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FURMAN AT FORTY

PREFACE

THE FOLLY – AND FAITH – OF *FURMAN*

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Justice Marshall's opinion in *Furman v. Georgia* memorably characterizes the abolition of capital punishment as "a major milestone in the long road up from barbarism."¹ For abolitionists today, it is surprising to recall that this phrase was not coined by Marshall, but borrowed from former Attorney General Ramsey Clark.² That the chief law enforcement official of the United States might publicly condemn capital punishment is, from a modern perspective, almost unimaginable. Since then, we have seen one liberal presidential candidacy founder at least in part on resisting the lure of vengeance: Michael Dukakis's rejection of capital punishment even for a hypothesized murderer of his wife hurt him badly. We have also watched two purportedly liberal candidates hustle to support capital punishment in particularly dubious circumstances; Bill Clinton

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1. 408 U.S. 238, 370 (1972) (Marshall, J., concurring).

2. Ramsey Clark, *Crime in America* 336 (Simon & Schuster 1970).

left the campaign trail to sign the death warrant of a man so mentally impaired by a self-inflicted gunshot wound that he didn't understand dying,³ and Barack Obama joined the clamor against a (conservative) Supreme Court's decision that imposition of the death penalty for child rape is unconstitutional.⁴ But back in *Furman*'s day, it was politically possible to condemn capital punishment. Indeed, by the time the Court decided *Furman*, it seemed that, like torture, capital punishment would eventually and inevitably be consigned to the dustbin of history.⁵

In fact, *Furman* was the culmination of a long campaign by the Legal Defense Fund of the NAACP, one fought on multiple constitutional fronts in the attempt to achieve a moratorium. The LDF attack on the death penalty, which began because of manifest racial injustice in the imposition of the death penalty, continued to gather data on racial disparities in anticipation of a racial challenge. But it also pressed the issue of "death qualification," which resulted in the seating of juries particularly likely to convict and prone to favor capital punishment, the unreliability in the sentencing determination introduced by unitary proceedings, the broad use of capital punishment for crimes less than murder, and the lack of guidance given to juries in the determination of whether death was appropriate.

When *Furman* struck down capital punishment statutes from Georgia and Texas, the LDF's jubilation is easily imagined, and has been somewhat ruefully chronicled.⁶ Whether

3. Stephen B. Bright, *The Death Penalty as the Answer to Crime: Costly, Counterproductive and Corrupting*, 36 Santa Clara L. Rev. 1069, 1071 (1996).

4. A.P. News Rel., *McCain, Obama Disagree with Child Rape Ruling*, <http://www.msnbc.msn.com/id/25379987/> (June 26, 2008) (quoting then-candidate Obama: "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") (accessed Oct. 22, 2012; copy on file with Journal of Appellate Practice and Process).

5. Now, of course, it is clear that torture was not so clearly consigned to that dustbin either. See e.g. Anthony Clark Arend, *Who's Afraid of the Geneva Conventions? Treaty Interpretation in the Wake of Hamdan v. Rumsfeld*, 22 Am. U. Int. L. Rev. 709, 714 (2007) (discussing the legal opinion of Deputy Assistant Attorney General John Yoo that "because al Qaeda is a non-state actor, it can not be deemed to be a party to the Geneva Conventions and thus its members would not enjoy the rights given to prisoners of war," including the right not to be tortured).

6. Michael Meltner, *Cruel and Unusual: The Supreme Court and Capital Punishment* 290 (Random House 1973) (reporting that the LDF received messages of both "praise and

or not the euphoria was widely shared, the belief—or, at least, the fervent hope—that *Furman* signaled the end of capital punishment was not limited to the abolitionist camp.⁷ That hope, however, was short-lived. The backlash to *Furman* was both swift and furious. Public outrage was fierce, and by 1976, thirty-five states had enacted new capital punishment statutes designed to remedy the flaws identified in the *Furman* opinions.

Although almost 600 lives were spared by *Furman*—lives that, as Joan Cheever documented, were largely lived out nonviolently⁸—in the end, or at least in the middle, capital punishment was both reinstated and reinvigorated. Four years later, in *Gregg v. Georgia*,⁹ the Supreme Court upheld Georgia's new “guided discretion” capital punishment statute, and by the end of the century, American executions approached a hundred a year. Why? There are many answers, including rising crime rates and changes in Supreme Court personnel. But certainly some of the explanation lies in the multiple *Furman* opinions, for just as *Brown v. Board of Education*¹⁰ exemplifies strategic unanimity, *Furman* reflects a remarkable disregard for consensus. Every Justice wrote his own opinion, and none of the Justices in the majority even joined another Justice's opinion. The articles in this section reveal, in different but fundamental ways, both the folly of that fractured approach and an animating faith that *Furman* was nonetheless rightly decided.

Professor Sullivan's article¹¹ explores the persistent problem of race. As he explains, concerns about racial bias in the administration of capital punishment, especially in Southern states, influenced the decisions of several members of the *Furman* majority. However, *Gregg* upheld the new and (in the opinion of their supporters) improved capital-sentencing schemes, relying upon the unsubstantiated claim that racial

scorn” once news of *Furman* began to circulate); see also Carol S. Steiker, *Furman v. Georgia: Not an End, But a Beginning*, in *Death Penalty Stories* 102 (John H. Blume & Jordan M. Steiker eds., Found. Press 2009) (describing the celebration at the LDF offices when *Furman* was announced).

7. Steiker, *supra* n. 6, at 103 (reporting that Justice Douglas sent a handwritten note to Justice Brennan expressing the hope that they had accomplished “total abolition”).

8. Joan M. Cheever, *Back from the Dead* (John Wiley 2006).

9. 428 U.S. 153 (1976).

10. 347 U.S. 483 (1954).

11. J. Thomas Sullivan, *The Abyss of Racism*, 13 J. App. Prac. & Process 91 (2012).

discrimination would be limited by procedures that guided the jury's discretion and required state appellate courts to review, and set aside, death sentences influenced by race or other arbitrary factors. In the post-*Gregg* years, numerous studies—the most comprehensive of which was the Georgia study conducted by the late David Baldus—revealed that the new guided-discretion schemes failed to curb racial discrimination, especially in black-defendant/white-victim cases. But, in *McCleskey v. Kemp*,¹² the Supreme Court, in an opinion authored by Justice Powell, rejected an equal protection and Eighth Amendment challenge to a Georgia death sentence based on the Baldus Study, finding only a “risk”¹³ that racial bias affected a death sentence in any particular case. Not stopping there, the Court declared that statistical evidence of racial discrimination in the imposition of capital punishment, regardless of its strength, would never be enough, without evidence of racially discriminatory purpose, to invalidate a death sentence.

As Professor Sullivan's article reveals, both in broad strokes and in his discussion of Arkansas death inmate Frank Williams's case, *McCleskey* has effectively insulated from judicial review challenges that the death penalty is applied in a racially discriminatory manner. And after detailing strong evidence of racial bias in the application of the death penalty in multiple contexts such as decisions to seek death against minority defendants, the exclusion of minority jurors from capital trials, and the lack of vigorous and adequate representation of minority defendants, he concludes that the Supreme Court's highly deferential review of state court decisions results in a failure of judicial action and “reflects a continued failure to recognize the damage done to the integrity of the criminal-justice process when race is a factor in the decision to impose the ultimate punishment.”¹⁴

Mr. Newton's article¹⁵ addresses another byproduct of the *Furman* majority's failure to end the American experiment with

12. 481 U.S. 279 (1987).

13. *Id.* at 291 n. 7.

14. Sullivan, *supra* n. 11, at 116–17.

15. Brent E. Newton, *The Slow Wheels of Furman's Machinery of Death*, 13 J. App. Prac. & Process 41 (2012).

capital punishment. He points out that the various constitutional defects in the pre-*Furman* capital sentencing schemes identified by the five members in the *Furman* majority continued to influence the Court's post-*Furman* capital-punishment jurisprudence, producing "an extremely complex body of constitutional rules in capital cases, which has made the wheels of [the machinery of death] move very slowly."¹⁶ He further argues that the system's demonstrated inability to address (often valid) claims of constitutional error in capital cases in a timely manner—some current inmates have been on death row for more than thirty years—is itself cruel and unusual punishment prohibited by the Eighth Amendment because "systemic delays have undermined the legitimate purposes of capital punishment."¹⁷

Mr. Newton offers two possible solutions to what he refers to as the "paradox" of excessive delay.¹⁸ The first is to create a "third generation death-penalty machine" that would significantly reduce the number of death-row inmates by significantly limiting the pool of death-eligible defendants, creating more rigorous trial procedures to reduce the risk of wrongful conviction, and expediting appeals and barring re-prosecution (at least capitally) when certain types of error are found.¹⁹ In theory, this would allow the system to process the much smaller pool of cases in a timely and rational manner. The second is to allow courts to invalidate individual death sentences when the delay reaches a certain temporal point (for example, fifteen years) and is attributable to state actors.²⁰ Mr. Newton acknowledges that the current Court is likely to do neither, but maintains that this is "no reason to allow the current death-penalty machine to grind on at such an excruciatingly slow pace."²¹

16. *Id.* at 45.

17. *Id.* at 65.

18. *Id.* at 67–68.

19. *Id.* at 68–70.

20. *Id.* at 71–72.

21. *Id.* at 73.

The third piece in this special section²² chronicles Justice Harry Blackmun's capital punishment metamorphosis. Mr. Schapiro divides Justice Blackmun's evolution into three phases: Phase one (1976–1986) involved a search for an appropriate set of constitutional norms regulating capital punishment.²³ Then in phase two (1987–1991), Justice Blackmun became increasingly disillusioned with the Court's attempt to regulate the ultimate punishment.²⁴ Finally, phase three (1991–1994) was marked by Justice Blackmun's dismay at the Court's refusal to acknowledge that the modern American death penalty was irreparably broken.²⁵ The culmination of Justice Blackmun's evolution was his dissent from the denial of certiorari in *Callins v. Collins*, in which he famously stated: "From this day forward, I no longer shall tinker with the machinery of death."²⁶

Mr. Schapiro posits that three main concerns drove Justice Blackmun to repudiate capital punishment. The first was his inability to reconcile in his own mind the two fundamental components of the Court's post-*Furman* Eighth Amendment jurisprudence: the requirements that the jury's discretion be sufficiently guided versus the mandate that a capital defendant was entitled to individualized sentencing.²⁷ Second, Justice Blackmun was persuaded that the death-penalty system was infected with racial discrimination.²⁸ The final nail in Justice Blackmun's death-penalty coffin was the Court's steady onslaught of decisions restricting federal courts' habeas corpus review powers.²⁹ Mr. Schapiro argues that Justice Blackmun was convinced that limiting federal court intervention so deregulated the administration of capital punishment that his conscience would no longer allow him to vote to uphold any death sentence.

Just as Justice Marshall is commonly credited with claiming that the abolition of capital punishment was a "major

22. Andrew J. Schapiro, *A Sober Second Thought*, 13 J. App. Prac. & Process 75 (2012).

23. *Id.* at 77–81.

24. *Id.* at 81–84.

25. *Id.* at 84–86.

26. 510 U.S. 1141, 1145 (1994).

27. Schapiro, *supra* n. 22, at 86, 88.

28. *Id.* at 89.

29. *Id.* at 88–89.

milestone on the long road up from barbarism,” Martin Luther King, Jr., is often quoted as having made the parallel though obviously broader claim that “[t]he moral arc of the universe is long, but it bends toward justice.” This more sweeping empirical claim was not original to King either,³⁰ but the underlying sentiment continues inspire efforts in the face of very slow progress toward greater humanity. What is strange and strangely disturbing about the *Furman* story is not the speed of change, however, but its reversal. As the articles in this special section demonstrate, this reversal is not a reflection of the ambiguity of the legal and moral questions before the *Furman* court. Rather, the path between *Furman* and *Gregg* is a blip in the moral arc of the universe, a detour on the long road up from barbarism.



30. See e.g. All Things Considered, Radio Broad. (NPR Sept. 2, 2010) (featuring Prof. Clayborne Carson, Founding Director, Martin Luther King, Jr., Research and Education Institute, Stanford University, who traces the roots of the King quotation back to similar sentiments in the works of nineteenth-century abolitionist Theodore Parker).

