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History Repeats Itself: The Post-Furman Return to Arbitrariness in Capital Punishment

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HISTORY REPEATS ITSELF: THE POST-FURMAN RETURN TO ARBITRARINESS IN CAPITAL PUNISHMENT

“[T]he burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society.”


“A disproportionate number of capital murder defendants are black, and [a] disproportionate number of capital murder defendants are people who are accused of killing a white victim. And close to 100 percent of capital murder defendants are indigent. At some level, everyone in America already knows this.”

—David R. Dow, capital defense attorney, 2002

INTRODUCTION

The 1972 landmark ruling in Furman v. Georgia appeared to be the end of the arbitrary imposition of the death penalty in the United States. Almost everyone around the country, including the Justices who decided Furman, believed the decision permanently invalidated America’s death penalty. Though each of the five Justices voting in the Furman majority authored individual opinions with differing reasoning, each relied on the arbitrary imposition of the death penalty in concluding the punishment was unconstitutional under the Cruel and Unusual Punishments Clause of the Eighth Amendment. The Justices in the majority had little Eighth Amendment precedent to rely upon in declaring

3. See 408 U.S. at 239–40 (per curiam).
the death penalty unconstitutional, but Furman came to be known for condemning the arbitrary imposition of the penalty. The Court’s concern that the unique punishment of death not be imposed in an “arbitrary and capricious manner” seemed to indicate the Constitution would not tolerate a system where the penalty was “so wantonly and so freakishly imposed.”

Likely as a result of the fractured and unprecedented ruling in Furman, the decision did not permanently end the death penalty in the United States. Four years after its decision in Furman, in Gregg v. Georgia, the Supreme Court upheld the constitutionality of Georgia’s new death penalty statute, believing it eliminated the possibility of arbitrariness. The Court held the new statute negated the jury’s ability to wantonly and freakishly impose a death sentence, allaying the concerns that prompted its decision in Furman. With the Court’s new commitment to standards in sentencing, arbitrariness in capital punishment appeared, at least to some, to be a thing of the past.

History, however, appears to be repeating itself. Arbitrariness continues to plague capital sentencing throughout the country and a review of the current status of the death penalty reveals many of the same factors that lead to Furman are again present. As a result, the Court may soon face a Furman-like challenge to the death penalty. Fortunately, significant Eighth Amendment precedent has developed since Furman which will allow the Court to approach the challenge in a more structured and reasoned way. When the challenge arises the Court should again declare the death penalty unconstitutional, but this time in a unified opinion declaring the death penalty unconstitutional per se, negating the possibility of history repeating itself yet again.

7. See Gregg, 428 U.S. at 206.
8. Id. at 188.
10. A look back reveals the Furman decision actually mobilized death penalty supporters and resulted in increased support for and use of the death penalty in years to come. See DAVID GARLAND, PECULIAR INSTITUTION: AMERICA’S DEATH PENALTY IN AN AGE OF ABOLITION 287 (2010); Lain, supra note 4, at 46–47.
11. 428 U.S. at 206; see also infra note 99.
13. See id. at 206 (noting Georgia’s new sentencing procedures “focus[ed] the jury’s attention on the particularized nature of the crime and the particularized characteristics of the individual defendant”).
Part I of this comment provides a brief review of Furman and the circumstances leading to the decision. Part II discusses the factors indicating current arbitrariness and other recurring factors surrounding the American death penalty. Part III examines the development of the Cruel and Unusual Punishments Clause since Furman. Finally, Part IV discusses how the Supreme Court should apply its contemporary Eighth Amendment doctrine to the current circumstances surrounding the imposition of the death penalty.

I. THE FURMAN DECISION: REASONING AND SURROUNDING CIRCUMSTANCES

The Furman decision shocked the country, especially in light of the Court’s ruling just one year earlier in McGuatha v. California, which upheld discretionary and standardless decision-making in the imposition of the death penalty. The Furman decision was not the product of a long line of precedent slowly chipping away at the institution of capital punishment; rather it resulted from the social and political movements at the time. At the time, Eighth Amendment doctrine and the Court’s own precedent clearly supported the constitutionality of the death penalty, but the circumstances surrounding its imposition con-
vinced five of the Justices the death penalty needed to be declared unconstitutional.18

A. Eighth Amendment Precedent at the Time of Furman

At the time of Furman, the Court’s interpretation of the Cruel and Unusual Punishments Clause provided little support for the Justices’ determination that the death penalty was cruel and unusual under the Clause’s meaning.19 In separate opinions, Justices Brennan and Marshall reviewed the history of the Clause, agreeing it derived from the English Bill of Rights, but noting the Framers provided little interpretation of its meaning.20 In the more than 150 years between the ratification of the American Bill of Rights and Furman, the Court only decided ten cases providing any interpretation of the Clause.21 These cases provided little interpretation of the Amendment and noted the difficulty in defining the provision with exactness.22 Only three times before Furman did the Court declare a punishment unconstitutional under the Eighth Amendment, none of which were a death penalty case.23

Not until 1958 did the Court provide the first, and lasting, tool for interpreting the Clause.24 In Trop v. Dulles, the Court held the

18. See Lain, supra note 4, at 18.
19. See STUART BANNER, THE DEATH PENALTY 233–34 (2002). In Boykin v. Alabama, the Court confronted a claim that a punishment of death for robbery was cruel and unusual, but ultimately decided the case on other grounds, providing no interpretation of the Eighth Amendment with regard to the death penalty. See 395 U.S. 238, 243–44 (1969) (reversing a death sentence after finding the record in the case was insufficient to prove the defendant had a full understanding of the constitutional rights he waived through a guilty plea).
22. See Furman, 408 U.S. at 258 (Brennan, J., concurring); Wilkerson, 99 U.S. at 135–36.
23. See Robinson, 370 U.S. at 667 (holding criminal punishment for addiction to narcotics violated the Eighth Amendment); Trop, 356 U.S. at 103 (holding expatriation as punishment violated the Eighth Amendment per se); Weems, 217 U.S. at 358, 381 (1910) (holding fifteen years of hard labor in ankle chains and loss of other civil rights for falsification of a public record violated the Eighth Amendment).
Amendment must be interpreted as drawing “its meaning from the evolving standards of decency that mark the progress of a maturing society.”25 The Court determined the Eighth Amendment was not a static clause, but one with inherent flexibility, which must continually be reexamined “in the light of contemporary human knowledge.”26 Until Furman, the Court only struck down a penalty under the Amendment when it found virtually unanimous or universal condemnation of the punishment.27

Thus, the Justices confronted Furman armed only with precedent interpreting the Cruel and Unusual Punishments Clause as one that changes over time with the evolving standards of decency of a maturing society. The Clause never invalidated the death penalty prior to Furman.28 In fact, only one year before, the Court upheld the death penalty in McGuatha, presuming its constitutionality under the Eighth Amendment.29 Though the Court interpreted the Eighth Amendment as evolving, the doctrine did not seem to allow for such a drastic evolution of the standards of decency.30 With the recent approval of the death penalty, the Court’s traditional legal analysis did not provide support for the Justices’ decision in Furman.31

B. The Court’s Stated Reasoning

Though the then-current interpretation of the Eighth Amendment did not clearly support their decision, five of the nine Justices declared the death penalty unconstitutional under the Cruel and Unusual Punishments Clause.32

26. Furman, 408 U.S. at 327 (Marshall, J., concurring) (quoting Robinson, 370 U.S. at 666); id. at 328 (noting Chief Justice Frankfurter’s emphasis on the “flexibility inherent in the words ‘cruel and unusual’” in Trop).
28. Furman, 408 U.S. at 380 (Burger, C.J., dissenting) (“In the 181 years since the enactment of the Eighth Amendment, not a single decision of this Court has cast the slightest shadow of a doubt on the constitutionality of capital punishment.”).
29. See McGuatha v. California, 402 U.S. 183, 310 n.74 (1971) (Brennan, J., dissenting). McGuatha was decided on due process grounds, leaving the question of whether the death penalty violated the Eighth Amendment open. See id. at 196 (majority opinion); Liebman, supra note 16, at 23.
30. See Furman, 408 U.S. at 409–10 (1972) (Blackmun, J., dissenting) (“I certainly subscribe to the position, that the Cruel and Unusual Punishments Clause may acquire meaning as public opinion becomes enlightened by a humane justice . . . My problem . . . is the suddenness of the Court’s perception of progress in the human attitude since decisions of only a short while ago.” (internal quotation marks omitted)).
31. Lain, supra note 4, at 11.
and Unusual Punishments Clause.\textsuperscript{32} The five concurring Justices could not agree on unified reasoning for the determination and wrote individual opinions; however, the common thread through each of the Justices’ opinions was their concern with the arbitrary imposition of the death penalty.\textsuperscript{33}

Justices Brennan and Marshall found the death penalty per se unconstitutional based in part on its arbitrary imposition.\textsuperscript{34} Justice Brennan found arbitrariness “virtually inescapable” in a punishment inflicted in a “trivial number of cases in which it is legally available.”\textsuperscript{35} He noted a steady decline in the infliction of the punishment, evidenced by the decline in executions and sentences from the 1930s to 1972.\textsuperscript{36} He concluded there was a strong inference the punishment was not being “regularly and fairly applied” when it was inflicted no more than fifty times per year in a country of over 200 million people.\textsuperscript{37} Based on arbitrariness and other justifications, Justice Brennan concluded the death penalty was unconstitutional in all circumstances.\textsuperscript{38} He concluded, “Rather than kill an arbitrary handful of criminals each year, the States will confine them in prison.”\textsuperscript{39}

Justice Marshall’s main rationale was that capital punishment was excessive and therefore violated the Eighth Amendment.\textsuperscript{40} However, even if the punishment was not excessive, he would have found it unconstitutional because it was morally unacceptable to the people of the United States.\textsuperscript{41} Though there were not clear indicators the people of the country found the punishment morally unacceptable, Justice Marshall determined the people would find it unacceptable if they knew more about the imposition.

\textsuperscript{32} Furman, 408 U.S. at 256–57 (Douglas, J. concurring); \textit{id.} at 305 (Brennan, J., concurring); \textit{id.} at 310 (Stewart, J., concurring); \textit{id.} at 314 (White, J., concurring); \textit{id.} at 370 (Marshall, J., concurring).
\textsuperscript{33} See Gregg v. Georgia, 428 U.S. 155, 206 (1976); Lain, supra note 4, at 14.
\textsuperscript{34} Furman, 408 U.S. at 293 (Brennan, J., concurring); \textit{id.} at 364, 369 (Marshall, J., concurring).
\textsuperscript{35} \textit{Id.} at 293 (Brennan, J., concurring).
\textsuperscript{36} \textit{Id.} at 291–93.
\textsuperscript{37} \textit{Id.} at 293.
\textsuperscript{38} \textit{Id.} at 305. In addition to finding the penalty unconstitutionally arbitrary, Justice Brennan found the penalty was unusually severe and thus degrading to human dignity, \textit{id.} at 291, unacceptable to contemporary society, \textit{id.} at 300, and excessive and unnecessary for the protection of society. \textit{Id.} at 304.
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} \textit{Id.} at 359 (Marshall, J., concurring).
\textsuperscript{41} \textit{Id.} at 360.
tion of the penalty.\textsuperscript{42} One of the reasons he believed the average citizen would find capital punishment unacceptable was its discriminatory imposition.\textsuperscript{43} Justice Marshall found discriminatory imposition based on evidence that “Negroes were executed far more often than whites in proportion to their percentage of the population,”\textsuperscript{44} that the penalty was employed against men and not women,\textsuperscript{45} and that the “burden of capital punishment falls upon the poor, the ignorant, and the under privileged members of society.”\textsuperscript{46} Accordingly, he concluded the death penalty violated the Eighth Amendment under all circumstances.\textsuperscript{47}

Justices Douglas, Stewart, and White each concluded capital punishment only violated the Eighth Amendment under the then-current statutes.\textsuperscript{48} Each of these Justices also based their decision on the arbitrary imposition of the death penalty.\textsuperscript{49} Justice Douglas noted the death penalty was applied “sparsely, selectively, and spottily to unpopular groups,” specifically African Americans, the poor, and the ill-educated.\textsuperscript{50} He determined an important part of the Eighth Amendment was equality and concluded the death penalty was unconstitutionally cruel and unusual under the then-

\begin{footnotes}
\footnotetext[42]{Id. at 362–63, 369.}
\footnotetext[43]{Id. at 363–64. In addition, Justice Marshall believed evidence that innocent people were executed and that the punishment “wreak[ed] havoc” on the entire criminal justice system would lead people to believe the death penalty was morally unacceptable. Id.}
\footnotetext[44]{Id. at 364 (noting 3859 people were executed between 1930 and 1972, of which 1751 were white and 2066 were African American).}
\footnotetext[45]{Id. at 365.}
\footnotetext[46]{Id. at 365–66.}
\footnotetext[47]{See id. at 370.}
\footnotetext[48]{Id. at 256–57 (Douglas, J., concurring) (“[T]hese discretionary statutes are unconstitutional in their operation.”); id. at 310 (Stewart, J., concurring) (“[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”); id. at 314 (White, J., concurring) (“In my judgment what was done in these cases violated the Eighth Amendment.”). In \textit{Furman}, the Justices reviewed the Georgia and Texas death penalty statutes in three companion cases. William Henry Furman was sentenced to death under Georgia’s statute for the murder of a householder while attempting to enter the home at night. See id. at 252 (Douglas, J., concurring). Lucious Jackson, Jr., a black male, was sentenced to death under Georgia’s statute for the rape of a white woman. See id. Elmer Branch, also a black male, was sentenced to death under Texas’s statute for the rape of a sixty-five year old white woman. See id. at 253.}
\footnotetext[49]{See id. at 256 (Douglas, J., concurring); id. at 309–10 (Stewart, J., concurring); id. at 313 (White, J., concurring).}
\footnotetext[50]{See id. at 256 (Douglas, J., concurring). Few cases prosecuting a person of means or social position resulted in execution. Defendants able to employ expert legal counsel were “almost certain to avoid death penalties.” Sara R. Ehrmann, \textit{For Whom the Chair Waits}, in CAPITAL PUNISHMENT 187, 205 (James A. McCafferty ed., 1972).}
\end{footnotes}
current statutes.\textsuperscript{51} Justice Stewart made the oft-cited statement that the few death sentences actually imposed were “cruel and unusual in the same way that being struck by lightning is cruel and unusual.”\textsuperscript{52} and concluded the “Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death . . . so wantonly and so freakishly imposed.”\textsuperscript{53} Finally, Justice White reasoned the death penalty was arbitrary because of the infrequency of its imposition, even for the most atrocious crimes, and found no meaningful basis for distinguishing between the cases resulting in execution and those which did not.\textsuperscript{54} In response to this arbitrariness, Justice White concluded the death penalty statutes before the Court in \textit{Furman} violated the Eighth Amendment.\textsuperscript{55}

Overall, the Justices found significant arbitrariness in the capital punishment system and stretched existing Eighth Amendment doctrine to invalidate the death penalty statutes throughout the country.\textsuperscript{56} The arbitrary infliction noted by the Justices, however, does not provide a complete picture of the institution of capital punishment in America leading up to \textit{Furman}.\textsuperscript{57} Other trends throughout the country certainly provided the catalyst for the Court’s decision.

C. \textit{The Status of Capital Punishment Leading up to Furman}

Numerous indicators signaled the decline of the death penalty’s use and popularity at the time of \textit{Furman}. The Justices discussed some of these indicators specifically, but others certainly played a role by creating a social and political climate seemingly ripe for the decision.\textsuperscript{58}

\begin{footnotesize}
\begin{enumerate}
\item \textit{See Furman}, 408 U.S. at 256–57 (Douglas, J., concurring).
\item \textit{Id.} at 309 (Stewart, J., concurring).
\item \textit{Id.} at 310.
\item \textit{Id.} at 313 (White, J., concurring).
\item \textit{See id.} at 314.
\item \textit{See Lain, supra} note 4, at 11.
\item \textit{See id.} at 18–19.
\item \textit{See generally Lain, supra} note 4 (discussing the Court’s reliance on social and political movements of the time in rendering the \textit{Furman} decision).
\end{enumerate}
\end{footnotesize}
1. Decline in Executions and Sentences

The decline in executions and sentences signaled more than arbitrary imposition. The nation showed its discomfort with the penalty by using it reluctantly and sparingly. The number of executions dropped sharply in the years leading up to Furman. Justice Brennan noted that the country averaged 167 executions per year in the 1930s, and that the average dropped to 128 per year in the 1940s and to 72 per year in the 1950s. The 1960s showed a further decrease in the use of the punishment with an average of 48 per year from 1960–1962. The remainder of the 1960s and early 1970s saw an even steeper decline in executions with 21 in 1963, 15 in 1964, 7 in 1965, 1 in 1966, 2 in 1967, and no executions between 1968 and the Furman decision in 1972.

The number of sentences imposed in capital cases also declined significantly in the years leading up to Furman. Though the population and number of capital crimes committed increased greatly, capital sentencing became a rarity in the forty years leading up to Furman. From 1935 to 1942, an average of 142 defendants received death sentences each year. That number dropped to 106 per year in the 1960s, revealing juries returned death sentences only about ten to twenty percent of the time when death was statutorily available. Additionally, commutations and other reprieves spared over half of those sentenced to death in the 1960s.

59. See Furman, 408 U.S. at 291 (Brennan, J., concurring).
60. Id. at 291 n.40.
61. Id.
62. See id. at 291 n.40. The decrease in executions likely resulted in part because of intense challenges to the constitutionality of the penalty by the National Association for the Advancement of Colored People and the American Civil Liberties Union in the late 1960s, the 1960s criminal procedure revolution allowing death row inmates new opportunities to litigate prior to execution, and the decreased number of sentences imposed by juries in capital cases. See Lain, supra note 4, at 20–21.
63. See Furman, 408 U.S. at 292–93 (Brennan, J., concurring).
64. Lain, supra note 4, at 21 (citing BANNER, supra note 19, at 244).
66. See id. at 291–92. The number is especially surprising because death qualified juries were not prohibited until 1968. See Witherspoon v. Illinois, 391 U.S. 510, 523 (1968) (holding the imposition of a death sentence by a jury where veniremen were excluded for cause simply because they voiced general objections to the death penalty was constitutionally impermissible).
Only one out of every four death sentences actually resulted in execution.\textsuperscript{67} The decrease in sentences and executions clearly showed the reluctance of the American people to impose the death penalty despite the statutory availability of the sentence. This is especially noteworthy because the decrease occurred in spite of the general belief that the rate of violent crime had increased during the same period.\textsuperscript{68}

2. National Trend Toward Abolition

Though not specifically noted by the Justices, the national trend toward abolition likely played a role in setting the stage for the \textit{Furman} decision. Several state legislatures abolished the death penalty in the decades leading up to \textit{Furman}.\textsuperscript{69} Six states and territories categorically abolished the death penalty between 1957 and 1972—the Alaska and Hawaii territories in 1957,\textsuperscript{70} West Virginia\textsuperscript{71} and Iowa in 1965,\textsuperscript{72} New Mexico in 1969,\textsuperscript{73} and California, by judicial decision, in 1972.\textsuperscript{74} At the same time, several states severely limited the crimes for which the penalty was available, resulting in limited abolition in those states.\textsuperscript{75} Even in the states retaining the death penalty, a trend toward discretionary statutes and limiting the crimes eligible for the penalty emerged.\textsuperscript{76} The movement toward abolition in the mid-twentieth century is especially noteworthy because no states made legislative moves toward abolition in the forty years leading up to the late 1950s.\textsuperscript{77}

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  \item \textsuperscript{67} See \textit{Furman}, 408 U.S. at 292 n.46 (Brennan, J., concurring).
  \item \textsuperscript{68} See Michael Meltsner, \textit{Cruel and Unusual: The Supreme Court and Capital Punishment} 52 (1973).
  \item \textsuperscript{69} See id. at 51–52; Lain, supra note 4, at 22.
  \item \textsuperscript{70} Meltsner, supra note 68, at 51.
  \item \textsuperscript{71} Banner, supra note 19, at 244.
  \item \textsuperscript{72} Id.; Meltsner, supra note 68, at 51–52.
  \item \textsuperscript{73} Garland, supra note 10, at 120.
  \item \textsuperscript{74} People v. Anderson, 493 P.2d 860, 899 (Cal. 1972) (concluding capital punishment was “impermissibly cruel” and its authorization was unconstitutional).
  \item \textsuperscript{75} Garland, supra note 10, at 120. New York and Vermont in 1965 and New Jersey in 1972 passed laws abolishing the death penalty for all murders except those of on-duty police and prison officials and those committed by an inmate serving a life sentence. Id.
  \item \textsuperscript{76} Lain, supra note 4, at 23–24. The movement toward abolition was incomplete as one state, Delaware, abolished the death penalty in 1958 only to reinstate the penalty again in 1961, and many states elected to retain their death penalty even when facing abolitionist legislation. See Garland, supra note 10, at 120; Lain, supra note 4, at 24–25.
  \item \textsuperscript{77} William J. Bowers, \textit{Legal Homicide: Death as Punishment in America}, 1864–
In addition to state abolition, political and public opposition to the death penalty created pressure to abolish the death penalty throughout the country. Numerous political groups publicly opposed the death penalty in the 1960s. In 1965, the Department of Justice announced its opposition to the death penalty, and in 1967, the National Crime Commission described the administration of the death penalty as intolerable and recommended its abolition absent substantial reform. In 1968, in an unprecedented move, the Johnson Administration specifically asked Congress to abolish the penalty. Also during the late 1950s and early 1960s, state governors pushed for abolition. The North Carolina governor made many public comments against the death penalty, and the Ohio governor campaigned against the penalty, going so far as to hire convicted murderers in order to demonstrate the possibility of rehabilitation.

Many nongovernmental organizations also took a public stand against the death penalty as well. Several of the nation’s prominent newspapers, including the New York Times, Washington Post, Los Angeles Times, and Philadelphia Inquirer, voiced opposition, as did organizations such as the American Judicature Society, the American Correctional Association, and the National Council on Crime and Delinquency. By the end of the 1960s, most major Protestant denominations and the American Jewish

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78. See Lain, supra note 4, at 33–34.
79. BANNER, supra note 19, at 241.
80. PRESIDENT’S COMM’N ON LAW ENFORCEMENT & THE ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (1967) (citing the penalty’s infrequent imposition, decline in application, unclear deterrent effect, undesirable impact on the administration of justice, and discriminatory patterns in imposition as necessitating significant reform or abandonment of the punishment).
81. To Abolish the Death Penalty: Hearing on S.1760 Before the S. Comm. on the Judiciary, 90th Cong. (1968) [hereinafter Death Penalty Hearing], as reprinted in CAPITAL PUNISHMENT, supra note 50, at 180 (statement of Attorney Gen. Ramsey Clark). In 1971, President Johnson’s Committee on Reform of the Federal Laws also called for abolition of the federal death penalty. Id.
82. BANNER, supra note 19, at 240–41.
83. Id. (noting that North Carolina Governor Terry Sanford made so many statements against the death penalty that the state’s condemned prisoners made a point to mention it in their clemency petitions). The North Carolina governor’s opposition to the punishment is especially informative as one would expect strong support for the punishment in the southern state. See Lain, supra note 4, at 34.
84. BANNER, supra note 19, at 240.
85. Lain, supra note 4, at 32 (citations omitted).
community officially opposed the death penalty.\textsuperscript{86} Many of these organizations made their opposition known to the Court in the eleven amicus briefs filed in \textit{Furman}, supporting the Justices’ ultimate decision.\textsuperscript{87}

Public opinion polls also showed declining national support for the death penalty. In 1953, sixty-eight percent of the public supported the death penalty, but support fell to less than half by 1965.\textsuperscript{88} A 1966 Gallup poll showed death penalty abolitionists outnumbered supporters.\textsuperscript{89} Overall, support for the death penalty fell between twenty to thirty percent in just over a decade, the steepest decline since Gallup began polling on the death penalty in the 1930s.\textsuperscript{90} The political and public opinion of the death penalty seemed to show the Court that the nation opposed the death penalty despite the fact that forty-one states and the federal government had capital punishment statutes on the books.\textsuperscript{91}

3. International Abolition and Pressure

The mid-twentieth century saw a major movement toward abolition internationally as well. By the end of the decade, the United States became an outlier by retaining the death penalty.\textsuperscript{92} The United States traditionally had milder penal codes than any in Europe, but that began to change in the mid-twentieth century.\textsuperscript{93} Most west European countries abolished capital punishment in the years immediately following World War II or in the 1960s and 1970s.\textsuperscript{94} By 1968, more than seventy nations, including almost all of western Europe, formally rejected capital punishment.\textsuperscript{95} The pressure on the United States mounted when international groups and individuals began protesting individual executions. In

\textsuperscript{87} See \textit{MELTSNER}, supra note 68, at 254–57; \textit{Lain}, supra note 4, at 32. The Court received only one amicus brief in favor of the constitutionality of the death penalty, which came from the State of Indiana. \textit{MELTSNER}, supra note 68, at 254.
\textsuperscript{88} \textit{Lain}, supra note 4, at 32–33.
\textsuperscript{89} \textit{Id.} at 33; see also \textit{BANNER}, supra note 19, at 240.
\textsuperscript{90} \textit{Lain}, supra note 4, at 32–33.
\textsuperscript{91} \textit{See Furman}, 408 U.S. at 340–41 (Marshall, J., concurring).
\textsuperscript{92} \textit{See BANNER}, supra note 19, at 242.
\textsuperscript{93} \textit{Id.} at 243.
\textsuperscript{94} \textit{GARLAND}, supra note 10, at 112.
\textsuperscript{95} \textit{Death Penalty Hearing}, supra note 81, at 177; see also \textit{GARLAND}, supra note 10, at 111–12.
addition, the racial overtones of the system resulted in international scorn, creating a problem for foreign relations. Some countries, after abolishing capital punishment themselves, appealed to the United Nations in an effort to put pressure on the United States to do the same.

International pressures, combined with the national movement toward abolition and the decreased imposition of the death penalty, certainly affected the Court’s decision in Furman. These circumstances pushed the Court to make the decision that would theoretically end the arbitrary imposition of the death penalty in the United States for good. History, however, reveals a different story. In response to Furman, the pro-death penalty movement grew stronger and many states reinstated the penalty. The Court held the new statute presented in Gregg did not violate the Constitution because it provided safeguards against “arbitrariness and caprice.” The next section discusses how the Court-approved, guiding statutes did not curb the arbitrariness of the death penalty. The imposition of the death penalty has again become arbitrary and many of the same social and political pressures present at the time of Furman are present in the country today.

II. HISTORY REPEATS: THE CURRENT STATUS OF THE AMERICAN DEATH PENALTY

Many of the factors influencing the Justices’ decision in Furman are present in the current imposition of the American death penalty. These factors and several new arbitrariness concerns indicate capital punishment is imposed as arbitrarily now as before Furman. Many of the socio-political factors not explicitly relied on in Furman, but undoubtedly catalyzing the decision, are again present, creating a climate ripe for a Furman-like challenge to the death penalty today.

96. See Banner, supra note 19, at 243–44. President Eisenhower delayed an execution until after a trip to Latin America for fear of the hostility he would encounter during his trip if an execution were to take place. Id. at 243.
97. Id.
98. See, e.g., Gregg v. Georgia, 428 U.S. 153, 207 (1976); see also Lain, supra note 4, at 47.
99. Gregg, 428 U.S. at 196–98. The Court reasoned the new statute would direct the jury’s attention to “the particularized nature of the crime and the particularized characteristics of the individual defendant,” ensuring a jury could no longer “wantonly and freakishly” impose death sentences. Id. at 206–07.
A. Arbitrariness Is Still Present in Capital Punishment

In 1976, the Supreme Court upheld Georgia’s new death penalty statute in *Gregg*, believing the statute created sentencing procedures that would eliminate the arbitrary and capricious imposition of death sentences.\(^{100}\) The Court found the statute eliminated arbitrariness and focused the jury’s attention on “the particularized nature of the crime and the particularized characteristics of the individual defendant.”\(^{101}\) The statute did so, according to the Court, by narrowing the class of murderer eligible for the death penalty, requiring the jury to find at least one statutory aggravating factor beyond a reasonable doubt, allowing jurors to consider mitigating factors, and providing an automatic appeal.\(^{102}\) The Court did not overrule *Furman* in *Gregg*, but determined the death penalty could be administered in a nonarbitrary fashion under the new statute.\(^{103}\) A review of the current state of the death penalty, however, reveals the death penalty is imposed at least as arbitrarily as it was when *Furman* was decided in 1972.

1. Low and Decreasing Execution Rates and Sentencing

Execution rates increased after the reinstatement of the death penalty in 1976 until the end of the twentieth century, when the number of executions began decreasing again.\(^{104}\) The increase in executions culminated in 1999 and 2000, with ninety-eight and eighty-five executions in those years, respectively.\(^{105}\) Since then, the number of executions throughout the country decreased to thirty-seven in 2008, fifty-two in 2009, and only forty-six in 2010.\(^{106}\) These numbers are especially significant in light of Jus-
tice Brennan’s conclusion that a strong inference of arbitrariness results from the infliction of the death penalty less than fifty times in a country of over 200 million people.107 Since Justice Brennan drew his conclusions, the population has risen to over 300 million people,108 yet the number of executions remains less than fifty per year.109 Accordingly, the low imposition rates raise the same inference of arbitrary imposition today as they did in 1972, if not an even stronger one.

The number of death sentences imposed by judges and juries has decreased significantly from the height of their imposition in the 1990s.110 When adjusted for the increase in national population since 1972, the number of death sentences imposed is roughly parallel to the frequency with which the sentences were handed down leading up to *Furman*.111 Just as Justice Brennan noted in *Furman*, the average number of death sentences imposed per year has decreased significantly in recent years.112 The average number of sentences per year in the 1980s was 259113 and 287 in the 1990s.114 The first decade of this century saw a significant decrease to an average of 145 sentences per year.115 The past

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111. David McCord, *Lightning Still Strikes: Evidence from the Popular Press that Death Sentencing Continues to be Unconstitutionally Arbitrary More than Three Decades After* *Furman*, 71 BROOK. L. REV. 797, 806–07 (2005). The study reviewed the four years leading up to *Furman* and the years 2000–2004 and found the rate per 100,000 population was 0.051 leading up to *Furman* and 0.053 in the beginning of the century. *Id.* The study is now several years old, but the number of sentences has decreased since keeping the study’s conclusions relevant in 2011. See *YEAR END REPORT*, supra note 106, at 1–4; *Death Sentences by Year*, supra note 110.
112. *Furman*, 408 U.S. at 291–92 (Brennan, J., concurring); *Death Sentences by Year*, supra note 110.

five years show a further downward trend in the number of sentences with an average of only 118 per year.\textsuperscript{116}

2. Race, Gender, and Status

Another major concern and indicator of arbitrariness in 1972 was the death penalty’s disproportionate imposition on African Americans, men, and poor, ill-educated defendants.\textsuperscript{117} Racial disparity continues to plague the death penalty’s imposition, indicating a return to arbitrariness. The majority of studies show the race of the victim or defendant is likely to influence charging decisions and ultimately who receives the death penalty.\textsuperscript{118} As of 2009, over forty-three percent of all executions since \textit{Furman} were carried out on minorities.\textsuperscript{119} The death penalty is still predominantly imposed on men and the ill-educated. At year-end 2009, over ninety-eight percent of condemned death row inmates were males and only nine percent had more than a twelfth grade education.\textsuperscript{120} The discriminatory imposition of the death penalty since \textit{Furman} is clear. These disparities reveal decisionmakers arbitrarily decide who receives the death penalty based on factors other than the particularized nature of the crime, as required by \textit{Gregg}.\textsuperscript{121}

\textsuperscript{116} The last five years have seen the following numbers of death sentences—2006: 123; 2007: 120; 2008: 119; 2009: 112; 2010: 114. \textit{Id}. (providing data for the years 2006–2009); \textit{Year End Report}, supra note 106 (providing data for 2010).

\textsuperscript{117} See \textit{Furman}, 408 U.S. at 249–50 (Douglas, J., concurring) (“The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.” (internal citations omitted)); \textit{id}. at 365–66 (Marshall, J., concurring) (“There is also overwhelming evidence that the death penalty is employed against men and not women . . . . It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society.”).


\textsuperscript{120} \textit{Snell}, supra note 104, at 9 tbl.5.

\textsuperscript{121} See \textit{Gregg} v. \textit{Georgia}, 428 U.S. 153, 206 (1976) (requiring determination based on the particularized nature of the crime and the particularized characteristics of the individual defendant).
3. Geographic Disparity

Though not relied on in Furman, the geographic disparity in the penalty’s present imposition also indicates arbitrariness. Almost half the jurisdictions in the United States conducted no executions over the last ten years.\(^{122}\) In 2010, only twelve states carried out any executions.\(^{123}\) In the jurisdictions carrying out executions, the majority of executions fell within a small number of states. Since Gregg, three states—Texas, Virginia, and Oklahoma—conducted more than half of all the executions in the United States.\(^{124}\) Indeed, from 2004 to 2009, all executions were carried out in only ten percent of the counties throughout the country.\(^{125}\) The murders in those counties were no more heinous than in other parts of the country, but prosecutors in those counties sought the death penalty more often, leading one commentator to refer to the counties collectively as the “Death Belt.”\(^{126}\) These statistics indicate the imposition of the death penalty depends more on the location of the crime than the “particularized nature of the crime and the particularized characteristics of the individual defendant” as required by Gregg.\(^{127}\)

4. The Worst of the Worst

Finally, the capital punishment system in America exhibits arbitrariness by failing to choose the “worst of the worst” for its imposition. A study of all sentences for death eligible offenses in 2004 concluded the system overincludes defendants who are not the “worst of the worst” and does not include a robust number of those who would be considered the “worst of the worst.”\(^{128}\) The

\(^{122}\) Almost Half of U.S. Jurisdictions Have Had No Executions in 10 Years, DEATH PENALTY INFO. CENTER (Jan. 5, 2011), http://www.deathpenaltyinfo.org/almost-half-us-jurisdictions-have-had-no-executions-10-years (noting there have been no executions in at least ten years for twenty-six of fifty-three United States jurisdictions—including the fifty states, the District of Columbia, the federal government, and the military).

\(^{123}\) YEAR END REPORT, supra note 106, at 2.


\(^{126}\) See id.


\(^{128}\) McCord, supra note 111, at 864. Though no system exists for collecting data on all
study determined that “159 murderers who did not receive death sentences were more depraved than about the bottom one-third who did” receive the penalty, a group totaling forty-three murderers.\textsuperscript{129} In reviewing these sentences, the study concluded the system “does not assure merit-based reasons” for choosing between the defendants receiving death sentences and those spared death.\textsuperscript{130} This finding of meritless determination is reminiscent of Justice White’s concern in \textit{Furman} that there was no meaningful basis for distinguishing between the cases which resulted in death and those that did not.\textsuperscript{131}

Anecdotal evidence also reveals the system fails to select the “worst of the worst.” Terry Nichols, convicted of killing 161 people, and serial killers Charles Cullen and Richard White, were spared death sentences.\textsuperscript{132} Yet Cory Maye, whose bedroom was suddenly raided by the police, causing him to fire one shot and hit one of the police officers—just missing the bulletproof vest—was sentenced to death by a jury.\textsuperscript{133} Failing to select the “worst of the worst” indicates the punishment’s arbitrary imposition rather than consideration of the particularized facts of the crime.\textsuperscript{134}

In an effort to ensure the “worst of the worst” receive death sentences, many jurisdictions encourage jurors to consider the danger a defendant will pose to society in the future by including future dangerousness as an aggravating factor.\textsuperscript{135} Research shows, death-eligible murders in the United States, the author of this study compiled a database of all death-eligible offenses in the country during 2004, relying primarily on news reports appearing in searchable online databases. \textit{Id.} at 825–26.

\textsuperscript{129} \textit{Id.} at 864. The author determined depravity by assigning “depravity points” to each offense based on the aggravation of the offenses (i.e., the method of murder, number of murders, type of victim, motive for killing, and disposal of the body). \textit{Id.} at 833–40. Mitigating factors were not taken into account in the depravity calculation because the effect of mitigation is difficult to quantify and has unpredictable effects on any given case. \textit{Id.} at 840–43.

\textsuperscript{130} \textit{Id.} at 864.

\textsuperscript{131} \textit{Furman v. Georgia}, 408 U.S. 238, 313 (1972) (White, J., concurring).

\textsuperscript{132} McCord, \textit{supra} note 111, at 864. Nichols was spared a death sentence by a jury determination. \textit{Id.} (citations omitted). Cullen and White were spared death sentences by the prosecutors in their cases because they agreed to identify their victims or the location of their remains. \textit{Id.} (citations omitted).

\textsuperscript{133} \textit{Id.} (citations omitted).


however, that juror and psychologist predictions of future dangerousness are rarely correct. One study concluded jurors making a prediction of future violence were wrong ninety-seven percent of the time, showing only “chance-level” performance of capital juries in predicting future dangerousness. Experts and psychologists presented to the jury by the prosecution do not fare any better. A recent study of defendants predicted by experts at their trials to be a future danger to society showed that none of the inmates “committed another homicide during their . . . incarceration” and “only 5.2% of [the] inmates . . . had committed a serious assaultive act requiring more than first aid.” The American Psychological Association (“APA”) agrees that psychiatrists cannot predict long-term future dangerousness, stating that such predictions, even under the best of conditions, are wrong in two


137. Cunningham, supra note 136, at 240, 246. The results of this study are consistent with other studies on the accuracy of juror predictions of future violence. See, e.g., James W. Marquart et al., Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?, 23 LAW & SOCIETY REV. 449, 462–64 (1989) (comparing predictions of future dangerousness to “gazing in a crystal ball”).

138. Edens, supra note 136, at 62–63. The study sample included forty-eight former death row inmates (whose sentences were reduced post-capital sentencing), forty-two current death row inmates, and sixty-five executed death row inmates. Id. at 62 tbl.1. Conditions on Texas’s death row were largely “similar to that of general population, including routine, unshackled interactions with staff and other inmates . . . and the ability to hold work-eligible status” until November of 1998. Id. at 62.
out of every three cases.\textsuperscript{139} As a result, the APA encouraged the Supreme Court to prohibit psychiatrists from offering their predictions of future dangerousness at capital trials.\textsuperscript{140} Though considering future dangerousness appears to provide a standard for ensuring the “worst of the worst” are sentenced to death, the inaccuracies of juror and expert predictions actually result in defendants who pose no danger to society receiving sentences of death.\textsuperscript{141}

Arbitrariness clearly exists in the imposition of the death penalty today. The low number of executions and sentences, indications of discriminatory imposition, geographic disparity, and failure to impose the sentence on the “worst of the worst” imply significant arbitrariness. Compared with the decades leading up to \textit{Furman}, the current capital punishment system in America appears to be at least as arbitrary as when the Court declared it unconstitutional in \textit{Furman}. The repeated arbitrariness, however, is not the only recurring condition in America’s death penalty—social and political pressures for abolition are also present today.

B. \textit{Recurring Social and Political Pressure}

Social and political pressures toward abolition seemed to provide a catalyst for the Justices’ decision in \textit{Furman}.\textsuperscript{142} Many of these same pressures are present in the current American capital punishment.

\textsuperscript{139} Brief Amicus Curiae for the American Psychiatric Ass’n at 9, Barefoot v. Estelle, 463 U.S. 880 (1983) (No. 82-6080).

\textsuperscript{140} \textit{Id.} at 8. The Court dismissed the APA’s concerns, stating “the suggestion that no psychiatrist’s testimony may be presented with respect to the defendant’s future dangerousness is somewhat like asking [the Court] to disinvent the wheel.” \textit{Estelle}, 463 U.S. at 896.

\textsuperscript{141} The errors in predicting future dangerousness are especially concerning because research shows future dangerousness plays a part in almost all jury determinations to impose a death sentence. Between 1995 and 2006, “future violence was alleged as a non-statutory aggravating factor in [77]% of the federal capital prosecutions” and a “death [sentence] occurred in over 80% of the federal cases where the jury found that future prison violence was likely.” Cunningham, \textit{supra} note 136, at 225, 244. A 2001 study in South Carolina found that even when prosecutors have not raised the issue of future dangerousness, it is present in the jury’s determination all the same. John H. Blume et al., \textit{Future Dangerousness in Capital Cases: Always “At Issue”}, 86 Cornell L. Rev. 397, 397–98 (2001). Even when prosecutors did not raise future dangerousness, nearly seventy percent of the jurors said “keeping the defendant from ever killing again” was fairly or very important to their decision. \textit{Id.} at 407.

\textsuperscript{142} See discussion accompanying \textit{supra} notes 58–99.
1. National Trend Toward Abolition

A trend toward abolition is once again present, as indicated by state actions abolishing the death penalty and public opinion polls. In recent years, several states abolished the death penalty or prevented its reinstatement, just as in the fifteen years leading to Furman. In 2004, the New York Court of Appeals declared the state’s death penalty statute unconstitutional, and the New York legislature voted in 2005 not to revise the statute in order to reinstate the penalty. Also in 2005, twenty-one years after the State’s Supreme Judicial Court struck down a constitutional amendment allowing the penalty, Massachusetts legislators defeated a bill to bring back the death penalty. The New Jersey legislature enacted a moratorium on the death penalty in 2006, and the legislature formally repealed the state’s death penalty statute in 2007. In 2009, New Mexico abolished the death pe-
nalty for all crimes. Illinois’ road to abolition further exemplifies the growing concern with the administration of the death penalty. In 2003, Illinois Governor George H. Ryan commuted the sentences of all 167 death row inmates in Illinois prior to leaving office. After the commutation, Illinois’ death penalty statute remained on the books, but the state legislature ultimately repealed it in early 2011, continuing the trend toward abolition throughout the country.

Public opinion polls also reveal declining support for the death penalty in America. A 2005 Gallup poll revealed support for the death penalty dropped from a high of eighty percent in September 1994 to only sixty-four percent in October 2005. When asking whether a person is for or against the death penalty, the Gallop poll showed support remained around sixty-four percent in October 2010. However, a more important question—not asked prior to Furman, in fact not asked until 1985—is whether the better

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150. Michael L. Radelet & Hugo Adam Bedau, The Execution of the Innocent, in America’s Experiment with Capital Punishment 325, 337 (James R. Acker et al. eds., 2d ed. 2003). In 2000, Governor Ryan learned of evidence that thirteen death row inmates in Illinois were innocent. Id. In response, he appointed a commission to study the state’s death penalty. Id. The commission found “widespread race-of-victim and regional biases” in the state’s death penalty and recommended eighty-five reforms in the way the state handled capital cases. Id. In response to the commission’s recommendations, Governor Ryan commuted the sentences of all the state’s death row inmates to life imprisonment. Id. Governor Quinn signed the abolition bill, concluding “it is impossible to create a perfect system.” John Schwartz & Emma G. Fitzsimmons, Illinois Governor Signs Capital Punishment Ban, N.Y. TIMES, Mar. 10, 2011, at A18.


penalty for murder is the death penalty or life imprisonment without the possibility of parole.\textsuperscript{155} When asked that question, support for the death penalty declined to less than half, with only forty-nine percent of people believing the death penalty was a better punishment in October 2010.\textsuperscript{156} Support for the death penalty is not quite as low as at the time of \textit{Furman}; however, declining support since the mid-1990s is clearly apparent, just as in the years leading up to \textit{Furman}.\textsuperscript{157}

Taken together with the decrease in executions and death sentences, and the states’ trend toward abolition, the public opinion polls reveal the country’s growing discomfort with capital punishment. The national climate of abolition and disapproval is similar to the climate the Justices encountered at the time of \textit{Furman}, creating a climate ripe for another \textit{Furman}-like challenge.

2. International Abolition

International pressures encouraging the repeal of the American death penalty are even greater than at the time of \textit{Furman}.\textsuperscript{158} Prior to \textit{Furman}, roughly seventy countries throughout the world abolished the death penalty.\textsuperscript{159} As of December 2010, ninety-six countries—more than two-thirds of those around the world—have abolished capital punishment for all crimes by law,\textsuperscript{160} and 139 countries have substantially abolished the penalty by practice.\textsuperscript{161} Executions around the world have decreased as well. In 2009, only nineteen countries actually carried out executions, the lowest

\begin{footnotesize}
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\item \textsuperscript{155} See id.
\item \textsuperscript{156} Id.
\item \textsuperscript{157} See id.
\item \textsuperscript{158} See supra Subpart I.C.3.
\item \textsuperscript{159} Lain, supra note 4, at 26.
\end{itemize}
\end{footnotesize}
number ever recorded.\textsuperscript{162} That number increased only slightly to twenty-three in 2010.\textsuperscript{163} The United States carried out the fifth greatest number of executions in 2010, behind only China, Iran, North Korea, and Yemen.\textsuperscript{164} The United States remains an outlier in continuing to retain and use the death penalty.

The most significant international pressure surrounding the death penalty today comes through the United Nations General Assembly. A 2007 resolution called for a moratorium on the death penalty throughout the world. The resolution was reaffirmed in 2008 and again in 2010, with increasing support each time.\textsuperscript{165} These pressures from the United Nations have made the death penalty an international political issue and created a movement toward global abolition.\textsuperscript{166} One commentator noted the death penalty in the West is approaching its “absolute antithesis: what was once an unproblematic institution, universally embraced, is fast becoming a violation of human rights, universally prohibited.”\textsuperscript{167}

The domestic and international movements for the abolition of the death penalty create the ideal climate for a Furman-like challenge. Such a challenge would require that the Justices render a decision under many of the same conditions existing in 1972. Today, however, the Court would be armed with more precedent to apply in its analysis and ultimate determination.

III. EVOLUTION OF CRUEL AND UNUSUAL PUNISHMENTS Clause Jurisprudence

At the time the Court decided Furman, the Cruel and Unusual Punishments Clause remained relatively undeveloped by the Court.\textsuperscript{168} Since then, the Court has decided numerous Eighth Amendment cases creating significant precedent to rely on in de-
This contemporary Eighth Amendment doctrine would allow the Court to make a better-reasoned decision, supported by its precedent, should a Furman-like challenge arise again.

The core of the Court’s Eighth Amendment consideration remains “the evolving standards of decency that mark the progress of a maturing society,” which “change as the basic mores of society change.” In addition to the concept of evolving standards of decency, “[t]he concept of proportionality has become central to the Eighth Amendment.” A punishment does not need to be challenged as “inherently barbaric,” but only as “disproportionate to the crime” in order to fall under the Eighth Amendment’s prohibition against cruel and unusual punishment. Therefore, when reviewing a general challenge to a death sentence, rather than the method of execution, the Court uses a proportionality inquiry which incorporates the evolving standards of decency.

The Court reviews challenges to the proportionality of sentences under the Eighth Amendment in two categories. The first category includes challenges to term-of-years sentences given the circumstances of a particular case and defendant. The
second category involves categorical challenges to sentences which compare the nature of the offense and the characteristics of the category of offender.\textsuperscript{177} The Court uses its categorical analysis for challenges to sentences with regard to a particular type of person, such as juveniles\textsuperscript{178} or the mentally retarded,\textsuperscript{179} as well as for challenges to sentences for a particular type of crime for all defendants, such as nonhomicide crimes\textsuperscript{180} and rape.\textsuperscript{181} A \textit{Furman}-like case, challenging the death penalty’s constitutionality as applied to all defendants, would be similar to the cases the Court has reviewed under the categorical challenge standard and would therefore be reviewed in the same manner.

In reviewing categorical challenges, the Court first looks to whether there is a national consensus against the penalty by considering the objective indicia of society’s standards.\textsuperscript{182} The Court reviews the history of the penalty for the crime, current state statutes and proposed enactments, and the frequency of the penalty’s imposition.\textsuperscript{183} Historically, the Court found a national consensus against a penalty when more than half of the states prohibited the punishment by legislation.\textsuperscript{184} Until this year, the Court’s inquiry into a national consensus would end if a majority of the states permitted a punishment.\textsuperscript{185} However, in \textit{Graham v. Florida}, the Court held a national consensus against a penalty case where that threshold comparison leads to an inference of gross disproportionality, the Court will then compare the defendant’s sentence to those received by others in the same jurisdiction and those imposed for the same crime in other jurisdictions. \textit{Id.} (citing \textit{Harmelin}, 501 U.S. at 1005). When the “comparative analysis ‘validate[s] an initial judgment that [the] sentence is grossly disproportionate,’ the sentence is cruel and unusual.” \textit{Id.} (quoting \textit{Harmelin}, 501 U.S. at 1005 (alterations in original)).

\textsuperscript{177} \textit{Id.}
\textsuperscript{182} \textit{See} \textit{Roper}, 543 U.S. at 567–68.
\textsuperscript{183} \textit{See} \textit{Kennedy}, 554 U.S. at 434.
\textsuperscript{184} \textit{See id.} at 426 (finding a national consensus against the death penalty for child rape where only six jurisdictions authorized the penalty); \textit{Roper}, 543 U.S. at 564 (finding a national consensus against executing juveniles where thirty states prohibited the punishment); \textit{Atkins}, 536 U.S. at 313–15 (finding a national consensus against executing the mentally retarded when over twenty states and the federal government prohibited such punishment); \textit{Enmund}, 458 U.S. at 789 (citations omitted) (finding a national consensus against the death penalty for participation in a robbery when only eight jurisdictions authorized the imposition of the sentence).
\textsuperscript{185} \textit{See} \textit{Graham}, 560 U.S. at ___, 130 S. Ct. at 2049 (Thomas, J., dissenting).
could be found even where a majority of the states permitted a punishment.\textsuperscript{186}

In Graham, despite the fact that thirty-seven jurisdictions permitted life without parole sentences for juvenile nonhomicide offenders, the Court found “a national consensus [had] developed against [the penalty].”\textsuperscript{187} Rather than stopping its inquiry where a majority of jurisdictions permitted the penalty, the Court looked to the actual sentencing practices throughout the country.\textsuperscript{188} Finding only 123 juveniles serving life without parole sentences throughout the country, seventy-seven of which were imposed in Florida, and that only eleven jurisdictions had actually imposed such a penalty, the Court determined the sentencing practice was exceedingly rare and therefore revealed a national consensus against the punishment.\textsuperscript{189} Graham sets the precedent for actual sentencing practices’ ability to trump the consideration of state legislation when determining whether a national consensus against the practice exists.\textsuperscript{190}

A national consensus against a punishment is not in itself determinative;\textsuperscript{191} therefore, after finding a national consensus against a penalty, the Court exercises its independent judgment to determine whether the punishment violates the Constitution.\textsuperscript{192} The Court’s independent judgment analysis consists of three considerations. First, the Court reviews the culpability of the catego-

\textsuperscript{186} Id. at ___, 130 S. Ct. at 2023–26 (majority opinion).

\textsuperscript{187} Id. at ___, 130 S. Ct. at 2026. Graham v. Florida may signal significant change in Eighth Amendment jurisprudence. The decision marked the first time the Court applied a categorical challenge analysis to a noncapital sentence, id. at ___, 130 S. Ct. at 2046 (Thomas, J., dissenting), and the first time actual sentencing practices trumped state legislation in determining a national consensus. Id. at ___, 130 S. Ct. at 2049. The effect the Graham decision will have on Eighth Amendment capital sentence challenges will only become clear as the Court decides future cases.

\textsuperscript{188} Id. at ___, 130 S. Ct. at 2024 (majority opinion).

\textsuperscript{189} Id. at ___, 130 S. Ct. at 2024–26.

\textsuperscript{190} The Court has not relied on this new precedent since its decision in 2010, so it remains to be seen whether the Court will continue to use actual sentencing to overcome a majority of states retaining a punishment, however, the stage is clearly set for the Court to do so. See id. The dissent in Graham strongly condemned the Court’s reliance on actual sentencing practices noting it was “nothing short of stunning” that the Court was “undaunted” by the lack of a consensus against the penalty. Id. at ___, 130 S. Ct. at 2049 (Thomas, J., dissenting).

\textsuperscript{191} Id. at ___, 130 S. Ct. at 2026 (majority opinion) (citing Kennedy v. Louisiana, 554 U.S. 407, 434 (2008)).

\textsuperscript{192} Id. at ___, 130 S. Ct. at 2022 (citing Roper v. Simmons, 543 U.S. 551, 572 (2005)).
of defendants in light of the crimes committed.\textsuperscript{193} Second, the Court considers the severity of the punishment, consistently holding that the death penalty is the most severe punishment permitted by law.\textsuperscript{194} The third consideration is whether the penological justifications support the imposition of the penalty.\textsuperscript{195} Where a sentence lacks legitimate penological justification, the sentence is “by its nature disproportionate to the offense.”\textsuperscript{196} Accordingly, the Court determines whether retribution, deterrence, incapacitation, or rehabilitation provide penological justification for the imposition of the sentence.\textsuperscript{197}

Finally, though not specifically included as a consideration in its independent judgment, the Court also reviews international acceptance or rejection of a penalty.\textsuperscript{198} International opinion is not dispositive, but the Court also notes it is not irrelevant.\textsuperscript{199} In \textit{Roper v. Simmons}, the Court noted international opinion is not controlling and that the Court retains the task of interpreting the Eighth Amendment, but also noted that laws of other nations have been instructive for the interpretation of the Cruel and Unusual Punishments Clause since its decision in \textit{Trop}.\textsuperscript{200}

\begin{itemize}
\item[193.] \textit{Id.} at ___, 130 S. Ct. at 2026 (citing \textit{Roper}, 543 U.S. at 568).
\item[194.] \textit{Id.} at ___, 130 S. Ct. at 2027 (citations omitted).
\item[195.] \textit{Id.} at ___, 130 S. Ct. at 2028 (citations omitted).
\item[196.] \textit{Id.}
\item[197.] \textit{Id.} at ___, 130 S. Ct. at 2028–30. The review of penological justifications in determining the constitutionality of a sentence is a clear change from Eighth Amendment jurisprudence at the time of \textit{Furman}. Dissenting in \textit{Furman}, Chief Justice Burger noted that seeking to attack a sentence on the grounds of legitimate penal aims sought to give a dimension to the Eighth Amendment the Court had never pursued. \textit{Furman v. Georgia}, 408 U.S. 238, 391 (1972) (Burger, C.J., dissenting).
\item[198.] See, e.g., \textit{Graham}, 560 U.S. at ___, 130 S. Ct. at 2033–34 (noting the United States was the only country that actually imposed juvenile life without parole sentences for non-homicide offenders); \textit{Atkins v. Virginia}, 536 U.S. 304, 316 n.21 (2002) (recognizing that within the world community, the death penalty for crimes committed by the mentally retarded was overwhelmingly disapproved); \textit{Trop v. Dulles}, 356 U.S. 86, 102 (1958) (“Civilized nations of the world [were] in virtual unanimity that statelessness is not to be imposed as punishment for [a] crime.”). Reliance on international opinion is not without controversy in the Court. In \textit{Roper}, Justice Scalia decried the Court’s reliance on international opinion, stating the Court relies on international opinion, inconsistently and its “attempt to downplay the significance of its extensive discussion of foreign law is unconvincing. ‘Acknowledgment’ of foreign approval has no place in the legal opinion of this Court unless it is part of the basis for the Court’s judgment—which is surely what it parades as today.” 543 U.S. at 628 (Scalia, J., dissenting).
\item[199.] \textit{Graham}, 560 U.S. at ___, 130 S. Ct. at 2033 (quoting \textit{Enmund v. Florida}, 458 U.S. 782, 796 n.22 (1982)).
\item[200.] \textit{Roper}, 543 U.S. at 575; see also \textit{Trop}, 356 U.S. at 102–03.
\end{itemize}
sequently, the Court uses international opinion to confirm its own independent judgment that a penalty is cruel and unusual.\(^{201}\)

In the nearly forty years since the Court decided *Furman* without clear guiding precedent, Eighth Amendment jurisprudence has developed significantly and now provides guidance for determining whether a punishment violates the Cruel and Unusual Punishments Clause. The decisions since *Furman* provide the Court with a clear structure for an Eighth Amendment analysis which considers and accounts for all of the factors that led to its decision in *Furman* and are present again today. Such reasoned consideration should allow the Court to create a lasting rule that the death penalty is unconstitutional as disproportionate for any defendant and against society’s evolving standards of decency.

**IV. CRITICAL FACTORS IN A *FURMAN*-LIKE CHALLENGE TODAY**

Consistent with its now-indoctrinated Eighth Amendment categorical challenge analysis, the Court could render a more unified—and therefore more persuasive—opinion in a *Furman*-like challenge today.\(^{202}\) The Court should use the analysis to determine that the death penalty in America violates the Constitution per se. The arbitrary imposition of the death penalty should no longer be the only cognizable reason for the Justices’ decision, but should be woven throughout the Court’s analysis of the categorical challenge.

A. **National Consensus**

In the first step of its analysis, the Court should determine there is a national consensus against the death penalty. Current-

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201. *Graham*, 560 U.S. at ____, 130 S. Ct. at 2034 (“The Court has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world’s nations that a particular sentencing practice is inconsistent with [the] basic principles of decency demonstrates that the Court’s rationale has respected reasoning to support it.”).

202. Bringing a *Furman*-like challenge to the Supreme Court will require properly raising and challenging the system in a lower court proceeding. McCord, *supra* note 111, at 866–67 (discussing the potential difficulties in raising a *Furman*-like challenge, and recommending that such a challenge be brought in a state with significant arbitrariness and judges skeptical of the punishment).
ly, thirty-four states and the federal government authorize the death penalty.\textsuperscript{203} However, this is less than the number of jurisdictions which authorized the punishment at the time of \textit{Furman},\textsuperscript{204} and a trend toward abolition can be seen in state legislatures and courts repealing their death penalty statutes.\textsuperscript{205} The Court’s inquiry need not stop at a finding that more than half the jurisdictions authorize the penalty: the \textit{Graham} decision allows the Court to review actual capital sentencing practices to determine whether there is a national consensus against the penalty.\textsuperscript{206} In recent years, the number of sentences and executions has decreased significantly,\textsuperscript{207} revealing juror, prosecutor, and judicial unwillingness to impose sentences of death despite their statutory availability. Like the sentences in \textit{Graham},\textsuperscript{208} the final imposition of death sentences, executions, is confined to a small number of jurisdictions.\textsuperscript{209} Only twelve states carried out executions in 2010,\textsuperscript{210} a similar number to the eleven jurisdictions that actually imposed juvenile life sentences noted by the \textit{Graham} Court.\textsuperscript{211} Current imposition of a death sentence is therefore “exceedingly rare,” making it “fair to say that a national consensus has developed against it.”\textsuperscript{212} In finding a national consensus against the penalty, the Court should continue its analysis using its independent judgment to determine the constitutionality of the penalty.

\textsuperscript{203} See Snell, supra note 104, at 2 (noting thirty-six states and the federal government authorized the death penalty at the end of 2009). New York and Illinois were removed from the Bureau of Justice Statistics number as New York does not have a constitutional death penalty statute, see supra notes 144–45 and accompanying text, and the Illinois legislature repealed its death penalty statute this year. See supra notes 151–53 and accompanying text.

\textsuperscript{204} Furman v. Georgia, 408 U.S. 238, 341 (1972) (Marshall, J., concurring) (noting forty-one states, the District of Columbia, and federal jurisdictions authorized the death penalty for at least one crime).

\textsuperscript{205} See supra notes 144–52 and accompanying text.

\textsuperscript{206} See supra notes 186–90 and accompanying text.

\textsuperscript{207} See discussion accompanying supra notes 110–21.

\textsuperscript{208} Graham v. Florida, 560 U.S. ___, ___., 130 S. Ct. 2011, 2024 (2010). Comparing execution rates to the rate of sentencing in \textit{Graham} is appropriate because executions reveal the actual imposition rather than the possible imposition of the sentence. Because so few sentences actually result in execution, using execution rates is particularly appropriate.

\textsuperscript{209} See Year End Report, supra note 106, at 2.

\textsuperscript{210} Id.

\textsuperscript{211} Graham, 560 U.S. at ___, 130 S. Ct. at 2024.

\textsuperscript{212} Id. at ___, 130 S. Ct. at 2026 (citing Atkins v. Virginia, 536 U.S. 304, 316 (2002)).
B. *Independent Judgment*

In reviewing its first consideration of independent judgment, the culpability of offenders, arbitrariness of the penalty should play a large role. Culpability is directly tied to the severity of the crime.\(^1\) The Court finds homicide offenders categorically more culpable than nonhomicide offenders;\(^2\) however, the arbitrariness present in capital sentencing indicates that the most culpable offenders are consistently not the ones chosen for execution. The evidence reveals the penalty is not reserved for the “worst of the worst.”\(^3\) Though all capital offenders have committed homicide crimes, a range of depravity still exists in those crimes, leading to differing levels of culpability within that class of offenders.\(^4\) Because the death penalty is the most severe punishment, it should be reserved for only the most culpable offenders.\(^5\) This is simply not the case in the contemporary system, where often the worst offenders are spared, yet less depraved and less culpable offenders are chosen for execution. Arbitrariness should therefore sway the culpability consideration in favor of declaring the penalty unconstitutional.

The second consideration, the severity of the punishment, will not be affected by arbitrariness, but also favors a ruling of unconstitutionality because the Court consistently notes the death penalty is the most severe penalty permitted by law.\(^6\) Being the most severe punishment, the culpability and penological justifications must be strongly in favor of the punishment in order for the Court to declare it constitutional.

The arbitrariness of the penalty should affect the Court’s analysis of the third consideration, penological justifications for the penalty, specifically its consideration of retribution, deterrence, and incapacitation. The Court considers retribution a legitimate reason to punish,\(^7\) but the arbitrary imposition of the penalty should negate the retributive justification because such justification is sufficient only when it correlates to the culpability of the

\(^{213}\) See id. at __, 130 S. Ct. at 2027.
\(^{214}\) Id.
\(^{215}\) See discussion supra Subpart II.A.4.
\(^{216}\) See supra note 129.
\(^{217}\) See Atkins, 536 U.S. at 319.
\(^{218}\) Graham, 560 U.S. at __, 130 S. Ct. at 2027.
\(^{219}\) Id. at __, 130 S. Ct. at 2028.
Studies show juries, judges, and prosecutors do not select the “worst of the worst” for the final imposition of the death penalty.\footnote{220} Just as it did at the time of \textit{Furman}, the low level of infliction of the penalty makes it “highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for [the] punishment.”\footnote{222} In a system that arbitrarily chooses who receives the death penalty, for reasons not based on the culpability of the defendant, retribution cannot provide sufficient justification for the penalty.

The Court should also strongly consider the arbitrary imposition of the penalty when reviewing deterrence as a justification. The Court has consistently been suspect of the deterrent effect of a punishment rarely imposed.\footnote{223} As Justice Brennan reasoned in \textit{Furman}, “A rational person contemplating a murder . . . is confronted, not with the certainty of a speedy death, but with the slightest possibility that he will be executed in the distant future.”\footnote{224} The same is true today. The imposition of a penalty dependent on the race of the defendant or victim, the defendant’s gender or education level, or the location of the crime, cannot logically create a deterrent effect. Additionally, numerous recent studies cast significant doubt on whether the death penalty acts as a deterrent at all.\footnote{225} Accordingly, the rarely imposed death penalty cannot reasonably serve as a deterrent justifying such a severe punishment.

The arbitrary imposition of the penalty should also be considered when reviewing incapacitation as a justification for capital punishment. Incapacitation is considered an important goal of the penological system to protect society from future harm by the defendant.\footnote{226} The justification should not be considered sufficient, however, where the system arbitrarily imposes the most severe punishment without a reliable determination of which defendants actually pose a future danger to society. Jurors and expert wit-
nesses fail a significant majority of the time to accurately predict whether a capital offender poses a future danger to society. Decisionmakers, therefore, may appear concerned with incapacitation in their determination, but their unreliable predictions result in incapacitating individuals who pose no future threat. This, along with the availability of an alternative punishment of life without parole in most every state, shows incapacitation can be accomplished with a lesser punishment than death and therefore cannot provide justification for the most severe penalty.

Rehabilitation should not be affected by arbitrariness, but should not provide justification for the death penalty either. The Graham Court noted life imprisonment without parole “forswears altogether the rehabilitative [goal].” In the same way life without parole sentences do not allow for rehabilitation, a sentence of death also forswears rehabilitation as the defendant in both instances remains incarcerated until death. Accordingly, rehabilitation cannot provide justification for the death penalty.

Taken together, none of the legitimate penological justifications should be considered sufficient to support the imposition of the most severe punishment. Because the death penalty is the most severe punishment and the most culpable defendants are not selected for its imposition, the Court’s independent judgment should contribute to the conclusion that the death penalty is unconstitutionally cruel and unusual under the Eighth Amendment.

C. International Opinion

As a final consideration, the Court should also note the United States remains an outlier among developed nations in continuing its use of the death penalty. The international trend toward abolition is more significant than at the time of Furman and similar to the trends discussed by the Court in its recent Eighth Amendment cases. Similar to the trend discussed in Graham, cur-
rently the United States is one of the few countries continuing to impose the death penalty despite United Nations encouragement of its abolition. International disapproval of capital punishment should confirm the Court’s independent judgment that the death penalty violates the Cruel and Unusual Punishments Clause of the Eighth Amendment.

CONCLUSION

_Furman_ shocked the nation, but failed to provide an end to arbitrary imposition of the death penalty in the United States. History has repeated itself. The capital punishment system in America is as arbitrary as it was leading up to _Furman_. The system and cultural climate of the country appear ripe for a _Furman_-like constitutional challenge to capital punishment for all offenders. The good news is that the Court now has an arsenal of precedent to write a powerful opinion declaring the death penalty unconstitutional once and for all, sparing the lives of thousands awaiting their potential death throughout the country and the arbitrary few who would be sentenced to death in the future.

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233. _See discussion supra_ Subpart II.B.2.

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