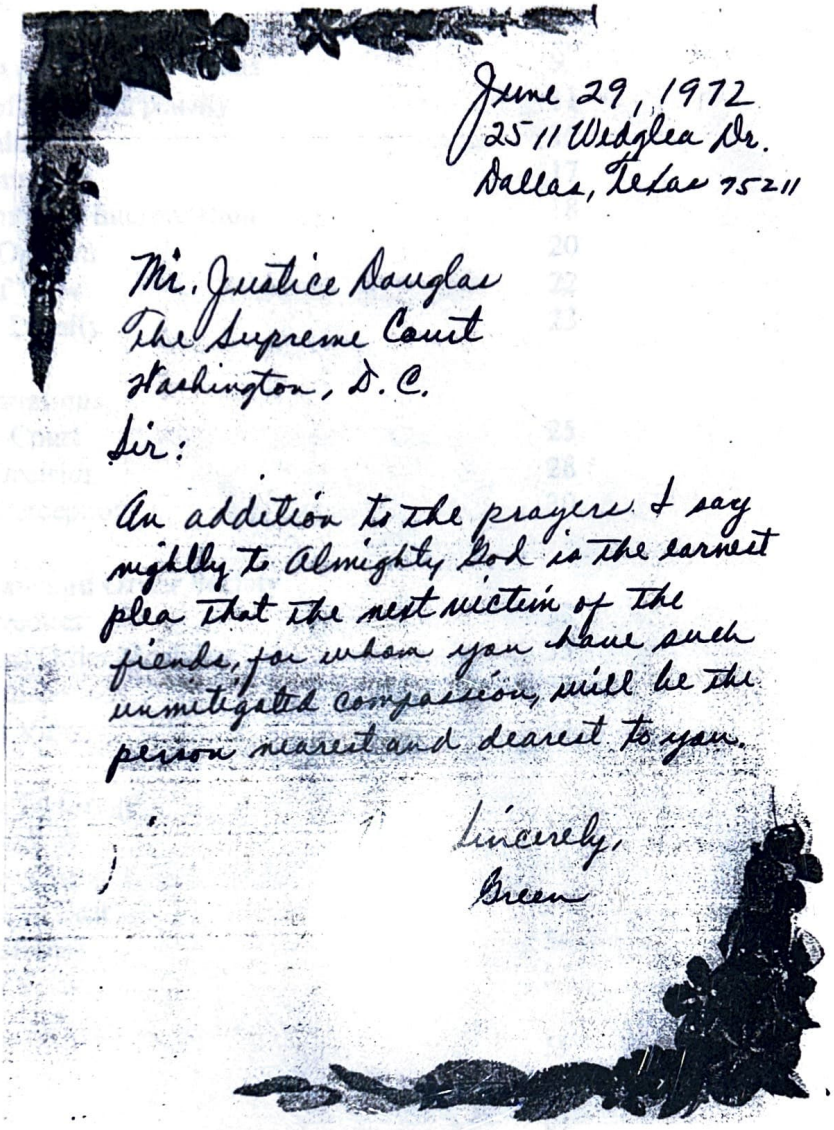
From *Furman* to *Gregg*: Capital Punishment and "Law and Order" Ideology in the United States



June 29, 1972
2511 Wedglea Dr.
Dallas, Texas 75211

Mr. Justice Douglas
The Supreme Court
Washington, D.C.

Sir:

An addition to the prayers I say nightly to Almighty God is the earnest plea that the next victim of the fiends, for whom you have such unmitigated compassion, will be the person nearest and dearest to you.

Sincerely,
Green

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Senior Honors Thesis
2004-2005
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Introduction

> "I simply conclude that the 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."
>
> Justice Stewart, *Furman v Georgia*

> "As the history of the punishment of death in this country shows, our society wishes to prevent crime; we have no desire to kill criminals simply to get even with them."
>
> Justice Brennan, *Furman v Georgia*

> "I fear the Court has overstepped. It has sought and achieved an end."
>
> Justice Blackmun, *Furman v Georgia*

> "The complete and unconditional abolition of capital punishment in this country by judicial fiat would have undermined the careful progress of the legislative trend... the highest judicial duty is to recognize the limits on judicial power..."
>
> Justice Burger, *Furman v Georgia*

In June of 1972, the Supreme Court declared in *Furman v Georgia* that capital punishment was unconstitutional under the 8th Amendment. The majority held that "the imposition and carrying out of the death sentence in the present cases constituted cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments."[1] Just four years later, in *Gregg v. Georgia*, the court decided that newly enacted statutes erased the arbitrariness in the application of the death penalty. How did this occur in such a short time period?

The trend against abolition of the death penalty gained momentum in the 1970's, increasing especially after *Furman* was decided in June of 1972. *Furman* was the set of cases that examined the constitutionality of the death penalty under the 8th Amendment's

[1] *Furman v. Georgia*, No. 69-5003, Supreme Court of the United States, Copyright 1994- 2005. <http://laws.findlaw.com/us/408/238.html> (21 February 2005), Douglas.

cruel and unusual clause. The attitude of the Court preparing for the case was that the constitutionality of capital punishment would probably be upheld,[2] although the trends in both the popularity of capital punishment and its actual practice had been declining.[3] Gathered under the *Furman v. Georgia* case, however, were three defendants that lawyers believed could persuade the judges to strike down capital punishment. All three defendants were African-American men. William Furman was sentenced to death in Georgia, after he was convicted of shooting a man through a closed door in a burglary, although the lawyers suggested that the murder could have been accidental. The other two defendants, Lucious Jackson in Georgia and Elmer Branch in Texas, were both young men convicted of raping white women.[4]

The Courts decided to hear the case solely on the 8th Amendment defense. A brief history of capital punishment prepared by the lawyers demonstrated that "evolving standards of decency" had come to render the death penalty cruel and unusual. Although opinion polls registered at about 50% pro capital punishment, lawyers argued that the declining usage of execution indicated public disdain for the practice. Also, the very unusualness, or arbitrariness, of capital punishment allowed racial disparity in capital sentencing. A death sentence imposed only rarely and without rational mechanisms allowed for discriminatory results that could not be traced to any one person's intent, and therefore could not be tried under the 14th Amendment.[5]

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[2] Joseph A. Melusky and Keith A. Pesto. *Cruel and Unusual Punishment: Rights and Liberties Under the Law* (Santa Barbara: ABC-CLIO, 2003), 105.
[3] Robert M. Bohm, "American Death Penalty Opinion, 1936-1986: A Critical Examination of the Gallup Polls," In *The Death Penalty in America: Current Research* ed, Bohm (Cincinnati: Anderson Publishing Co., 1991), 114.
[4] Melusky and Pesto, *Cruel and Unusual Punishment*, 105.
[5] Stuart Banner, *The Death Penalty: An American History* (Cambridge: Harvard University Press, 2002) 268. 258-9.

The Supreme Court decision, issued on June 29, 1972, was six sentences long, reversing the judgment for each defendant. The opinions, however, were 233 pages long, due to the uncommon circumstance that all nine justices wrote an opinion. Five justices explained their reasons for reversing the sentences, and four explained their dissent. In response to the decision, legislators, the angry public, and politicians voiced their concern. Thirty-five states revamped their policies in order to retain the death penalty in the four years following *Furman*.[6] According to a November 1972 Gallup poll, support for the death penalty increased 7% in the three months after *Furman* was announced.[7]

All of this activity culminated just four years later in *Gregg v. Georgia*, with a Supreme Court turnaround. The Supreme Court decided to look at five cases in which statutes had been revised to meet *Furman's* standards, collectively known as *Gregg v. Georgia*. Troy Gregg was convicted of the murder and robbery of two men with whom he had hitchhiked from Florida through Georgia. A jury sentenced him to death after a separate sentencing hearing.[8] Together with one case each from Florida, Texas, North Carolina, and Louisiana, the case under *Gregg* encompassed the full range of post-*Furman* statutes. The defendants' lawyers argued that the five statutes only shifted discretion to other parts of the process, rather than shedding it completely.[9] The brief in *Gregg* stated, "The changes in the Georgia sentencing procedure are only cosmetic, that the arbitrariness and capriciousness condemned by *Furman* continue to exist in Georgia."[10] However, the Court decided in a seven to two decision that sentences with

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[6] Melusky and Pesto, *Cruel and Unusual Punishment*, 108.
[7] Bohm, *The Death Penalty in America*, 116.
[8] Melusky and Pesto, *Cruel and Unusual Punishment*, 108.
[9] Banner, *The Death Penalty*, 271-3.
[10] Michael L. Radelet, "The Death Penalty in America: 25 Years After Gregg v. Georgia; Study Guide" (Amnesty International, USA, 2001), 14 -5.

aggravating (or both aggravating and mitigating) circumstances to guide the jury were acceptable. Therefore the death penalty itself was not inherently cruel or unusual, although they found mandatory sentencing unconstitutional by a vote of five to four.[11] How did such a significant change happen only four years later?

This question provides a window into the climate of public opinion about criminal justice as a whole in the 1970's. The 1970's were a time of great uncertainty and shifting social attitudes. In this arena, the climate of public opinion on criminal justice was also changing. By 'climate,' I mean the values, beliefs, and assumptions American people were making in terms of criminal justice. The change was one away from rehabilitation and towards a "law and order" mentality. Since receiving the death penalty translates into zero possibility for rehabilitation, the dramatic debates about capital punishment allow one to see the ultimate outcome of the shift. This is evident by the changes that occurred from *Furman* to *Gregg*, both in the Justices' decisions in these cases and in the popular debate surrounding the death penalty. One can see these shifts as located within the broader context of "law and order" at the time, more specifically in the rising fear of crime, in a shifting intellectual movement towards retribution, and in a change in the point of view from which these debates were taking place.

Historiography

For many, the death penalty evokes strong feelings about justice, vengeance, government, morality, and human life in general. For this reason, there is a large body of work devoted to the death penalty, dating back centuries. Several categories are noticeable within the literature.

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[11] Banner, *The Death Penalty*, 275.

Many books discuss trends in public opinion polls on the subject, and try to understand the changes. One of the most cited is The Death Penalty in America, by Robert Bohm. He describes the data contained in the Gallup public opinion polls on the death penalty for murder conducted between 1936 and 1986, analyzing ten demographic characteristics within this. He discusses the problems with death penalty opinion research in general.[12] I will be using this work in order to understand the public's sentiments and also because public opinion influenced the justices decisions.

Other writers, including historians, use the format of a debate for the purpose of forming opinions. These books use studies, historical evidence, and any scholarly argument to prove the pros and cons of the death penalty. Ernest van den Haag, a proponent, and John P. Conrad, an abolitionist, contributed to one such book: The Death Penalty: A Debate, published in 1983. In order to encourage people to think about the issue and come to their own conclusions, they draw on historical, moral, religious, and philosophical arguments. Another example of this is the 1976 book Capital Punishment in the United States, edited by capital punishment historian Hugo Adam Bedau, and Chester M. Pierce. This book focuses on social science research, presenting several different studies on various aspects of the death penalty in order to delve into the unanswered questions about the death penalty.

My research focuses on the history of the death penalty, on *Furman* and *Gregg* in particular. The body of work I came across that focuses on these cases is not very large, although their importance is acknowledged. Work done on these cases is overwhelmingly centered on the legal matter, more specifically on the Supreme Court decisions and opinions. Many times the authors omit the four years between the cases,

[12] Bohm, *The Death Penalty in America*, *x*.

jumping straight to *Gregg* and how that passed. The general consensus is that the court was not cohesive or decisive enough to make a strong abolition argument, and so when the states tried to apply *Furman* and make it less arbitrary, they re-instated the death penalty. The authors studied state legislative actions and data about the public opinion on the subject, in the context of the legal history. This is not surprising because it is a legal issue, but little is done to attempt a connection to a larger context, such as the status of criminal justice as a whole.

William Bowers, one of the foremost capital punishment historians, provides an excellent example. In Legal Homicide: Death as Punishment in America, 1864-1982, published in 1984, a chapter on *Furman* focuses on what types of statutes came about after *Furman* in order to get around the Supreme Court. He then embarks on a lengthier study as to whether they have actually succeeded. The time spent discussing these cases is entirely on the justices' opinions and the overall arbitrariness of the death penalty. The four years between *Furman* and *Gregg* are largely ignored because the focus is on whether *Gregg* was successful and legitimate in light of *Furman*, not what changed in those four years to make *Gregg* pass. Bowers concludes that the problem was not solved; the death penalty is still arbitrary.

He continues with this line of argument in a 1993 article, "Capital Punishment and Contemporary Values: People's Misgivings and the Court's Misperceptions." He takes an idea from the earlier book to a further conclusion. He states that the Supreme Court thought they were only examining the arbitrariness for *Gregg*, but that they actually paid a substantial amount of attention to what they perceived to be public opinion and standards. He then attempts to prove that the public was misinformed and so

the death penalty really was not as popular as the Supreme Court thought. In this later article, he spends more time on the four years in between, but only by looking at opinion polls and state actions in order to put it in a legal context.

A different use of the concentration on legal matter can be found in Cruel and Unusual Punishment, a book in a series titled "America's Freedoms: Rights and Liberties Under the Law," by Joseph Melusky and Keith Pesto, from 2003. The authors use this focus to look at the history of the abolitionist movement, and how it failed in this case. Since it is an overview series, with the goal of covering a lot of distance in a simple way, there are only seven pages devoted to the period from *Furman* to *Gregg*. The section focuses on the justices' differing opinions from case to case. They argue that the changed opinions were due to the new state statutes and "contemporary standards," both of which were put in terms of "reactions" to the decision.[13] Using the term "reaction" suggests that the public opinion between the cases was a backlash to *Furman* only, and was not connected to a broader context. The chapter concludes that abolition was ultimately unsuccessful in the Supreme Courts, and that period of consideration over the death penalty was over.

Another historian, Michael Foley, wrote Arbitrary and Capricious: The Supreme Court, the Constitution, and the Death Penalty in 2003. This book is about historical challenges to the death penalty, including an overview of what "cruel and unusual punishment," has meant historically. Two chapters deal with *Furman* and the death penalty since then. The first chapter very thoroughly discusses the opinions of every justice. The second chapter immediately delves into *Gregg* and the justice's opinions, in

[13] Melusky and Pesto, *Cruel and Unusual Punishment*, 107-8.

order to show how abolition failed. Foley included public opinion in the analyses, but only as it appears in the justices' decisions and thus the legal context.

There is, however, one historian who although primarily focused on the Supreme Court and the legal aspects, does acknowledge the larger trends involved besides the legal implications. In his 2002 The Death Penalty: An American History, Scott Banner gives a thorough background on the issue before *Furman*, including the Court, public, and the states. He describes the lawyers' tactics in the case, and then the opinions of the justices. However, instead of jumping straight to *Gregg*, he briefly examines the four years in between. Looking at legislation, public opinion, and also changes in abolition movements during the time, he places this period in the larger context of constitutional law as a whole, and also in the context of the public opinion on "law and order." He states, "the last three decades of the twentieth century, a period of mostly rising crime rates in which concern for law and order loomed large, would probably have been an era of restoration even without *Furman*;"[14] *Furman* just sped this process up.

Although Banner provides a larger background for these capital cases than other sources, it was very brief. My research departs from prior works in that I will examine the four years between the cases. Because the Supreme Court was not acting in a vacuum, and because public activities within the four years cannot be explained only as reactions to *Furman*, a broader context should be explored. I focus on the public attitude involved in the reaction to and impetus for the legal actions, and broaden the sources for this. In focusing on these four years, I am purposefully not attempting a detailed legal analysis but instead examine the broader context to the shift in opinion. I argue that this shift cannot be understood as a "backlash," but instead as a part of longer-term changes in

[14] Banner, *The Death Penalty*, 268.

social thought and political activism. The 1970's were a time when the attitude was shifting towards law and order. This will help us understand how both the Justices and the public helped to end the temporary abolition of capital punishment.

The *Furman* and *Gregg* Decisions

In order to understand the significance of the cases in a broader perspective, it is necessary to first get a sense of the key issues that were at stake in *Furman*. The case itself is one of the most important Supreme Court decisions on the death penalty; people now refer to the capital punishment timeline as "before *Furman*" and "after *Furman*." Not only did it examine the core issue of constitutionality of the death penalty for the first time, but also many of the pro and con arguments still used today are found in the opinions.[15]

The place of *Furman* as a whole in the Court's history is nuanced. In considering its significance then, one needs to understand that *Furman* embodied what the public saw as predictable in terms of techniques of the Courts, and on the other hand elicited shock and surprise because the courts had given no reason to act this way with regard to capital punishment cases specifically.

The Furman case fell in line with several recent cases that gave rights to criminals, as some would see it, or in making the judicial process fairer for people who are innocent until proven guilty, as others might say. The Court was gradually standardizing criminal procedure, creating a central set of rules for arrest and sentencing.

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[15] Michael A. Foley, *Arbitrary and Capricious: The Supreme Court, the Constitution, and the Death Penalty* (Westport: Praeger Publishers, 2003), 62.

Furman was decided at the high point of this.[16] The most famous case was *Miranda v. Arizona* (1966), which established the circumstances under which the police could question suspects.[17] Examples leading up to *Miranda* include *Gideon v. Wainwright* (1963), which guaranteed legal counsel, and *Mapp v Ohio* (1961), which established the exclusionary rule, allowing evidence to be excluded if obtained illegally.[18] These cases appeared to open up loopholes for the criminal, and the *Furman* decision was utilizing the ultimate loophole in the 8th Amendment.

However, *Furman* was significantly out of character for the Court's established rulings on capital punishment itself. The Court decided in *State ex rel. Francis v. Resweber* (1947) that the Constitution did not protect a convicted man from "the necessary suffering involved in any method employed to extinguish life humanely."[19] In *Trop v. Dallas* (1958), the Court ruled that the death penalty remains constitutional, although it also declared that the meaning for "cruel and unusual" is subject to change because the 8th Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[20]

In the latest cases before *Furman* the court had implicitly been upholding capital punishment by ruling on various facets of the death penalty without considering the constitutionality of the issue as a whole. Two of these seemed to defend the court's authority. In 1971, the Supreme Court ruled in *McGautha v. California* that states could give juries unguided discretion in sentencing decisions, and in *Crampton v Ohio* that

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[16] Banner, *The Death Penalty*, 265.
[17] Ibid.
[18] Frank J. Weed, *Certainty of Justice: Reform in the Crime Victim Movement* (New York: Aldine de Gruyter, 1995), 6.
[19] Michael Kronenwetter, *Capital Punishment: A Reference Handbook* (Santa Barbara: ABC-CLIO: 2001), 12.
[20] Ibid., 121.

there was nothing in the Constitution mandating separate guilt and punishment proceedings in capital trial.[21] Earlier, in 1968, the Court decided in *United States v. Jackson* against using the death penalty to force a guilty plea.[22] This case upheld the constitutional rights of the accused. Apart from how these cases fell in that regard, the Supreme Court was nevertheless implicitly upholding the legitimacy of the death penalty. In fact, for Justice Blackmun, a member of the dissent, these cases were of particular importance in deciding *Furman*. He noted that the Court was debating the constitutionality only one year since *McGautha*, 14 years since *Trop*, and 25 years since *Francis*. In that time, he asserted, no new evidence had come about to cause the court to strike down capital punishment. The change was just too sudden and dramatic.[23]

Due to the varying placement of this case in the Court's history, it is important to see the shift between *Furman* and *Gregg* not only in the context of the Court, but also within the core constitutional issues at stake. The two decisions themselves as well as the key terms involved need to be understood in order to place them in a broader context. *Furman* is a complicated case- the death penalty was not abolished once and for all, but instead many questions were left open for the legislatures to debate. I have identified seven key issues of argumentation that are important to understanding the cases and the core issues at stake.

Goals of the death penalty

In *Furman*, the most direct statements about the legality of the goals of capital punishment were discussed. The Justices disputed what these goals were or should be, as well as whether or not they were being met. What happened from *Furman* to *Gregg* was

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[21] Amnesty International USA, 6.
[22] Kronenwetter, *Capital Punishment*, 125.
[23] Foley, *Arbitrary and Capricious*, 78.

a significant narrowing of that debate. Retribution emerged as the dominant topic of a much smaller discussion.

The concurring justices in *Furman* felt overall that the goals for the death penalty were not being met in their current application. The arguments of Justices Brennan and Marshall use what they believe to be the goals of capital punishment in order to discredit the practice as a whole. Justice Brennan argued that the sentence was unnecessary; it was imposed so rarely that it could not possibly serve any penal purpose. Retribution, or "because they deserve it," is included in this category. He further dismissed this goal in particular with the claim that, "as the history of the punishment of death in this country shows, our society wishes to prevent crime; we have no desire to kill criminals simply to get even with them." Aside from retribution, he found no evidence that capital punishment deterred criminals, and listed other methods that could prevent recidivism.[24]

Justice Marshall's argument discussed six possible purposes and how they each failed or were unacceptable. First, he found retribution for its own sake improper, and that the 8th Amendment in fact "protects us from our baser selves." In terms of deterrence, he said that the question should be whether life imprisonment was more effective than the death penalty, a point Brennan also made. The goal of preventing recidivism failed due to the rarity of executions, but was made irrelevant due to the findings of the Report of Royal Commission on Capital Punishment, 1949-1953 (1953), which showed that most convicts become model citizens. He dismissed three other justifications- encouraging guilty pleas or confessions, eugenics, plus the utilitarian cost argument- for various reasons.[25]

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[24] *Furman v. Georgia*, Brennan.
[25] *Furman v. Georgia*, Marshall.

Justices White and Stewart also discussed the goals of the death penalty, but only in terms of how well the current application was achieving them. Justice White claimed that capital punishment was applied so rarely that it ceased to be a credible deterrent and that any need for retribution would go unsatisfied. The difference is that for his purposes he did not attempt to assess the inherent credibility of deterrence or retribution as goals.[26] Justice Stewart even further removed himself, stating that the issue of whether or not goals were met had no bearing on the question of its application through Georgia and Louisiana's statutes. Even with that, he took the time to assert that retribution was a constitutionally permissible goal because the "nature of man" needed to believe that organized society would indeed punish criminals, as they deserved. Otherwise, he claimed, man would turn to vigilante justice, self-help, and lynch law.[27]

The two dissenting justices in *Furman* who discussed the goals both claimed that the Constitution allowed these punishments even if their objectives were not fulfilled, and found retribution to be an acceptable goal regardless. Justice Burger based his dissent on the strict-constitutional method of interpretation. He said that even though no one knew if deterrence was effective, the Court saw that as a legitimate goal. In addition, he claimed that there was absolutely no evidence that the 8th Amendment intended to end the retributive goal.[28]

Justice Powell argued against Brennan and Marshall's assertion that a lesser punishment would make anything else excessive, and therefore illegal. He said that the Constitution did not invalidate a whole class of penalties because a lesser punishment

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[26] *Furman v. Georgia*, White.
[27] *Furman v. Georgia*, Stewart.
[28] *Furman v. Georgia*, Burger.

achieved the same goals, or if it did not realize any purpose at all. He specifically noted that although the effectiveness of deterrence was debatable and retribution was not the main goal, capital punishment had not been rejected altogether and its utility was still recognized.[29] Both Justices Burger and Powell disagreed with the majority that goals were an issue.

By the time *Gregg v Georgia* was decided, the majority opinion in *Gregg* had refined the retribution arguments of the dissenters in *Furman*, and the overall discussion of goals was significantly marginalized. The retribution argument was refined in the majority opinion, written by Justice Stewart and joined by Justices Powell and Stevens. Their opinion discussed the two "principal social purposes" that the death penalty was said to serve: retribution and deterrence. The opinion asserted that capital punishment was an "expression of moral outrage," essential so that citizens would not turn to vigilante justice.[30] This echoes Stewart's opinion in *Furman*, but instead of merely saying that retribution was acceptable as a goal, *Gregg* stated it was essential. The validation of deterrence was similarly refined. They concluded that its effect was debatable, but that resolving this issue was up to the legislature, not the judicial branch.[31] Furthermore, Stewart quoted Powell's opinion in *Furman* to state it was unacceptable to invalidate a group of punishments because a lesser one was deemed adequate.

Although the majority opinion debated both deterrence and retribution, *Gregg* included a much smaller dialogue of the legitimacy of the goals of capital punishment than *Furman* had. Furthermore, the topic was limited to only discussing retribution and

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[29] *Furman v. Georgia*, Powell.
[30] *Gregg v. Georgia*, Stewart, Powell, and Stevens.
[31] Ibid.

deterrence. In *Furman*, the Justices used goals as a main aspect of their arguments. While focusing mainly on retribution and deterrence, Justice Marshall brought several other possible objectives to the table. The dissent, although denying the category legitimacy as grounds for the argument, still discussed it. In *Gregg* however, this discussion was significantly narrowed. The majority opinion did discuss goals, but as a side argument, certainly not a central one. The concurring opinion of Justices White, Burger, and Rehnquist ignored the topic altogether. Furthermore, Justice Marshall, the one who opened the widest debate of goals in *Furman*, limited his argument in *Gregg* to only retribution and deterrence. He still felt that there was no data for deterrence and that retribution denied the wrongdoer of any dignity, but he limited his argument to only those two goals.[32] The difference between *Furman* and *Gregg* in this issue- the rise of retribution in a category that declined in prevalence- is an important aspect in the shift of the criminal justice system as a whole at this time, which will be discussed in a future section.

Unusualness

Some of the most memorable language in the decisions rose in argument of the penalty's unusualness. One of the most quoted lines was Justice Stewart's charge that the penalty was "wantonly and freakishly imposed."[33] This argument, which was so central in *Furman*, was not discussed in *Gregg*. In *Furman*, Justice Douglas found that capital punishment "inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a

[32] *Gregg v. Georgia*, Marshall.
[33] *Furman v. Georgia*, Stewart.

procedure that gives room for the play of such prejudices."[34] He discussed at length various examples of discrimination in death sentencing, focusing mainly on race and class. The uncontrolled discretion of judges and juries allowed selective application of the death penalty, "feeding prejudices" and making the current application of the death penalty unconstitutional[35] through both the 8th and 14th Amendments.

Unusualness was a key issue in three other opinions as well. Justices Stewart and White argued that the application of the death penalty was unusual because it was so infrequently imposed.[36] Justice Brennan also argued that it was very arbitrary. He claimed that the declining number of executions implied an irregular and unfair application; no more than a "lottery system."[37] For all of the concurring justices, this unusualness made the death penalty unconstitutional, in sum or in application. The only dissent to this was from Justice Burger, who argued the opposite: in fact the penalty was not rare, and to say that it was applied randomly would be "to cast grave doubt on the basic integrity of our jury system," something he was not willing to do.[38]

When this issue was discussed in *Gregg*, it was extremely narrowed. Since the Justices agreed with the new statutes, all discussion of unusualness was dropped. It was unnecessary. The majority opinion decided that the arbitrariness and capriciousness found in *Furman* could be avoided with the type of statutes that Georgia had enacted.[39] The opinion of Justices White, Burger, and Rehnquist similarly argued that although the death penalty had been imposed discriminately, wantonly, freakishly, and infrequently,

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[34] *Furman v. Georgia*, Douglas.
[35] *Furman v. Georgia*, Douglas.
[36] *Furman v. Georgia*, Stewart, White.
[37] *Furman v. Georgia*, Brennan.
[38] *Furman v. Georgia*, Powell, Burger.
[39] *Gregg v. Georgia*, Stewart, Powell, and Stevens.

Georgia's new statutes could not be assumed to fail.[40] Although they were not yet proven to be less arbitrary, they could not be presumed to fail. Furthermore, the infrequency that was such an important aspect of Justice White's 'unusual' argument in *Furman* was barely mentioned in *Gregg*. The heart of the *Gregg* decision was that the new statutes were fair, thus there was no discussion like there had been in *Furman* and that debate was in essence closed.

Discrimination

Discrimination is inextricably linked to arbitrariness and unusualness under the statutes. However, it can also be considered a separate issue. Arbitrariness is having no reliable basis for distinguishing between those sentenced to death and others to prison terms. Discrimination is a related problem, taking arbitrariness to the next step by identifying distinctions on the basis of legally irrelevant factors. There was a major shift in the treatment of this issue from Furman to Gregg: while a prominent argument in Furman, discrimination was not even a topic of discussion in Gregg.

For the concurring opinions of *Furman*, the discriminatory aspect of capital punishment arose in Justices Douglas, Stewart, and Marshall's arguments. Justice Douglas, as previously discussed, based his entire 8th Amendment argument on the idea that it was "unusual" if discriminatory. He admitted to the uncertainty of whether the specific defendants under *Furman* were sent to their death because they were black, but said that the "uncontrolled discretion" allowed prejudices to exert influence.[41] After proving the capriciousness of the death penalty, Justice Stewart suggested that the only possible basis for who received the capital sentence was race, although he put that

[40] *Furman v. Georgia*, White, Burger, Rehnquist.
[41] *Furman v. Georgia*, Douglas.

argument aside claiming it had not been proven.[42] This was included as a side argument under unusualness. Taking this further, Justice Marshall used discrimination on its face as a reason for the inherent unconstitutionality of the death penalty. He listed the poor, illiterate, underprivileged, and minorities as those who received the death penalty more often. He also noted that men received this penalty disproportionately to women.[43] In dissent, Justice Powell denied the discriminatory aspect of the death penalty altogether, contending that any discrepancies were due to the social or economic factors that caused the punishments to fall largely on the poor.

In *Gregg*, the issue of discrimination was not mentioned. Since they considered the problem of unusualness to be solved, it was no longer considered an issue. After all, without arbitrariness, how could discrimination be possible? However, the topic was not absent from debate at the time. Lawyers in *Gregg* argued that discretion still existed, and with discretion came discrimination. Scholars of the time were also discussing discrimination. Capital Punishment in the United States, published in 1975 before arguments opened for *Gregg*, discusses discrimination in terms of the new statutes. Marc Riedel argues that the post-*Furman* statutes "have not successfully reduced or eliminated discretion and, given that discretion has been expressed in the past by discriminatory practices in sentencing, there is little basis for expecting reduced differences in the proportions of white and nonwhite offenders sentenced to death."[44] Furthermore, discrimination has consistently been, and continues to be, a central argument for

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[42] *Furman v. Georgia*, Stewart.
[43] *Furman v. Georgia*, Marshall.
[44] Marc Reidel, "*Pre*-Furman *and Post*-Furman*: Comparisons and Characteristics of Offenders Under Death Sentences*," in *Capital Punishment in the United States*, ed. Hugo Adam Bedau and Chester M. Pierce (New York: AMS Press, Inc, 1975), 539-40.

abolition. Therefore it is noteworthy that the discussion of discrimination did not make its way into *Gregg*.

Constitutional Interpretation

One of the most salient issues in *Furman*, and certainly the most prevalent argument found in its dissenting opinions, was the issue of constitutionality. In terms of a shift from *Furman* to *Gregg*, the opinion of the dissent largely took precedent in *Gregg*. In *Furman*, the five justices who overturned the death penalty generally began with the assertion that the meaning of the "cruel and unusual" clause of the 8th Amendment could develop over time, based on the "evolving standards of decency" idea identified in *Trop*.[45] The dissent felt differently, however. All four of the dissenting opinions discussed as their chief point the role of the Court in interpreting the Constitution, and came to the conclusion that in this case it overstepped. Each justice argued that decisions such as this should come from the legislature, not the Court. Furthermore, the Constitution and previous cases supported the death penalty.[46] This implicitly dismissed the analysis of the majority justices, including the "evolving standards" interpretation. Justice Blackmun did not dismiss that entirely, but said that change should be much slower and incremental.[47] Justice Powell accused the majority of basing their opinions on personal preference instead of the Constitution, an argument that Justice Rehnquist used as well in discussing the necessary "self-restraint" of justices. Justice Burger called the decision a "judicial fiat."[48] In fact, both Justices Burger and Blackmun discussed their

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[45] *Furman v. Georgia.*
[46] *Furman v. Georgia*, Burger, Blackmun, Powell, Rehnquist.
[47] *Furman v. Georgia*, Blackmun.
[48] *Furman v. Georgia*, Powell, Rehnquist, Burger.

personal repugnance for the death penalty but said that as Justices they must interpret the Constitution in this way.[49]

By *Gregg*, the argument had moved on. Although the Justices had to adhere to the standards that *Furman* had set, the debate on constitutional legitimacy was severely narrowed. The question was no longer if the Justices should be focusing on the legality of capital punishment in its entirety or in application only. Now the debate centered on *how* it was applied. This is an important distinction because any argument after *Gregg*, at least in terms of the 8th Amendment, must deal with the application as opposed to capital punishment inherently. The narrowing of the argument had a profound impact on all future discussion of capital punishment.

Public Opinion

The interpretation and use of public opinion by the Justices provides one example of continuity between the cases: those Justices who felt capital punishment was always "cruel and unusual" and those who never felt it was did not change their analysis from *Furman* to *Gregg*. In *Furman*, the theme of public opinion in the concurring opinion was prominent in only the opinions of Justices Brennan and Marshall, the two who found capital punishment to be unconstitutional in all cases. Justice Brennan asserted that capital punishment had been "almost totally rejected by contemporary society," an argument which he said was supported by its history, "one of successive restriction" as well as in the current trend towards disuse. These two factors demonstrated that society

[49] ***Furman v. Georgia*, Burger, Blackmun.**

was questioning the death penalty's appropriateness.[50] Justice Marshall's treatment of public opinion was based on the assumption that the average citizen would find it "shocking to his conscience and sense of justice" if he knew all of the facts. These include its discriminatory application, the certainty that some innocents were executed, and how the penalty "tends to distort the course of the criminal law" due to the sensationalism involved.[51]

Justices Burger and Powell contested these views. Justice Burger found no obvious indications that capital punishment offended the public conscience so much that using the Supreme Court rather than the legislature was necessary.[52] Justice Powell made the argument that evolving standards of decency did not call for the abolition of capital punishment. He said that one could see this through the indicators most likely to show the public's view- the legislature, state referenda, and actual juries.[53]

In *Gregg*, the discussion was very similar, except that the sides were switched: those that found public opinion to support the death penalty were in the majority. The majority opinion decided that the argument from *Furman*, that decency had evolved to where public opinion no longer supported capital punishment, was unfounded. Justice Stewart claimed, "The most marked indication of society's endorsement of the death penalty for murder is the legislative response to Furman."[54] He cited the new statutes of state legislatures and Congress to prove that the representatives of the people had not

[50] *Furman v. Georgia*, Brennan.
[51] *Furman v. Georgia*, Marshall.
[52] *Furman v. Georgia*, Burger.
[53] *Furman v. Georgia*, Powell.
[54] *Gregg v. Georgia*, Stewart, Powell, and Stevens.

rejected capital punishment.[55] This was a direct contest to the claim in *Furman*. Justice Marshall, this time in the dissent, continued to insist that an informed public would find the death penalty "shocking" to their senses.[56]

Point of View

An interesting difference between those Justices who decided either pro-capital punishment or anti-capital punishment in both cases, is the point of view from which they are written. By point of view I mean seeing the criminal's viewpoint or the victim's viewpoint, terms that are explained in further detail in a future section. In *Furman* the dissent suggested victim's rights while the majority was on criminals rights. In *Gregg*, those dissenters writing in the victim's point of view were in the majority. In *Furman*, this victim's point of view is evident in Justice Blackmun's final point. He noted that not one of the concurring opinions, or the arguments for the petitioners, reference the victims, their families, or their communities. He cautions "the fear that stalks the streets of many of our cities today perhaps [deserves] not to be entirely overlooked."[57] His warning not to forget the victim foreshadowed the victims' movements to come, as well as some of the arguments used in favor of capital punishment after *Furman*.

In *Gregg*, this point of view continued. In both the majority and concurring opinions, Gregg and the other defendant's crimes and trials were described in detail. Their frame of mind of the Justice is obviously already on the crime itself. Also, having this summary first leads the reader to be more sympathetic to the victim and against the

[55] Ibid.
[56] *Gregg v. Georgia*, Marshall.
[57] *Furman v. Georgia*, Blackmun.

criminal. *Furman* on the other hand did not discuss the crimes in any of the opinions. Instead the focus was entirely on what was fair to the defendant, assuming his guilt. In *Furman* the dissenters focused on the Constitution and touched upon victim's rights, while the majority applied criminals rights. In *Gregg*, those dissenters were now in the majority, and obviously still believed the victim's point of view.

Human Dignity

The overarching argument of both Justices Brennan and Marshall is human dignity. It is absent from the arguments of all the other Justices, even those concurring. These two Justices were the only two who agreed that capital punishment was inherently unconstitutional, regardless of how it was applied. The crux of Justice Brennan's argument was that "A punishment is 'cruel and unusual,' ... if it does not comport with human dignity." The State must treat all human beings with dignity even when punishing. Every other argument Brennan made was held under this larger umbrella, including its severity and excessiveness, arbitrariness, and public opinion turning against it.[58] Similarly, Justice Marshall's argument was that a punishment violates the 8th Amendment if it is "no longer consistent with our own self-respect." All of the other aspects of his argument are to prove this statement true in terms of capital punishment, including its excessiveness and its moral unacceptability to the public.[59]

In *Gregg*, this issue again appeared only in Justices Brennan and Marshall's opinions. Justice Brennan wrote in response to the majority opinion on this point:

> "I do not understand that the Court disagrees that "[i]n comparison to all other punishments today . . . the

[58] *Furman v. Georgia*, Brennan.
[59] *Furman v. Georgia*, Marshall.

> deliberate extinguishment of human life by the State is uniquely degrading to human dignity." Id., at 291. For three of my Brethren hold today that mandatory infliction of the death penalty constitutes the penalty cruel and unusual punishment. I perceive no principled basis for this limitation. Death for whatever crime and under all circumstances "is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity . . . An executed person has indeed `lost the right to have rights.'" Id., at 290."[60]

In this passage, Brennan borrowed heavily from his argument in *Furman* to point out that capital punishment is the ultimate the denial of human rights. He further noted the irony of stopping at mandatory sentencing if one disagrees with his statement about human dignity.

Justice Marshall discussed human dignity in his argument against retribution. He asserted that the idea behind purely retributive punishment is that the death penalty is appropriate simply "because the taking of the murderer's life is itself morally good."[61] Ultimately,

> "To be sustained under the Eighth Amendment, the death penalty must "compor[t] with the basic concept of human dignity at the core of the Amendment," ibid.; the objective in imposing it must be "[consistent] with our respect for the dignity of [other] men." Ante, at 183. See Trop v. Dulles, 356 U.S. 86, 100. Under these standards, the taking of life "because the wrongdoer deserves it" surely must [428 U.S. 153, 241] fall, for such a punishment has as its very basis the total denial of the wrongdoer's dignity and worth."[62]

He therefore found the retributive function of the death penalty to be wrong. Justice Marshall discussed in *Furman* the basic concept of human dignity in relation to several

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[60] *Gregg v. Georgia*, Brennan.
[61] *Gregg v. Georgia*, Marshall.
[62] Ibid.

other aspects, and here it is only in relation to retribution. However, the core of the argument remains the same. Since Justices Brennan and Marshall were looking at the constitutionality of capital punishment as a whole, not just the application, human dignity was a valid argument. However, only those two Justices made them, and once they got to *Gregg*, they were relegated to dissenting opinions.

Possible Explanations

How did the Justices come to make these myriad arguments? In searching for explanations behind the Justices' opinions, and the differences from *Furman* to *Gregg*, probable legal reasons come to mind. It is important to discuss these possibilities first in order to discover what they explain, as well as to observe how they fall short. Placing the cases within the context of a transition from the Warren to Burger Court explains certain arguments in the opinions. Looking at the argument of how *Furman* was a weak decision contributes in part to an understanding of how *Gregg* occurred only four years later.

Warren Court

The necessary first step is to examine the Supreme Court itself. The recent transition from the Warren Court to the Burger Court accounts for the continuities behind the Justice's opinions in both *Furman* and *Gregg*. These continuities can be classified as differences between "activist" and "strict constructionist" judges. However, an examination of the Supreme Court falls short of explaining the differences in outcome of the two cases.

The "liberal Warren Court" label describes the period of the Court from 1962-69.[63] Starting in 1962, the Supreme Court became part of a government dominated in both Congress and the Presidency by liberal politicians.[64] Ideologically, the Court fully participated in this government's "grand sweep of political liberalism."[65] Historian Michael Tushnet captures the essence of how the Warren Court made its decisions in The Warren Court In Historical and Political Perspective. He defines the "willfulness" that characterized their decisions as one important dimension to the Court's liberalism. Instead of adhering to Justice Frankfurter's cautious belief that legislatures held a democratic legitimacy absent in the Courts,[66] Justice Warren and his core liberal colleagues, Justices Brennan, Marshall, and Fortas, engaged in this "willingness." This refers to the lack of concern for general constitutional theory, replaced instead with a use of whichever approach was necessary to get the correct results.[67] They chose doctrines on the basis of reaching results sensible to the case at hand. They felt authorized to act this way, believing they were chosen for their positions due to their sound judgment, which they were expected to exercise.[68] Consequently, their decisions elicited "strict constructionist" criticisms of the Court by Republicans, who felt that the justices should be "applying the law, not making it." They accused the Warren Court of enforcing personal preferences rather than the law.[69]

The two holdovers from the Warren Court in 1972 were Justices Brennan and Marshall. One can see this "activist" logic in their arguments for both *Furman* and

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[63] Mark Tushnet, *The Warren Court in Historical and Political Perspective* (Charlottesville: University Press of Virginia, 1993) 4.
[64] Ibid., 13.
[65] Ibid., 3.
[66] Ibid., 14.
[67] Ibid., 16-7
[68] Ibid., 16-8.
[69] Ibid., 29.

Gregg. Both Justices found *Furman* an acceptable case under which to examine capital punishment as a whole. They disregarded the arguments from the majority justices who felt that *Furman* only brought up questions of applicability, as well as the dissenters' arguments that the Supreme Court should leave the issue to the legislature. In looking at the inherent constitutionality of the death penalty, they found it acceptable to make arguments concerning human dignity. In these arguments, they used what they saw as appropriate definitions and rules to address the question they felt should be addressed. They did not waiver in these interpretations from *Furman* to *Gregg*. When Justices Brennan and Marshall did not worry about the overall history of the Supreme Court in regards to capital punishment, they were exercising "willful" character, using doctrines they felt suitable to the case at hand. One can see the belief that they were expected to exercise their own personal good judgment in Justice Marshall's argument on public opinion. He argued that if the public knew all of the facts, it would abhor the death penalty. Even if he had not previously found the penalty to be excessive, he felt that his argument on how the American people would feel if they were informed would be enough. He continued to support this idea in *Gregg* as well, even in the face of the flurry of public activity.

The dissenting Justices in *Furman* fit into the characterization of criticism to the Warren Court. They felt that the decision to use capital punishment was not in the Supreme Court's domain at all, a "strict constructionist" interpretation, and maintained this stance in *Gregg*. Those in the majority in *Furman*, who later contributed to the re-institution of capital punishment in *Gregg*, were still of a less "activist" stance than Justices Brennan and Marshall. The dissent in *Furman* also argued that the other Justices

had decided the case based on personal opinion instead of sound judgment. This is the same criticism that Republicans had been giving the Warren Court. These dissenters included Burger, Blackmun, Powell, and Rehnquist, who were all appointed by President Nixon, a Republican president.[70] Although appointees can be unpredictable at times, these four interpreted both *Furman* and *Gregg* as "strict constructionists."

In *Gregg*, the Justices were four years further from the actions of the Warren Court, and one Ford appointee heavier, since Douglas had to step down. So although examining the Warren Court is useful in understanding why some of the Justices argued as they did, it seems to clarify more the continuities between the two cases rather than the changes between them. Furthermore, the significant narrowing of certain arguments from *Furman* to *Gregg*, such as the goals, arbitrariness, and discrimination is not fully explained by looking at the emergence of these Justices away from the Warren Court memories.

Weak Decision

One possible explanation for the outcome of *Gregg* only four years after *Furman* is that the decision of *Furman* was simply too weak. Many of the legal reviews and intellectuals of the time recognized the uncertainty of the decision. Executions in America, the 1974 book by William Bowers, noted the large legislative response to *Furman*,[71] and concluded that because the court's decision was really about the application and not capital punishment in itself, it "was not definitive in character." "Thus," he concluded, "the struggle over capital punishment continues."[72]

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[70] *Supreme Court of the United States*, 2005, www.supremecourtus.gov/about/members.pdf (20 January 2005)
[71] William J. Bowers, *Executions in America* (Lexington: Lexington Books, 1974) xix.
[72] Bowers, *Executions in America*, 28-9.

Several law reviews also realized that Furman was not a strong case. The 1973 *Supreme Court Law Review* dedicated 40 pages to *Furman*, noting that capital punishment violated the 8th Amendment, "at least sometimes." The article was a very thorough review of the opinions, other recent death penalty decisions, and the arguments made by the justices. After all of this, the author concluded that the justices did not make a very convincing case for the proposition that capital punishment is "cruel and unusual." In fact, he entertained the idea that the decision was "almost deliberately calculated to make this judgment of dubious value as a precedent."[73] Other journals recognized its vagueness. The *American Bar Association Journal* called it "a difficult case both to summarize and to interpret."[74] *Stanford Law Review* wrote about the long-awaited decision that "beclouds more than it clarifies."[75] According to an article in the *Journal of Criminal Law and Criminology*, the decision "hardly represents the final resolution of the controversy over capital punishment."[76]

In addition, the *New York Times* published an article only two days after the decision that questioned *Furman's* finality. In "Banned—But for How Long? Capital Punishment," Lesley Oelsner brought up many of the same issues discussed in the legal reviews. She identified that its application was in question rather than capital punishment itself, and highlighted the narrow majority. Although she questioned the ability of any

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[73] Daniel D. Polsby, "The Death of Capital Punishment? Furman v. Georgia," *The Supreme Court Law Review* 1972 (1972): 40.
[74] Rowland L. Young, "The Supreme Court Report," *American Bar Association Journal* 58 (1972): 971.
[75] Malcom E. Wheeler, "Toward a Theory of Limited Punishment II: The Eighth Amendment After *Furman v. Georgia*," *Stanford Law Review* 25, no.1 (1972): 62.
[76] Charles W. Ehrhardt, et al., "The Aftermath of Furman: The Florida Experience," *Journal of Criminal Law and Criminology* 64, no. 1 (1973): 2.

new law to reduce discretion enough to be constitutional, her closing thought was a prediction that with one more Nixon appointee, the decision would change.[77]

Public Perception

Furman was by no means a strong decision, but the public did not see *Furman* at all as a weak decision; in fact quite the opposite is true. Since Oelsner's article was in *The New York Times*, it was more accessible and widely read than the law reviews, which discussed the case in detail. However, not every newspaper carried such a story, which suggests that the public was not well informed of the *Furman* case. There were no excerpts of the decisions like the ones *New York Times* had for *Gregg* four years later, and not more than cursory summaries of what each justice argued. News articles and politicians did not mention more than generally the possibility for reversal in the decision. Instead, the people read articles such as the one in *New York Times* on the same day as the decision, which outlined the history of abolition and its successes during the last 200 years.[78] An article the next day about *Furman* was devoted to how the legislators were reacting; they were not sure any statutes could ever be written to go against this decision, or that any Constitutional Amendment could pass.[79] These were politicians talking about the decision and making it sound very serious.

As demonstrated, the newspapers did not fully cover *Furman*, and furthermore the decision itself was not a document immediately accessible to the public. Perhaps for these reasons, the public in general did not have a grasp on what the decision really was,

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[77] Lesley Oelsner, "Banned—But for How Long? Capital Punishment," *New York Times*, 2 July 1972, sec. E.
[78] Paul L. Montgomery, "Campaign Against Capital Punishment Has Gained in West in Last 200 Years," *New York Times*. 30 June 1972, sec. A.
[79] Richard Phalon, "Death Penalty Urged in 5 States; Some Legislatures are Uncertain," *New York Times*, 1 July 1972, sec. A.

which Justice dissented or agreed, and certainly not the reasons behind it. The letters written to the Justices in the months following *Furman* demonstrate this. Justice Blackmun, who dissented, got many letters with people angry at the decision. In fact, out of ten letters in Blackmun's file, at least seven told him in various ways how wrong making the death penalty unconstitutional was. One of these even prompted a reply by Blackmun reminding her to "bear in mind that I was in the dissent."[80] Another example, by R. J. Ryan, Chairman of the Board of Nooter Corporation in Saint Louis, Missouri, was devoted to convincing Blackmun to reinstate the death penalty.[81] If he knew that Blackmun dissented, then there would be no reason to try to convince him. And if Ryan was aware of Blackmun's personal views, then this would be reflected in his letter. Overall, the majority did not seem to know even that Blackmun had dissented, and almost certainly hadn't read the opinion so they did not know why or how his decision was made.

Although the legal professionals concentrated on the shakiness of the decision, the public understood *Furman* primarily for its true momentousness, eliciting great praise in some cases but great consternation in others. This is evident by looking at letters that concerned citizens wrote to the justices in the months after the decision, as well as in the newspaper editorials. Some of the letters written to Justice Douglas were to congratulate him on the decision. Jon E. Grossklaus, M.D., from San Bernardino, CA, called the decision "one of the most edifying and momentous decisions in the evolution of human

[80] Harry A. Blackmun, *Harry A. Blackmun Papers* (Washington, D.C.: Library of Congress), Manuscript Division, Container 135, 11 July 1972.
[81] R.J. Ryan, *Harry A. Blackmun Papers* (Washington, D.C.: Library of Congress), Manuscript Division, Container 135, 8 August 1972.

civilization."[82] A.G. McCarver in Midland, TX, alternatively told Justice Douglas "Your vote... is the biggest miscarriage of justice this country has ever seen or will ever see."[83] Justice Blackmun also received letters. One from Louise Yocum Shallcross from Houston, TX portrays how important she found the decision to be. She accused him of "[giving] the U.S. to the criminals to ravage," and enclosed an article on how this decision gave hundreds of life term prisoners a "license to kill at will and without risk."[84] In a letter to the editor in the *New York Times*, one man wrote of the "helplessness" his community felt just after the death penalty was found unconstitutional. All of these letters show how important the *Furman* decision was in the public's consciousness, while there were no letters to the editor telling people to hold on and think about how unstable the decision was.

One letter to Justice Douglas sums up the character of much of the public reaction. The author did not write very much, and did not spell out any reasons for or against the death penalty. Ruth Green from Dallas, TX, wrote Douglas a note on a little sheet of flowered paper. The note read: "In addition to the prayers I say nightly to the Almighty God is the earnest plea that the next victim of the friends, for whom you have such unmitigated compassion, will be the person nearest and dearest to you."[85] This leaves the resounding sense that the public cared deeply about the *Furman* decision, and did not see its result in any uncertain terms.

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[82] John E. Grossklaus, *William O. Douglas Papers* (Washington, D.C.: Library of Congress), Manuscript Division, Container 1541, II, 29 June 1972.
[83] A.G. McCarver, *William O. Douglas Papers* (Washington, D.C.: Library of Congress), Manuscript Division, Container 1541, II, 30 June 1972.
[84] Louise Yocum Shallcross, *Harry A. Blackmun Papers* (Washington, D.C.: Library of Congress), Manuscript Division, Container 135, 28 July 1972.
[85] Ruth Green, *William O. Douglas Papers* (Washington, D.C.: Library of Congress), Manuscript Division, Container 1541, II, 29 June 1972.

Becoming a Law and Order Society

Don't you know the crime rate is going up, up, up, up, up
To live in this town you must be tough, tough, tough, tough, tough!
You got rats on the west side
Bed bugs uptown
What a mess this town's in tatters I've been shattered
My brain's been battered, splattered all over Manhattan
Rolling Stones, "Shattered" [86]

The reason why the decisions sparked such deeply felt letters is because the issue of capital punishment tapped into the larger context of change and anxiety in the 1970's. It is thus necessary to shift away from the *Furman* decision and discuss the emergence of a "law and order" mentality during this time. By looking at the climate of criminal justice in a broader context, the *Furman* case and the fate of capital punishment in America can be explained. Therefore it is necessary to first locate in the broader context how Americans felt about justice and how it should be served. This section is an effort to understand the significance of the decision in light of the lack of public comment on the weakness of the decision itself. Facing crime rates in the 1960s and 70s, penal reforms that seemed to "tilt" the justice system in favor of the criminal, and politicians who capitalized on this to gain votes, American society began a turn towards "law and order." A parallel academic shift in ideas about what caused crime was also occurring. All of these issues contributed to another large shift, the change in looking at the criminal justice system from the point of view of the accused to that of the victim.

The Seventies

During the 1970's, American society was experiencing changes and anxieties. For one, America had experienced several "setbacks" and was going through what

[86] The Rolling Stones, "Shattered," *Some Girls* (Rolling Stone Records: 1978).

historian Bruce J. Schulman termed "intimations of decline."[87] The nation seemed to be going downhill as Watergate was discovered, the Arab oil embargo humiliated the nation, the economy worsened, and Vietnam was winding down towards defeat.[88] However, these fears of decline did not begin with Watergate. As early as 1970 professor Andrew Hacker published *The End of the American Era*, which concluded that the United States was an "ungovernable nation," in "the years of middle age and decline."[89]

There were several dimensions to this decline, one of which was disillusionment with government. Overall, faith in government programs, the large-scale public efforts that had characterized government since FDR, fell. Then in 1973, the Watergate scandal unraveled. "Watergate" encompassed not only the robbery of tapes from the hotel, but also the covert agencies Nixon established in the White House, and the range of illegal and subversive activities they conducted. After being discovered in July of 1974, Nixon stepped down from office. The lesson the American public understood was that "you can't trust the government."[90]

In the early seventies there was also a sense of cynicism with society overall, not just politics. Many young people began to see America as "a sick society," and were disgusted with its basic values, [91] pushing them towards a counterculture. Dropping out of a corrupt society and living according to their own values held a significant pull. These countercultures were to be "a new world… parallel to the old."[92] At the same time, many young people and families took a turn in the direction of evangelical religion.

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[87] Bruce J. Schulman, *the seventies: The Great Shift in American Culture, Society, and Politics* (New York: The Free Press, 2001), 48.
[88] Ibid., 49.
[89] Ibid.
[90] Ibid., 51.
[91] Ibid., 17.
[92] Ibid.

People left the mainstream, moderate and liberal Protestant churches, while "born again" Christian numbers rose, and Pentecostal and charismatic denominations, with strict morality, fundamentalist theology, and spirit-filled worship services flourished.[93] Growth in the counterculture and religion encompass seemingly opposite morality and structures, but the push away from the mainstream was similar.

America was thus in the throes of change and anxiety in the 1970's. The nation, government, and society contributed to this. Against this general backdrop, however, there was a focused concern about the issues of crime and safety that fell close to many people's hearts. It is from this concern that "law and order" developed.

"Law and Order" Mentality

The emergence of a "law and order" mentality began in the late 1960's. "Law and order," for the purposes of this discussion, refers to the strict enforcement of laws, especially for controlling crime.[94] This grew out of the rising crime rates, a sharp upturn that began ten years earlier. Between 1960 and 1978, reported robberies more than tripled, auto thefts more than doubled, and burglaries nearly tripled in four major cities.[95] Besides the rising crime rates, there was a conservative reaction to Supreme Court penal reforms. Many people found these decisions too beneficial to criminals.[96] A study in 1972 found that the argument that the criminal justice system was "tilted" to the criminal was gaining credibility, as most people began to worry about becoming a victim rather

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[93] Ibid., 92-3.

[94] The use and meaning of the term "law and order" has been so ubiquitous that it is hard to define, complicated by the matter that books disagree over which politician used it first. The definition I use is from the *American Heritage Dictionary of Idioms* as a simple and concise way of putting it. See bibliography for further citation.

[95] James Q. Wilson and Richard J. Herrnstein, *Crime and Human Nature* (New York: Simon and Schuster, 1985), 408.

[96] Weed, *Certainty of Justice*, 3.

than finding themselves falsely accused or imprisoned.[97] This led to a public perception of lawlessness in the system, that the courts were more concerned with procedure than getting the truth, and that this would let violent criminals lose on technicalities.[98] As people worried for their safety, the courts seemed to be moving in the opposite direction. If the justice system facilitated the criminals, how would crime rates go down?

Furthermore, politicians using people's fears to get elected exacerbated the problem of rising crime and the simultaneous penal reforms. American presidential politics provides an example. In the 1968 presidential race, Nixon noticed that George Wallace had used the "law and order" cry to gain support from Northern and Southern white working class populations, the constituency Nixon needed to gain in order to win the close election.[99] Nixon "set out to capture the vote of the forty-seven-year-old Dayton housewife," a woman beginning to care more about social issues than voting with her pocketbook for unions, high wages, and college loans for her children. She was "now afraid to walk the streets alone at night," and worried about drugs and rioters.[100] Nixon was successful in his attacks against "permissiveness" and his appeal to voters to "take the offensive against criminals," gaining himself a victory.[101]

Nixon was not the only politician to adopt this rhetoric. Indeed, the *Journal of Criminal Law and Criminology*, in September 1973, included an article by Constance Baker Motley on the issue of narcotics laws. She begins by discussing the ubiquity of the phrase "law and order," and how "every candidate running for public office promises to

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[97] Andrew Karmen, *Crime Victims: An Introduction to Victimology* (Monterey: Brooks/ Cole Publishing Company, 1984), 20.
[98] Weed, *Certainty of Justice*, 6.
[99] Ibid.
[100] Schulman, *the seventies*, 38-9.
[101] Weed, *Certainty of Justice*, 6.

curb 'street crime.'"[102] The commonality of the phrase and how politicians used it shows that the people heard news about crime and the problems with the system quite often. Furthermore, the fact that the politicians won by using these hard-hitting refrains proves that the people paid attention and felt that this tough approach would give them more safety.

Intellectuals

As public fears rose, an intellectual movement was simultaneously evolving. The way the academia perceived crime and criminal behavior was changing. In 1968, Karl Menninger published a book called *The Crime of Punishment*, which argued against the use of punishment entirely.[103] The new forms of punishment would forcer the offender to bear the cost of conviction with "no moral surcharge," as well as reimbursing losses to victims. Menninger denied the justification of the retributive function of punishment because he believed that every action was caused by the actor's circumstances, not his free will. If it were society, his family, or any of his circumstances that caused the criminal behavior, it would be an injustice to punish him for it. Instead, he suggested rehabilitating or isolating him from society in the most humane way possible.[104]

Another example of the rehabilitation viewpoint is Motley's article on narcotics. She argued that retribution and deterrence, as opposed to any other theory or program, had been accepted as the correct way to deal with drug crimes.[105] She found that the system seemed to accomplish the two goals of retribution and incapacitation, or restraining the wrongdoer during his confinement, but that crime was still not being

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[102] Constance Baker Motley, "Criminal Law: 'Law and Order' and the Criminal Justice System," *The Journal of Criminal Law and Criminology* 64, no. 3 (1973): 259.
[103] Wilson and Herrnstein, *Crime and Human Nature*, 489.
[104] Ibid., 490.
[105] Motley, "Criminal Law," 259.

reduced. This was because the latter three purposes of the justice system- to individually and generally deter, and to rehabilitate or reform the wrongdoer, were not being accomplished.[106] If society did not commit sufficient resources to "ameliorate the social conditions which breed criminal conduct and to 'habilitate' or 'rehabilitate' major law violators," crime rates would not go down.[107] Society was seen as having caused the problem of crime- it was the criminal's circumstances, upbringing, social strife, etc that caused him to act in such a way. Menninger took this interpretation further than Motley, but the general consensus was that it would not be fair to simply punish the criminal for what he had done. Whether or not this goal was being accomplished, these academics felt that the goals of rehabilitation were valid and should be strived for.

One can see evidence of these academic ideas in some legislature of the 1960's, particularly among Lyndon B. Johnson's "Great Society" programs, meant to solve crime by eliminating the social problems such as poverty and unemployment.[108] He was very interested in studying the root causes of crime, and appointed a variety of research committees to do this.[109] In terms of actual legislation, one of the areas that Johnson focused on was drug abuse. A committee that Johnson appointed became the Narcotic Addict Rehabilitation Act of 1966, in which the government provided for the commitment of addicts to treatment and follow-up care.[110] Rehabilitation was also stressed in juvenile crime policies under Johnson as well. He wanted to give "disadvantaged young people the chance to break free of the waste and the boredom that

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[106] Ibid., 266.
[107] Ibid., 267.
[108] Nancy E. Marion, *A History of Federal Crime Control Initiatives, 1960-1993* (Westport: Praeger Publishers, 1994), 9.
[109] Ibid., 38.
[110] Ibid., 49.

would otherwise characterize their lives."[111] For this reason he called for the Juvenile Delinquency Prevention Act, passed in 1967, to prevent juvenile delinquency and rehabilitate those who were already offenders.[112] One can see the blame Johnson and Congress placed on society or outside factors in the types of legislation they were passing.

However, in the 1970's this outlook on criminality was shifting away from "blaming society" and towards individual responsibility. James Q. Wilson was a prominent neoconservative who wrote extensively on the subject of crime in general and the death penalty in particular. Examining Wilson as a neoconservative is important because the movement that he was a part of was influential in the 1970's, as it stemmed from intellectual thought but also contained connections to governmental circles.[113] Neoconservatism is "primarily a philosophical movement that has political relevance,"[114] the beliefs of which Mark Gerson has identified as stemming from the republican virtue tradition. Essentially, neoconservatives acknowledge particular interests while arguing that they need to be moderated by a concern for the common good.[115] James Q. Wilson was one of the forward thinkers who identified the individual as responsible rather than society. In the early 1970's his ideas on criminality were still forming, but by 1984, with Crime and Human Nature, they were solidified and one can see a noticeable change in his ideas about criminality.

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[111] Lyndon B. Johnson, "Special Message to the Congress on Crime in America," *Public Papers of the President* (February 6, 1967), 134-5, in Marion, *Federal Crime Control*, 44.
[112] Marion, *Federal Crime Control*, 52.
[113] Peter Steinfels, *The Neoconservatives: The Men Who are Changing America's Politics* (New York: Simon and Schuster, 1979), 9.
[114] Mark Gerson, *The Neoconservative Vision: From the Cold Wars to the Culture Wars* (Lanham: Madison Books, 1996), 14.
[115] Ibid., 11.

Two articles by James Q. Wilson were published in the *New York Times* in 1973, outlining his early ideas on the goals of the criminal justice system. They first mention the failure of both rehabilitation and deterrence in the criminal system. In his discussion of various studies showing the percentages of convicted felons on probation that committed another crime, he came to the following conclusion:

> The judges did not seem to operate on either the deterrence or the rehabilitation theory of sentencing- the low proportion of jail sentences for persons convicted of serious crimes who had prior convictions suggest that the judges did not believe jail had a deterrent effect, and the fact that the men were convicted after an earlier offense implies that for them, at least, there had been no rehabilitation.[116]

He found that deterrence was not being enforced, and that rehabilitation was not successful. Later in the article he became even clearer in his opinion that judges themselves believe that rehabilitation had failed. He claimed that since judges were using probation and suspended sentences, they believed that "a criminal left out of prison has at least as good a chance, and perhaps a better chance, to stop stealing as one sent away."[117] In the second article, published in October, Wilson revisited the idea that any utility for punishments was not currently being achieved. He suggested that any punishment should be given on the basis of justice, although he never specified what his idea of justice was.[118]

Two years later, he explored these ideas further in Thinking About Crime. Although he felt some crime could be explained by youth itself, he found a more compelling reason in the idea that the courts were not certain enough in their punishment.

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[116] James Q. Wilson, "If every criminal knew he would be punished if caught..." *New York Times*, 28 January 1973, sec. Magazine.
[117] Ibid.
[118] Wilson, "Is it useful? Is it just? Or is it only cruel? The Death Penalty." *New York Times*, 28 Oct 1973, sec. SM.

Since criminals were not sure that they would receive any punishment at all, the risk of crime was worth the pay off. He brought up capital punishment near the end to mention that one should decide based on a reason founded in a sense of justice. Again, he did not specify what his concept of justice was.[119]

Crime and Human Nature, written in 1984 by James Q. Wilson and Richard J. Herrnstein, an experimental psychologist, reveals the direction of his thoughts. In a definite shift away from earlier academics, he developed several of the ideas from his early writings. This includes continuing to deny rehabilitation's value as a punishment, as well as clarifying what his concept of justice was. In this book, Wilson did not only discuss the failure of rehabilitation, but he also argued that it was not a valid goal. He claimed that one should blame only the criminal for his misdeeds, not society. People should not believe that individuals are inevitably decent or corrupt, but that every action including crime is the result of a wholly free choice. Thus he urged the courts not to blame crime on outside factors.[120] Here Wilson and Herrnstein put into words what his articles were insinuating before- it is the criminal's fault. Part of the argument is discussed in terms of the value of crime vs. "noncrime,"[121] an argument from his 1975 book. He argues that crime occurred because it paid. A criminal rational enough to decide that crime pays, regardless of why, is making the choice to commit a crime. This places the blame squarely on the criminal.

Another part of Crime and Human Nature attempts to clarify why people use punishment, focusing especially on retribution. He claims that the tide had been shifting back towards retribution as an accepted reason for punishment, and argues that this is

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[119] Harwood, Edwin. "Debunking the Mythology of Crime." *Wall Street Journal*, 7 July 1975, sec. 1.
[120] Wilson and Herrnstein, *Crime and Human Nature*, 528.
[121] Ibid., 422.

valid because the justification for retribution is that it is Just, not that it is effective.[122] The idea that utility should not be a reason for law, first visited in his October 1973 article, is expanded in this book to further discuss retribution. A punishment must seem just to the people in order to be accepted.

In effect, there was a large shift in how academics were thinking, which was part of the framework for the shift towards "law and order." In some circles, the idea of rehabilitation was denied while the individual was held responsible. When a person is blamed instead of society, it seems just to punish him, and the idea of fixing society is ludicrous. Cracking down on the criminal is at least possibly more effective. At the same time, Wilson clarified that retribution was an acceptable justification. In a 1972 textbook, retribution was described as "the oldest theory of punishment... [but] least accepted today from theorists."[123] James Q. Wilson helped to bring that idea back into acceptability.

Wilson's academic ideas can best be seen in action through the policies of the Reagan administration, a 'return to "law and order"' after Carter. Reagan believed that criminal behavior was the result of a chosen lifestyle, a "willful, selfish choice made by some who consider themselves about the law."[124] In terms of drug policy, he supported controlling drug use and availability as opposed to treatment and education programs to reduce drug use, apparent in his proposals to eliminate the program that provided grants to local governments to identify and treat drug- and alcohol- abusing offenders. Throughout Reagan's term Congress passed several measures of legislation concerning

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[122] Ibid., 496-7.
[123] Ibid., 496.
[124] Ronald Reagan, "Remarks at the Annual Conference of the National Sheriff's Association in Hartford, Conn.," *Public Papers of the President* (July 8, 1988), 931, in Marion, *Federal Crime Control*, 145.

drugs, most of which provided new penalties for drug offenders and traffickers.[125] In addition to this, Reagan was the first president to focus on legislation for victims, who he felt deserved more attention from the government. The Senate passed a two-part law in 1984 that required victims to receive financial restitution as well as making it a federal offense to intimidate a crime victim or witness. The bill did not pass the House, but one can see that financial restitution is a way to define retribution.

Point of View

This shift in ideology accompanied by the fear for safety and the perceived "tilt" of the justice system towards the criminal led to a change in the point of view from primarily that of the criminal to that of the victim, or potential victims (i.e. society). What I mean by a "criminal point of view"[126] is that the laws, courts, and entire system in general is seen in terms of what will make a criminal act a certain way, and once he has committed a crime, how to stop him from committing another one. In this sense looking from a "criminal point of view" is looking at the system in a forward direction[127] - at what the criminal *will* do. Most reasons for punishment are from this perspective: deterrence, incapacitation, and moral education. They are all looking ahead to see what the criminal will do and how we can affect that,[128] not necessarily focusing on the crime itself. This is in Motley's narcotics article. For her, the way to help society was by helping the criminal. The system was seen in light of the criminal's point of view, figuring out what will help the criminal in order to help society. She believed that rehabilitation would work, which is what will *help* the criminal even as opposed to what

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[125] Marion, *Federal Crime Control*, 152-3.
[126] The point of view terms are mine, not Wilson's. In the interest of my argument I created these terms to encompass some of the ideas in his book.
[127] Wilson and Herrnstein, *Crime and Human Nature*. 497.
[128] Ibid.

will *stop* him. This is not a requirement of looking forward, but is one interpretation of the criminal's point of view.

What I mean by the victim's point of view is two-fold. The first is essentially opposite of what is discussed in the previous paragraph. This involves looking backwards, looking at the criminal justice system not necessarily in terms of what will affect the criminal in the future, but how we can serve some sense of justice for the victims of crime. Preventing future crimes is definitely still a goal of the justice system, but looking backwards is an integral part in that. This is particularly seen in the argument for retribution. Although James Q. Wilson still primarily concentrated on what causes crime (where the focus is necessarily on the criminal), he also discusses retribution. Retribution is the "eye for an eye" principle;[129] one must look at the crime, the victim and their family, and the devastation left behind in order to qualify what is necessary for retribution. This is looking backwards on the victims, making the punishment equal for them, instead of looking ahead to determine the criminal's future actions, therefore bypassing the victim altogether.

The second aspect of looking at the victim's point of view is to look at how the crime affected the victims and society instead of how society affected the criminal. When faced with crime and fear, people were willing to hit hard on criminals to keep themselves safe. They requested that the court stop concentrating on criminal's rights, because of rising crime rates, and instead emphasize the victims, or the individual citizen as a potential victim. One example of this is found in a letter to Justice Blackmun from Ralph T. Crossthwaite. He pleads, "Why must the criminal get all the breaks with no

[129] Ibid., 498.

consideration for the victim?"[130] This required a change in the point of view from focusing primarily on "how to stop a criminal" to "how to save a victim." The outcome is the same, but the emphasis shifted.

Ultimately, the victim's needs are stressed. One aspect of Nixon's implementation of his "law and order" campaign contributed to the change in outlook. The Law Enforcement Assistance Administration, already in existence when Nixon came to office, assumed the role of planning crime control. To do this, they needed better statistics pertaining to crime, as well as to evaluate the current effectiveness of the criminal court system.[131] Seeking this information unavoidably focused on victims, because the surveys were based on information received from them. They also began to support the idea that more attention and services needed to be focused on crime victims.[132] In examining the LEAA's expansion under Nixon, one can see that federal policies began to work within the point of view of the victim.

The victim's rights movement developed out of this new sense of "law and order" and attention to victims by the national surveys. The movement took this point of view a step further, requesting that the scales be tipped towards the victim instead of the criminal. In the court system, that had for a long time focused only on the court and the criminal, largely bypassing the victim altogether, this was very important to the overall shift.

One can see a shift in how Americans were viewing the criminal justice system. A "law and order" mentality prevailed, academics were blaming the individual rather

[130] Ralph T. Crossthwaite, *Harry A. Blackmun Papers* (Washington, D.C.: Library of Congress), Manuscript Division, Container 135.
[131] Weed, *Certainty of Justice*, 7-9.
[132] Ibid., 9.

than society for crime, and the system began to be viewed in terms of the victims as opposed to the accused. The climate of public opinion was changing; setting the stage for a reaction to *Furman* that had deeper roots in this "law and order" society than previously supposed.

From *Furman* to *Gregg*: More than a Backlash

Activity in reaction to *Furman* extended from the time the decision was announced until *Gregg* was decided four years later. However, the reaction was founded in the "law and order" mentality of the entire period; it was more than just a backlash as it has been described. In fact, as discussed in the introduction, the period between *Furman* and *Gregg* is largely ignored except to briefly note the "reaction," in terms of what legislative actions were taken and what the polls stated. This section will explain how, at a distance, this action does appear to be a backlash, when under the surface there are clear roots connecting it to the shift to "law and order." Not only will this help explain one aspect of the "law and order" ideology in action, but also how the judges came to the *Gregg* decision just four years later.

The "Backlash"

The actions of the state, Congress, the President and the public appeared to be merely a backlash to *Furman*, the decision that seemed to suddenly take away capital punishment. State legislatures took action right away. On June 30, 1972, just one day after *Furman* was decided, legislatures in five states declared their intention to write bills that would bring back capital punishment. By 1976, 35 states plus the federal

government had written the death penalty back in with new statutes.[133] California is an especially interesting case to look at. The state supreme court banished the death penalty because it was inherently "cruel and unusual" before *Furman* was decided, on February 18.[134] Then in November of 1972, the voters of CA passed Proposition 17, a bill to restore the death penalty.[135] Although Proposition 17 was passed after *Furman*, it was a measure passed in response to the California Supreme Court's banning of the death penalty earlier in the year. Then Governor Reagan urged voters to sign petitions to get it on the ballot, stressing it as "a question that must be decided by the people themselves. And I urge them to speak out in a loud, clear voice."[136] Reagan's stress of the people's choice foreshadows criticisms to *Furman* that the decision should have been left with the legislature. In sum, the actions of the states contributed to the total sudden negative response to *Furman* itself.

President Nixon also reacted to *Furman*. He requested information from the FBI about incidents in which convicted killers committed a second murder after being released from prison. His administration expressed plans to implement the death penalty in airplane hijacking cases in January of 1973.[137] Then in March, Nixon proposed his plan, this time including the penalty for those who committed wartime treason, sabotage,

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[133] Banner, *The Death Penalty*, 268.
[134] Earl Caldwell, "California Court, in 6-1 Vote, Bars Death Sentences," *New York Times*, 19 February 1972 sec. A.
[135] Tom Wicker, "Death Again in California," *New York Times*, 12 November 1972, sec. E.
[136] William Endicott, "Reagan Favors Vote on Death Penalty, is Cool to Coastal Plan," *Los Angeles Times*, 1 June 1972, Part II.
[137] Staff Reporter, "Death Penalty Likely to be Sought by Nixon in Skyjacking Cases," *Wall Street Journal*, 5 January 1973, sec. 1.

espionage, and other federal crimes in which death results, such as kidnapping and airplane hijacking.[138]

Although to a lesser degree, this reaction also took place in Congress. In 1974 both the House and the Senate passed acts to restore capital punishment for certain crimes. The Senate voted to reinstate the death penalty for the crimes of treason, espionage and murder, and for airplane hijacking and kidnapping when death resulted.[139] The House in the same day voted to give the death penalty to airplane hijackers that caused death.[140]

Public support for capital punishment was also rising. The Gallup Polls on the death penalty are a useful source to reveal what Americans felt. A thirteen-year decline in favor of the death penalty ended in 1966, which at 42% was the lowest percentage in favor since Gallup began polling in 1936. The next four polls averaged 50.75% in favor of the death penalty. The last of those in March of 1972, just before *Furman*, registered 50% in favor. Gallup took another poll in November of 1972 after the *Furman* decision, and the number in favor of the death penalty jumped to 57%. Since then, the rate has been climbing and reached its peak in 1985 at 75% support.[141] The spike after what had been a fairly steady five years particularly stands out, because it was most likely caused by *Furman*. It should be noted that *The New York Times* ran a rather accurate summary of the Gallup poll results just after they came out in November of 1972, when they did

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[138] Staff Reporter, "Nixon- Plan to Reinstate the Death Penalty Designed to Overcome High Court Qualms," *Wall Street Journal*, 15 March 1973, sec. 1.
[139] Staff Reporter, "Senate Votes to Reinstate Death Penalty in Some Federal Crimes," *Wall Street Journal*. 14 March 1974, sec. 1.
[140] Staff Reporter, "House Votes Death For Plane Hijackers Who Cause Fatalities," *Wall Street Journal*. 14 March 1974, sec. 1.
[141] Bohm, *The Death Penalty in America*, 116-7.

not run a story on the March results.[142] The issue rose in importance in the time between the cases. Public opinion is an important factor because many of the arguments used for and against the death penalty cite public opinion. This spike in public support for the death penalty, as well as the other apparently "backlash" actions, is located in the framework of the shift to "law and order."

The Real Changes

The capital punishment debate in the public arena was influenced by the "law and order" campaign that had been going on since the late sixties. The quick actions that suggested a "backlash" were done in reaction to *Furman*. However, they were rooted in the overall shift towards "law and order". The "politics of fear" that was emerging mimicked the larger occurrences of "law and order" politics. At the same time, justifications for the death penalty that were discussed in public debate relate to the "law and order mentality" that had developed and reflect the Justice's decisions. Finally, a change in point of view from criminal to victim was fundamental to enable a law and order mentality, which can be seen in *Gregg*.

In order to determine what the public's attitudes and motivations were, I do a detailed analysis of articles concerning capital punishment in the *New York Times* and the *Wall Street Journal*. The two papers are both well known and widely read, and have important differences. The *New York Times* seemed to present a more balanced opinion than the *Wall Street Journal*. For example, I found four articles in the *New York Times* written by or about convicts, and zero in the *Wall Street Journal*. Furthermore, the *Wall Street Journal* characterized proponents and opponents of the death penalty as conservative and liberal, respectively, whereas the *New York Times* did not label the

[142] "57% In Poll Back A Death Penalty," *New York Times*, 23 November 1972, sec. A.

opinions in such a way. Looking at these two papers provided a cross-section of the public debate.

"Politics of Fear"

In the years surrounding *Furman* and *Gregg*, the "Politics of Fear" mobilized the capital punishment issue. Politicians capitalized on the issues surrounding capital punishment in order to profit from the "law and order" politics practiced at the time. Many articles and letters dealt with the issue of safety, or being protected from crime. At least one-third of the letters throughout this period discussed or brought up this issue, with less in1972 and more in 1976. One example of this is found in Robert D. Gordon's letter to Justice Douglas the day after the decision. He felt that the decision had "given the signal to the criminal element of our society to commit more mass murders of law enforcement officers throughout this country."[143] But it was not only concern for police officer's safety that existed. Justice Douglas also received a letter from A. G. McCarver, who stated, "This decision has placed the Nation back to a society of the survival of the fittest, and placed the protection of ones family back to the head of the family, instead of the laws of the land as it should be."[144]

This issue of safety also dominated several articles in the Wall Street Journal. In December of 1976 the *Wall Street Journal* ran two editorials by noted historians, Earnest van den Haag and E Donald Shapiro. Each took a side, and then readers were invited to respond. One reader, Martin A. Tyokoski, wrote, "The state has a moral obligation to

[143] Robert D. Gordon, *William O. Douglas Papers* (Washington, D.C.: Library of Congress), Manuscript Division, Container 1541, II, 30 June 1972.
[144] A.J. McCarver, *William O. Douglas Papers* (Washington, D.C.: Library of Congress), Manuscript Division, Container 1541, II, 30 June 1972.

protect its citizens. What about future murder victims? They should be protected."[145] The American people were afraid for their safety and the safety of their families. They saw capital punishment as their only means of protection.

This fear and need for safety did not go unnoticed by the politicians. State Senator Joseph Azzolina, was a strong proponent of restoring capital punishment in New Jersey. It had been declared unconstitutional by the New Jersey Supreme Court in January of 1972, to which Azzolina replied, "The only way killers should come out of prison is in a box."[146] In New York, Governor Rockefeller considered proposing the death penalty for organized drug traffickers, as part of his new "tough" drug policy. The A.F.L.-C.I.O. members to whom he was speaking responded with a "thundering round of applause and shouted encouragement."[147] Governor Reagan, calling for the re-institution of capital punishment in California, stated, "Capital punishment is a deterrent. Society has a right to use it."[148] This type of rhetoric validated the people who felt that capital punishment was necessary for their safety.

At the federal level, President Nixon participated in the response to the public fear. Nixon called for the reinstatement of capital punishment in a radio broadcast on March 11, 1973. Giving a more detailed account to Congress a few days later, he named the crimes that would be considered for capital punishment and the 'aggravating circumstances' that would make the application fall under *Furman's* guidelines.[149] In a scathing criticism of this call to capital punishment, Anthony Lewis noted that Nixon had

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[145] Tyokoski, Martin A. "An Additional Issue," *Wall Street Journal*, 27 December 1976, Letters to the Editor.
[146] "Capital Punishment: Another Round in New Jersey," *New York Times*, 14 May 1972, *The Week in Review*.
[147] Francis X. Clines, "Governor Weighs Wider Drug Step," *New York Times*, 6 March 1973.
[148] "Reagan Calls on California to Reinstate the Death Penalty," *New York Times*, 1 March 1972.
[149] Warren Weaver, Nixon Asks New Sentencing System for Capital Crimes," *New York Times*, 15 March 1973.

"denounced "soft-headed judges" and said that a "permissive philosophy" had caused the crime wave."[150] Nixon reacted to the public's fear of crime by using tough language and proposing even tougher measures- capital punishment. Lewis goes further to denounce Nixon for being "less interested in specifics than mood," in essence substituting vengeance for justice.[151] Accusing Nixon of using the "mood" to crack down on crime is an illustration of how politicians played on American fears concerning the death penalty.

The sensationalism in the media about capital punishment added to this fear. One example of this is the NBC program "Thou Shalt Not Kill," which aired on July 28, 1972. Enclosed in a letter to Justice Blackmun attempting to convince him to reinstate the death penalty was an article by John Archibald that was in the St. Louis Post-Dispatch, the article is a commentary on the NBC Special.[152] Both the article and the television show itself demonstrate the media's influence in the public perception of the death penalty. The program was an interview with two Utah serial killers in custody, and the article focuses on the lack of remorse shown.

Archibald begins his article with "Just when you become convinced that the Supreme Court ruling against the death penalty was correct, something happens that makes you wonder if maybe there shouldn't be a few exceptions."[153] This opening illustrates the emotional effect that the media has on the public and its effect in shaping their concerns regarding the death penalty. Watching two murderers recount their tale with "complete lack of remorse" must have been a very emotional experience. Archibald

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[150] Anthony Lewis, "Crime and Punishment," *New York Times*, 2 April 1973.
[151] Ibid.
[152] R.J. Ryan, *Harry A. Blackmun Papers* (Washington, D.C.: Library of Congress), Manuscript Division, Container 135, 8 August, 1972.
[153] John Archibald, "Candid TV Report By Two Utah Killers," *Harry A. Blackmun Papers* (Washington, D.C.: Library of Congress), Manuscript Division, Container 135, 31 July 1972.

adds to the dramatic effect of the T.V. show by making the majority of his article excerpts from the interview. He included the convict's shocking comments, which show a complete lack of respect for human life, and concludes with a psychologist's opinion that the two men are absolutely sane by today's standards.[154] But the stark portrayal of two criminals who seem unable to rehabilitate and are perfectly sane sends a very strong message, especially if there is no program balancing this view. This type of message evokes emotions, leaving plenty of room for fear, followed by questions. Do we want men like this alive? If they don't care about death for others, would they care at least not to get the death penalty for themselves? In that case would it be a deterrent? Should we just kill them so that my family will be safe? These are the types of questions that are raised among the American public with an open program such as this.

Two letters to Justice Blackmun mentioned the program and responded to it. R. J. Ryan sent the article in order to further convince Justice Blackmun that capital punishment was necessary as a deterrent. For him, capital punishment had nothing to do with "revenge,"[155] but everything to do with safety. The other letter with a reference to the program was from Mrs. Jacqueline Bump, Chairman of the Fulton County Right to Life Committee in New York. She described herself as watching "in horror" as the program introduced two murderers and their "total disrespect for human life."[156] Ultimately, she uses the shock of the program to show the perceived irony of allowing these types of criminals to live, while allowing a completely innocent individual to be

[154] Ibid.
[155] Ibid.
[156] Jacqueline Bump, *Harry A. Blackmun Papers* (Washington, D.C.: Library of Congress), Manuscript Division, Container 135, 7 August 1972.

aborted.[157] The program shocked her, but she used it to affect others. One can see that the sensationalism of the media had an affect on Americans, often galvanizing them to action. At the same time one can see how the capital punishment issue became even more charged due to its proximity to issues such as abortion.

However, the fear Americans felt after the Supreme Court outlawed capital punishment lies not only with the immediate sensationalism or reaction to *Furman*, but also with the changing social and political dynamics of their time. Americans did not feel safe in the 1970s. Fear was rising in general, and this carried into the capital punishment debate.

Justifications

The four years between *Furman* and *Gregg* were characterized by a large amount of debate over what could or could not justify capital punishment. Although the discussions were much deeper in the Justice's opinions, the public was also participating in a parallel debate. Arguments about deterrence and incapacitation of criminals were seen throughout the four years, but the debate around retribution was seen more and more as the years wore on.

The most common goals for the death penalty throughout the *New York Times* and the *Wall Street Journal* were deterrence and incapacitation. The deterrence arguments went back and forth, with both proponents and abolitionists claiming their interpretation of the goal was correct. For example, while writing about the issue of deterrence, Anthony Lewis criticized Nixon's capital punishment policy. To discredit Nixon's claim that the penalty was "a valuable deterrent," he argued that the effect was nothing more

[157] Ibid.

than doubtful.[158] On March 19, a letter to the *New York Times* from Donald A. Windsor accused "the opposition" of claiming that the death penalty was not a deterrent without providing proof.[159] Both parties were complaining of the lack of evidence but ending up with two different conclusions.

The same back and forth disagreement was published in the *Wall Street Journal.* These examples are from a special section on December 27, 1976 where the readers could debate the death penalty. One of the readers argued that although studies have been inconclusive, the book Helter Skelter suggested that a death penalty law could have deterred the Sharon Tate murders.[160] Another reader wrote that "of all the possible justifications for capital punishment, deterrence is the worst," as "the least defensible on moral grounds."[161] There was also a reader who wrote to say that incapacitation was an obvious positive effect of capital punishment- "it seems safe to assume that the executed will be deterred."[162] These opposing arguments are examples of the justifications people were making about goals of the death penalty.

In terms of a connection to law and order mentality, the arguments for deterrence and incapacitation meant to protect society: the point is to cause people not to commit crimes. In a time of heightened fear of crime in general and capital punishment in particular, the debate will center on deterrence. Also, the way the Justices wrote about it fits exactly into this debate. The Justices admitted to not having conclusive evidence on deterrence. Justice Marshall and Brennan used this to declare capital punishment

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[158] Anthony Lewis, "Crime and Punishment," *New York Times*, 2 April 1973.
[159] Donald A. Windsor, "Reinstating the Death Penalty," *New York Times*, 19 March 1973, Letters to the Editor.
[160] Anthony Damath, "A Very Real Problem," *Wall Street Journal*, 27 December 1976, Letters to the Editor.
[161] Ron Fenton, "Abandon It," *Wall Street Journal*, 27 December 1976, Letters to the Editor.
[162] Raymond A. Patterson, "Deterrence," *Wall Street Journal*, 27 December 1976, Letters to the Editor.

inherently "cruel and unusual," while the other Justices spoke of the problem being the application rather than the goal itself. However, the intricacies and disagreements parallel those of the public.

What evolved over the four years between *Furman* and *Gregg* and gained center stage during and after *Gregg* was the increasing debate concerning retribution. In the letters to the Justices, written immediately after *Furman*, safety and constitutionality were the issues that dominated. Retribution was not yet an idea that proliferated. Victim's rights issues were mentioned in the letters, but it hadn't evolved to being in terms of retribution yet. Then beginning 1974 and continuing to 1976, a debate on retribution emerged. Most of the occurred near *Gregg*, or were prompted by it. This may be an example of the Supreme Court decision affecting the public, as opposed to the other way around. Some arguments existed for retribution before *Gregg*. For example, Nettie Leef wrote an editorial in which she qualified revenge as a goal due to her belief in human life.[163] A discussion emerged and there were two letters to the editor who disagreed with her and one that thanked the paper for printing her "irrefutable argument."[164]

Although this debate may have surfaced due to the Justices' use of the argument, it is important to understand *Furman* and *Gregg* because it was accepted in the public consciousness and was circulated as a debate. It seems that the Justices and intellectuals only were coming up with ideas about retribution, but the legislative actions have a lot to say.

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[163] Nettie Leef, "Respect for Life and Capital Punishment, Too," *New York Times*, 30 July 1975.
[164] D. Buonocore, "To Kill A Killer," *New York Times*, 12 August 1975, Letter to the Editor.

Point of View

The final aspect of "law and order" ideology is the change in point of view regarding the justice system. In terms of capital punishment, this was also a shift from looking at the criminal's point of view to the victims', or potential victims (society). These changes can be explained in terms of the developing "law and order ideology," and help to illuminate the changes in *Furman* and *Gregg*. In terms of capital punishment, the switch from criminal to victim can be seen in the *New York Times* by how many articles written before *Furman* and in the months immediately following address the criminal's perspective, and how few take up the point of view of the victim. Beginning in 1973 and continuing through to the *Gregg* decision, there are more articles from the victim's point of view. In early articles there are many examples of these key aspects.

More of the earlier articles show the key aspects of the criminal point of view. One example of this is a letter to the editor on October 1, 1971. Willard J. Lassers wrote in response to an Op-Ed article from the previous month that had supported the death penalty as a deterrent and as preventing recidivism. Lasser's response was that "Most murderers, despite movie and TV scripts to the contrary, are not premeditated… rather they are volcanoes of emotion, not directed by reason, and hence not restrained by fear of penalty, even death, or other rational considerations."[165] Lassers is looking forward to see what will make the criminal stop committing crimes, a key aspect in the criminal point of view. He does not find that capital punishment will affect what the criminal will do. In fact, he sums up by saying, "The death penalty is folly; it appeals to reason where there is no reason; it cheapens and demeans us all." Since it will not influence the criminal's behavior, he sees no reason to enact it.

[165] Willard J. Lassers, "Folly of Death Penalty," *New York Times*, 1 October 1971, Letters to the Editor.

Throughout the time leading up to *Gregg*, there are more articles written from the victim's point of view. This can be seen very well in a letter written to Justice Blackmun by Lyman J. Rocky, B.S.S., in Missouri. He questioned whether the victim's rights had been considered, and further asked the Justice, "Why is so much taxpayer money spent on "criminal's rights"?[166] Looking backwards towards the victims, he wanted them to be considered in the debate.

Another example of the victim's point of view is in a letter to the editor appearing in *The New York Times* on August 1, 1976. Sarah Herbert disagreed with a previous editorial that had claimed the public to "abhor" legal execution. She stated alternatively that the public:

> "not only abhors, but can no longer tolerate the killing of innocent citizens by sadistic murderers who are eventually paroled and permitted to strike again... Mr. Wicker's humane view, though admirable, can only be regarded as impractical in our present society." –Sarah Herbert, Brooklyn July 26, 1976[167]

This introduced the second aspect of looking from the victim's point of view. When she argued that to abolish the death penalty would be "impractical," coupled with the "innocent" descriptor applied to the victim and "sadistic" to the criminal, the focus became "how to save a victim," instead of "how to stop a criminal." She made it much easier to say that capital punishment is necessary, because whatever it takes must be done to save the victim. In addition to being part of the victim point of view, this language allowed people to dehumanize the criminal. They were able to forget that the person receiving the death penalty is a person too, although not innocent.

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[166] Lymun J. Rocky, B.S.S. *Harry A. Blackmun Papers* (Washington, D.C.: Library of Congress), Manuscript Division, Container 135.
[167] Sarah Herbert, "Letters to the Editor," *New York Times*. 1 August 1976, The Week in Review.

Another theme that comes about from the switch to the victim is that criminals are not seen as part of the community. When the Court gave rights to criminals in the form of penal reform it was treating the criminal as part of the community. He deserved rights in the justice system; it was made for him as well as the rest of society, because they are all in the community. The idea of rehabilitation necessitates a belief that the criminal will at least one day be able to rejoin the community. Capital punishment presupposes this to be impossible. The changing point of view allowed this because it is very easy to start thinking in terms of "us" versus "them." Capital punishment is acceptable when attempts at reform have stopped and the criminal is not longer seen as part of the society.

Looking at capital punishment from the victim's point of view rather than the criminal point of view is one specific aspect of what was happening in terms of changes in the 1970s. This modification in point of view was an integral part of the ideology of law and order, and an central part in allowing that ideology to exit. Similarly in the debates over capital punishment, changing one's point of view allowed one to focus on "how to save a victim." If capital punishment was necessary to save the victim, and the idea of "how to stop a criminal" was gone, then such a "tough" approach would be acceptable.

Conclusion

American society went through fundamental changes in the 1960's and 1970's that contributed to an important shift in ideology. This shift to "law and order" occurred due to a fear of rising crime rates, an intellectual movement that blamed the individual rather than the society for crime, and an accompanying shift in point of view that focused

more often on the victim. The four-year period between *Furman* and *Georgia* provides a window from which to examine these changes and also to see how they affected public debate on capital punishment as well as the Justice's decisions in these two important cases.

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