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Article

A LOST CHAPTER IN DEATH PENALTY HISTORY:

FURMAN V. GEORGIA, ALBERT CAMUS, AND THE NORMATIVE CHALLENGE TO CAPITAL PUNISHMENT

Mugambi Jouet*

ABSTRACT

Overlooked historical sources call into question the standard narrative that the Supreme Court's landmark decision in Furman v. Georgia *(1972), which temporarily abolished the death penalty, reflected a challenge to its arbitrary, capricious, and discriminatory application. This Article examines materials that scholars have neglected, including the main brief in* Aikens v. California*, a companion case to* Furman *that presented the fundamental constitutional claim: the death penalty is inherently cruel and unusual.*

Aikens *was largely forgotten to history after it became moot, leaving* Furman *as the main case before the Court. The* Aikens *brief's humanistic claims and rhetoric are at odds with the widespread idea that* Furman *was a case about administrative or procedural problems with capital punishment. This is truer of the* Furman *decision itself than of the way the case was litigated. Depicting any execution as "barbarity," as an "atavistic horror," the* Aikens *brief marshaled an argument that has garnered much less traction in modern America than Europe: the death penalty is an affront to human dignity. Yet the transatlantic divergence in framing abolitionism was not always as pronounced as it came to be in* Furman*'s aftermath. Since the Enlightenment, American and European abolitionists had long emphasized normative*

* Associate Professor, USC Gould School of Law. I am grateful to Anthony Amsterdam, Brandon L. Garrett, Corinna Lain, Evan Mandery, Andrea Roth, Carol Steiker, Barry Sullivan, Alexander Tsesis, Robert Weisberg, the organizers of the Culp Colloquium, the participants in the law faculty workshop at Washington University in St. Louis, and my colleagues at the USC Gould School of Law for their helpful comments on this research project.

arguments against capital punishment, thereby revealing why they played a central role in Aikens-Furman*.*

Strikingly, the Aikens *brief insistently quoted a European figure whose role in this seminal Supreme Court case has received no attention: Albert Camus.* Reflections on the Guillotine*, Camus's denunciation of the death penalty's inhumanity, is among the sources prominently featured in the* Aikens-Furman *briefs. The architect of this strategy was Anthony Amsterdam, a famed litigator. Subsequent generations of American abolitionists have placed less weight on humanistic objections to executions, instead stressing procedural and administrative claims. This shift has obscured how a lost chapter in death penalty history unfolded.*

These events are key to understanding the evolution of capital punishment, from its resurgence in the late twentieth century to its present decline as the number of executions nears record lows. On Furman*'s fiftieth anniversary, the Article offers another window into the past as scholars anticipate a future constitutional challenge to the death penalty in one or two generations.*

INTRODUCTION

The story of *Furman v. Georgia* has been told and retold.[1] Yet it misses an important chapter. When the U.S. Supreme Court abolished the death penalty in this seminal 1972 decision, many believed that America was joining the rest of the Western world in turning its back on capital punishment.[2] Four years later, in *Gregg v. Georgia*, the Court resurrected the death penalty by approving new statutes that were supposed to make its application fair and rational.[3] On its fiftieth anniversary, *Furman* is remembered as a successful, albeit short-lived, challenge to the unfair administration of capital punishment. Contrary to conventional wisdom, however, *Furman* was not fundamentally a challenge to the arbitrary, capricious, and discriminatory application of the death penalty.

This Article examines sources that scholars have largely overlooked, including the petitioner's brief in *Aikens v. California*, a companion case to *Furman*.[4] The *Aikens* brief presented the main constitutional claim under the Eighth Amendment. It was a frontal normative challenge: the death penalty is inherently cruel and dehumanizing. *Aikens* was mostly forgotten to history after it became moot, which left *Furman* as the main case before the Court.[5] But the succinct *Furman* brief specified that the *Aikens* brief "fully develops" the constitutional challenge to the death penalty.[6] The *Aikens* brief's humanistic claims and rhetoric are at odds with the widespread idea that *Furman* was principally a case about administrative or procedural problems with capital punishment. The briefs and oral arguments likewise reveal that race hardly was the central issue in *Aikens-Furman*, even though the abolitionists who spearheaded this challenge were deeply concerned about the death penalty's discriminatory application.[7] The conception of *Furman* as a case about due process and inequity is truer of the *Furman* decision itself than of the

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[1] Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

[2] DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 229 (2010); BRANDON L. GARRETT, END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE 81 (2017); CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 50 (2016); FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 37–38 (1986); Carol S. Steiker, *Capital Punishment and American Exceptionalism*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 57, 86 (Michael Ignatieff ed., 2005).

[3] Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion). *See generally* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 267–75 (2002).

[4] Brief for Petitioner, Aikens v. California, 406 U.S. 813 (1972) (No. 68-5027), 1971 WL 134168 [hereinafter Aikens brief].

[5] The Justices declared *Aikens* moot after the Supreme Court of California found the state's death penalty statute unconstitutional under California law. Aikens v. California, 403 U.S. 952 (1971), *cert. dismissed*, 406 U.S. 813 (1972) (per curiam). *See also* California v. Anderson, 493 P.2d 880 (Cal. 1972). The Article discusses these events in greater detail in Section II.

[6] Brief for Petitioner, Furman v. Georgia, 408 U.S. 238 (1972) (No. 71-5003), 1971 WL 134167, at *11 (footnote omitted) [hereinafter Furman brief].

[7] *See infra* notes 117–118, 272–288 and accompanying text.

way it was litigated. Depicting any execution as "barbarity,"[8] as an "atavistic horror,"[9] the *Aikens* brief marshaled an argument that has garnered much less traction in modern America than Europe: the death penalty is an affront to human dignity.[10] Strikingly, the *Aikens* brief insistently quoted a European figure whose role in this landmark Supreme Court case has received no attention: Albert Camus. *Reflections on the Guillotine*, Camus's denunciation of the death penalty's inhumanity and absurdity,[11] is among the sources prominently featured in the *Aikens* brief.[12]

Nowadays, one could imagine a senior litigator scolding a junior attorney for quoting Camus in the draft of a legal brief. The senior attorney may assume that a novelist, playwright, and philosopher's critique of the death penalty has no place in a formal argument, much less one intended for the Supreme Court, especially in a decisive and divisive test case. This is why it is revealing that the author of the *Aikens* brief was Anthony Amsterdam—one of the most brilliant attorneys in American history. Amsterdam has been the object of endless praise: "by common account the finest lawyer of his generation,"[13] "[n]o other attorney in American history has had such a profound influence on civil rights issues,"[14] "a phenomenally gifted lawyer and orator,"[15] a person of "overwhelming brain power"[16] and "superhuman" work ethic,[17] a "visionary."[18] This attorney contended that any execution is categorically inhumane—a strategy that today's observers may deem peculiar given modern America's overwhelming focus on administrative or procedural problems with capital punishment.[19] That one-sided focus has obscured the past.

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[8] Aikens brief, *supra* note 4, at 44.

[9] *Id.* at 26.

[10] *Id.* at 4, 13 n.24, 31, 35, 48, 49, 50. *See also* COUNCIL OF EUROPE & EUROPEAN UNION, Joint Declaration by the EU High Representative for Foreign Affairs and Security Policy and the Secretary General of the Council of Europe on the European and World Day Against the Death Penalty (Oct. 9, 2018), https://www.consilium.europa.eu/en/press/press-releases/2018/10/09/joint-declaration-by-the-eu-high-representative-for-foreign-affairs-and-security-policy-and-the-secretary-general-of-the-council-of-europe-on-the-european-and-world-day-against-the-death-penalty/ (last visited Feb. 12, 2020) [hereinafter Joint Declaration on the Death Penalty].

[11] ALBERT CAMUS, REFLECTIONS ON THE GUILLOTINE, *in* RESISTANCE, REBELLION, AND DEATH 173 (Justin O'Brien trans., 1961) (1st French ed. 1957).

[12] *See* Aikens brief, *supra* note 4, at 32, 33, 45, 45 n.89, 46, 47, 58 n.115 (citing CAMUS, REFLECTIONS ON THE GUILLOTINE, *supra* note 11).

[13] EDWARD LAZARUS, CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT 90 (2d ed. 2005).

[14] EVAN J. MANDERY, A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA 41 (2014).

[15] Mandery quotes the praise of the distinguished criminologist Franklin Zimring, among other leading legal voices. *Id.* at 44.

[16] MICHAEL MELTSNER, THE MAKING OF A CIVIL RIGHTS LAWYER 201 (2006).

[17] Frederick Mann, *Anthony Amsterdam: Renaissance Man or Twentieth Century Computer?*, 3 JURIS DOCTOR 30, 30 (1973).

[18] DAVID M. OSHINSKY, CAPITAL PUNISHMENT ON TRIAL: *FURMAN V. GEORGIA* AND THE DEATH PENALTY IN MODERN AMERICA 43 (2010).

[19] STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 248; FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 26–37, 43–46 (2003); Steiker, *Capital*

This Article sheds doubt on what I will call the "standard *Furman* narrative," the notion that *Furman* mainly concerned administrative or procedural issues with the death penalty. To be sure, it is true that the Justices in *Furman* primarily focused on these matters.[20] It is also true that, in subsequent decades, administrative or procedural problems have been central in the American debate over capital punishment, such as persistent due process violations, endemic arbitrariness, incorrigible racial bias, recurrent wrongful convictions of innocents, lack of deterrent value, and substantial financial cost. Such problems notably led the American Law Institute to withdraw, in 2009, the death penalty section from its Model Penal Code.[21] By contrast, as Carol Steiker has underlined, the notion that the death penalty is intrinsically a violation of human rights and human dignity is "much less prominent in, if not absent entirely from, American debates about abolition versus retention" in comparison to Europe,[22] where it has carried the day.[23]

This deep transatlantic divergence did not always exist, as humanistic objections to capital punishment were influential in both European and American abolitionism since the Enlightenment.[24] By the 1960s and early 1970s, American abolitionists still "drew heavily on arguments about human dignity," although the refusal of most Justices to embrace these arguments in *Furman* was among the reasons why they fell out of favor in the U.S. debate.[25] These circumstances have favored the standard *Furman* narrative and help explain why Anthony Amsterdam's frontal normative challenge to the death penalty in the *Aikens* brief, namely in *Furman*, has received little attention. It may seem to fit oddly in the U.S. debate.

Punishment and American Exceptionalism, *supra* note 2, at 88; Carol S. Steiker & Jordan M. Steiker, *No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code*, 89 TEX. L. REV. 353, 364–65 (2010).

[20] *See generally* BANNER, *supra* note 3, at 260–66; GARLAND, *supra* note 2, at 225–30; MANDERY, *supra* note 14, *passim*; STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 49–51; Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 315 (1983).

[21] The American Law Institute withdrew its model death penalty statute "in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment." Steiker & Steiker, *No More Tinkering*, *supra* note 19, at 354 (quoting Message from Lance Liebman, Dir., Am. Law Inst. (Oct. 23, 2009)).

[22] Steiker, *Capital Punishment and American Exceptionalism*, *supra* note 2, at 88. Even the most humanistic challenges to the death penalty in modern America are about the cruelty of the *process*, from botched executions to lengthy periods on death row—not the cruelty of the *punishment*. Illustratively, these were the most humanistic claims that Justices Stephen Breyer and Ruth Bader Ginsburg indicated when inviting a constitutional challenge to the death penalty. Glossip v. Gross, 576 U.S. 863, 908, 925–29 (2015) (Breyer, J., dissenting). *See infra* note 458 and accompanying text.

[23] For a discussion of European legal norms on capital punishment, see *infra* note 309 and accompanying text.

[24] Mugambi Jouet, *Death Penalty Abolitionism From the Enlightenment to Modernity*, AM. J. COMP. L. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733016 (documenting how the abolitionist movements in America and Europe largely converged from the Enlightenment until approximately the 1970s and *Furman*).

[25] Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117, 151 (2010).

Today, America is not simply an outlier among Western democracies in retaining the death penalty[26]—it also has the highest incarceration rate worldwide.[27] Overall, principles of humane punishment rooted in dignity and rehabilitation have far more influence in Europe than the United States,[28] where their de-legitimization contributed to both the resurgence of capital punishment and the emergence of mass incarceration in the 1980s.[29] These circumstances have again shaped how scholars look back on the past. In an exceptionally harsh environment where America became an outlier in both normalizing draconian punishments and rejecting norms of human dignity, the notion that the abolitionists' past victory in *Furman* could have reflected a humanistic challenge to the death penalty may seem incongruous. A wider historical perspective shows otherwise, as humanistic and rehabilitative conceptions of punishment and penal reform were relatively influential in the United States until the post-*Furman* era.[30]

A few scholars have thoughtfully discussed how *Aikens-Furman* presented a normative claim that any execution is "cruel and unusual" under the Eighth Amendment.[31] Still, their scholarship devotes far more attention to the history of administrative or procedural challenges to the death penalty,[32] including separate challenges that Anthony Amsterdam himself presented in the same period.[33] The object of this Article is not to call into question this scholarship but to explain why the humanistic nature of the constitutional challenge in *Furman* deserves a fuller account. If scholarship on the *Aikens-Furman* briefs is sparse, no publication appears to have discussed how Camus appeared prominently in Amsterdam's submissions. These circumstances are remarkable given *Furman*'s historical significance.

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[26] AMNESTY INT'L, *Abolitionist and Retentionist Countries as of July 2018*, (2018), https://www.amnesty.org/download/Documents/ACT5066652017ENGLISH.pdf (last visited May 8, 2021). The definition of the Western world has evolved over time but generally encompasses the United States, Canada, Australia, New Zealand, and European countries, except for Russia and states in its orbit, such as Belarus. *See* MUGAMBI JOUET, EXCEPTIONAL AMERICA: WHAT DIVIDES AMERICANS FROM THE WORLD AND FROM EACH OTHER 6 (2017).

[27] WORLD PRISON BRIEF, PRISON POPULATION RATE, https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All (last visited May 8, 2021).

[28] *See generally* JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003); Mugambi Jouet, *Juveniles Are Not So Different: The Punishment of Juveniles and Adults at the Crossroads*, 33 FED. SENT'G REP. 278, 281–83 (2021); Mugambi Jouet, *Mass Incarceration Paradigm Shift?: Convergence in an Age of Divergence*, 109 J. CRIM. L. & CRIMINOLOGY 703, 713–47 (2019); Michael Tonry, *Equality and Human Dignity: The Missing Ingredient in American Sentencing*, 45 CRIME & JUST. 459 (2016).

[29] *See infra* Section V. *See also* Jouet, *Death Penalty Abolitionism From the Enlightenment to Modernity*, *supra* note 24, at 44–49.

[30] *See generally* Jouet, *Death Penalty Abolitionism From the Enlightenment to Modernity*, *supra* note 24, *passim*; Mugambi Jouet, *Revolutionary Criminal Punishments: Treason, Mercy, and the American Revolution*, 61 AM. J. LEGAL HIST. 139 (2021). *See also* Tonry, *supra* note 28, at 465 ("Respect for equality and human dignity was part of the fabric of American sentencing during most of the twentieth century but largely disappeared in the 1980s.").

[31] *See, e.g.*, MANDERY, *supra* note 14, at 129–35; STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 48.

[32] *See infra* notes 73–90 and accompanying paragraphs.

[33] *See infra* note 51 and accompanying text.

The Article is structured as follows. First, it describes the "standard *Furman* narrative," the leading account of how America came to abolish the death penalty in 1972. Second, it tells the neglected story of *Aikens v. California*, *Furman*'s companion case, which presented the frontal normative challenge to capital punishment. Third, the Article provides context for the *Aikens* brief's multiple references to Albert Camus's *Reflections on the Guillotine* by explaining the relevance of the French author's critique of the death penalty in this epoch. Fourth, we zoom into the *Aikens* brief and how it depicted any execution as inherently dehumanizing. Naturally, Camus is not the only source cited in the *Aikens* brief, but this Article underlines citations to his arguments because they embody the humanistic claim at the heart of the *Furman* litigation. Fifth, the Article analyzes *Furman*'s aftermath, from the reintroduction of capital punishment in America to its modern disinclination to frame abolition in normative, humanistic terms. We conclude by examining the implications of the Article's findings for the future of the death penalty at a time of declining public support and plummeting executions.[34] A record twenty-three states, alongside the District of Columbia, have now joined the abolitionist camp.[35] In 2021, Virginia became the first Southern state to do so.[36] Certain experts anticipate that, within a generation or two, the Supreme Court may consider another test case to definitely abolish capital punishment.[37] In 2015, Justices Stephen Breyer and Ruth Bader Ginsburg even invited such a test case.[38] Although subsequent shifts in the makeup of the Supreme Court have dimmed these prospects,[39] future Justices may someday prove receptive.[40] A lost chapter of the last major abolitionist challenge is therefore worth exploring.

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[34] *See generally* DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2021: YEAR END REPORT 1 (2020). On July 14, 2020, the federal government conducted its first execution following a seventeen-year hiatus. Notwithstanding the thirteen federal executions that would ultimately occur in the last six months of Donald Trump's presidency, the nationwide decline is undeniable. A total of seventeen persons were executed at the state or federal levels in 2020—the lowest annual number in nearly three decades. In 2021, that figure dropped even lower with a total of eleven executions. *Id.* at 1–4, 10, 12. *See also* Lee Kovarsky, *The Trump Executions*, 100 TEX. L. REV. 620 (2022).

[35] DEATH PENALTY INFO. CTR., *State by State*, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Feb. 22, 2022).

[36] DEATH PENALTY INFO. CTR., *Virginia Becomes 23rd State and the First in the South to Abolish the Death Penalty* (Mar. 24, 2021), https://deathpenaltyinfo.org/news/virginia-becomes-23rd-state-and-the-first-in-the-south-to-abolish-the-death-penalty.

[37] *See generally* GARRETT, *supra* note 2, at 226–32; STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at ch. 3 ("The Future of the American Death Penalty"); ZIMRING, *supra* note 19, at 183–87.

[38] Glossip v. Gross, 576 U.S. 863, 908–48 (2015) (Breyer, J., dissenting). *See also* Barr v. Lee, No. 20A8, slip. op. at 2 (U.S. July 14, 2020) (per curiam) (Breyer, J., dissenting) (reiterating this stance in case regarding the first federal execution in seventeen years). *See infra* note 458 and accompanying text.

[39] Carol Steiker & Jordan Steiker, *Judicial Abolition of the American Death Penalty Under the Eighth Amendment: The Most Likely Path*, *in* THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT 189, 192–93 (Meghan J. Ryan & William W. Berry III eds., 2020). *See also* Bucklew v. Precythe, 139 S. Ct. 1112, 1122 (2019) ("The Constitution allows capital punishment.").

[40] Amsterdam himself recently outlined a long-term strategy for abolition prioritizing state-level efforts before returning to the Supreme Court, which "for many years to come" will not be amenable to abolition. Anthony G. Amsterdam, *The Ghost of Furman Past and the Specter of Furman Future*, 43 AMICUS 10, 10 (2022).

I. THE CHAPTER TOLD: THE STANDARD NARRATIVE OF AMERICA'S ABOLITION OF CAPITAL PUNISHMENT IN 1972

What I term the "standard *Furman* narrative" is the leading account of how America abolished the death penalty in 1972, only to bring it back in 1976. The outline of the story is familiar. In the 1960s, public concern about capital punishment mounted.[41] Meanwhile, the number of executions dropped from 105 in 1951 to 7 in 1965, before grinding to a halt in 1967 for the next decade.[42] In 1963, Justice Arthur J. Goldberg convinced two fellow Justices, William Brennan and William Douglas, to join a dissent signaling to litigators that the Supreme Court was prepared to consider constitutional challenges to capital punishment.[43] The National Association for the Advancement of Colored People's Legal Defense Fund (NAACP LDF) played a major role in this changing legal landscape. Led by the legendary attorney Anthony Amsterdam, the LDF conceived a sophisticated litigation strategy to bring the death penalty to a standstill, a *de facto* "moratorium."[44] As the foremost organization protecting African Americans, the LDF initially focused on racial disparities in death sentences, from rape to murder cases.[45] Capital punishment then applied in a wide range of cases and juries notoriously lacked standards to guide their sentencing discretion. The LDF presented diverse challenges to the penalty's application, which proved successful in clogging the system.[46] These developments encouraged the LDF to take the lead on all capital litigation nationwide, at the expense of other reform

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[41] BANNER, *supra* note 3, at 239–47; LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY 46–47 (1992); GARLAND, *supra* note 2, at 211–14; MANDERY, *supra* note 14, at 62–63, 112–13; STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 51–52, 60; Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 13–16 (2007); Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 19–45 (2007).

[42] BANNER, *supra* note 3, at 244, 246. While scholars commonly perceive *Furman* as a counter-majoritarian decision, Corinna Lain has suggested that it was relatively majoritarian in reflecting the tide of public opposition to capital punishment and decline of executions. Lain, *Furman Fundamentals*, *supra* note 41, at 71 ("The Court is willing to lead the country, but only where it is poised to go."). *Cf.* EPSTEIN & KOBYLKA, *supra* note 41, at 21 (observing that "justices *do* consider the views of the public in reaching judicial determinations") (emphasis in original).

[43] Rudolph v. Alabama, 375 U.S. 889 (1963) (Goldberg, J., dissenting from denial of certiorari); Arthur J. Goldberg, *The Death Penalty and the Supreme Court*, 15 ARIZONA L. REV. 355, 360–65 (1973). *See also* BANNER, *supra* note 3, at 248–50; EPSTEIN & KOBYLKA, *supra* note 41, at 42–44; GARLAND, *supra* note 2, at 208, 214, 217; MANDERY, *supra* note 14, at 3–30; STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 41, 51, 54; William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 314–15 (1986).

[44] BANNER, *supra* note 3, at 247–57; EPSTEIN & KOBYLKA, *supra* note 41, at 44–69; GARLAND, *supra* note 2, at 219–20; MANDERY, *supra* note 14, at 53–54; STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 42–43, 46, 55–56, 82; ZIMRING & HAWKINS, *supra* note 2, at 33–34.

[45] BANNER, *supra* note 3, at 250–52; GARLAND, *supra* note 2, at 218–19; MANDERY, *supra* note 14, at 48–50; STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 42, 44; Jack Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 912 (1982); Eric L. Muller, Comment, *The Legal Defense Fund's Capital Punishment Campaign: The Distorting Influence of Death*, 4 YALE L. & POL'Y REV. 158 (1985).

[46] BANNER, *supra* note 3, at 246–57; GARLAND, *supra* note 2, at 219–21, 224; STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 43–44, 46; ZIMRING & HAWKINS, *supra* note 2, at 35.

organizations or criminal defense lawyers.[47] By the late 1960s, the LDF had begun representing whites on death row, going beyond its historical work as a branch of the NAACP.[48] While the LDF's reform efforts encompassed outreach to legislators and governors, its main tactic was litigation.[49] It managed to bring several cases before the U.S. Supreme Court, albeit to no avail. The Justices would not heed its claims.[50] The LDF persisted in seeking an appropriate test case for the Supreme Court to abolish the death penalty once and for all.[51] In 1972, this test case became *Furman v. Georgia*.[52]

According to the standard narrative, *Furman* was fundamentally a case about the arbitrary, capricious, and discriminatory application of the death penalty. This is where the standard *Furman* narrative becomes doubtful. This narrative is basically correct in describing *Furman* as a judicial opinion. But this is not how the case was litigated. Anthony Amsterdam and the LDF argued that the death penalty is inherently "cruel and unusual punishment" under the Eighth Amendment, *regardless* of how it is administered. Amsterdam presented a normative, humanistic claim, as the *Aikens* brief explicitly asserted: "Any sampling of the literature of this debate makes manifest that—although there are entirely convincing practical reasons for putting an end to the death penalty—the principal arguments urged to support its abolition have always been *humanistic*, and concerned with fundamental human decency."[53] We will later see that the *Aikens* brief's emphatic references to Albert Camus's *Reflections on the Guillotine*, among other sources, arise in this context,[54] as Amsterdam specified:

> We set forth these expressions not for the purpose of convincing the Court that Albert Camus, or Ramsey Clark, or Michael Ramsey, is correct, as a moral matter. The point is simply that the terms they use are archetypal reflections of the terms in which the capital punishment controversy has been fought during the years in which world history has progressively, and now

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[47] MANDERY, *supra* note 14, at 56–62.

[48] BANNER, *supra* note 3, at 251–52; GARLAND, *supra* note 2, at 219; MANDERY, *supra* note 14, at 48–50; Muller, *supra* note 45, at 159, 162, 168, 170, 184.

[49] MANDERY, *supra* note 14, at 112; STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 47.

[50] McGautha v. California, 402 U.S. 183 (1971) (holding that the Constitution does not require standards for juries to impose capital punishment); Maxwell v. Bishop, 398 U.S. 262 (1970) (ruling on narrow grounds, circumventing the broader issue of sentencing standards); Boykin v. Alabama, 395 U.S. 238 (1969) (declining to rule on merits of claim that death penalty for robbery was unconstitutional); Witherspoon v. Illinois, 391 U.S. 510 (1968) (challenge to jury selection). The LDF represented the defendant in *Maxwell*. It filed *amicus* briefs in *Boykin*, *McGautha*, and *Witherspoon*. The *Boykin* brief is discussed *infra* at note 144 and accompanying text.

[51] BANNER, *supra* note 3, at 254, 258; GARLAND, *supra* note 2, at 224–25; MANDERY, *supra* note 14, at 58, 111–12, 116–19; STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 48; ZIMRING & HAWKINS, *supra* note 2, at 37.

[52] Amsterdam has offered an account of the litigation campaign and his life path. *The Reminiscences of Anthony G. Amsterdam*, COLUM. RULE OF L. ORAL HIST. PROJECT (2010). Michael Meltsner, another LDF counsel, wrote a personal account, too. MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT (1973).

[53] Aikens brief, *supra* note 4, at 31 (emphasis added).

[54] *See infra* Sections III. and IV.

> quite thoroughly, abandoned the death penalty. Opposition to capital punishment has invariably been asserted on the basis of "fundamental moral and social values in our civilization and in our society."[55]

The *Aikens* brief was the primary brief in the *Furman* litigation, as Amsterdam underlined in the *Furman* brief: "The Brief for Petitioner in *Aikens v. California* fully develops the reasons why we believe that the death penalty is a cruel and unusual punishment for the crime of murder, as that penalty is administered in the United States today."[56] Once the California Supreme Court found the state's death penalty law in violation of the California Constitution, the case became moot before the U.S. Supreme Court.[57] Nevertheless, Amsterdam had already submitted the *Aikens* brief and had even delivered the oral arguments in *Aikens* on the same day as those in *Furman*.[58] *Aikens* might have been the case everyone remembered. It was mostly lost to history. Perhaps this explains why the *Aikens* brief, the primary brief, whose rhetoric was more humanistic than that of the *Furman* brief,[59] has been underexamined. In any event, the *Aikens* brief suggests that the standard *Furman* narrative is incomplete in depicting this challenge as fundamentally about the arbitrary, capricious, and discriminatory nature of the death penalty.

An overview of the existing scholarship illustrates the standard *Furman* narrative. In his excellent book, *The Death Penalty: An American History*, Stuart Banner summarizes the LDF's strategy in the 1970s as follows: "For years, the LDF had made procedural arguments to serve a substantive goal, the abolition of the death penalty, because the procedural arguments were the only ones with any chance of succeeding."[60] Yet, as we saw, in the *Aikens* brief the LDF presented an explicit normative challenge to capital punishment. Barely four years later, in *Gregg v. Georgia*, the Court examined the constitutionality of new death penalty statutes that states passed in *Furman*'s aftermath. Describing the oral arguments, Banner rightly explains that certain Justices were wary of Anthony Amsterdam's procedural claims because they thought that he deemed the death penalty unconstitutional *per se*, meaning that no procedural scheme would satisfy him.[61] However, Amsterdam was already on record affirming that any execution is inherently inhumane, which was the main challenge in *Aikens-Furman* a few years earlier.

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[55] Aikens brief, *supra* note 4, at 33 (quoting Remarks of Canadian Prime Minister Lester B. Pearson, CAN. H. OF COMMONS, IV DEB., 27th Parl., 2d Sess. (16 Eliz. II), 4370 (Nov. 16, 1967)).

[56] Furman brief, *supra* note 6, at 11 (footnote omitted).

[57] *See* California v. Anderson, 493 P.2d 880 (Cal. 1972) (finding capital punishment unlawful under California Constitution). *See also* Aikens v. California, 403 U.S. 952 (1971), *cert. dismissed*, 406 U.S. 813 (1972) (per curiam) (declaring case moot). These cases are discussed *infra* in Section II.

[58] This was January 17, 1972. *See* Oral Argument, Aikens v. California, 406 U.S. 813 (1972) (No. 68-5027), https://www.oyez.org/cases/1971/68-5027; Oral Argument, Furman v. Georgia, 408 U.S. 238 (1972) (No. 71-5003), https://www.oyez.org/cases/1971/69-5030.

[59] *See infra* note 248 and accompanying text.

[60] BANNER, *supra* note 3, at 273.

[61] *Id.* at 273–74.

Banner succinctly discusses the *Aikens* brief in a prior chapter of his book, indicating that the LDF's claim was that the death penalty violated "evolving standards of decency," as both American society and "civilized nations" had largely or fully abandoned this punishment.[62] His otherwise illuminating study places limited weight on these normative claims in comparison to lengthy sections discussing administrative or procedural challenges to executions.

By the same token, David Garland suggests in an insightful article that *Furman* concerned systemic issues with capital punishment, as he describes a litigation strategy focusing on "14th-Amendment issues of equal protection, procedural irregularity and arbitrary application—a tactic that produced the *Furman* victory but also opened the way for the regulatory reform effort that followed."[63] Garland is absolutely right that the LDF had brought procedural challenges that shaped the *Furman* decision. In the run-up to *Furman*, the LDF had litigated a series of cases tackling procedural issues.[64] We will see that certain aspects of the *Aikens* and *Furman* briefs kept challenging the kinds of due process problems that Garland described.[65] Yet the LDF's fundamental claim in *Aikens-Furman* was that "the principal arguments urged to support [] abolition have always been *humanistic*," whereas "practical" questions were secondary.[66]

If the humanistic dimensions of the *Aikens-Furman* litigation have received little to no attention, it may be partly due to the normative "ambivalence" about state killing in American society that Garland's research has actually shed light upon.[67] According to Garland, the United States has "experienced a grating conflict between the practice of capital punishment and the values of liberalism and humanitarianism."[68] Epitomizing this tension, American officials have recurrently expressed misgivings as they became involved in the execution process.[69] Garland reminds us that such officials commonly were "affected by the liberal norm that states ought not to take life unnecessarily and by the humanistic insistence that life is sacred." They were "familiar with the fate of capital punishment in the rest of the Western nations and with the reformers' view that the death penalty has no place in a civilized society."[70] These humanitarian aspects of the question are often overlooked

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[62] *Id.* at 258–59.

[63] David Garland, *Capital Punishment and American Culture*, 7 PUNISHMENT & SOC'Y 347, 358 (2005).

[64] *See supra* note 50.

[65] *See generally infra* Section IV.

[66] Aikens brief, *supra* note 4, at 31 (emphasis added). In his book, *Peculiar Institution,* Garland's thoughtful discussion of *Furman* focuses primarily on the judges' decision, not the briefs. GARLAND, *supra* note 2, at 225–30.

[67] GARLAND, *supra* note 2, at 11. This matter is discussed in greater detail *infra* in Section V. With regard to Garland's research, see especially *infra* note 429 and accompanying text.

[68] GARLAND, *supra* note 2, at 207.

[69] *Id.* at 60. *See also* STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 261–66 (describing several Supreme Court Justices' reservations about executing prisoners).

[70] GARLAND, *supra* note 2, at 222.

or obscured in the modern U.S. debate given its focus on administrative or procedural problems with capital punishment.

Back in the early 1970s, Chief Justice Warren Burger had complained that the abolitionists' strategy was to present "an oblique attack on capital punishment" by denouncing due process violations instead of executions *per se*.[71] But a frontal normative attack against the death penalty finally came in *Aikens-Furman*, although the standard narrative has generally cast this litigation as another challenge to due process violations.[72]

A salient exception to the standard narrative is an outstanding book by Evan Mandery, *A Wild Justice*,[73] that explores the *Furman* litigation from its genesis to its undoing. Mandery explains how, in the run-up to *Furman*, Amsterdam and the LDF had not prevailed in diverse administrative and procedural challenges.[74] A key issued remained unaddressed: the inherent constitutionality of the death penalty.[75] Amsterdam wanted the Justices to finally consider whether "the real problem" was "procedural aspects of capital prosecutions" or "capital punishment itself—an unreasoning, vengeful monster that inevitably resists all efforts to restrain it by normal, fair, rational, even-handed process."[76]

Mandery is one of the few scholars who has given life to the debates about the morality of the death penalty in the *Furman* litigation. While Mandery instructively recounts the creation of the *Aikens* brief and its frontal normative challenge to executions,[77] this topic ultimately occupies limited space in his 534-page study,[78] which predominantly focuses on administrative and procedural issues surrounding capital punishment. This approach is perfectly understandable. After all, in modern America practical concerns about capital punishment have drastically more weight than normative ones. As we shall see, gripping passages of Mandery's book still capture how the substantive cruelty of the death penalty was a central issue in *Furman*. The book also makes a passing reference to how Amsterdam cited Albert Camus.[79] We will later consider how Camus prominently appears in the *Aikens* brief,[80] thereby revealing other aspects of these historical events.

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[71] BANNER, *supra* note 3, at 256–57 (quoting Justice William Douglas, Notes of Judicial Conference re McGautha v. California, Nov. 13, 1970).

[72] *See, e.g.*, SARAH BETH KAUFMAN, AMERICAN ROULETTE: THE SOCIAL LOGIC OF DEATH PENALTY SENTENCING TRIALS 42 (2020) (stating that the defense's fundamental argument in *Furman* was about arbitrariness); Lain, *Deciding Death*, *supra* note 41, at 48 (describing the *Furman* debate as being about "*fairness*" in the administration of the death penalty) (emphasis in original).

[73] MANDERY, *supra* note 14.

[74] *See supra* note 50 and accompanying text.

[75] MANDERY, *supra* note 14, at 96, 106, 111, 116–19.

[76] *Id.* at 130.

[77] *Id.* at 129–35.

[78] This refers to the page count for the paperback edition of Mandery's book.

[79] *Id.* at 133 ("[Amsterdam] claimed that society's most enlightened men and women condemned [capital punishment], citing everyone from Albert Camus to the Archbishop of Canterbury.").

[80] *See infra* Section III.

Another exception to the standard narrative is a masterful book on the history of death-penalty litigation, *Courting Death* by Carol Steiker and Jordan Steiker. This account explains how, in the decade preceding *Furman* (1972), the LDF and other defense counsel presented a series of challenges to the arbitrary, capricious, and discriminatory application of capital punishment, especially in *Witherspoon* (1968), *Boykin* (1969), *Maxwell* (1970), and *McGautha* (1971).[81] Facing defeat in all of these cases, Amsterdam and the LDF chose another strategy in *Furman*: "The sole remaining broad challenge to the death penalty was rooted in the Eighth Amendment—the claim that the death penalty was 'cruel and unusual' and no longer comported with evolving standards of decency."[82] Still, the Steikers' account devotes limited attention to the normative dimensions of the challenge.[83] Rather, the Steikers emphasize how "the LDF claimed that standardless discretion allowed states to retain the death penalty without actually using it," thereby perpetuating "a form of punishment that lacked meaningful public support and that would not be tolerated if regularly implemented."[84] In effect, the LDF reformulated its prior challenges by using "many of the same facts underlying the standardless discretion argument but deployed them in a new way."[85] Even though this account is highly insightful, it tends to downplay the "humanistic" claim at the heart of the *Aikens* brief: any execution is inherently cruel and dehumanizing.[86]

Overall, the Steikers' study focuses in far greater depth on the lengthy history of administrative or procedural challenges to the death penalty. This approach is again understandable given that in modern America practical concerns about the death penalty decidedly outweigh normative objections, particularly compared to the human rights discourse characterizing abolitionism in contemporary Western democracies.[87] These circumstances partly reflect a path dependence tied to *Furman*. Most Justices in the majority declined to approach whether the death penalty is "cruel and unusual" through a normative lens, which oriented the legal debate toward administrative and procedural questions.[88] Franklin Zimring has likewise tackled this intriguing issue in a thoughtful study exploring why modern Americans are far less inclined than Europeans to frame the issue in terms of human rights and human dignity.[89] "The question of whether executions violate a human right

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[81] STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 44–47, 81–87. For a synopsis of these cases, see *supra* note 50.

[82] STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 48.

[83] *See id.* at 48–49.

[84] *Id.* at 49.

[85] *Id. See also id.* at 87 (discussing the issue of racial discrimination in the *Aikens* brief).

[86] *See* Aikens brief, *supra* note 4, at 31.

[87] The Steikers themselves have made this observation. *See* STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 248; Steiker, *Capital Punishment and American Exceptionalism*, *supra* note 2, at 88; Steiker & Steiker, *No More Tinkering*, *supra* note 19, at 364–65.

[88] STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 75; Steiker & Steiker, *Cost and Capital Punishment*, *supra* note 25, at 151–55.

[89] ZIMRING, *supra* note 19, at 26–37, 43–46.

recognized by international authorities (or any other human rights standard) is almost never debated in the United States," Zimring concluded.[90]

However, all of this was front and center in the *Aikens-Furman* litigation. Alongside an openly "humanistic" approach tied to norms of dignity,[91] this historic constitutional challenge emphasized international standards.[92] It was the fruit of a litigation strategy palpable in a memo Amsterdam sent to LDF colleagues regarding the preparation of the *Aikens-Furman* briefs. Besides information on Supreme Court precedents and the death penalty's unfair administration, Amsterdam sought research on "humanistic literature," "the world history of capital punishment [and its] progressive abandonment," and how "enlightened conceptions of 'decency' and 'dignity' are the measure of the [Eighth] Amendment."[93] The prominent quotations to Albert Camus would come to epitomize all of these dimensions.[94]

I do not mean that the standard *Furman* narrative is simply wrong, but that it is incomplete, as it has eclipsed these key elements. For instance, David Oshinsky's historical account of the *Furman* litigation makes no reference to Camus. The book hardly discusses how Amsterdam presented a categorical normative argument in *Aikens*.[95] Oshinsky focuses on other aspects of these historical events, including systemic arbitrariness in the administration of capital punishment.[96]

The standard *Furman* narrative reflected in the prior studies is a more accurate interpretation of the *Furman* decision itself than of the way the case was litigated. A difficulty in interpreting *Furman* is that each Justice in the 5-4 majority wrote a separate opinion. Stuart Banner summed up the majority's discordance as follows: "None of the five joined any part of anyone else's opinion. There were few points on which more than two or three Justices agreed."[97] Anthony Amsterdam himself acknowledged that *Furman*, his greatest victory, amounted to "a confusing array of opinions by the several Justices."[98] In a nutshell, three of the five Justices in the majority—William Douglas, Potter Stewart, and Byron White—focused primarily on administrative and procedural problems at the heart of the standard *Furman* narrative. By contrast, the two other Justices—William Brennan and Thurgood Marshall—focused primarily on overarching normative issues with capital punishment.[99] Anthony Amsterdam and the LDF shaped both types of opinions.

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[90] *Id.* at 46.

[91] *See* Aikens brief, *supra* note 4, at 31.

[92] *See infra* notes 176, 188 and accompanying paragraphs.

[93] MELTSNER, CRUEL AND UNUSUAL, *supra* note 52, at 249–50 (quoting Memorandum from Anthony Amsterdam, July 23, 1971).

[94] *See infra* Sections III. and IV.

[95] OSHINSKY, *supra* note 18, at 42, 44.

[96] *See generally id.*

[97] BANNER, *supra* note 3, at 261.

[98] ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 195–96 (2000).

[99] For instructive analyses of the Justices' deliberations and opinions, see BANNER, *supra* note 3, at 260–66; GARLAND, *supra* note 2, at 225–30; MANDERY, *supra* note 14, *passim*; STEIKER & STEIKER,

Indeed, their prior litigation had particularly emphasized administrative and procedural issues.[100] These matters remained part of the picture in *Aikens-Furman*, although this ultimate test case was fundamentally about whether any execution is "cruel and unusual" *per se*.[101]

Amsterdam's strategy was not as far-fetched as a modern observer may believe. Besides persuading two of the five Justices in the *Furman* majority that the death penalty is categorically inhumane, namely Brennan and Marshall, recall that a catalyst of the LDF's anti-death-penalty litigation was Justice Arthur J. Goldberg.[102] Despite serving barely three years on the Court, from 1962 to 1965, Goldberg left his mark by encouraging colleagues to consider the constitutionality of capital punishment. He notably tasked his clerk, Alan Dershowitz, with crafting a memorandum urging fellow Justices toward abolition.[103] Goldberg was convinced that the death penalty was racially discriminatory and ineffective. He was equally concerned about its inhumanity. Having faced anti-Semitism, he saw parallels between the state violence of capital punishment and the Holocaust.[104] And Goldberg was another reader of *Reflections on the Guillotine*, as he quoted Camus's declaration that abolition would be "the great civilizing step."[105]

Contrary to what a modern observer would assume, Goldberg thought that the Supreme Court would be likelier to abolish capital punishment on normative grounds than because of racial disparities as race was—and still is—an explosive issue in America.[106] "Some Justices might be comfortable striking down an excessive punishment on ethical grounds but reluctant to critique the American justice system as racist," according to Mandery's account.[107] In his landmark 1963 memorandum encouraging fellow Justices to

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COURTING DEATH, *supra* note 2, at 49–51; Daniel D. Polsby, *The Death of Capital Punishment?* Furman v. Georgia, 1972 SUP. CT. REV. 1, *passim* (1972); Weisberg, *supra* note 20, at 314–17.

100 *See supra* note 50 and accompanying text.

101 *See infra* Section IV.

102 *See supra* note 43 and accompanying text.

103 MANDERY, *supra* note 14, at 3–30. *See also* Rudolph v. Alabama, 375 U.S. 889 (1963) (Goldberg, J., dissenting from denial of certiorari); Arthur J. Goldberg, *Memorandum to the Conference Re: Capital Punishment October Term*, 1963, 27 S. TEX. L. REV. 493, 493 n.* (1986) [hereinafter Goldberg Memo] (publication of Goldberg's memorandum "in the exact form" that he circulated it to fellow Justices); Goldberg, *supra* note 43, at 360–65.

104 MANDERY, *supra* note 14, at 5, 8, 18, 22.

105 Goldberg, *supra* note 43, at 366 (quoting CAMUS, REFLECTIONS ON THE GUILLOTINE, *supra* note 11, at 232). An earlier article by Arthur J. Goldberg and his former clerk Alan Dershowitz quotes the same passage of Camus's book. Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1773 (1970) (quoting CAMUS, REFLECTIONS ON THE GUILLOTINE, *supra* note 11, at 232).

106 MANDERY, *supra* note 14, at 22. Colleagues later made it clear to Goldberg that they considered the issue of racism in the administration of the death penalty, including the executions of black men convicted of raping white women, too explosive, especially after the backlash against *Brown v. Education* (1954). *Id.* at 26, 28–29. For an instructive survey of persistent racial bias, see Michael Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, 39 CRIME & JUST. 273, 283–93 (2010).

107 MANDERY, *supra* note 14, at 22. *Cf.* STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 97–100 (discussing Justices' worry that race-based reasons for limiting or abolishing punishment would cause backlash).

find the death penalty unconstitutional, Goldberg did not discuss race but insisted that "evolving standards of decency . . . now condemn as barbaric and inhuman the deliberate institutionalized taking of human life by the state."[108]

Goldberg eventually resigned from the Court in 1965 so that President Lyndon B. Johnson would appoint him U.S. Ambassador to the United Nations.[109] Goldberg's internationalism was already palpable in his 1963 memorandum, which had emphasized the shift toward abolition in the West.[110] Over the years, he remained involved in the U.S. death-penalty debate. In a 1973 article, Goldberg insisted that "the deliberate, institutionalized taking of human life by the State is the greatest conceivable degradation to the dignity of the human personality. Surely, this generation of Americans has experienced enough killing."[111] Had he remained on the Court, Goldberg would have been a sure vote for Amsterdam's categorical normative challenge to capital punishment in *Aikens-Furman*.

Yet the fact that three of the five Justices in the tenuous *Furman* majority ultimately chose to frame the issue in narrower administrative, procedural, and utilitarian terms had profound implications in shaping the ensuing death-penalty debate, including the standard *Furman* narrative. We will return to the *Furman* decision and its aftermath later in the Article.[112] For the time being, having described the standard *Furman* narrative, we will turn to related questions tied to our lost chapter in death penalty history. What happened to *Aikens v. California*? Why did *Aikens-Furman* present a frontal normative challenge to capital punishment? And why did Camus appear prominently in the *Aikens* brief?

II. THE LOST CHAPTER'S SETTING: THE RUN-UP TO *AIKENS-FURMAN*

This section will set the stage for our subsequent examination of the *Aikens* brief and its prominent references to Albert Camus's *Reflections on the Guillotine*.[113] Here, we will see how a key reason why Anthony Amsterdam and the LDF presented a frontal normative challenge to the death penalty in *Aikens-Furman* was that they had yet to present this argument, whereas their prior administrative and procedural claims had mostly failed.[114]

Until *Furman*, the U.S. Supreme Court had addressed the cruel and unusual punishment clause merely ten times. Whenever the Justices had discussed the death penalty, they had sanctioned its legitimacy,[115] including in

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[108] Goldberg Memo, *supra* note 103, at 499 (internal quotation marks omitted).

[109] MANDERY, *supra* note 14, at 17.

[110] Goldberg Memo, *supra* note 103, at 499.

[111] Goldberg, *supra* note 43, at 368.

[112] *See infra* Section V.

[113] *See infra* Sections III. and IV.

[114] MANDERY, *supra* note 14, at 96, 106, 111, 116–19; STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 48–49.

[115] MANDERY, *supra* note 14, at 15 (citing Lain, *Deciding Death*, *supra* note 41, at 10–12).

the LDF's pre-*Furman* challenges.[116] As an arm of the NAACP, the LDF initially focused on challenging the racially discriminatory nature of the death penalty.[117] These efforts proved fruitless. The LDF presented statistical research from the reputable criminologist Marvin Wolfgang on racial disparities in rape cases, which lower courts found unpersuasive. Judges suggested that statistical evidence of systemic racial bias would not warrant overturning a particular defendant's death sentence, much less abolishing capital punishment.[118] A recurring issue has been whether such racial challenges have a limiting principle. Because the entire U.S. penal system is discriminatory, certain judges have reasoned that abolishing the death penalty on this ground could also justify abolishing all kinds of punishments.[119] In 1987, the Supreme Court would adopt this reasoning in *McCleskey v. Kemp*, a controversial 5-4 decision that forestalled future challenges to flagrant systemic racial discrimination.[120]

Even so, Amsterdam and the LDF were making inroads in their abolitionist cause in the 1960s. The gradual halt of executions and the social tensions over capital punishment suggested that the tide of history was on their side.[121] In 1972, the Supreme Court of California would bolster their cause by holding in its landmark *Anderson* decision that capital punishment violated the state's constitution.[122] California's highest court adopted a multifaceted reasoning though the thrust of its holding was that the death penalty is inhumane, as "it is incompatible with the dignity of an enlightened society to attempt to justify the taking of life for purposes of vengeance."[123]

The Supreme Court of California had asked Amsterdam to file his *Aikens* brief,[124] suggesting that its "humanistic" approach might have influenced the judges.[125] Piecing things together, in *Anderson* we find a remarkable quotation from Lord Chancellor Gardiner that appears emphatically in the *Aikens* brief:

> Lord Chancellor Gardiner reminded the House of Lords, debating abolition of capital punishment in England [in the mid-1960s]: 'When we abolished the punishment for treason that you should be hanged, and then cut down

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[116] *See supra* note 50 and accompanying text. *See also* BANNER, *supra* note 3, at 257; GARLAND, *supra* note 2, at 225–30.

[117] MANDERY, *supra* note 14, at 37.

[118] *Id.* at 38–39, 45 (citing Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968); Maxwell v. Bishop, 370 S.W.2d 118 (Ark. 1963)); ZIMRING & HAWKINS, *supra* note 2, at 34–35.

[119] MANDERY, *supra* note 14, at 36, 39–40.

[120] McCleskey v. Kemp, 481 U.S. 279 (1987). Regarding *McCleskey*'s impact, see generally John J. Donohue, *Empirical Analysis and the Fate of Capital Punishment*, 11 DUKE J. CONST. L. & PUB. POL'Y 51, 84, 85, 94, 105 (2016); Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1835, 1841–42 (2000).

[121] BANNER, *supra* note 3, at 239–47; GARLAND, *supra* note 2, at 211–14.

[122] California v. Anderson, 493 P.2d 880 (Cal. 1972). *See* MANDERY, *supra* note 14, at 184-85.

[123] *Anderson*, 493 P.2d at 896.

[124] MANDERY, *supra* note 14, at 136.

[125] *See* Aikens brief, *supra* note 4, at 31.

> while still alive, and then disembowelled while still alive, and then quartered, we did not abolish that punishment because we sympathised with traitors, but because we took the view that it was a punishment no longer consistent with our self respect.'[126]

The quotation to this major British figure in the conclusion of the Supreme Court of California's historic decision spoke to broader transformations. So did its citation to a report from the Secretary General of the United Nations that documented "a clear trend toward total abolition" of capital punishment around the world.[127] The *Aikens* brief cited this report, too.[128] While *Anderson* mainly discussed federal and state law, its references to international standards suggested that these sources were not yet the object of friction that they would become at the turn of the century.[129] The Supreme Court of California was persuaded by the decline of the death penalty in the United States and fellow Western democracies sharing humanistic ideals and aspirations:

> We have concluded that capital punishment is impermissibly cruel. It degrades and dehumanizes all who participate in its processes. It is unnecessary to any legitimate goal of the state and is incompatible with the dignity of man and the judicial process. Our conclusion that the death penalty may no longer be exacted in California consistently with article I, section 6, of our Constitution [barring "cruel or unusual punishments"] is not grounded in sympathy for those who would commit crimes of violence, but in concern for the society that diminishes itself whenever it takes the life of one of its members.[130]

Anderson was an ill-fated decision. Under Governor Ronald Reagan, California voters reacted by passing Proposition 17, which declared the death penalty constitutional in the Golden State.[131] Meanwhile, with regard to the U.S. Supreme Court, *Anderson* had the effect of mooting *Aikens v. California*, *Furman*'s companion case.[132] The LDF was relieved because Earnest [sic] Aikens was an unsympathetic defendant guilty of several murders and rapes—facts that could have shaped the Justices' reasoning.[133] "The case was so emotionally charged," Oshinsky writes, that Anthony Amsterdam "had

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[126] *Anderson*, 493 P.2d at 899 (quoting 268 HANSARD, PARLIAMENTARY DEBATES (5th series) (Lords, 43d Parl., 1st Sess., 1964-1965) 703 (1965)). *See* Aikens brief, *supra* note 4, at 7 (providing the same quotation).

[127] *Anderson*, 493 P.2d at 898 (quoting United Nations, Economic and Social Council, Note by the Secretary General, Capital Punishment, 3 U.N. Doc. E/4947 (Feb. 23, 1971)).

[128] *See* Aikens brief, *supra* note 4, at 27 n.46, 29 n.49, 30.

[129] *See infra* note 178 and accompanying paragraph.

[130] *Anderson*, 493 P.2d at 899. The prohibition on "cruel or unusual punishment" now falls under Section 17 of California's Constitution.

[131] MANDERY, *supra* note 14, at 254–55; MELTSNER, CRUEL AND UNUSUAL, *supra* note 52, at 287.

[132] Aikens v. California, 403 U.S. 952 (1971), *cert. dismissed*, 406 U.S. 813 (1972) (per curiam).

[133] California v. Aikens, 450 P.2d 258 (Cal. 1969). *See* MANDERY, *supra* note 14, at 117, 185; MELTSNER, CRUEL AND UNUSUAL, *supra* note 52, at 247, 287.

trouble finding a secretary who would type the legal briefs. Several turned him down, insisting that Aikens deserved to die."[134]

In any event, *Aikens* was at the heart of the *Furman* litigation. We saw that the *Aikens* brief was the main one and that Anthony Amsterdam delivered the oral arguments in *Aikens* on the same day as *Furman*. But he spoke in *Aikens* first.[135]

Not only does the "humanistic" nature of the *Aikens* brief call into question the standard *Furman* narrative,[136] the *Furman* brief does, too. The *Furman* brief largely tackled issues *not* associated with the conventional understanding of *Furman*. On one hand, the first half of the brief indeed challenges the arbitrariness resulting from the absence of standards in Georgia, such as whether the death penalty should apply to an unintentional or accidental homicide, including felony murder.[137] This was tied to the particularities of William Furman's case, who shot a victim through a closed door during a burglary.[138] On the other hand, the second half of the *Furman* brief argues that capital punishment is unconstitutional for a defendant who is insane, mentally ill or intellectually-disabled.[139] This second issue is not part of the standard *Furman* narrative whatsoever.[140] Overall, the *Furman* brief is surprisingly succinct and three times shorter than the *Aikens* brief.[141]

To better grasp the normative thrust of the constitutional challenge in *Aikens*, we must turn to a prior case: *Boykin v. Alabama*. Amsterdam did not represent the defendant in this 1969 case but submitted an *amicus* brief.[142] The Supreme Court opinion itself is forgettable, as it ducked the issue of whether the death penalty was unconstitutional for robbery and issued a narrow holding.[143]

Yet Amsterdam's *amicus* brief in *Boykin* is a relevant piece of our historical puzzle, as it suggested that any execution is categorically inhumane.[144] To be sure, Amsterdam had technically reserved that issue for another day. "Amsterdam had gone to extremes to make it clear that LDF wasn't asking the Supreme Court to set aside the death penalty in all cases," as Mandery observed. "Court briefs generally contain a section of 'issues presented.'

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134 OSHINSKY, *supra* note 18, at 42. *See also* Polsby, *supra* note 99, at 2 (describing Aikens as "an extraordinarily vicious and unrepentant multiple rape-murderer," adding "[i]f any convicted criminal deserved the death penalty, it was Aikens").

135 *See supra* note 58 and accompanying text.

136 Aikens brief, *supra* note 4, at 31. *See also infra* Section IV.

137 Furman brief, *supra* note 6, at 6–8.

138 *Id.* at 3–10.

139 *Id.* at 8–10, 12–20.

140 *See supra* Section I.

141 The electronic version of the *Aikens* brief in the Westlaw database has 63 pages, compared to 20 pages for the *Furman* brief.

142 Boykin v. Alabama, 395 U.S. 238 (1969). *See also* MANDERY, *supra* note 14, at 66–70.

143 *Boykin*, 395 U.S. at 244 (reversing because record did not establish that defendant properly entered guilty plea resulting in death sentence).

144 Regarding the *Boykin* brief, see also BANNER, *supra* note 3, at 254–55; GARLAND, *supra* note 2, at 220–21; MELTSNER, CRUEL AND UNUSUAL, *supra* note 52, at 181–85.

Amsterdam's draft contained a section titled 'issues not presented.' First among the issues not presented was that 'the death penalty is cruel and unusual for murder.'"[145] Because the defendant in *Boykin* faced the death penalty for robbery and his counsel argued that it was a disproportional punishment, Amsterdam cautioned the Court that such a conclusion should "not imply that the death penalty is constitutionally acceptable for the crime of murder."[146]

Nevertheless, Amsterdam powerfully suggested that any execution is cruel and unusual. Scholars have overlooked how his *amicus* brief in *Boykin* contains multiple references to Albert Camus's *Reflections on the Guillotine*.[147] These references prefigured Amsterdam's frontal normative challenge to the death penalty in *Furman* via the brief in *Aikens*, *Furman*'s companion case. In fact, the *Aikens* brief repeats verbatim diverse passages from the *Boykin* brief.[148] The passages of the *Boykin* brief that differ still mostly frame capital punishment as a normative issue. The *Boykin* brief thus postulates that a "hypothetical non-legal scholar" would find the death penalty morally unjustifiable, "[i]f he were told that the Eighth Amendment contained a 'basic prohibition against inhuman treatment,' that its underlying concept was 'nothing less than the dignity of man'…"[149] "Our scholar," Amsterdam writes, "would examine the course of England from the 'bloody code' of the Eighteenth and Nineteenth Centuries to nearly total legal abolition in the mid-Twentieth, and the parallel history of the United States abutting, as we shall see, in virtually total abolition *de facto*."[150] Amsterdam quotes Albert Camus for the upshot of this reasoning: "Such an examination could only reinforce [the] intuitive sense that society's ceasing to use death as a punishment for crime is—in Albert Camus' phrase—'a great civilizing step.' Is this intuition not frankly obvious?"[151]

The *Aikens* brief would go further than the *Boykin* brief in denouncing the death penalty's inhumanity. The *Boykin* brief referred to it once as "barbarism"[152] and once as "barbarous."[153] The *Aikens* brief would use

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[145] MANDERY, *supra* note 14, at 69. Mandery also succinctly notes that, in *Aikens*, "Amsterdam relied on the argument from his Boykin brief." *Id.* at 132. *See also* Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, as Amici Curiae, Boykin v. Alabama, 395 U.S. at 238 (No. 642), 1968 WL 94353, at *69–73 [hereinafter Boykin brief].

[146] Boykin brief, *supra* note 145, at 70.

[147] *Id.* at 26, 29, 31, 32, 33 n.32, 34–35.

[148] *Compare* Boykin brief, *supra* note 145, at 39 ("The real danger concerning cruel and inhuman laws is that they will be enacted in a form such that they can be applied sparsely and spottily to unhappy minorities . . . ."), *with* Aikens brief, *supra* note 4, at 21 ("The real danger concerning cruel and inhuman laws is that they will be enacted in a form such that they can be applied sparsely and spottily to unhappy minorities . . . .").

[149] Boykin brief, *supra* note 145, at 24 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion)).

[150] *Id.*

[151] *Id.* at 25 (quoting CAMUS, REFLECTIONS ON THE GUILLOTINE, *supra* note 11, at 173).

[152] Boykin brief, *supra* note 145, at 26 (quoting Statement by Attorney General Ramsey Clark Before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee on S. 1760 To Abolish the Death Penalty, July 2, 1968, DEP'T OF JUST. (1968), at 2).

[153] *Id.* at 32.

"barbarism" or cognate terms seven times.[154] Throughout both briefs, Albert Camus is a recurrent voice. Among other similarities, each document repeats quasi-verbatim the same point about the French author's insights on capital punishment. In *Boykin*, Amsterdam stated: "Camus' forthright analysis of all that this implies is hardly refutable."[155] In *Aikens*, meaning *Furman*, Amsterdam reiterated: "Camus' forthright analysis of all that this implies is unavoidable."[156]

Before turning to the *Aikens* brief and its frontal normative challenge to capital punishment—the lost chapter in death penalty history—a relevant question remains. Why Camus?

III. PREFACE TO THE LOST CHAPTER: THE HISTORICAL RELEVANCE OF CAMUS'S *REFLECTIONS ON THE GUILLOTINE*

This section will describe the historical significance of a key source in the *Aikens* brief: *Reflections on the Guillotine* by Albert Camus. In the next section we will see that the brief quoted lengthy passages from Camus's essay when denouncing the immorality of executions. Because the *Aikens* brief was the primary brief in the *Furman* litigation,[157] these elements call into question the standard narrative that *Furman* was fundamentally a case about the arbitrary, capricious, and discriminatory administration of capital punishment.

While the *Aikens* brief cited legal authorities, statistical data, historical evidence, and other thinkers,[158] the decision to prominently cite Camus symbolizes the brief's avowed "humanistic" focus.[159] Camus comes across as a star witness in an array of voices that Anthony Amsterdam, a famed legal strategist,[160] marshaled to depict the death penalty's inherent cruelty.[161]

But why Camus? After all, a wide range of philosophers, novelists, and other thinkers have vigorously condemned capital punishment for centuries,[162] from Cesare Beccaria[163] to Victor Hugo[164] and Martin Luther King.[165] The decision to draw upon the perspective of a French intellectual as opposed

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154 Aikens brief, *supra* note 4, at 6, 13 n. 24, 21 n. 36, 33, 44 (i.e., "barbarism," "barbarity," "barbarous," "barbaric").

155 Boykin brief, *supra* note 145, at 31.

156 Aikens brief, *supra* note 4, at 46.

157 Furman brief, *supra* note 6, at 11 (footnote omitted).

158 *See infra* Section IV.

159 Aikens brief, *supra* note 4, at 31.

160 *See supra* note 13 and accompanying text.

161 For a discussion of these sources, see *infra* Section IV.

162 *See generally* Jouet, *Death Penalty Abolitionism From the Enlightenment to Modernity*, *supra* note 24, *passim*.

163 CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 48–52 (David Young trans., 1986) (1st Italian ed. 1764).

164 *See, e.g.*, VICTOR HUGO, THE LAST DAY OF A CONDEMNED MAN (Arabella Ward trans., 2009) (1st French ed. 1829); JEAN-YVES LE NAOUR, HISTOIRE DE L'ABOLITION DE LA PEINE DE MORT 93–94, 118, 128–29, 133–36 (2011).

165 DEATH PENALTY INFO. CTR., *The Reverend Dr. Martin Luther King, Jr. on the Death Penalty*, (Jan. 18, 2016), https://deathpenaltyinfo.org/news/the-reverend-dr-martin-luther-king-jr-on-the-death-penalty.

to an American counterpart may likewise seem puzzling at first glance. The brief cites certain Americans who questioned capital punishment, including Thorsten Sellin[166] and Ramsey Clark,[167] although it leaves out prominent citizens who embraced abolition,[168] such as the Founding Father Benjamin Rush,[169] Frederick Douglass,[170] Walt Whitman,[171] and Clarence Darrow.[172] One may be tempted to see in the sensibility to Camus a reflection of Anthony Amsterdam's background, as he earned a Bachelor's degree in French literature from Haverford College in 1957 before studying law, foregoing graduate studies in art history.[173] As an attorney, Amsterdam retained an affection for poetry and literary fiction.[174] One may also view Amsterdam's citations to Camus as a sign of the international esteem that the author had garnered. They fit neatly with Amsterdam's theory that a normative evolution against the death penalty had occurred throughout Western civilization.[175] This helps explain why Camus played a more central role in the *Aikens* brief than most American thinkers. Going beyond America's borders and citing the world-renown Frenchman and laureate of the Nobel Prize in Literature gave credence to Amsterdam's plea to the Justices. In his words, the death penalty was in its last throes "in countries sharing our western humanist traditions,"[176] an important consideration for America, "a Nation which aspires to be one of the world's more enlightened peoples."[177]

The *Aikens* brief highlighted Western norms on capital punishment partly because international standards had not yet become controversial in Supreme Court litigation. In twenty-first century America, Justices William Rehnquist, Antonin Scalia, and Clarence Thomas have led the charge in condemning such standards as irrelevant and illegitimate, including in capital cases.[178]

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166 Aikens brief, *supra* note 4, at 34–35.

167 *Id.* at 32.

168 Jouet, *Death Penalty Abolitionism From the Enlightenment to Modernity*, *supra* note 24, *passim* (documenting the views of eighteenth-, nineteenth-, and twentieth-century U.S. abolitionists). *See also* Jouet, *Revolutionary Criminal Punishments*, *supra* note 30 (discussing the disinclination of the Founding Fathers and first-generation Americans toward executing alleged traitors during the American Revolution and ensuing rebellions).

169 BANNER, *supra* note 3, at 88–89, 103–07; STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 10.

170 Frederick Douglass, *Resolutions Proposed for Anti-Capital Punishment Meeting*, Rochester, N.Y., Oct. 7, 1858, *in* FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 370, 370–71 (Philip S. Foner & Yuval Taylor eds., 2000).

171 Jane Bennett, *Whitman's Sympathies*, 69 POL. RES. Q. 607 (2016).

172 Debate: Resolved: That Capital Punishment Is a Wise Public Policy, Clarence Darrow, Negative, v. Judge Alfred J. Talley, Positive, LEAGUE FOR PUB. DISCUSSION (1924).

173 MANDERY, *supra* note 14, at 42; Mann, *supra* note 17, at 30–32; *The Reminiscences of Anthony G. Amsterdam*, *supra* note 52, at 10, 15.

174 Mann, *supra* note 17, at 30–31.

175 Aikens brief, *supra* note 4, *passim*.

176 *Id.* at 38.

177 *Id.* at 13.

178 *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting) ("Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded

Critics commonly identify citing foreign and international sources as a new practice influenced by the idiosyncrasies of swing Justice Anthony Kennedy, who proved receptive to these sources.[179] In reality, Martha Minow has described how American judges "have long consulted and referred to [these] materials."[180] This "longstanding practice is undisputed" among scholars and was "well-forecast by one of the Federalist Papers, which asserted, 'attention to the judgment of other nations is important to every government' as a matter of foreign policy and also as a check on 'strong passion or momentary interest' within the nation."[181] In the run-up to *Aikens-Furman*, Justices were indeed accustomed to citing international standards as non-binding, persuasive authority in both majority and dissenting opinions. They sometimes reached different conclusions on the state or weight of international norms, such as in the divisive *Miranda* decision,[182] although no Justice adamantly claimed that the norms of fellow Western democracies had no place in informing constitutional interpretation.

Alongside international norms, Aristotelian principles of rhetoric have long informed legal analysis.[183] Among them stands the principle of *ethos*, namely persuasion through ethics or credibility.[184] Citing authoritative sources can bolster an attorney's arguments when tackling intricate normative questions, "because we are likely to believe those whom we trust."[185] Put otherwise, this Aristotelean principle is rooted in the logic that, "[i]f we know a person to be someone of practical wisdom, and we trust both her intellect and her moral character, we will be more likely to believe her than if she is

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foreigners, I dissent."); Foster v. Florida, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring in denial of certiorari) (stressing that "this Court's Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans"); Atkins v. Virginia, 536 U.S. 304, 322 (2002) (Rehnquist, C.J., dissenting) ("I write separately, however, to call attention to the defects in the Court's decision to place weight on foreign laws . . ."). *See also* ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 22 (2003) ("The insidious appeal of internationalism is illustrated by the fact that some justices of the Supreme Court have begun to look to foreign decisions and even to foreign legislation for guidance in interpreting the Constitution.").

179 Martha Minow, *The Controversial Status of International and Comparative Law in the United States*, 52 HARV. INT'L L.J. ONLINE 1, 4–5, 6–7, 11, 12 (2010), https://dash.harvard.edu/handle/1/10511098.

180 *Id.* at 2. *See also* Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63, 64 (2007) ("The debate over the relevance of comparative and international legal materials to constitutional interpretation is not new, but it has intensified in recent years. . . ."). *Accord* Carrie Menkel-Meadow, *Why and How to Study "Transnational" Law*, 1 U.C. IRVINE L. REV. 97, 129 n.47 (2011).

181 Minow, *supra* note 179, at 2 (quoting THE FEDERALIST NO. 63 (James Madison)).

182 *Compare* Miranda v. Arizona, 384 U.S. 436, 486 (1966) ("The experience in some other countries also suggests that the danger to law enforcement in curbs on interrogation is overplayed."), *with id.* at 521 (Harlan, J., dissenting) ("The Court in closing its general discussion invokes the practice in federal and foreign jurisdictions as lending weight to its new curbs on confessions for all the States . . . none of these jurisdictions has struck so one-sided a balance as the Court does today.").

183 *See, e.g.*, Book Note, *The Rhetoric of Aristotle*, 45 HARV. L. REV. 967 (1932) (reviewing THE RHETORIC OF ARISTOTLE (Lane Cooper trans., 1932)).

184 ARISTOTLE ON RHETORIC: A THEORY OF CIVIC DISCOURSE 15, 22, 148–56, 246 (George A. Kennedy ed. & trans., 2d ed. 2007).

185 Brett G. Scharffs, *The Character of Legal Reasoning*, 61 WASH. & LEE L. REV. 733, 755 (2004).

just a skillful and accomplished rhetorician."[186] Anthony Amsterdam himself pinpointed the relevance of Aristotelian rhetoric to lawyering.[187]

This helps us understand why Amsterdam and the LDF did not solely cite international standards in the form of historical evidence indicating a trend toward abolition in Western democracies.[188] For *ethos*, Amsterdam cited Camus and other emblematic voices demonstrating the normative shift at the heart of his theory of the case. When indicating that the United Kingdom abolished capital punishment in 1965, Amsterdam stressed that "Lord Chancellor Gardiner made the basic point of our argument [in the *Aikens-Furman* litigation]," namely: "When we abolished the punishment for treason that you should be hanged, and then cut down while still alive, and then disembowelled [sic] while still alive, and then quartered, we did not abolish that punishment because we sympathised [sic] with traitors, but because we took the view that it was a punishment no longer consistent with our self-respect."[189] Beside the United Kingdom stood Canada, another traditional U.S. ally. Canada had not yet abolished capital punishment at the time of *Aikens-Furman*—it did so in 1976—although in 1967 it had effectively abolished it except for murders of police or corrections officers.[190] Anthony Amsterdam quoted Canadian Prime Minister Lester Pearson, who had specified that protecting society from murderers was not the only relevant issue: "[W]e are also concerned—and this concern has been voiced by many speakers in this debate—with certain fundamental moral and social values in our civilization and in our society."[191] The *Aikens* brief summarized the nub of this evidence as follows: "Today the death penalty in any form is inconsistent with the self-respect of a civilized people. It is therefore prohibited by the Eighth and Fourteenth Amendments."[192]

Anthony Amsterdam's emphatic references to Albert Camus's *Reflections on the Guillotine* arose in that context. By intent or design, Camus conferred *ethos* to the *Aikens-Furman* litigation in light of his reputation as a man of integrity, a member of the resistance to Nazism, and an ardent defender of a hopeful yet pragmatic humanism with universal aspirations.[193] In addition to the United Kingdom and Canada, France is a longstanding American ally. France did not abolish capital punishment before 1981 since it was

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[186] *Id.* at 781.

[187] AMSTERDAM & BRUNER, *supra* note 98, at 119, 122, 127–29.

[188] Aikens brief, *supra* note 4, *passim*.

[189] *Id.* at 7 (quoting 268 HANSARD, PARLIAMENTARY DEBATES (5th series) (Lords, 43d Parl., 1st Sess., 1964-1965) 703 (1965)).

[190] This 1967 Canadian legislation instituted an experimental period of five years when the death penalty was essentially abolished for ordinary homicides. Aikens brief, *supra* note 4, at 33 n.62. *Accord* Stuart Ryan, *Capital Punishment in Canada*, 9 BRIT. J. CRIMINOLOGY 80, 83 (1969); CORRECTIONAL SERV. CAN., *50 Years of Human Rights Developments in Federal Corrections: Abolition of Death Penalty 1976*, (last updated Mar. 5, 2015), https://www.csc-scc.gc.ca/text/pblct/rht-drt/08-eng.shtml.

[191] Aikens brief, *supra* note 4, at 33 n.62 (quoting CAN. H. OF COMMONS, IV DEB., 27th Parl., 2d Sess. (16 Eliz. II), 4370 (Nov. 16, 1967)).

[192] Aikens brief, *supra* note 4, at 7.

[193] *See generally* OLIVIER TODD, ALBERT CAMUS: A LIFE (Benjamin Ivry trans., 1997).

a laggard in Western Europe in this historical process.[194] In this regard, Camus's views did not fundamentally represent France in the briefs, but supported the "evolving standards of decency" argument under the Eighth Amendment.[195]

Amsterdam was not alone in citing Camus. Arthur J. Goldberg and Alan Dershowitz quoted Camus in the first paragraph of a major 1970 article on capital punishment.[196] The *Harvard Law Review*'s editorial article on the *Furman* decision quoted Camus, too, even though it overlooked how Amsterdam and the LDF had heavily drawn upon Camus in their briefs.[197] Given his popularity in America,[198] Camus's call for abolition resonated in the wider public debate, as epitomized by Hollywood's release of an Oscar-winning anti-death-penalty film beginning with Camus's endorsement.[199] In a 1972 article, Daniel Polsby cited *Reflections on the Guillotine* and contrasted it to the average American's thoughts on violent crime in the wake of *Furman*: "While the *haut monde* read Camus and refined their thoughts on the sanctity of life, the machinist's wife read the newspapers and thought about how the world was going to hell."[200]

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194 LE NAOUR, *supra* note 164, *passim*.

195 Aikens brief, *supra* note 4, 15, 18 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

196 "[A]t stake is our faith in and commitment to national self-improvement, as we decide whether to take what Camus called 'the great civilizing step' of abolishing the death penalty." Goldberg & Dershowitz, *supra* note 105, at 1773 (quoting CAMUS, REFLECTIONS ON THE GUILLOTINE, *supra* note 11, at 232).

197 *The Supreme Court, 1971 Term—The Death Penalty*, 86 HARV. L. REV. 76, 83–84 (1972) (quoting ALBERT CAMUS, REFLECTIONS ON THE GUILLOTINE, *in* RESISTANCE, REBELLION, AND DEATH 131, 151–52 (Modern Library ed., Justin O'Brien trans., 1960)). The law review cited a distinct edition of the book whose pages correspond to CAMUS, REFLECTIONS ON THE GUILLOTINE, *supra* note 11, at 199.

198 *See generally* TODD, *supra* note 193, at ch. 30 (describing Camus's three-month visit to America in 1946); Webster Schott, *For Camus Absurdity Began It All*, LIFE, Nov. 15, 1968, at 20 ("Camus looked directly into the darkness and saw sun—the human spirit . . . . We revere the magnificent sensitivity of the man, respect his intelligence and humility, discover in his language the lost voice of our emotions.").

199 Camus's endorsement read: "The day will come when such documents will seem to us to refer to prehistoric times, and we shall consider them as unbelievable that in earlier centuries witches were burned or thieves had their right hands cut off. Such a period of true civilization is still in the future, but this film has the honor of at least contributing to its coming." I WANT TO LIVE! (United Artists 1958). The movie recounted the life and execution of Barbara Graham in California. An alleged gangster who insisted on her innocence in a prominent murder case, Graham had faced a rough life. Garnering popular acclaim, the film earned Susan Hayward the Oscar for best actress, as well as five separate nominations. ACAD. OF MOTION PICTURE ARTS AND SCI., *I Want to Live!*, http://awardsdatabase.oscars.org (last visited July 30, 2020). *See* Robert LaGuardia & Gene Arceri, *The Happy Life of a Housewife and Oscar Winner*, CHI. TRIB., June 26, 1985, at 1 ("Camus thought the whole world should see the movie and that future generations would view it as a document of prehistoric cruelty. Eleanor Roosevelt publicly praised it. *Life* magazine devoted an article to the film."); ENCYCLOPAEDIA BRITANNICA, *Susan Hayward*, https://www.britannica.com/biography/Susan-Hayward (last updated June 26, 2020) (Susan Hayward "was a popular star during the 1940s and '50s known for playing courageous women fighting to overcome adversity").

200 Polsby, *supra* note 99, at 3 (citing CAMUS, REFLECTIONS ON THE GUILLOTINE, *supra* note 11). Walter Berns likewise cited Camus at the beginning of a 1979 pro-death-penalty book as he described abolitionists: "It must have seemed to them that every decent and thoughtful person supported their cause—Albert Camus, for example . . . ." WALTER BERNS, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY 5 (1979). *See also* ANDREW HAMMEL, ENDING THE DEATH PENALTY: THE EUROPEAN EXPERIENCE IN GLOBAL PERSPECTIVE 133–34, 164–67, 199 (2010) (discussing the historical influence of Camus in the European and American death-penalty debates); Walter E. Oberer, *Does*

The Law and Literature academic movement has used literary works as lenses to interpret the law. By extending methods of literary criticism outside the literary sphere, the multifaceted movement aspires to illuminate what the law means, how it is socially constructed, and what it should be.[201] The *Aikens* brief offers another window into the interrelationship between law and literature. The brief exemplifies how a skillful litigator can use a literary figure like Albert Camus for *ethos* and a literary essay like *Reflections on the Guillotine* to support a legal argument.[202]

However, Camus did not win the 1957 Nobel Prize in Literature or become famous by writing *Reflections on the Guillotine*. If lawyers or judges cite this abolitionist essay, that is because it gained attention due to prior writings that made Camus an influential voice, from *The Stranger* to *The Plague*. In other words, Anthony Amsterdam and other actors in the historical events surrounding *Aikens-Furman* would not have cited an unknown French writer's thoughts on the death penalty. That would have hardly offered any *ethos* to their cause. Before closely examining the *Aikens* brief, it is thus worth briefly discussing the historical context that gave salience to Camus's writing, including how the novels that made him famous discussed the death penalty in ways that have garnered limited attention.

Reflections on the Guillotine is far from the only publication where Camus focused on the morality of killing, a recurrent theme in his writing. Killing oneself is a central issue in *The Myth of Sisyphus*, a philosophical essay where Camus offers reasons to live and not commit suicide in a world that is all too often absurd and disheartening.[203] Killing political opponents is a major question in other works like the play *The Just Assassins*[204] or the essays *The Rebel*[205] and *Algerian Chronicles*.[206] In these writings, Camus denounced callous violence by both government officials and revolutionaries. Death wrought by nature, an indifferent killer of innocents, permeates *The*

Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?, 39 TEX. L. REV. 545, 545 (1961) (citing Camus's essay for the proposition that "[t]he season is presently open upon death as a penal sanction of a civilized society").

201 GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW ix, 3, 5, 18, 19 (2000). Law and Literature is not a monolithic movement, as it has flourished into diverse currents in recent decades. *See generally* Elizabeth S. Anker & Bernadette Meyler, *Introduction*, *in* NEW DIRECTIONS IN LAW AND LITERATURE 1 (Elizabeth S. Anker & Bernadette Meyler eds., 2017); Bernadette Meyler, *Law, Literature, and History: The Love Triangle*, 5 U.C. IRVINE L. REV. 365, 368–77 (2015).

202 Recall Amsterdam's research memo identifying "humanistic literature" as a relevant source to prepare the *Aikens-Furman* briefs. MELTSNER, CRUEL AND UNUSUAL, *supra* note 52, at 249–50 (quoting Memorandum from Anthony Amsterdam, July 23, 1971). Historically, the humanities have been intertwined to a greater or lesser extent in the life of the law, including American legal education. *See generally* James Boyd White, *The Cultural Background of* The Legal Imagination, *in* TEACHING LAW AND LITERATURE 29 (Austin Sarat, Cathrine O. Frank & Matthew Anderson eds., 2011).

203 ALBERT CAMUS, THE MYTH OF SISYPHUS (Justin O'Brien trans., 2000) (1st French ed. 1942).

204 ALBERT CAMUS, THE JUST ASSASSINS, *in* CALIGULA AND THREE OTHER PLAYS 1 (Stuart Gilbert trans., 1966). The play made its debut in Paris in 1945. *Id.* at 2.

205 ALBERT CAMUS, THE REBEL (Anthony Bower trans., 1991) (1st French ed. 1951).

206 ALBERT CAMUS, ALGERIAN CHRONICLES (Arthur Goldhammer trans., 2013) (1st French ed. 1958).

Plague.[207] Last but not least, Camus casts the death penalty in a bleak light in his two most prominent novels, *The Stranger*[208] and, again, *The Plague*.[209]

When Meursault, the antihero of *The Stranger*, learns that he will be executed after a trial before a little crowd, including his lover Marie, his reaction to the jury's verdict evokes a cold absurdity:

> I heard a muffled voice reading something in the courtroom. When the bell rang again, when the door to the dock opened, what rose to meet me was the silence in the courtroom, silence and the strange feeling I had when I noticed that the young reporter had turned his eyes away. I didn't look in Marie's direction. I didn't have time to, because the presiding judge told me in bizarre language that I was to have my head cut off in a public square in the name of the French people . . . That's when they took me away.[210]

The reaction to the death sentence embodies Meursault's distinctively distant and dispassionate narration. Once Meursault is on death row, Camus himself appears to stand in for him. Indeed, *The Stranger*'s narrator describes an account that reappears almost verbatim at the very beginning of *Reflections on the Guillotine*, Camus's subsequent essay cited in the *Aikens*, *Furman*, and *Boykin* briefs. The father of Meursault/Camus was keen on observing a murderer's public execution. He later came home and threw up in disgust after witnessing the state killing.[211] Amazingly, a near verbatim account of a perturbed father returning from an execution reappears for a third time in *The First Man*, Camus's unfinished semi-autobiographical novel.[212] Nearing his final moments on death row, Meursault summarized Camus's conviction: "How had I not seen that there was nothing more important than an execution, and that when you come right down to it, it was the only thing a man could truly be interested in?"[213]

Jean Tarrou, one of the main characters in *The Plague*, offers a more substantial critique of the death penalty that spans several pages in Camus's penetrating novel.[214] Tarrou describes his coming of age as the realization that his father was a prosecutor who regularly sought capital punishment. The father had invited Tarrou to watch him argue in court, yet Tarrou was utterly dismayed by what he saw.[215] The accused, doubtless guilty, "though it

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[207] ALBERT CAMUS, THE PLAGUE (Robin Buss trans., 2002) (1st French ed. 1947).

[208] ALBERT CAMUS, THE STRANGER (Matthew Ward trans., 1988) (1st French ed. 1942).

[209] CAMUS, THE PLAGUE, *supra* note 207.

[210] CAMUS, THE STRANGER, *supra* note 208, at 106–07. *See also* DENIS SALAS, ALBERT CAMUS: LA JUSTE RÉVOLTE 27–28 (2015) (suggesting that Meursault's trial represented a traditional society that had lost its values and sought to restore order by inflicting death).

[211] CAMUS, REFLECTIONS ON THE GUILLOTINE, *supra* note 11, at 175–76; CAMUS, THE STRANGER, *supra* note 208, at 110.

[212] ALBERT CAMUS, THE FIRST MAN 81–82 (David Hapgood trans., 1996) (1st French ed. 1994).

[213] CAMUS, THE STRANGER, *supra* note 208, at 110.

[214] *See generally* Mugambi Jouet, *Reading Camus in Time of Plague and Polarization*, BOS. REV. (Dec. 7, 2020), http://bostonreview.net/arts-society/mugambi-jouet-reading-camus-time-plague-and-polarization (analyzing *The Plague*'s themes and characters).

[215] CAMUS, THE PLAGUE, *supra* note 207, at 190.

doesn't matter of what," was "sincerely terrified by what he had done and what they were going to do to him." Unfazed, Tarrou's father commanded the jury: "This head must fall."[216] In this passage, Camus is less focused on condemning executioners than on depicting what the death penalty does to people and society. Tarrou accordingly does not demonize his father and remembers him as fundamentally "good-natured," "not a bad man," even "affectionate."[217] Nonetheless, Tarrou does not regret a life-changing decision: in his late teens he finally left the family home in protest and disavowed his father because he used his power as a prosecutor to execute people. The father, who had hoped to nudge his son toward a prosecutorial career, withheld "genuine tears" upon his departure.[218] Tarrou stands out in the novel as a heroic altruist, who volunteers to help plague victims at enormous personal risk. He ultimately dies from exposure to the virus.[219] His opposition to the death penalty had inspired his quest for justice after he fled his family household: "I thought the society in which I lived rested on the death penalty and that, if I fought against it, I should be fighting against murder."[220] After his coming of age, Tarrou joined what appears to be a revolutionary movement. It ended up executing people—a decision that he initially tried to rationalize but came to bitterly regret. Tarrou rejected his revolutionary allies' claims that they were killing for the greater good: "[A]s far as I was concerned, I would refuse ever to concede a single argument, a single one, to this disgusting butchery."[221]

Camus himself described the plague in his novel, which was partly written during World War Two, as a metaphor for "the European resistance to Nazism" even though the novel should "be read on several angles."[222] In the lengthy passage where Tarrou describes his coming of age, Camus refers several times to the death penalty as a "plague."[223] Here, the death penalty is a microcosm of state killing. In its most extreme form, this process can lead to genocide, purges, and other mass slaughter. In its more ordinary form, state killing consists of the death penalty. To Camus, executions are a facet of the plague because they represent a process by which prisoners can be dehumanized to the point where they are killed in cold blood, in the name of some greater good.

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216 *Id.* at 191.

217 *Id.* at 189–90.

218 *Id.* at 190, 192.

219 *Id.* at 219–23.

220 CAMUS, THE PLAGUE, *supra* note 207, at 192–93.

221 *Id.* at 194.

222 *Letter from Albert Camus to Roland Barthes (Jan. 11, 1955)*, *in* ALBERT CAMUS, THÉÂTRE, RÉCITS, NOUVELLES 1965, 1965 (Roger Quilliot ed., La Pléiade 1962) (my translation).

223 Tarrou begins the story about his pro-death-penalty-prosecutor father by stating "I was already suffering from the plague long before I knew this town and epidemic." CAMUS, THE PLAGUE, *supra* note 207, at 189. Additional references to the "plague" reappear as Tarrou ties the death penalty to his life path. *Id.* at 192, 193, 194, 195.

In addition to his resistance to the Nazi occupation of France,[224] Camus's moral opposition to the death penalty gained credibility due to his willingness to vigorously condemn senseless political violence on all sides. Camus adamantly defended this stance in *The Rebel*, a 1951 essay in political philosophy.[225] Its thesis caused a much-publicized rift with Jean-Paul Sartre, Francis Jeanson, and other far-left intellectuals. Shunning Camus, they believed that his denunciation of political violence by communist or anti-colonial movements reflected a cowardly bourgeois morality.[226] Camus had briefly been a member of the French Communist Party in his early twenties before becoming a voice of the non-communist, if not anti-communist, left.[227] Camus was not categorically opposed to violence, yet he was profoundly wary of ideologies or mindsets that rationalize unnecessarily killing people. This was not always the case of the radical Sartre, then an extraordinary literary celebrity on the global stage.[228] Camus's writings sometimes suggested a belief that his more nuanced conception of humanism and humanity was imperiled.[229] While *The Plague*'s publication in 1947 preceded the end of his tumultuous friendship with Sartre, the character of Tarrou made a prescient declaration evoking Camus's sensibilities: "[T]he moment I rejected killing, I condemned myself to a definitive exile. Other men will make history. I know too that I clearly cannot judge those others. There is a quality which is lacking in me to make a reasonable murderer. So it is not a matter of superiority."[230]

Unlike Tarrou, a literary figure who never gained the attention of a Meursault, Camus did make history. In 1957, he received the Nobel Prize in Literature. His acceptance speech stressed his earnest opposition to political violence, his skepticism of utopian ideologies, and his life's call for a more humane humanity.[231] Only three years later, he died in a car accident at forty-six years old. Camus would eventually become a character in a lost chapter of the most significant capital case in American history: *Furman v. Georgia*.[232]

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224 *See generally* TODD, *supra* note 193, at ch. 26, 27.

225 CAMUS, THE REBEL, *supra* note 205.

226 SARAH BAKEWELL, AT THE EXISTENTIALIST CAFÉ 258–61 (2016); MARIE-PIERRE ULLOA, FRANCIS JEANSON: A DISSIDENT INTELLECTUAL FROM THE FRENCH RESISTANCE TO THE ALGERIAN WAR 104–26 (Jane Marie Todd trans., 2007).

227 *See generally Biographie in* CAMUS, THÉÂTRE, RÉCITS, NOUVELLES *supra* note 222, at xxviii, xxix.

228 *See generally* ANNIE COHEN-SOLAL, SARTRE: A LIFE (Anna Cangoni trans., 2005); MICHEL WINOCK, LE SIÈCLE DES INTELLECTUELS (2016).

229 *See generally* Jouet, *Reading Camus in Time of Plague and Polarization*, *supra* note 214.

230 CAMUS, THE PLAGUE, *supra* note 207, at 195. Granted, Tarrou is a fictional character, not Camus himself, although Camus tended to weave in personal thoughts and experiences in certain characters. Besides the aforesaid parallel between the father of Camus and the father of *The Stranger*'s Meursault observing a frightful execution, consider the following. Two noble characters in *The Plague*, Tarrou and Dr. Bernard Rieux, had mothers who stood out for their silence. CAMUS, THE PLAGUE, *supra* note 207, at 93–94, 158, 189, 213. Camus had a profound connection to his mother, who was remarkably silent and laconic. TODD, *supra* note 193, at 7.

231 Albert Camus, Banquet Speech, Nobel Prize in Literature, Stockholm (Dec. 10, 1957), https://www.nobelprize.org/prizes/literature/1957/camus/speech/ (last visited Feb. 6, 2020).

232 *See infra* Section IV.

Reflections on the Guillotine, a key source in the *Furman* litigation, is where Camus methodically made his call for abolition. Years before his 1957 essay, Camus had begun dissecting the legal procedures and principles surrounding this practice. In *The Stranger*, the narrator shrewdly observed that "the condemned man was forced into a kind of moral collaboration" with execution procedures since resistance would lead to the agony of a botching.[233] "It was in his interest that everything go off without a hitch."[234] If the machinery of state-killing was cleverly thought out, the same could not be said about the very decision to execute a prisoner. A multitude of details "seemed to detract from the seriousness of the decision," Camus wrote, from its resounding arbitrariness to "the fact that it had been handed down in the name of some vague notion called the French (or German, or Chinese) people."[235]

Naturally, it is not my contention that Anthony Amsterdam and fellow LDF counsel spent time reading Camusian novels to prepare their anti-death-penalty litigation in the 1970s. Still, when Camus published *Reflections on the Guillotine* he caught Amsterdam's eye. It was an abolitionist tour de force. Its logic and rhetoric powerfully intertwined normative, utilitarian, administrative, and procedural objections to capital punishment. Camus repeatedly pinpointed the contradictions and hypocrisy of a state that kills in the name of morality—and that is so ashamed of its act that it hides executions from the public.[236] In the midst of the Cold War, the epoch in question, few thinkers possessed Camus's stature and ability to speak credibly about ethics to audiences of diverse persuasions.[237] Amsterdam, the most influential American abolitionist, ultimately brought these arguments to the attention of the U.S. Supreme Court.

IV. THE LOST CHAPTER: THE *AIKENS* BRIEF, CAMUS, AND THE HUMANISTIC ARGUMENT AGAINST CAPITAL PUNISHMENT

The references to Camus in the *Aikens-Furman* litigation have received no scholarly attention.[238] These references call into question the standard narrative that this litigation was fundamentally about administrative or procedural problems with capital punishment,[239] as we will now see.

In the *Aikens* brief, Anthony Amsterdam argues that the death penalty is unconstitutional because it violates "the evolving standards of decency that

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233 CAMUS, THE STRANGER, *supra* note 208, at 111.

234 *Id.*

235 *Id.* at 109.

236 *See generally* Aikens brief, *supra* note 4, at 44 (quoting CAMUS, REFLECTIONS ON THE GUILLOTINE, *supra* note 11, at 186–88).

237 *See generally supra* notes 198, 224 and accompanying text.

238 Parts of this section draw upon segments of the author's unpublished Ph.D. dissertation: *Les Droits de l'homme en France et aux États-Unis: La Dialectique des convergences et des divergences* (June 19, 2019) (on file with the law library at the Université Paris 1 Panthéon-Sorbonne).

239 *See supra* Section I.

mark the progress of a maturing society," a standard that the Supreme Court set out in *Trop v. Dulles* to interpret "cruel and unusual punishment" under the Eighth Amendment.[240] Amsterdam contends that "the extreme rarity of actual infliction of the death penalty in the United States and the world today" shows it is no longer consistent with "the basic standards of decency of contemporary society."[241] The brief summarizes its theory of the case as follows: "Worldwide and national abandonment of the use of capital punishment during this century has accelerated dramatically, and has now become nearly total. In historical context, this development marks an overwhelming repudiation of the death penalty as an atavistic barbarism."[242] Amsterdam ties this claim to the decline and halt of executions in the 1960s:[243] "The penalty remains on the statute books only to be—and because it is—rarely and unusually inflicted . . . It is an extreme and mindless act of savagery, practiced upon an outcast few. This is exactly the evil against which the Eighth Amendment stands."[244]

While this is also the gist of the argument in the *Furman* brief,[245] the *Aikens* brief presents a more vigorous challenge to the inherent cruelty of capital punishment. Again, the *Furman* brief directs the Court to the *Aikens* brief on this matter: "The Brief for Petitioner in *Aikens v. California* fully develops the reasons why we believe that the death penalty is a cruel and unusual punishment . . . ."[246] Nevertheless, research on this critical chapter of death penalty history has largely overlooked the *Aikens* brief.[247] This is all the more striking given that the *Aikens* brief differs from the *Furman* brief in key respects. At the outset, the *Aikens* brief is more emphatic in arguing that the death penalty is cruel in all cases and under all circumstances. It refers to the "horror" of the death penalty four times,[248] to its "barbarism" three times,[249] and to how the framers intended to ban "barbaric" practices four times.[250] By contrast, the *Furman* brief makes a single reference to "barbarity" and does not use the term "horror."[251] Responding to these claims, Ronald M. George, who argued *Aikens* on behalf of California, channeled precedent asserting that "cruelty implies something barbarous more than the

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[240] Aikens brief, *supra* note 4, at 15, 18 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)). In *Trop*, the Supreme Court held that stripping a deserter of his U.S. citizenship was cruel and unusual. 356 U.S. at 86.

[241] Aikens brief, *supra* note 4, at 6.

[242] *Id.*

[243] *See supra* note 42 and accompanying text.

[244] Aikens brief, *supra* note 4, at 6.

[245] Furman brief, *supra* note 6, at 11–12.

[246] *Id.* at 11 (footnote omitted).

[247] *See supra* Section I.

[248] Aikens brief, *supra* note 4, at 22, 26, 46, 48.

[249] *Id.* at 6 ("barbarism"), 33 (same), 44 ("barbarity").

[250] *Id.* at 13 n.24 ("barbarous"), 21 n.36 ("barbaric," "barbarous").

[251] Furman brief, *supra* note 6, at 19.

extinguishment of life," and that an execution could be conducted "humanely."[252]

Even though Amsterdam specified that "humanistic" reasons for abolition precede "practical" ones,[253] he drew heavily on Albert Camus to demonstrate that both are inextricably intertwined. The *Aikens* brief especially refers to sections of *Reflections on the Guillotine* where Camus denounces the atrocity of the death penalty while simultaneously questioning its deterrent value. Amsterdam stresses that executions are no longer public because "the barbarity of capital punishment" would appall the public if it could witness them.[254] Amsterdam then quotes Camus for the proposition that people who support executions in the abstract would be shocked if they observed them: "The man who enjoys his coffee while reading that justice has been done would spit it out at the least detail."[255] Amsterdam then provides a lengthy passage of Camus's essay spanning over 300 words, including the following excerpt: "As an example and for the sake of security, it would be wiser, instead of hiding the execution, to hold up the severed head in front of all who are shaving in the morning. Nothing of the sort happens."[256] Rather, the state hides executions because "it doesn't believe in the exemplary value of the penalty, except by tradition and because it has never bothered to think about the matter. . . A law is applied without being thought out and the condemned die in the name of a theory in which the executioners do not believe."[257] Camus was not the first thinker to make this argument, which had been a recurrent theme in the debate over public executions in France.[258] In 1829, Victor Hugo had notably pointed out this contradiction: "[E]ither the example offered by the death penalty is moral or it is immoral. If it is moral, why do you hide it? If it is immoral, why do you do it?"[259] Justice Curtis Bok of the Pennsylvania Supreme Court made a comparable observation: "Why is the State so ashamed of its process that it must kill at dead of night in an isolated place. . . ?"[260] Amsterdam does not refer to Hugo but briefly cites Bok, a fellow American, on this point.[261] Amsterdam ultimately places the most weight on Camus's voice to highlight contradictions in the administration of the death penalty in the United States.

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[252] Oral Argument at 37:05, Aikens v. California, 406 U.S. 813 (1972) (No. 68-5027), https://www.oyez.org/cases/1971/68-5027. *See* In re Kemmler, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution. It implies there something inhuman and barbarous—something more than the mere extinguishment of life.").

[253] Aikens brief, *supra* note 4, at 31.

[254] *Id.* at 44.

[255] *Id.* (quoting CAMUS, REFLECTIONS ON THE GUILLOTINE, *supra* note 11, at 187).

[256] *Id.* (quoting CAMUS, REFLECTIONS ON THE GUILLOTINE, *supra* note 11, at 186–88).

[257] *Id.* (ellipsis in brief).

[258] LE NAOUR, *supra* note 164, at 115, 151, 155–57, 160–62, 181–203.

[259] *Id.* at 115 (quoting VICTOR HUGO, ÉCRITS SUR LA PEINE DE MORT 72–74 (1992)) (my translation).

[260] CURTIS BOK, STAR WORMWOOD 197 (1959).

[261] Aikens brief, *supra* note 4, at 46 (quoting BOK, *supra* note 260, at 197).

Amsterdam additionally quotes a passage of *Reflections on the Guillotine* where Camus describes how, back in the days when executions occurred in public, they could not only disgust witnesses but also encourage "sadistic instincts."[262] Indeed, historical evidence indicates that, until French authorities hid executions behind prison walls in 1939, public executions had long galvanized unruly, curious crowds eager to see people put to death.[263] So were certain official public executions in the United States.[264] Likewise, public lynchings of black people in the American South were large festive events.[265] Although Amsterdam does not delve into this history, his brief relies on Camus to suggest that onlookers who would not be disgusted by public executions would be there because they enjoyed this grisly spectacle.

The brief's footnotes are revealing as well. Following a description of the death penalty in *The Idiot* by Fyodor Dostoevsky,[266] Amsterdam quotes another lengthy passage where Camus condemned capital punishment as a sinister vengeance exceeding *lex talionis*, the principle of an eye for an eye. Camus had co-opted an argument of death penalty proponents—premeditated killings are the worst:

> Let us admit that it is just and necessary to compensate for the murder of the victim by the death of the murderer. But beheading is not simply death. It is just as different, in essence, from the privation of life, as a concentration camp is from prison. *It is a murder*, to be sure, and one that arithmetically pays for the murder committed. But it adds to death a rule, a public premeditation known to the future victim, an organization, in short, which is itself a source of moral sufferings more terrible than death. Hence there is no equivalence. Many laws consider a premeditated crime more serious than a crime of pure violence. But *what then is capital punishment but the most premeditated of murders*, to which no criminal's deed, however calculated it may be, can be compared? For there to be an equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a *monster* is not encountered in private life.[267]

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[262] *Id.* at 44 (quoting CAMUS, REFLECTIONS ON THE GUILLOTINE, *supra* note 11, at 186–88).

[263] Before France finally abolished public executions in 1939, a social debate about the propriety of such events had persisted for at least a century. LE NAOUR, *supra* note 164, at 115, 151, 155–57, 160–62, 190–99, 244, 254–55.

[264] BANNER, *supra* note 3, at 27, 144–61; STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 12, 24–25.

[265] STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 12, 25–26.

[266] The brief describes how Dostoevsky, "who was himself condemned to die and reprieved only shortly before his scheduled execution," found "the worst part" of a death sentence knowing exactly when one would be killed. Aikens brief, *supra* note 4, at 57 n.114 (quoting FYODOR DOSTOEVSKY, THE IDIOT 20 (Constance Garnett trans., 1935)).

[267] Aikens brief, *supra* note 4, at 57 n.115 (quoting CAMUS, REFLECTIONS ON THE GUILLOTINE, *supra* note 11, at 199) (emphasis added).

In sum, the death penalty is legalized, premeditated murder. And any execution is intrinsically cruel.

Although Camus stands out among the literary and philosophical sources in the *Aikens* brief, its analysis rests upon precedent and empirical evidence. In particular, the brief refers to *Trop v. Dulles* over twenty times, including its mandate that punishments comport with the "principle of civilized treatment" and "the dignity of man."[268] Moreover, the brief documents the sharp decline in executions in the United States to bolster its theory that the death penalty is inconsistent with contemporary standards of decency.[269] However, the references to Camus reveal the normative dimension of this test case against the death penalty—elements that scholars have overlooked or minimized. The brief explicitly states that it draws on Camus's analysis for the proposition that the normative aspects of capital punishment are unavoidable and have been at the heart of abolitionism for generations.[270] "Camus' forthright analysis of all that this implies is unavoidable," Amsterdam urged the Justices.[271]

But what about race? Given its magnitude in the standard *Furman* narrative, one would think this issue would be front and center in the *Aikens* and *Furman* briefs. It was not. The *Aikens* brief's first explicit discussion of racial discrimination and bias does not appear before its fifty-first page, where it states that African Americans represent a disproportionate share of people on death row.[272]

The modern observer may be puzzled. After all, these were test cases brought by the NAACP LDF, the leading organization for the protection of African Americans. The standard narrative would have us incorrectly think that the test case was much more about racial discrimination than about the inherent cruelty of the death penalty.[273]

Why did race not play a more central role in this historic legal challenge? It is not because Anthony Amsterdam, who is Jewish,[274] was unconcerned about the issue. Race had drawn him to his life's work as an anti-death-penalty lawyer.[275] Once the *Aikens* brief explicitly addresses the issue at page 51,

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[268] *Id.* at 31 (quoting Trop v. Dulles, 356 U.S. 86, 99, 100 (1958) (plurality opinion)).

[269] *Id.* at 36–38. *See also supra* note 42 and accompanying text.

[270] *See also supra* note 55 and accompanying text.

[271] Aikens brief, *supra* note 4, at 46.

[272] *Id.* at 51–52. This is the fifty-first page of the electronic version of the brief on the Westlaw database.

[273] Overall, the Court's jurisprudence has "paid surprisingly scant attention . . . to the death penalty's long and ignoble history of race-based use." STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 3. *See also id.* ch. 3 ("The Invisibility of Race in the Constitutional Revolution").

[274] MANDERY, *supra* note 14, at 41.

[275] *Id.* at 44; OSHINSKY, *supra* note 18, at 43. Amsterdam's publications have also recurrently addressed racial issues. *See* Antony G. Amsterdam, *Race and the Death Penalty Before and After* McCleskey, 39 COLUM. HUM. RTS. L. REV. 34 (2007) (analyzing the lengthy history of racial discrimination in capital sentencing); Anthony G. Amsterdam, *Equality as an Enforceable Right: Problems and Prospects Ahead*, 135 PROC. AM. PHIL. SOC'Y 13 (1991) (discussing civil rights laws regarding race, inequality, and discrimination); Anthony G. Amsterdam, *Commentary: Race and the Death Penalty*, 7 CRIM. JUST. ETHICS 83 (1988) (discussing *McCleskey v. Kemp* (1987) and the Supreme Court's unwillingness to recognize racial discrimination in capital sentencing).

Amsterdam does not waver: "Racial discrimination is strongly suggested by the national execution figures."[276] But he explains that states can use subterfuge to hide discrimination and "not get caught," thereby suggesting a strategic reason why race is not a central issue in his brief.[277]

Most importantly, recall that Amsterdam and the LDF had previously presented an unsuccessful challenge to racial disparities in death sentences for rape in *Maxwell v. Bishop*, partly by drawing on data from the criminologist Marvin Wolfgang.[278] The available data on race, murder, and capital sentences consequently seemed unlikely to persuade Justices in *Aikens-Furman*. Amsterdam explicitly acknowledged this reality: "[A]n irrefutable statistical showing that a particular State has violated the Equal Protection of the Laws by consistent racial inequality in the administration of the death penalty is difficult to establish."[279] At the *Aikens* oral arguments, Justice William Douglas asked Amsterdam about the racial and social profile of persons on death row. The answer is revealing: "There is nothing in this record nor indeed in the record of any of the cases before the court which discloses that . . . There are some published materials such as the racial statistics, which I think are judicially noticeable but there is nothing in the record, Mr. Justice Douglas, on that."[280]

In the subsequent *Furman* arguments, again on the same day as those in *Aikens*, Amsterdam added that foreign countries likewise typically reserve the death penalty for minorities and the underprivileged, such as "those predominantly poor, black, personally ugly, and socially unacceptable."[281] The issue resurfaced in Amsterdam's rebuttal in the *Furman* oral arguments. Amsterdam reaffirmed the briefs' point tying evolving standards of decency to selective application "depending largely on the color of the defendant and in the ugliness of his person."[282] But he stressed that the primary claim was not about discrimination: "And our point, I repeat again, with regard to race . . . or poverty is not discrimination, we have not proved it. On these records, it could not be."[283]

Nevertheless, Amsterdam strategically intertwined the problems of racial discrimination, arbitrariness, and capriciousness with his core "humanistic" argument.[284] "The real danger concerning cruel and *inhuman* laws is that they will be enacted in a form such that they can be applied sparsely and spottily

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[276] Aikens brief, *supra* note 4, at 51–52.

[277] *Id.* at 53.

[278] MANDERY, *supra* note 14, at 38–39, 45 (citing Maxwell v. Bishop, 398 U.S. 262 (1970); Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968)); ZIMRING & HAWKINS, *supra* note 2, at 34–35.

[279] Aikens brief, *supra* note 4, at 53.

[280] Oral Argument at 11:49, Aikens v. California, 406 U.S. 813 (1972) (No. 68-5027), https://www.oyez.org/cases/1971/68-5027.

[281] Oral Argument at 18:30, Furman v. Georgia, 408 U.S. 238 (1972) (No. 71-5003), https://www.oyez.org/cases/1971/69-5030.

[282] *Id.* at 48:10.

[283] *Id.* at 48:48.

[284] Aikens brief, *supra* note 4, at 31.

to unhappy minorities," the *Aikens* brief explains. "[S]ociety can readily bear to see them suffer torments which would not for a moment be accepted as penalties of general application to the populace."[285] In Amsterdam's words, "[h]erein is found the difference between the judgment which the legislator makes, responding *politically* to public conscience, and the judgment which a court must make under the obligation that the Eighth Amendment imposes upon it to respond *rationally* to public conscience."[286] Put otherwise, Amsterdam suggested that the public tolerates the repugnant death penalty partly because, in practice, it only entails sporadically executing a small number of blacks and other underprivileged people.[287] He reemphasized this point in his oral arguments, such as by stating: "California counts Chicanos as white [when tallying its death-row population], something which for one who lives in California, I find rather strange in terms of the question who bears the brunt of the penalty."[288]

Statistical data on the application of modern death-penalty legislation would later conclusively establish that Amsterdam was correct about pervasive racial bias.[289] Psychological research has equally confirmed his point that the public is likelier to support or, at least, tolerate the death penalty and other harsh punishments if it cannot identify with prisoners, such as by stereotyping them as black criminals.[290]

When these matters were before the Supreme Court in 1972, the *Aikens* brief intertwined its sub-points about discrimination, arbitrariness, and utilitarianism with Camus's thesis in *Reflections on the Guillotine*: the government hides its rare executions because it is ashamed of their cruelty, confirming they lack deterrent value. The death penalty is not merely cruel and inhumane. It serves no purpose—except to inflict this very cruelty, to dehumanize downtrodden members of society. [291]

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[285] *Id.* at 21 (emphasis added).

[286] *Id.* at 22 (emphasis in original).

[287] In a 2007 article, Amsterdam recounted this strategy: "Evidence of caste discrimination and capricious inequality played a significant part in [the *Aikens-Furman*] argument, the point being that the death penalty would not enjoy even the limited acceptance that it has if it were not visited almost exclusively upon poor and powerless pariahs." Amsterdam, *Race and the Death Penalty Before and After* McCleskey, *supra* note 275, at 41.

[288] Oral Argument at 20:50, Furman v. Georgia, 408 U.S. 238 (1972) (No. 71-5003), https://www.oyez.org/cases/1971/69-5030.

[289] STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 110–11; John J. Donohue, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?*, 11 J. EMPIRICAL LEGAL STUDIES 637 (2014). *See also* Glossip v. Gross, 576 U.S. 863, 917–18 (2015) (Breyer, J., dissenting) (discussing studies on racial bias); Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, *supra* note 106, at 283–93 (same).

[290] *See, e.g.*, Rebecca Hetey & Jennifer Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCHOL. SCI. 1949 (2014); Jennifer Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCH. SCI. 383 (2006).

[291] Aikens brief, *supra* note 4, at 43–49.

Given "contemporary standards of decency," Amsterdam charged that Americans would take offense at the execution of numerous prisoners, whereas they tolerate killing a small minority that is discriminatorily and arbitrarily selected among the guilty.[292] He theorized that U.S. public opinion would have been "profoundly and fundamentally revolted" if 184 persons were executed in 1971, the year he filed the *Aikens* brief. Amsterdam picked that figure because it would have been the highest number of annual executions since the 1930s, as well as roughly the total number of executions in the 1960s.[293] In reality, it is unlikely that a surge in executions would have revolted public opinion as much as Amsterdam claimed. In 1999, 98 executions occurred in the United States—the highest annual number in the post-*Furman* era to this day—and polls continued to show significant support for the death penalty.[294] While public support has declined since then,[295] just like the annual number of executions, which had dropped to 11 in 2021,[296] it is not established that this trend is due to popular repugnance with the surge in executions at the end of the twentieth century. Even though this trend preoccupied certain Americans, it did not cause the widespread indignation that Amsterdam evoked when contending that the public simply could not stomach that many executions.[297]

The *Aikens* brief has a historicist tone since Amsterdam affirmed that America is destined to join the abolitionist camp: "Like flogging and banishment, capital punishment is condemned by history and will sooner or later be condemned by this Court under the Constitution. The question is whether that condemnation should come sooner or later." Amsterdam was convinced that a normative evolution "is inexorably rendering the death penalty intolerable," turning it into a "doomed, deadly institution."[298] In addition, Justice Stewart's remarks in the ensuing judicial conference shared a similar historicist tone: "Someday the Court will hold that the death sentence is unconstitutional. If we hold it constitutional in 1972, it would only delay its abolition."[299]

Historicism, the notion that history follows a set of laws or patterns, has been a matter of intellectual and philosophical debate since at least the days

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[292] *Id.* at 23–24. Goldberg and Dershowitz made an analogous claim in a 1970 article: "[A]nomalous imposition of a very harsh punishment within a particular jurisdiction may rest on no reasonable classification. A penalty therefore should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily." Goldberg & Dershowitz, *supra* note 105, at 1790.

[293] Aikens brief, *supra* note 4, at 25–26.

[294] In 1999, 71 percent of Americans backed the death penalty. In 2000, support remained at 66 percent. GALLUP, *Death Penalty*, https://news.gallup.com/poll/1606/Death-Penalty.aspx (last visited Feb. 22, 2022).

[295] In 2021, support was 54 percent. *Id.*

[296] DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2021, *supra* note 34, at 1.

[297] Amsterdam overstated his propositions at times: "This phenomenon reflects, we suggest, an overwhelming national repulsion against actual use of the penalty of death." Aikens brief, *supra* note 4, at 42.

[298] *Id.* at 10.

[299] MANDERY, *supra* note 14, at 168.

of Hegel.[300] When the Supreme Court ruled in Amsterdam's favor in *Furman*, certain observers indeed believed that America was following other Western democracies on the inevitable path toward abolition.[301] Contrary to Amsterdam's expectation, the Court reauthorized the death penalty in *Gregg* four years later,[302] casting doubt on experts' ability to predict the future of the death penalty.

Yet the *Aikens* brief's historicism may be interpreted as a strategic argument instead of a prediction about the future. This is because the brief's historicist passages are tied to the Court's jurisprudence, which recognizes that the Eighth Amendment's interpretation is not set in stone. Rather, it evolves based on the values of American society and the wider world. Amsterdam stressed that, if the conception of a "cruel and unusual punishment" were simply the one prevailing in 1791 at the time of the amendment's ratification, the Court would still permit "the pillory, public flogging, lashing and whipping on the bare body, branding of cheeks and forehead with a hot iron, and the slitting, cropping, nailing and cutting off of ears," corporal punishments applied in the eighteenth century.[303] Logically, the interpretation of this constitutional safeguard cannot be "static."[304] The Court must then, the brief submits, acknowledge this normative evolution and end the death penalty.

The *Aikens* brief has a significant international dimension as it emphasizes at the outset that the normative evolution toward abolition is not limited to America: "Worldwide and national abandonment of the use of capital punishment during this century has accelerated dramatically, and has now become nearly total."[305] Belying the notion that international standards are a novel consideration in U.S. litigation,[306] Amsterdam highlighted them throughout the *Aikens* brief. For instance, he indicated that the United Nations' Economic and Social Council adopted a 1971 resolution encouraging the restriction and abolition of capital punishment given the right to life recognized in Article 3 of the Universal Declaration of Human Rights.[307] Although this is the only direct reference to "human rights" in the brief, Amsterdam recurrently marshaled a position similar to the notion that the death penalty is a human rights violation and an affront to human dignity, such as how abolition "has been spearheaded by concerns derived from conceptions of the worth and dignity of the individual."[308]

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[300] *See generally* Mark Alznauer, *Spirit in The Phenomenology of Spirit*, *in* THE OXFORD HANDBOOK OF HEGEL 126, 127, 133 (Dean Moyar ed., 2017); Frederick C. Beiser, *Hegel's Historicism*, *in* THE CAMBRIDGE COMPANION TO HEGEL 270, 270–73 (Frederick C. Beiser ed., 1993); Dwight E. Lee & Robert N. Beck, *The Meaning of Historicism*, 59 AM. HIST. REV. 568, 572–75 (1954).

[301] *See supra* note 2 and accompanying text.

[302] Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion). *See infra* Section V.

[303] Aikens brief, *supra* note 4, at 17–18.

[304] *Id.* at 15, 18 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

[305] *Id.* at 6.

[306] *See supra* notes 178–182 and accompanying text.

[307] Aikens brief, *supra* note 4, at 30–31 (citing U.N., Economic and Social Council Res. 1574(L), Capital Punishment (May 20, 1971)).

[308] *Id.* at 36.

This approach to abolition has become the norm in European law, both at the national and international levels. The European Union and Council of Europe, the two main transnational bodies on the continent, proclaim: "The death penalty is an affront to human dignity. It constitutes cruel, inhuman and degrading treatment and is contrary to the right to life."[309] Comparatively, modern-day American abolitionists tend to ignore human rights or human dignity by focusing on administrative problems with the death penalty, such as racial discrimination, innocence, and financial cost.[310] However, the *Aikens* brief suggests that American abolitionists of yesteryear converged with European abolitionists in denouncing executions as inherently cruel and inhumane.

To underscore the "savagery,"[311] "horror,"[312] and "barbarism" of the death penalty,[313] the *Aikens* brief notably focused on the norms of "countries sharing our western *humanist* traditions."[314] We saw above that it quoted Lord Chancellor Gardiner of the United Kingdom and Prime Minister Lester Pearson of Canada to illustrate how leaders in allied nations have depicted executions as inhumane.[315] A Franco-American convergence further stands out in Anthony Amsterdam's brief, which cites Marc Ancel in addition to Albert Camus. Ancel is a major historical figure[316] in the movement for a humanist reform of criminal justice in France and Europe in the second half of the twentieth century.[317] The *Aikens* brief refers to a 1962 report on the

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[309] COUNCIL OF EUROPE & EUROPEAN UNION, Joint Declaration on the Death Penalty, *supra* note 10. The Council of Europe has forty-seven member states, compared to twenty-seven for the European Union. The Council, under which the European Court of Human Rights operates, is the leading human rights body in Europe. It has spearheaded two abolitionist treaties. *See* Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in All Circumstances, May 3, 2002, Europ. T.S. No. 187 (Armenia, Azerbaijan, and Russia are the sole member states that have not ratified this treaty, although they are abolitionist in practice); Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Apr. 28, 1983, Europ. T.S. No. 114 (Russia is the lone member state that has declined to ratify the treaty).

[310] ZIMRING, *supra* note 19, at 47–48; Jouet, *Death Penalty Abolitionism From the Enlightenment to Modernity*, *supra* note 24, at 1–10, 44–49.

[311] Aikens brief, *supra* note 4, at 6.

[312] *Id.* at 22, 26, 46, 48.

[313] *Id.* at 6, 33, 44.

[314] *Id.* at 38 (emphasis added).

[315] *Id.* at 7. *See also supra* notes 189, 191 accompanying text.

[316] "[Marc Ancel] exercised a greater influence than any criminalist in his age." Robert Badinter, *In memoriam: Marc Ancel (1902-1990)*, 42 REVUE INTERNATIONALE DE DROIT COMPARÉ 1093, 1102–03 (1990) (my translation). This praise is striking given that Badinter, probably the most esteemed French jurist of modern times, was the main architect of France's abolition of capital punishment in 1981 as Minister of Justice, following years as a prominent anti-death-penalty litigator. *See* LE NAOUR, *supra* note 164, *passim*.

[317] Marc Ancel is the author of an influential book, *La Défense sociale nouvelle: Un mouvement de politique criminelle humaniste*, which was translated into English. MARC ANCEL, SOCIAL DEFENCE: A MODERN APPROACH TO CRIMINAL PROBLEMS (John Wilson trans., 1965). *See also* BRUNO DREYFUS, REGARD CONTEMPORAIN SUR LA DÉFENSE SOCIALE NOUVELLE DE MARC ANCEL (2010); Mugambi Jouet, *Foucault, Prison, and Human Rights*, 26 THEORETICAL CRIMINOLOGY 202 (2022) (discussing Ancel's influence in debates over Foucauldian theory).

death penalty that Ancel prepared for the Council of Europe. The report advanced that humanist philosophy is at the root of the abolitionist movement born in the eighteenth century. In Ancel's account, vengeance, retribution, and expiation gradually lost legitimacy as penal objectives, thereby favoring capital punishment's decline.[318]

This trend has persisted into the twenty-first century. Besides European nations, Canada, Australia, and New Zealand have all abolished the death penalty for several decades, leaving America as the lone retentionist Western democracy. Moreover, over two-thirds of all countries worldwide have abolished capital punishment in law or practice.[319]

Presciently, Amsterdam and the LDF depict "a world-wide trend toward its disuse that is nothing short of drastic."[320] Their position and rhetoric is again of a far more humanistic and internationalist nature than what scholarship has intimated: "The values which have been most consistently opposed to capital punishment, and which have largely extirpated it in the western world over the course of the last two centuries, lie very close to the root of the Anglo-American conception of a free and civilized society;"[321] "Little wonder that the nations of the world most closely allied with our own in traditions, and sharing our heritage and aspirations of respect for the citizen, have now overwhelmingly rejected the death penalty;"[322] "Capital punishment has not simply atrophied or gone out of fad in the world, but has been progressively rejected in the course of an ideological and moral debate resonant with concerns that are intimately connected with the 'principle of civilized treatment' and 'the dignity of man.'"[323]

Even though the *Aikens* brief devoted non-negligible attention to administrative, procedural, and utilitarian objections to capital punishment, we saw that Amsterdam intertwined these objections with his fundamental normative argument that no one should be executed anymore. The NAACP LDF was well situated to present this test case. Recall that the LDF had set out to represent all people on death row, including whites, out of fairness and in an effort to end the death penalty system.[324] To the extent that the LDF represented everyone on death row, it was in a position to make a categorical challenge: the death penalty is always cruel and unusual.

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[318] Aikens brief, *supra* note 4, at 35 n.64 (citing MARC ANCEL, THE DEATH PENALTY IN EUROPEAN COUNTRIES 9 (Council of Europe ed., 1962)). Amsterdam cited another article by Ancel. *See* Aikens brief, *supra* note 4, at 35 n.92, 116 (citing Marc Ancel, *The Problem of the Death Penalty*, *in* CAPITAL PUNISHMENT 3 (Thorsten Sellin ed., 1967)).

[319] AMNESTY INT'L, *supra* note 26.

[320] Aikens brief, *supra* note 4, at 27. *See also* STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 56–57 (noting that the international trend toward abolition was among the momentous factors favoring Amsterdam and the LDF's victory in *Furman*).

[321] Aikens brief, *supra* note 4, at 34.

[322] *Id.* at 36.

[323] *Id.* at 31 (quoting Trop v. Dulles, 356 U.S. 86, 99, 100 (1958) (plurality opinion)).

[324] *See supra* note 48 and accompanying text.

The end of Amsterdam's oral arguments in *Furman* reaffirms that his fundamental claim was about the death penalty's intrinsic cruelty, *regardless* of how or why it is implemented. "Before you sit down Mr. Amsterdam, I just want to be sure that I understand your ultimate argument," Justice Stewart urged. "Is it that, even if assuming that retribution is a permissible ingredient of punishment, even assuming that rational people could conclude that the death sentence is the maximum deterrent . . . , even assuming we are dealing with somebody who is not capable of being rehabilitated," or even that the death penalty is the "most inexpensive" punishment ensuring the most incapacitation, "you say it is still violative of the Eighth Amendment, am I right in my understanding of that?"[325] Amsterdam's response was unequivocal: "That is correct, Your Honor." Amsterdam then succinctly restated his position that, "somewhat like the Fourth [Amendment]," the Eighth Amendment "is a limitation on means that says that the legislature may not use cruel penalties, cruel and unusual penalties, even though they may serve a legitimate cause, [just as police may not] engage in unlawful searches and seizures even though there may be a purpose for them."[326]

The counsel for Georgia, Dorothy T. Beasley, highlighted this point in concluding her own oral arguments: "[Anthony Amsterdam] has the burden to show that the legislative enactment is unconstitutional and I think that he has not done so, not with respect to the death penalty *per se* in the abstract which is what he contend should be declared unconstitutional."[327]

In other words, the position of Anthony Amsterdam and the LDF was that killing prisoners is inherently cruel and unusual punishment in light of evolving standards of decency. This is a far cry from the standard *Furman* narrative casting the case as a narrow challenge to the death penalty's unfair application. The quotations to Albert Camus's *Reflections on the Guillotine* ultimately stand out in the *Aikens* brief. Although a few other thinkers appear more times than Camus, especially Thorsten Sellin[328] and Hugo Adam Bedau,[329] Camus's writings convey the broader normative challenge to the death penalty's inhumanity.

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[325] Oral Argument at 25:40, Furman v. Georgia, 408 U.S. 238 (1972) (No. 71-5003), https://www.oyez.org/cases/1971/69-5030.

[326] *Id.* at 26:46. Amsterdam added that an "evidentiary hearing" would likely reveal that capital punishment does not rationally satisfy the penological goals Justice Stewart evoked. *Id.* at 27:11.

[327] *Id.* at 46:10.

[328] After growing up in Sweden, Thorsten Sellin moved to Canada at seventeen and went on to college in the United States, eventually becoming perhaps the most prominent American criminologist of the twentieth century. *See* Marvin E. Wolfgang, *Thorsten Sellin (26 October 1896 - 17 September 1994)*, 140 PROC. AM. PHIL. SOC'Y 580 (1996). *See also* MANDERY, *supra* note 14, at ch. 14 (discussing references to Sellin's research on capital punishment in the *Furman* litigation).

[329] Hugo Adam Bedau, a professor of philosophy, was heavily involved in the LDF's campaign for which he researched social and policy questions regarding capital punishment. MANDERY, *supra* note 14, at 112, 131, 284–86.

V. EPILOGUE TO THE LOST CHAPTER: VICTORY, VICISSITUDE, AND VINDICATION

Anthony Amsterdam's efforts were not in vain. In 1972, the Supreme Court found the death penalty unconstitutional. The decision, *Furman v. Georgia*, has become legendary.[330] This makes it all the more extraordinary that *Aikens v. California*, the companion case in which Amsterdam presented his main abolitionist challenge, largely fell into oblivion.

Yet *Furman* was a vulnerable ruling because it reflected no judicial consensus. The Justices did not merely reach this decision by the smallest of margins, a 5-4 vote. Members of the majority also wrote five separate opinions. Conclusions converged, reasoning diverged.

Still, the views of the majority can be categorized according to whether they primarily expressed practical concerns with the way the death penalty was being carried out or more fundamental normative concerns with state killing. Three Justices in the majority—William Douglas, Potter Stewart, and Byron White—emphasized administrative, procedural, and utilitarian problems with the application of capital punishment.[331] We will see below that their approach would shape future litigation, reinforce the tendency of modern American abolitionists to avoid humanitarian arguments, and bolster the standard *Furman* narrative. By contrast, the opinions of Justices William Brennan and Thurgood Marshall appeared the most receptive to Anthony Amsterdam's frontal normative challenge. Besides practical concerns,[332] Brennan and Marshall emphasized the inhumanity of the death penalty in finding it inherently unconstitutional.[333]

Amsterdam's humanistic arguments may notably have contributed to shaping Thurgood Marshall's conclusions. After all, the first African-American Justice did not initially appear categorically opposed to the death penalty on normative grounds,[334] despite having experience as a criminal defense lawyer, including in capital cases.[335] Justice Marshall's sixty-page opinion in

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330 Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

331 *See generally Furman*, 408 U.S. at 240 (Douglas, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring).

332 *Id.* at 274 (Brennan, J., concurring) ("In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the Clause—that the State must not arbitrarily inflict a severe punishment."); *id.* at 342 (Marshall, J., concurring) ("There are six purposes conceivably served by capital punishment: retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy.").

333 *See generally id.* at 257 (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring).

334 BANNER, *supra* note 3, at 258; MANDERY, *supra* note 14, at 137–38, 140–41; Brennan, *supra* note 43, at 321–22.

335 MANDERY, *supra* note 14, at 139–40. Mandery attributes Marshall's evolution to the influence of Brennan. *Id.* at 141–42, 144–45. On Marshall's moral reservations about the death penalty and his experience working in capital cases involving black defendants, see also Evan J. Mandery & Zachary Baron Shemtob, *Supreme Convolution: What the Capital Cases Teach Us About Supreme Court Decision-Making*, 48 NEW ENG. L. REV. 711, 742–44 (2014).

Furman actually devoted scant attention to race.[336] Leaning instead toward a universalistic conception of human dignity, he declared: "Only in a free society could right triumph in difficult times, and could civilization record its magnificent advancement. In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute."[337] His *Furman* opinion ultimately labeled the death penalty as "barbarism,"[338] a term marshaled multiple times in the *Aikens* brief[339] and lauded America for joining the approximately seventy other nations that had already "celebrate[d] their regard for civilization and humanity by shunning capital punishment."[340]

Parts of Brennan's *Furman* opinion similarly used language found in the *Aikens* brief. "Although pragmatic arguments for and against the punishment have been frequently advanced," he wrote, "[a]t bottom, the battle has been waged on moral grounds."[341] Compare this to the *Aikens* brief: "[A]lthough there are entirely convincing practical reasons for putting an end to the death penalty—the principal arguments urged to support its abolition have always been humanistic."[342] By the same token, Brennan cited a normative passage of a Thorsten Sellin study that appeared in the *Aikens* brief, including the following words: "[T]he struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man."[343]

As for Albert Camus, he only appeared once in the *Furman* judicial opinion, to boot in a dissent. Lewis Powell, joined by Harry Blackmun, Warren Burger, and William Rehnquist, argued that the high number of death sentences do not suggest that "juries are imposing the death penalty with such rarity as to [indicate] a public rejection of capital punishment."[344] Justice Powell's opinion cites Albert Camus's *Reflections on the Guillotine* among other sources in the ensuing footnote.[345] The citation suggests that the dissenters were mindful that Anthony Amsterdam had relied on Camus.

Camus's words still convinced another prominent actor in this historical chapter. Arthur J. Goldberg, a catalyst of the LDF's anti-death-penalty

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336 Among the nine separate *Furman* opinions, the only Justice who emphasized racial discrimination was William Douglas. STEIKER & STEIKER, COURTING DEATH *supra* note 2, at 89–90.

337 Furman v. Georgia, 408 U.S. 238, 371 (1972) (per curiam) (Marshall, J., concurring).

338 *Id.*

339 *See supra* note 154 and accompanying text.

340 *Furman*, 408 U.S. at 371 (Marshall, J., concurring).

341 *Id.* at 296 (Brennan, J., concurring).

342 Aikens brief, *supra* note 4, at 31.

343 *Furman*, 408 U.S. at 296 (Brennan, J., concurring) (quoting THORSTEN SELLIN, THE DEATH PENALTY, A REPORT FOR THE MODEL PENAL CODE PROJECT OF THE AMERICAN LAW INSTITUTE 15 (1959)); Aikens brief, *supra* note 4, at 34–35 (quoting *id.*).

344 Furman v. Georgia, 408 U.S. 238, 441 n.36 (1972) (per curiam) (Powell, J., dissenting).

345 *Id.* at 441 n.36 (citing ALBERT CAMUS, REFLECTIONS ON THE GUILLOTINE 151–56 (1960)). Justice Powell cited a 1960 edition of *Reflections on the Guillotine*, whereas the *Aikens* brief and this Article used the 1961 Vintage edition.

campaign when he was on the Supreme Court,[346] praised *Furman* before quoting Albert Camus enthusiastically: "Our country will not have to endure the barbarism of mass hangings, gassings and electrocutions carried out by the state under the auspices of law enforcement. The Court made a great contribution to what Camus has termed 'the great civilizing step.'"[347]

Furman caused a fierce backlash. Epitomizing the reaction of death penalty supporters, Lester Maddox, Georgia's Lieutenant Governor, called it "a license for anarchy, rape, murder." Jere Beasley, his counterpart in Alabama, added that the Justices had "lost contact with the real world."[348] Incensed legislators in numerous states enacted new statutes aiming to pass constitutional muster.[349] This immediately cast doubt on Amsterdam's claim that evolving standards of decency, at least in the form of political and public opinion, had rendered executions unacceptable to Americans.

To an extent, the vulnerable, discordant ruling in *Furman* may have been the doing of Warren Burger. According to one account, the Chief Justice insisted on a *per curiam* opinion in which each member of the narrow majority would state his reasons separately.[350] Burger appeared ambivalent about capital punishment, if not duplicitous. At times, he told fellow Justices that he had reservations about executions, such as: "I would vote in Congress to abolish capital punishment."[351] After the Court handed down its decision, Burger privately told his clerks that they could count on this being the end of capital punishment in America.[352] Meanwhile, his dissent advised legislators on how to craft new death penalty statutes that would plausibly satisfy a majority of Justices.[353]

Even three Justices in the *Furman* majority effectively encouraged states to pass new legislation. Indeed, by focusing on administrative and procedural problems with capital punishment, Justices Douglas, Stewart, and White seemed to suggest that the death penalty could be applied fairly, equally, rationally, and humanely. Better statutes would seem to be the solution.

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346 *See supra* note 43 and accompanying text.

347 Goldberg, *supra* note 43, at 366 (quoting CAMUS, REFLECTIONS ON THE GUILLOTINE, *supra* note 11, at 232).

348 ZIMRING & HAWKINS, *supra* note 2, at 38. Goldberg's 1973 article also discusses the immediate backlash, including "proposals for a constitutional amendment nullifying the *Furman* decision." Goldberg, *supra* note 43, at 367. Amsterdam and his LDF colleagues later admitted that the magnitude of the backlash surprised them. MANDERY, *supra* note 14, at 279.

349 BANNER, *supra* note 3, at 267–75; GARLAND, *supra* note 2, at 258–61; MANDERY, *supra* note 14, *passim*; STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 218–22; ZIMRING & HAWKINS, *supra* note 2, at 38–47; Lain, *Furman Fundamentals*, *supra* note 41, at 46–55.

350 MANDERY, *supra* note 14, at 170.

351 *Id.* at 95.

352 *Id.* at 242.

353 Furman v. Georgia, 408 U.S. 238, 401–04 (1972) (per curiam) (Burger, C.J., dissenting). In the final days of the drafting process, "Burger strengthened the parts of his opinions telling states how they might respond to the Court's decision." MANDERY, *supra* note 14, at 231. On Burger's ambivalence or duplicity, see also *id.* at 229 ("With apparent sincerity Burger told Brennan that he wished the Court had struck down the death penalty completely . . . . Death penalty cases took up a disproportionate amount of the Court's time.").

Conversely, if one finds the death penalty inherently "cruel and unusual" under the Eighth Amendment, as Justices Brennan and Marshall did, and as Amsterdam and the LDF urged, a legislative remedy is impossible.

Carol Steiker and Jordan Steiker have similarly observed that the "ambiguous *Furman* decision focusing on procedural and administrative defects contained an obvious invitation to future legislation and therefore litigation: a more decisive, categorical ruling would have contained no such initiation and would likely have stuck." In their view, "a constitutional abolition that firmly rejected the death penalty as inconsistent with contemporary values would have rendered later attempts to reinstate capital punishment extremely difficult."[354]

Another perspective is that categorical normative abolition would have been vulnerable to attack on the ground that it was wrongly decided—the fruit of "judicial activism" to be remedied by appointing new Justices who would overturn abolition. A peculiar feature of modern American society is a tendency to persistently re-fight and re-litigate major reforms after they have passed, a rarer trend elsewhere in the West. This peculiarity is symbolized by the interminable clashes over eviscerating the constitutional right to abortion recognized in *Roe v. Wade* (1973);[355] and over repealing the Affordable Care Act (2010), the Obama administration's health care reform.[356] These clashes partly reflect the intensifying polarization of American society since approximately the 1980s.[357] While abortion and universal health care also stirred resistance in various other Western democracies when they adopted these social reforms decades ago, their opponents often soon moved on and embraced these rights, which are now widely accepted among both liberals and conservatives.[358] Of course, Europe is not immune to undoing vested rights, as illustrated by diminished protections for immigrants in the age of xenophobic currents and "Brexit."[359] But this tendency has obscured how modern American society is more polarized over a host of other

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354 STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 75. In 1970, Arthur Goldberg and Alan Dershowitz had indeed urged the Court to address the substantive constitutionality of capital punishment instead of narrow procedural issues. Goldberg & Dershowitz, *supra* note 105, at 1800–02.

355 Roe v. Wade, 410 U.S. 113 (1973). *See also* JOUET, *supra* note 26, at 127–29. The Steikers offer an insightful comparison of the American debates over abortion and the death penalty. STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 223–26. *See also* EPSTEIN & KOBYLKA, *supra* note 41, *passim* (contrasting the historical evolution of the abortion and death-penalty debates).

356 *See* JOUET, *supra* note 26, at 66–67, 157–62, 171–72; Chris Riotta, *GOP Aims to Kill Obamacare Yet Again After Failing 70 Times*, NEWSWEEK (July 29, 2017), https://www.newsweek.com/gop-health-care-bill-repeal-and-replace-70-failed-attempts-643832.

357 *See generally* ALAN I. ABRAMOWITZ, THE POLARIZED PUBLIC?: WHY AMERICAN GOVERNMENT IS SO DYSFUNCTIONAL (2012); JOUET, *supra* note 26, *passim*; NOLAN MCCARTY, KEITH POOLE & HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES (2016); Jacob Hacker & Paul Pierson, *Confronting Asymmetric Polarization*, *in* SOLUTIONS TO POLARIZATION IN AMERICA 59 (Nathaniel Persily ed., 2015).

358 *See* JOUET, *supra* note 26, at 127–29 (discussing the evolution of the abortion debate in the United States compared to other Western societies).

359 *See generally* TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 21, 68–70 (2018).

fundamental issues than Europe or, for that matter, than Canada, Australia, and New Zealand.[360]

In this social context, criminal justice is a greater source of polarization in the United States. Although other Western societies have their own versions of the "tough-on-crime" movement, penal populism is less normalized and more moderate there in comparison to modern America.[361] Yet it would be a mistake to imagine American government as simply responding to public calls for the death penalty or merciless prison terms, as politicians regularly foment such public attitudes by appealing to fear and repression.[362]

Another peculiar American dynamic is part of the equation: the endemic clash over federalism and states' rights. This is not solely a feature of the debate over civil rights in the South. American government overall is exceptionally decentralized, fragmented, and localistic compared to other Western democracies,[363] including with regard to criminal justice.[364] National reforms thus recurrently cause friction and pushback. This dynamic was manifest in the backlash to *Furman*, which did not merely reflect substantive support for capital punishment, but also hostility toward the idea of Justices in Washington, D.C., telling states how to run their penal systems.[365] In this environment, any Supreme Court decision abolishing the death penalty may lead to intense resistance, irrespective of its framing or foundation.

Accordingly, if a majority of Justices in *Furman* had found capital punishment inherently inhumane, as Amsterdam and the LDF urged, the public might have reacted by voting for presidential candidates vowing to appoint new, pro-death penalty Justices to overturn that decision. But that recourse would likewise be available to replace Justices holding the death penalty unconstitutional on due process grounds. The more fundamental issue may be that judicial abolition, just as legislative abolition, no matter its reasoning, may be re-fought and re-litigated so long as American legal and sociopolitical culture remains intensely divided about its core values.[366]

That being noted, by emphasizing the arbitrary, capricious or discriminatory application of capital punishment, three Justices in *Furman*—the majority of the majority—invited legislators to come up with purported remedies. Justice Douglas's opinion particularly focused on racial discrimination,[367] which also was the focus of his questions during oral

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360 JOUET, *supra* note 26, *passim*.

361 *See generally id.* at ch. 7; JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007); WHITMAN, *supra* note 28, *passim*; Jouet, *Mass Incarceration Paradigm Shift?*, *supra* note 28, at 703, 730–33, 735–37.

362 JOUET, *supra* note 26, at 202–03.

363 *See* AMSTERDAM & BRUNER, *supra* note 98, at 277–78; JOUET, *supra* note 26, at 40–41; JOHN W. KINGDON, AMERICA THE UNUSUAL 42, 67–68 (1999).

364 *See* JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 13–16 (2017) (describing the patchwork of federal, state, and local penal systems).

365 *See* GARLAND, *supra* note 2, at 232, 234–35.

366 *See generally supra* note 357 and accompanying text.

367 *See generally* Furman v. Georgia, 408 U.S. 238, 240 (1972) (per curiam) (Douglas, J., concurring).

arguments.[368] When the Court reviewed new death penalty statutes in *Gregg*, the liberal Douglas might still have found them unconstitutional, although personal statements suggested he might not have done so.[369] Anyhow Douglas's health would falter after *Furman* and he had retired by the time of *Gregg*.[370] Scholarly attention has therefore focused on the views of the two Justices in the *Furman* majority who voted to uphold the new capital statutes in *Gregg*, namely Potter Stewart and Byron White.[371]

Justice Stewart is best remembered for declaring that a death sentence is "cruel and unusual in the same way that being struck by lightning is cruel and unusual."[372] Stewart's famous quotation has come to epitomize the standard narrative that *Furman* was solely or overwhelmingly about the arbitrary, capricious or discriminatory application of the death penalty. This narrative is reinforced by another passage of Stewart's opinion stating that, "if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race."[373] We saw that this narrative is incomplete, as it eclipses Anthony Amsterdam and the LDF's frontal normative challenge. Intriguingly, Justice Stewart's opinion did not latch onto this aspect of Amsterdam's argument, even though Stewart was concerned about the death penalty's substantive immorality. At first, he was inclined to write a concise opinion—a "short snapper," in his words—stating that the death penalty was flatly cruel and unusual because it treated people as a means to an end.[374] Until the final days of the *Furman* deliberations, Stewart even mulled joining a revised version of Brennan's dissent framing the holding in rather humanistic terms. Stewart finally relented and matched Byron White in adopting an opinion centered on narrower administrative and procedural problems.[375]

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368 *See supra* note 280 and accompanying text.

369 In a private memorandum, Douglas exclaimed: "For the life of me, I do not see how anyone would entertain the thought that as a matter of constitutional law the death penalty was prohibited in a straight clean-cut first-degree murder case." In the draft of a dissent, Douglas also stated: "I personally think it is monstrous for society to take one life because a defendant took one. But I do not see any mandate under the Constitution for judges to be the arbiters of the wisdom or folly, the ethics or barbarity of capital punishment." MANDERY, *supra* note 14, at 115–16. On Douglas's views, see also *id.* at 119.

370 *Id.* at 331–35.

371 STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 50 ("The concerns of Stewart and White were taken by most legal observers to be the crux of the decision."); Weisberg, *supra* note 20, at 315 ("The important opinions are those of Justices Stewart, Douglas, and White, which conditionally suspend the death penalty, and which are the source of the Court's later efforts in doctrine-making."). Jack Greenberg, Amsterdam's colleague at the LDF, also shared this view of *Furman*: "Although nine separate opinions accompanied the Court's per curiam decision, it is fair to say that the case stands for the proposition that capital punishment, as then administered, was inflicted arbitrarily or 'freakishly,' as [Justice Stewart] put it . . . ." Greenberg, *supra* note 45, at 914 (quoting Furman v. Georgia, 408 U.S. 238, 310 (1972) (per curiam) (Stewart, J., concurring).

372 Furman, 408 U.S. at 309 (Stewart, J., concurring).

373 *Id.* at 310.

374 MANDERY, *supra* note 14, at 173, 200–01.

375 *Id.* at 187–88, 189–90, 200–01, 216–17, 221, 223, 336, 401. Regarding Justice Stewart's moral objections to the death penalty, see also *id.* at 151, 154, 166, 175, 185–86, 336; Mandery & Shemtob, *supra* note 335, at 727, 729–34.

Once the Court issued its *Furman* decision, Stewart assured his clerks that the death penalty was finished.[376] But he must have realized that his opinion's reasoning would invite legislators to devise new statutes purporting to apply the death penalty fairly.[377]

Byron White apparently did not share such normative concerns. His *Furman* opinion focused on the death penalty's lack of deterrent value given how sparsely and arbitrarily it was applied.[378] Like Stewart, White signaled that he might uphold better death penalty statutes: "I do not at all intimate that the death penalty is unconstitutional per se or that there is no system of capital punishment that would comport with the Eighth Amendment."[379]

Legislators took notice and eagerly resuscitated the death penalty.[380] The new statutes included a soon-to-be standard model dividing capital trials in two phases. The first would determine a defendant's culpability. If convicted, the second phase would decide whether to impose capital punishment by evaluating aggravating and mitigating circumstances.[381] In 1976, in *Gregg v. Georgia*, the Court assessed the constitutionality of the revamped statutes.[382] Anthony Amsterdam did not represent the petitioner in *Gregg*[383] but the one in *Jurek v. Texas*, a companion case.[384] Interestingly, Amsterdam's brief in *Jurek* included several pages of the *Aikens* brief in an appendix.[385] In a sense, *Aikens* remained before the Court. But neither these excerpts nor the *Jurek* brief itself cite Camus.

On the whole, Amsterdam's fundamental argument became less humanistic than the one in the *Aikens* brief. He emphasized deficiencies in the new legislation under which "an arbitrary fraction of death-eligible offenders is selected to be actually put to death" based on the "capricious" discretion of prosecutors, jurors, and governors. Amsterdam argued that, in practice, the statutes entailed a status quo with the pre-*Furman* situation where death sentences only fell sporadically on downtrodden members of society.[386] His brief and reply brief in *Jurek* still persisted with diverse humanistic claims, such as: "[T]he death penalty in any form is no longer an experiment: it is an ancient exercise in savagery that has run its course. The time is too late now to rectify the errors of the past."[387] "[T]he limits of the Eighth Amendment are exceeded when the subject of the exercise is extermination of human life and

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376 MANDERY, *supra* note 14, at 242; STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 50–51.

377 *See generally* STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 75.

378 Furman v. Georgia, 408 U.S. 238, 311–12 (1972) (per curiam) (White, J., concurring).

379 *Id.* at 310–11.

380 BANNER, *supra* note 3, at 267–75.

381 *See generally* STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 61–62.

382 Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion).

383 The attorney for Troy Leon Gregg was G. Hughel Harrison. *See* Brief for Petitioner, Gregg v. Georgia, 428 U.S. 153 (1976) (No. 74-6257), 1976 WL 194055.

384 *See* Brief for Petitioner, Jurek v. Texas, 428 U.S. 153 (1976) (No. 75-5394) (companion case to Gregg v. Georgia), 1976 WL 181478.

385 *Id.* at app. B.

386 *Id.* at 23.

387 *Id.* at 82–83.

when its results can be foredoubted [sic] only by the blindest self-delusion," Amsterdam concluded in a thinly-veiled admonition to the Court.[388]

The Justices proved dismayed by Amsterdam's uncompromising arguments for continued abolition.[389] It would be difficult to contend that *Jurek*, meaning *Gregg*, was his best oral argument performance.[390] Amsterdam began with a lengthy synopsis of the new legislation that at times seemed to reaffirm his opponents' theory of the case and their claims of newfound due process.[391] He did not begin marshaling his strongest points until well into the argument.[392]

Nearly an hour into his oral presentation, Amsterdam found his voice: "Death is final. Death is irremediable . . . . It is a legislative decision to do something and we know not what we do."[393] Amsterdam thereafter made an argument that numerous experts have now accepted:[394] the revamped death penalty legislation had not, and could not, cure the ills identified in *Furman*. "[I]n order for a jury and judge and a prosecutor and governor to condemn a defendant, an intense *ad hominem* condemnatory judgment has to be made . . . [it] is uniquely difficult to control, uniquely difficult to rationalize or regularize," Amsterdam insisted. "Now, that combined with the breadth of discretion which is in the system . . . create[s] a total pattern whose result is that the infliction of death on specific defendants condemned to die is cruel and unusual."[395] Regardless of the merits or shortcomings of Amsterdam's

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388 *Id.* at 84.

389 MANDERY, *supra* note 14, at 400. *Cf.* EPSTEIN & KOBYLKA, *supra* note 41, at 107–10, 132–36 (arguing that Amsterdam's inflexible stance was counterproductive). Amsterdam again garnered criticism in *Woodson*—a companion case on mandatory death-penalty statutes—where he argued that executing anyone would be unconstitutional, even for terrorism or genocide. Oral Argument at 20:17, Woodson v. North Carolina, 428 U.S. 280 (1976) (No. 75-5491), https://www.oyez.org/cases/1975/75-5491. *See* MANDERY, *supra* note 14, at 375, 392–93; OSHINSKY, *supra* note 18, at 68–69.

390 Even though the decision came to be known as *Gregg v. Georgia*, Amsterdam did not argue *Gregg*. Rather, he orally argued two companion cases, *Jurek v. Texas* and *Roberts v. Louisiana*, in a combined presentation. These arguments occurred over two days, March 30 and 31, 1976. *See* Oral Argument, Parts 1 and 2, Jurek v. Texas and Roberts v. Louisiana, 428 U.S. 262 (1976) and 428 U.S. 325 (1976) (No. 75-5394 and No. 75-5844), https://www.oyez.org/cases/1975/75-5394.

391 *See, e.g.*, Oral Argument, Part 1 at 11:02, Jurek v. Texas and Roberts v. Louisiana, 428 U.S. 262 (1976) and 428 U.S. 325 (1976) (No. 75-5394 and No. 75-5844), https://www.oyez.org/cases/1975/75-5394 (describing the new legislation as "elaborate winnowing processes, involving a selective screening of cases potentially subject to the death penalty and an array of outlets for avoiding the actual use of the death penalty, either by the second stage penalty proceedings in which aggravating and mitigating circumstances are either balanced or adjudicated or else by definitions of the capital crime, which narrow the capital crime and set it off from others along often intangible and impressionistic lines").

392 *See, e.g.*, *id.* at 25:24 (arguing that the Eighth Amendment bars draconian penalties that can "be applied selectively and sporadically to a numerical few"), 33:04 ("Now, this case was tried under this statute exactly the way it would have been tried before *Furman*. The state's position was simple. The defendant is reprobate, the defendant killed the daughter of a local peace officer, the defendant ought to die. Those prepositions have nothing to do with the issues submitted under the Texas statute which theoretically guide the jury's sentencing decision.").

393 *Id.* at 58:23.

394 *See generally* Steiker & Steiker, *No More Tinkering*, *supra* note 19, *passim*.

395 Oral Argument, Part 1 at 58:51, Jurek v. Texas and Roberts v. Louisiana, 428 U.S. 262 (1976) and 428 U.S. 325 (1976) (No. 75-5394 and No. 75-5844), https://www.oyez.org/cases/1975/75-5394.

performance, the outcome depended more heavily on the Justices' choices, which themselves hinged on contingent factors, especially the very makeup of the Supreme Court following the results of presidential elections.[396]

Amsterdam's claims fell on deaf ears, as in *Gregg* the Supreme Court approved the new death penalty legislation by a 7-2 margin.[397] The historic *Furman* victory, barely four years earlier, was short-lived.

Only Justices Brennan and Marshall dissented in *Gregg*, maintaining that the death penalty is inherently unconstitutional, partly because it is intrinsically cruel to execute a prisoner. William Brennan's dissent vividly recalled Anthony Amsterdam's frontal normative challenge in *Aikens-Furman*. At the outset, Brennan criticized the *Gregg* majority for framing the issue in narrow procedural terms: "The opinions of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens today hold that 'evolving standards of decency' require focus not on the essence of the death penalty itself but primarily upon the procedures employed by the State to single out persons to suffer the penalty of death."[398] Brennan was adamant that this was not the overarching issue in *Furman*.[399] Similarly, Thurgood Marshall's dissent in *Gregg* adopted the normative approach that Anthony Amsterdam had urged in *Aikens-Furman*. On one hand, Marshall conceded the backlash to *Furman*: "I would be less than candid if I did not acknowledge that these developments have a significant bearing on a realistic assessment of the moral acceptability of the death penalty to the American people."[400] On the other hand, Marshall defended his past reasoning: "In *Furman*, I observed that the American people are largely unaware of the information critical to a judgment on the morality of the death penalty, and concluded that if they were better informed they would consider it shocking, unjust, and unacceptable."[401] Marshall added that, based on empirical evidence, the death penalty does not deter,[402] and that retribution is ultimately unacceptable as a "general justification for punishment" under the Eighth Amendment.[403]

To Thurgood Marshall, the "utilitarian" approach of the *Gregg* majority[404] eclipsed the principle of "dignity" at the heart of the Eighth Amendment, as "the taking of life 'because the wrongdoer deserves it'" amounts to "the total denial of the wrong-doer's dignity and worth."[405] William Brennan's ultimate argument likewise centered on human dignity: "[F]oremost

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396 STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 74–77; Carol S. Steiker, *Capital Punishment and Contingency*, 125 HARV. L. REV. 760 (2012) (reviewing GARLAND, PECULIAR INSTITUTION, *supra* note 2).

397 Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion).

398 *Id.* at 227 (Brennan, J., dissenting).

399 *Id.* (citing Furman v. Georgia, 408 U.S. 238, 257 (1972) (per curiam) (Brennan, J., concurring)).

400 Gregg, 428 U.S. at 231 (Marshall, J., dissenting).

401 *Id.*

402 *Id.* at 233–37.

403 *Id.* at 237.

404 *Id.* at 239.

405 *Id.* at 240–41 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion)).

among the 'moral concepts' recognized in our cases and inherent in the Clause is the primary moral principle that the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings a punishment must not be so severe as to be degrading to human dignity."[406]

Albert Camus then reprised his role in the debate. The last quotation in Brennan's *Gregg* dissent quoted Camus for the proposition that the death penalty is inherently dehumanizing: "Justice of this kind is obviously no less shocking than the crime itself, and the new 'official' murder, far from offering redress for the offense committed against society, adds instead a second defilement to the first."[407]

The approach to the death penalty that Anthony Amsterdam, William Brennan, and Thurgood Marshall adopted would crystallize elsewhere in the Western world. In Europe, notably, both national governments and continental governmental bodies stress that the death penalty is a categorical violation of human rights and human dignity.[408] This humanistic approach may someday gain traction in the United States, although it has struggled to make headway.[409] What the *Aikens* brief insisted was the crux of the issue—"the increasingly prevailing forces of abolition have staked their case primarily upon the inhumanity and indecency of the penalty"[410]—has largely proved true for all Western democracies except America. In the aftermath of *Furman* and *Gregg*, the debate over capital punishment in the United States has focused overwhelmingly on administrative and procedural problems.[411]

The death penalty nonetheless presents normative questions that might be inextricable from due process or practical considerations. It is not merely that anti-death-penalty lawyers present administrative or procedural claims as a means of blocking executions that many oppose *per se* on normative grounds. Robert Weisberg has equally suggested that the legal process in capital cases is intrinsically normative: "[A] judge or jury's decision to kill is an intensely moral, subjective matter that seems to defy the designers of general formulas for legal decision."[412] Put otherwise, "[t]o make a moral decision

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406 Gregg, 428 U.S. at 230–31 (Brennan, J., dissenting) ((citing Furman v. Georgia, 408 U.S. 238, 230–31 (1972) (per curiam) (Brennan, J., concurring)).

407 *Id.* at 231 (quoting ALBERT CAMUS, REFLECTIONS ON THE GUILLOTINE 5–6 (Fridtjof-Karla ed., 1960)). Brennan cited a distinct translation of the text. The page he quoted corresponds to CAMUS, REFLECTIONS ON THE GUILLOTINE, *supra* note 11, at 176.

408 *See supra* notes 309, 310 and accompanying text.

409 *See* STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 248; ZIMRING, *supra* note 19, at 26–37, 43–46; Jouet, *Death Penalty Abolitionism From the Enlightenment to Modernity*, *supra* note 24, at 1, 44–48; Steiker, *Capital Punishment and American Exceptionalism*, *supra* note 2, at 88; Steiker & Steiker, *No More Tinkering*, *supra* note 19, at 364–65. *Cf.* Lain, *Deciding Death*, *supra* note 41, at 47–48 (describing how the growing American debate over the death penalty at the turn of the century was not about "the morality of killing people who kill, but the quality of justice people were entitled to when their lives were at stake").

410 Aikens brief, *supra* note 4, at 38.

411 *See supra* note 409.

412 Weisberg, *supra* note 20, at 308.

about a defendant is to treat him as a unique being. And the state cannot treat him as unique under a substantive criminal law, since a criminal law is necessarily a generalization about human behavior and moral desert."[413] The professed search for due process in capital cases is intertwined with moral claims about killing in the name of some greater good.[414]

It therefore seems peculiar that modern-day American abolitionists commonly eclipse these normative questions, especially given that death penalty proponents insist on its morality. Justice Antonin Scalia, for instance, explained that his support for executions stemmed from his Christian faith: "I could not take part in [capital cases] if I believed what was being done to be immoral."[415] When his colleague Harry Blackmun famously announced "I no longer shall tinker with the machinery of death," disavowing capital punishment legislation that he had helped revive in *Gregg*,[416] Justice Scalia lambasted him while framing the issue largely in normative terms. "Justice Blackmun did not select as the vehicle for his announcement that the death penalty is always unconstitutional—for example, the case of the 11–year–old girl raped by four men and then killed by stuffing her panties down her throat," Scalia exclaimed. "How enviable a quiet death by lethal injection compared with that!"[417] Scalia also referred to the value of deterrence, although the tone and the substance of his position were normative, as he stressed that vengeance passes constitutional muster if the public wishes "such brutal deaths to be avenged by capital punishment."[418] The atrocious case with the 11-year-old victim that Scalia used to bolster his argument would later become a miscarriage of justice: the convicts were innocent.[419]

This exoneration again eclipsed a more fundamental issue captured in Justice Scalia's opinion. Modern-day supporters of capital punishment appear to set the terms of the debate by denouncing normative objections to executions as illegitimate—all while regularly framing their support in

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413 *Id.* at 323.

414 *See also* HAMMEL, *supra* note 200, at 228 (describing the Justices' "tendency to deflect responsibility for deciding a fundamental normative issue" by creating procedural tests); Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 986 (2016) (suggesting that, in the end, "the only kind of argument to have about capital punishment is a normative one").

415 Antonin Scalia, *God's Justice and Ours*, FIRST THINGS (May 2002), https://www.firstthings.com/article/2002/05/gods-justice-and-ours (last visited Feb. 13, 2020). Since at least the Enlightenment, Christians have actually been divided between religious convictions supporting or opposing capital punishment. While Justice Scalia was a fervent Catholic and invoked his faith in supporting the death penalty, the Catholic Church itself has come to embrace abolition. JOUET, *supra* note 26, at 214–17.

416 Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

417 *Id.* at 1143 (Scalia, J., concurring).

418 *Id.* As Bernard Harcourt observed, "this disagreement between Blackmun and Scalia brings us to the locus of interpretive choice and value-formation. Whether we view the choice as being between these competing values, or between rules of constitutional interpretation, the resolution still calls for a normative choice . . ." Bernard E. Harcourt, *Mature Adjudication: Interpretive Choice in Recent Death Penalty Cases*, 9 HARV. HUM. RTS. J. 255, 262 (1996).

419 The wrongfully convicted men were Henry McCollum and Leon Brown. *See* GARRETT, *supra* note 2, *passim*; STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 209; Lee Kovarsky, *Justice Scalia's Innocence Tetralogy*, 101 MINN. L. REV. HEADNOTES 94, 98 (2016), https://scholarship.law.umn.edu/headnotes/50/.

normative terms. In the decades following *Furman*, retribution regained "intellectual respectability" and retentionists insisted that "capital punishment was a moral imperative, regardless of whether it reduced the murder rate."[420] The changing terms of the debate may have influenced the evolution of American abolitionism away from normative objections and toward administrative or procedural problems, such as innocence, racial bias, and financial cost. This framing could be described as "implementation failure."[421]

Procedure dramatically trumping substance is sometimes perceived as a trait of American legal culture, if not common law systems centered on punctilious rules of due process and evidence.[422] But this is a doubtful explanation here given that all other modern Western democracies with a common law tradition, including the United Kingdom, consider the death penalty a human rights violation.[423] Rather, this may be more a reflection of American exceptionalism, the notion that America is an "exception" in the West.[424] American exceptionalism is not an immutable trait, as its nature has evolved over time.[425] Insofar as modern America has evolved toward a death-penalty debate narrowly centered on practical problems, this evolution does not signify that American culture as a whole lacks humanistic sensibilities. After all, a non-negligible number of Americans involved in this chapter of death penalty history were amenable to the humanistic view of abolition. Besides Anthony Amsterdam, William Brennan, and Thurgood Marshall, recall that Arthur Goldberg found the death penalty inhumane.[426] Justice Stewart appeared to share a similar sentiment but finally chose not to frame his judicial opinions in ethical terms.[427] It could still be that modern-day American sensibilities are, on average, less humanistic than those of Europeans and other

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[420] BANNER, *supra* note 3, at 282. By the same token, Corinna Lain has concluded: "People support the death penalty for different reasons, and in the aggregate, those reasons have changed over time . . . Today's death penalty is about retribution—we put people to death because we think they deserve it. A life for a life." Corinna Lain Barrett, *The Highs and Lows of Wild Justice*, 50 TULSA L. REV. 503, 515 (2015) (reviewing MANDERY, A WILD JUSTICE, *supra* note 14, and THANE ROSENBAUM, PAYBACK: THE CASE FOR REVENGE (2013)).

[421] On the concept of "implementation failure," see DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 20, 65 (2002).

[422] *See, e.g.*, Thomas Weigend, *Is the Criminal Process About Truth?: A German Perspective*, 26 HARV. J.L. & PUB. POL'Y 157, 168 (2003) ("In adversarial systems, truth is ultimately a procedural concept—an idea that comports well with an entrenched Anglo-American skepticism about man's ability to discover the 'substantive' truth.").

[423] *See, e.g.*, U.K. FOREIGN AND COMMW. OFF., HMG STRATEGY FOR ABOLITION OF THE DEATH PENALTY 2010-2015 4 (2011) ("Promoting human rights and democracy overseas is a priority for HMG [Her Majesty's Government]. It is the longstanding policy of the UK to oppose the death penalty in all circumstances as a matter of principle because we consider that its use undermines human dignity . . . .").

[424] Nowadays, "American exceptionalism" is often understood as a faith in American superiority, although this mainly reflects a political redefinition of the concept during the Obama presidency. JOUET, *supra* note 26, at 21–26.

[425] *See generally id.*; KINGDON, *supra* note 363; SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD (1997). For a nuanced discussion of American exceptionalism, contingency, and the death penalty, refer to STEIKER & STEIKER, COURTING DEATH, *supra* note 2, 71–77.

[426] MANDERY, *supra* note 14, at 5, 8, 22; Goldberg, *supra* note 43, at 368.

[427] MANDERY, *supra* note 14, at 173, 200–01; Mandery & Shemtob, *supra* note 335, at 727, 729–34.

Westerners.[428] This may be partly why Americans are presently less inclined to frame abolition in terms of human rights and human dignity.

Even though American sensibilities may be comparatively less humanistic, they may be humanistic enough so that state killings cause uneasiness. David Garland has compellingly described how the U.S. death penalty system reflects "an extreme form of institutional ambivalence, expressed in a uniquely cumbersome and conflicted set of arrangements."[429] Death sentences result in less than one percent of homicides, followed by convoluted, intricate appellate proceedings. The primary cause of death on death row is so-called "natural causes."[430] Support for the death penalty is relatively strong in the abstract but weaker in practice. Americans are not as keen on executing murderers as it might seem. Compared to Europeans, in particular, humanitarian concerns about state killings may be more repressed in the American psyche, thereby favoring the social tendency to circumvent, obscure or eclipse the issue by focusing narrowly on administrative or procedural problems.

This social ambivalence about state killing was a major obstacle for Anthony Amsterdam and the LDF when they presented their frontal normative challenge to the death penalty in *Aikens-Furman*.[431] Even Justices preoccupied about the inhumane nature of capital punishment have proved reticent to let these concerns shape their legal opinions, in Potter Stewart's image.[432] Of course, insofar as the Justices or society writ large have not centered on the humanitarian concerns at the heart of the *Aikens-Furman* litigation, it is partly because, both before and after this frontal normative challenge, Amsterdam and the LDF themselves often focused on administrative or procedural problems with the death penalty, much like other American abolitionists.[433]

The LDF's challenges to capital punishment ostensibly prompted the Supreme Court "to tame its arbitrary, discriminatory, and excessive applications through a growing set of constitutional doctrines."[434] Yet whether the Court genuinely sought to do so in *Gregg* and beyond is debatable. The "constitutionalization" of the death penalty system with an array of supposed due process protections comes across as window dressing to rationalize and legitimize an intractable punishment. In the words of Robert Weisberg, "the Court has tried to dignify the once lawless death penalty with the reassuring

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428 *See* JOUET, *supra* note 26, at 218–21.

429 GARLAND, *supra* note 2, at 11.

430 *Id.*

431 Aikens brief, *supra* note 4, *passim*.

432 MANDERY, *supra* note 14, at 173, 200–01.

433 *See* STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 86 (discussing how defense briefs used "stock language" about "'arbitrariness,' 'discrimination,' and 'irrationality'").

434 *Id.* at 40.

symbolism of legal doctrine."[435] The pre-*Furman* problems of discrimination, arbitrariness, and capriciousness would remain pervasive in the next half-century.[436] Furthermore, recurrent exonerations of innocents and the extraordinary financial cost of the death penalty system, including its lengthy trials and appeals, have been added to the list of concerns since these issues were not debated in the test cases of the 1970s.[437]

Shortly after *Furman* and *Gregg* revolutionized the constitutional landscape, the revolution thus revealed itself more cosmetic than substantive. The Supreme Court did not do what it said it would. Weisberg presciently observed in a 1983 article that the Justices were not keen on enforcing the rights they had granted to those facing death: "[T]he Court has reduced the law of the penalty trial to almost a bare aesthetic exhortation that the states do something—anything—to give [it] a legal appearance."[438] One interpretation is that the Court circled back to the avowed realism of Justice John Marshall Harlan II in *McGautha*, a 1971, pre-*Furman* case that deemed death-sentencing standards futile: "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."[439] Harlan was far from alone in holding this view, as the liberal Abe Fortas illustratively admitted in a private memorandum: "The basic fact is that it is impossible, as far as I am concerned, to state standards which would justify capital punishment."[440] During the Justices' endless deliberations over death-sentencing standards, others expressed concerns about unworkable or unrealistic schemes.[441]

Nevertheless, states began applying their new death penalty statutes immediately after *Furman*. "Only 42 people were sentenced to death in 1973, but there were 149 death sentences in 1974, probably more than in any year since 1942," as Banner recounts.[442] Under these circumstances, one may even dispute that *Furman* had "abolished" the death penalty. While the first post-*Gregg* execution came in 1977—Gary Gilmore in Utah—the pace of

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[435] Weisberg, *supra* note 20, at 307. For an introspective discussion of whether a lawyer representing prisoners condemned to die helps legitimize capital punishment, see BERNARD E. HARCOURT, CRITIQUE & PRAXIS 469–75 (2020).

[436] *See generally* Steiker & Steiker, *No More Tinkering*, *supra* note 19, *passim*; Sherod Thaxton, *Disciplining Death: Assessing and Ameliorating Arbitrariness in Capital Charging*, 49 ARIZ. ST. L.J. 137, 140–46 (2017).

[437] *See* Steiker & Steiker, *No More Tinkering*, *supra* note 19, at 362 ("Innocence and cost concerns have contributed to the remarkable decline in capital sentencing over the past decade [i.e., 2000–10].").

[438] Weisberg, *supra* note 20, at 306. *See also* ZIMRING, *supra* note 19, at 183–84 (discussing the Court's reluctance to oversee the death penalty's application).

[439] McGautha v. California, 402 U.S. 183, 204 (1971). *See also* Weisberg, *supra* note 20, at 308–13, 393–94.

[440] *Id.* at 90 (quoting Memorandum from Abe Fortas to William Douglas (Apr. 7, 1969)).

[441] *See generally* MANDERY, *supra* note 14, at 89–111.

[442] BANNER, *supra* note 3, at 270.

executions was low at first.[443] That was the single execution in 1977. None followed in 1978, two occurred in 1979, none again in 1980, a single one in 1981, and two in 1982.[444] This lent credence to Amsterdam's claim that Americans had much less appetite for the death penalty than it seemed.[445] But the pace picked up. A total of 117 persons were ultimately executed in the 1980s. Then 595 in the 1990s. And 590 in the 2000s. The figure plummeted to 324 in the 2010s.[446] In 2021, only eleven executions occurred in the United States.[447] This trend raises new questions about "evolving standards of decency" and whether "the post-*Furman* experiment" is drawing to a close.[448]

As the death penalty resurged in the 1980s, this experiment would engulf more and more protagonists. Anthony Amsterdam himself concluded that his involvement in the abolitionist movement had become counterproductive.[449] In his words, some Justices "came to view the Fund's lawyers as abolitionist zealots, embarked on a crusade against the death penalty for its own sake."[450] Michael Meltsner, Amsterdam's colleague at the LDF, interpreted the Justices' hostility as a reaction to a litigation campaign that "forced many judges to take public responsibility for sending men to their deaths."[451]

In a book published at the turn of the century, Anthony Amsterdam and Jerome Bruner describe how, in the 1980s, certain Justices chastised lower courts for not taking *Gregg* seriously and ceding to death-row prisoners' legal claims. Justice Lewis Powell, in particular, delivered a speech in 1983 urging lower courts to cease halting executions.[452] A few years later, a retired Powell admitted regretting one vote in his career: finding the death penalty constitutional.[453] Powell did not express his conversion in humanistic terms, yet his conscience appeared to weigh on him. Amsterdam himself suggested that Powell had long mustered "a self-justification that is strong enough to kill with, although not strong enough to endure much beyond the killing."[454]

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443 Regarding Gilmore's case, see OSHINSKY, *supra* note 18, at 81–84.

444 DEATH PENALTY INFO. CTR., *Execution Database*, https://deathpenaltyinfo.org/executions/execution-database (last visited Feb. 7, 2020). *See also* ZIMRING & HAWKINS, *supra* note 2, at 46.

445 *See, e.g.*, Aikens brief, *supra* note 4, at 23–26.

446 DEATH PENALTY INFO. CTR., *Execution Database*, *supra* note 444.

447 DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2021, *supra* note 34, at 1.

448 Steiker & Steiker, *No More Tinkering*, *supra* note 19, at 364.

449 MELTSNER, THE MAKING OF A CIVIL RIGHTS LAWYER, *supra* note 16, at 223–24.

450 AMSTERDAM & BRUNER, *supra* note 98, at 198.

451 MELTSNER, THE MAKING OF A CIVIL RIGHTS LAWYER, *supra* note 16, at 223. *See also* Weisberg, *supra* note 20, at 322 (observing that "[Justice] Stewart's summary of [Georgia's new death penalty] statute amounts to little more than judicial sighs of relief over how Georgia has allowed the Court to escape gracefully from the responsibility it posed for itself in *Furman*").

452 AMSTERDAM & BRUNER, *supra* note 98, at 198 (citing Remarks of Justice Lewis F. Powell, 11th Cir. Conf., Savannah, Ga., May 9–10, 1983; Linda Greenhouse, *Justice Powell Assails Delay in Carrying Out Executions*, N.Y. TIMES, May 19, 1983, at A16). *See also* Anthony G. Amsterdam, In Favorem Mortis: *The Supreme Court and Capital Punishment*, 14 HUM. RTS. 14, 50–52 (1987) (criticizing Justice Powell's remarks about groundless and illegitimate delays in death penalty appeals).

453 AMSTERDAM & BRUNER, *supra* note 98, at 198 (citing JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 451 (1994)).

454 *Id.* at 194. *See also* Anthony G. Amsterdam, *Selling a Quick Fix for Boot Hill: The Myth of Justice Delayed in Capital Cases*, *in* THE KILLING STATE 148 (Austin Sarat ed., 1999).

Over time, three of the Justices in the 7-2 *Gregg* majority changed their views. Alongside Lewis Powell, Harry Blackmun and John Paul Stevens repudiated the death penalty in one way or another.[455] Perhaps this may count as a retroactive victory for Anthony Amsterdam.

CONCLUSION

Today, the death penalty is again declining in America, evoking the mounting support for abolition in the run-up to *Furman*.[456] In 2021, the number of executions, death sentences, and retentionist states in the Union were around record lows.[457] A few years earlier, Stephen Breyer and Ruth Bader Ginsburg had raised eyebrows when they dissented in *Glossip v. Gross*, a case on lethal injection protocols. The two Justices encouraged litigators to bring another abolitionist test case: "[R]ather than try to patch up the death penalty's legal wounds one at a time, [we] would ask for full briefing on a more basic question: whether the death penalty violates the Constitution."[458] Tellingly, Breyer and Ginsburg's lengthy dissent lists almost every imaginable argument against the death penalty—except the very idea that killing prisoners is inhumane.[459] The omission is striking in an opinion spanning twenty-two pages, as well as five appendices. Breyer and Ginsburg lead their analysis with a discussion of wrongful convictions before turning to the arbitrary and discriminatory nature of capital sentencing. Their dissent even features a long section arguing that the death penalty is "cruel" because the "excessive delays" that prisoners spend on death row awaiting their potential execution are a form of mental abuse,[460] which they term "dehumanizing."[461] Nonetheless, they conspicuously do not suggest that putting prisoners to death is itself cruel. This omission is too significant to be unintended. The Breyer-Ginsburg dissent reflects the tendency of contemporary American death penalty opponents to avoid suggesting that executions are inherently inhumane.[462]

While other Western democracies have framed abolition in human rights terms, Carol Steiker and Jordan Steiker underline that America has taken a distinct path, as "[t]here does not appear to be markedly greater concern within the courts, legislatures, or the public at large about whether the death penalty denies human dignity or creates an inappropriate relation between

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455 Baze v. Rees, 553 U.S. 35, 86 (2008) (Stevens, J., concurring); Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting). *See also* STEIKER & STEIKER, COURTING DEATH, *supra* note 2, at 261–66.

456 *See supra* note 41 and accompanying text.

457 DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2021, *supra* note 34, at 1–3.

458 Glossip v. Gross, 576 U.S. 863, 908 (2015) (Breyer, J., dissenting).

459 *See id.* at 908–48.

460 *Id.* at 923–38.

461 *Id.* at 925. As Justices Breyer and Ginsburg renewed their call for abolition in a case concerning the federal death penalty's resumption following a seventeen-year hiatus, they again omitted any humanistic argument. Barr v. Lee, No. 20A8, slip. op. at 2 (U.S. July 14, 2020) (per curiam) (Breyer, J., dissenting).

462 *See also* Jouet, *Death Penalty Abolitionism From the Enlightenment to Modernity*, *supra* note 24, at 1, 46–47 (discussing the Breyer-Ginsburg dissent's framing).

state and citizen." Instead, "the momentum toward restriction and restraint has been propelled by perceptions about the inability of states to implement the death penalty in an accurate, nonarbitrary, and efficacious manner."[463] According to the Steikers, these factors help explain the decline of the death penalty in modern America.[464] In other words, on *Furman*'s fiftieth anniversary, Americans continue to primarily focus on the administrative, procedural, and utilitarian questions that shaped most Justices' reasoning in this pivotal decision.[465]

This path dependence may likewise have shaped how scholars have looked back on the past, thereby shedding light on the Article's findings. The fact that the death-penalty debate in modern America revolves around practical concerns like wrongful convictions of innocents, racial disparities, and financial cost has reinforced the standard *Furman* narrative. We saw that this narrative is rooted in the idea that *Furman* was fundamentally a case about the arbitrary, capricious or discriminatory administration of capital punishment. This is truer of the *Furman* decision itself than of the way the case was litigated. The *Aikens* brief, the key brief in *Furman*, presented a direct moral challenge. Anthony Amsterdam powerfully denounced "the inhumanity and indecency of the penalty," suggesting that its retention marks a profound dividing line between civilized and brutal penal systems.[466] The brief embodied the career of its author, one of the greatest attorneys the nation has ever known. Facing long odds, Amsterdam became the architect of the only period in American history when the law said "No" to more executions. In his eyes, it was a defining societal issue, a stance evoking the words of Albert Camus: "We shall know nothing until we know whether we have the right to kill our fellow men, or the right to let them be killed."[467]

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[463] Steiker & Steiker, *No More Tinkering*, *supra* note 19, 364–65.

[464] *See generally id.*

[465] *See also* Steiker & Steiker, *Cost and Capital Punishment*, *supra* note 25, at 151–55 (describing the decline of normative abolitionist claims in the post-*Furman* era).

[466] Aikens brief, *supra* note 4, at 38.

[467] CAMUS, THE REBEL, *supra* note 205, at 4.

Article

BORDER SEARCH IN THE DIGITAL ERA:

REFASHIONING THE ROUTINE VS. NONROUTINE DISTINCTION FOR ELECTRONIC DEVICE SEARCHES

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ABSTRACT

In the digital age, border searches of laptops and cell phones have significantly implicated the data privacy of 21st Century international travelers. The current legal landscape surrounding such searches, however, is far from clear. Currently, there is a multi-circuit split at two dimensions: the level of suspicion required, and, the scope of a permissible border search, which the Supreme Court just declined to review. Moreover, circuit courts classify digital device border searches into two categories, routine vs. nonroutine, adding another layer of complication. This article aims to conduct a thorough and in-depth evaluation of the border search legal framework. The evaluation reveals, however, even the Ninth Circuit's approach, which is so far the most favorable for digital privacy, still cannot provide a sufficient protection against warrantless or even suspicionless border searches. This is so primarily because, under the umbrella of routine search, manual searches of electronic devices are almost limitless. As such, the digital era calls for refashioning the conventional distinction between routine and nonroutine device searches. This article advocates for categorically requiring a heightened Fourth Amendment standard for all electronic device border searches without designating them as routine or nonroutine, for purposes of better safeguarding travelers' digital privacy.

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I. INTRODUCTION

On June 28, 2021, the Supreme Court declined to review three cases[1] relating to the constitutionality of border searches of international travelers' electronic devices, leaving the deep circuit split regarding the border search exception to the Fourth Amendment unresolved.[2] Under the border search exception, searches performed at international borders without a warrant or probable cause are nonetheless "reasonable" within the meaning of the Fourth Amendment.[3]

Among these three cases, it is particularly noteworthy that the Supreme Court denied the Government's petition[4] to review the Ninth Circuit's

[1] These three cases are United States v. Cano, 934 F.3d 1002 (9th Cir. 2019), Alasaad v. Mayorkas, 988 F.3d 8 (1st Cir. 2021), and United States v. Aigbekaen, 943 F.3d 713 (4th Cir. 2019).

[2] Sara Merken, *U.S. Supreme Court turns away digital device border search cases*, REUTERS (June 29, 2021 3:04 AM CST), https://www.reuters.com/legal/government/us-supreme-court-turns-away-digital-device-border-search-cases-2021-06-28/.

[3] United States v. Ramsey, 431 U.S. 606, 616–19 (1977).

[4] Merken, *supra* note 2.

ruling in *United States v. Cano*.[5] In *Cano,* the Ninth Circuit held, as a matter of first impression, that border searches of electronic devices "must be limited in scope to a search for digital contraband" and cannot include evidence of border-related crimes.[6] At the same time, the Supreme Court turned down requests by the American Civil Liberties Union and the Electronic Frontier Foundation to review the First Circuit's holding[7] in *Alasaad v. Mayorkas*,[8] which held the opposite—that the border search exception does *not* limit searches of electronic devices, routine or non-routine, to search for contraband only, but permits search for evidence of contraband or cross-border crimes.[9]

Indeed, the circuit split over electronic device border searches go beyond the issues presented in the petitions in *Cano* and *Alasaad*, as will be discussed in detail below.

II. CURRENT STATUS OF LAW ON BORDER SEARCH OF ELECTRONIC DEVICES: MULTIWAY CIRCUIT SPLITS AT TWO DIMENSIONS

A. *The Border Search Exception Generally*

Searches and seizures at international borders constitute "a historically recognized exception to the Fourth Amendment's general principle that a warrant be obtained," which is rooted in "the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country."[10]

However, this does not mean that "the sky is the limit"[11] or "anything goes"[12] for border searches. Rather, "reasonableness remains the touchstone for a warrantless search."[13] Of course, not all border searches are reasonable *per se* under the Fourth Amendment. Rather, the reasonableness of a border search, like other exceptions to the Fourth Amendment's warrant requirement,[14] is determined by "balancing its intrusion on the individual's Fourth

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[5] *Cano*, 934 F.3d at 1002.

[6] *Id.* at 1007.

[7] Merken, *supra* note 2.

[8] *Alasaad*, 988 F.3d at 8.

[9] *Id.* at 19.

[10] *Ramsey*, 431 U.S. at 616, 621.

[11] Nicolette Lotrionte, *The Sky's the Limit: The Border Search Doctrine and Cloud Computing*, 78 BROOK. L. REV. 663 (2013).

[12] United States v. Seljan, 547 F.3d 993, 1000 (9th Cir. 2008) (en banc).

[13] United States v. Cotterman, 709 F.3d 952, 957 (9th Cir. 2013).

[14] *See* Riley v. California, 134 U.S. 2473, 2482 (2014) (recognizing that "the ultimate touchstone of the Fourth Amendment is reasonableness" in context of the search incident to arrest exception); Wyoming v. Houghton, 526 U.S. 295, 300 (1999) (applying the "traditional standards of reasonableness" the automobile exception); United States v. Montoya de Hernandez, 473 U.S. 531, 550 (1985) (applying the reasonableness test under the border search exception).

Amendment interests against its promotion of legitimate governmental interests."[15] In this regard, the Supreme Court assessed that "the expectation of privacy [is] less at the border than in the interior" while "governmental interests in stopping smuggling at the border are high."[16] Thus, the Supreme Court concluded that "the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is struck much more favorably to the Government at the border."[17]

B. *Routine Searches vs. Nonroutine Searches*

Since the Supreme Court's decision in *Montoya de Hernandez*,[18] border searches are typically designated into two categories: routine searches and nonroutine searches.

In *Montoya*, the Supreme Court recognized that "[s]ince the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country."[19] The Supreme Court found that "[r]outine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant."[20] "[O]rdinary pat-downs or frisks, removal of outer garments or shoes . . . emptying of pockets, wallets, or purses,"[21] and x-ray examinations of a suitcase's contents[22] are commonly classified as routine.

On the other hand, a border search that is more intrusive or "beyond the scope of a routine customs search" is deemed nonroutine and therefore subject to higher standard of justification, such as reasonable suspicion.[23] Examples of nonroutine searches include "strip, body cavity, or involuntary x-ray searches."[24] Notably, the Supreme Court has not set a categorical rule as to what level of suspicion is required for nonroutine border searches.[25]

It is critical to note that the Supreme Court has not yet defined the terms "routine search" and "nonroutine search," nor has it set any bright-line rule to distinguish the latter from the former. As a federal district court

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[15] United States v. Villamonte-Marquez, 462 U.S. 579, 588 (1983); Delaware v. Prouse, 440 U.S. 648, 654 (1979).

[16] *Montoya de Hernandez*, 473 U.S. at 539, 541.

[17] *Id.* at 540.

[18] *Id.* at 537, 540.

[19] *Id.* at 537.

[20] *Id.* at 538.

[21] United States v. Kelly, 302 F.3d 291, 294 (5th Cir. 2002).

[22] United States v. Johnson, 991 F.2d 1287, 1293–94 (7th Cir. 1993).

[23] *Montoya de Hernandez*, 473 U.S. at 541 ("We hold that the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal.").

[24] *Id*. at n.4.

[25] *Id*.

observed, "circuit courts have looked to the intrusiveness of the search in distinguishing between routine and nonroutine border searches."[26]

C. *Border Searches in the Digital Era*

Border searches have certainly evolved over time. From October 2008 and June 2010, the Customs and Border Protection (CBP) conducted more than 6,500 warrantless searches of travelers' electronic devices at U.S. border crossings.[27] The number of warrantless device border searches has rapidly increased to 33,296 for Fiscal Year 2018, 40,913 for Fiscal Year 2019, and 32,038 for Fiscal Year 2020, according to the CBP's own statistics.[28]

Meanwhile, much more personal or private data is exposed to governmental border searches than before as a result of the enhanced storage capacity of electronic devices. In 2014, when the Supreme Court in *Riley v. California* asked the police to "get a warrant" for forensically searching a cell phone incident to arrest because of the wealth of information that might be contained in the phone,[29] the standard storage capacity of a cell phone ranged from 16 gigabytes to 64 gigabytes.[30] Today, just seven years later, an iPhone 12 Pro Max can store up to 512 gigabytes, 8 to 32 times of a 2014 cell phone's storage space.[31]

With these statistics as a backdrop, it is clear that border searches of electronic devices should not be "limitless" under the Fourth Amendment.

D. *Multiway Circuit Splits at Two Dimensions*

Currently, circuit courts are divided over the proper standard for border search of electronic devices at the following two dimensions:

1. *The Level of Articulable Suspicion Required*

While all circuit courts which have addressed this issue recognize that routine border device searches are wholly immune from the Fourth Amendment protections,[32] they disagree on whether and what quantum of articulable

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[26] United States v. Kolsuz, 185 F. Supp. 3d 843, 853 (E.D. Va. 2016).

[27] *Government Data about Searches of International Travelers' Laptops and Personal Electronic Devices*, AM. CIV. LIBERTIES UNION, https://www.aclu.org/government-data-about-searches-international-travelers-laptops-and-personal-electronic-devices (last visited July 28, 2021).

[28] *CBP Enforcement Statistics Fiscal Year 2021, Border Searches of Electronic Devices*, CUST. B. & DEC., https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics (last visited July 28, 2021).

[29] *Riley*, 573 U.S. at 403.

[30] Elizabeth Toft, *"Border"line Outrageous: How Riley Has Set the Circuits at War Over Border Search Exception*, 53 UIC J. MARSHALL L. REV. 1057, 1073 (2019).

[31] *What's the difference between device storage and iCloud storage?*, APPLE SUPPORT (January 08, 2021), https://support.apple.com/en-gb/HT206504.

[32] *Alasaad*, 988 F.3d at 18; *Cano*, 934 F.3d at 1015; *Kolsuz*, 890 F.3d at 137; United States v. Touset, 890 F.3d 1227, 1233 (11th Cir. 2018).

suspicion is required to justify a warrantless, nonroutine search of electronic devices at the border.

Specifically, in 2013 the Ninth Circuit Court of Appeals held in *United States v. Cotterman* that government agents must have reasonable suspicion before conducting a forensic examination of electronic devices due to the comprehensive and intrusive nature of forensic examinations.[33] On May 9, 2018, the Fourth Circuit Court of Appeals decided *United States v. Kolsuz,* requiring "some measure of individualized suspicion" for a forensic search.[34] Conversely, fourteen days later the Eleventh Circuit Court of Appeals ruled in *United States v. Touset* that "no suspicion is necessary to search electronic devices at the border" at all, even when it comes to forensic searches.[35]

2. *The Scope of Border Search*

The second dimension is the permissible scope of an electronic device search at border crossings, over which the circuit courts adopted conflicting rules.

The Eleventh Circuit currently does not require any suspicion for conducting a manual or forensic device border search, nor did it impose any restraints on the bounds of such searches; rather, the Eleventh Circuit suggests that reasonable suspicion is required only "for highly intrusive searches of a person's body".[36]

However, the Fourth Circuit held in *Kolsuz* that there must be a "direct link between the predicate for the search and the rationale for the border exception."[37] Subsequently, in *United States v. Aigbekaen*, the Fourth Circuit found that, where the defendant was suspected of being involved in *domestic* sex trafficking of minors, the warrantless forensic search of his laptops and cell phones did not fall within the scope of the border search exception because the search "lacked the requisite nexus to the recognized historic rationales justifying the border search exception."[38]

The Ninth Circuit in *Cano* went further to limit the scope of "cell phone searches at the border, whether manual or forensic," to "digital contraband" only, [39] starting a new battle in the war. The realm of "digital contraband" is certainly much narrower than the reach of evidence of border-related crimes as the Fourth Circuit contemplated.

Responding to *Cano*, the First Circuit in *Alasaad* wrote that "[w]e cannot agree with [the Ninth Circuit's] narrow view of the border search

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[33] *Cotterman*, 709 F.3d at 967–68.

[34] *Kolsuz*, 890 F.3d at 137, 144.

[35] *Touset*, 890 F.3d at 1229.

[36] *See Touset*, 890 F.3d at 1234 (quoting United States v. Alfaro-Moncada, 607 F.3d 720, 729 (11th Cir. 2010)); *see also* United States v. Vergara, 884 F.3d 1309, 1311–13 (11th Cir. 2018) (border searches of electronic devices do not require a warrant or probable cause).

[37] *Kolsuz*, 890 F.3d at 143.

[38] *Aigbekaen*, 943 F.3d at 721.

[39] *Cano,* 934 F.3d at 1007.

exception because *Cano* fails to appreciate the full range of justifications for the border search exception beyond the prevention of contraband itself entering the country."[40] Instead, the First Circuit took a position similar to the Fourth Circuit's, holding that "advanced border searches of electronic devices may be used to search for contraband, evidence of contraband, or for evidence of activity in violation of the laws enforced or administered by CBP or ICE."[41]

Thus, there exists a circuit split over the each of these two dimensions, rendering the current law on border searches of electronic devices extremely confusing and inconsistent. Most critically, the split resulted in different treatments of similarly situated travelers, i.e., "*where* an individual crosses the international border defines how their Fourth Amendment rights are handled,"[42] calling for a resolution of the split.

III. EVALUATING THE *CANO* APPROACH UNDER THE CURRENT TWO-DIMENSION BORDER SEARCH FRAMEWORK

For purposes of conducting a thorough evaluation of the border search legal framework, the *Cano* opinion will be analyzed in this article. This case was chosen because: (1) as discussed previously, compared to other circuit courts, the *Cano* Court went furthest in protecting digital privacy at the border; and (2) *Cano* presents an opportunity to scrutinize both the applicable standard and the permissible scope of border search of electronic devices.

Through the following examination of the *Cano* approach, however, this article posits that, in order to resolve the circuit split and increase protection of the significant privacy interests at issue, legal scholars and lawmakers must think outside of the box and look back into the fundamental concepts relating to border searches—especially the concepts of "routine" and "non-routine" searches, as well as the distinction between them. Are these notions and rules compatible with the digital age? The answer is no.

A. *The Factual and Procedural Background in* Cano

On July 25, 2016, Miguel Cano attempted to enter the United States from Tijuana, Mexico at the San Ysidro Port of Entry.[43] He was referred to a secondary inspection, where the CBP discovered 14.03 kilograms of cocaine from the spare tire of his vehicle.[44] Upon discovery, Cano was arrested, and his cell phone was seized by CBP officials.[45] The CBP agents conducted three searches of Cano's phone.

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[40] *Alasaad*, 988 F.3d at 21.

[41] *Id.*

[42] Elizabeth Toft, *"Border"line Outrageous: How Riley Has Set the Circuits at War Over Border Search Exception*, 53 UIC J. MARSHALL L. REV. 1057, 1078 (2019) (emphasis in original).

[43] *Cano*, 934 F.3d at 1008.

[44] *Id.*

[45] *Id.*

First, CBP Agent Petonak "'briefly' and manually reviewed Cano's cell phone, noticing a 'lengthy call log' but no text messages."[46] This manual search, according to the agent, was "two-pronged." The first prong was "to find some brief investigative leads in the current case," and the second "to see if there's evidence of other things coming across the border."[47]

Then, when Cano was questioned, Agent Medrano conducted a second manual search of the cell phone.[48] He "browsed the call log," "wrote down some of the phone numbers on a piece of paper," and took a photograph of two text messages that "arrived after Cano had reached the border."[49]

Finally, with the help of a software called "Cellebrite," Agent Medrano conducted a third search, a "logical download,"[50] of the phone, which allowed the government access to the "text messages, contacts, call logs, media, and application data" on Cano's phone, excluding "data stored within third-party applications."[51]

Indicted for importing cocaine, Cano file pretrial motions to suppress any evidence obtained from the warrantless border searches of his cell phone.[52] The district court denied his motion under the border search doctrine.[53] After a hung jury and a mistrial at his first trial, Cano was convicted at his second trial.[54] Cano appealed, arguing, *inter alia*, that the warrantless searches of his cell phone violated the Fourth Amendment and therefore the resulting evidence should be suppressed.[55]

B. *The* Cano *Approach on the Border Search Issue*

In *Cano*, the Ninth Circuit first pointed out that the border search exception is "subject to two important constraints. First, any search conducted under an exception must be within the *scope* of the exception. Second, some searches, even when conducted within the scope of the exception, are so *intrusive* that they require additional justification, up to and including probable cause and a warrant."[56] The first constraint came from *Riley v. California*,[57] where the Supreme Court held that cell phone searches do not fall within the scope of the search incident to arrest exception and requires a warrant, because such a search serves neither of the two purposes underlying this

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[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.* at 1008–09. Of note, Agent Medrano "typically does not select the option to download photographs." *Id.* at 1009.

[51] *Id.* at 1008–09.

[52] *Id.*

[53] *Id.*

[54] *Id.* at 1010.

[55] *Id.*

[56] *Id.* at 1011.

[57] *Riley*, 134 U.S. at 2482.

exception: (1) securing the officer's safety and preventing concealment; or (2) the destruction of evidence.[58] The second restraint is rooted from the notion that a more intrusive, nonroutine search must be supported by a higher level of suspicion.[59] Under this rationale, the Ninth Circuit emphasized that "[a] border search must be conducted to 'enforce importation laws,' and not for 'general law enforcement purposes.'"[60] By focusing on the restraints on the border search exception at the beginning of its opinion, the Ninth Circuit paved the way for the judiciary to limit the broad government authority and to respond to the calls of protecting digital privacy. Now, the remaining questions are: what approach would it take to reach this goal, and how effective would it be?

Next, the court concluded that cell phones are subject to search at the border, on grounds that "the purpose of the border search is to interdict contraband" and that cell phones can contain "digital contraband" such as child pornography.[61]

Then, the Ninth Circuit followed the "two-tiered suspicion framework"[62] it established in *Cotterman*:[63] that a routine, manual search of a laptop is reasonable even without particularized suspicion. However, a forensic examination, which is "essentially a computer strip search," requires reasonable suspicion.[64] Recognizing that digital devices carry sensitive data and consequently significant privacy interests, the court found that *Cotterman*'s reasoning "applies equally to cell phones."[65] As such, the Ninth Circuit held that "manual searches of cell phones at the border are reasonable without individualized suspicion, whereas the forensic examination of a cell phone requires a showing of reasonable suspicion."[66]

Having so concluded, the Ninth Circuit moved to the next critical question: whether searches for evidence of a crime, other than searches for contraband itself, exceeds the proper scope of a border search?[67] It found the answer must be "Yes." Recognizing that border officials are authorized to seize "merchandise,"[68] the court emphasized that "border officials have no general authority to search for crime," regardless of whether "such crimes may be perpetrated at the border in the future."[69] In this regard, the Ninth

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58 *Cano*, 934 F.3d at 1011–12 (citing *Riley*, 573 U.S. at 387).

59 *Id.* at 1012 (citing *Montoya de Hernandez*, 473 U.S. at 537–41).

60 *Id.* at 1013 (citing United States v. Soto-Soto, 598 F.2d 545, 549 (9th Cir. 1979)).

61 *Id.* at 1013–14.

62 Recent Case, *Criminal Procedure—Fourth Amendment—Ninth Circuit Limits the Scope of Warrantless Cell Phone Searches at the Border*—United States v. Cano*,* 934 F.3d 1002 (9th Cir. 2019), 133 HARV. L. REV. 2635, 2636 (2020), https://harvardlawreview.org/wp-content/uploads/2020/05/2635-2642_Online.pdf.

63 *Cotterman*, 709 F.3d 952 (9th Cir. 2013) (en banc).

64 *Cano*, 934 F.3d at 1015 (citing *Cotterman*, 709 F.3d at 960–61, 966–67).

65 *Id.*.

66 *Id.* at 1016.

67 *Id.*

68 *Id.* at 1017 (citing 19 U.S.C. § 482(a)).

69 *Id.*

Circuit acknowledged that its analysis was "in tension with the Fourth Circuit's decision in *Kolsuz*,"[70] which upheld forensic border searches for evidence of border-related crimes. The Ninth Circuit emphasized that searches for evidence of crimes and border searches for contraband are "two things [that] differ *toto coelo,*"[71] and that "every border-search case the Supreme Court has decided involved searches to locate items being smuggled" rather than evidence of crimes.[72] As such, the Ninth Circuit concluded that "border search exception authorizes warrantless searches of a cell phone only to determine whether the phone contains contraband,"[73] thus announcing a new limitation to the scope of the border search doctrine. However, the court did not clarify the definition of "digital contraband."[74] Although the court stated that "[t]he best example [of digital contraband] is child pornography,"[75] it also stated that "the detection-of-contraband justification would rarely seem to apply to an electronic search of a cell phone outside the context of child pornography."[76]

Consequently, the Ninth Circuit has established its legal framework for border searches: the two-tiered suspicion requirement, plus the narrow "contraband only" scope. Applying this framework to the searches in *Cano*, the court upheld the first manual search, finding the agent's observation that the phone contained no text messages "falls comfortably within the scope of a search for digital contraband" because "[c]hild pornography may be sent via text message."[77] The second manual search, however, was found unreasonable because the agent recorded phone numbers found in the call log and photographed two messages.[78] The court reasoned that, while "[c]riminals may hide contraband in unexpected places," "[t]h[e]se actions have no connection whatsoever to digital contraband."[79] As to the third search, the Ninth Circuit clarified that to conduct a more intrusive, forensic cell phone search border officials must "reasonably suspect that the cell phone to be searched itself contains contraband."[80] It finally concluded that "if the Cellebrite search of Cano's cell phone qualifies as a forensic search, the entire search was unreasonable under the Fourth Amendment" because the circumstances there "[did] not give rise to any objectively reasonable suspicion that the digital data in the phone contained contraband."[81]

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[70] *Id.*

[71] *Id.* at 1018 (quoting Boyd v. United States, 116 U.S. 616, 622–23 (1886), overruled in part on other grounds).

[72] *Id.*

[73] *Id.*

[74] *Id.* at 1014.

[75] *Id.*

[76] *Id.* at 1021 n.13.

[77] *Id.* at 1019.

[78] *Id.*

[79] *Id.*

[80] *Id.* at 1020.

[81] *Id.* at 1021.

C. *Evaluating the* Cano *Approach*

Since its issuance, *Cano* has attracted practitioners' and scholars' attention, comments, and criticisms. It is obvious that, by incorporating the scope standard into the existing suspicion requirement, the Ninth Circuit aimed to increase the Fourth Amendment protection of privacy interests at the border. However, its approach has been criticized for putting too many restraints on the government, and for offering too little protection of privacy rights, at the same time.

Specifically, on one hand, some scholars critiqued the Ninth Circuit's approach in *Cano* for "[being] too extreme and limit[ing] customs agents too much," as "a standard limited to contraband unduly constrains customs agents to say that they can *never* look for evidence, even if the crime is one that is border-related or transnational in nature."[82] Thus, scholars advocated that courts should reject the distinction between evidence and contraband drawn in *Cano* and adopt a "border nexus" standard similar to the Fourth Circuit's approach in *Kolsuz* and *Aigbekaen.*[83]

On the other hand, others criticized *Cano* as "its newly announced standard on the scope of the border search exception demonstrates the illusory nature of [the] purported protections."[84] "On its face" *Cano* narrowed the scope of the border search exception. However, "[t]he court's analysis of the first manual search demonstrates the extent to which its scope inquiry is susceptible to evasion by pretext."[85] Since the *Cano* court only offered very generic guidance that text messages may contain digital contraband, it "did little to deter future pretextual searches."[86] The court's analysis of the second manual search was also criticized by scholars for "expand[ing], rather than limit[ing], the universe of rationalizations that could be used to evade the strictures of its scope standard."[87] The court's comment that "[c]riminals may hide contraband in unexpected places"[88] could allow agents to " 'thumb[] through' . . . any app on the phone" without any individualized suspicion.[89] In contrast, the court's approach, as applied to the third search, was commended, because "[t]ethering the scope standard to the suspicion standard . . . moves the focus of the analysis earlier—to before the initiation of the search" and "prevents agents not searching for contraband from ever obtaining a

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[82] Brenna Ferris, *Border Searches for Investigatory Purposes: Implementing a Border Nexus Standard*, 54 U. MICH. J. L. REFORM CAVEAT 1, 16–17 (2020) (emphasis original).

[83] *Id.* at 3, 20.

[84] Recent Case, *supra* note 62, at 2635–36.

[85] *Id.* at 2639.

[86] *Id.* at 2640.

[87] *Id.*

[88] *Cano*, 934 F.3d at 1019.

[89] Recent Case, *supra* note 62, at 2640.

'lawful right of access' to the phone's content."[90] Thus, it "puts the lack of protection offered by the standard for manual searches . . . into sharp relief."[91]

The author of this article found that *Cano*'s approach, although seemingly having "significantly circumscribed the scope of border device searches,"[92] could not effectively provide sufficient protection of the important digital privacy interests, as demonstrated herein below.

Under *Cano*'s approach, the scope of a permissible border device search is restricted to digital contraband—almost exclusively child pornography.[93] This new standard faces three major challenges. First, it has triggered a sharp disagreement among circuit courts. In *Alasaad*, the First Circuit wrote that *Cano* "fails to appreciate the full range of justifications for the border search exception beyond the prevention of contraband itself entering the country."[94] Since the Supreme Court declined to review the border search issue, another battle among the circuit courts is foreseeable over the historic rationales underlying the border search exception and their applications to modern cell phones and devices. Second, by coming up with the scope standard the Ninth Circuit directed the public's attention to the concept of "digital contraband," but left the following difficult questions unanswered: what is the definition of digital contraband? What criteria should be used in determining digital contraband? Could anything other than child pornography, classified information, and counterfeit media constitute digital contraband?[95] Third, and regardless of the outcomes of the debates over the first two issues, the scope standard could be easily circumnavigated by customs agents in reality because, as the *Cano* court itself observed, "[c]riminals may hide contraband in unexpected places."[96] This holds particularly true when it comes to manual searches, for which *Cano* and other circuits require no suspicion at all. Consequently, agents could search and seize the most personal, sensitive data in one's phone, without any quantum of suspicion, by thumbing through the various apps installed. Since the *Cano* court found even a phone's call log could hide digital contraband in the forms of "images or videos,"[97] it is hard to argue that any other places, especially the more sophisticatedly designed apps installed in a phone, could not potentially contain contraband. Simply put, even under the very narrow scope standard, agents could still search any places in an electronic device so long as it could possibly contain pictures and/or videos.

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[90] *Id.* at 2642.

[91] *Id.*

[92] Sophia Cope, *Protecting Digital Data at the U.S. Border*, AM. CONST. SOC'Y (Sept. 11, 2019), https://www.acslaw.org/issue_brief/briefs-landing/protecting-digital-data-at-the-u-s-border/.

[93] *Cano*, 934 F.3d at 1021 n.13.

[94] *Alasaad*, 988 F.3d at 21.

[95] *See* Alasaad v. Nielsen, 419 F. Supp. 3d 142 (D. Mass. 2019) [hereinafter *Alasaad I*], *rev'd*, 988 F.3d 8 (1st Cir. 2021) (the defendant there identified digital contraband to include child pornography, classified information and counterfeit media).

[96] *Cano*, 934 F.3d at 1019.

[97] *Id.*

With regard to the suspicion requirement, however, *Cano* did little to safeguard against the invasion into traveler's digital privacy. It simply echoed other circuit courts that routine border searches require no suspicion and that nonroutine searches need reasonable suspicion. In this regard, the only difference between *Cano* and other circuit cases is that *Cano* clarified the requisite reasonable suspicion to justify a forensic cell phone search should be "that the cell phone to be searched itself contains contraband."[98] In reality, however, manual device searches are still most problematic under the lens of the Fourth Amendment, because no suspicion whatsoever is needed. Findings from such unfettered manual searches, in return, could conveniently satisfy the low standard of reasonable suspicion, thus supporting the more invasive forensic search and therefore subjecting a traveler's device to eventually "a computer strip search."[99]

Notably in this regard, the *Cano* court found that *Riley*'s warrant requirement has no application in border search context, because "the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior."[100] However, the *Cano* court then relied on *Riley* to illustrate the importance of digital privacy and to reject the government unfettered access to cell phones "on the mere basis that [the searches] occurred at the border."[101] Again, although the Ninth Circuit recognized the severe intrusion into privacy interests under the border search exception, it hesitated in enhancing the level of suspicion required, seemingly assuming that reasonable suspicion is the ceiling for device searches simply because they happen at the border.[102]

Having been examined under both dimensions, it is clear that *Cano*'s seemingly radical approach, although eliciting condemnations from those who are more conservative in supporting privacy rights, is actually unavailing in enhancing protection of digital privacy at the border. Critically in this regard, the Fourth Amendment limitation to manual device searches is tenuous, despite that a manual search could be no less revealing than any other searches given the design of today's easy-to-use apps. For example, where a home monitoring app is installed on a smartphone, only a few taps on a phone screen could lead agents to remotely view the live streaming video of the inside of one's home.[103] Ironically, while Fourth Amendment jurisprudence has long established that "[a] man's home is his castle,"[104] at the border the

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[98] *Id.* at 1020.

[99] *Cotterman*, 709 F.3d at 966.

[100] *Cano*, 934 F.3d at 1015 (citing *Montoya de Hernandez*, 473 U.S. at 538).

[101] *Id.* at 1020 (citing *Soto-Soto*, 598 F.2d at 549).

[102] *See id.* at 1015–16 ("post-*Riley*, no court has required more than reasonable suspicion to justify even an intrusive border search").

[103] IPHONE USER GUIDE, SET UP SECURITY CAMERAS IN HOME ON IPHONE (2022), https://support.apple.com/guide/iphone/configure-cameras-iph7bc5df9d9/ios; Natasha Baker, *Apps convert smartphones into home monitoring system*, REUTERS (May 6, 2013), https://www.reuters.com/article/net-us-app-home-monitoring/apps-convert-smartphones-into-home-monitoring-system-idUSBRE94503O20130506.

[104] Minnesota v. Carter, 525 U.S. 83, 94 (1998).

government agents could invade one's otherwise safeguarded castle with a manual search; and, sadly, under current law there is only flimsy restriction on such invasion. *Cano* put the scope restraint on manual searches as well as on forensic searches; however, as demonstrated herein above customs agents could easily circumnavigate the scope standard. Consequently, when it comes to manual device searches "anything goes."[105]

That said, one thing in the *Cano* opinion is particularly interesting and important: while finding that the government lacked reasonable suspicion to conduct the Cellebrite search of Cano's cell phone, the Ninth Circuit did not conclude that the Cellebrite search constitutes a forensic search *per se*; instead, it directed the district court to determine whether the Cellebrite search qualifies as a forensic search at any retrial.[106]

The same logic, when applied to the manual searches, invites the most critical question: whether a so-called manual search always constitutes a routine border search, or a nonroutine one which needs at least reasonable suspicion? However, the *Cano* court did not go this direction. It simply assumed, without offering any explanation, that the manual searches qualified as routine searches, without triggering the suspicion requirement.[107] By doing so, the Ninth Circuit missed the best opportunity to restructure the border search doctrine in the digital age—manual searches of electronic devices could and should be deemed as nonroutine due to their intrusiveness into traveler's digital privacy. Moreover, properly placing manual searches into the nonroutine category would be much more effective in safeguarding privacy interest at the border than implementing the controversial scope standard.

With the above analysis as a backdrop, the next section of this article will demonstrate the pressing need of restructuring the border search doctrine by exploring: (1) the application of the traditional distinction between routine and nonroutine border searches to the digital era; and (2) how and why manual searches of cell phones and laptops should be categorized as nonroutine rather than routine.

IV. REFASHIONING THE CONVENTIONAL DISTINCTION BETWEEN ROUTINE AND NONROUTINE BORDER SEARCHES

A. *Lack of Clarity on the Distinction Between Routine and Nonroutine Searches*

In most cases involving border searches of electronic devices, courts refer to a nonroutine search by using the terms "nonroutine," "forensic," or "advanced" interchangeably, just like using the phrases "routine," "manual,"

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105 *Seljan*, 547 F.3d at 1000.

106 *Cano*, 934 F.3d at 1022.

107 *Id.* at 1019.

or "basic" for routine searches in an undifferentiated manner.[108] Indeed, on most occasions courts assume that a manual search of a cell phones or a laptop is routine, while a forensic device search with the help of software or equipment is nonroutine.[109]

Notably, though the Supreme Court distinguished the more invasive, nonroutine border search from a routine one in *Montoya de Hernandez*,[110] it did not give any clear definitions to the concepts of routine or nonroutine border searches. The Supreme Court only held that "Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border," which "are not subject to any requirement of reasonable suspicion, probable cause, or warrant."[111] In contrast, "the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified . . . [by] reasonabl[e] susp[icion]."[112] Thus, the Supreme Court found that the sixteen-hour "long, uncomfortable, [and] humiliating" detention of the defendant was supported by customs agents' reasonable suspicion that she was smuggling drugs in her alimentary canal.[113]

Similarly, the CBP policy does not provide a shred of insight in clarifying these terms.[114] In fact, the CBP policy only provides that "[a]n advanced search is any search in which an Officer connects an external equipment, through a wired or wireless connection, to an electronic device not merely to gain access to the device, but to review, copy, and/or analyze its contents."[115] Then, a "basic search" is simply one "that is not an advanced search."[116] Thus, under the CBP policy, "a basic search and an advanced search differ only in the equipment used to perform the search and certain types of data that may be accessed with that equipment, but otherwise both implicate the same privacy concerns."[117] As a result, the CBP's technical standard, although a "manageable one,"[118] does not provide much enlightenment for a discussion under the Fourth Amendment context. However, some courts accepted such criteria, commenting that "officers [can] make a commonsense differentiation between a manual review of files on an electronic device and application of computer software to analyze a hard drive."[119]

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[108] *See generally Cano*, 934 F.3d 1002 ("routine" and "manual"); *Alasaad*, 988 F.3d 8 ("basic" or "manual" vs. "advanced" or "forensic"); *Kolsuz*, 890 F.3d 133 (same).

[109] *Id.*

[110] *Montoya de Hernandez*, 473 U.S. at 537, 540.

[111] *Id.* at 537, 538.

[112] *Id.* at 541.

[113] *Id.* at 544, 542.

[114] U.S. Customs & Border Prot., *Subject: Border Search of Electronic Devices* ¶ 3.2 (Jan. 4, 2018), https://www.dhs.gov/sites/default/files/publications/CBP%20Directive%203340-049A_Border-Search-of-Electronic-Media.pdf.

[115] *Id.* at ¶ 5.1.4.

[116] *Id.* at ¶ 5.1.3.

[117] *Alasaad I*, 419 F. Supp. 3d at 163.

[118] *Kolsuz*, 890 F.3d at 146.

[119] *Cotterman*, 709 F.3d at 967; *see also Kolsuz*, 890 F.3d at 146 (the CBP Directive suggests that "the distinction between manual and forensic searches is a perfectly manageable one.").

As such, the distinction between routine and nonroutine border searches has remained unclarified, let alone what constitutes routine or nonroutine searches of digital devices. Courts have observed this ambiguity and potential issues resulting therefrom. As Judge Callahan commented in her partially concurring and partially dissenting opinion to *Cotterman*, "[t]he majority never defines 'forensic,' leaving border agents to wonder exactly what searches are off-limits."[120] Similarly, a Virginia district court summarized that

> [a]lthough the Supreme Court has not made pellucid exactly what renders a border search nonroutine—and what level of individualized suspicion is necessary for nonroutine searches—circuit courts have looked to the intrusiveness of the search in distinguishing between routine and nonroutine border searches . . . Less clear, however, is whether digital searches of electronic devices—such as computers and cell phones—count as routine border searches.[121]

In sum, no matter what label the government or a court gives to a border device search, routine or nonroutine, manual or forensic, basic or advanced, it is important to remember that "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'"[122] Under the principle of reasonableness, circuit courts have described a routine search as one that does "not pose a serious invasion of privacy,"[123] "one that does not 'seriously invade a traveler's privacy,'"[124] or one that "do[es] not substantially infringe on a traveler's privacy rights."[125] This holds true as to border searches of electronic devices.

To be clear, while the lack of clarity in this regard leaves court without much guidance in distinguishing nonroutine border device searches from routine ones, it also gives courts some flexibility to refashion the border search doctrine in the digital age in order to accommodate developments in technology and law. As the Supreme Court emphasized, "'common sense and ordinary human experience must govern over rigid criteria.'"[126]

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[120] *Cotterman*, 709 F.3d at 978 (9th Cir. 2013) (Callahan, J., concurring in part and dissenting in part).

[121] United States v. Kolsuz, 185 F. Supp. 3d at 853 (E.D. Va. 2016).

[122] *Riley*, 134 U.S. at 2482.

[123] United States v. Johnson, 991 F.2d 1287, 1291 (7th Cir. 1993).

[124] United States v. Kelly, 302 F.3d 291, 294 (5th Cir. 2002) (quoting United States v. Cardenas, 9 F.3d 1139, 1148 n.3 (5th Cir 1993)).

[125] Tabbaa v. Chertoff, 509 F.3d 89, 98 (2d Cir. 2007).

[126] *Montoya de Hernandez*, 473 U.S. at 543, (quoting United States v. Sharpe, 470 U.S. 675, 685 (1985)).

B. *Reconsidering the Routine vs. Nonroutine Distinction in the Digital Era*

It was in 1985 when the Supreme Court came up with the distinction between routine and nonroutine searches in *Montoya de Hernandez,*[127] long before the first smartphone was invented in 1992,[128] and evener longer before smartphones became popular when Apple introduced its first iPhone in 2007.[129] Back then, the first truly portable computer was just invented four years before *Montoya* in 1981, and it was not until the end of 1980s when laptops became popular.[130]

Thus, it is natural that the *Montoya* Court's analysis did not anticipate the new trend of laptops and smartphones, let alone how these small devices eventually changed the world and impacted the Fourth Amendment jurisprudence. In fact, the *Montoya* Court discussed the distinction between routine and nonroutine searches primarily in context of detention and physical intrusion of a traveler.

Prior to the digital age, border searches of a traveler's belongings, such as the inspection of luggage and containers, were categorically considered routine as they only exposed limited privacy of the traveler and were not highly intrusive. As the *Montoya* Court put, "[t]ravelers at the national border are routinely subjected to questioning, patdowns, and thorough searches of their belongings."[131] The Supreme Court then reasoned that "[t]hese measures . . . do not violate the Fourth Amendment" because they "involve relatively limited invasions of privacy and which typically are conducted on all incoming travelers."[132]

Most critically, however, *Montoya* should not be read as prohibiting any subsequent refashioning of the border search doctrine from its original context, regardless of the rapid developments in technology and society. To the contrary, the *Montoya* Court did its best to give leeway to incorporate future evolution in law, by stating that "[a]t some point, however, further investigation involves such severe intrusions on the values the Fourth Amendment protects that more stringent safeguards are required."[133] As such, while in most device search cases courts cite to *Montoya* as the origin of the routine vs. nonroutine distinction, they must not disregard the Supreme Court's efforts in integrating future changes in society and technology with

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[127] *Id.* at 531.

[128] Meghan Tocci, *History and Evolution of Smartphones*, SIMPLETEXTIN (Aug. 19, 2019), https://simpletexting.com/where-have-we-come-since-the-first-smartphone/ ("The first smartphone, created by IBM, was invented in 1992 and released for purchase in 1994.").

[129] Shikha Ratnaker, *When Did Smartphones Become Popular?*, INVENTION OF MOBILE PHONES (Mar. 27, 2021), https://inventionofmobilephones.com/when-did-smartphones-become-popular/.

[130] Matt Hanson, *40 years of the laptop: how mobile PCs changed the world*, TECHRADAR (May 6, 2019), https://www.techradar.com/news/40-years-of-the-laptop-how-mobile-pcs-changed-the-world.

[131] *Montoya de Hernandez*, 473 U.S. at 551.

[132] *Id.*

[133] *Id.*

the border search doctrine for purposes of reconciling potential conflicts. Unfortunately, however, some courts still rigidly applied the "traditional model of physical items as mere containers"[134] to today's electronic devices.[135] Even in *Cano*, the most favorable case for protecting digital privacy at the border thus far, the court assumed that manual device searches were routine.

Courts and scholars have been rethinking the distinction between routine and nonroutine searches in light of the digital era. Post *Riley*, a Massachusetts district court held that "the broadly defined basic search and advanced searches of electronic devices are both non-routine searches."[136] And although it was later reversed by the First Circuit, the district court in *Alasaad I* provided a valuable analysis. Following *Riley*, the court recognized that "even a basic search [of electronic devices] alone may reveal a wealth of personal information" because "[s]uch devices can contain, for some examples, prescription information, information about employment, travel history and browsing history."[137] Critically, "[e]ven in a basic search, agents can peruse and search the contents of the device, using the native search functions on the device, including, if available, a keyword search."[138] This is so because "a device's native operating systems become more sophisticated and more closely mirror the capabilities of an advanced search."[139] Thus, a basic search's range is no less broad than that of an advanced search.[140] Consequently, the court held that it was "unable to discern a meaningful difference between the two classes of searches in terms of the privacy interests implicated."[141] As such, the court concluded that "agents and officials must have reasonable suspicion to conduct any search of entrants' electronic devices under the 'basic' searches and 'advanced' searches as . . . defined by the CBP and ICE policies."[142] However, the First Circuit reversed this holding in 2021, holding that routine border searches of electronic devices require no suspicion, reasoning "the bottom line is that basic border searches of electronic devices do not involve an intrusive search of a person, like the search the Supreme Court held to be non-routine in *Montoya de Hernandez*."[143]

Responding to courts' struggles, one scholar proposed "a bright-line rule for border searches of laptops and other digital devices that resolves the problematic nature of the routine/nonroutine dichotomy by obviating it: All digital border searches, including laptops, should be subject to a reasonable

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134 Eunice Park, *The Elephant in the Room: What Is a Nonroutine Border Search, Anyway? Digital Device Searches Post-Riley*, 44 HASTINGS CONST. L.Q. 277, 299 (2017).

135 United States. v. Touset, 890 F.3d 1227, 1233 (11th Cir. 2018) ("electronic devices should receive special treatment" because the Supreme Court has never extended this requirement to border searches of property "however nonroutine and intrusive.").

136 *Alasaad I*, 419 F.Supp.3d at 163, *rev'd*, 988 F.3d 8 (1st Cir. 2021).

137 *Id.*

138 *Id.*

139 *Id.* at 165.

140 *Id*.

141 *Id*.

142 *Id*.

143 *Alasaad*, 988 F.3d at 18 (emphasis in original).

suspicion standard without reference to whether the search is 'routine' or 'nonroutine.'"[144] The scholar advocated that "[w]hile the distinction between routine and nonroutine works for searches of containers and human bodies, the concepts are inapposite to digital data."[145] "Even if the terms 'routine' and 'nonroutine' or 'manual' and 'forensic' could be defined with any certainty," the author reasoned, "the actual searches will fall on a sliding scale because each digital search will differ from the next."[146] Consequently, "case-by-case assessments are undesirable," just like "the Supreme Court [in Riley] rejected the prospect of a case-by-case analysis of which digital files can be searched incident to arrest."[147] As such, the author suggested to "take the elephant out of the room" by triggering the reasonable suspicion standard for all border digital device searches.[148] The Electronic Frontier Foundation, filing amicus briefs in border device search cases, also argued that all such searches, manual or forensic, should be subject to heightened Fourth Amendment standards with regard to both scope and level of suspicion.[149]

Indeed, all border searches of electronic devices, manual or forensic, must be justified by at least reasonable suspicion. Manual searches happen more frequently at the border than forensic searches, and could be as invasive as forensic ones, but they have much fewer restraints than forensic searches.

A recent Tenth Circuit case, *United States v. Williams*,[150] gives a good—but sarcastic—illustration of the limitless invasion into digital privacy under the umbrella of manual search. In August 2015, CBP Agent Kyle Allen received a letter stating that Derrick Williams had been arrested in Germany for violating weapons laws.[151] Agent Allen then began investigating Williams and placed a "lookout" alert on him on the CBP system after the November 13, 2015 terrorist attack in Paris, although Allen "did not have specific information linking Mr. Williams to terrorist activity."[152] Later that month, when Williams entered the U.S. through Denver International Airport, the alert was triggered and Williams was subsequently interviewed by Allen.[153] Agent Allen asked Williams for passwords to his smartphone and laptop, which Williams refused to give.[154] The agent then detained Williams' devices, and "[a] computer forensics agent used a software program called

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144 Park, *supra* note 134 at 279. *See also* Thomas Mann Miller, *Digital Border Searches After* Riley v. California, 90 WASH. L. REV. 1943, 1995–96 (2015) ("courts should treat digital searches as nonroutine . . . and [do] away with the distinction between manual and forensic searches.").

145 *Id*. at 304.

146 *Id*. at 302.

147 *Id*. at 301.

148 *Id*. at 304.

149 Sophia Cope, *EFF to Ninth Circuit: Border Searches of Electronic Devices Require a Warrant*, ELEC. FRONTIER FOUND. (Feb. 19, 2020), https://www.eff.org/deeplinks/2020/02/eff-ninth-circuit-border-searches-electronic-devices-require-warrant.

150 United States v. Williams, 942 F.3d 1187, 1191 (10th Cir. 2019).

151 *Id.* at 1189.

152 *Id.*

153 *Id.*

154 *Id.*

'EnCase' to bypass the laptop's password and create a copy of the hard drive, which he was then able to search."[155] Simply put, the agents "hack[ed] into it."[156] Within three minutes of the manual search, the agent located child pornography files and subsequently obtained a search warrant.[157] Williams appealed from his child pornography convictions, arguing that the border searches violated his Fourth Amendment rights.[158] The Tenth Circuit found that the border searches were supported by reasonable suspicion.[159] Williams petitioned for the Supreme Court's review, and the government countered that ***no forensic search occurred*** because the agent only ***manually browsed*** the folders on the laptop, "'as one could do if accessing it directly from the laptop.'"[160] The Supreme Court denied certiorari.[161]

Thus, as demonstrated by the government's argument in *Williams*, the distinction between routine and nonroutine searches, and the broad scope of routine search as applied to a digital context, leaves a loophole in the Fourth Amendment privacy protection at the border. Moreover, the foregoing evaluation of the *Cano* approach indicates that it could not provide effective protection of digital privacy at the border, no matter how a court adjust the sliding scale along the two dimensions, with manual searches almost out of the picture. All these call for a refashioning of the border search exception in the digital age—treating all electronic device searches, manual or forensic, basic or advanced, as nonroutine and categorically protecting digital privacy with "more stringent safeguards."[162]

C. *Digital Devices are "Qualitatively," Not Just "Quantitatively," Different*

Why, then, did the *Cano* court insist to the routine vs. nonroutine distinction? The answer is that the court followed the two-category framework established by circuit precedent, *Cotterman*,[163] which was decided prior to *Riley*. The *Cano* court further commented that it does not "believe that *Riley* renders the *Cotterman* standard insufficiently protective," because the border search exception and the search incident to arrest exception have critical

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[155] *Id.* at 1189–90.

[156] J. Alexander Lawrence & Sara Stearns, *Uncertainty Around Border Phone Search Standard Continues*, LAW360 (Nov. 20, 2020), https://media2.mofo.com/documents/201120-uncertainty-around-border-phone-serch.pdf.

[157] *Williams*, 942 F.3d at 1190

[158] *Id.*

[159] *Id.*

[160] Brief for the United States in Opposition, Williams v. United States, 141 U.S. 235 (2020) (No. 19-1221), at 20, https://www.supremecourt.gov/DocketPDF/19/19-1221/145993/20200619163037597_19-1221%20-%20Williams.pdf.

[161] *Williams*, 942 F.3d at 1191 (10th Cir. 2019), *cert. denied*, 141 U.S. 235 (U.S. October 5, 2020) (No. 19-1221).

[162] *Montoya de Hernandez*, 473 U.S. at 551.

[163] *Cotterman*, 709 F.3d at 957.

"difference in context."[164] In reaching this conclusion, the *Cano* court, just like many other circuit courts in similar cases, relied on the *Montoya* Court's finding that "the Fourth Amendment's balance of reasonableness is ***qualitatively*** different at the international border than in the interior."[165]

The *Montoya* Court concluded so on grounds that "'[i]mport restrictions and searches of persons or packages at the national border rest on different considerations and different rules of constitutional law from domestic regulations," tracing back to Congress' power "[t]o regulate Commerce with foreign Nations" and "to protect the Nation by stopping and examining persons entering this country."[166] However, it was still unclear from *Montoya* why and how these "different considerations and different rules of constitutional law" render the Fourth Amendment test as to border searches "qualitatively" different to other searches.[167] The *Montoya* Court reasoned that "the expectation of privacy [is] ***less*** at the border than in the interior . . . [and] the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck much ***more*** favorably to the Government at the border."[168] Its reasoning, especially the terms "less" and "more," suggested that the difference between border searches and domestic searches is "quantitative," as opposed to "qualitative," in nature. However, with this not-so-well-explained notion of "qualitative difference," lower courts became reluctant to afford sufficient protection and safeguards that people's digital privacy deserves.

The *Riley* Court used the term "qualitatively" in favor of digital privacy, though this is often ignored or minimized by circuit courts.[169] *Riley* emphasized that modern electronic devices "implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse" and "differ in both a quantitative and ***qualitative*** sense from other objects that might be kept on a person."[170] Unlike *Montoya*'s conclusion on the "qualitative difference" between border searches and other searches, the *Riley* Court's finding of a cell phone's "qualitative difference" is well supported by in-depth analysis and statistics. Specifically, in addition to modern cell phones' "immense storage capacity," *Riley* further focused on the following considerations: (1) the "pervasiveness that characterizes cell phones but not physical records," (2) the highly sensitive data concerning the user's medical conditions and historic location information, (3) the fact that "apps" "offer a

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164 *Cano*, 934 F.3d at 1015.

165 *Id.* (quoting *Montoya de Hernandez*, 473 U.S. at 538) (emphasis added).

166 *Montoya de Hernandez*, 473 U.S. at 537–38.

167 *Id.*

168 *Id.* at 539–40.

169 *See e.g.*, *Cano*, 934 F.3d 1011–23 (commenting on *Riley* without mentioning of the *Riley* court's finding of a "qualitative" difference between a cell phone and other objects); *Kolsuz*, 890 F.3d at 137; *Kolsuz*, 890 F.3d at 145–46 (recognizing *Riley*'s finding that cell phones are fundamentally different "in both a quantitative and a qualitative sense," but minimizing such difference under the border exception) (internal citation omitted).

170 *Riley*, 573 U.S. at 393.

range of tools for managing detailed information about all aspects of a person's life," [and] (4) phones' capability of remotely "access[ing] data located elsewhere, at the tap of a screen."[171] These factors give reason as to how smartphones are "qualitatively" distinguishable from other physical vehicles containing information, such as "a tractor-trailer loaded with boxes of documents."[172]

Cano does not specifically address the "qualitative" difference raised in *Riley*. Although it recognized the remarkable privacy interests in electronic devices, the *Cano* Court declined to apply *Riley*'s warrant requirement to border search context, because "the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior."[173] In *Alasaad*, the First Circuit acknowledged the "qualitative difference" emphasized in *Riley* but dismissed it, holding that "[t]hese privacy concerns, however significant or novel, are nevertheless tempered by the fact that the searches are taking place at the border."[174]

The author of this article firmly believes that in no way should *Riley*'s well-founded finding be disregarded. Although *Riley* deals with the search incident to arrest exception, not the border search exception, it is clear that people's fundamental privacy rights are the focus of the reasonableness analyses in both instances. Thus, even when considered together with *Montoya*'s "qualitative difference," *Riley*'s well-reasoned "qualitative difference" is still sufficient to take all electronic device border searches to the nonroutine category, at the very least.

V. CONCLUSION

Just like the *Cano* court noted, "[t]he courts of appeals have just begun to confront the difficult questions attending cell phone searches at the border."[175] As demonstrated herein, the multi-circuit split over the standards for border device searches, combined with the ineffectiveness of even the most pro-privacy *Cano* approach, call for scrutinizing and refashioning the law in this area. Moreover, in light of the rapid evolution of mobile technology, especially the emerging trend of "Internet Of Things,"[176] it can be anticipated that smartphones and other electronic devices will implicate even much more privacy interests than *Riley* contemplated. Now, it is about time, if not too late, for courts to inject more "technology savvy" into the conventional border search exception—by categorically protecting digital privacy in electronic devices with a reasonable suspicion or higher standard, without classifying device searches as routine or nonroutine.

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171 *Id.* at 395–97.

172 *Touset*, 890 F.3d at 1233.

173 *Cano*, 934 F.3d at 1015 (citing *Montoya de Hernandez*, 473 U.S. at 538).

174 *Alasaad*, 988 F.3d at 18.

175 *Cano*, 934 F.3d at n.13.

176 Irving Wladawsky-Berger, *The Internet of Things Is Changing the World*, WALL ST. J., (Jan. 10, 2020, 3:56 PM), https://www.wsj.com/articles/the-internet-of-things-is-changing-the-world-01578689806.

Article

FUTURE DANGEROUSNESS:

A FAULTY COG IN THE MACHINERY OF DEATH

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I. INTRODUCTION

Two decades after Duane Buck was sentenced to death by a Texas jury, the Supreme Court effectively vacated his death sentence by holding that his counsel during sentencing was unconstitutionally deficient.[1] In doing so, the Court spoke to a national audience of outspoken critics demanding a new sentence for Buck, whose case had sparked an unexpected wave of outrage in the twenty years he had spent on death row.[2] Before sentencing him in 1997, Buck's jury had heard testimony from an expert psychologist who claimed that Buck was more likely to commit future acts of violence because he was black.[3] The expert, who had offered similar testimony in a number of capital cases, was called by Buck's own defense counsel.[4] Although he ultimately concluded that Buck was unlikely to commit future acts of violence in prison, Dr. Walter Quijano openly acknowledged that he regularly considered race in making predictions of future dangerousness, and that Buck's race suggested that he was more likely to commit violent crimes than a similarly situated white defendant would be.[5] In Texas, such predictions are especially important in capital trials, as the state's death penalty statute requires jurors to find "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" before they can sentence an offender to death.[6] Unsurprisingly, the State pressed Dr. Quijano on his suggestion that black defendants are genetically predisposed to future violence, and the psychologist's findings were raised on four separate occasions during sentencing.[7] Ultimately, it took the jury only two days to sentence Duane Buck to death after they unanimously agreed that he posed a continuing danger to society.[8]

In vacating Buck's death sentence, the Supreme Court was adamant in its condemnation of the "particularly noxious strain of racial prejudice" that seeped into his sentencing, rejecting the lower court's suggestion that the role of race in the case was *de minimis* and instead observing that "some toxins can be deadly in small doses."[9] After twenty years on death row, Duane Buck received a new sentence of Life Without Parole, closing a haunting chapter of his life that began when his own counsel introduced evidence linking his race to his propensity for future violence.[10]

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[1] Buck v. Davis, 137 S. Ct. 759 (2017).

[2] Sherri Lynn Johnson, Buck v. Davis *From the Left*, 15 OHIO ST. J. CRIM. L. 247, 261 (2017) (recounting the procedural background of *Buck* and noting the "storm of public protest" that accompanied the case.).

[3] *Buck*, 137 S. Ct. at 765–66.

[4] *Id.* at 766.

[5] *Id.* at 768.

[6] Tex. Code Crim. Proc. Ann., Art. 37.071, § 2(b)(1).

[7] *Buck*, 137 S. Ct. at 769.

[8] *Id.*

[9] *Id.* at 776–77.

[10] Alex Arriaga, *Texas Death Row Inmate Duane Buck Has Sentence Reduced to Life After Supreme Court Orders Retrial*, TEX. TRIB. (Oct. 3, 2017), https://www.texastribune.org/2017/10/03/high-profile-death-row-case-comes-end-guilty-plea/.

But while Buck's circumstances were shocking and egregious in many ways, the Court's insistence that racial prejudice is "extraordinary"[11] and uniquely "disturbing"[12] in capital sentencing is embarrassingly out of touch with the realities of capital punishment.[13] Indeed, racial prejudice is pervasive in death penalty cases even outside the "unusual confluence of factors"[14] in *Buck*, and the notion that Dr. Quijano's invocation of race was "a disturbing departure from a basic premise of our criminal justice system"[15] betrays the Court's willful ignorance about the role that race plays in even the most ordinary capital cases.[16] Particularly in jurisdictions like Texas, where capital jurors are asked to predict whether defendants will pose a future danger to society, implicit racial prejudices seep into sentencing and taint jury deliberations even when no expert psychologist explicitly links race to punishment.[17] Duane Buck's sentencing was egregious only in the sense that it explicitly introduced what usually only implicitly drives capital juries in death penalty states like Texas.[18]

This paper will use *Buck v. Davis* as an opportunity to reflect on the constitutionality of Texas's death penalty statute, which has resulted in more executions in the modern era of capital punishment than that of any other state in the country.[19] In particular, I will argue that the unique importance that Texas attaches to future dangerousness impermissibly empowers jurors to narrow the class of death-eligible offenders along racial lines, fundamentally abrogating the Court's central command when it reinstated the death penalty in *Gregg*.[20] The admissibility of future dangerousness predictions has been intensely scrutinized and widely challenged since the Court first upheld Texas's instruction in *Jurek*.[21] On the few occasions when it has squarely considered these challenges, however, the Supreme Court has upheld future dangerousness inquiries as both constitutionally permissible and practically unremarkable in a criminal justice system that routinely asks officials to predict future behavior.[22] For the past three decades, even as capital punishment has retreated to the fringes of the criminal justice system, the Court has

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[11] *Buck*, 137 S. Ct. at 766.

[12] *Id.*

[13] Johnson, *supra* note 2, at 264–65.

[14] *Buck*, 137 S. Ct. at 776.

[15] *Id.* at 778.

[16] *See, e.g.*, Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101:7 HARV. L. REV. 1388 (1988).

[17] Johnson, *supra* note 2, at 260.

[18] *Id.* at 259–60.

[19] *Texas Death Penalty Facts*, TEX. COAL. TO ABOLISH THE DEATH PENALTY, https://tcadp.org/get-informed/texas-death-penalty-facts/ (last visited Jan. 27, 2021).

[20] Gregg v. Georgia, 428 U.S. 153 (1976).

[21] Jurek v. Texas, 428 U.S. 262, 274–76 (1976).

[22] Thomas Reigner, *Barefoot in Quicksand: The Future of 'Future Dangerousness' Predictions in Death Penalty Sentencing in the World of Daubert and Kumho*, 37:3 AKRON L. REV. 469, 478–80 (2004).

remained silent in the face of a mounting chorus of criticism suggesting that future dangerousness has no place in capital sentencing.[23]

This paper accepts the Court's apparent hesitation to revisit the constitutionality of future dangerousness altogether, and instead offers a more modest challenge to the particular role that future dangerousness plays in Texas, where the inquiry functions as a threshold question that every capital jury must resolve before it is permitted to give weight to any potentially mitigating evidence.[24] In this scheme, future dangerousness is a mandatory gateway question that functions to narrow the class of death-eligible offenders, not a discretionary factor that aids the jury in selecting which death-eligible offenders deserve mercy.[25] As such, it should be more closely scrutinized, as it must narrow the class of convicted murderers eligible for the death penalty along objective, non-arbitrary lines.[26] But Texas's inquiry does just the opposite, activating particularly pervasive racial stereotypes with deep historical roots and ultimately producing death sentences implicitly based, at least in large part, on race.[27] As death penalty opponents have recognized from the time that the instruction was first challenged in 1976, racial prejudice taints jurors' perceptions of future dangerousness even when no expert witness explicitly connects race to violence.[28] Drawing from a robust body of empirical evidence confirming that perceptions of dangerousness are inevitably infected by implicit racial prejudices,[29] this paper argues that Texas's use of future dangerousness as a threshold inquiry is unconstitutional under *Furman* and *Gregg* because it invites arbitrary and discriminatory death sentences.

In Part 1, I begin by placing my argument within the extensive existing literature challenging future dangerousness considerations in capital sentencing. Since Texas's death penalty statute was first upheld in *Jurek*, future dangerousness predictions have been widely criticized as highly unreliable, constitutionally indefensible, and plainly irrelevant.[30] I argue that the Supreme

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[23] Johnson, *supra* note 2, at 261–63.

[24] *Id.* at 248.

[25] *See, e.g.*, Zant v. Stephens, 462 U.S. 862, 876–78 (1983).

[26] *Id.* ("To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."); *see also* Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (striking down an aggravating circumstance that was impermissibly vague and did not meaningfully narrow the class of death-eligible offenders.)

[27] Johnson, *supra* note 2, at 259.

[28] *See* Maurice Chammah, *The Case That Made Texas the Death Penalty Capital*, THE MARSHALL PROJECT (Jan. 26, 2021), https://www.themarshallproject.org/2021/01/26/the-case-that-made-texas-the-death-penalty-capital; *see also* Brief for Constitutional Accountability Center as Amicus Curiae at 3–4, Buck v. Davis, 137 S. Ct. 759 (2017) (observing that Dr. Quijano's testimony activated a particularly persistent racial stereotype and historically recounting how the stereotype of black men as inherently violent has come to exert unique power in this country); *see also* Brief on Behalf of National Black Law Students Association as Amicus Curiae at 22, Buck v. Davis, 137 S. Ct. 759 (2017) (arguing that the stereotype of Black men as dangerous criminals is deeply ingrained in our culture, and demonstrably affects perceptions of reality even today).

[29] *Id.*

[30] *See, e.g.*, Carla Edmondson, *Nothing is Certain But Death: Why Future Dangerousness Mandates Abolition of the Death Penalty*, 20 LEWIS & CLARK L. REV. 857 (2016).

Court's silence in the face of this mounting criticism suggests that a more modest challenge may be appropriate, and focus my attention on the unique role that future dangerousness plays in the state that has become the "Death Penalty Capital" of the country.[31] In Part 2, I will use the now-infamous case of Duane Buck to explore how Texas's unique future dangerousness instruction impacts capital sentencing. Unlike any other active death penalty state in the country, Texas *requires* capital juries to resolve the question of future dangerousness at the outset of their deliberations, before they are permitted to consider any potentially mitigating evidence. If the Court remains hesitant to revisit future dangerousness altogether, this unique scheme deserves to be challenged in its own right, as it structurally predisposes juries to death sentences by elevating a particularly arbitrary and demonstrably discriminatory inquiry to the center of capital sentencing. Finally, in Part 3, I will argue that this unique structure is patently unconstitutional, as it directly empowers Texas jurors to determine which offenders are eligible for the death penalty based on powerful racial prejudices, creating the same problems of discrimination and arbitrariness that led the Court to invalidate the death penalty in 1972.

II. PART 1: PREDICTING THE FUTURE

As a matter of public policy and debate, proponents of capital punishment most commonly defend the death penalty as either a just retributive response to murder or an effective deterrent of future violence.[32] But for a jury faced with the actual prospect of sentencing someone to death, the most powerful (and often decisive) consideration tends to be a lurking fear that the offender himself may pose a future danger to society.[33] Five states explicitly invite jurors to consider future dangerousness, but empirical accounts overwhelmingly suggest that "dangerousness is in fact the primary determinant in the sentencing process" throughout the twenty-seven states that still retain the death penalty.[34] This underlying intuition that an offender's fate should depend on the danger he might pose to others is understandable but, as critics have argued since the instruction first appeared in Texas's death penalty statute over four decades ago, it is also fundamentally misguided and highly problematic.[35] Unfortunately, on the few occasions when the Court has

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[31] Chammah, *supra* note 28.

[32] William W. Berry III, *Ending Death by Dangerousness, A Path to the De Facto Abolition of the Death Penalty*, 52 ARIZ. L. REV. 889, 893 (2010).

[33] *Id.*

[34] *Id.* at 900–02 (citing data from the Capital Jury Project); *see also* John H. Blume, Stephen P. Garvey, & Sheri Lynn Johnson, *Future Dangerousness in Capital Cases: Always 'At Issue,'* 86 CORNELL L. REV 397, 410 (2001) ("[T]he fact of the matter is that future dangerousness is on the minds of most capital jurors and thus 'at issue' in virtually all capital trials, even if the prosecution says nothing about it."); *see also* Edmondson, *supra* note 30, at 905 ("The data demonstrate that the perceived future dangerousness of a defendant is highly aggravating, with 57.9% of respondents stating they would be more likely to vote for death if asked whether the 'defendant might be a danger to society in the future.'").

[35] *See, e.g.*, Berry, *supra* note 32, at 893.

squarely addressed the question, it has upheld future dangerousness predictions as constitutionally permissible,[36] rejecting a consensus among psychiatric professionals and death penalty opponents alike that such predictions are highly unreliable and "intellectually indefensible" in light of the background theories justifying capital punishment.[37]

A. *"Future Dangerousness" and the Supreme Court*

In 1972, the Supreme Court held in *Furman v. Georgia* that the death penalty, as it was then administered, was unconstitutional under the Eighth Amendment's prohibition against cruel and unusual punishment.[38] In doing so, the Court threw the (then) forty death penalty states into disarray, commuting over 600 death sentences nationwide and signaling that the institution might never return to America.[39] Almost as soon as the Court's decision came down, however, states frantically rushed to draft new death penalty statutes, hoping to resurrect capital punishment in a second Supreme Court showdown.[40] But because the splintered *Furman* majority produced five separate opinions, state legislators struggled to identify the constitutional infirmities they had to cure in order to pass constitutional muster.[41] Some states, for example, passed mandatory death penalty statutes for specified crimes because legislators believed that the Court's central concern about arbitrary and capricious sentences[42] could only be cured by eliminating jury discretion altogether.[43] In other states, legislators read *Furman's* command more narrowly, reasoning that they could guide and cabin jury discretion by enumerating statutory factors that capital juries must consider at sentencing.[44] These states enacted statutes that mirrored the Model Penal Code's (MPC) framework, bifurcating capital trials into two phases and requiring jurors to find that the offender satisfied at least one statutory aggravating factor before issuing a death sentence.[45]

Alone among the death penalty states at the time, Texas adopted a new approach altogether, requiring juries to answer three "special issue" questions once they had convicted a defendant of a capital offense.[46] The offender would be sentenced to death if, and only if, the jury answered all three

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[36] *See, e.g.*, Jurek v. Texas, 428 U.S. 262 (1976); Barefoot v. Estelle, 463 U.S. 880 (1983).

[37] Johnson, *supra* note 2, at 261.

[38] Furman v. Georgia, 408 U.S. 238 (1972).

[39] *Constitutionality of the Death Penalty in America*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/constitutionality-of-the-death-penalty-in-america (last visited Feb. 1, 2020); Edmondson, *supra* note 30, at 859.

[40] *Id.*

[41] Edmondson, *supra* note 30, at 859.

[42] *Furman*, 408 U.S. at 310 (Stewart, J., concurring).

[43] Edmondson, *supra* note 30, at 860.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 864.

questions affirmatively.[47] But because the first and third questions functionally mirrored the statutory elements of capital murder, jury deliberations during sentencing would primarily turn on the second "special issue" question, which asked jurors to determine whether there was a probability that the defendant would pose a continuing danger to society.[48]

In 1976, the Supreme Court upheld Georgia's new death penalty statute, derived from the MPC approach, in *Gregg*,[49] while it rejected North Carolina's mandatory scheme in *Woodson*, holding that "the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense."[50] On the same day, the Court also upheld the constitutionality of Texas's unique statute in *Jurek*, reasoning that Texas's scheme differed from the mandatory framework it had rejected in *Woodson* because the "future dangerousness" question provided defendants with a vehicle to introduce mitigating evidence about their particular, individualized circumstances.[51] In the process, the Court addressed Mr. Jurek's objection that "it is impossible to predict future behavior and that the question is so vague as to be meaningless."[52] As his counsel pointed out during oral arguments, the State's arguments regarding Mr. Jurek's future dangerousness were based on the testimony of lay community members who were simply called to the stand to express their personal disdain of the defendant.[53] According to Anthony Amsterdam, Mr. Jurek's attorney, "the thing that is most devastating is that you can't even challenge the jury's finding because the question to which it responds is so meaningless."[54] Because the instruction offered jurors little concrete guidance, Mr. Jurek's legal team also suspected that "the emphasis on dangerousness would be used to tag Black defendants as especially deserving of death, since they were often perceived, consciously or not, to be more dangerous."[55]

But while the Court acknowledged that predicting an offender's propensity for future violence is difficult, it reasoned that such predictions are common in the criminal justice system, as "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose."[56] The *Jurek* Court devoted just one paragraph to Mr. Jurek's challenge to future dangerousness before concluding that "the task that a Texas jury must perform in answering the

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[47] *Id.*

[48] Eric F. Citron, *Sudden Death: The Legislative History of Future Dangerousness and the Texas Death Penalty*, 25 YALE L. & POL'Y REV. 143, 155–56 (2006).

[49] *Gregg*, 428 U.S. at 153.

[50] Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (citations omitted).

[51] *Jurek*, 428 U.S. at 274–76.

[52] *Id.* at 274.

[53] Chammah, *supra* note 28.

[54] *Id.*

[55] *Id.*

[56] *Jurek*, 428 U.S. at 275–76.

statutory question is thus basically no different from the task performed countless times each day throughout the American system of criminal justice."[57] Among constitutional scholars and professional psychiatrists, however, the future dangerousness instruction drew a different reception, inspiring widespread criticism almost immediately.[58] By the time future dangerousness reached the Court again in 1983, the American Psychiatric Association filed an *amicus* brief arguing that professional psychiatrists had no business predicting an offender's future behavior in court, as such predictions have no basis in science and tend to be wrong in *two out of every three cases*.[59] Despite this staggering figure, the Court upheld the use of expert psychiatric testimony to predict future dangerousness in *Barefoot v. Estelle*, echoing the *Jurek* Court's rationale that such predictions are ubiquitous throughout the American criminal justice system and concluding that eliminating expert testimony on the matter would require the Court to "disinvent the wheel."[60] The Court further reasoned that defendants were perfectly free to introduce their own experts at sentencing, and that differences among psychiatric experts are fully "within the province of the jury to resolve."[61]

Like *Jurek*, the Court's decision in *Barefoot* drew immediate criticism, and empirical experiences with the future dangerousness instruction soon refuted the assumptions that the Court relied on in both cases.[62] Nevertheless, the Supreme Court has been hesitant to revisit the constitutionality of future dangerousness, even as it has demonstrated a willingness to constrain the death penalty in other important ways.[63] In 1993, when the Court held in *Daubert v. Merrell Dow Pharmaceuticals* that the Federal Rules of Evidence require federal judges to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but *reliable*," some hoped that it would extend this same logic to capital sentencing and reconsider the admissibility of "expert" future dangerousness predictions.[64] But this hope remains unrealized, as many states have not applied *Daubert* to their own cases, and even those that have adopted the standard have never extended it to expert predictions of dangerousness in capital cases.[65] For its part, Texas purports to have adopted a similar standard to the one established in *Daubert*, but Texas courts

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[57] *Id.*

[58] *See, e.g.*, Reigner, *supra* note 22, at 476–80; George E. Dix, *Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness*, 55 TEX. L. REV. 1343, 1343 (1977).

[59] *Barefoot*, 463 U.S. at 920 (Blackmun, J., dissenting).

[60] *Id.* at 896.

[61] *Id.* at 902.

[62] *See, e.g.*, Reigner, *supra* note 22, at 487–93.

[63] Johnson, *supra* note 2, at 262–63.

[64] Eugenia T. La Fontaine, *A Dangerous Preoccupation with Future Danger: Why Expert Predictions of Future Dangerousness in Capital Cases are Unconstitutional,* 44 B.C. L. REV. 207, 225 (2002) (quoting Daubert v. Merrell Dow Pharms., 509 U.S. 579, 589 (1993).

[65] *Id.*; *see also* Jordan Dickson, *Daubert Won't Do: Why Expert Testimony Regarding Future Dangerousness Requires a New Rule of Evidence*, 107 GEO. L. J. 481, 491 (2019) (explaining that *Daubert* has not meaningfully changed and will not meaningfully change courts' approaches to future dangerousness).

have upheld expert predictions of dangerousness under a relaxed version of the standard.[66] Even on a federal level, the Supreme Court's recognition in *Daubert* that "expert evidence can be both powerful and quite misleading"[67] has not seriously changed how courts approach capital sentencing.[68] Instead, the Supreme Court's silence even in the face of new empirical objections to future dangerousness is both telling and puzzling, particularly in light of its oft-repeated mantra that "death is different."[69]

Before assessing the unique role that future dangerousness plays in Texas, I offer a brief overview of the existing literature concerning future dangerousness in general, which reflects a wide consensus among constitutional scholars and professional psychiatrists that the inquiry is fundamentally misguided and practically incoherent. These challenges generally fall into three broad categories: empirical, constitutional, and philosophical, each of which question and ultimately dismantle the assumptions made in *Jurek* and *Barefoot*. The Court's silence in the face of this robust, expanding literature suggests that any general constitutional objection to future dangerousness faces an "uphill battle."[70]

B. *Empirical and Practical Objections*

First, the most recent empirical research has overwhelmingly vindicated the APA's warning in *Barefoot* that even expert predictions of future dangerousness are highly unreliable.[71] One Texas study of 155 capital cases, for example, found that expert witnesses who predicted that defendants were likely to commit future acts of violence were wrong 95% of the time.[72] Unsurprisingly, lay jurors fare no better. An Oregon study of 115 inmates convicted of aggravated murder between 1985 and 2008, for example, concluded

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[66] *Id.* at 227 (citing Nenno v. State, 970 S.W.2d 549 (Tex. Crim. App. 1998)).

[67] *Id.* at 226 (quoting *Daubert*, 509 U.S. at 593).

[68] *See, e.g.*, *id.* at 226 (quoting Flores v. Johnson, 210 F.3d 456, 464 (5th Cir. 2000) (Garza, J., concurring) ("It is well settled that, in the federal courts, the rules of evidence generally do not apply at a sentencing hearing, even one in which the death penalty is a possibility.").

[69] *See, e.g.*, *Gregg*, 428 U.S. at 188; Caldwell v. Mississippi, 472 U.S. 320, 329 (1985) ("This Court has repeatedly said that under the Eighth Amendment 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'") (citation omitted).

[70] Brian Sites, *The Danger of Future Dangerousness in Death Penalty Use*, 34 FLA. ST. U. L. REV. 959, 986 (2007).

[71] *See, e.g.*, Berry, *supra* note 32, at 907 ("The incontrovertible scientific evidence demonstrates that future dangerousness determinations are, at best, wildly speculative."); Edmondson, *supra* note 30, at 904 ("Since *Jurek*, studies have demonstrated that capital jurors are not only unable to accurately predict future dangerousness, but their predictions are no better than random guesses."); Fowler, *infra* note 79, at 383 ("[J]urors often predict the defendant's future dangerousness with little-to-no accuracy.")

[72] Ana M. Otero, *The Death of Fairness: Texas's Future Dangerousness Revisited*, 4 U. DENV. CRIM. L. REV. 1, 3–4 (2014) (citing TEX. DEFENDER SERVICE, DEADLY SPECULATION – MISLEADING TEXAS CAPITAL JURIES WITH FALSE PREDICTIONS OF FUTURE DANGEROUSNESS 4 (2004)). In the Texas study, 95% of defendants who experts testified would pose serious risks of future violence did not engage in seriously assaultive behavior while they were incarcerated, even though many of these defendants spent time in general population. *Id.*

that "predictions of violence by capital juries are no more accurate than random guesses."[73] Defendants who were deemed dangerous by capital juries did not turn out to be any more violent than those who were not—of those sentenced to death, only 8% committed violent acts after their convictions, and offenders did not become any more violent when they spent time in general population off of death row.[74] These findings are unsurprising, since jurors overwhelmingly tend to overestimate the base rate of violent recidivism for capital offenders and, as a result, to exaggerate offenders' propensity for violence.[75] Indeed, Duane Buck himself "echoes the complete unreliability of future dangerousness determinations."[76] In the quarter century since a jury unanimously decided that he posed a serious danger of future violence, Buck's prison record "has been nothing short of exemplary," without so much as a minor disciplinary write-up.[77]

The Texas study also dispelled the *Barefoot* Court's assumption that juries could be trusted to properly weigh the reliability of expert testimony, as it found that predictions made by licensed psychiatrists routinely undermined reasoned jury deliberations because "jurors are often swayed in their deliberations by the air of authority that emanates from an expert bearing honorific titles such as 'Doctor.'"[78] For future dangerousness predictions, this reliance is grossly misplaced, especially since expert psychiatrists usually do not even observe defendants directly, instead relying on actuarial categories that "ignore sample sizes and base rates."[79] That defendants can offer their own expert psychiatrists also offers little reassurance, as additional studies have suggested that "jurors interviewed were more likely to see the defense experts [rather than the State's experts] as hired guns willing to testify for whoever was paying them."[80] As a result, juror deliberations surrounding future dangerousness are almost always distorted by inaccurate expert testimony. Even if one ignores the constitutional problems that such inaccurate predictions might pose in the death penalty context, it makes little practical sense, from a purely policymaking perspective, to retain an instruction that encourages jurors to base sentencing decisions on wildly speculative, essentially random predictions that even expert psychiatrists are not qualified to make.

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[73] Edmondson, *supra* note 30, at 910.

[74] *Id.* at 909.

[75] Jonathan R. Sorensen et al., *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. CRIM. L. & CRIMINOLOGY 1251, 1269 (2000).

[76] Johnson, *supra* note 2, at 263.

[77] *Id.*

[78] Edmondson, *supra* note 30, at 899.

[79] Brittany Fowler, *A Shortcut to Death: How the Texas Death Penalty Statute Engages the Jury's Cognitive Heuristics In Favor of Death*, 96 TEX. L. REV. 379, 381 (2017).

[80] Fontaine, *supra* note 64, at 232–33 (citing Scott Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1123 (1997)).

C. *Constitutional Objections*

Since Texas introduced its novel future dangerousness language fifty years ago, the instruction has time and time again been challenged on constitutional grounds. The most common version of these constitutional criticisms draws directly from the growing body of empirical research challenging the reliability of future dangerousness predictions, as many death penalty opponents have argued that using inaccurate predictions as a basis for administering capital punishment results in arbitrary and capricious sentences that violate the Eight Amendment's prohibition against cruel and unusual punishment.[81] While this argument was squarely rejected in *Jurek*, the Court's decision was based on several assumptions about jury deliberations that have since been empirically discredited.[82] Moreover, even if Justice Stevens was correct that similar predictions are made throughout the criminal justice system, the Court has repeatedly emphasized that "death is different," and that the irreversible stakes associated with capital punishment require heightened reliability in capital sentencing.[83] In light of the overwhelming consensus among constitutional scholars and psychiatrists that predictions of future dangerousness are wildly unreliable, the plausibility of the Court's reasoning in *Jurek* and *Barefoot* is, at the very least, extremely dubious.

A second strain of constitutional objections was also addressed in *Jurek* when the Court rejected the petitioner's objection that Texas's future dangerousness instruction was "so vague as to be meaningless."[84] As the Court acknowledged in 1976, an impermissibly broad jury instruction would render capital punishment cruel and unusual under the Eighth Amendment because it would produce arbitrary sentences.[85] But the Court rejected Mr. Jurek's invocation of this principle, again reiterating that assessing future dangerousness was an ordinary and unremarkable task in criminal law.[86] In doing so, however, the Court did not resolve any of the myriad ambiguities that Mr. Jurek identified in the statutory text, which persist to the amended version of Texas's statute that shapes capital sentencing today.[87] Since *Jurek,* moreover, interviews with capital jurors have empirically confirmed that Texas's future dangerousness instruction offers very little meaningful guidance.[88]

The Texas instruction asks jurors to determine "whether there is a probability that the defendant would commit criminal acts of violence that would

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[81] Fontaine, *supra* note 64, at 240–42.

[82] *See supra* notes 72–74.

[83] *See, e.g.*, *Gregg*, 428 U.S. at 188; *Caldwell* 472 U.S. at 329 (1985) ("This Court has repeatedly said that under the Eighth Amendment 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'") (citation omitted).

[84] *Jurek*, 428 U.S. at 274.

[85] Dix, *supra* note 58, 1356–58.

[86] *Jurek*, 428 U.S. at 275.

[87] *See id.*

[88] *See, e.g.*, Elizabeth S. Vartkessian, *When One Hand Giveth, the Other Taketh Away*, 32:2 PACE L. REV. 447, 465 (2012) (explaining how the structure of Texas's death penalty statute leads jurors to misunderstand the scope and purpose of mitigation).

constitute a continuing threat to society."[89] But, as Mr. Jurek argued, this language leaves several immediate questions unanswered.[90] For one thing, the instruction does not require jurors to find that the offender *will* be a future danger to society.[91] Instead, it unhelpfully requires only a "probability" of future violence, leaving it entirely unclear how certain jurors must be of an offender's propensity for violence and allowing prosecutors to obscure their burden of proof.[92] For another, the instruction does not clarify what constitutes "criminal acts of violence," a phrase which is "seemingly capable of embracing conduct ranging from misdemeanor assault through repeat murder, with offenses such as burglary, arson, and even property crimes potentially in the mix as well."[93] Perhaps most importantly, the instruction makes no effort to identify "the contemplated society that will be put at risk."[94] By not specifying *what sector of society* the offender must pose a risk to, the instruction further obscures the finality of Life Without Parole, a concept that jurors already tend to misunderstand.[95] Of course, an offender convicted of capital murder will only ever be exposed to the general population of inmates he will be incarcerated with, so he *cannot* pose a future danger to society as a whole. But in refusing to make this clear, the instruction encourages jurors to "imagine that their own community is the frame of reference," transforming the future dangerousness inquiry into a completely irrelevant hypothetical question and activating jurors' unfounded fears that the offender may commit further violence in their general communities.[96] Unsurprisingly, additional research confirms that "jurors are more likely to conclude a defendant presents a continuing threat to society when they are misinformed about death-penalty alternatives."[97]

While the Supreme Court did not specifically address any of these ambiguities in *Jurek*, the Texas Court of Criminal Appeals has consistently refused to require lower courts to clarify these terms, reasoning that "jurors are supposed to know such common meaning and terms."[98] But empirical evidence that juries routinely misunderstand the role of future dangerousness in capital sentencing undermines this plain assertion.[99] If, as the Supreme Court insists, death is different from any other criminal punishment, a jury instruction that is so ambiguous that it routinely misleads jurors should have no

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[89] Tex. Code Crim. Proc. Ann., Art. 37.071, § 2(b)(1).

[90] *Jurek*, 428 U.S. at 274.

[91] James R. Acker*, Snake Oil With a Bite: The Lethal Veneer of Science and Texas's Death Penalty,* 81 ALB. L. REV. 751, 776 (2018).

[92] *Id.*; *see also* Dix, *supra* note 58, at 1411 ("The term 'a probability' provides jurors no guidance in deciding how likely it must be that defendant will commit certain behavior.").

[93] *Id.* .

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] Edmondson, *supra* note 30*,* at 915.

[98] Acker, *supra* note 91, at 777 (quoting Druery v. State, 225 S.W.3d 491, 509 (Tex. Crim. App. 2007)).

[99] *See, e.g.*, Vartkessian (2012), *supra* note 88 (explaining how the structure of Texas's death penalty statute leads jurors to misunderstand the scope and purpose of mitigation).

place in capital punishment, as a misguided juror cannot express her "reasoned moral response" to a crime.[100]

A third common constitutional objection argues that "evolving standards of decency" render the dangerousness inquiry cruel and unusual under the Eighth Amendment. Since it decided *Coker v. Georgia* in 1977, the Supreme Court has developed a two-part inquiry to determine whether certain applications of the death penalty are disproportionate and impermissible under "evolving standards of decency."[101] Where objective indications of changing social norms, like state legislation or jury verdicts, indicate that a particular application of the death penalty is no longer acceptable *and* the Court's subjective judgment leads it to conclude that the practice is excessive, the Court has held entire categories of capital punishment unconstitutional.[102] As William Berry III has argued, the same analysis may demonstrate that future dangerousness inquiries no longer have any place in death penalty statutes.[103] Of twenty-seven states that currently authorize capital punishment, only Texas and Oregon *require* juries to make a determination of future dangerousness and only three other states make any mention of dangerousness in their statutes at all, which may be an objective indication that states now disfavor the instruction.[104] Berry also argues that the "Court should use its own subjective judgment to determine that assessments of future dangerousness cannot be justified by the purposes of retribution or deterrence," the only two penological purposes that the Court has recognized as acceptable justifications for capital punishment.[105] Under a retributive theory of capital punishment, the death penalty is only appropriate as a response to an offender's past behavior, not his potential future conduct.[106] A deterrence rationale similarly cannot justify future dangerousness instructions because "whether the offender is dangerous or not has no effect on whether executing them will have a deterrent effect" on others.[107] If the use of future dangerousness as a threshold statutory consideration cannot be supported by objective indications of changing social norms or by valid penological theories, the practice should be unconstitutional under the Eighth Amendment because it is inconsistent with "evolving standards of decency."[108]

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[100] Penry v. Lynaugh, 492 U.S. 302, 321 (1989).

[101] Coker v. Georgia, 433 U.S. 584 (1977).

[102] *See, e.g.*, *Coker*, 433 U.S. 584 (holding the death penalty unconstitutional under evolving standards of decency when it is applied to an offender convicted of rape of an adult); Atkins v. Virginia, 536 U.S. 304 (2002) (holding executions of intellectually disabled offenders unconstitutional under the Eighth Amendment).

[103] Berry, *supra* note 32, at 911.

[104] *Id.* at 912.

[105] *Id.*

[106] *Id.*

[107] *Id.* at 912–13.

[108] Roper v. Simmons, 543 U.S. 551, 561 (2005).

D. *Philosophical Objections*

Finally, future dangerousness may be fundamentally incompatible with the philosophical rationales underlying capital punishment. First, emphasizing future dangerousness actively undermines the penological theories that the Court has recognized as valid rationales for capital punishment. In directing jurors to predict an offender's *future* behavior, the instruction can obscure more relevant questions surrounding the offender's culpability for his *past* crimes, which should be the central consideration if the purpose of capital punishment is to offer a just, retributive response to violence.[109] Reliance on inaccurate predictions of future behavior "improperly shifts jurors' focus from legitimate evidence of culpability to prejudicial evidence of dangerousness by exploiting a powerful emotion—fear—and in this way may frequently violate the Eighth Amendment."[110] Mitigating evidence about an offender's culpability for the *past* crimes underlying his conviction are more easily ignored or forgotten when the jury is actively encouraged to express their fears concerning the offender's *future* behavior.[111] Indeed, "a review of executions based on future dangerousness reveals a trend consistent with the elimination of culpability determinations as described above: a morass of strikingly young defendants without particularly aggravated crimes, and frequently with lessened culpability due to additional factors that are universally recognized as mitigating."[112]

The modern realities of capital punishment also undermine any philosophical rationale that might justify tying sentencing to future dangerousness. For one thing, increasingly long delays between a defendant's sentence and execution can render the future dangerousness inquiry incoherent, as the inmate who is eventually put to death may not retain any of the qualities that once convinced a jury that he posed a future danger to society.[113] As Meghan Shapiro explains, "[d]angerousness-based executions are carried out as if time froze at the time of sentencing when, in reality, the defendant has aged approximately a decade, and events may have transpired that either tend to disprove the original dangerousness prediction or call into question its continuing validity."[114] Insisting on executing an offender simply because a jury once believed that he posed a future danger of violence, even if that belief has not borne out at all, simply reflects a misguided understanding of criminal behavior.[115]

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[109] Meghan Shapiro, *An Overdose of Dangerousness: How "Future Dangerousness" Catches the Least Culpable Capital Defendants and Undermines the Rationale for the Executions it Supports*, 35 AM. J. CRIM. L. 45 (2008).

[110] *Id.* at 179.

[111] *Id.* at 172.

[112] *Id.*

[113] *Id.*at 180.

[114] *Id.*

[115] *Id.*

Moreover, the emergence of Life Without Parole as the only alternative to the death penalty seriously undermines the underlying "incapacitation" intuition behind future dangerousness.[116] In assessing an offender's dangerousness, jurors are often driven by the misplaced notion that they must incapacitate the offender to prevent him from perpetrating future violence in their communities.[117] But "the ability to sentence a capital defendant to life without the possibility of parole has negated the need for execution as a valid technique of incapacitation," as LWOP guarantees that the offender will be incapacitated from the general community regardless of whether he is sentenced to death.[118] Especially in jurisdictions that do not clarify what segment of society the defendant might pose a risk of violence to, future dangerousness invites jurors to give force to a plainly irrelevant impulse to incapacitate capital offenders in order to protect their own communities. Of course, a death sentence could still incapacitate the offender from perpetrating violent acts in *prison*, but this is rarely the goal that actually motivates capital jurors,[119] and it is not one that the Supreme Court has recognized to be a valid penological justification for the death penalty.

Four decades have passed since the Court first considered the constitutionality of future dangerousness in Texas's amended death penalty statute. In that time, critics have roundly and convincingly discredited the halfhearted justifications that the Supreme Court first offered in 1976, and the existing literature exposes a wide range of practical, constitutional, and philosophical infirmities that render the future dangerousness inquiry "intellectually indefensible."[120] When he retired in 2010, Justice John Paul Stevens, who had been one of the three "swing" votes in 1976 and ultimately wrote the Court's majority opinion, reflected that *Jurek* was the single decision that he truly regretted.[121] Nevertheless, the Supreme Court has declined to revisit either *Jurek* or *Barefoot*, and its refusal to extend the common-sense logic of *Daubert* to capital defendants seems inexplicable in light of its oft-repeated mantra that "death is different."[122] This silence in the face of new empirical developments and a growing professional consensus suggests that future constitutional challenges to future dangerousness face "an uphill battle," especially since overturning *Jurek* now would require the Court to acknowledge that hundreds of defendants have been executed unconstitutionally.[123]

My approach in this paper will accordingly differ from the extensive existing literature surrounding predictions of dangerousness. Rather than argue

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116 Edmondson, *supra* note 30, at 915.

117 *Id.*

118 *Id.*

119 Edmondson, *supra* note 30, at 915.

120 Johnson, *supra* note 2, at 261.

121 Chammah, *supra* note 28.

122 *See, e.g.*, *Caldwell*, 472 U.S. at 329320, 329 (1985) ("This Court has repeatedly said that under the Eighth Amendment 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'") (citation omitted).

123 Citron, *supra* note 48, at 148–49.

that any use of future dangerousness in capital sentencing is a *per se* constitutional violation, I take selective aim at Texas's death penalty statute and argue that the uniquely central role that future dangerousness plays in Texas abrogates the principal command of *Furman* and *Gregg* that jurors may not narrow the class of death-eligible offenders along arbitrary or discriminatory lines. Shortly after the Court rejected the facial challenge to Texas's statute presented in *Jurek*, it upheld an as-applied challenge to the "special issue" questions at the heart of Texas's original amended statute,[124] spurring the state's legislature to revise its framework to include a question explicitly asking the jury to consider whether "there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed."[125] Still, future dangerousness remains "the centerpiece of the statute."[126]

Texas's unparalleled rate of executions is at least partially driven by this unique statutory structure, which predisposes jurors to death sentences by empowering prosecutors to routinely "enlist forensic psychiatrists—one with the nickname 'Dr. Death'—to make scientifically bogus predictions that defendants would kill again if not sentenced to death."[127] As the next Part of this paper will argue, a more narrow challenge to the unique structure of Texas's death penalty scheme is necessary if the Court remains hesitant to revisit future dangerousness altogether, as Texas's unmatched emphasis on future dangerousness guarantees that the inquiry will take on central importance in *every* case. If death penalty opponents take the empirical research surrounding future dangerousness seriously, Texas should be "Ground Zero" for a constitutional challenge. As Duane Buck's case demonstrates all too clearly, Texas's instruction can easily re-create the very same problems of arbitrariness and discrimination that rendered the death penalty unconstitutional in 1972. As I will argue in Part 3, the instruction impermissibly activates an especially powerful and prevalent set of racial prejudices even in the most ordinary capital cases, leading jurors in Texas to narrow the class of death-eligible offenders along discriminatory lines.

III. PART 2: TEXAS, DUANE BUCK, AND *FURMAN*'S EMPTY PROMISE

Even among the twenty-seven American states where capital punishment is still legal, Texas stands alone in several significant, often ignominious, regards. Since the Supreme Court revived the death penalty in 1976, Texas has executed 573 offenders, over five times as many as the next leading state.[128] Even as the national rate of executions has slowed in the past two decades, Texas continues to execute more offenders than any of its peers, as it has sent

[124] *Penry,* 492 U.S. 302 (1989).

[125] Tex. Code Crim. Proc. Ann., Art. 37.071, § 2(e)(1).

[126] Fowler, *supra* note 79, at 382.

[127] Chammah, *supra* note 28.

[128] *Executions Overview*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/executions-overview (last visited Feb. 12, 2022).

twice as many defendants to their deaths in each of the past two years as any other death penalty state in the country.[129] As one observer put it, Texas has "built the country's dominant conveyor belt to death row."[130]

Texas is also the "birthplace of the explicit inquiry into a defendant's future dangerousness,"[131] as its unique statutory scheme requires capital juries to unanimously find "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" before they may sentence an offender to death.[132] While three other death penalty states explicitly permit jurors to consider future dangerousness as an aggravating factor,[133] only Texas and Oregon treat the question as a statutory prerequisite to capital sentencing.[134] And while Oregon adopted Texas's scheme shortly after it was upheld in *Jurek*, the state has not executed anyone since 1996, and its governor placed an indefinite moratorium on future executions in 2011.[135] As a result, Texas is the only active death penalty state in the country where capital juries *must* answer the question of future dangerousness in *every* capital case. Indeed, the state's entire death penalty scheme revolves around future dangerousness, as its statute directs juries to resolve the dangerousness inquiry as a threshold matter before it may consider any potentially mitigating circumstances about the defendant's background or the circumstances of his offense.[136]

Because capital juries tend to consider future dangerousness even when they are not explicitly asked to, this difference may seem like nothing more than a cosmetic drafting anomaly. It may even appear to *benefit* criminal defendants, since no offender may be sentenced to death in Texas unless a jury first determines that they pose a danger of future violence, while the same finding would be sufficient, but not necessary, to make an offender death-eligible in another state.[137] But this structural oddity has demonstrable, profoundly negative effects on Texas juries. By elevating future dangerousness to the center of capital sentencing and requiring jurors to evaluate the question at the threshold of their deliberations, Texas's statute structurally predisposes capital juries to death.

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[129] *Executions by State and Year*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/executions-overview/executions-by-state-and-year (last visited Feb. 12, 2022).

[130] Chammah, *supra* note 28.

[131] Edmondson, *supra* note 30, at 861.

[132] Tex. Code Crim. Proc. Ann., Art. 37.071, § 2(b)(1).

[133] Wyoming, Idaho, and Oklahoma list future dangerousness as a potential aggravator in their death penalty statutes. Edmondson, *supra* note 30, at 873–76. Before Virginia abolished the death penalty on March 24, 2021, it also listed dangerousness as a potential statutory aggravating factor. Madeleine Carlisle, *Why It's So Significant Virginia Just Abolished the Death Penalty*, TIME (Mar. 24, 2021), https://time.com/5937804/virginia-death-penalty-abolished/. In addition to these states, thirteen death penalty states make no explicit mention of future dangerousness in their statutes but still permit prosecutors to raise the issue in certain circumstances. *See* Edmondson, *supra* note 30, at 879–95.

[134] Berry, *supra* note 32, at 894–95.

[135] *Oregon*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/oregon (last visited Feb. 11, 2021).

[136] Tex. Code Crim. Proc. Ann., Art. 37.071, § 2(b)(1).

[137] *Id.*

First, the Texas statute guarantees that future dangerousness will not be considered alongside potentially mitigating circumstances, as capital juries in Texas only ever reach the question of mitigation *after* they have already unanimously agreed that the offender presents a danger of future violence. In this way, the Texas statute "anchors" capital juries to a particular view of the offender that predisposes them to undervalue any potentially mitigating circumstances.[138] As James Acker explains, this "step-wise progression . . . puts jurors confronting the mitigation question in a nettlesome bind. Having just concluded that there is a probability that society will be put at risk if the defendant is not executed, they are now asked whether society should nevertheless be required to incur that risk because something about the circumstances of the offense, the defendant's character and background, and . . . [his] moral culpability warrants it."[139] This "anchoring" effect is well-documented and demonstrably powerful.[140] The structural progression of capital sentencing in Texas implicitly reinforces the idea that future dangerousness should be the central inquiry in jurors' minds, and that mitigation is only a secondary question that should take a backseat to jurors' unqualified predictions of future dangerousness.[141] Indeed, accounts of jury deliberations reveal that, "because the future dangerousness question is both first and specific, jurors anchor their discussion to that question – and largely ignore mitigation."[142] The language of Texas's mitigation instruction itself further reinforces this misperception—by asking juries to decide whether mitigating circumstances about the offender's background warrant a life sentence "rather than a death sentence," the instruction implies that a juror should approach the question with a presumption of death that can only be rebutted by a particularly strong showing of mitigation.[143] Unsurprisingly, "empirical evidence suggests that jurors pick up on this 'death default'" and undervalue mitigation while attaching an outsized importance to future dangerousness.[144]

Death penalty statutes that permit jurors to consider future dangerousness as one among many potential aggravators may predispose capital jurors to death in a similar way, but the "anchoring" effect is exacerbated in Texas. Unlike any of its peers, Texas directs capital juries to focus *exclusively* on future dangerousness as a threshold matter, which increases the likelihood that jurors will attach particular, central importance to the inquiry. In other states, jurors are first presented with a list of aggravating circumstances (which may include dangerousness), and then with a list of mitigating circumstances.[145] A juror in one of these states has no reason to think that any particular aggravator carries more significance than any other aggravator or

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138 Acker, *supra* note 91, at 778.

139 *Id.*

140 Fowler, *supra* note 79, at 396.

141 *Id.*

142 *Id.* at 397.

143 *Id.*

144 *Id.* at 389.

145 *See, e.g.*, GA Code § 17-10-31 (2020).

mitigator. But in Texas, jurors are presented first with a specific, concrete inquiry exclusively about future dangerousness, and then with an open-ended, secondary question of mitigation.[146] This juxtaposition is especially likely to mislead jurors to elevate future dangerousness above mitigation because the former consideration is concrete and specific, while the latter is comparatively open-ended and vague.[147] As Brittany Fowler explains,

> The [Texas] statute creates this effect not only by placing future dangerousness first, as an anchor, but also by giving jurors a specific concept (i.e., future dangerousness) to reference in deliberations. The mitigation question, however, is much more open-ended. Such an amorphous instruction, especially given jurors' misunderstanding of the term mitigation, does not give jurors a second anchor from which to adjust.[148]

This phenomenon is particularly troubling in light of the Supreme Court's powerful recognition that jurors *must* be afforded a meaningful opportunity to give force to mitigating circumstances, and that any death penalty statute that does not afford such an opportunity impermissibly "excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."[149] Compared to statutes that permit, but do not require juries to consider future dangerousness, the Texas statute drastically increases the likelihood that death sentences will turn on arbitrary and incorrect guesses about future behavior rather than the background characteristics of the offender that the Supreme Court has repeatedly recognized as indispensably important in capital sentencing.

Moreover, by placing future dangerousness at the center of capital sentencing, Texas's statute misleads jurors to believe that they may only consider mitigating evidence *to the extent that such evidence is relevant to future dangerousness*.[150] Thus, even where a defendant presents particularly strong mitigating evidence that might overcome the "anchoring" effect of future dangerousness and rebut the "death default," Texas's statute leads jurors to misunderstand the force that they are permitted to attach to such evidence. Prosecutors often compound this confusion by representing mitigation as an extension of future dangerousness, taking advantage of the statute's confusing order of operations in order to "dismantle and reframe the sentencing scheme in a way which advances the dismissal of such mitigating evidence."[151] This was the very phenomenon that led the Supreme Court to reject a Texas death sentence in *Penry v. Lynaugh*, where the Court held that

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146 Fowler, *supra* note 79, at 388.

147 *Id.*

148 *Id.* at 396.

149 *Woodson*, 428 U.S. at 304.

150 Vartkessian (2012), *supra* note 88, at 465–67.

151 Elizabeth S. Vartkessian, *Dangerously Biased: How the Texas Capital Sentencing Statute Encourages Jurors to be Unreceptive to Mitigation Evidence*, 29 QUINNIPIAC L. REV. 237, 240 (2011).

Texas's original amended statute did not provide the jury with a vehicle to express its "reasoned moral response" to the offense because it only permitted capital juries to consider potentially mitigating factors insofar as they related to future dangerousness.[152] The Court's decision spurred Texas to amend its statute to include an instruction explicitly empowering juries to consider mitigating evidence, but empirical accounts of jury deliberations suggest that the structural centrality of future dangerousness still leads juries to misunderstand the statute in *precisely the same way* that the Court once held to be unconstitutional.[153] As a result, the primacy of future dangerousness "fosters the perception among jurors that death is required" once they unanimously agree that the offender poses a future danger.[154] Even in states that do not place future dangerousness at the center of capital sentencing, "empirical evidence suggests that a third of jurors in capital proceedings nationwide believe that a showing of future dangerousness requires a sentence of death."[155] But this misperception is unquestionably heightened when the state's death penalty statute explicitly elevates future dangerousness to the forefront of sentencing.[156] Indeed, recent accounts of capital jury deliberations in Texas compiled by the Capital Jury Project revealed that "a full 70% of participating jurors in the current sample believed a death sentence to be required if the defendant was found to be a future danger."[157] Shockingly, "many jurors state that they did not even discuss the mitigation issue after determining the defendant's dangerousness" at all.[158] The concept of mitigation is already widely misunderstood among capital jurors, but the unique statutory order of operations that Texas imposes on capital sentencing sounds the death knell for the "individualized consideration of mitigating factors" that the Supreme Court once held to be indispensable to just sentencing.[159] The unique structure of Texas's statute is thus no benign drafting anomaly—it powerfully predisposes capital jurors to death sentences and further obscures the role that mitigating evidence may play in the sentencing process.

These practical difficulties also raise a separate, but obvious question: why did the Texas legislature adopt such a strange, unprecedented scheme in the first place, especially when every other death penalty state at the time adopted either the MPC approach upheld in *Gregg* or the mandatory scheme rejected in *Woodson*?[160] Unfortunately, as Eric Citron recounts, the statute's legislative history does not offer any meaningful answers.[161] Instead, the sparse record reveals only that the two chambers of Texas's legislature could

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[152] *Penry*, 492 U.S. at 304 .

[153] Fowler, *supra* note 79, at 385–86.

[154] *Id.*

[155] *Id.* at 385–86.

[156] *Id.* at 386.

[157] Vartkessian (2011), *supra* note 151, at 281.

[158] *Id.*

[159] Lockett v. Ohio, 438 U.S. 586, 606 (1978).

[160] *See, e.g.*, Edmondson, *supra* note 30, at 860.

[161] Citron, *supra* note 48, at 162–63.

not agree on whether to adopt a mandatory death penalty or an approach modelled after the MPC, so the task fell to a conference committee to find a compromise between the two approaches.[162] On the last possible day, the committee presented the entirely new scheme that would later be upheld in *Jurek* with absolutely no explanation for the newly inserted future dangerousness language.[163] Both houses promptly passed the bill without offering any explanation for the added language either.[164] But the legislative debates that took place before the bill went to the conference committee suggest that the Texas legislators in the committee may have believed that *Furman* could only be satisfied by removing any measure of jury discretion at all, and that the "special issue" questions were meant to function more or less as a mandatory scheme.[165] After all, the state representative at the helm of the committee was a staunch proponent of the mandatory model from the beginning.[166] Of course, the Supreme Court firmly rejected this understanding of *Furman* in *Woodson*, where it struck down North Carolina's mandatory death penalty statute.[167] But the sparse legislative record indicates that the unexplained, rushed process by which future dangerousness was incorporated into Texas's statute may have been driven by a fundamental misunderstanding of Supreme Court precedent.[168] This hurried, mistake-ridden process is understandable, even commonplace, in state legislation, and the purpose of this paper is not to belabor the procedural shortcomings of Texas's statute.[169] But, the Court has always recognized that capital punishment presents a fundamentally different context that demands heightened procedural safeguards.[170] At the very least, the haphazard, misinformed fashion in which Texas's statute was passed should give even the most staunch death penalty proponents great pause, and further suggests that it is high time to revisit the statute altogether.

For all of these reasons, Texas's future dangerousness instruction deserves to be challenged in its own right, even if the Supreme Court's hesitation to reconsider future dangerousness altogether persists (and the Court's current conservative makeup suggests that it will). Of course, Texas's unparalleled use of the death penalty is driven by larger forces than the linguistic structure of its statute,[171] and I do not mean to scapegoat future dangerousness as the primary culprit behind the state's executions. But, as I have argued, the

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[162] *Id.*

[163] *Id.* at 170–73.

[164] *Id.*

[165] *Id.* at 172–73.

[166] *Id.* at 172.

[167] *Woodson*, 428 U.S. at 280.

[168] Citron, *supra* note 48, at 173.

[169] *Id.* at 174.

[170] *See, e.g.*, Gardner v. Florida, 430 U.S. 349 (1977).

[171] *See, e.g.*, Ned Walpin, *Why is Texas #1 Executions?*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/why-is-texas-1-executions#:~:text=Texas%20has%20become%20ground%20zero,60%20during%20the%20same%20period (last visited Feb. 19, 2021).

unique role that the future dangerousness instruction plays in Texas is especially harmful for capital defendants. The state's inexplicable emphasis on future dangerousness strongly predisposes capital juries to death and distorts sentencing deliberations surrounding mitigation in important ways. Perhaps no case demonstrates this better than that of Duane Buck, whose appeal to the Supreme Court brought out some of the fundamental ways that future dangerousness can distort capital sentencing.

A. *The Case of Duane Buck: A Small Dose of a Deadly Toxin*

The procedural history of Buck's case is long and complicated, as he languished on death row for twenty years before his sentence was effectively vacated in 2017.[172] To start, "Duane Buck's crime was not a sympathetic one."[173] On a summer morning in 1995, Buck carried a loaded rifle and shotgun to a former girlfriend's house after she refused to speak with him on the phone.[174] When he found her with three friends, one of whom was his own stepsister, Buck began shooting indiscriminately, injuring his stepsister and killing another acquaintance before chasing his ex-girlfriend into the street, where he shot her as she begged for mercy on her knees.[175] When police officers arrived at the scene to place him under arrest, they found Buck laughing and joking as his victim lay bleeding to death.[176] As they drove him away from the scene, Buck reportedly remained "happy" and "upbeat."[177]

Buck's guilt was never in doubt, and a jury soon convicted him of capital murder.[178] Pursuant to Texas's death penalty statute, the jury was then instructed at sentencing that it must first determine whether there existed "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" before it could consider whether "mitigating circumstances nevertheless warranted a sentence of life imprisonment instead of death."[179] If, and only if, it unanimously found both that Buck posed a future danger to society and that no mitigating circumstances warranted a life sentence, Buck would be sentenced to death.[180] Unsurprisingly, much of Buck's sentencing focused on the primary question of future dangerousness, as the State emphasized Buck's lack of remorse in the immediate aftermath of the heinous shooting and introduced evidence to suggest that he had demonstrated a proclivity towards violence long before the shooting.[181] In response, Buck's counsel called two family members and a

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172 *See Buck*, 137 S. Ct. 759.

173 Johnson, *supra* note 2, at 248.

174 *Buck*, 137 S. Ct. at 783 (Thomas, J., dissenting).

175 *Id.*

176 *Id.*

177 *Id.*

178 Johnson, *supra* note 2, at 248.

179 *Buck*, 137 S. Ct. at 768 (explaining the structure of Texas's death penalty statute).

180 *Id.*

181 *Id.*

pastor to testify that they had never known Buck to be violent.[182] The defense also called two expert psychologists, Dr. Patrick Lawrence and Dr. Walter Quijano, to offer their opinions on Buck's propensity for future violence.[183] Based on Buck's relatively clean disciplinary record from a past stint in prison and the fact that his only violent episodes had come in the context of romantic relationships, Dr. Lawrence testified that Buck was unlikely to commit future acts of violence in prison.[184] Dr. Walter Quijano, Buck's second expert psychologist, had been appointed by the court to conduct an evaluation and had submitted his findings to Buck's counsel before the trial.[185] While he ultimately relied on the same two factors to conclude that Buck was unlikely to commit future acts of violence in prison, Dr. Quijano's report also identified seven "statistical factors" that he relied on to guide his determination of future dangerousness.[186] Under one factor, Dr. Quijano had written, "Race. Black: Increased probability. There is an over-representation of Blacks among violent offenders."[187]

Despite knowing that he had explicitly considered Buck's race in his assessment, the defense called Dr. Quijano to testify on Buck's behalf.[188] Perhaps as a pre-emptive measure, Buck's counsel even asked Dr. Quijano to explain his "statistical factors," and Dr. Quijano responded that, "it's a sad commentary that minorities, Hispanics and black people, are over represented in the Criminal Justice System."[189] Unsurprisingly, the prosecution returned to the issue on cross-examination, prompting Dr. Quijano to concede that Buck's race "increases [his] future dangerousness for various complicated reasons."[190] During the jury's two days of deliberation, it asked to see Dr. Quijano's report before ultimately sentencing Buck to death.[191]

After his conviction and sentence were affirmed on direct appeal, Buck's case "entered a labyrinth of state and federal collateral review, where it wandered for the better part of two decades."[192] During this time, another death penalty case where Dr. Quijano had offered similar testimony reached the Supreme Court.[193] Before the Court heard the case, however, Texas confessed error and asked the Court to vacate Victor Saldano's death sentence.[194] Just six days later, Texas Attorney General John Cornyn admitted that Dr. Quijano had offered the same racialized testimony in six other capital cases,

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182 *Id.*
183 *Id.*
184 *Id.*
185 *Id.*
186 *Id.*
187 *Id.*
188 *Id.* at 768–69.
189 *Id.* at 769.
190 *Id.*
191 *Id.*
192 *Id.*
193 Johnson, *supra* note 2, at 250.
194 *Buck*, 137 S. Ct. at 770.

including Duane Buck's.[195] But while Texas "confessed error and consented to resentencing" in the other five cases, Cornyn refused to do the same for Duane Buck, even when Buck filed a second state habeas petition arguing that he had received ineffective assistance of counsel (IAC) because his lawyers had introduced Dr. Quijano's testimony at sentencing.[196] Because Buck had not raised the IAC claim in his first state and federal habeas petitions, moreover, both the Texas Criminal Court of Appeals and a federal district court held the claim procedurally defaulted and dismissed his petitions.[197] Undeterred, Buck sought to reopen his federal IAC claim eight years later in 2014, arguing that the particularly egregious, explicit invocations of race during his sentencing were "extraordinary circumstances" that justified reopening his habeas petition under Federal Rule of Civil Procedure 60(b)(6).[198] The district court disagreed, holding that the introduction of race during Buck's sentencing was "ill-advised at best and repugnant at worst," but ultimately "*de minimis*."[199] The court went on to hold that, even if extraordinary circumstances did justify reopening Buck's IAC claim, that claim would fail on the merits anyways.[200] While it recognized that the decision to introduce Dr. Quijano's testimony was deficient, the court did not believe that it ultimately prejudiced the outcome of Buck's sentencing, as the horrific details of Buck's crime may themselves have been enough to convince a jury of his future dangerousness even without any invocation of race.[201]

To appeal this decision, Buck sought a "Certificate of Appealability" (COA) from the Fifth Circuit Court of Appeals, which may be granted "only if the applicant has made a substantial showing of the denial of a constitutional right."[202] But the Fifth Circuit denied Buck's request for a COA, agreeing with the district court that any deficiency in Buck's representation did not ultimately prejudice his case and determining that Buck's claim was "not extraordinary at all in the habeas context."[203] Buck then appealed this decision to the Supreme Court, which granted certiorari and ultimately reversed the Fifth Circuit's holding that Buck was not entitled to a COA because he had not made a substantial showing on his IAC claim.[204] As Justice Thomas's dissent pointed out, this question only required the Court to determine "whether reasonable jurists could debate" the constitutional question at issue,

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195 Johnson, *supra* note 2, at 250.

196 *Buck*, 137 S. Ct. at 770.

197 *Id* at 770–71.

198 *Id.* at 764. Buck also pointed to two Supreme Court decisions decided since 2006 which he believed changed the law such that his procedural default should have been excused. *Id.* at 772.

199 *Id.* at 772 (quoting Buck v. Stephens, No. H–04–3965, 2014 WL 11310152, at *5 (S.D. Tex. Aug. 29, 2014)).

200 *Id.*

201 *Id.*

202 *Id.* (quoting 28 U.S.C. § 2253(c)(2)).

203 *Id.* at 773 (quoting Buck v. Stephens, 623 F. App'x. 668, 673 (5th Cir. 2015)).

204 *Id.* at 767.

but the Supreme Court's majority opinion went further to assess and resolve the underlying merits of Buck's IAC claim.[205]

Applying the two-part test set forth in *Strickland v. Washington*, the Court held that Buck's counsel was clearly deficient for introducing Dr. Quijano's testimony and that this deficiency was reasonably likely to have prejudiced the outcome of Buck's sentencing.[206] Despite the particularly violent nature of Buck's crime, the Court held that it was reasonably likely that Dr. Quijano's testimony impermissibly influenced the jury's determination of Buck's future dangerousness, as it "appealed to a powerful racial stereotype—that of black men as 'violence prone.'"[207] Given the centrality of the future dangerousness question and the particularly pernicious racial biases associated with dangerousness, Dr. Quijano's testimony was especially likely to "provide support for making a decision on life or death on the basis of race."[208] Although the prosecution did not rely as heavily on Dr. Quijano's racialized testimony as it did on other features of Buck's background and crime, the Court rejected the district court's holding that race played only a *de minimis* role in Buck's sentencing, instead reasoning that "some toxins can be deadly in small doses."[209] Based on this analysis, the Court also explained that the district court was wrong to deny Buck's 60(b)(6) motion to reopen his case based on "extraordinary circumstances."[210] The possibility that Buck was sentenced to death based, even in part, on his race represented a "disturbing departure from a basic premise of our criminal justice system" for Chief Justice Roberts, who concluded that the "unique confluence of factors" that had resulted in Buck's death sentence represented an extraordinary affront to justice because it introduced the possibility that the jury had been led to "dispens[e] punishment on the basis of an immutable characteristic."[211] The Court concluded that Buck had adequately demonstrated ineffective assistance of counsel and that "extraordinary circumstances" entitled him to reopen his habeas petition under Rule 60(b)(6), reversing the Fifth Circuit's denial of a COA.[212] Eight months later, Buck was re-sentenced to life in prison after Texas chose not to pursue the death penalty, recognizing that Buck's case had "forever been tainted by the indelible specter of race."[213]

Duane Buck's long and complicated journey through Texas's death penalty process highlighted just some of the ways in which the state's unique future dangerousness instruction can impact capital sentencing. After his

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[205] *Id.*

[206] *Id.* at 776–77 (citing Strickland v. Washington, 446 U.S. 668 (1984)).

[207] *Id.* at 776.

[208] *Id.*

[209] *Id.* at 777.

[210] *Id.* at 777–78.

[211] *Id.* at 776, 778.

[212] *Id.* at 780.

[213] *Duane Buck, Whose Death Sentence Was Tainted by Racial Bias, Is Resentenced to Life,* DEATH PENALTY INFO. CTR. (Oct. 4, 2017), https://deathpenaltyinfo.org/news/duane-buck-whose-death-sentence-was-tainted-by-racial-bias-is-resentenced-to-life.

conviction, for example, Buck's jury heard almost nothing about Buck's character or background, except as it pertained to his propensity for future violence, as neither side felt the need to discuss mitigation outside of the central, threshold inquiry of future dangerousness.[214] Ironically, this extended focus on future dangerousness only served to demonstrate how unreliable and inaccurate jury predictions of future violence are, as Buck would go on to be an exemplary inmate with no serious disciplinary infractions.[215]

Dr. Walter Quijano's testimony during Buck's sentencing offered an even more incriminating view of Texas's scheme, as it demonstrated how the state's central focus on future dangerousness can allow racial prejudices to seep into sentencing. That neither the jury nor the judge thought to question whether such explicit appeals to race were appropriate suggests that such arbitrary considerations were commonplace in answering Texas's vague special issue instruction. Indeed, as the next part of this paper will explore in greater detail, the facts of Duane Buck's sentencing were both alarmingly extraordinary and painfully ordinary. Of course, the Chief Justice was right to recognize that "[i]t stretches credulity to characterize Mr. Buck's [ineffective assistance of counsel] claim as run-of-the-mill."[216] Buck's case generated remarkable media scrutiny precisely because his case *was* remarkable—such an explicit invocation of deeply-seated racial prejudices by a defendant's own expert witness should rightfully be regarded as particularly egregious. But the Court's soliloquy on racial prejudice in the criminal justice system obscures the actual prevalence of racism in capital punishment, perhaps betraying the Court's willfully ignorant understanding of the material realities of death penalty cases. By the Court's own admission, the idea that black men are uniquely prone to violence is a "powerful racial stereotype" and represents a "particularly noxious strain of racial prejudice" that is deeply embedded in social and cultural perceptions of blackness.[217] If this is true, though, then there was nothing unusual about the role that race played in Buck's sentencing at all, as the same specter of racial prejudice would loom in the background of *any* inquiry into an offender's future dangerousness.[218] The Court itself acknowledged that future dangerousness presents an "unusual inquiry" that requires jurors to exercise "a degree of speculation."[219] Its suggestion that racial prejudice cannot be *de minimis* when it touches future dangerousness invites a broader re-assessment of Texas's statute, which may guarantee that race will (at least implicitly) play a similar role in every sentencing hearing by placing future dangerousness at the center of capital sentencing.

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[214] *Buck,* 137 S. Ct. at 768.

[215] Johnson, *supra* note 2, at 263.

[216] *Buck*, 137 S. Ct. at 778 (quoting Brief for Petitioners at 57).

[217] *Id.* at 776.

[218] *See, e.g.*, Johnson, *supra* note 2, at 268–69.

[219] *Id.*

IV. PART 3: DEADLY TOXINS - A NEW CONSTITUTIONAL CHALLENGE TO TEXAS'S FUTURE DANGEROUSNESS INSTRUCTION

Since the Supreme Court reinstated the death penalty in 1976, states and criminal defendants alike have turned to the Court to define the constitutional boundaries of capital punishment.[220] Executing a criminal defendant raises obvious Eighth Amendment concerns, so looking to the Supreme Court for national guidance makes sense, particularly as Congress has generally been hesitant to regulate state death penalty schemes in any sweeping way. But this process of constitutionalizing the death penalty one case at a time has created a confusing set of doctrines rife with unanswered questions and potential contradictions. As one commentator observed, the Court's five-decade effort to determine when and how capital punishment may be permissible has produced a "confusing array of ill-defined concepts, conflicting pronouncements, ipse dixits, and short-lived precedents."[221] From the very beginning, Supreme Court justices themselves have often been among the most vocal critics of the Court's mission to constitutionalize death, with several justices abandoning the project altogether and renouncing capital punishment as fundamentally incompatible with the Eighth Amendment.[222]

From this twisting labyrinth of constitutional holdings, it may be easy to lose sight of *Furman*'s original command that the Eighth Amendment is most fundamentally a "safeguard against arbitrary punishments," particularly when the stakes are as final and irreversible as they are in capital cases.[223] This command has been constrained in important ways to accommodate the Court's equally strong conviction that the Eighth Amendment also requires individualized consideration of each offender's unique circumstances in capital cases.[224] But if *Furman*'s First Commandment means anything, it must mean that juries cannot be empowered to determine who does and does not deserve to be sentenced to death based on race.

As this Part will argue, Texas's threshold inquiry of future dangerousness is best understood as an "eligibility factor" meant to narrow the class of offenders eligible for the death penalty, not a "selection factor" that must only loosely guide juror discretion in choosing who among that class to actually

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220 Fontaine, *supra* note 64, at 212.

221 *Id.* (quoting Shelley Clarke, *A Reasoned Moral Response: Rethinking Texas's Capital Sentencing Statute After* Penry v. Lynaugh, 69 TEX. L. REV. 407, 409–10 (1990)).

222 *See, e.g.*, McGautha v. California, 402 U.S. 183, 204 (1971) ("To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."); Walton v. Arizona, 497 U.S. 639, 664 (1990) (Scalia, J., concurring) ("To acknowledge that 'there perhaps is an inherent tension' between this line of cases and the line stemming from *Furman*, is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II."); Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) ("From this day forward, I no longer shall tinker with the machinery of death.").

223 *Furman*, 408 U.S. at 275 (Brennan, J., concurring).

224 *Woodson*, 428 U.S. at 304.

sentence to death. To pass constitutional muster under *Gregg*, the instruction must distinguish between offenders who are eligible for the death penalty and offenders who are not in objective, nonarbitrary ways, and give juries meaningful, consistent guidance on how to draw this distinction in each case.[225] But, as the briefs filed in *Buck v. Davis* convincingly argue, future dangerousness does just the opposite, activating deeply-held implicit prejudices against certain racial groups and ultimately producing arbitrary and discriminatory death sentences.[226] Even where race is not explicitly raised by an expert witness, the substantial risk that it nevertheless colors sentencing deliberations should be impermissible in the capital context, as "some toxins can be deadly in small doses."[227]

A. *The Eligibility/Selection Distinction and Jury Discretion*

Two seemingly incompatible commands rose out of the four cases that reinstated the death penalty in 1976. On one hand, the Court held in *Gregg v. Georgia* that the exercise of jury discretion must be "controlled by clear and objective standards so as to produce non-discriminatory" sentences.[228] The Supreme Court has consistently read this command to mean that "channelling and limiting . . . the sentencer's discretion in imposing the death penalty" is a "fundamental constitutional requirement."[229] At the same time, however, the Court also held in *Woodson v. North Carolina* that "the fundamental respect for humanity underlying the Eighth Amendment" requires that each capital defendant be afforded individualized consideration of his particular circumstances.[230] At least on its face, this requirement of individualized sentencing seems to necessarily open the door for the unguided discretion condemned in *Furman* and *Gregg.* Indeed, Justice Scalia once reflected that, "shortly after introducing our doctrine *requiring* constraints on the sentencer's discretion to 'impose' the death penalty, the Court began developing a doctrine *forbidding* constraints on the sentencer's discretion to '*decline* to impose' it. This second doctrine—counterdoctrine would be a better word—has completely exploded whatever coherence the notion of 'guided discretion' once had."[231] This very tension led another Supreme Court justice to abandon the hope of a constitutional death penalty altogether, finding that "the constitutional goal of eliminating arbitrariness and discrimination from the administration of death can never be achieved without compromising an

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225 *Gregg*, 428 U.S. at 198 .

226 *See supra* sources cited note 28.

227 *Buck*, 137 S. Ct. at 777.

228 *Gregg*, 428 U.S. at 198(quoting Coley v. State, 204 S.E.2d 612, 715 (Ga. 1974)).

229 *Walton*, 497 U.S. at 660 (Scalia, J., concurring) (quoting Maynard v. Wartwright, 486 U.S 356, 362 (1988)).

230 *Woodson*, 428 U.S. at 304.

231 *Walton*, 497 U.S. at 661 (Scalia, J., concurring) (citation omitted).

equally essential component of fundamental fairness—individualized sentencing."[232]

The Court has attempted to navigate this "Furman-Lockett" paradox by drawing a distinction between two phases of capital sentencing. In the first phase, jurors determine which convicted murderers are eligible for the death penalty at all. At this "eligibility" phase, states must provide careful, objective guidance on how juries are to determine whether a defendant belongs in the class of death-eligible offenders, and statutory aggravators meant to serve this "narrowing" function must provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[233] Once a statute has narrowed the class of death-eligible offenders along objective lines, however, it may afford capital juries broader discretion in selecting which defendants among this class to actually sentence to death.[234] In this selection phase, statutory factors may be more open-ended, and juries are permitted to exercise discretion in individual cases with less guidance.[235] The Supreme Court first articulated this distinction in *Zant v. Stephens*, writing,

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.[236]

The Court has gone as far as to hold that "the sentencer may be given '*unbridled* discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty.'"[237] In dividing capital sentencing into an "eligibility" phase and a "selection" phase, the Supreme Court's doctrine purports to balance *Furman*'s concern with arbitrariness with *Woodson*'s command that capital defendants be afforded individualized consideration by cabining juror discretion to a smaller subset of offenders already deemed eligible for the death penalty for objective, nonarbitrary reasons. Effectively, this "abandonment in *Zant* of any requirement that discretion be channeled at the selection

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232 *Callins*, 510 U.S. at 1144 (Blackmun, J., dissenting).

233 *Furman*, 408 U.S. at 313 (White, J., concurring).

234 Zant v. Stephens, 462 U.S. 862, 878–79 (1984).

235 *Id.*

236 *Id.*

237 Tuilaepa v. California, 512 U.S. 967, 979–80 (1994) (quoting *Zant*, 426 U.S. at 875) (emphasis added).

stage rendered the narrowing requirement the sole constitutionally mandated means of constraining discretion in the capital sentencing process."[238]

But the distinction between "eligibility" and "selection" criteria is anything but clear, and the Supreme Court's efforts to apply it have produced perplexing results that have emboldened states to broaden jury discretion over time. In *Lowenfield v. Phelps*, for example, the Court held that a state's definition of capital murder could itself achieve *Gregg*'s narrowing requirement.[239] Thus, if a state defines capital murder as a smaller subset of homicides, it may sufficiently narrow eligibility at the *guilt phase* of capital trials by simply convicting offenders of capital murder, making any further statutory aggravators reserved for sentencing selection criteria that may be open-ended and broad.[240] In reaching this conclusion, the Court reasoned that a state that genuinely constrains death eligibility by defining capital murder narrowly would be able to reduce arbitrariness and alleviate *Furman*'s central concern before sentencing even begins.[241] But since *Lowenfield*, the Court has consistently refused to meaningfully scrutinize whether statutory definitions of capital murder actually narrow the class of death-eligible offenders *in practice*, and states have correspondingly expanded their statutory definitions of capital murder such that almost every murder is eligible for the death penalty in certain states.[242] In Georgia, for example, one study "concluded that 86% of all persons convicted of murder . . . over a five-year period were death eligible under the state's post-*Furman* statute."[243] This is no accident either, as "creating near-universal death eligibility may be the goal of some state legislators," who even campaign on the promise that they will expand the underlying elements of capital murder to reach more offenders.[244] As a result, many modern death penalty statutes make a mockery of the narrowing requirement articulated in *Gregg*, as they define capital murder so broadly that nearly every convicted murderer is death-eligible.[245] The Court is directly complicit in this trend, as its refusal to meaningfully police the narrowing requirement encourages states to define capital murder broadly and then treat any additional statutory aggravators as selection criteria that may leave jurors with considerable discretion.[246] Obviously, this structure directly undermines the logic of *Zant*; if the class of death-eligible offenders is so large

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238 Chelsea Creo Sharon, *The "Most Deserving: of Death:" The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 223, 231 (2011).

239 Lowenfield v. Phelps, 484 U.S. 231 (1988).

240 *Id.* at 245.

241 *Id.*

242 Sharon, *supra* note 238, at 232.

243 *Id.* at 234.

244 *Id.*

245 *Id.* ("A recent study in Missouri concluded that 76% of those convicted of homicide were death eligible under the state's statute. In California, more than 90% of adults convicted of first-degree murder are death eligible.")

246 *Id.*

that it encompasses nearly every murderer, juror discretion at the selection phase effectively amounts to absolute discretion.[247]

In theory, a defendant should be able to challenge this perverse effect by arguing that a particular element of a state's death penalty statute should be treated as an "eligibility phase" factor that must be more carefully scrutinized under *Gregg*'s narrowing requirement, and not as a "selection phase" factor that might deserve more judicial deference. But the Court's failure to police, or even clearly define, this distinction leaves it unclear when this sort of challenge would ever succeed. Indeed, decisions like *Lowenfield* and *Tuilaepa* may suggest that statutes can pass constitutional muster by narrowing death eligibility in *any* way, at *any phase* of capital cases, regardless of how minimal the narrowing may actually be in practice.[248] This view of the eligibility/selection distinction would be simple to administer, and would allow courts to avoid awkward clashes with state legislatures by converting the narrowing requirement into little more than a rubber stamp. But it would also produce patently absurd results. If, for example, a state's definition of capital murder reaches 99.99% of convicted murderers, does it really make sense to think that this definition has itself satisfied *Gregg*'s narrowing requirement, such that every subsequent aggravator can be deemed a "selection" criterion worthy of judicial deference? Because courts have largely treated the narrowing requirement as little more than a "procedural formality, satisfied by the mere presence of an aggravating factor, no matter how broad the aggravator is or how many are listed,"[249] the answer to this question is unclear.

But a recent concurrence authored by Justice Breyer in 2018 suggests that this sort of challenge at least remains on the table, as the Supreme Court justice acknowledged that empirical evidence suggesting that 98% of defendants convicted of murder in Arizona were death-eligible presented a "possible constitutional problem."[250] If Justice Breyer's opinion signals a willingness to rethink the Court's "hands-off" approach to the eligibility/selection distinction, Texas's death penalty statute, which has been responsible for more executions than any other modern statute in the country, should be the first to face careful re-examination. Unlike similar aggravators in other states, Texas's future dangerousness instruction is clearly an "eligibility" factor meant to narrow the class of death-eligible offenders, not a "selection" criterion meant to provide the jury with a vehicle to show mercy to certain members of that class. Understood in this way, the instruction is unconstitutional under *Furman* and *Greg* because it uniquely empowers juries to base "eligibility" determinations on racial prejudices.

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[247] *Id.*

[248] *Id.* at 226, 238.

[249] *Id.* at 226.

[250] Hidalgo v. Arizona, 138 S. Ct. 1054, 1057 (2018) (Breyer, J., concurring).

1. *Texas's future dangerousness inquiry is a "narrowing" factor that establishes the class of death-eligible offenders.*

First, although Texas might purport to satisfy *Furman*'s narrowing requirement with its definition of capital offenses, the state's future dangerousness instruction clearly *functions* as another narrowing factor. Unlike every other active death penalty state, Texas uses future dangerousness as a threshold inquiry that must be satisfied in every capital case before jurors are permitted to consider any mitigating evidence about the individual offender.[251] If future dangerousness were simply one among many selection factors, one would expect it to be considered alongside other selection criteria, like other statutory aggravators or mitigators. But the fact that Texas requires jurors to *exclusively* consider the future dangerousness inquiry before considering any other individualized circumstances suggests that the inquiry is meant to *establish eligibility* by narrowing the subset of offenders who may be sentenced to death in the first place. Indeed, the Court itself has always described the eligibility/selection distinction as a two-step process. First, the jury must find that the offender falls within the legislatively-defined class of death-eligible defendants.[252] Once it has done so, the jury is "free to consider a myriad of factors to determine whether death is the appropriate punishment" during the selection phase of sentencing.[253] But Texas juries are only permitted to consider a "myriad" of individualized selection factors once they have already determined that the offender poses a future danger, suggesting that the dangerousness inquiry serves to narrow the class of offenders for whom selection factors like mitigating circumstances are relevant at all.[254]

The Supreme Court's holding in *Lowenfield* presents an obvious hurdle to this reading of Texas's statute. Under *Lowenfield*, if a state defines capital murder as a subset of homicides, the narrowing requirement may be satisfied at the guilt phase of a capital trial and "the fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process."[255] A proponent of Texas's statute might accordingly argue that Texas satisfies the narrowing

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[251] Tex. Code Crim. Proc. Ann., Art. 37.071, § 2(b)(1).

[252] *Tuilaepa*, 512 U.S. at 979.

[253] *Id.*

[254] This logic may similarly suggest that future dangerousness is also an eligibility-phase narrowing factor when it is listed as one among many statutory aggravators, as it is in Wyoming, Idaho, and Oklahoma. In these states, dangerousness is also considered before mitigation because juries are instructed to find an aggravating circumstance before they are permitted to consider mitigation. The same constitutional objection that I advance against Texas's scheme may thus also apply to this limited subset of death penalty states. But there is still a meaningful difference between Texas's scheme and those of Wyoming, Idaho, and Oklahoma: in Texas, every jury *must* consider dangerousness, and only dangerousness, as a threshold inquiry *in every case*. In Wyoming, Idaho, and Oklahoma, juries need not touch the dangerousness inquiry at all, as long as they find that another aggravating circumstance applies. Dangerousness is more obviously a narrowing factor when it stands alone at the threshold of deliberation than when it is listed as one among many factors, although I acknowledge that this same constitutional objection may apply, albeit with less force, to the three schemes that list dangerousness as one among many aggravators.

[255] *Lowenfield*, 484 U.S. at 246.

requirement by specifically defining capital offenses, so the future dangerousness inquiry is merely a selection factor. But this reading is absurd in light of the underlying purposes of the narrowing requirement, and to the extent that it suggests otherwise, *Lowenfield* is inconsistent with *Gregg* and *Zant*. In both *Gregg* and *Zant*, which together established the narrowing requirement and the eligibility/selection distinction, the Court specified that the requirement was meant to constrain the *sentencer's* discretion.[256]

Gregg imposed a requirement that the jury's discretion be narrowly cabined and carefully guided *during sentencing*.[257] The stage of the case is important because, as Justice Marshall's dissenting opinion in *Lowenfield* pointed out, juries are not considering a defendant's sentence at the guilt phase of a criminal case (they are often explicitly instructed not to).[258] A definition of capital murder cannot constrain or narrow the *sentencer*'s discretion at all, because juries are simply not exercising their sentencing discretion during the guilt phase of a trial.[259] Put differently, if the Court's central concern in *Furman* and *Gregg* was that jurors would decide who to sentence to death arbitrarily, a definition of capital offenses cannot mitigate this worry because it does not affect jurors' deliberations about who deserves the death penalty in any way.[260] As Justice Marshall explained,

> [A]s our cases have emphasized consistently, the narrowing requirement is meant to channel the discretion of the *sentencer*. It forces the capital sentencing jury to approach its task in a structured, step-by-step way, first determining whether a defendant is eligible for the death penalty and then determining whether all of the circumstances justify its imposition. The only conceivable reason for making narrowing a constitutional requirement is its function in structuring sentencing deliberations.[261]

The Court's reading of the narrowing requirement in *Lowenfield* would perversely mislead capital jurors by having them render a determination of death-eligibility without actually understanding that they are doing so. Read this way, the narrowing requirement would not constrain arbitrary sentencing because it would not affect sentencing deliberations at all. Instead, courts should take a functional approach in distinguishing eligibility standards from

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256 *See Gregg*, 428 U.S. at 189 ("[W]here discretion is afforded a *sentencing body* on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited.") (emphasis added); *see also Zant*, 462 U.S. at 876–77 ("This conclusion rested, of course, on the fundamental requirement that each statutory aggravating circumstance must satisfy a constitutional standard derived from the principles of *Furman* itself. For a system 'could have standards so vague that they would fail adequately to channel *the sentencing decision* patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur.'") (citation omitted) (emphasis added).

257 *Lowenfield*, 484 U.S. at 257 (Marshall, J., dissenting) ("Rather, as our cases have emphasized consistently, the narrowing requirement is meant to channel the discretion of the sentencer.").

258 *Id.*

259 *Id.*

260 *Id.*

261 *Id.* (emphasis added).

selection standards—a threshold inquiry that jurors must answer before they may consider anything about the offender's individual circumstances clearly functions to narrow the class of death-eligible offenders.

Secondly, on the few occasions when the Court *has* attempted to articulate a discernable distinction between eligibility and selection, the factors it has deemed relevant suggest that Texas's future dangerousness inquiry more closely resembles a narrowing factor than a selection criterion. In *Tuilaepa v. California*, for example, the Court held that selection-stage factors may be phrased as open-ended, nonpropositional considerations, but suggested that eligibility factors may have to be phrased as propositional, factual questions.[262] While this distinction between propositional and nonpropositional factors has not proven influential in subsequent Supreme Court cases, it does represent one of the few attempts the Court has ever made to distinguish eligibility and selection criteria in an objective, discernible way. It is also consistent with the Court's persistent intuitions behind the eligibility/selection distinction—if juror discretion must be more closely constrained and guided at the eligibility phase than at the selection phase, it makes sense to require eligibility standards to be stated as factual, yes/no propositions while permitting selection standards to be stated as open-ended, nonpropositional considerations. This distinction, moreover, further suggest that Texas's future dangerousness instruction, phrased as a binary factual proposition, functions as an eligibility factor rather than as a selection standard.

Thirdly, the future dangerousness inquiry *must* be assessed as an eligibility factor because Texas's statute does not otherwise sufficiently narrow the class of death-eligible offenders. To the extent that the Supreme Court has suggested that *any* narrowing, no matter how insignificant, is sufficient to discharge *Furman*'s concerns of arbitrariness, it has badly misread and misapplied *Furman* and abrogated its Eighth Amendment duty to police death penalty statutes.[263] Instead, a more careful reading of *Furman* and *Gregg* suggests that Texas's list of capital offenses, standing alone, is too broad to sufficiently narrow eligibility, so the statute must further narrow death-eligibility with its future dangerousness instruction in order to survive constitutional scrutiny. The five justices who produced independent concurring opinions in *Furman* shared a central concern that contemporary death penalty statutes were being administered arbitrarily and capriciously.[264] This concern was primarily driven by the "Justices' understanding that only 15-20% of death-eligible murderers were sentenced to death."[265] Justice Stewart directly cited this figure in his *Furman* concurrence,[266] and the Court again referenced it four years later in *Gregg*, noting that "before Furman less than [20%] of those

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[262] *Tuilaepa*, 512 U.S. at 978.

[263] Sharon, *supra* note 238, at 226.

[264] *See, e.g.*, Scott Phillips & Alena Simon, *Is the Modern American Death Penalty a Fatal Lottery? Texas as a Conservative Test*, 3 LAWS 85, 86 (2014).

[265] Steven F. Shatz, *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 FLA. L. REV. 719, 745–46 (2007).

[266] *Id.* at 746 (citing *Furman*, 408 U.S. at 309 (Stewart, J., concurring)).

convicted of murder were sentenced to death in those states that authorized capital punishment."[267] This "miniscule percentage"[268] of death-eligible defendants who were actually being sentenced to death before *Furman* suggested to the Court that juries were exercising their broad sentencing discretion arbitrarily, and that there was "no meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not."[269] The "narrowing" requirement that the Court endorsed in *Gregg* was a direct response to this 15–20% figure [270]—by requiring states to limit the subset of offenders eligible for the death penalty in objective ways, the Court hoped that the rate of death sentences among death-eligible defendants would increase, which would indicate that the penalty was no longer being imposed "wantonly or freakishly,"[271] but instead with some measure of consistency. Indeed, Justice White's concurring opinion in *Gregg* noted that Georgia's amended statute passed constitutional muster only because it sufficiently narrowed the class of death-eligible offenders such that juries "will impose the death penalty in a substantial portion of the cases so defined."[272]

When modern courts uphold death penalty statutes that produce the same "minuscule percentage" of death sentences among the death-eligible, they are misapplying *Furman*, because it is clear that a state where fewer than 15-20% of death-eligible offenders are sentenced to death has not sufficiently narrowed the class of death-eligible offenders.[273] It was this percentage that suggested to the *Furman* Court that the death penalty was being imposed "wantonly and freakishly"[274] in the first place, and any death penalty statute that simply reproduces the very rates that led the Court to invalidate capital punishment in 1972 has not satisfied the Court's command to "genuinely narrow the class of persons eligible for the death penalty."[275]

To be sure, the Supreme Court has not read *Furman* to establish a numerical baseline in this way. Instead, the Court has become increasingly hesitant to second-guess states' attempts to meet *Gregg*'s narrowing requirement, refusing to scrutinize whether aggravators that purport to narrow death-eligibility actually do so in practice.[276] But Justice Breyer's *Hidalgo* concurrence demonstrates the absurdity of this trend: if state statutes can satisfy the narrowing requirement by eliminating 2% of potentially eligible offenders, it is difficult to see how the requirement solves or even minimizes the

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[267] *Id.* (citing *Gregg*,, 428 U.S. at 182).

[268] Sharon, *supra* note 238, at 228.

[269] *Furman*, 408 U.S. at 313 (White, J., concurring).

[270] Sharon, *supra* note 238, at 230 (noting that *Gregg*'s narrowing requirement was a response to the figures cited in *Furman*).

[271] *Gregg*, 428 U.S. at 206–07.

[272] *Id.* at 222 (White, J., concurring).

[273] Sharon, *supra* note 238, at 230, 237.

[274] *Id.* at 237 (explaining the *Furman* Court's understanding that "when aggravating factors present juries and prosecutors with a broad class of offenders of average culpability, arbitrary and discriminatory considerations are more likely to be used in distinguishing among these offenders").

[275] *Zant*, 462 U.S. at 877.

[276] Sharon, *supra* note 238, at 232.

arbitrariness concerns that rendered the death penalty unconstitutional in *Furman*.[277] Instead, the *only* coherent way to read *Furman* and *Gregg* is to recognize that state statutes must actually meaningfully narrow death-eligibility *in practice*; otherwise, the death penalty is no less rare or freakish than it was in 1972.[278] As one commentator has noted, "if courts continue to treat the narrowing requirement as little more than a procedural formality, they must admit that *Furman*'s command that the death penalty be administered in a non-arbitrary manner has been decisively abandoned."[279]

Understood in this way, *Furman* and *Gregg* provide another method of determining whether Texas's future dangerousness inquiry should be assessed as a narrowing factor or a selection factor: if the statute does not otherwise sufficiently narrow death-eligibility, future dangerousness *must* be treated as a narrowing factor in order for Texas's scheme to be constitutional under *Gregg*. Applying the Court's numerical standard in *Furman* and *Gregg,* Texas's list of capital offenses, standing alone, does not sufficiently narrow eligibility. Between 1976 and 2006, only somewhere between 11.4% and 12.2% of offenders whose crimes fell within the state's list of capital offenses were actually sentenced to death.[280] More recently, that rate has fallen even further to just 3.1% between 2006 to 2016, when only 76 of 2,416 death-eligible defendants received death sentences.[281] Of course, this largely reflects a declining use of the death penalty, which is unquestionably a welcome development for the country's leader in executions. But such a precipitous decline in the state's death sentence rate also creates a serious risk that jurors are exercising their discretion with increasing arbitrariness. Indeed, "not only does the overall death sentence rate fall below the threshold deemed arbitrary and therefore unconstitutional in *Furman*, the Texas death penalty has become increasingly arbitrary over time," as racial disparities have grown more prominent in Texas as the state's rate of death sentences has

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277 *Hidalgo*, 138 S. Ct. at 1057.

278 Some commentators have taken this numerical approach to *Gregg*'s narrowing requirement and concluded that most, if not all, modern death penalty statutes are unconstitutional. *See, e.g.*, Sharon, *supra* note 238, at 251. My argument does not rely on this more extreme conclusion. Instead, I suggest only that this numerical understanding of the narrowing requirement requires the Court to reconsider what may be categorized as eligibility standards and what may be categorized as selection standards. In states whose definitions of capital offenses do not sufficiently narrow eligibility, I suggest only that the Court must view additional aggravators in the state's death penalty statute as further eligibility standards. This view does not necessarily imply that all existing death penalty statutes are unconstitutional, but only that additional statutory planks must be viewed as eligibility standards in order to create a sufficiently small class of death-eligible offenders. In Texas, the most obvious candidate for an additional eligibility standard is future dangerousness. In other states, capital punishment statutes may be salvaged by viewing aggravating circumstances as eligibility standards in addition to the states' definitions of capital crimes. The more extreme condemnation of all death penalty schemes advanced by several commentators is beyond the scope of this paper.

279 Sharon, *supra* note 238, at 251.

280 Scott Phillips & Tret Steidley, *A Systematic Lottery: The Texas Death Penalty, 1976 to 2016*, 51:3 COLUM. HUM. RTS. L. REV. 1044, 1055 (2020).

281 *Id.* at 1059.

increased.[282] These "empirical patterns support Justice Douglas's intuition: discretion raises the specter of discrimination."[283]

Because Texas's list of capital offenses does not do so itself, the future dangerousness instruction must adequately narrow the class of death-eligible offenders in order to salvage the constitutionality of the statute. But, as a wide array of empirical evidence makes clear, the future dangerousness inquiry falls far short of the constitutional requirements that a narrowing factor must meet. Understood as an eligibility-phase narrowing factor, the inquiry is unconstitutional because it drastically and impermissibly increases the risk of discriminatory sentencing.

2. *Texas's future dangerousness inquiry makes a mockery of the constitutional requirements that the Supreme Court has attached to narrowing factors.*

While juries may be afforded wide, even "unbridled" discretion in the selection phase of capital sentencing, narrowing criteria at the eligibility phase must provide an objective and consistent basis for distinguishing offenders who are death-eligible from offenders who are not.[284] But Texas's future dangerousness inquiry does not do this. Instead, the inquiry perversely activates uniquely pernicious and prevalent racial prejudices even when no expert witness offers explicitly racialized testimony.[285] The *Buck* Court's adamant outrage at the very possibility that a death sentence might be based on "an immutable characteristic" and its repeated insistence that instances of racial prejudice in capital sentencing are extraordinary or uniquely egregious[286] naïvely assume that the same prejudices are not also activated during *any* deliberation surrounding future dangerousness.

Unfortunately, this assumption is badly out of touch with the realities of capital punishment. Explicitly asking a jury to consider whether an offender will commit future acts of violence, especially before the jury is allowed to consider any potentially mitigating individual characteristics about the defendant, activates racial prejudices *in every case.* The image of black men as especially and inherently violent is an enduring racial stereotype that has deep historical roots and continues to be uniquely powerful and salient today. As one amicus brief filed in *Buck v. Davis* explained, "the stereotype of the violent black male has a demonstrable effect on perceptions and judgments, as documented by an array of social science research employing a variety of

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[282] *Id.*

[283] *Id.* at 1063.

[284] *Zant*, 462 U.S. at 875.

[285] *See, e.g.*, Brief for Constitutional Accountability Center as Amicus Curiae, Buck v. Davis, 137 S. Ct. 759 (2017); Brief on Behalf of National Black Law Students Association as Amicus Curiae, Buck v. Davis, 137 S. Ct. 759 (2017).

[286] *Buck*, 137 S. Ct. at 778.

methods."[287] This association between blackness and violent criminality is inextricably intertwined with America's history of racial oppression, as "the narrative of black dangerousness reaches back to slavery when Black people were believed to be not just inferior, but also savage brutes prone to violence and criminality unless domesticated and made docile."[288] Over time, this portrayal even "evolved into a respected scientific doctrine," which served to reinforce white supremacy and maintain a racial hierarchy under the pretense of science.[289]

But while American society has ostensibly rejected such inherent, "scientific" differences among races, the stereotype of black criminality lives on, as the narrative that black men are predisposed to uncontrollable violence "is not some vestigial relic of a long dead past."[290] Instead, "the most rigorous cognitive and psychological scientific research of the last sixty years has shown without fail that even in our enlightened modern times vast segments of society hold on to belief that Blacks and Whites occupy different moral universes and that Blacks are more prone to criminality than Whites."[291] This persistent narrative has been sustained, in no small part, by the ways that trusted public institutions speak about crime and violence. When a misplaced fear of increasing crime rates gripped the nation in the 1980s, for example, media portrayals of the crime epidemic consistently linked violence to young black men.[292] Even today, popular news sources continue to overreport black crimes and regularly use coded language that trigger perceptions of black criminality.[293] As one political scientist observed, "in the post-civil rights era, explicit race-based appeals that violate norms of equality have been replaced by more subtle visual imagery and coded language that tap into persistent racial prejudices and fears."[294]

Unsurprisingly, this persistent and prevalent narrative shapes the ways that members of society who may serve on capital juries perceive reality and think about just deserts. A wide array of social research overwhelmingly confirms that black men are more likely to be perceived as violent threats,

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[287] Brief for Constitutional Accountability Cancer as Amicus Curiae at 4, Buck v. Davis, 137 S. Ct. 759 (2017).

[288] Aderson Bellegarde Francois, *Et in Arcadia Ego: Buck v. Davis, Black thugs, and the Supreme Court's Race Jurisprudence*, 15 OHIO STATE J. CRIM. L. 229, 235 (2017).

[289] *Id.*

[290] *Id.*

[291] *Id.*

[292] Brief for Constitutional Accountability Cancer as Amicus Curiae at 15, Buck v. Davis, 137 S. Ct. 759 (2017) (quoting ROBERT M. ENTMAN, THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA 82–82, 85 (2000)) ("An examination of one city's local news broadcasting found that it 'presented Blacks in physical custody more than twice as much as Whites,' that 'stories about Blacks were four times more likely to include mug shots,' that Whites were 'more likely to receive helpful pro-defense sound-bites,' and that programs 'were more likely to provide an on-screen name for Whites accused of violence than for Blacks.'")

[293] Brief on Behalf of National Black Law Students Association as Amicus Curiae at 22, Buck v. Davis, 137 S. Ct. 759 (2017).

[294] *Id.* at 23 (citing TALI MENDELBERG, RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES AND THE NORM OF EQUALITY 6 (2001)).

particularly in the contexts of criminal justice and policing.[295] Indeed, "whether the matter involves recalling the details of a scene, gauging the aggressiveness of ambiguous behavior, assessing the risk of danger in a given location, judging the extent to which a crime was attributable to the offender's inherent disposition, or evaluating the appropriate sanction, research consistently reveals that a latent association between African Americans and violence distorts perceptions of reality and leads to racially biased assessments."[296] Several independent local surveys, for example, have demonstrated that the "perceived risk of criminal victimization is elevated by the perception that blacks live in one's neighborhood."[297] National surveys similarly show that white participants consistently overestimate the overall frequency of violent crimes committed by African-Americans.[298]

These surveys reflect the findings of an even more robust body of research designed to measure implicit prejudices. A series of studies, for example, found that participants were quicker to associate black faces, rather than white faces, with dangerous weapons like guns and knives.[299] Police officers fared no better, as "[w]hen officers were given no information other than a face and when they were explicitly directed to make judgments of criminality, race played a significant role in how those judgments were made. Black faces looked more criminal to police officers; the more Black, the more criminal."[300] These implicit biases are not only pervasive and widespread, but also incredibly powerful, as they can distort perceptions of reality and justice. The same 2004 study, for example, found that police officers were more likely to "misremember a Black face as more stereotypically Black than it actually was" when they were presented with particularly violent crimes.[301] Similar implicit bias studies have confirmed that participants are more likely to endorse harsh retributive responses to identical crimes when they are committed by black men rather than white men, and more likely to accept aggressive police action in response to crimes that happen to be committed by black offenders.[302]

Unsurprisingly, the same implicit prejudices also plague capital jurors. In simulations of capital sentencing proceedings, researchers consistently find that participants are more likely to regard black defendants as dangerous

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[295] Brief for Constitutional Accountability Center as Amicus Curiae at 4, Buck v. Davis, 137 S. Ct. 759 (2017).

[296] *Id.*

[297] *Id.* at 20 (quoting Ted Chiricos et al., *Perceived Racial and Ethnic Composition of Neighborhood and Perceived Risk of Crime*, 48 SOC. PROBS. 322, 334–35 (2001)).

[298] Francois, *supra* note 288, at 242.

[299] Brief for Constitutional Accountability Center as Amicus Curiae at 19–20, Buck v. Davis, 137 S. Ct. 759 (2017) (quoting Jennifer Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 878–81 (2004)).

[300] Francois, *supra* note 288, at 242 (quoting Eberhardt, *supra* note 299, at 889).

[301] Brief for Constitutional Accountability Center as Amicus Curiae at 20, Buck v. Davis, 137 S. Ct. 759 (2017) (quoting Eberhardt, *supra* note 299, at 878, 885–88).

[302] *Id.* at 21 (quoting Mary Peffley et al., *Racial Stereotypes and Whites' Political Views of Blacks in the Context of Welfare and Crime*, 41 AM. J. POL. SCI. 30, 52 (1997)).

and violent, even when the black defendants and their white counterparts are otherwise identically situated.[303] As a result, jurors were far more likely to sentence black defendants to death even when researchers controlled for every variable other than race.[304] As Duane Buck's counsel pointed out in his appeal, surveys of capital sentences in Harris County, where Buck was convicted and sentenced and where more defendants have been sentenced to death than in any other county in the nation,[305] confirm the same patterns, as "among a group of cases comparable to Buck's, and controlling for other factors, researchers found that juries were 1.3 times as likely to impose a death sentence on a black defendant as on a white defendant."[306] These studies should be entirely unsurprising in light of the overwhelming empirical evidence that perceptions of justice and beliefs about proper punishments are directly impacted by stereotypes of black criminality. Of course, they should also be entirely unsurprising because they merely reflect the same patterns of racial bias that touch every aspect of American social life. Still, few stereotypes are as deeply entrenched or as powerful as the narrative of black violence and criminality, which seems to pervade every stage of American society. One study, for example, found that black children were viewed as more dangerous and less innocent than other children "starting at age ten," and that black students were perceived as unruly and disciplined more strictly as early as middle school.[307]

As it did in *Buck v. Davis*, the Supreme Court has repeatedly insisted that racial animus or bias is uniquely impermissible in criminal sentencing, and is even more so in capital cases where the defendant's life hangs in the balance. As Chief Justice Roberts observed in his majority opinion in *Buck*, dispensing punishments based on what defendants do, not who they are, is a "basic premise" of the criminal justice system.[308] Racial prejudice should have no place in any criminal trial, but the Supreme Court has repeatedly recognized that it must be especially vigilant in reviewing capital cases, as the "complete finality of the death sentence"[309] imposes a heightened duty to ensure that capital sentences are reliable, consistent, and fair. This duty also takes on particular importance because "the range of discretion entrusted to a jury in a capital sentencing hearing" presents "a unique opportunity for racial prejudice to operate but remain undetected."[310] Death is a particularly severe, irreversible criminal punishment, and race is a particularly unjust,

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[303] *Id.* at 22 (citing Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the "Empathetic Divide,"* 45 L. & SOC'Y REV. 69, 70 (2011)).

[304] *Id.*

[305] Jay R. Jordan, *If Harris County is Death Penalty Capital, How Do Houston's Surrounding Counties Stack Up?*, CHRON (Sep. 5, 2019), https://www.chron.com/news/houston-texas/houston/article/If-Harris-County-is-death-penalty-capital-how-do-14417171.php.

[306] Johnson, *supra* note 2, at 269.

[307] Francois, *supra* note 288, at 242–43 (citing Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26 J. PSYCHOL. SCI. 617, 617–18 (2015)).

[308] *Buck*, 137 S. Ct. at 778.

[309] Turner v. Murray, 476 U.S. 28, 35 (1986).

[310] *Turner*, 476 U.S. at 35.

arbitrary basis for dispensing criminal punishments. Chief Justice Roberts's majority opinion in *Buck* appears to be consistent with these proclamations, as the Court is unflinching in its condemnation of Dr. Quijano's testimony and the decision to put such racialized testimony before the jury.[311]

But ultimately, the Supreme Court's implication that the deadly "toxin" of racial prejudice only rarely infects capital sentencing in narrow circumstances (like those presented in Duane Buck's case) is either embarrassingly naïve or willfully, infuriatingly ignorant.[312] After all, the Court itself recognized in a separate case that "more subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty."[313] When Texas instructs jurors to determine whether a defendant poses a future danger to society, this hypothetical possibility becomes an undeniable reality. Where it is not explicit, racial prejudice lives in coded language and implicit biases.[314] The future dangerousness inquiry uniquely triggers these prejudices, as an overwhelming array of social science confirms that potential jurors are significantly more likely to view black defendants as threatening or dangerous, and that this tendency distorts jurors' perceptions of reality and justice. Put differently, "*it is the future dangerousness inquiry itself, not the testimony of Dr. Quijano, that* 'provide[s] support for making a decision on life or death on the basis of race.'"[315] If, as the Court insists, racial prejudice infects capital sentencing with a deadly toxin, activating deeply-held racial prejudices should never be permissible. But Texas's death penalty statute uniquely predisposes capital juries to base death sentences on implicit racial prejudices by activating those prejudices at the eligibility phase of sentencing, *requiring* jurors to unanimously agree that the defendant poses a future danger of violence before they are permitted to consider any potentially mitigating individual circumstances. Until the Supreme Court recognizes that Texas's unique statute guarantees that race will *always* play a powerful role in capital sentencing, its stubborn insistence that the statute is constitutional will render it complicit in the countless death sentences that will be based on future dangerousness determinations that are unquestionably tainted by racial prejudice.

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311 *Buck*, 137 S. Ct. at 778.

312 Johnson, *supra* note 2, at 269 ("In the end, we come once more back to colorblindness. If we do not say race, we speak no evil; and if we speak no evil, a majority of the Court not only hears no evil but refuses to see it.").

313 *Turner*, 476 U.S. at 35.

314 Brief on Behalf of National Black Law Students Association as Amicus Curiae at 17, Buck v. Davis, 137 S. Ct. 759 (2017).

315 Johnson, *supra* note 2, at 269 (quoting *Buck*, 137 S. Ct. at 776).

V. CONCLUSION

While capital punishment has retreated to the fringes of criminal justice in most American states,[316] Texas remains unflinching in its use of the death penalty, as the state continues to lead the nation in executions even as its peers move in the opposite direction.[317] Few cases demonstrate Texas's preoccupation with capital punishment as poignantly or as tragically as Duane Buck's, whose pleas for justice were ignored for two decades. Ultimately, Buck's case gave the Supreme Court an opportunity to recite its oft-repeated pledge to root out the deadly toxin of racial bias from criminal punishment.[318] It gave the Court a chance to wax poetically about the "basic premise of our criminal justice system" and to decry the "disturbing" and "extraordinary" circumstances of Buck's sentencing.[319] But if this commitment to racial justice is anything more than an empty mantra, the Supreme Court must fundamentally revisit the future dangerousness inquiry at the heart of Duane Buck's sentencing. Understood as an "eligibility" criterion that functions to narrow the class of death-eligible offenders, Texas's future dangerousness instruction fails the constitutional requirements set out in *Furman* and *Gregg* because it impermissibly invites powerful implicit racial prejudices into *every* capital sentencing proceeding.

316 *Executions by State and Year*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/executions-overview/executions-by-state-and-year (last visited Feb. 12, 2022).

317 *Id.*

318 *Buck*, 137 S. Ct. at 777.

319 *Id.* at 778.