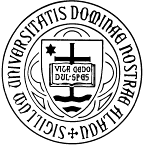

Notre Dame Journal of Law, Ethics & Public Policy

Volume 8
Issue 1 *Symposium on Capital Punishment*

Article 1

1-1-2012

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Recommended Citation

William J. Brennan Jr., *Foreword: Neither Vict1ms Nor Executioners*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1 (1994).
Available at: https://scholarship.law.nd.edu/ndjlepp/vol8/iss1/1

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FOREWORD: NEITHER VICTIMS NOR EXECUTIONERS

WILLIAM J. BRENNAN, JR.*

I.

On February 22, 1994, Justice Blackmun dissented from the denial of certiorari in *Callins v. Collins*,[1] in which a Texas prisoner convicted of murder and sentenced to death challenged the constitutional validity of his conviction and sentence. Justice Blackmun concluded that the death penalty cannot be imposed fairly and with reasonable consistency, as required by the Constitution.[2] What I find most extraordinary about Justice Blackmun's dissenting opinion is the very fact that it may fairly be described as extraordinary: the opinion adopts what certainly has become a remarkable view—indeed, a unique one—among the justices of the Supreme Court.

This state of affairs prevails despite the indisputable fact that more than twenty years after the Court's opinion in *Furman v. Georgia*, "the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake."[3] This assessment cannot be dismissed as the mere recitation of platitudes. I will not replay the Court's death penalty jurisprudence since *Furman*, nor attempt an exhaustive survey of the empirical evidence or the academic literature. A few tragic facts should suffice to demonstrate the accuracy of Justice Blackmun's appraisal.

Although a (bare) majority of the Court turned a blind eye on the evidence in *McCleskey v. Kemp*,[4] it was then, and it remains today, an uncontroverted fact that the race of a capital defendant and that of his victim play a prominent role in determining whether the defendant lives or dies.[5] The statistics paint a chil-

* Associate Justice, Supreme Court of the United States (retired).

1. 510 U.S. —, 62 U.S.L.W. 3546, 1994 U.S. LEXIS 1327 (1994).

2. *See* Furman v. Georgia, 408 U.S. 238 (1972); *cf.* McGautha v. California, 402 U.S. 183, 248 (1971) (Brennan, J., dissenting).

3. *Callins*, 510 U.S. at —, 1994 U.S. LEXIS 1327 at *6 (Blackmun, J., dissenting).

4. 481 U.S. 279 (1987).

5. *Id.* at 321–22 (Brennan, J., dissenting); *see also* David C. Baldus, Charles Pulaski, and George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); Samuel R. Gross and Robert Mauro, *Patterns of Death: An Analysis of Racial*

ling portrait of racial discrimination. The seminal Baldus study[6] on which the defendant relied in *McCleskey v. Kemp* demonstrated that in Georgia, blacks who kill whites are sentenced to death "at nearly *22 times* the rate of blacks who kill blacks, and more than *7 times* the rate of whites who kill blacks."[7] The statistics regarding actual executions are equally stark. Since the Court's 1976 decision in *Gregg v. Georgia*,[8] there have been 228 executions carried out throughout the country; the underlying murders involved 307 victims.[9] In these cases resulting in execution, more than 8 of every 10 victims were white,[10] although only half of all murder victims during the same period were white.[11] The comparison of executions in various types of "cross-race" murders is even more striking. The vast majority of all murders, upwards of 90%, involve a perpetrator and victim of the same race.[12] Among the relatively small group of cross-race murders, "black-on-white" murders are about two and one-quarter times more common than "white-on-black" murders.[13] However, of the 228 persons executed over the last 17 years, 80 black defendants were executed for the murders of white victims (35% of all executions), and only *one* white defendant was executed for the murder of a black victim (0.44% of all executions).[14]

Racial disparity is but one of a host of inequalities that inheres in the death penalty. Another is the stunning lack of counsel adequately equipped to afford capital defendants a fair opportunity to defend their lives in the courtroom. Justice Thurgood Marshall described the situation this way:

> Death penalty litigation has become a specialized field of practice, and even the most well intentioned attorneys often are unable to recognize, preserve, and defend their

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Disparities in Capital Sentencing and Homicide Victimizing, 37 STAN. L. REV. 27 (1984); Michael L. Radelet and Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 L. & SOC'Y REV. 587 (1985).

6. *See* Baldus, *et al.*, *supra* note 5.

7. *McCleskey*, 481 U.S. at 327 (emphasis in original).

8. 428 U.S. 153 (1976).

9. *See* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW U.S.A. 522 (Oct, 1993) (documenting 222 executions through October 6, 1993); Unpublished statistics (on file at the Supreme Court Library) (documenting 6 executions since October 7, 1993).

10. *See* sources cited *supra* note 9.

11. *See* "Victim/Offender Relationship by Race and Sex" tables printed annually in U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES: UNIFORM CRIME REPORTS (1977–1992).

12. *Id.*

13. *Id.*

14. *See* sources cited *supra* note 9.

> client's rights. Often trial counsel simply are unfamiliar with the special rules that apply in capital cases. Counsel—whether appointed or retained—often are handling their first criminal cases, or their first murder cases, when confronted with the prospect of a death penalty. Though acting in good faith, they often make very serious mistakes.[15]

The case reporters and academic literature are filled with countless accounts of inadequate legal representation in capital cases, both at the trial and sentencing phases.[16] As Justice Marshall observed, the problem can be attributed in part to a shortage of defense counsel with adequate training and experience. But even in cases involving competent counsel, there almost invariably exists a lack of the necessary time and money to prepare a constitutionally adequate defense.[17] Notwithstanding the heroic efforts of resource centers and appellate projects throughout the country, the meager hourly rates and expenditure caps that many states impose on appointed counsel in capital cases do not suggest that a solution to this crisis is imminent.

A closely related symptom of this diseased death penalty system is the shocking frequency with which reviewing courts find constitutional error in capital convictions and sentences. Even conservative estimates place the total reversal rate at an astounding 45%; some commentators believe the figure may be as high as 60% or more.[18] Federal courts exercising *habeas corpus* review,

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15. Thurgood Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1 (1986); *see also* Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513 (1988); Roy Brasfield Herron, *Defending Life in Tennessee Cases*, 51 TENN. L. REV. 681 (1984); Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299 (1983).

16. *See, e.g.*, Marcia Coyle, Fred Strasser, and Marianne Lavelle, *Fatal Defense: Trial and Error in the Nation's Death Belt*, NAT'L L.J., June 11, 1990, at 30; Vivian Berger, *The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 245, 245–49 (1991); Mello, *supra* note 15, at 567–85; Goodpaster, *supra* note 15, at 300–302.

17. Numerous commentators have argued that the assistance of counsel standard adopted in *Strickland v. Washington*, 466 U.S. 668 (1984), as applied to representation in capital proceedings, falls woefully short of guaranteeing a constitutionally adequate defense. *See, e.g.*, Goodpaster, *supra* note 15; Berger, *supra* note 16.

18. *See* Jack Greenberg, *Against the American System of Capital Punishment*, 99 HARV. L. REV. 1670, 1672 (1986) ("[A]bout forty-five percent of capital judgments which were reviewed [between January 1, 1982 and October 1, 1985] were set aside by one court or another.") (citation omitted); James S. Liebman, *More Than "Slightly Retro:" The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 537, 541 n. 15 (1991) (citing numerous studies suggesting that "the reversal rate in capital cases as a whole was probably 60% or more" between mid-1976 and mid-1991).

despite an ever-expanding gauntlet of extra-statutory constraints imposed by the Rehnquist Court,[19] have found constitutional error in nearly half of all the cases that reach them.[20] Anthony Amsterdam has explained the piercing indictment this figure conveys:

> In every one of these cases [in which federal *habeas* relief was granted], the inmate's claim had been rejected by a state trial court and by the state's highest court, at least once and often a second time in state post-conviction proceedings; the Supreme Court had usually denied *certiorari* at least once and sometimes twice; and a federal district court [in those cases reaching a court of appeals] had then rejected the inmate's claims of federal constitutional error infecting his conviction and/or death sentence.[21]

Perhaps the bleakest fact of all is that the death penalty is imposed not only in a freakish and discriminatory manner, but also in some cases upon defendants who are actually innocent.[22] In sum, as Jack Greenberg has trenchantly observed, "[d]eath penalty proponents have assumed a system of capital punishment that simply does not exist . . . ."[23]

II.

While I concur in Justice Blackmun's miserable assessment of the death penalty system that actually does exist in this country, I have also long held the view that the death penalty is in all circumstances an uncivilized and inhuman punishment inconsistent with the Eighth Amendment of the Constitution.[24] The

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19. *See, e.g.*, Herrera v. Collins, — U.S. —, 113 S. Ct. 2325 (1993); Keeney v. Tamayo-Reyes, — U.S. —, 112 S. Ct. 1715 (1992); Coleman v. Thompson, 501 U.S. —, 111 S. Ct. 2546 (1991); McCleskey v. Zant, 499 U.S. 467 (1991); Butler v. McKellar, 494 U.S. 407 (1990); Teague v. Lane, 489 U.S. 288 (1989).

20. *See* Liebman, *supra* note 18, at 541 n.15.

21. Anthony G. Amsterdam, *In Favorem Mortis: The Supreme Court and Capital Punishment*, 14 HUM. RTS. (A.B.A. SEC. INDIVIDUAL RTS. & RESP.) 14 (1987).

22. *See* Hugo Adam Bedau and Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 36, 173–79 (1987);

23. Greenberg, *supra* note 18, at 1670. These critical facts undercut the Court's continuing adherence to the position that the death penalty is constitutional. "[T]he Court's 1976 opinions approving several capital schemes were in an important sense provisional. They were based to an unusually significant degree on specific empirical claims about the possibility of reliable and evenhanded administration of the death penalty." Jordan Steiker, *The Long Road Up from Barbarism: Thurgood Marshall and the Death Penalty*, 71 TEX. L. REV. 1131 (1993).

24. *See Furman*, 408 U.S. at 257 (Brennan, J., concurring).

legal reasoning which led me to this view, and which convinced me to reject competing arguments, bears repeating.

I began my opinion in *Furman* with the recognition that it is difficult to define precisely the constitutional words "cruel and unusual."[25] What we do know about the drafting and adoption of the Eighth Amendment sheds little light on its precise meaning, or on the Framers' intent in including its protections among those enumerated in the Bill of Rights.[26] The Framers apparently intended to ban torturous punishments.[27] But it also appears that they contemplated that the Eighth Amendment was neither "limited to the proscription of unspeakable atrocities[, nor intended] simply to forbid punishments considered 'cruel and unusual' at the time."[28] Indeed, all of the dissenters in *Furman* joined the opinion of Chief Justice Burger, who wrote that "the Eighth Amendment prohibition cannot fairly be limited to those punishments thought excessively cruel and barbarous at the time of the adoption of the Eighth Amendment."[29] Anyone defending the narrow historical approach that the Court unanimously rejected in *Furman*[30] must also be prepared to defend the contemporary use of pillorying, branding, and cropping and nailing of the ears, all of which were practiced in this country during colonial times.[31]

Some have advanced the simplistic and superficially attractive textual argument that even if we do not know *exactly* what the Framers meant by cruel and unusual, we do know with certainty that they did not regard capital punishment as constitutionally impermissible because the Fifth Amendment[32] "authorizes" the death penalty in certain circumstances.[33] But the language of the Fifth Amendment does not declare that the right of the state to punish by death shall be inviolable; it merely requires that

25. *Id.* at 258.

26. *See id.* at 258–64.

27. *See id.* at 258–60 (discussing debates in the state ratifying conventions of Massachusetts and Virginia).

28. *Id.* at 263.

29. *Id.* at 382 (Burger, C.J., dissenting).

30. *See also* Weems v. United States, 217 U.S. 349 (1910); Trop v. Dulles, 356 U.S. 86 (1958).

31. *See Furman*, 408 U.S. at 414 (Powell, J., dissenting).

32. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . . [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb, . . . nor be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

33. *See, e.g.*, *Callins*, 510 U.S. at —, 1994 U.S. LEXIS 1327 at *1 (Scalia, J., concurring); Ernest van den Haag, *The Death Penalty Once More*, 18 U.C. DAVIS L. REV. 957 (1985).

when and if death is a possible punishment, the defendant shall enjoy certain procedural safeguards. Turning to the Eighth Amendment itself—the section of the Constitution that deals specifically with limitations on the state's penal power—we find no language which suggests that the death penalty was to be forever regarded as outside the scope of its prohibition.

The proponents of the textual argument insist that the allusions in the Fifth Amendment indicate, at the very least, that the Framers did not consider the death penalty a "cruel and unusual" punishment prohibited by the Eighth Amendment. We hardly need rely on the Fifth Amendment to reach this conclusion: capital punishment, like pillorying, branding, and cropping and nailing of the ears, was a penalty commonly imposed during the founding period. But as I have already noted, even those who disagree with my ultimate position must acknowledge that the Eighth Amendment definition of "cruel and unusual" is not frozen in time.[34] Thus, the fact that the Framers did not view the death penalty as "cruel and unusual" cannot settle the matter.[35] The resort to this position is nothing less than an abdication of the judicial responsibility of interpreting the Constitution.

Of course, rejecting the easy answers leaves the more difficult task of ascertaining and applying the broad principles and values embodied in the general and relativistic words of the Eighth Amendment. Mindful of Justice Marshall's warning that this language "presents dangers of too little . . . self-restraint" on the part of the bench,[36] I attempted in *Furman* to explain my understanding that the Eighth Amendment "prohibits the infliction of uncivilized and inhuman punishments."[37] I summarized my position in a 1986 lecture at the Harvard Law School:

> As I read them, the Bill of Rights generally, and the Eighth Amendment specifically, insist that the state treat its members with respect for their intrinsic worth as human beings, and this is true even as the state punishes the commission

34. See *supra* notes 28–31 and accompanying text.

35. For general critiques of the originalist mode of constitutional interpretation, *see* Ronald Dworkin, LAW'S EMPIRE 359–69 (1986); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); *see also* Kent Greenfield, *Original Penumbras: Constitutional Interpretation in the First Year of Congress*, 26 CONN. L. REV. 79 (1993). For critiques of originalism in the specific context of Eighth Amendment interpretation, *see* Hugo Adam Bedau, *Thinking of the Death Penalty as a Cruel and Unusual Punishment*, 18 U.C. DAVIS L. REV. 873 (1985); William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 324–26 (1986).

36. *Furman*, 408 U.S. at 315 (Marshall, J., concurring).

37. *Id.* at 270 (Brennan, J., concurring).

> of the most brutal crimes. . . . When we consider *why* various punishments have been condemned by history as barbaric, we appreciate that they generally involve the infliction of great pain. But why do we, and why did the Framers, care so much about pain? This is not a simple question, and it does not answer itself. The true significance of the thumbscrew, of the iron boot, of the stretching of limbs, is that they treat members of the human race as nonhumans, as objects to be hurt and then discarded. . . . Mutilations and tortures are not unconstitutional merely because they are painful—they would not, I submit, be saved from unconstitutionality by having the convicted person sufficiently anesthetized such that no physical pain were felt; rather, they are unconstitutional because they are inconsistent with the fundamental premise of the eighth amendment that "even the vilest criminal remains a human being possessed of common human dignity."[38]

In a similar address a year earlier at the Hastings College of Law, I put it this way: "A punishment must not be so severe as to be utterly and irreversibly degrading to the very essence of human dignity. . . . The calculated killing of a human being by the state involves, by its very nature, an absolute denial of the executed person's humanity. The most vile murder does not, in my view, release the state from constitutional restraints on the destruction of human dignity. Yet an executed person has lost the very right to have rights, now or ever. For me, then, the fatal constitutional infirmity of capital punishment is that it treats members of the human race as nonhumans, as objects to be toyed with and discarded."[39]

The inevitable dehumanization of those to be executed is evident in the gruesome spectacle that often unfolds outside a prison on the night of a scheduled execution. On January 10, 1986, for example, a crowd of more than 200 gathered outside the Central Correctional Institution of the South Carolina Department of Corrections for the electrocution of James Terry Roach, who pleaded guilty five years earlier, at the age of 17, to the brutal murder of two area teenagers. Some in the crowd carried signs and banners with messages like "Save Energy, Use a Rope," "Fry Him," "Let the Juice Flow," and "Bon Voyage, Mr.

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38. Brennan, *supra* note 35, at 329–30 (quoting *Furman*, 408 U.S. at 273) (citation omitted).

39. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 436 (1986).

Roach."[40] I am not aware of, and I cannot imagine, a similar display ever taking place outside a prison on the day a convicted murderer arrives to serve the first day of a life sentence.

Some have argued that the view that the death penalty is cruel and unusual because it treats humans as objects to be hurt and then discarded is based on little more than personal opinion. But I have always attempted to justify my position by means of reasoned argument about the meaning of the vague words of the Eighth Amendment. I submit that it was the dissenters in *Furman* who failed to make arguments and to respond to arguments, who failed to explore what values underlie their feelings and what values the Eighth Amendment was intended to serve. I have made this point before:

> In his *Furman* dissent, Chief Justice Burger distinguished capital punishment from "a punishment such as burning at the stake that everyone would ineffably find repugnant to all civilized standards." In my view, this is not an argument; this is simply the view of a single judge. Think about it: burning at the stake *is* capital punishment. . . . Death by electrocution could be described in equally graphic terms. . . . *Furman* might have been characterized not as a case about the death penalty, but rather as a case about death by electrocution, which might fairly be described as "frying in a chair." How would frying in a chair be distinguished from burning at a stake?[41]

I am convinced that those who argue that the death penalty is unconstitutional "have made the better—and I mean the better reasoned—case."[42]

There are also those who argue that opponents of the death penalty are insensitive to the scourge of violent crime, that they refuse to hold murderers accountable for their crimes, treating the victimizers as morally equivalent to their victims. Of course, these arguments do not go to the constitutional issues involved, but rather to questions of social policy. But apparently it cannot go without saying, if one is to oppose the death penalty for any reason, that rampant crime is a serious social ill, and that murderers deserve to be punished. The death penalty may be a reaction to the problem of crime in a particular sense, a "symbolic

40. I saw these signs in television news coverage of the execution. *See also South Carolina Executes Killer: Age Stirs Protest*, N.Y. TIMES, Jan. 11, 1986, at 6; Craig Walker, *Groups Applaud, Condemn Roach Execution*, UPI, Jan. 10, 1986 (*available* in LEXIS, News Library, UPI File).

41. Brennan, *supra* note 35, at 330 (citation omitted).

42. *Id.* at 331.

palliative for the fear of crime,"[43] but it is not part of the a solution. Most opponents and supporters of capital punishment agree that there is no reliable evidence that the death penalty deters homicide better than life imprisonment.[44] In any event, our urgent need to curb the problem of crime does not justify our abandonment of the Constitution. Our desire not to become victims must not condemn us to become executioners.

III.

These are not the first pages of a legal journal in which I have defended the position that I first articulated in *Furman v. Georgia.* But they may well be the last. I have come to realize that I shall not likely live to see that "great day for our country . . . [and] our Constitution" when a majority of the Supreme Court finally comes to accept the fact that the death penalty "denies the humanity and dignity of the victim and transgresses the prohibition against cruel and unusual punishment."[45] But even if it is not for me, as it was not for Justice Marshall, to finish the work, neither were we free to desist. The final labor, it seems, will be left to the brave and able hands and minds of those we leave behind.

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43. Arthur J Goldberg and Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1774 (1970).

44. *See, e.g.*, Dane Archer, Rosemary Gartner, and Marc Beittel, *Homicide and the Death Penalty: A Cross-National Test of A Deterrence Hypothesis*, 74 J. CRIM. L. & CRIMINOLOGY 991 (1983); John Kaplan, *The Problem of Capital Punishment*, 1983 U. ILL. L. REV. 555; Lewis F. Powell, *Capital Punishment*, 102 HARV. L. REV. 1035, 1041 (1989); van den Haag, *supra* note 33, at 964–65. In fact, there is evidence that publicized executions may have a "brutalizing" effect on society that causes homicide rates to increase. *See. e.g.*, William C. Bailey, *Disaggregation in Deterrence and Death Penalty Research: The Case of Murder in Chicago*, 74 J. CRIM. L. & CRIMINOLOGY 827 (1983); William J. Bowers and Glenn L. Pierce, *Deterrence or Brutalization: What is the Effect of Executions?*, 26 CRIME & DELINQUENCY 453 (October 1980).

Even those who favor capital punishment generally state that they would prefer the alternative of genuine "life imprisonment," which they apparently believe to be unavailable currently because of the possibility of parole or lenient sentencing. *See* J. Mark Lane, *"Is There Life Without Parole?": A Capital Defendant's Right to a Meaningful Alternative Sentence*, 26 LOY. L.A. L. REV. 327, 364–65 (1993) (citing polls). The evidence also indicates that sentencing juries often choose the death penalty instead of life imprisonment because they are concerned about the possibility of parole. *See id.* at 334–43, 364–65; *see also* Theodore Eisenberg and Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORN. L. REV. 1 (1993).

45. Brennan, *supra* note 35, at 331.