

Furman, after Four Decades

J. Thomas Sullivan

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ABSTRACT

Problems of racial discrimination in the imposition of capital sentences, disclosure of misconduct by prosecutors and police, inconsistency in the quality of defense afforded capital defendants, exoneration of death row inmates due to newly available DNA testing, and, most recently, controversies surrounding the potential for cruelty in the execution process itself continue to complicate views about the morality, legality, and practicality of reliance on capital punishment to address even the most heinous of homicide offenses. Despite repeated efforts by the Supreme Court to craft a capital sentencing framework that ensures that death sentences be imposed fairly in light of the offenses committed and character of the offenders, perhaps the most profound questioning about capital punishment policy has come from within the Court itself. Capital punishment remains a difficult problem both in terms of constitutional criminal procedure and sound public policy. It will likely remain so for some time to come based on the Court's unwavering commitment to its implicit holding in *Furman v. Georgia* that execution does not constitute cruel and unusual punishment under the Eighth Amendment.

AUTHOR

Professor of Law, University of Arkansas at Little Rock School of Law; Founding Editor, *The Journal of Appellate Practice and Process*.

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I. INTRODUCTION

The forty-year history of the Supreme Court's capital punishment jurisprudence, set in place by its decision in *Furman v. Georgia*,¹ has been marked by a determined intervention in the administration of the death penalty. The Court's continuing interest in reviewing death sentences has, in a very real sense, touched on virtually every aspect of the criminal process² and has reshaped concepts underlying the very heart of the capital punishment debate.³ In *Furman*, the Supreme Court essentially voided all existing state capital punishment statutes only a year after it had generally upheld the death penalty in the companion

¹ *Furman v. Georgia*, 408 U.S. 238 (1972).

² *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419 (1995) (holding that prosecutors have a duty to disclose evidence favorable to the defense); *Holmes v. South Carolina*, 547 U.S. 319 (2006) (discussing the rules governing the admissibility of evidence indicating another's guilt); *Ake v. Oklahoma*, 470 U.S. 68 (1985) (establishing an indigent's right to assistance of forensic expert); *Arizona v. Fulminante*, 499 U.S. 279 (1991) (establishing that the admission of a coerced confession as "trial error" is subject to the harmless error test); *Turner v. Murray*, 476 U.S. 28 (1986) (establishing a right to *voir dire* jurors as to racial bias in interracial capital case); *Bradshaw v. Stumpf*, 545 U.S. 175 (2005) (remanding for consideration of due process issues due to prosecutor's use of inconsistent theories in pursuing death penalty against co-defendant in severed trial); *Rompilla v. Beard*, 545 U.S. 374 (2005) (overturning death penalty where counsel failed to examine prosecutor's file on defendant's prior conviction admitted at capital sentencing hearing); *Deck v. Missouri*, 544 U.S. 622 (2005) (holding that it was improper to shackle the defendant at capital sentencing hearing).

³ For instance, one of the critical questions regarding the constitutionally acceptable use of capital sentences has involved the imposition of the death penalty for rape. As death was an acceptable alternative penalty for rape and other serious felonies at the common law, it informed considerations of the scope of capital punishment in light of the Eighth Amendment's proscription of "cruel and unusual" punishment. *See Coker v. Georgia*, 433 U.S. 584, 614 (1977) (Powell, J., concurring and dissenting). Nonetheless, the Court held early on in the post-*Furman* capital punishment revival that imposition of a death sentence for rape of an adult woman offended proportionality protections. *See id.* at 600. The question of constitutional prohibition against the imposition of the death penalty for the rape of a child, even when State statutory criteria for determining when the capital sentence may be appropriate exists, was addressed much later in *Kennedy v. Louisiana*, with the majority holding that the imposition of death where life was not taken was impermissible. 554 U.S. 407, 421 (2008).

cases of *McGautha v. California* and *Crampton v. Ohio*.⁴ In these cases, the majority, in an opinion written by Justice John Marshall Harlan during his last term on the Court, rejected an attack based upon the unguided exercise of discretion in imposing a death sentence by the capital sentencing authority⁵ whether jury or judge.⁶ The changing view, reflected in the rejection of the Georgia⁷ and Texas⁸ capital murder statutes by the *Furman* Court, corresponded with a dramatic and historic change in the Court's composition,⁹ as the four *Furman*

⁴ 402 U.S. 183 (1971), *reh'g denied*, *McGautha v. California*, 406 U.S. 978 (1972), *but vacated in part and reh'g granted*, *Crampton v. Ohio*, 408 U.S. 941 (1972) (remanding to the Supreme Court of Ohio insofar as the imposition of the death penalty was undisturbed, to be disposed of in light of *Furman*).

⁵ The majority upheld the California process in which the jury exercised its discretion to impose a capital sentence without statutory criteria guiding its exercise of discretion. *McGautha*, 402 U.S. at 207–08. While finding no federal constitutional requirement for the employment of criteria by which to channel the sentencing jury's discretion, the majority noted the proposed capital sentencing approach taken in the Model Penal Code which provides specific direction to capital juries regarding the circumstances under which imposing the death penalty is warranted. *Id.* at 221–25. The companion case to *McGautha*, *Crampton v. Ohio*, questioned whether the unitary trial in which the jury considered the questions of guilt and punishment in a single proceeding violated due process. *Id.* at 192.

⁶ Justices Douglas, Brennan, and Marshall dissented in both cases. *Id.* at 226. In Justice Douglas' dissent, in which Justices Brennan and Marshall concurred, he argued that the unitary trial system in place in Ohio unfairly compromised Crampton's right to testify in support of his punishment case by subjecting him to cross-examination on matters that would otherwise not have been heard by the jury on the question of his guilt. *Id.* at 239 (“That ‘undeniable tension’ between two constitutional rights . . . should lead to a reversal here. For the unitary trial or single-verdict trial in practical effect allows the right to be heard on the issue of punishment only by surrendering the protection of the Self-Incrimination Clause of the Fifth Amendment.”). In Justice Brennan's dissent, in which Justices Douglas and Marshall joined, he argued that the capital sentencing procedures used in both California and Ohio violated due process by failing to provide standards or criteria to guide the discretion of the sentencing authority in determining whether to impose the death sentence. *Id.* at 248, 251–52.

⁷ Furman was convicted of murder and sentenced to death. *Furman v. Georgia*, 408 U.S. 238, 252 (1972). In a companion case, *Jackson v. Georgia*, the petitioner was convicted of rape under Georgia law and sentenced to death. *Id.*

⁸ *Id.* at 239 (discussing the Texas statute in *Branch v. Texas*, a companion case to *Furman*, which authorized the death penalty for rape).

⁹ The dramatic shift in the Justices' views on capital punishment evident in the *McGautha/Furman* sequence is not adequately explained by a changing

dissenters—Warren Burger, Harry Blackmun, Lewis Powell, and William Rehnquist—had all been recent appointees of President Richard Nixon.¹⁰ During the tenure of Chief Justice Burger the Court both retreated from¹¹ and expanded upon the well-known progressive posture set by the Warren Court in the field of criminal procedure.¹² The Warren Court’s posture reflected concerns that violations of civil rights of African-Americans were often most readily exposed in the context of the criminal justice system.¹³

II. THE CHANGING LANDSCAPE OF CAPITAL PUNISHMENT

The rejection of existing capital sentencing schemes by the five-vote plurality in *Furman* did not serve the ultimate goal of abolitionists. Instead, within four years, newly drafted and adopted

composition of the Court however, since Justices Brennan, Stewart, White, and Marshall, members of the *Furman* plurality, all served on the Court in both cases. For discussions of the unusual shift in the Court’s position on capital punishment over consecutive terms, see Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 43–45 (2007), and Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1754–62 (1987).

¹⁰ Maxwell L. Stearns, *Standing at the Crossroads: The Roberts Court in Historical Perspective*, 83 NOTRE DAME L. REV. 875, 896 (2008) (“While President Nixon’s four Supreme Court appointments did not emerge as consistently conservative picks, on balance, they moved the Court in a more conservative direction.”).

¹¹ The Court’s conservative turn during the tenure of Chief Justice Burger prompted publication of one of the most influential law review articles, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977), in which Justice Brennan argued that litigants should rely on state constitutional protections in order to avoid retrenchment on federal constitutional protections by conservative elements within the Court. *See id.* at 501.

¹² While Chief Justice Burger joined much of the retreat from the Warren Court initiatives, he also occasionally advanced them in a significant way. For example, in *Abney v. United States*, 431 U.S. 651 (1977), he wrote the majority opinion recognizing the right of an accused to interlocutory appeal for review of a prior jeopardy claim to avoid “the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense.” *Id.* at 661.

¹³ *E.g.*, *Graham v. Collins*, 506 U.S. 461, 478–479 (1993) (Thomas, J., concurring) (“It is important to recall what motivated Members of this Court at the genesis of our modern capital punishment case law. *Furman v. Georgia* was decided in an atmosphere suffused with concern about race bias in the administration of the death penalty—particularly in Southern States . . .”).

capital punishment statutes were before the Court.¹⁴ These post-*Furman* statutes were designed to address the concerns of Justices Potter Stewart and Byron White, who had joined in the *Furman* judgment and focused on the infrequency and apparent random use of the death penalty, rather than holding that the death penalty itself could not be constitutionally imposed.¹⁵

Though the Court rejected many mandatory capital sentencing statutes, which were often the result of states' legislative efforts to comply with *Furman*,¹⁶ the Court upheld capital sentencing schemes in the 1976 decisions in *Gregg v. Georgia*,¹⁷ *Proffitt v. Florida*,¹⁸ and *Jurek v. Texas*.¹⁹ These schemes in these cases limited the range of homicides for which a death sentence could be imposed, and required consideration of the offender's character and individual circumstances when determining whether a death sentence was appropriate. The approval of state capital sentencing schemes that allowed sentencing authorities to impose death only after considering mitigating factors served to justify the imposition of non-capital sentences when balanced against factors supporting death and led to a series of decisions requiring the broad admissibility of mitigating circumstances evidence.

The Court has consistently upheld the right of capital defendants to offer evidence of circumstances that mitigates their culpability or that

¹⁴ See cases cited *infra* notes 17–20.

¹⁵ *Furman v. Georgia*, 408 U.S. 238, 306, 309 (1972) (Stewart, J., concurring) (“[T]hese sentences are ‘unusual’ in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare.”); *id.* at 311–12 (White, J., concurring) (“executed defendants are finally and completely incapacitated from again committing rape or murder or any other crime. But when imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied.”).

¹⁶ *E.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 333 (1976); *Roberts v. Louisiana*, 431 U.S. 633, 637–38 (1977) (holding mandatory death sentence for murder of police officer unconstitutional); *Summer v. Shuman*, 483 U.S. 66, 82–85 (1987) (holding unconstitutional a Nevada statute imposing mandatory death sentence for an inmate who commits murder while under life sentence); *Williams v. Oklahoma*, 428 U.S. 907 (1976) (vacating judgment and remanding for reconsideration in light of *Woodson*).

¹⁷ 428 U.S. 153 (1976).

¹⁸ 428 U.S. 242 (1976).

¹⁹ 428 U.S. 262 (1976).

warrants a sentence other than death.²⁰ For those defendants for whom mitigating circumstances result in rejection of capital punishment, the individualized sentencing considerations imposed in the Court's jurisprudence is undeniably favorable. But over time the Court's micromanagement of state capital sentencing procedures to ensure consideration of mitigating circumstances evidence in deciding punishment necessarily led to a rather curious consistency problem, as noted by Justice Antonin Scalia, in his concurring opinion in *Walton v. Arizona*²¹:

Since the individualized determination is a unitary one (does this defendant deserve death for this crime?) once one says each sentencer must be able to answer "no" for whatever reason it deems morally sufficient (and indeed, for whatever reason any one of 12 jurors deems morally sufficient), it becomes impossible to claim that the Constitution requires consistency and rationality among sentencing determinations to be preserved by strictly limiting the reasons for which each sentencer can say "yes." In fact, randomness and "freakishness" are even more evident in a system that requires aggravating factors to be found in great detail, since it permits sentencers to accord different treatment, for whatever mitigating reasons they wish, not only to two different

²⁰ *Lockett v. Ohio*, 438 U.S. 586, 607–08 (1978) (holding unconstitutional a statute which permitted the sentencer to consider only those mitigating factors enumerated in the statute); *Eddings v. Oklahoma*, 455 U.S. 104, 114–17 (1982) (holding that capital defendant must be permitted to offer evidence relating to childhood circumstances which could reasonably influence emotional development); *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (ruling that the defendant's record of behavior while previously imprisoned or jailed pending capital trial admissible); *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (holding that evidence of mental impairment due to developmental disabilities is admissible as mitigating factor in capital sentencing, but execution of mentally impaired was not per se cruel and unusual). *Penry* was eventually overruled on substance in *Atkins v. Virginia* when the Court held that the Eighth Amendment prohibits the execution of the mentally retarded, leaving open the degree of impairment that must be shown to avoid the imposition of the death penalty. 536 U.S. 304, 318–21 (2002). Instances of less significant impairment would still require consideration as mitigating circumstances.

²¹ 497 U.S. 639, 656 (1990) (Scalia, J., concurring), *overruled by* *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (holding that after a determination of guilt has been made, a judge's singular determination of the presence or absence of aggravating factors in death penalty sentencing violated the Sixth Amendment right to a jury in capital prosecutions). Justice Scalia's history of the Court's *Furman* jurisprudence is far more comprehensive than attempted here. See *Walton*, 497 U.S. at 656–76.

murderers, but to two murderers whose crimes have been found to be of similar gravity.²²

Justice Scalia correctly identifies a persistent problem with the Court's capital sentencing jurisprudence: the virtually unlimited reliance on mitigating circumstances, or evidence suggesting that mitigation is warranted, permits some capital defendants whose offenses mirror those committed by others similarly situated, to escape the death penalty based upon factors that lead capital jurors to reject death. For Justice Scalia, the Court's post-*Furman* jurisprudence has resulted in an essentially irrational approach to solving the problems identified by Justices Stewart and White in *Furman*.

The statistics regarding the actual use of the death penalty, particularly in terms of executions, bears out the perception that after some thirty-five years of Court-directed innovation, the landscape of capital punishment is much the same as it was when *Furman* was decided in 1972.²³ The execution record for the thirty-three states that impose capital punishment, the federal government, and the United States military, collectively the thirty-five jurisdictions in which a death sentence is an authorized punishment for murder, shows just how sporadic and freakish capital sentencing remains.²⁴ For the past several years, executions nationally are running at about fifty per year.²⁵ Since *Furman*, the greatest total number of executions in any year was ninety-eight in 1999.²⁶

The overall problem implicit in the Court's direct and indirect architecture developed to limit the number of homicides found to warrant death sentences quite simply, is that the universe of eligible offenses and offenders has limited both the potential and actual imposition of capital sentences. In short, the Court's process of refining capital sentencing has, at its threshold, imposed significant restrictions on the use of capital sentencing, which in turn has caused its use to be more sporadic and, perhaps, more freakish than would have proved acceptable to the aims of Justices Stewart²⁷ and White²⁸ in their *Furman* concurring opinions.²⁹

²² *Id.* at 666–67.

²³ See DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY (2012), available at <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>.

²⁴ *Id.*

²⁵ *Id.* at 1 (46 in 2010, 43 in 2011, and 43 in 2012).

²⁶ *Id.*

²⁷ *Furman v. Georgia*, 408 U.S. 238, 306–10 (1972) (Stewart, J., concurring).

III. JUDICIAL RETROSPECTION: THE FLAWED SYSTEM OF CAPITAL PUNISHMENT

Whether Justices Stewart and White would today rethink their positions in post-*Furman* cases upholding state death sentencing schemes, in light of their experience, is arguable. However, two *Furman* dissenters ultimately repudiated their support for capital sentencing. Justice Lewis Powell, who had argued against Justice William O. Douglas' *Furman* conclusion that capital punishment could not be employed without misuse directed at minorities,³⁰ wrote the opinion in *McCleskey v. Kemp*.³¹ There, the majority rejected an attack on Georgia's capital punishment system based on statistical evidence that showed that death sentences were more frequently imposed on black capital defendants and an even higher percentage were imposed in cases where the victims were white.³² The Court held that the apparent disparities reflected neither an arbitrary nor a racially discriminatory application of the penalty, as the death sentences imposed in each case were based upon evidence developed in support of aggravating circumstances.³³

After leaving the Court, Justice Powell reversed his thinking on the death penalty and stated, in reflection, that he regretted his vote in *McCleskey v. Kemp*.³⁴ Later, Justice Blackmun, who had voted to uphold the death penalty in *Furman*,³⁵ while disclaiming his personal support for capital punishment,³⁶ finally came to reject the use of death

²⁸ *Id.* at 310–14 (White, J. concurring).

²⁹ There is nothing original in this analysis, of course. *See, e.g.*, Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1 (1995) (criticizing the Court's capital punishment jurisprudence). It seems highly unlikely that the authors would not find developments since their article's publication to have compounded the problems they identified.

³⁰ *Furman*, 408 U.S. at 448–59 (Powell, J., dissenting); *id.* at 245–57 (Douglas, J., concurring).

³¹ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

³² *Id.* at 286–92.

³³ *Id.*

³⁴ *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 451 (2001); Mark A. Graber, *Judicial Recantation*, 45 SYRACUSE L. REV. 807, 807 (1994) (“Had Justice Powell seen the light while on the bench, the Supreme Court would have dealt a crippling blow to the death penalty in *McCleskey*.”).

³⁵ *Furman*, 408 U.S. at 405.

³⁶ *Id.* at 405–06, 414.

in his dissent from the denial of certiorari in *Callins v. Collins*.³⁷ Discussing *McCleskey v. Kemp*, he observed:

Despite this staggering evidence of racial prejudice infecting Georgia's capital sentencing scheme, the majority turned its back on McCleskey's claims, apparently troubled by the fact that Georgia had instituted more procedural and substantive safeguards than most other States since *Furman*, but was still unable to stamp out the virus of racism.³⁸

Concluding that he could no longer attempt to find a rational means for the fair enforcement of capital punishment, Justice Blackmun authored a dramatic reversal from his position in *Furman*, concluding with this simple indictment of the system of capital punishment: "The basic question—does the system accurately and consistently determine which defendants 'deserve' to die?—cannot be answered in the affirmative."³⁹

The defections of Justices Powell and Blackmun from support for the continued use of the death penalty offered dramatic responses from judges charged with enforcing constitutional protections and applying them to the problems posed by the varied, troubling contexts in which relief is denied and executions proceed. Had they voted with the plurality in *Furman*, the past thirty-five plus years of capital litigation might have been avoided, as their votes would have apparently provided five solid votes against the death penalty. Instead, Justice Blackmun took a position consistently examining capital cases for procedural error and unfairness. In doing so, he contributed to a middle road on the death penalty within the Court that helped shape the constitutional requirements for capital sentencing, while never repudiating the death penalty as an acceptable punishment under the Eighth Amendment.⁴⁰

³⁷ *Callins v. Collins*, 510 U.S. 1141, 1143–59 (1994) (Blackmun, J., dissenting).

³⁸ *Id.* at 1154.

³⁹ *Id.* at 1145.

⁴⁰ See Carol S. Steiker & Jordan M. Steiker, *No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code*, 89 TEX. L. REV. 353, 354 (2010) (discussing the American Law Institute's decision to withdraw provisions relating to capital sentencing from the Model Penal Code due to its perception of the "intractable and structural obstacles to ensuring a minimally adequate system for administering capital punishment" in noting Justice Blackmun's ultimate conclusion rejecting capital punishment as an acceptable sentencing option in light of his experience on the Court).

The reconsiderations of Justices Powell and Blackmun, *Furman* dissenters, have been joined by Justices Sandra Day O'Connor and John Paul Stevens, both of whom questioned the fairness of the death penalty without formally withdrawing support while still members of the Court. Justice O'Connor's delivered her initial criticism to a group of Minnesota women lawyers in Minneapolis in July 2001, raising the questions about the likelihood of executions of innocent defendants and inadequate representation in capital cases.⁴¹ She left the Court, however, without formally changing her position on the death penalty.

Justice Stevens delivered his criticism of the death penalty in his remarks to the American Bar Association at its annual meeting in Chicago on August 6, 2005.⁴² He noted "serious flaws" in the implementation of capital punishment, suggesting concern over the appointment of a new Justice following the resignation of Justice O'Connor.⁴³ He offered extensive criticism of continuing reliance on capital punishment in *Baze v. Rees*,⁴⁴ including its potential for disparate impact based upon the offender's race noting, "A third significant concern is the risk of discriminatory application of the death penalty. While that risk has been dramatically reduced, the Court has allowed it to continue to play an unacceptable role in capital cases."⁴⁵ Assessing the weakening logical and historical support for the death penalty, he concluded:

⁴¹ See Alan Berlow, *A Supreme Court Shocker*, SALON.COM (July 4, 2001, 10:14 PM), <http://www.salon.com/2001/07/04/oconnor>. Justice O'Connor's address prompted an editorial in the *New York Times* that observed that her criticism suggested that she might be open to a reconsideration of the fundamental fairness of capital punishment, particularly in light of her disclosure that ninety death row inmates had been exonerated since 1973, including six the preceding year. Op-Ed., *Justice O'Connor on Executions*, N.Y. TIMES, July 5, 2001, at A16, <http://www.nytimes.com/2001/07/05/opinion/justice-o-connor-on-executions.html>. See also Editorial, *Second Thoughts*, WASHINGTON POST, July 4, 2001, at A18. For a different, and highly critical view of Justice O'Connor's expressions, see Edward Lazarus, *Justice O'Connor's Death Penalty Regrets— and Responsibility*, FINDLAW (July 10, 2001) <http://writ.news.findlaw.com/lazarus/20010710.html> (criticizing O'Connor's decisions upholding limitations on federal habeas review of state court capital punishment decisions).

⁴² Gina Holland, *Justice Stevens Criticizes Death Penalty*, SEATTLE POST-INTELLIGENCER, (Aug. 7, 2005), <http://www.fadp.org/news/SPI-20050808.htm>.

⁴³ *Id.*

⁴⁴ 553 U.S. 35, 72, 84–86 (2008) (Stevens, J., concurring in the judgement).

⁴⁵ *Id.* at 85.

In sum, just as Justice White ultimately based his conclusion in *Furman* on his extensive exposure to countless cases for which death is the authorized penalty, I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents “the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment.”⁴⁶

Nevertheless, Justice Stevens concurred in the judgment rather than rejecting capital sentencing as a matter of Eighth or Fourteenth Amendment dictate as Justices Brennan, Marshall, and Douglas did in *Furman*, as Justice Blackmun did in *Callins v. Collins*, or as Justice Powell did after his retirement.⁴⁷

IV. REDRAWING THE MAP OF CAPITAL SENTENCING: STATE LEGISLATIVE ACTION

The problems in administering capital sentencing, including its fiscal costs, have prompted a number of States to abolish the death penalty despite its continuing viability as a constitutionally acceptable punishment option for the most heinous of offenses.⁴⁸ New Jersey,⁴⁹

⁴⁶ *Id.* at 86 (citing *Furman v. Georgia*, 408 U.S. 238, 312 (White, J., concurring)).

⁴⁷ For scholarly assessments of Justice Stevens’ evolving position on capital punishment, see Elisabeth Semel, *Reflections on Justice John Paul Stevens’s Concurring Opinion in Baze v. Rees*, 43 U.C. DAVIS L. REV. 783 (2010), and James S. Liebman & Lawrence C. Marshall, *Less is Better: Justice Stevens and the Narrowed Death Penalty*, 74 FORDHAM L. REV. 1607 (2006).

⁴⁸ DEATH PENALTY INFO. CTR, THE DEATH PENALTY IN 2009: YEAR END REPORT (Dec. 2009), available at <http://www.deathpenaltyinfo.org/documents/2009YearEndReport.pdf>.

⁴⁹ N.J. STAT. ANN. § 2C:11-3 (West 2007) (repealing death penalty sentencing provision in homicide statute). In *State v. Fortin*, 969 A.2d 1133, 1139-41 (N.J. 2009), the Supreme Court of New Jersey held that a defendant, convicted of capital murder, could be sentenced under the life without parole mandatory sentence authorized under the amended statute, but only if the State could prove that aggravating circumstances outweighed mitigating circumstances. Such a finding would have resulted in a death sentence under the former provision, whereas under the amended statute, the court is able to impose the less onerous sentence of life imprisonment. See Act of Dec. 17, 2007, ch. 204, sec. 1, 2007 N.J. Laws 1427 (codified at N.J. Stat. Ann. § 2C:11-3 (West Supp. 2008)). If the State failed to meet its burden however, the defendant would be subject to a life sentence with a possible thirty-year parole disqualifier, which remains available under the former statute. *Fortin*, 969 A.2d at 1134. In this way, the majority

New Mexico,⁵⁰ Illinois,⁵¹ and Connecticut⁵² have legislatively rejected further reliance on capital sentences to address murder, while in other states significant legislative debate has failed to result in repeal of

sought to avoid the *ex post facto* claim resting on the imposition of a retroactive sentence voided by intervening legislative action, an approach sharply criticized by dissenting Justice Albin, joined by Justice Long. *Id.* at 1141 (Albin, J., dissenting). They maintained that the majority's decision violated the *ex post facto* protections afforded by both the United States and New Jersey Constitutions. *Id.* at 1142.

⁵⁰ N.M. STAT. ANN. § 31-20A-1 (setting out capital sentencing procedure), *repealed by* An Act Relating to Capital Felony Sentencing, ch. 11, §§ 1–7, 2009 N.M. Laws 133. The repeal of the State's capital sentencing statute applied the change in the law prospectively, requiring the New Mexico Supreme Court to consider what procedure would apply to capital prosecutions pending at the time of the effective date of the amendment for which death sentences could still be imposed. *In re* Death Penalty Sentencing Jury Instructions, 222 P.3d 673 (N.M. 2009); *In re* Death Penalty Sentencing Jury Rules, 222 P.3d 674 (N.M. 2009). In a pre-repeal case, *State v. Fry*, the court had rejected a challenge to the State's capital sentence process on the ground that the jury sentencing procedure did not require jurors to find first that proven aggravating circumstances outweighed mitigating ones before they could impose a sentence of death. 126 P.3d 516, 531–32 (N.M. 2005). After the repeal, the New Mexico Supreme Court issued a procedural rule that permitted capital defendants to elect to have separate juries empanelled for the guilt/innocence phase of trial and the capital-sentencing phase in the event of conviction. 222 P.3d 674, 674–75 (citing NMRA, Rule 5-704(A)).

⁵¹ An Act Concerning Criminal Law, § 10, 2010 Ill. Laws 7779 (codified as amended at 725 Ill. Comp. Stat. Ann. 5/119-1 (West 2012) (“Beginning on the effective date of this amendatory Act of the 96th General Assembly, notwithstanding any other law to the contrary, the death penalty is abolished and a sentence to death may not be imposed.”)). *See also* Christina McMahon, *Illinois Abolishes the Death Penalty*, 16 PUB. INT. L. REP. 83 (2011) (discussing political pressure stemming from cases of actual death row inmate innocence and other factors influencing the legislative decision to repeal death penalty).

⁵² An Act Revising the Penalty for Capital Felonies, §§ 1–6, 2012 Conn. Legis. Service. P.A. 12-5 (S.B. 280) (West) (codified as amended at CONN. GEN. STAT. § 53a-46a (2012)). However, Connecticut only abolished the death penalty prospectively. *Id.* at § 5(a) (“A person shall be subjected to the penalty of death for a capital felony committed prior to April 25, 2012 under the provisions of section 53a-54b in effect prior to April 25, 2012 only if a hearing is held in accordance with the provisions of this section.”). The prospective law's prospective effect exempted eleven men who were on death row, “including Joshua Komisarjevsky and Steven J. Hayes, the men convicted of the Petit murders.” Peter Applebome, *Death Penalty Repeal Goes to Connecticut Governor*, N.Y. TIMES, Apr. 11, 2012, <http://www.nytimes.com/2012/04/12/nyregion/connecticut-house-votes-to-repeal-death-penalty.html>.

capital sentencing.⁵³ The New York Court of Appeals held that the State's death penalty statute could not be constitutionally applied in decisions rendered in 2004⁵⁴ and 2007,⁵⁵ because the "deadlocked jury" instruction, deemed critical to the operation of the sentencing process, was found to be constitutionally flawed.⁵⁶ The legislature has failed to adopt an amendment to the capital sentencing process designed to address the court's reasoning in these decisions. Meanwhile, the jurisdictions most actively relying on the death penalty

⁵³ See Steiker & Steiker, *supra* note 40, at 362 n.70 (collecting news reports of repeal failures in New Hampshire, Montana, and Kansas within the past four years).

⁵⁴ *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004).

⁵⁵ *People v. Taylor*, 878 N.E.2d 969, 984 (N.Y. 2007) (applying *LaValle* to vacate death sentence imposed at trial).

⁵⁶ In *LaValle*, 817 N.E.2d at 356–66, the court held that the "deadlocked jury" instruction included in the capital sentencing statute was fatally flawed. The statute required the jury be instructed that in the event it could not reach a unanimous sentencing decision, "the court will sentence the defendant to a term of imprisonment with a minimum term of between twenty and twenty-five years and a maximum term of life." *Id.* at 356 n.9 (citing N.Y. CRIM. PROV. L. § 400.27(10) (2004)). The court explained the flaw in this statutorily mandated instruction:

Like some other states with death penalty statutes, New York recognized that jurors should know the consequences of a deadlock. However, New York's deadlock provision is unique in that the sentence required after a deadlock is less severe than the sentences the jury is allowed to consider. No other death penalty scheme in the country requires judges to instruct jurors that if they cannot unanimously agree between two choices, the judge will sentence defendant to a third, *more lenient*, choice.

Id. at 357 (emphasis added) (internal citation omitted). The instruction, as written and required to be given, would at least theoretically influence a capital jury to reach a sentencing verdict in order to avoid the possibility that the trial judge would impose a more lenient sentence than the death or life without parole options authorized by statute, and available only to juries upon conviction for capital murder. Later, in *Taylor*, the court rejected the argument that it should simply "rewrite the deadlock instruction," concluding that "the death penalty sentencing statute is unconstitutional on its face and it is not within our power to save the statute." 878 N.E.2d at 983–84. It held that *LaValle* compelled that Taylor's death sentence be vacated, noting, "[t]he Legislature, mindful of our State's due process protections, may reenact a sentencing statute that is free of coercion and cognizant of a jury's need to know the consequences of its choice." *Id.* at 984.

as a punishment option continue to impose capital sentences while the actual rate of execution remains relatively low.⁵⁷

The reality of capital sentencing is that the Court's attempt to direct development of a process that ensures fair application of the death penalty fails to satisfy both proponents and opponents of capital punishment. In operation, the costs and flaws in the system have frustrated Justices Powell, Blackmun, O'Connor, and Stevens, all of whom found no Eighth Amendment prohibition in its use and who struggled with the Court's mechanism to ensure fairness. For thirty-five years, since the Court's action in upholding post-*Furman* type legislation in *Gregg*, *Proffitt*, and *Jurek*,⁵⁸ the Court's review of process either has failed individual cases, or has failed to address the concerns of Justices Stewart and White. The experience, insight, and wisdom of those Justices who have examined the reality of capital punishment should not be dismissed, nor should the concern expressed by Justice Scalia in *Walton* be disregarded. For the reality of capital punishment in practice demonstrates its failure as a matter of policy.

V. LIBERALS, DEMOCRATS, AND THE COURT'S CURRENT POSTURE

It is clear that not a single member of the current Court is committed to ending capital punishment,⁵⁹ whether as a matter of evolving notions of decency that find the death penalty cruel and unusual, either due to the difficulty in administering capital punishment consistent with the promise of due process, or simply based on the enormous costs in expending necessary fiscal or judicial resources. The apparent consistent support for capital punishment among current members of the Court may reflect an interesting reality

⁵⁷ According to the Death Penalty Information Center, as of November 7, 2012, 3,170 inmates reside on death row in state and federal prisons; 1313 executions have been performed since 1976 when the Court upheld post-*Furman* capital sentencing statutes in *Gregg*, *Proffitt*, and *Jurek*; and a total of thirty-six executions have been performed in 2012 alone. DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 1-3 (2012), available at <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>.

⁵⁸ See cases cited *supra* notes 17-19 and accompanying text.

⁵⁹ See, e.g., *Parker v. Mathews*, 132 S. Ct. 2148 (2012) (per curiam and without dissent) (reversing grant of habeas relief from death sentence in a case nearly thirty years old).

of American political life, the concern among national Democratic leaders that they not be viewed by the public as “soft on crime.”⁶⁰

This was a perception often linked to the 1988 presidential campaign when the Democratic nominee, former Massachusetts Governor Michael Dukakis, was subject to this criticism.⁶¹ Governor Dukakis was linked to a television ad featuring Willie Horton, a Massachusetts inmate who committed a violent crime while on furlough from a state prison under a program supported by the Governor.⁶² A retrospective assessment of the Governor’s troubling anti-capital punishment position reports:

In 1988, a question about rape and capital punishment tripped up Democratic presidential nominee Michael Dukakis.

Dukakis was asked during a nationally televised debate with Republican George H. W. Bush whether he’d still oppose the death penalty if his wife were raped and murdered.

His unemotional, dispassionate answer was ridiculed, and gave Republicans more material to paint him as an emotionless liberal.⁶³

As a presidential candidate, then Arkansas Governor Bill Clinton, apparently learned from the mistake made during the unsuccessful Dukakis race in 1988. During the campaign, Clinton interrupted his schedule to return to Arkansas to oversee the execution of Rickey Ray

⁶⁰ The change in Democratic policy was noted by John Nichols, *No Longer Pushing the Death Penalty*, THE NATION (July 27, 2004, 6:28 AM), <http://www.thenation.com/blog/no-longer-pushing-death-penalty> (discussing an apparent policy shift away from support for capital punishment during the 2004 presidential campaign of United States Senator John Kerry, and noting that both former President Bill Clinton and 2000 Democratic nominee Al Gore had endorsed Democratic platforms that explicitly and frequently endorsed capital punishment).

⁶¹ Robin Toner, *Prison Furloughs in Massachusetts Threaten Dukakis Record on Crime*, N.Y. TIMES, (July 5, 1988), <http://www.nytimes.com/1988/07/05/us/prison-furloughs-in-massachusetts-threaten-dukakis-record-on-crime.html>.

⁶² See, e.g., *The :30 Second Candidate: Willie Horton* (Wisconsin Public Television broadcast 1988), available at <http://www.pbs.org/30secondcandidate/timeline/years/1988b.html>. The ad opens with photos of then Vice-President George H.W. Bush and Governor Dukakis, 1988 U.S. presidential candidates, comparing their pro and anti-death penalty positions. *Id.*

⁶³ *McCain, Obama Disagree with Child Rape Ruling*, MSNBC.COM (June 26, 2008, 1:26 PM), <http://www.msnbc.msn.com/id/25379987>.

Rector,⁶⁴ whose capacity to understand his pending execution had been challenged based on a severe brain injury from a self-inflicted gunshot wound.⁶⁵ President Clinton would go on to appoint two Justices to the Court, Ruth Bader Ginsburg and Stephen Breyer.⁶⁶

Later, in *Buck v. Thaler*, Justice Breyer joined Justice Alito's statement regarding the denial of certiorari in a case in which the capital defendant failed to challenge his death sentence due to damning expert testimony.⁶⁷ A psychologist was allowed to render an opinion that the defendant posed a greater threat to commit acts of violence in the future as a result of his race because defense counsel had opened up the issue during his direct examination in the capital sentencing hearing.⁶⁸ Justice Alito explained that the introduction of this evidence before the jury would have constituted constitutional error, but for the fact that Buck's own attorney had elicited the expert's opinion.⁶⁹ Justice Ginsburg voted to deny certiorari, but did not join Justice Alito's statement.

Similarly, then-Senator Barack Obama, while campaigning during the course of the 2008 presidential campaign, aligned himself with the dissenting opinion in *Kennedy v. Louisiana*, where the Court struck down a statute authorizing imposition of the death penalty for a limited class of rapes involving child victims,⁷⁰ thereby establishing his "not soft on crime" credential:

⁶⁴ Peter Applebome, *The 1992 Campaign: Death Penalty: Arkansas Execution Raises Questions on Governor's Politics*, N.Y. TIMES (Jan. 25, 1992), <http://www.nytimes.com/1992/01/25/us/1992-campaign-death-penalty-arkansas-execution-raises-questions-governor-s.html> ("After shooting Officer Martin, Mr. Rector turned the gun on himself, destroying part of his brain. His lawyers said that even though he could speak, his mental capacities were so impaired that he did not know what death is or understand that the people he shot are not still alive.").

⁶⁵ *Rector v. Clinton*, 823 S.W.2d 829, 830 (Ark. 1992).

⁶⁶ *Supreme Court Nominations: Confirmed*, LIBR. OF CONG. (July 19, 2012), <http://www.loc.gov/law/find/court-confirmed.php>.

⁶⁷ 132 S. Ct. 32 (2011) *denying cert. in* 452 F. App'x 423 (5th Cir. 2011), *temporarily staying execution*, 132 S. Ct. 69 (2011), *denying cert. to 5th Cir.*, 130 S. Ct. 2096 (2010).

⁶⁸ 132 S. Ct. at 33–34 (statement respecting the denial of certiorari) (Alito, J., joined by Scalia & Breyer, JJ.)

⁶⁹ *Id.* at 37.

⁷⁰ 554 U.S. 407, 447 (2008) (Alito, J., dissenting).

I have said repeatedly that I think that the death penalty should be applied in very narrow circumstances for the most egregious of crimes,” Obama said at a news conference. “I think that the rape of a small child, 6 or 8 years old, is a heinous crime and if a state makes a decision that under narrow, limited, well-defined circumstances the death penalty is at least potentially applicable, that that does not violate our Constitution.⁷¹

In fact, Louisiana referred to the consistent statements made by Senators Obama and John McCain, the Republican nominee, in support of the child-rape death penalty sentencing provision in its brief to the Court.⁷²

In *Buck*, President Obama appointees Justices Sonia Sotomayor and Elena Kagan, dissented, but not in opposing the use of the death penalty, generally.⁷³ Rather, they favored review on procedural grounds, concerned about claims that Texas had misrepresented the record in the court below.⁷⁴

An irony exists, whether substantial or superficial, in the fact that it is Republican appointees to the Court, Justices Blackmun, Powell, O’Connor, and Stevens, who have either repudiated capital sentencing or offered significant criticisms of the capital sentencing process; appointees who might logically have been expected to persist in restrained, conservative views on the death penalty, rather than the presumably more liberal appointees of Democratic Presidents Clinton and Obama. And perhaps the ultimate irony lies in President Gerald Ford’s appointment of John Paul Stevens to the Court as the successor to Justice William O. Douglas, whom Ford had sought to impeach while serving as House Minority Leader in 1970.⁷⁵ Justice Stevens’ penetrating indictment of capital sentencing in his concurring opinion in *Baze v. Rees*⁷⁶ reflected his experience in reviewing a process in

⁷¹ MSNBC.COM, *supra* note 63.

⁷² Lyle Denniston, *Final Brief on Kennedy v. Louisiana*, SCOTUSBLOG (Sept. 24, 2008, 2:12 PM), <http://www.scotusblog.com/2008/09/final-brief-on-kennedy-v-louisiana/>.

⁷³ *See* 132 S. Ct. at 35 (Sotomayor, J., dissenting, joined by Kagen, J.).

⁷⁴ *Id.* at 36–37.

⁷⁵ Professor Michael Dorf offers a very thoughtful analysis of the changing perspectives of some serving justices whose orientation was that of “Rockefeller,” or of moderate Republicans before their appointment to the Court. *See* Michael C. Dorf, *Becoming Justice Stevens: How and Why Some Justices Evolve*, FINDLAW (Apr. 21, 2010), <http://writ.news.findlaw.com/dorf/20100421.html>.

⁷⁶ 553 U.S. 35 (2008).

which procedural protections for capital defendants have eroded over time, in which racial prejudice remains a compelling problem characterized by juries unreflective of the community from which they have been drawn, in which unjustified costs are imposed on judicial and fiscal resources, and in which justice is compromised by the potential for the wrongful execution of innocent defendants.⁷⁷

It may be, of course, that significant Court-imposed limitations on the use of the death penalty in cases of rape,⁷⁸ the severely mentally impaired,⁷⁹ and for capital offenses committed by juveniles⁸⁰ have addressed the primary concerns of liberals, including Democratic appointees to the Court, allowing capital punishment to remain a viable sentencing option. Or, it may be that the Clinton and Obama appointees were carefully vetted to determine that they shared their appointing President's support for capital sentencing. Regardless, to date, none of the four Democratic appointees have veered beyond recognition that the Eighth Amendment proscription against cruel and unusual punishments does not preclude capital punishment.

VI. CONCLUSION

While the current Court's position on capital punishment generally reflects unanimous support for the death penalty as a sentencing option, recent polling data shows that public support for capital punishment has decreased. A Gallup Poll in October 2011, for instance, shows that support for the death penalty has declined to sixty-one percent of individuals surveyed, the lowest level of support for capital punishment since the time of the Court's decision in

⁷⁷ *Id.* at 71, 81–86 (Stevens, J., concurring). Justice Stevens, while criticizing use of the death penalty, concurred in the judgment only, rejecting the specific issue before the Court regarding the argument that the lethal injection protocol used in Kentucky violated the Eighth Amendment protection against cruelty in the infliction of punishment.

⁷⁸ *See Kennedy v. Louisiana*, 554 U.S. 407 (2008) (holding Louisiana statute authorizing death sentence for rape of a child with aggravating factors unconstitutional); *Coker v. Georgia*, 433 U.S. 584 (1977) (holding death penalty disproportionate for crime of rape of an adult woman).

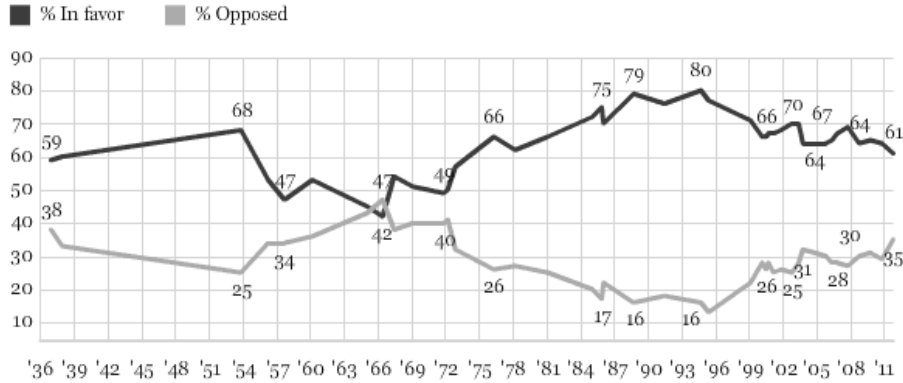
⁷⁹ *Atkins v. Virginia*, 536 U.S. 304, 320 (2002).

⁸⁰ *Roper v. Simmons*, 543 U.S. 551, 571–73 (2005).

Furman in 1972; at that time, just forty-nine percent of individuals surveyed supported the death penalty (see inset).⁸¹

Are you in favor of the death penalty for a person convicted of murder?

1936-2011 trend



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The trend in support for the death penalty over the period of time surveyed shows significant fluctuation, perhaps reflecting public perceptions of the fairness or factual accuracy in the prosecution process. It may also reflect public response to perceptions about a reduction in the prevalence of violent crime. Regardless, the trend suggests that capital punishment remains an unresolved source of anxiety with respect to the operation of the criminal justice system. The notion that execution violates the Eighth Amendment has less currency now than forty years ago, when a significant coalition of Supreme Court Justices found compelling, though varying, flaws in the capital sentencing system. The nation's experience, and the Court's experience, in addressing the problems posed by the death penalty remains an unsettling problem that will only be addressed over time by state legislatures.

⁸¹ Frank Newport, *In U.S., Support for Death Penalty Falls to 39-Year Low*, GALLUP (Oct. 13, 2011), <http://www.gallup.com/poll/150089/Support-Death-Penalty-Falls-Year-Low.aspx>.