Given Him a Fair Trial, Then Hang Him: The Supreme Court's Modern Death Penalty Jurisprudence*

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In Furman v. Georgia *(1972), the Supreme Court ruled the arbitrary and capricious nature of the death penalty rendered it an unconstitutional cruel and unusual punishment under the Eighth and Fourteenth Amendments. Then, in* Gregg v. Georgia *(1976), the Court held that Georgia's revised death penalty statute employing separate guilt and sentencing phases passed constitutional muster under* Furman. *With these cases in which some answers were provided but the door was opened to a host of other questions, the Court introduced the modern era of its death penalty jurisprudence. Since then, the Court has addressed whether crimes other than murder are subject to the death penalty, attempted to balance aggravating and mitigating circumstances, and considered whether the death penalty can be applied to minors and mentally deficient individuals. Further, the Court has addressed questions of race, claims of actual innocence, and whether judges or juries determine death sentences. These cases collectively illustrate the Court's struggle to come up with consistent standards for capital punishment. The continuing legacy of* Furman *and* Gregg*, then, is that future decisions will likely not settle the issue of the death penalty, though it is highly probable the Supreme Court will continue to inject itself into the debate over the death penalty in the United States.*

Jurisprudential changes with respect to criminal justice that had begun with the Warren Court reached the area of the death penalty when, in 1972, the Supreme Court decided *Furman v. Georgia*. By a 5-4 vote, the Court held in a brief per curiam decision that the death penalty as imposed and administered—the arbitrary and random nature of the death penalty, and the resulting inequalities in its imposition—constituted an unconstitutional cruel and unusual punishment under the Eighth Amendment. However, *Furman* was far from a simple or concise decision, as every justice wrote a separate concurring or dissenting opinion based on disparate rationales and covering hundreds of pages, and all four of President Nixon's recently appointed, so-called law-and-order justices dissented. Notwithstanding its complexity and controversy, this decision put the death penalty on hold while states attempted to remedy its deficiencies of which the Court majority complained.

The Supreme Court soon revisited capital punishment when it reviewed a death penalty law passed in the aftermath of *Furman*. In *Gregg v. Georgia* (1976), the Court held, 7-2, that Georgia had appropriately remedied its death penalty procedure and, applying the rules from *Furman* and *Gregg* to four companion cases, upheld certain

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other death penalty statutes. In so doing, the Court provided that states could now execute certain defendants, so long as the types of crimes eligible for the death penalty were narrowed and suitable safeguards were present in sentencing procedures in death penalty cases. Since then, the Supreme Court has issued many other decisions on the death penalty, including the very recent cases on the means of execution and the imposition of the death penalty for crimes other than murder. This article provides a broad overview of the Supreme Court's death penalty jurisprudence in light of *Furman* and *Gregg*.

THE EIGHTH AMENDMENT BEFORE *FURMAN AND GREGG*

While some jurists and scholars contend the death penalty is an unconstitutional cruel and unusual punishment per se under the Eighth Amendment, the Constitution elsewhere appears to acknowledge the death penalty. The Fifth and Fourteenth Amendments forbid depriving any person of *life*, liberty, or property without due process of law. The Fifth Amendment also refers to persons accused of *capital crimes* as well as those in jeopardy of *life* and limb, thus implying the constitutionality of the death penalty under certain conditions.

The Supreme Court interpreted the Eighth Amendment in a number of cases before *Furman* and *Gregg*. One issue with which it dealt related to the meaning of cruel and unusual punishments. In *Trop v. Dulles* (1958), which concerned a congressional statute requiring loss of citizenship for military desertion during times of war, the Supreme Court discussed the history and derivation of the Eighth Amendment. In his plurality opinion, Chief Justice Warren, specifically noting that the prohibition on cruel and unusual punishments was adapted from the English Declaration of Rights of 1688 and the Magna Carta (*Trop*, at 100), indicated that because of its dynamic nature the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" (*Trop*, at 101). The Court accordingly held that under then-current standards of decency, stripping one's citizenship as a criminal penalty violated the Eighth Amendment's proscription. Chief Justice Warren also discussed the constitutionality of the death penalty, saying: "Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty" (*Trop*, at 99).

Trop's "evolving standards of decency" would find its way into the Court's death penalty cases. Justice Brennan's *Furman* concurrence relied on that language when he maintained that the death penalty was unconstitutional per se because the Eighth Amendment "prohibits the infliction of uncivilized and inhuman punishments" (*Furman*, at 270). However, in his *Furman* dissent, Justice Powell noted the irony of Justice Brennan employing Chief Justice Warren's rationale in *Trop* while reaching the opposite conclusion. Justice Stewart also used the "evolving standards of decency" language to dispute Justice Brennan's position. Based on the response in the states

after *Furman* largely endorsing reinstatement of the death penalty, he asserted, "it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction" (*Gregg*, at 179).

The second issue decided before *Furman* involved incorporation of the Bill of Rights into the Fourteenth Amendment—in particular, whether states were required to comply with the Eighth Amendment's prohibitions. The Supreme Court decided this in the affirmative in *Robinson v. California* (1962), where the Court held that a state statute criminalizing addiction to narcotics constituted an Eighth Amendment violation because the status of a defendant, not his conduct, had been criminalized. The Court thus supplanted *Louisiana ex rel. Francis v. Resweber* (1947), where it had assumed but did not directly decide that states were restrained by the cruel-and-unusual-punishment clause. *Robinson* also superseded earlier cases such as *In re Kemmler* (1890), which specifically held that the Eighth Amendment was not incorporated in the Fourteenth Amendment. *Kemmler* also had held that torture or lingering death constitutes a cruel punishment, but had provided the death penalty itself did not violate the Eighth Amendment. The Supreme Court in *Furman* subsequently accepted the *Robinson* rationale for incorporation of the Eighth Amendment in death penalty cases.

Thus, by the time the Supreme Court decided *Furman* and *Gregg* in the 1970s, it had resolved that evolving standards of decency would guide its death penalty rulings and that the states would be bound by the Eighth Amendment in death penalty cases. It now was time for the Supreme Court to address the death penalty in the United States head on.

FURMAN: THE SUPREME COURT STAYS THE DEATH PENALTY

Furman v. Georgia involved three petitioners convicted of capital crimes under state law. Two cases stemmed from Georgia, one involving a petitioner convicted of murder, the other of rape, while a third petitioner had been convicted of rape in Texas. While the *Furman* per curiam opinion held these death sentences violated the Eighth and Fourteenth Amendments, the Court provided no indication why the death penalty was unconstitutional. An analysis of the concurring and dissenting opinions would be critical to understanding the Court's reasoning.

While the five justices in the majority believed the death penalties in Georgia and Texas were unconstitutional, only Justices Brennan and Marshall deemed the death penalty unconstitutional under all circumstances. Justice Brennan asserted that the arbitrary nature of the death penalty made it constitutionally impermissible under the Eighth Amendment. Justice Marshall, after voluminously discussing the history of the death penalty in the United States and England, expressed the view that this criminal sanction served none of its stated purposes of "retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy" (*Furman*, at 342). He also argued that the death penalty was imposed discriminatorily against blacks and men.

The other justices in the majority, all holdovers from the Warren Court, did not believe the death penalty unconstitutional per se. Justice Douglas contended in his concurrence that the death penalty violated equal protection, as it had been imposed "arbitrarily and discriminatorily" because it was administered so rarely and most often against the poor and minorities (*Furman*, at 249). Justices Stewart and White largely agreed with Justice Douglas. Although Justice Stewart was not convinced that racial discrimination had been proven regarding the death penalty, he was persuaded that "this unique penalty [was] so wantonly and so freakishly imposed" that it violated the Eighth Amendment (*Furman*, at 310). And Justice White determined that the social end of deterrence once used to justify the death penalty no longer sufficed, in large part because it was infrequently administered.

The theme running through all the dissenting opinions was that legislatures, not courts, should decide the parameters of the death penalty. Basing his decision on both the intent of the Framers of the Eighth Amendment and evolving standards of decency, Chief Justice Burger, joined by Justices Blackmun, Powell, and Rehnquist, concluded that the death penalty was not a cruel or unusual punishment in a constitutional sense. Accordingly, legislatures must determine whether death is an appropriate criminal sanction, with limited exceptions for "punishments that are so cruel and inhumane as to violate society's standards of civilized conduct" (*Furman*, at 397). Justice Powell, also joined by all the other dissenters, asserted that stare decisis dictated a ruling in favor of the death penalty, and that "[n]o Justice of the Court, until today, has dissented from this consistent reading of the Constitution" (*Furman*, at 428). Justice Rehnquist, again joined by all of the other dissenters, similarly argued for judicial restraint, and he also made an argument against incorporation of the Bill of Rights: "The Due Process and Equal Protection Clauses of the Fourteenth Amendment were never intended to destroy the States' power to govern themselves" (*Furman*, at 470).

Justice Blackmun considered his dissent "personal" comments, and none of the other dissenters joined in those comments (*Furman*, at 405). As he put it, "Although personally I may rejoice at the Court's result, I find it difficult to accept or to justify as a matter of history, of law, or of constitutional pronouncement" (*Furman*, at 414). Though morally opposed to the death penalty, Justice Blackmun said that the decision whether or not to use it was for the nonjudicial branches of government. Interestingly, Justice Blackmun eventually was to change his mind on the constitutionality of the death penalty, stating in a dissent from denial of certiorari, "There is little doubt now that *Furman's* essential holding was correct" (*Callins v. Collins*, 1994, at 1147).

In sum, while all five justices in the *Furman* majority believed Georgia's and Texas's death penalty laws were unconstitutional, thus providing a judicial stay of its imposition across the nation, only two deemed the death penalty unconstitutional per se. The four dissenters clearly envisioned the death penalty as a viable, constitutional option. It also appeared that the three justices in the majority who did not view the death penalty as per se unconstitutional might be persuaded that a more carefully drafted and administered death penalty statute would pass constitutional

muster. As a consequence, the death penalty would live to see another day in court. That day occurred just four years later.

GREGG: THE DEATH PENALTY IS REINSTATED

The reaction to *Furman* was swift and vehement. Over two-thirds of the states and Congress amended their respective penal codes in response to *Furman* to include capital punishment for some crimes. Notwithstanding this manifest evidence that the political process favored the death penalty, these legislative revisions yielded to the mandates of *Furman* by including new procedures attempting to rectify the penalty's arbitrariness. The constitutionality of those new procedural safeguards would be at issue in the cases the Court decided in 1976.

Gregg v. Georgia involved Georgia's recently amended death penalty statute that called for bifurcated trials in capital cases, with separate guilt and sentencing phases. The petitioner had been found guilty of murder and armed robbery by the jury, which then returned a sentence of death in the trial's penalty phase. The Supreme Court ruled that Georgia's law comported with *Furman*. Like *Furman*, however, *Gregg* did not represent a simple outcome. Justice Stewart, with Justices Powell and Stevens, announced the judgment of the Court and expressed the view that Georgia's new death penalty statute was not unconstitutional. This plurality opinion first stated that the death penalty is not, nor has it ever been, unconstitutional per se and that the legislative reaction since *Furman* demonstrated that capital punishment is not contrary to societal values, a viewpoint supported by Supreme Court precedent. Justice Stewart continued by asserting that Georgia's bifurcated process provided sufficient confidence that death sentences would not be handed down arbitrarily or capriciously. He found of particular import the automatic appeal of death sentences to the Georgia Supreme Court. Accordingly, the new statutory procedures did not fall prey to the problems the Court had found in *Furman*.

Justice White, along with Chief Justice Burger and Justice Rehnquist, concurred in the Court's judgment. Automatic review by the state supreme court also was critical to these justices. Justice White would have permitted greater use of the death penalty than would Justice Stewart (Palmer, 1979), a divergence that apparently led Justice White to concur only in the judgment and not in Justice Stewart's opinion. While Justice Blackmun also concurred in the judgment, he did so for himself in a two-line opinion in which he relied on his and the other dissenting opinions in *Furman*. Justices Brennan and Marshall dissented in *Gregg*, each reiterating his view that the death penalty was unconstitutional under all circumstances.

Based on the standards set by *Furman* and *Gregg*, on the same day it released *Gregg*, the Court upheld the death sentences in cases from Florida and Texas (*Proffitt v. Florida*, 1976; *Jurek v. Texas*, 1976), because their statutory procedures were similar to those upheld in *Gregg*. However, the Court reversed the death sentences in cases from North Carolina and Louisiana (*Woodson v. North Carolina*, 1976; *Roberts v. Louisiana*, 1976), as those states' procedures provided inadequate standards for the

sentencer to determine whether death should be imposed on any particular criminal defendant.

In *Gregg*, the Supreme Court allowed the death penalty to be reinstated and carried out, so long as the procedures employed in sentencing someone convicted of a capital crime do not allow for arbitrary or capricious results. In large part, this standard is satisfied by a bifurcated trial, especially one where the judge or jury in the sentencing phase weighs both aggravating and mitigating factors in determining whether or not the death penalty is warranted. The outcome in *Gregg* was accordingly different from that in *Furman* because three justices representing the *Furman* majority, including Justices Stewart, White, and Stevens (who had since replaced Justice Douglas) joined the four *Furman* dissenters in ratifying Georgia's amended death penalty statute.

THE SUPREME COURT'S POST-*FURMAN*/*GREGG* DECISIONS

The Supreme Court's decisions in *Furman* and *Gregg* did not settle all issues regarding the death penalty, as defendants continued to argue the constitutionality of their death sentences in subsequent cases before the Court. Indeed, *Furman* and *Gregg* opened the door to a host of other Supreme Court decisions on the death penalty, many of which are seminal in nature. These can be generally categorized as questions regarding 1) the scope of possible application of the death penalty, 2) to whom the penalty can be applied, and 3) miscellaneous other issues. While a majority of the Court has never accepted the view that capital punishment is unconstitutional per se, so the death penalty continues to be constitutional, some specific arguments against imposition of the death penalty have succeeded before the Court.

Crimes Other Than Murder. As *Furman* indicated, crimes other than murder have traditionally carried a potential death sentence, although no defendant has been executed in the United States for a crime other than murder in since the 1960s. In *Coker v. Georgia* (1977), the Supreme Court held, 7-2, that the penalty of death for conviction of rape violated the Eighth Amendment, which precludes not just cruel and unusual punishments but also punishments that are excessive. Justice White's decision for the Court contended that the sentence of death was "grossly disproportionate" for the rape of an adult (sixteen-year-old) woman. Justice Powell, concurring only in the judgment, stated that rape with aggravating factors could justify a death sentence, and Chief Justice Burger and Justice Rehnquist, dissenting, claimed that rape constituted a major crime that could be punished by death. The Supreme Court would revisit this issue in the recently decided case, *Kennedy v. Louisiana* (2008), holding unconstitutional a death sentence for the rape of an eight-year-old girl (see below).

Aggravating and Mitigating Factors. The Supreme Court has struggled over the years with respect to admission of aggravating and mitigating evidence when imposing death sentences, which is also related to when capital punishment can be applied. Given that the Court in *Furman* and *Gregg* had required narrowing of the range of offenses to which the death penalty was applicable, it is important to look at a major

way the states have grappled with this mandate—by specifying aggravating factors that would death-qualify an offense. For instance, the death penalty statute upheld in *Gregg* specified that a death sentence could not be imposed unless the jury found beyond a reasonable doubt the presence of at least one of ten codified aggravating circumstances, one of which provided: "The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim" (*Gregg*, at 165, fn. 9). The Court believed that a clear finding of aggravating factors during the sentencing phase was necessary "to narrow the class of murderers subject to capital punishment" (*Gregg*, at 196), so as to ensure against the arbitrary nature of the death penalty the Court discussed in *Furman*.

The states' use of aggravating factors is in tension with the Court's insistence that juries be able to consider a broad range of mitigating evidence. In *Gregg*, the Court introduced this issue by quoting the Model Penal Code: "[I]t is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other* when they are presented in a concrete case" (*Gregg*, at 193, emphasis in original). Whether it is possible in fact to consider both mitigating and aggravating factors has been debated by the justices in the post-*Furman*/*Gregg* era. For instance, in *Lockett v. Ohio* (1978), the Supreme Court held that the "Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" (*Lockett*, at 604). Chief Justice Burger, writing the plurality opinion, stated that individualization of sentences was constitutionally necessary in capital cases, and because the Ohio law did not allow for admission of mitigating factors during the sentencing phase of bifurcated trials, the death sentence in this case was reversed.

The Supreme Court soon sustained this rationale when it held in *Eddings v. Oklahoma* (1982) that states may not prevent the admission of mitigating evidence in capital cases, whether that preclusion is imposed by statute or common law. Justice Powell, writing for the 5-4 majority (with Chief Justice Burger in dissent), held that excluding mitigating evidence from the sentencing authority's consideration was constitutionally improper. Oklahoma law specified a number of aggravating factors to be considered in sentencing, including whether the crime was "especially heinous, atrocious, or cruel" (*Eddings*, at 106), but no mitigating factors were similarly codified. Because the defendant's death sentence was imposed without consideration of his age (sixteen when the crime was committed) or his troubled upbringing, both clear mitigating factors according to the Court, the case was reversed and remanded so that aggravating *and* mitigating circumstances could be considered in determining whether a death sentence was appropriate.

The issue of weighing both mitigating and aggravating circumstances would arise again in *McCleskey v. Kemp* (1987), where the Court upheld Georgia's death

penalty law that required the jury to find at least one aggravating factor as defined by the statute, in part because the law also permitted the defendant to introduce any mitigating evidence in his favor. While this case particularly pertained to racial issues, the inclusion of mitigating and aggravating factors was a key justification behind the Court's decision.

There is an inherent conflict between the mandate to accommodate both aggravating factors—to ensure the death penalty is imposed only in the most egregious cases—and mitigating factors—to allow for individualized sentencing determinations. In his concurrence in *Walton v. Arizona* (1990), Justice Scalia addressed this state of affairs when he said, "To acknowledge that there perhaps is an inherent tension between this line of cases [on mitigation] and the line stemming from *Furman* [on aggravating factors] is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II. And to refer to the two lines as pursuing twin objectives . . . is rather like referring to the twin objectives of good and evil. They cannot be reconciled" (*Walton*, at 664).

While the Supreme Court has stated time and again that the death penalty must be imposed on an individualized basis, this process of weighing both aggravating and mitigating factors runs the risk that capital punishment could be capriciously administered. The Mc*Cleskey* Court seemed aware of this possibility when it stated, "Because [the defendant's] sentence was imposed under Georgia sentencing procedures that focus discretion on the particularized nature of the crime and the particularized characteristics of the individual defendant, we lawfully may presume that [the defendant's] death sentence was not wantonly and freakishly imposed" (Mc*Cleskey*, at 288). Yet, as Justice Scalia's *Walton* concurrence shows, this conclusion did not settle the matter among the justices. Indeed, in *Kansas v. Marsh* (2006), writing for a 5-4 Court, Justice Thomas ruled that a statute directing juries to impose a death sentence when mitigating factors do not outweigh aggravating circumstances, even when mitigating and aggravating factors are in equipoise, was constitutional.

Mental Incapacities. Who is eligible for the death penalty? The Supreme Court has confronted a number of cases in which the death penalty has been imposed on defendants who are adjudged to be criminally insane or otherwise mentally deficient. In *Ford v. Wainwright* (1986), with Justice Marshall writing for a 5-4 majority, the Court reversed a death sentence of a defendant who suffered from severe mental diseases, including paranoid schizophrenia, as executing a defendant considered mentally insane violated the Eighth Amendment. A few years later, in *Penry v. Lynaugh* (1989), the Court considered a defendant who was judged to have the mental capacity of a seven year old. In another 5-4 decision, with Justice O'Connor writing for the Court, the defendant's death sentence was upheld as constitutional, as executing mentally deficient individuals did not violate the Eighth Amendment. However, the *Penry* Court also held that the jury must be apprised of the defendant's mental capacity at the sentencing phase of a capital case.

In the most recent in this line of cases, *Atkins v. Virginia* (2002), the Supreme Court confronted the same issue as in *Penry*, but this time it reached a very different conclusion. For the 6-3 Court, Justice Stevens, who had dissented in *Penry*, contended that much had changed since *Penry*, including a shift in societal values concerning the execution of mentally deficient individuals. Consequently, the Eighth Amendment prohibited death sentences against the mentally deficient, and *Penry* was officially overruled. The critical factor explaining the *Atkins* outcome was the switch of votes by Justices O'Connor and Kennedy from their prior stance in *Penry*, changing a 5-4 decision favoring the death penalty for mentally deficient individuals into this 6-3 decision against such executions.

Minors. The Supreme Court also has considered cases on the execution of defendants who were minors when they committed their crimes. The Court first held, in a 5-3 ruling in *Thompson v. Oklahoma* (1988), that the Eighth Amendment precluded the death penalty for defendants younger than sixteen years old. However, there was no majority opinion, as the fifth vote for the result was provided by Justice O'Connor, who argued that a national consensus had not yet appeared on which a constitutional holding regarding executing minors could be based. A year later, with Justice Scalia writing for a 5-4 majority saying no national consensus had yet emerged on this issue, the Court held in *Stanford v. Kentucky* (1989) that the Eighth Amendment does not preclude a state from executing a sixteen- or seventeen-year-old minor. *Thompson* and *Stanford* collectively instruct that states could not execute anyone under the age of sixteen, but that sixteen and seventeen year olds could be subject to the death penalty.

The Supreme Court revisited this issue in *Roper v. Simmons* (2005). Justice Kennedy, who had not taken part in *Thompson* and had voted with the *Stanford* majority, wrote for the 5-4 Court to hold that societal standards had changed in the states and internationally, such that executing minors less than eighteen years old represented a disproportionate sanction that violated the Eighth Amendment. As this decision was at odds with its prior decision in *Stanford*, Justice Kennedy provided that *Stanford* "should be deemed no longer controlling on this issue" (*Roper*, at 574). The dissents were issued by Justices O'Connor and Scalia, the latter joined by Chief Justice Rehnquist and Justice Thomas.

Judge or Jury. The Supreme Court has covered a number of other issues concerning the death penalty that consider neither the scope nor the object of the sentence. For instance, in *Ring v. Arizona* (2002) the trial judge determined that aggravating but no mitigating factors were present, which rendered the defendant subject to the death penalty in accordance with state law. The Supreme Court, 7-2, reversed the defendant's death sentence, holding the Sixth Amendment requires that sentencing decisions be made by the jury, not the judge. Justice Ginsburg's opinion in *Ring* relied on the rationale of *Apprendi v. New Jersey* (2000), in which the Court had ruled that juries, not judges, must make factual determinations involved in sentencing (see

Hurwitz, 2006). Because the Court's prior decision in *Walton v. Arizona* (1990) permitted judges to make factual determinations on aggravating and mitigating circumstances for sentencing, the *Ring* Court specifically overruled *Walton*, as only juries can make factual rulings on sentencing, even in capital cases.

Race. There has been much dispute about racial imbalance in application of the death penalty. While *Furman* touched on issues of race, it was not until the Supreme Court's decision in *McCleskey v. Kemp* (1987) that the convergence of racial implications and capital punishment were directly before the Court. In *McCleskey*, the defendant argued that Georgia's death penalty was imposed at least in part based on race, particularly that of the victim, and introduced a statistical study as evidence of racial bias in capital cases. In his decision for a 5-4 Court, Justice Powell disagreed, saying that while the statistical study could be used to show the state's history regarding the death penalty, it had no bearing on the penalty imposed in this particular case, and thus the death penalty was not unconstitutional for this defendant.

Claim of Actual Innocence. One of the prime arguments made by those seeking abolition of the death penalty is that it risks executing an innocent person who would have no ability to appeal the sentence after it has been carried out. This constitutional issue has become tangled in state procedural elements. This happened in *Herrera v. Collins* (1993), where the defendant, sentenced to death for murder in Texas, claimed a decade after his conviction that newly discovered evidence demonstrated his actual innocence. Because Texas law required a defendant to make claims for new trials, including those based on newly discovered evidence, within thirty days of conviction, his new claims were barred in state court. He thus filed a petition for habeas corpus. Chief Justice Rehnquist, writing for the Court's 6-3 majority, rejected that petition, ruling that this federal procedure was reserved for reversing clear errors at trial, not for raising new claims, even claims of actual innocence, after the trial. Thus, the proper procedure at this point for the defendant was to apply for clemency under the laws of Texas. While Justices Brennan and Marshall were no longer on the Court to make their claims of the death penalty's unconstitutionality, Justices Blackmun, Stevens, and Souter dissented, asserting that not allowing the defendant another habeas claim in light of the newly discovered evidence of his innocence violated the Eighth and Fourteenth Amendments. The defendant was executed a few months after the Supreme Court's decision.

THE SUPREME COURT'S 2008 DECISIONS

The Court's continued attention to the death penalty made the October 2007 Term an important one for this area of the law. In April 2008, the Court issued its decision in the first of two death penalty cases it had agreed to hear, *Baze v. Rees*, which concerned the constitutionality of execution by lethal injection. When the Supreme Court had granted certiorari in this case, the effect was to put on hold all executions in the United States employing lethal injection. At issue in *Baze* was the multidrug protocol used by Kentucky to execute capital defendants. In a 7-2 decision, the Court

held that this multidrug protocol did not violate the Eighth Amendment. Chief Justice Roberts, joined by Justices Kennedy and Alito, issued the prevailing opinion, saying that the multidrug protocol is humane if employed properly, as the risk of improper administration was not great enough to render this procedure an Eighth Amendment violation. Justices Scalia and Thomas concurred in a separate opinion, as did Justices Stevens and Breyer in their own separate opinions, while Justices Ginsburg and Souter dissented.

Perhaps the most interesting opinion in *Baze* was that by Justice Stevens. Like his predecessor Justice Blackmun, Justice Stevens announced that, after long supporting its constitutionality, he now opposed the death penalty. In his concurrence, he questioned the "legitimate penological function . . . [of] incapacitation, deterrence, and retribution" that the *Gregg* Court found necessary for imposing the death penalty (*Baze*, at 1547). Justice Stevens also stated rather emphatically that the death penalty violates the Eighth Amendment. As he put it, "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" (*Baze*, at 1551).

If he had arrived at this conclusion, why then did Justice Stevens concur with the Court's outcome permitting capital punishment in *Baze*? He said his concurrence was based on his respect for the authority of the Court's death penalty jurisprudence, providing that the death penalty is constitutional, but one could surmise that he knew he did not have the votes on his side to go further. While Justice Stevens was not on the Court when *Furman* was decided, he had joined in Justice Stewart's opinion in *Gregg* that held the death penalty constitutional under certain conditions. Significantly, Justice Stevens had written the Court's prevailing opinion in *Jurek v. Texas*, one of the *Gregg* companion cases, providing that the death penalty is not unconstitutional per se. Moreover, he believed that Texas's death penalty procedure was constitutional, as it allowed for juries to ponder both aggravating and mitigating circumstances, and he had concluded, "Because this system serves to assure that sentences of death will not be wantonly or freakishly imposed, it does not violate the Constitution" (*Jurek*, at 276). Plainly, Justice Stevens's *Jurek* opinion is diametrically at odds with his concurrence in *Baze*.

In the second decision during the Court's most recent term, *Kennedy v. Louisiana* (2008), the Court ruled that executing a defendant convicted of raping—but not killing—a child was unconstitutional under the Eighth and Fourteenth Amendments. Louisiana had passed a statutory rape law in 1995 defining any intercourse with a child under thirteen as aggravated rape, subject to the death penalty. Writing for the 5-4 Court, Justice Kennedy placed Louisiana's statute within the context of death penalty laws for the crime of rape. He noted that in the wake of *Furman*, *Gregg*, and *Coker* (which invalidated death sentences for rape of adults), Louisiana was one of only six states that had passed laws constituting child rape as a capital crime. For Justice Kennedy, this was problematic under evolving standards of decency: "The evidence of

a national consensus with respect to the death penalty for child rapists, as with respect to juveniles, mentally retarded offenders, and vicarious felony murderers, shows divided opinion but, on balance, an opinion against it" (*Kennedy*, at 2653).

Justice Kennedy also stated that *Coker*, which rendered unconstitutional the death penalty for the rape of adults, did not necessarily signify that child rape was an appropriate capital offense. Indeed, in *Kennedy*, the Court held that executing a child rapist is similar to executing an adult rapist in that both represent penalties disproportionate to the crime. Justice Kennedy concluded that "resort to the [death] penalty must be reserved for the worst of crimes and limited in its instances of application. In most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense" (*Kennedy*, at 2665).

Justice Alito's dissenting opinion, joined by Chief Justice Roberts and Justices Scalia and Thomas, disagreed that a national consensus had been reached regarding opposition to executing child rapists. In particular, said Alito, *Coker* specifically distinguished between convictions for raping an adult and a child. Consequently, a number of state legislatures passed laws rendering child rape a capital offense. As Justice Alito put it: "I do not suggest that six new state laws necessarily establish a national consensus or even that they are sure evidence of an ineluctable trend. In terms of the Court's metaphor of moral evolution, these enactments might have turned out to be an evolutionary dead end. But they might also have been the beginning of a strong new evolutionary line. We will never know, because the Court today snuffs out the line in its incipient stage" (*Kennedy*, at 2672-73). Moreover, Justice Alito contended that executing child rapists is not disproportionate to what are often heinous crimes that have devastating effects on both the victim and society.

CONCLUSION

By deciding *Furman* and *Gregg* as it did, the Supreme Court firmly injected itself into the decision-making process regarding the death penalty. In *Furman*, the Court effectively stayed the death penalty in the United States, only to lift that suspension four years later in *Gregg* when it acknowledged certain death sentences as constitutional. Interestingly, a common theme in the majority opinions in *Gregg* is the need for judicial restraint, for the federal judiciary to allow the political process in the states to determine the extent to which the death penalty will be permitted. Notwithstanding, as Justice Powell in *Furman* and Justice Stewart in *Gregg* declared, judicial intervention remains necessary due to the mere existence of the Eighth Amendment. Even though Justices Powell and Stewart also argued for judicial restraint in these cases, it was clear by the time the *Gregg* decision was announced that judicial restraint was, yet again but unsurprisingly, a nominal moniker without much substance.

Furman and *Gregg* provided the opportunity for a range of issues to be raised regarding the death penalty. As a consequence, the Court has struggled to come up with consistent standards in capital cases. Personnel changes on the Court, as well as the changing minds of some justices, have made the Court's death penalty jurisprudence variable. Indeed, the Court's decisions subsequent to *Furman* and *Gregg* illustrate that the legal battles over the death penalty were not settled by these seminal decisions, and even the more recent cases have not closed the door to new arguments and legal issues in this area of the law. As Justice Stevens stated in his concurrence in the recent *Baze* case: "I am now convinced that this case will generate debate not only about the constitutionality of the three-drug protocol . . . but also about the justification for the death penalty itself" (*Baze*, at 1542-43).

Whether the Supreme Court continues to interject itself in the death penalty debate remains to be seen. As always, the personnel on the Supreme Court loom critical to this issue. Justice Stevens seems to have taken a similar route to that taken by Justice Blackmun on the death penalty, moving away from his original stance that capital sentences are not unconstitutional. Yet there remain four justices on the Court who likely consider capital punishment an appropriate and constitutional criminal sanction—Chief Justice Roberts and Justices Scalia, Thomas, and Alito, who make up the conservative bloc of the Court. With Justices Souter, Ginsburg, and perhaps Breyer presumably joining Justice Stevens on the liberal side of death penalty cases, Justice Kennedy's position at the Court's median will likely control most outcomes in death penalty cases, as it does more generally. Indeed, Justice Kennedy's influence has already proven pivotal in recent decisions on capital cases (e.g., *Atkins v. Virginia*, *Roper v. Simmons*).

Whatever direction the Supreme Court takes in upcoming death penalty cases, the notion that the Court resolves critical death penalty issues derives at least in part from the competing stances it took in *Furman* and *Gregg*, the cases that inaugurated the modern era of Supreme Court jurisprudence on death sentences. And the continuing legacy of these cases from the 1970s is that any future decisions by the Court will likely not settle the issue of the death penalty, as succeeding cases will presumptively oversee those issued even in the recent past. Yet, as crucial the Supreme Court has proven to the death penalty debate over the past thirty-five years, in the end the outcome of capital punishment may be determined by the political process engaged by legislative and executive branches, at least if the recent trend of executing fewer capital defendants each year continues. Nonetheless, impending judicial review by the Supreme Court remains a pragmatic threat to legislative action with respect to the death penalty. **jsj**

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