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## “THERE WILL NEVER BE ANOTHER EXECUTION IN THIS COUNTRY”<sup>1</sup>: THE ANTI-DEATH PENALTY ARGUMENTS IN *FURMAN V. GEORGIA*

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### ABSTRACT

In 1972 the United States Supreme Court issued a decision in the case of *Furman v. Georgia* that effectively imposed a moratorium on capital punishment. Chief Justice Warren A. Burger predicted that after *Furman*, “there will never be another execution in this country”. The prediction proved erroneous. The paper analyzes the anti-death penalty arguments of the five Justices who voted in *Furman* to overturn capital punishment laws and explains why Burger’s prognosis did not come true.

**SŁOWA KLUCZOWE:** kara śmierci, 8 nowelizacja, Sąd Najwyższy, oryginalizm, interpretacja konstytucyjna

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Discussing the role of the United States’ Supreme Court, Henry J. Abraham, one of the leading American constitutional scholars, firmly concludes that “there is no gainsaying the importance and the majesty of this most powerful of courts, not only in the United States, but in the entire free world [...] The public does, in the final analysis, look to the Court to be its guide, no matter how major or minor the constitutional or statutory issue involved”<sup>2</sup>. A similar sentiment has been lately expressed by Edward

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- <sup>1</sup> These words were spoken privately by the Chief Justice Warren E. Burger – who believed that the death penalty is constitutional – in the aftermath of the landmark case *Furman v. Georgia*, quoted in B. Woodward, S. Armstrong, *The Brethren: Inside the Supreme Court*, New York 1979, p. 219. Obviously the prediction did not come true.
  - <sup>2</sup> H.J. Abraham, *The Judiciary: The Supreme Court in the Governmental Process*, Boston 1977, pp. 21–22.

Lazarus; “It is at most a small exaggeration to say that legal rules and litigation have become Americans’ civil religion and that if we share one sacred text, it is our Constitution. Whether the issue is abortion, race discrimination, sexual harassment, the environment, criminal justice, religious liberty, freedom of speech, or almost any other aspect of how we live and even how we die, Americans have come almost routinely to expect the courts, especially the Supreme Court, to take sides on every issue of national urgency and help resolve our most vexing social problems”<sup>3</sup>. That is not to say that the Court’s decisions are not quite often socially, politically or even legally controversial and are accepted without question by scholars or the general public. The debate regarding the proper role of the judiciary in the American constitutional system, the correct mode of legal interpretation, or the Supreme Court’s reading of specific constitutional provisions is, to borrow a famous phrase from one of the Court’s landmark decision on freedom of speech, “uninhibited, robust, and wide-open” and certainly happens to include “vehement, caustic, and sometimes unpleasantly sharp attacks”<sup>4</sup>. However, apart from a relatively small, though vocal, number of supporters of radical version of originalism (usually of conservative political persuasion)<sup>5</sup>, the systemic position of the Supreme Court as the final arbiter and interpreter of the Constitution remains unquestioned. In other words, while the specific pronouncements often raise considerable furor, hardly anybody finds it problematic that the Court takes a definite and definitive stand on fundamental moral-and-political issues of the day. Nowhere is all of the above more true than with respect to the “recurring dilemma”<sup>6</sup> of capital punishment. This article is devoted to the analysis of one of the major Supreme Court decisions in that realm, *Furman v. Georgia*<sup>7</sup>, which for all practical purposes imposed a moratorium on the death penalty in the United States.

Before we discuss the case in point, we need to make two introductory remarks. First, the constitutional background of the problem of capital

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3 E. Lazarus, *Closed Chambers: the Rise, Fall and Future of the Modern Supreme Court*, New York 1999, p. 5.

4 *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

5 See in particular R. Bork, *Slouching towards Gomorrah: modern liberalism and the American decline*, New York 1996; *idem*, *Slouching towards Gomorrah: modern liberalism and the American decline*, New York 1996.

6 P. Bartula, *Kara śmierci. Powracający dylemat*, Kraków 2007.

7 *Furman v. Georgia*, 408 U.S. 238 (1972).

punishment must be presented. The relevant clause, included in the Eighth Amendment, prohibits the infliction of “cruel and unusual punishments”<sup>8</sup>. The phrase was taken from the English Bill of Rights (1689) and, right after its framing, arguably possessed “familiar content”<sup>9</sup>. Looking at the plain text, however, the precise meaning of the clause is difficult to pinpoint. All reasonable observers surely have to agree that the Amendment prohibits “barbaric forms of execution and torture”<sup>10</sup>. For instance, ancient practices like “drawing and quartering, burning alive, and crucifixion” certainly seem to fall under the proviso’s mantle<sup>11</sup>. On the other hand, there are convincing arguments that the Amendment does not – from a strictly textual point of view – necessarily encompass ear-clipping, whipping, branding, pillory, stocks and the dunking-stool<sup>12</sup>. If some sort of consensus cannot be reached on the question of ear-clipping, we must realize that the construction of the clause is troublesome... This example – hopefully strictly academic one, since the return of such practices is not very likely, at least in the predictable future – barely scratches the surface of interpretive problems. Another controversial issue is whether the word “cruel” only denotes certain types of punishments because of their intrinsic features (like causing excessive and gratuitous pain, being unnecessary humiliating, causing ignominy, violating human dignity, etc.) or whether the term also relates to the issue of proportionality of the punishment to the crime (is sentencing a first-time offender for marijuana possession without intent to distribute for ten years of prison “cruel”)? Other questions abound. Does the Amendment impose any requirements, and, if so, to what extent, regarding the conditions of convict’s incarceration? Are the personal traits of a criminal

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8 It should be added, that by virtue of the 14<sup>th</sup> Amendment the prohibition applies both to the federal government and to state and local authorities. Other possibly relevant clauses can be found in Fifth and Fourteenth Amendments’ commandments giving every person “due process” guarantees and the promise of “equal protection of laws”. These provisions touch (or may touch) upon the issue of death penalty as far as procedural aspects of its infliction are concerned.

9 R. Berger, *Cruel and Unusual Punishments Clause*, in *The Bill of Rights: Original Meaning and Current Understanding*, E.W. Hickok, Jr. (ed.), Charlottesville 1993, p. 303.

10 J.B. Grossman, R.S. Wells, *Constitutional Law and Judicial Policy Making*, New York 1998, p. 531.

11 R.A. Rossum, G.A. Tarr, *American Constitutional Law: Cases and Interpretation*, New York 1991, p. 470.

12 R. Berger, *op. cit.*, p. 304.

pertinent and should different standards be introduced with respect to, say, minors or the mentally incompetent in comparison with adults or offenders who do not suffer from a mental handicap? Do aggravating and extenuating circumstances of the same crime and, if so, to what degree, need to be taken into account during sentencing phase of a trial in order to render a punishment “not cruel”? The second adjective used in the clause is even more difficult to fathom from a purely textual perspective. Does “unusual” refer only to exotic, strange or peculiar punishments or does it encompass a situation when a sentence in question is infrequently, irrationally or arbitrarily imposed<sup>13</sup>? Moreover, what is the relationship between the two adjectives? The answers to these questions have to be found – in the practical operation of the American legal system – by the courts (and the Supreme Court in particular).

Second, and even more important, the problem with the constitutionality of death penalty is connected with two conflicting theories of legal interpretation that – within the realm of “cruel and unusual” prohibition – remain diametrically opposite and are simply impossible to reconcile. Assuming that the plain text of the Amendment is not sufficiently clear to render any in-depth analysis unnecessary, what standards should be used in providing interpretive clues? The first answer is given by “originalists” who contend that the meaning of the Amendment is fixed in time. Currently, the most prominent advocate of this interpretive paradigm is U.S. Supreme Court Justice Antonin Scalia. According to his concise explanation of this approach, “the originalist [...] knows what he is looking for: the original meaning of the text”, by which he understands “how the text of the Constitution was originally” comprehended. It logically follows that the Constitution, and any legal text for that matter, does not change its meaning over time. To assume the contrary is to impose unjustified restrictions upon democratic (or majoritarian) government, to make the legal system inflexible and incapable of responding to new political, social, ethical or economic challenges unforeseen by the Framers and to accept unprincipled (i.e. arbitrary) adjudication<sup>14</sup>. There are of course many variants of originalism. Some representatives of this judicial philosophy search for an original meaning in the writings of the Constitution’s Framers; oth-

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<sup>13</sup> J.B. Grossman, R.S. Wells, *op. cit.*, p. 531.

<sup>14</sup> A. Scalia, *A Matter of Interpretation: Federal Courts and the Law. An Essay*, Princeton 1997, p. 42, 45.

ers look to popular understanding of constitutional clauses at the turn of the 18<sup>th</sup> century; others consider the previously mentioned two methods as a starting point and attempt to distill from results of such exegesis certain general principles that may be applied to new phenomena, unknown at the time of the Constitution's establishment<sup>15</sup>. It is, however, important to realize that from our perspective these significant internal differences inside originalist camp are immaterial; doubtlessly, when the 8<sup>th</sup> Amendment was introduced, it was thought neither by the Framers nor by the general populace to forbid the death penalty, and therefore it does not prohibit its imposition today. The opposing conception of constitutional construction is often called "purposivism". The theory is – at its very foundations – based on the premise that was well expressed by Justice Oliver Wendell Holmes, who contended in one of his decisions that "when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters". Holmes also added that "the case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that amendment has reserved"<sup>16</sup>. The merits of this case are obviously unimportant here. What is crucial is Holmes' insistence upon investigating the "invisible radiation" of constitutional clauses, using "whole experience" as a benchmark for constitutional jurisprudence and not confining constitutional interpretation to "what was said years ago" or to a purely textual analysis. It is the very essence of purposivism. One of the most vocal proponents of this interpretive mode is another current U.S. Supreme Court Justice, Stephen Breyer. He argues (quoting a number of judicial decisions and doctrinal works) that this approach "sees texts as driven by purposes. The judge should try to find and 'honestly say what was the underlying purpose expressed' in a statute. The judge should read constitutional language 'as the revelation of the great purposes which were

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15 See more in: A.B. Coan, *Talking originalism*, Brigham Young University Law Review 2009, September 24.

16 *State of Missouri vs. Holland*, 252 U.S. 416, 433–434 (1920).

intended to be achieved by the Constitution' itself, a 'framework for' and a 'continuing instrument of government'. The judge should recognize that the Constitution will apply to 'new subject matter... with which the framers were not familiar'. The judge, whether applying statute or Constitution, should 'reconstruct the past solution imaginatively in its setting and project the purposes which inspired it upon the concrete occasions which arise for their decision'. Since law is connected to life, judges, in applying a text in light of its purpose, should look to *consequences*, including 'contemporary conditions, social, industrial, and political, of the community to be affected'. And since 'the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded'<sup>17</sup>. Applying the above-mentioned philosophy of legal construction to the exegesis of "cruel and unusual" phrase, we are supposed to conclude that the Eighth Amendment's meaning is not set in stone. The clause does not only prohibit penalties understood to be "cruel and unusual" at the time of its adoption but also gives future generations the right to concretize or reassess its meaning in light of forever-changing circumstances, evolving sensibilities and new developments. This sentiment found its best expression in the words of the Chief Justice (1953–1969) Earl Warren, who declared that "the words of the [Eighth – E.M.] Amendment are not precise and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society"<sup>18</sup>. The conflict between originalists and purposivists provides the crucial background for the death penalty debate in the United States, at least as far as the legal and constitutional dimension of capital punishment is concerned.

Before 1972, the Supreme Court had confronted the issue of the death penalty, either directly or indirectly, in several of its decisions<sup>19</sup>. Its institutional (there were significant differences between individual Justices) constitutional assessment of the relevant question appeared to be based upon

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17 S. Breyer, *Active Liberty: Interpreting Our Democratic Constitution. The Tanner Lectures on Human Values*, [http://tannerlectures.utah.edu/\\_documents/a-to-z/b/Breyer\\_2006.pdf](http://tannerlectures.utah.edu/_documents/a-to-z/b/Breyer_2006.pdf), p. 10–11, accessed: 10.12.2012.

18 *Trop v. Dulles*, 356 U.S. 86, 100–101 (1958).

19 See *Wilkerson v. Utah*, 99 U.S. 130 (1879); *In Re Kemmler*, 136 U.S. 436 (1890); *Rooney v. North Dakota*, 196 U.S. 319 (1905); *Weems v. United States*, 217 U.S. 349 (1910); *Powell v. Alabama*, 287 U.S. 45 (1932); *Francis v. Resweber*, 329 U.S. 459 (1947); *Trop v. Dulles*...; *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *McGautha v. California*, 402 U. S. 183 (1971).

a number of foundational principles: the very meaning of the “cruel and unusual” proviso cannot be determined exclusively and purely by using 18<sup>th</sup> century standards; capital punishment in itself does not violate the mentioned constitutional prohibition, though certain modes of execution (“burning at the stake, crucifixion, breaking on the wheel, or the like”) undoubtedly fall within the scope of forbidden penalties; states possess a lot of leeway in determining procedural aspects of capital cases (for instance, there are no legal obligations to separate “guilt” and “punishment” stages of criminal trials and no obligations to introduce precise, concrete and specific criteria limiting juries’ “untrammelled discretion” in deciding whether the death penalty is appropriate in a particular case). It may also be safely assumed that the Court would have invalidated any legislation (or judicial decision) if it had imposed or foreseen the sentence of death for a relatively minor crime (as was later confirmed in *Coker v. Georgia*<sup>20</sup>). In the case of *Furman v. Georgia* all of these assumptions came under careful judicial scrutiny, some of them holding up, others crumbling. What is especially significant in the light of future restoration of death penalty<sup>21</sup>, the Court was very fragmented and could not agree on one rationale for its decision. Apart from the fact that the decision was supported by the slimmest possible majority (5–4), the five concurring Justices disagreed about reasons for setting three death penalty convictions aside. It is also necessary to remember that officially – in accordance with the general operating principles of the American constitutional adjudication – *Furman v. Georgia* referred exclusively to the three cases (consolidated as one) at hand. The Supreme Court simply declared that “the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings”. Therefore, the *Furman* decision did not delegalize capital punishment *in corpore*, even though a number of concurring opinions expressly stated that any capital punishment law should be viewed as unconstitutional. Let us now turn our attention to the individual opinions of the Justices.

Out of five concurring opinions, the most eloquent and unequivocal one seems to be the position taken by Justice William Brennan. Although

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20 *Coker v. Georgia*, 433 U.S. 584 (1977).

21 *Gregg v. Georgia*, 428 U.S. 153 (1976).

he searched for the original meaning of the 8<sup>th</sup> Amendment, he categorically rejected a historically static interpretation of the clause; such an analysis was of subsidiary character at best. Quoting debates in the First Congress and *Weems v. United States*, Brennan said that “the “import” of the Clause is, indeed, “indefinite,” and for good reason. A constitutional provision “is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth”<sup>22</sup>. The static interpretation unjustifiably provides only “narrow and unwarranted view of the Clause”. The Amendment must not be “read out of the Constitution” by confining the meaning of the relevant phrase to punishments “inflicted by the Stuarts”. If we adopt a dynamic view of constitutional construction, we have to come up with criteria and standards that would enable us to give a more or less concretized meaning of the “cruel and unusual” phrase. According to Justice Brennan, the general test is quite simple: “the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is “cruel and unusual,” therefore, if it does not comport with human dignity”<sup>23</sup>. What the Justice did next was enumerate four basic principles permitting the Court to – with a degree of objectivity – assess the impact of capital punishment on human dignity. The first guideline states that “a punishment must not be so severe as to be degrading to the dignity of human beings”. While the infliction of serious physical suffering is one of the determining factors in this area, “there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation [...] there may be involved no physical mistreatment, no primitive torture [...] severe mental pain may be inherent in the infliction of a particular punishment”<sup>24</sup>. Therefore, while such barbaric penalties as “the rack, the thumbscrew, the iron boot, the stretching of limbs and the like” for sure involve infliction of physical pain, this fact is not the only reason

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<sup>22</sup> *Furman v. Georgia*, 263–264.

<sup>23</sup> *Ibidem*, 270.

<sup>24</sup> *Ibidem*, 271.

for their moral and historical condemnation. In the Justice's view, "the true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity"<sup>25</sup>. In other words, these penalties (and others like expatriation, fake execution or punishing someone for having a cold) do not recognize the criminal as a fellow human being. The second principle enabling us to evaluate whether a given punishment is in agreement with the requirement of respecting human dignity has to do with political-and-legal practice. It says "that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others"<sup>26</sup>. The third test concerns the issue of acceptability of certain punishment in light of contemporary societal standards. While evaluating this point, the interpreter should take into account such factors as the existence of the punishment in other jurisdictions, the history of the punishment's usage and the present practices regarding its infliction. The fourth and final principle involved states that the penalty in question "must not be excessive. A punishment is excessive under this principle if it is unnecessary: the infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering [...] Although the determination that a severe punishment is excessive may be grounded in a judgment that it is disproportionate to the crime [...] the more significant basis is that the punishment serves no penal purpose more effectively than a less severe punishment"<sup>27</sup>. In conclusion, Brennan declares that these principles must not be viewed separately but cumulatively. The reason for such exegetic approach is that the four earlier mentioned standards remain "interrelated, and in most

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<sup>25</sup> *Ibidem*, 272–273.

<sup>26</sup> *Ibidem*, 274. It is worth noting that the arbitrariness factor – so crucial for the reasoning of Justices Douglas, White and Stewart and of many opponents of capital punishment (see S. Nathanson, *Does it Matter if the Death Penalty is Arbitrarily Administered?*, in *Punishment and the Death Penalty: the Current Debate*, R.M. Baird and S.E. Rosenbaum (eds.). Amherst 1995, p. 161–162) – played only a relatively minor and subsidiary role in Brennan's thinking.

<sup>27</sup> *Furman v. Georgia*, 279–280.

cases it will be their convergence that will justify the conclusion that a punishment is “cruel and unusual.” The test, then, will ordinarily be a cumulative one: if a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command [...] that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes”<sup>28</sup>.

The application of this cumulative test to the death penalty was the next step in Brennan’s analysis. In his opinion, capital punishment is unique in its severity. It involves infliction of pain, be it physical suffering or mental anguish resulting from inevitable waiting period. It is also unusually severe due to “its finality and enormity”. Capital punishment – which Brennan defines as “the calculated killing of a human being by the State” – deprives the criminal of his “right to have rights”, excludes him from membership in a “human family” and denies him his humanity. It is also irrevocable, which is especially daunting when we take into account the unavoidable fallibility of human beings. The arbitrariness argument against the death penalty is also justified. Brennan observes that “when a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied [...] thousands of murders and rapes are committed annually in States where death is an authorized punishment for those crimes. However the rate of infliction is characterized – as “freakishly” or “spectacularly” rare, or simply as rare – it would take the purest sophistry to deny that death is inflicted in only a minute fraction of these cases [...] it smacks of little more than a lottery system”<sup>29</sup>. While the government may claim that such statistics prove that the capital punishment is inflicted in an informed and properly selective way, “it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment. No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison. Crimes and criminals simply do not admit of a distinction that can be drawn so finely as to explain, on that ground, the execution of such

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<sup>28</sup> *Ibidem*, 282.

<sup>29</sup> *Ibidem*, 293.

a tiny sample of those eligible”<sup>30</sup>. Brennan is also convinced that the death penalty has been “almost totally rejected by contemporary society”. The Justice insists that the appropriateness of sentencing people to death has been the subject of intense moral conflict and axiological debate in the United States. Because of this discussion, the practice of capital punishment’s imposition has significantly evolved. The changes Brennan refers to concern: socially approved modes of execution (from firing squads and gallows to lethal gas), the rejection of public executions as “debasement and brutalizing”, a radical decrease of crimes threatened with the death penalty (to first degree murder and rape) and the fact that nine states adopted the abolitionist position. These factors led Brennan to conclude that “history of this punishment is one of successive restriction. What was once a common punishment has become, in the context of a continuing moral debate, increasingly rare”<sup>31</sup> – which in turn proves that the death penalty has become problematic and troublesome for the American national conscience. While it is certainly true that “many legislatures authorize death as the punishment for certain crimes and that substantial segments of the public, as reflected in opinion polls and referendum votes, continue to support it”, this availability of capital punishment combined with the rareness of its imposition “simply underscores the extent to which our society has in fact rejected this punishment. When an unusually severe punishment is authorized for wide-scale application but not, because of society’s refusal, inflicted save in a few instances, the inference is compelling that there is a deep-seated reluctance to inflict it. Indeed, the likelihood is great that the punishment is tolerated only because of its disuse. The objective indicator of society’s view of an unusually severe punishment is what society does with it, and today society will inflict death upon only a small sample of the eligible criminals. Rejection could hardly be more complete without becoming absolute”<sup>32</sup>. Last but not least, the Justice says that the continued existence of the death penalty is not necessary in order to achieve some legitimate and recognized purpose of criminal punishment. In other words, Brennan is in favor of evaluating this question from a comparative perspective, measuring the effects of the death penalty against those of incarceration (including life imprisonment). Looking at the issue from this vantage

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30 *Ibidem*, 294.

31 *Ibidem*, 299.

32 *Ibidem*, 299–300.

point, capital punishment is not justified by argument from deterrence because the purpose of neither general nor individual prevention (recognized functions of any criminal punishment) requires it. In Justice Brennan's opinion, to maintain that there is a "rational person who will commit a capital crime knowing that the punishment is long-term imprisonment, which may well be for the rest of his life, but will not commit the crime knowing that the punishment is death"<sup>33</sup> is to accept the implausible. Furthermore, even if we were inclined to agree with this assumption in purely theoretical and abstract terms, in reality the deterrence factor is not currently achieved in the United States because "its validity depends upon the existence of a system in which the punishment of death is invariably and swiftly imposed. Our system, of course, satisfies neither condition. A rational person contemplating a murder or rape is confronted, not with the certainty of a speedy death, but with the slightest possibility that he will be executed in the distant future. The risk of death is remote and improbable; in contrast, the risk of long-term imprisonment is near and great. In short, whatever the speculative validity of the assumption that the threat of death is a superior deterrent, there is no reason to believe that as currently administered the punishment of death is necessary to deter the commission of capital crimes"<sup>34</sup>. As far as individual prevention is concerned, Brennan observes that "if a criminal convicted of a capital crime poses a danger to society, effective administration of the State's pardon and parole laws can delay or deny his release from prison, and techniques of isolation can eliminate or minimize the danger while he remains confined"<sup>35</sup>. The death penalty also does not – at least not better than incarceration – serve another aim of criminal convictions, which is to "manifest the community's outrage at the commission of the crime. It is, they say, a concrete public expression of moral indignation that inculcates respect for the law and helps assure a more peaceful community. Moreover, we are told, not only does the punishment of death exert this widespread moralizing influence upon community values, it also satisfies the popular demand for grievous condemnation of abhorrent crimes and thus prevents disorder, lynching, and attempts by private citizens to take the law into their own hands"<sup>36</sup>. The

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<sup>33</sup> *Ibidem*, 301.

<sup>34</sup> *Ibidem*, 302.

<sup>35</sup> *Ibidem*, 300–301.

<sup>36</sup> *Ibidem*, 303.

infliction of imprisonment instead of the death penalty does not encourage private blood feuds and disorders, sufficiently denounces the immorality of capital crimes and efficiently reinforces basic communal values. Conversely, according to Brennan, “the deliberate extinguishment of human life” attendant to the capital punishment may “lower our respect for life and brutalize our values”. Finally, while criminal punishment certainly and properly has a retributive purpose, there is no sufficient evidence to claim that “for capital crimes death alone comports with society’s notion of proper punishment”. The extreme rareness of the death penalty’s imposition also undermines such a contention; “when the overwhelming number of criminals who commit capital crimes go to prison, it cannot be concluded that death serves the purpose of retribution more effectively than imprisonment. The asserted public belief that murderers and rapists deserve to die is flatly inconsistent with the execution of a random [...] few. 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”<sup>37</sup>. In conclusion we may say that Brennan argued that, at least under current circumstances<sup>38</sup>, any law allowing for imposition of capital punishment was unconstitutional and should be dealt accordingly by the judicial branch.

It is worth noting that Brennan’s position was rooted mostly in deontological morality. Even the purportedly purposivist approach present in the last part of his opinion was a reflection of his staunch axiological convictions and, as such, remained clearly of secondary importance. The opinion second most forceful in its anti-death penalty tenor, written by Justice Thurgood Marshall, was based primarily on utilitarian grounds, i.e. in disbelief that capital punishment served any useful – and constitutional – purpose<sup>39</sup>. The Justice started with a comprehensive overview of the history of death penalty in England and America, of the abolitionist movement in the United States and of the Supreme Court’s up-to-date construction of the 8<sup>th</sup> Amendment pertaining to the capital punishment. He also agreed with “evolving standards of decency” test and express-

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<sup>37</sup> *Ibidem*, 304–305.

<sup>38</sup> It can be argued that Brennan was not above twisting the reality to fit his a priori assumptions. In particular, his arguments concerning societal attitude towards capital punishment and retributive justification of the death penalty (at least with regard to most vicious and heinous crimes) seem somewhat strained and far-fetched.

<sup>39</sup> R. Steffof, *Furman v. Georgia: Debating the Death Penalty*, Tarrytown 2007, p. 90–91.

ly declared that once permissible penalty may become unconstitutional overtime. In his opinion, four factors should be taken into account in the process of “cruel and unusual” clause’s interpretation. First, the inherent presence in the punishment in question of an inordinate amount of physical pain and suffering, which makes it intolerable for civilized people, second, the innovative character of the penalty increasing its cruelty in comparison with the superseded one, third, the penalty’s excessiveness in light of legitimate legislative purpose, and fourth, the popular abhorrence of the penalty. According to Marshall, only two final criteria are relevant to an examination of the capital punishment. He proceeded then to analyze the death penalty from a purposivist perspective. First of all, he emphasizes that retribution may not become the “sole end in punishing”. After agreeing that retributive justice constitutes a foundation for the decision to inflict some penalty on a criminal, he nevertheless contends that “the fact that some punishment may be imposed does not mean that any punishment is permissible. If retribution alone could serve as a justification for any particular penalty, then all penalties selected by the legislature would by definition be acceptable means for designating society’s moral approbation of a particular act. The “cruel and unusual” language would thus be read out of the Constitution”<sup>40</sup>. Therefore the retribution for retribution’s sake is morally unacceptable and – more importantly – unconstitutional. The latter is true because the objective of the 8<sup>th</sup> Amendment is to legally ensure “our insulation from our baser selves. The “cruel and unusual” language limits the avenues through which vengeance can be channeled. Were this not so, the language would be empty and a return to the rack and other tortures would be possible in a given case”<sup>41</sup>. As far as other aims of punishment are concerned, Marshall starts by observing an obvious fact that the death penalty makes rehabilitation impossible. It also does not serve as a more efficient deterrent in comparison with imprisonment, including life incarceration. Reliable statistical evidence does not seem to support a notion that the capital punishment has any significant, or even measurable, effect on a rate of crime. What is even more important in this context, while “abolitionists have not proved non-deterrence beyond a reasonable doubt, they have succeeded in showing by clear and convincing evidence that the capital punishment

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40 *Furman v. Georgia*, 344.

41 *Ibidem*, 345.

is not necessary as a deterrent to crime in our society. This is all that they must do<sup>42</sup>. Marshall admits that the death penalty obviously prevents recidivism; nevertheless life imprisonment also performs this function in a huge majority of cases. He also rejects the arguments that the death penalty – or the threat of execution – encourages criminals to cooperate more willingly with law enforcement authorities and to take the “guilty” pleas more often<sup>43</sup>, provides eugenic benefits<sup>44</sup> and is more economical<sup>45</sup>. Due to the above-mentioned factors, Marshall somewhat clumsily sums up that “there is no rational basis for concluding that capital punishment is not excessive. It therefore violates the Eighth Amendment<sup>46</sup>”.

In the final portion of his opinion the Justice attempted to demonstrate that the death penalty had now become “morally unacceptable to the people of the United States at this time in their history”. In order to attain this objective Marshall uses an interesting reasoning, a sort of a judicial sleight-of-hand, ingenious but somewhat disingenuous. He considers actual polling data showing the popular support for the capital punishment as unreliable; instead he proposes a different standard of evaluating citizens’ moral sentiments. This test assumes that people are “full informed as to the purposes of the penalty and its liabilities”. If, under such conditions with respect to knowledge, citizens find “the penalty shocking, unjust, and unacceptable”, then the punishment violates the 8<sup>th</sup> Amendment. The Justice observes that American citizens are almost totally unaware of the realities concerning the death penalty. They do not realize that it “is no more effective a deterrent than life imprisonment, that convicted murderers are rarely executed, but are usually sentenced to a term in prison; that convicted murderers usually are model prisoners, and that they almost always become law-abiding citizens upon their release from prison; that the costs of executing a capital offender exceed the costs of imprisoning him for life; that while in prison, a convict under sentence of death performs none of the useful functions that life prisoners perform; that no attempt is made in the sentencing process to ferret out likely recidivists for execution;

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42 *Ibidem*, 353.

43 This line of reasoning is factually incorrect and constitutionally questionable.

44 Again, factually false and morally reprehensible.

45 The costs of criminal proceedings in capital cases and of incarcerating an inmate on a death row usually far exceed the costs incurred during non-capital trials and expenditures involved with a normal “imprisonment”.

46 *Ibidem*, 359.

and that the death penalty may actually stimulate criminal activity<sup>47</sup>. If they were conscious of the facts, they would recognize the punishment for what it is: an unwise, purposeless, morally reprehensible vengeance. This conclusion would have been strengthened by discriminatory way in which the penalty is administered. Credible studies show that “the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society”, and also upon racial minorities and men (as opposed to women). Finally, the death penalty would be rejected by the collective conscience of America if the people realized the very real potential for and the actual scale of miscarriages of justice, the penalty’s harmful impact on criminal proceedings due to the sensationalization of trials and the deleterious effect on the penal system. In summation, Marshall states that “the measure of a country’s greatness is its ability to retain compassion in time of crisis. No nation in the recorded history of man has a greater tradition of revering justice and fair treatment for all its citizens in times of turmoil, confusion, and tension than ours. This is a country which stands tallest in troubled times, a country that clings to fundamental principles, cherishes its constitutional heritage, and rejects simple solutions that compromise the values that lie at the roots of our democratic system. In striking down capital punishment, this Court does not malign our system of government. On the contrary, it pays homage to it<sup>48</sup>”.

While Marshall’s position was less unequivocal than Brennan’s, it also entailed a total abolition of the death penalty in the given historical context. Three other concurring opinions, written by Justices William O. Douglas, Potter Stewart and Byron White, were significantly less radical and based on narrower grounds. Let us begin by analyzing Douglas’ views. After disposing of certain preliminary questions (description of the 8<sup>th</sup> Amendment, its applicability to States’ actions etc.<sup>49</sup>), he states that “the generality of a law inflicting capital punishment is one thing. What may be said of the validity of a law on the books and what may be done with the law in its application do, or may, lead to quite different conclusions. It would seem to be incontestable that the death penalty inflicted on one

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<sup>47</sup> *Ibidem*, 362–363.

<sup>48</sup> *Ibidem*, 370.

<sup>49</sup> It is particularly worth noting that Douglas rejected the „evolving standards of decency” argument, fearing that its acceptance may lead to a relativization of other clauses of the Bill of Rights. See H.H. Haines, *Against Capital Punishment: the Anti-Death Penalty Movement in America 1972–1994*, New York 1996, p. 39.

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 procedure that gives room for the play of such prejudices<sup>50</sup>. In other words, the 8<sup>th</sup> Amendment includes at least rudimentary equal protection guarantees. Therefore “it is “cruel and unusual” to apply the death penalty – or any other penalty – selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board”<sup>51</sup>. Dependable sociological data and reasoned opinions of law enforcement experts convincingly demonstrate that the infliction of capital punishment involves racial and economic discrimination. In particular, Douglas approvingly quotes a statement by the warden of Sing Sing prison, who observed that the death penalty “is an unequal punishment in the way it is applied to the rich and to the poor. The defendant of wealth and position never goes to the electric chair or to the gallows. Juries do not intentionally favor the rich, the law is theoretically impartial, but the defendant with ample means is able to have his case presented with every favorable aspect, while the poor defendant often has a lawyer assigned by the court. Sometimes such assignment is considered part of political patronage; usually the lawyer assigned has had no experience whatever in a capital case”<sup>52</sup>. The constitutional problem with the death penalty laws being examined by the Court in *Furman v. Georgia* is not therefore caused by their abstract meaning or their text (they are theoretically evenhanded, nonselective and nonarbitrary) but rather by their actual execution. The statutes in question inevitably lead – under current social, political and economic circumstances – in their practical operation to discrimination resulting from their discretionary character<sup>53</sup>. Douglas makes a very interesting analogy: “A law that stated that anyone making more than \$50,000 would be exempt from the death penalty would plainly fall, as would a law that in terms said that blacks, those who never went beyond the fifth grade in school, those who made less than \$3,000 a year, or those who were unpopular or unstable should be the only people ex-

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50 *Furman v. Georgia*, 242.

51 *Ibidem*, 245.

52 *Ibidem*, 251.

53 Marshall explicitly refused to consider if laws predicting mandatory death penalty for certain heinous crimes are constitutional. It is however safe to assume that he would reject such laws as too rigid and inflexible from the constitutional standpoint.

ecuted. A law which in the overall view reaches that result in practice has no more sanctity than a law which in terms provides the same"<sup>54</sup>. Douglas concludes that the relevant statutes create in the American model of law enforcement aspects of constitutionally impermissible "caste system" which are impossible to disregard or ignore from the perspective of constitutional jurisprudence. The Court is entitled (required even) to nullify such statutes due to their commonly discriminatory application.

Two final concurrences are founded on even narrower grounds than Douglas' view. In comparison with previously analyzed opinions, Stewart's writing "is refreshingly short at just four pages, but these four pages send a message as important as any delivered in this case"<sup>55</sup>. He argues that "the penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity"<sup>56</sup>. Despite making such a harsh assessment, he hints that he would be unwilling to delegalize the death penalty if it was inflicted in a procedurally proper way for some specific, heinous and precisely defined crimes. His main argument in this area is that retribution remains a legitimate "ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy – of self-help, vigilante justice, and lynch law"<sup>57</sup>. At the same time the Justice firmly rejects discretionary capital punishment laws like the ones investigated in this case. The actual application of the statutes in question means that the death sentences pronounced on their basis "are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968,

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<sup>54</sup> *Furman v. Georgia*, 256.

<sup>55</sup> M.A. Foley, *Arbitrary and Capricious: the Supreme Court, the Constitution, and the Death Penalty*, Westport 2007, p. 68.

<sup>56</sup> *Furman v. Georgia*, 306.

<sup>57</sup> *Ibidem*, 308.

many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed”<sup>58</sup>. While constitutionally impermissible discrimination in death sentencing has not been conclusively proven, “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”<sup>59</sup>. White’s concurrence is based on utilitarian grounds. The Justice fails to discover socially tangible penological purpose of capital punishment as it is currently administered<sup>60</sup>. He concedes that the death penalty may of course serve as a useful instrument of individual deterrence and may even constitute a proportional social response to particularly vicious crimes. These reasons, however, are insufficient from a social perspective. He points out that “when imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied. Nor could it be said with confidence that society’s need for specific deterrence justifies death for so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient, or that community values are measurably reinforced by authorizing a penalty so rarely invoked”<sup>61</sup>. He also attaches a lot of importance to the question of general deterrence. According to White, this “major goal of the criminal law” is not “substantially served where the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others [...] common sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted”<sup>62</sup>. As White concludes, under such legal and factual circumstances as are present in this case, the capital punishment becomes nothing more than a “pointless and needless extinction of life with only marginal contributions to any discernible social or pub-

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58 *Ibidem*, 309–310.

59 *Ibidem*, 310.

60 C.S. Steiker, J.M. Steiker, *The Beginning of the End*, in: *The Road to Abolition? The Future of Capital Punishment in the United States*, C.J. Ogletree and A. Sarat (eds.), New York 2009, p. 109.

61 *Furman v. Georgia*, 311–312.

62 *Ibidem*, 312.

lic purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment”<sup>63</sup>.

Taking into account the substance and tenor of all concurrences, it is hardly surprising that Warren Burger’s prediction did not come true and that the legal moratorium on the capital punishment lasted only four years<sup>64</sup>. While Brennan’s and Marshall’s opinions indicated an absolute or nearly absolute rejection of the death penalty *in abstracto*, the views exhibited by Stewart and White (and possibly even Douglas) clearly suggested that the Justices would be willing to accept statutes permitting the capital punishment if the “excessive discretion” issue was solved. This is precisely what many states attempted to do in the post-*Furman* period. Their efforts were recognized by the Supreme Court in the *Gregg v. Georgia* decision (1976), which generally declared that capital punishment laws must navigate between Scylla of arbitrariness (threatened by overly discretionary laws) and Charybdis of rigidity (threatened by mandatory laws). If, in capital cases, government is capable of devising a sentencing scheme including a set of objective and comparatively useful criteria and of applying them across the board, the death penalty imposed under such laws raises no constitutional problems<sup>65</sup>. Such is the law of the United States as it currently stands.

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#### STRESZCZENIE

Łukasz Machaj

„W TYM KRAJU JUŻ NIGDY NIE ZOSTANIE PRZEPROWADZONA  
ŻADNA EGZEKUCJA”. ARGUMENTY PRZECIWKO KARZE ŚMIERCI  
W SPRAWIE *FURMAN V. GEORGIA*

W 1972 roku Sąd Najwyższy Stanów Zjednoczonych wydał wyrok w sprawie *Furman versus Georgia*, który faktycznie – aczkolwiek nie formalnie (z uwagi na obowiązujący w USA model sądownictwa konstytucyjnego) – wprowadził moratorium na wykonywanie kary śmierci. Prezes SN Warren E. Burger wyraził wówczas prze-

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<sup>63</sup> *Ibidem*.

<sup>64</sup> The first involuntary (without a request from a convict) execution took place in 1979.

<sup>65</sup> S. Banner, *The Death Penalty: an American History*, Cambridge 2003, p. 263.

konanie, że „w tym kraju już nigdy nie zostanie przeprowadzona żadna egzekucja”. Chociaż wskazana prognoza nie sprawdziła się, to jednak rzeczony rozstrzygnięcie radykalnie zmieniło zasady rządzące wymierzaniem kary głównej w Ameryce. Artykuł analizuje uzasadnienia do wyroku, które zostały sformułowane przez sędziów opowiadających się za modyfikacją stanu prawnego pozwalającego sądom niższych instancji na orzekanie kary śmierci. Autor umiejscawia tę analizę na tle żywego w amerykańskim uniwersum konstytucyjnym sporu o prawidłowe metody wykładni konstytucyjnej. Ósma poprawka do ustawy zasadniczej USA zakazuje wymierzania „okrutnych i nadzwyczajnych kar”. Rzecznicy interpretacji oryginalistycznej utrzymują, że klauzulę tę należy wyjaśniać przez odwołanie się do standardów moralnych i prawnych funkcjonujących w USA w okresie przyjmowania poprawki (tj. pod koniec XVIII stulecia). Przyjęcie tej formuły oznacza, iż kara główna nie jest konstytucyjnie wykluczona. Z kolei zwolennicy wykładni dynamiczno-celowościowej uznają, że znaczenie ósmej poprawki winno być każdorazowo ustalone poprzez przywołanie zasad etycznych obowiązujących w danym momencie historycznym, oraz wskazują, iż kara główna obraża współczesne poczucie sprawiedliwości, już to z uwagi na swoje okrucieństwo, już to z uwagi na kapryśny charakter jej orzekania. To ostatnie stanowisko znalazło odzwierciedlenie w wypowiedziach sędziów SN. Autor przywołuje uzasadnienia sporządzone przez sędziego Williama Brennana (kara śmierci jako sankcja naruszająca godność człowieka), Thurgooda Marshalla (kara śmierci jako bezużyteczny z pragmatyczno-utilitytarnego punktu widzenia instrument polityki karnej), Williama O. Douglasa (kara śmierci jako narzędzie dyskryminacji upośledzonych grup społecznych), Pottera Stewarta (nadmierna dyskrejonalność przepisów dopuszczających wymierzanie kary głównej) i Byrona White’a (relatywna rzadkość orzekania o karze śmierci pozbawiająca tę sankcję jakichkolwiek walorów z punktu widzenia społecznych funkcji kary). W konkluzji autor stwierdza, że w świetle zaprezentowanych argumentów późniejsza zgoda większości składu SN na przywrócenie kary śmierci – jeśli tylko regulacje ją przewidujące są w odpowiedni sposób skonstruowane – nie może być uznana za zaskakującą.

