This next case, *Furman v. Georgia*, whether rightly or wrongly decided, is somewhat of a turning point in the Nation's criminal jurisprudence. In principle, I do not believe civilized government should be putting anyone to death. Yet, I realize that if a member of my family were the victim of murder, I could have an abrupt attitude adjustment. Additionally, even my blood boils to the point of almost yielding to principle when reading these cases. From this point forward, watch as the majority of the Court proceeds to dismantle our criminal justice system, step by step, State by State, with a near total lack of judicial restraint. Watch, as five unelected Justices legislate right before your eyes. See if you agree when you have reached the other side.

FURMAN v. GEORGIA

SUPREME COURT OF THE UNITED STATES

408 U.S. 238

June 29, 1972

[5 to 4]

OPINION: [Furman was convicted of **murder in Georgia**; Jackson was convicted of **rape in Georgia**; Branch was convicted of **rape in Texas**. All were sentenced to death.] Certiorari was granted limited to the following question: **"Would the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?"** [Answer? Yes!]...The judgment in each case is therefore reversed...

This case is unusual in that there are five separate opinions in favor of reversal. In other words, five justices agreed to reverse, but they could not agree on reasoning. The "Opinion" is simply "Reversal." The "Concurrences" state the various reasons.

CONCURRENCE: Justice Douglas...In these three cases..., the [laws of the State left the]... determination of whether the penalty should be death or a lighter punishment...to the **discretion of** the judge or of **the jury** [and] in each...the trial was to a jury...

It has been assumed in our decisions that punishment by death is not cruel, unless the manner of execution can be said to be inhuman and barbarous. *In re Kemmler*. It is also said in our opinions that the proscription of cruel and unusual punishments "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by

a humane justice." *Weems.* A like statement was made in *Trop v. Dulles*[1] that **the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."**

I can feel the momentum of "evolving standards of decency" starting to build. Where will the new generations of "more decent" folks take us? I guess it no longer matters what the Framers meant or, for that matter, what the Constitution says!

...It would seem to be incontestable that the death penalty inflicted on one defendant is "unusual" if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.

There is evidence that the provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid <u>arbitrary</u> and <u>discriminatory</u> penalties of a severe nature...The English Bill of Rights...stated that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." These were the words chosen for our Eighth Amendment...[T]he debates of the First Congress on the Bill of Rights throw little light on its intended meaning. All that appears is the following:

Mr. SMITH: [The words 'nor cruel and unusual punishments' are too indefinite.]

Mr. LIVERMORE: The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary...No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.

The words "cruel and unusual" certainly include penalties that are barbaric. But the words... suggest that it is "cruel and unusual" to apply the death penalty -- **or any other penalty -- selectively to minorities** whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer...

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[1]Case 8A-CUP-5 on this website.

The Court in *McGautha v. California* noted that in this country there was almost from the beginning a "**rebellion against** the common-law rule imposing a **mandatory death sentence** on all convicted murderers." The first attempted remedy was to restrict the death penalty to defined offenses such as "premeditated" murder. But juries "took the law into their own hands" and refused to convict on the capital offense.

"In order to meet the problem of jury nullification, legislatures did not try, as before, to refine further the definition of capital homicides. Instead they adopted the method of forthrightly granting juries the discretion which they had been exercising in fact."

Translation: When jurors were instructed that "if you find the defendant guilty of premeditated murder, you **must** invoke the death penalty," but did not believe the death penalty should be given in a particular case, even if the defendant **should be** found guilty, they would not find guilt or, if given the opportunity, would find guilt on a lesser charge. In other words, "jury nullification" occurs when a jury disregards the law because they do not like the law.

The Court concluded: "In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution." The Court refused to find constitutional dimensions in the argument that those who exercise their discretion to send a person to death should be given standards by which that discretion should be exercised.

A recent witness at the Hearings before [Congress]...stated:

> "Any penalty, a fine, imprisonment or the death penalty could be unfairly or unjustly applied. **The vice...is not in the penalty but in the process** by which it is inflicted. It is unfair to inflict unequal penalties on equally guilty parties, or on any innocent parties, regardless of what the penalty is."

But those who advance that argument overlook *McGautha.* We are now imprisoned in the *McGautha* holding...Juries (or judges, as the case may be) have practically untrammeled discretion to let an accused live or insist that he die.

Justice Field, dissenting in *O'Neil v. Vermont*[2], said, "The State may...make the drinking of one drop of liquor an offence to be punished by imprisonment, but it would be an unheard-of cruelty if it should count the drops in a single glass and make thereby a thousand offences, and thus extend the punishment for drinking the single glass of liquor to an imprisonment of almost indefinite duration." What the legislature may not do for all classes uniformly and systematically, a judge or jury may not do for a class that prejudice sets apart from the community.

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[2]Case 8A-CUP-2 on this website.

There is increasing recognition of the fact that the basic theme of equal protection is implicit in "cruel and unusual" punishments. "**A penalty...should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily**." The same authors add that "the extreme rarity with which applicable death penalty provisions are put to use raises a strong inference of arbitrariness." The President's Commission on Law Enforcement and Administration of Justice recently concluded:

> "...**[The death sentence is imposed] disproportionately**...and carried out on the poor, the Negro, and the members of unpopular groups."

Without a doubt, the facts of a murder case being identical except for the identity of the accused (poor or rich, educated or uneducated, Black or White, male or female, and on and on), if one is put to death, all should be put to death. The concept of "young or old" might be somewhat different. We don't execute people who murder when they are 8 years old and we might not want to execute a 90 year old defendant with terminal cancer.

While the foregoing is surely true, wouldn't one also expect to find that most of the persons committing murder are the relatively young, the relatively poor and even the relatively ignorant. Why does one rob if not poor? Why does one kill if not immature and impulsive? No doubt there are rich educated murderers amidst us. But, just because they are few in number compared to the universe of "those that kill," does that alone support abolition of the death penalty? Ponder.

A study of capital cases in Texas from 1924 to 1968 reached the following conclusions:

> "**Application of the death penalty is unequal**: most of those executed were poor, young, and ignorant. Seventy-five of the 460 cases involved co-defendants, who, under Texas law, were given separate trials. In several instances where a white and a Negro were co-defendants, the white was sentenced to life imprisonment or a term of years, and the Negro was given the death penalty..."

Warden Lewis E. Lawes of Sing Sing said:

> "The defendant of wealth and position never goes to the electric chair or to the gallows. Juries do not intentionally favor the rich, the law is theoretically impartial, but the defendant with ample means is able to have his case presented with every favorable aspect, while the poor defendant often has a lawyer assigned by the court...[who] has had no experience whatever in a capital case."

Former Attorney General Ramsey Clark has said, "It is the poor, the sick, the ignorant, the powerless and the hated who are executed." One searches our chronicles in vain for the execution of any member of the affluent strata of this society. The Leopolds and Loebs are given prison terms, not sentenced to death.

[Justice Douglas now describes the three defendants in these cases.]

Jackson, a black, convicted of the rape of a white woman, was 21 years old. A court-appointed psychiatrist said that Jackson was of average education and average intelligence, that he was not an imbecile, or schizophrenic, or psychotic, that his traits were the product of environmental influences, and that he was competent to stand trial. Jackson had entered the house after the husband left for work. He held scissors against the neck of the wife, demanding money. She could find none and a struggle ensued for the scissors, a battle which she lost; and she was then raped, Jackson keeping the scissors pressed against her neck. While there did not appear to be any long-term traumatic impact on the victim, she was bruised...in the struggle but was not hospitalized. Jackson was a convict who had escaped from a work gang in the area, a result of a three-year sentence for auto theft. He was at large for three days and during that time had committed several other offenses -- burglary, auto theft, and assault and battery.

Furman, a black, killed a householder while seeking to enter the home at night. [He] shot the deceased through a closed door. He was 26 years old and had finished the sixth grade in school. Pending trial, he was committed to the Georgia Central State Hospital for a psychiatric examination on his plea of insanity tendered by court-appointed counsel. The superintendent reported that a unanimous staff diagnostic conference had concluded "that this patient should retain his present diagnosis of Mental Deficiency, Mild to Moderate, with Psychotic Episodes associated with Convulsive Disorder." The physicians agreed that "at present the patient is not psychotic, but he is not capable of cooperating with his counsel in the preparation of his defense"; and the staff believed "that he is in need of further psychiatric hospitalization and treatment." Later, the superintendent reported that the staff diagnosis was [the same.] He concluded, however, that Furman was "not psychotic at present, knows right from wrong and is able to cooperate with his counsel in preparing his defense."

Branch, a black, entered the rural home of a 65-year-old widow, a white, while she slept and raped her, holding his arm against her throat. Thereupon he demanded money and for 30 minutes or more the widow searched for money, finding little. As he left, Jackson said if the widow told anyone what happened, he would return and kill her. The record is barren of any medical or psychiatric evidence showing injury to her as a result of Branch's attack. He had previously been convicted of felony theft and found to be a borderline mental deficient and well below the average IQ of Texas prison inmates. He had the equivalent of five and a half years of grade school education...

We cannot say from [the] facts disclosed...that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system...that leaves to the **uncontrolled discretion** of judges or juries the determination whether defendants committing these crimes should die or be imprisoned...People live or die, dependent on the whim of **one man** or of **12**.

Apparently, once found guilty of murder or rape in Texas or Georgia, the respective State laws gave discretion to the jury (or the judge in a bench trial) to impose the death penalty or not. Sounds a bit like a Roman "thumbs up/thumbs down" decision at the Coliseum. In other words, the laws did not provide any guidelines for a judge or jury to follow when deciding whether to impose the death penalty.

Irving Brant has given a detailed account of the Bloody Assizes, the reign of terror that occupied the closing years of the rule of Charles II and the opening years of the regime of James II (the Lord Chief Justice was George Jeffreys):

> "Nobody knows how many hundreds of men, innocent or of unproved guilt, Jeffreys sent to their deaths in the pseudo trials that followed Monmouth's feeble and stupid attempt to seize the throne. When the ordeal ended, scores had been executed and 1,260 were awaiting the hangman in three counties. To be absent from home during the uprising was evidence of guilt. Mere death was considered much too mild for the villagers and farmers rounded up in these raids. The directions to a high sheriff were to provide an ax, a cleaver, 'a furnace or cauldron to boil their heads and quarters, and soil to boil therewith, half a bushel to each traitor, and tar to tar them with, and a sufficient number of spears and poles to fix their heads and quarters' along the highways. **One could have crossed a good part of northern England by their guidance.**"

My, what a grizzly picture!

> "The story of The Bloody Assizes...[caused the Framers] to place constitutional limitations on the crime of treason and to produce a bar against cruel and unusual punishments..."

Those who wrote the Eighth Amendment knew what price their forebears had paid for a system based, not on equal justice, but on discrimination. In those days the target was...those who opposed absolutism in government, who struggled for a parliamentary regime, and who opposed governments' recurring efforts to foist a particular religion on the people. But the tool of capital punishment was used with vengeance against the opposition and those unpopular with the regime. **One cannot read this history without realizing that the desire for equality was reflected in the ban against "cruel and unusual punishments" contained in the Eighth Amendment.**

In a Nation committed to equal protection of the laws there is no permissible "caste" aspect of law enforcement. **Yet we know that the <u>discretion</u> of judges and juries in imposing the death penalty <u>enables the penalty to be selectively applied</u>, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or**

unpopular minority, and saving those who by social position may be in a more protected position. In ancient Hindu law...punishment increased in severity as social status diminished. We have, I fear, taken in practice the same position, partially as a result of making the death penalty **discretionary** and partially as a result of the **ability of the rich to purchase** the services of the most respected and most resourceful legal talent in the Nation.

The high service rendered by the "cruel and unusual" punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded...and to require judges to see to it that general laws are not applied...selectively...to unpopular groups.

A law that stated that anyone making more than $50,000 would be exempt from the death penalty would plainly fall, as would a law that in terms said that blacks, those who never went beyond the fifth grade in school, those who made less than $3,000 a year, or those who were unpopular or unstable should be the only people executed. **A law which...reaches that result <u>in practice</u> has no more sanctity than a law which in terms provides the same...**[T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination..., an ingredient **not compatible with...equal protection of the laws** that is **implicit in the ban on "cruel and unusual" punishments**. Any law which is nondiscriminatory on its face **<u>may be applied</u>** in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment. Such conceivably <u>might be</u> the fate of a **mandatory death penalty**, where equal or lesser sentences were imposed on the elite, a harsher one on the minorities or members of the lower castes.

Translation: Even if we made death mandatory for certain crimes (and removed the sentencing decision from the judge or jury), we may still have a discrimination problem in the manner in which guilt is determined **before** sentencing.

Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach. I concur in the judgments of the Court.

The Douglas Conclusion: These death sentences are reversed because the legislatures have not provided any guidelines to judges and juries as to when a death sentence is appropriate. That decision is subject to the whim of the decisionmaker and history shows that the death penalty has been discriminatorily applied in violation of the equal protection promise of the Constitution.

ELL Note: Please understand that Justice Douglas has not ruled that the death penalty is always unconstitutional, just that "as applied" to these defendants on these laws that do not provide any guidance, the "sentences" are unconstitutional. At a minimum, he would like to see these State

CONCURRENCE: Justice Brennan...The question presented in these cases is whether death is **today** a punishment for crime that is "**cruel and unusual**" and consequently, by virtue of the Eighth

and Fourteenth Amendments, beyond the power of the State to inflict.

...We have very little evidence of the Framers' intent in including the Cruel and Unusual Punishments Clause among those restraints upon the new Government enumerated in the Bill of Rights. The absence of such a restraint from the body of the Constitution was alluded to, so far as we now know, in the debates of only two of the state ratifying conventions. In the Massachusetts convention, Mr. Holmes...[feared] that Congress would have unlimited power to prescribe punishments for crimes. [His concerns were] echoed by Patrick Henry at the Virginia convention:

> "...In the definition of crimes, I trust [Congress] will be directed by what wise representatives ought to be governed by. But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives. What says our [Virginia] bill of rights? -- 'that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' Are you not, therefore, now calling on those gentlemen who are to compose Congress, to...define punishments without this control?...What has distinguished our ancestors? -- That they would not admit of tortures, or cruel and barbarous punishment."

These...statements shed some light on what the Framers meant by "cruel and unusual punishments." Holmes referred to "the most cruel and unheard-of punishments," Henry to "tortures, or cruel and barbarous punishment." It does not follow, however, that the Framers were exclusively concerned with prohibiting torturous punishments...In addition, it is quite clear that Holmes and Henry... insisted that Congress must be limited in its power to punish. Accordingly, they called for a "constitutional check" that would ensure that "when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives."

Patrick Henry

...The extent of the discussion...[from the debates in the First Congress on the adoption of the Bill of Rights was that between Mr. Smith and Mr. Livermore].

[See this “discussion” in the Douglas Concurrence, above.]

...Livermore thus agreed with Holmes and Henry that the Cruel and Unusual Punishments Clause imposed a limitation upon the legislative power to prescribe punishments. However, in contrast to Holmes and Henry, who were supporting the Clause, Livermore, opposing it, did not refer to punishments that were considered barbarous and torturous. **Instead, he objected that the Clause might someday prevent the legislature from inflicting what were then quite common and, in his view, "necessary" punishments -- <u>death</u>, whipping**, and **earcropping**. **The only inference to be drawn from Livermore's statement is that the "considerable majority" was prepared to run that risk.** No member of the House rose to reply that the Clause was intended merely to prohibit torture.

...We know that the Framers' concern was directed specifically at the exercise of legislative power. They included in the Bill of Rights a prohibition upon "cruel and unusual punishments" precisely because the legislature would otherwise have had the unfettered power to prescribe punishments for crimes. **Yet we cannot now know exactly what the Framers thought "cruel and unusual punishments" were.** Certainly they intended to ban torturous punishments, but the available evidence does not support the further conclusion that *only* torturous punishments were to be outlawed. **As Livermore's comments demonstrate, the Framers were well aware that the reach of the Clause was not limited to the proscription of unspeakable atrocities.**

Foul! Justice Brennan, please do not attribute one man's comment to **<u>all</u>** of the Framers. Livermore's comment **does <u>not</u> demonstrate** that even he was "well aware that the reach of the Clause was not limited to the proscription of unspeakable atrocities." The truth of the matter is that he was concerned it **<u>might</u>** be interpreted in that fashion. There is a world of difference.

Nor did they intend simply to forbid punishments considered "cruel and unusual" **at the time**...Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. *Weems.*

It was almost 80 years before this Court had occasion to refer to the Clause [in] *Pervear v. Commonwealth*[3]. These early cases...did not undertake to provide an exhaustive definition of cruel and unusual punishments. Most of them proceeded primarily by looking backwards for examples by which to fix the meaning of the clause, concluding simply that a punishment would be "cruel and unusual" if it were similar to punishments considered "cruel and unusual" **at the time the Bill of Rights was adopted**. In *Wilkerson v. Utah*, for instance, the Court found it "safe to affirm that punishments of torture...and all others in the same line of unnecessary cruelty, are forbidden." The "punishments of torture"...were cases where the criminal "was embowelled alive, beheaded, and quartered," and cases "of public dissection...and burning alive." Similarly, in *In re Kemmler*, the Court declared that "if the punishment prescribed for an offence against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional

[3]Case 8A-CUP-1 on this website.

prohibition." The Court then observed...that "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...something inhuman and barbarous, something more than the mere extinguishment of life."

Had this "historical" interpretation of the Cruel and Unusual Punishments Clause prevailed, the Clause would have been effectively read out of the Bill of Rights. As the Court noted in *Weems*[4], this interpretation led Story to conclude "that the provision 'would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct.'"...The result of...this interpretation was not surprising. A state court, for example, upheld the constitutionality of the whipping post: "In comparison with the 'barbarities of quartering, hanging in chains, castration, etc.,' it was easily reduced to insignificance."

But this Court in *Weems* decisively repudiated the "historical" interpretation of the Clause. The Court, returning to the intention of the Framers, "relied on the conditions which existed when the Constitution was adopted." And the Framers knew "that government by the people instituted by the Constitution would not imitate the conduct of arbitrary monarchs. The abuse of power might, indeed, be apprehended, but not that it would be manifested in provisions or practices which would shock the sensibilities of men." The Clause, then, guards against "the abuse of power"; contrary to the implications in *Wilkerson* and *In re Kemmler*, the prohibition of the Clause is not "confined to such penalties and punishment as were inflicted by the Stuarts." Although opponents of the Bill of Rights "felt sure that the spirit of liberty could be trusted, and that its ideals would be represented, not debased, by legislation," the Framers disagreed:

> "[Patrick] Henry and those who believed as he did would take no chances. Their predominant political impulse was distrust of power, and they insisted on constitutional limitations against its abuse. But surely they intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts...[I]t must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation...We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked."

...In short, this Court finally adopted the Framers' view of the Clause as a "constitutional check" to ensure that "when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives."...**If the judicial conclusion that a punishment is "cruel and unusual" "depended upon virtually unanimous condemnation of the penalty at issue," then, "like no other constitutional provision, [the Clause's] only function would be to legitimize advances already made by the other departments and opinions already the conventional wisdom."** We know that the Framers did not envision "so narrow a role for this basic guaranty of human rights."

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[4]Case 8A-CUP-3 on this website.

The right to be free of cruel and unusual punishments, like the other guarantees of the Bill of Rights, "may not be submitted to vote; it depends on the outcome of no elections." "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Board of Education v. Barnette.*

...In formulating...constitutional principles, **we must avoid the insertion of "judicial conceptions of...wisdom or propriety**," *Weems*, **yet we must not, in the guise of "judicial restraint," abdicate our fundamental responsibility to enforce the Bill of Rights.** Were we to do so, the "constitution would indeed be as easy of application as it would be deficient in efficacy and power..."

We know...that the Clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." That knowledge, of course, is but the beginning of the inquiry.

In *Trop v. Dulles*[5], it was said that "the question is whether a penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Clause." It was also said that a challenged punishment must be examined "in light of the basic prohibition against inhuman treatment" embodied in the Clause. It was said, finally, that:

> "The basic concept underlying the [Clause] is nothing less than the dignity of man. While the State has the power to punish, the [Clause] stands to assure that this power be exercised within the limits of civilized standards."

At bottom, then, the...State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. **A punishment is "cruel and unusual," therefore, if it does not comport with human dignity...The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings. Pain, certainly, may be a factor in the judgment. The infliction of an extremely severe punishment will often entail physical suffering...**[And,] severe mental pain may be inherent in the infliction of a particular punishment. That, indeed, was one of the conclusions underlying the holding of the plurality in *Trop* v. *Dulles* that the **punishment of expatriation** violates the Clause. And the physical and **mental suffering** inherent in the punishment...was an obvious basis for the Court's decision in *Weems* that the punishment was "cruel and unusual."...

The infliction of an extremely severe punishment, then, like the one before the Court in *Weems*, from which "no circumstance of degradation [was] omitted," may reflect the attitude that the person punished is not entitled to recognition as a fellow human being. That attitude may be apparent apart from the severity of the punishment itself. In *Louisiana ex rel. Francis v. Resweber*[6], for example, the unsuccessful electrocution, although it caused "mental anguish and physical pain," was the result

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[5]Case 8A-CUP-5 on this website.

[6]Case 8A-CUP-4 on this website.

of "an unforeseeable accident." Had the failure been intentional, however, the punishment would have been, like torture, so degrading and indecent as to amount to a refusal to accord the criminal human status. Indeed, a punishment may be degrading to human dignity solely because it *is* a punishment. A State may not punish a person for being "mentally ill, or a leper, or...afflicted with a venereal disease," or for being addicted to narcotics. *Robinson v. California*[7]...Finally, of course, a punishment may be degrading simply by reason of its enormity. A prime example is expatriation, a "punishment more primitive than torture," *Trop v. Dulles,* for it necessarily involves a denial by society of the individual's existence as a member of the human community.

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...In *Wilkerson v. Utah*, the Court...**upheld death by shooting...solely on the ground that it was a common method of execution.**

As *Wilkerson* suggests, when a severe punishment is inflicted "in the great majority of cases" in which it is legally available, there is little likelihood that the State is inflicting it arbitrarily. If, however, the infliction of a severe punishment is "something different from that which is generally done" in such cases, there is a substantial likelihood that the State, contrary to the requirements of regularity and fairness embodied in the Clause, is inflicting the punishment **arbitrarily**...

A third principle inherent in the Clause is that a severe punishment must not be unacceptable to contemporary society. Rejection by society, of course, is a strong indication that a severe punishment does not comport with human dignity. In applying this principle, however, we must make certain that the judicial determination is as objective as possible...The question under this principle, then, is whether there are objective indicators from which a court can conclude that contemporary society considers a severe punishment unacceptable. Accordingly, **the judicial task is to review the history of a challenged punishment and to examine society's present practices with respect to its use.** Legislative authorization, of course, does not establish acceptance. The acceptability of a severe punishment is **measured, not by its availability**, for it might become so offensive to society as never to be inflicted, **but by its use**.

The final principle inherent in the Clause is that a severe punishment must not be excessive. A punishment is excessive under this principle if it is unnecessary...[i.e.,] nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive.

This principle first appeared in our cases in Justice Field's dissent in *O'Neil v. Vermont.* He there took the position that:

> "[The Clause] is directed, not only against punishments of the character mentioned

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[7]Case 8A-CUP-6 on this website.

> [torturous punishments], but against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged..."

Although the determination that a severe punishment is excessive may be grounded in a judgment that it is disproportionate to the crime, the more significant basis is that the punishment serves no penal purpose more effectively than a less severe punishment...*Weems*...

There are, then, **four principles** by which we may determine whether a particular punishment is "cruel and unusual." **The primary principle...is that a punishment must not by its severity be degrading to human dignity.** The paradigm violation of this principle would be the infliction of a torturous punishment of the type that the Clause has always prohibited. Yet "**it is unlikely that any State at this moment in history," *Robinson v. California*, would pass a law providing for the infliction of such a punishment...The same may be said of the other principles**. It is unlikely that this Court will confront a severe punishment that is obviously inflicted in **wholly arbitrary fashion**; no State would engage in a reign of blind terror. Nor is it likely that this Court will be called upon to review a severe punishment that is **clearly and totally rejected throughout society**; no legislature would be able even to authorize the infliction of such a punishment. Nor, finally, is it likely that this Court will have to consider a severe punishment that is **patently unnecessary**; no State today would inflict a severe punishment knowing that there was no reason whatever for doing so. **In short, we are unlikely to have occasion to determine that a punishment is fatally offensive under any one principle.**

Since the Bill of Rights was adopted, this Court has adjudged only three punishments to be within the prohibition of the Clause. *Weems* (12 years in chains at hard and painful labor); *Trop* (expatriation); *Robinson* (imprisonment for narcotics addiction). Each punishment, of course, was degrading to human dignity, but of none could it be said conclusively that it was fatally offensive under one or the other of the principles. Rather, these "cruel and unusual punishments" seriously implicated several of the principles, and it was the application of the principles in combination that supported the judgment. That, indeed, is not surprising. **The function of these principles, after all, is simply to provide means by which a court can determine whether a challenged punishment comports with human dignity**. They are, therefore, interrelated, and in most cases it will be their convergence that will justify the conclusion that a punishment is "cruel and unusual." The test, then, will ordinarily be a cumulative one: **If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.**

I am just trying to follow the logic of Justice Brennan. Didn't he just say that in today's enlightened world it is unlikely the Court would see any one of the principles abridged by a legislature? And, yet, he concludes that the test is cumulative. In other words, although "we don't expect to see any one principle violated," "when all are violated, then we know we have a breach of the Eighth Amendment." ?!?!?!?

The punishment challenged in these cases is death. Death, of course, is a "traditional" punishment, one that "has been employed throughout our history" and its constitutional background is accordingly an appropriate subject of inquiry.

There is, first, a textual consideration raised by the Bill of Rights itself. The Fifth Amendment declares that if a particular crime is punishable by death, a person charged with that crime is entitled to certain procedural protections. **We can thus infer that the Framers recognized the existence of what was then a common punishment. We cannot, however, make the further inference that they intended to exempt this particular punishment from the express prohibition of the Cruel and Unusual Punishments Clause**...

There is also the consideration that this Court has decided three cases involving constitutional challenges to particular methods of inflicting this punishment...(*Wilkerson; Kemmler; Resweber)*... **These three decisions thus reveal that the Court, while ruling upon various <u>methods</u> of inflicting death, has assumed in the past that death was a constitutionally permissible punishment.** Past assumptions, however, are not sufficient to limit the scope of our examination of this punishment today. **The constitutionality of death itself under the Cruel and Unusual Punishments Clause is before this Court for the first time; we cannot avoid the question by recalling past cases that never directly considered it.**

I suppose this is technically the "first time" death itself was challenged as cruel and unusual. However, in dicta at least, it was said in *Kemmler* that "**the punishment of death is not cruel within the meaning of that word as used in the Constitution**. [The word 'cruel'] implies ...inhuman and barbarous, something more than the mere extinguishment of life."

The question, then, is whether the deliberate infliction of death is today consistent with the command of the Clause that the State may not inflict punishments that do not comport with human dignity. I will analyze the punishment of death in terms of the principles set out above and the cumulative test to which they lead: It is a denial of human dignity for the State arbitrarily to subject a person to an unusually severe punishment that society has indicated it does not regard as acceptable, and that cannot be shown to serve any penal purpose more effectively than a significantly less drastic punishment. <u>Under these principles and this test, death is today a "cruel and unusual" punishment</u>.

Death is a unique punishment in the United States...[T]hose States that still inflict death reserve

it for the most heinous crimes...Some legislatures have required particular procedures, such as two-stage trials and automatic appeals, applicable only in death cases...This Court, too, almost always treats death cases as a class apart...

The only explanation for the uniqueness of death is its extreme severity. Death is today an **unusually** severe punishment, **unusual** in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering. Although our information is not conclusive, it appears that there is no method available that guarantees an immediate and painless death. Since the discontinuance of flogging as a constitutionally permissible punishment, *Jackson v. Bishop*, death remains as the only punishment that may involve the conscious infliction of physical pain. In addition, we know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death. As the California Supreme Court pointed out, "the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute **psychological torture**." Indeed,..."the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon."...

The calculated killing of a human being by the State involves, by its very nature, **a denial of the executed person's humanity**...Apart from the common charge, grounded upon the recognition of human fallibility, that the punishment of death must **inevitably be inflicted upon innocent men**, we know that death has been the lot of men whose convictions were unconstitutionally secured in view of later, retroactively applied, holdings of this Court. The punishment itself may have been unconstitutionally inflicted, see *Witherspoon v. Illinois*[8], yet the finality of death precludes relief...

In comparison to all other punishments today, then, the deliberate extinguishment of human life by the State is uniquely degrading to human dignity. **I would not hesitate to hold, on that ground alone, that death is today a "cruel and unusual" punishment, were it not that death is a punishment of longstanding usage and acceptance in this country.** I therefore turn to the second principle -- that the State may not **arbitrarily** inflict an unusually severe punishment.

The outstanding characteristic of our present practice of punishing criminals by death is the infrequency with which we resort to it...There has been a steady decline in the infliction of this punishment in every decade since the 1930's, the earliest period for which accurate statistics are available. In the 1930's, executions averaged 167 per year; in the 1940's, the average was 128; in the 1950's, it was 72; and in the years 1960-1962, it was 48. There have been a total of 46 executions since then, 36 of them in 1963-1964. Yet our population and the number of capital crimes committed have increased greatly over the past four decades. The contemporary rarity of the infliction of this punishment is thus the end result of a long-continued decline. That rarity is plainly revealed by an examination of the years 1961-1970, the last 10-year period for which statistics are available. During that time, an average of 106 death sentences was imposed each year. Not nearly that number,

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[8]Case 8A-CUP-9 on this website.

however, could be carried out, for many were precluded by commutations to life or a term of years, transfers to mental institutions because of insanity, resentences to life or a term of years, grants of new trials and orders for resentencing, dismissals of indictments and reversals of convictions, and deaths by suicide and natural causes. On January 1, 1961, the death row population was 219; on December 31, 1970, it was 608; during that span, there were 135 executions. Consequently, had the 389 additions to death row also been executed, the annual average would have been 52. In short, the country might, at most, have executed one criminal each week. In fact, of course, far fewer were executed. Even before the moratorium on executions began in 1967, executions totaled only 42 in 1961 and 47 in 1962, an average of less than one per week; the number dwindled to 21 in 1963, to 15 in 1964, and to seven in 1965; in 1966, there was one execution, and in 1967, there were two.

When a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied...When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a **lottery system**. The States claim, however, that this rarity is evidence not of arbitrariness, but of informed selectivity: Death is inflicted, they say, only in "extreme" cases.

Informed selectivity, of course, is a value not to be denigrated...[But,] **[n]o one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison**...Furthermore, our procedures in death cases, rather than resulting in the selection of "extreme" cases for this punishment, actually sanction an arbitrary selection. For this Court has held that juries may, as they do, make the decision whether to impose a death sentence wholly unguided by standards governing that decision. *McGautha v. California.* In other words, **our procedures are not constructed to guard against the totally capricious selection of criminals for the punishment of death...**

When there is a strong probability that an unusually severe and degrading punishment is being inflicted arbitrarily, we may well expect that society will disapprove of its infliction. I turn, therefore, to the third principle. An examination of the history and present operation of the American practice of punishing criminals by death reveals that this punishment has been almost totally rejected by contemporary society...

"[T]he struggle...has been...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 that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries." It is this essentially moral conflict that forms the backdrop for the past changes in and the present operation of our system of imposing death as a punishment for crime.

Our practice of punishing criminals by death has changed greatly over the years. One significant

change has been in our methods of inflicting death...[W]e did for a long time rely almost exclusively upon the gallows and the firing squad. Since the development of the supposedly more humane methods of electrocution late in the 19th century and lethal gas in the 20th, however, hanging and shooting have virtually ceased. Our concern for decency and human dignity, moreover, has compelled changes in the circumstances surrounding the execution itself. **No longer does our society countenance the spectacle of public executions, once thought desirable as a deterrent to criminal behavior by others. Today we reject public executions as debasing and brutalizing to us all.**

...[T]he crime of capital murder has...been limited. As the Court noted in *McGautha v. California,* there was in this country a "rebellion against the common-law rule imposing a **mandatory death sentence** on all convicted murderers." Initially, that rebellion resulted in legislative definitions that distinguished between degrees of murder, retaining the mandatory death sentence only for murder in the first degree. Yet "this new legislative criterion for isolating crimes appropriately punishable by death soon proved as unsuccessful as the concept of 'malice aforethought,'" the common-law means of separating murder from manslaughter. Not only was the distinction between degrees of murder confusing and uncertain in practice, but even in clear cases of first-degree murder juries continued to take the law into their own hands: if they felt that death was an inappropriate punishment, "they simply refused to convict of the capital offense." The phenomenon of **jury nullification** thus remained to counteract the rigors of mandatory death sentences. **Bowing to reality, "legislatures did not try, as before, to refine further the definition of capital homicides. Instead they adopted the method of forthrightly granting juries the discretion which they had been exercising in fact."** In consequence, virtually all death sentences today are **discretionarily imposed**... [N]ine States no longer inflict the punishment of death under any circumstances, and five others have restricted it to extremely rare crimes.

Thus, although "the death penalty has been employed throughout our history," in fact the history of this punishment is one of successive restriction...It is, of course, "We, the People" who are responsible for the rarity both of the imposition and the carrying out of this punishment...

The progressive decline in, and the current rarity of, the infliction of death demonstrate that our society seriously questions the appropriateness of this punishment today...When an unusually severe punishment is authorized for wide-scale application but not, because of society's refusal, inflicted save in a few instances, the inference is compelling that there is a deep-seated reluctance to inflict it...**Rejection could hardly be more complete without becoming absolute**...

The final principle to be considered is that an unusually severe and degrading punishment may not be excessive in view of the purposes for which it is inflicted...**The States' primary claim is that death is a necessary punishment because it prevents the commission of capital crimes more effectively than any less severe punishment.** The first part of this claim is that the infliction of death is necessary to stop the individuals executed from committing further crimes. The sufficient answer to this is that if a criminal convicted of a capital crime poses a danger to society, effective administration of the State's pardon and parole laws can delay or deny his release from

prison, and techniques of isolation can eliminate or minimize the danger while he remains confined.

The more significant argument is that the threat of death prevents the commission of capital crimes because it deters potential criminals who would not be deterred by the threat of imprisonment...[T]he available evidence uniformly indicates, although it does not conclusively prove, that the threat of death has no greater deterrent effect than the threat of imprisonment. The States argue, however, that...[b]ecause people fear death the most,...the threat of death must be the greatest deterrent.

...It is not denied that...probably most capital crimes cannot be deterred by the threat of punishment. Thus the argument can apply only to those who think rationally about the commission of capital crimes. Particularly is that true when the potential criminal, under this argument, must not only consider the risk of punishment, but also distinguish between two possible punishments. The concern, then, is with a particular type of potential criminal, the rational person who will commit a capital crime knowing that the punishment is long-term imprisonment, which may well be for the rest of his life, but will not commit the crime knowing that the punishment is death. **On the face of it, the assumption that such persons exist is implausible.**

...**Proponents of this argument necessarily admit that its validity depends upon the existence of a system in which the punishment of death is invariably and swiftly imposed**. Our system, of course, satisfies neither condition...**The risk of death is remote and improbable; in contrast, the risk of long term imprisonment is near and great**. In short, whatever the speculative validity of the assumption that the threat of death is a superior deterrent, there is no reason to believe that as currently administered the punishment of death is necessary to deter the commission of capital crimes...

There is, however, another aspect to the argument that the punishment of death is necessary for the protection of society. The infliction of death, the States urge, serves to manifest the community's outrage at the commission of the crime. It is, they say, a concrete public expression of moral indignation that inculcates respect for the law and helps assure a more peaceful community. Moreover, we are told, not only does the punishment of death exert this widespread moralizing influence upon community values, it also satisfies the popular demand for grievous condemnation of abhorrent crimes and thus prevents disorder, lynching, and attempts by private citizens to take the law into their own hands. The question, however, is not whether death serves these supposed purposes of punishment, but whether death serves them more effectively than imprisonment. There is no evidence whatever that utilization of imprisonment rather than death encourages private blood feuds and other disorders. Surely if there were such a danger, the execution of a handful of criminals each year would not prevent it...[I]f the deliberate extinguishment of human life has any effect at all, it more likely tends to lower our respect for life and brutalize our values. That, after all, is why we no longer carry out public executions...There is, then, no substantial reason to believe that the punishment of death, as currently administered, is necessary for the protection of society.

The only other purpose suggested ...is retribution...Although it is difficult to believe that any State today wishes to proclaim adherence to "naked vengeance," the States claim...that death is the only fit punishment for capital crimes and that this retributive purpose justifies its infliction. In the past,... death was considered the only fit punishment for the crime of **forgery**, for the first federal criminal statute provided a mandatory death penalty for that crime. Obviously, **concepts of justice change**;...

Certainly, "concepts of justice" change. Do the contours of the Constitution change? How so? By legislation? No...Congress cannot alone amend the Constitution. By judicial fiat? Well, I didn't think so. I always thought the only way to amend the Constitution was by the rules of doing so embedded within the Constitution itself. You know, it takes "*We, the People*" to do that, doesn't it? Silly me. Apparently it can be done by "other" means.

As administered today,...the punishment of death cannot be justified as a necessary means of exacting retribution from criminals...The asserted public belief that murderers and rapists deserve to die is flatly inconsistent with the execution of a random few. As the history of the punishment of death in this country shows, our society wishes to prevent crime; we have no desire to kill criminals simply to get even with them.

In sum, the punishment of death is inconsistent with all four principles: Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment. The function of these principles is to enable a court to determine whether a punishment comports with human dignity. Death, quite simply, does not.

...Today...[w]hen examined by the principles applicable under the Cruel and Unusual Punishments Clause, death stands condemned as fatally offensive to human dignity. The punishment of death is therefore "cruel and unusual," and the States may no longer inflict it as a punishment for crimes. Rather than kill an arbitrary handful of criminals each year, the States will confine them in prison. "The State thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal."...I concur in the judgments of the Court.

The Brennan Conclusion: He would reverse the death sentences because the concept of death as punishment is no longer constitutional in his mind.

ELL Note: Please understand that, unlike Justice Douglas, Justice Brennan is not asking these State legislatures to improve their legislation by amending their death penalty provisions. For him, this is the end of the death penalty...period.

CONCURRENCE: Justice Stewart...The penalty of death differs from all other forms of criminal

punishment...in [that it is totally irrevocable, it rejects] rehabilitation...as a basic purpose of criminal justice [and it renunciates]...our concept of humanity.

For these and other reasons, at least two of my Brothers have concluded that the infliction of the death penalty is constitutionally impermissible **in all circumstances...**Their case is a strong one. But I find it unnecessary to reach the ultimate question they would decide...

Legislatures -- state and federal -- have **sometimes specified** that the penalty of death shall be the **mandatory** punishment for every person convicted of engaging in certain designated criminal conduct. Congress, for example, has provided that anyone convicted of acting as a **spy for the enemy in time of war** shall be put to death. The Rhode Island Legislature has ordained the death penalty for a **life term prisoner who commits murder**. Massachusetts has passed a law imposing the death penalty upon anyone convicted of **murder in the commission of a forcible rape**. An Ohio law imposes the mandatory penalty of death upon the **assassin of the President** of the United States or the **Governor of a State**.

...I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy -- of self-help, vigilante justice, and lynch law.

The constitutionality of capital punishment in the abstract is not, however, before us in these cases. For the Georgia and Texas Legislatures have not provided that the death penalty shall be... [mandatory for the crimes charged.] **In a word, neither State has made a legislative determination that forcible rape and murder can be deterred only by imposing the penalty of death upon all who perpetrate those offenses**...

...[T]hese sentences are "cruel" in the sense that they...go beyond...the punishments that the state legislatures have determined to be necessary. *Weems*...[T]hese sentences are "unusual" in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare. But I do not rest my conclusion upon these two propositions alone.

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated 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**. But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed. For these reasons I concur in the judgments of the Court.

The Stewart Conclusion: These death sentences are reversed because of the "hit or miss" method of implementation. Justice Stewart does not decide whether the death penalty *per se* should remain as a constitutional punishment option.

CONCURRENCE: Justice White...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. That question...is not presented by these cases and need not be decided.

The narrower question to which I address myself concerns the constitutionality of capital punishment statutes under which (1) the legislature authorizes the imposition of the death penalty for murder or rape; (2) the legislature does not itself mandate the penalty in any particular class or kind of case (that is, legislative will is not frustrated if the penalty is never imposed), but delegates to judges or juries the decisions as to those cases, if any, in which the penalty will be utilized; and (3) judges and juries have ordered the death penalty with such infrequency that the odds are now very much against imposition and execution of the penalty with respect to any convicted murderer or rapist. It is in this context that we must consider whether the execution of these petitioners would violate the Eighth Amendment.

I begin with what I consider a near truism: that the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system. It is perhaps true that no matter how infrequently those convicted of rape or murder are executed, the penalty so imposed is not disproportionate to the crime and those executed may deserve exactly what they received. It would also be clear that executed defendants are finally and completely incapacitated from again committing rape or murder or any other crime. **But when imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied**... **[C]ommon sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted...**

The White Conclusion: These death sentences are reversed, again, due to the implementation of the death penalty. Justice White does not rule out the death penalty altogether.

CONCURRENCE: Justice Marshall...The criminal acts with which we are confronted are ugly, vicious, reprehensible acts...But, we are not called upon to condone the penalized conduct; we are asked only to examine the penalty...[and determine] whether or not it violates the Eighth Amendment. The question then is...whether capital punishment is "a punishment no longer consistent with our own self-respect" and, therefore, violative of the Eighth Amendment...

[In] *Wilkerson v. Utah*,...the Court found that **unnecessary cruelty** was no more permissible than

torture. **To determine whether the punishment under attack was unnecessarily cruel, the Court examined the history of the Utah Territory and the then-current writings on capital punishment, and compared this Nation's practices with those of other countries. It is apparent that the Court felt it could not dispose of the question simply by referring to traditional practices; instead, it felt bound to examine developing thought.**

...[The next] case of *In re Kemmler*...today...**stands primarily for the proposition that a punishment is not necessarily unconstitutional simply because it is unusual, so long as the legislature has a humane purpose in selecting it.**

Two years later in *O'Neil v. Vermont,* the Court reaffirmed that the Eighth Amendment was not applicable to the States. [The dissent opined otherwise and stated that the inhibition against cruel and unusual punishments]..."is directed, not only against [torture], but against all punishments which by their excessive length or severity are greatly **disproportioned to the offences charged. The whole inhibition is against that which is excessive**..."

In *Howard v. Fleming*, the Court, in essence, followed the approach advocated by the dissenters in *O'Neil.* In rejecting the claim that 10-year sentences for conspiracy to defraud were cruel and unusual, the Court...considered the nature of the crime, the purpose of the law, and the length of the sentence imposed.

The Court used the same approach seven years later in the landmark case of *Weems v. United States*...The Court made it plain...that excessive punishments were as objectionable as those that were inherently cruel. Thus, it is apparent that the dissenters' position in *O'Neil* had become the opinion of the Court in *Weems*...

Resweber is perhaps most significant because the analysis of cruel and unusual punishment questions first advocated by the dissenters in *O'Neil* was at last firmly entrenched in the minds of [the] entire Court.

[In] *Trop v. Dulles*...Chief Justice Warren...wrote that "the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." His approach to the problem was that utilized by the Court in *Weems*: he scrutinized the severity of the penalty in relation to the offense, examined the practices of other civilized nations of the world, and concluded that involuntary statelessness was an excessive and, therefore, an unconstitutional punishment...

[F]our years later a majority [agreed] in *Robinson v. California* that a sentence of 90 days' imprisonment for violation of a California statute making it a crime to "**be addicted to the use of narcotics**" was cruel and unusual. Justice Stewart...reiterated...that the cruel and unusual punishment clause was not a static concept, but one that must be continually re-examined "in the light of contemporary human knowledge." The fact that the penalty under attack was only 90 days evidences the Court's willingness to carefully examine the possible excessiveness of punishment in a given case even where what is involved is a penalty that is familiar and widely accepted.

...Perhaps the most important principle in analyzing "cruel and unusual" punishment questions is... [that] the cruel and unusual language "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Thus, **a penalty that was permissible at one time in our Nation's history is not necessarily permissible today.**

Perhaps one can live with such a philosophy if applicable only to this Amendment or a selected few issues. However, if the Constitution can be "amended" by 5 judges who determine for the rest of us when "standards of decency" have "evolved," why have a Constitution at all? Indeed, why have a Congress? I did not begin this journey with any idea I would become cynical, but some of this is hard to swallow, at least for me. What do you think?

The fact, therefore, that the Court, or individual Justices, may have in the past expressed an opinion that the death penalty is constitutional is not now binding on us...[U]nless a very recent decision existed, *stare decisis* would bow to changing values, and the question of the constitutionality of capital punishment at a given moment in history would remain open...The decisions discussed in the previous section imply that a punishment may be deemed cruel and unusual for any **one of four** distinct reasons.

First, there are certain punishments that inherently involve so much **physical pain and suffering** that civilized people cannot tolerate them...

Second, there are punishments that are **unusual**, signifying that they were **previously unknown** as penalties for a given offense. If these punishments are intended to serve a humane purpose, they may be constitutionally permissible...[O]ne would suppose that an innovative punishment would probably be constitutional if no more cruel than that punishment which it superseded. We need not decide this question here, however, for capital punishment is certainly not a recent phenomenon.

Third, a penalty may be cruel and unusual because it is **excessive** and serves no valid legislative purpose...**The entire thrust of the Eighth Amendment is, in short, against "that which is excessive."**

Fourth, where a punishment is not excessive and serves a valid legislative purpose, it still may be invalid if **popular sentiment** abhors it...There are no prior cases in this Court striking down a penalty on this ground, but the very notion of changing values requires that we recognize its existence.

It is immediately obvious, then, that since capital punishment is not a recent phenomenon, if it violates the Constitution, it does so because it is excessive or unnecessary, or because it is abhorrent to currently existing moral values...

By 1500, English law recognized eight major capital crimes: treason, petty treason (killing of a husband by his wife), murder, larceny, robbery, burglary, rape, and arson...By shortly after 1800,

capital offenses numbered more than 200 and not only included crimes against person and property, but even some against the public peace. While England may, in retrospect, look particularly brutal, Blackstone points out that England was fairly civilized when compared to the rest of Europe. **Capital punishment was not as common a penalty in the American Colonies.**

"The Capitall Lawes of New-England," dating from 1636,...make the following crimes capital offenses: **idolatry, witchcraft, blasphemy, murder, assault in sudden anger, sodomy, buggery, adultery, statutory rape, rape, manstealing, perjury in a capital trial, and rebellion**. Each crime is accompanied by a reference to the Old Testament to indicate its source...By the 18th century, the list of crimes became much less theocratic and much more secular. In the average colony, there were 12 capital crimes. This was far fewer than existed in England, and part of the reason was that there was a **scarcity of labor in the Colonies**. Still, there were many executions, because "with county jails inadequate and insecure, the criminal population seemed best controlled by death, mutilation, and fines."...

In recent years there has been renewed interest in modifying capital punishment...**At the present time**, 41 States, the District of Columbia, and other federal jurisdictions authorize the death penalty for at least one crime...[M]urder is the crime most often punished by death, followed by kidnaping and treason. Rape is a capital offense in 16 States and the federal system...The question now to be faced is whether American society has reached a point where abolition is...demanded by the Eighth Amendment. To answer this question, we must first examine whether or not the death penalty is today tantamount to excessive punishment.

Doesn't this discussion have the "feel" of a legislative function?

In order to assess whether or not death is an excessive or unnecessary penalty, it is necessary to consider the reasons why a legislature might select it as punishment for one or more offenses, and examine whether less severe penalties would satisfy the legitimate legislative wants as well as capital punishment. If they would, then the death penalty is unnecessary cruelty, and, therefore, unconstitutional.

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...

"Eugenics" is the science of improving hereditary qualities of a race or breed.
My assumption is that "death" insures no offspring will be produced from a "bad seed."
Rather grizzly and questionable in its premise.

A...[**T]he Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance...**[T]he view of the *Weems* Court was that punishment for the sake of retribution was not permissible under the Eighth Amendment...Retribution surely underlies the imposition of some punishment on one who commits a criminal act...[; however,] **the Eighth Amendment is our insulation from our baser selves**. The "cruel and unusual" language limits the avenues through which vengeance can be channeled...

B. The most hotly contested issue regarding capital punishment is whether it is better than life imprisonment as a **deterrent** to crime...[D]eath has always been viewed as the ultimate sanction... [T]he question to be considered is not simply whether capital punishment is a deterrent, but whether it is a better deterrent than life imprisonment.

There is no more complex problem than determining the deterrent efficacy of the death penalty. "Capital punishment has obviously failed as a deterrent when a murder is committed. We can number its failures...**[W]e cannot number its successes**. No one can ever know how many people have refrained from murder because of the fear of being hanged."...The two strongest arguments in favor of capital punishment as a deterrent are both logical hypotheses devoid of evidentiary support, but persuasive nonetheless. The first proposition was best stated by Sir James Stephen in 1864:

> "...Was there ever yet a criminal who, when sentenced to death and brought out to die, would refuse the offer of a commutation of his sentence for the severest secondary punishment? Surely not. Why is this? It can only be because 'All that a man has will he give for his life.' In any secondary punishment, however terrible, there is hope; but death is death; its terrors cannot be described more forcibly."

...The second proposition is that "if life imprisonment is the maximum penalty for a crime such as murder, an offender who is serving a life sentence **cannot then be deterred from murdering a fellow inmate or a prison officer.**"

...Thorsten Sellin, one of the leading authorities on capital punishment, has urged that if the death penalty deters prospective murderers, the following hypotheses should be true:

> "(a) Murders should be less frequent in states that have the death penalty than in those that have abolished it...
>
> "(b) Murders should increase when the death penalty is abolished and...decline when it is restored.

"(c) The deterrent effect should be greatest...in those communities where the crime occurred and its consequences are most strongly brought home to the population.

"(d) Law enforcement officers would be safer from murderous attacks in states that have the death penalty..."

Sellin's evidence indicates that not one of these propositions is true...

In light of the massive amount of evidence before us, I see no alternative but to conclude that capital punishment cannot be justified on the basis of its deterrent effect.

C. Much of what must be said about the death penalty as a device to prevent **recidivism** is obvious -- if a murderer is executed, he cannot possibly commit another offense. The fact is, however, that murderers are extremely unlikely to commit other crimes either in prison or upon their release...

D. The three final purposes which may underlie utilization of a capital sanction -- **encouraging guilty pleas and confessions, eugenics, and reducing state expenditures** -- may be dealt with quickly. If the death penalty is used to encourage guilty pleas and thus to deter suspects from exercising their rights under the Sixth Amendment to jury trials, it is unconstitutional...Since life imprisonment is sufficient for bargaining purposes, the death penalty is excessive if used for the same purposes...If eugenics is one of our purposes, then the legislatures should say so forthrightly and design procedures to serve this goal. Until such time, I can only conclude...that capital punishment cannot be defended on the basis of any eugenic purposes. As for the argument that it is cheaper to execute a capital offender than to imprison him for life, even assuming that such an argument, if true, would support a capital sanction, it is simply incorrect...When all is said and done, there can be no doubt that it costs more to execute a man than to keep him in prison for life.

E. **There is but one conclusion that can be drawn from all of this -- the death penalty is an excessive and unnecessary punishment that violates the Eighth Amendment**...In addition, even if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is **morally unacceptable** to the people of the United States at this time in their history...**But, if this information needs supplementing, I believe that the following facts would serve to convince even the most hesitant of citizens to condemn death as a sanction: capital punishment is imposed discriminatorily against certain identifiable classes of people; there is evidence that innocent people have been executed before their innocence can be proved; and the death penalty wreaks havoc with our entire criminal justice system...**

Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice. For this reason alone capital punishment cannot stand...I concur in the judgments of the Court...

The Marshall Conclusion: Marshall finds the death penalty is *per se* unconstitutional.

DISSENT: Chief Justice Burger/Blackmun/Powell/Rehnquist...**If we were possessed of legislative power,** I would either join with Justice Brennan and Justice Marshall or...restrict the use of capital punishment to a small category of the most heinous crimes. **Our constitutional inquiry, however, must be divorced from personal feelings as to the morality...of the death penalty, and be confined to the meaning...of the uncertain language of the Eighth Amendment...**

[T]he Framers[']...exclusive concern was the absence of any ban on tortures...There was no discussion of the interrelationship of the terms "cruel" and "unusual," and there is nothing in the debates supporting the inference that the Founding Fathers would have been receptive to torturous or excessively cruel punishments even if usual in character or authorized by law...[I]t disregards the history of the Eighth Amendment...to rely on the term "unusual" as affecting the outcome of these cases. Instead, I view these cases as turning on the single question whether capital punishment is "cruel" in the constitutional sense. The term "unusual" cannot be read as limiting the ban on "cruel" punishments or as somehow expanding the meaning of the term "cruel." For this reason I am unpersuaded by the...argument that since capital punishment has always been cruel in the everyday sense of the word, and has become unusual due to decreased use, it is, therefore, now "cruel and unusual."

Counsel for petitioners properly concede that capital punishment was not impermissibly cruel at the time of the adoption of the Eighth Amendment... The opening sentence of the Fifth Amendment is a guarantee that the death penalty not be imposed "unless on a presentment or indictment of a Grand Jury."...Thus, **the explicit language of the Constitution affirmatively acknowledges the legal power to impose capital punishment...**Since the Eighth Amendment was adopted on the same day in 1791 as the Fifth Amendment, it hardly needs more to establish that the death penalty was not "cruel" in the constitutional sense at that time.

In the 181 years since the enactment of the Eighth Amendment, not a single decision of this Court has cast the slightest shadow of a doubt on the constitutionality of capital punishment... Nonetheless, **the Court has now been asked to hold that a punishment clearly permissible under the Constitution at the time of its adoption...is suddenly so cruel as to be incompatible with the Eighth Amendment...**Chief Justice Warren, writing the plurality opinion in *Trop v. Dulles* stated, "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." **Nevertheless, the Court up to now has never actually held that a punishment has become impermissibly cruel due to a shift in the weight of accepted social values**; nor has the Court suggested judicially manageable criteria for measuring such a shift..

[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people. For this reason, early commentators suggested that the "cruel and unusual punishments" clause was an unnecessary constitutional provision...[I]t is the legislature, not the Court, which responds to public opinion and immediately reflects the society's standards of decency. Accordingly, punishments such as branding and the cutting off of ears, which were commonplace at the time of the adoption of the Constitution, passed from the penal scene without judicial intervention because they became basically offensive to the people and **the**

legislatures responded to this sentiment...**The paucity of judicial decisions invalidating legislatively prescribed punishments is powerful evidence that in this country legislatures have in fact been responsive...to changes in social attitudes and moral values...**[I]n a democracy, **the legislative judgment is presumed to embody the basic standards of decency prevailing in the society**...**There are no obvious indications that capital punishment offends the conscience of society to such a degree that our traditional deference to the legislative judgment must be abandoned**...Capital punishment is authorized by statute in 40 States, the District of Columbia, and in the federal courts for the commission of certain crimes...[T]he reported results [of opinion polls] have shown nothing...that might lead us to suspect that the legislatures in general have lost touch with current social values...

In *McGautha v. California,* decided only one year ago, the Court held that [the Constitution does not] mandate...that juries be given instructions as to when the death penalty should be imposed. After reviewing the autonomy that juries have traditionally exercised in capital cases and noting the practical difficulties of framing manageable instructions, this Court concluded that judicially articulated standards were not needed to insure a responsible decision as to penalty. Nothing in *McGautha* licenses capital juries to act arbitrarily or assumes that they have so acted in the past. On the contrary, the assumption underlying the *McGautha* ruling is that juries "will act with due regard for the consequences of their decision."

Douglas, Brennan, Stewart, White, Marshall, Blackmun and Burger were on both Courts.
Harlan and Black were on the *McGautha* Court, but not this Court.
Powell and Rehnquist were on this Court, but not the *McGautha* Court.
What a difference one year can make!!!

The responsibility of juries deciding capital cases in our system of justice was nowhere better described than in *Witherspoon v. Illinois*:

> "[A] jury that must choose between life imprisonment and capital punishment can do little more -- and must do nothing less -- than express *the conscience of the community* on the ultimate question of life or death."

...The selectivity of juries in imposing the punishment of death is properly viewed as a refinement on, rather than a repudiation of, the statutory authorization for that penalty. Legislatures prescribe the categories of crimes for which the death penalty should be available, and, acting as "the conscience of the community," juries are entrusted to determine in individual cases that the ultimate punishment is warranted. Juries are undoubtedly influenced in this judgment by myriad factors...[I]t is hardly surprising that juries have been increasingly meticulous in their imposition of the penalty. But to assume from the mere fact of relative infrequency that only a random assortment of pariahs are sentenced to death, is to cast grave doubt on the basic integrity of our jury system.

It would, of course, be unrealistic to assume that juries have been perfectly consistent in choosing

the cases where the death penalty is to be imposed, for no human institution performs with perfect consistency...However,...there is no empirical basis for concluding that juries have generally failed to discharge in good faith the responsibility described in *Witherspoon* -- that of choosing between life and death in individual cases according to the dictates of community values...

Capital punishment has also been attacked as violative of the Eighth Amendment on the ground that it is not needed to achieve legitimate penal aims and is thus "unnecessarily cruel."...[This approach] seeks to give a dimension to the Eighth Amendment that it was never intended to have and promotes a line of inquiry that this Court has never before pursued...The apparent seed of the "unnecessary cruelty" argument is the following language, quoted earlier, found in *Wilkerson:*

> "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture...*and all others in the same line of unnecessary cruelty*, are forbidden by that amendment to the Constitution."

To lift the italicized phrase from the context of the *Wilkerson* opinion and now view it as a mandate for assessing the value of punishments in achieving the aims of penology is a gross distortion; nowhere are such aims even mentioned in the *Wilkerson* opinion. The only fair reading of this phrase is that punishments similar to torture in their extreme cruelty are prohibited by the Eighth Amendment. In *Resweber,* the Court made reference to the Eighth Amendment's prohibition against the infliction of "unnecessary pain" in carrying out an execution. The context makes abundantly clear that the Court was disapproving the wanton infliction of physical pain, and once again not advising pragmatic analysis of punishments approved by legislatures.

Apart from these isolated uses of the word "unnecessary," nothing in the cases suggests that it is for the courts to make a determination of the efficacy of punishments. The decision in *Weems* is not to the contrary...**The case is generally regarded as holding that a punishment may be excessively cruel within the meaning of the Eighth Amendment because it is grossly out of proportion to the severity of the crime**; some view the decision of the Court primarily as a reaction to the mode of the punishment itself. Under any characterization of the holding, it is readily apparent that the decision grew out of the Court's overwhelming abhorrence of the imposition of the particular penalty for the particular crime; it was making an essentially moral judgment, not a dispassionate assessment of the need for the penalty. The Court specifically disclaimed "the right to assert a judgment against that of the legislature of the expediency of the laws..." Thus, apart from the fact that the Court in *Weems* concerned itself with the crime committed as well as the punishment imposed, the case marks no departure from the largely unarticulable standard of extreme cruelty. However intractable that standard may be, that is what the Eighth Amendment is all about...

[T]he Court has consistently assumed that **retribution** is a legitimate dimension of the punishment of crimes...It would be reading a great deal into the Eighth Amendment to hold that the punishments authorized by legislatures cannot constitutionally reflect a retributive purpose...

I know of no convincing evidence that life imprisonment is a more effective **deterrent** than 20 years' imprisonment...In fact, there are some who go so far as to challenge the notion that any punishments deter crime. If the States are unable to adduce convincing proof rebutting such assertions, does it then follow that all punishments are suspect as being "cruel and unusual" within the meaning of the Constitution? On the contrary, **I submit that the questions raised by the necessity approach are beyond the pale of judicial inquiry under the Eighth Amendment.**

...To be sure, there is a recitation cast in Eighth Amendment terms: petitioners' sentences are "cruel" because they exceed that which the legislatures have deemed necessary for all cases; petitioners' sentences are "unusual" because they exceed that which is imposed in most cases. This application of the words of the Eighth Amendment suggests that capital punishment can be made to satisfy Eighth Amendment values if its rate of imposition is somehow multiplied; **it seemingly follows that the flexible sentencing system created by the legislatures, and carried out by juries and judges, has yielded more mercy than the Eighth Amendment can stand**. The implications of this approach are mildly ironical. For example, by this measure of the Eighth Amendment, the elimination of death-qualified juries in *Witherspoon* can only be seen in retrospect as a setback to "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*.

...The decisive grievance of the opinions...is that the present system of discretionary sentencing in capital cases has failed to produce evenhanded justice; the problem is not that too few have been sentenced to die, but that the selection process has followed no rational pattern. This claim of arbitrariness is not only lacking in empirical support, but also...fails to establish that the death penalty is a "cruel and unusual" punishment. **The Eighth Amendment was included...to assure that certain types of punishments would never be imposed, not to channelize the sentencing process...**

All of the arguments and factual contentions accepted in the concurring opinions today were considered and rejected by the Court one year ago...[I]f *stare decisis* means anything, *McGautha* ...should be regarded as...controlling...

[I]t is clear that if state legislatures and the Congress wish to maintain the availability of capital punishment, significant statutory changes will have to be made. Since the two pivotal concurring opinions turn on the assumption that the punishment of death is now meted out in a random and unpredictable manner, **legislative bodies may seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed...**

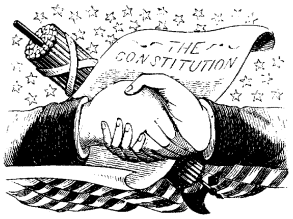
I could more easily be persuaded that mandatory sentences of death, without the intervening and ameliorating impact of lay jurors, are so arbitrary and doctrinaire that they violate the Constitution. The very infrequency of death penalties imposed by jurors attests their cautious and discriminating reservation of that penalty for the most extreme cases. I had thought that nothing was clearer in history, as we noted in *McGautha* one year ago, than the American abhorrence of "the common-law

rule imposing a mandatory death sentence on all convicted murderers." As the concurring opinion of Justice Marshall shows, the 19th century movement away from mandatory death sentences marked an enlightened introduction of flexibility into the sentencing process. It recognized that individual culpability is not always measured by the category of the crime committed. This change in sentencing practice was greeted by the Court as a humanizing development. I do not see how this history can be ignored and how it can be suggested that the Eighth Amendment demands the elimination of the most sensitive feature of the sentencing system...

The Highest Judicial Duty Is to Recognize the Limits on Judicial Power and to Permit the Democratic Processes to Deal with Matters Falling Outside of Those Limits...[Capital letters provided by ELL at no extra charge!]

DISSENT: Justice Blackmun...**Were I a legislator**, I would vote against the death penalty...The several concurring opinions acknowledge...that until today capital punishment was accepted and assumed as not unconstitutional *per se* under the Eighth Amendment or the Fourteenth Amendment ...[*Wilkerson* in 1879; *In re Kemmler* in 1890; *Weems* in 1910; *Resweber* in 1947; *Trop* in 1958; *Rudolph* in 1963; *McGautha* in 1971].

Suddenly,...the passage of time has taken us to a place of greater maturity and outlook. The argument...is not persuasive, for it is only one year since *McGautha*, only eight and one-half years since *Rudolph*, 14 years since *Trop*, and 25 years since *Francis*, and **we have been presented with nothing that demonstrates a significant movement of any kind in these brief periods**. The Court has just decided that it is time to strike down the death penalty...I...subscribe to the proposition that the Cruel and Unusual Punishments Clause "may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems*...My problem...is the suddenness of the Court's perception of progress in the human attitude since decisions of only a short while ago.



...It is comforting to relax in the thoughts...that this is the compassionate decision for a maturing society; that this is the moral and the "right" thing to do; that thereby we convince ourselves that we are moving down the road toward human decency; that we value life even though that life has taken another or others or has grievously scarred another or others and their families; and that we are less barbaric than we were in 1879, or in 1890, or in 1910, or in 1947, or in 1958, or in 1963, or a year ago, in 1971...This, for me, is good argument, and it makes some sense...**only in a legislative and executive way and not as a judicial expedient**. [If only I were a legislator or chief executive.]...The authority should not be taken over by the judiciary in the modern guise of an Eighth Amendment issue...**We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these**...It is not without interest...to note that...none of [the concurring] opinions makes reference to the misery the petitioners' crimes occasioned to the victims, to the families of the victims, and to the communities where the offenses took place...Although personally I may rejoice at the Court's result, I find it difficult to accept or to justify as a matter of history, of law, or of constitutional

pronouncement. **I fear the Court has overstepped. It has sought and has achieved an end.**

DISSENT: Justice Powell/Burger/Blackmun/Rehnquist...**Justice Douglas** concludes that capital punishment is incompatible with notions of "**equal protection**" that he finds to be "implicit" in the Eighth Amendment. **Justice Brennan** bases his judgment...on the thesis that the penalty "does not comport with **human dignity**." **Justice Stewart** concludes that the penalty is **applied in a "wanton" and "freakish" manner**. For **Justice White** it is the "**infrequency**" with which the penalty is imposed that renders its use unconstitutional. **Justice Marshall** finds that capital punishment is an impermissible form of punishment because it is "**morally unacceptable" and "excessive**"...Both Justice Brennan and...Marshall call for the abolition of all existing...capital punishment statutes...

[The outcome of this case has a] shattering effect...on the root principles of *stare decisis*, federalism, judicial restraint and...separation of powers...**I can recall no case in which, in the name of deciding constitutional questions, this Court has subordinated national and local democratic processes to such an extent...**The relevant provisions are the Fifth, Eighth, and Fourteenth Amendments...[make it clear that **the Framers] intended no absolute bar on the Government's authority to impose the death penalty**...

[Petitioners] assert that the constitutional issue is an open one uncontrolled by prior decisions of this Court [and] view the several cases decided under the Eighth Amendment as assuming the constitutionality of the death penalty without focusing squarely upon the issue. I do not believe that the case law can be so easily cast aside...

No more eloquent statement of the essential separation of powers limitation on our prerogative can be found than the admonition of Justice Frankfurter, dissenting in *Trop*. His articulation of the traditional view takes on added significance where the Court undertakes to nullify the legislative judgments of the **Congress and four-fifths of the States.**

> "...When the power of Congress to pass a statute is challenged, the function of this Court is to determine whether legislative action lies clearly outside the constitutional grant of power to which it has been...referred...It is not easy to...disregard one's own strongly held view of what is wise in the conduct of affairs. **BUT IT IS NOT THE BUSINESS OF THIS COURT TO PRONOUNCE POLICY**...Self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the Executive Branch do."...

Emphasis provided by ELL. At the very beginning of the ELL journey, all were advised of the ELL Mission. Although it is impossible to avoid injecting personal "policy" views into discussion, it was noted that interpreting the Constitution does not (or should not) involve any "policy" decisions, "policy" meaning "a determination of that which is best for the Country" as opposed to "a determination of what the Constitution means" because...➳

In a democracy the first indicator of the public's attitude must always be found in the **legislative judgments of the people's chosen representatives**...Forty States, the District of Columbia, and the Federal Government still authorize the death penalty for a wide variety of crimes...

Any attempt to discern, therefore, where the prevailing standards of decency lie must take careful account of the jury's response to the question of capital punishment...Whether it is true that death sentences were returned in less than 10% of the cases as petitioners estimate or whether some higher percentage is more accurate, these totals simply do not support petitioners' assertion...that "the death penalty is virtually unanimously repudiated and condemned by the conscience of contemporary society."...[T]hese considerations fall short of indicating that juries are imposing the death penalty with such rarity as to justify this Court in reading into this circumstance a public rejection of capital punishment...**The assessment of popular opinion is essentially a legislative, not a judicial, function**.

...If, as petitioners urge, we are to engage in speculation, it is not at all certain that the public would experience deep-felt revulsion if the States were to execute as many sentenced capital offenders this year as they executed in the mid-1930's. It seems more likely that public reaction, rather than being characterized by undifferentiated rejection, would depend upon the facts and circumstances surrounding each particular case...

[It is Justice Marshall's] contention that if the average citizen were aware of the disproportionate burden of capital punishment borne by the "poor, the ignorant, and the underprivileged," he would find the penalty "shocking to his conscience and sense of justice" and would not stand for its further use. This argument, like the apathy rationale, calls for further speculation on the part of the Court...

Certainly the claim is justified that this criminal sanction falls more heavily on the relatively impoverished and underprivileged elements of society. The "have-nots" in every society always have been subject to greater pressure to commit crimes and to fewer constraints than their more affluent fellow citizens. This is, indeed, a tragic byproduct of social and economic deprivation, but it is not an argument of constitutional proportions under the Eighth or Fourteenth Amendment. The same discriminatory impact argument could be made with equal force and logic with respect to those sentenced to prison terms...If discriminatory impact renders capital punishment cruel and unusual, it likewise renders invalid most of the prescribed penalties for crimes of violence. The root causes of the higher incidence of criminal penalties on "minorities and the poor" will not be cured by abolishing the system of penalties...The basic problem results not from the penalties imposed for criminal conduct but from social and economic factors that have plagued humanity since the

beginning of recorded history, frustrating all efforts to create in any country at any time the perfect society in which there are no "poor," no "minorities" and no "underprivileged." The causes underlying this problem are unrelated to the constitutional issue before the Court...

[Also,]...I find no support...for the view that this Court may invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology...

In two of the cases before us today juries imposed sentences of death after convictions for rape. In these cases we are urged to hold that even if capital punishment is permissible for some crimes, it is a cruel and unusual punishment for this crime. Petitioners in these cases rely on the Court's opinions holding that the Eighth Amendment, in addition to prohibiting punishments deemed barbarous and inhumane, also condemns punishments that are greatly disproportionate to the crime charged...I find it quite impossible to declare the death sentence grossly excessive for all rapes...

I now return to the overriding question in these cases: whether this Court, acting in conformity with the Constitution, can justify its judgment to abolish capital punishment as heretofore known in this country. It is important to keep in focus the enormity of the step undertaken by the Court today. **Not only does it invalidate hundreds of state and federal laws, it deprives those jurisdictions of the power to legislate with respect to capital punishment in the future, except in a manner consistent with the cloudily outlined views of those Justices who do not purport to undertake total abolition. Nothing short of an amendment to the United States Constitution can reverse the Court's judgments. Meanwhile, all flexibility is foreclosed. The normal democratic process, as well as the opportunities for the several States to respond to the will of their people expressed through ballot referenda (as in Massachusetts, Illinois, and Colorado), is now shut off.**

The sobering disadvantage of constitutional adjudication of this magnitude is the universality and permanence of the judgment. The enduring merit of legislative action is its responsiveness to the democratic process, and to revision and change: mistaken judgments may be corrected and refinements perfected...As recently as 1967 a presidential commission did consider, as part of an overall study of crime in this country, whether the death penalty should be abolished. The commission's unanimous recommendation was as follows:

> "The question whether capital punishment is an appropriate sanction is a policy decision to be made by each State. Where it is retained, the types of offenses for which it is available should be strictly limited, and the law should be enforced in an evenhanded and nondiscriminatory manner, with procedures for review of death sentences that are fair and expeditious. When a State finds that it cannot administer the penalty in such a manner, or that the death penalty is being imposed but not carried into effect, the penalty should be abandoned."

The thrust of the Commission's recommendation...is that this question "is a policy decision to be made by each State." There is no hint that this decision...should be made by the judicial

branch...

[I]t seems to me that all these studies...suggest that...this is a classic case for the exercise of our oft-announced allegiance to judicial restraint...It seems to me that the sweeping judicial action undertaken today reflects a basic lack of faith and confidence in the democratic process...Rarely has there been a more appropriate opportunity for this Court to heed the philosophy of Justice Oliver Wendell Holmes. As Justice Frankfurter reminded the Court in *Trop*:

> "The whole of [Justice Holmes'] work during his thirty years of service on this Court should be a constant reminder that the power to invalidate legislation must not be exercised as if, either in constitutional theory or in the art of government, it stood as the sole bulwark against unwisdom or excesses of the moment."

DISSENT: Justice Rehnquist/Burger/Blackmun/Powell...The Court's judgments today strike down a penalty that our Nation's legislators have thought necessary since our country was founded. My Brothers Douglas, Brennan and Marshall would at one fell swoop invalidate laws enacted by Congress and 40 of the 50 state legislatures, and would consign to the limbo of unconstitutionality under a single rubric penalties for offenses as varied and unique as murder, piracy, mutiny, highjacking, and desertion in the face of the enemy...[T]oday's holding necessarily brings into sharp relief the fundamental question of the role of judicial review in a democratic society. **How can government by the elected representatives of the people co-exist with the power of the federal judiciary, whose members are constitutionally insulated from responsiveness to the popular will, to declare invalid laws duly enacted by the popular branches of government?**

The answer, of course, is found in Hamilton's Federalist Paper No. 78 and in Chief Justice Marshall's classic opinion in *Marbury v. Madison*...Sovereignty resides ultimately in the people as a whole and, by adopting through their States a written Constitution for the Nation and subsequently adding amendments to that instrument, they have both granted certain powers to the National Government, and denied other powers to the National and the State Governments. Courts are exercising no more than the judicial function conferred upon them by Art. III of the Constitution when they assess...whether or not a particular legislative enactment is within the authority granted by the Constitution to the enacting body, and whether it runs afoul of some limitation placed by the Constitution on the authority of that body. For the theory is that the people themselves have spoken in the Constitution, and therefore its commands are superior to the commands of the legislature, which is merely an agent of the people...

The task of judging constitutional cases imposed by Art. III cannot for this reason be avoided, but it must surely be approached with the **deepest humility and genuine deference to legislative judgment.** Today's decision to invalidate capital punishment is, I respectfully submit, significantly lacking in those attributes...I conclude that this decision...is not an act of judgment, but rather an act of will. It completely ignores the strictures of Mr. Justice Holmes...:

> "I have not yet adequately expressed the more than anxiety that I feel at the ever

> increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable...[W]e ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass." *Baldwin* v. *Missouri*.

...If there can be said to be one dominant theme in the Constitution,...it is the notion of checks and balances. The Framers were well aware of the natural desire of office holders as well as others to seek to expand the scope and authority of their particular office at the expense of others. They sought to provide against success in such efforts by erecting adequate checks and balances in the form of grants of authority to each branch of the government in order to counteract and prevent usurpation on the part of the others. This philosophy of the Framers is best described by one of the ablest and greatest of their number, James Madison, in Federalist No. 51:

> "In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself."

Madison's observation applies to the Judicial Branch with at least as much force as to the Legislative and Executive Branches. While overreaching by the Legislative and Executive Branches may result in the sacrifice of individual protections that the Constitution was designed to secure against action of the State, judicial overreaching may result in sacrifice of the equally important right of the people to govern themselves...Judicial self-restraint is surely an implied, if not an expressed, condition of the grant of authority of judicial review. The Court's holding in these cases has been reached, I believe, in complete disregard of that implied condition.

And this is just the beginning — hold on to your seat!

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