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PUTTING THE GUESSWORK BACK INTO CAPITAL SENTENCING

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In 1972, in *Furman v. Georgia*, the Supreme Court deemed it "incontestable" that a death sentence is cruel and unusual if inflicted "by reason of [the defendant's] race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices." Arbitrary and discriminatory patterns in capital sentencing moved the Court to strike down death penalty statutes that required judges or juries to cast thumbs-up or thumbs-down verdicts against offenders found guilty of capital crimes. The issue of innocence was barely a footnote in *Furman*; the Court's concerns focused on race, class, and fairness in the imposition of the ultimate punishment.

Four years later, *Gregg v. Georgia* cautiously put the executioner back in business, conditioned upon a system of guided discretion designed to minimize the death penalty's arbitrary and discriminatory inclinations. On the same day it decided *Gregg*, the Court in *Woodson v. North Carolina* held that a reasoned, moral response to any crime required consideration of the unique circumstances of each offender, and struck down statutes that provided for the automatic imposition of the death penalty for defendants convicted of murder. It thus made individualized consideration of the background and character of the accused "a constitutionally indispensable part of the process of inflicting the penalty of death." Further, because of the enormous implications of erroneously taking a human life, the Court found a strong constitutional "need for reliability in the determination that death is the appropriate punishment in a specific case." The Court then, in *Godfrey v. Georgia*, cautioned that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty."

The Court's decision last term in *Kansas v. Marsh* appears to deviate from the Eighth Amendment protections insisted upon by *Furman's* progeny. In *Marsh*, the Court responded to a Kansas Supreme Court decision invalidating a capital sentencing statute that required jurors to impose a death sentence even if they were unable to decide whether mitigating circumstances outweighed aggravating factors. In a previous case, *State v. Kleypas*, the Kansas Supreme Court had interpreted the statute to mean that

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"in doubtful cases the jury must return a sentence of death," regardless of any mitigating aspect of the defendant's background, character or circumstances of the offense. By "doubtful case[]," the court meant one in which the jury "could not fairly come to a conclusion about what balance existed between [aggravating and mitigating circumstances]." If the aggravating and mitigating circumstances cancel one another out, the court reasoned, then the resulting death sentence cannot be the product of guided discretion. In such circumstances, the risk is unacceptably high that arbitrary factors, such as race and class, will influence the outcome. *Kleypas* attempted to construe the statute to avoid the constitutional issue, as state courts had done with similar statutes in Idaho, Montana, and New Jersey. The Kansas Supreme Court in *Marsh* had decided that this issue was more appropriately left to the legislature to write a constitutional sentencing formula, as the Colorado Supreme Court had done with a nearly identical statute.

The Supreme Court, in an opinion by Justice Thomas, overturned the Kansas court's decision, over the dissent of Justice Stevens, who warned that "[n]othing more than an interest in facilitating the imposition of the death penalty in [Kansas] justified this Court's exercise of its discretion to review the judgment of the [Kansas] Supreme Court." Justice Stevens's concern that *Marsh* is the product of judicial activism is easy to understand. At the heart of Justice Thomas's opinion is a rejection of the Kansas Supreme Court's interpretation of its own state's statute. The Court found that the state court was simply wrong to conclude that "an equipoise determination reflects juror confusion or inability to decide between life and death, or that a jury may use equipoise as a loophole to shirk its constitutional duty to render a reasoned, moral decision." This seems at odds with the respect owed to the Kansas Supreme Court as the ultimate expositor of state law.

In addition to running roughshod over the Kansas Supreme Court's interpretation of its own law, the Court overlooked express waivers by the State in order to reach the Eighth Amendment issue. In its brief in the state court, Kansas agreed that Marsh's sentence violated the Eighth Amendment, and conceded that *Kleypas* was correctly decided. When the Kansas Supreme Court relied on *Kleypas* to invalidate the statute altogether, the Attorney General moved for rehearing, but still did not challenge *Kleypas*. The issue on which the Supreme Court overturned the Kansas Supreme Court was raised *for the first time* in the petition for *certiorari*. In virtually any other context, the Court would have denied review because of the petitioner's disrespect for the Kansas Supreme Court and its processes. Justice Stevens's fears about the Court's apparent desire to facilitate executions are well-grounded.

A remarkable aspect of *Marsh* is that even though the case was strictly about capital sentencing, the issue of executing the innocent dominated the opinions of five justices. On its face, *Marsh* had nothing to do with innocence. Nevertheless, four justices expressed concerns about the wisdom of reducing constitutional barriers to execution at a time when DNA technology is exonerating death row inmates in unprecedented numbers. Justice Souter wrote, "We cannot face up to these facts and still hold that the guar-

antee of morally justifiable sentencing is hollow enough to allow maximizing death sentences, by requiring them when juries fail to find the worst degree of culpability: when, by a State's own standards and a State's own characterization, the case for death is 'doubtful.' " While Justice Scalia attempted to manipulate the number of death row innocents to a statistically insignificant minimum, even he conceded that the possibility of executing an innocent person "is a truism, not a revelation."

Equally notable about *Marsh* is that, aside from two passing references to the Eighth Amendment's mandate of "guided discretion," there is no discussion of the Eighth Amendment concerns that were at the heart of both *Furman* and *Kleypas*. Not even the dissenters addressed the obvious problem that the Kansas statute increases the risk of death sentences based on race, religion, class, or other impermissible factors. *Marsh* is a clear sign that this Court intends to diminish constitutional protection against arbitrary and discriminatory death sentences. The *Marsh* dissent, on the other hand, suggests that the growing awareness of the risk of executing the innocent may have awakened new reservations about the constitutionality of the death penalty. Whether this will lead to a constitutional showdown over the death penalty in some future case remains to be seen. In the meantime, the duty falls upon the Kansas Supreme Court to decide what to do with the uniquely harsh Kansas death penalty statute.

The Kansas Supreme Court is not finished with this case. After explicitly finding that a death sentence imposed under this statute cannot be viewed as a reasoned, moral response to the offender or the crime, the court would be wrong to abdicate its responsibility to the United States Supreme Court. As the plurality stated in *Trop v. Dulles*, the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." In recent years, it has been up to the states to exercise leadership in placing reasonable limits on executions. In *Penry v. Lynaugh*, the Court authorized the execution of persons with mental retardation, in response to which many states enacted statutes exempting the mentally retarded from execution. The Court finally followed in *Atkins v. Virginia*. In *Stanford v. Kentucky* and *Wilkins v. Missouri*, the Court authorized the execution of juveniles; again, states subsequently prohibited the practice. When the Missouri Supreme Court found that evolving standards of decency were offended by the execution of children, the Court followed suit in *Simmons v. Roper*.

On remand, the Kansas Supreme Court must look to its own Constitution for guidance on what to do with this morally troubling statute. In *Kleypas*, the court relied upon the Supreme Court's Eighth Amendment jurisprudence to interpret Kansas's Bill of Rights, which prohibits "cruel *or* unusual punishment." That is understandable, given the dearth of modern death penalty law in Kansas, and the fact that federal cases at the time sufficiently respected the human dignity of the accused by requiring a moral, reliable determination that death is the appropriate punishment. There are, however, compelling reasons to find that the Kansas Constitution provides defendants greater protection than the Eighth Amendment. The Michigan Su-

preme Court, for example, declined to follow the Supreme Court's decision in *Harmelin v. Michigan*, which found that a sentence of life without parole for a drug offender did not violate the Eighth Amendment. Michigan courts invalidated Harmelin's sentence, relying on the Michigan Constitution, which, like that of Kansas, prohibits cruel *or* unusual punishment.

The Kansas Supreme Court should also look to its neighbor to the West for inspiration. In *People v. Young*, the Colorado Supreme Court relied upon its own Constitution to invalidate a death penalty statute almost identical to the Kansas statute. The Colorado Constitution, like the Eighth Amendment, bans "cruel and unusual punishment." Nevertheless, the Colorado Supreme Court found that "the Colorado Constitution, written to address the concerns of our own citizens and tailored to our unique regional location, is a source of protection for individual rights that is independent of and supplemental to the protections provided by the United States Constitution."

Like Colorado, Kansas has a unique history that embraces the values at the core of *Furman* and *Kleypas*, particularly the concern that race and class could influence the decision to impose the death penalty. Kansas has a unique history of tolerance and concern for human rights. Several of its major population centers were founded by abolitionists from New England, who flocked to the territory after the Kansas-Nebraska Act put the legality of slavery to a popular vote when each territory applied for statehood. While officially nicknamed the "Sunflower State," Kansas is proudly called the "Free State" by its native inhabitants, in celebration of the 1859 ratification of the Wyandotte Constitution, which prohibited slavery, and the subsequent admission of Kansas to the Union in 1861 as a free state. In 1903, the Kansas legislature became one of the first in the nation to make mob lynching a felony offense. In 1925, Kansas became the first state to outlaw the Ku Klux Klan, and while some communities adopted segregation as a matter of local custom, Kansas never adopted Jim Crow laws. Unlike the vast majority of current death penalty jurisdictions, Kansas did not act quickly to reinstate the death penalty after *Furman*. Kansans have historically valued social and racial justice, and their constitutional prohibition of cruel or unusual punishment reflects a heightened concern for human dignity.

Justice Souter is correct that *Marsh*'s rule maximizing death sentences undoubtedly increases the risk of executing the innocent. Equally true is that putting guesswork back into capital sentencing is certain to exacerbate the existing pattern of arbitrary and discriminatory imposition of the death penalty against the poor, minorities, and other disenfranchised members of society. These concerns are the focus of the Eighth Amendment; the mandate of reliability in capital sentencing has never been viewed as a protection for the wrongly convicted. By refusing to become the only State to require undecided jurors to impose death, and by continuing to insist on reliability in the determination that death is the appropriate punishment, the Kansas Supreme Court can make an important stand for human decency.