *Furman* galvanized death penalty supporters into action and brought the abolition movement to a screeching halt,<sup>406</sup> causing even the NAACP to wonder whether winning the case was good or bad.<sup>407</sup> Like other highly salient, controversial decisions, *Furman* ultimately retarded the very cause that the Justices sought to advance, proving true the old adage that an activist court is a conservative’s best friend.<sup>408</sup>

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402. See THE FEDERALIST NO. 78, at 425 (Alexander Hamilton) (J.R. Pole ed., 2005); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

403. Gerald N. Rosenberg makes this very point with his seminal work, THE HOLLOW HOPE: CAN COURTS BRING ABOUT CHANGE? (1991).

404. See *supra* Part I.C; *supra* notes 234–38 and accompanying text.

405. See *supra* Part II.A (discussing backlash to *Furman*).

406. See Bohm, *supra* note 22, at 31 (noting that *Furman* had a decisive effect on public support for the death penalty and that “death penalty support has been increasing steadily ever since”).

407. MELTSNER, *supra* note 22, at 307.

408. See BANNER, *supra* note 77, at 269 (“*Furman*, like other landmark cases, had the effect of calling its opponents to action.”); Kirchmeier, *supra* note 6, at 75 (noting that *Furman* created a backlash that practically destroyed the abolition movement and that the decision to bypass public opinion and seek reform in courts may have brought the movement to a premature end); Klarman, *supra* note 19, at 452–82 (discussing political backlash ignited by the Supreme Court’s decisions on

In fairness, perhaps rising crime rates would have led to the return of strong death penalty support anyway. But they had not had that effect before *Furman*, so perhaps not. We will never know whether *Furman* merely hastened the return of the death penalty's popularity or brought it about entirely. What we do know is that the Justices' intervention had an impact, but not the one they had in mind. In light of the Supreme Court's limited ability to effectuate even slightly countermajoritarian change, one cannot help but wonder whether the abolition movement would have been better off pursuing more moderate reform (like the moratorium bill pending when *Furman* was decided) through the other, more politically accountable branches instead.<sup>409</sup>

## CONCLUSION

For the first time in a long time, the Supreme Court's most important death penalty decisions have all gone the defendant's way. One gets the sneaking suspicion that the Court's newfound willingness to protect capital defendants is just a reflection of popular support for death penalty reform and will dissipate when needed the most—in less hospitable times. At first glance, the Supreme Court's 1972 decision in *Furman* allows for optimism, seemingly exemplifying the Court's willingness to play a heroic, countermajoritarian role in the death penalty context. From a historical perspective, however, that view of the decision is inaccurate. If anything, *Furman*, *Gregg*, and the events that transpired between them showcase a fundamental flaw in the Supreme Court's role as protector of minority rights—its limited inclination and ability to render countermajoritarian change.

Both *Furman* and *Gregg* illustrate the Supreme Court's inherent limitations, but they do so in different ways. *Furman* shows that even in its more countermajoritarian moments, the Court tends to reflect the social and political movements of its time. *Gregg* shows that when faced with a genuinely hostile socio-political context, the Court tends to back down, deferring instead to popular sentiment. Taken together, both decisions reveal a Supreme Court that is unlikely to intervene on behalf of unpopular minorities until a substantial (and growing) segment of

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racial and sex equality). See generally James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 BYU L. REV. 1037, 1134 (1993) (“One of the ironies of the modern American system is that one of the political conservatives’ best friends is an activist, liberal court.”).

409. See *supra* text accompanying notes 220–21 (discussing moratorium bill).

society supports that intervention. Even then, *Furman* reminds us that the Court's "help" may do more harm than good, retarding the very cause that the Justices are trying to promote.

Of course, the lessons of *Furman* and its aftermath still leave the question of how the majoritarian influence of extralegal context interacts with the Supreme Court's majoritarian Eighth Amendment doctrine. Does doctrine drive the Supreme Court's "evolving standards" decision-making, or is there still room for extralegal influences? If extralegal influences still play a role, can those influences shape the development of doctrine itself? These are important and as yet unanswered questions that I leave for another day.<sup>410</sup> For now, it is enough to know that even without the influence of majoritarian doctrine, extralegal context places intrinsic limits on the Supreme Court's inclination and ability to protect.

We tend to see the Supreme Court as a countermajoritarian hero, our white knight ready and able to protect unpopular, politically powerless minorities who cannot protect themselves.<sup>411</sup> Yet this image of the Court is ahistoric. In the death penalty context and beyond, the Court's inclination to protect is profoundly influenced by the social and political setting in which it operates. We ought to recognize that fact and rethink our reliance on the Supreme Court to protect unpopular minorities from the tyrannical potential of majority rule.

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410. See Corinna Barrett Lain, *Deciding Death* (forthcoming 2007, on file with author).

411. Indeed, the Court's countermajoritarian image continues to inform most justifications for judicial review. See Barry Friedman, *The Politics of Judicial Review*, 84 TEXAS L. REV. 257, 279 ("Yet most extant normative theories of judicial review rest on the capacity of judges to act in a manner contrary to political or popular preferences. Love it or hate it, the countermajoritarian image of the Supreme Court endures."). John Hart Ely is probably the most famous proponent of this view. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980) (arguing that judicial review is not inconsistent with democratic rule because it protects minorities from tyranny of the majority).